

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

DOCKET NO. 9372

In the Matter of)
)
)
1-800 CONTACTS, INC.,)
a corporation,)
)
Respondent)
_____)

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Dated: June 22, 2017

SUMMARY TABLE OF CONTENTS

I.	Jurisdiction.....	1
II.	Contact Lens Retail Industry Participants.....	1
III.	Contact Lens Industry Background	27
IV.	Search Advertising Background	36
V.	Advertising in Response to Searches Including 1-800 Contacts’ Branded Queries is a Successful, Commercially Significant Strategy for Online Contact Lens Retailers.....	59
VI.	1-800 Contacts Entered into the Challenged Agreements to Prevent Online Rivals from Presenting Competitive Search Advertising	87
VII.	Horizontal Restraints are Likely to Cause Competitive Harm	145
VIII.	Competitive Effects of the Restraints: Direct Evidence of Harm to Search Engines.....	146
IX.	Competitive Effects of the Restraints: Direct Evidence of Harm to Consumers.....	150
X.	Competitive Effects: Harm to Competition Within A Relevant Market	184
XI.	No Procompetitive Effects Outweigh Anticompetitive Effects of Restraints	199

DETAILED TABLE OF CONTENTS

I.	Jurisdiction.....	1
II.	Contact Lens Retail Industry Participants.....	1
A.	Online Retailers	1
1.	1-800 Contacts	1
2.	AC Lens	8
3.	Vision Direct.....	11
4.	Coastal Contacts	13
5.	Lens.com.....	14
6.	Memorial Eye	14
7.	Luxottica.....	15
8.	EZ ContactsUSA	16
9.	Lensfast.....	17
10.	Lenses for Less	18
11.	Contact Lens King.....	19
12.	Empire Vision / VisionWorks	19
13.	ReplaceMyContacts.....	20
14.	Walgreens	21
15.	WebEyeCare.....	22

16.	Standard Optical	23
17.	Walmart	23
18.	LensDirect	24
19.	Lens Discounters	25
20.	LensWorld	25
B.	Non-Online Retailers (Brick and Mortar).....	25
C.	Manufacturers	26
III.	Contact Lens Industry Background	27
A.	Contact Lens Consumers	27
B.	Contact Lenses are Sold By Prescription, Which Doctors Must Provide to Patients	27
C.	Prescription Verification.....	28
D.	Contact Lenses are a Commodity Product.....	29
E.	Contact Lens Retailers Compete on the Basis of Price and Service.....	30
1.	Inventory.....	30
2.	Shipping.....	31
3.	Many of 1-800 Contacts' Rivals Offer Excellent Customer Service.	32
IV.	Search Advertising Background	36
A.	Description of Search Advertising.....	36
1.	What are Search Engines?	36
2.	What is Search Advertising?	36
3.	Search Engines Have a Strong Incentive to Show Only Search Advertisements that are Relevant and Useful to Users.....	37
4.	Search Engines Attempt to Display Advertisements Relevant to Users' Interests	39
5.	Search Advertising Auctions are Second-Price Auctions Based Advertisers' Bids on Keywords	41
6.	Contact Lens Retailers Set, and Adjust, Their Search Advertising Budgets and Expenditures Based on Return on Investment.....	43
B.	Search Advertising is a Uniquely Important Marketing Channel in the Online Sale of Contact Lenses	48
1.	Search Advertising Accounts for a Significant Portion of Online Contact Lens Retailers' Advertising Expenditures.....	48
2.	Search Advertising Accounts for a Significant Portion of Online Contact Lens Retailers' Orders	50
3.	Search Advertising is Essential for Online Contact Lens Retailers	51
4.	Search Advertising is Particularly Effective Because it is Particularly Targeted, Reaching Consumers Very Near the Point of Purchase.....	52

5.	Search Advertising is Particularly Effective Because it is Cost-Effective and Allows Advertisers to Easily Monitor, Adjust, and Control Their Advertising.....	53
6.	Online Contact Lens Retailers Find Other Types of Advertising Less Effective than Search Advertising.....	55
V.	Advertising in Response to Searches Including 1-800 Contacts’ Branded Queries is a Successful, Commercially Significant Strategy for Online Contact Lens Retailers.....	59
A.	Search Advertising Trademark Policies.....	60
B.	Advertising in Response to Searches Including 1-800 Contacts’ Branded Queries is Commercially Important for Online Contact Lens Retailers.....	61
1.	Trademark Paid Search is a Commercially Significant Advertising Channel for 1-800 Contacts.....	61
2.	In Rivals’ Business Experience, Advertising in Response to Searches Including 1-800 Contacts Branded Queries is Commercially and Competitively Significant.....	63
3.	Expert Analysis.....	83
4.	Evidence from Search Engines.....	84
5.	It is Valuable for 1-800 Contacts’ Rivals to Show Advertisements in Response to Searches for 1-800 Contacts Related Terms Even if Those Advertisements Do Not Immediately Result in Clicks or Conversions	84
6.	Searches for 1-800 Contacts Brand Terms are More Commercially Significant than Searches for Other Contact Lens Retailers Brand Terms	85
VI.	1-800 Contacts Entered into the Challenged Agreements to Prevent Online Rivals from Presenting Competitive Search Advertising	87
A.	Online Rivals Threatened 1-800’s Relatively High Priced Business Model.....	87
1.	1-800 Contacts Charges Higher Prices than its Online Rivals	87
2.	1-800 Contacts Consistently Recognized that Online Search Advertising from its Lower-Priced Rivals Threatened its Sales, and that its Results Improved When it Eliminated Rivals’ Trademark Advertising.....	89
3.	Rivals’ Advertising on 1-800 Branded Searches Increased 1-800’s Advertising Costs	95
4.	1-800 Contacts Complained to Google in an Effort to Stop its Rivals From Displaying Trademark Search Advertising.....	97
B.	By Suing or Threatening to Sue Rivals, 1-800 Extracted Agreements that Prevent Rivals From Presenting Search Advertisements in Response to 1-800 Branded Searches	98
1.	1-800 Contacts Entered Bidding Agreements with at Least Fourteen Rivals	98
2.	In 2004, 1-800 Contacts Entered into Written Bidding Agreements with its Primary Online Competitors.....	99
3.	In 2005, 1-800 Contacts Secured Further Protection from Online Competition Through Unwritten Agreements with Four Contact Lens Retailers	102
4.	Trademark Monitoring	111

5.	Commencement of Lens.com Litigation	113
6.	Memorial Eye Litigation and Settlement.....	114
7.	EZ Contacts	117
8.	2009 Vision Direct Agreement.....	118
9.	Lensfast.....	124
10.	Lenses for Less	125
11.	Contact Lens King	127
12.	AC Lens	128
13.	Empire Vision/Visionworks	132
14.	Replace My Contacts.....	133
15.	Walgreens	134
16.	Web Eye Care.....	134
17.	Luxottica.....	135
C.	1-800 Contacts Enforced the Agreements	138
1.	AC Lens	138
2.	Coastal	138
3.	Vision Direct.....	139
4.	Walgreens	141
5.	EZ Contacts	142
6.	Lensfast.....	142
7.	Contact Lens King	142
8.	Empire Vision.....	143
9.	Lenses For Less	143
D.	Parties Enforced the Agreements Against 1-800 Contacts.....	143
VII.	Horizontal Restraints are Likely to Cause Competitive Harm	145
A.	Horizontal Bidding Restraints are Likely to Harm Search Engines	145
B.	Horizontal Advertising Restraints are Likely to Harm Consumers	146
VIII.	Competitive Effects of the Restraints: Direct Evidence of Harm to Search Engines	146
A.	The Bidding Agreements Reduced Competition Among Advertisers in Search Advertising Auctions	146
B.	Reduced Competition Among Advertisers Lowered Search Engine Revenues	148
C.	Reduced Competition Allowed Advertisers to Pay Lower Prices	148
D.	Reduced Competition Resulted in Lower-Quality Results Pages.....	149
IX.	Competitive Effects of the Restraints: Direct Evidence of Harm to Consumers.....	150

A.	The General Concern About the Effect of Restrictions on Advertising Competition Applies with Force to the Online Retail Sale of Contact Lenses.....	150
1.	The General Concern About the Effect of Restrictions on Advertising Competition Applies with Force to Restrictions on Search Advertising.....	150
2.	1-800 Contacts' Price Premium Over Other Online Contact Lens Retailers Cannot be Fully Explained by Higher Service Levels	151
3.	Consumers are Not Well Informed About Relative Prices of Online Contact Lens Retailers	155
4.	Online Contact Lens Consumers Value, and Act on, Price Information.....	156
5.	Restricted Advertisements are Relevant and Useful to Online Contact Lens Consumers.....	158
B.	The Bidding Agreements Restricted a Significant Volume of Advertising from Online Contact Lens Retailers	160
1.	Analysis Based on Memorial Eye Experience	161
2.	Dr. Evans's Impact Analysis Estimates Lost Advertising and Rival Sales.....	163
3.	Dr. Athey's Analysis Based on comScore Data.....	164
4.	These Analyses are Consistent with One Another	169
5.	The Reduction in Advertising Is Commercially Significant	170
6.	Both Analyses Are Conservative.....	172
C.	Historically, Increased Advertising by Rivals in Response to 1-800 Contacts Branded Queries Has Caused 1-800 Contacts to Respond with More Generous Price Matching Offers	175
D.	But for the Bidding Agreements, Contact Lens Consumers Would Pay Lower Prices..	176
E.	Dr. Murphy's Arguments that 1-800 Contacts' Bidding Agreements Have Little Competitive Impact Lack a Factual Basis	178
1.	Contrary to Dr. Murphy's Model, an Appropriate Economic Analysis of Settlement Confirms that the Bidding Agreements Harmed Consumers Without Justification.....	178
2.	Dr. Murphy's Direct Effects Analysis Fails to Accurately Measure the Effects of the Settlements and Fails to Account for Confounding Factors	180
3.	Dr. Murphy Mischaracterizes Dr. Athey's Analysis to Argue that 1-800 Contacts' Bidding Agreements Facilitate Online Sales	182
4.	Dr. Murphy's Argument that Non-Settling Retailers Obtained Few of Their Conversions from Bidding on 1-800 Ads Lacks a Factual Basis	183
X.	Competitive Effects: Harm to Competition Within A Relevant Market	184
A.	The Relevant Product Market is the Online Retail Sale of Contact Lenses	184
1.	Physical Channels of Sale Are Not Good Substitutes for Online Sales	184
2.	Online Prices are Lower Than Prices in Most Physical Stores, and Online Customers are More Price Sensitive	187

3.	The Behavior of Lost Customers Separately Shows that Physical Retailers Do Not Provide a Sufficient Substitute for Online Retailers.....	188
4.	The Imposition of Unilateral Pricing Policies Creates a Natural Experiment that Separately Shows Physical Retailers are Not Close Substitutes for Online Retailers.....	189
5.	Direct Effects Evidence Indicates that the Online Sale Of Contact Lenses is the Relevant Market.....	191
6.	Respondent’s Expert, Dr. Murphy, was Unable to Provide Support for his Claim that the Relevant Product Market is All Retail Sales of Contact Lenses.....	192
B.	The Relevant Geographic Market is the United States.....	193
C.	1-800 Contacts and the Settling Firms Collectively Have Market Power in the Online Market.....	194
1.	Collectively, 1-800 Contacts and the Settling Firms Account for a High Share of the Online Market.....	194
2.	Barriers to Entry Sufficient to “Deter or Counteract” the Consumer Harm.....	194
D.	The Bidding Agreements had Anticompetitive Effects Within this Market.....	198
XI.	No Procompetitive Effects Outweigh Anticompetitive Effects of Restraints	199
A.	The Fact that the Bidding Agreements Settled Lawsuits Does Not Provide a Procompetitive Justification for Their Restrictions	199
B.	1-800 Contacts’ Claim that the Bidding Agreements are Justified Because They Incentivize Investment in 1-800 Contacts’ Brand and Advertising is Unsupported by Facts or Economic Theory.....	199
C.	1-800 Contacts’ Claim That the Bidding Agreements Are Justified Because They Reduce Consumer Confusion Lacks Factual Basis	201
1.	There Is No Evidence Of Actual Confusion Caused By The Mere Appearance Of Competitive Ads In Response To A 1-800 Contacts Branded Query	201
2.	1-800 Contacts’ Competitors Had No Incentive To Confuse Consumers About Their Identities.....	210
3.	1-800 Contacts’ Competitors Identified Their Own Brand Names In Their Search Advertisements	211
4.	The Mere Appearance Of Competitive Ads In Response To A 1-800 Contacts Branded Query Is Not Likely to Cause Confusion	212
5.	Confusion Regarding Other Aspects of Online Advertisements Is Not Confusion Regarding Source, Sponsorship, Or Affiliation.....	219
6.	1-800 Contacts’ Trademark Settlement Agreements Go Beyond Prohibiting Confusing Uses Of 1-800 Contacts’ Trademarks	220
D.	Describing 1-800 Contacts Branded Queries as “Navigational Searches” Does Nothing to Justify the Bidding Agreements.....	223
1.	“Navigational” Searchers Who Enter 1-800 Contacts Branded Queries Ultimately Have a “Transactional” Intent: the Purchase of Contact Lenses	223

2. Even Users With the Ultimate Intent of Purchasing Contact Lenses From 1-800
Contacts Specifically Are Not Harmed By—and in Fact Benefit From—the Display of
Rival Ads in Response to 1-800 Contacts Branded Queries..... 224

Complaint Counsel’s Conclusions of Law

Witness Index

Exhibit Index

I. Jurisdiction

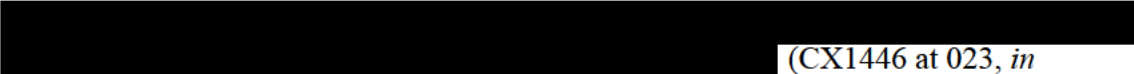
1. 1-800 Contacts, Inc., (“1-800 Contacts”) is headquartered at 261 West Data Drive, Draper, Utah. (JX0001 (¶ 1) (Joint Stipulations of Jurisdiction, Law, and Facts)).
2. 1-800 Contacts is a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (JX0001 (¶ 2) (Joint Stipulations of Jurisdiction, Law, and Facts)).
3. 1-800 Contacts, through its operations based in Draper, Utah, has engaged in and continues to engage in commerce and activities affecting commerce in each of the fifty states in the United States and the District of Columbia, as the term “commerce” is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. §44. (JX0001 (¶ 3) (Joint Stipulations of Jurisdiction, Law, and Facts); CX1441 at 004 (Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel’s First Set of Requests for Admissions)).

II. Contact Lens Retail Industry Participants

A. **Online Retailers**

1. **1-800 Contacts**

a. Company Basics

4. 1-800 Contacts was founded in 1995, and completed an IPO in 1998. The company was acquired by a private equity firm, Fenway Partners, in 2007. (CX0525 at 007; Coon, Tr. 2672, 2665; CX9001 (Bethers, IHT at 23-24)).
5.  (CX1446 at 023, *in camera*). In January, 2016, AEA Investors acquired a majority stake in 1-800 Contacts, which it still holds. (Evans, Tr. 1588; Steven Perry, Tr. 25-26).
6. In 2004, 1-800 Contacts’ internet sales surpassed its phone sales. (CX1775 at 001).
7. In 2007, 1-800 Contacts launched its first mobile ads. (CX1775 at 001).
8. In 2011, 1-800 Contacts launched its mobile web site. (CX1775 at 001).
9. In 2012, 1-800 Contacts was the largest retailer of contact lenses in the US. (CX0526 at 007).
10. As of 2012, 1-800 Contacts had an estimated 10% share, by revenue, of all contact lenses sold in the United States. (CX0526 at 007).

11. [REDACTED] (CX1446 at 005, *in camera*).
12. The annual volume of contact lenses sold via the internet to U.S. consumers by 1-800 Contacts currently exceeds the annual volume of contact lenses sold via the internet to U.S. consumers by any other single company. (JX0001 (¶ 5) (Joint Stipulations of Jurisdiction, Law, and Facts)).
13. In 2015, 1-800 Contacts had revenues of approximately \$460 million. (JX0001 (¶ 6) (Joint Stipulations of Jurisdiction, Law, and Facts)).
- b. Key Employees & Agents: Chief Executive Officers
- i. Jonathan Coon
14. Jonathan Coon founded 1-800 Contacts in 1992. (Coon, Tr. 2649).
15. Mr. Coon was the Chief Executive Officer (CEO) of 1-800 Contacts from 1992 until approximately January 2014. (Coon, Tr. 2649).
16. Mr. Coon has no current role or interest in 1-800 Contacts. (Coon, Tr. 2649).
- ii. Brian Bethers
17. Brian Bethers currently serves as the CEO of 1-800 Contacts. (Bethers, Tr. 3506).
18. Mr. Bethers has been the CEO of 1-800 Contacts since January 2014. (Bethers, Tr. 3506-3507).
19. Mr. Bethers began his career with 1-800 Contacts in 2003 as a Chief Financial Officer (CFO). (Bethers, Tr. 3507).
20. Mr. Bethers became president of 1-800 Contacts in 2004. (Bethers, Tr. 3507).
- c. Key Employees & Agents: Chief Marketing Officers
- i. Tim Roush
21. Tim Roush currently serves at the Chief Marketing Officer (CMO) at 1-800 Contacts. (CX9034 (Roush, Dep. at 6)).
22. Mr. Roush began work for 1-800 Contacts in February 2013. (CX9034 (Roush, Dep. at 6)).
- ii. Joan Blackwood
23. Joan Blackwood began working at 1-800 Contacts in October 2009. (CX9017 (Blackwood, Dep. at 10)).

24. Ms. Blackwood left 1-800 Contacts in December 2012. (CX9017 (Blackwood, Dep. at 10)).
25. Throughout her time at 1-800 Contacts, Ms. Blackwood served as the company's Chief Marketing Officer. (CX9017 (Blackwood, Dep. at 10)).
26. As CMO at 1-800 Contacts, Ms. Blackwood was accountable for the website and all media, including TV, print, radio, display, search and email, as well as public relations, and for understanding customer demographics. (CX9017 (Blackwood, Dep. at 11-12)).

d. Key Employees & Agents: Marketing Staff

i. Laura Schmidt

27. Laura Schmidt currently serves as the marketing director for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 6)).
28. Ms. Schmidt started working for 1-800 Contacts in November 2010. (CX9032 (L. Schmidt, Dep. at 6)).
29. When she was hired in November 2010, Ms. Schmidt reported to Joan Blackwood. (CX9032 (L. Schmidt, Dep. at 6)).
30. From December 2012 to February 2013, Ms. Schmidt reported to Brian Bethers. (CX9032 (L. Schmidt, Dep. at 7)).
31. From February 2013 through the present, Ms. Schmidt has reported to Tim Roush. (CX9032 (L. Schmidt, Dep. at 7)).
32. Ms. Schmidt's responsibilities as marketing director, from November 2010 through October 2012, included overseeing paid search. (CX9032 (L. Schmidt, Dep. at 7)).
33. From November 2012 through August 2013, Ms. Schmidt did not oversee paid search for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 7)).
34. From September 2013 through April 2015, Ms. Schmidt's responsibilities included overseeing paid search. (CX9032 (L. Schmidt, Dep. at 7-8)).
35. Since May, 2015 Ms. Schmidt's responsibilities have not included overseeing paid search. (CX9032 (L. Schmidt, Dep. at 8)).
36. Currently Ms. Schmidt oversees natural search for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 9)).

ii. Brady Roundy

37. Brady Roundy began working at 1-800 Contacts in 2013. (CX9028 (Roundy, Dep. at 84)).

38. Mr. Roundy currently runs the paid search program at 1-800 Contacts. (CX9028 (Roundy, Dep. at 24)).

iii. Bryce Craven

39. Bryce Craven joined 1-800 Contacts in 2005. (Craven, Tr. 494-495).

40. Mr. Craven left 1-800 Contacts in November 2011. (Craven, Tr. 496).

41. Mr. Craven became responsible for search marketing at 1-800 Contacts as the Search Marketing Manager in 2006. (Craven, Tr. 495).

42. From September 2008 until he left 1-800 Contacts in November 2011, Mr. Craven served as Senior Search Marketing Manager. (Craven, Tr. 496-497).

iv. Amy Guymon Larson

43. Amy Guymon Larson worked at 1-800 Contacts in contact lens marketing related roles from 2004 to 2012 (CX9027 (Larson, Dep. at 7-11)).

44. Ms. Larson joined 1-800 Contacts in 2004. (CX9027 (Larson, Dep. at 7)).

45. In or around the end of 2005 or the beginning of 2006, Ms. Larson became the Director of Online Marketing at 1-800 Contacts. (CX9027 (Larson, Dep. at 8)).

46. From approximately the end of 2007 or the beginning of 2008 until 2012, Ms. Larson became Director of Marketing at 1-800 Contacts. (CX9027 (Larson, Dep. at 8-10)).

47. In 2012, Ms. Larson took a position with 1-800 Contacts' subsidiary, Glasses.com. (CX9027 (Larson, Dep. at 10)).

48. Glasses.com was sold to Luxottica in 2014. (CX9027 (Larson, Dep. at 11)).

v. Patrick Galan

49. Patrick ("Rick") Galan worked for 1-800 Contacts from early 2012 to early 2014. (CX9015 (Galan, Dep. at 99-100); CX1375 (Mr. Galan wrote on February 6, 2014 that his "last day at 1800Contacts will be tomorrow.")).

50. From early 2012 through early 2014, Mr. Galan held the title of Associate Director of Search Marketing at 1-800 Contacts. (CX9015 (Galan, Dep. at 13, 99-100)).

51. Mr. Galan oversaw paid search, natural search, and affiliate marketing at 1-800 Contacts. (CX9015 (Galan, Dep. at 16)).

52. During his time at 1-800 Contacts, Mr. Galan reported to Laura Schmidt, and later Phil Barrett. (CX9015 (Galan, Dep. at 16)).

vi. Jordan Judd

53. Jordan Judd worked for 1-800 Contacts from 2005 to 2012. (CX9016 (Judd, Dep. at 5)).
54. Ms. Judd was hired as a customer service representative for 1-800 Contacts in 2005. (CX9016 (Judd, Dep. at 5)).
55. In October 2007 Ms. Judd took a position within 1-800 Contacts as an online marketing coordinator. (CX9016 (Judd, Dep. at 7)).
56. In her position as an online marketing coordinator, Ms. Judd reported to Bryce Craven. (CX9016 (Judd, Dep. at 7)).
57. Ms. Judd's position as online marketing coordinator involved keyword research and paid search. (CX9016 (Judd, Dep. at 8)).
58. In her position as an online marketing coordinator, Ms. Judd's responsibilities included putting together a weekly report on search performance numbers from the prior week. (CX9016 (Judd, Dep. at 15)).
59. Ms. Judd left 1-800 Contacts in June or July 2012. (CX9016 (Judd, Dep. at 156)).

vii. Amber Powell

60. Amber Powell worked for 1-800 Contacts between June 2005 and 2014. (CX9030 (Powell, Dep. at 10, 14-15)).
61. In October, 2007, Ms. Powell started working as an online marketing coordinator at 1-800 Contacts. (CX9030 (Powell, Dep. at 12)).
62. Ms. Powell's responsibilities as an online marketing coordinator included preparing Excel "dashboards" which provided data and analysis of 1800 contacts' search advertising performance, and creating monthly reports regarding sales and other performance metrics. (CX9030 (Powell, Dep. at 12)).
63. Ms. Powell worked as an online marketing coordinator and online marketing manager for approximately three and a half years. (CX9030 (Powell, Dep. at 13)).
64. Ms. Powell began working for Glasses.com in 2014. (CX9030 (Powell, Dep. at 14-15)).

viii. Clint Schmidt

65. Clint Schmidt began work as an independent contractor for 1-800 Contacts in January 2004. (C. Schmidt, Tr. 2935).
66. Mr. Schmidt was hired by 1-800 Contacts as director of E-Commerce in April 2004. (C. Schmidt, Tr. 2889, 2936).

67. Mr. Schmidt left 1-800 Contacts in the first week of January 2006. (C. Schmidt, Tr. 2936).
68. Mr. Schmidt had no business dealings with 1-800 Contacts after he left the company in the first week of January 2006. (C. Schmidt, Tr. 2936).
69. Mr. Schmidt worked for 1-800 Contacts for less than two years. (C. Schmidt, Tr. 2936).
70. During his time employed by 1-800 Contacts, Mr. Schmidt served as the company's Director of E-Commerce. (C. Schmidt, Tr. 2889).
71. Mr. Schmidt was responsible for acquiring new customers to transact on the 1-800 Contacts website, for getting repeat purchases and customer retention on the website, and for ensuring ease of use of the website. (C. Schmidt, Tr. 2889).

ix. Josh Aston

72. Josh Aston worked at 1-800 Contacts between April or May 2002 and April or May 2004. (CX9013 (Aston, Dep. at 8)).
73. Mr. Aston began at 1-800 Contacts as a call center representative, then transitioned to the marketing team after a year. (CX9013 (Aston, Dep. at 8-9)).
74. Mr. Aston worked in the manager level of the marketing department. (CX9013 (Aston, Dep. at 9)).
75. Mr. Aston reported to Jason Mathison initially, and later to Clint Schmidt. (CX9013 (Aston, Dep. at 9)).

e. Key Employees & Agents: Legal

i. Joseph Zeidner

76. Joseph Zeidner joined 1-800 Contacts in September 2000. (CX9009 (J. Zeidner, IHT at 8)).
77. Joseph Zeidner left 1-800 Contacts in September 2014. (CX9009 (J. Zeidner, IHT at 8-9)).
78. While at 1-800 Contacts, Joseph Zeidner served as the Chief Legal Officer and Corporate Secretary for 1-800 Contacts. (CX9009 (J. Zeidner, IHT at 8)).

ii. David Zeidner

79. David Zeidner worked as a full-time employee at 1-800 Contacts from May 2003 to December 2013. (CX9006 (D. Zeidner, IHT at 9, 56)).
80. Prior to joining 1-800 Contacts as a full-time employee, David Zeidner did research work on a contract basis for 1-800 Contacts. (CX9006 (D. Zeidner, IHT at 11)).

81. David Zeidner was hired as a legal counsel at 1-800 Contacts in May 2003. (CX9006 (D. Zeidner, IHT at 15)).
82. David Zeidner eventually took over and managed the Intellectual Property (“IP”) legal portfolio for 1-800 Contacts. (CX9006 (D. Zeidner, IHT at 25, 28-29)).
83. At the time David Zeidner managed the IP legal portfolio for 1-800 Contacts, he had not taken any courses related to trademarks or trademark law. (CX9006 (D. Zeidner, IHT at 29)).
84. David Zeidner took over managing the IP legal portfolio for 1-800 Contacts because “[t]here was a need, and . . . I was the best fit there. . . . there were things moving so fast that it was kind of divide and conquer as far as what needed to be done. And that’s – that’s how we did it. I jumped in and started doing it.” (CX9006 (D. Zeidner, IHT at 29-30)).

iii. Mark Miller

85. Mark Miller is an attorney with Holland and Hart, located in Salt Lake City, Utah. (CX9040 (Miller, Dep. at 7-8)).
86. Mr. Miller is a member of the Utah State Bar. (CX9040 (Miller, Dep. at 8)).
87. 1-800 Contacts is currently a client of Holland and Hart. (CX9040 (Miller, Dep. at 10)).
88. Mr. Miller represented 1-800 Contacts on IP litigation matters, including trademark matters, from 2009 until at least 2014. (CX9040 (Miller, Dep. at 10-11); CX0800).
89. During the time he represented 1-800 Contacts, Mr. Miller negotiated trademark litigation settlement agreements on behalf of 1-800 Contacts. (CX9040 (Miller, Dep. at 73)).

iv. Bryan Pratt

90. Bryan Pratt is an intellectual property attorney with Holland and Hart in Salt Lake City, Utah. (Pratt, Tr. 2490-2491).
91. Mr. Pratt has practiced at Holland and Hart for eight years. (Pratt, Tr. 2491).
92. Mr. Pratt is a partner at Holland and Hart. (Pratt, Tr. 2493).
93. Mr. Pratt has represented and still currently represents 1-800 Contacts. (Pratt, Tr. 2493).
94. Mr. Pratt worked with the law firm Rader Fishman & Grauer prior to working at Holland and Hart. (Pratt, Tr. 2491).
95. Mr. Pratt came to represent 1-800 Contacts in 2005. (Pratt, Tr. 2494-2495).

96. Mr. Pratt was contacted to represent 1-800 Contacts by David Zeidner of 1-800 Contacts. (CX9021 (Pratt, Dep. at 10)).

97. Mr. Pratt managed 1-800 Contacts' patent portfolio and trademark portfolio. (Pratt, Tr. 2495-2496).

f. Key Employees & Agents: Finance

i. Scott Osmond

98. Scott Osmond is currently the Director of Financial Planning and Analysis for 1-800 Contacts. (CX9025 (Osmond, Dep. at 7)).

99. Mr. Osmond started with 1-800 Contacts in August 2010 and has been with the company since that time. (CX9025 (Osmond, Dep. at 7)).

100. Mr. Osmond reports to Rob Hunter, CFO for 1-800 Contacts. (CX9025 (Osmond, Dep. at 7)).

101. Mr. Osmond's role in the Financial Planning and Analysis group is to support the other departments by helping with financial planning, forecasting and budgeting or each department. (CX9025 (Osmond, Dep. at 8)).

2. AC Lens

a. Company Basics

102. Arlington Contact Lens Service, Inc. ("AC Lens") is an online retailer of contact lenses that sells throughout the United States. (CX1623; Clarkson, Tr. 173, 183).

103. AC Lens is located in Columbus, Ohio. (Clarkson, Tr. 173; CX1623).

104. AC Lens was founded in 1995 and made its first sales in 1996. (CX9039 (Clarkson, Dep. at 88)).

105. From its founding until 2011, AC Lens was a "four person family business" owned by founder and CEO Peter Clarkson along with his wife, sister-in-law, and brother-in-law. (Clarkson, Tr. 172-174).

106. Following an acquisition in 2011, AC Lens is a wholly-owned subsidiary of National Vision, Inc. (CX9039 (Clarkson, Dep. at 9)).

107. AC Lens sells contact lenses online through several websites, including ACLens.com, discountcontactlenses.com, bestpricecontacts.com, militarycontactlenses.com, and lenscatalog.co.uk. (Clarkson, Tr. 182-183; CX9018 (Drumm, Dep. at 18-19, 172-173)).

108. AC Lens sells contact lenses "primarily" through ACLens.com and DiscountContactLenses.com. (Clarkson, Tr. 182-183).

109. AC Lens competes with other online retailers of contact lenses, including 1-800 Contacts, Vision Direct, Coastal, and Lens.com. (Clarkson, Tr. 187-188; CX9039 (Clarkson, Dep. at 90-91, 184)).
110. AC Lens also provides “wholesale contact lens services” to several companies, including Sam’s Club and Walmart. (Clarkson, Tr. 175).
111. AC Lens’s wholesale service entails shipping to stores or making shipments to partners’ customers based on in-store orders. (Clarkson, Tr. 176-177).
112. In addition to its wholesale service, AC Lens provides “white label services” to several partners. (Clarkson, Tr. 176).
113. White label service is an e-commerce service that entails building a website for its partner, providing customer service such as answering telephone calls on the partner’s behalf, fulfilling orders, providing prescription verification, and providing customer retention services such as sending emails to existing customers. (Clarkson, Tr. 176-177; CX9003 (Clarkson, IHT at 9-10); (CX9039 (Clarkson, Dep. at 192-193))).
114. Neither wholesale services nor white label service entails marketing on the partner’s behalf, with the exception of providing customer retention emails. (Clarkson, Tr. 177).
115. AC Lens provides white label services to partners including CVS, Sam’s Club, Walmart and Giant Eagle. (CX9003 (Clarkson, IHT at 9-10); (CX9039 (Clarkson, Dep. at 192-193))).
116. White label services account for over half of AC Lens’s business. (CX9003 (Clarkson, IHT at 10)).
117. AC Lens’s 2010 contact lens sales were \$23.1 million. (CX1488).
118. AC Lens’s 2011 contact lens sales were \$24.1 million. (CX1488).
119. AC Lens’s 2012 contact lens sales were \$26.0 million. (CX1488).
120. AC Lens’s 2013 contact lens sales were \$27.4 million. (CX1488).
121. AC Lens’s 2014 contact lens sales were \$29.2 million. (CX1488).
122. AC Lens’s 2015 contact lens sales were \$28.9 million. (CX1488).

b. Key Employees

123. Peter Clarkson is the president, CEO, and founder of AC Lens. (CX9039 (Clarkson, Dep. at 8)).
124. Robert James Drumm has been with AC Lens since 2006. As of December 2016, he had been the marketing director for approximately three years. (CX9018 (Drumm, Dep. at 10-12)).

- c. Agreement(s)
125. In June or July 2005, AC Lens informed 1-800 Contacts that it did not bid on search queries containing 1-800 Contacts' trademark terms ("1-800 Contacts Branded Queries"), and that AC Lens had implemented negative keywords to prevent its search advertisements from appearing in response to consumer searches that included "800" or "express." (RX0052; Clarkson, Tr. 238-240).
 126. If it had not received a threatening letter from 1-800 Contacts, AC Lens would not have implemented negative keywords to prevent its search advertisements from appearing in response to consumer searches that included "800" or "express." (Clarkson, Tr. 240; *see also* RX0052).
 127. 1-800 Contacts and AC Lens entered an agreement dated March 10, 2010 to resolve a trademark dispute initiated by 1-800 Contacts. (RX0028 (Settlement agreement by and between 1-800 Contacts and AC Lens dated March 10, 2010) (hereinafter "AC Lens Agreement"))).
 128. The AC Lens Agreement prohibits the parties from "using the other Party's trademark keywords or URLs (as listed in Exhibit 1) to target or trigger the appearance of delivery of advertisements of other content to the user." (RX0028 at 002 (AC Lens Agreement)).
 129. The AC Lens Agreement prohibits the parties from "using generic, non-trademarked keywords as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1) without also using negative keywords as set forth in subsection (C) [of the agreement], unless the particular internet search provider does not permit use of negative keywords." (RX00028 at 002 (AC Lens Agreement)).
 130. The AC Lens Agreement requires the parties, when "using generic, non-trademarked keywords as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1)," to implement negative keywords "to the fullest extent possible...in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1). Specifically, for each internet search provider from which a Party purchases keywords to display advertising and/or internet links, the other Party's trademark keywords and URLs listed in Exhibit 1 shall be provided to such internet search provider as negative keywords, such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website." (RX0028 at 002 (AC Lens Agreement)).

3. Vision Direct

a. Company Basics

131. Vision Direct is an online retailer of contact lenses and vision care supplies (Hamilton, Tr. 388-390; *see also* CX8002 at 001 (¶ 2) (Hamilton, Decl.)).¹
132. Vision Direct has been a subsidiary of Walgreen Boots Alliance, Inc. (“Walgreens”) since 2011. (Hamilton, Tr. 389; CX9007 (Fedele, IHT at 5, 7)).
133. Before being acquired by Walgreens, Vision Direct was owned by Drugstore.com. (Hamilton, Tr. 469).
134. Vision Direct sells contact lenses through its website only and does not have brick-and-mortar stores. (Hamilton, Tr. 388-390).
135. Vision Direct competes with other online retailers of contact lenses including 1-800 Contacts, Lens.com, Discount Contact Lenses, Contact Lens King, Coastal, “and some of the other smaller ones as well.” (Hamilton, Tr. 392; *see also* CX8002 at 001 (¶ 3) (Hamilton, Decl.)).
136. Vision Direct’s sales in 2015 were [REDACTED]. (RX1842 (FY2015 Revenue Analysis (August 24, 2014-August 23, 2015), *in camera*)).

b. Key Employees

137. Glen Hamilton was employed by Walgreens from December 2011 through January 2017 as “senior manager, online marketing” and later “functional manager, digital and marketing.” (Hamilton, Tr. 388, 390).
138. Throughout his time at Walgreens, Mr. Hamilton was responsible for online paid search advertising for both Walgreens.com and VisionDirect.com. (Hamilton, Tr. 388, 390-391).
139. In June 2004, Alesia Pinney was employed by Vision Direct and Drugstore.com as the Vice President and General Counsel, and was the signatory on the agreement by and between 1-800 Contacts and Vision Direct dated June 24, 2004. (CX0311 (Settlement agreement between 1-800 Contacts and Vision Direct dated June 24, 2004)).
140. For a time period including at least the period of time in or around October and November 2007, Cindy L. Caditz was outside counsel for Vision Direct, and a lawyer employed at Klarquist Sparkman, LLP located in Seattle, Washington. (CX0138).

¹ The parties have stipulated that sworn declarations included on the joint exhibit list are admissible for all purposes, including CX8000 (Declaration of Park A. Studebaker (Oakwood Eye Clinic)), CX8001 (Declaration of Glen M. Hamilton (Walgreens, Inc.)), CX8002 (Declaration of Glen M. Hamilton (Vision Direct, Inc.)), CX8003 (Declaration of Shaneef Mitha (Lens Discounters)), CX8004 (Declaration of Art Salas (Costco Wholesale)) and CX8005 (Declaration of Rukmini Iyer (Microsoft/Bing)). *See* JX0002-A.

141. Ms. Caditz is the Vision Direct outside counsel who wrote to 1-800 Contacts attorney Bryan Pratt, in a November 5, 2007 letter, that implementing negative keywords in the manner 1-800 Contacts was asking Vision Direct to do was “a possible violation of the Sherman Act” that raised concerns “under the Sherman Act with respect to restrictions on advertising.” (CX0138 at 001-002).
142. For a time period including at least the period of time in or around January 2008, Scott Sher was outside counsel for Vision Direct, and a lawyer employed at Wilson Sonsini Goodrich & Rosati in Washington, DC. (CX0141; CX0142).
- c. Agreement(s)
143. 1-800 Contacts, Inc. and Vision Direct, Inc. entered an agreement dated June 24, 2004 to resolve a trademark dispute initiated by 1-800 Contacts. (CX0311 (Settlement agreement between 1-800 Contacts and Vision Direct dated June 24, 2004 (hereinafter “2004 Vision Direct Agreement”))).
144. The 2004 Vision Direct Agreement prohibits both parties from “causing a Party’s brand name, or link to the Party’s restricted Websites to appear in a search results page of an Internet search engine, when a user specifically searches for the other Party’s brand name, trademarks, or URLs.” (CX0311 at 004 (2004 Vision Direct Agreement)).
145. The 2004 Vision Direct Agreement prohibits both parties from “causing a Party’s website or Internet advertisement to appear in response to any Internet search for the other Party’s brand name, trademarks or URLs.” (CX0311 at 004 (2004 Vision Direct Agreement)).
146. 1-800 Contacts, Inc. and Vision Direct, Inc./Drugstore.com entered into a second agreement effective May 8, 2009. (CX0314 (Settlement Agreement and Mutual Release between 1-800 Contacts and Vision Direct effective May 8, 2009 (hereinafter “2009 Vision Direct Agreement”))).
147. The 2009 Vision Direct Agreement provides that “[t]he 2004 Settlement Agreement shall remain in full force and effect except that the Parties’ sole obligations with respect to the use of negative keywords shall be to comply with the terms of this Settlement Agreement.” (CX0314 at 004 (2009 Vision Direct Agreement)).
148. The 2009 Vision Direct Agreement provides that a Stipulated Order be filed with the Court so as to “require the Parties to implement the Negative Keywords Lists,” and “[i]f the Court refuses to enter the Order . . . then the Parties shall confer in good faith to determine whether they will agree to proceed with a settlement.” (CX0314 at 004-005 (2009 Vision Direct Agreement)).

4. Coastal Contacts

a. Company Basics

149. Coastal Contacts, Inc. (“Coastal” or “Coastal Contacts”), headquartered in Vancouver, British Columbia, is an online retailer of vision care products and services, including contact lenses. (CX1615 at 2 (¶ 4)).
150. Coastal operates a U.S. website at the URL coastalcontacts.com and a Canadian website at the URL clearlycontacts.ca. Coastal has also operated the websites ClearlyContacts.com, TheContactLensStore.com, Lensway.com, NordicLenses.com, and CoastalContacts.ca. (CX0310 at 018).
151. In 2015, Coastal Contacts had contact lens sales revenue of [REDACTED] (CX1465 (Coastal Contacts CL Revenue (total revenue), *in camera*)).

b. Key Employees

152. Steve Bochen, Chief Operating Officer at Coastal Contacts, Inc. was the signatory on the agreement by and between Coastal Contacts, Inc. and 1-800 Contacts dated November 8, 2004. (CX0310 at 010 (Settlement Agreement by and between 1-800 Contacts and Coastal Contacts dated November 8, 2004)).
153. Michael Suh, Search Engine Marketing Manager of Coastal Contacts, was contacted by 1-800 Contacts employees related to implementation of negative keywords and other bidding agreement compliance issues. (CX0432).

c. Agreement(s)

154. 1-800 Contacts and Coastal entered into an agreement dated November 8, 2004. (CX0310 (Settlement Agreement by and between 1-800 Contacts and Coastal Contacts dated November 8, 2004) (hereinafter “Coastal Agreement”)).
155. The Coastal Agreement is governed under New York State laws. (CX0310 (Coastal Agreement)).
156. The Coastal Agreement prohibits the parties to the agreement from “causing a website or Internet advertisement to appear in response to any Internet search for another Party’s brand name, trademarks, or URLs but not through a search employing Generic or Descriptive Terms.” (CX0310 at 003 (Coastal Agreement)).
157. The Coastal Agreement prohibits the parties from “causing a Party’s brand name, or link to that Party’s websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party’s brand name, trademarks, or URLs.” (CX0310 at 003 (Coastal Agreement)).

5. Lens.com

a. Company Basics

158. Lens.com, Inc. (“Lens.com”) is an online retailer of contact lenses that sells throughout the United States. It is a Nevada corporation. Lens.com’s mailing addresses include PO Box 366, Louisiana, MO 63353. (CX1125 at 003).
159. Lens.com sells online through the website www.lens.com. In 2005, Lens.com search ads were appearing in response to searches on Google containing 1-800 Contact’s trademarks. (CX0462 at 001).

b. Key Employees

160. Cary Samourkachian has been the owner and CEO of Lens.com, Inc. since approximately 1998. (CX1673 (Samourkachian, Dep. at 16, 21, 30)).

6. Memorial Eye

a. Company Basics

161. Memorial Eye P.A. (“Memorial Eye”) is based in Houston, Texas, and sells glasses, contact lenses, and optometry services through several brick and mortar facilities. (Holbrook, Tr. 1851; RX0072 at 002-003 (¶¶ 7-8) (1-800 Contacts, Inc. v. Memorial Eye, PA Complaint)).
162. Memorial Eye currently employs six optometrists and approximately 38 employees. (Holbrook, Tr. 1854-1855).
163. Memorial Eye sold contact lenses online directly to consumers throughout the United States through the internet from December 2004 through December 2013. (Holbrook, Tr. 1856-1859, 1873; CX9024 (Holbrook, Dep. at 10-11); RX0072 at 004 (¶ 17) (1-800 Contacts, Inc. v. Memorial Eye, PA Complaint)).
164. During the time it sold contact lenses online, Memorial Eye did so through two websites: ShipMyContacts.com and IWantContacts.com. (Holbrook, Tr. 1858-1859).
165. Memorial Eye began selling contact lenses online through the website ShipMyContacts.com in December 2004. (Holbrook, Tr. 1859; CX9024 (Holbrook, Dep. at 10-11)).
166. Memorial Eye began selling contact lenses online through the website IWantContacts.com in November 2007. (Holbrook, Tr. 1859; CX9024 (Holbrook, Dep. at 10-11)).

b. Key Employees

167. Eric Holbrook is the co-founder and general manager of Memorial Eye. (Holbrook, Tr. 1850-1851).
168. Mr. Holbrook is responsible for the overall management of Memorial Eye, including both its brick-and-mortar stores and, during the time it sold contact lenses online, its online operations. Mr. Holbrook was ultimately responsible for all online operations, including marketing and advertising efforts, as well as other strategic and general business decisions. (Holbrook, Tr. 1855-1856, 1872-1873).

c. Agreement(s)

169. 1-800 Contacts and Memorial Eye entered into an agreement effective November 26, 2013, which requires the parties to “refrain from purchasing or using any of the terms of the other Party as listed in Exhibit 2 as triggering keywords in any search engine advertising campaign,” and to “implement all of the terms the other Party has listed in Exhibit 2 as negative keywords in all internet search engine advertising campaigns with respect to those internet search engines that allow the implementation of negative keywords by the Party.” (CX0326 at 003 (Settlement Agreement between 1-800 Contacts, Inc. and Memorial Eye P.A. dated Nov. 26, 2013 (hereinafter “Memorial Eye Agreement”))).

7. Luxottica

a. Company Basics

170. Luxottica is based in Milan, Italy. Its U.S. subsidiary, Luxottica North America, is based in Ohio. ((CX0331 at 006 (Sourcing Agreement by and between 1-800 Contacts and Luxottica)).
171. Luxottica’s subsidiaries include, but are not limited to, Luxottica Retail North America Inc., LensCrafters International, Inc., EYEXAM of California, Inc., and EyeMed Vision Care LLC, among others. ((CX0331 (Sourcing Agreement by and between 1-800 Contacts and Luxottica)).
172. Luxottica’s primary business in the United States is operating optical chains such as LensCrafters, Pearl Vision, Sears Optical, and Target Optical and distributing optical products including eyeglasses and contact lenses. ((CX0331 at 006 (Sourcing Agreement by and between 1-800 Contacts and Luxottica)).
173. Luxottica’s volume of sales for contact lenses in the United States in 2016 was [REDACTED] [REDACTED]. (CX1817, *in camera*).

b. Agreement(s)

174. In May 2005, 1-800 Contacts and Luxottica entered into an agreement whereby each party agreed not to use the other's trademarks in search advertising, and to have affiliates stop using the other party's trademarks in search advertising as well. (CX0174, CX1378).
175. 1-800 Contacts and Luxottica entered into a sourcing and services agreement, dated December 23, 2013 that prohibited both parties and their affiliates (including, for Luxottica, retailers such as EyeMed, LensCrafters, Pearle Vision, Sears Optical, and Target Optical) from the "purchase or use of any of the [other party's] Trademarks or confusingly similar variations . . . as triggering keywords in any internet search engine advertising campaign," and further required each party to enter the other party's trademarks as negative keywords in all advertising campaigns. (CX0331 (Sourcing Agreement by and between 1-800 Contacts and Luxottica §§ 17.10-11); Bethers, Tr. 3721-22; CX9001 (Bethers, IHT at 221-222)).

8. EZ ContactsUSA

a. Company Basics

176. EZContactsUSA is an online seller of contact lenses, sunglasses, and eyeglasses, and takes purchases both online and over the telephone. (CX0313).
177. EZContactsUSA is located at 4111 Glenwood Road, Brooklyn, NY and at 544 Park Avenue, Brooklyn, NY. (CX0313).
178. On or about December 6, 2007, 1-800 Contacts filed a lawsuit against EZ Contacts, alleging trademark infringement. (CX0313).

b. Key Employees

179. Sholomo Lefkowitz was the owner of EZ Contacts as of May 12, 2008. (CX0313).

c. Agreement(s)

180. EZ Contacts and 1-800 Contacts, Inc. entered into an agreement effective May 12, 2008 to resolve a trademark dispute initiated by 1-800 Contacts. (CX0313).
181. EZ Contacts and 1-800 Contacts, Inc. entered into an agreement effective May 12, 2008 which prohibits the parties from, "performing any action or omission of actions that would cause advertisements, internet links, and/or other promotion material related to a Party's website to appear in response to an entry of any one of the other Party's prohibited keywords listed in Exhibit 3." (CX0313 at 004).
182. EZ Contacts and 1-800 Contacts, Inc. entered into an agreement effective May 12, 2008 which required, for any keyword purchase, including generic, non-trademark keywords, "the Parties shall use the prohibited keywords (as listed in Exhibit 3) as negative keywords in order to prevent the generation of advertisements and internet links triggered

by keywords that are prohibited under [the] agreement,” and that the negative keywords must be implemented, “such that advertisements will not be generated when the negative keywords are used on the website of an internet search provider,” and that “use of generic, non-trademarked words without use of negative keywords shall be considered a prohibited act.” (CX0313 at 005).

9. Lensfast

a. Company Basics

183. Lensfast, LLC (“Lensfast”) is an online retailer of contact lenses, with operations throughout the United States, and with a mailing address of P.O. Box 1001, Meredith, New Hampshire, 03253. (CX0315 at 006).
184. Lensfast sells contact lenses online at the websites lensfast.com, contactlens.com, and E-Contacts.com. (CX0315 at 010).
185. Lensfast had sales in 2011 of \$1,351,592. (CX1480).
186. Lensfast had sales in 2012 of \$1,583,339. (CX1481).
187. Lensfast had sales in 2013 of \$1,747,547. (CX1482).
188. Lenstast had sales in 2014 of \$1,696,954. (CX1483).
189. Lensfast had sales in 2015 of \$2,058,000. (CX1484).

b. Key Employees

190. Randall Weigner, President and CEO of Lensfast, was the signatory on the agreement dated January 4, 2010, by and between 1-800 Contacts and Lensfast, Inc. (CX0315 (Settlement Agreement by and between 1-800 Contacts, Inc. and Lensfast, Inc. dated January 4, 2010)).

c. Agreement(s)

191. On January 4, 2010, 1-800 Contacts and Lensfast, Inc. into an agreement to resolve a trademark dispute initiated by 1-800 Contacts. (CX0315 (Settlement Agreement by and between 1-800 Contacts, Inc. and Lensfast, Inc. dated January 4, 2010 (hereinafter “Lensfast Agreement”))).
192. The Lensfast Agreement prohibits either party from “causing a Party’s brand name, or Internet link to the Party’s Restricted Websites to appear as a listing in the search results page of Internet search engine, when the user specifically searches for the other Party’s brand name, trademark, or URLs (as listed in Exhibit 2).” (CX0315 at 003 (Lensfast Agreement)).

193. The Lensfast Agreement requires the parties to “use the prohibited key words (as listed in Exhibit 2) as negative keywords” in order “to prevent the generation of advertisements and internet links triggered by keywords that are prohibited under the agreement.” (CX0315 at 004 (Lensfast Agreement)).

10. Lenses for Less

a. Company Basics

194. Oakwood Eye Clinic is a privately owned eye care provider company based in Dayton, Ohio. (CX8000 at 001 (¶¶ 1-2) (Studebaker, Decl.)).

195. Lenses for Less is a subsidiary of Oakwood Eye Clinic that sells contact lenses online. (CX8000 at 001 (¶ 3) (Studebaker, Decl.)).

196. Lenses for Less began selling contact lenses online in 1999. (CX8000 at 001 (¶ 3) (Studebaker, Decl.)).

197. Lenses for Less competes against 1-800 Contacts for the sale of contact lenses online. (CX8000 at 001 (¶ 5) (Studebaker, Decl.)).

198. Lenses for Less utilizes search advertising. (CX8000 at 001 (¶ 6) (Studebaker, Decl.)).

b. Key Employees

199. Park A. Studebaker owns and operates Lenses for Less, which is a subsidiary of Oakwood Eye Clinic that sells contact lenses online. (CX8000 at 001 (¶ 3) (Studebaker, Decl.)).

c. Agreement(s)

200. Lenses For Less entered into an agreement with 1-800 Contacts, effective March 23, 2010. (CX0320 at 002 (Settlement Agreement dated March 23, 2010 by and between 1800 Contacts and Lenses for Less) (“Lenses For Less Agreement))).

201. The Lenses For Less Agreement prohibits “engaging in or participating in internet advertising or any other action that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs.” (CX0320 at 003 (Lenses For Less Agreement)).

202. Pursuant to the Lenses For Less Agreement, Lenses For Less and 1-800 Contacts “mutually agree to use the other Party’s trademark keywords and URLs . . . as negative keywords in all of their respective keyword advertising campaigns for any internet search provider that allows the use of negative keywords, to the fullest extent allowable by the internet search provider, in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs.” (CX0320 at 004 (Lenses For Less Agreement)).

203. Pursuant to the Lenses For Less Agreement, Lenses For Less and 1-800 Contacts agreed to adopt negative keywords “in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs.” (CX0320 at 004 (Lenses For Less Agreement)).

11. Contact Lens King

a. Company Basics

204. Contact Lens King, Inc. (“Contact Lens King”) is engaged in the retail sale of contact lenses via the internet. (CX0461 at 002 (Complaint filed by 1-800 Contacts dated March 3, 2010)).

205. In 2015, Contact Lens King had [REDACTED] in contact lens sales. (CX1473, *in camera*).

206. In calendar year 2016, through September 29, 2016, Contact Lens King had [REDACTED] [REDACTED] (CX1474, *in camera*).

b. Key Employees

207. At all times relevant to this matter, Jacque Matte served as the President and CEO of Contact Lens King. (CX1801 (Letter from Jacque Matte to Bryan Pratt dated May 26, 2009)).

c. Agreement(s)

208. 1-800 Contacts and Contact Lens King entered into an agreement on March 29, 2010. (CX0323 at 008 (Settlement agreement between 1-800 Contacts and Contact Lens King dated March 29, 2010 (hereinafter “Contact Lens King Agreement”))).

12. Empire Vision / VisionWorks

a. Company Basics

209. Visionworks of America, Inc. (“Empire Vision / Visionworks”) provides optical services and products through its subsidiaries, including Visionworks, Inc. (“Visionworks”) and Empire Vision Centers, Inc. (“Empire Vision”) (CX0943 at 001 (¶¶ 1, 5) (Duley, Decl.), *in camera*; see also CX9036 (Duley, Dep. at 119-120 [REDACTED]

[REDACTED], *in camera*).

210. Empire Vision / Visionworks operates more than 700 optical retail stores in 42 states and the District of Columbia. (CX0943 at 001 (¶ 5) (Duley, Decl.), *in camera*; see also CX9036 (Duley, Dep. at 23 [REDACTED]

[REDACTED], 119-120 [REDACTED]

- [REDACTED], *in camera*)).
211. Empire Vision / Visionworks has sold contact lenses online since 2005 through websites including www.lens123.com and www.visionworkscontacts.com. (CX0943 at 001 (¶ 6) (Duley, Decl.), *in camera*; see also CX9036 (Duley, Dep. at 30-32 [REDACTED], 119-120 [REDACTED], *in camera*)).
212. [REDACTED] (CX1477, *in camera*).
- b. Key Employees
213. Jared Duley is the Director of Marketing for Visionworks of America, Inc. (CX0943 at 001 (¶ 1) (Duley, Decl.), *in camera*; see also CX9036 (Duley, Dep. at 119-120)).
- c. Agreement(s)
214. On May 13, 2010, Empire Vision entered into an agreement with 1-800 Contacts that prohibits Empire Vision/Visionworks from bidding for trademark keywords, and requires implementation of negative keywords that are contained in a list. (CX0319 (Settlement agreement between 1-800 Contacts and Empire Vision/Visionworks) (hereinafter “Empire Vision / Visionworks Agreement”))).
- 13. ReplaceMyContacts**
- a. Company Basics
215. Tram Data, LLC d/b/a ReplaceMyContacts.com (“ReplaceMyContacts”) was an online seller of contact lenses and, according to 1-800 Contacts, provided, “directly competitive services” to 1-800 Contacts. (CX0638 at 002).
- b. Key Employees
216. At all times relevant to the agreement at issue in this case, Todd Messinger was the President of ReplaceMyContacts. (CX0321).
217. At all times relevant to the agreement at issue in this case, Kevin Drucker, counsel for Tram Data was an attorney with Mendelsohn, Drucker and Associates, P.C. located in Philadelphia, Pennsylvania. (CX0828).

c. Agreement(s)

218. 1-800 Contacts and ReplaceMyContacts entered into an agreement on May 18, 2010, which prohibited the parties from “engaging in internet search advertising that causes any website, advertisement, . . . to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs (as listed in Exhibit 2).” (CX0321 at 002 (Settlement Agreement by and between 1-800 Contacts and Tram Data, LLC d/b/a ReplaceMyContacts.com dated May 18, 2010 (hereinafter “ReplaceMyContacts Agreement”))).

14. Walgreens

a. Company Basics

219. Walgreens is headquartered in Deerfield, Illinois. (CX9007 (Fedele, IHT at 26)).

220. Walgreens sells contact lenses to consumers through its website walgreens.com. (Hamilton, Tr. 388-389).

221. Walgreens does not sell contact lenses through its brick-and-mortar retail stores. (Hamilton, Tr. 388-389 (“Q. Does Walgreens sell contact lenses online? A. Yes. . . . Does Walgreens sell contact lenses in its brick-and-mortar retail pharmacy stores? A. Not that I’m aware of an not during my time there.”)).

222. Walgreens competes with 1-800 Contacts and other online retail sellers of contact lenses including Lens.com, Coastal, Discount Contact Lenses, Contact Lens King “and some smaller ones that are aggressive in online product listing and marketing, such as WebEyeCare.com and OptiContacts.com.” (Hamilton, Tr. 391).

223. Since at least 2009, Walgreens has been advertising contact lenses online. (CX1816 at 005 (Daily Summary – Alerts Found)).

224. Walgreens acquired Drugstore.com, which owned Vision Direct, in June of 2011. (CX9007 (Fedele, IHT at 5, 7)).

225. Walgreens had ██████████ in sales of contact lenses in 2015. (CX1510 (fy15-Contacts), *in camera*).

b. Key Employees

226. Glen Hamilton was employed by Walgreens from December 2011 through January 2017 as “senior manager, online marketing” and later “functional manager, digital and marketing.” (Hamilton, Tr. 388, 390).

227. Throughout his time at Walgreens, Mr. Hamilton was responsible for online paid search advertising for both Walgreens.com and VisionDirect.com. (Hamilton, Tr. 388, 390-391).

c. Agreement(s)

228. 1-800 Contacts and Walgreens entered into an agreement effective on June 29, 2010, which requires the parties to “refrain from purchasing or using any of the terms the other Party has listed in Exhibit 2 as triggering keywords in any internet search engine advertising campaign,” and to “implement all of the terms the other Party has listed in Exhibit 2 as negative keywords in all internet search advertising campaigns.” (CX0322 at 002 (Settlement Agreement by and between 1-800 Contacts and Walgreen Co. dated June 29, 2010 (hereinafter “Walgreens Agreement”))).

15. WebEyeCare

a. Company Basics

229. Web Eye Care, Inc. opened for business in late 2009. Peter Batushansky joined as President in spring 2010. (CX9000 (Batushansky, IHT at 8)).

230. [REDACTED]
(CX9000 (Batushansky, IHT at 8-10), *in camera*).

231. WebEyeCare sells contact lenses online. (CX9000 (Batushansky, IHT at 9)).

232. [REDACTED]
(CX9000 (Batushansky, IHT at 9), *in camera*).

233. [REDACTED]
(CX9000 (Batushansky, IHT at 19-20), *in camera*).

234. [REDACTED]
(CX9014 (Batushansky, Dep. at 68), *in camera*).

235. In 2015, WebEyeCare had [REDACTED] million in net revenue. (CX1820, *in camera*).

b. Key Employees

236. Peter Batushansky is the co-owner and President of WebEyeCare, and has overseen WebEyeCare’s marketing strategy since [REDACTED]. (CX 9000 (Batushansky, IHT at 6-7, 22-23, *in camera*); CX9014 (Batushansky, Dep. at 102), *in camera*).

Agreement(s)

237. 1-800 Contacts and WebEyeCare entered into an agreement effective September 3, 2010, which prohibits the parties from “engaging in internet search advertising that causes any website, advertisement ... to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs (as listed in Exhibit

2).” (CX0324 at 002 (Settlement Agreement by and between 1-800 Contacts and Web Eye Care, Inc. dated September 3, 2010 (hereinafter “WebEyeCare Agreement”))).

16. Standard Optical

a. Company Basics

238. Standard Optical Company is a brick-and-mortar optical company located in Salt Lake City, Utah. (CX9009 (J. Zeidner, IHT at 237-238); CX0965).

239. Standard Optical had \$5,000 in sales of contact lenses online from January 1, 2015 to October 27, 2016. (CX1750).

b. Agreement(s)

240. 1-800 Contacts and Standard Optical entered into an agreement effective February 4, 2011, which prohibits the parties from “engaging in internet search advertising that causes any website, advertisement ... to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs (as listed in Exhibit 2).” (RX0408 at 0001, 0003 (Settlement Agreement by and between 1-800 Contacts and Standard Optical Company dated February 4, 2011 (hereinafter “Standard Optical Agreement”))).

17. Walmart

a. Company Basics

241. Walmart is headquartered in Bentonville, Arkansas. (CX9037 (Owens, Dep. at 29)).

242. Walmart had \$25.7 million in sales of contact lenses online in 2015. (CX1745; CX8006 at 022-023 (¶ 54) (Evans Expert Report)).

243. Walmart has not made the contact lens business a priority. (CX9033 (Mohan, Dep. at 17 (the contact lens business is not a priority for Walmart), 19, 41 (the contact lens business is not a way to keep customers coming back to Walmart), 93-95, 167, 170 (contact lenses are not a “bread and butter” business for Walmart), 187-188); CX9037 (Owens, Dep. at 18-20)).

244. Other than in-store promotions, search advertising is the only means by which Walmart promotes its contact lens business. (CX9033 (Mohan, Dep. at 17-18); CX9037 (Owens, Dep. at 17)).

245. From 2008 to January 1, 2013, Walmart had an alliance with 1-800 Contacts involving some co-branding and marketing and a revenue-share arrangement. (CX9037 (Owens, Dep. at 36); CX9001 (Bethers, IHT at 20-23); CX9003 (Clarkson, IHT at 139); CX0525 at 026).

246. AC Lens began providing white label fulfillment services to Walmart in 2013 after the dissolution of the alliance with 1-800 Contacts. (CX9037 (Owens, Dep. at 40)). Under the arrangement, AC Lens fulfilled orders placed on Walmart's websites and handled customer retention efforts for Walmart customers. Walmart conducted its own marketing activities, including internet search marketing. (CX9037 (Owens, Dep. at 41-42); CX9018 (Drumm, Dep. at 53-54)).
247. Walmart's purpose in selling contact lenses online is simply to provide online ordering as an added service for its in-store customers. (CX9033 (Mohan, Dep. at 18-19 ("we don't want to be – to become irrelevant, like say Sears...we want to make sure we always have the online presence...")); CX9037 (Owens, Dep. at 19-20)).

b. Key Employees

248. David Owens is a Senior Buyer for Walmart, responsible for Walmart's in-store contact lens business, including its budgets, inventories, and promotions. He joined Walmart 15 years ago. (CX9037 (Owens, Dep. at 7-8)).
249. Sandhya Mohan is a Senior Product Manager for Walmart. She joined Walmart in 2013 and has been responsible for search engine advertising for Walmart's online contact lens sales since 2015. (CX9033 (Mohan, Dep. at 8-12)).

18. LensDirect

a. Company Basics

250. LensDirect LLC is an online retailer of contact lenses and direct competitor of 1-800 Contacts, headquartered in Garden City, New York. (Alovis, Tr. 977, 979; CX1241).
251. LensDirect sells contact lenses, glasses, and other eye care products through its website at Lensdirect.com. (Alovis, Tr. 979).
252. LensDirect had approximately \$1.4 million in sales in 2015. (CX1463).
253. LensDirect had approximately \$3.3 million in sales in 2016. (Alovis, Tr. 983; CX9023 (Alovis, Dep. at 27)).
254. LensDirect's closest competitors are 1-800 Contacts, Vision Direct, Coastal Contacts and Lens.com. (Alovis, Tr. 988; CX9023 (Alovis, Dep. at 108, 110)).

b. Key Employees

255. Ryan Alovis is the CEO of LensDirect. (Alovis, Tr. 968; CX9023 (Alovis, Dep. at 10-11)).
256. Mr. Alovis communicates regularly with Dale Kim, who manages LensDirect's search advertising, and participates directly in the formulation of LensDirect's search advertising strategy. (Alovis, Tr. 994-995, 997-998).

19. Lens Discounters

a. Company Basics

257. LD Vision Group, Inc. (“Lens Discounters”) was founded in 2002. (CX8003 at 001 (¶¶ 2-3) (Mitha, Decl.)).
258. Shaneef Mitha, LenDiscounters’ Chief Operating Officer, declared under penalty of perjury that LensDiscounters sells contact lenses over the internet through websites, including LensDiscounters.com, in the United States. (CX8003 at 001 (¶ 3) (Mitha, Decl.)).
259. Mr. Mitha, LenDiscounters’ Chief Operating Officer, declared under penalty of perjury that LensDiscounters’ closest competitors are other companies that sell contact lenses online, such as Lens.com, AC Lens, and Vision Direct. (CX8003 at 001 (¶ 4) (Mitha, Decl.)).
260. Mr. Mitha, LenDiscounters’ Chief Operating Officer, declared under penalty of perjury that LensDiscounters’ preferred method of acquiring new customers is online paid search advertising. (CX8003 at 002 (¶ 6) (Mitha, Decl.)).

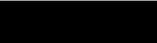
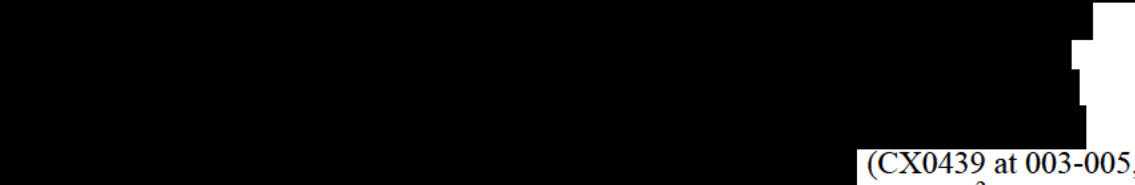
b. Key Employees

261. Shaneef Mitha is the Chief Operating Officer of LD Vision Group, Inc. (CX8003 at 001 (¶ 2) (Mitha, Decl.)).

20. LensWorld

262. As of 2008, Lensworld was an online retailer of contact lenses located in New Jersey (CX1622 (Complaint filed by 1-800 Contacts dated January 8, 2008 at 3 – 4)).

B. **Non-Online Retailers (Brick and Mortar)**

263. Several types of non-online (brick-and-mortar) businesses sell contact lenses: independent eye care professionals, optical retail chains, mass merchants, and club stores. (Bethers, Tr. 3509; *see also infra* ¶¶ 264-74).
264. A 2015 report prepared at the direction of 1-800 Contacts’ owner states that 

(CX0439 at 003-005, 007-009 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).²

² The AEA “Staff Final Update” report, CX0439, *in camera*, was prepared as part of AEA’s diligence during its acquisition of 1-800 Contacts. For every potential investment, over the course of months or longer, AEA performs detailed due diligence, on the basis of which AEA’s decision makers give final approval to commit hundreds of millions of dollars. *See* AEA Investors LP’s Motion for In Camera Treatment, Mar. 24, 2017, Exhibit C, Declaration

a. Brick and Mortar Independent Eye Care Professionals (IECPs)

265. Independent Eye Care Professionals (“IECPs”) are one channel through which consumers can purchase contact lenses. (Clarkson, Tr. 188).
266. IECPs have traditionally sold at the highest prices among the various types of contact lens retailers. (Bethers, Tr. 3543-3544).
267. IECPs tend to charge approximately 25 percent more for contact lenses than the next highest priced retail channel: brick-and-mortar optical chains. (Clarkson, Tr. 170-171).
268. A 2015 report prepared at the direction of 1-800 Contacts’ owner stated that the independent eye care professional channel accounted for ██████ of overall retail sales of contact lenses in the U.S. at the time of the report. (CX0439 at 009 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).

b. Brick and Mortar Optical Chains/ High Street Retailers

269. Brick and mortar chain retailers, such as LensCrafters and PearleVision, offer an alternative channel for the sale of contact lenses. (Clarkson, Tr. 188).
270. These retail optical chains provide eye care professionals on location. (Bethers, Tr. 3509-3511, 3520-3521).

c. Brick and Mortar Mass Merchants and Club Stores

271. Mass merchant or “big box” retailers, which include Walmart and Target stores, offer a different channel through which consumers may buy contact lenses. (Clarkson, Tr. 188-189).
272. Mass merchants that sell contact lenses in their brick-and-mortar either employ or have other relationships with ECPs that allow them to sell contact lenses. (Murphy, Tr. 4096-4097).
273. Club or membership stores such as Costco and Sam’s Club constitute a separate channel for the sale of contact lenses. (Clarkson, Tr. 189).
274. A 2012 presentation prepared by 1-800 Contacts stated that Costco makes 4 percent of all sales of contact lenses. (CX0201 at 017).

C. Manufacturers

275. There are four major manufacturers of the contact lenses sold in the United States: Johnson and Johnson, Alcon, Bausch and Lomb, and CooperVision. (Clarkson, Tr. 183 (“[T]here are four major manufacturers that represent probably 95 percent-plus of the

of Barbara Burns, ¶ 5. The Staff Final Update summarized the findings of AEA’s diligence efforts and cost at least \$1 million to develop. *Id.* ¶ 7. Further, the document is an ordinary AEA business record. *See* Order on Non-Parties’ Motions for In Camera Treatment at 4; JX0002-A-011 (CX0439 admitted for all purposes).

U.S. market. They are Johnson & Johnson, Alcon, CooperVision and Bausch & Lomb.”); Holbrook, Tr. 1880; *see also* CX1214 (Walgreens product pricing data), *in camera*).

276. Vistakon is a division within Johnson and Johnson. (Holbrook, Tr. 1880).
277. Vistakon manufactures [REDACTED] (CX1214 (Walgreens product pricing data), *in camera*).
278. Alcon manufactures [REDACTED] [REDACTED] (CX1214 (Walgreens product pricing data), *in camera*).
279. Bausch and Lomb manufactures [REDACTED] [REDACTED] (CX1214 (Walgreens product pricing data), *in camera*).
280. CooperVision manufactures [REDACTED] } (CX1214 (Walgreens product pricing data), *in camera*).

III. Contact Lens Industry Background

A. Contact Lens Consumers

281. One in four visually corrected Americans use contact lenses. (CX0055 at 004).
282. In 2004, nearly 36 million Americans wore contact lenses. (RX0566 at 002).
283. In 2012, approximately 38 million Americans wore contact lenses. (CX0525 at 037).
284. Contact lens users are younger than the general population needing vision correction. [REDACTED] (CX0439 at 020 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*); CX9004 at 004 (Coon, IHT at 10)).

B. Contact Lenses are Sold By Prescription, Which Doctors Must Provide to Patients

285. Contact lenses are a medical device. (Clarkson, Tr. 159-160).
286. In the United States, contact lenses cannot be sold to a consumer without a prescription. (RX0566 at 002; Clarkson, Tr. 178).
287. State licensing boards, which regulate the practice of optometry, set conditions for the sale of contact lenses and eyeglasses in each state. (Joint Stipulations of Jurisdiction, Law and Facts, JX0001 ¶ 4; RX0566 at 002).
288. Eye Care Professionals write the prescriptions required for the purchase of contact lenses, and all such Eye Care Professionals are licensed and authorized to write such prescriptions pursuant to the laws of the states in which they deliver their services. (JX0001 ¶ 4 (Joint Stipulations of Jurisdiction, Law and Facts); *see also* Bethers, Tr.

3511-3512, 3526-3527 (testifying that ECPs, who write contact lens prescriptions, are “gatekeepers” for contact lens wearers)).

289. Eye care professionals select a suitable lens product for the patient, write a prescription for a certain brand, size, and refraction, and then check the patient every year or two to see whether her needs have changed. (RX0569 at 0009-0010; CX0439 at 040 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).
290. The Fairness in Contact Lens Consumers Act, 15 U.S.C. 7601-7610, requires that contact lens prescribers – such as optometrists and ophthalmologists – provide contact lens prescriptions to their patients upon completion of a contact lens fitting. (RX0566 at 002).
291. The FTC issued a final rule in June 2004 to implement the Fairness in Contact Lens Consumers Act, 16 CFR Parts 315 and 456. (RX0566 at 001-012 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).
292. The FTC’s final rule is called “The Contact Lens Rule.” (RX0566 at 002-003 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

C. Prescription Verification

293. Before selling contact lenses to a customer, contact lens retailers must either obtain a copy of the prescription or verify the information in the prescription with the prescribing doctor. (Clarkson, Tr. 177-178; *see also* RX0566 at 011 (Section 315.5(a) of the Contact Lens Rule, entitled “Prescription Requirement,” explaining that a seller cannot sell contact lenses to a consumer unless the seller has obtained a copy of the patient’s contact lens prescription, or verified the prescription, or verified the prescription through a direct communication with the prescriber)).
294. Section 315.5(b) of the Contact Lens Rule, entitled “Information for Verification,” states that the information that a seller must provide to the prescriber is: (1) the patient’s full name and address; (2) the contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate; (3) the quantity of the lenses ordered; (4) the date of the patient request; (5) the date and time of the verification request; and (6) the name of the contact person at the seller’s company, including a facsimile and a telephone number. (RX0566 at 004 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).
295. A contact lens prescription is verified if one of the following occurs: (1) the prescriber confirms the prescription is accurate by direct communication with the seller; (2) the prescriber informs the seller through direct communication that the prescription is inaccurate and provides the accurate prescription; or (3) the prescriber fails to communicate with the seller within eight business hours after receiving from the seller the information for verification described in Section 315.5(b) of the Contact Lens Rule. 16 CFR §315.5. (RX0566 at 011 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

296. If a prescriber does not actively verify the prescription within eight business hours of notice, the prescription is treated as verified. This is called passive verification. (Clarkson, Tr. 178).
297. The prescription verification process is “administratively burdensome” for 1-800 Contacts, which has █████ employees dedicated to prescription verification. (CX0439 at 014 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).
298. AC Lens purchased the database of doctors with their phone and fax numbers that it uses for prescription verification, and AC Lens has continued to refine the database based on customer interaction over the years. (Clarkson, Tr. 361). *See also* Clarkson, Tr. 180-181; CX9003 (Batushansky, IHT at 26) (“larger companies now would have an online database of all of the doctors in the United States” for prescription verification).

D. Contact Lenses are a Commodity Product

299. Contact lenses are a commodity product. (*Infra* ¶¶ 300-304).
300. At the point that a consumer has a prescription and is shopping for contact lenses, the lenses are a commodity product. (Clarkson, Tr. 202-203 (“[A] contact lens might be a highly differentiated product when it’s manufactured, but the moment the doctor writes a prescription for it, it becomes a pure commodity. I mean, a box of ACUVUE is a box of ACUVUE and it really doesn’t matter where you buy it.”); Coon, Tr. 2688; Alovis Tr. 994; CX9039 (Clarkson, Dep. at 99); Athey, Tr. 725-726, Evans, Tr. 1696).
301. A contact lens prescription specifies the power, base curve, and brand of contact lens. (Clarkson, Tr. 186); CX8007 at 012 (¶ 27) (Athey Expert Report)).
302. Even if multiple manufacturers manufacture contact lenses with the same parameters, there can be differences between the brands in terms of fit and comfort, which can be associated with slight differences in the materials used in the lens or the thickness of the lens, thus a consumer “cannot switch brands” once a prescription is written. (Clarkson, Tr. 167, 293; CX9000 (Batushanky, IHT at 13)).
303. More than ninety percent of contact brand decisions are made by doctors instead of consumers. (CX0055 at 004).
304. 1-800 Contacts sells the same products as other retailers of contact lenses. (CX9029 (Bethers, Dep. at 22-23) (contact lens retailers “sell a commodity that [is] a mass produced product. A consumer can only buy one product. They have no ability to buy a different product. And the product we sell is the exact same product they can buy from any other retailer.”); CX9035 (Coon, Dep. at 111) (“[Y]ou can’t compete on the product because there is no alternative, unless somebody can get a prescription for a different brand. So once a prescription’s been written, you’re only left with two things that you can compete on, price and service”); CX9034 (Roush, Dep. at 177) (“[W]e sell the same contact lenses other retailers sell.”); CX9043 (Athey, Dep. at 64-65) (1-800 Contacts’ competitors “deliver the exact same shrinkwrapped box to the consumer” as 1-800 Contacts)).

E. Contact Lens Retailers Compete on the Basis of Price and Service

305. Contact lens consumers are able to decide where to purchase their contact lenses. (Clarkson, Tr. 186).
306. As of 2004, the contact lens market had undergone significant change in that the development of disposable soft contact lenses, followed by the growth of different retail channels, gave consumers a greater choice of sellers and means of delivery when they purchase contact lenses. (RX0566 at 002).
307. Online contact lens retailers compete on the basis of price and service. (Clarkson, Tr. 202-203 (“[A] contact lens might be a highly differentiated product when it’s manufactured, but the moment the doctor writes a prescription for it, it becomes a pure commodity. I mean, a box of ACUVUE is a box of ACUVUE and it really doesn’t matter where you buy it. Then it really comes down only to convenience, service, and price.”); CX9014 (Batushansky, Dep. at 91), *in camera*; Aloviz, Tr. 994 (“We know we sell a commodity. We sell the same thing that the other guys sell; we just offer it at a better price and what we believe to be a better service, so it is compelling.”); CX9018 (Drumm, Dep. at 113 (AC Lens tries to distinguish itself “with price, service, ability to ship quickly, return policies, and customer service. Contact lenses are a commodity item, so it’s kind of difficult to differentiate manufacturers.”); CX9039 (Clarkson, Dep. at 89) (“We try to distinguish ourselves by being pretty fanatical about service, by trying very hard to make the process convenient and quick.”); Aloviz, Tr. 990 (LensDirect matches prices for any “credible” competitors)).
308. Ways that online contact lens retailers seek to distinguish themselves from competitors include inventory, shipping, return policies, trust, and customer service. (CX9014 (Batushansky, Dep. at 103-104), *in camera*; CX9039 (Clarkson, Dep. at 89); CX9018 (Drumm, Dep. at 113-114)).

1. Inventory

309. Some online retailers carry large inventories of contact lenses. (CX9003 (Clarkson, IHT at 21); CX0439 at 010 (Staff Final Update), *in camera*).
310. Carrying a large inventory ensures that potential customers would be satisfied with the selection available, and allows the customers to receive their lenses more quickly. (CX9024 (Holbrook, Dep. at 22)).
311. A 2015 report prepared at the direction of 1-800 Contacts’ owner states that significant scale is required to compete online through investment in inventory. (CX0439 at 014 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).
312. During the time that it was selling contact lenses online, Memorial Eye needed to stock many more contact lenses for its online business than it did for its ECP business, requiring it to order a much larger inventory. (Holbrook, Tr. 1861-1863). See also (CX9024 (Holbrook, Dep. at 21)) (Memorial Eye strived to have a large selection of lenses available).

313. During the time that it was selling contact lenses online, Memorial Eye “wanted as many contact lenses available so that [it] could have a quick turnaround time to the customers that were looking for contact lenses.” (CX9024 (Holbrook, Dep. at 22)).
314. During the time that it was selling contact lenses online, Memorial Eye had the vast majority of lenses customers ordered in stock. (Holbrook, Tr. 1895).
315. Generally, customers were satisfied with Memorial Eye’s online selection. (CX9024 (Holbrook, Dep. at 22); Holbrook, Tr. 1895-1896 (“Q. In your experience, were customers generally satisfied with Memorial Eye’s selection of contact lenses? A. Yeah. We got quite a few, lots and lots of positive comments about that, both . . . people calling us and e-mailing us and also from the—from the sites that were out there that rated services.”)).
316. AC Lens currently has 37,000 SKUs (stock keeping units) in stock. (Clarkson, Tr. 192).
317. Having 37,000 SKUs in stock allows AC Lens to “fill about 96 percent of our orders from inventory.” (Clarkson, Tr. 192).
318. For orders covered by the 37,000 SKUs AC Lens has in stock from customers that already have a verified prescription on file, AC Lens can ship the same day the order was placed. (Clarkson, Tr. 194).
319. When AC Lens ships an order the same day, the customer can receive the lenses between one and three days from the day the order was placed. (CX9039 (Clarkson, Dep. at 92) (“It’s hard for me to think that anyone else could be exceeding that in terms of speed of delivery.”)).
320. Web Eye Care is able to fill the vast majority of orders quickly from its stock or through distributors, with only approximately [REDACTED] of orders going on backorder. (CX9014 (Batushansky, Dep. at 109), *in camera*).

2. Shipping

321. Fast shipping is a competitive advantage because the faster customers receive the contact lenses they order, the happier they’re going to be. (CX9018 (Drumm, Dep. at 114) (“There’s a good book about the founder of LensCrafters, and he built LensCrafters entirely on the ability people to get people eyeglasses in a very, very quick amount of time. And we kind of adopted that model for the online world. The faster we can get contact lenses to the customers, the more—happier they’re going to be, especially if you’re out.”)).
322. A 2015 report prepared at the direction of 1-800 Contacts’ owner states that 1-800 Contacts “offers quick delivery straight to customer’s door and convenient ordering.” (CX0439 at 010 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).
323. One of the metrics AC Lens cares about specifically regarding service is getting orders shipped the day they arrive. (CX9039 (Clarkson, Dep. at 89); Clarkson, Tr. 193 (“We

provide—we strive to ship as many orders as quickly as possible, so we have metrics to ship orders that are released to our distribution center on the day that they arrive so that we get the—we get the product into the consumer’s hands as quickly as possible.”)).

324. AC Lens tries to ship fast generally, and also offers a variety of shipping options. (CX9018 (Drumm, Dep. at 114) (“So for shipping, we try to ship fast, also a variety of offers”)).
325. AC Lens offers overnight shipping, which not all of its competitors offer. (CX9018 (Drumm, Dep. at 114)).
326. AC Lens is able to ship “in-stock orders that are released to our distribution center by 2:00 p.m. Eastern” on the same day the order is placed. (Clarkson, Tr. 194).
327. At AC Lens, orders for products that are not in stock are overnighted from the manufacturers, and unless there is a back order from the manufacturer, AC Lens would get them the day after the order was placed by the customer and would be shipped that same day. (Clarkson, Tr. 194).
328. Web Eye Care seeks to distinguish itself from other contact lens sellers through convenience, and shipping is a component of convenience. (CX9014 (Batushansky, Dep. at 103), *in camera*).
329. [REDACTED] (CX9014 (Batushansky, Dep. at 107), *in camera*).
330. During the time that it sold contact lenses online, Memorial Eye would sometimes offer free shipping for online orders, and generally “tried to stay competitive” compared to what other online retailers were offering regarding free shipping. (CX9024 (Holbrook, Dep. at 23-24)).
331. Fast shipping was a high priority for Memorial Eye’s online business. (Holbrook, Tr. 1894).
332. Memorial Eye tried to ship out online orders as quickly as possible. (Holbrook, Tr. 1894-1895). Orders could be shipped the same day if the customer already had a valid prescription on file and the lenses were in stock. (Holbrook, Tr. 1895).
- 3. Many of 1-800 Contacts’ Rivals Offer Excellent Customer Service.**
333. Though generally at a lower price point, AC Lens competes with 1-800 on service. (CX9039 (Clarkson, Dep. at 90-92)).
334. AC Lens strives to provide excellent service in order to distinguish itself from competitors and to capture repeat orders. (Clarkson, Tr. 193; CX9039 (Clarkson, Dep. at 91) (providing good customer service has been “a principle since day one” for AC Lens in part because AC Lens typically loses money on an initial order because of the cost of

marketing, and the only way that works as a business model is if they can “take very good care of the customers so they keep coming back.”).

335. AC Lens employs customer service agents to handle responding to customer service calls, emails, and prescription verification. (CX9039 (Clarkson, Dep. at 89)).
336. AC Lens empowers its customer service agents “to take care of the customer and to accept returns under any circumstances, to offer discounts, to give people free shipping upgrades, whatever it takes basically.” (CX9039 (Clarkson, Dep. at 91); Clarkson, Tr. 195 (AC Lens’s return policy used to be less than 365 days but it empowered its customer care agents to “basically ignore the policy and always take the order back anyway” and so AC Lens decided to extend its returns policy to a full year)).
337. CX9039 (Clarkson, Dep. at 90) (AC Lens customer service agents are empowered to accept returns even when they fall outside the stated return policy).
338. AC Lens has tried to make its stated return policy “at least as generous as anyone else’s.” (CX9039 (Clarkson, Dep. at 89-90)).
339. AC Lens seeks to distinguish itself by offering “extended returns and various returns that other retailers may not offer.” (CX9018 (Drumm, Dep. at 114)).
340. During the time that it sold contact lenses online, Memorial Eye allowed customers to return unopened boxes of contacts ordered from Memorial Eye, although it did not happen very often. (Holbrook, Tr. 1896).
341. During the time that it sold contact lenses online, Memorial Eye bent the rule that customers could only return unopened boxes in 90 percent of the cases because the company wanted to provide good customer service. (Holbrook, Tr. 1896).
342. AC Lens’s call center is designed to have consumers talking live with an agent within 20 seconds. (Clarkson, Tr. 306).
343. AC Lens’s call center is open from 8:00 a.m. to 11:00 p.m., Eastern time, during the week, and from 9:00 a.m. to 9:00 p.m., Eastern time, on Saturdays and Sundays. (Clarkson, Tr. 306).
344. AC Lens’s target time to respond to customer emails is two hours. (Clarkson, Tr. 306).
345. During AC Lens’s call center operating hours the average time to respond to an email is significantly shorter than two hours. (Clarkson, Tr. 308-309).
346. In general, AC Lens tries to answer customer service calls quickly and provide a good customer service experience, make sure that it can deal with custom problems as expediently as possible, and make sure that the customer is as happy as possible. (CX9018 (Drumm, Dep. at 113-114)).

347. Web Eye Care endeavors to provide service to do its best to meet customer expectations. (CX9014 (Batushansky, Dep. at 105-106), *in camera*).
348. Web Eye Care maintains a call center and also accepts customer service emails at the call center. (CX9014 (Batushansky, Dep. at 106), *in camera*).
349. [REDACTED] (CX9014 (Batushansky, Dep. at 107), *in camera*).
350. [REDACTED] (CX9014 (Batushansky, Dep. at 108), *in camera*).
351. Vision Direct has a call center that is open 24 hours. (CX9038 (Hamilton, Dep. at 49)).
352. LensDirect has recently made changes that has cemented it as a leader in service for the optical space. (Alovis, Tr. 979-980).
353. LensDirect uses dedicated account reps so that every customer has a one-to-one relationship with a specific customer service representative. (Alovis, Tr. 980).
354. LensDirect has offers a subscription program called AutoRefill that allows customers to set a date for a subsequent shipment of lenses and have the arrive automatically without placing a new order. (Alovis, Tr. 980-981).
355. Customers using LensDirect's AutoRefill also receive discounts. (Alovis, Tr. 980-981).
356. LensDirect maintains a customer service email address. (Alovis, Tr. 981).
357. LensDirect's CEO, Ryan Alovis, used to personally review every single customer service email to ensure that the conversation was up to his standards. (Alovis, Tr. 981).
358. Ensuring that LensDirect continues to provide good customer service is the most important priority for Mr. Alovis. (Alovis, Tr. 981).
359. LensDirect competes on service in a number of ways. It has dedicated account representatives for each customer; it offers free shipping on almost every order; it offers an auto-refill program; it has very low rate of returns; and CEO Alovis is directly copied on every consumer complaint. (Alovis, Tr. 979-982; CX9023 (Alovis, Dep. at 29, 45, 50, 52, 63, 106)).
360. Mr. Alovis reads every customer review of LensDirect on Trustpilot and Google, in order to determine whether LensDirect's customer service efforts are working as intended. (Alovis, Tr. 981-982).
361. Trustpilot is a service that emails customers after an order has shipped giving them the opportunity to review their shopping experience, whether it is negative or positive. (Alovis, Tr. 982).

362. Mr. Alovio regards customer service as the heart and soul of LensDirect. (Alovio, Tr. at 981).
363. LensDirect has made changes to improve its service in response to Trustpilot and Google reviews by customers. (Alovio, Tr. 982-983).
364. Customer service was very important to Memorial Eye's online business. (Holbrook, Tr. 1890-1891 (“[W]e were trying to—it was very important for us to get repeat customers, and if you don't provide really good customer service, you're not going to get repeat customers. Plus we wanted to distinguish ourselves that way, so we . . . put a lot of effort in providing top-notch customer service.”)).
365. During the time that it sold contact lenses online, Memorial Eye put a lot of effort into providing good service, including responding quickly, answering questions, finding creative solutions to issues and concerns, and using the doctors it had on staff to answer specific questions from customers about contacts. (Holbrook, Tr. 1891; CX9024 (Holbrook, Dep. at 13 (“We were a small, nimble company. So we spent a lot of time paying attention to the customer service responses. We also had opticians and doctors available on staff to be able to call on if there were any technical questions about contacts or diseases or things like that. If the customers had any questions, we could call on them anytime and get professional guidance on that . . . [e]ven for customers who weren't patients.”); Holbrook, Dep. at 13-14 (“[W]e trained our customer service reps quite a bit. We watched them like a hawk, listened in to their conversations and tried to make sure that they were providing the best customer service possible. And we always responded to any issues immediately and we just felt like we were, you know, providing top-notch customer service.”)).
366. Memorial Eye maintained a customer service center for its online business that was staffed from 9:00 to 7:00 during the week, 9:00 to 1:00, or sometimes 2:00, 3:00, or 4:00 on Saturdays. (Holbrook, Tr. 1892).
367. Memorial Eye's customer service representatives regularly kept notes of calls with customers. (Holbrook, Tr. 1893).
368. Memorial Eye maintained a customer service email address that customers could use for assistance. (Holbrook, Tr. 1893).
369. Responding to customer emails was a high priority for Memorial Eye's online business, and they were usually answered on the same day except for weekends. (Holbrook, Tr. 1893).
370. Net Promoter Scores (“NPS”) are a way of measuring customer satisfaction by asking customers how likely they are to recommend a company to someone else. (Clarkson, Tr. 207).
371. AC Lens customers are generally highly satisfied, based on Net Promoter Scores. (Clarkson, Tr. 208). AC Lens routinely has NPS scores in the low 80s. (Clarkson, Tr. 208).

372. [REDACTED] (CX430 at 006) [REDACTED] *in camera*).

373. Other online competitors view their service level as comparable to that of 1-800 Contacts. (CX9014 (Batushansky, Dep. at 65, 17-21); CX9039 (Clarkson, Dep. at 88-92)).

374. Dr. Athey, analyzing record materials including raw data behind Net Promoter Score surveys, opined that some online rivals of 1-800 Contacts offer similar enough service levels that service alone could not account for 1-800 Contacts' price premium over those rivals. (Athey, Tr. 750-754 ("The conclusion was that the price premium is not supported by the service differential, particularly for consumers that are doing—that are coming through the Internet search channel."); CX8007 at 016-019 (¶¶ 42-50) (Athey Expert Report)).

IV. Search Advertising Background

A. Description of Search Advertising

1. What are Search Engines?

375. Search engines allow their users to usefully access the vast amount of information on the internet. Search engines employ complex algorithms to match the end user's request with parts of the web that may contain relevant responses. (Joint Stipulation on Search Engines and Glossary, ¶1)

376. The search engine ranks potential responses based on the predicted likelihood of relevance to the user's query. (Joint Stipulation on Search Engines and Glossary, ¶5-6)

377. The search engine results page ("SERP") that appears in response to a user's search shows the user a list of unpaid results, and sometimes advertisements related to the query. (Joint Stipulation on Search Engines and Glossary, ¶4)

378. "Most searches . . . are ones where no ads appear." (Juda, Tr. 1080-1081). However Google finds ads can be helpful to consumers "when the inherent task of a user is commercial in nature." (CX9019 (Juda, Dep. at 23))

379. The unpaid results are referred to as "natural" or "organic" search results. The paid results are referred to as "ads" or "sponsored" results. (Clarkson, Tr. 224-225).

380. The most popular search engines in the U.S., both with users and advertisers, are Google and Bing. (CX8006 at 024 (¶ 56) (Evans Expert Report)).

2. What is Search Advertising?

381. Search engines are free for users. Their revenue comes from advertising. (Juda, Tr. 1065 ("Q. Does Google charge users to use the search engine? A. No. The service is free. Q.

So how does Google make money? A. So Google makes money predominantly by showing ads on the search results page...”); *see also* CX8005 at 001 (¶ 7) (Iyer, Decl.), *in camera*).

382. Unlike other types of advertisements online, search engine advertisements are text only. (Jt. Stip. Regarding Search Engines and Glossary ¶ 10; *see, e.g.*, CX0296 at 015 (Feb. 6, 2015, 1-800 Contacts Affiliate and Paid Search Overview presentation), *in camera*).
383. On Google, search engine advertisements consist of a blue headline, followed by a green box with the word “Ad” in it and the actual URL of the site being advertised, followed by the ad copy, which is text that the advertiser provides to Google. (Jt. Stip. Regarding Search Engines and Glossary ¶ 11; *see, e.g.*, CX0296 at 015 (Feb. 6, 2015, 1-800 Contacts Affiliate and Paid Search Overview presentation), *in camera*).
384. Search engines “only generate revenue when an ad is clicked.” (Juda, Tr. 1068); *see also* CX8005 at 001 (¶ 7) (Iyer, Decl.), *in camera*); Clarkson, Tr. 217 (“[W]hen you bid on a search term and a user clicks on your ad, you pay.”); Hamilton, Tr. 396 (“Q. Does Vision Direct pay the search engine to display ad impressions related to online keyword search advertising? A. No. Q. Under what circumstances does Walgreens pay the search engine in connection with online keyword search advertising? A. Only when there's a click. It's cost-per-click advertising.”)).

3. Search Engines Have a Strong Incentive to Show Only Search Advertisements that are Relevant and Useful to Users

385. Search engines have a strong incentive to show only search advertisements that are relevant and useful to users. (*Infra* ¶¶ 386-41).
386. Search engines attempt to balance the interests of users, advertisers, and the search engines themselves. (Ghose, Tr. 3999) (search engines “would like to have satisfied consumers, advertisers, and themselves. So search engines are trying to balance multiple things.”); (CX9019 (Juda, Dep. at 181), *in camera*) [REDACTED]
[REDACTED]
[REDACTED]; (CX9019 (Juda, Dep. at 129-30), *in camera*) [REDACTED]
[REDACTED] (CX8005 at 001 (¶ 7) (Iyer, Decl.), *in camera*) [REDACTED]
[REDACTED]; (CX8005 at 001 (¶ 8) (Iyer, Decl.), *in camera*) [REDACTED]
[REDACTED]).
387. As a result of search advertising being purchased on a pay-per-click basis, Google has a “strong economic incentive to show useful ads” (Juda, Tr. 1072) and only useful ads. (Juda, Tr. 1084 (“... advertisers are only charged when a user interacts with their ad. It

creates a nice economic incentive for advertisers to try and create high-quality content, as well as a strong incentive for Google to only show an ad when it's useful.”); RX0612A-0002 (“... users don't want to be bothered with ads that aren't closely related to what they're searching for, and advertisers want to show relevant ads so users will actually click on them”); RX0612A-0005-0006 (users want to see relevant ads. Advertisers want to present relevant ads to users and Google wants both advertisers and users to have a good experience so they come back and continue to use our system.”).

388. Search engines do not benefit from showing ads that are not relevant to users. (Juda, Tr. 1081, 1083-1084 (We actually believe there's a whole variety of ads in the system where the short-term revenue those ads would generate would actually be dwarfed by negative ramifications of users not clicking on ads in the future, and so it's neither a relevant ad to the user nor something in our economic interest to want to show.”) RX0612A-0002. See also (CX8005 at 001 (¶ 8) (Iyer, Decl.), *in camera*) [REDACTED]).
389. Search engines do not benefit over the long term from showing ads that are not relevant to users. (Juda, Tr. 1081, 1083-1084 (explaining that there are ads in the system that would generate clicks and revenue, but over time over-delivery of ads results in a declining rate of clicks by customers); RX0612A-0002; *see also* CX8005 at 001 (¶ 8) (Iyer, Decl.), *in camera*) [REDACTED]).
390. “[Google] observed on a number of occasions that users' propensity for clicking on ads over time can also be influenced based on the quality...of ads that they are presented, so by increasing the quality of ads that [Google] present[s] to users, [Google] can actually see their likelihood of clicking on ads in the future steadily increase over time.” (Juda, Tr. 1073).
391. [REDACTED] (Juda, Tr. 1341).
392. [REDACTED] (Juda, Tr. 1341).
393. [REDACTED] (CX8005 at 002 (¶ 13) (Iyer, Decl.), *in camera*).
394. [REDACTED] (CX9019 (Juda, Dep. at 206), *in camera*; Juda, Tr. 1343).
395. [REDACTED] (CX9019 (Juda, Dep. at 207), *in camera*).

4. Search Engines Attempt to Display Advertisements Relevant to Users' Interests

396. Selecting relevant ads for users is an important priority for search engines. (Juda, Tr. 1072 (“Q. Is selecting relevant ads for users an important priority for Google? A. It is.”); *see also* CX8005 at 002 (¶ 9) (Iyer, Decl.), *in camera* [REDACTED])).
397. Google [REDACTED] created a multi-signal system to select relevant ads. (Juda, Tr. 1077; CX8005 at 002 (¶ 13) (Iyer, Decl.), *in camera*).
398. [REDACTED] system for selecting relevant ads is based on records of user’s responses to—for instance, either clicking or not clicking on—each advertisement on the SERP. (CX9019 (Juda Dep. at 30); CX8005 at 002 (¶ 16) (Iyer, Decl.), *in camera*).
399. Google considers four signals when choosing ads for the SERP: an assessment of predicted click-through rate, ad text relevance (also known as creative quality), landing page experience, and the advertiser’s bid. (Juda, Tr. 1077); *see* RX00612A at 0006-0008.
400. [REDACTED] (Juda, Tr. 1098).
401. Google uses the predicted click through rate signal because click-through rate is “a fairly good proxy for whether an ad may be relevant...” (Juda, Tr. 1068).
402. [REDACTED] (Juda, Tr. 1113-1114, *in camera*) [REDACTED]
403. [REDACTED] (Juda, Tr. 1096, *in camera*; CX8005 at 002 (¶ 12) (Iyer, Decl.), *in camera*).
404. [REDACTED] (Juda, Tr. 1103).
405. [REDACTED] (Juda, Tr. 1089-1091, *in camera*; *see also* (CX8005 at 2 (¶ 13) (Iyer, Decl.), *in camera* [REDACTED])).

406. Google’s assessment of ad text relevance examines how relevant the ad copy, or ad text, is to the user’s search query. (Juda, Tr. 1077); RX0612A at 0007 (“Google determines ad relevance. By analyzing the language in your ad, they determine how well it relates to the query. This is a way to measure the ads relevance to the users search and to make sure that only useful ads are shown.”).
407. Google’s assessment of landing page experience measures how relevant the landing page—the website the user is taken to after clicking the ad—is to the user’s search query. (Juda, Tr. 1077; RX0612A at 0006).
408. [REDACTED] (Juda, Tr. 1099, *in camera*).
409. [REDACTED] (Juda, Tr. 1102).
410. [REDACTED] (Juda, Tr. 1103).
411. [REDACTED] (CX9019 (Juda, Dep. at 113-114), *in camera*).
412. [REDACTED] CX8005 at 002 (¶ 14) (Iyer, Dec.), *in camera*).
413. Advertisers compete for higher positions on the page. (Juda, Tr. 1077 (“Whichever ad has the highest score will appear first, followed by subsequent ads”); Athey, Tr. 718 (“Another reason that search advertisements are so effective is that those advertisements are the result of a competitive auction.”)).
414. Advertisers want to appear higher on the page because higher positions receive more clicks. (CX9014 (Batushansky, Dep. at 66-67); Juda, Tr. 1277-1278).
415. To appear high on the page, advertisers must have strong assessments from Google on the three quality signals compared to other auction participants and must have high bids relative to other participants on a keyword related to the user’s search. (Juda, Tr. 1077) RX0612A-0005 (“we [Google] want to show more useful ads in a higher position on the results page”).
416. [REDACTED] (Juda, Tr. 1198, *in camera*).

417. Bing's ad selection system [REDACTED] } (CX8005 at 003
 [REDACTED] ¶ 20) (Iyer, Decl.), *in camera*).

5. Search Advertising Auctions are Second-Price Auctions Based Advertisers' Bids on Keywords

a. Auction Process

418. Advertisers bid a maximum cost-per-click, meaning the maximum price they are willing to pay each time a user clicks. (Joint Stipulation on Search Engines and Glossary, ¶ 54).

419. The price an advertiser pays for a click on its ad is determined by a second price auction. (RX0612A at 0005; *see also* Juda, Tr. 1114, *in camera*; CX8005 at 003 (¶ 18) (Iyer, Decl.), *in camera*).

420. In the second-price auctions that search engines use, each advertiser's price is the minimum amount required to beat the advertiser that is behind them in the auction. (CX0612A at 0005 ("the buyer doesn't have to pay their full bid, they only have to pay the amount of the next highest bidder below them . . . they only have to pay just enough to beat the competition."); Juda, Tr. 1114, *in camera*; CX8005 at 003 (¶ 21) (Iyer Decl.), *in camera*).

421. [REDACTED]
 [REDACTED] (Juda, Tr. 1200, *in camera*)
 [REDACTED]; CX8005 at 006
 (¶ 36) (Iyer, Decl.), *in camera*).

422. 1-800's own executives confirmed that more advertisers bidding leads to higher costs. (CX9001 (Bethers, IH at 196) ("if you have less competition in terms of trademarks, with Google, costs will be lower. That's true with any search that is a paid search with Google, Yahoo, or anyone else."); Bethers, Tr. 3768 ("I'm certain that there were times when cost per click may have gone up in response to competitive ads appearing on our trademark term. Yes."); CX0915 at 001 (July 28, 2008 email from Bryce Craven (former 1-800) to Brandon Dansie et al containing Weekly Dashboard Summary) ("There were more advertisers on our marks this week...which increased competition and CPCs..."); CX0051 at -004: "Low competition = low cost"; CX0296, *in camera* (marketing team presentation stating that [REDACTED]); CX9020 (Craven, Dep. at 26) ("[I]n general, the more competitive a term, or, in other words, the more advertisers that are competing for a search term, in general, the cost per click for that term will go up. And so in this instance, I'm referring to there were more competitors for our top trademarked keywords, which would have pushed the cost per clicks higher for those specific terms.") (discussing CX0915)); CX9016 (Judd, Dep. at 138 (testifying that keywords on which more advertisers bid tend to be more expensive than keywords on which fewer advertisers bid); CX0424 (June 5, 2013 email from Rick Galan (1-800) to Jonathan Coon and Tim Roush (1-800) stating in part: "It's true – certain high-volume

(and thus high-competition) keywords have gotten extremely expensive.”); CX0218 at 002 (“[Pay Per Click] is a dynamic bidding environment where costs and CTR are dependent upon what the competition is doing.”).

423. [REDACTED] (Juda, Tr. 1114-1115, *in camera*; CX8005 at 003 (¶ 18) (Iyer, Decl.), *in camera*).
424. [REDACTED] (Juda, Tr. 1338, *in camera*).
425. Google includes the bid together with the three ad quality signals to determine the ad rank score. Then Google uses the ad rank score to determine the order of the advertisements on the page. (Juda, Tr. 1077); RX0612A at 0008 (“Google combines your bid with multiple quality factors, the clickthrough rate, the landing page, the ad relevancy, as well as the expected impact of ad formats -- to calculate a score for your ad called ad rank.”).
426. [REDACTED] (CX8005 at 003 (¶ 19) (Iyer, Decl.), *in camera*).
427. [REDACTED] (Juda, Tr. 1338, *in camera*).
- b. Keywords and Match Types
428. Advertisers use keywords to indicate which auctions they would like to enter. (Juda, Tr. 1084, 1081-1082; Hamilton, Tr. 395; *see also* CX8005 at 002 (¶ 10) (Iyer, Decl.), *in camera*).
429. Advertisers can choose the match types they would like applied to those keywords to further delineate which auctions they would like to enter. (Juda, Tr. 1082)
430. Google’s Exact Match function enters the ad into auctions for searches that are “roughly equivalent” to the keyword. (Juda, Tr. 1082).
431. Google’s Phrase Match function enters the ad into auctions for “searches where the search term contains the keyword inside of it.” (Juda, Tr. 1082 (further testifying, by way of example, that bidding on the word “toys” in phrase match would enter an advertiser’s ad into auctions for searches such as “cheap toys”).
432. Google’s Broad Match function enters the ad into auctions for searches “that are topically relevant” to the keyword. (Juda, Tr. 1082).
433. [REDACTED] (Juda, Tr. 1124, *in camera*).

434. [REDACTED] (Juda, Tr. 1124-1125, *in camera*).
435. [REDACTED] (Juda, 1126-1127, *in camera*).
436. [REDACTED] (CX8005 at 004 (¶ 26) (Iyer, Decl.), *in camera*).
437. Advertisers can indicate which auctions they want to avoid entering by using negative keywords. (CX9019 (Juda, Dep. at 72); Juda, Tr. 1131, *in camera*; CX8005 at 005 (¶ 28) (Iyer, Decl.), *in camera*).
438. [REDACTED] (Juda, Tr. 1133-1134, *in camera*; CX8005 at 005 (¶ 28) (Iyer, Decl.), *in camera*)
439. [REDACTED] (CX9019 (Juda, Dep. at 79), *in camera*; Juda, Tr. 1131, *in camera*).
440. [REDACTED] (Juda, Tr. 1131, *in camera*).
441. [REDACTED] (Juda, Tr. 1131-1132, *in camera*).
442. [REDACTED] (Juda, Tr. 1132, *in camera*).

6. Contact Lens Retailers Set, and Adjust, Their Search Advertising Budgets and Expenditures Based on Return on Investment

443. Online contact lens retailers' decisions about how to allocate their search advertising expenditures are made based return on investment, which the retailers often express in terms of the cost of acquiring a customer, the cost of acquiring an order, and/or the cost of a conversion. (*Infra* §§ 6.a–6.c).
444. Online contact lens retailers calculate the Return on Investment (“ROI”) for a keyword by comparing the advertising expenditures “on a certain keyword as compared to the orders attributable to that keyword.” (Hamilton, Tr. 398; Hamilton, Tr. 396-397 (Walgreens and Vision Direct determined “return on investment” for particular keywords based on “cost per order,” which means “total amount of the ad spend divided by the

number of orders.”); CX 9005 (Dansie, IHT at 16) (at 1-800 Contacts, ROI was evaluated in at least two ways: it was calculated as the ratio between the amount spent on search advertising and the revenue on sales, and also the amount spent on advertising and the number of new customers acquired)).

445. Cost per acquisition, sometimes referred to as “acquisition cost” or “CPA,” refers to the amount spent per order received; calculating the amount spent divided by the number of orders received. (Clarkson, Tr. 226-227; Alovio, Tr. at 995; CX9036 (Duley, Dep. at 134), *in camera* [REDACTED]); CX9039 (Clarkson, Dep. at 166); CX 9038 (Hamilton, Dep. at 9-10); CX9028 (Roundy, Dep. at 216-218); CX9034 (Roush, Dep. at 216-217).
446. “Cost per order” refers to “the total amount of the ad spend divided by the number of orders.” (Hamilton, Tr. at 397).
447. “Cost per conversion” is the cost divided by the number of orders, or “conversions.” (Clarkson, Tr. 227; see also CX9033 (Mohan, Dep. at 153-154)).
448. With respect to contact lens customers, the term “lifetime value” refers to the amount of revenue a company expects to generate from a customer over the life of the business relationship between the retailer and the customer. It is calculated by the probability that the customer will come back multiplied with the expected sales revenue from multiple orders. (Clarkson, Tr. 232; CX9039 (Clarkson, Dep. at 126-127); CX9017 (Blackwood, Dep. at 178-179); CX9033 (Mohan, Dep. at 35-36); CX9034 (Roush, Dep. at 29).

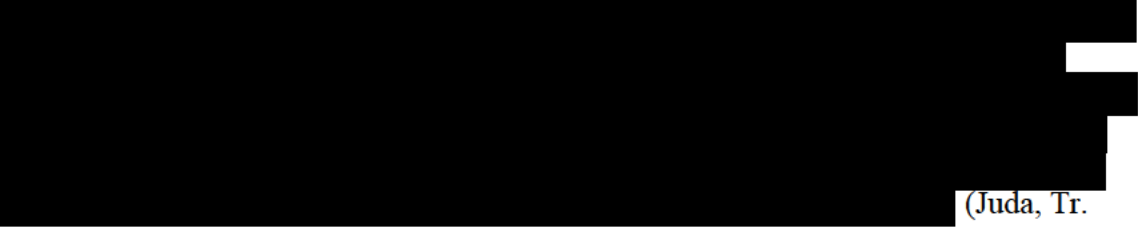
a. ROI Drives Decisions Regarding Advertising Expenditures

449. According to Yahoo, “[a]n active bid management program with a clear understanding of ROI and traffic goals is critical to optimizing a campaign.” (CX1806-038 at 030 (Yahoo Category Overview, Agency Training, June 15-16, 2005)).
450. Vision Direct and Walgreens.com made decisions about how to allocate their search advertising expenditures based on return on investment. (Hamilton, Tr. 396 (“My responsibility [with respect to Walgreens’ and Vision Direct’s use of keywords related to contact lenses] was to manage the ad spend budget related to the portfolio of keywords that we placed bids on within the auction and to manage that to acceptable return on investment goals from that advertising spend.”)).
451. In 2012, 1-800 Contacts evaluated the ROI or effectiveness of marketing spend for search advertising by looking at NI orders, CAC, CPO and CPC. (CX0040 at 001-002 (May 1, 2012 e-mail from Laura Schmidt to Joan Blackwood re: Due Diligence: Advertising)).
452. In making decisions about how to allocate its search advertising expenditures, Vision Direct and Walgreens bid on keywords that “demonstrated a strong return on investment.” (Hamilton, Tr. 397 (“Q. In general, how did you determine which keywords to bid on? A. In general, terms that we – that demonstrated a strong return on investment, largely as measured by a low cost per order, ad spend per order.”)).

453. In making decisions about how much to bid on specific keywords, Vision Direct and Walgreens “tend[ed] to focus on the ones that drive the greatest amount of orders” because “there’s a time value. You can only manage so many keywords effectively.” (Hamilton, Tr. 398-399).
454. For keywords for which Vision Direct and Walgreens had some “performance history,” Vision Direct and Walgreens made decisions regarding how much money to bid on specific keywords by “review[ing] regularly the performance history” of keyword-match type combinations, focusing on “cost per order” as “the basic key performance indicator.” (Hamilton, Tr. 398).
455. For keywords that Vision Direct and Walgreens had not used in the past, Vision Direct and Walgreens made decisions regarding how much money to bid on specific keywords by performing research using “tools that are available for that purpose,” setting an initial bid in the auction, and then assessing performance on an ongoing basis. (Hamilton, Tr. 398).
456. AC Lens makes decisions about what types of advertising to use and how much to spend on particular advertising efforts using an “acquisition cost model.” (CX9018 (Drumm, Dep. at 22-23); *see also* Clarkson, Tr. 231 (“Q. And how do you go about making decisions about how much to spend on a particular type of advertising? A. We have a target customer acquisition cost, which does vary by lens, and we work sort of in a fairly disciplined way against that.”); Clarkson, Tr. 222 (“[E]verything we do in marketing is targeted or is geared by a target customer acquisition cost.”)).
457. AC Lens takes a customer’s expected “lifetime value” to the company into account in determining target customer acquisition costs. (Clarkson, Tr. 231-232).
458. If AC Lens is unable to meet its target customer acquisition cost using a particular advertising campaign, AC Lens will “discontinue” the campaign.” (CX9018 (Drumm, Dep. at 22-23 (“[O]ur model is based on an acquisition cost model . . . [W]e try “to fit into an acquisition cost for a new customer. And if we can’t track that and if we can’t hit the metrics that we need to reach, then we discontinue a campaign.”)).
459. Lenses for Less “select[s] keywords by assessing the return on investment.” (CX8000 at 001 (¶ 6) (Studebaker, Decl.)).
460. WebEyeCare [REDACTED]
[REDACTED]
(CX9014 (Batushansky, Dep. at 51), *in camera*).
461. [REDACTED]
[REDACTED] (CX9014 (Batushansky, Dep. at 51), *in camera*).
462. LensDirect determines how to allocate its advertising expenditures within the paid search channel by “spend[ing] money on the keywords that convert the best.” (Alovis, Tr. 998).

463. LensDirect calculates a target cost per acquisition for the company based on average revenue and margins. (Alovis, Tr. 998-999).
464. Metrics that LensDirect's CEO focuses on include the conversion rate, representing the percentage of users who made a purchase during their visit to the website, and the cost per acquisition, representing how much LensDirect spends to get an order. (Alovis, Tr. 995-996; CX9023 (Alovis Dep. at 108)).
465. "Lens Discounters selects keywords based on how well they perform on a 'cost per conversion' basis, that is, how much Lens Discounters spends on any advertisement that results in a sale." (CX8003 at 002 (¶ 8) (Mitha, Decl.); *see also id.* ("Lens Discounters continually evaluates the performance of the keywords on which we bid. If a keyword performs well, that is, if the keyword helps Lens Discounters secure customer orders at a favorable cost per conversion, then we continue to bid on that keyword.")).
- b. The Desire to Drive Repeat Business Affects Retailers' Target Acquisition Costs
466. Repeat sales, that is, the retention of customers, is an important goal for online contact lens retailers. (Alovis, Tr. 984-985; *see also infra* ¶¶ 467-81).
467. A large percentage of Walgreens and Vision Direct's contact lens orders came from repeat orders of contact lenses. (Hamilton, Tr. 401).
468. Vision Direct and Walgreen's Functional Manager of Digital Marketing, Mr. Hamilton, testified that "this particular business is a strong repeat business." (Hamilton, Tr. 401).
469. Vision Direct and Walgreen's Functional Manager of Digital Marketing, Mr. Hamilton, testified that the reason it was important for Walgreens to develop or increase consumer awareness of its online contact lens business was "not only direct marketing to [consumers] to acquire that order, it's really to acquire a customer that then Walgreens or Vision Direct can have an ongoing dialogue with." (Hamilton, Tr. 401).
470. AC Lens often spends more to acquire a new customer than the company expects to earn from that new customer's first purchase because the company has observed, in historical data, the proportion of those new customers who will return to make future purchases. (Clarkson, Tr. 231 (noting also that "in that sense, we're building an annuity of future revenue by overspending a little bit on that first purchase, but we can't overspend beyond the lifetime value or otherwise it's a losing proposition"); CX9039 (Clarkson, Dep. at 34 ("[I]f you only buy from me once, I may actually lose money on the sale because of my marketing expense and may not become profitable until they make a second or subsequent purchase.")); Clarkson, Tr. 231-232 (noting that AC Lens takes a customer's expected "lifetime value" to the company into account in determining its target customer acquisition cost)).
471. AC Lens CEO Mr. Clarkson testified that "when we get a new customer, we very much want them to become a repeat customer." (CX9039 (Clarkson, Dep. at 33)).

472. LensDirect sometimes spends more money to acquire a new customer than it makes on an initial sale. (Alovis, Tr. 984).
473. The reason that LensDirect sometimes spends more money to acquire a new customer than it makes on an initial sale is that the sale of contact lenses is “a retention business” in which the retailer’s “goal” is for a new customer to make not only an initial but also subsequent purchases from the retailer. (Alovis, Tr. 984-985 (“Q. Why would you spend more money than you make on an initial sale? A. The goal is – it’s a retention business. You got to hope that they’ll come back for a second, third, fourth, fifth, you know, forever time.”)).
474. LensDirect is willing to sell at a loss by spending more money to acquire a new customer than it will earn from its first sale to that customer because LensDirect has concluded that “the customer will enjoy working with us enough that they will continue to buy from LensDirect.” (Alovis, Tr. 1011).
475. LensDirect was willing to sell at a loss by spending more money to acquire a new customer than it earned from its first sale to that customer because LensDirect “believe[s] in the long-term relationship.” (Alovis, Tr. 1011).
476. [REDACTED] (CX9014 (Batusahansky, Dep. at 148), *in camera*).
477. [REDACTED] (CX9014 (Batushansky, Dep. at 148), *in camera*).
478. [REDACTED] (CX9014 (Batushansky, Dep. at 148), *in camera*).
479. [REDACTED] (CX9014 (Batushansky, Dep. at 148), *in camera*).
480. Customer Service was important for Memorial Eye’s online business to get repeat customers. (Holbrook, Tr. 1890-1891).
481. The profit margin on a repeat customer is better because it costs less to provide service and orders, and foregoes the need to advertise to the consumer. (Holbrook, Tr. 1891-1892).
- c. Contact Lens Retailers Increase Spending on Search Advertising in Response to Return on Investment
482. [REDACTED] (Juda, Tr. 1120, 1122, *in camera*).

483.  (Juda, Tr. 1123, *in camera*).
484. Peter Clarkson of AC Lens explained that AC Lens does not strictly limit its AdWords budget. As long as the cost-per-click is profitable, “there would be no limit” to the amount AC Lens would want to spend. On the other hand, “if we can’t garner customers at the acquisition cost we’re targeting, then we’ll spend less than the budget.” (Clarkson, Tr. 233-234).
485. Memorial Eye did not set a “hard budget” for its marketing expenses for its online businesses. (Holbrook, Tr. 1901).
486. Fluctuations in Memorial Eye’s marketing budget were based “primarily on return on investment, what kind of return we were getting on the search advertising primarily.” (Holbrook, Tr. 1901-1902 (also testifying that “If we got a good return on it, we’d obviously want to spend more – I would want to spend more money on it. If we didn’t get a good return on it, I want to spend less money on it.”)).
487. Memorial Eye’s budget for marketing expenses “did fluctuate” as the search manager was empowered to seek additional funds “if he saw a good reason for it.” (Holbrook, Tr. 1901).
488. Lens Discounters’ “paid search advertising budget is flexible. (CX8003 at 002 (¶ 7) (Mitha, Decl.) (“If we see strong returns on investment from our online paid search advertising, we are able to allocate more money into the budget. In theory, if we consistently meet our goals in terms of return on investment, we would have an unlimited budget. In practice, our spend on online paid search advertising has gone up dramatically in the last several years.”).

B. Search Advertising is a Uniquely Important Marketing Channel in the Online Sale of Contact Lenses

1. Search Advertising Accounts for a Significant Portion of Online Contact Lens Retailers’ Advertising Expenditures

489. Search advertising accounts for a significant portion of online contact lens retailers’ advertising expenditures, because it is a highly cost-efficient means of acquiring customers. (*See infra* §§ IV.B.2-IV.B.6).
490. Some of 1-800 Contacts’ online competitors advertise exclusively online, and a majority of that goes to paid search. (*See infra* ¶¶ 492-505).

491. Dr. Murphy admits that [REDACTED]
[REDACTED]
(RX0739 at 0092 (Murphy Expert Report Exhibit 8), *in camera*).
492. During Mr. Hamilton's tenure at Vision Direct, Vision Direct advertised "almost exclusively online." (CX9038 (Hamilton, Dep. at 23)). Most of Vision Direct's advertising budget was spent on search advertising. (Hamilton, Tr. 402-403).
493. During Mr. Hamilton's tenure at Vision Direct, [REDACTED] (Hamilton, Tr. 431-432, *in camera* [REDACTED]
[REDACTED]; see also CX8002 at 002 (¶ 6) (Hamilton, Decl.), *in camera* [REDACTED]
[REDACTED])).
494. Most of Walgreens' contact lens advertising budget was spent on search advertising. (Hamilton, Tr. 402-403; see also Hamilton, Tr. 400 (testifying that search advertising "was how Walgreens advertised the fact that it sold contact lenses. . . . [S]ince we only sold them online, no one would know about it unless we advertised it. And we advertised it online.")).
495. Search advertising accounts for between 60 and 70 percent of AC Lens's advertising expenditures, not including search advertising that AC Lens' affiliates engage in on AC Lens' behalf. (Clarkson, Tr. 220).
496. AC Lens also does some advertising via "affiliates," which are companies that drive traffic to an internet retailer's website using a variety of methods, including paid search among other things. (Clarkson, Tr. 221 (an "affiliate" is "generally another website that, using one method or another, drives traffic to [an internet retailer's] website, and then that affiliate will receive a commission on any sales that result from traffic that they drove to the website."); CX9039 (Clarkson, Dep. at 171, 173-174 (explaining that some affiliates "are themselves engaged in pay-per-click advertising")); CX9018 (Drumm, Dep. at 100)). Affiliate advertising accounts for approximately 15% of AC Lens' advertising expenditures. (Clarkson, Tr. 221; CX9039 (Clarkson, Dep. at 171, 173); CX9018 (Drumm, Dep. at 100)).
497. Other than search and affiliate marketing, AC Lens does very little other advertising. (CX9039 (Clarkson, Dep. at 172)).
498. Paid search advertising accounts for a significant majority of LensDirect's marketing expenditures. (CX9023 (Alovis, Dep. at 53 (in 2016, search advertising accounted for "the vast majority," approximately 85 to 90 percent, of LensDirect's marketing

expenditures)); Alovis, Tr. 992 (LensDirect spends more money on paid search advertising through Google than on any other marketing channel)).

499. Memorial Eye “primarily relied on search advertising, online search advertising” for its online contact lens business. (Holbrook, Tr. 1903; *see also* CX9024 (Holbrook, Dep. at 27) (testifying that “online advertising, search advertising” was the “vast, vast, vast majority” of its advertising spend)).
500. [REDACTED]
(CX9014 (Batushansky, Dep. at 109), *in camera*).
501. [REDACTED]
(CX9014 (Batushansky, Dep. at 110, 115-16), *in camera*).
502. Search advertising is the only type of online advertising for contact lenses that Walmart uses. (CX9033 (Mohan, Dep. at 18)).
503. Lenses for Less “engage[s] in no other forms of internet advertising” other than search advertising. (CX8000 at 001 (¶ 8) (Studebaker, Decl.)).
504. [REDACTED] (CX9036 (Duley, Dep. at 54), *in camera*).
505. “Online paid search advertising is the main form of advertising that Lens Discounters purchases.” (CX8003 at 002 (¶ 6) (Mitha, Decl.); *see also* id. ¶ 7 (Lens Discounters’ “spend on online paid search advertising has gone up dramatically in the last several years. Today, we spend five times more on online paid search advertising than we did in 2010.”).
- 2. Search Advertising Accounts for a Significant Portion of Online Contact Lens Retailers’ Orders**
506. Search advertising accounts for a significant portion of online contact lens retailers’ orders. (*See infra* ¶¶ 507-509).
507. Search advertising “was a major driver” of traffic to Vision Direct and Walgreens’ online contact lens retail websites, and “drove new customers as well as supported with repeat customers.” (Hamilton, Tr. 399).
508. Pay-per-click search advertising “is the dominant portion of [AC Lens’] new customer acquisition.” (CX9039 (Clarkson, Dep. at 174); CX9018 (Drumm, Dep. at 123-24 (among marketing channels currently used by AC Lens, pay-per-click generates the most new customer orders and the most revenue))).
509. Search advertising “was the way [Memorial Eye’s online businesses] attracted new customers and increased our volume.” (Holbrook, Tr. 1903-1904); *see also* (CX9024

(Holbrook, Dep. at 30-31)) (“[t]he typical way that we attracted new customers was through the online search advertising.”).

510. [REDACTED]
 (CX9014 (Batushansky, Dep. at 110-111), *in camera*; id. at 116, *in camera*)

3. Search Advertising is Essential for Online Contact Lens Retailers

511. Online contact lens retailers view search advertising as an essential form of advertising for their businesses. (*See infra* ¶¶ 512-522).
512. Pay-per-click search advertising is the most effective and important marketing channel AC Lens has for growing and maintaining its business. (Clarkson, Tr. 230 (pay-per-click “has been historically the lifeblood of [AC Lens’] growth.”) CX9039 (Clarkson, Dep. at 175-76 (search advertising has played a “tremendous role” in AC Lens’s success)); CX9018 (Drumm, Dep. at 124-125 (“Pay-per-click” search advertising is the most effective marketing channel that AC Lens uses and is “the easiest way to get in front of new customers.”)); CX9018 (Drumm, Dep. at 124-25 (search advertising is particularly effective because it is “high volume,” in that it presents AC Lens with a high “[t]otal number of potential impressions.” The “volume from search is massive, so that’s why it’s the most important probably.”)); (CX9018 (Drumm, Dep. at 112 (pay-per-click search advertising and affiliate marketing are two of the “three best ways to get new customers.”))).
513. For Memorial Eye, search advertising was “vital” for building its online contact lens retail business. (CX9024 (Holbrook, Dep. at 30-31); Holbrook, Tr. 1903 (search advertising was critical for Memorial Eye’s growth); CX9024 (Holbrook, Dep. at 39-40 (Memorial Eye built the brands of its online contact lens retail websites ShipMyContacts and IWantContacts “primarily through . . . online search advertising.”))).
514. Paid search advertising through Google and Bing is the most important of LensDirect’s marketing channels, and has been effective in generating growth for LensDirect. (Alovis, Tr. 992-93 (LensDirect’s CEO views paid search advertising through Google as the single most important marketing channel for LensDirect); (Alovis, Tr. 992).
515. Search advertising “[d]efinitely” helped Walgreens increase consumer awareness of its contact lens business on Walgreens.com.” (Hamilton, Tr. 400).
516. It was “important” to Walgreens “to reach that particular audience who had the ability and showed the intent through their searching for our products and services, to be able to reach them and to allow them to with one click get to our site and with a few more clicks purchase.” (Hamilton, Tr. 400-401).
517. “[O]nline paid search advertising has been a major driver in building Vision Direct’s business over the years” and is “an essential tool to a company that wants to become a

significant online seller of contact lenses.” (CX8002 at 003 (¶¶ 8-9) (Hamilton, Decl.), *in camera*).

518. Online paid search advertising “is an essential form of advertising for Walgreens in order to remain competitive with other online resellers of contact lenses, and grow its online contact lens retail market share.” (CX8001 at 003 (¶ 8) (Hamilton, Decl.), *in camera*).
519. Search advertising was “[e]specially” important for Walgreens at the time that it began selling contact lenses online because the company “needed to let people know that Walgreens was a retailer that offered contacts and to leverage the brand equity that Walgreens had and the good brand goodwill of the brand to let people know that this is one other prescription product that they could purchase from an already trusted retail brand.” (Hamilton, Tr. 401; *see also* CX8001 at 003 (¶ 9) (Hamilton, Decl., *in camera*) (“[B]ecause Walgreens’ ads appear when consumers conduct online searches related to contact lenses, online paid search advertising has helped to increase consumer awareness that Walgreens sells contact lenses through Walgreens.com. This was particularly important when Walgreens first entered into the business of selling contact lenses online because Walgreens was already a well-known, trusted brand, but was not known as a retailer of contact lenses.”)).
520. Online paid search advertising is “essential” to Lens Discounters’ business. (CX8003 at 002 (¶ 6) (Mitha, Decl.) (paid search is Lens Discounter “essential to [Lens Discounters’] ability to attract new customers” because it allows the company “to reach a large number of customers who are seeking to learn about or purchase contact lenses online.”)).
521. Lenses for Less owner Mr. Studebaker declared under penalty of perjury that “[i]n my experience, search advertising is the most important form of advertising for selling contact lenses over the internet.” (CX8000 at 001 (¶ 8) (Studebaker, Decl.)).
522. Dr. Evans concluded that “Search advertising was an important method for competing for online sales online contact lens retailers. All of the parties that entered into the agreements used this method of advertising; several have testified that search accounted for the majority of their advertising spending.” (CX8006 at 011 (¶ 23) (Evans Expert Report)).

4. Search Advertising is Particularly Effective Because it is Particularly Targeted, Reaching Consumers Very Near the Point of Purchase

523. Search advertising is particularly effective because it is particularly targeted, reaching consumers very near the point of purchase. (*See infra* ¶¶ 525-32).
524. Search advertising is uniquely valuable to advertisers because it puts an advertisement in front of a consumer at the precise moment the consumer is signaling her interest or intent by telling the search engine what she is seeking. (*See infra* ¶¶ 525-32).
525. 1-800 Contacts’ employees viewed search advertising an important way to reach customers who are in the market because the advertiser is giving them what they are looking for. (CX 9016 (Judd, Dep. at 46-48, 50).

526. 1-800 Contacts’ employees viewed search advertising an important way for customers to find products in the ecommerce world. (CX 9016 (Judd, Dep. at 41)).
527. Search advertising a particularly valuable type of advertising for AC Lens because it can be used to target customers who are looking to purchase contact lenses. (CX9039 (Clarkson, Dep. at 173-175) (“[B]road-based marketing that does not target is inherently far less efficient in reaching a target audience. Search is beautiful in the sense that you get right in front of the customer who’s looking to buy your product, and you don’t pay unless they click on your ad. It’s a wonderful thing.”)).
528. The owner of Lenses for Less declared under penalty of perjury that “[s]earch advertising is valuable because it displays our advertisements to potential customers at the time they have expressed interest in the products we sell.” (CX8000 at 001 (¶ 8) (Studebaker, Decl.)).
529. The Chief Operating Officer of LD Vision Group, Inc. (Lens Discounters) declared under penalty of perjury that “Online paid search advertising allows us to reach a large number of consumers who are seeking to learn about or purchase contact lenses online.” (CX8003 at 002 (¶ 6) (Mitha, Decl.)).
530. Search advertising helps Walmart acquire new contact lens customers because “search engine marketing is very bottom of the funnel. You’ve already decided what you want to buy, and then you go on the search engine and search for it, unlike, like say T.V. advertising, when we don’t even know if that person is going to buy something. So search engine marketing it’s also easier to acquire customers.” (CX9033 (Mohan, Dep. at 18-20)).
531. Consumers “using search to look for products to buy online . . . are often ready to buy. Therefore, if the company doesn’t make a sale during that search session it may not make that sale later.” (CX9019 (Juda, Dep. at 18 (also testifying by way of example: “...a user would like to come to Google, and it’s Mother’s Day, and they’re doing a search for flowers on sale. And that, potentially, is a strong signal that the user is interested in purchasing some flowers right around the corner.”); *see also* CX8006 at 033-034 (¶ 76) (Evans Expert Report))
532. If a consumer is performing an internet search, a company unable to reach that via search advertising “cannot readily substitute another type of advertising to reach that user—such as bidding on a different keyword for search, buying an ad that would be inserted in the Facebook Newsfeed ad, buying a banner ad on the Yahoo homepage—because it is unlikely that the user will see that ad right before she buys.” (CX8006 at 033-034 (¶ 76) (Evans Expert Report)).

5. Search Advertising is Particularly Effective Because it is Cost-Effective and Allows Advertisers to Easily Monitor, Adjust, and Control Their Advertising

533. Search advertising is a particularly cost-effective type of advertising. (*See infra* ¶¶ 535-51, 546-47).

534. Online contact lens retailers view search advertising as a particularly effective form of advertising because it allows firms to easily monitor their expenditures and return on investment. (*See infra* ¶¶ 42-545, 548-549).
535. 1-800 Contacts' employees viewed search advertising as a particularly effective form of advertising because it allows firms to easily monitor their expenditures and return on investment. (CX 9016 (Judd, Dep. at 41)).
536. "Search advertising is a particularly efficient method of marketing for small firms because they do not have to make any significant investment in using this channel. The search engines provide all the necessary software for using paid search advertising for free, do not impose any entry or minimum fees for using the service, and charge advertisers only when people click on an ad." (CX8006 at 028 (¶ 64) (Evans Expert Report)).
537. During Mr. Hamilton's tenure, search advertising allowed Vision Direct [REDACTED] (Hamilton, Tr. 432, *in camera*).
538. During Mr. Hamilton's tenure, search advertising allowed Walgreens [REDACTED] (Hamilton, Tr. 432, *in camera*).
539. AC Lens' Director of Marketing views search advertising as "cost-effective" as compared to "other marketing channels." (CX9018 (Drumm, Dep. at 124-125)).
540. The reason AC Lens spends a large portion of its advertising budget on pay-per-click search advertising is that pay-per-click search advertising is "consistently the channel that [AC Lens] ha[s] found productive in terms of bringing in customers at an acquisition cost that [the company has determined] is consistent with [its] financial goals." (Clarkson, Tr. 220-221).
541. Search advertising allows advertisers to measure how their search advertising is performing, by providing "a reporting interface" that allows advertisers to view the entire account or "drill down on specific campaigns and act on those and even at the keyword level see how many people have seen the ad, how many of them clicked, what it's costing you and how many of them ended up buying something." (Clarkson, Tr. 230-231; CX9018).
542. Pay-per-click advertising allows AC Lens to track performance "at the ad group level and the campaign level" and even "down to the keyword level." (Drumm, Dep. at 118-121).
543. Search advertising allows advertisers to measure how the actual cost of acquiring a customer through a given search advertising method compares to the company's goal acquisition cost. (CX9018 (Drumm, Dep. at 118-121 (noting that "what we look at" is "ultimately at the end of the day cost and orders and how the acquisition cost relates to our goal acquisition cost.")); Clarkson, Tr. at 226 ("So if I can use an example as, say, Google, a certain number of people will see an ad that will display for certain keyword

searches. A certain number of people will click that ad. We will pay a cost per click that will give me a total spend, but we're able to track how many of those people who clicked made a purchase, and so in rough terms we calculate an acquisition cost based on the ratio of those two numbers.")).

544. [REDACTED] (CX9014 (Batushansky, Dep. at 117-118), *in camera*).

545. [REDACTED] CX9014 (Batushansky, Dep. at 117-118), *in camera*).

546. The reason that [REDACTED] (CX9014 (Batushansky, Dep. at 116), *in camera*).

547. Online search advertising "was the most efficient, the most practical way to attract new customers" for Memorial Eye's online contact lens retail business. (Holbrook, Tr. 1903).

548. Search advertising tools provided by the search engines provide LensDirect's CEO with access to a daily report about the performance of LensDirect's search advertising that includes information such as overall expenditures per day, conversion rate, cost per acquisition, and number of conversions. (Alovis, Tr. 994-995).

549. The Chief Operating Officer of LD Vision Group, Inc. (Lens Discounters) declared under penalty of perjury that "Online paid search advertising . . . provides various metrics that are helpful for evaluating and controlling our advertising costs." (CX8003 at 002 (¶ 6) (Mitha, Decl.)).

6. Online Contact Lens Retailers Find Other Types of Advertising Less Effective than Search Advertising

a. Non-Internet Advertising is Not an Effective Substitute for Search Advertising

550. For online contact lens retailers, non-internet advertising is not an effective substitute for search advertising. (*Infra* ¶¶ 551-554).

551. LensDirect has used only internet advertising during Mr. Alovis' tenure as CEO. (Alovis, Tr. 991-992 (the only marketing channels LensDirect uses to sell contact lenses, apart from paid search advertising through Google, Bing, and Yahoo, are social media advertising through Facebook, email-marketing, and one commercial that LensDirect ran online); CX9023 (Alovis, Dep. at 26, 45)). During Mr. Alovis's tenure, LensDirect has

not advertised on offline channels such as television, radio, billboards, magazines, or newspapers because, in Mr. Alovís’s business judgment, these advertising channels are inefficient compared to internet advertising. (Alovís, Tr. 1029 (television advertising is “too expensive”); CX9023 (Alovís, Dep. at 45 (same)); Alovís, Tr. 1029 (no radio advertising); CX9023 (Alovís, Dep. at 48 (same)); Alovís, Tr. 1029 (no billboard advertising); CX9023 (Alovís, Dep. at 45 (“I’m not sure if it’s [billboards] a vertical or channel that makes sense for us”)); Alovís, Tr. 1029 (no magazine advertising); Alovís, Tr. 1029 (no newspaper advertising); CX9023 (Alovís, Dep. at 46 (print advertising would not have a great return on investment for LensDirect))).

552. AC Lens does “[n]ot routinely” use non-internet advertising methods. (Clarkson, Tr. 219-220). AC Lens has tested various non-internet advertising methods including direct mail, Valpak, radio, Google TV and concluded that they would not bring in customers at an attractive cost. (Clarkson, Tr. 219-220; CX9039 (Clarkson, Dep. at 212 (customer acquisition cost of magazine advertising was not consistent with company goals)); CX9018 (Drumm, Dep. at 23-24 (AC Lens attempted radio advertising and found it to be unsuccessful); CX9039 (Clarkson, Dep. at 178 (AC Lens tested a Google TV ad that turned out to be “quite ineffective in terms of its acquisition cost”)). AC Lens has not used TV or billboard advertising because they are expensive and target too broad of a population to result in a customer acquisition cost that aligns with AC Lens’s business goals. (CX9039 (Clarkson, Dep. at 178-79 (National Vision customers have a higher potential lifetime value than AC Lens customers because National Vision sells more products and services than just contact lenses, which is one reason why TV advertising is effective for National Vision but would not be for AC Lens)); CX9039 (Clarkson, Dep. at 210-213 (Mr. Clarksons’s directive from AC Lens’s parent company is to run at no worse than break-even, and television advertising for the would be insufficiently cost-effective to achieve that goal)); CX9039 (Clarkson, Dep. at 211 (AC Lens has not attempted billboard advertising because it is very expensive and targets a very broad population))).
553. Memorial Eye ran direct mail advertisements for its online business “[f]or a very brief period of time,” approximately “less than two months.” This direct mail campaign was not effective for Memorial Eye “[a]nd that’s why we didn’t run it anymore.” (CX9024 (Holbrook, Dep. at 27-28)).
554. WebEyeCare has never attempted television, radio, or print advertising, because it has limited resources as a small company. (CX9014 (Batushansky, Dep. at 117-18)).

b. Organic Search is Not an Effective Substitute for Paid Search Advertising

555. For online contact lens retailers, organic search is not an effective substitute for paid search advertising. (*Infra* ¶¶ 555-60).
556. “Search engine optimization” refers to “a process of trying to get your website to show towards the top of the search page in the natural or organic or unpaid section of the search results page.” (Clarkson, Tr. at 224).

557. Organic search has becoming become less effective in driving business to AC Lens over time, increasing the importance of pay-per-click advertising. (CX9018 (Drumm, Dep. at 65, 112, 129-30); Clarkson, Tr. at 225; CX9039 (Clarkson, Dep. at 175-176)).
558. The commercial nature of ads “can at times result in increased utility for a user” as compared to organic results. (Juda, Tr. 1167-1168).
559. An advertiser has “more control over” the placement of its advertisements as compared to the placement of the advertiser’s organic links. (Juda, Tr. 1330).
560. In his trial testimony, Google’s Mr. Juda explained the value of commercial advertising results over organic results by way of the following example: if a user “is searching for ‘flowers’ the day before Mother’s Day,” “many of those users in practice are looking to purchase flowers.” As such, advertisements, which have “a very, oftentimes, clear objective to try and sell that user flowers, . . . are going to very directly assist the users toward fulfilling their intent. By contrast, the organic results may indeed include people who sell flowers, but they could also include websites like a Wikipedia website where you can learn about the anatomy of a flower, which is relevant to the search but isn’t necessarily as directly relevant to the user’s intent, which is more commercial at that moment in time.” (Juda, Tr. 107-1068).

c. Email Marketing is Not an Effective Substitute for Search Advertising

561. For online contact lens retailers, email marketing is not an effective substitute for search advertising. (*See infra* ¶¶ 563-65).
562. Email marketing is used primarily by online contact lens retailers most effectively for customer retention rather than for attracting new customers. (*See infra* ¶¶ 563-65).
563. AC Lens attempted using email marketing to target new customers via “email blasts,” by “purchas[ing] email lists of people who were not [AC Lens] customers, and it was another unsuccessful experiment in that [AC Lens] had . . . a greatly increased rate of unsubscribes and not a lot of sales.” (CX9039 (Clarkson, Dep. at 210-213)).
564. AC Lens no longer purchases any external e-mail lists. (Clarkson, Tr. 222).
565. AC Lens uses email instead only for “retention marketing . . . to our own customers” and for marketing to people who have already “visit[ed] the site,” and “sign[ed] up [to] receive special offers.” (Clarkson, Tr. 222-223; CX9039 (Clarkson, Dep. at 171)).

d. Display Advertising is Not an Effective Substitute for Search Advertising

566. For online contact lens retailers, display advertising is not an effective substitute for search advertising. (*Infra* ¶¶ 567-69).
567. Display advertising has “generally not been very successful” for AC Lens. (Clarkson, Tr. 229).

568. Display advertising is less effective than search advertising because display advertising is less targeted. (Clarkson, Tr. 229-230 (“[I]f you buy a banner [advertisement] on, say, the Yahoo health page, you’re targeting a pretty broad section of the population, and only roughly 10 percent of people in America wear contact lenses. And of the ones that wear them, quite a lot are happy with their – buying them from their eye doctor. And even the ones that are potentially willing to make a change may not be in the market to buy them right now. So it’s far less targeted than when you put in a search term. If someone searches ‘buy contact lenses,’ that is a very, very targeted customer.”)).

569. LensDirect does not use traditional display advertising. (CX9023 (Alovis, Dep. at 26 (“What avenues of marketing did LensDirect use in 2016, other than paid search? A. Social media, minimal video on YouTube, SEO, search engine optimization, affiliate marketing, email marketing. That’s it.”))).

e. Online Marketplaces are Not Available for Prescription Contact Lenses

570. Online marketplaces such as Amazon.com and eBay.com are not an option available to contact lens retailers because “you can’t show prescription contacts on Amazon or eBay”; “only nonprescription items” may be listed on Amazon and eBay. (CX9039 (Clarkson, Dep. at 171-72)).

571. AC Lens uses “online marketplaces” such as Amazon.com and eBay.com for “only optical accessories.” (Clarkson, Tr. 222).

f. Social Media Marketing is Not an Effective Substitute for Search Advertising

572. For online contact lens retailers, social media marketing is not an effective substitute for search advertising. (*Infra* ¶¶ 573-78).

573. Social media marketing has “[n]ot really” been a successful type of marketing for AC Lens. (Clarkson, Tr. 223)

574. Social media marketing accounts for “on average no more than 5 percent” of AC Lens’ advertising expenditures.” (Clarkson, Tr. 223).

575. AC Lens has had “a limited presence on Facebook, Twitter, Instagram.” (Clarkson, Tr. 223).

576. AC Lens has used Facebook advertising “off and on” over the past four or five years. (CX9018 (Drumm, Dep. at 24)).

577. AC Lens “tested Twitter” but does not currently use Twitter advertising because “[i]t didn’t reach the acquisition cost that we needed to reach.” (CX9018 (Drumm, Dep. at 24-25)).

578. While AC Lens has done “periodic experiments with social” marketing, these have focused “more around eyeglasses than contacts.” (CX9039 (Clarkson, Dep. at 172)).

- g. Comparison Shopping Websites are Not an Effective Substitute for Search Advertising and are of Limited Efficacy for Advertising Contact Lenses Online
579. For online contact lens retailers, comparison shopping websites are not an effective substitute for search advertising. (*Infra* ¶¶ 580-89).
580. A “comparison shopping engine” is “a website that will list different website offers of the same product with their price, so it allows a consumer to go to a single page and do a price comparison between different websites.” (Clarkson, Tr. at 224).
581. Examples of comparison shopping engines include Shopping.com and Shopzilla.com. (CX9018 (Drumm, Dep. at 14)).
582. AC Lens has been using comparison shopping engines less frequently than it used to. (Clarkson, Tr. at 224).
583. The amount of business that AC Lens has been able to derive from comparison shopping engines has declined over time. (Clarkson, Tr. at 224).
584. In AC Lens’s experience, comparison shopping engines “used to do better” than they do now in driving business to AC Lens. (Clarkson, Tr. at 224).
585. AC Lens has “seen higher rates of fraud coming from the operators of some of those” comparison shopping engines. (Clarkson, Tr. at 224).
586. The customers who reach AC Lens “through price comparison shopping engines are more price-sensitive” than other customers. (CX9039 (Clarkson, Dep. at 123); *see also* CX9039 (Clarkson, Dep. at 177 (“Comparison shopping engines almost, by definition, are for price-sensitive shoppers.”))).
587. AC Lens CEO Mr. Clarkson testified that “the downside” of using comparison shopping engines as an advertising tool is that “if you’re priced above the competition, you’re likely to get a lot of clicks that you’ll pay for but not a lot of sales.”
588. Google offers its own comparison shopping engine referred to by advertisers as Product Listing Ads. (Hamilton, Tr. 402-403).
589. “[S]earch engines like Google show these product listing ads...when they infer that the intent of the consumer who puts in a generic query can be, in fact, to look for the price of the same product across multiple retailers.” (Ghose, Tr. 3875).
- V. Advertising in Response to Searches Including 1-800 Contacts’ Branded Queries is a Successful, Commercially Significant Strategy for Online Contact Lens Retailers
590. Displaying search advertising triggered by 1-800 Contacts’ branded queries is a successful, commercially significant strategy for online contact lens retailers. (*See infra* §§ V.A-V.B).

A. Search Advertising Trademark Policies

591. Prior to April 2004, Google permitted a trademark owner to restrict the use of its trademark by third parties both in the text of advertisements and as keywords in AdWords advertising auctions. (CX1148; Charleston Dep. at 19-21).
592. While Google's pre-April 2004 trademark policy allowed trademark owners to restrict rivals from bidding directly on keywords comprising trademark terms, Google did not provide any way for trademark owners to limit rivals' ads resulting from broad-match or phrase-match advertisements triggered by queries comprising or containing trademark terms. (CX9022 (Charlston, Dep. at 179 ("...so pre April 2004 in the U.S. and Canada and post April 2004 in the rest of the world, which scaled back over time, even if we had a trademark complaint on file for a trademark term, we would still serve ads if the user's query included the trademark term and another nontrademark term on which the advertiser had broad matched.")); CX0789 at 003 (Trademark Complaint Procedure – Trademark rights outside the US and Canada ("please be aware that we do not take any action in situations where an advertisement is being triggered by non-trademarked terms even though the search query contains a trademarked term.")); CX8006 at 035 (¶ 80) (Evans Expert Report)).
593. [REDACTED] (CX1773 at 002 (Mar. 11, 2004 email from Prashant Fuloria to Maria Stone, others reporting results of study), *in camera*).
594. [REDACTED] (CX0470 at 002 (Feb. 23, 2004, Domestic Trademark Policy Change Transition Plan Discussion presentation), *in camera*); (CX9022 (Charlston, Dep. at 23, 24)). [REDACTED] (CX9022 (Charlston, Dep. at 23, 24)).
595. In April 2004, Google changed its policy to permit all advertisers to bid on trademarks as keywords, including on their competitors' trademarks. (CX1148; CX9022 (Charlston, Dep. at 19-21); CX1785 at 003-004 (April 9, 2004 email from Daniel Daugherty (Google) to Josh Aston (1-800 Contacts) informing Mr. Aston of policy change)).
596. Under the new April 2004 policy, advertisers were still prohibited from using trademarks in the text of their ads without authorization. (CX1148; CX9022 (Charlston, Dep. at 19-21); CX0471 ("the new AdWords trademark policy does not limit the use of trademark

terms keywords. However, the new policy is designed to reduce user confusion by prohibiting advertisers from using trademarks in their ad text or ad titles unless the advertiser is authorized to do so by the trademark owner.”)).

597. [REDACTED] (CX8005 at 007 (¶¶ 41-46) (Iyer, Decl.), *in camera*).

598. Bing changed its policy so as to no longer prohibit the use of a competitor’s trademark as a keyword to trigger advertisements in March 2011. (CX1804).

B. Advertising in Response to Searches Including 1-800 Contacts’ Branded Queries is Commercially Important for Online Contact Lens Retailers

1. Trademark Paid Search is a Commercially Significant Advertising Channel for 1-800 Contacts

599. Trademark paid search (that is, paid search advertising displayed in response to search queries containing 1-800 Contacts’ branded queries and variations thereof) is a commercially significant channel for 1-800 Contacts. (*Infra* ¶¶ 600-610).

600. [REDACTED] (CX0296 at 024 (Presentation entitled “1-800 Contacts Affiliate and Paid Search Overview,” dated Feb. 6, 2015), *in camera*; CX0558; CX0616 at 001; CX0014 at 001-002).

601. 1-800 Contacts often refers to the trademark paid search channel as “TM paid search.” (*See, e.g.*, CX0646; CX9030 (Powell, Dep. at 63-64)).

602. In 1-800 Contacts’ internal reports, “NI” refers to “new internet” customers, that is, customers who order via 1-800 Contacts’ website who have not ordered from 1-800 Contacts in the past. (CX9015 (Galan, Dep. at 83 (“What is an NI order? A. It stands for New Internet, which meant a new customer acquired through the online channel.”)); CX9017 (Blackwood IHT at 57-58 (“[T]here’s a column saying ‘NI Orders’ on the bottom chart. What is that? A. New Internet. New, basically. New orders or new customers that ordered online.”))).

603. 1-800 Contacts’ trademark terms have higher conversion rates for 1-800 Contacts than non-branded search terms. (CX9017 (Blackwood, Dep. at 35)); (CX0014 at 001-002 (1-800 Contacts’ trademark keywords “convert drastically differently than other terms.”).

604. The trademark paid search channel accounts for the substantial majority of 1-800 Contacts’ new customer orders attributable to paid search advertising. (CX0051 at 006 (“About 75% of all paid search orders come through our trademark terms”); CX0646 at 005 (in 1-800 Contacts’ fiscal year 2011³, 74.6 percent of 1-800 Contacts’ NI customer

³ During the years of 1-800 Contacts’ alliance with Walmart (2008 through January 1, 2013), 1-800 Contacts followed Walmart’s conventions regarding fiscal years, in which a given fiscal year referred to the previous calendar year. (CX9017 (Blackwood, Dep. at 213 (“Q. Now the date of this email is July 1, 2010. A. Right. Q. Is that in your

orders attributable to search advertising were generated by TM Paid Search; as reported in “FY 2011 Totals” row of “NI” (new internet) tab of Excel, 125,220 NI orders compared to 42,729 NI orders attributable to “Other Paid Search”); CX0646 at 005 (in 1-800 Contacts’ fiscal year 2012, 72.5 percent of 1-800 Contacts’ NI customer orders attributable to paid search attributable to TM Paid Search (138,951) compared to 52,771 NI orders attributable to “Other Paid Search”); CX0646 at 005 (in 1-800 Contacts’ fiscal year 2013 through the end of the third quarter, 69.2 percent of 1-800 Contacts NI customer orders attributable to paid search attributable to TM Paid Search (85,648) compared to 38,129 NI orders attributable to “Other Paid Search”); CX0094 at 001 (for the week ending May 31, 2014, trademark paid search orders represented 11,931 out of 13,014 total paid search orders for 1-800 Contacts)).

605. Each year for 2008, 2007, and 2006, 1-800 attributed far more orders to “TM Orders” than to “Non-TM Orders.” (CX0423 (reporting, in “2008” Tab, 2008 weekly and quarterly orders for Google, Yahoo, and other search engines. For Google, the quarterly numbers total to 140,923 TM Orders and 47,933 Non-TM Orders; for Yahoo the totals are 35,960 TM Orders and 11,799 Non-TM Orders); (CX0423 (reporting same information for 2007 in in “2007” Tab, plus annual totals showing 112,696 “TM Orders” and 44,138 “Non-TM Orders” through Google; 25,802 “TM Orders” and 9,529 “Non-TM Orders” through Yahoo); (CX0423 (reporting, in “2006” Tab, 90,748 TM Orders through Google, compared to 40,035 Non-TM Orders⁴)).
606. In 2010, 1-800 Contacts’ cost per click for clicks on advertisements appearing in response to 1-800 Contacts branded queries was under \$0.30. (CX0051 at 006 (Presentation entitled “Search Overview November 2010” (“Big Orders, Little Cost. . . . TM CPCs are under \$0.30.”))).
607. 1-800 Contacts considers “Paid Search on 1-800 CONTACTS Trademark” to be a “Direct Traffic Source” that is “much less susceptible to competitive advertising or offers” than “Non-Direct Traffic Sources” such as “Other Paid Search.” (CX0429 at 013 (Presentation entitled “Management Presentation” dated November 2013)).
608. Due to the commercial importance of the trademark paid search channel to 1-800 Contacts, and the fact that that channel is “much less susceptible to competitive advertising or offers” than other channels such as non-trademark paid search, the appearance of rivals’ advertisements in response to searches for 1-800 Contacts’ trademark terms represented a competitive threat to 1-800 Contacts. (*See infra* § VI).
609. Trademark paid search advertising was of concern to 1-800 Contacts because orders through trademark paid search accounted “for such a large percentage of [1-800 Contacts’] orders,” and therefore “small decreases in [trademark] can have large effects overall.” (CX0863 at 001 (in one week in October 2012, for example, trademark

fiscal year 2011, the way 1-800 Contacts keeps track of things? A. Yeah, so we were on Walmart’s fiscal year, so it ran February to January . . . Q. So just to make sure we’re all on the same page, so February of 2010, under the Walmart calendar, would be in fiscal year 2011? A. Correct. . . . I know it was a little odd.”)).

⁴ CX0423 does not provide 2006 data for Yahoo or other search engines.

keywords accounted for 73% of 1-800 Contacts’ paid search orders, which was below the historical average of 82-83% of paid search orders).

610. A significant decline in trademark paid search orders from August 2012 was described as “scary” by a senior 1-800 Contacts marketing executive. (CX0864 at 001).

2. In Rivals’ Business Experience, Advertising in Response to Searches Including 1-800 Contacts Branded Queries is Commercially and Competitively Significant

611. In rivals’ business experience, advertising in response to searches including 1-800 Contacts’ branded queries is commercially and competitively significant. (*Infra* §§ V.B.2.a-V.B.2).j).

612. During the period from 2002 through 2016, Google served advertisements for nine of the fourteen firms that entered into formal agreements with 1-800 Contacts regarding keyword bidding as a result of those firms directly bidding on 1-800 Contacts’ trademark terms prior to entering their agreements. (CX8006 at 056-057 (¶ 122 & Table 3) (Evans Expert Report)).

613. The existence of “direct bid impressions” for these nine firms suggests that “these online rivals found that direct bidding on 1-800 Contacts keywords provided an acceptable rate o[f] return in competing for sales, and that Google determined based on the quality scores of these rivals that it was worthwhile to serve their ads to users who entered search queries related to 1-800 Contacts keywords.” (CX8006 at 057 (¶ 122) (Evans Expert Report)).

614. Dr. Evans uses the term “matched ads” to refer to advertisements “that result from the search engine making a decision to serve an ad, in response to a user typing in a search query that includes a 1-800 Contacts [trademark term] through phrase match (e.g., if the keyword is ‘contacts’) or broad match (e.g., if the keyword is ‘contact lens’) even though the rival advertiser did not bid on a keyword that is a 1-800 Contacts [trademark term].” (CX8006 at 051 (¶ 111) (Evans Expert Report)).

615. During the limited time period for which data on matched ads is available (January 2010 through November 2016), Google served matched ads for five of the fourteen firms that entered into formal agreements with 1-800 Contacts regarding keyword bidding. (CX8006 at 058 (¶¶ 123-124) (Evans Expert Report)).

616. The existence of these “matched ads” suggests that “Google decided that it was worthwhile to present these match ads to its users” and “that these rivals found that these matched ads provided an acceptable rate of return.” (CX8006 at 058 (¶ 124) (Evans Expert Report)).

a. AC Lens

617. In the business judgment of AC Lens' CEO Mr. Clarkson, showing AC Lens advertisements to customers who have entered 1-800 Contacts related search queries would increase AC Lens sales. (*Infra* ¶¶ 618-36).
618. AC Lens has an interest in its marketing messages reaching consumers who currently shop at other contact lens retailers, including those who currently shop at 1-800 Contacts. (Clarkson, Tr. 217-218; CX9003 (Clarkson, IHT at 35-36 (“It would be” valuable to get AC Lens’ brand names in front of consumers who entered searches for rivals’ brand names because “[c]learly, they are looking for contact lenses.”)); CX9003 (Clarkson, IHT at 37-38 (testifying that bidding on another company’s trademark is valuable because “you are providing an alternative supply to the consumer. You’re making them aware that there’s somewhere else they could purchase their contact lenses, and you may have a point of differentiation, whether it’s service, convenience, or price compared to that competitor.”))).
619. Absent the threat of litigation from 1-800 Contacts, AC Lens would have shown ads to consumers searching for 1-800 Contacts. (CX9039 (Clarkson, Dep. at 104, 155-156); *see also* CX9039 (Clarkson, Dep. at 167-168); Clarkson, Tr. 253-254 (testifying that if AC Lens were not subject to its agreement with 1-800 Contacts, then, “[s]ubject to blessing from my corporate counsel,” AC Lens would bid on 1-800 Contacts related terms and remove the 1-800 Contacts related negative keywords that AC Lens uses)).
620. The “business instinct” of AC Lens’ CEO is that he “would expect a significant sales boost from” bidding on 1-800 Contacts branded queries “with ads that were clearly stating ‘Try us, we’re cheaper.’” (CX9039 (Clarkson, Dep. at 167-168)).
621. AC Lens’ CEO Mr. Clarkson testified that the reason AC Lens has an interest in its marketing messages reaching consumers who currently shop at 1-800 Contacts is that “[w]e think we offer comparable service and convenience at a lower price, so we think we would be attractive to those customers.” (Clarkson, Tr. 218).
622. AC Lens’ CEO Mr. Clarkson testified that he wanted to use “1-800 Contacts” as a keyword in AC Lens’ paid search advertising campaigns “because we think people who type that are looking to buy contact lenses, and we sell them.” (Clarkson, Tr. 343-344).
623. AC Lens CEO Mr. Clarkson testified that he would like to show AC Lens advertisements in response to consumer searches for 1-800-CONTACTS, if the company could do so without fear of cease and desist letters, because “we know from public data that there are an awful lot of people who search for 1-800-CONTACTS. We think that some portion of them would be interested in an offer that said, ‘We’re 20 percent cheaper.’ So it – we think it would be a compelling proposition to consumers.” (CX9039 (Clarkson, Dep. at 104))
624. In October 2015, AC Lens Marketing Director Mr. Drumm expressed “hope” that the AC Lens Agreement was “void at this point” and asked AC Lens CEO Mr. Clarkson whether there was “any chance we can start to bid on their brand.” (CX1087).

625. The reason that AC Lens Marketing Director Mr. Drumm asked Mr. Clarkson whether AC Lens could “start to bid on” 1-800 Contacts’ brand in October 2015 was for the purpose of obtaining “more sales.” (CX9018 (Drumm, Dep. at 152)).
626. AC Lens’ Marketing Director testified that “1-800 Contacts obviously is a large company with a lot of people that know about them. Bidding on their terms would provide us an opportunity to show those people that there’s an alternative.” (CX9018 (Drumm, Dep. at 152)).
627. In the business judgment of AC Lens Marketing Director Mr. Drumm, “[i]t would be beneficial for” AC Lens to have the option for an AC Lens advertisement to appear on the search engine results page in response to a search for “1-800 Contacts” or related terms. (CX9018 (Drumm, Dep. at 197)).
628. Mr. Drumm testified that the reason he testified that “[i]t would be beneficial” to AC Lens to show advertisements in response to search queries for “1-800 Contacts” or related terms was that “[t]here are a lot of people that search for ‘1-800 Contacts’ from what we can tell via the keyword tool and other sources. Those are people who are most likely looking for contact lenses to purchase, and it would be definitely relevant and helpful to advertise our sites in that location.” (CX9018 (Drumm, Dep. at 197)).
629. AC Lens’ CEO Mr. Clarkson testified that, regardless of what a person’s intentions were at the time that person entered a search query for “1-800 Contacts,” AC Lens could benefit from showing its advertisements to such a person “[b]ecause we sell the same products and we sell them at a lower price.” (Clarkson, Tr. 378).
630. AC Lens’ CEO Mr. Clarkson testified that “from a business perspective,” AC Lens “absolutely” has an interest in showing its advertisements to consumers who entered the search query “1-800 Contacts” into a search engine even if those consumers did so because the consumers intended to navigate directly to 1-800 Contact’s website. (CX9039 (Clarkson, Dep. at 158)).
631. AC Lens’ CEO Mr. Clarkson testified that the reason AC Lens has a business interest in showing its advertisements to consumers who entered the search query “1-800 Contacts” for the purpose of navigating directly to 1-800 Contacts website is that “our pricing is sufficiently attractive that we would have a decent shot at converting that customer to shop with us.” (CX9039 (Clarkson, Dep. at 158)).
632. Mr. Clarkson testified that AC Lens’ agreement with 1-800 Contacts “hurt us in terms of sales we likely could have gotten by offering a lower price on the same product to consumers.” (CX9039 (Clarkson, Dep. at 163-164)).
633. Mr. Clarkson testified that “I think that we would certainly have garnered more sales in a world in which we were free to advertise on [1-800 Contacts’] marks” and that “given the size of their company and the volume of monthly searches,” the amount of such sales would have been “significant.” (Clarkson, Tr. 260).

634. The only reason AC Lens adopted negative key words related to 1-800 Contact's trademarks was in response to threatening letters from 1-800 Contacts, not the relative performance of such advertising. (CX9039 (Clarkson, Dep. at 135-136)).
635. AC Lens did adopt negative key words for some brick and mortar retailers because it expected most consumers searching for such retailers were interested in eye exams. (CX9039 (Clarkson Dep. at 194-5)).
636. AC Lens bids on trademarks of Lens.com, Vision Direct and ShipMyContacts. (CX9039 (Clarkson, Dep. at 197)).

b. Memorial Eye

637. Memorial Eye did not bid on the keyword "1-800 Contacts" in search advertising auctions, but Memorial Eye ads frequently appeared in response to 1-800 Contacts branded queries as a result of Memorial Eye bidding on other terms (such as "contacts") in broad match or phrase match. (Holbrook, Tr. 1905-1907; CX8006 at 012, *in camera* (¶ 26) (Evans Expert Report) ("Between January 2010 and December 2011, Google showed Memorial Eye text ads on approximately [REDACTED] search results pages generated by queries related to 1-800 Contacts brand name keywords."); CX8006 at 012 (¶ 26) (Memorial Eye's ads appeared on [REDACTED] of the search results pages generated by queries that included 1-800 Contacts branded queries between January 2010 and December 2011)).
638. It was important to Memorial Eye that ads for its websites be displayed in response to search queries that included the term "1-800 Contacts" because Memorial Eye's online businesses were getting a large number of conversions and new customers in response to displaying ads from generic keywords being broad-matched and phrase-matched to 1-800 Contacts terms. (Holbrook, Tr. 1907-1908 (those ads generated "a lot of conversions" for Memorial Eye); CX9024 (Holbrook, Dep. at 70-71) (when Memorial Eye was showing advertisements in response to searches for 1-800 Contacts related terms, its online business "did reap a lot of benefits from that," and "benefited from the fact that the people looking for contact lenses, that relevant traffic would be sent to our site; and it was a large amount."); (CX8006 at 012, *in camera* (¶ 26) (Evans Expert Report)) (between January 2010 and December 2011, clicks on Memorial Eye ads appearing on search results pages following queries that included 1-800 Contacts branded queries accounted for [REDACTED] of Memorial Eye's search-advertising related sales)).
639. The ability to show advertisements in response to searches for 1-800 Contacts "was extremely important" and "critical" to Memorial Eye's online contact lens retail business. (CX9024 (Holbrook, Dep. at 74)).
640. Even if a customer entering a search for 1-800 Contacts intended to only go to 1-800 Contacts website, Memorial Eye would benefit from its ad appearing on the search engine result page because doing so helped improve Memorial Eye's brand recognition. (Holbrook, Tr. 1910-1911).

641. Memorial Eye determined that implementing the negative keywords for 1-800 Contacts related terms that 1-800 Contacts was asking Memorial Eye to use “would destroy [the] business.” (Holbrook, Tr. at 1876-1877).
642. The reason Memorial Eye determined that implementing the negative keywords for 1-800 Contacts related terms that 1-800 Contacts was asking Memorial Eye to use “would destroy [the] business” was that “we got a vast amount of conversions from” “search terms that included the 1-800 Contacts-related terms,” “which yielded a vast amount of sales. And we knew that if – if we had to file those negative keywords that 1-800 Contacts was demanding that we would no longer be able to get those conversions, those sales.” (Holbrook, Tr. at 1876-1877).
643. For the period from January 1, 2005 through December 31, 2013, [REDACTED] of the ten search queries responsible for Memorial Eye’s largest number of conversions through Google AdWords were search queries that contained 1-800 Contact’s name or a variation thereof. (CX1626, *in camera*; see also CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).
644. For the period from January 1, 2005 through December 31, 2013, [REDACTED] of the ten search queries responsible for Memorial Eye’s largest number of clicks through Google AdWords were search queries that contained 1-800 Contact’s name or a variation thereof. (CX1625, *in camera*; see also CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).
645. As Dr. Evans explained: “[t]he fact that Memorial Eye had an average position of [REDACTED] on non 1-800 Contacts BKW searches and an average position of [REDACTED] on 1-800 Contacts BKW searches suggests that, in the absence of the bidding agreements, other firms would likely have performed better on 1-800 Contacts BKW searches.” (CX8006 at 100, *in camera* (¶ 218) (Evans Expert Report)).

i. Best Performing Generic Queries

646. For the period from January 1, 2005, through December 31, 2013, the three highest performing search queries for Memorial Eye in Google AdWords both in terms of number of conversions and in terms of the number of clicks (other than search terms that contained a variation of Memorial Eye’s or 1-800 Contacts’ brand names) were [REDACTED] (CX1626, *in camera*; CX1625, ; see also CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

(A) “Contact Lenses”

647. For the period from January 1, 2005, through December 31, 2013, the search query “contact lenses” (within the campaign “Campaign #1,” within the Ad Group “Contacts – Specific Terms”) was the [REDACTED] for Memorial Eye in Google AdWords, in terms of number of conversions, and was the [REDACTED] performing search query for Memorial Eye in Google AdWords, in terms of number of clicks. (CX1626, *in camera*; CX1625, *in camera*; see also CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

(B) “Contacts”

648. For the period from January 1, 2005, through December 31, 2013, the search query “contacts” was the [REDACTED] for Memorial Eye in Google AdWords, in terms of number of conversions, and was [REDACTED] in terms of number of clicks. (CX1626, *in camera*; CX1625, *in camera*; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

(C) “Contact Lens”

649. For the period from January 1, 2005, through December 31, 2013, the search query “contact lens” was the [REDACTED] for Memorial Eye in Google AdWords, in terms of number of conversions and was the [REDACTED] in terms of number of clicks. (CX1626, *in camera*; CX1625, *in camera*; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

ii. “1800contacts”

650. The term “1800contacts” is one of the “1-800 Contacts, Inc.’s Trademark Keywords” listed in the Memorial Eye Agreement. (CX0326 at 010 (Memorial Eye Agreement, Exhibit 2)).

651. For the period from January 1, 2005, through December 31, 2013, Memorial Eye advertisements were served in response to the search query “1800contacts” as a result of broad match bids on multiple terms including “contacts” and “contact lenses.” (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

652. For the period from January 1, 2005, through December 31, 2013, the search query “1800contacts” (based on broad match for the keyword “contacts” alone) was the fourth highest performing search query for Memorial Eye in Google AdWords, in terms of conversions, and was the third highest performing search query in terms of number of clicks. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

653. Memorial Eye’s average cost per conversion for conversions associated with the search query “1800contacts” (based on broad match for the keyword “contacts” alone) in Google AdWords for the period from January 1, 2005, through December 31, 2013, was \$14.88, which is less than the average costs per conversion for conversions associated with the generic searches “contact lenses” (\$18.98), “contacts” (\$17.04), or “contact lens” (\$20.60) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

654. Memorial Eye’s average conversion rate in Google AdWords for the search query “1800contacts” (based on broad match for the keyword “contacts” alone) during the period from January 1, 2005, through December 31, 2013, was 10.11%, which is greater than the average conversion rates for the generic search queries “contact lenses” (8.55%), “contacts” (8.9%), or “contact lens” (7.68%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)). Memorial Eye’s average

conversion rate for “1800contacts” (based on broad match for the keyword “contacts” alone) was also higher than Memorial Eye’s overall average conversion rate for all search queries (7.9%) for the same time period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

655. Memorial Eye’s click-through rate in Google AdWords for the search query “1800contacts” (based on broad match for the keyword “contacts” alone) for the period from January 1, 2005, through December 31, 2013, was 0.98%, which is greater than the click-through rate for the generic search query “contacts” (0.77%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).
- iii. “1800 contacts”
656. The term “1800 contacts” is one of the “1-800 Contacts, Inc.’s Trademark Keywords” listed in the Memorial Eye Agreement. (CX0326 at 010 (Memorial Eye Agreement, Exhibit 2)).
657. For the period from January 1, 2005, through December 31, 2013, the search query “1800 contacts” was the third highest performing search query for Memorial Eye in Google AdWords, in terms of conversions, and the second highest performing in terms of number of clicks. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).
658. Memorial Eye’s average cost per conversion for conversions associated with the search query “1800 contacts” in Google AdWords for the period from January 1, 2005, through December 31, 2013, was \$18.36, which is less than the average costs per conversion for conversions associated with the generic searches “contact lenses” (\$18.98) or “contact lens” (\$20.60) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).
659. Memorial Eye’s average conversion rate in Google AdWords for the search query “1800 contacts” during the period from January 1, 2005, through December 31, 2013, was 10.74%, which is greater than the average conversion rates for the generic search queries “contact lenses” (8.55%), “contacts” (8.9%), or “contact lens” (7.68%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)). Memorial Eye’s average conversion rate for “1800 contacts” was also higher than Memorial Eye’s overall average conversion rate for all search queries (7.9%) for the same time period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).
660. Memorial Eye’s click-through rate in Google AdWords for the search query “1800 contacts” for the period from January 1, 2005, through December 31, 2013, was 1.39%, which is greater than the click-through rates for the generic search queries “contact lenses” (1.17%) or “contacts” (0.77%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

c. LensDirect

661. [REDACTED] (CX8006 at 061 (¶ 132) (Evans Expert Report)).
662. [REDACTED] (CX8006 at 061 (¶ 132) (Evans Expert Report)).
663. [REDACTED] (CX8006 at 061 (¶ 132) (Evans Expert Report)).
664. [REDACTED] (CX8006 at 061 (¶ 132) (Evans Expert Report)).
665. LensDirect “find[s] great value in bidding on ‘1-800 Contacts.’” (Alovis, Tr. 1014).
666. LensDirect “would not bid” on 1-800 Contacts related keywords in search advertising auctions if doing so amounted to a waste of money. (Alovis, Tr. 1015).
667. During Mr. Alovis’ time as CEO of LensDirect, LensDirect’s bidding on 1-800 Contacts terms “absolutely” drove a significant amount of business for LensDirect.” (Alovis, Tr. 1014).
668. The large “volume” of searches for 1-800 Contacts related terms—that is, the fact that “[a] lot of people were searching for” such terms—is one reason LensDirect began to bid on those terms. (CX9023 (Alovis, Dep. at 121); *see also* Alovis, Tr. 1006; *see also* Alovis, Tr. 1014 (testifying that one reason LensDirect finds “great value” in bidding on ‘1-800 Contacts’ is that “[a] a lot of people search for ‘1-800 Contacts.’”)).
669. LensDirect’s CEO further testified that the volume of searches for 1-800 Contacts related terms made bidding on those terms attractive because “[w]e figured we offered a better solution” for customers “and we should go where there are other people.” (CX9023 (Alovis, Dep. at 122)).
670. The volume of searches for 1-800 Contacts and LensDirect’s ability to offer customers a “better” offering is why LensDirect bids on 1-800 Contacts related terms. (CX9023 (Alovis, Dep. at 122)).
671. LensDirect’s CEO testified that he believes the message “Same Contacts, Better Prices” is “[a]bsolutely” an appealing message to a consumer who searched for “1-800 Contacts.” (Alovis, Tr. 993-994).

672. LensDirect's CEO testified that it makes business sense for LensDirect to show advertisements in response to a search for "1800contacts" because "[a] lot of people search for '1800contacts' and we want to be there when they do. . . . We hope to get those interested people to become customers of LensDirect because we believe we're offering . . . a better price for the same product." (Alovis, Tr. 1006).
673. LensDirect has no plans to stop using 1-800 Contacts terms as search advertising keywords. (Alovis, Tr. 1015-1016 ("Q. Sitting here today, do you think LensDirect will continue to use 1-800 Contacts terms as search advertising keywords? A. God willing, we will. Q. Have you discussed any plans with your marketing team to stop using 1-800 Contacts terms a search advertising keywords? A. I have not and I hope I don't have to ever have that conversation.")).
674. In the year 2016, terms related to 1-800 Contacts generated revenue for LensDirect. (CX9023 (Alovis Dep. at 128)).
675. In the year 2016, terms related to 1-800 Contacts had high conversion rates for LensDirect. (CX9023 (Alovis Dep. at 128)).
676. LensDirect's marketing personnel reported to LensDirect's CEO Mr. Alovis that in the year 2016, the keyword "1 800 contacts" and other terms related to 1-800 Contacts were "performing well," meaning that they had high conversion rates and brought in revenue for LensDirect. (CX9023 (Alovis Dep. at 128)).
677. In order to measure the importance of a marketing strategy, LensDirect evaluates "[o]verall conversions," meaning "how many sales we actually got from a specific keyword, and what that cost per acquisition was." Specifically, "[i]f it was a low cost per acquisition, [and] we got a lot of conversions, we're very happy." (Alovis, Tr. 1014).
678. The cost per conversion figures reported in LensDirect's AdWords account (including in, for example, the document bearing the exhibit number CX1641) represent LensDirect's cost per acquisition, that is, the "[c]ost for a new customer." (Alovis, Tr. 1004-1005 ("Q. And what does the abbreviation 'Cost/conv.' Refer to? A. That's really a cost per acquisition. Q. An so it's – does 'conv.' Mean conversion here? A. Yes. Cost per conversion. Cost for a new customer. Q. Do you think of those two terms interchangeably? A. Definitely. Same thing.")).
679. In terms of overall conversions, bidding on 1-800 Contacts terms has been a successful strategy for LensDirect. (Alovis, Tr. 1014).
680. For the period from January 1, 2010, through December 31, 2016, four of the ten search queries responsible for LensDirect's largest number of conversions through Google AdWords were search queries that contained 1-800 Contact's name or a variation thereof. (CX1641; CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl)).
681. For the period from January 1, 2010, through December 31, 2016, 17 of the 50 search queries responsible for LensDirect's largest number of conversions through Google

AdWords were search queries that contained 1-800 Contact's name or a variation thereof. (CX1641; CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl)).

682. LensDirect uses the terms “cost per conversion” and “cost per acquisition” interchangeably. (Alovis, Tr. 1004-1005).
683. LensDirect's target cost per acquisition for paid search advertising in the year 2016 “ranged anywhere from \$45 to even some days \$60 per new customer.” (Alovis, Tr. 1000).
684. LensDirect's target cost per acquisition for 2017 was between \$20 and \$25. (Alovis, Tr. 999-1000 (“We aim to spend around \$20 to \$25 per acquisition, per new customer.”)).
685. A higher conversion rate is better for business than a lower conversion rate. (Alovis, Tr. 1013 (“The higher the conversion rate, the better for business, absolutely. We hope that it is higher than it is today and continues to grow.”)).

i. Best Performing Generic Queries

686. For the period from January 1, 2010 through December 31, 2016, the two highest performing search queries for LensDirect in terms of number of conversions (other than search terms that contained a variation of LensDirect's or 1-800 Contacts' brand names) were “contacts” and “order contacts online.” (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
687. For the period from January 1, 2010, through December 31, 2016, the search query “contacts” was the seventh highest performing search query for LensDirect, in terms of number of conversions. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
688. For the period from January 1, 2010, through December 31, 2016, the search query “order contacts online” was the eleventh highest performing search query for LensDirect, in terms of number of conversions. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
689. LensDirect's click-through rate for the search query “contacts” for the period from January 1, 2010, through December 31, 2016 was 0.75%. (Alovis, Tr. 1052-1053; CX1640; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl)).

ii. “1800contacts”

690. The term “1800contacts” is one of the “keywords/search terms” that 1-800 Contacts, in a June 6, 2011 letter and proposed agreement attached thereto, asked LensDirect to stop bidding on. (CX1241; Alovis, Tr. 1007-1008).
691. The term “1800contacts” is one of the “keywords/search terms” that 1-800 Contacts, in a June 6, 2011 letter and proposed agreement attached thereto, asked LensDirect to implement as a negative keyword. (CX1241).

692. In a June 6, 2011 letter and proposed agreement attached thereto, 1-800 Contacts asked LensDirect to stop showing advertisements in response to searches for “1800contacts.” (CX1241).
693. During the period from January 1, 2010, through December 31, 2016, LensDirect bid on the keyword “1800contacts” in “exact match” as part of at least two Google AdWords campaigns: a campaign identified as “Competitors – 1800 Contacts” and a campaign identified as “Competitors.” (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
694. To the extent that bidding on the keyword “1800contacts” in exact match resulted in LensDirect advertisements being shown in response to the search query “1800contacts,” information regarding those advertisement impressions is reported separately in LensDirect’s Google AdWords data for each of the campaigns in which LensDirect bid on “1800contacts” in exact match. (*See* CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
695. For the period from January 1, 2010, through December 31, 2016, the single search query “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors – 1-800-Contacts”) was the fifth highest performing search query for LensDirect, in terms of conversions. (Alovis, Tr. 1005-1006; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
696. LensDirect’s average cost per conversion for conversions associated with the search query “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors – 1-800-Contacts”) for the period from January 1, 2010, through December 31, 2016, was \$43.13, which is less than its average cost per conversion for conversions associated with the generic queries “contacts” (\$46.06) or “order contacts online” (\$48.62) during the same period. (Alovis, Tr. 1010; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
697. A cost per conversion of \$43.13 is “in line with what we were spending in 2016” per conversion. (Alovis, Tr. 1010).
698. LensDirect’s average cost per conversion for conversions associated with the search query “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors”) for the period from January 1, 2010, through December 31, 2016, was \$39.97, which is less than its average cost per conversion for conversions associated with the generic queries “contacts” (\$46.06) or “order contacts online” (\$48.62) during the same period. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
699. LensDirect’s average conversion rate for the search query “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors – 1-800-Contacts”) for the period from January 1, 2010, through December 31, 2016, was 7.88%, which is greater than its average conversion rate for the generic search query “contacts” (5.96%) during the same period. (Alovis, Tr. 1013; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26)

(Nguon, Decl.)). The average conversion rate for “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors – 1-800-Contacts”) is also greater than LensDirect’s overall average conversion rate for all search queries (5.89%) for the same period. (Alovis, Tr. 1004, 1013; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

700. LensDirect’s average conversion rate for the search query “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors”) for the period from January 1, 2010, through December 31, 2016, was 5.6%, which is comparable to LensDirect’s overall average conversion rate for all search queries (5.89%) for the same period. (Alovis, Tr. 1004; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

701. LensDirect’s average click-through rate for the search query “1800contacts” (as part of the LensDirect AdWords campaign titled “Competitors – 1-800-Contacts”) for the period from January 1, 2010, through December 31, 2016, was 1.43%, which is higher than its average click-through rate for the generic search query “contacts” (0.75%) during the same period. (Alovis, Tr. 1052-1053; CX1640; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

iii. “1800contacts coupon”

702. The term “1800contacts coupon” is one of the “keywords/search terms” that 1-800 Contacts, in a June 6, 2011 letter and proposed agreement attached thereto, asked LensDirect to stop bidding on and implement as a negative keyword. (CX1241; Alovis, Tr. 1007-1008).

703. For the period from January 1, 2010, through December 31, 2016, the search query “1800contacts coupon” (broad match) was the ninth highest performing search query for LensDirect, in terms of number of conversions. (CX1641; CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

704. For the period from January 1, 2010, through December 31, 2016, the search query “1800contacts coupon” (exact match) was the tenth highest performing search query for LensDirect, in terms of conversions. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

705. LensDirect’s average cost per conversion for conversions associated with the search query “1800contacts coupon” in broad match for the period from January 1, 2010, through December 31, 2016, was \$18.73, which is less than its average cost per conversion for conversions associated with the generic queries “contacts” (\$46.06) or “order contacts online” (\$48.62) during the same period. (CX1641; CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

706. A cost per conversion of \$18.73 “is a very attractive price for a new customer” that is below LensDirect’s 2017 target customer acquisition cost. (Alovis, Tr. 1009).

707. LensDirect's average cost per conversion for conversions associated with the search query "1800contacts coupon" in exact match for the period from January 1, 2010, through December 31, 2016, was \$9.92, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" (\$46.06) or "order contacts online" (\$48.62) during the same period. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
708. LensDirect's average conversion rate for the search query "1800contacts coupon" in broad match for the period from January 1, 2010, through December 31, 2016, was 13.2%, which is greater than its average conversion rates for the generic search queries "contacts" (5.96%) or "order contacts online" (11.2%) during the same period. (Alovis, Tr. 1012; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)). A conversion rate of 13.2% is "more than double" LensDirect's average conversion rate for all search terms for the period from January 1, 2010, through December 31, 2016. (Alovis, Tr. 1012.)
709. LensDirect's average conversion rate for the search query "1800contacts coupon" in exact match for the period from January 1, 2010, through December 31, 2016, was 13.63%, which is greater than its average conversion rates for the generic search queries "contacts" (5.96%) or "order contacts online" (11.2%) during the same period. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)). The average conversion rate for the search query "1800contacts coupon" in exact match is also greater than LensDirect's average conversion rate for all search terms (5.89%) for the same period. (Alovis, Tr. 1004; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).
710. For the period from January 1, 2010 through December 31, 2016, LensDirect's average click-through rate for the search query "1800contacts coupon" in both broad match (8.32%) and exact match (7.67%) was higher than its average click-through rate for common generic search queries such as "contacts" (0.75%) and "order contacts online" (4.3%). (CX1640; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

d. Vision Direct

711. Vision Direct has not implemented negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (Hamilton, Tr. 417; CX8002 at 005 (¶ 17) (Hamilton, Decl.) ("I am not aware of Vision Direct implementing negative keywords with respect to any online contact lens retailer other than 1-800 Contacts.")).
712. Absent the settlement with 1-800 Contacts, Vision Direct would not have implemented any negative keywords related to 1-800 Contacts. (CX8001 at 005 (¶ 16) (Hamilton, Decl.)).
713. During Mr. Hamilton's tenure at Vision Direct, [REDACTED]

- [REDACTED] (CX8002 at 006 (¶ 20) (Hamilton, Decl.), *in camera*).
714. During Mr. Hamilton's tenure at Vision Direct, [REDACTED] [REDACTED] } (CX8002 at 006 (¶ 20) (Hamilton, Decl.), *in camera*).
715. Other contact lens retailers have bid on Vision Direct's trademarks as keywords. (Hamilton, Tr. 417).
716. "Google AdWords Keyword Planner" is a tool that Google provides that companies engaged in search advertisers can use "to research new keywords to add to their account." (Hamilton, Tr. 418; *see also* CX8002 at 005 (¶ 18) (Hamilton, Decl.)).
717. The Google AdWords Keyword Planner allows an advertiser to input keywords and then provides the advertiser with estimates of the number of impressions and clicks (as well as other information such as cost per click and at times, expected number of orders or conversions) that would result from that advertiser bidding on those keywords. (Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 82-83); *see also* CX8002 at 005-006 (¶ 18) (Hamilton, Decl.)).
718. Vision Direct's Functional Manager, Digital and Marketing, Mr. Hamilton, input the keywords "that were specifically prohibited" by Vision Direct's agreement with 1-800 Contacts into the Google AdWords Keyword Planner. (Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 81-82 ("Q. Going back to Paragraph 18 of the declaration we were looking at marked CX8002, the last sentence states, 'Nonetheless, based on information from the Google AdWords Keyword Planner, absent the settlement with 1-800 Contacts, I believe it would be beneficial to Vision Direct to test the prohibited keywords in online paid search advertising in Google, Bing, and Yahoo Gemini.'" In that sentence, what are the prohibited keywords? A. The keywords that I put into the Google Ad Planner, I believe, were the 40-odd keywords that were in the settlement agreement that were specifically prohibited.)); *see also* CX8002 at 005-006 (¶ 18) (Hamilton, Decl.)).
719. The results of Mr. Hamilton inputting the keywords specifically prohibited by the Vision Direct-1-800 Contacts agreement into the keyword planner tool "suggested that there would be a significant volume of clicks and that the cost per click and the conversion rate would be such that the cost per order would be lower than [Vision Direct's] average cost per order on the account." (Hamilton, Tr. 427).
720. The results of the keyword planner tool suggested to Mr. Hamilton that Vision Direct "should test these keywords and see if that in fact would be the case in the actual auction." (Hamilton, Tr. 427; *see also* CX8002 at 005-006 (¶ 18) (Hamilton, Decl.) ("[B]ased on information from the Google AdWords Keyword Planner, absent the settlement agreement with 1-800 Contacts, I believe it would be beneficial to Vision

Direct to test the prohibited keywords in online paid search advertising in Google, Bing, and Yahoo Gemini.”)).

721. Mr. Hamilton testified that [REDACTED]
[REDACTED]
[REDACTED] (Hamilton, Tr. 431, *in camera*; see also CX8002 at 006 (¶¶ 18-19) (Hamilton, Decl.), *in camera*).
722. The reason that Mr. Hamilton concluded [REDACTED]
[REDACTED]
[REDACTED] (Hamilton, Tr. 431, *in camera*).
- e. Walgreens
723. Walgreens has not implemented negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (Hamilton, Tr. 417; CX8001 at 005 (¶ 17) (Hamilton, Decl.)) (“I am not aware of Walgreens implementing negative keywords with respect to any online contact lens retailer other than 1-800 Contacts.”)).
724. Other contact lens retailers have bid on Walgreens’ trademarks as keywords. (Hamilton, Tr. 417).
725. Walgreens’s Functional Manager, Digital and Marketing Mr. Hamilton input the 1-800 Contacts related keywords on which bidding is prohibited by the terms of Walgreens’ agreement with 1-800 Contacts into the Google AdWords Keyword Planner. (Hamilton, Tr. 418; CX8001 at 006 (¶ 19) (Hamilton, Decl.)).
726. The results of inputting the keywords prohibited by the Walgreens-1-800 Contacts agreement into the keyword planner tool, “suggested that there would be a significant volume of clicks and that the cost per click and the conversion rate would be such that the cost per order would be lower than [Walgreens’] average cost per order on the account.” (Hamilton, Tr. 427; see also CX8001 at 006 (¶ 19) (Hamilton, Decl.)) (“[B]ased on information from the Google AdWords Keyword Planner, absent the settlement agreement with 1-800 Contacts, I believe it would be beneficial to Walgreens to test the prohibited keywords in online paid search advertising in Google, Bing, and Yahoo Gemini.”)).
727. The results of the keyword planner tool suggested to Mr. Hamilton, Functional Manager, Digital and Marketing for Walgreens, “that we should test these keywords and see if that in fact would be the case in the actual auction.” (Hamilton, Tr. 427).
728. [REDACTED]
[REDACTED] (Hamilton, Tr. 429, *in camera*).

729. [REDACTED] (Hamilton, Tr. 429-430, *in camera*).
730. Mr. Hamilton testified that [REDACTED] (Hamilton, Tr. 430, *in camera*; see also CX8001 at 006-007 (¶¶ 19-20) (Hamilton, Decl.), *in camera*).
731. Walgreens does not implement negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (CX8001 at 005 (¶ 17) (Hamilton Decl.)).
732. [REDACTED] (Hamilton, Tr. 431, *in camera*).
733. [REDACTED] (Hamilton, Tr. 431, *in camera*).
734. [REDACTED] (Hamilton, Tr. 431, *in camera*).
735. [REDACTED] (Hamilton, Tr. 430-431, *in camera*).
736. [REDACTED] (Hamilton, Tr. 431, *in camera*).
737. In the business judgment of Mr. Hamilton, who was at the time Walgreens' Functional Manager, Digital and Marketing, if Walgreens were entering the online contact lens anew and was able to bid on the 1-800 Contacts trademark keywords that are the subject of the Walgreens Agreement, Walgreens "would likely do that. And we would likely test those out." (CX9008 (Hamilton, IHT at 63)).
738. The reason that Walgreens would "likely test . . . out" bidding on 1-800 Contacts' trademark terms if Walgreens were entering the online contact lens business anew is because doing so "would be a way to make sure that, for the universe of contact lens wearers that have a prescription that do go to the search engines to do research on the options that they have available to them, that they would learn that Walgreens is a contact lens seller online." (CX9008 (Hamilton, IHT at 63-64) (testifying also that "we would

definitely want to test the terms that are related to our competitors, and if we're legally able to do that, to be able to let those folk know that they have yet one more option online").

f. Walmart

739. Google data shows that Walmart, which does not have an agreement with 1-800 Contacts regarding keyword bidding, has placed advertisements on searches for 1-800 Contacts' brand name terms as a result of both direct bidding on 1-800 Contacts trademark keywords and being matched into such searches when bidding on other keywords. (CX8006 at 060 (¶ 130) (Evans Expert Report)).
740. Google data shows that between September 2015 and March 2016, Walmart showed approximately [REDACTED] each month in response to searches for 1-800 Contacts' brand name terms. (CX8006 at 060 (¶ 130) (Evans Expert Report), *in camera*).
741. Walmart Senior Product Manager Ms. Mohan testified that Walmart considers bidding on the brand name terms of its contact lens retailer competitors as keywords to be "a general best practice." (CX9033 (Mohan, Dep. at 54) ("[w]e have [bids on competing retailer brand names] everywhere," even outside the contact lens space. For example, she testified that "[w]e have Target in our main account. . . . Usually, when we set it up, we add a campaign. . . . We just add all our competitor names." (CX9033 (Mohan, Dep. at 54)).
742. Walmart has a search advertising campaign focused on bidding on the names of competing contact lens retailers as keywords, including 1-800 Contacts, Vision Direct, and AC Lens. (CX9033 (Mohan, Dep. at 53-54)).
743. Six percent of Walmart's contact lens orders currently come from the "Competitors" ad campaign, which consists of competitors' brand names as keywords. (CX9033 (Mohan, Dep. at 54-56)).
744. One reason that Walmart considers bidding on competing retailer brand names to be a "best practice" is because it helps to attract "newer traffic." (CX9033 (Mohan, Dep. at 54) ("[I]f you want to get some newer traffic, then it makes sense to say, okay, let me add some competitor terms.")).
745. Walmart Senior Product Manager Ms. Mohan testified that 1-800 Contacts related keywords would "bring us a lot of clicks" and "bring a lot of people who are looking in the market for contact lenses to our website, and then we'll take the offer, we'll take that." (CX9033 (Mohan, Dep. at 61)).
746. Walmart does not implement the brand names of any contact lens retailer competitors as negative keywords. (CX9033 (Mohan, Dep. at 64)).
747. If bidding on competitor brand names in the contact lens industry were not successful for Walmart, Walmart would lower its bids on those terms to "a very low bid, or one cent." (CX9033 (Mohan, Dep. at 72-73)).

g. WebEyeCare

748. [REDACTED] (CX9014 (Batushansky, Dep. at 161-162), *in camera*).

749. [REDACTED] (CX9014 (Batushansky, Dep. at 162), *in camera*).

750. [REDACTED] (CX9000 (Batushansky, IHT at 64), *in camera*).

751. [REDACTED] (CX9000 (Batushansky, IHT at 66), *in camera*).

752. [REDACTED] (CX9000 (Batushansky, IHT at 65-66), *in camera*).

753. [REDACTED] (CX9000 (Batushansky, IHT at 65-66), *in camera*).

754. [REDACTED] (CX9014 (Batushansky, Dep. at 46, 163), *in camera*).

755. [REDACTED] (CX9014 (Batushansky, Dep. at 67), *in camera*).

756. In the business judgment of WebEyeCare co-owner and president Mr. Batushansky, [REDACTED] (CX9014 (Batushansky, Dep. at 46), *in camera*).

757. In the business judgment of WebEyeCare co-owner and president Mr. Batushansky, [REDACTED] (CX9000 (Batushansky, IHT at 89-90), *in camera*) [REDACTED]).

758. In the business judgment of WebEyeCare co-owner and president Mr. Batushansky, [REDACTED] (CX9000 (Batushansky, IHT at 110-111), *in camera*).

759. In the business judgment of WebEyeCare co-owner and president Mr. Batushansky, [REDACTED] (CX9000 (Batushansky, IHT at 111-112), *in camera*).

760. [REDACTED] (CX9014 (Batushansky, Dep. at 167), *in camera*).

761. [REDACTED] (CX9014 (Batushansky, Dep. at 164, 168-169), *in camera*).

h. Lens Discounters

762. “No later than 2005, Lens Discounters began bidding on the term ‘1-800 Contacts’ and variations thereof.” (CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.)).

763. For Lens Discounters, “bidding on the term ‘1-800 Contacts’ and variations thereof was a profitable strategy.” (CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.)).
764. At the time that Lens Discounters was bidding on 1-800 Contacts and related terms, “the cost per conversion for those terms was low, and [Lens Discounters’] conversion rates were good. [Lens Discounters] received a good amount of traffic, as well as resulting orders, from bidding on those keywords.” (CX8003 at 002 (¶ 10) (Mitha, Decl.)).
765. Lens Discounters COO Mr. Mitha declared under penalty of perjury that at the time Lens Discounters was bidding on 1-800 Contacts and related terms “I believe that we attracted customers who used 1-800 Contacts-related terms in their searches because our prices were better than 1-800 Contacts’ prices.” (CX8003 at 002 (¶ 10) (Mitha, Decl.)).
766. One reason Lens Discounters chose to bid on 1-800 Contacts and related terms was that “by bidding on 1-800 Contacts’ terms, [Lens Discounters was] able to generate a significant number of ad impressions, which meant that, even if consumers did not purchase from [Lens Discounters] in response to any particular search query, [the company was] able to get the Lens Discounters name in front of a large audience of potential customers.” (CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.)).
767. In or around December 2016, after having for a time ceased bidding on 1-800 Contacts related terms and implementing negative keywords at the request of 1-800 Contacts, Lens Discounters decided to remove those negative keywords relating to 1-800 Contacts and to begin bidding on 1-800 Contacts related terms once again. (CX8003 at 005 (¶ 30) (Mitha, Decl.)).
768. The reason that Lens Discounters decided to begin bidding on 1-800 Contacts related terms and to remove 1-800 Contacts related negative keywords in December 2016 is “because it was previously successful.” (CX8003 at 005 (¶ 30) (Mitha, Decl.)).
769. Lens Discounters believes that having its ads appear in response to searches for other online sellers of contact lenses to be beneficial because these keywords are cost effective and have resulted in a strong return on investment. (CX8003 at 005-006 (¶ 31) (Mitha, Decl.)).

i. Lenses for Less

770. The owner of Lenses for Less, Mr. Studebaker, declared under penalty of perjury that Lenses for Less has not entered into any agreements similar to its agreement with 1-800 Contacts regarding participation in search engine auctions. (CX8000 at 003 (¶ 19) (Studebaker, Decl.)).
771. The owner of Lenses for Less, Mr. Studebaker, declared under penalty of perjury that “[b]ut for the settlement agreement, and the threat of 1-800 Contacts su[ing] us based on the appearance of Lenses for Less advertisements on a search engine results page in response to a search query that includes their trademark, we would periodically test to see if it would be profitable to bid on the term ‘1-800 Contacts’ or similar terms, and/or

remove the negative keywords we have implemented as a result of our agreement with 1-800 Contacts.” (CX8000 at 002 (¶ 16) (Studebaker, Decl.)).

772. The owner of Lenses for Less, Mr. Studebaker, declared under penalty of perjury that “[i]f the settlement agreement were terminated, and threat of 1-800 Contacts suing us based on the appearance of Lenses for Less advertisements on a search engine results page in response to a query that includes their trademark were removed, we would periodically test to see if it would be profitable to bid on the term ‘1-800 Contacts’ or similar terms, and/or remove the negative keywords we have implemented as a result of our agreement with 1-800 Contacts.” (CX8000 at 002 (¶ 17) (Studebaker, Decl.)).

j. Coastal

773. [REDACTED] (CX0621 at 122 (Agenda and attached documents for consideration at October 30, 2008 1-800 Contacts Board of Directors Meeting), *in camera*).

k. Visionworks/Empire Vision

774. In the business judgment of Visionworks’ Director of Marketing Mr. Duley, “[i]f the Settlement Agreement were terminated or otherwise invalidated, Visionworks would also cease using the negative keywords listed in the Settlement Agreement. Visionworks believes that this would give the search engine providers, such as Google, Bing, and others, the opportunity to best deliver advertisements to Visionworks’ customers and/or potential customers who would be interested in Visionworks goods and/or services.” (CX0943 at 003 (¶ 18) (Duley, Decl.); *see also* CX9036 (Duley, Dep. at 119-120), *in camera* ([REDACTED])).

3. Expert Analysis

775. It is “commonplace for consumers to see competitive offerings,” when they have an intent to interact with an established brand, both “online [and] offline.” (Evans, Tr. 1475-1479); (“competitive ads, competitive offerings to consumers who are looking for an established brand” is “a common thing for rivals of established brands to want to do” and it is “a common thing for “platforms...that are connecting consumers and advertisers to offer.”).

776. Dr. Evans concluded that “the fact that we see this [practice] so commonly suggests that it’s an efficient practice.” Evans, Tr. 1475-1479, 1479; CX8009 at 028 (¶¶ 44-45, 49 & Table 1) (Evans Rebuttal Expert Report) (listing more than 60 examples of comparative advertising based on queries for brand terms on Google).

777. Dr. Evans concluded that “[b]ased on an analysis of data provided by Google, I found that, since the early 2000s, most significant online contact lens retailers that compete with

1-800 Contacts have chosen to pay to place text ads in front of consumers who have searched on terms that include 1-800 Contacts brand name keywords such as 1800contacts—when they have not been restricted from doing so.” (CX8006 at 7 (¶ 10) (Evans Expert Report)).

778. Dr. Evans concluded that “[a]dvertising on search results pages following queries on 1-800 Contacts brand name key words was an important competitive strategy for online contacts lens retailers based on the testimony and documents I have reviewed.” (CX8006 at 011 (¶ 23) (Evans Expert Report)).
779. One reason that Dr. Athey concluded that search queries containing 1-800 Contacts’ brand name terms are “an extremely attractive place to bid” is that “the 1-800 search term is the largest, single branded search term” meaning that “it’s a hard one to pass up . . . you wouldn’t forget about it.” (Athey, Tr. 764-765).
780. Another reason that Dr. Athey concluded that search queries containing 1-800 Contacts’ brand name terms are “an extremely attractive place to bid” is that “[w]e also see that for the firms that are currently bidding on ‘1-800 Contacts,’ their conversion rate are higher when they bid against 1-800 Contacts then when they are on other search terms, so they convert the best against 1-800 versus other firms.” (Athey, Tr. 764-765).
781. Another reason that Dr. Athey concluded that search queries containing 1-800 Contacts’ brand name terms are “an extremely attractive place to bid” is that “any competitor other than 1-800 is generally going to have lower prices and be a tougher competitor for this online consumer coming for a search.” (Athey, Tr. 764-765).

4. Evidence from Search Engines

782.  (CX1172, *in camera*).

783. When Microsoft changed its trademark policy on March 3, 2011 to no longer prohibit the use of a competitor’s trademark as a keyword to trigger an advertisement, Microsoft proposed to advertisers that they optimize their account by suggesting they include some competitors’ brands as keywords. Microsoft asked advertisers to notify it if they did not wish to add any of those keywords. (CX1804 at 001).

5. It is Valuable for 1-800 Contacts’ Rivals to Show Advertisements in Response to Searches for 1-800 Contacts Related Terms Even if Those Advertisements Do Not Immediately Result in Clicks or Conversions

784. It is valuable for 1-800 Contacts’ rivals to show advertisements in response to searches for 1-800 Contacts related terms even if those advertisements do not immediately result in clicks or conversions. (*See infra* ¶¶ 785-788).

785. Memorial Eye considered it a value to consumers to show an ad for Memorial Eye, even if the consumer did not click on the ad, because showing such advertisements “helped build our brand” and “put our brand in [the consumer’s] mind.” (Holbrook, Tr. 1904-1905 (testifying also that “the next time they were looking for contact lenses they would be more likely to remember our name, our brand, and possibly look for us again”)); *see also* Holbrook, Tr. 1910-1911 (testifying that even if a customer entering a search for 1-800 Contacts intended to only go to 1-800 Contacts website, Memorial Eye would benefit from its ad appearing on the search engine result page because doing so helped improve Memorial Eye’s brand recognition)).
786. Walmart considered it useful to show its contact lens advertisements in search advertising results even when users did not click on the ads because showing impressions builds brand awareness and awareness that Walmart sells contact lenses. (CX9033 (Mohan, Dep. at 71-72) (“[T]he impression also counts. . . . ‘Cause it’s getting your name out there, and [the consumer] can say ‘Oh, Walmart sells contacts?’ And, you know, they might not click on it immediately, but a small percentage of people might go in the store, or they might open it next day, or on a different window.”)).
787. Even if a consumer enters a search for “1-800-CONTACTS” because the consumer intends to directly navigate to 1-800 Contacts’ website and an AC Lens ad appears in response to that search but the consumer does not click on the AC Lens ad, there is still “a net benefit” to AC Lens of having shown that advertisement because “you could argue that it helps to increase awareness of the brand” and “in a pay-per-click wor[l]d, we wouldn’t pay for the view.” (CX9039 (Clarkson, Dep. at 158)).
788. Even if the consumer does not click on the LensDirect ad, having advertisements appear in responses to a search for 1-800 Contacts can improve LensDirect’s brand visibility, which helps Lens Direct because “the more times people see LensDirect, the better chance there is of them becoming a customer one day.” (Alovis, Tr. 1006-1007) (“[b]rand visibility is always good. We don’t spend anything and we get to sit next to or sit at the table with the larger players.”); *see also* CX9023 (Alovis, Dep. at 122-123) (discussing benefit of “visibility”)).

6. Searches for 1-800 Contacts Brand Terms are More Commercially Significant than Searches for Other Contact Lens Retailers Brand Terms

789. 1-800 Contacts has significantly higher brand awareness than other online contact lens retailers. (*See infra* ¶¶ 790-791).
790. [REDACTED] (CX1446 at 011, *in camera*).
791. In 2013, 1-800 Contacts claimed that it had 30% unaided brand awareness, which was based on a third party survey where participants were asked on an unaided basis “When you think about places to buy contact lenses, what places come to mind?” They claimed that this unaided brand awareness was eight times higher than that of their nearest online competitor. (CX0429 at 010).

792. A 2008 presentation to 1-800 Contacts' Board of Directors noted that Lens.com's "ability to divert customers using 1-800 trademarks increases as [1-800 Contacts] increase[s] brand awareness." (CX0621 at 123 (Agenda and attached documents for consideration at October 30, 2008 1-800 Contacts Board of Directors Meeting)).
793. There are far more searches for 1-800 Contacts brand terms than there are for any other online contact lens retailers' brand terms. (Alovis, Tr. 1006, 1015 (testifying that more people search for 1-800 Contacts than for other online contact lens retailer brand names); *supra* § V.B.2.b-c).
794. While LensDirect bids on the names of contact lens retailers other than 1-800 Contacts in paid search advertising, such bidding is "[n]ot as significant for us" as bidding on 1-800 Contacts terms because more people search for 1-800 Contacts related terms than other retailers' terms. (Alovis, Tr. 1006; 1014-1015).
795. In the business judgment of AC Lens CEO Mr. Clarkson, there is "considerably more" value to his company in showing an advertisement in response to a search query for a 1-800 Contacts related term than in response to a search query for the brand name of another online contact lens retailer. (Clarkson, Tr. 253; CX9039 (Clarkson, Dep. at 156)).
796. Mr. Clarkson testified that one reason it would be more valuable to show advertisements in response to search queries for 1-800 Contacts related terms than in response to search queries for the brand names of other online contact lens retailers is that "the amount of brand awareness of 1-800 dwarfs that of all the other online competitors, so when you look at the number of monthly searches for 1-800 terms, it's orders of magnitude greater than it would be for other competitors." (Clarkson, Tr. 253); see also (CX9039 (Clarkson, Dep. at 156) (value that AC Lens can obtain from bidding on the trademark term of a competitor "depends on the strength of the competitor's brand, because it clearly will depend on the total number of searches attached . . . to that brand.")).
797. 1-800 Contacts' price premium over other online contact lens retailers makes searches for 1-800 Contacts brand terms more attractive targets for rivals' search advertising than searches for other online retailers' brand terms. (*See infra* § VI.A.1).
798. Mr. Clarkson testified that one other reason it would be more valuable to show advertisements in response to search queries for 1-800 Contacts related terms than in response to search queries for the brand names of other online contact lens retailers is "the price advantage that we enjoy" relative to 1-800 Contacts. (CX9039 (Clarkson, Dep. at 156); *see also* Clarkson, Tr. 253 ("Also, there's less value in advertising on, say a Vision Direct term because they're in roughly the same price point, so there isn't quite the same incentive for consumers to switch.")).
799. Walmart's brand recognition as an online contact lens retailer is lower than that of other online contact lens retailers. (CX9033 (Mohan, Dep. at 57-58) (Walmart "doesn't have enough brand recognition in the contact lens case. As in when you think 'I want to buy contact lenses,' you don't say 'Let me go to Walmart contacts.' You would probably think of some other bigger competitors of that.)); CX9033 (Mohan, Dep. at 90-91) ("[I]n

contact lenses I would think that we don't have unaided brand awareness, because you would think of Walmart as a store where you can buy groceries, where you can buy certain types of electronics like T.V.s, and so on. You would not think of it as your first choice of destination when you are wanting to buy contact lenses.")).

800. Walmart Senior Product Manager Ms. Mohan testified that "1-800" as a keyword would bring more visitors to Walmart contacts' website than "Vision Direct" "[b]ecause a lot more people know the brand." (CX9033 (Mohan, Dep. at 61)).
801. Walmart Senior Product Manager Ms. Mohan testified that it is better to advertise against a competitor when one has a better offering than that competitor, as opposed to when one has a less advantageous offering than that competitor. (CX9033 (Mohan, Dep. at 63 ("I'll give you an example. We can buy the keyword 'Amazon' today. We'll get a ton of traffic, but nobody will buy anything on our site because Amazon has two-day shipping. We don't have that. So it might not immediately be great for us. But, I mean, assuming all the other factors are the same, we have the same price, we have the same shipping and everything, we'll definitely go after Amazon, we'll pay a lot to get those customers. Q. So is it better to advertise against a competitor when you have a better offering than they do? A. Yes."))).
802. Walmart Senior Product Manager Ms. Mohan testified that Walmart will "definitely go after" a competing retail brand and "pay a lot to get" customers of that competing retail brand if Walmart's offering is comparable to that of its competitor in price, shipping, and other factors. (CX9033 (Mohan, Dep. at 63)).

VI. 1-800 Contacts Entered into the Challenged Agreements to Prevent Online Rivals from Presenting Competitive Search Advertising

A. Online Rivals Threatened 1-800's Relatively High Priced Business Model

1. 1-800 Contacts Charges Higher Prices than its Online Rivals

803. [REDACTED] (Bethers, Tr. 3773-3774; Coon, Tr. 2711-2713; Athey, Tr. 821-823 (discussing CCXD0003 at -075); Clarkson, Tr. 197; Aloviss, Tr. 989-990; RX1228 at 036, *in camera* (2015 analysis showing that higher than those of its [REDACTED] CX0429 at 015 (November 2013 management presentation prepared by 1-800 Contacts' President Brian Bethers featuring a chart showing indicating that 1-800 Contacts has a higher "Price" than Vision Direct, other "Online Discounters," and Costco); CX0547 at 032, *in camera* (in 2006, gross prices of 1-800 Contacts' three major online rivals were [REDACTED] while [REDACTED] by 2011); CX1211 at 007 (In January 2005, Vision Direct's prices were 15% lower than 1-800 Contacts' prices on average, and Coastal's prices were even lower than Vision Direct's); CX1459 at 001; (CX8006 at 085 (¶ 188) (Evans Expert Report), *in camera*); *see also infra* ¶¶ 807-821).

804. Walmart's prices for contact lenses are not significantly lower than 1-800's. (CX1449 at 026).
805. A 2015 report prepared at the direction of 1-800 Contacts' owner states that 1-800 Contacts "is the most expensive online retailer," and that "1-800 is not – and does not try to be – the lowest-cost retailer, as other online discount and retailers such as Costco are cheaper." (CX0439 at 010, 036, *in camera*).
806. 1-800 Contacts' price premium over competing online retailers is significant, with the exception of products with manufacturer-imposed price floors. (*Infra* ¶¶ 810-811).
807. Dr. Athey calculated that 1-800 Contacts' prices were 21% higher than online competitors' prices, on average, for its top ten selling products between 2010 and 2016. (CX8007 at 014, 045-051 (¶ 32, Exhibit D-1 to D-7) (Athey Expert Report)).
808. In April 2004, 1-800 Contacts' prices were the "highest of all entities on the Web." (CX0055 at 015).
809. In 2005, 1-800 Contacts noted that it had "no appeal" to extremely price sensitive consumers because they were "not the lowest priced alternative." (CX0299 at 003).
810. In January 2006, 1-800 Contacts' single box and four-box pricing were higher than either Coastal or Vision Direct's pricing for each of the following products: Acuvue 2, Acuvue Advance, Soflens 66 Toric, Focus Dailies, and Freshlook Colors. (CX0535 ("US Retail 2006 Business Plan") at 012-013).
811. In June 2010, Coastal, Vision Direct, Lens.com, and AC Lens all offered lower prices than 1-800 Contacts for three top-selling lens products Acuvue Oasys, Acuvue Oasis for Astigmatism, and Acuvue 2, not accounting for rebates. (CX0904 at CX0904_NATIVE_1-800F_00034658, "Top 3 Product Online Price Comparison.xlsx").
812. As of November 2011, 1-800 Contacts would avoid "mentioning price in [its] text ads given that all [its] online competitors [were] usually much cheaper." (CX0033 at 002).
813. By June 2013, 1-800 Contacts' prices had been higher than those of other internet competitors for many years. (CX1459 at 001-002 (Mr. Roush, 1-800 Contacts' Chief Marketing Officer, further explained that 1-800 Contacts "must not alter [its] premium pricing strategy." His email responded to observations by 1-800 Contacts marketing executive Phil Barrett 1-800 Contacts' conversion rate in search "dropped immediately once google made price more visible."))).
814. In or around June 2013, 1-800 had a "premium pricing strategy." (CX1459 at 001-002).
815. In October 2013, 1-800 Contacts' prices online were not competitive compared to those of other online retailers. (CX0983 at 002) (Mr. Galan explained that a Google feature showing product ads with prices negatively affected 1-800 Contacts' sales via paid search due to 1-800 Contacts' "lack of competitive prices in the online space").

816. In October 2013, 1-800 Contacts' [position], Mr. Galan, noted that 1-800 Contacts "lack[ed]" "competitive prices in the online space." (CX0983 at 002).
817. [REDACTED] (CX0295 at 063, *in camera*).
818. [REDACTED] (CX0295 at 064, *in camera*).
819. Douglas Haber, Managing Director of the firm (Thomas Lee Partners) that owned 1-800 Contacts at the time, observed in 2015 that analysis and data provided by a consulting firm was [REDACTED] (CX1162 at 001, *in camera*) (discussing his May 2015 review of a 2013 analysis from consulting firm Bain and Company).
820. [REDACTED] (CX1449 at 026, *in camera*).
821. 1-800 Contacts' prices today remain higher than those of other online contact lens retailers. (CX9034 (Roush, Dep. at 142) ("When I think of our pricing, you know, clearly our prices are higher than the online players. Certainly they are.")).
- 2. 1-800 Contacts Consistently Recognized that Online Search Advertising from its Lower-Priced Rivals Threatened its Sales, and that its Results Improved When it Eliminated Rivals' Trademark Advertising**
822. 1-800 Contacts' business records reflect a consistent concern over time that online competitors' advertising on searches for 1-800 Contacts' trademarks hurt 1-800 Contacts' sales. (*See infra* ¶¶ 825-826, 829-837, 840-844, 846-847, 850-852, 856, 860-865).
823. 1-800 Contacts' business records also reflect a consistent acknowledgement over time that the absence of competitor ads on searches for 1-800 Contacts' trademarks significantly improved 1-800 Contacts' sales, as well as the click-through rates of 1-800 Contacts' trademark paid search ads. (*See infra* ¶¶ 828, 838-839, 845, 848-849, 853-855, 857).
824. During Jonathan Coon's tenure, 1-800 Contacts' competitors running search advertising triggered by 1-800 Contacts' trademark terms imposed costs on 1-800 Contacts in the form of lost sales and higher costs per click, which, according to Mr. Coon, exceeded 1% of 1-800 Contacts' total advertising budget in size. (Coon, Tr. 2851-2853).
825. 1-800 Contacts contacted Google in 2011, inquiring about an online article (that turned out to be incorrect) reporting that Google would allow trademark owners to limit the entities that could purchase their trademarks as keywords. Bryce Craven told Google that this would be "a welcome feature." (CX0029).

826. 1-800 Contacts' trademark keywords are among the "biggest contributors to orders." (CX0732 at 004).
827. Because of the importance of 1-800 Contacts' trademark keywords, 1-800 Contacts' weekly paid search reporting separately discussed trademark paid search performance. (CX0732 -004; *see infra* ¶¶ 829-830, 833-839, 845, 848-865).
828. When reporting search advertising performance, 1-800 Contacts' specifically identified competitor activity in the form of competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks as a factor affecting results on 1-800 Contacts' trademark keywords. (Craven, Tr. 530 ("we looked at competitor activity as a possible contributor"); *see infra* ¶¶ 829-830, 833-839, 845, 848-865).
829. In his instructions for preparing weekly paid search reports, Bryce Craven, 1-800 Contacts' paid search manager, identified "more competitors showing up on searches for our best TM words" as the first factor to consider as an explanation for paid search performance. (CX0732 at 004; Craven, Tr. 515 (Mr. Craven testified that CX0732 was "something that I prepared to help my team when I left 1-800 Contacts . . . it was to help my team take over my responsibilities.")).
830. 1-800 Contacts believed that fewer competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks "always helps improve performance" of 1-800 Contacts' paid search. (CX0855).
831. 1-800 Contacts' concern about the impact of online competitor ads on queries for 1-800 Contacts' trademarks was evident as early as 2003, at which point 1-800 Contacts began complaining to Google about its competitors' advertising. (*See infra* §VI.A.4).
832. In 2004, 1-800 Contacts spoke with Google about preventing competitors from bidding on its branded queries, after a 1-800 executive referred to "controlling" bids on 1-800's trademark name as a "battle." (CX1397 at 001-002).
833. In the week ending July 28, 2007, 1-800 Contacts received fewer orders than the previous week on its most popular trademark keyword, 1800contacts, which it attributed to "probably been loosing [sic] some traffic to Lens.com, LensWorld, VisionDirect and a few other advertisers" who were "consistently showing up on" the term 1800contacts. (CX0606 at -002; CX0606 ("Search Dashboard 073007.xls")).
834. On August 7, 2007 (less than one week before 1-800 Contacts sued Lens.com, *see below*), the 1-800 Contacts employee responsible for search advertising sent his supervisors an analysis of "how Lens.com has affected [1-800 Contacts'] business by advertising on [1-800 Contacts'] trademarks in Google." (CX0613 at 001). Among other things, he estimated that 1-800 Contacts may have lost around \$426,000 in revenue to Lens.com, year to date, as a result of Lens.com ads appearing in response to searches for 1-800 Contacts trademarks. (CX0613 at 001).
835. As of September 2007, Lens.com had grown to 5,000 order per week from 1,000 orders per week three years earlier because of its ability to display search advertising in response

- to searches for 1-800 Contacts' trademarks. (Coon, Tr. 2826-2827). 1-800 Contacts' founder and CEO personally raised this development in an email to his boss from the private equity firm that owned 1-800 Contacts at the time. (Coon, Tr. 2823-2824; CX0300).
836. During the week ending September 22, 2007, 1-800 Contacts attributed a 6% week over week drop in trademark paid search orders to competition from Vision Direct, which had been "advertising in the 2nd position on many of [1-800 Contacts'] branded terms in Google." (CX0616 at 001).
837. During the week ending April 11, 2008, 1-800 Contacts experienced a 9% week over week decline in new customer orders through MSN, leading its search marketing manager to "step up . . . monitoring in this engine" going forward because the decline "could be a sign of increased affiliate and/or competitive trademark activity in MSN." (CX0931 at 001).
838. During the week of June 20, 2008, 1-800 Contacts experienced a "bump" in trademark orders, which helped improve "weekly NI performance" (referring to new internet customers). (CX0558 at 001). Trademark orders for that week were "helped somewhat by LensWorld finally removing all their ads from all of [1-800 Contacts'] trademark keywords." (CX0558 at 001).
839. During the week ending September 12, 2008, 1-800 Contacts attributed improved performance to the absence of advertisements from Lens.com and JustLenses ads on 1-800 Contacts' trademarks. (CX0231 at 001 ("We may be seeing some benefit from the absence of Lens.com and JustLenses ads on our best marks.," discussing "improved NI order volume . . . largely due to a jump in each engine from trademark searches and orders.")).
840. On October 17, 2008, an analysis of "Competitor on TM Cost Estimates" sent to Allen Hwang, 1-800 Contacts' Chief Marketing Officer, showed 1-800 Contacts was losing \$68,604 in revenue per month due to competitor ads showing up on searches for 1-800 Contacts' trademark keywords. (CX0211; CX0213 at NATIVE_1-800F_00024851.xls).
841. 1-800 Contacts' founder and CEO personally had business concerns with competitor advertising appearing in response to searches for 1-800 Contacts' trademarks, because competitor advertising created "friction" that made it less "easy and quick" for 1-800 Contacts to convert consumers, which negatively impacted 1-800 Contacts' business. (Coon, Tr. 2726-2727, 2733, 2738). Mr. Coon attended a Board of Directors presentation in 2008 discussing the "growing and serious problem" of competitor trademark advertising. (Coon, Tr. 2730-2733; CX0621).
842. On October 30, 2008, 1-800 Contacts' board of directors held a meeting at which 1-800 Contacts' executives discussed how search advertising triggered by 1-800 Contacts' trademarks was restraining 1-800 Contacts' growth and allowing competitors to grow rapidly with limited marketing expenditures. (CX0621 at 118; Coon, Tr. 2753-2755). Lens.com, the fastest-growing online contact lens seller at the time, was using "trademark

- advertising on 1-800 Contacts as their primary marketing tool for growth.” (CX0621 at 118, 121). From 2004 to 2007, Lens.com’s sales “increased 475%, making them the third largest online seller.” (CX0621 at 121). Unlike Lens.com, as of 2008, Coastal had “ceased trademark advertising as a result of a settlement agreement with 1-800,” and its market share declined from 12% in 2005 to 6% in 2007. (CX0621 at 122; *see infra* § VI.B.2.a).
843. Vision Direct’s market share decreased from 31% in 2003 to 20.3% in 2007, after entering into a settlement agreement with 1-800 Contacts. (CX0621 at 120; *see infra* § VI.B.2.b).
844. In October 2008, 1-800 Contacts was concerned that the more money it spent on television advertising, the more its competitors were running search advertisements triggered by 1-800 Contacts’ trademarks and stealing its potential customers, a concern which was also presented to 1-800 Contacts’ board of directors. (Coon, Tr. 2763-2764, 2767; CX0621 at 123).
845. The week of March 6, 2009, was “a very strong week” for paid search for 1-800 Contacts, due in part to a “boost in TM orders” caused by a reduction in competitor ads appearing on searches for 1-800 Contacts’ trademarks. (CX0914 at 001). The conversion rate and order volume for orders coming through trademark paid search ads increased because there were “substantially less competitors showing up on [1-800 Contacts’] list of monitored TM words.” (CX0914 at 001; Craven, Tr. 529 (“I meant that when we did our trademark monitoring process, we saw fewer instances of competitor ads showing up”); Craven, Tr. 529-520 (“TM CR” meant conversion rate on 1-800 Contacts’ trademark keywords, and “TM order volume” meant the total order volume that came through 1-800 Contacts’ trademark keywords)). No other explanation that accounted for the improved trademark search performance for the week of March 6, 2009, was given. (Craven, Tr. 530-531).
846. In December 2009, competitors of 1-800 Contacts were taking “advantage of the extra ad space” on searches for phrases such as “1800contacts coupon code” in place of 1-800 Contacts’ own affiliates. CX0279 at 002; CX9016 (Judd, Dep. at 106 (“I don’t remember the exact terms that affiliates could bid on, but at one point they could bid on brand-plus coupon code terms, which I think is what this is talking about”); CX9016 (Judd, Dep. at 108 (“[T]hose were the terms that they’d monitor for affiliates. And like I said, I think at one point affiliates could bid on those terms, but I believe that changed over time.”)). 1-800 Contacts became concerned that potential customers would begin ordering from competitors, in particular because the competitor ads identified emphasized savings. (CX0279 at 001-002)).
847. In response to the concerns raised in December 2009 regarding competitor ads appearing on “trademark + coupon” searches such as “1800contacts coupon code,” 1-800 Contacts added the “top four TM+Coupon terms” to its weekly trademark monitoring report on January 8, 2010, and began to monitor those terms in addition to its other trademark keywords. (CX0279 at 001; *see infra* § VI.B.4).

848. During the week ending January 8, 2010, 1-800 Contacts achieved “an all-time record high” for orders through its trademark keywords, due in part to the fact that fewer advertisers were appearing on 1-800 Contacts’ monitored trademark terms that week. (CX0855 at 001). As 1-800 Contacts marketing manager Bryce Craven observed, having fewer organizations appear on searches for the trademark keywords “always helps improve performance.” (CX0855 at 001; Craven, Tr. 538-540).
849. During the week ending February 19, 2010, 1-800 Contacts experienced the “biggest weekly (+25%) and yearly (+21%) improvement in TM orders” on Bing so far that year, because “very few competitors and affiliates” were appearing on 1-800 Contacts’ trademark keywords on Bing, which was a “big contributor to the recent order improvement” for 1-800 Contacts’ trademark paid search on Bing. (CX0925 at 001).
850. During the week ending March 12, 2010, 1-800 Contacts’ trademark paid search orders fell and its click-through rate for trademark paid search “wasn’t as strong as the five weeks prior,” which 1-800 Contacts attributed to “additional competitor’s [sic] ads (VisionDirect, StandardOptical, ShipMyContacts) showing up on [1-800 Contacts’] best terms such as *1800contacts* and *1800 contacts*.” (CX0510 at 001) (italics in original)).
851. During the week ending April 30, 2010, 1-800 Contacts’ click-through rate for trademark keywords was “lower” compared to other weeks, due to “[a]n increase in competitor’s [sic] showing up on [1-800 Contacts’] branded terms.” (CX0924 at 001).
852. During the week ending June 11, 2010, 1-800 Contacts’ trademark paid search orders through Google, and click-through rates for trademark ads, “were slightly softer than [the preceding week] because of increased competition on [1-800 Contacts’] best branded terms.” At the time, searches on Google for 1-800 Contacts’ most profitable keyword, 1800-contacts, were yielding “ads for six other advertisers.” (CX0906 at 001).
853. During the week ending June 18, 2010, 1-800 Contacts’ orders through its’ trademark paid search ads improved significantly, which 1-800 Contacts concluded was due to “the removal of a few competitors who had been showing up on [1-800 Contacts’] best TM terms.” (CX0564 at 001). Among those competitors, “Walgreens was the most notable.” (CX0564 at 001). Walgreens “dropped off” of 1-800 Contacts’ trademark searches on June 15, 2010. (CX0564 at 001; *see infra* § VI.B.15).
854. During the week ending June 25, 2010, 1-800 Contacts experienced “another very solid week” for trademark paid search orders, and “the highest TM CTRs (27.2%)” that 1-800 Contacts’ had ever seen, which 1-800 Contacts attributed to, among other factors, “[t]he removal of ShipMyContacts from [1-800 Contacts’] trademarks . . . contributed to [1-800 Contacts’] excellent TM CTR.” (CX0927 at 001).
855. In late August 2010, orders from new customers coming through search ads on searches for 1-800 Contacts’ trademarks “jumped to the highest level of the year,” due in part to the appearance of “fewer competitors on [1-800 Contacts’] best TM words such as *1800contacts* *1800 contacts* and *1800 contacts*.” (CX0836 at -001 (emphasis in original)). The removal of ads by Standard Optical “from the paid listings . . . was likely

- a big help” to 1-800 Contacts’ paid search performance in late August 2010. (CX0836 at 001; Craven, Tr. 534-535 (“I was trying to . . . connect the dots to provide an explanation behind not having [Standard Optical’s] ad there could have potentially helped our—could have potentially helped our metrics for those keywords . . . We had our own search engine data, we have the trademark monitoring reports, so that was offering up one explanation behind why orders potentially look better.”)).
856. In May 2011, 1-800 Contacts believed it might be losing new internet customers to “aggressive competitor offers” by competitors in ads appearing on 1-800 Contacts’ trademarked searches. LensDirect and ShipMyContacts were specifically identified. (CX0044 at 010; CX0044 at 016 “[m]ore competitors on [its] TM ads YoY” using “[a]ggressive ‘price’ messaging,” and overall there was “[m]ore paid search TM activity” that caused a reduction in new internet orders compared to the same period in 2010.).
857. During the week ending August 5, 2011, 1-800 Contacts’ trademark paid search orders improved, as it “saw fewer instances of ShipMyContacts on [its] TM searches which may have helped . . . CTR” for trademark paid search. (CX0918 at 001).
858. In April 2012, Coastal, Vision Direct, and Walgreens were offering “aggressive discounts on top of lower prices,” compared to 1-800 Contacts’ prices. (CX0875 at 001; CX9015 (Galan, Dep. at 101) (“[A]ll of these companies [referring to Coastal, Vision Direct, and Walgreens] had a . . . base price per contact lens box, and then there were volume discounts, and then they would throw on top of that discounts for new customers . . . [T]heir base box price was lower than ours, and then they would throw aggressive new customer discounts on top of that base price.”)).
859. Around July 2012, Google was “releasing a lot of product-specific ad units and changing some of the layouts to include a product and a price, which did lead to more price transparency,” when 1-800 Contacts’ single box price was “higher than” the single-box price for 1-800 Contacts’ “competitors’ [equivalent] products.” (CX9015 (Galan, Dep. at 108, 110)).
860. Around July 2012, 1-800 Contacts was experiencing a “decrease” in click-through rates and conversion rates in paid search compared to the same period in 2011 that was in part due to “more competitive pressure and price transparency in the search engines.” (CX0410 at 001).
861. In August 2012, 1-800 Contacts faced many online competitors with “much lower” prices, leading search marketing executives to wonder, “I don’t know how we still get orders from your channel [paid search]. Look at all the prices that are much lower than ours.” (CX1086 at 003).
862. In August 2012, 1-800 Contacts was experiencing a drop in conversion rate for new customers coming through paid search that was “disproportionate to other channels,” specifically disproportionate to direct channels (such as visitors who type in the website address or have the website bookmarked in their browser) in which “customers aren’t

exposed to other websites' pricing before coming to [www.1800contacts.com] which likely makes them less sensitive to pricing." (CX1086 at 002).

863. In late October 2012, 1-800 Contacts found it "extremely difficult" to capture extra orders in the non-trademark paid search channel "because of the amount of transparency around price" in non-trademark paid search. (CX0646 at 002 (the prices of 1-800's competitors were "shown prominently on Google and [were] usually much lower than [1-800 Contacts']"); CX0874 at 003 ("Coastal, Vision Direct, and Walgreens are all offering aggressive discounts on top of lower prices which is making winning [New Internet] customers more difficult.")).

864. During the week ending July 4, 2015, [REDACTED] (CX0648 at 001, *in camera*), [REDACTED] (CX0648 at 001, *in camera*) [REDACTED]

865. 1-800 Contacts [REDACTED] (CX0648 at 001, *in camera*) [REDACTED]

3. Rivals' Advertising on 1-800 Branded Searches Increased 1-800's Advertising Costs

866. 1-800 Contacts' business records reflect a consistent concern over time that online competitors' advertising on 1-800 Contacts' trademark keywords increased 1-800 Contacts' advertising costs. 1-800 Contacts' business records also reflect a consistent acknowledgement over time that a reduction in competition for trademark keywords reduced the amount of money it paid to advertising platforms. (*See infra* ¶¶ 867-881).

867. During Jonathan Coon's tenure as CEO, 1-800 Contacts' competitors running search advertising triggered by 1-800 Contacts' trademark terms decreased 1-800 Contacts' return on advertising investment. (Coon, Tr. 2837). 1-800 Contacts fixed this problem by entering agreements with its competitors. (Coon, Tr. 2838).

868. During Jonathan Coon's tenure as CEO, 1-800 Contacts' competitors running search advertising triggered by 1-800 Contacts' trademark terms increased 1-800 Contacts' customer acquisition costs. (Coon, Tr. 2838). 1-800 Contacts fixed this problem by entering agreements with its competitors. (Coon, Tr. 2838).

869. 1-800 Contacts' agreements with competitors helped prevent an increase in 1-800 Contacts' customer acquisition cost. (Coon, Tr. 2838-2839).

870. During the week ending July 28, 2007, 1-800 Contacts' observed that its "[t]rademarked keyword costs jumped up 20% from" the previous week "because of higher CPCs on [its] TM terms." (CX0606 at 002; CX0606 ("Search Dashboard 073007.xls/1-800F_00028705)). 1-800 Contacts concluded that this increase in trademark keyword costs was "most likely caused by Lens.com, LensWorld, and other companies increasing the competition on our TM terms." (CX0606 at 002).
871. As of August 7, 2007, "additional competition from Lens.com" was causing 1-800 Contacts "to pay about \$2,000 more each week in trademarked keyword costs" (\$3,500, as compared to the \$1,500 a week 1-800 Contacts used to pay in the absence of competition from Lens.com). (CX0613 at 001).
872. During the week ending September 22, 2007, 1-800 Contacts experienced an 11% week over week increase in trademark paid search cost which it attributed to competition from Vision Direct, who had "been advertising in the 2nd position on many of [1-800 Contacts'] branded terms in Google and pushing up [1-800 Contacts'] TM cpcs." (CX0616 at 001; CX0616 at CX0616_NATIVE_1-800F_00028655.xls).
873. During the week ending April 11, 2008, 1-800 Contacts' customer acquisition cost for new customers arriving through MSN paid search ads increased by 6%, which 1-800 Contacts' search marketing manager concluded that "could be a sign of increased affiliate and/or competitive trademark activity in MSN." (CX0931 at 001).
874. In July 2008, 1-800 Contacts experienced a "jump" in the cost per click of its trademark terms of 18% compared to the previous week, because "[t]here were more advertisers on [its] marks . . . which increased competition and CPCs for [its] top terms." (CX0915 at 001).
875. In May and June 2010, costs for 1-800 Contacts' trademark keywords shot up because of "rising CPCs in Google for [its] most popular" trademark keyword, 1800-contacts. (CX0907 at 001) (On June 7, 2010, Bryce Craven wrote: "We've seen TM costs shoot up in the past few weeks.")). 1-800 Contacts believed the increase in CPCs could have been caused by added competition from Walgreens.com. (CX0907 at 001).
876. During the week ending April 8, 2011, 1-800 Contacts' cost per click and cost per order for its trademark keywords "increased . . . by 20%" due to "increased competitive activity on those types of keywords." (CX0923 at 001).
877. During the week ending July 1, 2011, fewer paid search ads by 1-800 Contacts' competitors were shown in response to the trademark keywords 1-800 Contacts monitored. (Craven, Tr. 559-561; CX0658 at 001).
878. During the week ending July 1, 2011, 1-800 Contacts was able to drop its spend for trademark keywords because there were "fewer competitors showing on [its] TM terms." (CX0658 at 001; Craven, Tr. 561). No other explanation accounting for the decline in spending on trademark keywords by 1-800 Contacts during the week ending July 1, 2011, was given. (Craven, Tr. 561).

879. In July 2011, competition for 1-800 Contacts' trademark keywords was "lighter than recent history," which was "likely a contributing factor" in 1-800 Contacts' achieving a lower trademark CPO during the week ending July 8, 2011. (CX0657 at 001).
880. During the week ending October 28, 2011, 1-800 Contacts' spending on its trademark keywords "jumped up by 7%," the highest level of spend on trademark keywords during the quarter so far, because, as Mr. Craven explained to his colleagues: "We're seeing more advertisers on our best TM keywords (1800contacts, 1800 contacts, 1800-contacts) recently, which is pushing up our CPCs and cost for these terms." (CX0916 at 001; Craven, Tr. 558-559); *see also* CX0916 at 001 (1-800 Contacts also experienced "softer conversion rates" on its trademark keywords, which "led to a weekly 3% drop in TM orders.").
881. In an email dated May 14, 2014 Natalia Bohm of Google wrote to 1-800 Contacts to address an issue concerning a rise CPC's, and expressed that "1800contacts coupon" and "1800contacts coupon code" were causing a dramatic increase in CPC's, and stated that "increased auction intensity due to a new competitor" entering the auction starting in April, 2014 which had a high impression share and overlap rate and "is the biggest change to the competitive landscape around the period where the CPC's started rising." CX1120. Two weeks after 1-800 Contacts received the information from Natalia Bohm of Google, 1-800 Contacts sent letters to Contact Lens King, Coastal Contacts, AC Lens, Lensfast demanding that new keywords be added to the Bidding Agreements. (CX0800 (Letter from Mark Miller to Contact Lens King dated May 20, 2014); CX0323 (Settlement agreement by and between 1-800 Contacts and Contact Lens King dated March 29, 2014 at 10); CX0703 at 1; CX0310 (Settlement Agreement between 1-800 Contacts, Inc., and Coastal Contacts, Inc. dated October 29, 2004); (CX0006; CX0317 (Settlement Agreement between 1-800 Contacts and Arlington Contact Lens Services, Inc. dated March 10, 2010 at 8); (CX0453; CX0315 (Settlement Agreement between 1-800 Contacts and Lensfast, Inc. dated December 9, 2009 at 9)).

4. 1-800 Contacts Complained to Google in an Effort to Stop its Rivals From Displaying Trademark Search Advertising

882. In approximately late 2003 and early 2004, 1-800 Contacts expressed concern to Google about competitors using 1-800 Contacts' trademarks as search advertising keywords in a series of emails and conversations. 1-800 Contacts asked Google to prevent any other advertiser from using 1-800 Contacts' trademarks as search advertising keywords, pursuant to Google's then-existing trademark policy. (*See supra*, §VI.A.). Google ultimately did not do so, and on April 9, 2004, Google told 1-800 Contacts that it had adopted a new trademark policy under which it would not prevent use of trademarks as keywords. (*See* ¶¶ 887-888).
883. On January 28, 2004, Josh Aston, the 1-800 Contacts employee in charge of paid search advertising at that time, emailed his contact at Google asking whether anything could be done to stop competitors from using 1-800 Contacts' trademarks as search advertising keywords. Mr. Aston explained that 1-800 Contacts was spending "millions of dollars in advertising on television, internet, radio" and that competitors were "spending a few

dollars per click and in exchange . . . receiving the benefits of millions of dollars we devote to branding. People see our commercials, search on ‘1800contacts’ on the web, and see Coastal contacts.” (CX1396 at 001-002).

884. The issue Mr. Aston raised with Google was that searches on “1800contacts” were resulting in the appearance of competitors such as Coastal Contacts and Vision Direct in the paid listings on Google. (CX9013 (Aston, Dep. at 20)).

885. The January 28, 2004 email to Google was not the first time Mr. Aston had complained that competitors were appearing in response to searches for 1-800 Contacts’ trademarks. (CX9013 (Aston, Dep. at 150) (“[A]s evidenced by the fact I said it keeps popping up, it had been a conversation for some amount of time, I’m not exactly sure when that started.”)).

886. On February 13, 2004, Mr. McCallum spoke with Mr. Daugherty from Google, and sent a completed trademark complaint letter by fax that same day. (RX0104 at 001).

887. Google never implemented 1-800 Contacts’ request, made in the February 13, 2004 trademark complaint letter, that Google prevent all other advertisers from using 1-800 Contacts’ trademarks as keywords. (CX0789 at 001; CX9013 (Aston, Dep. at 166-67)). On April 9, 2004, Mr. Daugherty emailed Mr. McCallum explaining that Google had adopted a new trademark policy, and attached a copy of that policy. (CX0789 at 001).

888. Pursuant to the trademark policy adopted by Google in April 2004, Google would only investigate whether advertisements used a “trademarked term in **ad text**.” (CX0789 at 002 (emphasis in original); CX9022 (Charlston, Dep. at 20)).

889. In response to the April 9, 2004 email from Mr. Daugherty, Clint Schmidt invited Mr. Daugherty and his boss, Tim Moynihan, to visit him at 1-800 Contacts’ headquarters, to discuss Google’s new policy. (C. Schmidt, Tr. 2900-2901).

890. The statements made by the Google representatives at the 2004 meeting at 1-800 Contacts’ headquarters did not have an impact on Mr. Schmidt’s thinking, beyond confirming information he already knew regarding negative keywords. (C. Schmidt, Tr. 2905-2906; *see supra* § IV.A.5.b). Specifically, Mr. Schmidt testified that the Google representatives’ statements confirmed his belief at the time that negative keywords were a tool that could be used to “effectively address . . . a trademark dispute.” 1-800 Contacts “had been using negative keywords far before” the meeting with Google following the April 2004 trademark policy change. (C. Schmidt, Tr. 2906).

B. By Suing or Threatening to Sue Rivals, 1-800 Extracted Agreements that Prevent Rivals From Presenting Search Advertisements in Response to 1-800 Branded Searches

1. 1-800 Contacts Entered Bidding Agreements with at Least Fourteen Rivals

891. In 2004, 1-800 Contacts began threatening its major online competitors regarding their advertising on Google and other search engines. That year, it secured written agreements

(“Bidding Agreements”) with its two primary online competitors: Vision Direct and Coastal Contacts. (*See infra* § VI.B.2).

892. 1-800 Contacts also corresponded with at least four other competitors in 2005 and reached unwritten agreements barring competitive trademark bidding with each. (*Infra* § VI.B.3).
893. Later, 1-800 Contacts implemented a formal process within the marketing department for monitoring search results pages for competitors, and referring the information to legal counsel. 1-800 Contacts’ marketing employees also directly contacted competitors with whom 1-800 Contacts had agreements to enforce the terms of those agreements. (*Infra* § VI.B.4).
894. Writing to a 1-800 Contacts investor in 2007, 1-800 Contacts’ CEO called his company’s efforts in “going after people” who advertised on 1-800 Contacts’ trademarks “a worthwhile investment.” (CX0068 at 001 (April 12, 2007 email from Jonathan Coon (former 1-800) to Mario Cibelli re “Google, Utah on collision course over Web ‘keywords’”); CX9035 (Coon, Dep. at 288-89)). 1-800 Contacts did not like “having competitors hijack and steal [its] customers before they get to checkout.” (CX0068 at 001).
895. By 2014, 1-800 Contacts had secured fourteen written agreements barring rivals from advertising on 1-800 Contacts’ trademarks, and vice versa. (*Infra* § VI.B.2-17).
896. Although the precise language of the agreements varies slightly, each imposes the same functional restrictions. (*Infra* § VI.B.2-17).
897. Each agreement forbids the counterparty from using 1-800 Contacts’ brand name, URLs, and variations, as search advertising keywords. (*Infra* § VI.B.2-17).
898. Each agreement requires the counterparty to take further steps to prevent search ads from appearing any time a search query includes 1-800 Contacts’ brand name, URLs, or variations. (*Infra* § VI.B.2-17).
899. All fourteen of the written agreements impose identical restrictions on 1-800 Contacts, regarding the counterparty’s brand name, URLs, and variations. (*Infra* § VI.B.2-17).

2. In 2004, 1-800 Contacts Entered into Written Bidding Agreements with its Primary Online Competitors

a. Coastal

900. 1-800 Contacts filed a complaint in federal court against Coastal on March 18, 2004, alleging trademark infringement, among other causes of action. (CX1615). The complaint alleged that Coastal had caused pop-up advertisements for Coastal to appear when internet users visited the www.1800contacts.com website. (CX1615 at 007-008).

901. 1-800 Contacts and Coastal reached a settlement agreement effective October 29, 2004. (CX0310).
902. Pursuant to the Coastal agreement, 1-800 Contacts and Coastal agreed to refrain from and not to cause in the future certain “Prohibited Acts,” which include, among other things, “causing a Party’s website or Internet advertisement to appear in response to any Internet search for the other Party’s brand name, trademarks or URLs.” (CX0310 at 002-003).
903. The Coastal agreement Prohibited Acts include, among other things, “causing a Party’s brand name, or link to that Party’s websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party’s brand name, trademarks, or URLs.” (CX0310 at 003).
904. The Coastal agreement provides that it the terms of the agreement should be construed by the parties “to include all future Internet advertising techniques and advertisement delivery technologies that are substantially similar to the Prohibited Acts as a result of their use of trademarks, brand names, or URLs. (CX0310 at 004).
905. The Coastal agreement never expires. (CX0310).
906. Both 1-800 Contacts and Coastal enforced the terms of the agreement against each other. (*See infra* § VI.C.2). In particular, 1-800 Contacts and Coastal enforced the agreement by asking for, and agreeing to, the use of negative keywords to prevent the appearance of ads due to broad matching. (*See infra* § VI.C.2).
- b. Vision Direct
907. 1-800 Contacts filed a complaint in federal court against Vision Direct and WhenU.com, Inc., on October 9, 2002, alleging trademark infringement, among other causes of action. (CX1614). The complaint alleged in part that Vision Direct had caused pop-up advertisements for Vision Direct to appear when internet users visited the www.1800contacts.com website. (CX1614 at 011-012). The complaint did not contain any allegations regarding the use of 1-800 Contacts’ trademarks as keywords to trigger search engine advertisements. (CX1614).
908. By April 2004, attorneys representing Vision Direct and 1-800 Contacts were exchanging draft settlement agreements. (*See* CX0058 at 004).
909. 1-800 Contacts informed Drugstore.com (VisionDirect’s corporate parent at the time) that it was “interested in global peace, not partial. Thus, an agreement that has a limitation on either pop-ups only or only 5 years holds no interest for us.” (CX0058 at 003).
910. 1-800 Contacts’ interest in settling with Vision Direct was to prevent Vision Direct from using 1-800 Contacts in any manner, regardless of whether the use was likely to confuse. Mr. Zeidner wrote to Ms. Pinney on May 20, 2004, transmitting a revised draft settlement agreement. He explained that he “added some substantive items you and I discussed—

- mainly the prohibition to use each other's trademarks or IP in any manner." (CX0058 at 002).
911. 1-800 Contacts and Vision Direct entered into a settlement agreement effective June 24, 2004. (CX0311) ("2004 Vision Direct Agreement"). The agreement was signed on June 24, 2004, by Joe Zeidner on behalf of 1-800 Contacts, and Alesia Pinney, on behalf of Vision Direct. (CX0311 at 008).
 912. Pursuant to the settlement agreement, Vision Direct agreed to pay 1-800 Contacts one dollar in consideration. (CX0311 at 002). That demand came directly from 1-800 Contacts' CEO, Jonathan Coon, who testified that he "would ask the people bring [sic] a check for a dollar and then the terms of the settlement . . . would allow us to say that we settled for an undisclosed amount." (CX9004 (Coon, IHT at 294); CX0058 at 001 (Joe Zeidner wrote to Alesia Pinney during negotiation of the agreement asking her to "please send the check for one dollar," noting that it was "actually very important to Jonathan [Coon]"). Coon elaborated that they wouldn't want future settlement parties to know that "somebody else paid nothing." (CX9004 (Coon, IHT at 295)).
 913. Pursuant to the 2004 Vision Direct Agreement, 1-800 Contacts and Coastal agreed to refrain from and not to cause in the future certain "Prohibited Acts." (CX0311 at 003).
 914. The 2004 Vision Direct Agreement Prohibited Acts include, among other things, "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs." (CX0310 at 003).
 915. The 2004 Vision Direct Agreement Prohibited Acts include, among other things, "causing a Party's brand name, or link to that Party's websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs." (CX0310 at 003).
 916. The 2004 Vision Direct Agreement prohibited certain advertising regardless of whether Vision Direct used "a trademark to achieve" the result prohibited the by agreement. (CX0135 at 002 ("there is no requirement" in the 2004 Vision Direct Agreement "that drugstore.com . . . specifically use a trademark to achieve the prohibited result.")).
 917. The 2004 Vision Direct agreement provides that the terms of the agreement should be construed by the parties "to include as Prohibited Acts all future Internet advertising techniques and advertisement delivery technologies that are substantially similar to the Prohibited Acts." (CX0310 at 005).
 918. The 2004 Vision Direct agreement never expires. (CX0310; CX0314 at 004 (a subsequent settlement agreement entered into by 1-800 Contacts and Vision Direct in 2009 provided that the June 24, 2004 settlement agreement "shall remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords shall be to comply with the terms of" the 2009 agreement)).
 919. The agreement between 1-800 Contacts and Vision Direct successfully achieved 1-800 Contacts' goals, which included permanently stopping Vision Direct from displaying ads

in response to searches that contained 1-800 Contacts' trademark terms. (Coon, Tr. 2777-2778).

920. 1-800 Contacts' former CEO and founder believes that it was necessary for 1-800 Contacts to prevent Vision Direct from displaying its ads in response to queries that contained both a 1-800 Contacts trademark and generic terms, even though some search queries containing both a 1-800 Contacts trademark and generic terms would not cause any confusion. (Coon, Tr. 2809).

3. In 2005, 1-800 Contacts Secured Further Protection from Online Competition Through Unwritten Agreements with Four Contact Lens Retailers

a. AC Lens

921. 1-800 Contacts sent a cease and desist letter dated June 28, 2005, to AC Lens, stating that advertisements for www.discountcontactlenses.com were "triggered upon a search for '1800 CONTACTS' and 'LENS EXPRESS,'" which 1-800 Contacts claimed was trademark infringement. (RX0051 at 001). 1-800 Contacts demanded that AC Lens cease "all infringing activities" and "remove ALL sponsored advertisements" on any search engine that were triggered by 1-800 Contacts' trademarks. (RX0051 at 0002 (emphasis in original)). 1-800 Contacts stated that it would take further legal action if it did not receive a satisfactory response from AC Lens within seven days. (RX0051 at 0002).
922. 1-800 Contacts also sent a cease and desist letter to AC Lens regarding advertisements for www.aclens.com, containing nearly identical allegations and demands as those contained in the June 28, 2005 letter. (Clarkson, Tr. 235 (referring to the June 28, 2005 cease and desist letter marked RX0051: "I think there were two, and one of them went to Phil and one went to me. I think they sent one to AC Lens and one to Discount Contact Lenses."))).
923. In early July 2005, Peter Clarkson responded in writing to 1-800 Contacts' letters of June 28, 2005. (RX0052 at 0002; CX9039 (Clarkson, Dep. at 80-81)).
924. Mr. Clarkson explained that AC Lens had "no advertisements that trigger for searches for '800contacts', '1800contacts' or Lens Express'." (CX1759 at 002). He further explained that AC Lens did use generic terms including "contacts" and "lens," which may have caused AC Lens ads to appear "in relation to searches that included the generic term" like "lens express." (RX0052 at 0002). Mr. Clarkson wrote that AC Lens added "'negative terms' for the words 'express' and/or '800' which should result in no generic search results of ours appearing in response to searches for your trademarked terms." (RX0052 at 0002; CX9039 (Clarkson, Dep. at 81)).
925. Since receiving the June 2005 cease and desist letters from 1-800 Contacts, AC Lens has adopted a policy of implementing negative keywords to prevent its ads from appearing in response to searches for 1-800 Contacts, and to avoid further cease and desist letters from 1-800 Contacts. (Clarkson, Tr. 239; CX1759 at 001; CX9039 at 023 (Clarkson, Dep. at 85); RX0053 at 0001).

926. Between July 2005 and February 2010, AC Lens and 1-800 Contacts confirmed their understanding that AC Lens would not purchase 1-800 Contacts' trademarks as search advertising keywords and would implement appropriate negative keywords to prevent its ads from appearing in response to searches for 1-800 Contacts. (Clarkson, Tr. 241-242). During that time period, 1-800 Contacts contacted AC Lens multiple times concerning AC Lens ads that appeared in response to online searches for 1-800 Contacts' trademarks. (Clarkson, Tr. 241). Each time, AC Lens agreed to do what 1-800 asked it to do. (Clarkson, Tr. 242). By February 2010, AC Lens understood that it was obligated to prevent its advertisements from appearing in response to 1-800 Contacts searches. (Clarkson, Tr. 242; CX1759 at 002; RX0053 at 0001).
927. In September 2006, Bryan Pratt, an attorney for 1-800 Contacts, complained to AC Lens that ads for DiscountContactLenses were infringing upon 1-800 Contacts' trademarks on Google Adwords. (RX0023 at 0001). Mr. Pratt threatened further legal action against AC Lens if it did not remove the advertising within seven days. (RX0024 at 0001).
928. On September 26, 2006, Robert Drumm, the affiliate program manager for AC Lens, emailed an affiliate, instructing it to "remove all bidding on paid search engines for the terms 1800contacts.com" and "other variations" of 1-800 Contacts' trademarks," explaining that AC Lens had "just been notified by 1800Contacts.com that [the affiliate] used our name to violate their trademark rights on Google Adwords [sic] and other paid search engines." (RX0024 at 0001; CX9018 (Drumm, Dep. at 82-83)). The requests made of the affiliate were satisfied. (CX9018 (Drumm, Dep. at 82-83)).
929. Mr. Drumm notified Mr. Pratt that he had "notified the offending affiliate in writing to remove all advertisements" using 1-800 Contacts' trademarks and variations. (RX0023 at 002; CX9018 (Drumm, Dep. at 78-82)).

b. Lens Discounters

930. On June 28, 2005, Roy Montclair, in-house counsel for 1-800 Contacts, sent a letter to Lens Discounters, claiming that Lens Discounters was infringing upon 1-800 Contacts' trademarks by purchasing sponsored advertisements for a 1-800 Contacts trademark to trigger a link to www.LensDiscounters.com. (CX1237 at 001; CX8003 at 002-003 (¶ 11) (Mitha, Decl.)). 1-800 Contacts demanded that Lens Discounters cease "all infringing activities" and remove ads on any search engine that were triggered by 1-800 Contacts' trademarks. (CX1237 at -002; CX8003 at 002-003 (¶ 11) (Mitha, Decl.)). 1-800 Contacts threatened to take further legal action if it did not receive a satisfactory response from Lens Discounters within seven days. (CX1237 at 002; CX8003 at 002-003 (¶ 11) (Mitha, Decl.)).
931. Lens Discounters responded to Mr. Montclair's June 28, 2005 letter by letter dated July 11, 2005, in which it expressed a willingness to immediately remove ads triggered by 1-800 Contacts' trademarks. (CX1238 at 001).
932. On September 6, 2005, David Zeidner, in-house counsel for 1-800 Contacts, responded to Lens Discounters' July 11, 2005 letter. (CX1238 at 001). Mr. Zeidner stated that there

- were still three advertisements that had been purchased for the term “1800 CONTACTS,” which triggered a link to www.LensDiscounters.com.” (CX1238 at 001). Mr. Zeidner attached screenshots showing the LensDiscounter ads to his September 6, 2005 letter. (CX1238 at 001, 003, 005). Mr. Zeidner asked Lens Discounters to confirm that it had removed all ads purchased through Google, Yahoo, and any other search engine, triggered by 1-800 Contacts’ trademarks. (CX1238 at 001).
933. Mr. Zeidner’s September 6, 2005 letter enclosed a list of twenty “Forbidden Keywords/Terms” on which Lens Discounters was told to stop bidding. (CX1238 at 002; CX8003 at 003 (¶ 13) (Mitha, Decl.)). Mr. Zeidner asked Lens Discounters to confirm that it had removed all ads purchased on any search engine triggered by 1-800 Contacts’ trademarks. (CX1238 at 001).
934. In response to Mr. Zeidner’s September 6, 2005 letter, Lens Discounters stopped bidding on the twenty “Forbidden Keywords/Terms” in all of its search advertising campaigns. (CX8003 at 003 (¶ 14) (Mitha, Decl.)).
935. In response to Mr. Zeidner’s September 6, 2005 letter, Lens Discounters implemented the “Forbidden Keywords/Terms” as negative keywords in all of its search advertising campaigns. Lens Discounters implemented the terms as “phrase match” negative keywords. Prior to September 2005, Lens Discounters had not used any of the “Forbidden Keywords/Terms” as negative keywords. (CX8003 at 003 (¶ 14) (Mitha, Decl.); *see supra* § IV.A.5.b).
936. On September 20, 2005, Bryan Pratt, an attorney for 1-800 Contacts, sent a cease and desist letter to Lens Discounters. (CX1235 at 001; CX8003 at 003 (¶ 15) (Mitha, Decl.)). The letter alleged that Lens Discounters had infringed upon 1-800 Contacts’ trademarks by purchasing sponsored advertisements “for at least one of the 1800 CONTACT or 1800CONTACTS trademarks, or a confusingly similar variation thereof, to trigger a link to . . . www.lensdiscounters.com.” (CX1235 at 001). 1-800 Contacts requested that Lens Discounters “immediately remove **ALL** sponsored advertisements” triggered by “the 1800 CONTACTS trademark or a confusingly similar variation thereof.” (CX1235 at 002 (emphasis in original); CX8003 at 003 (¶ 15) (Mitha, Decl.)).
937. On September 23, 2005, Lens Discounters responded to the September 20, 2005 letter, stating that Lens Discounters would comply with 1-800 Contacts’ request “to remove any sponsored search engine advertisements that may be triggered by the 1800 CONTACTS trademark or any confusingly similar variations thereof.” (CX1230; CX8003 at 003 (¶ 16) (Mitha, Decl.)). Lens Discounters explained that “[i]t was not our intention or policy to mislead your client’s traffic to our site, but to offer them an alternative in the interest of fair competition.” (CX1230).
938. From approximately September 2005 through December 2016, Lens Discounters did not bid on any of the keywords identified by 1-800 Contacts in the September 6, 2005 letter. (CX8003 at 003 (¶ 17) (Mitha, Decl.)).

939. From approximately September 2005 through December 2016, Lens Discounters maintained the terms identified by 1-800 Contacts in the September 6, 2005 letter, as negative keywords. (CX8003 at 003 (¶ 17) (Mitha, Decl.)).
940. On May 12, 2009, Mr. Pratt, on behalf of 1-800 Contacts, sent an additional cease and desist letter to Lens Discounters that was nearly identical to his September 20, 2005 letter. (CX1229; CX8003 at 003, 004 (¶ 18) (Mitha, Decl.); CX1235). The letter again accused Lens Discounters of infringing upon 1-800 Contacts' trademarks by purchasing sponsored advertisements on a 1-800 Contacts trademark "or a confusingly similar variation thereof," to trigger a link to www.Lensdiscounters.com." (CX1229 at 001). 1-800 Contacts requested that Lens Discounters "immediately remove ALL sponsored advertisements" that were triggered by a 1-800 Contacts trademark or a confusingly similar variation thereof. (CX1229 at 002 (emphasis in original); CX8003 at 003-004 (¶ 18) (Mitha, Decl.)).
941. 1-800 Contacts "demanded" that Lens Discounters incorporate a list of nine negative keywords attached to the May 12, 2009 letter. (CX1229 at 002, 003; CX8003 at 004 (¶ 18) (Mitha, Decl.)).
942. Lens Discounters added the terms listed in Mr. Pratt's May 12, 2009 letter as "phrase-match" negative keywords in all of its search advertising campaigns. (CX8003 at 004 (¶ 19) (Mitha, Decl.)). Lens Discounters maintained those terms as negative keywords until December 2016. (CX8003 at 004 (¶ 19) (Mitha, Decl.)).
943. On June 4, 2009, Arshil Abdulla, CEO of Lens Discounters, replied to Mr. Pratt's May 12, 2005 letter, stating that Lens Discounters had not purchased any of the keywords listed in the May 12, 2009 letter, and that Lens Discounters would comply with 1-800 Contacts' request to remove the sponsored advertisements appearing in response to a user query for a 1-800 Contacts' trademark term or variation thereof. (CX1186 at 001; CX8003 at 004 (¶ 20) (Mitha, Decl.)). Lens Discounters confirmed that it had added the negative keywords listed in the May 12, 2009 letter. (CX1186 at 001).
944. On November 9, 2009, Mark Miller, an attorney for 1-800 Contacts, sent a cease and desist letter to Lens Discounters. (CX1232; CX8003 at 004 (¶ 21) (Mitha, Decl.)). Mr. Miller, on behalf of 1-800 Contacts, accusing Lens Discounters of infringing upon 1-800 Contacts' trademarks by purchasing sponsored advertisements "for at least one of the 1800 CONTACTS marks, or a confusingly similar variation thereof," to trigger a link to www.Opticontacts.com and Lensdiscounters.com. (CX1232 at 001). 1-800 Contacts demanded that Lens Discounters "remove ALL sponsored advertisements" triggered by a 1-800 Contacts' trademark "or a confusingly similar variation thereof" (CX1232 at 002).
945. On November 12, 2009, Mr. Abdulla, on behalf of Lens Discounters, responded to Mr. Miller's November 9, 2009 letter. (CX1233; CX8003 at 004 (¶ 23) (Mitha, Decl.)). Mr. Abdulla stated that Lens Discounters was not using 1-800 Contacts' trademarks as keywords. (CX1233 at 001; CX8003 at 004 (¶ 23) (Mitha, Decl.)). Lens Discounters agreed to add 1-800 Contacts' trademarks and "any reasonable confusing variations thereof" as negative keywords in Lens Discounters' ad campaigns. (CX1233 at 001).

946. On December 29, 2009, Mr. Miller, on behalf of 1-800 Contacts, responded to Mr. Abdulla's November 12, 2009 letter, alleging that Lens Discounters continued to purchase at least fifteen "infringing keywords" containing a 1-800 Contacts trademark term. (CX1234 at 001, 002; CX8003 at 004-005 (¶ 24) (Mitha, Decl.)). Mr. Miller demanded that Lens Discounters cease and desist from purchasing as keywords the 1-800 Contacts trademark terms and phrases listed in his letter and all other keywords "confusingly similarly to the 1-800 Contacts, Inc. trademarks." (CX1234 at 002; CX8003 at 004-005 (¶ 24)). Mr. Miller also demanded that Lens Discounters implement as negative keywords the fifteen terms and phrases identified in his letter, along with thirty additional terms and phrases relating to 1-800 Contacts, its trademarks, and websites. (CX1234 at 002-003).
947. Lens Discounters implemented the terms identified in the December 29, 2009 letter as phrase-match negative keywords. (CX8003 at 005 (¶ 25) (Mitha, Decl.); CX1234 at 001-003 (the list of terms)).
948. On December 30, 2009, Mr. Abdulla responded to Mr. Miller's December 29, 2009 letter, again stating that Lens Discounters "do[es] not purchase any keywords relating to 1-800 Contacts trademarks or any similar variations thereof." (CX1239 at 001). Mr. Abdulla also stated that Lens Discounters had already added negative keywords that had been previously identified by 1-800 Contacts and had added "all the additional negative keywords" mentioned in Mr. Miller's December 29, 2009 letter. (CX1239 at 001).
949. As of December 30, 2009, Lens Discounters was using nine Ad group-level exact-match and phrase-match negative keywords in its Google AdWords campaign. (CX1239 at 002; CX8003 at 005 (¶ 26) (Mitha, Decl.)).
950. As of December 30, 2009, Lens Discounters was using 43 campaign-level phrase-match negative keywords in its Google AdWords campaign. (CX1239 at 002-003; CX8003 at 005 (¶ 26) (Mitha, Decl.)).
951. On February 17, 2010, Mr. Miller, an attorney for 1-800 Contacts, sent a letter to Lens Discounters, stating that Lens Discounters' ads were being triggered by the search term "1800contacs." (CX1236 at 001; CX8003 at 005 (¶ 27) (Mitha, Decl.)). 1-800 Contacts requested that Mr. Abdulla add the term "1800contacs" to its negative keyword list. (CX1236 at 002; CX8003 at 005 (¶ 27) (Mitha, Decl.)).
952. In response to Mr. Miller's letter dated February 17, 2010, Lens Discounters implemented the term "1800contacs" as a phrase match negative keyword. (CX8003 at 005 (¶ 28) (Mitha, Decl.)). Lens Discounters maintained the additional term as a negative keyword until December 2016.
953. On February 18, 2010, Mr. Abdulla responded to Mr. Miller's February 17, 2010 letter, confirming that Lens Discounters had added the term "1800contacs" to its list of negative keywords. (CX1227 at 001). As of February 18, 2010, Lens Discounters had in place 45 negative keywords relating to 1-800 Contacts, its websites, and its trademarks. (CX1227 at 001; CX8003 at 005 (¶ 29) (Mitha, Decl.)). All of the negative keywords were

implemented as “phrase-match” negative keywords. (CX8003 at 005 (¶ 29) (Mitha, Decl.)).

c. Lens.com

954. On September 1, 2005, David Zeidner, in-house counsel at 1-800 Contacts, sent a cease and desist letter to Lens.com, alleging that Lens.com was infringing upon 1-800 Contacts’ trademark by purchasing sponsored advertisements “triggered by” a 1-800 Contacts trademark search term. (CX0462 at 001). 1-800 Contacts demanded that Lens.com “immediately remove ALL sponsored advertisements” on any search engine which were “triggered by” 1-800 Contacts trademark search terms. (CX0462 at 002 (emphasis in original)). The letter included copies of screen shots purporting to show “each of the infringing actions” by Lens.com. (CX0462 at 001, 003-006).
955. On September 20, 2005, Bryan Pratt, an attorney representing 1-800 Contacts, sent a cease and desist letter to Cary Samourkachian, owner and CEO of Lens.com. (CX1513). The letter alleged that Lens.com had “continually purchased sponsored advertisements at Google, and possibly other search engines” that were “triggered upon a search for ‘1800 Contacts.’” (CX1513 at 001). 1-800 Contacts demanded that Lens.com cease and desist “from further use of the mark 1800 CONTACTS, and confusingly similar variations thereof in the United States.” It further demanded that Lens.com “immediately remove ALL sponsored advertisements” on “Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark.” (CX1513 at 002 (emphasis in original)).
956. Mr. Pratt sent the letter of September 20, 2005 (CX1513), for the purpose of inducing Lens.com “to stop having their sponsored advertisements come up in response to searches for 1-800 Contacts’ registered trademarks.” (Pratt, Tr. 2500).
957. Mr. Pratt understood that as a result of his September 2005 letter (CX1513), Lens.com agreed that it “would do whatever they needed to” to prevent the appearance of advertisements from being displayed in response to searches for 1-800 Contacts’ trademarks. (Pratt, Tr. 2568).
958. On September 22, 2005, Mr. Pratt sent to counsel for Lens.com “a list of negative search terms that, when correctly implemented, prevent unintentional advertisements from displaying in response to keyword searches.” (Pratt, Tr. 2580 (discussing CX1184 at - 017)).
959. Mr. Pratt understood that, in 2005, “both parties agreed to implement negative terms to prevent sponsored advertisements from appearing” in response to searches for the other party’s trademark terms. (Pratt, Tr. 2578-2579).
960. The agreement reached between 1-800 Contacts and Lens.com in 2005 “explicitly contemplated that Lens.com would look into any future advertisements brought to its attention by 1-800 Contacts and take the steps necessary to prevent advertisements from appearing in response to searches for 1-800 Contacts. Depending upon the respond the investigation, such steps would either be implementation of negative keywords or

informing affiliates to alter its keyword purchases.” (CX1184 at 003 (Declaration of Bryan Pratt, *1-800 Contacts, Inc. v. Lens.com, Inc.*)).

961. On September 21, 2005, an attorney representing Lens.com emailed Mr. Pratt, stating that he had investigated the matter and determined that some of Lens.com’s “affiliates appear to be involved in the problems [Mr. Pratt] outlined.” (CX0591 at 004). The Lens.com attorney stated that he would advise the affiliate “to cease purchasing 1-800CONTACTS from Google.” (CX0591 at 004).
962. Shortly after the September 21, 2005 email from Lens.com’s attorney, Lens.com and 1-800 Contacts “agreed not to purchase sponsored advertisements using the other parties’ names.” (CX1182 (*1-800 Contacts v. Lens.com* Complaint) at 008 (¶ 26)).
963. On November 30, 2005, Mr. Pratt emailed Lens.com’s attorney, stating that Lens.com was “again showing up as a sponsored advertisement on Google and Yahoo triggered by the search terms 1-800contacts and 1-800contacts.com.” (CX0591 at 003). Mr. Pratt acknowledged “the prompt action” that Lens.com had taken in the past “in resolving these situations with your affiliates.” (CX0591 at 003).
964. In response to Mr. Pratt’s November 30, 2005 email, Lens.com removed the sponsored advertisement that had been appearing on Google in response to searches for “1800contacts.” (CX0591 at 003).
965. On December 7, 2005, Mr. Pratt emailed Lens.com’s attorney again, stating that “sponsored advertisements for Lens.com are still present on search.aol.com” and requesting “detail of the actions you plan to take to remedy the situation.” (CX0591 at 003).
966. According to 1-800 Contacts, Lens.com “appeared to comply with 1-800 Contacts’ request [of December 2005] and ceased” displaying advertisements. (CX1182 (*1-800 Contacts v. Lens.com* Complaint) at 008 (¶¶ 27-28)).
967. From 2005 until April 2007, Lens.com prevented Lens.com ads from appearing in response to searches for 1-800 Contacts pursuant to an agreement with 1-800 Contacts. (*See supra* ¶¶ 954-966; CX1673 (Samourkachian, *1-800 Contacts v. Lens.com* Dep. at 178-181); CX0591 at 002; CX1254 at 001 (1-800 Contacts’ outside counsel Bryan Pratt referred to Lens.com’s “past and continued cooperation” with 1-800 Contacts’ requests to prevent Lens.com ads from appearing on searches for 1-800 Contacts); (CX1182 (*1-800 Contacts v. Lens.com* Complaint) at 008 (¶¶ 26-31) (describing 2005 agreement, alleging that when 1-800 Contacts contacted Lens.com in April 2007 after observing search advertisements, “this time Lens.com took no action.”)).

d. Luxottica

968. On April 25, 2005, Karen Gaunt, an attorney representing LensCrafters, sent a cease and desist letter to 1-800 Contacts, alleging infringement of LensCrafter’s trademark. (CX0087). Ms. Gaunt stated that 1-800 Contacts had “purchased sponsored advertisements at Google and possibly at other search engines” that were “triggered upon

- a search for 'LensCrafters.'" (CX0087 at 001). Ms. Gaunt demanded that 1-800 Contacts "immediately remove any and all sponsored listings that you have purchased relating to the LENS-CRAFTERS trademark" within seven days. (CX0087 at 002).
969. On May 5, 2005, Kevin McCallum, then Chief Marketing Officer of 1-800 Contacts, spoke with Seth McLaughlin of Luxottica (LensCrafters' parent company), regarding the alleged trademark infringement by 1-800 Contacts. (CX0681 at 001-002). Aspects of the conversation were memorialized in emails exchanged between Mr. McCallum and Mr. McLaughlin on May 5, 2005 and May 6, 2005. (CX0681 at 001-002).
970. On May 5, 2005, Mr. McLaughlin wrote that he and Mr. McCallum agreed that some of 1-800 Contacts' affiliates were inappropriately using the LensCrafters trademark, and provided a list of such affiliates. (CX0681 at 002).
971. Mr. McCallum replied to Mr. McLaughlin on May 6, 2005, stating that 1-800 Contacts had not served ads on searches containing LensCrafters or "for any term containing the word 'craft' just incase [sic] there were searches for any variation of the LensCrafters trademark." (CX0681 at 001). Mr. McCallum also explained that none of the entities identified in Mr. McLaughlin's May 5, 2005 email were current affiliates of 1-800 Contacts, and that one of the identified entities was Vision Direct, 1-800 Contacts' "largest competitor." Mr. McCallum viewed it as "comical" to imply that 1-800 Contacts' "largest competitor would be redirecting traffic to [its] website for any reason." (CX0681 at 002).
972. In his May 6, 2005 email, Mr. McCallum suggested that LensCrafters provide screen shots "and the specific redirecting link's target URL" to "confirm what is happening and who the violator is." (CX0681 at 002). He agreed to "take immediate action to rectify it." (CX0681 at 002).
973. On May 6, 2005, David Zeidner, in-house counsel for 1-800 Contacts, replied to Ms. Gaunt's April 25, 2005 cease and desist letter. (CX0088). Mr. Zeidner asserted that 1-800 Contacts had done none of the things alleged in Ms. Gaunt's letter, as confirmed by the emails between Kevin McCallum and Seth McLaughlin. (CX0088 at 001). He wrote that, based on the emails between Mr. McCallum and Mr. McLaughlin, that he "deemed this matter closed." (CX0088 at 001).
974. On May 10, 2005, Clint Schmidt and Brandon Dansie of 1-800 Contacts spoke with Connie Ross of LensCrafters regarding search and trademark issues. (CX1378 at 001; CX0442 at 001).
975. Ms. Ross memorialized the May 10, 2005 call in an email to Mr. McLaughlin and Patricia Sharp. (CX0442).
976. On the May 10, 2005 call with Ms. Ross, Mr. Schmidt explained that 1-800 Contacts' ads appearing on Google and Overture on searches for LensCrafters were placed by affiliates and not by 1-800 Contacts itself, and that it was difficult to monitor affiliates. (CX0442 at 001).

977. On the May 10, 2005 call with Ms. Ross, Mr. Schmidt, and Mr. Dansie, 1-800 Contacts and Luxottica “agreed to a friendly policy of co-policing” trademark keyword advertising by affiliates. (CX0206 at 001; CX0442 at 001, 002 (email from Connie Ross to Seth McLaughlin memorializing May 10, 2005 call with 1-800 Contacts); CX0418 (On July 26, 2005, Clint Schmidt wrote: “We already had that ‘let’s be civil’ conversation with Luxottica with regard to bidding on trademarks.”). LensCrafters would notify 1-800 Contacts if affiliates were appearing on LensCrafters’ searches through paid ads, and 1-800 Contacts would deal with the affiliate, and vice versa. (CX0206 at-001; CX0442 at 001-002).
978. On August 24, 2005, Kevin McCallum of 1-800 Contacts sent to Connie Ross and Seth McLaughlin, both of Luxottica, a .pdf of some search engine results captured on Google. (CX0715 at 002).
979. On August 25, 2005, Connie Ross replied to Kevin McCallum’s email dated August 24, 2005, and stated that she had investigated the issue, determined that LensCrafters had not purchased the “1800contacts” keyword, but, “we have purchased the term ‘contacts’ as a broad match term,” and that “[a]ccording to Google,” the Lenscrafterscontacts.com ad could come up when a search is performed under “1800contacts” because “contacts” is part of 1-800 Contacts’ tradename, and any retailer purchasing “contacts” as a broad match can potentially display an ad under “1800contacts.” (CX0715 at 002).
980. On August 25, 2005, Mr. McCallum replied and asked whether “negative key words” were something Luxottica would consider to prevent its ads from appearing on searches for 1-800 Contacts. (CX0715 at 001).
981. Between August 25, 2005, and August 29, 2005, Connie Ross and Brandon Dansie discussed the operation and use of negative keywords. (CX0715 at 001 (August 25, 2005 email from Mr. Dansie: “I left a voicemail with Connie offering to explain how negative keywords can be used to limit the way broad match ads are displayed.”); CX0117 at 001 (August 29, 2005 email from Ms. Ross to Brandon Dansie referring to “our phone conversation on Friday.”)).
982. In August 2005, 1-800 Contacts and Luxottica reached an agreement to add each other’s trademarks as negative keywords to their advertising accounts and to the lists of negative keywords affiliates would be required to use. (CX0117 at 001-002 (August 29, 2005 email from Ms. Ross to Mr. Dansie: “As per our phone conversation on Friday, below are the LensCrafters terms we would like for you to add to your list of excluded terms for use by 1800 Contacts and its affiliates . . . We are in the process of adding exact negative matches/excluded words to the following terms which will address your request”)).
983. 1-800 Contacts and Luxottica abided by their agreement to use each other’s trademarks as negative keywords. (CX0117 at 001 (Mr. Dansie confirmed to his supervisors on September 7, 2005 that he added the term “lenscrafters” and certain variations in spelling as negative keywords 1-800 Contacts’ Google and Yahoo campaigns, and recommended asking LensCrafters to add “1-800,” “1 800,” “express,” “contacts.com,” and

“1800contacts.com,” to their negative keyword lists in addition to the terms Ms. Ross listed in her August 29, 2005 email)).

984. On January 30, 2006, Joe Zeidner told Wallace Lovejoy of Luxottica that 1-800 Contacts had “been vigilant in keeping competitors from bidding on [its] trademarks.” (CX0066 at 001). Mr. Zeidner asked if LensCrafters had changed its policy disapproving of “competitive businesses linking ads to its trademark,” as “we [1-800 Contacts] would very much like to bid on the keyword ‘lenscrafters’ as it receives a lot of traffic (we don’t plan to, but would like to confirm that it is not acceptable).” (CX0066 at 002). On March 23, 2006, Mr. Lovejoy confirmed that Luxottica objects to any third party making use of Luxottica’s trademarks in, among other things, keyword advertising and sponsored links. (CX0119 at 001).

4. Trademark Monitoring

985. By 2006, 1-800 Contacts was systematically monitoring search results pages to identify and remove competitor ads. CX0067 at 073 (October 2006 “Marketing & Sales Review” presentation prepared by 1-800 Contacts’ marketing executives, referring to “Stringent monitoring of trademarks in paid search” and “Cease & Desist letters sent weekly to competitors bidding on trademarks and variations”); CX9004 (Coon, IHT at 258-59) (“Q. Does this slide [CX0067 at -073] refer to the trademark enforcement program that we were speaking about earlier today that you had? A. I would guess that it does. It seems to describe that.”); CX0256 (1-800 Contacts email from May 4, 2007, regarding “other organizations on Trademarked Keywords 5.04.07,” identifying “Coastal contacts” as one of “the trademark offenders for the week”).

986. The following are examples of 1-800 Contacts’ weekly trademark monitoring reports: CX0078; CX0256; CX0508; CX0507; CX0505; CX0255; CX0944; CX1068; CX1069; CX1070; CX0279; CX1071; CX0887; CX1072.

987. The weekly trademark monitoring reports were also referred to as “Weekly Trademark Violators Reports.” (CX0732; Craven, Tr. 581-584).

988. A 1-800 Contacts employee monitored 1-800 Contacts’ “top keywords” twice a week and prepared a weekly report with screenshots. (CX0935 at 001; CX0555 at 004 (under “Competitor Policing:” “Weekly report with screenshots to legal.”)).

989. On March 7, 2008, Bryce Craven “updated the list of trademark terms” 1-800 Contacts would be “actively monitoring based on data for the past year.” (CX0255). The monitored terms covered “90% of TM searches and about 91% of [1-800 Contacts’] TM orders” at the time. (CX0255).

990. The trademark monitoring report was often entitled “other organizations on trademarks” and took the form of an Excel spreadsheet. (CX9016 (Judd, Dep. at 65)).

991. As of 2008, Jordan Judd, a 1-800 Contacts marketing employee, monitored 16 terms in a list that she inherited from a predecessor. (CX9016 (Judd, Dep. at 66-67)).

992. The information in the trademark monitoring reports was gathered by running a search for each term, recording the identity of every advertiser whose ad appeared, and the position on the search engine results page in which their ad appeared. (CX9016 (Judd, Dep. at 65-75); CX9015 (Galan, Dep. at 131); Craven, Tr. 529; CX0732 at 009 (Nov. 2011 transition document prepared by Mr. Craven for his successor)). The person preparing the report would also click on the ad, generate a web page privacy report, and create a screenshot of that privacy report which was added to the spreadsheet. (CX9016 (Judd, Dep. at 93-95)).
993. After each search, the employee would clear the browser of cookies and cache information, and move on to the next term. (CX9016 (Judd, Dep. at 73-74)).
994. The trademark monitoring process was repeated for each major search engine. (CX9016 (Judd, Dep. at 91) (in November 2008, monitoring was conducted on Google and Yahoo)).
995. The trademark monitoring process required at least 6 hours of employee time every week. (CX9016 (Judd, Dep. at 87; CX0732 at 009 (“Takes about 6-7 hours weekly to compile.”)).
996. BrandVerity was also used as of 2009 for some trademark monitoring. (CX0935 at 001; Craven, Tr. 529 (“Later on, I know we used a software service called BrandVerity”); CX9020 (Craven, Dep. at 62)).
997. On January 8, 2010, 1-800 Contacts added its “top four TM+Coupon terms” to the list of terms monitored. (CX0279 at 001).
998. Mr. Galan, who was responsible for trademark monitoring during his tenure at the company from early 2012 to early 2014, routinely add new terms to the list he monitored, such as variations in spelling or phrases with additional words like “coupon” or “order code.” (CX9015 (Galan, Dep. at 134, 180-81); *infra* VI.C.2-4). Mr. Galan recalls monitoring somewhere between 20 and 100 terms. (CX9015 (Galan, Dep. at 133)).
999. The trademark monitoring process was regarded as one of 1-800 Contacts’ “levers” for optimizing its paid search performance. (CX0555 at 002; CX0051 at 003). One of the bid management techniques 1-800 Contacts employed was keeping “competition out of results” for trademark keywords in order to “bid as low as possible” on those terms. (CX0555 at 003; CX0051 at 004 (“Low competition = low cost” for trademark keywords); (CX0296 at 034, *in camera* [REDACTED]).
1000. 1-800 Contacts enforced its “trademark policy to remove competitors which in turn drives down how much [it pays] per click.” (CX0935 at 001).

5. Commencement of Lens.com Litigation

1001. In April 2007, 1-800 Contacts identified ads for LensWorld and Lens.com's website "JustLenses.com" appearing in response to searches for "1800contacts" through 1-800 Contacts' trademark monitoring. (CX0078 at 001).
1002. Brandon Dansie, a search marketing employee at 1-800 Contacts, explained that, of the two companies identified in the April 9, 2007 search monitoring report, "Lens.com . . . is a more important offender because they are a more viable competitor." (CX0078 at 001).
1003. Mr. Dansie recommended that 1-800 Contacts' counsel "prioritize the list" of companies to contact regarding their advertising on 1-800 Contacts' brand name "with Lens.com/JustLenses.com at the top." (CX0078 at 001).
1004. On April 16, 2007, Bryan Pratt emailed Anthony DeGidio, an attorney for Lens.com, explaining that 1-800 Contacts had recently contacted him and informed him that "Lens.com is again showing up as a sponsored advertisement on Google and Yahoo triggered by the search terms 1 800 contacts, 1800 contact, 800 contacts, 800.contacts, 1-800contacts.com, lens express, and lensexpress." (CX0591 at 002). Mr. Pratt attached screen shots purporting to show the sponsored advertisements. Mr. Pratt alluded also to Lens.com's "prompt action . . . taken in the past in resolving these situations" and expressed "hope for a continued amicable relationship." (CX0591 at 002).
1005. Mr. DeGidio emailed Mr. Pratt on April 16, 2007, writing that he would speak with Lens.com and see if they could "determine why these sponsored listings are appearing." He further wrote that Lens.com "has a trademark for LENS and I assume you do not expect him to take any steps to stop his links from coming up when the word lens is a search term." (CX1254 at 001).
1006. Mr. Pratt emailed Mr. DeGidio again on April 16, 2007, thanking him for his "prompt response." He wrote that 1-800 Contacts was "aware of [Lens.com's] trademark application for LENS" and that 1-800 Contacts had "taken measures to have affiliates remove sponsored advertisements associated with lens.com" when notified in the past. (CX1254 at 001).
1007. Lens.com took no action to remedy the conduct alleged in Mr. Pratt's April 16, 2007 email. (CX1125 at 009). Instead, Lens.com's so-called "infringement . . . actually increased." (CX1125 at 009).
1008. On August 18, 2007, 1-800 Contacts filed a complaint against Lens.com in the U.S. District Court for the District of Utah alleging trademark infringement and breach of contract. (CX1125).
1009. In 1-800 Contacts' infringement claim against Lens.com was based on the appearance of Lens.com's advertisements on search engine results pages in response to searches for the "1-800 Contacts" trademark and related terms. (CX1125 at 005-013).

- 1010.1-800 Contacts’ breach of contact claim against Lens.com was based on the agreement between 1-800 Contacts and Lens.com to refrain from purchasing each other’s names as search advertising keywords. (CX1125 at 008-010).
- 1011.On December 14, 2010, the court issued an opinion granting summary judgment in favor of Lens.com on 1-800 Contacts’ trademark infringement and breach of contract claims. (*1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010)).
- 1012.1-800 Contacts appealed to the Tenth Circuit Court of Appeals. (*1-800 Contacts v. Lens.com*, 722 F.3d 1229 (10th Cir. 2013)).
- 1013.On July 16, 2013, the Tenth Circuit Court of Appeals upheld the district court’s decision granting Lens.com’s summary judgment motion except with respect to issues regarding Lens.com’s potential secondary liability for its affiliates advertisements that used 1-800 trademark terms in the text of advertisements. (*1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013)).
- 1014.After the Tenth Circuit opinion in *1-800 Contacts v. Lens.com*, Lens.com refrained from bidding on 1-800 Contacts’ trademarks. (CX9004 (Coon, IHT at 183)).
- 1015.Lens.com and 1-800 Contacts have an unwritten agreement not to use one another’s trademarks for search advertising and to take steps to prevent the display of their ads in response to searches for the other’s trademarks, similar to 1-800 Contacts’ agreements with Coastal, Vision Direct, and others. (CX9035 (Coon, Dep. at 135 (“I thought there was an agreement with lens—with Lens.com, and I—I would assume there would have been at least a couple of others”)); CX9004 (Coon, IHT at 183 (“I don’t know when we entered into the agreement with Lens.com”)); CX9001 (Bethers, IHT at 231 (“I don’t advertise on Lens.com’s trademark. They don’t advertise on ours. We dropped the litigation between our two parties with no prejudice. But neither party advertises. We know that. They know that. Now we understand it, we know how to work together. So I’ve got limited concern about Lens.com.”)); CX9001 (Bethers, IHT at 305 (“So what we have right now [with Lens.com] is what I would describe as a détente . . . if they respect our trademark, we respect theirs.”)); Bethers, Tr. 3656-57 (referring to “the settlement agreement” 1-800 Contacts had with Lens.com)).

6. Memorial Eye Litigation and Settlement

- 1016.1-800 Contacts contacted Memorial Eye numerous times regarding advertisements that Memorial Eye was displaying in response to search queries relating to 1-800 Contacts, beginning 9 to 10 months after Memorial Eye first launched its online business. (Holbrook, Tr. at 1914).
- 1017.On September 13, 2005, David Zeidner, in-house counsel for 1-800 Contacts, sent a cease and desist letter to Memorial Eye, alleging trademark infringement (CX1751 at 001; Holbrook, Tr. at 1914-15). Mr. Zeidner stated that Memorial Eye infringed on 1-800 Contacts’ trademarks by purchasing sponsored advertisements that were “triggered upon a search for ‘1800 CONTACTS.’” (CX1751 at 001). Mr. Zeidner enclosed a screenshot of “the infringing action,” an AOL search engine results page which allegedly appeared

in response to the query “1800contacts.com” and showed an ad for ShipMyContacts.com. (CX1751 at 001, 003; Holbrook, Tr. at 1917). Mr. Zeidner demanded that Memorial Eye “immediately remov[e] ALL sponsored advertisements” purchased on any search engine “which are triggered by the 1800 CONTACTS trademark.” (CX1751 at 001).

1018. In 2005, Memorial Eye was not bidding, and never did bid, on the 1-800 Contacts trademark. (Holbrook, Tr. at 1914-15).

1019. On October 13, 2005, Randall Luckey, counsel for Memorial Eye, replied to David Zeidner’s September 13, 2005 letter. (CX1752). Mr. Luckey stated that Mr. Zeidner was mistaken in alleging that Memorial Eye had used 1-800 Contacts’ trademark as a triggering keyword for sponsored ads and noted that the Memorial Eye advertisement in the screenshot enclosed with Mr. Zeidner’s September 13, 2005 letter (CX1751) made “absolutely no reference” to 1-800 Contacts trademark. (CX1752 at 001).

1020. On November 3, 2005, Mr. Zeidner replied to Mr. Luckey’s October 13, 2005 letter (CX1753), stating that Memorial Eye was “in fact using the 1800 CONTACTS trademark as a triggering keyword to advertise” competitive goods because the search term “1800Contacts.com” was being used to trigger a link to Memorial Eye’s website. He enclosed another screenshot, emphasizing that “1800contacts.com is the term used in the search box.” (CX1753 at 001).

1021. Mr. Zeidner demanded that Memorial Eye “immediately remove ALL sponsored advertisements Memorial Eye had purchased through Google, Yahoo Search, and any and other [sic] search engines which are triggered by the 1800 CONTACTS trademark.” (CX1753 at 002). Mr. Zeidner also requested that Memorial Eye add a list of twenty 1-800 Contacts-related negative keywords to any campaigns containing search terms related to contact lenses (CX1753 at 002).

1022. Memorial Eye applied the negative keywords 1-800 Contacts requested “for a very short period of time, a few weeks, no more than probably two months.” (Holbrook, Tr. 1921-1922).

1023. On September 12, 2007, counsel for 1-800 Contacts, Bryan Pratt, sent a letter to Memorial Eye alleging trademark infringement from purchasing sponsored advertisements on Google “that are triggered upon a search for ‘1800 CONTACTS.’” (CX1754 at 002).

1024. 1-800 Contacts requested that Memorial Eye “cease and desist from further use of the mark 1800 CONTACTS, and confusingly similar variations thereof.” It requested that Memorial Eye “immediately remove ALL sponsored advertisements . . . purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark or a confusingly similar variation thereof.” It further demanded that 1-800 Contacts incorporate a list of negative keywords (enclosed with the letter) “in any continued sponsored advertisement campaigns.” (CX1754 at 002).

1025. Memorial Eye did not agree to implement negative keywords in response to Mr. Pratt’s letter of September 12, 2007. (CX9024 (Holbrook, Dep. at 47)).

1026. On February 27, 2008, Mr. Pratt sent a “near identical letter” to Memorial Eye claiming that Memorial Eye was “once more engaged in a targeted scheme to infringe upon the 1800 CONTACTS and 1800CONTACTS trademarks,” specifically by purchasing “sponsored advertisements at Google, and possibly other search engines, for at least one of the 1800 CONTACTS or 1800CONTACTS trademarks, or a confusingly similar variation thereof, to trigger a link to . . . www.shipmycontacts.com.” (RX0072 at 008; CX1318 at 001).
1027. Through Mr. Pratt’s February 27, 2008 letter, 1-800 Contacts demanded that Memorial Eye “immediately remove **ALL** sponsored advertisements . . . purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark or a confusingly similar variation thereof.” (CX1318 at 002 (emphasis in original)). It further demanded that Memorial Eye incorporate a list of negative keywords (enclosed with the letter) “in any continued sponsored advertisement campaigns.” (CX1318 at 002).
1028. On March 17, 2008, Randall Luckey, counsel for Memorial Eye, wrote to Mr. Pratt in response to the letter dated February 27, 2008. (CX1755). Mr. Luckey stated that “Memorial Eye has never used . . . 1800 Contacts, Inc.’s trademarks in its sponsored advertisements, or even as a search phrase trigger.” (CX1755 at 001).
1029. On December 23, 2008, 1-800 Contacts sued Memorial Eye for trademark infringement. (RX0072; Holbrook, Tr. 1872). 1-800 Contacts alleged that Memorial Eye “had purchased sponsored advertisements from Google, and other search engines, for [1-800 Contacts’ trademarks] to trigger advertising and/or a link to” Memorial Eye’s websites. (RX0072 at 005).
1030. Litigation between 1-800 Contacts and Memorial Eye continued until late 2013. (CX0326 (Nov. 26, 2013 Memorial Eye settlement agreement)).
1031. The lawsuit expended a great deal of financial and human resources, and removed focus on running Memorial Eye’s business. (Holbrook Tr. at 1872).
1032. Memorial Eye knew that Lens.com had spent more than \$2,000,000 already on its case, and the court had not put to rest the issues related to ads appearing as a result of broad match. (Holbrook, Tr. at 1874-76).
1033. Memorial Eye knew that by entering the negative keywords, it would no longer be able to get valuable conversions. (Holbrook, Tr. at 1876-77).
1034. Memorial Eye began thinking about shutting down its online business in the summer of 2013. (Holbrook, Tr. at 1879-80).
1035. Memorial Eye laid off a customer service representative in the summer of 2013 in anticipation of shutting down the online business. (Holbrook, Tr. at 1879-80).
1036. 1-800 Contacts and Memorial Eye entered into a settlement agreement effective November 26, 2013 (“Memorial Eye Agreement”). (CX0326; Holbrook, Tr. at 1879).

1037. Memorial Eye shut down its ShipMyContacts and IWantContacts websites on December 7, 2013, after which it did not accept any new orders. (Holbrook, Tr. at 1873-74).
1038. Memorial Eye shut down the online business because it was concerned about the financial risk involved with continuing the 1-800 Contacts lawsuit. (Holbrook, Tr. at 1874-76).
1039. Pursuant to the Memorial Eye Agreement, 1-800 Contacts and Memorial Eye agreed not to purchase or use any of the other party's trademarks or websites/URLs (listed in an exhibit to the Memorial Eye Agreement) as triggering keywords in any internet search engine advertising campaign." (CX0326 at 003).
1040. The Memorial Eye Agreement also required each party to adopt the other party's trademarks and websites as negative keywords. (CX0326 at 003).
- The Memorial Eye Agreement required Memorial Eye to use broad match for the specified negative keyword implementation. (Holbrook, Tr. at 2053).
1041. The Memorial Eye Agreement lists over forty trademark terms and websites on which the parties are prohibited from bidding as "triggering keywords" and are required to implement as "broad match" negative keywords. (CX0326 at 010).
1042. The Memorial Eye agreement never expires. (CX0326).
1043. Without the settlement agreement with 1-800 Contacts, Memorial Eye would not have implemented negative keywords against 1-800 Contacts' trademarks, but would have continued to seek to display advertisements in response to queries related to 1-800 Contacts. (Holbrook, Tr. at 1992-93).
1044. But for the settlement agreement with 1-800 Contacts, Memorial Eye would still be operating online today. (Holbrook, Tr. at 1994-95).

7. EZ Contacts

1045. On December 6, 2007, 1-800 Contacts sued Premier Holdings, Inc. (which operated the website www.ezcontactsusa.com), alleging trademark infringement. (CX1617). The complaint alleged that EZ Contacts was purchasing "keywords consisting of at least one of [1-800 Contacts' trademarks,] such that ads for EZ Contacts will be generated when consumers specifically search for . . . 1-800 Contacts." (CX1617 at 002).
1046. 1-800 Contacts and EZ Contacts entered into a settlement agreement effective May 12, 2008 ("EZ Contacts Agreement"). (CX0313).
1047. Pursuant to the EZ Contacts Agreement, EZ Contacts agreed not to use, as a keyword or otherwise, 1-800 Contacts' trademarks. (CX0313 at 003). 1-800 Contacts agreed not to use, as a keyword or otherwise, EZ Contacts' trademarks. (CX0313 at 003).

1048. The EZ Contacts Agreement prohibited the parties from “causing a Party’s website, Internet link, or Internet advertisement to appear in response to any Internet search for the other Party’s brand name, trademarks or URLs” (as listed in exhibits to the EZ Contacts Agreement) (CX0313 at 003).
1049. The EZ Contacts Agreement prohibited the parties from “causing a Party’s brand name, or Internet link to the Party’s Restricted Websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party’s brand name, trademark, or URLs” (which were listed in exhibits to the EZ Contacts Agreement). (CX0313 at 003-004).
1050. The EZ Contacts Agreement requires the Parties to implement certain negative keywords listed in an exhibit to the agreement. (CX0313 at 005).
1051. Exhibits to the EZ Contacts Agreement list seventy brand names, trademarks, and websites of 1-800 Contacts and EZ Contacts, on which the parties are prohibited from bidding and are required to implement as negative keywords. (CX0313 at 027-028).
1052. The EZ Contacts Agreement never expires. (CX0313).

8. 2009 Vision Direct Agreement

1053. From June 2004 until September 2007, both Vision Direct and 1-800 Contacts enforced the 2004 Vision Direct agreement by notifying the other directly when ads appeared or by directing their attorneys to send letters alleging breach of the agreement. (*Infra* VI.C.3).
1054. Between June 2004 and September 2007, Vision Direct and 1-800 Contacts had an “established practice between the parties” of using negative keywords to ensure no ads would show up on branded queries. (CX0843 at 012; CX0134 at 001; CX0137 at 002 (“As illustrated by over 30 email communications, Vision Direct and 1-800 Contacts, Inc. have both interpreted the Settlement Agreement as requiring each party to implement negative keywords”); CX1062 at 008 (1-800 Contacts alleged in its 2007 complaint against Vision Direct that “until sometime just before July 13, 2007, both 1-800 CONTACTS and [Vision Direct] clearly understood that the Settlement Agreement required use of negative keywords); *see infra* VI.C.3).
1055. Until late 2007, Vision Direct and 1-800 Contacts both interpreted the 2004 agreement “as requiring each party to implement negative keywords” and both parties were “very proactive in resolving matters and immediately stopping offending practices.” (CX0137 at 002).
1056. In July and August 2007, Vision Direct ads appeared on occasion in response to searches for 1-800 Contacts’ trademarks. (*Infra* ¶¶ 1234-1236; CX0133; CX0627).
1057. In late October 2007, Vision Direct represented to 1-800 Contacts that Vision Direct did not believe that the 2004 Vision Direct Agreement required Vision Direct to use negative keywords to prevent its ads from appearing on searches for 1-800 Contacts’ trademarks. (CX0136; CX1062 at 008 (complaint alleged Vision Direct “recently informed 1-800

CONTACTS that they were no longer going to use negative keywords to prevent the appearance of Vision Direct advertisements”)).

1058. In December 2007, Vision Direct represented to 1-800 Contacts that it had serious antitrust liability concerns with 1-800 Contacts’ demand that Vision Direct use negative keywords to prevent its ads from appearing in response to searches for 1-800 Contacts’ trademarks. (CX0140).

1059. On December 28, 2007, 1-800 Contacts sued Vision Direct for breach of contract. 1-800 Contacts alleged that Vision Direct was “violating the Settlement Agreement by purchasing advertisements without utilizing negative keywords to prevent the appearance of Vision Direct advertisements when users search for 1-800 CONTACTS’ brand name.” (CX0162 at 008).

1060. On September 19, 2007, Amy Reischauer, Associate General Counsel for drugstore.com (Vision Direct’s corporate parent at the time), emailed Brandon Dansie regarding allegations by 1-800 Contacts that Vision Direct was breaching the 2004 Vision Direct Agreement due to “Vision Direct ads being triggered by searches on Google . . . for variations on the 1-800 Contacts name.” (CX0134 at 001). Ms. Reischauer represented that the appearance of Vision Direct ads was “due solely to algorithms employed by Google and not due to any search term bidding being done” by Vision Direct. (CX0134 at 001).

1061. On September 25, 2007, Mr. Dansie instructed Vision Direct to use phrase- or broad-match negative keywords “to comply with the settlement agreement between [Vision Direct and 1-800 Contacts] while still allowing both companies to freely advertise for general keywords.” (CX0134 at 001). Mr. Dansie recommended that Vision Direct use “negative keywords [] such as *1-800*, *800*, or *express*. . . . [I]f the negative keywords *1800* were used in your company’s Google campaign containing the general keyword *contacts*, your company’s ad for *contacts* would be shown on all searches containing that word, except those searches also containing “1800.” (CX0134 at 001; *see supra* IV.A.5.b).

1062. Mr. Dansie’s September 25, 2007 email also attached “several screenshots, taken [that day,] of Vision Direct’s listings in the search results pages for internet searches when users specifically search for 1-800 CONTACTS” (CX0134 at -001). Mr. Dansie asked whether Vision Direct was “opposed to reinstating the simple measure of including the necessary negative keywords to prevent this type of violation” of the 2004 Vision Direct Agreement. (CX0134 at 001).

1063. On October 9, 2007, Brandon Dansie wrote to Colin Veach of Vision Direct, alluding to recent discussions between legal counsel for Drugstore.com and 1-800 Contacts. (CX0556).

1064. Mr. Dansie identified for Mr. Veach examples of 1-800 Contacts-related search queries that had resulted in the display of Vision Direct ads:

1 800 contacts

1800 contacts
 1-800 contacts
 1800.contacts
 1800contacts
 1-800-contacts
 800 contacts
 800contacts
 (CX0556 at 001).

1065.Mr. Dansie recommended that Vision Direct employ negative keywords consisting of subparts of 1-800 Contacts' trademarks to "eliminate this issue" of Vision Direct ads appearing and "save ourselves some time." Specifically, Mr. Dansie recommended that Vision Direct use the following negative keywords:

800
 1800
 1 800
 1-800
 1800.contacts
 1800contacts
 1-800-contacts
 800contacts
 Express
 Lensexpress
 (CX0556 at 001).

1066.Mr. Dansie explained that 1-800 Contacts used that same approach to keep its "own search campaigns compliant" with the agreement. (CX0556 at 001).

1067.As of October 2007, 1-800 Contacts was using "the negative keyword 'direct' . . . in any campaign related to 'vision'" in order to prevent the display of 1-800 Contacts ads in response to searches for Vision Direct. (CX0556 at 001).

1068.On October 12, 2007, Bryan Pratt sent a letter to drugstore.com, providing "official notice of breach of the Settlement Agreement" between 1-800 Contacts and Vision Direct, based on the appearance of Vision Direct ads appearing on searches for "variations of 1-800's trademarks." (CX1787 at 001-002). Mr. Pratt explained that 1-800 Contacts had not received an "adequate response" to its notifications to Vision Direct, beginning in July 2007, that Vision Direct ads had been appearing in response to searches for 1-800 Contacts' trademarks. (CX1787 at 002).

1069.In October 2007, 1-800 Contacts was concerned that Vision Direct had abandoned the "established practice of using negative keywords" detailed in the 2004 Vision Direct Agreement. 1-800 Contacts viewed "any such change in the established course of conduct under the Settlement Agreement" as "totally unacceptable and clearly a violation of . . . the Settlement Agreement." (CX1787 at 002).

1070. On October 22, 2007, counsel for 1-800 Contacts represented to Vision Direct that the 2004 Vision Direct Agreement prohibited certain advertising regardless of whether Vision Direct used “a trademark to achieve” the result prohibited by the agreement. (CX0135 at 002 (“there is no requirement” in the 2004 Vision Direct Agreement “that drugstore.com . . . specifically use a trademark to achieve the prohibited result.”)).
1071. 1-800 Contacts’ position was “that by ceasing to incorporate negative keywords, as ha[d] been the established practice of the parties under the agreement, Vision Direct [was] ‘causing’” its ads to appear in violation of the agreement. (CX0135 at 001).
1072. On October 25, 2007, counsel for Vision Direct wrote to 1-800 Contacts stating that the “[2004] agreement obligates neither party to implement negative keywords” and that Vision Direct had “implemented negative keywords solely to enable the parties to focus on reaching an amicable resolution.” (CX0136 at 002).
1073. On November 1, 2007, counsel for 1-800 Contacts informed Vision Direct that 1-800 Contacts his law firm currently represented 1-800 Contacts “in several litigation matters related to 1-800 Contacts, Inc.’s valuable trademarks.” (CX0137 at 001-002). Counsel for 1-800 Contacts asked Vision Direct to reconsider its request that Vision Direct “continue to use negative keywords and other reasonable measures to avoid the Prohibited Acts of the [2004] Settlement Agreement,” and reiterated that the parties had previously both “interpreted the [2004] Settlement Agreement as requiring each party to implement negative keywords.” (CX0137 at 002).
1074. On November 5, 2007, counsel for Vision Direct stated its position that the 2004 Vision Direct agreement did not require the use of negative keywords and that it regarded 1-800 Contacts’ request to implement negative keywords as a “possible violation of the Sherman Act.” (CX0138 at 001).
1075. In her letter dated November 5, 2007, Vision Direct’s counsel suggested that both parties “discuss the possible competition law issue more thoughtfully.” (CX0138 at -002). She wrote: “We urge you to ask your competition law attorney to contact Scott Sher at Wilson Sonsini . . . to discuss the facts at hand and what the limits might be to what 1-800 Contacts can require, and [Vision Direct] can accept, under the Sherman Act and other relevant law.” (CX0138 at 002).
1076. On December 11, 2007, 1-800 Contact’s counsel, Bryan Pratt, emailed Scott Sher, requesting to speak regarding concerns Vision Direct had about 1-800 Contacts’ request that Vision Direct implement negative keywords. They set up a call for December 13, 2007. (CX0270 at 002-003).
1077. On December 21, 2007, Scott Sher emailed Mr. Pratt, referring to a discussion from the previous week regarding the issues surrounding the negative keyword restrictions that Mr. Pratt had previously demanded of Vision Direct. (CX0140 at 001). Mr. Sher wrote: “As Jonathan and I discussed with you both during our call, we believe that there are serious antitrust implications surrounding an agreement to implement such restrictions” and asked him to confirm his “understanding of [their] conclusions.” (CX0140 at 001).

1078. On December 28, 2007, 1-800 Contacts filed a complaint against Vision Direct in Utah state court for breach of the 2004 Vision Direct agreement. (CX1062).
1079. 1-800 Contacts alleged that Vision Direct was “violating the Settlement Agreement by purchasing advertisements without utilizing negative keywords to prevent the appearance of Vision Direct advertisements when users search for 1-800 CONTACTS’ brand name.” (CX1062 at 008). 1-800 Contacts alleged that Vision Direct’s actions violated the provision of the agreement that prohibited the parties from “causing a party’s brand name . . . to appear as a listing in the search results page of an Internet search engine when the user specifically searches for the other party’s brand name.” (CX1062 at 008-009).
1080. On January 7, 2008, Mr. Sher wrote to Mr. Pratt and stated that Vision Direct had “serious concerns regarding the enforceability of the Agreement, particularly as it relates to the implementation of negative keywords.” (CX0141 at 001). He wrote that Vision Direct believed that “any agreement between the parties with regard to the implementation of negative key words create[d] an unacceptable risk of violating Section 1 of the Sherman Act. Any such agreement would appear to represent a restraint unrelated to the terms of the Agreement, and one that depresses the price of key words to search companies such as Google, Yahoo! And Microsoft.” (CX0141 at 001; Pratt, Tr. at 2609-2610).
1081. In his January 7, 2008 letter, Mr. Sher wrote that Vision Direct had “unilaterally decided to implement the negative key words at issue—in part to forestall litigation with 1-800 Contacts” and that it would “no longer continue to implement negative keywords, effective immediately.” (CX0141 at 002).
1082. Mr. Pratt responded to Mr. Sher’s January 7, 2008 letter on January 11, 2008. (CX0724).
1083. Mr. Pratt’s letter dated January 11, 2008, stated that Vision Direct’s “failure to implement negative key words constitutes a violation of the settlement agreement, as interpreted by both parties and that 1-800 Contacts reserves all of its available remedies.” (CX0724 at 002).
1084. On January 24, 2008, Mr. Sher wrote to Joe Zeidner, 1-800 Contacts’ general counsel, and Mr. Pratt, alleging that 1-800 Contacts had breached the 2004 Vision Direct agreement by filing its breach of contract claim against Vision Direct in Utah state court in violation of the forum selection clause. (CX0142 at 001-002).
1085. In his January 24, 2008 letter, Mr. Sher also wrote that that 1-800 Contacts was “engaged in the very behavior that its complaint alleges constitutes a breach of contract” by Vision Direct, and enclosed screenshots purporting to show that 1-800 Contacts was not implementing negative keywords. (CX0142 at 002, 004-005).
1086. In his January 24, 2008 letter, Mr. Sher also wrote that Vision Direct had serious concerns regarding enforceability of the agreement, “particularly as it relate[d] to the implementation of negative keywords,” and that any agreement between the parties regarding implementation of negative keywords would create “an unacceptable risk of violating Section 1 of the Sherman Act.” (CX0142 at 003).

1087. On February 26, 2008, 1-800 Contacts filed a complaint against Vision Direct in the U.S. District Court for the District of Utah, based on alleged breach of the 2004 Vision Direct Agreement. (CX0314 at 001-002).
1088. On February 27, 2008, 1-800 Contacts filed a complaint against Vision Direct in the U.S. District Court for the Southern District of New York, based on alleged breach of the 2004 Vision Direct Agreement. (CX0314 at 001-002).
1089. 1-800 Contacts and Vision Direct entered into a settlement agreement effective May 8, 2009 (“2009 Vision Direct Agreement”). (CX0314).
1090. The 2009 Vision Direct Agreement required the parties to jointly submit an order of permanent injunction and to jointly request its entry. (CX0314).
1091. The order of permanent injunction, provided for in the 2009 Vision Direct Agreement, was to require the parties to implement negative keyword lists “for the purpose of preventing a party’s internet advertising from appearing in response to a search for another party’s” trademarks, URLs, or variations. (CX0314 at 004). An exhibit to the order of permanent injunction would contain the initial negative keyword lists. (CX0314 at 004).
1092. The 2009 Vision Direct Agreement provided that the 2004 Vision Direct agreement would “remain in full force and effect except that the Parties’ sole obligations with respect to the use of negative keywords” would be governed by the 2009 Vision Direct Agreement. (CX0314 at 004).
1093. On May 25, 2009, the U.S. District Court for the Southern District of New York issued the order of permanent injunction required by the 2009 Vision Direct Agreement on stipulation of 1-800 Contacts and Vision Direct (“Vision Direct Permanent Injunction”). (CX0316).
1094. The Vision Direct Permanent Injunction requires 1-800 Contacts and Vision Direct to implement negative keywords for the purpose of preventing their internet ads from appearing in response to a search for the other’s trademarks, variations of trademarks, domain names containing trademarks or variations of trademarks, and URLs containing trademarks or variations of trademarks. (CX0316 at 002).
1095. The Vision Direct Permanent Injunction requires Vision Direct to implement 42 negative keywords (set forth in Exhibit A to the injunction) related to 1-800 Contacts’ trademarks, domain names, and URLs, or variations thereof. (CX0316 at 004).
1096. The Vision Direct Permanent Injunction requires 1-800 Contacts to implement 29 negative keywords (set forth in Exhibit B to the injunction) related to Vision Direct’s trademarks, domain names, and URLs, or variations thereof. (CX0316 at 005).
1097. The Vision Direct Permanent Injunction “shall expire . . . upon the submission to the Court by the Parties of a Joint Stipulation to Dissolve Injunction.” (CX0316 at 002).

1098. The Vision Direct Permanent Injunction remains in force.

9. Lensfast

1099. On September 12, 2007, Bryan Pratt, counsel for 1-800 Contacts, sent a letter to Randolph Weigner, the proprietor of Lensfast, alleging trademark infringement from purchasing sponsored advertisements on Google “that are triggered upon a search for ‘1800 CONTACTS.’” (CX1618 at 032).

1100. 1-800 Contacts requested that Mr. Weigner “immediately remove ALL sponsored advertisements . . . purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark or a confusingly similar variation thereof.” (CX1618 at 032 (emphasis in original)). It further demanded that Lensfast incorporate a list of negative keywords (enclosed with the letter) “in any continued sponsored advertisement campaigns.” (CX1618 at 032).

1101. On March 14, 2008, Mr. Pratt sent another cease and desist letter to Mr. Weigner on behalf of 1-800 Contacts, nearly identical to the September 12 letter. (CX1618 at 035-036). Mr. Pratt again demanded that Lensfast “immediately remove ALL sponsored advertisements” triggered by “the 1800 CONTACTS trademark or a confusingly similar variation thereof” and demanded that Lensfast incorporate an enclosed list of negative keywords. (CX1618 at 036, 039).

1102. On December 23, 2008, 1-800 Contacts sued Lensfast for trademark infringement. (CX1618).

1103. On February 20, 2009, Lensfast filed an answer denying the allegations in 1-800 Contacts’ complaint and setting forth affirmative defenses. (CX0315 at 001).

1104. 1-800 Contacts and Lensfast entered into a settlement agreement effective December 18, 2009 (“Lensfast Agreement”). (CX0315).

1105. Pursuant to the Lensfast Agreement, 1-800 Contacts and Lensfast agreed to refrain from “Internet advertising or any other action that causes advertisements and/or internet links . . . to appear above, below, to the side of, or otherwise in connection with an internet search on any website providing internet search services as a result of a search for any of the prohibited keywords listed in Exhibit 2.” (CX0315 at 002-003).

1106. Pursuant to the Lensfast Agreement, 1-800 Contacts and Lensfast agreed to refrain from engaging in certain “Prohibited Acts.” (CX0315 at 003).

1107. The Lensfast Agreement Prohibited Acts include “causing a Party’s website, Internet link, or Internet advertisement to appear in response to any Internet search for the other Party’s brand name, trademarks or URLs (as listed in Exhibit 2).” (CX0315 at 003).

1108. The Lensfast Agreement Prohibited Acts include “causing a Party’s brand name, or Internet link to the Party’s Restricted Websites to appear as a listing in the search results

page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademark, or URLs (as listed in Exhibit 2)." (CX0315 at 003).

1109. The Lensfast Agreement Prohibited Acts include "performing any action or omission of actions that would cause advertisements, internet links, and/or any other promotional material to appear in response to an entry of any one of the prohibited keywords listed in Exhibit 2." (CX0315 at 004).
1110. The Lensfast Agreement requires 1-800 Contacts and Lensfast to "use the prohibited keywords (as listed in Exhibit 2) as negative keywords to the extent practicable in the internet search provider's system in order to prevent the generation of advertisements and internet links triggered by keywords that are prohibited under [the agreement]." (CX0315 at 004). Under the agreement, "[u]se of generic, non-trademarked words without use of negative keywords shall be considered a Prohibited Act . . . unless the internet search provider does not permit use of negative keywords." (CX0315 at 005).
1111. Exhibit 2 to the Lensfast Agreement lists 1-800 Contacts' and Lensfast's prohibited keywords—the terms each party was prohibited from using as search advertising keywords and which each party was required to implement as negative keywords. (CX0315 at 010).
1112. Exhibit 2 to the Lensfast Agreement lists dozens of brand names, trademarks, and websites of 1-800 Contacts and Lensfast, on which the parties are prohibited from bidding and are required to implement as negative keywords.
1113. The Lensfast agreement never expires. (CX0315).

10. Lenses for Less

1114. In a letter dated November 9, 2009, Mark Miller, counsel for 1-800 Contacts, wrote to Lenses for Less claiming that Lenses for Less was infringing upon 1-800 Contacts' "trademark rights through [its] purchase of sponsored advertisements at Google, and possibly other search engines, for at least one of the 1800 CONTACTS marks, or a confusingly similar variation" to trigger advertisements for www.lenses.forless.com. (CX0637 at 001).
1115. In a letter dated November 9, 2009, Mark Miller, counsel for 1-800 Contacts, demanded that Lenses for Less remove "ALL sponsored advertisements . . . purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademarks or any confusingly similar variations thereof." (CX0637 at 002).
1116. On January 20, 2010, 1-800 Contacts, by and through its counsel including Mr. Miller, filed a complaint against Lenses for Less in the U.S. District Court for the District of Utah for trademark infringement and certain other state and federal claims. (CX0452 at 003-013).
1117. On January 21, 2010, Mark Miller wrote to Lenses for Less stating that 1-800 Contacts was "willing to resolve this matter informally" and enclosed "a settlement agreement that

would resolve [1-800 Contacts'] claims against Lenses For Less.” (CX0452 at 001, 014-021).

1118. On January 21, 2010, Mark Miller wrote to Lenses for Less explaining that that the proposed settlement agreement would “give the parties a mutually beneficial framework to govern their future competitive relationship,” noting that it “imposes obligations on both parties and only seeks \$5000.00 payment from Lenses For Less as damages for its past infringement.” (CX0452 at 001).

1119. January 21, 2010, Mark Miller wrote to Lenses for Less, explaining that 1-800 Contacts preferred “to resolve these matters informally.” (CX0452 at 001).

1120. Lenses For Less entered into a settlement agreement with 1-800 Contacts, effective March 23, 2010. (CX0320 (“Lenses For Less Agreement”) at 002).

1121. Pursuant to the Lenses For Less Agreement, Lenses For Less was not obligated to pay any money to 1-800 Contacts to settle 1-800 Contacts' claims of trademark infringement stating” “**PAYMENT:** Neither party shall pay the other party any monies under this Agreement, except as applicable under sections 5 and 6 herein. Sections 5 and 6 govern payment for breaches of the agreement.” (emphasis in original). (CX0320 at 002.)

1122. Pursuant to the Lenses For Less Agreement, 1-800 Contacts and Lenses For Less agreed to refrain from certain “Prohibited Acts.” (CX0320 at 003.)

1123. The “Prohibited Acts” described in the Lenses For Less Agreement include “engaging in or participating in internet advertising or any other action that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs.” (CX0320 at 003).

1124. The Prohibited Acts described in the Lenses For Less Agreement include “using the other Party’s trademark keywords or URLs . . . to target or trigger the appearance or delivery of advertisements or other content to the user.” (CX0320 at 003).

1125. The Prohibited Acts described in the Lenses For Less Agreement include “using generic, non-trademarked words as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs . . . without also using negative keywords as set forth [elsewhere in the Agreement,] unless the particular internet search provider does not permit the use of negative keywords.” (CX0320 at 003).

1126. Pursuant to the Lenses For Less Agreement, Lenses For Less and 1-800 Contacts “mutually agree to use the other Party’s trademark keywords and URLs . . . as negative keywords in all of their respective keyword advertising campaigns for any internet search provider that allows the use of negative keywords, to the fullest extent allowable by the internet search provider, in order to prevent the display of advertisements and/or internet

links in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs." (CX0320 at 004).

1127. Pursuant to the Lenses For Less Agreement, Lenses For Less and 1-800 Contacts agreed to adopt negative keywords "in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs." (CX0320 at 004).

1128. Mark Miller, counsel for 1-800 Contacts, testified pursuant to 16 C.F.R. 3.33(c)(1) as to "the obligations imposed on each party to a Settlement Agreement, the meaning of each provision of each Settlement Agreement, including 1-800 Contacts' interpretation of each word used in the Settlement Agreement." (CX9040 (Miller, Dep. at 10-11); CX1347).

1129. Mr. Miller testified that a user query that reads in its entirety "contact lenses 1-800 Contacts," "includes" the term "1-800 Contacts" (CX9040 (Miller, Dep. at 52-53)).

1130. Mr. Miller testified that, in the query "contact lenses 1-800 Contacts," the term "1-800 Contacts" is "part of the query." (CX9040 (Miller, Dep. at 52-53)).

1131. Pursuant to the Lenses For Less Agreement, Lenses For Less agreed to adopt 24 negative keywords related to 1-800 Contacts' trademarks and 10 negative keywords related to 1-800 Contacts' URLs. (CX0320 at 010).

11. Contact Lens King

1132. In a letter dated May 12, 2009, from Bryan Pratt, counsel for 1-800 Contacts, to Contact Lens King Inc., Mr. Pratt alleged that Contact Lens King was infringing upon 1-800 Contacts' trademarks, and demanded that Contact Lens King adopt certain suggested negative keywords "to ensure your broad match advertisements for general keywords are not displayed on searches for 1-800 Contacts, Inc.'s trademarks," listing nine requested negative keywords. (CX1472 at 001-008).

1133. On May 26, 2009, Jaques Matte, President of Contact Lens King, replied to Mr. Pratt's May 12, 2009 letter, stating that he had given a directive to have the Google and Yahoo advertising accounts reviewed, and ordered that any modifications necessary be made to Contact Lens King's search advertising within "24-48 hours." (CX1801 at 004).

1134. On February 18, 2010, Mark Miller, counsel for 1-800 Contacts, wrote to Jacque Matte of Contact Lens King, Inc., and alleged that Contact Lens King infringed upon 1-800 Contacts trademark rights by delivering ads that were triggered by nineteen keywords related to 1-800 Contacts' trademarks or variations thereof. (CX0448 at 002).

1135. In his February 18, 2010 letter, Mr. Miller demanded that Contact Lens King implement 19 terms specified in the letter as negative keywords (CX0448 at 003).

1136. In his February 18, 2010 letter, Mr. Miller also demanded that Contact Lens King implement the 36 additional terms specified in the letter as negative keywords (CX0448 at 003-004).

1137. In his February 18, 2010 letter to Contact Lens King, Mr. Miller did not allege that the 36 additional negative keywords specified in the letter were terms that Contact Lens King had used to infringe 1-800 Contacts trademarks. (CX0448 at 001-004).
1138. In a letter dated March 11, 2010, Mark Miller, counsel for 1-800 Contacts, informed Contact Lens King that 1-800 Contacts had filed a complaint in federal court against Contact Lens King, Inc. and enclosed a copy “of our standard settlement agreement for these matters.” (CX0799 at 001).
1139. Mr. Miller worked on the settlement agreement between 1-800 Contacts and Contact Lens King. (CX9040 (Miller, Dep. at 83)).
1140. 1-800 Contacts and Contact Lens King, Inc., entered into a settlement agreement on March 29, 2010. (CX0323 at 009 (“Contact Lens King Agreement”)).
1141. Pursuant to the Contact Lens King Agreement, Contact Lens King was required to adopt 36 negative keywords listed in an exhibit to the agreement. (CX0323 at 010). The list of 36 negative keywords that Contact Lens King was required to implement is the exact same list of terms that Mark Miller demanded be adopted as negative keywords but which he did not allege were causing infringement in his letter to Contact Lens King dated February 18, 2010. (CX0448 at 002; CX0323 at 010).
1142. None of the terms which Mark Miller previously alleged were causing trademark infringement by Contact Lens King were included in the Contact Lens King Agreement as required negative keywords. (CX0448 (February 18, 2010 letter from Mark Miller to Jacque Matte of Contact Lens King) at 002); CX323 (March 29, 2010 Contact Lens King Agreement) at 10).
1143. Of the nine terms which, in his letter dated May 12, 2009, Bryan Pratt demanded be adopted as negative keywords to solve the alleged infringement issue and to “ensure that Contact Lens Kings’ broad match advertisements for general keywords are not displayed on searches for 1-800 Contacts, Inc.’s trademarks,” only four terms (“800 contacts,” “1-800 contacts,” “1-800-contacts,” and “1800contacts.com”) were included in the final settlement agreement dated March 29, 2010. (CX1472 (May 12, 2009 letter from Bryan Pratt to Contact Lens King) at 001-008); CX323 (March 29, 2010 Contact Lens King Agreement) at 10).

12. AC Lens

1144. As of February 2010, AC Lens already understood that it was obligated to avoid showing up in response to searches for 1-800 Contacts’ trademarks. (CCPTF ¶ 125).
1145. Mark Miller, counsel for 1-800 Contacts, sent a letter to Peter Clarkson and Phillip Dietrich of AC Lens, dated February 2, 2010. (CX1623). Mr. Miller acknowledged previous correspondence between AC Lens and 1-800 Contacts, explaining his understanding that each time 1-800 Contacts had contacted them in the past, AC Lens “agreed to stop purchasing the 1800 CONTACTS marks and variations thereof as

keywords and to implement appropriate negative keywords to prevent” its ads from appearing. (CX1623 at 001).

1146. In his letter dated February 2, 2010, Mr. Miller wrote that AC Lens had purchased “sponsored advertisements at Google, and possibly other search engines, for at least one of the 1800 CONTACTS marks, or a confusingly similar variation or misspelling thereof, to trigger a link to . . . www.discountcontactlenses.com.” (CX1623 at 001-002). He demanded, on behalf of 1-800 Contacts, that AC Lens remove “ALL sponsored advertisements . . . purchased through Google, Yahoo Search, Bing, and any other search engines which are triggered by the 1800 CONTACTS trademarks or any confusingly similar variations or misspellings thereof” and cease purchasing 1800 CONTACTS trademarks and confusingly similar variations as keywords. (CX1623 at 002-003). Mr. Miller also demanded that AC Lens “implement the 1800 CONTACTS trademarks and confusingly similar variations and misspellings thereof as negative keywords” in all of AC Lens’ search engine advertising campaigns. (CX1623 at 003).
1147. The letter dated February 2, 2010, from Mr. Miller enclosed a draft settlement agreement. (CX1623 at 005-012).
1148. Mr. Clarkson responded to the letter from Mr. Miller dated February 2, 2010, on February 4, 2010. (CX1623 at 013). Mr. Clarkson wrote that AC Lens had not placed paid advertisements on Google or other search engines for 1-800 Contacts trademark terms. (CX1623 at 013). He stated that AC Lens had added “negative terms” to prevent AC Lens ads from appearing in response to 1-800 Contacts’ terms. (CX1623 at 013). Mr. Clarkson wrote that he was “unable to determine what specific issue” Mr. Miller was referring to because his letter did “not provide any specific instances of [AC Lens] ads appearing in response to trademark searches.” (CX1623 at 013).
1149. Mr. Miller responded to Mr. Clarkson’s letter in a letter dated February 10, 2010. (CX1623 at 014). His letter enclosed “eight screen shots taken on January 29, 2010 showing advertisements for Discount Contact Lenses under the sponsored links section of Google in response to searches for [1-800 Contacts],” and a report generated by KeywordSpy allegedly showing that AC Lens and its affiliates were currently purchasing 1-800 Contacts’ trademarks as keywords on Google. (CX1623 at 014).
1150. In his letter dated February 10, 2010, Mr. Miller demanded, on behalf of 1-800 Contacts, that AC Lens comply with the demands made in his February 2 letter and return the settlement agreement enclosed with that letter by February 19, 2010. (CX1623 at 014). Mr. Miller characterized the settlement agreement as a “bi-lateral agreement imposing mutually beneficial obligations on both parties.” (CX1623 at 014).
1151. Mr. Clarkson responded to Mr. Miller’s February 10, 2010 letter in a letter dated February 12, 2010. (CX1623 at 016). Mr. Clarkson wrote that his company had “never removed negative keywords applied to [1-800 Contacts’] trademarks,” and attributed the ads shown in the enclosures to Mr. Miller’s February 10, 2010 letter to “rogue affiliates.” (CX1623 at 016). Mr. Clarkson wrote that AC Lens already had a bilateral letter

agreement with 1-800 Contacts from November 2002 “which would presumably obviate the need for an additional understanding.”

1152. On February 18, 2010, 1-800 Contacts filed a complaint against AC Lens in the United States District Court for the District of Utah, alleging trademark infringement, among other claims. (CX1623 at 029-039). 1-800 Contacts alleged that AC Lens “has purchased, continues to purchase, and has caused to be purchased, the 1-800 Contacts marks and/or confusingly similar variations or misspellings thereof as keywords that trigger the display of sponsored advertisements for” AC Lens’ goods and services. (CX1623 at 032).
1153. Mr. Miller sent a letter to Mr. Clarkson dated February 19, 2010, stating that AC Lens was continuing to purchase 1-800 Contacts’ trademarks as keywords, and enclosing screen shots purporting to show AC Lens advertisements appearing in response to searches for “1800 contacts.” (CX1623 at 017). Mr. Miller explained that 1-800 Contacts had filed a complaint, enclosed with the letter, in federal court. He reiterated 1-800 Contacts’ demand that AC Lens sign the draft settlement agreement proposed by 1-800 Contacts. (CX1623 at 017-018). He stated that 1-800 Contacts would serve the complaint and move forward with litigation if AC Lens did not accept 1-800 Contacts’ “standard agreement.” (CX1623 at 018).
1154. Mr. Clarkson signed 1-800 Contacts’ “standard agreement” on March 9, 2010, and returned it to 1-800 Contacts. (RX0028 at 007; Clarkson, Tr. 244).
1155. Mr. Clarkson signed the 1-800 Contacts’ agreement because his company was faced with fighting a lawsuit in a faraway jurisdiction, with limited resources against a much larger company. (Clarkson, Tr. 244-245). It was not a “tough decision” for him at the time, given that AC Lens was a small family business. (Clarkson, Tr. 245).
1156. Mr. Clarkson consulted local counsel regarding 1-800 Contacts’ threatened litigation. (Clarkson, Tr. 245). Mr. Clarkson testified that his counsel said that AC Lens might be able to win the case but would definitely spend “at least six figures, may more.” (Clarkson, Tr. 245).
1157. 1-800 Contacts and AC Lens entered into a settlement agreement effective March 10, 2010. (RX0028) (“AC Lens Agreement”).
1158. Pursuant to the AC Lens Agreement, 1-800 Contacts and AC Lens agreed to refrain from certain “Prohibited Acts.” (RX0028 at 001).
1159. The AC Lens Agreement Prohibited Acts include, among other things, “engaging in or participating in internet advertising or any other action that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs (as listed in Exhibit 1).” (RX0028 at 001-002).
1160. The AC Lens Agreement Prohibited Acts include, among other things, “using the other Party’s trademark keywords or URLs (as listed in Exhibit 1) to target or trigger the appearance or delivery of advertisements or other content to the user.” (RX0028 at 002).

1161. The AC Lens Agreement Prohibited Acts include, among other things, “using generic, non-trademarked words as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs (as listed in Exhibit 1) without also using negative keywords as set forth in [Section 2(C) of the Agreement,] unless the particular internet search provider does not permit use of negative keywords.” (RX0028 at 002).
1162. Section 2(C) of the AC Lens Agreement provides that each Party agreed to “use the other Party’s trademark keywords and URLs (as listed in Exhibit 1) as negative keywords in all of their respective keyword advertising campaigns for any internet search provider that allows the use of negative keywords, to the fullest extent allowable by the internet search provider, in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs (as listed in Exhibit 1).” (RX0028 at 002-003). Specifically, each party must provide the other Party’s trademark keywords and URLs listed in Exhibit 1 to search engine providers as negative keywords, “such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider’s website.” (RX0028 at 003).
1163. Pursuant to the AC Lens Agreement, 1-800 Contacts and AC Lens agreed to extend the agreed-to restrictions on search advertising to all similar technologies that might arise in the future. Specifically, 1-800 Contacts and AC Lens agreed to construe the agreement “such that all future internet advertising techniques and advertisement delivery technologies that are substantially similar to the foregoing Obligations and Prohibited Acts shall also be considered Obligations and Prohibited Acts under” the AC Lens Agreement. (RX0028 at 003).
1164. The AC Lens Agreement provides a procedure for enforcement, which requires the enforcing party to notify the breaching party in writing, and allows the breaching party time to respond or to remedy an alleged breach. (RX0028).
1165. The AC Lens Agreement provides that, in event of a breach that is not cured in time, the enforcing party is entitled to damages of \$1,000 per day of the breach. (RX0028 at 004). If the agreement is breached by one party “more than once in any given six-month period,” the non-breaching party is entitled to damages of \$5,000 per day of breach. (RX0028 at 005).
1166. The AC Lens Agreement provides a separate provision for breaches by affiliates, which also entitles the enforcing party to damages \$1,000 for each day of the breach if the breaching affiliate is not terminated in time. (RX0028 at 005).
1167. Exhibit 1 to the AC Lens Agreement lists 37 terms as negative keywords related to 1-800 Contacts’ trademarks, brand names, or URLs. (RX0028 at 008).

13. Empire Vision/Visionworks

1168. On February 25, 2010, 1-800 Contacts sued Empire Vision Center, Inc., in federal district court in Utah alleging trademark infringement. (CX0808).
1169. In a letter dated February 26, 2010, Mark Miller, counsel for 1-800 Contacts wrote to David Holmberg of Empire Vision Center, Inc., alleging that Empire Vision infringed upon 1-800 Contacts' trademarks through the purchase of sponsored advertisements. (CX0449 at 001-022).
1170. In his February 26, 2010 letter, Mr. Miller included a list of 24 keywords that were allegedly causing infringement, although he listed several of the terms multiple times. (CX0449 at 002).
1171. Only six of the 24 listed terms listed in Mr. Miller's February 26, 2010 letter were unique: "800contacts" "[www.1800contacts](http://www.1800contacts.com)" "1-800 contacts", "1800contacts coupon code", "1800contacts", and "800 contacts." (CX0449 at 002).
1172. In his February 26, 2010 letter to Empire Vision, Mr. Miller enclosed "a copy of our standard settlement agreement for these types of matters," which included a list of 24 keywords to be implemented as negative keywords (CX0449 at 001-022). The list of negative keywords did not include "[www.1800contacts](http://www.1800contacts.com)," "1800contacts coupon code," or "1800contacts." (CX0449 at 001-022).
1173. On May 13, 2010, Empire Vision entered into a settlement agreement with 1-800 Contacts that prohibits Empire Vision/Visionworks from bidding for trademark keywords, and requires implementation of negative keywords that are contained in a list. (CX0319 ("Empire Vision Agreement")).
1174. Pursuant to the Empire Vision Agreement, Empire Vision/Visionworks was required to implement a list of 23 negative keywords related to 1-800 Contacts' brand names and trademarks, across all of its search advertising campaigns "in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URL's (as listed in Exhibit 2); specifically implementing negative keywords "such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website." (CX0319 at 003).
1175. The Empire Vision Agreement requires each party not to bid on any of the keywords identified by the other party, and to adopt the same as negative keywords so to instruct the search engine not to deliver an ad, even if relevant to the consumer, if any of the party's keywords are in any way, "part of a search performed on the internet search provider's website." (CX0319 at 003).
1176. The list of 1-800 Contacts' terms to be implemented as negative keywords proposed by Mark Miller in his letter to Empire Vision dated February 26, 2010 is the exact same list of 1-800 Contacts brand negative keywords adopted in the final settlement agreement. (CX0449 at 001-022); CX0319 at 010-012).

1177. Pursuant to Empire Vision Agreement, implementing the list of 1-800 Contacts' trademark terms in exact match would not prevent an ad from appearing for "1-800 Contacts Coupon Code" because "1-800 Contacts Coupon Code" is neither proposed by 1-800 Contacts nor adopted as a keyword to be implemented as a negative keyword. (CX0319 at 010-012).

1178. The Empire Vision Agreement does not include the term "1800 contact" as a negative keyword. (CX0319 at 010-012).

1179. The Empire Vision Agreement does not have a termination date, and provides no means to terminate the agreement in the event that the circumstances change such that the alleged confusion-causing conduct no longer causes confusion to the average consumer. (CX0319).

14. Replace My Contacts

1180. On May 6, 2010, Mark Miller, Counsel for 1-800 Contacts, sent a letter to Todd Messinger and Don Kloss of Tram Data/ReplaceMyContacts, wherein he alleged that Tram Data was infringing upon 1-800's trademarks through the "purchase of sponsored advertisements at Google, Ask, AOL, and possibly other search engines" that are "triggered by" keywords such as "1800 contacts," "1 800 contacts," and "1-800-contacts." (CX0638 at 002). Mr. Miller threatened to sue Tram Data unless they signed the enclosed "standard" settlement agreement. (CX0638 at 002-003).

1181. The proposed settlement agreement attached to Mr. Miller's May 6, 2010 letter to Tram Data/Replace My Contacts included a list of keywords to be adopted as negative keywords. (CX0638 at 024).

1182. On May 13, 2010, Kevin Drucker, counsel for Tram Data responded to Mark Miller's May 6, 2010 letter, and alleged that 1-800 Contacts "has been purchasing sponsored advertisements" that are triggered by keywords that "incorporate or are variants of the mark REPLACE MY CONTACTS," but in the interest of avoiding litigation he agreed that the parties could settle, absent any payment of fee. (CX0828 at 001).

1183. 1-800 Contacts and Tram Data/Replace My Contacts entered into a settlement agreement on May 18, 2010, which prohibited the parties from "engaging in internet search advertising that causes any website, advertisement, ... to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 2)." (CX0321 at 002 ("Replace My Contacts Agreement")).

1184. The Replace My Contacts Agreement required both parties to adopt as negative keywords the other party's list of designated "trademark" keywords "such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website." (CX0321 at 003).

1185. The list of designated "trademark" keywords that Replace My Contacts was required to adopt as negative keywords under the The Replace My Contacts Agreement was nearly

identical to the list that was proposed by 1-800 Contacts' counsel in his initial letter to Tram Data/Replace My Contacts dated May 6, 2010. (CX0321 at 010; CX0638 at 024).

15. Walgreens

1186. Early in 2010, 1-800 Contacts notified Walgreens of "issues found by [1-800 Contacts'] marketing group" concerning the appearance of Walgreens advertisements in response to search queries containing variants of 1-800 Contacts' trademarks (CX0482 at 002 (March 1, 2010 email from David Zeidner to Cary Pumphrey at Walgreens)).
1187. In April of 2010, David Zeidner of 1-800 Contacts emailed Cary Pumphrey of Walgreens, forwarding an email that noted "a spike in Walgreens ads showing up on our [1-800 Contacts] marks," told Cary that "it appears that the problem has started back up again," and asked him to "[p]lease let me know ... how your company is handling the situation." (CX1177 at 001).
1188. In May 2010, 1-800 Contacts' in-house counsel, David Zeidner, sent Mr. Pumphrey of Walgreens a list of companies that 1-800 Contacts had sued and a list of 36 required negative keywords that 1-800 Contacts included in its "standard agreement" with competitors. (CX0494 at 002-003).
1189. In May 2010, counsel for Walgreens represented that Walgreens was not, at that time, bidding on the name "1-800 Contacts" but that its ads may have been appearing in response to the generic keyword "contacts," on which Walgreens was bidding. (CX0460).
1190. Walgreens rejected 1-800's request to implement negative search terms, stating its view that there was "no basis in law for such a request." (CX0460 at 001). Counsel for Walgreens noted that the Walgreens advertisement at issue was "clearly identified as a link to Walgreens' goods and services and displays a link to Walgreens' web page." (CX0460 at 001).
1191. 1-800 sued Walgreens in June 2010 for trademark infringement. The parties quickly entered into a settlement agreement. (CX0322).

16. Web Eye Care

1192. On August 10, 2010, shortly after it started advertising against 1-800 Contacts, WebEyeCare received a letter from Mark Miller, counsel for 1-800 Contacts. (CX0643). Mr. Miller stated that he had filed a complaint in federal court alleging that Web Eye Care was infringing upon 1-800 Contacts' trademarks "through your online advertising campaigns with Google, and possibly other search engines," that used a list of 1-800 Contacts trademark-related keywords/search terms "to trigger advertisements" for Web Eye Care's services and website. (CX0643).
1193. In his August 10, 2010 letter to Web Eye Care, Mr. Miller enclosed a draft settlement agreement, and demanded that WebEyeCare cease any use of the 1-800 Contacts trademark, and adopt negative keywords to prevent its ads from appearing when a user entered a query in a search engine that included any variant of the term 1-800 Contacts.

(CX0643). Mr. Miller also demanded that WebEyeCare pay 1-800 Contacts \$10,000. (CX0643).

1194. [REDACTED] (CX9000 (Batushansky, IHT at 82)).
1195. [REDACTED] (CX9000 (Batushansky, IHT at 73-75); CX9014 (Batushansky, Dep. at 44-46)).
1196. On September 3, 2010 WebEyeCare and 1-800 Contacts entered into a settlement agreement to resolve 1-800's allegations of infringement. [REDACTED] (CX0324 ("Web Eye Care Agreement"); CX9000 (Batushansky, IHT at 73-75); CX9014 (Batushansky, Dep. at 44-46)).
1197. The Web Eye Care Agreement prohibits WebEyeCare from seeking to advertise against the 1-800 Contacts name (and similar identified terms) through search advertising in perpetuity. (CX0324). The agreement also requires WebEyeCare to use in perpetuity negative keywords in all of its search advertising campaigns so as to prevent display of all, "advertisements and/or internet links in response to or as a result of any internet search that includes [1-800 Contacts'] trademark keywords or URL." (CX0324 at 003; CX9000 (Batushansky, IHT at 74-75), *in camera*).
1198. The Web Eye Care Agreement makes no reference to or exception for WebEyeCare advertisements that are truthful and non-misleading. (CX0324).
1199. [REDACTED] CX9014 (Batushansky, Dep. at 204-205), *in camera*).

17. Luxottica

1200. By August 2005, 1-800 Contacts and Luxottica had reached an agreement to add each other's trademarks as negative keywords to their advertising accounts and to the lists of negative keywords that their affiliates would be required to use. (CX0117 at 001-002; CX0174; CX1378).
1201. On December 23, 2013, 1-800 Contacts and Luxottica entered into a sourcing and services agreement ("Luxottica Sourcing Agreement"). (CX0331; CX9001 (Bethers, IHT at 221-222 (CX0331 is "a sourcing and fulfillment agreement between 1-800 CONTACTS and Luxottica"))).

- 1202.1-800 Contacts' CEO, Brian Bethers, led the negotiation for the Luxottica Sourcing Agreement. (CX9001 (Bethers, IHT at 222)).
- 1203.Pursuant to the Luxottica Sourcing Agreement, 1-800 Contacts supplies contact lenses, including trial lenses, for Luxottica retail stores, and provides logistics support, and provides other services to support Luxottica's contact lens retail business. (CX0331 at -016-017; CX9001 (Bethers, IHT at 225)).
- 1204.1-800 Contacts does not provide any services for Luxottica's e-commerce business. (CX9001 (Bethers, IHT at 223 ("No, we are not providing internet fulfillment services for Luxottica"))).
- 1205.1-800 Contacts does not provide any search marketing services for Luxottica. (CX9001 (Bethers, IHT at 227-228 ("So we structured the agreement in a way that kept separate all decisions related to marketing, advertising. We focused the relationship that we had on sourcing and fulfillment."); CX9001 (Bethers, IHT at 235 ("In the case of Luxottica, we did not create an alliance. So in areas of pricing, in areas of advertising, we were completely separate. No involvement, no discussion, no meetings, no topics. So we do not work with them in advertising, whether it's broad scale, whether it's in a store, whether it's online, digital, doesn't matter. We don't work with Luxottica in those areas."))).
- 1206.Vision Direct provides e-commerce services to Luxottica, including front end services like Internet marketing. (CX9001 (Bethers, IHT at 224) (Luxottica asked Mr. Bethers if he would give them "permission to allow Vision Direct to continue to provide [e-commerce] services" and he gave them verbal permission)).
- 1207.Pursuant to the Luxottica Sourcing Agreement, Luxottica and 1-800 Contacts agreed not to use each other's trademarks as search advertising keywords, and agreed to implement each other's trademarks as negative keywords. (CX0331 at 045-048).
- 1208.Pursuant to the Luxottica Sourcing Agreement, Luxottica agreed that it "shall not purchase or use any of the 1-800 Trademarks or confusingly similar variations as listed in Schedule 17.10 as triggering keywords in any internet search engine advertising campaign." (CX0331 at 045).
- 1209.Pursuant to the Luxottica Sourcing Agreement, Luxottica agreed to "implement all of the 1-800 Trademarks or confusingly similar variations as listed in Schedule 17.10 as exact match negative keywords in all internet search engine advertising campaigns" accessible in the relevant territories. (CX0331 at 045-046).
- 1210.Schedule 17.10 of the Luxottica Sourcing Agreement lists certain trademarks of 1-800 Contacts and variations in spelling of those trademarks, along with a list of URLs owned by 1-800 Contacts. (CX0331 at 160-161).
- 1211.Pursuant to the Luxottica Sourcing Agreement, 1-800 Contacts agreed that it shall not "purchase or use any of the [Luxottica] Trademarks or confusingly similar variations as

- listed in Schedule 17.11 as triggering keywords in any internet search engine advertising campaign.” (CX0331 at 047).
1212. Pursuant to the Luxottica Sourcing Agreement, 1-800 Contacts agreed to “implement all of the [Luxottica] Trademarks or confusingly similar variations as listed in Schedule 17.11 as exact match negative keyword sin all internet search engine advertising campaigns.” (CX0331 at 047).
1213. Schedule 17.11 of the Luxottica Souring Agreement lists certain trademarks of Luxottica and variations in spelling of those trademarks, along with a list of URLs owned by Luxottica. (CX0331 at 162-167).
1214. 1-800 Contacts considered the trademark keyword advertising restrictions in the Luxottica Sourcing Agreement as an important “absolute” that Brian Bethers “insisted on having in the agreement.” (CX9001 (Bethers, IHT at 228)). 1-800 Contacts’ general counsel, Joe Zeidner, was “very concerned about it, as well.” (CX9001 (Bethers, IHT at 230)).
1215. Before the Luxottica Sourcing Agreement, Vision Direct was providing internet marketing services for Luxottica’s e-commerce business. (CX9001 (Bethers, IHT at 228-229)).
1216. 1-800 Contacts believed that it had “trademark protection” from Luxottica before entering into the Luxottica Sourcing Agreement because of its agreements with Vision Direct, who operated Luxottica’s e-commerce business. (CX9001 (Bethers, IHT at 228-229) (“Vision Direct was subject to an agreement with us that mutually respected our trademarks. To our knowledge, they were the ones that were running the search program previously for Luxottica . . . They expressed to me an intention to take over the front end, which included search advertising, all advertising digital. We had no agreement with Luxottica. We did have an agreement with Vision Direct. They represented that they were going to terminate the agreement with Vision Direct and do it themselves. We didn’t have trademark protection.”); CX9001 (Bethers, IHT at 231 (“With Vision Direct in place providing the service to Luxottica, I had not concerns about trademark violations and their intents.”)).
1217. 1-800 Contacts sought “trademark protection” from Luxottica through the Luxottica Sourcing because it believed that Luxottica was going to take over its e-commerce business from Vision Direct and 1-800 Contacts did not yet have a written agreement with Luxottica. (CX9001 (Bethers, IHT at 228-229)).
1218. Luxottica and 1-800 Contacts continue to compete on the front end, and Luxottica may advertise freely except “when it comes to trademark.” (CX9001 (Bethers, IHT at 235-36) (“We need to be free and clear to advertise any way we want to, however we want to. They [Luxottica] can spend whatever they want to. They can run any programs they want to. But when it comes to trademark, we agree to mutually respect our trademark. And that’s the intent of the discussion or the agreement and the language we had.”)).

C. 1-800 Contacts Enforced the Agreements

1. AC Lens

1219. In April of 2010, Mark Miller, counsel for 1-800 Contacts, wrote to Peter Clarkson of AC Lens claiming that AC Lens had breached the settlement agreement between the two parties. (CX1107 at 001). Mr. Miller included screenshots that, he said, “demonstrate[] the breach by affiliates of AC Lens.” (CX1107).
1220. In April of 2013, Mr. Miller wrote to Mr. Clarkson that 1-800 Contacts had discovered a breach of the settlement agreement by AC Lens, in the form of advertisements for the Walmart Contacts website appearing in response to a Google search for “1800 contacts lenses” and “through searches on Facebook for the 1800CONTACTS trademark terms.” (CX0007 at 001-002).
1221. In response to the April 2013 claim of breach by Mr. Miller, James Trigg, counsel for AC Lens, denied the breach, saying that AC Lens was not responsible for the advertisements by Walmart Contacts. (CX0007 at 004-005).
1222. In a May 30, 2014 letter, Mr. Miller notified Mr. Clarkson of a claimed breach of the AC Lens Agreement, claiming that “sponsored links for the aclens.com and discountcontactlenses.com websites” had been “triggered by searches for the term ‘www800contacts.’” (CX0006 at 001).
1223. In a letter dated June 4, 2014, Peter Clarkson, President and CEO of AC Lens responded to Mr. Miller’s May 30, 2014 letter, stating that “[t]he search term you describe is not on the list attached to our agreement, so we do not think there is a breach. Regardless, we have added the term as a negative keyword.” (CX0740).

2. Coastal

1224. In August of 2006, Ed McCready of 1-800 Contacts sent an email to Coastal Contacts stating that “[s]earch engine advertisements from Coastal Contacts and their affiliates are being triggered by searches on variations of 1-800 CONTACTS’ trademarks...in violation of the settlement agreement...” and asked Coastal to “ensure the proper steps are taken to remedy this.” (CX0260).
1225. In response to the August 2006 email from Mr. McCready that alleged breach of the 2004 Coastal Agreement, Sarah Villeneuve Bundy of Coastal Contacts responded that Coastal was “not aware of this discrepancy” and would stop its ads from appearing “immediately.” (CX0260).
1226. In November of 2006, Mr. McCready of 1-800 Contacts wrote to Ms. Villeneuve Bundy of Coastal Contacts again, claiming that Coastal had breached the 2004 Coastal Agreement and attached screenshots of the allegedly “violating ads.” These screenshots showed Coastal Contacts advertisements appearing in response to searches for “800 contacts;” “800contacts;” “1800 contacts;” and “1-800 contacts.” (CX0751 at 002-008).

1227. After receiving Ms. Villeneuve Bundy's assurance that the complained-of ads had been removed, Mr. McCready wrote again to Ms. Villeneuve Bundy, stating that the allegedly "infringing ads are still active and they appear to be from your company and not an affiliate." He asked her to "please ensure the necessary steps, such as the use of negative keywords as described by your Marketing Specialist" would be "taken as soon as possible to prevent your ads from showing on these searches." (CX0751 at 001). The negative keyword "described by [Coastal's] Marketing Specialist" to which Mr. McCready referred was "800." (CX0751 at 001).
1228. On March 2, 2011, Bryce Craven of 1-800 Contacts emailed Curtis Petersen of Coastal Contacts to notify him that "Lensway.com ads" were "showing up on our trademarked terms..." Mr. Craven asked Mr. Petersen to "double check to ensure the appropriate negatives are implemented..." (CX0432 at 002). Mr. Petersen responded that he had complied. (CX0432 at 001).
1229. On March 31, 2011, Mr. Craven again emailed Mr. Peterson, claiming that advertisements for ClearlyContacts, a property of Coastal Contacts, were "appearing on our term *1-800contacts* in the Google Canada search results" and telling him to "add the necessary negative keywords..." (CX0236).
1230. In June of 2011 Mr. Petersen responded to Mr. Craven to let him know, the "issue has been addressed" and that the list of negative keywords had been added, "across the entire US Google Contacts account" for Coastal. (CX0757).
1231. In February of 2012, Jordan Judd of 1-800 Contacts emailed Mr. Petersen claiming another instance of "a Coastal.com ad...on our trademark KW." In this instance the 1-800 Contacts trademark allegedly infringed was "contacts.com." (CX0719). Ms. Judd asked Coastal to "get that bid removed and/or add the appropriate negative keywords..." (CX0719).
1232. In February of 2013, Mark Miller sent a letter to Steven Bochen of Coastal Contacts notifying him of an alleged breach of the 2004 Coastal Agreement. Mr. Miller included screenshots of the alleged violations and stated, "we expect that you will take immediate actions to remedy this breach pursuant to the terms of the Agreement." (CX0746).
1233. In June of 2014 Brady Roundy of 1-800 Contacts emailed Braden Hoepfner of Coastal Contacts to follow up on an earlier communication. Mr. Roundy "listed the terms that are in violation and attached screenshots, stating that "[a] few negative keywords should take care of the problem," and requesting that Mr. Hoepfner, "[p]lease let me know when these are added to the account." (CX0703 at 001). Mr. Hoepfner replied that he had complied. (CX0703 at 001).

3. Vision Direct

1234. In late July of 2007, Brandon Dansie of 1-800 Contacts emailed Colin Veach of Vision Direct alleging that Vision Direct had breached the 2004 Vision Direct Agreement. (CX0627; CX0844).

1235. In his July of 2007 email alleging a breach of the 2004 Vision Direct Agreement, Mr. Dansie asked Mr. Veach to “please address this as soon as possible.” (CX0627 at 002).
1236. The July 2007 communications between Mr. Dansie and Mr. Veach eventually led to the amended settlement agreement signed by the two parties on May 8, 2009. (*See supra* § VI.B.8; CX0314 (2009 Vision Direct Agreement)).
1237. In October of 2007, Brandon Dansie of 1-800 Contacts sent a list of negative keywords to Colin Veach of Vision Direct, stating that “[i]f you were to ensure the following negative keywords were consistently used for all of VisionDirect’s search campaigns, I am sure we could eliminate this issue and save ourselves some time.” (CX0556).
1238. In December of 2009, David Zeidner of 1-800 Contacts emailed Yukio Morikubo of Vision Direct, stating that Vision Direct “has been showing up on several terms for the last two weeks, and my marketing guy has not been heard back from Colin. . . . We need to get this resolved ASAP, as it has already been up for two weeks.” Mr. Morikubo replied that Coastal had complied with Mr. Zeidner’s request. (CX0481 at 002-003).
1239. In March of 2010, Bryce Craven of 1-800 Contacts told Rick Mitchell of Drugstore.com (then owned by Vision Direct) that, “We’ve seen VisionDirect ads showing up periodically for these terms,” referencing a list of 1-800 Contacts related terms, “during the past few weeks” and asked Mr. Mitchell to “double check [the] negative keywords” in place. (CX0845 at 002).
1240. In August of 2010 Mr. Craven again contacted Mr. Mitchell by email, attaching a screenshot of a Vision Direct advertisement appearing on Bing in apparent response to a search for “800contacts.” (CX0845 at 001).
1241. In his August 2010 email claiming that a Vision Direct advertisement had appeared in response to a Bing search for “800contacts,” Mr. Craven insisted that Vision Direct add the term “800contacts” as a negative keyword. (CX0845 at 001).
1242. In January of 2013, Mr. Miller sent a notice of “Breach of...Settlement Agreement” to Drugstore.com, then owned by Vision Direct. (CX0837 at 001).
1243. In his January 2013 notice of breach to Drugstore.com, Mr. Miller alleged that Vision Direct had breached the agreement because, Mr. Miller claimed, Vision Direct’s ad appeared on the Yahoo! and Google search engine results pages in response to a search for “1800contacts coupon”, and on the Google search engine results page in response to a search for “1800contacts contact lenses.” (CX0837 at 001-003).
1244. In his January 2013 notice of breach to Drugstore.com, Mr. Miller stated, “we trust that you will immediate actions to remedy this breach.” (CX0837 at 003).
1245. In January of 2013, Cabrelle Abel, an attorney at drugstore.com, the owner of Vision Direct, responded to a letter from Mark Miller in which Mr. Miller accused Walgreens of breaching the 2004 Vision Direct Agreement. (CX1217).

1246. In her January 2013 response to Mr. Miller's letter, Ms. Abel stated that she would "be in contact regarding implementing the requested negative keywords" to its advertising campaigns. (CX1217).

4. Walgreens

1247. In April of 2010, David Zeidner of 1-800 Contacts emailed Cary Pumphrey of Walgreens, forwarded an email that noted "a spike in Walgreens ads showing up on our [1-800 Contacts] marks," told Cary that "it appears that the problem has started back up again," and asked him to "[p]lease let me know ... how your company is handling the situation." (CX1177 at 001).

1248. In December of 2010, Mark Miller, an attorney for 1-800 Contacts, emailed Peter Wilson, an attorney at Walgreens, saying that "1-800 Contacts discovered Walgreens ads coming up on Google searches for 1-800-contacts, 1800contacts.com and 1800 contacts coupon" and claiming that this was "in violation of the parties' ... settlement agreement," referring to the 2010 Walgreens Agreement. (CX1521 at 001).

1249. In his December 2010 email to Mr. Wilson alleging a violation of the settlement agreement, Mr. Miller asked that Mr. Wilson "remedy the situation." (CX1521).

1250. In May of 2011, Mr. Miller emailed Mr. Wilson memorializing a phone conversation in which Mr. Miller claimed that Walgreens had breached the 2010 Walgreens Agreement and had agreed by phone to implement a weekly audit of the ad campaigns to ensure the necessary keywords were in place. (RX1029).

1251. In his May of 2011 email, Mr. Miller also said that Mr. Wilson had agreed over the phone that Walgreens would implement additional negative keywords that were not included in the 2010 Walgreens Agreement. (RX1029).

1252. On July 8, 2013, Rick Galan of 1-800 Contacts emailed Andrea Kaduk of Walgreens, "I noticed that there have been a few trademarks we monitor that you guys have started showing up on, and I was hoping you could take a look and make sure the negatives cover the following situations," he said. (CX1060 at 001-002).

1253. In response to the July 8, 2013 email from Mr. Galen claiming that Walgreens advertisements had appeared on terms 1-800 Contacts was monitoring, Ms. Kaduk stated that she had complied with his request to make sure the negative keywords covered the situations he listed. (CX1060 at 001).

1254. On July 24, 2013, Mr. Galan emailed Glen Hamilton of Walgreens. Again, he claimed that Walgreens ads had "popped up on [1-800 Contacts'] trademark monitoring," and suggested "perhaps some negatives got messed up." (CX1058 at 001-002).

1255. In response to Mr. Galan's July 24, 2013 email claiming Walgreens ads had been appearing on 1-800 Contacts' trademark monitoring, Mr. Hamilton said that he "reapplied our negatives," and that "Hopefully it's fixed." (CX1058 at 001).

1256. In June of 2014 Brady Roundy of 1-800 Contacts emailed Mr. Hamilton screenshots claiming they showed “Walgreens is showing up for a handful of our Trademark terms.” (CX0042 at 001-002).

1257. In his June 2014 email claiming Walgreens ads were appearing on 1-800 Contacts’ trademark terms, Mr. Roundy asked Mr. Hamilton to add a list of additional negative keywords to Walgreens’ advertising campaigns, saying that doing so “should take care of it.” (CX0042 at 001-002).

5. EZ Contacts

1258. In January of 2008, William Thomashower, counsel for EZ Contacts, responded to a communication from Bryan Pratt with an saying “I replicated your Google search today and EZCONTACTS did NOT come up as sponsored link.” (CX0816 at 002).

1259. In response to Mr. Thomashower’s January 2008 email saying EZContacts advertisements did not appear on 1-800 Contacts branded queries, Mr. Pratt agreed to “re-check” the search. (CX0816 at 002).

1260. In August of 2008, Mr. Thomashower responded to an August 21 letter from Bryan Pratt which Mr. Thomashower said had a “screen shot of a Google search on 800contacts” by saying that again, “I ran the exact same search and it did not duplicate” the results Mr. Pratt had sent him. (CX0816 at 002).

1261. In response to Mr. Thomashower’s August 2008 email, Mr. Pratt responded by claiming that a second attempt to check the search results for EZ Contacts advertisements showed “evidence of a violation” of the agreement. (CX0816 at 001).

1262. In March of 2013, Mr. Miller sent a letter to Sam Lefkowitz of EZ Contacts, alleging that EZ Contacts had breached the agreement. (CX0450 at 001).

1263. In his March 2013 letter alleging a breach of the settlement by EZ Contacts, Mr. Miller told Mr. Lefkowitz, “we expect that you will take immediate actions to remedy this breach pursuant to the terms of the Agreement.” (CX0450 at 003).

6. Lensfast

1264. In May of 2014, Mr. Miller sent a “Notice of Breach” to Randolph Weigmer of Lensfast. The letter alleged that advertisements for Lensfast were being displayed in results for the search term “1800 contact lenses.” Mr. Miller notified Lensfast that he was adding the term “1800 contact” to the previously signed Lensfast Agreement. (CX0453).

7. Contact Lens King

1265. In April of 2010, Mr. Miller sent a letter to Jacques Matte of Contact Lens King, alleging that the attached screenshots of Contact Lens King advertisements “demonstrat[ed]” a breach of the 2010 Contact Lens King Agreement. (CX0796 at 001).

1266. In May of 2014, Mr. Miller sent a second allegation of breach to Mr. Matte, noting that 1-800 Contacts had identified Contact Lens King advertisements that he claimed were triggered by certain 1-800 Contacts-related search terms not included in the settlement agreement. (CX0800 at 001).

1267. In the letter, dated May 30, 2014, Mr. Miller alleged a breach of the Contact Lens King Agreement based on the appearance of “search engine advertising” for various search terms listed in the letter, including “1800contacts coupon.” (CX0800 at 001).

1268. In his May 2014 letter, Mr. Miller claimed that as a result of seeing Contact Lens King advertisements appear in response to certain search terms, 1-800 Contacts was “adding the term ‘1800 contact’ to the list of trademark keywords” prohibited in the Contact Lens King Agreement. (CX0800 at 001).

8. Empire Vision

1269. In August of 2010, J. Daniel Harkins, counsel for Empire Vision, responded to a July 2010 letter from Mr. Miller, agreeing to Mr. Miller’s request to add the term “1800 contact” to the Empire Vision / Visionworks Agreement, stop bidding on the term, and enter the term as a negative keyword. (CX0810).

9. Lenses For Less

1270. In August of 2010, Mr. Miller sent a letter to Park Studebaker of Lenses for Less, alleging that Lenses for Less had breached the 2010 Lenses for Less Agreement, including screenshots he claimed “show[ed]” the breach. (CX0822 at 002).

D. Parties Enforced the Agreements Against 1-800 Contacts

1271. In April of 2010, Matthew Jenkins, counsel for Lenses for Less, alleged to David Zeidner of 1-800 Contacts that one of 1-800 Contacts’ affiliates had breached the 2010 Lenses for Less Agreement. (CX0702 at 002).

1272. In April of 2012, Peter Wilson, counsel for Walgreens alleged to Mr. Miller that 1-800 Contacts had breached the 2010 Walgreens Agreement. (CX0713 at 003-004).

1273. In response to Mr. Wilson’s April 2012 email alleging a breach of the 2010 Walgreens Agreement by 1-800 Contacts, Mr. Miller said that the issue “was remedied within minutes of your...email.” (CX0713 at 001).

1274. In November of 2014, Mitch Wessels of Luxottica emailed John Graham of 1-800 Contacts. Mr. Wessels noted that his team at Luxottica’s EyeMed subsidiary, “believe[d] that 1-800 may be using (purchasing) EyeMed as a search term...in contrast to our agreement,” and added, “If so, obviously we want it to stop.” (CX0693 at 002).

1275. In response to Mr. Wessels’ November 2014 email alleging that 1-800 Contacts may have been violating the agreement, Tim Roush of 1-800 Contacts told his team to, “temporarily stop eyemed searches.” (CX0693 at 001).

1276. As of April 12, 2012, Walgreens had in place a master list of negative keywords relating to 1-800 Contacts. (CX1218). Walgreens would “implement this master list of 1800 contacts negatives” every time it launched new contacts campaigns. (CX1218). Implementation of the negative keywords was “of the utmost importance” to Walgreens because of the Walgreens Agreement. Walgreens’ search marketing manager admonished a colleague that “under no circumstances can [we] show for these terms.” (CX1218).
1277. The master list maintained by Walgreens as of April 2012 comprised 121 negative keywords relating to 1-800 Contacts. CX1219.
1278. The master list maintained by Walgreens as of April 2012 included two phrase match negative keywords, as indicated by the use of quotation marks on the keywords. (CX1219; Jt. Stip. re Terms ¶ 28). Those keywords were:
 “1800Contacts”
 “1800 Contacts”
1279. The master list maintained by Walgreens as of April 2012 included 119 exact match negative keywords. (CX1219). The majority of those exact match negative keywords were multiple-word phrases containing the term 1800Contacts along with additional generic words. (CX1219). Examples of the exact match negative keywords Walgreens was using in April 2012 due to the Walgreens Agreement include:
 [1800contacts review]
 [free shipping 1800contacts]
 [1800contacts discounts]
 [1800 contact lenses]
 [1800contacts coupon]
 [1800 contacts discount]
 [1800 color contacts]
 [1800 eyecontact]
 [ciba contacts 1800contacts]
 [1800contacts insurance]
 [sofmed breathables 1800contacts]
 [1800contacts store brands]
 [acuvue oasis astigmatism 1800 contacts]
 [1800contacts in tucson az]
 [vp1005 1800contacts]
 [1800contacts coupon code air optix]
 [is 1800 contact]
 [1800contacts coupon code acuvue oasis]
 [coupons for acuvue lenses 1800contacts]
 [cheap avaira contacts 1800 contacts]
 (CX1219).
1280. In February of 2010, Shan Shan Li of 1-800 Contacts asked the 1-800 Contacts affiliate coordinator to instruct an affiliate, Lenshopper.com, to add negative keywords relating to Contact Lens King. (CX0604 at 002).

1281. In response to Mr. Li's February 2010 email asking Commission Junction to instruct Lenshopper.com to add negative keywords relating to Contact Lens King, Commission Junction conveyed the message back from Lenshopper.com that they were already complying with the request. (CX0604 at 002).

1282. In response to the April 2010 letter from Lenses for Less, Bryce Craven of 1-800 Contacts told Jordan Judd of 1-800 Contacts and Mr. Li to ensure that the affiliate that appeared to have breached the 2010 Lenses for Less Agreement cured the alleged breach, saying, "we may need to terminate our relationship with them." (CX0702 at 001).

VII. Horizontal Restraints are Likely to Cause Competitive Harm

A. Horizontal Bidding Restraints are Likely to Harm Search Engines

1283. Dr. Evans reviewed the relevant theoretical and empirical economic studies of collusion over dimensions of competition. These studies invariably find that such agreements result in decreased competition, higher prices, lower output, and decreased economic efficiency. CX8006 at 069-070 (¶ 153) (Evans Expert Report) (citing Janice Rye Kinghorn and Randall Nielsen (2004), "A Practice without Defenders: The Price Effects of Cartelization," in Peter Z. Grossman (ed.), *How Cartels Endure and How They Fail* (Cheltenham, UK: Edward Elgar); Richard A. Posner (2001), *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press); Gregory J. Werden (2003), "The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook," AEI-Brookings Joint Center for Regulatory Studies, Related Publication 04-09, <https://core.ac.uk/download/pdf/6665195.pdf>).

1284. With respect to strategies used by firms to interfere in bidding processes, the relevant literature finds that a variety of cooperative bidding strategies reduce competition and benefit the firms engaging in these collusive strategies, by raising the amount that they can charge in a supply-side auction, or reducing the amount that they have to pay in a demand-side auction. (CX8006 at 070 (¶ 154) (Evans Expert Report) (citing Ken Hendricks and Robert H. Porter (2007), "An Empirical Perspective on Auctions," in Mark Armstrong and Robert H. Porter (eds.) (Amsterdam: North-Holland), pp. 2073-2143, at 2122-2133; Gian Luigi Albano, Paolo Buccirossi, Giancarlo Spagnolo and Matteo Zanza, "Preventing Collusion in Procurement," in *Handbook of Procurement*, Edited by Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo. Cambridge University Press (2006); William E. Kovacic, Robert C. Marshall, Leslie M. Marx and Matthew E. Raiff, "Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements in *Handbook of Procurement*, Edited by Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo. Cambridge University Press (2006)).

1285. Based on economic literature, theory, and empirical data, Dr. Evans concluded that there is a presumption in economics that parties that collude will secure more favorable terms for themselves and worse terms for the other side of the market. (CX8006 at 070 (¶ 155) (Evans Expert Report)).

B. Horizontal Advertising Restraints are Likely to Harm Consumers

1286. Dr. Evans reviewed the relevant economic literature, including dozens of empirical studies, and concluded that economics provides a strong presumption that horizontal agreements to prevent informative advertising are harmful to consumers and competition. Evans, Tr. 1422-1423; 1651; CX8006 at 081-082, 084, 179-185 (¶¶ 180-181, 186 & Appendix E.) (Evans Expert Report) (Timothy J. Muris, *California Dental Association v Federal Trade Commission: The Revenge of Footnote 17*, Supreme Court Economic Review (2000) at 265-310. (“A large empirical literature already provides the evidence that the court sought that restraining professional advertising raises prices without improving quality.”); *In re Polygram Holding*, 136 F.T.C. 310, 355 n.52 (2003)). Appendix E of Dr. Evans Report lists and summarizes more than 20 articles supporting Dr. Evans’ conclusions.
1287. Dr. Evans concluded that because Google and Bing have policies allowing trademark owners to prevent the use of their trademarks in the text of any rival advertisement, the Bidding Agreements are not necessary to prevent any consumer confusion related to trademarks. (CX8006 at 138 (¶ 298) (Evans Expert Report)).
1288. Dr. Evans further concluded that because the Bidding Agreements restrict the flow of accurate information necessary for the efficient functioning of the market for online contact lenses, they lack any plausible efficiency justification. (Evans, Tr. 1382, 1561; CX8006 at 138 (¶¶ 298-299) (Evans Expert Report)).
1289. Dr. Evans further found that the Bidding Agreements’ anticompetitive effects outweigh 1-800 Contacts asserted efficiency justifications. (Evans, Tr. 1382, 1564; CX8006 at 138 (¶¶ 298-299) (Evans Expert Report)).

VIII. Competitive Effects of the Restraints: Direct Evidence of Harm to Search Engines

A. The Bidding Agreements Reduced Competition Among Advertisers in Search Advertising Auctions

1290. The Bidding Agreements were effective in changing online contact lens retailers advertising behavior. (*See infra* ¶¶ 1291-1297).
1291. Parties to the Bidding Agreements testified (or declared under penalty of perjury) that if the Bidding Agreements were not in place, they would bid on, or test bidding on 1-800 Contacts’ trademarks as keywords in their search advertising campaigns. (Clarkson, Tr. 252-254, 344; Hamilton, Tr. 430-432; CX9003 (Clarkson, Dep. at 156); CX9008 (Hamilton, Dep. at 111); CX8002 at 005-006 (¶ 18) (Hamilton, Decl.) (“[A]bsent the settlement with 1-800 Contacts, I believe it would be beneficial to Vision Direct to test the prohibited keywords in online search advertising in Google, Bing and Yahoo Gemini”); (CX9014 (Batushansky, Dep. at 164-165, 168-169), *in camera*; CX0943 at 003 (¶ 17) (Duley, Decl.) (“If the Settlement Agreement were terminated or otherwise invalidated, it is possible that Visionworks would test to see if the [prohibited keywords]...would be desirable to use for online marketing purposes”); CX8000 at 002 (¶ 16) (Studebaker, Decl.) (“But for the Settlement Agreement,...we would periodically

test to see if it would be profitable to bid on the term “1-800 Contacts” or similar terms....”).

1292. Parties to the Bidding Agreements testified (or declared under penalty of perjury) that if the Bidding Agreements were not in place, they would not implement 1-800 Contacts’ trademarks as negative keywords in their search advertising campaigns. (Clarkson, Tr. 252-253; Hamilton, Tr. 417; CX9014 (Batushansky, Dep. at 168-169), *in camera*; CX0943 at 003 (¶ 18) (Duley, Decl.) (“If the Settlement Agreement were terminated or otherwise invalidated, Visionworks would also cease using the negative keywords listed in the Settlement Agreement.”); CX8002 at 004-005 (¶ 15-17) (Hamilton, Decl.) (“Absent the settlement, Vision Direct would not have implemented any of the negative keywords attached to the 2008 settlement agreement, or any of the negative keywords related to 1-800 Contacts that have subsequently been implemented.”)).
1293. All counterparties to the agreements stopped bidding on 1-800 Contacts trademark keywords almost entirely following the agreements. (Evans, Tr. 1414-1415 (referencing CCXD0005-021); CX8006 at 071 (¶ 157) (Evans Expert Report) (showing that Google bidding data demonstrates that counterparties to the agreements who were bidding directly on 1-800 Contacts brand-name keywords before the agreements ceased bidding almost entirely following the agreements)).
1294. Counterparties to the agreements who were appearing on search results pages for 1-800 Contacts brand-name keywords through their use of “matched ad” bids ceased this practice following the agreements. (Evans, Tr. 1410-1411; CX8006 at 071-072 (¶ 158) (Evans Expert Report)).
1295. Dr. Evans concluded that “1-800 Contacts targeted its major rivals, who were likely to be the most effective in competing with 1-800 Contacts and therefore the likely bidder just below them in the ad ranks.” These firms had been engaged in the most advertising on 1-800 Contacts’ trademark keywords. (Evans, Tr. 1416, 1424-1425; CX8006 at 071 (¶ 157) (Evans Expert Report)).
1296. Thus, the bidding agreements removed over a dozen advertisers from the auctions that determined which advertisements would appear on search results pages for 1-800 Contacts’ trademark keywords. (Evans, Tr. 1424-1425; CX8006 at 064, 070-071 (¶¶ 139, 156-57) (Evans Expert Report)).
1297. Dr. Evans defined the term “Informal Agreement” to describe what he observed regarding Lens.com and Lens Discounters. Both “got cease and desist letters, and there was also a dialogue between 1-800 [Contacts] and those two firms ... concerning the advertising activity” followed by cessation of advertising observed in the Google data. Evans Tr. 1408-1409; CX8006 at 008, 037-038, 023, 047, 130-132 (¶¶ 14, 84, 104 n.112, 279, 285 & Table 1) (Evans Expert Report); CX8009 at 098 (¶ 186) (Evans Rebuttal Expert Report)).

B. Reduced Competition Among Advertisers Lowered Search Engine Revenues

1298. Dr. Evans found that as a result of the reduced competition caused by the Bidding Agreements, search engines displayed fewer ads, which lowered their revenues; and were forced to offer a lower-quality product to their users. In addition, Dr. Evans performed an empirical analysis that found that the Bidding Agreements lowered the prices paid for clicks on the affected searches. (Evans, Tr. 1378-1379; CX8006 at 064, 074-077 (¶¶ 139-140, 163-169) (Evans Expert Report)).

C. Reduced Competition Allowed Advertisers to Pay Lower Prices

1299. The economic structure of the keyword advertising market means that 1-800 Contacts paid less for advertisements than it would have in the absence of the agreements. (CX8006 at 072 (¶ 159) (Evans Expert Report)).

1300. Google and Bing use modified second-price auctions to sell advertisements. In a second-price auction, a winning advertiser is not charged what it bid, but instead pays only the amount needed to just beat the next-highest bidder. The Google and Bing auctions are “modified” second-price because the algorithm ranks ads by “ad rank,” which incorporates not only the amount of the bid, but also an ad’s quality score, so that a bidder with a lower bid but higher quality score can win an auction over a bidder with a higher bid but lower quality score. (CX8006 at 065-066 (¶¶ 143-144) (Evans Expert Report); Juda, Tr. 1077; *see also supra* Section IV.A).

1301. When one bidder drops out of a second-price auction, if that bidder has an ad rank of greater than zero and was previously awarded a position in the auction, at least one of the remaining bidders will pay less. Generally, more advertisers result in higher cost per click payments. (CX8006 at 067-068 (¶ 149) (Evans Expert Report); Juda, Tr. 1204-1205, *in camera*; CX9029 (Bethers, Dep. at 163-164) (additional ads results in “meaningfully higher” costs per click in some instances, “slightly higher” cost per click in other instances); CX0915 at 001 (“TM CPCs . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this past week (both local and national retailers), which increased competition and CPCs for our top terms.”); CX9020 (Craven, Dep. at 26) (“[I]n general, the more competitive a term, or, in other words, the more advertisers that are competing for a search term, in general, the cost per click for that term will go up. And so in this instance, I’m referring to there were more competitors for our top trademarked keywords, which would have pushed the cost per clicks higher for those specific terms.”) (discussing CX0915)); CX9020 (Craven, Dep. at 27) (“[I]f we have fewer competitors, typically, with all things being held equal, your cost per clicks will decrease.”); CX9020 (Craven, Dep. at 30)).

1302. When faced with competition, firms may determine they are willing to increase their bids, so when bidders drop out, reduced competition could lower the amount which firms that remained were bidding. (CX8006 at 068 (¶ 150 & n.164) (Evans Expert Report); Juda, Tr. 1337-1338, *in camera*).

- 1303.1-800 Contacts recognized that competition for keywords related to its trademarks increased its prices, and that less competition lowered its costs. (*Supra* § VI.A.3; *see also* CX9034 (Roush, Dep. at 60-62); CX9001 (Bethers, IHT at 196); CX9012 (L. Schmidt, IHT at 211); CX9020 (Craven, Dep. at 26-27, 30, 37-38); CX9032 (L. Schmidt, Dep. at 188); CX0655 (May 16, 2011 email from Bryce Craven to Laura Schmidt: “We’ve seen an increase in competitor activity on our marks during the last few weeks which may be responsible for our increased TM CPCs.”)).
1304. [REDACTED] (Juda, Tr. 1178-1179, 1336, 1349, *in camera*; CX8005 at 006 (¶¶ 35-37) (Iyer, Decl.), *in camera*).
1305. Trade literature on search advertising recognizes that less competition lowers advertising costs. (CX8006 at 073-074 (¶ 162) (Evans Expert Report) (citing WordStream, “PPC Keyword Research Guide: How to Find the Words for Your Paid Search Campaigns,” <http://marketing.wordstream.com/WSContentDLKeywordResearchGuide.html>; Armin Laidre, “How to Lower Your CPC Costs in AdWords Advertising Platform,” My Ads Agency, July 3, 2015, <http://myads.agency/guides/lower-cpc>; Matt Redford, “How to Find Lowe Competition, High ROI Keywords,” Keyword Eye, October 15, 2014, <http://www.keywordeve.com/blog/how-to-find-low-competition-high-roi-keywords/>; WordStream, “How Much Does Google AdWords Cost?” December 8, 2016, <http://www.wordstream.com/blog/ws/2015/05/21/how-much-does-adwords-cost>)).
1306. Dr. Evans’s empirical analysis of the relationship between intensity of competition and the prices 1-800 Contacts paid demonstrates that, absent the bidding agreements, 1-800 Contacts’ would have paid [REDACTED] for each click on its advertisements, while in fact it paid only [REDACTED] cents. The agreements reduced 1-800’s cost per click by \$0.54 to \$0.80 per click, [REDACTED].

Table 5: Effect of Competition on 1-800 Contacts

Explanatory Variable	Coefficient	Standard Error	T-Statistic	Implied CPC Decrease (Broad Match)
Impressions	6.08E-7**	2.05E-7	2.97	\$0.80 (\$0.15, \$1.44)
Clicks	0.00003373**	0.00000958	3.52	\$0.54 (\$0.15, \$0.92)

Heteroscedasticity-robust standard errors and t-statistics are reported; * Significant at the 5% level; ** Significant at the 1% level; 95% confidence intervals are reported for the implied CPC increase from removing the restrictions

(CX8006 at 077 (¶ 168) (Evans Expert Report)).

D. Reduced Competition Resulted in Lower-Quality Results Pages

1307. Keyword advertising auctions are designed to ensure the user is presented only with relevant ads, and ensure that ads more relevant to the consumer appear on the first search

1315. Dr. Evans also reviewed several studies that examined the relationship between greater availability of price information for online shopping and the prices that consumers pay. These studies find a positive relationship between price information and lower transaction prices. (CX8006 at 084 (¶ 185) (Evans Expert Report) (citing Jeffrey R. Brown and Austan Goolsbee, “Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry,” *Journal of Political Economy*, Vol. 110, No. 3 (June 2002), pp. 481-507; Florian Zettelmeyer, Fiona Scott Morton, and Jorge Silva-Risso. "How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data," *Journal of Marketing Research*, Vol. 43, No. 3 (2006), pp. 168-181; and Glenn Ellison and Sara Fisher Ellison. "Search, Obfuscation, and Price Elasticities on the Internet," *Econometrica*, Vol. 77, No. 2, (2009), pp. 427-452.)).
1316. Dr. Evans concluded there is a strong economic presumption, based on the economic evidence on the effect of advertising restrictions and the nature of online competition, that prohibitions on advertising, particularly search-based advertising, will increase prices and harm competition between online sellers. (CX8006 at 084 (¶ 186) (Evans Expert Report)).
1317. Search advertising, like many forms of advertising, increases price transparency in the market, which is something 1-800 Contacts was trying to reduce relative to its competition. (CX9039 (Clarkson, Dep. at 118 (“[I]t is hard to support higher pricing in a commoditized market, and the internet, in general, made comparison shopping easier.”), Schmidt, Tr. 2928-2931; CX0063 at 21 (1-800 Contacts Marketing Presentation dated April 29, 2005).
- 2. 1-800 Contacts’ Price Premium Over Other Online Contact Lens Retailers Cannot be Fully Explained by Higher Service Levels**
1318. 1-800 Contacts’ price premium over other online contact lens retailers cannot be fully explained by higher service levels. (*See infra* ¶¶ 1323-1343).
1319. Contact lenses are a commodity product. (*See supra* § III.D; *see also* Athey, Tr. 743-748).
1320. Dr. Athey reviewed relevant economic literature regarding markets for commodity products, which are sometimes referred to as “commoditized product markets.” (CX8007 at 010-011 (¶¶ 23-26) (Athey Expert Report)).
1321. The relevant literature regarding commoditized product markets finds that “[c]ommoditized product markets typically have strong price competition” and “price has more significance as a purchasing decision factor in commoditized markets than in non-commoditized markets as there are few other sources of product differentiation.” (CX8007 at 011 (¶ 25) (Athey Expert Report)).
1322. In the “typical” functioning of commoditized product markets, “[f]or retail goods, consumers are able to shop around to find the retailer with the lowest price.” (CX8007 at 011 (¶ 25) (Athey Expert Report)).

- 1323.1-800 Contacts' prices are, on average, higher than those of its online competitors. (*See supra* § VI.A.1; *see also* Bethers, Tr. 3543-3545 (distinguishing 1-800 Contacts from "other pure-play online contact lens sellers" when describing the pricing structure of contact lens retailers); RX1228 at 036, *in camera* (listing [REDACTED] CX8006 at 085 (¶ 188) (Evans Expert Report), *in camera*; CX8007 at 013-014, 045-051 (¶¶ 31-32 & Exhibits D1-D7) (Athey Expert Report), *in camera*; Athey, Tr. 740-742 (testifying that she reached a conclusion that 1-800 Contacts charged a price premium over other online contact lens retailers based on both the observations of market participants and her own analysis of market data)).
- 1324.Dr. Athey examined "1-800 Contacts' claims that the price premium could be explained by a customer service differential." (CX8007 at 014 (¶ 34) (Athey Expert Report); Athey, Tr. 749).
- 1325.In order to examine the contention that the price premium 1-800 Contacts charges could be fully explained by a customer service differential, Dr. Athey examined information available in the record regarding "consumer perspectives on firms" that sell contact lenses online and examined how investors, 1-800 Contacts, and rival online contact lens sellers used that information in their business decision making. (CX8007 at 014 (¶ 34) (Athey Expert Report); Athey, Tr. 749).
- 1326.In examining the contention that the price premium 1-800 Contacts charges could be fully explained by a customer service differential, Dr. Athey relied on her economic expertise and experience regarding pricing and product differentiation, including the finding of economic theory that "when consumers are fully informed," "you need to have product differentiation of some sort to sustain a price premium" and her economic and statistical expertise and experience regarding internet search, including experience in "how to conduct surveys that would help elicit consumer information about their preferences and the factors that lead to those preferences." (Athey, Tr. 2102-2103).
- 1327.Dr. Athey concluded that "differences in customer service quality between online contact lens retailers, if any, cannot rationalize 1-800 Contacts' entire price premium." (CX8007 at 014 (¶ 34) (Athey Expert Report); Athey, Tr. 754 ("Q. Dr. Athey, to be clear, did you reach a conclusion that 1-800's service isn't any better than anyone else's in the online contact lens retail space? A No. There was lots of material that supported that 1-800 provides excellent customer service and it provides better service than some of the online competitors. The conclusion was that the price premium is not supported by the service differential, particularly for consumers that are doing – that are coming through the Internet search channel.")).
- 1328.Many of 1-800 Contacts' online rivals offer customer service that rivals 1-800 Contacts' service. (*See supra* § III.E).
- 1329.1-800 Contacts' online rivals often carry a large inventory of contact lenses to ensure customer satisfaction with selection and speedy delivery. (*See supra* § III.E.1).

1330. 1-800 Contacts' online rivals ship customer orders quickly, in many cases the day the customers place the orders. (*See supra* § III.E.2).
1331. Many of 1-800 Contacts' online rivals offer excellent customer service, including generous return policies and quick responses to customer telephone calls and emails. (*See supra* § III.E.3).
1332. Because online contact lens retailers' business models often rely on customers making more than one purchase (*see supra* Section V.A.6.b), they invest in service in order to ensure that customers return. (*E.g.*, Holbrook, Tr. 1890-1891 [REDACTED] Alovis, Tr. 1011 (LensDirect is willing to spend more money to acquire a new customer than it will earn from its first sale to that customer because LensDirect has concluded that "the customer will enjoy working with us enough that they will continue to buy from LensDirect."); CX9014 (Batushansky, Dep. at 148), *in camera* [REDACTED] [REDACTED]).
1333. Many of 1-800 Contacts' online rivals earn high levels of customer satisfaction and high net promoter scores (NPS, a measure of consumers' willingness to recommend their businesses to friends.) (*See supra* § III.E.3).
1334. In an August 7, 2012 email, 1-800 Contacts' online marketing manager, when discussing the difficulty of attracting consumers through the paid search channel, wrote: "the only other option I see is trying to convince customers that our existing prices are better than they really are or worth the cost. Tough challenge considering that we sell the exact same thing as everyone else." (CX1086 at 001 (Email from Amber Powell to Laura Schmidt and Rick Galan); *see also* CX1086 at 003 ("I'm sure you don't need me to tell you this, but I don't know how we still get orders from your channel. Look at all the prices that are much lower than ours.")).
1335. 1-800 Contacts' price match policy suggests its service is not substantially better than service offered by its rivals. "If the customer service differential between 1-800 Contacts and online competitors was sufficient to support the price differential, the Price Match program would not be required." (CX8007 at 018 (¶ 46) (Athey Expert Report)).
1336. Customers who switch from 1-800 Contacts to other online retailers do not switch back. (CX1117 at 023 (January 2013 1-800 Contacts presentation entitled "Where's the love? Deadfile Customer Survey" reporting that "If they've gone online somewhere else – we've lost them."))
1337. The fact that [REDACTED] suggests that 1-800 Contacts does not offer sufficiently better service than rivals to justify its price premium. (Athey, Tr. 825-826, *in camera* (testifying that [REDACTED] [REDACTED])).

[REDACTED] X8007 at 018 (¶ 47) (Athey Expert Report)).

1338. In 2012, Berkshire Partners, then parent to National Vision (the parent company of AC Lens), considered an acquisition of 1-800 Contacts. In its evaluation, it determined that the price premium 1-800 enjoyed at the time was likely not sustainable because its service levels were not sufficiently distinguishable from those of its lower-priced rivals. (CX1109 at 003 (“Our findings have been mixed. . . . we are concerned that 1-800 Contacts’ premium pricing positioning versus its competitors is unsustainable in the medium to long term given the commodity-like nature of contact lenses and 1-800 Contacts’ insufficiently distinguishable service.”), 009 (“Another challenge for 1-800 is that despite its strong culture around customer service, contact lenses are a fundamentally difficult market in which to differentiate an offering. NPS data aggregated from a variety of sources suggests that while 1-800’s customers are generally highly satisfied, so are customers of AC Lens and Vision Direct. Similarly, the Stax online competitor comb chart (slides 37-38), shows that 1-800 is at best marginally superior to its peers on metrics such as ease of purchase price, trust, delivery speed and customer service.”), 008-009 (“[W]e are acutely concerned with 1-800’s relative retail pricing, which is ~10% less than [IECPs]s and non-discount chain retailers and ~15%-30% more than online discounters”), 009 (“[T]he Company has significant churn – approximately 50% of customers don’t return to make a second purchase”); CX9039 (Clarkson, Dep. at 97-98)).
1339. Berkshire Partners’ decision to make a bid despite this concern was driven by its desire to arrange a meeting with Walmart (when then was in an alliance with 1-800 Contacts) in order to enable National Vision to expand its relationship with Walmart. (CX1109 at 003-004 (“[A] key valuation consideration for us is how an acquisition of 1-800 could enable NVI to further its relationship with Walmart. Unfortunately, sell-side banker Sonenshine Partners has thus far been unwilling to grant us direct access to Walmart management . . . Our bid strategy is guided by our desire to arrange such a meeting – only by making it to the final stage of this process and having the opportunity to meet with Walmart will we be able to fully determine 1-800’s value to NVI [National Vision], inclusive of the financial profile of a new Alliance agreement and/or additional retail vision centers that Walmart would enable NVI to operate in exchange for acquiring 1-800 and preserving some form of the contact lens Alliance.”), 005 (describing 1-800 Contacts “Alliance” with Walmart)).
1340. In the due diligence process in connection with Berkshire Partners’ potential acquisition of 1-800 Contacts in 2012, 1-800 Contacts managers “admit[ted] they haven’t done enough to differentiate their service recently and acknowledge[d] that others such as Vision Direct do a good job servicing their customers.” (CX1109, at 009).
1341. In the due diligence process in connection with Berkshire Partners’ potential acquisition of 1-800 Contacts in 2012, 1-800 Contacts “concede[d] that it has not adjusted price sufficiently in response to its disadvantaged pricing position and growing competitive intensity. Pending a renegotiation or termination of the Walmart Alliance, however, 1-

800 plans to pull two key pricing and margin levers: Lower prices [and] . . . Return to rebates.” (CX1109 at 010-011).

1342.AC Lens CEO Mr. Clarkson was part of the diligence team Berkshire Partners relied on to evaluate 1-800 Contacts. Mr. Clarkson was “the online contact lens guy” within Berkshire Partners’ subsidiary National Vision. As part of the diligence efforts, Mr. Clarkson reviewed 1-800 Contacts documents, visited 1-800 Contacts, and met with 1-800’s management team. (Clarkson, Tr. 199-201).

1343.Mr. Clarkson concurred with Berkshire Partners’ concern that 1-800’s price premium would not be sustainable as consumers learned about less expensive offerings. (CX9039 (Clarkson, Dep. at 98) (“Q. Could you elaborate a bit more on – what is your understanding of that concern, that 1-800’s price premium was not sustainable? A. Well, I think it’s more or less, you know, what I was saying, that 1-800 has – because of their sort of unmatched brand awareness has been able to charge a premium over what contact lenses are available for in other internet competitors, including people like AC Lens. The nervousness is around whether or not that would be sustainable. As more and more people learned about – consumers learned about less expensive offerings, would 1-800’s businesses necessarily suffer when there were much cheaper options available?”)).

3. Consumers are Not Well Informed About Relative Prices of Online Contact Lens Retailers

1344.Many consumers are not aware of the price discrepancy between 1-800 Contacts and its online competitors. (RX1228 at 036, *in camera* [REDACTED])

[REDACTED]
CX8006 at 081-082 (¶ 189 & nn.198-199) (Evans Expert Report), *in camera*; CX8007 at 021 (¶ 56) (Athey Expert Report) (“Consumers are not aware in general of the price distribution among online contact lens sellers.”); *see also infra* ¶¶ 1349-1354).

1345.As part of the due diligence regarding its potential acquisition of 1-800 Contacts in 2012, Berkshire Partners retained a third party, Stax, Inc., a global consulting firm, to perform some research, including a consumer survey, to inform Berkshire’s decisions about the acquisition of 1-800 Contacts. (CX9039 (Clarkson, Dep. at 34-35)).

1346.Stax concluded based its consumer survey results that 1-800 Contacts’ customers were less likely than customers of other online retailers to have comparison shopped before initially choosing their online retailer. (RX0041 at 019 (reporting that 34.7% of 1-800 Contacts’ customers comparison shopped across multiple websites and found 1-800 to be the most appealing, compared to 82.9% of Vision Direct’s customers, and 63.1% of other online retailers’ customers, who comparison shopped and found their retailer to be the most appealing; reporting that “1-800 Customers Are Less Likely to Have Comparison Shopped Before Choosing 1-800 vs. Other Online Retailers”)).

1347. In the Stax consumer survey, 34.7% of respondents, asked why they decided to initially purchase from 1-800 Contacts, responded that “It Was the Only Online Contacts Site of Which I Was Aware.” (RX0041 at 019; CX9039 (Clarkson, Dep. at 41-42)).
1348. In conducting its due diligence regarding a potential acquisition of 1-800 Contacts in 2012, Berkshire Partners considered the following question to be “particularly relevant to 1-800’s dilemma: are customers of high-priced, low cost-to-serve products truly loyal, or are they uninformed?” (CX1109 at 011).
1349. In conducting its due diligence regarding its potential acquisition of 1-800 Contacts in 2012, Berkshire Partners’ investment analysis team concluded that “a sizeable segment” of consumers were uninformed about lower-priced options for purchasing contact lenses online. (CX1109 at 011 (“Investment Concern Summary . . . The team believes that 1-800 likely benefits from a sizable segment of uninformed buyers who are simply unaware of the other (and growing) low-priced choices on the internet.”)).
1350. 1-800 Contacts itself made business decisions based on its understanding that consumers misunderstood prices. (CX1086 at 001 (Email from Amber Powell to Laura Schmidt and Rick Galan, noting that: “We actually have found success in the past when we used ‘We’ll beat any price’. Our past thought was that the customer than [sic] interpreted this to mean we had lower prices.”)).
1351. 1-800 Contacts considers “Paid Search on 1-800 CONTACTS Trademark” to be a “Direct Traffic Source” that is “much less susceptible to competitive advertising or offers” than “Non-Direct Traffic Sources” such as “Other Paid Search.” (CX0429 at 013 (“Management Presentation” dated November 2013); *see also supra* §§ V.B.1 and VI.A).
1352. Between [REDACTED] of 1-800 Contacts’ initial web orders came from users searching on a 1-800 Contacts trademark. (RX0428 at 030, *in camera* [REDACTED] [REDACTED] Bethers, Tr. 3802 [REDACTED] X8006 at 088-089 (¶ 193 & Figure 1) (Evans Expert Report), *in camera*).
1353. Dr. Athey concluded, “the price premium is not fully explained by other factors like differentiation and service...” (Athey, Tr. 756).
1354. Dr. Athey found that, “economic theory suggests, especially in this type of industry, that lack of information about prices . . . is the leading alternative for a source of a price premium of this type.” (Athey, Tr. 756-757).

4. Online Contact Lens Consumers Value, and Act on, Price Information

1355. Online contact lens consumers value, and act on, price information. (*See infra* ¶¶ 1356-1368).

- 1356.1-800 Contacts recognized that consumers act on price information in advertisements. (CX1086 at 002-003 (August 7, 2012 email from Amber Powell to Laura Schmidt and Rick Galan stating “I think it’s very likely” that “all the prices that are much lower than ours” in the paid search channel were responsible for “paid search experiencing a drop in NI [new internet] CR [conversion rate] that is disproportionate to other channels” and noting that, by contrast, “[t]yped/bookmarked customers aren’t exposed to other websites’ pricing before coming to our site which likely makes them less sensitive to pricing.”)).
- 1357.The fact that consumers who switch from 1-800 Contacts to other online retailers do not switch back to 1-800 Contacts suggests that consumers do value and act on information about 1-800 Contacts’ rivals offering lower-priced options for purchasing contact lenses online. (*See supra* § IX.A.2; CX1117 at 023; Athey, Tr. 762-763 (“I also examined other types of documents in the case, internal e-mail chains, as well as a survey that 1-800 conducted, also to answer the same type of question, called the deadfile customer survey that looked at why consumers stopped using 1-800 Contacts. Q. What did those 1-800 materials you just referenced tell you about consumers’ interest in pricing information? A. So one important piece of information that came out of this, 1-800 documents, is that – that they mention that customers that aren’t exposed to other websites before coming back to their site are less sensitive to pricing and that consumers typically don’t come back to 1-800 once they purchase from online competitors, so once they become aware of other alternatives, they don’t come back. And the context for this document is important. This is where 1-800 was doing surveys of their customers to understand . . . why they don’t come back after they leave. And so they . . . find that if they’ve gone to another online retailer, they’re not going to get them back, which is consistent with the idea that those other firms are offering enough service, making a trade-off that makes the customers better off.”)).
- 1358.Many online contact lens retailer advertisements contain information regarding prices or discounts. (*See infra* Section IX.A.5.a; Athey, Tr. 761; CX8010 at 058 (Exhibit E) (Athey Rebuttal Report) (showing that in the comScore data set that Dr. Athey used, 50% of contact lens related advertisements’ “text contains either “\$” or “% off” in the ad description or title”)).
- 1359.The fact that many online contact lens retailer advertisements contain information regarding prices suggests that, to the extent these firms are rational, price information is important to consumers. (Athey, Tr. 761 (“Are consumers of contact lenses in the online space interested in information about prices? A. Yes. I find that they are. And I find that they do respond to the availability of this information. And so, again, I look at that from a couple of different perspectives. The first perspective is direct market data. In my comScore data set, I can observe the text of the advertisement that was shown to the consumers. They only have a small space in which to present their information, and they choose to promote price information, and so that choice suggests that the firms themselves believe and have evidence that price information is important to consumers.”)).

1360.AC Lens's sales increased greatly when it lowered prices after Johnson & Johnson discontinued its UPP program. (CX9018 (Drumm, Dep. at 183-184)).

1361. [REDACTED] (CX1449 at 050, *in camera*).

1362. [REDACTED] (CX1449 at 050, *in camera*).

1363. [REDACTED] (CX1449 at 050, *in camera*).

1364. [REDACTED] (CX1449 at 053, *in camera* (showing that

1365. [REDACTED] (CX1449 at 055, *in camera*).

1366.Visitors to 1-800 Contacts' website are often interested in price information. (CX0852 at 103 (September 29, 2010 1-800 Contacts Board Meeting presentation, reporting results of an online survey showing that while most visitors to 1-800's website are "considering purchase," about a quarter as many are "checking prices but not intent to buy."); CX0853 at 066 (August 18, 2011 1-800 Contacts Board Meeting presentation, [REDACTED]

1367.Dr. Athey concluded that "consumers who search for 1-800 Contacts queries are interested in comparing prices and would use pricing information if it was provided." (CX8007 at 021 (¶ 58) (Athey Expert Report)).

1368.1-800 Contacts' online rivals valued advertising in response to search queries including 1-800 Contacts' brand terms because consumers act on information provided by those ads. (*See supra* § V.B.2).

5. Restricted Advertisements are Relevant and Useful to Online Contact Lens Consumers

1369.The Bidding Agreements prevented competitors from showing informative advertising to consumers who came to 1-800 Contacts via trademark searches. (*Supra* §§ V, VIII.A; Evans, Tr. 1423-1424; CX8006 at 088 (¶ 193) (Evans Expert Report)).

⁵ See JX0002-A-030 (CX1449 admitted for all purposes).

1370. Google strives to ensure that search advertising is “useful and relevant to user’s search” and “aspire[s] to show relevant and useful commercial information to users.” (Juda, Tr. 1072).
1371. Selecting relevant advertisements for users is an important priority for Google. (Juda, Tr. 1072).
1372. The fact that an advertiser is willing to pay for each click received is a strong signal of relevance to users. (Athey, Tr. 719-720 (“[A]n advertiser won’t be able to afford to be in those high positions on the page unless they are relevant.”); CX8006 at 33 (¶ 75) (Evans Expert Report) (“It often makes economic sense for online sellers to pay for search ads so long as they are making a large enough margin on each sale net of the cost of the search advertising that results in that sale.”)).
1373. The fact that an ad consistently appears in paid search results is itself a strong signal of relevance to users. (Athey, Tr. 707-708 (“I have a paper that shows that, in equilibrium, the search advertisements that are ranked most highly are also those that are most relevant for consumers.”), 718-719; *see also supra* § IV.A.4 (explaining the signals of relevance—including click through rate, ad text relevance, and landing page experience—that search engines use to determine an advertisement’s ad rank and thus placement on the search engine results page)).
1374. When contact lens retailers have shown advertisements in response to 1-800 Contacts branded queries, those advertisements have resulted in clicks and conversions. (*See supra* § V.B.2.).
- a. Contact lens retailer advertisements provide relevant information to consumers, including price information.
1375. Many online contact lens retailer advertisements contain information regarding prices or discounts. (*See infra* ¶¶ 1376-1382; Athey, Tr. 761; CX8010 at 058 (Exhibit E) (Athey Rebuttal Report) (showing that in the comScore data set that Dr. Athey used, 50% of contact lens related advertisements’ “text contains either “\$” or “% off” in the ad description or title”)).
1376. In its marketing efforts, AC Lens focuses on informing potential customers about “service, convenience and price,” and considers price information to be a particularly important message to send to potential customers. (Clarkson, Tr. 218).
1377. In its internet advertising, the message that LensDirect attempts to convey is: “Same product, better prices, better service.” (Alovis, Tr. 993).
1378. The primary marketing message that LensDirect seeks to send to customers is a message that “We sell the same contact lenses that the other guys are selling, but we do it with better pricing and we do it without doubt with better service.” (Alovis, Tr. 1017).
1379. Memorial Eye promoted its lower prices and discounts in its search advertising messages. (Holbrook, Tr. 1904).

1380.The messaging that Memorial Eye focused on in search advertising for its online businesses was “[p]rimarily . . . a discount type of messaging, offering discounted lenses, you know, low-priced lenses, lower-priced lenses, . . . coupons for lenses, . . . discounts on lenses.” (Holbrook, Tr. 1904).

1381.Memorial Eye was targeting customers looking for lower priced contact lenses through search advertising. (Holbrook, Tr. 1904).

1382.Dr. Athey concluded that consumers are interested in seeing price information and chose to promote price information as a part of their contact lens advertising when they were able to bid. (Athey, Tr. 761-762; CX8010 at 026, 058 (¶ 63 & Exhibit E) (Athey Rebuttal Report)).

- b. Absent restrictions, contact lens retailer advertisements appearing in response to search queries containing 1-800 Contacts’ brand name terms would provide relevant information to consumers, including price information.

1383.For online contact lens retailers, the opportunity to share their advertising messages with consumers who have entered search queries containing 1-800 Contacts’ brand name terms is particularly attractive. (*See supra* § V.B.2).

1384.In search advertising, advertisers can and do tailor advertising copy (the text of advertisements) to the search query terms in response to which the advertisement appears. (Clarkson, Tr. 228 (“Q. When you create an ad, are you able to target the messaging in your ads based on the type of search terms that that ad would be associated with? A. Yes. So we’d write a different ad for someone searching for ACUVUE, which is one brand of contacts, compared to someone who is searching for dailies, AquaComfort, for example, which is – I think that’s probably what you’re asking. Q. Yes. Yes. And is that something that AC Lens actually does? A. Yes.”)).

1385.But for the agreements, advertisers would include relevant information, including price information, in advertisements that appear in response to search queries that include 1-800 Contacts brand name terms. (*See supra* § V.B.2, *infra* §§ IX.A.4 and IX.A.5.a; Athey, Tr. 790 (1-800 Contacts’ competitors “specifically want to customize their ad text in the -- in the way that they present themselves to the consumer to emphasize the fact that they do have lower prices for those firms that – which many of them do”)).

B. The Bidding Agreements Restricted a Significant Volume of Advertising from Online Contact Lens Retailers

1386.The Bidding Agreements restricted a significant volume of advertising from online contact lens retailers. (*See infra* ¶¶ 1387-1464).

1387.Complaint Counsel’s economic experts, Dr. Athey and Dr. Evans each conducted substantial empirical analysis of how the Bidding Agreements affected advertising. Dr. Evans used historical data from one successful advertiser to calculate the volume of lost advertising. Dr. Athey constructed a model to estimate the reduction of the quantity and quality of the lost advertising as well. (*See infra* §§ IX.B.1-3).

1388. Dr. Evans defined the term Matched Ads as advertising “that result from the search engine making a decision to serve an ad, in response to a user typing in a search query that includes a 1-800 Contacts’ [brand name keyword], through phrase match (e.g., if the keyword is “contacts”) or broad match (e.g., if the keyword is “contact lens”), even though the rival advertiser did not bid on a keyword that is a 1-800 Contacts [brand name keyword].” (CX8006 at 051 (¶ 111) (Evans Expert Report)).

1389. Dr. Evans defined the term Rival Direct Bid Ads as advertising that is served by a search engine “as a result of a rival advertiser bidding directly on a keyword that is a 1-800 Contacts [brand name keyword].” (CX8006 at 051 (¶ 111) (Evans Expert Report)).

1. Analysis Based on Memorial Eye Experience

1390. Dr. Evans studied whether the advertising restrictions had a material effect on consumer purchasing decisions by identifying an online contact lens retailer that was not subject to the advertising restrictions for a substantial period of time, Memorial Eye. (Evans, Tr. 1601-1608, *in camera*; CX8006 at 014, 086-092 (¶¶ 195-207) (Evans Expert Report)).

1391. Memorial Eye provides reliable data for assessing the role of competitive ads in consumer behavior. Memorial Eye was the only online retailer that had engaged in competitive advertising on 1-800 Contacts’ branded searches for any length of time. All of the other online retailers stopped shortly after 1-800 Contacts sent them a Cease & Desist letter. (Evans, Tr. 1601-1602, *in camera*; CX8006 at 090-091 (¶ 196) (Evans Expert Report)).

1392. Further, Memorial Eye was also the only online retailer for which Dr. Evan could observe matched ads in the data produced by Google. (Evans, Tr. 1602, *in camera*; CX8006 at 091 (¶ 197) (Evans Expert Report) (explaining that Google produced matched ads data from January 2010, but 1-800 reached settlements with six major competitors before 2010)).

1393. Memorial Eye, which operated a chain of brick-and-mortar optometry stores in Texas, started selling contact lenses online using the web site www.shipmycontacts.com in December 2004. (CX9024 (Holbrook, Dep. at 9-10); CX8006 at 092 (¶ 199) (Evans Expert Report)).

1394. Ten months after it started as an online seller, in September 2005, 1-800 Contacts sent a cease and desist letter to Memorial Eye alleging that Memorial Eye was bidding on 1-800 Contacts’ brand name keywords. Notwithstanding Memorial Eye’s denial, 1-800 Contacts sued Memorial Eye in December 2008. Memorial Eye entered into a bidding agreement in November 2013. (*See supra* Section VI.B.6; CX8006 at 092 (¶ 200) (Evans Expert Report)).

1395. According to the Google data for 2002 to 2016, the only Memorial Eye ads that appeared in response to 1-800 Contacts branded queries were Matched Ads. Dr. Evans, who had access to Memorial Eye’s AdWords account, verified that it did not engage in Direct Bid advertising. (CX8006 at 093 (¶ 201 & n.218) (Evans Expert Report)).

1396. Memorial Eye's manager testified that it did not engage in Direct Bid advertising because of 1-800 Contacts' cease and desist letter. (Holbrook, Tr. 1905-1906).

1397. Using data from Memorial Eye on all of its paid advertising, Dr. Evans focused on 2010-2011, which are the two years before Memorial Eye began to decrease its search advertising and ultimately decide to enter into the settlement agreement. (Evans, Tr. 1604; CX8006 at 093 (¶ 202) (Evans Expert Report)).

1398. Dr. Evans' analysis of Memorial Eye's experience shows that [REDACTED]

(Evans, Tr. 1605, *in camera*)

1399. First, Memorial Eye gained broad exposure from this advertising. As a result of broad matching and phrase matching, Memorial Eye's ads appeared on [REDACTED] SERPs generated by queries related to 1-800 Contacts' brand terms. (CX8006 at 094 (¶ 203) (Evans Expert Report), *in camera*). Google made the decision to show Memorial Eye's ads on [REDACTED] of all queries that included 1-800 Contacts' brand terms. (Evans, Tr. 1605, *in camera*; CX8006 at 094 (¶ 203) (Evans Expert Report), *in camera*). On average, Memorial Eye got the [REDACTED] the ad from 1-800 Contacts. (CX8006 at 095 (¶ 205 & n.229) (Evans Expert Report), *in camera* (average position is [REDACTED] That means [REDACTED] (Evans, Trial Tr. 1605, *in camera*).

1400. Second, [REDACTED]

[REDACTED] (Evans, Trial Tr. 1606, *in camera*). People who clicked also [REDACTED] Memorial Eye converted, or made an initial sale on, [REDACTED] of the clicks on matched ads, which was [REDACTED] (Evans, Trial Tr. 1605, *in camera*) [REDACTED] CX8009 at 084 (n.193) (Evans Rebuttal Expert Report).

1401. Third, the matched ads drove [REDACTED] of the online sales that Memorial Eye made: between 2010 and 2012, about [REDACTED] of Memorial Eye's sales came from consumers who entered a query with a 1-800 Contacts brand term, saw an ad from Memorial Eye, and then clicked on that ad. (Evans, Tr. 1605, *in camera*; CX8006 at 095 (¶ 205) (Evans Expert Report), *in camera*). Dr. Evans concluded that matched ads were an effective competitive strategy for driving sales. (Evans, Tr. 1605-1606, *in camera*)

1402. Dr. Evans further concluded that consumers, who purchased from Memorial Eye paid less than they would have paid 1-800 Contacts for the same contact lenses. (Evans, Tr. 1607, *in camera*; CX8006 at 095 (¶ 205) (Evans Expert Report); CX9024 (Holbrook, Dep. at 138 ("1-800 Contacts was generally typically a lot higher than we were.")). In this respect, Memorial Eye's pricing is consistent with the pricing strategy taken by the other pure play online firms, which also offered discount pricing. (Murphy, Tr. 4115 (pure-play

online “focused more on a price play”), 4119 (1-800 Contacts’ prices were “higher than many of the pure-play online sellers”).

1403. Thus, Evans concluded that Memorial Eye’s use of matched ads benefited consumers. Consumers who were aware of 1-800 Contacts were able to learn that Memorial Eye was another source of contact lenses online, which typically offered lower prices. A number of consumers decided to purchase from Memorial Eye, and paid less for their contact lenses than they would have had purchased them from 1-800 Contacts, just as they would have saved by purchasing from any other discount, pure-play online retailer. (Evans, Tr. 1608).

2. Dr. Evans’s Impact Analysis Estimates Lost Advertising and Rival Sales

1404. Building on his Memorial Eye analysis, Dr. Evans conducted an empirical study that estimated the additional advertisements rivals currently bound by the bidding agreements would have placed on SERPs, and the quantity of additional sales rivals would have made as a result of the change in advertising activity. (Evans, Tr. 1618-1620, *in camera*; CX8006 at 102-103 (¶¶ 222-224 & Table 6) (Evans Expert Report); CX8009 at 083-085 (¶¶ 152-159) (Evans Rebuttal Expert Report)).

1405. Dr. Evans used two Google datasets, 1-800 Contacts internal search data, and the Memorial Eye AdWords account for his analysis. (Evans, Tr. 1618-1619, *in camera*).

1406. For this empirical study, Dr. Evans first estimated the number of additional, or incremental, ads and clicks, and then estimated the impact of those additional clicks on sales. (Evans, Tr. 1618-1619, *in camera*).

1407. Dr. Evans made reasonable, conservative assumptions to estimate the number of impressions and clicks that would have occurred absent the bidding agreements. First, he assumed that Google would show up to five ads on the SERP following a query containing a 1-800 brand term. (Evans, Tr. 1623, *in camera*). Because he assumed that 1-800 would always have a top ad itself, Dr. Evans analysis added four other advertisements. (Evans, Tr. 1623-1624, *in camera*). That figure is conservative because the number of ads Google shows on generic searches on average is [REDACTED]. (Evans, Tr. 1624, *in camera*).

1408. Second, because 1-800 would always occupy the first position, Dr. Evans took the actual click through rate Memorial Eye experienced in the second position [REDACTED] to represent the expected click through rate of other rival advertisers in the second position. (Evans, Tr. 1624, *in camera*). Again, that click through rate assumption is conservative, because Memorial Eye is a small firm compared to several of the better-known bound rivals, such as Vision Direct or AC Lens. (Evans, Tr. 1625, *in camera*).

1409. Third, Dr. Evans observed user clicking behavior on results for queries containing a 1-800 Contacts brand term where multiple competitive ads appeared, and found the relative decline in CTRs for ads in positions 3, 4, and 5. Starting with the [REDACTED] for position 2, Dr. Evans estimated the CTRs for the lower positions – [REDACTED]. (CX8006 at 100-101 (¶ 218) (Evans Expert

Report, *in camera*). These estimates are all conservative because they are based on the [REDACTED] Memorial Eye click through rate figure for position 2, which is itself conservative. (CX8006 at 100-101 (¶ 218) (Evans Expert Report), *in camera*).

1410. Absent the agreements, between January 2010 and June 2015, 114 million additional rival ads would have appeared in response to queries containing 1-800 Contacts' brand terms. (Evans, Tr. 1619, *in camera*; CX8009 at 067 (¶ 117 & n.158) (Evans Rebuttal Expert Report)). By the first half of 2015, because of the new advertising, rival sales would have increased by 12.3 percent. (Evans, Tr. 1622, *in camera*; CX8009 at 084 (¶ 155 & n.193) (Evans Rebuttal Expert Report), *in camera*). The results for incremental impressions and clicks are summarized in the following corrected version of Table 6 from Dr. Evans first expert report:

Estimates of Competitive Advertising in Absence of Restrictions

Year	Incremental Impressions	Incremental Clicks
2010	17,164,841	217,184
2011	20,277,896	223,186
2012	25,368,588	333,281
2013	18,852,485	229,258
2014	21,708,608	280,004
2015 (Jan-Jun)	11,385,856	145,729
Total	114,758,273	1,428,642

3. Dr. Athey's Analysis Based on comScore Data

1411. Dr. Athey's empirical economic model of the market without the Bidding Agreements proceeded in two stages: first, Dr. Athey determined what the search results page would look like if rivals were free to bid, creating counterfactual ad layouts; second, she constructed a model of consumer click behavior in order to determine how many clicks the ads in each counterfactual ad layouts would receive. (Athey, Tr. 766-767, 774, 780-781; CX8007 at 029 (¶ 85) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).

1412. In her empirical analysis, Dr. Athey constructed a dataset (the "comScore dataset") using data from comScore Web Behavior Panel (CX8007 at 026 (¶ 74) (Athey Expert Report)).

1413. ComScore is a company that collects data from a panel of internet users. Specifically, comScore installs software on consumers devices to track their behavior, including collecting information on the screens that users see when they perform searches. (Athey, Tr. 852-853; *see also* Athey, Tr. 767 (describing comScore as "a leading provider of data about . . . consumer behavior")).

1414. Dr. Athey has generally found comScore to be a reliable source of data in her work studying search engine economics in both academia and business. (Athey, Tr. 767, 853, 2106).

1415. The data that Dr. Athey received from comScore consisted of detailed online search information from 377,002 internet users in the United States from July 11, 2013, through August 14, 2016, covering all the search queries those users performed on all major search engines and reported at a query-by-query level. (CX8007 at 026-029 (¶¶ 074-084) (Athey Expert Report); Athey Tr. 767-769, 2107).
1416. The comScore data Dr. Athey used provides included the search queries that the users typed during that time period, the paid search results that were displayed to the users (including the number ads displayed, the text of the ads, and information about ad position), and which paid or algorithmic results the users clicked on, if any. (CX8007 at 026-029 (¶¶ 74-84) (Athey Expert Report); Athey, Tr. 768-769).
1417. Dr. Athey divided the search data in her model into several categories of search queries: “branded” queries that included the name of an online contact lens retailer, “manufacturer” queries that included the name of a contact lens manufacturer or brand, “generic” queries that related to contact lenses but were not classified as branded or manufacturer queries, and “unrelated” queries, which did not relate to contact lenses and were removed from the data set. (CX8007 at 027 (¶ 77) (Athey Expert Report)).
1418. In the first step of her empirical model, Dr. Athey constructed ad layouts that she predicted consumers would likely see in response to 1-800 Contacts Branded Queries, absent the Bidding Agreements. (Athey, Tr. 766-767; CX8007 at 030 (¶ 89) (Athey Expert Report)).
1419. Dr. Athey derived the counterfactual ad layouts in her model from data showing the actual ad layouts displayed in response to the set of queries for generic search terms related to contact lenses that appeared in the available data. (Athey, Tr. 770; CX8007 at 030 (¶ 90) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).
1420. One reason that Dr. Athey used the generic search term queries from her dataset for constructing her counterfactual ad layouts is that those queries were “not affected by the agreements.” (Athey, Tr. 770; CX8007 at 030 (¶ 90) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).
1421. Another reason that Dr. Athey used the generic search term queries from her dataset for constructing her counterfactual ad layouts because “the volume of generic searches is comparable to the volume of 1-800 Contacts branded searches.” (Athey, Tr. 770; CX8007 at 030 (¶ 90) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).
1422. The generic search queries presented a set of queries “where the advertisers were bidding in a way that would be similar to what we would expect in the counterfactual world”; that is, they reflect “the outcome of the equilibrium” in which the advertisers “were bidding against one another,” “users were clicking,” search engines were “computing quality scores,” and “those were entered into an auction.” (Athey, Tr. 769-770).

1423. To construct the counterfactual ad layouts using the observed generic ad layouts, Dr. Athey modified the observed generic ad layouts in two ways. (*See infra* ¶¶ 1424-1429).
1424. In the first step of constructing counterfactual ad layouts from observed generic ad layouts, Dr. Athey discarded any observed generic search ad layouts in her dataset that did not include an advertisement for 1-800 Contacts. (Athey, Tr. 770-771; CX8007 at 030-031 (¶ 91) (Athey Expert Report)).
1425. In the second step of constructing counterfactual ad layouts from observed generic ad layouts, Dr. Athey moved the 1-800 Contacts advertisement to the top ad position in each of the remaining layouts. (Athey, Tr. at 770-771; CX8007 at 030-031 (¶ 91) (Athey Expert Report)).
1426. Dr. Athey took the steps described in the two immediately preceding paragraphs in order to reflect 1-800 Contacts' high click-through rates and high quality score on searches for its own name, testimony from 1-800 Contacts personnel that 1-800 Contacts would take steps to "always appear on top" in response to searches for the company's name, the fact that it is "economically rational" for 1-800 Contacts to take such steps and to participate in auctions for its branded terms, and search engines policies "designed specifically to keep the branded firms on top" in response to searches for their brand names. (Athey, Tr. 770-773).
1427. In the second step of Dr. Athey's empirical model, Dr. Athey "built a statistical model that predicts consumer click behavior as a function of the ads presented to the consumer." (Athey, Tr. 774; *see also* CX8007 at 029-030 (¶¶ 85-88) (Athey Expert Report)).
1428. The data that Dr. Athey used in the second step of her empirical model consisted of observed consumer click behavior in response to searches for 1-800 Contacts' and other online contact lens retailers' brand name terms. (Athey, Tr. 775-776).
1429. Dr. Athey used this data to model how the likelihood of a consumer clicking on any given advertisement is affected by each of several factors. (Athey, Tr. 775-780; CX8007 at 029-031 (¶¶ 85-91) (Athey Expert Report)).
1430. The type of methodology that Dr. Athey used in constructing her statistical model of consumer clicking behavior is referred to by economists as a multinomial logistic regression model (MNL model). (CX8007 at 029-030 (¶ 86) (Athey Expert Report)).
1431. In a MNL model, "[o]nce the structural parameters of the model are estimated, the model can predict the [click through rate] for any ad given on any hypothetical layout for a search result." (CX8007 at 030 (¶ 86) (Athey Expert Report); *see also* Athey, Tr. 780 ("[T]hat variation in the data, the fact that the same query is showing different layouts at different times, allows me to statistically estimate the parameters of the model. And then those parameters in turn allow me to make counterfactual predictions.")).
1432. The factors that Dr. Athey's model of consumer clicking behavior account for are: (i) the consumer appeal of the advertised brand ("brand effect"), (ii) the position of the ad on the search results page ("position effect"), (iii) whether the ad clicked on was served by the

firm searched for by the user (“searched-for firm” effect), (iv) whether the ad clicked on was an ad for 1-800 Contacts (specifically, Dr. Athey calculated distinct position effects and searched-for firm effects for 1-800 branded searches, allowing for the possibility that the other effects may be stronger for 1-800 Contacts’ ads than they are for other competitors’ ads), and (v) the propensity of the particular user to click on any ad (the consumer’s “clickiness”). (Athey, Tr. 775-780; CX8007 at 030 (¶ 88) (Athey Expert Report)).

1433. Dr. Athey modeled each of these effects based on observed data, rather than making assumptions about them. (Athey, Tr. 777-780 (testifying that her model includes “indicator variables for each of the factors” and used “variation[s] in the data” “to statistically estimate the parameters of the model”)).
1434. For example, Dr. Athey modeled brand effects based on observations of variations in click-through rates of “different brands [that] appear in the same position on the same query.” and modeled position effects based on observations of variations in click-through rates of the same firm’s ad appearing in different positions. (Athey, Tr. 778-780).
1435. Indeed, Dr. Athey’s model took into account the value consumers may place on 1-800 Contacts’ brand strength—or, stated otherwise, the possibility that some of 1-800 Contacts’ price premium may be explained by the strength of 1-800 Contacts’ brand—in her empirical model and other parts of her analysis. (Athey, Tr. 755-756 (“Q. So far you’ve talked about differentiation in product and differentiation in service and whether they fully explain the difference in 1-800’s prices from its online competitors, but did you take into account whether 1-800’s well-known brand or trustworthy reputation explain its price premium? A. Absolutely. It’s accounted for in really every part of my analysis. Starting with the review of, say, the Net Promoter Score data or other consumer surveys in the documents, when consumers answer a survey about whether they would recommend a brand, they’re including in that their value of the brand, so the consumer survey evidence absolutely accounts for that. The conclusions of the investors, the conclusions of the industry participants also account for that. They account for – when somebody is asking the question can I support this price premium, how can I convince consumers to pay a price premium, they are – one of the possible answers is that the consumers like the brand, and if they are still finding it hard, that suggests that at least for the consumers under consideration the brand is not sufficient to support the price premium. Then, in my empirical model, I don’t make any assumptions about brand. I estimate consumer preferences for different brands using consumer choice data. And indeed, I find and incorporate consumer preference for 1-800 Contacts.”)).
1436. Similarly, rather than making assumptions about the effect of users performing navigational queries on those users’ likelihood of clicking on ads of the firms they searched for, Dr. Athey modeled that likelihood based on observations. (Athey, Tr. 777-778 (“[T]his model explicitly accounts for the fact that when a user searches for a term, . . . they potentially are more likely to click on an advertisement from that [firm]. But there’s no assumptions here. The data is going to tell me how important that effect is.”)).

1437. Dr. Athey's model also allowed for the possibility that the searched-for effect may be stronger for 1-800 Contacts than for other rivals. (Athey, Tr. 777 ("I allowed [the searched-for firm effect] to be distinct for 1-800 just in case that effect is stronger for 1-800")).
1438. Dr. Athey's model does not make any assumptions about the extent to which a consumer's likelihood of clicking on a retailer's ad is affected by the fact that a consumer searched for that retailer's brand name (that is, conducted what is sometimes called a "navigational query"). (Athey, Tr. 777).
1439. Dr. Athey testified that rather than making assumptions about the effect of a navigational query on a consumer's likelihood of clicking on the searched-for firm, she modeled it. (Athey, Tr. 777 ("[T]his model explicitly accounts for the fact that when a user searches for a term, . . . they potentially are more likely to click on an advertisement from that [firm]. But there's no assumptions here. The data is going to tell me how important that effect is. . . . And in particular, I allowed it to be distinct for 1-800 just in case that effect is stronger for 1-800.")).
1440. Dr. Athey applied the statistical model of click behavior derived in step two of her empirical model to the counterfactual ad layouts derived in step one of her empirical model. (Athey, Tr. 780-782; CX8007 at 030-031 (¶ 91) (Athey Expert report)).
1441. Specifically, Dr. Athey's model predicted that absent the Bidding Agreements, the number of competitor ads appearing in response to 1-800 Contacts Branded Queries (in addition to the one 1-800 Contacts ad that would still appear in the first position on each such results page) would increase from 0.54 to 1.85 competitor ads per search (an increase of 242 percent). (Athey, Tr. 783-784; CX8007 at 032, 112 (¶ 92 & Table 2; Errata to February 6, 2017 Expert Report and March 8, 2017 Rebuttal Expert Report of Dr. Susan Athey) (Athey Expert Report)).
1442. Dr. Athey's model also predicted that absent the Bidding Agreements, "[t]here would be more clicks on those competitor ads. . . . In addition, there would be fewer clicks on 1-800 ads." (Athey, Tr. 782-783).
1443. Specifically, Dr. Athey's model predicted that absent the Bidding Agreements, in response to 1-800 Contacts Branded Queries, consumer clicks on ads for competitors of 1-800 Contacts would increase by 3.5 clicks per 100 searches (an increase of 350%) and consumer clicks on the 1-800 Contacts ad would decline by 2 clicks per 100 searches. (CX8007 at 032 (¶ 92 & Table 2) (Athey Expert Report) (showing that clicks on competitor ads would increase from 1 click per 100 searches to 4.5 clicks per 100 searches and clicks on 1-800 Contacts ads would decrease from 45.8 clicks per 100 searches to 43.8 clicks per 100 searches); Athey, Tr. 784-785).
1444. In addition to predicting the change in the quantity of competitor advertisements and clicks on those advertisements, Dr. Athey's model also predicted changes in the strength of competitors whose advertisements would, but for the Bidding Agreements, appear on the results pages for 1-800 Contacts Branded Queries. (*See infra* ¶¶ 1445-1448).

1445. As described *supra*, Dr. Athey’s comScore data set revealed that when different firms appear in the same position on the search results screen, some have higher click-through rates than others, and Dr. Athey used these variations to estimate “brand effect” coefficients for each competitor. (See *supra* ¶ 1434; see also CX8007 at 107-108 (App’x D)).
1446. Dr. Athey used this brand effect information to determine how “strong” a competitor is. (Athey, Tr. 833 (“Q. How did you determine how strong a competitor is? A. In this case I was discussing specifically the predictions . . . of my click model, and so my click model has factors for the brand of different firms, . . . and it makes predictions about how different firms would do if they appeared in position two.”)).
1447. Dr. Athey’s model, in constructing counterfactual ad layouts, predicted not only how many competitor ads would appear but also “the likely change in the nature of competition,” that is, “the broad characteristics,”—specifically the strength based on observed click through rate data—of the set of firms whose ads would appear on 1-800 Contacts Branded Searches in the counterfactual. (CX8010 at 044-045 (¶ 111) (Athey Rebuttal Expert Report) (“My estimate is based on a model which predicts the likely change in the nature of competition, using data which included observations across a range of competitors to 1-800 Contacts. My approach allows that stronger competitors, with larger market share and consumer awareness, and who also therefore tended to have higher CTR, could be shown.”); Athey, Tr. 2101 (“[W]hat we do know is that the mix of firms that is available in the absence of the agreements is a strong set of firms that on average offers lower prices.”), 2081, *in camera* [REDACTED] 817 (“My model was not designed to make specific predictions about the specific firms that appear and exactly what will happen by firm. Instead, what my model was designed to do was to predict the collection of advertisers that would appear and their broad characteristics. So in equilibrium, say generic [queries, on which counterfactual ad layouts are based], in equilibrium today I see a mix of firms appearing. . . . [T]hose firms have a mix of click-through rates, a mix of brand effects. They have a mix of price discounts. That’s the mix that we see in equilibrium. . . . [I]t’s not important the exact identities of the firms. What’s important is that – that in the counterfactual I’m predicting there’s going to be [a] mix of firms with a mix of price discounts and a mis of brand effects, similar to what I see in the counterfactual.”)).
1448. Because Dr. Athey’s click prediction model accounts for brand effects, the strength of the firms that Dr. Athey’s model predicts would show ads in response to 1-800 Contacts Branded Searches in the Counterfactual is built into, and reflected in, her model’s prediction of the number of clicks that competitor ads would receive in the counterfactual. (See *supra* ¶¶ 1418-1434).

4. These Analyses are Consistent with One Another

1449. Dr. Athey and Dr. Evans used different methodologies and sources of data for their analyses. Further, only Dr. Athey modeled the change in advertiser quality that would

result from ending the Bidding agreements. Nevertheless, their results are quite close, and both show that the advertising restrictions had a significant impact on impressions and clicks. (CX8009 at 079-080 (¶¶ 142-143) (Evans Rebuttal Expert Report); CX8010 at 044-046 (¶¶ 109-115) (Athey Rebuttal Expert Report) (“Each of our analyses rests on conservative assumptions: my model is particularly conservative in the number of ad impressions per page, while Dr. Evans’ approach to estimating CTR [click-through rate] is conservative. “We have followed complementary approaches, and it is striking that the final results regarding changes in clicks are remarkably comparable.”); Athey, Tr. 814-818).

1450. Drs. Athey and Evans used different methodologies, in part, because they used different sources of data. (Athey, Tr. 815-816 (“The approaches were different because we relied on different data, so we really couldn’t have used exactly the same approaches. . . . It’s important to note that his data is aggregated . . . he uses an approach tailored to that data. . . . I have data on individual searches conducted by consumers. I see exactly which ads were in which position and how consumers chose among those individual ads. So my model makes full use of the disaggregated data that I have.”)).
1451. But for the Bidding Agreements, for each one hundred 1-800 Contacts Branded Queries, Dr. Athey’s model predicts 3.5 additional clicks on competitor ads and Dr. Evans’ model predicts 3.7 additional clicks on competitor ads. (Athey, Tr. 814 (“We came to very similar conclusions in terms of the counterfactual clicks on competitor ads in a world without the agreements. I said there would be 3.5 additional clicks on competitor ads. Dr. Evans’ model predicted 3.7. And of course, both of our models account for statistical uncertainty, and so on, so they’re statistically, you know, indistinguishable.”); CX8010 at 046 (¶ 115) (Athey Rebuttal Expert Report)).
1452. While Dr. Evans and Dr. Athey used different approaches an apples-to-apples comparison of their results shows that they are “very much in line.” (CX8010 at 046 (¶ 115) (Athey Rebuttal Expert Report) (“A meaningful comparison between my results and Dr. Evans considers the number of clicks on competitor ads which have been lost, due to the Agreements. My model predicts 3.5 additional clicks on competitor ads for every one hundred counterfactual searches; Dr. Evans’ analysis predicts 3.7 additional clicks per one hundred searches. These results are very much in line. The fact that two unrelated approaches produce results which are in agreement underlines the reliability of the results.”)).

5. The Reduction in Advertising Is Commercially Significant

1453. The reduction in advertising that Dr. Evans and Dr. Athey attributed to the Bidding Agreements is commercially significant. (*See infra* 1454-1464).

a. The reduction in advertising Dr. Evans found is commercially significant

1454. The results of Dr. Evans impact study permitted him to estimate the effect of the Bidding Agreements on overall competition and prices. To account for the impact of the Bidding Agreements on sales, Dr. Evans assumed that the online retailers would have the same

conversion rate as Memorial Eye on the clicks they would have received absent the bidding agreements. Accounting for repeat sales, Dr. Evans estimated that 1-800 Contacts' rivals would have realized an increase in sales of 8.3 percent over the period from January 2010 to June 2015, and of 12.3 percent over the period from January 2015 to June 2015. (Evans, Tr. 1620-1621, *in camera*; CX8009 at 084 (¶ 155) (Evans Rebuttal Expert Report)).

1455. To put this finding in perspective, Dr. Evans presented the value of affected sales in two different ways. (*See infra* ¶¶ 1456-1458).

1456. First, as Dr. Evans found, the affected sales amount to [REDACTED]. (Evans, Tr. 1622, *in camera*).

1457. Second, as Dr. Evans found, the affected sales amount to [REDACTED] (Evans, Tr. 1622, *in camera*; CX8009 at 084 (¶ 155 & n.193) (Evans Rebuttal Expert Report), *in camera*).

1458. Finally, Dr. Evans explained that these figures reflect the significance of the lost advertising competition resulting from the bidding agreements. "If 1-800 Contacts wasn't shielded from competitive advertising, and its rivals could have purchased both matched ads and direct bid ads from the search engines, the competitive dynamics would have been different." (CX8009 at 084-085 (¶ 156) (Evans Rebuttal Expert Report)). If 1-800 Contacts responded to greater advertising by rivals by lowering its price, rivals' sales gains may not have been as large. Consumers, however, would benefited from the lower prices. (CX8009 at 079 (¶ 156) (Evans Rebuttal Expert Report)).

1459. Dr. Evans concluded that the effect of the Bidding Agreements was commercially significant in that removing the advertising restrictions in this case would have increased competition among online contact lens retailers and caused consumers to pay lower prices.

b. The reduction in advertising Dr. Athey found is commercially significant

1460. Based on her expertise in the economics of search advertising, Dr. Athey concluded that the predicted change in clicks on competitor ads attributable to the Bidding Agreements is commercially significant. (Athey, Tr. 785 ("Q. Is the magnitude of these changes something that you consider to be significant? A. Absolutely.")).

1461. Dr. Athey noted that a "small number of clicks per 100 searches" is significant, as firms engaged in search advertising are "typically getting a small number of clicks per 100 searches." (Athey, Tr. 785) (testifying also that "a firm in the fourth position might be getting only three-quarters of a click per 100 searches, so a number like . . . three clicks per 100 searches is very large.")).

1462. Dr. Athey noted that the increase in clicks on rival ads appearing in response to 1-800 Contacts Branded Queries but for the Bidding Agreements would be “more than a tripling of the traffic to competitors” through these searches. (Athey, Tr. 785).

1463. As discussed further *infra*, Dr. Athey concluded that the effect of the Bidding Agreements was commercially significant in that removing the advertising restrictions in this case would have increased competition among online contact lens retailers and caused consumers to pay lower prices.

1464. Dr. Athey also concluded that rescinding the Bidding Agreements would benefit consumers by increasing the information—and thus the choices—available to them. (Athey, Tr. 804-806) (testifying that, with access to more information about contact lens retailer offerings “the consumer has the ability to make more informed choices, they can select the retailer that meets their needs the best. That – a primary benefit here would be to select a lower-priced retailer, but they also could select based on other characteristics, an introductory discount, which is a form of price, shipping or other considerations, any other considerations they might – they might consider. So the consumer with more choices can find the one that works best for them.”)).

6. Both Analyses Are Conservative

a. Dr. Evans’ analysis is conservative

1465. Dr. Evans impact analysis of lost advertising is conservative because his benchmark was Memorial Eye. Memorial Eye is a small firm compared to several of the better-known, larger, bound rivals. (Evans, Tr. 1625, *in camera* [REDACTED])

[REDACTED] see also CX8010 at 044 (¶ 111) (Athey Rebuttal Expert Report) (“Dr. Evans’ approach is conservative since Memorial Eye was a small company who later stopped selling contact lenses online, and therefore could be considered a weaker competitor than many other of the Bound Competitors.”); Athey, Tr. 816 (“[T]he advertiser that Dr. Evans considered, Memorial Eye, is not a particularly strong advertiser, so when I compare the performance of Memorial Eye in terms of performance might be something like Walmart, . . . which had a lower click through rate than average.”)).

1466. [REDACTED]

(Evans, Tr. 1642-1643, *in camera*). [REDACTED]

[REDACTED] (Evans, Tr. 1643, *in camera*).

b. Dr. Athey's analysis is conservative

1467. Dr. Athey took a conservative approach in her empirical model and was “particularly conservative in the number of ad impressions per page” that the model predicted. (CX8010 at 044-045 (¶ 110-112) (Athey Rebuttal Expert Report); Athey, Tr. 789-791; *see infra* § IX.B.6).
1468. Dr. Athey's use of generic search queries in determining the counterfactual ad layouts in her model meant that, to the extent her analysis reflects uncertainty over the but-for world, Dr. Athey would have erred if at all in the direction of underestimating the impact of the Bidding Agreements, and so in reality the effects of the agreements would be even larger than the effects Dr. Athey found. (*See infra* § IX.B.6.b; *see also* Athey, Tr. 789)).
1469. One reason Dr. Athey's use of generic search queries in determining the counterfactual ad layouts in her model was conservative is that the generic terms that Dr. Athey used included not only queries that, like 1-800 Contacts branded terms, are searched with high frequency, but also less frequently searched terms to which advertisers pay less attention than they do to frequently searched queries. (Athey, Tr. 773-774, 786 (“[S]ome of the less frequently searched generics are probably not the best indication of what would occur. They may be conservative because advertisers are not paying as much attention to those terms.”); CX8010 at 033 (¶ 83) (Athey Rebuttal Expert Report) (“The long tail of less common, less profitable generic search keywords means that in fact, using generic searches as a proxy for the counterfactual is likely to under-estimate, rather than over-estimate, the range and number of ads appearing on 1-800 Contacts' Trademark searches in the counterfactual. Retailers can be expected to manage their bids more and the performance of their advertising copy for 1-800 Contacts' trademarks more closely than for the broad set of keywords related to generic terms, because of the high volume of searches and higher expected returns across a smaller set of keywords”)).
1470. Another reason that use of all generic queries in construction of the counterfactual ad layouts was conservative in predicting the number of competitor ads that would appear in response to 1-800 Contacts Branded Queries but for the agreements is that 1-800 Contacts Branded Queries are “special” in their commercial appeal to rivals and thus would likely garner more attention from rivals than the average generic search term. (Athey, Tr. 789-790 (“1-800 is kind of special in terms of the specific attention the advertisers would give to it because the advertisers' value proposition, the thing they have to offer, is particularly high relative to 1-800. Many of the competing firms are offering the same contact lenses that fill your prescription at lower prices and similar shipping, and so if they can just tell the consumers about it, they're particularly likely to convert, so they're going to pay special attention to that. And again, in my data, I saw that the firms that do currently bid against 1-800 have higher conversion rates there than they do on other firms['] branded queries]. They would also specifically want to customize their ad text in the – in the way that they present themselves to the consumer to emphasize the fact that they do have lower prices for those firms that – which many of

them do. So . . . that would generally result in more clicks, that all that customization results in more clicks and better performance than I used in the click model.”)).

1471. Another way that Dr. Athey’s construction of the counterfactual ad layouts was conservative is that she only considered ads in “mainline 1 through 4” that is, the top ads that appear at the top of the page above the algorithmic results.” (Athey, Tr. 790-791 (“While those account for most of the clicks, there’s absolutely non-zero clicks on the ads on the side and . . . we expect, based on what we see on generics, and so on, that there also would be ads appearing on the side in the counterfactual world. So I entered a zero for those ads and those clicks even though . . . it’s almost certain that there would be positive clicks.”)).
1472. To check the robustness of her results, Dr. Athey repeated the process of constructing counterfactual ad layouts using each of two alternate sets of queries: branded queries for firms other than 1-800 Contacts and the subset of generic terms that were most often searched in the comScore data set. The results of these two alternate approaches were very similar to (and in fact showed the Bidding Agreements having a larger effect than) the methodology that Dr. Athey used in her initial report. (Athey, Tr. 786-787; CX8010 at 033-035 (¶¶ 84-85) (Athey Rebuttal Expert Report) (“These results are very similar to the results I presented in my February report . . . This confirms my model’s robustness to changes in the method of constructing the counterfactual ad layouts.”); Athey Tr. 2112 (testifying that checking results for “robustness” “means checking the sensitivity of the results to changes in the way the models are constructed”); *see also infra* ¶¶ 1473-1477).
1473. As noted above, constructing counterfactual ad layouts for Dr. Athey’s model using the generic queries in the comScore dataset, then applying the click model to those layouts, resulted in 3.5 more predicted clicks per 100 searches on competitor ads in the counterfactual compared to the status quo. (CX8007 at 032 (¶ 92 & Table 2) (Athey Expert Report); Athey, Tr. 784-785; CX8010 at 033 (¶ 83 & Table 1) (Athey Rebuttal Expert Report)).
1474. Constructing counterfactual ad layouts for Dr. Athey’s model using only the three most commonly searched generic queries in the comScore dataset, then applying the click model to those layouts, resulted in a predicted increase of 4.6 clicks on competitor ads per 100 searches as compared to the status quo. (CX8010 at 033-035 (¶ 84 & Table 2) (Athey Rebuttal Expert Report)).
1475. Constructing counterfactual ad layouts for Dr. Athey’s model using the branded queries for firms other than 1-800 Contacts from the comScore dataset, then applying the click model to those layouts, resulted in a predicted increase of 3.6 clicks on competitor ads per 100 searches as compared to the status quo. (CX8010 at 033-035 (¶ 84 & Table 2) (Athey Rebuttal Expert Report)).
1476. To ensure robustness for her click behavior model, Dr. Athey used the simplest model (out of a family of models of consumer choice behavior) that fit the data, because, as she explained, “all else equal, simplicity is more robust and reliable.” (Athey, Tr. 788-789; CX8010 at 041-042 (¶ 100) (Athey Rebuttal Expert Report) (“Generally, more complex

models can be more fragile and more prone to over-fitting, so typically the simplest model that fits the data well is preferred, all else equal, particularly in an environment with limited data.”)).

1477. To test the robustness of the model she used, Dr. Athey tested a more complex version of her MNL model, called a “nested logit model,” which provided results that were “very similar to and not statistically different from those” of the MNL model. As a result, Dr. Athey concluded that the simpler MNL model could not be rejected and thus was appropriate. (Athey, Tr. 788-789; CX8010 at 041-043 (¶¶ 100-106 & Table 4) (Athey Rebuttal Expert Report)).

C. Historically, Increased Advertising by Rivals in Response to 1-800 Contacts Branded Queries Has Caused 1-800 Contacts to Respond with More Generous Price Matching Offers

1478. Dr. Evans also studied the impact of competitive ads on the prices that 1-800 Contacts charged its own customers through its price match program. He found that, during the period when Memorial Eye was most active, “[s]earch advertising placed by online sellers forced 1-800 Contacts to modify its online ad policy to highlight that it would beat rival’s prices by 2 percent.” (CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report)).

1479. Through its price match program, 1-800 Contacts offers a discount to customers who call it call center and report a lower price offer from another contact lens retailer. Because the program requires a telephone call, the discount is not available on 1-800 Contacts’ website. (CX9025 (Osmond, Dep. at 20-22); CX9020 (Craven, Dep. at 147); CX1086 at 001 (price match “requires a phone call (which removes them from the channel and makes it so we wouldn’t be able to attribute the conversion anyway).”)).

1480. In 2011, 1-800 Contacts found that it was facing competitive pressure from search ads from online rivals, including competitive ads on brand searches from Memorial Eye and others. (Evans, Tr. 1609-1610, *in camera*; CX0946 at 011 (identifying competitive ads from Memorial Eye (Shipmycontacts) and LensDirect); *see also* CX9032 (L. Schmidt, Dep. at 132-133); CX0946 at 001-002, 012).

1481. In and around June 2011, senior executives at 1-800 Contacts were concerned that rival advertising was reducing conversions, or sales. Ads placed by online competitors emphasized their low prices, which “impacts conversions when [1-800 Contacts] extends out search.” (CX0946 at 001-002 (email from then-President Mr. Bethers to then-CEO Mr. Coon and then-Chief of Marketing Ms. Blackwood noting that “I have also attached a document that shows how our copy looks on search compared to our competitors. My point is that our copy isn’t very compelling. We have competitors touting 70% off normal prices or 20% off for new customers”)); Evans, Tr. 1612, *in camera*).

1482. In response to that competitive pressure, 1-800 Contacts changed its price match program by switching to what its executives called “more aggressive” online ad copy to highlight

that, rather than matching rivals' lower prices, it would beat them by 2 percent. (CX0946 at 001 (reply email from then-Chief of Marketing Ms. Blackwood); Evans, Tr. 1612, *in camera*).

1483. Dr. Evans concluded that [REDACTED] (Evans, Tr. 1608-1617, *in camera*; CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report), *in camera*; CX8006 at 104 (¶ 227) (Evans Expert Report) (discussing the cumulative impact of lost customers due to repeat sales), *in camera*; CX1334 at 004, *in camera*).

1484. Price match discounts accounted for roughly 2 percent of 1-800 Contacts' initial revenue in the first half of 2014 (before Johnson & Johnson implemented UPP). (CX1339 at 003).

1485. Given this, "the change in ad copy could be viewed as leading to the equivalent of a 1 percent price decline at 1-800 Contacts." (CX8009 at 072 (¶ 127) (Evans Rebuttal Expert Report)).

1486. Dr. Evans concluded that [REDACTED] (Evans, Tr. 1616 *in camera*). It also confirms that search advertising is an important means by which online contact lens retailers compete. (Evans, Tr. 1617, *in camera*).

D. But for the Bidding Agreements, Contact Lens Consumers Would Pay Lower Prices

1487. But for the Bidding Agreements, contact lens consumers would pay lower prices for contact lenses purchased online. (*See infra* ¶¶ 1488-1495).

1488. With access to more information about rivals' prices, consumers would act on that information and either purchase from 1-800 Contacts' rivals or use the price match program to purchase at lower prices from 1-800 Contacts. (*See infra* ¶¶ 1489-1495)

1489. Evidence shows that in the presence of information about lower priced options for purchasing contact lenses online, consumers act on that information. (*See supra* §§ IX.A.4-5).

1490. Dr. Evans concluded from his impact study that the Bidding Agreements harmed competition and consumers in general. He concluded that, consistent with economic theory and historical experience, removing the advertising restrictions would have increased price competition between 1-800 Contacts and the online discounters in three distinct ways. (1) Sales would have shifted from 1-800 Contacts to online discounters with lower average prices; (2) using its price match program, 1-800 Contacts would have

continued to selectively lower prices to retain individual customers; and (3) 1-800 Contacts would have lowered its average prices generally in response to the increased competitive pressure from the online discounters. (Evans, Tr. 1644-1645; CX8006 at 105-109 (¶¶ 230-240) (Evans Expert Report); CX8009 at 084-85 (¶¶ 156-159) (Evans Rebuttal Expert Report)).

1491. Dr. Athey similarly concluded that “more likely than not the prices would fall as a result of the additional competition.” (Athey, Tr. 797).

1492. Dr. Athey, like Dr. Evans, identified multiple mechanisms through which prices would fall—including more purchases from lower-priced competitors and more price-matching at 1-800 Contacts. (Athey, Tr. 711 (“[A]bsent the agreements, consumers would purchase at lower prices more often”), 797-798 (“[D]irect facts and market data support that there is a price premium and that that price premium is not fully accounted for by service differentials and that the product is identical. In those circumstances, economic theory is clear that an increase in information makes the market more competitive. It’s removing a friction. The exact way in which that plays out can depend on additional industry facts. We saw that information from 1-800 Contacts and investors of 1-800 Contacts agree that when -- if consumers become more informed, it will be difficult to sustain a price premium and that they would thus face a choice, either lose market share in the online channel, and particularly in the search channel, or lower their price. What they would choose, I didn’t reach a conclusion on that. But more likely than not, prices -- prices would fall. It’s also possible that they could keep their prices high and -- but consumers would use more price match, which would lead to a reduction in the effective price by 1-800 even if the list price stayed high.”); CX8007 at 022 (¶ 62) (Athey Expert Report) (“If the information gap is narrowed, we see that consumer preference for 1-800 Contacts is reduced and consumers are more likely to purchase from competitors.”); CX8007 at 035-036 (¶¶ 104-108) (Athey Expert Report) (“The first gain is for consumers who switch from 1-800 Contacts to another retailer. . . . The second gain is for 1-800 Contacts [customers] who apply the additional information learned from the search results page to the 1-800 Contacts Price Match policy. . . . [and] [t]he increased availability to consumers of price comparison information and the rate of consumer switching from 1-800 Contacts to competitors would put downward pressure on prices.”)).

1493. Dr. Athey concluded that “[t]he increased availability to consumers of price comparison and the rate of consumer switching from 1-800 Contacts to competitors would put downward pressure on prices.” (CX8010 at 036 (¶ 108) (Athey Rebuttal Expert Report)).

1494. Dr. Evans viewed 1-800 Contacts’ past practice of responding to competitive pressure by offering more generous discounts through its price-match program as consistent with the with extensive economic literature which predicts that informative advertising leads to greater price competition. (Evans, Tr. 1615-1616).

1495. Dr. Evans concluded that competition for these additional sales would lead to greater competition generally, which benefits user who navigate directly to 1-800 Contacts’ website. (Evans, Tr. 1720-1720 (“[T]o the extent that there’s an intensification of competition for consumers, then that leads 1-800 Contacts to lower its price and for more

price competition to take place in the business. And the result of that is that even if you have a consumer who is never using search but is going directly to the website, once you had that intensification of competition, they're then an indirect beneficiary of the opening of the competitive advertising.”)).

E. Dr. Murphy's Arguments that 1-800 Contacts' Bidding Agreements Have Little Competitive Impact Lack a Factual Basis

1. Contrary to Dr. Murphy's Model, an Appropriate Economic Analysis of Settlement Confirms that the Bidding Agreements Harmed Consumers Without Justification

1496. Dr. Murphy opines that the settling firms did not highly value competitive advertising, because otherwise they would not have settled without compensation. (RX0739 at 0049 (¶ 127) (Murphy Expert Report); Murphy, Tr. 4204, 4207). From his analysis, Dr. Murphy concludes that the bidding agreements did not have a substantial impact on competition. (RX0739 at 0049-0051 (¶¶ 127-130) (Murphy Expert Report); Murphy, Tr. 4207).

1497. Dr. Murphy bases his analysis on one type of settlement agreement where one party has a monopoly protected by a patent, and the other party has to challenge that patent successfully in order to execute its business plan of early entry. (RX0739 at 0051-0052 (¶¶ 131-132) (Murphy Expert Report)). However, he does not address trademarks, which do not confer the same monopoly power on the rights holder as a strong patent, or unreasonable restraints on advertising competition, which harm competition in a different way than a collusive patent settlement. Dr. Murphy also does not provide any empirical support for the inferences he draws. (CX8009 at 45 (¶ 76) (Evans Rebuttal Expert Report)).

1498. At trial, Dr. Murphy described his economic model for these opinions as “a cost-benefit analysis.” (Murphy, Tr. 4207). To calculate the benefit from seeing the case through trial, the model starts with the net present value of the expected profits from competitive advertising and subtracts the cost of litigating through trial. If the expected benefit is positive, the model predicts that each defendant will litigate the case through a trial unless the plaintiff compensates the defendant in some way for the foregone benefit. Because he finds that each defendant settled with 1-800 Contacts without compensation, Dr. Murphy concludes that the expected benefit of each settling firm must be less than the cost of litigating. (Murphy, Tr. 4204; RX0739 at 0049-0050 (¶ 128 & n.125) (Murphy Expert Report)). Dr. Murphy estimates the cost of a trademark litigation at \$2 million. (Murphy, Tr. 4205; (RX0739 at 0049-0050 (¶ 128) (Murphy Expert Report)).

1499. Based on this model, Dr. Murphy concludes that the bidding agreements did not have a substantial impact on competition. (RX0739 at 0049-0051 (¶¶ 127-130) (Murphy Expert Report); Murphy, Tr. 4207).

1500. Dr. Evans explained that, like all economic models, Dr. Murphy's model of settlement economics rests on a series of assumptions. Assumptions behind an economic model are

accurate when they “match the reality of the phenomenon that [the economist is] trying to understand. So, the more accurate the assumptions are, the more reliable the model will typically be.” (Evans, Tr. 1549-1550; *see also* Evans, Tr. 1549 (“in order for an economic model to be predictive to help explain the real world, you want it to reflect the reality of what's happening in the real world”); CX8009 at 045 (¶ 76) (Evans Rebuttal Expert Report)).

1501. Dr. Evans identified assumptions that would have to be true for Dr. Murphy’s model to be relevant or reliable to predict the likelihood of harm in this case. He also explained why the assumptions are not accurate as applied to this case, because they do not “match the reality of the phenomenon [that Dr. Murphy was] trying to understand.” (Evans, Tr. 1549-1550).
1502. First, for Dr. Murphy’s model to be relevant or reliable, each of the settling parties would need to be able to obtain funds to finance the litigation. (Evans, Tr. 1551 (“Implicit in that calculation is that the online retailer could actually fund the lawsuit”); CX8009 at 047 (¶ 78) (Evans Rebuttal Expert Report)).
1503. As Dr. Evans explained, for most of the settling parties – and for all the discount, pure-play online retailers – funding litigation would have been impossible at the time of the decision to settle. (Evans, Tr. 1551-1552 (Dr. Murphy “doesn't demonstrate ... that in fact these firms ... could go out and come up with the \$2 million”)).
1504. Second, for Dr. Murphy’s model to be relevant or reliable each of the settling parties would need to be able to calculate the expected profits from using competitive ads in the distant future at the time it made the decision to settle. (Evans, Tr. 1553 (“requires them to be able to forecast how successful that advertising activity would be but also requires them to forecast their competitive situation in this business.”); CX8009 at 046-049 (¶¶ 77, 79) (Evans Rebuttal Expert Report)).
1505. As Dr. Evans explained, particularly for the early settlements with AC Lens and Vision Direct, the settling parties lacked the information to come up with reliable forecasts of expected profits. (Evans, Tr. 1553 (“At that point in time, particularly the 2004-2006 period of time, ... before these firms got a cease and desist letter, they actually had very little experience with the direct bid or matched ads; therefore, they didn't have the ability to really come up with good estimates of how successful it would be.”), 1554 (“there's a lot of risk in terms of how successful these competitive ads are going to be”), 1553 (“there's also a lot of uncertainty as to how competition in this industry will evolve over time. So it's difficult to come up with a reliable forecast of profits.”)).
1506. Third, for Dr. Murphy’s model to be relevant or reliable, each of the settling parties would need assurance that, following a successful defense, it could make a profit from the sales associated with the competitive advertising sufficient to pay for the costs incurred in the trademark litigation. (Evans, Tr. 1555-1556; CX8009 at 047-048 (¶¶ 78-79) (Evans Rebuttal Expert Report)).

1507. As Dr. Evans explained, if a firm expects to make a normal competitive profit, it will not be able to afford to spend millions of dollars on the litigation for the opportunity to make additional sales at normal profits. (Evans, Tr. 1554-1555 (“for Dr. Murphy’s calculation to make any sense, it has to be tied down to a precise definition of what we mean by ‘profits.’ [A settling firm is] not going to be willing to spend \$2 million just to get a competitive rate of return. So, in order for it to be willing to spend money to get these profits, those profits have to be in effect super competitive profits. And, Dr. Murphy hasn’t really done any analysis or been specific about what he’s assuming about the ability of these online firms to be able to get super competitive profits in order to make it worth their while to put money up front to fund a lawsuit.”)).
1508. Fourth, for Dr. Murphy’s model to be relevant or reliable the incentives of 1-800 Contacts and each settling party must be symmetrical, and informed by the costs and benefits of settling each individual case. (Evans, Tr. 1555-1556; CX8009 at 046-048 (¶¶ 77-79) (Evans Rebuttal Expert Report)).
1509. As Dr. Evans explained, because 1-800 Contacts had a strategy of threatening or suing all firms that engaged in competitive ads on its queries, it had an incentive to be a tough negotiator. In contrast, all the other settling parties considered the costs and benefits of settling each litigation from a stand-alone perspective. (Evans, Tr. 1556 (“1-800 [Contacts] is not negotiating just with one firm, it is pursuing a strategy where it’s negotiating with multiple firms, ... and needs to take into account the possibility that if it were to pay something out that that would attract other firms to just come in and engage in this activity to get a payment.”); CX8009 at 046 (¶ 77) (Evans Rebuttal Expert Report)). Conversely, a successful defense could embolden other rivals to increase their advertising spending on 1-800 brand queries, which may further limit the returns to the successful defendant.
1510. For these reasons, Dr. Evans concluded that the settling parties did not take account of consumers’ interest. (Evans, Tr. 1559 (“the settling firm is not benefiting from all the competition and lower prices that consumers are going to get, so the settling firm doesn’t take into account the benefits of competition to consumers.”)). Thus, while each settlement may be “privately efficient” within the context of the information available to the parties at the time of settlement, that is not a basis for Dr. Murphy to conclude as a matter of economics that the settlements are “socially efficient” or do not harm consumers. (Evans, Tr. 1557 (agreement is “privately efficient for the two parties”)). To the contrary, Dr. Evans concluded that by blocking informative advertising, the agreements impose costs on, and harm, consumers. (CX8006 at 107-110 (¶¶ 234-240) (Evans Expert Report)).

2. Dr. Murphy’s Direct Effects Analysis Fails to Accurately Measure the Effects of the Settlements and Fails to Account for Confounding Factors

1511. Dr. Murphy presented a chart that plots the number of settlement agreements and 1-800 Contacts’ gross margin over the years 2003 through 2016. (Murphy, Tr. 4197-4199, *in camera*; RX0739 at 0107 (Ex. 20) (Murphy Expert Report), *in camera*).

1512. [REDACTED]
[REDACTED] (Murphy, Tr. 4199, *in camera*).

1513. [REDACTED] (Murphy, Tr. 4199, *in camera*).

1514. [REDACTED]
[REDACTED] (Murphy, Tr. 4272
[REDACTED] *in camera*).

1515. However, Dr. Murphy criticized another analysis performed by Dr. Evans, in which Dr. Evans regressed 1-800 Contacts' gross margin on the number of rival clicks (or impressions) from 2010 to 2016 because it did not account for other factors that might affect 1-800 Contacts' gross margins. (CX9048 (Murphy, Dep. at 225-231)).

1516. Dr. Murphy criticized Dr. Evans for "run[ning] a single variable regression analysis with no controls for other variables." (CX9048 (Murphy, Dep. at 226)).

1517. Dr. Murphy noted: "when you run that kind of regression like this, time series regression over that long period of time, lots of other things are going on." (CX9048 (Murphy, Dep. at 227)).

1518. Dr. Murphy concluded his criticism of Dr. Evans' regression analysis by opining: "I think based on the underlying variables itself, but also the failure to control for other variables, I don't think [there] is really much of anything here in economic evidence." (CX9048 (Murphy, Dep. at 228)).

1519. [REDACTED]
[REDACTED] (Murphy, Tr. 4268-4269, *in camera*).

1520. [REDACTED]
[REDACTED] (Evans, Tr. 1661-1662, *in camera*).

1521. When Dr. Evans modified Dr. Murphy's analysis by regressing 1-800 Contacts' gross margin on the number of ad impressions on queries for 1-800 Contacts brand terms, he found "a statistically significant decrease in 1-800 Contacts' margins." (CX8009 at 095 (¶ 180) (Evans Rebuttal Expert Report)).

3. Dr. Murphy Mischaracterizes Dr. Athey's Analysis to Argue that 1-800 Contacts' Bidding Agreements Facilitate Online Sales

1522. Dr. Athey estimated that, if 1-800 Contacts' bidding restrictions were removed, rival sellers would obtain 3.5 additional clicks on every 100 searches for 1-800 Contacts brand terms while 1-800 Contacts would obtain 2.0 fewer clicks for every 100 such searches. (CX8007 at 033 (¶¶ 94-96) (Athey Expert Report)).

1523. [REDACTED] (RX0739 at 0083-0084 (¶ 231) (Murphy Expert Report), *in camera*).

1524. [REDACTED] (RX0739 at 0083-0084 (¶ 231) (Murphy Expert Report), *in camera*).

1525. In his expert report, Dr. Murphy suggested that these were Dr. Athey's calculations. (RX0739 at 0083-0084 (¶ 231) (Murphy Expert Report)). However, at his deposition, Dr. Murphy acknowledged that "she didn't say that." (CX9048 (Murphy, Dep. at 263)).

1526. [REDACTED] (RX0793 at 0083-0084 (¶ 231) (Murphy Expert Report), *in camera*; Murphy, Tr. 4129-4138, *in camera*).

1527. In his deposition, however, Dr. Murphy stated that the [REDACTED] at 1-800 Contacts that he uses in his calculation implies that [REDACTED] of the clicks that 1-800 Contacts receives on ads placed on its brand terms searches do not result in a conversion. (CX9048 (Murphy, Dep. at 263-264)).

1528. Dr. Murphy then conceded that the lost clicks that 1-800 Contacts experienced could come disproportionately from the [REDACTED] of those customers who click on a 1-800 Contacts ad appearing in response to a search of its brand terms and do not convert. (CX9048 (Murphy, Dep. at 265 ("I don't think you know whether the conversion rate on those incremental ones would be higher or lower than that number, I don't think you know which way it goes.")).

1529. Dr. Murphy acknowledged that he did nothing to assess whether the conversion rate on the incremental clicks was higher or lower than the average conversion rate. (CX9048 (Murphy, Dep. at 267)).

1530. Dr. Athey explained that Dr. Murphy's examination of the change in consumer welfare ignored the value of information to consumers. (CX8010 at 050-051 (¶ 133) (Athey Rebuttal Expert Report); *see also* Athey, Tr. 799 ("[I]t's not necessary to have a reduction in output to have an improvement in consumer welfare in this setting.")).

1531. Specifically, Dr. Athey explained that Dr. Murphy’s approach of “attempt[ing] to examine the change in consumer welfare by considering the change in total output, proxied by measured conversions” is “ill-suited to the case at hand.” (CX8010 at 051 (¶ 133) (Athey Rebuttal Expert Report) (explaining further that “[c]onsumers looking to purchase contact lenses are unlikely to not purchase contact lenses; they went to the trouble of getting a prescription for them, and they may rely on them for daily activities. The main question is where they will buy them. Thus, it is more instructive to consider the information available to consumers, and whether that information is relevant to the purchase process.”)).

1532. Dr. Athey explained that additional advertising competition is beneficial because it provides consumers with information about the existence and relative prices of other sellers. (CX8007 at 035 (¶ 102) (Athey Expert Report)).

1533. Consumers can use this information to secure lower prices in two ways. Consumers can click on ads from rivals with lower average prices. (CX8007 at 036 (¶ 106) (Athey Expert Report)).

1534. Consumers can also use the information to obtain lower prices from 1-800 Contacts through 1-800 Contacts’ price match program. (CX8007 at 036 (¶ 106) (Athey Expert Report)).

1535. Consumers who use 1-800 Contacts’ price match program must complete their purchase through 1-800 Contacts’ call center – they cannot complete their purchase online. (CX9025 (Osmond, Dep. at 21-22); CX1086 at 001 (price match “requires a phone call (which removes them from the channel and makes it so we wouldn’t be able to attribute the conversion anyway)”)).

4. Dr. Murphy’s Argument that Non-Settling Retailers Obtained Few of Their Conversions from Bidding on 1-800 Ads Lacks a Factual Basis

1536. [REDACTED] Murphy, Tr. 4194-4195, *in camera*).

1537. [REDACTED] (Murphy Tr. 4187-4195, *in camera*; RX0739 at 0064 (¶ 169) (Murphy Expert Report), *in camera*).

1538. [REDACTED] (Murphy, Tr. 4190-4191, *in camera*).

1539. [REDACTED] (Murphy, Tr. 4188, *in camera*).

1540. [REDACTED]
[REDACTED] (Murphy, Tr. 4217, *in camera*).

1541. [REDACTED]
[REDACTED] (Murphy, Tr. 4188, *in camera*).

X. Competitive Effects: Harm to Competition Within A Relevant Market

A. The Relevant Product Market is the Online Retail Sale of Contact Lenses

1542. Online sales of contact lenses constitute a relevant product market. (Evans, Tr. 1432; CX8006 at 014, 111-12 (¶¶ 30, 245-46) (Evans Expert Report)).

1. Physical Channels of Sale Are Not Good Substitutes for Online Sales

1543. No physical channel of sale is a close substitute for online sales. (CX8006 at 116 (¶ 254) (Evans Expert Report); *infra* ¶¶ 1544-1552).

a. When purchasing contact lenses, online and physical options will not be equally convenient

1544. Convenience is a key factor in determining where consumers buy contact lenses. At the times when consumers find it convenient to purchase contact lenses online, the ability to purchase contact lenses at physical stores is not a close substitute for those online purchases. (CX8006 at 112 (¶ 248) (Evans Report)).

1545. 1-800 Contacts recognized that it and its online rivals compete on the basis of convenience and price. (CX1743 at 009 (1-800 Contacts Management Presentation, September 2015) [REDACTED] *in camera*); (CX0439 at 0014, *in camera*) [REDACTED] see also Holbrook, Tr. 1889 (“online customers are looking primarily for low price and quick delivery”).

1546. ECPs are not well-positioned to compete for sales made by online providers, because a consumer who is not already at an ECP for an eye exam would need to make a separate trip to their ECP in order to purchase at a physical location. (CX8006 at 113 (¶ 249) (Evans Expert Report); Evans, Tr. 1436-1437, 1440).

1547. [REDACTED] (CX1449 at 119, *in camera*).

1548. Online purchasing is more convenient than any purchasing from any other channel because the consumer does not need to return to the store to pick up her purchase. (Clarkson, Tr. 189-190).

1549. The fact that some consumers purchase online on some occasions and from ECPs on other occasions does not mean that the two options are close substitutes for specific purchase occasions. (CX8006 at 114 (¶ 251) (Evans Expert Report)).

1550. A consumer who has just had an eye exam may find it convenient to buy from the ECP. (Evans, Tr. 1434; CX8006 at 112-113 (¶ 248) (Evans Expert Report); CX0547 at 036, *in camera* [REDACTED])

1551. [REDACTED] (RX1228 at 0025, *in camera*; Evans, Tr. 1568-1569, *in camera*; CX8006 at 115 (¶ 253) (Evans Expert Report), *in camera*).

1552. Online providers, including 1-800 Contacts, are not well-positioned to capture most sales made to consumers with vision insurance, who generally find it preferable to purchase from in-network retailers, which typically includes ECPs but excludes all major online retailers. (Evans, Tr. 1440-1441; CX8006 at 114 (¶ 252) (Evans Expert Report); RX0428 at 0040, *in camera* (2015 1-800 Contacts Management Presentation noting: [REDACTED])

b. There is significant industry recognition of the online contact lens retail market

1553. There is significant industry recognition of the online contact lenses retail market. (*Infra* ¶¶ 1554-1558).

1554. Documents prepared and presented by 1-800 Contacts and its agents consistently refer to the online market as a separate economic entity, including by calculating 1-800 Contacts' [REDACTED] (RX0428 at 0005, *in camera*); *see also* (Bethers, Tr. 3807-3808 (testifying that he personally presented RX0428); CX1449 at 043, *in camera*) (1-800 Contacts [REDACTED] CX0439 at 033, *in camera*)

1555. In 2004, 1-800 Contacts sought to develop and execute a plan to dominate the "Internet contact lens market." (CX0055 at 006 (2004 Strategy Offsite Summary)).

1556. In addition to 1-800 Contacts, other online retailers consistently identify online retailers as their closest competitors. (Clarkson, Tr. 187-188; Hamilton, Tr. 391-393; Holbrook, Tr. 1887-1888, 1898-1900; CX9018 (Drumm, Dep. at 115-116); CX9000 (Batushansky, IHT at 19-20), *in camera*; CX9036 (Duley, Dep. at 127); (CX8003 at 001 (¶ 4) (Mitha, Decl.) ("Lens Discounters' closest competitors are other companies that sell contact lenses online"); CX8001 at 001 (¶ 3) (Hamilton, Walgreens Decl.), *in camera*; CX8002 at

001 (¶ 3) (Hamilton, Vision Direct Decl.), *in camera*); CX9003 (Clarkson, IHT at 23-24)).

1557. LensDirect's CEO does not consider any brick and mortar retailers to be among its "main competitors" or its "primary competition." (Alovis, Tr. 988 (Lens Direct's "primary competition" consists exclusively of online firms); CX9023 (Alovis, Dep. at 108, 110) (Lens Direct's "main competitors" are exclusively online firms, and none of its main competitors are "companies that sell contact lenses in brick-and-mortar stores.")).

1558. A significant number of specialized vendors, referred to in the industry as "pure-play" retailers, sell contact lenses exclusively in the online market. (Bethers, Tr. 3536-3539).

c. Unique facilities are required in order to sell contact lenses online at significant scale

1559. Unique facilities are required in order to sell contact lenses online at a significant scale. (*Infra* ¶¶ 1560-1563).

1560. [REDACTED] (RX0428 at 0034, *in camera*). See also CX0439 at 0014, *in camera* [REDACTED] (Bethers, Tr. 3642) (1-800 Contacts is looking to open an east-coast distribution hub and five additional "spoke" facilities in order to provide two-day delivery, which online customers often expect); Coon, Tr. 2881 (1-800 Contacts had an inventory of 65,000 SKUs worth millions of dollars); RX1228 at -010, *in camera* [REDACTED]

[REDACTED] ((RX0428 at 0045, *in camera*); see also CX0439 at 0014, *in camera* [REDACTED])

1562. Online retailers must invest in, build out, and maintain sophisticated websites. Holbrook, Tr. 1860-1862 (designing and building out website was investment); CX0525 at 016 (2012 1-800 Contacts management presentation notes that 1-800 Contacts invests in having a "best-in-class website," with continuing "site optimization through constant user monitoring and surveys," "new customer tutorials to help enter order and prescription information," "simple and streamlined order process for new and repeat customers," and 24/7 "click-to-chat" services).

1563. To participate in online sales at scale, online contact lens retailers must invest in increasingly sophisticated prescription verification systems. Clarkson, Tr. 180-181. See also CX9003 (Batushansky, IHT at 26) ("larger companies now would have an online database of all of the doctors in the United States" for prescription verification).

2. Online Prices are Lower Than Prices in Most Physical Stores, and Online Customers are More Price Sensitive

1564. Online retailers of contact lenses charge distinct prices which differ from prices charged by physical retailers. (*Infra* ¶¶ 1565-1567)).

1565. Other than 1-800 Contacts, online retailers set list prices below IECPs, chain ECPs, and mass merchandisers. (Bethers, Tr. 3544-3545; Evans, Tr. 1522-1524; CX8006 at 085, 095, (¶¶ 188, 205 & n.228) (Evans Expert Report), *in camera*).

1566. Offline contact lens retailer pricing is generally higher than online pricing. (CX9039 (Clarkson, Dep. at 180)). *See also* (CX0439 at 0014, *in camera*) [REDACTED]

1567. LensDirect looks at its online competitors' prices and always sets its prices below 1-800 and to be competitive with the other online retailers. (Alovis, Tr. 989; CX9023 (Alovis, Dep. at 108)).

1568. [REDACTED] CX1449 at 050, *in camera*).

1569. [REDACTED] (CX1449 at 054, *in camera*).

1570. [REDACTED] (CX1449 at 055, *in camera*).

1571. [REDACTED] CX1449 at 153-157, *in camera*).

1572. [REDACTED] (CX9014 (Batushansky, Dep. at 144-147), *in camera*).

1573. 1-800 Contacts' price-matching program is an attempt to compete on price against online retailers. (Bethers, Tr. 3629, 3774).

⁶ See JX0002-A-030 (CX1449 admitted for all purposes).

1574. Although membership clubs such as Costco charge prices which are also below IECs, chain ECs, and mass merchandisers, club prices are distinct from the prices charged by online retailers due to the separate membership fee charged to their members. Consistent with this, 1-800 Contacts' policy is not to price-match membership clubs, such as Costco or Sam's Club. (CX1337 at 001-002; CX1341 at 001; CX8006 at 127-128 (¶ 276) (Evans Expert Report)).

1575. Dr. Evans concluded that the price difference between online retailers and physical stores was strong evidence that the online channel is a separate relevant market: "the doctors and other physical retailers, that are charging higher prices and offer less convenience and service. It is not possible for that situation to exist in a market where they're all close substitutes and they're competing." (Evans, Tr. 1522-1524).

3. The Behavior of Lost Customers Separately Shows that Physical Retailers Do Not Provide a Sufficient Substitute for Online Retailers

1576. The evidence regarding the behavior of lost customers confirms that online sales constitute a relevant market. (Evans, Tr. 1456-1457).

1577. A hypothetical monopolist consisting of all online retailers of contact lenses could profitably impose a small but significant non-transitory increase in prices ("SSNIP") in the online market of more than five percent. (CX8006 at 124 (¶ 269) (Evans Expert Report); CX9048 (Murphy, Dep. at 141)).

1578. The online market's ability to sustain a SSNIP can be assessed via a "critical loss" analysis, which requires determination of profit margins and diversion ratios from 1-800 Contacts to other online providers, and from other online providers to 1-800 Contacts. (Evans, Tr. 1448-1449; CX8006 at 117 (¶ 257) (Evans Expert Report)).

1579. 1-800 Contacts' margin is about 35%, while other online sellers have margins of [REDACTED] (Evans, Tr. 1455; CX8006 at 123, *in camera* (¶ 268) (Evans Expert Report)).

1580. Given these profit margins, any diversion ratio of 23% or higher would support a finding that a SSNIP would be profitable. (CX8009 at 061 (¶ 106) (Evans Rebuttal Report)).

1581. The appropriate measure of diversion is approximately 40%. (CX8006 at 121-122 (¶ 266) (Evans Expert Report)).

1582. Given this diversion ratio, a hypothetical monopolist consisting of all online retailers would be able to raise prices by approximately 12.1 percent. (Evans, Tr. 1456; CX8006 at 124 (¶ 269) (Evans Expert Report)).

1583. Dr. Murphy acknowledges that the online sale of contact lenses meets the SSNIP test using Dr. Evans' analysis. (Murphy, Tr. 4167-4168; CX9048 (Murphy, Dep. at 141)).

1584. Dr. Murphy admits that a relevant market for online contact lens sales satisfies the SSNIP test with any diversion ratio "above, say, in the mid-20s." (Murphy, Tr. 4167-4168 (discussing RX0739, Ex. 22 (Murphy Expert Report))).

1585. Diversion ratios are typically calculated based on actual lost sales, for example by analyzing lost sales reports. (Evans, Tr. 1835, *in camera* [REDACTED])

1586. Dr. Murphy's reliance on a high percentage of 1-800 Contacts' customers making purchases from ECPs compared to those who switch to other online sellers is not an appropriate diversion ratio because it does not rely on customers who are actually lost. Dr. Murphy errs by treating as a "lost sale" a 1-800 Contacts customer who cycles between buying from ECPs when they require a new prescription and buying 1-800 Contacts when they need a refill. Evans, Tr. 1538-1539 (explaining that Dr. Murphy's figure includes "individuals who didn't purchase from 1-800 the last time but are going to the next time.") (discussing CX1117 at 015-016 (1-800 Contacts 2014 Board Meeting Presentation); CCXD0005 at 082); Murphy, Tr. 4156-4157; CX8009 at 060-061 (§§104-105) (Evans Rebuttal Expert Report) (explaining why Dr. Murphy is wrong to select [REDACTED] as a diversion statistic, and discussing RX1129 at 0015-0016, *in camera*)).

1587. Dr. Murphy argues that 1-800 Contacts customers who cycle between buying from ECPs when they get their initial prescription and 1-800 Contacts when they obtain refills might be especially price sensitive. (Murphy, Tr. 4151, 4167). [REDACTED] (RX1228 at 0025, *in camera*).

1588. Dr. Murphy further argues that ECPs must be included in the product market because the switching that he estimates to ECPs exceeds the switching that he estimates going to other online sellers. (CX9048 (Murphy, Dep. at 198-199)).

1589. However, Dr. Murphy deviates from standard practice in comparing switching to the full set of sellers in one category (ECPs) with switching to a subset of sellers in another category (non 1-800 Contacts online sellers). (Evans, Tr. 1445).

4. The Imposition of Unilateral Pricing Policies Creates a Natural Experiment that Separately Shows Physical Retailers are Not Close Substitutes for Online Retailers

1590. The effects of manufacturer-imposed unilateral pricing policies ("UPP") further confirm that brick and mortar sellers are not close substitutes for online sellers and that online sellers of contact lenses represent a market. (Evans, Tr. 1445, 1571, *in camera*).

1591. UPP refers to resale price maintenance programs in which "major contact lens manufacturers prohibited retailers that bought their products from reselling certain of those products at prices below specified levels." (CX8006 at 125 (§ 271) (Evans Expert Report); CX1336 at 130, *in camera*).

1592. [REDACTED] (CX8006 at 125 (§ 271) (Evans Expert

- Report), *in camera*; CX1336 at 130, *in camera*). Johnson & Johnson terminated its UPP program on April 13, 2016. (CX8006 at 125 (¶ 271) (Evans Expert Report)).
1593. Online discounters and club stores had to raise their prices by roughly 20-25 percent to meet the new minimum prices for products covered by UPP policies. (Evans Tr. 1442-1443; CX8006 at 125 (¶ 272) (Evans Expert Report)).
1594. Physical sellers other than membership clubs were generally not required to increase their prices because their prices were already near or above the UPP-mandated prices. (Evans, Tr. 1445); CX8006 at 125-126 (¶ 272) (Evans Expert Report)).
1595. 1-800 Contacts, which sets its prices at a small discount to ECPs, did not need to increase its prices significantly in response to UPP. (Evans, Tr. 1445)
1596. Dr. Evans examined the change in profits on sales of Johnson & Johnson products at four discount online retailers that were forced to substantially increase their prices. (Evans, Tr. 1443-1444; CX8006 at 125-126 (¶ 272) (Evans Expert Report)).
1597. Dr. Evans found that profits increased substantially at these online sellers as a result of these price increases. (Evans, Tr. 1443-1444; CX8006 at 126-127 (¶ 273) (Evans Expert Report)). [REDACTED] (CX8006 at 127, 194-200 (¶ 273, Appendix H) (Evans Expert Report), *in camera*).
1598. Scott Osmond, 1-800 Contacts' Director of Financial Planning and Analysis, testified that UPP reduced the company's overall discounts, which had a favorable impact on the company's margins. (CX9025 (Osmond, Dep. at 82)).
1599. A February 2015 marketing presentation for 1-800 Contacts states that [REDACTED] (CX0296 at 008 ("Affiliate and Paid Search Overview"), *in camera*).
1600. Dr. Evans explained that this increase in profits shows "the physical retailers were not a sufficiently significant constraint to prevent the profits [at the discount online sellers] from going up as a result of the price increase." (Evans, Tr. 1445; (CX8006 at 127 (¶ 274) (Evans Expert Report)).
1601. Respondent's expert, Dr. Murphy, argues that, because the UPP-mandated price increases 1) did not cover all online sales in a uniform way; and 2) also affected club stores, they are simultaneously too narrow and too broad to represent a "natural experiment" for the hypothetical monopolist test. (Murphy, Tr. 4172-4173).
1602. In his first point, Dr. Murphy ignores standard economic practice for defining a market in arguing that the UPP mandated price increases are uninformative because they did not apply uniformly to all online contact lens sellers. Horizontal Merger Guidelines §4.1.1 ("[The hypothetical monopolist] test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those

products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms.”).

1603. Dr. Murphy’s second point ignores Dr. Evans own analysis of Costco and other club stores. Dr. Evans acknowledged that the “natural experiment” where discount online sellers and club stores were forced to raise price does not - by itself - provide information about substitution between online sellers and club stores. (Evans, Tr. 1446).
1604. However, Dr. Evans concludes that other information indicates that there is little substitution between online sellers of contact lenses and club stores. (CX8006 at 127-128 (¶ 276) (Evans Expert Report)).
1605. Because club stores require a paid membership, club stores are only an option for members of the club store. (Clarkson, Tr. 196-197; CX9039 (Clarkson, Dep. at 183-185 (“[Club stores are] not quite in our competitive set because you pay a membership fee to join, and the membership fee could be as much as \$100 for a year, and you wouldn’t join it just to buy contacts.”); CX8006 at 127-128 (¶ 276) (Evans Expert Report)).
1606. 1-800 Contacts’ stated price-match policy is that it does not match club stores. (CX1334 at 013 (Sept. 2016 Price Matching Review), *in camera*; CX9029 (Bethers, Dep. at 37); CX8006 at 127-128 (¶ 276) (Evans Expert Report). Price matches to club stores were made on a limited discretionary basis by call center personnel though 1-800 Contacts has recently reaffirmed that price-matches to club stores would not be offered and instructed call center personnel to follow this policy.” (CX9025 (Osmond, Dep. at 17-18)).
1607. Whether or not individual online retailers thought the UPP program was harmful in the long term does not affect the UPP analysis; the UPP may have prevented individual retailers from winning business from other online providers (such as 1-800 Contacts) but there is no evidence that the online retail market on the whole would have lost enough business to defeat the price increase the UPP represented. (Evans, Tr. 1753-1734).

5. Direct Effects Evidence Indicates that the Online Sale Of Contact Lenses is the Relevant Market

1608. Direct evidence of competitive effects can also inform market definition. (Merger Guidelines, Section IV).
1609. Instances of head-to-head competition between 1-800 Contacts and its online rivals indicate the online sale of contact lenses is the relevant product market. (*See supra* § 6.A).
1610. Rivals’ search advertising forced 1-800 Contacts to modify its price matching policy to highlight that it would beat rivals’ prices by 2 percent. (Evans Tr. 1608-1617; (CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report); CX0634 at 001-002, 011-012; CX9032 (L. Schmidt, Dep. at 132-133); *see supra* § 9.D).

6. Respondent’s Expert, Dr. Murphy, was Unable to Provide Support for his Claim that the Relevant Product Market is All Retail Sales of Contact Lenses

- a. Dr. Murphy provided no support for his claim that trademarks tie online sales and ECP (brick & mortar) sales into a single market

1611. Dr. Murphy claimed that the strongest evidence supporting a market that includes all retail sales of contact lenses is the “overall history of 1-800’s business and its business model. And its business model in developing its brand name and its investment in advertising has been to win customers away from these other channels . . .” Murphy, Tr. 4153-4154; (CX9048 (Murphy, Dep. at 188)).

1612. Elaborating on this, Dr. Murphy claimed “[t]he agreements in this case are about trademarks. If you think about how that affects competition it is going to affect competition not just between 1-800 Contacts and other online retailers, but trademarks, and 1-800 trademark in particular is a critical element of their competition against those other players.” (CX9048 (Murphy, Dep. at 114-115)).

1613. Dr. Murphy elsewhere criticized Dr. Evans for not tying together the role of trademarks and the definition of the market. (CX9048 (Murphy, Dep. at 253)).

1614. However, in his deposition, Dr. Murphy conceded that the effect of greater competition on a firm’s incentive to develop a brand is ambiguous. (CX9048 (Murphy, Dep. at 45-13)). And, Dr. Murphy conceded that he did not try to explicitly measure the effect of greater competition on 1-800’s branding incentives. (CX9048 (Murphy, Dep. at 47-52)).

1615. Moreover, Dr. Murphy’s expert report did not discuss his theory that trademarks mean the market is broad. (CX9048 (Murphy, Dep. at 156-157)). And, when asked whether he was familiar with “any economic articles that discuss how trademarks affect market definition,” Dr. Murphy could only respond “I don’t recall any off the top of my head.” (CX9048 (Murphy, Dep. at 255)).

- b. Dr. Murphy assertion that that competition with ECPs determines 1-800’s prices ignores price match evidence

1616. Dr. Murphy claimed that 1-800’s price setting practices support his definition of a market that includes all sales of contact lenses. (Murphy, Tr. 4151; RX0739 at 041 (¶104) (Murphy Expert Report) (“[T]he fact that it [1-800] sets its prices based on a discount off ECP prices is direct evidence that its prices are constrained by ECP prices and, therefore, that ECPS are in the same market as 1-800.”))

1617. However, Dr. Murphy conceded that 1-800 tends to price match other online sellers much more than ECPs in its price match program because “even if they [1-800] are competing aggressively against ECPs, they [1-800] are competing against them [ECPs] on other bases [than price].” (CX9048 (Murphy, Dep. at 189-190)).

- c. Dr. Murphy failed to show that competition between online sellers and ECPs was sufficient to include them the same market

1618. Dr. Murphy claimed the Fairness to Contact Lens Consumers Act (FCLCA) supports the conclusion that the relevant market in which the analyze 1-800 Contacts' Bidding Agreements consists of all sales of contact lenses. (Murphy Tr. 4154; see also RX0793 at 042 (¶111) (Murphy Expert Report) (“[t]he economic logic behind the FCLCA . . . was that requiring ECPs to provide patients with their prescriptions would make it easier for those patients to substitute between ECPs and lower priced alternatives, such as online or mass merchant contact lens retailers.”)).
1619. Dr. Murphy conceded that “the fact that there is some substitution doesn’t mean you are in the same market automatically.” (CX9048 (Murphy, Dep. at 193)).
1620. Dr. Murphy admitted he did not perform any empirical analysis to quantify the amount of substitution that would occur from online retailers to ECPs if some set of online retailers increased their prices. (CX9048 (Murphy, Dep. at 195-196)).
1621. Dr. Murphy suggested that the introduction of UPP shows contact lens manufacturers wanted to help “ECPs compete more effectively with people who were selling online and other mass merchants who were offering discount sales.” (Murphy, Tr. 4154-4155). The manufacturers’ imposition of UPP shows that ECPs were unable to constrain the pricing of online sellers through the ordinary give and take of the marketplace.
1622. J&J terminated its UPP in early 2016. (CX8006 at 125 (¶ 271) (Evans Expert Report)). Dr. Murphy did not discuss what implications Johnson & Johnson’s termination of its UPP program has for market definition.

B. The Relevant Geographic Market is the United States

1623. The relevant geographic market for the online sale of contact lenses consists of all relevant products sold to consumers in the United States. (CX8006 at 022-023, 019 (¶54 & n5) (Evans Expert Report)).
1624. The relevant geographic market does not extend to products sold to consumers outside the United States because contact lenses are healthcare products subject to regulation by national authorities, and because consumers in other jurisdictions require differing storefronts in order to purchase (such as the option to purchase in foreign currency or the option to navigate a website written in a language other than English).
1625. The relevant geographic market extends to the entire United States because many online contact lens retailers ship their products nationally. (Holbrook, Tr. 1860; Evans Tr. 1690, 1692; CX8006 at 092 (¶ 199) (Evans Expert Report)).
1626. Dr. Murphy admits that he did not define a geographic market in his report. (Murphy, Tr. 4318).

1627. From the perspective of a United States consumer, the contact lenses sold by one online retailer are interchangeable with those sold by another online retailer located elsewhere. The product is purchased online and delivered by mail, making the consumer relatively indifferent to the location of the retailer.

C. 1-800 Contacts and the Settling Firms Collectively Have Market Power in the Online Market

1628. 1-800 Contacts and the settling firms jointly have market power in the online contact lens retail market. (Evans, Tr. 1540; CX8006 at 130 (¶ 279) (Evans Expert Report) (“The parties to the agreements account for the substantial majority all of the sales in the relevant antitrust market defined above. That provides a strong presumption that the parties to the agreement, collectively, have significant market power.”)).

1. Collectively, 1-800 Contacts and the Settling Firms Account for a High Share of the Online Market

1629. 1-800 has maintained a market share exceeding [REDACTED] even though its prices are roughly [REDACTED] higher than prices at other online contact lens sellers. (Murphy, Tr. 4260, 4261, *in camera*).

1630. Collectively, 1-800 Contacts and the settling firms have a market share of 79% of the online contact lens market. (Evans, Tr. 1376; CX8006 at 130 (¶ 279) (Evans Expert Report)).

1631. Accounting for what Dr. Evans concluded were Informal Agreements with Lens.com and Lens Discounters, 1-800 Contacts and the settling firms have a market share of 91% of the online contact lens market. (CX8006 at 130 (¶ 279) (Evans Expert Report)).

1632. 1-800 Contacts alone has controlled roughly half or more of the market during the relevant period and most recently had 53.6% of the market in 2015. (CX8006 at 023, 131 (¶ 54, Table 1, ¶ 282) (Evans Expert Report); *see also* CX9001 (Bethers, IHT at 159) (1-800 Contacts CEO testifying that 1-800 Contacts’ sales constituted approximately 62 percent of the online contact lens market); (RX0428 at 005, 008, *in camera*) (September 2015 management presentation reporting that 1-800 Contacts had a [REDACTED])

1633. The settling firms’ market power is enhanced by the fact that firms outside of the market have little incentive to compete by bidding on keyword advertising. (*See supra* ¶ 243; *infra* § X.C.2.a.i).

2. Barriers to Entry Sufficient to “Deter or Counteract” the Consumer Harm

1634. Dr. Evans testified that the anticompetitive effect of concern in this case is the loss of competition due to the suppression of comparative internet search advertising. (Evans, Tr. 1541-1543).

1635. Dr. Evans and Dr. Athey concluded that 1-800 Contacts' course of conduct resulted in a reduction in the number of ad impression and quality of the ads shown on SERPs in response to 1-800 Contacts Branded Queries since about 2005. (*See supra* § IX.B).

1636. [REDACTED]
[REDACTED] Evans, Tr. 1581, *in camera*).

1637. [REDACTED] Evans, Tr. 1581, *in camera*).

1638. Because of the large number of quality advertisers excluded by the bidding agreements, effective entry requires several new firms with the resources to advertise consistently on 1-800 Contacts' brand name terms. (Evans, Tr. 1401-1403; 1625; CX8006 at 099 (¶ 216) (Evans Expert Report)).

1639. Further, because leading search engines display results with multiple advertising slots, including the most prominent four top slots, entry by multiple advertisers would be required to replace the lost advertising competition and fill empty ad slots. (*See supra* § IV.A, VIII.D).

1640. Further, the requisite group of entrants must include several firms of the size and quality of Vision Direct and AC Lens to restore the quality of the advertising shown on a typical SERP. (*See supra* § IV.A, VIII.D).

- a. Entrants must have the incentive and ability to provide comparative advertising

1641. To replace the lost competition, entrants must have both the ability and incentive to cause ads to consistently appear on SERPs for queries containing 1-800 Contacts brand terms with ad text that contains information and offers comparable to the advertising lost because of the Bidding Agreements. (Evans, Tr. 1541-1544; *see also infra* §§ X.C.2.a.i - iii).

- i. Many Online Contact Lens Sellers Lack The Incentive to Provide The Lost Comparative Advertising

1642. Many existing online contact lens sellers lack the incentive either to compete aggressively online or to provide significant comparative advertising. [REDACTED]
[REDACTED] Evans Tr. 1748, *in camera*; CX9042 (Evans, Dep. at 140)).

1643. An eye doctor that offers online ordering "is unlikely to offer prices that are competitive with other online players because he or she is probably going to keep the pricing comparable with what the customer would pay in store." (Clarkson, Tr. 192).

1644. Likewise “Costco considers its online optical store to be a service for Costco members.” (CX8004 at 002 (¶ 6) (Salas, Decl.)).

1645. When it began selling contact lenses online, Costco chose to advertise largely by sending emails to existing Costco members. (CX8004 at 002 (¶ 7) (Salas, Decl.)).

1646. Costco has not yet engaged in search advertising to market its online contact lens ordering option. (CX8004 at 002 (¶ 7) (Salas, Decl.)).

ii. Potential Entrants Lack The Ability To Provide The Lost Comparative Advertising

1647. The barriers to entry into online contact lens retail are greater today than they were 15 years ago, when AC Lens entered the market, due to established competitors, decreased effectiveness of organic search, and increased expenses related to data security. (CX9039 (Clarkson, Dep. at 185-187)).

1648. Entry on the scale of Memorial Eye could not replace the lost advertising competition, because Memorial Eye lacked the ability to replace the lost advertising. *see also infra* ¶¶ 1648-1651).

1649. As Dr. Evans explained: “[t]he fact that Memorial Eye had an average position of [REDACTED] on non 1-800 Contacts BKW searches and an average position of [REDACTED] on 1-800 Contacts BKW searches suggests that, in the absence of the bidding agreements, other firms would likely have performed better on 1-800 Contacts BKW searches.” (CX8006 at 100-101 (¶ 218) (Evans Expert Report), *in camera*).

1650. When Memorial Eye advertised most actively in response to 1-800 Contacts related searches, its ads appeared on average in the [REDACTED] (Evans, Tr. 1605, *in camera*).

1651. Because only [REDACTED] search engine users saw Memorial Eye’s comparative ads, Memorial Eye did not replace the advertising competition that would have occurred if several larger online discount advertisers were competing to advertise on those queries. (CX9042 (Evans, Dep. at 70-71), *in camera*).

1652. Thus, entry by one or more firms with resources comparable to Memorial Eye could not replace the advertising competition lost as a result of the Bidding Agreements.

iii. 1-800 Contacts’ Litigation Threats Curb Entrants’ Incentive And Ability To Replace The Lost Advertising

1653. 1-800 Contacts’ litigation threats raise entrants’ cost of replacing the lost advertising and of building brand awareness online. (*See infra* ¶¶ 1653-1658).

1654. Online paid search advertising is a critical means of developing brand awareness for online sellers. (Hamilton, Tr. 401; Clarkson Tr. 220-221; Holbrook Tr. 1903-1904; CX1449 at 048 [REDACTED] *in camera*).

1655. “[B]eing an online seller in anything does require the ability to use paid advertising effectively, at least when you’re just starting out.” (CX9042 (Evans, Dep. at 137)).

1656. Historically, 1-800 Contacts’ rivals have sought to build their brands by highlighting their lower price offerings. (Clarkson, Tr. 218; Holbrook, Tr. 1904).

1657. Entrants would require brand recognition or brand awareness. (CX9042 (Evans, Dep. at 137-138 (describing one barrier to successful entry as the “challenge” of “getting noticed online” by “making oneself visible to a large enough audience”); CX1449 at 048 [REDACTED] *in camera*; RX1228 at 014 (AEA Analysis titled “Staff Final Update,” concludes: [REDACTED] *in camera*)).

1658. Even established firms with well-known brands must have the ability to become known as online vendors of contact lenses. (Hamilton, Tr. 401 (“[W]e needed to let people know that Walgreens was a retailer that offered contacts and to leverage the brand equity that Walgreens had and the good brand goodwill of the brand to let people know that this is one other prescription product that they could purchase from an already trusted retail brand.”)).

1659. 1-800 Contacts’ strategy of targeting for litigation firms whose ads appear on searches containing 1-800 Contacts’ brand terms deters firms from replacing the lost advertising competition and raises barriers to entry or expansion. (Evans, Tr. 1583; CX8006 at 130 (¶¶ 280-281) (Evans Expert Report); Holbrook Tr. 1876-1877; 1907-1908; 1910-1911).

b. At least some entrants must have substantial scale

1660. For a set of entering firms to replace the lost advertising competition, some of the entrants must possess assets needed to be effective online sellers of contact lenses, at least comparable to firms such as Vision Direct or AC Lens. (*See infra* ¶¶ 1660-1667; *see also* [REDACTED] *in camera*).

1661. [REDACTED]

1662. [REDACTED]

1663. 1-800 Contacts had 133 full-time employees devoted to prescription verification as of August 2015. (RX0428 at 038).

1664. [REDACTED] (RX1228 at 014 [REDACTED] *n camera*).

1665. [REDACTED]
 (CX0439 at 014 (Report entitled “1-800 Contacts: Staff Final Update”), *in camera*).
1666. [REDACTED] (CX1343 at 010, *in camera*).
- 1667.AC Lens stocks 37,000 SKUs. (Clarkson, Tr. 192).
- 1668.Entrants must have scale and bargaining power with contact lens suppliers sufficient to secure a steady supply of lenses at competitive wholesale prices, which smaller pure-play online firms cannot do. [REDACTED] Holbrook, Tr. 1863-1866).
- c. There is no history of effective entry in this market
- 1669.The actual history of entry into the online sales of contacts lenses confirms that entry by new firms or expansion of smaller firms could not offset the anticompetitive harm from the settlement agreements. (Evans, Tr. 1578 (“in terms of online discounters, there has been no firm that’s entered since 2000... that has entered and obtained a significant share of online sales”)).
- 1670.A recent analysis prepared by AEA investors, 1-800’s owner, cites [REDACTED]
 [REDACTED] (CX1343 at 014, *in camera*;
 CX0439 at 014, *in camera*).
- 1671.An examination of the experience of the four firms that Dr. Murphy pointed to as examples of entrants shows that none of those firms were effective entrants.
- 1672.Dr. Murphy claimed that WebEyeCare, which was founded in 2009, has been able [REDACTED]
 [REDACTED] (RX0739 at 045 (¶ 115) (Murphy Expert Report), *in camera*). But, on cross examination, Dr. Murphy conceded that WebEyeCare only had a [REDACTED] percent share of online sales six years later. (Murphy, Tr. 4262-4263, *in camera*; RX0739 at 087, *in camera*).
- 1673.Dr. Murphy also conceded that he grouped Contact Lens King, Walmart, and Costco into a category he labeled “other online” when he calculated market shares for his report. (Murphy, Tr. 4263-4264).
- 1674.Likewise, Dr. Murphy could not show that any of his four examples of entry consistently advertised on 1-800 Contacts Branded Queries, gained market share, or disciplined 1-800 Contacts’ competitive conduct. (Murphy, Tr. 4262-4266).

D. The Bidding Agreements had Anticompetitive Effects Within this Market

- 1675.The Bidding Agreements had anticompetitive effects on consumers who purchased contact lenses online. (*Supra* § IX).

XI. No Procompetitive Effects Outweigh Anticompetitive Effects of Restraints

A. The Fact that the Bidding Agreements Settled Lawsuits Does Not Provide a Procompetitive Justification for Their Restrictions

1676. The fact that the Bidding Agreements settled lawsuits does not provide a procompetitive justification for the agreements' restrictions on competition. (*See infra* § XI.A; *supra* § IX.D.1).

1677. Respondent's claimed efficiencies from the settlements are private benefits that accrue to 1-800 Contacts or to the settling parties, but do not offset the harm to consumers from the reduction in informational advertising. (*See supra* § IX.D.1).

1678. As described in further detail above, an appropriate economic analysis of settlement confirms that the Bidding Agreements harmed consumers without justification. (*See supra* § IX.D.1).

B. 1-800 Contacts' Claim that the Bidding Agreements are Justified Because They Incentivize Investment in 1-800 Contacts' Brand and Advertising is Unsupported by Facts or Economic Theory

1679. Dr. Murphy and Dr. Landes claim that the Bidding Agreements are procompetitive because they have the "the potential to . . . increase interbrand competition," which, Drs. Murphy and Landes argue, "can increase consumer welfare by reducing search costs and increasing the quality of products or services." (Murphy, Tr. 4124-4125; RX0739 at 010, 082-083 (¶ 18, 228) (Murphy Expert Report); *see also* RX0737 at 019 (¶ 52) (Landes Expert Report)).

1680. Dr. Murphy further claims that the Bidding Agreements are procompetitive because they incentivize 1-800 Contacts' investment in television advertising to bring consumers into the online channel and away from higher-priced eye care professionals. (Murphy, Tr. 4098-4099, 4122-4123); CX9048 (Murphy, Dep. at 146, 234-235)).

1681. The claims that, but for the Bidding Agreements, 1-800 Contacts would have less incentive to invest in its brand or television advertising lack factual support. (*See infra* ¶¶ 1682-1686).

1682. In his deposition, Dr. Murphy conceded that the effect of greater competition on a firm's incentive to develop a brand is ambiguous. (CX9048 (Murphy, Dep. at 45)).

1683. Dr. Murphy also conceded that he did not try to explicitly measure the effect of greater competition on 1-800 Contacts' branding incentives. (CX9048 (Murphy, Dep. at 47-52)).

1684. But for the Bidding Agreements, 1-800 Contacts' ad would still appear in the first position on search results pages appearing in response to 1-800 Contacts Branded Queries. (*See infra* Section XI.D.2.a).

1685. Appearing in the number one position confers significant benefits to an advertiser. (Athey, Tr. 917).
1686. Dr. Athey's model has shown that, but for the Bidding Agreements, the position effect of appearing in the number one ad position, the brand effect of being 1-800 Contacts, and the searched-for firm effect of being the firm whose name appears in the search query all provide large benefits to 1-800 Contacts in 1-800 Contacts Branded Queries. Taking these factors into account, her model shows that but for the Bidding Agreements, 1-800 Contacts would still receive 43.8 clicks for each 100 1-800 Contacts Branded Queries. (CX8007 at 030, 032 (¶¶ 88, 92, Table 2) (Athey Expert Report)).
1687. The claim that but for the Bidding Agreements, 1-800 Contacts would have less incentive to invest in its brand is contrary to economic principles. (*See infra* ¶¶ 1688-1690).
1688. The premise underlying Dr. Murphy and Dr. Landes' assertions that the Bidding Agreements increase consumer welfare by enhancing the "value of 1-800 Contacts' trademark" is that "reducing advertising competition supports inter-brand competition." (CX8010 at 050 (¶ 130) (Athey Rebuttal Expert Report)).
1689. The notion that reducing advertising competition supports inter-brand competition is contrary to the findings of the economic literature, including dozens of empirical studies, regarding horizontal restraints on advertising. (*See supra* Section VII.B (discussing the economic literature and Dr. Evans conclusion based on that literature that economics provides a strong presumption that horizontal agreements to prevent informative advertising are harmful to consumers and competition)).
1690. Indeed, it is increasing advertising competition by removing restrictions on advertising—not decreasing such competition by implementing horizontal advertising restrictions—that incentivizes firms to invest in the value of their trademarks. (CX8010 at 050 (¶¶ 130-131) (Athey Rebuttal Expert Report) ("I consider it more likely that competing with other brands will increase the incentive for each retailer to invest in their trademark, and the consistent, high quality products that support trademark investment, as identified by Dr. Murphy. . . . [T]he value of trademarks and the role of trademarks in signaling to consumers and reducing search costs should be higher if advertising is not restricted. Faced with attracting a consumer who is presented with attractive alternatives from other retailers, 1-800 Contacts' incentive to invest in the value of their trademark will increase, rather than decrease.")); Athey, Tr. 807-808 ("Q. Why did you reach the conclusion that faced with attracting a consumer who is presented with attractive alternatives from other retailers, 1-800 Contacts' incentive to invest in the value of their trademark will increase rather than decrease? A. When a consumer sees two very similar products at different prices and has information about that, they're going to be very likely to choose the lower-priced product, and so in that scenario, a key way to retain consumers is to convince them that you have a great product.")).

C. 1-800 Contacts' Claim That the Bidding Agreements Are Justified Because They Reduce Consumer Confusion Lacks Factual Basis

1. There Is No Evidence Of Actual Confusion Caused By The Mere Appearance Of Competitive Ads In Response To A 1-800 Contacts Branded Query

- a. 1-800 Contacts did not monitor its rivals' advertisements for confusing text or uses of its trademarks in the ad text

1691. 1-800 Contacts did not monitor other companies' advertisements for confusing text or uses of its trademarks in the ad text. (*See infra* § X.C.1.a).
1692. Jonathan Coon, 1-800 Contacts' CEO when 1-800 Contacts entered into the challenged bidding agreements with its competitors, believed that "confusion" occurred whenever a competitor's advertisement appeared in response to a search for a 1-800 Contacts trademark term, whether or not a 1-800 Contacts trademark term appeared in the text of the advertisement. (CX9035 (Coon, Dep. at 10)).
1693. When he was CEO of 1-800 Contacts, Mr. Coon never conducted any empirical analysis to establish the correctness or incorrectness of his view that any advertisement that appears in response to a consumer typing in the term "1-800contacts" is likely to be confusing. (Coon, Tr. 2872-2873).
1694. Mr. Coon never evaluated the text of a competitor's advertisement that appeared in response to a search for 1-800 Contacts' trademark terms to determine whether or not it was confusing. (CX9004 (Coon, IHT at 157)).
1695. Mr. Coon did not recall Vision Direct ever using 1-800 Contacts' trademarks in the text of its advertisement. (Coon, Tr. 2855).
1696. Mr. Coon did not recall Walgreens.com ever using 1-800 Contacts' trademarks in the text of its advertisement. (Coon, Tr. 2855).
1697. 1-800 Contacts never discussed whether competitors' advertisements were confusing because the relevant question in 1-800 Contacts' trademark enforcement efforts was "not a question of the content of the ad. It's the placement of the ad." (CX9001 (Bethers, IHT at 123-124)).
1698. 1-800 Contacts' position was that "confusion" resulted from the "mere placement" of a competitors' advertisement in response to a 1-800 Contacts' trademark term. (CX9001 (Bethers, IHT at 123-124)).
1699. Laura Schmidt, 1-800 Contacts' marketing director, generated reports of every competitor whose advertisements appeared in response to a search containing a 1-800 Contacts trademark. (CX9032 (L. Schmidt, Dep. at 95)).

1700. Ms. Schmidt reported to 1-800 Contacts' legal department every competitive advertisement that appeared in response to a search containing a 1-800 Contacts trademark. (CX9032 (L. Schmidt, Dep. at 95-96)).
1701. Ms. Schmidt never made a determination that a particular advertisement should not be reported to the legal department based on the content of the advertisement. (CX9032 (L. Schmidt, Dep. at 95)).
1702. Ms. Schmidt never made a determination that a particular advertisement should not be reported to the legal department because the advertisement clearly identified the advertiser. (CX9032 (L. Schmidt, Dep. at 95)).
1703. Ms. Schmidt did not recall ever evaluating the text of an advertisement that appeared in response to a 1-800 Contacts' trademark search term. (CX9012 (L. Schmidt, IHT at 148)).
1704. Any competitive advertisement that appeared in response to a 1-800 Contacts' trademark search query was considered a concern to send to 1-800 Contacts' legal department. (CX9012 (L. Schmidt, IHT at 151-152)).
1705. When compiling 1-800 Contacts' weekly trademark monitoring reports, which identified every competitive advertisement that appeared in response to 1-800 Contacts Branded Queries (*see supra* VI.B.4), 1-800 Contacts' senior search marketing manager was never asked to assess whether any of the competitive advertisements were misleading. (Craven, Tr. 585, 588).
1706. 1-800 Contacts' former senior search marketing manager did not recall ever determining that certain advertisements that appeared in response to a 1-800 Contacts Branded Query were permissible because the content of the advertisement was not confusing. (CX9002 (Craven, IHT at 129)).
1707. When 1-800 Contacts' senior search marketing manager, Bryce Craven, contacted Coastal Contacts requesting that Coastal remove an advertisement that appeared in response to a 1-800 Contacts trademark term, Mr. Craven did not make any prior independent determination that the advertisement was actually confusing. (CX9002 (Craven, IHT at 173-174)).
- b. 1-800 Contacts made no effort to evaluate whether, or to what extent, consumers were confused in any way by competitors' advertisements
1708. 1-800 Contacts made no effort to evaluate whether, or to what extent, consumers were confused in any way by competitors' advertisements. (*See infra* § XI.C.1.b).
1709. 1-800 Contacts' former CEO, Jonathan Coon, could not recall collecting any information about consumer confusion among brands while he was at 1-800 Contacts. (CX9004 (Coon, IHT at 136)).

1710. Aside from a survey conducted during its litigation with Lens.com, 1-800 Contacts did not conduct any analysis of consumer confusion. (CX9029 (Bethers, Dep. at 167-168)).
1711. 1-800 Contacts has conducted several consumer research sessions since its current CEO, Mr. Bethers, has been with the company. (Bethers, Tr. 3690-3691).
1712. None of the consumer research sessions conducted by 1-800 Contacts were intended to assess whether consumers were confused by the presence of competitors' advertisements in response to searches for 1-800 Contacts' trademark terms. (Bethers, Tr. 3854).
1713. None of the consumer research sessions conducted by 1-800 Contacts studied whether consumers were confused by the presence of competitors' advertisements in response to searches for 1-800 Contacts' trademark terms. (Bethers, Tr. 3854-3855).
1714. Timothy Roush, 1-800 Contacts' Chief Marketing Officer, was unaware of any system within 1-800 Contacts that was used for recording instances of customer confusion. (CX9034 (Roush, Dep. at 70)).
1715. 1-800 Contacts' former CEO, Jonathan Coon, could not recall any study that 1-800 Contacts performed to assess whether customers were diverted to Coastal because they were confused about the identity of the seller from which they purchased contact lenses. (CX9035 (Coon, Dep. at 39-40)).
1716. 1-800 Contacts' former CEO, Mr. Coon, could not recall any study that 1-800 Contacts performed to assess whether customers were diverted to Vision Direct because they were confused about the identity of the seller from which they purchased contact lenses. (CX9035 (Coon, Dep. at 39-40)).
1717. Brandon Dansie, a former 1-800 Contacts employee, did not recall ever looking into whether competitors' advertisements appearing in response to 1-800 Contacts trademark search terms were confusing to customers. (CX9005 (Dansie, IHT at 161)).
1718. 1-800 Contacts labeled any advertisement that appeared in response to a 1-800 Contacts Branded Query as "confusing" to customers. (CX9006 (D. Zeidner, IHT at 173)).
- c. 1-800 Contacts gathered no evidence of actual confusion regarding competitors' advertisements that appeared in response 1-800 Contacts Branded Queries
1719. 1-800 Contacts gathered no evidence of actual confusion regarding competitors' advertisements that appeared in response to online searches for 1-800 Contacts. (*See infra* ¶¶ XI.C.1.c)
1720. 1-800 Contacts' former CEO, Mr. Jonathan Coon, could not recall any evidence of consumer confusion as between 1-800 Contacts and various other brands. (CX9004 (Coon, IHT at 136)).

1721. Mr. Coon could not recall any evidence of consumer confusion as between LensCrafters and 1-800 Contacts. (CX9004 (Coon, IHT at 136)).
1722. Mr. Coon could not recall any evidence of consumer confusion as between Walgreens and 1-800 Contacts. (CX9004 (Coon, IHT at 136)).
1723. Mr. Coon could not recall any evidence of consumer confusion as between Vision Direct and 1-800 Contacts. (CX9004 (Coon, IHT at 136)).
1724. Mr. Coon could not recall any documents indicating that any individual ordered from a competitor of 1-800 Contacts because that individual was confused as a result of search advertising. (CX9035 (Coon, Dep. at 14)).
1725. The only information that Mr. Coon had about 1-800 Contacts' customers becoming confused came from statements made by other people during management meetings while he was at 1-800 Contacts. (Coon, Tr. 2776-2777).
1726. Mr. Coon lacked any empirical study to support his opinion that all of the sales that 1-800 Contacts lost to its rivals results from consumers becoming confused. (Coon, Tr. 2865).
1727. Mr. Coon never conducted any empirical analysis to establish the correctness or incorrectness of his view that any advertisement that appears in response to a consumer typing in the term "1-800contacts" is likely to be confusing. (Coon, Tr. 2872-2873).
1728. Mr. Bryce Craven, former senior search marketing manager at 1-800 Contacts, was not aware of any customers being confused after searching for "1-800 Contacts" and subsequently visiting the Walgreens website. (Craven, Tr. 600).
1729. Mr. Craven had no personal knowledge of any customer searching for "1-800 Contacts" and subsequently visiting the Vision Direct website because the customer was confused about the identity of the advertiser sponsoring the Vision Direct advertisement. (Craven, Tr. 600).
1730. Mr. Craven had no personal knowledge of any customer searching for "1-800 Contacts" and subsequently visiting the Walmart website because the customer was confused about the identity of the advertiser sponsoring the Walmart advertisement. (Craven, Tr. 600).
1731. Mr. Craven was never presented with any empirical evidence regarding customers being confused by the appearance of competitive advertisements nor regarding the impact of any such confusion on 1-800 Contacts' click-through rate. (Craven, Tr. 603-604).
1732. Mr. Craven was never made aware of any instance in which a customer confused an advertisement for any competitor of 1-800 Contacts with an advertisement for 1-800 Contacts. (CX9020 (Craven, Dep. at 92)).
1733. Mr. Craven was never made aware of any instance in which a potential customer confused an advertisement for any competitor of 1-800 Contacts with an advertisement for 1-800 Contacts. (CX9020 (Craven, Dep. at 92-93)).

1734. Mr. Craven did not recall any instance of consumer confusion as between any competitor and 1-800 Contacts. (CX9002 (Craven, IHT at 201-202)). In particular, he did not recall any instance of a customer confusing 1-800 Contacts with Walgreens, LensCrafters, Drugstore.com, Vision Direct, or Coastal Contacts. (CX9002 (Craven, IHT at 201)).
1735. While at 1-800 Contacts, Mr. Craven was not personally concerned about customers confusing 1-800 Contacts with LensCrafters and could not recall any other 1-800 Contacts employees being concerned about customers confusing 1-800 Contacts with LensCrafters. (CX9002 (Craven, IHT at 202)).
1736. 1-800 Contacts gathered no evidence of customers being confused about the distinction between 1-800 Contacts and its competitors. (CX9012 (L. Schmidt, IHT at 60-64)).
1737. Brandon Dansie, 1-800 Contacts' former paid search coordinator, was never made aware of an example in which a customer confused 1-800 Contacts with another company. (CX9005 (Dansie, IHT at 30)).
1738. Mr. Dansie could not recall any instance in which an individual expressed a concern that customers might confuse 1-800 Contacts with another company. (CX9005 (Dansie, IHT at 30)).
1739. Mr. Dansie is not aware of any evidence of consumer confusion as between 1-800 Contacts and any competitor. (CX9005 (Dansie, IHT at 30)).
1740. David Zeidner, 1-800 Contacts' former in-house legal counsel, testified that 1-800 Contacts did not gather information about consumers being confused by other companies' advertisements appearing in response to a query for a 1-800 Contacts trademark. (CX9006 (D. Zeidner, IHT at 168)).
1741. David Zeidner did not instruct 1-800 Contacts' call center to keep track of any complaints of consumer confusion based on the appearance of other companies' advertisements appearing in response to a query for a 1-800 Contacts trademark. (CX9006 (D. Zeidner, IHT at 168-169)).
1742. John Aston, a former employee of 1-800 Contacts' marketing department, was not aware of any evidence of actual consumer confusion resulting from competitive advertisements appearing in response to a 1-800 Contacts' trademark search term. (CX9013 (Aston, Dep. at 234)).
1743. 1-800 Contacts' former Chief Marketing Offer, Joan Blackwood, never conducted a consumer confusion study. (CX9017 (Blackwood, Dep. at 276)).
1744. No one at 1-800 Contacts ever presented its former Chief Marketing Offer Ms. Blackwood with any evidence that consumers were confused when they clicked on a link other than a link to 1-800 Contacts. (CX9017 (Blackwood, Dep. at 276)).
1745. Amy Larson, 1-800 Contacts' former Director of Online Marketing and later Director of Marketing, was not aware of any actual examples in which a customer was confused by a

- competitive advertisement appearing on searches for 1-800 Contacts' trademarks. (CX9027 (Larson, Dep. at 8-10, 131)).
1746. 1-800 Contacts' marketing director, Laura Schmidt, who oversees paid search advertising, is not aware of any consumer being confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 101-102)).
1747. 1-800 Contacts did not have a system in place to record instances of consumers being confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 102)).
1748. As 1-800 Contacts' marketing director, Ms. Schmidt would want to be aware of any instances in which a consumer was confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 102-103)).
1749. Ms. Schmidt could not recall any instance in which an employee from 1-800 Contacts' call center made her aware of a consumer who was confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 102)).
1750. 1-800 Contacts' Chief Marketing Officer, Tim Roush, is not aware of any instances of a consumer being confused by clicking on another company's advertisement thinking it was an advertisement for 1-800 Contacts. (CX9034 (Roush, Dep. at 69-70)).
1751. Mr. Roush is not aware of any system to record any instances of consumers being confused by clicking on another company's advertisement thinking it was an advertisement for 1-800 Contacts. (CX9034 (Roush, Dep. at 70)).
1752. Although Mr. Roush believes that consumers are confused, he is not aware of any actual instances of consumer confusion. (CX9034 (Roush, Dep. at 175-176)).
1753. 1-800 Contacts' trademark litigation counsel, Bryan Pratt and Mark Miller, testified that they did not have any evidence of actual consumer confusion regarding competitors' advertisements that appeared in response to a search query containing a 1-800 Contacts trademark. (CX9021 (Pratt, Dep. at 19-20, 110-111); CX9040 (Miller, Dep. at 154-155)).
1754. Mr. Pratt, an attorney who represented 1-800 Contacts in a variety of disputes with other contact lens retailers, reviewed periodic trademark monitoring reports that were prepared by 1-800 Contacts personnel. (CX1185; CX9021 (Pratt, Dep. at 19-20)).
1755. The trademark monitoring reports that Mr. Pratt reviewed included screenshots of alleged "violators" whose ads were seen in response to search queries that included 1-800 Contacts' top monitored keywords. (*Supra* § VI.B.4).
1756. Mr. Pratt could not recall any information in the trademark monitoring reports from 1-800 Contacts regarding an empirical analysis of the likelihood that consumers would

- become confused by the paid search advertising displayed in those reports. (CX9021 (Pratt, Dep. at 110)).
1757. Mr. Pratt did not recall ever conducting a survey or other empirical analysis of any type to assess confusion regarding any of the screenshots that were included in any of the periodic trademark monitoring reports that Mr. Pratt received from 1-800 Contacts personnel. (CX9021 (Pratt, Dep. at 110-111)).
1758. Mr. Pratt testified that it was not his practice to run any surveys to determine whether the screenshots sent to him by 1-800 Contacts result in consumer confusion. (CX9021 (Pratt, Dep. at 111)).
1759. Mr. Pratt could not recall any empirical studies to support his assessment of the likelihood of consumer confusion as a result of a sponsored link appearing on a search engine results page. (CX9021 (Pratt, Dep. at 83)).
1760. Mr. Mark Miller is an attorney who represented 1-800 Contacts in a variety of intellectual property litigation matters. (CX9040 (Miller, Dep. at 10-11)).
1761. Mr. Miller testified that he could not recall having any evidence of actual confusion when he sent cease and desist letters to 1-800 Contacts' competitors on behalf of 1-800 Contacts, asserting trademark infringement claims. (CX9040 (Miller, Dep. at 154-155)).
- d. When threatening to enforce its trademark rights against competitors, 1-800 Contacts did not provide evidence that the mere appearance of competitor advertisements in response to 1-800 Contacts Branded Queries was likely to cause consumer confusion
1762. In many of its complaints against competitors, 1-800 Contacts did not allege that the content of its competitors' ads was confusing. (CX1062 (Vision Direct Complaint); CX1617 (EZContacts Complaint); CX1618 (Lensfast Complaint); CX1622 (LensWorld Complaint); 1620 (Walgreens Complaint); CX1621 (Web Eye Care Complaint); CX1180 (AC Lens Complaint); CX9039 (Clarkson, Dep. at 138)).
1763. 1-800 Contacts did not provide its competitors with any evidence of consumer confusion caused by the mere appearance of a competitors' advertisement in response to a search query for a 1-800 Contacts' trademark term. (*See infra* ¶¶ 1764-1772).
1764. 1-800 Contacts never showed Web Eye Care any evidence that users were confused by Web Eye Care's advertisements appearing in response to search queries containing the phrase "1-800 Contacts." (CX9014 (Batushansky, Dep. at 151-152); CX9000 (Batushansky, IHT at 92)).
1765. Web Eye Care's President, Peter Batushansky, was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking Web Eye Care was 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).

1766. Mr. Batushansky was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking WebEyeCare was affiliated with 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).
1767. Mr. Batushansky was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking WebEyeCare was sponsored by 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).
1768. Mr. Batushansky was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking WebEyeCare was approved by 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).
1769. When 1-800 Contacts filed its complaint against AC Lens, 1-800 Contacts did not supply AC Lens with any data or reports that stated that consumers were routinely being confused. (CX9003 (Clarkson, IHT at 124-125)).
1770. During the course of all of its dealings with AC Lens, 1-800 Contacts never supplied AC Lens with any data or reports of consumers being confused by AC Lens's advertisements. (CX9039 (Clarkson, Dep. at 129)).
1771. During the course of its lawsuit against Memorial Eye, 1-800 Contacts did not present Memorial Eye with evidence that consumers had been confused by the presence of Memorial Eye advertisements appearing in response to search queries containing the phrase "1-800 Contacts." (CX9024 (Holbrook, Dep. at 54)).
1772. [REDACTED] (Holbrook, Tr. at 1958, *in camera*).
- e. 1-800 Contacts' competitors had no knowledge of any instances of customers confusing their advertisements for 1-800 Contacts' advertisements
1773. 1-800 Contacts' competitors had no knowledge of any instances of customers confusing their advertisements for 1-800 Contacts' advertisements. (CX9000 (Batushansky, IHT at 90-91); CX9003 (Clarkson, IHT at 105-106); CX9039 (Clarkson, Dep. at 128-129); CX9007 (Fedele, IHT at 14); CX9008 (Hamilton, IHT at 80); Hamilton, Tr. 404-405); (CX9033 (Mohan, Dep. at 202-203); CX9036 (Duley, Dep. at 124), *in camera* [REDACTED] *see also infra* ¶¶ 1774-1785).
1774. Mr. Batushanky, the co-owner and president of WebEyeCare, was unaware of any instance in which any customer had mistaken a WebEyeCare advertisement for an advertisement for 1-800 Contacts. (CX9000 (Batushansky, IHT at 90-91)).
1775. Mr. Clarkson of AC Lens had not seen or heard evidence of consumers being confused as to affiliation when they search for one brand and see a rival brand's advertisement. (CX9003 (Clarkson, IHT at 105-106)).

1776. Mr. Clarkson of AC Lens was not aware of any complaints from consumers who believed that AC Lens was 1-800 Contacts because of AC Lens' advertisements. (CX9039 (Clarkson, Dep. at 128-129)).
1777. Mr. Clarkson stated that if there had been any pattern of complaints from consumers who believed that AC Lens was 1-800 Contacts because of AC Lens' advertisements, he would have been made aware of it. (CX9039 (Clarkson, Dep. at 129); CX9003 (Clarkson, IHT at 105-106)).
1778. Mr. Stephen Fedele, Senior Manager, Digital and Marketing, at Walgreens and formerly of Vision Direct, testified that he was unaware of any complaints about Vision Direct's search advertising being confusing or causing consumers to land on Vision Direct's website when they intended to go to a different website. (CX9007 (Fedele, IHT at 14)).
1779. Mr. Hamilton, Functional Manager, Digital and Marketing, at Walgreens and formerly of Vision Direct, was unaware of any instance in which a Vision Direct advertisement confused a consumer into believing they were clicking on an advertisement for 1-800 Contacts. (Hamilton, Tr. 404); CX9008 (Hamilton, IHT at 80)).
1780. Mr. Hamilton was not aware of any consumer complaining about confusion resulting from any Vision Direct advertisement for contact lenses. (Hamilton, Tr. 404).
1781. Mr. Hamilton was not aware of any consumer being confused by a Vision Direct advertisement regarding the source of their contact lens purchase. (Hamilton, Tr. 404).
1782. Mr. Hamilton was unaware of any instance in which a Walgreens advertisement confused a consumer into believing that the consumer was clicking on an advertisement for 1-800 Contacts. (Hamilton, Tr. 404); CX9008 (Hamilton, IHT at 80)).
1783. Mr. Hamilton was not aware of any consumer complaining about confusion resulting from any Walgreens advertisement for contact lenses. (Hamilton, Tr. 404).
1784. Mr. Hamilton was not aware of any consumer being confused by a Walgreens advertisement regarding the source of the consumer's contact lens purchase. (Hamilton, Tr. 404).
1785. Ms. Mohan was not aware of any examples of a person being confused by a contact lens ad that appeared on the Google search engine. (CX9033 (Mohan, Dep. at 202-203)).
- f. 1-800 Contacts' competitors were unaware of any evidence of customers buying from their companies under the impression that the competitors were 1-800 Contacts
1786. 1-800 Contacts' competitors were unaware of any evidence of customers buying from them under the impression that the competitors were 1-800 Contacts. (CX9007 (Fedele, IHT at 14); CX9014 (Batushansky, Dep. at 151); Hogan, Tr. 3356; *see also infra* ¶¶ 1787-1791).

1787. Stephen Fedele, Senior Digital and Marketing Manager at Walgreens and formerly of Vision Direct, was unaware of any instance in which customers complained that they purchased from Vision Direct thinking that it was a different company. (CX9007 (Fedele, IHT at 14)).
1788. Mr. Batushansky of Web Eye Care was not aware of any complaints from consumers who believed WebEyeCare was 1-800 Contacts. (CX9014 (Batushansky, Dep. at 151)).
1789. Mr. Batushansky was not aware of anyone accidentally ordering from Web Eye Care believing that WebEyeCare was 1-800 Contacts. (CX9014 (Batushansky, Dep. at 151)).
1790. Walmart Senior Product Manager Sandhya Mohan had “not heard of” any complaints from consumers who believed because of one of Walmart’s ads that Walmart was actually 1-800 Contacts. (CX9033 (Mohan, Dep. at 91-92)).
1791. Ms. Mohan had never heard about any complaints from consumers who believed because of one of Walmart’s ads that Walmart was affiliated with 1-800 Contacts. (CX9033 (Mohan, Dep. at 92)).

2. 1-800 Contacts’ Competitors Had No Incentive To Confuse Consumers About Their Identities

1792. 1-800 Contacts’ competitors had no incentive to confuse consumers about their identities. (*See infra* § XI.C.2).
1793. AC Lens has no interest in tricking customers into thinking they are dealing with 1-800 Contacts instead of AC Lens because it would create a “disastrous customer service experience for that consumer” and would be ethically “very questionable.” (CX9039 (Clarkson, Dep. at 127)).
1794. Visionworks’ Director of Marketing, Mr. Duley, testified that [REDACTED] (CX9036 (Duley, Dep. at 180-181); *see also* CX9036 (Duley, Dep. at 124, *in camera*) [REDACTED]
1795. Walmart has no interest in showing search advertisements to consumers who will not find those advertisements relevant. (CX9033 (Mohan, Dep. at 88)).
1796. The reason that Walmart has no interest in showing search advertisements to consumers who will not find those advertisements relevant is that “we might – end up wasting some money there. . . . [b]ecause we are still paying for the click, even – and then they’ll come to the site and bounce back immediately, and so the engines will think this is probably a bad site, too. So in both ways we are wasting money.” (CX9033 (Mohan, Dep. at 88-89)).

1797. LensDirect “has not and does not use the 1-800 Contacts trademarks in its advertising.” (CX1242 at 001, June 14 2011 Letter from LensDirect outside counsel to Mark Miller responding to 1-800 cease and desist letter.)
1798. LensDirect does not use the names of any of its competitors in the text of its advertisements. (CX9023 (Alovis, Dep. at 60)).
1799. Advertisements for the ShipMyContacts website never included the 1-800 Contacts trademark in the title or text of the ad. (Holbrook, Tr. at 1913; *see also* CX9024, Holbrook, Dep. at 50)).
1800. Advertisements for the IWantContacts website (run by Memorial Eye) never included the 1-800 Contacts trademark in the title or text of the ad. (Holbrook, Tr. at 1914; CX9024 (Holbrook, Dep. at 50)).
1801. Memorial Eye, which sold contacts online primarily through its IWantContacts and ShipMyContacts websites, had no incentive to confuse consumers because doing so “deteriorates the image that customers have of the company, “and they’re less likely to come back and see us if we do that.” (CX9024 (Holbrook, Dep. at 41)).
1802. If WebEyeCare’s advertisements are confusing, customers are less likely to want to buy from WebEyeCare. (CX9014 (Batushansky, Dep. at 144)).
1803. WebEyeCare never identified 1-800 Context in the text of its own ads. (CX9014 (Batushansky, Dep. at 152-153)).
1804. Vision Direct has no intent to confuse consumers with its online advertisements. (CX9038 (Hamilton, Dep. at 80)).

3. 1-800 Contacts’ Competitors Identified Their Own Brand Names In Their Search Advertisements

1805. Walmart aims to directly identify itself in its search engine advertisements.(CX9033 (Mohan, Dep. at 89)).
1806. Memorial Eye always included the name of its website in its search advertisements. (Holbrook, Tr. 1914; CX9024 (Holbrook, Dep. at 40-41)).
1807. WebEyeCare identifies its brand in the text of its advertisements as well as its URL listed in the advertisement. (CX9014 (Batushansky, Dep. at 130)).
1808. [REDACTED] (CX9036 (Duley, Dep, at 137-138), *in camera*)).
1809. [REDACTED] (CX9036 (Duley, Dep, at 137-138), *in camera*))

[REDACTED]

1810. Visionworks Director of Marketing Mr. Duley testified that [REDACTED] (CX9036 (Duley, Dep. at 139), *in camera*)).

1811. AC Lens wants customers who click on its ads to know that they are clicking on an AC Lens ad. (CX9039 (Clarkson, Dep. at 128)).

4. The Mere Appearance Of Competitive Ads In Response To A 1-800 Contacts Branded Query Is Not Likely to Cause Confusion

1812. Consumer survey findings in this litigation indicate an unlikelihood of confusion when consumers view competitive advertisements in response to a search query for “1800contacts.” (*See infra* § XI.C.4).

1813. Dr. Jacob Jacoby conducted a consumer survey to assess whether consumers are likely to be confused by advertisements for competitors appearing in response to a query for the search term “1800contacts.” (CX8008 at 004, 007 (Background) (Jacoby Expert Report)).

1814. Dr. Jacoby’s survey findings were based on responses from 1,272 contact lens users between the ages 18 and 74 who live in the continental United States and indicated that they were likely to purchase contact lenses online during the next 12 months. (CX8008 at 007 (Principal Findings) (Jacoby Expert Report)).

1815. Dr. Jacoby’s survey tested two versions of the Google search engine results page (a “pre-2016” version and a “2016” version) to account for a relevant formatting change to the Google search results page layout that occurred in early 2016. (CX8008 at 015, 018 (Use of Two Different SERP Formats) (Jacoby Expert Report)).

1816. Dr. Jacoby’s survey findings showed *de minimis* levels of likelihood of confusion as to source, affiliation, or sponsorship caused by a rival advertisement appearing in response to a search query for “1800contacts.” (CX8008 at 008, 009, 010) (Principal Findings) (Jacoby Expert Report)).

1817. Dr. Jacoby found a net confusion rate (that is, confusion as to source, affiliation, or sponsorship caused by a rival advertisement appearing in response to a search query for “1800contacts”) of 1.1% for the pre-2016 version of his survey. (CX8008 at 056 (Overall Likelihood of Confusion) (Jacoby Expert Report); Jacoby, Tr. 2139, 2143).

1818. Dr. Jacoby found a net confusion rate of 6.1% for the 2016 version of his survey. (CX8008 at 056 (Overall Likelihood of Confusion) (Jacoby Expert Report); Jacoby, Tr. 2139-2140, 2143).

1819. Regarding the inclusion of a pre-2016 version of his survey, Dr. Jacoby Expert Reported that “the world in which 1-800 Contacts challenged its rivals’ ads was a world in which

- the Google SERP looked markedly different, specifically, with regard to the placement of ads on the right-hand side of the SERP. As of February 2016, ads no longer appear on the right-hand side of the SERP. To test consumer confusion on a SERP that contained ads at the top of the page only would thus not appropriately reflect the real-world marketplace conditions in which these agreements were consummated.” (CX8011 at 029 (¶39) (Jacoby Rebuttal Expert Report)).
1820. Dr. Jacoby Expert Reported that “[g]iven the circumstances, particularly the timing of 1-800 Contacts’ agreements with its rivals, it would be irresponsible *not* to test consumer confusion based on this pre-2016 SERP layout.” (CX8011 at 029(¶ 37) (Jacoby Rebuttal Expert Report)).
1821. Dr. Van Liere conducted a survey that purported to measure the extent to which sponsored advertisements that appear in response to search requests for “1-800 Contacts” are likely to cause confusion as to source or affiliation. (RX0735 at 005(¶ 10) (Van Liere Report); Van Liere, Tr. 2977).
1822. Dr. Van Liere acknowledged that the relevant question to be tested was “whether the sponsored advertisements that appear in response to the search for the trademarked term are likely to be confusing.” (RX0735 at 026(¶ 52) (Van Liere Report)).
1823. Dr. Van Liere’s survey purportedly showed a net overall confusion rate of 21%. (RX0735 at 006, 021 (¶¶ 12, 40) (Van Liere Report)).
1824. Dr. Jacoby reviewed Dr. Kent Van Liere’s report and survey materials. (CX8011 (Jacoby Rebuttal Expert Report); RX0735 (Van Liere Report)).
1825. Dr. Jacoby identified flaws in Dr. Van Liere’s survey that, in Dr. Jacoby’s opinion, rendered Dr. Van Liere’s survey results meaningless and his conclusions unreliable. (CX8011 at 002-028) (¶¶ 1-35) (Jacoby Rebuttal Expert Report)).
1826. Dr. Jacoby testified that Dr. Van Liere’s survey failed to test the question that needed to be addressed. (Jacoby, Tr. 2218-2222; CX8011 at 007-009 (Jacoby Rebuttal Expert Report)).
1827. Dr. Jacoby testified that Dr. Van Liere designed a flawed control group that rendered his “net confusion” results meaningless. (Jacoby, Tr. 2227-2229; CX8011 at 011) (¶20-21) (Jacoby Rebuttal Expert Report)).
1828. Dr. Jacoby testified that Dr. Van Liere’s test and control conditions artificially inflated his reported confusion levels by removing advertisements for 1-800 Contacts that should have appeared on the mock-up search engine results pages (or “stimuli”) in Dr. Van Liere’s survey. (Jacoby, Tr. 2229-2234; CX8011 at 007 (¶11) (Jacoby Rebuttal Expert Report)).
1829. Dr. Jacoby testified that Dr. Van Liere’s test and control conditions failed to replicate real-world conditions by removing advertisements for 1-800 Contacts that should have

- appeared on the stimuli in Dr. Van Liere's survey. (Jacoby, Tr. 2229-2234; CX8011 at 007 (¶11) (Jacoby Rebuttal Expert Report)).
1830. Dr. Van Liere testified that it is important for survey stimuli to replicate marketplace conditions as much as possible. (Van Liere, Tr. 3004-3005; CX9049 (Van Liere, Dep. at 192-193)).
1831. At his deposition, Dr. Van Liere testified that he was asked to design his stimuli without a 1-800 Contacts advertisement appearing on the mock-up SERP. (CX9049 (Van Liere, Dep. at 189-190)).
1832. At trial, Dr. Van Liere testified that in order to create his stimuli, he ran a "wide variety of searches," including searches on the terms "1-800 Contacts," other brand names, and generic terms (such as "contact lenses"). (Van Liere, Tr. 3002-3003).
1833. Dr. Van Liere testified that he searched on the term "1-800 Contacts" to create his test and control stimuli. (Van Liere, Tr. 3005-3006).
1834. Dr. Van Liere testified that his control stimulus, which contained no sponsored listings, reflects "marketplace conditions" because "we did have searches on '1-800 Contacts' where there was [sic] no sponsored links." (Van Liere, Tr. 3004).
1835. Dr. Van Liere testified that there is no record to support his testimony that he saw search engine results pages in which a 1-800 Contacts advertisement did not appear. (Van Liere, Tr. 3133).
1836. Testimony from current and former 1-800 Contacts employees, as well as contemporaneous documents, contradict Dr. Van Liere's testimony that a search for "1-800 Contacts" occasionally yields search results pages in which no sponsored advertisements appear. (Bethers, Tr. 3787-3788; CX0296 at 035 [REDACTED] *in camera*; CX9028 (Roundy Dep. at 086-088); CX9031 (C. Schmidt Dep. at 125-127); CX9020 (Craven at 123-125)).
1837. According to the testimony of Brady Roundy, a former 1-800 Contacts employee, 1-800 Contacts allocates as much of its budget to bidding on its trademark keywords as is necessary to ensure that 1-800 Contacts' website is the first advertisement displayed in response to searches for its own trademark. (CX9028 (Roundy, Dep. at 86-88)).
1838. According to the testimony of Clint Schmidt, a former 1-800 Contacts employee, during his time at the company, 1-800 Contacts allocated as much of its budget to bidding on its trademark keywords as was necessary to ensure that 1-800 Contacts' website was the first advertisement displayed in response to searches for its own trademark. (CX9031 (C. Schmidt, Dep. at 125-127)).
1839. According to the testimony of Bryce Craven, 1-800 Contacts' former senior paid search marketing manager, 1-800 Contacts "would maximize [its] spend on the trademarked

- keywords and then use the rest on the other types of keywords.” (CX9020 (Craven, Dep. at 125)).
1840. According to a February 2015 internal 1-800 Contacts marketing document, it was 1-800 Contacts’ goal for its advertisement to “show up in position 1 every time” for “trademark keywords.” (CX0296 at 035, *in camera*).
1841. [REDACTED]
(Bethers, Tr. 3787-3788 (referencing CX0296 at 035), *in camera*).
1842. 1-800 Contacts’ “goal” was to always have its advertisement appear in the first position in response to a search for one of its trademarks. (CX9032 (L. Schmidt, Dep. at 092)).
1843. Laura Schmidt, 1-800 Contacts’ marketing director, could not recall a single instance in which 1-800 Contacts’ advertisement was not the first advertisement that appeared in response to a 1-800 Contacts trademark search query. (CX9032 (L. Schmidt, Dep. at 91-92)).
1844. An internal 1-800 Contacts marketing email describes 1-800 Contacts’ trademark keyword management process as follows: “Ensure top ad placement by giving each TM keyword a high CPC . . . All trademark keywords are given a relatively high CPC bid, in order to ensure we will stay in the first position despite competitors.” (CX0935 at 001); CX9020 (Craven, Dep. at 123 (discussing CX0935: “I meant that we wanted to always be in the first position for our trademarked keywords, and so we would bid higher than what we actually would have to pay in the event that another competitor or affiliate bid on those trademarked keywords, so that we could stay in number one – in the number one position for those terms.”); Craven, Tr. 670-672).
1845. Mr. Craven testified that 1-800 Contacts typically bid to be in the first position on its trademark terms. (CX9020 (Craven, Dep. at 124 (“We wanted to be number one.”)).
1846. In 2011, Mr. Craven wrote that “TM keywords convert drastically different than our other terms and should always be around position number one.” (CX0014 at 002); CX9020 (Craven, Dep. at 136 (discussing CX0014: “I meant that we wanted our ad, our paid search ad to always show up in the first position for those queries” because trademark keywords “had significantly better” conversion rates and click-through rates than other keywords.)).
1847. Mr. Craven testified that “at 1-800, we tried to be the only advertiser for our own trademark keywords.” (CX9002 (Craven, IHT at 122)).
1848. Dr. Van Liere testified that he used one of his searches on “1-800 Contacts” where no sponsored ads appeared as the basis for his control stimulus. (Van Liere, Tr. 3010-3011).
1849. Dr. Van Liere testified that he did not know how many searches he conducted to develop his test and control stimuli. (Van Liere, Tr. 3099).

1850. Dr. Van Liere testified that he “didn’t keep a count” of how many searches he ran where a 1-800 Contacts sponsored ad did not appear. (Van Liere, Tr. 3099, 3100).
1851. Dr. Van Liere testified that he could not recall if there were more than 10 searches that he conducted where a 1-800 Contacts sponsored ad did not appear. (Van Liere, Tr. 3100).
1852. Dr. Van Liere testified that he could not recall if there were more than 500 searches that he conducted where a 1-800 Contacts sponsored ad did not appear. (Van Liere, Tr. 3100).
1853. Dr. Van Liere testified that he provided information about the searches that he ran in his report, “only to the extent that we looked at other searches.” (Van Liere, Tr. 3100).
1854. Dr. Van Liere’s report does not discuss any searches that he conducted or relied upon to design his survey stimuli. (RX0735 (Van Liere Report); RX0729 (Van Liere Report, Ex. B (Documents Relied Upon))).
1855. Dr. Van Liere testified that the searches he relied on to create his test and control stimuli “are in the test and control documents” themselves. (Van Liere, Tr. 3100).
1856. Dr. Van Liere testified that he did not produce any “additional searches” beyond what was in the test and control stimuli. (Van Liere, Tr. 3100).
1857. Dr. Van Liere testified that he did not maintain any copies of the searches that he ran to develop his test and control stimuli. (Van Liere, Tr. 3133).
1858. Dr. Jacoby testified that Dr. Van Liere’s survey results were inflated because Dr. Van Liere failed to remove nonresponsive “verbatim” responses provided by survey participants, a standard practice in consumer surveys that show nontrivial levels of confusion. (Jacoby, Tr. 2234-2238; CX8011 at 019-020 (¶ 33) (Jacoby Rebuttal Expert Report)).
1859. Dr. Jacoby testified that Dr. Van Liere’s survey results were inflated because Dr. Van Liere failed to appropriately weight his data to reflect real-world usage of the two search engines that Dr. Van Liere purported to test. (Jacoby, Tr. 2238-2243); CX8011 at 019, 020, 023 (¶33) (Jacoby Rebuttal Expert Report)).
1860. Dr. Van Liere testified that he designed two versions of his survey using different search engines, Google and Yahoo. (Van Liere, Tr. 3102).
1861. Dr. Van Liere testified that Google has the highest market share of all search engines. (Van Liere, Tr. 3107).
1862. Dr. Van Liere testified that Google’s share of the search market was approximately 65 percent in October 2016, according to a web page cited in Dr. Van Liere’s expert report. (Van Liere, Tr. 3103-3105; RX0735 at 022 (¶ 45) (Van Liere Report)).
1863. 1-800 Contacts spent most of its paid search marketing funds on Google. (Craven, Tr. 509).

1864. Dr Van Liere testified that Bing is the second largest search engine. (Van Liere, Tr. 3107).
1865. Dr. Van Liere testified that Bing's share of the search market was approximately 25 percent in October 2016, according to a web page cited in Dr. Van Liere's expert report. (Van Liere, Tr. 3106; RX0735 at 024 (¶45) (Van Liere Report)).
1866. Dr. Van Liere testified that Yahoo is the third largest search engine. (Van Liere, Tr. 3107).
1867. Dr. Van Liere testified that Yahoo's share of the search market was approximately 14 percent in October 2016, according to a web page cited in Dr. Van Liere's expert report. (Van Liere, Tr. 3106; RX0735 at 024 (¶45) (Van Liere Report)).
1868. Dr. Van Liere testified that he considered the respective market shares of Google, Bing, and Yahoo in deciding which search engines to use in his survey. (Van Liere, Tr. 3106).
1869. Dr. Van Liere did not use Bing, the second largest search engine, in his survey. (Van Liere, Tr. 3107, 3108).
1870. Dr. Van Liere testified that he assigned approximately 50 percent of his survey respondents to the Google version of his survey. (Van Liere, Tr. 3118; CX9049 (Van Liere, Dep. at 99)).
1871. Dr. Van Liere testified that he assigned approximately 50 percent of his survey respondents to the Yahoo version of his survey. (Van Liere, 3118; CX9049 (Van Liere, Dep. at 99)).
1872. Dr. Van Liere testified that weighting is a statistical technique that can be used to adjust for over- or under-represented samples. (Van Liere, Tr. 3114).
1873. Dr. Van Liere testified that he did not do any weighting to adjust for his Google and Yahoo results. (Van Liere, Tr. 3116).
1874. Dr. Van Liere testified that if he had weighted his survey results in accordance with Google's and Yahoo's actual market shares, that would have made a difference in Dr. Van Liere's final confusion numbers. (Van Liere, Tr. 3119).
1875. Dr. Van Liere testified that the net confusion levels reported in his survey would have been reduced if he had weighted his survey results in accordance with Google's and Yahoo's actual market shares. (Van Liere, Tr. 3120-3121).
1876. Dr. Jacoby testified that Dr. Van Liere undermined the reliability of his survey results by failing to assign respondents to use a search engine that they had actually used or would use in the future. (Jacoby, Tr. 2243-2247; CX8011 at 013-014 (¶¶25-26) (Jacoby Rebuttal Expert Report)).

1877. Dr. Van Liere testified that there was a programming error with his survey that resulted in assigning respondents to the Yahoo version of his survey, when such respondents had never used the Yahoo search engine. (Van Liere, Tr. 3126).
1878. Dr. Van Liere testified that approximately 10 percent (32 of 342 individuals) of respondents who were assigned to the Yahoo version of his survey were subject to the programming error. (Van Liere, Tr. 3127).
1879. Dr. Jacoby testified that Dr. Van Liere undermined the reliability of his survey results by failing to define a proper universe of survey respondents (Jacoby, Tr. 2247-2252; CX8011 at -014, -015 (¶27) (Jacoby Rebuttal Expert Report)).
1880. Dr. Van Liere defined the relevant universe for his survey as consumers 18 years or older in the United States who “had purchased contact lenses online in the past twelve months” or “would consider searching on the internet to purchase contact lenses in the next 12 months.” (RX0735 at 009 (¶19) (Van Liere Report); Van Liere, Tr. 2982).
1881. Dr. Jacoby testified that Dr. Van Liere inappropriately defined his universe by including contact lens purchasers who had only purchased contact lenses online in the past but would not likely to purchase contact lenses online in the future. (Jacoby, Tr. 2250, 2252).
1882. Dr. Jacoby testified that the proper universe consists of potential purchasers, rather than past purchasers, of the product at issue. (Jacoby, Tr. 2168-2170, 2250).
1883. Dr. Van Liere testified that in order to qualify for his survey, respondents had to indicate that they “would consider searching on the internet to purchase contact lenses” in the next 12 months. (Van Liere, Tr. 3148; RX0730 at 0003 (Van Liere Report, Ex. C).
1884. Dr. Jacoby testified that Dr. Van Liere’s question asking whether respondents “would consider searching on the internet to purchase contact lenses” in the next 12 months did not appropriately identify potential purchasers of contact lenses. (Jacoby, Tr. 2252; CX8011 at 015 (¶29) (Jacoby Rebuttal Expert Report)).
1885. Dr. Van Liere testified that his question, which asked, “In the next 12 months, would you consider searching on the internet to purchase contact lenses?,” did not ask whether individuals were actually potential purchasers. (Van Liere, Tr. 3148).
1886. Dr. Van Liere testified that he intended to include screening questions in his survey to find out whether respondents usually use glasses or contact lenses to read, and then to remind those respondents to put them on before taking the survey. (CX9049 (Van Liere, Dep. at 075)).
1887. Instead of reminding respondents to put on their glasses or contact lenses if they used them to read, Dr. Van Liere’s survey excluded contact lens users who did not use contact lenses when they read. (Van Liere, Tr. 2992, 3142-3143; CX9049 (Van Liere, Dep. at 74-75); RX0730 at 003 (Exhibit C) (Van Liere Report)).

1888. Dr. Jacoby testified that Dr. Van Liere’s survey results were rendered less reliable because he excluded a segment of the proper universe. (Jacoby, Tr. 2248; CX8011 at 015 (¶28) (Jacoby Rebuttal Expert Report)).
1889. Dr. Jacoby testified that Dr. Van Liere undermined the reliability of his survey findings because he used problematic questions, including leading and ambiguous questions. (Jacoby, Tr. 2253-2257; CX8011 at 016-017 (¶31) (Jacoby Rebuttal Expert Report)).
1890. Dr. Van Liere testified that his question on source confusion, which states “Using your mouse, please point and click on the link or links, if any, that you think will take you to the website of the company that you searched for,” does not indicate what respondents should do if they did not think any of the links on the stimulus would take them to the website of the company they searched for. (Van Liere, Tr. 3174).
1891. Dr. Van Liere testified that his question on source confusion does not indicate that respondents have the option of clicking on the “next” button to move to the next screen without selecting any links. (Van Liere, Tr. 3176-3177).
1892. Dr. Van Liere testified that the font of the first three advertisements on his Yahoo test stimulus appeared larger than the font on the organic listings. (Van Liere, Tr. 3209).
1893. Dr. Jacoby testified that Dr. Van Liere failed to observe proper protocols for handling the survey data that he collected. (Jacoby, Tr. 2257-2259, 2261; CX8011 at 023-027 (¶34-35) (Jacoby Rebuttal Expert Report)).
1894. Dr. Jacoby Expert Reported that Dr. Van Liere’s data did not include a date or time stamp on the individual records. (CX8011 at 024 (¶34b) (Jacoby Rebuttal Expert Report)).
1895. Dr. Jacoby Expert Reported that Dr. Van Liere failed to include any data records state the reasons why certain individuals’ survey results (11 cases) were excluded. (CX8011 at 025(¶34b) (Jacoby Rebuttal Expert Report)).
1896. Dr. Van Liere acknowledged that his demographic sample distribution undersampled younger people and oversampled older people as compared to CDC data on contact lens wearers. (RX0735 at 010 (Van Liere Report)).
1897. Dr. Van Liere’s noted in Table 1 of his report that his demographic sample distribution oversampled women as compared to CDC data on contact lens wearers. (RX0735 at 011 (Table 1) (Van Liere Report)).

5. Confusion Regarding Other Aspects of Online Advertisements Is Not Confusion Regarding Source, Sponsorship, Or Affiliation

1898. Ms. Rebecca Tushnet, a trademark law professor at Georgetown University testified that in many cases, consumers may be confused about why they are seeing an online advertisement, yet very few of those consumers are confused about the source, sponsorship or affiliation of those advertisements. (Tushnet, Tr. 4439-4440; CX8014 at 005, 009-010 (¶ 9, ¶¶ 17-19) (Tushnet Rebuttal Report)).

1899. Mr. Howard Hogan, a practicing trademark attorney hired as an expert by 1-800 Contacts in this litigation, testified that it is possible that a consumer could be confused about whether a listing is sponsored or organic, yet still understand the source of the listing. (Hogan, Tr. 3356).

6. 1-800 Contacts' Trademark Settlement Agreements Go Beyond Prohibiting Confusing Uses Of 1-800 Contacts' Trademarks

1900. 1-800 Contacts' trademark enforcement program was not limited to addressing confusing uses of its trademarks. (*See supra* § IV.B.7 – 17; *infra* § XI.C.6).

1901. 1-800 sought to prevent all advertising on its trademark terms. (CX0935 at 001 (“Enforce trademark policy to remove competitors”); CX9020 (Craven, Dep. at 43) (discussing CX0935: “remove competitors” meant removing competitors’ paid search ads that appears in response to user queries for 1-800 Contacts’ trademark terms); CX9001 (Bethers, IHT at 299-300); CX9004 (Coon, IHT at 273); CX9020 (Craven, Dep. at 94) (“[I]n general, I feel like I was concerned about any advertisement that was showing up near the top of the search results in response to a trademark query . . .”).

1902. Mr. Bryce Craven, former senior paid search marketing manager at 1-800 Contacts, understood that 1-800 Contacts’ agreements with its rivals required its rivals to prevent their advertisements from appearing, through whatever means necessary, in response to queries containing 1-800 Contacts’ trademark terms. (CX9020 (Craven, Dep. at 181)).

1903. 1-800 Contacts’ [REDACTED] was to [REDACTED] its trademark keywords (CX0051 at 004, 007 (Nov. 2010 Search Overview); CX9001 (Bethers, IHT at 196-197); Bethers, Tr. 3787-3788, *in camera*).

1904. Mr. Coon believed that any advertisement that appears in response to a consumer typing in the term “1-800contacts,” is likely to be confusing. (Coon, Tr. 2784-2785).

1905. Mr. Coon believed that an advertisement that appears in response to a consumer typing in the term “1-800contacts” is likely to be confusing, even if the text of the advertisement states “This is not 1-800 Contacts’ website.” (Coon, Tr. 2787, 2872).

1906. 1-800 Contacts’ goal when it negotiated a settlement agreement with Vision Direct was to stop advertisements from being displayed, regardless of the text of the advertisement. (Coon, Tr. 2788-2790).

1907. Mr. Coon believed that in order to achieve 1-800 Contacts’ goals, it was necessary to prevent the display of search advertising triggered by a user typing in “1-800 Contacts,” even if the brand displayed in the advertising is “Walgreens or Walmart or any other brand.” (Coon, Tr. 2800-2801).

1908. Mr. Pratt’s goal in corresponding with 1-800 Contacts rivals was to prevent the display of any sponsored advertisements appearing in response to consumers’ searches for 1-800 Contacts’ trademarks, even though Mr. Pratt agrees that “it’s possible for a competitor of 1-800 Contacts to display a search advertisement in response to a query for a 1-800

- Contacts trademark term that would not create an unacceptable likelihood that consumers would become confused,” and indeed has personally seen such advertisements. (Pratt, Tr. 2597-2598; *see also* Pratt, Tr. 2621-2622 (Mr. Pratt’s goal in negotiating with LensFast “was for LensFast to commit and be contractually bound to not have their sponsored advertisements appear in response to searches for 1-800 Contacts’ trademark terms”); Pratt, Tr. 2622-2623 (Mr. Pratt’s goal in negotiating with Contact Lens King was “to have a contract that they were obligated not to have their sponsored advertisements be displayed in response to searches for 1-800 Contacts’ trademarks”); Pratt, Tr. 2526, 2623 (Memorial Eye)).
1909. Mr. Pratt’s goal in sending a cease and desist letter to Memorial Eye on behalf of 1-800 Contacts was to “have them remove their sponsored advertisements that appear in response to consumer searches for 1-800 Contacts’ trademarks.” (Pratt, Tr. 2623). Another goal in sending a cease and desist letter to Memorial Eye on behalf of 1-800 Contacts was to prevent Memorial Eye from placing “*any* future sponsored advertisements appearing in response to consumers’ searches for 1-800 Contacts’ trademarks.” (Pratt, Tr. 2623 (emphasis added)).
1910. In May 2009, Mr. Pratt sent a cease and desist letter on behalf of 1-800 Contacts to IWantContacts.com, one of the websites operated by Memorial Eye. (CX1313 at 001).
1911. The May 2009 cease and desist letter to IWantContacts/Memorial Eye requested that IWantContacts.com “immediately remove ALL sponsored advertisements that you have purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark or a confusingly similar variation thereof.” (CX1313 at 002; Pratt, Tr. 2632).
1912. Mr. Bethers believes that the “sheer placement” of competitive advertisements would cause a consumer to be confused “because they exist . . . not simply because of the content of the ads.” (CX9029 (Bethers, Dep. at 032-033)).
1913. Mr. Hogan, a trademark law expert hired by 1-800 Contacts in this litigation, testified that he was not aware of any claims brought by 1-800 Contacts that involved the text “1-800 Contacts” in the text of a defendant’s advertisement. (Hogan, Tr. 3386).
1914. Mr. Hogan testified that he was not aware of any evidence that any of the defendants in the trademark cases brought by 1-800 Contacts were using the name 1-800 Contacts on the defendant’s website. (Hogan, Tr. 3413).
1915. Mr. Hogan testified that he was not aware of any evidence that any of the defendants in the trademark cases brought by 1-800 Contacts named themselves 1-800 Contacts. (Hogan, Tr. 3413-3414).
1916. 1-800 Contacts’ competitors understood that 1-800 Contacts’ trademark enforcement program was not limited to confusing uses of 1-800’s trademarks. [REDACTED] CX9003 (Clarkson, IHT at 125-126; [REDACTED])

1917. Any ad that appeared in response to a search for 1-800 Contacts was prohibited. .
(CX9003 (Clarkson, IHT at 125-126); (CX9000 (Batushansky, IHT at 76, *in camera*);
(CX9008 (Hamilton, IHT at 24-25)).
1918. [REDACTED]
[REDACTED] (CX9000 (Batushansky, IHT at 76), *in camera*).
1919. [REDACTED]
[REDACTED] (CX9014 (Batushansky, Dep. at 152), *in camera*).
1920. [REDACTED]
[REDACTED] (CX9014 (Batushansky, Dep. at 152), *in camera*).
1921. [REDACTED]
[REDACTED] (CX9014 (Batushansky, Dep. at 152), *in camera*).
1922. [REDACTED]
[REDACTED] (CX9014 (Batushansky, Dep. at 152), *in camera*).
1923. Mr. Clarkson of AC Lens did not recall any allegation by 1-800 Contacts that AC Lens was trying to confuse consumers into thinking that AC Lens was 1-800 Contacts.
(CX9003 (Clarkson, IHT at 125)).
1924. Mr. Clarkson’s understanding was that all advertisements in response to a search for 1-800 Contacts were prohibited. (CX9003 (Clarkson, IHT at 125-126)).
1925. [REDACTED]
[REDACTED] (CX9008
(Hamilton, IHT at 26, *in camera*).
1926. [REDACTED]
[REDACTED] (CX9008 (Hamilton,
IHT at 26, *in camera*).
1927. The effect of the negative keywords requirements imposed by Vision Direct’s settlement agreement with 1-800 Contacts was to “prevent any Vision ad from showing up on any of these [trademark] terms when a consumer would search for them on a major search engine[.]” (CX9008 (Hamilton, IHT at 24-25)).

D. Describing 1-800 Contacts Branded Queries as “Navigational Searches” Does Nothing to Justify the Bidding Agreements

1. “Navigational” Searchers Who Enter 1-800 Contacts Branded Queries Ultimately Have a “Transactional” Intent: the Purchase of Contact Lenses

1928. Dr. Ghose relies on a classification of search intents as either informational, transactional, and navigational. (Ghose, Tr. 3869; CX8010 at 006 (Athey Rebuttal Report ¶¶ 15-16)).
1929. As described in Dr. Ghose’ testimony and report and the academic literature on which he relies, a user who runs a search looking for information has an “informational” intent. (CX8010 at 007 (Athey Rebuttal Report ¶ 16)).
1930. As described in Dr. Ghose’ testimony and report and the academic literature on which he relies, a user who runs a search looking to complete a transaction has a “transactional” intent. (CX8010 at 007 (Athey Rebuttal Report ¶ 16)).
1931. As described in Dr. Ghose’ testimony and report and the academic literature on which he relies, a user who runs a search looking to navigate to a specific predetermined website has a “navigational” intent. (CX8010 at 007 (Athey Rebuttal Report ¶ 16)).
1932. That same academic literature on which Dr. Ghose relies regarding this classification system undercuts Dr. Ghose’ conclusions about what inferences can be drawn about a user’s ultimate intent that can be drawn from the mere classification of a query as “navigational.” (CX8010 at 007-010 (¶¶ 6-25) (Athey Rebuttal Report) (explaining how the literature on which Dr. Ghose relies and other relevant literature regarding the categorization of searches warn of “the challenge in inferring search intent”); Athey, Tr. 713 (“I concluded that Dr. Ghose improperly relied on a very narrow reading of the literature that he cited and indeed drew conclusions from [it] that were not appropriate for the specific industry and also did not represent the richer conclusions of the literature to which he refers.”)).
1933. The industry literature accepts that users may have multiple intents when running a search query, and users who search with navigational intent are ultimately either informational or transactional in their intent. (Athey, Tr. 811; CX8010 at 007 (Athey Rebuttal Report ¶ 17 & nn.11-12)).
1934. It is not possible to infer that users searching for brand name keywords have navigational intent simply because the search is for a brand name. (Juda, Tr. 1230; CX8010 at 008-009 (Athey Rebuttal Report ¶¶ 18-20)).
1935. Even if a search engine user does have intent to navigate to 1-800 Contacts’ website, that fact alone does not tell us that that person’s ultimate intent is to visit the 1-800 Contacts website. (Athey, Tr. 811-812 (“Q. What does calling a search navigational tell an economist who studies search advertising about that user’s ultimate intent? A. Well, as is clear in the academic literature as well as in business practice, every search query corresponds to a range of intents. . . . When somebody types in the name of a website, by far, the most common thing they do is visit the website of the company whose name they

typed in. But that doesn't mean that they intrinsically derive pleasure from visiting the website.'')).

1936. It is likely that users searching for 1-800 Contacts keywords have the ultimate intent to purchase contact lenses, either in addition to or instead of any intent to navigate to 1800contacts.com. (Athey, Tr. 811-812 (“[A]s an economist, when I think about what makes a consumer well off, their fundamental preferences are over the goods they consume, the time they consume them, the price they pay for them. Those are the fundamentals of consumer welfare. So they – they may get something from visiting a web page, but . . . if I have more information about a specific navigational query, then I can draw more conclusions about what their ultimate goal is. If I know that the main activity available at 1-800 Contacts’ website is to purchase contact lenses and have them shipped to my house, then, again, maybe not all, but most of the consumers who thought they might potentially like to visit that website could also have their needs served other places.”); CX8010 at 009-012 (¶¶ 21, 26-32) (Athey Rebuttal Report) (“While I do not dispute the likelihood that many users who perform a branded 1-800 Contacts search do expect that they will visit 1800contacts.com, it is also inescapable that most visitors to the site have a specific intent: purchasing the specific brand and type of contact lens for which the consumer has a prescription. For a user whose initial intent was to go to 1-800 Contacts’ website and purchase, the consumer’s ultimate intent is transactional; navigation to 1800contacts.com is just a means to an end.”)).

2. Even Users With the Ultimate Intent of Purchasing Contact Lenses From 1-800 Contacts Specifically Are Not Harmed By—and in Fact Benefit From—the Display of Rival Ads in Response to 1-800 Contacts Branded Queries.

1937. Even users with the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically (to the extent such users exist) are not harmed by the display of rival ads in response to 1-800 Contacts Branded Queries. (*See infra* §§ XI.D.2.a-c).

- a. Were the Bidding Agreements to be rescinded, users who want to find 1-800 Contacts website will still be able to do so easily, because 1-800 Contacts’ advertisement would remain in the first position

1938. Were the Bidding Agreements to be rescinded, 1-800 Contacts’ advertisements would remain in the first position on the search results page in response to 1-800 Contacts Branded Queries. (*See supra* § XI.C.4; *infra* § XI.D.2.a).

1939. 1-800 Contacts’ advertising policy was to bid a sufficient amount to win the top advertising slot on its own trademarks. (CX9020 at 123 (Craven Dep.)).

1940. As the trademark owner, 1-800 Contacts advertisements on its own trademarks will have a higher quality score than advertisements from competitors. (CX8010 at 025 (¶ 61) (Athey Rebuttal Report)).

1941. Due to its willingness to bid any required amount and its higher quality score, in the absence of the bidding agreements, 1-800 Contacts would have remained in the first

advertising slot on its own trademarks. (CX8010 at 025-026 (¶ 62 & Figure 5) (Athey Rebuttal Report).

1942. Users searching on 1-800 Contacts keywords with navigational intent would be able to navigate directly to the 1-800 Contacts website by clicking on the first advertising result. (CX8010 at 026 (¶ 63) (Athey Rebuttal Report).
1943. On mobile devices, the fact that 1-800 Contacts is the first advertising result would have made it even more prominent relevant to competitors' ads than it would have been on desktop devices. (CX8010 at 027 (¶ 65) (Athey Rebuttal Report).
1944. If users searching on 1-800 Contacts keywords with the intent to navigate to 1-800 Contacts did not find advertising for other retailers informative, the inclusion of other ads which are not relevant to those searchers below 1-800 Contacts' advertisement would not have changed the competitive dynamics. (CX9043 (Athey Dep.) at 75-76).
1945. Users who clicked on other ads were, therefore, not generally confused, but were instead likely legitimately diverted to consider competing offers. (CX8010 at 027-028 (¶ 66-68) (Athey Rebuttal Report).
- b. Were the Bidding Agreements to be rescinded, users who initially intend to purchase from 1-800 Contacts will benefit from the additional information—and additional choices—provided by rival ads.
1946. Were the Bidding Agreements to be rescinded, users who initially intend to purchase from 1-800 Contacts will benefit from the additional information—and additional choices—provided by rival ads. (*See infra* § XI.D.2.b).
1947. Some consumers looking to purchase contact lenses would find the existence of competing retailers, as well as the potential of lower-priced offers, to be relevant information. (Athey, Tr. 807-812; CX8010 at 009 (¶ 21 & n.18) (Athey Rebuttal Report); Ghose, Tr. 3968-3969 (“[A]gain, as a general proposition, is it possible that some consumers benefit from seeing a price-comparative rival ad? Yes. I don't think, you know, I have argued that -- against that.”)).
1948. Some consumers who have an intent to visit a certain retailer to complete a transaction will, when presented with competing offers, prefer to complete their transaction with competing retailers. (Ghose, Tr. 3962 (“Q. Okay. And advertising has the capacity to change the consumer's commercial intent. Isn't that right? A. Sure. Sometimes it can be.”)).
1949. Competing offers which fulfill a consumer's transactional intent at a lower price will be particularly relevant. (CX8010 at 011-012 (¶ 31) (Athey Rebuttal Report); Ghose, Tr. 3964 (“Q. Okay. What can reliably change the consumer's mind is the opportunity to purchase the desired product at a lower price, correct? A. Yes. I do mention price -- lowering of price as a factor.”)).

1950. Firms commonly target their competitors' customers to take advantage of this sales opportunity. (CX8010 at 016 (¶ 43) (Athey Rebuttal Report); CX8009 at 028-030 (¶ 45 & Table 1) (Evans Expert Report (listing retailers advertising on competitors' brand-name queries)); Ghose, Tr. 3960-3961 ("Okay. Q. Okay. So as a general proposition, is it often effective for an advertiser to target a customer at the very time that that customer intends to engage with a rival of the advertiser? A. Yes."), 3974 ("I can see scenarios where, you know, companies who know their customers are going to buy from them anyway, they might find it, you know, attractive to target some of their rivals' customers, sure.")).
1951. Contact lens retailers, in particular, have commonly found that they were able to attract customers by presenting competitive offers in response to searches for or containing competing retailers' brand names. (CX8010 at 013-14 (¶¶ 35, 38-40) (Athey Rebuttal Report); CX8006 at 091 (¶ 205) (Evans Expert Report)).
- c. Were the Bidding Agreements to be rescinded, even consumers who still ultimately choose to purchase from 1-800 Contacts will benefit from the existence of competing offers
1952. Even if a consumer does not purchase from a competing website, consumers who search with the intent of navigating to 1-800 Contacts' website may benefit from the knowledge that competition exists. (CX8010 at 013 (¶ 35) (Athey Rebuttal Report)).
1953. When 1-800 Contacts price match policy has been in effect, consumers who purchased from 1-800 Contacts benefited from informational advertising from lower-priced competitors because those consumers had the option to take advantage of a price match at 1-800 Contacts if they wished to do so. (CX8006 at 104-105 (¶ 228) (Evans Expert Report)).
1954. In addition, as described elsewhere, Dr. Evans found that the suppression of advertising likely had an effect on 1-800 Contacts' pricing. Even consumers who intended to navigate to 1-800 Contacts and had no desire to consider competing offers would have benefitted from the lower prices they would have obtained had there been additional competing offers on 1-800 Contacts' brand-name keywords. (*Supra* §§ IX.D).

COMPLAINT COUNSEL’S PROPOSED CONCLUSIONS OF LAW

A.	GENERAL.....	1
B.	COMPLAINT COUNSEL MAY ESTABLISH A <i>PRIMA FACIE</i> CASE THAT THE BIDDING AGREEMENTS VIOLATE SECTION 5 OF THE FTC ACT THROUGH THREE ALTERNATIVE METHODS.....	1
C.	IF COMPLAINT COUNSEL ESTABLISHES A <i>PRIMA FACIE</i> CASE, RESPONDENT MUST ADVANCE COGNIZABLE AND PLAUSIBLE JUSTIFICATIONS SUPPORTED BY RECORD EVIDENCE, DEMONSTRATING THAT THE BIDDING AGREEMENTS ARE REASONABLY NECESSARY TO ACHIEVE A PROCOMPETITIVE OUTCOME.....	2
D.	AGREEMENTS THAT SETTLE LITIGATION ARE SUBJECT TO ANTITRUST SCRUTINY.....	2
E.	THE BIDDING AGREEMENTS ARE INHERENTLY SUSPECT.....	3
F.	THE BIDDING AGREEMENTS HAVE ANTICOMPETITIVE EFFECTS.....	4
1.	DIRECT EVIDENCE.....	5
2.	INDIRECT EVIDENCE.....	5
a.	Market Definition.....	5
b.	Market Power.....	6
G.	1-800 CONTACTS HAS NOT MET ITS BURDEN TO PROFFER COGNIZABLE, PLAUSIBLE EFFICIENCY JUSTIFICATIONS FOR THE BIDDING AGREEMENTS.....	7
1.	THE BIDDING AGREEMENTS CANNOT BE JUSTIFIED ON THE GROUNDS THAT THEY PREVENT “FREE RIDING”.....	7
2.	1-800 CONTACTS’ TRADEMARK RIGHTS DO NOT JUSTIFY THE BIDDING AGREEMENTS BECAUSE THE AGREEMENTS ARE OVERBROAD.....	7
a.	The Bidding Agreements Restrict Non-Infringing Uses of the Trademark.....	8
b.	The Bidding Agreements Are Not Reasonably Necessary to Achieve Any Cognizable Efficiencies.....	8
	CONCLUSION.....	10

A. GENERAL

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent 1-800 Contacts, Inc. (“1-800 Contacts”).
2. 1-800 Contacts is, and at all relevant times has been, a corporation as “corporation” is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, as amended (“FTC Act”).
3. 1-800 Contacts’ written agreements with rival contact lens retailers (“Bidding Agreements”) constitute acts or practices in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1).
5. Conduct that violates Section 1 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators’ Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

B. COMPLAINT COUNSEL MAY ESTABLISH A PRIMA FACIE CASE THAT THE BIDDING AGREEMENTS VIOLATE SECTION 5 OF THE FTC ACT THROUGH THREE ALTERNATIVE METHODS

6. Complaint Counsel may establish a *prima facie* case that the Bidding Agreements violate Section 5 of the FTC Act through three alternative methods.
7. First, restraints on certain fundamental forms of rivalry are “inherently suspect” and are presumed to be anticompetitive. Inherently suspect restraints may be condemned without proof of market power or actual marketplace effects. *See In re Realcomp II, Ltd.*, No. 9320, 2007 WL 6936319, at *18 (F.T.C. Oct. 30, 2009), *aff’d*, 635 F.3d 815 (6th Cir. 2011) (“*Realcomp*”).
8. Second, in the alternative, Complaint Counsel may show direct evidence of “actual marketplace effects.” *Id.* at *19 (citing *Fed. Trade Comm’n v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) [hereinafter, “*Indiana Federation*”). If a plaintiff shows actual marketplace effects, “that would be a basis for condemnation regardless of whether market power is shown.” *Id.*
9. Third, in the alternative, Complaint Counsel may establish that market power, together with the nature of the restraint, is likely to have “the potential for genuine adverse effects on competition.” *Id.* at *19 (citing *Indiana Federation*, 476 U.S. at 460).

10. If Complaint Counsel, using any one of these methods, proves its *prima facie* case, then the burden shifts to 1-800 Contacts to proffer justifications. *See id.* at *21.

C. IF COMPLAINT COUNSEL ESTABLISHES A PRIMA FACIE CASE, RESPONDENT MUST ADVANCE COGNIZABLE AND PLAUSIBLE JUSTIFICATIONS SUPPORTED BY RECORD EVIDENCE, DEMONSTRATING THAT THE BIDDING AGREEMENTS ARE REASONABLY NECESSARY TO ACHIEVE A PROCOMPETITIVE OUTCOME

11. If Complaint Counsel establishes a *prima facie* case, the burden shifts to 1-800 Contacts to advance cognizable and plausible justifications that outweigh any anticompetitive harm. *See Realcomp*, No. 9320, 2007 WL 6936319, at *17, *31; *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 344-48 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

12. 1-800 Contacts' efficiency justifications must satisfy three separate requirements.

13. First, the efficiencies advanced must be (i) cognizable and (ii) plausible.

14. "Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Polygram*, 136 F.T.C. at 345-46.

15. "A justification is plausible if it cannot be rejected without extensive factual inquiry." *Id.* at 347.

16. Second, these efficiencies must be supported by actual record evidence. *Realcomp*, No. 9320, 2007 WL 6936319, at *17.

17. Third, 1-800 Contacts must demonstrate that the restraints are a "reasonably necessary means to achieve a legitimate, procompetitive end." *Id.* (emphasis added). If there is a significantly less restrictive alternative, then a challenged restraint is not reasonably necessary. *See id.*; *Polygram*, 136 F.T.C. at 335.

D. AGREEMENTS THAT SETTLE LITIGATION ARE SUBJECT TO ANTITRUST SCRUTINY

18. Private agreements entered in settlement of actual or threatened litigation are commercial agreements subject to the antitrust laws.⁷ *Noerr-Pennington* defense (which applies to the *filing* of non-sham lawsuits as First Amendment-protected

⁷ *See, e.g., United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (settlement of patent interference claim before the PTO held to violate Sherman Act); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (holding that a dissolution agreement between former law partners settling a state court lawsuit was a horizontal agreement to allocate markets among competitors and thus a per se violation of the Sherman Act); *Duplan Corp. v. Deering Milliken, Inc.*, 594 F.2d 979, 981 (4th Cir. 1979) (finding a patent settlement agreement to be the core of a horizontal agreement in violation of the antitrust laws).

petitioning activity) does not apply to private parties' settlement agreements. *See* Opinion and Order of the Commission Granting Complaint Counsel's Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4 ("the Complaint alleges liability based only on private agreements that do not constitute government petitioning."⁸ *Noerr* protection is also unavailable for private settlement agreements that have been entered by a court as stipulated injunctions or consent decrees.⁹

19. If a restraint represents the type of agreement subject to inherently suspect analysis, the fact that it is contained in a settlement agreement resolving litigation does not change the appropriate mode of analysis.¹⁰

E. THE BIDDING AGREEMENTS ARE INHERENTLY SUSPECT

20. Certain categories of restraints almost always tend to raise price or reduce output, and hence are treated as "inherently suspect," or presumptively anticompetitive. *Realcomp*, No. 9320, 2007 WL 6936319 at *21; *Polygram*, 136 F.T.C. at 344-45.
21. 1-800 Contacts' Bidding Agreements are presumptively anticompetitive for two independent reasons, either of which alone is sufficient to characterize the Bidding Agreements as inherently suspect.

⁸ *See also N.M. Nat. Gas Antitrust Litig.*, 1982 U.S. Dist. LEXIS 9452, at *16 (D.N.M. Jan. 26, 1982) (when litigants "voluntarily withdraw their dispute from the court and resolve it by agreement among themselves there would be no purpose served by affording *Noerr-Pennington* protection. The parties by doing so must abide with any antitrust consequences that result from their settlement."); *F.T.C. v. Actavis*, 133 S.Ct. 2223, 2230, 2232 (2013) (holding, where the underlying suit was not claimed to be a sham, that "patent-related settlements can sometimes violate the antitrust laws"); *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 818 (D.C. Cir. 2001); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 635, 641 (E.D. Mich. 2000), *aff'd on other grounds*, 332 F.3d 896 (6th Cir. 2003).

⁹ *See In re Androgel Antitrust Litig.*, No. 1:09-cv-955, 2014 WL 1600331, at *6-9 (N.D. Ga. Apr. 21, 2014); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 395-98 (D. Mass. 2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 212-13 (E.D.N.Y. 2003) (*Cipro*). While government advocacy is protected by *Noerr*, simply seeking government approval of a private agreement is not. *E.g., Ticor Title Ins. Co. v. F.T.C.*, 998 F.2d 1129, 1138 (3d Cir. 1993).

¹⁰ *See Clorox v. Sterling Winthrop*, 117 F.3d 50, 55-56 (2d Cir. 1997) (agreements settling trademark litigation are subject to *per se* condemnation where they "effect any of the types of restraints that have historically been condemned as illegal *per se*"); *In re Cardizem Antitrust Litig.*, 332 F.3d 896, 907-908 (6th Cir. 2003) (considering and rejecting defendants' attempt to avoid *per se* condemnation of patent settlement where the settlement restrained a competitor from marketing both the allegedly infringing version of a drug and "noninfringing and/or potentially noninfringing versions of" the drug); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (patent settlement agreement *per se* illegal where "the exclusionary effects of the challenged provision of the [agreement] exceeded the exclusionary potential of the [patent]."); *see also Singer*, 374 U.S. at 195-97 (holding *per se* illegal patent license agreements that exceeded limits of the patent monopoly by obligating Singer to enforce the patents of the other parties to the agreement, in order to exclude competition from other rivals); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 373-74, 379 (1952) (holding *per se* illegal a settlement among competing patent owners); *United States v. Line Material Co.*, 333 U.S. 287, 310-15 (1948) (condemning as *per se* illegal a patent settlement and cross-licensing agreement).

22. First, the Bidding Agreements restrict competitive bidding, in that they allocate among competing bidders the right to participate in search advertising auctions and thus restrain price competition within those auctions. The Supreme Court has held that agreements suppressing bidding are presumptively unlawful. *Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978).
23. Second, the Bidding Agreements restrict truthful, non-deceptive advertising by lower-price contact lens retailers. *See Realcomp*, No. 9320, 2007 WL 6936319 at *26 (holding that agreement among real estate brokers to impede the dissemination of real estate listings “operated as a restraint on advertising” and “thus was inherently suspect; observing that “[c]ourts have long treated agreements among competitors to restrict advertising as posing serious dangers to competition and as having a great capacity to affect prices”); *Polygram*, 136 F.T.C. at 354-55 (“[r]estrictions on truthful and nondeceptive advertising harm competition, because they make it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors’ incentives to compete with each other with respect to such features”).
24. Restraints on truthful and nonmisleading advertising are inherently suspect even if they restrain only a portion of advertising by rivals. *See Realcomp*, No. 9320, 2007 WL 6936319, at *38, *41.
25. The origin of the Bidding Agreements in settlement of threatened or actual litigation does not change the mode of analysis. *See FTC v. Actavis*, 133 S. Ct. 2223, 2231-32 (2013) (citing *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948)); *Clorox v. Sterling Winthrop*, 117 F.3d 50, 55-56 (2d Cir. 1997) (agreements settling trademark litigation are subject to per se condemnation where they “effect any of the types of restraints that have historically been condemned as illegal per se”); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶1907b (3d ed. 2007) (“[T]he following defenses to a horizontal restraint affecting price or output are unacceptable: . . . that collusion or market division is necessary to prevent firms from violating one another’s intellectual property rights, or to discipline others who are violating them.”).
26. Because the Bidding Agreements are inherently suspect, the burden shifts to 1-800 Contacts to proffer a cognizable and plausible efficiency justification for the Bidding Agreements. *See Realcomp*, No. 9320, 2007 WL 6936319, at *27; *Polygram*, 136 F.T.C. at 345-46.

F. THE BIDDING AGREEMENTS HAVE ANTICOMPETITIVE EFFECTS

27. As an alternative to demonstrating that the agreements are inherently suspect, Complaint Counsel may also establish its *prima facie* case either by offering direct evidence of actual anticompetitive effects; or, through a showing of market power, in combination with a restraint that has the tendency to harm competition. *See Realcomp*, No. 9320, 2007 WL 6936319, at *21.

1. DIRECT EVIDENCE

28. First, Complaint Counsel may meet its burden under the rule of reason by showing “direct evidence of anticompetitive effect,” which ““obviate[s] the need for an inquiry into market power”” and does not require “elaborate econometric proof.” *Realcomp*, No. 9320, 2007 WL 6936319, at *19 (quoting *Indiana Federation*, 476 U.S. at 460-62).
29. Direct evidence may consist of evidence of higher prices or lower output, or it may consist of evidence of a marketplace distortion that is likely to result in higher prices or lower output. *See Indiana Federation*, 476 U.S. at 460-62; *Realcomp*, No. 9320, 2007 WL 6936319, at *32.
30. Because Complaint Counsel has shown, by direct evidence, that the Bidding Agreements harm competition, the burden shifts to 1-800 Contacts to proffer a cognizable and plausible efficiency justification for the Agreements.

2. INDIRECT EVIDENCE

31. Alternately, Complaint Counsel may meet its burden under the rule of reason by showing that the parties to the challenged agreements “had market power and that their conduct tended to reduce competition.” *Realcomp*, No. 9320, 2007 WL 6936319, at *19. That is, Complaint Counsel may show that “defendant’s market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects.” *Realcomp*, No. 9320, 2007 WL 6936319, at *34.¹¹ If Complaint Counsel makes such a showing, “it is unnecessary to demonstrate directly that [Respondent’s] practices had adverse effects on competition.”¹²

a. Market Definition

32. An antitrust market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).
33. A well-defined antitrust market consists of “any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly

¹¹ *See also Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has “two independent means by which to satisfy the adverse-effect requirement” – direct proof of “actual adverse effect on competition” or “indirectly by establishing . . . sufficient market power to cause an adverse effect on competition”); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (“plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market . . .”).

¹² *Realcomp*, No. 9320, 2007 WL 6936319, at *18; *Realcomp*, 635 F.3d at 828 (““The purpose of the inquiries into market definition and market power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition’ and this is so precisely because actual anticompetitive effects may be difficult to demonstrate.”) (quoting *Indiana Federation*, 476 U.S. at 460)).

- above the competitive level.” *United States v. Am. Express Co.*, 838 F.3d 179, 198–99 (2d Cir. 2016); *Brown Shoe Co., v. United States*, 370 U.S. 294, 325-26 (1962); 2010 Horizontal Merger Guidelines at § 4.1.1.
34. The key factors in identifying the bounds of a relevant product market are “(1) the reasonable interchangeability of use” by consumers and “(2) the cross-elasticity of demand between the product itself and substitutes for it.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *Brown Shoe*, 370 U.S. at 325); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).
 35. The relevant geographic market is “the ‘area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.’” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).
 36. A relevant product market or line of commerce in which to analyze the competitive effects of the Bidding Agreements is the online retail sale of contact lenses.
 37. The relevant geographic market in which to analyze the competitive effects of the Bidding Agreements is the United States.

b. Market Power

38. Market power is the collective “ability [of firms] to significantly affect prices and other outcomes in the [] market.” *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1154 (9th Cir. 2011).
39. The parties to the Bidding Agreements, including 1-800 Contacts, have market shares sufficient to give rise to a strong presumption of market power unless “entry into the market is so easy” that the parties, either unilaterally or collectively, “could not profitably raise price or otherwise reduce competition compared to” the but-for world. 2010 Horizontal Merger Guidelines at § 9; *see also id.* (“Entry is easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern. . .”).
40. The parties to the Bidding Agreements, including 1-800 Contacts, have market power in a relevant market for the online retail sale of contact lenses in the United States, as entry into the market is not so easy as to prevent the parties from profitably raising price or otherwise reducing competition.
41. “In light of [this] market power, and the facially restrictive nature of the [Bidding Agreements] at issue, no more is required, under the rule of reason, to support [the] conclusion that the [Bidding Agreements] are unreasonable because they will predictably result in harm to competition.” *Realcomp*, No. 9320, 2007 WL 6936319, at *37.

42. Because the evidence shows that the parties to the Bidding Agreements have market power and that the Bidding Agreements have a tendency to harm competition, the burden shifts to 1-800 Contacts to proffer a cognizable and plausible efficiency justification for the Agreements. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011) (“If Realcomp’s challenged policies are shown to have an anticompetitive effect, or if Realcomp is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to Realcomp to provide procompetitive justifications for the policies.”) (italics in original).

G. 1-800 CONTACTS HAS NOT MET ITS BURDEN TO PROFFER COGNIZABLE, PLAUSIBLE EFFICIENCY JUSTIFICATIONS FOR THE BIDDING AGREEMENTS

43. As Complaint Counsel has satisfied its *prima facie* case, the burden shifts to 1-800 Contacts to show a valid efficiency justification for the restraint. That is, Respondent must show that the Bidding Agreements were and are reasonably necessary in order to promote competition and benefit consumers.
44. It is not sufficient for Respondent merely to advance a plausible hypothesis as to why a suspect restraint could have been efficiency enhancing. Respondent must demonstrate that actual record evidence supports the existence of the procompetitive efficiency. *Realcomp*, No. 9320, 2007 WL 6936319, at *17.
45. In addition, Respondent must demonstrate that the restraint is reasonably necessary to achieve its plausible and cognizable justification. *Realcomp*, No. 9320, 2007 WL 6936319, at *17.
46. Respondent has not met its burden of (i) identifying a plausible and cognizable efficiency justification for the challenged restraints, (ii) supported by record evidence, (iii) that is reasonably necessary to achieve the justification.

1. THE BIDDING AGREEMENTS CANNOT BE JUSTIFIED ON THE GROUNDS THAT THEY PREVENT “FREE RIDING”

47. Free riding is not a cognizable defense to the Bidding Agreements because the agreements are among independent horizontal competitors, and not ancillary to any substantial business integration. *Polygram*, 136 F.T.C. at 366-68.

2. 1-800 CONTACTS’ TRADEMARK RIGHTS DO NOT JUSTIFY THE BIDDING AGREEMENTS BECAUSE THE AGREEMENTS ARE OVERBROAD

48. Trademark law permits the holder to prevent uses of a trademark that cause consumer confusion “as to the source, affiliation, or sponsorship of [a company’s] products or services.” *Fetzer Co. v. House of Vacuums*, 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id.* § 1125(a)).

49. Because the Bidding Agreements are overbroad, 1-800 Contacts' trademark rights do not justify the Bidding Agreements.

a. The Bidding Agreements Restrict Non-Infringing Uses of the Trademark

50. The Bidding Agreements exceed the scope of any property right that 1-800 Contacts may have in its trademarks because they prevent non-confusing (and therefore lawful) advertising using 1-800 Contacts' trademarks. Specifically, the Bidding Agreements prevent rivals' advertisements from appearing in response to user queries for 1-800 Contacts' trademark and variations thereof, even though many such advertisements would not be confusing within the meaning of trademark law. *See Cardizem*, 332 F.3d 896, 907, 908 n.13 (condemning a patent settlement as *per se* illegal where the settlement restrained a competitor from marketing both the allegedly infringing version of a drug and "noninfringing and/or potentially noninfringing versions of" the drug).

51. The Bidding Agreements further exceed the scope of 1-800 Contacts' trademark rights by requiring the use of "negative keywords" that restrict the appearance of rival advertising even when the rivals have not bid on (or "used") 1-800 Contacts' trademarks.

52. The Bidding Agreements further exceed the scope of 1-800 Contacts' trademark rights because they are reciprocal agreements, untethered to any claim that 1-800 Contacts infringed the trademarks of the settling parties.

53. The Bidding Agreements also exceed the scope of 1-800 Contacts' right to prevent trademark dilution because they apply to advertisements where the rival does not identify itself by a name that is confusingly similar to any trademark claimed by 1-800 Contacts. *See Dallas Cowboys Football Club v. Am.'s Team Properties*, 616 F. Supp. 2d 622, 643 (N.D. Tex. 2009) (finding dilution where the defendant adopted plaintiff's "America's Team" trademark to identify its own goods).

b. The Bidding Agreements Are Not Reasonably Necessary to Achieve Any Cognizable Efficiencies

54. A restraint may be justified by a cognizable and plausible procompetitive efficiency only if the restraint is reasonably necessary to achieve this objective.¹³ Broad restrictions on non-confusing uses of a trademark are not necessary to achieve any efficiencies cognizable under trademark law; instead, in trademark cases relief is

¹³ *Realcomp*, No. 9320, 2007 WL 6936319, at *17 (restraint must be a "reasonably necessary means" to achieve a legitimate procompetitive objective); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1416 (7th Cir. 1995), *as amended on denial of reh'g* (Oct. 13, 1995) (territorial division unlawful unless essential to the provision of a lawful service); *Brown University*, 5 F.3d 658, 679 (3d Cir. 1993) (restraint must be "reasonably necessary to achieve the legitimate objectives proffered by the defendant"); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1018-19 (10th Cir. 1998) (same).

“tailored to eliminate only the specific harm alleged”¹⁴ and is “no broader than necessary to cure the effects of the harm caused.”¹⁵

55. Claims of confusion based on discrete types of infringing conduct should not result in broad injunctions that proscribe truthful, non-deceptive advertising.¹⁶

56. In particular, Courts considering remedies in trademark infringement matters routinely conclude that clear labeling as to the source of advertisements is an appropriate and sufficient remedy that sufficiently reduces any likelihood of consumer confusion.¹⁷

57. “To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives.”¹⁸ Here, less restrictive alternatives are, and at all relevant times have been, available to 1-800 Contacts to safeguard any legitimate interest the company may have or may have had under trademark law, such as:

- Requiring clear and conspicuous disclosure of the identity of the seller (for example, a requirement that the text of the advertisement or the URL appearing with the advertisement clearly disclose “walgreens.com”);
- Prohibiting rival sellers from using its trademarks (or a confusingly similar variation thereof) in the *text* of their ads, absent appropriate disclosures;
- Prohibiting rival sellers from identifying themselves with names that might be confusingly similar to 1-800 Contacts;

¹⁴ *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010) (citing *E. & J. Gallow Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992)).

¹⁵ *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1542 (2d Cir. 1992) (quoting *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325, 1329-30 (2d Cir. 1987)); *Hypertherm, Inc. v. Precision Prods., Inc.*, 832 F.2d 697, 701 (1st Cir. 1987) (holding that courts in the First Circuit will vacate any provision in an injunction that, instead of “affirmatively mandating that [a party] better identify the genealogy of its wares, . . . effectively took [its] products off the market”).

¹⁶ *E.g. PODS Enters., LLC v. U-Haul Int’l, Inc.*, 126 F. Supp. 3d 1263, 1287-93 (M.D. Fla. 2015) (holding that plaintiff’s proposed injunction was too broad because it “would prohibit the use of comparative advertising, which one of PODS’ experts admitted at trial was acceptable and non-confusing” and revising the injunction to allow use of a trademark in “comparative advertising in a manner that is not likely to confuse the public as to the source of the goods in question”).

¹⁷ *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930 (9th Cir. 2015) (affirming that disclosure of the seller’s name in the text of advertisements triggered by search queries including plaintiff’s trademark was sufficient to prevent confusion “[b]ecause Amazon’s search results page *clearly labels the name and manufacturer of each product* offered for sale”) (emphasis added); *1-800 Contacts v. Lens.com*, 722 F.3d 1229, 1245 (10th Cir. 2013) (an inference that a trademark owner is the source of a competitor’s webpage “is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for”).

¹⁸ *Areeda & Hovenkamp* ¶ 1505; *Competitor Collaboration Guidelines* § 3.36(b); *see also PolyGram*, 136 F.T.C. at *349 (“The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.”).

- Requiring clear and conspicuous comparative language.
58. The Bidding Agreements do not protect 1-800 Contacts' trademark rights or otherwise reduce consumer confusion in a manner "significantly better" than these less restrictive alternatives.¹⁹

CONCLUSION

59. The acts or practices of Respondent were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. These acts or practices may recur in the absence of the Proposed Order entered in this proceeding.
60. Entry of the Proposed Order is necessary and appropriate to remedy and prevent the violations of law found to exist. *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegal & Co. v. FTC*, 327 U.S. 608 (1946); *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (2003).

¹⁹ Areeda & Hovenkamp ¶ 1505.

Dated: June 22, 2017

Respectfully Submitted,

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**IN THE MATTER OF 1-800 CONTACTS, INC.
DOCKET NO. 9372**

COMPLAINT COUNSEL'S WITNESS INDEX

NAME	TITLE	COMPANY	TRANSCRIPT CITE **TOTAL**	TRANSCRIPT CITE **IN CAMERA**	DATE	VOLUME
Complaint Counsel's Opening Statements	N/A	N/A	Tr. 6:09-84:03	N/A	4/11/2017	Volume 1
Respondent Counsel's Opening Statements	N/A	N/A	Tr. 87:11-164:16	N/A	4/11/2017	Volume 1
Peter M. Clarkson	President	Arlington Contact Lens Service, aka ACLens.com	Tr. 171:11-381:15	N/A	4/11/2017 - 4/12/2017	Volume 1 - 2
Glen M. Hamilton	Former employee - Functional Manager of Digital and Marketing	Walgreens Corporation	Tr. 387:15-488:16	Tr. 429:01-443:25 Tr. 449:01-452:16 Tr. 465:01*-468:22	4/12/2017	Volume 2
Bryce Craven	Former employee - Senior Search Marketing Manager	1-800 Contacts	Tr. 493:08-693:20	N/A	4/13/2017	Volume 3
Dr. Susan Athey	Expert Witness - Professor of Economics	Stanford Graduate School of Business	Tr. 702:15-961:07 Tr. 2068:17-2121:06	Tr. 819:22-832:19 Tr. 929:23-946:23 Tr. 2034:23-2049:12 Tr. 2069:02-2081:13	4/18/2017 4/26/2017	Volume 4 & 9
Ryan Aloviz	CEO	LensDirect	Tr. 968:10-1060:25	N/A	4/19/2017	Volume 5
Adam Juda	Director - Product Management in the Search Ads Quality Group	Google	Tr. 1062:01-1363:02	Tr. 1089:01-1127:13 Tr. 1130:01-1202:03 Tr. 1204:01-1245:03 Tr. 1254:01-1293:13 Tr. 1336:01-1361:09	4/19/2017 4/20/2017	Volume 5 Volume 6
Dr. David Evans	Expert Witness - Chairman	Global Economics Group	Tr. 1363:11-1839:04	Tr. 1567:01-1592:13 Tr. 1594:01-1645:23 Tr. 1648:01-1695:20 Tr. 1736:01-1748:19 Tr. 1764:08-1839:04	4/20/2017 4/21/2017 4/24/2017	Volume 6 - 8

NAME	TITLE	COMPANY	TRANSCRIPT CITE **TOTAL**	TRANSCRIPT CITE **IN CAMERA**	DATE	VOLUME
Eric Holbrook	General Manager	Memorial Eye	Tr. 1850:07-2068:10	Tr. 1949:08-1990:24 Tr. 1997:11-2015:21	4/26/2017	Volume 9
Dr. Jacob Jacoby	Expert Witness - Professor	New York University	Tr. 2128:12 - 2355:14	N/A	4/27/2017	Volume 10
Ronald Goodstein	Expert Witness - Associate Professor	Georgetown McDonough School of Business	Tr. 2364:07 - 2488:24	Tr. 2387:01 - 2395:22 Tr. 2475:01 - 2483:05	4/28/2017	Volume 11
Bryan Pratt	Attorney	Holland & Hart	Tr. 2490:08 - 2643:06	N/A	4/28/2017	Volume 11
Jonathan Coon	Founder/ Former CEO	1-800 Contacts	Tr. 2648:20 - 2887:18	N/A	5/1/2017	Volume 12
Clint Schmidt	Former Director of E- Commerce	1-800 Contacts	Tr. 2888:10 - 2957:13	N/A	5/1/2017 5/2/2017	Volume 12 - 13
Dr. Kent Van Liere	Expert Witness - Managing Director	NERA	Tr. 2957:18 - 3238:20	N/A	5/2/2017 5/3/2017	Volume 13 - 14
Howard Hogan	Attorney/Partner	Gibson, Dunn & Crutcher	Tr. 3239:04 - 3506:03	Tr. 3280:01 - 3296:19 Tr. 3342:01 - 3344:11	5/3/2017 5/4/2017	Volume 14 - 15
Brian Bethers	CEO	1-800 Contacts	Tr. 3506:14 - 3855:06	Tr. 3560:01 - 3580:08 Tr. 3785:01 - 3826:21 Tr. 3833:01 - 3852:19	5/4/2017 5/9/2017	Volume 15 - 16
Dr. Anindya Ghose	Expert Witness - Professor	New York University	Tr. 3861:08 - 4082:09	Tr. 3877:01 - 3902:03 Tr. 3923:01 - 3926:16 Tr. 4055:01 - 4068:09	5/10/2017	Volume 17
Prof. Kevin M. Murphy	Expert Witness - Economics Professor	University of Chicago	Tr. 4082:19 - 4367:02	Tr. 4103:01 - 4113:25 Tr. 4129:01 - 4140:03 Tr. 4187:01 - 4202:11 Tr. 4210:01 - 4245:25 Tr. 4247:01 - 4278:13	5/10/2017 5/11/2017	Volume 17 - 18
Prof. Rebecca Tushnet	Attorney/Law Professor	Georgetown University	Tr. 4369:14 - 4543:20	N/A	5/11/2017 5/12/2017	Volume 18 - 19
*ALJ asked reporter to go back & label as In Camera as \$ figures spoken in public session						

**IN THE MATTER OF 1-800 CONTACTS, INC.
DOCKET NO. 9372**

COMPLAINT COUNSEL'S EXHIBIT INDEX

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0001 - CX0005	INTENTIONALLY NOT USED					N/A			
CX0006	Letter from Holland & Hart to Peter Clarkson re: Breach of Settlement Agreement with 1-800 Contacts, Inc	5/30/2014	FTC-PROD-0006119	FTC-PROD-0006120		JX0002-A	NH		Tr. 255:02, 255:03
CX0007	Correspondence between 1-800 Counsel and AC Lens re: Breach of Settlement Agreement with 1-800 Contacts	4/22/2013	FTC-PROD-0007687	FTC-PROD-0007700		JX0002-A	NH		Tr. 256:25; 257:01; 259:12
CX0008 - CX0013	INTENTIONALLY NOT USED					N/A			
CX0014	Email from Bryce Craven to Mary Shirley, Nidhi K, Kendalle B, et al. re: First Page Big Suggestions - Ready to implement?	5/3/2011	1-800F_00029918	1-800F_00029920	RX0200	JX0002-A			Tr. 686:20; 686:21; 692:08
CX0015	INTENTIONALLY NOT USED					N/A			
CX0016	Email from Joan Blackwood to Brian Bethers, Rob Hunter, Junhyon Park, et al. re: Modifying price Match	5/27/2011	1-800F_00042836	1-800F_00042837		JX0002-A			
CX0017	Email from Laura Schmidt to Joan Blackwood and Amy Larson re: We beat any price by x%	5/31/2011	1-800F_00033858	1-800F_00033859		JX0002-A			
CX0018	INTENTIONALLY NOT USED					N/A			
CX0019	Email from Laura Schmidt to Bryce Craven and Thomas Nehren re: We beat any price by x%	6/3/2011	1-800F_00030529	1-800F_00030532		JX0002-A			
CX0020	Email from Jordan Judd to Bryce Crave and Laura Schmidt re: Big 3 Bid Competitors	6/14/2011	1-800F_00030064	1-800F_00030065		JX0002-A			
CX0021 - CX0028	INTENTIONALLY NOT USED					N/A			
CX0029	Email from Mary Shirley to Laura Schmidt, et al. re: Trademark Owners to Block Purchase of their Marks?	8/24/2011	1-800F_00030262	1-800F_00030265		JX0002-A			
CX0030	Email from Bryce Craven to Joan Blackwood, Laura Schmidt re: we need some help	9/8/2011	1-800F_00029607	1-800F_00029609		JX0002-A			
CX0031 - CX0032	INTENTIONALLY NOT USED					N/A			
CX0033	Email from Bruce Christy to William Van Fleet, et al. re: Question About Searchable Text on Our New Product Pages	11/1/2011	1-800F_00029052	1-800F_00029053		JX0002-A			
CX0034 - CX0041	INTENTIONALLY NOT USED					N/A			
CX0042	Email from Roy Montclair to Brady Roundy and Laura Schmidt re: Trademark Terms	7/9/2014	1-800F_00047469	1-800F_00047470		JX0002-A			
CX0043	INTENTIONALLY NOT USED					N/A			
CX0044	Media Strategy Meeting Request from Joan Blackwood to Brian Bethers, Laura Schmidt, Jonathan Coon, Thomas Nehren, et al. w/Attach: Search Overview, May 2011	7/6/2011	1-800F_00029305	1-800F_00029311	CX0479	JX0002-A			
CX0045 - CX0048	INTENTIONALLY NOT USED					N/A			
CX0049	Email from Brandon Danise to Bryce Craven and Amy Guymon re: lensworld.com	10/4/2006	1-800F_00028992	1-800F_00028993	RX1224	JX0002-A			
CX0050	INTENTIONALLY NOT USED					N/A			
CX0051	Email from Laura Schmidt to Thomas Nehren re: Search Overview w/Attach: Search_Overview_NOV 2010.pptx	1/28/2011	1-800F_00040022	1-800F_00040023		JX0002-A			Tr. 3751:24; 3752:18; 3758:08; 3758:11; 3758:13; 3758:17; 3758:23; 3782:08; 3782:13
CX0052 - CX0054	INTENTIONALLY NOT USED					N/A			

PUBLIC

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0055 CX0056 - CX0057	Email from Kevin McCallum to Jonathan Coon et al. re: Strategy Offsite Follow-ups w/Attach: Strategy Meeting Results and Next Steps.doc	7/23/2004	1-800F_00036953	1-800F_00036968	CX0412	JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0058 CX0059	Email from Joe Zeidner to Brian Bethers, Kevin McCallum and Jonathan Coon re: DSCM counter proposal- input needed w/Attach: DSCM proposed release 052404.doc	5/24/2004	1-800F_00036860	1-800F_00036863	RX0250	JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0060 CX0061 - CX0062	Email from Kevin McCallum to Clinton Schmidt re: search strategy	8/11/2005	1-800F_00037546	1-800F_00037548		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0063 CX0064 - CX0065	Draft Presentation: Marketing, Company Brands, Product Development & Call Center	4/29/2005	1-800F_00037242	1-800F_00037243	CX0949	JX0002-A			Tr. 2926:17; 2927:04; 2927:23; 2930:10; 2932:01; 2952:24
	INTENTIONALLY NOT USED					N/A			
CX0066 CX0067	Email from Joe Zeidner to Kevin McCallum, Jonathan Coon, and Brian Bethers re: Trademarks of Lenscrafters Presentation: Marketing & Sales Review, October 2006 by Kevin McCallum, Ann Harrison, Amy Guymon	2/6/2006 10/00/2006	1-800F_00037667 1-800F_00037679	1-800F_00037668 1-800F_00037679		JX0002-A JX0002-A			
CX0068 CX0069 - CX0077	Email from Jonathan Coon to Mario Cibelli re: Google, Utah on collision course over Web 'keywords'	4/12/2007	1-800F_00043440	1-800F_00043442		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0078 CX0079 - CX0086	Email from Brandon Denise to Dave Zeidner, Bryan Pratt re: Other Organizations ads on our Trademarks 04/06/07 w/Attach: Other Organizations on Trademarked Keywords 040607.doc; Trademark Offenders Contact Info 040607.doc	4/9/2007	1-800F_00010365	1-800F_00010365	CX0235, CX0253	JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0087 CX0088 CX0089 - CX0091	Letter from Karen Kreider Gaunt to 1-800 Contacts re: Trademark Infringement of LENS-CRAFTERS Trademark in Sponsored Advertisements at Google and Related Search Engines Letter from David Zeidner to Karen Kreider Gaunt re: Trademark issue	4/25/2005 5/6/2005	1-800F_00037337 1-800F_00037440	1-800F_00037338 1-800F_00037443	CX0111, CX0414 CX0416	JX0002-A JX0002-A	NH		Tr. 2615:08
	INTENTIONALLY NOT USED					N/A			
CX0092 CX0093	Letter from Mark A. Miller to Steven Bochen re: Notice of [Coastal Contacts] Breach of Settlement Agreement with 1-800 Contacts, Inc.	5/30/2014	1-800F_00047468	1-800F_00047468		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0094 CX0095 - CX0097	Email from Brady Roundy to Marketing, Scott Osmond and Brian Taylor re: Paid Search DB Week 22 - Ending 5/31/2014 w/Attach: PPC Dashboard 20140602.xlsx	6/2/2014	1-800F_00047478	1-800F_00047480		JX0002-A		Ordered 4/4/2017	
	INTENTIONALLY NOT USED					N/A			
CX0098 CX0099	Email from Brady Roundy to Natalia Bohm re: Trademark Keywords Quality Score	11/21/2014	1-800F_00047856	1-800F_00047860		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0100 CX0101 - CX0105	Email from Brady Roundy to James Hollyday and Kevin Hutchings re: Negative Keyword List w/Attach: adMarketplace Negative Keyword List.xlsx	9/25/2014	1-800F_00047873	1-800F_00047874		JX0002-A			
	INTENTIONALLY NOT USED					N/A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0106	Email from Brandon Dansie to Amy Guymon re: Coastal Contacts Breach w/Attach: Unnamed Attachment	1/19/2006	1-800F_00025092	1-800F_00025096	CX0047, CX0065 & CX0596	JX0002-A			
CX0107 - CX0114	INTENTIONALLY NOT USED					N/A			
CX0115	Email from Brandon Dansie to Kevin McCallum re: Trademark Issue	8/25/2005	1-800F_00037436	1-800F_00037437	CX0716	JX0002-A			
CX0116	INTENTIONALLY NOT USED					N/A			
CX0117	Email from Brandon Dansie to Kevin McCallum, Clinton Schmidt and Amy Guymon re: Trademark Issue	9/7/2005	1-800F_00037477	1-800F_00037479	CX0419	JX0002-A			
CX0118	INTENTIONALLY NOT USED					N/A			
CX0119	Email from Joe Zeidner to Kevin McCallum, Jonathan Coon, Brian Bethers, et al. re: email from Wally Lovejoy w/Attach: Wallace Lovejoy.vcf	3/23/2006	1-800F_00037622	1-800F_00037623	CX0422	JX0002-A			
CX0120 - CX0132	INTENTIONALLY NOT USED					N/A			
CX0133	Email from Joe Zeidner to N. Garnett re: VisionDirect Ads on 1800 CONTACTS' Trademarked Keywords 07/27/07 w/Attach: 1800contacts-VD infringements 072707.doc	8/1/2007	1-800F_00047079	1-800F_00047083	CX0050	JX0002-A			
CX0134	Email from Brandon Dansie to Amy Reischauer, Colin Veach and Stan Pavlovsky re: VisionDirect Ads on 1800 CONTACTS' Trademarked Keywords 9/25/07 w/Attach: 1800contacts-VD infringements 092507.doc	9/25/2007	1-800F_00045132	1-800F_00045138	CX0737 CX0608, RX0257, RX0945	JX0002-A			
CX0135	Email from Bryan Pratt to Cindy Caditz and Dave Zeidner re: drugstore.com and 1-800 Contacts, Inc.	10/22/2007	1-800F_00046031	1-800F_00046033		JX0002-A			
CX0136	Letter from Cindy Caditz to Bryan Pratt re: Compliance with Settlement Agreement between 1-800 Contacts, Inc. and Vision Direct, Inc.	10/25/2007	1-800F_00023986	1-800F_00023988	CX0268, CX0607, CX0611	JX0002-A	NH		
CX0137	Letter from Bryan Pratt to Drugstore.com, Inc. and Cindy Caditz re: Compliance with Settlement Agreement Between 1-800 Contacts, Inc. and Vision Direct, Inc.	11/1/2007	1-800F_00045853	1-800F_00045864	CX0269	JX0002-A			
CX0138	Letter from Cindy Caditz to Bryan Pratt re: Compliance with Settlement Agreement between 1-800 Contacts, Inc. and Vision Direct, Inc.	11/5/2007	1-800F_00024006	1-800F_00024007		JX0002-A	NH		
CX0139	INTENTIONALLY NOT USED					N/A			
CX0140	Email from Richard Liebeskind to Bryan Pratt, Dave Zeidner, Jody Trapasso and Maritza Nelson re: Vision Direct/Drugstore.com	12/21/2007	1-800F_00045830	1-800F_00045831	CX0271, CX0615	JX0002-A	NH		
CX0141	Letter from Scott Sher to Brian Pratt re: Compliance with Settlement Agreement between 1-800 Contacts, Inc. and Vision Direct, Inc.	1/7/2008	1-800F_00046010	1-800F_00046011		JX0002-A	NH		
CX0142	Letter from Scott Sher to Joe Zeidner and Bryan G. Pratt re: Compliance with Settlement Agreement between 1-800 Contacts, Inc. and Vision Direct, Inc. and Litigation Filed by 1-800 Contacts, Inc., in Connection with Settlement Agreement	1/24/2008	1-800F_00045680	1-800F_00045684	CX0069, CX0273	JX0002-A	NH		Tr. 2606:06; 2607:02; 2607:04
CX0143	INTENTIONALLY NOT USED					N/A			
CX0144	USDC S.D. NY Order of Permanent Injunction in 1-800 Contacts, Inc vs. Vision Direct, Inc. (08-cv-1949)	5/15/2009	FTC-0000124	FTC-0000128		JX0002-A	NH		
CX0145 - CX0155	INTENTIONALLY NOT USED					N/A			
CX0156	Email from Bryan Pratt to Dan Garriot, Kristin Murphy and Linda Mettes re: 1-800 Contacts v. Lensfast et al. w/Attach: Lensfast Settlement Agreement.pdf + Exhibits	3/30/2009	1-800F_00045378	1-800F_00045394	CX0488	JX0002-A			
CX0157 - CX0158	INTENTIONALLY NOT USED					N/A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0159	Email from Bryce Craven to Park Studebaker, Mark Miller and Dave Zeidner re: Trademark Breach	8/6/2010	1-800F_00020968	1-800F_00020968	CX0500, RX0870, RX0159, RX0254	JX0002-A			
CX0160	Email from Samantha Blair to Brandon Dansie and Amy Guymon re: Alleged Infringement of the 1800 CONTACTS Trademark	5/9/2006	1-800F_00028418	1-800F_00028419	CX0597	JX0002-A	NH		
CX0161	INTENTIONALLY NOT USED					N/A			
CX0162	USDC D. UT Order of Default Judgment in 1-800 Contacts v. Lensworld.com (08-cv-00015)	9/9/2008	1-800F_00010539	1-800F_00010541	CX0312	JX0002-A	NH		Tr. 2558:06; 2558:08; 2558:10
CX0163 - CX0171	INTENTIONALLY NOT USED					N/A			
CX0172	Email from Kevin McCallum to Kevan Hancock re: LensCrafter fiasco	5/5/2005	1-800F_00037291	1-800F_00037291		JX0002-A			
CX0173	INTENTIONALLY NOT USED					N/A			
CX0174	Email from Connie Ross to Seth McLaughlin re: Trademark Issue	5/6/2005	1-800F_00037294	1-800F_00037296		JX0002-A			
CX0175 - CX0205	INTENTIONALLY NOT USED					N/A			
CX0206	Email from Clinton Schmidt to Jonathan Coon, Kevin McCallum, Amy Guymon, et al. re: searches on 1800 vs lenscrafter	7/29/2005	1-800F_00037457	1-800F_00037458	CX0417	JX0002-A			
CX0207 - CX0210	INTENTIONALLY NOT USED					N/A			
CX0211	Email from Paige to Bryce Craven re: [#199657382] Trademark Protection	9/27/2007	1-800F_00045153	1-800F_00045154	CX0108, RX0780	JX0002-A			
CX0212	INTENTIONALLY NOT USED					N/A			
CX0213	Email from Amy Larson to Allen Hwang re: Competitor on TM Cost Estimates w/Attach: Competitor on TM Cost Estimates.xls	10/17/2008	1-800F_00024850	1-800F_00024851	CX0457	JX0002-A			
CX0214 - CX0217	INTENTIONALLY NOT USED					N/A			
CX0218	Email from Amy Larson to Bryce Craven, Betsy Kelleher and Brandon Dansie re: Paid Search Spend Reduction	9/15/2010	1-800F_00027506	1-800F_00027508		JX0002-A			Tr. 674:04
CX0219 - CX0225	INTENTIONALLY NOT USED					N/A			
CX0226	Email from Kevin McCallum to Amy Guymon, Clinton Schmidt, Sunny Baker, Brandon Dansie, et al. re: price positioning	11/7/2005	1-800F_00037485	1-800F_00037486	CX0647, CX0950	JX0002-A			
CX0227 - CX0230	INTENTIONALLY NOT USED					N/A			
CX0231	Email from Bryce Craven to Brandon Dansie, Amy Larson and Jordan Judd re: Search & Partner DB Week 33 - 09/12/08 w/Attach: Partner Dashboard 091508.xls; Search Dashboard 0915.08.xls	9/15/2008	1-800F_00026038	1-800F_00026041		JX0002-A			
CX0232	INTENTIONALLY NOT USED					N/A			
CX0233	Email from David Steele to Dave Zeidner re: VisionDirect Ads on 1800 CONTACTS' Trademarks 12/15/09	12/18/2009	1-800F_00045184	1-800F_00045186		JX0002-A			
CX0234	Email from Bryce Craven to Contactlens.com re: Contactlens.com - 1800Contacts Negative Keyword Questions - Yahoo/Bing?	1/7/2010	1-800F_00045162	1-800F_00045165	CX0590, CX0735, RX0251, RX0925	JX0002-A			Tr. 605:25; 606:07; 634:13; 634:23
CX0235	INTENTIONALLY NOT USED					N/A			
CX0236	Email from Bryce Craven to Curtis P. re: Google Canada	3/31/2011	1-800F_00045152	1-800F_00045152	CX0722	JX0002-A			
CX0237 - CX0244	INTENTIONALLY NOT USED					N/A			
CX0245	Email from Clinton Schmidt to Kevin McCallum re: Affiliate T/Cs and Settlement Agreements	1/27/2005	1-800F_00037132	1-800F_00037133		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0246 - CX0253	INTENTIONALLY NOT USED					N/A			
CX0254	Email from Amy Larson to Allen Hwang re: 2007 and 2008 Results by Program w/Attach: 2007-2008-results-by-program.xls	3/10/2009	1-800F_00024844	1-800F_00024845		JX0002-A			
CX0255	Email from Bryce Craven to Jordan Judd and Brandon Dansie re: New Top TM terms w/Attach: Other Organizations on Trademarks_DATE.xls; Daily Other Organizations on TM_Date.xls, et al.	3/7/2008	1-800F_00026352	1-800F_00026355		JX0002-A			Tr. 682:10; 683:04; 685:15
CX0256	Email from Trevor Dow to Bryce Craven, Brandon Dansie and Jessica Faulkner re: other organizations on Trademarked Keywords 5.04.07 w/Attach: Trademark Offenders Contact Info 050407.doc; Other Organizations on Trademarked Keywords 050407_CAPProxy.doc	5/4/2007	1-800F_00026893	1-800F_00026936	CX0509, CX0238	JX0002-A			Tr. 681:23
CX0257 - CX0259	INTENTIONALLY NOT USED					N/A			
CX0260	Email from Ed McCreedy and Brandon Dansie re: 1-800 CONTACTS Settlement Agreement	8/15/2006	1-800F_00027916	1-800F_00027916		JX0002-A			
CX0261 - CX0266	INTENTIONALLY NOT USED					N/A			
CX0267	Email from Samantha Blair to Dave Walker, Kevin McCallum re: 1800 Contacts Trademark Infringement	7/9/2005	1-800F_00037471	1-800F_00037471	CX0120	JX0002-A			
CX0268 - CX0269	INTENTIONALLY NOT USED					N/A			
CX0270	Email from Dave Zeidner to Bryan G. Pratt, Richard Liebeskind and Jody Trapasso re: Vision Direct/Drugstore.com	12/12/2007	1-800F_00046016	1-800F_00046019		JX0002-A			
CX0271 - CX0278	INTENTIONALLY NOT USED					N/A			
CX0279	Email from Bryce Craven to Jessica Faulkner, Jordan Judd, et al. re: Competitor + TM Terms w/Attach: Other Organizations on Trademarks_010810.xlsx	1/8/2010	1-800F_00025155	1-800F_00025156	CX0458	JX0002-A			
CX0280 - CX0294	INTENTIONALLY NOT USED					N/A			
CX0295	Email from Laura Schmidt to Kevin Aldridge, Roger Gibson, Jerry Turner, et al. re: Marketing Plan Follow Ups w/Attach: Business Plan (xECOMM).pptx	1/22/2014	1-800F_00047573	1-800F_00047574		JX0002-A		Ordered 4/4/2017	
CX0296	Email from Laura Schmidt to Brian Bethers, Rob Hunter, Scott Osmond, et al. re: Paid Search and Affiliate Marketing Presentation w/Attach: Affiliate and Paid Search Update Final 2.6.15.pptx	2/5/2015	1-800F_00047236	1-800F_00047237		JX0002-A		Ordered 4/4/2017	Tr. 3785:08; 3785:11; 3785:12; 3786:02; 3796:04; 3796:05
CX0297	INTENTIONALLY NOT USED					N/A			
CX0298	Email from Joe Zeidner to Jonathan C, Kevin McCallum and Brian Bethers re: coastal contacts URLs	1/19/2008	1-800F_00042421	1-800F_00042422		JX0002-A			
CX0299	Email from Kevin McCallum to Brian Bethers re: Follow-up items w/Attach: Feb 2005 Online Qualitative Summary draft FINAL.DOC	8/3/2006	1-800F_00042120	1-800F_00042130		JX0002-A			
CX0300	Email from Jonathan Coon to Brian Bethers, Kevin McCallum, Allen Hwang, et al. re: DRAFT email to Fenway on Q4 market test	9/19/2007	1-800F_00042196	1-800F_00042197	CX0477	JX0002-A			Tr. 2823:04
CX0301 - CX0302	INTENTIONALLY NOT USED					N/A			
CX0303	Email from Brian Bethers to Joan Blackwood re: Search Deck w/Attach: Search Update-AUG 2011.pptx	8/31/2011	1-800F_00043109	1-800F_00043110	CX0631	JX0002-A			
CX0304 - CX0309	INTENTIONALLY NOT USED					N/A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0310	Settlement Agreement between 1-800 Contacts, Inc. and Coastal Contacts, Inc.	10/29/2004	1-800F_00037136	1-800F_00037153	CX1350, RX0479, RX0921, RX0398	JX0002-A			
CX0311	Settlement Agreement between 1-800 Contacts, Inc. and Vision Direct, Inc.	6/24/2004	1-800F_00037324	1-800F_00037331	CX1351, RX0399, RX0843, CX0143	JX0002-A			
CX0312	INTENTIONALLY NOT USED					N/A			
CX0313	Settlement Agreement between 1-800 Contacts, Inc. and EZ Contacts USA	5/12/2008	1-800F_00106496	1-800F_00106523	RX1145	JX0002-A			Tr. 2545:23; 2546:01; 2546:14; 2547:07; 2547:12; 2550:24; 2551:12; 2588:04; 2589:19
CX0314	Settlement Agreement and Mutual Release between 1-800 Contacts, Inc., Vision Direct, Inc. and drugstore.com	5/8/2009	1-800F_00023421	1-800F_00023437	CX0456	JX0002-A			Tr. 482:08; 484:16; 485:18
CX0315	Settlement Agreement between 1-800 Contacts, Inc. and Randolph Weigner and Lensfast, L.L.C d/b/a Contactlens.com, Lensfast.com, and E-Contacts.com	12/18/2009	1-800F_00021153	1-800F_00021163	RX0400, RX0665	JX0002-A			Tr. 2554:19; 2554:23; 2554:24; 2555:04; 2622:12
CX0316	1-800 Contacts, Inc. vs Vision Direct, Vision Direct., (Counterclaim Plaintiff) vs. 1-800 Contacts, Inc.; Case Number: 08-cv-01949 (GBD) (Counterclaim-Defendant) (Order of Permanent Injunction)	5/15/2009	CX0316-001	CX0316-005		JX0002-A	NH		
CX0317 - CX0318	INTENTIONALLY NOT USED					N/A			
CX0319	Settlement Agreement between 1-800 Contacts, Inc. and Empire Vision Center, Inc. d/b/a Lens123, HVHC, Inc., ECCA Enterprises, Inc., Eye Care Centers of America, Inc., Viva Optique, Inc., Davis Vision, Inc., Eye Care Holdings, Inc., et al.	5/13/2010	1-800F_00081147	1-800F_00081160	CX1353, RX0403, RX0667, RX1249, RX1819, RX1825	JX0002-A			
CX0320	Settlement Agreement between 1-800 Contacts, Inc. and Lenses for Less	3/23/2010	1-800F_00020857	1-800F_00020866	CX0818, RX0404, RX0867	JX0002-A			
CX0321	Settlement Agreement between 1-800 Contacts, Inc. and Tram Data, LLC d/b/a ReplaceMyContacts.com	5/18/2010	1800_FTC-00000112	1800_FTC-00000121	RX0405	JX0002-A			
CX0322	Settlement Agreement between 1-800 Contacts, Inc. and Walgreen Co.	6/29/2010	1-800F_00053309	1-800F_00053316	CX1352, RX0406	JX0002-A			Tr. 487:04
CX0323	Settlement Agreement between 1-800 Contacts, Inc. and Contact Lens King, Inc.	3/29/2010	1-800F_00020477	1-800F_00020486	CX0318, CX0149, RX0402	JX0002-A			
CX0324	Settlement Agreement between 1-800 Contacts, Inc. and Web Eye Care, Inc.	9/3/2010	WEBEYECARE0000057	WEBEYECARE0000066	CX1354, CX0011, RX0407	JX0002-A			
CX0325	INTENTIONALLY NOT USED					N/A			Tr. 863:11; 863:23
CX0326	Settlement Agreement between 1-800 Contacts, Inc. and Memorial Eye	11/26/2013	1-800F_00022040	1-800F_00022049	CX1348, RX0409, RX0480, RX1797	JX0002-A			Tr. 2618:12; 2618:16; 2620:22; 2620:24
CX0327	INTENTIONALLY NOT USED					N/A			
CX0328 - CX0329 - CX0330	Letter from Jonathan Coon to Representative Brad Last re: 1-800 Contacts Lobbying Efforts	3/3/2009	1-800F_00046815	1-800F_00046816		JX0002-A			
CX0331 - CX0332 - CX0403	Contact Lens Sourcing and Services Agreement between Luxottica Retail North America Inc., LensCrafter International, Inc., EYEXAM of California, Inc., EyeMed Vision Care LLC, Luxottica Retail Canada Inc., Leonardo Optical Corp, and 1-800 Contacts, Inc.	12/23/2013	1-800F_00053002	1-800F_00053168		JX0002-A			Tr. 3697:05; 3697:07; 3697:11; 3697:17
	INTENTIONALLY NOT USED					N/A			

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CX0404	Email from Bryan G. Pratt to Scott Slade, Dave Zeidner, Joe Zeidner, et al. re: 800 contacts response letter w/Attach: lensdirect letter.pdf	3/20/2006	1-800F_00045139	1-800F_00045145	CX0602	JX0002-A			
CX0405	INTENTIONALLY NOT USED					N/A			
CX0406	1-800 Contacts Report: List of negative keyword and match type	3/30/2015	1-800F_00024785	1-800F_00024785		JX0002-A			
CX0407 - CX0408	INTENTIONALLY NOT USED					N/A			
CX0409	Email from kathy.katemopoulos@mediavestww.com to Joan Blackwood, Laura Schmidt, Roger Gibson, et al. re: 1-800 CONTACTS: MMM Lite Presentation & Upfront TV Media Strategy Recommendation w/Attach: 1-800-CONTACTS MMM Lite v20.pdf	7/27/2012	1-800F_00031110	1-800F_00031176		JX0002-A			
CX0410	Email from Rick Galan to Marketing, kathy.katemopoulos@mediavestww.com, ciju.nair@smvgroup.com re: Search & Partner DB Week 25 - Ending 7/20/2012 w/Attach: Partner Dashboard 072312.xlsx; Search Dashboard_7-23-12.xlsx	7/23/2012	1-800F_00031197	1-800F_00031200	CX0077, CX0947	JX0002-A			
CX0411 - CX0417	INTENTIONALLY NOT USED					N/A			
CX0418	Email from Clinton Schmidt to Kevin McCallum re: FYI - J&J bidding on our trademark	7/26/2005	1-800F_00037464	1-800F_00037465	CX0163	JX0002-A			
CX0419 - CX0422	INTENTIONALLY NOT USED					N/A			
CX0423	1-800 Contacts Spreadsheet: Non-Trademark Weekly Data 2007 and 2008	9/1/2009	1-800F_00040542	1-800F_00040542		JX0002-A			
CX0424	Email from Rick Galan to Jonas Newsome and Jesse Brimhall re: Paid search costs	6/6/2013	1-800F_00052959	1-800F_00052963	CX0952	JX0002-A			
CX0425	Email from David Naffziger to Rick Galan and BrandVerity Support re: BrandVerity Feedback	5/30/2013	1-800F_00052996	1-800F_00053001		JX0002-A			
CX0426	INTENTIONALLY NOT USED					N/A			
CX0427	Email from Brady Roundy to Bryan Pratt, Roy Montclair, Kevin Hutchings re: Negative Keyword Matching	10/30/2014	1-800F_00053611	1-800F_00053612		JX0002-A			
CX0428	Email from Laura Schmidt to Tim Roush re: Board Meeting Presentation Draft - Improved Aquasoft Image on slide 27 w/Attach: November Board Meeting - Core Revenue Draft Plan.pptx	11/10/2014	1-800F_00053785	1-800F_00053852		JX0002-A		Ordered 4/4/2017	
CX0429	Email from Brian Bethers to Douglas Haber, Joshua Nelson, Jeff Swenson, et al. re: 1800 CONTACTS MP 110813_730amMT_bb.ppt w/Attach: 1800 CONTACTS MP 110813_730amMT_bb.ppt	11/8/2013	1-800F_00054890	1-800F_00054891		JX0002-A			Tr. 1519:18
CX0430	Email from Scott Osmond to Tim Roush re: 2015-05-12 Vision Directv2.pptx w/Attach: 2015-05-12 Vision Directv2.pptx	7/30/2015	1-800F_00056322	1-800F_00056323	RX0429	JX0002-A	*	Ordered 4/4/2017	Tr. 165:11; 166:13; 168:10; 168:13; 168:25; 170:06; 170:11; 2477:24; 2478:10; 2479:22
CX0431	INTENTIONALLY NOT USED					N/A			
CX0432	Email from Bryce Craven to curtisp@coastalcontacts.com re: Lensway.com - Google	3/3/2011	1-800F_00072173	1-800F_00072174		JX0002-A			Tr. 623:13; 624:23
CX0433	Email from Bryce Craven to Contactlens.com re: contactlens.com	11/14/2011	1-800F_00072514	1-800F_00072514		JX0002-A			
CX0434 - CX0438	INTENTIONALLY NOT USED					N/A			
CX0439	1-800 Contacts Presentation: Staff Final Update	12/00/15	FTC-1800VD-20161492	FTC-1800VD-20161585	RX1228	JX0002-A		Ordered 4/4/2017	
CX0440 - CX0441	INTENTIONALLY NOT USED					N/A			
CX0442	Email from SMACK@luxotticaRetail.com to Karen Kreider Gaunt re: 1-800 Contacts Update	5/11/2005	LUX00000377	LUX00000379		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0443	INTENTIONALLY NOT USED					N/A			
CX0444	Email from Greg Matthews to Mitch Wessels re: EyeMed/Contacts Direct	11/20/2014	LUX00000542	LUX00000551		JX0002-A			
CX0445	Email from Mitch Wessels to Thomas Hersch re: wording for sec 3.01	11/8/2013	LUX00000809	LUX00000812		JX0002-A			
CX0446 - CX0447	INTENTIONALLY NOT USED					N/A			
CX0448	Letter from Mark Miller to Jacques Matte re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	2/18/2010	1-800F_00020410	1-800F_00020413		JX0002-A	NH		
CX0449	Letter from Mark Miller to David Holmberg re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	2/26/2010	1-800F_00020544	1-800F_00020565	CX0636, RX0865	JX0002-A	NH		
CX0450	Letter from Mark Miller to Sam Lefkowitz and William Thomashower re: Breach of Settlement Agreement with 1-800 CONTACTS, Inc.	3/5/2013	1-800F_00020842	1-800F_00020845	RX0866	JX0002-A			
CX0451	INTENTIONALLY NOT USED					N/A			
CX0452	Letter from Mark Miller to Lenses for Less re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	1/21/2010	1-800F_00020868	1-800F_00020892	RX0868	JX0002-A	NH		
CX0453	Letter from Mark A. Miller to Randolph Weigmer re: Notice of Breach of Settlement Agreement with 1-800 Contacts, Inc.	5/30/2014	1-800F_00021201	1-800F_00021202		JX0002-A			
CX0454	Letter from Dave Zeidner to Memorial Eye, P.A. re: Trademark Infringement of 1800 Contacts Trademark in Sponsored Advertisements at Google and Related Search Engines	9/13/2005	1-800F_00021250	1-800F_00021264		JX0002-A	NH		
CX0455 - CX0458	INTENTIONALLY NOT USED					N/A			
CX0459	Email from Josh Aston to Kevin McCallum, Jason Mathison, Ann Harrison, et al. re: Web Report 7/14/2003 w/Attach: Web Reporting-071403-JA.xls	7/14/2003	1-800F_00036582	1-800F_00036584		JX0002-A			
CX0460	Email from Cary Pumphrey to Dave Zeidner re: Search Term inquiry	5/21/2010	1-800F_00046715	1-800F_00046715		JX0002-A	NH		
CX0461	1-800 Contacts, Inc., vs Contact Lens King, Inc.; Case Number. 2:10-cv-205 (Jury Demand)	3/8/2010	1800_FTC-00003056	1800_FTC-00003068	RX0412	JX0002-A	NH		
CX0462	Letter from Dave Zeidner to Lens.com, Inc. re: Trademark Infringement of 1800 Contacts Trademark in Sponsored Advertisements at Google and Related Search Engines	9/1/2005	1800_FTC-00011417	1800_FTC-00011422		JX0002-A	NH		
CX0463 - CX0467	INTENTIONALLY NOT USED					N/A			
CX0468	Email to Prashant Fuloria to Maria Stone, Rose Hagan, Nikhil Bhatla re: Preliminary results from user experiment #2	3/11/2004	GOOG-LENSE_00000943	GOOG-LENSE_00000944		JX0002-A			
CX0469	INTENTIONALLY NOT USED					N/A			
CX0470	Google Presentation: Domestic Trademark Policy Change Transition Plan Discussion	2/23/2004	GOOG-LENSE-00000910	GOOG-LENSE-00000914		JX0002-A		Ordered 4/4/2017	
CX0471	Email from Rose Hagan to metzenberg@yahoo.com, Alex Porter re: [C#8959245] AdWords Policy Update	4/13/2004	GOOG-LENSE-00001014	GOOG-LENSE-00001016		JX0002-A			
CX0472 - CX0473	INTENTIONALLY NOT USED					N/A			
CX0474	Email to Francois Hure to tmayhew@fenwaypartners.com, Jonathan C, Brian Bethers, et al. re: SLC Presentations w/Attach: 1800 CONTACTS SLC MP 111107- Essilor.pdf; 1800 CONTACTS SLC MP 111108 - Luxottica.pdf	11/4/2011	1-800F_00041141	1-800F_00041267		JX0002-A			

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CX0475 - CX0479	INTENTIONALLY NOT USED					N/A			
CX0480	1-800 Contacts Presentation: Leading the Online Optical Category- Presentation to Luxottica	9/20/2011	1-800F_00045058	1-800F_00045086		JX0002-A			
CX0481	Email from Bryce Craven to cabel@drugstore.com, ymorikubo@drugstore.com, Dave Zeidner re: Vision Direct showing up on several terms	12/22/2009	1-800F_00045149	1-800F_00045151	CX0145 , CX0721 CX1770, RX0063	JX0002-A			
CX0482	Email from Cary Pumpfrey to Dave Zeidner re: Keyword issues w/Attach: Walgreens Reports.xlsx	3/4/2010	1-800F_00045157	1-800F_00045159	CX1369	JX0002-A			
CX0483 - CX0488	INTENTIONALLY NOT USED					N/A			
CX0489	Email from Bryan G. Pratt to Anthony Hong, Dave Zeidner, Kristin L. Murphy, et al. re: comments on settlement proposal w/Attach: rfg.jpg	2/21/2009	1-800F_00045395	1-800F_00045399	RX0926	JX0002-A			
CX0490	Email from Cary Pumpfrey to Dave Zeidner re: Additional report w/Attach: 2010-03-08Walgreenskeywordrpt.pdf	3/11/2010	1-800F_00045448	1-800F_00045449	RX0927, RX0928	JX0002-A			
CX0491 - CX0493	INTENTIONALLY NOT USED					N/A			
CX0494	Email from Dave Zeidner to Cary Pumpfrey re: Information for Walgreens	5/11/2010	1-800F_00046295	1-800F_00046297		JX0002-A			
CX0495 - CX0504	INTENTIONALLY NOT USED					N/A			
CX0505	Email from Trevor Dow to Jessica Faulkner, Bryce Craven and Brandon Dansie re: Other orgs on our trademak keywords 8.17.07 w/Attach: Trademark Offenders Contact Info 081707.doc; 1800contacts-VD infringements 081707_CAPProxy.doc	8/17/2007	1-800F_00026529	1-800F_00026566		JX0002-A			
CX0506	INTENTIONALLY NOT USED					N/A			
CX0507	Email from Trevor Dow to Bryce Craven, Brandon Dansie aJessica Faulkner re: Other org. on trademark key 6.08.07 w/Attach: Coastal Infringements 06087 CAPProxy.doc; 1800contacts-VD infringements 06087_CAPProxy.doc	6/8/2007	1-800F_00026773	1-800F_00026810		JX0002-A			
CX0508	Email from Trevor Dow to Bryce Craven, Brandon Dansie and Jessica Faulkner re: other org on Trademark Keywords w/Attach: Other Organizations on Trademarked Keywords 05117_CAPProxy.doc; Traemark Offenders Contact Infor 951107.doc	5/11/2007	1-800F_00026859	1-800F_00026892		JX0002-A			
CX0509	INTENTIONALLY NOT USED					N/A			
CX0510	Email from Bryce Craven to Brandon Dansie, Jordan Judd, Amy Larson, et al. re: Search & Partner DB Week 6 - Ending 03/12/10 w/Attach: Partner Dashboard 031510.xlsx; Search Dashboard 03-15-10.xlsx	3/15/2010	1-800F_00028293	1-800F_00028294	CX0783	JX0002-A			Tr. 566:24
CX0511 - CX0524	INTENTIONALLY NOT USED					N/A			
CX0525	Email from Brian Bethers to John Graham and Joan Blackwood re: Essilor Management Presentation w/Attach: 1800 CONTACTS MP 120225 - Essilor.pdf; 1800 CONTACTS MP 120225 - Essilor MGMT.pdf	2/24/2012	1-800F_00032130	1-800F_00032252	RX0903, RX0904, RX0905	JX0002-A			
CX0526	Email from Brian Bethers to Joe Zeidner, Dave Walker, Max Neves, et al. re: Final Information Memorandum w/Attach: 1800 CONTACTS Information Memorandum Private Equity 120213.pptx; 1800 CONTACTS Information Memorandum Strategic 120213.ppt	2/14/2012	1-800F_00032425	1-800F_00032427	CX0201	JX0002-A			
CX0527	INTENTIONALLY NOT USED					N/A			

PUBLIC

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CX0528 CX0529 - CX0534	Email from Laura Schmidt to Joan Blackwood and Junhyon Park re: Other Organizations' ads on our Trademarks - 06/17/2011	7/28/2011	1-800F_00033574	1-800F_00033576		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0535 CX0536 - CX0538	Email from Brian Bethers to Graham Mullis, Joe Zeidner, Kevin McCallum, et al. re: Broad Presentation - 2006 Plan w/Attach: 2006 Business Plan Board Presentation.ppt	1/12/2006	1-800F_00037596	1-800F_00037597		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0539 CX0540 - CX0544	Email from Garth Vincent to Mark Miller, Joe Zeidner and Roy Montclair re: Confidential Settlement Proposal w/Attach: Lens.com Settlement Agreement (DRAFT).doc	2/4/2014	1-800F_00053401	1-800F_00053409		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0545 CX0546	Email from Brad Scott to Jay Magure re: % Sales by Quarter w/Attach: Online Contact Lens Competitor.xls; Online Contact Lense Competitors Web Sales_Chart.jpg	10/16/2008	1-800F_00053253	1-800F_00053256		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0547 CX0548	Email from Kami Wilson to Dave Walker, Joe Zeidner, John Murray re: Presentations w/Attach: 060314_Directors Meeting_final.pptx; 060314_Managers Meeting_final.pptx	6/18/2014	1-800F_00054389	1-800F_00054515		JX0002-A		Ordered 4/4/2017	Tr. 3833:08; 3833:15; 3833:16; 3834:10; 3838:06; 3841:24; 3843:13; 3843:19; 3844:02; 3844:04; 3844:21; 3844:22
	INTENTIONALLY NOT USED					N/A			
CX0549 CX0550 - CX0551	Email from Tim Roush to Diane Foster, Laura Schmidt, Justin Olson re: Presentation w/Attach: Business Plan TRR3.pptx	1/17/2014	1-800F_00055394	1-800F_00055395		JX0002-A		Ordered 4/4/2017	
	INTENTIONALLY NOT USED					N/A			
CX0552 CX0553 - CX0554	Email from Brandon Dansie to Kami Wilson re: Q Mgrs Presentation w/Attach: Managers and Directors Meeting - Web 120910.pptx; Q Mgrs Presentation_120910_137p_kw-bd.pptx	12/9/2010	1-800F_00058037	1-800F_00058045	CX0551, CX0951	JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0555	1-800 Contacts Presentation: Search Overview with Q1 Results	6/17/2009	1-800F_00058970	1-800F_00058970		JX0002-A			
CX0556 CX0557	Email from Brandon Dansie to Colin Veach re: Negative Keywords	10/9/2007	1-800F_00059119	1-800F_00059119		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0558	Email from Bryce Craven to Brandon Dansie, Amy Larson, Jordan Judd, et al. re: Search & Partner DB Week 21 06/20/08	6/23/2008	1-800F_00064458	1-800F_00064458		JX0002-A			Tr. 535:22; 536:14
CX0559 CX0560 - CX0563	Email from Bryce Craven to Jessica Faulkner to: [LIKELY SPAM] 1-800 CONTACTS New Search Restrictions - Plead read and come into compliance ASAP.	12/7/2009	1-800F_00072761	1-800F_00072764		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0564 CX0565 - CX0567	Email from Bryce Craven to Brandon Dansie, Jordan Judd, Amy Larson, et al. re: Search & Partner DB Week 20 - Ending 06/18/10 w/Attach: Partner Dashboard 062110.xls; Search Dashboard 06-21-10.xlsx	6/21/2010	1-800F_00072926	1-800F_00072932	CX0905	JX0002-A			
	INTENTIONALLY NOT USED					N/A			

PUBLIC

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0568	Email from Amber Powell to Ann Harrison, Amy Larson, Bryce Craven, et al. w/Attach: Online Exit Survey 11-03-09.xls; Customer Comments 10-2009.docx	11/4/2009	1-800F_00075411	1-800F_00075435		JX0002-A			
CX0569 CX0570 - CX0571	Email from Bryce Craven to Allen Hwang and Brandon Dansie re: Trademark Cost Estimate - eVision Ad INTENTIONALLY NOT USED	9/25/2007	1-800F_00076896	1-800F_00076896		JX0002-A			
CX0572 CX0573	Email from Mark Miller to Bryan Pratt, Bryce Craven and Dave Zeidner re: Negative Keywords INTENTIONALLY NOT USED	1/4/2010	1-800F_00079122	1-800F_00079125	CX0979, CX0824, CX0978, RX0984	JX0002-A N/A			
CX0574 CX0575	Email from Cary Samourkachian to Michael Pierce, Jeff Cummings and Ryan Van Horn re: technical contact INTENTIONALLY NOT USED	5/19/2008	CX0574-001	CX0574-002		JX0002-A N/A			
CX0576 CX0577	Email from Adrian Brajas to Baiju Hindocha, Mohit Bagga and Natalia Bohm re: Trademark Keywords Quality Score INTENTIONALLY NOT USED	11/6/2014	GOOG-LENSE-00000065	GOOG-LENSE-00000066	RX1320	JX0002-A		Ordered 4/4/2017	
CX0578 CX0579	Email from Google AdWords Trademark Team to Paige Rossetti re: [#199698076] Trademark Protection INTENTIONALLY NOT USED	9/27/2007	GOOG-LENSE-00000471	GOOG-LENSE-00000472		JX0002-A		Ordered 4/4/2017	
CX0580 CX0581	Email from Google AdWords Trademark Team to Fiona Sortor re: [#43650922] Trademark question Google: Customer Detail	1/13/2006 00/00/0000	GOOG-LENSE-00000859 GOOG-LENSE-00000918	GOOG-LENSE-00000860 GOOG-LENSE-00000918		JX0002-A		Ordered 4/4/2017	
CX0582 CX0583 CX0584 - CX0588	Email from Kulpreet Rana to Jacob Jacoby and Rose Hagan re: another test... w/Attach: Trademark Study 2.doc Google Spreadsheet: Query and Advertiser Contact Information INTENTIONALLY NOT USED	3/12/2004 00/00/0000	GOOG-LENSE-00000939 GOOG-LENSE-00001023	GOOG-LENSE-00000942 GOOG-LENSE-00001023	CX0467	JX0002-A		Ordered 4/4/2017	
CX0589 CX0590	Email from Bryce Craven to Adam Tarnowsky re: Violating 1-800 CONTACTS keyword bidding policies INTENTIONALLY NOT USED	4/13/2006	PL027819	PL027820	CX0588	JX0002-A			
CX0591 CX0592	Email from Bryan Pratt to Tony DeGidio and Dave Zeidner re: Unauthorized use of 1800 CONTACTS Trademark (Our Matter No. 40302-0012) Email from Bryan Pratt to Michael Kroll and Dave Zeidner re: 1-800 Contacts Trademarks	4/16/2007 10/25/2006	1-800F_00045872	1-800F_00045875 1-800F_00045929		JX0002-A			Tr. 2509:24; 2510:02; 2510:04; 2510:05; 2510:10; 2510:19
CX0593 CX0594 - CX0603	Email from Mark Miller to Park Studebaker and Matthew R. Jenkins re: Notice of Breach INTENTIONALLY NOT USED	8/5/2010	1-800F_00020967	1-800F_00020967		JX0002-A			
CX0604 CX0605	Email from Jordan Judd to Shan Shan Li re: New Negative terms on Lenshopper campaign Email from Brian Bethers to Tim Roush and Kami Brierty re: November Board Meeting - Marketing and Retail Plan.pptx w/Attach: November Board Meeting - Marketing and Retail Plan.pptx	2/24/2010 11/13/2014	1-800F_00057949	1-800F_00057950 1-800F_00056908		JX0002-A		Ordered 4/4/2017	
CX0606	Email from Brandon Dansie to Amy Larson, Sunny Baker, Bryce Craven, et al. re: Week 30 Acquisition Dashboards w/Attach: Search Dashboard 073007.xls; Aff DB_073007.xls; 2007 Top 25 Dashboard 073007.xls; Partner Dashboard 07 30 07.xls	8/2/2007	1-800F_00028702	1-800F_00028708	CX0242	JX0002-A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0607 - CX0611	INTENTIONALLY NOT USED					N/A			
CX0612	Email from Bryce Craven to Brandon Dansie and Jessica Faulkner re: Google Trademark Term Violation	4/17/2007	1-800F_00026948	1-800F_00026950		JX0002-A			
CX0613 CX0614 - CX0615	INTENTIONALLY NOT USED					N/A			
CX0616 CX0617 - CX0620	INTENTIONALLY NOT USED					N/A			
CX0616	Email from Brandon Dansie to Amy Larson, Bryce Craven, Jessica Faulkner, et al. re: Week 38 Acquisition Dashboards w/Attach: Search Dashboard 092407.xls; Aff DB_092408.xls; Aff DB_092407.xls; 2007 Top 25 Dashboard 092407.xls; Partner Dashboard 09 2407.xls	9/25/2007	1-800F_00028651	1-800F_00028657		JX0002-A			
CX0621	1-800 Contacts Board of Directors Meeting	10/30/2008	1-800F_00040726	1-800F_00040846		JX0002-A			Tr. 2751:14; 2752:02; 2752:12; 2754:07; 2756:23; 2757:09; 2758:08; 2760:12; 2763:10; 3648:09; 3649:06; 3663:16; 3665:25; 3667:03
CX0622 CX0623	INTENTIONALLY NOT USED					N/A			
CX0624 CX0625 - CX0626	INTENTIONALLY NOT USED					N/A			
CX0627 CX0628 - CX0636	INTENTIONALLY NOT USED					N/A			
CX0627	Email from Dave Zeidner to Joe Zeidner, Brian Dansie and Kevin McCallum re: VisionDirect Ads on 1800 CONTACTS' Trademarked Keywords 07/27/2007	8/1/2007	1-800F_00027932	1-800F_00027933		JX0002-A			
CX0637	Letter from Mark Miller to Lenses for Less re: Unauthorized Use of 1-800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	11/9/2009	1-800F_00020893	1-800F_00020895	RX0869	JX0002-A	NH		
CX0638	Letter from Mark Miller to Todd Messinger re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines (ReplacemyContacts complaint attached)	5/6/2010	1-800F_00023620	1-800F_00023643	RX0875	JX0002-A	NH		
CX0639	Letter from Mark Miller to Stephen Schubach re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	7/14/2010	1-800F_00023644	1-800F_00023646	RX0876	JX0002-A	NH		
CX0640	Letter from John Delaney to Mark Miller re 1-800 Contacts, Inc. v. Standard Optical, Company (Case No. 2:10-cv-00643)	9/1/2010	1-800F_00023647	1-800F_00023649		JX0002-A	NH		
CX0641 CX0642	INTENTIONALLY NOT USED					N/A			
CX0641	Letter from John Delaney to Mark Miller re: 1-800 Contacts, Inc. v. Standard Optical, Company (Case No. 2:10-cv-00643)	10/5/2010	1-800F_00023652	1-800F_00023653		JX0002-A	NH		
CX0643 CX0644	INTENTIONALLY NOT USED					N/A			
CX0643	Letter from Mark Miller to Web Eye Care, Inc. re: Infringing Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	8/10/2010	1-800F_00024267	1-800F_00024291	RX0002, RX0887	JX0002-A	NH		
CX0644	INTENTIONALLY NOT USED					N/A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0645	Email from Mike Allen to Bryce Craven re: 1-800 CONTACTS PPC Violation	1/19/2007	1-800F_00028910	1-800F_00028912		JX0002-A			
CX0646	Email from Amber Powell to Marketing, Brian Bethers, Junhyon Park, et al. re: Summary of Week 39 Core Web Results w/Attach: Core-Website-Overview-FY13-Week-39.docx; Web Channel Trend.xlsx	10/29/2012	1-800F_00030798	1-800F_00030802		JX0002-A			
CX0647	INTENTIONALLY NOT USED					N/A			
CX0648	Email from Brady Roundy to Scott Osmond, Garred Sheppard, Justin Smith, et al. re: Paid Search DB Week 26 Ending 7/4/2015 w/Attach: PPC Dashboard 20150706.xlsx	7/6/2015	1-800F_00056951	1-800F_00056953		JX0002-A		Ordered 4/4/2017	
CX0649 - CX0653	INTENTIONALLY NOT USED					N/A			
CX0654	Email from Bryce Craven to Laura Schmidt, Brandon Dansie, Jordan Judd, et al. re: Search & Partner DB Week 13- Ending 4/29/11 w/Attach: Search Dashboard 05-02-11.xlsx; Partner Dashboard 050211.xlsx	5/2/2011	1-800F_00027155	1-800F_00027158	CX0780	JX0002-A			
CX0655 - CX0656	INTENTIONALLY NOT USED					N/A			
CX0657	Email from Joan Blackwood to Jonathan C, Brian Bethers, John Murray, et al. re: Search & Partner DB Week 23 - Ending 7/8/11 w/Attach: Search Dashboard_07-11-11.xlsx; Partner Dashboard 071111.xlsx	7/11/2011	1-800F_00042791	1-800F_00042792	CX1457, CX0919	JX0002-A			
CX0658	Email from Joan Blackwood to Brian Bethers and Jonathan C. re: Search & Partner DB Week 22 - Ending 7/1/11 w/Attach: Search Dashboard_07-05-11.xlsx; Partner Dashboard 070511.xlsx	7/5/2011	1-800F_00042801	1-800F_00042804	CX0920	JX0002-A			Tr. 559:25; 564:24
CX0659 - CX0662	INTENTIONALLY NOT USED					N/A			
CX0663	Email from Brandon Dansie to Bryce Craven and Amy Guymon re: EZContactsUSA.com	11/7/2006	1-800F_00028960	1-800F_00028961		JX0002-A			
CX0664	Email from Bryce Craven to Laura Schmidt re: Other Organizations' ads on our Trademarks - 06/17/2011	6/21/2011	1-800F_00029805	1-800F_00029807		JX0002-A			
CX0665	Email from Bryce Craven to Laura Schmidt, Jordan Judd and Joan Blackwood re: Other Organizations' ads on our Trademarks - 06/17/2011	6/21/2011	1-800F_00029808	1-800F_00029812		JX0002-A			
CX0666 - CX0669	INTENTIONALLY NOT USED					N/A			
CX0670	Email from Bryce Craven to Laura Schmidt and Joan Blackwood re: Other Organizations' ads on our Trademarks - 06/17/2011 w/Attach: Other Organizations on Trademarks_061711.xls	6/21/2011	1-800F_00033749	1-800F_00033754		JX0002-A			
CX0671	Email from Joan Blackwood to Laura Schmidt re: Other Organizations' ads on our Trademarks - 06/17/2011	6/21/2011	1-800F_00035887	1-800F_00035888		JX0002-A			
CX0672 - CX0676	INTENTIONALLY NOT USED					N/A			
CX0677	Email from Kevin Hancock to Joe Zeidner, Clinton Schmidt and Kevin McCallum re: 1800 affiliate still showing up on search for "vision direct"	12/7/2004	1-800F_00037042	1-800F_00037042		JX0002-A			
CX0678	INTENTIONALLY NOT USED					N/A			
CX0679	Email from Clinton Schmidt to Kevin McCallum, Sunny Baker, Amy Guymon re: Online Rollup and Priorities w/Attach: Online Rollup yearend 2004.xls; Team Priorities wk of 01_03_2005.xls	1/4/2005	1-800F_00037205	1-800F_00037212		JX0002-A			
CX0680	INTENTIONALLY NOT USED					N/A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0681	Email from Clinton Schmidt to Kevin McCallum re: Trademark issue	5/6/2005	1-800F_00037286	1-800F_00037287		JX0002-A			
CX0682 - CX0692	INTENTIONALLY NOT USED					N/A			
CX0693	Email from Tim Roush to John Graham re: Fwd: Search word Q w/Attach: Search Term Q Data.xlsx	11/25/2014	1-800F_00056965	1-800F_00056967		JX0002-A			
CX0694 - CX0701	INTENTIONALLY NOT USED					N/A			
CX0702	Email from Bryce Craven to Jordan Judd, Shan Shan Li re: Lenses for less w/Attach: Jenkins re Lenses for Less 041510.pdf	4/20/2010	1-800F_00057984	1-800F_00057980		JX0002-A			
CX0703	Email from Roy Montclair to Brady Roundy re: Notice from 1-800 Contacts	6/11/2014	1-800F_00047456	1-800F_00047458		JX0002-A			
CX0704 - CX0708	INTENTIONALLY NOT USED					N/A			
CX0709	Email from Bryan Pratt to Matthew Jenkins, Mark Miller re: Lenses for less	1/25/2010	1-800F_00020910	1-800F_00020911		JX0002-A			
CX0710 - CX0712	INTENTIONALLY NOT USED					N/A			
CX0713	Email from Peter Wilson to Mark Miller re: 1800 Contacts	4/12/2012	1-800F_00024263	1-800F_00024266		JX0002-A			
CX0714	INTENTIONALLY NOT USED					N/A			
CX0715	Email from Brandon Dansie to Kevin McCallum re: Trademark Issue	8/25/2005	1-800F_00037429	1-800F_00037430		JX0002-A			
CX0716 - CX0718	INTENTIONALLY NOT USED					N/A			
CX0719	Email from Jordan Judd to Curtis Peterson and Rick Galan re: Trademark Keyword - 1-800 CONTACTS	2/24/2012	1-800F_00038800	1-800F_00038800		JX0002-A			
CX0720 - CX0723	INTENTIONALLY NOT USED					N/A			
CX0724	Letter from Bryan Pratt to Scott Sher re: Engagement Letter	1/11/2008	1-800F_00045685	1-800F_00045686		JX0002-A			
CX0725	Email from Dave Zeidner to Yuko Morikubo re: VisionDirect Ads on 1800 CONTACTS' Trademarked Keywords 9/25/07 w/Attach: 1800contacts-VD infringements 092507.doc	10/8/2007	1-800F_00045865	1-800F_00045871		JX0002-A			
CX0726 - CX0727	INTENTIONALLY NOT USED					N/A			
CX0728	Email from Brady Roundy to Roy Montclair re: Notice from 1-800 Contacts w/Attach: Capture.png; Capture 1.png; Capture 2.png; Capture 3.png	8/12/2014	1-800F_00047895	1-800F_00047900		JX0002-A			
CX0729 - CX0731	INTENTIONALLY NOT USED					N/A			
CX0732	Email from Bryce Craven to Laura Schmidt, Jordan Judd, and Eric Farmer re: Transition Items - Search w/Attach: Transition Items - Tasks and Login Information_Bryce.xlsx; Transition Doc-Bryce Craven_final.docx	11/22/2011	1-800F_00075572	1-800F_00075586		JX0002-A			Tr. 514:25; 520:15; 546:04; 546:07; 547:08; 579:24; 581:07; 581:11; 591:15; 591:22; 610:25; 624:10; 624:15; 630:06; 631:24
CX0733 - CX0739	INTENTIONALLY NOT USED					N/A			
CX0740	Letter from Peter Clarkson to Mark Miller re: Settlement Agreement with 1-800 Contacts, Inc.	6/4/2014	1-800F_00020532	1-800F_00020532	RX0864	JX0002-A	NH		Tr. 256:01; 256:03; 256:05
CX0741	Email from Mark Miller to J. Dreitler re: 1-800 Contacts/Arlington Contact Lens Service Agreement w/Attach: Acceptance of Agreement (2-25-2010).pdf	3/2/2010	1-800F_00023585	1-800F_00023586		JX0002-A	NH		
CX0742	Letter from Mitchell Goodman to Mark Miller, Reade Fahs, and Peter Clarkson re: 1-800 Contacts, Inc. - Arlington Contacts Lens Service, Inc.	8/29/2013	1-800F_00053345	1-800F_00053348		JX0002-A	NH		

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0743 - CX0745	INTENTIONALLY NOT USED					N/A			
CX0746	Letter from Mark Miller to Steven Bochen and Amy Benjamin re: Breach of October 29, 2004 Settlement Agreement with 1-800 Contacts	2/26/2013	1-800F_00020524	1-800F_00020526		JX0002-A			
CX0747	Letter from Mark Miller to Steven Bochen re: Breach of October 29, 2004 Settlement Agreement with 1-800 Contacts	3/5/2013	1-800F_00020527	1-800F_00020531		JX0002-A			
CX0748	Email from Curtis Peterson to Bryce Craven, Steve Bochen, and Mike Suh re: 1800 - on google for clearly and coastal	7/18/2008	1-800F_00026123	1-800F_00026124	CX0961	JX0002-A			
CX0749	Email from Kristin Jolley to Brandon Dansie and Amy Guymon re: CoastalContacts Agreement Infringement	5/26/2005	1-800F_00027002	1-800F_00027002		JX0002-A			
CX0750	Email from Kristin Jolley to Brandon Dansie and Amy Guymon re: Coastal Contacts	5/15/2005	1-800F_00027012	1-800F_00027012		JX0002-A			
CX0751	Email from Ed McCreedy to Brandon Dansie re: 1-800 CONTACTS Settlement Agreement w/Attach: 1800contacts-Coastal Infringements 11_16_06.doc	11/16/2006	1-800F_00027907	1-800F_00027914		JX0002-A			
CX0752	Letter from Amy Benjamin to Joe Zeidner re: Breach of Settlement Agreement	1/12/2006	1-800F_00028425	1-800F_00028427		JX0002-A	NH		
CX0753 - CX0754	INTENTIONALLY NOT USED					N/A			
CX0755	Letter from Roy Montclair to Steven Bochen re: Explanation of Corrective Action Taken by 1-800 CONTACTS, Inc. in Response to Letter dates January 20, 2006	2/13/2006	1-800F_00053279	1-800F_00053279		JX0002-A			
CX0756	Letter from Amy Benjamin to Joe Zeidner re: Breach of Settlement Agreement	1/20/2006	1-800F_00053420	1-800F_00053422		JX0002-A	NH		
CX0757	Email from Bryce Craven to Curtis Peterson re: 1-800-Contacts Negative Match	6/13/2011	1-800F_00069146	1-800F_00069146		JX0002-A			
CX0758	Email from Kristin Jolley to Brandon Dansie and Amy Guymon re: Affiliate Ads on CoastalContacts' Words	8/5/2005	PL027841	PL027841		JX0002-A			
CX0759 - CX0761	INTENTIONALLY NOT USED					N/A			
CX0762	Email from Laura Schmidt to Joan Blackwood, Angie Pace, and Rick Galan re: Revised Media Presentation and ? regarding PPC Performance w/Attach Media Review August 2013.pptx	8/2/2012	1-800F_00031043	1-800F_00031063		JX0002-A			
CX0763	INTENTIONALLY NOT USED					N/A			
CX0764	Email from Laura Schmidt to Joan Blackwood and Angie Pace re: media mtg this week - Updated Presentation w/Attach: Media Update_041912.pptx	4/18/2012	1-800F_00031876	1-800F_00031877		JX0002-A			
CX0765 - CX0767	INTENTIONALLY NOT USED					N/A			
CX0768	Email from Laura Schmidt to Joan Blackwood re: Paid Search Performance by Group w/Attach: Paid Search Performance by Group_Google-Bing_040111-070611_v2.xlsx	7/8/2011	1-800F_00033651	1-800F_00033653		JX0002-A			
CX0769 - CX0774	INTENTIONALLY NOT USED					N/A			
CX0775	Email from Amber Powell to Joshua Neilson, Amy Larson, Justin Puzey, et al. re: May 2011 Website Survey Results w/Attach: 2011-05 ForeSee and Exit Survey.xlsx; 2011-05 ForeSee Customer Comments.xlsx; 2011-05 Omniture Customer Comments.xlsx	6/28/2011	1-800F_00075522	1-800F_00075524		JX0002-A			
CX0776 - CX0785	INTENTIONALLY NOT USED					N/A			

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CX0786	Email from Clinton Schmidt to Roy Montclair, Samantha Blair, Brandon Dansie, et al. re: Vision Direct Infringements	1/4/2005	1-800F_00028416	1-800F_00028417		JX0002-A			
CX0787	Email from Josh Aston to Kevin McCallum, Jason Mathison, Ann Harrison, et al. re: Web Report 6/30/2003 w/Attach: Web Reporting-063003-JA.xls	6/30/2003	1-800F_00036576	1-800F_00036578		JX0002-A			
CX0788	INTENTIONALLY NOT USED					N/A			
CX0789	Email from Daniel Daugherty to Josh Aston re: Follow Up To TM email	4/9/2004	1-800F_00080734	1-800F_00080737	RX0454, RX0987	JX0002-A			
CX0790 - CX0794	INTENTIONALLY NOT USED					N/A			
CX0795	Letter from Neal Slifkin to Mark Miller re: 1-800 Contacts v. Contacts Lens King	4/29/2010	1-800F_00020341	1-800F_00020365		JX0002-A	NH		
CX0796	Letter from Mark Miller to Jacques Matte re: Breach of Settlement Agreement with 1-800 Contacts, Inc.	4/26/2010	1-800F_00020366	1-800F_00020375		JX0002-A			
CX0797	INTENTIONALLY NOT USED					N/A			
CX0798	Letter from Neal Slifkin to Mark Miller re: 1-800 Contacts v. Contact Lens King	3/30/2010	1-800F_00020387	1-800F_00020407		JX0002-A	NH		
CX0799	Letter from Mark Miller to Jacques Matte re: 1-800 Contacts, Inc. v. Contact Lens King, Inc., Case No. 2:10-cv-00205	3/11/2010	1-800F_00020408	1-800F_00020409		JX0002-A			
CX0800	Letter from Mark Miller to Jacques Matte re: Notice of Breach and Amendment to Settlement Agreement with 1-800 Contacts, Inc.	5/30/2014	1-800F_00020414	1-800F_00020416		JX0002-A			
CX0801 - CX0803	INTENTIONALLY NOT USED					N/A			
CX0804	Letter from Mark Miller to Roy Montclair re: Response from CLK w/Attach: 4621_001.pdf	6/10/2014	1-800F_00053332	1-800F_00053333		JX0002-A	NH		
CX0805	Email from Bryce Craven to Jordan Judd, Shan Shan Li, Brandon Dansie re: CLK- New negatives	3/18/2010	1-800F_00057931	1-800F_00057931		JX0002-A			
CX0806	INTENTIONALLY NOT USED					N/A			
CX0807	Email from Jordan Judd to Shan Shan Li and Bryce Craven re: New Affiliate Required Negative	2/19/2010	1-800F_00057988	1-800F_00057988		JX0002-A			
CX0808	1-800 Contacts, Inc. vs Empire Vision Center, Inc., d/b/a Lens123; Case Number: 2:10-cv-173 (Complaint)	2/25/2010	1800_FTC-00003079	1800_FTC-00003091	RX0413	JX0002-A			
CX0809	INTENTIONALLY NOT USED					N/A			
CX0810	Letter from J. Daniel Harkins to Mark Miller, Brett Calvert, Richard Enterline re: Cause No. 2:10-CV-173; 1-800 Contacts, Inc. v. Empire Vision Center, Inc. d/b/a Lens123	8/3/2010	1-800F_00020534	1-800F_00020534		JX0002-A	NH		
CX0811	Letter from Mark A. Miller to Brett Calvert and J. Daniel Harkins re: Amendment to Settlement Agreement with 1-800 Contacts, Inc.	7/28/2010	1-800F_00020535	1-800F_00020539		JX0002-A			
CX0812 - CX0815	INTENTIONALLY NOT USED					N/A			
CX0816	Email from Bryan Pratt to William Thomashower, Mary O'Donnell, Dave Zeidner re: EZ Contacts w/Attach: rfg.jpg; EZcontactsusa_082308.xls	8/28/2008	1-800F_00045485	1-800F_00045489		JX0002-A			
CX0817 - CX0821	INTENTIONALLY NOT USED					N/A			
CX0822	Email from Mark Miller to park2020@ameritech.net and Matthew Jenkins re: Notice of Breach of Settlement Agreement with 1-800 Contacts w/Attach: Notice of Breach (8-5-2010).pdf	8/5/2010	1-800F_00020957	1-800F_00020966		JX0002-A			
CX0823	Email from Mark Miller to Dan Garriott and Bryan Pratt re: Lensfast Settlement w/Attach: Lensfast Settlement Agreement.pdf	12/30/2009	1-800F_00021103	1-800F_00021118	CX0977	JX0002-A			
CX0824	INTENTIONALLY NOT USED					N/A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0825	Email from Bryce Craven to Contactlens.com re: Contactlens.com- 800 Adwords	5/4/2010	1-800F_00069147	1-800F_00069149		JX0002-A			
CX0826 - CX0827	INTENTIONALLY NOT USED					N/A			
CX0828	Letter from Kevin Drucker to Mark Miller re: Your May 6, 2010 Letter to Tram Data, LLC Our Ref.: 1121.000	5/13/2010	1-800F_00023609	1-800F_00023619	RX0073	JX0002-A	NH		
CX0829 - CX0832	INTENTIONALLY NOT USED					N/A			
CX0833	Email from Mark Miller to John Delaney re: Stipulation and Proposed Order w/Attach: Other Organizations on Trademarks_081310.xlsx	8/18/2010	1-800F_00023674	1-800F_00023677		JX0002-A			
CX0834 - CX0835	INTENTIONALLY NOT USED					N/A			
CX0836	Email from Bryce Craven to bdanise@1800contacts.com and jjudd@1800contacts.com re: Search & Partner DB Week 30- Ending 08/27/10	8/31/2010	1-800F_00063692	1-800F_00063693		JX0002-A			Tr. 531:21
CX0837	Letter from Mark Miller to Drugstore.com, Inc. re: Breach of June 24, 2004 Settlement Agreement with 1-800 Contacts	1/2/2013	1-800F_00024013	1-800F_00024015		JX0002-A			
CX0838	Email from Affiliates Marketing to Brandon Danise re: VisionDirect Ads on Trademark	7/28/2005	1-800F_00026994	1-800F_00026995		JX0002-A			
CX0839	INTENTIONALLY NOT USED					N/A			
CX0840	Email from Joe Zeidner to Clinton Schmidt and Kevin McCallum re: our agreement	7/26/2004	1-800F_00036912	1-800F_00036912	RX0160	JX0002-A			
CX0841 - CX0842	INTENTIONALLY NOT USED					N/A			
CX0843	Email from Dave Zeidner to David Steele re: Compliance with Settlement Agreement w/Attach: rfg.jpg; Settlement Agreement.pdf; Letter.pdf	2/11/2008	1-800F_00045650	1-800F_00045663	RX0941	JX0002-A			
CX0844	Email from Brandon Danise to Victoria Khemani and Colin Veach re: VisionDirect Ads on 1800 CONTACTS' Trademarked Keywords 8/24/07	8/27/2007	1-800F_00059088	1-800F_00059089		JX0002-A			
CX0845	Email from Rick Mitchell to Bryce Craven re: introduction	8/16/2010	1-800F_00078333	1-800F_00078334		JX0002-A			Tr. 610:17; 642:20
CX0846	INTENTIONALLY NOT USED					N/A			
CX0847	Email from Alesia Pinney to Joe Zeidner re: 1800 settlement violation	8/3/2004	1-800F_00046730	1-800F_00046730		JX0002-A			
CX0848 - CX0851	INTENTIONALLY NOT USED					N/A			
CX0852	Email from Joan Blackwood to Amy Larson re: Amy-Urgent Question w/Attach: Board Materials_combined_092910.pdf	9/29/2010	1-800F_00058241	1-800F_00058400		JX0002-A			
CX0853 - CX0854	INTENTIONALLY NOT USED					N/A			
CX0855	Email from Bryce Craven to Brandon Dansie, Jordan Judd, Jessica Faulkner, et al. re: Search & Partner DC Week 49 - Ending 01/08/10 w/Attach: Partner Dashboard 011110.xlsx; Search Dashboard 011110.xlsx	1/11/2010	1-800F_00025144	1-800F_00025146		JX0002-A			Tr. 538:09
CX0856 - CX0861	INTENTIONALLY NOT USED					N/A			
CX0862	Email from Joan Blackwood to Brian Bethers, Laura Schmidt, Jonathan C, et al. re: Media Strategy Meeting w/Attach: Copy of Google Breakdown Summary_April-June 2011.xlsx; Copy of Paid Search_Copy_Testing_Summary 2011.xlsx	7/6/2011	1-800F_00030787	1-800F_00030789		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0863	Email from Rick Galan to Marketing, kathy.katemopoulos@mediavestww.com, ciju.nair@smvgroup.com, et al. re: Search & Partner DB Week 35 - Ending 9/28/2012 w/Attach: Partner Dashboard 100112.xlsx; Search Dashboard_10-01-12.xlsx	10/1/2012	1-800F_00030850	1-800F_00030853		JX0002-A			
CX0864	Email from Laura Schmidt to Joan Blackwood re: Search & Partner DB Week 28 - Ending 8/10/2012 - Reach for last 4 weeks	8/14/2012	1-800F_00030980	1-800F_00030981		JX0002-A			
CX0865 - CX0866	INTENTIONALLY NOT USED					N/A			
CX0867	Email from Joan Blackwood to Joan Blackwood re: PPC rates w Google? Revised Answer	7/14/2012	1-800F_00031223	1-800F_00031224		JX0002-A			
CX0868	Email from Rick Galan to Marketing, kathy.katemopoulos@mediavestww.com, ciju.nair@smvgroup.com, et al. re: Search & Partner DB Week 23 - Ending 7/6/2012 w/Attach: Partner Dashboard 070912.xlsx; Search Dashboard_07-09-12.xlsx	7/9/2012	1-800F_00031258	1-800F_00031261		JX0002-A			
CX0869 - CX0870	INTENTIONALLY NOT USED					N/A			
CX0871	Email from Jordan Judd to Laura Schmidt, Rick Galan, Joan Blackwood, et al. re: Affiliates Info Request w/Attach: Commission Junction- Terms & Conditions 2006.docx; List of Restricted Terms- Affiliates.docx; Historical Affiliate List.xlsx	5/8/2012	1-800F_00031745	1-800F_00031757		JX0002-A			
CX0872 - CX0873	INTENTIONALLY NOT USED					N/A			
CX0874	Email from Amber Powell to Marketing, Brian Bethers, Junhyon Park, et al. re: Summary of Week 10 Web Results w/Attach: Website-Overview-FY13-Week-10.docx; Web Channel Trend.xlsx	4/9/2012	1-800F_00031921	1-800F_00031926		JX0002-A			
CX0875	Email from Rick Galan to Marketing, Christopher Coon, Seth Walters, et al. re: Search & Partner DB Week 10 - Ending 4/6/2012 w/Attach: Partner Dashboard 040912.xlsx; Search Dashboard_04-09-12.xlsx	4/9/2012	1-800F_00031932	1-800F_00031934		JX0002-A			
CX0876 - CX0877	INTENTIONALLY NOT USED					N/A			
CX0878	Email from Rick Galan to Christopher Coon, Laura Schmidt, Jordan Judd re: Search Testing and Anything Else	3/29/2012	1-800F_00031941	1-800F_00031941		JX0002-A			
CX0879	Email from Jordan Judd to Laura Schmidt and Rick Galan re: Search Promotions Analysis	4/4/2012	1-800F_00031942	1-800F_00031943		JX0002-A			
CX0880 - CX0882	INTENTIONALLY NOT USED					N/A			
CX0883	Email from Laura Schmidt to Joan Blackwood and Angie Pace re: Deal20 Paid Search Analysis w/Attach: Deal20 Test Summary_11-28-11.docx	11/29/2011	1-800F_00032935	1-800F_00032940		JX0002-A			
CX0884 - CX0885	INTENTIONALLY NOT USED					N/A			
CX0886	Email from Laura Schmidt to Joan Blackwood, Bryce Craven, Angie Pace re: Search & Partner DB Week 39- Ending 10/28/11	10/31/2011	1-800F_00033287	1-800F_00033288		JX0002-A			
CX0887	Email from Jordan Judd to Bryce Craven re: Trademark Monitoring Report w/Attach: Trademark Offenders Contact Info 052810.docx; Other Organizations on Trademarks_052810.xlsx; BrandVerityAdReport_TM_05.15-05.28.xlsx	5/28/2010	1-800F_00080039	1-800F_00080044		JX0002-A			Tr. 582:18; 582:20; 583:17; 584:05; 586:20

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0888 CX0889 - CX0900	Email from Prashant Fuloria to Rose Hagan, Michael Mayzel, Alana@Google.com, et al. re: PR Draft-Trademark FAQ/key msgs	3/30/2004	GOOG- LENSE-00000935	GOOG- LENSE-00000938		JX0002-A		Ordered 4/4/2017	
	INTENTIONALLY NOT USED					N/A			
CX0901 CX0902 - CX0903	Email from Bryce Craven to Jordan Judd, Betsy Kelleher, Amy Larson, et al. re: Search & Partner DB Week 44 - Ending 12/03/10 w/Attach: Daily Search DB_120610.xlsx; Partner Dashboard 120610.xlsx	12/6/2010	1-800F_00034538	1-800F_00034540	CX0259	JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0904 CX0905	Email from Brad Scott to Joan Blackwood re: Competitive Information w/Attach: Top 3 Product Online Price Comparison.xlsx; Online Contact Lens Company Overview Summary Report_2010 May 14.xlsm; Market Share 2010 YTD.xlsx; Industry Online Company Comparison	6/23/2010	1-800F_00034657	1-800F_00034661		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0906	Email from Bryce Craven to Brandon Dansie, Jordan Judd, Amy Larson, et al. re: Search & Partner DB Week 19 - Ending 06/11/10 w/Attach: Partner Dashboard 061410.xlsx; Search Dashboard 06-14-10.xlsx	6/14/2010	1-800F_00034676	1-800F_00034678		JX0002-A			
CX0907 CX0908 - CX0913	Email from Bryce Craven to Brandon Dansie, Jordan Judd, Amy Larson, et al. re: Search & Partner DB Week 18 - Ending 06/04/10 w/Attach: Partner Dashboard 060710.xlsx; Search Dashboard 06-07-10.xlsx	6/7/2010	1-800F_00034679	1-800F_00034682	CX0928	JX0002-A			Tr. 549:21
	INTENTIONALLY NOT USED					N/A			
CX0914	Email from Bryce Craven to Brandon Danise, Jordan Judd, Jessica Faulkner, et al. re: Search & Partner DB Week 5 - 03/06/09 w/Attach: Partner Dashboard 030909.xlsx; Search Dashboard 030909.xlsx	3/10/2009	1-800F_00025699	1-800F_00025702		JX0002-A			Tr. 525:14
CX0915	Email from Bryce Craven to Brandon Danise, Amy Larson, Jordan Judd, et al. re: Search & Partner DB Week 26_07/25/08 w/Attach: Search Dashboard 072808.xls; Partner Dashboard 072808.xls	7/28/2008	1-800F_00026126	1-800F_00026129		JX0002-A			Tr. 540:19; 545:04; 525:24; 546:08; 547:03; 547:06; 547:13; 548:09; 552:13
CX0916	Email from Bryce Craven to Marketing, Seth Walters, Kathy Katemopoulos, et al. re: Search & Partner DB Week 39 - Ending 10/28/11 w/Attach: Search Dashboard_10-31-11.xlsx; Partner Dashboard 103111.xlsx	10/31/2011	1-800F_00029066	1-800F_00028069		JX0002-A			Tr. 558:10
CX0917	Email from Justin Olson to Bryce Craven and Scott Shaw re: Search & Partner DB Week 23 - Ending 7/8/11	7/13/2011	1-800F_00029417	1-800F_00029419		JX0002-A			
CX0918 CX0919 - CX0920	Email from Bryce Craven to Laura Schmidt, Jordan Judd, Amy Larson, et al. re: Search & Partner DB Week 27- Ending 8/05/11 w/Attach: Search Dashboard_08-08-11.xlsx; Partner Dashboard 080811.xlsx	8/8/2011	1-800F_00029678	1-800F_00029681		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0921 CX0922	Email from Laura Schmidt to Bryce Craven re: Search & Partner DB Week 30 - Ending 8/26/11	8/29/2011	1-800F_00030402	1-800F_00030403		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0923	Email from Bryce Craven to Laura Schmidt, Brandon Danise, Jordan Judd, et al. re: Search & Partner DB Week 10 - Ending 4/8/11 w/Attach: Search Dashboard 0411-11.xlsx; Partner Dashboard 041111.xlsx	4/11/2011	1-800F_00033965	1-800F_00033968		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0924	Email from Bryce Craven to Brandon Danise, Jordan Judd, Amy Larson re: Search & Partner DB Week 13 - Ending 04/30/10 w/Attach: Partner Dashboard 050310.xlsx; Search Dashboard 05-03-10.xlsx	5/3/2010	1-800F_00034738	1-800F_00034741		JX0002-A			Tr. 576:16; 573:14;
CX0925	Email from Bryce Craven to Brandon Danise, Jordan Judd, Amy Larson re: Search & Partner DB Week 3 - Ending 02/19/10 w/Attach: Search Dashboard 02-22-10.xlsx; Partner Dashboard 022210.xlsx	2/22/2010	1-800F_00034827	1-800F_00034829		JX0002-A			
CX0926	INTENTIONALLY NOT USED					N/A			
CX0927	Email from Brandon Danise to Bryce Craven re: Search & Partner DB Week 21 - Ending 06/25/10	6/28/2010	1-800F_00061107	1-800F_00061109		JX0002-A			Tr. 571:01
CX0928 - CX0930	INTENTIONALLY NOT USED					N/A			
CX0931	Email from Bryce Craven to Brandon Dansie, Amy Larson, et al. re: Search & Partner DB Week 11 _ 04/11/08 w/Attach: Search Dashboard 041408.xls; Partner Dashboard 041408.xls	4/15/2008	1-800F_00067397	1-800F_00067402		JX0002-A			
CX0932 - CX0934	INTENTIONALLY NOT USED					N/A			
CX0935	Email from Bryce Craven to Jessica Faulkner and Jordan Judd re: TM KeyWord Management	6/22/2009	1-800F_00048850	1-800F_00048850		JX0002-A			Tr. 629:04; 632:20; 669:16; 671:16
CX0936 - CX0937	INTENTIONALLY NOT USED					N/A			
CX0938	Email from Clinton Schmidt to Joe Zeidner, Kevin McCallum re: 1-800 contacts showing up on keyword search for "Vision Direct"	10/21/2004	1-800F_00037008	1-800F_00037009	CX1540, RX0259	JX0002-A			Tr. 118:05
CX0939	Email from Joe Zeidner to Kevan Hancock, Clinton Schmidt re: 1800 affiliate still showing up on "Vision Direct" search	12/6/2004	1-800F_00037036	1-800F_00037036		JX0002-A			
CX0940	INTENTIONALLY NOT USED					N/A			
CX0941	Email from Kevin McCallum to Josh Aston re: Adwords w/Attach: Updated Trademark Letter_7.28.03.doc	1/30/2004	1-800F_00037070	1-800F_00037070		JX0002-A			
CX0942	Letter from Kevin McCallum to Google, Inc. re: Trademark Complaints	1/30/2004	1-800F_00037082	1-800F_00037082		JX0002-A			
CX0943	Declaration of Jared Duley and Exhibits	6/3/2016	FTC-PROD-0000913	FTC-PROD-0000957		JX0002-A		Ordered 4/4/2017	
CX0944	Email from Jordan Judd to Bryce Craven re: TM Monitor w/Attach Other Organizations on Trademarks_042508.xls; Trademark Offenders Contact Info 042508.doc	4/25/2008	1-800F_00073623	1-800F_00073627		JX0002-A			
CX0945	INTENTIONALLY NOT USED					N/A			
CX0946	Email from Joan Blackwood to Brian Bethers, Jonathan Coon re: Google searches for keywords w/Attach: Search_Overview_May 2011.ppts; 1800 contacts Google presentation.pdf	6/19/2011	1-800F_00041846	1-800F_00041900	CX0076, CX0401, CX0634	JX0002-A			Tr. 1610:08; 1611:06
CX0947 - CX0953	INTENTIONALLY NOT USED					N/A			
CX0954	Email from Tim Roush to Brian Bethers re November Board Meeting - Core Revenue Plan.pptx w/Attach: November Board Meeting - Core Revenue Plan.pptx	11/13/2014	1-800F_00054955	1-800F_00055025		JX0002-A		Ordered 4/4/2017	
CX0955 - CX0959	INTENTIONALLY NOT USED					N/A			
CX0960	Email from Brady Roundy to Cindy Williams, Roy Montclair, Garth Vincent re: Bidding on our Brand Terms w/Attach: 1.png	8/4/2015	1-800F_00053430	1-800F_00053431		JX0002-A			
CX0961	INTENTIONALLY NOT USED					N/A			
CX0962	Email from curtisp@coastalcontacts.com to Bryce Craven re: 1800 Contacts advertising on our name	8/28/2008	1-800F_00079103	1-800F_00079103		JX0002-A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0963 - CX0964	INTENTIONALLY NOT USED					N/A			
CX0965 CX0966 - CX0967	1-800 Contacts, Inc. v. Standard Optical Company Complaint Case No. 2:10-cv-643	7/3/2010	Standard000001	Standard000025	RX0420, RX1821	JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0968	Letter from Mark Miller to South Hills Family Eye Care re: Unauthorized Use of 1-800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	11/9/2009	1-800F_00084049	1-800F_00084051	RX1038	JX0002-A			
CX0969	Letter from Sherman Pierce to Mark Miller re: South Hills Family Eye Care	11/19/2009	1-800F_00084048	1-800F_00084048		JX0002-A	NH		
CX0970	Letter from Timothy Feathers to Mark Miller re: Claim of Unauthorized Use of 1-800-CONTACTS, Inc.'s Trademarks in Sponsored Advertisements	11/30/2009	1-800F_00084045	1-800F_00084046	CX0720	JX0002-A	NH		
CX0971 CX0972	Letter from Sherman Pierce to Mark Miller re: South Hills Family Eye Care	1/14/2010	1-800F_00084047	1-800F_00084047		JX0002-A	NH		
	INTENTIONALLY NOT USED					N/A			
CX0973	Letter from Arshil Abdulla to Mark Miller re: 1-800 CONTACTS INC.'s Trademarks	2/18/2010	1-800F_00084044	1-800F_00084044		JX0002-A	NH		
CX0974	Letter from Mark Miller to Opticontacts.com re: Unauthorized Use of 1-800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	11/9/2009	1-800F_00084008	1-800F_00084010	RX0068	JX0002-A			
CX0975	Letter from Arshil Abdulla to Mark Miller re: 1-800 CONTACTS INC.'s Trademarks	11/12/2009	1-800F_00084016	1-800F_00084016	CX1233, RX0069, RX0265	JX0002-A	NH		
CX0976 CX0977 - CX0979	Letter from Arshil Abdulla to Mark Miller re: 1-800 CONTACTS INC.'s Trademarks	12/30/2009	1-800F_00084011	1-800F_00084012	CX1239, RX0071	JX0002-A	NH		
	INTENTIONALLY NOT USED					N/A			
CX0980 CX0981 - CX0982	Email from Rick Galan to Marketing re Search & Partner DB Week 39 - Ending 10/26/2012 w/Attach: Partner Dashboard 102912.xlsx; Search Dashboard_10-29-12.xlsx	10/29/2012	1-800F_00030794	1-800F_00030797		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0983	Email from Rick Galan to Laura Schmidt, Tim Roush, Scott Osmond re: Search Questions w/Attach: Rick Slides.pptx	10/3/2013	1-800F_00052888	1-800F_00052891	RX0794	JX0002-A			
CX0984 CX0985	Email from Rick Galan to Marketing, Christopher Coon, Scott Osmond, et al. re: Search DB Week 35 w/Attach: Search Weekly Dashboard 20130903.xlsx	9/4/2013	1-800F_00052898	1-800F_00052900		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0986 CX0987	Email from Rick Galan to Phil Barrett re: Slides with Performance w/Attach: 20130821 Ecommerce Update - Search.pptx	8/21/2013	1-800F_00052911	1-800F_00052932		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0988	Letter from Mark Miller to Sharp Contacts Trading Co re: Unauthorized Use of 1-800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	11/9/2009	1-800F_00084005	1-800F_00084007	RX1034	JX0002-A			
CX0989 CX0990 - CX0993	Letter from Mark Miller to Robert Cohen re: Infringing Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	6/6/2011	1-800F_00083981	1-800F_00083992		JX0002-A			
	INTENTIONALLY NOT USED					N/A			
CX0994	Email from Josh Aston to Kevin McCallum re: Problem	1/23/2004	1-800F_00080461	1-800F_00080461		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX0995 - CX1006	INTENTIONALLY NOT USED					N/A			
CX1007 CX1008 - CX1014	Email from Clint Schmidt to Josh Aston re: mktg plan for 2004 w/Attach: CTAC Online Marketing Strategy DRAFT v2 short.ppt INTENTIONALLY NOT USED	2/20/2004	1-800F_00080493	1-800F_00080494		JX0002-A			
CX1015 CX1016 - CX1035	Email from Joe Zeidner to Kevin McCallum re: Our Pricing INTENTIONALLY NOT USED	5/8/2004	1-800F_00080558	1-800F_00080559		JX0002-A			
CX1036	Email from Amber Powell to Marketing, Brian Bethers, Junhyon Park et al re Summary of Week 32 Core Web Results w/attach: Core-Website-Overview-FY13-Week32.docx; Web Channel Trend.xlsx	9/10/2012	1-800F_00030886	1-800F_00030890		JX0002-A			
CX1037 CX1038 - CX1047	Email from Brandon Dansie to Joan Blackwood, Bryce Craven, Jordan Judd and Amy Larson re: Search & Partner DB Week 24- Ending 07/06/10 INTENTIONALLY NOT USED	7/21/2010	1-800F_00034598	1-800F_00034600		JX0002-A			
CX1048 CX1049 - CX1053	Email from Bryce Booth to Kevin McCallum, Jason Mathison, Josh Aston re Web Report 9/29/03 w/Attach: Web Reporting 092903 BB.xls INTENTIONALLY NOT USED	9/29/2003	1-800F_00036633	1-800F_00036635	RX0907, RX0908	JX0002-A			
CX1054 CX1055 - CX1056	Email from Josh Aston to Kevin McCallum re RE: Google in January INTENTIONALLY NOT USED	2/9/2004	1-800F_00036779	1-800F_00036780	RX0797	JX0002-A			
CX1057	Email from Glen Hamilton to Rick Galan re A new term for your negative list for Vision Direct: [www.visiondirect.com]	3/18/2013	WAG-00000094	WAG-00000094		JX0002-A			Tr. 414:01; 414:04; 414:06; 416:05
CX1058	Email from Rick Galan to Glen Hamilton re: Trademarks	7/24/2013	WAG-00000097	WAG-00000097		JX0002-A			
CX1059	Email from Andrea Kaduk to Adam Garcia re: FW: Connect and apologize	4/12/2012	WAG-00000103	WAG-00000103		JX0002-A			
CX1060	Email from Rick Galan to Andrea Kaduk re: Some Trademark issues	7/12/2013	WAG-00000109	WAG-00000109		JX0002-A			
CX1061	Email from Clinton Schmidt to Kevin McCallum re: Focus DAILIES 5-Day Free Trial Follow up	8/23/2004	1-800F_00036948	1-800F_00036949		JX0002-A			
CX1062 CX1063 - CX1067	1-800 Contacts v Drugstore.com & Vision Direct Complaint INTENTIONALLY NOT USED	12/28/2007	1-800F_00045690	1-800F_00045772	RX0421	JX0002-A			Tr. 2606:06
CX1068	Email from Jordan Judd to Bryce Craven re TM Monitor w/Attach: Trademark Offenders Contact Info110708.doc; Other Organizations on Trademarks_110708.xls	11/7/2008	1-800F_00074058	1-800F_00074064	RX0798	JX0002-A			
CX1069	Email from Jordan Judd to Bryce Craven re Trademark Report w/Attach: Other Organizations on Trademarks_031309.xlsx; Trademark Offenders Contact Info 031309.docx	3/13/2009	1-800F_00074242	1-800F_00074248		JX0002-A			
CX1070	Email from Jordan Judd to Bryce Craven re TM Monitoring report w/attach: Other Organizations on Trademarks_032009.xlsx; Trademark Offenders Contact Info 032009.docx	3/20/2009	1-800F_00074250	1-800F_00074253		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1071	Email from Jordan Judd to Bryce Craven re TM Monitoring report w/Attach: Trademark Offenders Contact Info 041610.docx; Other Organizations on Trademarks_041610.xlsx; BrandVerityAdReport_TM_04.10-04.16.xlsx	4/16/2010	1-800F_00080014	1-800F_00080018		JX0002-A			
CX1072	Email from Jordan Judd to Bryce Craven re TM Monitor Report w/Attach: Trademark Offenders Contact Info 061110.docx; Other Organizations on Trademarks_061110.xlsx; BrandVerityAdReport_TM_06.05-06.11.xlsx	6/11/2010	1-800F_00080047	1-800F_00080051		JX0002-A			
CX1073 - CX1075	INTENTIONALLY NOT USED					N/A			
CX1076	Email from Bryce Craven to Betsy Kelleher, Amy Larson, Jordan Judd, and Brandon Dansi re: Search & Partner DB Week 39- Ending 10/29/10 w/Attach: Search Dashboard 11-01-10.xlsx; Partner Dashboard 110110.xlsx	11/1/2010	1-800F_00027448	1-800F_00027449		JX0002-A			
CX1077 - CX1085	INTENTIONALLY NOT USED					N/A			
CX1086	Email from Amber Powell to Laura Schmidt and Rick Galan re: just sayin...	8/7/2012	1-800F_00088369	1-800F_00088369		JX0002-A			
CX1087	Email from Nick Stanley to Peter Clarkson and Bob Drumm re: DCL Adwords CPC/CAC w/Attach: yahoo.dcl00001.png	10/30/2015	ACLENS-00020212	ACLENS-00020218		JX0002-A			
CX1088	INTENTIONALLY NOT USED					N/A			
CX1089	Email from Brian Work to Peter Clarkson, Philip Dietrich and Bob Drumm re: Info for Consultant w/Attach: ACLens Digital Marketing00001.docx	1/22/2014	ACLENS-00022867	ACLENS-00022888		JX0002-A			
CX1090 - CX1094	INTENTIONALLY NOT USED					N/A			
CX1095	AC Lens Presentation: AC Lens Due Diligence	6/3/2011	ACLENS-00017177	ACLENS-00017377		JX0002-A			
CX1096 - CX1099	INTENTIONALLY NOT USED					N/A			
CX1100	Email from Peter Clarkson to Phil Dietrich re: October 31 Letter	11/1/2005	ACLENS-00000262	ACLENS-00000263		JX0002-A			
CX1101 - CX1102	INTENTIONALLY NOT USED					N/A			
CX1103	Email from Kelli Ford to Peter Clarkson re: UPP Analysis w/Attach: UPP Margin Impact.xlsx	9/29/2014	ACLENS-00000184	ACLENS-00000185		JX0002-A			
CX1104	Email from Josh Kirsten to Peter Clarkson, Robert Drumm and Kelli Ford re: UPP Margin Analysis w/Attach: UPP Margin Impact 0316.xlsx	4/4/2016	ACLENS-00000210	ACLENS-00000211		JX0002-A			
CX1105	Email from Brian Frank to Robert Drumm, Philip Dietrich and Peter Clarkson re: 1800Contact Trademark Infringement	9/28/2008	ACLENS-00000363	ACLENS-00000364	CX1763, RX0024	JX0002-A			
CX1106	INTENTIONALLY NOT USED					N/A			
CX1107	Letter from Mark Miller to Peter Clarkson re: Breach of Settlement Agreement with 1-800 Contacts, Inc. w/Enclosures	4/23/2010	ACLENS-00000342	ACLENS-00000354		JX0002-A			
CX1108	INTENTIONALLY NOT USED					N/A			
CX1109	Email from Peter Clarkson to Brian Frank and Phil Dietrich re: 1-800 Berkshire firm memo materials w/Attach: 1-800 Firm Memo 5.14_full pack.pdf	5/10/2012	ACLENS-00021699	ACLENS-00021790		JX0002-A			Tr. 203:24; 204:06; 281:17; 296:06; 299:21; 309:07; 310:17; 892:18; 893:01; 893:13; 894:10; 894:16; 923:21; 926:16; 2114:05; 2114:07
CX1110	Email from Phil Dietrich to Peter Clarkson and Brian Frank re: Business case for making EGW our attempt at crossing the 800Contacts moat	3/28/2014	ACLENS-00021158	ACLENS-00021159		JX0002-A			Tr. 214:12; 214:13

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1111	Email from Edward Casserley to Peter Clarkson re: Online Eyewear Purchasing Consumer Surveys w/Attach: Aperia Online Eyewear Slides_v01.pdf; BPL_Vision Survey vFinal.pdf	8/13/2014	ACLENS-00021334	ACLENS-00021398		JX0002-A			
CX1112	INTENTIONALLY NOT USED					N/A			
CX1113	Email from Peter Clarkson to Admingroup@aclenscorp.com re: Monthly Update	5/31/2016	ACLENS-00018387	ACLENS-00018393		JX0002-A			
CX1114	INTENTIONALLY NOT USED					N/A			
CX1115	Email from Robert Drumm to Peter Clarkson re: Keyword Expansion/Conversion Optimizer w/Attach: AC Lens_Keyword Expansion 10.17.11.xlsx; Conversion_Optimizer_data.pdf	10/25/2011	ACLENS-00018061	ACLENS-00018069		JX0002-A			
CX1116	INTENTIONALLY NOT USED					N/A			
CX1117	Presentation: Where's the love? Deadfile Customer Survey	1/8/2013	1-800F_00092273	1-800F_00092273	RX1129	JX0002-A			Tr. 154:21; 889:18; 890:06; 894:03; 1452:19; 1531:11; 1533:08; 1533:11; 1535:25; 1776:21; 1777:03-04; 1781:06; 1783:13; 1794:14
CX1118	INTENTIONALLY NOT USED					N/A			
CX1119	Email from Natalia Bohm to Baiju Hindocha re: Avg. CPC Increase	5/14/2014	GOOG-LENSE-00000282	GOOG-LENSE-00000286	RX1353	JX0002-A		Ordered 4/4/2017	
CX1120	Email from Natalia Bohm to Kevin Hutchings, Brady Roundy, Adrian Barajas, et al. re: Avg. CPC Increase w/Attach: 1-800Contacts-AuctionInsights.xlsx	5/14/2014	GOOG-LENSE-00000299	GOOG-LENSE-00000301	CX1121, RX1161, RX1360, RX1361	JX0002-A			
CX1121 - CX1123	INTENTIONALLY NOT USED					N/A			
CX1124	Email from Natalia Bohm to Mohit Bagga and po5@google.com re: Clinic interaction in category: Adelphi Tracking Category>Brand & Performance>Troubleshooting (Fix/Explain)>Search>Ad Serving & Quality>Ad Serving>Performance/Traffic Fluctuation>CPC Fluctuatio	10/8/2015	GOOG-LENSE-00001187	GOOG-LENSE-00001188	RX1508	JX0002-A		Ordered 4/4/2017	
CX1125	Complaint - 1-800 Contacts v. Lens.com	8/13/2007	1-800F_00008879	1-800F_00008997		JX0002-A			Tr. 2515:25; 2640:17; 2641:09
CX1126 - CX1133	INTENTIONALLY NOT USED					N/A			
CX1134	Email from Prashant Fuloria to tish@google.com, adimarco@google.com, bart@google.com, et al. re: Trademark policy transition - update #2 (2/25)	2/25/2004	GOOG-LENSE-00000870	GOOG-LENSE-00000871	RX1385	JX0002-A		Ordered 4/4/2017	
CX1135	Email from Prashant Fuloria to Sheryl Sandberg, Tim Armstrong, Salar Kamangar re: Trademark user experiment results and timing of policy changes	2/25/2004	GOOG-LENSE-00001017	GOOG-LENSE-00001017		JX0002-A		Ordered 4/4/2017	
CX1136	Email from Prashant Fuloria to Salar Kamangar re: Trademark policy transition - update #3 (3/2)	3/3/2004	GOOG-LENSE-00001021	GOOG-LENSE-00001022		JX0002-A		Ordered 4/4/2017	
CX1137 - CX1142	INTENTIONALLY NOT USED					N/A			
CX1143	Email from Ramsey Homsany to rose@google.com, bismarck@google.com re: Trademark Presentation w/Attach: Trademark Policy.PPT	3/26/2004	GOOG-LENSE-00000872	GOOG-LENSE-00000882		JX0002-A		Ordered 4/4/2017	
CX1144 - CX1147	INTENTIONALLY NOT USED					N/A			
CX1148	AdWords U.S. Trademark Policy Development Timeline	00/00/0000	GOOG-LENSE-00000261	GOOG-LENSE-00000261		JX0002-A			
CX1149	Google Trademark Document	00/00/0000	GOOG-LENSE-00000131	GOOG-LENSE-00000260		JX0002-A			
CX1150 - CX1154	INTENTIONALLY NOT USED					N/A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1155	Email from Kevin Hutchings to Natalia Bohm, Brady Roundy and Adrian Barajas re: Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000080	GOOG-LENSE-00000081	CX1123, CX1153, RX1328	JX0002-A			
CX1156 - CX1158	INTENTIONALLY NOT USED					N/A			
CX1159	AdWords Help: Keyword Planner: Get search volume data and trends	00/00/0000	GOOG-LENSE-00001208	GOOG-LENSE-00001209		JX0002-A			
CX1160	1800 Contacts Presentation: Project Venus	00/00/0000	1-800F_00091135	1-800F_00091135		JX0002-A		Ordered 4/4/2017	
CX1161	INTENTIONALLY NOT USED					N/A			
CX1162	Email from Douglas Haber to Jeff Swenson, Joshua Nelson, Brian Bethers, et al. re: Vision w/Attach: 2015-05-12 Vision Directv2.pptx	5/14/2015	1-800F_00091702	1-800F_00091704	RX0444	JX0002-A	*	Ordered 4/4/2017	Tr. 168:10; 168:13; 168:25; 170:06; 170:11; 830:02
CX1163 - CX1164	INTENTIONALLY NOT USED					N/A			
CX1165	Presentation: Deadfile, Where They Went	11/28/2016	1-800F_00092274	1-800F_00092274	RX1130	JX0002-A			
CX1166	Negative Keywords	00/00/0000	GOOG-LENSE-00001215	GOOG-LENSE-00001215	RX1522, RX0118	JX0002-A			
CX1167	AdWords Help: Using Broad Match	00/00/0000	GOOG-LENSE-00001351	GOOG-LENSE-00001353	RX0115	JX0002-A			
CX1168	AdWords Help: About keyword matching options	00/00/0000	GOOG-LENSE-00001491	GOOG-LENSE-00001493		JX0002-A			
CX1169	INTENTIONALLY NOT USED					N/A			
CX1170	Ads Quality Communications Document - Search (DRAFT)	2/22/2002	GOOG-LENSE-00004081	GOOG-LENSE-00004089	RX1641, RX0125	JX0002-A		Ordered 4/4/2017	
CX1171	INTENTIONALLY NOT USED					N/A			
CX1172	Google Spreadsheet: Query and Impressions information	00/00/0000	GOOG-LENSE-00001028	GOOG-LENSE-00001028		JX0002-A		Ordered 4/4/2017	
CX1173	INTENTIONALLY NOT USED					N/A			
CX1174	Email from Bismarck Lepe to ad-sales@google.com amd Rose Hagan re: TM Update: Legal/Policy Email Sent	4/8/2004	GOOG-LENSE-00000906	GOOG-LENSE-00000906		JX0002-A		Ordered 4/4/2017	
CX1175 - CX1176	INTENTIONALLY NOT USED					N/A			
CX1177	Email from Dave Zeidner to Cary Pumphrey re: Additional report	4/6/2010	1-800F_00084176	1-800F_00084178	RX1043	JX0002-A			Tr. 589:01; 589:02
CX1178	Email from Bryce Craven to Laura Schmidt re: Search Question	7/27/2011	1-800F_00088443	1-800F_00088446	CX0714	JX0002-A			
CX1179	INTENTIONALLY NOT USED					N/A			
CX1180	1-800 Contacts, Inc. v. Arlington Contacts Lens Service, Inc., d/b/a Discount Contact Lenses; Case Number: 2:10-cv-131 (Civil Cover Sheet, Complaint)	2/18/2010	CX1180-001	CX1180-013	RX0411	JX0002-A			
CX1181	1-800 Contacts, Inc. v. Arlington Contact Lens Service, Inc., d/b/a Discount Contact Lenses; Case Number: 2:10-cv-131 (Notice of Voluntary Dismissal)	3/10/2010	CX1181-001	CX1181-001		JX0002-A			
CX1182	1-800 Contacts, Inc. v. Lens.com, Inc. d/b/a as Lens.com, Justlens.com and JustLenses.com; Case Number: 2:07-cv-00591 (First Amended Complaint and Jury Demand)	8/15/2008	1-800F_00081289	1-800F_00081314		JX0002-A			
CX1183	Index of Exhibits to First Amended Complaint	00/00/0000	1-800F_00081315	1-800F_00081416		JX0002-A			
CX1184	Declaration of Bryan Pratt, 1-800 Contacts, Inc. v. Lens.com, Inc. d/b/a as Lens.com, Justlens.com and Justlenses.com; Case Number: 2:07-cv-00591	2/23/2009	1-800F_00006405	1-800F_00006492		JX0002-A			Tr. 2572:06; 2579:16; 2579:20; 2580:01
CX1185	Description of Monitoring Activities	00/00/0000	CX1185-001	CX1185-001		JX0002-A			
CX1186	Letter from Arshil Abdulla to Bryan Pratt re: Your Ref # 40302-00012	6/4/2009	LDV_0001046	LDV_0001048		JX0002-A	NH		
CX1187 - CX1203	INTENTIONALLY NOT USED					N/A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1204	Email from Brady Roundy to Glen Hamilton re: Trademark Terms	6/4/2014	WAG-00000096	WAG-00000096		JX0002-A			Tr. 410:14,19; 411:14; 416:05
CX1205	INTENTIONALLY NOT USED					N/A			
CX1206	Vision Direct Excel Spreadsheet	10/4/2007	WAG-00000031	WAG-00000031		JX0002-A			
CX1207	Vision Direct Excel Spreadsheet	00/00/0000	WAG-00000032	WAG-00000032		JX0002-A			
CX1208 - CX1209	INTENTIONALLY NOT USED					N/A			
CX1210	Presentation: IVD 2005 Budget Discussion	12/1/2004	WAG-00000037	WAG-00000037		JX0002-A			
CX1211	Presentation: Contact Lens Business Overview	1/12/2005	WAG-00000038	WAG-00000038		JX0002-A			
CX1212	INTENTIONALLY NOT USED					N/A			
CX1213	Spreadsheet: Overview by product	00/00/0000	WAG-00000046	WAG-00000046		JX0002-A			
CX1214	Spreadsheet: Acuvue information	00/00/0000	WAG-00000051	WAG-00000051		JX0002-A		Ordered 4/4/2017	
CX1215	Spreadsheet: Orders, Sales, Profit and AOV information	00/00/0000	WAG-00000053	WAG-00000053		JX0002-A		Ordered 4/4/2017	
CX1216	Spreadsheet: Walgreens.com Contact Lens Category (Placed Order Data)	00/00/0000	WAG-00000054	WAG-00000054		JX0002-A		Ordered 4/4/2017	
CX1217	Email from Abel Cabrelle to Mark Miller re: Receipt of January 2, 2013 Letter	1/4/2013	WAG-00000098	WAG-00000098		JX0002-A	NH		
CX1218	Email from Andrea Kaduk to James Lerner: 1800 Negs-Master List w/attach: 1800_Negs_All.xlsx	4/12/2012	WAG-00000100	WAG-00000100		JX0002-A			
CX1219	Spreadsheet: Keyword information	4/12/2012	WAG-00000101	WAG-00000101		JX0002-A			
CX1220	Email from Greg Mintzias to Andrea Kaduk re: 2 Confirmations for FTC (1800 contacts)	9/8/2015	WAG-00000106	WAG-00000106		JX0002-A			
CX1221	INTENTIONALLY NOT USED					N/A			
CX1222	Spreadsheet: Report on Negative Keywords	00/00/0000	WAG-00000003	WAG-00000003		JX0002-A		Ordered 4/4/2017	
CX1223	Email from Jordan Judd to Bryce Craven re: Trademark Monitoring Report	5/23/2011	1-800F_00062665	1-800F_00062665		JX0002-A			
CX1224 - CX1226	INTENTIONALLY NOT USED					N/A			
CX1227	Letter from Arshil Abdulla to Mark Miller re 1-800 Contacts inc.'s Trademarks	2/18/2010	LDV_0000001	LDV_0000002		JX0002-A	NH		
CX1228	INTENTIONALLY NOT USED					N/A			
CX1229	Cease & Desist Letter from 1-800 Contacts Outside Counsel to LensDiscounters	5/12/2009	LDV_0000170	LDV_0000178		JX0002-A			
CX1230	Letter from Arshil Abdulla to Bryan Pratt re 1-800 Contacts Trademark in Sponsored Advertisements Ref# 40302-00012	9/23/2005	LDV_0000185	LDV_0000185		JX0002-A	NH		
CX1231	INTENTIONALLY NOT USED					N/A			
CX1232	Cease & Desist Letter from 1-800 Contacts to LensDiscounters	11/9/2009	LDV_0000187	LDV_0000189		JX0002-A			
CX1233	Letter from Arshil Abdulla to Mark Miller re: 1-800 Contacts Inc's, Trademarks	11/12/2009	LDV_0001044	LDV_0001045		JX0002-A	NH		
CX1234	Cease & Desist Letter from 1-800 Contacts to LensDiscounters	12/29/2009	LDV_0001049	LDV_0001051		JX0002-A			
CX1235	Cease & Desist Letter from 1-800 Contacts to LensDiscounters	9/20/2005	LDV_0001275	LDV_0001277	CX0644	JX0002-A			
CX1236	Cease & Desist Letter from 1-800 Contacts to LensDiscounters	2/17/2010	LDV_0001278	LDV_0001279		JX0002-A			
CX1237	Cease & Desist Letter from 1-800 Contacts to LensDiscounters	6/28/2005	LDV_0001282	LDV_0001283		JX0002-A			
CX1238	Letter from David Zeidner to Arshil Abdulla re Trademark Infringement of 1800 CContacts Trademark in Sponsored Advertisements at Google and Related Search Engines	9/6/2005	LDV_0001284	LDV_0001288		JX0002-A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1239	Letter from Arshil Abdulla to Mark Miller re 1-800 Contacts Inc.'s Trademarks	12/30/2009	LDV_0001289	LDV_0001292		JX0002-A	NH		
CX1240	INTENTIONALLY NOT USED					JX0002-A			
CX1241	Cease & Desist Letter from 1-800 Outside Counsel to LensDirect	6/6/2011	LD000001	LD000011	CX0435	N/A			Tr. 970:02; 970:12; 970:14; 972:01; 973:05; 973:18; 975:25; 1007:21; 1031:07
CX1242	LensDirect outside counsel Response to Cease & Desist Letter from 1-800	6/14/2011	LD000012	LD000013		JX0002-A	NH		Tr. 974:02; 974:08; 974:13
CX1243 - CX1253	INTENTIONALLY NOT USED					N/A			
CX1254	Email from Bryan Pratt to Tony DeGidio, Bryce Craven, Brandon Dansie, et al. re: Unauthorized use of 1800 CONTACTS Trademark	4/16/2007	1-800F_00045880	1-800F_00045883		JX0002-A			
CX1255 - CX1256 - CX1308	1-800 Contacts v. Lensworld.com, Inc; Case Number: 2:08-cv-015-SA (Motion for Entry of Default Judgement)	9/8/2008	CX1255-001	CX1255-035		JX0002-A			
CX1309	Profit & Loss: ShipMyContacts.com (Jan through Dec 2011)	10/4/2016	ME10000718	ME10000721		JX0002-A		Granted 4/12/2017	Tr. 2035:15; 2035:16; 2036:02; 2038:01
CX1310	Profit & Loss: Memorial Eye, P.A. (Jan through Dec 2011)	10/4/2016	ME10000722	ME10000731		JX0002-A		Granted 4/12/2017	
CX1311	Profit & Loss: Better Vision, P.A. (Jan through Dec 2011)	10/4/2016	ME10000732	ME10000741		JX0002-A		Granted 4/12/2017	
CX1312	Email from Kirsten Y to Elio Sanchez re: [#385713264] 366016827: Your "Campaign #1" optimization is ready	1/9/2009	ME10000794	ME10000795		JX0002-A			
CX1313 - CX1314 - CX1315	Letter from Bryan Pratt to IWantContacts.com in TX re: Unauthorized Use of the 1800CONTACTS and 1 800 CONTACTS Trademarks; Use of 1800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Related Search Engines	5/12/2009	ME10000808	ME10000814	RX1792	JX0002-A			Tr. 2631:01; 2631:08; 2631:19
CX1316	Settlement agreement between 1-800 Contacts, Inc. and Memorial Eye P.A., Memorial Eye P.A. d/b/a Shipmycontacts.com, Memorial Eye P.A. d/b/a Ship-My-Contacts.com and Memorial Eye P.A. d/b/a iwantcontacts.com	11/26/2013	ME10001101	ME10001110	RX1795	JX0002-A			Tr. 1936:03; 1936:06; 1937:12; 1938:19; 1940:03; 2052:01; 2053:16; 2053:19; 2054:18; 2054:21; 2055:19
CX1317	Letter from ShipMyContacts.com to Valued Customers re: Suspension of Online Contact Lens Operations	10/27/2014	ME10001320	ME10001320	RX1798	JX0002-A			
CX1318 - CX1319 - CX1333	Letter from Bryan Pratt to Elio Sanchez in TX re: Unauthorized Use of the 1800CONTACTS and 1 800 CONTACTS Trademarks; Use of 1800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Related Search Engines	2/27/2008	ME10001352	ME10001358		JX0002-A			Tr. 2527:20; 2528:15
CX1334	Presentation: Price Matching Review	9/2/2016	1-800F_00084718	1-800F_00084718		JX0002-A		Ordered 4/4/2017	Tr. 1614:23
CX1335	Presentation: 1-800 Contacts Vistakon UPP Pricing Proposal	6/24/2014	1-800F_00089460	1-800F_00089483	RX1116	JX0002-A		Ordered 4/4/2017	
CX1336	Email from Kami Wilson to Tim Roush re: Combined board presentation w/Attach: 111814_BOD Combined Presentation.pptx	11/17/2014	1-800F_00056699	1-800F_00056905		JX0002-A		Ordered 4/4/2017	
CX1337 - CX1338	Email from Dustin Dipo to Mike Nielson re: Price Matching	7/6/2016	1-800F_00084271	1-800F_00084273		JX0002-A			
CX1339	1-800 Contacts price matching graphs	00/00/2016	1-800F_00084253	1-800F_00084253		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1340	INTENTIONALLY NOT USED					N/A			
CX1341	Price Matching: Best Practices & Guidelines booklet	TBD	1-800F_00084258	1-800F_00084270		JX0002-A			
CX1342	INTENTIONALLY NOT USED					N/A			
CX1343	Report: Staff Final Update, 1-800 Contacts	12/00/2015	1-800F_00091505	1-800F_00091570		JX0002-A		Ordered 4/4/2017	Tr. 941:20; 942:08; 1681:14; 1682:05
CX1344	Email from Matt Maddox to Lola Ogundimu, Christine Sheehan, Andrew Feola, et al. re: 2016 Week 21 Reporting 1-800 Contacts	5/31/2015	1-800F_00097083	1-800F_00097106		JX0002-A			
CX1345	INTENTIONALLY NOT USED					N/A			
CX1346	Presentation: 1-800 Contacts UPP Update	9/30/2014	1-800F_00097411	1-800F_00097411		JX0002-A		Ordered 4/4/2017	
CX1347	Notice of deposition from the FTC to 1-800 Contacts, Inc.	12/28/2016	CX1347-001	CX1347-006		JX0002-A			
CX1348 - CX1358	INTENTIONALLY NOT USED					N/A			
CX1359	Data on 1-800 Contacts Clickstream To/From Competitors	00/00/0000	1-800F_00090423	1-800F_00090423		JX0002-A			
CX1360 - CX1361	INTENTIONALLY NOT USED					N/A			
CX1362	Email from Amy Larson to Brad Scott and Joan Blackwood re: FW: Clickstream Report	4/18/2011	1-800F_00090185	1-800F_00090186		JX0002-A			
CX1363	INTENTIONALLY NOT USED					N/A			
CX1364	Email from Joan Blackwood to Jonas Newsome, Laura Schmidt, Amber Powell, et al. re: Weekly web conversion dashboard	1/16/2012	1-800F_00093862	1-800F_00093864		JX0002-A			
CX1365 - CX1367	INTENTIONALLY NOT USED					N/A			
CX1368	Email from Amber Powell to Marketing, Brian Bethers, Junhyon Park, et al. re: Summary of Week 27 Web Results	8/8/2011	1-800F_00094141	1-800F_00094146		JX0002-A			
CX1369 - CX1374	INTENTIONALLY NOT USED					N/A			
CX1375	Email from Andrea Kaduk to Rick Galan, Brady Roundy re: Trademark Issues	2/6/2014	1-800F_00088272	1-800F_00088272		JX0002-A			
CX1376	Email from Curtis Petersen to Rick Galan, Brady Roundy re: New Contact	2/6/2014	1-800F_00088273	1-800F_00088273		JX0002-A			
CX1377	INTENTIONALLY NOT USED					N/A			
CX1378	Email from Clinton Schmidt to Connie Ross, Brandon Dansie re: 1-800-CONTACTS contact info	5/10/2005	1-800F_00088265	1-800F_00088265		JX0002-A			
CX1379 - CX1382	INTENTIONALLY NOT USED					N/A			
CX1383	Google Spreadsheet: Keyword Data	00/00/0000	GOOG-LENSE-00000861	GOOG-LENSE-00000861		JX0002-A		Ordered 4/4/2017	
CX1384 - CX1390	INTENTIONALLY NOT USED					N/A			
CX1391	Email from Steve Evans to Brady Roundy et al. re 2015 Week 48 Digital Commerce Dashboard w/attach: Digital Commerce Dashboard- CY15 Wk48.xlsx	12/8/2015	1-800F_00096769	1-800F_00096770		JX0002-A		Ordered 4/4/2017	
CX1392	INTENTIONALLY NOT USED					N/A			
CX1393	Walmart Spreadsheet: Ad Group and Keyword Data	00/00/0000	WM2016-022541C001036	WM2016-022541C011898		JX0002-A			
CX1394 - CX1395	INTENTIONALLY NOT USED					N/A			
CX1396	Email from Daniel Daugherty to Josh Aston re: Adwords	1/29/2004	1-800F_00080466	1-800F_00080467	RX0795	JX0002-A			Tr. 114:07
CX1397	Email from Kevin McCallum to clintmvp10@yahoo.com (Clint Schmidt), Josh Aston re: Strategy w/attach: 1-800 Contacts_Google Advertisements.doc	2/13/2004	1-800F_00102782	1-800F_00102784	RX1133, RX1134	JX0002-A			Tr. 2894:15; 2894:20; 2897:16; 2942:09
CX1398 - CX1402	INTENTIONALLY NOT USED					N/A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1403	Letter from Mark Miller to Brett Calvert & J. Daniel Harkins re: Amendment to Settlement Agreement with 1-800 Contacts, Inc.	7/28/2010	VISIONWORKS00000834	VISIONWORKS00000838	CX0811	JX0002-A			
CX1404 - CX1430	INTENTIONALLY NOT USED					N/A			
CX1431	Email from Lauren Hawks to Rick Galan re: SEM post 1/1 Vision change	1/2/2013	1-800F_00088358	1-800F_00088359		JX0002-A			
CX1432	Email from Rick Galan to Lauren Hawks re: Sams Club Bidding	2/26/2013	1-800F_00088345	1-800F_00088345		JX0002-A			
CX1433	Email from Rick Galan to Lauren Hawks re: Walmart on 1800Contacts Brand Terms	4/5/2013	1-800F_00088420	1-800F_00088421		JX0002-A			
CX1434 - CX1440	INTENTIONALLY NOT USED					N/A			
CX1441	Response of 1-800 Contacts, Inc. to Complaint Counsel's First Set of Requests for Admissions	9/19/2016	CX1441-001	CX1441-025		JX0002-A			
CX1442	Respondent's Preliminary Witness List	10/24/2016	CX1442-001	CX1442-016		JX0002-A			
CX1443	INTENTIONALLY NOT USED					N/A			
CX1444	Email from Angie Pace to Laura Schmidt, Tim Roush re: QMM Presentation and Agenda w/attach: QMSM 12-19-13.doc; Presentation QMM 12-19-13.pptx	12/18/2013	1-800F_00054876	1-800F_00054878		JX0002-A			
CX1445	Email from Kami Wilson to Tim Roush re: 1-800 background ppt w/attach: 1800 CONTACTS MP Private Equity MGMT 120402_NO JCoon.ppt	3/28/2013	1-800F_00055784	1-800F_00055785		JX0002-A			
CX1446	Email from Sami Nazif to Brian Bethers, Jeff Swenson, Joshua Nelson, et al. re: Updated Management Presentation w/attach: 1800 Management Presentation 150926.pdf; 1800 Management Presentation 150926.ppt	9/25/2015	1-800F_00056173	1-800F_00056231	RX0428	JX0002-A		Ordered 4/4/2017	
CX1447	Presentation: 1-800 Contacts 2015 Q2 Product & Pricing Review	7/23/2015	1-800F_00089486	1-800F_00089486	RX1117	JX0002-A		Ordered 4/4/2017	
CX1448	INTENTIONALLY NOT USED					N/A			
CX1449	AEA Investors Bain & Company Project Mars-Integrated Materials Deck	3/28/2016	1-800F_00096399	1-800F_00096615	RX0447	JX0002-A		Ordered 4/4/2017	Tr. 931:21; 932:13; 939:20; 941:04
CX1450 - CX1457	INTENTIONALLY NOT USED					N/A			
CX1458	Information on price match/price beat policy	00/00/0000	1-800F_00053175	1-800F_00053175		JX0002-A			
CX1459	Email from Tim Roush to Phil Barrett, Dane Folster, Laura Schmidt, et al. re: Can you send me report we reviewed this afternoon?	6/6/2013	1-800F_00055885	1-800F_00055887		JX0002-A			
CX1460	INTENTIONALLY NOT USED					N/A			
CX1461	2015 exact match, substring match, and co-occurring word counts	00/00/0000	GOOG-LENSE-00000064	GOOG-LENSE-00000064		JX0002-A		Ordered 4/4/2017	
CX1462	INTENTIONALLY NOT USED					N/A			
CX1463	2011-2016 Weekly QB Data, 2016-11-03 Lens Direct FTC Production	00/00/0000	CX1463-001	CX1463-001		JX0002-A			
CX1464	Lens.com Spreadsheet: Production of Data to FTC	12/29/2016	CX1464	CX1464		JX0002-A		Ordered 4/4/2017	
CX1465	Coastal Contacts CL Revenue (total revenue)	00/00/0000	FTC-PROD-0011007	FTC-PROD-0011007		JX0002-A		Ordered 4/4/2017	
CX1466	AC Lens Responses to Specs 4-8 Letter	00/00/0000	CX1466-001	CX1466-004		JX0002-A			
CX1467	WebEyeCare Spreadsheet: Sales by Product	00/00/0000	FTC-WEC-0000029	FTC-WEC-0000029		JX0002-A		Ordered 4/4/2017	
CX1468	Letter from Mark Miller to Jacques Matte re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	2/18/2010	CLK_001	CLK_001	CX0448	JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1469	Email from Jordan Judd to Bryce Craven re: TM Monitor w/attach: Trademark Offenders Contact Info 021210.docx	2/12/2010	1-800F_00079982	1-800F_00079983		JX0002-A			
CX1470	INTENTIONALLY NOT USED					N/A			
CX1471	Coastal Contacts Sales by Product	00/00/0000	FTC-PROD-0011008	FTC-PROD-0011008		JX0002-A		Ordered 4/4/2017	
CX1472	Letter from Bryan Pratt to Contactlensking.com re: Unauthorized Use of the 1800CONTACTS and 1800 CONTACTS Trademarks; Use of 1800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Related Search Engines	5/12/2009	CLK_003	CLK_003		JX0002-A			
CX1473	Contact Lens King 2015 Sales	00/00/0000	CLK_052	CLK_052		JX0002-A		Ordered 4/4/2017	
CX1474	Contact Lens King 2016 Sales	00/00/0000	CLK_054	CLK_054		JX0002-A		Ordered 4/4/2017	
CX1475	INTENTIONALLY NOT USED					N/A			
CX1476	Contact Lens King Adgroups negative keyword report	00/00/0000	CLK_793	CLK_793		JX0002-A		Ordered 4/4/2017	
CX1477	Visionworks contacts 2015 margins	00/00/0000	Visionworks00000750	Visionworks00000750		JX0002-A		Ordered 4/4/2017	
CX1478	INTENTIONALLY NOT USED					N/A			
CX1479	LensDirect Spreadsheet: 2011-2016 Sales/Revenue/Profit/Costs	00/00/0000	LDV_0000481	LDV_0000481		JX0002-A		Ordered 4/4/2017	
CX1480	Spreadsheet: Lensfast 2011 P&L	00/00/0000	Lensfast-00031	Lensfast-00031		JX0002-A			
CX1481	Spreadsheet: Lensfast 2012 P&L	00/00/0000	Lensfast-00032	Lensfast-00032		JX0002-A			
CX1482	Spreadsheet: Lensfast 2013 P&L	00/00/0000	Lensfast-00033	Lensfast-00033		JX0002-A			
CX1483	Spreadsheet: Lensfast 2014 P&L	00/00/0000	Lensfast-00034	Lensfast-00034		JX0002-A			
CX1484	Spreadsheet: Lensfast 2015 P&L	00/00/0000	Lensfast-00035	Lensfast-00035		JX0002-A			
CX1485	INTENTIONALLY NOT USED					N/A			
CX1486	Contactlens.com campaign negative keywords	00/00/0000	Lensfast-000025	Lensfast-000025		JX0002-A			
CX1487	Standard Optical negative keywords	00/00/0000	Goog-Lense-00000033	Goog-Lense-00000033		JX0002-A		Ordered 4/4/2017	
CX1488	AC Lens Spreadsheet: 2004-2016 Phone/Online/Shipment/Total data	00/00/0000	ACLENS-00000001	ACLENS-00000001		JX0002-A			
CX1489	Walgreens 2015 Cost/Revenue/Profit data	00/00/0000	WAG-00000074	WAG-00000074	RX1842	JX0002-A		Ordered 4/4/2017	
CX1490	Walgreens 2016 cost/revenu/profit data	00/00/0000	WAG-00000075	WAG-00000075	RX1843	JX0002-A		Ordered 4/4/2017	
CX1491 - CX1492	INTENTIONALLY NOT USED					N/A			
CX1493	Email from Mike Suh to Lori Ahn, Curtis Petersen re: Visa Perks Google Campaign	4/7/2010	COA-00000836	COA-00000838		JX0002-A			
CX1494 - CX1500	INTENTIONALLY NOT USED					N/A			
CX1501	Letter from Curtis Petersen to Mike Suh re: Trademark Keyword - 1-800 Contacts	2/28/2012	COA-00000750	COA-00000751		JX0002-A			
CX1502	Email from Mike Suh to Lisa Craveiro re: Coastal.com	6/11/2012	COA-00000881	COA-00000882		JX0002-A			
CX1503	Email from Curtis Petersen to Lisa Craveiro, Mike Suh re: Trademarks on Mobile	9/5/2012	COA-00000734	COA-00000734		JX0002-A			
CX1504	INTENTIONALLY NOT USED					N/A			
CX1505	Email from Mike Suh to Curtis Petersen re: Negative match on trademark	10/31/2012	COA-00000797	COA-00000798		JX0002-A			
CX1506	Email from Curtis Petersen to Mike Suh re: Trademark	12/4/2012	COA-00000898	COA-00000900		JX0002-A			
CX1507 - CX1508	INTENTIONALLY NOT USED					N/A			
CX1509	Email from Curtis Petersen to Mike Suh, Steve Szeto re: FW: Bidding on our Brand Terms	1/14/2014	COA-00000909	COA-00000910		JX0002-A			
CX1510	Walgreens 2013-2016 sales data	00/00/0000	WAG-00000076	WAG-00000076	RX1844	JX0002-A		Ordered 4/4/2017	

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1511 - CX1512	INTENTIONALLY NOT USED					N/A			
CX1513	Letter from Bryan Pratt to Cary Samourkachian re: Unauthorized Use of the 1800CONTACTS and 1800 CONTACTS Trademarks; Use of 1800 CONTACTS, INC.'s Trademarks in Sponsored Advertisements at Google and Related Search Engines	9/20/2005	1-800F_00081167	1-800F_00081169		JX0002-A			Tr. 2498:15; 2499:12; 2499:13; 2504:24; 2505:20; 2565:17; 2580:20; 2581:02; 2613:09; 2613:10
CX1514 - CX1520	INTENTIONALLY NOT USED					N/A			
CX1521	Email from Mark Miller to Pete Wilson re Breach of 1-800 Contacts/Walgreens Agreement w/Attach: Screen Shots 12-17-2010.pdf	12/20/2010	1-800F_00083937	1-800F_00083940		JX0002-A			
CX1522	INTENTIONALLY NOT USED					N/A			
CX1523	Email from Peter Wilson to Mark Miller re: 1800 Contacts	4/11/2012	1-800F_00083950	1-800F_00083952		JX0002-A	NH		
CX1524	Presentation: 1-800 Contacts Training Manual	3/27/2014	1-800F_00084296	1-800F_00084328		JX0002-A			
CX1525	Presentation: 1-800 Contacts Clickstream	00/00/0000	1-800F_00084329	1-800F_00084345		JX0002-A			
CX1526 - CX1532	INTENTIONALLY NOT USED					N/A			
CX1533	Spreadsheet: Negative Keyword Bing	3/13/2015	1-800F_00088251	1-800F_00088251	RX1057	JX0002-A			
CX1534	INTENTIONALLY NOT USED					N/A			
CX1535	Email from Curtis Peterson to Rick Galan re: Bidding on our Brand Terms	1/14/2014	1-800F_00088296	1-800F_00088296		JX0002-A			
CX1536	Email from Rick Galan to Curtis Peterson re: Facebook Search	3/11/2013	1-800F_00088332	1-800F_00088333		JX0002-A			
CX1537	Email from Rick Galan to Glen Hamilton re: Receipt of January 2, 2013 Letter	1/8/2013	1-800F_00088355	1-800F_00088357		JX0002-A			
CX1538 - CX1541	INTENTIONALLY NOT USED					N/A			
CX1542	Email from Rick Galan to Lauren Hawks re: Walmart on 1800Contacts Brand Terms	5/9/2013	1-800F_00088419	1-800F_00088419		JX0002-A			
CX1543	Email from Rick Galan to Brady Roundy re: Bidding on our Brand Terms	1/9/2014	1-800F_00088484	1-800F_00088484		JX0002-A			
CX1544	INTENTIONALLY NOT USED					N/A			
CX1545	Email from Glen Hamilton to Rick Galan re: A new term for your negative list for Vision Direct: [www.visiondirect.com]	3/18/2013	1-800F_00088538	1-800F_00088539		JX0002-A			
CX1546	Presentation: 1800 Contacts Market Pulse (Phase III Market Pulse Survey Results - DRAFT - July2015)	07/00/2015	1-800F_00089452	1-800F_00089452	RX1109	JX0002-A		Ordered 4/4/2017	
CX1547 - CX1590	INTENTIONALLY NOT USED					N/A			
CX1591	Email from Joan Blackwood to Justin Olson, Amy Larson re: FW: Summary of Week 25 Core Web Results w/attach: Core-Website-Overview-FY13-Week25.docx; Web Channel Trend.xlsx	7/24/2012	1-800F_00093830	1-800F_00093834		JX0002-A			
CX1592 - CX1595	INTENTIONALLY NOT USED					N/A			
CX1596	Email from Laura Schmidt to Tim Roush re: Brian One on One w/Attach: 2016 8 15 FTC Lawsuit News Coverage.pdf	8/22/2016	1-800F_00097013	1-800F_00097049		JX0002-A			
CX1597 - CX1604	INTENTIONALLY NOT USED					N/A			
CX1605	Email from Dean Johnson to Junhyon Park, Joan Blackwood, Laura Schmidt et al re: 2013 Plan Update w/attach: FY 2013 Revenue Forecase 3-13-12 v67.xlsx	3/14/2012	1-800F_00099380	1-800F_00099381		JX0002-A			
CX1606 - CX1613	INTENTIONALLY NOT USED					N/A			
CX1614	1-800 Contacts v. Vision Direct Complaint	10/9/2002	1-800F_00045713	1-800F_00045733		JX0002-A			

PUBLIC

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1615	1-800 Contacts v. Coastal Contacts Complaint	3/18/2004	CX1615-001	CX1615-018	RX0570	JX0002-A			
CX1616	INTENTIONALLY NOT USED					N/A			
CX1617	1-800 Contacts v. EZ Contacts Complaint	12/6/2007	CX1617-001	CX1617-019		JX0002-A			Tr. 2536:19; 2536:21; 2536:22; 2537:16
CX1618	1-800 Contacts v. Lensfast Complaint	12/23/2008	CX1618-001	CX1618-040	RX0414	JX0002-A			
CX1619	INTENTIONALLY NOT USED								
CX1620	1-800 Contacts v. Walgreen Co Complaint	6/8/2010	CX1620-001	CX1620-014	RX0422	JX0002-A			
CX1621	1-800 Contacts v. WebEyeCare Complaint	8/10/2010	CX1621-001	CX1621-014	RX0423	JX0002-A			
CX1622	1-800 Contacts v. Lensworld.com Complaint	1/8/2008	CX1622-001	CX1622-184	RX0574, RX0461	JX0002-A			
CX1623	Letter from Mark Miller to Peter Clarkson and Phillip Dietrich re: Unauthorized Use of 1-800 Contacts, Inc.'s Trademarks in Sponsored Advertisements at Google and Other Search Engines	2/2/2010	ACLENS-00000291	ACLENS-00000331	RX0053	JX0002-A			Tr. 240:21; 241:03; 243:08; 338:23
CX1624	Spreadsheet: Memorial Eye Top 50 Search Terms by Impression 2005-2013	00/00/0000	CX1624-001	CX1624-003		JX0002-A		Granted 4/12/2017	
CX1625	Spreadsheet: Memorial Eye Top 50 Search Terms by Clicks 2005-2013	00/00/0000	CX1625-001	CX1625-003		JX0002-A		Granted 4/12/2017	
CX1626	Spreadsheet: Memorial Eye Top 50 Search Terms by Conversions 2005-2013	00/00/0000	CX1626-001	CX1626-002		JX0002-A		Granted 4/12/2017	Tr. 1965:21; 1967:05; 1970:01; 1970:13; 1981:12; 1988:04; 1988:09
CX1627	Spreadsheet: Memorial Eye Top 50 Keywords by Impression 2005-2013	00/00/0000	CX1627-001	CX1627-006		JX0002-A		Granted 4/12/2017	
CX1628	Spreadsheet: Memorial Eye Top 50 Keywords by Clicks 2005-2013	00/00/0000	CX1628-001	CX1628-007		JX0002-A		Granted 4/12/2017	
CX1629	Spreadsheet: Memorial Eye Top 50 Keywords by Conversions 2005-2013	00/00/0000	CX1629-001	CX1629-007		JX0002-A		Granted 4/12/2017	
CX1630	Spreadsheet: Memorial Eye Search Terms Including "800" 2005-2013 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1630-001	CX1630-123		JX0002-A		Granted 4/12/2017	
CX1631	Spreadsheet: Memorial Eye Search Terms Including "800" 2013 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1631-001	CX1631-032		JX0002-A		Granted 4/12/2017	
CX1632	Spreadsheet: Memorial Eye Search Terms Including "800" 2012 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1632-001	CX1632-038		JX0002-A		Granted 4/12/2017	
CX1633	Spreadsheet: Memorial Eye Search Terms Including "800" 2011 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1633-001	CX1633-044		JX0002-A		Granted 4/12/2017	
CX1634	Spreadsheet: Memorial Eye Search Terms Including "800" 2010 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1634-001	CX1634-037		JX0002-A		Granted 4/12/2017	
CX1635	Spreadsheet: Memorial Eye Search Terms Including "800" 2009 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1635-001	CX1635-029		JX0002-A		Granted 4/12/2017	
CX1636	Spreadsheet: Memorial Eye Search Terms Including "800" 2008 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1636-001	CX1636-013		JX0002-A		Granted 4/12/2017	
CX1637	Spreadsheet: Memorial Eye Search Terms Including "800" 2007 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1637-001	CX1637-010		JX0002-A		Granted 4/12/2017	
CX1638	Spreadsheet: Memorial Eye Negative Keywords 2005-2013 (Cover Page and Screen Shot)	00/00/0000	CX1638-001	CX1638-087		JX0002-A		Granted 4/12/2017	
CX1639	Spreadsheet: Lens Direct Top 50 Search Terms by Impression 2010-2016	00/00/0000	CX1639-001	CX1639-003		JX0002-A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1640	Spreadsheet: Lens Direct Top 50 Search Terms by Clicks 2010-2016	00/00/0000	CX1640-001	CX1640-003		JX0002-A			Tr. 1038:10
CX1641	Spreadsheet: Lens Direct Top 50 Search Terms by Conversions 2010-2016	00/00/0000	CX1641-001	CX1641-003		JX0002-A			Tr. 1001:11; 1001:12; 1002:14; 1008:12; 1052:06
CX1642	Spreadsheet: Lens Direct Top 50 Keywords by Impression 2010-2016	00/00/0000	CX1642-001	CX1642-008		JX0002-A			
CX1643	Spreadsheet: Lens Direct Top 50 Keywords by Clicks 2010-2016	00/00/0000	CX1643-001	CX1653-009		JX0002-A			
CX1644	Spreadsheet: Lens Direct Top 50 Keywords by Conversions 2010-2016	00/00/0000	CX1644-001	CX1644-009		JX0002-A			
CX1645	Spreadsheet: Lens Direct Search Terms Including "800" 2010-2016 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1645-001	CX1645-175		JX0002-A			
CX1646	Spreadsheet: Lens Direct Search Terms Including "800" 2016 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1646-001	CX1646-039		JX0002-A			Tr. 1042:12; 1053:14
CX1647	Spreadsheet: Lens Direct Search Terms Including "800" 2015 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1647-001	CX1647-050		JX0002-A			
CX1648	Spreadsheet: Lens Direct Search Terms Including "800" 2014 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1648-001	CX1648-033		JX0002-A			
CX1649	Spreadsheet: Lens Direct Search Terms Including "800" 2013 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1649-001	CX1649-031		JX0002-A			
CX1650	Spreadsheet: Lens Direct Search Terms Including "800" 2012 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1650-001	CX1650-035		JX0002-A			
CX1651	Spreadsheet: Lens Direct Search Terms Including "800" 2011 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1651-001	CX1651-058		JX0002-A			
CX1652	Spreadsheet: Lens Direct Search Terms Including "800" 2010 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1652-001	CX1652-002		JX0002-A			
CX1653	Spreadsheet: Lens Direct Negative Keywords 2010-2016 (Cover Page and Screen Shot)	00/00/0000	CX1653-001	CX1653-450		JX0002-A			Tr. 1045:16
CX1654	Spreadsheet: Lens Direct Keywords Including "800" 2016 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1654-001	CX1654-037		JX0002-A			
CX1655	Spreadsheet: Lens Direct Keywords Including "800" 2016 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1655-001	CX1655-030		JX0002-A			
CX1656	Spreadsheet: Lens Direct Keywords Including "800" 2015 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1656-001	CX1656-029		JX0002-A			
CX1657	Spreadsheet: Lens Direct Keywords Including "800" 2014 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1657-001	CX1657-028		JX0002-A			
CX1658	Spreadsheet: Lens Direct Keywords Including "800" 2013 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1658-001	CX1658-028		JX0002-A			
CX1659	Spreadsheet: Lens Direct Keywords Including "800" 2012 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1659-001	CX1659-033		JX0002-A			
CX1660	Spreadsheet: Lens Direct Keywords Including "800" 2011 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1660-001	CX1660-038		JX0002-A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1661	Spreadsheet: Lens Direct Keywords Including "800" 2010 (Cover Page, First 50 Results by Impression, and Totals)	00/00/0000	CX1661-001	CX1661-028		JX0002-A			
CX1662	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000133	MSFT-00000133	RX1808	JX0002-A		Ordered 4/4/2017	
CX1663	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000134	MSFT-00000134	RX1809	JX0002-A		Ordered 4/4/2017	
CX1664	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000135	MSFT-00000135	RX1810	JX0002-A		Ordered 4/4/2017	
CX1665	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000136	MSFT-00000136	RX1811	JX0002-A		Ordered 4/4/2017	
CX1666	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000137	MSFT-00000137	RX1812	JX0002-A		Ordered 4/4/2017	
CX1667	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000138	MSFT-00000138		JX0002-A		Ordered 4/4/2017	
CX1668	Presentation: Study - Brand Term Bidding Research from Bing Ads	00/00/0000	MSFT-00000139	MSFT-00000139	RX1813	JX0002-A		Ordered 4/4/2017	
CX1669	Presentation: Dominant Advertiser Pricing	00/00/0000	MSFT-00000141	MSFT-00000141	RX1814	JX0002-A		Ordered 4/4/2017	
CX1670	Presentation: Dominant Advertiser Pricing v10	00/00/0000	MSFT-00000147	MSFT-00000147	RX1815	JX0002-A		Ordered 4/4/2017	
CX1671	INTENTIONALLY NOT USED					N/A			
CX1672	Presentation: Computational Search Advertising (Microsoft)	00/00/0000	MSFT-00000153	MSFT-00000153	RX1816	JX0002-A			
CX1673	Deposition Transcript of Cary Samourkachian	4/28/2008	1800_FTC-00000741	1800_FTC-00000824		JX0002-A			
CX1674	Email from Mike Suh to Curtis Petersen re: Facebook Search	2/12/2013	COA-00000846	COA-00000847		JX0002-A			
CX1675	Email from Curtis Petersen to Mike Suh re: Facebook Search	3/18/2013	COA-00000923	COA-00000924		JX0002-A			
CX1676	INTENTIONALLY NOT USED					N/A			
CX1677	Email from Steve Bochen to Nick Bozikis re: the lists of keywords we do not advertise on w/Attach: updated negative list; RE: US Google Negative Keyword list	2/19/2014	COA-00000001	COA-00000005	CX1706	JX0002-A			
CX1678 - CX1681	INTENTIONALLY NOT USED					N/A			
CX1682	Email from Craig Lennox to Mike Suh, Paul Jassal, Steve Szeto re: 1-800-Contacts	3/31/2016	COA-00000149	COA-00000150	CX1681	JX0002-A			
CX1683	Coastal Contacts search advertising memo and recommendations	00/00/0000	COA-00000341	COA-00000344		JX0002-A			
CX1684	Email from Curtis Petersen to Mike Suh re: Facebook Search w/Attach: fb_search.png.png	2/6/2013	COA-00000353	COA-00000354		JX0002-A			
CX1685	Email from Curtis Petersen to Mike Suh re: Trademarks	1/12/2013	COA-00000357	COA-00000357		JX0002-A			
CX1686	Coastal.com Presentation: Return of the Customer, Version 2.0	00/00/0000	COA-00000699	COA-00000699		JX0002-A		Ordered 4/4/2017	
CX1687	Email from Curtis Petersen to Mike Suh, Lisa Craveiro re: Coastal.com	6/11/2012	COA-00000739	COA-00000740		JX0002-A			
CX1688	Email from Mike Suh to Curtis Petersen, Mike Suh re: 1800contacts	00/00/0000	COA-00000752	COA-00000752		JX0002-A			
CX1689	Email from Jessica Bahn to Mike Suh re: CoastalContacts Ads w/Attach: 1-800contacts SERP results 3 3 10.doc	3/3/2010	COA-00000766	COA-00000769		JX0002-A			
CX1690	Email from Mike Suh to Lisa Craveiro re: Coastal Paid Search ad on 1-800 TM w/attach: image001.png	6/13/2011	COA-00000811	COA-00000812	CX1721	JX0002-A			
CX1691	Email from Mike Suh to Kristin Lelonek and Carla Cui re: additional keywords to add	3/22/2013	COA-00000867	COA-00000868		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1692	Email from Carla Cui to Mike Suh and Albert Chong re: Clearly Contacts Negative KWs V2 w/Attach: Clearly Contacts - Negative KWs Recommendations 002 112410.xlsx	11/25/2010	COA-00000886	COA-00000887	CX1728	JX0002-A			
CX1693 - CX1694	INTENTIONALLY NOT USED					N/A			
CX1695	Coastal Contacts Spreadsheet: Channel Mix Repull - Sep 27	00/00/0000	FTC-COASTAL-000024	FTC-COASTAL-000024		JX0002-A		Ordered 4/4/2017	
CX1696	Coastal Contacts 2010-2013 data	00/00/0000	FTC-COASTAL-000025	FTC-COASTAL-000025		JX0002-A			
CX1697	Coastal Contacts Spreadsheet: Contacts Spend by Channel 2014-16	00/00/0000	FTC-COASTAL-000026	FTC-COASTAL-000026		JX0002-A			
CX1698	INTENTIONALLY NOT USED					N/A			
CX1699	Spreadsheet: Referral data	00/00/0000	FTC-COASTAL-000040	FTC-COASTAL-000040		JX0002-A		Ordered 4/4/2017	
CX1700	Coastal Contacts Spreadsheet: Net Shipped Revenue and Product Margin	00/00/0000	FTC-COASTAL-000008	FTC-COASTAL-000008		JX0002-A		Ordered 4/4/2017	
CX1701	Coastal Contacts Spreadsheet: Bing Campaign Daily Budget Change Report	9/22/2016	FTC-COASTAL-000009	FTC-COASTAL-000009		JX0002-A		Ordered 4/4/2017	
CX1702	Coastal Contacts Spreadsheet: Google campaign daily budget change report	00/00/0000	FTC-COASTAL-000010	FTC-COASTAL-000010		JX0002-A		Ordered 4/4/2017	
CX1703	Coastal Contacts Spreadsheet: Bing Campaign Daily Budget Report	00/00/0000	FTC-COASTAL-000011	FTC-COASTAL-000011		JX0002-A			
CX1704	Coastal Contacts Spreadsheet: Google Campaign Daily Budget Report	00/00/0000	FTC-COASTAL-000012	FTC-COASTAL-000012		JX0002-A			
CX1705 - CX1709	INTENTIONALLY NOT USED					N/A			
CX1710	Coastal Presentation: Coastal Contacts	00/00/0000	COA-00000447	COA-00000447	RX1209	JX0002-A		Ordered 4/4/2017	
CX1711	Coastal Contacts Presentation: Brand Awareness Omnibus Study: Canada (Wave 13), U.S. (Wave 7) & Australia (Wave 2)	00/00/0000	COA-00000690	COA-00000690		JX0002-A		Ordered 4/4/2017	
CX1712	Email from Curtis Petersen to Mike Suh re 1-800 contacts	5/1/2012	COA-00000724	COA-00000724		JX0002-A			
CX1713	INTENTIONALLY NOT USED					N/A			
CX1714	Email from Carla Cui to Mike Suh and Albert Chong re: Coastal Contacts - Account Analysis Follow Up Files w/Attach: Coastal Contacts Documents.xls	1/19/2011	COA-00000746	COA-00000749		JX0002-A		Ordered 4/4/2017	
CX1715	INTENTIONALLY NOT USED					N/A			
CX1716	Email from Jessica Bahn to Mike Suh, Curtis Petersen and Jennifer Kaiser re: CoastalContacts Ad in Google	1/14/2010	COA-00000764	COA-00000765		JX0002-A			
CX1717	Email from Sami Dilaveri to Mike Suh, Aaron Hoiles, Albert Chong and Curtis Petersen re: Action Items - Week 1	1/10/2011	COA-00000770	COA-00000773		JX0002-A			
CX1718	INTENTIONALLY NOT USED					N/A			
CX1719	Email from Mike Suh to Curtis Petersen re: 1800contacts	3/19/2013	COA-00000804	COA-00000804		JX0002-A			
CX1720 - CX1722	INTENTIONALLY NOT USED					N/A			
CX1723	Email from Mike Suh to Curtis Petersen re: Trademark	12/4/2012	COA-00000830	COA-00000831		JX0002-A			
CX1724 - CX1733	INTENTIONALLY NOT USED					N/A			
CX1734	Email from Curtis Petersen to Mike Suh re: take some joy in the day	4/29/2013	COA-00000921	COA-00000922		JX0002-A			
CX1735 - CX1740	INTENTIONALLY NOT USED					N/A			
CX1741	1-800 Contacts Shipped Revenue, Advertising Expenses 2002-2014	00/00/0000	1-800F_00000059	1-800F_00000059	RX0844	JX0002-A			
CX1742	INTENTIONALLY NOT USED					N/A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1743	Email from Brian Bethers to John Graham, Rob Hunter, Tim Roush w/attach: 1800 Management Presentation 150927 - KKR - Presenter Deck.ppt	9/28/2015	1-800F_00056109	1-800F_00056110	CX1446	JX0002-A		Ordered 4/4/2017	Tr. 1598:07; 1598:08
CX1744	Email from Maria Cirincione to Stuart Hirschfeld, Barry Nigro, Vadim Brusser re: 1-800 Contacts/Vision Direct w/attach: 1-800 Lost Customres FINAL.PDF	4/29/2016	1-800F_00091868	1-800F_00091869		JX0002-A			
CX1745	ACLens Retail Information	00/00/0000	ACLENS-00000134	ACLENS-00000134		JX0002-A			
CX1746	INTENTIONALLY NOT USED					N/A			
CX1747	Online marketing orders and revenue	00/00/0000	ACLENS-00000507	ACLENS-00000507		JX0002-A			
CX1748 - CX1749	INTENTIONALLY NOT USED					N/A			
CX1750	Spreadsheet: Product Order Details by Modality, Manufacturer & Annual Supply	00/00/0000	Standard000058	Standard000058		JX0002-A			
CX1751	Letter from David Zeidner to Memorial Eye re: Trademark Infringement of 1800 CONTACTS Trademark in Sponsored Advertisements at Google and Related Search Engines	9/13/2005	ME100000703	ME100000705		JX0002-A			Tr. 1915:13; 1915:18; 1917:03; 1917:21; 1918:08
CX1752	Letter from Randall D. Luckey to David Zeidner re: Trademark Infringement of "1800 Contacts" Trademark in Sponsored Advertisements at Google and Related Search Engines	10/13/2005	ME100000707	ME100000708		JX0002-A	NH		Tr. 1918:19; 1919:01; 1919:04
CX1753	Letter from David Zeidner to Memorial Eye re: www.shipmycontacts.com	11/3/2005	ME100000709	ME100000712		JX0002-A			
CX1754	Letter from Bryan Pratt to Elio Sanchez re: Memorial Eye Unauthorized Use of 1800CONTACTS Trademarks	9/12/2007	ME100000713	ME100000715		JX0002-A			Tr. 2526:11; 2612:15; 2620:03
CX1755	Letter from Randall D. Luckey to Bryan G. Pratt re: Alleged Unauthorized Use of "1800Contacts" and "1800 Contacts" Trademarks in Sponsored Advertisements at Google and Related Search Engines	3/17/2008	ME100000716	ME100000717		JX0002-A	NH		
CX1756 - CX1756	INTENTIONALLY NOT USED					N/A			
CX1757	Email from Joseph Dreidler to Mark Miller, Bryan Pratt re: 1-800 Contacts/Arlington Contact Lens Service Agreement	3/3/2010	1-800F_00080843	1-800F_00080844	RX0994	JX0002-A			
CX1758	Email from Brady Roundy to Bryce Craven re: Trademark Infringement Info	10/30/2014	1-800F_00103118	1-800F_00103118		JX0002-A			
CX1759 - CX1768	INTENTIONALLY NOT USED					N/A			
CX1769	Email from Shelley Carmichael to Bryce Craven re: Account Negatives?	3/12/2010	1-800F_00078484	1-800F_00078486	RX0057	JX0002-A			
CX1770	INTENTIONALLY NOT USED					N/A			
CX1771	Email from Kevin McCallum to Josh Aston re: Adwords	1/28/2004	1-800F_00080697	1-800F_00080697	RX0101	JX0002-A			
CX1772	INTENTIONALLY NOT USED					N/A			
CX1773	Email from Prashant Fuloria to Maria Stone, Rose Hagan, Nikhil Bhatla re: Preliminary results from user experiment #2	3/11/2004	GOOG-LENSE-00000943	GOOG-LENSE-00000944	RX0134	JX0002-A		Ordered 4/4/2017	
CX1774	Trademark experiment information	00/00/0000	GOOG-LENSE-00000941	GOOG-LENSE-00000942	RX0135	JX0002-A			
CX1775	Email from Tim Roush to Amy Larson re: Marketing History	10/3/2013	1-800F_00202906	1-800F_00202907	RX0154	JX0002-A			
CX1776	WalMart Spreadsheet: Campaign Report, January 1, 2016 - August 15, 2016	00/00/0000	WM2016-022541C000001	WM2016-022541C000002	RX0180	JX0002-A			
CX1777	WalMart Presentation: Contact Lenses Category Landscape	00/00/0000	WM2016-022541C023123	WM2016-022541C023123	RX0182	JX0002-A			
CX1778	Declaration of Jared Duley	6/3/2016	CX1778-001	CX1778-003	RX0241	JX0002-A		Ordered 4/4/2017	
CX1779	Lens Direct paid search traffic data for 2011	1/10/2017	CX1779-001	CX1779-002	RX307	JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1780	Lens Direct paid search traffic data for 2012	1/10/2017	CX1780-001	CX1780-002	RX308	JX0002-A			
CX1781	INTENTIONALLY NOT USED					N/A			
CX1782	Email from Laura Schmidt to Rick Galan re: FW: Competitive Pricing w/Attach: Competitor Pricing (Web) Changes for 9/12/2013; Top 25 Price Comparison.xlsx	9/26/2013	1-800F_00104638	1-800F_00104646		JX0002-A			
CX1783	INTENTIONALLY NOT USED					N/A			
CX1784	Lens Direct paid search traffic data for 2016	1/10/2017	CX1784-001	CX1784-002	RX309	JX0002-A			Tr. 1800:10
CX1785	Email from Josh Aston to Kevin McCallum, Joe Zeidner, Clinton Schmidt re Sorry - here's the attachment w/Attach: Google Trademark Policy 4-9-2004.pdf	4/9/2004	1-800F_00102777	1-800F_00102781	RX0159, RX0448	JX0002-A			
CX1786	Email from Mark Miller to Bryan Pratt re: Negative Keywords w/Attach: Exhibit 2- keywords.pdf; Exhibit 3- Restricted Websites.pdf	1/4/2010	1-800F_00081942	1-800F_00081943	RX0252; RX0438	JX0002-A			
CX1787	Letter from Mark Miller to General Counsel of Drugstore.com re: Compliance with Settlement Agreement between 1-800 Contacts, Inc. and Vision Direct, Inc.	10/12/2007	1-800F_00045660	1-800F_00045663	RX0256, RX0943	JX0002-A			
CX1788	Email from Mark Miller to Dan Garriott re: Lensfast Settlement	12/30/2009	1-800F_00081926	1-800F_00081937	RX0261; RX0869	JX0002-A			
CX1789 - CX1790	INTENTIONALLY NOT USED					N/A			
CX1791	AC Lens data files - affirmative bidding on competitors	00/00/0000	ACLENS-00000148	ACLENS-00000157		JX0002-A			
CX1792	Coastal data files - affirmative bidding on competitors (Bing keyword performance)	00/00/0000	FTC-COASTAL-000028	FTC-COASTAL-000028		JX0002-A		Ordered 4/4/2017	
CX1793	Coastal data files - affirmative bidding on competitors (Google keyword performance)	00/00/0000	FTC-COASTAL-000035	FTC-COASTAL-000039		JX0002-A		Ordered 4/4/2017	
CX1794	Contact Lens Kings data files - NKW lists and affirmative bidding on competitors	00/00/0000	CLK_011	CLK_160		JX0002-A		Ordered 4/4/2017	
CX1795	Google data files - change history	00/00/0000	GOOG-LENSE-00000017	GOOG-LENSE-00001103		JX0002-A		Ordered 4/4/2017	
CX1796	Visionworks data files - affirmative bidding on competitors	00/00/0000	VISIONWORKS00000754	VISIONWORKS00000762		JX0002-A		Ordered 4/4/2017	
CX1797	Walgreens data files - affirmative bidding on competitors	00/00/0000	WAG-00000008	WAG-00000008		JX0002-A		Ordered 4/4/2017	
CX1798	Walgreens data files - affirmative bidding on competitors (SEM profiles)	00/00/0000	WAG-00000009	WAG-00000014		JX0002-A		Ordered 4/4/2017	
CX1799	Walgreens data files - affirmative bidding on competitors (natural/paid data)	00/00/0000	WAG-0000223	WAG-0000230		JX0002-A		Ordered 4/4/2017	
CX1800	INTENTIONALLY NOT USED					N/A			
CX1801	Correspondence between Bryan Pratt and Jacques Matte re: Contact Lens King	5/26/2009	CLK007	CLK_007		JX0002-A			
CX1802	1-800 Contacts, Inc. v. Premier Holdings, Inc. d/b/a Filmart, Eugene Lefkowitz, Sholomo Lefkowitz, Judith Lefkowitz, d/b/a EZ Contacts USA; Case No. 07-cv-00946 (Stipulation for Extension to Answer Plaintiff 1-800 Contacts, Inc.'s Complaint)	1/15/2008	EZC_FTC_0001	EZC_FTC_0118	RX1226	JX0002-A			
CX1803	Email from Brad Scott to Aislynn Schultz, Amber Powell, Amy Larson et al. re: Hitwise US Report- Hitwise Website Report for 1-800 Contacts- 04/15/2011	4/15/2011	1-800F_00027184	1-800F_00027217	RX0007	JX0002-A			
CX1804	U.S. & Canada TM Policy Change	2/15/2011	YAH-0000200	YAH-0000200		JX0002-A			
CX1805	INTENTIONALLY NOT USED					N/A			
CX1806	Yahoo Category Overview, Agency Training, June 15-16, 2005	6/15/2005	YAH-0003895	YAH-0003932		JX0002-A			
CX1807	INTENTIONALLY NOT USED					N/A			
CX1808	Coastal data files - Bing NKW list	00/00/0000	FTC-COASTAL-000029	FTC-COASTAL-000029		JX0002-A			

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX1809	Coastal data files - Coastal change history 09/26/2016	00/00/0000	FTC-COASTAL-000030	FTC-COASTAL-000030		JX0002-A			
CX1810	Coastal data files - NKW lists	00/00/0000	FTC-COASTAL-000031	FTC-COASTAL-000033		JX0002-A			
CX1811	AC Lens data files - NKW lists	00/00/0000	ACLENS-00000127	ACLENS-00000131		JX0002-A			
CX1812	LensDiscounters.com data files - NKW Report Sheet	00/00/0000	LDV_0000190	LDV_0000190		JX0002-A		Ordered 4/4/2017	
CX1813	LensDiscounters.com data files - Sales Sheet	00/00/0000	LDV_0000062	LDV_0000062		JX0002-A		Ordered 4/4/2017	
CX1814	Walgreens/Vision Direct data files - FY14 Rev. Analysis Vision Template	00/00/0000	WAG-00000073	WAG-00000073		JX0002-A		Ordered 4/4/2017	
CX1815	Walgreens/Vision Direct data files - Walgreens Contact Lens Stats	00/00/0000	WAG-00000077	WAG-00000077		JX0002-A		Ordered 4/4/2017	
CX1816	Email from BrandVerity Alerts to Jordan Judd re: Daily Summary - Alerts Found	1/28/2009	1-800F_00052488	1-800F_00052493		JX0002-A			
CX1817	Luxtotta US Contact Lens Sales	00/00/0000	LUX00005533	LUX00005533		JX0002-A		Ordered 4/4/2017	
CX1818	FTC Analysis ECL_FTC_Annual (Elective Contact Lens Glossary)	00/00/0000	FTC-VSP-000001	FTC-VSP-000001		JX0002-A			
CX1819	WebEyeCare Spreadsheet: Keywords report by month	00/00/0000	FTC-WEC-0000031	FTC-WEC-0000031		JX0002-A		Ordered 4/4/2017	
CX1820	WebEyeCare Spreadsheet: Financials	00/00/0000	FTC-WEC-0000030	FTC-WEC-0000030		JX0002-A		Ordered 4/4/2017	
CX1821	Walgreens Boots Alliance 10-K Form	10/20/2016	CX1821-001	CX1821-216		JX0002-A			
CX1822	1-800 Answer to Complaint	8/29/2016	CX1822-001	CX1822-013		JX0002-A			
CX1823	RC's Amended Responses and Objections to CC's 1st Interrogatories	11/14/2016	CX1823-001	CX1823-042		JX0002-A			
CX1824	RC's Amended Responses to CC's First Set of Interrogatories_Redacted and Verified	11/22/2016	CX1824-001	CX1824-042		JX0002-A			
CX1825	RC's Responses to CC's 2nd Set of ROGs	1/13/2017	CX1825-001	CX1825-011		JX0002-A			
CX1826 - CX1852	INTENTIONALLY NOT USED					N/A			
CX1853	Downloaded data corresponding to Exhibits CX1624-CX1661	00/00/0000	CX1853-001	CX1853-001		JX0002-A			
CX1854 - CX7999	INTENTIONALLY NOT USED					N/A			
CX8000	Declaration of Park A. Stuebaker (Oakwood Eye Clinic)	12/13/2016	CX8000-001	CX8000-003		JX0002-A			
CX8001	Declaration of Glen M. Hamilton (Walgreens, Inc.)	12/19/2016	CX8001-001	CX8001-008		JX0002-A		Ordered 4/4/2017	
CX8002	Declaration of Glen M. Hamilton (Vision Direct, Inc.)	12/19/2016	CX8002-001	CX8002-008		JX0002-A		Ordered 4/4/2017	
CX8003	Declaration of Shaneef Mitha (Lens Discounters)	1/10/2017	CX8003-001	CX8003-057		JX0002-A			
CX8004	Declaration of Art Salas (Costco Wholesale)	1/23/2017	CX8004-001	CX8004-003		JX0002-A			
CX8005	Declaration of Rukmini Iyer (Microsoft/Bing)	1/27/2017	CX8005-001	CX8005-008		JX0002-A		Ordered 4/4/2017	
CX8006	Expert Report of David Evans	2/6/2017	CX8006-001	CX8006-202		JX0002-A			Tr. 1796:22; 1796:23; 1804:05
CX8007	Expert Report of Dr. Susan Athey	2/6/2017	CX8007-001	CX8007-111		JX0002-A			Tr. 854:05; 855:25; 908:06; 2070:19; 2071:10; 3873:13; 3874:22

Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
									Tr. 2264:24; 2265:12; 2266:09; 2266:19; 2266:24; 2268:22; 2270:02; 2271:09; 2272:21; 2273:04; 2276:02; 2276:13; 2279:01; 2279:05; 2279:13; 2279:25; 2283:12; 2286:04; 2286:10; 2288:01; 2288:23; 2290:19; 2290:23; 2291:10; 2291:15; 2291:23; 2295:01; 2295:07; 2295:18; 2297:10; 2301:06; 2302:07; 2303:10; 2307:09; 2309:06; 2310:04; 2310:14; 2317:07; 2319:10; 2326:20; 2337:03; 2339:06; 2343:06; 2343:11; 3077:05; 3080:13; 3081:23; 3084:23; 3087:19; 3094:15
CX8008	Expert Report of Jacob Jacoby	2/6/2017	CX8008-001	CX8008-058		JX0002-A			
CX8009	Rebuttal Expert Report of David Evans	3/8/2017	CX8009-001	CX8009-114		JX0002-A			
CX8010	Rebuttal Expert Report of Dr. Susan Athey	3/8/2017	CX8010-001	CX8010-072		JX0002-A			Tr. 914:01; 2087:07; 2091:24
CX8011	Rebuttal Expert Report of Jacob Jacoby	3/8/2017	CX8011-001	CX8011-061		JX0002-A			
CX8012	Declaration of Peter Nguon (FTC) (Memorial Eye & Lens Direct Adwords Recreation)	2/16/2017	CX8012-001	CX8012-017		JX0002-A			
CX8013	Appendix H to Expert Report of Jacob Jacoby	00/00/0000	CX8013-001	CX8013-100		JX0002-A			
CX8014	Expert Report of Complaint Counsel Expert Rebuttal Witness - Rebecca Tushnet	3/8/2017	CX8014-001	CX8014-068		JX0002-A			Tr. 4402:11; 4409:14; 4457:24; 4458:03; 4459:06; 4460:20; 4460:25; 4488:17; 4488:18; 4488:20; 4488:22; 4493:24; 4494:02
CX8015 - CX8999	INTENTIONALLY NOT USED					N/A			
CX9000	IH Transcript of Peter Batushansky	7/8/2015	CX9000-001	CX9000-054		JX0002-A		Ordered 4/4/2017	
CX9001	IH Transcript of Brian Bethers	9/30/2015	CX9001-001	CX9001-134		JX0002-A			Tr. 3750:13; 3750:14; 3751:15; 3758:06; 3759:02; 3759:25; 3762:25; 3763:20; 3766:16
CX9002	IH Transcript of Bryce Craven	9/3/2015	CX9002-001	CX9002-086		JX0002-A			
CX9003	IH Transcript of Peter Clarkson	7/1/2015	CX9003-001	CX9003-076		JX0002-A			
CX9004	IH Transcript of Jonathan Coon	8/21/2015	CX9004-001	CX9004-124		JX0002-A			Tr. 2770:02
CX9005	IH Transcript of Brandon Danise	9/28/2015	CX9005-001	CX9005-088		JX0002-A			
CX9006	IH Transcript of David Zeidner	8/19/2015	CX9006-001	CX9006-108		JX0002-A			
CX9007	IH Transcript of Stephen Fedele	10/15/2015	CX9007-001	CX9007-031		JX0002-A		Ordered 4/4/2017	
CX9008	IH Transcript of Glen Hamilton	10/15/2015	CX9008-001	CX9008-037		JX0002-A		Ordered 4/4/2017	
CX9009	IH Transcript of Joe Zeidner	9/29/2015	CX9009-001	CX9009-112		JX0002-A			
CX9010	IH Transcript of Amy Larson	9/4/2015	CX9010-001	CX9010-097		JX0002-A			
CX9011	IH Transcript of Brady Roundy	8/18/2015	CX9011-001	CX9011-067		JX0002-A			
CX9012	IH Transcript of Laura Schmidt	8/17/2015	CX9012-001	CX9012-121		JX0002-A			
CX9013	Deposition Transcript of Josh Aston	11/15/2016	CX9013-001	CX9013-097		JX0002-A			
CX9014	Deposition Transcript of Peter Batushansky	11/16/2016	CX9014-001	CX9014-081		JX0002-A		Ordered 4/4/2017	
CX9015	Deposition Transcript of Patrick William Galan	11/16/2016	CX9015-001	CX9015-084		JX0002-A			
CX9016	Deposition Transcript of Jordan Judd	11/18/2016	CX9016-001	CX9016-076		JX0002-A			
CX9017	Deposition Transcript of Joan Blackwood	11/29/2016	CX9017-001	CX9017-132		JX0002-A			
CX9018	Deposition Transcript of Robert Drumm	12/1/2016	CX9018-001	CX9018-082		JX0002-A			

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Exhibit No.	Description	Date	BegBates	EndBates	Also Referenced As	Admissibility	Purpose	In Camera	Trial Transcript Citation
CX9019	Deposition Transcript of Adam Juda	12/13/2016	CX9019-001	CX9019-095		JX0002-A		Ordered 4/4/2017	
CX9020	Deposition Transcript of Bryce Craven	12/14/2016	CX9020-001	CX9020-075		JX0002-A			Tr. 542:24; 543:02; 5453:17; 545:15; 546:23; 557:11; 557:12; 564:11; 564:15; 575:25; 576:03; 597:10; 597:16; 615:24; 618:16
CX9021	Deposition Transcript of Bryan Pratt	12/15/2016	CX9021-001	CX9021-097		JX0002-A			Tr. 2595:11; 2595:14; 2596:10
CX9022	Deposition Transcript of Gavin Charlston	12/16/2016	CX9022-001	CX9022-086		JX0002-A		Ordered 4/4/2017	
CX9023	Deposition Transcript of Ryan Alovio	1/10/2017	CX9023-001	CX9023-053		JX0002-A			Tr. 1021:10
CX9024	Deposition Transcript of Eric Holbrook	1/12/2017	CX9024-001	CX9024-101		JX0002-A		Ordered 4/12/2017	Tr. 2027:12; 2058:04
CX9025	Deposition Transcript of Scott Osmond	1/18/2017	CX9025-001	CX9025-040		JX0002-A			
CX9026	Deposition Transcript of Neil Weiloch	1/18/2017	CX9026-001	CX9026-017		JX0002-A			
CX9027	Deposition Transcript of Amy Larson	1/19/2017	CX9027-001	CX9027-053		JX0002-A			
CX9028	Deposition Transcript of Brady Roundy	1/19/2017	CX9028-001	CX9028-046		JX0002-A			
CX9029	Deposition Transcript of Brian Bethers	1/20/2017	CX9029-001	CX9029-071		JX0002-A			Tr. 3732:24; 3733:05
CX9030	Deposition Transcript of Amber Powell	1/23/2017	CX9030-001	CX9030-054		JX0002-A			
CX9031	Deposition Transcript of Clint Schmidt	1/24/2017	CX9031-001	CX9031-104		JX0002-A			
CX9032	Deposition Transcript of Laura Schmidt	1/24/2017	CX9032-001	CX9032-111		JX0002-A			
CX9033	Deposition Transcript of Sandhya Mohan	1/24/2017	CX9033-001	CX9033-081		JX0002-A			
CX9034	Deposition Transcript of Tim Roush	1/25/2017	CX9034-001	CX9034-099		JX0002-A			
CX9035	Deposition Transcript of Jonathan Coon	1/26/2017	CX9035-001	CX9035-059		JX0002-A			Tr. 2831:24; 2832:03
CX9036	Deposition Transcript of Jared Duley	1/26/2017	CX9036-001	CX9036-071		JX0002-A		Ordered 4/4/2017	
CX9037	Deposition Transcript of David Owens	1/26/2017	CX9037-001	CX9037-042		JX0002-A			
CX9038	Deposition Transcript of Glen Hamilton	1/17/2017	CX9038-001	CX9038-054		JX0002-A		Ordered 4/4/2017	Tr. 449:05; 467:11
CX9039	Deposition Transcript of Peter Clarkson	12/2/2016	CX9039-001	CX9039-096		JX0002-A			
CX9040	Deposition Transcript of Mark Miller	2/8/2017	CX9040-001	CX9040-100	RX0822	JX0002-A			
CX9041	Deposition Transcript of Jacob Jacoby	3/17/2017	CX9041-001	CX9041-085		JX0002-A			
CX9042	Deposition Transcript of David Evans	3/20/2017	CX9042-001	CX9042-112		JX0002-A			
CX9043	Deposition Transcript of Dr. Susan Athey	3/24/2017	CX9043-001	CX9043-119		JX0002-A			Tr. 951:12
CX9044	Deposition Transcript of Complaint Counsel Expert Rebuttal Witness, Rebecca Tushnet	3/21/2017	CX9044-001	CX9044-093		JX0002-A			
CX9045	Deposition Transcript of Ronald Goodstein	3/10/2017	CX9045-001	CX9045-113		JX0002-A			
CX9046	Deposition Transcript of Anindya Ghose	3/14/2017	CX9046-001	CX9046-103		JX0002-A			
CX9047	Deposition Transcript of Howard Hogan	3/14/2017	CX9047-001	CX9047-123		JX0002-A			Tr. 3386:18; 3396:11
CX9048	Deposition Transcript of Kevin Murphy	3/16/2017	CX9048-001	CX9048-114		JX0002-A			Tr. 4312:15; 4312:18
CX9049	Deposition Transcript of Kent Van Liere	3/17/2017	CX9049-001	CX9049-111		JX0002-A			Tr. 3210:19
CX9050	Deposition Transcript of William Landes	3/7/2017	CX9050-001	CX9050-091		JX0002-A			
RX0051	Letter from Roy Montclair to Discount Contact Lenses re Trademark Infringement	6/28/2005	PL013502	PL013503		JX0002-A			

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
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Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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Dated: June 22, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

June 22, 2017

By: /s/ Daniel J. Matheson
Attorney