



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

**In the Matter of**

**1-800 CONTACTS, INC.,  
a corporation,**

**Respondent.**

**Docket No. 9372**

**COMPLAINT COUNSEL'S POST-TRIAL REPLY FINDINGS OF FACT**

Markus Meier  
Acting Director

Geoffrey M. Green  
Assistant Director

Barbara Blank  
Deputy Assistant Director

Charles A. Loughlin  
Chief Trial Counsel

Daniel J. Matheson  
Kathleen M. Clair  
Nathaniel M. Hopkin  
Charlotte S. Slaiman  
Mika Ikeda  
Gustav P. Chiarello  
Joshua B. Gray  
Aaron Ross  
Thomas H. Brock  
Attorneys

Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Ave., NW  
Washington, DC 20580  
Telephone: (202) 326-2075  
Facsimile: (202) 326-3496  
Electronic Mail: [dmatheson@ftc.gov](mailto:dmatheson@ftc.gov)

*Counsel Supporting the Complaint*

Dated: July 19, 2017

**TABLE OF CONTENTS**

	<b>Page</b>
I. Response to Proposed Findings Regarding “Contact Lenses – Industry Background” .....	1
II. Response to Proposed Findings Regarding “1-800 Contacts” .....	7
III. Response to Proposed Findings Regarding “Contact Lens Retailers – The Competitive Landscape” .....	139
IV. Response to Proposed Findings Regarding “The Relevant Market In This Matter Is All Retail Sales Of Contact Lenses” .....	171
V. Response to Proposed Findings Regarding “1-800 Contacts Lacks Market Power” .....	223
VI. Response to Proposed Findings Regarding “Internet Advertising” .....	244
VII. Response to Proposed Findings Regarding “Trademarks And Paid Search Advertising” .....	330
VIII. Response to Proposed Findings Regarding “1-800 Contacts’ Trademark Litigation” .....	367
IX. Response to Proposed Findings Regarding “1-800 Contacts’ Trademark Settlement Agreements” .....	439
X. Response to Proposed Findings Regarding “Putting The Settlement Agreements In Context” .....	516
XI. Response to Proposed Findings Regarding “The Settlement agreements Had Significant Procompetitive Benefits” .....	557
XII. Response to Proposed Findings Regarding “The Settlement Agreements Had No Anticompetitive Effects” .....	936
Complaint Counsel’s Responses to 1-800 Contact’s Proposed Conclusions of Law .....	1034

**REFERENCES TO THE RECORD**

References to the record are made using the following citation forms and abbreviations:

CX# — Complaint Counsel Exhibit

RX# — Respondent Exhibit

Name of Witness, Tr. XX — Trial Testimony

CX/RX# (Name of Witness, Dep. at XX) — Deposition Testimony

CX/RX# (Name of Witness, IHT at XX) — Investigational Hearing Testimony

Cmplt. ¶ X — Complaint

CCPTB- Complaint Counsel's Post Trial Brief

CCPTF- Complaint Counsel's Proposed Findings

**{bold}** — In Camera Material

**I. Contact Lenses – Industry Background**

**A. Contact Lenses Are A Prescription-Only Medical Device**

1. Around 40 million consumers use contact lenses. (CX 8006-020; CX 429-029).

**Response to Proposed Finding No. 1**

Complaint Counsel has no specific response.

2. A consumer interested in wearing contact lenses must go to an optometrist or ophthalmologist for a contact lens prescription. (Bethers, Tr. 3511-12; CX 8006-020).

**Response to Proposed Finding No. 2**

Complaint Counsel has no specific response.

3. Contact lenses originally were made of a rigid material and required an eye care professional to custom fit each pair. (RX 569-005).

**Response to Proposed Finding No. 3:**

Complaint Counsel has no specific response.

4. Beginning in the late 1980s, contact lens manufacturers began to sell disposable lenses that were designed to be replaced on a daily, weekly, or monthly basis. (RX 569-0009).

**Response to Proposed Finding No. 4**

Complaint Counsel has no specific response.

5. Technological improvements in manufacturing contact lenses eliminated the need for an ECP to fit each pair of contact lenses on the prescription has been finalized at the end of the contact lens fitting process. (RX 569-0009).

**Response to Proposed Finding No. 5**

Complaint Counsel has no specific response.

6. The evolution in contact lens technology now allows the sale of contact lenses to be unbundled from the fitting exam by an optometrist or ophthalmologist. (RX 569-0009).

**Response to Proposed Finding No. 6**

Complaint Counsel has no specific response.

7. Although not required in all states, a contact lens prescription will almost invariably include a brand name because different brands of contact lenses that have the same prescription will produce different fits for a consumer. (RX 569-0009, n.15).

**Response to Proposed Finding No. 7**

Complaint Counsel objects to the “almost invariably” qualification, because the best evidence in this matter is that ECPs invariably “prescribe a specific contact lens brand.” CX0439-040. *See also* Bethers, Tr. 4545 (“a doctor writes a prescription with a brand on it.”); CCPTF ¶ 289. The source upon which Respondent relies for this proposed finding is an FTC Report dated February, 2005, which does not provide reliable evidence about what is currently “required in all states.”

8. The replacement contact lenses that consumers purchase, pursuant to a prescription that specifies a brand, will be identical, regardless of whether the patient receives the lens from his or her prescribing optometrist/ophthalmologist or from another seller. (RX 569-0009).

**Response to Proposed Finding No. 8**

Complaint Counsel has no specific response.

9. Contact lens prescriptions typically expire within one or two years. (Bethers, Tr. 3601; CX 8006-021). In most states, a contact lens prescription expires in one year. (Bethers, Tr. 3601; CX 8006-021). In seven states, a contact lens prescription expires in two years. (Bethers, Tr. 3601; CX 8006-021).

**Response to Proposed Finding No. 9**

Complaint Counsel has no specific response.

10. Because of the expiration of a contact lens prescription, a contact lens wearer must visit an optometrist or ophthalmologist at least once every year (or every two years in seven states) to renew their prescription or obtain a new prescription. (Bethers, Tr. 3601).

**Response to Proposed Finding No. 10**

Complaint Counsel has no specific response.

**B. Contact Lens Manufacturers**

**11.** There are four major manufacturers of contact lenses that account for about 95 percent of the U.S. market: Johnson & Johnson, Alcon, CooperVision, and Bausch & Lomb. (Clarkson, Tr. 183; RX 739-0085).

**Response to Proposed Finding No. 11**

Complaint Counsel has no specific response.

**12.** In the United States, the total sales of contact lens at retail in 2015 was estimated to be about \$4.7 billion. (Bethers, Tr. 3552; RX 428-0006).

**Response to Proposed Finding No. 12**

Complaint Counsel has no specific response.

**13.** In the United States, total sales of contact lens at retail grew about 4-5 percent annually from 2001 through 2015. (RX 428-0006; RX 904-0038).

**Response to Proposed Finding No. 13**

Complaint Counsel has no specific response.

**C. ECPs Prescribe And Sell Contact Lenses**

**14.** There are approximately 40,000 optometrists and 18,000 ophthalmologists in the United States. (Bethers, Tr. 3509-10).

**Response to Proposed Finding No. 14**

Complaint Counsel has no specific response.

**15.** Optometrists and ophthalmologists are commonly referred to as eye care practitioners or “ECPs.” (RX 569-0005).

**Response to Proposed Finding No. 15**

Complaint Counsel has no specific response.

**16.** ECPs operate in independent practices, with optical retail chains, and in conjunction with mass merchants and club stores. (Bethers, Tr. 3509-11; RX 739-0015-0016).

**Response to Proposed Finding No. 16**

Complaint Counsel has no specific response.

**17.** There are about 16,000 independent ECP practices in the United States. (Bethers, Tr. 3509-10 & 3546).

**Response to Proposed Finding No. 17**

Complaint Counsel has no specific response.

**18.** Independent ECPs represent approximately 60 percent of all contact lens prescriptions. (Bethers, Tr. 3543).

**Response to Proposed Finding No. 18**

Complaint Counsel has no specific response.

**19.** ECPs are permitted to sell the contact lenses that they prescribe. (Coon, Tr. 3685; Bethers, Tr. 3510; RX 569-0013).

**Response to Proposed Finding No. 19**

Complaint Counsel has no specific response.

**20.** ECPs have a unique position in the healthcare industry in that they are healthcare providers and are permitted to sell the product that they prescribe. (CX 9029 (Bethers, Dep. at 111); CX 9017 (Blackwood, Dep. at 101)).

**Response to Proposed Finding No. 20**

Complaint Counsel objects to this Proposed Finding as it misstates testimony, the evidence cited is unreliable and lacks an adequate foundation, and it is factually inaccurate. CX9029 (Bethers Dep. at 111) is silent as to whether ECPs have a unique position “in the healthcare industry,” and Mr. Bethers has no foundation to testify regarding whether others in “the healthcare industry” are permitted to sell the product that they prescribe. CX9017 (Blackwood, Dep. at 101) simply says, “unlike other doctors, they [ECP’s] sell the product they prescribe.” This statement does not support an assertion that ECPs have a unique position in the healthcare industry, as “doctors” are not the only “healthcare providers” who are permitted to write prescriptions and sell products. Moreover, Ms. Blackwood’s has no foundation to testify about practices in “the

healthcare industry,” as her only professional responsibilities relate to marketing. (CX9017 (Blackwood, Dep. at 10 ). Further, it is common knowledge that healthcare professionals at ambulatory surgery centers, orthopedic centers, dental service providers, and many other “healthcare providers” may sell the products that they prescribe.

**21.** ECPs have a competitive advantage over non-ECP retailers because ECPs write contact lens prescriptions and sell the contact lenses in the same location. (Alovis, Tr. 1026-27; CX 9037 (Owens, Dep. at 48)).

**Response to Proposed Finding No. 21**

Complaint Counsel objects to this proposed finding to the extent that it suggests that ECPs have a competitive advantage *overall* compared to non-ECP retailers. Such a finding is not supported by the testimony cited. Mr. Alovis identified “*certain* advantages” that ECPs possess compared to online retailers, he did not state that ECPs have an overall competitive advantage. Alovis, Tr. 1026-1027 (emphasis added). Mr. Owens’s deposition testimony was limited to “independent eye care doctors,” it did not apply to all ECPs (which include ECPs who operate in optical retail chains, in conjunction with mass merchants, or in club stores – *see above*, Respondent’s Proposed Finding No. 16). CX 9037 (Owens, Dep. at 47). And, like Mr. Alovis, Mr. Owens testified that the ability to write a prescription constituted *one* competitive advantage, he did not testify that “independent eye care doctors” had an overall competitive advantage. CX 9037 (Owens, Dep. at 47-48). A finding that “ECPs have a competitive advantage” would ignore competitive advantages that those operating in the online retail channel have over ECPs with respect to costs, scale, and convenience.

**22.** ECPs have a competitive advantage over non-ECP retailers as a result of preferential treatment from contact lens manufacturers. (Bethers, Tr. 3545-46). Because independent ECPs write contact lens prescriptions, manufacturers independent ECPs with assistance to compete in the retail sale of contact lenses that includes advantageous wholesale pricing, growth incentives, and rebates only available through ECPs. (Clarkson, Tr. 296-97; Bethers, Tr. 3545-46).

**Response to Proposed Finding No. 22**

Complaint Counsel objects to this proposed finding because no evidence supports the assertion that manufacturers make available any of the “preferential treatment” referred to in the proposed finding to ECPs who operate in optical retail chains, in conjunction with mass merchants, or in club stores. See above, Respondent’s Proposed Finding No. 16. Complaint Counsel further objects to the extent that it suggests that ECPs have a competitive advantage *overall* compared to non-ECP retailers. The testimony of both Messrs. Bethers and Clarkson identified certain competitive advantages, but does not support a finding that ECPs have a competitive advantage overall. Such a finding would ignore the competitive advantages that those operating in the online retail channel have over ECPs with respect to costs, scale, and convenience.

***D.      Contacts Lens Retailers***

**23.**     There are tens of thousands of locations where contact lens consumers can go to purchase contact lenses. (Bethers, Tr. 3509). There are also a large number of online retailers that sell contact lenses. (Bethers, Tr. 3538-41; RX 739-0017).

**Response to Proposed Finding No. 23**

Complaint Counsel has no specific response.

**24.**     There are four different types of contact lens retailers: (1) independent ECPs; (2) optical retail chains; (3) mass merchants and club stores; and (4) “pure play” online retailers. (Bethers, Tr. 3509; RX 739-0015-0017).

**Response to Proposed Finding No. 24**

Complaint Counsel has no specific response.

**25.**     Independent ECPs, optical retail chains, and mass merchants and club stores have physical retail locations where consumers can purchase contact lenses. (Bethers, Tr. 3512, 3522, & 3526-28).

**Response to Proposed Finding No. 25**

Complaint Counsel has no specific response.

26. Many independent ECPs, optical retail chains, and mass merchants and club stores also have online stores where consumers can purchase contact lenses. (Bethers, Tr. 3512-19, 3522, 3529, 3525-26 & 3530; CX 8007-042).

### **Response to Proposed Finding No. 26**

Complaint Counsel objects to this proposed finding of fact. No evidence suggests that “many” club stores operate online stores “where consumers can purchase contact lenses.” Likewise, no evidence indicates that “consumers” can purchase contact lenses in the online stores operated by independent ECPs and optical retail chains, instead sales may be restricted only to those who obtained a prescription from that particular ECP. Complaint Counsel further objects because it cites CX8007 (Athey Report) -042 as evidence, but the cited does not support the proposition that firms actually sell contact lenses. For example, Amazon is listed at CX8007-042 because it is a competitor for search advertising, but it does not sell contact lenses. Holbrook, Tr. 1900; Athey, Tr. 868 (Amazon is “not a firm that sells contact lenses online.”); Evans, Tr. 1589 (“Amazon does not sell contact lenses.”). Likewise, there is no evidence that other firms listed at CX8007-042 actually sell contact lenses online. Some, but not all, ECPs, optical retail chains, and mass merchants and club stores make ordering contact lenses online available to *some* customers, but not all provide the same offerings (such as at-home delivery, among other things) available vis-à-vis contact lens retailers operating in the “pure play” online market. (Evans, Tr. 1596-1598; Bethers Tr. 3538-3543).

## **II. 1-800 Contacts**

### ***A. 1-800 Contacts Was Founded In 1992 To Provide Better Service And Lower Prices Than ECPs***

27. Jonathan Coon (“Coon”) started the business that became 1-800 Contacts from his college dorm room in February 1992. (Coon, Tr. 2649)

### **Response to Proposed Finding No. 27**

Complaint Counsel has no specific response.

28. Coon was CEO of 1-800 Contacts from its inception in February 1992 until about January 2014. (Coon, Tr. 2649).

### **Response to Proposed Finding No. 28**

Complaint Counsel has no specific response. (See CCPTF 15).

29. Coon came up with the idea of starting the business that became 1-800 Contacts after he tried to purchase contact lenses for the first time from a store called Sixty Minute Eyewear. (Coon, Tr. 2649-50).

### **Response to Proposed Finding No. 29**

Complaint Counsel has no specific response.

**30.** Coon was a college student at the time, had no money, and had to walk to Sixty Minute Eyewear in order to purchase contact lenses. (Coon, Tr. 2649-50).

**Response to Proposed Finding No. 30**

Complaint Counsel has no specific response, other than to note that a finding of fact that Mr. Coon had “no money” is not supported by the cited testimony, as that was presumably a figure of speech Mr. Coon employed rather than a literally true statement. If Mr. Coon intended to purchase contact lenses on the day he walked to Sixty Minute Eyewear, surely he either had some money with which to make his purchase, or had access to money.

**31.** Coon learned that while he could have glasses made in just one hour, he would have to make two trips and wait a week in order to get contact lenses. (Coon, Tr. 2649-50).

**Response to Proposed Finding No. 31**

Complaint Counsel has no specific response.

**32.** It did not make any sense to Coon that he could have glasses made in one hour but he would have to make multiple trips and wait a week to get contact lenses. (Coon, Tr. 2649-50).

**Response to Proposed Finding No. 32**

Complaint Counsel has no specific response.

**33.** Coon believed that the process of buying contact lenses was inconvenient, the service was not very good, and the prices were high. (Coon, Tr. 2650).

**Response to Proposed Finding No. 33**

Complaint Counsel has no specific response.

**34.** Coon believed that there was a good opportunity for a mail order business to provide contact lenses at lower prices and with better service than ECPs. (Coon, Tr. 2650-51).

**Response to Proposed Finding No. 34**

Complaint Counsel has no specific response.

**35.** Coon began his own mail order contact lens business called Eye Supply from his college dorm room in February 1992. (Coon, Tr. 2651).

**Response to Proposed Finding No. 35**

Complaint Counsel has no specific response.

36. Coon started the business with \$50. (Coon, Tr. 2651).

**Response to Proposed Finding No. 36**

Complaint Counsel has no specific response.

37. Coon used that \$50 to print 1,000 fliers (a nickel each) that he distributed around nearby college dorms. (Coon, Tr. 2651-52).

**Response to Proposed Finding No. 37**

Complaint Counsel has no specific response.

38. Eye Supply initially carried just four products that it sold exclusively to college students living in nearby dorms on campus. (Coon, Tr. 2652).

**Response to Proposed Finding No. 38**

Complaint Counsel has no specific response.

39. Eye Supply initially generated about \$200 per week in income. (Coon, Tr. 2652-53).

**Response to Proposed Finding No. 39**

Complaint Counsel has no specific response.

40. After about a year of doing business under the name Eye Supply, Coon obtained the phone number for 1-800 Lens Now. (Coon, Tr. 2653).

**Response to Proposed Finding No. 40**

Complaint Counsel has no specific response.

41. Coon changed the name of the business to 1-800 Lens Now and began Valpak and other print advertising under that name. (Coon, Tr. 2654).

**Response to Proposed Finding No. 41**

Complaint Counsel has no specific response.

42. In the first few years of 1-800 Lens Now, Coon became acquainted with John Nichols, who had started a mail order contact lens business called Discount Lens Club in Santa Monica, California. (Coon, Tr. 2654 55).

**Response to Proposed Finding No. 42**

Complaint Counsel has no specific response.

43. Coon and Nichols combined their respective businesses and ran them out of a rented house in Orem, Utah. (Coon, Tr. 2655-56).

**Response to Proposed Finding No. 43**

Complaint Counsel has no specific response.

44. Coon and Nichols set up eight cubicles in the living room to serve as the call center and used the garage and basement for inventory and distribution. (Coon, Tr. 2657-58).

**Response to Proposed Finding No. 44**

Complaint Counsel has no specific response.

45. After about a year of doing business under the name 1-800 Lens Now, Coon and Nichols obtained the 1-800 Contacts phone number for approximately \$163,500 in or about June 1995. (Coon, Tr. 2658-60).

**Response to Proposed Finding No. 45**

Complaint Counsel has no specific response.

46. Coon and Nichols paid \$10,000 upfront for the 1-800 Contacts phone number, which was all the money they had in the bank at that time, and agreed to pay the remainder in monthly installments. (Coon, Tr. 2659-60).

**Response to Proposed Finding No. 46**

Complaint Counsel has no specific response.

47. Coon considered the purchase of the 1-800 Contacts phone number to be a huge investment because the purchase price required all the cash that the company had in the bank and required future monthly payments representing approximately 10 percent of the company's recent total monthly revenue. (Coon, Tr. 2660).

**Response to Proposed Finding No. 47**

Complaint Counsel has no specific response.

48. After obtaining the rights to the 1-800 Contacts phone number, Coon and Nichols changed the name of the business to 1-800 Contacts. (Coon, Tr. 2661).

**Response to Proposed Finding No. 48**

Complaint Counsel has no specific response.

**49.** The company activated the 1-800 Contacts phone number on or about July 1, 1995. (Coon, Tr. 2661). 1-800 Contacts' sales more than doubled the first month after activating the 1-800 Contacts phone number, growing from \$35,000 in June 1995 to \$78,000 in July 1995. (Coon, Tr. 2661-62).

**Response to Proposed Finding No. 49**

Complaint Counsel has no specific response.

**50.** The goal in acquiring rights to the 1-800 Contacts phone number and name was to increase the return on advertising investments because it would be a memorable name and number that customers would not have to look up when they wanted to order or reorder. (Coon, Tr. 2662-63).

**Response to Proposed Finding No. 50**

Complaint Counsel has no specific response.

**51.** 1-800 Contacts began Valpak, free-standing inserts, and other print advertising under the 1-800 Contacts name in or about September 1995. (Coon, Tr. 2661 & 2663-64).

**Response to Proposed Finding No. 51**

Complaint Counsel has no specific response.

**52.** Once the company began advertising the 1-800 Contacts name and phone number, it saw a 20-25 percent increase in customer acquisition as well as customer retention. (Coon, Tr. 2662-63).

**Response to Proposed Finding No. 52**

Complaint Counsel has no specific response.

**53.** The 1-800 Contacts website was launched in or about 1996. (Coon, Tr. 2664).

**Response to Proposed Finding No. 53**

Complaint Counsel has no specific response.

**54.** 1-800 Contacts decided to raise capital for television advertising through an initial public offering. (Coon, Tr. 2665). 1-800 Contacts completed its initial public offering, listing on NASDAQ under the symbol CTAC, in or about February 1998. (Coon, Tr. 2665).

**Response to Finding No. 54**

Complaint Counsel objects that the proposed finding is misleading insofar as it suggests that “capital for television advertising” was the sole purpose of 1-800 Contacts’ initial public offering. Mr. Coon testified that the company would “have to staff up and have a bigger call center,” as additional reasons for going public. (Coon, Tr. 2665). Notwithstanding, the proposed finding is irrelevant.

**55.** 1-800 Contacts began advertising on television in or about June 1998. (Coon, Tr. 2666).

**Response to Proposed Finding No. 55**

Complaint Counsel has no specific response.

**56.** 1-800 Contacts’ television advertising had a huge and immediate impact on its business. (Coon, Tr. 2667).

**Response to Proposed Finding No. 56**

Complaint Counsel has no specific response.

**57.** 1-800 Contacts’ business grew approximately 50 percent in just a couple months after it started doing television advertising. (Coon, Tr. 2667).

**Response to Proposed Finding No. 57**

Complaint Counsel has no specific response.

**58.** In order to meet the substantial increase in demand that ensued after the start of 1-800 Contacts’ television advertising, 1-800 Contacts hired many new employees, developed a new order management system, increased its inventory, and opened a brand new distribution center. (Coon, Tr. 2667-68).

**Response to Proposed Finding No. 58**

Complaint Counsel has no specific response.

**59.** 1-800 Contacts opened a new distribution center in 1999 that it believed had the largest inventory of contact lenses in terms of the number and variety of SKUs in one location. (Coon, Tr. 2668-69). As a result, 1-800 Contacts began promoting itself as “The World’s Largest Contact Lens Store.” (Coon, Tr. 2668-69).

**Response to Proposed Finding No. 59**

Complaint Counsel has no specific response, other than to note that Mr. Coon's testimony regarding the year the distribution center opened appears on page 2670 of the trial transcript. (Coon, Tr. 2670 ("We did 3.6 million in '96, 21.1 million in '97, 59 million in '98 the year after we went public, 98 million in '99, which is when the DC opened.")).

**60.** As a result of having the largest inventory of contact lenses, 1-800 Contacts was able to deliver orders faster and provide better service. (Coon, Tr. 2668-69).

**Response to Proposed Finding No. 60**

Complaint Counsel has no specific response.

**61.** Coon was named National Entrepreneur of the Year by Ernst & Young in 2000. (Coon, Tr. 2670-71).

**Response to Proposed Finding No. 61**

Complaint Counsel has no specific response.

**62.** 1-800 Contacts remained a public company from February 1998 to July 2007, when it was acquired by the private equity firm Fenway Partners. (Coon, Tr. 2672). 1-800 Contacts was later acquired in 2012 by Wellpoint/Anthem, and then by the private equity firm TH Lee in 2014. (Coon, Tr. 2677; RX 428-0023). Today, 1-800 Contacts is owned by the private equity firm AEA Investors.

**Response to Proposed Finding No. 62**

Complaint Counsel has no specific response.

***B. 1-800 Contacts' Principal Competitors Have Always Been The Independent ECPs***

**63.** 1-800 Contacts has always considered independent ECPs to be its principal competitors. (Bethers, Tr. 3542 ("Our principal competitor is the independent eyecare practice"); Bethers, Tr. 3600-01; Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)).

**Response to Proposed Finding No. 63**

The proposed finding is contradicted by the weight of the record evidence. The record shows that competition from online contact lens retailers has historically constrained 1-800

Contacts' pricing, while competition from ECPs has not constrained 1-800 Contacts' pricing. (CCPTF 803-865, 894, 1478-1486, 1553-1558, 1573, 1576-1610).

For example, 1-800 Contacts adopted its "We beat by 2%" price match program in response to online discounters' low prices and aggressive advertising, not in response to competition from ECPs or club stores. CX9012 (L. Schmidt, Dep. 252-257); CC Post-Trial Brief at 59-60, nn. 232-235. *See* CCPTF 1573; *see also* CCPTF 1478-1486. Indeed, the data shows that ECPs are barely relevant to 1-800 Contacts' price matching activity: in 2016 only {█} of the orders on which customers received discounts were attributed to ECP pricing, while at least {█} were attributed to online rivals. CX1334-007.

The cited deposition testimony of Ms. Blackwood does not support the proposed finding because Ms. Blackwood was only employed by 1-800 Contacts from October 2009 to December 2012, and thus has no personal knowledge of who 1-800 Contacts considered to be its principal competitors outside that timeframe. (CCPTF 23-24).

**64.** 1-800 Contacts' principal competitors are the independent ECPs because every customer must go to an ECP for a prescription, and independent ECPs write the majority of prescriptions. (Bethers, Tr. 3601).

#### **Response to Proposed Finding No. 64**

The proposed finding is contradicted by the weight of the record evidence. The record shows that competition from online contact lens retailers has historically constrained 1-800 Contacts' pricing, while competition from ECPs has not constrained 1-800 Contacts' pricing. (CCPTF 803-865, 894, 1478-1486, 1553-1558, 1573, 1576-1610).

For example, 1-800 Contacts adopted its "We beat by 2%" price match program in response to online discounters' low prices and aggressive advertising, not in response to competition from ECPs or club stores. CX9012 (L. Schmidt, Dep. 252-257); CC Post-Trial Brief at 59-60, nn. 232-235. *See* CCPTF 1573; *see also* CCPTF 1478-1486. Indeed, the data shows that

ECPs are barely relevant to 1-800 Contacts' price matching activity: in 2016 only {█} of the orders on which customers received discounts were attributed to ECP pricing, while at least {█} were attributed to online rivals. CX1334-007.

**65.** 1-800 Contacts' principal competitors are the independent ECPs because independent ECPs always have enjoyed a large percentage of total contact lens sales, despite having generally high prices and poor service. (Coon, Tr. 2710; Bethers Tr. 3601; CX 9027 (Larson, Dep. at 128)).

#### **Response to Proposed Finding No. 65**

The proposed finding is contradicted by the weight of the record evidence. The record shows that competition from online contact lens retailers has historically constrained 1-800 Contacts' pricing, while competition from ECPs has not constrained 1-800 Contacts' pricing. (CCPTF 803-865, 894, 1478-1486, 1553-1558, 1573, 1576-1610).

For example, 1-800 Contacts adopted its "We beat by 2%" price match program in response to online discounters' low prices and aggressive advertising, not in response to competition from ECPs or club stores. CX9012 (L. Schmidt, Dep. 252-257); CC Post-Trial Brief at 59-60, nn. 232-235. *See* CCPTF 1573; *see also* CCPTF 1478-1486. Indeed, the data shows that ECPs are barely relevant to 1-800 Contacts' price matching activity: in 2016 only {█} of the orders on which customers received discounts were attributed to ECP pricing, while at least {█} were attributed to online rivals. CX1334-007, *in camera*.

Moreover, all of the witness testimony cited should be disregarded as lacking the proper personal knowledge foundation: there is no evidence establishing that Mr. Coon, Mr. Bethers, or Ms. Larson know, personally, the prices or the quality of the service offered by all ECPs or any representative subset of ECPs. The cited testimony of Mr. Coon and Ms. Larson also fails to support the proposed finding because both Mr. Coon and Ms. Larson are former employees and lack personal knowledge of 1-800 Contacts' primary competition at the present time. (*See* CCPTF 15-16, 43).

*1. 1-800 Contacts' Marketing Efforts Have Focused On Attracting Contact Lens Customers Away From ECPs*

**66.** 1-800 Contacts' marketing efforts have focused on offering consumers a better alternative to buying from their ECP because most people buy contact lenses from their ECP. (Coon, Tr. 2687, 2695).

**Response to Proposed Finding No. 66**

The proposed finding is unsupported by the evidence cited insofar as it refers to marketing efforts after June 2009, at which point Mr. Coon was not involved "in the day-to-day operation of the business," such as marketing. (Coon, Tr. 2677-2678). It is also inaccurate and contradicted by the weight of the evidence to the extent that it suggests that 1-800 Contacts' marketing efforts are more focused on publicizing an alternative to ECPs than on competing with online retailers for customers.

1-800 Contacts spends millions of dollars on internet-based advertising (CCPTF 491), in order to compete against online rivals. 1-800 Contacts' price matching program exists so 1-800 Contacts can better compete with online rivals. (CCPTF 1573; *see also* CCPTF 1478-1486 (historically, more aggressive advertising by 1-800 Contacts' rivals caused 1-800 Contacts to respond by offering more generous price matching offers). For example, 1-800 Contacts adopted its "We beat by 2%" price match program in response to online discounters' low prices and aggressive advertising, not in response to competition from ECPs or club stores. CX9012 (L. Schmidt, Dep. 252-257); CC Post-Trial Brief at 59-60, nn. 232-235. *See* CCPTF 1573; *see also* CCPTF 1478-1486. Indeed, the data shows that ECPs are barely relevant to 1-800 Contacts' price matching activity: in 2016 only {█} of the orders on which customers received discounts were attributed to ECP pricing, while at least {█} were attributed to online rivals. CX1334-007, *in camera*.

**67.** 1-800 Contacts’ marketing efforts have focused on consumers buying contact lenses from their ECP because ECPs were and are 1-800 Contacts’ principal competitor. (Coon, Tr. 2687; CX 9002 (Craven, IHT at 30, 34-36)).

**Response to Proposed Finding No. 67**

The proposed finding is inaccurate and contradicted by the weight of the evidence to the extent that it suggests that 1-800 Contacts’ marketing efforts are more focused on publicizing an alternative to ECPs than on competing with online retailers for customers, as described in the Response to Proposed Finding No. 66. The implied proposed finding that ECPs are 1-800 Contacts’ principal competitor is and contradicted by the weight of the record evidence, as described in Response to Proposed Findings Nos. 63-65. The implied proposed finding that ECPs are 1-800 Contacts’ current principal competitor is unsupported by the evidence because the cited testimony lacks foundation: both Mr. Coon and Mr. Craven are former employees with no current knowledge about the company. (CCPTF 15-16, 40). Mr. Craven has not worked at the company since November 2011. CCPTF 40. Mr. Coon has had no role at the company since stepping down in 2014. CCPTF 15-16. Mr. Craven’s testimony also does not support the proposed finding because Mr. Craven was only ever responsible for 1-800 Contacts’ Internet marketing and not its marketing efforts generally. (CCPTF 41-42; Craven, Tr. 495-496).

**68.** It is very difficult to persuade consumers to buy online a prescription medical device, like contact lenses, that they typically buy from their doctor. (CX 9027 (Larson, Dep. at 65)).

**Response to Proposed Finding No. 68**

The proposed finding is unsupported by the evidence cited and contradicted by the weight of the evidence. The evidence shows that online sales of contact lenses increased rapidly and continue to increase rapidly, contradicting the suggestion that it is “very difficult” to persuade consumers to purchase online. RX0428-008 { [REDACTED] }, in [REDACTED]

*camera*. Moreover, several of Respondent's proposed findings regarding the founding and early growth of the company contradict this proposed finding because they suggest that 1-800 Contacts was easily able to obtain new customers, after making sufficient investments to enter the online business. (*See* RPF 34, 49, 54, 57).

The cited testimony of Ms. Larson lacks foundation because there is no evidence that she has personal knowledge of the "typical" buying habits of all prescription medical device consumers or the difficulty of persuading consumers to buy contact lenses online. The proposed finding is also vague as to time, and is unsupported for the period outside Ms. Larson's tenure at 1-800 Contacts (2004 to 2012). (*See* CCPTF 44, 47).

**69.** 1-800 Contacts' marketing efforts have been tailored to address specific challenges faced by a non-ECP contact lens retailer in attracting customers from ECPs. (Coon, Tr. 2666-67, 2687; Bethers, Tr. 3611).

#### **Response to Proposed Finding No. 69**

The proposed finding is inaccurate and contradicted by the weight of the evidence to the extent that it suggests that 1-800 Contacts' marketing efforts are more focused on publicizing an alternative to ECPs than on competing with online retailers for customers, as described in the Response to Proposed Finding No. 66. The proposed finding is also vague as to time. The cited testimony of Mr. Coon does not support the proposed finding as to any time after June 2009, at which point Mr. Coon was not involved "in the day-to-day operation of the business," such as marketing. (Coon, Tr. 2677-2678).

**70.** Trust is an important consideration of consumers in selecting a retailer for prescription contact lenses. (CX 9017 (Blackwood, Dep. at 46, 61, 74, 224); CX 9032 (L. Schmidt, Dep. at 237); RX 106-0001; { [REDACTED] }).

#### **Response to Proposed Finding No. 70**



evidence that Ms. Blackwood has personal knowledge of the attitudes or mental decision-making processes of millions of contact lens consumers, or a representative set of consumers, or any individual consumers. Ms. Blackwood is not currently involved in the contact lens retail industry, and thus her testimony also lacks foundation as to present-day contact lens consumers. (CX9017 (Blackwood, Dep. at 14-15)).

**72.** As a non-ECP retailer of contact lenses, building trust and credibility among consumers is particularly important to compete with ECPs. (Coon, Tr. 2666).

**Response to Proposed Finding No. 72**

The proposed finding should be rejected because the evidence cited does not support the proposition that trust and credibility are more “important to compete with ECPs” than to compete with other non-ECP retailers. To the extent that non-ECP retailers this finding suggests that “trust” in a retailer is more important to consumers of contact lenses than to consumers of other products, such a finding is unsupported. It is also misleading because it ignores evidence that 1-800 Contacts emphasizes convenience and relatively low pricing in its marketing efforts aimed at capturing customers. (*See, e.g.*, RPF § II.A. “1-800 Contacts Was Founded In 1992 To Provide Better Service And Lower Prices Than ECPs” (emphasis added); RPF 86).

**73.** Consumers have to believe that a contact lens retailer is a quality provider, will provide quality service, and will provide the contact lenses that their ECP prescribed. (CX 9017 (Blackwood, Dep. at 61)).

**Response to Proposed Finding No. 73**

The proposed finding is unsupported. The only cited source lacks foundation because there is no evidence that Ms. Blackwood has personal knowledge of the individual beliefs of millions of contact lens consumers, or a representative set of consumers, or any individual consumers. Ms. Blackwood is not currently involved in the contact lens retail industry, and thus her testimony also lacks foundation as to present-day contact lens consumers. (CX9017 (Blackwood, Dep. at 14-15)).



The proposed finding is unsupported. The proposed finding merely relays unreliable hearsay statements by anonymous ECPs and customers, to which no hearsay exception applies. Further, the cited testimony lacks foundation because there is no evidence that Mr. Coon has personal knowledge of any conversations between ECPs and their patients. Notwithstanding, the proposed finding is irrelevant.

**77.** Some ECPs have told their patients that if they bought contact lenses elsewhere, then they could not be sure the contact lenses were direct from the manufacturer. (CX 9017 (Blackwood, Dep. at 304)).

**Response to Proposed Finding No. 77:**

The proposed finding is unsupported. The proposed finding merely relays unreliable hearsay statements by anonymous ECPs and contact lens customers, to which no hearsay exception applies. Notwithstanding, the proposed finding is irrelevant.

**78.** Some ECPs have told their patients that if they bought contact lens elsewhere, then the ECP would be worried that the patient might get the wrong contact lenses. (CX 9017 (Blackwood, Dep. at 304)).

**Response to Proposed Finding No. 78:**

The proposed finding is unsupported. The proposed finding merely relays unreliable hearsay statements by anonymous ECPs and contact lens customers, to which no hearsay exception applies.

**79.** In a consumer survey conducted by 1-800 Contacts in or about 2007, 37 percent of consumers believed that buying contact lenses through the phone, mail, or internet would be risky. (RX 1137-012-014; CX 9027 (Larson, Dep. at 123)).

**Response to Proposed Finding No. 79:**

This proposed finding is vague as to what “risky” refers to and therefore irrelevant. This proposed finding is also unsupported. The record contains no exhibit labeled RX1137. (*See* JX0002-A at 058 (noting that RX1137 was “intentionally not used”)). Nor did Ms. Larson testify to the proposed finding that “37 percent of consumers believed that buying contact lenses through

the phone, mail, or internet would be risky.” While Ms. Larson did testify at her deposition as to her “understanding” of various survey findings in a deposition exhibit labeled RX0156 (which has not been entered into evidence), that speculative testimony lacks foundation. (*See, e.g., CX9027* (Larson, Dep. at 122 (“Q. If you go next to the survey findings, you understand those to be the findings of the 2007 survey? A. Yes.), 123 (“Q. The second line down says ‘Of risk, convenience and price, consumers’ main concern about purchasing contacts through p/m/i is risk.’ Do you see that? A. Yes. Q. What do you understand that to mean? A. People are concerned about buying a prescription medical device someplace other than their doctor.”)). No testimony establishes that Ms. Larson had any personal involvement in or personal knowledge of the study’s results; to the contrary, Ms. Larson testified that an employee named Ann Harrison led a 2007 market segmentation study that apparently included the referenced survey results. (*CX9027* (Larson, Dep. at 110 (“Q. . . . A couple of items down under 2007, you have ‘updated contact lens marketing segmentation.’ Do you see that A. I do. Q. Tell me what that is. A. So that is referring back to the 2003 item that we just discussed. But it was basically a study that, again, Ann Harrison led . . . ”), 118 (“Q. . . . Ms. Larson, can you tell us what Exhibit 156 is? A. This is the 2007 market segmentation study, the updated one that I referred to . . . ”)).

In addition to the document apparently containing the study results not being in evidence, there is also no evidence establishing how the study was conducted; how, if at all, the study was relied on; or why the results should be accepted as fact here.

**80.** In a consumer survey conducted by 1-800 Contacts in or about 2007, consumers expressed concerns about receiving “generic lenses,” the “wrong Rx,” or “inferior/defective lenses” if they purchased contract lenses from 1-800 Contacts. (RX 1137-012).

**Response to Proposed Finding No. 80:**

The proposed finding is unsupported. The record contains no exhibit labeled RX1137. (*See JX0002-A* at 058 (noting that RX1137 was “intentionally not used”)). A proposed finding

regarding the results of such a study is also unsupported and lacking in foundation for the reasons set forth in response to Proposed Finding No. 79.

**81.** Consumers had inherent concerns about the reliability of products purchased online, and 1-800 Contacts marketing and customer service personnel went to great lengths to assuage those concerns. (CX 9013 (Aston, Dep. at 185-87)).

**Response to Proposed Finding No. 81:**

The proposed finding is vague as to time period, vague in its use of the undefined term “inherent concerns,” and vague in its use of the undefined phrase “great lengths.” The proposed finding is also irrelevant as it is not probative of any issue material to this case. Additionally, because the only source cited in support of the proposed finding is the deposition testimony of former 1-800 Contacts’ employee Mr. Aston, the proposed finding is unsupported and lacking in foundation insofar as it refers to facts about the contact lens industry other than during Mr. Aston’s brief tenure at 1-800 Contacts from spring 2002 to spring 2004. (*See* CCPTF ¶ 72).

Further, the first clause of the proposed finding is unsupported and lacking in foundation because there is no evidence that Mr. Aston has personal knowledge about any “concerns” or “inherent concerns” held by any specific consumers, by contact lens consumers, or by “consumers” generally. (*See* CX9013 (Aston, Dep. at 185 (“The consumer would oftentimes have concerns. Again, I don’t know the sources of where these concerns came from . . . .”))).

The second clause of the proposed finding is also unsupported and lacking in foundation because there is no evidence that Mr. Aston has personal knowledge of “great lengths” other employees at 1-800 Contacts went to assuage any consumer concerns.

**82.** 1-800 Contacts’ marketing programs have been informed by concerns of contact lens wearers about purchasing from an Internet retailer regarding the legitimacy, trustworthiness, ability to return products, and whether they would be the same contact lenses sold by an ECP. (Bethers, Tr. 3612).

**Response to Proposed Finding No. 82:**

The proposed finding is vague as to time, vague as to what “marketing programs” were “informed” or in what manner they were “informed.”

It is also irrelevant. Indeed, this testimony concerns market research that 1-800 Contacts conducted and was introduced following an objection that Mr. Bethers’ testimony could not introduce the results of that market research—that is, what that market research purportedly found about consumer beliefs, attitudes, or knowledge—for their truth. In arguing the objection, 1-800 Contacts’ counsel made clear that this testimony was not being offered for its truth and moreover that it was not probative of any material issue in the case. (Bethers, Tr. 3609 (Statement of Mr. Stone: “I’m not offering it for the truth. . . . This is not intended to go to any one of the – what I think are maybe an issue in this case. This is just his effort to describe how they changed their marketing.”)). The Court resolved the objection in reliance on 1-800 Contacts’ counsel’s representation that the testimony about the results of the research was not being offered for its truth. (Bethers, Tr. 3609-3610 (“If not offered for the truth, by definition, it’s not hearsay. Overruled.”)).

As such, to the extent this proposed finding purports to suggest that there existed any “concerns [among] contact lens wearers about purchasing from an Internet retailer regarding the legitimacy, trustworthiness, ability to return products, and whether they would be the same contact lenses sold by an ECP,” it is hearsay, lacking in foundation, and unsupported because it is beyond the scope of the testimony that Respondent’s counsel made clear he was eliciting.

To the extent this proposed finding suggests anything else, it can be taken to mean only that 1-800 Contacts, in designing some unspecified “marketing programs,” took into account some unspecified understanding or belief held by some people at 1-800 Contacts about the existence, nonexistence, and/or nature of consumers’ regarding the above-mentioned issues. Such a statement is so vague as to be meaningless and thus is irrelevant.

**83.** Earning the trust of its customers and establishing and maintaining credibility with its customers were immensely important to 1-800 Contacts, particularly since it was in the business of selling medical devices that its customers would place in their eyes. (CX 9031 (Schmidt, Dep. at 79)).

**Response to Proposed Finding No. 83:**

The proposed finding is vague as to time frame and unsupported to the extent it refers to any time period outside Mr. Schmidt’s brief tenure working for 1-800 Contacts between January 2004 and January 2006. (*See* CCPTF ¶¶ 65-67). Otherwise, Complaint Counsel has no specific response.

**84.** Because trust and credibility with consumers was immensely important to 1-800 Contacts, it was sensitive to anything that might be detrimental to its brand. (CX 9031 (Schmidt, Dep. at 79)).

**Response to Proposed Finding No. 84:**

The proposed finding is vague as to time frame and unsupported to the extent it refers to any time period outside Mr. Schmidt’s brief tenure working for 1-800 Contacts between January 2004 and January 2006. (*See* CCPTF ¶¶ 65-67). Otherwise, Complaint Counsel has no specific response.

**85.** To compete with ECPs, 1-800 Contacts had to create a brand that consumers knew they could trust, given that they were purchasing a medical device. (Coon, Tr. 2687).

**Response to Proposed Finding No. 85:**

The proposed finding is misleading insofar as it implies that creating a trusted brand to attract consumers was a challenge unique to 1-800 Contacts’ experience. (*See, e.g.*, Coon, Tr. 2686 (Q. . . . [W]hat, if any, challenge did you have in order to try to persuade consumers to buy from you rather than their ECP. A. I mean, I think that’s the core challenge in any business, is changing human behavior . . .”); Coon, Tr. 2687 (“So, you know, establishing a brand that people knew they could trust to, you know, purchase a medical device, it’s—I think it’s a challenge in any space . . .”)).

**86.** 1-800 Contacts’ advertising message, which it repeated in many of its advertisements, was that the consumer could get the exact same contact lenses delivered to their door for less than they would pay to drive to their ECPs’ office and pick them up. (Coon, Tr. 2666-67, 2687; CX 9013 (Aston, Dep. at 182-83); RX 904-0002).

**Response to Proposed Finding No. 86:**

The proposed finding is vague as to time. It is also misleading insofar as it paraphrases, rather than quotes, one of 1-800 Contacts’ actual advertising slogans, and omits that 1-800 Contacts used many other advertising messages, including advertising messages aimed at attracting customers of other online contact lens retailers. (E.g., CCPTF ¶¶ 1478-1482; CX9015 (Galan, Dep. at 94-95 (“We did run some tests on including pricing in our advertising because we were competitive at certain levels of contacts, but we would generally revert more towards our language around our service and reliability and a low price guarantee and price matching and so on . . .”)) CX0946 at 011 (showing a 1-800 Contacts ad with the following ad copy: “Free Shipping on Contact Lenses + Easy Ordering at 1-800 Contacts”); CX9001 (Bethers, IHT at 291 (“We found our most compelling copy, quite frequently, is, ‘We beat any price.’ That was a very compelling message when we were talking to customers.”)); CX0016 (On May 27, 2011, Joan Blackwood wrote: “This idea of going back to a price beat policy came up as something we though could be really competitive. In looking at it further—when we used to advertise this message in search—it was the best-performing copy we have ever run and haven’t been able to beat it since.”)).

**87.** During Coon’s time period with 1-800 Contacts, the general purpose of the company’s television advertising was to build trust and credibility in its brand. (Coon, Tr. 2666).

**Response to Proposed Finding No. 87:**

The proposed finding is misleading because it omits at least one additional reason 1-800 Contacts decided to advertise on television: avoiding the “clutter” of “smaller businesses”

presenting competitive ads in print and online advertising channels. (Coon, Tr. 2666).

Notwithstanding, the proposed finding is irrelevant.

**88.** 1-800 Contacts' television advertising has emphasized that ECPs are not the only place where a consumer can buy contact lenses, there is a choice of different contact lens retailers. (CX 9017 (Blackwood, Dep. at 174)).

**Response to Proposed Finding No. 88:**

The proposed finding is vague as to time, and is unsupported to the extent it refers to any time period other than during Ms. Blackwood's tenure at 1-800 Contacts from October 2009 to December 2012. (*See* CCPTF ¶¶ 23-24).

**89.** As a non-ECP retailer, 1-800 Contacts also had to overcome consumers' familiarity and preference with the status quo of purchasing contact lenses from their ECPs. (CX 9029 (Bethers, Dep. at 56)).

**Response to Proposed Finding No. 89:**

The proposed finding is vague as to time and therefore irrelevant. This proposed finding is also unsupported by the cited deposition testimony. Even if the proposed finding were supported by the cited testimony, which it is not, it is nonetheless lacking in foundation because there is no evidence that Mr. Bethers has personal knowledge of millions of contact lens consumers' purchasing preferences or degree of familiarity with ECPs. Finally, the proposed finding is irrelevant.

**90.** Historically, consumers were accustomed to buying contact lenses from their ECPs. (Coon, Tr. 2686).

**Response to Proposed Finding No. 90:**

The proposed finding is vague as to time. To the extent this proposed finding refers to any time period outside the time period "when [Mr. Coon] started [1-800 Contacts]," it is unsupported by the cited testimony which was offered in response to a question about "challenges [Mr. Coon] faced as a non-ECP retailer of contact lenses when [he] started this business." (Coon, Tr. 2684-

2686). To the extent this proposed finding refers only to the time period “when [Mr. Coon] started this business,” it is not probative of any material issue and is therefore irrelevant.

Finally, the proposed finding unsupported and lacking in foundation because there is no evidence that Mr. Coon has personal knowledge of what contact lens consumers actually think or thought.

**91.** The majority of consumers still buy contact lenses from their ECP and feel a tremendous amount of pressure to buy contact lenses from their ECP at the time that they receive their contact lens prescription, even though they often pay a higher price than they could find elsewhere. (CX 9017 (Blackwood, Dep. at 101)).

**Response to Proposed Finding No. 91:**

The proposed finding is unsupported. There is no evidence that Ms. Blackwood has personal knowledge of the “feel[ings]” of the “majority of consumers” of contact lenses. Moreover, the proposed finding that the “majority of consumers *still* buy contact lenses from their ECP” (emphasis added) is unsupported and lacking in foundation because Ms. Blackwood is a former employee of 1-800 Contacts and is not involved in the contact lens industry at the present time. (CX9017 (Blackwood, Dep. at 14-15)).

**92.** Part of the focus of 1-800 Contacts’ advertising has been to change the entrenched behavior of consumers in buying contact lenses from their ECP. (CX 9029 (Bethers, Dep. at 56)).

**Response to Proposed Finding No. 92:**

This proposed finding is vague and unsupported in its use of the phrase “entrenched behavior of consumers” without reference to which consumers, how many consumers, or what proportion of consumers purportedly display the “entrenched behavior” of buying contact lenses from their ECPs; without reference to the degree to which contact lens consumers are similar to or dissimilar from one another regarding how “entrenched” they are in purchasing from ECPs; and without reference to the manner in which buying from ECPs in “entrenched” behavior. It is therefore irrelevant. This proposed finding is also unsupported by the cited deposition testimony.

**93.** There has been substantial confusion among contact lens wearers about how to purchase contact lenses from 1-800 Contacts instead of their ECP. (Bethers, Tr. 3610).

**Response to Proposed Finding No. 93:**

The proposed finding is unsupported, lacking in foundation, outside the scope of the cited testimony, irrelevant, and misleading. It was explicitly conceded at trial that Mr. Bethers' testimony regarding consumer behavior insights, including that consumers were confused and did not know how to work with 1-800 Contacts, was not offered for its truth—and that Mr. Bethers' cited testimony was not relevant to any material issue in the case. (Bethers, Tr. 3609-3610 (“MR. STONE: Your Honor, his understanding of how they directed their advertising and how they changed their marketing, he’s simply explaining the basis for that. *I’m not offering it for the truth. . . . This is not intended to go to any one of the – what I think are maybe an issue in this case. . . .* Q. Do you have in mind where you were in your answer, Mr. Bethers? A. Yes. . . . we heard the term ‘confused’ used by consumers on a regular basis who did not know how to work with 1-800 Contacts . . . ”) (emphasis added)). It is further unsupported, lacking in foundation, and irrelevant for the reasons set forth in response to Proposed Finding No. 82.

This proposed finding is also irrelevant and misleading because confusion regarding topics other than source, sponsorship, or affiliation of search advertisements served in response to 1-800 Contacts Branded Queries is not probative of any issue in this case. (See CCPTF Section XI.C.5 (¶¶ 1898-1899)).

**94.** In a consumer survey conducted by 1-800 Contacts in or about 2007, 62 percent of consumers believed they would have to mail, email, or fax their prescription to 1-800 Contacts to purchase contact lenses; and 33 percent of consumers were not sure how they would communicate their prescription information to 1-800 Contacts. (RX 1137-014).

**Response to Proposed Finding No. 94:**

The proposed finding is unsupported. The record contains no exhibit labeled RX1137. (See JX0002-A at 058 (noting that RX1137 was “intentionally not used”)).

**95.** Potential customers often did not know where their prescription was because the vast majority of the time a doctor would not give a customer a copy of their prescription. (Bethers, Tr. 3610). In order to address consumers' confusion about how to communicate their contact lens prescription to 1-800 Contacts, one of the most effective advertisements by 1-800 Contacts was a commercial that highlighted: "Don't know where your prescription is? It's right on the box." (Bethers, Tr. 3611).

**Response to Proposed Finding No. 95:**

This proposed finding is vague as to time and therefore irrelevant.

The first sentence of the proposed finding is unsupported, lacking in foundation, outside the scope of the cited testimony, and irrelevant for the reasons set forth in response to Proposed Findings no. 82 and 93. Moreover, there is no evidence that Mr. Bethers has personal knowledge about the "vast majority" of contact lens patient visits.

The entire proposed finding is also irrelevant and misleading because confusion regarding topics other than source, sponsorship, or affiliation of search advertisements served in response to 1-800 Contacts Branded Queries is not probative of any issue in this case. (*See* CCPTF Section XI.C.5 (¶¶ 1898-1899)).

**2. *1-800 Contacts' Customers Primarily Switch To And From Independent ECPs***

**96.** Independent ECPs are the primary source of 1-800 Contacts' new customers. (Bethers, Tr. 3547; CX 9017 (Blackwood, Dep. at 156); { [REDACTED] } RX 1108-0006).

**Response to Proposed Finding No. 96:**

The proposed finding is vague and confusing as written. Otherwise, Complaint Counsel has no specific response.

**97.** About 80 percent of 1-800 Contacts' new customers have indicated that 1-800 Contacts was the first place they had purchased contact lenses other than from their ECP. (CX 9017 (Blackwood, Dep. at 156-57)).

**Response to Proposed Finding No. 97:**

The proposed finding is vague as to time, and unsupported as to any time after Ms. Blackwood left 1-800 Contacts in December 2012. (*See* CCPTF ¶ 24). This proposed finding is also unsupported and lacks foundation because there is no evidence regarding the reliability or representativeness of the data that Ms. Blackwood was citing in the cited testimony: surveys that 1-800 Contacts conducted “through Foresee.” (*See* CX9017 (Blackwood, Dep. at 156-157))

**98.** Most of 1-800 Contacts’ customers come from independent ECPs, then retail optical chains, and then from mass merchants and club stores. (Bethers, Tr. 3625).

**Response to Proposed Finding No. 98:**

The proposed finding is vague and misleading because it does not differentiate between new customers and returning customers. Complaint Counsel notes that record evidence shows that most of 1-800 Contacts’ customers are actually repeat customers who “come from” previous purchases at 1-800 Contacts. (*See, e.g.,* Bethers, Tr. 3571-3572, *in camera* ({} [REDACTED] {}); CX9035 (Coon, Dep. at 22 (“The vast majority of the business is just repeat.”)); CX9017 (Blackwood, Dep. at 157 (“Q. What percentage of the customers of 1-800 Contacts during the time you were there were repeat customers? A. Between 85 and 88 percent.”)); CX9010 (Larson, IHT at 198 (“[T]he majority of 1-800 CONTACTS’ business is repeat”))).

The proposed finding is also irrelevant insofar as it discusses the channels through which 1-800 Contacts’ customers previously purchased contact lenses but ignores the question of what contact lens retailers 1-800 Contacts loses customers to and what contact lens retailers are in a position to constrain 1-800 Contacts’ pricing. As Dr. Evans explained, the latter is also significant: “1-800 Contacts competes with other online retailers, ECPs, and other physical retailers but in different ways and degrees. It sets prices so that they are lower than ECPs, but not much lower. It competes to get customers from ECPs by advertising, often on television, its convenience and

possibly its lower prices. It sets its prices significantly higher than discount online sellers of contact lenses. It competes with these online discounters through search advertising on generic terms and by providing price-match discounts to the small subset of 1-800 customers who are both knowledgeable about competitive offerings, and are willing to take the steps necessary to obtain the price match. I described these competitive relationships in my initial report. Professor Murphy hasn't disagreed with my description and many of his statements are consistent with mine.”

(CX8009 at 055 (¶ 92) (Evans Rebuttal Expert Report)).

**99.** In a recent survey of 1-800 Contacts' new customers, 56 percent reported making their last purchase of contact lenses from an independent ECP. (RX 1108-0006). In that survey, the next largest source of 1-800 Contacts' new customers was national optical retail chains: 13 percent of 1-800 Contacts' new customers reported making their last purchase of contact lenses from a national optical retail chain. (RX 1108-0006).

**Response to Proposed Finding No. 99:**

This proposed finding is irrelevant for the reasons set forth in response to Proposed Finding No. 98.

**100.** The principal source of customers that 1-800 Contacts' targets is by far the independent ECPs. (Bethers, Tr. 3625).

**Response to Proposed Finding No. 100:**

This proposed finding is vague, misleading, and irrelevant for the reasons set forth in response to Proposed Finding No. 98.

**101.** 1-800 Contacts views its greatest opportunity as taking customers away from ECPs. (Bethers, Tr. 3601).

**Response to Proposed Finding No. 101:**

This proposed finding is so vague as to be rendered irrelevant. This proposed finding is also misleading insofar as it ignores the evidence that 1-800 Contacts has consistently recognized and responded to competitive pressure from online contact lens retailers, including the evidence that:

- (a) advertising by 1-800 Contacts’ lower-priced online rivals threatened its high-priced business model and that 1-800 Contacts spent significant time and resources monitoring, suing or threatening to sue, and extracting Bidding Agreements from, and enforcing those Bidding Agreements with its online rivals in order to effect a “ceasefire” on such competitive advertising (CCPTF Section VI (¶¶ 803-1282); *see also* CX9015 (Galan, Dep. at 141-142 (“A. . . . [T]here were contractual agreements in place between [1-800] Contacts and a certain number of our competitors that detailed—basically detailed keywords that we wouldn’t bid on . . . Q. And you characterized that as a ceasefire on trademark bidding? A. Yeah . . . ”)));
- (b) 1-800 Contacts spends millions of dollars on internet-based advertising (CCPTF ¶ 491);
- (c) trademark paid search advertising (i.e., using 1-800 Contacts’ own trademarks as keywords) is a commercially significant marketing channel for 1-800 Contacts (CCPTF Section V.B.1 (¶¶ 599-610));
- (d) 1-800 Contacts has consistently expressed concern about competition from internet-based contact lens retailers, and recognized that 1-800 Contacts’ business performance improves, and its advertising costs decrease, when competitive advertising is eliminated (CCPTF Section VI.A.2-3 (¶¶ 822-881); CCPTF ¶ 894 (collecting evidence that 1-800 Contacts former CEO Mr. Coon 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 to Mario Cibelli); CX9035 (Coon, Dep. at 288-289)) and expressed the view that 1-800 Contacts did not like “having competitors hijack and steal [its] customers before they get to checkout” (CX0068 at 001));

- (e) 1-800 Contacts complained directly to Google about competitor search advertising on several occasions because of the material impact it was having on 1-800 Contacts' sales and marketing costs (CCPTF Section VI.A.4 (¶¶ 882-889)); and
- (f) 1-800 Contacts' price matching program exists so 1-800 Contacts can better compete with online rivals. (CCPTF ¶ 1573; *see also* CCPTF Section IX.C (¶¶ 1478-1486) (showing that historically, more aggressive advertising by 1-800 Contacts' rivals caused 1-800 Contacts to respond by offering more generous price matching offers).

**102.** 1-800 Contacts' competitive focus is to get ECPs' patients to come and buy contact lenses from 1-800 Contacts. (CX 9001 (Bethers, IHT at 78)).

**Response to Proposed Finding No. 102:**

The proposed finding is vague and misleading insofar as the phrase "competitive focus" is undefined and does not appear in Mr. Bethers' cited investigational hearing testimony. The proposed finding is also misleading, unsupported and contrary to the weight of the evidence insofar as it implies that 1-800 Contacts' exclusive competitive focus is on ECPs for the reasons set forth in response to Proposed Finding No. 101.

**103.** Every customer of 1-800 Contacts must go back to an ECP to renew their prescription or obtain a new prescription. (Bethers, Tr. 3626-27). Thus, 1-800 Contacts loses customers that return to their ECP and purchase contact lenses there. (Bethers, Tr. 3626-27).

**Response to Proposed Finding No. 103:**

This proposed finding is irrelevant insofar as it discusses customers who have previously purchased contact lenses online purchasing from ECPs simply because they happen to be visiting the ECPs for required prescription renewals rather than because the ECPs compete with the online sellers in terms of price or convenience. (*See* CCPTF ¶¶ 1549-1550).

**104.** The vast majority of contact lens wearers purchase some amount of contact lenses when they obtain an eye exam. (CX 9017 (Blackwood, Dep. at 158-59); { ██████████ } )

**Response to Proposed Finding No. 104:**





The proposed finding is vague insofar as the qualifier “by far most likely” is not defined and if it is intended to compare the number of survey respondents who made their most recent purchase from an ECP to the number of survey respondents who made their most recent purchase from some other retailer, it is unclear what type or types of retailers are intended as the comparators.

**109.** In a survey conducted in or about 2013 of 1-800 Contacts’ “lost” customers (customers who had stopped buying from 1-800 Contacts), over 50 percent reported marking their most recent purchase of contact lenses from an ECP (independent ECPs or optical retail chain); about 22 percent reported making their most recent purchase from Walmart or another national general retailer; and about 17 percent reported marking their most recent purchase from another online contact lens retailers. (RX 739-0041, 102; RX 1129-0015).

**Response to Proposed Finding No. 109:**

The proposed finding is unsupported. The proposed finding improperly cites one of Respondent’s expert reports (RX0739) for a proposition of fact that should be proven with fact witness testimony or documents, namely facts about results of a survey 1-800 Contacts conducted regarding customer churn. The cited page from the Expert Report of Dr. Murphy merely describes a 1-800 Contacts survey document which itself is not in evidence. (RX0739 at 0041).

The record contains no exhibit labeled RX1129.

***C. 1-800 Contacts’ Differentiation Strategy Is Designed To Provide The Best Customer Service At Prices Below ECPs***

**110.** 1-800 Contacts differentiates itself among contact lens retailers by focusing on exceptional service and retail prices lower than ECPs. (CX 9029 (Bethers, Dep. at 23)).

**Response to Proposed Finding No. 110:**

Complaint Counsel does not disagree that 1-800 Contacts generally provides good customer service and that 1-800 Contacts’ prices tend to be lower than those of ECPs, but the proposed finding is misleading, unsupported, and contradicted by the weight of the evidence insofar as it suggests that 1-800 Contacts differentiates or distinguishes itself among online contact lens sellers with “exceptional service” or lower prices. To the contrary, 1-800 Contacts stands out

as having higher prices than its online rivals (CCPTF Section VI.A.1 (¶¶ 803-821)); those other rivals also offer good customer service and many offer service that is comparable to that offered by 1-800 Contacts (CCPTF Section III.E (¶¶ 305-374); and 1-800 Contacts' price premium over other online rivals cannot be fully explained by any marginan distinction in service quality it may offer over any other online rivals. (CCPTF Section IX.A.2 (¶¶ 1318-1343)).

**111.** 1-800 Contacts has always deliberately positioned itself within the contact lens retail industry to have the highest levels of service and convenience with retail prices below independent ECPs and optical retail chains. (Coon, Tr. 2708-10; CX 9001 (Bethers, IHT at 80); RX 904-0016; CX 525-017; { ██████████ })

**Response to Proposed Finding No. 111:**

This proposed finding is misleading insofar as it suggests that 1-800 Contacts has in fact positioned itself within the contact lens retail to have the highest levels of service and convenience among retailers that have prices lower than independent ECPs and optical retail chains, which is unsupported. While 1-800 Contacts tends to offer high levels of customer service, other online contact lens retailers offer comparably high levels of service and convenience. (CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343)).

**112.** 1-800 Contacts' message to consumers through extensive marketing often has emphasized that 1-800 Contacts has excellent customer service and lower prices than ECPs. (CX 9029 (Bethers, Dep. at 10)).

**Response to Proposed Finding No. 112:**

Complaint Counsel has no specific response.

**113.** 1-800 Contacts' founder and former CEO explained that the company's strategy of positioning itself within the market as having the best customer service was based on recognizing that it would be easy for another retailer to match prices but it is very difficult to create a brand and provide great service. (Coon, Tr. 2712).

**Response to Proposed Finding No. 113:**

Complaint Counsel has no specific response.

**114.** Price is only one component of how consumers typically define value; consumers also consider service and satisfaction, along with price, in determining the value provided by a retailer. (CX 9017 (Blackwood, Dep. at 163)).

**Response to Proposed Finding No. 114:**

The proposed finding is unsupported because it relies solely on the testimony of Ms. Blackwood, but there is no evidence establishing that Ms. Blackwood has personal knowledge of what contact lens consumers actually think, how they actually “typically define value,” or what they consider when determining the value provided by a retailer. The proposed finding is also vague as to time and unsupported as to any time other than during Ms. Blackwood’s tenure at 1-800 Contacts from October 2009 to December 2012. (CCPTF ¶¶ 23-24).

This proposed finding is also misleading and irrelevant insofar as it suggests that Complaint Counsel and its experts have ignored consumer preferences regarding non-price aspects of competition. That is not the case. (*See, e.g.* CCPTF ¶¶ 1428-1448 (describing the click-prediction portion of Dr. Athey’s empirical model, which accounted for consumer preferences for retailer brands and the effect of performing navigational searches based on observed consumer click behavior rather than ignoring or making assumptions about these factors), 1487-1495 (explaining how absent the agreements, both consumers who choose to purchase from lower-priced rivals *and* those who continue to choose to purchase from 1-800 Contacts would benefit from increased competition); Section XI.D.2 (¶¶ 1937-1954) (explaining that 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); CX8010 at 047 (¶¶ 119-120) (Athey Rebuttal Expert Report) (“Dr. Murphy claims that since there is evidence of a customer service quality differential between 1-800 Contacts and competitors, if consumers purchase from competing retailers in the counterfactual, consumer welfare would decrease due to lower average quality. *Dr. Murphy ignores the process by which consumers*

*make purchasing decisions. When a consumer is aware of the range of retailers available and the price differentials between them, the decision to purchase from a lower-priced retailer is made because it provides maximum overall utility.* As detailed in my report, the price premium charged by 1-800 Contacts is not justified by the service provided to that consumer. [But e]ven if it were, providing consumers with information on competitive offerings allows them to make better informed purchase decisions. . . . Consumers who are willing to pay the price premium charged by 1-800 Contacts are well-served by paid search results absent the Agreements . . . Other consumers benefit from information about lower-priced offerings, and of course *in the long run, competitive forces incentivize firms to provide both low prices and high quality. This competitive process relies crucially on consumers having enough information to compare alternative offerings.*”) (emphasis added).

**115.** 1-800 Contacts offered an overall value proposition inclusive of several different factors: the price per box that you pay for your contact lenses, the price of shipping, the rebates that you might be able to receive by purchasing larger quantities, the guaranteed returns, and the customer support that you received. (Schmidt, Tr. 2929).

**Response to Proposed Finding No. 115:**

The proposed finding is vague as to time, and unsupported as to any time other than during Mr. Schmidt’s brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶66-67). Notwithstanding, the proposed finding is irrelevant.

**116.** This overall value proposition in terms of price included the benefit of rebates from ordering in larger quantities and the benefit of free shipping. (Schmidt, Tr. 2930; CX 63-020).

**Response to Proposed Finding No. 116:**

The proposed finding is misleading because it omits that the reference to rebates and free shipping in the cited document, CX0063, was made in the context of 1-800 Contacts’ efforts to “reduce price transparency” versus its competition. (CX0063; *see* CCPTF ¶ 1317). This proposed finding is also irrelevant and misleading insofar as it omits that 1-800 Contacts’ online rivals sell

the same products as 1-800 Contacts at a significantly lower price, (CCPTF ¶¶ 803-821), which caused 1-800 Contacts to undertake various efforts to address this disadvantage, and specifically that { [REDACTED] } [REDACTED] }. (Athey, Tr. 821-823, *in camera*); CX0549 at 063, *in camera* ({ [REDACTED] } [REDACTED] })).

The proposed finding is also vague as to time, and unsupported as to any time other than during Mr. Schmidt’s brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶ 66-67).

**117.** 1-800 Contacts wanted to be perceived by its customers as being comparable to buying from one’s ECP and it did not want to do anything that might undermine that perception. (CX 9031 (Schmidt, Dep. at 80-81)).

**Response to Proposed Finding No. 117:**

The proposed finding is vague in its use of the phrase “comparable to” without misleading and unsupported. In the portion of deposition testimony cited, Mr. Schmidt testified that he was concerned that a proposed business “affiliation with Overstock would negatively affect” 1-800 Contacts’ credibility due to Overstock’s status as a liquidation website. (CX9031 (C. Schmidt, Dep. at 80)). His subsequent testimony that 1-800 Contacts did not want to “compromise the perception of 1-800 CONTACTS as being comparable to buying from your eye doctor” is inadmissible and should be disregarded because it lacks foundation. (CX9031 (C. Schmidt, Dep. at 85)). The testimony was based on statements from an email written by Josh Aston, a 1-800 Contacts employee, to employees of another company in March 2004, when Mr. Schmidt was an outside contractor for 1-800 Contacts. (CX9031 (C. Schmidt, Dep. at 82 (“Q. [T]his is a—for the record an e-mail that was sent by Josh Aston to Sean McClaughtery on March 11, 2004”))); CCPTF ¶¶ 65-66; C. Schmidt, Tr. 2889, 2936). The underlying email discussed in the cited

deposition testimony is not in evidence, and the cited testimony itself was prompted by Mr. Schmidt merely being asked to speculate as to his understanding of Mr. Aston's written statements (CX9031 (C. Schmidt, Dep. at 84-85)).

The proposed finding is also misleading and contradicted by the weight of the record evidence. 1-800 Contacts undertook extensive efforts to emphasize the differences between buying contact lenses online rather than from an ECP, such as the convenience of home delivery, better pricing, larger selection, and the ability to order 24 hours a day. (*See, e.g.*, Coon, Tr. 2650, 2694-2695).

**118.** 1-800 Contacts viewed contact lens consumers in three segments: (1) customers committed to purchasing only from their ECP; (2) customers willing to consider purchasing their lenses from someplace other than their ECP, but who were apprehensive about compromising on quality, and therefore considered trust and quality of service as paramount next to price; and (3) customers ruthlessly focused on price and willing to take additional risk in order to pay a lower price. (CX 9031 (Schmidt, Dep. at 87-88)). 1-800 Contacts targeted its value proposition toward the second segment and was not willing to compromise its brand reputation or the quality of its services in order to gain traction with the third segment. (CX 9031 (Schmidt, Dep. at 88-89)).

**Response to Proposed Finding No. 118:**

The proposed finding is unsupported. The cited testimony was based on statements from an email written by Josh Aston, a 1-800 Contacts employee, to employees of another company in March 2004, when Mr. Schmidt was an outside contractor for 1-800 Contacts. (CX9031 (C. Schmidt, Dep. at 82 (“Q. [T]his is a—for the record an e-mail that was sent by Josh Aston to Sean McClaughtery on March 11, 2004”)); CCPTF ¶¶ 65-66;; C. Schmidt, Tr. 2889, 2936). The underlying email discussed in the cited deposition testimony is not in evidence, and the cited testimony itself was prompted by Mr. Schmidt merely being asked to speculate as to his “understanding” of Mr. Aston's written statements. (CX9031 (C. Schmidt, Dep. at 87-89 (“Q. What was—what did you understand that to mean? A. . . . There's a third portion of the market

and one that we're referencing here, that are ruthlessly focused on price. . . . And we didn't want to go chasing the smaller part of the market and in the process compromise our brand . . .").

The first sentence of the proposed finding also lacks foundation because there is no evidence that Mr. Schmidt has personal knowledge of the attitudes toward buying online of millions of contact lens consumers, or that this former employee who has not been employed by 1-800 Contacts since January 2006 can testify as to 1-800 Contacts' "view." The second sentence of the proposed finding also lacks foundation because in the testimony cited, Mr. Schmidt was merely speculating possible effects on 1-800 Contacts' brand that might have come about if it entered into a business arrangement with Overstock, which it never did.

This proposed finding is also vague as to time and while, as described above, it is unsupported and lacking in foundation entirely, it is further lacking in foundation to the extent it refers to any time period after Mr. Schmidt left 1-800 Contacts in January 2006. (CCPTF ¶ 67).

**119.** While 1-800 Contacts wanted to be perceived as competitive on prices, it did not want to create a perception that it provided lower quality service or lower quality products; instead, 1-800 Contacts focused on creating the impression that it was the highest quality contact lens provider. (CX 9031 (Schmidt, Dep. at 80-81)).

**Response to Proposed Finding No. 119:**

The proposed finding is misleading and unsupported because it omits that the testimony cited was specifically addressing potential concerns with affiliating with Overstock, due to its reputation as offering products that "were often deeply discounted for a reason," such as being unpopular or leftover inventory. (CX9031 (C. Schmidt, Dep. at 80)). Therefore, the cited testimony does not support the generalized propositions that 1-800 Contacts did not want to create a perception that it provided lower quality service, or that 1-800 Contacts focused on building a reputation that it was the highest quality lens provider.

The proposed finding is also vague as to time, and unsupported as to any time other than during Mr. Schmidt's brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶ 66-67).

**120.** 1-800 Contacts declined a partnership with Overstock out of a concern that Overstock's emphasis on price discounts and its reputation for discounted products of lower value might impact 1-800 Contacts' reputation as a provider of highest quality service and product. (CX 9031 (Schmidt, Dep. at 82-84); CX 9013 (Aston, Dep. at 181-182)).

**Response to Proposed Finding No. 120:**

The proposed finding is irrelevant; it has no probative value to any material issue in this case.

The proposed finding is also nonsensical and misleading to the extent it suggests the 1-800 Contacts has a "reputation as a provider of highest quality . . . product." 1-800 Contacts, as a retailer rather than a manufacturer, sells the exact same contact lenses that its rival contact lens retailers sell. There is no differentiation in the products. (CCPTF Section III.D (¶¶ 299-304)).

The proposed finding is also misleading to the extent it ignores the evidence that many of 1-800 Contacts' online rivals offer service that is comparable to that offered by 1-800 Contacts (CCPTF Section III.E (¶¶ 305-374) and 1-800 Contacts' price premium over other online rivals cannot be fully explained by any marginal distinction in service quality it may offer over any other online rivals. (CCPTF Section IX.A.2 (¶¶ 1318-1343)).

Finally, this proposed finding is unsupported. The cited testimony of Mr. Schmidt and Mr. Aston is based on a document marked RX0106, which is not in evidence, and most of the transcript consists of Respondent's counsel improperly reading statements from the document into the record without laying the proper foundation and asking leading questions to which objections were made.

Specifically, the cited testimony of Mr. Schmidt was entirely based on statements from the document marked RX0106, which was purportedly written by Mr. Aston to employees of another company in March 2004, when Mr. Schmidt was an outside contractor for 1-800 Contacts. (CX9031 (C. Schmidt, Dep. at 82 (“Q. [T]his is a—for the record an e-mail that was sent by Josh Aston to Sean McClaughtery on March 11, 2004”)); CCPTF ¶¶ 65-66; C. Schmidt, Tr. 2889, 2936). The underlying document discussed in the cited deposition testimony is not in evidence, and the cited testimony itself was prompted by Mr. Schmidt merely being asked to speculate as to his “understanding” of Mr. Aston’s written statements. (*See* CX9031 (C. Schmidt, Dep. at 83) (“Q. And what did you understand that to mean? A. It’s just documenting very clearly the importance that we placed on quality . . . ”)).

Additionally, Mr. Aston’s cited deposition testimony does not support the proposed finding that 1-800 Contacts declined a partnership with Overstock over a concern about Overstock’s reputation for “products of a lower value” or that 1-800 Contacts had a reputation as a provider of highest quality service and product that would have been harmed by such a partnership. (*See* CX9013 (Aston, Dep. at 180-182)).

**121.** In a marketing presentation dated April 29, 2005, 1-800 Contacts’ employees used the phrase “Reduce Price Transparency versus Competition” to mean that 1-800 Contacts wished to present a message to consumers that reflected its overall value proposition as opposed to a single incomplete element of value. (Schmidt, Tr. 2929; CX 63-014).

**Response to Proposed Finding No. 121:**

The proposed finding is misleading, unsupported, contrary to the weight of the evidence, and lacking in credibility insofar as it suggests that a desire to “reflect[] its overall value proposition” was the exclusive, the primary, or even a plausible meaning of the phrase “Reduce Price Transparency versus Competition” as used in CX0063. Such a finding would contradict the plain meaning of the phrase “reduce price transparency versus competition,” which suggests

making price information—particularly, information about how one’s prices compare to those of competitors—less easily visible, less clear, or less straightforward for potential customers.

Such a proposed finding is also misleading, unsupported, contrary to the weight of the evidence, and lacking in credibility because references to price transparency and efforts to reduce it appear throughout 1-800 Contacts’ documents in record evidence, and the overwhelming weight of these references shows that (a) 1-800 Contacts faced a competitive disadvantage in the advertising platforms with the greatest price transparency because its competitors’ prices were lower than 1-800 Contacts’ prices and those competitor prices were easily visible to consumers and (b) 1-800 Contacts undertook various actions, including displaying after-rebate pricing and promoting its price-matching policy, in order to compete while obscuring apples-to-apples comparisons of its prices to those of its competitors. (*See, e.g.*, CX1015 at 002 (In May 2004, 1-800 Contacts’ Chief Marketing Officer Kevin McCallum wrote: “In different forums on the Web we will need multiple price benefit platforms” because “Price transparency is much higher in specific Web forums”); CX0226 at 001 (In November 2005, 1-800 Contacts’ marketing employee Amy Guymon wrote: “In May, we initiated an effort to reduce price transparency on these [comparison shopping engines]. We were running our regular price per box . . . . We tested using our after rebate pricing” which “worked better for us”); CX0067 at 009 (An October 2006 1-800 Contacts marketing presentation identified various “tactics” to “reduce competitive price transparency” including “Leverage Rebates—Lower Unit Price,” “Price Matching,” and “Upsell/Package Deals”); CX0044, at 010-011, 016 (A May 2011 “Search Overview” presentation expressed concern that 1-800 Contacts could be “Losing NI [new internet] customers to aggressive competitor offers,” and showed, as examples of this concern, Google results pages that appeared in response to searches for each “1-800contacts” and “contact lenses,” which yielded ads for Lens Direct emphasizing “Free Shipping + Coupon + 70% Off,” for ShipMyContacts which

emphasized “Aggressive ‘70% Off’” messaging, for Lens.com and Coastal emphasizing “70% off” messaging, and for Vision Direct advertising “Extra 20% + Promo Code.” The presentation expressed concern that 1-800 Contacts as “Losing Natural Search NI [new internet] customers” due to “[m]ore competitors on [its] TM ads YoY,” “[a]ggressive ‘price’ messaging from competitors,” and “[m]ore paid search TM activity.”); CX0410 at 001 (In a July 2012 email, Rick Galan wrote to marketing personnel at 1-800 Contacts that “We’re continuing to be down year over year in Paid” and “our conversion rate is about 29% lower” and that “[a] lot of this decrease comes from more competitive pressure and price transparency in the search engines.”); CX1086 at 001-003 (In an August 2012 email, 1-800 Contacts Online Marketing Manager Amber Powell sent Rick Galan, Laura Schmidt, and Justin Olson a screen shot of search page results and wrote: “I don’t know how we still get orders from your [paid search] channel. Look at all the prices that are much lower than ours.” Laura Schmidt replied asking whether Ms. Powell believed “this is why our PPC is dropping so significantly YoY – particularly NI?” and noted that “We still need to try to different things to try to offset the declines though . . .” Ms. Powell replied “I think it’s very likely. *We’ve noticed paid search experiencing a drop in NI CR [new internet conversion rates] that is disproportionate to other channels. For example, typed/bookmarked has actually experienced a lift in NI CR recently. Typed/bookmarked customers aren’t exposed to other websites’ pricing before coming to our site which likely makes them less sensitive to pricing.*” Mr. Galan replied: “*I would agree 100%. The price visibility in search is only increasing . . .*” Ms. Powell replied again, noting: “I’ve been trying to think of ways to *improve NI CR for this channel (without lowering prices) and it’s no easy task.*” Ms. Schmidt replied that “*this is a big challenge for us* and we are trying out promos/copy etc. to see if we can come up with anything to offset this issue.” Ms. Powell replied, lamenting that “*[l]owering prices really would be the easiest thing to do. 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.”* In a later email in the chain, Ms. Schmidt stated that “We actually have found success in the past when we used ‘We’ll beat any price.’ Our past though was that the customer than [sic] interpreted this to mean that we had lower prices.”) (emphasis added); see also CCPTF Section VI.A.2 (¶¶ 822-865)).

**122.** 1-800 Contacts business model is different than most other online contact lens retailers. (CX 9029 (Bethers, Dep. at 10)).

**Response to Proposed Finding No. 122:**

The proposed finding is so vague as to be rendered irrelevant.

It is also unsupported because the cited testimony lacks foundation. There is no evidence suggesting that Mr. Bethers has personal knowledge of the business models of all or any other online contact lens retailers.

Finally, this proposed finding is misleading to the extent it ignores the similarities between 1-800 Contacts and its online rivals, for example:

- (a) they sell the exact same product (CCPTF Section III.D (¶¶ 299-304));
  - (b) they sell it online (CCPTF Section II.A (¶¶ 4-262));
  - (c) they compete against one another for customers (CCPTF Section VI.A. (¶¶ 803-890));
  - (d) they operate within the same relevant market (CCPTF Section X.A. (¶¶ 1542-1622));
  - (e) they utilize search advertising in selling their product (CCPTF Section IV.B (¶¶ 489-589));
- and
- (f) they compete on the basis of price and service, focusing on providing sufficient inventory to quickly fill orders, providing speedy delivery, and striving to ensure that customers are sufficiently satisfied to return to make repeat purchases, on which online contact lens

retailers' business models depend (CCPTF Section III.E (¶¶ 305-374), Section IV.A.6.b (¶¶ 466-481)).

**123.** Online contact lens retailers, other than 1-800 Contacts, generally chose to differentiate themselves solely based on price. (CX 9029 (Bethers, Dep. at 10-11)).

**Response to Proposed Finding No. 123:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence establishing that Mr. Bethers has personal knowledge of the competitive strategies and pricing policies that any other contact lens retailers employed to differentiate themselves.

The proposed finding is also inaccurate and contradicted by the weight of the record evidence, which shows that online contact lens retailers other than 1-800 Contacts differentiate themselves in a variety of ways, including by emphasizing superior service and convenience in addition to price. (CCPTF Section III.E (¶¶ 305-374)).

***1. 1-800 Contacts Has Made Enormous Investments In Customer Service***

**124.** Customer service is one means by which 1-800 Contacts has differentiated and continues to differentiate itself from many other contact lens retailers. (RX 736-006; CX 9017 (Blackwood, Dep. at 16) (“one of the primary differentiators was [1-800 Contacts’] service”)).

**Response to Proposed Finding No. 124:**

The proposed finding is misleading insofar as it suggests that other online contact lens retailers do not also focus on customer service, do not in some respects have levels of customer service on par with 1-800 Contacts, or do not also seek to “differentiate[]” themselves from other contact lens retailers by providing high levels of customer service, among other things. (CCPTF Section III.E (¶¶ 305-374); CCPTF Section IX.A.2 (¶¶ 1318-1343); CCPTB at 15 n.58).

**125.** Providing better service was the key thing that has differentiated 1-800 Contacts from other contact lens retailers. (Coon, Tr. 2707-08).

**Response to Proposed Finding No. 125:**

The proposed finding is misleading insofar as it suggests that other online contact lens retailers do not also focus on customer service and do not in some respects have levels of customer service on par with 1-800 Contacts. (CCPTF Section III.E (¶¶ 305-374); CCPTF Section IX.A.2 (¶¶ 1318-1343); CCPTB at 15 n.58).

The proposed finding is also unsupported insofar as it refers to any time after January 2014 when Mr. Coon left the company. (CCPTF ¶¶ 15-16).

**126.** Although some consumers might be interested in just getting the lowest price, 1-800 Contacts found that many consumers valued speed and convenience just as much as price. (Coon, Tr. 2705-07).

**Response to Proposed Finding No. 126:**

The proposed finding is vague as to time and vague and unsupported in its use of the qualifiers “some,” “many,” and “just as much as.” The proposed finding is also speculative and unsupported as there is no evidence that Mr. Coon has personal knowledge regarding what millions of consumers value and how those consumers rank price, speed, convenience, and other factors.

This proposed finding is also misleading and irrelevant insofar as it suggests that Complaint Counsel and its experts have ignored consumer preferences regarding non-price aspects of competition. That is not the case, as set forth in response to Proposed Finding No. 112.

**127.**

[REDACTED]  
[REDACTED] (RX 1117-0028).

**Response to Proposed Finding No. 127:**

This proposed finding, to the extent it purports to establish as fact what “consumers” in general value, is lacking in foundation as it is drawing conclusions from the results of “consumer research” without the benefit of appropriate expert analysis or testimony.

This proposed finding is also misleading and irrelevant insofar as it suggests that Complaint Counsel and its experts have ignored consumer preferences regarding non-price aspects of competition. That is not the case, as set forth in response to Proposed Finding No. 112.

**128.** A recent consumer survey conducted by 1-800 Contacts found that convenience is more important than price for customers using the internet or a mobile app to shop for contact lenses. (RX 1108-0010).

**Response to Proposed Finding No. 128:**

The proposed finding is misleading. { [REDACTED]

[REDACTED]

[REDACTED] } (RX1108 at 001, 010, *in camera*).

By the document's own terms, { [REDACTED]

[REDACTED] } (RX1108 at

010, *in camera*).

This proposed finding is also misleading and irrelevant insofar as it suggests that Complaint Counsel and its experts have ignored consumer preferences regarding non-price aspects of competition. That is not the case, as set forth in response to Proposed Finding No. 112.

**129.** In a consumer survey conducted by 1-800 Contacts in or about 2007, consumers responded that “ease, price and speed are common considerations in the contact lens buying process”: “67% decide where to purchase contacts based on what is easiest”; “42% shop around to get the best price on contacts”; and “56% need contacts fast because they are almost out.” (RX 1137-009).

**Response to Proposed Finding No. 129:**

The proposed finding is unsupported. The only source cited (RX1137) is not in evidence. (See JX0002-A at 058 (noting that RX1137 was “intentionally not used”). The proposed finding is also vague and nonsensical as written.

**130.** [REDACTED] } (RX 1117-0028).

**Response to Proposed Finding No. 130:**

Complaint Counsel has no specific response.

**131.** One of the best indicators that consumers value convenience and speed of delivery is that customers pay a premium for overnight shipping on about one-third of the orders placed with 1-800 Contacts. (Coon, Tr. 2705-06; Bethers, Tr. 3641).

**Response to Proposed Finding No. 131:**

Complaint Counsel does not disagree that some online contact lens consumers value convenience and speed of delivery. Complaint Counsel notes, however, that the testimony of Mr. Coon does not support the proposed finding regarding the proportion of 1-800 Contacts customers who pay for overnight shipping as to any time after June 2009, at which point Mr. Coon was not involved “in the day-to-day operation of the business,” (Coon, Tr. 2677-2678) and that the testimony of both Mr. Coon and Mr. Bethers regarding the prevalence of expedited shipping is unclear as to time. Further, the proposed finding that “consumers value convenience and speed of delivery” is so general and vague as to be rendered irrelevant and unsupported by the single data point presented about the behavior of certain 1-800 Contacts customers.

**132.** Since its inception, 1-800 Contacts had the idea that it was going to win on service. (Coon, Tr. 2712-13).

**Response to Proposed Finding No. 132:**

Complaint counsel has no specific response except to note that the proposed finding is so vague as to be rendered irrelevant.

**133.** 1-800 Contacts’ business objective from the beginning was to make the process of buying contact lenses simple. (Coon, Tr. 2669-70).

**Response to Proposed Finding No. 133:**

Complaint Counsel has no specific response.

**134.** 1-800 Contacts operated under the simple formula “satisfaction equals reality minus expectations,” which conveys the importance of exceeding consumers’ expectations. (Coon, Tr. 2698-700).

**Response to Proposed Finding No. 134:**

Complaint Counsel has no specific response.

**135.** [REDACTED] (CX 547-011).

**Response to Proposed Finding No. 135:**

Complaint Counsel does not dispute that the quoted statement is or at least at some point was 1-800 Contacts’ mission statement, but notes only that this proposed finding is irrelevant, and it is unsupported by the cited source, which { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]}. (CX0547 at 011). { [REDACTED]  
[REDACTED]  
[REDACTED]}. (CX0547 at 011).

**136.** The first sentence in 1-800 Contacts’ mission statement, which says “customer retention is what drives us,” was meant to convey the importance of customer retention since 1- 800 Contacts generally would lose money on a customer’s first order, break even on the second order, and start becoming profitable on a customer’s third order. (Coon, Tr. 2689).

**Response to Proposed Finding No. 136:**

Complaint Counsel has no specific response except to note that other online contact lens retailers have the same business strategy due their reliance on repeat business and customer retention in order to justify their return on investment in attracting a new customer. (CCPTF Sections IV.A.6 (¶¶ 443-488) and III.E (¶¶ 305-374)).

**137.** The second sentence in 1-800 Contacts’ mission statement, which says “the real value in this business is the reputation we build,” was meant to convey the importance of building a reputation such that customers will recommend the company to their friends. (Coon, Tr. 2689-90).

**Response to Proposed Finding No. 137:**

Complaint Counsel has no specific response.

**138.** The final portion of 1-800 Contacts’ mission statement, which says “contact lenses are just the product we deliver, what we really sell is service,” was meant to convey that it is the experience around the product that the company delivers that will distinguish its business. (Coon, Tr. 2690).

**Response to Proposed Finding No. 138:**

Complaint Counsel has no specific response.

**139.** 1-800 Contacts’ mission statement conveys to its employees that 1-800 Contacts is selling service, not a commodity, and that every interaction with a customer either builds or detracts from 1-800 Contacts’ reputation. (Coon, Tr. 2688-89).

**Response to Proposed Finding No. 139:**

This proposed finding is unsupported. The cited testimony lacks foundation as to 1-800 Contacts’ employees’ perceptions, understandings, or interpretations of its mission statement. Nonetheless, the proposed finding is irrelevant.

**140.** 1-800 Contacts tries to distinguish itself from other contact lens retailers by making it faster, easier, and more convenient to get contact lenses. (Coon, Tr. 2669-70).

**Response to Proposed Finding No. 140:**

This proposed finding is misleading to the extent it suggests that other online contact lens retailers do not also try to distinguish themselves in this manner and offer customer service

comparable to and competitive with that offered by 1-800 Contacts. (CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343))).

**141.** 1-800 Contacts has focused on removing friction for the customer and making it as fast and easy as possible to get contact lenses. (Coon, Tr. 2669-70).

**Response to Proposed Finding No. 141:**

Complaint Counsel has no specific response.

**142.** 1-800 Contacts has made extraordinary investments in providing a credible service and a high quality service to customers, including a very well-run and consistent call center, prompt shipping within two business days, packaging, quality control measures in inventory and prescription verification, and a 100% guaranteed return policy. (CX 9031 (Schmidt, Dep. at 90-91)).

**Response to Proposed Finding No. 142:**

The proposed finding is unsupported as to any time other than Mr. Schmidt's brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶ 66-67). This proposed finding is also vague and therefore irrelevant in its use of the phrase "credible service." And the proposed finding is misleading and irrelevant insofar as it suggests that other online contact lens retailers have not also invested in customer service, a broad inventory, and speedy delivery, or insofar as it suggests that 1-800 Contacts' price premium is explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers. (See CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343))).

**143.** 1-800 Contacts has made many substantial investments to build a reputation for superior customer service. (Coon, Tr. 2690).

**Response to Proposed Finding No. 143:**

The proposed finding is vague. It is also misleading and irrelevant insofar as it suggests that other online contact lens retailers have not also invested in customer service, a broad inventory, and speedy delivery, or insofar as it suggests that 1-800 Contacts' price premium is

explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers. (See CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343)).

(a) ***1-800 Contacts' Commitment To Customer Service Involves Many Aspects Of The Shopping Experience***

**144.** 1-800 Contacts has more inventory in stock than any other contact lens retailer, allowing 1-800 Contacts to fill 98 percent of all orders with inventory on hand. (Coon, Tr. 2690-91; Bethers, Tr. 3640; CX 9029 (Bethers, Dep. at 136); RX 904-0016; [REDACTED])

**Response to Proposed Finding No. 144:**

Complaint Counsel has no specific response except to note that this proposed finding is misleading and irrelevant insofar as it suggests that 1-800 Contacts' price premium is explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers. (See CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343); see also e.g., Clarkson, Tr. 192 (testifying that AC Lens is able to fill 96% of orders from inventory on hand)).

**145.** In comparison, independent ECPs typically have about 40 percent of orders in stock. (Bethers, Tr. 3641; Coon, Tr. 2669).

**Response to Proposed Finding No. 145:**

This proposed finding lacks foundation in that there is no evidence that either Mr. Bethers or Mr. Coon has personal knowledge about the precise percent of orders that the average ECP is able to fill from stock; nonetheless, Complaint Counsel agrees that ECPs—and other brick and mortar retailers—typically hold far less inventory in stock than online contact lens sellers. (See, e.g., CX1448, at 119, *in camera* ([REDACTED]); Clarkson, Tr. 181-182 (“[T]he other part of starting a business is . . . to fill a high percentage of orders from stock, you need to keep a tremendous number of SKUs in stock. And a small business, like a doctor’s office, wouldn’t have literally the space or the budget to do that.”), 191 (“[B]ig-box stores also don’t carry a great deal of inventory because it would require a lot of space, so I can speak specifically

to Walmart and Sam's. They would have a selection of maybe four different lenses, perhaps a total of 400 SKUs in the store. A doctor would have even less, and many doctors don't carry any inventory."); *see also* CCPTF ¶ 264; *see also generally* CCPTF Section X.A.1 (¶¶ 1543-1563)).

**146.** 1-800 Contacts offers customers the ability to place orders for contacts lenses 24/7 both online and by phone. (RX 904-0016; { [REDACTED] })

**Response to Proposed Finding No. 146:**

Complaint Counsel has no specific response.

**147.** 1-800 Contacts' customer care representatives are always available to answer questions. (RX 904-0016; { [REDACTED] })

**Response to Proposed Finding No. 147**

Complaint Counsel has no specific response.

**148.** 1-800 Contacts' call center has over 300 trained employees. (RX 428-0031).

**Response to Proposed Finding No. 148:**

Complaint Counsel has no specific response.

**149.** 1-800 Contacts' customer care representatives are empowered to take care of the customer. (CX 9029 (Bethers, Dep. at 37); CX 9017 (Blackwood, Dep. at 307); RX 428-0031).

**Response to Proposed Finding No. 149:**

This proposed finding is vague in its use of the phrase "take care of." Otherwise, Complaint Counsel has no specific response.

**150.** 1-800 Contacts' customer care representatives answer most calls with a live person by the third ring. (Coon, Tr. 2691; RX 904-0019; CX 525-020).

**Response to Proposed Finding No. 150:**

This proposed finding is vague in its use of the word "most." Otherwise, Complaint Counsel has no specific response.

**151.** 1-800 Contacts' customer care representatives answer most emails within 10 minutes. (RX 904-0019; CX 525-020).

**Response to Proposed Finding No. 151:**

This proposed finding is vague in its use of the word “most.” Otherwise, Complaint Counsel has no specific response.

**152.** 1-800 Contacts’ has live customer care representatives available to answer text messages. (Coon, Tr. 2691).

**Response to Proposed Finding No. 152:**

The proposed finding is unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**153.** 1-800 Contacts offers customer service through click-to-chat. (RX 904-0016).

**Response to Proposed Finding No. 153:**

The proposed finding is vague in its use of the undefined term “click-to-chat.” Otherwise, Complaint Counsel has no specific response.

**154.** 1-800 Contacts offers free replacements for torn contact lenses. (Coon, Tr. 2700; RX 904-0016; { ██████████ } )

**Response to Proposed Finding No. 154:**

Complaint Counsel has no specific response.

**155.** 1-800 Contacts invested in the “unboxing experience” by creating clean, attractive packaging for the purpose of enhancing credibility. (CX 9031 (Schmidt, Dep. at 90-91)).

**Response to Proposed Finding No. 155:**

This proposed finding is vague in its use of the terms “unboxing experience” and “credibility,” vague as to time, and unsupported as to any points in time outside Mr. Schmidt’s brief tenure at 1-800 Contacts. Otherwise, Complaint Counsel has no specific response.

**156.** The box that 1-800 Contacts uses to ship contact lenses to customers was designed to make it as simple as possible to open. (Coon, Tr. 2692).

**Response to Proposed Finding No. 156:**

The proposed finding is unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**157.** 1-800 Contacts sends orders with no signature required, replacing at its own cost any package left on a customer's doorstep that the customer does not actually receive. (Coon, Tr. 2691).

**Response to Proposed Finding No. 157:**

The proposed finding is unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**158.** 1-800 Contacts sends handwritten apology notes to customers if their order was late. (Coon, Tr. 2691).

**Response to Proposed Finding No. 158:**

The proposed finding is unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**159.** 1-800 Contacts has a marketing program called the "WOW initiative" by which it sends small, personalized gifts to certain customers based on comments or feedback from the customer. (Bethers, Tr. 3646-47).

**Response to Proposed Finding No. 159:**

Complaint Counsel has no specific response.

**160.** 1-800 Contacts designed its website to be as simple and efficient as possible for a customer to place an order. (CX 9027 (Larson, Dep. at 94)). 1-800 Contacts' website is designed to minimize the amount of time spent on the website and the number of clicks a consumer had to make to purchase contact lenses. (CX 9027 (Larson, Dep. at 94)). 1-800 Contacts' repeat customers could place an order for contact lenses with two clicks on the website. (CX 9027 (Larson, Dep. at 94)).

**Response to Proposed Finding No. 160:**

The proposed finding is vague as to time. Otherwise, Complaint Counsel has no specific response.

**161.** 1-800 Contacts has made recent changes to its website that allow a potential customer to enter just their ECP's name and 1-800 Contacts will contact the ECP to obtain the necessary prescription information. (Bethers, Tr. 3643).

**Response to Proposed Finding No. 161:**

Complaint Counsel has no specific response.

**162.** 1-800 Contacts developed a mobile app to make it easier and simpler for customers to order contact lenses online. (Coon, Tr. 2678-79 & 2691-92).

**Response to Proposed Finding No. 162:**

Complaint Counsel has no specific response.

**163.** 1-800 Contacts' mobile app allows a consumer to reorder contact lenses in just 3 clicks. (Coon, Tr. 2680).

**Response to Proposed Finding No. 163:**

The proposed finding is unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**164.** 1-800 Contacts' mobile app allows a consumer to scan their prescription, scan the barcode on their contact lens box, and use their location to find a nearby eye doctor's office. (Coon, Tr. 2678-79).

**Response to Proposed Finding No. 164:**

The proposed finding is unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**165.** 1-800 Contacts recently expanded its mobile app features to allow customers to take a photo with their mobile device of their prescription and send it to 1-800 Contacts immediately. (Bethers, Tr. 3643; { [REDACTED] })

**Response to Proposed Finding No. 165:**

Complaint Counsel has no specific response.

**166.** Over one million people have downloaded 1-800 Contacts' mobile app. (Coon, Tr. 2678-80).

**Response to Proposed Finding No. 166:**

Complaint Counsel has no specific response.

**167.** 1-800 Contacts' mobile app has had a 5 star rating from the beginning. (Coon, Tr. 2680).

**Response to Proposed Finding No. 167:**

This proposed finding is vague as to time and unsupported as to any time after Mr. Coon left the company in January 2014. (CCPTF ¶¶ 15-16). Otherwise, Complaint Counsel has no specific response.

**168.** 1-800 Contacts currently has plans to expand its distribution network from one distribution center currently in Salt Lake City to add another hub in the eastern United States with five additional distribution spokes. (Bethers, Tr. 3641-42). This will allow 1-800 Contacts to delivery contact lenses to 98 percent of the United States population with free, standard two-day delivery. (Bethers, Tr. 3641-42).

**Response to Proposed Finding No. 168:**

Complaint Counsel has no specific response.

(b) *1-800 Contacts' Customer Service Has Been Recognized For Its Excellence By Customers And Third-Parties*

**169.** 1-800 Contacts' service has been rewarded by customers through both repeat business and recommendations to friends. (Coon, Tr. 2706-07).

**Response to Proposed Finding No. 169:**

The proposed finding is unsupported and lacking in foundation as to customers making recommendations to friends because there is no evidence that Mr. Coon has personal knowledge of customers recommending 1-800 Contacts to friends. Otherwise, Complaint Counsel has no specific response..

**170.** [REDACTED] (Bethers, Tr. 3571-72; RX 904-0019; CX 525-020).

**Response to Proposed Finding No. 170:**

Complaint Counsel has no specific response.

**171.** [REDACTED]

**Response to Proposed Finding No. 171:**

Complaint Counsel has no specific response.

**172.** The Net Promoter Score is based on asking customers one question: “How likely is it that you would recommend our company to a friend or colleague?” { [REDACTED] } RX 736-013). And the customer answers that one question on a scale of 0 to 10. { [REDACTED] } RX 736-013).

**Response to Proposed Finding No. 172:**

Complaint Counsel has no specific response.

**173.** The Net Promoter Score is calculated by subtracting the percentage of respondents who answer with a score of 0 to 6 from the percentage who answer with a score of 9 or 10 (those who answer with 7 or 8 are included only in the number of total respondents). { [REDACTED] } RX 736-013).

**Response to Proposed Finding No. 173:**

Complaint Counsel has no specific response.

**174.** The Net Promoter Score is considered a strong indicator of both the loyalty of a company’s customers and the company’s growth potential. { [REDACTED] } RX 736-013).

**Response to Proposed Finding No. 173:**

Complaint Counsel has no specific response.

**175.** 1-800 Contacts’ Net Promoter Score of 74 percent is considered to be very high. (CX 9017 (Blackwood, Dep. at 159-60); { [REDACTED] } RX 736-014).

**Response to Proposed Finding No. 175:**

The proposed finding is vague insofar as it does not identify who considers 1-800 Contacts’ Net Promoter Score to be very high. This proposed finding is also misleading and irrelevant insofar as it suggests that other online contact lens retailers do not also achieve strong NPS scores or insofar as it suggests that 1-800 Contacts’ price premium is explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers.

(See CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343)).

**176.** In one comparison, 1-800 Contacts’ Net Promoter Score was higher than Amazon.com, Netflix, Apple, and Trader Joe’s. (CX 9017 (Blackwood, Dep. at 160); { [REDACTED] } RX 736-014).

**Response to Proposed Finding No. 176:**

Complaint Counsel notes that the testimony of Ms. Blackwood does not support the proposed finding. Indeed, Ms. Blackwood initially testified that Apple, along with Costco, had a higher NPS than 1-800 Contacts, and then contradicted herself by agreeing in response to an improperly leading question that there were times when 1-800 Contacts exceeded Apple on NPS score. (CX9017 (Blackwood, Dep. at 159-60 (“1-800 Contacts had a very, very high NPS when I was there. It was in the almost 80s. There’s only several—there’s only a couple brands in the U.S. that are above that number, which is Costco, Apple, so it is a very high NPS score . . . Q. And were there ever times when you exceeded Apple on that score? A. Yes. Yes, we did.”))). Accordingly, her testimony is unreliable. Ms. Blackwood did not testify at all about the NPS of Amazon, Netflix, or Trader Joe’s.

Complaint Counsel also notes that the proposed finding improperly cites one of Respondent’s expert reports (RX0736) for a proposition of fact that should be proven with fact witness testimony or documents, namely the results of a Net Promoter Score surveys conducted in 2014 and 2015, as reported in a 1-800 Contacts document.

Even to the extent this proposed finding is supported by CX1446 at 028, this proposed finding is misleading and irrelevant insofar as it suggests that other online contact lens retailers do not also achieve strong NPS scores or insofar as it suggests that 1-800 Contacts’ price premium is explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers. (*See* CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343)).

The proposed finding is also irrelevant because comparing NPS scores across unrelated companies in entirely distinct industries has no probative value to any issue material to this case.

**177.** 1-800 Contacts’ Net Promoter Score shows that it has a large base of customers that are willing to share positive information about the company with prospective new customers. (RX 736-014).

**Response to Proposed Finding No. 177:**

The proposed finding is unsupported because it relies entirely on the expert opinions of Dr. Goodstein, which must be disregarded for the reasons set forth in Complaint Counsel’s Post-Trial Brief. (CCPTB at 165-168). It is also so vague as to be rendered irrelevant in its use of the term “large base of customers.”

**178.** 1-800 Contacts is a top performer in customer satisfaction for the health/beauty section in Answers Experience Index. (RX 739-0020).

**Response to Proposed Finding No. 178:**

This proposed finding is vague in its use of the undefined terms “top performer” and “Answers Experience Index” The proposed finding is unsupported as it improperly cites the expert report of Dr. Murphy (RX0739) for a proposition of fact that should be proven with fact witness testimony or documents. The Answers Experience Index itself to which Dr. Murphy referred is not in evidence. Moreover, Dr. Murphy was not qualified as an expert in retail service quality and thus his opinions on 1-800 Contacts’ customer service lack foundation.

Notwithstanding, the proposed finding is misleading and irrelevant insofar as it suggests that 1-800 Contacts’ price premium is explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers (*see* CCPTF Sections III.E (¶¶ 305-374 & IX.A.2 (¶¶ 1318-1343)) and because comparisons of service offered by 1-800 Contacts and unrelated companies in entirely distinct industries has no probative value to any issue material to this case.

**179.** The Answers Experience Index compares companies featured on Internet Retailer’s Top 500 web and mobile commerce sites and the National Retail Federation’s Top 100 Retailers. (RX 739-0020).

**Response to Proposed Finding No. 179:**

The proposed finding is unsupported. The proposed finding improperly cites the expert report of Dr. Murphy (RX0739) for a proposition of fact that should be proven with fact witness testimony or documents,. The Answers Experience Index itself to which Dr. Murphy cited in his

report is not in evidence. Moreover, Dr. Murphy was not qualified as an expert in retail service quality and thus his opinions on 1-800 Contacts' customer service lack foundation.

Notwithstanding, the proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

**180.** 1-800 Contacts is the only contact lens retailer to appear as a top firm on Answer's Experience Index. (RX 739-0020).

**Response to Proposed Finding No. 180:**

This proposed finding is vague as to time. The proposed finding is unsupported. The proposed finding improperly cites the expert report of Dr. Murphy (RX0739) for a proposition of fact that should be proven with fact witness testimony or documents. The Answers Experience Index itself to which Dr. Murphy cited in his report is not in evidence. Moreover, Dr. Murphy was not qualified as an expert in retail service quality and thus his opinions on 1-800 Contacts' customer service lack foundation.

Notwithstanding, the proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

**181.** 1-800 Contacts' customer service has been recognized by, and received awards from, many third parties. (CX 9027 (Larson, Dep. at 71; Goodstein, Tr. 2396-97; RX 736-012-016, Table 2; RX 739-0020).

**Response to Proposed Finding No. 181:**

Complaint Counsel has no specific response.

**182.** 1-800 Contacts' call center received the highest score ever given by J.D. Power and Associates to a call center. (RX 590-0002; CX 9027 (Larson, Dep. at 71-72); RX 904-0019; CX 525-020; Goodstein, Tr. 2397-98; RX 736-012).

**Response to Proposed Finding No. 182:**

This proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

**183.** J.D. Power and Associates explained that “[s]urvey results show 1-800-Contacts’ overall satisfaction index score to be 949 out of 1000, which falls well above the passing score of 768 that is needed for certification. In fact, it is the highest index score achieved in the history of our call center certification program, and can be compared to the average index score of other J.D. Power and Associates’ certified call centers, which is currently 864.” (RX 590-0002.)

**Response to Proposed Finding No. 183:**

The proposed finding is unsupported because it consists entirely of hearsay statements by non-party J.D. Power and Associates, which do not fall into any hearsay exception.

Notwithstanding, the proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

**184.** 1-800 Contacts received the StellaService Elite award for its customer service: “Top scores by 1-800 Contacts across numerous service areas earned it the industry’s most coveted award for outstanding customer service—the StellaService Elite Seal.” (RX 155-0001; CX 9027 (Larson Dep. at 71)).

**Response to Proposed Finding No. 184:**

The second clause of the proposed finding is unsupported because it consists entirely of a hearsay statements by non-party StellaService. (RX0155 at 001). Notwithstanding, the proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

**185.** 1-800 Contacts was ranked #7 on a list of top 100 online retailers for customer satisfaction by Foresee (a commonly used company to measure customer satisfaction). (RX 901-001; RX 736-013).

**Response to Proposed Finding No. 185:**

The proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

**186.** Other customer service awards received by 1-800 Contacts include: 2016 Loyalty 360 CX Award for Customer Insights: Online Trust Alliance (“OTA”) 2015 Online Trust Honor Roll; 2015 Innovation in Service Excellence Award from the Gartner Group and Ito1 Media; 2014 Stella Service Elite Rating; 2011 Internet Retailer Hot 100; and Utah Best of State – Customer Service, Call Center. (RX 736-016, Table 2).

**Response to Proposed Finding No. 186:**

The proposed finding is unsupported. The proposed finding improperly cites the expert report of Dr. Goodstein (RX0736) for propositions of fact that should be proven with fact witness testimony or documents, namely the identity of specific customer service awards actually received by 1-800 Contacts. The awards themselves are not in evidence.

Notwithstanding, the proposed finding is misleading and irrelevant for the reasons set forth in response to Proposed Finding No. 178.

*(c) Many Other Contact Lens Retailers Provide Lower Levels Of Customer Service Than 1-800 Contacts*

**187.** Other online contact lens retailers generally did not offer a comparable level of service to what 1-800 Contacts offered. (Coon, Tr. 2703; CX 9017 (Blackwood, Dep. at 162)).

**Response to Proposed Finding No. 187:**

The proposed finding is unsupported because the cited testimony of Mr. Coon and Ms. Blackwood lacks foundation and consists of improper lay opinion testimony. There is no evidence that either of them has personal knowledge of the level of service offered by “contact lens retailers generally” or even any specific contact lens retailer.

The proposed finding is also misleading, irrelevant, and contradicted by the weight of the record evidence, which shows that many online contact lens retailers do offer comparable levels of customer service to what 1-800 Contacts offered and perform similarly well in customer-satisfaction surveys, and the evidence that any service differential that 1-800 Contacts may have offered was not sufficient to fully explain its price premium. (*See* CCPTF Sections III.E (¶¶ 305-374) & IX.A.2 (¶¶ 1318-1343); CCPTB at 15 n.58).

**188.** 1-800 Contacts has been well above other online contact lens retailers in terms of service standards and quality. (CX 9031 (Schmidt, Dep. at 93)).

**Response to Proposed Finding No. 188:**

The proposed finding is unsupported because the cited testimony of Mr. Schmidt lacks foundation and consists solely of speculation and lay opinion testimony. There is no evidence that

Mr. Schmidt has personal knowledge of the “service standards and quality” of any, let alone all, online contact lens retailers, as noted by Complaint Counsel’s objections on the record. (*See* CX9031 (Schmidt, Dep. at 92-93)). Moreover, the proposed finding is vague as to time and additionally unsupported as to any time outside of Mr. Schmidt’s brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶ 66-67).

The proposed finding is also misleading, irrelevant, and contradicted by the weight of the record evidence for the reasons set forth in response to Proposed Finding No. 187.

**189.** Online contact lens retailers, other than 1-800 Contacts, focused on offering the cheapest lenses in a race to the bottom and for that reason were not able to afford to offer the superior quality of 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 93)).

**Response to Proposed Finding No. 189:**

The proposed finding is unsupported, speculative, misleading, irrelevant, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 187 and 188 and because there is no evidence that Mr. Schmidt has personal knowledge of the business strategies, pricing policies, or financial shortfalls of any, let alone all, online contact lens retailers, as noted by Complaint Counsel’s objections on the record. (*See* CX9031 (Schmidt, Dep. at 92-93)).

**190.** The perception from customer surveys was that companies like Vision Direct and Coastal Contacts offered a price discount, but service quality suffered; for example, they were difficult to reach, there were problems with the contact lenses shipped such as lenses that had already expired, and sketchy packaging, among other issues. (CX 9013 (Aston, Dep. at 187-88)).

**Response to Proposed Finding No. 190:**

The proposed finding is vague regarding whose perception is referred to in the first sentence. The proposed finding is also unsupported because the cited testimony lacks foundation, as noted by Complaint Counsel’s objection on the record. Mr. Aston even testified in response to the question “how did the service of 1-800 Contacts differ compared to other online retailers in general” that he did not “know all the details.” (CX9013 (Aston, Dep. at 187)). He then proceeded

to relay unreliable hearsay statements by customers from “customer surveys.” (CX9013 (Aston, Dep. at 187-188)).

The proposed finding is also misleading, irrelevant, and contradicted by the weight of the record evidence, which shows that many online contact lens retailers do offer comparable levels of customer service to what 1-800 Contacts offered and perform similarly well in customer-satisfaction surveys, and the evidence that any service differential that 1-800 Contacts may have offered was not sufficient to fully explain its price premium. (See CCPTF ¶ 372 ( [REDACTED] }, *in camera*); CCPTF Sections III.E (¶¶ 305-374) & IX.A.2 (¶¶ 1318-1343)).

This proposed finding is also irrelevant insofar as it suggests that an informed customer decision to trade service for price by purchasing contact lenses from a low-priced retailer that offers less robust customer service rather than purchasing the same contact lenses from a higher-priced retailer that offers more robust customer service is irrational or represents a loss in consumer welfare. There is no reason to believe that consumers would switch from one contact lens retailer to another if they did not prefer the combination of price and service the new retailer offered; as such, there is no reason to believe that a consumer making such a choice is worse off than the consumer would be if she did not have the information available to make that choice. (See CX8010 at 047 (¶¶ 119-120) (Athey Rebuttal Expert Report) (“Dr. Murphy claims that since there is evidence of a customer service quality differential between 1-800 Contacts and competitors, if consumers purchase from competing retailers in the counterfactual, consumer welfare would decrease due to lower average quality. *Dr. Murphy ignores the process by which consumers make purchasing decisions. When a consumer is aware of the range of retailers available and the price differentials between them, the decision to purchase from a lower-priced retailer is made because it provides maximum overall utility.* As detailed in my report, the price premium

charged by 1-800 Contacts is not justified by the service provided to that consumer. [But e]ven if it were, providing consumers with information on competitive offerings allows them to make better informed purchase decisions. . . . Consumers who are willing to pay the price premium charged by 1-800 Contacts are well-served by paid search results absent the Agreements . . . Other consumers benefit from information about lower-priced offerings, and of course *in the long run, competitive forces incentivize firms to provide both low prices and high quality. This competitive process relies crucially on consumers having enough information to compare alternative offerings.*”) (emphasis added)).

**191.** 1-800 Contacts’ founder and former CEO, Mr. Coon, believes that the level of service offered by other online contact lens retailers was not even close to what 1-800 Contacts offered during his tenure at 1-800 Contacts. (Coon, Tr. 2703).

**Response to Proposed Finding No. 191:**

The proposed finding should be rejected because Mr. Coon’s subjective believe is irrelevant and lacks foundation, as Mr. Coon does not have personal knowledge of the policies and practices of other online retailers.

Additionally, that belief—the proposition that “the level of service offered by other online contact lens retailers was not even close to what 1-800 Contacts offered”—is misleading, unsupported, and contradicted by the weight of the evidence, which shows that many online contact lens retailers do offer comparable levels of customer service to what 1-800 Contacts offered and perform similarly well in customer-satisfaction surveys, and that 1-800 Contacts’ price premium is not explained fully by any marginal distinction in service quality that it may offer over other online contact lens retailers. (CCPTF Sections III.E (¶¶ 305-374) & IX.A.2 (¶¶ 1318-1343)).

**192.** In secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that the service of other online contact lens retailers usually was not as good as the service 1-800 Contacts offered. (Coon, Tr. 2701).

**Response to Proposed Finding No. 192:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or had personal knowledge of the policies and practices of other online retailers. As such, his testimony consists only of speculation or relaying hearsay statements by other 1-800 Contacts employees to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees (“that the service of other online contact lens retailers usually was not as good as the service 1-800 Contacts offered”) would themselves be (a) inadmissible lay opinion testimony in that they offer these employees’ subjective opinions and in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were judged to be “not as good” as 1-800 Contacts’ service, and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191.

**193.** In secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that a customer would wait longer to get other online contact lens retailers to answer the phone and, in some cases, could not reach a live person at all. (Coon, Tr. 2701).

**Response to Proposed Finding No. 193:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the matter described, and so his testimony consists only of speculation or relaying hearsay statements by other 1-800 Contacts employees to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible

lay opinion testimony in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed, and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191.

**194.** 1-800 Contacts observed first-hand the low quality of service received by customers of other online contact lens retailers, for example: if a customer ordered a specific contact lens prescription at some other online contact lens retailers, that retailer would indicate the lens was available on their website but then have a four to eight week delay between the time the order was placed and the lenses were shipped because those lenses were not actually in stock. (CX 9031 (Schmidt, Dep. at 95)).

**Response to Proposed Finding No. 194:**

The proposed finding is erroneous and false in stating that “1-800 Contacts” the company observed anything “first-hand.” A company is not a person capable of making “first-hand” observations. The proposed finding is also inaccurate, unsupported and lacking in foundation. Specifically, the cited testimony makes clear that Mr. Schmidt himself did not personally experience the claimed low quality service he testified about. Rather, he testified that his basis for the cited testimony was that, occasionally, friends or family members or colleagues would “spot-check” competitors and then tell others at 1-800 Contacts about their experience. (CX9031 (Schmidt, Dep. at 94) (“[F]rom time to time, we would spot-check by having, you know, a friend or a family member or a colleague place an order through some of those online competitors and we would be able to observe firsthand the low quality of service that their customers received, relative to our 1-800-CONTACTS customer.”)). Notwithstanding Mr. Schmidt’s odd use of the word “firsthand” in that statement, the context of the statement makes clear that Mr. Schmidt himself did not observe anything he was testifying about firsthand. Accordingly, the cited

testimony merely relays unreliable hearsay by unidentified declarants. Mr. Schmidt even explicitly testified that his conclusion about the reason for the shipping delay was speculation. (CX9031 (Schmidt, Dep. at 95 (“And *we speculated*, based on our subject matter expertise in the contact lenses industry, that they didn’t have the lenses in stock.”) (emphasis added))). The record contains no admissible documents or testimony by percipient witnesses corroborating the hearsay statements Mr. Schmidt attempted to relay.

The proposed finding is also unsupported as to any time outside Mr. Schmidt’s brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶ 66-67).

Furthermore, even if a hearsay exception did apply and other foundation issues were resolved, the underlying hearsay statements of the other unidentified employees, friends, and family members would themselves be (a) inadmissible lay opinion testimony in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed (e.g., which online contact lens retailers, how often, how many customers), and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191.

**195.** In secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that it might take other online contact lens retailers a day to respond to a customer’s email while 1-800 Contacts’ practice was to respond to emails within ten minutes with a live person. (Coon, Tr. 2701).

**Response to Proposed Finding No. 195:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the matter described, and so his testimony consists

only of speculation or relaying hearsay statements by other 1-800 Contacts employees to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible lay opinion testimony in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed, and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191 and because the record evidence shows that 1-800 Contacts’ online contact lens retail competitors usually respond to customer emails on the same day. (See CCPTF ¶¶ 344 (AC Lens usually responds in less than two hours), 349 ({} [REDACTED] {}), 369 (Memorial Eye responds on the same day)).

**196.** In secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that the orders delivered by other online contact lens retailers arrived later than 1-800 Contacts’ orders as a general rule. (Coon, Tr. 2701).

**Response to Proposed Finding No. 196:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the matter described, and so his testimony consists only of speculation or relaying hearsay statements by other 1-800 Contacts employees to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible lay opinion testimony in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular

experiences with which particular retailers were observed, and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191.

**197.** In secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that some other online contact lens retailers intentionally did things that would undermine consumer trust. (Coon, Tr. 2701).

**Response to Proposed Finding No. 197:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in "secret shopping other online contact lens retailers," or otherwise personally observed the matter described, and so his testimony consists only of speculation or relaying hearsay statements by other 1-800 Contacts employees to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible lay opinion testimony in that they offer unidentified employees' or others' subjective opinions and in that the proposed finding extrapolates conclusions about "other online contact lens retailers" generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed, including what particular "things" were done, what is meant by "intentionally," or in what manner these "things" "would undermine consumer trust," and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191. Notwithstanding, the proposed finding is irrelevant.

**198.** During Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts was concerned about some of the practices by other online contact lens retailers, even though those practices were not affecting 1-800 Contacts' customers, because in some cases those practices would get attributed to 1-800 Contacts. (Coon, Tr. 2701-02).

**Response to Proposed Finding No. 198:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally observed “some of the practices by other contact lens retailers” or those practices being attributed to 1-800 Contacts. Thus, his testimony consists only of speculation or relaying hearsay statements by others to which no hearsay exception applies.

The proposed finding is also vague, and irrelevant, because it does not specify which online contact lens retailers, or what “practices,” the proposed finding purports to describe.

Further the proposed finding is entirely speculative as to Mr. Coon’s “concern” that “in some cases those practices would get attributed to 1-800 Contacts.” As such, it lacks support and is irrelevant.

**199.** By secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that other online contact lens retailers would advertise prices net of rebates for which the vast majority of people would not qualify. (Coon, Tr. 2701-02).

**Response to Proposed Finding No. 199:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the matter described, and so his testimony consists only of speculation or relaying hearsay statements by other 1-800 Contacts employees to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible lay opinion testimony in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed, and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191. Notwithstanding, the proposed finding is irrelevant.

**200.** By secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that one of them, a Canadian company called Coastal Contacts, was charging a 6.5 percent sales tax even though there was no applicable sales tax. (Coon, Tr. 2701-02).

**Response to Proposed Finding No. 200:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the pricing practice, and so his testimony consists only of speculation or relaying hearsay statements by others to which no hearsay exception applies. The proposed finding that “there was no applicable sales tax” is also unsupported because there is no evidence that Mr. Coon has the expertise necessary to opine on the intricacies of sales tax matters. There is also no admissible evidence anywhere in the record corroborating Mr. Coon’s baseless testimony.

Notwithstanding, the proposed finding is irrelevant.

**201.** By secret shopping other online contact lens retailers during Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts found that other online contact lens retailers set a very low bar on verifying prescriptions. (Coon, Tr. 2701-02, 2704-05).

**Response to Proposed Finding No. 201:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the matter described, and so his testimony consists only of speculation or relaying hearsay statements by other individuals to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible lay opinion testimony in that they offer unidentified employees’ or others’ subjective opinions and in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to

be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed, including what specifically is meant by “set a low bar,” and (c) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191.

The proposed finding is also misleading and unsupported insofar as Mr. Coon’s testimony consists of a legal opinion about the adequacy of his online contact lens retail competitors’ compliance with federal law, which he is not qualified to give. (*See* Coon, Tr. 2766 (“I’m not a lawyer”)).

Notwithstanding, the proposed finding is irrelevant.

**202.** As a general rule, 1-800 Contacts found during Mr. Coon’s tenure with 1-800 Contacts that other online contact lens retailers were not maintaining outstanding service to consumers and in some cases were engaged in what 1-800 Contacts viewed as unethical or blatantly illegal behavior. (Coon, Tr. 2702).

**Response to Proposed Finding No. 202:**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally engaged in “secret shopping other online contact lens retailers,” or otherwise personally observed the matter described, and so his testimony consists only of speculation or relaying hearsay statements by other individuals to which no hearsay exception applies. Furthermore, even if a hearsay exception did apply, the underlying hearsay statements of those other unidentified employees would themselves be (a) inadmissible lay opinion testimony in that they offer unidentified employees’ or others’ subjective opinions and in that the proposed finding extrapolates conclusions about “other online contact lens retailers” generally from what could be anecdotal, unrepresentative experiences, (b) so vague as to be rendered irrelevant in the absence of any description of which particular experiences with which particular retailers were observed, including what is meant by the vague and undefined

phrase “not maintaining outstanding service to consumers” and the vague and undefined phrase “unethical or blatantly illegal behavior,” (c) unsupported as Respondent has not cited any evidence in the record of “unethical or blatantly illegal behavior,” and (d) irrelevant, misleading, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 191.

Additionally, the proposed finding is unsupported and inappropriate in that it sets forth a conclusion of law—a problem that is only confounded by the fact that the conclusion was made by unidentified “secret shoppers” who have not been shown to possess any legal expertise.

**203.** During Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts had concerns about being associated with various practices of other online contact lens retailers that it viewed as unethical because 1-800 Contacts was getting blamed for those practices and those practices were making the whole industry look bad. (Coon, Tr. 2703).

**Response to Proposed Finding No. 203:**

This proposed finding is nonsensical and therefore irrelevant insofar as it suggests that 1-800 Contacts, the company, rather than individuals in it, “had concerns.” The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon personally observed “various practices of other online contact lens retailers” that concerned 1-800 Contacts or made the industry “look bad.” Thus, his testimony consists only of speculation or relaying hearsay statements by others to which no hearsay exception applies. Nor has Respondent cited any evidence in the record supporting the proposed finding.

The proposed finding that that 1-800 Contacts “was getting blamed” for certain practices merely relays hearsay statements by unidentified individuals, to which no hearsay exception applies.

The proposed finding is also so vague as to be rendered irrelevant because it does not identify to which online contact lens retailers the proposed finding applies and because it

incorporates broad, vague, and undefined terms such as “being associated with,” “unethical,” “getting blamed for” and “look bad.”

Finally, to the extent this proposed finding is suggesting that the mere appearance of rival ads in response to 1-800 Contacts Branded Queries caused consumer confusion about the source, sponsorship, or affiliation of those ads, it is unsupported and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1484-1765. (*See also* CCPTF Section XI.C (¶¶ 1691-1927)). To the extent this proposed finding is suggesting the existence of some other type of confusion, it is irrelevant.

**204.** During Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts had concerns about being associated with practices of other online contact lens retailers that it viewed as unethical because such practices were inconsistent with 1-800 Contacts’ brand. (Coon, Tr. 2703-04).

**Response to Proposed Finding No. 204:**

This proposed finding is nonsensical, irrelevant, vague, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 203.

**205.** During Mr. Coon’s tenure with 1-800 Contacts, 1-800 Contacts had concerns about being associated with practices of other online contact lens retailers that it viewed as unethical because 1-800 Contacts had put a lot of effort into creating industry standards that other online contact lens retailers were not following. (Coon, Tr. 2705).

**Response to Proposed Finding No. 205:**

This proposed finding is nonsensical, irrelevant, vague, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 203.

*(d) Dr. Athey’s Analysis Of The Service Differential Is Not Reliable*

**206.** Dr. Athey relied upon the Net Promoter Scores of 1-800 Contacts and Vision Direct provided by the Stax survey in the Berkshire Partners presentation to reach her opinion that the 1-800 Contacts price premium is not justified by superior service offerings. (Athey, Tr. 751-54; CX 1109-047).

**Response to Proposed Finding No. 206:**



recall being asked what accounted for 1-800 Contacts' price premium by respondent's counsel a few moments ago? A. Yes. Q. And do you recall responding that 'Yes. My finding was that the price premium was not fully accounted for by service differences, but part could be.'? A. Yes. Q. In reaching that conclusion, what areas of your expertise were you drawing on? A. So there's several. First is that I teach classes about pricing and product differentiation. And . . . for that type of analysis, . . . you can consider what are the forces that could lead a firm to have a price premium. And so we – generally what economic theory shows is that you need to have product differentiation of some sort to sustain a price premium when consumers are fully informed. In addition, I reviewed a variety of survey evidence about these differentials. In the context of my teaching, my research and my business work on Internet search, it's very common to consider those – these types of surveys. I would teach in my courses about . . . how to conduct surveys that would help elicit consumer information about their preferences and the factors that lead to those preferences. For example, if a firm is going to choose their price point, . . . I would teach about how to use surveys to elicit the information relevant for selecting a price point. Also in my academic and business work I would carry out that type of empirical analysis as well. Q. Is that type of work, whether you do it in your academic work or your business work, economics? A. Yes. Economics and statistics.”); Athey, Tr. 708 (Dr. Athey was tendered as an “expert in microeconomics and econometrics with particular expertise in the economics of advertising platforms and online search advertising” and Respondent “agree[d] that that is within the scope of her expertise” and expressed “no objection to her being tendered for those topics”); Athey, Tr. 707 (Dr. Athey testified that microeconomic theory is “the study of consumer and firm behavior and how that behavior affects welfare” and econometrics is “using statistics to estimate the parameters of economic models, often also to try to determine the effects of a behavior or changes on welfare”)).

**207.** Dr. Athey relied on one slide from a Berkshire Partners document that purported to show that the Stax survey concluded that 1-800 Contacts' Net Promoter Score was almost identical to Vision Direct's Net Promoter Score. (Athey, Tr. 751).

**Response to Proposed Finding No. 207:**

The proposed finding is misleading, unsupported, and contradicted by the evidence insofar as it implies that the referenced information in the Berkshire Partners presentation was the sole basis for her opinion that the 1-800 Contacts price premium is not fully explained by superior service offerings, that it was even the sole source of NPS scores that Dr. Athey considered, or that her conclusion regarding the explanation for 1-800 Contacts' price premium is otherwise unreliable, for the reasons set forth in response to Proposed Finding No. 206.

**208.** The slide on which Dr. Athey relied indicates that the results of the Stax survey for Net Promoter Scores of all online contact lens retailers was based on only 226 total respondents: 101 respondents for 1-800 Contacts, 41 respondents for Vision Direct, and 84 respondents for all other online contact lens retailers. (CX 1109-047). Dr. Athey's expert report described no analysis of whether the number of respondents in total or individually for 1-800 Contacts, Vision Direct, or all other online contact lens retailers was sufficient to provide statistically significant (or otherwise meaningful) results on this issue. (CX 8007).

**Response to Proposed Finding No. 208:**

The proposed finding is misleading, unsupported, and contradicted by the evidence insofar as it implies that the referenced information in the Berkshire Partners presentation was the sole basis for her opinion that the 1-800 Contacts price premium is not fully explained by superior service offerings, that it was even the sole source of NPS scores that Dr. Athey considered, or that her conclusion regarding the explanation for 1-800 Contacts' price premium is otherwise unreliable, for the reasons set forth in response to Proposed Finding No. 206. The proposed finding is misleading insofar as it assumes with no basis that it would have been helpful or necessary for Dr. Athey to describe any particular "analysis of whether the number of respondents . . . was sufficient to provide statistically significant (or otherwise meaningful) results" in the Stax

survey shown on page 047 of CX1109. Notably, Respondent cites no analysis from its own experts to this effect.

Nonetheless, Dr. Athey testified, about this particular slide, that in relying on it (in part, among other evidence) she did take into account: (a) “the raw data from this particular survey,” (b) the fact that this survey “was conducted by a professional,” and (c) the fact that “I also see in this slide that the investors also drew a conclusion from this slide which was an expressed opinion about the importance of this, and so they – one of the things that I looked at was that they – in making decisions about investments, they also needed to answer the question of whether the price premium was sustainable and why . . . they had a price premium. And we also see they are – are coming to the conclusion that other firms can offer similar service. At lower price.” (Athey, Tr. 751-752 (discussing CCDX003-027, which is a copy of CX1109 at 047)); *see also generally* Athey, Tr. 902-903 (testifying, in response to questions about results of another survey involving 101 1-800 Contacts customers and 41 Vision Direct customers, that the question of whether the difference between two means is statistically significant “depends on the two means that you’re comparing” and that “even with 41 users you could be fairly confident” of the statistical significance of the results in certain instances)).

**209.** Dr. Athey failed to recognize that the results of the Stax survey, assuming they were reliable, show that 1-800 Contacts’ Net Promoter Score was almost twice the Net Promoter Score of other contact lens retailers except for Vision Direct. (CX 1109-047).

**Response to Proposed Finding No. 209:**

The proposed finding is inaccurate. Dr. Athey testified that she was aware of information showing that 1-800 Contacts has high Net Promoter Scores. (Athey, Tr. 824-826, *in camera* ({"  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] })).

Specifically, Dr. Athey concluded based on several sources of information in the record (including information that 1-800 Contacts earns high Net Promoter Scores) that the price premium charged by 1-800 Contacts is not fully explained by a service quality differential. (See generally CX8007 at 016-019 (¶¶ 42-50) (Athey Expert Report); Athey, Tr. 749-755). This conclusion is unchanged by—and not inconsistent with—1-800 Contacts having a high level of service and customer satisfaction generally, or with its service being superior to that of some of its competitors. (E.g., Athey, Tr. 754-755 (“Q. If you were to learn additional information that showed very definitively that some portion of 1-800’s consumers highly value service and are willing to pay 15-20 percent more than they would at someone else because of that service, would that change your opinion? A. No. Q. And why not? A. Because . . . my assignment is to look at the consumer welfare benefits of getting rid of the agreements. And if the agreements go away, some consumers will be – will be exposed to price information and better alternatives for them, and I provide evidence that a set of consumers will indeed avail themselves of that information and receive lower prices. *The idea that some consumers value high service is completely consistent with that conclusion.*”) (emphasis added)).

210. [REDACTED]  
 [REDACTED] } Athey, Tr. 825).  
 [REDACTED] } (CX 1343-035).

**Response to Proposed Finding No. 210:**

The proposed finding is misleading for the reasons set forth in response to Proposed Finding No. 206 insofar as it implies that the above-cited information in the referenced document, [REDACTED] (CX1343, *in camera*), was the sole basis for her opinion that the 1-800 Contacts price premium is not fully explained by superior

service offerings, that it was even the sole source of NPS scores that Dr. Athey considered, or that her conclusion regarding the explanation for 1-800 Contacts' price premium is otherwise unreliable. The proposed finding is also misleading in citing to the transcript of Dr. Athey's testimony at page 825 of the trial transcript, which { [REDACTED] [REDACTED] }

Complaint Counsel agrees that the referenced page of CX1343 states that { [REDACTED] [REDACTED] [REDACTED] }, (CX1343 at 035, *in camera*). To the extent, however, that this proposed finding suggests that those NPS score are unreliable because { [REDACTED] [REDACTED] }, or that Dr. Athey did not critically consider the reliability of the results before relying on them, it is misleading, inaccurate, and contradicted by the weight of the evidence, because:

(a) CX1343 “{ [REDACTED] [REDACTED] [REDACTED] }” (Athey, Tr. 942, *in camera*; CX1343 at 005, *in camera* ( { [REDACTED] [REDACTED] [REDACTED] } ));

(b) Dr. Athey testified, regarding the surveys conducted by Bain regarding net promoter scores generally, that “[n]et promoter score studies are a fairly standard type of analysis. Their numbers are reported in industry publications on a regular basis and used to make business decisions and Bain is a company that presumably was selected on the basis of their expertise which is consistent with my industry knowledge as well. So I have no reason to question their methodology. And I don't know a reason that Bain would have to deviate from the best methodology for answering the question” and “I found that the presentations



Proposed Finding Nos. 1979-1984 and in points (b) and (c) above, Complaint Counsel nonetheless notes that both CX1162 and CX0430 reported { [REDACTED] }  
 { [REDACTED] }  
 (CX1162, at 006, *in camera*; CX0430, at 004, *in camera*), while CX1343 reported { [REDACTED] }  
 { [REDACTED] }

**211.** { [REDACTED] }  
 { [REDACTED] }  
 (CX 1343-035). Dr. Athey’s expert report described no analysis of whether the number of respondents in total or individually for 1-800 Contacts, Vision Direct, or any of the other listed contact lens retailers was sufficient to provide statistically significant (or otherwise meaningful) results. (CX 8007).

**Response to Proposed Finding No. 211:**

The proposed finding is misleading, unsupported, and contradicted by the evidence for the reasons set forth in response to Proposed Finding No. 206 insofar as it implies that the referenced information in the referenced presentation was the sole basis for Dr. Athey’s opinion that the 1-800 Contacts price premium is not fully explained by superior service offerings, that it was even the sole source of NPS scores that Dr. Athey considered, or that her conclusion regarding the explanation for 1-800 Contacts’ price premium is otherwise unreliable.

The proposed finding is misleading insofar as it assumes with no basis that it would have been helpful or necessary for Dr. Athey to describe any particular “analysis of whether the number of respondents . . . was sufficient to provide statistically significant (or otherwise meaningful) results.” Notably, Respondent cites no analysis from its own experts to this effect.

To the extent that the proposed finding purports to suggest that the referenced survey results are unreliable because { [REDACTED] } or that Dr. Athey did not critically consider the reliability of the results before relying on them, it is misleading, inaccurate, and contradicted by the weight of the evidence for the reasons set forth in

response to Proposed Finding No. 210. (*See also generally* Athey, Tr. 902-903 (testifying, in response to questions about results of another survey involving 101 1-800 Contacts customers and 41 Vision Direct customers, that the question of whether the difference between two means is statistically significant “depends on the two means that you’re comparing” and that “even with 41 users you could be fairly confident” of the statistical significance of the results in certain instances)).

**212.** [REDACTED]

(CX 1343-035).

**Response to Proposed Finding No. 212:**

The proposed finding is inaccurate for the reasons set forth in response to Proposed Finding No. 209.

**213.** In her expert report, Dr. Athey states that she relied on “statements by employees at 1-800 Contacts [that] demonstrate that 1-800 Contacts’ service offering is insufficient to offset the lower prices offered by online competitors,” but Dr. Athey cites as support for this opinion only one single email chain, dated August 7, 2012, among 1-800 Contacts’ marketing staff. (Athey, Tr. 747-48, 752-53; CX 8007-017-018). A single email, taken out of context by Dr. Athey, is insufficient to support the sweeping opinion that Dr. Athey offers regarding the ability of 1-800 Contacts to justify a price premium relative to other online contact lens retailers.

**Response to Proposed Finding No. 213:**

The proposed finding is inaccurate for the reasons set forth in response to Proposed Finding No. 206 insofar as it asserts that the referenced information in the email chain August 7, 2012, was the sole basis for Dr. Athey’s opinion that the 1-800 Contacts price premium is not fully explained by superior service offerings or that such conclusion is otherwise unreliable..

The second sentence of the proposed finding is irrelevant and misleading because, as set forth above and made clear in Dr. Athey’s report and testimony, Dr. Athey did not rely on “a single email” in support of any conclusion she reached.

This proposed finding is also inaccurate, misleading, and contrary to the weight of the evidence, insofar as it states that Dr. Athey took CX1086 “out of context.” To the contrary, for the reasons set forth in response to Proposed Finding No. 214—and apparent from a reading of CX1086 itself—the full context of the emails in that chain only further bolster the conclusions that Dr. Athey drew from the quoted portions.

**214.** Dr. Athey did not consider the deposition testimony of the author of the relevant portions of the August 2012 email (Amber Powell) that Dr. Athey cites. Ms. Powell explained that 1-800 Contacts was concerned with the misleading nature of Internet comparison-shopping tools that only showed retail prices for a single box of contact lenses, which failed to accurately reflect the consumers’ true costs. (CX 9030 (Powell, Dep. at 113-15)).

**Response to Proposed Finding No. 214:**

The proposed finding is unsupported because the cited deposition testimony of Ms. Powell lacks foundation. There is no evidence that Ms. Powell has personal knowledge that the prices displayed by 1-800 Contacts and its online contact lens competitors was misleading. Moreover, Ms. Powell’s testimony that the email that she wrote (which is included in the email chain labeled CX1086) reflected a concern about misleading prices or misrepresentation lacks credibility because it contradicts the plain language of the document itself. (*See, e.g.*, CX9030 (Powell, Dep. at 115 (“So it’s about the misrepresentation that is inherent in the contact lens business. Q. Did you use the word ‘misrepresentation’ anywhere in this e-mail chain? A. I do not think so.”))). The deposition testimony referred to, claiming that 1-800 Contacts was concerned with the misleading nature of internet comparison-shopping tools that only showed retail prices for a single box of contact lenses, is inconsistent with what Ms. Powell actually wrote at the time, and with what her colleagues wrote at the time in the August 2012 series of emails labeled CX1086. Specifically:

- (a) In an August 2012 email, 1-800 Contacts Online Marketing Manager Amber Powell sent Rick Galan, Laura Schmidt, and Justin Olson a screen shot of search page results and

wrote: “I don’t know how we still get orders from your [paid search] channel. Look at all the prices that are much lower than ours.” (CX1086 at 003).

- (b) When Laura Schmidt replied asking whether Ms. Powell believed “this is why our PPC is dropping so significantly YoY – particularly NI?” and noted that “We still need to try to different things to try to offset the declines though . . .”, Ms. Powell replied “I think it’s very likely. *We’ve noticed paid search experiencing a drop in NI CR [new internet conversion rates] that is disproportionate to other channels. For example, typed/bookmarked has actually experienced a lift in NI CR recently. Typed/bookmarked customers aren’t exposed to other websites’ pricing before coming to our site which likely makes them less sensitive to pricing.*” (CX1086 at 002-003 (emphasis added)).
- (c) Mr. Galan then replied: “*I would agree 100%. The price visibility in search is only increasing . . .*” (CX1086 at 002 (emphasis added)).
- (d) Ms. Powell replied again, noting: “I’ve been trying to think of ways to *improve NI CR for this channel (without lowering prices) and it’s no easy task.*” (CX1086 at 002 (emphasis added)).
- (e) Ms. Schmidt replied that “We appreciate any ideas you can come up with - *this is a big challenge for us* and we are trying out promos/copy etc. to see if we can come up with anything to offset this issue.” (CX1086 at 002 (emphasis added)).
- (f) Ms. Powell replied, lamenting that “*[l]owering prices really would be the easiest thing to do. 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 (emphasis added)).
- (g) Mr. Galan replied to that email, noting that in the past, when 1-800 Contacts had “tried the promotion that temporarily lowered the price – it had no effect on the conversion. I think

that the issue was that *even with the promo there were competitors that beat us on price – so for those that are price sensitive it didn't really matter.*" (CX1086 at 001 (emphasis added)).

(h) Ms. Schmidt replied to that email, stating 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 that we had lower prices." (CX1086 at 001). CX1086 contains no references to misleading prices, comparison shopping tools, display of per-box pricing as opposed to other types of pricing, or a failure to reflect consumers' true costs. (CX1086).

**215.** Although Dr. Athey relies on the email written by Ms. Powell, Dr. Athey did not consider Ms. Powell's deposition at all. (CX 8007-101 (listing Dr. Athey's materials considered)). Nor did Dr. Athey address the evidence in the record, including many 1-800 Contacts business documents and the testimony of many 1-800 Contacts current and former employees, that discuss 1-800 Contacts' pricing strategy and its level of customer service.

**Response to Proposed Finding No. 215:**

The proposed finding is vague and unsupported insofar as it refers generically to "evidence in the record" that Dr. Athey did not address without identifying a single piece of evidence or other information available to Dr. Athey that she allegedly failed to consider.

The second sentence of the proposed finding is also inaccurate. Dr. Athey did address evidence in the record, including many 1-800 Contacts business documents and the testimony of 1-800 Contacts' current and former employees, that discuss 1-800 Contacts' pricing strategy and customer service. (CX8007 at 100-103 (Athey Expert Report) (materials considered); CX8010 at 070-071 (Athey Rebuttal Expert Report) (same); Athey, Tr. 741-744 (describing information considered regarding 1-800 Contacts' price premium), 750-751 (describing information considered regarding service level differentiation)).

Dr. Athey expressly specifically considered evidence that 1-800 Contacts provides "excellent service." (E.g., 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 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.”).

Dr. Athey also specifically considered the possibility that some consumers may be willing to pay a premium to buy their contact lenses from 1-800 Contacts instead of from another retailer. The possibility that such consumers exist did not, however, change her conclusions, because those consumers willing to pay a premium to buy from 1-800 Contacts will still be able to do so but for the Bidding Agreements (and in fact they may also be better off, paying lower prices at 1-800 Contacts due to increased price matching as a result of increased information and/or downward price pressure caused by increased competition). At the same time, though, but for the Bidding Agreements, other consumers, who are not willing to pay 15-20 percent more for the exact same contact lenses in order to receive customer service from 1-800 Contacts rather than one of its rivals, will have more information and more choices. (*E.g.*, Athey, Tr. 754-755 (“Q. If you were to learn additional information that showed very definitively that some portion of 1-800's consumers highly value service and are willing to pay 15-20 percent more than they would at someone else because of that service, would that change your opinion? A. No. Q. And why not? A. Because . . . my assignment is to look at the consumer welfare benefits of getting rid of the agreements. And if the agreements go away, some consumers will be – will be exposed to price information and better alternatives for them, and I provide evidence that a set of consumers will indeed avail themselves of that information and receive lower prices. ***The idea that some consumers value high service is completely consistent with that conclusion.***”) (emphasis added); CX8010 at 047 (¶¶ 119-120) (Athey Rebuttal Expert Report) (“Dr. Murphy claims that since there is evidence of a customer

service quality differential between 1-800 Contacts and competitors, if consumers purchase from competing retailers in the counterfactual, consumer welfare would decrease due to lower average quality. *Dr. Murphy ignores the process by which consumers make purchasing decisions. When a consumer is aware of the range of retailers available and the price differentials between them, the decision to purchase from a lower-priced retailer is made because it provides maximum overall utility.* As detailed in my report, the price premium charged by 1-800 Contacts is not justified by the service provided to that consumer. [But e]ven if it were, providing consumers with information on competitive offerings allows them to make better informed purchase decisions. . . . Consumers who are willing to pay the price premium charged by 1-800 Contacts are well-served by paid search results absent the Agreements . . . Other consumers benefit from information about lower-priced offerings, and of course *in the long run, competitive forces incentivize firms to provide both low prices and high quality. This competitive process relies crucially on consumers having enough information to compare alternative offerings.*) (emphasis added); CCPTF ¶¶ 1432-1435, 1440-1448, 1487-1495 (explaining that Dr. Athey’s empirical model and analysis thereof showed that but for the Bidding Agreements, consumers would pay lower prices for contact lenses online *even after the model took into account the value that consumers may place on 1-800 Contacts’ brand strength* (that is, the possibility that some of 1-800 Contacts’ price premium may be explained by the strength of its brand) *by modeling brand effects based on observed data* rather than making assumptions about them or their magnitude)).

**2. *1-800 Contacts Sets Its Retail Prices In Reference Primarily To Independent ECPs’ Pricing***

**216.** It is difficult and expensive to provide consistently superior customer service. (Coon, Tr. 2701, 2712-13).

**Response to Proposed Finding No. 216:**



[REDACTED]);  
 RX1228 at 036, *in camera* (2015 analysis showing that higher than those of its { [REDACTED] }  
 [REDACTED]  
 [REDACTED]); CX0547 at 032, *in camera* (in 2006, gross prices of 1-800 Contacts' three major online rivals were { [REDACTED] }, while { [REDACTED] }  
 [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); CX8007 at 013, 045-051 (¶ 32, Exhibit D-1 to D-7, *in camera*) (Athey Expert Report) ( { [REDACTED] }  
 [REDACTED] })).

The final clause of the proposed finding is also unsupported. There is no evidence in the recording establishing that Mr. Schmidt has personal knowledge of the margins of 1-800 Contacts' competitors. Indeed, such knowledge would be highly problematic from an antitrust perspective. The proposed finding is also vague as to time, and unsupported as to any time other than during Mr. Schmidt's brief tenure at 1-800 Contacts, from April 2004 to January 2006. (CCPTF ¶¶ 66-67).

**219.** Because 1-800 Contacts strove to achieve the optimal balance of premium service and competitive price, it did not focus on having the lowest price of any contact lens retailer. (CX 9013 (Aston, Dep. at 193)).

**Response to Proposed Finding No. 219:**

Complaint Counsel does not disagree that 1-800 Contacts "did not focus on having the lowest price of any contact lens retailer" but otherwise, the proposed finding is unsupported because the cited testimony lacks foundation. Mr. Aston's responsibilities at 1-800 Contacts included "recording surveys, distributing customer satisfaction surveys, tracking in Excel spreadsheets," "management of paid search, the management of the affiliate program, and the

management oversight of media buying, digital media buying.” (CX9013 (Aston, Dep. at 9-10)).

His responsibilities did not include pricing, or setting business priorities such as offering premium service, and there is no evidence he had personal knowledge of these matters.

**220.** 1-800 Contacts sets its retail prices for contact lenses on a product-by-product basis. (Bethers, Tr. 3773).

**Response to Proposed Finding No. 220:**

Complaint Counsel has no specific response.

**221.** In 2006, 1-800 Contacts explained in an internal business plan document that its general pricing strategy was to set its retail prices below independent ECPs, close to optical retail chains, but above other online retailers and club stores like Costco; but then 1-800 Contacts would offer extensive rebates to provide more competitive pricing for customers who are price sensitive. (CX 535-010).

**Response to Proposed Finding No. 221:**

Complaint Counsel has no specific response.

**222.** 1-800 Contacts today continues to set its retail prices based primarily on the retail prices of independent ECPs and then optical retail chains. (Bethers, Tr. 3544 (A: “We set our pricing based on the prices that occur principally in independent practices and also in reference to what retail optical channels are doing.”)).

**Response to Proposed Finding No. 222:**

Complaint Counsel has no specific response.

**223.** Independent ECPs’ retail prices for contact lenses drive 1-800 Contacts’ pricing decisions. (Bethers, Tr. 3548 (A: “And it’s helpful to understand what prices are for other eyecare providers in addition to independents, but it’s really the independent price that drives our pricing decisions. They’re the ones that we secret-shop the most.”)).

**Response to Proposed Finding No. 223:**

Complaint Counsel has no specific response.

**224.** 1-800 Contacts sets its retail prices for contact lenses to reflect a discount to independent ECPs and optical retail chains. (Bethers, Tr. 3542 (A: “So our model has always been very focused on advertising and brand name recognition and high levels of service, and so we set our pricing in a manner that reflected a discount to the independent eyecare professional and a discount to the retailer optical locations that I described earlier.”); (CX 9025 (Osmond, Dep. at 99))).

**Response to Proposed Finding No. 224:**

Complaint Counsel has no specific response.

**225.** For new contact lens products, 1-800 Contacts generally sets its retail prices five to ten percent below the average retail price for independent ECPs. (Bethers, Tr. 3549-50).

**Response to Proposed Finding No. 225:**

Complaint Counsel has no specific response.

**226.** For mature contact lens products, 1-800 Contacts generally sets its retail prices at a discount to the average retail prices of independent ECPs, but the discount is typically less than it is for new products. (Bethers, Tr. 3550).

**Response to Proposed Finding No. 226:**

Complaint Counsel has no specific response.

**227.** For legacy or discontinued contact lens products, 1-800 Contacts' retail prices generally go up because of higher wholesale prices charged by the manufacturer. (Bethers, Tr. 3550).

**Response to Proposed Finding No. 227:**

Complaint Counsel has no specific response.

(a) *1-800 Contacts Invests Substantial Time And Effort Into Collecting Prices From Independent ECPs*

**228.** In order to set its retail prices, 1-800 Contacts conducts a sampling of the 16,000 independent ECP practices on a weekly basis to determine their current retail prices for major contact lens products. (Bethers, Tr. 3546; CX 9025 (Osmond, Dep. at 98-99); { [REDACTED] })

**Response to Proposed Finding No. 228:**

Complaint Counsel has no specific response.

**229.** [REDACTED]

**Response to Proposed Finding No. 229:**

Complaint Counsel has no specific response.

**230.** [REDACTED]

**Response to Proposed Finding No. 230:**

The proposed finding is unsupported insofar as the cited source, { [REDACTED]

[REDACTED] }. (RX1117 at 033, *in camera*). Otherwise,

Complaint Counsel has no specific response.

**231.** 1-800 Contacts also collects information on the pricing of contact lenses at optical retail chains, mass merchants, club stores, and other online retailers in order to have a perspective of the entire industry. (Bethers, Tr. 3548).

**Response to Proposed Finding No. 231:**

Complaint Counsel has no specific response.

**232.** In order to set its retail prices, the majority of 1-800 Contacts' efforts to collect prices charged by other contact lens retailers goes towards collecting prices from independent ECPs. (CX 9025 (Osmond, Dep. at 98)).

**Response to Proposed Finding No. 232:**

The proposed finding is misleading and unsupported insofar as it implies the relative importance to 1-800 Contacts of gathering independent ECP pricing. Mr. Osmond testified only that collecting information about independent ECPs was "probably the majority of our effort" because it entailed calling "quite a few doctors every week" in order to "have a good enough sample" and the process was "time consuming." (CX9025 (Osmond, Dep. at 98-99)).

**233.** While it is helpful for 1-800 Contacts to understand the prices for all contact lens retailers, it is really the independent ECPs' pricing that drives 1-800 Contacts' pricing decisions. (Bethers, Tr. 3548).

**Response to Proposed Finding No. 233:**

The proposed finding is misleading because it omits that 1-800 Contacts also reacts to competitive pressure from the prices of online contact lens retailers. The record shows that competition from online contact lens retailers, when 1-800 Contacts faces such competition, is viewed as a competitive threat to 1-800 Contacts and does indeed constrain 1-800 Contacts, particularly its pricing. (CCPTF 803-865, 894, 1478-1486, 1553-1558, 1573, 1576-1610).

*(b) 1-800 Contacts Offers A Price Guarantee*

**234.** 1-800 Contacts offers customers a price guarantee that has been available since July 2006. (CX 9025 (Osmond, Dep. at 16); CX 9029 (Bethers, Dep. at 36)).

**Response to Proposed Finding No. 234:**

Complaint Counsel has no specific response.

**235.** 1-800 Contacts' price guarantee started as an offer to match the price of other contact lens retailers. (CX 9025 (Osmond, Dep. at 16, 43-44)).

**Response to Proposed Finding No. 235:**

Complaint Counsel has no specific response.

**236.** In March 2008, 1-800 Contacts revised the terms of its price guarantee so that it would beat another retailer's prices by 2 percent, rather than just match that retailer's price. (CX 9025 (Osmond, Dep. at 16, 43-44); CX 1341-001).

**Response to Proposed Finding No. 236:**

Complaint Counsel has no specific response.

**237.** 1-800 Contacts' price guarantee applies for retail prices of contact lenses from any retailer except club stores, such as Costco, Sam's Club, and BJ's. (CX 9025 (Osmond, Dep. at 18); CX 1341-001).

**Response to Proposed Finding No. 237:**

Complaint Counsel has no specific response.

**238.** 1-800 Contacts' price guarantee applies for retail prices of contact lenses offered by independent ECPs and retail optical chains. (CX 9025 (Osmond, Dep. at 39-40)).

**Response to Proposed Finding No. 238:**

Complaint Counsel has no specific response except to note that because ECPs and retail optical chains charge higher prices than 1-800 Contacts does, 1-800's guarantee to match their prices is irrelevant.

**239.** Although 1-800 Contacts' price guarantee does not apply, as written, to retail prices for contact lenses offered by club stores, 1-800 Contacts has in fact matched prices to club stores for some consumers. (CX 9025 (Osmond, Dep. at 18-19); CX 9029 (Bethers, Dep. at 37-38)).

**Response to Proposed Finding No. 239:**

Complaint Counsel has no specific response.

240. 1-800 Contacts' price guarantee is explained on 1-800 Contacts' website. (CX 9025 (Osmond, Dep. at 22)).

**Response to Proposed Finding No. 240:**

Complaint Counsel has no specific response.

241. 1-800 Contacts has promoted its price guarantee through emails to consumers. (CX 9025 (Osmond, Dep. at 22)).

**Response to Proposed Finding No. 241:**

Complaint Counsel has no specific response.

242. Approximately 2-6 percent of 1-800 Contacts' orders receive a discount from the retail list prices as a result of the price guarantee. (Bethers, Tr. 3797-98).

**Response to Proposed Finding No. 242:**

Complaint Counsel has no specific response.

243. { [REDACTED] } (CX 1334-002).

**Response to Proposed Finding No. 243:**

Complaint Counsel has no specific response.

244. [REDACTED] (CX 1334-007).

**Response to Proposed Finding No. 244:**

The proposed finding is misleading because { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CX1334 at 007, *in camera*).

245. [REDACTED] (CX 1334-007).

**Response to Proposed Finding No. 245:**

The proposed finding is misleading because { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (CX1334 at 007, *in camera*).

**246.** [REDACTED] } (CX 1334-007).

**Response to Proposed Finding No. 246:**

The proposed finding is misleading because { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (CX1334 at 007, *in camera*).

**247.** [REDACTED] } (CX 1334-007).

**Response to Proposed Finding No. 247:**

The proposed finding is misleading because { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (CX1334 at 007, *in camera*).

***D. 1-800 Contacts Has Made Enormous Investments In Broadscale Advertising***

**248.** 1-800 Contacts had a marketing strategy of generating brand awareness and encouraging new customers to try 1-800 Contacts. (Schmidt, Tr. 2927-2928).

**Response to Proposed Finding No. 248:**

This proposed finding is so vague as to be rendered irrelevant; it is also misleading and contradicted by the weight of the evidence to the extent it suggests that attracting *new* customers was the only marketing goal or strategy employed by 1-800 Contracts, and that retaining existing

customers was not a marketing goal or strategy employed by 1-800 Contacts. This proposed finding is also unsupported and lacks foundation for all periods outside Mr. Schmidt's brief tenure at 1-800 Contacts between early 2004 and January 2006 (CCPTF ¶¶ 65-67).

**249.** 1-800 Contacts sought a multichannel integrated marketing plan that took into account both online and traditional offline advertising channels and integrated them to ensure consistency in messaging across channels. (Schmidt, Tr. 2932).

**Response to Proposed Finding No. 249:**

Complaint Counsel has no specific response.

***1. 1-800 Contacts Engages In Many Different Types Of Advertising***

**250.** There are many different ways for a contact lens retailer to advertise to consumers. (Bethers, Tr. 3700-01).

**Response to Proposed Finding No. 250:**

Complaint Counsel has no specific response.

**251.** 1-800 Contacts has used print advertising. (Bethers, Tr. 3700).

**Response to Proposed Finding No. 251:**

Complaint Counsel has no specific response.

**252.** 1-800 Contacts has used television advertising. (Bethers, Tr. 3700).

**Response to Proposed Finding No. 252:**

Complaint Counsel has no specific response.

**253.** 1-800 Contacts has used radio advertising. (Bethers, Tr. 3700).

**Response to Proposed Finding No. 253:**

Complaint Counsel has no specific response.

**254.** 1-800 Contacts has used Internet search advertising. (Bethers, Tr. 3700-01).

**Response to Proposed Finding No. 254:**

Complaint Counsel has no specific response.

**255.** 1-800 Contacts has used Internet display advertising. (Bethers, Tr. 3701).

**Response to Proposed Finding No. 255:**

Complaint Counsel has no specific response.

**256.** 1-800 Contacts has used Internet affiliate marketing, such as Groupon and Ebates. (Bethers, Tr. 3701).

**Response to Proposed Finding No. 256:**

Complaint Counsel has no specific response.

**257.** 1-800 Contacts has used social media advertising (*e.g.*, Facebook, Twitter, and YouTube). (Bethers, Tr. 3702).

**Response to Proposed Finding No. 257:**

Complaint Counsel has no specific response.

**258.** 1-800 Contacts has used search engine optimization that is designed to improve the position of a company's organic link in search engine results. (Bethers, Tr. 3701-02).

**Response to Proposed Finding No. 258:**

Complaint Counsel has no specific response.

**259.** Warby Parker, an online seller of glasses, has built incredible awareness through the use of earned media (*i.e.*, free public relations) rather than paid advertising. (Bethers, Tr. 3827). Earned media is a way for a company to create brand awareness with very limited advertising dollars. (Bethers, Tr. 3827).

**Response to Proposed Finding No. 259:**

This proposed finding should be disregarded because it is irrelevant, is vague in its use of the term “incredible awareness” and the undefined term “earned media (*i.e.*, free public relations), consists of lay opinion testimony, lacks foundation and is unsupported and speculative because (a) Mr. Bethers has no personal knowledge of what resources Warby Parker committed to any “earned media” efforts, and (b) there is no evidence to establish that a strategy that worked for Warby Parker could ever substitute for search advertising on 1-800 Contacts Branded Queries for the rivals restrained by the Bidding Agreements or that such a strategy would be appropriate, achievable, or successful for an online contact lens retailer—let alone a group of such retailers sufficient to put competitive pressure on 1-800 Contacts.

2. ***1-800 Contacts Focuses On Television Advertising To Drive Traffic To Its Website And Build Brand Awareness***

260. 1-800 Contacts has spent over \$500 million in advertising during the life of the company. (Bethers, Tr. 3614; CX 1446-010).

**Response to Proposed Finding No. 260:**

The exhibit cited does not support the proposed finding. CX1446 states that { [REDACTED]

[REDACTED] } (CX1446 at 010, *in camera*). Notwithstanding, the proposed finding is irrelevant.

261. The majority of 1-800 Contacts' advertising expenditures has been for TV advertising. (RX 844-001 (tab labeled "Request #3); Coon, Tr. 2721; Bethers, Tr. 3614; RX 736-006; RX 739-0092).

**Response to Proposed Finding No. 261:**

Complaint Counsel has no specific response.

262. Between 2002 and 2014, 1-800 Contacts spent { [REDACTED] } on advertising, more than { [REDACTED] }. (RX 844-001 (tab labeled "Request #3); RX 736-006; RX 739-0092).

**Response to Proposed Finding No. 262:**

The proposed finding improperly cites two Respondent's expert reports (RX0736 and RX0739) for a proposition of fact that should be proven with fact witness testimony or documents, namely the amount of money 1-800 Contacts actually spent on advertising and the share { [REDACTED] }. Notwithstanding, the proposed finding is irrelevant.

263. 1-800 Contacts understood that if it was going to build a brand, do national advertising, and set a high bar for service, it would need higher prices than it would otherwise. (Coon, Tr. 2712-13).

**Response to Proposed Finding No. 263:**

The proposed finding is vague and irrelevant.

264. 1-800 Contacts' founder and former CEO believes that it was not possible for 1-800 Contacts to do television advertising and offer superior customer service and at the same time offer the lowest possible price on contact lenses. (Coon, Tr. 2701).

**Response to Proposed Finding No. 264:**

The proposed finding is unsupported because the cited testimony lacks foundation. Mr. Coon subsequently testified that he had no personal experience with attempting to do television and offer superior customer service and at the same time offer the lowest possible price on contact lenses. (Coon, Tr. 2755-2756). The proposed finding is also vague and irrelevant.

**265.** Television is 1-800 Contacts' principal means for driving growth in terms of brand awareness and identifying and finding customers. (CX 9001 (Bethers, IHT at 60); (Coon, Tr. 2727-29)).

**Response to Proposed Finding No. 265:**

The proposed finding is vague and confusing as to the meaning of "identifying and finding customers" using broadscale TV advertising. Complaint Counsel also notes that the cited trial testimony of Mr. Coon does not support the proposed finding.

**266.** Broadscale advertising drove traffic to the 1-800 Contacts website both directly when users typed in the URL and through paid internet search advertising. (CX 9002 (Craven, IHT at 40)).

**Response to Proposed Finding No. 266:**

The proposed finding is misleading because it omits the possibility that traffic to the 1-800 Contacts website was driven by other forces, such as Internet search advertising or the habits of repeat customers.

**267.** 1-800 Contacts' investments in television advertising has increased the total number of consumers shopping online for contact lenses, mostly at 1-800 Contacts, but also at other online contact lens retailers. (CX 9001 (Bethers, IHT at 149)).

**Response to Proposed Finding No. 267:**

The proposed finding is unsupported. The cited testimony is speculative and lacks foundation as there is no evidence that Mr. Bethers has personal knowledge for the testimony on page 149 of his investigational hearing transcript, including the testimony that "we are a feeder for many online players." Moreover, the cited testimony does not support the proposed finding that 1-800 Contacts' investments in television advertising have increased the total number of consumers

shopping online for contact lenses. (CX9001 (Bethers, IHT at 148-49). Notwithstanding, the proposed finding is irrelevant.

**268.** The benefits of TV advertising are seen immediately by 1-800 Contacts in terms of driving greater traffic to its website. (CX 9017 (Blackwood, Dep. at 176); CX 9029 (Bethers, Dep. at 98); CX 9032 (L. Schmidt, Dep. at 247); RX 736-008).

**Response to Proposed Finding No. 268:**

The proposed finding improperly cites one of Respondent's expert reports (RX0736) for a proposition of fact that should be proven with fact witness testimony or documents, the fact TV advertising drives traffic to 1-800 Contacts' website. Notwithstanding, the proposed finding is irrelevant.

**269.** There is a high correlation between 1-800 Contacts' television advertisements and traffic to its website from clicks on a sponsored ad by 1-800 Contacts that appeared in response to a search for 1-800 Contacts' trademarks. (CX 9017 (Blackwood, Dep. at 176); CX 9029 (Bethers, Dep. at 98); CX 9032 (L. Schmidt, Dep. at 247); RX 736-008).

**Response to Proposed Finding No. 269:**

The proposed finding is vague as to time and as to the meaning of "a high correlation." To the extent the proposed finding purports to suggest that the nondescript "high correlation" reported is evidence of a *causal* relationship between 1-800 Contacts' television advertising and traffic to its website, it is unsupported by any appropriate, qualified expert analysis. The expert report of Dr. Goodstein does not present any such analysis on this point, and in any event, the expert opinions of Dr. Goodstein must be disregarded for the reasons set forth in Complaint Counsel's Post-Trial Brief. (CCPTB at 165-168). To the extent this proposed finding does *not* purport to suggest any such causal relationship, its inclusion in Respondent's proposed findings makes little sense.

In either case, however, the proposed finding is irrelevant.

**270.** 1-800 Contacts observed that when it increased its broad-scale advertising spend in a particular region it saw a strong increase in internet traffic in that region on 1-800 Contacts search terms. (CX 9031 (Schmidt, Dep. at 97)).

**Response to Proposed Finding No. 270:**

The proposed finding is vague as to time, and unsupported as to any time other than during Mr. Schmidt's brief tenure at 1-800 Contacts, from January 2004 to January 2006. (CCPTF ¶¶ 65-67). Notwithstanding, the proposed finding is irrelevant.

**271.** Research conducted by 1-800 Contacts found that 40 percent of the traffic to its website from paid trademark search was directly related to television advertising. (CX 9017 (Blackwood, Dep. at 230)).

**Response to Proposed Finding No. 271:**

The proposed finding is inaccurate. The "research" referred to was conducted by a third party, not by 1-800 Contacts. (CX9017 (Blackwood, Dep. at 217 ("So this was a—what's called a 'Marketing Mix Modeling,' which is basically a summary or overview that was done by a third party, Marketing Analytics"))).

The proposed finding is also vague in its use of the phrase "directly related to." The proposed finding is otherwise unsupported because the cited testimony lacks foundation. As suggested by the language of the proposed finding itself, the testimony cited consists of Ms. Blackwood describing statements in a document that she was shown at deposition, but the document itself is not in evidence. There is no other evidence that Ms. Blackwood has personal knowledge of the precise degree of correlation between 1-800 Contacts' television advertising and paid trademark search. Nor is there any evidence about the nature of the research that would allow its conclusions to be examined. Notwithstanding, the proposed finding is irrelevant.

**272.** Internet search advertising does not itself generate significant consumer demand, rather it is typically a means to convert on consumer demand that already exists because of other forms of advertising. (CX 9017 (Blackwood, Dep. at 61)).

**Response to Proposed Finding No. 272:**

The proposed finding is unsupported, lacks foundation, and consists of lay opinion testimony, as there is no evidence that Ms. Blackwood is qualified to opine on or has ever studied the question whether internet search advertising, in general, "does not itself generate significant

consumer demand.” Nor is there evidence that Ms. Blackwood has personal knowledge of the efficacy of internet search advertising for online contact lens retailers other than 1-800 Contacts itself. As applied to the online sale of contact lenses, this proposed finding is also inaccurate and contradicted by the weight of the record evidence, which shows that Internet search advertising is a uniquely important marketing channel in the online sale of contact lenses, both generating awareness of retailer brands and leading to conversions (*See* CCPTF Section IV.B (¶¶ 489-589), Section V.B.5 (¶¶ 784-788)).

**273.** 1-800 Contacts’ television advertising produces longer term benefits in the form of building brand awareness. (RX 736-008).

**Response to Proposed Finding No. 273:**

This proposed finding should be disregarded because it relies only on the expert opinions of Dr. Goodstein, which must be disregarded for the reasons set forth in Complaint Counsel’s Post-Trial Brief. (CCPTB at 165-168). The proposed finding is also vague regarding to whom the “longer term benefits” referenced therein accrue and regarding what is meant by “longer term benefits.” The proposed finding is also irrelevant.

**274.** As a result of its television advertising, 1-800 Contacts is consistently one of the most familiar brand names among contact lens retailers. (RX 736-009-011).

**Response to Proposed Finding No. 274:**

This proposed finding should be disregarded because it relies only on the expert opinions of Dr. Goodstein, which must be disregarded for the reasons set forth in Complaint Counsel’s Post-Trial Brief. (CCPTB at 165-168). Complaint Counsel agrees, however, that 1-800 Contacts has relatively high brand awareness compared to other online contact lens retailers.

**275.** 1-800 Contacts has extremely high brand awareness, particularly relative to other online contact lens retailers. { [REDACTED] } RX 736-011).

**Response to Proposed Finding No. 275:**

Complaint Counsel has no specific response.

**276.** 1-800 Contacts' unaided awareness has been the highest of any retailer in the contact lens industry. (Bethers, Tr. 3705; RX 904-0009; CX 1446-011; RX 736-009-11).

**Response to Proposed Finding No. 276:**

Complaint Counsel has no specific response.

**277.** In 2012, 1-800 Contacts' unaided awareness was thirty-three times the unaided awareness of the nearest online contact lens retailer. (RX 904-0009; CX 525-010).

**Response to Proposed Finding No. 277:**

Complaint Counsel has no specific response.

**278.** In 2015 and 2016, 1-800 Contacts' unaided awareness was often at least ten times the unaided awareness of the nearest online contact lens retailer. { [REDACTED] }  
RX 736-010).

**Response to Proposed Finding No. 278:**

Complaint Counsel has no specific response.

**279.** 1-800 Contacts' unaided awareness is more than twice its actual market share. (Bethers, Tr. 3705; CX 525-010; RX 736-010).

**Response to Proposed Finding No. 279:**

The proposed finding is inaccurate because, according to 1-800 Contacts' sources, 1-800 Contacts' unaided brand awareness was either 22% or 30%, but its market share in the market for the online sale of contact lenses was over 50%. (Bethers, Tr. 3705; CX0525 at 010; CCPTF ¶ 1629).

The proposed finding also relies on the expert opinions of Dr. Goodstein, which must be disregarded for the reasons set forth in Complaint Counsel's Post-Trial Brief. (CCPTB at 165-168).

**280.** Online contact lens retailers, other than 1-800 Contacts, generally do not engage in broadscale advertising, such as television advertising. (CX 9029 (Bethers, Dep. at 10-11)).

**Response to Proposed Finding No. 280:**

Complaint Counsel has no specific response.

**281.** Online contact lens retailers, other than 1-800 Contacts, have not invested in broadscale advertising like 1-800 Contacts. (Bethers, Tr. 3614; CX 9029 (Bethers, Dep. at 10-11); CX 9035 (Coon, Dep. at 88); RX 736-009).

**Response to Proposed Finding No. 281:**

Complaint Counsel has no specific response.

**282.** Online contact lens retailers, other than 1-800 Contacts, barely register in measures of unaided awareness. { [REDACTED] } RX 736-010).

**Response to Proposed Finding No. 282:**

The proposed finding is vague as to the meaning of “barely register” and is therefore irrelevant.

**283.** Online contact lens retailers, other than 1-800 Contacts, had little to no brand awareness. (CX 9013 (Aston, Dep. at 144)).

**Response to Proposed Finding No. 283:**

The proposed finding is unsupported. First, Mr. Aston did not testify that as a general matter, other online contact lens retailers had little to no brand awareness. He simply speculated, based on a document not in evidence, that a company called Lensmart did not have high brand awareness because he himself couldn’t recall what Lensmart was. (CX9013 (Aston, Dep. at 144 (“Q. And is Lensmart, to the extent someone were to see that, is that a well known name? Is that a company that had high brand awareness . . . when you were at 1-800 CONTACTS? MR GRAY: Objection. Foundation. THE WITNESS: I would say no. I mean, even earlier today I had a hard time recalling Lensmart”))). Second, even if he had testified in such a way as to support the proposed finding, such testimony would lack foundation. There is no evidence that Mr. Aston has personal knowledge of the level of brand awareness of any, let alone all, other online contact lens retailers during his brief tenure at 1-800 Contacts.

Nonetheless, Complaint Counsel agrees that 1-800 Contacts’ brand awareness is high compared to that of its online rivals.

**284.** In studies of “unaided awareness,” Vision Direct was the only online retailer, other than 1-800 Contacts, that frequently showed up in the results, with about 1 percent unaided awareness. (Bethers, Tr. 3706; { ██████████ } )

**Response to Proposed Finding No. 284:**

Complaint Counsel has no specific response.

**285.** Many online contact lens retailers, other than 1-800 Contacts, have levels of brand awareness lower than their market share, which suggests that some of their existing customers do not always remember their names. (Bethers, Tr. 3707).

**Response to Proposed Finding No. 283:**

The proposed finding is vague and nonspecific with regard to which retailers it refers to, what differences in market shares and brand awareness levels are being described, or what sources of information Mr. Bethers’ testimony relied upon. It is also unsupported insofar as it reaches a conclusion that customers of many other online contact lens retailers actually do not remember the names of the retailers. There is no evidence that Mr. Bethers has any personal knowledge of the memories of customers of other contact lens retailers or that he is qualified to draw conclusions from a comparison of studies regarding market shares and separate, unrelated studies (presumably with different populations surveyed) regarding brand awareness and with no information provided to help evaluate, among other things, whether the differences discussed are or are not within margins of error.

**3. *Paid Search Trademark Advertising Represented Less Than One Percent Of 1-800 Contacts’ Advertising Expenditures***

**286.** 1-800 Contacts spends less than one percent of its total advertising expenditures on paid search advertising for sponsored ads that appear in response to an internet search for 1-800 Contacts’ trademarks. (Bethers, Tr. 3702; Coon, Tr. 2723).

**Response to Proposed Finding No. 286:**

This proposed finding is misleading and contradicted by the weight of the evidence insofar as it purports to equate the proportion of 1-800 Contacts’ advertising expenditures spent on advertisements that appear in response to a search for 1-800 Contacts’ trademarks with the relative

importance to the company of such advertisements as compared to other advertisements. The fact that 1-800 Contacts would not spend a large portion of its advertising expenditures on advertisements that appear in response to searches for its own name is not probative of the relative value of those respective types of advertisements to 1-800 Contacts. Rather, the difference in expenditure is not at all surprising in light of (1) the manner in which pricing for search advertisements works (CCPTF Sections IV.A.4-5 (¶¶ 396-442)) and (2) the effect that the Bidding Agreements challenged in this case had on the competition that 1-800 Contacts faced—and therefore the prices it paid—in auctions for search queries consisting of 1-800 Contacts’ trademarks (CCPTF Section VIII (¶¶ 1290-1312)). Insofar as the proposed finding suggests that search advertising in response to searches for 1-800 Contacts’ trademarks is unimportant to 1-800 Contacts, it is contradicted by the evidence that this type of advertising (what 1-800 Contacts called “trademark paid search”) is a commercially significant advertising channel for 1-800 Contacts (CCPTF Section V.B.1 (¶¶ 599-610), VI.A.2 (¶¶ 822-865)).

**287.** For the time period from 2002 and 2014, { [REDACTED] } of 1-800 Contacts’ advertising expenses were for Internet-based advertising. (RX 844-001 (tab labeled “Request #3”); RX 736-006; RX 739-0092).

**Response to Proposed Finding No. 287:**

Complaint Counsel has no specific response.

**288.** Between 2004 and 2014, overall internet advertising accounted for between { [REDACTED] } of 1-800 Contacts’ total annual advertising costs. (RX 844-001 (tab labeled “Request #3”); RX 739-0092).

**Response to Proposed Finding No. 288:**

Complaint Counsel has no specific response.

**289.** Between 2004 and 2014, paid internet search advertising accounted for between { [REDACTED] } of 1-800 Contacts’ total annual *internet* advertising costs. (RX 844-001 (tab labeled “Request #3”); RX 739-0092).

**Response to Proposed Finding No. 289:**

Complaint Counsel has no specific response.

**290.** Between 2004 and 2014, paid internet search advertising for sponsored that appeared in response to an internet search for 1-800 Contacts’ trademarks accounted for between { [REDACTED] } of 1-800 Contacts’ total paid internet search advertising costs. ((RX 844-001 (tab labeled “Request #3”); RX 739-0092).

**Response to Proposed Finding No. 290:**

This proposed finding is nonsensical because it appears to be missing a word. It is also misleading insofar as it purports to equate the proportion of 1-800 Contacts’ paid internet search advertising expenditures spent on advertisements that appear in response to a search for 1-800 Contacts’ trademarks with the relative importance to the company of such advertisements as compared to other search advertisements. The fact that 1-800 Contacts would pay much lower prices for clicks on advertisements that appear in response to searches for its own name than it would for other advertisements is not probative of the relative value of those respective types of advertisements to 1-800 Contacts. In fact, the difference in expenditure is not at all surprising in light of (1) the manner in which pricing for search advertisements works (CCPTF Sections IV.A.4-5 (¶¶ 396-442)) and (2) the effect that the Bidding Agreements challenged in this case had on the competition that 1-800 Contacts faced—and therefore the prices it paid—in auctions for search queries consisting of 1-800 Contacts’ trademarks (CCPTF Section VIII (¶¶ 1290-1312)).

**291.** Between 2004 and 2014, paid internet search advertising for sponsored ads that appeared in response to an internet search for 1-800 Contacts’ trademarks (“paid search trademark expenses”) accounted for between { [REDACTED] } of 1-800 Contacts’ total annual advertising costs. (RX 844-001 (tab labeled “Request #3”); RX 739-0092).

**Response to Proposed Finding No. 291:**

This proposed finding is misleading and contradicted by the evidence for the reasons set forth in response to Proposed Findings No. 286 and 290.

**292.** From 2002 through 2014, the amount spent by 1-800 Contacts for sponsored ads that appeared in response to an internet search for 1-800 Contacts’ trademarks was not material to 1-800 Contacts’ business. (Coon, Tr. 2722-23).



Complaint Counsel has no specific response but notes that Mr. Bethers also agreed that

{ [REDACTED] }  
 [REDACTED] }. (RX0428 at 030; Bethers, Tr. 3814-3816, *in camera*).

296. [REDACTED]

[REDACTED] (Bethers, Tr. 3575; RX 428-0030).

**Response to Proposed Finding No. 296:**

Complaint Counsel has no specific response.

297. In 2015, mobile devices accounted for { [REDACTED] } of initial orders placed with 1-800 Contacts and { [REDACTED] } of the traffic to 1-800 Contacts' website. (CX 1446-033).

**Response to Proposed Finding No. 297:**

Complaint Counsel has no specific response.

***F. 1-800 Contacts' Alliance With Walmart***

298. 1-800 Contacts had an alliance with Walmart from 2008 until about 2012. (Bethers, Tr. 3533-34, 3612-13; Coon, Tr. 2672).

**Response to Proposed Finding No. 298:**

Complaint Counsel has no specific response.

299. Walmart's distribution center for contact lenses was set up to send multiple orders to roughly 2,500 stores rather than to send individual contact lens orders to customers. (Coon, Tr. 2672-73).

**Response to Proposed Finding No. 299:**

Complaint Counsel has no specific response.

300. Walmart had approximately 2,500 stores with Vision Centers and contact lens solution aisles where there was an opportunity to market to contact lens wearers but little or no marketing was being done by Walmart. (Coon, Tr. 2672-74).

**Response to Proposed Finding No. 300:**

This proposed finding is vague as to time period. Otherwise, Complaint Counsel has no specific response.

**301.** The general idea behind the alliance was that 1-800 Contacts and Walmart would work together to provide better service to Walmart customers and to expand their respective marketing efforts. (Coon, Tr. 2672-74).

**Response to Proposed Finding No. 301:**

Complaint Counsel has no specific response.

**302.** During the alliance, 1-800 Contacts ran Walmart's contact lens business on the 1-800 Contacts' website and handled fulfillment for the approximately 2,500 Walmart retail locations. (Coon, Tr. 2675-76).

**Response to Proposed Finding No. 302:**

This proposed finding is vague and confusing as written in its use of the phrase "ran Walmart's contact lens business on the 1-800 Contacts' website." Otherwise, Complaint Counsel has no specific response.

**303.** The Walmart Alliance changed the nature of 1-800 Contacts' business from being a pure-play online retailer to having a physical presence in approximately 2,500 Walmart retail locations. (Coon, Tr. 2674).

**Response to Proposed Finding No. 303:**

The proposed finding is misleading insofar as it implies, as written, that 1-800 Contacts was no longer a pure-play online retailer in the sense that it was making sales in stores. In fact, pursuant to the alliance, 1-800 Contacts merely handled Walmart's online contact lens sales and handled fulfillment for Walmart stores. (*See* Respondent's Proposed Finding No. 302 and Response to Proposed Finding No. 302).

**304.** 1-800 Contacts then-CEO, Mr. Coon, believed that 1-800 Contact's primary competitor, the independent ECP, gained credibility and trust from having a physical presence and interaction with consumers. (Coon, Tr. 2674).

**Response to Proposed Finding No. 304:**

This proposed finding is misleading and contrary to the weight of the evidence in identifying "the independent ECP" as "1-800 Contact's [*sic*] primary competitor" insofar as this proposed finding ignores the important ways in which 1-800 Contacts competes with online

contact lens retailers. As set forth in response to Proposed Finding No. 98, 1-800 Contacts competes with different types of retailers in different ways. And as set forth in Complaint Counsel's proposed findings of fact, the relevant market in this case is the market for the online sale of contact lenses. (CCPTF Section X.A (¶¶ 1542-1622)).

This proposed finding is vague in its use of the term "credibility." While Complaint Counsel does not dispute that Mr. Coon held the subjective belief to which he testified, to the extent this proposed finding suggests that his belief was accurate, it is unsupported, because the testimony cited is speculative and lacking in foundation.

**305.** Coon believed that 1-800 Contacts' physical presence in approximately 2,500 Walmart retail locations would help it to build trust and credibility with consumers. (Coon, Tr. 2674).

**Response to Proposed Finding No. 305:**

This proposed finding is vague in its use of the undefined term "credibility." Otherwise, Complaint Counsel has no specific response.

**306.** 1-800 Contacts' alliance with Walmart was designed to provide customers an opportunity to buy contact lenses at their place of choice, either online or in a store, and to obtain an eye exam at Walmart. (Bethers, Tr. 3617; RX 904-0025).

**Response to Proposed Finding No. 306:**

Complaint Counsel has no specific response.

**307.** During the alliance, 1-800 Contacts and Walmart did cobranding on television and cobranding in stores. (Bethers, Tr. 3617).

**Response to Proposed Finding No. 307:**

Complaint Counsel has no specific response.

**308.** Prior to the alliance, 1-800 Contacts' average retail prices were higher than Walmart's on a number of products on a per-box basis, but 1-800 Contacts' average retail prices were lower than Walmart's on a number of products when accounting for volume discounts. (Bethers, Tr. 3619).

**Response to Proposed Finding No. 308:**

This proposed finding, while Complaint Counsel does not dispute its literal truth, is misleading and contradicted by the weight of the evidence insofar as it suggests that Walmart is representative of online contact lens retailers. In fact, Walmart is distinct from most online contact lens retailers in many ways. For example, 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)). { [REDACTED] } (Evans Tr. 1748, *in camera*; CX9042 (Evans, Dep. at 140)). { [REDACTED] } (CX1449 at 026, *in camera*).

1-800 Contacts documents have shown that as a general matter, { [REDACTED]

{ [REDACTED] } (Athey, Tr. 821-823, *in camera*; CX0549 at 063, *in camera* (“{ [REDACTED]

{ [REDACTED] }”).

**309.** During the alliance, 1-800 Contacts and Walmart had uniform pricing on contact lenses so that the retail prices were the same for a customer who purchased over the phone, on the internet, or in the store. (Bethers, Tr. 3619).

**Response to Proposed Finding No. 309:**

Complaint Counsel has no specific response.

**310.** When the alliance ended, 1-800 Contacts and Walmart returned to being competitors in the sale of contact lenses. (Bethers, Tr. 3621-22).

**Response to Proposed Finding No. 310:**

Complaint Counsel has no specific response.

**311.** Walmart has been a major competitor of 1-800 Contacts in the retail sale of contact lenses since the end of the alliance. (Bethers, Tr. 3725).

**Response to Proposed Finding No. 311:**

This proposed finding is misleading, unsupported, and contradicted by the weight of the evidence insofar as it characterizes Walmart as a “major competitor” in the retail sale of contact lenses. To the contrary, Walmart is a relatively weak competitor in the online sale of contact lenses. Specifically:

- (a) Walmart has not made the contact lens business a high priority for the company. (CX9033 (Mohan, Dep. at 17 (the contact lens business is not a priority for Walmart), 19, 40-41 (unlike other departments such as electronics and groceries, the contact lens business is not seen by Walmart as a way to keep customers coming back to Walmart), 93-95, 167, 170 (contact lenses are not a “bread and butter” business for Walmart)); CX9037 (Owens, Dep. at 19-20)); (CX8006 at 090 (¶ 196 n.211) (Evans Expert Report) (Walmart is “not an effective proxy for how online competitors would have performed in the but-for world” because “Walmart’s prices are not significantly lower than those of 1-800 Contacts” and Walmart has not focused heavily on its online contact lens business, which it sees largely “as a service for in-store customers rather than as an important standalone business.”));
- (b) { [REDACTED] } (Evans Tr. 1748, *in camera*; CX9042 (Evans, Dep. at 140));
- (c) { [REDACTED] } (CX1449 at 026, *in camera*);
- (d) 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.”));

(e) Walmart has only one percent of the online contact lens market. (CX9037 (Owens, Dep. at 58-60));

(f) Out of a group of twelve firms for which online contact lens sales revenue information was available, Walmart also was in the lower half of performers (ranking eighth out of the twelve firms). (CX8007 at 044 (Exhibit C: Revenue Comparison of Contact Lens Retailers Selling Online) (Athey Rebuttal Expert Report)); and

(g) Dr. Athey used the observed consumer behavior data from comScore to calculate firms’ “brand effects,” which reflect average consumer preference for each retailer, controlling for the ad position on the page, whether the retailer was searched for, and other factors. Walmart had one of the weakest brand effects of all the online contact lens retailers for which data was available. (*See* CCPTF ¶¶ 1444-1448; Athey, Tr. 833-836 (testifying that, in terms of brand effects, only two firms about which Dr. Athey had data were “weaker” than Memorial Eye while 21 were “stronger” and that Walmart was “comparable to Memorial Eye” “in terms of its click-through rates,” which “incorporate[] name recognition as revealed by consumer behavior”); CX8007 at 107-108 (App’x D: Multinomial logit results) (showing the brand effect coefficients about which Dr. Athey testified, with larger (less negative) coefficients reflecting stronger brand effects and

smaller (more negative) coefficients reflecting weaker brand effects; specifically showing that, for example, 1-800 Contacts (coefficient -4.593) has a relatively strong brand effect while Walmart has a relatively weak brand effect (-5.507) and showing that most firms had stronger brand effects than Walmart).

**312.** Competition between 1-800 Contacts and Walmart following the end of the alliance has been fierce, in part because they shared customers for the four-and-half years of the alliance. (Bethers, Tr. 3621-22).

**Response to Proposed Finding No. 312:**

This proposed finding is vague in its use of the subjective and undefined word “fierce,” and it is misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 311.

**313.** Following the end of the alliance, Walmart placed big placards in its Vision Centers that compared Walmart’s prices on specific contact lens products directly to prices of the “most popular Internet seller,” which was 1-800 Contacts. (Bethers, Tr. 3622-23; CX 547-002, slide 47).

**Response to Proposed Finding No. 313:**

Complaint Counsel has no specific response.

***G. 1-800 Contacts Has Led Numerous Regulatory And Legal Battles To Permit Greater Competition With ECPs***

***1. Supporting The Fairness To Contact Lens Consumers Act (“FCLCA”)***

**314.** 1-800 Contacts has faced significant challenges as a non-ECP retailer of contact lenses. (Coon, Tr. 2684-85).

**Response to Proposed Finding No. 314:**

This proposed finding is so vague as to be rendered irrelevant.

**315.** One major challenge that 1-800 Contacts faced in competing with ECPs was that ECPs would not release contact lens prescriptions as a general rule. (Coon, Tr. 2684-85).

**Response to Proposed Finding No. 315:**

This proposed finding is vague in its use of the term “as a general rule.” It is also unsupported because the cited testimony lacks foundation: there is no evidence that Mr. Coon has

personal knowledge of the practices of a large and unspecified numbers of ECPs “as a general rule.” Notwithstanding, the proposed finding is irrelevant.

**316.** In 1-800 Contacts’ early years, consumers had no legal right to a copy of their contact lens prescription in approximately half the states and in other states they often had to argue with their ECP to get it. (Coon, Tr. 2685-86).

**Response to Proposed Finding No. 316:**

The final clause of the proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Coon has personal knowledge of how often consumers had to argue with ECPs over prescriptions. Notwithstanding, the proposed finding is irrelevant.

**317.** At one point, 1-800 Contacts was engaged in disagreements with approximately 25-30 different state optometry boards. (Coon, Tr. 2714-15).

**Response to Proposed Finding No. 317:**

This proposed finding is so vague as to be rendered irrelevant in its use of the phrase “engaged in disagreements.”

**318.** A number of state optometry board regulations impeded online sales of contact lenses by regulations requiring that contact lenses be sold in a face-to-face transaction or by an ECP who was licensed and resided in that state. (Coon, Tr. 2714-15).

**Response to Proposed Finding No. 318:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**319.** The broadest issue 1-800 Contacts faced were state regulations requiring “affirmative verification” for contact lens prescriptions. (Coon, Tr. 2715).

**Response to Proposed Finding No. 319:**

This proposed finding is irrelevant. It is also vague in its use of the term “broadest issue.” Otherwise, Complaint Counsel has no specific response.

**320.** Affirmative verification meant that the retailer would need to contact the prescriber and wait indefinitely for an affirmative response verifying the prescription or confirming that the order could be filled. (Coon, Tr. 2715-16).

**Response to Proposed Finding No. 320:**

Complaint Counsel has no specific response.

**321.** Unlike a doctor-pharmacy relationship, the contact lens prescriber is also a competitor of other contact lens retailers. (Coon, Tr. 2716-17). In making a verification request, a contact lens retailer is asking the prescribing ECP for permission to sell to that ECP's own customer. (Coon, Tr. 2716-17).

**Response to Proposed Finding No. 321:**

Complaint Counsel has no specific response.

**322.** Affirmative verification was a disaster for 1-800 Contacts' business because ECPs would just ignore the verification requests or respond in ways that would not allow 1-800 Contacts to fill the customer's order. (Coon, Tr. 2715-16).

**Response to Proposed Finding No. 322:**

This proposed finding is vague in its use of the subjective term "disaster." Complaint Counsel notes that Respondent has elsewhere stated that it had early business success and rapid growth. (*E.g.*, Proposed Findings No. 49, 52, 57). Otherwise, Complaint Counsel has no specific response.

**323.** 1-800 Contacts entered into an agreement with the Texas optometry board to affirmatively verify prescriptions in exchange for it sending a notice out to ECPs that it would be a violation of Texas law not to respond to 1-800 Contacts' verification requests. (Coon, Tr. 2716). 1-800 Contacts ended up having to cancel 50 percent of its orders in Texas because ECPs would just ignore its prescription verification requests. (Coon, Tr. 2716).

**Response to Proposed Finding No. 323:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**324.** The Texas optometry board received 4,000 handwritten complaints from consumers about the failure of ECPs to respond to 1-800 Contacts' verification requests but failed to pursue a single complaint. (Coon, Tr. 2717).

**Response to Proposed Finding No. 324:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**325.** In response to the problems it encountered with affirmative verification, 1-800 Contacts proposed an alternative system called “presumed verification.” (Coon, Tr. 2716-18).

**Response to Proposed Finding No. 325:**

Complaint Counsel has no specific response.

**326.** Under presumed verification, the retailer would communicate the customer’s prescription to the prescriber and may presume it is valid unless the prescriber informs it within a certain time period that the prescription is incorrect, invalid, or expired. (Coon, Tr. 2717-18).

**Response to Proposed Finding No. 326:**

Complaint Counsel has no specific response.

**327.** ECPs responded to presumed verification by arguing that it was not an appropriate way to verify a prescription for a medical device like contact lenses. (Coon, Tr. 2718).

**Response to Proposed Finding No. 327:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**328.** 1-800 Contacts took many steps to establish presumed verification as the applicable standard for verifying contact lens prescriptions. (Coon, Tr. 2718).

**Response to Proposed Finding No. 328:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**329.** 1-800 Contacts’ representatives visited more than two dozen state capitals, as well as Washington, D.C., in an effort to change both state and federal law with respect to verification of contact lens prescriptions. (Coon, Tr. 2718).

**Response to Proposed Finding No. 329:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**330.** 1-800 Contacts’ then-CEO, Mr. Coon, personally visited numerous state capitals, and spent over 300 days in Washington, D.C. over a five-year period, to establish presumed verification as the applicable standard for verifying contact lens prescriptions. (Coon, Tr. 2718-19).

**Response to Proposed Finding No. 330:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**331.** Ultimately, 1-800 Contacts was successful in urging the U.S. Congress to pass the Fairness to Contact Lens Consumers Act (“FCLCA”), which adopted presumed verification as a national standard for verifying contact lens prescriptions. (Coon, Tr. 2719-20).

**Response to Proposed Finding No. 331:**

Complaint Counsel has no specific response.

**332.** 1-800 Contacts’ primary opponents in nearly all of its various legal and regulatory battles relating to competition in the sale of contact lenses were ECPs and their trade associations. (Coon, Tr. 2720).

**Response to Proposed Finding No. 332:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**2. *Supporting Access To Supply Of Contact Lens For Non-ECP Retailers***

**333.** Another major challenge that 1-800 Contacts faced was that the major contact lens manufacturers refused to supply product to 1-800 Contacts and other non-ECP retailers. (Coon, Tr. 2685-86).

**Response to Proposed Finding No. 333:**

Complaint Counsel has no specific response.

**334.** 1-800 Contacts believed that major contact lens manufacturers refused to supply their products to 1-800 Contacts because ECPs threatened not to prescribe the products of a manufacturer who provided supply to 1-800 Contacts. (Coon, Tr. 2685-86).

**Response to Proposed Finding No. 334:**

This proposed finding is nonsensical in describing 1-800 Contacts, as a company, having a “belie[f].” It is also speculative and lacking in foundation to the extent it suggests that the subjective belief reported therein is in fact true. To the extent the proposed finding does not suggest that the subjective belief reported therein is in fact true, it is irrelevant.

**335.** 1-800 Contacts was involved in a major lawsuit brought by approximately 32 State Attorneys General against the American Optometric Association (“AOA”), individual ECPs, and the major contact lens manufacturers. (Coon, Tr. 2685).

**Response to Proposed Finding No. 335:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**336.** The lawsuit alleged that the AOA, individual ECPs, and major manufacturers unlawfully conspired to restrict the supply of contact lenses to non-ECP retailers and to restrict consumer access to their prescriptions. (Coon, Tr. 2685-86).

**Response to Proposed Finding No. 336:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**337.** As part of the settlement of this litigation, the defendant contact lens manufacturers agreed to sell contact lenses to alternative distribution channels, including non-ECP retailers. (RX 567-0011-0012).

**Response to Proposed Finding No. 337:**

The proposed finding is unsupported. Exhibit RX0567 is not in evidence.

**3. *The Battles Against Unilateral Pricing Policies (“UPPs”)***

**338.** Unilateral pricing policies were implemented by the four major contact lens manufacturers, starting in 2013. (Bethers, Tr. 3670; RX 739-0090).

**Response to Proposed Finding No. 338:**

Complaint Counsel has no specific response.

**339.** A unilateral pricing policy sets a minimum retail price for specific contact lenses. (Bethers, Tr. 3671).

**Response to Proposed Finding No. 339:**

Complaint Counsel has no specific response.

**340.** Alcon was the first manufacturer to implement a unilateral pricing policy in June 2013, and it did so only with respect to new products (starting with Dailies Total 1). (Bethers, Tr. 3671-74; RX 739-0090).

**Response to Proposed Finding No. 340:**

Complaint Counsel has no specific response.

**341.** Bausch & Lomb then introduced a new product, Ultra, with a unilateral pricing policy in February 2014. (Bethers, Tr. 3671-74; RX 739-0090).

**Response to Proposed Finding No. 340:**

Complaint Counsel has no specific response.

**342.** Johnson & Johnson Vision Care followed by implementing a unilateral pricing policy on many of its existing products in July and August 2014. (Bethers, Tr. 3671-74; RX 739-0090).

**Response to Proposed Finding No. 342:**

Complaint Counsel has no specific response other than to note that Johnson & Johnson Vision Care terminated its UPP program entirely on April 13, 2016. (CX8006 at 125 (¶ 271) (Evans Expert Report)).

**343.** The last manufacturer to introduce a unilateral pricing policy was CooperVision, which did so with respect to certain products sold by a company it had acquired, Sauflon. (Bethers, Tr. 3671-74; RX 739-0090).

**Response to Proposed Finding No. 343:**

Complaint Counsel has no specific response other than to note that Sauflon, which had an insignificant US market share, had announced its pricing policy prior to its acquisition by CooperVision.

**344.** Both manufacturers and ECPs have publicly supported unilateral pricing policies because of their effect on the ability of ECPs to compete against lower priced contact lens retailers. (RX 739-0019).

**Response to Proposed Finding No. 339:**

The proposed finding is unsupported. The proposed finding improperly relies on the Expert Report of Dr. Murphy (RX0739) for a proposition of fact that should be proven with fact witness testimony or documents, namely the facts that manufacturers and ECPs support unilateral pricing policies. The sources Dr. Murphy cites in his reports in support of this statement are not in evidence. The proposed finding also conflicts with Johnson & Johnson Vision Care's decision to

terminate its UPP program entirely on April 13, 2016, which was less than two years after its introduction. (CX8006 at 125 (¶ 271) (Evans Expert Report)).

**345.** The president of Johnson & Johnson Vision Care described its unilateral pricing policy as giving the optometrist the ability to improve his or her capture rate in the office by reducing the incentives of consumers to shop around. (RX 739-0019).

**Response to Proposed Finding No. 345:**

The proposed finding is unsupported. The proposed finding improperly relies on the Expert Report of Dr. Murphy (RX0739) for a proposition of fact that should be proven with fact witness testimony or documents, namely the facts that manufacturers and ECPs support unilateral pricing policies. The sources Dr. Murphy cites in his reports in support of this statement are not in evidence. Indeed, for this specific proposition Dr. Murphy quotes hearsay statements by a Johnson & Johnson executive, to which no hearsay exception would apply. (RX0739 at 019). In addition, the statement of a former division president no longer reflects Johnson & Johnson Vision Care's policy at least since its decision to terminate its UPP program entirely on April 13, 2016, less than two years after its introduction. (CX8006 at 125 (¶ 271) (Evans Expert Report)).

**346.** At the peak of unilateral pricing policies in the contact lens industry, 1-800 Contacts estimated that approximately 57 percent of consumers in the United States experienced a price increase because the contact lenses that they purchased were subject to a unilateral pricing policy. (Bethers, Tr. 3673).

**Response to Proposed Finding No. 346:**

This proposed finding is unsupported. The cited testimony lacks foundation as there is no evidence that Mr. Bethers has personal knowledge of the prices paid by customers of other contact lens retailers. In addition, he cannot be correct that "approximately 57 percent of consumers in the United States experienced a *price increase*" because of UPP. While it is possible that UPP policies applied to more than half of the lens products sold in the US at some point in time, it is not controverted that UPP did not change the average prices at ECPs or most brick and mortar chain stores. Because sales through these channels are substantial, Mr. Bethers' "estimate" that

“approximately 57 percent of consumers in the United States experienced a price increase” must be incorrect.

**347.** Unilateral pricing policies concerned 1-800 Contacts because they took away the concept of consumers shopping around to find a lower price. (Bethers, Tr. 3673).

**Response to Proposed Finding No. 347:**

The proposed finding is vague and nonsensical in that it states that unilateral pricing policies “took away the concept of consumers shopping around to find a lower price.” It is also misleading because evidence in the record shows that 1-800 Contacts sought to avoid competing on the basis of price because its prices were higher than those of its closest competitors. In that regard, it is not credible and is contrary to the weight of the evidence to suggest that 1-800 Contacts would have been concerned about a decrease in price comparison shopping. (*See, e.g.*, Coon, Tr. 2688; CX1459 (“Frankly, for many years, our price has been higher than the other internet competitors . . . . As you suggest below, we must not alter our premium pricing strategy”); CX9001 (Bethers, IHT at 80 (“[W]e were never trying to compete with our online competitors on price.”)). As stated in Respondent’s Proposed Finding of Fact No. 362, the most significant impact of UPP on 1-800 Contacts’ business was lost “cooperative marketing and other advertising funds,” which increased its wholesale costs and reduced margins.

**348.** Unilateral pricing policies threatened 1-800 Contacts’ principal source of new customers by reducing the incentives for consumers to shop for contact lenses beyond their ECP. (Bethers, Tr. 3686).

**Response to Proposed Finding No. 348:**

This proposed finding is not credible and is contradicted by the evidence that unilateral pricing policies did little to change the prices that 1-800 Contacts charged (*e.g.* Respondent’s Proposed Finding No. 350 (“The minimum retail price established by unilateral pricing policies was often *just below* or *slightly above* 1-800 Contacts’ retail prices at the time.”) (emphasis



This proposed finding is vague in its use of the term “some.” To the extent it suggests that any required increases were large or material, it is misleading and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 348.

**352.** Unilateral pricing policies forced 1-800 Contacts to reduce some of the rebates that it offered to consumers. (CX 9025 (Osmond, Dep. at 71)).

**Response to Proposed Finding No. 352:**

This proposed finding is vague in its use of the term “some.” To the extent it suggests that any required increases were large or material, it is misleading and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 348. Otherwise, Complaint Counsel has no specific response.

**353.** Unilateral pricing policies forced some independent ECPs to raise their retail prices on contact lenses. (Bethers, Tr. 3675).

**Response to Proposed Finding No. 353:**

This proposed finding is unsupported. The cited testimony lacks foundation as there is no evidence that Mr. Bethers has personal knowledge as to what caused any company other than 1-800 Contacts to change its prices at any time. The proposed finding is also vague as to the meaning of “some independent ECPs.” The record is clear that, by design, UPP did not change average ECP prices: { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The effect of UPP on average ECP prices is not controverted. (See Murphy, Tr. 4172 (“the UPP were minimum pricing restraints ... were an effort to raise the prices that lower-price sellers in the marketplace were charging, which would have the effect of pushing sales back to the



of UPP by Johnson & Johnson. (CX1346 at 004, 017, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CX1346 at 017, *in camera*). The proposed finding is also incorrect for the reasons stated in response to Proposed Findings No. 353 and 354.

**356.** [REDACTED] (CX 1346-018).

**Response to Proposed Finding No. 356:**

The proposed finding is false, because the inference that “unilateral pricing policy *caused*” the price change is not reasonable. CX1346 { [REDACTED] }  
[REDACTED]  
[REDACTED] } (*See* CX1346 at 017-018, *in camera*). Thus, one cannot infer from CX1346 that { [REDACTED] }  
[REDACTED] }  
(CX1346 at 018, *in camera*).

This proposed finding is also unsupported because there is no evidence [REDACTED]  
[REDACTED]  
[REDACTED] } (CX1346 at 017, *in camera*).

**357.** [REDACTED] (CX 1346-018).

**Response to Proposed Finding No. 357:**

The proposed finding is misleading because it omits that { [REDACTED] }  
[REDACTED]

[REDACTED]

(CX1346 at 018, *in camera*).

This proposed finding is also unsupported because there is no evidence [REDACTED]

[REDACTED]

[REDACTED] } (CX1346 at 017, *in camera*).

**358.** [REDACTED]

[REDACTED] (CX 1346-018).

**Response to Proposed Finding No. 358:**

The proposed finding is misleading because it omits that [REDACTED]

[REDACTED]

[REDACTED] } (CX1346 at 018, *in*

*camera*).

This proposed finding is also unsupported because there is no evidence [REDACTED]

[REDACTED]

[REDACTED] } (CX1346 at 017, *in camera*).

**359.** [REDACTED]

[REDACTED] (Bethers, Tr. 3676; CX 1346-018; CX 9037 (Owens, Dep. 80 (“In some instances it increased. In some instances it may have decreased a little bit.”))).

**Response to Proposed Finding No. 359:**

The proposed finding is vague as to the meaning of “some of its retail prices” and incorrect to the extent it suggests Walmart raised average contact lens prices because of unilateral pricing policies. Rather, consistent with the quoted testimony from Mr. Owens, the record shows no material change to Walmart’s prices. (CX9037 (Owens, Dep. 80 (“In some instances it increased. In some instances it may have decreased a little bit.”))).

**360.** Unilateral pricing policies forced Costco to raise some of its retail prices on contact lenses. (Bethers, Tr. 3675-76).

**Response to Proposed Finding No. 360:**

This proposed finding is unsupported as the cited testimony lacks foundation. There is no evidence that Mr. Bethers has personal knowledge as to what caused any company other than 1-800 Contacts to change its prices at any time.

Furthermore, Respondent's counsel specifically stated during Mr. Bethers' testimony (which supposedly relayed statements made by Costco about price increases) that such testimony was "not offered for the truth." (Bethers, Tr. 3675).

**361.** Johnson & Johnson Vision Care's unilateral pricing policy set minimum prices for contact lens significantly higher than Costco's retail prices, and forced Costco to increase its retail prices on contact lens subject to the policy by 20 to 30 percent. (CX 8004-002).

**Response to Proposed Finding No. 361:**

Complaint Counsel has no specific response.

**362.** In conjunction with its unilateral pricing policy, Johnson & Johnson Vision Care lowered its wholesale price to 1-800 Contacts but also eliminated cooperative marketing and other advertising funds, which had the net impact of increasing 1-800 Contacts' costs for Johnson & Johnson Vision Care's contact lenses. (Bethers, Tr. 3677).

**Response to Proposed Finding No. 362:**

Complaint Counsel has no specific response.

**363.** In conjunction with its unilateral pricing policy, Johnson & Johnson Vision Care introduced a 24-pack of its leading product Oasys, which was more conducive to selling an annual supply of contact lenses at one time. (Bethers, Tr. 3678).

**Response to Proposed Finding No. 363:**

Complaint Counsel has no specific response.

**364.** 1-800 Contacts, Costco, Lens.com, and the National Association of Optometrists and Opticians (which includes Luxottica, Walmart, Sam's Club, Costco, and Visionworks) established a coalition in opposition to unilateral pricing policies. (Bethers, Tr. 3680-81).

**Response to Proposed Finding No. 364:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**365.** 1-800 Contacts' counsel made presentations to state attorneys general and the Federal Trade Commission in opposition to unilateral pricing policies. (Bethers, Tr. 3681).

**Response to Proposed Finding No. 365:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**366.** 1-800 Contacts' executives testified before the United States Congress in opposition to unilateral pricing policies. (Bethers, Tr. 3682).

**Response to Proposed Finding No. 366:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**367.** 1-800 Contacts presented its arguments in opposition to unilateral pricing policies to legislators in 14 different states. (Bethers, Tr. 3682).

**Response to Proposed Finding No. 367:**

This proposed finding is irrelevant. Otherwise, Complaint Counsel has no specific response.

**368.** Utah (one of the states where 1-800 Contacts presented arguments in opposition to unilateral pricing policies) passed a law that prohibited unilateral pricing policies in the contact lens industry. (Bethers, Tr. 3682).

**Response to Proposed Finding No. 368:**

Complaint Counsel has no specific response.

**369.** After the enactment of the Utah law prohibiting unilateral pricing policies in the contact lens industry, Alcon, Bausch & Lomb, and Johnson & Johnson Vision Care dropped their unilateral pricing policies. (Bethers, Tr. 3684).

**Response to Proposed Finding No. 369:**

The proposed finding is misleading, and unsupported, to the extent it implies a causal relationship between the enactment of the Utah law prohibiting unilateral pricing policies in the contact lens industry and the abandonment of UPP by Alcon, Basuch & Lomb, and Johnson & Johnson Vision Care, to which Mr. Bethers did not testify.

**III. Contact Lens Retailers – The Competitive Landscape**

**A. *There Are Different Types Of Contact Lens Retailers, Many Of Which Sell Contact Lens Online***

**1. *Independent Eye Care Professionals***

**370.** There are about 16,000 independent ECP practices in the United States. (Bethers, Tr. 3509-10, 3546).

**Response to Proposed Finding No. 370**

Complaint Counsel has no specific response.

**371.** Independent ECPs sell contact lenses in their physical retail stores. (Bethers, Tr. 3543).

**Response to Proposed Finding No. 371**

This proposed finding is vague to the extent it suggests “all” or “each and every” independent ECP sells contact lenses.

**372.** [REDACTED]

**Response to Proposed Finding No. 372**

This proposed finding mischaracterizes the evidence. [REDACTED]

[REDACTED]

[REDACTED] } Additionally, the same presentation slide notes that [REDACTED]

[REDACTED] }

**373.** Independent ECPs represent approximately 40 percent of all contact lens sales in the United States. (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; [REDACTED] [REDACTED] } RX 736-009 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739-0086 (showing that the average market share for 2012-2015 of independent ECPs was 39.7 percent)).

**Response to Proposed Finding No. 373**

Complaint Counsel has no specific response.

**374.** Each of the major contact lens manufacturers offers to ship its contact lenses either to an ECP's office or directly to the ECP's patient, which gives the independent ECP the ability to provide home delivery of contact lenses to their patients. (Bethers, Tr. 3514).

**Response to Proposed Finding No. 374**

This proposed finding lacks foundation. Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for details of contact lens manufacturers agreements with independent ECPs.

**375.** A significant number of independent ECPs sell contact lens online through, or in conjunction with, services provided by contact lens manufacturers, contact lens wholesale distributors, or vision insurance providers. (Bethers, Tr. 3513-14).

**Response to Proposed Finding No. 375**

This proposed finding misstates the testimony cited. Mr. Bethers did not give any indication of the number of independent ECPs selling contacts online through or in conjunction with these services, or whether it was a "significant" number. (Bethers, Tr. 3513-14). Complaint Counsel agrees that some number of independent ECPs sell contacts online through or in conjunction with, services provided by contact lens manufacturers, contact lens wholesale distributors, or vision insurance providers.

**376.** CooperVision, one of the four major contact lens manufacturers, provides a service to consumers under the name LensFerry. (Bethers, Tr. 3514-15).

**Response to Proposed Finding No. 376**

This proposed finding lacks foundation, as Mr. Bethers does not demonstrate personal knowledge sufficient to establish the factual basis for asserting that CooperVision has such a service.

**377.** LensFerry offers consumers a subscription service that allows them to order or reorder an annual supply of contact lenses from their ECP through the internet, and the contact lenses are shipped directly to their home. (Bethers, Tr. 3514-15; Clarkson, Tr. 285).

**Response to Proposed Finding No. 377**

This proposed finding lacks foundation. Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for the details of a CooperVision service. Mr. Clarkson does not possess personal knowledge sufficient to establish the factual basis for the details of a CooperVision service, even stating before being asked the question, “We don’t track eye care professionals very closely.” (Clarkson, Tr. 284).

**378.** ABB Vision Group (“ABB”), the largest distributor of contact lenses for independent ECPs, has a service named YourLens.com that allows an independent ECP to create her or his own website that customers can visit to buy contact lenses. (Bethers, Tr. 3515-16).

**Response to Proposed Finding No. 378**

This proposed finding lacks foundation as Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for asserting that ABB has such a service for ECPs or what the service entails.

**379.** YourLens.com explains to ECPs that it is easy to set up a personalized website and webstore. (RX 45-0001).

**Response to Proposed Finding No. 379**

RX0045 is not in evidence. This proposed finding of fact is unreliable hearsay.

**380.** Essilor, one of the world’s largest optical companies, provides a service called MyOnlineOptical that allows independent ECPs to customize his or her own website for selling glasses and contact lenses online, at prices set by the ECP. (Bethers, Tr. 3516-17).

**Response to Proposed Finding No. 380**

This proposed finding lacks foundation as Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for asserting that Essilor has such a service for ECPs or what the service entails.

**381.** VSP, the largest provider of vision insurance, has a website called Eyeconic where customers can use their vision insurance benefits to purchase contact lenses. (Bethers, Tr. 3518).

**Response to Proposed Finding No. 381**

This proposed finding lacks foundation as Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for asserting that VSP has such a website or what insurance benefits it offers.

**382.** Eyemed, the second largest vision insurance provider, owns ContactsDirect.com, where a consumer can use vision insurance benefits to purchases contact lenses or glasses and the prescribing ECP receives a dispensing fee. (Bethers, Tr. 3519).

**Response to Proposed Finding No. 382**

This proposed finding lacks foundation as Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for asserting that EyeMed owns ContactsDirect.com or what services they offer to their insured patients or to ECPs. Further, Eyemed is an entity owned by Luxottica, Inc., and is governed by the terms of the agreement by and between Luxottica and 1-800 Contacts dated December 23, 2013, and which restricts the use of trademarks as keywords in search advertising, and requires the adoption of negative keywords for the purpose of preventing ads from being delivered if a search query includes the party's trademark as a part of the query. (CX331 at 1, 40-41).

**383.** Guardian, a vision insurance company, operates LensBenefits.com, where a consumer can use insurance benefits to purchase contact lenses. (Bethers, Tr. 3519).

**Response to Proposed Finding No. 383**

This proposed finding lacks foundation as Mr. Bethers does not possess personal knowledge sufficient to establish the factual basis for asserting that Guardian operates LensBenefits.com and what insurance benefits they offer.

**384.** { [REDACTED] } (RX 1117-0004-0031).

**Response to Proposed Finding No. 384**

{ [REDACTED]

[REDACTED]

[REDACTED]

(RX 1117-0004-0031).

**385.** [REDACTED] } (RX 1117-0004, -0031).

**Response to Proposed Finding No. 385**

{ [REDACTED]  
[REDACTED]  
[REDACTED]. }

(RX 1117-0004-0031).

**386.** [REDACTED] (RX 1117-0004, -0031).

**Response to Proposed Finding No. 386**

{ [REDACTED]  
[REDACTED]  
[REDACTED] }

(RX 1117-0004-0031).

**387.** Independent ECPs’ retail prices for contact lenses vary substantially. (CX 9001 (Bethers, IHT at 82) (“**Some** were outrageously high, and they marked up very high. Some were below our price. It depended on the independent doctor and how they wanted to approach the marketplace.”)).

**Response to Proposed Finding No. 387**

This proposed finding is vague as to the meaning of the word “substantially.” Complaint Counsel does not object to the finding of fact insofar as it states that prices for contact lenses vary among independent ECPs.

**388.** Independent ECPs on average have the highest retail prices for contact lenses in the industry. (Bethers, Tr. 3544).

**Response to Proposed Finding No. 388**

Complaint Counsel has no specific response.

**389.** ABB distributes a quarterly price monitor for independent ECPs to use in setting their retail prices. (Bethers, Tr. 3632-33; RX 819-0002-0005).

**Response to Proposed Finding No. 389**

RX0819 is not in evidence. This proposed finding lacks foundation as Mr. Bethers lacks personal knowledge as whether ABB distributes the quarterly monitor to ECPs, their purpose in allegedly doing so.

**390.** The ABB quarterly price monitor provides information on the retail prices of 1-800 Contacts, Walmart, a leading retail optical chain, and a sample of independent ECPs. (Bethers, Tr. 3632-33; RX 819-0002-0005).

**Response to Proposed Finding No. 390**

RX0819 is not admitted into evidence. This proposed finding lacks foundation as Mr. Bethers lacks personal knowledge as to the contents of the price monitor that ABB allegedly sends to independent ECPs.

**391.** Independent ECPs use ABB's quarterly price monitor to consider how to set their retail prices for contact lenses. (Bethers, Tr. 3633).

**Response to Proposed Finding No. 391**

This proposed finding lacks foundation as Mr. Bethers lacks personal knowledge as how independent ECPs use ABB's quarterly price monitor.

**392.** ABB's decision to include the prices of 1-800 Contacts and Walmart in its quarterly price monitor for independent ECPs reflects ABB's determination, as the largest wholesale distributor of contact lenses, that those prices are relevant to independent ECPs in setting their own retail prices for contact lenses. (RX 819-0002-0005).

**Response to Proposed Finding No. 392**

RX0819 is not admitted into evidence. This claim is unsupported.

## 2. *Optical Retail Chains*

**393.** In the United States, there are national and regional optical retail chains that sell contact lenses. (Bethers, Tr. 3520).

### **Response to Proposed Finding No. 393**

Complaint Counsel has no specific response.

**394.** Optical retail chains offer an eye exam and have one or more optometrists that work at a location. (Bethers, Tr. 3522).

### **Response to Proposed Finding No. 394**

Complaint Counsel has no specific response.

**395.** National optical retail chains include LensCrafters, Pearle Vision, Visionworks, America's Best Contacts and Glasses, and MyEyeDr. (Bethers, Tr. 3520-21).

### **Response to Proposed Finding No. 395**

Complaint Counsel has no specific response.

**396.** Regional optical retail chains include Cohen Optical, Sterling Optical, and many others. (Bethers, Tr. 3520-21).

### **Response to Proposed Finding No. 396**

Complaint Counsel has no specific response.

**397.** For many optical retail chains, a consumer can purchase contact lenses in the store, by phone, or on the chain's website. (Bethers, Tr. 3522).

### **Response to Proposed Finding No. 397**

Complaint Counsel objects to this proposed finding of fact as it misstates the testimony.

Further, this proposed finding is speculative and vague as the term "many."

**398.** Optical retail chains on average have retail prices for contact lenses that are below independent ECPs but higher than other retailers. (Bethers, Tr. 3544).

### **Response to Proposed Finding No. 398**

Complaint Counsel has no specific response.

### 3. *Mass Merchants And Club Stores*

**399.** Many mass merchant and club stores have an onsite optometrist and a separate optical department located within the store. (Bethers, Tr. 3526, 3528).

#### **Response to Proposed Finding No. 399**

This proposed finding mischaracterizes the evidence and lacks foundation. Mr. Bethers testified that mass merchants and club stores have an onsite optometrist, *unless* they're in a state where employing optometrists is prohibited. (Bethers, Tr. 3526). Mr. Bethers also testified that club stores "like to have a doctor in the club," and the methods they might use to achieve that goal in states where employing an optometrist is prohibited. (Bethers, Tr. 3526). Mr. Bethers does not have the personal knowledge sufficient to establish a factual basis for these detailed claims about club stores and mass merchants and how they deal with their regulatory requirements.

**400.** Mass merchants, such as Walmart, Target, Sears, Fred Meyer, and JC Penny, sell contact lenses in their stores. (Bethers, Tr. 3583)

#### **Response to Proposed Finding No. 400**

Complaint Counsel objects to this proposed finding of fact because it mischaracterizes the evidence. Mr. Bethers did not testify that Walmart, Target, Sears, Fred Meyer and JC Penney sell contact lenses in their stores. (Bethers, Tr. 3583).

**401.** Walmart sells contacts lenses in its stores, over the phone, and through its own website. (Bethers, Tr. 3529; CX 9037 (Owens, Dep. at 10)).

#### **Response to Proposed Finding No. 401**

Complaint Counsel has no specific response.

**402.** Targets, Sears, and JC Penney sell contact lenses in their stores and online. (CX 8007-042).

#### **Response to Proposed Finding No. 402**

Complaint Counsel objects to this finding of fact because it misstates the record evidence. In the cited page of her report, Professor Athey lists a series of "unbound" competitors; meaning

contact lens retailers who are not subject to an agreement with 1-800 Contacts. (CX 8007 at 042 (Athey Expert Report)). While Target, Sears, and JC Penney are listed there as contact lens retailers, that does not indicate that the three companies sell contact lenses both in their stores and online. Indeed, 1-800 Contacts provides fulfillment services to all of Luxottica retail brands and mass merchants, which includes Sears Optical, Target Optical, Pearle Vision, LensCrafters, and others wherein 1-800 Contacts ships contact lenses to fulfill orders for these companies. (Bethers, Tr. 3524).

**403.** Mass merchants on average have retail prices for contact lenses below independent ECPs, optical retail chains, and 1-800 Contacts, but higher than club stores and other pure-play online retailers. (Bethers, Tr. 3544).

**Response to Proposed Finding No. 403**

Complaint Counsel has no specific response.

**404.** Club stores—Costco, Sam’s Club, and BJ’s Wholesale Club—sell contact lenses in their stores and online through their own websites. (Bethers, Tr. 3525-26, 3530).

**Response to Proposed Finding No. 404**

Complaint Counsel has no specific response.

**405.** Club stores on average have the lowest retail prices for contact lenses. (Bethers, Tr. 3545).

**Response to Proposed Finding No. 405**

Complaint Counsel objects to this proposed finding of fact because it misstates Mr. Bethers’ testimony. Mr. Bethers testified that Costco, Sam’ Club and BJ’s are “the cheapest place to buy contact lenses.... *if you’re a member.*” (Bethers, Tr. 3545) (emphasis added) Indeed, the weight of the evidence makes it clear that online retailers do not view club stores as necessarily the lowest price alternative because the membership fee affects the pricing. (CX9017 (Blackwood, Dep. at 288) (“So Costco, BJ’s, [there are] other pricing strategies where they are actually paying to belong to that club. Part of the pricing comes from the membership fee. . . .”); CX9034 (Roush,

Dep. at 156) (“[O]ur price matching has typically excluded clubs as a policy. And the reason for that is pretty simple, and that is that there’s a fee, a membership fee that’s associated with clubs, and so you have to pay that fee.”); Clarkson, Tr. 195-196 (“[E]ven though club stores have very competitive pricing, they’re not a big part of . . . analysis to figure out where to put prices because, for one thing, it’s a very different category of customer. They’ve paid a membership fee...”); CX9039 (Clarkson, Dep. at 92-93); CX9003 (Clarkson, IHT at 23-24); CX9018 (Drumm, Dep. at 115-116); CX8006 at 127-129 (¶¶ 276-77) (Evans Expert Report).

(a) *Walmart*

**406.** Walmart’s retail prices for contact lenses are the same in-store and online. (CX 9037 (Owens, Dep. at 26)).

**Response to Proposed Finding No. 406**

Complaint Counsel has no specific response.

**407.** Walmart considers all retailers of contact lenses to be its competitors in the retail sale of contact lenses. (CX 9037 (Owens Dep. at 14)).

**Response to Proposed Finding No. 407**

Complaint Counsel objects this finding of fact as it misstates the cited testimony. Mr. Owens testified that, on the basis of having many brands of contact lenses available, Walmart considers all retailers of contact lenses as its competitors. (CX9037 (Owens, Dep. at 14)). Mr. Owens also testified about other important bases of competition, such as price and availability across multiple channels. (CX9037 (Owens, Dep. at 13-14)). Walmart recognizes that, “[t]hroughout the industry . . . offline prices are generally higher than online,” which suggests that online sellers price in response to other online rivals rather than in response to ECPs and other offline sellers. (CX9037 (Owens, Dep. at 27)). Indeed, Walmart has made the decision to sell contact lenses at the same price online and in its physical stores for customer relationship reasons, rather than in response to competition its online business faces from offline rivals. (CX9037

(Owens, Dep. at 26-27) (“Q. Does Walmart price its contact lenses the same in store and online? A. Yes. Q. Why is that? A. Well, I believe it's bad business to tell a customer, if you shop in the store you maybe get one price, but if you shop online you get another price. . . .”). Indeed, Walmart looks at the entire landscape of contact lens retail channels when determining its pricing and competition strategy. (CX 9037 (Owens, Dep. at 52-53 (Indicating that, with respect to making pricing determinations, Walmart will “look across the entire landscape....”))).

**408.** Walmart considers its largest competitor in the retail sale of contact lenses to be independent ECPs. (CX 9037 (Owens, Dep. at 11)).

**Response to Proposed Finding No. 408**

Complaint Counsel objects this finding of fact as it misstates the testimony. As explained in response to Proposed Finding No. 407, WalMart’s pricing and competition strategy regarding the sale of contact lenses looks to compete against the entire landscape of contact lens retail channels.

**409.** Walmart considers both its in-store and online sales of contact lenses to be competing against independent ECPs. (CX 9037 (Owens, Dep. at 60)).

**Response to Proposed Finding No. 409**

Complaint Counsel objects this finding of fact as it misstates the testimony and is incomplete. As explained in response to Proposed Finding No. 407, WalMart’s pricing and competition strategy regarding the sale of contact lenses looks to compete against the entire landscape of contact lens retail channels.

**410.** Walmart considers 1-800 Contacts to be one of its biggest competitors in the retail sale of contact lenses. (CX 9037 (Owens, Dep. at 13)).

**Response to Proposed Finding No. 410**

Complaint Counsel has no specific response.

**411.** Walmart considers Target, Walgreens, and other online contact lens retailers to be its competitors in the retail sale of contact lenses. (CX 9037 (Owens, Dep. at 13-14)).

**Response to Proposed Finding No. 411**

Complaint Counsel objects this finding of fact as it misstates the testimony and is incomplete. As explained in response to Proposed Finding No. 407, WalMart's pricing and competition strategy regarding the sale of contact lenses looks to compete against the entire landscape of contact lens retail channels.

**412.** In order to set its retail prices, Walmart tracks the prices of 1-800 Contacts, Target, independent ECPs, Sears, JC Penney, ACLens, club stores, LensCrafters, PearleVision, America's Best, and Visionworks. (CX 9037 (Owens, Dep. at 22, 52)).

**Response to Proposed Finding No. 412**

Complaint Counsel objects this finding of fact as it misstates the testimony and is incomplete. Testimony provided by Mr. Owens was not a complete list of all retailers against whom Walmart sets its prices, and indicates that Walmart examines prices by other retailers across the entire landscape of contact lens retail channels. (CX 9037 (Owens, Dep at 52-53 (Indicating that, with respect to making pricing determinations, Walmart will "look across the entire landscape, but also then look at our internal margins."))).

**413.** Walmart tries to set its retail prices for contact lenses to have better pricing than 1-800 Contacts. (CX 9037 (Owens, Dep. at 25, 54)).

**Response to Proposed Finding No. 413**

Mr. Owens testified that Walmart sets prices based on a variety of factors. (CX9037 (Owens, Dep. at 25)). Walmart looks at the competitive landscape to evaluate what other brands may be priced competitively, looks internally at factors such as margin (among others), and also at options such as aggressive pricing in some product areas to beat all competition just for select products. (CX9037 (Owens, Dep. at 25, 53-54)).

(b) *Costco*

**414.** Costco had about \$230 million in contact lens sales in 2015. (CX 8004-001).

**Response to Proposed Finding No. 414**

Complaint Counsel has no specific response.

**415.** Costco seeks to be the lowest-cost seller of contact lenses. (CX 8004-001).

**Response to Proposed Finding No. 415**

Complaint Counsel has no specific response.

**416.** Costco has been selling contact lenses in its brick-and-mortar stores for over twenty-five years. (CX 8004-001).

**Response to Proposed Finding No. 416**

Complaint Counsel objects to this proposed finding of fact as it is incomplete. Costco has sold (and continues to sell) contact lenses in its brick-and-mortar stores only to its members, and not the general public. (CX 8004-001(Salas Declaration at ¶2 (“To take advantage of Costco’s low prices in the warehouse and on-line, customers need to be a Costco Member))).

**417.** Costco has ECPs located within its brick-and-mortar stores. (CX 8004-001).

**Response to Proposed Finding No. 417**

Complaint Counsel has no specific response.

**418.** Costco began selling contact lenses online in October 2016. (CX 8004-001).

**Response to Proposed Finding No. 418**

Complaint Counsel objects to this proposed finding of fact as it is incomplete. Costco has sold (and continues to sell) contact lenses online only to its members, and not the general public. (CX 8004-001(Salas Declaration at ¶2 (“To take advantage of Costco’s low prices in the warehouse and on-line, customers need to be a Costco Member))).

**419.** Costco’s retail prices for contact lenses are the same in-store and online. (CX 8004-002).

**Response to Proposed Finding No. 419**

Complaint Counsel has no specific response.

**420.** In order to set its retail prices for contact lenses, Costco checks the prices of brick-and-mortar stores and online stores. (CX 8004-002).

**Response to Proposed Finding No. 420**

Complaint Counsel has no specific response.

**4. *Pure-Play Online Retailers***

**421.** Contact lens retailers who sell online but do not have a physical store are often referred to as “pure-play” online retailers. (Bethers, Tr. 3536-38).

**Response to Proposed Finding No. 421**

Complaint Counsel has no specific response.

**422.** 1-800 Contacts is generally categorized as a “pure-play” online retailer, although it recently opened four physical retail stores under the name Lumen Optical in the Chicago area. (Bethers, Tr. 3535).

**Response to Proposed Finding No. 422**

Complaint Counsel has no specific response.

**423.** “Pure-play” online retailers of contacts lenses include:

- (a) 1-Save-On-Lens.com,
- (b) 2020Direct.com,
- (c) AAlens.com,
- (d) ACLens.com (DiscountContactLenses.com),
- (e) Essilor (CoastalContacts.com, Clearly Contacts, LensWay, and FramesDirect.com),
- (f) ContactsLand.com,
- (g) ContactLens.com,
- (h) ContactLensKing.com,
- (i) CVS,
- (j) EyecareUniverse.com,
- (k) EZContactsUSA.com,
- (l) Lens.com (123ContactLenses.com, 1-800GetLens.com, ContactsAmerica.com, ContactLensConnection.com, JustLenses.com),

- (m) LensDirect.com,
- (n) LensDiscounters.com (Contacts1st, OptiContacts, PostalContacts.com, and Lens247.com),
- (o) LensFast.com,
- (p) LensesForLess.com,
- (q) LowestPriceContacts.com,
- (r) MajorLens.com,
- (s) PerfectLensWorld.com,
- (t) ReplaceMyContacts.com,
- (u) SmartBuyGlasses.com,
- (v) WebEyeCare.com,
- (w) Walgreens (Walgreens.com, Vision Direct.com, LensMart.com, LensQuest.com, and LensWorld.com), and
- (x) X-Contacts.com.

(Bethers, Tr. 3538-41).

**Response to Proposed Finding No. 423**

This proposed finding lacks foundation. This list of competitors corresponds with a list Mr. Bethers read at trial which he said he compiled after he “visited a number of sites” since he was unable to remember the names companies he claims are his competitors. (Bethers, Tr. 3537-41). He said the list was companies who he considers as “pure play” online retailers, but he lacks personal knowledge as to whether all of these entities are currently operational, and whether they operate exclusively online or also operate brick-and-mortar stores. (Bethers, Tr. 3537-41). Mr. Bethers’ attorney-prompted internet research to find websites that claim to sell contacts online does not indicate that each of these companies is available competitor selling contact lenses into the United States. The best evidence of those companies 1-800 Contacts views as “pure play” online retailers can be found in the ordinary course business documents maintained in 1-800 Contacts

employees. { [REDACTED] }.

**424.** Pure-play online retailers (other than 1-800 Contacts) on average have retail prices for contact lenses generally between the retail prices of mass merchants and club stores. (Bethers, Tr. 3545).

**Response to Proposed Finding No. 424**

Complaint Counsel objects to this proposed finding of fact as it misstates the evidence and is incomplete. Pure-play online merchants usually offer the lowest prices for contact lenses. (CX8006 at 017-018 (¶ 50, 53) (Evans Expert Report); Clarkson, Tr. 189-190; Holbrook, Tr. 1888 (Memorial Eye’s small chain of brick-and-mortar stores priced contact lenses “quite a bit higher” than its national pure-play online storefront). Club stores do not offer low prices to the general public. (CX8004-001 (Salas Declaration at ¶2) (“To take advantage of Costco’s low prices in the warehouse and on-line, customers need to be a Costco member.”); Bethers, Tr. 3536-3537, 3544-3545 (noting that to buy contact lenses at membership clubs the customer must be a member);

**425.** 1-800 Contacts on average has retail prices for contact lenses below independent ECPs and retail optical chains but higher than mass merchants, club stores, and other pure-play online retailers. (Bethers, Tr. 3544).

**Response to Proposed Finding No. 425**

Complaint Counsel has no specific response.

(a) *LensDirect*

**426.** LensDirect is a “pure-play” online retailer of contact lenses. (Bethers, Tr. 3538-41; CX 9023 (Alovis, Dep. at 106)).

**Response to Proposed Finding No. 426**

Complaint Counsel has no specific response.

**427.** Services offered by contact lens distributors make it easy for an online retailer like LensDirect to sell contact lenses to consumers without keeping a large inventory of contact lenses on hand. (Alovis, Tr. 1026).

**Response to Proposed Finding No. 427**

This proposed finding is incomplete and misstates the testimony of Mr. Alovís. Mr. Alovís did testify that services offered by contact lens distributors make it easy for a hypothetical online retailer like LensDirect to sell contact lenses to consumers without keeping a large inventory of contact lenses on hand, but only “[i]f they have the type of relationship with a distributor that we have, which is a really good relationship, then they could probably do it.” (Alovís, Tr. 1025-1026).

**428.** LensDirect competes with every retailer of contact lenses, including ECPs, Walmart, other brick-and-mortar retailers, and online retailers of contact lenses based in Canada. (Alovís, Tr. 1026-27; CX9023 (Alovís, Dep. at 39)).

**Response to Proposed Finding No. 428**

Complaint Counsel objects to this proposed finding of fact as it misstates the testimony. Mr. Alovís testified that LensDirect views online competitors as its “main” competition. (CX9023 (Alovís, 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.”); Alovís, Tr. 988 (Lens Direct’s “primary competition” consists exclusively of online firms)).

**429.** LensDirect tries to differentiate itself based on customer service and its auto-refill program. (Alovís, Tr. 979-81; CX 9023 (Alovís, Dep. at 106-07)).

**Response to Proposed Finding No. 429**

Complaint Counsel has no specific response.

**430.** LensDirect tries to set its retail prices for contact lenses to be in the middle of the industry; LensDirect does not attempt to have the lowest retail prices for contact lenses. (CX9023 (Alovís, Dep. at 108)).

**Response to Proposed Finding No. 430**

This proposed finding is vague as to the definition of the word “industry.” Assuming “industry” refers to the relevant market for online contact lens sales in the United States, Mr. Alovís testified that LensDirect seeks to set its prices “right in the middle” of its “main

competitors,” which he defined as 1-800 Contacts, Vision Direct, Coastal, and Lens.com. (CX9023 (Alovis, Dep. at 108); *see also* Response to Proposed Finding No. 428)).

**431.** LensDirect has no agreement with 1-800 Contacts with respect to paid search advertising. (Alovis, Tr. 1018).

**Response to Proposed Finding No. 431**

Complaint Counsel has no specific response.

**432.** LensDirect has used 1-800 Contacts’ trademarks as keywords for internet search advertising since about 2010. (Alovis, Tr. 1018 & 1019-20).

**Response to Proposed Finding No. 432**

Complaint Counsel has no specific response.

**433.** LensDirect has been either unprofitable or has barely broken even in each year since it started using 1-800 Contacts’ trademarks as keywords for internet search advertising. (Alovis, Tr. 1019-21).

**Response to Proposed Finding No. 433**

Complaint Counsel has no specific response other than to add that Mr. Alovis explained the reason the company has not been profitable, although they are bringing in substantial revenue, is that LensDirect is making capital investments to have a stronger company in the future, and that in 2017 they will be profitable. (Alovis, Tr. 983-986).

**434.** LensDirect had total revenue of \$3.3 million in 2016 and was not profitable, but expects to earn total revenue of approximately \$6 million in 2017. (Alovis, Tr. 983-85).

**Response to Proposed Finding No. 434**

Complaint Counsel has no specific response.

**435.** LensDirect attributes its expected success in 2017 to a redesigned website, dedicated account representatives to help with retention, its subscription program, and tremendous organic growth, not to any form of internet search advertising. (Alovis, Tr. 985).

**Response to Proposed Finding No. 435**

Complaint Counsel objects to this proposed finding of fact as it mischaracterizes Mr. Aloviss' testimony. Mr. Aloviss testified that internet search advertising is very important to the business and the single most important marketing channel. (Aloviss, Tr. 992-93)..

**(b) *WebEyeCare***

**436.** WebEyeCare started in 2009. (CX 9000 (Batushansky, IHT at 8)).

**Response to Proposed Finding No. 436**

Complaint Counsel has no specific response.

**437.** WebEyeCare is an online retailer of contact lenses, glasses, and accessories. (CX9000 (Batushansky, IHT at 9)).

**Response to Proposed Finding No. 437**

Complaint Counsel has no specific response.

**438.** WebEyeCare's net revenue increased from [REDACTED] [REDACTED] (CX 1820; CX 9000 (Batushansky, IHT at 8, 34, 38-40)).

**Response to Proposed Finding No. 438**

This proposed finding mischaracterizes the record evidence. Neither CX1820 nor the testimony state that { [REDACTED] } (CX1820; CX9000 (Batushansky, IHT at 8, 34, 38-40)).

**439.** [REDACTED] (CX 9000 (Batushansky, IHT at 9)).

**Response to Proposed Finding No. 439**

Complaint Counsel has no specific response.

**440.** [REDACTED] (CX 9014 (Batushansky, Dep. at 36-37)).

**Response to Proposed Finding No. 440**

Complaint Counsel has no specific response.

(c) *Vision Direct And Walgreens*

441. Vision Direct and Walgreens both sell contact lenses online. (Bethers, Tr. 3538-41; Hamilton, Tr. 388-90).

**Response to Proposed Finding No. 441**

Complaint Counsel has no specific response.

442. { [REDACTED] }

**Response to Proposed Finding No. 442**

Complaint Counsel has no specific response.

443. { [REDACTED] }

**Response to Proposed Finding No. 443**

Complaint Counsel has no specific response.

444. [REDACTED]

**Response to Proposed Finding No. 444**

Complaint Counsel has no specific response.

445. [REDACTED]

**Response to Proposed Finding No. 445**

Complaint Counsel has no specific response.

446. [REDACTED]

**Response to Proposed Finding No. 446**

Complaint Counsel has no specific response.

447. [REDACTED]

**Response to Proposed Finding No. 447**

This proposed finding of fact is unsupported and misstates the evidence. { [REDACTED]

[REDACTED]  
[REDACTED] }

448. [REDACTED]  
[REDACTED] }

**Response to Proposed Finding No. 448**

Complaint Counsel has no specific response.

449. [REDACTED]  
[REDACTED] }

**Response to Proposed Finding No. 449**

Complaint Counsel has no specific response.

450. [REDACTED]  
[REDACTED] }

**Response to Proposed Finding No. 450**

Complaint Counsel has no specific response.

451. [REDACTED]  
[REDACTED]

**Response to Proposed Finding No. 451**

Complaint Counsel has no specific response other than to add that { [REDACTED]

[REDACTED]  
[REDACTED] }

452. [REDACTED]  
[REDACTED]

[REDACTED]

**Response to Proposed Finding No. 452**

Complaint Counsel objects to this proposed finding { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Craven, Tr. at 673).

***B. Market Share Of Contact Lens Retailers***

**453.** In recent years, about 40 percent of contact lens sales in the United States were by independent ECPs; 20 percent were by optical retail chains; 23 percent were by mass merchants and club stores; and 17 percent were by pure-play online retailers, including 1-800 Contacts. (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; { [REDACTED] } RX 736-009 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739-0086).

**Response to Proposed Finding No. 453**

Complaint Counsel objects to this proposed finding of fact as it misstates the evidence.

Respondents stated in their Post-Trial brief, and rely on Professor Murphy’s report, which both state that online-retailers sales of contact lenses is not 17 percent but { [REDACTED] } of all contact lens sales. { [REDACTED] }

**454.** 1-800 Contacts accounts for about 10 percent of total contact lens sales in the United States. (Bethers, Tr. 3552-53).

**Response to Proposed Finding No. 454**

This proposed finding is irrelevant. 10 percent is not a valid or useful market share for antitrust analysis because the relevant antitrust product market in which to analyze the conduct at issue in this case is the market for the sale of contact lenses online, and 1-800 Contacts primarily competes with other online vendors, particular on price and service. In a properly defined relevant product market, 1-800 Contacts' market share is greater than 50 percent. (CX8007 at 007 (¶17) (Athey Expert Report); CX8006 at 007 (¶8) (Evans Expert Report); CCPTF § X.A.1-5 (¶¶1542-1610)). The combined market shares of the settling retailers are about 79% of online sales. (CCPTF § X.C.1 (¶¶ 1628-1633)).

**455.** Walmart accounts for about 6 to 10 percent of total contact lens sales in the United States. (Bethers, Tr. 3553; CX 9037 (Owens, Dep. at 16, 59); RX 182-0001).

**Response to Proposed Finding No. 455**

RX182-0001 is not in evidence. This proposed finding is irrelevant. While Walmart's total contact lens sales (including brick and mortar and otherwise) account for six percent of overall retail sale of contact lenses, Mr. Owens testified that in fact Walmart has only 1 percent of the online contact lens market. (CX9037 (Owens, Dep. at 58-60)). The proper relevant product market is online retail sale of contact lenses. (CCPTF § X.A.1-5 (¶¶1542-1610)). The combined market shares of the settling retailers are at least 79% of online sales. (CCPTF § X.C.1 (¶¶ 1628-1633)).

**456.** Costco accounts for about 5 percent of total contact lens sales in the United States. (Bethers, Tr. 3553).

**Response to Proposed Finding No. 456**

This proposed finding is irrelevant, as the evidence shows that club stores and online sellers do not directly compete. (CX8006 at 128 (¶276) (Evans Expert Report)). The proper relevant product market is online retail sale of contact lenses. (CCPTF § X.A.1-5 (¶¶1542-1610)). The combined market shares of the settling retailers are at least 79% of online sales. (CCPTF § X.C.1 (¶¶ 1628-1633)).

**457.** 1-800 Contacts measures market shares for contact lens retailers by starting with the 16,000 independent ECP practices that account for about 40 percent of total contact lens sales in the United States. (Bethers, Tr. 3552).

**Response to Proposed Finding No. 457**

This proposed finding is irrelevant. It is irrelevant whether 1-800 Contacts measures market shares for contact lens retailers by starting with independent ECPs. Better evidence of those companies against which 1-800 Contacts focuses its competitive attention is presented in the economic evidence presented at trial and the lawsuits that gave rise to the illegal bidding agreements. The proper relevant product market is online retail sale of contact lenses. (CCPTF § X.A.1-5 (¶¶1542-1610)). In a properly defined relevant product market, 1-800 Contacts' market share is { [REDACTED] } (CX8007 at 007 (¶17) (Athey Expert Report) *in camera*; CX8006 at 007 (¶8) (Evans Expert Report) *in camera*; CCPTF ¶¶1542-1610). The combined market shares of the settling retailers are at least 79% of online sales. (CCPTF § X.C.1 (¶¶ 1628-1633)).

**458.** 1-800 Contacts regularly tracks its own market share based on all contact lens sales in the United States. (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; CX 1446-009; RX 1117-0024).

**Response to Proposed Finding No. 458**

This proposed finding is irrelevant. The proper relevant product market is online retail sale of contact lenses. (CCPTF § X.A.1-5 (¶¶1542-1610)). In a properly defined relevant product market, 1-800 Contacts' market share is { [REDACTED] } (CX8007 at 007 (¶17) (Athey Expert Report) *in camera*; CX8006 at 007 (¶8) (Evans Expert Report) *in camera*; CCPTF ¶¶1542-1610). The combined market shares of the settling retailers are about 79% of online sales. (CCPTF § X.C.1 (¶¶ 1628-1633)).

**459.** Walmart calculates its market share in the sale of contact lenses based on all retail sales of contact lenses. (RX 182-0001).

**Response to Proposed Finding No. 459**

RX182-0001 is not in evidence, so this proposed finding is unsupported.

**460.** In the last 14 years, the market share of pure-play online retailers as an entire group has increased, relative to other groups of contact lens retailers. (Bethers, Tr. 3554-55; RX 904-0039).

**Response to Proposed Finding No. 460**

Complaint Counsel has no specific response.

**461.** In the last 14 years, the market share of 1-800 Contacts and other pure-play online retailers has increased from about 7.5 percent to 17 percent. (Bethers, Tr. 3554-55).

**Response to Proposed Finding No. 461**

Complaint Counsel objects to this proposed finding of fact as it misstates the evidence.

Respondents stated in their Post-Trial brief, and rely on Professor Murphy's report, which both state that online-retailers sales of contact lenses is not 17 percent but { [REDACTED] } of all contact lens sales. { [REDACTED] }

**462.** In the last 14 years, the increase in market share for pure-play online retailers is a result of pure-play online retailers gaining market share primarily from independent ECPs and retail optical chains. (Bethers, Tr. 3554-55).

**Response to Proposed Finding No. 462**

Complaint Counsel has no specific response.

***C. Recent New Entrants To The Contact Lens Retail Industry***

**463.** It is relatively easy to enter the business of selling contact lenses online. (CX 9029 (Bethers, Dep. at 132-33)).

**Response to Proposed Finding No. 463**

This proposed finding lacks foundation and is contradicted by the weight of the evidence.

There is no evidence that Mr. Bethers has owned or operated a business that has attempted to enter the business of selling contact lenses online. He joined 1-800 Contacts in 2003, after it was already a significant player in the industry. (Bethers, Tr. 3507). At his deposition, Mr. Bethers testified about three barriers to enter the market for the online sale of contact lenses: (1) prior knowledge of contact lenses; (2) a supply source for contact lenses to sell through a distributor; (3)

establish a prescription verification system. (CX9029 (Bethers, Dep. at 132-33)). However, there are several more barriers to entry in this industry.

1-800 Contacts' own business documents state that the company benefits from { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Mr. Owens of Walmart

confirmed that fulfillment and distribution for such a large number of SKUs is a significant barrier. (CX9037 (Owens, Dep. at 32-33) (“managing...the inventory for those various SKUs is also very difficult”). Mr. Clarkson of AC Lens confirmed that “you need a significant marketing budget” to successfully sell contact lenses online. (Clarkson, Tr. 181).

{ [REDACTED]

[REDACTED]

[REDACTED] } Mr.

Holbrook of Memorial Eye, a witness who actually had experience with entry in this market, also testified that effective entry required scale and bargaining power with contact lens suppliers sufficient to secure a steady supply of lenses at competitive wholesale prices. (Holbrook, Tr. 1863-1866). While Memorial Eye was able to obtain some volume discounts, due to their lack of scale they were not able to take advantage of the best pricing tiers. (Holbrook, Tr. 1866).

Indeed, a new entrant would need to attain [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX1228 at 014, *in camera* ( [REDACTED]

[REDACTED]

[REDACTED] })). In fact many of the supposedly independent competitors 1-800 Contacts touts as viable entrants have been forced to purchase fulfillment and distribution capabilities from two established online retailers: National Vision (AC Lens), and 1-800 Contacts itself. RX1228 at 014, *in camera* ([REDACTED] [REDACTED]); Clarkson, Tr. 196 (Walmart and Sam’s Club purchase fulfillment services from National Vision (AC Lens)).

Among the barriers providing 1-800 Contacts with a [REDACTED]

[REDACTED] } Mr. Clarkson confirmed this in his testimony at trial. (Clarkson, Tr. 181-182).

**464.** To start a new business selling contact lenses online, a company needs knowledge of contact lenses, a supply source for contact lenses (which is easy to obtain from existing distributors or directly from manufacturers), and the ability to verify prescriptions. (CX 9029 (Bethers, Dep. at 132-33)).

**Response to Proposed Finding No. 464**

Complaint Counsel has no specific response, other than to add that a new business selling contacts online also faces This proposed finding lacks foundation and is contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 463.

**465.** In the last two years, there have been new entrants to the contact lens retail market that offer different services and new business models, including a number of new online retailers of contact lenses. (Bethers, Tr. 3584, 3588).

**Response to Proposed Finding No. 465**

This proposed finding mischaracterizes Mr. Bethers’ testimony. The cited testimony indicates that there are two companies that have developed a new way to extend a customer’s prescription, but does not indicate that there are “a number of new online retailers of contact lenses.” (Bethers, Tr. 3584-3588).

## *1. Simple Contacts*

**466.** Simple Contacts is a new entrant that offers customers the ability to extend their contact lens prescription online and purchase contacts lens online from Simple Contacts. (Bethers, Tr. 3588-89).

### **Response to Proposed Finding No. 466**

This proposed finding is irrelevant. Mr. Bethers did not say and in fact lacks foundation to say whether Simple Contacts will be a successful or aggressive competitor. (Bethers, Tr. 3588-3589). The fact that Simple Contacts has entered the market, without any indication that it has been successful with customers or is likely to be successful with customers, is not relevant to how significant barriers to entry may be in the industry.

**467.** To extend a contact lens prescription, Simple Contacts allows consumers to use the camera on a mobile device to record a video while looking at a visual acuity chart. (Bethers, Tr. 3588-89). The results are reviewed by an ophthalmologist who determines the prescription. (Bethers, Tr. 3588-89).

### **Response to Proposed Finding No. 467**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 466.

**468.** Simple Contacts sells online all of the major contact lenses manufactured in the United States. (Bethers, Tr. 3589).

### **Response to Proposed Finding No. 468**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 466.

## *2. Sightbox*

**469.** Sightbox is a new entrant that sells contact lens online and also arranges for its customers to obtain an eye exam with an ECP. (Bethers, Tr. 3589-90).

### **Response to Proposed Finding No. 469**

This proposed finding is irrelevant. Mr. Bethers did not say and in fact lacks foundation to say whether Sightbox will be a successful or aggressive competitor. (Bethers, Tr. 3589-90). The

fact that Sightbox has entered the market, without any indication that it has been successful with customers or is likely to be successful with customers, is not relevant to how significant barriers to entry may be in the industry.

**470.** Sightbox operates on a subscription model. (Bethers, Tr. 3589-90).

**Response to Proposed Finding No. 470**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 469.

**471.** A Sightbox customer pays a monthly subscription fee, and Sightbox takes care of the customer for the whole year by supplying contact lenses, arranging an appointment for an eye exam with an ECP, and paying for the eye exam. (Bethers, Tr. 3589-90).

**Response to Proposed Finding No. 471**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 469.

**3. *Hubble***

**472.** Hubble Contacts is a new entrant that launched around the end of 2016 and has its own brand of contact lenses and sells those directly to consumers online. (Bethers, Tr. 3593-94; Clarkson, Tr. 289-90).

**Response to Proposed Finding No. 472**

This proposed finding is irrelevant. Mr. Bethers stated that there have so far been very few prescriptions written for Hubble contact lenses. (Bethers, Tr. 3597). The fact that Hubble has entered the market without any indication that it has been successful with customers or is likely to be successful with customers is not relevant to how significant barriers to entry may be in the industry.

**473.** Hubble Contacts is a very well-funded start-up company that has already raised about \$25 million in capital. (Clarkson, Tr. 290).

**Response to Proposed Finding No. 473**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 472.

**474.** Hubble Contacts' contact lenses are manufactured in Taiwan by St. Shine. (Bethers, Tr. 3594).

**Response to Proposed Finding No. 474**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 472.

**475.** Hubble Contacts operates with a subscription model that costs a consumer \$30 per month for daily disposable lenses (in comparison, other daily disposable lenses can cost between \$500 and \$750 per year). (Bethers, Tr. 3595).

**Response to Proposed Finding No. 475**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 472.

**476.** Instead of using traditional online marketing approaches of internet search advertising and marketing affiliates, Hubble Contacts introduced its concept through Facebook and other vehicles of social media. (Bethers, Tr. 3594).

**Response to Proposed Finding No. 476**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 472.

**477.** Hubble Contacts has been very successful in growing their orders and attracting customers to their business. (Bethers, Tr. 3595).

**Response to Proposed Finding No. 477**

This proposed finding is contradicted by Mr. Bethers' own testimony that, "We know that very few prescriptions have been written for that particular St. Shine lens," that's been branded Hubble. (Bethers, Tr. 3597).

**478.** Since Hubble Contacts started, customers have called 1-800 Contacts asking if it carries the Hubble brand of contact lenses. (Bethers, Tr. 3720).

**Response to Proposed Finding No. 478**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 473.

**479.** Although Hubble Contacts has been in existence for a very short time, consumers are already going into their ECPs' offices asking for Hubble Contacts' contact lenses. (Clarkson, Tr. 290-91).

**Response to Proposed Finding No. 479**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 473. Mr. Clarkson did not give an estimate as to the number of consumers requesting the lenses, or even if it was many or a few. (Clarkson, Tr. 290-291).

**480.** Peter Clarkson, the founder and President of ACLens.com (Clarkson, Tr. 172), sees Hubble as a potential threat to ACLens.com over the next five to ten years. (Clarkson, Tr. 296).

**Response to Proposed Finding No. 480**

Complaint Counsel objects to this proposed finding as it is irrelevant and misstates the testimony. As described in Response to Proposed Findings 472-479, Hubbel is akin to a manufacturer that offers online retail through a subscription services. Mr. Clarkson described Hubbel as being "in a category like the four manufacturers," because Hubble is a brand of contact lenses (the lenses are supplied by a manufacturer in Asia), and Hubbel must be prescribed by doctors before Hubbel can sell the lenses online. (Clarkson, Tr. 295-296).

**4. *Daysoft***

**481.** Daysoft is a manufacturer of contact lenses that sells its lenses directly to consumers online. (Bethers, Tr. 3591-92).

**Response to Proposed Finding No. 481**

This proposed finding is irrelevant. Mr. Bethers did not say that Daysoft has been or will be a successful or aggressive competitor. (Bethers, Tr. 3591-3593). The fact that Daysoft, a U.K. company, is selling contact lenses into the U.S. without any indication that it has been successful with customers or is likely to be successful with customers is not relevant to how significant

barriers to entry may be in the industry. (Bethers, Tr. 3591-3593). Mr. Bethers even noted that their prescription verification model is different from that of U.S. companies saying, “I don’t know whether that complies with the Contact Lens Rule...” (Bethers, Tr. 3593).

**482.** Daysoft is run by one of the original inventors of daily-disposable contact lenses. (Bethers, Tr. 3591).

**Response to Proposed Finding No. 482**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 481.

**483.** Although Daysoft is located in the United Kingdom, a consumers in the United States can use Daysoft’s website and have contact lenses delivered to the United States. (Bethers, Tr. 3593).

**Response to Proposed Finding No. 483**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 481. This proposed finding also lacks foundation as Mr. Bethers did not explain how he knows that U.S. consumers can have contact lenses delivered from Daysoft. (Bethers, Tr. 3593).

**5. *Opternative***

**484.** Opternative is a new entrant that offers customers a refraction through a desktop computer. (Bethers, Tr. 3584-85).

**Response to Proposed Finding No. 484**

This proposed finding is irrelevant. Opternative is not a competitor in this market; it is not a retailer of contact lenses online, it is not a retailer of contact lenses at all. (Bethers, Tr. 3584-3585). Opternative provides a service of extending prescriptions to customers or to retailers of contact lenses, but is not itself a retailer of contact lenses. (Bethers, Tr. 3585-3586). Mr. Bethers did not say and in fact lacks foundation to say whether Opternative will increase competition in the industry. (Bethers, Tr. 3587).

**485.** Opternative has contracted with ophthalmologists to review the results of the refraction and write a contact lens prescription for the customer that can be used to purchase the same brand of contact lenses that the customer is currently wearing. (Bethers, Tr. 3585-86).

**Response to Proposed Finding No. 485**

This proposed finding is irrelevant for the reasons explained in the Response to Proposed Finding No. 484.

**486.** 1-800 Contacts has partnered with Opternative because it allows customers to extend their contact lens prescription and, if necessary, change the power of the prescription with a lower-cost exam from the comfort of their home. (Bethers, Tr. 3586-87).

**Response to Proposed Finding No. 486**

This proposed finding is irrelevant for the reasons explained in the Response to Proposed Finding No. 484.

**487.** Opternative provides an opportunity for any online retailer to provide its customers with the ability to extend their contact lens prescription and, if necessary, change the power of the prescription without visiting an ECP's office. (Bethers, Tr. 3587).

**Response to Proposed Finding No. 487**

This proposed finding is irrelevant for the reasons explained in the Response to Proposed Finding No. 484.

**IV. The Relevant Market In This Matter Is All Retail Sales Of Contact Lenses In The U.S.**

**488.** The relevant market for analyzing the competitive effects of the settlement agreements is the market for retail sales of contact lenses. (RX 739-007-9, 037-043 (Murphy Report); Murphy, Tr. 4092, 4148).

**Response to Proposed Finding No. 488**

The proposed finding is incorrect and contrary to the weight of the evidence. Complaint Counsel's expert, Dr. Evans, undertook a detailed market definition analysis and concluded that the relevant market for analyzing the competitive effects of the challenged agreements is the market for the sale of contact lenses online. *See* CCPTF ¶ 1542 *et. seq.* The weaknesses of Respondent's proposed relevant market were covered at length in Dr. Evans' Rebuttal Report and at trial. *See* CX8009 at 054-066 (¶¶90-115) (Evans Rebuttal Report); Evans, Tr. 1519-1539.

Complaint Counsel established, consistent with the narrowest market principle, a market for the online sale of contact lenses. *See* CC Br. at 101-120. This showing is not undermined, even if 1-800 Contacts can establish that a larger relevant market also exists. (CC Br. at 116-118.)

**A. *The Structure Of Competition And 1-800 Contacts' Business Model Reflects That Offline Sellers Constrain Its Pricing***

**489.** The appropriate way to define the relevant market is to identify other retailers that are sufficiently close substitutes for buyers of contact lenses that they constrain contact lens retailers' prices and prevent 1-800 Contacts or other retailers from exercising monopoly power. (RX 739-0040 (Murphy Report); Murphy, Tr. 4149).

**Response to Proposed Finding No. 489**

The proposed finding is incorrect and should be rejected. First, it incorrectly states that the proper method of defining a market is to identify the firms that prevent "1-800 Contacts or other retailers from exercising monopoly power." This is legally incorrect. As explained in Complaint Counsel's Post-Trial Brief and Post-Trial Reply Brief, the relevant question is whether it would be profitable for 1-800 Contacts and rival online retailers, *acting in combination*, to raise prices. (*See* CC Br. at 101-103; CC Post-Trial Reply Br. at 86-87).

Second, the proposed finding incorrectly suggests that all firms that play a significant role in constraining price must be included in the relevant market. This is incorrect. The question is not whether firms outside the relevant market play any role in constraining prices—Dr. Evans agrees that they can, *see* CX8009 at 056 (¶ 94 & n.125)—but whether the constraint imposed by firms outside the market is sufficient to prevent harm to competition and consumers that could result from anticompetitive practices within the relevant market. (*Id.*; *see also* CX9048 (Murphy, Dep. at 193 ("Certainly the fact that there is some substitution doesn't mean you are in the same market automatically.")); HMG § 4.1.1 ("The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.")).

Third, the proposed finding is misleading because it omits any mention of the practice at issue and implies that a relevant market may be defined without reference to the practice being challenged. But, as Dr. Evans noted, the relevant market depends on the competitive practice at issue, and definition of the relevant market without reference to the competitive practice will not “identify the set of competitive constraints that could limit the ability of a firm to engage in a particular practice in a way that could ultimately harm competition and consumers.” (CX8009 at 055-056 (¶ 93 & n 121) (Evans Expert Report) (*citing* U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 4 (Aug. 19, 2010) (hereinafter “HMG”) (“The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects.”))).

**490.** The goal of market definition is to understand the competitive constraints on pricing in the marketplace and how that pricing might change in a world without the challenged conduct. (RX 739-0040 (Murphy Report); Murphy, Tr. 4149).

**Response to Proposed Finding No. 490**

The proposed finding is incorrect and misleading because it does not mention that the goal of market definition is to understand the competitive implications of *the practice at issue*—here, the Bidding Agreements. (Evans, Tr. 1430). Indeed, Dr. Murphy admitted that the goal of market definition included “analyz[ing] the competitive impact of the conduct at issue in the case you’re looking at.” (Murphy, Tr. 4149).

**491.** [REDACTED]  
[REDACTED] (Evans, Tr. 1668-669).

**Response to Proposed Finding No. 491**

The proposed finding is unsupported by the cited testimony and should be rejected. Dr. Evans’s cited testimony { [REDACTED] }, nor does Dr. Evans use the words { [REDACTED] } in the cited passage. (Evans, Tr. 1668-1669), *in camera*. In the [REDACTED]

cited passage, Dr. Evans { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Evans, Tr. 1668-1669), *in camera*.

**492.** Market definition should avoid rigid boundaries. (Evans, Tr. 1430-31). (“we should avoid rigid boundaries . . . I believe that you have got to look both inside the market and – and take on board what else is happening in the – in the broader – in the broader sphere.”).

**Response to Proposed Finding No. 492**

Complaint Counsel has no specific response to the proposed finding.

**493.** The first step in assessing the relevant market is to identify the set of retailers to which 1-800 Contacts’ customers might be willing to substitute because they provide services similar to 1-800 Contacts. (RX 739-0040 (Murphy Report)).

**Response to Proposed Finding No. 493**

The proposed finding is misleading, incorrect and contrary to the weight of the evidence. Because the purpose of market definition is to analyze the challenged restraints, market definition does not begin with all retailers to whom customers “might be willing to substitute,” but rather with the restraint at issue—in this case, the agreements with online retailers. (*See* Evans, Tr. 1431-32 (“[I]t’s important for the market definition analysis to start with the practice that’s being complained about . . . So I needed to start with the consumers who are purchasing contact lenses online.”); CX8009 at 056-057 (¶¶ 94-95) (Evans Rebuttal Report) (describing the approach taken in Proposed Finding No. 493 as a “fundamental analytical error”)). Only after that is an assessment made to determine “to what extent there are substitutes available to those consumers,” and potential substitutes are not considered simply because a customer “might be willing to substitute,” but rather are evaluated to determine if the substitute “would constrain bad effects . . . flowing out of the agreements.” (Evans, Tr. 1432; CX8009 at 056-058(¶¶ 94-98) (Evans Expert Report)).

There is significant support for Dr. Evans's approach. (*See* CX8009 at 057 (¶ 96 n.128) (citing the Horizontal Merger Guidelines, an article by Michael Katz and Carl Shapiro in *Antitrust*, and Dr. Murphy's expert report in *FTC v. Whole Foods Market*)). In contrast, the proposed finding relies solely on Professor Murphy's expert, RX0739-0040 (¶101), which cites no evidence for the idea that market definition must begin with the identification of all potential substitute retailers (including, in this case, retailers who never advertise online and thus could not replace the informative advertising lost as a result of the Bidding Agreements).

**494.** In order to determine that online retailers are not in the same market as ECPs, one would have to find that the services offered by the different types of retailers were sufficiently different that a large enough share of consumers would not be willing to substitute between the two types of retailers such that the ECPs would not constrain online retailers' prices. (RX 739-0040 to -0041, -0076 (Murphy Report)).

#### **Response to Proposed Finding No. 494**

The proposed finding is incorrect and contrary to the weight of the evidence. The proposed finding is premised on Proposed Finding No. 493, and proceeds from the assumption that in order to end up with a relevant market without ECPs, it is necessary to eliminate them at some step of the process. However, as explained above and in Dr. Murphy's report, market definition should begin with a candidate market covering the restraint at issue, and then extend outward if a single entity which controlled those retailers could not raise price profitably by a small but significant non-transitory amount. (*See* Response to Proposed Finding No. 493; CX8009-057 (¶ 95)(Evans Rebuttal Report)). Although competitive factors outside the market should be considered, it is incorrect to start from the premise that ECPs are a part of the relevant market which must be excluded.

**495.** Consumers have numerous options regarding where to buy contact lenses. (RX 739-0039, -0040, -0086 (Murphy Report); Bethers, Tr. 3509, 3538-3541).

**Response to Proposed Finding No. 495**

Complaint Counsel has no specific response to the proposed finding, other than to note that the proposed finding relies upon Mr. Bethers' assertion that customers can purchase contact lenses from "literally tens of thousands of locations," which is misleading because it appears to assume that every physical retail location in the United States is a reasonable option for consumers. In fact, however, not only can consumers not reasonably purchase from every physical location, but even nearby physical locations may be much less convenient for some consumers than purchasing online on some occasions. (*See* CX8006 at 113 (¶ 249) (Evans Expert Report)).

**496.** Surveys show that customers switch from 1-800 Contacts to retailers in other channels in rough proportion to the share of sales accounted for by retailers in each channel. (RX 739-0041 to -0042 (Murphy Report); CX 1117-016).

**Response to Proposed Finding No. 496**

The proposed finding is incorrect and contrary to the weight of the evidence. As Dr. Evans explained in his rebuttal report, the slide upon which Respondent relies, CX1117-016, is not a slide describing customers who have "switch[ed] from 1-800 Contacts" in the sense that is relevant to market definition (diversion); rather, the chart on the right-hand-side of the slide shows all customers who did not make their last purchase from 1-800 Contacts, including those who intend to purchase from 1-800 Contacts again in the future when it is convenient. Indeed, fully 58% of these customers who did not make their *last* purchase from 1-800 Contacts report they are nonetheless likely to make their *next* purchase from 1-800 Contacts. (CX1117-017). These customers have not diverted to another supplier—instead, they simply purchase from different suppliers at different times (*e.g.*, from their ECP when visiting the ECP and from 1-800 Contacts when ordering refills). These customers have not "switch[ed] from 1-800 Contacts" in the sense

that is economically meaningful when performing a critical loss analysis. (CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report)).

Instead, as Dr. Evans explained, a better measure of customers who have switched from 1-800 Contacts in a way that means they are unlikely to return is presented at slide CX1117-015, which details the purchasing habits of customers who are *not* likely to buy from 1-800 Contacts for their next purchase. The switching patterns displayed on CX1117-015 do not support the proposed finding.

Separately, even using the slide Respondent and Dr. Murphy rely upon, the survey data do not show that customers switch to retailers in other channels in rough proportion to the share of other channels. The data show 17 percent of customers switching to other online providers, but Respondent admits online providers other than 1-800 make up only 7 percent of contact lens sales. See Proposed Findings No. 453 (pure-play online sales, including 1-800 Contacts sales, are 17 percent of all contact lens sales), 454 (1-800 Contacts is 10 percent of all contact lens sales). Excluding 1-800 Contacts, this implies other online providers are only 7.7% of sales (7% / 90%). Thus, even using the cited data (which is inappropriate and gives Respondent more favorable results than other data), it is clear that online providers receive at least 2.2 times as many customers as their share of sales would suggest, which is not “in rough proportion” to their share of sales.

**497.** Dozens of firms sell contact lenses online. (Bethers, Tr. 3537-3541).

**Response to Proposed Finding No. 497**

Complaint Counsel has no specific response to the proposed finding, other than to note that the proposed finding contains no discussion of the market shares or capabilities of the firms Mr. Bethers named in his testimony.

**498.** In the 2001-2002 time period, approximately 7.5 percent of contact lens sales were made by firms that primarily sell online. (Bethers, Tr. 3555).

**Response to Proposed Finding No. 498**

The proposed finding should be rejected because Mr. Bethers has no personal knowledge of the share of contact lens sales made in 2001-2002. He did not begin working for 1-800 Contacts until 2003, and he had no experience in the contact lens industry prior to that time. (*See* Bethers, Tr. 3507-3508.) Although Mr. Bethers testified that “we tracked these market shares right from the start,” Respondent points to no documentary evidence to verify or corroborate this proposed finding, thus his testimony simply relays hearsay.

The proposed finding is also misleading because Mr. Bethers described the 7.5% figure as an estimate of the “online market,” not an estimate of firms that “primarily sell online.” (Bethers, Tr. 3555). Mr. Bethers’ admission that 100% of 1-800 Contacts’ sales are in the “online market” corroborates other evidence in the record which suggests that 1-800 Contacts’ phone sales are appropriately considered as a part of its online business because, for example, a customer could be purchasing online and then call 1-800 Contacts phone center to obtain a price match. (*See, e.g.,* Athey, Tr. 791-792; RX0739 at 0087 (Exhibit 3) (Murphy Expert Report), *in camera* (including all of 1-800 Contacts’ sales under the heading “share of total online sales” and as part of the calculation of “pure-play market share”)).

**499.** Today, approximately 17 percent of contact lens sales are made by firms that primarily sell online. (RX 739-0086 (Murphy Report); Bethers, Tr. 3555).

**Response to Proposed Finding No. 499**

Complaint Counsel has no specific response to the proposed finding, other than to note that it is not relevant or meaningful to group sales according to the “primary” sales channel of the firms making those sales. Dr. Evans defined a market consisting of all sales made online, regardless of retailer, rather than all sales from firms that primarily sell online. Evans, Tr. 1687

("[M]y relevant market doesn't consist of pure play. My relevant market consists of any entity that sells online."); CX8009-058-059 (¶ 100) (Evans Rebuttal Report)). This approach is consistent with the Horizontal Merger Guidelines. (HMG § 5.2 ("In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market.")).

**500.** The proportion of contact lens sales made by firms that primarily sell online grew from approximately 7.5 percent in the 2001-2002 time period to 17 to 18 percent today at the expense of the share of sales made by independent ECPs and optical chains. (Bethers, Tr. 3554-55).

**Response to Proposed Finding No. 500**

Complaint counsel has no specific response to Proposed Finding No. 500, other than to note that it relies upon Proposed Findings No. 498 and 499, and so the objections to those findings are equally applicable.

**501.**

[REDACTED] (RX 739-0087 (Murphy Report); Murphy, Tr. 4104-06)).

**Response to Proposed Finding No. 501**

The proposed finding is unsupported because none of the cited sources discuss a share of sales from firms which "primarily" sell online or offline—rather, Dr. Murphy's expert report makes clear that Dr. Murphy's analysis concerns the share of sales actually made online. (*See* RX0739-0087 (Exhibit 3) (Murphy Expert Report), *in camera* (calculating a "share of total online sales" using an "online contact lens market size"); Murphy, Tr. 4103 (making clear that Dr. Murphy's testimony at 4104-4106 refers to his Exhibit 3)).

Complaint Counsel also reiterates its objection that the sales made by firms that do or do not "primarily" sell online is misleading and irrelevant. *See* Response to Proposed Finding No. 499.

**502.** Optical chains such as LensCrafters, Pearle Vision, Visionworks and America’s Best sell contact lenses. (Bethers, Tr. 3520-3521).

**Response to Proposed Finding No. 502**

Complaint Counsel has no specific response to the proposed finding.

**503.** Optical chains offer eye exams by optometrists in many of their brick-and-mortar locations. (Bethers, Tr. 3521-22).

**Response to Proposed Finding No. 503**

Complaint Counsel has no specific response to the proposed finding.

**504.** Optical chains make approximately 20 percent of all contact lens sales. (Bethers, Tr. 3553; RX 739-0086 (Murphy Report)).

**Response to Proposed Finding No. 504**

Complaint Counsel has no specific response to the proposed finding.

**505.** Independent ECPs make approximately 40 percent of all contact lens sales. (Bethers, Tr. 3552; RX 739-0086 (Murphy Report)).

**Response to Proposed Finding No. 505**

Complaint Counsel has no specific response to the proposed finding.

**506.** Independent ECPs and optical chains with ECPs in their stores make approximately 60 percent of contact lens sales. (RX 739-0017, -086 (Murphy Report)).

**Response to Proposed Finding No. 506**

Complaint Counsel has no specific response to the proposed finding.

**507.** Though prices vary by SKU, on average, the price of contact lenses offered independent ECPs and optical chains are approximately 25 to 30 percent higher than prices offered by online retailers and mass merchants. (RX 739-0089 (Murphy Report)).

**Response to Proposed Finding No. 507**

Complaint Counsel objects to the proposed finding for five reasons. First, the proposed finding misleadingly groups the prices of “online retailers and mass merchants” in order to compare the two groupings, despite the fact that the evidence demonstrates that online retailers charge lower prices than mass merchants. (Clarkson, Tr. at 188-190). Thus, it is not meaningful to

first group these channels and then speak of the average price difference between this group and other groups.

Second, the proposed finding misleadingly relies upon a chart which displays a line depicting “mass merchant” prices, but which in fact is an average of the prices of Walmart, Costco and Sam’s Club—two of which, while “mass merchants” under Dr. Murphy’s grouping, are not “mass merchants” under other the groupings contemplated by these proposed findings. (*Compare* Murphy, Tr. 4257, *in camera* { [REDACTED] } and RX0739 at 0016 (¶ 33) (Murphy Expert Report) (listing Wal-Mart and Costco as example mass merchandisers) *with* Proposed Finding No. 530 (distinguishing club stores and mass merchants and listing Costco as a club store, not a mass merchant)).

Third, the exhibit Respondent cites, RX0739-0089 (Exhibit 5) (Murphy Report), does not explain whether the “price indices” it displays reflect the impact of price matching and rebate programs. This makes a significant difference in pricing in the contact lens industry. (Evans, Tr. 1686), *in camera*. The proposed finding is thus impermissibly vague.

Fourth, even if the prices displayed in the cited source were meaningful, Dr. Murphy’s report explicitly stated that a { [REDACTED] } price difference occurred only in 2011 and 2012, the first two years on the exhibit. (RX0739-0089 (Exhibit 5) (Murphy Report)), *in camera*; (RX0739-0018 (¶ 38) (noting the price difference “narrowed beginning in 2013”)).

Fifth, as a matter of math, even assuming that the cited exhibit is correct, the chart shows that in 2011-2012 IECPs charged an index price of approximately { [REDACTED] }, while mass merchandisers charged an index price of approximately { [REDACTED] }. This would mean that IECP prices were approximately { [REDACTED] } higher than online retailer prices, not { [REDACTED] }. (RX0739 at 0089 (Exhibit 5) (Murphy Expert Report)).

**508.** Consumers who must visit their physician—a competing seller—every one to two years are the ultimate source of business for all contact lens retailers. (Evans, Tr. 1700-1701; RX 739-0042 (Murphy Report); Murphy, Tr. 4151; Bethers, Tr. 3601).

**Response to Proposed Finding No. 508**

Complaint Counsel has no specific response to the proposed finding, except to the extent that the characterization of eye doctors as “a competing seller” is intended to imply that ECPs and online retailers are participants in the same antitrust market for purposes of this litigation, in which case Complaint Counsel objects. (*See, e.g.* Clarskon, Tr. 188-190).

**509.** 1-800 Contacts considers independent ECPs to be its primary competitors. (Bethers, Tr. 3600-01).

**Response to Proposed Finding No. 509**

Proposed Finding No. 509 is incorrect and contrary to the weight of the record evidence. Respondent points to no evidence other than the trial testimony of Mr. Bethers to support its proposed finding. In contrast, 1-800 Contacts’ business records and out-of-court statements demonstrate that, although 1-800 attracts customers from doctors, it considers retailers who sell online to be its primary competitors. (*See, e.g.*, CX0055-009 (noting 1-800 Contacts’ “market leadership” and asserting that 1-800 Contacts has “no phone competitors, and double our nearest internet competitor,” without considering or mentioning physical retailers), 011 (noting that “Internet marketing skills – are not on par with our competitors” at a time when physical retailers were not advertising online); CX0526 at 007 (giving a “Business Snapshot” of 1-800 Contacts noting, as the first point, that 1-800 Contacts has “nearly 4x the revenue of next largest online competitor,” and as the third point, that 1-800 Contacts has “33x brand awareness of the nearest online competitor”); CX1446 at 073, *in camera* (noting that 1-800 Contacts’ { [REDACTED] })). Indeed, Mr. Bethers himself has admitted that the online retailers with which 1-800 Contacts reached Bidding Agreements constitute *all of* 1-800 Contacts’ “major competitors,” belying the notion that IECs are its “primary competitors.”

(Bethers, Tr. 3724 (agreeing that CCXD0032, in which Mr. Bethers said to a journalist that “eventually we signed settlement agreements with all of our major competitors,” accurately reflects his statement in an interview); *see also* CX9001 (Bethers, IHT at 159) (“We have a hole in our bucket. Online competitors use search to try to acquire customers that start looking for lowest price.”), CX9001 (Bethers, IHT at 267) (“[W]e are fighting to keep and retain customers . . . [to] keep them so they don’t go back to the doctor *and don’t go to the online competitors. But we lose to online competitors.*”) (emphasis added)).

Even 1-800 Contacts’ own expert opined that, at a minimum, competition from online providers is as important as competition from physical retailers. (*See, e.g.*, Murphy, Tr. 4100-4101 (“[T]he economic evidence . . . suggests that [1-800 Contacts is] competing against online sellers. That is, they have to compete against online sellers.”).

**510.** 1-800 Contacts’ core business model is persuading ECP customers to switch to buying contacts online. (Murphy, Tr. 4097-99, 4100-01, 4105; RX 739-0019; Bethers, Tr. 3600-01).

**Response to Proposed Finding No. 510**

Proposed finding No. 510 is incorrect and contrary to the weight of the evidence. As described in Response to Proposed Finding No. 509, and in contrast to the trial testimony of 1-800 Contacts employees and 1-800 Contacts’ expert, 1-800 Contacts’ business documents and out-of-court statements make clear that 1-800 Contacts’ business model is more dependent (or, at a minimum, as highly dependent) on preventing customers from switching to other online providers. For example, 1-800 Contacts offers a “price match” policy which only makes sense if 1-800 Contacts’ business model is competing with retailers who offer *lower* prices. (CX8006 at 105 (¶ 229) (Evans Expert Report)).

**511.** The fact that 1-800 Contacts' core business model is persuading ECP customers to switch to buying contacts online makes it economically important to consider ECPs in analyzing competition in the relevant market. (RX 739-0020 to 0021 (Murphy Report); Murphy, Tr. 4100-01, 4105, 4115-16, 4149).

**Response to Proposed Finding No. 511**

Proposed finding No. 511 is incorrect and misleading. None of the cited sources say that it is "economically important" to "consider ECPs" in analyzing competition in the relevant market, nor do these sources define what it would mean to be "economically important" or to be "considered." To the extent this proposed finding is intended to mean that market definition requires beginning with a market that includes ECPs, the finding is repetitive of earlier proposed findings and fails for the same reasons. (*See* Response to Proposed Findings No. 488-501).

To the extent this proposed finding is simply intended to mean that an expert must have learned about or thought about the role of ECPs as a part of the market definition analysis, the finding is so vague as to be both indisputable and irrelevant. Complaint Counsel notes that, although Dr. Evans ultimately concluded that the relevant market for this case did not include ECPs, he did "consider" competition from ECPs in his relevant market analysis. (*See, e.g.* CX8006 at 020-023) (¶¶46-54)(Evans Report).

In addition, the finding presupposes the truth of finding No. 510, which as described above, is incorrect.

**512.** ECP customers are 1-800 Contacts' largest source of new customers. (Murphy , Tr. 4159; Bethers, Tr. 3625).

**Response to Proposed Finding No. 512**

The proposed finding is unsupported by the cited testimony, and also irrelevant because it simply shows that 1-800 Contacts underprices ECPs and attracts customers away from them. Respondent cites to no documentary evidence (or even contemporaneous statements) to support this conclusion, instead relying only on oral trial testimony. In contrast, the analysis conducted for

AEA investors by Bain Consulting when AEA acquired 1-800 concluded { [REDACTED]

[REDACTED] } (CX1449 at 034), *in camera* { [REDACTED]

[REDACTED] } (*See Proposed*

Finding No. 453, *in camera* { [REDACTED]

**513.** 1-800 Contacts' largest growth opportunity is the possibility of inducing customers currently buying contacts from their ECPs to substitute to 1-800 Contacts. (RX 739-0020 to 0021 (Murphy Report); Murphy, Tr. 4100, 4104-05; Bethers, Tr. 3600-01).

**Response to Proposed Finding No. 513**

Proposed Finding No. 513 is incorrect and contrary to the weight of the evidence. In fact, the record indicates substitution from ECP customers is not 1-800 Contacts' largest potential source of new customers. *See* Response to Proposed Finding No. 512.

Additionally, as Respondent's expert admitted, in order to grow, 1-800 Contacts must retain its existing customers, and in part for this reason 1-800 Contacts is at least equally as focused on competing against online providers. Murphy, Tr. 4100-4101. Online sales have been growing by under 1% per year (*see* CX1446-066, *in camera* (showing "online penetration" grew from { [REDACTED] } over the course of eight years)), and the current online market is approximately { [REDACTED] } (CX8006 at 023 (Table 1) (Evans Expert Report)), implying

that yearly growth in the online market is under { [REDACTED] }. Given that 1-800 Contacts' sales are approximately { [REDACTED] } and that other top 9 pure-play online retailers combined have sales of approximately { [REDACTED] } (*id.*), 1-800 Contacts must focus as much or more on retaining existing customers and winning customers from other online providers if it wishes to grow.

**514.** Dr. Evans agreed that 1-800 Contacts competes for new customers from ECPs. (CX 9042 (Evans, Dep. at 248-249)).

**Response to Proposed Finding No. 514**

Respondent has no specific response to Proposed Finding No. 514, other than to note that the cited transcript does not imply that 1-800 Contacts *exclusively* competes for new customers from ECPs. (CX9042 (Evans, Dep. at 248-249)).

**515.** The fact that most of 1-800 Contacts' potential new customers are ECP customers makes it economically important to consider ECPs in analyzing competition in the relevant market. (RX 739-0020-0021 (Murphy Report); Murphy, Tr. 4149).

**Response to Proposed Finding No. 515**

Proposed finding No. 515 is, other than the introductory dependent clause, word-for-word equivalent to Proposed Finding No. 511, and is incorrect and misleading for the same reasons (*i.e.*, because the terms "economically important" and "consider" are not meaningful, and because any conclusion that ECPs must be declared a part of the relevant market *a priori* is incorrect). *See* Response to Proposed Finding No. 511. In addition, the introductory clause is incorrect. *See* Response to Proposed Findings No. 512-513.

**516.** How firms price their product is direct evidence of market definition when pricing decisions are based directly on prices of particular competitors. (RX 739-0042 (Murphy Report)).

**Response to Proposed Finding No. 516**

The proposed finding is incorrect and misleading because, if a firm has engaged in anticompetitive practices allowing it to charge supracompetitive prices, its decision to base its

pricing at that point on prices of particular competitors is not direct evidence of market definition. Here, 1-800 Contacts was able to maintain supracompetitive prices by keeping customers uninformed about the existence of lower-priced rivals. Thus, the fact that 1-800 Contacts priced in part with reference to ECPs, to the extent true, would be evidence that its anticompetitive strategies succeeded, not evidence that ECPs must be considered as a part of the market.

**517.** 1-800 Contacts prices its contact lenses at a 5 to 10 percent discount off the prices offered by independent ECPs. (Bethers, Tr. 3549-50).

**Response to Proposed Finding No. 517**

The proposed finding is incorrect and contrary to the weight of the evidence. First, there is substantial evidence that, whatever its prices, 1-800 Contacts uses its price match policy in order to charge competitive prices to customers who might otherwise switch to other online retailers. *See, e.g.*, CX8006 at 105 (¶ 229) (Evans Expert Report) (explaining that 1-800 Contacts’ aggressive price match policy is a competitive response to online competition); CX0016; CX9012 (L. Schmidt, Dep. at 251-258). Second, there is evidence that, although it may consider IECP prices in its pricing decisions, 1-800 Contacts also considers { [REDACTED] } } *See, e.g.*, CX1447-030, *in camera* (2015 Q2 Product & Pricing Review July 23, 2015).

**518.** 1-800 Contacts’ decision to price at a discount off of ECPs’ prices makes economic sense. (RX 739-0042 to -0043 (Murphy Report)).

**Response to Proposed Finding No. 518**

The proposed finding is incorrect because it is dependent upon Proposed Finding No. 517, which, as explained above, is incorrect and contrary to the weight of the evidence. In addition, the conclusion that a pricing strategy “makes economic sense” is meaninglessly vague. To the extent Proposed Finding No. 518 is intended to incorporate prior findings of fact stating that ECPs are 1-800 Contacts’ primary competitors and that ECP customers are somehow more important to 1-800

Contacts as potential customers than 1-800 Contacts' own customers or customers of other online providers, Complaint Counsel reiterates its prior objections to these conclusions.

**519.** The fact that 1-800 Contacts prices at a discount off of ECPs' prices makes it economically important to consider ECPs in analyzing competition in the relevant market. (RX 739-0042 to 0043 (Murphy Report); Murphy, Tr. 4100-01, 4115-16, 4149; CX 9048 (Murphy, Dep. at 126-27, 187, 194-95)).

**Response to Proposed Finding No. 519**

Proposed finding No. 519 is, other than the introductory dependent clause, word-for-word equivalent to Proposed Finding No. 511, and is incorrect and misleading for the same reasons (*i.e.*, because the terms “economically important” and “consider” are not meaningful, and because any conclusion that ECPs must be declared a part of the relevant market *a priori* is incorrect). *See* Response to Proposed Finding No. 511.

Furthermore, Proposed Finding No. 519 is misleading because the record contains substantial evidence that other online discounters price based on the prevailing online price, without consideration of ECP pricing, and that 1-800 Contacts is an outlier among online retailers in considering the price of ECPs. (CCPTF ¶¶ 1323, 1402, 1545, 1567).

**520.** 1-800 Contacts' policy of pricing its contact lenses at a 5 to 10 percent discount off the prices offered by independent ECPs indicates that those prices constrain 1-800 Contacts' ability to raise its own prices. (RX 739-0041 to -0042 (Murphy Report)).

**Response to Proposed Finding No. 520**

Proposed Finding No. 520 is incorrect and misleading because it implies that the question of whether one product “constrain[s] . . . prices” of another is a binary question which can be answered as either yes or no. In the real world of differentiated products, as Dr. Evans has noted, some products will be stronger constraints and some products will be weaker constraints. The market definition question is whether, beginning with the products at issue due to the nature of the restraint, another product or set of products form a sufficient constraint to prevent a price increase. CX8006 at 110 (¶ 241 n.258) (Evans Expert Report).

Proposed Finding No. 520 is also incorrect because it assumes the veracity of Proposed Finding No. 517, which, as described above, is incorrect and contrary to the weight of the evidence. *See* Response to Proposed Finding No. 517.

**521.** Dr. Evans did “not disagree with Professor Murphy that 1-800 Contacts price checks ECPs and mass merchants and that ECPs and mass merchants play some role in constraining prices at online sellers.” (CX 8009-057 (Evans Rebuttal Report, at n.128)).

**Response to Proposed Finding No. 521**

Complaint Counsel has no specific response to the proposed finding.

**522.** Raising prices would inhibit 1-800 Contacts’ ability to attract new customers from ECPs. (Murphy, Tr. 4158, 4161-62; Evans, Tr. 1757).

**Response to Proposed Finding No. 522**

Complaint Counsel has no specific response to the proposed finding, except to note that Dr. Evans’s report nowhere states that it is necessary to find 1-800 Contacts specifically (rather than the set of online retailers combined) would raise its own already-supracompetitive prices in order to find that there is an online market.

**523.** According to Dr. Evans, “one consequence of raising prices is a reduction in the ability to attract consumers from the physical retailers, including the ECPs.” (Evans, Tr. 1757).

**Response to Proposed Finding No. 523**

Complaint Counsel has no specific response to the proposed finding, other than to note that Dr. Evans further testified that “that doesn’t answer the relevant -- relevant market question. It’s a question of how significant a substitute they are, not whether they’re a substitute at all.” (Evans, Tr. 1757).

**524.** Dr. Evans did not analyze how 1-800 Contacts’ increase in price would affect its ability to attract new customers from ECPs. (Murphy, Tr. 4162-63).

**Response to Proposed Finding No. 524**

Proposed Finding No. 524 should be rejected. First, it is incoherent, since there was no “increase in price” for 1-800 Contacts that Dr. Evans could have analyzed. What Dr. Evans

properly analyzed was whether a price increase imposed by all online retailers of contact lenses would be profitable. This is the appropriate implementation of the hypothetical monopolist test (which discusses the ability of a combined firm consisting of all market participants, not just one market participant, to raise prices from the competitive level). (CX8006 at 124 (¶¶ 269) (Evans Expert Report)).

Second, Dr. Evans did in fact analyze how a price increase would affect the ability of discount online contact lens retailers collectively to attract new customers from ECPs. His UPP natural experiment examined a situation in which discount online retailers, but not ECPs, increased prices by approximately 20-25%, and Dr. Evans found that any decreased profits resulting from a reduction in the ability to attract new customers from ECPs was less than the increased profit online retailers generated as a result of the price increases. (CX8006 at 125-127 (¶¶ 272-274) (Evans Expert Report)).

As Dr. Evans explained at trial, while his analysis did not consider the ability of *individual firms* to attract new customers following a price increase (which is irrelevant), it did consider the ability of a *hypothetical monopolist* consisting of all online sellers to attract new customers (which is the relevant question), and found that the hypothetical monopolist would be able to attract sufficient new customers to make the price increase worthwhile. (Evans, Tr. 1753-1754).

**525.** If a reduction in price induces a small share of ECP buyers to substitute to buying from 1-800 Contacts, that would represent a much larger increase in sales than would a reduction in price that induces a similar share of buyers from other online retailers to substitute to 1-800 Contacts. (RX 739-0008, 0042 to -0043 (Murphy Report)).

#### **Response to Proposed Finding No. 525**

Proposed Finding No. 525 is misleading, irrelevant, and contrary to the weight of the evidence. The proposed finding cites, for support, to (RX0739 at 0042-0043, ( ¶ 109) (Murphy Report), which states this proposed fact as a hypothetical proposition, without citation to the

record or to any other source. A hypothetical thought experiment unsupported by the record is not an appropriate finding of fact.

The record demonstrates that Proposed Finding No. 525 is misleading. This thought experiment is premised on the idea that 1-800 Contacts has to charge the same price to all customers and cannot reduce its price to compete with online competitors while at the same time charging a different and higher price to prospective ECP customers. In fact, however, the record shows that 1-800 Contacts instituted its price match policy to do just that—the price match was intended to allow 1-800 Contacts to be price-competitive with online competitors without having to lower the price it showed to customers purchasing from ECPs (which charge higher prices than 1-800 Contacts and thus could not take advantage of a price match). (CX8006 at 105 (¶ 229) (Evans Expert Report)).

**526.** Dr. Evans agreed that, because 1-800 Contacts' prices are lower than ECPs' prices, it would make economic sense for 1-800 Contacts to consider how raising prices would affect the relationship between its prices and ECPs' prices. (Evans, Tr. 1732).

**Response to Proposed Finding No. 526**

The proposed finding is misleading because it misstates Dr. Evans' testimony. Dr. Evans was asked to assume that "1-800 Contacts was going to raise their prices," and then agreed that 1-800 Contact would need to consider "the extent to which they're changing the price relationship between themselves and ECPs." Dr. Evans did not agree that it would make economic sense to consider raising prices in the first place, especially in view of the fact that Dr. Evans concluded 1-800 Contacts already prices above the competitive price which would prevail in the absence of the Bidding Agreements. (Evans, Tr. 1732).

**527.** Surveys have found that a higher proportion of customers who switch from 1-800 Contacts switch to ECPs than to other online retailers. (CX 1117-016).

**Response to Proposed Finding No. 527**

The proposed finding is incorrect and contrary to the weight of the evidence for the same reason Proposed Finding No. 496 is incorrect—the proposed finding relies upon survey data which does not appropriately measure “customers who switch from 1-800 Contacts.” (*See* Proposed Finding No. 496; CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report)).

Using more appropriate data, it is clear that the opposite is true: “40% of those not likely to come back will go to another online supplier” vs. only 33% who will switch to IECPs. (CX1117-015).

**528.** Club stores such as Costco, Sam’s Club and BJ’s sell contact lenses. (Bethers, Tr. 3525-3526).

**Response to Proposed Finding No. 528**

Complaint Counsel has no specific response to the proposed finding.

**529.** Club stores offer eye exams by optometrists in many of their brick-and-mortar locations. (Bethers, Tr. 3526-27).

**Response to Proposed Finding No. 529**

Complaint Counsel has no specific response to the proposed finding.

**530.** Club stores such as Costco, Sam’s Club and BJ’s and mass merchandisers such as Walmart, Target and Sears make approximately 25 percent of retail contact lens sales in the United States. (Bethers, Tr. 3552-53; RX 739-0017, -086 (Murphy Report)).

**Response to Proposed Finding No. 530**

Complaint Counsel objects to the proposed finding as misleading insofar as it groups together mass merchandisers and club stores and implies the two are logically similar or are relevantly considered as a single group for any purpose. Respondent admits that mass merchandisers price differently than club stores. (Bethers, Tr. 3544-3545). And the weight of the evidence also demonstrates that 1-800 Contacts considers mass merchandisers and club stores

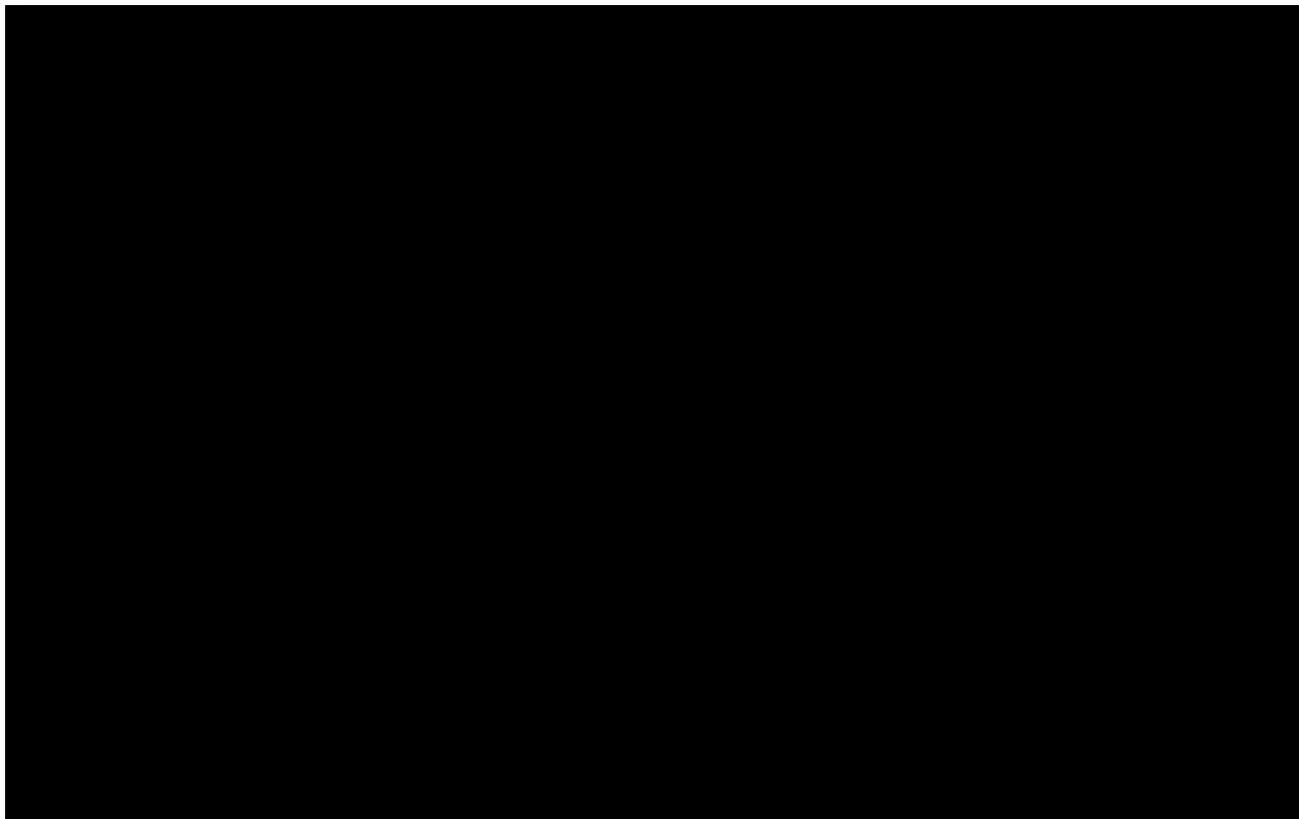
differently and competes against them differently, for example by including mass merchandisers, but not club stores, in its price match policy. *See* Response to Proposed Findings No. 234-237.

**531.** Walmart makes approximately 8 percent of U.S. retail contact lens sales. (CX 9037 (Owens, Dep. at 16)).

**Response to Proposed Finding No. 531**

Complaint Counsel objects to the proposed finding, which incorrectly characterizes Mr. Owens' estimate, which was that Wal-Mart was "somewhere around the 6 to 8 percent" range but that "the data is just not readily available." (CX9037 (Owens, Dep. at 16.)) Complaint Counsel also notes that Mr. Owens reported Walmart represented only "1 to 2 percent" of online sales. (CX9037 (Owens, Dep. at 17)).

**532.** Though prices vary by SKU, on average, club stores such as Costco, Sam's Club and BJ's generally offer lower prices than 1-800 Contacts and other online sellers. (RX 739-0089 (Murphy Report); Bethers, Tr. 3544-45; CX 9037 (Owens, Dep. at 27); Coon, Tr. 2710). [REDACTED]



}

(RX 739-0089 (Murphy Report)).

**Response to Proposed Finding No. 532**

The proposed finding should be rejected because it is vague and unsupported by the evidence cited.

First, the finding is unsupported because simply by examining the chart it is obvious that “Online Retailers” had { } prices than “Mass Merchandisers” in 2013, 2014, and 2015. (RX0739 at 0088 (Exhibit 4) (Murphy Report), *in camera*).

Second, the proposed finding groups together 1-800 Contacts and other online sellers and describes their average price, but 1-800 Contacts has dramatically higher pricing than other online retailers. (*See, e.g.*, Bethers, Tr. 3544-3545).

The chart relied upon by the proposed finding also groups Costco, Sam’s Club, and Walmart and calls that grouping “Mass Merchandisers,” despite the fact that Costco and Sam’s Club are not “mass merchants” under other the groupings contemplated by these proposed findings. *See* Response to Proposed Finding No. 507.

**533.** Though prices vary by SKU, Walmart offers lower prices on average than 1-800 Contacts. (CX 9037 (Owens, Dep. at 24-25)).

**Response to Proposed Finding No. 533**

This proposed finding should be rejected because it is contrary to the weight of the evidence. First, 1-800 Contacts admits that during much of the time period at issue Wal-Mart and 1-800 Contacts were in an alliance and jointly set prices and price incentives. (Bethers, Tr. 3619 (“[O]ne of the first actions we needed to take after the alliance was created was to uniform or bring the prices together so that the prices would be the same and the incentive offers would be the same.”)).

Furthermore, the proposed finding is misleading and incorrect because it does not explain whether the prices “offer[ed]” refers to the actual prices charged, net of any rebates and net of 1-800 Contacts’ substantial price match program. When prices are compared net of rebates, 1-800 Contacts admitted at trial that it charged lower prices than Walmart for many of its products.

(Bethers, Tr. 3620 (“Our rebates were greater than the instant savings offered in the alliance [with Walmart], so it meant that *our customers who were buying an annual supply actually saw their prices go up a little bit* [when 1-800 Contacts matched Walmart’s prices].”) (emphasis added)).

**534.** Dr. Evans agreed that if Costco, Walmart or mass merchandise chains were lower than 1-800 Contacts’ prices, it would make economic sense for 1-800 Contacts to consider how many customers it would lose to Costco or Walmart if it raised prices. (Evans, Tr. 1729-30; Evans, Tr. 1731-32 (“Q. So if 1-800 Contacts was going to raise their prices, one of the things they would have to think about is whether they’re going to lose business to Costco to a greater extent than they’re losing it now because the price gap between 1-800 Contacts and Costco would be increased; correct? A. Be something they’d consider.”)).

#### **Response to Proposed Finding No. 534**

Complaint Counsel has no specific response to the proposed finding, except to note that it is irrelevant on its own, and misleading in conjunction with Proposed Finding No. 535. As described below, and in response to Proposed Finding No. 524, Dr. Evans appropriately accounted for this consideration in his analysis.

**535.** Dr. Evans did not calculate the percentage of customers who would leave online suppliers for mass merchandisers if online retailers raised their prices. (Evans, Tr. 1746. (“Q. So did you in your analysis calculate the percentage of consumers who would leave online suppliers of contact lenses if prices were to go up 12 percent and switch instead to mass merchandisers? A. In terms of calculating a number for that, no.”)).

#### **Response to Proposed Finding No. 535**

The proposed finding should be rejected because it is misleading and irrelevant. In conjunction with Proposed Finding No. 534, the proposed finding suggests that Dr. Evans did not “consider” customers who would leave online suppliers for mass merchandisers if online retailers raised their prices. In fact, however, while Dr. Evans did not *calculate* a specific percentage of

customers who would leave 1-800 Contacts for mass merchandisers, Dr. Evans' analysis of diversion did include his *review* and *consideration* of surveys which contained such figures. (CX8006 at 120-123 (¶¶ 262-67) (citing survey data which does report the percentage of customers who would leave 1-800 Contacts for mass merchandisers)). However, as Dr. Evans explained, in order to *calculate* the critical loss, it is only necessary to use the diversion ratio of 1-800 Contacts customers to other online providers (40%) and, by implication, the number of customers who would switch to all other sellers in the aggregate (60%). (CX8006 at 120-124 (¶¶ 263-269)). Respondent is thus incorrect to imply that Dr. Evans' failure to calculate a diversion ratio to mass merchandisers specifically represents a failure to consider the competitive dynamics and potential impact they had in the market.

In addition, Complaint Counsel notes that Proposed Findings No. 533-534 refer specifically to 1-800 Contacts, while Proposed Finding No. 535 refers to "online retailers." In addition, Complaint Counsel notes that Walmart claims its list prices are above online retailers other than 1-800 Contacts. (CX9037 (Owens, Dep. at 23)).

**536.** Surveys have found that a higher proportion of customers who switch from 1-800 Contacts switch to Walmart or other primarily brick-and-mortar retailers than to other online retailers. (CX 1117-016).

**Response to Proposed Finding No. 536**

The proposed finding is incorrect and contrary to the weight of the evidence for the same reason Proposed Finding No. 496 is incorrect—the proposed finding relies upon survey data which does not appropriately measure "customers who switch from 1-800 Contacts." (*See* Proposed Finding No. 496; CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report)).

In addition, Complaint Counsel notes the comparison described in the proposed finding is misleading because it compares switching to a subset of suppliers in a category (that is, online retailers other than 1-800 Contacts, which comprises over 50% of online sales) with switching to

an entire other category (assuming “Walmart or other primarily brick-and-mortar” retailers is construed narrowly to mean “mass merchandisers,” although the term is vague and, if interpreted more broadly, yields an even more problematic comparison).

**537.** Trademarks play an important role in 1-800 Contacts’ ability to attract customers from ECPs. (Murphy, Tr. 4116-18, 4152-53; RX 739-0042 (Murphy Report); CX 9048 (Murphy, Dep. at 40-41, 114-16, 145)).

**Response to Proposed Finding No. 537**

This proposed finding should be rejected because it constitutes improper expert testimony beyond the scope of Dr. Murphy’s expert report. Although Respondent purports to cite Dr. Murphy’s expert report in support of this proposed finding, there is no discussion of this point in Dr. Murphy’s report; Dr. Murphy raised it for the first time in his oral testimony.

**538.** 1-800 Contacts’ brand name plays an important role in 1-800 Contacts’ ability to attract customers from ECPs. (Murphy, Tr. 4116-118, 4152-53; RX 739-0042 (Murphy Report); CX 9048 (Murphy, Dep. at 40-41, 117, 145)).

**Response to Proposed Finding No. 538**

This proposed finding should be rejected because it constitutes improper expert testimony beyond the scope of Dr. Murphy’s expert report. Although Respondent purports to cite Dr. Murphy’s expert report in support of this proposed finding, there is no discussion of this point in Dr. Murphy’s report; Dr. Murphy raised it for the first time in his oral testimony.

**539.** The fact that 1-800 Contacts’ trademarks and brand name play an important role in attracting customers from ECPs makes it economically important to consider ECPs in analyzing the market in which trademark protection affects competition. (Murphy, Tr. 4116; CX 9048 (Murphy, Dep. at 40-41, 114-16, 117, 128-32, 188, 254-55); RX 739-0042 (Murphy Report)).

**Response to Proposed Finding No. 539**

This proposed finding should be rejected because it constitutes improper expert testimony beyond the scope of Dr. Murphy’s expert report. Although Respondent purports to cite Dr. Murphy’s expert report in support of this proposed finding, there is no discussion of this point in Dr. Murphy’s report; Dr. Murphy raised it for the first time in his oral testimony.

Complaint Counsel further objects that, as described in Proposed Finding No. 511, the terms “economically important” and “consider” are not meaningful, and any market definition analysis which first concludes that ECPs must be declared a part of the relevant market *a priori* and then turns to the Bidding Agreements is incorrect. (*See* Response to Proposed Finding No. 511.) In addition, “the market in which trademark protection affects competition” is improper expert testimony beyond the scope of Dr. Murphy’s expert report. This is not a market which was proposed by Dr. Evans, or proposed by Dr. Murphy in his expert report. To the extent that this is an argument that there are economic efficiencies related to trademark protection, it is misleading to include it in Respondent’s proposed findings relating to market definition, and the substantive argument is addressed elsewhere.

***B. The Industry Recognizes That Offline And Online Sellers Compete***

**540.** Walmart views ECPs, brick-and-mortar stores, and online retailers as competitors. (CX 9037 (Owens, Dep. 13-15, 60)).

**Response to Proposed Finding No. 540**

Complaint Counsel has no specific response to the proposed finding, other than to note that Walmart has both online and in-store sales operations, and the cited evidence does not suggest that Walmart’s online operation specifically considers ECPs or brick-and-mortar stores to be close competitors.

**541.** ACLens views ECPs, brick-and-mortar stores, and online retailers as competitors. (CX 9023 (Alovis, Dep. at 8-39)).

**Response to Proposed Finding No. 541**

The proposed finding should be rejected because it is unsupported by the cited testimony. Mr. Alovis did not provide any testimony regarding AC Lens at the cited portion of his deposition transcript. And in any event he has no foundation to provide testimony about AC Lens or who AC Lens views as its main competitors, as he has never been employed by AC Lens.

**542.** In enacting the Fairness to Contact Lens Consumers Act (“FCLCA”), Pub. L. 108-164, 117 Stat. 2024 (Dec. 6, 2003), Congress found that “[t]he practice of optometrists withholding the prescription has limited the consumer’s ability to shop for the best price and has impacted competition (H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1759).

**Response to Proposed Finding No. 542**

Complaint Counsel objects to the proposed finding, which does not cite to any evidence in the record. To the extent Respondent is attempting to establish the truth of matters discussed in a House Report via judicial notice, such notice would be improper, as statements in a house report are not facts which are “not subject to reasonable dispute.” FRE 201(b); *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (holding that, while it may be appropriate to take judicial notice of the *existence* of a House Report, “[t]o the extent their contents are in dispute, such matters of controversy are not appropriate subjects for judicial notice”).

**543.** “Consumers are now offered a myriad of competitive options to fill contact lens prescriptions from the optometrist’s office, to third party sellers like pharmacies, department stores, and Internet or mail order outlets.” (H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1760).

**Response to Proposed Finding No. 543**

Complaint Counsel objects to Proposed Finding No. 543, which does not cite to any evidence in the record, nor to any source which is the proper subject of judicial notice. *See* Response to Proposed Finding No. 542.

**544.** “[D]espite the range of options, consumers continue to face a difficult time getting prescriptions filled by alternative third party sellers due to prescription verification obstacles.” (H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1760).

**Response to Proposed Finding No. 544**

Complaint Counsel objects to Proposed Finding No. 544, which does not cite to any evidence in the record, nor to any source which is the proper subject of judicial notice. *See* Response to Proposed Finding No. 542.

**545.** The FCLCA “promotes competition, consumer choice, and lower prices by extending to contact lens wearers the same automatic right to copies of their own prescriptions and allows consumers to purchase contact lenses from the provider of their choice.” (H.R. REP. 108-318, 5, 2004 U.S.C.C.A.N. 1759, 1760).

**Response to Proposed Finding No. 545**

Complaint Counsel objects to Proposed Finding No. 545, which does not cite to any evidence in the record, nor to any source which is the proper subject of judicial notice. *See* Response to Proposed Finding No. 542.

**546.** The 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. (RX 739-0043 (Murphy Report); Murphy, Tr. 4154).

**Response to Proposed Finding No. 546**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation. Further, Complaint Counsel objects to this proposed finding of fact to the extent it attributes the opinions reflected in testimony and reports here as anything more than the experts opinions of “an” economic logic behind the FCLCA, and not necessarily “the” sole economic logic behind the act.

**547.** The FCLCA directed the Commission to “undertake a study of the strength of competition in the sale of prescription contact lenses.” 15 U.S.C. § 7609.

**Response to Proposed Finding No. 547**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

**548.** In 2005, the Commission published a report entitled *The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*. (RX 569).

**Response to Proposed Finding No. 548**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

**549.** According to the Commission, “[c]ompetition will constrain an ECP’s pricing for contact lenses as long as a sufficient proportion of his patients know that they can purchase replacement lenses elsewhere, and the ECP cannot distinguish between informed and uninformed patients.” (RX 569-0024).

**Response to Proposed Finding No. 549**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

**550.** According to the Commission, “empirical evidence suggests that most consumers know that they can use a prescription from an ECP to purchase contact lenses elsewhere, including from mail-order companies.” (RX 569-0024).

**Response to Proposed Finding No. 550**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

Complaint Counsel also notes the quoted portion of the commission report is misleadingly depicted, as the quoted material is preceded by the word “some.” RX0569-0024 (“[S]ome empirical evidence suggests...”). Additionally, to the extent proposed finding no. 550 is offered to show that consumers know there are online retailers other than 1-800 Contacts, it is contrary to the record evidence in this case, which suggests that in many cases consumers were unaware that alternate online suppliers existed. (*See, e.g.,* CX0525-010 (noting 1-800 Contacts’ “unparalleled brand awareness” which was “33x that of the nearest online competitor”); Bethers, Tr. 3706 (“[W]e identified brand awareness with 1-800 Contacts and then all of our major competitors . . . and the only online player [other than 1-800 Contacts] that frequently would show up would be Vision Direct, and Vision Direct would have about -- *we'd round it up to 1 percent awareness. The other parties didn't even show up in terms of meaningful brand awareness.*”) (emphasis added)).

**551.** The FCLCA directed the Commission to “prescribe rules pursuant to section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) to carry out” the FCLCA. 15 U.S.C. § 7607.

**Response to Proposed Finding No. 551**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

**552.** According to the Commission, “[t]he development of disposable soft contact lenses, followed by the growth of ‘alternative’ retail sources of contact lenses (*e.g.,* non-eye care

practitioners), including mail order and Internet firms, and mass merchants, has given consumers a greater choice of sellers and means of delivery when they purchase contact lenses.” (RX 566-002).

**Response to Proposed Finding No. 552**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

**553.** The Commission promulgated the Contact Lens Rule, 16 C.F.R. § 315, *et seq.*, requiring ECPs to give patients a copy of their prescription in order to “increase[] consumers’ ability to shop around when buying contact lenses.” (RX 620).

**Response to Proposed Finding No. 553**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

To the extent the proposed finding is intended to prove the truth of the quoted statement,

Complaint Counsel notes that this statement is a blog post and was not an approved statement of the Commission.

**554.** The economic logic of the Commission’s Contact Lens Rule was that giving patients who purchase contact lenses from their ECPs access to their prescription would encourage entry and growth by non- ECP retailers. (CX 8006-021 (Evans Opening Report) (“The Contact Lens Rule made it easier for non-ECPs to refill contact lens prescriptions obtained from an ECP and thereby encouraged non-ECP retailers to enter and grow.”); RX 703-0001).

**Response to Proposed Finding No. 554**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

Complaint Counsel further objects to the proposed finding to the extent it misleadingly relies on expert opinions as to “an” economic logic of the Commission’s Contact Lens Rule, not the actual opinion or logic of the Commission.

**555.** According to Dr. Evans, the FCLCA and the Contact Lens Rule “provided significant opportunities for online sellers who couldn’t offer prescriptions but could sell contact lenses more conveniently and more cheaply than ECPs.” (CX 8006-105 (Evans Opening Report)).

**Response to Proposed Finding No. 555**

Complaint Counsel objects to the proposed finding as irrelevant to the present litigation.

**556.** According to the Commission, the Contact Lens Rule “was intended to facilitate the ability of consumers to comparison shop for contact lenses.” (RX 703-0001).

**Response to Proposed Finding No. 556**

Complaint Counsel objects to the Proposed Finding of Fact as misleading. RX0703 appears to be a press release describing a news event and not a Commission statement.

**557.** Manufacturers adopted UPP policies to protect ECPs from losing sales to other retailers, including online retailers. (Evans, Tr. 1764; Murphy, Tr. 4154-55; RX 739-0019 (Murphy Report)).

**Response to Proposed Finding No. 557**

Complaint Counsel has no specific response to the proposed finding.

**558.** Both manufacturers and ECPs publicly supported UPP policies because of their effect on ECPs’ ability to compete against lower priced contact lens retailers. (RX 739-0019 (Murphy Report); Murphy, Tr. 4154-55, 4172).

**Response to Proposed Finding No. 558**

This proposed finding should be rejected because it improperly relies solely on an expert to establish a factual proposition. Respondent quotes Professor Murphy, who cites two sources, not in evidence, which, even if true, do not establish that all or most manufacturers and ECPs publicly supported UPP policies for this reason. Accordingly, the proposed finding is unreliable.

**559.** It would be economically irrational for manufacturers to use resale price maintenance policies such as UPP unless ECPs were in the same relevant market as retailers that offer lower prices. (RX 739-0044 (Murphy Report)).

**Response to Proposed Finding No. 559**

Complaint Counsel objects to the proposed finding as incorrect and unsupported by the evidence cited.

First, the cited evidence does not state that it would be “economically irrational” for manufacturers to use UPPs unless ECPs were in the same market as lower-priced retailers. Instead, it states that “as a matter of economics, we would not expect to see manufacturers using policies like the UPPs unless . . . .” (RX 739 at 0044 (¶ 112) (Murphy Report)).

Second, even if it were true that the economic logic of UPP policies was in part to prevent customers from switching from ECPs to lower-priced retailers, this would not demonstrate that the two are in the same relevant market. (*See* Response to Proposed Finding No. 493; HMG § 4.1.1 (“The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.”)). To the contrary, UPP policies show that manufacturers believe ECPs are *unable* to compete effectively with online retailers in the ordinary give and take of business. If ECPs were able to compete effectively with lower-priced online sellers, lens manufacturers would not have elected to force online retailers to raise their prices by some *20 percent* across the board. (CX8006 at 127 (¶ 274) (Evans Expert Report)).

In any event, this proposed finding is irrelevant because it is often possible to define more than one market. Dr. Evans’s approach in this matter is consistent with the HMG (§4.1.1) which states: “Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.”

**560.** The economic logic of UPP policies reflects competition between online and ECPs. (RX 739-0044 (Murphy Report); Murphy, Tr. 4154-55, 4173).

**Response to Proposed Finding No. 560**

Complaint Counsel objects to the proposed finding, both because it is premised on the above, incorrect, findings, and to the extent it implies there is *sufficient* competition between online players and ECPs to mean no online market is appropriate for antitrust purposes, which is incorrect. *See* Response to Proposed Finding No. 559.

**561.** There are many omni-channel suppliers of contact lenses that supply lenses through more than one channel. (Evans, Tr. 1728; Bethers, Tr. 3529-31; CX 9037 (Owens, Dep. at 13, 15)).

**Response to Proposed Finding No. 561**

Complaint Counsel has no specific response to the proposed finding.

**562.** Walmart, Costco, Sam’s Club, BJ’s, Target, and JCPenney are omni-channel sellers of contact lenses. (Bethers, Tr. 3529-31; CX 9037 (Owens, Dep. at 13, 15)).

**Response to Proposed Finding No. 562**

Complaint Counsel objects to the proposed finding as vague and misleading. The identified retailers do not necessarily provide prescription verification or fulfillment services online. In particular, 1-800 Contacts provides “prescription verification and . . . fulfillment for orders placed on” websites operated by Luxottica, including SearsOptical.com, TargetOptical.com, ContactsDirect.com, LensCrafsters.com, PearleVision.com, and Eyemedcontacts.com. (CX0331-031, 071 (providing definition of “LUX Websites”)). Likewise, AC Lens provides fulfillment services to Walmart and Sam’s Club. (Clarkson, Tr. 196.)

There is no evidence that Costco and Sam’s Club sell to anyone outside their membership or are able to provide prescription verification online. Further, there is no evidence competitors participate in all or most channels—for example, there is no evidence any of these competitors take telephone orders.

**563.** [REDACTED] } (CX 9037 (Owens, Dep. at 26)).

**Response to Proposed Finding No. 563**

Complaint Counsel has no specific response to the proposed finding, other than to note that Walmart’s online contact lens operations are not a focus or strategic priority for the company. (CX9033 (Mohan, Dep. at 24 (“[W]e haven’t as a company made contact lens a priority.”))).

**564.** Dr. Evans, however, split Walmart’s contact lens business into online and brick-and-mortar parts for purposes of his market definition analysis. (Evans, Tr. 1726).

**Response to Proposed Finding No. 564**

Complaint counsel objects to the use of the word “however,” which implies that it is illogical or inappropriate to separate online and brick-and-mortar offerings as a part of market definition with respect to the practice at issue in this case. In fact, what Dr. Evans did is consistent with the Horizontal Merger Guidelines. (HMG § 5.2 (“In most contexts, the Agencies measure each firm’s market share based on its actual or projected revenues in the relevant market.”)).

***C. Critical Loss Analysis Shows That The Market Is Broader Than Online Sales***

**565.** Critical loss analysis is one method economists sometimes use to define relevant markets for analyzing competition. (RX 739-0076 (Murphy Report)).

**Response to Proposed Finding No. 565**

Complaint Counsel has no specific response to the proposed finding.

**566.** A critical loss analysis asks whether it would be profitable for a set of firms that make up a candidate relevant market to raise prices by some threshold level if they jointly chose their profit maximizing prices. (RX 739-0076 (Murphy Report); Murphy, Tr. 4156-57).

**Response to Proposed Finding No. 566**

Complaint Counsel has no specific response to the proposed finding, other than to note that Dr. Evans’s discussion of the critical loss analysis cites the Horizontal Merger Guidelines, which suggest that a five percent increase in price for at least one of the products controlled by the hypothetical monopolist is the appropriate “threshold level” for market definition in most cases. (CX8006 at 116-117 (¶¶ 256-57) (Evans Expert Report); HMG § 4.1.1.).

**567.** For any given price increase by a set of firms that make up a candidate relevant market, there is some critical loss in sales the set of firms would experience above which it would not be profitable to raise prices. (RX 739-0076, -077 (Murphy Report)).

**Response to Proposed Finding No. 567**

Complaint Counsel has no specific response to the proposed finding. (*See also* CX8006 at 118 (¶ 259) (Evans Expert Report)).

**568.** If the actual loss that a set of firms that make up a candidate relevant market would suffer from lost sales in response to a price increase exceeds the critical loss, raising prices would not be profitable. ((RX 739-0077 (Murphy Report)).

**Response to Proposed Finding No. 568**

Complaint Counsel has no specific response to the proposed finding. (*See also* CX8006 at 118-119 (¶ 260) (Evans Expert Report)).

**569.** A critical loss analysis depends on the diversion ratio and the margins of firms in the candidate relevant market. (RX 739-0077 (Murphy Report)).

**Response to Proposed Finding No. 569**

Complaint Counsel has no specific response to the proposed finding. (*See also* CX8006 at 119-120 (¶ 261) (Evans Expert Report)).

**570.** Whenever firms have high margins, using critical loss analysis can yield a market that is too narrowly defined. (RX 739-0079 (Murphy Report)).

**Response to Proposed Finding No. 570**

Complaint Counsel objects to this finding as incorrect and contrary to the weight of the evidence. Dr. Murphy's expert report, which is Respondent's sole source for this proposed finding, cites to no source for this statement. And the academic source Dr. Murphy cites to support his general discussion of critical loss makes precisely the opposite point, finding that the economics of the critical loss test are sound even in markets with high margins. (*See* M. Katz and C. Shapiro, "Critical Loss: Let's Tell the Whole Story," 17 *Antitrust* 49, 54 (2002-2003) ("We are not arguing for 'narrow' markets. Rather, *we are arguing for consistency and economic coherence*

in the application of the Merger Guidelines. Our approach is to follow the logical conclusions of basic economic theory. *If one does not like the answer, do not blame the logic.*”) (emphasis added) (cited at RX0739-0077 n.183)).

In contrast, Dr. Evans found that a critical loss test provided relevant information in this instance and supported the finding that contact lenses sold online was a relevant market in this case. (CX8006 at 124 (¶ 269) (Evans Expert Report)). And, elsewhere in his report and testimony, Dr. Murphy appears to agree that the critical loss test is helpful—Dr. Murphy uses the test himself. (*See, e.g.*, RX0739 at 0109 (Exhibit 22) (Murphy Expert Report), *in camera*).

**571.** A diversion ratio is the share of the firm’s lost sales that would be diverted to other firms in the candidate market in response to a price increase of some specified level. (RX 739-0077 (Murphy Report)).

**Response to Proposed Finding No. 571**

Complaint Counsel has no specific response to the proposed finding. *See also* CX8006 at 119-120 (¶ 261) (Evans Expert Report).

**572.** A critical loss analysis based on estimates of the diversion ratio from 1-800 Contacts to ECPs found in documents that Dr. Evans cites and relies on for purposes of his critical loss analysis shows that a hypothetical monopolist that owned 1-800 Contacts and all ECPs could profitably raise prices { [REDACTED] } threshold set forth in the Merger Guidelines. (RX 739-0079, -0110 (Murphy Report); Murphy, Tr. 4164-65).

**Response to Proposed Finding No. 572**

Complaint Counsel objects to the proposed finding as misleading and irrelevant. The proposed finding is misleading because the “estimates of the diversion ratio” were improper as described above in response to Proposed Finding Nos. 496 and 527. (*See* Proposed Finding No. 496; CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report) (explaining that the cited survey data does not appropriately measure customers who switch from 1-800 Contacts)). Moreover, the proposed finding is irrelevant because a hypothetical market consisting of 1-800 Contacts and all ECPs would not include any of the parties to the Bidding Agreements apart from 1-800 Contacts,

and thus would not enable any assessment of whether 1-800 Contacts and the parties to the Bidding Agreements could profitably raise prices by suppressing advertising. (*See* CX8009 at 056-057 (¶¶ 94-96) (Evans Rebuttal Report) (noting that the possibility Dr. Murphy’s methods could find a relevant market that did not bear on the practice at issue was “a fundamental analytical error”)).

**573.** A critical loss analysis based on estimates of the diversion ratio from 1-800 Contacts to ECPs found in documents that Dr. Evans cites and relies on for purposes of his critical loss analysis shows that ECPs and 1-800 Contacts constitute a relevant market. (RX 739-0079, -0110 (Murphy Report); Murphy, Tr. 4164-66).

**Response to Proposed Finding No. 573**

Complaint Counsel objects to the proposed finding as misleading, because the “estimates of the diversion ratio” were improper as described above in response to Proposed Finding Nos. 496 and 527. (*See* Proposed Finding No. 496; CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report) (explaining that the cited survey data which does not appropriately measure customers who switch from 1-800 Contacts)). Further, the proposed finding is irrelevant for the reasons described in response to Proposed Finding No. 572.

**574.** Dr. Evans did not conduct a critical loss analysis with respect to a candidate market of 1-800 Contacts and ECPs. (Murphy, Tr. 4169-70).

**Response to Proposed Finding No. 574**

Complaint Counsel objects to the proposed finding as misleading and irrelevant. As discussed, the critical loss analysis Respondent conducted is misleading and irrelevant, and the fact that Dr. Evans did not perform it is therefore irrelevant as well. (*See* Responses to Proposed Finding Nos. 572, 573).

**575.** Where a critical loss analysis defines more than one candidate market, economists look to direct evidence of effects in the market. (Murphy, Tr. 4170; CX 9048 (Murphy Dep. at 141-42)).

**Response to Proposed Finding No. 575**

Complaint Counsel objects to the proposed finding as improper expert testimony beyond the scope of Dr. Murphy’s expert report, which does not contain any discussion of the proposed finding.

Complaint Counsel additionally objects that the proposed finding is contrary to the weight of the evidence. Dr. Evans’s report explained that it was important to begin with the practice at issue—put another way, when there are multiple candidate markets as the result of a critical loss analysis, economists do not simply look elsewhere, but instead choose the market that best helps them to evaluate the competitive effects. (CX8009 at 056-057 (¶¶ 94-96) (Evans Rebuttal Report); *see also* HMG § 4.1.1 (“The Agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.”)).

***D. Dr. Evans’ Critical Loss Analysis Is Flawed And Unreliable***

**576.** In order to be reliable, a critical loss analysis must be based on reliable estimates of actual diversion ratios. (RX 739-0077 (Murphy Report)).

**Response to Proposed Finding No. 576**

Complaint Counsel has no specific response.

**577.** Dr. Evans cited but did not rely on surveys that provide a wide range of data regarding the percentage of 1-800 Contacts customers that actually switched to other online retailers as compared to ECPs or mass merchants. (RX 739-0078 (Murphy Report); CX 8006-120 to -122 (Evans Report)).

**Response to Proposed Finding No. 577**

Complaint Counsel objects to the proposed finding as misleading, incorrect and contrary to the weight of the evidence, because Dr. Evans did in fact rely on the surveys the proposed finding refers to. Although Dr. Evans ultimately used a single diversion ratio in his critical loss analysis,

he did so after reviewing the evidence regarding diversion ratios and concluding that other diversion ratios provided consistent estimates. (CX8006 at 120-121 (¶¶ 263-267) (Evans Expert Report)). He relied on these estimates to conclude that, considering all the evidence, 40% was the most reasonable estimate of the likely diversion ratio. *Id.*

Dr. Evans also relied on these alternative estimates to conclude that, even if his initial estimate of diversion was somehow incorrect, the critical loss analysis still suggested that the online sale of contact lenses constituted a relevant market. (CX8009 at 062 (¶ 106) (Evans Rebuttal Report)); *see also* Response to Proposed Finding No. 576).

**578.** Some of the surveys that Dr. Evans cited found that as few as 17 percent of 1-800 Contacts' former customers have substituted to other online suppliers. (RX 739-0078 (Murphy Report); CX 8006-122 (Evans Report); CX 1117-016).

#### **Response to Proposed Finding No. 578**

Complaint Counsel objects to the proposed finding as misleading and incorrect. As Dr. Evans explained at length, the 17% switching data the proposed finding cites to is not an appropriate measure of substitution in the context of a diversion ratio. (*See* Response to Proposed Finding No. 496).

In addition, the proposed finding mischaracterizes the 17% figure as originating in different data than the data Dr. Evans ultimately used. In fact, the 17% figure comes from the same survey Dr. Evans found contained a 40% diversion ratio. (CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report)). The other surveys discussed by cited by Dr. Evans suggest diversions ratio of either { [REDACTED] }. *Id.* at 061-062 (¶ 106 n 143), *in camera*.

**579.** Applying Dr. Evans' critical loss methodology, using the switching data that Dr. Evans cited but did not rely on, results in findings that it would not be profitable for a candidate market of online firms to raise prices by more than the 5 percent standard set forth in the Merger Guidelines. (RX 739-0078, -0109 (Murphy Report); Murphy, Tr. 4166-68).

**Response to Proposed Finding No. 579**

The proposed finding should be rejected because it is incorrect. Dr. Evans cited data indicating diversion ratios of { [REDACTED] } (CX8009 at 061-062 (¶ 106 n 143) (Evans Rebuttal Report)). Either of these estimates of diversion ratios would still lead to a conclusion that the critical loss test supported a relevant market, as both Dr. Evans and Dr. Murphy found that any diversion ratio of 23% or more would lead to a conclusion that the critical loss test supported a relevant market. (CX8009 at 061 (¶ 106) (Evans Rebuttal Report); RX0739 at 0078 (¶ 216) (Murphy Expert Report)). While Dr. Evans concluded that the most reliable estimate of diversion was 40%—well above the 23% threshold—he also noted that even if this estimate were incorrect, other potential estimates diversion all exceeded 23%. (CX8009 at 062 (¶ 106 & n.143) (Evans Rebuttal Report)).

Applying Dr. Evans' critical loss methodology using diversion ratios from the alternate studies Dr. Evans analyzed, the critical loss analysis would still suggest a relevant market. The *only* way to find that no relevant market exists is to use 17% as the appropriate measure of diversion, but the 17% figure is an inappropriate measure of diversion. (*See* Response to Proposed Finding No. 496).

**580.** Applying Dr. Evans' critical loss methodology, using the switching data that Dr. Evans cited but did not rely on, yields the conclusion that the relevant market is broader than online sales of contact lenses. (RX 739-0078 (Murphy Report); Murphy, Tr. 4166-68).

**Response to Proposed Finding No. 580**

The proposed finding should be rejected because it is incorrect. *See* Response to Proposed Finding No. 579.

**581.** In his teaching regarding the diversion ratio in critical loss analysis, Dr. Evans has cited a survey that asked customers of two parties to a merger about where they would buy if their current supplier raised prices. (Evans, Tr. 1770-1772).

**Response to Proposed Finding No. 581**

Complaint Counsel objects to the proposed finding as misleading and irrelevant. In the present case—which is not a merger, and where the concern is that prices are currently supra-competitive, not that there will be a potential future price increase above currently competitive levels—the question of whether 1-800 Contacts would lose customers if it raised its prices above the current level is not an appropriate measure of diversion. (Evans, Tr. 1770 (“[W]hat you want to know is what [1-800 Contacts] would lose to those other online contact lens rivals if they raised their prices; correct? That is, if 1-800 Contacts raised its prices. A. No.”)). As Dr. Evans explained, a diversion ratio based on customers who have actually switched away from 1-800 Contacts at its current price level is a better estimate of the diversion for purposes of market definition in this case. CX8006 at 117-118 (¶ 258) (Evans Expert Report)). A question Dr. Evans used in his teaching regarding a hypothetical merger is not relevant.

**582.** For purposes of his analysis in this case, Dr. Evans calculated the diversion ratio without conducting or relying on any survey of contact lens customers about where they would buy contact lenses if 1-800 Contacts or other online sellers raised their prices by 10 percent or by any other amount. (Evans, Tr. 1773, 1776).

**Response to Proposed Finding No. 582**

Complaint Counsel objects to the proposed finding because it is irrelevant. Although the proposed finding implies that a survey is the only method which may be used to obtain a diversion ratio, in fact, courts have found that appropriate switching data may be used as a proxy for diversion. (CC Post-Trial Reply Br. at 91-95.)

In addition, the proposed finding is misleading because the relevant question is not diversion in response to a 1-800 Contacts price increase, but instead whether sufficient customers would switch if all online sellers increased their prices. As Dr. Evans testified, “a hypothetical 10

percent price increase [is] just divorced from the two analyses that I've done" and would not provide information relevant to the market definition analysis. (Evans, Tr. 1791; *see also* Response to Proposed Finding No. 581).

**583.** Dr. Evans based his critical loss analysis on the results of a so-called "Deadfile" survey, CX 1117-015. (Evans, Tr. 1452-1454). Among other things, the survey asked respondents to rate on a 0 to 10 scale how likely they were to make their next purchase of contact lenses from 1-800 Contacts. (Evans, Tr. 1452-1454; CX 1117-015).

**Response to Proposed Finding No. 583**

Complaint Counsel has no specific response to the proposed finding, other than to note that 1-800 Contacts, not Dr. Evans, came up with the name of the "Deadfile" survey. (CX1117-002).

**584.** According to Dr. Evans, some 40 percent of respondents who responded with a number between 0 and 5 reported that they would likely make their next purchase of contact lenses from another online retailer. However, Dr. Evans did not know what question the respondents were asked after being asked to rate on a 0 to 10 scale how likely they were to make their next purchase of contact lenses from 1-800 Contacts. (Evans, Tr. 1782-1783).

**Response to Proposed Finding No. 584**

Complaint Counsel objects to the proposed finding as incorrect and irrelevant. The 40% figure comes from a 1-800 Contacts document, not from Dr. Evans, and reflects 1-800 Contacts' determination that "40% of those not likely to come back will go to another online supplier." (CX1117 at 015).

It is, thus, irrelevant how the survey was conducted. In any event, however, Dr. Evans testified that as a professional "consumer of these kinds of surveys," he found the reporting of the survey results to be "clear" and "standard." (Evans, Tr. 1783-84).

**585.** The "Deadfile" survey did not ask consumers what they would do if 1-800 Contacts raised prices. (Evans, Tr. 1777).

**Response to Proposed Finding No. 585**

Complaint Counsel objects to the proposed finding as irrelevant. *See* Response to Proposed Findings No. 581-582.

**586.** Dr. Evans did not know whether the respondents in the “Deadfile” survey were randomly selected or were representative of 1-800 Contacts’ customers. (Evans, Tr. 1777-78).

**Response to Proposed Finding No. 586**

Complaint Counsel objects to the proposed finding as irrelevant. Both Dr. Evans and Dr. Murphy made use of the survey data, concluding that it was reliable evidence of diversion. (CX8006 at 121-122 (¶ 266) (Evans Expert Report); Murphy, Tr. 4275 (“I tried to use rates that came out of the kind of documents that he was looking at . . . .”); RX0739 at 0102 (Exhibit 15) (Murphy Expert Report) (reporting diversion data from “deadfile” surveys, although disagreeing with Dr. Evans as to the correct number to use from the surveys)).

**587.** The “Deadfile” survey included respondents who did not make their last purchase from 1-800 Contacts. (Evans, Tr. 1779).

**Response to Proposed Finding No. 587**

Complaint Counsel has no specific response to the proposed finding, other than to note that, as Dr. Evans explained and accounted for in his analysis, this was a survey of former 1-800 Contacts customers who “haven’t purchased from [1-800 Contacts recently],” which includes both customers who have not made any purchase recently as well as customers who most recently purchased elsewhere.

**588.** Dr. Evans did not survey any consumers of online sellers other than 1-800 Contacts. (Evans, Tr. 1787-88).

**Response to Proposed Finding No. 588**

Complaint Counsel has no specific response to the proposed finding, other than to note that Dr. Evans did not survey *anyone* as a part of his analysis—he relied on credible survey summaries created and relied on by 1-800 Contacts and its agents and investors in the ordinary course of their business. These surveys included data from customers of online sellers other than 1-800 Contacts.

**589.** The “Deadfile” survey found that more than 50 percent of surveyed former 1-800 customers made their last purchase from an independent ECP or optical chain. (CX 1117-016).

**Response to Proposed Finding No. 589**

The proposed finding is misleading and incorrect. The survey does not show “former 1-800” customers at the cited page; the source material includes many customers who are current 1-800 Contacts customers but last purchased from an ECP due to a change in circumstance. As Dr. Evans explained, many of the participants in the deadfile survey who last purchased from ECPs did so due to a change in circumstance (e.g., they were at their doctor’s office) and reported that they are likely to purchase from 1-800 Contacts or another online supplier again for their next purchase. (See CX8009 at 060-061 (¶ 105) (Evans Rebuttal Report); CX1117-017 (58% of the survey participants who did not make their last purchase from 1-800 Contacts reported that they were likely to make their *next* purchase from 1-800 Contacts)).

**590.** The “Deadfile” survey found that only 17 percent of surveyed former 1-800 customers made their last purchase from another online retailer. (CX 1117-016).

**Response to Proposed Finding No. 590**

The proposed finding is misleading and incorrect because the survey does not show “former 1-800” customers at the cited page, and because the 17 percent is not an appropriate measure of diversion from 1-800 to other online retailers. (See Response to Proposed Finding Nos. 496, 589.)

**591.** Dr. Evans did not include paid advertising expenses in calculating the contribution margin for 1-800 Contacts that he used in his critical loss analysis. (Evans, Tr. 1797).

**Response to Proposed Finding No. 591**

Complaint Counsel has no response to the proposed finding, other than to note that Dr. Evans noted he followed 1-800 Contacts’ own definition of its contribution margin, and that “[t]he exclusion of most marketing expenses as a variable cost makes sense in this context because a

rival would not need to increase its marketing to obtain additional customers that were driven to it by a price increase by its rivals.” (CX8006 at 123 (¶ 268) (Evans Expert Report)).

**592.** Dr. Evans claims that if online sellers raised their prices by 10 percent, some 40 percent of their customers would switch to 1-800 Contacts. (Evans, Tr. 1793-94). However, Dr. Evans has no data regarding where customers of online sellers other than 1-800 Contacts would buy their contact lenses if online sellers raised their prices by 10 percent. (Evans, Tr. 1788).

#### **Response to Proposed Finding No. 592**

Complaint Counsel objects to the proposed finding as misleading and incorrect because Dr. Evans did in fact use data and documentary evidence to draw a conclusion regarding the diversion ratio of other online sellers to 1-800 Contacts. Dr. Evans determined that the diversion ratio from 1-800 Contacts to other online suppliers, which came from survey data, was a reasonable estimate for the diversion ratio from other suppliers to 1-800 Contacts. He determined that this would be a reasonable and conservative assumption because many of these customers had previously purchased from 1-800 Contacts. (CX8006 at 122-123 (¶ 267)).

**593.** Dr. Evans agreed that the hypothetical monopolist test was a valiant but problematic effort to draw a boundary around a set of firms at a particular distance from the original product considered. (Evans, Tr. 1745).

#### **Response to Proposed Finding No. 593**

Complaint Counsel objects to the proposed finding as irrelevant, as it dealt with the application of the hypothetical monopolist test to a particular hypothetical situation outlined in an academic paper, which has no relevance to the present case.

**594.** In order to be reliable, a critical loss analysis must be based on reliable estimates of actual diversion ratios. (RX 739-0077) (Murphy Report). Because Dr. Evans’ critical loss analysis does not meet this standard, and for the other reasons stated above, the analysis is unreliable and entitled to no weight.

#### **Response to Proposed Finding No. 594**

Complaint Counsel objects to the proposed finding, which relies upon all of the previous findings in this section, for the reasons stated above. *See* Responses to Proposed Findings 565-

593. In addition, Complaint Counsel notes that Dr. Murphy conceded, in his deposition, that a reliable critical loss analysis would find that online sales are a market, although he disputed that it was the relevant market for this case. (CX9048 (Murphy, Dep. at 141 (“[L]et’s lump 1-800 with the online guys, on the other hand, let’s lump 1-800 with the other guys. *Either one would pass the SSNIP test to qualify as a relevant market.*”) (emphasis added))).

***E. Dr. Evans’ UPP “Natural Experiment” Is Flawed***

**595.** Prices during UPP would only provide an appropriate natural experiment for conducting critical loss analysis of an online market for contact lenses if it increased prices only for online retailers. (RX 739-0079 (Murphy Report)).

**Response to Proposed Finding No. 595**

The finding should be rejected because the cited paragraph in Dr. Murphy’s report cites to no evidence to support the proposed finding. To the contrary, Dr. Murphy admits that Dr. Evans’ UPP natural experiment does allow the inference that “a hypothetical monopolist that controlled all non 1-800 online retailers and mass merchants could profitably raise prices by more than 5 percent.” (RX0739 at 0079-0080 (¶ 221) (Murphy Expert Report)). Dr. Evans separately explained that appropriate market definition analysis starts with 1-800 Contacts, and that other evidence allowed him to conclude that club stores (which are the “mass merchants” to which Dr. Murphy is referring) are not a part of the market. (CX8009 at 056, 062-063 (¶¶ 94, 108) (Evans Rebuttal Report)).

**596.** Club stores such as Costco increased contact lens prices as a result of UPP. (Evans Tr., 1441-42 (“what we observed in the 2015-’15 period is there was an across-the-board increase for the – most of the online firms, and I should add here, this is also true for the club stores, principally Costco.”); Evans, Tr. 1445; Murphy, Tr. 4172-73; Bethers, Tr. 3675-76).

**Response to Proposed Finding No. 596**

Complaint Counsel has no specific response to the proposed finding.

**597.** Walmart increased some contact lens prices as a result of UPP. (Bethers, Tr. 3676; CX 9037 (Owens, Dep. at 79-80)).

**Response to Proposed Finding No. 597**

Complaint Counsel has no specific response to the proposed finding, other than to note that there is no evidence to suggest that Walmart increased contact lens prices by a significant amount or on many products. (CX9037 (Owens, Dep. at 79-80) (“Q. Did it end up increasing your retail prices or -- A. In some instances it increased. In some instances it may have decreased a little bit.”). Mr. Bethers’ testimony that Walmart increased prices “across the board” in response to UPP is clearly contradicted by Mr. Owens’ testimony and suggests his statement was made without personal knowledge.

**598.** UPP is not a natural experiment to analyzing a candidate market of online contact lens retailers. (RX 739-0079 (Murphy Report); Evans, Tr. 1446, 1748; Murphy, Tr. 4173).

**Response to Proposed Finding No. 598**

Complaint Counsel objects to the proposed finding as misleading and contrary to the weight of the evidence. The UPP was a real life event. Insofar as the proposed finding is intended to mean that the UPP provides no evidence regarding the basis on which to assess Dr. Evans’ candidate market, the weight of the evidence is clearly to the contrary; the proposed finding cites nothing more than Dr. Murphy’s pronouncement, while ignoring that Dr. Evans was in fact able to infer significant relevant information from the UPP. (CX8006 at 124-129 (§ VI.3) (Evans Expert Report)). While the information which could be inferred from the UPP is not the exact same as the information which could be inferred if a controlled experiment could be run, the fact that online discounters and club stores were able to profitably increase prices is, *inter alia*, strong evidence that a relevant market can be defined without ECPs, which Respondent contests.

Indeed, Dr. Evans found that the UPP allowed the profitable imposition of a 20% price increase, well above the 5% threshold price increase at which it would be appropriate to define a

market. (CX8006 at 127 (¶ 274) (Evans Expert Report)). Thus, the UPP provides extremely strong evidence that a relevant market can be defined without ECPs.

**599.** Dr. Evans agreed that that his analysis of online retailers’ profits during UPP does not indicate anything about the extent of competition between Costco and online contact lens retailers. (Evans, Tr. 1446, 1748).

**Response to Proposed Finding No. 599**

Complaint Counsel has no specific response to the proposed finding, other than to note that Dr. Evans relied on other evidence to determine that club stores are not part of the relevant market, including { [REDACTED] } (CX8006 at 127-128 (¶ 276) (Evans Expert Report), *in camera*; see also CX9003 (Clarkson, Dep. at 183-185) (“They’re 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 . . . .”).

**600.** Repeat customers are one of the most important aspects of an online business. (Evans, Tr. 1750).

**Response to Proposed Finding No. 600**

Complaint Counsel has no specific response to the proposed finding, other than to note that the critical loss analysis examines the effect of a price increase on all sales without distinguishing between repeat customers and new customers.

**601.** A critical loss analysis should account for the effect of a price increase on firms’ ability to attract new customers. (Murphy, Tr. 4158-59).

**Response to Proposed Finding No. 601**

Complaint Counsel objects to the proposed finding as improper expert testimony beyond the scope of Dr. Murphy’s expert report. There is no discussion of this point in Dr. Murphy’s report; Dr. Murphy raised it for the first time in his oral testimony.

Moreover, the proposed finding is misleading and incorrect. As Dr. Evans explained when cross-examined on this point, from the perspective of an individual firm, a price increase “ties a hand behind your back and you’re not able to compete as aggressively with all the other firms,” but that is *not* evidence that the candidate market is not a market because “if you’re talking about the hypothetical monopolist, in effect everyone -- everyone has raised their prices.” (Evans, Tr. 1753.) The critical loss analysis need not consider the effect on an individual firm’s ability to attract new customers because that is “a different experiment in a different situation.” *Id.*

**602.** UPP made it very difficult for ACLens to attract new customers, which made UPP a “long-term disaster” for ACLens. (Clarkson, Tr. 198).

**Response to Proposed Finding No. 602**

Complaint Counsel objects to the proposed finding as misleading and irrelevant insofar as AC Lens’ ability to attract new customers is not relevant to the critical loss analysis. Professor Evans’ analysis showed that, *as a group*, online sellers were able to attract enough customers to make a 20 percent price increase profitable. (Evans, Tr. 1753). Moreover, any difficulty the online discounters might face in attracting new customers would likely be due to a difficulty in attracting new customers from 1-800 Contacts itself, because they were no longer able to undercut 1-800 Contacts’ prices due to the UPPs. (Evans, Tr. 1755-1756).

Complaint Counsel also notes that Mr. Clarkson agreed the UPP increased AC Lens’ short-term profits and did not identify any problem with the UPP other than the inability to attract new customers. (Clarkson, Tr. 198).

**603.** Dr. Evans, however, made no effort to quantify the extent to which online sellers lost new customers as a result of UPP. (Evans, Tr. 1752).

**Response to Proposed Finding No. 603**

Complaint Counsel objects to the proposed finding as misleading and incorrect. Dr. Evans’ analysis of UPP profit margins necessarily includes an analysis of the extent to which

online sellers lost new customers as a result of UPP. (*See, e.g.*, CX8006 at 127 (Table 7) (Evans Expert Report)).

To the extent the proposed finding is intended to assert that Dr. Evans did not quantify the extent to which the UPP was harmful, in the long run only, to online sellers, such a fact is misleading and irrelevant to the UPP analysis for the reasons described above. *See* Response to Proposed Finding Nos. 600-602.

**604.** For these reasons, Dr. Evans' UPP "natural experiment" is unreliable and entitled to no weight.

**Response to Proposed Finding No. 604**

Complaint Counsel objects to the proposed finding, which relies upon the prior findings in this section, for the reasons stated above. *See* Responses to Proposed Findings of Fact 595-603

***F. Dr. Evans Lacks Any Basis To Treat Online Sales Differently Because They Are More Convenient***

**605.** For consumers who regularly shop at a club store, there is very little difference in convenience of buying contact lenses in person or online. (Evans, Tr. 1731).

**Response to Proposed Finding No. 605**

The proposed finding should be rejected because it is not supported by the cited testimony. Dr. Evans agreed with the hypothetical suggestion that "if you purchased the contact lenses from a brick-and-mortar seller in conjunction with a trip you otherwise would have made, there's not much difference in the convenience" between in-store purchases and online purchases. (Evans, Tr. 1731). This hypothetical assumes that the customer successfully *made the purchase at the store*, and thus that the store had the lenses in stock.

Dr. Evans did not testify that "consumers who regularly shop at a club store" would be able to make purchases from in-stock contact lenses, and no such suggestion is warranted, as the evidence shows that "Costco could fill at most 30 percent of prescriptions from the inventory it carried in its stores." (Coon, Tr. 2876). Likewise, Mr. Bethers testified that there are a

“meaningful” number of 1-800 Contacts customers who are Costco members but buy from 1-800 Contacts because Costco does not have their lenses in stock. (CX9001 (Bethers, IHT at 241-242)).

**606.** Doctors do not always have in stock the contact lenses that their patients purchase. (Evans, Tr. 1437).

**Response to Proposed Finding No. 606**

Complaint Counsel has no specific response to the proposed finding.

**607.** Dr. Evans did not know what proportion of contact lens orders ECPs could fill by mail or that were shipped directly to patients by ECPs’ major distributor, ABB. (Evans, Tr. 1439, 1441, 1689 (“Q. And can you tell us what percentage of ABB’s sales were made of shipments that ultimately went from ABB directly to a patient on behalf of a physician.” A. No.”)).

**Response to Proposed Finding No. 607**

Complaint Counsel objects to the proposed finding as misleading and incorrect. Dr. Evans testified that ECPs’ major distributor, ABB, shipped only a “small percentage” of orders through the site ABB provides to doctors to allow their patients to order contacts online. (Evans, Tr. 1688 (“Q. Okay. And you didn’t investigate ECP websites as part of your work in connection with this case, did you? A. That’s not correct.”); CX8006 at 022-023 (¶ 54 n.15) (Evans Expert Report), *in camera* (“In {█}, ABB filled {█} million of contact lens orders placed through [its online sales website] yourlens.com, which represents less than {█} percent of online contact lens sales.”)).

**V. 1-800 Contacts Lacks Market Power**

**A. *There Is No Direct Evidence That 1-800 Contacts Has Market Power Because There Is No Evidence That It Is Charging Supracompetitive Margins***

**608.** One way that economists typically assess whether a firm has monopoly power is to look for direct evidence that the firm is charging monopoly prices. (RX 739-0073 (Murphy Report)).

**Response to Proposed Finding No. 608**

Complaint Counsel has no specific response to the proposed finding.

**609.** Another way that economists typically assess whether a firm has monopoly power is to indirectly infer that a firm has monopoly power by defining the market in which the firm competes and calculating its share in that putative market. (RX 739-0073 (Murphy Report)).

**Response to Proposed Finding No. 609**

Complaint Counsel has no specific response to the proposed finding.

**610.** Economists generally prefer to use direct evidence to determine whether a firm has monopoly power because the market definition exercise required for the indirect method can be imprecise. (RX 739-0074, -0075 (Murphy Report)).

**Response to Proposed Finding No. 610**

Complaint Counsel objects to the proposed finding as incorrect. Although Dr. Murphy cites the Horizontal Merger Guidelines to support this proposed finding, those guidelines do not support the statement. Instead, the guidelines suggest the two sources have equal weight. HMG § 4 (“Evidence of competitive effects can inform market definition, *just as* market definition can be informative regarding competitive effects.”) (emphasis added). The guidelines do say that direct evidence of *effects*, not market power, may reduce the need to define a market in the first place. *Id.* But that speaks to Dr. Murphy’s approach elsewhere in his analysis and not to the question of whether market shares or competitive effects are preferable to show market power for purposes of market definition.

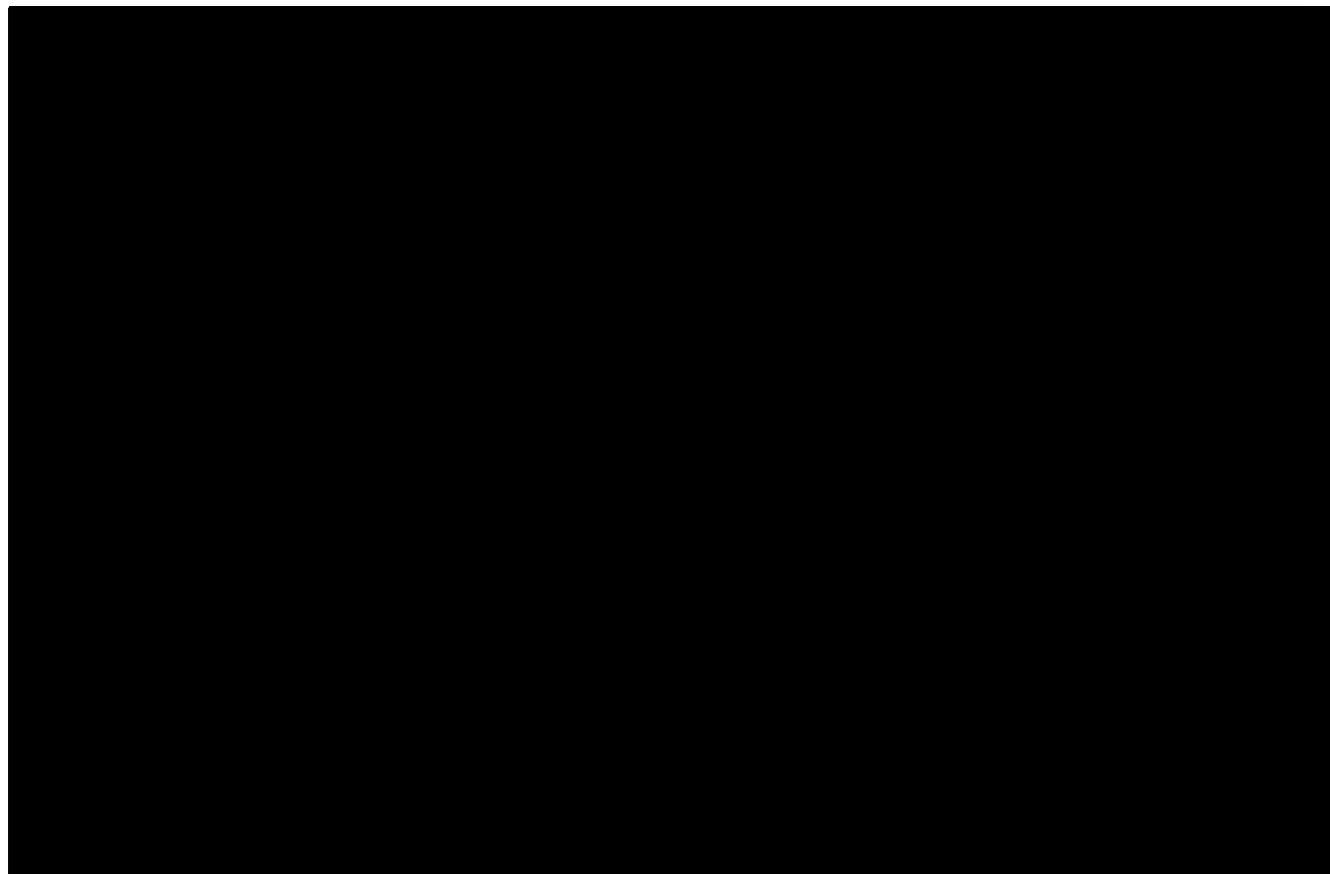
**611.** Direct evidence of monopoly power is particularly preferable when market definitions lead to very different calculations of market shares. (RX 739-0074 (Murphy Report)).

**Response to Proposed Finding No. 611**

Complaint Counsel objects to the proposed finding as incorrect. Although Dr. Murphy cites to the 2010 Horizontal Merger Guidelines to support the proposed finding, the guidelines suggest that “direct forms of evidence concerning those [competitive] effects” is helpful “[w]here analysis suggests alternative *and reasonably plausible* candidate markets.” HMG § 4. Here, Dr. Evans did present direct evidence of effects, which is distinct from direct evidence of market power for the purposes of market definition. Additionally, in this case there are not two

reasonably plausible markets. Dr. Murphy has posited a market consisting of all contact lens sales. But the guidelines note that narrowly defined markets are preferable to broad markets when both meet market definition criteria. *Id.*

**612.** { [REDACTED] }  
[REDACTED] } (RX 739-0064, -0107 (Murphy Report); Murphy, Tr. 4198-99). { [REDACTED] }



}

(RX 739-0107 (Murphy Report)).

**Response to Proposed Finding No. 612**

Complaint Counsel has no specific response to the proposed finding.

613. { [REDACTED] }  
 (RX 739-0074, -075 (Murphy Report); Murphy, Tr. 4198-99).

**Response to Proposed Finding No. 613**

Complaint Counsel objects to the proposed finding as contrary to the weight of the evidence. Dr. Evans presented evidence that 1-800 Contacts' margins substantially exceed those of its main rivals. (CX8006 at 123 (Evans Expert Report)).

In addition, the record contains significant evidence that the components of margin—price and incremental cost—were affected by the Bidding Agreements, including that (1) 1-800 Contacts sets its prices substantially above those of many of its rivals (CX8006 at 085 (¶268) (Evans Expert Report); CX8007 at 013-014 (¶¶31-33)(Athey Expert Report)); (2) differences in quality cannot explain 1-800 Contacts' price premium (CX8007 at 016-019 (¶¶42-50)(Athey Expert Report)); and (3) differences in incremental cost cannot explain 1-800 Contacts' price premium (RX0447 at 133-134, *in camera*).

1-800 Contacts' price match program also provides evidence that its margins are supracompetitive. When consumers use 1-800 Contacts' price match program, its contribution margin shrinks from roughly 35 percent (CX8006 at 123 (¶ 268) (Evans Expert Report)) to { [REDACTED] } (CX1334 at 009, *in camera*).

Finally, Dr. Evans found that 1-800 Contacts' gross margin declined when more rival ads are placed on searches for 1-800 Contacts branded queries. (CX8009 at 092-096 (¶¶175-181) (Evans Rebuttal Report)).

**614.** Dr. Evans has not analyzed 1-800 Contacts' margins. (RX739 at 075 (Murphy Expert Report)).

**Response to Proposed Finding No. 614**

The proposed finding should be rejected because it is incorrect. Dr. Evans conducted a detailed analysis of 1-800 Contacts margins and found that the evidence suggested 1-800 Contacts had been able to earn supracompetitive margins. *See* Response to Proposed Finding No. 613.

In addition, Complaint Counsel notes that margins were analyzed by Dr. Evans as part of the critical loss test he conducted for market definition. (CX8006 at 123 (¶ 268) (Evans Expert Report)).

***B. 1-800 Contacts And The Other Settling Parties' Share Of All Retail Sales Is Too Small To Reflect Market Power***

**615.** [REDACTED] (RX 739-0087 (Murphy Report); Murphy, Tr. 4103-04).

**Response to Proposed Finding No. 615**

Complaint Counsel objects to the proposed finding as irrelevant. In the relevant market for the sale of contact lenses online, Dr. Evans calculated that 1-800 Contacts had a share of 53.6%, while Dr. Murphy calculated 1-800 Contacts' 2011-2015 share as between [REDACTED]. (CX8006 at 023 (Table 1) (Evans Expert Report); RX0739 at 0087, *in camera* (Exhibit 3) (Murphy Expert Report)). And 1-800 Contacts documents suggest a market share of [REDACTED]. RX0428 at 005, *in camera* [REDACTED] [REDACTED].

**616.** A firm that makes 10 percent of sales in a market cannot exercise market power. (RX 739-0038, -0044 (Murphy Report)).

**Response to Proposed Finding No. 616**

The proposed finding should be rejected because it is irrelevant. *See* Response to Proposed Finding No. 615. In addition, the proposed finding is inconsistent with Respondent's own

assertion that an inference from market share is only one of the ways in which market power may be proved.

**617.** 1-800 Contacts lacks market power in the overall retail market for contact lenses. (RX 739-0038, -0044 (Murphy Report)).

**Response to Proposed Finding No. 617**

The proposed finding should be rejected because it is irrelevant. *See* Response to Proposed Finding No. 615.

Additionally, while a broader market of all contact lens sales would include the online market, Dr. Evans clearly explained why using this broader market to calculate market shares and then use them to gauge market power would be wrong. (Evans Tr. 1540-1544). Dr. Evans' explanation of this point is consistent with the logic outlined in the Merger Guidelines §4.1.1. (HMG § 4.1.1 (“Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.”)).

**618.** Together, 1-800 Contacts and the other settling parties account for less than { [REDACTED] } of contact lens sales. (RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 618**

The proposed finding should be rejected because it is irrelevant. As Dr. Evans explained, the use of { [REDACTED] } as a market share figure in the context of market definition is highly misleading because the putative market includes “ECPs and other physical retailers who price higher than 1-800 Contacts, and much higher than the online discounters,” without any evidence that “higher priced physical retailers impose any competitive constraint on 1-800 Contacts’ efforts to suppress competition by low-priced online retailers.” (CX8009 at 057-058 (¶¶ 97-98) (Evans Rebuttal Report)).

**619.** Firms that make { [REDACTED] } of sales in a market cannot exercise market power (RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 619**

The proposed finding should be rejected because it is irrelevant. *See* Response to Proposed Finding No. 618. In addition, the proposed finding is inconsistent with Respondent's own assertion that an inference from market share is only one of the ways in which market power may be proved.

**620.** 1-800 Contacts and other settling parties do not jointly have market power in the overall retail market for contact lenses. (RX 739-0038, -0044 (Murphy Report)).

**Response to Proposed Finding No. 620**

The proposed finding should be rejected because it is irrelevant. *See* Response to Proposed Finding No. 617. In addition, even if one assumed a market for the overall retail sale of contact lenses, the proposed finding would be incorrect and contrary to the weight of the evidence because there is significant direct evidence that the Bidding Agreements had anticompetitive effects.

***C. There Are No Barriers To Entry Or Expansion For Online Contact Lens Retailers And 1-800 Contacts, And The Other Settling Parties Lack Market Power In A Market For Online Sales Of Contact Lenses***

**621.** 1-800 Contacts lacks market power even in a market for online sales of contact lenses. (RX 739-0038, -0044 (Murphy Report)).

**Response to Proposed Finding No. 621**

The proposed finding should be rejected because it is incorrect and contrary to the weight of the evidence. The evidence demonstrates that 1-800 Contacts 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*).

**622.** 1-800 Contacts and other settling parties do not jointly have market power even in a market for online sales of contact lenses. (RX 739-0038, -0044 to 46 (Murphy Report)).

**Response to Proposed Finding No. 622**

The proposed finding should be rejected because it is incorrect and contrary to the weight of the evidence. First, the citations to Dr. Murphy's report do not support the proposed finding. Dr. Murphy discusses (1) the market share of 1-800 Contacts alone in a market for all contact lenses, (2) the market share of 1-800 Contacts and other parties to the Bidding Agreements in a market for all contact lenses, and (3) the market share of 1-800 Contacts alone in a market for online sales of contact lenses. (RX0739 at 0038 (¶95) (Murphy Expert Report)). He does not mention or analyze the market share of 1-800 Contacts and other parties to the Bidding Agreements in a market for online sales of contact lenses, and so does not consider whether, in this scenario, their market share would support an inference of market power. *Id.*

In contrast, Dr. Evans did calculate such a market share—79%—and explained that such a share creates a strong presumption of market power. (CX8006 at 130 (¶ 279) (Evans Expert Report)). Dr. Evans then went on to confirm that the presumption of market power was appropriate in this case. (CX8006 at 130-131 (¶¶ 280-283)(Evans Expert Report)).

**623.** Whether a firm or firms with a market share of approximately { } can have monopoly power depends, in part, on the supply elasticity of other firms in the industry. (RX 739-0044 (Murphy Report); Evans, Tr. 1699; CX 8006-130 (Evans Opening Report)).

**Response to Proposed Finding No. 623**

Complaint Counsel has no specific response to the proposed finding, other than to note that it appears undisputed that a firm with a market share of approximately 50 percent *can have* monopoly power, but that whether the firm *does have* monopoly power depends on other factors. In this case, the evidence suggests 1-800 Contacts, by itself, does have market power. *See* Response to Proposed Finding No. 621. The proposed finding also omits any discussion of the higher market share of 1-800 Contacts and its counterparties, who collectively have a 79% share

and provide the only potential source of supply elasticity. *See* Response to Proposed Finding No. 622.

**624.** Firms’ ability to jointly exercise monopoly power depends on their ability to agree on a method for reducing output. (RX 739-0046 (Murphy Report)).

**Response to Proposed Finding No. 624**

The proposed finding should be rejected because it is not supported by the material cited. Dr. Murphy cites no support for this statement. In contrast, Dr. Evans relies upon extensive economic literature concluding that a reduction in informative advertising leads to higher prices even when there is no agreed-upon method for reduction of output. (CX8006 at 080-084, 179-185 (¶¶ 178-186, App. E) (Evans Expert Report)).

**625.** When firms compete on multiple dimensions, agreements to collude on one dimension will induce firms to compete more aggressively on other dimensions, which can eliminate any possible collusive profits. (RX 739-0046 (Murphy Report)).

**Response to Proposed Finding No. 625**

The proposed finding should be rejected because the material cited does not support the assertion that “agreements to collude on one dimension will induce firms to compete more aggressively on other dimensions.”

Respondent cites the following statement in Dr. Murphy’s report: “If the settlements allowed 1-800 and the settling retailers to raise prices, then we would expect they would respond by competing on other dimensions...” (RX0739 at 046 (Murphy Report)). Yet, in his deposition, Dr. Murphy conceded there are instances where firms can profitably restrict competition on just one dimension of competition. (CX9048 (Murphy, Dep. at 277) (“It would be possible . . . particularly if it was a very important dimension of competition, that would have an effect.”)). Moreover, Dr. Murphy did not suggest that if the parties were able to collude in a way that *maintained* 1-800 Contacts’ already supra-competitive prices, any “more aggressive” competition would result on any other dimensions. In addition, Dr. Evans noted that “economic studies of

market-wide restrictions on informative advertising demonstrate that eliminating competition on just this one dimension raises prices and harms consumers.” (CX8009 at 099-100 (¶ 190) (Evans Rebuttal Report)).

**626.** The settlement agreements did not limit the retailers’ ability to compete on price, output or service quality. (RX 739-0046 (Murphy Report)).

**Response to Proposed Finding No. 626**

The proposed finding should be rejected because the material cited does not support the proposed finding. The cited passage of Dr. Murphy’s report cites no evidence and conducts no analysis to support this proposition, while Complaint Counsel presented significant evidence at trial that the settlement agreements did impair the ability of retailers to place informative advertising, which necessarily includes limiting their ability to inform potential customers about prices and service quality.

**627.** If 1-800 Contacts and the settling retailers raised prices, economics teaches that they would respond by competing on other dimensions such as raising output or increasing service quality. (RX 739-0046 (Murphy Report)).

**Response to Proposed Finding No. 627**

Complaint Counsel objects to the proposed finding as incorrect and contrary to the weight of the evidence. *See* Response to Proposed Finding No. 625.

**628.** It is not appropriate to rely only on market share data in determining market power; an economist must consider a variety of other factors. (Evans, Tr. 1699).

**Response to Proposed Finding No. 628**

Complaint Counsel has no specific response to the proposed finding.

**629.** Economists analyzing competitive constraints take into account barriers to entry. (Murphy, Tr. 4171; Evans, Tr. 1765).

**Response to Proposed Finding No. 629**

Complaint Counsel has no specific response to the proposed finding.

**630.** Economists analyzing competitive constraints consider the possibility of expansion by existing competitors. (Evans, Tr. 1765).

**Response to Proposed Finding No. 630**

Complaint Counsel has no specific response to the proposed finding.

**631.** According to Dr. Evans, “[e]ven when a firm has a high market share it is possible that entry or the threat of entry could significantly restrain its market power.” (CX 8006-130 (Evans Opening Report)).

**Response to Proposed Finding No. 631**

Complaint Counsel has no specific response to the proposed finding.

**632.** For a firm or firms to be able to exercise monopoly power, there have to be barriers to entry for firms that would increase competition. (RX 739-0045 to -0046 (Murphy Report)).

**Response to Proposed Finding No. 632**

Complaint Counsel has no specific response to the proposed finding.

**633.** If 1-800 Contacts’ rivals could easily increase their output in response to higher contact lens prices, then 1-800 Contacts would not be able to exercise monopoly power. (RX 739-0044 to -0045 (Murphy Report)).

**Response to Proposed Finding No. 633**

Complaint Counsel objects to the proposed finding as incorrect and contrary to the weight of the evidence. Dr. Evans cited and discussed significant evidence finding a restriction on advertising could lead to the exercise of market power irrespective of whether output was reduced (CX8009 at 099-100 (¶ 190) (Evans Rebuttal Report)); the relevant question is whether 1-800 Contacts’ rivals could quickly and sufficiently restore the lost advertising competition by bidding on 1-800 Contacts branded queries. Dr. Murphy’s explanation, in contrast, relies upon a market with perfect information in which there are no search costs and thus no need for informative advertising.

**634.** Barriers to entry are factors that would prevent entry even if incumbent firms were earning monopoly profits. (RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 634**

Complaint Counsel has no specific response to the proposed finding, other than to note that the question is whether the barriers are significant enough to prevent entry that is timely and sufficient to deter or counteract the competitive effects of concern, not whether the barriers are significant enough to prevent all entry of any form.

**635.** There are no significant barriers to entering a market for online sales of contact lenses. (Murphy, Tr. 4171-72; RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 635**

This proposed finding should be rejected because it is incorrect and contrary to the weight of the evidence. The record shows there are significant barriers to entry. *See* CCPTF 1634-1674.

**636.** Entry into a market for the online sale of retail contact lenses would not require significant upfront capital investment. (RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 636**

This proposed finding should be rejected because it is unsupported by the cited material, incorrect, and contrary to the weight of the evidence. Dr. Murphy conducted no analysis of the level of up-front capital investment required. In contrast, when 1-800 Contacts' current owner analyzed the issue it found there were { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].} (RX1228

at 0014, *in camera*).

**637.** Online contact lens retailers have a relatively elastic supply, so they would be able to easily expand production if prices rose above the competitive level. (RX 739-0045 (Murphy Report); Murphy, Tr. 4184).

**Response to Proposed Finding No. 637**

This proposed finding should be rejected because it is unsupported by the cited material, misleading and irrelevant. First, Dr. Murphy’s report cannot be cited as substantive proof of the underlying facts in this case, and no admissible evidence is cited in the relevant portion of his report. Second, restrictions on advertising cannot be cured simply through increased output without some explanation of how entrants would compete to restore the lost advertising. *See* Response to Proposed Finding No. 625. Third, there is no evidence that online retailers can “expand production if prices rose above the competitive level.” The retailers do not produce contact lenses.

**638.** Online retailers do not actually produce contact lenses, so they would not have the same regulatory or intellectual property constraints on their ability to expand output as manufacturers. (RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 638**

This proposed finding should be rejected because it is unsupported by the cited material, misleading and irrelevant. First, Dr. Murphy’s report cannot be cited as substantive proof of the underlying facts in this case, and no admissible evidence is cited in the relevant portion of his report. Second, restrictions on advertising cannot be cured simply through increased output without some explanation of how entrants would compete to restore the lost advertising. *See* Response to Proposed Finding No. 625.

**639.** Online retail sales of contact lenses are not a high fixed cost business, so the costs of adding capacity would be relatively low. (RX 739-0045 (Murphy Report)).

**Response to Proposed Finding No. 639**

This proposed finding should be rejected because it is unsupported by the cited material, misleading and irrelevant. First, Dr. Murphy’s report cannot be cited as substantive proof of the

underlying facts in this case, and no admissible evidence is cited in the relevant portion of his report. To the contrary, the record reflects that there are significant fixed costs required to become an online retailer of significant scale, such as fulfillment, distribution, and prescription verification capabilities. (*See* Clarkson, Tr. 180-181; CX9003 (Clarkson, IHT at 26) (“larger companies now would have an online database of all of the doctors in the United States” for prescription verification); Holbrook, Tr. 1868-1870 (in order to enter the online space, Memorial Eye set up prescription verification process, which was “a big deal” and a significant investment); *see also* Response to Proposed Finding No. 636). Indeed, Mr. Bethers testified that having a single distribution center to serve the entire country is no longer enough, and that to remain competitive 1-800 Contacts is planning to establish a second major distribution “hub” and at least five additional smaller “spoke[.]” distribution facilities in order to offer faster shipping. (Bethers, Tr. 3641-3642).

640. { [REDACTED] }.} (Evans, Tr. 1576).

**Response to Proposed Finding No. 640**

Complaint Counsel has no specific response to the proposed finding, other than to note that although Dr. Evans did not quantify the exact cost of creating a prescription verification system, he did review and analyze evidence suggesting the burden of prescription verification was a barrier to timely and sufficient entry in a manner sufficient to neutralize the potential anticompetitive impact of the Bidding Agreements. (*See* RX1228 at 014, *in camera*; Evans, Tr. 1575, *in camera* (referencing RX1228 at 014); Holbrook, Tr. 1868-1870 (in order to enter the online space, Memorial Eye set up prescription verification process, which was “a big deal” and a significant investment)).

641. { [REDACTED] } (Evans, Tr. 1576-77).

**Response to Proposed Finding No. 641**

Complaint Counsel has no specific response to the proposed finding, other than to note that although Dr. Evans did not quantify the exact cost of stocking an inventory of contact lenses, he did review and analyze evidence suggesting the cost of inventory was a barrier to timely and sufficient entry in a manner sufficient to neutralize the potential anticompetitive impact of the Bidding Agreements. (*See* RX1228 at 014, *in camera*; Evans, Tr. 1575, *in camera* (referencing RX1228 at 014); Holbrook, Tr. 1868-1870 (in order to enter the online space, Memorial Eye made “a huge investment” in purchasing inventory, which was significantly larger than the inventory carried by its brick-and mortar stores)).

642. The only barrier to entry into the supposed market for online retail sales of contact lenses that Dr. Evans identified was building awareness in the marketplace. (CX 9042, Evans, Dep. at 136-138).

**Response to Proposed Finding No. 642**

This proposed finding should be rejected because it is incorrect and contrary to the weight of the evidence. The record reflects, and Dr. Evans considered, a number of additional barriers.

*See* CCPTF 1634-1674.

643. The only barrier to expansion in the supposed market for online retail sales of contact lenses that Dr. Evans identified was building awareness in the marketplace. (CX 9042 (Evans, Dep. at 137-138)).

**Response to Proposed Finding No. 643**

This proposed finding should be rejected because it is incorrect and contrary to the weight of the evidence. The record reflects, and Dr. Evans considered, a number of additional barriers.

*See* CCPTF ¶¶ 1634-1674.

644.

[REDACTED]  
 [REDACTED] (Evans, Tr. 1691).

**Response to Proposed Finding No. 644**

Complaint Counsel has no specific response to the proposed finding.

645.

[REDACTED]  
 [REDACTED] }  
 (Evans, Tr. 1691-92).

**Response to Proposed Finding No. 645**

Complaint Counsel has no specific response to the proposed finding, other than to note that Memorial Eye was sued by 1-800 Contacts and forced to sign a Bidding Agreement itself following its entry, and, regardless, Memorial Eye did not enter and compete at a scale sufficient to restore the competition lost as a result of the Bidding Agreements in a timely manner. Indeed, Respondent acknowledges this in Proposed Finding No. 2023 (“Memorial Eye was too small of a company to constrain 1-800 Contacts prices.”).

646.

[REDACTED]  
 [REDACTED] } (Evans, Tr. 1692).

**Response to Proposed Finding No. 646**

Complaint Counsel has no specific response to the proposed finding, other than to note that Memorial Eye was sued by 1-800 Contacts and forced to sign a Bidding Agreement itself following its entry, and, regardless, Memorial Eye did not enter and compete at a scale sufficient to restore the competition lost as a result of the Bidding Agreements in a timely manner. Indeed, Respondent acknowledges this in Proposed Finding No. 2023 (“Memorial Eye was too small of a company to constrain 1-800 Contacts prices.”).

**647.** The contact lens manufacturer CooperVision provides a service known as LensFerry that enables independent ECPs to sell their patients an annual supply of contact lenses. (Bethers, Tr. 3514-15; Clarkson, Tr. 285).

**Response to Proposed Finding No. 647**

Complaint Counsel has no specific response to the proposed finding, other than to note that LensFerry only enables an ECP to sell to his or her specific patients. Unless a patient's ECP has signed up, LensFerry is not an option for the customer. (Bethers, Tr. 3514). Additionally, as Peter Clarkson of AC Lens noted: "most optometrists would neither have the expertise nor the resources to engage in serious online marketing. At best, it's a play to retain a number of their own customers and not really a play to go outside of that footprint. And most optometrists continue to offer higher prices, so it's difficult for them to compete." (CX9039 (Clarkson, Dep. at 181)). Furthermore, Dr. Evans did consider the universe of websites offering similar services and noted that their sales volume was not meaningful. (CX8006 at 022-023 (¶ 54, n.15)(Evans Expert Report)).

**648.** { [REDACTED] } (Evans, Tr. 1687).

**Response to Proposed Finding No. 648**

Complaint Counsel objects to the proposed finding as misleading and irrelevant. Dr. Evans did analyze and consider the class of services which enable ECPs to offer online ordering, even if he did not specifically reference LensFerry. (CX8006 at 022-023 (¶ 54, n.15)(Evans Expert Report)).

**649.** Dr. Athey was not aware of LensFerry. (Athey, Tr. 855).

**Response to Proposed Finding No. 649**

Complaint Counsel objects to the proposed finding as irrelevant. Dr. Athey was asked about LensFerry in the context of firms who had not done any search advertising in the Google

data Dr. Athey examined. (Athey, Tr. 854-855.) The fact that Dr. Athey had not specifically heard of LensFerry, which does not run search advertisements, is not relevant to her analysis.

**650.** The contact lens distributor ABB Vision Group provides a service known as YourLens.com to independent ECPs that enables them to set up a website to sell contact lenses to their patients online. (Bethers, Tr. 3515-16).

**Response to Proposed Finding No. 650**

Complaint Counsel has no specific response to the proposed finding.

**651.** Essilor provides a service known as MyOnlineOptical to independent ECPs that enables them to set up a website to sell contact lenses to their patients online. (Bethers, Tr. 3516-18).

**Response to Proposed Finding No. 651**

Complaint Counsel has no specific response to the proposed finding.

**652.** The monthly cost of Essilor’s MyOnlineOptical service is \$129. (Bethers, Tr. 3517).

**Response to Proposed Finding No. 652**

Complaint Counsel has no specific response to the proposed finding.

**653.** CVS began selling contact lenses online during the term of the challenged settlement agreements. (Bethers, Tr. 3583).

**Response to Proposed Finding No. 653**

Complaint Counsel objects to the proposed finding as misleading and incorrect, insofar as it implies that CVS has entered the market and is selling contact lenses online itself, when in fact CVS’s contact lens website is operated by AC Lens, which was already a market participant. (CX9003 (Clarkson, IHT at 11 (“CVS doesn’t do any optical outside of their relationship with us. And so they rely on us to price the contact lenses and sell them.”))).

**654.** Costco began selling contact lenses online during the term of the challenged settlement agreements. (Bethers, Tr. 3529).

**Response to Proposed Finding No. 654**

Complaint Counsel has no specific response to the proposed finding, other than to note that Costco does not engage in search engine advertising, and is thus not in a position to restore competition in branded query advertising auctions. (CX8004 at 002 (¶7)(Salas, Decl.)).

**655.** Simple Contacts began selling contact lenses during the term of the challenged settlement agreements. (Bethers, Tr. 3588-89).

**Response to Proposed Finding No. 655**

Complaint Counsel objects to the proposed finding as incorrect and misleading, insofar as its inclusion in a section titled “there are no barriers to entry” implies Simple Contacts is an entrant into the market for the sale of online contacts which is capable of rectifying anticompetitive effects of the Bidding Agreements.

According to Mr. Bethers, Simple sells “a service to extend a prescription.” (Bethers, Tr. 3588). Only after offering this service does Simple offer to sell contact lenses. (Bethers, Tr. 3589). Thus, it is incorrect to say that Simple Contacts sells contact lenses as a standalone product, and it is incorrect and misleading to characterize Simple Contacts as an entrant in the relevant market.

In addition, even were Simple Contacts an entrant, the proposed finding would be misleading insofar as it implies that Simple Contacts was able to entry in a timely and sufficient manner and restored lost competition. Respondent has cited no evidence regarding Simple Contacts’ revenues or the timing of its introduction.

**656.** Simple Contacts offers a service that enables customers to take eye exams through their mobile devices. (Bethers, Tr. 3588-89).

**Response to Proposed Finding No. 656**

The proposed finding should be rejected because it is incorrect, as even according to Mr. Bethers, Simple does not provide eye exams; they offer a service to “extend a prescription,” and “they don’t do an actual refraction.” (Bethers, Tr. 3588).

The proposed finding is misleading insofar as its inclusion in a section titled “there are no barriers to entry” implies Simple Contacts is an entrant into the market for the sale of online contacts which is capable of rectifying anticompetitive effects of the Bidding Agreements. *See* Response to Proposed Finding No. 655.

**657.** Sightbox began selling contact lenses during the term of the challenged settlement agreements. (Bethers, Tr. 3589-91).

**Response to Proposed Finding No. 657**

The proposed finding should be rejected because it is incorrect. According to Mr. Bethers, Sightbox does not sell contact lenses; instead, it sells only a “subscription service” which bundles an eye exam with a long-term supply of contact lenses. (Bethers, Tr. 3589-3590).

The proposed finding is also misleading insofar as its inclusion in a section titled “there are no barriers to entry” implies Sightbox is an entrant into the market for the sale of online contacts which is capable of rectifying anticompetitive effects of the Bidding Agreements. Even if Sightbox were a competitor in the relevant market, Mr. Bethers testified that Sightbox charges higher prices than existing players in exchange for the convenience of arranging and paying for the doctor’s eye exam. (Bethers, Tr. 3590). Higher-priced sellers do not have an incentive to run search advertisements against 1-800 Contacts’ brand-name keywords and inform customers that they can purchase the same product at lower cost elsewhere. (CX8006 at 131 (¶ 283) (Evans Expert Report)).

**658.** Sightbox offers a service that sends a customer contact lenses and makes an appointment for the customer with an ECP. (Bethers, Tr. 3589-90).

**Response to Proposed Finding No. 658**

The proposed finding should be rejected because it is incorrect. *See* Response to Proposed Finding No. 657.

**659.** Hubble Contacts began selling contact lenses during the term of the challenged settlement agreements. (Bethers, Tr. 3593-98)).

**Response to Proposed Finding No. 659**

Complaint Counsel objects to the proposed finding as misleading, insofar as its inclusion in a section titled “there are no barriers to entry” implies Hubble Contacts is an entrant into the market for the sale of online contacts which is capable of rectifying anticompetitive effects of the Bidding Agreements. This is misleading for three reasons.

First, the proposed finding is misleading because it elides the fact that Hubble is not an entrant which could restore lost competition. Hubble does not sell common brands of contact lenses. Instead, Mr. Bethers claimed that Hubble sells only its own private label brand of contact lenses; thus, a consumer with an ECP prescription for another brand cannot purchase from Hubble. (Bethers, Tr. 3594-3597). There are “very few” customers with existing prescriptions for the contact lenses Hubble sells. (Bethers, Tr. 3597). And even for those customers, Hubble does not sell lenses in a way comparable to other retailers; instead, they sell a monthly subscription. (Bethers, Tr. 3594-3595).

Second, Hubble is not in any position to restore search advertising competition lost as a result of the Bidding Agreements because Mr. Bethers testified that Hubble does not use search advertising. (Bethers, Tr. 3594).

Third, the proposed finding is misleading because there is no evidence Hubble’s entry was timely or likely to be at a sufficient scale to restore competition. Mr. Bethers testified that

Hubble “launched within the last I’d say about six months,” and Respondent points to no evidence of its current sales. (Bethers, Tr. 3593). In contrast, the record contains significant evidence of barriers to entry at scale or to scaling smaller businesses. *See, e.g.*, CX8006 at 130 (¶ 280) (Evans Expert Report); CX8009 at 063-066 (¶¶ 109-115)(Evans Rebuttal Report).

**660.** Hubble Contacts recently raised \$16.5 million in funding from investors. (Bethers, Tr. 3598).

**Response to Proposed Finding No. 660**

This proposed finding should be rejected because Mr. Bethers does not have personal knowledge that might support it, and also it is irrelevant.

**661.** WebEyeCare began selling contact lenses online in 2009. (CX 9000 (Batushansky, IH at 8)).

**Response to Proposed Finding No. 661**

Complaint Counsel objects to the proposed finding as misleading, insofar as its inclusion in a section titled “there are no barriers to entry” suggests WebEyeCare is a successful entrant which has been able to restore competition in the market for contact lens sales online. As Dr. Evans noted, (1) since its launch in 2009 WebEyeCare has managed to achieve a market share of only {██████}, and (2) WebEyeCare signed a Bidding Agreement, meaning it has not been able to restore any of the competition lost as a result of the Bidding Agreements. (CX8009 at 066, *in camera* (¶¶ 114-15) (Evans Rebuttal Report)).

**VI. Internet Advertising**

***A. There Are Multiple, Varied Methods Of Advertising On The Internet.***

**662.** There are multiple, varied marketing channels available to advertisers on the internet. These channels include display advertising, retargeting advertising, social media advertising, affiliate marketing, email advertising, mobile applications, natural search engine optimization, paid search advertising, and product listing advertisements. (RX 426-0002 at 6-17; CX 9005 (Dansie, IHT at 23-24); Clarkson, Tr. 219-229).



download and order through its mobile application, but that does not make the mobile application itself a marketing channel. *See* Response to Proposed Finding No. 662.

**664.** Other online retailers of contact lenses also use each of these varied marketing tools to advertise their products and services on the internet. (RX 426-0002 at 20 (“Online competitors use all marketing tools that are employed by 1800 with the exception of TV and other broadband video . . . .”); CX 1095-099; CX 9007-006 (Fedele, IHT at 19-21); Clarkson, Tr. 219-229; Aloviss, Tr. 1029–1030).

#### **Response to Proposed Finding No. 664**

The proposed finding should be rejected for the reasons explained in response to Proposed Findings No. 662 and 663. Moreover, the proposed finding is irrelevant because the types of advertising referred to are not substitutes for search engine advertising, which is the most important form of advertising for online contact lens retailers other than 1-800 Contacts. (CX9007 (Fedele, IHT at 19-23) (paid search makes up 60% of the marketing spending); Clarkson, Tr. 228-229 (display advertising has “generally not been very successful”); CX9038 (Hamilton, Dep. at 24-25) (retargeting requires that the customer has already visited your website)).

**665.** The settlement agreements at issue in this litigation only affect paid search advertising that is generated in response to search queries containing 1-800 Contacts’ trademarks and confusingly similar variations of 1-800 Contact’s trademarks. (Evans, Tr. 1725–26; CX 310; CX 311; CX 313; CX 314; CX 315; CX 317; CX 318; CX 319; CX 320; CX 321; CX 322; CX 324; CX 325; CX 326).

#### **Response to Proposed Finding No. 665**

This finding is incorrect, not supported by the evidence cited, and should be rejected. On their face, the Bidding Agreements impact internet advertising broadly, not merely paid search advertising. (*See* RX0028 (Bidding Agreement between 1-800 Contacts and AC Lens) at -003 (“The parties understand and appreciate that new internet advertising techniques and technologies that are unknown as of the Effective Date of this agreement will likely be developed and employed in the future. It is the intent of the Parties to construe this Section 2 in good faith such that all future internet advertising techniques and advertisement delivery technologies that are subsentailly

similar to the foregoing Obligations and Prohibited Acts shall also be considered Obligations and Prohibited Acts under this Agreement.”)).

Moreover, admissible evidence indisputably establishes that the settlement agreements restricted advertising on social media, as well as display advertising. (*See, e.g.*, CX0746 (1-800 Contacts informed Coastal Contacts that the Bidding Agreements prohibited Facebook advertisements); CX0960 (Coastal Contacts informed 1-800 Contacts that the Bidding Agreements prohibited display advertising on the Google Display Network); CX9028 (Roundy, Dep. at 61, 63) (same)).

In addition, to the extent that “affiliate advertising” is represented to be a separate channel of advertising (see Proposed Finding No. 662), affiliate advertising was clearly an intended and actual target of the agreements since many affiliates use search engine marketing as a way to acquire customers. (CX9039 (Clarkson, Dep. at 173); CX9020 (Craven, Dep. at 123); CX0051 (“keep competitors *and affiliates* off TMs”) (emphasis added)). For example, “The Parties agree that any third-party participating in an associate or affiliate program or similar program of a Party’s Restricted Websites (an ‘Affiliate’) shall also abide by this Agreement.” (CX0315; *see also* CX0310; CX0311; CX0313; CX0319; CX0320; CX0321; CX0322; CX0323; CX0324; CX0326).

In addition, the proposed finding lacks foundation and is contrary to the weight of the evidence because the finding cites only to the agreements themselves, and not to evidence regarding how the parties interpreted and actually enforced the agreements. The record demonstrates that the agreements were in fact enforced in response to affiliate advertising (*e.g.*, CX0758; CX0838; CX0807; CX0677) as well as display advertising and social media advertising, as noted above.

Finally, Complaint Counsel notes that CX0317, CX0318, and CX0325 are not on the exhibit list and are not in evidence.

**666.** The settlement agreements do not place any restrictions on forms of advertising other than paid search advertising generated in response to search queries containing 1-800 Contacts' trademark. (CX 310; CX 311; CX 313; CX 314; CX 315; CX 317; CX 318; CX 319; CX 320; CX 321; CX 322; CX 324; CX 325; CX 326; Hogan, Tr. 3276).

**Response to Proposed Finding No. 666**

This proposed finding should be rejected for the reasons explained above in Response to Proposed Finding No. 665.

*1. Display Advertising*

**667.** Display advertising refers to various methods of displaying a graphic advertisement to consumers on the internet. (Bethers, Tr. 1674).

**Response to Proposed Finding No. 667**

Complaint Counsel has no specific response.

**668.** [REDACTED]  
[REDACTED] } (CX 9000 (Batushansky, IHT at 106)).

**Response to Proposed Finding No. 668**

Complaint Counsel has no specific response.

**669.** [REDACTED]  
[REDACTED] (CX 9000 (Batushansky, IHT at 106); CX 9010 (Larson, IHT at 22–23)).

**Response to Proposed Finding No. 669**

Complaint Counsel has no specific response.

**670.** [REDACTED]  
[REDACTED] (CX 9038 (Hamilton, Dep. at 53–54)).



they visit other websites.” (Clarkson, Tr. 229; Alovis, Tr. 1030; CX 9000 (Batushansky, IHT at 35-36); CX 9004 (Coon, IHT at 285)).

**Response to Proposed Finding No. 673**

Complaint Counsel has no specific response.

**674.** For example, if a consumer previously visited Memorial Eye’s website, it would be possible for Memorial Eye to use retargeting to display Memorial Eye’s banner advertisement to that consumer the next time the consumer logged onto the internet. (Evans, Tr. 1675).

**Response to Proposed Finding No. 674**

Complaint Counsel has no specific response.

**675.** [REDACTED]  
[REDACTED] (CX 9038 (Hamilton, Dep. at 53-54)).

**Response to Proposed Finding No. 675**

This proposed finding is unsupported. The cited testimony from Mr. Hamilton does not support the finding that { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

**676.** Many of the settling retailers engage in retargeting advertising. (Clarkson, Tr. 229; CX 9038 (Hamilton, Dep. at 24-25); CX 9007 (Fedele, IHT at 19-20); { [REDACTED]  
[REDACTED] }

**Response to Proposed Finding No. 676**

This proposed finding is irrelevant because retargeting advertising is not a replacement for search engine advertising. Retargeting advertising can only be used for customers who have already visited the retailer's website. (Clarkson, Tr. 229; Alovic, Tr. 1030; CX 9000 (Batushansky, IHT at 35-36); CX 9004 (Coon, IHT at 285)). Search engine advertising is used by 1-800 Contacts' competitors to get new customers. (CCPTF § IV.B.1).

**677.** Executives and employees of three contact lens retailers — ACLens, LensDirect, and Vision Direct — testified that they engage in retargeting marketing. (Clarkson, Tr. 229; Alovic, Tr. 1030; CX 9038 (Hamilton, Dep. at 24-25)).

**Response to Proposed Finding No. 677**

This proposed finding is irrelevant for the same reasons explained in the Response to Proposed Finding No. 676.

**678.** Several other settling contact lens retailers, including Walgreens and WebEyeCare, testified that they engage in retargeting advertising. (CX 9007 (Fedele, IHT at 19-20); { [REDACTED] } [REDACTED] }

**Response to Proposed Finding No. 678**

This finding is irrelevant for the same reasons explained in the Response to Proposed Finding No. 676.

**3. *Social Media Advertising***

**679.** Social media advertising involves displaying advertisements and other content to consumers on social media websites, such as Facebook, Instagram, and Twitter. (Clarkson, Tr. 223; { [REDACTED] } CX 9008 (Hamilton, IHT at 64)).

**Response to Proposed Finding No. 679**

Complaint Counsel has no specific response.

**680.** Social networks, such as Facebook, maintain demographic information about their users, such as age, gender, hobbies, and interests. (CX 9003 (Clarkson, IHT at 55)).

**Response to Proposed Finding No. 680**

Complaint Counsel has no specific response.

**681.** The social networks use demographic information about their users to allow advertisers to target their advertisements to specific consumers based on the consumer’s demographics and interests. (CX 9003 (Clarkson, IHT at 55-56); CX 9043 (Athey, Dep. at 279)).

**Response to Proposed Finding No. 681**

Complaint Counsel has no specific response.

**682.** In addition to displaying advertisements over social media, companies can engage directly with consumers over social media and obtain feedback from customers about their products and services. (See CX 764-004; RX 155-0002; RX 736-015).

**Response to Proposed Finding No. 682**

Complaint Counsel has no specific response.

**683.** Many of the settling retailers engage in social media advertising. (Clarkson, Tr. 219; CX 9038 (Hamilton, Dep. at 25-26); CX 9007 (Fedele, IHT at 20); { [REDACTED] } [REDACTED] }

**Response to Proposed Finding No. 683**

This proposed finding is unsupported by the testimony cited, as three counterparties do not constitute “many” of the retailers who entered Bidding Agreements. Moreover, the proposed finding ignores that each of these three retailers testified that social media advertising was a small part of their total advertising, and also constitutes “retargeting” rather than a separate form of marketing. (Clarkson, Tr. 219, 223; CX 9038 (Hamilton, Dep. at 25-26) (Vision Direct’s only social media advertising has been retargeting, meaning Vision Direct only advertises to people on Facebook who have already visited their site); { [REDACTED] } [REDACTED] }.

**684.** Executives and employees of four contact lens retailers — ACLens, LensDirect, Vision Direct, and Walgreens — testified that they advertise on social media platforms. (Clarkson, Tr. 219; Aloviss, Tr. 1029-30; CX 9038 (Hamilton, Dep. at 25-26); CX 9007 (Fedele, IHT at 20)).

**Response to Proposed Finding No. 684**

The proposed finding should be rejected because the claim is unsupported as to Walgreens. Mr. Fedele testified as to the business practices of Vision Direct, the subsidiary for which he

managed advertising, not Walgreens. Although he was employed by Walgreens, the then parent company of Vision Direct, his role was business management for Vision Direct. (CX9007 (Fedele, IHT at 4-5)). He later testified that he didn't "have good visibility" into Walgreens advertising techniques and was "not directly involved" in it. (CX9007 (Fedele, IHT at 23)). The deposition testimony cited from Mr. Hamilton refers only to Vision Direct as well. (CX 9038 (Hamilton, Dep. at 25-26)). Respondents have cited no evidence that Walgreens advertises contact lenses on social media platforms.

In addition, this finding is not relevant, and each of these retailers testified that search engine advertising is where they choose to spend most of their advertising money. (Clarkson, Tr. 220; Alovis, Tr. 992; CX9023 (Alovis, Dep. at 53); Hamilton, Tr. 402-403 (Walgreens); 431-432 (Vision Direct)).

**685.** Several other contact lens retailers, including Walmart and WebEyeCare, also engage in social media advertising. (CX 9037 (Owens, Dep. at 93); [REDACTED] }

#### **Response to Proposed Finding No. 686**

This claim is unsupported and inaccurate as to Walmart. Mr. Owens did not testify that Walmart advertises contact lenses on social media. In the testimony cited by Respondents, Mr. Owens is referring to what Walmart would need to do in order to increase sales of contact lenses. (CX9037 (Owens, Dep. at 90)). The only form of advertising Walmart uses for contact lenses, other than its pricing decisions, is search engine marketing. (CX9033 (Mohan, Dep. at 17)).

#### ***4. Affiliate Marketing***

**686.** Affiliate marketing is a method of advertising where an advertiser enlists the assistance of an affiliated website to refer traffic to the advertiser's website in return for a commission on sales resulting from the referred traffic. (Clarkson, Tr. 221; Craven, Tr. 639-640; Schmidt, Tr. 2891; Bethers, Tr. 3578).

**Response to Proposed Finding No. 686**

This proposed finding is irrelevant, as affiliate advertising was not an available substitute for search engine advertising. Affiliates find customers to refer to retailers by using search engine advertising. (CX9039 (Clarkson, Dep. at 173); CX9020 (Craven, Dep. at 123)). Prohibitions on search engine advertising in the bidding agreements also applied to settling parties' affiliates as explained in the Responses to Proposed Findings No. 665 and 666.

**687.** Affiliate marketing is an efficient method for generating new customers because an advertiser only pays a commission when a sale is realized. (Clarkson, Tr. 222; CX 9023 (Alovis, Dep. at 26)).

**Response to Proposed Finding No. 687**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 686. Affiliate marketing can be inefficient if it cannibalizes sales that the retailer would have made anyway. 1-800 Contacts clearly recognized this concern, as it had strict rules about affiliates' ads competing with their own. (*See, e.g.*, CX0612).

**688.** For several online contact lens retailers, including Walgreens and Vision Direct, affiliate marketing is the "most efficient form of advertising." (CX 9008 (Hamilton, IHT at 65-66)).

**Response to Proposed Finding No. 688**

This proposed finding is misleading because it implies that affiliate marketing is separate from search engine advertising and that its efficiency can be judged separately from search engine advertising. In fact, however, affiliates also use search engine advertising, and settling parties' affiliates were also prohibited from bidding for search queries containing 1-800 Contacts' trademark terms under the bidding agreements as explained in the Responses to Proposed Findings No. 665 and 666.

**689.** For Vision Direct and Walgreens, affiliate advertising is more efficient than keyword-based paid search advertising and generates approximately the same amount of revenue. (CX 9008 (Hamilton, IHT at 65-66)).

**Response to Proposed Finding No. 689**

This proposed finding should be rejected because affiliate advertising *includes* keyword-based paid search advertising, it is not a separate form of advertising that could possibly be “more efficient.” (*See* Clarkson, Tr. 221-222). Moreover, the Bidding Agreements also affected affiliate advertising as explained in the Responses to Proposed Findings No. 665 and 666.

**690.** Affiliate marketing is also effective because affiliates frequently offer discount coupons for the advertisers’ products. (Clarkson, Tr. 221; CX 9001 (Bethers, IHT at 86)).

**Response to Proposed Finding No. 690**

This proposed finding should be rejected because it lacks foundation; at trial, neither Mr. Clarkson nor Mr. Bethers described discount coupons as a frequent or primary reason for the use or attraction of affiliate marketing. Instead, these witnesses agreed that search engine advertising is at least as much of a focus for affiliates. (Clarkson, Tr. 221 (“Q. What types of methods do your affiliates use to draw customers in? A. They actually use a lot of the same methods we use, which is to say, some of them do pay-per-click. . . . And some of them are coupon sites.”);

Bethers, Tr. 3578, *in camera* (

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

**691.** Affiliate advertising, therefore, frequently appeals to “consumers that are price sensitive [and] are looking for coupons.” (CX 9001 (Bethers, IHT at 86)).

**Response to Proposed Finding No. 691**

This proposed finding should be rejected because affiliate advertising overlaps with search advertising, as described above in Responses to Proposed Findings No. 665, 666, and 689.

Complaint Counsel further notes that at trial Mr. Bethers did not describe affiliate marketing as

directed specifically at price-focused customers—instead, he said only that “affiliate will bring traffic to us that may be interested in buying contact lenses.” (Bethers, Tr. 3593).

**692.** [REDACTED]  
[REDACTED] } (RX 428-0030; Bethers, Tr. 3569, 3578).

**Response to Proposed Finding No. 692**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 686.

**693.** Many of the settling retailers engage in affiliate advertising. (Clarkson, Tr. 219, 221; CX 9007 (Fedele, IHT at 17-18); CX 9008 (Hamilton, IHT at 65-66)).

**Response to Proposed Finding No. 693**

This proposed finding is unsupported by the testimony cited, as four retailers do not constitute “many” of the retailers who entered Bidding Agreements. Moreover, the proposed finding ignores that search engine advertising is the most important form of advertising and where the retailers spend most of their advertising budget. (Clarkson, Tr. 220; Holbrook, Tr. 1903-1904; Hamilton, Tr. 399 (Walgreens & Vision Direct); Hamilton, Tr. 400-403 (Walgreens); [REDACTED]  
[REDACTED] }; CX9023 (Alovis, Dep. at 53); CX9033 (Mohan, Dep. at 18); [REDACTED] }; CX8003 at 002 (¶ 6) (Mitha, Decl.); *see generally* CCPTF § IV.B (¶¶ 489-589)).

**694.** Executives and employees of four contact lens retailers — ACLens, Walgreens, Vision Direct, and LensDirect — testified that they engage in affiliate advertising. (Clarkson, Tr. 219, 221; CX 9007 (Fedele, IHT at 17-18); CX 9008 (Hamilton, IHT at 65-66); Alovis, Tr. 1030).

**Response to Proposed Finding No. 694**

This proposed finding is irrelevant as explained in the Response to Proposed Finding No. 686.

## 5. *Email Advertising*

**695.** Email advertising allows advertisers to send promotions and advertisements to current and prospective customers by email. (Clarkson, Tr. 222-23; Bethers, Tr. 3572-73; { [REDACTED] } CX 9036 (Duley, Dep. at 18)).

### **Response to Proposed Finding No. 695**

This finding is misleading. Email marketing is used with customers that have given the retailer their email address, usually by visiting their website and signing up to receive emails, or by making a purchase. (Clarkson, Tr. 222-23; CX9000 (Batushansky, IHT at 17-18) ({ [REDACTED]

[REDACTED] })). Email marketing is not a good method of reaching new customers who have never visited the retailer’s site before. (*See, e.g.*, CX9039 (Clarkson, Dep. at 212)).

**696.** Online contact lens retailers frequently contact former customers by email to let them know it is time for them to reorder their contact lenses and to provide them an easy method to take advantage of current promotions. (Holbrook, Tr. 1892; CX 9010 (Larson, IHT at 48)).

### **Response to Proposed Finding No. 696**

Complaint Counsel has no specific response.

**697.** Email marketing is frequently referred to as “customer relationship management” or CRM. (CX 9001 (Bethers, IHT at 200)).

### **Response to Proposed Finding No. 697**

Complaint Counsel has no specific response, other than to note that “customer relationship management” is a broad phrase frequently used to refer to more than email marketing. *E.g.*, Encyclopedia Britannica, “Customer Relationship Management” (describing CRM as a “type of enterprise system”), *available at* <https://www.britannica.com/topic/customer-relationship-management>.

**698.** The cost of email advertising “is minimal to nothing.” (Holbrook, Tr. 1892).



**Response to Proposed Finding No. 701**

This proposed finding is irrelevant as explained in the Response to Proposed Finding Nos. 695 through 698.

**702.** Executives and employees of five contact lens retailers — ACLens, Vision Direct, Walgreens, LensDirect and Memorial Eye— testified that they engage in email advertising. (Clarkson, Tr. 219; CX 9008 (Hamilton, IHT at 54); CX 9007 (Fedele, IHT at 20); CX 9023 (Alovis, Dep. at 26); Holbrook, Tr. 1892).

**Response to Proposed Finding No. 702**

This proposed finding is irrelevant as explained in the Response to Proposed Finding Nos. 695 through 698

**703.** Several other settling retailers, including WebEyeCare and Vision Works, also engage in email advertising. (CX 9000 (Batushansky, IHT at 17); CX 9036 (Duley, Dep. at 18)).

**Response to Proposed Finding No. 703**

This proposed finding is irrelevant as explained in the Response to Proposed Finding Nos. 695 through 698.

## **6. *Mobile Applications***

**704.** A mobile application is a program downloaded from the Apple or Android app store onto a smartphone or tablet device that allows consumers to interact with a retailer using a mobile device. (Bethers, Tr. 3565).

**Response to Proposed Finding No. 704**

Complaint Counsel has no specific response.

**705.** Mobile applications are important marketing tools for returning customers because they permit returning customers to easily repurchase products. (Bethers, Tr. 3565).

**Response to Proposed Finding No. 705**

Complaint Counsel has no specific response, other than to note that 1-800 Contacts considered its mobile application an important sales tool in large part because { [REDACTED]

[REDACTED]

[REDACTED] } (CX1743 at 041, 042).

**706.** Mobile applications allow a retailer to remind customers when it is time to reorder. (CX 9010 (Larson, IHT at 48)).

**Response to Proposed Finding No. 706**

Complaint Counsel has no specific response.

**707.** [REDACTED] (RX 428-0030; Bethers, Tr. 3569, 3575).

**Response to Proposed Finding No. 707**

Complaint Counsel has no specific response.

**708.** 1-800 Contacts' mobile application is the company's fastest growing marketing channel. (Bethers, Tr. 3568).

**Response to Proposed Finding No. 708**

The proposed finding should be rejected because "mobile applications" are not a marketing channel. *See* Response to Proposed Finding No. 662.

**7. *Search Engine Optimization***

**709.** Search engine optimization is a method used by advertisers to increase the likelihood that their website will display in a prominent position in the organic listings of a search engine's results page. (Athey, Tr. 760; Alovis, Tr. 1030; Bethers, Tr. 3655 ("Search engine optimization is looking at methods to improve your natural search ranking."))

**Response to Proposed Finding No. 709**

Complaint Counsel has no specific response.

**710.** Most online contact lens retailers engage in search engine optimization. (Bethers, Tr. 3655).

**Response to Proposed Finding No. 710**

This finding lacks foundation and should be rejected. Mr. Bethers has no reason to know whether most contact lens retailers engage in search engine optimization. Mr. Bethers testified he had little familiarity with online retailers beyond the largest and most important competitors.

(CX9029 (Bethers, Dep. at 9) (“So when we spoke about online competitors, we were typically talking about the Coastal Contacts, the Vision Directs, the AC Lenses of the world, or Lens.com.”)).

**711.** In the contact lens industry, “search engine optimization is the process of trying to get your website to rank highly when people search for terms you care about, like ‘contact lenses’ or particular brands of contact lenses.” (Clarkson, Tr. 225).

**Response to Proposed Finding No. 711**

Complaint Counsel has no specific response.

**712.** Techniques used to increase the position of organic listings on search engine results include, inter alia, ensuring that a website has “new content, new reviews . . . [a] lot of interaction, page load speed . . . multiple screen sizes. . . more content and a lot of links.” (CX 9033 (Mohan, Dep. at 111)).

**Response to Proposed Finding No. 712**

Complaint Counsel has no specific response.

**713.** Search engine optimization is a particularly efficient form of advertising because the advertiser does not accrue any costs to the search engine when a user clicks on an organic link. (Alovis, Tr. 985 (“It’s free traffic that Google, you know, deems you relevant to certain keywords, so that’s completely free.”)).

**Response to Proposed Finding No. 713**

This proposed finding is unsupported by the cited testimony and should be rejected. Mr. Alovis did not testify about the returns to search engine optimization, and he did not testify about the expense of paying personnel to engage in search engine optimization. Without any idea of the return or expense, there is no foundation to assert that it is “particularly efficient.”

Moreover the finding is contradicted by the weight of the evidence. Mr. Juda from Google testified about the ways that search engine advertising is superior to mere search engine optimization: “in order for a small business to actually be able to really be featured prominently in front of a user, and that user giving that small business a healthy amount of attention, the advertising system can oftentimes be a very efficient way for the small business to get their

message in front of a user, where that message may not be nearly as prominent, at least within the product that is Google.com, if the advertiser were to rely solely on trying to optimize their landing page to get a high ranking within the organic results. And, in effect, because advertisements take both advertiser bids and creative copy into control, in addition to our quality signals, it gives the small advertiser, and really, any advertiser, a lot more control over whether their message can appear, relative to the functionality that organic results provide.” (CX9019 (Juda, Dep. at 20-21)).

**714.** Many of the online contact lens retailers engage in search engine optimization. (Alovis, Tr. 1030-31; CX 9023 (Alovis, Dep. at 26); Holbrook, Tr. 1944; CX 9033 (Mohan, Dep. at 111)).

**Response to Proposed Finding No. 714**

The proposed finding is unsupported by the evidence cited, as it misleadingly characterizes two retailers as “many” retailers. And it is contradicted by the cited evidence, as Ms. Mohan testified specifically that Walmart does *not* engage in search engine optimization for the website where it sells contact lenses, walmartcontacts.com. (CX9033 (Mohan, Dep. at 114-115)).

**715.** Executives and employees of two contact lens retailers — LensDirect and Memorial Eye — testified that they engage in search engine optimization. (Alovis, Tr. 1030-31; CX 9023 (Alovis, Dep. at 26); Holbrook, Tr. 1944).

**Response to Proposed Finding No. 715**

Complaint Counsel has no specific response.

**716.** Other online contact lens retailers, such as Walmart, also engage in search engine optimization. (CX 9033 (Mohan, Dep. at 111)).

**Response to Proposed Finding No. 716**

The proposed finding is incorrect and should be rejected. Insofar as the proposed finding implies that Walmart engages in search engine optimization *with respect to contact lenses*, it is flatly incorrect. (CX9033 (Mohan, Dep. at 114-115)). Insofar as the proposed finding is simply referring to Walmart’s practice for sales of other goods, it is irrelevant.

## 8. *Product Listing Advertisements (PLAs)*

**717.** Product listing advertisements, known as PLAs or comparison shopping feeds, are a type of targeted advertisement that appears on search engine results pages in response to a search for a particular type of product. (RX 715-0115; RX 739-0026; Juda, Tr. 1322; CX 9000 (Batushansky, IHT at 50-51); CX 9002 (Craven, IHT at 25)).

### **Response to Proposed Finding No. 694**

Complaint Counsel has no specific response, other than to note that PLAs could not be purchased at all until 2009, at that time could only be purchased by select retailers, and there is no evidence suggesting PLAs appear on many or all searches for 1-800 Contacts trademarks. (RX0715 at 0593-0594).

**718.** PLAs offer consumers richer product information than typical paid search advertising, including an image of the product, the price of the product, and the specific names of retailers who sell the product. (RX 715-0115; RX 739-0026; Juda, Tr. 1322; [REDACTED] } CX 9002 (Craven, IHT at 25)).

### **Response to Proposed Finding No. 718**

Complaint Counsel has no specific response.

**719.** A PLA typically has photographs of the products for sale, the price of the product, and a link to the website of the retailer who sells the product. (Juda, Tr. 1322).

### **Response to Proposed Finding No. 719**

Complaint Counsel has no specific response.

**720.** PLAs “appear in their own box on Google Search, separate from text ads and on Google Shopping.” (RX 716-0074).

### **Response to Proposed Finding No. 720**

Complaint Counsel has no specific response.

**721.** PLAs are not displayed in response to advertisers selecting specific keywords. (Juda, Tr. 1322-23, 1334; RX 715-0116, 0158).

### **Response to Proposed Finding No. 721**

Complaint Counsel has no specific response.

**722.** Rather than using keywords, “Google will automatically show the most relevant products along with the associated image, price and product name,” for a given search query. (RX 715-0116; see also RX 715-0158).

**Response to Proposed Finding No. 722**

Complaint Counsel has no specific response. *See* Response to Proposed Finding No. 717.

**723.** For example, a search for the keyword “contact lenses” using either Google or Bing will display a box in the upper area or on the right-hand side of the search results page with prices for contact lens brands at different online retailers. (RX 739-0026).

**Response to Proposed Finding No. 723**

The proposed finding is irrelevant, insofar as it has no bearing on whether or not PLAs appear in response to search for 1-800 Contacts branded queries. *See* Response to Proposed Finding No. 717.

**724.** The image below (RX 739-0094) depicts the position of PLAs relative to the organic search results and the sponsored ads with respect to a Google search for “contact lens.”

The image shows a Google search results page for the query "contact lens". The search bar at the top indicates "About 24,300,000 results (0.74 seconds)".

**Sponsored ads:** A red box on the left highlights the top four sponsored advertisements. The first ad is for "Cheapest Contact Lenses -- 25% off with coupon: 25SHOP" from visiondirect.com. The second is "Contact Lenses up to 70% Off - All Major Brands In Stock - iLens.com". The third is "Walgreens Contacts Sale" from walgreens.com. The fourth is "Contact Lenses \$14.99/Box - New Customers Get 20% Off - coastal.com".

**Shopping results (PLAs):** A red box on the right highlights the "Shop for contact lens on Google" section, which is labeled "Sponsored". It displays a grid of product listings with images, prices, and store names. An arrow points from this box to a larger red box below it.

**Organic search results:** A red box on the left highlights the organic search results starting with "Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens...". Other organic results include "Discount Contact Lenses - Order Contacts Online and Save Money...", "Vision Direct - Contact Lenses: Order Discount Contact Lenses...", "Contact Lenses From Walmart Contacts", "Contact Lens King: Discount Contact Lenses Online", "Contact Lenses | Buy Prescription Contacts | iLens.com", "Contact Lenses - A Consumer Guide from AllAboutVision.com", "Contact Lenses - Free Shipping on Discount Contacts | Walgreens", and "Order Contact Lenses | Buy Best Contacts Online - Volume Discounts".

A large red box on the right, containing the text "Shopping results, also known as Product Listing Advertisement (PLA)", has an arrow pointing upwards to the shopping results section.

### Response to Proposed Finding No. 724

The proposed finding is irrelevant, insofar as it has no bearing on whether or not PLAs appear in response to search for 1-800 Contacts branded queries. *See* Response to Proposed Finding No. 717.

**725.** On Google, users can also access PLAs by viewing the “Google Shopping” page, which is accessible from the Google results page. (Juda, Tr. 1324-26).

### Response to Proposed Finding No. 725

Complaint Counsel has no specific response.

**726.** At the top of Google search results, including results pages in response to the query “1-800 Contacts” and its variations, is a link entitled “Shopping.” (*See, e.g.*, RX 310-0001; RX 311-0001; RX 312-0001).

**Response to Proposed Finding No. 726**

Complaint Counsel has no specific response, other than to note that at trial, Mr. Juda from Google noted that RX0312 may not be an accurate representation of the search engine results page and that the formatting may have been altered. (Juda, Tr. 1305-1307).

**727.** Clicking such a link takes the user to the “shopping-specific Google property.” (Juda, Tr. 1324-1325; *see also* RXD 022 (illustrating testimony)).

**Response to Proposed Finding No. 727**

Complaint Counsel has no specific response.

**728.** The shopping-specific Google property for a search on the term “1800contacts” may contain listings for different types of contact lenses. (Juda, Tr. 1325; *see also* RXD 024 (illustrating testimony)).

**Response to Proposed Finding No. 728**

The proposed finding is irrelevant and unsupported. Mr. Juda testified as to what the demonstrative, which is not in evidence, “appeared” to show. (Juda, Tr. 1325 (“Q. And if you scroll down, there are number of different brands and types of contact lenses shown, right, if you scroll through the pages? A. Given my limited understanding of contact lenses that appears to be the case.”)). Respondent has provided no actual evidence supporting this proposed finding.

**729.** The Google Shopping page displays a series of PLAs, including brands, prices and retailers for the specific product searched for. (Juda, Tr. 1324-26; { [REDACTED] } [REDACTED] }

**Response to Proposed Finding No. 729**

Complaint Counsel has no specific response. *See* Response to Proposed Finding No. 717.

**730.** Advertisers do not have to pay Google for their Shopping ads to be shown; advertisers pay Google only when a user clicks on a Shopping ad. (Juda, Tr. 1322).

## Response to Proposed Finding No. 730

The proposed finding is irrelevant.

**731.** For illustrative purposes, the image below (RXD 024-0001) depicts the first three PLAs displayed on the Google Shopping page in response to a search for “1800contacts.”

4/18/2017 1800contacts - Google Search

Google 1800contacts Sign in

All Images Maps **Shopping** More Settings

Your location: Washington, DC Sort: Default View: List My Shortlist (0) Merchant links are sponsored

**Show only**  
 New items

**Price**  
 Up to \$35  
 \$35 - \$50  
 Over \$50  
 \$ to \$ Go

**Category**  
 Contact Lenses

**Brand**  
 Acuvue  
 Alcon  
 Bausch + Lomb  
 Ciba Vision  
 CooperVision  
 DreamEyes

**Lens design**  
 —

**Search the web instead for 1800contacts**  
 Showing shopping results for 1800contacts

**Acuvue Oasys Contact Lenses with HydraClear Plus - 24 pack**  
**\$114.50** from 3 stores  
 ★★★★★ 804 product reviews  
 Acuvue · Corrective  
 Acuvue Oasys is a weekly disposable contact lens manufactured by Johnson & Johnson (Vistakon). Oasys brand contacts feature the next generation ...  
 Other options: 6 (\$27)

**FreshLook ColorBlends Contacts**  
**\$32.98** from 5+ stores  
 ★★★★★ 441 product reviews  
 Ciba Vision · Colored  
 Freshlook ColorBlends lenses blend three colors into one to create the subtle, natural depth of beautiful eyes. Try one of the dramatic new shades ...

**SofLens Toric (SofLens For Astigmatism) Contact Lenses**  
**\$45.99** from 10+ stores  
 ★★★★★ 16 product reviews  
 Bausch + Lomb · Corrective · Toric  
 SofLens Toric For Astigmatism contact lenses provide crisp clear vision, excellent comfort, and easy handling and durability. Frequent replacement ...

## Response to Proposed Finding No. 731

The proposed finding is unsupported by evidence, as it cites only to a demonstrative which is not in evidence and which was not confirmed as accurate by any witness at trial. *See* Response to Proposed Finding No. 717.

**732.** Google Shopping is also available to consumers on mobile devices, such as tablets and mobile phones. “Just like on desktop computers, Google Shopping for mobile makes it easier for . . . customers to find and compare different products.” (RX 715-0213).

**Response to Proposed Finding No. 732**

The proposed finding is unsupported. RX0715-0213 does not contain this quote and does not support this claim. It is also irrelevant. *See* Response to Proposed Finding No. 717.

**733.** PLAs “enable shoppers to make quick visual comparisons while browsing products.” (RX 715-0213).

**Response to Proposed Finding No. 733**

The proposed finding is unsupported. RX0715-0213 does not contain this quote and does not support this claim. It is also irrelevant. *See* Response to Proposed Finding No. 717.

**734.** Consumers can refine the results to “help to surface the brands, features and price point they want, so shoppers can easily buy the product they want from the merchant of their choice.” (RX 715-0213).

**Response to Proposed Finding No. 734**

The proposed finding is unsupported. RX0715-0213 does not contain this quote and does not support this claim. It is also irrelevant. *See* Response to Proposed Finding No. 717.

**735.** PLAs are “helpful for consumers who want to do price comparison shopping” because they allow the consumer to compare “the price of the same product across multiple retailers.” (Ghose, Tr. 3875).

**Response to Proposed Finding No. 735**

Complaint Counsel has no specific response. *See* Response to Proposed Finding No. 717.

**736.** A PLA “allows a consumer to go to a single page and do a price comparison between different websites.” (Clarkson, Tr. 224).

**Response to Proposed Finding No. 736**

The proposed finding is irrelevant. *See* Response to Proposed Finding No. 717.

**737.**

[REDACTED] } (CX 9000 (Batushansky, IHT at 51)).  
 [REDACTED] (CX 9000 (Batushansky, IHT at 51)).

**Response to Proposed Finding No. 737**

The proposed finding is irrelevant. *See* Response to Proposed Finding No. 717.

**738.** Many of the “small budget” “more recent entrants” in the online contact lens market have found PLAs “to be more effective” than keyword advertising at attracting new customers. (CX 9008 (Hamilton, IHT at 69)).

**Response to Proposed Finding No. 738**

This proposed finding is unsupported and should be rejected. The finding says “many” retailers have found it useful, yet cites only one. Mr. Hamilton had no foundation to assess how effective PLAs were for other companies.

**739.** For Walgreens and Vision Direct, comparison shopping engines, such as Google Shopping, are a more efficient form of advertising than paid search advertising. (CX 9008 (Hamilton, IHT at 66)).

**Response to Proposed Finding No. 739**

This proposed finding is misleading and should be rejected. Immediately following the cited testimony, Mr. Hamilton continued, “But that’s from a return-on-ad-spend-investment standpoint. There’s different ways to understand efficiency...So from a total revenue perspective, again, the affiliate channel, right there with search in terms of the amount of revenue. And then the comparison shopping channels and the social media channels would be way, way down the list, hardly even significantly, but they’re fairly efficient.” (CX9008 (Hamilton, IHT at 66)).

**740.** According to a Google study from November 2010, consumers “are twice as likely to click on a Product Listing Ad as they are to click on a standard [keyword-based] text ad in the same location.” (RX 715-0157).

**Response to Proposed Finding No. 740**

This proposed finding is unsupported. RX0715-0157 does not contain this quote and does not support this claim. The proposed finding is also irrelevant. *See* Response to Proposed Finding No. 717.

**741.** In addition to PLAs, Google also displays the “Knowledge Graph” or “Knowledge Card” on many search engine results pages. The “Knowledge Graph” or “Knowledge Card” is a summary of content relevant to a user’s search query, which is displayed on the right side of certain Google search results. (RX 721-0001-0004.)

**Response to Proposed Finding No. 741**

Complaint Counsel has no specific response.

**742.** Google introduced the Knowledge Graph in May 2012. (RX 721-0001).

**Response to Proposed Finding No. 742**

Complaint Counsel has no specific response.

**743.** Information displayed in the Knowledge Graph is based on Google’s assessment of user searches about the particular item. (RX 721-0004.) For instance, the Knowledge Graph for a user query on “Marie Curie” includes information and links to further information about her husband, children, and the family’s Nobel Prizes. (RX 721-0004.)

**Response to Proposed Finding No. 743**

Complaint Counsel has no specific response.

**744.** The Knowledge Graph also contains a “People Also Searched For” feature, which includes links to other sites. (RX 721-0005).

**Response to Proposed Finding No. 744**

Complaint Counsel has no specific response.

**745.** The links in the People Also Searched For feature are not the result of any payment to Google. (Juda, Tr. 1307-1308).

**Response to Proposed Finding No. 745**

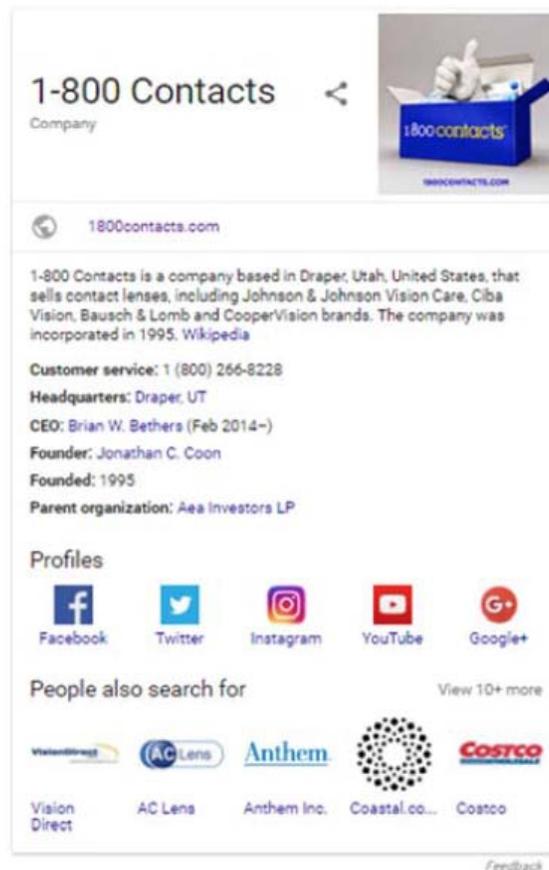
Complaint Counsel has no specific response.

**746.** Google search results for the query “1-800 Contacts” and variants of that search term include a Knowledge Graph regarding 1-800 Contacts. (*See, e.g.*, RX 310-001, 005; RX 311-001-003; *see also* CX 8007-010).

**Response to Proposed Finding No. 746**

Complaint Counsel has no specific response.

**747.** An example of a Knowledge Graph shown in response to the search query “1-800 contacts” as shown in the report of one of Complaint Counsel’s experts:



(CX 8007-010).

### **Response to Proposed Finding No. 747**

Complaint Counsel has no specific response, other than to note that this is not admissible evidence.

**748.** The Knowledge Graph shown in response to the query “1-800 Contacts” and variants of that search term includes links to competing contact lens retailers, including some that entered into settlement agreements with 1-800 Contacts, such as ACLens and Coastal Contacts. (See, e.g., RX 310-0001). Clicking on one of these links takes the user to the website of the retailer. (Juda, Tr. 1308).

**Response to Proposed Finding No. 748**

This proposed finding is irrelevant. These results are not a substitute for search engine advertising. These results are not advertisements and the companies listed cannot control their appearance in the Knowledge Graph the same way they control advertisements. (Juda, Tr. 1308).

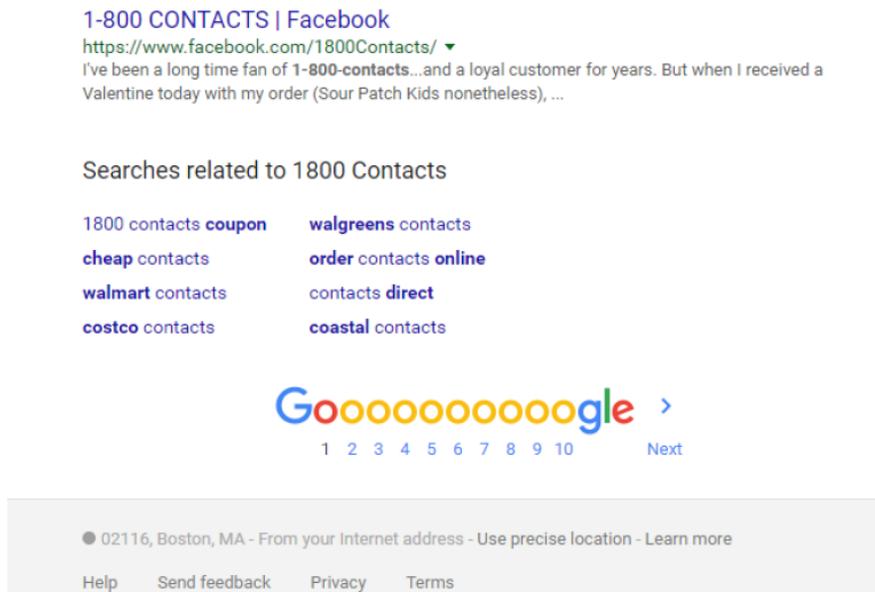
This proposed finding is also unsupported. When Mr. Juda said that clicking on one of these links takes the user to the website of the retailer, he was responding to questions about RX0312, which Respondent used “illustratively” and “under the assumption that this is a results page for ‘1-800 Contacts.’” (Mr. Gates, Tr. 1306-1308). Mr. Juda noted that he was not sure RX0312 was a search engine results page, and that the formatting of this document was not one that he was familiar with. (Juda, Tr. 1305-1306). Respondent may not now rely on Mr. Juda’s testimony about RX0312, a document he discredited, to describe RX0310, a nearly identical document.

**749.** At the bottom of a Google search results for the query “1-800 Contacts” and variants of that search term is a section entitled “Searches related to,” which includes links to searches for competing retailers, such as Walgreens, Vision Direct, Costco, and Coastal Contacts. (Juda, Tr. 1308-1309; RX 312-835; *see also* RX 310-0032, 0072; RX 311-0002).

**Response to Proposed Finding No. 749**

Complaint Counsel has no specific response.

**750.** An example of the Searches related to section shown in response to the search query “1-800Contacts” as shown in the report of one of Complaint Counsel’s experts:



(CX 8010-020).

### **Response to Proposed Finding No. 750**

Complaint Counsel notes that Respondent is improperly citing an expert for a proposition of fact.

#### ***9. Paid Search Advertising***

**751.** Paid search advertising, also referred to as sponsored advertisements, refers to a method of advertising where the advertiser pays the search engine to place its advertisement on the search engine results page. (Juda, Tr. 1065; RX 733-013-24).

### **Response to Proposed Finding No. 751**

Complaint Counsel has no specific response.

#### ***B. Search Engines 101***

**752.** There are three major search engine providers in the US: Google, Bing, and Yahoo!. (Craven, Tr. 509; Aloviz, Tr. 991).

**Response to Proposed Finding No. 752**

This proposed finding should be rejected, because Yahoo is not a “major search engine provider.” Google is the dominant search engine: “It is generally recognized that Google accounts for 82 percent of spending on search advertising.” (Joint Stipulation Regarding Search Engines and Glossary). It is misleading to describe Bing and Yahoo, which together account for 18% of search advertising spending, as “major” providers—especially in the case of Yahoo, which is significantly smaller than Bing. (Van Liere, Tr. 3103 (“I understand Yahoo is smaller than Bing and Google.”); Evans, Tr. 1373-1374 (“[T]ogether Google and Bing account for most searches that are done by consumers. But most importantly, for this matter, they account for most of the advertising spending on search that's conducted in the U.S.”)).

**753.** Users can access these search engines through desktop computers, laptop computers, tablets, and mobiles phones. (RX 733-008; Joint Stipulation Containing Glossary of Terms, Appendix 1).

**Response to Proposed Finding No. 735**

Complaint Counsel has no specific response.

**754.** Estimates of the market shares of these search engines vary across sources, but it is generally recognized that Google accounts for the large majority of spending on search advertising. (Joint Stipulation Containing Glossary of Terms, Appendix 1).

**Response to Proposed Finding No. 735**

Complaint Counsel has no specific response.

***1. Organic And Paid Search Results***

**755.** When a user enters a search query, the search engine generally displays two types of results. (RX 716-0105; RX 704 (Iyer Decl., ¶ 3 ( { [REDACTED] })). The first are “organic” or “natural” results, which are links to websites the search engine has determined are relevant to the user’s search terms. (RX 716-0068 (organic results are a “free listing in Google Search that appears because it’s relevant to someone’s search terms”); Juda, Tr. 1330 (organic results are “useful and relevant information based on the user’s search query”)).

**Response to Proposed Finding No. 735**

This proposed finding is incorrect in its claim that search engines “generally” display both organic results and paid search advertisements. (Juda, Tr. 1080-1081 (“Most searches . . . are ones where no ads appear.”)). Complaint Counsel agrees that some search queries do lead to ads being shown, but the proposed finding cites no evidence suggesting paid advertisements are “generally” displayed.

**756.** In general, organic results are ranked in order of relevance, with the most relevant result at the top of the list. (RX 716-0099 (for organic results, the “more relevant the site to the search term, the higher the link will appear in the list”)).

**Response to Proposed Finding No. 756**

Complaint Counsel objects to the proposed finding as a misleading oversimplification. For some searches, for a user looking to buy a product, search advertisements (which are ordered differently) may present a more “relevant” ordering of potential websites to a user than organic results. For example, the algorithm used to present organic results may not give a high rank to products offered by firms which are less well-known, even if the product may be of interest to the user. (CX8007 at 025 (¶ 69) (Athey Expert Report)).

**757.** The relevance of organic results is determined by algorithms that are proprietary to each search engine. (Juda, Tr. 1330; RX 704 (Iyer Decl., ¶ 8 ( { [REDACTED] } ))).

**Response to Proposed Finding No. 757**

Complaint Counsel has no specific response.

**758.** Organic links are “free,” i.e., the company whose link appears is not charged any money by the search engine for the appearance of its link or if a user clicks on the link. (RX 716-0068; see also RX 716-0100 (“Ads will never appear within the organic search results themselves.”)). Moreover, no one can pay to have an organic result appear or to change the ranking of a particular organic result. (RX 716-0068).

**Response to Proposed Finding No. 758**

Complaint Counsel has no specific response.

**759.** The second type of result is paid search advertising. These advertisements are displayed above, below, and (on some search engines) to the side of the organic results. (RX 716-0099; RX 704-002 (Iyer Decl., ¶ 3)).

**Response to Proposed Finding No. 759**

Complaint Counsel has no specific response.

**760.** Google and Bing, for instance, will display { [REDACTED] } at the top of the page, above the organic results. (CX 9019, Juda Dep. at 53; RX 704 (Iyer Decl.) ¶ 3).

**Response to Proposed Finding No. 760**

Complaint Counsel has no specific response.

**2. *Keyword Advertising – The Google AdWords Auction***

**761.** Google and other search engines use an “auction” to determine which ads will appear on a search engine results page (SERP). (RX 716-0038; see also RX 704 (Iyer Decl., ¶¶ 8-11)). Every time a user enters a search query, the search engine runs an instantaneous auction to determine which, how many, and the position of paid ads to be displayed on the results page. (RX 716-0038; see also CX 9019 (Juda, Dep. at 134)).

**Response to Proposed Finding No. 761**

Complaint Counsel has no specific response.

**762.** Google’s paid search platform is called AdWords. (Juda, Tr. 1065).

**Response to Proposed Finding No. 762**

Complaint Counsel has no specific response.

**763.** The Google AdWords auction has three steps. First, “the AdWords system finds all ads whose keywords match [the user] search.” (RX 716-0038). Second, the AdWords system “ignores” any ads that the system determines are not eligible to appear, “like ads that target a different country or are disapproved.” (RX 716-0038). Third, of the remaining ads, “only those with a sufficiently high Ad Rank may show. Ad Rank is a combination of [the advertiser’s] bid, ad quality, and the expected impact of extensions and other ad formats.” (RX 716-0038).

**Response to Proposed Finding No. 763**

Complaint Counsel has no specific response.

(a) *Keywords And Match Types*

**764.** Keywords are “words or phrases” the advertiser believes “potential customers are likely to use when searching for products or services” provided by the advertiser. (RX 716-0087). The advertiser matches the keywords with an ad or ads in an “ad group.” (RX 716-0087; RX 716-0029).

**Response to Proposed Finding No. 764**

Complaint Counsel has no specific response.

**765.** An advertiser’s ad may be shown when the ad’s keywords “match” a user’s search query. (RX 716-0087; RX 716-0016; RX 119-0002 (“The relationship between queries and keywords is at the heart of search advertising with AdWords.”)).

**Response to Proposed Finding No. 765**

Complaint Counsel has no specific response.

**766.** Advertisers frequently bid on hundreds or thousands of keywords. Walmart, for instance, bids on somewhere under 5,000 keywords related to contact lens. (CX 9033 (Mohan, Dep. at 26–27). Keywords may consist of a single word (e.g., “contacts”), a set of words (e.g., “contacts,” “Accuvision,” and “coupon”), a phrase (e.g., “contact lens”), or a combination of words and phrases. (Joint Stipulation Containing Glossary of Terms, Appendix 1).

**Response to Proposed Finding No. 766**

Complaint Counsel has no specific response.

**767.** There are several “match types” or “matching options” in AdWords. (RX 716-0016-17).

**Response to Proposed Finding No. 767**

Complaint Counsel has no specific response.

(i) *Broad Match*

**768.** “Broad match” allows an ad to be matched to “relevant variations” of the ad’s keywords, “including synonyms, singular or plural forms, possible misspellings, stemmings (such as floor and flooring), related searches, and other relevant variations.” (RX 716-0090).

**Response to Proposed Finding No. 768**

Complaint Counsel has no specific response.

**769.** Broad match is a “semantic” match; it seeks to match with the “meaning of the user’s search.” (RX 119-0005). For example, a broad match keyword “low-carb diet plan” may match with a search for “carb-free foods” or “Mediterranean diet plans.” (RX 716-0090).

**Response to Proposed Finding No. 769**

Complaint Counsel has no specific response.

**(ii) *Modified Broad Match***

**770.** “Modified broad match” allows the advertiser to “specify that certain broad match keyword terms, or their close variants, must appear to trigger [the] ad.” (RX 716-0090).

**Response to Proposed Finding No. 770**

Complaint Counsel has no specific response.

**771.** Modified broad match keywords are indicated by a “+” symbol. (RX 716-0016). For instance, the modified keyword “+women’s +hats” would match to a search for “hats for women.” (RX 716-0016).

**Response to Proposed Finding No. 771**

Complaint Counsel has no specific response.

**(iii) *Phrase Match***

**772.** “Phrase match” allows an ad to be matched to searches that include the ad’s “exact keyword and close variants of [the] exact keyword, with additional words before or after.” (RX 716-0094; RX 716-0117).

**Response to Proposed Finding No. 772**

Complaint Counsel has no specific response.

**773.** Phrase match keywords are indicated by quotation marks. (RX 716-0094). For example, for the phrase match keyword “tennis shoes,” ads may be shown on searches for “red leather tennis shoes” or “buy tennis shoes on sale.” (RX 716-0094). But such ads will not be shown on searches for “shoes for tennis” or “tennis sneakers laces.” (RX 716-0094).

**Response to Proposed Finding No. 773**

Complaint Counsel has no specific response.

**(iv) *Exact Match***

**774.** “Exact match” allows an ad to be matched to searches that include the ad’s “exact keyword, or close variants of [the] exact keyword, exclusively.” (RX 716-0092).

**Response to Proposed Finding No. 774**

Complaint Counsel has no specific response.

**775.** Exact match keywords are indicated by square brackets. (RX 716-0092). For instance, the exact match keyword “[tennis shoes]” may be matched to searches for “tennis shoes” but not for “red tennis shoes.” (RX 716-0092).

**Response to Proposed Finding No. 775**

Complaint Counsel has no specific response.

(v) *Negative Keywords*

**776.** “Negative keywords” are a type of keyword that prevents an “ad from being triggered by a certain word or phrase.” (RX 716-0067). For example, a retailer that sells eyeglasses may add the negative keyword “wine glasses” to prevent its ads from showing in response to searches for that term. (RX 716-0019).

**Response to Proposed Finding No. 776**

Complaint Counsel has no specific response.

**777.** According to Google, negative keywords are “an essential part of a well-rounded keyword strategy.” (RX 119-0011).

**Response to Proposed Finding No. 777**

The proposed finding is misleading and irrelevant. The cited document continues by noting that the purpose of negative keywords is to “prevent you from showing ads to people that are less valuable to you or less interested in what you have to offer.” RX0119-0011. This case does not concern the unilateral decision to use negative keywords in order to improve return on search engine marketing investment—it instead deals with agreements to implement negative keywords where the search result would otherwise provide the advertiser with a sufficient ROI. The cited document provides no suggestion that Google contemplates the use of negative keywords in this manner.

**778.** Negative keywords also have match types, but these match types have differences from the normal match types. (RX 119-0011).

**Response to Proposed Finding No. 778**

Complaint Counsel has no specific response.

**779.** One difference is that “negative broad match” will not “exclude queries that are synonyms or close variations of the negative keyword. It will only exclude queries that include all words within a keyword, irrespective of the order in which the words appear.” (RX 119-011).

**Response to Proposed Finding No. 779**

Complaint Counsel has no specific response.

**780.** Another difference is that queries “that are close variations of phrase and exact match negative keywords won’t be excluded.” (RX 119-0011). Because of this matching behavior, an advertiser must separately add close variations as negative keywords. (RX 119-011).

**Response to Proposed Finding No. 780**

Complaint Counsel agrees that queries containing some close variations of phrase and exact match negative keywords are not excluded by the use of those negative keywords. However,

[REDACTED]

[REDACTED]

[REDACTED]. (Juda, Tr. 1131-1132, *in camera*; see also, Juda, Tr. 1134, *in camera*).

**(b) Ad Rank And Its Components**

**781.** In AdWords, which ads appear and the order in which an ad appears on a page (the Ad Position) is determined by a “formula called Ad Rank.” (RX 716-030).

**Response to Proposed Finding No. 781**

Complaint Counsel has no specific response.

**782.** For those ads that have keywords that match the user’s search query and are otherwise eligible to be shown, the AdWords system determines each ad’s Ad Rank. (RX 716-0038).

**Response to Proposed Finding No. 782**

Complaint Counsel has no specific response other than to add that “ad quality helps determine whether it is qualified to be appear.” (RX0716-0038).

**783.** Ad Rank is a “score that’s based on [the advertiser’s] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats.” (RX 716-001).

**Response to Proposed Finding No. 783**

Complaint Counsel has no specific response.

**784.** Google’s algorithms consider factors other than the advertiser’s bid and will show no ads in response to some searches to avoid the long-term “negative ramifications of users not clicking on ads.” (Juda, Tr. 1081). Based on experiments, Google has found that the “natural rate at which users are clicking on ads actually decreases over time” when AdWords shows “additional ads or lower-quality ads.” (Juda, Tr. 1084).

**Response to Proposed Finding No. 784**

Complaint Counsel has no specific response.

**785.** Google considers factors other than the advertiser’s bid because showing ads that do not meet Google’s criteria could lead to [REDACTED] } (CX 9019 (Juda, Dep. at 129-130); see also Juda, Tr. 1198 (Google considers predicted click-through rate, landing page experience, and ad relevance because, among other things, doing so will { [REDACTED] })).

**Response to Proposed Finding No. 785**

Complaint Counsel has no specific response.

***(i) Bids***

**786.** In AdWords, each advertiser specifies a bid for each keyword, which is the maximum the advertiser will pay for a click on its ad. (RX 716-0041). This amount is the “maximum cost-per click” or “max. CPC.” (RX 716-0041).

**Response to Proposed Finding No. 786**

Complaint Counsel has no specific response.

**787.** The advertiser’s bid, or max. CPC, is one of factors considered in calculating Ad Rank, which determines whether and in what position the ad may appear. (RX 716-001).

**Response to Proposed Finding No. 787**

Complaint Counsel has no specific response.

***(ii) Expected CTR***

**788.** Expected CTR is a measurement of “how likely it is that [the advertiser’s] ads will get clicked when shown for [the particular] keyword.” (RX 716-0049).

**Response to Proposed Finding No. 788**

Complaint Counsel has no specific response.

**789.** Google’s algorithms calculate expected CTR based on a variety of inputs, including “the actual search of the user, information about the ad copy, the geography of the user, the time and day in which the user’s search term was conducted.” (Juda, Tr. 1096). In addition, if “the user has personalization turned on,” the algorithm will also “use various historical information about that user and their past activities.” (Juda, Tr. 1096).

**Response to Proposed Finding No. 789**

Complaint Counsel has no specific response.

**790.** Predicted CTR is not { [REDACTED] } (CX 9019 (Juda, Dep. at 31-32)). Rather, { [REDACTED] } { [REDACTED] }. The assessment is based on { [REDACTED] } { [REDACTED] } (Juda, Tr. 1099).

**Response to Proposed Finding No. 790**

Complaint Counsel has no specific response.

**791.** To predict CTR for new ads the system uses { [REDACTED] } { [REDACTED] } (CX 9019 (Juda, Dep. at 31-32)).

**Response to Proposed Finding No. 791**

Complaint Counsel has no specific response.

**792.** The predicted CTR for a given ad may { [REDACTED] } (Juda, Tr. 1260). It may { [REDACTED] } (Juda, Tr. 1260).

**Response to Proposed Finding No. 792**

This proposed finding is misleading. { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Juda,

Tr. 1263, *in camera*). An example of a circumstance in which predicted CTR would change would be if the advertiser changes the advertisement, or if a user types in a different search.

*(iii) Ad Relevance*

**793.** Ad relevance is a measure of “how closely related [the advertiser’s] keyword is to [the advertiser’s] ads.” (RX 716-0032; see also Juda, Tr. 1104 (Ad relevance is [REDACTED] [REDACTED] })).

**Response to Proposed Finding No. 793**

This proposed finding is incorrect, and contradicted by the cited testimony. Ad relevance is not a measure of how closely related the advertiser’s keyword is to its own ad text, but rather [REDACTED] [REDACTED] }. (Juda, Tr. 1104, *in camera*).

**794.** In the AdWords algorithms, ad relevance is based on models that use human-evaluated data as an input “to identify patterns that will allow [the system] to predict . . . what the human raters would have thought of the ads.” (CX 9019 (Juda, Dep. at 38-39); see also Juda, Tr. 1105).

**Response to Proposed Finding No. 794**

Complaint Counsel has no specific response.

**795.** Ad relevance for a particular ad may { [REDACTED] } (Juda, Tr. 1261).

**Response to Proposed Finding No. 795**

This proposed finding is misleading. { [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] }

*(iv) Landing Page Experience*

**796.** Landing page experience is a “measure that AdWords uses to estimate how relevant and useful [the advertiser’s] website’s landing page will be to people who click in [the advertiser’s] ad.” (RX 716-0061).

**Response to Proposed Finding No. 796**

Complaint Counsel has no specific response.

**797.** In the AdWords algorithms, landing page experience is based on { [REDACTED] }  
[REDACTED]  
(CX 9019 (Juda, Dep. at 40); Juda, Tr. 1101).

**Response to Proposed Finding No. 797**

Complaint Counsel has no specific response.

**798.** In addition, to determine the landing page experience signal, the algorithms take into account { [REDACTED] }  
[REDACTED] (Juda, Tr. 1102).

**Response to Proposed Finding No. 798**

Complaint Counsel has no specific response.

**799.** For landing page experience, the AdWords algorithms also “visit landing pages through our crawl and try and extract information about the content or topics of landing pages ... to compare whether search terms and landing pages have similar topical relevance or not.” (Juda, Tr. 1102).

**Response to Proposed Finding No. 799**

Complaint Counsel has no specific response.

**800.** Google considers landing page experience in its algorithms { [REDACTED] }  
[REDACTED]  
(CX 9019 (Juda, Dep. at 121-122)).

**Response to Proposed Finding No. 800**

This proposed finding is misleading. Although Complaint Counsel agrees that this is one of the reasons that Google considers landing page experience, Google also considers landing page

experience because it wants to have high quality ads so that users return to Google. (RX0612A-0004).

**801.** The landing page experience for a particular ad may { [REDACTED] } (Juda, Tr. 1261).

**Response to Proposed Finding No. 801**

This proposed finding is misleading. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*(v) Ad Extensions And Format*

**802.** Ad extensions are “a type of ad format that show extra information ... about [the advertiser’s] business.” (RX 716-0045). Examples of ad extensions include information about the advertiser’s location, consumer ratings of the advertiser, and links to different parts of the advertiser’s website. (RX 716-0045-46).

**Response to Proposed Finding No. 802**

Complaint Counsel has no specific response.

**803.** The AdWords algorithms { [REDACTED] } (CX 9019 (Juda, Dep. at 41); Juda, Tr. 1113).

**Response to Proposed Finding No. 803**

Complaint Counsel has no specific response.

*(c) The Auction Outcome: Ad Rank, Ad Position, And Actual CPC*

**804.** The Google AdWords system [REDACTED]

[REDACTED] } (CX 9019 (Juda, Dep. at 41-42)).

**Response to Proposed Finding No. 804**

Complaint Counsel has no specific response.

**805.** For each auction, the AdWords algorithms calculate Ad Rank for each ad that is eligible to be shown in response to the particular user query. (CX 9019 (Juda, Dep. at 42)).

**Response to Proposed Finding No. 805**

Complaint Counsel has no specific response.

**806.** The quality signals used to determine CPC and Ad Rank { [REDACTED] } (Juda, Tr. 1260). Each of these signals, { [REDACTED] } (Juda, Tr. 1260).

**Response to Proposed Finding No. 806**

This proposed finding is misleading. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

**807.** Ads must have an Ad Rank greater than zero to be eligible to be shown. (CX 9019 (Juda, Dep. at 42)). If there are no ads with an Ad Rank greater than zero, the AdWords system will not show any ads in response to the particular user query. (CX 9019 (Juda, Dep. at 42)).

**Response to Proposed Finding No. 807**

Complaint Counsel has no specific response.

**808.** Google requires [REDACTED] } (Juda, Tr. 1094; CX 9019 (Juda, Dep. at 182)).

**Response to Proposed Finding No. 808**

Complaint Counsel has no specific response.

*(i) Minimum Bids*

**809.** The requirement that an ad's Ad Rank be greater than zero means that each advertiser faces a minimum bid to have its ads shown in response to a particular user search. (CX 9019 (Juda, Dep. at 168-169)).

**Response to Proposed Finding No. 809**

Complaint Counsel has no specific response, other than to clarify that for many ads on many searches, { [REDACTED] [REDACTED] [REDACTED] }. (Juda, Tr. 1089-1090).

**810.** The minimum bid is determined on an auction-by-auction basis, and each advertiser may have a different minimum bid. (CX 9019 (Juda, Dep. at 169)). The minimum bid for an advertiser to { [REDACTED] [REDACTED] } (Juda, Tr. 1266-1267).

**Response to Proposed Finding No. 810**

Complaint Counsel has no specific response.

**811.** In general, the lower the quality of the ad, the higher the minimum bid necessary to qualify to be shown. (CX 9019 (Juda, Dep. at 169)).

**Response to Proposed Finding No. 811**

Complaint Counsel has no specific response.

**812.** Google requires a minimum bid to try to ensure a [REDACTED] [REDACTED] [REDACTED] (Juda, Tr. 1095).

**Response to Proposed Finding No. 812**

Complaint Counsel has no specific response.

*(ii) Ad Position*

**813.** Ads are positioned on the search results page based on Ad Rank; the ad with the highest Ad Rank is placed at the top of the page. (Juda, Tr. 1077; RX 716-0001; CX 9019 (Juda, Dep. at 42)).

**Response to Proposed Finding No. 813**

Complaint Counsel has no specific response.

**814.** Google will show { [REDACTED] } above the organic search results. (Juda, Tr. 1080; CX 9019 (Juda, Dep. at 53)).

**Response to Proposed Finding No. 814**

Complaint Counsel has no specific response.

**815.** Because AdWords takes into account a number of factors other than the bid amount, advertisers that obtain the top ad positions may not be the highest bidders. (RX 612A, Varian Video, Tr. 9).

**Response to Proposed Finding No. 815**

Complaint Counsel has no specific response.

***(iii) Actual Cost-Per-Click***

**816.** The actual amount an advertiser pays for a click, or “actual CPC,” depends on the outcome of the auction process. (RX 716-0026).

**Response to Proposed Finding No. 816**

Complaint Counsel has no specific response.

**817.** Even if an ad appears in response to a user search (thus generating an “impression” (RX 502-0001)), the advertiser pays only if the user clicks on its ad. (RX 716-0026).

**Response to Proposed Finding No. 817**

Complaint Counsel has no specific response.

**818.** In AdWords, each advertiser’s actual cost-per-click (the amount the advertiser will pay for a click on its ad) is determined by a modified general second price auction. (RX 612A, Varian Video, Tr. 5).

**Response to Proposed Finding No. 818**

Complaint Counsel has no specific response.

**819.** For each advertiser, Google’s algorithms determine the lowest bid the advertiser could have made to still have an Ad Rank greater than the advertiser whose ad is in the position below. (CX 9019 (Juda, Dep. at 54)).

**Response to Proposed Finding No. 819**

Complaint Counsel has no specific response.

**820.** Under the modified general second price auction used by Google, the CPC of the advertiser in the top position { [REDACTED] } (CX 9019 (Juda, Dep. at 60, 137-138)).

**Response to Proposed Finding No. 820**

Complaint Counsel objects to the proposed finding as misleading, insofar as it does not consider the extent to which a bidder in the third or fourth position will affect general auction dynamics and incentives, and instead misleadingly considers only an auction run a single time. In fact, as Respondent admits, AdWords auctions are repeated each time a user enters a search query. (See Proposed Finding No. 761).

**821.** Because of the effects of predicted CTR, ad relevance, landing page quality, ad extensions, and other ad formats, in the AdWords system an advertiser may have a lower actual CPC than advertisers whose ads appear in in lower positions. (RX 612A, Varian Video, Tr. 9-10).

**Response to Proposed Finding No. 821**

Complaint Counsel has no specific response.

**822.** An advertiser's CPC for a particular keyword may vary from auction to auction. (CX 9019 (Juda, Dep. at 137)).

**Response to Proposed Finding No. 822**

Complaint Counsel has no specific response.

*(iv) User Information*

**823.** Additionally, in Google's paid search advertising system, the ads shown [REDACTED] } (Juda, Tr. 1264; CX 9019 (Juda, Dep. at 136-137)).

**Response to Proposed Finding No. 823**

Complaint Counsel has no specific response.

**824.** This variation can occur for a number of reasons, such as [REDACTED]

[REDACTED] }  
(Juda, Tr. 1264-1265)

**Response to Proposed Finding No. 824**

Complaint Counsel has no specific response other than to clarify that the reason variation occurs is unlikely to be that the algorithm’s predictions of quality changed. { [REDACTED]

[REDACTED]

[REDACTED] }. (Juda, Tr. 1263).

**825.** The ads shown as well as the number of ads shown [REDACTED] (Juda, Tr. 1265-1266; CX 9019 (Juda, Dep. at 134-136)).

**Response to Proposed Finding No. 825**

Complaint Counsel has no specific response.

**826.** Two consumers who are signed into their Google email accounts (known as “Gmail accounts”) { [REDACTED] } (Juda, Tr. 1266).

**Response to Proposed Finding No. 826**

Complaint Counsel has no specific response.

(v) *Whether An Ad Is Shown May Change Over Time*

**827.** Given the dynamic nature of the AdWords algorithms, the quality score for a particular advertiser with a particular ad { [REDACTED] } (Juda, Tr. 1262).

**Response to Proposed Finding No. 827**

This proposed finding is misleading. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }. (Juda, Tr. 1262-1263).

**828.** Through the AdWords system, advertisers are provided a quality score for their ads, [REDACTED]  
[REDACTED] (Juda Tr. 1261-1262).

**Response to Proposed Finding No. 828**

Complaint Counsel has no specific response.

**829.** Because an ad's quality scores may [REDACTED]  
[REDACTED] (Juda, Tr. 1263).

**Response to Proposed Finding No. 829**

This proposed finding is misleading. [REDACTED]  
[REDACTED]  
[REDACTED] (Juda, Tr. 1262-1263).

**830.** Given the dynamic nature of the AdWords algorithms, it is possible [REDACTED]  
[REDACTED] (Juda, Tr. 1263).

**Response to Proposed Finding No. 830**

Complaint Counsel has no specific response.

*(d) Advertiser Budgets*

**831.** In the AdWords system, advertisers may set a daily budget. (RX 716-0004, 0025, 0042).

**Response to Proposed Finding No. 831**

Complaint Counsel has no specific response.

**832.** When an advertiser's budget is reached, its "ads will typically stop showing for that day." (RX 716-0042). The AdWords system may show ads on a given day accruing up to 120% of the daily budgeted costs, but the advertiser's monthly costs will not exceed its daily budget times the average number of days in a month (30.4). (RX 716-0042).

**Response to Proposed Finding No. 832**

This proposed finding is misleading since [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }.

(e) *The Effect Of Additional Bidders On CPC In A Single Auction Instance*

**833.** The number of bidders in an auction { [REDACTED] } (CX 9019 (Juda, Dep. at 55)).

**Response to Proposed Finding No. 833**

This proposed finding is misleading and irrelevant. While the number of bidders in an auction could hypothetically have no affect the CPC calculated for an advertiser in a single auction, Mr. Juda testified that in practice { [REDACTED] } (Juda, Tr. 1205).

1-800 Contacts' own marketing team and CEO clearly recognized that having to compete with more bidders in the auction increased the average CPCs it would have to pay. (CX0915; CX9020 (Craven, Dep. at 26) (describing CX0915, "I meant that in search marketing, in paid search marketing, in 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."); CX0658 ("Compared with recent weeks, we saw fewer competitors showing up on our TM keywords this week which helped drop our spend for these terms"); CX0916 ("We're seeing more advertisers on our best TM keywords...recently, which is pushing up our CPCs and cost for these terms."); CX9034 (Roush, Dep. at 60-62) ("Another reason why I wouldn't want competitors to bid on our terms is that they would drive up our search costs... If more competitors were bidding on our term, then the costs would go up."); CX9001 (Bethers, IHT at 196) ("if you have less competition in terms of trademarks, with Google, costs will be lower."); CX9012 (L. Schmidt, IHT at 211) ("Low competition equals low cost. Again, that's one of the things that we talked

about, the -- we think one of the harms of competitors bidding on our trademark is potential cost increase.”).

The proposed finding is also irrelevant because the unusual circumstance in which additional bidders do not influence the CPC is not present here. This occurs only when {

[REDACTED]

[REDACTED]

[REDACTED] } In this case, it was only advertisements that appeared on the search page that were targeted for agreements, so it is not relevant that other advertisers, who did not sign agreements, may also have been bidding without affecting the CPC. (Craven, Tr. 529).

**834.** The addition of an additional bidder for a keyword [REDACTED] (CX 9019 (Juda, Dep. at 137-138)).

**Response to Proposed Finding No. 834**

This proposed finding is vague and irrelevant. As explained in the Response to Proposed Finding No. 833, it is clear from the facts of the case which factors are at play here, and it is clear that the addition of one or more of the restricted bidders would tend to increase advertiser’s CPCs in this case.

**835.** If additional bidders { [REDACTED] } (Juda, Tr. 1204-1205).

**Response to Proposed Finding No. 825**

This proposed finding is irrelevant. { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

**836.** Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not { [REDACTED] } (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

**Response to Proposed Finding No. 836**

Complaint Counsel objects to the proposed finding as misleading, insofar as it does not consider the extent to which an additional bidder will affect bid prices except in the very first auction containing the additional bidder. When a new bidder enters, the advertisers who are below that new bidder are moved down in the search advertising auction, or (for the fourth position) are dropped completely. If those advertisers desire to maintain their ad position, they will need to raise their CPC. As a result, advertisers below a new bidder may, in practice, increase their bid in order to maintain their position.

**837.** Given how the AdWords auction works, similarly, the addition of an additional bidder who wins an ad position will not [REDACTED] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

**Response to Proposed Finding No. 837**

Complaint Counsel objects to the proposed finding as misleading, insofar as it again fails to consider the effect of a new bidder on advertiser bidding after the very first auction in which the new bidder participates. The record reflects that generally, the presence of additional bidders leads advertisers to submit higher bids, which will affect all advertisers, even those multiple positions above the “new bidder” in the first such auction. (*See* Response to Proposed Finding No. 833; CX8005 (Iyer Decl. ¶ 37).) Advertisers have easy access to detailed data on their CPCs and ad positions, and watch them closely. (*See, e.g.*, Craven, Tr. 670; CX9023 (Alovis, Dep. at 65-66); CX9018 (Drumm, Dep. at 35)).

**838.** The addition of an additional bidder who wins an ad position will { [REDACTED] } (Juda, Tr. 1206-1210,

1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

**Response to Proposed Finding No. 838**

This proposed finding is misleading for the same reasons as Proposed Finding No. 837.

839. Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser { [REDACTED] } (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make { [REDACTED] } (Juda, Tr. 1215-1217).

**Response to Proposed Finding No. 839**

Complaint Counsel has no specific response.

840. Google's data show that the expected click-through rate { [REDACTED] } (Juda, Tr. 1216-1218).

**Response to Proposed Finding No. 840**

Complaint Counsel has no specific response.

***3. The Bing Paid Search Program***

841. Microsoft launched the Bing Network { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 2)). The Bing Network { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 2)).

**Response to Proposed Finding No. 841**

Complaint Counsel has no specific response.

842. Microsoft's Bing Network is { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 2)).

**Response to Proposed Finding No. 842**

Complaint Counsel has no specific response.

843. Beginning in 2010, { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 2)).

**Response to Proposed Finding No. 843**

Complaint Counsel has no specific response.

844. The Bing Network [REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 3)).

**Response to Proposed Finding No. 844**

Complaint Counsel has no specific response.

845. On the Bing Network, [REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 3)).

**Response to Proposed Finding No. 845**

Complaint Counsel has no specific response.

846. Today, Microsoft displays [REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 3)).

**Response to Proposed Finding No. 846**

Complaint Counsel has no specific response.

847. Microsoft uses [REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 8)).

**Response to Proposed Finding No. 847**

Complaint Counsel has no specific response.

848. Microsoft earns revenue [REDACTED]  
(RX 704 (Iyer, Decl. ¶ 9)). The amount of revenue that Microsoft earns [REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 9)). Generally, an advertiser pays Microsoft [REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 9)).

**Response to Proposed Finding No. 848**

Complaint Counsel has no specific response.

849. Bing uses keyword matching similar to that in Google AdWords. (Craven, Tr. 646).

**Response to Proposed Finding No. 849**

Complaint Counsel has no specific response.

850. In general, a paid search advertisement's rank in response to a user query depends on [REDACTED] [REDACTED] } (RX 704 (Iyer, Decl. ¶ 10)).

**Response to Proposed Finding No. 850**

Complaint Counsel has no specific response.

851. Microsoft takes each advertiser's [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 11)). This affects { [REDACTED] [REDACTED] } (RX 704 (Iyer, Decl. ¶ 11)).

**Response to Proposed Finding No. 851**

Complaint Counsel has no specific response.

852. In general and within reason, { [REDACTED] [REDACTED] } (RX 704 (Iyer, Decl. ¶ 11)). Accordingly, a paid search advertisement for a website [REDACTED] [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 11)).

**Response to Proposed Finding No. 852**

Complaint Counsel has no specific response.

853. Microsoft's algorithm for determining { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (RX 704 (Iyer, Decl. ¶ 12)).

**Response to Proposed Finding No. 853**

Complaint Counsel has no specific response.

**854.** In many cases, Microsoft's algorithm { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 13)).

**Response to Proposed Finding No. 854**

Complaint Counsel has no specific response.

**855.** Microsoft's algorithm for determining { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 14)). The algorithm is programmed { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 14)). Accordingly, { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 14)).

**Response to Proposed Finding No. 855**

Complaint Counsel has no specific response.

**856.** Because Microsoft's algorithm for determining { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 15)).

**Response to Proposed Finding No. 856**

This proposed finding is irrelevant. For this case, it is not necessary to predict the exact results of any one auction individually. Complaint Counsel's experts were able to estimate the overall impact of the agreements in the aggregate using multiple methods and models. (CX8007 at 026 (Athey Expert Report at §VII); CX8006 at 078 (Evans Expert Report at §V).

***4. Determining The Effect Of Additional Bidders On Search Engines Or On Search Engine Users Is Incredibly Complex And Requires Analyses Of A Multiplicity Of Factors And Potential Responses***

**857.** The Chief Economist at Google and the Principle Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

**Response to Proposed Finding No. 857**

This proposed finding is unsupported.

**858.** The Chief Economist at Google has explained that for Google’s paid search engine advertising program, AdWords, “every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue.” (RX 701 (Varian, Decl. ¶ 6)).

**Response to Proposed Finding No. 858**

This proposed finding should be rejected because it is vague. The operation of the auction process, described above, determines how much advertisers pay when their ads are clicked on. Moreover the proposed finding is misleading and irrelevant. Mr. Varian’s declaration was written for class certification in an unrelated matter. (RX 701-0001 (Varian, Decl.)). Mr. Varian was not a witness in the present case and gave this declaration years before this case began. (RX 701 (Varian, Decl.)). Any application of the Varian declaration to this case would be misleading. For this case, it is not necessary to predict the results of any one auction in order to calculate damages to individual class members. Complaint Counsel’s experts were able to estimate the overall impact of the agreements in the aggregate using multiple methods and models. (CX8007 at 026 (Athey Expert Report at §VII), CX8006 at 078 (Evans Expert Report at §V)).

**859.** According to Google’s Chief Economist, “[i]n the world of AdWords advertising, any effort to determine what advertisers ‘would have paid’ under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed.” (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that “the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue.” (RX 701 (Varian, Decl. ¶ 16)).

**Response to Proposed Finding No. 859**

This proposed finding lacks foundation and is irrelevant for the reasons explained in the Response to Proposed Finding No. 858.

**860.** Google’s Chief Economist stated that to “determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input.” (RX 701 (Varian, Decl. ¶ 16)).

**Response to Proposed Finding No. 860**

This proposed finding lacks foundation and is irrelevant for the reasons explained in the Response to Proposed Finding No. 858.

**861.** The Principal Scientist at Microsoft who oversees Bing’s search advertising auction algorithms explained that an agreement resulting in fewer bidders is {

[REDACTED]

[REDACTED]

(RX 704 (Iyer, Decl. ¶ 20)).

**Response to Proposed Finding No. 861**

This proposed finding is irrelevant. This is not a situation in which the only fact known is that the number of bidders was reduced. As explained in Response to Proposed Finding No. 833, the bidders in this case were relevant, since they had been previously appearing on the SERPs for queries containing the targeted trademark terms. Ms. Iyer declared that {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (CX8005 (Iyer, Decl. ¶36)).

**862.** To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [REDACTED] (RX 704 (Iyer, Decl. ¶ 21)).

**Response to Proposed Finding No. 862**

This proposed finding is irrelevant. Dr. Evans and Dr. Athey are qualified experts in this case and they were able to estimate the overall impact of the agreements in the aggregate using multiple methods and models. (CX8007 at 026 (Athey Expert Report at §VII), CX8006 at 078 (Evans Expert Report at §V). Ms. Iyer's speculation about the manner in which Microsoft might attempt to analyze something (which it has not attempted to analyze) is not relevant to the models used by the experts in this matter, and moreover lacks foundation. Respondent has not indicated that Ms. Iyer has any experience or expertise that would qualify her to describe the correct type of study that an economic expert should use to determine the economic impact of the Bidding Agreements.

**863.** To do such an analysis would require [REDACTED] (RX 704 (Iyer, Decl. ¶ 22)).

**Response to Proposed Finding No. 863**

This proposed finding is irrelevant and lacks foundation for the same reasons explained in the Response to Proposed Finding No. 862.

**864.** Neither Complaint Counsel nor any of its experts has proffered any analyses of the dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue.

**Response to Proposed Finding No. 864**

This proposed finding is unsupported, irrelevant, and inaccurate. Such individualized analysis is not necessary in order to estimate the overall impact of the agreements. Dr. Evans's model uses multiple different regression analyses, a widely accepted method, to estimate the overall impact of the agreements.

However, Dr. Evans did also analyze one individual advertiser as a case study, as well as documents and testimony from many advertisers, in order to understand the individual motivations and behaviors of the relevant parties and the impacts of the bidding agreements on those motivations and behaviors. (CX8006 at 090 (Evans Expert Report at §V.C-D)).

**865.** Neither Complaint Counsel nor any of its experts has proffered individualized analyses of advertiser behavior in response to the absence of the Settlement Agreements.

**Response to Proposed Finding No. 865**

This proposed finding is unsupported, irrelevant, and inaccurate for the same reasons explained in the Response to Proposed Finding No. 864.

**866.** Neither Complaint Counsel nor any of its experts has proffered any analyses of data for each user query alleged affected by the Settlement Agreements if those queries were undertaken in the absence of the Settlement Agreements, such as (1) the identities of all potential bidders on keywords associated with the user query; (2) each bidder's bids for each of those keywords; (3) each bidder's campaigns of which those keywords were a part; (4) the quality scores of each bidder's ads and websites; (5) each bidder's daily, weekly, and monthly or yearly budgets for keywords or campaigns including those keywords; or (6) any changes in each bidder's bidding on keywords other than those affected by the Settlement Agreements.

**Response to Proposed Finding No. 866**

This proposed finding is unsupported, irrelevant, and inaccurate for the same reasons explained in the Response to Proposed Finding No. 864. Additionally, Dr. Athey analyzed data for

each user query affected by the bidding agreements for a representative period, July 2013 to July 2016. (CX8007 at 026-027 (¶¶ 74-75) (Athey Expert Report)). While individual query level data for the twelve year period during which 1-800 Contacts' agreements distorted the market is massive and unavailable, Dr. Athey was able to accurately model the difference between a world with the bidding agreements and world without the bidding agreements. (CX8007 at 026 (Athey Expert Report at §VII)).

Dr. Evans also analyzed what would have happened if the user queries were undertaken in the absence of the bidding agreements using keyword-level data provided by the search engines and the advertisers. (CX8006 at 096 (Evans Expert Report §V.D)).

*(a) Advertisers May Take Actions In Response To Additional Ads That Could Decrease CPC And Change The Ads Shown In Response To A Search Query*

**867.** Any effort to determine the effects, if any, of the Settlement Agreements in this case would be complicated by the fact that advertisers, in the absence of the Settlement Agreements, may take various actions in response to additional ads showing up in response to search queries for the 1-800 Contacts trademarks.

**Response to Proposed Finding No. 867**

This proposed finding is unsupported and inaccurate. Complaint Counsel agrees that advertisers may take various actions in response to additional ads showing up in response to search queries for 1-800 Contacts trademarks, but some of those actions are more common and more likely than others. This does not complicate efforts to model the effects of the bidding agreements.

**868.** An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that { [REDACTED] } (Juda, Tr. 1254-1259; see also RXD 26-005-007 (illustrating testimony)).

**Response to Proposed Finding No. 868**

Complaint Counsel has no specific response.

**869.** There are a number of actions advertisers may take in response to additional ads showing up next to theirs that { [REDACTED] } (Juda, Tr. 1272-1274).

**Response to Proposed Finding No. 869**

This proposed finding is vague and irrelevant. Complaint Counsel agrees that advertisers may take various actions in response to additional ads showing up in response to search queries for 1-800 Contacts trademarks, and that some of those potential actions may affect whether the advertiser's ads are shown in response to particular search queries. However, Dr. Evans and Dr. Athey have modeled, and 1-800 Contacts marketing executives testified as to their actual responses to, the effects of additional ads showing up next to 1-800 Contacts advertisements in the past. (CF §IX.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").

**870.** In response to additional ads showing up next to theirs, advertisers could { [REDACTED] } (Juda, Tr. 1272-1274).

**Response to Proposed Finding No. 870**

This proposed finding is irrelevant. Although such a response would hypothetically be possible, there is strong evidence that this would not have been the actual response of 1-800 Contacts if the bidding agreements had not been in place. Based on their previous behavior it is likely that 1-800 Contacts would have competed more in the absence of the agreements, rather than less. (CF §IX.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").

**871.** In response to additional ads showing up next to theirs, advertisers could [REDACTED] } (Juda, Tr. 1272-1274).

**Response to Proposed Finding No. 871**

This proposed finding is irrelevant. Although such a response would hypothetically be possible, there is strong evidence that this would not have been the actual response of 1-800 Contacts if the bidding agreements had not been in place. 1-800 Contacts marketing executives testified that having their ad in the first position on SERPs for search queries containing their trademark terms was a high priority. Craven, Tr. 670 (“[W]e wanted our trademark keywords to appear in the first position, and so we wanted to bid aggressively enough to make that happen.”). Historically, when competitors’ ads appeared next to 1-800 Contacts for these search queries, the result was increased CPCs for 1-800 Contacts, not shifting funds away from those searches. CX8006 at 068 (¶ 150) (Evans Expert Report) (“1-800 Contacts has itself increased its bid in response to competition.”), 076-077 (¶ 168) (“These [regression] results strongly suggest that 1-800 Contacts’ agreements have substantially lowered the price it pays for clicks on its keywords.”).

**872.** In response to additional ads showing up next to theirs, advertisers could [REDACTED] (Juda, Tr. 1272-1274).

**Response to Proposed Finding No. 872**

Complaint Counsel has no specific response other than to note that changing the ad copy to be more compelling to consumers would be a form of beneficial competition.

**873.** In response to additional ads showing up next to theirs, advertisers could [REDACTED] (Juda, Tr. 1272-1274).

**Response to Proposed Finding No. 873**

Complaint Counsel has no specific response other than to note that changing the landing page to be more compelling to consumers would be a form of beneficial competition.

**874.** These advertiser actions [REDACTED] } (Juda, Tr. 1274-1275).

**Response to Proposed Finding No. 874**

This proposed finding is vague and irrelevant for the same reasons explained in the Response to Proposed Finding No. 869.

**875.** There are also a number of advertiser-controlled settings in AdWords that { [REDACTED] } (Juda, Tr. 1267-1268).

**Response to Proposed Finding No. 875**

Complaint Counsel has no specific response.

**876.** Among the advertiser-controlled settings are: [REDACTED]

[REDACTED] (Juda, Tr. 1267-1270).

**Response to Proposed Finding No. 876**

Complaint Counsel has no specific response.

**877.** Advertisers may also { [REDACTED] } (Juda, Tr. 1267-1270). Google's algorithms cannot { [REDACTED] } (Juda, Tr. 1273).

**Response to Proposed Finding No. 877**

Complaint Counsel has no specific response.

**878.** Neither Complaint Counsel nor any of its experts proffered any analysis that included consideration of the effects of these potential advertiser actions.

**Response to Proposed Finding No. 878**

This proposed finding is vague and irrelevant for the same reasons explained in the Response to Proposed Finding No. 869.

*(b) Any Effort To Determine The Effects, If Any, Of The Settlement Agreements In This Case Would Be Complicated By The Fact That The Algorithms Have Changed Over Time*

**879.** Any effort to determine the effects, if any, of the Settlement Agreements in this case is complicated by the fact that the algorithms have changed over time.

**Response to Proposed Finding No. 879**

This proposed finding is vague. While an effort to measure the exact amount of damages from the bidding agreements may be complicated by changes in the algorithm, Complaint Counsel seeks no damages and need not calculate them. Complaint Counsel's experts, Dr. Athey and Dr. Evans, have modeled the harms caused by the agreements using conservative estimates based on fundamental principles of the search engine ad algorithms which have not meaningfully or relevantly changed since the search engines first allowed advertising. (CF § IX.B.6). When changes to the search engine auction would impact their models, they have conservatively accounted for those changes. (*See, e.g.*, CX8006 at 010 (¶ 21) (Evans expert report) (explaining that Dr. Evans' model runs only from 2010-2015, not from the date of the bidding agreements, and that Evans has made other conservative assumptions to arrive at his estimate of lost clicks over this time period).

**880.** The algorithms for calculating Ad Rank, quality scores, and CPC in Google's AdWords paid search advertising program { [REDACTED] } (Juda, Tr. 1278).

**Response to Proposed Finding No. 880**

Complaint Counsel has no specific response.

**881.** For instance, the inputs for the algorithms [REDACTED] (Juda, Tr. 1278-1279). In addition, { [REDACTED] } (Juda, Tr. 1279-1280; CX 9019 (Juda, Dep. at 167-168)).

**Response to Proposed Finding No. 881**

Complaint Counsel has no specific response.

**882.** How Ad Rank is { [REDACTED] } (Juda, Tr. 1280). Moreover, Google { [REDACTED] } (Juda, Tr. 1280-1281).

**Response to Proposed Finding No. 882**

Complaint Counsel has no specific response.

**883.** Some of the changes to Google's AdWords algorithms have been publicly announced. In December 2005, Google incorporated landing page experience into the algorithms determining quality score. (RX 715-0075).

**Response to Proposed Finding No. 883**

Complaint Counsel has no specific response.

**884.** In February 2007, Google announced it would be making changes to the way in which its algorithms determined ads' quality scores. (RX 715-0223-0224).

**Response to Proposed Finding No. 884**

Complaint Counsel has no specific response.

**885.** In August 2007, Google changed its algorithms with regard to which ads are placed in the top spots above the organic results. (RX 715-0300). After the change, the algorithm no longer uses actual CPC but instead uses maximum CPC for this determination. (RX 715-0300).

**Response to Proposed Finding No. 885**

Complaint Counsel has no specific response.

**886.** In June 2008, Google changed its algorithms to consider landing page load time in determining an ad's quality score. (RX 715-0401-0402).

**Response to Proposed Finding No. 886**

Complaint Counsel has no specific response.

**887.** In August 2008, Google announced that it would change its algorithms so that an ad's quality score would be calculated at the time of each search query. (RX 715-0419).

**Response to Proposed Finding No. 887**

Complaint Counsel has no specific response.

**888.** In October 2008, Google changed its algorithms so the influence of position on click-through-rate is removed when calculating quality score. (RX 715-0428-0429).

**Response to Proposed Finding No. 888**

Complaint Counsel has no specific response.

**889.** In December 2008, Google extended its AdWords program to certain mobile devices. (RX 715-0450).

**Response to Proposed Finding No. 889**

Complaint Counsel has no specific response.

**890.** In October 2011, Google changed its algorithms to give greater weight to ad relevance and landing page quality. (RX 715-0947-0948).

**Response to Proposed Finding No. 890**

Complaint Counsel has no specific response.

**891.** In October 2013, Google changed its algorithms to consider the effect of ad extensions and other ad formats. (RX 715-1349-1350).

**Response to Proposed Finding No. 891**

Complaint Counsel has no specific response.

**892.** Neither Complaint Counsel nor any of its experts proffer any analysis that includes the effects of these changes.

**Response to Proposed Finding No. 892**

This proposed finding is misleading and incorrect. Dr. Athey and Dr. Evans have used actual search engine data over this time period to build their models, and thus *do* account for these changes by relying on data which already reflects the effects of these changes. To the extent any individual policy changes are not reflected in the bidding data but are nonetheless important—an idea for which Respondent cites no evidence—Dr. Athey and Dr. Evans account for potential variations by being conservative in their calculations at each step in the process. (CF § IX.B.6). Even if each of these algorithm changes had the impact of lessening the harms, which Respondent has not and cannot show, it would not invalidate Complaint Counsel’s experts’ results, due to the multiple conservative choices the experts used in making their estimates of harm. (CF § IX.B.6).

(c) ***Determining The Effects Of Additional Bidders Is Complicated By The Fact That The User Interface Has Changed Over Time***

**893.** Any effort to determine the effects, if any, of the Settlement Agreements in this case is complicated by changes to the user interface for paid search ads over time.

**Response to Proposed Finding No. 893**

This proposed finding should be rejected because it is vague, unsupported, and irrelevant. Complaint Counsel’s experts—Dr. Athey, Dr. Evans, and Dr. Jacoby—have been able to model the harms caused by the agreements using actual data which would reflect changes over time, as well as conservative estimates to account for any further variation. (CF §§ IX.B.6, XI.C.4).

**894.** The user interface of Google’s paid search ads has changed over time. (See, e.g., Juda, Tr. 1281). For instance, { [REDACTED] } (Juda, Tr. 1281). The number of ads shown [REDACTED] (Juda, Tr. 1281). Now, however, { [REDACTED] } (Juda, Tr. 1281-1282).

**Response to Proposed Finding No. 894**

Complaint Counsel has no specific response.

**895.** In November 2011, Google began showing ads below (in addition to above and to the side of) the organic search results. (RX 715-0968).

**Response to Proposed Finding No. 895**

Complaint Counsel has no specific response.

**896.** In the past, Google displayed paid search ads { [REDACTED] } (Juda, Tr. 1282). But in the first part of 2016, Google removed the ads from the right-hand side. (RX 715-1733-4; Juda, Tr. 1282).

**Response to Proposed Finding No. 896**

Complaint Counsel has no specific response.

**897.** According to Google, as of May 2016, every year “there are trillions of searches on Google and over half of those searches happen on mobile.” (RX 715-1733).

**Response to Proposed Finding No. 897**

Complaint Counsel has no specific response.

**898.** Neither Complaint Counsel nor any of its experts proffer any analysis that includes the effects of these changes.

**Response to Proposed Finding No. 898**

This proposed finding is misleading. Although Complaint Counsel and experts do not attempt to account for each of the specific changes to the SERP listed by Respondents here, both of their analyses account for potential variations such as the ones explained here by building their models using data which would reflect the impact of the variations Respondent describes here, as well as by being conservative in their calculations at each step in the process. (CF § IX.B.6). Even if each of these SERP changes had the impact of lessening the harms, which Respondent has not and cannot show, it would not invalidate Complaint Counsel’s experts’ results, due to the multiple conservative choices the experts used in making their estimates of harm. (CF § IX.B.6). Dr. Jacoby also directly accounts for changes in the SERP by running his survey with both a pre-2016 SERP and a 2016 SERP. (CX8008 at 015, 018 (Use of Two Different SERP Formats) (Jacoby Expert Report)).

***C. By Permitting Paid Search Advertisements, Search Engines Displace Organic Results And Shift Clicks From Organic Results To Paid Search Advertisements.***

***1. Paid Search Advertisements Displace Potentially Valuable Organic Links That Complaint Counsel’s Experts Have Not Considered.***

**899.** Search engines, such as Google, are increasingly “allocating less space to organic results on their search page” and allocating more space to paid advertisements. (Clarkson, Tr. 225). This trend is driven by search engines’ “drive to generate more revenue.” (Clarkson, Tr. 225).

**Response to Proposed Finding No. 899**

This proposed finding is unsupported, lacks foundation, and is irrelevant. Mr. Clarkson is not qualified to speak on the subject of the motivations of search engines. No other witnesses, expert or fact, were able to confirm the claim that search engines are increasing the amount of space allocated to advertisements versus organic results or other non-advertising features such as the “knowledge graph.” (RX 721-0001).

**900.** When a search engine displays additional paid advertisements in the search results, the organic results are pushed further down the results page. (RX 733-0040–41; Athey, Tr. 2082).

**Response to Proposed Finding No. 900**

This proposed conclusion is not supported by the citation to the Ghose report (RX0733-040-041), nor is it an opinion Dr. Ghose expresses anywhere else in his Report. Complaint Counsel has no further specific response.

**901.** The organic listings are based on the relevance or usefulness of the website to the user's search query. (Ghose, Tr. 3909).

**Response to Proposed Finding No. 901**

Complaint Counsel has no specific response.

**902.** When organic listings are pushed further down the search results page, they are less accessible to consumers and their value to consumers is thereby decreased. (RX 733-0040-41).

**Response to Proposed Finding No. 902**

This proposed conclusion should be rejected because it is not supported by the citation to the Ghose report (RX0733-040-041), nor is it an opinion Dr. Ghose expresses anywhere else in his Report. The cited portion of Ghose report has nothing to do with "organic listings" being "pushed further down the search results page," and does not express any conclusion that this decreases value to consumers. To the extent the proposed finding implies that the relevance of the overall page is decreased when ads are included, it is misleading and unsupported. *See* Response to Proposed Finding No. 920.

**903.** Results appearing further down on the search results page have a lower click through rate. (CX 9042 (Evans, Dep. at 175–76)).

**Response to Proposed Finding No. 903**

This proposed finding is not supported by the testimony cited. Dr. Evans (who is not a fact witness) stated that *with respect to paid advertisements* "the higher you are in the stack, all else equal, the higher the click-through rate is going to be." CX9042 (Evans, Dep. at 176.) This does not support an assertion that, in general, results that appear lower down have a lower click-through-rate.

**904.** Consumers incur greater search costs when they must scroll further down the search results page to find the most relevant organic listings. (Ghose, Tr. 3913, 3917).

**Response to Proposed Finding No. 904**

This proposed finding should be rejected because it is not an opinion Dr. Ghose expressed in his expert report. Respondent cites RX0733-040-041 as related to this contention (see Proposed Findings Nos. 900, 902), but the cited portions of Dr. Ghose’s report fail to disclose the opinion suggested in Proposed Finding No. 904. Nor does Dr. Ghose disclose or support such an opinion elsewhere in his report.

Even if the Court were to consider the opinions that Dr. Ghose expressed for the first time at trial, the cited testimony does not support the proposed finding. Ghose, Tr. 3917 simply states that search costs are higher on mobile devices because the consumer might have to “scroll down the screen before he or she gets to see the most relevant *offer*” (emphasis added), which does not relate to an opinion about finding “the most relevant *organic listings*.”

Ghose, Tr. 3913, in relevant part, deals exclusively with Dr. Ghose’s view that if many different *paid advertisements* are shown, “you have to incur additional cognitive costs of scrolling down the screen and evaluating different choices, and all of these add up to search costs.” Ghose, Tr. 3913. Again, this does not disclose or relate to any opinion about finding “the most relevant *organic listings*.”

Further, this proposed conclusion should be rejected because it is inaccurate. Scrolling down the page is a de minimis search cost. “The literature which Dr. Ghose cites does not support his assertion that increased advertising would increase consumer search costs for consumers in this case.” (CX8010 at 023 (¶ 57) (Athey Rebuttal Report)). “Indeed, the potential for detrimental effects of increased choice claimed by Dr. Ghose...are understandable in the case of an individual designing a long-term savings plan to cover Social Security requirements. They are not relevant,

however, to an online consumer who is presented with paid search results relevant to her search query.” (CX8010 at 023 (¶ 57) (Athey Rebuttal Report)).

**905.** Search costs are heightened on mobile devices, where the visible results are limited by reduced screen size and the consumer must scroll further down the page to see the relevant organic listings.. (RX 733-0038-41; see also Ghose, Tr. 3916-3917).

**Response to Proposed Finding No. 905**

This proposed finding should be rejected because it states an opinion Dr. Ghose expressed in his expert report. Dr. Ghose did not express in his report the opinion that “search costs are heightened on mobile devices.” He stated that one fact “implies that the potential harm . . .to consumers who search with a navigational intent . . . is likely to be higher on a mobile device than on a PC,” and specifically noted that “the harm to consumers can be in the form of higher search costs *or* in the form of confusion.” RX0733-040-041. This opinion is thus limited to consumers “who search with a navigational intent,” and the opinion does not relate in any way to the claim that this harm arises because “the consumer must scroll further down the page to see the relevant *organic listings*.” Even if the Court were to consider the opinions that Dr. Ghose expressed for the first time at trial, the cited testimony does not support the proposed finding. Ghose, Tr. 3917 simply states that search costs are higher on mobile devices because the consumer might have to “scroll down the screen before he or she gets to see the most relevant *offer*” (emphasis added), which does not relate to an opinion about finding “the most relevant *organic listings*.”

Moreover, this proposed finding should be rejected because it is inaccurate. Search costs are greatly reduced by mobile devices because consumers can search for goods with greater convenience than before search was available on mobile devices.

**906.** As of 2016, more than 50 percent of searches conducted in the United States were performed on mobile devices. (Ghose, Tr. 3917).

**Response to Proposed Finding No. 906**

This proposed finding should be rejected because it is not an opinion that Dr. Ghose expresses in his report, and he is not a fact witness.

**907.** Complaint Counsel's expert, Dr. Susan Athey, acknowledges that the display of additional paid search advertisements displaces organic search results. (Athey, Tr. 2082).

**Response to Proposed Finding No. 907**

This proposed finding is not supported by the cited testimony. Dr. Athey testified that organic results "are pushed further down the page" when "more paid ads appear on a particular search engine," she did not agree that they were "displaced." Athey, Tr. 2082.

**908.** Complaint Counsel's expert, Dr. Susan Athey, admits that she did not quantify the value to consumers of the organic results that are displaced by the appearance of additional paid search advertisements. (Athey, Tr. 2082-23; see also CX 9043 (Athey, Dep. at 180, 278-281)).

**Response to Proposed Finding No. 908**

This proposed finding is not supported by the cited testimony. Dr. Athey testified that organic results "are pushed further down the page" when "more paid ads appear on a particular search engine," she did not agree that they were "displaced." Athey, Tr. 2082. Moreover, Dr. Athey did note that the results which were "pushed down the page" in the example Dr. Athey was asked about had very low click-through rates, which is some indication of their value to consumers. (Athey, Tr. 2083). In the example discussed in Respondent's citation, Figure 2 of Dr. Athey's report, there is only one advertisement, an advertisement for 1-800 Contacts. Thus Dr. Athey could not have been indicating that the organic results had low click through rates due to already being "displaced," since the page had not been impacted by having "additional" advertisements. (CX8007 at 010 (Athey Expert Report, Figure 2)).

**909.** Complaint Counsel's expert, Dr. Susan Athey, did not consider the harm to consumers that arises when additional paid advertisements displace organic listings on a search engine results page. (Athey, Tr. 2082-23; see also CX 9043 (Athey, Dep. at 180, 278-281)).

**Response to Proposed Finding No. 909**

This proposed finding should be rejected because it baselessly asserts that “harm to consumers . . . arises when additional paid advertisements displace organic listings on a search engine results page.” No evidence supports such an assertion, and Dr. Ghose provided no expert opinion testimony that supports it. See Response to Proposed Findings Nos. 902, 904, 905.

To the extent the proposed finding is intended to imply that Dr. Athey did not consider whether the presence of additional advertisements increases or decreases the value of the search results page to consumers, the proposed finding is incorrect. (Athey, Tr. 950 (“[C]onsumer welfare is increased by allowing...bidding on competitors’ trademarks.”)).

**2. *The Presence Of Additional Paid Search Advertisements Shifts Clicks From Organic Results To Paid Search Advertisements.***

**910.**

(Ghose, Tr. 3893-94; RX 733-0025-27).

**Response to Proposed Finding No. 910**

This proposed finding should be rejected because this is not an opinion Dr. Ghose expressed or disclosed in his report. His report noted that some literature suggests this effect *can* occur, but the only actual opinion he expressed related to the incentives of search engines. The opinion expressed in his report is the following:

64. In sum, the academic literature and some evidence from the industry indicate that increasing the number of ads displayed in response to searches for trademarks can make consumers shift their clicks from organic links to the trademark owner’s website to paid advertisements for that website. Accordingly, displaying additional ads in response to searches for trademarked terms may be in the search engine’s interest even if the additional ads are not highly relevant for consumers and consumers do not click on them.

RX0733-027. Furthermore, the proposed finding is irrelevant, unless Respondent is implying search engines are motivated to hide relevant organic links from users, which is simply incorrect. *See* Response to Proposed Finding No. 920.

**911.**

(Ghose, Tr. 3894 {(

}.}

**Response to Proposed Finding No. 911**

This proposed finding should be rejected because, as explained in response to Proposed Finding No. 910, there is no evidence that a “shift between organic listings and paid advertisements occurs,” as no expert has expressed any opinion on the matter, and there is no admissible evidence that would support the proposition.

**912.**

}.} (RX 733-0025; Ghose, Tr. 3894; RX 716-0026, 68).

**Response to Proposed Finding No. 912**

Complaint Counsel has no specific response.

**913.** Several researchers have conducted recent studies demonstrating that, when additional paid advertisements are displayed in response to a trademark search, there is a shift in consumer clicks from the organic links of the trademark holder to the paid advertisements of the trademark holder. (RX 733-0026–27).

**Response to Proposed Finding No. 913**

This proposed finding should be rejected because this is not an opinion Dr. Ghose expressed or disclosed in his report. This proposed finding should be rejected for the additional reason that it inaccurately characterizes the findings of each of the “recent studies,” which are not admissible evidence in this case.

**914.** In a recent working paper, researchers Simonov, Nosko, and Rao found that the main effect of displaying additional paid advertisements in response to a search for a trademark is to

shift clicks from the trademark holder's organic link to the trademark holder's paid advertisement. (RX 733-0026).

#### **Response to Proposed Finding No. 914**

This proposed finding should be rejected because it inaccurately states “the main effect” found by the researchers “trademark is to shift clicks from the trademark holder's organic link to the trademark holder's paid advertisement.” The most significant effect of displaying “additional paid advertisements” for rivals was to increase the number of clicks the trademark holders' rivals received. See CCPTB at 82.

**915.** Researchers Reiley, Li, and Lewis found in a field experiment that, when a search engine displays additional ads at the top of the results page, users click on the top paid advertisement more frequently and on the organic listings less frequently. (RX 733-0026).

#### **Response to Proposed Finding No. 915**

This proposed finding should be rejected because it is incomprehensibly vague. All this proposed finding states is that the researchers found a correlation between the number of ads displayed, the click-through-rate on the top paid ad, and the click-through rate on the organic listings. This finding simply confirms the hypothesis that search engines are very adept at determining when paid listings will be of interest to consumers – the search engines display more paid ads when they know consumers are interested in ads, and they display fewer paid ads when consumers are not searching with a commercial intent and are instead interested in clicking on organic links.

**916.** Researchers Blake, Nosko, and Tadelis also documented the substitution between organic and paid advertising on search engines. They found, in a natural experiment, that when brand keyword paid search is disabled, “almost all (99.5 percent) of the forgone click traffic . . . was immediately captured by natural search traffic from the platform. . . . That is, substitution between paid and unpaid traffic was nearly complete.” (RX 733-0026).

#### **Response to Proposed Finding No. 916**

This proposed finding should be rejected because it is incomprehensibly vague. All this proposed finding states is that the researchers found that search engines are very good at displaying relevant links (both paid and unpaid) to consumers, and consumers click on relevant links after they run user queries. .

**917.**

(RX 733-0026-27; CX 1665-0006).

**Response to Proposed Finding No. 917**

This proposed finding should be rejected because it is incomprehensibly vague. The proposed finding does not state whether the advertiser received more total clicks when its ad was displayed. Moreover, it is irrelevant.

**918.** A similar study by Google found that, “[o]n average, for advertisers who appear in the top rank organic slot, 50% of ad clicks are incremental. This means that half of all ad clicks are not replaced by organic clicks when search ads are paused.” This result suggests that the remaining 50 percent of the clicks on paid links for the top brand are “shifted” from organic to paid results. (RX 733-0027).

**Response to Proposed Finding No. 918**

This proposed finding should be accepted by the Court, as it demonstrates that paid advertising is valuable to both consumers and advertisers – advertisers get more clicks when they advertise than when they display organic results alone. 919.

(CX 9043 (Athey, Dep. at 85); Ghose, Tr. 3894-96; RX 733-0025 (Ghose Report)).

**Response to Proposed Finding No. 919**

This proposed finding is incomprehensible and should be rejected. Complaint Counsel agrees that 1-800 Contacts pays search engines when consumers click on its paid links, and does not pay

search engines when consumers click on its organic links. But this proposed finding does not suggest any connection between a “shift” in clicks from organic to paid and the presence of “ads for other retailers,” and no evidence or expert testimony suggests any such connection.

**3. *Search Engines Have An Incentive To Display Paid Advertisements Even If They Are Irrelevant And Do Not Receive Clicks.***

**920.**

} (Ghose, Tr. 3894; RX 733-0027).

**Response to Proposed Finding No. 920**

This proposed finding should be rejected because it is contradicted by the weight of the evidence. Mr. Juda testified on behalf of Google that “there’s both short-term and long-term benefits to showing relevant and useful ads. In the short-term, we only generate revenue when users click on ads, so that certainly creates a very strong economic incentive to show useful ads. In addition, we have observed on a number of occasions that users’ propensity for clicking on ads over time can also be influenced based on the quality and quantity of ads that they are presented, so by increasing the quality of ads that we present to users, we can actually see their likelihood of clicking on ads in the future steadily increase over time.” (Juda, Tr. 1072-1073; *see also* CX8005 (Iyer, Decl. ¶8) (“If we present irrelevant ads, low quality ads, or too many ads, Bing will lose users, which would make our site less attractive to advertisers and publishers.”)). Complaint Counsel’s experts confirmed this view. (Evans, Tr. 1426; Athey, Tr. 708; CX8010 at 017-018 (¶ 45) (Athey Rebuttal Report)). Google has systems in place to prevent ads that are not relevant to consumers from appearing, since it believes such ads are not beneficial to Google’s bottom line. (CX9019 (Juda, Dep. at 126-127)). Advertisers recognize that less relevant ads are less likely to be shown, and that “Google can tell very clearly” which ads are relevant and which are not. (CX9033 (Mohan, Dep. at 44, 93); CX9038 (Hamilton, IHT at 14-16)).

Advertisers, including 1-800 Contacts, also testified that they have no incentive to have their ads appear where they are not relevant. (Craven, Tr. 652 (“[I]f someone types a keyword, we wanted our ad to be closely matched to what they were searching for.”); CX9020 (Clarkson, Dep. at 127)).

**921.** [REDACTED] (RX 733-0025; Ghose, Tr. 3894; ; RX 716-0026, 68).

**Response to Proposed Finding No. 921**

Complaint Counsel has no specific response.

**922.** Search engines obtain more revenue when users click on paid advertisements than when users click on organic listings. (RX 733-0025-27; ; RX 716-0026, 68).

**Response to Proposed Finding No. 922**

This proposed finding is misleading and contradicted by the weight of the evidence to the extent that it suggests search engines increase their revenues over the long run if users click on less-relevant paid advertisements rather than more-relevant organic listings. See Response to Proposed Finding No. 920. While search engines make money from clicks on paid listings and do not make money from clicks on organic listings, search engines benefit from users having a good experience. (Juda, Tr. 1198; CX8005 (Iyer, Decl. ¶¶7-8)). In fact, on many searches Google doesn’t show any ads because “it doesn’t appear to make business sense as well as quality sense from a user perspective to do so.” (Juda, Tr. 1081). “[T]here’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.” (Juda, Tr. 1081).

**923.** Shifting clicks from organic links to paid advertisements results in additional revenue for the search engines. (RX 733-0025-27).

**Response to Proposed Finding No. 923**

This proposed finding is contradicted by the weight of the evidence to the extent that it suggests that search engines would increase revenue if they pushed users to click on less-relevant paid advertisements rather than more-relevant organic listings, for the same reasons as explained in the Response to Proposed Finding No. 922.

**924.** The search engines have an incentive to display additional advertisements in response to searches for trademark terms even if the additional advertisements are not highly relevant for consumers and consumers do not click on them because the display of additional advertisements causes a shift in clicks from the organic links to the paid advertisements. (RX 733-0027; { [REDACTED] } [REDACTED] }

#### **Response to Proposed Finding No. 924**

This proposed finding is contradicted by the weight of the evidence. “[W]e run experiments where at times showing users more ads results in there being a trend line to that click-through rate over time where, if we're showing additional ads or lower-quality ads, that trend line is moving down.” (Juda, 1083). “If we present irrelevant ads, low quality ads, or too many ads, Bing will lose users, which would make our site less attractive to advertisers and publishers.” (CX8005 (Iyer Decl. ¶8)).

Complaint Counsel also notes that, contrary to this Court’s Order, Respondent is improperly citing an expert for a proposition of fact.

#### ***D. Search Engine Trademark Policies***

##### ***1. History Of Trademark Policies***

##### ***(a) Google Trademark Policies***

**925.** Prior to 2004, “Google’s U.S. AdWords trademark policy permitted brand owners to restrict the use of their trademark within ad text and as a keyword upon demonstrating protectable rights.” (CX 1148-001). Thus, prior to 2004, in response to a complaint from a trademark owner, Google would prevent ads from appearing in response to searches on the trademark owner’s trademark. (CX 9022 (Charlston, Dep. at 19)).

#### **Response to Proposed Finding No. 925**

The second sentence of this proposed finding should be rejected because it is not supported by the evidence cited and is incorrect. Prior to 2004 Google allowed trademark owners to limit their rivals ability to **bid** on trademarks as keywords, but it did not allow trademark owners to prevent rivals from broad-matching into user queries for the trademark term. So, for example, prior to 2004 one of 1-800 Contacts' rivals (e.g., Memorial Eye) would be free to bid on "contacts" as a keyword, and display ads triggered by user queries for "1800 contacts" as a result of broad matching.

The proposed finding relies on a snippet from the deposition of Mr. Gavin Charlston of Google, but it ignores the authoritative testimony he provided later in that same deposition:

pre April 2004 in the U.S. and Canada . . . 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 non-trademark term on which the advertiser had broad matched.

. . . if a user had decided -- or an advertiser has decided to broad match on the word "shoes" and the query consists of Nike shoes, ads may still appear by third parties, notwithstanding Nike's trademark complaint.

CX9022 (Charlston, Dep. at 179-180).

**926.** In April 2004, Google changed its U.S. trademark policy to "permit brand owners to restrict use of their trademark within ad text, but not as a keyword." (CX 1148-001; CX 9022 (Charlston, Dep. at 19-20 ("Beginning in April 2004, we no longer restricted the use of trademarks as keywords, but we would continue to allow trademark owners to restrict the use of their trademark with an ad text."))).

**Response to Proposed Finding No. 926**

Complaint Counsel has no specific response.

**927.** Google acknowledged in its filing with the Securities and Exchange Commission that is April 2004 change in the U.S. trademark policy could subject Google "to more trademark infringement lawsuits." (RX 140-0028).

**Response to Proposed Finding No. 927**

Complaint Counsel has no specific response.

928. After it changed its U.S. trademark policy in 2004, Google stated on its website that “Google is not in a position to arbitrate trademark disputes between advertisers and trademark owners.” (RX 159-0004). Google accordingly encouraged “trademark owners to resolve their disputes directly with the advertisers.” (RX 159-0004).

#### **Response to Proposed Finding No. 928**

Complaint Counsel has no specific response.

929. In June 2009, Google again changed its U.S. trademark policy such that, subject to a certain exception, Google “will restrict the use of trademark in ad text, reactively, in response to a complaint received from a trademark owner reflecting that they own rights in a term, in connection with a particular goods and services in the United States.” (CX 9022 (Charlston, Dep. at 16); CX 1148-001). Under the exception, Google “will allow a trademark to appear in ad text where the ad and landing page indicate that the advertiser is a reseller, is providing compatible goods or services, or is providing information about the trademark products or services.” (CX 9022 (Charlston, Dep. at 16); CX 1148-001).

#### **Response to Proposed Finding No. 929**

This proposed finding is irrelevant because it provides a “fair use” exception for the use of a trademark in the *text* of an ad for specified resellers, sellers of compatible goods or services, or parties “providing information about the trademark products or services” of 1-800 Contacts. None of the settling parties qualify for this particular fair use exception for the use of 1-800 Contacts’ trademark in the text of an ad. Thus the June of 2009 change had no impact on the parties to the agreements. The “reactive” nature of Google’s trademark enforcement had been in place in 2004 as well, it was not a change. (CX9022 (Charlston, Dep. at 19) (“Prior to 2004, in response to a complaint from a trademark owner, we would restrict ads from appearing on that trademark owner’s trademark”); RX0159 at 0003 (April 09, 2004 email referring to complaint investigations preceding Google’s trademark monitoring)).

930. Under Google’s U.S. trademark policy since June 2009, in response to a complaint by a trademark holder, advertisers are not allowed to include the holder’s trademark in the text of their ads. (CX 9022 (Charlston, Dep. at 16)).

#### **Response to Proposed Finding No. 930**

Complaint Counsel has no specific response except to note that this policy relates only to the use of a trademark in the text of an advertisement, and is unchanged from Google's 2004 trademark policy vis-à-vis 1-800 Contacts and its competitors, who would not qualify for the "fair use" exception to the in-text use of a trademark that was described by the Response to Proposed Finding No. 929.

**931.** In response to a complaint by a trademark holder, Google's U.S. trademark policy since June 2009 prohibits ads using the holder's trademark "term in a competitive way, including ads with a landing page selling or facilitating the sale of goods or services of a competitor of the trademark owner." (CX 1149-007).

**Response to Proposed Finding No. 931**

Complaint Counsel has no specific response except to note that this policy relates only to the use of a trademark in the text of an advertisement, and is unchanged from Google's 2004 trademark policy vis-à-vis 1-800 Contacts and its competitors, who would not qualify for the "fair use" exception to the in-text use of a trademark that was described by the Response to Proposed Finding No. 929.

**932.** Google's U.S. trademark policy thereby prohibits { [REDACTED] } (CX 9022 (Charlston, Dep. at 126)).

**Response to Proposed Finding No. 932**

Complaint Counsel has no specific response, but notes that the competitive advertising restricted by the bidding agreements was not restricted by Google's trademark policy. This policy relates only to the use of a trademark in the text of an advertisement, and is unchanged from Google's 2004 trademark policy vis-à-vis 1-800 Contacts and its competitors, who would not qualify for the "fair use" exception to the in-text use of a trademark that was described by the Response to Proposed Finding No. 929.

**933.** According to Google's in-house trademark counsel, in response to a trademark holder's complaint, Google will [REDACTED]

[REDACTED] (CX 9022 (Charlston, Dep. at 126-27)).

**Response to Proposed Finding No. 933**

This proposed finding is irrelevant and misleading in conjunction with Proposed Finding No. 932. The proposed finding describes trademark policies regarding competitive references and product descriptions in comparison to another competitor, which are wholly separate from the policies described above, remain in force, and are not relevant to or impacted by the bidding agreements. *See* Response to Proposed Finding No. 929.

**934.** To submit a complaint under Google’s U.S. trademark policy, a trademark holder need only submit a Google-provided form to Google. (RX 716-0053-0054).

**Response to Proposed Finding No. 934**

Complaint Counsel has no specific response.

*(b) Bing Trademark Policies*

**935.** At the time that Microsoft launched the Bing Network in 2009, Microsoft’s terms of service that advertisers agreed to in order to advertise on the Bing Network { [REDACTED] (RX 704 (Iyer, Decl. ¶ 16)). In 2011, Bing { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 16)).

**Response to Proposed Finding No. 935**

Complaint Counsel has no specific response.

**936.** At the time that Microsoft launched the Bing Network in 2009, Microsoft also { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 17)). This { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 17)).

**Response to Proposed Finding No. 936**

Complaint Counsel has no specific response.

**937.** In 2013, Microsoft implemented a { [REDACTED] } (RX 704 (Iyer, Decl. ¶ 18)). The

[REDACTED] (RX 704 (Iyer, Decl. ¶ 18)).

**Response to Proposed Finding No. 937**

Complaint Counsel has no specific response, except to note that Bing would not display competitor non-trademark ads in addition to the trademark owner’s ad if Microsoft determined they were irrelevant. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

938. Under the [REDACTED] (RX 704 (Iyer, Decl. ¶ 18)). These [REDACTED] (RX 704 (Iyer, Decl. ¶ 18)).

**Response to Proposed Finding No. 938**

Complaint Counsel has no specific response.

939. 1-800 Contacts [REDACTED] (RX 704 (Iyer, Decl. ¶ 19)). Accordingly, Microsoft [REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 19)).

**Response to Proposed Finding No. 939**

Complaint Counsel has no specific response.

***2. Search Engine’s Trademark Policies Are Not Socially Optimal***

940. There is no basis to conclude that the search engine’s trademark policies are socially optimal.

**Response to Proposed Finding No. 940**

This proposed finding is erroneous, and irrelevant. First, it is not correct that there is “no basis to conclude that the search engine’s trademark policies are socially optimal.” The record evidence shows that search engines rely on significant consumer feedback in determining what ads are relevant and beneficial to consumers. Further, when Google changed its trademark policy, it expressly stated that this policy change would be beneficial for consumers. “By preventing advertisers from using trademarked terms as keywords, Google has been reducing the relevant information about products and services users see and thus limiting user choice. We believe the right approach is to give users more choices and access to as much information as is relevant to their search or interest. With this idea in mind, the new AdWords trademark policy does not limit the use of trademark terms [as] keywords.” (CX0471 (2004 email from Rose Hagan, Google, to Howard Metzenberg regarding AdWords policy update); CX0888, *in camera* { [REDACTED] } [REDACTED] }).

Further, whether the search engines’ trademark policies are socially optimal has no bearing on this case. The search engines balance their own interests with those of consumers and advertisers. (Juda, 1083; CX Iyer (Decl. ¶8); Evans, Tr. 1565-1566). Whether or not it is the “optimal” balance, “consumer welfare is increased by allowing...bidding on competitors’ trademarks.” (Athey, Tr. 950). By contrast, the situation created by Respondent’s bidding agreements is decidedly sub-optimal, in that many otherwise relevant and beneficial advertisements are blocked from consumers.

**941.** As Respondent’s expert, Dr. Murphy, points out, one cannot infer, as a matter of economics, that search engines’ policies regarding trademarks are efficient. (RX 739-0035). Providers of advertising services, such as search engines, can benefit from trademark infringement because it can increase the demand for their advertising services by infringers. (RX 739-0035). In addition, the costs of monitoring infringement may be higher for providers of advertising services because they provide services to many different trademark owners. (RX 739-0035).

**Response to Proposed Finding No. 941**

This proposed finding is erroneous and irrelevant for the same reasons explained in the Response to Proposed Finding No. 940.

**942.** Thus, the optimal level of trademark protection for search engines will typically differ from the optimal level of trademark protection for the companies owning such trademarks. (RX 739-0035).

**Response to Proposed Finding No. 942**

This proposed finding is erroneous and irrelevant for the same reasons explained in the Response to Proposed Finding No. 940.

**943.** Complaint Counsel’s economist, Dr. David Evans, admitted that with respect to trademark protection, search engines are not seeking to maximize the interests of trademark holders; search engines are seeking to maximize profit. (Evans, Tr. 1817).

**Response to Proposed Finding No. 943**

This proposed finding is erroneous and irrelevant for the same reasons explained in the Response to Proposed Finding No. 940. It is also misleading because it implies that trademark law is intended to “maximize” the interests of the trademark holder.

**944.** Dr. Evans further admitted that he would not look to the search engines as making the optimal decisions with respect to the enforcement of trademark law. (Evans, Tr. 1817).

**Response to Proposed Finding No. 944**

This proposed finding is erroneous and irrelevant for the same reasons explained in the Response to Proposed Finding No. 940.

**945.** When asked whether she would be offering an opinion as to whether Google’s trademark policy is socially optimal, Complaint Counsel’s expert, Dr. Susan Athey, testified at her deposition, “Is it perfectly socially optimal? No.” (CX 9043 (Athey, Dep. at 192-193)).

**Response to Proposed Finding No. 945**

This proposed finding is erroneous and irrelevant for the same reasons explained in the Response to Finding No. 940.

## VII. Trademarks And Paid Search Advertising

### A. *1-800 Contacts' Trademark Paid Search Policy*

#### 1. *1-800 Contacts' Marketing Personnel Understood Trademark Search To Be Navigational*

**946.** A search for 1-800 Contacts' trademark is typically a navigational search (*i.e.*, someone trying to navigate to 1-800 Contacts' website). (Coon, Tr. 2723-24); CX 9017 (Blackwood, Dep. at 54); CX 9031 (Schmidt, Dep. at 96)).

### **Response to Proposed Finding No. 946**

1-800 Contacts' self-serving testimony notwithstanding, the record evidence does not support the proposition that consumers have a monolithic navigational intent that cannot be changed. Google returns rival ads based on consumer feedback showing that consumers find such ads to be helpful. (Juda, Tr. 1111-1112). When consumers saw rival ads in response to searches relating to 1-800 Contacts, many consumers clicked on those ads and purchased from those rivals. 1-800's ordinary course documents show that 1-800 lost sales to advertisers who advertised in response to searches relating to 1-800 Contacts. (CCPTF §VI.A.2 ¶822-865). Testimony from retailers and Google confirms that consumers who do use the search term "1-800 Contacts" navigationally may be interested in seeing competitor's ads and shopping at 1-800 Contacts' competitors. (CX9019 (Juda, Dep. at 47-48); CX9033 (Mohan, Dep. at 131); CX9000 (Batushansky, IHT at 120-122)).

Additionally, 1-800 Contacts' bidding agreements impacted many other searches, not simply "1-800 Contacts" and close variations, including search queries with additional generic terms. (*See, e.g.*, CX0323 at 0010 (Contact Lens King Agreement); RX0028 at 0008 (AC Lens Agreement); CX0315 at 009 (Lensfast Agreement)).

Even if 1-800 Contacts' proposition that searches for trademarks are typically navigational were correct, it is irrelevant because the question of trademark infringement is not what users "want" to see, but whether they are confused by what they see. (*See* CCPTB §IV.B.3).

**947.** 1-800 Contacts did a significant amount of customer research, and collected both qualitative and quantitative data, that showed that when consumers were searching by typing in "1 800 Contacts" they were specifically trying to navigate to the 1-800 Contacts website. (Coon, Tr. 2725; CX 9031 (Schmidt, Dep. at 96)).

**Response to Proposed Finding No. 947**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding No. 946.

**948.** Data collected by 1-800 Contacts in the course of business showed that 95 percent of people who did a search for "1-800 Contacts" clicked on a link to 1-800 Contacts' website. (CX 9017 (Blackwood, Dep. at 276)).

**Response to Proposed Finding No. 948**

This proposed finding is incomplete. Respondents have entered no evidence as to the date of this claimed study. If the study took place during the thirteen year period in which the bidding agreements have been in place, the results have been impacted by the diminished competitive advertising the agreements caused. Based on the record evidence in this case, it's likely that more consumers would have clicked on alternative advertisements had there been unfettered competition to advertise in response to those searches. This proposed finding is also inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding No. 946.

**949.** Consumer surveys showed that customers typed in a search on Google for "1 800 Contacts" and variations when they wanted to navigate to the 1-800 Contacts website. (CX 9031 (Schmidt, Dep. at 96)).

**Response to Proposed Finding No. 949**

This proposed finding is inaccurate and irrelevant. Mr. Schmidt testified that 1-800 Contacts did customer surveys and focus groups asking customers how they got to the 1-800 Contacts website.

(CX9031 (Schmidt, Dep. at 96)). Mr. Schmidt said that “a very frequent response” was that they would type “a term like ‘1-800 Contacts’” into a search engine. (CX9031 (Schmidt, Dep. at 96-97)). However, the percentage of 1-800 Contacts customers who reach the site using search engines with the search query “1 800 Contacts” and variations does not indicate what percentage of users who search the query “1 800 Contacts” and variations go directly to 1-800 Contacts’ website. Mr. Schmidt did not provide even that not particularly illustrative percentage. (CX9031 (Schmidt, Dep. at 96-97)). The proposed finding is also inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding No. 946.

**950.** A search for 1-800 Contacts’ trademark is no different than typing 1-800 Contacts into a telephone, because in both circumstances the person is clearly trying to reach to 1-800 Contacts. (Coon, Tr. 2723-24).

#### **Response to Proposed Finding No. 950**

This proposed finding is clearly inaccurate. A search engine is where consumers go to discover information. If a consumer wanted to call 1-800 Contacts, they would pick up a phone. If consumers wanted to reach 1-800 Contacts directly, they would type the web address in the browser or load the app. There are numerous ways to reach 1-800 Contacts directly. A search engine is not one of them. Jonathan Coon has no basis to testify that a search engine is the same thing as a telephone, which it is not. Thus, this proposed finding of fact lacks foundation, is unsupported and is inaccurate. While Jonathan Coon, the former President and CEO of 1-800 Contacts, may think this, there is no evidence search engines or consumers agree. Mr. Coon demonstrated no foundation for this opinion, saying simply, “it’s incredibly obvious” and “That’s what I want.” (Coon, Tr. 2723-2724).

This proposed finding is also entirely inconsistent with the record evidence in this case, *see* Response to Proposed Finding No. 946, laying out significant evidence that consumers are not just trying to “typ[e] 1-800 Contacts into a telephone.” (Coon, Tr. 2723-24). If this were the case,

competitors would not have success advertising against 1-800 Contacts searches, and Google would not return ads for competitors on 1-800 Contacts searches.

Further, this finding is undermined by Mr. Coon's subsequent testimony that the real concern facing 1-800 Contacts was competition related business concerns. Coon's assertion that "all the data support it, right," is equally unfounded. (Coon, Tr. 2725-2727). That television advertising may spur searches, the fact that the consumer chooses to search on the internet with a search engine that will deliver a search engine results page with various offerings (as opposed to picking up the phone and dialing 1-800-contacts) indicates that consumer was looking for something other than going directly to the 1-800 Contacts web-page.

**951.** The consumers who come to 1-800 Contacts' website from a search for 1-800 Contacts' trademark behave similarly to those who type 1-800 Contacts' URL directly into their internet browser's navigational bar. (Coon, Tr. 2725-26).

**Response to Proposed Finding No. 951**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding Nos. 946 and 951. It is also irrelevant because there is no evidence that searchers having similar conversion rates, time spent on the site, and "behavior" (which Mr. Coon did not define) indicates that they intended to navigate directly to the 1-800 Contacts website. Dr. Athey explained that economic literature suggests that this assumption is not reasonable and that actual intent data would need to be gathered instead. (CX8010 at ¶33, (Athey Rebuttal Report)).

**952.** Conversely, traffic from a search for 1-800 Contacts' trademark and other direct traffic to 1-800 Contacts' website behave totally different than other types of traffic, like non-trademark search, to 1-800 Contacts' website. (Coon, Tr. 2726).

**Response to Proposed Finding No. 952**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding No. 946 and the Response to Proposed Finding No. 951.

**953.** Traffic from a search for 1-800 Contacts' trademark and other direct traffic to 1-800 Contacts' website is driven by 1-800 Contacts' television advertising, as was demonstrated by tests that 1-800 Contacts conducted in specific geographic markets. (Coon, Tr. 2725-26).

**Response to Proposed Finding No. 953**

This proposed finding lacks foundation and is contradicted by the weight of the evidence. Mr. Coon has no foundation for his assumptions about what drives consumers searching online. (Coon, Tr. 2725-2727). Even if the alleged studies, which were never provided in this case, showed that consumers visited search engines entering searches that included 1-800 Contacts' trademarks in greater numbers after television advertisements were shown, this would not indicate whether those consumers were actually attempting to navigate to 1-800 Contacts or were simply trying to purchase contact lenses online from the best or least expensive retailer. Consumers who search for "1-800 Contacts" or a different search that contains the phrase "1-800 Contacts" do not have monolithic intent, as explained in the Response to Proposed Finding No. 946.

**954.** When internet browsers combined the search box with the URL navigation box, many consumers trying to navigate directly to 1-800 Contacts' website by typing in its URL would be automatically directed to an internet search results page for "1-800 Contacts." (CX 9029 (Bethers, Dep. at 65-66)).

**Response to Proposed Finding No. 954**

This proposed finding is unsupported and inaccurate. Mr. Bethers clarified at trial that the omnibox would treat it as a search if a user typed in "1-800 Contacts," not if the user typed in the URL for 1-800 Contacts, which is [www.1800contacts.com](http://www.1800contacts.com). (Bethers, Tr. 3747). Mr. Bethers also stated at trial that the change went into effect around 2013, although the bidding agreements began in 2004. (Bethers, Tr. 3747-3748). If a consumer types [www.1800contacts.com](http://www.1800contacts.com) into the URL box of the browser, the consumer is directed to [1800contacts.com](http://1800contacts.com), not to a search engine.

**955.** 1-800 Contacts views customers who navigate to its website from an internet search for 1-800 Contacts' trademark as "direct" customers. (CX 9029 (Bethers, Dep. at 14, 18-19)).

**Response to Proposed Finding No. 955**

Complaint Counsel has no specific response.

**956.** Testimony by 1-800 Contacts personnel confirms that customers who navigate to its website from an internet search for 1-800 Contacts' trademark are direct customers, because the conversion rates are more similar to customers who navigated to 1-800 Contacts' website through bookmark or URL than customers who navigated to 1-800 Contacts' website by a non-trademark search. (CX 9029 (Bethers, Dep. at 14, 18-19); CX 9031 (Schmidt, Dep. at 97-98); Coon, Tr. 2725-26; Craven, Tr. 680).

**Response to Proposed Finding No. 956**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding No. 946. This self-serving testimony from 1-800 Contacts current and former employees also lacks foundation and is inaccurate. There is no evidence that similar conversion rates among different groups of customers indicates that they had similar navigational intent across different methods of reaching the 1-800 Contacts website. Dr. Athey explained that economic literature suggests that this assumption is not reasonable and that actual intent data would need to be gathered instead. (CX8010 at ¶33, (Athey Rebuttal Report)).

**957.** The conversion rates are significant because they give insight into the type of consumer who was conducting trademark paid search. (Craven, Tr. 681).

**Response to Proposed Finding No. 957**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Proposed Finding No. 946 and lacks foundation and is inaccurate for the reasons explained in the Response to Proposed Finding No. 956.

**958.** 1-800 Contacts targeted its ad copy to different value propositions based on the type of search conducted by the customer and found that trademark keywords correspond most closely to credibility and convenience. (RX 167; CX 9031 (Schmidt, Dep. at 123-124)).

**Response to Proposed Finding No. 958**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Finding No. 946.

**959.** Price is a lesser consideration than credibility and convenience for those customers searching for a trademark term like “1-800 Contacts.” (CX 9031 (Schmidt, Dep. at 112-123)).

**Response to Proposed Finding No. 959**

This proposed finding is inaccurate and irrelevant for the same reasons explained in the Response to Finding No. 946. It is clear from the success that 1-800 Contacts’ lower-price rivals have had in advertising to consumers who type “1-800 Contacts” (or a variation thereof) into a search engine that price is not a “lesser consideration.” (CCPTF §V.B.2 ¶¶ 611-774; *e.g.* Holbrook, Tr. 1907-1908 (those ads generated “a lot of conversions” for Memorial Eye); Alovis, Tr. 1014 (bidding on 1-800 Contacts terms “absolutely” drove a significant amount of business for LensDirect)). This proposed finding also assumes that only 1-800 Contacts has “credibility and convenience” to a consumer, a proposition that is wholly unsupported by the record evidence.

***2. Customers Know How To Comparison Shop And Identify Alternatives***

**960.** Contact lens consumers are aware of many ways to access comparative information about contact lens retailers, including by non-navigational searches. (Schmidt, Tr. 2924). In a consumer survey conducted in 2014, less than 5 percent of consumers identified “unaware of alternatives” as a factor influencing the location of their most recent contact lens purchase. (RX 1128-0121).

**Response to Proposed Finding No. 960**

This proposed finding lacks foundation. At trial, Mr. Schmidt simply agreed that he had written parts of the summary of findings from some qualitative, not quantitative, research that 1-800 Contacts employees had undertaken with only 57 participants. (Schmidt, Tr. 2924; RX0781). Mr. Schmidt did not offer his own opinion of whether consumers were actually aware of many ways to access comparative information about contact lens retailers. (Schmidt, Tr. 2924). He

admitted that he was only present for one day of the so-called “study” and that the record of the “study” was partially compiled by others. (Schmidt, Tr. 2924, 2951-2952). Mr. Schmidt admitted that the written report did not include the questions participants were asked or the responses they provided, and it did not contain details on the manner in which the responses were recorded. (Schmidt, Tr. 2955-2956).

The 2014 study gives no information about how informed consumers were during the prior ten years of the relevant period. Even as to 2014, the survey does not indicate if consumers were aware of alternative online retailers. (RX 1128-0121). Since every contact lens consumer visits their eye doctor to obtain a prescription, it’s unlikely that many consumers would be unaware of that particular alternative place to buy contact lenses. The survey data does not report how many respondents were aware of multiple alternatives, or how many were aware of alternative online retailers other than 1-800 Contacts. (RX 1128 at 0121).

Further, this finding is contradicted by { [REDACTED]  
 [REDACTED] } The study showed that  
 { [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }; *see also* CX8006 at 085-086 (¶ 189 & n.197-200) (Evans Expert Report)).

**961.** 1-800 Contacts understood from consumer surveys that consumers knew how to find other contact lens retailers on the Internet. (Bethers, Tr. 3708).

**Response to Proposed Finding No. 961**

This proposed finding lacks foundation. Respondent has improperly cited evidence for the truth of the matter that they indicated at trial was intended only for the state of mind. (Tr. 3709

(“JUDGE CHAPPELL: Is this offered for a state of mind, what action he took, rather than the truth of the matter? MR. STONE: Yes, it is, Your Honor.”)). This testimony may not be used for the proposition that consumers actually knew how to find other contact lens retailers on the internet since Mr. Bethers does not have the technical expertise to interpret consumer surveys, and the surveys themselves are not in evidence.

Further, this finding is contradicted by { [REDACTED]

[REDACTED] } The study showed that

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }; *see also* CX8006 at 085-086 (¶ 189 & n.197-200) (Evans Expert Report)).

**962.** Clint Schmidt assisted in preparing consumer research for 1-800 Contacts, including a February 2005 online qualitative summary. (Schmidt, Tr. 2917-21; RX 781).

**Response to Proposed Finding No. 962**

This proposed finding lacks foundation for the same reasons explained in the Response to Proposed Finding No. 960.

**963.** The consumer surveys conducted or supervised by Clint Schmidt while he was at 1-800 Contacts showed that when consumers wanted to comparison shop, they knew exactly how to do so by using generic search terms like “contact lenses” or “prices on contact lenses.” They did not comparison shop by searching on specific trademark terms associated with a particular retailer, such as 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 98, 102-103)).

**Response to Proposed Finding No. 963**

This proposed finding is inaccurate and lacks foundation for the same reasons explained in the Response to Proposed Finding No. 960.

**964.** Complaint Counsel’s expert witnesses conceded that consumers are aware of many different ways to comparison shop. CX 8014 (Tushnet Rep.) ¶ 46 (citing research for the proposition that consumers are well aware of different tools that allow them to compare their purchase options); Tushnet, Tr. 4501-04; Athey, Tr. 938-39).

**Response to Proposed Finding No. 964**

This proposed finding is inaccurate and irrelevant. General consumer awareness of alternative generic phrases such as ‘contact lenses’ does not ameliorate the harm posed by the Bidding Agreements to consumers who start their search with the word “1-800 Contacts” or a phrase that includes “1800contacts,” even one that seeks lower price options such as “1800 contacts competitors.” In response to any of these searches, lower-price online competitors are prevented from returning ads, but consumers have no way of knowing this. The record evidence also shows that { [REDACTED] }; *see also* CX8006 at 085-086 (¶ 189 & n.197-200) (Evans Expert Report)). Showing ads in response to searches for 1-800 Contacts would ameliorate this information gap. Indeed, the record evidence shows that when rival ads do appear, consumers click on those ads and pay less for contact lenses, either because they purchase from lower-price competitors or because they seek price-matches from 1-800 Contacts. This is the very problem that caused 1-800 Contacts to enter into the Bidding Agreements in the first place. Plainly, this harm cannot be ameliorated by a consumer’s ability to see ads for generic searches or ads on television. Appearing in response to searches relating to 1-800 Contacts’ is an advertiser’s “last opportunity . . . to provide consumers with information that would lead them to purchase from one of those rivals rather than 1-800 Contacts.” (CC Post-Trial Reply Br. at 114 & n. 199 (quoting Evans, Tr. 1644-1645)).

Further, this is a significant volume of traffic. Analyzing the available data on the portion of consumer queries involving 1-800 Contacts’ trademark terms revealed that such queries

represent 30 percent of all queries relating to contact lenses. This is a competitively significant volume of searches, approximately equal to the volume of queries for the “Big Three” generic terms combined. (CC Post-Trial Reply Br. at 104).

**965.** Prof. Tushnet and Dr. Athey each testified that consumers routinely use the Internet to comparison shop, including by reference to third party shopping sites where consumers can compare their purchase items. (Tushnet, Tr. 4503-04; Athey, Tr. 939).

**Response to Proposed Finding No. 965**

This proposed finding is inaccurate and irrelevant for the reasons explained in the Response to Proposed Finding No. 964.

**966.** Among the comparison shopping tools available to consumers, according to Prof. Tushnet, are Product Listings, or PLAs. (Tushnet, Tr. 4504).

**Response to Proposed Finding No. 966**

This proposed finding is inaccurate and irrelevant for the reasons explained in the Response to Proposed Finding No. 964. In addition, product listing ads are not as useful to consumers of contact lenses as traditional search engine advertisements. While product listings offer product information (RF ¶718), it is service and company information that is more important in the contact lens industry, since the product consumers must purchase is specified by the ECP. Typical paid search advertising offers richer company or service information: typical paid search advertising offers the advertiser multiple lines of text it can control. (CX9019 (Juda, Dep. at 16)).

**967.** 1-800 Contacts consistently found in consumer research that consumers would use generic search terms like “contacts,” “contact lens,” and “contact lenses” in order to find an online retailer of contact lenses. (CX 9029 (Bethers, Dep. at 19); Schmidt, Tr. 2924 (identifying generic terms such as “contact,” “contact lens,” and “discount eye contacts” as best ways for consumers to find comparative information online); CX 9001 (Bethers, IHT at 115)).

**Response to Proposed Finding No. 967**

This proposed finding lacks foundation. Mr. Bethers does not have the technical expertise to interpret consumer surveys, and the surveys themselves are not in evidence. Mr. Schmidt

simply agreed that he had written parts of the summary of findings from some qualitative, not quantitative, research that 1-800 Contacts employees had undertaken with only 57 participants. (Schmidt, Tr. 2924; RX0781). Mr. Schmidt did not offer his own opinion of whether consumers actually used those search terms. (Schmidt, Tr. 2924). He admitted that he was only present for one day of the so-called “study” and that the record of the “study” was partially compiled by others. (Schmidt, Tr. 2924, 2951-2952). Mr. Schmidt admitted that the written report did not include the questions participants were asked or the responses they provided, and it did not contain details on the manner in which the responses were recorded. (Schmidt, Tr. 2955-2956).

By contrast, as described above, 30 percent of all contact-lens search query volume was for search queries relating to 1-800 Contacts (CC Post-Trial Reply Br. at 104), and many consumers who type in “1800 contacts” (or a variation thereof) click on, and buy, from rivals (CCPTB at 44-47), suggesting that consumers also use “1800 contacts” in order to find information about buying contact lenses online, from other retailers in addition to 1-800 Contacts.

**968.** The most popular internet searches related to contact lenses are generic terms, such as “contact lenses” and “contact lens.” (CX 9001 (Bethers, IHT at 115)).

#### **Response to Proposed Finding No. 968**

Complaint Counsel has no specific response to this proposed finding of fact.

**969.** 1-800 Contacts found in consumer surveys that consumers who were interested in shopping for contact lenses online, but who did not know which retailer they were going to purchase from, used generic search terms like “contacts,” “contact lens,” and “contact lenses,” or “discount contacts.” (Bethers, Tr. 3709-10; CX 9029 (Bethers, Dep. at 16)).

#### **Response to Proposed Finding No. 969**

This proposed finding lacks foundation. Respondent has improperly cited evidence for the truth of the matter that they indicated at trial was intended only for the state of mind. (Tr. 3709

(“JUDGE CHAPPELL: Is this offered for a state of mind, what action he took, rather than the truth of the matter? MR. STONE: Yes, it is, Your Honor.”)). This testimony may not be used for the proposition that consumers actually knew how to find other contact lens retailers on the internet since Mr. Bethers does not have the technical expertise to interpret consumer surveys, and the surveys themselves are not in evidence.

To the extent the proposed finding implies that consumers who had not yet decided on a retailer do not use searches that contain 1-800 Contacts’ trademarks, it is inaccurate as explained in the Response to Proposed Finding No. 946.

### ***3. Paid Search Strategy And Budget***

**970.** A goal when using paid search advertising was to acquire as many customers as possible, but efficiently and within a given budget. (Craven, Tr. 509).

#### **Response to Proposed Finding No. 970**

This proposed finding is contradicted by the weight of the evidence, including evidence provided by several online retailers that testified they do not set specific search advertising budgets. For example, 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). Memorial Eye did not set a “hard budget” for its marketing expenses for its online businesses. (Holbrook, Tr. 1901). 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.”)). 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). 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.”)).

Additionally, the evidence shows that 1-800 Contacts moved more money into its search advertising budget when the channel was performing well and the search ad manager had the power to increase the budget within certain parameters, such as keeping 1-800 Contacts’ ads within the top three ad spots for the “Big 3” keywords. (CX 9013 (Aston, Dep. at 17-19) (“We always liked to show up 100 percent of the time on all of our relevant terms,” leading him to request a budget increase for paid search in 2004), at 50-51 (“the goal specifically of paid search was...getting as many acquisitions or orders as possible while staying within those defined targets from a CPA [cost per acquisition] or CPO [cost per order] target number” rather than staying within a strictly limited budget); CX0218 at 001 (2010 email from Bryce Craven, “We spend as much as possible as long as we’re able to stay at or below the CAC target of \$26.30. We currently don’t cap impressions/spend for a given month since we’re achieving that CAC target.”); CX9028 (Roundy, Dep. at 86-88) (former 1-800 Contacts marketing executive testified that 1-800 Contacts allocates as much of its budget to bidding on its trademarks as necessary to ensure that 1-800 Contacts’ advertisement is the first advertisement displayed in response to searches for its trademarks); CX9031 (C. Schmidt, Dep. at 125-127 (same)); CX1080 (“We are still being outbid on keyword ‘800contacts’ but just by one competitor. *I have increased the bid.*”) (emphasis added); CX0921 at 001 (“How did we respond when we would see Walgreens in #3? Did we

increase our bid to get us back up in the top 3?” “Yes, *we always will raise our Big 3 bids* if we see we’re getting pushed out of the top bar.”) (emphasis added)).

{ [REDACTED] } (Juda, Tr. 1120, 1122, *in camera*). { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Juda, Tr. 1123, *in camera*).

**971.** 1-800 Contacts’ paid search marketing team determined its bid amounts for particular keywords based on the past performance of key metrics such as customer acquisition cost and conversion rate. (Craven, Tr. 670-71; CX 9002 (Craven, IHT at 76-78)).

**Response to Proposed Finding No. 971**

Complaint Counsel has no specific response other than to add that this strategy was not necessarily shared by other online retailers of contact lenses, as explained in the Response to Proposed Finding No. 970.

**972.** 1-800 Contacts’ trademark terms are an efficient allocation of paid search marketing spend because trademark terms are navigational in quality and result in significantly higher click-through and conversion rates for 1-800 Contacts than other terms. (CX 9002 (Craven, IHT at 144); Craven, Tr. 672; CX 9031 (Schmidt, Dep. at 126)).

**Response to Proposed Finding No. 972**

This proposed finding is lacks foundation, is unsupported, and is inaccurate for the reasons explained in the Response to Proposed Finding No. 946. Further, Mr. Craven did not work at 1-800 Contacts prior to the bidding agreements, so he has no foundation to say that the reason 1-800

Contacts' trademark terms are efficient keywords is that users have a navigational intent when they use them, or because 1-800 Contacts faces significantly less competition on those keywords.

Mr. Schmidt's testimony does not support this finding. Mr. Schmidt testified that 1-800 Contacts bid to be in the first position for its trademark terms because they were "navigational in nature," not that that was why they more efficient. (CX9031 (Schmidt, Dep. at 126)).

**973.** For example, cost per conversion for 1-800 Contacts' trademark terms was considerably lower for 1-800 Contacts than the Big 3 generic terms. (Craven, Tr. 676; CX 9020 (Craven, Dep. at 99)).

### **Response to Proposed Finding No. 973**

Complaint Counsel has no specific response other than to add that this too may have been as a result of 1-800 Contacts' bidding agreements, not inherent qualities of the trademark terms. 1-800 Contacts' internal documents confirm that "low competition = low cost" in search advertising auctions, and Mr. Craven confirmed this analysis in his testimony at trial. (CX0051 at 004 (2010 "Search Overview"); CX0658 at 01; CX0657 at 001 (2011 email from Blackwood to Jonathan Coon, CEO of 1-800 Contacts, forwarding Search & Partner Dashboard) ("Competition on our TM [trademark] terms is lighter than recent history, which is likely a contributing factor in our lower TM CPO's [costs per order] -\$1.26 this week."); CX0935 (2009 email among marketing team explaining that one of the *purposes* of the trademark enforcement policy was to "remove competitors[,] which in turn drives down how much we pay per click."); Craven, Tr. 541, 551, 559, 560-563, 573-575).

**974.** 1-800 Contacts designed different ad copy for its trademarked keyword campaigns than its generic or product keyword campaigns because users searching specifically for 1-800 Contacts made up a different class of consumers. (CX 9002 (Craven, IHT at 149)).

### **Response to Proposed Finding No. 974**

Complaint Counsel has no specific response other than to add that this different class of consumers was characterized not only by typing in search queries that contained 1-800 Contacts'

trademarked terms, but also by the fact that they saw little to no competitive advertising on their searches. 1-800 Contacts used different ad copy with that different class of consumers because they faced little to no competition with those consumers. For example, the very effective “we beat any price” ad copy had “zero or negative impact” on customers searching for terms encumbered by the bidding agreements. (“we beat any price” ad copy very effective) CX9032 (L. Schmidt, Dep. 130), CX0634, CX0016; CX9020 (Craven, Dep. at 152-153) (“we beat any price” ad copy had “zero or negative impact” on TM searchers)).

**975.** 1-800 Contacts had no interest in bidding on any of its competitor’s trademarked terms because such terms were extremely inefficient given their cost compared to the sales they generated, and the money could be better allocated to other categories of keywords. (CX 9031 (Schmidt, Dep. at 126-27)).

**Response to Proposed Finding No. 975**

This proposed finding is contradicted by the weight of the evidence. Earlier in this case, perhaps before Respondent fine-tuned its legal defense, other 1-800 Contacts employees testified that the reason 1-800 Contacts did not bid on any of its competitor’s trademarked terms as keywords was because it was ethically wrong. (CX9001 (Bethers, IHT at 104-105); CX9010 (Larson, IHT at 161)). Former CEO and President of 1-800 Contacts, Jonathan Coon, testified that he viewed the practice as “stealing.” (CX 9004 (Coon, IHT at 182, 264)). Competitors of 1-800 Contacts also testified that bidding on competitor’s trademark terms is a best practice and is or would be very valuable to their businesses. (CF §V.B.2).

**976.** On generic terms, 1-800 Contacts did not always target the top position since the added conversions from that position did not always justify the increased cost. (CX 9002 (Craven, IHT at 88-89)).

**Response to Proposed Finding No. 976**

Complaint Counsel has no specific response except to add that 1-800 Contacts did regularly increase its bid to make it into the “top 3.” (CCPTB at 63 n. 251).

**977.** During the 2004-05 period, the budget for online advertising was managed according to “cost efficiency,” where highest value keywords received priority in the allocation of marketing funds. (CX 9031 (Schmidt, Dep. at 125-127)).

**Response to Proposed Finding No. 977**

Complaint Counsel has no specific response.

**978.** The budgets for online paid search advertising were “fixed,” and the paid search marketing team received a set budget annually from management, and it only had discretion to make budgetary decisions within that set amount. (CX 9031 (Schmidt, Dep. at 127-28); Craven, Tr. 669 (“Q: Okay. And did you set that budget? A: I don’t think it was me who set it. I think it was given to me.”)).

**Response to Proposed Finding No. 978**

This proposed finding is contradicted by the weight of the evidence. Mr. Aston, paid search manager for 1-800 Contacts, testified that, “We always liked to show up 100 percent of the time on all of our relevant terms,” leading him to request a budget increase for paid search in 2004. (CX 9013 (Aston, Dep. at 17-19)). He also testified that “the goal specifically of paid search was...getting as many acquisitions or orders as possible while staying within those defined targets from a CPA [cost per acquisition] or CPO [cost per order] target number.” rather than staying within a strictly limited budget. (CX 9013 (Aston, Dep. at 50-51)). In 2010, Bryce Craven described the strategy like this, “We spend as much as possible as long as we’re able to stay at or below the CAC target of \$26.30. We currently don’t cap impressions/spend for a given month since we’re achieving that CAC target.” (CX0218 at 001).

It is also contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 970, to the extent that it implies that the strategy Respondent’s claim was used by 1-800 Contacts’ marketing team was shared by other competitors.

**979.** Therefore, an increase in trademark search cost would not have had an impact on the overall spend or allocation of marketing funds because an increase in search costs on some terms

would mean less money to allocate to the rest of the keywords in that advertising campaign. (CX 9031 (Schmidt, Dep. at 127-28); Craven, Tr. 670).

**Response to Proposed Finding No. 979**

This proposed finding is contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 978.

**980.** Many factors contribute to the cost per click or cost per conversion that 1-800 Contacts ultimately pays to the search engines for searches on its trademark terms. (Craven, Tr. 561, 563, 574).

**Response to Proposed Finding No. 980**

This proposed finding is contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 978. It is also not supported by Mr. Craven's testimony on page 561.

This proposed finding is also contradicted by Mr. Craven's own documents. Mr. Craven claimed in numerous emails sent to the entire marketing team, including his supervisors, that competition for search queries containing 1-800 Contacts' trademark terms caused the cost per click and cost per conversion for those keyword terms to go up. (CX0855 (fewer competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks "always helps improve performance"); CX0923; CX0658; CX0916). He admitted that when writing the emails, he attempted to provide accurate, reliable explanations. (Craven, Tr. 520, 525).

This proposed finding is also contradicted by testimony from Mr. Juda of Google and Ms. Iyer of Microsoft, who each have a stronger foundation to describe the factors that contribute to cost per click and cost per conversion in search engine advertising systems than Mr. Craven. { [REDACTED]

[REDACTED] } (Juda, Tr. 1200,

*in camera* ( { [REDACTED]

[REDACTED]); CX8005 at 006 (¶ 36) (Iyer, Decl.) *in camera* { [REDACTED]  
 [REDACTED]  
 [REDACTED] }); *see*  
*also* CCPTB at 63 n. 251 (1-800 regularly increased its bids in the face of competition)).

1-800 Contacts' CEO and president Brian Bethers acknowledged: "That's the goal and objective that we have .... So on our trademark search I would like to spend an appropriate amount, as little as we can." (CX9001 (Bethers, IHT at 196-197)). 1-800 Contacts' chief marketing officer Tim Roush agrees: "I wouldn't want our competitors to bid on our terms [because] . . . they would drive up our search costs. . . . If more competitors were bidding on our term, then the costs would go up." CX9034 (Roush, Dep. at 60-62). (*See also* CX9012 (L. Schmidt, IHT at 182) ("Q: And the second bullet says, Low competition equals low costs. What's your understanding of that bullet? A: The harm that we – one of the harms from people bidding on our brand is that it increased our costs. Q: It increased your costs when they bid? A: Yes.")).

**981.** Many factors contribute to the click-through rate that 1-800 Contacts ultimately achieves on its trademark terms. (Craven, Tr. 572, 575; CX 9020 (Craven, Dep. at 54-55)).

### **Response to Proposed Finding No. 981**

This proposed finding is contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 978. It is also contradicted by Mr. Craven's own documents. Mr. Craven claimed in numerous emails sent to the entire marketing team, including his supervisors, that competition for search queries containing 1-800 Contacts' trademark terms caused the click-through rate on those keyword terms to go down. (CX0855 (fewer competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks "always helps improve performance")); CX0606 at 002 ("probably been losing [*sic*] some traffic to Lens.com, LensWorld, Vision Direct, and a few other advertisers" who were "consistently

showing up on” the term 1800contacts.”); CX0927; CX0924). He admitted that when writing the emails, he attempted to provide accurate, reliable explanations. (Craven, Tr. 520, 525).

**982.** The evidence does not suggest that an increase in the number of competitors bidding on 1-800 Contacts’ trademarks would necessarily increase 1-800 Contacts’ costs per click, or similarly that a decrease in the number of competitors bidding on 1-800 Contacts’ trademarks necessarily contributed to reduced costs. (Craven, Tr. 548, 574).

#### **Response to Proposed Finding No. 982**

This proposed finding is contradicted by the weight of the evidence as explained in the Responses to Proposed Findings No. 978 and 980.

**983.** The evidence does not suggest that an increase in the number of competitors placing advertisements in response to searches for 1-800 Contacts’ trademarks would necessarily decrease the click-through rate, or similarly, that a decrease in the number of competitors placing advertisements in response to searches for 1-800 Contacts’ trademarks would necessarily increase the click-through rate. (Craven, Tr. 567-68, 575; CX 9020 (Craven, Dep. at 55)).

#### **Response to Proposed Finding No. 983**

This proposed finding is contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 981.

**984.** There were times when Walmart actively advertised on 1-800 Contacts’ trademark with no material impact on 1-800 Contacts’ cost per click or 1-800 Contacts’ cost to acquire customers. (Bethers, Tr. 3771).

#### **Response to Proposed Finding No. 984**

This proposed finding is vague, lacks foundation and is inaccurate. It is unclear what “there were times” is intended to mean. The proposed finding is vague as to the number of times, when the alleged times were, and what is meant by “material impact.”

Futher, Mr. Bethers does not possess personal knowledge of, and also gave no explanation as to how he claimed to know, that at times when Walmart was showing ads in response to search queries including 1-800 Contacts’ trademarks it was having no impact on 1-800 Contacts’ advertising costs. In order to know this he would need to know what 1-800 Contacts would have

been paying if not for Walmart's bids. Finally, as described above, Mr. Bethers' self-serving testimony also contradicts the great weight of evidence, including 1-800 Contacts' documents authored by 1-800 Contacts employees in the regular course of business, as described in the response to proposed Findings 980 and 981, and Mr. Bethers' own previous testimony relating to increased competition increasing 1-800 Contacts' search costs.

***B. Business Concerns With Unauthorized Use Of Trademarks In Paid Search***

***1. 1-800 Contacts Did Not Use Other Company's Trademarks In Paid Search***

**985.** 1-800 Contacts' policy is (and has been) not to use other companies' trademark terms as keywords to trigger Internet search advertisements. (CX 9031 (Schmidt, Dep. at 57); CX 9001 (Bethers, IHT at 104)).

**Response to Proposed Finding No. 985**

Complaint Counsel has no specific response, other than to note that 1-800 Contacts' unilateral "policy" is irrelevant to this case, as its policy is not being challenged; its agreements with competitors are being challenged. To wit, 1-800 Contacts' "policy" appears to not to be shared or subscribed to by 1-800's competitors, otherwise the Bidding Agreements would not be necessary. The parties to the Bidding Agreements testified 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); 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....”). Complaint Counsel further notes that Clint Schmidt cannot speak to whether or not 1-800 Contacts indeed followed this policy since January, 2006; which predates all but two of the Bidding Agreements that it still enforces and which are at issue in this matter. (C. Schmidt, Tr. 2936 (Mr. Schmidt worked for 1-800 Contacts for less than two years, and left 1-800 Contacts in the first week of January 2006.))

**986.** 1-800 Contacts adopted and maintained this policy before any of the settlement agreements were put in place. (CX 9031 (Schmidt, Dep. at 58)).

**Response to Proposed Finding No. 986**

This proposed finding lacks foundation as it relies on Mr. Schmidt’s testimony, which predates most of the Bidding Agreements, and is unreliable to verify both exactly what the policy was and whether or not it was indeed maintained. Complaint Counsel further notes that Clint Schmidt cannot speak to whether or not 1-800 Contacts indeed followed this policy since January 2006; which predates all but two of the Bidding Agreements that it still enforces and which are at issue in this matter. (C. Schmidt, Tr. 2936 (Mr. Schmidt worked for 1-800 Contacts for less than two years, and left 1-800 Contacts in the first week of January 2006.))

Further, the evidence suggests that 1-800 Contacts may have had unwritten agreements with certain competitors in place as early as 2005, if not before. (CCPTB at 22 n.82-84).

Finally, as described above, 1-800 Contacts’ unilateral policy is irrelevant to this matter, as it entered into Bidding Agreements with numerous competitors that did not subscribe to this policy, as described above in the Response to Proposed Finding No. 985.

**987.** There were three key reasons behind the policy of 1-800 Contacts to not bid on competitor trademark terms: (1) the risk of consumer confusion, since trademark searches are navigational

and it was antithetical to the 1-800 Contacts brand to cause confusion; (2) it was an inefficient use of funds to bid on navigational search terms; and (3) it seemed improper to make an unauthorized use of other companies' trademarks. (CX 9031 (Schmidt, Dep. at 57-58)).

### **Response to Proposed Finding No. 987**

Complaint Counsel has no specific response to points (2) and (3), other than to note that (2) does not use "dilute" in the trademark sense, as "free riding" does not constitute trademark dilution. (CCPTB at 166-167). Here, (2) and (3) mean the same thing: 1-800 Contacts was concerned about competitors "free-riding" on 1-800 Contacts' investments into broad scale advertising. We note that free-riding is not a cognizable defense. (CCPTB § IV.A).

Point (1) is pretextual. 1-800 Contacts had no evidence of confusion and did not undertake to investigate the issue of confusion prior to litigation. 1-800 Contacts' executives testified that they had no personal knowledge of confusion relating to ads appearing in response to search queries for 1-800 Contacts. (CCPTB at 143). The record evidence indicates that another concern played the most important role in 1-800 Contact's decision to pursue bidding agreements: competition from lower-price rivals. First, 1-800 Contacts could not maintain its supracompetitive prices if consumers ran search queries relating to 1-800 Contacts and saw competitive offers each time they searched. (CCPTF §VI.A.2). Second, 1-800 Contacts did not want to pay the market rate for the advertising they depended on to bring those customers in ("low competition = low cost"). (CCPTF §VI.A.3).

**988.** Since trademark searches are navigational in nature, it is inefficient for an advertiser to bid on a third party's trademark because consumers visiting that advertiser's website after conducting a trademark search and clicking on the advertiser's link will likely not stay long on the website or make a purchase. (Schmidt, Tr. 2908-09).

### **Response to Proposed Finding No. 988**

This finding of fact is plainly erroneous and contradicted by the great weight of record evidence. As described in the Response to Proposed Finding No. 946, the proposition that trademark searches are “navigational” is incorrect.

Other retailers do not find advertising against 1-800’s trademark to be “inefficient.” Many advertisers have found success advertising in response to queries relating to 1-800 Contacts. This is supported by retailer testimony and data. (CCPTF §V.B.2 ¶¶ 611-774; *e.g.* Holbrook, Tr. 1907-1908 (those ads generated “a lot of conversions” for Memorial Eye); CX1626 [REDACTED] [REDACTED] } *in camera*; Alovis, Tr. 1014 (bidding on 1-800 Contacts terms “absolutely” drove a significant amount of business for LensDirect); CX1641 (LensDirect Top 50 Search Terms from 2010-2016)).

Finally, Clint Schmidt cannot speak to whether or not trademark searches are “navigational in nature;” his is not an expert, and his only involvement in this case predates the day he left 1-800 Contacts in January, 2006. (C. Schmidt, Tr. 2936 (Mr. Schmidt worked for 1-800 Contacts for less than two years, and left 1-800 Contacts in the first week of January 2006.)) There is no support for the assertions made in this proposed finding of fact.

**989.** 1-800 Contacts also took affirmative steps to prevent its advertisements from triggering as pop-up advertisements over the websites of other contact lens retailers, including by preventing affiliates from participating in certain advertising practices. (CX 9013 (Aston, Dep. at 210-212)).

**Response to Proposed Finding No. 989**

Complaint Counsel has no specific response.

**990.** 1-800 Contacts also implemented negative keywords for the trademark terms of other contact lens retailers to avoid displaying advertisements in response to searches for those trademarks. By 2004, 1-800 Contacts had implemented negative keywords for Vision Direct, Coastal Contacts, and a number of other competitors. (CX 9031 (Schmidt, Dep. at 58)).

**Response to Proposed Finding No. 990**

This finding is contradicted by the weight of the evidence. The evidence does not show that 1-800 Contacts adopted negative keywords for competitors at any time other than when it was preparing to sue its rivals. That is, only when it discovered the competitor advertising against them, and did not implement the negative keywords itself in advance of threatening trademark litigation (i.e. discovering that a rival was advertising against 1-800 Contacts). (*See, e.g.* CX0449 at 003, 022 (Letter from Mark Miller, counsel for 1-800 Contacts to David Holmberg, Empire Vision Center, Inc., indicating that the proposed settlement agreement is “bi-lateral,” and that 1-800 Contacts would be “willing” to reciprocate, and not that it already has unilaterally not bid on keyword or adopted negative keywords, and indicating that it had not already listed as “prohibited” keywords any of the Empire Vision words it would have already adopted in its search advertising campaigns). Indeed, it was common that, at the time when 1-800 Contacts was threatening to sue, and just before 1-800 Contacts entered settlement agreements with competitors, 1-800 Contacts employees circulate a list of “new negatives” that included the litigation target to employees with the instructions to add the competitors’ names and negative keywords. (*See, e.g.* CX0807 (email from Jordan Judd of 1-800 Contacts to Shan Shan Li of 1-800 Contacts, and copying Bryce Craven, dated February 19, 2010, instructing to add “new required negatives,” which included “contactlensking.com, contact lens king, and more.); CX0448 (Letter from Mark Miller, Counsel for 1-800 Contacts to Jacque Matte, president of Contact Lens King, dated February 18, 2010, alleging infringement and proposing settlement).

Indeed, 1-800 Contacts employee testified that it added competitors as negative keywords because there was an agreement with competitors, and in many cases simply did not have knowledge of when negative keywords were implemented. (CX 9028 (Roundy, Dep. at 13-20, 78-80).

**991.** 1-800 Contacts found that implementing negative keywords is and was a straightforward exercise and easy to do. (CX 9031 (Schmidt, Dep. at 60)).

**Response to Proposed Finding No. 991**

This proposed finding is irrelevant.

**2. *1-800 Contacts Opposed The Unauthorized Use Of Its Trademark In Paid Search Advertising***

**992.** With respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts' trademarks, 1-800 Contacts had three main business concerns: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers, Tr. 3688-91; Coon, Tr. 2726-27).

**Response to Proposed Finding No. 992**

Complaint Counsel has no specific response to points (2) and (3), other than to note that (2) does not use "dilute" in the trademark sense, as "free riding" does not constitute trademark dilution. (CCPTB at 166-167). Here, (2) and (3) mean the same thing: 1-800 Contacts was concerned about competitors "free-riding" on 1-800 Contacts' investments into broad scale advertising. We note that free-riding is not a cognizable defense. (CCPTB § IV.A).

Point (1) is pretextual. 1-800 Contacts had no evidence of confusion and did not undertake to investigate the issue of confusion prior to litigation. 1-800 Contacts' executives testified that they had no personal knowledge of confusion relating to ads appearing in response to search queries for 1-800 Contacts. (CCPTB at 143). The record evidence indicates that another concern played the most important role in 1-800 Contact's decision to pursue bidding agreements: competition from lower-price rivals. First, 1-800 Contacts could not maintain its supracompetitive prices if consumers ran search queries relating to 1-800 Contacts and saw competitive offers each time they searched. (CCPTF §VI.A.2). Second, 1-800 Contacts did not want to pay the market rate

for the advertising they depended on to bring those customers in (“low competition = low cost”). (CCPTF §VI.A.3).

**993.** First, with respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts’ trademarks, 1-800 Contacts had great concern that confusion and misdirection among consumers would impact its business. (Bethers, Tr. 3691; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06); Coon, Tr. 2727-29 (citing concerns about consumers being frustrated, confused, and misdirected)).

#### **Response to Proposed Finding No. 993**

This proposed finding is not supported by any record evidence. Rather, as described above, in the Response to Proposed Finding No. 992, 1-800 Contacts did not have any evidence of confusion when it threatened its competitors with lawsuits, nor did it undertake to investigate any such confusion except in the course of the Lens.com litigation and this litigation. 1-800 Contacts’ actual concern was that lower-price competitors were taking sales away from 1-800 Contacts (e.g., CX0621), and that competitive bidding increased 1-800 Contacts’ cost of search advertising. (CCPTB at 61-62).

**994.** 1-800 Contacts also had evidence that customer confusion resulted from the placement of paid search advertisements that were triggered by a search query for another company’s trademark term. (CX 9031 (Schmidt, Dep. at 14-15 (“And we had pretty good qualitative and quantitative evidence that these third parties ... were creating confusion for consumers”))). Such confusion was a pervasive issue for 1-800 Contacts and many other companies with an online presence.

#### **Response to Proposed Finding No. 994**

This proposed finding is unsupported and lacks foundation. First, Mr. Schmidt’s testimony is drawn from the less than two year period he worked at 1-800 Contacts, and pre-dates most of

the written Bidding Agreements by more than three years. (C. Schmidt, Tr. 2936 (Mr. Schmidt worked for 1-800 Contacts for less than two years, and left 1-800 Contacts in the first week of January 2006.))

Further, Mr. Schmidt appears in this quote to be referring to some qualitative research that 1-800 Contacts employees undertook with only 57 participants in 2005. (RX0781). Schmidt admitted that he was only present for one day of the so-called “study” and that the record of the “study” was partially compiled by others. (Schmidt, Tr. 2924, 2951-2952). Mr. Schmidt admitted that the written report did not include the questions participants were asked or the responses they provided, and it did not contain details on the manner in which the responses were recorded. (Schmidt, Tr. 2955-2956). It is unclear what quantitative evidence he refers to, but Mr. Schmidt does not have the necessary expertise to evaluate quantitative evidence of confusion. 1-800 Contacts’ executives have all testified that they have no personal knowledge of any confusion. Nor have they investigated the issue except during the Lens.com litigation and this litigation.

Dr. Jacoby is qualified as an expert in this case and found that confusion is not caused by the mere appearance of a competitor’s ad in response to a search queries containing 1-800 Contacts’ trademark terms. (CX8008 at 8-10 (Jacoby Expert Report)). There is also no evidence to support the second claim in this proposed finding that “other companies with an online presence” faced the same problem. To the contrary, 1-800 Contacts’ rivals are not aware of evidence that consumers are confused by the appearance of their ads in response to searches for rivals. E.g., Hamilton Decl.; Holbrook, Tr. (CCPTB at 143 n.454).

**995.** 1-800 Contacts was hearing from consumers who were confused and thought they had ordered from 1-800 Contacts when they in fact had not done so. (Coon, Tr. 2727-29, 2736).

**Response to Proposed Finding No. 995**

This proposed finding is unsupported by any record evidence. 1-800 Contacts has provided exactly zero evidence, aside from self-serving testimony from Mr. Coon, that it was hearing from consumers who were confused and thought they had ordered from 1-800 Contacts when they in fact had not done so. Further, Mr. Coon's testimony at trial is inconsistent with his earlier testimony at the investigational hearing, when he could not recall any particular instances of confusion or any collection of instances of confusion from competitors' ads except for one Lens.com ad which he claimed used 1-800 Contacts in the content of the ad (a practice prohibited by Google at that time, which Mr. Juda testified is "pretty easy" for Google to enforce (Juda, Tr. 1141-1142)). Notably, 1-800 Contacts also failed to produce any evidence of confusion in the *Lens.com* litigation. *See Lens.com*, 755 F. Supp. 2d 1151, 1177 (D. Utah 2010) ("... Plaintiff admitted it knew of no actual case where a consumer was confused by a Lens.com advertisement appearing after a consumer entered a search for Plaintiff.").

**996.** 1-800 Contacts believed a source of confusion from sponsored ads by other companies appearing in response to a search for 1-800 Contacts' trademark was that it was potentially confusing for consumers to see competitor's advertisements appear in response to searches for 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 105-06); Coon, Tr. 2731-38). Marketing professionals understood 1-800 Contacts' trademark terms, when used as a search query, to be navigational in nature, and to be reflective of the searcher's intent to find her way to 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 106)).

#### **Response to Proposed Finding No. 996**

The first sentence of this proposed finding is contradicted by the weight of the evidence. If this subjective belief was truly held by these two 1-800 Contacts executives at the time, it is not reflected in contemporaneous business documents. The subjective belief is also completely false, and has been disproven time and time again, including in the only litigation that 1-800 Contacts brought to conclusion against Lens.com. (*See also* CX8008 at 8-10 (Jacoby Expert Report) (finding that almost no confusion is caused by the appearance of competitor's ads in response to search queries containing 1-800 Contacts' trademark terms)).

To the extent the second sentence of this proposed finding of fact is referring only to 1-800 Contacts marketing professionals, Clint Schmidt and Bryce Craven, Complaint Counsel has no specific response other than to add that this subjective belief, if truly held, is also not reflected in contemporaneous business documents and is inaccurate as explained in the Response to Proposed Finding No. 946 and in the Response to Proposed Finding No. 956. To the extent the second sentence of this proposed finding of fact is attributing this subjective belief to other marketing professionals, it is unsupported. Respondents have cited no evidence that any other marketing professionals, at 1-800 Contacts or at competing contact lens retailers, held this subjective belief.

**997.** Due to the navigational quality of a search for 1-800 Contacts, there was a concern that consumers trying to navigate to 1-800 Contacts' website by searching on its trademarked name were getting confused, being diverted, or finding it more difficult to order from 1-800 Contacts as the result of the triggering of competitor advertisements in response to such searches. (CX 9031 (Schmidt, Dep. at 112); Coon, Tr. 2727-29).

**Response to Proposed Finding No. 997**

The proposed finding is inaccurate and unsupported. The first part of the finding, "due to the navigational quality of a search," is plainly erroneous, as already addressed by the Response to Proposed Finding No. 946. The second part of the finding regarding consumers "getting confused" is unsupported, as no record evidence indicates that "confusion" was a concern for 1-800 Contacts when it filed lawsuits against its competitors. *See* the Response to Proposed Finding No. 994. As described in the Response to Proposed Finding No. 992, 1-800 Contacts' ordinary-course documents cite competitive concerns. Complaint Counsel has no specific response to the proposed finding that 1-800 Contacts was concerned about consumers being "diverted" to their competitors if competing advertisements were allowed to show in response to queries containing their trademark terms, other than to note that such is the essence of competition.

**998.** With respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts' trademarks, 1-800 Contacts was also concerned that consumers

searching the internet often do not read carefully and just click on the first link. (CX 9027 (Larson, Dep. at 87)).

### **Response to Proposed Finding No. 998**

This proposed finding is not supported by any record evidence, as described in the Responses to Proposed Findings No. 992 and 994.

**999.** 1-800 Contacts' search marketing professionals shared the concern that rival advertisements may cause confusion because of misleading ad copy. (CX 9020 (Craven, Dep. at 93)).

### **Response to Proposed Finding No. 999**

This proposed finding is inaccurate, irrelevant, and inconsistent with 1-800 Contacts' contemporaneous conduct. 1-800 Contacts did not pursue litigation based on a theory that parties were advertising "misleading ad copy." 1-800 Contacts' entire theory of trademark infringement revolved around confusion as to the source, sponsorship, or affiliation of the ad, which has nothing to do with "misleading ad copy." There is no record evidence that 1-800 Contacts attempted to address or ameliorate the "misleading ad copy" of any of its rivals. Moreover, there is no record evidence that any of the parties to the Bidding Agreements were using "misleading ad copy." As described above, 1-800 Contacts' documents evidence concerns that it was losing sales to lower-price competitors.

**1000.** 1-800 Contacts would never advertise using misleading statements about savings offers such as "Save up to 70%" since the company would not participate in non-truthful advertising. (CX 9002 (Craven, IHT at 127-28); CX 9020 (Craven, Dep. at 93-94)).

### **Response to Proposed Finding No. 1000**

This proposed finding is irrelevant for the reasons explained in the Response to Proposed Finding No. 999. It is also not supported by any record evidence. In fact, 1-800 could be accused of misleading advertising with their unscrupulous advertising of their price match program.

Although 1-800 Contacts has had at times the highest prices on the internet, they continued to use

their “We’ll beat any price” ad copy particularly because, “Our past thought was that the customer than [sic] interpreted this to mean that we had lower prices.” (CX1086, August, 2012 email from Laura Schmidt to Rick Galan and Amber Powell).

**1001.** 1-800 Contacts was concerned that competitors were using the 1-800 Contacts’ trademark to trick people into going to their website. (Coon, Tr. 2731-32).

**Response to Proposed Finding No. 1001**

This proposed finding is unsubstantiated by any record evidence. As described above, 1-800 Contacts’ contemporaneous documents do not reveal concerns about “tricking” or confusing people; they reveal concerns about losing sales to lower-price competitors and paying too much for search advertising. (*See* Response to Proposed Finding No. 992).

**1002.** Second, with respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts’ trademarks, 1-800 Contacts thought those ads would dilute the value of its brand and the message that it was trying to advertise to consumers. (Bethers, Tr. 3689; CX 9029 (Bethers, Dep. at 27 & 29)).

**Response to Proposed Finding No. 1002**

This proposed finding is unsupported and pretextual. 1-800 Contacts does not use “dilute” in the trademark sense, as the competitive advertising at the heart of this case does not (and could not) constitute trademark dilution. (CCPTB at 166-167). Indeed, 1-800 Contacts did not allege trademark dilution in the vast majority of complaints it filed against rivals. (*See* Hogan, Tr. 3487 (testifying that he is not aware of any complaints that alleged trademark dilution against 1-800 Contacts’ competitors)). This claimed concern is a pretext for 1-800 Contacts’ actual purpose for pursuing these bidding agreements, avoiding price competition and keeping advertising costs low. (CCPTF §VI.A.2-3).

**1003.** For example, Jonathan Coon was concerned about 1-800 Contacts being associated with competitors who were engaged in practices that were totally the opposite of 1-800 Contacts’ philosophy (e.g., bad service, bad prescription verification practices, fake pricing). (Coon, Tr. 2727, 2729).

**Response to Proposed Finding No. 1003**

This proposed finding is unsupported for the reasons explained in the Response to Proposed Finding No. 1002.

**1004.** Third, 1-800 Contacts invested millions of dollars in TV, radio, direct mail, and other advertising to build brand awareness and direct contact lens users towards the 1-800 Contacts website, and one concern of the company was online competitors who were not making the same investments in advertising necessary to attract customers were free-riding off that investment by paying search engines to appear when customers tried to navigate to 1-800 Contacts. (CX 9013 (Aston, Dep. at 147); Coon, Tr. 2729; Bethers, Tr. 3690; CX 9001 (Bethers, IHT at 125-27)).

**Response to Proposed Finding No. 1004**

The proposition that a search relating to 1-800 Contacts is “navigational” is erroneous, for the reasons described in the Response to Proposed Finding No. 946. Further, this proposed finding is irrelevant because free-riding is not a cognizable defense. (CCPTB § IV.A).

**1005.** 1-800 Contacts believes that its investments in broadscale advertising would decrease if other companies’ sponsored ads appeared in response to an internet search for 1-800 Contacts’ trademarks. (CX 9001 (Bethers, IHT at 149); CX 9004 (Coon, IHT at 152, 178-79, 182)).

**Response to Proposed Finding No. 1005**

This proposed finding is unsupported by any record evidence. This subjective belief, if truly held by Mr. Bethers and Mr. Coon, is not reflected in contemporaneous business documents. Further, this proposed finding is irrelevant for the reasons described in the Response to Proposed Finding No. 1004.

**1006.** 1-800 Contacts’ entire business model centered on removing friction and making it simpler for customers to purchase contact lenses. (Coon, Tr. 2738).

**Response to Proposed Finding No. 1006**

This first part of this proposed finding is vague and unclear. The phrase “removing friction” is unclear and, in any event, this proposition is unsupported by the record evidence. Complaint Counsel has no specific response to the proposition that 1-800 Contacts’ business model “centered on . . . making it simpler for customers to purchase contact lenses.”

**1007.** In general, 1-800 Contacts was thus concerned that such ads were interfering with 1-800 Contacts’ efforts to remove friction and make it simple, easy and quick for consumers to reach 1-800 Contacts by causing consumers to become frustrated, confused, and misdirected when they were just trying to reach the 1-800 Contacts website. (Coon, Tr. 2627-29, 2738).

**Response to Proposed Finding No. 1007**

This proposed finding is contradicted by the weight of the evidence. The proposed finding erroneously assumes that the ads shown by Google and Bing are not useful or relevant to users. As explained in Complaint Counsel’s Proposed Findings of Fact, Section IV.3 and 4, this is false. (See CCPTF §IV.3-4 ¶¶ 385-417). The party with much greater interest in whether consumers become “frustrated, confused, and misdirected” when using search engines is the search engine. Google’s { [REDACTED] } top search ad engineers agreed that their product is useful for users and that their goal is that users would want to return. ({ [REDACTED] } Juda, Tr. 1072-1073; RX0612A at 0005-0006 (Hal Varian Video)). The record evidence shows that consumers find these ads beneficial because, when exposed to lower-price ads in response to searches relating to “1-800 Contacts,” consumers click on these ads, and they purchase from these retailers. (See Response to Proposed Finding No. 988). The record evidence shows that advertisers have been successful in advertising against 1-800 Contacts’ trademarks. (See Response to Proposed Finding No. 988). This is consistent with the search engines’ determination that such ads are valuable and beneficial to consumers. In fact, Respondent’s own proposed findings contradict this claim, admitting that 95% of search engine users with queries containing 1-800 Contacts trademarks find their way to 1-800 Contacts. (RPF ¶948).

**1008.** 1-800 Contacts was typically the first place that consumers would go other than their eye doctor. (Coon, Tr. 2738). 1-800 Contacts was understandably troubled that if somebody's very first experience online was the appearance of misleading, confusing, and irrelevant advertisements when they were trying to navigate to 1-800 Contacts, it would create a high friction experience and lead those consumers to go back to their eye doctor for contact lenses. (Coon, Tr. 2738-39)

**Response to Proposed Finding No. 1008**

This proposed finding is unsupported by any record evidence. As described in the Response to Proposed Finding No. 994, 1-800 Contacts has presented no evidence that any of its rivals ads are confusing to consumers. Further, { [REDACTED] } (CX9019 (Juda, Dep. at 207), *in camera*). Both search engines depend on their sophisticated ads quality systems, the entire purpose of which is to select relevant ads that consumers will be interested in. (CF § IV.A.4). Additionally, Dr. Jacoby found that almost no confusion is caused by the appearance of competitor's ads in response to search queries containing 1-800 Contacts' trademark terms. (CX8008 at 8-10 (Jacoby Expert Report)). Dr. Jacoby's results are consistent with the search engines' internal studies, as well as with the Tenth Circuits conclusion in Lens.com.

**1009.** 1-800 Contacts believed that anything that created friction for the customer, or made it difficult for the customer to just do business with 1-800 Contacts when that is what they wanted to do, was a problem for 1-800 Contacts. (Coon, Tr. 2739).

**Response to Proposed Finding No. 1009**

This proposed finding is unsupported by the record evidence and irrelevant.

**1010.** Concerns about consumers being confused by competitor ads appearing in response to searches for 1-800 Contacts' trademarks became a topic at 1-800 Contacts' management team meetings. (Coon, Tr. 2736-37).

**Response to Proposed Finding No. 1010**

Complaint Counsel objects to this proposed finding of fact as pretextual and unsupported by the weight of the evidence. Indeed, while Mr. Coon may today say he was concerned about consumer confusion, his employees have made it emphatically clear that he was concerned about the “crabs in the bucket” of lower priced competitors taking sales from 1-800 Contacts, which was the subject of many 1-800 Contacts’ employee meetings and conversations. (Bethers, Tr. 3775 (referring to a “hole in the bucket” as “one of the downstream competitors who pick up some of our lost customers.”); CX9001 (Bethers, IHT at 80-81) (Online competitors were described by Jonathan Coon as being “crabs in the bucket” (a phrase Coon coined), and that “crabs in a bucket ... are all trying to get their way up over the bucket by fighting on price....All they are saying is ‘Here is our price. Boom. We are at the bottom.’ ...So we kept track of their pricing, ....”); CX 9027 (Larson, Dep. at 127-128) (1-800 Contacts executives, including Jonathan Coon, would talk about “the crab in the bucket and everyone trying to claw their way to the top of the bottom, and then just kind of that race to the bottom [sic]. Yeah.”); CX9031 (C. Schmidt, Dep. at 85-86 (Despite not working at 1-800 Contacts for more than 11 years, Clint Schmidt remembered that in his short time there from 2004 to 2006 the term “crabs in a bucket” was “a phrase that was very frequently used at 1-800 Contacts” to describe competitors who were lower priced where one was as good as the next, whose products were not differentiated, and that it was a challenge to compete with them by setting 1-800 Contacts apart from them.)

**1011.** 1-800 Contacts informed its Board of Directors about the concerns it had with competitors using the 1-800 Contacts trademark to generate advertisements in response to navigational searches. (Coon, Tr. 2730).

**Response to Proposed Finding No. 1011**

Complaint Counsel objects to this proposed finding to the extent that implies that the concern was for anything other than the appearance of advertisements by competitors offering the same contacts lenses for lower prices.

**1012.** 1-800 Contacts conveyed to its Board of Directors that expansion of trademark triggered ads by other competitors would further reduce the value of its trademarks. (Coon, Tr. 2731).

**Response to Proposed Finding No. 1012**

Complaint Counsel has no specific response, except to add that 1-800 Contacts' concern was that it was losing market share to its rivals.

**1013.** 1-800 Contacts' presentation to its Board of Directors was meant to convey its concern that the practice of competitors running ads based on 1-800 Contacts' trademark was undermining the investment it was making in building a brand. (Coon, Tr. 2731).

**Response to Proposed Finding No. 1013**

Complaint Counsel objects to this proposed finding of fact as nothing more than post-hoc rationale. As discussed in response to proposed finding of fact number 1010, the overwhelming concern at the relevant time was ads appearing from competitors offering lower prices and the fact that 1-800 Contacts would lose sales to them.

**VIII. 1-800 Contacts' Trademark Litigation**

**A. *Early History And The Vision Direct Settlement***

**1014.** In the early 2000s there were dozens of new entrants into the online contact lens retail space. (CX 8006 (Evans Rep.) ¶¶ 85-89; CX 8007-105 (Athey Rep.)).

**Response to Proposed Finding No. 1014**

The proposed finding of fact is misleading and unsupported. Dr. Evans did not write that in the early 2000s there were "dozens" of new entrants into the online contact lens retail space.

(See CX8006 at 038-039 (¶ 87) (Evans Expert Report) ("By 2003, four major online sellers of

contact lenses had emerged in addition to 1-800 Contacts’)). The cited table from Dr. Athey’s report does not indicate that in the early 2000s that there were dozens of new entrants into the online contact lens retail space. Rather, it shows how Dr. Athey categorized various brand names that appeared in the ComScore dataset she used for her empirical analysis, which comprised searches from internet users from July 11, 2013 to August 14, 2016. (CX8007 at 026-027, 105 (¶ 74 & Appendix C) (Athey Expert Report)).

**1015.** Concerns that unbounded uses of trademarks in online advertising violated the intellectual property laws and eroded the goodwill of established brands resulted in litigation over various methods of internet advertising starting in the late 1990’s. *See, e.g., Brookfield Commns, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1050-51 (9th Cir. 1999) (use of marks in HTML codes); *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176, 185 (Feb. 28, 2000) (finding likelihood of success on the merits satisfied in Lanham Act claim for use of registered trademark in domain name); *Bihari v. Gross*, 119 F. Supp. 2d 309, 319 (S.D.N.Y. 2000) (discussing use of marks in metatags); *1-800 Contacts v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003) (addressing “pop-up” advertisements); *Google v. American Blind & Wallpaper Factory, Inc.*, No. 03-05340, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005) (denying motion to dismiss for potentially actionable “use” of a trademark in keyword search advertising).

#### **Response to Proposed Finding No. 1015**

The proposed finding is unsupported and improper. It relies on no evidence admitted in this matter and consistutes nothing more than Respondent’s conclusions drawn from its own reading of cases.

**1016.** In 2002, 1-800 Contacts brought a trademark infringement claim against Vision Direct, Inc. (“Vision Direct”), another contact lens retailer, and the advertising software company WhenU, alleging that pop-up advertisements for Vision Direct would appear when consumers attempted to access 1-800 Contacts’ website. (CX 1614 (Oct. 9, 2002 Complaint against Vision Direct)); *1-800 Contacts v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003).

#### **Response to Proposed Finding No. 1016**

Complaint Counsel does not dispute that 1-800 Contacts brought a trademark infringement claim against Vision Direct in 2002. Otherwise, proposed finding is unsupported. The cited exhibit, CX1614, consists entirely of hearsay statements by 1-800 Contacts, which are inadmissible for the truth when offered by 1-800 Contacts. To the extent the proposed finding is

based on a citation to *1-800 Contacts v. WhenU.com*, it consists of nothing more than Respondent's conclusions drawn from its own reading of cases.

**1017.** 1-800 Contacts had previously concluded another settlement agreement in 2002 with Arlington Contact Lens Service ("ACLens") restricting a similar set of practices related to the appearance of pop-up advertisements when a user attempted to navigate to the other company's web-page. (CX 3; Clarkson, Tr. 322 ("Q: Take a look at [CX 3] and see if it refreshes your recollection that you did sign an agreement back in 2002. A: It does. Q: And generally speaking, did ACLens agree not to cause an advertisement to be displayed over or on a website owned by 1-800 Contacts? A: Correct."))).

**Response to Proposed Finding No. 1017**

Complaint Counsel has no specific response.

**1018.** In 2003, the District Court enjoined the defendants, Vision Direct and WhenU, from causing such advertisements to be displayed, *1-800 Contacts*, 309 F. Supp. 2d at 498-508.

**Response to Proposed Finding No. 1018**

The proposed finding is unsupported because it relies on no evidence admitted in this matter and consists of nothing more than Respondent's conclusions drawn from its own reading of cases. Moreover, the proposed finding is vague because it refers to "such advertisements" without defining or identifying the advertisements referred to.

Notwithstanding, the proposed finding is irrelevant. The preliminary injunction in *WhenU* addressed only pop-up advertising, not the search engine advertising at issue here. Further, Complaint Counsel notes that the district court's *WhenU* decision was reversed, and the injunction lifted by the Second Circuit on June 27, 2005. *See 1-800 Contacts, Inc. v. WhenU.com and Vision Direct*, 414 F.3d 400, 403 (2d Cir. 2005) ("We hold that, as a matter of law, WhenU does not 'use' 1-800's trademarks within the meaning of the Lanham Act, 15 U.S.C. § 1127, when it (1) includes 1-800's website address, which is almost identical to 1-800's trademark, in an unpublished directory of terms that trigger delivery of WhenU's contextually relevant advertising to C-users; or (2) causes separate, branded pop-up ads to appear on a C-user's computer screen either above, below, or along the bottom edge of the 1-800 website window. Accordingly, we reverse the

district court's entry of a preliminary injunction and remand with instructions to (1) dismiss with prejudice 1-800's trademark infringement claims against WhenU, and (2) proceed with 1-800's remaining claims.").

1019. [Intentionally Not Used].

**1020.** Following entry of the injunction against WhenU and Vision Direct, 1-800 Contacts' counsel wrote to Vision Direct regarding the appearance of Vision Direct's paid search advertisements in response to searches for 1-800 Contacts' trademark. (RX 100 (January 16, 2004 letter to Vision Direct)).

**Response to Proposed Finding No. 1020**

The proposed finding is misleading and unsupported. First, RX0100 is not a letter dated January 16, 2004, to Vision Direct. RX0100 is a letter dated January 22, 2004, from Theodore J. McEvoy of the law firm Simpson Thatcher, who represented Vision Direct, to Amy Barrier of the law firm Gibson, Dunn & Crutcher LLP, who represented 1-800 Contacts. (RX0100).

Accordingly, the statements contained in RX0100 are hearsay to which no exception applies.

The proposed finding is also misleading because it implies a connection between an injunction against Vision Direct and the correspondence between 1-800 Contacts' and Vision Direct's outside counsel without any basis. Complaint Counsel notes that the hearsay statements in RX0100 make no reference whatsoever to an injunction. As stated in response to Respondent's Proposed Finding of Fact No. 1018, there is no admissible evidence in this case establishing facts regarding the scope of the injunction entered in the *WhenU* case, including whether it had any application to search advertising. Notwithstanding, the district court's decision in *WhenU* explains that the injunction applied specifically to WhenU's software services and pop-up advertising. *See 1-800 Contacts, Inc. v. WhenU.com*, 309 F. Supp. 2d 467, 510 (S.D.N.Y. 2003), *rev'd and remanded*, 414 F.3d 400 (2d Cir. 2005) (Defendants are preliminarily enjoined from: 1) including the 1-800 Contacts mark, and confusingly similar terms, as elements in the SaveNow software

directory, and 2) displaying Plaintiff's mark "in the ... advertising of" Defendant Vision Direct's services, by causing Defendant Vision Direct's pop-up advertisements to appear").

**1021.** Vision Direct indicated it would notify its affiliates to cease their activities, but also advised that 1-800 Contacts could file a trademark complaint with Google requesting that the search engine take down advertising on 1-800 Contacts' trademark. (RX 796).

**Response to Proposed Finding No. 1021**

Complaint Counsel objects to this proposed finding of fact because it misstates the evidence and lacks support. RX0796 is an email from Kevin McCallum of 1-800 Contacts to Josh Aston of 1-800 Contacts dated March 17, 2004, which involves an ongoing email exchange between employees at 1-800 Contacts and employees of Google, Inc. RX0796 does not reference Vision Direct at all. RX0100 (discussed in relation to Respondent's Proposed Finding No. 1020) appears to indicate that Vision Direct requested affiliates to stop generating the links giving rise to 1-800 Contacts' concern. The statements in RX0100, however, merely relay the hearsay statements of Vision Direct's outside counsel from a letter which is not itself in evidence, and to which no hearsay exception applies.

**1022.** 1-800 Contacts attempted to resolve the trademark dispute by filing a complaint with Google. (Schmidt, Tr. 2896; CX 1054; CX 1397; RX 159, RX 796 CX 1396).

**Response to Proposed Finding No. 1022**

The proposed finding is misleading and vague because it does not identify the "trademark dispute" referenced. To the extent the proposed finding refers to Proposed Finding Nos. 1020 and 1021, it is unsupported for the reasons explained in Complaint Counsel's Response thereto.

The proposed finding is also misleading because it characterizes 1-800 Contacts' communications with Google in 2003 and early 2004 as concerning a "trademark dispute" with no basis. Those communications pertained to an attempt by 1-800 Contacts to prevent advertisers from placing ads on Google in response to searches for "1-800 Contacts" and related terms under any circumstances. (*See generally* CCPTF 882-890). Indeed, Mr. Schmidt testified that 1-800

Contacts contacted Google to ask Google to prevent 1-800 Contacts' competitors bidding on 1-800 Contacts trademarks as search advertising keywords under any circumstances. (Schmidt, Tr. 2896-2897).

**1023.** Other contact lens retailers such as Vision Direct and AC Lens also attempted to prevent the unauthorized use of their trademarks by “ask[ing] Google to not allow others to advertise on it.” (Clarkson, Tr. 327-329; RX 1188 (Mar. 18-19, 2003 email to Peter Clarkson, CEO of ACLens, from Google alerting them that Vision Direct has requested that Google remove Vision Direct's trademarks and all variations of the term Vision Direct from ACLens' keyword list); RX 1191 (Apr. 18, 2003 email from Clarkson to Google asking for Google to restrict other advertisers from using “AC Lens” as a keyword trigger)).

**Response to Proposed Finding No. 1023**

Complaint Counsel has no specific response.

**1024.** In April 2004, Google modified its policies to permit advertisers to purchase each other's trademarks as keywords. (CX 1148; CX 9022 (Charlston, Dep. at 19-20); (Schmidt, Tr. 2898-2900)).

**Response to Proposed Finding No. 1024**

Complaint Counsel has no specific response.

**1025.** In announcing the policy change, Google indicated it would no longer resolve disputes over trademark use and encouraged advertisers to work their trademark disputes out amongst themselves. (Schmidt, Tr. 2948-49; RX 159; CX 9013 (Aston, Dep. at 168-170); CX 9031 (Schmidt, Dep. at 34 (Google “would no longer be interceding” in grievances between trademark owners and advertisers))).

**Response to Proposed Finding No. 1025**

The proposed finding is misleading and unsupported. When Google changed its trademark complaint procedure in April 2004, Josh Aston sent a copy of the new policy to other marketing employees and to 1-800 Contacts' general counsel. (RX0159; *see* Schmidt, Tr. 2942-2946). As explained in RX0159, Google indicated that it was “not in a position to arbitrate trademark disputes between advertisers and trademark owners,” but said that it would investigate trademark-related complaints, in the United States, where “the advertisements at issue are using the trademark term in the ad text,” and that Google would, “require the advertiser to remove the

trademarked term in ad text in the future.” (RX159 at 004). By comparison, outside the United States and Canada, Google would preclude trademark use as a keyword, but would, “not take any action in situations where an advertisement is being triggered by non-trademarked terms even though the search query contains the trademark term.” (RX159 at 005). Further, there is no testimony or evidence to support the statement that Google would “no longer” resolve any disputes between advertisers and trademark owners. First, it is not clear that Google *ever* resolved legal trademark infringement disputes between trademark owners and advertisers. As Mr. Schmidt testified, Google did not opine in the legality of trademark infringement issues. (Schmidt, Tr. 2948-2949). Nevertheless, as RX0159 explains, Google would continue responding to trademark owner complaints about use of trademarked terms in ad text. (RX159 at 004; Schmidt, Tr. 2948-2949).

**1026.** Google made the same representations to other companies regarding trademark rules on AdWords. (CX 9031 (Schmidt, Dep. at 21-23 (describing experience at Half.com), 34 (“They had a very clear set of three messages that they were conveying to all of their advertisers, including 1-800 Contacts”)); CX 9013 (Aston, Dep. at 174)).

**Response to Proposed Finding No. 1026**

The proposed finding is vague as to the meaning of “the same representations. Moreover, the proposed finding is unsupported. The testimony cited merely relays out-of-court statements by unidentified Google employees to representatives of other companies. Accordingly, it is hearsay to which no exception applies and is unreliable.

**1027.** 1-800 Contacts met with Google representatives to discuss the issue in April of 2004. (Schmidt Tr. 2904-05; CX 9013 (Aston, Dep. at 32-35)). At this meeting, Google representatives stated to 1-800 Contacts that while Google would no longer resolve trademark disputes directly, it offered negative keywords as a tool to implement on the AdWords platform that would be effective at arresting future infringement. (Schmidt Tr. 2900, 2904-05; CX 9031 (Schmidt, Dep. at 33-34 (“Google would no longer be interceding in these grievances. The second was that the responsibility to protect trademarks or to settle any grievances around trademark terms would no[w] be the responsibility of the trademark holder. And the third piece was that, you know, making sure that we knew about the negative keyword tools that were available to advertisers to enforce any of those grievances.”))).

**Response to Proposed Finding No. 1027**

Complaint Counsel does not dispute that representatives of Google met with Mr. Schmidt. (CCPTF 889). The proposed finding regarding the statements made by the Google representatives, however, is unsupported. As the Court ruled at trial, Mr. Schmidt's testimony regarding the Google meeting in 2004 was admitted for the exclusive purpose of demonstrating the impact it had on Mr. Schmidt, not for the truth of those statements. (Schmidt, Tr. 2901 ("Q. What did the representatives of Google say to you about the implementation of the new policy? MR. CHIARELLO: Objection, Your Honor. . . . I'm objecting on hearsay as to what—the fact that Google's statements shouldn't be admitted for the truth of the matter that might be asserted. MR. PERRY: We're offering it for the impact that it had on the listener, Your Honor, a nonhearsay purpose. JUDGE CHAPPELL: State of mind rather than truth of the matter? MR. PERRY: That's correct, Your Honor."); Tr. 2905 (overruling another objection to Mr. Schmidt's testimony on hearsay and foundation grounds because the testimony was "offered not for the truth")). The cited deposition testimony of Mr. Schmidt is substantively the same in that he merely relayed out-of-court statements made to him by a Google representative in 2004, and is also unreliable hearsay. Complaint Counsel further notes Mr. Schmidt's account of his conversation with Google employees is not corroborated by a single document, even though several other documents authored by Mr. Schmidt from the 2004 period appear in the record. (*E.g.*, CX1397; CX1007; CX0938; CX1061; RX0161). Accordingly, there is no evidence to support the proposed finding.

**1028.** Google representatives specifically suggested that 1-800 Contacts resolve its disputes directly with its competitors by telling them to implement 1-800's trademarks as negative keywords. (CX 9031 (Schmidt, Dep. at 34-35); CX 9013 (Aston, Dep. at 170, 173)).

**Response to Proposed Finding No. 1028**

The proposed finding is unsupported because it relies entirely upon inadmissible hearsay. For the same reasons stated in Complaint Counsel's response to Proposed Finding No. 1027, Mr.

Schmidt's and Mr. Aston's testimony regarding what "Google representatives specifically suggested" to them is unreliable, inadmissible hearsay.

Complaint Counsel notes that Mr. Aston testified that he did not recall that Google representatives suggested to 1-800 Contacts that it reach agreements with its competitors to use negative keywords to prevent ads from showing up on searches for 1-800 Contacts' trademarks. (CX9013 (Aston, Dep. at 88-89)).

**1029.** Google's statements to 1-800 Contacts in 2004 confirmed the belief held by 1-800 Contacts' marketing personnel that negative keywords were an effective tool that Google provided to resolve trademark disputes. (Schmidt, Tr. 2905-2906).

**Response to Proposed Finding No. 1029**

Complaint Counsel has no specific response, other than to note that 1-800 Contacts "had been using negative keywords far before this meeting." (Schmidt, Tr. 2906; *see* CCPTF 890).

**1030.** After the discussions with Google, 1-800 Contacts and Vision Direct began negotiating to resolve their trademark dispute and reached the first settlement agreement challenged in this case. (CX 58 (May 24, 2004 settlement negotiation emails exchanged between Alesia Pinney for drugstore.com and Joe Zeidner for 1-800 Contacts); CX 311 (June 2004 Vision Direct Settlement Agreement)).

**Response to Proposed Finding No. 1030**

The proposed finding is vague because it refers to "discussions with Google" without identifying the discussions or identifying when they occurred. As described in Complaint Counsel's Response to Proposed Finding No. 1027, the date of meeting between Clint Schmidt and representatives of Google regarding Google's trademark policy is not in the record, except that it occurred some time after April 9, 2004. (*See* RX0159; Schmidt, Tr. 2900-2901).

The proposed finding is also misleading and unsupported. The documents cited do not show that settlement negotiations between 1-800 Contacts and Vision Direct began after a meeting with Google, or were in any way affected by or related to "discussions with Google." CX0058 indicates that negotiations on settlement were ongoing as of April 16, 2004, only one week after

the April 9 email from Google that purportedly prompted Mr. Schmidt to invite Google representatives to meet with him in Utah. (CX0058 at 004 (email from 1-800 Contacts outside counsel, dated April 16, 2004, transmitting a “draft settlement agreement” to outside counsel for Vision Direct)).

**1031.** Google also disclosed that its 2004 policy change created a material litigation risk over the prospect that trademark owners would commence litigation over the unauthorized use of trademarks in its search advertising platform. (Hogan, Tr. 3250).

**Response to Proposed Finding No. 1031**

The proposed finding is unsupported. First, the proposed finding improperly cites expert testimony for a proposition of fact that should be proven with fact witness testimony or documents, namely the contents of disclosures ostensibly made by Google in 2004. Second, Mr. Hogan’s testimony merely relays out-of-court statements made by Google in documents which are not in the record and to which no hearsay exception applies. Accordingly, his testimony as to the contents of Google’s disclosures in 2004 must also be disregarded as unreliable.

***B. 1-800 Contacts’ Trademark Monitoring Efforts***

**1032.** Following the Google policy change, trademark owners began to bring infringement suits based on the sale and use of trademarks as keywords in paid search advertising, starting around 2004. (Hogan, Tr. 3249; RX 734 (Hogan Rep.) ¶ 97; *see also Playboy Enters., Inc. v. Netscape Commc’ns*, 354 F.3d 1020 (9th Cir. 2004); *Gov’t Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004)).

**Response to Proposed Finding No. 1032**

This proposed finding should be rejected because it is not an opinion Mr. Hogan offered in his expert report. And if he had offered such a view, it should be rejected as inaccurate, because the *Playboy* litigation cited in the relevant portion of his report commenced well before the 2004 policy change, and did not involve Google’s search engine keyword advertising policies. *See Playboy Enters., Inc. v. Netscape Commc’ns*, No. SACV 99-320, 2000 WL 1308815 (C.D. Cal. Sept. 13, 2000), *rev’d*, 354 F.3d 1020 (9th Cir. 2004). The cited portion of Mr. Hogan’s trial

testimony also does not support the proposed finding, but even if it did he should not be permitted to offer an opinion for the first time at trial.

**1033.** After signing the first two pop-up advertising settlements with Coastal Contacts and Vision Direct, 1-800 Contacts and its outside counsel also began an effort to uncover others' unauthorized use of its trademark in paid search advertising. (CX 9021 (Pratt, Dep. at 25-30, 140-141); CX 9040 (Miller, Dep. at 128-129)).

**Response to Proposed Finding No. 1033**

The proposed finding is vague as to the terms “first two,” and “pop-up settlements,” and also vague as to time. The proposed finding is also misleading and contradicted by the weight of the record evidence insofar as it implies that 1-800 Contacts' 2004 agreements with Coastal and Vision Direct only applied to pop-up advertising. (CCPTF 902 (Coastal Agreement required Coastal not refrain from causing an “Internet advertisement to appear in response to any Internet search for” 1-800 Contacts' brand name trademarks or URLs); CCPTF 914 (Vision Direct Agreement required Vision Direct to refrain from causing an “Internet advertisement to appear in response to any Internet search for” 1-800 Contacts' brand name trademarks or URLs)).

The proposed finding also improperly asserts a conclusion of law regarding whether trademark use was “unauthorized.” Bidding on trademarks was not “unauthorized” either by the law or by Google, so 1-800 Contacts has no basis on which to claim that it began an effort to “uncover others' unauthorized used of its trademarks in paid search advertising.” Complaint Counsel agrees that 1-800 Contacts began threatening and harassing competitors soon after Google changed its trademark policy, as documented by a series of cease-and-desist letters, email correspondence, and ensuing Bidding Agreements. (*See generally* CCPTF 891-1199).

**1034.** Trademark owners are often advised to have marketplace intelligence to determine how their marks are being used and to prepare appropriate steps to enforce their rights. (Hogan, Tr. 3265-66 (“trademark lawyers often advise clients to have marketplace intelligence and take steps to determine how their marks are being used and to take appropriate steps to remedy those uses in they appear like they would be problematic or could diminish ... the trademark owner's ability to use the mark to connote one specific source of goods or services.”)).

**Response to Proposed Finding No. 1034**

The proposed finding is unsupported. Mr. Hogan has no basis to testify on what trademark lawyers “often” do, or how trademark owners are “often” advised. Mr. Hogan is a single practitioner, and did not divulge any details of any case in which he or anyone else “advise[d]” a single client regarding the use of “marketplace intelligence.” He also testified that he did not consult with a single trademark owner or trademark practitioner in forming the basis of his opinion for this litigation. (Hogan, Tr. 3329-3330).

**1035.** 1-800 Contacts internal marketing personnel monitored rivals’ advertisements that were showing up in response to searches for 1-800 Contacts key trademark terms and provided that information to the legal team in trademark monitoring reports. (Craven, Tr. 685-86; CX 9002 (Craven, IHT at 121, 128-29); CX 9020 (Craven, Dep. at 45); Pratt, Tr. 2513 (“I received reports, periodic reports, from my client as they monitored those results. They monitored – they did searches for their trademarks themselves on Google and other search engines. They kept track of who was coming up in response to those searches.”)).

**Response to Proposed Finding No. 1035**

The proposed finding is vague as to the meaning of “searches for 1-800 Contacts key trademark terms.” The proposed finding is also misleading insofar as it implies, without basis, that 1-800 Contacts internal marketing personnel monitored the contents of rivals’ advertisements that appeared in responses to searches for “1-800 Contacts” and related terms. 1-800 Contacts’ internal marketing employees monitoring consisted of searching to identify competitors whose ads appeared in response to searches relating to 1-800 Contacts, regardless of the contents of those ads. (CCPTF 992; CX9002 (Craven, IHT at 128 (“The process was for us to identify who was showing up—upon the trademark keywords.”)); CX9020 (Craven, Dep. at 62-63 (“In other words, we would enter in the list of keywords one at a time and see who was showing up in the paid search results in response to those queries.”); Pratt, Tr. 2513; CX9015 (Galan, Dep. at 145 (“We were more looking just to see who was bidding on our terms, period.”))). The proposed finding is also misleading because it omits that 1-800 Contacts internal marketing employees also used the

information they found while monitoring 1-800 Contacts' trademarks in communications directly with competitors in which they asked competitors to remove ads and add negative keywords. (*See, e.g.*, CCPTF 1224-1231, 1233-1235, 1237, 1239-1241, 1252-1257; CX1675; CX1431, CX1432, CX1433).

**1036.** It was the responsibility of the legal team and outside counsel, not the marketing team, to determine whether and when the appearance of competitor advertisements in response to searches for 1-800 Contacts' trademarks constituted trademark infringement or was otherwise unlawful. (CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)).

**Response to Proposed Finding No. 1036**

The proposed finding is misleading because it omits that the 1-800 Contacts marketing team and senior executives also weighed in on which competitors to sue based on their competitive threat to 1-800 Contacts (CX0078 (Bryce Craven recommending that the lawyers sue Lens.com because it is "a more viable competitor"); CX0621 at 118-123). The proposed finding is also misleading because it omits that 1-800 Contacts' marketing team regularly communicated directly with competitors to ask them to remove ads that appear in response to searches for 1-800 Contacts' trademarks and related terms. (*E.g.*, CCPTF 1224-1231, 1233-1235, 1237, 1239-1241, 1252-1257; CX1675; CX1431, CX1432, CX1433).

**1037.** Respondent's outside counsel, chiefly Mr. Bryan Pratt and Mr. Mark Miller, reviewed these reports to see the results that would come up in response to searches for 1-800 Contacts and variations and in order to provide legal guidance to 1-800 Contacts by evaluating potential infringement, potential misappropriation of goodwill. (CX 9021 (Pratt, Dep. at 20-21)).

**Response to Proposed Finding No. 1037**

The proposed finding is unsupported because any testimony of Mr. Pratt and Mr. Miller regarding their legal analysis or "legal guidance to 1-800 Contacts" must be disregarded. Complaint Counsel has been unduly prejudiced by 1-800 Contacts' invocation of privilege every time Complaint Counsel has attempted to explore the basis for Mr. Miller and Mr. Pratt's concerns that the use of 1-800 Contacts' trademarks as search advertising keywords might cause confusion,

constitute potential infringement, or support any other cause of action. (Tr. 2500-2502; Complaint Counsel’s Trial Brief Regarding Anticipated Objections to the Testimony of Mr. Bryan Pratt (Apr. 27, 2017); *see also* Complaint Counsel’s Motion *in limine* to Preclude Testimony From Respondent’s Outside Counsel, Based on Previous Invocations of Attorney-Client Privilege). The proposed finding is also unsupported insofar as it asserts that Mark Miller reviewed certain reports, with no citations to record evidence whatsoever.

**1038.** Mr. Pratt and Mr. Miller also conducted and reviewed Keyword Spy and Brand Verity Reports to investigate unauthorized uses of the trademark. (CX 9021 (Pratt Dep. at 27-30 (“Q: Why did you review the report? A: To – to evaluate the information provided by Keyword Spy regarding keywords used by – by advertisers. Q: Why did you want to evaluate the information provided by Keyword Spy? A: As a – as a data point to understand, hopefully get a glimpse on what was happening and why search results were coming up”), 140-141; CX 9040 (Miller, Dep. at 123 (“Q: Who would have performed those prior searches? ... A: Could have come from trademark monitoring reports that 1-800 Contacts performed on – as part of their normal course of business. It could have been something we got out of a Keyword Spy report, BrandVerity report. We used a bunch of different tools to evaluate use of the trademark as a triggering keyword or search term”), 128-129 (describing the operation of Keyword Spy and Brand Verity); Pratt, Tr. 2557; CX 9020 (Craven, Dep. at 62-63)).

### **Response to Proposed Finding No. 1038**

The proposed finding is unsupported because the testimony of Mr. Pratt and Mr. Miller regarding their legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037.

The proposed finding is also misleading and unsupported insofar as it asserts that Mr. Pratt and Mr. Miller conducted and reviewed Keyword Spy and BrandVerity reports to investigate “unauthorized uses of the trademark.” First, as to Keyword Spy, Mr. Pratt testified that he did not conduct Keyword Spy reports. (CX9021 (Pratt, Dep. at 28)). Moreover, Mr. Pratt’s testimony shows that he lacks personal knowledge about what Keywors Spy reports actually show, so the cited testimony of Mr. Pratt on Keyword Spy lacks foundation. (CX9021 (Pratt, Dep. at 30 (“Q. Based on a Keyword Spy report, are you able to ascertain whether an advertiser bids on a

particular keyword? MR. STONE: Objection. Lacks foundation. THE WITNESS: My understanding, based on Keyword Spy's front page, is that that's what's provided.)). Mr. Miller similarly testified that he did not know how Keyword Spy reports actually worked. (CX9040 (Miller, Dep. at 124 ("Q. Do you know how these reports, BrandVerity and you mentioned Keyword Spy, how they would assess the keyword use? A. I don't know the details of their, you know, algorithm or their software or how they did it. I mean, I -- I don't know. I don't know how they implemented it."), 128 (testifying regarding conducting Keyword Spy reports: "Boy, it's been a long time. I don't remember how the system works . . . I could, you know, create a report, produce a report based on a keyword . . . it would generate like an Excel spreadsheet type of report based on the settings I put in there. I don't even remember all the details of how it worked."))). Accordingly, Mr. Miller's testimony regarding Keyword Spy also lacks foundation. Even so, Mr. Miller did not testify that Keyword Spy reports provided information on the use of keywords, or whether the use was "unauthorized."

As to BrandVerity, both Mr. Pratt and Mr. Miller testified that they received BrandVerity reports from 1-800 Contacts, not that they conducted reports themselves. (CX9021 (Pratt, Dep. at 27); CX9040 (Miller, Dep. at 127)). And neither testified about what information is actually contained in a BrandVerity report, including whether it showed information on "unauthorized uses of the trademark." (E.g., CX9040 (Miller, Dep. at 124 ("I don't—I just can't remember specifically how BrandVerity reports actually looked in detail, but I remember the name."))).

**1039.** Mr. Pratt and Mr. Miller also typed in their own search queries for 1-800 Contacts' trademarks and confusingly similar variations to see which advertisements were displayed in response. (CX 9021 (Pratt, Dep. at 25-26); Pratt, Tr. 2513 ("I also conducted my own searches")).

**Response to Proposed Finding No. 1039**

The proposed finding is unsupported because the testimony of Mr. Pratt and Mr. Miller regarding their legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037.

The proposed finding is also unsupported insofar as it asserts that Mr. Pratt and Mr. Miller typed in search queries for “confusingly similar variations” of 1-800 Contacts’ trademarks. First, the proposed finding cites no record evidence showing that Mr. Miller typed in searches of any kind. Second, the cited testimony of Mr. Pratt shows only that he conducted “searches for 1-800 Contacts.” (CX9021 (Pratt, Dep. at 26 (“Q. What Internet searches are referred to in this description of monitoring activities? . . . A. A general description would include searches for 1-800 Contacts.”))).

Moreover, the proposed finding is vague and improper as to the use of “confusingly similar variation” of a trademark, which is a legal conclusion inappropriate for a finding of fact.

**1040.** Next, Respondent, Mr. Pratt, and/or Mr. Miller would conduct an analysis to determine whether the advertisements that appeared in response to searches for 1-800 Contacts’ trademark had indicia of an infringing use, taking into account the factors and context that courts had identified as relevant to that determination. (CX 9040 (Miller, Dep. at 19, 129, 132 (“There’s a lot of factors that—outside of just looking at a search results page that you take into account when you’re evaluating potential infringement. And then if you have the basis to argue there’s a likelihood of confusion or we’ve got a good faith basis to allege trademark infringement here, then you’ve got a claim. And then discovery will prove what kind of evidence you have.”), 133 (“Well, we would always evaluate the case before we made the allegations or filed the complaint, absolutely”)); CX 9021 (Pratt, Dep. at 78-79, 131-132); RX 734 (Hogan Report) ¶ 38 n. 60).

#### **Response to Proposed Finding No. 1040**

The proposed finding is vague as to the use of “next” without identifying to what it refers.

The proposed finding is also unsupported because the testimony of Mr. Pratt and Mr. Miller regarding their legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037. Further, none of the sources cited support the proposition that 1-800 Contacts would conduct a trademark infringement

analysis. At pages 78-79, and again on pages 131-132 of his deposition, Mr. Pratt offered only an improper opinion as to whether particular ads on a search engine results pages he was shown could give rise to confusion, not regarding his practice of reviewing trademark monitoring reports generally. (CX9021 (Pratt, Dep. at 78-79 (testifying regarding screenshot on CX0078), 131-132 (testifying regarding screenshot on RX0067))). The citation to the Hogan Report must be disregarded because it consists only of Mr. Hogan's opinion as to what the law is and a list of U.S. Court of Appeals cases.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1041.** Such factors considered by Respondent's counsel before asserting a trademark infringement claim included the frequency of appearances, placement on the page and nature of the search, (CX 9021 (Pratt, Dep. at 129-130)); the nature of the market, the nature of the parties, how strong the trademark is, consumer awareness of the brands, (CX 9040 (Miller, Dep. at 132)); depending on who that consumer is, their experience with the internet, their past history purchasing contact lenses online, the frequency in which they use the Internet, and their familiarity with the Google Adwords process; (CX 9021 (Pratt, Dep. at 84)); and product advertised, whether it was a product or retailer name, the text of the advertisements, and the dynamics of the search engine results page as a whole. (CX 9021 (Pratt, Dep. at 86)).

#### **Response to Proposed Finding No. 1041**

The proposed finding is unsupported because the testimony of Mr. Pratt and Mr. Miller regarding their legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037.

Complaint Counsel notes that the cited testimony of Mr. Pratt at deposition pages 129-130, discussing a letters dated 2005 from Roy Montclair and David Zeidner, does not support the proposed finding.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1042.** Each factor is just one data point considered in the infringement analysis and taken together they are not exhaustive or exclusive. (CX 9040 (Miller, Dep. at 131)).

**Response to Proposed Finding No. 1042**

The proposed finding is improper because it consists entirely of an assertion as to what the law is. The proposed finding is also unsupported because the testimony of Mr. Miller regarding his legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1043.** 1-800 Contacts' outside counsel noted how the trademark infringement factors operated in 1-800 Contacts' favor in relation to advertisements placed by allegedly lesser known, lower quality competitors advertising against its trademark. (CX 9021 (Pratt, Dep. at 134-35; 78-79 ("there are a number of reasons that I believe the LensWorld.com ad could give rise to confusion. A couple of those include – I mean, could give confusion to an ordinary consumer based on the name recognition [of 1-800 Contacts] and the lack of name recognition for LensWorld")))).

**Response to Proposed Finding No. 1043**

The proposed finding is unsupported because the testimony of Mr. Pratt regarding his legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037. Further, the quoted deposition testimony of Mr. Pratt

consists of an improper opinion by a fact witness regarding whether a particular search engine advertisement he was shown is likely to cause confusion. CX9021 (Pratt, Dep. at 78-79)). Mr. Pratt's the testimony on pages 134-135 is entirely unrelated to any consideration of how trademark infringement factors operated in 1-800 Contacts' favor. Moreover, the cited testimony includes nothing about whether any of 1-800 Contacts' competitors were lesser known, or lower quality.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1044.** Frequency of appearances in the infringement analysis refers to the rate at which another retailer's advertisements appeared in response to searches for 1-800 Contacts' most popular trademark terms, including searches with misspellings of the trademark. A higher frequency of advertisements suggested a higher likelihood that consumers would infer an affiliation between 1-800 Contacts and the other retailer. (CX 9040 (Miller, Dep. at 130)).

**Response to Proposed Finding No. 1044**

The proposed finding improperly asserts a conclusion of law, which must be disregarded. The proposed finding is also unsupported because the cited testimony consists of an improper opinion offered by a lay witness. Mr. Miller testified only to his view that frequency of appearance might affect the likelihood of confusion. There is no evidence that Mr. Miller has personal knowledge of what "consumers would infer" and he was not qualified as an expert witness in this case. Further, any testimony of Mr. Miller regarding his legal analysis or legal guidance to 1-800 Contacts must be disregarded, for the reasons described in the Response to Proposed Finding No. 1037.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not

a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts’ agreements, which are overbroad.

**1045.** Placement on the page in the infringement analysis refers to where the rival advertisements appear on the search engine results page. Consumers may assume that the higher the placement of the advertising content, the more relevant that content is to the search term entered which can lead to confusion about the connection between the search term and the product. (CX 9040 (Miller, Dep. at 131)); *accord Rescuecom*, 562 F.3d at 131 (“This is particularly so, Rescuecom alleges, when the advertiser’s link appears in a horizontal band at the top of the list of search results in a manner which makes it appear to be the most relevant search result and not an advertisement”).

**Response to Proposed Finding No. 1045**

The proposed finding improperly asserts a conclusion of law, which must be disregarded, and relies on material not in evidence in this case. Further Mr. Miller’s testimony regarding consumer behavior intent and impressions of search advertising results lacks foundation and consists of an improper opinion by a fact witness. There is no evidence that Mr. Miller has personal knowledge about behavior of consumers on search engines, and he was not qualified as an expert witness. His testimony as to consumer behavior is pure speculation. (*See* CX9040 (Miller, Dep. at 131 (providing no support, Mr. Miller testified: “I still think even to this day there’s – there’s a significant percentage of ordinary consumers that don’t fully understand how Google works....So the higher up the content, sometimes people may think that’s more relevant. ... I think that can lead to more confusion, too.”)). Thus, the proposed finding is unsupported.

**1046.** The way Google and other search engines displayed ads that appeared in response to searches for 1-800 Contacts could cause a user to consider that the advertiser’s “sponsored” link had an affiliation with, or was “sponsored by,” the search term, 1-800 Contacts. (CX 9021 (Pratt, Dep. at 79 (“The use of the word ‘sponsored’ could give rise to confusion as to who sponsors it, or if there’s some sponsorship or affiliation in relation to the search term.”)); CX 9031 (Schmidt, Dep. at 110 (“it was easy for a person who was performing such a search to conclude that any one of the results that appeared in these sponsored ad section was put there by the company that they were intending to navigate to, which in this case was 1-800 Contacts.”)); CX 9033 (Mohan, Dep. at 103-105 (a user who does not have a search engine marketing background could “mistakenly click on” a LensDirect ad triggered by a search for 1-800 Contacts))).

**Response to Proposed Finding No. 1046**

The proposed finding is unsupported because all of the cited testimony lacks foundation. The cited testimony consists, in each case, of improper opinion testimony by fact witnesses about the behavior and beliefs of consumers regarding ads on search engine results pages. None of the witnesses cited have the personal knowledge to testify about what other consumers do or believe regarding ads they see on Google's search engine results pages. Moreover, none of the witnesses cited were qualified as an expert in this case. The proposed finding is also contradicted by the weight of the record evidence, which shows that the appearance of rival ads in response to searches for 1-800 Contacts causes no material confusion. (CCPTF 1762-1899).

**1047.** Many of 1-800 Contacts' online competitors placed advertisements with deceptive or confusing ad copy that did not identify the retailer placing the advertisement, did not compare the product to 1-800 Contacts, and included unconfirmed and misleading savings claims. (CX 9021 (Pratt, Dep. at 151-152 (describing possible confusing aspects of 70% off claims in the text of ShipMyContacts.com advertisements)); RX 72 (Complaint against Memorial Eye identifying several advertisements with the URL ShipMyContacts.com but titled "Discount Contact Lenses" with non-descript text offering "70% off"); CX 1318-005 (cease and desist letter to Memorial Eye showing an advertisement with the URL ShipMyContacts.com and same confusing text and title); CX 654 ("70% off is everywhere")).

**Response to Proposed Finding No. 1047**

The proposed finding is improper insofar as it asserts the legal conclusion that ads placed by 1-800 Contacts' competitors used "deceptive" or "confusing" ad copy with "misleading" savings claims. The proposed finding is also unsupported in that regard, because none of the sources cited support the proposition that an ad placed by a 1-800 Contacts' competitor resulted in "deception" or "confusion" due to the ad copy. Mr. Pratt testified only that he did not know one way or the other what a "70 percent off" statement in an ad referred to. (CX9021 (Pratt, Dep. at 151)). Complaint Counsel notes that there is no evidence that 1-800 Contacts ever challenged its competitors claims related to savings and its lawsuits did not identify misleading savings claims as a concern. To the contrary, 1-800 Contacts' consistent concern has been that lower-priced

competitors were winning sales by placing ads in response to searches for 1-800 Contacts' trademarks, and also driving up 1-800 Contacts' advertising costs. (CCPTF 803-881). Complaint Counsel further notes that 1-800 Contacts' itself has advertised using claims such as "Save up to 70% on your contact lenses." (RX1204 at 031 (showing an ad for 1-800 Lens Now, the company founded by Jonathan Coon that eventually became 1-800 Contacts); *see also* RXD003 at 009 (a color image of exhibit RX1204 at 024 showing a 1-800 Lens Now ad with the claim "save up to 75% on your contact lenses"))).

The proposed finding is also unsupported because it cites only materials referring to ads by Memorial Eye's ShipMyContact's website to suggest that "many" competitors of 1-800 Contacts used such claims. The proposed finding is misleading and inaccurate as to Memorial Eye because it asserts that online competitors of 1-800 Contacts placed ads "that did not identify the retailer placing the advertisement" but in every relevant example cited the retailer—[www.shipmycontacts.com](http://www.shipmycontacts.com), the online brand used by Memorial Eye—is identified in the URL portion of the ad, as described in the citations above. 1-800 Contacts also threatened and secured an agreement with one competitor that did use ad text that explicitly compared itself to 1-800 Contacts. (*See* CX1229 at 004 (screenshot attached to 2009 cease and desist letter sent to Lens Discounters showing a Lens Discounters ad with the text "We'll beat all 1800 and web prices."); CCPTF 930-953).

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1048.** 1-800 Contacts observed that rival contact lens retailers designed the labeling and phrasing of their advertisements so as to make consumers believe that they would land on 1-800 Contacts when they selected the link for another company. (CX 9031 (Schmidt, Dep. at 108)).

**Response to Proposed Finding No. 1048**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Schmidt has personal knowledge about the beliefs of other consumers when viewing and clicking on search ads, and he was not qualified as an expert to offer such an opinion in this case. Nor is there any evidence for the proposition that rival contact lens retailers designed the labeling and phrasing of their advertisements to confuse, or evidence that 1-800 Contacts' employees ever expressed concern about consumer confusion. (*See* Response to Proposed Finding No. 1047). Moreover, the proposed finding is contradicted by the weight of the record evidence, which shows that the appearance of rival ads in response to searches for 1-800 Contacts causes no material confusion. (CCPTF 1762-1899).

**1049.** Many of the settling parties conducted business with generic names that were variations of the terms "contacts" and "lenses," which suggested a connection or affiliation with 1-800 Contacts' well-known trademark. (CX 9021 (Pratt, Dep. at 86 (noting that generic competitor names suggest "a sponsorship or affiliation between th[em] and 1-800 Contacts," and could easily be mistaken for "a link to a sub-page of 1-800 Contacts")); CX 9040 (Miller, Dep. at 130 ("If it's like ShipMyContacts.com, consumers could think if they're always coming up when I search for 1-800 Contacts, maybe they're a fulfillment center. Maybe they've got some agreement with them. Maybe they've got some affiliation.")))).

**Response to Proposed Finding No. 1049**

The proposed finding is unsupported because the cited testimony lacks foundation. Mr. Pratt and Mr. Miller's cited testimony consists entirely of speculation regarding what a consumer could or might believe regarding connection to or affiliation with 1-800 Contacts. There is no evidence that Mr. Pratt or Mr. Miller has personal knowledge about the beliefs of other consumers when they see the name of a competitor of 1-800 Contacts, and neither was qualified as an expert to offer such an opinion in this case. There is also no support cited for the proposed finding that

“many” of the settling parties conducted business with “generic names,” because the sources cited identify only two settling parties.

Moreover, to the extent the proposed finding purports to assert a legal conclusion about confusion due to “affiliation” with 1-800 Contacts for purposes of trademark infringement, it is improper for a finding of fact.

The proposed finding is also unsupported, contradicted by the weight of the record evidence, and irrelevant for the reasons described in the Responses to Proposed Findings Nos. 1047 and 1048.

**1050.** Multiple distinct retailers would use each other’s trade names or other nondescript titles for their advertisements such that multiple advertisements in the same search engine results page bore identical titles. (CX 1255-032 (Motion for Entry of Default Judgment against LensWorld attaching screenshot with advertisements for ShipMyContacts.com, LensWorld.com, and ContactLens.com all titled “Discount Contact Lenses”)).

**Response to Proposed Finding No. 1050**

The proposed finding is unsupported because it relies entirely on inadmissible hearsay. CX1255, 1-800 Contacts’ motion for entry of a default judgment, is an out-of-court statement by 1-800 Contacts to which no hearsay exception applies. The proposed finding is also unsupported, contradicted by the weight of the record evidence, and irrelevant for the reasons described in the Responses to Proposed Findings Nos. 1047 and 1048.

**1051.** A user specifically trying to navigate to “1-800 Contacts” or a variant is more susceptible to confusion as to the sponsorship of the links that appear in a prominent position on the search engine results page than a consumer conducting a comparative or informational query. (CX 9040 (Miller, Dep. at 19-20, 117-118); CX 9021 (Pratt, Dep. at 131-132 (“And the field is 1-800 Contacts, so I believe that it would be easy for someone to consider that you are searching for links that are sponsored by 1-800 Contacts, because that’s what’s in the field when you’re searching for sponsored links”)))).

**Response to Proposed Finding No. 1051**

The proposed finding is vague as to the use of “comparative” or “informational query.” The proposed finding is also unsupported because the cited testimony lacks foundation. Neither

Mr. Pratt nor Mr. Miller has personal knowledge about the susceptibility of other consumers to confusion, and neither is qualified to opine on whether or under what circumstances a consumer is susceptible to confusion. The proposed finding is also unsupported, contradicted by the weight of the record evidence, and irrelevant for the reasons described in the Responses to Proposed Findings Nos. 1047 and 1048.

**1052.** Further, 1-800 Contacts alleged that some of its rivals placed advertisements that used the 1-800 Contacts name or a variation deceptively in the text of the advertisement. (CX 1513-002 (“Additionally, a number of your sponsored ads include titles and/or text, such as “1-800-Discount Contacts,” that may be confusingly similar to the above-mentioned federally registered trademarks”); CX 1125-007 (screenshots contained in the complaint against Lens.com showing advertisement for “JustLenses.com” using “1800Contacts” as its title); CX 78 (Apr. 9, 2007 email from Brandon Dansie to Bryan Pratt attaching screenshot with LensWorld, owned by Vision Direct, advertising as “1 800 Contacts”)).

**Response to Proposed Finding No. 1052**

The proposed finding is misleading and unsupported. CX1513 and CX1125 both pertain only to Lens.com. CX1125, a litigation complaint filed by 1-800 Contacts, also consists entirely of out-of-court statements by 1-800 Contacts, to which no hearsay exception applies.

The citation to CX0078 asserts inaccurately that the document shows a screenshot of LensWorld “advertising as ‘1 800 Contacts’” but no such ad appears in CX0078. Complaint Counsel notes that CX0078 does show an ad with the title “LensWorld.com 75% Off” with the URL www.LensWorld.com. (CX0078). There is also no support provided for the proposition that LensWorld is or was “owned by Vision Direct.” Accordingly, the proposed finding is unsupported as to any rival other than Lens.com. Notably, the U.S. District Court for the District of Utah concluded, and U.S. Court of Appeals for the Tenth Circuit affirmed, that there was no evidence of confusion with regard to ads placed by Lens.com in response to searches for 1-800 Contacts. (*See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013)).

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1053.** Further, 1-800 Contacts alleged that some of the settling parties made unauthorized use of the 1-800 Contacts trademarks both as keywords in paid search advertising and on their websites and advertising materials. (CX 1617 (Complaint against EZContactsUSA); Pratt, Tr. 2538 (“So as I recall, EZContacts also on their website had included copied sections that were lifted directly from 1-800 Contacts' website. Those sections included 1-800 Contacts' trademarks”)).

**Response to Proposed Finding No. 1053**

The proposed finding is unsupported insofar as it asserts that multiple settling parties made unauthorized use of 1-800 Contacts trademarks “on their websites and advertising materials” because it cites information pertaining only to EZ Contacts. Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1054.** Consistent with trademark practice, 1-800 Contacts would assert its trademark rights prior to obtaining actual evidence of confusion, and then identify actual confusion evidence during discovery. (CX 9040 (Miller Dep.) at 156 -57 (“Nobody files a trademark claim only after they've proven that it's a slam dunk, guaranteed to win, and they've got a judgment type of claim. When you assert a trademark claim you believe somebody is misusing your trademark rights, and you do your analysis and figure out you've got a claim...I would assert a trademark claim without having actual confusion evidence as everybody around the country does all the time”)); RX 734 (Hogan Report) ¶ 134).

**Response to Proposed Finding No. 1054**

The proposed finding is misleading and unsupported insofar as it implies that 1-800 Contacts in fact “indentif[ied] actual confusion evidence during discovery,” of which there is no

evidence. Indeed, 1-800 Contacts has never produced reliable evidence of confusion in any trademark litigation or in its defense of this case.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1055.** In the years between 2005 and 2010, 1-800 Contacts sent cease-and-desist letters to multiple online contact lens retailers whose advertisements appeared in response to a search for 1-800 Contacts' trademarks. (Pratt, Tr. 2498, 2500 (discussing letters sent to Lens.com), 2526-2529 (discussing letters sent to Memorial Eye), 2553 (discussing letters sent to Lensfast); CX 9040 (Miller, Dep. at 150-152 (discussing letter sent to Contact Lens King)); CX 1472 (May 12, 2009 Cease & Desist Letter to Contact Lens King); CX 9040 (Miller, Dep. at 217-220 (discussing letters to LensDiscounters.com regarding alleged trademark infringement for keyword advertising practices)); CX 1235 (Sep. 20, 2005 LensDiscounters.com Cease & Desist Letter); CX 1751 (Sep. 13, 2005 Cease & Desist Letter to Memorial Eye); CX 1754 (Sep. 12, 2007 Cease & Desist Letter to Memorial Eye); CX 1318 (Feb. 27, 2008 Cease & Desist Letter to Memorial Eye); CX 1513 (Sep. 20, 2005 Cease & Desist Letter to Lens.com); CX 1229 (May 12, 2009 Letter to LensDiscounters.com); RX 53 (Feb. 2, 2010 Cease & Desist Letter to ACLens); RX 1010 (Sep. 12, 2007 Letter to Lensfast); RX 1011 (Mar. 14, 2008 Letter to Lensfast); CX 494 (May 11, 2010 email to Walgreens with notice of alleged infringement); CX 1313 (May 12, 2009 letter to IWantContacts.com).

**Response to Proposed Finding No. 1055**

Complaint Counsel has no specific response.

**1056.** After 2009, 1-800 Contacts began occasionally including a filed Complaint with the demand letter to preserve jurisdiction and avoid the other party filing their own declaratory judgment action outside Utah in response to the demand letter. (CX 9040 (Miller, Dep. at 114)).

**Response to Proposed Finding No. 1056**

The proposed finding is misleading because it omits that Mr. Miller testified that the transmittal of a filed complaint along with a demand letter "can always come across as threatening." (CX9040 (Miller, Dep. at 114)). Notwithstanding, the proposed finding is irrelevant.

As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts'

trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts’ agreements, which are overbroad.

**1057.** In the cease and desist correspondence, 1-800 Contacts notified the alleged infringers of 1-800 Contacts’ trademark rights, the goodwill that 1-800 Contacts had invested in its brand, and its concern that the unauthorized use of its trademarks to generate sponsored advertisements in response to searches specifically for 1-800 Contacts could cause a likelihood of confusion and trademark dilution. (Pratt, Tr. 2500; CX 1513 (Sep. 1, 2005 letter to Lens.com); CX 1754 (Sep. 12, 2007 letter to Memorial Eye); RX 1010 (Sep. 12, 2007 letter to Lensfast)).

**Response to Proposed Finding No. 1057**

The proposed finding is unsupported. The cited testimony of Mr. Pratt must be disregarded because Complaint Counsel has been unduly prejudiced by 1-800 Contacts’ invocation of privilege every time Complaint Counsel has attempted to explore the basis for Mr. Pratt’s “concern” that the use of 1-800 Contacts’ trademarks as search advertising keywords could cause confusion. (Tr. 2500-2502; Complaint Counsel’s Trial Brief Regarding Anticipated Objections to the Testimony of Mr. Bryan Pratt (Apr. 27, 2017); *see also* Complaint Counsel’s Motion *in limine* to Preclude Testimony From Respondent’s Outside Counsel, Based on Previous Invocations of Attorney-Client Privilege).

Regardless, the cited testimony addresses only a specific letter Mr. Pratt sent to Lens.com, not the “cease and desist correspondence” generally. CX1513, CX1754, and RX1010, copies of cease and desist letters sent by 1-800 Contacts’ counsel, consist entirely of out of court statements by 1-800 Contacts’ agent, to which no hearsay exception applies. Thus, they cannot be relied upon by 1-800 Contacts’ to prove the contents of 1-800 Contacts’ cease and desist correspondence.

**1058.** 1-800 Contacts specifically advised other parties that their purchase or use of the 1-800 Contacts trademark in paid search advertising could cause initial interest confusion. (Pratt, Tr. 2582-83 (“much of it is detailed in the letter, that 1-800 Contacts had a strong mark, that they had goodwill in the mark, that the Lens.com advertisements were coming up in response to searches for those trademark keywords, that there was a likelihood of initial interest confusion by a consumer, that there was a potential ... injury to the strength of 1-800 Contacts’ trademarks by

dilution”); CX 1315 (Sep. 1, 2005 letter to Lens.com); RX 67 (Sep. 23, 2005 LensDiscounters.com demand letter); CX 638 (Tram Data demand letter); CX 9040 (Miller, Dep. at 121-122 (“Well, I think the basis, you know, I state it in this letter. I state it in the complaint we filed. And the basis is they were using their search engine advertising in a way that triggered their sponsored links in response to searches for the 1-800 Contacts trademark. And, you know, that can create a likelihood of confusion and lead to trademark infringement”))).

**Response to Proposed Finding No. 1058**

The proposed finding is unsupported. The cited testimony of Mr. Pratt must be disregarded because Complaint Counsel has been unduly prejudiced by 1-800 Contacts’ invocation of privilege every time Complaint Counsel has attempted to explore the basis for Mr. Pratt’s concerns that the use of 1-800 Contacts’ trademarks as search advertising keywords could cause initial interest confusion or injury to the strength of 1-800 Contacts’ trademarks by dilution. (Tr. 2500-2502; Complaint Counsel’s Trial Brief Regarding Anticipated Objections to the Testimony of Mr. Bryan Pratt (Apr. 27, 2017); *see also* Complaint Counsel’s Motion *in limine* to Preclude Testimony From Respondent’s Outside Counsel, Based on Previous Invocations of Attorney-Client Privilege (Mar. 22, 2017)). The cited testimony of Mr. Miller must be disregarded for the same reasons.

CX1315, RX0067, and CX0638, cease and desist letters sent by 1-800 Contacts’ counsel, consist entirely of out-of-court statements by 1-800 Contacts’ agent, to which no hearsay exception applies. Thus, they cannot be relied upon by 1-800 Contacts’ to prove the contents of 1-800 Contacts’ cease and desist correspondence.

**1059.** 1-800 Contacts also alleged that Lens.com or its affiliates used its trademark both as a keyword and in the text of its advertisements. (CX 1513-002; CX 1125).

**Response to Proposed Finding No. 1059**

The proposed finding is unsupported because it relies entirely on inadmissible hearsay. CX1513, a cease and desist letter from 1-800 Contacts’ counsel, and CX1125, a litigation complaint filed by 1-800 Contacts, both consist entirely of out-of-court statements by 1-800

Contacts' or its agents to which no hearsay exception applies. Thus, they cannot be relied upon by 1-800 Contacts to prove the substance of 1-800 Contacts' allegations against Lens.com.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1060.** 1-800 Contacts also alleged that EZContactsUSA "on their website had included copied sections that were lifted directly from 1-800 Contacts' website. Those sections included 1-800 Contacts' trademarks" (Pratt, Tr. 2538; CX 1617 (EZ Contacts USA Complaint)).

**Response to Proposed Finding No. 1060**

CX1617, a litigation complaint filed by 1-800 Contacts, consists entirely of out-of-court statements by 1-800 Contacts' to which no hearsay exception applies. Thus, it cannot be relied upon by 1-800 Contacts to prove the substance of 1-800 Contacts' allegations against EZ Contacts.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1061.** 1-800 Contacts also alleged that ACLens' affiliates used the 1-800 Contacts trademark in various ways in paid search advertising, practices ACLens repudiated. (RX 23 (email exchange between Robert Drumm at ACLens and Bryan Pratt); Clarkson, Tr. 330).

**Response to Proposed Finding No. 1061**

The proposed finding is vague as to the use of the phrase "used the 1-800 Contacts trademark in various ways." The proposed finding is also misleading and unsupported. RX0023

consists of an email from an AC Lens employee to Bryan Pratt, 1-800 Contacts' outside counsel, explaining that an ad identified by Mr. Pratt had been placed by an AC Lens affiliate, not AC Lens. (RX0023). It does not show that 1-800 Contacts alleged that AC Lens affiliates used the 1-800 Contacts trademark. Further, the use of the vague term "repudiated" is misleading because it omits that, as of 2006, AC Lens was subject to an agreement with 1-800 Contacts not to place (and to prevent its affiliates from placing) search ads in response to searches for 1-800 Contacts' trademarks. (CCPTF 921-929).

1062. 1-800 Contacts' counsel followed up with the alleged infringers in written and oral correspondence regarding the continued appearance of their advertisements in response to searches for 1-800 Contacts trademark terms over several years. (CX 591; CX 1318; Pratt, Tr. 2510-2513, 2529).

#### **Response to Proposed Finding No. 1062**

Complaint Counsel notes that 1-800 Contacts business employees also followed up with "alleged infringers" in written and oral correspondence regarding the appearance of advertisements in response to searches for 1-800 Contacts, and both 1-800 Contacts' outside counsel and its business employees followed up regarding the appearance of ads in response to searches containing 1-800 Contacts' trademarks along with other words, and searches for variations or misspellings of 1-800 Contacts' trademarks. (*See, e.g.*, CX1058 (email from marketing employee, identifying several terms including "1800 contacts coupons," that Vision Direct ads were allegedly appearing in response to); CX1521 (email from outside counsel identifying terms including "1800 contacts coupon" that Walgreens ads were allegedly appearing in response to); *see generally* CCPTF 891-1199).

**1063.** For example, Mr. Pratt wrote to Lens.com in 2005 regarding the appearance of sponsored links in response to searches specifically for 1-800 Contacts trademarks. (CX 1513) Mr. DeGidio, counsel for Lens.com, responded via email and stated that he had "identified what was causing [Lens.com's] sponsored ads to come up and removed them." (Pratt, Tr. 2511; CX 591).

#### **Response to Proposed Finding No. 1063**

The proposed finding as to the subject matter of Mr. Pratt's letter to Lens.com in 2005 is unsupported because it relies on inadmissible hearsay. CX1513, a cease and desist letter by Mr. Pratt, consists entirely of out-of-court statements by 1-800 Contacts' agent, to which no hearsay exception applies. Thus, it cannot be used by 1-800 Contacts to prove the contents of the 2005 letter.

**1064.** Mr. DeGidio stated he would instruct Lens.com's affiliates to cease the activities complained of, namely, the appearance of their advertisements in response to searches for 1-800 Contacts trademarks. (CX 591; Pratt, Tr. 2512).

**Response to Proposed Finding No. 1064**

Complaint Counsel has no specific response.

**1065.** The appearance of the Lens.com advertisements that 1-800 Contacts believed to be infringing receded for several years, and then resurfaced in 2007. (Pratt, Tr. 2513 ("Q: When did those next communications occur? A: I believe they occurred in 2007. Q: "And what was the occasion for those communications? A: So, again, Lens.com's sponsored advertisements were coming up in response to searches for 1-800 Contacts' federally registered trademarks"))).

**Response to Proposed Finding No. 1065**

Complaint Counsel has no specific response.

**1066.** After the last communication from Mr. Pratt to Dr. DeGidio in April 2007, Mr. DeGidio did not respond. (CX 591 (chain of emails ending in April 2007 between Bryan Pratt and Tony DeGideo); Pratt, Tr. 2514 ("I didn't receive any further communication from him"))).

**Response to Proposed Finding No. 1066**

Complaint Counsel has no specific response.

**1067.** Likewise, Mr. Pratt contacted Memorial Eye first in September 2007 regarding the appearance of advertisements in response to searches for 1-800 Contacts trademarks. (CX 1754). 1-800 Contacts received no response. (Pratt, Tr. 2527).

**Response to Proposed Finding No. 1067**

The proposed finding is misleading because it omits that 1-800 Contacts sent two letters to Memorial Eye in 2005, complaining of Memorial Eye advertisements. (CCPTF 1017-1021).

**1068.** The frequency of advertisements for ShipMyContacts.com initially decreased after 1-800 Contacts' cease and desist letter, but then "ramped back up" in early 2008. (Pratt, Tr. 2528).

**Response to Proposed Finding No. 1068**

Complaint Counsel has no specific response.

**1069.** Mr. Pratt then wrote a second letter in February 2008 identifying the same issue. (CX 1318). Memorial Eye responded by stating that they “refused to make modifications to their practices.” (Pratt, Tr. 2530).

**Response to Proposed Finding No. 1069**

The proposed finding is vague insofar as it mentions “the same issue” without identifying to what it refers. The second sentence of the proposed finding is unsupported because it relies on inadmissible hearsay. Mr. Pratt’s testimony merely relayed out-of-court statements made to him by counsel for Memorial Eye, to which no hearsay exception applies. Complaint Counsel notes that the letter Memorial Eye’s counsel wrote to 1-800 Contacts in response to Mr. Pratt’s February 2008 letter indicated that Memorial Eye was not using 1-800 Contacts’ trademarks in its sponsored advertisements or “as a search phrase trigger.” (CCPTF 1028; CX1755 at 001).

***C. 1-800 Contacts’ Trademark Lawsuits In The Context Of The Development Of Keyword Advertising Law***

**1070.** 1-800 Contacts ultimately filed complaints in the District of Utah against each of the settling parties asserting claims for trademark infringement under 15 U.S.C. § 1114, in addition to federal unfair competition (15 U.S.C. § 1125(a)), state and common law unfair competition (Utah Code Ann. § 13-5-1 *et seq.*), misappropriation, and unjust enrichment. (RX 72 (Complaint against Memorial Eye); CX 1617 (Complaint against EZContactsUSA); CX 1615 (Complaint against Coastal Contacts); CX 1618 (Complaint against Lensfast); CX 1620 (Complaint against Walgreens); CX 1621 (Complaint against Web Eye Care); CX 1623 (Letter from Mark Miller to ACLens attaching Complaint); RX 1821 (Standard Optical Complaint); RX 1822 (Empire Vision Complaint); CX 452 (Letter to Lenses for Less attaching Complaint); CX 448 (Letter to Contact Lens King attaching Complaint); CX 638 (Complaint against Tram Data); CX 9021 (Pratt, Dep. at 163-164 (“Q: Okay. And what are the legal theories of liability that are alleged in this complaint based upon the facts as alleged? A: So asserted in this complaint is federal trademark infringement, violation of the Lanham Act in the first count. The second count is federal unfair competition, false designation of origin, and passing off or false advertising. There’s a third count of common law unfair competition, misappropriation, and trademark infringement, which is also included in that common law trademark infringement. And then lastly, the unfair enrichment claim.”))).

**Response to Proposed Finding No. 1070**

The proposed finding is unsupported. Each of the cited trademark complaints consist entirely of out-of-court statements made by 1-800 Contacts in a legal filing, to which no hearsay exception applies. Thus, they cannot be relied upon by 1-800 Contacts to prove what claims were actually alleged in each of the trademark complaints. The cited testimony of Mr. Pratt merely relays such hearsay with respect to the Memorial Eye complaint. Complaint Counsel also notes that RX1822 is not in evidence at all.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1071.** In litigation involving keyword search advertising it was common to include claims for trademark infringement, false advertising, unfair competition, and trademark dilution, among others. (Hogan, Tr. 3251-52, 3329 ("1-800 Contacts' position was typical of the kinds of claims that were asserted over the use of trademarks in keyword search advertising programs"); RX 734-0058-59, 0075-76).

#### **Response to Proposed Finding No. 1071**

The proposed finding is unsupported because the cited testimony lacks foundation. Mr. Hogan has no grounds to testify on what is "common" among trademark owners. He did not consult any trademark owners prior to offering his opinion in this case. (Hogan, Tr. 3329-3330). The proposed finding is also contradicted by the evidence in this case, which shows that 1-800 Contacts did not alleged dilution claims in the vast majority of its complaints against its competitors. (Hogan, Tr. 3487 (testifying that he is not aware of any complaints that alleged trademark dilution against 1-800 Contacts' competitors)).

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not

a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts’ agreements, which are overbroad.

**1072.** The failure to police third-party use of a trademark could lead to a finding by a court that the mark is no longer enforceable. (Hogan, Tr. 3265 (“a court could find that a mark is not enforceable because there is extensive third-party use. In a specific case, a court could find that because the plaintiff did not take steps with respect to the specific practice or use at issue by the defendant that the defense of laches, the equitable defense, is – is – creates a defense to a trademark infringement claim”)).

**Response to Proposed Finding No. 1072**

The proposed finding is improper because it consists entirely of a conclusion of law, supported by improper testimony as to what the law is. Further, it is erroneous. 1-800 Contacts did not need to pursue agreements with competitors in order to avoid abandonment. (Tushnet, Tr. 4475 (“Q: [D]o you agree with Mr. Hogan’s opinion that 1-800 needed to pursue the settlement agreements with its competitors in order to avoid abandonment? A: No. Q: And why not. . . ? A: It’s not reasonable or common conduct among trademark owners . . . ”)).

**1073.** 1-800 Contacts was hardly alone in protecting its trademark in this way; numerous trademark owners monitored search results for their trademarks on search engines and filed trademark infringement lawsuits based on paid search advertising in this period. (RX 734 (Hogan Report) ¶¶ 127-134; RX 926 (listing cases regarding “purchase of another party’s trademark as a keyword for internet advertising”)).

**Response to Proposed Finding No. 1073**

The proposed finding is unsupported. The cited paragraphs of Mr. Hogan’s pertain to Mr. Hogan’s opinion of how commentators, courts, and trademark holders viewed the state of trademark law “around the time of 1-800 Contacts’ settlements,” his description of surveys conducted in other cases, his description of search engine documents regarding the potential for consumer confusion arising from search engine advertising, his improper legal opinion that 1-800 Contacts had “supportable claims for trademark dilution,” and his assertion that 1-800 Contacts

correspondence with its competitors is typical of trademark litigants. (RX0734 at 083 ¶¶ 127-134) (Hogan Expert Report)). He did not offer an opinion that “numerous trademark owners monitored search results for their trademarks” or “filed infringement lawsuits.”

RX0926, an email sent by Bryan Pratt to Memorial Eye’s counsel during the course of a litigation, consists entirely of out-of-court statements by 1-800 Contacts’ agent to which no hearsay exception applies. Thus, it cannot be relied upon by 1-800 Contacts to prove the existence of cases regarding the purchase of another party’s trademark as a keyword. Moreover, the finding that the cases listed involve “purchase of another party’s trademark as a keyword for internet advertising” is merely the legal opinion of Mr. Pratt gleaned from reading case law, not based upon his personal knowledge.

The proposed finding is also contradicted by the evidence. The publicly available cases show this is not commonplace, and that plaintiffs do not win these cases. (CX8014 at 012-014 (¶¶ 25-28) (collecting cases); Tushnet, Tr. 4475 (“It’s not reasonable or common conduct among trademark owners . . . .”)).

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts’ trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts’ agreements, which are overbroad.

**1074.** For example, other trademark owners in this space understood the use of trademarks as keywords in paid search advertising as infringement of their trademark rights as well. CX 828 (“Tram Data is aware that 1-800 Contacts has, since at least as early as June 2009 . . . been purchasing sponsored advertisements from search engines including Bing, Yahoo, and Google (see evidence attached as Exhibit A), and these advertisements are triggered by keywords that incorporate or are variants of the mark REPLACE MY CONTACTS, which is a registered trademark of Tram Data (see registration certificate attached as Exhibit B). Tram Data is fully prepared to file a counterclaim against 1-800 Contacts to seek redress for this infringement.” ); CX 9021 (Pratt, Dep. at 171-75); CX 9031 (Schmidt, Dep. at 61-64 (discussing the efforts by U.S.

Shoe to protect its proprietary trademarks by demanding that 1-800 Contacts stop “trademark infringement” by “removing ALL sponsored advertisements [it has] purchased through Google, Overture, and any and all other search engines which are triggered by the LensCrafters trademark”))).

#### **Response to Proposed Finding No. 1074**

Complaint Counsel objects to this proposed finding of fact is vague as to “in this space.” The proposed finding is also unsupported. CX0828, a letter from a lawyer representing Tram Data, LLC, to Mark Miller, counsel for 1-800 Contacts, consists entirely of out-of-court statements by a non-party, and was admitted only for a non-hearsay purpose. Thus, it cannot be used to prove what “other trademark owners understood” regarding “the use of trademarks as keywords in paid search advertising.” The cited testimony Mr. Pratt lacks foundation. CX0828 was not addressed to Mr. Pratt, nor was any foundation laid to suggest Mr. Pratt had personal knowledge of the contents of the letter; rather he was asked to provide his “understanding” of the letter based on reading it during his deposition. (*See* CX9021 (Pratt, Dep. at 173 (“That’s my understanding reading the letter now . . . I don’t have a recollection of it. Q. Let me re-ask it. When you look at this letter and the information that’s attached, what on Exhibit A, the first page of the Yahoo search page, do you understand to be the claimed trademark infringement by 1-800 Contacts?”))). Thus, his testimony merely relays hearsay statements. (*E.g.*, CX9021 (Pratt, Dep. at 171-72 (“So it says that—I mean, it’s—and it’s in the letter, that they allege that 1-800 Contacts had been purchasing sponsored advertisements from search engines . . . that were triggered by keywords that incorporate variants of ‘replace my contacts’))).

The cited testimony of Mr. Schmidt must be disregarded for the same reasons. Mr. Schmidt was merely asked to provide his “understanding” of various paragraphs of a letter (a deposition exhibit identical to exhibit CX0087), which itself has only been admitted into evidence for a non-hearsay purpose.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1075.** Other trademark owners also contemplated taking legal action against alleged infringers placing advertisements in response to searches for their trademark and brand names. (RX 1192 (Draft letter from Robert Drumm at ACLens to Lensfast, alleging that Lensfast was infringing on ACLens' trademarks by placing advertisements for Lensfast in response to searches for ACLens' trademark terms); Clarkson, Tr. 336-37 ("Q: Is [RX 1192] a draft letter from Mr. Drumm to Lensfast, another online retailer of contacts? A: Yes. Q: And does it complain about Lensfast's use on paid search of AC Lens' name and trademark? A: Yes."); CX 9031 (Schmidt, Dep. at 64 (U.S. Shoe sent cease and desist letters alleging the placement of paid search advertising in response to a search for its trademarks constituted trademark infringement)).

**Response to Proposed Finding No. 1075**

The proposed finding is irrelevant. No other competitor in the online retail sale of contact lenses entered bidding agreements, except with 1-800 Contacts. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1076.** Moreover, these disputes arose in a dynamic legal landscape where challenges to online advertising practices were common and the legality of keyword search advertising remained unsettled. (RX 734 (Hogan Report) ¶¶ 96-108).

**Response to Proposed Finding No. 1076**

This proposed finding is an improper conclusion of law. It is also inaccurate and irrelevant. 1-800 Contacts has entered into a series of agreements over a decade, during which time the law has been quite clear: keyword bidding, on its own, does not violate trademark law. (CCPTB at 26). That 1-800 Contacts has continued to enter into, and to enforce these agreements, even after it lost

its own court case on this precise theory, demonstrates that 1-800 Contacts was not interested in the “legal landscape” regarding keyword bidding. 1-800 Contacts’ motivation was simply to suppress competitors through settlement agreements.

The proposed finding is irrelevant because, as ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts’ trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts’ agreements, which are overbroad.

**1077.** In the initial years of paid search advertising litigation, between 2004 and 2009, whether courts would recognize such claims for trademark infringement by plaintiffs such as 1-800 Contacts remained uncertain. (RX 734 (Hogan Report) ¶¶ 98-99).

**Response to Proposed Finding No. 1077**

This proposed finding is improper, inaccurate, and irrelevant as explained in the Response to Proposed Finding No. 1076.

**1078.** In 2005, the Second Circuit reached the conclusion that “internal” use of trademarks in pop-up advertising software did not constitute a “use in commerce” for the purposes of trademark infringement. *1-800 Contacts, Inc. v. WhenU.com*, 414 F.3d 400 (2d Cir. 2000).

**Response to Proposed Finding No. 1078**

The proposed finding is improper because it consists entirely of a legal conclusion, and cites no evidence admitted in this case. The proposed finding is also irrelevant because, as ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts’ trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts’ agreements, which are overbroad.

**1079.** Defendants, relying on the underlying reasoning of the *WhenU* decision, argued that the use, purchase, or sale of keywords to trigger the appearance of paid advertisements in response to trademark searches did not constitute “use” within the meaning of the Lanham Act. Some courts

credited this defense, but most courts rejected the argument and found that the unauthorized purchase of keywords for paid advertising in response to trademark searches qualified as a commercial use, rather than a strictly “internal” one. (RX 743 (Hogan Rep.) ¶ 99; *Compare Merck & Co v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402, 415 (S.D.N.Y. 2006) (not a use in commerce) *with Edina Realty, Inc. v. TheMLSOnline.com*, No. CIV. 04-4371JRTFLN, 2006 WL 737064, at \*3 (D. Minn. 2006) (use of keywords to trigger advertisements in response to trademark searches constitutes a use in commerce)).

#### **Response to Proposed Finding No. 1079**

The proposed finding is improper and irrelevant for the reasons explained in the Response to Proposed Finding No. 1078.

**1080.** In one notable case, Rescuecom sued Google over the display of allegedly confusing paid search advertising by rivals in response to searches for Rescuecom’s trademark. The district court initially held that Google’s sale of Rescuecom’s mark and display of advertising in response to a search for that mark did not give rise to a triable issue of fact because Google’s activities did not meet the threshold “use in commerce” requirement as a matter of law. *Rescuecom Corp. v. Google, Inc.*, 456 F. Supp. 2d 393 (N.D.N.Y. 2006), *rev’d* 562 F.3d 123 (2d Cir. 2009).

#### **Response to Proposed Finding No. 1080**

The proposed finding is improper and irrelevant for the reasons explained in the Response to Proposed Finding No. 1078.

**1081.** Prof. Tushnet, along with other trademark and advertising law professors such as Eric Goldman, signed and submitted an *amicus* brief in support of Google’s position in the *Rescuecom* case, arguing that trademark law should be interpreted narrowly to exclude claims against search engines based on the sale or use of keywords. (Tushnet, Tr. 4515-4518); *Rescuecom, Inc. v. Google, Inc.*, No. 06-4881-cv, Brief of *Amici Curiae* Intellectual Property Law Faculty in Support of Affirmance, at 8, 12-13, 15 (2d Cir. Feb. 27, 2007).

#### **Response to Proposed Finding No. 1081**

The proposed finding is improper insofar as it consists of Respondent’s characterization of arguments put forth in a legal brief, not matters of fact at issue in this case. The proposed finding is also unsupported. Professor Tushnet did not testify that an argument in the *amicus* brief referenced was that “trademark law should be interpreted narrowly.” (See Tushnet, Tr. 4517 (“Q. Okay. And your purpose in that brief was to say this is what trademark law today provide; right? A. So it was an attempt to argue that traditional principles of trademark law should apply in a

particular way to search engine advertising. Q. Yes. You were not asking the court to extend the law, were you? A. We didn't think so. No.”)). The *amicus* brief itself is not in evidence. The proposed finding is also irrelevant for the reasons explained in the Response to Proposed Finding No. 1078.

**1082.** The Second Circuit rejected the arguments submitted by Google and the amici. (Tushnet, Tr. 4520-24; *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129-30 (2d Cir. 2009). The Court stated that if it “were to adopt Google and its amici’s argument, the operators of search engines would be free to use trademarks in ways designed to deceive and cause consumer confusion,” a practice “neither within the intention nor the letter of the Lanham Act.” (Tushnet, Tr. 4520-21); *Rescuecom Corp.*, 562 F.3d at 130.

### **Response to Proposed Finding No. 1082**

The proposed finding is improper and irrelevant for the reasons explained in the Response to Proposed Finding No. 1078.

**1083.** The Court held that the sale and display of trademarks as keywords in a paid search advertising campaign established a use in commerce. *Rescuecom Corp.*, 562 F.3d at 131-31. Courts have also held that the display of advertisements in response to a search for a competitor’s trademark also constituted a use in commerce under the Lanham Act. (CX 9044 (Tushnet, Dep. at 59)); *Network Automation, Inc. v. Advanced Sys. Concept, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011).

### **Response to Proposed Finding No. 1083**

The proposed finding improperly states a legal conclusion, which is itself inaccurate. (*See* CCOL 51 (conclusion that 1-800 Contacts’ agreements exceed the scope of its trademark rights because by requiring the use of negative keywords to restrict the appearance of rival advertising even when the rivals have not used 1-800 Contacts’ trademarks)). The proposed finding is also irrelevant for the reasons explained in the Response to Proposed Finding No. 1078.

**1084.** The use in commerce question is now “basically settled with respect to keyword advertising.” (CX 9044 (Tushnet, Dep. at 59-60); RX 743, ¶ 100 (“The circuits are now in agreement that keyword advertising programs constitute “use in commerce” because search engines make trademarks available for purchase and display them in search results”)).

### **Response to Proposed Finding No. 1084**

The proposed finding improperly asserts a legal conclusion. The proposed finding is also unsupported. RX0743, which appears to be a photocopy of a 1-800 Contacts mail-order form, does not support the proposed finding. RX0734, the Expert Report of Howard Hogan, also does not support the proposed finding. Paragraph 100 of Mr. Hogan's report should be disregarded as improper and unhelpful because it consists of Mr. Hogan's opinion as to what the law is. The proposed finding is also irrelevant for the reasons explained in the Response to Proposed Finding No. 1078.

**1085.** However, no American court has held one way or the other on whether the appearance of a sponsored link in response to a trademark search due to broad matching on the purchase of a generic term constitutes a use in commerce. (Hogan, Tr. 3476, 3478, 3480). This issue awaits further judicial consideration in the years to come.

#### **Response to Proposed Finding No. 1085**

The proposed finding improperly states a legal conclusion. Moreover, the final sentence of the proposed finding is vague and misleading and unsupported by any citations to record evidence. The proposed finding is also irrelevant and inaccurate for the reasons explained in the Response to Proposed Findings No. 1083 and 1078.

**1086.** Once it was decided that the purchase of another's trademark term as a keyword for purposes of triggering paid advertising was a use in commerce, a threshold defense was eliminated and the focus of paid search advertising cases shifted to the issue of whether the unauthorized use was likely to cause confusion among consumers. (Hogan, Tr. 3256).

#### **Response to Proposed Finding No. 1086**

The proposed finding improperly states a legal conclusion. The proposed finding is also unsupported because neither the cited testimony of Mr. Hogan nor Mr. Hogan's report provide that the issue of "use in commerce" was a threshold defense in paid search advertising cases. Moreover, the cited testimony consists of Mr. Hogan's opinion as to what the law is, and should be disregarded as improper and unhelpful. The proposed finding is also irrelevant and inaccurate for the reasons explained in the Response to Proposed Findings No. 1083 and 1078.

**1087.** The multi-factor likelihood of confusion tests vary between the circuits, but they are considered intensely fact-intensive and not proper for resolution on a motion to dismiss. (Hogan, Tr. 3258; CX 9044 (Tushnet, Dep. at 96-97)).

**Response to Proposed Finding No. 1087**

The proposed consists entirely of an improper and inaccurate legal conclusion. The proposed finding is also unsupported. Mr. Hogan’s testimony that likelihood of confusion analysis “is generally considered an intensely fact-intensive determination” constitutes an improper and unhelpful legal opinion. The cited testimony of Professor Tushnet does not support the proposed finding. Professor Tushnet testified that in the context of keyword advertising cases, the only cases relevant here, “courts have been clear that labeling is going to be the key factor.” (CX9044 (Tushnet, Dep. at 97)). The sources cited contain no support whatsoever for the assertion that likelihood of confusion tests are “not proper for a resolution on a motion to dismiss.”

**1088.** Trademark litigators consider multiple factors including the strength of the plaintiff’s mark, the similarity of the marks, the nature of the advertising at issue, the sophistication of the consumers, the intent of the defendant in using the mark, and the existence of actual confusion, among others. (RX 743 (Hogan Rep.) ¶¶ 101-103).

**Response to Proposed Finding No. 1088**

The proposed finding is misleading and unsupported. The cited paragraphs of Mr. Hogan’s report do not discuss what “trademark litigators consider” but rather consist of Mr. Hogan’s description of the likelihood of confusion factors considered by U.S. Courts of Appeals, based on his analysis of case law. Those paragraphs should be disregarded as improper and unhelpful legal opinion. Accordingly, the proposed finding actually consists of an improper conclusion of law.

**1089.** The traditional tests are applied flexibly in the keyword advertising context, with no one factor considered determinative. *See Network Automation*, 638 F.3d at 1154; *Checkpoint Systems, Inc. v. Check Point Software Techs.*, 269 F.3d 270, 280 (3d Cir. 2001) (no single factor is “determinative”).

**Response to Proposed Finding No. 1089**

The proposed is improper and inaccurate for the reasons explained in the Response to Proposed Findings No. 1078 and 1083.

**1090.** In practice, district courts today balance the various factors recognized in their circuit in evaluating the likelihood of confusion in a case involving a keyword advertising claim. *Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-CV-00250, 2016 WL 4074121, \*6 (D. Conn. July 29, 2016); *SanMedica International, LLC v. Amazon.com, Inc.*, Case No. 2:13-cv-00169-DN, 2016 WL 527055 (D. Utah Jan. 20, 2016).

**Response to Proposed Finding No. 1090**

The proposed is improper and inaccurate for the reasons explained in the Response to Proposed Findings No. 1078 and 1083.

**1091.** Complaint Counsel propose a novel single-factor test to supplant the multi-factor likelihood of confusion analysis established by the courts, namely, whether the trademark appears in the text of a sponsored link triggered by a trademark search. (CX 8014 (Tushnet Rep.) ¶ 32 (“use of the plaintiff’s trademark in advertising text, not in keyword searches, is the proper context in which consumer confusion may arise”)).

**Response to Proposed Finding No. 1091**

The proposed finding consists entirely of Respondent’s inaccurate characterization of Complaint Counsel’s legal arguments and must be disregarded. The cited expert report of Professor Tushnet does not support the proposed finding. In her report, Professor Tushnet opined that “[w]hile the case law does take differing facts into account, those facts turn on whether the defendant’s ads displayed the plaintiff’s mark to consumers as the title of the ad, or are instead otherwise labeled.” (CX8014 at 014 (¶ 29) (Tushnet Rebuttal Expert Report)). She further opined that “the cases cited by Mr. Hogan as examples of keyword advertising giving rise to trademark infringement liability can readily be distinguished by the fact that use of the plaintiff’s trademark in advertising test, not in keyword searches, is the proper context in which consumer confusion may arise.” (CX8014 at 015 (¶ 31) (Tushnet Rebuttal Expert Report)). She did not opine that a “novel single-factor test” should “supplant the multi-factor likelihood of confusion analysis,” but

rather opined as to what the courts considering keyword advertising cases cited by Mr. Hogan actually did.

**1092.** However, Complaint Counsel and their expert witness, Prof. Tushnet, have been unable to identify a single case that made that specific holding. (CX 9044 (Tushnet, Dep. at 96 (“Q: When you say the ad text is the key question, do you mean that there’s a rule that if the ad text does not contain the trademark term, there’s no likelihood of confusion? A: ... I would not want to say that there was never any way you could do it. But I would say that distinguishing labeling is the general rule.”), 129-130 (“Q: Does either one of them hold that it is a rule of law that you can’t have a trademark infringement claim [without the name in the sponsored link]? ... A: Well, again, as I said, I can imagine a case, say, where you – where you say in the ad, you know, “Yes, this is the football team you’re looking for” without using a team’s actual name. That conveys a misrepresentation, so I don’t think those cases say that that is clearly non-infringing, nor do I think they should.”))).

**Response to Proposed Finding No. 1092**

The proposed finding is improper and inaccurate as explained in the Response to Proposed Finding No. 1091.

**1093.** Indeed, Prof. Tushnet conceded at her deposition that the *Rosetta Stone* case, a leading keyword advertising case, did not “frame the question” of trademark infringement as whether the trademark appeared in the text of the advertisement. (CX 9044 (Tushnet, Dep. at 101)).

**Response to Proposed Finding No. 1093**

The proposed finding of fact is vague and unsupported as to the characterization of “the *Rosetta Stone* case” as “a leading keyword advertising case.” Notwithstanding, the proposed finding is irrelevant. The proposed finding is also improper and inaccurate as explained in the Response to Proposed Finding No. 1091.

**1094.** Prof. Tushnet stated that she could imagine scenarios where the advertisements would be confusing without use of the Plaintiff’s trademark in the text of the advertisement. (CX 9044 (Tushnet, Dep. at 96)).

**Response to Proposed Finding No. 1094**

The proposed finding is vague and misleading because it omits that Professor Tushnet testified regarding a specific hypothetical in which an ad stated “we’re the major football brand

you're looking for" and stated that such an ad would be confusing. (CX9044 (Tushnet, Dep. at 96)).

**1095.** Further, Prof. Tushnet conceded that courts have specifically denied motions to dismiss in circumstances where the Defendant had displayed sponsored links in response to a search for the Plaintiff's trademark, but did not use the trademark in the text of the advertisement itself. (CX 9044 (Tushnet, Dep. at 132-133)).

#### **Response to Proposed Finding No. 1095**

The proposed finding is vague and improper as to the use of "conceded" to characterize testimony by Professor Tushnet. Notwithstanding, as described in Response to Proposed Finding No. 1091, the proposed finding is inaccurate and irrelevant.

**1096.** Courts consider survey evidence as evidence of actual confusion in keyword advertising cases. (CX 9044 (Tushnet, Dep. at 100)).

#### **Response to Proposed Finding No. 1096**

The proposed finding improperly states a legal conclusion. The proposed finding is also unsupported. Professor Tushnet did not testify that courts consider survey evidence as evidence of actual confusion in keyword cases. Her testimony was that "[c]ourts have denied summary judgment to the defendant in cases involving trademarks used in text of ads in part based on survey evidence." (CX9044 (Tushnet, Dep. at 100)). She also testified that courts have not denied summary judgment to the defendant in cases involving keyword advertising alone without the use of a trademark in text. (CX9044 (Tushnet, Dep. at 99-100)).

**1097.** However, a survey is not required for a plaintiff to prevail on a trademark infringement or trademark dilution claim. (CX 9044 (Tushnet, Dep. at 118)).

#### **Response to Proposed Finding No. 1097**

The proposed finding consists entirely of an improper legal conclusion.

**1098.** Most trademark infringement cases do not involve consumer surveys. (CX 9044 (Tushnet, Dep. at 112)).

#### **Response to Proposed Finding No. 1098**

This proposed finding lacks foundation because Respondent has no way of knowing what “most” trademark infringement cases involve.

**1099.** “In search engine advertising cases, courts have ... generally focused on the species of confusion known as initial interest confusion, which can be a form of sponsorship or source confusion.” (Hogan, Tr. 3359; CX 9044 (Tushnet, Dep. at 101 (“There are cases adopting the concept of initial interest confusion as part of actionable confusion”), 109 (“Q: Professor, does the Blue Nile case we talked about just before the break say that initial interest confusion is not actionable as a matter of law? A: No, it does not”)); See *Network Automation*, 638 F.3d at 1148 (“We begin by examining the *Sleekcraft* factors that are most relevant to the determination whether the use is likely to cause initial interest confusion.”))

#### **Response to Proposed Finding No. 1099**

The proposed finding consists entirely of an improper legal conclusion, supported by characterizations of or citations to case law.

**1100.** Prof. Tushnet, along with other law professors, submitted an amicus brief in the *Multi Time Machine v. Amazon* case arguing that initial interest confusion should not apply to keyword advertising cases. (CX 8014 (Tushnet Rep.) ¶ 5).

#### **Response to Proposed Finding No. 1100**

The proposed finding is unsupported, and consists of an improper legal conclusion, supported by characterizations of or citations to case law. Further, Professor Tushnet’s report states only that she was an author of an amicus brief in *Multi Time Machine, Inc. v. Amazon.com, Inc.*, along with several other cases, but it contains nothing describing the arguments made therein. The amicus brief itself is not in evidence. Notwithstanding, the proposed finding is irrelevant.

**1101.** The Ninth Circuit, rehearing the case after a preliminary ruling in favor of the plaintiff, rejected the arguments offered by amici, including Prof. Tushnet, and reaffirmed the applicability of the doctrine of initial interest confusion in keyword advertising cases. *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 936 n. 2 (2015).

#### **Response to Proposed Finding No. 1101**

The proposed finding consists entirely of Respondent’s improper and inaccurate characterization of a judicial decision, supported only by a citation to that decision (which is not evidence), and so must be disregarded.

**1102.** The resolution of the use in commerce question changed the risk calculus regarding whether it was advisable to select keywords that triggered the appearance of advertisements in response to a competitor's trademark. (Hogan, Tr. 3253).

**Response to Proposed Finding No. 1102**

The proposed finding is unsupported because the cited testimony exceeded the scope of Mr. Hogan's expert report, as ruled by the Court. (Tr. 3257 ("Right now, the objection is sustained"). Mr. Hogan's expert report did not disclose an opinion that the resolution of the use in commerce question "changed the risk calculus for whether it was advisable to bid on trademarks as [sic] search engines," so the cited testimony must be disregarded. (Hogan, Tr. 3253).

Further, Mr. Hogan's testimony lacks foundation, as he cannot speak regarding how "the use in commerce question changed the risk calculus" for other trademark owners. He did not consult with other trademark owners in forming the basis of his opinion for this report. (CX9047 (Hogan, Dep. at 40)).

Further, Mr. Hogan's testimony is inaccurate for the reasons described in Responses to Proposed Findings No. 1076.

**1103.** The fact-specific nature of the trademark confusion inquiry and necessity of a full trial on the merits of each claim increased the incentives of accused infringers to settle. (Hogan, Tr. 3261).

**Response to Proposed Finding No. 1103**

The proposed finding lacks foundation and is erroneous, for the reasons described in Responses to Proposed Findings No. 1102 and 1076.

**1104.** As it became clear that paid search advertising was actionable after *Rescuecom* and that the result of a fact-intensive likelihood of confusion analysis created legal uncertainty, 1-800 Contacts settled with nine retailers between the fall of 2009 and January 2011. (CX 316; CX 317; CX 318; CX 319; CX 320; CX 321; CX 322; CX 323; CX 324; CX 325).

**Response to Proposed Finding No. 1104**

Complaint Counsel does not dispute that 1-800 Contacts entered into settlement agreements with nine contact lens retailers from 2009 to 2011.

The proposed findings that “it became clear that paid search advertising was actionable after *Rescuecom*” and that the decision created legal uncertainty are an improper and inaccurate legal conclusions, which must be disregarded. They are also inaccurate for the reasons described in Response to Proposed Finding 1076.

Moreover, the proposed finding is misleading and unsupported. The only support cited consists of 1-800 Contacts’ settlement agreements with certain competitors, and an Order of Permanent Injunction. CX0317 is not in evidence, although an identical document labeled RX0028 is. CX0318 is not in evidence, although CX0323 (also cited above) is an identical document. 1-800 Contacts entered into another agreement, not cited above, on December 18, 2009, with Lensfast, LLC. That agreement came about after 1-800 Contacts sued Lensfast in December 2008, before the *Rescuecom* decision (decided April 3, 2009). *See Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009). Further, CX0316, the Order of Permanent Injunction entered pursuant to the 2009 Vision Direct Agreement in May 2009, arose from litigation that commenced “on or about February 27, 2008,” over a year before the *Rescuecom* decision. (CX0316 at 001; *see* CCPTF 1053-1088 (describing events leading up to 2009 Vision Direct Agreement)).

Regardless, none of the agreements cited support the causal connection between the *Rescuecom* decision and 1-800 Contacts’ settlements implied in the proposed finding.

Complaint Counsel does not dispute the proposed finding insofar as it constitutes an admission by Respondent that trademark litigation based on paid search advertising was not actionable before *Rescuecom*, and notes that 1-800 Contacts threatened, sued, or entered into agreements with several competitors before *Rescuecom*. (*See* CX0311 (2004 Vision Direct

Agreement, dated June 2004); CX0310 (Coastal Agreement, dated December 2004); CX0313 (EZ Contacts Agreement, dated May 2008); CCPTF 921-929 (agreement with AC Lens following 2005-06 correspondence); CCPTF 930-938 (agreement with Lens Discounters following 2005 correspondence); CCPTF 954-967 (agreement with Lens.com following 2005 correspondence); CCPTF 968-983 (2005 agreement with Luxottica); CCPTF 1016-1029 (1-800 Contacts sent cease and desist letters to Memorial Eye in 2005, 2007, and 2008, and sued Memorial Eye in 2008); CCPTF 1001-1008 (commencement of Lens.com litigation in 2007); CCPTF 985 (1-800 Contacts systematically monitored search results pages to identify and remove competitor ads at least as early as 2006)).

**1105.** For example, ACLens settled within a month after its lawyers explained that the result was “uncertain,” and that ACLens “may well lose” the case. (CX 9039 (Clarkson, Dep. at 86-87, 114); CX 9003 (Clarkson, IHT at 108-109; Clarkson, Tr. 339 (“He said, to my recollection, that the outcome was uncertain, that we may win or we may lose, but that either way it would be very expensive to fight it”)). The President of ACLens testified it was “unclear ... what the legal situation was relative to advertising on other companies’ trademarks.” (Clarkson, Tr. 325).

#### **Response to Proposed Finding No. 1105**

The proposed finding is misleading because it omits additional reasons Mr. Clarkson gave for his decision to settle with 1-800 Contacts, including that his company had no in-house counsel, the litigation was “in a faraway jurisdiction,” and that he had “limited resources against a much larger company.” (Clarkson, Tr. 244-245).

The final sentence of the proposed finding is misleading. Mr. Clarkson was asked whether he had a concern “it might be illegal to use other companies’ trademarks in paid search” as of “2002-2003.” He responded that as follows: “I think over a number of years I was—it was unclear to me what the legal situation was relative to advertising on other companies’ trademarks, but I can’t really be certain in 2002.” (Clarkson, Tr. 325). Complaint Counsel further notes that this testimony is unrelated to the first sentence in the proposed finding.

Notwithstanding, the proposed finding is irrelevant. As ordered by the Commission, the objective and subjective reasonableness of 1-800 Contacts' trademark infringement lawsuits is not a defense to the allegations in the Complaint. (Opinion and Order of the Commission Granting Complaint Counsel's Motion for Partial Summary Decision (Feb. 1, 2017)). The Complaint challenges 1-800 Contacts' agreements, which are overbroad.

**1106.** { [REDACTED] } also settled within a month of 1-800 Contacts' filing of a lawsuit in August 2010, *see* RX 1032, reasoning that keyword advertising on trademark terms "is likely not allowed . . . not legal." (CX 9014 ( { [REDACTED] } at 204-205, 47-49; CX 9000 ( { [REDACTED] } at 93-94)).

**Response to Proposed Finding No. 1106**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that { [REDACTED] } a non-lawyer who did not consult counsel after his company was sued by 1-800 Contacts, had the necessary legal expertise to opine that "keyword advertising on trademark terms" was unlawful. (CX9000 ( { [REDACTED] }, *in camera* at 94 ( { [REDACTED] } did not "want to get an attorney involved" to try to further negotiate 1-800 Contacts' proposed settlement))).

Complaint Counsel does not dispute that { [REDACTED] } entered into an agreement with 1-800 Contacts within a month of 1-800 Contacts' filing a lawsuit against it.

**1107.** Multiple federal judges have also ordered that other contact lens retailers refrain from purchasing 1-800 Contacts trademarks as keywords in paid search advertising and implement negative keywords for 1-800 Contacts' trademark terms. (Pratt, Tr. 2558-59, 2640; CX 144; CX 162).

**Response to Proposed Finding No. 1107**

The proposed finding is unsupported and contradicted by the record evidence. CX0144 and CX0162, orders from federal courts in cases brought by 1-800 Contacts, consist entirely of out-of-court statements, and were admitted exclusively for non-hearsay purposes. Accordingly, they cannot be relied upon to prove the terms of the federal court orders alluded to in the proposed

finding. The cited testimony of Mr. Pratt regarding CX0144 consists of him relaying the hearsay statements contained in CX0144, and so must be disregarded as unreliable hearsay.

The other portion of Mr. Pratt's testimony cited does not support the proposed finding because it lacks foundation. Mr. Pratt testified that he had no involvement in a lawsuit against Vision Direct that resulted in a permanent injunction after it was transferred to the Southern District of New York, and that he did not actually know how it was resolved. (Pratt, Tr. 2639-2640 ("Q. And did you have any involvement with the case once it was pending in the Southern District of New York? A. I did not. Q. And do you know how that case was ultimately resolved? A. I—I don't."))).

**1108.** After 1-800 Contacts sued LensWorld for trademark infringement over the appearance of paid search advertising in response to searches for 1-800 Contacts trademark terms, a federal judge granted 1-800 Contacts a default judgment in 2008 requiring LensWorld to implement negative keywords for 1-800 Contacts' trademark terms. (CX 1733 (Complaint against LensWorld); CX 1255 (Motion for entry of Default Judgment against LensWorld); CX 162 (Order of Default Judgment, *1-800 Contacts, Inc. v. LensWorld, Inc.*, Case No. 2:08-cv-015-SA (D. Utah. Sep. 9, 2008))); Pratt, Tr. 2557-59).

#### **Response to Proposed Finding No. 1108**

The proposed finding is unsupported and contradicted by the record evidence. CX1733 is not in evidence. CX1255, a motion for entry of default judgment filed by 1-800 Contacts, consists entirely of out-of-court statements by 1-800 Contacts in a legal filing, to which no hearsay exception applies. Thus, it cannot be relied upon by 1-800 Contacts to prove the terms of the default judgment. CX0162 likewise consists of out-of-court statements and was admitted only for non-hearsay purposes. It too cannot be relied upon to prove the terms of the default judgment. The cited testimony of Mr. Pratt consists of the witness relaying the hearsay statements contained in CX0162, and so must be disregarded as well.

Notwithstanding, the proposed finding is irrelevant. LensWorld is not a party to a Bidding Agreement with 1-800 Contacts.

**1109.** A federal judge in the Southern District of New York ordered Vision Direct to implement negative keywords for 1-800 Contacts’ trademark terms subject to a stipulated permanent injunction in 2009. (Pratt, Tr. 2640; CX 314; CX 144).

**Response to Proposed Finding No. 1109**

The proposed finding mischaracterizes the nature of the Bidding Agreement between 1-800 Contacts and Vision Direct because it omits that 1-800 Contacts and Vision Direct agreed in writing to jointly submit and order of permanent injunction and to jointly request its entry. (CCPTF 1090). Pursuant to the parties’ agreement, the jointly stipulated permanent injunction was to require both parties to implement negative keywords for the purpose of preventing a party’s internet advertising from appearing in response to a search for” the other party’s trademarks, URLs or variations. (CCPTF 1091). The injunction required by the 2009 Vision Direct Agreement therefore also required 1-800 Contacts to implement negative keywords for Vision Direct’s trademark terms. The court merely rubber-stamped the jointly stipulated consent agreement. (CCPTF 1093).

The cited testimony of Mr. Pratt does not support the proposed finding because it lacks foundation. Mr. Pratt testified that he had no involvement in the lawsuit against Vision Direct that resulted in a permanent injunction after it was transferred to the Southern District of New York, and that he did not actually know how it was resolved. (Pratt, Tr. 2639-2640 (“Q. And did you have any involvement with the case once it was pending in the Southern District of New York? A. I did not. Q. And do you know how that case was ultimately resolved? A. I—I don’t.”)).

***D. Memorial Eye And Lens.com Litigations***

**1110.** Two parties, Memorial Eye and Lens.com, pursued litigation instead of settlement between 2007 and 2013. (RX 72; CX 1125); *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-938 TS, 2010 WL 988524 (D. Utah Mar. 15, 2010); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013).

**Response to Proposed Finding No. 1110**

Complaint Counsel has no specific response.

**1111.** In the Lens.com case, 1-800 Contacts retained Rader Fishman & Grauer LLP to represent them in the litigation before the District of Utah. (CX 1125 (Lens.com Complaint filed in August 2007); Pratt, Tr. 2520-21).

**Response to Proposed Finding No. 1111**

Complaint Counsel has no specific response.

**1112.** Discovery was conducted in the Lens.com case, which included numerous depositions, document requests, expert reports, and surveys. (Pratt, Tr. 2521).

**Response to Proposed Finding No. 1112**

Complaint Counsel has no specific response.

**1113.** Lens.com was sanctioned for discovery abuses, and only produced certain evidence that showed actual confusion on the eve of summary judgment. (CX 9021 (Pratt, Dep. at 128)); *1-800 Contacts, Inc.*, 722 F.3d at 1245. At that hearing, this evidence of actual confusion was not introduced. (CX 9021 (Pratt, Dep. at 128)).

**Response to Proposed Finding No. 1113**

The proposed finding is vague and misleading insofar as it refers to certain discovery material from the Lens.com litigation as “evidence.” The proposed finding consists of an improper legal conclusion as to the assertion that certain evidence in the Lens.com case showed actual confusion. The proposed finding is also unsupported. Mr. Pratt did not testify that the “evidence” in question was not introduced.

Notwithstanding, the proposed finding is irrelevant.

**1114.** This evidence of actual confusion consisted of records from a Lens.com call center agent who noted that a customer had called to request to cancel their order because they had purchased from Lens.com erroneously believing Lens.com to be 1-800 Contacts. (CX 9021 (Pratt, Dep. at 128)).

**Response to Proposed Finding No. 1114**

The proposed finding is unsupported because the cited testimony consists entirely of unreliable hearsay. Mr. Pratt’s testimony was a description of out-of-court statements in a

Lens.com document (which is not in evidence in this case), which in turn consisted of a description of an out-of-court conversation between Lens.com and a customer. Thus, the testimony must be disregarded.

Further, this proposed finding is directly contradicted by the *Lens.com* court, which expressly found that 1-800 Contacts produced *no* evidence of actual confusion in that case. *Lens.com*, 755 F. Supp. 2d 1151, 1177 (D. Utah 2010) (“ . . . Plaintiff admitted it knew of no actual case where a consumer was confused by a Lens.com advertisement appearing after a consumer entered a search for Plaintiff.”).

Notwithstanding, the proposed finding is irrelevant.

**1115.** Shortly after the summary judgment hearing, Bryan Pratt, one of the litigators for 1-800 Contacts, left Rader Fishman. (Pratt, Tr. 2522).

**Response to Proposed Finding No. 1115**

Complaint Counsel has no specific response.

**1116.** 1-800 Contacts also terminated Rader Fishman after the summary judgment stage of the case and retained Holland & Hart LLP to handle the appeal. (Pratt, Tr. 2523).

**Response to Proposed Finding No. 1116**

Complaint Counsel has no specific response.

**1117.** The district court dismissed 1-800 Contacts’ infringement claim in 2010 on the ground that, “as a matter of law,” such a “keyword use can generate a likelihood of confusion only in combination with the specific language of the resulting impressions.” *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013).

**Response to Proposed Finding No. 1117**

The proposed finding consists entirely of an improper legal conclusion, supported only by a citation to case law, and must be disregarded.

**1118.** However, the Tenth Circuit, reviewing *de novo*, declined to adopt the reasoning of the district court. It expressly reserved decision on that issue, and instead explained that the existence of initial interest confusion turns on multiple factors that “depend very much on

context.” *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1243-44 (10th Cir. 2013) (noting “the danger of applying the factors mechanically without attention to context.”)

#### **Response to Proposed Finding No. 1118**

The proposed finding consists entirely of an improper legal conclusion, supported only by a citation to case law, and must be disregarded.

**1119.** The Tenth Circuit acknowledged that users who clicked on a Lens.com advertisement displayed in response to a search for 1-800 Contacts’ trademark “may have been confused into thinking that Lens.com was affiliated with 1-800.” *1-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1244 (10th Cir. 2013). But the Court found that, in 2005-2007, the low incidence of such confusion based on the record in that case “cannot support an inference that Lens.com’s keyword activity was likely to lure consumers away from 1-800.” *1-800 Contacts*, 722 F.3d at 1244.

#### **Response to Proposed Finding No. 1119**

The proposed finding consists entirely of an improper legal conclusion, supported only by citations to case law, and must be disregarded. It is also completely mischaracterizes the Tenth Circuit’s holding, and quotes it out of context. (*See Lens.com*, 722 F.3d at 1244 (“The users in those 25 instances may have been confused into thinking that Lens.com was affiliated with 1-800, or they may simply have wished to look at the offerings of those whom they knew to be 1-800’s competitors.”)).

**1120.** The Tenth Circuit also held that 1-800 Contacts “presented enough evidence to support a claim of contributory infringement” as to advertisements presented by Lens.com’s affiliates, where the evidence showed a greater number of consumers were affected. *1-800 Contacts*, 722 F.3d at 1255; *see also Lens.com, Inc. v. 1-800 Contacts, Inc.*, Case No. 2:12CV00352 DS, 2014 WL 12596493, \*1 (D. Utah Mar. 3, 2014) (noting the Tenth Circuit’s partial reversal of the district court’s summary judgment ruling as to the contributory infringement claims).

#### **Response to Proposed Finding No. 1120**

The proposed finding consists entirely of an improper legal conclusion, supported only by a citation to case law, and must be disregarded. Further, it mischaracterizes the holding of *Lens.com* regarding “affiliates,” which was not based on “a greater number of consumers” being affected, but rather, the fact that several of Lens.com’s affiliates used the 1-800 Contacts

trademark *in the text of the ads*. (*Lens.com*, 722 F.3d at 1175-76, 1181-82 (expressly distinguishing ads that used the trademarks in the text of an ad and those that did not, and finding no likelihood of confusion for ads where the trademarks were *not* used in the text of the ad)).

**1121.** The result in *Lens.com* was “fact-specific” and does not preclude Respondent from proving that other competitors’ use of 1-800 Contacts’ trademark could have caused, or was likely to cause, confusion. Order Denying Complaint Counsel’s Motion to Bar Testimony And Argument (Feb. 21, 2017) at 3-4.

**Response to Proposed Finding No. 1120**

The proposed finding consists entirely of a Respondent’s interpretation of this Court’s Order, and is inappropriate for a finding of fact.

**1122.** More recent cases applying the *Lens.com* initial interest confusion analysis to keyword advertising cases have relied on click-through rate data to support the inference that consumers were “lured” by an advertisement triggered by a trademark search. (CX 9044 (Tushnet, Dep. at 111)); *SanMedica International v. Amazon.com, Inc.*, No. 2:13-cv-00169-DN, 2015 WL 1786104, \*7-8 (D. Utah Apr. 15, 2015) (“*1-800 Contacts* is instructive in the particular circumstances of this case. *1-800 Contacts* dealt with initial-interest confusion”).

**Response to Proposed Finding No. 1122**

The proposed finding consists entirely of an improper legal argument. The proposed finding is also unsupported. Professor Tushnet did not testify regarding cases applying the *Lens.com* initial interest confusion analysis to keyword advertising cases and relying on click-through rate data, only that *Lens.com* itself used such an analysis. (CX9044 (Tushnet, Dep. at 111) (“So the Ninth Circuit cases hold that with—with appropriate labeling, confusion is simply unlikely, so they don’t really need to get into anything more. And the 1-800 versus *Lens.com* case does look at click through rates as a proxy for initial interest confusion and again finds it too low to go any further.”)). The cited judicial decision is not evidence in this case and must be disregarded.

**1123.** 1-800 Contacts also included a breach of contract claim in its motion for summary judgment in the *Lens.com* case. (Pratt, Tr. 2516 (“we filed a breach of contract claim”)).

**Response to Proposed Finding No. 1123**

Complaint Counsel has no specific response.

**1124.** 1-800 Contacts alleged as the basis for its breach of contract claim an agreement between Anthony DeGidio and Bryan Pratt. (Pratt, Tr. 2518 (“I alleged that there was an agreement between Anthony DeGidio and I”)). Mr. Pratt submitted a declaration in which he outlined the facts of the alleged agreement. (CX 1184; (Pratt, Tr. 2572-73)).

**Response to Proposed Finding No. 1124**

The proposed finding is misleading and contradicted by the weight of the record evidence insofar as it implies that only Mr. DeGidio and Mr. Pratt, and not 1-800 Contacts and Lens.com, were party to an agreement. 1-800 Contacts alleged as the basis for its breach of contract claim that 1-800 Contacts and Lens.com agreed not to purchase sponsored advertisements triggered by the other party’s trademarks. (CX1125 at 008 (*E.g.*, “Lens.com agreed not to purchase sponsored advertisements triggered by the use of the 1-800 CONTACTS Marks”)). Mr. Pratt’s declaration similarly provided that the “agreement required that both Lens.com and its affiliates would cease purchasing 1-800 CONTACTS as keywords.” (CX1184).

**1125.** Anthony DeGidio submitted his own declaration, alleging that there was no agreement. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1191 (D. Utah, 2010), *rev’d in part*, 722 F.3d 1229. The district court did not credit 1-800 Contacts’ argument and found that there was no agreement between Lens.com and 1-800 Contacts. (Pratt, Tr. 2519); *1-800 Contacts*, 755 F. Supp. 2d at 1189.

**Response to Proposed Finding No. 1125**

The proposed finding is improper insofar as it asserts a legal conclusion regarding what the district court in Lens.com found.

**1126.** There is no agreement between Lens.com and 1-800 Contacts regarding paid search advertising, and Lens.com is not prohibited or restrained from purchasing keywords that trigger advertisements in response to searches for 1-800 Contacts trademark. (Pratt, Tr. 2520 (“Q: Other than the agreement that was referred to in the complaint, that was alleged in the complaint, between you and Mr. DeGidio, are you aware of any other agreement between 1-800 Contacts and Lens.com relating to paid search advertising? A: I am not.”), 2576 (“Q: My question is, sitting here today, yes or no, is it the case that there was an agreement between Lens.com and 1-800 Contacts that was memorialized in writing on September 22, 2005? A: Sitting here today, I don’t

believe that there was”); Bethers, Tr. 3693-94 (“Q: Is there any agreement in place today between 1-800 Contacts and Lens.com with respect to paid advertising? A: There is no agreement and has not been an agreement with Lens.com”)).

### **Response to Proposed Finding No. 1126**

The proposed finding is contradicted by the weight of the record evidence, which shows that there is an agreement between Lens.com and 1-800 Contacts regarding paid search advertising, and that Lens.com is restrained from purchasing keywords that trigger advertisements in response to searches for 1-800 Contacts trademark. (CCPTF 1015). (*See* Pratt, Tr. 2567 (in 2005, Mr. Pratt’s understanding of the agreement “was that [Lens.com] would take action to make sure that [its] sponsored advertisements did not come up in response to searches for 1-800 Contacts’ trademarks.”); *see also* RX0415 at ¶ 18 (Lens.com complaint) (“1-800 CONTACTS discovered that Lens.com had purchased sponsored advertisements from Google, and other search engines, for Plaintiff’s Marks to trigger advertising and/or a link to the Lens.com Websites. Such infringing activity was immediately brought to the attention of Lens.com, after which *Lens.com* agreed to cease such practices.”) (emphasis added), ¶ 19 (“*Notwithstanding Lens.com’s agreement to cease using the 1-800 CONTACTS Marks to trigger advertising, the infringing behavior recently resurfaced.*”) (emphasis added)). Lens.com’s CEO confirmed the existence of the agreement in his deposition during the Lens.com litigation. (CX1673 (Samourkachian, Dep. at 178, *1-800 Contacts v. Lens.com*)). Complaint Counsel notes that the cited testimony of Bryan Pratt does not support the proposed finding. He merely stated that he was unaware of any *current* agreement from between the parties, and that he believed there was no written agreement dated from 2005 between the parties.

**1127.** Lens.com does not purchase 1-800 Contacts or any other competitors’ trademarks in search advertising auctions as a general practice because such purchases do not result in conversions and are therefore inefficient allocations of advertising expenditure. (CX 1673 (April 28, 2008 deposition of Cary Samourkachian in the *1-800 Contacts v. Lens.com* case, at 171 (“we’re not in the business of purchasing our competitor’s trademarks”), 175 (“our intent is not to be bidding on

[1-800's] trademark or show up on their trademark"), 182 ("Traffic that is coming from these [trademark] terms are not going to convert to us, because they're looking for your client, not us.")).

**Response to Proposed Finding No. 1127**

The proposed finding is vague as to time, and unsupported as to any time after April 28, 2008. It is also contradicted by the great weight of record evidence, cited in Response to Proposed Finding No. 1126, that Lens.com does not purchase 1-800 Contacts' trademarks because it has an agreement with 1-800 Contacts not to do so.

**1128.** In the Memorial Eye case, after 1-800 Contacts filed its Complaint, *see* RX 72, Anthony Hong, counsel for Memorial Eye, initially engaged in settlement discussions with counsel for 1-800 Contacts. (Pratt, Tr. 2530 ("So as I recall...their counsel contacted us to talk about potential settlement of the Complaint")).

**Response to Proposed Finding No. 1128**

Complaint Counsel has no specific response.

**1129.** 1-800 Contacts proposed terms for a settlement, including the requirement that Memorial Eye implement negative keywords for 1-800 Contacts trademark terms. (RX 926-0003; Pratt, Tr. 2531).

**Response to Proposed Finding No. 1129**

Complaint Counsel has no specific response.

**1130.** Memorial Eye's counsel, Anthony Hong, stated that under the Second Circuit precedent of *1-800 Contacts v. WhenU*, the purchase of keywords to trigger advertisements in response to trademark terms did not constitute a use in commerce. (RX 926-0002).

**Response to Proposed Finding No. 1130**

The proposed finding is unsupported. The relevant portion of RX0926 consists of out-of-court statements by Mr. Hong written to opposing counsel in the course of litigation, to which no hearsay exception applies. Thus, it cannot be used to support the proposed finding regarding what Mr. Hong stated. Notwithstanding, the proposed finding is irrelevant.

**1131.** Mr. Pratt responded to Mr. Hong with citations to case law where the courts had found the purchase of keywords to trigger paid search advertising to constitute a use in commerce under the Lanham Act. RX 926-0001. He also stated that he was aware of other examples of competitors

agreeing to respect each other's trademark rights by not placing advertisements in response to searches for each other's trademark terms. (RX 926-0001).

**Response to Proposed Finding No. 1131**

The proposed finding is unsupported. The relevant portion of RX0926 consists of out-of-court statements by Mr. Pratt written in the course of litigation to opposing counsel, to which no hearsay exception applies. Thus, it cannot be relied upon by 1-800 Contacts to prove the finding regarding the substance of Mr. Pratt's response to Mr. Hong. Moreover, the cited response of Mr. Pratt's consists entirely of legal conclusions, not facts. (RX0926 at 001).

**1132.** Memorial Eye did not settle the case in 2009, but instead filed an answer and counterclaims. (Pratt, Tr. 2535). This included a counterclaim alleging sham litigation. (Pratt, Tr. 2535). The district court dismissed the counterclaims and the case proceeded to discovery. (Pratt, Tr. 2535 (1-800 Contacts "filed a motion to dismiss the counterclaims, that there was a hearing where the – where the judge dismissed the counterclaims for sham litigation, and then discovery continued.")); *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, \*6 (D. Utah Mar. 15, 2010).

**Response to Proposed Finding No. 1132**

Complaint Counsel has no specific response.

**1133.** Discovery uncovered evidence of actual confusion. (CX 9024 (Holbrook Dep. at 51;

{ [REDACTED] }

**Response to Proposed Finding No. 1133**

The proposed finding consists of an improper legal conclusion, which must be disregarded, insofar as it asserts that material produced in the Memorial Eye case was probative the existence of confusion for purposes of trademark law. The proposed finding is also misleading and unsupported. Mr. Holbrook testified that he { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] }. (Holbrook, Tr. 1957, *in camera*). The cited deposition testimony of Mr. Holbrook

does not support the proposed finding. Mr. Holbrook testified that he “didn’t think there was actual confusion” arising due to “competitors’ ads coming up based on customers searching for some version of our [i.e., Memorial Eye’s] trademarks or names.” (CX9024 (Holbrook, Dep. at 51-52)). See also Holbrook, Tr. 1958, *in camera* { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] }

**1134.** [REDACTED] (Holbrook, Tr. 2000-2001).

**Response to Proposed Finding No. 1134**

Complaint Counsel has no specific response, other than to note that this proposed finding is irrelevant.

**1135.** [REDACTED] (Holbrook, Tr. 2002).

**Response to Proposed Finding No. 1135**

Complaint Counsel has no specific response.

**1136.** [REDACTED] (Holbrook, Tr. 2005-06 { [REDACTED]

**Response to Proposed Finding No. 1136**

The proposed finding is misleading and unsupported. { [REDACTED]  
[REDACTED] } (Holbrook, Tr. 2003-2006, *in camera* (testifying regarding RX1777)). Complaint Counsel notes that Mr. Holbrook also testified that he { [REDACTED]

[REDACTED]

[REDACTED] }.  
(Holbrook, Tr. 1957, *in camera*).

Further, the records referenced by Mr. Holbrook are admissible only to show that the statements were made, not for the underlying truth of the statement. (*See* Holbrook, Tr. 2004-2005).

Notwithstanding, the proposed finding is irrelevant because, as set forth in Complaint Counsel's Post-Trial Reply Brief, { [REDACTED] }.  
{ [REDACTED] }. (CC Post-Trial Reply Br. at 35-38).

**1137.** [REDACTED]  
[REDACTED] } (RX 1777; Holbrook, Tr. 2006-07).

**Response to Proposed Finding No. 1137**

Complaint Counsel does not dispute that { [REDACTED] }  
[REDACTED] }. The remainder of the proposed finding is unsupported. RX1777 is admissible only to show that { [REDACTED] } not for the truth of the underlying statement. { [REDACTED] } consistute hearsay to which no exception applies. The cited testimony does not support the proposed finding because it merely consists of Respondent's counsel reading a hearsay statement contained in RX1777 to the witness and thus is inadmissible.

Notwithstanding, the proposed finding is irrelevant because { [REDACTED] }  
[REDACTED] }.  
(RX1777, *in camera*; CC Post-Trial Reply Br. at 35-38). Indeed, RX1777 { [REDACTED] }  
[REDACTED] }. (RX1777, *in camera*).

**1138.** [REDACTED]  
[REDACTED] } (RX 1774; Holbrook, Tr. 2007-08).

**Response to Proposed Finding No. 1138**

Complaint Counsel does not dispute that [REDACTED]  
[REDACTED]}. The remainder of the proposed finding is unsupported. RX1774 is admissible only to show that [REDACTED] [REDACTED] } not for the truth of the underlying statements. [REDACTED] [REDACTED] } consistute hearsay to which no exception applies. The cited testimony does not support the proposed finding because it merely consists of Respondent's counsel reading the hearsay statements contained in RX1774 to the witness and thus is inadmissible.

Notwithstanding, the proposed finding is irrelevant because [REDACTED]  
[REDACTED]  
[REDACTED]}.  
(RX1774, *in camera*; CC Post-Trial Reply Br. at 35-38). Indeed, [REDACTED]  
[REDACTED]}. (RX1774, *in camera*).

**1139.** [REDACTED]  
[REDACTED] } (RX 1776; Holbrook, Tr. 2009). [REDACTED]  
[REDACTED] } (Holbrook, Tr. 2009).

**Response to Proposed Finding No. 1139**

Complaint Counsel does not dispute that [REDACTED]  
[REDACTED]}. The remainder of the first sentence of the proposed finding is unsupported. RX1776 is admissible only to show that [REDACTED], } not for the truth of the underlying statements. [REDACTED]

[REDACTED] } consistute hearsay to which no exception applies. The cited testimony does not support the first sentence of the proposed finding because it merely consists of Respondent’s counsel reading the hearsay statements contained in RX1776 to the witness and thus is inadmissible.

Notwithstanding, the proposed finding is irrelevant because { [REDACTED]

[REDACTED]  
[REDACTED] }. (RX1776, *in camera*; CC Post-Trial Reply Br. at 35-38).

**1140.** [REDACTED]  
[REDACTED] } (RX 1775; Holbrook, Tr. 2010-11). [REDACTED]

**Response to Proposed Finding No. 1140**

Complaint Counsel does not dispute that { [REDACTED]

[REDACTED]  
[REDACTED] }. The remainder of the first sentence of the proposed finding is unsupported. RX1775 is admissible only to show that { [REDACTED] } not for the truth of the underlying statements. { [REDACTED] } consistute hearsay to which no exception applies. The cited testimony does not support the first sentence of the proposed finding because it merely consists of Respondent’s counsel reading the hearsay statements contained in RX1775 to the witness and thus is inadmissible.

Notwithstanding, the proposed finding is irrelevant because { [REDACTED]

[REDACTED]  
[REDACTED] }. (RX1775, *in camera*; CC Post-Trial Reply Br. at 35-38).

1141. [REDACTED]  
[REDACTED] (RX 1772 { [REDACTED] }  
[REDACTED] (RX 1772; Holbrook Tr. 2013).

**Response to Proposed Finding No. 1141**

Complaint Counsel does not dispute that { [REDACTED] }  
[REDACTED] }. Complaint Counsel also does not dispute that { [REDACTED] }  
[REDACTED] }. The remainder of the proposed finding is unsupported. RX1772 is admissible only to show that { [REDACTED] } not for the truth of the underlying statements. { [REDACTED] } constitute hearsay to which no exception applies. The cited testimony does not support the first sentence of the proposed finding because it merely consists of Respondent’s counsel reading a hearsay statement contained in RX1772 to the witness and thus is inadmissible.

The use of the characterization { [REDACTED] } is misleading and inaccurate because RX1772 shows that the { [REDACTED] }  
[REDACTED] }. (RX1772 at 001, *in camera* ( { [REDACTED] }  
[REDACTED] })).

Notwithstanding, the proposed finding is irrelevant because { [REDACTED] }  
[REDACTED] }. (RX1772, *in camera*; CC Post-Trial Reply Br. at 35-38). Indeed, { [REDACTED] }. (RX1772, *in camera*).

1142. [REDACTED]  
[REDACTED]

[REDACTED] (RX 850; Holbrook, Tr. 2015).

**Response to Proposed Finding No. 1142**

Complaint Counsel does not dispute that [REDACTED]  
[REDACTED]  
[REDACTED]. The remainder of the proposed finding is unsupported. RX0850 is admissible only to show that [REDACTED], not for the truth of the underlying statements. [REDACTED] consistute hearsay to which no exception applies. The cited testimony does not support the proposed finding because it merely consists of Respondent’s counsel reading a hearsay statement contained in RX0850 to the witness and thus is inadmissible.

Notwithstanding, the proposed finding is irrelevant because [REDACTED]  
[REDACTED]  
[REDACTED]. (RX0850, *in camera*; CC Post-Trial Reply Br. at 35-38). Indeed, [REDACTED]. (RX0850, *in camera*).

**1143.** [REDACTED]  
[REDACTED] RX 850. [REDACTED]  
[REDACTED] CX 9024 (Holbrook, Dep. at 213-216).

**Response to Proposed Finding No. 1143**

The proposed finding is misleading and unsupported. RX0850 [REDACTED]  
[REDACTED]. Complaint Counsel notes that RX0851 [REDACTED]  
[REDACTED]  
[REDACTED]. (RX0851 at 001, *in camera*).

The second sentence of the proposed finding is also unsupported because Mr. Holbrook did not testify { [REDACTED] }.

He testified that he { [REDACTED] } (CX9024 (Holbrook, Dep. at 214, *in camera*)). He also testified that he believed that { [REDACTED] } (CX9025 (Holbrook, Dep. at 215, *in camera*)).

Notwithstanding, the proposed finding is irrelevant.

1144. [REDACTED] CX 9024 (Holbrook, Dep. at 213-14).

**Response to Proposed Finding No. 1144**

The proposed finding is misleading and unsupported. No where in the cited testimony does { [REDACTED] } CX 9024 (Holbrook, Dep. at 213-14, *in camera*)). Mr. Holbrook did testify that it was Memorial Eye’s policy to clarify with a consumer that may have had the mis-impression that they were dealing with another party, including 1-800 Contacts, “to make clear that when a customer was potentially confused, to make clear that ShipMyConatcts was not affiliated with 1-800 Contacts.” This was because Memorial Eye “had no incentive to confuse anybody in any way. Quite the opposite. We had every incentive to make sure that they knew they were dealing with us and not somebody else.” (CX9024 (Holbrook, Dep. at 219-220)).

1145. [REDACTED]

[REDACTED] (Holbrook, Tr. 2001-2015).

**Response to Proposed Finding No. 1145**

The proposed finding is misleading because it omits that Memorial Eye closed its online operations following its agreement with 1-800 Contacts. (CCPTF 1037-1038). The proposed finding also constitutes an improper and inaccurate legal conclusion insofar as it asserts with that

{ [REDACTED] }.

1146. Complaint Counsel's expert trademark law witness concedes that an individual who clicks on a rival advertisements and starts the ordering process but aborts when he or she realizes he or she is in the wrong place prior to making a purchase was actually confused. (CX 9044 (Tushnet, Dep. at 118-19)).

**Response to Proposed Finding No. 1146**

The proposed finding is misleading. Professor Tushnet opined as follows: "assuming this is 1-800 Contacts, the consumer clicks on an ad for a site that's not 1-800 Contacts, begins a transaction, adds items to a cart, say, under the impression that he is dealing with 1-800 Contacts and then before pay ing realized he not dealing with 1-800 Contacts . . . I believe that person would count as confused." (CX9044 (Tushnet, Dep. at 119)).

1147. Complaint Counsel's expert trademark law witness further concedes that an individual who clicks on a rival advertisements and completes an order and then realizes they had not purchased from the company they intended to purchase from was actually confused. (CX 9044 (Tushnet, Dep. at 119-20)).

**Response to Proposed Finding No. 1147**

The proposed finding is unsupported. The cited testimony was based on a question that was improper as to form and posited an incomplete hypothetical. (CX9044 (Tushnet, Dep. at 119 (preserving objections))).

1148. The parties ultimately agreed to stay the case pending the outcome of the Lens.com Tenth Circuit appeal. (Pratt, Tr. 2535).

**Response to Proposed Finding No. 1148**

The proposed finding is vague because it references “parties” without identifying them.

Notwithstanding, the proposed finding is irrelevant.

1149. The Lens.com decision created “a lot of legal uncertainty” regarding the scope of trademark rights with respect to paid search advertising. CX 9024 (Holbrook, Dep. at 63).

**Response to Proposed Finding No. 1149**

The proposed finding is unsupported because the cited testimony lacks foundation. There is no evidence that Mr. Holbrook has the necessary legal expertise to opine regarding the effect a judicial decision on creating “legal uncertainty.” (CX9024 (Holbrook, Dep. at 42 (“I’m not a lawyer.”))). Nevertheless, the proposed finding is misleading because it omits that the testimony cited was referring specifically to the legal status of broad matched ads where the advertiser had not purchased a trademark, not trademark rights and paid search advertising generally. (CX9034 (Holbrook, Dep. at 63 (“We also knew that in the appellate court, I believe it was, that the appellate court had been silent on the broad matching issue . . . So there was a lot of legal uncertainty because of that still hanging out there.”))).

1150. After the Lens.com case was decided in 2013, Memorial Eye agreed to settle the case on terms comparable to previous settlement agreements rather than proceed with a protracted litigation over unsettled law. (Pratt, Tr. 2535; Holbrook, Tr. 1942 (“we knew that the Lens.com/1-800 Contacts case was still going on and they had spent \$2 million. We knew that the broad matching issue had not firmly been put to rest by the court”)); { [REDACTED] } CX 9024 (Holbrook Dep. at 63)).

**Response to Proposed Finding No. 1150**

The proposed finding is misleading and unsupported insofar as it implies that Memorial Eye’s decision to settle was informed by the fact that the terms were comparable to previous settlement agreements. There is no evidence that Mr. Holbrook or anyone else at Memorial Eye had personal knowledge of 1-800 Contacts’ confidential settlement agreements with other

competitors. The proposed finding constitutes in improper and inaccurate legal conclusion insofar as it asserts that the law was “unsettled.”

The proposed finding is also misleading and unsupported because it omits that Mr. Holbrook decided to shut down Memorial Eye’s online business entirely before he agreed to 1-800 Contacts’ settlement terms. (Holbrook, Tr. 1941-1942). The proposed finding also quotes Mr. Holbrook’s testimony out of context. The quoted testimony pertains to Mr. Holbrook’s decision to close Memorial Eye’s online contact lens retail business, not his decision to accept 1-800 Contacts’ settlement terms. Complaint Counsel notes that additional the reasons that Mr. Holbrook decided to shut down the online business were that Memorial Eye would not longer be able to get valuable conversions if it entered negative keywords as requested by 1-800 Contacts and due to the financial risk involved with continuing the 1-800 Contacts lawsuit. (CCPTF 1033, 1038).

1151. Ultimately, courts in both Memorial Eye and Lens.com expressly held that 1-800 Contacts’ trademark enforcement efforts were *bona fide*. See *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, \*6 (D. Utah Mar. 15, 2010) (“In the case currently facing the Court, Plaintiff has alleged that Defendant purchased some keywords related to Plaintiff’s website and or trademark. Therefore, according to *Rescuecom*, the allegations in Plaintiff’s Complaint plead a use in commerce. Moreover, the Tenth Circuit has held that the purchase of another’s trademark through a search engine for the purpose of diverting internet traffic and using goodwill associated with that trademark, as alleged here, violates the Lanham Act. Consequently, the Court finds that Plaintiff’s claim is not baseless and, it is therefore, protected by *Noerr-Pennington* immunity”); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS, 2014 WL 12596493, at \*1 (D. Utah Mar. 3, 2014) (“Because the district court and the Tenth Circuit agree that the underlying action was not baseless, this court agrees that Lens.com’s claims, all of which center on the proposition that 1-80 engaged in sham litigation, should be dismissed with prejudice”).

### **Response to Proposed Finding No. 1151**

The proposed finding consists entirely of an improper and inaccurate legal conclusion, supported solely by citations to case law, and must be disregarded.

1152. Complaint Counsel also concede that 1-800 Contacts’ trademark enforcement efforts were *bona fide*. (RX 680-0013 (Response to Interrogatory No. 6); RX 678-0007-08 (Response to Interrogatory Nos. 9 (“Complaint Counsel does not contend that the lawsuit, *1-800*

*Contacts, Inc. v. Memorial Eye, P.A.*, was sham litigation”), 10 (“Complaint Counsel does not contend that the lawsuit, *1-800 Contacts, Inc. v. Lens.com*, was Sham Litigation”)).

**Response to Proposed Finding No. 1152**

This proposed finding is inaccurate on its face and must be disregarded. The cited interrogatory and request for admission responses indicate only that Complaint Counsel is not seeking to prove one way or the other whether two specific lawsuits commenced by 1-800 Contacts were “sham litigations,” as shown by the excerpts quoted. They do not address 1-800 Contacts’ “trademark enforcement efforts” other than those two lawsuits, and they do not suggest a concession.

For clarity’s sake, due to Respondent’s repeated representations that Complaint Counsel “concede” that 1-800 Contacts did not engage in sham litigation: Complaint Counsel does not concede, and never has conceded, that 1-800 Contacts’ enforcement efforts (the Memorial Eye and Lens.com litigations included) were *bona fide*. Complaint Counsel does not concede, and has never conceded, that any of 1-800 Contacts’ enforcement efforts and lawsuits (the Memorial Eye and Lens.com litigations included) were not sham litigation. Complaint Counsel has taken no position on this because, as the Commission stated in its Order Granting Partial Summary Decision, dated February 1, 2017, the merits of the underlying litigation are not an issue in this case.

Complaint Counsel has stated this position repeatedly:

- “Complaint Counsel states that it takes no position on whether any Lawsuit or cease-and-desist letters by Respondent constituted or threatened “sham” litigation . . . as this issue is not relevant to the Complaint in this matter.” (RX0680 at 0013 (Response to Interrogatory No. 6)).

- “Complaint Counsel is not in a position to determine whether the 1-800 Contacts’ lawsuit, *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, 2010 WL 988524 (D. Utah 2010), was objectively baseless or subjectively brought in bad faith . . . the information known to or readily obtainable by Complaint Counsel is insufficient to enable it to admit or deny this Request for Admission.” ( RX 678 at 007-008 (Response to RFA No. 9)).
- “Complaint Counsel is not in a position to determine whether the 1-800 Contacts’ lawsuit, *1-800 Contacts, Inc. v. Lens.com* (D. Utah), was objectively baseless or subjectively brought in bad faith . . . the information known to or readily obtainable by Complaint Counsel is insufficient to enable it to admit or deny this Request for Admission. (RX0678 at 008 (Response to RFA No. 10)).

The proposed finding must also be disregarded insofar as it consists of a legal argument by Respondent’s counsel and posits no facts based on evidence in this case.

1153. [Intentionally Not Used].

## **IX. 1-800 Contacts’ Trademark Settlement Agreements**

### **A. A. *The Settlement Agreements Are Narrowly Tailored***

**1154.** During the time period 2004 through 2013, 1-800 Contacts entered into settlement agreements with thirteen other contact lens retailers to resolve trademark litigation. (CX 311 (2004 Vision Direct Settlement Agreement), CX 314 (2009 Vision Direct Settlement Agreement), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com)).

### **Response to Proposed Finding No. 1154:**

Complaint Counsel does not dispute that 1-800 Contacts entered into thirteen agreements with contact lens retailers. The proposed finding is misleading insofar as it implies that the

exclusive purpose or effect of the agreements was to resolve trademark litigation because, among other things, the agreements prohibit non-confusing advertising and also impose reciprocal restrictions on 1-800 Contacts.

**1155.** These settlements each included a “Release” of “any and all liability, claims, counterclaims, demands, debts, charges, liens and causes of action” arising from the various claims asserted in the litigations. (CX 311 (Vision Direct Settlement) § 1; CX 317 (ACLens Settlement) § 1).

**Response to Proposed Finding No. 1155:**

Complaint Counsel has no specific response.

**1156.** The settlement agreement with Standard Optical Company had a two year term and is no longer in force as of 2013. (CX 325-001 (“TERM: The term of this Agreement shall be for a period of two (2) years from the Effective Date,” February 4, 2011); CX 9040 (Miller, Dep. at 111)).

**Response to Proposed Finding No. 1156:**

The proposed finding is unsupported. The evidence cited does not establish that there is not currently an agreement between 1-800 Contacts and Standard Optical to prevent the appearance of ads in response to searches including each other’s trademarks. (*See* CX9040 (Miller, Dep. at 111 (“I think they [Standard Optical] maintained the same practice. I don’t think they come up when somebody searches for 1-800 Contacts.”))).

**1157.** The settlement agreement provisions at issue are “narrowly tailored” to address the scope of the parties’ trademark rights as set forth in the claims alleged in the complaints. (CX 9040 (Miller, Dep. at 117-18); RX 253-002 (“I can’t see any unfairness in the narrowly tailored, bi-lateral agreement.”); Hogan, Tr. 3275 (“these are, in the context of trademark settlement agreements, especially limited settlement agreements”), 3278-79).

**Response to Proposed Finding No. 1157:**

The proposed finding is improper and must be disregarded because it merely asserts a legal conclusion about the relative scope of the challenged agreements. (*See* CCL 48-53 (conclusions of law that the challenged agreements exceed the scope of 1-800 Contacts’ trademark rights)).

The proposed finding is also unsupported. The cited testimony of Mr. Miller consists entirely of improper opinion testimony offered by a fact witness (E.g., CX9040 at 117 (“To me, they’re pretty narrowly tailored.”))).

The statements in the document cited, RX0253, are unreliable hearsay. RX0253 is a demand letter sent by 1-800 Contacts’ outside counsel to a competitor. As such, RX0253 does not qualify for the business records exception to the hearsay rule, because it is not a record of a regularly-conducted business activity created in the ordinary course of business. Nor does any other hearsay exception apply. Thus, it contains only unreliable hearsay.

The cited testimony of Mr. Hogan does not support the proposed finding. Mr. Hogan testified specifically that the agreements were limited only in the sense that they were limited to a certain kind of advertising. (Hogan, Tr. 3275-3276 (“They related to one specific type of advertising and generally they carve out and explicitly allow other types of advertising. Q. Have you now described for us, just so the record is clear, what about the agreements is limited? A. Yes. They’re limited specifically to paid search and use of a trademark to trigger search advertising.”))). He then testified that he believed the agreements were narrower than some consent judgments he had seen in the public record again because the challenged agreements bar only a certain kind of advertising and allow other kinds. (Hogan, Tr. 3278-3279). His testimony does not support the proposition that the agreements were narrowly tailored relative to 1-800 Contacts’ property rights or narrowly tailored relative to the allegations in 1-800 Contacts’ complaints.

**1158.** The settlement agreements do not affect areas of advertising other than online paid search engine advertising. Among the areas of advertising that are not affected by the settlement agreements are television advertising, radio advertising, banner advertising, display advertising, third party price comparison shopping, and organic search results. (Hogan, Tr. 3276; RX 939 (1-800 Contacts outside counsel stating to another party that the settlement agreements did not impact third party comparison shopping sites); Aloviz, Tr. 1031-32 (the 1-800 Contacts cease and desist letter and proposed settlement did not raise an issue with LensDirect’s “social media advertising,” “video advertising,” “affiliate marketing,” “email advertising campaigns,” “banner advertisements,” or generic searches)).

**Response to Proposed Finding No. 1158:**

The proposed finding is inaccurate. First, eleven of the fourteen challenged agreements prohibit conduct other than paid advertising on search engines. (CX0311 at 003-004 (prohibiting, among other things, pop-up advertising and “causing” a link to a party’s website to appear regardless of whether the link is in a paid advertisement); *see also* CX0310 at 003-004; CX0313 at 003-004; CX0315 at 003-004; RX0028 at 001-002; CX0320 at 003; CX0323 at 002-003; CX0319 at 002; CX0321 at 002; CX0324 at 002-003; RX0408 at 003). Second, ten agreements provide explicitly that the restrictions imposed by the agreements apply to all future advertising techniques that are similar to online paid search advertising. (CX0311 at 005 (providing that the parties intend the agreement to include “all future Internet advertising techniques and advertisement delivery technologies that are substantially similar to the Prohibited Acts”); *see also* CX0310 at 004; CX0313 at 005; CX0315 at 005; RX0028 at 003; CX0320 at 004-005; CX0323 at 004; CX0319 at 003; CX0321 at 003; CX0324 at 004).

Moreover, 1-800 Contacts has invoked its agreements to bar competitor ads on social media platforms. (*E.g.*, CX1675 at 002). And 1-800 Contacts has removed its own display ads from the Google Display Network pursuant to its agreement with Coastal. (CX0960).

The proposed finding is also unsupported. The cited testimony of Mr. Hogan should be disregarded because it lacks credibility. For the reasons described above, his opinion that the agreements only affect paid search advertising are contradicted by the weight of the record evidence including the plain language of most of the agreements and evidence showing 1-800 Contacts’ enforcement of the agreements in other contexts.

The cited document, RX0939, consists entirely of out-of-court statements by 1-800 Contacts’ counsel, made in context of negotiating a settlement agreement. Accordingly, it RX0939 does not qualify for the business records exception to the hearsay rule, because it is not a record of

a regularly-conducted business activity created in the ordinary course of business. Nor does any other hearsay exception apply. Thus, it contains only unreliable hearsay and must be disregarded here.

The cited testimony of Mr. Alovic is entirely unrelated to the proposed finding because LensDirect never entered into an agreement with 1-800 Contacts.

**1159.** Moreover, within the category of search engine advertising, the settlements affected at most paid advertising in response to several dozen trademark-related search terms out of thousands of internet searches related to contact lenses. (RX 739 (Murphy Rep.) ¶ 121 (“The paid search advertising restricted by the settlements represented a small share of retailers’ impressions”); RX 733 (Ghose Rep.) ¶¶ 141-143 (searches for 1-800 Contacts and variations account for a fraction of the Athey comScore dataset and are far less popular searches than generic terms, which are not restricted by the settlement agreements); CX 9044 (Tushnet, Dep. at 40) (identifying as the list of keywords impacted by the settlement the trademarks and variation lists in the settlement exhibits)).

**Response to Proposed Finding No. 1159:**

The proposed finding should be rejected because it is incomprehensible and inaccurate.

First, it makes no sense to compare “several dozen trademark-related search terms” to “thousands of internet searches related to contact lenses.” Comparing a number of “search terms” to a number of “internet searches” does not generate any meaningful information, since a single search term can be searched for thousands or millions of times.

In addition, the proposed finding is inaccurate because the Bidding Agreements prohibited 1-800 Contacts’ rivals from displaying advertisements “in response to or as a result of any internet search **that includes** the other Party’s trademark keywords or URLs.” (*E.g.*, RX0028 at 002 (Bidding Agreement with AC Lens)). Thus, on their face the Bidding Agreements affected a limitless number of different search queries because they affected a limitless variety of user queries that include 1-800 Contacts’ trademark terms.

The proposed finding is also misleading insofar as it implies that the number of unique terms affected by the agreements, relative to the universe of internet searches, is a relevant metric

for measuring competitive effects of the agreements. As Dr. Evans explained, one relevant metric for those effects is the amount of advertising that was suppressed by the agreement. (Evans, Tr. 1379-1381). Dr. Evans found that the agreements blocked over 100 million advertisements from being served. (Evans, Tr. 1381; CX8006 at 009-010 (¶ 19) (Evans Expert Report)).

**1160.** For example, the settlements do not impact the purchase or appearance of advertisements in response to generic searches such as “contacts,” “contact lens,” and “contact lenses,” and other retailers compete with 1-800 Contacts in auctions for those terms. (Hamilton, Tr. 453-54 (“Q: And isn’t it true that the settlement agreements that you discussed earlier, those settlement agreements with 1-800 Contacts, do not prevent Vision Direct or Walgreens from bidding on those search terms? A: Correct. Q: And isn’t it true that Vision Direct and Walgreens actively bid against 1-800 Contacts and others for those search terms? A: That’s correct”); CX 9031 (Schmidt, Dep. at 234 (“There should be robust competition for [the term “contacts”]”))).

**Response to Proposed Finding No. 1160:**

Complaint Counsel has no specific response.

**1161.** The intent and purpose of the settlement agreements was to target only those search queries most likely to be navigational in nature and most likely to result in consumer confusion. (CX 9040 (Miller, Dep. at 42 (“I believe the intent was let’s put in the ones that are meaningful with relation to searching for our trademark and – and navigational in the context of looking for us. And that’s what we want to preclude...you don’t have to preclude everything to get the protection of your trademark that you’re trying to get and to avoid the consumer confusion you’re trying to avoid.”)); CX 709-001 (explaining that the purpose of the settlement was “to prevent sponsored ads from being displayed in response to searches for the other party’s registered trademarks and exact URLs”)).

**Response to Proposed Finding No. 1161:**

The proposed finding is unsupported. As shown in the quoted excerpt, Mr. Miller’s testimony lacks foundation. (CX9040 (Miller, Dep. at 42 (“*I believe* the intent was...”) (emphasis added))). There is no evidence that Mr. Miller has personal knowledge of what 1-800 Contacts’ own intent or purpose was in entering into the settlement agreements. Moreover, Mr. Miller had no involvement in drafting the agreements with Coastal, Vision Direct, or EZ Contacts. (CCPTF 88 (Mr. Miller began representing 1-800 Contacts in 2009, after the Coastal, Vision Direct, and EZ Contacts agreements were in place). There is also no evidence that Mr. Miller has any personal

knowledge of consumers' search habits or the necessary expertise to opine as to whether searches are "navigational."

The cited document, CX0709, consists of out of court statements by 1-800 Contacts' outside counsel in the context of negotiating a settlement agreement with one of 1-800 Contacts' competitors, offered to prove the facts of 1-800 Contacts' intent and purpose with the agreement discussed in the communication and thirteen other agreements. There are a variety of reasons an attorney in settlement negotiations may not share his client's true intention and purpose. CX0709 does not qualify for the business records exception to the hearsay rule, because it is not a record of a regularly-conducted business activity created in the ordinary course of business. Nor does any other hearsay exception apply. Thus, it contains only unreliable hearsay.

**1162.** To that end, the challenged agreements prohibit only one limited kind of infringing behavior relevant to this case: "causing a Party's brand name, or 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." (CX 311 (Vision Direct Settlement) § 4(A)e; CX 9040 (Miller, Dep. at 26 ("So I believe the intent when it says "specifically searches for the other party's brand name" is they're trying to restrict or target searches where the user is searching for that party and that party's brand...I'm not just searching for contact lenses in general, I'm searching for a specific retailer ... So I think the use of 'specifically searches for the other party's brand' is meant to limit it to searches where the search is for that brand rather than contact lenses in general or comparative understanding of the industry in general")))).

**Response to Proposed Finding No. 1162:**

The proposed finding should be rejected because it is inaccurate, and also improper because it asserts a legal conclusion. (*See* CCOL 50-53 (conclusions of law that the agreements prohibit non-infringing behavior)).

The proposed finding is inaccurate because it quotes only one of the fourteen challenged agreements, which itself was subsequently modified, in support of a finding as to all of the "challenged agreements," most of which contain different language. Indeed, seven of the agreements state explicitly that they bar causing ads to appear in response to any search that

**includes** a trademark or URL. (RX0028 (AC Lens); CX0320 (Lenses for Less); CX0321 (Tram data d/b/a Replace My Contacts); CX0323 (Contact Lens King); CX0319 (Empire Vision); CX0324 (Web Eye Care); RX0408 (Standard Optical)).

The cited testimony of Mr. Miller is pure speculation, both as shown by his own testimony (“I believe;” “I think”), and because the settlement agreement he testified about (CX0311, the 2004 Vision Direct Agreement) was drafted in 2004, before he began representing 1-800 Contacts. (CCPTF ¶ 88).

**1163.** The non-use provisions were drafted to reflect the party’s trademark rights by preventing competitor advertisements from appearing when a user is looking to navigate to the 1-800 Contacts website. (CX 9040 (Miller, Dep. at 220 (“the point we raise in our trademark infringement claims and—and the point we raise with everybody we talk to is the issue is to prevent competitor ads from coming up when...[t]he type of search that is done is somebody looking specifically for 1-800 Contacts to go to their website. And that’s the context...situations where users are looking to go to the 1-800 Contacts’ website. They’re navigating towards us. Their searches are driven by their understanding of our brand. They’re not doing a comparative search. They’re not doing just a market research type of inquiry. They’re looking for us as a source. And so that was always the intent and import of all the settlement agreements.”))).

**Response to Proposed Finding No. 1163:**

The proposed finding is improper insofar as it implies the agreements actually reflect trademark rights since the scope of 1-800 Contacts’ trademark right is a legal conclusion. (*See* CCOL 50-53 (conclusions of law that the agreements prohibit non-infringing behavior)).

Notwithstanding, the proposed finding is unsupported. The only source cited is the testimony of Mr. Miller, who has no personal knowledge of the drafting of the Coastal, Vision Direct, or EZ Contacts agreements, which pre-date his time with 1-800 Contacts. (CCPTF ¶ 88).

The cited testimony also lacks foundation more generally. There is no evidence that Mr. Miller has personal knowledge of what internet users in general are thinking when they type in one type of query or another. Nor is there evidence that Mr. Miller has any expertise in this subject matter to support him offering opinion testimony. Complaint Counsel notes that 1-800 Contacts

hired no fewer than three expert witnesses to attempt to shed light on the question of “navigational intent.” Mr. Miller was not one of them.

Further, the proposition that a consumer who types in a trademark name as a search query (or as part of a search query) is “looking to navigate to the 1-800 Contacts website” is contradicted by the weight of the evidence more generally. (*See, e.g.*, Response to Proposed Finding No. 1766).

Finally, the proposition that these are “non-use” provisions is inconsistent with the actual terms of the agreement, which go substantially beyond “non-use” through the requirement of negative keywords, described in Proposed Finding No. 1165 and the response thereto. No “use” has occurred when a party has not bid on the trademark as a keyword. (*See* Complaint Counsel’s Post-Trial Reply Brief, at 19-20). Thus, on their face, the requirement of “negative” keywords goes beyond a “non-use” agreement.

**1164.** The settlements include two mechanisms to achieve that goal. First, although the specific language varies, the settlements generally prohibit “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,” and include as exhibits lists of the specific restricted trademark keywords. (E.g., CX 317 (ACLens Settlement) § 2(A)b); *see also* (CX 311 § 4(A)d.,e.; CX 310 § 3d.,e.; CX 313 § 5(A)b.; CX 315 § 4(A)b.; CX 320 § 4(A)b.; CX 319 § 2(A)b.; CX 321 § 3(A)b.; CX 322 § 3a.; CX 323 § 4(A)b.; CX 324 § 4(A)b.; CX 325 § 5(A)b.; CX 326 § 3a.).

**Response to Proposed Finding No. 1164:**

The proposed finding is improper insofar as the reference to “that goal” is a reference to proposed finding number 1163, for the reasons set forth in the Response to Proposed Finding No. 1163.

The proposed finding is misleading because it omits four of the specifically-enumerated “prohibited acts” in the cited agreement. (Complaint Counsel notes that CX0317 is not in evidence.) For example, the cited 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) (emphasis added).

**1165.** Second, the settlements require the parties to implement the listed trademark terms as negative keywords, which instruct search engines not to display ads in response to searches for those terms. (E.g., CX 313, § 5(B.) (“However, when any keyword purchase of any kind, including the purchase of generic, non-trademarked words, is made through any internet search provider, the Parties shall use the prohibited key words (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 this agreement”); Pratt, Tr. 2532-33 (“Q: And what were the elements of the settlement agreement that you laid out for Mr. Hong at that time? A: So at that time I requested that the parties would implement negative keywords – or actually that – yeah, that they would implement negative keywords, when possible, so that the other party’s advertisements would not come up in response to searches for those specific phrases”).); *see also* (CX 314-004, -011; CX 315 § 4(B); CX 320 § 4(C); CX 319 § 2(C); CX 317 § 2(C); CX 321 § 3(C); CX 322 § 3b.; CX 323 § 4(C); CX 324 § 4(C); CX 325 § 5(C); CX 326 § 3b.).

**Response to Proposed Finding No. 1165:**

Complaint Counsel does not dispute that the settlements require the parties to implement trademark terms as negative keywords. The proposed finding, however, is misleading. Seven of the agreements state explicitly that they bar causing ads to appear in response to any search that *includes* a trademark or URL. (RX0028 (AC Lens); CX0320 (Lenses for Less); CX0321 (Tram data d/b/a Replace My Contacts); CX0323 (Contact Lens King); CX0319 (Empire Vision); CX0324 (Web Eye Care); RX0408 (Standard Optical)). Thus, the proposed finding is inaccurate and misleading to imply that the obligation to use negative keywords was limited to “searches for those terms” when the obligation as written is to avoid searches that *include* those terms. This is the difference between a search consisting of “1-800 Contacts” and a search consisting of “Cheaper than 1-800 Contacts.”

In practice, 1-800 Contacts did not limit its enforcement of the agreements to the negative keyword lists written in the agreements. (*See, e.g.*, CX1058 (requesting that Vision Direct add negative keywords which do not appear in the 2009 Agreement, including “i800contacts,” “1800 contact lenses,” “1800 contacts coupons,” “1800 contacts promo code,” “1 800 contacts coupon

code,” “800 contacts coupon code,” and many others); CX0006 (1-800 Contacts alleged that AC Lens had breached its agreement with 1-800 Contacts based on the appearance of an AC Lens ad in response to a search term that was not listed in the AC Lens Agreement); *see generally* CX8006 at 175-178 (Appendix D) (Evans Expert Report) and the materials cited therein (compiling examples of 1-800 Contacts’ demands that agreement counterparties add negative keywords to their accounts)). As a result of 1-800 Contacts’ enforcement activities, as Dr. Evans explained based on his analysis of Google data and documents in the record, the settlement parties incorporated negative keywords to preclude Google from serving almost all ads on queries containing a 1-800 Contacts term. (Evans, Tr. 1411-1412; CX8006 at 059 (¶ 128) (Evans Expert Report); CX8009 at 068 (¶ 120) (Evans Rebuttal Expert Report) (explaining that 1-800 Contacts’ expert witnesses did not dispute this empirical evidence)).

**1166.** The parties modeled the language of the Prohibited Acts in the settlements after the Lanham Act. (CX 9040 (Miller, Dep. at 211-213 (“I had to explain to him ‘using’ is an important word because this settlement is about settling trademark infringement issues. ‘Use’ in commerce is part of—is the first element of trademark infringement. We wanted to keep that language to be consistent with the purpose of the agreement.”))) 1-800 Contacts stated this intention in its settlement negotiation correspondence with retailers. (RX 691 (“With respect to the term “using” in the subsequent sections, my client wants to keep that term. The Lanham Act discusses trademark “use”. We want to keep that language consistent with the statute”)).

**Response to Proposed Finding No. 1166:**

The proposed finding is unsupported and inaccurate. It cites only discussion regarding the word “use” from the Lanham Act, which does not support the general proposition that all the language in the Prohibited Acts models the Lanham Act. The Prohibited Acts also include concepts that are not found in the Lanham Act, including prohibiting the appearance of advertising when there has been no “use” of the trademark (*see* Complaint Counsel’s Post-Trial Reply Brief, at 19-20), and omit entirely the core Lanham Act concept of likelihood of confusion.

**1167.** The lists of restricted terms and negative keywords were limited to registered or common law trademarks, owned URLs, and confusingly similar variations thereof. (CX 320, § 4(F);

CX 9040 (Miller, Dep. at 89-90) (describing the amendment procedure for additional restricted terms)).

**Response to Proposed Finding No. 1167:**

The proposed finding is misleading because it omits that the list of restricted terms and required negative keywords was, in practice, much broader than the terms listed in the agreements pursuant to the enforcement practices of the parties. (*See, e.g.*, CX1058 (requesting that Vision Direct add negative keywords which do not appear in the 2009 Agreement, including “i800contacts,” “1800 contact lenses,” “1800 contacts coupons,” “1800 contacts promo code,” “1800 contacts coupon code,” “800 contacts coupon code,” and many others); CX0006 (1-800 Contacts alleged that AC Lens had breached its agreement with 1-800 Contacts based on the appearance of an AC Lens ad in response to a search term that was not listed in the AC Lens Agreement); *see generally* CX8006 at 175-178 (Appendix D) (Evans Expert Report) and the materials cited therein (compiling examples of 1-800 Contacts’ demands that agreement counterparties add negative keywords to their accounts)). The proposed finding is also misleading because the Bidding Agreements required parties to implement negative keywords to ensure that their ads would not appear in response to any search queries “including” the trademark, which necessarily prevents the appearance of advertisements in response to search queries that include generic keywords, in addition to 1-800 Contacts’ trademarks. (*See* Response to Proposed Finding No. 1165).

**1168.** During settlement negotiations, 1-800 Contacts adhered strictly to these categories of restricted keywords and refused to impose additional constraints by adding keywords beyond those categories. (CX 823 (Dec. 30, 2009 email from Mark Miller to Dan Garriott, same); RX 690 (email from Mark Miller to Empire Vision challenging extensive list of Visionworks-related entities as restricted keywords); RX 691 (email from Mark Miller to Neal Slifkin refusing to add “King” and “Kings” to the restricted keyword list for Contact Lens King, since those words were too “attenuated” to CLK’s trademark rights)).

**Response to Proposed Finding No. 1168:**

This proposed finding misconstrues the record evidence. While 1-800 Contacts may not have added additional keywords to its own “restricted” keywords list, it required that other companies do so on multiple occasions. AC Lens informed 1-800 Contacts in-house counsel Roy Montclair that it had added “800” and “express” as negative keywords in 2005 in an effort to comply with the bidding agreement. (RX0052; Clarkson, Tr. 238-240). Further, as described in the Response to Proposed Finding No. 1165, regardless of the actual negative keyword listed in the agreement, 1-800 Contacts required parties to implement the negative keywords broadly, which had the effect of precluding *any* generic keyword used in combination with a “restricted” keyword. 1-800 Contacts reciprocally applied “restricted” keywords in the same broad fashion.

**1169.** The Walgreens and Memorial Eye settlements provide the principles of non-use of the keyword in paid search advertising and implementation of negative keywords as affirmative obligations rather than prohibited acts. (CX 322 (Walgreens Settlement Agreement) § 3a., b.; CX 326 (Memorial Eye Settlement) § 3a., b.).

**Response to Proposed Finding No. 1169:**

The proposed finding is misleading to the extent it continues to propagate the term “non-use” to apply to 1-800 Contacts’ Bidding Agreements, which go significantly beyond “non-use” agreements, as described in Response to Proposed Finding No. 1163.

**1170.** However, the Walgreens and Memorial Eye agreements had the same intent and operation as the other settlement agreements that were framed in terms of “Prohibited” and Non-Prohibited acts. (CX 9040 (Miller, Dep. at 103-04 (“Q: And if you could explain, how is the phrase as used here in the Standard Optical agreement “engaging in internet search advertising that causes any website” different from “Refrain from purchasing or using any of the key terms” that was agreed to in the Walgreens? ... A: Well, I think substantively, in practice, I don’t think there’s really a difference. There’s – there’s a difference in phraseology ... I think those are two different ways of saying the same thing.”))).

**Response to Proposed Finding No. 1170:**

The proposed finding is improper as the operation of the challenged agreement is a legal conclusion. The proposed finding is also unsupported. The cited testimony should be disregarded

as improper and unhelpful because it consists exclusively of the legal opinions of Mr. Miller, or else his opinion as to what the words in the Standard Optical agreement mean. The proposition is misleading also for the reasons described in the Response to Proposed Finding No. 1169.

***B. The Settlement Agreements Carved Out Certain Activities As Non-Prohibited Acts To Preserve Lawful, Non-Deceptive Advertising***

**1171.** The settlement agreements also specified certain “non-prohibited acts,” which would be permissible even if they were otherwise captured by the Prohibited Acts section. (CX 9040 (Miller, Dep. at 60-61); Pratt, Tr. 2551; CX 315 § 4(B)).

**Response to Proposed Finding of Fact No. 1171**

This proposed finding should be rejected because it is unsupported and inaccurate.

Although the term “non-prohibited act” is in quotes in the proposed finding, it does not appear in the Bidding Agreements. In fact these are simply acts that are listed as “not include[d]” in the “Prohibited Acts,” rather than specified as “non-prohibited” acts. (CX0315 (Lensfast Agreement) § 4(B)). Moreover, there is no support for the suggestion the non-prohibited acts superseded the prohibited acts described in the Bidding Agreements. The construction of, “Prohibited Acts shall not include...” followed by “However, when any keyword purchase of any kind is made through any internet search provider, the Parties shall use the prohibited key words (as listed in Exhibit 2) as negative keywords...” should clearly be interpreted to mean that while certain acts are not totally prohibited, 1-800 Contacts’ rivals were still obligated to implement negative keywords, so the ability to conduct the “non-prohibited acts” did not give the settlement parties the right to display search advertising. (CX0315 (Agreement between 1-800 Contacts and Lensfast, Dec. 18, 2009) § 4(B)). Neither Mr. Miller, nor Mr. Pratt, nor any other witness testified that settlement parties were told about the interpretation that Mr. Miller and Mr. Pratt claim.

**1172.** First, the parties reserve the right to advertise by purchasing generic terms like “contacts” and “contact lenses”: each agreement expressly lists advertising in response to generic terms as a “non-prohibited act.” (CX 317 § 2(B); CX 311 § 4(B); CX 310 § 3d.,e.; CX 313 § 5(B); CX 315

§ 4(B); CX 320 § 4(B); CX 319 § 2(B); CX 321 § 3(B); CX 322 § 3; CX 323 § 4(B); CX 324 § 3(B); CX 325 § 5(B); CX 326 § 3; CX 9040 (Miller Dep. at 60-61)).

**Response to Proposed Finding of Fact No. 1172**

This proposed finding should be rejected because it is inaccurate. The Bidding Agreements cited do not contain the phrase “non-prohibited acts.” In each of the cited agreements in this proposed finding, immediately following the proscription that “Prohibited Acts shall not include” the use of generic keywords, the agreement contains an abridgement of that right, e.g.: “However, when any keyword purchase of any kind if made through any internet search provider, the Parties shall use the prohibited key words (as listed in Exhibit 2) as negative keywords to the extent practicable...” (CX0315 (Lensfast Agreement) § 4(B)). “[T]o the extent practicable” is defined in the footnote by an example of one particular very long trademark term which “cannot be added as a negative keyword in Google’s AdWords program due to its length.” (CX0315 at 004 (Lensfast Agreement); *see also* CX 317, CX 311, CX 310, CX 313, CX 315, CX 320, CX 319, CX 321, CX 322, CX 323, CX324, CX 325, and CX 326 § 3 (same)). Thus, while the Bidding Agreements permitted parties to bid on generic keywords like “contacts” and “contact lenses,” the Bidding Agreements also imposed an obligation to limit that advertising by implementing negative keywords.

**1173.** For example, the Memorial Eye settlement agreement provides that “Nothing in this Section shall be construed to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyewear, frames, or other, similar generic terms as long as the appropriate negative keywords are implemented.” (CX 326, § 3).

**Response to Proposed Finding of Fact No. 1173**

Complaint Counsel has no specific response other than to state that it is clear from this proposed finding that the claim in Proposed Finding No. 1172, that parties reserve the right to advertise by purchasing generic terms, is incomplete. As is clear in this proposed finding, while parties may advertise by purchasing generic terms like “contacts” and “contact lenses” under the

agreements, doing so triggers an obligation to limit that advertising by implementing negative keywords.

**1174.** Ten of the thirteen settlement agreements also contain express protections for comparative advertising: “Prohibited Acts shall not include (i) use of the other Party’s Trademarks on the internet in a manner that would not constitute an infringing use in a non-internet context, e.g., the use on the internet of comparative advertising, parodies, and similar non-infringing, uses.” (CX 311 § 4(B); CX 313 § 5(B); CX 315 § 4(B); CX 320 § 4(B); CX 319 § 2(B); CX 317 § 2(B); CX 321 § 3(B); CX 323 § 4(B); CX 324 § 3(B); CX 325 § 5(C); Pratt, Tr. 2551)).

**Response to Proposed Finding of Fact No. 1174**

This proposed finding should be rejected, because the manner in which 1-800 Contacts interpreted “comparative advertising” is inconsistent with the ordinary English language understanding of that term, and thus the supposed protections for “comparative advertising” are meaningless. Mr. Coon testified that the “comparative advertising” provisions were intended to allow advertisements to be triggered by “comparative searches,” such as “cheaper than 1-800 contacts.” (Coon, Tr. 2739-2741). In contrast, he testified any advertisement triggered by a search for a non-comparative query such as “1-800 contacts” would be prohibited by the agreement, regardless of the text of the advertisement (that is, regardless of whether the advertisement made a comparative claim, such as “we have lower prices than 1-800 contacts.”). (Coon, Tr. 2780-2791). This is the only evidence of what the Bidding Agreements meant by “comparative advertising,” as there is no record evidence that this provision was ever invoked to allow the display of any search advertising.

**1175.** The comparative advertising provision came about as a result of initial settlement negotiations between Vision Direct and 1-800 Contacts in 2004. (RX 250 (“We should both retain the right to participate in lawful comparative advertising, parodies, etc.”); CX 9040 (Miller, Dep. at 27-28)).

**Response to Proposed Finding of Fact No. 1175**

Complaint Counsel has no specific response to the proposed finding, other than to note that Mr. Miller’s testimony provides no support for it, as he testified that he was not part of the

negotiations with Vision Direct in 2004, and in fact started with 1-800 Contacts in 2009.

(CX9040 (Miller, Dep. at 44, 233, 252)).

**1176.** When Vision Direct proposed the comparative advertising clause, Jonathan Coon agreed to the language because 1-800 Contacts had no objection to legitimate comparative advertising, parodies, or other lawful uses of the trademark in advertising. (Coon, Tr. 2742-43 (“Q: And you personally didn’t have any problem with it as well? A: No. I mean, I vaguely remember Joe asking me about this and I was like that’s fine, if somebody wants to do a parody or something like that and it’s clear they’re comparing themselves and they’re not pretending to be us, then that’s – then that’s different”); RX 250 (May 24, 2004 email exchange between Joe Zeidner, Alesia Pinney, and Jonathan Coon)).

**Response to Proposed Finding of Fact No. 1176**

This proposed finding is contradicted by the weight of the evidence, as well as Mr. Coon’s testimony that the purpose of the Bidding Agreement with Vision Direct was to prevent Vision Direct from displaying any advertisements triggered by searches for 1-800 Contacts’ trademark terms, regardless of the text of the advertisements:

Q. . . . My question is, when you said "for that not to happen," you meant no search advertisements could be displayed regardless of the text of the ad; right?

A. We couldn't come up with another way to fix it other than just not have it happen.

Q. And so the answer to my question is yes.

A. Yeah. You haven't and nobody else has come up with examples that would eliminate all confusion other than not running ads when somebody is just trying to navigate to our trademark.

Q. And 1-800 Contacts' agreement with Vision Direct was successful in accomplishing that goal; right?

A. I believe it was.

Q. And it was 1-800 Contacts' goal when negotiating with Vision Direct to accomplish this goal permanently; right?

A. Yeah. We wanted to fix it.

Coon, Tr. 2789-2790.

In fact, Mr. Coon testified that the concern behind the Bidding Agreements was that competitors would free-ride on 1-800 Contacts' television advertising by "stealing" customers that it sent to the search engine to look for them. (CX9035 (Coon, Dep. at 24-25) ("If they type in '1-800 Contacts,' they're just trying to go to 1-800 Contacts, and we don't think companies should run ads that redirect people who are simply just trying to go to 1-800 Contacts."); CX (Coon, IHT at 177-182)). Mr. Coon even drew a distinction between the two concerns that led to the bidding agreements: the first was "pretending to be 1-800 Contacts" and the second was "run[ing] ads that redirect people" who had typed '1-800 Contacts' into the URL bar. (CX9035 (Coon, Dep. at 24-25)). Mr. Coon also made clear that the "redirect" issue was the purpose of the agreements. (CX9035 (Coon, Dep. at 62-63)).

**1177.** 1-800 Contacts was not concerned about rivals presenting advertisements in response to comparative searches such as "cheaper than 1-800 Contacts" because such comparative searches were clearly intended by the consumer to be for price comparison or other comparative shopping purposes and 1-800 Contacts didn't want to preclude that. CX 9031 (Schmidt, Dep. at 111); Coon, Tr. 2741 ("Q: If you had seen others' ads appearing in response to a comparative search containing 1-800 Contacts' trademark name, would you have had a problem with it? A: No. Q: Why not? A: Because it's not somebody trying to navigate to there, it's somebody looking for alternatives to 1-800 Contacts.")).

### **Response to Proposed Finding of Fact No. 1177**

This proposed finding should be rejected because it is contradicted by the weight of the evidence. 1-800 Contacts clearly was concerned about rivals presenting advertisements in response to comparative searches such as "cheaper than 1-800 Contacts" because its agreements clearly prohibited such advertisements. The plain terms of the agreement dictate that settling parties may not place advertisements in response to any searches that include 1-800 Contacts' trademark terms: "each Party . . . agree[s] 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 results of any internet search that includes the other Party's trademark keywords or URLs.*" (CX0324 at 003 (Web Eye Care agreement) (emphasis added)).

**1178.** 1-800 Contacts marketing personnel did not complain about the appearance of rivals' advertisements being presented in response to comparative searches containing the 1-800 Contacts trademark. (CX 9031 (Schmidt, Dep. at 112-13); Coon, Tr. 2743).

### **Response to Proposed Finding of Fact No. 1178**

This proposed finding is unsupported by the cited evidence and should be rejected. First, although there is no evidence of 1-800 Contacts marketing personnel complaining about the appearance of rivals' advertisements being presented in response to comparative searches containing the 1-800 Contacts trademark, there is evidence that other searches, including "1-800 Contacts coupon" were monitored and 1-800 Contacts marketing personnel complained about those searches. (*See, e.g.*, CX1509). The method of blocking ads from appearing on these types of searches is the same as the method used to block ads from appearing on comparative searches: implementing the negative keywords in broad or phrase match rather than exact match. (Juda, Tr. 1135-1136; CX1155 (email dated October 30, 2014 from Natalia Bohm of Google to Kevin Hutchings, Brady Roundy and Adrian Barajas of 1-800 Contacts describing the various methods of implementing negative keywords)).

In sending cease and desist letters, 1-800 Contacts' lawyers alleged trademark violations by one set of words, but remedies with a different set which, only if entered as phrase match, would prevent competitive ads from appearing. For example, in a letter dated 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 1-800 Contacts trademark rights by delivering ads that were triggered by queries for keywords which did not appear on the list of keywords he demanded be added as negative keywords in the final agreement. (CX0448 (Letter from Mark Miller to

Jacque Matte of Contact Lens King dated February 18, 2010 at 002; ); CX0323 at 010) (Contact Lens King agreement))). The only way to prevent the alleged infringing words contained in Mr. Miller's cease and desist letter from triggering an ad would be if the ultimate set of negative keywords were entered as broad match or phrase match; exact match would not prevent those words from appearing.

Lastly, 1-800 Contacts lawyers enforced agreements as if they were in phrase match. On May 30, 2014, Mark Miller wrote to Lensfast because 1-800 Contacts saw that d ads appeared for the term "**1800 contact lenses**," and required Lensfast to modify the agreement. But it only required Lensfast to add the keyword "**1800 contact**," and not the exact match "1800 contact lenses." As a phrase match "1800 contact" will prevent the ad from appearing for "1800 contact lenses," but not as an exact match. (CX0453 (letter from Mark Miller to Randall Weigner dated May 30, 2014). Similarly, Mr. Miller wrote to AC Lens, also on May 30, 2014, alleging breach of §2 (of the agreement which encompasses the bidding and negative keyword provisions) because AC Lens ads were "triggered by searches for the term 'www 800contacts'" (CX0006, CX317 (AC Lens bidding agreement, 1-2)). However, "www 800contacts" is not a listed as an enforceable negative keyword, while "800contacts" is listed (CX317 (AC Lens bidding agreement, 8). The only way to enforce the agreement in this way, without modification as was proposed on the same day to Lensfast, is if the negative keyword "800 contacts" is expected to be entered as a phrase match.

**1179.** 1-800 Contacts did not monitor advertisements appearing in response to comparative searches. (CX 9031 (Schmidt, Dep. at 113)).

**Response to Proposed Finding of Fact No. 1179**

This proposed finding is misleading for the same reasons explained in the Response to Proposed Finding No. 1178. Mr. Galan, who was responsible for trademark monitoring during his

tenure at 1-800 Contacts from early 2012 to early 2014, routinely added 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)). With this many terms being monitored, the only practical way for settlement parties to comply was to enter their negative keywords in broad or phrase match rather than exact match. (Juda, Tr. 1135-1136; CX1155 (email dated October 30, 2014 from Natalia Bohm of Google to Kevin Hutchings, Brady Roundy and Adrian Barajas of 1-800 Contacts describing the various methods of implementing negative keywords)).

**1180.** The carve-outs that expressly permit the selection of generic terms and comparative advertising make these agreements narrow relative to other settlements, default judgments, and consent decrees relating to paid search advertising. (Hogan, Tr. 3278-79 (other consent judgments and settlements tend to prohibit more conduct than the 1-800 Contacts settlement agreements and tend not to recognize permitted lawful forms of advertising); RX 732 (Hogan Rep.) ¶ 155).

**Response to Proposed Finding of Fact No. 1180**

Contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. This proposed finding lacks foundation and is inaccurate, because the Bidding Agreements did not have any “carve-outs” for comparative advertising. *See* Response to Proposed Findings No. 1174 and 1176. Nor did the Bidding Agreements have any “carve-outs” that permitted “the selection of generic terms” – 1-800 Contacts’ rivals were required to implement negative keywords to prevent the display of advertisements triggered by bids on generic terms.

Mr. Hogan’s testimony and report provide no support for this proposed finding, as Mr. Hogan’s expert testimony was based solely on publicly available materials, and he expressly disclaimed reliance on any settlement agreements except the publicly available settlement agreements made available to Prof. Tushnet and the Court. CX9047 (Hogan, Dep. at 18, 24, 31-

33, 176-177). And he cited no settlement agreements in keyword advertising cases that are more restrictive than the Bidding Agreements. In fact, he cited only one case to support this contention. RX 732 (Hogan Rep.) ¶155 (providing only one case—which was inapplicable and distinguished from the facts here because, among other reasons, the comparative advertising provision that it contained explained how the trademark could be used in the content of an ad, where the Bidding Agreements here do not permit such uses—as the only example he could provide in order to substantiate the claim that 1-800 Contacts’ bidding agreements at issue here are akin to “other consent judgements”). In fact, Courts have not granted remedies as broad as those used by 1-800 Contacts in its bidding agreements for the same behavior, bidding on keywords with non-confusing ad text. (CX8014 (Tushnet Rebuttal Report § III.D)).

**1181.** Complaint Counsel argue that 1-800 Contacts “assigned no meaning to the ‘carveout’” for comparative advertising. Pre-Trial Brief at 17 n. 55. Complaint Counsel’s expert witness also stated that “the key to the dispute is whether you can engage in comparative advertising when someone searches for “1-800 Contacts.”” (CX 9044 (Tushnet, Dep. at 44)).

**Response to Proposed Finding of Fact No. 1181**

Complaint Counsel has no specific response.

**1182.** Comparative advertisements “can be a non-confusing manner in which two brands are presented together, with both brands presented properly within the same advertisement.” (Goodstein, Tr. 2471; CX 9031 (Schmidt, Dep. at 237 (Comparative advertising online occurs when “you make a reference to a competitor on a given feature, price, or characteristic of the business and you invite consumers or prospective customers to compare the business on that axis.”), 239-40 (Comparative advertising must be “explicit” by specifically drawing attention to a comparison between the characteristics of two distinct brands or products))).

**Response to Proposed Finding of Fact No. 1182**

This proposed finding should be rejected, as it has nothing to do with the “comparative advertising” language in the Bidding Agreements, which implemented 1-800 Contacts’ idiosyncratic interpretation of “comparative advertising.” *See* Response to Proposed Findings no. 1174 and 1176. Neither Mr. Goodstein nor Mr. Schmidt has any foundation to testify about the

meaning of the term “comparative advertising” in the Bidding Agreements. Moreover, Mr. Goodstein and Mr. Schmidt are not lawyers and not competent to testify as to the legal definition of comparative advertising. (RX0736 (Goodstein Expert Report §I); CX9031 (Schmidt, Dep. at 7-9)). Further, Mr. Schmidt is not an expert on any topics related to comparative advertising, let alone the specific components necessary for such advertising. Because Respondent is relying on him here as an expert, which he is not, the proposed finding should be stricken.

**1183.** However, the sponsored links that appeared in response to a trademark searches for “1-800 Contacts” in the 1-800 Contacts litigations did not constitute comparative advertising. (Goodstein, Tr. 2470-71 (“It is my opinion that those are not comparative advertising.”); Pratt, Tr. 2636-37 (stating that a rival advertisement does not fall properly within the comparative advertising exception to certain settlement agreements); CX 9031 (Schmidt, Dep. at 239-40); Hogan, Tr. 3469 (“search engine advertising is not a forum that lends itself to comparative advertising in the traditional sense” comparing two products such as Pepsi and Coke explicitly in the same advertisement, since “[y]ou don’t have room in search engine advertising” to do it properly)).

**Response to Proposed Finding of Fact No. 1183**

Complaint Counsel has no specific response.

**1184.** The Federal Trade Commission defines comparative advertising as an “advertisement that compares alternative brands on objectively measurable attributes or price and identifies the alternative brand by name, illustration, or other distinctive information.” (CX 9044 (Tushnet, Dep. at 46); 16 C.F.R. § 14.15 n. 1).

**Response to Proposed Finding of Fact No. 1184**

Complaint Counsel has no specific response, except to note that the Bidding Agreements did not adopt the Federal Trade Commission’s definition of comparative advertising. *See* Response to Proposed Findings No. 1174 and 1176.

**1185.** Complaint Counsel’s expert witness takes “exception” to elements of the Federal Trade Commission’s definition and believes instead that the comparative aspect can “come from context.” (CX 9044 (Tushnet, Dep. at 47)).

**Response to Proposed Finding of Fact No. 1185**

This proposed finding mischaracterizes Professor Tushnet’s testimony. Asked how she was using the phrase “comparative advertising” in a discussion, Professor Tushnet said it was “very

similar” to the way the Federal Trade Commission had defined the term, but that she would add “that a lot of this information can come from context.” (CX 9044 (Tushnet, Dep. at 46-47)).

Professor Tushnet went on to explain that placing generic cola next to Coca-Cola on the shelf “makes a representation about the comparability” of the two products. (CX 9044 (Tushnet, Dep. at 46-47)).

***C. Negative Keywords Are A Necessary And Administrable Means Of Achieving The Purpose Of The Settlement Agreements***

**1186.** Negative keywords are commonly used industry tools that optimize return on paid search campaigns. (RX 734 (Hogan Rep.) ¶ 158; RX 483; Hamilton, Tr. 472 (Q: “You would agree that as a general matter, implementation of negative keywords can be beneficial to a company like Walgreens? A: Yes. Absolutely.”)).

**Response to Proposed Finding No. 1186:**

This proposed finding lacks foundation to the extent Mr. Hogan has expressed an opinion on the use of negative keywords as a business tool. Mr. Hogan cites to no reliable evidence in his report in order to render such a categorical opinion that would substantiate this proposed finding of fact. In fact, despite referencing negative keywords in his report, Mr. Hogan does not have a fundamental understanding of how negative keywords or various match types work, CX9047 (Hogan, Dep. at 107-110), so he could not possibly be qualified to testify regarding their “common[] use[]” as industry tools for “optimiz[ing]” paid search campaigns. Further, this proposed finding mischaracterizes Mr. Hamilton’s testimony. Mr. Hamilton testified that negative keywords would help Walgreens, but did not testify about negative keywords as a general matter in the industry as suggested by the proposed finding. (Hamilton, Tr. 472).

Finally, RX483 does not support 1-800 Contacts’ proposed finding. RX483, a Google AdWords Help web page, explains that negative keywords prevent ads from appearing when the advertiser does not sell the *product* for which the consumer is searching. For example, “Let’s say you’re an optometrist who sells glasses. You’d want to prevent your ad from showing to someone

searching for or visiting webpages that contain terms like “wine glasses” and “drinking glasses,” since that person isn’t likely to buy a pair of your eyeglasses.” (RX 483 at 1). Google suggests that “negative keywords are an important part of every campaign because they help make sure your ads appear only to people looking *for what you offer*.” (CX1166 (emphasis added)). RX483 does not suggest, encourage, or advise advertisers to implement negative keywords so as not to appear in response to search queries for an advertiser’s competitor. To the contrary, Google revised its trademark policy specifically because it thought such advertising was beneficial. *See* CCPTB at 20. Indeed, RX483 cautions advertisers to choose negative keywords “carefully” to avoid narrowing down the universe of an advertiser’s potential customers. (RX483-002).

**1187.** By using negative keywords for another company’s trademark along with generic keyword purchases, advertisers can increase their return on investment by ensuring that their sponsored links are displayed to consumers searching for the product offered by the advertiser and not another company’s product. (RX 734 (Hogan Rep.) ¶ 158).

**Response to Proposed Finding No. 1187**

Complaint Counsel objects to this proposed finding of fact, as it relies on testimony of Mr. Hogan who has no foundation to testify regarding how advertisers “can increase their return on investment” for the reasons set forth in Complaint Counsel’s Response to RPF 1186. The more reliable evidence with respect to the purpose of negative keywords is offered in RX483 and CX1166, where Google explains that negative keywords are meant to help consumers find the products they are looking for, and does not say the purpose is to prevent consumers from seeing ads from competitors who may offer the same products.

**1188.** The negative keyword term is necessary to carry out the purpose of the agreements because search engines frequently “broad match” the keyword that a retailer purchases to related, but not identical search queries. (RX 734 (Hogan Rep.) ¶ 164 (“This is because settlements are designed to stop the conduct that gave rise to the dispute in the first place. In this case, the conduct at issue is the appearance of ads for a competitor, when Internet users search for a well-known trademark term like 1-800 Contacts.”); CX 9040 (Miller, Dep. at 28)).

**Response to Proposed Finding No. 1188:**

Complaint Counsel objects to this proposed finding of fact as it is vague as to the “purpose of the agreements.” If the purpose of the agreements is to suppress competition from lower-price online competitors, and to prevent consumers from seeing truthful, non-misleading advertising, then Complaint Counsel agrees that the negative keywords are an effective means of fulfilling 1-800 Contacts’ ”purpose.” However, if the purpose of the agreement is to prevent trademark infringement, then Complaint Counsel objects because the use of negative keywords expressly goes beyond the protection of any “trademark right,” as they prevent the appearance of an advertisement even when there has been no “use” of the keyword. *See* CC Post-Trial Reply Br. at 18. Further, there are numerous less restrictive alternatives that would achieve the “purpose” of preventing trademark infringement.

**1189.** It is impossible to know just from looking at the search engine results page what match type the advertiser selected that served as the basis for the appearance of a particular sponsored link on a search engine results page. (CX 9031 (Schmidt, Dep. at 46)). There’s no difference from the perspective of the search engine user between an advertisement appearing because the advertiser selects a generic term but fails to implement a negative keyword for the trademarked query, or whether the advertiser selected the trademark itself as a keyword. (CX 9021 (Pratt, Dep. at 188-89)).

#### **Response to Proposed Finding No. 1189**

Complaint Counsel objects to this proposed finding as it relies on testimony of Mr. Schmidt and Mr. Pratt, both of whom are unqualified to provide any testimony about whether its possible to determine the match type the advertiser selected from a search engine results page, and anything from the perspective of a search engine user. Indeed, respondent twice objected to questions posed to Mr. Pratt related to his understanding of match type on the basis that it would require Mr. Pratt to render an opinion for which he is not qualified and about which he would need to speculate. (CX 9021 (Pratt, Dep. at 188-89)).

Further, Complaint Counsel objects for the reasons described in Complaint Counsel's Response to RPF 1188.

**1190.** Thus, absent the use of negative keywords, a retailer that instructed a search engine to display ads for any queries that are a broad match for the keyword "contacts" might cause its ads to be displayed in response to a search for 1-800 Contacts' trademark. (CX 9033 (Mohan, Dep. at 185-187 (negative keywords are the "only" way to prevent an ad from showing up when the query includes a generic term)); CX 9040 (Miller, Dep. at 28, 66); CX 1787 (Oct. 12, 2007 letter to Vision Direct describing mutual implementation of negative keywords for the other party's trademark terms as the "longstanding course of conduct" under the agreement necessary to ensure compliance); Clarkson, Tr. 237-40).

**Response to Proposed Finding No. 1190:**

Complaint Counsel objects for the reasons described in Complaint Counsel's Response to RPF 1188. Further, this proposed finding is misleading to the extent it implies that the purpose of the negative keywords provisions in the settlement agreements is to prevent ads from being displayed in response to a search "for 1-800 Contacts; trademark." In fact, the negative keywords provisions blocked ads from appearing in response to queries that *included* "1-800 Contacts" as part of the query, a vastly broader category of query than implied in this proposed finding. See CC Post-Trial Reply Br. at 23-24.

**1191.** Negative keywords are therefore an "easy-to-administer solution" to disputes between advertisers over the use of trademarks as keywords. (Hogan, Tr. 3304-05 ("when you're talking about a dispute between two parties, you're talking about parties where there is adversity and a lack of trust. It is not a recipe for alternative mechanisms to allow each side to confirm what keywords the other side is or is not bidding on, so by having an easy-to-administer solution, like a negative keyword, it makes it easier to settle these cases and eliminate the instances of advertising that lead to future disputes."))).

**Response to Proposed Finding No. 1191:**

Complaint Counsel objects to this proposed findings because it continues to mischaracterize the implementation of "negative keywords" as relating to the "use" of keywords. As described in Complaint Counsel's Response to RPF 1188, negative keywords go significantly

beyond “non-use” because they restrict advertisements from appearing when there has categorically been *no* use – and no infringement – of the holders’ trademark.

Further, this proposed finding is contradicted by the weight of the evidence. Complying with the negative keyword provisions was not “easy to administer” for many of the parties to the bidding agreements. Numerous emails passed back and forth between the parties and 1-800 Contacts in attempts to comply with the negative keyword provisions. (*E.g.*, CX1107; CX007; CX0260; CX0751; CX0481; CX1177; CX0816; CX0453; CX0800).

Indeed, this proposed finding is contradicted by Respondent’s contradictory suggestion that the negative keywords need only have been implemented in “exact” match. *See* 1-800 CCPTB at 22-23. If this were the case, settling parties’ ads could have been displayed in response to numerous search queries “including” 1-800 Contacts’ trademark, which not only would have been in direct contravention of the plain language of the agreements, but would have also made the agreements quite tricky to administer. (1-800 Contacts would not know if the party was in violation of the Bidding Agreement or not because it would not know why the party’s ad was appearing on the SERP, as described above.)

**1192.** In October 2004, several months after their settlement, Vision Direct contacted Joe Zeidner, counsel for 1-800 Contacts, regarding the appearance of 1-800 Contacts’ paid advertisements in response to the term “vision direct.” (CX 9031 (Schmidt, Dep. at 44-46); RX 258).

**Response to Proposed Finding No. 1192:**

Complaint Counsel objects to this proposed finding of fact to the extent it relies on Mr. Schmidt’s testimony as the testimony regarding the document. Any portions of the document involving Mr. Schmidt have been redacted under claims of privilege, and therefore could not be the subject of further examination at his deposition or trial on this issue. (CX9031 (Schmidt, Dep. at 44-46); RX 258).

**1193.** 1-800 Contacts responded that it had investigated the issue and concluded that while 1-800 Contacts did not purchase Vision Direct as a keyword, a 1-800 Contacts affiliate was “buying the keyword ‘vision’ and not adding the negative keyword ‘direct’ on Google.” (RX 258).

**Response to Proposed Finding No. 1193**

This proposed finding is inaccurate and completely misstates the evidence cited. RX258 does not show a response from 1-800 Contacts to Vision Direct. Instead, it shows the communications of two Vision Direct employees: Eric Duerr and Alesia Pinney. (CX9031 (Schmidt, Dep. at 44); RX258 at 0001-0002). Mr. Duerr of Vision Direct describes to Ms. Pinney of Vision Direct two potential ways that advertisements for 1-800 Contacts may have been appearing in response to a search for “Vision Direct.” (RX258). Ms. Pinney then forwarded Mr. Duerr’s email to Joe Zeidner of 1-800 Contacts, asking him to “handle” it. (RX258 at 0001). The rest of the communications in RX258 are internal to 1-800 Contacts and redacted as privileged. (RX258 at 0001).

**1194.** Vision Direct further responded that it already implemented negative keywords designed to avoid its ads appearing based on its bids for “contacts” and suggested that 1-800 Contacts do the same for “vision”; 1-800 Contacts agreed. (CX 9031 (Schmidt, Dep. at 47); CX 938).

**Response to Proposed Finding No. 1194:**

This proposed finding misstates the evidence cited. Vision Direct’s response was that it already asked its *affiliates* to implement negative keywords, not that Vision Direct itself had already implemented negative keywords. (CX938). Vision Direct already had the responsibility to police affiliate behavior under the 2004 bidding agreement with 1-800 Contacts. (CX0311 at 003).

**1195.** 1-800 Contacts agreed to take the extra step of requiring its affiliates to use a negative keyword for Vision Direct keywords if Vision Direct would continue to do the same for 1-800 Contacts keywords. (CX 9031 (Schmidt, Dep. at 51)).

**Response to Proposed Finding No. 1195:**

Complaint Counsel objects to this proposed finding of fact as lacking foundation and misstating and misrepresenting the testimony. Mr. Schmidt was asked at his deposition if words

printed on a page were read correctly, and did not read or testify about what 1-800 Contacts would agree to do relative to an agreement with Vision Direct. (CX9031 (Schmidt, Dep. at 50-52)).

**1196.** In January of 2008, Vision Direct told 1-800 Contacts that it would no longer implement negative keywords for 1-800 Contacts' trademarked terms. (CX 141-002).

**Response to Proposed Finding No. 1196:**

Complaint Counsel has no specific response.

**1197.** In December of 2007, 1-800 Contacts sued Vision Direct for breach of the 2004 Settlement Agreement after Vision Direct indicated it would no longer implement negative keywords. (CX 1062-009). The case was ultimately litigated in United States District Court for the Southern District of New York. (Pratt, Tr. 2640).

**Response to Proposed Finding No. 1197:**

Complaint Counsel objects to this proposed finding to the extent that it misleadingly suggests the case was "ultimately litigated" and decided by the United States District Court for the Southern District of New York. 1-800 Contacts and Vision Direct settled the litigation, as described below in Complaint Counsel's Response to Proposed Finding No. 1199.

**1198.** In 2009, Judge George B. Daniels issued an order of permanent injunction in *1-800 Contacts, Inc. v. Vision Direct, Inc.*, Case No. 08-cv-1949, which required Vision Direct to implement negative keywords for 1-800 Contacts' trademark terms. (CX 144; CX 314).

**Response to Proposed Finding No. 1198:**

Complaint Counsel objects to this proposed finding of fact as it misstates the evidence. The order in question was a consent agreement stipulated to by the parties, and not determined by the court. (CX314).

**1199.** Mr. Mark Miller, who drafted the majority of the settlement agreements at issue in this matter, testified that following 1-800 Contacts' experience with Vision Direct, each subsequent settlement agreement included a provision requiring the use of negative keywords. (CX 9040 (Miller, Dep. at 28, 66)).

**Response to Proposed Finding No. 1199:**

This proposed finding is misleading to the extent that it implies the negative keyword provisions of the bidding agreements were suggested or advocated by Vision Direct. In fact, Vision Direct advocated for the removal of the negative keyword provisions. Vision Direct counsel Scott Sher wrote, “Vision Direct continue to have serious concerns regarding the enforceability of the Agreement, particularly as it relates to the implementation of negative key words. ... Vision Direct continues to believe that any agreement between the parties with regard to the implementation of negative key words creates an unacceptable risk of violating Section 1 of the Sherman Act, and as such, represents a serious antitrust issue.” (CX0142-003).

**1200.** It is not viable to monitor another company’s AdWords accounts because Google does not allow advertisers access to others’ AdWords accounts, among other reasons. To this point, the use of negative keywords is the most efficient and effective enforcement mechanism for the trademark settlement agreement between 1-800 Contacts and Vision Direct. (CX 9031 (Schmidt, Dep. at 48 (“you would literally have to have people monitoring a large set of search terms in every state because you have the ability to geotarget the ads”)); Hogan, Tr. 3304-05 (“when you’re talking about a dispute between two parties, you’re talking about parties where there is adversity and a lack of trust. It is not a recipe for alternative mechanisms to allow each side to confirm what keywords the other side is or is not bidding on, so by having an easy-to-administer solution, like a negative keyword, it makes it easier to settle these cases and eliminate the instances of advertising that lead to future disputes.”)).

**Response to Proposed Finding No. 1200:**

Complaint Counsel objects to this proposed finding of fact as it lacks foundation. Mr. Schmidt has no basis to assert that it is impossible to monitor an account. Mr. Hogan’s testimony also lacks foundation, as he (and Respondent’s counsel) expressly disclaimed any knowledge regarding how the agreements could “technically” be implemented. (Hogan, Tr. 3464-3465 (objecting to Complaint Counsel’s question, and stating that how agreements could be implemented “is not an area of expertise on which Mr. Hogan has been proffered as an expert or on which he has opined in either his direct testimony or report”) (Mr. Stone)).

Complaint Counsel further objects to this proposed finding for the reasons described in Complaint Counsel’s Response to Proposed Finding No. 1199.

**1201.** 1-800 Contacts stressed the common use of negative keywords to address these circumstances in trademark disputes in its correspondence with other parties. (RX 926-0002 (noting the incorporation of negative keywords ordered in other cases and that “an agreement to incorporate negative keywords is the most effective and readily confirmable method for compromise.”)).

**Response to Proposed Finding No. 1201:**

This proposed finding of fact is unreliable hearsay, contradicted by the weight of the evidence, and an improper attempt to present a conclusion of law as a finding of fact. RX926-0002 consists of correspondence in relation to settlement negotiations, and could otherwise not be used as evidence in that matter pursuant to the dictates of Federal Rules of Evidence 408. Here it cannot be used for the truth of the matter asserted, and is hearsay.

In fact, negative keywords are not commonly used to address these circumstances in trademark disputes. (Hogan, Tr. 3486 (Identifying three consent judgments and one default judgment in which negative keywords had been ordered); CX8014 at 035 (¶ 75) (Tushnet Rebuttal Expert Report) (“There is no evidence that the remedies Mr. Hogan defends are “common” for *any* group of defendants. Thousands of trademark suits are filed and settled every year; Mr. Hogan identifies only a handful.”)).

To the extent the finding of fact is attempting to present a conclusion of law, that negative keywords had been “ordered in other cases” like these, it is improper and inaccurate. Complaint Counsel has addressed this point in the appropriate place, the post-trial brief (CCPTB § IV.B.5), but will address it again here. The Bidding Agreements restrained competition well beyond what any court has ordered in similar circumstances. No court has ordered reciprocal agreements. CX9047 (Hogan Dep., at 197-198). No court has ordered any relief against parties that were not bidding on trademarks as keywords. (Hogan, Tr. 3476, 3485; CX9047 (Hogan, Dep. at 125-126, 166, 168-170) (discussing the only two cases that have addressed the issue of whether bidding on generic terms can result in liability; and noting that both cases find that bidding on generic

keywords is *not* “use” of a trademark, and *cannot* result in liability). And no defendant – outside of three consent judgments (*Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (M.D. Fla. Mar. 16, 2010); *Probar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (M.D. Fla. Oct. 29, 2014), *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 807CV1753T26MAP, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008)) and one default judgment (*Transamerica Corp. v. Moniker Online Servs., LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010)) – has ever been ordered to implement negative keywords in any circumstances, let alone similar circumstances. (Hogan, Tr. 3486). Note that three of those four cases – *Probar*, *Orion Bancorp*, and *Transamerica Corp.*, did not involve any allegation relating to keyword bidding). Indeed, in the only context in which a court expressly considered whether a defendant should be ordered to implement negative keywords, such relief was expressly rejected by the court. (*See Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1302745 (D. Ariz. May 2, 2007), at \*18; *see also Lens.com*, 755 F. Supp. 2d at 1174 (“It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder’s mark in any way, even if that competitor’s advertisement appeared when a *consumer* entered a trademarked *search term.*”) (emphasis in original)).

**1202.** 1-800 Contacts also emphasized in correspondence with settling parties that the form of settlement agreement that is used, including the negative keyword requirement, had the advantages of being administrable, consistent, and helpful in avoiding future disputes. (RX 926 (“We have found that the incorporation of negative keywords eliminates the display of competing advertisements in response to searches for trademarked terms. If incorporated, the desired result is always achieved and compliance is readily confirmed by a simple search...it has been our experience that an agreement to incorporate negative keywords is the most effective and readily confirmable method for compromise.”); RX 64 (explaining in a Feb. 16, 2010 email from Mark Miller to Matthew Jenkins, counsel for Lenses for Less, that 1-800 Contacts “need[s] a level of consistency in the agreements we reach” and that the settlement proposed has proven administrable in the past and reflects the “product of significant prior efforts and negotiations with many other parties”); CX 799 (In referring to a proposed settlement with Contact Lens King, Mark Miller writes, “This agreement has proven very effective at facilitating fair competition between the parties and quick resolution of future disputes without significant attorney involvement.”); CX 741 (explaining to Arlington Contact Lens Center in a Mar. 2, 2010 email that

1-800 Contacts will not agree to further changes to the agreement because the “standard agreement we sent is the product of significant negotiation and study on these matters in the past.”).

**Response to Proposed Finding No. 1202:**

Complaint Counsel objects to this proposed finding of fact as unreliable hearsay. While 1-800 Contacts may have “emphasized” this point in correspondence, this proposed finding is an improper attempt to claim the underlying hearsay as a fact, that the negative keyword requirement really was administrable, consistent, and helpful in avoiding future disputes. RX926-0002, RX 64, CX799, CX741 all consist of correspondence in relation to settlement negotiations, and could otherwise not be used as evidence in that matter pursuant to the dictates of Federal Rules of Evidence 408. These statements are not admissible for their underlying truth.

Complaint Counsel further objects for the reasons stated in Complaint Counsel’s Response to Proposed Finding No 1191.

**1203.** Settling parties agreed that negative keywords were an easy and practical way to ensure compliance with the settlement agreements. (CX 9038 ({} at 105 (compliance is “not difficult in any regards”)); CX 9008 ({} at 25 (“it’s a pretty easy process”)); CX 9000 ({} at 103-104 (it is “relatively low maintenance” to insert negative keywords))).

**Response to Proposed Finding No. 1203:**

Complaint Counsel objects to this proposed finding of fact as irrelevant and misleading. Whether or not it is easy and practical to implement negative keywords as a device to prevent truthful and non-misleading advertising and comply with the bidding agreements is of no moment for this case.

Although it may be simple to manually input negative keywords into an advertising account, maintaining compliance with the negative keyword provisions of the bidding agreements was not simple, as demonstrated by significant correspondence between the settling parties regarding

purported violations and requests for additional negative keywords to be added. (*E.g.*, CX1107; CX007; CX0260; CX0751; CX0481; CX1177; CX0816; CX0453; CX0800.)

Complaint Counsel further objects for the reasons stated in Complaint Counsel's Response to Proposed Finding No. 1191.

**1204.** Many settling parties and non-settling parties implement negative keywords for their competitor's brands voluntarily regardless of whether they have agreements to do so with those competitors. (Clarkson, Tr. 334-337; Aloviz, Tr. 1048-49 (“Q: Why does LensDirect implement “1800 Contacts” as a negative keyword in some of its paid search advertising campaigns? A: Internal decision-making. Q: But this is a voluntary decision to implement these negative keywords; correct? A: Yes. We were not – we did not agree to implement those negative keywords.”)); CX 1653 (AdWords report for LensDirect showing negative keywords implemented from 2010 to 2016)).

**Response to Proposed Finding No. 1204:**

This proposed finding mischaracterizes Mr. Aloviz' testimony. Immediately following the quote, he went on to say the reason for implementing the negative keywords was, “I got a letter from a big company and I probably got nervous...” (Aloviz, Tr. 1048).

Further, this finding is plainly erroneous, as it goes against the great weight of record evidence, demonstrating that *none* of the settling parties had implemented negative keywords prior to entering into Bidding Agreements with 1-800 Contacts, and multiple retailer witnesses testified that they would remove the negative keywords if not subject to these agreements. *E.g.*, CX9008 (Hamilton, IHT at 63-64); CX8001 at 006 (¶ 19) (Hamilton (Walgreens), Decl.); CX8002 at 005-006 (¶ 18 (Hamilton, Vision Direct), Decl.); CX9003 (Clarkson, IHT at 35-38); CX9000 (Batushansky, IHT at 110-112), *in camera*. Indeed, many of 1-800 Contacts competitors already do bid on the trademarks of other competitors. *E.g.*, CX8002 at 006 (¶ 20) (Hamilton (Vision Direct), Decl.), *in camera* { [REDACTED]



Mark Miller to Jacque Matte of Contact Lens King dated April 26, 2010 alleging “significant breach of the Settlement Agreement” entered by the parties “just weeks ago,” and stating that 1-800 Contacts “will be monitoring such activity closely and will aggressively enforce the provisions of the settlement agreement); CX0323 (Agreement with Contact Lens King)). In response to Mr. Miller’s threat of aggressive enforcement, Contact Lens King simply sent over all the negative keywords it had adopted since the threat of litigation and the renewed threat from 1-800 Contacts, and such list included the names of many rivals as well. (CX795 at 2-25). This does not support an inference that Contact Lens King added these negative keywords because it was in its own interest to do so, rather than 1-800 Contacts’ threats of litigation spurring it into action.

**1207.** Companies use negative keywords for their competitors voluntarily for independent business reasons, including that appearing in response to a search for another company’s trademark “constitutes a wildly inefficient use of advertising dollars.” (Schmidt, Tr. 2908-09); (Alovis, Tr. 1043-44 (noting that cost per conversion for LensDirect of 1-800 Contacts’ trademark terms is “about double” the target customer acquisition range for 2017)).

**Response to Proposed Finding No. 1207:**

Complaint Counsel objects to this proposed finding of fact to the extent it implies that companies regularly or generally implement the trademarks of their competitors as negative keywords. The cited testimony provides no support for this proposition. Further, to the extent Mr. Schmidt is speaking beyond the scope of 1-800 Contacts and his experience at other companies prior to joining 1-800 Contacts more than 13 years ago, his testimony is unreliable.

Further, Respondents have taken Mr. Alovis’ testimony out of context. He testified that 1-800 Contacts’ trademark terms has driven a significant amount of business for LensDirect and that the conversion rate for some 1-800 Contacts terms was more than double their average conversion rate. (Alovis, Tr. 1012-1014).

**1208.** Complaint Counsel’s expert witness, Prof. Tushnet, testified that a court considered a negative keyword request to resolve a keyword advertising dispute. (Tushnet, Tr. 4470 (“So there – so the – the case – the only case to consider a negative keyword request said no. That’s the Rhino Sports case.”)) This is incorrect. (Hogan, Tr. 3479-80); *Rhino Sports, Inc. v. Sport Court, Inc.*, No. CV-02-1815-PHX-JAT, 2007 WL 1302745 (D. Ariz. 2007).

**Response to Proposed Finding No. 1208:**

Complaint Counsel objects to this proposed finding as it constitutes a conclusion of law and not a finding of fact. It relies on material not admitted as evidence in this case, and should be disregarded.

**1209.** In the *Rhino Sports* case, the issue was “not whether Rhino Sports’ current activities infringe Sport Court’s trademark, but whether Rhino Sports substantially violated the permanent injunction.” *Rhino Sports*, 2007 WL 1302745, \*4; (Hogan, Tr. 3479-80). The Court determined that it would be improper to read the text of the injunction to “preclude Rhino Sports from using these generic terms as keywords.” *Rhino Sports*, 2007 WL 1302745, \*5. The Court was never presented with, and never considered, the option of negative keywords. *Rhino Sports*, 2007 WL 1302745, \*2-5.

**Response to Proposed Finding No. 1209:**

Complaint Counsel objects to this proposed finding of fact as it is a conclusion of law and not a finding of fact. It relies on conjecture of a legal holding, and not on evidence in this case, and as such should be rejected as a proposed finding of fact.

Further, Respondent’s characterization of *Rhino Sports* is misleading. *Rhino Sports* addressed a complaint that is on all fours with 1-800 Contacts’ requirement that its rivals implement negative keywords. There, the defendant was bidding only on generic keywords, but its ads were being displayed in response to searches containing the plaintiff’s trademark. The plaintiff challenged the defendant’s bids on *generic* terms as a violation of a prior consent agreement. The court rejected this challenge, observing: “With regard to keyword purchasing, the permanent injunction serves as no bar to Rhino Sports’ use of any generic terms such as ‘courts’ or ‘basketball court.’ Sport Court cites no legal authority establishing that a *consumer’s* use of certain search terms in a Google or other web search, that generates a sponsored ad link which reflects no

use of the mark at issue in terms of keyword use, metatag use or ad text use, constitutes use of a mark under the Lanham Act.” *Rhino Sports*, 2007 U.S. Dist. LEXI 32970, at \*16-17 (emphasis added). As Respondent has already conceded, the only way to prevent the appearance the appearance of such advertisements is through the use of “negative keywords.” RPF No. 1190. Thus, *Rhino Sports* is squarely on point. *See also Lens.com*, 755 F. Supp. 2d at 1174 (“It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder’s mark in any way, even if that competitor’s advertisement appeared when a *consumer* entered a trademarked *search term*.”) (emphasis in original).

***D. Exact Match Negative Keywords Were Sufficient To Comply With The Settlement Agreements***

**1210.** According to the plain language of the settlement agreements, thirteen of them do not specify a negative keyword match type. (CX 315, § 4(B); CX 326, § 3(b)).

**Response to Proposed Finding No. 1210:**

Complaint Counsel objects to this proposed finding of fact – and this series of proposed findings with respect to exact match – as false. The plain language of the agreements call, at a minimum, for phrase match negative keywords to be used; the cease and desist letters similarly call, at a minimum, for phrase match negative keywords to be used, and the enforcement by 1-800 Contacts is consistent with the expectation that the parties would adopt the negative keywords in (at least) phrase match. The plain language of the agreements requires, at a minimum, phrase match. (RX0028 at 002 (§ 2(C)) (AC Lens agreement) (Negative keywords are to be implemented “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....Specifically, for each internet search provider ... the other Party’s trademark keywords and URLS listed in Exhibit 2 shall also 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....*”) (emphasis added); CX0320 at 004 (§ 4(C)) (Lenses For Less agreement) (same); CX0321 at 003 (§ 3(C)) (Tram Data d/b/a Replace My Contacts agreement) (same); CX0323 at 003 (§ 4(C)) (Contact Lens King agreement) (same); CX0319 at 003 (§ 2(C)) (Empire Vision agreement) (same); CX0324 at 003 (§ 4(C)) (Web Eye Care agreement) (same); RX0408 at 003-004 (§ 5(C)) (Standard Optical agreement) (same)). The term “includes” directs that, at a minimum, phrase match must be used because, if “exact” match were used, ads could appear in response to search queries that “include” 1-800 Contacts’ trademark. There is no plausible reading of these agreements that suggests any narrower application of negative keywords. Only 1-800 Contacts’ 2013 Bidding Agreement with Luxottica – incorporated as part of a sourcing agreement between the firms – states that negative keywords may be implemented in “exact match.” *See* CX0331 at 045-046 (§ 17.10) (Luxottica “agrees that it shall . . . 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. . . .”).

Further, 1-800 Contacts’ enforcement of the Bidding Agreements confirm the intention of the plain language of the agreements was that negative keywords be entered broadly. For example, in a letter dated February 26, 2010, Mark Miller, counsel for 1-800 Contacts, wrote to David Holmberg of Empire Vision Center, Inc., and alleged that Empire Vision infringed 1-800 Contacts trademark rights by delivering ads in response to queries which did not match the list of keywords he demanded be added as negative keywords. (CX0449 at 002, 022). If Empire Vision had added the listed negative keywords in exact match, their ads would have continued to show on the searches Mr. Miller complained about. (Juda, Tr. 1133-1134). The only way to prevent Empire Vision’s ads from appearing in response to the queries Mr. Miller complained of in the cease and desist letter would be if the set of negative keywords listed were entered as broad match or phrase

match negative keywords. Entering the listed negative keywords in exact match would not prevent ads from appearing in response to those queries.

And, on May 30, 2014, Mark Miller wrote to Lensfast because 1-800 Contacts saw that Lensfast ads appeared in response to queries for “**1800 contact lenses**,” and required Lensfast to modify the agreement. But Mr. Miller only told Lensfast to add the keyword “**1800 contact**,” and not the exact match “1800 contact lenses.” (CX0453 (letter from Mark Miller to Randall Weigner dated May 30, 2014)). As a phrase match negative keyword, “1800 contact” will prevent the ad from appearing for “1800 contact lenses,” but as an exact match negative keyword it will not. (Juda, Tr. 1133-1134). Similarly, Mr. Miller wrote to AC Lens, also on May 30, 2014, alleging breach of §2 of the agreement, which encompasses the bidding and negative keyword provisions, because AC Lens ads were “triggered by searches for the term ‘www 800contacts’.” (CX0006; RX0028 at 1-2 (AC Lens Agreement)). However, “www 800contacts” is not listed as an enforceable negative keyword, while “800contacts” is listed. (RX0028 at 8 (AC Lens bidding agreement)). The only way to enforce the agreement in this way is if Mr. Miller expected AC Lens to enter “800 contacts” as a phrase match negative keyword. The parties to the Bidding Agreements also clearly understood that the agreements required that negative keywords be entered in at least phrase match. Multiple settling parties testified that they implemented the negative keywords in phrase match or broad match, as they understood the agreements to require. CCPTB at 34. Indeed, some parties entered the negative keywords in all three match types (exact, phrase, and broad) in order to ensure redundancy so that they would not be in violation of the Bidding Agreements. CCPTB at 34.

**1211.** Contracts do not lend themselves to an interpretation that restricts a greater amount of conduct and, in general, negative keyword provisions expressly specify phrase or broad match types when those more restrictive match types are intended. (RX 734 (Hogan Report) ¶ 154); *see also Pierce v. Pierce*, 2000 UT 7, ¶ 19 (“where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an

interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given to it.”) (quoting *Plain City Irr. Co. v. Hooper Irr. Co.*, 11 Utah 2d 188, 192-93 (1960)).

**Response to Proposed Finding No. 1211:**

Complaint Counsel objects to this proposed finding of fact as it is a conclusion of law. It relies on no evidence in this case, but rather conjecture about the state of contract law and interpretation in Utah. Further, regardless of whether the law calls for a narrow interpretation “where there is doubt,” here there is *no* doubt, as the plain language of all but one of the Bidding Agreements (the Luxottica agreement) *requires* broad implementation of negative keywords. Consistent with the plain language of its agreements, 1-800 Contacts imposed and enforced the agreements in such a way to be consistent with the plain language of the Bidding Agreements, and the parties likewise interpreted the agreements in the same manner. 1-800 Contacts also implemented negative keywords in a broad fashion, consistent with the plain language of its agreements. Indeed, the only contrary interpretation is the post-hoc interpretation offered by 1-800 Contacts in response to this litigation. *See* Complaint Counsel’s Response to Proposed Finding No. 1210.

**1212.** The one challenged agreement that does specify a match type, the Luxottica Contact Lens Sourcing and Services Agreement, explicitly requires only exact match negative keywords. (CX 331, § 17.10).

**Response to Proposed Finding No. 1212:**

Complaint Counsel does not dispute that the Luxottica agreement alone specifies “exact match,” but objects to the remainder of the proposed finding as it mischaracterizes the evidence, described in Complaint Counsel’s Response to Proposed Finding No. 1210. **1213.** Brian Bethers, the CEO of 1-800 Contacts who negotiated the Luxottica agreement, testified that the agreement specified exact match negative keywords because the “exact term ‘1-800 Contacts’ was the trademark that we were concerned about.” (Bethers, Tr. 3699). The exact-match negative

keyword clause in the Luxottica agreement was intended to have the same meaning as the negative keyword provisions in the settlements that were earlier entered into. (Bethers, Tr. 3700 (“The purpose was exactly the same” as the purpose of “all the settlement agreements.”)).

**1213.** Brian Bethers, the CEO of 1-800 Contacts who negotiated the Luxottica agreement, testified that the agreement specified exact match negative keywords because the “exact term ‘1-800 Contacts’ was the trademark that we were concerned about.” (Bethers, Tr. 3699). The exact match negative keyword clause in the Luxottica agreement was intended to have the same meaning as the negative keyword provisions in the settlements that were earlier entered into. (Bethers, Tr. 3700 (“The purpose was exactly the same” as the purpose of “all the settlement agreements.”)).

**Response to Proposed Finding No. 1213:**

This proposed finding should be rejected because it is unsupported by the cited evidence and Mr. Bethers has no knowledge about the “purposes” of “all the settlement agreements.” The cited testimony requested Mr. Bethers to speak to the “purposes of, as you understood it, of the settlements that had been discussed earlier.” (Bethers, Tr. 3700) Mr. Bethers’s “understanding” does not constitute personal knowledge and is not admissible. See, *e.g.*, Tr., 435-436 (“asking a witness ‘is it your understanding,’ that’s not a good idea. Maybe you weren’t here yesterday. Because understanding is not what we’re after here. We’re after facts, knowledge, not understandings, not theories, not opinions.”); *see also* Tr, 210 (“let me make something clear. I don’t want to hear about anybody’s understanding. I want to know facts.”). Moreover, Mr. Bethers explicitly disclaimed knowledge of the “all the settlement agreements” on multiple occasions. *See, e.g.*, Bethers, Tr. 3723 (“As I said previously, I didn’t keep track of who we had settlement agreements with or even the number of settlement agreements that we have. . .”); *id.* (“I did not read all of the settlement agreements nor follow all of the parties that had settlement agreements with us.”).

Regardless, for the reasons stated in Complaint Counsel’s Response to Proposed Finding No. 1210, 1-800 Contacts clearly showed through cease and desist demands and enforcement of the agreements that phrase or broad match negative keywords would be required to forestall further action by 1-800 Contacts.

**1214.** 1-800 Contacts and its outside counsel took the consistent position that a counterparty to the settlement satisfied its obligations by implementing required negative keywords in any match type. (CX 9040 (Miller, Dep. at 66 (“But I think the requirement here is just...if you implement the terms on Exhibit 2 as a negative keyword of *any kind*, a negative keyword of *any match*, you’re in compliance as long as it is a negative keyword. That’s why it doesn’t expressly state you have to exact match it or broad match it as a negative. If that term is listed as a negative keyword of *any match type*, you’re in compliance. And that’s the only thing that was required by these agreements.”)); CX 9031 (Schmidt, Dep. at 116); CX 9020 (Craven, Dep. at 117-121)); *see also Upland Indus. Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 642 (Utah 1984) (In determining the parties intent, “a construction given to [a contractual provision] by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable, be adopted and enforced by the court.”))

**Response to Proposed Finding No. 1214:**

Complaint Counsel objects to this proposed finding of fact for several reasons. First, to the extent it relies on cited cases it proposes a conclusion of law and should be disregarded. Second, it mis-states the testimony of Mr. Craven. In the cited portion of Mr. Craven’s deposition he does not take the position that the counterparty “satisfied its obligations by implementing” negative keywords in exact match. To the contrary, in the cited portion of the deposition transcript Mr. Craven testified about CX0234, an email in which he explicitly informed a counterparty that if he saw “exact match” negative keywords were not sufficient to prevent all advertisements from appearing, Mr. Craven would “let [him] know and then you can change the negatives to ‘phrase match or broad match.’” (CX9020 120-121; *see also* CX0234; Craven, Tr. 606-607). Moreover, at trial Mr. Craven testified that he could not recall informing *any* competitors that they should implement negative keywords in exact match, and that he did not know how *any* rivals implemented negative keywords unless they informed him. (Craven, Tr. 609-610). And the only

rival who informed Mr. Craven – Coastal Contacts – explicitly informed him that the negative keywords were implemented on a phrase match basis. (Craven, Tr. 624-629 (discussing CX0432, a communication from Curtis Petersen of Coastal Contacts informing Mr. Craven that four negative keywords had been implemented on a phrase match basis). Mr. Craven also stated that the match type required “depends on the advertiser...”); CX9002 (Craven, IHT at 182)). In addition, Mr. Craven also sent correspondence to other parties to the Bidding Agreements showing *both* phrase and exact match negative keywords, referring to this as a “best practice.” (CX0159). Mr. Craven testified at trial that it was 1-800 Contacts’ business practice to also implement terms on both a phrase match and exact match basis. (Craven, Tr. 613).

Third, the proposed finding lacks foundation to the extent it relies on testimony of Clint Schmidt because he has no personal relevant knowledge. Mr. Schmidt testified that he did not work on any settlement agreement after he left 1-800 Contacts in January, 2006, including the revision to the 2004 Vision Direct settlement agreement. (Schmidt, Tr. 2937-2938). Reliance on his testimony is thereby inappropriate here.

As for Mr. Miller’s testimony, he said that the language of the agreements meant what the words on the page say. (CX9040 (Miller, Dep. at 51-52)). The plain language of those agreements requires phrase match or broader implementation of negative keywords. No other interpretation is possible, as described in Complaint Counsel’s Response to Proposed Finding No. 1210. Mr. Miller’s post hoc rationale notwithstanding, for the reasons stated in Complaint Counsel’s Response to Proposed Finding No. 1210, all of the record evidence clearly shows that the Bidding Agreements require broad implementation of negative keywords; 1-800 Contacts enforced the agreements in this manner; and the parties interpreted the agreements in this manner. *See* Complaint Counsel’s Response to Proposed Finding 1210.

**1215.** An exact match negative keyword comports with the intent and purpose of the settlements to prevent the display of a competitor's advertisement when a customer is specifically searching for and trying to navigate to 1-800 Contacts. (CX 9040 (Miller, Dep. at 18-20, 217-220)).

**Response to Proposed Finding No. 1215:**

This proposed finding is contradicted by the weight of the evidence and is misleading for the reasons stated in Complaint Counsel's Response to Proposed Finding No. 1210.

**1216.** In contemporaneous written and oral communication at the time of the negotiation and execution of the settlement agreements, 1-800 Contacts told settling parties they could implement negative keywords in the match type of their preference, including exact match. (CX 9040 (Miller, Dep. at 173-74, 180-81); CX 9021 (Pratt, Dep. at 109)).

**Response to Proposed Finding No. 1216:**

This proposed finding of fact mischaracterizes, is unsupported by the cited testimony, and for several reasons, should be rejected.

First, Mr. Miller's testimony relates to only two settling parties, Lensfast and Standard Optical. (CX 9040 (Miller, Dep. at 173-74, 180-181)). In the cited portion of his deposition transcript, Mr. Miller did *not* state that he told Mr. Garriott, counsel for Lensfast, that his client could implement the negative keywords in the match type of their preference. (CX 9040 (Miller, Dep. at 173-74)). He described their conversation, then simply asserted, "And he was free to use either exact match or phrase match..." (CX 9040 (Miller, Dep. at 173-74)). Mr. Miller never testified that he relayed this position to Mr. Garriott, and there is no evidence that he did so. Likewise, Mr. Miller never testified that that he communicated with Standard Optical regarding whether the negative keywords could be entered in exact match or phrase match. (CX 9040 (Miller, Dep. at 180-181)). Mr. Miller claimed Mr. Delaney of Standard Optical wanted to add to the agreement a provision that the negative keyword would "not [be] the individual component parts of any such phrase," comparing the negative keyword "1 800 contact" to negative keywords "1", "800", and "contact." (RX408 at 0012; CX 9040 (Miller, Dep. at 173-74, 180-181)). This

distinction is unrelated to the difference between phrase match and exact match. (Juda, Tr. 1134-1135).

Likewise, Mr. Pratt's testimony does not support the proposed finding of fact that he told settling parties they could select a negative match type of their choosing. Mr. Pratt simply described the email in CX0709, in which he copied and pasted information from Google describing the negative match types. (CX 9021 (Pratt, Dep. at 109)). Neither the email nor Mr. Pratt's testimony indicates that settling parties could comply with the agreements by using only exact match negative keywords. (CX 9021 (Pratt, Dep. at 109)).

**1217.** For example, Mark Miller testified to numerous oral conversations and email exchanges with Lensfast's counsel surrounding implementation of the negative keyword provision of the settlement agreement wherein he explained that Lensfast could implement negative keywords in exact match so that Lensfast's sponsored links could continue to appear in response to larger phrases that included the trademark and smaller sub-parts of the trademark, such as "contacts." (CX 9040 (Miller, Tr. 169-171, 173-74); CX 1786 (Jan. 4, 2010 email from M. Miller to Dan Garriott providing exact match and phrase match as possible suggestions)).

**Response to Proposed Finding No. 1217:**

This proposed finding should be rejected because it is not supported by Mr. Miller's testimony. Mr. Miller did not testify to having "numerous" oral conversations or email exchanges with Lensfast's counsel on this subject. (CX 9040 (Miller, Tr. 169)). Mr. Miller did not testify that he told Lensfast it could implement negative keywords in exact match. (CX 9040 (Miller, Tr. 169)). The January 4, 2010 email does not say that Lensfast can use phrase match or exact match for their negative keywords. (CX1786). Mr. Miller simply copied and pasted information from Google describing the negative keyword match types and discussed the distinction that Standard Optical was concerned about, whether implementing "1 800 contacts" as a negative keyword would have the impact of making the words "1", "800", and "contacts" all negative keywords. (CX1786). This is not the distinction between phrase match and exact match, which is focused on

whether additional words in the search query can undo the effect of the negative keyword or not. (Juda, Tr. 1133-1134).

The proposed finding is also clearly contradicted by the weight of the evidence, as explained in the Complaint Counsel's Response to Proposed Finding No. 1210.

**1218.** Bryan Pratt wrote to Lenses for Less making the same assurances regarding the adequacy of exact-match negative keywords. (CX 709; CX 9021 (Pratt, Dep. at 109)).

**Response to Proposed Finding No. 1218:**

This proposed finding is unsupported and contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 1216 and No. 1210.

**1219.** Mark Miller further testified to oral conversations with counsel for Standard Optical Company regarding the availability of negative keyword match types that would only prevent advertisements from appearing in response to the specific trademark terms and variations on the restricted terms list. (CX 9040 (Miller, Dep. at 108-109, 172, 180-181)). In the context of those phone conversations, Mr. Miller also wrote to Standard Optical's counsel, stating, "I want to emphasize that the agreement does not negatively impact your client's online advertising in any respect and will only prevent your client from posting sponsored advertising in response to search for my client's trademark." (RX 253-002).

**Response to Proposed Finding No. 1219:**

Complaint Counsel has no specific response, other than to note that the cited evidence does not indicate that Mr. Miller communicated to counsel for Standard Optical *which* match type was required to comply with the Bidding Agreement.

**1220.** 1-800 Contacts' marketing team also handled some of the discussions of implementation of the negative keyword provisions of the settlement agreement. (CX 9002 (Craven, IHT at 166-67 (communication with competitors regarding settlement implementation), 179-182); CX 9020 (Craven, Dep. at 20-22)).

**Response to Proposed Finding No. 1220:**

Complaint Counsel has no specific response.

**1221.** 1-800 Contacts' marketing team understood exact match negative keywords for navigational terms to be sufficient to comply with the settlement agreement. (CX 9002 (Craven, IHT at 181)).

**Response to Proposed Finding No. 1221:**

This proposed finding should be rejected because it is not support by the evidence cited, and is contradicted by the weight of the evidence.

The finding is not supported by the cited portion of Mr. Craven's Investigational Hearing transcript because he testified multiple times while discussing the subject of match type that he did not know and could not remember what match type was required by the agreements or what he communicated to settlement parties. (CX9002 (Craven, IHT at 180-182) ("I don't know if [phrase match negative keywords] would be necessary or not"; "I don't know what I thought then."; "I can't remember.")). Mr. Craven also stated that the match type required "depends on the advertiser..." (CX9002 (Craven, IHT at 182)).

The more reliable evidence on this subject are the contemporaneous documents. Mr. Craven testified at trial regarding about CX0234, an email in which he explicitly informed a counterparty that if he saw "exact match" negative keywords were not sufficient to prevent all advertisements from appearing, Mr. Craven would "let [him] know and then you can change the negatives to 'phrase match or broad match.'" (CX0234; Craven, Tr. 606-607). Moreover, at trial Mr. Craven testified that he could not recall informing *any* competitors that they should implement negative keywords in exact match, and that he did not know how *any* rivals implemented negative keywords unless they informed him. Craven, Tr. 609-610. And the only rival who informed Mr. Craven – Coastal Contacts – explicitly informed him that the negative keywords were implemented on a phrase match basis. See Craven, Tr. 624-629 (discussing CX0432, a communication from Curtis Petersen of Coastal Contacts informing Mr. Craven than four negative keywords had been implemented on a phrase match basis). Mr. Craven also stated that the match type required "depends on the advertiser..." (CX9002 (Craven, IHT at 182)).

In addition, Mr. Craven also sent correspondence to other parties to the Bidding Agreements showing *both* phrase and exact match negative keywords, referring to this as a “best practice.” (CX0159). Mr. Craven testified at trial that it was 1-800 Contacts’ business practice to also implement terms on both a phrase match and exact match basis. Craven, Tr. 613.

Other contemporaneous documents written by “1-800 Contacts’ marketing team” also contradict the proposed finding. In November of 2006, Ed McCready of 1-800 Contacts emailed Sarah Villeneuve Bundy of Coastal Contacts saying Coastal was in breach of the agreement. (CX0751). Bundy answered with a forwarded explanation from a Coastal marketing specialist, explaining that Coastal was likely being broad matched into the complained of searches, and that entering a negative keyword of “800” should prevent any ads from showing in response to those searches again. (CX0751). Mr. McCready of 1-800 Contacts responded, “Can you please ensure the necessary steps, such as the use of negative keywords as described by your Marketing Specialist, are taken as soon as possible to prevent your ads from showing on these searches?” (CX0751). Although he did not explicitly say that the negative keyword “800” should be implemented in phrase match, it is quite clear from the context that this is what Mr. McCready was requiring of Coastal. If the negative keyword “800” had been implemented in exact match, it would not have prevented Coastal advertisements from appearing in response to any of the relevant queries. It would only prevent Coastal advertisements from appearing in response to a search that was exactly the same word, “800”. Not only is such a search extremely unlikely to take place and not targeted at 1-800 Contacts, such a search does not contain a 1-800 Contacts trademark. It is obvious that Mr. McCready intended for Coastal to enter the negative keyword “800” in phrase match or broad match. That is the only way to implement that negative keyword that would “prevent your ads from showing on these searches.”

**1222.** Whenever the issue of negative keyword match type arose, Bryce Craven, a member of the search marketing team until 2011, instructed counterparties to the settlement agreements that they could implement the settlement the negative keywords in exact match, unless they preferred to block additional irrelevant or inefficient queries. ((Craven, Tr. 635-36 (“when any questions arose, from what I remember, the suggestion was exact match should be fine”)); CX 9002 (Craven, IHT at 179-180)).

**Response to Proposed Finding No. 1222:**

This proposed finding should be rejected because it is contradicted by the weight of the evidence as explained in the Response to Proposed Finding No. 1221. See also Response to Proposed Finding No. 1210.

**1223.** When asked how to implement the negative keyword requirement for the settlement agreement with 1-800 Contacts, Bryce Craven instructed Lensfast that “exact match would be sufficient.” (CX 234 (Jan. 7, 2010 letter from Bryce Craven to Contactlens.com); (Craven, Tr. 635-36)).

**Response to Proposed Finding No. 1223:**

This proposed finding takes Mr. Craven’s email statement out of context. Immediately following the quoted statement, Mr. Craven went on to say that phrase match might be necessary to comply with the agreement: “If I see any problems with Google, I will let you know and then you can change the negatives to ‘phrase match.’” (CX0234). See Response to Proposed Finding No. 1221. See also Response to Proposed Finding No. 1210.

**1224.** While 1-800 Contacts employed a mix of keyword match types to avoid displaying advertisements in response to low-performing queries, 1-800 Contacts’ marketing team understood exact match negative keywords to be sufficient for their internal compliance with settlement agreement obligations. (CX 159 (Aug. 6, 2010 emails between Bryce Craven, Park Studebaker, and Mark Miller showing implementation of both exact match and phrase match negative keywords as options)).

**Response to Proposed Finding No. 1224:**

This finding should be rejected because it is inaccurate. The undisputed record evidence in this matter shows that 1-800 Contacts implemented all relevant negative keywords in phrase match. Mr. Brady Roundy was identified as 1-800 Contacts corporate representative, under Rule

3.33(c)(1), to testify about “Each negative keyword 1-800 Contacts implemented as a result of a settlement agreement and the date each such negative keyword was implemented.” CX 9028 (Roundy, Dep. at 81-82). Mr. Roundy testified that CX0100 “accurately represents the negative keywords that 1-800 Contacts had implemented in its Google account as of September 25th, 2014.” CX 9028 (Roundy, Dep. at 75). Mr. Roundy confirmed the fact, which is obvious from the face of the document, that all of its competitors’ names were implemented in phrase match. See generally CX0100; CX 9028 (Roundy, Dep. at 79). Moreover, Mr. Craven admitted at trial that 1-800 Contacts implemented negative keywords “in both exact match and phrase match.” Craven, Tr. 613.

**1225.** 1-800 Contacts maintained identical negative keyword policies for its affiliate terms and conditions as it did for its trademark settlement agreements. (Craven, Tr. 637, 640 (“the list of keywords that were prohibited were the same list that we monitored on a regular basis”)).

**Response to Proposed Finding No. 1225:**

This proposed finding should be rejected because it is not supported by the evidence cited. The fact that the list of negative keywords required of affiliates was the “same list that [1-800 Contacts] monitored on a regular basis does not indicate that the negative keyword policies were identical.

**1226.** Jessica Faulkner managed the 1-800 Contacts’ affiliate program and reported to Bryce Craven in the 2009 to 2011 time period as a member of the 1-800 Contacts marketing team. (Craven, Tr. 639).

**Response to Proposed Finding No. 1226:**

Complaint Counsel objects to this proposed finding on the basis that Mr. Craven could not recall the dates and responsibilities, other than managing the affiliate program. (Craven, Tr. 639).

**1227.** 1-800 Contacts’ marketing team instructed affiliates when asked that in order to comply with the negative keyword requirement, they should implement negative keywords in exact match type. (RX 1818 (“Thanks, Sandy. Please add all of those negative keywords to your exact match negative keywords in Google, Yahoo, MSN Live”)); Craven, Tr. 641-42).

**Response to Proposed Finding No. 1227:**

Complaint Counsel objects to this proposed finding of fact because it is not supported by the evidence cited. The cited document indicates that the affiliate had already implemented all of the relevant negative keywords – presumably in phrase match – and was being asked to implement them again in exact match. RX1818 (“I don’t understand your email. I thought I have added all the negative keywords as previous email.”). Moreover, this proposed finding is irrelevant as explained in the Response to Proposed Finding No. 1225.

**1228.** If an advertiser implements “800 contacts” as a phrase match negative keyword, then that advertiser cannot show up in response to a user query for “1 800 contacts”. (Craven, Tr. 649-50 (“Q: And if we’re talking about the difference between phrase match and exact match, going back to the one on the board, if I used “800 contacts” as phrase match, would that allow or prevent ads from coming up if the search query was “1 800 contacts”? A: That would prevent the ad from showing up because the phrase that you implemented as your negative keyword is contained in the ‘1 800 contacts.’”)).

**Response to Proposed Finding No. 1228:**

Complaint Counsel has no specific response.

**1229.** The lists of restricted keywords included in the exhibits to the settlement agreements are inconsistent with a requirement that negative keywords be implemented other than in exact match. The list of restricted keywords includes terms such as “800 contacts” and “Aquasoft” that make up parts of longer strings of other restricted keywords such as “1 800 contacts” and “Aquasoft Complete Vision System,” respectively. If these restricted keywords were required to be implemented in phrase match or broad match, the inclusion of the longer terms would be redundant since the shorter terms would in those circumstances prevent an ad from appearing when a search was performed for the shorter phrase. For instance, if phrase or broad match was required, the use of 800 contacts as a keyword would prohibit ads from appearing when the search query was for 1 800 contacts. Thus, in order to give meaning to all of the terms of the settlement agreement, the negative keyword provision must be interpreted only to require the use of exact match keywords. (CX 320, Ex. 2; Craven, Tr. 648; CX 316 (listing terms “empire vision,” “empire vision centers,” and “empire vision centers focused on you”, where the single term “empire vision” as a negative keyword in phrase match type would make the longer strings superfluous)); *accord Glenn v. Reese*, 2009 UT 80, ¶ 10 (“Contractual interpretation requires considering “each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.”); *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12 (Courts should “attempt to harmonize all of the contract’s provisions and all of its terms”).

**Response to Proposed Finding No. 1229:**

This proposed finding states legal conclusions and is unsupported by the evidence cited. Further, the assertion that the agreements allow exact match is inconsistent with the plain language of the agreements and 1-800 Contacts' conduct throughout the relevant period as explained in the Responses to Proposed Finding No. 1210 and 1221.

**1230.** 1-800 Contacts also corresponded directly with Google, after its meetings with the Commission in 2014, to confirm its understanding that exact match negative keywords could be implemented that would permit an advertisement to be served in response to a larger query containing the trademark. ( RX 1321-0001 (Oct. 29, 2014 email from Kevin Hutchings to Natalia Bohm)).

**Response to Proposed Finding No. 1230:**

Complaint Counsel has no specific response other than to add that 1-800 Contacts employees met with FTC Staff in August, 2014 to discuss the FTC's concerns about the bidding agreements. This communication took place more than two months after that meeting.

**1231.** In this correspondence, Kevin Hutchings, a 1-800 Contacts paid search analyst, wrote to Natalia Bohm, a Google representative, on October 29, 2014, to confirm how an exact match and phrase match negative keyword would function in reference to "competitors potentially bidding on our brand/trademark terms." (RX 1321).

**Response to Proposed Finding No. 1231:**

Complaint Counsel has no specific response.

**1232.** Natalia Bohm (Google) responded the next day, on October 30, 2014, to explain the distinction between an exact match negative keyword using brackets, [1800 contacts] and a phrase match negative keyword in quotations, "1800 contacts." (RX 1328).

**Response to Proposed Finding No. 1232:**

Complaint Counsel objects to this proposed finding of fact to the extent that it is incomplete and misrepresents the nature of Ms. Bohm's reply. Ms. Bohm provided details on all negative keyword match types and how they can be used by advertisers. (RX1328).

**1233.** Numerous settling parties, including Web Eye Care, Walgreens, and Vision Direct, employed negative keywords in both exact and phrase-match type without regard to the specific requirements of the agreement. (CX 9014 ( { [REDACTED] } at 159-160); CX 9008 (Hamilton, IHT at 72-74); (Hamilton, Tr. 474 ("both phrase and exact"))).

**Response to Proposed Finding No. 1233:**

This proposed finding mischaracterizes the evidence. { [REDACTED]

[REDACTED] } Mr. Hamilton testified that it was in “the spirit of the agreement” to enter the negative keywords as phrase match. (CX9008 (Hamilton, IHT at 72-74) (“Q. Why phrase? A. Because it just helps to protect in case, like, for instance, if that term might be by ‘1-800 CONTACTS.’ If it – if someone said, you know, ‘reorder from 1-800 CONTACTS,’ if it was – if it wasn’t exact match, we still potentially could show up for the word ‘reorder contacts.’ So it’s just within, I think, the spirit of the agreement, just do that so that it is fully compliant.”)).

**1234.** For example, when Walgreens implemented negative keywords in phrase match for a 1-800 Contacts term, it did so without understanding whether phrase match negative keywords were actually required by the agreement. (Hamilton, Tr. 474 (“Q: But when you chose to implement them as phrase match, was there anything in the settlement agreements that expressly required you to implement them that way? A: “I don’t believe I made reference to the agreement, so I didn’t really have an opinion on whether it did or not...I didn’t understand that if it was the case – and I guess I still don’t a hundred percent know”)).

**Response to Proposed Finding No. 1234:**

This proposed finding is contradicted by the weight of the evidence. Mr. Hamilton’s testimony clearly shows that he believes phrase match was necessary in order to comply with the agreement. “Q. Did you think [phrase match] was necessary to be compliant with the settlement agreements? A. I did, yeah. Q. Why is that? A. Well, I understand the intent of the agreement is to do everything we can to prevent our ads from showing up on 1-800 Contacts trademark search queries ... So phrase is a way to take care of close variants that creep into the auction even -- that you wouldn’t be able to block if you used exact only.” (Hamilton, Tr. 409; see also CX9038 (Hamilton, Dep. at 106-109); CX8002 (Hamilton, Decl. ¶14); CX9008 (Hamilton, IHT at 72-74)).

**1235.** No party to a settlement was ever told it had to implement negative keywords in broad or phrase match type to be in compliance with the settlement agreement. (Pratt, Tr. 2560-61; Hamilton, Tr. 475-76 (“Q: In the course of those pretty effective communications, did anyone from 1-800 Contacts tell you that you were required to use phrase match to implement the negative keywords? A: Not specifically, no.”); CX 9039 (Clarkson, Dep. at 147); { [REDACTED] } CX 9038 (Hamilton, Dep. at 72-74)).

**Response to Proposed Finding No. 1235:**

This proposed finding is not supported by the evidence cited and should be rejected. Mr. Pratt does not have personal knowledge of communications between 1-800 Contacts and all of the parties to the Bidding Agreements, and he neither testified nor suggested that he does. First, he did not begin representing 1-800 Contacts until 2005, *after* the settlements with Coastal and Vision Direct had been reached. Pratt, Tr. 2562. Mr. Pratt also disclaimed any knowledge of the agreement with Memorial Eye. And even if he had negotiated with each of the parties to the Bidding Agreements (which he did not), he could not possibly have knowledge of what 1-800 Contacts’ rivals were told by 1-800 Contacts’ marketing personnel.

Messrs. Hamilton, Clarkson, and Batushanksy likewise do not have personal knowledge that might support this proposed finding. First, each of them can testify only to communications between 1-800 Contacts and their firm. Second, they are not aware of all such communications – indeed, Mr. Hamilton did not join Walgreens until after the relevant Bidding Agreements were in place.

In addition, this finding is contradicted by correspondence sent by Mr. Craven to parties to the Bidding Agreements showing *both* phrase and exact match negative keywords, referring to this as a “best practice.” (CX0159).

Even if there were no communications between 1-800 Contacts and settlement parties explicitly requesting phrase match or broad match for the negative keywords, it was clear from the plain language of the agreements and 1-800 Contacts’ attorneys and marketing team’s conduct that

phrase match was required, as explained in the Responses to Proposed Findings No. 1210 and 1221.

**1236.** 1-800 Contacts never insisted that another company implement 1-800 Contacts' trademark terms as negative keywords in broad or phrase match. (CX 9031 (Schmidt, Dep. at 116 (“Q: Are you aware of anyone from 1-800 Contacts ever insisting that others implement 1-800 Contacts' trademarks as negative keywords in broad or phrase match? A: No.”)); CX 9040 (Miller, Dep. at 173-174, 180-181); CX 9020 (Craven, Dep. at 117-121); Craven, Tr. 636).

**Response to Proposed Finding No. 1236:**

This proposed finding is not supported by the evidence cited and should be rejected. None of the individuals whose testimony is cited have personal knowledge of communications between 1-800 Contacts and all of the parties to the Bidding Agreements, and none of them either testified or suggested that they do. See also Responses to Proposed Findings No. 1210 and 1221.

***E. Complaint Counsel Misinterpret The Meaning Of Certain Settlement Provisions***

**1237.** The comparative advertising exception present in ten of the settlement agreements is inconsistent with a requirement to implement phrase or broad match negative keywords. (CX 9040 (Miller, Dep. at 37-39, 66)).

**Response to Proposed Finding No. 1237:**

This proposed finding should be rejected because it is unsupported by the cited material. There is no discussion of the “comparative advertising exception” in the pages of testimony cited. Any other testimony of Mr. Miller regarding the meaning or intent of the agreements at issue here should be disregarded as unhelpful. As Respondent's counsel noted throughout Mr. Miller's deposition, the documents speak for themselves. (CX9040 (Miller, Dep. at 16 (“MR. STONE: Objection. The document speaks for itself. But you can answer as to your understanding.”), 20, 32, 60, 139)). Mr. Miller agrees. (*E.g.*, CX9040 (Miller, Dep. at 16 (“I think it just means what it says,”), 17 (“Well, you know, I think that one's pretty clear too.”), 52 (“Again, I think ‘includes’ is a pretty plain term. I think it means what it means.”), 61 (“I think it speaks for itself.”))). Mr. Miller's testimony on these topics consists entirely of his legal opinions or else speculation on

how 1-800 Contacts may have interpreted or enforced the agreement. (*See, e.g.*, CX9040 (Miller, Dep. at 120)). He offers no facts based on his personal knowledge about the meaning or intent of the agreements beyond reading their terms into the record.

To address Mr. Miller's response that "it just means what it says," the Bidding Agreements are quite clear about which provision would prevail in the event of a conflict between the "comparative advertising" section and the requirement to implement negative keywords. The Agreements explicitly state that the "comparative advertising" section applies only "as long as the appropriate negative keywords are also being used as set forth in subsection (C) below." (*E.g.*, CX0324 at 003 (Web Eye Care Agreement); RX0028 at 0002 (AC Lens Agreement); CX0319 at 002-003 (Empire Vision Agreement)). "Subsection (C)," in turn, provides that negative keywords must be used to block the display of ads "in response to . . . any internet search that *includes* the other Party's trademark keywords." (CX0342 at 003; RX0028 at 0003; CX0319 at 003) (emphasis added). Mr. Clarkson of AC Lens testified that, "[T]here is a piece of this agreement that says that it excludes comparative advertising, but the way I read it... was that it says all of this is subject to the use of negative keywords, so I could never figure out how we could create an ad, a comparative ad, while at the same time having the negative keywords in place." (Clarkson, Tr. 247).

1238. Settling parties can place advertisements in response to comparative searches by using exact match negative keywords for the 1-800 Contacts trademark, which would not prevent a search like "cheaper than 1-800 Contacts." (CX 9031 (Schmidt, Dep. at 115 ("Google gives you the tools, gives you the negative keyword tools to very explicitly say, "I want a negative exact match for this term"...Tools that Google made available were very simple and easy to use, so that if you wanted a negative match for just 1-800 Contacts, but you did want to appear for something like "lower prices than 1-800 Contacts," you could manipulate your negative keywords in the syntax associated with – with those ads to do exactly that."))).

**Response to Proposed Finding No. 1238:**

This proposed finding should be rejected because it is hypothetical and vague. To the extent it claims that Google allows advertisers the capability to tailor their negative keywords with match types, Complaint Counsel agrees. To the extent the proposed finding is claiming that the agreements allowed settling parties to place advertisements in response to comparative searches such as “lower prices than 1-800 Contacts,” it is unsupported and contradicted by the weight of the evidence as explained in the Responses to Proposed Findings No. 1210, 1221, and 1237. The cited testimony merely describes what negative keywords are and ways they could be used as a general matter. (CX 9031 (Schmidt, Dep. at 115)). In fact, Mr. Clarkson of AC Lens testified that, “[T]here is a piece of this agreement that says that it excludes comparative advertising, but the way I read it... was that it says all of this is subject to the use of negative keywords, so I could never figure out how we could create an ad, a comparative ad, while at the same time having the negative keywords in place.” (Clarkson, Tr. 247).

1239. 1-800 Contacts understood that if another party desired to place an advertisement in response to a comparative query that contained a trademarked term, they could do so under the settlement agreements by implementing negative keywords in exact match. (CX 9002 (Craven, IHT at 185-86); CX 9020 (Craven, Dep. at 18-19 (understanding that Vision Direct was not prohibited from displaying search advertising in response to a user query that contained a TM term even if the query also contained other words, and that Vision Direct was not prohibited from displaying a response to “1-800 contacts cheaper competitors”))).

**Response to Proposed Finding No. 1239:**

The proposed finding should be rejected because it is unsupported. First, the cited testimony lacks foundation because Mr. Craven testified he did not remember the terms of the agreement and that he had no personal knowledge of ever permitting a settling party to place ads on a “comparative query.” (CX9002 (Craven, IHT at 185-186)). In his deposition, he provided only his speculative understanding of what the agreements might allow, and later that he didn’t remember if searches with a 1-800 Contacts trademark and other terms would or wouldn’t be prohibited under the terms of the agreement. (CX9020 (Craven, Dep. at 19 (“Q. So it was your

understanding Vision Direct was not prohibited from displaying advertisements in response to a user query, for example, ‘1800contacts cheaper competitors’? A. Correct. My understanding is that that was permissible under the agreements that we had. Q. What about—same question for a user query ‘1800contacts coupons’? . . . A. I—I can’t remember under that scenario if that would be—if that was prohibited or allowed’’’’)).

Moreover, even if the cited testimony supported Mr. Craven’s understanding (which it did not), it does not support any assertion about what “1-800 Contacts understood.” 1-800 Contacts’ behavior and communications with its rivals indicated phrase or broad match was required as explained in the Response to Proposed Finding No. 1210, 1221, and 1238.

1240. Certain of the settlement agreements state that negative keywords shall be implemented “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.” (CX 317, § 2C). This language must be construed “in the context of the entire agreement.” (CX 9040 (Miller, Dep. at 119-120)); *accord Glenn v. Reese*, 2009 UT 80, ¶ 10 (“Contractual interpretation requires considering “each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.”); *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12 (Courts should “attempt to harmonize all of the contract’s provisions and all of its terms”).

**Response to Proposed Finding No. 1240:**

Complaint Counsel has no specific response to the first sentence of the proposed finding. The second sentence of the proposed finding consists entirely of a legal argument, relying on citations to case law and the legal argument of 1-800 Contacts’ outside counsel, and so must be disregarded entirely.

1241. More than half of the extant challenged agreements do not have the language “any internet search that includes the other Party’s trademark keywords” or “when the negative keywords are part of a search” in their negative keyword provisions. (*Compare* CX 317, § 2C *with* CX 311; CX 314 (updated Vision Direct settlement subject to stipulated permanent injunction with negative keyword provision); CX 310; CX 313, § 5B; CX 315, § 4B; CX 322, § 3; CX 325, § 3; CX 311, § 17.10 (calling for exact match negative keywords)).

**Response to Proposed Finding No. 1241:**

The proposed finding is inaccurate and should be rejected. The proposed finding lists only five extant agreements that do not contain the “includes” and “part of” language, out of the thirteen challenged in this case. In other words, fewer than half. CX0311 is listed twice, and is no longer extant, having been superseded by CX0314, the new Vision Direct agreement, as amended. CX0325 is not in evidence, but the Standard Optical Agreement it did refer to is in evidence as RX0408. More importantly, the Standard Optical agreement *does* in fact include the language “any internet search that includes the other Party’s trademark keywords” and “when the negative keywords are part of a search.” (RX0408 at 003-004 (§ 5(C))). This makes for a total of seven agreements containing that language. (RX0028 at 002 (§ 2(C)) (AC Lens Agreement); CX0320 at 004 (§ 4(C)) (Lenses For Less Agreement); CX0321 at 003 (§ 3(C)) (Tram Data d/b/a Replace My Contacts Agreement); CX0323 at 003 (§ 4(C)) (Contact Lens King Agreement); CX0319 at 003 (§ 2(C)) (Empire Vision Agreement); CX0324 at 003 (§ 4(C)) (Web Eye Care Agreement); RX0408 at 003-004 (§ 5(C)) (Standard Optical Agreement)).

The five extant agreements Respondents actually cited that do not contain this exact language are CX0314 (Vision Direct), CX0310 (Coastal), CX0313 (EZ Contacts), CX0315 (Lensfast), CX0322 (Walgreens). However, many of these agreements have the same impact.

Although the Coastal Contacts agreement contains no written “negative keyword provision,” the evidence of Coastal and 1-800 Contacts’ mutual enforcement of the agreement proves that the agreement did in fact require negative keywords which would had to have been implemented in at least phrase match. In November of 2006, Ed McCready of 1-800 Contacts emailed Sarah Villeneuve Bundy of Coastal Contacts saying Coastal was in breach of the agreement. (CX0751). Bundy answered with an explanation from a Coastal marketing specialist, explaining that Coastal was likely being broad matched into the complained of searches, and that entering a negative keyword of “800” should prevent any ads from showing in response to those

searches again. (CX0751). Mr. McCready of 1-800 Contacts responded, “Can you please ensure the necessary steps, such as the use of negative keywords as described by your Marketing Specialist, are taken as soon as possible to prevent your ads from showing on these searches?” (CX0751). Although he did not explicitly say that the negative keyword “800” should be implemented in phrase match, it is quite clear from the context that this is what Mr. McCready was requiring of Coastal. If the negative keyword “800” had been implemented in exact match, it would not have prevented Coastal advertisements from appearing in response to any of the trademark queries. It would only prevent Coastal advertisements from appearing in response to a search that was exactly the same word, “800”. Not only is such a search extremely unlikely to take place and not targeted at 1-800 Contacts, such a search does not contain a 1-800 Contacts trademark. It strains credulity to think that Mr. McCready intended for Coastal to undertake such a meaningless action. It is quite obvious that Mr. McCready intended for Coastal to enter the negative keyword “800” in phrase match or broad match. That is the only way to implement that negative keyword that would “prevent your ads from showing on these searches.”

On January 7, 2010, Mr. Craven emailed Randy Weigner of Lensfast telling him that although they “should be fine with making the negative keywords exact match,” phrase match might be necessary to comply with the agreement: “If I see any problems with Google, I will let you know and then you can change the negatives to ‘phrase match.’” (CX0234). On August 6, 2010 he emailed with Park Studebaker of Lenses for Less. (CX0159). Studebaker wrote to Craven: “Enclosed is a list of the Negative keywords that had been running, and the newly updated today list which now include ANY reference to ‘800.’ I certainly hope this will fix the problem.” (CX0159 (emphasis in original)). Mr. Craven replied to Mr. Studebaker, not to tell him that he had been overly broad in his negative keyword implementation, but rather to say, “Looks like you got your bases covered.” (CX0159). Mr. Craven also included in that email to Mr.

Studebaker a screenshot showing both phrase and exact match negative keywords, saying the screenshot showed a “best practice.” (CX0159).

Mr. Hamilton’s testimony clearly shows that he believes phrase match was necessary in order to comply with both the Vision Direct and Walgreens bidding agreements. “Q. Did you think [phrase match] was necessary to be compliant with the settlement agreements? A. I did, yeah. Q. Why is that? A. Well, I understand the intent of the agreement is to do everything we can to prevent our ads from showing up on 1-800 Contacts trademark search queries ... So phrase is a way to take care of close variants that creep into the auction even -- that you wouldn't be able to block if you used exact only.” (Hamilton, Tr. 409; *see also* CX9038 (Hamilton, Dep. at 106-109); CX8002 (Hamilton, Decl. ¶14); CX9008 (Hamilton, IHT at 72-74)).

1242. Since contracts shall not be read to render any provision superfluous, *Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752 (S.D.N.Y. 2012), the natural reading of the agreement as analyzed by Respondent’s trademark expert witness, Howard Hogan, is that the parties are permitted to implement negative keywords in exact match such that they could place an advertisement in response to a comparative query such as “cheaper than 1-800 Contacts.” (Hogan Tr. 105:24-106:20 (“I am aware of the agreements. I’ve seen it. I think for the most part...it appeared to me to be designed to require exact match...[b]y reading the agreement in the context of all the language”)); *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000) (“The language is ‘capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.’”).

**Response to Proposed Finding No. 1242:**

The proposed “finding” consists entirely of a legal argument, relying on citations to case law and opinions on what the law is proffered by 1-800 Contacts trademark law expert witness, and so must be disregarded entirely.

1243. Additional keywords that were deemed navigational in nature and that included the trademark or a close misspelling were added from time to time, sometimes informally and sometimes formally via modification to the settlement. (Clarkson, Tr. 381; CX 9040 (Miller, Dep. at 98-99 (“Q: Looking at both the Walgreens and the Memorial Eye agreement, are you aware of whether or not these agreements have ever been changed or modified? A: What do you mean? By adding terms to Exhibit 2? Q: That could be one example. A: It could have. I don’t have a

specific recollection if we have. But I know there are times when we would talk about potential breaches, and sometimes we'd do some informal – sometimes I'd do a letter to a party that says, please add this to Exhibit 2. Sometimes we'd do an informal phone call and say, coming up on this, it's not on Exhibit 2, but are you willing to add it as a negative”))).

**Response to Proposed Finding No. 1243:**

Complaint Counsel has no specific response.

1244. Breach notifications and demand letters exchanged between the parties generally only attached screenshots of searches for exact trademark terms and confusing variations of those terms. (CX 796, CX 1468).

**Response to Proposed Finding No. 1244:**

The proposed finding should be rejected because it is inaccurate, and also because it is unsupported by the two examples cited. 1-800 Contacts sent breach notifications or demand letters based on longer searches that included but were not limited to trademark terms. For example, the record includes examples of screenshots sent by 1-800 Contacts to parties regarding searches for longer, non-trademarked phrases such as “1800contacts com rebates” and “1 800 contacts coupons.” (CX1060 at 002; CX453; CX837; CX1241; CX1058; CX0703). Moreover, Complaint Counsel notes that enforcement correspondence exchanged between the parties sometimes attached no screenshots at all, (*E.g.*, CX1058). The two cited examples are insufficient to support a finding regarding a general practice of 1-800 Contacts.

1245. 1-800 Contacts occasionally sent a cease and desist letter or breach notification to another party complaining of advertisements appearing in response to navigational queries that contained the trademark term plus one closely related word, for example “1 800 contacts coupons” or “1 800 contacts coupon code.” (CX 453, CX 837, CX 1241; Hogan, Tr. 3471-72 (since 1-800 Contacts is the only company that can offer coupons to 1-800 Contacts, “it would be deceptive and misleading for a competitor” to advertise coupons for 1-800 Contacts))).

**Response to Proposed Finding No. 1245:**

Complaint Counsel does not dispute that 1-800 Contacts sent emails and letters to competitors with whom it had Bidding agreements complaining of advertisements by that competitor appearing in response to searches for non-trademarked phrases such as “1 800 contacts

coupons” or “1 800 contacts coupon code,” among many others. (*See, e.g.*, CX1060; CX1058; CX0703). Complaint Counsel also notes that 1-800 Contacts’ trademark expert, to the extent any of his testimony can be relied upon, testified that a restriction on advertising going beyond 1-800 Contacts’ trademark term itself would be completely unrelated to the goal of a proper settlement agreement. (Hogan, Tr. 3471 (“Q. So if a competitor were able to advertise under any search query that was broader than ‘1-800 Contacts’ itself, so 1-800 Contacts coupon, 1-800 Contacts discount, 1-800 Contacts cheaper than, would that undermine the goal of the agreements, which was to have finality to this dispute? A. No. Not at all. Because if 1-800 Contacts saw the content of the advertising and it was legitimately comparative looking at the text, there would be no need for a dispute, so it does not undermine the goal of finality at all.”)).

Nonetheless, the proposed finding should be rejected because it is misleading and unsupported insofar as it assumes, as written, that the generic terms “coupons” or “coupon code” are “closely related” to a trademarked term like “1-800 Contacts.” The proposed finding is also misleading and unsupported because it asserts, with no basis, that the queries “1 800 contacts coupons” or “1 800 contacts coupon code” are “navigational.”

The excerpted testimony of Howard Hogan is unrelated to the proposed finding. In any event, the citation is inaccurate and misleading. Mr. Hogan has no personal knowledge of whether companies besides 1-800 Contacts can offer coupons. (*See* Hogan, Tr. 3471 (“my understanding is only 1-800 Contacts has the ability to offer coupons”), 3472 (“*if* 1-800 Contacts is the only party that can offer coupons to 1-800 Contacts . . .”) (emphasis added)). He even testified that he was not familiar with the letters 1-800 Contacts sent to competitors regarding ads appearing on searches for “1-800 Contacts coupon.” (Hogan, Tr. 3472). The couponing practices of internet retailers is a topic outside the scope of his expertise. The legal conclusion that an ad appearing on

such a query is “deceptive and misleading” is an improper subject of testimony for any witness, and unsupported.

It is also not accurate that 1-800 Contacts is the only company that can offer coupons for 1-800 Contacts. 1-800 Contacts routinely uses affiliate companies to offer coupons for its products, and for some time allowed affiliates to use keywords such as “1-800 Contacts coupon” to advertise those coupons. (CX9032 (L. Schmidt, Dep. at 15-16 (offering “coupon sites” as one example of affiliates 1-800 Contacts used)); CX9016 (Judd, Dep. at 34 (explaining that one tactic 1-800 Contacts used to help bring in increased revenue through affiliates was offering coupons), 106 (explaining that at one point, affiliates were allowed bid on “brand-plus coupon code”)). A search including the word “coupon” primarily signals an interest in saving money. (CX9002 (Craven, IHT at 45 (“So a query, like, 1-800 CONTACTS coupon, you’re going to assume that they’re looking for a coupon. So in that instance, from what I remember of my time at 1-800 CONTACTS, we would think that they were a more of a price-sensitive shopper”))). These are consumers that may be particularly interested in seeing comparative advertising.

1246. The nomenclature and technical specifics of negative keywords changed over time, and the search engines maintained different policies with regard to negative keyword implementation. (Pratt, Tr. 2533 (“the Internet service providers that allowed the search, sometimes you weren’t able to implement negative keywords, you know. Google is one example. There’s Bing and Yahoo and others. And they all had different parameters, so sometimes you could put them in, sometimes you couldn’t. Sometimes there were limitations on what you could enter”)); CX 592-001 (identifying negative keywords in Yahoo! search engine as “excluded terms”); CX 9040 (Miller, Dep. at 93 (“And that kind of goes to the same concept of sometimes, you know, Internet search engine can change their policies and some of them had limits on how many negative keywords you could use”))).

**Response to Proposed Finding No. 1246:**

Complaint Counsel has no specific response.

1247. To account for these various policies, the settlement agreements were drafted to only require implementation of negative keywords to the fullest extent practicable or allowable by the search engine’s parameters, with minor changes in the language that all conveyed the same meaning. (CX 313, § 5B (“unless the internet search provider does not utilize negative keywords

in its search parameters); CX 315, § 4B (“the Parties shall use the prohibited key words as negative keywords to the extent practicable”); CX 317, § 2C (“to the fullest extent allowable by the internet search provider”); Pratt, Tr. 2556).

**Response to Proposed Finding No. 1247:**

Complaint Counsel does not dispute that seven of agreements at issue required implementation of negative keywords “to the fullest extent allowable,” as evidenced by the plain language of the agreements. (RX0028 at 002 (AC Lens); CX0320 at 004 (Lenses For Less); CX0321 at 003 (Tram Data d/b/a Replace My Contacts); CX0319 (Empire Vision); CX0323 at 003 (Contact Lens King); CX0324 (Web Eye Care); RX0408 (Standard Optical)).

Otherwise, the proposed finding is improper because it purports to assert as a “finding of fact” a legal argument about the scope of the agreements at issue. The cited testimony of Mr. Pratt, a fact witness, purporting to offer a legal opinion about the meaning and legal effects of the phrase “to the extent practicable” in one of the fourteen agreements must be disregarded. Moreover, the testimony offers no support whatsoever as to “the settlement agreements” generally.

1248. The limitation to implement negative keywords to the “extent practicable” or to the “fullest extent allowable” by the internet search provider did not speak to match type, but intended to account for the fact that search engines may cap or otherwise limit the number of negative keywords or length of a negative keyword and the parties were not obligated to go beyond the parameters established by the search engine. (CX 9040 (Miller, Dep. at 62-63)).

**Response to Proposed Finding No. 1248:**

The proposed finding should be rejected because it is unsupported by the cited evidence. The cited testimony lacks foundation because Mr. Miller testified only as to his “understanding” of what the phrase might have been intended to mean, he has no personal knowledge. (CX9040 (Miller, Dep. at 63 (“So ‘the fullest extent’ just meant if you have room for more negative keywords then you are obligated to use these. *That’s my understanding.*”)) (emphasis added))). *See* Tr, 210 (“let me make something clear. I don't want to hear about anybody's understanding. I want to know facts.”).

Moreover, the testimony of Mr. Miller, a fact witness, purporting to offer a legal opinion about the meaning and legal effect of the phrase “to the fullest extent allowable” in the challenged agreements must be disregarded.

1249. For example, the Lensfast agreement includes a footnote to clarify that under the language providing that the parties need only implement negative keywords to the extent allowable, Lensfast would not be obligated to implement a negative keyword for the phrase, “Exact Same Contact Lenses, Delivered to your Door, for Less Than You’re Paying Now,” since it exceeded the character limit imposed by the search engine. (CX 315-004, § 4B n. 1; Pratt, Tr. 2555-56).

**Response to Proposed Finding No. 1249:**

Complaint Counsel does not dispute that the Lensfast agreement includes a footnote in the section describing the parties’ obligations to use negative keywords, stating that Lensfast is not obligated to implement that long phrase as a negative keyword in Google’s Adwords program under the agreement. (CX0315 at 004).

However, the proposed finding should be rejected to the extent it is intended to provide an “example” of anything, as Proposed Finding No. 1248 should be rejected for the reasons explained in response to Proposed Finding No. 1248.

***F. The Settlement Agreements Lack The Character Of Collusive “Bidding Agreements” Or Reverse Payment Agreements.***

1250. None of thirteen settlement agreements mention the words “bidding,” “bid,” or “auction.” (CX 311 (Vision Direct), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com); Pratt, Tr. 2608-2609)).

**Response to Proposed Finding No. 1250:**

Complaint Counsel has no specific response.

1251. The outside counsel for 1-800 Contacts who negotiated the settlement agreements testified that they never discussed bidding or search auctions with settling parties. (CX 9040 (Miller, Dep. at 202-204); Pratt, Tr. 2561).

**Response to Proposed Finding No. 1251:**

The proposed finding should be rejected because it is contradicted by the weight of the record evidence: Mr. Pratt and Mr. Miller both sent well over a dozen letters to competitors of 1-800 Contacts stating that the competitor had “purchased” search engine keywords that trigger the display of sponsored advertisements in response to 1-800 Contacts’ trademarks, and requesting that the competitor cease “purchasing” 1-800 Contacts trademarks as keywords. (*E.g.*, RX0053; CX1235; CX1229; CX1232; CX1234; CX1513; CX1754; CX1318; CX1618 at 031-033, 035-037; CX0637; CX1472{more}). And each of the very similar trademark infringement complaints filed by 1-800 Contacts (through Mr. Pratt or Mr. Miller) include allegations that a competitor of 1-800 Contacts “purchased” 1-800 Contacts trademarks as keywords that trigger the display of sponsored advertisements for the competitor’s goods. (*E.g.*, CX0452).

The fact that Mr. Miller did not discuss auctions is irrelevant, as he testified that he never understood search advertising, and how the bidding process worked at AdWords. (CX9040 (Miller, Dep. at 202). Mr. Miller’s failure to understand how the AdWords auctions operates through the bidding process has no bearing on whether or not the agreements in question are bidding agreements: referring to how the agreements would work, Miller said, “It was always, just, let’s avoid using each other’s trademarks to trigger advertisements....” (CX9040 (Miller, Dep. at 204). In other words, Mr. Miller was demanding that the parties avoid the search advertising auction all together (i.e. avoid bidding in the auction) when the customer typed the opposing party’s trademark somewhere in the search engine’s search query.

As demonstrated, and despite the fact that Mr. Miller had no idea how search advertising worked when he worked on these bidding agreements, and despite absence of the word “bid” in the Bidding Agreements, the plain language of the Aidding Agreements forbids bidding in search

advertising auctions. (CX 311 (Vision Direct), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com)).

1252. The outside counsel for 1-800 Contacts who negotiated the settlement agreements testified that they never discussed advertising costs or how the settlement agreements would impact the parties' respective costs with settling parties. (CX 9040 (Miller, Dep. at 202-204); Pratt, Tr. 2561).

**Response to Proposed Finding No. 1252:**

This proposed finding should be rejected because it is irrelevant. Further, Respondent here misstates the testimony. Mr. Miller simply stated that no party raised the issue of financial impact directly; the issue for 1-800 Contacts was to avoid advertising against one another altogether by avoiding "using each others' trademarks...." (CX 9040, (Miller, Dep. at 202-204)).

1253. No parties testified that they settled the cases in order to save money on advertising costs. Instead, they testified that they settled in order to avoid the costs of litigation or because they might lose the litigation. (CX 9042 (Evans, Dep. at 124); CX 9039 (Clarkson, Dep. at 86-87, 114 (ACLens might "lose" the case, and it would cost "well over \$100,000" to litigate it)); (Clarkson, Tr. 244-45, 338-39 ("the outcome was uncertain, that we may win or we may lose, but either way it would be very expensive to fight it"));

});  
 CX 8000-002 (Park Studebaker, principal for Lenses for Less, "signed a settlement agreement with 1-800 Contacts to resolve the threatened litigation"))).

**Response to Proposed Finding No. 1253:**

Complaint Counsel has no specific response.

1254. Every settling party pushed back against 1-800 Contacts at some point in the litigation and settlement negotiation process. (CX 9021 (Pratt, Dep. at 122)). The settlements were not collusive in nature. Instead, they were the result of disputed litigations and arms-length negotiations.

**Response to Proposed Finding No. 1254:**

The proposed finding should be rejected because it is is vague, irrelevant, and not supported by the evidence cited.

The proposed finding is vague and incomprehensible to the extent it suggest that the agreements are “not collusive in nature.” A horizontal agreement between direct competitors to refrain from competing in an auction constitutes collusion. The fact that parties supposedly “pushed back” during the process of negotiating the collusion is irrelevant. In a price-fixing agreement, the conspirators may argue about the right price to set, but that is not relevant to the antitrust analysis of the agreement.

Further, the finding is not supported by the testimony cited because Mr. Pratt was not personally involved in negotiations with “every settling party.” (*e.g.*, CX0058 (negotiations with Coastal by 1-800 Contacts’ in-house counsel)). Moreover, Mr. Pratt’s actual testimony was merely that he did not *recall* a situation in which the other party did not do at least one of the following: “resist,” “push back,” “try to either avoid signing the agreement,” or “change the terms of the agreement.” (CX9021 (Pratt, Dep. at 122)).

Moreover, the claim that some parties “pushed back” is too vague to be adopted as a finding. Some parties “pushed back” on the payment demand by 1-800 Contacts, but were told 1-800 Contacts would not negotiate on the aspects of the agreement precluding bidding and requiring negative keywords. (*see, e.g.* CX9014 (Batushansky, Dep. 43-47) (Explaining that 1-800 Contacts would discuss adjusting the settlement fee amount, but would not negotiate on the terms of the settlement agreement related to bidding on trademarked terms and negative keywords.); *see also* RX926, RX64, CX 799, and CX 741 (samples of correspondence from 1-800 Contacts’ lawyers explaining that the bidding prohibition and negative keyword requirements are all non-negotiable elements necessary in order to reach a settlement with 1-800 Contacts)).

1255. In addition to the Memorial Eye and Lens.com litigations, several of the cases that ultimately settled involved months of litigation and/or contentious negotiations before an agreement was reached to settle the dispute. (CX 640; CX 823; CX 965; CX 1618; RX 253; RX 1013; RX 1014; RX 1022;).

**Response to Proposed Finding No. 1255:**

Complaint Counsel objects to this proposed finding insofar as the cited material does not support the conclusion. Rather, the cited material includes the complaints filed by 1-800 Contacts and some correspondence between 1-800 Contacts which involve only Standard Optical and Lensfast. (CX 640; CX 823; CX 965; CX 1618; RX 253; RX 1013; RX 1014; RX 1022). “Two,” in this context, does not mean “several.” Further, if by “contentious” Respondent means that the tone and tenor of the communications leading up to the Bidding Agreements, then the proposed finding is irrelevant.

1256. Settling parties other than 1-800 Contacts were successful in obtaining additional provisions or language through their settlement negotiations. (Pratt, Tr. 2544, 2546 (including a force majeure clause requested by EZ Contacts USA into the EZ Contacts USA settlement); CX 9040 (Miller, Dep. at 104 (“And so I know that in this agreement with Standard Optical the opposing counsel, you know, did some edits of his own”), 111 (“Q: Why did you put a term in this agreement? A: Standard Optical asked for it.”)); CX 9040 (Miller, Dep. at 86-87 (discussing changes proposed and accepted by Walgreens counsel to settlement.); CX 9040 (Miller, Dep. at 95-96 (“It could have been part of the negotiation pushback, and those trademarks are not as commonly searched and so it’s less important to have them on there. And that was kind of a give-and-take in order to get Memorial Eye to settle. That could be the case.”))).

**Response to Proposed Finding No. 1256:**

The proposed finding should be rejected because it is irrelevant. The fact that EZ Contacts sought a standard force majeure clause (Pratt, Tr. 2544, 2546 ) and that Walgreens suggested modifications to clarify the bidding prohibition and negative keyword requirement are irrelevant. (CX9040 (Miller, Dep. at 86 Each of the Bidding Agreements at issue prohibit rivals from purchasing ads in response to queries that include the 1-800 Contacts trademarks, which is the issue in this case. (CX 311 (Vision Direct), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks),

CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com)).

1257. However, none of the settlement agreements required 1-800 Contacts to pay another retailer, and none of the other retailers received financial compensation as part of the settlement agreement. (CX 311 (Vision Direct), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com)).

**Response to Proposed Finding No. 1257:**

The proposed finding should be rejected because it is irrelevant.

1258. Settling retailers testified that they received little to no benefit from the settlement agreement. (Clarkson, Tr. 363-64; CX 9039 (Clarkson, Dep. at 164 (1-800 Contacts “didn’t really give anything up by agreeing not to advertise on our marks”)); CX 9024 (Holbrook, Dep. at 175 (“Q: That wasn’t something that was important to you, that you get agreement from 1-800 Contacts that they also implement negative keywords? A: No. Absolutely it was not important to us. It was totally an empty gesture on our part. It was not important to us. It didn’t affect us in any way. It was purely symbolic, quite frankly”), 176 (“we did not see that as a benefit to us in any way whatsoever. We were harmed by the agreement totally. We saw no advantage to getting them to implement the negative keywords at all, zero, none”)); {REDACTED} } CX 9014 (Batushansky, Dep. at 45-47 (“So other than not having litigation...there was not any benefit to Web Eye Care signing the agreement”))).

**Response to Proposed Finding No. 1258:**

The proposed finding is misleading. The settling retailers’ benefit from the bidding agreements was avoiding litigation costs. Indeed, as Mr. Holbrook testified, Memorial Eye was “harmed by the agreement totally,” and would not have sought the agreement but for the costs imposed by 1-800 Contacts through the litigation. (CX 9024 (Holbrook, Dep. at 175-177) (explaining that Memorial Eye was “forced” into the agreement, and that the protracted litigation

leading up to the settlement agreement caused Memorial Eye to change its business strategy and exit the online market altogether)).

1259. Dr. Evans did not dispute that the settlement agreements did not confer anything of significant value to the other settling parties besides avoiding the costs of litigation and the risks of losing the trademark infringement case. (CX 9042 (Evans, Dep. at 115-16 (“Q: Let’s just take AC Lens as an example. What benefit did it get from the settlement agreement? A: It avoided a lawsuit. Q: Did it receive any money? A: It received money in the sense that it received money that – in its pockets that it didn’t have to spend on a lawsuit.” Q: Other than avoiding the lawsuit did it receive any benefit? A: No”); (CX 9042 (Evans, Dep. at 116 (“One of the costs is the risk of losing the lawsuit”))).

**Response to Proposed Finding No. 1259:**

Complaint Counsel has no specific response.

1260. Several settling parties testified that they discontinued selecting 1-800 Contacts’ trademarks as keywords and/or began to implement negative keywords as a result of being contacted by 1-800 Contacts in a cease and desist letter or complaint about potential trademark infringement. { [REDACTED] }; CX 8000-002 (Studebaker Decl. on behalf of Lenses for Less); Clarkson, Tr. 238-39)).

**Response to Proposed Finding No. 1260:**

Complaint Counsel has no specific response.

1261. LensDirect was sent a cease and desist letter by 1-800 Contacts’ outside counsel in June of 2011. (CX 1241; Alovis, Tr. 970-972). LensDirect did not agree to settle the case and continues to place advertisements in response to searches for 1-800 Contacts. (Alovis, Tr. 974, 976 (“Q: Is LensDirect currently bidding on 1-800 Contacts terms as keywords? A: Yes.”)).

**Response to Proposed Finding No. 1260:**

Complaint Counsel objects to this proposed finding of fact as it misstates the testimony.

There was no “case” to “settle.” Mr. Alovis testified that he was contacted by 1-800 Contacts lawyers by letter, reached out to a family attorney who wrote a response to 1-800 Contacts, that he took the position that LensDirect was not infringing 1-800 Contacts’ trademarks, that LensDirect did not agree to the terms sought by 1-800 Contacts, that after sending the letter to Counsel for 1-800 Contact never heard back from 1-800 Contacts, and that after they sent their response to 1-800

Contacts LensDirect scaled back their bidding on 1-800 Contacts trademarks. (Alovis, Tr. 970-976).

1262. The 2004 Vision Direct settlement agreement included a nominal \$1.00 payment to 1-800 Contacts. (CX 311, § 3).

**Response to Proposed Finding No. 1262:**

Complaint Counsel has no specific response.

1263. Under the 2009 Settlement Agreement and Mutual Release with Vision Direct pursuant to a permanent injunction, Vision Direct paid 1-800 Contacts a sum of \$475,000 as partial reimbursement of 1-800 Contacts' attorney's fees. (CX 314-001, § J).

**Response to Proposed Finding No. 1263:**

The proposed finding is unsupported. Complaint Counsel does not dispute the existence of the cited provision of the 2009 Vision Direct Bidding Agreement, but that agreement does not prove that the payment was actually made.

Moreover, the proposed finding is irrelevant.

1264. The EZ Contacts USA settlement included a \$29,000 payment in six installments from EZ Contacts USA to 1-800 Contacts. (CX 313, § 4).

**Response to Proposed Finding No. 1264:**

The proposed finding is unsupported by the evidence cited. The Bidding Agreement states that EZ Contacts USA was required to pay the amount in monthly installments of \$5000 (except for \$4000 in the last month) beginning in May, 2009, but does not evidence whether such payment was made. (CX 313, § 4).

1265. The Lensfast settlement agreement included a \$20,000 payment from Lensfast to 1-800 Contacts. (CX 315, § 1).

**Response to Proposed Finding No. 1265:**

The proposed finding is unsupported by the evidence cited. The Bidding Agreement states that Lensfast was required to pay the amount in monthly installments of \$3,333.33 beginning in January, 2010 but does not evidence whether such payment was made. (CX 314, § 1).

1266. The Contact Lens King settlement agreement included an \$8,000 payment from Contact Lens King to 1-800 Contacts. (CX 323, § 1).

**Response to Proposed Finding No. 1266:**

The proposed finding is unsupported by the evidence cited. The Bidding Agreement reads in pertinent part, “CLK shall pay 1-800 Contacts ten thousand dollars (\$8,000.00) on or before the date on which both parties have executed the agreement,” (CX323, §1), but does not evidence whether such payment was made.

1267. The Web Eye Care settlement agreement included a \$2,000 payment from Web Eye Care to 1-800 Contacts. (CX 324, § 1).

**Response to Proposed Finding No. 1267:**

The proposed finding is unsupported by the evidence cited. The Bidding Agreement 1-800 Contacts entered into with WebEyeCare required a payment of \$2,000, but does not evidence that such payment was made.

***G. Luxottica Sourcing And Fulfillment Agreement***

1268. Complaint Counsel also challenge a sourcing and fulfillment agreement entered into between 1-800 Contacts and Luxottica on December 23, 2013, even though it is not a settlement agreement. (CX 331-001).

**Response to Proposed Finding No. 1268:**

Complaint Counsel notes that the sourcing and fulfillment agreement in question incorporates a pre-existing Bidding Agreement akin to the other Bidding Agreements at issue here. (CX331-045-048 (§§17.10-17.11)). The agreement between Luxottica and 1-800 Contacts was originally entered in May 2005, and remained in effect at all times. *See* CCPTFOF No. 174.

1269. Pursuant to the agreement with Luxottica, 1-800 Contacts provides fulfillment services for Luxottica's retail chains (e.g., LensCrafters, Pearle Vision, Sears Optical, and Target Optical). (Bethers, Tr. 3524-25).

**Response to Proposed Finding No. 1269:**

Complaint Counsel has no specific response, except to note that additional websites are included in the sourcing agreement that are not identified in Proposed Finding No. 1269.

1270. The fulfillment services provided by 1-800 Contacts to Luxottica consist of shipping contact lenses directly to Luxottica's retail chain stores and directly to the home of customers of Luxottica's retail stores. (Bethers, Tr. 3524-25).

**Response to Proposed Finding No. 1270:**

Complaint Counsel has no specific response. 1271. The products shipped by 1-800 Contacts as part of the fulfillment services provided to Luxottica do not indicate that they came from 1-800 Contacts. (Bethers, Tr. 3524-25).

**Response to Proposed Finding No. 1271:**

Complaint Counsel has no specific response. 1272. Under the agreement between 1-800 Contacts and Luxottica, 1-800 Contacts ships contact lens to Luxottica's stores and Luxottica's customers in boxes that are labeled and packaged under the Luxottica names. (Bethers, Tr. 3694-95).

**Response to Proposed Finding No. 1272:**

Complaint Counsel has no specific response. 1273. Under the agreement between 1-800 Contacts and Luxottica, the parties work together in sourcing contact lenses from the four major contact lens manufacturers. (Bethers, Tr. 3695).

**Response to Proposed Finding No. 1273:**

Complaint Counsel has no specific response.

1274. [REDACTED]

)} [REDACTED]

**Response to Proposed Finding No. 1274:**

Complaint Counsel has no specific response.

**X. Putting The Settlement Agreements In Context****A. *The Settlement Agreements Take A Commonplace Form***

**1275.** The settlement agreements at issue in this litigation “are standard trademark-related settlements.” (Hogan, Tr. 3274-75; RX 734-0005–6).

**Response to Proposed Finding No. 1275**

Complaint Counsel objects to the proposed finding as plainly erroneous and contrary to the weight of the evidence. It is also irrelevant. 1-800 Contacts’ Bidding Agreements have three salient terms: (i) the rival may not bid for designated trademarks in a search advertising auction, even where consumers are not confused; (ii) the rival must designate certain “negative keywords” in its search advertising campaigns; and (iii) the settlement terms are reciprocal, constraining both 1-800 Contacts and the alleged infringer. CC Post-Trial Reply Br. at 7. Mr. Hogan (and 1-800 Contacts) have identified zero trademark cases or settlement agreements that include all three of the salient characteristics of the Bidding Agreements in this case. Mr. Hogan (and 1-800 Contacts) have identified four trademark cases or settlement agreements that include two of the three salient characteristics of the Bidding Agreements. Mr. Hogan (and 1-800 Contacts) have identified zero keyword bidding cases in which a court found trademark infringement where the alleged infringer did not bid on the plaintiff’s trademark keyword. (In other words, no U.S. court has ever found liability for an advertiser where the challenged ad was “matched” to a query by the search engine.) And Mr. Hogan (and 1-800 Contacts) have identified zero trademark cases or settlement agreements that include reciprocal terms. CC Post-Trial Reply Br. at 8-9.

Finally, even if the terms were “common” that is not relevant because there is no exception to antitrust scrutiny for “commonplace” settlement agreements. CC Post-Trial Reply Br. at 5-6.

**1276.** The settlement agreements “contain terms that are commonly used and accepted in trademark disputes.” (RX 734-0096; Hogan, Tr. 3247-48).

**Response to Proposed Finding No. 1276**

Complaint Counsel objects to the proposed finding as erroneous and irrelevant for the reasons set forth in Response to Proposed Finding No. 1275.

**1277.** The settlement agreements “correlate to remedies issued by courts in trademark disputes.” (RX 734-0096).

**Response to Proposed Finding No. 1277**

Complaint Counsel objects to the proposed finding as misleading and irrelevant. The record demonstrates that the Bidding Agreements do not correlate to remedies issued by any court, let alone by any court in a dispute involving a similar claim. (*See* CCPTB at 147 & n. 468 (describing features of Bidding Agreements that have never been ordered by any court)). Even if they did, this would not immunize the bidding agreements. *See* Response to Proposed Finding No. 1275; (CCPTB 157-164).

**1278.** The vast majority of trademark cases involving keyword advertising are resolved through settlements rather than trials. (Hogan, Tr. 3266).

**Response to Proposed Finding No. 1278**

Complaint Counsel objects to the proposed finding as irrelevant, and notes that Mr. Hogan has no idea how many cases are settled every year, has no idea what the contents of those settlement agreements are, and has no idea whether trademark cases are more or less likely to settle than other cases (Hogan, Tr. 3322, 3324, 3490-3491).

**1279.** The parties to a trademark infringement settlement agreement are in the best position to determine what restrictions with respect to internet advertising are in their best interests. (Hogan, Tr. 3505).

**Response to Proposed Finding No. 1279**

Complaint Counsel objects to the proposed finding as irrelevant. Anticompetitive agreements are frequently in the best interests of the parties to those agreements, but nonetheless cause harm to consumers.

**1280.** The parties to a trademark infringement settlement are in the best position to determine the effect on their business of specific restrictions on internet advertising. (Hogan, Tr. 3505).

**Response to Proposed Finding No. 1280**

Complaint Counsel objects to the proposed finding as irrelevant. *See* Response to Proposed Finding No. 1279.

**1281.** It is common for trademark litigators to recommend settlement to their clients if it is possible to resolve the dispute quickly and without significantly impacting the party's business. (RX 734-0094).

**Response to Proposed Finding No. 1281**

Complaint Counsel objects to the proposed finding as lacking foundation and unsupported, as Mr. Hogan cannot broadly speak to what is “common” among any particular group of trademark practitioners. (*See* CC Post-Trial Reply Br. at 9). The proposed finding relies solely on Mr. Hogan's experience. (RX0734 at 0094 (¶ 139) (Hogan Expert Report) (containing the proposed finding, preceded by the words “In my experience, . . .”). Whether or not Mr. Hogan's personal practice is to recommend clients sign agreements which create legal risks, the record contains no evidence to suggest that such a recommendation would be commonplace. Indeed, the record demonstrates that other trademark practitioners were concerned by the Bidding Agreements because of their potential to violate the antitrust laws. (CX0141 at 001 (“Vision Direct believes that any agreement between the parties with regard to the implementation of negative keywords creates an unacceptable risk of violation Section 1 of the Sherman Act.”)).

Further, this proposed finding is irrelevant because the commonality of settlements generally has no bearing on the terms of the Bidding Agreements at issue. (*See* CC Post-Trial Reply Br. at 5-6.)

Finally, the record evidence demonstrates that the Bidding Agreements here did “significantly impact[] the party[ies’] business,” so the hypothetical contemplated by the proposed finding of fact is inapposite. (*See, e.g.,* Holbrook, Tr. 1931-1933).

**1282.** Trademark cases involving keyword advertising frequently settle because there are many alternative ways for the defendant to advertise its goods or services other than using the plaintiff’s trademark as a keyword. (Hogan, Tr. 3266–67; RX 734-0096–97).

**Response to Proposed Finding No. 1282**

Complaint Counsel objects to the proposed finding as expert opinion not contained within Mr. Hogan’s expert report; although Respondent purports to cite to Mr. Hogan’s expert report, and asserted at trial that Mr. Hogan’s report addressed this issue, the cited page of Mr. Hogan’s report notes only that non-use agreements are common if “the law is unsettled or the extent of liability is unclear.” (RX0734 at 0096 (¶ 144) (Hogan Expert Report)). Mr. Hogan’s report then specifically discusses the 1-800 Contacts agreements. *Id.* There is no discussion of the reasons why other trademark cases involving keyword advertising do or do not settle. (RX0734 at 0096-0097 (¶ 145) (Hogan Expert Report)).

The proposed finding that “there are many alternative ways” for the settling parties to advertise their goods or services is also contradicted by the record evidence, which shows that the settling parties relied primarily, or even solely, on search advertising to market their goods and services. (CCPTF ¶¶ 489-589). Further, the record evidence shows that trademark keyword advertising – specifically advertising in response to search queries relating to 1-800 Contacts – was very valuable to many of the settling parties. (CCPTF ¶¶ 590-802).

Further, Mr. Hogan is relying solely on his own minimal litigation record (a total of seven cases he identified as keyword bidding cases) to explain why trademark cases settle. But Mr. Hogan's rationale for settlement cannot reasonably be imputed to most trademark settlements. (Hogan, Tr. 3321-3322).

**1283.** Courts, recognizing that parties must have some leeway in reaching a negotiated settlement, generally accord substantial deference to the terms of those settlement agreements. (RX 734-0093; Hogan, Tr. 3271).

**Response to Proposed Finding No. 1283**

Complaint Counsel objects to the proposed finding as improper expert opinion regarding a legal conclusion, and therefore not a proper subject of a finding of fact. Mr. Hogan does not cite any statistical analysis or other non-legal source, but instead relies solely upon legal cases in support of the proposed finding.

To the extent the proposed finding implies that the bidding agreements are owed deference even when they are in violation of the antitrust laws, Complaint Counsel objects that the proposed finding is erroneous. See CC Post-Trial Reply Br. at 127-128.

**1284.** The most common way for an accused infringer to settle a trademark dispute is to agree to not use the trademark in question. (RX 734-0096; Hogan, Tr. 3272 (“In the trademark context, the most common form of settlement agreement is what we call a nonuse agreement”)).

**Response to Proposed Finding No. 1284**

Complaint Counsel objects to the proposed finding as lacking foundation. As described in CC Post-Trial Reply Br. at 9, Mr. Hogan has no idea what the “most common way” for an accused infringer to settle a trademark dispute is. He has not been involved in the vast majority of trademark settlement agreements; he has been counsel of record in a grand total of seven cases he termed to be keyword bidding cases (all of them were not keyword bidding cases); he has relied solely on publicly available cases and redacted settlement agreements to form the basis of his opinion; and they do not support his opinion, as described in CCPTB at 159-163.

Further, Mr. Hogan's conclusion is simply erroneous. The terms in the Bidding Agreement are not common for any group of defendants. (CX8014 at 035 (¶ 75) (Tushnet Rebuttal Expert Report)). Indeed, 1-800 Contacts failed to produce a single case or settlement agreement that contained all three salient terms of 1-800 Contacts' Bidding Agreements, and produced only four cases (three consent judgments and one default judgment) in which two of the three salient terms were present. Statistically, this is a miniscule number, and certainly not sufficient to support any definition of "common." See CC Post-Trial Reply Br. at 8-9.

Further, the proposed finding of fact is inapposite to the facts of this case. As described in CC Post-Trial Reply Br. at 76-77, 1-800 Contacts' Bidding Agreements go well beyond a standard "non-use" agreement, in that they require the implementation of negative keywords (by definition, negative keywords are implemented to prevent the display of advertisements when there has been no "use" of the trademark) and they are reciprocal.

Finally, the proposed finding of fact is irrelevant because the "commonplace" nature of settlement agreements do not equate to lawfulness. CC Post-Trial Reply Br. at 5-6.

**1285.** In trademark disputes, the most common form of a settlement agreement, referred to as a "non-use agreement," restricts the defendant from using the allegedly infringed trademark in any context. (Hogan, Tr. 3272-73).

**Response to Proposed Finding No. 1285**

Complaint Counsel objects to the proposed finding for the reasons cited in Response to Proposed Finding No. 1284.

**1286.** Westlaw's trademark settlement template includes terms to "permanently cease all use of" the owner's trademark. (RX 734-0096).

**Response to Proposed Finding No. 1286**

Complaint Counsel objects to the proposed finding for the reasons cited in Response to Proposed Finding No. 1284.

**1287.** It is common and typical for trademark judgments and settlement agreements to prohibit not only the use of the trademark terms at issue but also common misspellings and variations of the trademark at issue. (Hogan, Tr. 3291; RX 734-0109–14).

**Response to Proposed Finding No. 1287**

Complaint Counsel objects to the proposed finding for the reasons cited in Response to Proposed Finding No. 1284.

**1288.** The settlement agreements at issue in this case are limited non-use agreements in that they relate to one specific type of advertising and also carve out and explicitly allow other types of advertising. (Hogan, Tr. 3275).

**Response to Proposed Finding No. 1288**

The proposed finding is plainly false, in that the Bidding Agreements are not “limited non-use agreements” in any sense of the word. First, they relate to “one specific type of advertising” but it is the most important type of advertising that 1-800 Contacts’ rivals rely upon, and in many cases, the only type of advertising they rely upon. (CCPTF ¶¶ 489-589). Moreover, the record evidence shows that 1-800 Contacts and some of its rivals enforced the Bidding Agreements even outside of the paid search advertising context. (CCPTB at 39.) Second, although several (not all) of the Bidding Agreements contain so-called carveout provisions, the carveouts are meaningless, as the settling parties testified. They do not allow any comparative or competitive advertising in response to any search queries that include a 1-800 Contacts trademark. None of the parties could identify any ad that was displayed as a result of the carveout; neither could 1-800 Contacts. (*E.g.*, Hogan, Tr. 3468.) Third, the description of the Bidding Agreement as a “non-use” agreement is misleading, as described in CC Post-Trail Reply Br. 76-77. The Bidding Agreements go significantly beyond “non-use” because they involve negative keywords and reciprocal provisions. *See* Response to Proposed Finding Nos. 1163, 1165.

**1289.** The scope of the settlement agreements at issue is narrower than the scope of typical agreements and consent judgments involving disputes over paid search advertising because the settlement agreements at issue in this case restrict only one type of advertising — paid search. (Hogan, Tr. 3275–79).

**Response to Proposed Finding No. 1289**

The proposed finding is erroneous for several reasons. First, the cases cited by Mr. Hogan, by and large, did not relate to keyword bidding or paid search advertising. See CCPTB at 160-163. Second, for all of the reasons described in CC Post-Trial Reply Br. at 7-9, the Bidding Agreements were significantly broader than what Mr. Hogan terms a “typical” agreement or consent judgment. As noted there, *id.*, neither Mr. Hogan nor 1-800 Contacts has identified a single agreement with all three characteristics of the Bidding Agreements, and out of thousands of settlement agreements that have presumably been entered over the last decade, Mr. Hogan has managed to identify a grand total of four cases (three consent judgments and one default judgment) in which negative keywords are implemented. Third, as described in Response to Proposed Finding No. 1288, 1-800 Contacts enforced the Bidding Agreements even beyond paid search advertising.

**1290.** Complaint Counsel offer the opinion of Prof. Tushnet to rebut the opinion of Mr. Hogan that the settlement agreements take a commonplace form. (Tushnet, Tr. 4452). Prof. Tushnet’s opinion on this issue is not reliable and is entitled to no weight, because she lacks the background and expertise required to provide such an opinion.

**Response to Proposed Finding No. 1290**

Complaint Counsel objects to the proposed finding, which cites no evidence. Nor could it, as it is a legal conclusion regarding the weight of evidence and is not itself a conclusion regarding facts at issue in in this matter. In point of fact, Professor Tushnet is a Harvard law professor who teaches courses on trademarks, advertising, and marketing law. She is actively involved in the legal bar, regularly submitting *amicus* briefs in novel and important trademark cases, and she maintains and writes a blog dedicated to trademark issues. Professor Tushnet has also written “the only casebook dedicated to advertising and marketing law,” a casebook that addresses trademark keyword bidding. Prior to her career as an academic, Professor Tushnet clerked for the Third Circuit and the Supreme Court, and spent two years as a litigation associate at a Washington, D.C.,

law firm, specializing in advertising, trademarks, and copyrights. Moreover, as part of her professional obligations, Professor Tushnet regularly surveys, reviews, and contributes to studies relating to consumer behavior. For example, Professor Tushnet reviewed and provided commentary to the Franklyn & Hyman study cited by Professor Goodstein in his expert report and discussed by Professor Tushnet in her own expert report. Indeed, Franklyn & Hyman revised their study as a result of Professor Tushnet's comments on their original work. (Tushnet, Tr. 4373-4392, 4432, 4434; CX8014 at 003-004 (¶¶ 3-5) (Tushnet Rebuttal Expert Report)).

Professor Tushnet is certainly as qualified, if not more so, than Mr. Hogan, a lawyer at a local firm, to review publicly available cases and reach conclusions based on those documents. Indeed, Professor Tushnet reviewed the dockets of the cases and understood the claims at issue, as opposed to Mr. Hogan, who reviewed only the purported "decisions," documents that perfunctorily granted relief without any discussion of the allegations or claims. CCPTB at 163 & n. 525.

**1291.** Prof. Tushnet did not review the settlement agreements at issue in this case. (Tushnet, Tr. 4495-96; CX 9044 (Tushnet, Dep. at 33). By contrast, Mr. Hogan reviewed all of the settlement agreements at issue in this case, as well as pleadings. (Hogan, Tr. 3248).

**Response to Proposed Finding No. 1291**

The proposed finding is misleading and irrelevant. The relevant question is whether Professor Tushnet understood the salient terms of the agreements (she did), which were expressly spelled out by Mr. Hogan in his report. (Tushnet, Tr. 4469; *see* RX0734 at 0096, 0115, 0117-0118 (¶¶ 145, 155, 158) (Hogan Expert Report) (describing terms of 1-800 Contacts' agreements, and quoting the relevant portions of the agreements)). Professor Tushnet is perfectly capable of comparing those terms to the relief granted in other cases.

Additionally, Respondents' claim that Mr. Hogan reviewed the pleadings related to the agreements at issue in this case is misleading. Mr. Hogan did not list the pleadings as materials

considered in his expert report. (RX0732 at 0010-0017 (Exhibit B)). If he did review the pleadings in the underlying cases, this would be the only handful of pleadings he reviewed out of all of the cases he cited in his report. As Mr. Hogan testified, he did not review pleadings in the vast majority of cases he cited for purposes of forming his opinions in his report. CCPTB at 163 & n. 525.

**1292.** The Court noted that since Prof. Tushnet “didn’t review the settlement agreements,” as she admitted she had not, “she will not be allowed to testify regarding the settlement agreements.” (Tushnet, Tr. 4467-68).

### **Response to Proposed Finding No. 1292**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1291.

**1293.** Prof. Tushnet was not qualified to opine on what is common or typical in settling trademark cases because Prof. Tushnet has never settled a trademark case. (CX 9044 (Tushnet, Dep. at 21); Tushnet, Tr. 4374). In contrast, Mr. Hogan has settled hundreds of trademark cases. (CX 9047 (Hogan, Dep. at 23)).

### **Response to Proposed Finding No. 1293**

Complaint Counsel objects to the proposed finding because it is erroneous. During his career as a trademark practitioner, Mr. Hogan has been personally involved in a grand total of seven court cases that he identified as “keyword bidding” cases. (RX0734 at 0007 (¶14) (Hogan Expert Report); CX9047 (Hogan, Dep. at 17); Hogan, Tr. 3313-3315. Mr. Hogan conceded that one of these cases, *Weight Watchers*, had no allegations relating to keyword bidding. CX9047 (Hogan, Dep. at 250)). Mr. Hogan expressly disclaimed reliance on any “confidential” settlement agreements with which he is familiar (none of which he made available to Complaint Counsel or to this Court) as forming the basis for his opinion regarding the “commonplace” nature of the Bidding Agreements. (CX9047 (Hogan, Dep. at 18, 24, 31-33, 176-177)). In other words, Mr. Hogan, like Complaint Counsel’s expert, Professor Rebecca Tushnet, simply reviewed and relied

on publicly available cases and settlement agreements to reach his opinion; and the statistics on those cases are described above.

Professor Tushnet, a Harvard law professor, is just as qualified as Mr. Hogan, if not more so, to review publicly available legal materials and to reach a conclusion regarding those documents. *See* Response to Proposed Findings No. 1290-1291.

**1294.** Prof. Tushnet has only helped to litigate a handful of trademark cases, when she was an associate at Debevoise & Plimpton more than 15 years ago, and she was not the lead lawyer on any of those cases. (Tushnet, Tr. 4374; CX 9044 (Tushnet, Dep. at 15)). By contrast, Mr. Hogan has litigated and advised clients in hundreds of trademark matters involving paid search advertising. (CX 9047 (Hogan, Dep. at 15, 20)).

**Response to Proposed Finding No. 1294**

Complaint Counsel objects to this proposed finding of fact for all the reasons listed in Response to Proposed Findings No. 1290 and 1293.

**1295.** Prof. Tushnet only reviewed two settlement agreements in other cases, beyond those cited by Mr. Hogan. (Tushnet, Tr. 4489, 4492-93).

**Response to Proposed Finding No. 1295**

Complaint Counsel objects to this proposed finding of fact for all the reasons listed in Response to Proposed Findings No. 1290 and 1293.

***1. All Of The Agreements Settling Keyword Cases Identified By The Parties Restrict Bidding On Keywords Containing Trademarks.***

**1296.** The parties identified six settlement agreements that resolved disputed trademark litigation pertaining to the use of trademarks in keyword advertising. (RX 734-0108-09; RX 732-0212-30 { [REDACTED] } RX 732-0232-35 (*Yahoo!* settlement); CX 9022 { ( [REDACTED] ); } RX 732-0237-42 (*Pine Tree Legal* settlement); Tushnet, Tr. 4529-32 (describing *Sen* settlement)).

**Response to Proposed Finding No. 1296**

This proposed finding of fact is erroneous, as none of these settlement agreements were analogous to the Bidding Agreements, for the reasons described in CC Post-Trial Reply Br. at 7-9. Further, this Proposed Finding, if it were true, confirms that the Bidding Agreements are decidedly

not commonplace, as Respondent concedes that it has identified a grand total of six agreements that purportedly resolve “disputed trademark litigation pertaining to the use of trademarks in keyword advertising.” Notably, none of these publicly-available, and heavily redacted, agreements contain all three salient terms of the 1-800 Contacts Bidding Agreements. None of them contain negative keywords, and none of them are reciprocal. CC Post-Trial Reply Br. at 7-9.

Further, even if the Bidding Agreements were common (they are not), this would be irrelevant for all of the reasons listed in CC Post-Trial Reply Br. at 5-6.

Complaint Counsel further notes that the citations to Mr. Hogan’s appendices cite purported agreements which are not themselves in evidence.

**1297.** [REDACTED] (See RX 732-0212-30 { [REDACTED] } RX 732-0232-35 (*Yahoo!* settlement); CX 9022 { [REDACTED] } at 132-34 { [REDACTED] };} RX 732-0237-42 (*Pine Tree Legal* settlement); Tushnet, Tr. 4529-32 (describing *Sen* settlement)).

**Response to Proposed Finding No. 1297**

Complaint Counsel objects to the proposed finding for all of the reasons listed in Response to Proposed Finding No. 1296.

**1298.** [REDACTED] (See RX 732-0212-30 (*Greenberg Smoked Turkeys* settlement); RX 732-0232-35 (*Yahoo!* settlement); CX 9022 { [REDACTED] } .}

**Response to Proposed Finding No. 1298**

Complaint Counsel objects to the proposed finding for all of the reasons listed in Response to Proposed Finding No. 1296.

**1299.** Neither Complaint Counsel nor their experts identified a single settlement agreement in a keyword advertising case that did not include a provision restricting the use of a trademark as a keyword in paid search advertising. (See Tushnet, Tr. 4484).

**Response to Proposed Finding No. 1299**

Complaint Counsel objects to the proposed finding for all of the reasons listed in Response to Proposed Finding No. 1296. Furthermore, it is not Complaint Counsel’s burden to demonstrate the lack of commonality of the Bidding Agreements, as the “commonality” (or lack thereof) is not relevant to this case. Complaint Counsel has no obligation to prove the negative.

However, Complaint Counsel has referenced numerous trademark cases that direct that clear identification of the seller is a sufficient remedy for potential confusion. *See, e.g., Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 933 (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”); *1-800 Contacts v. Lens.com*, 722 F.3d 1229, 1245 (10th Cir. 2013) (“[An] inference [that the trademark owner is the source of a rival ad] 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.”) (following *Network Automation, Inc. v. Advanced Systems Concept, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011)); *Playboy Enters., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1025 n. 16 (9th Cir. 2004) (“Note that if a banner advertisement clearly identified its source, or even better, overtly compared [plaintiff’s] products to the sponsor’s own, no confusion would occur under [plaintiff’s] theory.”). For a broader discussion of appropriate remedies, *see* CCPTB at 134-137 and CC Post-Trial Reply Br. at 122-128.

**(a) Greenberg Smoked Turkeys Settlement Agreement****1300.**

 } (RX 732-0212–30; RX 734-0107–08).

**Response to Proposed Finding No. 1300**

Complaint Counsel objects to this proposed finding as citing to a purported settlement agreement which is not in evidence. In addition, this settlement agreement does not show that the Bidding Agreements are “commonplace,” and it is not relevant to this case, for all of the reasons described in CC Post-Trial Reply Br. at 5-10.

**1301.** [REDACTED] } (RX 732-0213; RX 734-0107-08; Hogan, Tr. 3288-89).

**Response to Proposed Finding No. 1301**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1302.** [REDACTED] } (RX 732-0220-227; Hogan, Tr. 3288-89).

**Response to Proposed Finding No. 1302**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1303.** [REDACTED] (Hogan, Tr. 3289).

**Response to Proposed Finding No. 1303**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1304.** [REDACTED]

[REDACTED] } (Hogan, Tr. 3295).

**Response to Proposed Finding No. 1304**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300. This finding is further erroneous because it suggests that the *Greenberg Smoked Turkeys* settlement agreement is “broader” than the relief obtained through the 1-800 Contacts Bidding Agreements. This is clearly not the case, as described at length in Response to Proposed Finding No. 1165, which described the negative keyword requirements, and the reciprocity of the agreements.

***(b) American Airlines v. Yahoo! Settlement Agreement***

**1305.** In *American Airlines, Inc. v. Yahoo! Inc., et al.*, No. 08-CV-626-A (Nov. 27, 2009) (hereinafter the “*Yahoo!* case”), the parties reached a settlement agreement. (RX 732-0232–35; RX 734-0108).

**Response to Proposed Finding No. 1305**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1306.** Pursuant to the settlement in the *Yahoo!* case, Yahoo! agreed “to block service of Sponsored Search advertisements on Yahoo!.com, or any website to which Yahoo! services Sponsored Search advertisements to the extent of such service . . . in response to search terms” containing American Airlines’ trademarks. (RX 732-232–33).

**Response to Proposed Finding No. 1306**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1307.**

[REDACTED]  
[REDACTED] (Hogan, Tr. 3284).

**Response to Proposed Finding No. 1307**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

Complaint Counsel further objects to the proposed finding as expert testimony as beyond the scope of Mr. Hogan's report. Moreover, the testimony is unreliable—at trial, Mr. Hogan did not suggest that he conducted any systematic review of the search or otherwise suggest that he was qualified to testify about the systemic prevalence of search results. (Hogan, Tr. 3284).

**1308.** [REDACTED]

[REDACTED] } (Hogan, Tr. 3295).

**Response to Proposed Finding No. 1308**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Findings No. 1300 and 1304.

(c) *American Airlines v. Google Settlement Agreement*

**1309.** [REDACTED]

[REDACTED] } (CX 9022 (Charlston, Dep. at 132–34); Hogan, Tr. 3287).

**Response to Proposed Finding No. 1309**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1310.** [REDACTED]

[REDACTED] } (CX 9022 (Charlston, Dep. at 132–33; Hogan, Tr. 3287).

**Response to Proposed Finding No. 1310**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1311.** [REDACTED]  
[REDACTED] (CX 9022 (Charlston, Dep. at 133)).

**Response to Proposed Finding No. 1311**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1312.** [REDACTED]  
[REDACTED] (CX 9022 (Charlston, Dep. at 133)).

**Response to Proposed Finding No. 1312**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1313.** [REDACTED]  
[REDACTED] } (Hogan, Tr. 3295).

**Response to Proposed Finding No. 1313**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Findings No. 1300 and 1304.

**(d) *GEICO Settlement Agreement***

**1314.** In *Government Employee Insurance Co. v. Google, Inc. et al.*, No. 04-CV-507 LMB/TCB (E.D. Va. Nov. 24, 2004) (hereinafter the “*GEICO case*”), the plaintiff reached a settlement agreement with one of the defendants, Overture. (RX 732-138-57; RX 734-0108-09).

**Response to Proposed Finding No. 1314**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1315.** The terms of the settlement agreement in the *GEICO case* required Overture to “permanently cease delivering to the Overture Distribution Network any Overture Sponsored Listings for any of the Blocked Queries.” (RX 732-0139; RX 734-0108-09).

**Response to Proposed Finding No. 1315**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1316.** The terms of the settlement agreement in the *GEICO* case { [REDACTED] } (RX 732-0147-57; Hogan, Tr. 3293-94).

**Response to Proposed Finding No. 1316**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1317.** [REDACTED] } (Hogan, Tr. 3294-95; RX 732-0138-57).

**Response to Proposed Finding No. 1317**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1318.** [REDACTED] } (Hogan, Tr. 3295).

**Response to Proposed Finding No. 1318**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Findings No. 1300 and 1304.

***(e) Pine Tree Legal Settlement Agreement***

**1319.** In *Pine Tree Legal Assistance v. LegalMatch.com*, No. 06-cv-00045 (D. Me. 2006) (hereinafter the “*Pine Tree* case”), the parties reached a settlement agreement. (RX 732-0237-242; RX 734-0108).

**Response to Proposed Finding No. 1319**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1320.** The terms of the settlement agreement in the *Pine Tree* case required the defendant “not [to] use any of the Pine Tree Marks in connection with any Advertising or the sale of any good or services.” (RX 732-0238).

**Response to Proposed Finding No. 1320**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1321.** The terms of the settlement agreement in the *Pine Tree* case defined “Advertising . . . to includ[e] without limitation use of key words or search terms to influence or monitor Internet searches, links, or advertisements, and including the generation of ‘impressions’ in response to the use by consumers of certain words in Internet searches to publish advertisements to those consumers.” (RX 732-0238; RX 734-0108).

**Response to Proposed Finding No. 1320**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

***(f) Sen v. Amazon Settlement Agreement***

**1322.** In addition to the five settlement agreements identified by Mr. Hogan, Prof. Tushnet testified at trial about a settlement agreement in *Sen v. Amazon.com, Inc.*, 2013 WL 6730180 (S.D. Cal. Dec. 19, 2013) (hereinafter the “*Sen* case”). (Tushnet, Tr. 4484, 4487; CX 8014-038).

**Response to Proposed Finding No. 1322**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

**1323.** According to Prof. Tushnet, the terms of the settlement in the *Sen* case became public because they were “kind of accidentally unredacted by the court” in that case. (Tushnet, Tr. 4484; CX 8014-038).

**Response to Proposed Finding No. 1322**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300. Insofar as the proposed finding simply states that Prof. Tushnet described how terms in the *Sen v. Amazon* settlement became public, the proposed finding is irrelevant.

**1324.** The terms of the settlement agreement in the *Sen* case specify that, in the event that the Plaintiff provides notice to Amazon that no third parties are selling the Plaintiff's product on Amazon.com, Amazon will not use the Plaintiff's trademark as a paid search keyword. (Tushnet, Tr. 4530–32).

**Response to Proposed Finding No. 1324**

Complaint Counsel objects to the proposed finding for the reasons listed in Response to Proposed Finding No. 1300.

Complaint Counsel further objects that the proposed finding draws conclusions regarding the purported terms of an agreement based solely on inaccurately described testimony. (Tushnet, Tr. 4530-4531 (“Q. And that provision means that if Ms. Sen should stop selling the Baiden Mitten on Amazon, and no one else was allowed to sell it either, that Amazon agreed that they would not use ‘Baiden’ as a keyword; correct? A. I don't believe that this speaks about allowance . . . .”)).

**2. *Consent Decrees, Default Judgments, And Other Court Orders Also Restrict Bidding On Keywords Containing Trademarks.***

**1325.** The publicly available injunctions, consent decrees, and other court orders illustrate that it is a common remedy to prohibit defendants from using the plaintiff's trademarks as keywords to trigger search engine advertising. (Hogan, Tr. 3297; RX 734-0099, ¶ 149).

**Response to Proposed Finding No. 1325**

Complaint Counsel objects to the proposed finding as inaccurate, misleading, lacking foundation, and irrelevant for all of the reasons described in Response to Proposed Finding No. 1275 (describing the fact that there is no record evidence that such agreements are

“commonplace”); Response to Proposed Finding No. 1281 (describing Mr. Hogan’s lack of foundation to testify as to what is “commonplace”); CC Post-Trial Reply Br. at 5-6 (describing the irrelevance of any proposed finding that speaks to the “commonplace” nature of an agreement).

**1326.** Complaint Counsel concede that under the conditions where 1-800 Contacts prevailed on its trademark infringement claims, a court would have the power to issue an injunction that prevented the infringer from purchasing the terms it had used to infringe as keywords. (RX 679A-0005 (“Complaint Counsel admits that the obligations of 1-800 Contacts’ counterparties to the Challenged Settlement Agreements under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case”)).

**Response to Proposed Finding No. 1326**

Complaint Counsel objects to the proposed finding as misleading, incorrect, and irrelevant. To the extent the proposed finding is intended to support the underlying point, the proposed finding is both a conclusion of law, not of fact, and misleadingly relies on a portion of Complaint Counsel’s RFA response while omitting the immediately following portion, which stated that “[f]or the avoidance of doubt, Complaint Counsel specifically denies that such relief would have been appropriate or supported . . . or could reasonably have been expected to be ordered in the cases that Respondent filed.” (RX0679 at -0005 (Complaint Counsel’s RFA Response)). Read together, the passage makes clear that while a court in “*an appropriate case*” would have the ability to order certain relief, keyword advertising claims, including the claims asserted by 1-800 Contacts, were not such cases. (CCPTB 147-149).

Further, it is irrelevant to this case what a court “would have had the legal authority to order,” because Complaint Counsel is challenging private Bidding Agreements entered into by 1-800 Contacts and multiple competitors. (CC Post-Trial Reply Br. at 10-12).

**1327.** Complaint Counsel’s expert witness, Prof. Tushnet, also concedes that under the conditions where 1-800 Contacts prevailed on its trademark infringement claims, a court would have the power to issue an injunction that prevented the infringer from purchasing the terms it had used to infringe as keywords. (CX 9044 (Tushnet, Dep. at 161-162 (“The court would have the power to stop [the defendant] from buying the terms it had used to infringe”))).

**Response to Proposed Finding No. 1327**

Complaint Counsel objects to the proposed finding for the reasons stated in Response to Proposed Finding No. 1326. Further, Complaint Counsel objects that Respondent mischaracterizes Prof. Tushnet’s testimony. Prof. Tushnet made clear that “[t]he power of the court is not free-floating” and that injunctive relief including a ban on keyword advertising has only been awarded where “the defendant has adopted the plaintiff’s mark as its own”—i.e., *not* the claims 1-800 Contacts asserted prior to the Bidding Agreements. (Tushnet, Tr. 161). Ms. Tushnet specifically did *not* agree to the proposition embodied in the proposed finding. (*Id.* at 161-162 (positing a hypothetical “when someone is using ‘1-800’ in the text of the ad or as its own operational name” and noting that in *that* situation such relief might be awarded)). Respondent’s exceedingly selective and misleading quotation of Prof. Tushnet’s deposition answer is not evidence of any concession.

1328. Courts have enjoined the purchase of trademarked keywords in contested keyword advertising cases. (Hogan, Tr. 3392-93; RX 734-0099 (citing *Skydive Ariz., Inc. v. Quattrochi*, No. CV-05-2656-PHX-MHM, 2010 WL 1743189, at \*8 (D. Ariz. Apr. 29, 2010)); *PODS Enterprises, LLC v. U-Haul International, Inc.*, 126 F. Supp. 3d 1263, 1292 (M.D. Fla. 2015))).

**Response to Proposed Finding No. 1328**

Complaint Counsel objects to the proposed finding as misleading, incorrect, and irrelevant. Neither *Skydive* nor *PODS* is a “keyword advertising case.” (*See* CCPTB at 162 nn. 522-523.) As described in detail in CCPTB at 162-163 & n. 521-522, Mr. Hogan cited numerous cases that have nothing to do with keyword bidding, despite his express assertion in his report, at his deposition, and at trial that these cases are “keyword bidding” cases. (*See id.* at 158 n. 501; *id.* at 162-163). To the extent the proposed finding instead is intended to refer to judgments issued in trademark disputes involving completely different claims (Hogan, Tr. 3399, 3401-3404), it is both improper expert opinion and in direct contradiction to his expert report—and it is irrelevant.

Further, to the extent that this finding is meant to imply that the relief in any of these cases is similar to the relief in the Bidding Agreements, this is incorrect, for the reasons described in Response to Proposed Finding 1275.

Additionally, the proposed finding cites only to materials attached as appendices to Mr. Hogan's expert report which are not themselves in evidence, and Mr. Hogan was not personally involved in the cases and did not have access to any non-public information concerning the cases. (CX9047 (Hogan, Dep. at 146-147, 233-234)).

Finally, as described in Response to Proposed Finding No. 1326, what a court could order is not relevant to Complaint Counsel's challenge of multiple private Bidding Agreements among competitors.

**1329.** Courts have also issued injunctions in default judgment cases preventing the defendants from using or purchasing the plaintiff's trademarks and confusingly similar variations of the plaintiff's trademarks in paid search advertising. (Hogan, Tr. 3360; RX 734-0100).

#### **Response to Proposed Finding No. 1329**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1328.

**1330.** In *World Entertainment, Inc. v. Brown*, No. 09-5365, 2011 WL 2036686, at \*8 (E.D. Pa. May 20, 2011), the court enjoined the defendant from using keywords "containing plaintiffs' CTO trademark, or any mark incorporating plaintiffs' CTO trademark, colorable imitations thereof or any confusingly similar mark." (RX 734-0101).

#### **Response to Proposed Finding No. 1330**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1331.** In *Quidgeon v. Olsen*, No. 10-CV-1168, 2011 WL 1480537, at \*3 (C.D. Ill. Apr. 29, 2011), the courts enjoined the defendants "from using or displaying Plaintiff's federally registered DADDYO's TATOO' service mark and/or common law marks, or any similar or confusing variations thereof ... [in] keywords for Internet search engines." (RX 734-0101).

**Response to Proposed Finding No. 1331**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1332.** In *Rolex Watch U.S.A., Inc. v. Jesus Eloy Hernandez*, No. 13-20653-CIV (Dkt. 14) (S.D. Fla. Aug. 20, 2013), the court enjoined the defendant from “[u]sing or continuing to use the Rolex Marks or trade names in any variation thereof on the Internet (either in the text of a website, as a domain name, or as a keyword, search word, metatag...)” (RX 734-0100).

**Response to Proposed Finding No. 1332**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1333.** In *Partners for Health & Home, L.P v. Yang*, No. CV 09-07849 (CBM) (RZx) (Dkt. 146) (C.D. Cal. June 21, 2012), the defendants were enjoined from “using Plaintiff’s PERMA-LIFE mark (with or without spaces, however spelled, whether capitalized, abbreviated, singular or plural, with or without a hyphen, or used alone or in combination with any other words) in metatags, in keyword or other pay-per-click advertising, or in any sponsored search engine advertising.” (RX 734-0101).

**Response to Proposed Finding No. 1333**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1334.** In *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, No. 14-Civ-60288, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015), the court enjoined defendants from “using the Louis Vuitton Marks, or any confusingly similar trademarks, from search engine’s databases or cache memory, and any other form of use of such terms which is visible to a computer user or serves to direct computer searches to websites registered by, owned, or operated by Defendants.” (RX 734-0100).

**Response to Proposed Finding No. 1334**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1335.** In *Transamerica Corp. v. Moniker Online Servs, LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010), the court enjoined the defendants from “purchasing, selling, or using any form of advertising including keywords or Adwords in Internet advertising containing any mark that incorporates, initiates, or is confusingly similar to Plaintiff’s ‘Transamerica’ service mark.” (RX 734-0102).

**Response to Proposed Finding No. 1335**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1336.** Courts have also issued injunctions in consent judgment cases preventing the defendants from using or purchasing the plaintiff's trademarks and confusingly similar variations in paid search advertising. (Hogan, Tr. 3378; RX 734-0102).

**Response to Proposed Finding No. 1336**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1337.** In *Joshua David Mellberg, LLC v. Advanced Retirement Income Solutions, LLC*, No. 12-cv-854 (Dkt. 89) (D. Ariz. Oct. 27, 2016), the defendants agreed to a permanent injunction prohibiting them from “[u]sing any Accused Keywords or any colorable imitations thereof or confusingly similar words or phrases as Google Ad Words [sic] or otherwise, to divert business, sales or customers to [defendant].” RX 734-0102.

**Response to Proposed Finding No. 1337**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1338.** In *Probar, LLC v. One Board*, No. 14-cv-166 (Dkt. 18) (D. Fla. Oct. 29, 2014), the court enjoined the defendants from “purchasing or using any forms of advertising including keywords or ‘adwords’ in internet advertising containing any mark incorporating Plaintiff’s Marks in text, or any confusingly similar marks.” RX 734-0103.

**Response to Proposed Finding No. 1338**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1339.** In *Select Management Resources, LLC v. D and D Marketing, Inc.*, No. CV10-10008 (Dkt. 39) (July 15, 2011), the court enjoined the defendant from “using the QUICKCLICK or QUICKCLICKLOANS.COM trademarks and any confusingly similar variations thereof, alone or in combination with other words, names, styles, titles or marks as a business or trade name on or in connection with the advertising, promotion, . . . including but not limited to the use of the QUICKCLICK or QUICKCLICKLOANS.COM trademarks in Internet advertisement text or as keywords for generation of Internet advertisements.” (RX 734-0103-04).

**Response to Proposed Finding No. 1339**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1340.** In *Fragrancenet.com, Inc. v. Les Parfums, Inc.*, No. 09 Civ. 2626 (Dkt. 22) (E.D.N.Y. Mar. 8, 2010), the court prohibited defendant from “purchasing keywords or the functional equivalent from any Internet search provider for the terms FRAFRANCENET, FRAGRANCENET.COM, or any confusingly similar term, phrase, or mark, including without limitation ‘fragrance net’ and ‘fragrance.net.’” (RX 734-0104).

**Response to Proposed Finding No. 1340**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1341.** In *Mastercard International Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009), the parties agreed that the defendant is enjoined from “using any names, words, designations or symbols consisting of, or otherwise confusingly similar to MASTERCARD Marks or any translation thereof” as “search terms, keywords, key terms, hit generating pages, or any other devices used, intended, or likely to cause any web sites of [defendant] to be listed by any Internet search engines in response to any searches that include any terms identical with or confusingly similar to the MASTERCARD Marks.” (RX 734-0104).

**Response to Proposed Finding No. 1341**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1342.** In *True & Dorin Medical Group, P.C. v. Leavitt Medical Associates, P.A.*, No. 06-CV-00092 (PKC) (Dkt. 78) (S.D.N.Y. Apr. 20, 2007), the court enjoined the defendant from “directly or indirectly purchasing advertising keywords, links, and metatags that are identical or substantially similar to True’s ELLIOT & TRUE Trademark.” (RX 734-0104-05).

**Response to Proposed Finding No. 1342**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1343.** In *Guardian Pool Fence Systems, Inc. v. Sentry Safety Systems, LLC*, No. CV07-1213 JFW (Ex) (Dkt. 25) (C.D. Cal. Sep. 14, 2007), the court enjoined the defendant from “using the trademark GUARDIAN alone or in combination with other words, symbols, or designs in any manner...including but not limited to, use of said trademark as an Internet keyword or metatag.” (RX 734-0105).

**Response to Proposed Finding No. 1343**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1344.** In *J-Rich Clinic, Inc. v. Cosmedic Concepts, Inc.*, No. 02-CV-74324 (Dkt. 359) (E.D. Mich. May 16, 2006), the court ordered the defendant to “discontinue and . . . not commence or resume any and all keyword-linked Internet advertising (on the Google search engine, any other search engine – e.g., and without limitation, MSN, Yahoo!, etc., or any other Internet advertising mechanism employed now or in the future by Sephora), using REAL PURITY as a keyword or trigger for such advertising.” (RX 734-0105).

**Response to Proposed Finding No. 1341**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1345.** In *Weightwatchers.com, Inc. v. Diet Patch, Inc.*, No. 04 Civ. 4053 (LAP) (S.D.N.Y. Apr. 18, 2005), the court entered multiple orders enjoining different parties and defendants from using “Plaintiffs’ trademarks as a trigger for the delivery of advertisements.” (RX 734-0106).

**Response to Proposed Finding No. 1345**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1346.** In *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (Dkt. 22) (M.D. Fla. Mar. 16, 2010), the court enjoined the defendant from “purchasing search engine keyword advertising, such as but not limited to Google AdWords advertisements, based on keywords incorporating or comprising” plaintiff’s marks. (RX 734-0106-07; Hogan, Tr. 3298-99).

**Response to Proposed Finding No. 1346**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1347.** In *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 807CV1753T26MAP, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008), the court enjoined the defendant “from purchasing or using any form of advertising including keywords or adwords in internet advertising containing any mark incorporating Plaintiff’s Mark, or any confusingly similar mark.” (RX 734-0107).

**Response to Proposed Finding No. 1347**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**1348.** [REDACTED] (Hogan, Tr. 3434, 56–57).

**Response to Proposed Finding No. 1348**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328.

**3. *A Number Of Settlement Agreements, Consent Decrees And Default Judgments Also Require The Implementation Of Negative Keywords.***

**1349.** It is increasingly common for trademark agreements and injunctions in the keyword advertising context to require advertisers to designate certain trademarks as “negative keywords.” (RX 734-0117; Hogan, Tr. 3300–01).

**Response to Proposed Finding No. 1349**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding 1328. Further, as a point of fact, it is simply wrong. 1-800 Contacts has identified exactly *four* cases (three consent agreements, one default judgment) – out of a universe of multiple thousands – that contain “negative keywords.” See Response to Proposed Finding No. 1275. Under no definition of the term “common” is the use of negative keywords “common” in trademark agreements. Notably, three of the four cases in which negative keywords have been implemented have nothing at all to do with “keyword advertising,” despite the assertions above. (*See* CCPTB at 147 n.468).

Further, the only two courts to have expressly considered whether this type of relief is appropriate have rejected it. *See Lens.com*, 755 F. Supp. 2d at 1174 (bidding on generic keywords is not infringing); *Rhino Sports*, 2007 WL 1302745, at \*5 (same).

**1350.** Courts presiding over trademark infringement litigation have ordered defendants to adopt negative keywords. (RX 734-0118).

**Response to Proposed Finding No. 1350**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1328 and 1349.

**1351.** In *Porbar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (D. Fl. Oct. 29, 2014), the court required the defendant to “activat[e] . . . the term ‘PROBAR’ as negative keywords or negative adwords1 [sic] in any internet advertising purchased or used.” (RX 732-0119; *see also* RX 734-0118).

**Response to Proposed Finding No. 1351**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1328 and 1349.

**1352.** In *Porbar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (D. Fl. Oct. 29, 2014), the court defined negative keyword” or “negative adword” as “a special kind of advertiser keyword matching option that allows an advertiser to prevent its advertisement from appearing when the specific terms are a part of a given user’s internet search or search string.” (RX 732-0119; *see also* RX 734-0118).

**Response to Proposed Finding No. 1352**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1328 and 1349.

**1353.** In *Transamerica Corp. v. Moniker Online Services, LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010), the court required the defendant “when purchasing or selling internet advertising using keywords, Adwords or the like, to activate the name “Transamerica’ as a negative keyword or negative Adword in any Internet advertising purchased, sold or used.” (RX 732-0102; RX 734-0188).

**Response to Proposed Finding No. 1353**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1328 and 1349.

**1354.** In *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (Dkt. 22) (M.D. Fla. Mar. 16, 2010), the court required the defendant to maintain plaintiff’s infringed trademarks as “negative keywords on all search engine advertising accounts in their custody or control.” (RX 732-0205; RX 734-0118–19; *see also* Hogan, Tr. 3298–99).

**Response to Proposed Finding No. 1354**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1328 and 1349.

**1355.** In *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, 807CV1753T26MAP, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008), the court required the defendant to, “when purchasing internet advertising using keywords, adwords or the like, require the activation of the term ‘ORION’ as negative keywords or negative adwords in any internet advertising purchased or used.” (RX 732-0210; RX 734-0119).

**Response to Proposed Finding No. 1355**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1328 and 1349.

**1356.** Legal commentators have also recognized that the advisability of including a negative keyword requirement in any injunctive relief in a keyword advertising trademark case. (Tushnet, Tr. 4526–27).

**Response to Proposed Finding No. 1356**

Complaint Counsel objects to the proposed finding, which is hearsay, as it is based solely upon Prof. Tushnet’s testimony concerning the accuracy of a demonstrative she was handed purporting to contain the contents of a blog post.

The proposed finding is also incorrect, as it uses the phrase “keyword advertising trademark case,” while the cited portion of the transcript (which is itself a question) refers only to “a trademark case.” (Tushnet, Tr. 4526.) As repeatedly discussed, the effort to jumble together cases which dealt with claims or allegations of keyword bidding and other claims or allegations is misleading – in this case, the transcript describes a blog post discussing *Orion Bancorp*, which concerned the defendant’s adoption of the plaintiff’s trademark name as its own, and contained no allegations or claims related to keyword bidding. See Response to Proposed Finding No. 1328.

The proposed finding is also misleading insofar as it attempts to generalize from a single piece of evidence to reach a conclusion regarding the purported opinion of “legal commentators” without any citation or support.

Finally, the proposed finding is contrary to both Prof. Tushnet’s conclusion that negative keywords are *not* permissible or included in any similar case of which she was aware, (CX8014 at 038 (¶ 83) (Tushnet Rebuttal Report)), and to Mr. Hogan’s admission that he is not aware of the existence of *any* “academic support for the proposition that not bidding on a keyword can . . . constitute use,” and hence be infringing. (CX9047 (Hogan, Dep. at 166) (“Q. Are you aware of extensive academic support for the position that not bidding on a keyword can still constitute use? A. *I am not aware of anybody who has argued that not bidding on a keyword can constitute use.*”) (emphasis added)).

**1357.** Professor Eric Goldman, who is the co-author of an advertising law textbook with Complaint Counsel’s expert witness Rebecca Tushnet, wrote in April 2008 that a negative keyword requirement is “a logical addition to any injunctive relief request in a trademark case.” (Tushnet, Tr. 4526).

#### **Response to Proposed Finding No. 1357**

Complaint Counsel objects to the proposed finding, which is based solely upon hearsay testimony and is irrelevant because it does not specifically analyze or consider keyword bidding cases, and instead analyzes a non-analogous case. Complaint Counsel also objects for the reasons described in response to Proposed Finding No. 1356.

**1358.** Similarly, in 2011, Mr. Hogan published an article in BNA’s Patent, Trademark and Copyright Journal that recommended that advertisers “consider applying their competitors’ marks as ‘negative match’ keywords” in order to avoid liability. (Hogan, Tr. 3499; CX 1872-004).

#### **Response to Proposed Finding No. 1358**

Complaint Counsel objects to the proposed finding for the reasons described in Proposed Finding No. 1356. Further, the proposed finding omits the rest of the “negative keyword” discussion from Mr. Hogan’s article, which observes that no court has found liability for “broad

matching,” precisely the conduct prevented by the implementation of negative keywords. The article states:

To date, only two courts have directly addressed the use of “broad match” keywords.

In *Rhino Sports Inc. v. Sport Court Inc.*, 2007 WL 1302745 (D. Ariz. May 2, 2007), the court concluded that a former trademark defendant did not violate an order preventing it from buying the trademark of a competitor as a keyword, when it turned out that the advertiser had merely chosen the generic terms “courts” and “basketball court,” and the search engine had itself “broad matched” the ad to the trademark term. The court observed that the trademark owner had failed to provide any authority for the proposition that the advertiser had used the trademark without “some actual use of the mark at issue, either as a keyword, in a metatag, or in the ad text itself.” *Id.* at \*5. The court concluded that, since Rhino Sports had not used Sport Court’s mark, Rhino Sports had not violated the injunction. *Id.*

In *1-800 Contacts Inc. v. Lens.com Inc.*, 755 F. Supp.2d at 1173-74, the court reasoned that because a search for trademark terms is likely to yield broad match search results, there can be no additional confusion from the fact that the defendant’s ads appeared as a result of an intentional selection of the trademark as a keyword. *Id.* The court observed that “[i]mposing liability under such circumstances would elevate ‘use’ over consumer confusion.” *Id.* at 1174.

Significantly, although the court focused on the fact that a consumer could not tell what keyword triggered the sponsored link, the *Lens.com* court did not impose an obligation on the purchaser of keywords to institute *negative* keywords. Doing so would ensure that the sponsored link would *not* appear whenever a consumer entered the exact mark as a search term, but the court concluded that “[w]ere Plaintiff actually able to preclude competitor advertisements from appearing on a search-results page anytime its mark is entered as a search term, it would result in an anti-competitive, monopolistic protection, to which it is not entitled.” *Id.*

CX 1872-004.

In addition, the proposed finding cites only to hearsay testimony regarding Mr. Hogan’s past statements, and to CX1872, which is not in evidence.

1359. [REDACTED]

[REDACTED] } (Hogan, Tr. 3503).

**Response to Proposed Finding No. 1359**

Complaint Counsel objects to the proposed finding, which is improper expert testimony beyond the scope of Mr. Hogan's report, as inaccurate, misleading, and irrelevant. First, in his report, Mr. Hogan repeatedly described the cases he was relying on as keyword bidding cases. *See* Response to Proposed Finding No. 1328. Confronted with the claims and allegations at issue in these cases affirmatively demonstrating that they were not, in fact, keyword bidding cases, Mr. Hogan changed his opinion, testifying for the first time at trial that, even if the cases were unrelated, it makes no difference to the opinions in his report. (Hogan, Tr. 3456-3458). To the extent the proposed finding is intended to support this testimony, it is both beyond the scope of his report, and contradicted by it.

Further, the notion that 1-800 Contacts may privately agree to whatever it wants with its rivals, so long as it can find a court somewhere that has allowed another party to do something vaguely similar under *completely different circumstances*, finds no support beyond Mr. Hogan's unsubstantiated (and contradictory) testimony, and is implausible. (*See* CCPTB at 164 & n.531).

Additionally, to the extent that this finding is meant to imply that the relief in any of these cases is similar to the relief in the Bidding Agreements, this is incorrect, for the reasons described in Response to Proposed Finding 1275.

Finally, as described in Response to Proposed Finding No. 1326, what a court could order is not relevant to Complaint Counsel's challenge of multiple private Bidding Agreements among competitors.

**1360.** It is common for businesses to require their affiliates to use negative keywords in order to prevent the affiliates' advertisements from displaying in response to a search for the business's trademark. (Hogan, Tr. 3303; RX 734-0114–16).

**Response to Proposed Finding No. 1360**

Complaint Counsel objects to the proposed finding for all of the reasons described in Response to Proposed Finding No. 1359. Further, the proposed finding is irrelevant because Complaint Counsel is not challenging 1-800 Contacts' agreements with affiliates or agents; Complaint Counsel is challenging 1-800 Contacts' agreements with independent competitors.

**1361.** An employee of ACLens, Peter Clarkson, testified that using negative keywords is the only way to prevent ACLens's paid advertisements from displaying in response to a search for 1-800 Contacts' trademarks. (Clarkson, Tr. 237–40; CX 9039 (Clarkson, Dep. at 80–82)).

**Response to Proposed Finding No. 1361**

Complaint Counsel has no specific response to the proposed finding, other than to note that Mr. Clarkson did *not* testify that the use of negative keywords was necessary to comply with trademark law; he merely testified that using negative keywords was the only way to stop ACLens ads from appearing in response to any search containing 1-800 Contacts trademarks or similar variations.

**1362.** An employee of Walmart, Sandhya Mohan, testified that using negative keywords is the only method to prevent Walmart's paid advertisements from displaying in response to a particular search query. (CX 9033 (Mohan, Dep. at 185–87)).

**Response to Proposed Finding No. 1362**

Complaint Counsel has no specific response to the proposed finding, other than to note that Ms. Mohan did *not* testify that the use of negative keywords was necessary to comply with trademark law; she merely testified that using negative keywords was the only way to stop Walmart ads from appearing in response to any search containing 1-800 Contacts trademarks or similar variations.

**1363.** Trademark practitioners have recently learned more about the usefulness and advisability of using negative keywords in trademark settlement agreements in order to prevent disputes

regarding the defendants' displaying allegedly infringing advertisements in response to a search for the plaintiff's trademark. (Hogan, Tr. 3301).

**Response to Proposed Finding No. 1363**

Complaint Counsel objects to the proposed finding as irrelevant and unsupported by the evidence. The proposed finding is irrelevant because the question of whether or not negative keywords are common (they are not, *see* Response to Proposed Finding No. 1349) is not at issue, but also because the agreements at issue in this case are not "recent"; 1-800 Contacts has been requiring parties to implement negative keywords for more than a decade.

In addition, the proposed finding is unsupported by the evidence, as Mr. Hogan has no idea what other trademark practitioners are advising with regard to negative keywords, and he cites to only four cases (out of thousands) in which negative keywords have been implemented. (*See* Response to Proposed Finding No. 1275).

**1364.** The requirement of negative keywords is a settlement provision that is easy to manage and administer. (Hogan, Tr. 3304; { [REDACTED] }  
[REDACTED] ).}

**Response to Proposed Finding No. 1364**

Complaint Counsel objects to the proposed finding as misleading and irrelevant. Whether or not implementing negative keywords makes it easier to suppress competition has no bearing on the case. Further, the notion that negative keyword provisions in the agreements make managing the agreements easier is contradicted by the fact that 1-800 Contacts vigorously enforced the agreements with renewed threats of litigation and expanded the scope of the agreements to cover more and more phrases and keywords. (*See, e.g.* CX0006, CX0007 (Letters from Counsel for 1-800 Contacts to AC Lens, dated April 2013 and May 2014, seeking to expand the scope of the bidding agreement and to add terms to the "prohibited" keywords list which, if implemented, would need to be implemented as phrase match); CX796 (Letter from Mark Miller to Jacque Matte of Contact Lens King dated April 26, 2010 alleging "significant breach of the Settlement

Agreement” entered by the parties “just weeks ago,” and stating that 1-800 Contacts “will be monitoring such activity closely and will aggressively enforce the provisions of the settlement agreement); CX1058 (requesting that Vision Direct add negative keywords which do not appear in the 2009 Agreement, including “i800contacts,” “1800 contact lenses,” “1800 contacts coupons,” “1800 contacts promo code,” “1 800 contacts coupon code,” “800 contacts coupon code,” and many others); *see generally* CX8006 at 175-178 (Appendix D) (Evans Expert Report) and the materials cited therein (compiling examples of 1-800 Contacts’ demands that agreement counterparties add negative keywords to their accounts)).

**1365.** Including in a settlement agreement a provision requiring the implementation of negative keywords reduces the risk of further disputes between the advertising parties. (Hogan, Tr. 3304–05).

**Response to Proposed Finding No. 1365**

Complaint Counsel objects to the proposed finding as irrelevant. In an antitrust action, 1-800 Contacts cannot justify restraints on competition that exceed the scope of its trademark rights by claiming that broad trademark rights are more conducive to living “the quiet life.” *See* CC Post-Trial Reply Br. at 127.

**1366.** Including in a settlement agreement a provision requiring the implementation of negative keywords reduces monitoring and administration expenses. (Hogan, Tr. 3304–05).

**Response to Proposed Finding No. 1366**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365.

**4. *The Purported Alternative Remedies Identified By Complaint Counsel Are Not Feasible.***

**1367.** Complaint Counsel have proposed that an alternative remedy to resolve keyword advertising disputes is for the parties to agree not to engage in advertising that has “purportedly confusing text.” (RX 680-0004 (Response to Interrogatory No. 1); Hogan, Tr. 3305).

**Response to Proposed Finding No. 1367**

Complaint Counsel has no specific response to the proposed finding, other than to note that Complaint Counsel has identified several proposed less restrictive alternatives, *see* CCPTB at 134-138 and CC Post-Trial Reply Br. at 124-125.

**1368.**

(Hogan, Tr. 3504).

**Response to Proposed Finding No. 1368**

Complaint Counsel objects to the proposed finding, which is a conclusion of law, not a conclusion of fact. Further, this proposed finding is incorrect. Complaint Counsel has in fact identified a number of less restrictive alternatives, with cited case law in support of each of its proposed less restrictive alternatives, which is more credible than Respondent’s reliance on a single trademark practioner’s testimony. *See* CCPTB at 134-138 & CC Reply Br. at 124-125. Further, Respondent has made the irrelevant argument that its Bidding Agreements are “commonplace.” Complaint Counsel has no burden to disprove this assertion for the reasons described in Complaint Counsel’s Post Trial Reply Brief at 5-6, although it has done so anyway. *See* Response to Proposed Finding 1275 (none of the cited agreements have all three salient terms).

**1369.** [REDACTED] (Hogan, Tr. 3504).

**Response to Proposed Finding No. 1369**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1368.

**1370.** Complaint Counsel’s proposed alternative remedy is not a feasible or efficient remedy to resolve trademark disputes pertaining to keyword advertising. (Hogan, Tr. 3305; RX 734-0119–23).

**Response to Proposed Finding No. 1370**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1368.

**1371.** Trademark practitioners heavily disfavor settlements that restrict only “confusing” ads because they are a recipe for future litigation and its attendant costs. (Hogan, Tr. 3272, 3305, 3495).

**Response to Proposed Finding No. 1371**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1368.

**1372.** The goal of any settlement agreement is to achieve finality, to eliminate the risk and cost of litigation, and to resolve an issue so as to avoid repeat litigation. (Hogan, Tr. 3271).

**Response to Proposed Finding No. 1372**

Complaint Counsel has no specific response, except to note that the “goal of any settlement agreement” does not trump public policy or antitrust laws. *See* CC Post-Trial Reply Br. at 4-5.

**1373.** In order to accomplish these goals, trademark practitioners draft clear settlement agreements that are easy to administer and do not invite future disputes. (Hogan, Tr. 3271).

**Response to Proposed Finding No. 1373**

*See* Response to Proposed Finding No. 1372.

**1374.** Complaint Counsel’s proposed alternative remedy would not satisfy any of the goals that trademark practitioners seek to accomplish in drafting a settlement agreement. (RX 734-0119–23; Hogan, Tr. 3305–06).

**Response to Proposed Finding No. 1374**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1365 and 1368.

**1375.** Complaint Counsel’s proposed alternative remedy would invite further disputes between the settling parties because it does not clearly define the scope of the prohibited conduct. (Hogan, Tr. 3305–06; RX 734-119).

**Response to Proposed Finding No. 1375**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365 and 1368.

**1376.** Complaint Counsel’s proposed alternative remedy, which focuses on whether the defendant’s advertisement text is “confusing,” would invite further disputes among the settling parties because it does not clearly define what constitutes “confusing” text. (Hogan, Tr. 3305–06; RX 734-0119–20).

**Response to Proposed Finding No. 1376**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365 and 1368.

**1377.** The parties to a trademark settlement agreement frequently do not agree on what conduct constitutes trademark infringement or what conduct is likely to cause confusion. (Hogan, Tr. 3272).

**Response to Proposed Finding No. 1377**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365 and 1368.

**1378.** Complaint Counsel’s proposed alternative remedy would hinder each party’s ability to monitor compliance with the settlement agreement. (RX 734-119).

**Response to Proposed Finding No. 1378**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365 and 1368.

**1379.** Complaint Counsel’s proposed alternative remedy would cause confusion on the part of business personnel regarding how to accomplish the settlement’s requirements. (RX 734-0119–20).

**Response to Proposed Finding No. 1379**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365 and 1368.

**1380.** Complaint Counsel’s proposed alternative remedy would necessitate additional future agreements between the settling parties that specify each party’s prohibited conduct. (R0734-0120).

**Response to Proposed Finding No. 1380**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1365 and 1368.

**1381.** In cases where infringement has been found, courts typically order relief that is broader than what was alleged as the specific infringing acts in the complaint. (Hogan, Tr. 3503).

**Response to Proposed Finding No. 1381**

Complaint Counsel objects to the proposed finding as irrelevant. Whether courts typically order relief that is broader than necessary to address the legal wrong is not relevant to whether private parties may agree to such relief, because private parties are subject to the antitrust laws, while courts are not. *See* Response to Proposed Finding No. 1326.

Complaint Counsel further objects to the proposed finding improper expert testimony beyond the scope of Mr. Hogan’s expert report, as well as inaccurate. Mr. Hogan’s report says only that courts frequently order relief that prohibits usage of “confusingly similar” versions of a

mark in situations where use of the mark is trademark infringement. (RX0734 at 0122 (¶ 165) (Hogan Expert Report)). In such situations, the use of a confusingly similar mark would also violate the law. *Id.* (citing the Lanham Act). Mr. Hogan’s report does *not* say that courts typically order relief which prohibits broad categories of otherwise-legal action. To the contrary, in crafting injunctive relief, trademark courts have consistently emphasized that “remedies must be carefully tailored.” (CX8014 at 038-040 (¶ 84) (Tushnet Rebuttal Expert Report) (collecting cases)).

**1382.** It is not common for trademark settlement agreements simply to prohibit the defendant from infringing the trademark in the future. (Hogan, Tr. 3272).

**Response to Proposed Finding No. 1382**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1381.

**1383.** It is not typical for courts to limit the relief granted in a trademark injunction to preventing the use of the trademark within the text of the advertisement, but otherwise permitting advertisements to be presented in response to internet searches for a plaintiff’s trademark. (Hogan, Tr. 3503–04).

**Response to Proposed Finding No. 1383**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Finding No. 1381. Further, this proposed finding mischaracterizes Complaint Counsel’s less restrictive alternatives, which are described at CCPTB at 134-138 and CC Post-Trial Reply Br. at 124-125.

**1384.** Unlike Complaint Counsel’s proposed alternative remedy, the settlement agreements at issue in this litigation achieve the goals that practitioners seeks to accomplish in a trademark settlement agreement by clearly defining the scope of the prohibited conduct. (Hogan, Tr. 3276).

**Response to Proposed Finding No. 1384**

Complaint Counsel objects to the proposed finding for the reasons described in Response to Proposed Findings No. 1365 and 1368.

## **XI. The Settlement agreements Had Significant Procompetitive Benefits**

### ***A. The Settlements Were Efficient***

**1385.** Settlements are generally efficient because they reduce litigation costs. (RX 737-0017 (Landes Report); RX 739-0053 (Murphy Report); Murphy, Tr. 4208; CX 9042 (Evans, Dep. at 196)).

#### **Response to Proposed Finding No. 1385**

Complaint Counsel has no specific response.

**1386.** Dr. Evans agreed that settlements of litigation promote efficiency. (CX 9042 (Evans, Dep. at 196)).

#### **Response to Proposed Finding No. 1386**

The proposed finding is misleading. Dr. Evans testified at his deposition settlements of litigation *can* promote efficiency, not that they necessarily do promote efficiency. (CX9042 (Evans, Dep. at 196)).

**1387.** It is efficient for firms to settle when it is in their interest to do so. (RX 739-0034 (Murphy Report); Murphy, Tr. 4208).

#### **Response to Proposed Finding No. 1387**

This proposed finding should be rejected. It is often efficient for the settling parties to settle when it is in their interest to do so, but parties may settle in ways that are inefficient for others not involved in the settlement. For example, manufacturers of brand-name pharmaceuticals and manufacturers of generic pharmaceuticals may find it in their mutual interest to settle patent infringement litigation by agreeing that the generic manufacturer will refrain from entering the market, and the brand-name manufacturer will pay the generic manufacturer millions of dollars. While this may be in the interests of the firms involved, it is not an “efficient” outcome for the rest of society. Likewise, parties may find it “in their interest” to settle when they do not have the financial capability to litigate, even if the outcome is not efficient for the rest of society. Dr. Evans testified this was likely the case for most of the online discount sellers of contact lenses during this

time. (Evans, Tr. 1551-1552 (It's "clear from the economic literature, but frankly, I think it's pretty well-known, that if you're a smaller firm, it's not so easy to come up with money to fund -- to fund anything. So just assuming that these firms could go out and come up with the \$2 million [to litigate against 1-800 Contacts], I don't think there's any basis ... that in fact these firms could have done that."); *see also* CX9024 (Holbrook, Dep. at 63-64 ("We hadn't done anything wrong, but we still gave it our best shot and fought as long and hard as we could. But we just didn't have enough money to continue even though we felt like we were in the right, and we needed to cut our losses and do our best to protect our optometric offices. So that's what led to the decision.")); Holbrook, Tr. 1933, 1942, 1947-1948, 2065-2066 (describing the high costs inflicted by the litigation against 1-800 Contacts that ultimately forced Memorial Eye to settle)).

**1388.** Forcing firms to litigate when it is in their interests to settle would be inefficient. (RX 739-0053 (Murphy Report; Murphy, Tr. 4208)).

**Response to Proposed Finding No. 1388**

This proposed finding should be rejected for the same reasons explained in the response to Proposed Finding No. 1387.

**1389.** Firms will have an incentive to settle trademark litigation claims, rather than litigate them, when the expected net benefits to both parties from continuing the challenged practice are lower than the expected litigation costs for both parties. (RX 737-017 (Landes Report); RX 739-0053, 0034 (Murphy Report); Murphy, Tr. 4203-05; CX 9048 (Murphy, Dep. at 272)).

**Response to Proposed Finding No. 1389**

This proposed finding should be rejected for the same reasons explained in the response to Proposed Finding No. 1387.

**1390.** Dr. Evans agreed that economists analyzing a settlement generally assume that, in deciding whether to proceed with litigation, parties evaluate the cost of litigation and the likely benefits of a favorable outcome, accounting for the likelihood of that outcome. (Evans, Tr. 1830-1831; CX 8009-045 (Evans Rebuttal Report at n.103) ("As a purely general matter, I agree that parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason.")).

**Response to Proposed Finding No. 1390**

Complaint Counsel has no specific response.

**1391.** Economists generally assume that firms act rationally in settling litigation. (Evans, Tr. 1830).

**Response to Proposed Finding No. 1391**

Complaint Counsel has no specific response.

**1392.** There is no reason in this case to depart from the general economic assumption that firms act rationally in settling litigation. (Evans, Tr. 1830).

**Response to Proposed Finding No. 1392**

Complaint Counsel has no specific response.

**1393.** From the settling parties' perspective, the settlements were economically rational. (CX 9042 (Evans, Dep. at 119-120)).

**Response to Proposed Finding No. 1393**

Complaint Counsel has no specific response.

**1394.** The settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")).

**Response to Proposed Finding No. 1394**

This proposed finding should be rejected. It is unsupported by the testimony cited, as it ignores the important portion of the question that dealt with "each side taking into account their best assessments of . . . their expected costs of litigation."

**1395.** Dr. Evans did not calculate the costs to the settling parties of defending against 1-800 Contacts' trademark litigation. (CX 9042 (Evans, Dep. at 135)).

**Response to Proposed Finding No. 1395**

Complaint Counsel has no specific response.

**1396.** While Dr. Evans tried to suggest that some of the settling parties were capital constrained, he admitted that Walgreens, one of the settling parties, was not. (Evans, Tr. 1831-32; CX 9042 (Evans, Dep. at 133-134)).

**Response to Proposed Finding No. 1396**

Complaint Counsel has no specific response.

**1397.** Dr. Evans did not investigate the capital available to any of the settling parties to determine whether they were capital-constrained. (Evans, Tr. 1832; CX 9042 (Evans, Dep. at 135)).

**Response to Proposed Finding No. 1397**

Complaint Counsel has no specific response.

**1398.** ACLens made a business decision to settle with 1-800 Contacts in light of the potential costs and protracted nature of the litigation between the companies. (Clarkson, Tr. 342; CX 9039 (Clarkson Dep.) at 86-87, 144; CX 9003 (Clarkson, IH at 108-109)).

**Response to Proposed Finding No. 1398**

Complaint Counsel has no specific response.

1399. [REDACTED]  
[REDACTED] (Batushansky, Dep. at 46-48)).

**Response to Proposed Finding No. 1399**

Complaint Counsel has no specific response.

**1400.** [REDACTED]  
[REDACTED] (Batushansky, Dep. at 46-48)).

**Response to Proposed Finding No. 1400**

Complaint Counsel has no specific response.

**1401.** Memorial Eye settled with 1-800 Contacts to avoid paying an expected \$150,000 in expert witness fees. (Holbrook, Tr. 2032; CX 9024 (Holbrook, Dep. at 63, 160-61)).

**Response to Proposed Finding No. 1401**

Complaint Counsel has no specific response.

**1402.** Memorial Eye settled with 1-800 Contacts due to “the continuing impact that the legal cost would have on our business.” (CX 9024 (Holbrook, Dep. at 162); Holbrook, Tr. 2032)).

**Response to Proposed Finding No. 1402**

Complaint Counsel has no specific response.

**1403.** Memorial Eye settled with 1-800 Contacts due to legal uncertainty regarding the case. (Holbrook, Tr. 2032; CX 9024 (Holbrook, Dep. at 63, 164-65)).

**Response to Proposed Finding No. 1403**

This proposed finding should be rejected because it is not supported by the cited testimony.

Mr. Holbrook testified that he settled for multiple reasons, one of which was the fact that “the Lens.com decision created additional legal uncertainty.” (Holbrook, Tr. 2032). He did not testify that he was uncertain “regarding the case.” (*See also* CX9024 (Holbrook, Dep. at 63-64)).

**1404.**

(Duley Decl.) ¶ 10).

**Response to Proposed Finding No. 1404**

Complaint Counsel has no specific response.

**1405.** Dr. Evans did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts’ trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133)).

**Response to Proposed Finding No. 1405**

Complaint Counsel has no specific response.

**1406.** The only significant economic benefit that the settling parties other than 1-800 Contacts received was avoiding a lawsuit and its attendant costs, including costs associated with the risk of losing. (CX 9042 (Evans, Dep. at 115-16 (“Q. Okay. So the only significant economic benefit [AC Lens] received, in your opinion, is the avoidance of a lawsuit and the costs attendant upon a lawsuit. A. Yeah. Where I’m using the word ‘costs’ expansively, all the things that related to having to deal with a lawsuit. Q. And one of those costs was the risk of losing the lawsuit; right? . . . THE WITNESS: One of the costs is the risk of losing the lawsuit – well, is the risk of losing the lawsuit and any attendant financial consequences that that would bring.”); CX 9042 (Evans, Dep. at 119) (“Q. Okay. Are the benefits received by the other settling parties the same as the benefits you describe being received by AC Lens, namely, avoiding the costs writ large of a lawsuit? A. Yes.”); RX 739-0050 to -0051 (Murphy Report); { [REDACTED] }).

**Response to Proposed Finding No. 1406**

Complaint Counsel has no specific response.

**1407.** { [REDACTED] } (RX 733-0053 (Ghose Report); Ghose, Tr. 3924).

**Response to Proposed Finding No. 1407**

This proposed finding is not supported by the evidence cited. Dr. Ghose is an expert witness rather than a fact witness, and he did not offer an expert opinion regarding the frequency with which 1-800 Contacts bid on other retailers' trademarks.

**1408.** According to data from Google regarding ads for 1-800 Contacts that appeared between 2002 and 2016, only { [REDACTED] } of such ads appeared based on 1-800 Contacts' bid on another retailer's trademark. (RX 733-0053 (Ghose Report); Ghose, Tr. 3923).

**Response to Proposed Finding No. 1408**

Complaint Counsel has no specific response.

**1409.** According to data from Google regarding ads for 1-800 Contacts that appeared between 2002 and 2016, less than 1% of such ads appeared based on 1-800 Contacts' bid on another retailer's trademark. (RX 739-0027 (Murphy Report)).

**Response to Proposed Finding No. 1409**

Complaint Counsel has no specific response.

**1410.** According to data from Bing regarding ads for 1-800 Contacts that appeared between 2013 and 2016, only { [REDACTED] } out of approximately { [REDACTED] } ads for 1-800 Contacts appeared based on 1-800 Contacts' bid on another retailer's trademark. (RX 733-0053 (Ghose Report)).

**Response to Proposed Finding No. 1410**

Complaint Counsel has no specific objection.

**1411.** According to the Commission, one measure of whether a settlement is anticompetitive is if it involves payments by the plaintiff to the defendant in excess of litigation costs. (RX 739-0051 (Murphy Report); CX 9048 (Murphy, Dep. at 283)).

**Response to Proposed Finding No. 1411**

This proposed finding is not supported by the evidence cited. Dr. Murphy is an expert witness rather than a fact witness, and he did not offer an expert opinion regarding the Commission's view on "measure[s] of whether a settlement is anticompetitive."

**1412.** If the settlements significantly reduced settling retailers' profits, economics teaches that the settling parties would have received a settlement payment. (RX 739-0049 (Murphy Report); CX 9048 (Murphy, Dep. at 239)).

**Response to Proposed Finding No. 1412**

This proposed finding is not supported by the evidence cited because Professor Murphy did not offer an expert opinion on this issue, and the cited portion of his report and deposition fails to provide any evidentiary foundation for the proposed finding. As Dr. Evans points out in his rebuttal report, "Professor Murphy relies on a particularly simple model of pre-trial settlement that relies on numerous assumptions that he hasn't disclosed or supported and are unlikely to be true." (CX8009 at 045 (¶76) (Evans Rebuttal Report)). Dr. Murphy did not provide any reliable model or analysis suggesting that 1-800 Contacts would make a payment to its financially constrained rivals if the Bidding Agreements reduced their profits significantly. Many of the rivals 1-800 Contacts targeted for settlement were small, privately held firms. Such companies often have liquidity constraints and staff constraints that make litigation more costly for them than for other types of companies, driving them to settle in order to stay in business, even if their profits were reduced. (CX8009 at 046 (¶78-79) (Evans Rebuttal Report)). Memorial Eye, AC Lens, and Web Eye Care testified that such constraints influenced their decisions to settle. (CX9024 (Holbrook, Dep. at 63) ("we just didn't have enough money to continue [the litigation] even though we felt like we were in the right...")); CX9039 (Clarkson, Dep. at 143-144); CX9014 (Batushansky, Dep. at 153)).

Dr. Evans suggests alternative reasons that 1-800 Contacts did not make payments to settling parties that are actually supported by the evidence. (CX8009 at 046 (¶77) (Evans Rebuttal Report)).

In addition, since 1-800 Contacts was settling with multiple parties, it had an incentive not to pay any firms, in order to develop a reputation that could be useful in future disputes. (CX8009 at 046 (¶77) (Evans Rebuttal Report)). “It was very important to me that we always established a reputation of, you know, we’re not somebody to steal from . . . .” (CX9035 (Coon Dep. at 46-47)). This is why 1-800 Contacts insisted on settlements with nominal payments and non-disclosure agreements, so that 1-800 Contacts could publicize a settlement for an “undisclosed amount.” (CX9035 (Coon Dep. at 294-296)). 1-800 Contacts’ competitors understood the threat. (CX (Duley Dep. at 112) (noting 1-800 Contacts is “known for being so litigious”).

**1413.** The fact that the settling parties did not receive a settlement payment indicates that the settlements did not significantly reduce the settling retailers’ profits. (RX 739-0049 (Murphy Report); Murphy, Tr. 4091).

**Response to Proposed Finding No. 1413**

This proposed finding is inaccurate and unsupported, as explained in the Response to Proposed Finding No. 1412.

**1414.** The settling retailers would have had an incentive to settle for any settlement payment greater than the difference between the expected incremental profits from litigating and their litigation costs. (RX 739-0049 (Murphy Report)).

**Response to Proposed Finding No. 1414**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1415.** The fact that the settling parties did not receive a settlement payment indicates that any incremental profits from the settlement must have been less than the cost of litigating the case. (RX 739-0049-0050 (Murphy Report)).

**Response to Proposed Finding No. 1415**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1416.** The fact that the settling parties did not receive a settlement payment indicates that the settlements did not significantly reduce the settling retailers' ability to compete. (RX 739-0049 (Murphy Report); Murphy, Tr. 4091; CX 9048 (Murphy, Dep. at 239-241).

**Response to Proposed Finding No. 1416**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1417.** The fact that the settling parties did not receive a settlement payment indicates that the settlements were not critical to the settling retailers' ability to compete. (RX 739-0049 (Murphy Report); Murphy, Tr. 4091; CX 9048 (Murphy, Dep. at 239-241).

**Response to Proposed Finding No. 1417**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1418.** The average cost of trademark litigation in which more than \$25 million are at risk is \$2.1 million. (RX 739-0050 (Murphy Report)).

**Response to Proposed Finding No. 1418**

Complaint Counsel has no specific response.

**1419.** Lens.com spent \$1.4 million defending 1-800 Contacts' trademark suit against it prior to trial. See *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4.

**Response to Proposed Finding No. 1419**

Complaint Counsel has no specific response.

**1420.** The fact that the settling parties settled suggests that they expected to earn less than { [REDACTED] } in profits from advertising in response to searches for 1-800 Contact's trademark. (RX 739-0049 to -0050 (Murphy Report); Murphy, Tr. 4205-07).

**Response to Proposed Finding No. 1420**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1421.** The fact that the settling parties settled suggests that they believed that advertising in response to searches for 1-800 Contact’s trademark was less economically significant than the costs of litigation. (RX 739-0049-0050 (Murphy Report); Murphy, Tr. 4205-07).

**Response to Proposed Finding No. 1421**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1422.** If the settlements enabled 1-800 Contacts to earn monopoly profits, economics indicates that 1-800 Contacts should have been willing to make a payment to the settling parties as large as its expected incremental profits from the litigation. (RX 739-0050 (Murphy Report)).

**Response to Proposed Finding No. 1422**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

**1423.** The fact that 1-800 Contacts did not make a settlement payment indicates that the settlements did not enable 1-800 Contacts to earn monopoly profits. (RX 739-0050 (Murphy Report)).

**Response to Proposed Finding No. 1423**

This proposed finding should be rejected for the reasons explained in the Response to Proposed Finding No. 1412.

***B. The Settlements Provided Procompetitive Trademark Protection***

***1. Trademarks Promote Interbrand Competition***

**1424.** Respondent’s expert, Dr. William Landes, is an expert in the economics of trademarks. (RX 737 (Landes Report)).

**Response to Proposed Finding No. 1424:**

Complaint Counsel has no specific response.

**1425.** With Richard A. Posner, Dr. Landes authored seminal works regarding the economic principles of trademarks, including “Trademark Law: An Economic Perspective,” *Journal of Law and Economics* (Oct. 1987).

**Response to Proposed Finding No. 1425:**

Complaint Counsel has no specific response except to note that Professor Posner and Dr. Landes have described the appropriate limits of trademark protection, from an economic perspective, in a manner consistent with Complaint Counsel's positions and inconsistent with the positions that Respondent's counsel has taken in this case, by writing that "In order to prevent another seller from selling his goods under your trademark, you must show that consumers are likely to think that it is your brand that he is selling. This is a sensible restriction on the scope of the property right if the function of a trademark is, as we have been assuming, to name a brand." (CX8009 at 037 (¶ 59) (Evans Rebuttal Expert Report) (citing Landes and Posner at 300)).

Dr. Landes' testimony in this case is consistent with the view expressed in his co-authored article. Dr. Landes testified that "trademark rights are quite limited because you still can't prevent other firms from using your mark so long as they're not using it in a trademark sense; and, of course, ... trademark statutes ... explicitly allow[] for non-trademark uses," including "comparative advertising." (CX9050 (Landes, Dep. at 146)). Dr. Landes also testified that "the statute itself tries to incorporate important limitations on the trademark holder's rights when they spill over to reducing competition by making it more difficult for competitors to compete." (CX9050 (Landes, Dep. at 146)). Thus, in Dr. Landes' words, "[y]ou could say Pepsi better than Coke, as long as you make it clear that you're Pepsi and you're not trying to confuse people into thinking that Pepsi and Coke are sponsored or affiliated with each other or merged or something like that." (CX9050 (Landes, Dep. at 147)). This testimony echoes Dr. Landes' published view that "the function of a trademark" is "to name a brand." (CX8009 at 037 (¶ 59) (Evans Rebuttal Expert Report) (citing Landes and Posner at 300); *see also* CX9050 (Landes, Dep. at 87 ("it's a limited trademark right. It protects you against people who are using your mark in a way that there's likely to be confusion."); 129 ("the economic purpose of trademarks is to provide information which lowers search costs, which make markets work better. And to the extent

somebody uses a confusingly similar trademark but there is no *possibility of likely confusion* because the disclaimer is clearly adequate, that *wouldn't compromise the benefits of trademarks.*") (emphasis added)).

Dr. Landes' testimony also aligns with the opinions of Complaint Counsel's trademark expert. Like Dr. Landes, Prof. Tushnet describes trademark law as "considering the harms of overprotection as well as underprotection, balancing private interests with public interests in competition and freedom of speech." (CX8014 at 004 (¶ 7) (Tushnet Rebuttal Report)). She also agreed with Dr. Landes that the policy of allowing "non-trademark uses, reflect this deliberate compromise among varying interests" and that "the freedom to engage in comparative advertising targeting likely consumers of a trademark owner's product or service ...is a core part of the freedom to compete protected by the limits on trademark law." CX8014 at 004 (¶ 7) (Tushnet Rebuttal Report)).

**1426.** Trademark policies reflected in trademark law enhance economic efficiency. (Evans, Tr. 1829; CX 9042 (Evans, Dep. at 157 (Q. So what I want to ask you is, do you agree that the trademark policies encompassed in trademark law are efficient? . . . A. Yeah . . . the general concept of trademarks is efficiency enhancing, so as an economist, I would support trademark policy generally as something that is valuable for promoting economic efficiency."); CX 9042 (Evans, Dep. at 196 (Q. So protection of trademark – well, trademark law promotes efficiency? . . . THE WITNESS: "So trademark law as a general matter promotes efficiency."); CX 8009-031 (Evans Rebuttal Report, at n.65) ("As Professor Landes observes there is no dispute between us that trademarks play an important role in market economics and can promote efficiencies."); Murphy, Tr. 4208).

**Response to Proposed Finding No. 1426:**

This proposed finding, while true as a "general" matter, is irrelevant, misleading, and unsupported as applied to this case, because:

- (a) Respondent has not provided any "economic analysis or evidence . . . that the particular kinds of restrictions at issue here have anything to do with securing the economic benefits

considered in the economics literature on trademarks.” (CX8009 at 031 (¶ 46) (Evans Rebuttal Expert Report));

- (b) Respondent’s reliance on the “economics of trademark law” is misplaced, because trademark policy contradicts Respondent’s position in this case for the reasons stated in response to proposed finding 1425;
- (c) Insofar as the proposed finding regarding the economic efficiency of trademark policies “as a general matter” is intended to suggest that the Bidding Agreements are justified because they incentivize 1-800 Contacts’ investments in brand and advertising, it is unsupported by facts or economic theory, as set forth in Complaint Counsel’s Proposed Findings of Fact (CCPTF Section XI.B (¶¶ 1679-1690), including, among other things, (i) Dr. Murphy conceded that the effect of greater competition on a firms’ incentive to develop a brand is ambiguous and that he did not try to measure any such effect on 1-800 Contacts’ branding incentives (CX9048 (Murphy, Dep. at 45-52)); (ii) but for the Bidding Agreements, 1-800 Contacts would still reap many benefits from the strength of its marks—including still appearing in the number one ad position on 1-800 Contacts’ Branded Queries and still attaining a large proportion of clicks and conversions resulting from those queries; and (iii) there has been no showing that these benefits would be insufficient to maintain 1-800 Contacts’ incentives for investing in its own service or ongoing brand advertising. (CCPTF ¶¶ 1684-1686));
- (c) “[I]t is common for companies to present information about themselves to consumers who are looking for their competitors and for intermediaries [such as search engines, online retailers, social media companies, grocery stores and other physical retailers] “to help companies to do that.” (CX8009 at 031-034 (¶¶ 46-47, 49-52) (Evans Rebuttal Expert Report)). For instance, on Amazon.com, a search for “Clorox wipes” “generates a page

that has Clorox disinfecting wipes on it. The page also has sponsored links for Lysol and Seventh Generation brands of disinfecting wipes. Those firms have paid to make themselves known specifically to people who are potential customers of Clorox disinfecting wipes. Similarly, Walmart.com routinely shows ads for competing products when a user searches for a brand name.” (CX8009 at 033 (¶ 51) (Evans Rebuttal Expert Report)). Likewise, “Facebook and Twitter enable advertisers to target advertising to competitor customers by referencing the brand name or variations of the brand name of that competitor.” (CX8009 at 033 (¶ 52) (Evans Rebuttal Expert Report)). As Dr. Evans explained, “[t]he fact that this behavior is common in competitive markets suggests that it is generally efficient.” (CX8009 at 031 (¶ 47) (Evans Rebuttal Expert Report) (emphasis added)).

- (d) Moreover, it “*is consistent with the economic theory of how trademarks can increase economic efficiency*” to conclude that using trademarks as a communication tool simply to reference a product or brand—*e.g.*, bidding in a search advertising keyword auction on another retailer’s trademark does—is generally economically efficient. (CX8009 at 031 (¶ 47) (Evans Rebuttal Expert Report) (emphasis added)). Specifically, “[t]he key economic feature of trademarks is that they *identify products in much the same way names identify people. This reduces communication and search costs.*” Intermediaries such as search engines, online retailers, and social media companies “use trademarks to communicate with companies that are seeking to put themselves in front of people looking for other companies.” (CX8009 at 037 (¶ 58) (Evans Rebuttal Expert Report) (emphasis added)). Dr. Evans found no “reference in the economics literature on trademarks that would suggest that the use of trademarks for communication, including providing truthful messages to people interested in a competitor’s product, reduces economic efficiency.” Rather, “[t]he

economics literature focuses on the use of the same trademark, or the use of a confusingly similar phrase or symbol related to that trademark” so as to make consumers “likely to think that it is your brand [that your competitor] is selling.” (CX8009 at 037 (¶ 59) (Evans Rebuttal Expert Report)).

As Dr. Evans explained: “Professors Landes and Murphy provide no explanation as to why presenting messages to people interested in a competitor’s products should be considered trademark infringement as an economic matter. . . . In fact, the proposition that firms should be prevented from getting information about themselves to consumers who are planning to buy another firm’s product is quite radical” and “doesn’t follow from the economic literature on trademark protection.” (CX8009 at 038 (¶ 60) (Evans Rebuttal Expert Report)).

- (e) While the role of trademarks, in general, in promoting investments in quality is economically efficient, Respondent has not shown “that showing non-infringing ads to people interested in buying 1-800 Contacts would result in a decrease in 1-800 Contacts’ investment in quality.” (CX8009 at 038-042 (¶ 61-69) (Evans Rebuttal Expert Report)). In fact, the notion that reducing advertising competition supports inter-brand competition is contrary to the findings of economic literature, including dozens of empirical studies, regarding horizontal restraints on advertising. (CCPTF ¶¶ 1687-1690)).
- (f) This literature applies with particular force to the search advertising at issue in this case, which is informational advertising. Informational advertising provides consumers with timely information about price and availability of contact lens products. Specifically, informative advertising “provides consumers with information about a product such as its attributes, its prices, and where to buy it,” and “[t]here is a consensus in the economics literature that informative advertising increases economic efficiency by enabling

consumers to reduce their search costs, find products that better match their preferences, and by encouraging price competition.” (CX8009 at 039 (¶¶ 63-64) (Evans Rebuttal Expert Report); *see also* 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.”)).

**1427.** A trademark provides informational benefits to consumers about relevant product and quality attributes that reduce their cost of searching. (RX 737-0005, 0007 (Landes Report); CX 9050 (Landes, Dep. at 29, 56-58); RX 739-0033 (Murphy Report); CX 9048 (Murphy, Dep. at 10-11)).

**Response to Proposed Finding No. 1427:**

This proposed finding, while partially true is misleading and incomplete as a description of the economics of trademark law and as applied to this case. Because, as Dr. Landes stated, the function of a trademark is to “name a brand,” (CX8009 at 037 (¶ 59) (Evans Rebuttal Expert Report) (citing Landes and Posner at 300), “[t]rademark law only concerns itself with certain

search costs that arise out of deceptive uses of a source-identifier.” CX8014 at 005, 009-010 (¶ 12) (Tushnet Rebuttal Report)). Thus, search costs unrelated to “deceptive uses of a source-identifier” do not raise trademark law concerns. (CX8014 at 007-009 (¶¶ 12-19) (Tushnet Rebuttal Report)); CX8014 at 009 (¶ 17) (Tushnet Rebuttal Report) (“The larger insight is that reducing search costs is not an end in itself for trademark law. Truthful, nondeceptive advertising adds information to the retail environment, which is a positive; if search costs have to be incurred to learn about market alternatives, they are worth paying.”)).

**1428.** There is a consensus among economists that the primary role of trademarks is to reduce consumers’ search costs. (RX 739-0033 (Murphy Report); Murphy, Tr. 4116-17; CX 9048 (Murphy, Dep. at 10-11)).

**Response to Proposed Finding No. 1428:**

This proposed finding is misleading, incomplete, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings Nos. 1426 and 1428. Further, Complaint Counsel specifically notes that the restrictions at issue in this case *reduce* informative advertising—that is, advertising that “enabl[es] consumers to reduce their search costs.” (CX8009 at 039 (¶ 64) (Evans Rebuttal Expert Report)).

**1429.** Different consumers experience different search costs and value those costs differently. (CX 9050 (Landes, Dep. at 67-68); RX 739-0033 (Murphy Report)).

**Response to Proposed Finding No. 1429:**

Complaint Counsel has no specific response, other than to note that Prof. Landes’s deposition testimony should not be considered by the Court because this is not an opinion he expressed in his report, and moreover he did not testify at trial. (*See also* Response to Proposed Finding No. 1822, *infra*).

**1430.** A retailer’s brand name enables a consumer to use his prior experience or information acquired from others to distinguish a particular retailer from other retailers without conducting an exhaustive examination of each retailer and the goods and services each provides. (RX 737-0007 (Landes Report); CX 9048 (Murphy, Dep. at 10-11)).

**Response to Proposed Finding No. 1430:**

This proposed finding, while true as a general matter, is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428. Further, Complaint Counsel specifically notes that the utility of a retail brand trademark to consumers is limited to the particular attributes of the retailer, including the prices of the products sold and the services the retailer provides. Additionally, as applicable to this particular case, because contact lenses are a commodity product and contact lenses sold through various channels and outlets are identical, there is no issue in this case that the retail brands at issue could be understood by consumers as a signal of the quality or attributes of products sold by the retailer, as may be the case with other retail brands such as Tiffany, Bergdorf Goodman, or Whole Foods.

**1431.** Trademark enforcement can improve market efficiency by reducing consumers' search costs. (CX 9050 (Landes, Dep. at 76)).

**Response to Proposed Finding No. 1431:**

This proposed finding should be rejected because it does not express an opinion contained in Professor Landes's expert report, and moreover Prof. Landes's deposition testimony should not be considered by the Court because he did not testify at trial.

**1432.** Consumers' inability to visit a brick-and-mortar 1-800 Contacts means that their search costs are likely to be higher than for in person retail shopping. (RX 737-0009 (Landes Report)).

**Response to Proposed Finding No. 1432:**

This proposed finding should be rejected because it is vague and nonsensical in that it uses the comparative phrase "higher than" without making clear what situations are being compared with one another.

If this proposed finding purports to make the argument that Dr. Landes did at paragraphs 22 and 23 of his report—that is, that because 1-800 Contacts does not have brick-and-mortar stores, it “is less able to provide information about its goods and services that,” for brick-and-mortar retailers, is “readily observable prior to a transaction simply by visiting the store, e.g. prices, selection of available products and brands, helpfulness of staff, and the checkout process,” and that therefore “a service mark of an online retailer such as 1-800 Contacts will have more potential to reduce search costs by signifying attributes of quality and reliability that are otherwise unobservable” (RX0737 at 009 (¶¶ 22-23) (Landes Expert Report))—it is contradicted by the weight of the record evidence and irrelevant, misleading, and unsupported for the reasons set forth in response to Proposed Findings No. 1426 and 1428.

Dr. Landes asserts that “trademarks tend to have significant potential to reduce search costs (H) for experience goods and services” (RX0737 at 008 (( ¶ 19) (Landes Expert Report)), but provides no analysis as to whether this economic generalization applies here.

First, there can be no claim that contact lenses are an “experience good.” As Dr. Evans explained, “[t]he main thing consumers are experiencing, once they have a prescription, is a product that is identical across retailers. The difference in the experience involves other aspects of the distributor.” (CX8009 at 041 (¶ 67 n.91) (Evans Rebuttal Expert Report)). In the context of a retailer selling a commodity product, the retailer’s opportunities for “vertical differentiation would result from shipping and service rather than the actual product.” (CX8009 at 041 (¶ 67) (Evans Rebuttal Expert Report)).

Dr. Landes’ claim that the purchase of contact lenses online is an “experience service”—with less information “readily observable” to online consumers before purchase than is the case for purchasing of contact lenses in a physical retail store—is unsupported, speculative, and contradicted by the weight of the evidence. (RX0737 at 008 (¶¶ 20-23) (Landes Expert Report)).

Dr. Landes describes several “characteristics [that] are readily available prior to a transaction [in a brick-and-mortar store] simply by visiting the store, e.g., prices, selection of available products and brands, helpfulness of staff, and the checkout process” and purports to “contrast” these with the information available prior to purchase from “a retailer with an online or telephone-only service.” (RX0737 at 008 (¶¶ 22-23) (Landes Expert Report)). But the report provides no basis for such a contrast in the case of contact lens sales. And the record belies it. For example, a 2012 1-800 Contacts Management Presentation touts its “Best-In-Class Website” that offers a “[p]roduct page [with] larger images and links for brands,” “24 / 7 click-to chat directly with a live agent,” “[n]ew customer tutorials to help enter order and prescription information,” and “[t]wo click reorders” and includes a screen shot of a 1-800 Contacts web page showing its offers of “free shipping on orders over \$50,” promises that “We beat any price on contact lenses,” and invites those “New to 1-800 Contacts” to “Check out our simple order process,” among other information. (RX0904 at 015; *see also* CX8010 at 011 (¶ 27) (Athey Rebuttal Expert Report) (“Consumers who visit 1-800 Contacts’ website can potentially learn price, stocking, and shipping information”). It is difficult to imagine what information about “prices, selection of available products and brands, helpfulness of staff, and the checkout process” Dr. Landes may believe is missing from such a website. Indeed, Dr. Landes does not appear to have reviewed this document (RX0904) or even the websites of 1-800 Contacts and its rivals before speculating in his report about the information available (and not available) on those websites. (*See* RX0737 at 033-034 (Materials Relied Upon) (Landes Expert Report)).

Many of the ways that online contact lens retailers differentiate themselves from one another—such as price, delivery terms, whether insurance is accepted, website quality and ease of use, the existence (and hours) of a customer support call center—are readily observable to a user interacting with the retailer’s website. These factors are no more difficult to observe online than in

a store, and may be easier to find or evaluate online. Moreover, for online shoppers, customer service from a call center becomes a concern only if there is a problem that requires a personal interaction to resolve, and Dr. Landes provides no reason why customers in physical stores have more information about the retailer's willingness to resolve problems than do customers shopping online. If anything, because of the prevalence of reviews, star ratings, and internet search, online customers are just as likely to have a distinct informational advantage over customers of physical stores.

Dr. Landes' disparagement of the information available to shoppers online compared to shoppers in physical stores is particularly inapt in the context of this case, because the Bidding Agreement interfered with "one of the key methods for ... consumers to discover and reach vendors" online: search engine results pages. (CX8006 at 083 (¶ 183) (Evans Expert Report) (noting also that whereas in "physical shopping malls" or "on a stroll down a main street," "people use shoe leather for discovery," online, it is search that serves this function)). This is why the Bidding Agreements' restrictions on the functioning of that search raises, rather than lowers, consumers' search costs.

**1433.** For that reason, 1-800 Contacts' trademark will have more potential to reduce search costs and 1-800 Contacts' service mark is likely to be more valuable than the mark for retailers with physical locations. (RX 737-0007, -0008 (Landes Report)).

**Response to Proposed Finding No. 1433:**

This proposed finding should be rejected for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1432. The proposed finding is also inconsistent with Dr. Landes claims that 1-800 Contacts retail business involves "experience goods or services" that causes its trademark to be particularly effective in reducing search costs because it is precisely the first-time purchaser who is most likely to highly value the trademark as a signal of unobservable quality attributes at the point of sale.

**1434.** A consumer who makes a one-time only purchase from a retailer tends to derive less value from a trademark's reduction in search costs because the consumer is unlikely to take advantage of the reduction to find the retailer again in the future. (RX 737-0007 (Landes Report)).

**Response to Proposed Finding No. 1434:**

This proposed finding is irrelevant and should be rejected for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1432.

**1435.** The more common it is for consumers to return to the same retailer, the more value a trademark tends to be in reducing search costs. (RX 737-0007 (Landes Report)).

**Response to Proposed Finding No. 1435:**

This proposed finding is irrelevant and should be rejected for the reasons set forth in response to Proposed Findings No. 1426 and 1428. In the context of online retailers, this proposed finding also overlooks other methods consumers commonly use to return to a commercial website, such as identifying it as a bookmark or favorite.

**1436.** { [REDACTED] } (Bethers, Tr. 3571-72).

**Response to Proposed Finding No. 1436:**

Complaint Counsel has no specific response.

**1437.** Trademarks are particularly valuable for companies like 1-800 Contacts that rely primarily on repeat customers. (RX 737-0010 (Landes Report)).

**Response to Proposed Finding No. 1437:**

This proposed finding should be rejected because there is no evidence in the record that 1-800 Contacts relies any more on repeat customers than any other retailer in the world, and thus no evidence that trademarks are "particularly" valuable to it. No evidence has been presented that deriving { [REDACTED] } of sales from repeat customers is a high number that indicates that 1-800 Contacts relies "primarily" on repeat customers, and to the contrary the evidence shows that its

rivals also get the vast majority of their business from repeat customers. (*E.g.*, CCPTF Sections III.E (¶¶ 305-374) and IV.A.6b (¶¶ 466-481)).

**1438.** A trademark's value to a firm is a function of the information it provides consumers and its ability to reduce search costs. (RX 737-0011 (Landes Report)).

**Response to Proposed Finding No. 1438:**

This proposed finding is irrelevant and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428.

**1439.** In economic terms, the true cost of purchasing a good or service includes both the dollar price paid and the search costs of finding it. (RX 739-0033 (Murphy Report)).

**Response to Proposed Finding No. 1439:**

Complaint Counsel has no specific response.

**1440.** By lowering search costs, a firm's trademark lowers the full cost of a consumer's purchase from that firm. (RX 737-0007 (Landes Report)).

**Response to Proposed Finding No. 1440:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428.

**1441.** By lowering search costs, 1-800 Contacts' trademark lowers the full costs of consumers' purchases from 1-800 Contacts. (RX 737-0007 (Landes Report)).

**Response to Proposed Finding No. 1441:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428.

**1442.** The greater the information value of a firm's trademark or service mark, the lower the search costs the consumer incurs and the greater the monetary price the consumer is willing to pay. (RX 737-0012 (Landes Report); CX 9050 (Landes, Dep. at 31)).

**Response to Proposed Finding No. 1442:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428.

Insofar as this proposed finding suggests that the “value” of 1-800 Contacts’ trademark explains its price premium over other online contact lens retailers, it is unsupported and contradicted by:

- (a) Dr. Athey’s conclusion—reached in reliance on her economic expertise and experience regarding pricing and product differentiation—that 1-800 Contacts’ price premium over other online contact lens retailers cannot be fully explained by 1-800 Contacts having a better quality of service than its online rivals. (CCPTF Section IX.A.2 (¶¶ 1318-1343)); and
- (b) Dr. Athey’s empirical model and analysis thereof, which showed that but for the Bidding Agreements, consumers would pay lower prices for contact lenses online even after the model took into account the value that consumers may place on 1-800 Contacts’ brand strength (that is, the possibility that some of 1-800 Contacts’ price premium may be explained by the strength of its brand) by modeling brand effects based on observed data rather than making assumptions about them or their magnitude. (CCPTF ¶¶ 1432-1435, 1440-1448, 1487-1495).

**1443.** Trademarks therefore enable firms to charge a ‘premium,’ which gives them an incentive to invest in and develop their trademarks. (RX 737-0012 (Landes Report); CX 9050 (Landes, Dep. at 33-35); RX 739-0033 (Murphy Report); CX 9048 (Murphy, Dep. at 15-16)).

**Response to Proposed Finding No. 1443:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1442. In particular, the proposed finding also omits the importance of advertising competition to ongoing investment in trademark promotion. (*E.g.*, 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.")).

**1444.** Any difference in prices between 1-800 Contacts and other online retailers is consistent with 1-800 Contacts having a stronger trademark than other online retailers. (RX 737-0019 (Landes Report); CX 9050 (Landes, Dep. at 73 ("Q. 1-800 Contacts has a trade name that has some value, correct? A. Correct. Q. And for which it can charge a premium, correct? A. Yes".))).

**Response to Proposed Finding No. 1444:**

This proposed finding is incorrect, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 1442. The proposed finding is also contradicted by the facts that (1) 1-800 Contacts has a price match program, which meets or beats lower prices offered by any of its online, discount competitors, and (2) 1-800 Contacts had to restrict advertising competition to maintain its premium pricing.

**1445.** Firms that produce products of consistently high quality are best placed to capture the trademark 'premium' associated with a trademark's potential to reduce search costs because inconsistency and poor quality undermine the predictability necessary to lower search costs. (RX 737-0011 (Landes Report)).

**Response to Proposed Finding No. 1445:**

This proposed finding is irrelevant because neither 1-800 Contacts nor its competitors produce the products they sell, and all contact lens retailers are required by law to sell the exact

same prescription products. Further, the ability of 1-800 Contacts to capture a trademark premium as compared to the ability of unspecified other firms to capture a trademark premium in their own sales has no probative value to any issue material to this case. Finally, the proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1442.

**1446.** According to Dr. Evans, “[f]irms may invest in developing and offering a high quality product if they can charge a higher price for it and thereby recover their investments. A trademark can help convey information to consumers that the product is high quality. It thereby attracts consumers who are willing to pay a higher price for superior quality.” (CX 8009-039 (Evans Rebuttal Report)).

**Response to Proposed Finding No. 1446:**

Complaint Counsel has no specific response.

**1447.** Firms’ incentives to invest in and develop their trademarks benefit consumers by reducing search costs and giving firms an incentive to provide products and services that benefit consumers. (RX 737-0012 (Landes Report); CX 9050 (Landes, Dep. at 33-35); RX 739-0034 (Murphy Report)).

**Response to Proposed Finding No. 1447:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428.

**1448.** As Dr. Evans explained, “[p]rotecting trademark rights encourages investment in this sort of brand-building activity, which in turn generates valuable market information, promotes competition and ultimately benefits consumers.” (CX 8006-135 (Evans Report)).

**Response to Proposed Finding No. 1448:**

This proposed finding should be rejected because it does not make clear what “this sort of brand-building activity” refers to. To the extent it refers to the types of activities described in the previous sentences of Dr. Evans report (“convey information to consumers about themselves and their products” and “signal to consumers that the company provides a high quality product or offers particular attributes that consumers care about,” (CX8006 at 135)( ¶292)(Evans Report)),

Complaint Counsel agrees that as a general matter, protecting trademark rights can encourage investment in informational advertising and investments in product quality. As Dr. Athey explained, *increasing* advertising competition by removing restrictions on advertising is what benefits consumers and incentivizes firms to invest in the value of their trademarks. (CX8010 at 050 (¶¶ 130-131) (Athey Rebuttal Expert Report); *see also* Response to Proposed Finding No. 1426).

**1449.** In order to reduce search costs, a brand must maintain a consistently reliable and positive association between its trademark and the product or service that the brand provides. (RX 739-0033 (Murphy Report); CX 9048 (Murphy, Dep. at 12-14)).

**Response to Proposed Finding No. 1449:**

This proposed finding should be rejected because it is untrue. If a trademark conveyed a consistent and negative association to consumers, that would also benefit consumers and reduce search costs, because consumers would know they should avoid the brand. *See infra*, Proposed Finding No. 1452.

**1450.** Where firms provide products and services that lack uniform attributes or quality, a trademark will have less impact on reducing consumer search costs, thereby undermining the consumer's willingness to pay a premium. (RX 737-0013 (Landes Report); RX 739-0033-0034 (Murphy Report)).

**Response to Proposed Finding No. 1450:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426 and 1428. Specifically, as noted in response to Proposed Finding No. 1426:

- (a) The conduct in this case concerns the suppression of informational advertising, not trademark protection. Respondent has not shown “that 1-800 Contacts’ price premium is the result of investments in quality that would make its product better than its rival’s product” or “that showing non-infringing ads to people interested in buying 1-800 Contacts

would result in a decrease in 1-800 Contacts’ investment in quality.” (CX8009 at 038-042 (¶¶ 61-69) (Evans Rebuttal Expert Report));

(b) Dr. Murphy conceded that the effect of greater competition on a firms’ incentive to develop a brand is ambiguous and that he did not try to measure any such effect on 1-800 Contacts’ branding incentives (CX9048 (Murphy, Dep. at 45-52));

(c) But for the Bidding Agreements, 1-800 Contacts would still reap many benefits from the strength of its marks—including still appearing in the number one ad position on 1-800 Contacts’ Branded Queries and still attaining a large proportion of clicks and conversions resulting from those queries—and there has been no showing that these benefits would be insufficient to maintain 1-800 Contacts’ incentives for investing in its own service. (CCPTF ¶¶ 1684-1686)); and

(d) It is more likely that *increasing* advertising competition by removing restrictions on advertising—rather than decreasing such competition by implementing horizontal advertising restrictions—will incentivize 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.”)).

**1451.** In order to fully realize the value of investments in its trademark, a firm has a strong incentive to provide products and services of consistent quality. (RX 737-0013 (Landes Report); CX 9050 (Landes, Dep. at 33-35, 42); RX 739-0034 (Murphy Report)).

**Response to Proposed Finding No. 1451:**

Complaint Counsel has no specific response.

**1452.** A firm that supplies products or services of poor and uneven quality may actually suffer from the information benefits that a trademark provides because the trademark would enable consumers to more easily identify and reject the firm's product or service. (RX 737-0013 (Landes Report)).

**Response to Proposed Finding No. 1452:**

Complaint Counsel has no specific response.

**1453.** Firms have significant incentives to produce consistently high quality produce and services to prevent a trademark's signifying effect from working against them. (RX 737-0013 (Landes Report)).

**Response to Proposed Finding No. 1453:**

Complaint Counsel has no specific response.

**1454.** The benefits of trademarks – reducing search costs and incentivizing firms to provide products and services of consistently high quality – can be compromised if other firms use the mark in confusingly similar ways. (RX 737-0014 (Landes Report); CX 9048 (Murphy, Dep. at 17)).

**Response to Proposed Finding No. 1454:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1450 and because:

- (a) The mere appearance of competitive ads in response to a 1-800 Contacts Branded Query is not likely to cause confusion (CCPTF Section XI.C.4 (¶¶ 1812-1897)) and there is no evidence of any such actual confusion (CCPTF Section XI.C.1 (¶¶ 1691-1791));
- (b) 1-800 Contacts’ competitors had no incentive to confuse consumers about their identities. (CCPTF Section XI.C.2 (¶¶ 1792-1804). For instance, AC Lens CEO Mr. Clarkson explained that doing so would create a “disastrous customer service experience for that consumer;” Visionworks’ Director of Marketing Mr. Duley testified that that he “would never want to” confuse a customer with his company’s trade name and that “I don’t want to confuse a customer, in general. Wouldn’t be a good policy.” (CX9036 (Duley, Dep. at 180-181); Memorial Eye General Manager Mr. Holbrook testified that 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” and that the company’s advertisements never included 1-800 Contacts’ trademark in their text or title (CX9024 (Holbrook, Dep. at 41, 50)); WebEyeCare President and CEO Mr. Batushansky testified that { [REDACTED] [REDACTED] [REDACTED] } (CX9014 (Batushansky, Dep. at 144, 152-153), *in camera*).

The concerns that any actions to confuse customers into thinking that the competitors were or were associated with 1-800 Contacts would backfire by producing a bad “customer service experience” or making customers “less likely to come back” and “less likely to want to buy [from the company] in the future” (CCPTF Section XI.C.2 (¶¶

1792-1804)) are particularly salient because online contact lens retailers depend on repeat business. (CCPTF Section IV.A.6.b (¶¶ 466-481));

(c) 1-800 Contacts competitors identified their own brand names in their search advertisements. (CCPTF Section XI.C.3 (¶¶ 1805-1811));

(d) Confusion regarding other aspects of online advertisements (e.g., whether a listing is sponsored or organic) is not confusion regarding source, sponsorship, or affiliation and irrelevant to any of the concerns posed by this proposed finding (CCPTF Section XI.C.5 (¶¶ 1898-1899)); CX8014 at 009 (¶19) (Tushnet Rebuttal Report) (“just as it is possible to be confused about where you parked your car without being confused about what model it is....whether or not the consumer consciously recognizes that a link is a ‘sponsored’ link or an ‘organic’ link says nothing about whether she can identify the source of that link.”); and

(e) 1-800 Contacts’ Bidding Agreements go beyond prohibiting confusing uses of its trademarks (CCPTF Section XI.C.6 (¶¶ 1900-1927)).

**1455.** Other retailers’ use of 1-800 Contacts’ trademarks to generate paid search advertising undermined the investment that 1-800 Contacts made in its brand. (Coon, Tr. 2731).

**Response to Proposed Finding No. 1455:**

Complaint Counsel agrees that, prior to the Bidding Agreements, 1-800 Contacts’ rivals were able to use paid search advertising to compete with 1-800 Contacts and take sales away by offering the same product at lower prices. Nonetheless, this proposed conclusion should be rejected because it lacks foundation, as Mr. Coon has no personal knowledge that the paid search advertising that concerned 1-800 Contacts’ executives resulted from “[o]ther retailers’ use of 1-800 Contacts’ trademarks.” In fact, the evidence shows that most of 1-800 Contacts’ rivals did not use 1-800 Contacts’ trademarks to generate paid search advertising, but instead bid on generic keywords such as “contacts,” and thus did not “use” 1-800 Contacts’ trademarks at all.

**1456.** Infringers have a strong incentive to use a mark belonging to a firm that has a reputation for producing a consistently high quality product or service because they may be able to obtain the higher price that consumers are willing to pay without incurring the expense of building awareness of the mark and producing products or services of consistently high quality. (RX 737-0016 (Landes Report)).

**Response to Proposed Finding No. 1456:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1454 and because the rival contact lens retailers that 1-800 Contacts entered into Bidding Agreements with charge lower prices than 1-800 Contacts charges. (CCPTF Section VI.A.1 (¶¶ 803-821); *see also* CCPTF Section IX.A.2 (¶¶1318-1343)).

**1457.** It can be rational for one firm to infringe another’s trademark. (Athey, Tr. 841).

**Response to Proposed Finding No. 1457:**

This proposed finding is not supported by the evidence cited, as Dr. Athey specifically qualified her agreement with this statement by stating that “it depends on the consequences and legal framework.”

**1458.** Using a firm’s trademark in confusingly similar ways reduces the information associated with the mark, thereby raising consumer search costs. (RX 737-0014 (Landes Report); CX 9050 (Landes, Dep. at 35-36)).

**Response to Proposed Finding No. 1458:**

This proposed finding should be rejected because “confusingly similar ways” is ambiguous, not defined, and inaccurate as a descriptive of advertising at issue in this case.

**1459.** Confusion negates a trademark’s effect of reducing search costs by limiting the extent to which consumers can rely on the trademark to correctly distinguish one seller from others. (RX 737-0016 (Landes Report)).

**Response to Proposed Finding No. 1459:**

Complaint Counsel has no specific response.

**1460.** By increasing consumer search costs, confusion reduces the value of the mark to consumers and the monetary premium they are willing to pay for the trademarked product or service. This undermines the trademark owner's incentive to invest in the mark and produce goods or services of consistently high quality that benefit consumers. (RX 737-0016 (Landes Report); RX 739-0034 (Murphy Report); Murphy, Tr. 4121-22; CX 9048 (Murphy, Dep. at 17)).

**Response to Proposed Finding No. 1460:**

Complaint Counsel has no specific response.

**1461.** Competing ads that reduce 1-800 Contacts' return on advertising on its trademark will reduce 1-800 Contacts' incentive to invest in its trademark through advertising. (RX 739-0034 (Murphy Report); Murphy, Tr. 4122; CX 9048 (Murphy, Dep. at 46-49, 146-49); Coon, Tr. 2829-31, 2833 ("if we didn't get the benefit of our ads, we wouldn't run ads"), 2834 ("If somebody gets less benefit from investing in advertising, they will spend less."), 2837-39).

**Response to Proposed Finding No. 1461:**

This proposed finding should be rejected because it is unsupported by the testimony cited and unsupported by any opinion Dr. Murphy offered in his report. The cited portion of Dr. Murphy's report does not contain or disclose any opinion or analysis regarding how competing ads that impacted 1-800 Contacts' return on investment in advertising would impact 1-800 Contacts' incentives. (Indeed, it doesn't refer to 1-800 Contacts at all, or to incentives to invest in advertising, or to how competing ads impact return on investment.) Thus, Dr. Murphy's cited trial testimony should be rejected to the extent it contains any opinion on this issue.

But in any event, Dr. Murphy's trial testimony does not even support this proposed finding. While it is obviously true that if 1-800 Contacts received *zero* benefit from advertising (and was aware of this fact), it would cease advertising. However, no witness (fact or expert) testified that non-confusing advertising (i.e., lawful competition) that reduced the return 1-800 Contacts *currently* receives from its advertising would reduce its incentives to invest in advertising. Dr. Murphy did not express such an opinion. Mr. Coon did not express such a view, and even if he had, he has no foundation for it, as he has not been involved in the business in many years.

Finally, this finding should be rejected because the opposite is likely true – competitive advertising would increase 1-800 Contacts incentives offer consumers informative advertising, as well as lower prices.

**1462.** A reduction in 1-800 Contacts’ incentive to invest in its trademark through advertising will harm consumers by reducing competition to offer ECP customers lower prices and superior service. (Murphy, Tr. 4122-24).

**Response to Proposed Finding No. 1462:**

This proposed finding should be rejected because it is not an opinion contained in Dr. Murphy’s report, it is unsupported by the cited testimony, and it is contradicted by Proposed Finding No. 1461.

Proposed Finding No. 1461 posits that, absent the Bidding Agreements, 1-800 Contacts’ rivals’ search advertising would result in a “reduction in 1-800 Contacts’ incentive to invest in its trademark through advertising.” This would obviously constitute an *increase* in “competition to offer ECP customers lower prices and superior service.” Dr. Murphy’s report does not disclose or include any opinion or analysis supporting the assertion that this increase in competition would ultimately “harm consumers,” due to a supposed reduction in 1-800 Contacts’ “incentives to invest in its trademark through advertising.”

**1463.** By preventing infringement, trademark protection can induce potentially infringing firms to invest in developing their own valuable trademarks. (RX 739-0036 (Murphy Report); Murphy, Tr. 4123-25).

**Response to Proposed Finding No. 1463:**

Complaint Counsel has no specific response.

**1464.** Limiting the settling retailers’ ability to use 1-800 Contacts’ trademark increased the settling retailers’ incentives to develop recognized brands of their own. (RX 739-0052 (Murphy Report)).

**Response to Proposed Finding No. 1464:**

This proposed finding should be rejected because it is unsupported by the cited portion of Dr. Murphy's report. Dr. Murphy did not disclose or offer an opinion that the Bidding Agreements (or any other limitation on retailers' ability to use 1-800 Contacts' trademark ) actually "increased their incentives to develop recognized brands of their own."

And if the cited portion discloses this supposed opinion, it should be rejected because it is entirely unsupported. The settling retailers actively promote their own brands, including in their search advertising, as a result of the normal incentives firms have to invest in their own brands, not due to any limitation on their ability to use 1-800 Contacts' trademark. (CCPTF Section XI.C.3 (¶¶ 1805-1811)). Dr. Murphy does not provide any analysis or opinion stating that some portion of their incentive to promote their own brands is provided by a "limit" on their ability to "use 1-800 Contacts' trademark," or explain why such incentives were increased, or how much they were increased.

**1465.** The economic effect of trademark dilution by tarnishment is to undermine the positive association that consumers have with a famous mark, diminishing the trademark owner's reputational capital. (RX 737-0016 (Landes Report)).

**Response to Proposed Finding No. 1465:**

The proposed finding should be rejected because it is a general statement about the law with no analysis or connection to the facts of this case. Further, as Professor Tushnet explained, dilution is not relevant to the conduct at issue in this case for, at least, two reasons: (1) "dilution requires the defendant to use a similar mark *to identify itself*"; and 2) the federal dilution statute includes an express exception for "comparative advertising" which courts have applied to competitive keyword advertising. (CX8014 at 041-043 (¶¶ 87-90) (Tushnet Rebuttal Expert Report) (listing cases)).

**1466.** The economic effect of trademark dilution by blurring is to weaken the signaling effect that connects the mark to its owner, which undermines the trademark's informational benefits. (RX 737-0017 (Landes Report)).

**Response to Proposed Finding No. 1466:**

The proposed finding should be rejected because it is a general statement about the law with no analysis or connection to the facts of this case. Further, as Professor Tushnet explained, dilution is not relevant to the conduct at issue in this case for, at least, two reasons: (1) “dilution requires the defendant to use a similar mark *to identify itself*”; and 2) the federal dilution statute includes an express exception for “comparative advertising” which courts have applied to competitive keyword advertising. (CX8014 at 041-043 (¶¶ 87-90) (Tushnet Rebuttal Expert Report) (listing cases)).

**2. *Trademark Settlements Balance Competitive Interests***

**1467.** Trademark law balances interests of trademark holders, consumers and competitors. (Evans, Tr. 1829-30; CX 9050 (Landes, Dep. at 146 (trademark law “itself tries to incorporate important limitations on the trademark holder’s rights when they spill over to reducing competition by making it more difficult for consumers to compete”))).

**Response to Proposed Finding No. 1467:**

Complaint Counsel has no specific response to the proposed finding other than to note Dr. Landes’ phrase “more difficult for consumers to compete” is incomprehensible, and may be a transcription error, but should be disregarded anyway because it is not an opinion expressed in his Report.

**1468.** From an ex ante perspective, companies compete by investing in their brands to differentiate their products or services, which benefits consumers. (RX 739-0052 (Murphy Report)).

**Response to Proposed Finding No. 1468:**

This proposed finding should be rejected because it is incomprehensibly vague in its use of the phrase “from an ex ante perspective.” Firms should compete on the basis of branding, advertising, price, and other dimensions at all times.

**1469.** From an ex post perspective, companies compete on price and other dimensions given the different perceptions of quality, which also benefits consumers. (RX 739-0052 (Murphy Report)).

**Response to Proposed Finding No. 1469:**

This proposed finding should be rejected because it is incomprehensibly vague in its use of the phrase “from an ex post perspective.” Firms should compete on the basis of branding, advertising, price, and other dimensions at all times.

**1470.** Even if the settlements reduced ex post price competition, consumers could still benefit because the settlements would increase ex ante investments in brands. (RX 739-0052 (Murphy Report)).

**Response to Proposed Finding No. 1470:**

This proposed finding should be rejected because Dr. Murphy did not offer any opinion that the Bidding Agreements increased any firms’ investments in service quality or brand advertising. No such opinion is disclosed at the cited portion of his expert report. In addition, it is misleading and unsupported for the reasons set forth in response to Proposed Findings No. 1426, 1428, 1450, 1468 and 1469. As set forth in response to those proposed findings, no evidence suggests that there has been no showing whatsoever that the Bidding Agreements increased any firms’ investments in service quality or brand advertising. That said, Complaint Counsel agrees with the proposed finding only to the extent that it admits that the Bidding Agreements reduced price competition.

**1471.** Analyzing the competitive effects of the challenged settlement agreements required comparing the potential effect of the settlements to limit ex post price competition and the potential effect of the settlements to increase ex ante interbrand competition. (RX 739-0065, 0082 (Murphy Report)).

**Response to Proposed Finding No. 1471:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Finding No. 1470. Furthermore, such balancing is the province of Congress, which did balance competing interests when defining the scope of

trademark rights. The owner of intellectual property is not entitled to greater rights than those afforded by Congress, as described in Complaint Counsel's Post-Trial Reply Brief. (*See* CC Post-Trial Reply Br. at 23).

**1472.** Analyzing the effects of trademark protection requires balancing an increase in firms' incentive to invest in their brands and lower search costs that can benefit consumers, and a decrease in competitors' ability to make a use of a mark that can in theory also benefit consumers. (RX 739-0037 (Murphy Report)).

**Response to Proposed Finding No. 1472:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Finding No. 1470.

**1473.** Owners of valuable trademarks negotiating a settlement will seek terms that maximize the value of their trademark. (RX 739-0053 (Murphy Report)).

**Response to Proposed Finding No. 1473:**

Complaint Counsel agrees that rational profit-maximizing firms will seek to maximize their profits. For this reason, the antitrust laws exist and are applicable to settlement agreements, just as the antitrust laws are applicable to all horizontal agreements between competitors. In fact, as Dr. Evans explained, settling parties are expected to maximize their private benefit without considering any public costs or benefits. (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."); CCPTF ¶ 1510).

**1474.** A trademark owner's rivals negotiating a settlement will seek terms that allow them to use their trademark to increase competition between their products and the trademark owner's product. (RX 739-0053 (Murphy Report)).

**Response to Proposed Finding No. 1474:**

This proposed finding should be rejected because it is unsupported by the cited portion of Dr. Murphy's report, and Dr. Murphy does not express this opinion anywhere else in his report.

Dr. Murphy instead suggests the opposite in his report; he states in his report that the “trademark owner’s rivals” will have an incentive to use “the trademark” – that is, the trademark owner’s trademark – to “increase competition between their products and the trademark owner’s product.” See RX0739-0053 (Murphy Report Par. 139).

Notably, in this case the parties to the Bidding Agreements did not act consistently with the incentives Dr. Murphy proposes, since they agreed to reciprocal non-use agreements that prevented competition rather than increasing competition.

**1475.** According to Dr. Evans, trademark policies “reflect a balance between the benefits of encouraging investment in trademarks that are valuable for the competitive process and the benefits encouraging the free flow of information.” (CX 8006-137 (Evans Report)).

**Response to Proposed Finding No. 1475:**

Complaint Counsel has no specific response to this proposed finding other than to point out that, in the quoted paragraph, Dr. Evans stated: “It would also harm competition . . . if Pepsi couldn’t use the term ‘Coke’ in efforts to persuade consumers to try Pepsi instead of Coke, obtain information on people who like Coke, and talk to businesses that serve soft drafts about promoting Pepsi to people who have expressed an interest in Coke and so on.” (CX8006 at 137 (¶ 296) (Evans Expert Report)).

**1476.** Dr. Evans offered no opinion that the balance trademark law strikes should be shifted one direction or the other. (CX 9042 (Evans, Dep. at 158)).

**Response to Proposed Finding No. 1476:**

Complaint Counsel has no specific response.

**1477.** The fact that the settlements did not involve monetary payments from 1-800 Contacts indicates that the settlements achieved a balance of competitive incentives that benefit consumers. (RX 739-0053 (Murphy Report)).

**Response to Proposed Finding No. 1477:**

This proposed finding should be rejected because it is unsupported by the cited portion of Dr. Murphy’s report, and Dr. Murphy does not express this opinion anywhere else in his report.

This proposed finding is also unsupported and contrary to the weight of the evidence because it depends on an assumption—that if the settlements increased the profits for 1-800 Contacts, then 1-800 Contacts’ rivals would have bargained over splitting those terms as part of the settlement—that does not apply to this case, as set forth in response to Proposed Finding No. 1474. (*See also* CCPTF Section IX.E.2 (¶¶ 1496-1510); CX8009 at 044-049 (¶¶ 74-79) (Evans Rebuttal Expert Report); CCPTF Section VI.B (¶¶ 891-1218)). This proposed finding is also misleading and unsupported for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1450.

**1478.** Limiting a trademark owner’s freedom to settle trademark litigation raises the costs of trademark protection. (RX 737-0018 (Landes Report); RX 739-0035, -0053 (Murphy Report)).

**Response to Proposed Finding No. 1478:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1450. The proposed finding also omits the obvious less restrictive provisions for settling legitimate trademark infringement claims without banning a type of truthful informative advertising. (*See* CCCOL¶ 57).

**1479.** For a trademark owner that cannot settle trademark litigation without risking antitrust liability, the expected costs of trademark enforcement are more likely to reflect the full costs of litigating the case through trial as well as the expected costs of any antitrust liability. (RX 737-0018 (Landes Report)).

**Response to Proposed Finding No. 1479:**

This proposed finding is irrelevant because all litigants who settle litigation “risk antitrust liability” if they reach anticompetitive agreements that violate the antitrust laws.

**1480.** Increasing the expected costs of trademark enforcement will reduce a trademark owner's incentives to enforce its trademark, which will reduce the value of the trademark. (RX 737-0018 (Landes Report); CX 9050 (Landes, Dep. at 218-219; RX 739-0035).

**Response to Proposed Finding No. 1480:**

Complaint Counsel has no specific response.

**1481.** Increasing the expected costs of trademark enforcement will reduce firms' incentives to invest in brands that lower search costs. (RX 739-0035, -0053 (Murphy Report)).

**Response to Proposed Finding No. 1481:**

This proposed finding is irrelevant, misleading, and unsupported as applied to this case for the reasons set forth in response to Proposed Findings No. 1426, 1428, and 1450. The proposed finding also omits the obvious less restrictive provisions for settling legitimate trademark infringement claims without banning a type of truthful informative advertising. (See CCCOL¶ 57). Complaint Counsel also notes that to the extent that the value of the trademark comes from its potential to be misused to obtain a restriction on lawful, informative advertising, any reduced incentive to pursue such restrictions would benefit consumers and advance the underlying, procompetitive policy of trademark law.

**1482.** Trademark infringement is costly for trademark owners because it involves monitoring the use of their trademarks by rivals as well as the costs of settling and litigating trademark infringement claims. (RX 739-0035 (Murphy Report)).

**Response to Proposed Finding No. 1482:**

This proposed finding should be rejected because it is not an opinion Dr. Murphy expresses in his report. See RX 739-0035 (Murphy Report). Dr. Murphy does not express the opinion that trademark owners find it costly to engage in trademark infringement, nor does he express the opinion that trademark infringement requires trademark owners to monitor their marks, settle, or litigate infringement claims.

**1483.** Settlements that prohibit confusing uses of a mark are costlier to the parties than broad non-use settlements because they require ongoing monitoring enforcement. (CX 9050 (Landes, Dep. at 158-60)).

**Response to Proposed Finding No. 1483:**

The proposed finding should be rejected because it is not an opinion that Prof. Landes disclosed in his report. This Court should not allow Prof. Landes, or any other expert, to offer opinions at deposition or trial that were not disclosed in their report.

Even if Prof. Landes were permitted to offer opinions for the first time at deposition, he did not offer this opinion. In the cited portion of his deposition transcript he did not anywhere use the phrase “broad non-use settlements,” which is vague in any event.

Further, no opinion regarding “broad non-use agreements” is relevant to this case. In a typical non-use agreement, the parties may agree to not use confusingly similar names to identify their competing products. The result of such settlements is to require the defendant to switch to a more distinct name, which advances trademark law’s purpose to “name a brand.” (CX8009 at 037 (¶ 59) (Evans Rebuttal Expert Report) (citing Landes and Posner at 300)). Here, the defendants sued by 1-800 Contacts did not use its trademarks to identify their own goods and services. Each of the defendants had its own distinctive tradename, some of which were well-known, or even famous, brands, like Walgreens. The settlements thus did not require the defendants to adopt new and more distinctive brands. Instead, their purpose and practical effect was to stop a particular category of advertising altogether, no matter what brand names appeared in the ads. Thus, the terms are not typical “broad non-use” trademark provisions, but rather broad bans on advertising, which require no change to the names the defendants use to identify their own goods or services or to the clarity of their advertising.

Further, to the extent that it is true that the settlements do not require “ongoing monitoring,” it is precisely because they ban the advertising entirely. If no ads appear, there is

nothing to monitor, other than to confirm the non-appearance of all ads. Typical trademark “broad non-use” provisions do not go that far. For example, if Walgreens had agreed to always use its distinct, famous tradename in connection with online advertising for contact lenses, all that would be required would be monitoring to confirm that its ads do indeed feature the word “Walgreens.” But that is a far cry from a settlement that reduces monitoring costs by banning ads entirely.

Thus, the proposed finding also omits the obvious less restrictive provisions for settling legitimate trademark infringement claims without banning a type of truthful informative advertising. (CX8014 at 040 (¶ 85) (Tushnet Rebuttal Expert Report) (“the proper remedy for a finding of infringement would be (1) to bar the confusing use of a plaintiff’s trademark in the text of an ad, and/or (2) to require clear labeling of the source of the ad.”)). This proposed finding also ignores the impact of the negative keyword and reciprocal provisions of the agreements, which are consistent with restricting advertising, and inconsistent with a typical, trademark “non-use” agreement.

Finally, the proposed finding is inaccurate, unsupported, and contrary to the evidence insofar as it suggests that less restrictive alternatives to the Bidding Agreements that prohibited only certain confusing uses of 1-800 Contacts’ mark would be costlier to 1-800 Contacts’ counterparties than the Bidding Agreements were. Such a claim is contrary to the evidence that non-confusing advertising in response to 1-800 Contacts Branded Queries is a successful, commercially significant strategy for online contact lens retailers and that the Bidding Agreements caused 1-800 Contacts’ counterparties to the agreements harm (CCPTF Section V (¶¶ 590-802); *see also generally* CCPTF Section IX (¶ 1313-1541)).

### ***C. The Settlement Agreements Reduced Consumer Confusion***

1484. The weight of the evidence shows that the Settlement Agreements reduce potential consumer confusion.

**Response to Proposed Finding No. 1484**

This proposed finding is unsupported and contradicted by the weight of the evidence for the reasons set forth below in Responses to Proposed Findings Nos. 1485–1766. Furthermore, this proposed finding is immaterial and irrelevant insofar as the consumer confusion purportedly addressed by the Settlement Agreements is not the type of confusion cognizable under trademark law, i.e., confusion as to source, sponsorship, or affiliation of a company’s products or services.

***1. Consumer Survey Evidence Shows The Restricted Ads Potentially Cause Consumer Confusion***

1485. Respondent’s expert, Dr. Kent Van Liere, conducted a study to test whether competitor ads showing in response to the search query “1-800 Contacts” are likely to cause consumer confusion. (RX 735 (Van Liere Report); RX 728 (curriculum vitae); RX 729 (documents relied upon); RX 730 (study questionnaire)). More specifically, Dr. Van Liere sought to determine whether or not keyword-generated advertisements on search engines caused consumers to believe that the companies whose advertisements are placed on the page are the same as (i.e., source confusion) or affiliated with (i.e., affiliation confusion) 1-800 Contacts. (RX 735-0003).

**Response to Proposed Finding No. 1485**

Complaint Counsel has no specific response to this proposed finding to the extent it is intended merely to describe Dr. Van Liere’s assignment in this case, as set forth in his expert report, as opposed to his findings and conclusions. Complaint Counsel notes that Dr. Van Liere also indicated in his expert report that the question he was trying to test 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 Expert Report)).

1486. Based on his study, Dr. Van Liere concluded that among consumers who search using the 1-800 Contacts trademark as a search query there is a potential for real-world confusion regarding whether paid-search advertisements sponsored by competitors of 1-800 Contacts are advertisements for 1-800 Contacts or are affiliated with 1-800 Contacts. (RX 735-006; Van Liere, Tr. 2976).

**Response to Proposed Finding No. 1486**

This proposed finding is contrary to the weight of the evidence because the numerous flaws in Dr. Van Liere's survey, as identified by Dr. Jacoby, render his results meaningless and his conclusions unreliable. (CX8011 at 002-028) (¶¶ 1–35) (Jacoby Rebuttal Expert Report). (*See generally* CCPTF ¶¶ 1825–1897.) Most importantly, Dr. Van Liere failed to use the proper control, and thus failed to test the relevant question. (CX8011 at 002-010 (¶¶ 1-19) (Jacoby Rebuttal Expert Report); Jacoby, Tr. 2218-2229). Indeed, Dr. Van Liere changed multiple variables between his test and control, and thus, failed to answer any question at all.

Moreover, although Dr. Van Liere purportedly concluded that “there is a potential for real-world confusion among consumers,” he failed to replicate real-world conditions in his study. As a result, Dr. Van Liere's purported findings of consumer confusion are irredeemably suspect and inherently unreliable. First, Dr. Van Liere's test and control conditions failed to replicate real-world conditions because Dr. Van Liere removed advertisements for 1-800 Contacts that should have been part of both sets of stimuli in his survey. (Van Liere, Tr. 3010–3011; Jacoby, Tr. 2230–2234; CX8011 at 011 (¶ 21) (Jacoby Rebuttal Expert Report). In particular, as Dr. Jacoby explained, the removal of advertisements for 1-800 Contacts from the test stimuli was a “fatal design flaw” because advertisements for 1-800 Contacts consistently appear at the top of a search engine results page in response to an actual search for “1-800 Contacts,” and it is quite possible that all of the confusion reported in Dr. Van Liere's study would have disappeared had survey respondents seen 1-800 Contacts' advertisement appearing above other sponsored advertisements in the list of search results, as happens in the real world. (CX8011 at 011–012 (¶¶ 21–22) (Jacoby Rebuttal Expert Report).

Second, Dr. Van Liere's control conditions failed to replicate real-world conditions because all sponsored advertisements, including advertisements for 1-800 Contacts, have been

removed from the control stimuli. (Van Liere, Tr. 3010–3011.) As Dr. Jacoby pointed out, “[b]y removing all of the sponsored links from the ‘control’ condition, Dr. Van Liere provided his control group respondents with an artificially constructed, unnatural SERP, one that departs significantly from real-world conditions.” (CX8011 at 011 (¶ 20) (Jacoby Rebuttal Expert Report); *see also* Jacoby, Tr. 2222–2223.)

In response to these two flaws, Dr. Van Liere claimed that when he ran searches for “1-800 Contacts,” some search engine results pages did not have any sponsored advertisements, including advertisements for 1-800 Contacts, but he acknowledged that there is nothing in the record to support his claim. (Van Liere, Tr. 3304, 3133.) Furthermore, his claim that searches for “1-800 Contacts” occasionally yield search engine results pages with no sponsored advertisements is contradicted by testimony from current and former 1-800 Contacts employees, as well as contemporaneous documents. (Bethers, Tr. 3787–3788, *in camera*; CX0296 at 035 (1-800 Contacts February 2016 Affiliate and Paid Search Overview Presentation), *in camera*; CX9028 (Roundy Dep. at 086–088); CX9031 (C. Schmidt Dep. at 125–127); CX9020 (Craven at 123–125)). (*See also* CCPTF ¶¶ 1836–1847.)

Third, Dr. Van Liere also failed to replicate real-world conditions in his Google test conditions because he placed sponsored advertisements only at the top of the search engine results page and not also on the right-hand side of the page, as Google had done prior to February 2016. (*Compare* RX0730 at 009 (Van Liere Expert Report, Exhibit C (study questionnaire containing Google test stimuli)) *with* RX0072 at 0006 (¶ 19) (Complaint against Memorial Eye, P.A.) (pointing to a link to [www.shipmycontacts.com](http://www.shipmycontacts.com) appearing on the right-hand side of the search engine results page under “Sponsored Links” as an example of infringement).) As Dr. Jacoby pointed out, “Dr. Van Liere failed to test whether consumers were confused by *any* advertisements on a real-world Google SERP prior to February 2016, even though the bulk of ads actually

challenged by 1-800 Contacts over some 12 years appeared in this prior format. This is a substantial limitation on the usefulness of his study.” (CX0811 at 012 (Jacoby Rebuttal Expert Report ¶ 24).)

1487. Dr. Van Liere thus concluded that there is the potential for consumer confusion if the at-issue settlement agreements did not exist and the parties to the settlements could cause their ads to appear in response to consumer searches using the 1-800 Contacts trademark as the search term. (Van Liere, Tr. 2976-2978).

**Response to Proposed Finding No. 1487**

This proposed finding is contrary to the weight of the evidence because of the flaws in Dr. Van Liere’s survey, as identified by Dr. Jacoby, that render his results meaningless and his conclusions unreliable. (CX8011 at 002-028) (¶¶ 1-35) (Jacoby Rebuttal Expert Report).) (*See generally* CCPTF ¶¶ 1825–1897.)

*(a) Dr. Van Liere’s Qualifications*

1488. Dr. Van Liere is a survey and sampling expert. (RX 735-0003; Van Liere, Tr. 2958). Complaint Counsel stipulated to his qualification as a survey expert. (Van Liere, Tr. 2962).

**Response to Proposed Finding No. 1488**

Complaint Counsel has no specific response to this proposed finding, except to note that Dr. Van Liere does not teach at any academic institution, and has not published or contributed to any books, written for any peer-reviewed journals, or edited any academic treatises in (at least) the past 15 years. Van Liere, Tr. 3160.

1489. Over the course of his nearly 40-year career, Dr. Van Liere has been primarily been involved in conducting social science research using survey and sampling methods on a wide range of consumer and business decision-making issues. (Van Liere, Tr. 2958).

**Response to Proposed Finding No. 1489**

Complaint Counsel notes that in his expert report, Dr. Van Liere referred to his “30-year career” and not a 40-year career. (RX0735 at 003 (¶ 3) (Van Liere Expert Report)). The proposed finding is also misleading to the extent it suggests that Dr. Van Liere has been conducting

litigation surveys for several decades. In fact, Dr. Van Liere did not start working on litigation surveys until the early 2000s. As Dr. Van Liere admitted, “[f]rom the mid-1980s until the early 2000s, my work was all applied survey research to other kinds of decision-making. I didn’t do any litigation work during those periods.” (Van Liere, Tr. 2963-2964).

The distinction between litigation surveys and other types of marketing surveys is important because the skill set and survey design considerations differ considerably, depending on the type of survey that needs to be conducted. *See, e.g.*, Jacoby, Tr. 2178-2179 (“This is a little different from traditional marketing surveys. Over there you may want to find out how people are leaning, and so you may want to find out a guess. But in litigation surveys, as the Reference Manual on Scientific Evidence says, you don’t want guesses and you need to take precautions to prevent guessing. . . . Another thing is to make sure the questions are balanced, so they not only give the affirmative side but the negative side.”); *see also* CX9041 (Jacoby, Dep. at 205-207)).

1490. Dr. Van Liere has a Ph.D. in sociology, with a specialization in methods and statistics. (RX 728-0003). He was a professor in the Department of Sociology at the University of Tennessee from 1978 to 1985, where he taught various courses, including survey methodology, sampling and statistics. (RX 728-0003; Van Liere, Tr. 2960). Dr. Van Liere was a visiting professor at the University of Wisconsin-Madison in 1985. (RX 728-0003).

#### **Response to Proposed Finding No. 1490**

Complaint Counsel has no specific response to this proposed finding except to note that Dr. Van Liere’s curriculum vitae states that his specialization was in research methods and statistics. (RX0728 at 003 (Van Liere Expert Report, Exhibit A (curriculum vitae)).)

1491. After teaching, Dr. Van Liere spent 17 years conducting applied survey research for corporations and government agencies. From 1985 to 1995, Dr. Van Liere was a Principal and later President of a survey research-based applied social science market research company. (RX 728-0003; Van Liere, Tr. 2961). At that survey research company, he conducted studies of consumers and business decision makers on a wide range of topics, including for large corporations and large government agencies (such as the National Park Service, NOAA, and the Bureau of Reclamation). (Van Liere, Tr. 2961-63). His work included surveys regarding new products and services, switching behavior, segmenting markets to identify consumers who were interested in different benefits, and customer satisfaction surveys. (Van Liere, Tr. 2961-2963).

**Response to Proposed Finding No. 1491**

Complaint Counsel has no specific response, other than to note that none of the work described above involved designing or conducting litigation surveys, which require different design considerations than traditional marketing surveys and other applied survey research. *See* Response to Proposed Finding No. 1489.

1492. From 1995 to 2000, Dr. Van Liere was a Director and later Senior Vice President in the market analysis and survey research group of another consulting firm. (Van Liere, Tr 2964-5; RX 728-0003). At that firm, Dr. Van Liere conducted survey research for most of the electric and gas utilities in the U.S. as well as for a variety of large companies, including Whirlpool, Microsoft, and Procter & Gamble. (Van Liere, Tr 2965).

**Response to Proposed Finding No. 1492**

Complaint Counsel has no specific response to this proposed finding, other than to note that none of the work described above involved designing or conducting litigation surveys, which require different design considerations than traditional marketing surveys and other applied survey research. *See* Response to Proposed Finding No. 1489.

1493. In 2000, Dr. Van Liere became the CEO of Primen, a joint venture formed by the Electric Power Research Institute and the Gas Research Institute. (Van Liere, Tr. 2966; RX 728-0003). Primen conducted regular surveys of electric and gas utility customers, including both consumers and business customers. (Van Liere, Tr. 2966).

**Response to Proposed Finding No. 1493**

Complaint Counsel has no specific response to this proposed finding.

1494. None of Dr. Van Liere's work from 1985 to 2002 involved litigation. (Van Liere, Tr. 2963; RX 728-0003).

**Response to Proposed Finding No. 1494**

Complaint Counsel has no specific response to this proposed finding.

1495. From 2002 to present, Dr. Van Liere has provided survey and sampling work for litigation purposes. (Van Liere, Tr. 2967; RX 728-0003). He has conducted studies in 60 to 80 cases in which his involvement has been disclosed. (Van Liere, Tr. 2968-2969).

**Response to Proposed Finding No. 1495**

Complaint Counsel has no specific response to this proposed finding.

1496. Dr. Van Liere has conducted surveys primarily in intellectual property cases, such as trademark, trade dress and patent-type cases. (Van Liere, Tr. 2968; RX 728-0004-0006). He has also conducted studies in false advertising cases and antitrust cases, including for the Federal Trade Commission. (Van Liere, Tr. 2968-2970; RX 728-0006-0011).

**Response to Proposed Finding No. 1496**

Complaint Counsel has no specific response to this proposed finding.

1497. Dr. Van Liere has had 15 to 20 engagements involving likelihood of confusion or secondary meaning. (Van Liere, Tr. 2970). He has represented both plaintiffs and defendants in such cases. (Van Liere, Tr. 2970).

**Response to Proposed Finding No. 1497**

Complaint Counsel has no specific response to this proposed finding.

1498. Dr. Van Liere has conducted consumer confusion studies in several cases involving keyword advertising, i.e., cases in which the question involves whether consumers who search using a trademark term are likely to be confused by sponsored ads triggered by that trademark term but are placed by companies other than the trademark holder. (Van Liere, Tr. 2971). These cases include *American Airlines, Inc. v. Google, Inc.* and *Rosetta Stone Ltd. v. Google, Inc.* (RX 728-0005-6).

**Response to Proposed Finding No. 1498**

Complaint Counsel has no specific response to this proposed finding, except to note that to the extent Respondent purports to rely on the studies performed in the *American Airlines* case, such reliance is inappropriate because, among other reasons, the *American Airlines* surveys are flawed in several respects and do not provide a sufficient basis for Professor Goodstein's opinions, as Rule 702 requires.

Specifically, Professor Tushnet testified that the study asked "the wrong question with the wrong controls and the wrong stimuli." (Tushnet, Tr. 4444.) Specifically, if the question is whether a consumer searching for "American Airlines" will think that sponsored ads appearing in response to her search come from American Airlines, then the survey should have tested whether

the fact that the search query is for “American Airlines,” as opposed to a generic search term like “airlines,” is causing confusion about the sponsored ads that appear as search results. (Tushnet, Tr. 4445; CX8014 at 031 (¶ 67) (Tushnet Rebuttal Expert Report)). Furthermore, the study could not properly control for confusion arising from inattention or guessing because the test stimulus included additional links not present in the control stimulus. (Tushnet, Tr. 4445-4446; CX 8014 at 029 (¶ 62) (Tushnet Rebuttal Expert Report)). Professor Tushnet explained, “When you ask your test group 18 questions and your control group 12, it's as if you gave them math problems and you find out that, in the test group, some of the test group got some of the extra six wrong and you conclude, well, they're worse at math than the control group.... [T]hat conclusion just isn't supported by your evidence.” (Tushnet, Tr. 4446.)

Professor Tushnet testified about two additional flaws with the *American Airlines* surveys that impact Professor Goodstein's reliance on them. One is that in the control group, the study arbitrarily chose not to count respondents who thought that the Wikipedia page about American Airlines was affiliated with the company as confused, even though there is no such affiliation. (Tushnet, Tr. 4446-47; CX8014 at 030 (¶¶ 63-65) (Tushnet Rebuttal Expert Report).) Not counting these responses in the control drove down the level of confusion reported in the control. (*Id.*) The other is that the study failed to replicate real-world stimuli, in which respondents would have seen an ad from American Airlines as part of the stimulus, appearing as the first listed result. (Tushnet, Tr. 4447; CX8014 at 030 (¶ 66) (Tushnet Rebuttal Expert Report).)

Professor Tushnet also testified that the flaws she has identified in the *American Airlines* survey were repeated by Dr. Van Liere in his 1-800 Contacts survey performed for this case, and Professor Goodstein therefore should not have relied on the 1-800 Contacts survey either. (Tushnet, Tr. 4449; CX8014 at 031-032 (¶ 68) (Tushnet Rebuttal Expert Report)).

**1499.** In *Rosetta Stone*, the United States Court of Appeals for the Fourth Circuit stated that Dr. Van Liere’s survey conducted regarding confusion from sponsored link advertisements that appeared in response to a user’s Internet search for the trademark term “Rosetta Stone” “‘yield[ed] a net confusion rate of 17 percent’—that is, ‘17 percent of consumers demonstrate actual confusion.’ This result is clear evidence of actual confusion for purposes of summary judgment. . . [T]his evidence should have been added to the other evidence of actual confusion to be considered in the light most favorable to Rosetta Stone.” (RX 735-0004; *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 159 (4th Cir. 2012)).

**Response to Proposed Finding No. 1499**

This proposed finding is irrelevant and misleading to the extent that the fact of the holding of the United States Court of Appeals for the Fourth Circuit is being used somehow to bolster Dr. Van Liere’s opinions in this case. Dr. Van Liere’s opinions with respect to likelihood of confusion in the *Rosetta Stone* case have no bearing on the issue in this case because the question of likelihood of confusion must be evaluated based on the facts and circumstances of each individual case. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 933 (4th Cir. 1995) (“Given the fact that the likelihood of confusion depends on ‘varying human reactions to situations incapable of exact appraisal,’ ... this Court has concluded that determining the likelihood of confusion is an ‘inherently factual’ issue that depends on the facts and circumstances in each case.”) (citations omitted); *accord Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012). *See also 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (“The weight to be accorded a specific survey depends on the facts and circumstances of each case.”) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 20, cmt. g, at 217 (1995))).

Furthermore, the Fourth Circuit merely held in *Rosetta Stone* that Dr. Van Liere’s opinions constituted evidence of actual confusion that the district court should have considered in a light most favorable to Rosetta Stone, as the nonmoving party, under the governing summary judgment standard. 676 F.3d at 159. As the court of appeals noted, the role of the district court in assessing evidence on a motion for summary judgment is quite different from its role as a trier of fact after a

bench trial, when it can weigh the evidence and make findings of fact. *Id.* at 155 & 160. The court of appeals therefore remanded the case to the district court; importantly, it did not direct a finding of likelihood of confusion or actual confusion in Rosetta Stone's favor based on Dr. Van Liere's opinions. The case was subsequently dismissed with prejudice by the parties. *See* Stipulation of Voluntary Dismissal with Prejudice, *Rosetta Stone Ltd. v. Google, Inc.*, No. 1:09-cv-736-GBL (E.D. Va. Oct. 31, 2012), ECF No. 283.

1500. Dr. Van Liere's expert opinions have never been excluded by a court. (Van Liere, Tr. 2975).

**Response to Proposed Finding No. 1500**

Although Dr. Van Liere indeed testified as such at trial, this proposed finding is not accurate. In *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d 839, 864 (N.D. Tex. 2009), the district court granted in part the defendants' motion to strike the expert testimony of Dr. Van Liere. In *Mary Kay*, Dr. Van Liere conducted a survey that set out to probe whether and the extent to which consumers were confused as to "affiliation" between the defendants' touchofpinkcosmetics.com website and Mary Kay, the trademark holder. The court agreed with the defendants that "the responses of interviewees who believed affiliation existed solely because the website sells Mary Kay products are inadmissible." *Id.* at 848. For purposes of trademark infringement, the defendants had to do something *improper* to cause confusion, and merely reselling the trademark holder's genuine products was *not* improper. *Id.* at 849. The district court therefore held that "confusion that stems solely from the fact that the Webers are reselling Mary Kay products is not legally relevant and might confuse the jury" and determined that it would not "allow the jury to hear the bald statement that forty five percent of consumers were confused about touchofpinkcosmetics.com's affiliation with Mary Kay." *Id.* (*See* Van Liere, Tr. 3196–3198.)

Furthermore, in *Stop Staring! Designs v. Tatyana, LLC*, No. 09-cv-02014-DSF, 2011 U.S. Dist. LEXIS 159768 (C.D. Cal. Aug. 11, 2011), the plaintiff moved to exclude the expert opinions of Dr. Van Liere, who had conducted a survey and concluded that there was no likelihood of confusion. *Id.* at \*36–37. The district court granted the motion when it excluded the opinions of the plaintiff’s expert, Gary Frazier, which Dr. Van Liere was purportedly retained to rebut. *Stop Staring! Designs v. Tatyana, LLC*, No. 09-cv-02014-DSF, 2011 U.S. Dist. LEXIS 159767, at \*3–4 (C.D. Cal. Aug. 11, 2011).

Additionally, this proposed finding is misleading to the extent it is meant to suggest that Dr. Van Liere’s expert opinions, notwithstanding their admission as evidence, have never been criticized or rejected by courts. To the contrary, Dr. Van Liere’s surveys have been criticized and given no weight on several occasions. In a recent hospital merger case, the court dismissed an employer survey conducted by Dr. Van Liere because it “does little more than ‘gauge employer interest’” and was “essentially speculative and unable to withstand the ‘rigorous analysis’ that the Clayton Act requires.” *FTC v. Advocate Health Care*, No. 15 C 11473, 2017 U.S. Dist. LEXIS 37707, at \*54-57 (N.D. Ill. Mar. 16, 2017)). Another district court concluded that Dr. Van Liere’s survey results regarding the materiality of messages in the defendants’ advertisements for e-cigarettes were “not probative” and instead were “suspect,” particularly because “Van Liere did not ask respondents questions relevant in assessing the [relevant issue].” *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 2d 1050, 1117 (C.D. Cal. 2015). Another district court rejected Dr. Van Liere’s study opining that the plaintiff’s “Backyard” trademark for grills had no value when compared against a control. *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, No. 5:14-cv-00217-BO, 2016 U.S. Dist. LEXIS 161512, at \*14–15 (E.D.N.C. filed Nov. 22, 2016).

1501. Dr. Van Liere conducted a study in this case similar to the studies he has done in other keyword advertising cases. (Van Liere, Tr. 2978). He sampled consumers in the relevant market, showed them various search results pages, and measured, using certain survey questions,

the degree to which they were likely to be confused in terms of source or affiliation confusion. (Van Liere, Tr. 2978).

**Response to Proposed Finding No. 1501**

This proposed finding is misleading to the extent it suggests that Dr. Van Liere “sampled consumers in the relevant market” or that Dr. Van Liere “measured . . . the degree to which [consumers] were likely to be confused in terms of source of affiliation confusion.” As Dr. Jacoby explained, Dr. Van Liere failed to define the relevant universe of survey respondents by including contact lens purchasers who had purchased contact lenses online in the past but who were not likely to purchase them online in the future, and by excluding an entire class of contact lens wearers. *See* CCPTF ¶¶ 1879-1885. Complaint Counsel also notes that Dr. Van Liere failed to disclose and produce the search engine results pages that he expressly “relied upon” in creating the “test” and “control” conditions for his survey. (Van Liere, Tr. 3099–3100; *see also* CCPTB at 152-154).

Dr. Van Liere also failed to “measure . . . the degree to which [consumers] were likely to be confused in terms of source of affiliation confusion.” Because Dr. Van Liere’s survey used a “flawed and irrelevant control,” he failed to test the relevant question, and his ultimate confusion “calculations” are meaningless. (CX8011 at 002-010 (¶¶ 1-19) (Jacoby Rebuttal Expert Report); Jacoby, Tr. 2218-2229).

***(b) The Relevant Population***

1502. The relevant population for a survey is the population of people whose opinions matter to the particular issue. (Van Liere, Tr. 2981). The definition of the relevant population is typically case-specific. (Van Liere, Tr. 2981).

**Response to Proposed Finding No. 1502**

Complaint Counsel has no specific response to this proposed finding.

1503. In this case, the Complaint alleges that 1-800 Contacts entered into agreements that prevented certain retailers of contact lenses from displaying paid search advertisements in

response to consumer searches that included 1-800 Contact’s trademark in the search query. (Complaint ¶¶ 17-25, 27). According to the Complaint, one relevant market can be defined as “the sale of search advertising by auction in response to user queries signaling the user’s interest in contact lenses, or smaller relevant markets therein.” (CX 1132 (Complaint ¶ 28)). The Complaint alleges a second relevant market as “no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses.” (CX 1132 (Complaint ¶ 29)).

#### **Response to Proposed Finding No. 1503**

Complaint Counsel has no specific response to this proposed finding.

1504. Based on the allegations in the Complaint, the consumers whose perceptions would matter are those who would be searching the Internet for information regarding contact lens retailers and who could encounter sponsored ads of competitors to 1-800 Contacts. (Van Liere, Tr. 2981-2982).

#### **Response to Proposed Finding No. 1504**

Complaint Counsel notes that this is Dr. Van Liere’s opinion regarding how the “relevant population” for his survey should be defined, based on his reading of the FTC’s Complaint, and not a statement of fact regarding any subset of consumers in the real world.

1505. Dr. Van Liere therefore defined the relevant population for his study “as adult consumers 18 years or older who reside in the US who either a) have purchased contact lenses online within the past 12 months; or b) would consider searching on the internet to purchase contact lenses in the next 12 months.” (RX 735-0009).

#### **Response to Proposed Finding No. 1505**

Complaint Counsel has no specific response to this proposed finding other than to note that Dr. Jacoby disagrees that this defines the proper universe of survey respondents, who should be *potential* purchasers of contact lenses. (See CCPTF ¶¶ 1879–1885.)

#### ***(c) Sampling The Relevant Population***

1506. To identify and sample from the relevant population, potential respondents were contacted via email using a well-respected national online survey firm – Critical Mix – that has a panel of millions of consumers. (RX 735-009; Van Liere, Tr. 2983).

#### **Response to Proposed Finding No. 1506**

Complaint Counsel has no specific response to this proposed finding.

1507. Critical Mix has demographic, occupational, and other information regarding the persons who agree to participate on its panels. (Van Liere, Tr. 2986). This information is verified through a number of quality control measures, including third-party validation. (Van Liere, Tr. 2986-2987).

**Response to Proposed Finding No. 1507**

Complaint Counsel has no specific response to this proposed finding.

1508. Dr. Van Liere's study used the Critical Mix online panel of consumers. (Van Liere, Tr. 2980-2981). The study did not use pop-up surveys, in which the study is not actually accessing members of a survey panel but instead accesses people who go to a particular website. (Van Liere, Tr. 2980-2981).

**Response to Proposed Finding No. 1508**

Complaint Counsel has no specific response to this proposed finding.

1509. An invitation was sent via email by Critical Mix to a representative random sample of adult consumers in the US, age 18 and older, who were part of their consumer panel. (RX 735-0009).

**Response to Proposed Finding No. 1509**

Complaint Counsel has no specific response to this proposed finding.

1510. Respondents were asked a set of screening questions to determine whether they are members of the relevant population. (RX 735-0009; RX 730-0002-0004; Van Liere, Tr. 2986-2987).

**Response to Proposed Finding No. 1510**

This proposed finding is misleading to the extent it suggests that Dr. Van Liere's screening questions enabled him to define the relevant universe of survey respondents. In fact, as a result of his flawed screening questions, Dr. Van Liere failed to define the relevant universe of survey respondents because he included contact lens purchasers who had purchased contact lenses online only in the past but who were not likely to purchase them online in the future, and by excluding an entire class of contact lens wearers. *See* CCPTF ¶¶ 1879-1885; *see also* CX8011 at 014-015 (¶¶ 27-28) (Jacoby Rebuttal Expert Report)).

1511. To qualify for the study, respondents must have either purchased contact lenses online in the past 12 months or would consider searching on the internet to purchase contact lenses in the next 12 months. (RX 730-0003, 0014; Van Liere, Tr. 2992-2999).

**Response to Proposed Finding No. 1511**

Complaint Counsel agrees that this is how Dr. Van Liere qualified respondents for his study. However, the screening question described above resulted in an improper universe of survey respondents. Dr. Van Liere improperly included contact lens purchasers who had purchased contact lenses online only in the past, but who were *not* likely to purchase them online in the future. *See* CCPTF ¶¶ 1879-1885; CX8011 at 014-015 (¶¶ 27-28) (Jacoby Rebuttal Expert Report)). As Dr. Jacoby explained, the proper universe of survey respondents consists of potential purchasers, rather than past purchasers, of the product at issue. (Jacoby, Tr. 2168-2170, 2250).

1512. Because the study used search results pages based on the Google and the Yahoo! search engines, to qualify for the survey respondents had to indicate they had used either the Google or Yahoo! search engine in the past 12 months or thought they would use one of those search engines in the next 12 months. (RX 730-0004, 0014; Van Liere, Tr. 2998).

**Response to Proposed Finding No. 1512**

This proposed finding is misleading insofar as it suggests that respondents in Dr. Van Liere's survey were only assigned to use search engines that they had actually used in the past. In fact, Dr. Van Liere admitted that a programming error in his survey resulted in assigning respondents to the Yahoo! version of his survey, when such respondents had *never* used the Yahoo! search engine before. (Van Liere, Tr. 3126). Because of this programming error, roughly 10 percent of the respondents who were assigned to the Yahoo! version of Dr. Van Liere's survey had never used the Yahoo search engine. (Van Liere, Tr. 3127). Similarly, Dr. Van Liere's screening methodology failed to account for respondents who may have used Yahoo! in a single instance in the past 12 months, but never planned to do so again, as they could still be assigned to

the Yahoo! group based on the single instance. (CX8011 at 013-014 (¶ 26) (Jacoby Rebuttal Expert Report)).

Complaint Counsel also notes that Google and Yahoo! are only two of eight search engines listed on Dr. Van Liere's screening questions S6 and S7, and Dr. Van Liere limited the pool of qualified survey respondents to Google and Yahoo! search engine users even though he knew that the Bing search engine had a larger market share of searches than the Yahoo! search engine. (RX0730 at 0004, 0014–0015 (Van Liere Expert Report, Exhibit C (study questionnaire)); Van Liere, Tr. 3102–3103, 3106–3017.) Dr. Van Liere testified that he could have tested all three search engines but with “time and money concerns to do more,” he “picked two out of the three big ones.” (Van Liere, Tr. 3107.) Oddly, he selected the search engine with the smallest market share and smallest pool of users.

1513. To participate in the survey, respondents must also agree to abide by a set of instructions; wear glasses or contacts; complete the survey on a desktop, laptop, or tablet computer; and not work for (or anyone in their household work for) certain types of companies that may give the respondent insight that would bias the survey (e.g., an optometrist or a market research company). (RX 730-0002-0003, 0013-0014; Van Liere, Tr. 2987-2992).

### **Response to Proposed Finding No. 1513**

This proposed finding incompletely and inaccurately recites one of the screening questions. To participate in the survey as designed by Dr. Van Liere, respondents must *normally* wear glasses or contact lenses *when reading* (which they are then reminded to wear while completing the survey). (RX0730 at 0003 & 0013–0014 (Van Liere Expert Report, Exhibit C (study questionnaire)); Van Liere, Tr. 2991–2992, 3141–42.) As Dr. Van Liere testified, this question would have screened out, for example, potential respondents who wear glasses or contact lens for distance vision *but not for reading*. (Van Liere, Tr. 3142–3143, 3147.) Dr. Van Liere's survey was therefore programmed to exclude a relevant class of contact lens purchasers. (Jacoby, Tr. 2248; CX8011 at 015 (¶ 28) (Jacoby Rebuttal Expert Report)).

1514. There were 689 respondents who met the qualifying criteria for the study. (RX 735-0006).

**Response to Proposed Finding No. 1514**

Complaint Counsel has no specific response to this proposed finding.

1515. Dr. Van Liere verified that the sample population was representative of the relevant population by comparing the demographics of the sample population against data regarding contact lens wearers from the Center for Disease Control as well as against data regarding the customers of 1-800 Contacts. (RX 735-0010-0011; Van Liere, Tr. 2999-3002). Based on these comparisons, Dr. Van Liere concluded that the study sample population can be considered representative of the relevant population. (RX 735-0011; Van Liere, Tr. 3001-3002).

**Response to Proposed Finding No. 1515**

This proposed finding is inaccurate, as Dr. Van Liere acknowledged in his expert report that, in comparing the demographics of the sample population against the data from the Center for Disease Control, it appears that younger respondents are under-represented and older respondents are over-represented in the sample population. (RX0735 at 0010 (¶ 22) (Van Liere Expert Report).) Dr. Van Liere also testified that he was not sure whether the data regarding 1-800 Contacts' customers included just online sales, or both online and telephone sales. (Van Liere, Tr. 3151.)

*(d) The Design Of The Study Stimuli*

1516. The 689 respondents were assigned to perform a simulated internet search for "1-800 Contacts" as a keyword using one of two search engines: either Google or Yahoo!. (RX 735-0006).

**Response to Proposed Finding No. 1516**

Complaint Counsel has no specific response to this proposed finding.

1517. Respondents in both groups were then randomly assigned to view either a test or control stimulus. (RX 735-0006). The stimuli were designed to be reasonable reflections of a search results page from Google and Yahoo!. (Van Liere, Tr. 3002).

**Response to Proposed Finding No. 1517**

This proposed finding is vague with respect to the term "reasonable reflections." Although Dr. Van Liere used this term in his testimony at trial, a clearer term would be what Dr. Van Liere

used in his deposition: “a reasonable representation of what a search and a search result might look like.” (CX9049 (Van Liere, Dep. at 130).)

Additionally, this proposed finding is contradicted by the weight of the evidence to the extent that it is intended to be a finding that the test and control stimuli administered by Dr. Van Liere *in fact* substantially resembled a Google or Yahoo! search engine results page, as opposed to a finding regarding Dr. Van Liere’s *goal* to design test and control stimuli that would be a reasonable representation of a Google or Yahoo! search engine results page. (*Compare* Van Liere, Tr. 3002 (“So here the issue is whether the sponsored links are likely to confuse consumers that appear on a search results page when you search for ‘1-800 Contacts,’ so *what we wanted to use as our stimuli* here were reasonable reflections of a search results page from Google and Yahoo.”) (emphasis added), *with* CCPTF ¶¶ 1829–1847 (citing evidence in the record that search engine results pages with advertisements for 1-800 Contacts removed do not comport with real-world marketplace conditions).) *See also* Response to Proposed Finding No. 1486.

1518. As both party’s experts acknowledged, for a consumer confusion study to be reliable, it is important for the study stimuli reasonably replicate what consumers would encounter in the marketplace. (Van Liere, Tr. 3004-3005; Jacoby, Tr. 2263-2264).

#### **Response to Proposed Finding No. 1518**

Complaint Counsel has no specific response to this proposed finding except to note that it should be corrected to read, “As both parties’ experts acknowledged, for a consumer confusion study to be reliable, it is important for the study stimuli to reasonably replicate what consumers would encounter in the marketplace.”

1519. In the test conditions, respondents performed a search and then were shown an image of search results that included sponsored advertisements that could appear if the agreements challenged in the FTC’s complaint were not in place and that are representative of the type of advertisements that currently appear in response to a search related to contact lenses. (RX 735-0006). In the control conditions, respondents were shown the same test stimuli but with the sponsored advertisements removed. (RX 735-0006).

**Response to Proposed Finding No. 1519**

This proposed finding incompletely and inaccurately describes how the sponsored advertisements appearing in the test conditions were created by Dr. Van Liere. The proposed finding, and the expert report to which it cites, refer to the sponsored advertisements as being “representative of the type of advertisements that currently appear in response to a search related to contact lenses.” As Dr. Van Liere explained at trial, however, not only did he do “a variety of searches on ‘contact lenses’ or generic terms,” but he “also searched on the brands of the individual companies, and . . . looked for what does their typical ad look like on the first page. And we basically cut-and-pasted versions of those ads onto the places where they would normally appear on a Google search results page.” (Van Liere, Tr. 3017; *see also* Van Liere, Tr. 3018 (“As I mentioned earlier, we basically searched on their brands or their names and on generic terms like ‘contact lenses’ and see what did those ads look like and how did they come up.”)). Based on Dr. Van Liere’s testimony, this proposed finding should read, in pertinent part, “sponsored advertisements . . . that are representative of the type of advertisements that currently appear in response to a search on ‘contact lenses’ or generic terms, or a search for the brands or names of the individual companies that are parties to the agreements with 1-800 Contacts.”

The proposed finding is also inaccurate because none of the respondents in Dr. Van Liere’s survey actually “performed a search.” The survey was designed to *simulate* a search by asking respondents to *type in* certain keywords, and then view certain advertisements that appear on a search engine results page in response to those keywords. (*See* RX0735 at 0012 (¶ 24) (Van Liere Expert Report) (“The main questionnaire was designed to simulate searching the internet . . . .”; respondents were “instructed to type the word ‘1-800 Contacts’ into the Google or Yahoo search box. . . . The assigned search result appeared to respondents as though they had just conducted a search . . . .”).

1520. The control stimulus for the Dr. Van Liere's Google condition is designed to look like what a consumer would typically see in response to the search query "1-800 Contacts." (Van Liere, Tr. 3003-3004).

**Response to Proposed Finding No. 1520**

This proposed finding is vague and misleading, as well as unsupported and contradicted by the weight of the evidence, which indicates that a consumer searching for "1-800 Contacts" would "typically" see a SERP that has some sponsored advertisements, including a sponsored advertisement for 1-800 Contacts. (CX8011 at 057, 059) (Jacoby Rebuttal Expert Report) (screen shots of actual Google and Yahoo SERPs that appeared on March 7, 2017 in response to the search query "1-800 Contacts"). At trial, Dr. Van Liere testified that he used one of his searches on "1-800 Contacts" where no sponsored advertisements appeared as the basis for his control stimulus. (Van Liere, Tr. 3010–3011.) He acknowledged, however, that when he did searches for "1-800 Contacts," "the 1-800 Contacts sponsored links was [sic] sometimes there and sometimes not." (Van Liere, Tr. 3010) This is in contradiction to substantial record evidence that shows that 1-800 Contacts *always* bids enough to ensure that its ad appears in the top spot in response to a search for 1-800 Contacts. See CCPTB at 153 n.486. Similarly, with respect to ads for other companies appearing in response to searches for "1-800 Contacts," "[s]ometimes they were there and sometimes they were not." (*Id.*) Given that advertisements for 1-800 Contacts and other companies purportedly appeared at least "sometimes" in Dr. Van Liere's searches for "1-800 Contacts," it is implausible that a search engine results page that only had organic links and no sponsored links (not even one for 1-800 Contacts)\_ is what a consumer would "typically" see in response to a search query "1-800 Contacts."

Indeed, Dr. Van Liere said himself that he did not know how many searches he conducted to develop his test and control stimuli. (Van Liere, Tr. 3099). He 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). And there is no way to verify how many searches yielded search results with no sponsored advertisements, including advertisements for 1-800 Contacts, because Dr. Van Liere testified that he did not produce any “additional searches” beyond what was in the test and control stimuli, and he did not maintain any copies of the searches that he ran to develop his test and control stimuli. (Van Liere, Tr. 3100, 3133.) Dr. Van Liere acknowledged 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.) Absent such a record, there is no reliable basis for this Court to find that a search engine results page with only organic links and no sponsored links is what a consumer would “typically” see in response to a search query “1-800 Contacts.”

Additionally, 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, *in camera*; CX0296 at 035 (1-800 Contacts February 2016 Affiliate and Paid Search Overview Presentation), *in camera*; CX9028 (Roundy Dep. at 086-088); CX9031 (C. Schmidt Dep. at 125-127); CX9020 (Craven at 123-125)). (*See also* CCPTF ¶¶ 1837–1847.) This proposed finding is therefore unsupported and contradicted by the weight of the evidence.

1521. For the Google control stimulus, Dr. Van Liere used actual organic listings that are shown in response to the search query “1-800 Contacts.” (Van Liere, Tr. 3008-3009).

#### **Response to Proposed Finding No. 1521**

Complaint Counsel has no specific response to this proposed finding other than to note that some of the organic listings used by Dr. Van Liere did not appear on the first page of search results in response to the search query “1-800 Contacts.” (Van Liere, Tr. 3011–3013.) Further, Dr. Van Liere did not have the same number of total links in his test and control stimuli, with a “test”

group that contained between six and eight more links than the control group. Dr. Van Liere's Google "test" page contained six more links than the Google "control" page; the Yahoo! "test" page contained eight more links than the Yahoo! "control" page. *See* CX8011 at 006-007, 009-010, 016 (¶¶ 9, 16-19, 30) (Jacoby Rebuttal Expert Report) (observing that Dr. Van Liere's "control" and "test" conditions had numerous differences); *see also* Van Liere, Tr. at 3225 (six less opportunities for confusion in Google control condition than Google test condition); *id.* at 3226 (eight less opportunities for confusion in Yahoo! control condition than Yahoo! test condition).

1522. The similarity between the Google control stimulus in Dr. Van Liere's study and actual real-world search results is verified by a comparison of the control stimulus with actual search results in response to searches on the 1-800 Contacts trademark and its variations. (*Compare* RX 730-0010 *with* RX 314-0001-0010).

#### **Response to Proposed Finding No. 1522**

This proposed finding is vague and misleading as to the term "similarity." The proposed finding is also unsupported because the only document on which Respondent relies, RX0314, was admitted for non-hearsay purposes only, and "not to show the results of a search." (JX0002-A at 043; Hamilton, Tr. 456 (discussing similar document, RX0318). 1-800 Contacts does not cite any testimony from Dr. Van Liere in the record making such a comparison and being cross-examined on that comparison.

To the extent that 1-800 Contacts is now inviting the Court to make its own unaided visual comparison as a predicate to this proposed finding, Complaint Counsel notes that any conclusion of "similarity" between Dr. Van Liere's Google control stimulus and actual real-world search results would be foreclosed by the fact that sponsored advertisements for 1-800 Contacts and, in some cases, for other companies appear at the top of the actual search results. (*See* RX0314 at 0001 (February 2017 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts,

1800Contacts, 1-800-Contacts and 1-800 Contacts) (sponsored ads for 1-800 Contacts, Dailies.com, and Lenspure.com appearing in response to a search for “1 800 Contacts”); RX0314 at 0003 (sponsored ads for 1-800 Contacts and Dailies.com appearing in response to a search for “1800 Contacts”); RX0314 at 0005 (sponsored ad for 1-800 Contacts appearing in response to a search for “1800Contacts”); RX0314 at 0007 (sponsored ad for 1-800 Contacts appearing in response to a search for “1-800-Contacts”); RX0314 at 0009 (sponsored ad for 1-800 Contacts appearing in response to a search for “1-800 Contacts”).) Furthermore, none of the actual search results features a section entitled “In the news” with news links as seen in RX0730 at 0010 (Van Liere Expert Report, Exhibit C (study questionnaire)); and only one of the actual search results shows organic links for a press release on [www.ftc.gov](http://www.ftc.gov) about this lawsuit and a Wikipedia entry in the first page of the results. (See RX0314 at 0002 (February 2017 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts).)

1523. To avoid introducing bias, Dr. Van Liere replaced certain of the organic listing in the “In the news” section that referred to this litigation with other news items that appeared on later pages. (Van Liere, Tr. 3011-3013).

#### **Response to Proposed Finding No. 1523**

This proposed finding is unsupported because Dr. Van Liere did not produce or maintain copies of any of the SERPs that he relied on to construct his survey stimuli. (Van Liere, Tr. 3100, 3133.) Thus, there is no way to verify whether or not Dr. Van Liere replaced certain news items with “other news items that appeared on later pages.”

1524. Dr. Van Liere followed a similar procedure to create the control stimulus for the Yahoo! condition. (Van Liere, Tr. 3014-3015; RX 730-0012).

#### **Response to Proposed Finding No. 1524**

Complaint Counsel has no specific response to this proposed finding, but incorporates by reference its Responses to Proposed Findings Nos. 1519–1523, which would apply equally to

proposed findings regarding Dr. Van Liere's control stimulus for the Yahoo! condition as they would to Dr. Van Liere's control stimulus for the Google condition.

1525. The similarity between the Yahoo! organic listings in Dr. Van Liere's study and actual real-world search results is verified by a comparison of the control stimulus with actual search results in response to searches on the 1-800 Contacts trademark and its variations. (*Compare* RX 730-0012 *with* RX 314-0011-0029).

**Response to Proposed Finding No. 1525**

This proposed finding is vague and misleading as to the term "similarity." The proposed finding is also unsupported because the only document on which Respondent relies, RX0314, was admitted for non-hearsay purposes only, and "not to show the results of a search." (JX0002-A at 043; Hamilton, Tr. 456 (discussing similar document, RX0318). 1-800 Contacts does not cite any testimony from Dr. Van Liere in the record making such a comparison and being cross-examined on that comparison.

To the extent that 1-800 Contacts is now inviting the Court to make its own unaided visual comparison as a predicate to this proposed finding, Complaint Counsel notes that any conclusion of "similarity" between Dr. Van Liere's Yahoo! control stimulus and actual real-world search results would be foreclosed by the fact that sponsored advertisements for 1-800 Contacts and for other companies appear at the top, bottom, and right-hand side of the actual search results. (*See* RX0314 at 0011 & 0013 (February 2017 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts) (sponsored ads for 1-800 Contacts, Walmartcontacts.com, Visionpros.com, Lowestpricecontacts.com, Dailies.com, Lenspure.com, and Lensdirect.com appearing in response to a search for "1 800 Contacts"); RX0314 at 0015 & 0016–0017 (sponsored ads for 1-800 Contacts, Walmartcontacts.com, Acuvue.com, Dailies.com, Opicontacts.com, Visionpros.com, and Lowestpricecontacts.com appearing in response to a search for "1800 Contacts"); RX0314 at 0018 & 0020 (sponsored ad for 1-800 Contacts,

Walmartcontacts.com, Acuvue.com, Visionpros.com, Lowestpricecontacts.com, Lenspure.com, Lensdirect.com, and Opiconcontacts.com appearing in response to a search for “1800Contacts”); RX0314 at 0022 & 0024 (sponsored ad for 1-800 Contacts, Walmartcontacts.com, Lenspure.com, Lowestpricecontacts.com, Dailies.com, and Lensdirect.com appearing in response to a search for “1800 Contacts”); RX0314 at 0026 & 0028 (sponsored ad for 1-800 Contacts, Walmartcontacts.com, Lenspure.com, Visionpros.com, Lowestpricecontacts.com, Dailies.com, and Lensdirect.com appearing in response to a search for “1800Contacts”).) Furthermore, none of the actual search results features a section entitled “1-800 Contacts News” with news links as seen in RX0730 at 0012 (Van Liere Expert Report, Exhibit C (study questionnaire)).

Although organic links for individual websites (e.g., [www.1800contacts.com](http://www.1800contacts.com), [www.groupon.com](http://www.groupon.com), and [www.youtube.com](http://www.youtube.com)) appearing as search results in Dr. Van Liere’s Yahoo! control stimulus may be similar to organic links for websites appearing in the actual search results, a link-by-link comparison of organic listings is improper and irrelevant because it is the control stimulus (i.e, the search results page as a whole) that is supposed to replicate real-world conditions in the marketplace. (*See* Van Liere, Tr. 3004–3005 (“I mean, the beginning of this process is they’re searching on 1-800 Contacts’ trademark and these search results pages come up, *so we want to use something that looks like what a search results page would to mimic marketplace—what they would encounter in the marketplace, so this is made to look basically like a real search results page.*”) (emphasis added).

Moreover, as both survey experts in this case agree, the relevant question concerns consumers’ understandings of *sponsored* listings; Respondent has never claimed that consumers are confused by organic listings that appear in response to a search query containing a 1-800 Contacts’ trademark. (RX0735 at 0026 (¶ 52) (Van Liere Report) (relevant question is “whether the *sponsored advertisements* that appear in response to the search for the trademarked term are

likely to be confusing”) (emphasis added); Jacoby, Tr. 2283 (“The question was what would happen if we had the sponsored links, would people think these sponsored links, not the organic links, would people think these sponsored links were necessarily related to or come from or the source of 1-800 Contacts as a result of having typed in ‘1-800 Contacts’ as a search term.”).

1526. In a consumer confusion study, test stimuli include the allegedly confusing or allegedly infringing content. (Van Liere, Tr. 3016). In this case, the test stimuli represent the but-for world in which the Settlement Agreements did not exist and advertisements from the settling parties appear in response to searches using 1-800 Contacts trademarks as the search term. (Van Liere, Tr. 3016-7; RX 735-0013-0014).

### **Response to Proposed Finding No. 1526**

Complaint Counsel has no specific response to this proposed finding except to note that it is consistent with how Dr. Jacoby has framed the question to be addressed by a consumer confusion study: advertisements from the settling parties are allegedly confusing or allegedly infringing when they appear in response to searches using 1-800 Contacts trademarks as the search term. (CX8011 at 003–004 (¶¶ 3–5) (Jacoby Rebuttal Expert Report); Jacoby, Tr. at 2283 (“The question was what would happen if we had the sponsored links, would people think these sponsored links, not the organic links, would people think these sponsored links were necessarily related to or come from or the source of 1-800 Contacts as a result of having typed in ‘1-800 Contacts’ as a search term.”); *cf.* Van Liere, Tr. 3224 (“Q. So you agree that the issue is the effect on the sponsored advertisements in response to a search on ‘1-800 Contacts’; correct? A. Yes.”); RX0735 at 0026 (¶ 52) (Van Liere Expert Report) (“The question is not whether the trademarked term is confusing, but whether the sponsored advertisements that appear in response to the search for the trademarked term are likely to be confusing.”) (referring to the consumer’s search for “1-800 Contacts” as a “background condition”).)

In other words, the test stimuli—the allegedly confusing or allegedly infringing content—has two components: (1) a search by the consumer using 1-800 Contacts trademarks as the search

term, and (2) advertisements from the settling parties appearing in response to such a search, which would occur in the but-for world in which the Settlement Agreements did not exist. (Jacoby, Tr. 2328–2329.) Advertisements from the settling parties are not alleged to be confusing or infringing absent a search by the consumer using 1-800 Contacts trademarks as the search term. (See RX0735 at 0005 (¶ 10) (Van Liere Expert Report) (“As noted above, I was asked to measure the extent, if any, to which *sponsored advertisements that appear in response to search requests for ‘1-800 Contacts’ on internet search engines* are likely to cause consumers to believe that the companies whose advertisements are displayed on a search results page are the same as or are affiliated with 1-800 Contacts.”) (emphasis added).

1527. In Dr. Van Liere’s study, the Google and Yahoo! test stimuli are identical to the respective control stimuli, except the test stimuli include advertisements from certain of the settling parties. (Van Liere, Tr. 3017-3021; RX 730-0009, 0011; RX 735-0013-0014). These advertisements appeared in response to queries using generic search terms, such as “contact lenses.” (Van Liere, Tr. 3017-3021).

#### **Response to Proposed Finding No. 1527**

The first sentence of this proposed finding is incomplete and inaccurate because it fails to clarify that “advertisements from certain of the settling parties” excludes 1-800 Contacts (who is a party of each of the challenged Settlement Agreements). Dr. Van Liere testified that neither his test stimuli nor his control stimuli included a sponsored advertisement for 1-800 Contacts. (Van Liere, Tr. 3037.) His rationale is that he “want[ed] to measure the impact of those ads [from competitors] without the trademark owner having to essentially purchase its own ad to be in the sponsored link area.” (*Id.*) At his deposition, Dr. Van Liere testified that he was asked to design test stimuli without a sponsored advertisement for 1-800 Contacts appearing in the search engine results page. (CX9049 (Van Liere, Dep. at 189–190 (“I was asked to test a future world where these ads could appear and 1-800 did not spend money to purchase its way to the top of that list or somewhere on that list.”).)

Regarding the first sentence of this proposed finding, Complaint Counsel further notes that both Dr. Jacoby and Dr. Tushnet disagree with Dr. Van Liere that sponsored advertisements should be absent in the control stimuli. As Dr. Jacoby explained, advertisements from the settling parties are not, by themselves, alleged to be confusing or infringing. It is only when they appear in response to a search using 1-800 Contacts trademarks as the search term that they are alleged to be confusing or infringing. (CX8011 at 004 (¶ 5) (Jacoby Rebuttal Expert Report); *see also* RX0735 at 0026 (¶ 52) (Van Liere Report) (relevant question is “whether the sponsored advertisements *that appear in response to the search for the trademarked term* are likely to be confusing”) (emphasis added)). Accordingly, what distinguish the test stimuli from the control stimuli are not the sponsored advertisements from the settling parties but, rather, the *context* in which they appear—in response to searches using 1-800 Contacts trademarks as the search term as opposed to generic terms like “contact lenses.” (CX8011 at 005 (¶ 7) (Jacoby Rebuttal Expert Report); *see also* CX9044 (Tushnet, Dep. at 201-202) (“The only way to test that is to actually test the thing that you say is confusing, and that’s why a true control for that theory would involve ‘1-800 Contacts’ as a search term versus something that was not ‘1-800 Contacts’ as a search term.”)).

Dr. Van Liere appears to concede this point when he acknowledged in his expert report that “consumers’ search behavior (*i.e.*, searching on the trademarked term 1-800 Contacts) should be taken as part of the *background condition*, and the question to be considered is whether, *against this background condition*, displaying a sponsored ad for a retailer other than 1-800 Contacts is likely to cause confusion.” (RX0735 at 0026 (¶ 52) (Van Liere Expert Report) (emphases added).) Using Dr. Van Liere’s terminology, it is the presence of this background condition in the test stimuli that raises the question whether sponsored advertisements from the settling parties are likely to cause consumer confusion. Accordingly, what should differ between the test stimuli and

the control stimuli is the presence of the background condition, and not the sponsored advertisements.

The second sentence of this proposed finding is incomplete and inaccurate because, as Dr. Van Liere testified, the sponsored advertisements from the settling parties that he chose as test stimuli appeared in response not only to “a variety of searches on ‘contact lenses’ or generic terms,” but also to searches “on the brands of the individual companies.” (Van Liere, Tr. 3017; *see also id.*, Tr. 3018 (“As I mentioned earlier, we basically searched on their brands or their names and on generic terms like ‘contact lenses’ and see what did those ads look like and how did they come up.”)). Based on Dr. Van Liere’s testimony, the second sentence of this proposed finding should read: “These advertisements appeared in response to queries using generic search terms, such as ‘contact lenses,’ and in response to queries using the brands or names of the individual companies that are parties to the agreements with 1-800 Contacts.”

Further, the control and the test conditions have substantial differences, including a difference of between six and eight links in the test and control. See Response to Proposed Finding No. 1521.

*(e) The Purpose Of A Control Condition*

1528. Dr. Van Liere explained that in trademark confusion studies, it is possible that the observed level of confusion in the test condition may be the result of so-called “background noise” such as confusion due to elements of the test stimuli that are not allegedly infringing, demand effects of the survey instruments themselves, or guessing. (RX 735-0015; Van Liere, Tr. 3022-3024).

**Response to Proposed Finding No. 1528**

Complaint Counsel has no specific response to this proposed finding.

1529. As a consequence, most surveys used for litigation in trademark disputes include a control stimulus to assess the effects of background noise on the results. (RX 735-0015).

**Response to Proposed Finding No. 1529**

Complaint Counsel has no specific response to this proposed finding.

1530. By using a control, the researcher is able to “net off all of the things other than the alleged confusing element.” (Van Liere, Tr. 3025-3026).

**Response to Proposed Finding No. 1530**

Complaint Counsel has no specific response to this proposed finding other than to note that Dr. Van Liere did not actually follow this procedure by “net[ting] off all of the things other than the alleged confusing element,” as he changed a number of elements between his test and control, but he did not change the critical variable, i.e., “the alleged confusing element.” See Responses to Proposed Findings No. 1579, 1692, 1696.

1531. In general, the control group stimulus should be designed such that the control stimulus “shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.” (RX 735-0015; Van Liere, Tr. 3025-3026).

**Response to Proposed Finding No. 1531**

Complaint Counsel has no specific response to this proposed finding other than to note that the finding incorporates a from a treatise on survey research written by Professor Shari Diamond. Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC RESEARCH 359, 399 (Federal Judicial Center 3d ed. 2011). (RX0735 at 0015 (¶ 28 n.14) (Van Liere Expert Report) (quoting from Diamond at 399); see Jacoby, Tr. 2150 (quoting the same passage).) Further, as described above, Dr. Van Liere did not actually follow this procedure by designing a control that “shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed,” as he changed a number of variables between the test and control, but he did not change “the key” variable, the search term, i.e., “the characteristic whose influence is being assessed.” See Response to Proposed Finding No. 1579, 1692, 1696.

1532. Dr. Van Liere’s stimuli were designed to test the presence of the allegedly confusing elements, the sponsored ads. (Van Liere, Tr. 3027-3030). In this study, a search using the trademark “1-800 Contacts” which generates only organic listings would be the non-infringing alternative to the test stimuli because it would not include any allegedly confusing sponsored links. (RX 735-0015). Thus, the appropriate controls for this study are identical to the test screenshots in every way except that they do not include any of the sponsored links (or any of the other features of the Google or Yahoo search results pages that are used to distinguish the sponsored links such as the heading “Ad” on Google or “Ad related to:” on Yahoo). (RX 735-0015).

### **Response to Proposed Finding No. 1532**

This proposed finding is inaccurate and misleading because Dr. Van Liere’s stimuli in fact did *not* correctly test the presence of the allegedly confusing elements, which are, as Dr. Van Liere himself indicated, sponsored advertisements from the settling parties appearing in response to searches using 1-800 Contacts trademarks as the search term. (*See* Van Liere, Tr. 3017 (“So for the test we want to put ads that represent a but-for world in which the parties that are currently part of the settlement agreements would have *ads that may appear in response to a 1-800 Contacts search.*”) (emphasis added); RX0735 at 0005 (¶ 10) (Van Liere Expert Report) (“As noted above, I was asked to measure the extent, if any, to which *sponsored advertisements that appear in response to search requests for ‘1-800 Contacts’ on internet search engines* are likely to cause consumers to believe that the companies whose advertisements are displayed on a search results page are the same as or are affiliated with 1-800 Contacts.”) (emphasis added).)

As Dr. Jacoby explained, if the allegedly confusing elements are sponsored advertisements from the settling parties *that appear in response to searches using 1-800 Contacts trademarks as the search term*, then the “non-infringing alternative to the test stimuli,” to use the wording of this proposed finding, should have included sponsored advertisements that appear in response to searches that do *not* use 1-800 Contacts trademarks—for example, searches using generic terms like “contact lenses” or searches using the brands or names of the settling parties (which, incidentally, Dr. Van Liere used to find, for his test stimuli, sponsored advertisements that no

longer appear in response to searches for “1-800 Contacts” because of the settlement agreements). (CX8011 at 004 (¶ 4) (Jacoby Rebuttal Expert Report) (“As I understand it, the issue is *not* that these competitor advertisements are themselves confusing, but that they become confusing in the *context* of consumers having used “1-800 Contacts” as the search term.”); Van Liere, Tr. 3017 (“so what we did is we did a variety of searches on ‘contact lenses’ or generic terms, and then we also searched on the brands of the individual companies”) & 3018 (“As I mentioned earlier, we basically searched on their brands or their names and on generic terms like ‘contact lenses’ and see what did those ads look like and how did they come up.”).) After all, it is the use of “1-800 Contacts” as a search query that is the gravamen of 1-800 Contacts’ claim of trademark infringement. Stated differently, it is the use of 1-800 Contacts’ trademark as the search term that defines and distinguishes the allegedly infringing condition being tested for likelihood of confusion. *See also* CX9044 (Tushnet, Dep. at 201-202) (“1-800’s theory of liability that it has articulated, and 1-800’s theory of liability depends on the idea that no matter what the ads say, if the consumer has typed in ‘1-800 Contacts,’ she’s going to be confused about the source, sponsorship or affiliation of non-1-800 Contacts ads that show up in response to her having typed that. The only way to test that is to actually test the thing that you say is confusing, and that’s why a true control for that theory would involve ‘1-800 Contacts’ as a search term versus something that was not ‘1-800 Contacts’ as a search term.”).

As this proposed finding indicates, in designing his study, Dr. Van Liere did not define the allegedly infringing condition based on a search using “1-800 Contacts” trademark as the search term. To use Dr. Van Liere’s terminology, he failed to make the background condition part of his allegedly infringing condition even though he implicitly recognized that this is the correct inquiry. (*See* RX0735 at 0026 (¶ 52) (Van Liere Expert Report) (“It is my understanding that consumers’ search behavior (*i.e.*, searching on the trademarked term 1-800 Contacts) should be taken as part

of the *background condition*, and the question to be considered is whether, *against this background condition*, displaying a sponsored ad for a retailer other than 1-800 Contacts is likely to cause confusion.”) (emphasis added); Van Liere, Tr. 3036 (“And so here, the searching on ‘1-800 Contacts’ is a key element of the alleged confusion ...”).) Instead, Dr. Van Liere defined the allegedly infringing condition as the presence of “any allegedly confusing sponsored links,” to use the wording of this proposed finding, when a search using “1-800 Contacts” trademark is made, and he therefore defined the control as a search engine results page with only organic links when a search using “1-800 Contacts” trademark is made. As Dr. Jacoby explained, Dr. Van Liere’s study “tells us nothing about whether the use of the 1-800 Contacts trademark *as a search term* leads to users being confused as to the source, affiliation, or sponsorship of ads for competing sellers when those ads are presented *in conjunction with that search term.*” (CX8011 at 006 (¶ 8) (Jacoby Rebuttal Expert Report).)

Rather than measuring the level of consumer confusion in the allegedly infringing condition, as one would do in a trademark infringement case, Dr. Van Liere purportedly measured the level of consumer confusion in a condition absent the settlement agreements. (*See* Van Liere, Tr. 3017 (“So for the test we want to put ads that represent a but-for world in which the parties that are currently part of the settlement agreements would have ads that may appear in response to a 1-800 Contacts search.”), Van Liere, Tr. 3037 (“[W]e’re being asked to measure confusion in this case in a but-for world in the future where the agreements weren’t in place and the sponsored ads of the competitors are now appearing.”) & Van Liere, Tr. 3126 (“I mean, it’s actual search results page and it uses real content from search results, but the presence of the settlement parties’ sponsored links is manufactured to create what a search results page would look like in a but-for world where those settlement agreements didn’t exist, so sure, that’s what that does.”); RX0735 at 0007 (¶ 17) (Van Liere Expert Report) (“1-800 Contacts believes that there is potential for

consumer confusion if the agreements at issue were no longer in effect. It is for this purpose that I have been asked by counsel for 1-800 Contacts to conduct a survey to investigate the degree to which consumers would be confused by the sponsored advertisements should the agreements be removed.”.) He purportedly compared a world with the settlement agreements in place (organic links only; no sponsored ads from competitors (or from 1-800 Contacts)) against a counterfactual world without the settlement agreements (organic links and sponsored ads from competitors (but not from 1-800 Contacts)) instead of comparing a world with the alleged infringement (use of “1-800 Contacts” as the search term and sponsored ads appearing in response) against a world without the alleged infringement (use of “contact lenses” or another generic term as the search term and sponsored ads appearing in response), as shown in the table below:

	<b>Pre-Settlement World (Jacoby Study)</b>	<b>Post-Settlement World (Van Liere Study)</b>
<b>Control Stimuli</b>	Likelihood of confusion from sponsored advertisements appearing in response to searches for generic terms like “contact lenses” ( <i>no alleged infringement</i> )	Likelihood of confusion from organic links, with no sponsored advertisements appearing in response to searches for “1-800 Contacts” ( <i>settlement agreements in place</i> )
<b>Test Stimuli</b>	Likelihood of confusion from sponsored advertisements appearing in response to searches for “1-800 Contacts” ( <i>alleged infringement</i> )	Likelihood of confusion from sponsored advertisements (from competitors only) appearing in response to searches for “1-800 Contacts” ( <i>no settlement agreements in place</i> )

1533. The test and control stimuli are identical except for the presence of the sponsored ads from the settling parties in the test stimulus. (Van Liere, Tr. 3027-3028; *compare* RX 730-0011 *with* RX 730-0009).

**Response to Proposed Finding No. 1533**

Complaint Counsel has no specific response to this proposed finding other than to note its Responses to Proposed Findings Nos. 1527 and 1532, which explain why using the presence of sponsored advertisements from the settling parties (but not from 1-800 Contacts) as the test condition does not address the question that Dr. Van Liere was tasked to answer, i.e., whether the mere presence of an ad from a firm other than 1-800 Contacts is confusing in response to a search for 1-800 Contacts. As described above, the only way to test that question is to use a different search term in the “control” stimulus.

Further, by removing all of the sponsored ads from the control stimulus, Dr. Van Liere changed multiple elements on the page, including changing the total number of links as between the test and the control stimulus. By changing so many variables, Dr. Van Liere could not assess what, if anything, caused consumer confusion. *See* CC Reply Brief at 33-34, 46 (citing GEICO).

*(f) The Survey Questionnaire*

1534. After the screening questions in Dr. Van Liere’s survey questionnaire, respondents are introduced to the main part of the survey. (RX 730-0005, 0016; Van Liere, Tr. 3039-3040).

**Response to Proposed Finding No. 1534**

Complaint Counsel has no specific response to this proposed finding.

1535. The main questionnaire was designed to simulate searching the internet using the Google or Yahoo search engines. (RX 735-0012).

**Response to Proposed Finding No. 1535**

This proposed finding is inaccurate and misleading because (1) the Google and Yahoo! control stimuli shown to survey respondents did not have any sponsored advertisements, including advertisements for 1-800 Contacts, as compared to actual real-world search results, which did

show sponsored advertisements, *see* Responses to Proposed Findings Nos. 1517, 1520, 1522, 1524 and 1525, and (2) the Google and Yahoo! test stimuli shown to survey respondents did not have any sponsored advertisements for 1-800 Contacts, which is contrary to the real-world marketplace where 1-800 Contacts would have bid to have its advertisement appear as the first-listed ad, *see* Responses to Proposed Findings Nos. 1517, 1520 & 1527.

In his deposition, Dr. Van Liere testified that the statement that “[t]he main questionnaire was designed to simulate searching the internet using the Google or Yahoo search engines” “essentially says that the exercise we’re putting respondents through is a reasonable representation of what a search and a search result might look like.” (CX9049 (Van Liere, Dep. at 130).) For the reasons set forth above, the Google and Yahoo! control and test stimuli were not reasonable representations of what an actual search results page might look like. This proposed finding is therefore inaccurate and misleading.

1536. With a limited exception, respondents were assigned to either the Google or Yahoo conditions based on what search engines they indicated during the screening questions they used or would use. (RX 735-0012; Van Liere, Tr. 3096-3097 (small number of respondents assigned to the wrong Google versus Yahoo condition, but removing those respondents does not change overall results; moreover, these respondents were equally randomly assigned to the test and the control conditions, so any effect netted off)).

#### **Response to Proposed Finding No. 1536**

This proposed finding is vague as to its reference to a “limited exception.” Complaint Counsel surmises that, based on the particular citations to Dr. Van Liere’s trial testimony, the “limited exception” may be referring to a programming error that resulted in the assignment of some respondents to the Yahoo! version of Dr. Van Liere’s survey, when these respondents had never used the Yahoo! search engine. (Van Liere, Tr. 3126.) If that is the case, then this proposed finding mischaracterizes and improperly trivializes the error. As Dr. Van Liere testified, the programming error resulted in 16 respondents being erroneously assigned to the Yahoo! test

condition and 16 respondents being erroneously assigned to the Yahoo! control condition. (Van Liere, Tr. 3126–3127.) The error therefore amounted to 32 erroneously respondents out of a total of 342 respondents in the Yahoo! group, or almost ten percent. (Van Liere, Tr. 3127.) Because there were significantly more links in the “test” than “control” group (among other problems with the survey design), thus (as Dr. Jacoby explained) “stacking the deck” in favor of finding confusion – the error was not “netted off” based on the number of respondents who were erroneously assigned to the Yahoo! group for both the “test” and “control” conditions.

This proposed finding is also an incomplete and misleading statement of Dr. Van Liere’s methodology for assigning respondents to either the Google or Yahoo! group. Importantly, if a respondent selected more than one search engine, she was randomly assigned to either the Google or Yahoo! group. (Van Liere, Tr. 3127; RX0730 at 0005 (Van Liere Expert Report, Exhibit C (study questionnaire)); RX0735 at 0012 (¶24, n.13) (Van Liere Expert Report).) For example, if a respondent selected “Google and Bing” in response to question S6 (“Which of these search engines, if any, *have you used* in the past 12 months?”) (emphasis added) and selected “Google, Bing, and Yahoo” in response to question S7 (“And which of these search engines, if any, *do you think you will use* in the next 12 months?”) (emphasis added), she could be randomly assigned to the Yahoo! group, even though she had used only the Google and Bing search engines in the past and was *only thinking of using* the Yahoo! search engine as well in the future. (RX0730 at 0004 (Van Liere Expert Report, Exhibit C (study questionnaire) (questions S6 and S7) (emphases added) & 0005 (“search engine condition assignment: if respondent selects more than one search engine, assign randomly to either Google or Yahoo”). As Dr. Jacoby testified, 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).)

1537. The introduction to the main section of the questionnaire informs respondents that the study is “on how consumers use the internet” and to look at the search results “as you would normally if you were conducting an online search.” (RX 730-0005-0006, 0016).

**Response to Proposed Finding No. 1537**

Complaint Counsel has no specific response to this proposed finding.

1538. The survey did not instruct respondents to look at the results as though they were seeking to make a purchase of contact lenses because doing so would have been improper. (Van Liere, Tr. 3041-3043). As Dr. Van Liere explained, respondents “should be in the state of mind of information seeking. They’re about to do a search. They’re gathering information. They’re going to respond to a search results page. So as a consequence, we did not want to set the respondent up to think just about making a purchase. We want them to just do a search, look at the search results page as they normally would, and tell us something about what they see.” (Van Liere, Tr. 3041-3043).

**Response to Proposed Finding No. 1538**

This proposed finding should not be adopted because it is based on trial testimony from Dr. Van Liere that was not previously disclosed in his expert report. There is no explanation of this methodology in either the body of Dr. Van Liere’s expert report or the study questionnaire that is attached as Exhibit C to the report. (*See* Van Liere, Tr. 3101–02 (testifying that he has no specific recollection of the term “information seeking” being in his report.)

Further, the proposed finding is simply erroneous. Dr. Van Liere does not provide any foundation for his assertion that the only “proper” state of mind is “information seeking” rather than considering the purchase of contact lenses. Indeed, the record evidence demonstrates that search advertising drives conversions, i.e., sales. CCPTB at 40. This suggests that the “proper” state of mind, as Dr. Jacoby instructed respondents, was to imagine themselves thinking about purchasing contact lenses, much as they do in real life. (Because contact lens prescriptions dictate the brand and power of the lens, a consumer searching for contact lenses online is not analogous to a consumer searching for, say, a television set, where the consumer has control over the brand,

style, size, and many other elements. A consumer who is looking for contact lenses online can make only limited choices (price, quantity, and shipping speed) regarding his or her purchase.)

1539. Respondents were shown their assigned Google or Yahoo basic search page with an empty search box and instructed to type the words “1-800 Contacts” into the Google or Yahoo search box. (Van Liere, Tr. 3040-3041; RX 730-0006, 0016-0017). The respondent initiated the search by clicking on the search button. (RX 735-0012; RX 730-0006, 0016-0017).

**Response to Proposed Finding No. 1539**

Complaint Counsel has no specific response to this proposed finding other than to note that respondents in Dr. Van Liere’s survey did not actually conduct a search. *See* Response to Proposed Finding No. 1519.

1540. Respondents were randomly assigned to either the test or control conditions. (RX 735-0012). Respondents were thus shown one of the four stimuli: the Google test stimulus, the Google control stimulus, the Yahoo! test stimulus, or the Yahoo! control stimulus. (RX 730-0006-0007; Van Liere, Tr. 3043-3045).

**Response to Proposed Finding No. 1540**

Complaint Counsel has no specific response to this proposed finding other than to incorporate its Response to Proposed Finding No. 1536, which addresses how respondents were assigned to either the Google or the Yahoo! group.

1541. The assigned search result appeared to respondents as though they had just conducted a search using the trademark “1-800 Contacts.” (RX 735-0012).

**Response to Proposed Finding No. 1541**

This proposed finding is misleading to the extent it suggests that the test or control stimuli (SERPs) in Dr. Van Liere’s survey replicated a real-world search for the query “1-800 Contacts.” *See* Response to Proposed Finding No. 1520. Complaint Counsel also incorporates its Response to Proposed Finding No. 1532, which addresses Dr. Van Liere’s use of a search for “1-800 Contacts” in both the test and control conditions.

*(i) Source Confusion*

1542. Source confusion occurs when advertising leads a consumer to believe that the source of the advertisement is the trademark owner, in this case 1-800 Contacts, when in fact it is not. (Van Liere, Tr. 3030, 3045-3046).

**Response to Proposed Finding No. 1542**

Complaint Counsel has no specific response to this proposed finding other than to note that Dr. Van Liere made clear that he was not offering a legal opinion regarding trademark law. (Van Liere, Tr. 3030; *see also* CX 9049 (Van Liere, Dep. at 38) (1-800 Contacts' counsel objecting to the question as calling for a legal conclusion)).

1543. To test for source confusion, after the search results appeared, respondents were instructed, "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. Please select all that you think apply. When you are finished please click the forward button." (RX 730-0007, 0018; Van Liere, Tr. 3045-3046).

**Response to Proposed Finding No. 1543**

Complaint Counsel has no specific response to this proposed finding other than to note three points that ought to be considered in connection with this proposed finding. First, Dr. Van Liere testified that his test for source confusion does not instruct respondents that they have the option of clicking on the "Next" button to move to the next screen without selecting any links. (Van Liere, Tr. 3175–3177.) If anything, the instructions suggest otherwise because they direct respondents to "[p]lease select all that you think apply. When you are finished please click the forward button." (RX0730 at 0007 & 0018 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

Second, Dr. Jacoby testified that Dr. Van Liere's test for source confusion contains flawed instructions. Specifically, the instruction ("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.") introduces unnecessary ambiguity because it forces survey respondents to figure out that "the website of the company that you searched for" refers to "1-800 Contacts," which is unnecessary

because all of the respondents in Dr. Van Liere's study were directed to search for "1-800 Contacts." (Jacoby, Tr. 2253–2254). The instruction ("Please select all that you think apply.") is superfluous and leading because the preceding instruction already directs respondents to "point and click on the link or links, if any," and there is no balancing instruction such as ("Or select none if you think none apply."). (Jacoby, Tr. 2254–2255.)

Third, although the instruction in Dr. Van Liere's survey refers to a "forward button," there is no "forward button" in Dr. Van Liere's survey. Instead, as Dr. Van Liere testified, respondents were supposed to understand that "forward" button referred to a button labeled "next" at the bottom of the web page. (Van Liere, Tr. 3180-3181).

1544. Respondents were free to click on any of the links on the page; they were not directed to any particular link nor were they restricted with regard to which links they could select. (Van Liere, Tr. 3047-3048).

#### **Response to Proposed Finding No. 1544**

This proposed finding is misleading to the extent it suggests that Dr. Van Liere did not employ subtly leading techniques to suggest answers to his survey questions. First, as Dr. Van Liere testified, his test for source confusion does not instruct respondents that they have the option of clicking on the "Next" button to move to the next screen without selecting any links. (Van Liere, Tr. 3175–3177.) Nor does Dr. Van Liere's survey question indicate that respondents can select "none of these" (or even where that option is located on the search page). (RX0730 at 0018 (Van Liere Expert Report). Dr. Van Liere admitted that he did not include any language in his question to inform the respondent that she could select none of the listings. (Van Liere, Tr. 3175). In order for a respondent to select none of the listings, she would need to scroll all the way to the bottom of the page (below the search results), find a small checkbox on the bottom left side of the page that states "None of these," and determine (without any instruction from the survey) that

checking the box is an appropriate way to not identify any of the listings. (RX0730 at 0018; Van Liere, Tr. 3175-1376).

Dr. Van Liere's question also does not provide an "I don't know" or an "I don't have an opinion" option. (RX0730 at 0018 (Van Liere Expert Report); Van Liere, Tr. 3180). Moreover, Dr. Van Liere's instructions suggest that there are several correct answers to his question because he directs respondents to "[p]lease select all that you think apply." (RX0730 at 0007 & 0018 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

1545. Dr. Van Liere asked respondents to "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" rather than asking them to click on the link that they think would take them to 1-800 Contacts for two reasons. (Van Liere, Tr. 3046-3047). First, phrasing the instruction this way avoids any possibility of a leading question. (Van Liere, Tr. 3046-3047).

#### **Response to Proposed Finding No. 1545**

This proposed finding is misleading to the extent it suggests that Dr. Van Liere's source confusion question was not leading or otherwise problematic. As explained above, Dr. Van Liere used subtly leading techniques that suggested the answer(s) to his question. *See* Response to Proposed Finding No. 1544. Moreover, Dr. Van Liere testified that "having the name of the [company] in the stem [of the question] would create a demand effect that's netted off if it's asked the same way in the test and the control." (Van Liere, Tr. 3046.) Second, Dr. Van Liere testified that as a general matter, ambiguous questions in surveys could be a problem. (Van Liere, Tr. 3171.) As Dr. Jacoby explained, the use of the phrase "the company that you searched for" was vague and indirect, and thwarted respondents' rapid comprehension of the question. (CX8011 at 017 (Jacoby Rebuttal Expert Report)).

1546. Second, and more important, the phrasing ensures that respondents are engaged in conducting a search. (Van Liere, Tr. 3046-3047). As Dr. Van Liere explained, the study is "trying to have the respondent conduct a search, and we want them engaged on the search. And by having them have to rethink about, well, okay, what is the company I searched for, they're looking

at the search results page reasonably more engaged on conducting a search.” (Van Liere, Tr. 3046-3047).

**Response to Proposed Finding No. 1546**

This proposed finding is misleading for the reasons described in Response to Proposed Finding No. 1545. This proposed finding is also inconsistent with Dr. Van Liere’s testimony, in which he testified that “[he] didn’t want to screen people out [from his study] simply because they hadn’t specifically heard of the name 1-800 Contacts.” (CX9049 (Van Liere, Dep. at 142).) He also testified that, in the real world, “[a]s a general matter, I will agree that the entering ‘1-800 Contacts’ yourself, typing it, means that you have seen it and are looking at it, heard it, or otherwise are aware of it, sure. You’re being asked to affirmatively type it into the search block.” (CX9049 (Van Liere, Dep. at 144).) Dr. Van Liere’s deposition testimony thus calls into question whether the instruction (“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”) actually causes respondents who have not “specifically heard of the name 1-800 Contacts” to “rethink about ... what is the company I searched for” and whether this instruction is leading if “entering ‘1-800 Contacts’ yourself ... means that you have seen it and are looking at it.”

1547. In the test condition, respondents were counted as confused if they clicked on any of the sponsored ads. (RX 735-0017; Van Liere, Tr. 3049-3050). If they clicked on any other link, they were counted as not confused. (Van Liere, Tr. 3049-3050).

**Response to Proposed Finding No. 1547**

Complaint Counsel has no specific response to this proposed finding other than to note that *different* elements of a search engine results page are being counted by Dr. Van Liere as representing confusion in the test condition versus the control condition. (CX8011 at 010 (¶ 19 n.19) (Jacoby Rebuttal Expert Report).) In Dr. Jacoby’s opinion, this adds to the unreliability of Dr. Van Liere’s methodology and conclusions.

1548. In the control condition, respondents were counted as confused if they clicked on any of certain organic links, e.g., TIME, New York Times, www.fda.gov. (RX 735-0017-0018; Van Liere, Tr. 3052-3053)

**Response to Proposed Finding No. 1548**

Complaint Counsel has no specific response to this proposed finding other than to incorporate Complaint Counsel's Response to Proposed Finding No. 1547.

1549. The survey instructs respondents that if they need not give an answer if they have no opinion and that should not guess. (RX 730-0002, 0013 ("If for any question you have no opinion, please feel free to choose the 'don't know' option. Please do not guess."); RX 730-0002, 0016 ("If you don't know the answer to any of the questions, that's okay, just say you don't know or that you do not have an opinion.")).

**Response to Proposed Finding No. 1549**

This proposed finding appears to ask the Court to make its own visual inspection of the survey instrument (RX0730 (Van Liere Expert Report, Exhibit C (study questionnaire).) If so, Complaint Counsel asks that the Court also take note of the following:

(1) The instruction in question ("If for any question you have no opinion, please feel free to choose the 'don't know' option. Please do not guess.") appears separately in a screenshot labeled "Introduction," rather than among a set of instructions under question S0, which respondents are required to "carefully read" before continuing the survey, and to select either ("I have read the above instructions and understand them, and I will adhere to these instructions.") or ("I do not understand the above instructions, or I do not wish to agree to adhere to them."). (RX0730 at 0002 & 0013 (Van Liere Expert Report, Exhibit C (study questionnaire)).) As Dr. Van Liere testified, the respondent clicked through several screens after reading that instruction before arriving at Dr. Van Liere's source confusion question. (Van Liere, Tr. 3187-3189).

(2) The instruction in question instructs respondents to choose the "don't know" option if they do not have an opinion, but there is not always a "don't know" option. For example, question S2 asks respondents "Do you or does anyone in your household work for any of the

following?” Respondents are required from one or more of the listed options or else choose “No. None of the above.” There is no “don’t know” option. (RX0730 at 0003 & 0013 (Van Liere Expert Report, Exhibit C (study questionnaire))).

(3) Similarly, Dr. Van Liere’s survey instrument instructs respondents “If you don’t know the answer to any of the questions, that’s okay, just say you don’t know or that you do not have an opinion.” (RX0730 at 0005 & 0016 (Van Liere Expert Report, Exhibit C (study questionnaire))). And yet, for questions Q1 (“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.”) and Q4 (“This time, please click on the link or links, if any, that you think will take you to the website of a company that is affiliated with the company that you searched for.”), there is no option for respondents to “just say you don’t know or that you do not have an opinion.” They are prompted instead to “[p]lease select all that you think apply” or else scroll down and check a box at the bottom of the simulated search engine results page that is labeled “None of these.” (RX0730 at 0007, 0008, 0017–0018, 0023–0024, 0029–0030, 0034–0035, 0039–0040, 0045–0046, 0051–0052, 0055–0056 (Van Liere Expert Report, Exhibit C (study questionnaire))).

1550. Consistent with these instructions, the survey asks respondents to click on the appropriate link or links, “if any,” indicating that the respondent need not select any of the links. (RX 730-0007, 0018; Van Liere, Tr. 3048).

### **Response to Proposed Finding No. 1550**

This proposed finding incompletely and inaccurately describes the instructions that respondents were given. Although the survey instructs respondents to “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,” it also instructs them to “[p]lease *select all* that you think apply.” (RX0730 at 0007 & 0018 (Van Liere Expert Report, Exhibit C (study questionnaire) (emphasis added).) Dr. Jacoby testified that the instruction (“Please select all that you think apply.”) is superfluous and leading

because the preceding instruction already directs respondents to “point and click on the link or links, if any,” and there is no balancing instruction such as (“Or select none if you think none apply.”). (Jacoby, Tr. 2254–2255.)

Furthermore, as noted in Complaint Counsel’s Response to Proposed Finding No. 1549, there is no option for respondents to “just say you don’t know or that you do not have an opinion,” even though the survey instructs respondents at the outset that “[i]f you don’t know the answer to any of the questions, that’s okay, just say you don’t know or that you do not have an opinion.” (RX0730 at 0005 & 0016 (Van Liere Expert Report, Exhibit C (study questionnaire)).) There are only two options for respondents who for whatever reason do not want to select, or are unable to select, any of the links shown on the page: they can scroll down to the bottom of the page and check the box labeled “None of these” or else click on the “Next” button. (RX0730 at 0008 & 0018 (Van Liere Expert Report, Exhibit C (study questionnaire)); Van Liere, Tr. 3048–49.) Neither of these options is equivalent to “I don’t know or I don’t have an opinion,” (Van Liere, Tr. 3179–3180), and as Dr. Van Liere, there is no explicit instruction to respondents that they are allowed to click on the “Next” button without selecting any links on the page, (Van Liere, Tr. 3175–3177). If anything, the instructions are to the contrary: “*Please select all that you think apply. When you are finished please click the forward button.*” (RX0730 at 0007 & 0017–18 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

1551. If a respondent did not believe that any of the links on the page would take the respondent to the website of the company searched for, the respondent could either check a box next to “None of these” at the bottom of the page or simply hit the “next” button. (Van Liere, Tr. 3048-3049). If a respondent did so, he or she was counted as not confused. (Van Liere, Tr. 3051).

### **Response to Proposed Finding No. 1551**

This proposed finding incompletely and inaccurately describes the instructions that respondents were given.

First, Dr. Van Liere admitted that he did not include any language in his question to inform the respondent that she could select none of the listings. (Van Liere, Tr. 3175). In order for a respondent to select none of the listings, she would need to scroll all the way to the bottom of the page (below the search results), find a small checkbox on the bottom left side of the page that states “None of these,” and determine (without any instruction from the survey) that checking the box is an appropriate way to not identify any of the listings. (RX0730 at 0018; Van Liere, Tr. 3175-1376).

Second, as already pointed out in Complaint Counsel’s Response to Proposed Finding No. 1550, there is no explicit instruction to respondents that they are allowed to click on the “Next” button without selecting any links on the page. (Van Liere, Tr. 3175–3177.) If anything, the instructions are to the contrary: “*Please select all that you think apply. When you are finished please click the forward button.*” (RX0730 at 0007 & 0017–18 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

Furthermore, as already pointed out in Complaint Counsel’s Response to Proposed Finding No. 1550, there is no option for respondents to answer “I don’t know or I don’t have an opinion,” even though the survey at the outset tells them not to guess and indicates that not knowing the answer to any question is okay. (RX0730 at 0005 & 0016 (Van Liere Expert Report, Exhibit C (study questionnaire)); Van Liere, Tr. 3179–3180.)

1552. Each of the respondents that selected a link or links, whether scored as confused or not confused, was then shown each listing they selected and asked, “You said that you think that the following link would take you to the website of the company that you searched for. What makes you say that?” (RX 735-0006; RX 730-0019; Van Liere, Tr. 3053-3056). This question was repeated for each link selected. (RX 735-0006; RX 730-0019; Van Liere, Tr. 3053-3056). The responses are sometimes called “verbatim.” (Van Liere, Tr. 3053-3056).

**Response to Proposed Finding No. 1552**

Complaint Counsel has no specific response to this proposed finding other than to note that this question is unnecessarily vague, in Dr. Jacoby’s opinion, because it refers “to the website of the company that you searched for” instead of identifying that company directly as “1-800 Contacts.” (CX8011 at 017 (¶ 31(c)) (Jacoby Rebuttal Expert Report).)

1553. The responses to this question were used as a quality control to ensure that respondents were generally understanding the study. (Van Liere, Tr. 3054-3055). For instance, if a respondent simply entered gibberish, that respondent may be excluded from the survey. (Van Liere, Tr. 3054-3055).

**Response to Proposed Finding No. 1553**

This proposed finding is misleading because Dr. Van Liere did not use the verbatims as “a quality control to ensure respondents were generally understanding the study.” (Jacoby, Tr. 2234–2238; CX8011 at 019–020 (¶ 33(a)) (Jacoby Rebuttal Expert Report).) For example, respondents who were not removed from Dr. Van Liere’s final tally provided verbatim responses to the question (“You said that you think that the following link would take you to the website of the company that you searched for. What makes you say that?”) such as “Looks good,” “You said it would,” “idk” (I don’t know), and “vbuhnji”. (CX8011 at 019–021 (¶ 33(a) n.39) (Jacoby Rebuttal Expert Report).) In Dr. Jacoby’s opinion, because Dr. Van Liere failed to remove all nonresponsive “verbatim” responses provided by survey participants, his survey results were erroneously inflated. (Jacoby, Tr. 2238; CX8011 at 020 (¶ 33(a)) (Jacoby Rebuttal Expert Report).)

1554. After giving verbatims, all respondents who selected any of the links indicating confusion were routed to the end of the survey. (RX 735-0012; Van Liere, Tr. 3064-3065). The remaining respondents moved on to the next question in the survey. (RX 735-0012; Van Liere, Tr. 3064-3065).

**Response to Proposed Finding No. 1554**

Complaint Counsel has no specific response to this proposed finding.

(ii) *Affiliation Confusion*

1555. Affiliation confusion occurs when advertising leads a consumer to believe that the ad is affiliated with the trademark holder, here 1-800 Contacts, when in fact it is not, or that there is an affiliation between one entity and another entity when in fact there is none. (Van Liere, Tr. 3030, 3062).

**Response to Proposed Finding No. 1555**

Complaint Counsel has no specific response to this proposed finding other than to note that Dr. Van Liere made clear that he was not offering a legal opinion regarding trademark law. (Van Liere, Tr. 3030; *see also* (CX9049 (Van Liere, Dep. at 38-39) (1-800 Contacts' counsel objecting to the question as calling for a legal conclusion)).

1556. To test for affiliation confusion, respondents in Dr. Van Liere's study were told, "We would now like to ask you another set of questions about the original page of search results you were shown. When the Search results appear, please look at them as you would normally if you were conducting an online search. This time, please click on the link or links, if any, that you think will take you to a website of a company that is affiliated with the company that you searched for." (RX 730-0007, 0023).

**Response to Proposed Finding No. 1556**

Complaint Counsel has no specific response to this proposed finding other than to note that, in Dr. Jacoby's opinion, the survey question is unnecessarily vague because it refer "the company that you searched for" instead of identifying that company directly as "1-800 Contacts." (CX8011 at 017-018 (¶ 31(d)) (Jacoby Rebuttal Expert Report); *cf.* Jacoby, Tr. 2253-54.) Dr. Jacoby also opined that the term "affiliated" is ambiguous because it has other meanings besides a business connection or relationship; for example, two companies might be "affiliated" because they belong to the same trade association. (CX8011 at 017-018 (¶ 31(d)) (Jacoby Rebuttal Expert Report); Jacoby, Tr. 2208-09, 2256).

1557. Respondents were again shown the search results page and instructed, "Now, using your mouse, click on the link or links, if any, that you think will take you to the website of a company that is affiliated with the company that you searched for. Please select all that you think apply." (RX 730-0008, 0024).

**Response to Proposed Finding No. 1557**

Complaint Counsel has no specific response to this proposed finding other than to note two points that ought to be considered in connection with this proposed finding. First, Dr. Van Liere testified that his test for source confusion does not instruct respondents that they have the option of clicking on the “Next” button to move to the next screen without selecting any links. (Van Liere, Tr. 3175–3177.) The same is true of his test for affiliation confusion. If anything, the instructions suggest otherwise because they direct respondents to “[p]lease select all that you think apply. When you are finished please click the forward button.” (RX0730 at 0008 & 0024 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

Second, Dr. Jacoby testified that Dr. Van Liere’s test for affiliation confusion contains flawed instructions. Specifically, the instruction (“Now, using your mouse, click on the link or links, if any, that you think will take you to the website of a company that is affiliated with the company that you searched for.”) introduces unnecessary ambiguity because it forces survey respondents to figure out that “the website of the company that you searched for” refers to “1-800 Contacts,” which is unnecessary because all of the respondents in Dr. Van Liere’s study were directed to search for “1-800 Contacts.” (CX8011 at 017–018 (¶ 31(d)) (Jacoby Rebuttal Expert Report) (cross-referencing ¶¶ 31(b) & 31(c); cf. Jacoby, Tr. 2253–2254.) Just as in the test for source confusion, the instruction (“Please select all that you think apply.”) is superfluous and leading because the preceding instruction already directs respondents to “click on the link or links, if any,” and there is no balancing instruction such as (“Or select none if you think none apply.”). (CX8011 at 017–018 (¶ 31(d)) (Jacoby Rebuttal Expert Report); cf. Jacoby, Tr. 2254–2255.) Finally, and yet importantly, the term “affiliated” is ambiguous because it has other meanings besides a business connection or relationship; for example, two companies might be “affiliated”

because they belong to the same trade association. (CX8011 at 017–018 (¶ 31(d)) (Jacoby Rebuttal Expert Report); Jacoby, Tr. 2208–09, 2256.)

1558. As in the source confusion test, respondents were free to click on any or none of the links on the page. (Van Liere, Tr. 3063-3064 (“So this is the same exercise but with regard to affiliation. They’re asked to look at the whole search results page and click on any of the links, sponsored or organic, that they think will take them to the website of a company that is affiliated with the company they searched for.”)).

#### **Response to Proposed Finding No. 1558**

Complaint Counsel has no specific response to this proposed finding other than to note that, as Dr. Van Liere testified, his test for source confusion does not instruct respondents that they have the option of clicking on the “Next” button to move to the next screen without selecting any links. (Van Liere, Tr. 3175–3177.) The same is true of his test for affiliation confusion. If anything, the instructions suggest otherwise because they direct respondents to “[p]lease select all that you think apply. *When you are finished* please click the forward button.” (RX0730 at 0008 & 0024 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

1559. The use of the term “affiliated” in the survey question is appropriate. (Van Liere, Tr. 3064-3066). Terms such as “business relationship” or “business connection” are too restrictive. (Van Liere, Tr. 3064-3066). As Dr. Van Liere explained, “if you ask the question as a business connection or a business relationship, it leads the respondent to think they may have to determine whether there’s a legal relationship between the entities, so that language is often considered too restrictive or forcing the respondent to consider whether there’s a legal relationship, which is something they wouldn’t know, so I think the more standard practice and certainly the treatises that talk about this generally talk about asking as affiliation, not as business relationship or business connection.” (Van Liere, Tr. 3064-3066).

#### **Response to Proposed Finding No. 1559**

This proposed finding lacks sufficient foundation and support. Dr. Van Liere testified that it was *his* personal choice not to use “business relationship” or “business connection” and, importantly, he acknowledged that other experts in the field have used these terms. (Van Liere, Tr. 3065 (“I have not used it and I generally don’t use it. *It is apparently used by some other experts in the field.*”) (emphases added).) (See also Van Liere, Tr. 3193 (“I’m generally aware that

*something of that type has been used* because that’s why it gets raised in the discussions of how to ask affiliation, whether other courts have ruled whether it causes the consumer to have to form a legal opinion. I know of that.”.) Dr. Van Liere referred to treatises as supporting his view that “the more standard practice” is to ask about “affiliation” generally, and not about a “business relationship” or a “business connection,” but none of these treatises is in the record and cited as part of this proposed finding.

1560. In the test condition, respondents were counted as confused if they clicked on any of the sponsored ads. (RX 735-0017; Van Liere, Tr. 3066-3067).

**Response to Proposed Finding No. 1560**

Complaint Counsel has no specific response to this proposed finding other than to note that different elements of a search engine results page are being counted by Dr. Van Liere as representing confusion in the test condition versus the control condition. (CX8011 at 010 (¶ 19 n.19) (Jacoby Rebuttal Expert Report).) In Dr. Jacoby’s opinion, this adds to the unreliability of Dr. Van Liere’s methodology and conclusions.

1561. If a respondent clicked on more than one sponsored ad, the respondent was scored as confused only once. (Van Liere, Tr. 3067).

**Response to Proposed Finding No. 1561**

Complaint Counsel has no specific response to this proposed finding other than to note that different elements of a search engine results page are being counted by Dr. Van Liere as representing confusion in the test condition versus the control condition. (CX8011 at 010 (¶ 19 n.19) (Jacoby Rebuttal Expert Report)). In Dr. Jacoby’s opinion, this adds to the unreliability of Dr. Van Liere’s methodology and conclusions.

1562. In the control condition, respondents were counted as confused if they clicked on any of certain organic links, e.g., TIME, New York Times, www.fda.gov. (RX 735-0017-0018; Van Liere, Tr. 3068-3070)

**Response to Proposed Finding No. 1562**

Complaint Counsel has no specific response to this proposed finding other than to note that different elements of a search engine results page are being counted by Dr. Van Liere as representing confusion in the test condition versus the control condition. (CX8011 at 010 (¶ 19 n.19) (Jacoby Rebuttal Expert Report).) In Dr. Jacoby’s opinion, this adds to the unreliability of Dr. Van Liere’s methodology and conclusions.

1563. If a respondent did not believe that any of the links on the page were affiliated with the company searched for, the respondent could either check a box next to “None of these” at the bottom of the page or simply hit the “next” button. (Van Liere, Tr. 3067-3068).

**Response to Proposed Finding No. 1563**

This proposed finding incompletely and inaccurately describes the instructions that respondents were given. As already pointed out in Complaint Counsel’s Response to Proposed Finding No. 1550, there is no explicit instruction to respondents that they are allowed to click on the “Next” button without selecting any links on the page. (Van Liere, Tr. 3175–3177.) If anything, the instructions are to the contrary: “*Please select all that you think apply. When you are finished please click the forward button.*” (RX0730 at 0008 & 0023–24 (Van Liere Expert Report, Exhibit C (study questionnaire)) (emphases added).)

Furthermore, as already pointed out in Complaint Counsel’s Response to Proposed Finding No. 1550, there is no option for respondents to answer “I don’t know or I don’t have an opinion,” even though the survey at the outset tells them not to guess and indicates that not knowing the answer to any question is okay. (RX0730 at 0005 & 0016 (Van Liere Expert Report, Exhibit C (study questionnaire)); Van Liere, Tr. 3179–3180.)

**(iii) Survey Results**

1564. Dr. Van Liere found a net confusion rate in his Google condition of 13.3% and a net confusion rate in his Yahoo! condition of 27.2%. The results of Dr. Van Liere’s study are summarized in the following table:

**Table 3: Summary of Confusion**

	<u>Test</u>		<u>Control</u>		<u>Net</u>
	<u>Count</u>	<u>Percent</u>	<u>Count</u>	<u>Percent</u>	
<b>Google</b>					
Confused as to Source	22	13.0%	5	2.8%	
Confused as to Affiliation	8	4.7%	3	1.7%	
Total Confused	30	17.8%	8	4.5%	13.3%
Total Google Respondents	169		178		
<b>Yahoo</b>					
Confused as to Source	58	33.0%	9	5.4%	
Confused as to Affiliation	11	6.3%	11	6.6%	
Total Confused	69	39.2%	20	12.0%	27.2%
Total Yahoo Respondents	176		166		
Overall Confused	99	28.7%	28	8.1%	20.6%
Total Study Respondents	345		344		

Note: Respondents who were confused as to source were not asked questions about affiliation.

Source: NERA 1-800 Contacts Survey Data

(RX 735-0021).

### **Response to Proposed Finding No. 1564**

Complaint Counsel has no specific response to this proposed finding other than to note that, according to Dr. Jacoby, these net confusion rates are meaningless and unreliable because of the numerous flaws in Dr. Van Liere's methodology, as noted in Responses to Proposed Findings Nos. 1505, 1512–1513, 1515, 1519–1520, 1522–1527, 1531–1532, 1535, 1536, 1543–1553, 1556–1563; *see also* CCPTB at 152-157.

Additionally, Dr. Jacoby testified that Dr. Van Liere's net confusion rates are inflated because Dr. Van Liere failed to weight appropriately 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 023 (¶¶ 33(e)) (Jacoby Rebuttal Expert Report).) As seen in this proposed finding, Dr. Van Liere had roughly equal numbers of respondents assigned to the Google and Yahoo! conditions (347 for Google and 342 for Yahoo!), (Van Liere, Tr. 3118; CX9049 (Van Liere, Dep. at 99)), even

though, as Dr. Van Liere acknowledged, Google’s share of searches (65%) was almost five times as large as Yahoo!’s share of searches (14%) in October 2016, (Van Liere, Tr. 3103–3106; RX0735 at 022 (¶ 45) (Van Liere Report)). If Dr. Van Liere had properly weighted his data to reflect the proportional shares of the Google and Yahoo! search engines, his overall net confusion rate would have been lower because he reported significantly higher net rates of confusion for the Yahoo! group (27.2%) than the Google group (13.3%). Dr. Van Liere acknowledged that this would be the case. (Van Liere, Tr. 3119–3121.) Dr. Jacoby uncovered numerous additional problems with Dr. Van Liere’s survey design, sampling, and data collection, described in detail in Dr. Jacoby’s rebuttal report, CX8011 at 002-006, 007-009 (¶¶ 3-8, 11-15) (Jacoby Rebuttal Expert Report) (describing Dr. Van Liere’s failure to use the proper control); *id.* at 006-007, 009-010, 016 (¶¶ 9, 16-19, 30) (observing that Dr. Van Liere’s “control” and “test” conditions had numerous differences); *id.* at 010-023 (¶¶ 20-34) (describing multiple additional problems with Dr. Van Liere’s survey, controls, and data collection)

1565. Based on these data, Dr. Van Liere concluded that “there is potential for real world confusion among consumers in the relevant population regarding whether the sponsored advertisements of the type tested are the same as or are affiliated with 1-800 Contacts when searching for 1-800 Contacts using various search engines.” (RX 735-0006).

#### **Response to Proposed Finding No. 1565**

This proposed finding is unsupported and contradicted by the weight of the evidence because of the numerous flaws in Dr. Van Liere’s methodology, as noted in Responses to Proposed Findings Nos. 1505, 1512–1513, 1515, 1519–1520, 1522–1527, 1531–1532, 1535, 1536, 1543–1553, 1556–1564. (*See* CX8011 at 002–028) (¶¶ 1–35) (Jacoby Rebuttal Expert Report).)

Additionally, this proposed finding incompletely and inaccurately states what Dr. Van Liere purportedly concluded from his confusion study. First, at trial, Dr. Van Liere conceded that, in a world in which 1-800 Contacts’ ad appears on the SERP (*i.e.*, the real world), his survey is

worthless, because it failed to test whether consumers would be confused in the presence of a 1-800 Contacts ad. Van Liere Tr. 3222 (“I would have no way to know for sure if it would or would not change my results because I didn’t test that.”).

Second, he also testified that “there is the potential for confusion *in the future if the settlement agreements didn’t exist and the parties to the settlement could buy [the] 1-800 trademark* and that those ads would appear when consumers searched on [the] 1-800 trademark in a search engine and that those ads would lead consumers to believe that the [links of the] sponsored companies either take them to or are affiliated with 1-800 Contacts.” (Van Liere, Tr. 2976–2977.) Dr. Van Liere’s testimony makes clear that he did not study “the extent, if any, to which sponsored advertisements that appear in response to search requests for ‘1-800 Contacts’ on internet search engines are likely to cause consumers to believe that the companies whose advertisements are displayed on a search results page are the same as or are affiliated with 1-800 Contacts.” (RX0735 at 0005 (¶ 10) (Van Liere Expert Report).) Rather, he “investigate[d] the degree to which consumers would be confused by the sponsored advertisements should the agreements be removed” because he understood “that 1-800 Contacts believes that there is potential for consumer confusion if the agreements at issue were no longer in effect.” (RX0735 at 0007 (¶ 17) (Van Liere Expert Report).)

(g) ***The Purported Criticisms Of Complaint Counsel’s Expert, Dr. Jacoby, Are Invalid.***

1566. Complaint Counsel retained Dr. Jacob Jacoby as an expert, who sought to raise various criticisms of Dr. Van Liere’s study. (CX 8011). These criticisms have no weight, are invalid and unsupported, and none indicate any unreliability in Dr. Van Liere’s results.

**Response to Proposed Finding No. 1566**

This proposed finding is unsupported and contradicted by the weight of the evidence, for the reasons explained below in Responses to Proposed Findings Nos. 1567–1590.

1567. Dr. Jacoby contended that Dr. Van Liere should not have used the search term “1-800 Contacts” in his control conditions. (Jacoby, Tr. 2219-22). According to Dr. Jacoby, respondents in Dr. Van Liere’s control condition should not have searched using the query “1-800 Contacts” but should have used a generic term, such as “contact lenses.” (Jacoby, Tr. 2219-22). These contentions are wrong. As discussed more extensively below, Dr. Jacoby’s use of a different search term in his control condition was a fundamental flaw in his own study, rendering that study unreliable.

**Response to Proposed Finding No. 1567**

This proposed finding is unsupported and contradicted by the weight of the evidence, for the reasons explained above in the Response to Proposed Finding No. 1532 and below in Responses to Proposed Findings Nos. 1568–1569.

1568. Dr. Van Liere appropriately had respondents in both the test and control conditions search using the query “1-800 Contacts.” (Van Liere, Tr. 3035-36). As Dr. Van Liere explained, the basic idea in a trademark confusion study “is that the test and the control should be identical except for the allegedly confusing elements, so here we want the respondents in both conditions to come to the exercise with the same frame of reference. That means they’re both searching on ‘1-800 Contacts’ and then evaluating the search results page based on having done that exercise.” (Van Liere, Tr. 3035). Respondents in the control and the test conditions must be asked to think about what they’re looking at the same way. (Van Liere, Tr. 3036).

**Response to Proposed Finding No. 1568**

This proposed finding is erroneous because Dr. Van Liere’s stimuli in fact did *not* correctly test the presence of the allegedly confusing elements, which are, as Dr. Van Liere himself indicated, sponsored advertisements from the settling parties appearing in response to searches using 1-800 Contacts trademarks as the search term. (See Van Liere, Tr. 3017 (“So for the test we want to put ads that represent a but-for world in which the parties that are currently part of the settlement agreements would have *ads that may appear in response to a 1-800 Contacts search.*”)) (emphasis added); RX0735 at 0005 (¶ 10) (Van Liere Expert Report) (“As noted above, I was asked to measure the extent, if any, to which *sponsored advertisements that appear in response to search requests for ‘1-800 Contacts’ on internet search engines* are likely to cause consumers to

believe that the companies whose advertisements are displayed on a search results page are the same as or are affiliated with 1-800 Contacts.”) (emphasis added.)

As Dr. Jacoby explained, if the allegedly confusing elements are sponsored advertisements from the settling parties *that appear in response to searches using 1-800 Contacts trademarks as the search term*, then the “non-infringing alternative to the test stimuli,” to use the wording of Proposed Finding No. 1532, should have included sponsored advertisements that appear in response to searches that do *not* use 1-800 Contacts trademarks—for example, searches using generic terms like “contact lenses” or searches using the brands or names of the settling parties (which, incidentally, Dr. Van Liere used to find, for his test stimuli, sponsored advertisements that no longer appear in response to searches for “1-800 Contacts” because of the settlement agreements). (CX8011 at 004 (¶ 4) (Jacoby Rebuttal Expert Report) (“As I understand it, the issue is *not* that these competitor advertisements are themselves confusing, but that they become confusing in the *context* of consumers having used “1-800 Contacts” as the search term.”); Van Liere, Tr. 3017 (“so what we did is we did a variety of searches on ‘contact lenses’ or generic terms, and then we also searched on the brands of the individual companies”) & Van Liere, Tr. 3018 (“As I mentioned earlier, we basically searched on their brands or their names and on generic terms like ‘contact lenses’ and see what did those ads look like and how did they come up.”).) After all, it is the use of “1-800 Contacts” as a search query that is the gravamen of 1-800 Contacts’ claim of trademark infringement. Stated differently, it is the use of 1-800 Contacts’ trademark as the search term that defines and distinguishes the allegedly infringing condition being tested for likelihood of confusion. *See also* CX9044 (Tushnet, Dep. at 201-202) (“1-800’s theory of liability that it has articulated, and 1-800’s theory of liability depends on the idea that no matter what the ads say, if the consumer has typed in ‘1-800 Contacts,’ she’s going to be confused about the source, sponsorship or affiliation of non-1-800 Contacts ads that show up in response to

her having typed that. The only way to test that is to actually test the thing that you say is confusing, and that's why a true control for that theory would involve '1-800 Contacts' as a search term versus something that was not '1-800 Contacts' as a search term.”); CX9017 (Blackwood, Dep. at 284-285) (testifying that the identical ads could be confusing when returned in response to a search to “1-800 Contacts,” but not confusing when returned in response for a search for “contact lenses”); CX9047 (Hogan Dep. at 132-133) (“Well, I think the very premise of these cases is that by inducing a search engine to serve up a sponsored link at the top of a page *in response to a search for 1-800 Contacts*, these advertisers were in effect *communicating to consumers that they were 1-800 Contacts* or were affiliated or endorsed or sponsored by 1-800 Contacts. . . .”) (emphasis added).

As this proposed finding implies, in designing his study, Dr. Van Liere did not define the allegedly infringing condition based on a search using “1-800 Contacts” trademark as the search term. To use Dr. Van Liere’s terminology, he failed to make the background condition part of his allegedly infringing condition even though he implicitly recognized that this is the correct inquiry. (See RX0735 at 0026 (¶ 52) (Van Liere Expert Report) (“It is my understanding that consumers’ search behavior (*i.e.*, searching on the trademarked term 1-800 Contacts) should be taken as part of the *background condition*, and the question to be considered is whether, *against this background condition*, displaying a sponsored ad for a retailer other than 1-800 Contacts is likely to cause confusion.”) (emphases added); Van Liere, Tr. 3036 (“And so here, the searching on ‘1-800 Contacts’ is a key element of the alleged confusion ...”))

Instead, Dr. Van Liere defined the allegedly infringing condition as the presence of “any allegedly confusing sponsored links,” to use the wording of Proposed Finding No. 1532, when a search using “1-800 Contacts” trademark is made, and he therefore defined the control as a search engine results page with only organic links when a search using “1-800 Contacts” trademark is

made. As Dr. Jacoby explained, Dr. Van Liere's study "tells us nothing about whether the use of the 1-800 Contacts trademark *as a search term* leads to users being confused as to the source, affiliation, or sponsorship of ads for competing sellers when those ads are presented *in conjunction with that search term.*" (CX8011 at 006 (¶ 8) (Jacoby Rebuttal Expert Report).)

Rather than measuring the level of consumer confusion in the allegedly infringing condition, as one would do in a trademark infringement case, Dr. Van Liere purportedly measured the level of consumer confusion in a condition absent the settlement agreements. (*See* Van Liere, Tr. 3017 ("So for the test we want to put ads that represent a but-for world in which the parties that are currently part of the settlement agreements would have ads that may appear in response to a 1-800 Contacts search."), Van Liere, Tr. 3037 ("[W]e're being asked to measure confusion in this case in a but-for world in the future where the agreements weren't in place and the sponsored ads of the competitors are now appearing.") & Van Liere, Tr. 3126 ("I mean, it's actual search results page and it uses real content from search results, but the presence of the settlement parties' sponsored links is manufactured to create what a search results page would look like in a but-for world where those settlement agreements didn't exist, so sure, that's what that does."); RX0735 at 0007 (¶ 17) (Van Liere Expert Report) ("1-800 Contacts believes that there is potential for consumer confusion if the agreements at issue were no longer in effect. It is for this purpose that I have been asked by counsel for 1-800 Contacts to conduct a survey to investigate the degree to which consumers would be confused by the sponsored advertisements should the agreements be removed.".) He purportedly compared a world with the settlement agreements in place (organic links only; no sponsored ads from competitors (or from 1-800 Contacts)) against a counterfactual world without the settlement agreements (organic links and sponsored ads from competitors (but not from 1-800 Contacts)) instead of comparing a world with the alleged infringement (use of "1-800 Contacts" as the search term and sponsored ads appearing in response) against a world

without the alleged infringement (use of “contact lenses” or another generic term as the search term and sponsored ads appearing in response), as shown in the table below:

	<b>Pre-Settlement World (Jacoby Study)</b>	<b>Post-Settlement World (Van Liere Study)</b>
<b>Control Stimuli</b>	Likelihood of confusion from sponsored advertisements appearing in response to searches for generic terms like “contact lenses” ( <i>no alleged infringement</i> )	Likelihood of confusion from organic links, with no sponsored advertisements appearing in response to searches for “1-800 Contacts” ( <i>settlement agreements in place</i> )
<b>Test Stimuli</b>	Likelihood of confusion from sponsored advertisements appearing in response to searches for “1-800 Contacts” ( <i>alleged infringement</i> )	Likelihood of confusion from sponsored advertisements (from competitors only) appearing in response to searches for “1-800 Contacts” ( <i>no settlement agreements in place</i> )

1569. In this case, the appropriate frame of reference is a consumer looking at results after having searched using the term “1-800 Contacts.” (Van Liere, Tr. 3036). As Dr. Van Liere explained, “the searching on ‘1-800 Contacts’ is a key element of the alleged confusion, so we want both the test and control to do that.” (Van Liere, Tr. 3036).

#### **Response to Proposed Finding No. 1569**

This proposed finding is erroneous and misleading because it is internally inconsistent. As Dr. Van Liere testified, “the searching on ‘1-800 Contacts’ is a *key element of the alleged confusion.*” (Van Liere, Tr. 3036 (emphasis added).) Since that is the case, a search using the “1-800 Contacts” trademark should *only* be a part of the test condition because, as Dr. Van Liere

pointed out, “the test and the control should be identical *except for the allegedly confusing elements.*” (Van Liere, Tr. 3035 (emphasis added).)

A search using the “1-800 Contacts” trademark cannot also be a “frame of reference,” as Dr. Van Liere has asserted. In the context of likelihood-of-confusion surveys in trademark cases, a “frame of reference” refers to “the group whose associations or attitudes are at issue.” *Centaur Commc’ns, Ltd. v. A/S/M Commc’ns, Inc.*, 830 F.2d 1217, 1223 (2d Cir. 1987). In this case, the “frame of reference,” according to Dr. Jacoby, would be users who are potential purchasers of contact lenses online. (Jacoby, Tr. 2250.) To be useful, a survey must measure the likelihood of confusion from sponsored advertisements that appear in response to a search for “1-800 Contacts,” from the perspective of users who use and buy contact lenses online.

1570. Dr. Jacoby also contends that Dr. Van Liere’s control condition was improper because it has fewer links than the test condition. (Jacoby, Tr. 2225-26). This contention is invalid.

#### **Response to Proposed Finding No. 1570**

This proposed finding is simply naked assertion unsupported by a single piece of evidence and contradicted by the weight of the evidence, for the reasons explained below in Responses to Proposed Findings Nos. 1571–1573.

1571. By making the test and control stimuli identical except for the presence of the sponsored ads, the test stimuli have overall more links on the page. (Van Liere, Tr. 3030-31). Having fewer links in the control condition does not affect the reliability of the study. (Van Liere, Tr. 3030-31). As Dr. Van Liere explained, both stimuli are “realistic replications of what those search results pages would look like if you had one that had no sponsored links and one that had a typical number of sponsored links, so in that sense, both the test and the control replicate marketplace conditions.” (Van Liere, Tr. 3030-3031; *compare* RX 730-0011 (control stimulus) *with* RX 310-0634-35 (actual search result), RX 310-0636-37 (actual search result)). Because of this, including fewer links in the control condition enhanced the realism, and therefore the reliability, of the study.

**Response to Proposed Finding No. 1571**

This proposed finding is unsupported and contrary to the weight of the evidence for the reasons set forth above in Responses to Proposed Findings Nos. 1486, 1520, 1527, and 1532, and the reasons set forth below.

As Dr. Jacoby explained, if the allegedly confusing elements are sponsored advertisements from the settling parties *that appear in response to searches using 1-800 Contacts trademarks as the search term*, then the “non-infringing alternative to the test stimuli,” to use the wording of Proposed Finding No. 1532, should have included sponsored advertisements that appear in response to searches that do *not* use 1-800 Contacts trademarks—for example, searches using generic terms like “contact lenses” or searches using the brands or names of the settling parties (which, incidentally, Dr. Van Liere used to find, for his test stimuli, sponsored advertisements that no longer appear in response to searches for “1-800 Contacts” because of the settlement agreements). (CX8011 at 004 (¶ 4) (Jacoby Rebuttal Expert Report) (“As I understand it, the issue is *not* that these competitor advertisements are themselves confusing, but that they become confusing in the *context* of consumers having used “1-800 Contacts” as the search term.”); Van Liere, Tr. 3017 (“so what we did is we did a variety of searches on ‘contact lenses’ or generic terms, and then we also searched on the brands of the individual companies”) & Van Liere, Tr. 3018 (“As I mentioned earlier, we basically searched on their brands or their names and on generic terms like ‘contact lenses’ and see what did those ads look like and how did they come up.”).) After all, it is the use of “1-800 Contacts” as a search query that is the gravamen of 1-800 Contacts’ claim of trademark infringement. Stated differently, it is the use of 1-800 Contacts’ trademark as the search term that defines and distinguishes the allegedly infringing condition being tested for likelihood of confusion.

The test and control stimuli in Dr. Van Liere’s study therefore should have differed based on the search query (e.g., “1-800 Contacts” vs. “contact lenses”), and not on the presence or absence of sponsored advertisements appearing in response to the query. *See also* CX9044 (Tushnet, Dep. at 201-202). The removal of all sponsored advertisements from the control stimulus also contributed to the study’s failure to replicate real-world marketplace conditions. (*Compare* RX0730 at 0010 (Van Liere Expert Report, Exhibit C) (Google control stimulus in the study questionnaire) *with* CX8011 at 057 (Jacoby Rebuttal Expert Report) (actual Google SERP conducted March 7, 2017 showing 1-800 Contacts ad at the top of the page in response to search query “1-800 Contacts”). Respondent’s reliance on RX0310 should be rejected because RX0310 was admitted for non-hearsay purposes only, and “not to show the results of a search.” (JX0002-A at 043; Hamilton, Tr. 456 (discussing similar document, RX0318)).

Even assuming that Dr. Van Liere could properly remove all sponsored advertisements from the control stimuli, Dr. Jacoby explained why it was erroneous to have a discrepancy between the number of sponsored and organic links in the test stimulus and the number of organic links in the control stimulus: “It’s analogous to a basketball player going up to the line and shooting baskets, and if he shoots 20 baskets, you count the misses, and then he goes and shoots ten minutes later 14 baskets and you count the misses, and you’re comparing these two. That’s ridiculous. You got to compare 20 to 20. You can’t say, oh, he made fewer misses when he was only shooting 14 baskets. Yes, dummy, he was only making – he was making fewer because he only shot 14 baskets.” (Jacoby, Tr. 2225–26.)

	<b>Test Stimulus</b>	<b>Control Stimulus</b>	<b>Difference</b>

<b>Google Condition</b>	20 organic and sponsored links – RX0735 at 0015-17	14 organic links – RX0735 at 0015-0016	6 additional links (sponsored ads) in the test stimulus
<b>Yahoo! Condition</b>	19 organic and sponsored links – RX0735 at 0016-0017	11 organic links – RX0735 at 0016	8 additional links (sponsored ads) in the test stimulus

Indeed, the opportunities for countable “missed baskets” were greater in the test stimulus than the control stimulus for both the Google and Yahoo! conditions. (Jacoby, Tr. 2228). As Dr. Van Liere noted in his expert report, in the Google condition, there were six opportunities (sponsored links) out of a total of twenty links for respondents to be counted as confused in the test stimulus, compared with only three or four opportunities (organic news links) out of a total of fourteen links in the control stimulus. (RX0735 at 0017–0018 (¶¶ 30 & 31) (Van Liere Expert Report).) In the Yahoo! condition, the difference was even more dramatic—eight opportunities (sponsored links) out of a total of seventeen links for respondents to be counted as confused in the test stimulus, compared with only three opportunities (organic news links) out of a total of nine links in the control stimulus. (RX0735 at 0017–0018 (¶¶ 30 & 32) (Van Liere Expert Report).)

1572. Dr. Jacoby’s criticism would only have weight if respondents were randomly clicking on links. But the survey data show that respondents were not randomly clicking on links; the data show respondents were looking at the control search results and reacting to the content on the page. (Van Liere, Tr. 3031-3035).

#### **Response to Proposed Finding No. 1572**

This proposed finding is misleading and inaccurate for the reasons described in Response to Proposed Finding No. 1571. Further, Dr. Van Liere was testifying about the data set forth in

Table 2 of his expert report, which is a calculation of the average number of links clicked by respondents in the test group and the control group. (Van Liere, Tr. 3034; RX0735 at 0020 (¶ 37) (Van Liere Expert Report).) The average number of links clicked does not respond to Dr. Jacoby's criticism, as set forth in Complaint Counsel's Response to Proposed Finding No. 1571. Even if respondents were making roughly the same number of clicks with respect to the test and control stimuli, the fact remains that the test stimulus presented more links that would have resulted in countable confusion if clicked than did the control stimulus. Dr. Van Liere's reasoning therefore presents a non sequitur.

1573. The survey data show that the average number of links clicked by respondents in the test group and the control group were very close. (RX 735-0020). For instance, respondents in the Google test group clicked on an average of 1.8 links in response to the Source Question and those in the Google control group clicked on an average of 1.7 links for that question. (RX 735-0020; Van Liere, Tr. 3034). These data show that having fewer links in the control stimulus than the test stimulus did not affect the reliability of the study. (Van Liere, Tr. 3031-3035).

#### **Response to Proposed Finding No. 1573**

This proposed finding is misleading and inaccurate for the reasons described in Complaint Counsel's Response to Proposed Finding Nos. 1571 and 1572. Dr. Van Liere failed to exercise quality control in calculating the average links clicked, as Dr. Jacoby flagged in his rebuttal expert report. (CX8011 at 023–024 (¶ 34(a)) (Jacoby Rebuttal Expert Report).)

1574. Dr. Jacoby contended that Dr. Van Liere's test and control stimuli were improper because they did not include an advertisement for 1-800 Contacts. (Jacoby, Tr. 2231-2232). This contention is incorrect.

#### **Response to Proposed Finding No. 1574**

The second sentence of this proposed finding ("This contention is incorrect.") is a naked assertion unsupported by a single piece of evidence and contrary to the weight of the evidence for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1486, 1522, 1525, 1535, and 1571, and those set forth in Responses to Proposed Findings Nos. 1575 to 1577.

1575. Dr. Jacoby's contention assumes that (1) 1-800 Contacts should be required in the but-for world to pay to have its ads placed in response to other advertisers bidding on its trademarks as keywords and (2) the search engines would always place 1-800 Contacts ads in response to queries using its trademarks. Neither assumption is valid.

**Response to Proposed Finding No. 1575**

This proposed finding lacks any supporting citations to the record and, in any event, it is unsupported and contradicted by the weight of the evidence in the record, as shown below.

Lacking any supporting citations, this proposed finding is also vague with respect to its reference to the "but-for world."

During cross-examination by counsel for 1-800 Contacts, Dr. Jacoby was asked, "[I]f 1-800 Contacts had its way and there were no rival ads that could appear, what would the search engine results page look like in that but-for world?" He answered, "I think if 1-800 had its way, there would be no other sponsored ads *other than a sponsored link to 1-800 Contacts.*" (Jacoby, Tr. 2330 (emphasis added).) Counsel for 1-800 Contacts did not challenge Dr. Jacoby's answer.

Indeed, sample, real-world search engine results pages performed by 1-800 Contacts confirm that a sponsored advertisement for 1-800 Contacts appears in response to a search for 1-800 Contacts' trademarks, even if no other sponsored ads appear. (*See, e.g.*, RX0314 at 0001 (February 2017 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts) (1-800 Contacts' ad is listed first among three ads in response to a Google search for "1 800 Contacts"), at 0003 (1-800 Contacts' ad is listed first among two ads in response to a Google search for "1800 Contacts"), at 0005 (1-800 Contacts' ad appears as the only ad in response to a Google search for "1800Contacts"), at 0007 (1-800 Contacts' ad appears as the only ad in response to a Google search for "1-800-Contacts"), at 0009 (1-800 Contacts' ad appears as the only ad in response to a Google search for "1-800 Contacts"), at 011 (1-800 Contacts' ad is listed first among four ads at the top left of the page in response to a Yahoo! search

for “1 800 Contacts”), at 015 (1-800 Contacts’ ad is listed first among four ads at the top left of the page in response to a Yahoo! search for “1800 Contacts”), at 018 (1-800 Contacts’ ad is listed first among five ads at the top left of the page in response to a Yahoo! search for “1800Contacts”), at 022 (1-800 Contacts’ ad is listed first among four ads at the top left of the page in response to a Yahoo! search for “1-800-Contacts”), at 026 (1-800 Contacts’ ad is listed first among four ads at the top left of the page in response to a Yahoo! search for “1-800 Contacts”).

During direct examination by 1-800 Contacts’ counsel, Dr. Van Liere testified to a *different* but-for world than the one that Dr. Jacoby had addressed: “So for the test we want to put ads that represent a but-for world in which the parties that are currently part of the settlement agreements would have ads that may appear in response to a 1-800 Contacts search.” (Van Liere, Tr. 3017.) In other words, this is a but-for world in which there are *no settlement agreements in place*. (Van Liere, Tr. 3037 (“[W]e’re being asked to measure confusion in this case in a but-for world in the future where the agreements weren’t in place and the sponsored ads of the competitors are now appearing.”).)

With respect to Dr. Van Liere’s but-for world, the evidence of record consisting of testimony from current and former 1-800 Contacts employees, as well as contemporaneous documents, contradicts Dr. Van Liere’s assertion that 1-800 Contacts would *not* have bid on its own trademark keywords and sought to have its own sponsored advertisement appear at the top of the list of any sponsored ads. 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).) 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).)

According to a February 2015 internal 1-800 Contacts marketing document, it was 1-800 Contacts' goal for its advertisement to { [REDACTED] } for { [REDACTED] } (CX0296 at 035, *in camera*.) Referring to this marketing document, 1-800 Contacts' CEO, Bryan Bethers, testified { [REDACTED] } (Bethers, Tr. 3787-3788 (referencing CX0296 at 035), *in camera*.) According to Laura Schmidt, 1-800 Contacts' marketing director, 1-800 Contacts' "goal" was always to have its advertisement appear in the first position in response to a search for one of its trademarks. (CX9032 (L. Schmidt, Dep. at 092).) Notably, Ms. Schmidt 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).)

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).) His testimony is consistent with an internal 1-800 Contacts marketing email that 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.) Mr. Craven also testified that 1-800 Contacts typically bids to be in the first position on its trademark terms. (CX9020 (Craven, Dep. at 124 (“We wanted to be number one.”).) 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.). Mr. Craven testified that “at 1-800, we tried to be the only advertiser for our own trademark keywords.” (CX9002 (Craven, IHT at 122).)

1576. As Dr. Van Liere explained, “we’re being asked to measure confusion in this case in a but-for world in the future where the agreements weren’t in place and the sponsored ads of the competitors are now appearing. We want to test that, whether those ads themselves are confusing, whether 1-800 Contacts chose to buy their way to the top of or into the sponsored links or not. So in this case and in prior of these cases I’ve worked on, the basic idea is you want to measure the impact of those ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area, so that’s why we’ve designed these, both in other cases and here, without the trademark owner’s sponsored link in the pool that’s tested.” (Van Liere, Tr. 3037-3038; *see also* CX 9049 (Van Liere, Dep. at 187-188 (“confusion has to be measured whether 1-800 Contacts is forced to purchase its own names as the first sponsored link or it is not.”); (Van Liere, Tr. 3214 (“After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off. But it wasn’t a unilateral decision by counsel . . . it was never unilateral. I discussed at some length with them what we’ve done in prior cases and why it wasn’t necessarily appropriate to assume that the trademark owner had to purchase the top spot or one of the upper links as an assumption in how you design the test and control conditions.”))).

#### **Response to Proposed Finding No. 1576**

As already noted in Complaint Counsel’s Response to Proposed Finding No. 1575, the evidence of record consisting of testimony from current and former 1-800 Contacts employees, as well as contemporaneous documents, contradicts Dr. Van Liere’s construction of a but-for world in which the challenged settlement agreements are not in place and sponsored advertisements from 1-800 Contacts’ competitors appear in response to searches for 1-800 Contacts’ trademarks. (*See*

*generally* Bethers, Tr. 3787-3788; CX0296 at 035 (1-800 Contacts February 2016 Affiliate and Paid Search Overview Presentation), *in camera*; CX9028 (Roundy Dep. at 086-088); CX9031 (C. Schmidt Dep. at 125-127); CX9020 (Craven at 123-125).) By intentionally removing an advertisement for 1-800 Contacts from the set of sponsored links in his test stimulus, Dr. Van Liere failed to replicate real-world conditions in his control and test stimuli and increased the likelihood that survey respondents would be confused by the presence of sponsored links in response to a search for 1-800 Contacts' trademarks in his test stimulus. (Jacoby, Tr. 2230–2234; CX8011 at 011–012 (¶¶ 21–22) (Jacoby Rebuttal Expert Report).)

1577. Moreover, given the complexities of the search engine auctions, it is not appropriate to assume that the search engines would always place 1-800 Contacts ads even if 1-800 Contacts bid on its trademarks as keywords. In fact, although 1-800 Contacts has bid on its own trademarks as keywords, its ads do not always appear in response to searches using those trademark terms. (*See, e.g.*, RX 310-0318, RX 310-0634-35, RX 310-0636-37, RX 310-0640-41, RX 311-0007-08, RX 311-0009-10, RX 311-0034-35, RX 311-0426-27, and RX 311-0579-80).

#### **Response to Proposed Finding No. 1577**

This proposed finding is misleading in two respects. First, 1-800 Contacts proposes this finding as purported support for Dr. Van Liere's construction of a but-for world in which the challenged settlement agreements are not in place and *only* sponsored advertisements from 1-800 Contacts' competitors appear in response to searches for 1-800 Contacts' trademarks. The Google search engine results pages cited as examples in this proposed finding, however, are not a product of Dr. Van Liere's *but-for world*. Rather, they reflect the *current world* in which the challenged agreements prevent sponsored advertisements from 14 of 1-800 Contacts' competitors from appearing in response to searches for 1-800 Contacts' trademarks. Accordingly, in all but one of these cited examples, there are no ads whatsoever, from 1-800 Contacts or its competitors. (The lone exception is an ad for Lenspure.com, a company that is not bound by an agreement with 1-800 Contacts, which appears at the *bottom* of the search results page. RX0311 at 0427.)

Second, the cited examples of Google search engine results pages reflect the fact that “[m]ost searches ... are ones where no ads appear.” (Juda, Tr. 1080–1081). Google may choose not to show any ads in response to some searches if “it doesn’t appear to make business sense as well as quality sense from a user perspective to do so.” (Juda, Tr. 1081.) That fact, however, does not justify Dr. Van Liere’s construction of a but-for world in which the challenged settlement agreements are not in place and *only* sponsored advertisements from 1-800 Contacts’ competitors appear in response to searches for 1-800 Contacts’ trademarks. If Google determines that ads can be helpful to consumers because “the inherent task of a user is commercial in nature,” (CX9019 (Juda, Dep. at 23)), then one would expect Google to show an advertisement from 1-800 Contacts in addition to advertisements from its competitors.

1578. Dr. Jacoby contends that Dr. Van Liere should have considered respondents’ verbatims in coding for confusion. (Jacoby, Tr. 2237-2238). This contention is not correct.

#### **Response to Proposed Finding No. 1578**

The second sentence of this proposed finding (“This contention is incorrect.”) is a naked assertion unsupported by a single piece of evidence, and contrary to the weight of the evidence for the reasons set forth in Complaint Counsel’s Response to Proposed Finding No. 1553, and those set forth in Responses to Proposed Findings Nos. 1579 to 1581.

1579. Dr. Van Liere counted respondents as confused or not confused based their click behavior not on the verbatims for a number of reasons: (1) any effects of respondents who are inattentive or guessing is netted off because respondents are randomly assigned to the test and control conditions; (2) respondents vary in their ability to articulate their reasons why they have an opinion; (3) doing so would require the researcher “to impose too much of their own judgment on who they’re going to count as confused or not.” (Van Liere, Tr. 3056-3058).

#### **Response to Proposed Finding No. 1579**

This proposed finding is misleading and inaccurate for a number of reasons. First, Dr. Van Liere relies principally on being able to “net off” any effects of inattentiveness and guessing on the part of respondents by subtracting the levels of confusion observed in the control condition from

the levels of confusion observed in the test condition. (Van Liere, Tr. 3056 (“Well, in a study like this, there probably is respondents who are inattentive or guessing, but we’re using a test condition and a control condition, so the rate at which people are inattentive or guessing or responding to demand characteristics is in both the test and the control at whatever the rate is in the population.”) & 3058 (“Well, the issue in a study like this where we’re – we’re using a proper test and a proper control to net them off, using the verbatims to determine whether the respondent is actually confused or not is a subjective judgment.... To the extent their verbatim suggests that they’re guessing and there’s noise, then that’s in the control, and we’re netting that effect off.”). As Dr. Jacoby testified, however, Dr. Van Liere designed a flawed control group that rendered his “net confusion” results meaningless. (Jacoby, Tr. 2227–2229; CX8011 at 009–010 (¶¶ 17–19) (Jacoby Rebuttal Expert Report)). Dr. Van Liere agreed with Dr. Jacoby that the point of having a control condition is to isolate “the characteristic whose influence is being assessed.” Professor Shari Diamond. Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC RESEARCH 359, 399 (Federal Judicial Center 3d ed. 2011). But he failed to set up the control condition so that it would capture, and “net off,” any inattentiveness and guessing that would also be present in the test condition.

Second, Dr. Jacoby testified that verbatims take on greater importance and significance when confusion levels are as high as those observed in Dr. Van Liere’s study. (Jacoby, Tr. 2198–99, 2235–37, 2344–45; CX8011 at 019–020 (¶ 33(a)) (Jacoby Rebuttal Expert Report).) If the confusion level is already within a de minimis range, then it is not worth the effort to use verbatims to reduce it further. When the confusion level is as high as the 20-to-30 percent range, as Dr. Van Liere observed, then the verbatims need to be reviewed, and the confusion level adjusted downward, as appropriate.

Third, quoted in full for completeness and accuracy, Dr. Van Liere's concern is that "you don't want to – the researcher essentially to impose too much of their own judgment on who they're going to count as confused or not, so we use it as a quality control mechanism in a study like this, but we don't actually try and fully interpret what a respondent meant by a given verbatim." (Van Liere, Tr. 3058.) The examples of verbatim responses set forth in Dr. Jacoby's rebuttal expert report show that even the use of verbatims as a "quality control mechanism" should have caused Dr. Van Liere to question at least some of the responses. It does not require any interpretation to see that verbatims like "looks good" or "it's nice" are plainly nonresponsive to the question "You said that you think that the following link would take you to the website of the company that you searched for. What makes you say that?" (Jacoby, Tr. 2237–2238; CX8011 at 020–021 (¶ 33(a) n.39) (Jacoby Rebuttal Expert Report).) *See also* Complaint Counsel's Response to Proposed Finding No. 1553.

1580. In fact, Dr. Jacoby admitted that "it is much easier for individual respondents to tell us their state of mind as opposed to why or how they came to be in that state of mind." (Jacoby, Tr. 2341). He further admitted that "there is considerable empirical evidence, both from cognitive, consumer and other research psychologists, that people have an inability to observe directly or identify how their own minds work." (Jacoby, Tr. 2341).

#### **Response to Proposed Finding No. 1580**

This proposed finding of fact mischaracterizes Dr. Jacoby's testimony. For completeness and accuracy, these out-of-context quotes should be considered in conjunction with related testimony from Dr. Jacoby. Specifically, Dr. Jacoby went on to say, "You've read my writings correctly. And my writings further say, so don't pay attention to that, but do pay attention to gibberish. Those things you really have to adjust and take into account." (Jacoby, Tr. 2341.)

An example of what Dr. Jacoby refers to as "gibberish" would be the responses "vbuhnji" and "yuhij." (CX8011 at 021 & 025 (¶¶ 33(a) n.39 & 34(c) n.45) (Jacoby Rebuttal Expert Report).) Dr. Jacoby further testified that there are nonresponsive answers that do not require a

researcher to attempt to divine a respondent's state of mind: "And if they type something that's nonresponsive, as I gave examples in my earlier testimony this morning, they could have given any response. It could have been correct or in – not incorrect – not correct, but if it was responsive to the question, you have to take a look at each response. But if they give things that are totally nonresponsive, like 'nice,' et cetera – I gave examples and I gave 30 examples in my rebuttal report – those things you take out." (Jacoby, Tr. 2342.) Dr. Jacoby was then asked if he is assuming that an answer like "looks nice" is nonresponsive, and he replied, "No, I don't assume. I know. And you know that doesn't answer the question. But there are other examples of – in a footnote in my rebuttal report, and you can see how clearly nonresponsive they are to the question." (Jacoby, Tr. 2342; *see* CX8011 at 020–21 & 025 (¶¶ 33(a) n.39 & 34(c) n.45) (Jacoby Rebuttal Expert Report).)

1581. Accordingly, Dr. Jacoby has written, "it is an illusion to think that answers respondents give to questions seeking to measure their mental processes, such as whether or not they were confused, what caused them to be confused, it's an illusion to think that those are reliable indicators of the actual influence of the stimuli on the responses." (Jacoby, Tr. 2341).

#### **Response to Proposed Finding No. 1581**

This proposed finding of fact mischaracterizes Dr. Jacoby's testimony. For completeness and accuracy, this out-of-context quote should be considered in conjunction with related testimony from Dr. Jacoby. Specifically, Dr. Jacoby went on to say, "You've read my writings correctly. And my writings further say, so don't pay attention to that, but do pay attention to gibberish. Those things you really have to adjust and take into account." (Jacoby, Tr. 2341.)

An example of what Dr. Jacoby refers to as "gibberish" would be the responses "vbuhnji" and "yuhij." (CX8011 at 021 & 025 (¶¶ 33(a) n.39 & 34(c) n.45) (Jacoby Rebuttal Expert Report).) Dr. Jacoby further testified that there are nonresponsive answers that do not require a researcher to attempt to divine a respondent's state of mind: "And if they type something that's

nonresponsive, as I gave examples in my earlier testimony this morning, they could have given any response. It could have been correct or in – not incorrect – not correct, but if it was responsive to the question, you have to take a look at each response. But if they give things that are totally nonresponsive, like ‘nice,’ et cetera – I gave examples and I gave 30 examples in my rebuttal report – those things you take out.” (Jacoby, Tr. 2342.) Dr. Jacoby was then asked if he is assuming that an answer like “looks nice” is nonresponsive, and he replied, “No, I don’t assume. I know. And you know that doesn’t answer the question. But there are other examples of – in a footnote in my rebuttal report, and you can see how clearly nonresponsive they are to the question.” (Jacoby, Tr. 2342; *see* CX8011 at 020–21 & 025 (¶¶ 33(a) n.39 & 34(c) n.45) (Jacoby Rebuttal Expert Report).)

1582. Dr. Jacoby contended that Dr. Van Liere improperly weighted the Yahoo! results in his survey. (Jacoby, Tr. 2239-2240). But Dr. Van Liere reported his Google and Yahoo! results separately and then a combined number for the respondents in the study. (RX 735-0021). As Dr. Van Liere explained, “[W]hen you have multiple conditions, multiple versions of a product, multiple versions of the -- a trademark on different types of products, so on and so forth, you just report the results for the conditions that you tested and then -- and then you give an overall result, so that's simply what I did here.” (Van Liere, Tr. 3074).

### **Response to Proposed Finding No. 1582**

This proposed finding is inaccurate and misleading because Dr. Van Liere’s quoted explanation does not in fact address Dr. Jacoby’s critique. Dr. Van Liere’s explanation might have some traction if he had conducted *two separate and independent confusion studies*—one involving a select number of verified Google search engine users and another involving a select number of verified Yahoo! search engine users. But he did not do that. Rather, Dr. Van Liere conducted *a single study* involving 689 respondents, who were qualified by applying a set of screening questions to a representative random sample of adult consumers in the U.S., who were part of Critical Mix’s consumer panel. (RX0735 at 0009 & 0020 (¶¶ 21, 37) (Van Liere Expert Report).)

As noted already in Complaint Counsel's Response to Proposed Finding No. 1536, Dr. Van Liere assigned the qualified respondents to either the Google or Yahoo! group by applying the following rule:

- (1) If a respondent answered question S6 ("Which of these search engines, if any, have you used in the past 12 months?") and question S7 ("And which of these search engines, if any, do you think you will use in the next 12 months?") by selecting Google, but not Yahoo!, in response to at least one of the questions, he or she was assigned to the Google group.
- (2) If a respondent answered question S6 ("Which of these search engines, if any, have you used in the past 12 months?") and question S7 ("And which of these search engines, if any, do you think you will use in the next 12 months?") by selecting Yahoo!, but not Google, in response to at least one of the questions, he or she was assigned to the Yahoo! group.
- (3) If a respondent answered question S6 ("Which of these search engines, if any, have you used in the past 12 months?") and question S7 ("And which of these search engines, if any, do you think you will use in the next 12 months?") by selecting Google in response to at least one of the questions and Yahoo! in response to at least one of the questions, he or she was assigned randomly to either the Google or the Yahoo! group.

(RX0730 at 0004 (Van Liere Expert Report, Exhibit C (study questionnaire) (questions S6 and S7) & 0005 ("search engine condition assignment: if respondent selects more than one search engine, assign randomly to either Google or Yahoo").)

In other words, if a respondent selected more than one search engine, she was randomly assigned to either the Google or Yahoo! group. (Van Liere, Tr. 3127; RX0730 at 0005 (Van Liere

Expert Report, Exhibit C (study questionnaire)); RX0735 at 0012 (¶24, n.13) (Van Liere Expert Report).) For example, if a respondent selected “Google and Bing” in response to question S6 (“Which of these search engines, if any, *have you used* in the past 12 months?”) (emphasis added) and selected “Google, Bing, and Yahoo” in response to question S7 (“And which of these search engines, if any, *do you think you will use* in the next 12 months?”) (emphasis added), she could be randomly assigned to the Yahoo! group, even though she had used only the Google and Bing search engines in the past and was *only thinking of using* the Yahoo! search engine as well in the future. (RX0730 at 0004 (Van Liere Expert Report, Exhibit C (study questionnaire) (questions S6 and S7) (emphases added) & 0005 (“search engine condition assignment: if respondent selects more than one search engine, assign randomly to either Google or Yahoo”). As Dr. Jacoby testified, 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).)

As already explained in Complaint Counsel’s Response to Proposed Finding No. 1564, Dr. Van Liere then compounded his error in assignment methodology by failing to weight appropriately his results from the Google and Yahoo! groups to reflect real-world usage of the two search engines that he purported to test. (Jacoby, Tr. 2238–2243); CX8011 at 023 (¶¶ 33(e)) (Jacoby Rebuttal Expert Report).) His search engine condition assignment rule produced *roughly equal numbers* of respondents designated as Google and Yahoo! users, (347 for Google and 342 for Yahoo!), (Van Liere, Tr. 3118; CX9049 (Van Liere, Dep. at 99)), even though these respondents were drawn from a *single* Critical Mix panel intended to be *a representative random sample of adult consumers in the U.S.*, (RX0735 at 0009 & 0020 (¶¶ 21, 37) (Van Liere Expert Report)). As such, the allocation of the respondents to the Google and Yahoo! conditions should have more closely reflected the proportional market shares of the search engines based on the

number of queries (Google (65%) and Yahoo! (14%)) or some other measure of market share. (Van Liere, Tr. 3103–3106; RX0735 at 022 (¶ 45) (Van Liere Report).) It did not, however. Dr. Van Liere therefore should have compensated for this error by weighting the results in accordance with the search engine market shares. (Jacoby, Tr. 2242 (“And once he uses [the Yahoo! search engine], he’s got to allocate people roughly evenly to each different search engine. But even if he didn’t do that and had equal numbers to each of the search engines he tested, he’s got to allocate the results proportionally, if he wants to be honest.”).)

In summary, Dr. Van Liere’s explanation treated the Google and Yahoo! groups as though they were two separate and independent data sets. But that is not the case here. The respondents in both groups were selected from a single panel that was supposed to be a representative random sample of adult consumers in the U.S. As such, their composition should have reflected the relative popularity of the Google, Bing, and Yahoo! search engines among users in the U.S.

1583. Dr. Jacoby’s suggestion that the results should have been weighted by the search engine’s share of search queries is wrong; those data do not reflect the shares of users, which would be the relevant measure. (Van Liere, Tr. 3119-3120). Moreover, even if appropriate, Dr. Jacoby’s weighting using search results yields a net confusion of 15.68%, which is still significant. (Jacoby, Tr. 2240-2241).

#### **Response to Proposed Finding No. 1583**

The first sentence of this proposed finding lacks support in the record and should be disregarded because the cited trial testimony from Dr. Van Liere was stricken by the Court as nonresponsive. (Van Liere, Tr. 3120.) Dr. Van Liere agreed that if he had weighted the results from his Google and Yahoo! respondent groups in accordance with the relative market shares of Google and Yahoo! in the search engine results pages market (by whatever measure), that would have reduced the net confusion down to some degree. (Van Liere, Tr. 3121.)

The second sentence of this proposed finding is inaccurate and misleading because it purports to attribute the statement that “a net confusion of 15.68% ... is still significant” to Dr.

Jacoby, when that was not his testimony at all. Dr. Jacoby was merely testifying that, *assuming* Dr. Van Liere's "net confusion" numbers were valid and reliable (which they were not for reasons discussed previously), if Dr. Van Liere had properly weighted his Google and Yahoo! results, it would have reduced the net confusion rate from 20.6% to at most 15.68%. (Jacoby, Tr. 2242–43 ("Well, to – I think I just answered that, but basically what he does is comes up with an inflated 20.6 percent estimate when, if he wanted to be honest, at most it would be 15.68.")) At no point did Dr. Jacoby agree that a net confusion rate of 15.68% was valid and significant, and that is not surprising given all of the other errors he had identified in Dr. Van Liere's study. (Jacoby, Tr. 2242 ("[T]his is rigging the system, stacking the deck. And it's only one of a number of things in his study that does so.")).

1584. Dr. Jacoby contended that certain of respondents in Dr. Van Liere's study were improperly put in the Yahoo! condition. (Jacoby, Tr. 2243-2244). But this issue had no effect on the reliability of Dr. Van Liere's study. As Dr. Van Liere explained, "We had an issue where a small number of people were assigned to the wrong Google versus Yahoo condition, but if you remove those respondents, they don't change my overall results or my opinions. And the individuals were equally randomly assigned to the test and the control conditions, and as a consequence, if they had had an effect, it was equally affecting both the test and the control, so therefore, it didn't change anything about my opinions." (Van Liere, Tr. 3096-3097).

#### **Response to Proposed Finding No. 1584**

This proposed finding is inaccurate and misleading because Dr. Van Liere's quoted explanation does not in fact address Dr. Jacoby's critique. As the transcript makes clear, Dr. Van Liere was referring to a programming error that resulted in the assignment of some respondents to the Yahoo! version of his survey, even though these respondents had never used the Yahoo! search engine. (Van Liere, Tr. 3126.) As Dr. Van Liere testified, the programming error resulted in 16 respondents being erroneously assigned to the Yahoo! test condition and 16 respondents being erroneously assigned to the Yahoo! control condition. (Van Liere, Tr. 3126–3127.) The error

therefore amounted to 32 erroneously respondents out of a total of 342 respondents in the Yahoo! group, or almost ten percent. (Van Liere, Tr. 3127.)

Dr. Jacoby's critique, however, related to a broader problem with Dr. Van Liere's assignment methodology, which is already set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1536 and 1582. As reflected in his study questionnaire, Dr. Van Liere posed two screening questions (S6 and S7) to prospective respondents, ostensibly to identify consumers that used either the Google or the Yahoo! search engine. (RX0730 at 0004 (Van Liere Expert Report, Exhibit C (study questionnaire) (questions S6 and S7).)<sup>1</sup> Dr. Van Liere's screening questions were problematic, however, because although question S6 ("Which of these search engines, if any, have you used in the past 12 months?) should have identified past users of the Google or Yahoo! search engine, question S7 ("And which of these search engines, if any, do you think you will use in the next 12 months?") was worded in a wishy-washy manner that failed to identify committed future users of the Google or Yahoo! search engine. As a result, a prospective respondent who did not identify either Google or Yahoo! in response to question S6 but chose Yahoo! and AOL in response to question S7 would have been qualified and assigned to the Yahoo! group even though she had never used the Yahoo! search engine and might not necessarily use Yahoo! in the future. (Jacoby, Tr. 2244 ("There are numerous cases of individuals who had not used Yahoo, didn't say they would use Yahoo, who were assigned to take Yahoo.")).

Furthermore, for a prospective respondent who identified some combination of Google and Yahoo! in their responses to question S6 or question S7, Dr. Van Liere employed a search engine

---

<sup>1</sup> (Dr. Jacoby has raised a separate issue as to why Dr. Van Liere chose to test users of the Yahoo! search engine but not the Bing search engine, which is more popular, but one can set that issue aside for the moment. (Jacoby, Tr. 2240 ("If we're just going to go further, why not test Bing at 21 percent."), 2242 ("But he has to explain why he [used the Yahoo! search engine] and not also include Bing."), 2246 ("Again, my question is why not Bing because Bing is so much larger, but all right.")).

condition assignment rule that randomly assigned her to either the Google or Yahoo! group. (RX0730 at 0005 (Van Liere Expert Report, Exhibit C (study questionnaire) (“search engine condition assignment: if respondent selects more than one search engine, assign randomly to either Google or Yahoo”).) Dr. Jacoby testified that he had concerns about this rule because a respondent that identified herself as a past user of Google and Bing in response to question S6 could still be assigned to the Yahoo! group if she identified Yahoo! as a search engine that she *thinks* she will use in the future in response to question S7. (Jacoby, Tr. 2246.)

In summary, Dr. Van Liere’s explanation of the programming error did not address the broader concerns raised by Dr. Jacoby about Dr. Van Liere’s screening questions and assignment methodology.

1585. Dr. Jacoby contended that Dr. Van Liere improperly excluded persons who wear contact lenses for distance vision but not for reading. (Jacoby, Tr. 2248). But there is no evidence in the record that anyone wears contact lenses for distance vision and then takes them out for reading. Dr. Jacoby’s contention is completely unsupported.

#### **Response to Proposed Finding No. 1585**

This proposed finding mischaracterizes the nature of Dr. Jacoby’s critique and fails to respond to it. Dr. Jacoby testified that Dr. Van Liere used a screening question S3 (“Do you normally wear glasses or contact lenses when you read?”) that improperly screened out any prospective respondents who answered either “no” or “don’t know.” (Jacoby, Tr. 2248; CX8011 at 0015 (¶ 28) (Jacoby Rebuttal Expert Report); *see* RX0730 at 0003 & 0013–0014 (Van Liere Expert Report, Exhibit C (study questionnaire).) There is no dispute that this screening question had the effect of excluding from Dr. Van Liere’s study those respondents who wear glasses or contact lenses for other reasons besides reading—for example, to correct distance vision. (*See* Van Liere, Tr. 3142–3143 (“Q: Okay. So if a potential respondent wore glasses or contact lenses for distance vision, but they did not wear – but they did not – excuse me – normally wear glasses or

contact lenses for reading, they would have been screened out from the survey if they answered no; correct? A: That's correct.”.) Dr. Van Liere himself acknowledged that “it's possible” his screening question “excluded a group of individuals who normally wear glasses or contacts for distance vision but do not do so for reading purposes,” and he “[doesn't] have specific data” on “how large or small that group might be.” (Van Liere, Tr. 3147.)

Dr. Jacoby therefore raised a valid critique—screening question S3, as a result of its wording, had the effect of excluding a group of respondents who should have been part of the relevant universe of consumers who use contact lenses and would buy them on the internet. (Jacoby, Tr. 2248.) Regardless of how large or small that excluded group may be, the fact remains that Dr. Van Liere ended up with an overly narrow universe of respondents and he therefore could not extrapolate his results to the entire population of contact lens users and prospective purchasers. (Jacoby, Tr. 2248.) Dr. Jacoby did not need to come forward with evidence of specific Critical Mix panel members who were excluded from Dr. Van Liere's study as a result of question S3—not when there is *no dispute* between him and Dr. Van Liere that question S3 had that exclusionary effect. In any event, it is common knowledge that contact lenses can correct nearsightedness, and the Court may take judicial notice of this adjudicative fact on its own or at the request of Complaint Counsel. FED. R. EVID. 201(b); *First Nat'l Bank v. Material Serv. Corp.*, 544 F.2d 911, 916 (7th Cir. 1976) (noting that it is common knowledge that the Chicago River flows out of Lake Michigan rather than into it); see *Contacts Lens FAQ*, 1800CONTACTS.COM, <https://www.1800contacts.com/connect/your-stories/contact-lens-faq> (“Some lenses can correct for astigmatism as well as nearsightedness or farsightedness, and some provide additional reading correction.”).

1586. Dr. Jacoby contended that Dr. Van Liere should only have included future purchasers in his survey and should not have included past purchasers. (Jacoby, Tr. 2250). This is wrong. Dr. Van Liere appropriately included past purchasers in the relevant population.

**Response to Proposed Finding No. 1586**

This proposed finding is a naked assertion that lacking any support. There is no evidence, and Respondent cites none, for the assertion that Dr. Jacoby was wrong in his critique and that Dr. Van Liere appropriately included past purchasers in the relevant population. Dr. Jacoby testified that if the issue is stopping future confusion as opposed to remedying past confusion, then the relevant universe would consist of “individuals who use and buy contact lenses online,” i.e., potential purchasers. (Jacoby, Tr. 2250). And that makes sense. Even if a consumer has bought contact lenses online in the past 12 months, if she has no intention of doing so in the future (for example, if she underwent vision correction surgery), then her responses to the test or control stimulus do not matter. (Jacoby, Tr. 2169.) And to be clear, Dr. Jacoby’s critique is not that it was wrong to include past purchasers in the relevant population; rather, it is that those past purchasers *also* have to be future purchasers of contact lenses online in order for their responses to stimuli to matter. (Jacoby, Tr. 2168–2169, 2251–2252; CX8011 at 014–015 (¶ 27) (Jacoby Rebuttal Expert Report).)

1587. Dr. Van Liere explained the relevant population includes past purchasers because such purchasers are also often future purchasers. (Van Liere, Tr. 2993-2994). In fact, in response to the responses to the screening questions many respondents indicated they were past purchases and that they also intend to search on the internet to purchase contact lenses in the future. (Van Liere, Tr. 2993-2994).

**Response to Proposed Finding No. 1587**

This proposed finding is inaccurate for the reasons described in Response to Proposed Finding No. 1586. As noted above, Dr. Jacoby agreed with Dr. Van Liere that the relevant population may include past purchasers as long as they are also future purchasers. (Jacoby, Tr. 2168–2169, 2251–2252; CX8011 at 014–015 (¶ 27) (Jacoby Rebuttal Expert Report).) But Dr. Van Liere’s screening questions S4 (“In the past 12 months, did you purchase contact lenses online?”) and S5 (“In the next 12 months, would you consider searching on the internet to

purchase contact lenses?") are used so that a "yes" to question S4 and a "no" to question S5 would still qualify a respondent (a past purchaser only) for the survey. (RX0730 at 0003 & 0005 (Van Liere Expert Report, Exhibit C) (study questionnaire).)

1588. Dr. Van Liere also explained the relevant population includes past purchasers because people who have purchased contact lenses online in the past, even if they don't intend to purchase them again in the next twelve months, are part of the group of people whose perceptions of the sponsored links would matter. (Van Liere, Tr. 2993-2994). As he explained, these consumers have "been online, they know about contact lens buying online, so we want to know -- we want them as part of the population that we use to measure whether consumers are likely to be confused by the sponsored ads." (Van Liere, Tr. 2993-2994).

#### **Response to Proposed Finding No. 1588**

This proposed finding is inaccurate for the reasons described in Responses to Proposed Findings Nos. 1586 and 1587..

1589. Dr. Van Liere also included past purchasers in the relevant population because the study sought to measure initial interest confusion (as he has in other keyword advertising cases). (Van Liere, Tr. 2994-2996). Initial interest confusion occurs when a consumer is in the process of searching for information about products and services. (Van Liere, Tr. 2994-2995). Initial interest confusion is distinct from point-of-sale confusion, which has to do with whether consumers at the point of making a purchase are likely to be confused by a trademark or a trade dress or advertising. (Van Liere, Tr. 2994). The perceptions of both past and future purchasers are relevant to the question of whether there is potential initial interest confusion. (Van Liere, Tr. 2996).

#### **Response to Proposed Finding No. 1589**

This proposed finding should be disregarded to the extent that 1-800 Contacts is asking the Court to adopt legal definitions of "initial interest confusion" and "point-of-sale confusion" based on testimony from Dr. Van Liere, who is not a lawyer or legal scholar.

As for the statement that past purchasers should be included in the relevant population when studying initial interest confusion, Dr. Van Liere failed to provide a cogent explanation of his position in the cited record. He testified, "Well, as I said, I think both past purchasers and future purchasers can encounter the alleged – the sponsored links that are at issue, and so their perceptions would all matter, and both can be in searching behavior." (Van Liere, Tr. 2996.) But

this explanation is at odds with Dr. Van Liere’s statement that a study of initial interest confusion is concerned with consumers who are “in the process of searching for information about the products and services that [they’re] considering buying or [they’re] looking for information about[.]” (Van Liere, Tr. 2994–2995.) In his study, prospective respondents who answered “no” or “don’t know” to question S5 (“In the next 12 months, would you consider searching on the internet to purchase contact lenses?”) are plainly *not* “in the process of searching for information” about contact lenses online, and therefore would not be relevant to a study of initial interest confusion, even if they have purchased contact lenses online in the past 12 months (“yes” to question S4). Dr. Van Liere’s reasoning therefore makes no sense.

1590. Dr. Jacoby’s contentions that Dr. Van Liere used improper phrasing in his questions is incorrect. As discussed above, Dr. Van Liere’s survey was properly worded.

**Response to Proposed Finding No. 1590**

This proposed finding is vague and ambiguous, and entirely unsupported, as it contains no citations to the record that would allow Complaint Counsel to identify the contentions from Dr. Jacoby that are at issue and the corresponding replies from Dr. Van Liere. As a result, Complaint Counsel is unable to formulate a specific response to this proposed finding other than to incorporate by reference its Responses to Proposed Findings Nos. 1566 to 1589.

***(h) Prof. Tushnet Is Not Qualified To Opine On Survey Methodology***

1591. Complaint Counsel offered the opinions of Prof. Rebecca Tushnet in rebuttal to critique Dr. Van Liere’s survey.

**Response to Proposed Finding No. 1591**

Complaint Counsel has no specific response to this proposed finding.

1592. Prof. Tushnet is not qualified to offer an opinion on survey design or survey methodology. Accordingly, the Court will not consider her opinions regarding the consumer surveys in this case.

**Response to Proposed Finding No. 1592**

This proposed finding is improper because whether an individual is qualified to testify as an expert is a question of law, not one of fact. FED. R. EVID. 104(a); *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *Kinser v. Gehl Co.*, 184 F.3d 1259, 1269 (10th Cir. 1999).

Even if the question of Professor Tushnet's qualifications were properly lodged as a finding of fact, this proposed finding is nonetheless vague as to "survey design or survey methodology." The specific opinions that Professor Tushnet offers in rebuttal to Dr. Van Liere are set forth in her rebuttal expert report and in her trial testimony, and Rule 702 of the Federal Rules of Evidence requires only that Professor Tushnet "have 'specialized knowledge' regarding the area of testimony, which can be based on 'practical experience as well as academic training and credentials.'" *Betterbox Commc'ns, Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 327 (3d Cir. 2002) (internal quotations and citations omitted). *See* FED. R. EVID. 702 (permitting a witness to be "qualified as an expert by knowledge, skill, experience, training, or education"); *Gladhill v. Gen. Motors Corp.*, 749 F.2d 1049, 1052 (4th Cir. 1984) ("Whether a witness is qualified can only be determined by the nature of the opinion he offers."). Simply asserting that Professor Tushnet is not qualified to offer an opinion on "survey design or survey methodology" does not answer the question of law under Rules 104(a) and 702. A witness may be qualified to address some aspects of "survey design or survey methodology" but not others; it depends on the opinion being offered. *See, e.g., Gladhill*, 749 F.2d at 1052 (holding that a police officer was qualified, based on his experience investigating accidents, to offer an opinion that the accident in question may have been caused by "some problem with the vehicle," even though he lacked an "engineering background" or "specialized knowledge of automobiles," as the plaintiffs had asserted).

Moreover, the standard for “specialized knowledge” is a liberal one. *Betterbox Communications*, 300 F.3d at 328 (3d Cir. 2002); *Hankey*, 203 F.3d at 1168. *See also AVX Corp. v. United States*, 518 Fed. App’x 130, 135 (4th Cir. 2013) (noting that “the specialized knowledge inquiry is one of sufficient reliability, not specificity” and “‘general’ expertise may encompass multiple areas of ‘specialized knowledge that will assist a trier of fact’”). The question of law under Rules 104(a) and 702 is whether Professor Tushnet, as a prominent legal scholar in the fields of trademark and advertising law and a practicing trademark lawyer, (Tushnet, Tr. 4370–4392; CX8014 at 048–054 (Tushnet Rebuttal Expert Report, Exhibit A (curriculum vitae))), possesses specialized knowledge that would assist this Court, as the trier of fact, in understanding particular aspects of the survey conducted by Dr. Van Liere, and in determining whether the appearance of advertisements for competitors in response to a search engine query using 1-800 Contacts’ trademarks would likely confuse consumers. As argued in the Post-Trial Reply Brief at 40-42, Complaint Counsel submits that, judged under the accepted liberal standard of what constitutes “specialized knowledge,” Professor Tushnet’s knowledge, skill, and experience more than suffice.

1593. Prof. Tushnet is a law professor with a law degree; she has “the knowledge that every lawyer in this courtroom has.” (Tr. 4430).

**Response to Proposed Finding No. 1593**

This proposed finding is contrary to the weight of the evidence to the extent it implies that Professor Tushnet does not have any *specialized knowledge* called for by Rule 702 because she has only a law degree. Although Professor Tushnet received her formal education from law school, arguably no different than “every lawyer in this courtroom,” requisite expertise under Rule 702 may also be based on knowledge, skill, training, or experience. FED. R. EVID. 702; *Paoli*

*R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (“We have held that a *broad range* of knowledge, skills, and training qualify an expert as such.”) (emphasis added).

Notwithstanding well-settled authority, this proposed finding misleadingly suggests that Professor Tushnet—despite her career as a prominent legal scholar in the fields of trademark and advertising law and a practicing trademark lawyer—possesses no expertise that would be relevant to the factual issues in this case simply because her education is no different than that of any lawyer involved in these proceedings. Case law involving experts who are lawyers indicates otherwise. *See, e.g., Ruggiero v. Yamaha Motor Corp.*, No. 15-49 (JBS/KMW), 2017 U.S. Dist. LEXIS 48908, at \*11–12 (D.N.J. Mar. 31, 2017) (the fact that Kitzes, a lawyer formerly with the Consumer Products Safety Commission, “is not a ‘human factors’ expert does not mean that there is no ‘specialized knowledge’ he can provide to inform Plaintiff’s allegations that the [personal wavecraft] warnings were inadequate”); *MCC Mgmt. of Naples, Inc. v. Int’l Bancshares Corp.*, No. Civ.-06-1345-M, 2010 U.S. Dist. LEXIS 10834, at \*9–10 (W.D. Okla. Feb. 8, 2010) (holding that Morgan, an “attorney by training” and “a professor of law at various law schools specializing in the area of the professional obligation of lawyers,” was “eminently qualified to testify concerning the rules and regulations governing legal professionals”); *United States v. Weed*, No. 04-cr-00103-REB, 2007 U.S. Dist. LEXIS 23707, at \*3–4 (D. Colo. Mar. 30, 2007) (holding that Dunham, as a lawyer and law professor with a general background in commercial law, was sufficiently qualified to testify about insurance law and matters involving trusts and insurance contracts); *Cary Oil Co. v. MG Ref’g & Mktg., Inc.*, No. 99-Civ.-1725, 2003 U.S. Dist. LEXIS 6150, at \*16 (S.D.N.Y. Apr. 11, 2003) (holding that Kahan, “a professor of law at one of the nation’s most esteemed law schools who teaches exclusively on matters involving corporations and who has lectured and published extensively on matters of corporate governance,” was more than qualified to provide testimony regarding corporate governance issues, including veil-

piercing). In each of these cases, the fact that the witness has a law degree, no different from any other lawyer, did not mean that he lacked specialized knowledge that would be helpful to a trier of fact.

1594. Prof. Tushnet does not have a graduate degree in marketing, economics, sociology, psychology, or mathematics. (Tushnet, Tr. 4479).

**Response to Proposed Finding No. 1594**

This proposed finding, while factually accurate, is not dispositive of the question of law under Rule 104(a)—whether Professor Tushnet is qualified to testify as an expert and to offer certain opinions about Dr. Van Liere’s likelihood-of-confusion survey. As explained in Complaint Counsel’s Response to Proposed Finding No. 1593, requisite expertise under Rule 702 may be based on knowledge, skill, training, or experience, as well as education. FED. R. EVID. 702; *Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (“We have held that a *broad range* of knowledge, skills, and training qualify an expert as such.”) (emphasis added).

The fact that Professor Tushnet does not have a graduate degree in a particular field therefore does not disqualify her from testifying about specific aspects of a survey conducted to address likelihood of confusion, the central issue in trademark infringement. *See, e.g., Ruggiero v. Yamaha Motor Corp.*, No. 15-49 (JBS/KMW), 2017 U.S. Dist. LEXIS 48908, at \*10 (D.N.J. Mar. 31, 2017) (qualifying a lawyer as an expert on the adequate placement of product safety warnings, despite the fact that he “has no degrees in engineering, psychology, communications theory, or any science field, nor does he have a degree in industrial safety management”); *Bagher v. Auto Owners Ins. Co.*, No. 1:12-cv-00980-REB, 2014 U.S. Dist. LEXIS 39238, at \*15–16 (D. Colo. Mar. 25, 2014) (“The decision to qualify someone as an expert rests not on the specific academic degree held, but on the presence of sufficient knowledge, skill, experience, training or education.”); *Arias v. DynCorp*, 928 F. Supp. 2d 10, 15 (D.D.C. 2013) (“A proffered witness who

does not hold a specific academic degree may be qualified as an expert if he has some degree of specialized knowledge regarding the subject or a similar topic.”); *Dyson v. Winfield*, 113 F. Supp. 2d 44, 50 (D.D.C. 2000) (“It is true that Dr. Smith is not a physician. But that does not automatically render him ineligible to testify on scientific matters pertaining to the human body. Rather, the key to qualifying him as an expert is his knowledge, not his academic degree.”); *Mason v. E.L. Murphy Trucking Co.*, 769 F. Supp. 341, 344 (D. Kan. 1991) (rejecting defendant’s argument that “only persons with a formal education in a particular field are qualified to express an expert opinion”).

In this case, as Professor Tushnet testified, practicing trademark lawyers, despite having “only a law degree,” can develop practical experience with likelihood-of-confusion surveys because they have “worked closely with survey experts to figure out how to ask the legally relevant questions and how to interpret the results in light of the legal questions that arise in trademark and advertising cases.” (Tushnet, Tr. 4375 (describing her practice of trademark and false advertising law at Debevoise & Plimpton, the same law firm where 1-800 Contacts’ expert, Howard Hogan, started his legal career).) Similarly, law professors, despite having “only a law degree,” can develop specialized knowledge regarding likelihood-of-confusion surveys through their teaching trademark and advertising law, because they have to be able to review and explain “the elements of a successful survey for Lanham Act purposes, including what courts have generally looked for and what relevant questions, you know, lawyers ought to be asking.” (Tushnet, Tr. 4389 (describing what the casebook on the law of advertising and promotion that she has co-authored with Eric Goldman says about survey evidence).)

1595. Prof. Tushnet has never taught a marketing course. (Tushnet, Tr. 4480).

**Response to Proposed Finding No. 1595**

This proposed finding is vague as to what Respondent deems to be a “marketing course,” but on its face, this proposed finding is inaccurate. Professor Tushnet’s course entitled Advertising and Marketing Law, which she has taught at Georgetown, Harvard, and NYU, seemingly qualifies as a “marketing course.” (Tushnet, Tr. 4372, 4389 (describing the casebook entitled THE LAW OF ADVERTISING AND MARKETING that she has co-authored for the course), 4480.)

This proposed finding also mischaracterizes Professor Tushnet’s testimony. When asked whether she had ever taught a “marketing course,” Professor Tushnet did not say “no.” Rather, she responded, “*Other than my advertising law course.*” (Tushnet, Tr. 4479–4480 (emphasis added).) Professor Tushnet also testified that she covers the topic of survey design in her advertising law course. (Tushnet, Tr. 4480.)

Further, this proposed finding is also irrelevant because it is not apparent how teaching a “marketing course”—assuming the advertising law course that Professor Tushnet teaches does not count—would make her more qualified to offer opinions regarding particular aspects of the survey conducted by Dr. Van Liere, and whether the appearance of advertisements for competitors in response to a search engine query using 1-800 Contacts’ trademarks would likely confuse consumers.

1596. Prof. Tushnet has not taken any courses in survey design or administered a consumer survey. (Tushnet, Tr. 4479-81).

**Response to Proposed Finding No. 1596**

This proposed finding, while factually accurate, is not dispositive of the question of law under Rule 104(a)—whether Professor Tushnet is qualified to testify as an expert and to offer certain opinions about Dr. Van Liere’s likelihood-of-confusion survey. As explained in Complaint Counsel’s Responses to Proposed Findings Nos. 1593 and 1594, requisite expertise under

Rule 702 may be based on knowledge, skill, training, experience, or education. FED. R. EVID. 702; *Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (“We have held that a *broad range* of knowledge, skills, and training qualify an expert as such.”) (emphasis added). Just as a particular academic degree is not required for a witness to demonstrate specialized knowledge in her area of testimony, specific coursework is not required either. Here, the fact that Professor Tushnet actually teaches the topic of survey design in her advertising law course, and has written an advertising law casebook that covers this topic, should be considered as part of her qualifications in any determination under Rules 104(a) and 702.

Furthermore, the fact that Professor Tushnet has not administered a consumer survey herself is also not dispositive of the question of law under Rule 104(a)—whether she is qualified to testify as an expert and to offer certain opinions about Dr. Van Liere’s likelihood-of-confusion survey. As already noted in Complaint Counsel’s Response to Proposed Finding No. 1594, a practicing trademark lawyer, as Professor Tushnet testified, can develop practical experience with likelihood-of-confusion surveys because they have “worked closely with survey experts to figure out how to ask the legally relevant questions and how to interpret the results in light of the legal questions that arise in trademark and advertising cases.” (Tushnet, Tr. 4375 (describing her practice of trademark and false advertising law at Debevoise & Plimpton).) Indeed, Professor Tushnet has even worked with one of the leading survey experts—Shari Seidman Diamond. (Tushnet, Tr. 4376–4377, 4482.)

This proposed finding appears to advance a spurious argument that a witness qualified as an expert must have first-hand experience with the particular subject matter. That is not necessarily the case; it depends on the nature of the opinion and the area of testimony being offered. *See, e.g., Ruggiero v. Yamaha Motor Corp.*, No. 15-49 (JBS/KMW), 2017 U.S. Dist. LEXIS 48908, at \*11 (D.N.J. Mar. 31, 2017) (rejecting defendant’s argument that “[w]ith no

education or training in [personal watercraft] design or operation, or human factors engineering, Mr. Kitzes is not qualified to opine on the efficacy of on-product warning labels on the FZR or alternate warning systems.”); *Bombardier Recreational Prods., Inc. v. Arctic Cat, Inc.*, No. 12-2706-JRT, 2017 U.S. Dist. LEXIS 26517, at \*46–48 (D. Minn. Feb. 24, 2017) (rejecting plaintiff’s argument that an expert with “a bachelor’s degree in manufacturing engineering, a master’s degree in mechanical engineering, and significant experience in the field of accident reconstruction and automotive testing” was not qualified because he did not have professional experience designing snowmobiles).

1597. Prof. Tushnet is not familiar with basic concepts in survey methodology, testifying that she had only a “minimal understanding” of conjoint analysis and would “have to refresh my memory” regarding a t-statistic. (Tushnet, Tr. 4483).

#### **Response to Proposed Finding No. 1597**

This proposed finding, while accurate as to Professor Tushnet’s answers to specific questions about “conjoint analysis” and “t-statistics,” lacks support as to the broader assertion that Professor Tushnet “is not familiar with basic concepts in survey methodology.” There is no basis in the record for this Court to extrapolate from Professor Tushnet’s answers regarding her knowledge of these two specific terms to a general finding that she is not familiar with basic concepts in survey methodology. For example, there is no testimony in the record that anyone who has experience working with likelihood-of-confusion surveys would readily be able to define these two terms. Nor is there any testimony in the record regarding whether “conjoint analysis” and “t-statistics” are considered “basic concepts” in survey methodology. (Notably, these terms are nowhere to be found in Professor Shari Seidman Diamond’s treatise, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC RESEARCH 359, 399 (Federal Judicial Center 3d ed.).) If anything, this proposed finding is vague as to its use of the phrase “basic concepts in survey methodology.”

More fundamentally, with respect to Professor Tushnet's qualifications as an expert, the operative question is whether her opinions and areas of testimony require any knowledge and application of the terms "conjoint analysis" and "t-statistic." Professor Tushnet testified that these terms were not relevant to the opinions she was rendering. (Tushnet, Tr. 4539–4540.) Moreover, these terms are not mentioned at all in the expert report(s) and deposition of Dr. Van Liere or Dr. Jacoby. Apart from its use in cross-examining Professor Tushnet, the term "t-statistic" is not mentioned by any other witness at trial. The term "conjoint analysis" is mentioned—but in the cross-examination of *Professor Evans*, not Dr. Jacoby or Dr. Van Liere, and in the context of a paper on *market definition*, not surveys, that Professor Evans and two co-authors had submitted to the Federal Competition Commission of Mexico. (Evans, Tr. 1773–1775; RX1974 (cross-examination use only; not part of the record.)

1598. Experts prepared to design, conduct, and analyze a survey generally should have graduate training in psychology (especially social, cognitive, or consumer psychology), sociology, political science, marketing, communication sciences, statistics, or a related discipline; that training should include courses in survey research methods, sampling, measurement, interviewing, and statistics. S. Diamond, *Reference Guide on Survey Research*, in *Reference Manual on Scientific Evidence Third Edition* 375 (2011).

#### **Response to Proposed Finding No. 1598**

This proposed finding correctly quotes from Professor Diamond's treatise but it is irrelevant for the reasons already set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1593, 1594, and 1596. In this section (II.C) of her treatise, Professor Diamond is addressing the skill and experience of experts who are retained to design, conduct, and analyze surveys. She is not talking about experts like Professor Tushnet, who is merely offering a critique of Dr. Van Liere's study. Case law makes clear that Professor Tushnet does not have to have conducted surveys herself in order to be qualified to address whether a particular study answers the relevant legal questions in trademark infringement.

This proposed finding also lacks a proper basis in the record because neither Dr. Jacoby nor Dr. Van Liere referred to the quoted passage from Professor Diamond's treatise. Nor was Professor Tushnet cross-examined on this passage. The treatise is not otherwise part of the record.

1599. In all cases, the expert must demonstrate an understanding of foundational, current, and best practices in survey methodology, including sampling, instrument design (questionnaire and interview construction), and statistical analysis. Publication in peer-reviewed journals, authored books, fellowship status in professional organizations, faculty appointments, consulting experience, research grants, and membership on scientific advisory panels for government agencies or private foundations are indications of a professional's area and level of expertise. S. Diamond, *Reference Guide on Survey Research*, in *Reference Manual on Scientific Evidence* Third Edition 375 (2011).

#### **Response to Proposed Finding No. 1599**

This proposed finding correctly quotes from Professor Diamond's treatise but it is irrelevant for the reasons already set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1593, 1594, and 1596. In this section (II.C) of her treatise, Professor Diamond is addressing the skill and experience of experts who are retained to design, conduct, and analyze surveys. She is not talking about experts like Professor Tushnet, who is merely offering a critique of Dr. Van Liere's study. Case law makes clear that Professor Tushnet does not have to have conducted surveys herself in order to be qualified to address whether a particular study answers the relevant legal questions in trademark infringement.

This proposed finding also lacks a proper basis in the record because neither Dr. Jacoby nor Dr. Van Liere referred to the quoted passage from Professor Diamond's treatise. Nor was Professor Tushnet cross-examined on this passage. The treatise is not otherwise part of the record.

1600. Further, an expert who gives an opinion about the adequacy and interpretation of a survey not only should have general skills and experience with surveys, but also should demonstrate familiarity with the following properties of the survey being discussed: (1) purpose of the survey; (2) survey methodology, including (a) the target population, (b) the sampling design used in conducting the survey, and (c) the survey instrument (questionnaire or interview schedule); (3) results, including rates and patterns of missing data; and (4) statistical analyses used to interpret the results. S. Diamond, *Reference Guide on Survey Research*, in *Reference Manual on Scientific Evidence* Third Edition 375 (2011).

**Response to Proposed Finding No. 1600**

This proposed finding is misleading because it selectively quotes from a section (II.D) of Professor Diamond’s treatise that addresses the skill and experience of “secondary” experts who are called to testify about a survey conducted by someone else. Specifically, this proposed finding omits three sentences (italicized below) that immediately precede the quoted passage from the same paragraph:

*Parties often call on an expert to testify about a survey conducted by someone else. The secondary expert’s role is to offer support for a survey commissioned by the party who calls the expert, to critique a survey presented by the opposing party, or to introduce findings or conclusions from a survey not conducted in preparation for litigation or by any of the parties to the litigation. The trial court should take into account the exact issue that the expert seeks to testify about and the nature of the expert’s field of expertise.<sup>74</sup> The secondary expert who gives an opinion about the adequacy and interpretation ...*

Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC RESEARCH 359, 375 (Federal Judicial Center 3d ed. 2011). (Footnote 74 in the quoted passage cites Margaret A. Berger, *The Admissibility of Expert Testimony*, Section III.A, in the same manual, pages 22–23.)

One of the sentences omitted from this proposed finding (“The trial court should take into account the exact issue that the expert seeks to testify about and the nature of the expert’s field of expertise.”) is especially important because it highlights a point already made in Complaint Counsel’s Responses to Proposed Findings Nos. 1592 and 1596, which is that Rule 702 of the Federal Rules of Evidence requires only that an expert witness “have ‘specialized knowledge’ regarding the area of testimony” that she is offering. *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998) (“For a court to qualify a witness to testify as an expert, Rule 702 requires the witness to

have ‘specialized knowledge’ regarding the area of testimony.’”); *Gladhill v. Gen. Motors Corp.*, 749 F.2d 1049, 1052 (4th Cir. 1984) (“Whether a witness is qualified can only be determined by the nature of the opinion he offers.”). Stated differently, an expert witness need only demonstrate expertise relevant to the particular issue on which she is testifying. As explained above and argued in Complaint Counsel’s Post-Trial Reply Brief at 40-42, Professor Tushnet possessed specialized knowledge as to the particular aspects of Dr. Van Liere’s study that she was critiquing.

This proposed finding also lacks a proper basis in the record because neither Dr. Jacoby nor Dr. Van Liere referred to the quoted passage from Professor Diamond’s treatise. Nor was Professor Tushnet cross-examined on this passage. The treatise is not otherwise part of the record.

1601. Prof. Tushnet does not qualify as an expert on survey design or methodology.

**Response to Proposed Finding No. 1601**

This proposed finding is improper because whether an individual is qualified to testify as an expert is a question of law, not one of fact. FED. R. EVID. 104(a); *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *Kinser v. Gehl Co.*, 184 F.3d 1259, 1269 (10th Cir. 1999).

Even if the question of Professor Tushnet’s qualifications were properly lodged as a finding of fact, this proposed finding is unsupported and contrary to the weight of the evidence (and the case law) for the reasons set forth in Complaint Counsel’s Responses to Proposed Findings Nos. 1592–1600.

**2. *The Study Conducted By Complaint Counsel’s Expert, Dr. Jacob Jacoby, Is Unreliable And Will Be Accorded No Weight***

1602. Complaint Counsel’s survey expert, Dr. Jacoby, also conducted a consumer confusion study. For the several reasons explained below, Dr. Jacoby’s study is fundamentally flawed. Accordingly, the Court finds Dr. Jacoby’s study to be unreliable and will give it no weight.

**Response to Proposed Finding No. 1602**

The proposed finding is unsupported by the evidence for the reasons stated below. Dr. Jacoby's study provides reliable evidence of an unlikelihood of consumer confusion when consumers view rivals' sponsored advertisements that appear in response to a search query for the term "1800contacts." (CC Post-Trial Reply Br. at 41-52).

*(a) Dr. Jacoby's 2016 Test Stimulus Failed To Replicate Marketplace Conditions*

1603. Dr. Jacoby created two sets of stimuli for his survey. According to his report, Dr. Jacoby's "study replicated both the Google SERP as it looked prior to 2016, and as it looks today" (i.e., in 2016). (CX 8008-007). Half of the respondents in his survey were shown the pre-2016 stimulus; the other half were shown the 2016 stimulus. (CX 8008-007).

**Response to Proposed Finding No. 1603**

Complaint Counsel has no specific response to Proposed Finding No. 1603, other than to note that "approximately" half of the respondents whose confusion levels were tallied in Dr. Jacoby's study were shown the pre-2016 stimulus, and approximately half of the respondents whose results were tallied were shown the 2016 stimulus. (CX8008 at 007) (Principal Findings (Jacoby Report)). This is because several respondents who completed Dr. Jacoby's study were ultimately removed from Dr. Jacoby's dataset to ensure reliable and unbiased responses. (CX8008 at 030) (Individuals Eliminated/Excluded) (Jacoby Report).

1604. The 2016 test stimulus is shown at CX 8008-429-430. (Jacoby, Tr. 2264-2267).

**Response to Proposed Finding No. 1604**

Proposed Finding No. 1604 is inaccurate and misleading insofar as it suggests that CX8008 at 429-430 is the actual 2016 test stimulus used in Dr. Jacoby's survey. CX8008 at 429-430 is a "representative screen shot" depicting part of the 2016 test stimulus used in Dr. Jacoby's online study. (CX8008 at 023, 410) (Screener Questionnaire, Appendix H) (Jacoby Report)). The actual 2016 test stimulus appeared as an online web page; respondents could scroll down to view

the bottom of the page (represented as a separate screenshot at CX8008 at 430). (Jacoby, Tr. 2183). As with nearly all of the images included in Exhibit H to Dr. Jacoby's report, CX8008 at 429-430 also includes marginalia, or explanatory content, on the sides of the pages to explain what is depicted in the corresponding screen shot. (CX9041 (Jacoby, Dep. at 109)). Proposed Finding No. 1604 further mischaracterizes the evidence because the representative screenshot at CX8008 at 429-430 depicts the "second part" of Dr. Jacoby's 2016 test stimulus; the first part of the stimulus consisted of typing in the search term "1800contacts." (Jacoby, Tr. 2264-2265).

1605. As described below, Dr. Jacoby's 2016 test stimulus fails to replicate market conditions, thereby rendering his study unreliable.

#### **Response to Proposed Finding No. 1605**

Proposed Finding No. 1605 is inaccurate, unsupported, misleading, and vague for the reasons stated below. (*See also* CC Post-Trial Reply Br. at 41-52).

1606. As Dr. Jacoby admitted, the test stimuli provided to respondents as a basis for the responding to the survey's questions needs to conform with what is found in the real-world marketplace. (Jacoby, Tr. 2263-2264). As he explained, the closer a stimuli get to reflecting real world conditions, "the better able you are to make accurate predictions." (CX 9041 (Jacoby, Dep. 16); *see also* CX 9041 (Jacoby, Dep. at 17-18 (the closer stimuli are "to what's real in you're being asked what would you do with something that's real, the more likely you as a respondent can give an honest answer"))).

#### **Response to Proposed Finding No. 1606**

Proposed Finding No. 1606 is inaccurate and misleading because it mischaracterizes Dr. Jacoby's testimony. Dr. Jacoby testified that the test stimulus provided to respondents "generally" needs to conform the real-world marketplace, recognizing that no survey "can replicate reality 100 percent." (Jacoby, Tr. 2263-2264, 2284; *see also* Jacoby, Tr. 2229; CX9041 (Jacoby, Dep. at 79-80, 108, 116)). Dr. Jacoby testified that his survey, like all surveys, "is not the real world. This is an attempt to reflect the real world at different moving points in time." (Jacoby, Tr. 2298; CX9041 (Dep. at 16 ("You try to get as close as possible to the real world as possible, recognizing

that any survey is not the real world.”)). Dr. Jacoby testified that the relevant question is whether the survey replicates real-world marketplace conditions in *material* respects. (Jacoby, Tr. 2284; *see also* Jacoby, Tr. 2183 (“These are studies where you’re asking people questions. That’s not the real world. They’re just trying to simulate the real world as closely as possible in the essential respects.”); Jacoby, Dep. at 103-104). Indeed, Dr. Jacoby testified that “you sometimes have to modify the real world to get an honest answer to the key question you’re asking.” (CX9041 (Jacoby, Dep. at 140)).

1607. To create his 2016 test stimulus, Dr. Jacoby had a subcontractor take an actual search result page supplied by Complaint Counsel and make a few modifications. (Jacoby, Tr. 2267-2268).

#### **Response to Proposed Finding No. 1607**

Complaint Counsel has no specific response, other than to note that Dr. Jacoby’s subcontractor compiled the 2016 test stimulus under Dr. Jacoby’s instruction. (Jacoby, Tr. 2268-2269).

1608. Dr. Jacoby testified that his intent was to design test stimuli that was very close to what would happen when somebody actually saw a search engine results page on a screen after they did a search. (Jacoby, Tr. 2264)).

#### **Response to Proposed Finding No. 1608**

Complaint Counsel has no specific response.

1609. For his 2016 test stimulus, Dr. Jacoby intended create a search results page to look as much as possible as would look like in real life for a real-life person doing a real-life search for “1-800 Contacts.” (Jacoby, Tr. 2266-2267 (“Q. And what you did when you designed this search engine result page is you wanted to have a page to look as much as possible as would look like in real life for a real life person doing a real-life search for “1-800 Contacts”; right? A. Yes. Recognizing that the page changes as Google changes its format, but to do something that exemplified what Google has typically done.”); *see also* Jacoby, Tr. 2273 (“Q. And your intent in using that was to reasonably reflect what would come up when a person searches on ‘1-800 Contacts’; right? A. Yes.”)).

#### **Response to Proposed Finding No. 1609**

Proposed Finding No. 1609 is misleading because it mischaracterizes the very testimony that it purports to summarize. Dr. Jacoby testified that he wanted to design a web page that “look[ed] as much as possible” as a “real-life search for ‘1-800 Contacts,’ [*r*]ecognizing that the page changes as Google changes its format,” thus Dr. Jacoby wanted “to do something that *exemplified* what Google has *typically* done.” (Jacoby, Tr. 2267) (emphasis added).

Proposed Finding No. 1609 further mischaracterizes Dr. Jacoby’s testimony to the extent it suggests that it would have been possible to construct an appropriate test stimulus based on an actual search results page that appears after searching for “1800contacts.” As Dr. Jacoby testified, it was important that survey respondents in his test condition saw exactly the same search results page as the survey respondents in his control condition, who entered the search term “contact lenses.” (Jacoby, Tr. 2349-2350). Dr. Jacoby further testified that it was necessary to include competitive advertisements in the stimulus for both the test and the control groups, and that no competitive advertisements appeared on actual search engine results pages when one searched for “1800contacts.” (Jacoby, Tr. 2350). Therefore, it would not have been possible to use an actual search results page that appeared in response to the search term “1800contacts” as Dr. Jacoby’s test stimulus. (Jacoby, Tr. 2350). For his survey, Dr. Jacoby needed to create a prospective search engine results page to assess what would happen if the Bidding Agreements were not in effect and competitive advertisements were allowed to appear in response to a search query for “1800contacts.” (Jacoby, Tr. 2350-2351).

1610. Dr. Jacoby’s 2016 test stimulus includes sponsored ads of 1-800 Contacts’ rivals. (Jacoby, Tr. 2269). According to Dr. Jacoby, the purpose of putting in the sponsored ads was to otherwise keep that test stimulus as close as possible to a search engine results page that would come up in response to a search for “1-800 Contacts.” (Jacoby, Tr. 2269; *see also* CX 9041 (Jacoby, Dep. at 143 (“And your goal in putting these other sponsored links in the page, if necessary, is to keep the page otherwise as close as possible to what actually would have come up with the search for 1-800 Contacts? A. Generally speaking, yes.”))).

#### **Response to Proposed Finding No. 1610**

Proposed Finding No. 1610 is misleading and contradicted by the weight of the evidence to the extent it suggests that the only reason that Dr. Jacoby included sponsored advertisements in his 2016 test stimulus was to replicate real-world search results for “1800contacts.” As noted *supra* in Response to Proposed Finding No. 1609, Dr. Jacoby testified that it was necessary to include competitive advertisements in both the test and the control conditions. Dr. Jacoby relied on widely accepted academic literature to support his conclusion that the appropriate survey design should include sponsored advertisements in both the test and control stimuli. (Jacoby, Tr. 2148-2154). Dr. Jacoby testified that an appropriate survey design should show the exact same search engine results page with the exact same six rival advertisements in both the test and control groups, with the only difference being the search term that the respondent types into the search box. (Jacoby, Tr. 2153-2154).

Because no competitive advertisements appeared on actual search engine results pages when one searched for “1800contacts,” it would not have been possible for Dr. Jacoby to use an actual search results page that appeared in response to the search term “1800contacts” as his test stimulus. As a result, Dr. Jacoby needed to create a prospective search engine results page to assess what would happen if the Bidding Agreements were not in effect and competitive advertisements were allowed to appear in response to a search query for “1800contacts.” *See supra*, Response to Proposed Finding No. 1609.

1611. Despite Dr. Jacoby’s repeatedly stated intent to create a search results page that replicated the results of a search for “1-800 Contacts,” his 2016 test stimulus fails to do so.

#### **Response to Proposed Finding No. 1611**

Proposed Finding No. 1611 is inaccurate and misleading because it mischaracterizes Dr. Jacoby’s testimony and improperly suggests that it would have been possible (or preferable) to create an appropriate test stimulus using an actual search results page that appeared in response to

a search for “1800contacts.” As noted *supra* in Response to Proposed Finding No. 1606, Dr. Jacoby testified that: (i) the test stimulus provided to respondents “generally” needs to conform the real-world marketplace, recognizing that no survey “can replicate reality 100 percent”; (ii) the relevant question is whether the survey replicates real-world marketplace conditions in *material* respects; and (iii) “you sometimes have to modify the real world to get an honest answer to the key question you’re asking.” (CX9041 (Jacoby, Dep. at 140)).

As noted further in Response to Proposed Finding No. 1609, Dr. Jacoby testified that: (i) it was important that survey respondents in his test condition saw exactly the same search results page as the survey respondents in his control condition, who entered the search term “contact lenses”; (ii) it was necessary to include competitive advertisements in the stimulus for both the test and the control groups; (iii) no competitive advertisements appeared on actual search engine results pages when one searched for “1800contacts”; and (iv) it therefore would not have been possible to use an actual search results page that appeared in response to the search term “1800contacts” as Dr. Jacoby’s test stimulus. Accordingly, Dr. Jacoby needed to create a prospective search engine results page to assess what would happen if the Bidding Agreements were not in effect and competitive advertisements were allowed to appear in response to a search query for “1800contacts.” (Jacoby, Tr. 2350-2351).

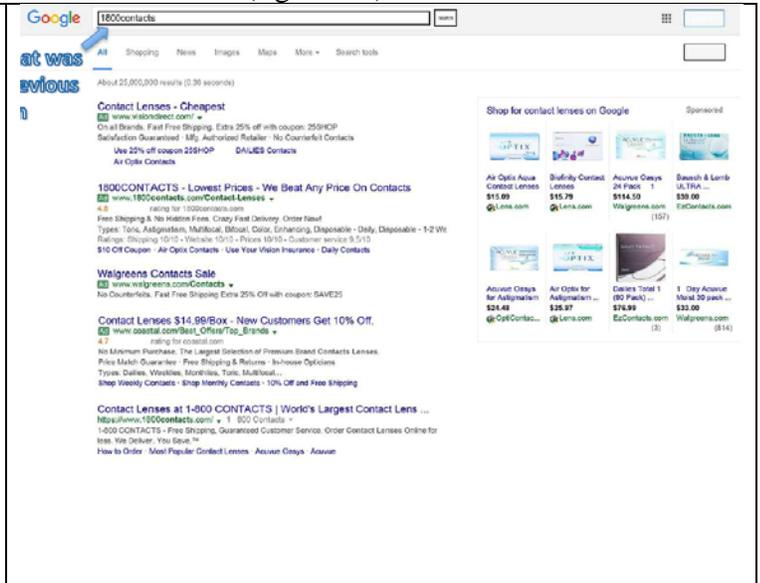
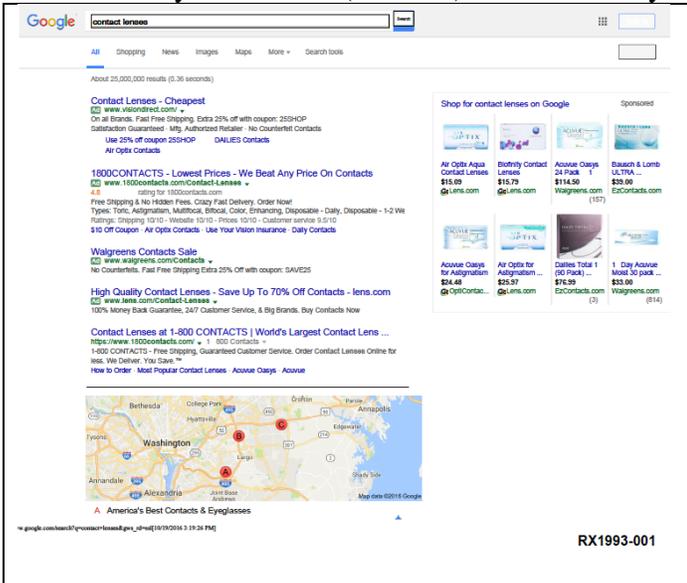
Complaint Counsel notes that 1-800 Contacts’ own survey expert, Dr. Van Liere, also had to “mock up” his test SERP to include ads that would not otherwise appear in real-world search results for “1-800 Contacts” today, precisely because 1-800 Contacts’ Bidding Agreements prevent them from appearing. *See* Resp. Br. at 47 n. 8.

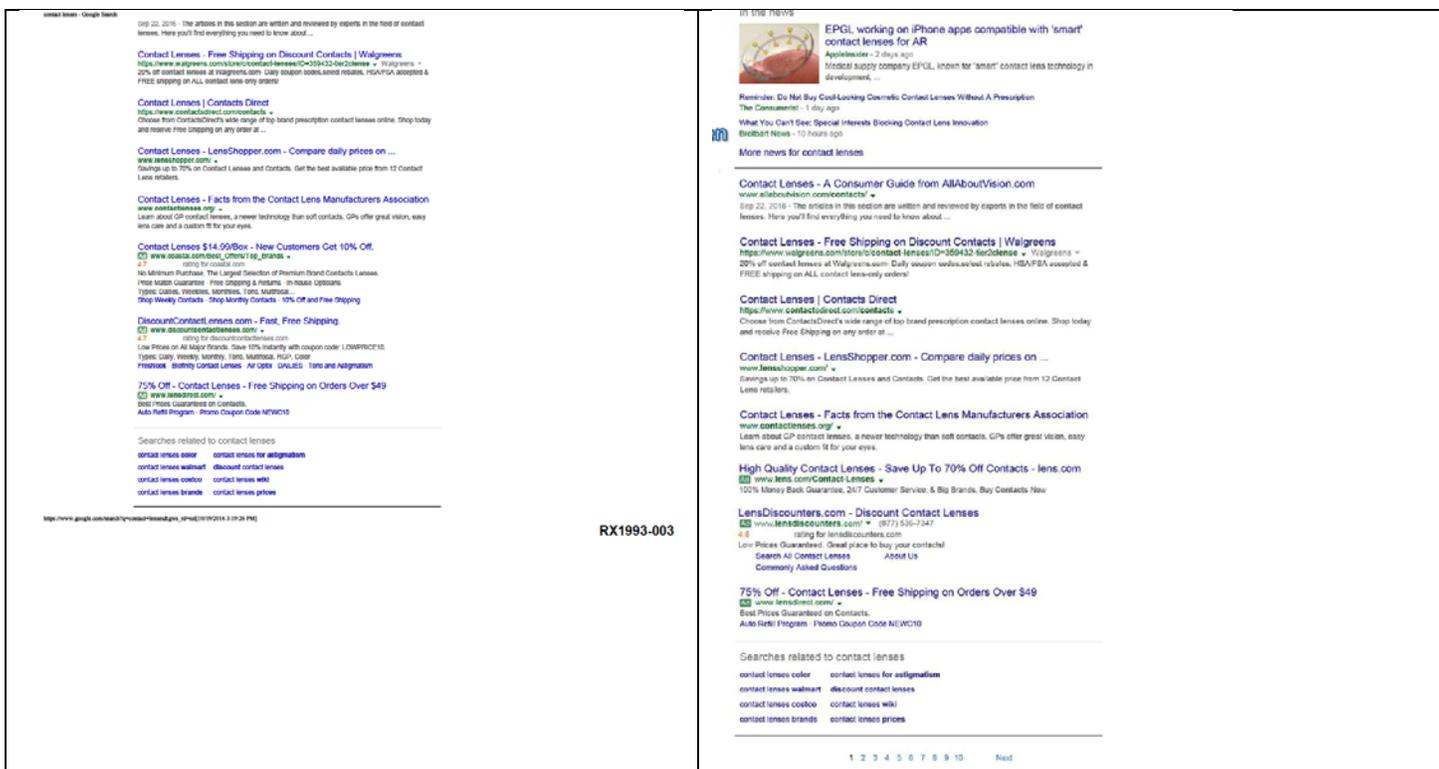
1612. Rather than using an actual SERP for the query “1-800 Contacts” as the basis for his 2016 test stimulus, Dr. Jacoby used an actual SERP for the query “contact lenses.” (Jacoby, Tr. 2270-2275).

**Response to Proposed Finding No. 1612**

Proposed Finding No. 1612 is misleading to the extent it suggests that it would have been possible (or preferable) to create an appropriate test stimulus using an actual search results page that appeared in response to a search for “1-800 Contacts” (or similar variation thereof). See Response to Proposed Finding No. 1609.

1613. The fact that Dr. Jacoby used a SERP for the query “contact lenses” as the basis for his 2016 test stimulus is readily apparent by comparing the actual SERP for the query “contact lenses” in the materials Dr. Jacoby’s relied on with Dr. Jacoby’s 2016 test stimulus. (*Compare* RX 1993 (actual SERP for search query “contact lenses”) with RX8008-429-430 (2016 test stimuli); Jacoby, Tr. 2270-2275 (admitting that actual SERP and 2016 test stimulus have numerous identical elements)). The actual SERP for the query “contact lenses” in the materials Dr. Jacoby’s relied on (left side) and Dr. Jacoby’s 2016 test stimulus (right side) are shown below:





(RX 1993; RX8008-429-430).

**Response to Proposed Finding No. 1613**

Proposed Finding No. 1613 is unsupported and contradicted by the weight of the evidence to the extent it suggests that RX1993 was the only basis for constructing Dr. Jacoby’s 2016 test stimulus. Dr. Jacoby testified that RX1993 was “only one of the several items” used to construct his 2016 test stimulus. (Jacoby, Tr. 2272; *see also* Jacoby, Tr. 2273 (“[W]e used a variety of pages we looked at. These weren’t the only pages.”)). Dr. Jacoby also testified regarding a number of *differences* between RX1993 and his 2016 test stimulus. *See* Jacoby, Tr. 2272 (noting that the map shown in RX1993 does not appear in Dr. Jacoby’s 2016 test stimulus and that the search term in RX1993 (“contact lens”) was different than the search term used in Dr. Jacoby’s 2016 test stimulus (“1800contacts”).

Complaint Counsel also notes that RX1993 was admitted only “for the purposes the witness covered in his testimony,” and not for the purpose offered in Respondent’s Proposed

Finding No. 1613. (Jacoby, Tr. 2355). Because Dr. Jacoby did not testify that RX1993 was “the basis” for his 2016 test stimulus, Respondent may not rely on RX1993 for that purpose in its

Proposed Findings of Fact.

1614. As can be seen by comparing the actual SERP for the query “contact lenses” in the materials Dr. Jacoby’s relied on with Dr. Jacoby’s 2016 test stimulus, (1) the first three ads are identical, (2) the fourth ad in the test stimulus is identical to the first ad below the organic listings in the actual SERP, (3) the last ad below the organic listings are identical, (4) with the exception of the map in the actual SERP, the organic listings are identical, (5) the news items are identical, and (6) each page states “About 25,000,000 results in .36 seconds.” (RX 1993; CX 8008-429-430; Jacoby, Tr. 2270-2275).

#### **Response to Proposed Finding No. 1614**

Complaint Counsel again notes that RX1993 was admitted only “for the purposes the witness covered in his testimony,” not for any purpose Respondent wishes to offer in its Proposed Findings of Fact. (Jacoby, Tr. 2355). Dr. Jacoby did not testify that RX1993 was “the actual SERP for the query ‘contact lenses.’” (*See* Jacoby, Tr. 2270-2275). Nor did he testify that the “the fourth ad in the test stimulus is identical to the first ad below the organic listings in the actual SERP” or that “the last ad below the organic listings are identical.” (Jacoby, Tr. 2270-2275). Dr. Jacoby also did not testify that all of “the organic listings are identical”; he testified that *three* of the nine organic search listings in RX1993 also appeared in his 2016 test stimulus. (Jacoby, Tr. 2274-2275). Dr. Jacoby also did not testify that “the news items are identical” in the two documents; he testified that the *one* of the three news articles in RX1993 also appeared in his 2016 test stimulus. (Jacoby, Tr. 2271).

Because RX1993 is admissible only for the purposes covered in Dr. Jacoby’s testimony, Proposed Finding No. 1614 is inaccurate, unsupported, and misleading for the reasons the reasons stated above. Proposed Finding No. 1614 is also vague because it is unclear whether “the actual SERP for the query ‘contact lenses.’” refers to RX1993. In any event, Dr. Jacoby never testified that RX1993 is “the actual SERP for the query ‘contact lenses.’” (Jacoby, Tr. 2270-2275).

1615. Because Dr. Jacoby used an actual SERP for the query “contact lenses,” his 2016 test stimulus does not replicate the results of a search for “1-800 Contacts.”

**Response to Proposed Finding No. 1615**

Proposed Finding No. 1615 is unsupported because there is no foundation for the statement that Dr. Jacoby used “an actual SERP for the query ‘contact lenses.’” To the extent “an actual SERP for the query ‘contact lenses’” refers to RX1993, this finding is inaccurate, unsupported, contradicted by the weight of the evidence, and misleading because (i) Dr. Jacoby never testified that RX1993 was “an actual SERP for the query ‘contact lenses’” (*see* Jacoby, Tr. 2270-2275); and (ii) RX1993 was “only one of the several items” that Dr. Jacoby used to construct his 2016 test stimulus. (Jacoby, Tr. 2272; *see also* Jacoby, Tr. 2273 (“[W]e used a variety of pages we looked at. These weren’t the only pages.”)). *See generally* Response to Proposed Findings No. 1613-1614.

1616. In his rebuttal report, Dr. Jacoby provided an actual SERP for the query “1-800 Contacts.” (CX 8011-057; Jacoby, Tr. 2276). The actual SERP for the query “1-800 Contacts” in Dr. Jacoby’s rebuttal report is typical of Google SERPs for the that query and variations of the 1-800 Contacts trademark. (*Compare* CX 8011-057 *with* RX 310-0001-0010).

**Response to Proposed Finding No. 1616**

Complaint Counsel does not dispute that Dr. Jacoby provided an actual SERP for the query “1-800 Contacts” in his rebuttal report. (CX8011 at 011,039 ¶¶ 21, 57) (Jacoby Rebuttal Report)). However, the remainder of Proposed Finding No. 1616 is unsupported, as there is no evidence to support the statement that the actual SERP for the query “1-800 Contacts” in Dr. Jacoby’s rebuttal report (CX8011 at 057)(Appendix K)(Jacoby Rebuttal Report)) is “typical of Google SERPs for the [sic] that query and variations of the 1-800 Contacts trademark.” The only document on which Respondent relies, RX0310, was admitted for non-hearsay purposes only, and “not to show the results of a search.” (JX0002-A at 044; Hamilton, Tr. 456) (discussing similar document, RX0318).

1617. A comparison of Dr. Jacoby's 2016 test stimulus with an actual SERP for the query "1-800 Contacts" shows significant differences. (Jacoby, Tr. 2275-2280; *compare* CX 8011-057 (actual SERP in Jacoby rebuttal report) *with* CX 8008-0429-430 (2016 test stimulus)).

**Response to Proposed Finding No. 1617**

Proposed Finding No. 1617 is ambiguous, misleading, and irrelevant because: (i) the term "significant" is undefined; (ii) there is no specific example of or context for what constitutes a "significant difference"; (iii) it improperly suggests that Dr. Jacoby's 2016 test stimulus, a mock-up SERP for the query "*1800contacts*," should have been identical or more similar to an actual SERP for the query "*1-800 Contacts*"; and (iv) it improperly suggests that any difference between Dr. Jacoby's 2016 test stimulus and an actual SERP for the query "1-800 Contacts" were material to the outcome of Dr. Jacoby's consumer survey.

As stated above in Response to Proposed Finding No. 1606, the relevant question is whether the survey replicates real-world marketplace conditions in *material* respects. (Jacoby, Tr. 2284; *see also* Jacoby, Tr. 2183 ("These are studies where you're asking people questions. That's not the real world. They're just trying to simulate the real world as closely as possible in the essential respects."); (CX9041 (Jacoby, Dep.) at 103-104)). Indeed, Dr. Jacoby testified that "you sometimes have to modify the real world to get an honest answer to the key question you're asking." (CX9041 (Jacoby, Dep. at 140)). As explained in Response to Proposed Finding No. 1609, (i) it was important that survey respondents in Dr. Jacoby's test condition saw exactly the same search results page as the survey respondents in his control condition, who entered the search term "contact lenses"; and (ii) it was necessary to include competitive advertisements in the stimulus for both the test and the control groups. No competitive advertisements appeared on actual Google search engine results pages when one searched for "1800contacts" or "1-800 Contacts." *See* Response to Proposed Finding No. 1609; *see also* (CX8011 at 057 (Appendix K) (Jacoby Rebuttal Report)) (actual Google SERP dated Mar. 7, 2017, search query "1-800

Contacts”). It therefore would not have been possible to use an actual search results page that appeared in response to the search term “1800contacts” or “1-800 Contacts” as Dr. Jacoby’s 2016 test stimulus.

1618. Dr. Jacoby’s 2016 test stimulus includes PLAs, or Shopping, ads on the right side of the SERP. (CX 8008-0429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query “1-800 Contacts” does not have PLA, or Shopping, ads on the right side. (CX 8011-057). Instead, it includes a Knowledge Graph for 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2281).

### **Response to Proposed Finding No. 1618**

Proposed Finding No. 1618 is irrelevant, misleading, and unsupported to the extent it suggests that: (i) Dr. Jacoby’s 2016 test stimulus, a mock-up SERP for the query “1800contacts,” should have been identical or more similar to an actual SERP for the query “1-800 Contacts”; (ii) Dr. Jacoby should have included a 1-800 Contacts Knowledge Graph on his 2016 test stimulus; (iii) Dr. Jacoby should not have included PLAs on his 2016 test stimulus; or (iv) the presence of PLAs and the absence of a 1-800 Contacts Knowledge Graph on Dr. Jacoby’s 2016 test stimulus had a material effect on the design or outcome of his survey.

Dr. Jacoby’s 2016 test stimulus was properly designed to simulate an actual SERP for the query “1800contacts” (not “1-800 Contacts”) “as closely as possible in the essential respects,” while maintaining the key features that needed to remain constant in both the test and control stimuli (CX9041 (Jacoby, Dep. at 103-104; Jacoby, Tr. 2148-2154)). Specifically, the appropriate survey design in this case required showing the exact same search engine results page with the exact same rival advertisements in both the test and control groups, with the only difference being the search term that the respondent typed into the search box, as Dr. Jacoby did in his survey. (Jacoby, Tr. 2153-2154). As previously explained, it would not have been possible to use an actual search results page that appeared in response to the search term “1800contacts” or “1-800 Contacts” as Dr. Jacoby’s test stimulus because no competitive advertisements appeared on actual

search engine results pages when one searched for those terms. *See Responses to Proposed Findings No. 1606, 1609, 1610, 1617.*

1619. Dr. Jacoby's 2016 test stimulus includes organic links for competitors of 1-800 Contacts. (CX 8008-0429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" does not have any organic links for competitors of 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2280).

### **Response to Proposed Finding No. 1619**

Proposed Finding No. 1619 is irrelevant and misleading to the extent it suggests that: (i) Dr. Jacoby's 2016 test stimulus, a mock-up SERP for the query "1800contacts," should have been identical or more similar to an actual SERP for the query "1-800 Contacts"; (ii) Dr. Jacoby should not have included any organic links for 1-800 Contacts' competitors in his 2016 test stimulus; or (iii) the presence of organic links for 1-800 Contacts' competitors on Dr. Jacoby's 2016 test stimulus had a material effect on the design or outcome of his survey.

As explained above in Response to Proposed Finding No. 1618, Dr. Jacoby's 2016 test stimulus was properly designed to simulate an actual SERP for the query "1800contacts" (not "1-800 Contacts") "as closely as possible in the essential respects," while maintaining the key features that needed to remain constant in both the test and control stimuli. Specifically, the appropriate survey design in this case required showing the exact same search engine results page with the exact same rival advertisements in both the test and control groups, with the only difference being the search term that the respondent typed into the search box, as Dr. Jacoby did in his survey. It would not have been possible to use an actual search results page that appeared in response to the search term "1800contacts" or "1-800 Contacts" as Dr. Jacoby's test stimulus because no competitive advertisements appeared when one searched for those terms, just as it was not possible for Respondent's survey expert, Dr. Van Liere. *See Responses to Proposed Findings No. 1606, 1609, 1610, 1611, 1617.*

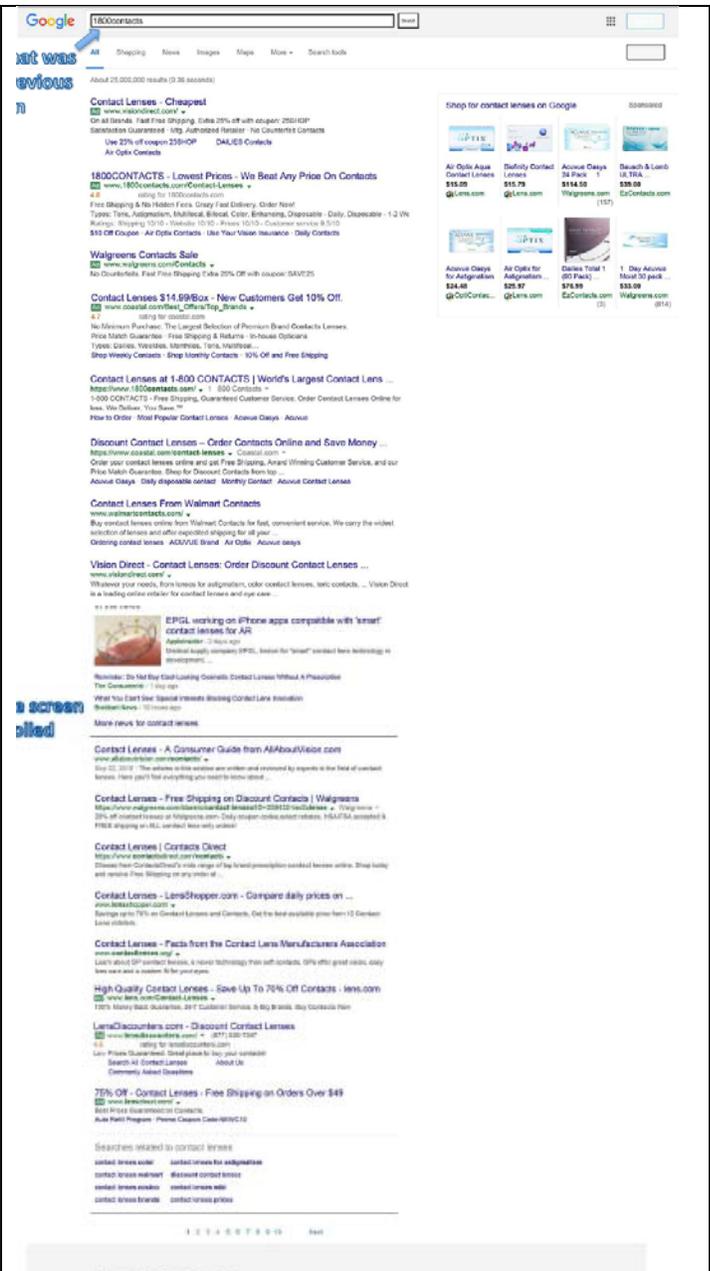
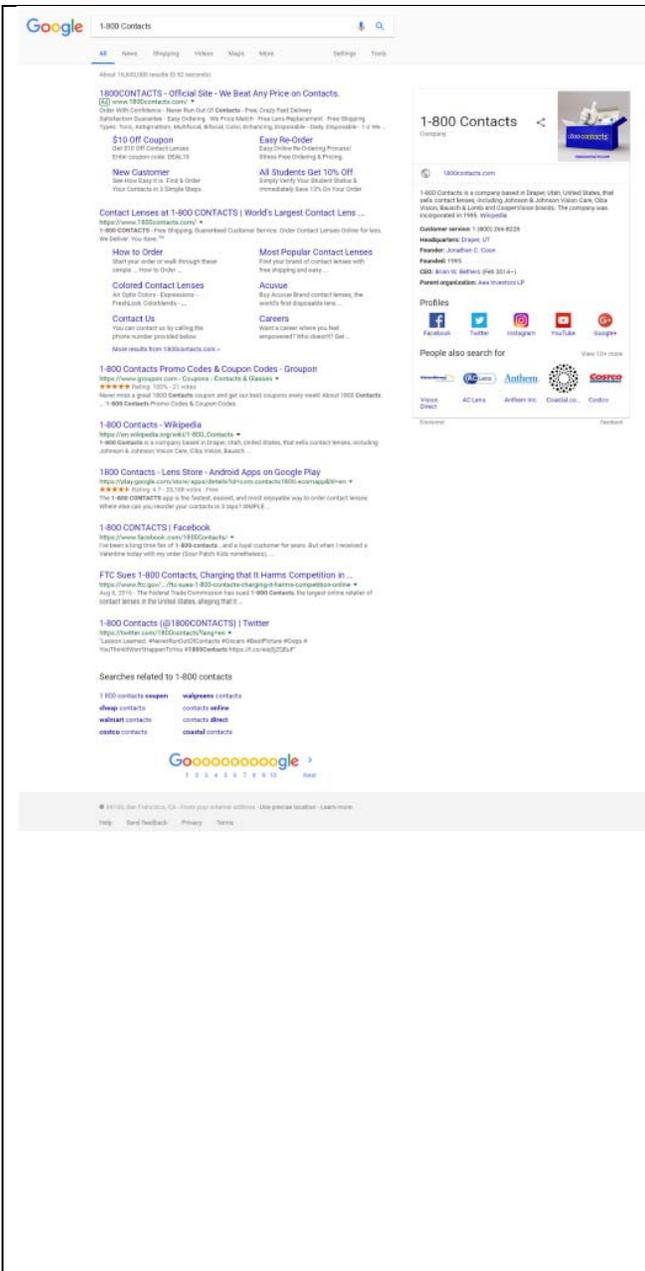
In any event, Respondent's focus on the specific content of the organic listings in Dr. Jacoby's test stimulus is a red herring. Organic listings have never been at issue in this case. Respondent has never claimed that consumers are confused by organic listings that appear in response to a search query containing a 1-800 Contacts' trademark. (Jacoby, Tr. 2283) ("The question was what would happen if we had the sponsored links, would people think these sponsored links, not the organic links, would people think these sponsored links were necessarily related to or come from or the source of 1-800 Contacts as a result of having typed in '1-800 Contacts' as a search term.").

1620. Dr. Jacoby's 2016 test stimulus includes one organic link for 1-800 Contacts. (CX 8008-0429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" has five organic links for 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2280).

#### **Response to Proposed Finding No. 1620**

Proposed Finding No. 1620 is irrelevant and misleading to the extent it suggests that: (i) Dr. Jacoby's 2016 test stimulus, a mock-up SERP for the query "*1800contacts*," should have been identical or more similar to an actual SERP for the query "*1-800 Contacts*"; (ii) Dr. Jacoby should have included additional organic links for 1-800 Contacts in his 2016 test stimulus; or (iii) the absence of additional organic links for 1-800 Contacts' competitors on Dr. Jacoby's 2016 test stimulus had a material effect on the design or outcome of his survey. *See Responses to Proposed Findings No. 1606, 1609, 1610, 1617-1619.*

1621. The actual SERP for the query "1-800 Contacts" in Dr. Jacoby's rebuttal report (left side) and Dr. Jacoby's 2016 test stimulus (right side) are shown below:



(CX 8011-057; CX 8008-0429-430).

**Response to Proposed Finding No. 1621**

Proposed Finding No. 1621 is inaccurate and misleading insofar as it suggests that CX8008 at 429-430 is the actual 2016 test stimulus used in Dr. Jacoby’s survey. As explained previously, CX8008 at 429-430 is a “representative screen shot” depicting part of the 2016 test stimulus used in Dr. Jacoby’s online study. The actual 2016 test stimulus appeared as an online

web page; respondents could scroll down to view the bottom of the page (represented as a separate screenshot at CX8008 at 430). As with nearly all of the images included in Exhibit H to Dr. Jacoby's report, CX8008 at 429-430 also includes marginalia, or explanatory content, on the sides of the pages to explain what is depicted in the corresponding screen shot. *See* Response to Proposed Finding No. 1604.

The image shown on the left side of Proposed Finding No. 1621 (CX8011 at 057) is "an" (not "the") actual SERP that appeared in response to the search query "1-800 Contacts." CX8011 at 057 is a screen shot that captured an actual Google SERP on March 7, 2017. (CX8011 at 011 ¶21 (Jacoby Rebuttal Report)).

1622. Because of the significant differences between Dr. Jacoby's 2016 test stimulus and the actual SERP for the query "1-800 Contacts," Dr. Jacoby admitted that his 2016 test stimulus did not test the question of whether rivals ads shown in response to the query "1-800 Contacts" on a SERP with the characteristics of an actual actual SERP for the query "1-800 Contacts":

QUESTION: So if the relevant question in this case is whether there would be confusion caused by rival ads showing up on a search engine result page that had, like in the real world, a Knowledge Graph for 1-800 Contacts on the right-hand side, no organic links for rival sellers of contact lenses, and only organic links that related to 1-800 Contacts, your test stimulus did not test that question, did it?"

THE WITNESS: The answer is, if that was the question, I don't agree, but if that was the question, my stimulus did not represent that....

(Jacoby, Tr. 2281).

### **Response to Proposed Finding No. 1622**

Proposed Finding No. 1622 is incomprehensible. Further, the cited testimony does not support the proposed finding that "Dr. Jacoby admitted that his 2016 test stimulus did not test the question of whether rivals ads shown in response to the query '1-800 Contacts' on a SERP with the characteristics of an actual actual [sic] SERP for the query '1-800 Contacts.'" Moreover, the

term “significant” is not defined, and there are no examples or context to determine what constitutes a “significant difference.”

Focusing solely on the cited transcript testimony, Proposed Finding No. 1622 is irrelevant and misleading to the extent it suggests that Dr. Jacoby’s 2016 test stimulus, a mock-up SERP for the query “1800contacts,” should have (or *could* have) been identical or more similar to an actual SERP for the query “1-800 Contacts.” See Responses to Proposed Findings No. 1606, 1609, 1610, 1617, 1618.

In addition, as described above, in Response to Proposed Finding 1611, both Dr. Jacoby and Dr. Van Liere had to “mock up” their test stimuli to include ads that would not otherwise appear in real-world search results for “1-800 Contacts” or “1800contacts” today, precisely because 1-800 Contacts’ Bidding Agreements prevent them from appearing.

1623. Dr. Jacoby further admitted that he could not tell us, without running a different test, whether or not there would be significant confusion on a search engine results page caused by rival ads in response to a search on “1-800 Contacts” and showing on a page that has a Knowledge Graph about 1-800 Contacts, organic results that all related to 1-800 Contacts, and no organic links for rival companies.” (Jacoby, Tr. 2282).

### **Response to Proposed Finding No. 1623**

Proposed Finding No. 1623 is false. In fact, Dr. Jacoby stated the exact opposite of the statement in this proposed finding. Dr. Jacoby testified that he *could* determine whether there would be significant confusion caused by rival ads appearing in response to a search on “1-800 Contacts” on a SERP containing the features listed above by extrapolating from the study that he did. (Jacoby, Tr. 2282) (“Q. So the answer is that without doing a test, a different test, you wouldn’t be able to answer the question that I asked; right? A. Not really. No. I’d be able to extrapolate from what I had with a reasonable degree of certainty to what would happen.”).

1624. In effect, Dr. Jacoby used the wrong test stimulus. Accordingly, his survey results are unreliable and will be accorded no weight.

**Response to Proposed Finding No. 1624**

Proposed Finding No. 1624 is unsupported, contradicted by the weight of the evidence, and misleading insofar as it suggests that the “correct” test stimulus in this case would have been identical or more similar to an actual SERP that appeared in response to the search term “1-800 Contacts” (or similar variation). Indeed, the proposed finding cites no evidence whatsoever and consists merely of an unsupported legal conclusion regarding the reliability of Dr. Jacoby’s study. As explained previously, Dr. Jacoby designed an appropriate test stimulus for this case by adhering to best practices in survey design, which required showing the exact same search engine results page with the exact same rival advertisements in both the test and control groups, with the only difference being the search term that the respondent typed into the search box, as Dr. Jacoby did in his survey. It would not have been possible to use an actual search results page that appeared in response to the search term “1800contacts” or “1-800 Contacts” as Dr. Jacoby’s test stimulus because no competitive advertisements appeared when one searched for those terms. *See* Responses to Proposed Findings No. 1606, 1609, 1610, 1611, 1617.

1625. Dr. Jacoby made this same mistake in another case, resulting in his survey being excluded. (Jacoby, Tr. 2285).

**Response to Proposed Finding No. 1625**

Proposed Finding No. 1625 is vague as to what the term “mistake” means, and irrelevant and misleading to the extent it suggests that surveys that Dr. Jacoby has designed in other cases have any bearing on his survey in this case. As Dr. Jacoby explained, “these are not cookie-cutter situations. Each case brings its own fact pattern and questions that are unique.” (Jacoby, Tr. 2352). Proposed Finding No. 1625 is also misleading to the extent it seeks to highlight *one* survey that was excluded among “well over a thousand” litigation surveys that Dr. Jacoby has designed in the last 37 years. (Jacoby, Tr. 2134). Of the approximately one thousand litigation surveys that

Dr. Jacoby has designed, he could recall only “four or five” that have been excluded, as compared to “close to 200” that have been admitted as evidence by courts. (Jacoby, Tr. 2135).

1626. In addition, Dr. Jacoby used the wrong test stimulus in a case in front of the Trademark Trial and Appeal Board. In *Factory Five Racing, Inc. v. Carroll Shelby*, 2010 WL 4232609 (TTAB Oct. 13, 2010), the Board found that Dr. Jacoby had used as his stimulus the photograph of the wrong model car, which did not have a distinguishing feature that the real-world car had. 2010 WL 4232609, \*15. When asked at deposition about this mistake, Dr. Jacoby replied, “You know, this is interesting to me. Number one, these photographs were provided by Mr. Cummings. Why he didn’t provide a photo with that very distinguishing feature, exhaust pipes, would be a question for him. I took what I was provided.” 2010 WL 4232609, \*16.

### **Response to Proposed Finding No. 1626**

Proposed Finding No. 1626 is irrelevant and misleading to the extent it suggests that surveys that Dr. Jacoby has designed in other cases have any bearing on his survey in this case. Proposed Finding No. 1626 is also misleading to the extent it seeks to highlight *one* survey that was excluded among “well over a thousand” litigation surveys that Dr. Jacoby has designed in the last 37 years. (Jacoby, Tr. 2134). *See* Response to Proposed Finding No. 1625. Dr. Jacoby’s survey in the *Factory Five Racing* case is particularly inapposite because it involved a question (not a finding, as the proposed finding incorrectly states above) of whether Dr. Jacoby was provided with a photograph of the correct model car to use in his survey stimulus. 2010 WL 4232609, \*16. In this case, there is no allegation that Dr. Jacoby used incorrect screen shots of allegedly infringing rival advertisements. Dr. Jacoby clearly identified the files and images that he used to design his survey. *See* CX8008 at 005 (Jacoby Expert Report) (listing “Screenshots of Allegedly Infringing Ads,” including complaints that 1-800 Contacts filed against competitors Memorial Eye, Vision Direct, EZ Lens, and Lensfast)). And Respondent has never asserted that the screen shots of the allegedly infringing rival advertisements were inaccurate in any way. Indeed, Dr. Jacoby relied on real-world advertisements that were actually challenged by 1-800 Contacts, and used those in his stimulus.

1627. The Board found that the discrepancy “calls into question the reliability of the survey” and “diminishes the probative value of the survey.” 2010 WL 4232609, \*16. Based on this and other failings, the Board found Dr. Jacoby’s survey of “no probative value.” 2010 WL 4232609, \*15.

**Response to Proposed Finding No. 1627**

Proposed Finding No. 1627 is irrelevant and misleading to the extent it suggests that surveys that Dr. Jacoby has designed in other cases have any bearing on his survey in this case. Proposed Finding No. 1627 is also misleading to the extent it seeks to highlight one survey that was excluded among “well over a thousand” litigation surveys that Dr. Jacoby has designed in the last 37 years. (Jacoby, Tr. 2134). It is also misleading for the reasons described in Response to Proposed Finding No. 1625.

***(b) Dr. Jacoby’s Pre-2016 Test Stimulus Failed To Replicate Recent Marketplace Conditions***

1628. Dr. Jacoby also created a pre-2016 test stimulus. (CX 8008-431). According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 (“And what you tried to do here with CX 8008 at page 431 was to create a search engine results page that is what you would see in the real world in the beginning of 2016; right? A. Yeah. To exemplify it, right.”); RX 715-1734 (Google SERP format changed in February 2016)).

**Response to Proposed Finding No. 1628**

Proposed Finding No. 1628 is inaccurate and contradicted by the weight of the evidence. Dr. Jacoby did not testify that he intended to “replicate” the format of a Google SERP *just before* February 2016. He testified that he intended to “exemplify” the general format of a Google SERP prior to February 2016, when Google no longer displayed advertisements on the right side of the SERP. (Jacoby, Tr. 2286). This finding is also misleading to the extent it suggests that the only reason that Dr. Jacoby created a pre-2016 test stimulus was to “replicate the format of a Google SERP just before February 2016.” In fact, Dr. Jacoby testified that “there are all kinds of reasons why I did the . . . pre-2016 format.” (Jacoby Tr. 2287; *see also* CX9041 (Jacoby, Dep. at 46-47)).

For example, Dr. Jacoby testified that “with this major [formatting] change in 2016 what I did was to test what is currently the case, but I thought it prudent to also test what previously was the case since that accounted for the vast majority of time in which complaints had been offered by respondents in this matter[.]” (Jacoby, Tr. 2141; *see also* CX9041 (Jacoby, Dep. at 44-45, 47) (“the majority of the search pages that 1-800 Contacts was contesting had taken place with the earlier format”)). Thus, “as an abundance of caution, just to dot the i, cross the t, especially in the case the trier of fact would have a question as to what the data would look like for the prior years, I thought it wise to do that second [pre-2016] portion of the study as well.” (Jacoby, Tr. 2140). Dr. Jacoby was not testing consumers’ responses to other (minor) formatting changes; he was testing consumers only as to their understanding of ads appearing on the right-hand-side of the SERP, which remained consistent for more than a decade, until February 2016.

Proposed Finding No. 1628 is also misleading insofar as it suggests that CX8008 at 431 is the actual pre-2016 test stimulus used in Dr. Jacoby’s survey. CX8008 at 431 is a “representative screen shot” depicting the pre-2016 test stimulus used in Dr. Jacoby’s online study. (CX8008 at 023, 410). The actual pre-2016 test stimulus appeared as an online web page; respondents could scroll up and down to view the page as desired. (*See* Jacoby, Tr. 2183). As with nearly all of the images included in Exhibit H to Dr. Jacoby’s report, CX8008 at 431 also includes marginalia, or explanatory content, on the sides of the pages to explain what is depicted in the corresponding screen shot. (CX9041 (Jacoby, Dep. at 109)). Proposed Finding No. 1628 further mischaracterizes the evidence because the representative screenshot at CX8008 at 431 depicts the “second part” of Dr. Jacoby’s pre-2016 test stimulus; the first part of the stimulus consisted of typing in the search term “1800contacts.” (*See* Jacoby, Tr. 2264-2265).

1629. In creating his pre-2016 SERP, Dr. Jacoby was not intending to “to go back and way back to 2004 or something when these [1-800 Contacts] lawsuits happened.” (Jacoby, Tr. 2288).

**Response to Proposed Finding No. 1629**

Complaint Counsel has no specific response, except to note that 1-800 Contacts continued to threaten and/or sue competitors through 2013.

1630. As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, “You really can’t go back in time.” (Jacoby, Tr. 2286-2287).

**Response to Proposed Finding No. 1630**

Proposed Finding No. 1630 is misleading insofar as it suggests that *all* surveys that use an “outdated” SERP format could be questioned. Dr. Jacoby testified that *because* “[y]ou really can’t go back in time . . . [y]ou have to look at the environment, the stimulus, the respondents, a whole bunch of things” to determine whether using an outdated SERP format is appropriate. (Jacoby, Tr. 2287). For example, Dr. Jacoby testified during his deposition that a study that tested how consumers understood a SERP that existed several years ago may or may not be appropriate, depending on such considerations as “[t]he nature of the environment, the nature of the stimulus, the nature of the individuals,” and whether the stimulus is “perceived as being pretty much the same by the respondents.” (CX9041 (Jacoby, Dep. at 42, 44). As

1631. In this case, Dr. Jacoby thought it was appropriate to use an outdated SERP format because the change in formatting was very recent. (Jacoby, Tr. 2287).

**Response to Proposed Finding No. 1631**

Proposed Finding No. 1631 is inaccurate, contradicted by the weight of the evidence, and misleading to the extent it suggests that the only reason Dr. Jacoby believed it was appropriate to design a second version of his survey using a pre-2016 SERP format was “because the change in formatting was very recent. In fact, Dr. Jacoby testified that “there are all kinds of reasons why I did the . . . pre-2016 format.” (Jacoby Tr. 2287). In addition to the fact that the only Google format change relevant to *this* case had only taken place about ten months before he conducted his

survey, Dr. Jacoby considered the following factors: (i) “it’s questionable that consumers would have noticed any difference [between the previous format and the current Google SERP format], or if they did . . . thought much of it”; (ii) “the majority of the search pages that 1-800 Contacts was contesting had taken place with the earlier [pre-2016] format”; and (iii) the possibility that there would be questions regarding data for the years prior to 2016 (CX9041 (Jacoby, Dep. at 46-47); Jacoby, Tr. 2140). As noted above, Dr. Jacoby was not testing consumers’ responses to other (minor) formatting changes; he was testing consumers only as to their understanding of ads appearing on the right-hand-side of the SERP, which remained consistent for more than a decade, until February 2016.

1632. As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: “[I]t is important to understand that we are testing consumers on a SERP that existed last year, not on pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol.” (CX 8011-029-30).

### **Response to Proposed Finding No. 1632**

Proposed Finding No. 1632 is inaccurate, unsupported, and contradicted by the evidence to the extent it represents that replicating the Google SERP format in early 2016 was “critical to the reliability of [Dr. Jacoby’s] survey.” First, the proposed finding mischaracterizes the evidence it cites because Dr. Jacoby’s rebuttal report, and the portion cited in Proposed Finding No. 1632, makes no such statement. To the contrary, Dr. Jacoby testified that he would have “sufficient and firm” grounds to offer the same opinion, even if one were to *disregard* the results from the pre-2016 version of his survey, because he could instead rely on the results of the 2016 version of his survey:

Q. If you were to disregard the results that you obtained in the pre-2016 version of your survey, would you still have an opinion today on whether consumers are likely to be confused by the appearance of sponsored advertisements that appeared in response to the search term "1-800 Contacts"?

A. I would.

Q. What would that opinion be?

A. It would be the same opinion, and it would be predicated on roughly half the sample, which is large -- half the sample would be -- what did we have, what, 12 -- 7 -- 8 -- 635 people, which is a large enough and stable enough sample on which to extrapolate. And so my conclusion would be the same. With the 2016 stimulus, we had a net of 6.1 percent confusion, and that would be sufficient and firm grounds for me to offer the opinion I'm offering.

(Jacoby Tr. at 2351-2352)

1633. The pre-2016 test stimulus is shown at CX 8008-431-432.

### **Response to Proposed Finding No. 1633**

Proposed Finding No. 1633 is inaccurate because CX8008 at 432 has no relation to Dr. Jacoby's pre-2016 test stimulus. CX8008 at 432 is a portion of a representative screen shot of Dr. Jacoby's 2016 control stimulus.

Proposed Finding No. 1633 is also misleading insofar as it suggests that CX8008 at 431 is the actual pre-2016 test stimulus used in Dr. Jacoby's survey. (CX8008 at 431)(Jacoby Report)) is a "representative screen shot" depicting the pre-2016 test stimulus used in Dr. Jacoby's online study. (CX8008 at 023, 410) (Jacoby Report)). The actual pre-2016 test stimulus appeared as an online web page; respondents could scroll up and down to view the page as desired. (See Jacoby, Tr. 2183). As with nearly all of the images included in Exhibit H to Dr. Jacoby's report, CX8008 at 431 also includes marginalia, or explanatory content, on the sides of the pages to explain what is depicted in the corresponding screen shot. (CX9041 (Jacoby, Dep. at 109)). Proposed Finding No. 1633 further mischaracterizes the evidence because the representative screenshot at CX8008 at 431 depicts the "second part" of Dr. Jacoby's pre-2016 test stimulus; the first part of the stimulus consisted of typing in the search term "1800contacts." (See Jacoby, Tr. 2264-2265).

1634. As discussed below, Dr. Jacoby's pre-2016 test stimulus does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Accordingly, Dr. Jacoby's study is unreliable and will be accorded no weight.

#### **Response to Proposed Finding No. 1634**

Proposed Finding No. 1634 is vague as to the meaning of "a Google SERP from October 2007." Further, Dr. Jacoby's "pre-2016 test stimulus" was not trying to replicate an exact Google SERP "as of early 2016," but rather, aimed to replicate one important condition that changed in February 2016. Specifically, for more than a decade prior to February 2016, Google showcased ads on the right-hand side of the SERP. In February 2016, Google removed the ads from the right-hand side of the page. This was the substantive change that Dr. Jacoby designed the stimulus to test, and this was the change that he tested. Other (minor) formatting changes that may have been made to other parts of the SERP during this time-frame are not relevant to this case.

The proposed finding also states an unsupported legal conclusion regarding the reliability of Dr. Jacoby's survey, and cites no record evidence whatsoever. For the reasons stated in Complaint Counsel's Post-Trial Reply Brief, at 41-52, Dr. Jacoby's study is reliable evidence of an unlikelihood of confusion when consumers view sponsored advertisements that appear in response to a search query for "1800contacts."

1635. As Dr. Jacoby was forced to admit, instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 ("Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes.")).

#### **Response to Proposed Finding No. 1635**

Proposed Finding No. 1635 is irrelevant and misleading to the extent it suggests that Dr. Jacoby should have used an actual SERP from the beginning of 2016 to create his pre-2016 test stimulus. The objective was *not* to replicate an actual Google SERP that existed at the beginning of 2016. *See* Response to Proposed Finding No. 1628, 1634. Rather, as described above, Dr.

Jacoby intended to “exemplify” the general format of a Google SERP that existed “for the vast majority of time in which complaints had been offered by respondents in this matter” (i.e., prior to February 2016, when Google stopped displaying advertisements on the right side of the SERP). (Jacoby, Tr. 2141; *see also* CX9041 (Jacoby, Dep. at 44-45, 47) (“the majority of the search pages that 1-800 Contacts was contesting had taken place with the earlier format”); Jacoby, Tr. 2286, 2296). As Dr. Jacoby testified, there were “at least a dozen years, perhaps more, going back to 2003 or ‘4,” where 1-800 Contacts implemented its trademark enforcement program under the previous format (Jacoby, Tr. 2140). Because the Google SERP was a “changing, dynamic one” during the many years that 1-800 Contacts implemented its trademark enforcement program, Dr. Jacoby’s pre-2016 stimulus was intended to represent an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016. (Jacoby, Tr. 2294, 2295, 2997, 2998) (“If the stimulus is a changing, dynamic one, then you’d have to do your best to represent what it looked like at different points in time.”). But the critical portion of the pre-2016 stimulus was that it replicated the condition that existed for more than a dozen years prior: ads displayed on the right-hand side of the page.

1636. The fact that Dr. Jacoby’s pre-2016 test stimulus replicates the format of a Google SERP from October 2007 is demonstrated by a comparison of the pre-2016 test stimulus and the SERP included in the 1-800 Contacts 2008 complaint. (*Compare* CX 8008-431-432 (pre-2016 stimulus) *with* RX 414-0007 (SERP in 2008 complaint)). The Google SERP from October 2007 (left side) and the the pre-2016 test stimulus (right side) are shown below:

The image displays two side-by-side screenshots of a Google search results page for the query "1800contacts".

**Left Screenshot:** Shows the search results for "1800contacts". The top results include "1800CONTACTS.com" with a sponsored link, "Buy Contact Lenses Online" with a sponsored link, and "Lowest Prices of Contacts" with a sponsored link. There are also several organic search results for "1800CONTACTS" and "1-800 CONTACTS".

**Right Screenshot:** Shows a similar view of the search results, but with a search bar at the bottom and a "Next" button. The search bar contains the text "1800contacts" and the "Next" button is highlighted.

(RX 414-0007; CX 8008-431-432).

### Response to Proposed Finding No. 1636

Proposed Finding No. 1636 is vague as to what “the SERP included in the 1-800 Contacts 2008 complaint” means. To the extent this expression refers to RX0414 at 0007, the proposed finding is also unsupported and contradicted by the weight of the evidence because: (i) RX0414, the sole document on which Respondent relies, was not admitted into evidence (JX0002-A at 045); (ii) Dr. Jacoby identified and produced numerous Google SERPs on which he relied to create his pre-2016 test stimulus (CX8008 at 005 (Jacoby Expert Report) (listing 16 “Screenshots of Allegedly Infringing Ads” that were considered by Dr. Jacoby)); and (iii) Dr. Jacoby testified that his pre-2016 test stimulus was an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016. (Jacoby, Tr. 2294, 2295, 2997, 2998). *See also* Responses to Proposed Findings No. 1634-1635.

1637. There can be no doubt that Dr. Jacoby's pre-2016 test stimulus was based on the 2007 Google SERP. The organic results in the 2007 SERP and Dr. Jacoby's pre-2016 test stimulus are identical. (Jacoby, Tr. 2290-2291). Both state at the top right, "Results 1-10 of about 190,000." (Jacoby, Tr. 2290-2291). Both state below the 1-800 Contacts ad, "87,940 results stored on your computer." (Jacoby, Tr. 2290-2291).

### **Response to Proposed Finding No. 1637**

Proposed Finding No. 1636 is vague as to what "the 2007 Google SERP" means. To the extent "the 2007 Google SERP" refers to RX0414, this proposed finding is unsupported because RX0414 was not admitted into evidence (JX0002-A at 045). Even if RX0414 had been admitted, Proposed Finding No. 1637 would be inaccurate, contradicted by the weight of the evidence to the extent it suggests that RX0414 at 007 and Dr. Jacoby's pre-2016 test stimulus are identical because: (i) the image shown in RX0414 at 007 is a portion of what appears to be a Google SERP, whereas Dr. Jacoby's pre-2016 test stimulus is a full-page Google SERP (*compare* RX0414 at 007, *with* CX8008 at 431 (Jacoby Expert Report)); (ii) the organic results shown in RX0414 at 007 and Dr. Jacoby's pre-2016 test stimulus are not identical; (iii) Dr. Jacoby's pre-2016 test stimulus includes at least two organic results that are not included on the image in RX0414 at 007; and (iv) at trial, Dr. Jacoby noted differences in the bolding of the text in the two documents.

Proposed Finding No. 1637 is also misleading to the extent it suggests that RX0414 at 007 is the only image that Dr. Jacoby considered in creating his pre-2016 test stimulus. Dr. Jacoby identified and produced numerous Google SERPs on which he relied to create his pre-2016 test stimulus (CX8008 at 005 (Jacoby Expert Report) (listing 16 "Screenshots of Allegedly Infringing Ads" that were considered by Dr. Jacoby). Dr. Jacoby also testified that his pre-2016 test stimulus was an "amalgamation of many years' worth" of Google SERPs that existed prior to the major formatting change in February 2016. (Jacoby, Tr. 2294, 2295, 2997, 2998). *See also* Responses to Proposed Findings No. 1634-1636.

1638. When confronted by this evidence and his testimony that he had based his pre-2016 test stimulus on Google search results from early 2016, Dr. Jacoby equivocated and claimed that he could not remember how the stimulus was created. (Jacoby, Tr. 2293 (“Q. Ten minutes ago, Dr. Jacoby, you testified that you created your pre-’16 test condition based on a search engine result that was run in the beginning of 2016; correct? A. Mr. Gates, that’s what I testified. You’re running a lot of stuff by me. If you want me to sit down and spend 15 minutes looking at each one of these exactly, I will. But I don’t remember exactly what happened at this point in time, as I tried to answer your previous question. A lot has gone on in your life and mine since the time these were created. I don’t know exactly what was used at this point and what I instructed the subcontractor. To be definitive about that, I’d have to be able to go back with the subcontractor and try and recreate what happened at that point in time.”)).

### **Response to Proposed Finding No. 1638**

Proposed Finding No. 1638 misrepresents Dr. Jacoby’s testimony and is misleading insofar as it suggests that Dr. Jacoby “could not remember how the stimulus was created.” As Dr. Jacoby wrote in his report and testified multiple times, he reviewed numerous Google SERPs that were used to create his pre-2016 test stimulus. (CX8008 at 005 (Jacoby Expert Report) (listing 16 “Screenshots of Allegedly Infringing Ads” considered by Dr. Jacoby); Jacoby, Tr. 2294, 2295, 2997, 2998) (pre-2016 test stimulus was an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016); Jacoby, Tr. 2289 (Jacoby reviewed several complaints besides the LensFast complaint); *see also supra* Responses to Proposed Findings No. 1634-1636). Although he could not recall the details of each and every item that he reviewed to construct his pre-2016 test stimulus, Dr. Jacoby consistently testified (and his report states) that his pre-2016 test stimulus was “an amalgam of many things I saw. And that included prior to what happened in, say December of 2015.” (Jacoby, Tr. 2294; *see also* CX8008 at 005 (Jacoby Expert Report)).

Proposed Finding No. 1638 is also misleading to the extent it suggests that Dr. Jacoby’s reliance on Google SERPs from early 2016 as well as other SERPs from previous years is inconsistent with Dr. Jacoby’s statement and testimony that his pre-2016 test stimulus represented

an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016). As a matter of logic, these statements are not inconsistent.

1639. When asked point blank whether he based his “pre-2016 test condition on a search engine result that was generated at the beginning of 2016,” Dr. Jacoby claimed that it was based “on that and it’s an amalgam of many things I saw.” (Jacoby Tr. 2294). Given the clear evidence that Dr. Jacoby’s pre-2016 test condition was based on the 2007 Google SERP, Dr. Jacoby’s testimony is not credible.

### **Response to Proposed Finding No. 1639**

Proposed Finding No. 1639 is vague, inaccurate, unsupported, and contradicted by the weight of the evidence because it is premised on the faulty assumption that Dr. Jacoby’s pre-2016 test condition was based solely on “the 2007 Google SERP.” For reasons stated above (*see* Responses to Proposed Findings No. 1635-1638), Dr. Jacoby’s testimony is both consistent and credible.

1640. When pushed, Dr. Jacoby admitted that he could not answer the question of whether his pre-2016 test stimulus was an accurate representation of the Google SERP format as of the beginning of 2016. (Jacoby, Tr. 2295 (“Q. Dr. Jacoby, can you tell us, based on your personal knowledge, whether the test stimuli represented at CX 8008 page 431 is an accurate representation of the format in which Google’s search engine pages appeared in January of 2016? A. .... I can’t answer your question. The total, complete, honest answer to your question is I don’t know.”)).

### **Response to Proposed Finding No. 1640**

Proposed Finding No. 1640 is irrelevant and misleading insofar as it suggests that Dr. Jacoby’s pre-2016 test stimulus should have been an exact replica of an SERP from the beginning of 2016 to create his pre-2016 test stimulus. As explained in Response to Proposed Findings No. 1634-1635, the objective was *not* to replicate an exact Google SERP that existed at the beginning of 2016. Rather, Dr. Jacoby intended to exemplify the general format of a Google SERP that existed “for the vast majority of time in which complaints had been offered by respondents in this matter” (i.e., prior to February 2016, when Google stopped displaying advertisements on the right side of the SERP). (Jacoby, Tr. 2141; *see also* CX9041 (Jacoby, Dep. at 44-45, 47) (“the majority

of the search pages that 1-800 Contacts was contesting had taken place with the earlier format”); Jacoby, Tr. 2286, 2296). As Dr. Jacoby testified, there were “at least a dozen years, perhaps more, going back to 2003 or ‘4,” where 1-800 Contacts implemented its trademark enforcement program under the previous format (Jacoby, Tr. 2140). Because the Google SERP was a “changing, dynamic one” during the many years that 1-800 Contacts implemented its trademark enforcement program, Dr. Jacoby’s pre-2016 stimulus was intended to represent an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016. (Jacoby, Tr. 2294, 2295, 2997, 2998) (“If the stimulus is a changing, dynamic one, then you’d have to do your best to represent what it looked like at different points in time.”).

1641. The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. { [REDACTED] }; *see also* RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)).

#### **Response to Proposed Finding No. 1641**

RXD027 is a demonstrative exhibit and may not be cited as evidence. *See* May 16, 2017 Order on Post-Trial Briefs, at 3. Proposed Finding No. 1641 is also misleading to the extent it suggests that all of the Google formatting changes that have taken place since 2007 are equally significant. The only “major change” that is relevant for purposes of a consumer survey in this case is the removal of advertisements on the right side of the Google SERP, which occurred in February 2016. (Jacoby, Tr. 2141). This change “paved the way for [Google] to introduce the biggest changes to [its] text ads since AdWords launched fifteen years ago.” (RX0715 at 1734; *see also* CX8008 at 007 n.3 (“Over time Google has made some changes to its SERP. However, the general advertising format (ads on the top and right-hand side of the page) remained consistent until [February] 2016.”). *See* Proposed Findings No. 1634-1635.

1642. Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby’s pre-2016 test stimulus rendered his study unreliable.

**Response to Proposed Finding No. 1642**

Proposed Finding No. 1642 merely asserts an unsupported legal conclusion regarding the reliability of Dr. Jacoby's survey and cites no record evidence whatsoever. Moreover, it is inaccurate, unsupported, contradicted by the evidence, and misleading insofar as it suggests that the exclusion of other minor changes to the Google SERP layout in Dr. Jacoby's pre-2016 test stimulus affect the reliability of his survey. First, as noted in Response to Proposed Finding No. 1632, Dr. Jacoby could have *disregarded* the results from the pre-2016 version of his survey yet still offer the same opinion, because he could have instead relied on the results of the 2016 version of his survey:

Q. If you were to disregard the results that you obtained in the pre-2016 version of your survey, would you still have an opinion today on whether consumers are likely to be confused by the appearance of sponsored advertisements that appeared in response to the search term "1-800 Contacts"?

A. I would.

Q. What would that opinion be?

A. It would be the same opinion, and it would be predicated on roughly half the sample, which is large -- half the sample would be -- what did we have, what, 12 -- 7 -- 8 -- 635 people, which is a large enough and stable enough sample on which to extrapolate. And so my conclusion would be the same. With the 2016 stimulus, we had a net of 6.1 percent confusion, and that would be sufficient and firm grounds for me to offer the opinion I'm offering.

(Jacoby Tr. at 2351-2352)

Second, Proposed Finding No. 1642 is misleading to the extent it suggests that Dr. Jacoby's pre-2016 test stimulus could have, or should have, captured every change to the Google SERP layout that took place from 2007 to 2016. This would have been impossible. The objective in designing a pre-2016 version of Dr. Jacoby's study was to exemplify the *general* format of a Google SERP that existed "for the vast majority of time in which complaints had been offered by respondents in this matter" (i.e., prior to February 2016, when Google stopped displaying

advertisements on the right side of the SERP). (Jacoby, Tr. 2140-2141; *see also* CX9041 (Jacoby, Dep. at 44-45, 47) (“the majority of the search pages that 1-800 Contacts was contesting had taken place with the earlier format”); Jacoby, Tr. 2286, 2296). Because the Google SERP was a “changing, dynamic one” during the many years that 1-800 Contacts implemented its trademark enforcement program, Dr. Jacoby’s pre-2016 stimulus was intended to represent an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016. (Jacoby, Tr. 2294, 2295, 2997, 2998) (“If the stimulus is a changing, dynamic one, then you’d have to do your best to represent what it looked like at different points in time.”). Most importantly, Dr. Jacoby’s pre-2016 test stimulus included the one feature of the Google SERP layout that remained consistent until 2016: the appearance of advertisements on the top and right-hand side of the page. (CX8008 at 007 n.3 (Jacoby Expert Report) (“Over time Google has made some changes to its SERP. However, the general advertising format (ads on the top and right-hand side of the page) remained consistent until [February] 2016.”). *See generally* Response to Proposed Finding No. 1634-1635, 1641.

1643. Dr. Jacoby’s pre-2016 test stimulus also rendered his survey unreliable because Dr. Jacoby failed to ensure that respondents were in the market at the relevant time. (Van Liere, Tr. 3078). As Dr. Van Liere testified, one problem with Dr. Jacoby’s use of the pre-2016 stimulus was “if he’s trying to measure whether confusion over this search results page would have occurred in the past, he would have had to include in his screening questions ... that would determine whether the consumers who were seeing it were actually in the market during the period of time at which he intended to represent the data for. So, for example, if this is a 2009 version of the search results page, you’d have to know, well, am I asking people who were in the market in 2009 whether they’re confused or not by these ads. He didn’t do that. He doesn’t do anything to determine whether consumers in the past were in the market for any given period of time.” (Van Liere, Tr. 3078).

### **Response to Proposed Finding No. 1643**

Proposed Finding No. 1643 asserts an unsupported legal conclusion regarding the reliability of Dr. Jacoby’s survey. It is also inaccurate and misleading to the extent it suggests that any purported flaw in Dr. Jacoby’s pre-2016 test stimulus would render his survey “unreliable.”

As explained previously, Dr. Jacoby could have disregarded the results from the pre-2016 version of his survey and could have offered the same opinion in this case by instead relying on the results of the 2016 version of his survey. *See supra* Response to Proposed Findings Nos. 1632, 1642.

Moreover, Proposed Finding No. 1643 is inaccurate, unsupported, contradicted by the weight of the evidence, and misleading to the extent it suggests that Dr. Jacoby's pre-2016 test stimulus exemplified anything other than the general format of a Google SERP that existed at the beginning of 2016 or before that time. As Dr. Jacoby testified, his pre-2016 test stimulus was intended to exemplify the general format of a Google SERP that one would have seen in the real world in the beginning of 2016, when Google no longer displayed advertisements on the right side of the SERP. (Jacoby, Tr. 2288). The "major change" between a Google SERP that one saw prior to February 2016 and after February 2016 was the removal of sponsored advertisements on the right side of the SERP. (Jacoby, Tr. 2141). That change was reflected in the two versions of Dr. Jacoby's survey. (CX8008 at 015 (Use of Two Different SERP Formats) (Jacoby Expert Report)). The notion that Dr. Jacoby did not include any screening questions "that would determine whether the consumers who were seeing [the pre-2016 stimulus] were actually in the market during the period of time at which he intended to represent the data for" is contradicted by the evidence. Dr. Jacoby included a screening question that asked whether respondents bought contact lenses online in the past 12 months. (CX8008 at 109 (Jacoby Expert Report)). Some, if not all, of the respondents who answered that question affirmatively would have viewed a version of the Google SERP that was more similar to Dr. Jacoby's pre-2016 stimulus, rather than the 2016 Google SERP layout, which had only been in effect for approximately nine months when Dr. Jacoby administered his survey. (Jacoby, Tr. 2140).

1644. Dr. Jacoby also failed to take any steps to ask respondents to view the pre-2016 test stimulus as they would have in 2007. (Van Liere, Tr. 3078-3079). As Dr. Van Liere explained, "But if [Dr. Jacoby is] actually trying to use it as some sort of an estimate of what -- whether there

was confusion in the past, he would have had to ask some sort of question in which respondents would have to think back, well, if you were looking at this in 2009, what would you think about this or that. And I – it’s a separate issue whether it even could be reliably done, but he doesn’t do anything to set the consumer’s mindset back to the time when this particular search results page would have occurred.” (Van Liere, Tr. 3078-3079).

**Response to Proposed Finding No. 1644**

Proposed Finding No. 1644 is irrelevant and unsupported because there was no reason for Dr. Jacoby to “take any steps to ask respondents to view the pre-2016 test stimulus as they would have in 2007.” To the extent this proposed finding suggests that Dr. Jacoby’s pre-2016 test stimulus is an exact replica of a 2007 Google SERP, the proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons stated in Responses to Proposed Findings Nos. 1634-1637. Dr. Jacoby’s pre-2016 stimulus was intended to represent an “amalgamation of many years’ worth” of Google SERPs that existed prior to the major formatting change in February 2016. (Jacoby, Tr. 2294, 2295, 2997, 2998) (“If the stimulus is a changing, dynamic one, then you’d have to do your best to represent what it looked like at different points in time.”). Most importantly, Dr. Jacoby’s pre-2016 test stimulus included the one feature of the Google SERP layout that remained consistent until 2016: the appearance of advertisements on the top and right-hand side of the page. (CX8008 at 007 n.3 (Jacoby Expert Report)). There was no need to ask respondents to view the pre-2016 test stimulus “as they would have in 2007” when the stimulus exemplified the general format of the Google SERP that was in effect only nine months before Dr. Jacoby administered his survey. (Jacoby, Tr. 2140).

1645. Accordingly, Dr. Jacoby’s survey shall be given no weight.

**Response to Proposed Finding No. 1645**

Proposed Finding No. 1645 is not a proposed finding of fact. It is a naked legal conclusion without any evidence to support it. For the reasons stated in Complaint Counsel’s Post-Trial

Reply Brief, at 41-52, Dr. Jacoby's survey is reliable and credible evidence of an unlikelihood of confusion when consumers view rivals' sponsored advertisement that appear in response to a search query for a 1-800 Contacts' trademarked term.

(c) ***Dr. Jacoby's Survey Failed To Replicate Recent Marketplace Conditions***

1646. Dr. Jacoby admitted that courts have excluded or given little weight to some of his prior surveys because they determined that the survey failed to sufficiently replicate marketplace conditions. (CX 9041 (Jacoby, Dep. at 164).

**Response to Proposed Finding No. 1646**

Proposed Finding No. 1646 is irrelevant and misleading to the extent it suggests that surveys that Dr. Jacoby has designed in other cases have any bearing on his survey in this case. As Dr. Jacoby explained, "these are not cookie-cutter situations. Each case brings its own fact pattern and questions that are unique." (Jacoby, Tr. 2352). Proposed Finding No. 1646 is also misleading to the extent it seeks to highlight an unspecified handful of Dr. Jacoby's surveys that were excluded or given little weight among "well over a thousand" litigation surveys that Dr. Jacoby has designed in the last 37 years. (Jacoby, Tr. 2134). Of the approximately one thousand litigation surveys that Dr. Jacoby has designed, he could recall only "four or five" that have been excluded, as compared to "close to 200" that have been admitted as evidence by courts. (Jacoby, Tr. 2135).

1647. In this case, Dr. Jacoby's survey is also unreliable because it fails to replicate market conditions in a number of ways.

**Response to Proposed Finding No. 1648**

Proposed Finding No. 1648 is vague and conclusory, without any evidence cited to support it. For the reasons stated in Complaint Counsel's Post-Trial Reply Brief, at 41-52, Dr. Jacoby's survey is reliable evidence of an unlikelihood of confusion when consumers view sponsored advertisements that appear in response to a search query for "1800contacts."

(i) *The Survey Improperly Drew Attention To A Single Ad*

1648. To begin with, Dr. Jacoby's survey failed to replicate marketplace conditions because, in its main question, the survey improperly drew respondents' attention to a single sponsored ad by inserting into the stimulus a large green arrow.

**Response to Proposed Finding No. 1648**

Proposed Finding No. 1648 is vague and conclusory, without any evidence cited to support it. For the reasons stated in Complaint Counsel's Post-Trial Reply Brief, at 41-52, Dr. Jacoby's survey is reliable evidence of an unlikelihood of confusion when consumers view sponsored advertisements that appear in response to a search query for "1800contacts."

1649. The "main question" in Dr. Jacoby's survey related to source confusion. (Jacoby, Tr. 2310-2311; CX 8008-445).

**Response to Proposed Finding No. 1649**

Complaint Counsel has no specific response, other than to note that Dr. Jacoby also tested for two other types of confusion: (i) affiliation and (ii) sponsorship. CX8008 at 007-008 (Principal Findings and Opinions) (Jacoby Expert Report). In addition, CX8008 at 445 (which is cited to support this proposed finding) is a representative screen shot showing only one of six possible variations of the "main question" for the 2016 test group of Dr. Jacoby's survey. For respondents in the 2016 test group, the "main question" could have also appeared as reflected in CX8008 at 446-453, depending on which rival advertisement (randomly selected) the survey was programmed to indicate. Dr. Jacoby's report also includes representative screen shots showing possible variations of the "main question" in the pre-2016 test group (CX8008 at 454-459).

1650. In this "main question" related to source confusion, the survey asked the respondents to look at the ad indicated by the green arrow and asked respondents to write in the answer to the following question, "If you click on this listing, which company's website would it take you to." (CX 8008-445). Each respondent was asked only about one ad. (Jacoby, Tr. 2310-2311).

**Response to Proposed Finding No. 1650**

Proposed Finding No. 1650 is inaccurate and unsupported because the survey did not ask respondents to “look at the ad” indicated by the green arrow. Instead, the survey asked respondents to “locate the listing” indicated by the arrow. (CX8008 at 116, 445-459 (Jacoby Expert Report)). The survey respondents were not asked look at any ad. Nor were they told that the listing indicated was an advertisement. In fact, Dr. Jacoby’s survey did not characterize any of the listings in the stimulus as organic listings or sponsored advertisements. *See* CX8008 at 115-121 (Jacoby Expert Report).

Proposed Finding No. 1650 is also misleading to the extent it suggests that all respondents were asked about the same one advertisement in the “main question” of Dr. Jacoby’s survey. As Dr. Jacoby explained in his report and at trial, for the main question regarding source confusion in his survey, respondents were randomly assigned to answer questions about one of six rival advertisements that appeared on Dr. Jacoby’s stimulus. (CX8008 at 116 (Jacoby Expert Report); Jacoby, Tr. 2311). For other questions in Dr. Jacoby’s survey regarding affiliation and sponsorship confusion, respondents were asked about all seven advertisements (1-800 Contacts’ advertisements plus six rival advertisements) at the same time. (CX8008 at 117, 118 (Jacoby Expert Report); Jacoby, Tr. 2311).

1651. The screen shot with the “main question” in Dr. Jacoby’s survey is below:

Condition 1  
Arrow 1

Please locate the listing indicated with the green arrow. You may need to scroll down. If you click on this listing, which company's website will it take you to?

Please carefully type your answer into the box immediately below.  NEXT

Google 1800contacts

All Shopping News Images Maps More Search tools

About 25,000,000 results (0.36 seconds)

**Contact Lenses - Cheapest**  
www.visiondirect.com  
On all Brands. Fast Free Shipping. Extra 25% off with coupon: 25SHOP  
Satisfaction Guaranteed - Mfg. Authorized Retailer - No Counterfeit Contacts  
Use 25% off coupon 25SHOP DAILIES Contacts  
Air Optix Contacts

**1800CONTACTS - Lowest Prices - We Beat Any Price On Contacts**  
www.1800contacts.com/Contact-Lenses  
4.8 rating for 1800contacts.com  
Free Shipping & No Hidden Fees. Crazy Fast Delivery. Order Now!  
Types: Toric, Astigmatism, Multifocal, Bifocal, Color, Enhancing, Disposable - Daily, Disposable - 1-2 We  
Ratings: Shipping 10/10 - Website 10/10 - Prices 10/10 - Customer service 9.5/10  
\$10 Off Coupon - Air Optix Contacts - Use Your Vision Insurance - Daily Contacts

**Walgreens Contacts Sale**  
www.walgreens.com/Contacts  
No Counterfeits. Fast Free Shipping Extra 25% Off with coupon: SAVE25

**Contact Lenses \$14.99/Box - New Customers Get 10% Off.**  
www.coastal.com/Best\_Offers/Top\_Brands  
4.7 rating for coastal.com  
No Minimum Purchase. The Largest Selection of Premium Brand Contacts Lenses.  
Price Match Guarantee - Free Shipping & Returns - In-house Opticians  
Types: Dailies, Weeklies, Monthlies, Toric, Multifocal ...  
Shop Weekly Contacts - Shop Monthly Contacts - 10% Off and Free Shipping

**Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens ...**  
https://www.1800contacts.com/ - 1 800 Contacts  
1-800 CONTACTS - Free Shipping, Guaranteed Customer Service, Order Contact Lenses Online for less. We Deliver. You Save.™  
How to Order - Most Popular Contact Lenses - Acuvue Oasys - Acuvue

**Discount Contact Lenses – Order Contacts Online and Save Money ...**  
https://www.coastal.com/contact-lenses - Coastal.com  
Order your contact lenses online and get Free Shipping, Award Winning Customer Service, and our Price Match Guarantee. Shop for Discount Contacts from top ...  
Acuvue Oasys - Daily disposable contact - Monthly Contact - Acuvue Contact Lenses

**Contact Lenses From Walmart Contacts**  
www.walmartcontacts.com/  
Buy contact lenses online from Walmart Contacts for fast, convenient service. We carry the widest selection of lenses and offer expedited shipping for all your ...  
Ordering contact lenses - ACUVUE Brand - Air Optix - Acuvue oasys

**Vision Direct - Contact Lenses: Order Discount Contact Lenses ...**  
www.visiondirect.com/  
Whatever your needs, from lenses for astigmatism, color contact lenses, toric contacts, ... Vision Direct is a leading online retailer for contact lenses and eye care ...

In the news

Shop for contact lenses on Google Sponsored

Air Optix Aqua Contact Lenses \$15.09 @Lens.com	Biofinity Contact Lenses \$15.79 @Lens.com	Acuvue Oasys 24 Pack \$114.50 Walgreens.com	Bausch & Lomb ULTRA ... \$39.00 EzContacts.com
Acuvue Oasys for Astigmatism \$24.48 @Opticontact...	Air Optix for Astigmatism ... \$25.97 @Lens.com	Dailies Total 1 (90 Pack) ... \$76.99 EzContacts.com	1 Day Acuvue Moist 30 pack ... \$33.00 Walgreens.com

q128

Note: this q128 question randomly appeared before or after q124

There are 6 possible listings to get the green arrow. Each respondent only sees one.

## Response to Proposed Finding No. 1651

Proposed Finding No. 1651 is inaccurate and misleading insofar as it suggests that the image above is the actual stimulus used for the “main question” in Dr. Jacoby’s survey. The image above was included in Respondent’s proposed finding without a citation, but it appears to be taken from CX8008 at 445 (Jacoby Expert Report). CX8008 at 445 is a “representative screen shot” depicting part of the stimulus for the “main question” shown to respondents in the 2016 test condition of Dr. Jacoby’s online study. (CX8008 at 023, 410). The actual 2016 test stimulus appeared as an online web page; respondents could scroll down to view the bottom of the page if they wished. (Jacoby, Tr. 2183). As with nearly all of the images included in Exhibit H to Dr. Jacoby’s report, CX8008 at 445 also includes marginalia, or explanatory content, on the sides of

the pages to explain what is depicted in the corresponding screen shot. (CX9041 (Jacoby, Dep. at 109)).

Proposed Finding No. 1651 is also misleading insofar as it suggests that there is only one variation of the “main question” in Dr. Jacoby’s survey (“the screenshot with the ‘main question’”). As explained *supra*, Response to Proposed Finding No. 1649, CX8008 at 445 shows only one of six possible variations of the “main question” for the 2016 test group of Dr. Jacoby’s survey. For respondents in the 2016 test group, the “main question” could have also appeared as reflected in CX8008 at 446-453, depending on which rival advertisement (randomly selected) the survey was programmed to indicate. Dr. Jacoby’s report also includes representative screen shots showing possible variations of the “main question” in the pre-2016 test group (CX8008 at 454-459).

1652. As Dr. Van Liere explained, Dr. Jacoby does not replicate a real search environment in which consumers are free to scan as much or as little of the search results page as they wish before making their own selections. (RX 735-0023). Consumers reviewing actual search results pages are able to select the natural, or organic, listings as well as sponsored advertisements if they wish. (RX 735-0023).

#### **Response to Proposed Finding No. 1652**

Proposed Finding No. 1652 is inaccurate, unsupported, and contradicted by the weight of the evidence. Respondents cites Dr. Van Liere’s report to support this proposed finding. A review of Dr. Van Liere’s report reveals that this proposed finding merely parrots the same statements made by Dr. Van Liere in his report, which fails to cite any evidence in support thereof. (RX0735 at 0023) (¶43) (Van Liere Report)). To the contrary, the evidence shows that respondents in Dr. Jacoby’s were in fact “free to scan as much or as little of the search results pages as they wish before making their own selections.” This is evident from Dr. Jacoby’s survey, when he first presented respondents with the relevant stimulus (with no arrows or markings of any kind) and instructed them to “[p]lease take as much time looking at this screen as you normally

would when thinking about ordering contact lenses on-line; feel free to scroll up or down if that's what you normally would do.” (CX8008 at 429-434) (Jacoby Report)).

Proposed Finding No. 1652 is also misleading to the extent it suggests that organic listings are relevant to the question that needed to be tested in Dr. Jacoby's and Dr. Van Liere's surveys. As Dr. Jacoby explained, this critique “miss[es] the point of my survey, and his own.” (CX8011 at 032 (¶ 42) (Jacoby Rebuttal Report)). 1-800 Contacts' alleged justification for its trademark enforcement program is that consumers are confused as to the source of *advertisements* shown in response to search queries containing a 1-800 Contacts trademark (or similar variations). “If an examiner seeks to determine whether users are *actually* confused by the source (or sponsorship or business affiliation) of those *advertisements*, there is no way to test that question *except* to ask about the *advertisements*, which is what [Dr. Jacoby] did, and Dr. Van Liere did not.” (CX8011 at 032 (¶ 42) (Jacoby Rebuttal Report) (emphasis in original)).

1653. Instead, Dr. Jacoby modifies the Google search results in very artificial ways. (RX 735-0023). Dr. Jacoby places large green arrows on the page, singling out and directing the respondent to a particular link or links and then asks closed-end questions about the highlighted links. (RX 735-0023). Dr. Jacoby's instruction to respondents for his key source questions direct the respondents, “Please locate the listing indicated with the green arrow. You may need to scroll down.” (RX 735-0023). Dr. Jacoby then asks respondents, “If you click on this listing, which company's website will it take you to?” (RX 735-0023).

### **Response to Proposed Finding No. 1653**

Proposed Finding No. 1653 is inaccurate, unsupported, contradicted by the weight of the evidence, and misleading because: (i) Respondent again copies statements from Dr. Van Liere's report, which cite no evidence or authority to support them; and (ii) Respondent mischaracterizes the evidence in several ways. First, all of the respondents in Dr. Jacoby's survey encountered the Google SERP stimulus in its pristine format (with no arrows or markings of any kind) and were told to look at it as they normally would. As Dr. Jacoby explained, Respondents were shown a mock-up Google SERP that included organic and sponsored listings, and there were no arrows

pointing to any of the listings on the SERP. (CX8008 at 429-434) (Jacoby Expert Report); CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). Respondents were also told to review and/or scroll through the screen as they *normally* would when thinking about ordering contact lenses. (CX8008 at 429-434 (Jacoby Expert Report); (Jacoby, Tr. 2182-2183) (“What you want them to do is, A, act as they normally would. B, you want them to know this is not the whole page, there’s another part to the page, and you can scroll down. If that’s what you normally would do, go ahead and do it.”).

Only after respondents had an opportunity to review (or not) the Google SERP as they normally would, were respondents asked questions about specific listings indicated by an arrow. It was necessary to ask respondents about the specific listings: “[T]o know whether it was the ‘1-800 Contacts’ search term or the particular sponsored ad that likely was responsible for any confusion that would be manifested, it was imperative that [Dr. Jacoby] test whether *each* of the sponsored links was likely to cause confusion as to source, business affiliation, or sponsorship.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). Contrary to Dr. Van Liere’s assertion, Dr. Jacoby did not diminish or augment any of the search results in any way. As Dr. Jacoby explained, the arrows were used as a “pointing device” in order to “identify to the respondent the link that was being asked about.” (Jacoby, Tr. 2200; CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). This is a widely accepted survey practice and analogous to “having an interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)).

The proposed finding further mischaracterizes Dr. Jacoby’s source confusion question as a “close-ended question.” A “close-ended” question “provide[s] the respondent with an explicit set of responses from which to choose; the choices may be as simple as *yes* or *no* . . . or as complex as a range of alternatives.” Shari Seidman Diamond, *Reference Guide on Survey Research*, in

Reference Manual on Scientific Research 359, 392 (Fed. Judicial Center 3d ed.). Dr. Jacoby's source confusion question does not ask respondents to choose from an explicit set of responses. Dr. Jacoby asks: "If you click on this listing, which company's website will it take you to?" (CX8008 at 034-035 (Likelihood of Confusion as to Source) (Jacoby Expert Report)). Contrary to the assertion in this proposed finding, Dr. Jacoby's source confusion question is an *open-ended* question because it "require[s] the respondent to formulate and express an answer in his or her own words." Diamond, *Reference Guide on Survey Research*, at 391. The advantage of open-ended questions, like Dr. Jacoby's source confusion question, "is that they give the respondent fewer hints about expected or preferred answers." Diamond, *Reference Guide on Survey Research*, at 392. By contrast, Dr. Van Liere's source confusion question suggests a preferred answer by asking respondents to select "all" links that they think "will take you to the website of the company that you searched for [1-800 Contacts]." CX8011 at 016-017(¶30-31) (Jacoby Rebuttal Report)).

1654. This is highly artificial and does not reasonably replicate consumer review of search results. (RX 735-0023). By contrast, in Dr. Van Liere's study, the respondent is instructed that he or she should "review these search results as you normally would" and click on the "link or links, if any" that she would like to select. (RX 735-0023).

#### **Response to Proposed Finding No. 1654**

Proposed Finding No. 1654 states a legal conclusion that is vague, inaccurate, unsupported, contradicted by the weight of the evidence, and misleading. First, it is unclear what specifically is alleged to be "highly artificial" or "not reasonably replicat[ing] consumer review of search results." As explained above, all respondents in Dr. Jacoby's survey were shown a Google SERP stimulus in its pristine format and were told to look at it as they normally would. *See* Response to Proposed Finding No. 1653. Second, the proposed finding again copies statements from Dr. Van Liere's report, which cite no evidence or authority to support them. Third, the

proposed finding is misleading insofar as it suggests that Dr. Jacoby did not instruct his respondents to review the search results as they normally would. In fact, Dr. Jacoby's survey explicitly instructed respondents to "take as much time looking at this screen as you normally would" and to "scroll up or down if that's what you normally would do." (CX8008 at 429-434 (Jacoby Expert Report)).

Fourth, the proposed finding is misleading insofar as it suggests that Dr. Van Liere's survey replicates consumers' actual review of a search results page. In the real world, consumers would see both organic *and* sponsored listings in response to a search query containing a 1-800 Contacts trademark. *See* (CX8011 at 011)( n.23, 057, 059) (Jacoby Rebuttal Report)). Yet, for half of the respondents in Dr. Van Liere's survey (in his control group), Dr. Van Liere "eliminated *all* sponsored links (including 1-800 Contacts' own sponsored link) . . . [B]y artificially removing the advertisements, Dr. Van Liere took away the very freedom he contends is critical in a consumer's review of the SERP: the ability to 'select the natural, organic, listings *as well as sponsored advertisements* if [she] wish[es].'" (CX8011 at 030-031 (¶ 41) (Jacoby Rebuttal Report)). Moreover, Dr. Van Liere's survey urged respondents to "select all" links that they thought would take them to the 1-800 Contacts website. As Dr. Van Liere admitted, in the real world, consumers cannot click on multiple links on a SERP at the same time. (Van Liere, Tr. 3163) ("Can you click on them at the -- at the same time without the process of going to some landing page? No.").

Fifth, the proposed finding is misleading and mischaracterizes the evidence because it selectively omits features of Dr. Van Liere's survey that contributed to the unduly suggestive nature of his survey questions. Dr. Van Liere did not simply ask respondents to "click on the link or links, if any," that she would like to select. Instead, Dr. Van Liere encouraged respondents to "select all" links that they thought were applicable. (RX0730 at 0018)(Exhibit C) (Van Liere

Report)). Dr. Van Liere's survey made it difficult for respondents to select no listings and impossible to indicate that respondents did not know or did not have an opinion. Dr. Van Liere admitted that he did not include any language in his question to inform the respondent that she could select none of the listings. (Van Liere, Tr. 3175). In order for a respondent to select none of the listings, she would need to scroll all the way to the bottom of the page (below the search results), find a small checkbox on the bottom left side of the page that states "None of these," and determine (without any instruction from the survey) that checking the box is an appropriate way to not identify any of the listings. (RX0730 at 0018 (Exhibit C) (Van Liere Report); Van Liere, Tr. 3175-1376). Dr. Van Liere also admitted that he did not include any option for a respondent to answer "I don't have an opinion." (Van Liere, Tr. 3180).

1655. Dr. Jacoby's use of the green arrows and asking about a single ad makes the survey unreliable. (Van Liere, Tr. 3080-3082). As Dr. Van Liere explained, "the way in which [Dr. Jacoby] uses these large green arrows to essentially force respondents to look at very specific parts of the page ... doesn't replicate marketplace conditions, meaning doesn't replicate the way in which a consumer would interact with a search results page, so in that sense it also doesn't reasonably replicate marketplace conditions." (Van Liere, Tr. 3079-3080).

#### **Response to Proposed Finding No. 1655**

Proposed Finding No. 1655 states a legal conclusion regarding the reliability of Dr. Jacoby's survey that is unsupported and contradicted by the weight of the evidence. Dr. Jacoby's use of arrows as a "pointing device" to "identify to the respondent the link that was being asked about" is one of the many reasons why his survey constitutes reliable evidence of an unlikelihood of confusion when consumers view sponsored advertisements that appear in response to a search query for "1800contacts." (Jacoby, Tr. 2200; CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). This is a widely accepted survey practice and analogous to "having an interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question." (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). Whether or not a survey respondent would

have focused her attention on the particular link in the real world is irrelevant. “[I]f you want to know whether or not that link is likely to be confusing, you ask a question.” (CX9041 (Jacoby, Dep. at 153)). And only by testing whether “*each* of the sponsored links was likely to cause confusion as to source, business affiliation, or sponsorship” was Dr. Jacoby able to determine “whether it was the ‘1-800 Contacts’ search term or the particular sponsored ad that likely was responsible for any confusion that would be manifested.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). *See* Response to Proposed Finding No. 1653.

1656. By using the green arrow to identify specific elements of the SERP for respondents to at, the survey leads respondents “to inspect it to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole,” causing respondents to “consider certain parts of the stimulus that you’ve decided they should pay attention to rather than let them look at the stimulus as they normally would . . . . creating a very artificial way for them to look at the results that they see.” (Van Liere., Tr. 3080-3081).

#### **Response to Proposed Finding No. 1656**

Proposed Finding No. 1656 is unsupported, contradicted by the weight of the evidence, and misleading. Dr. Van Liere’s assertion that the arrow used in Dr. Jacoby’s survey leads respondents “to inspect [the SERP] to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole” is baseless and lacks credibility. To the contrary, Dr. Jacoby’s survey instructed respondents to “take as much time looking at this screen as you normally would” and to “scroll up or down if that’s what you normally would do.” (CX8008 at 429-434 (Jacoby Expert Report)).

The proposed finding is also misleading to the extent it suggests that Dr. Jacoby’s survey should have asked respondents to “respond to the page as a whole.” This was not a survey about consumers’ understanding of the search results page “as a whole.” This was a survey about consumers’ understanding about *sponsored advertisements* that appear on a search results page in certain context. “If an examiner seeks to determine whether users are *actually* confused by the

source (or sponsorship or business affiliation) of those *advertisements*, there is no way to test that question *except* to ask about the *advertisements*, which is what [Dr. Jacoby] did, and Dr. Van Liere did not.” (CX8011 at 032 (¶ 42) (Jacoby Rebuttal Report) (emphasis in original). *See* Response to Proposed Finding No. 1652.

1657. In fact, Dr. Jacoby himself has written, “The test stimulus, including the mark that appears on the test stimulus, should not be diminished or supplemented in any way that would change how it appears in the marketplace.” (CX 9041 (Jacoby, Dep. at 19-20)).

### **Response to Proposed Finding No. 1657**

Complaint Counsel has no specific response, other than to note that, consistent with his testimony in this case, and with the treatise that he wrote, entitled *Trademark Surveys*, Dr. Jacoby did not diminish or supplement any of the search results in his stimulus. (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). By contrast, Dr. Van Liere admitted that his test stimuli differed from how they would normally appear in the marketplace because: (i) he removed 1-800 Contacts’ own advertisement from a search engine results page where it normally appeared at the top of the page (CX9049 (Van Liere, Dep. at 189); and (ii) the font size of the first three advertisements on one of his test stimuli appeared larger than the font size of the organic listings below it (Van Liere, Tr. 3209).

1658. Other literature regarding surveys confirms that drawing attention to a particular aspect of a stimulus is problematic. As one scholar wrote:

When consumers purchase a product in the real world, they obtain the information they want about the product on their own (without being led by the questions that may be included in the interview). [emphasis in original] They may elect to obtain a great deal of specific information, or they may be satisfied with overall impressions without going into details. To capture this phenomenon, the respondents should be instructed to look at the products, advertisements or marks at issue as they would normally when considering whether to make a purchase of the products at issue.

(CX 735-0025 (quoting Ostberg, Henry D. (2005) “Response to the Article Entitled: A ‘Reading’ Test or a ‘Memory’ Test: Which Survey Methodology Is Correct?” Trademark Reporter, 95: 1446-1449)).

### **Response to Proposed Finding No. 1658**

Proposed Finding No. 1658 is unsupported because it relies on quoted language from an article that is not in evidence in this case. The proposed finding is also irrelevant and misleading to the extent it suggests that respondents in Dr. Jacoby’s survey were not instructed to look at the search results page “as they normally would when considering whether to make a purchase of the products at issue.” Dr. Jacoby specifically instructed his respondents to “[p]lease take as much time looking at this screen as you normally would when thinking about ordering contact lenses online.” (CX8008 at 429-434). Further, none of the links were diminished or augmented; the ad being asked about was simply identified so the focus of the question was clear. As Professor Jacoby states in his report: “This is comparable to having an interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question.” CX8011 at 032 (¶ 44) (Jacoby Rebuttal Expert Report). This is a widely accepted survey practice, and 1-800 Contacts points to no authoritative source to the contrary.

1659. Dr. Jacoby nonetheless admitted that the purpose of the green arrow in his survey was to draw attention to one particular ad. (Jacoby, Tr. 2313 (“Q. Now, just to be a hundred percent clear respondents did see the big -- the green arrow pointed to the particular ad to which you were trying to draw attention; correct? A. Yes. Q. And the purpose of that green arrow was in fact to draw attention to that particular ad; right? A. It was to say, Hey, that's the one we're asking the question about. Yes.”)).

### **Response to Proposed Finding No. 1659**

Proposed Finding No. 1659 mischaracterizes the very testimony it cites to support it. The purpose of the arrow in Dr. Jacoby’s survey was not to “draw attention to one particular ad,” but rather to clearly identify which advertisement was the subject of Dr. Jacoby’s question. (Jacoby, Tr. 2313 (“Hey, that’s the one we’re asking the question about.”)). As Dr. Jacoby explained:

[N]one of the sponsored links were diminished or augmented; they were simply pointed to and identified so that the focus of the question was clear. This is comparable to having an interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question. This is a widely-accepted survey practice, and Dr. Van Liere points to no authoritative source to the contrary.

1660. As Dr. Van Liere opined, “Dr. Jacoby fails to meet his own standard and creates an artificial survey environment removed from the way consumers actually interact with the search results page.” (CX 735-0023).

### **Response to Proposed Finding No. 1660**

Complaint Counsel does not dispute that Dr. Van Liere opined as stated above. As a substantive matter, however, Dr. Van Liere’s statement is an opinion, not a fact, and is unsupported and contradicted by the weight of the evidence. *See supra*, Responses to Proposed Findings Nos. 1652-1659.

#### **(ii) *The Survey Did Not Allow Respondents To Engage With The Search Results In A Realistic Way***

1661. By using the green arrow to draw attention to a single ad, and asking only about that ad, the survey did not allow respondents to, as they would in the real-world, select and click on any link on the screen. (Jacoby, Tr. 2308-2312). Dr. Jacoby’s survey therefore did not allow respondents to engage with the search results in a realistic way.

### **Response to Proposed Finding No. 1661**

Proposed Finding No. 1661 is irrelevant and misleading insofar as it suggests that Dr. Jacoby’s survey should have allowed respondents to “click” on links on the screen. As Dr. Jacoby explained, the survey was designed to test initial interest confusion, which assesses consumers’ perceptions about the source of sponsored listings that appear on the search engine results page *before* they can click to see where the listings actually take them.

1. We were testing initial interest confusion, which is exactly what this is, hey, once you take a look at this, what do you think of this. They weren’t allowed to go further and perhaps disabuse themselves of the confusion . . . [I]n all these studies if you’re testing initial interest confusion. You’re asking them about this

page. You're not asking them what would you do if you took it further, when you're testing initial interest confusion. (Jacoby, Tr. 2192).

1662. Dr. Jacoby admitted that he could have designed the survey to allow respondents to click on the links; there was no technological or technical impediment to doing so. (Jacoby, Tr. 2312-2313 ("I'm not limited by the technology.")).

### **Response to Proposed Finding No. 1662**

Proposed Finding No. 1662 is irrelevant and misleading because Dr. Jacoby's survey was designed to test initial interest confusion, which assesses consumers' perceptions about the source of sponsored listings that appear on the search engine results page *before* they can click to see where the listings actually take them. *See* Response to Proposed Finding No. 1661.

1663. Dr. Jacoby further admitted that he had designed a survey in a prior keyword advertising case in which respondents were allowed to select any of the links that were presented. (Jacoby, Tr. 2315-2316; CX 9041 (Jacoby, Dep. at 20-25)).

### **Response to Proposed Finding No. 1663**

Proposed Finding No. 1663 is vague as to which prior survey is referenced ("a survey in a prior keyword advertising case") and as to the purpose for which respondents in Dr. Jacoby's "prior" survey "were allowed to select any of the links that were presented." The transcript citation and deposition citation above discuss two different surveys that Dr. Jacoby designed in the past. (*See* Jacoby, Tr. 2315-2316 (discussing *GEICO* survey); CX 9041 (Jacoby, Dep. at 20-25) (discussing *Bharat Matrimony* survey)). In either case, this proposed finding is irrelevant because the questions that Dr. Jacoby was addressing in the prior surveys were different than the one that needed to be addressed in this matter, which has nothing to do with whether a user clicks on the actual link shown. (Jacoby, Tr. 2315; CX9041 (Jacoby, Dep. at 20-25)).

#### ***(iii) The Survey Amounted To A Reading Test***

1664. By asking respondents to look at the particular ad indicated by the green arrow and to type into a box the company's website clicking on the ad will it take you to, Dr. Jacoby's survey amounted to reading test. (RX 735-0024-0025).

**Response to Proposed Finding No. 1664**

Proposed Finding No. 1664 is false and unsupported. It is also unclear what the following phrase means: “and to type into a box the company’s website clicking on the ad will it take you to.” The statement that “Dr. Jacoby survey amounted to [a] reading test” is inaccurate, unsupported, and contradicted by the weight of the evidence because Dr. Jacoby’s survey did not ask respondents to read anything. Instead, Dr. Jacoby’s question asked respondents where they believed a certain sponsored listing would take them if they clicked on it. (Jacoby, Tr. 2203-2204). Moreover, the statement that Dr. Jacoby’s source confusion question amounted to a “reading test” is irrelevant because, as Dr. Jacoby explained, any test could be called either a reading test or a memory test:

Either the stimulus is left in front of the respondent when the question is being asked, in which case it can be called a reading test, or the stimulus is removed from view before the question is asked, in which case it can be called a memory test. In this respect, both [Dr. Van Liere] and I relied on a reading test. In the real world, users make decisions while reviewing a SERP. It would be artificial to remove the SERP and then to ask questions.

(CX8011 at 033 (¶ 46) (Jacoby Rebuttal Report)).

1665. The data show that respondents in Dr. Jacoby’s survey simply read the ad copy or URL and typed it into the box. (RX 735-0024; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087).

**Response to Proposed Finding No. 1665**

Proposed Finding No. 1665 is vague as to what portion of Dr. Jacoby’s respondents allegedly “read the ad copy or URL and typed it into the box.” The proposed finding is also inaccurate and unsupported because there is no evidence that respondents in Dr. Jacoby’s survey “simply read the ad copy or URL.” None of the cited materials state that respondents in Dr. Jacoby’s survey “read the ad copy or URL.” (See RX0735 at 0024 (¶47) (Van Liere Expert Report) (stating that 8 percent of respondents “typed the advertisement copy”; no mention of

“reading” the ad copy or URL); Jacoby, Tr. 2317-2321 (some respondents may have typed in the URL or portions of the ad copy; no mention of whether or what respondents read); Van Liere, Tr. 3086-3087 (same)). Even if Dr. Van Liere or Dr. Jacoby had testified as to what respondents read while taking Dr. Jacoby’s survey, there would be no foundation for any such statement. To the extent this proposed finding suggests that Dr. Jacoby’s survey was a “reading test,” that conclusion is inaccurate, unsupported, contradicted by the weight of the evidence, and irrelevant for the reasons stated above. *See* Response to Proposed Finding No. 1665.

1666. Dr. Jacoby’s data show that 53% of respondents asked “If you click on this listing, which company’s website will it take you to?” simply typed into the supplied box the URL of the link in the ad indicated by the green arrow. (RX 735-0024; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087).

#### **Response to Proposed Finding No. 1666**

Proposed Finding No. 1666 is unsupported and irrelevant. The three citations supplied by Respondent above provide no support for the proposed finding. Although Dr. Van Liere stated in his expert report that “it appears that 53 percent of [Dr. Jacoby’s] respondents typed in the URL in their answer to Q124 and Q128, Dr. Van Liere provided no data or other basis for his calculation. (RX0735 at 0024 (¶47) (Van Liere Expert Report; *see also* Van Liere Tr. 3086-3087 (same)). The third citation is to Dr. Jacoby’s testimony. Dr. Jacoby confirmed that Dr. Van Liere made a determination that 53 percent of respondents typed in the URL of the relevant advertisement, but he did not confirm whether Dr. Van Liere’s determination was correct. (Jacoby, Tr. 2320-2321).

Even accepting Dr. Van Liere’s unsupported allegation as true, and assuming that 53 percent of the respondents in Dr. Jacoby’s survey typed in the URL of the relevant advertisement as the answer to the question asking where they thought the listing would take them, “that basically establishes [Dr. Jacoby’s] point. They weren’t confused into thinking it took them to 1-800 Contacts.” (Jacoby, Tr. 2321).

1667. Thus, for example, respondents asked “If you click on this listing, which company’s website will it take you to?” with regard to the following link simply copied into the answer box “www.lens.com/Contact-Lenses.” (Jacoby, Tr. 2317-2319).



### **Response to Proposed Finding No. 1667**

Proposed Finding No. 1667 is vague as to what percentage of respondents who viewed the specified advertisement typed in the specific response above. The proposed finding is also misleading and contradicted by the weight of the evidence to the extent it suggests that every respondent who viewed the specified advertisement typed in the specific response above. The evidence indicates that “some,” not all, of the respondents who were shown this particular ad typed in the URL specified above. (Jacoby, 2319). The proposed finding is also misleading and inaccurate for the reasons listed in Response to Proposed Finding No. 1666.

1668. Dr. Jacoby counted such answers as “not confused.” (Jacoby, Tr. 2319-2220).

### **Response to Proposed Finding No. 1668**

Proposed Finding No. 1668 is vague as to what “such answers” means. To the extent it refers to the unspecified number of respondents who were shown the advertisement in Proposed Finding No. 1667 and entered the URL specified in Proposed Finding No. 1667 as their answer to the question “If you click on this listing, which company’s website will it take you to?,” the proposed finding is correct that Dr. Jacoby did *not* count those respondents as confused, because those respondents were clearly not confused. (Jacoby, Tr. 2319-2320). As Dr. Jacoby explained, unless the respondent responded that they believed the rival ad would take them to 1-800 Contacts, “then by definition they were not confused” as to the source of the advertisement in a

way that was relevant to 1-800 Contacts because “they weren’t confused into thinking it took them to 1-800 Contacts.” (Jacoby Tr. 2320-2321).

1669. Dr. Jacoby’s data also show that 8% of respondents asked “If you click on this listing, which company’s website will it take you to?” simply typed into the supplied box a portion of the ad copy from the ad indicated by the green arrow. (RX 735-0024; Jacoby, Tr. 2317-2321).

### **Response to Proposed Finding No. 1669**

Proposed Finding No. 1669 is unsupported and irrelevant. The two citations supplied by Respondent above provide no support for the proposed finding. Although Dr. Van Liere stated in his expert report that 8 percent of [Dr. Jacoby’s respondents typed a portion of the advertisement copy, Dr. Van Liere provided no data or other basis for his calculation. (RX0735 at 0024 (¶47) (Van Liere Expert Report). At trial, Dr. Jacoby merely confirmed that Dr. Van Liere made this determination, but he did not confirm whether Dr. Van Liere’s determination was correct. (Jacoby, Tr. 2320-2321).

Even accepting Dr. Van Liere’s unsupported allegation as true, and assuming that 8 percent of the respondents in Dr. Jacoby’s survey typed in a portion of the relevant ad copy as the answer to the question asking where they thought the listing would take them, “that basically establishes [Dr. Jacoby’s] point. They weren’t confused into thinking it took them to 1-800 Contacts.” (Jacoby, Tr. 2321). *See* Response to Proposed Finding No. 1666.

1670. Thus, for example, respondents asked “If you click on this listing, which company’s website will it take you to?” with regard to the following link simply copied into the answer box “High Quality Contact Lenses - Save Up To 70% Off Contacts.” (Jacoby, Tr. 2317-2319).



### **Response to Proposed Finding No. 1670**

Proposed Finding No. 1670 is vague as to what percentage of respondents who viewed the specified advertisement typed in the specific response above. The proposed finding is also misleading and contradicted by the weight of the evidence to the extent it suggests that every respondent who viewed the specified advertisement typed in the specific response above. The evidence indicates that “some,” not all, of the respondents who were shown this particular ad typed in the response specified above. (Jacoby, 2319). The proposed finding is also misleading and inaccurate for the reasons listed in Response to Proposed Finding No. 1666.

1671. Dr. Jacoby counted such answers as “not confused.” (Jacoby, Tr. 2319-2220).

#### **Response to Proposed Finding No. 1671**

Proposed Finding No. 1671 is vague as to what “such answers” means. To the extent it refers to the unspecified number of respondents who were shown the advertisement in Proposed Finding No. 1670 and entered the response specified in Proposed Finding No. 1670 as their answer to the question “If you click on this listing, which company’s website will it take you to?,” the proposed finding is correct that Dr. Jacoby did *not* count those respondents as confused. (Jacoby, Tr. 2319-2320). As Dr. Jacoby explained, unless the respondent responded that they believed the rival ad would take them to 1-800 Contacts, “then by definition they were not confused” as to the source of the advertisement in a way that was relevant to 1-800 Contacts because “they weren’t confused into thinking it took them to 1-800 Contacts.” (Jacoby Tr. 2320-2321). *See* Response to Proposed Finding 1666.

1672. In fact, so long as respondents typed in anything that they saw next to the green arrow, or in fact anything other than “1-800 Contacts,” Dr. Jacoby counted the respondent as “not confused.” (Jacoby, Tr. 2320 (“With a qualification, and that is, a few people typed in gibberish answers. They were just taken out. They weren’t counted at all in the data.”)).

#### **Response to Proposed Finding No. 1672**

Proposed Finding No. 1672 is vague, inaccurate, and incorrect to the extent it suggests that respondents who “typed in anything that they saw next to the green arrow” were not counted as confused. “Anything next to the green arrow” could include the 1-800 Contacts advertisement, which for several of the respondents was adjacent to the rival advertisement that was the subject of Dr. Jacoby’s source confusion question. (*See, e.g.*, CX8008 at 445 (Appendix H) (Jacoby Report) (1-800 Contacts ad directly below rival ad indicated by the arrow); CX8008 at 446 (Appendix H) (Jacoby Report) (1-800 Contacts ad directly above rival ad indicated by the arrow)). If the survey respondent had indicated that she thought that clicking on the rival ad in question would take her to the 1-800 Contacts website, she would have been counted as confused in Dr. Jacoby’s survey. (Jacoby, Tr. 2317-2320). In addition, Dr. Jacoby excluded respondents who “entered gibberish answers,” among other exclusions. CX8008 at 030 (Individuals Eliminated/Excluded) (Jacoby Expert Report).

1673. Respondents could type in just “contact lenses” and would be counted as not confused in Dr. Jacoby’s survey because they didn’t type in “1-800 Contacts.” (Jacoby, Tr. 2320).

### **Response to Proposed Finding No. 1673**

Proposed Finding No. 1673 is misleading to the extent it suggests that a respondent who typed “contact lenses” in response to the question “If you click on this listing, which company’s website would it take you to” should have been counted as confused into thinking that the rival advertisement would take them to the 1-800 Contacts website. As Dr. Jacoby explained, 1-800 Contacts’ alleged theory of trademark infringement is that any user who types a search query “1-800 Contacts” (or similar variation) would be confused into thinking that a rival advertisement that appeared in response to the query would take them to the 1-800 Contacts website. (Jacoby, Tr. 2318); *see also* CX9044 (Tushnet, Dep. at 201-202) (“1-800’s theory of liability that it has articulated, and 1-800’s theory of liability depends on the idea that no matter what the ads say, if

the consumer has typed in ‘1-800 Contacts,’ she’s going to be confused about the source, sponsorship or affiliation of non-1-800 Contacts ads that show up in response to her having typed that.”)).

The only relevant “confusion” for purposes of this survey is confusion that results from respondents who are “misled, deceived, confused into thinking this [rival ad] would take them to 1-800 Contacts.” (Jacoby, Tr. 2320); *see also* CX8014 at 009 (¶ 19) (Tushnet Rebuttal Report (“not all consumer confusion is trademark confusion”)). Although the response “contact lenses” may (or may not) indicate some type of confusion by the survey respondent, it does not indicate that the respondent believes that the rival advertisement would take them to the 1-800 Contacts website, and therefore should not have been counted as relevant confusion in Dr. Jacoby’s survey. (Jacoby, Tr. 2320).

1674. As one scholar explained, a “reading test” is not appropriate in circumstances, as here, consumers are not making involved, deliberate, thoughtful decisions:

A “reading” test generates a higher level of attention – e.g., a respondent may reflexively examine a product when asked who puts it out. A reading test should thus be used to assess point-of-sale confusion under circumstances where consumers make involved, deliberate, thoughtful decisions.

A “reading” test is inappropriate, however, to disprove likely confusion among normally inattentive consumers, particularly where the stimulus conveys information that might not otherwise come to a consumer’s attention.

I. (RX 735-0025 (quoting Swann, Jerre B. (2005) “A ‘Reading’ Test or a ‘Memory’ Test: Which Survey Methodology Is Correct?” Trademark Reporter, 95: 876-881)).

#### **Response to Proposed Finding No. 1674**

Proposed Finding No. 1674 is unsupported because it relies on quoted language from an article that is not in evidence in this case. The proposed finding is also irrelevant, unsupported, and

misleading insofar as it suggests that Dr. Jacoby's survey was an inappropriate "reading test." As Dr. Jacoby explained, any test could be called either a reading test or a memory test:

Either the stimulus is left in front of the respondent when the question is being asked, in which case it can be called a reading test, or the stimulus is removed from view before the question is asked, in which case it can be called a memory test. In this respect, both [Dr. Van Liere] and I relied on a reading test. In the real world, users make decisions while reviewing a SERP. It would be artificial to remove the SERP and then to ask questions.

(CX8011 at 033 (¶ 46) (Jacoby Rebuttal Report)). Moreover, Dr. Jacoby's survey did not ask respondents to read anything. Instead, Dr. Jacoby's question asked respondents where they believed a certain sponsored listing would take them if they clicked on it. (Jacoby, Tr. 2203-2204). The passage cited in Dr. Van Liere's report, copied above, is taken from one of two companion articles by Jerre B. Swann, a leading trademark attorney, and Henry Ostberg, Ph.D., a retired survey expert, in which they debated the merits and demerits of reading and memory tests. The passage quoted above sheds no light on how consumers view a SERP, as in this case, or what their response would or should be. Nor does the debate suggest any consensus in the academic community on whether, and in what circumstances, one type of test is preferable to another. (CX8011 at 033 (n.59) (Jacoby Rebuttal Report)).

1675. As Dr. Van Liere explained, "the one issue that you have to consider is how you're going to show the stimuli and whether the way in which consumers interact with the stimuli would lead them essentially to just read information off the stimuli rather than interact with it or respond with their perceptions in a way that more reliably measured the degree to which they were confused." (Van Liere, Tr. 3084).

### **Response to Proposed Finding No. 1675**

Complaint Counsel does not dispute that Dr. Van Liere made the statement quoted above. To the extent Proposed Finding No. 1675 is intended to rely on the substance of Dr. Van Liere's statement as a proposed finding of fact, this is improper because the statement is an opinion about

survey design, not a fact. Moreover, the proposed finding is misleading insofar as it suggests that Dr. Jacoby's survey was an improper "reading test." See Response to Proposed Finding No. 1674.

1676. Dr. Jacoby's survey "leads the respondent to inspect the particular link with the big green arrow and essentially parrot back what they saw next to the big green arrow rather than any evidence that they're considering whether the thing they searched on is a website that -- whether this is a website that they would have gone to as 1-800 Contacts . . . . So it's not really measuring whether the consumer is confusing this link with 1-800 Contacts. It's simply asking the respondent to look at this ad and tell them what company it would go to with a big green arrow next to the URL of that company." (Van Liere, Tr. 3085-86).

### **Response to Proposed Finding No. 1676**

Proposed Finding No. 1676 states Dr. Van Liere's opinion, not a fact, which is unsupported and contradicted by the weight of the evidence. Respondent cites no evidence to support Dr. Van Liere's opinion that Dr. Jacoby's survey led respondents to "inspect" any link or "parrot back" what they saw next to the arrow, and the proposed "finding" is misleading insofar as it suggests that the use of an arrow was improper for these reasons. To the contrary, Dr. Jacoby used the arrow as a "pointing device" to "identify to the respondent the link that was being asked about" (Jacoby, Tr. 2200; CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). This is a widely accepted survey practice and analogous to "having an interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question." (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)).

The opinion that Dr. Jacoby's survey is "not really measuring whether the consumer is confusing this link with 1-800 Contacts" is unsupported and contradicted by the weight of the evidence. As Dr. Jacoby explained, "if you want to know whether or not that link is likely to be confusing, you ask a question." (CX9041 (Jacoby, Dep. at 153)). And only by clearly identifying each link and testing whether "each of the sponsored links was likely to cause confusion as to source, business affiliation, or sponsorship" was Dr. Jacoby able to determine "whether it was the

‘1-800 Contacts’ search term or the particular sponsored ad that likely was responsible for any confusion that would be manifested.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)).

1677. In particular, Dr. Jacoby’s data showing that 53% of respondents simply copied the URL of the ad and 8% typed in the ad copy next to the green arrow, demonstrates that Dr. Jacoby’s survey is unreliable. As Dr. Van Liere testified, “The use of the big green arrow and the use of a question that divorces it from the search process and a specific question that’s asking to look at, inspect this single ad and say which company’s website it takes you to, all that suggests that it’s not really measuring whether there was some initial interest confusion created by that ad appearing on a search results page.” (Van Liere, Tr. 3088-3089).

### **Response to Proposed Finding No. 1677**

Proposed Finding No. 1677 is a legal conclusion that is unsupported and contradicted by the weight of the evidence. First, as explained *supra*, there is no support for the statement that 53% of respondents in Dr. Jacoby’s survey “copied” the URL or that 8% of respondents typed a portion of the ad copy. *See* Responses to Proposed Findings Nos. 1666 and 1669. Even assuming that a certain percentage of respondents in Dr. Jacoby’s survey typed in the URL or a portion of the relevant ad copy as the answer to the question asking where they thought the listing would take them, “that basically establishes [Dr. Jacoby’s] point. They weren’t confused into thinking it took them to 1-800 Contacts.” (Jacoby, Tr. 2321).

Furthermore, Dr. Van Liere’s baseless opinion that Dr. Jacoby’s survey “divorces [the user] from the search process” is unsupported insofar it suggests that Dr. Jacoby’s survey did not simulate an online search query in material respects (*see* Responses to Proposed Findings Nos. 1653, 1657), and irrelevant and misleading to the extent it suggests that the Dr. Jacoby’s survey should have asked respondents to find a particular website or engage in some other “search process.” As both Dr. Jacoby and Dr. Van Liere agree, the relevant question is “whether the *sponsored advertisements* that appear in response to the search for the trademarked term are likely to be confusing.” (RX0735 at 0026 (¶ 52) (Van Liere Report)). Only by testing whether “*each of*

the sponsored links was likely to cause confusion as to source, business affiliation, or sponsorship” was Dr. Jacoby able to determine “whether it was the ‘1-800 Contacts’ search term or the particular sponsored ad that likely was responsible for any confusion that would be manifested.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)).

1678. Dr. Jacoby’s survey is thus unreliable because it does not measure potential consumer confusion in a realistic circumstance.

#### **Response to Proposed Finding No. 1678**

Proposed Finding No. 1678 is a legal conclusion that is unsupported and contradicted by the weight of the evidence. Respondent cites no evidence to support this conclusion. For reasons stated previously, Dr. Jacoby’s survey reliably measures potential confusion using stimuli that replicate the real-world marketplace in material respects. *See* Responses to Proposed Findings Nos. 1653, 1676.

#### *(iv) The Survey Improperly Lengthens The Time To Decide*

1679. Dr. Jacoby’s survey also failed to replicate marketplace conditions by requiring respondents to view the test stimuli for an unrealistic amount of time. The survey slowed the decisionmaking process

#### **Response to Proposed Finding No. 1679**

Proposed Finding No. 1679 is vague as to the meaning of the terms “unrealistic amount of time” and “the decisionmaking process.” The proposed finding is also unsupported and contradicted by the weight of the evidence because: (i) Respondent cites no evidence to support this conclusion; and (ii) for reasons stated above, Dr. Jacoby’s survey reliably measures potential confusion using stimulus that replicate the real-world marketplace in material respects. *See* Responses to Proposed Findings Nos. 1653, 1676.

1680. In the real world, consumers view SERPs very quickly before clicking on a link. (Goodstein, Tr. 2416-17; RX 736-0019, 0030-31).

**Response to Proposed Finding No. 1680**

Proposed Finding No. 1680 is vague as to what the term “very quickly” means. The proposed finding is also irrelevant because, without knowing what “very quickly” means, it is impossible to know whether or not respondents in Dr. Jacoby’s survey viewed the SERPs in the survey “very quickly.” More importantly, Dr. Jacoby instructed respondents in his survey to “take as much time looking at this [SERP] as you *normally* would.” (CX8008 at 429-434 (Appendix H) (Jacoby Expert Report) (emphasis added)). Because all individuals are different, ensuring respondents view the SERP in as much time as they “normally would” is a more reliable tool to simulate the “real world” than imposing an arbitrary time limit on all respondents that one might consider “very quickly.” (Jacoby, Tr. 2182 (“What you want them to do is . . . act as they normally would.”)).

Proposed Finding No. 1680’s emphasis on consumers’ “very quick[]” review of SERPs is also inconsistent with the manner in which Respondent’s own expert programmed his survey, in wherein he allowed respondents to take up to 39 minutes to complete his survey. (RX0735 at 0019 n.16 (Van Liere Expert Report). Although “there is no explanation of how he arrived at this seemingly arbitrary time limit,” CX8011 at 019 n. 38 (Jacoby Rebuttal Expert Report), it is fair to say that he did not limit respondents to a “very quick[]” review.

1681. In Dr. Jacoby’s survey, however, respondents were shown a search result and instructed, “Please take as much time looking at this screen as you normally would when thinking about ordering contact lenses online; feel free to scroll up or down if that’s what you normally would do.” (CX 8008-0034; Jacoby, Tr. 2302-2303). The survey programming would not allow respondents to go to the next part of survey until at least five seconds passed. (CX 8008-114; Jacoby, Tr. 2302-2303).

**Response to Proposed Finding No. 1681**

Proposed Finding No. 1681 is vague as to what the term “very quickly” means. The proposed finding is also irrelevant because, without knowing what “very quickly” means, it is impossible to know whether or not respondents in Dr. Jacoby’s survey viewed the SERPs in the survey “very quickly.” More importantly, Dr. Jacoby instructed respondents in his survey to “take as much time looking at this [SERP] as you *normally* would.” (CX8008 at 429-434 (Appendix H) (Jacoby Expert Report) (emphasis added)). Because all individuals are different, ensuring that respondents view the SERP in as much time as they “normally would” is a more reliable tool to simulate the “real world” than imposing an arbitrary time limit on *all* respondents that they view the SERP “very quickly.” (Jacoby, Tr. 2182 (“What you want them to do is . . . act as they normally would.”)). The instruction that Dr. Jacoby used is a standard practice in trademark surveys; imposing an arbitrary time limit is not. (CX9041 (Jacoby, Dep. at 97); Jacoby, Tr. 2306 (“[Y]ou don’t want to be intrusive [by imposing a time limit]. You want to let these people do what they naturally do.”)).

Proposed Finding No. 1681 is also misleading to the extent it suggests that the five second pause in Dr. Jacoby’s survey affected the amount of time that respondents spent looking at or reviewing the SERP in his survey. As Dr. Jacoby testified, the purpose of the five second pause was to make sure that respondents read his instruction to look at the SERP as they normally would: “It took an average of six seconds to read that instruction. I wanted to make sure they read that instruction, and then they were free to go ahead and do what they normally do.” (Jacoby, Tr. 2303).

1682. After respondents clicked the “Next” button, they continued to view the search result and were instructed, “Please locate the listing indicated with the green arrow. You may need to scroll down. If you click on the listing, which company’s website will it take you to?” (CX 8008-115; Jacoby, Tr. 2303).

**Response to Proposed Finding No. 1682**

Complaint Counsel notes that there is no foundation for the statement that respondents “continued to view the search result” without data on what exactly respondents were looking at when they took Dr. Jacoby’s survey. Although respondents were free to continue looking at the search result, they were neither required nor instructed to do so. Dr. Jacoby simply instructed respondents to “take as much time looking at this [SERP] as you *normally* would.” (CX8008 at 429-434 (Appendix H) (Jacoby Expert Report) (emphasis added)). Respondents “took as much or as little time as they wanted.” (Jacoby, Tr. 2306).

1683. In designing his survey, Dr. Jacoby did not do any study or seek any other’s research on how long consumers typically take after they type in a search query, before they select a link. (Jacoby, Tr. 2305-2306).

#### **Response to Proposed Finding No. 1683**

Proposed Finding No. 1683 is irrelevant and misleading insofar as it suggests that Dr. Jacoby did not replicate the real world marketplace because he did not conduct a study on “how long consumers typically take after they type in a search query.” Statistics regarding the “typical” or average amount of time consumers take after typing in a search query would not have been helpful to Dr. Jacoby’s survey, and likely would have decreased its reliability. As explained in Response to Proposed Finding No. 1682, Dr. Jacoby instructed respondents in his survey to “take as much time looking at this [SERP] as you *normally* would.” (CX8008 at 429-434 (Jacoby Expert Report) (emphasis added)). Because all individuals are different, ensuring that respondents view the SERP in as much time as they “normally would” is a more reliable tool to simulate the “real world” than imposing an arbitrary time limit on *all* respondents. (Jacoby, Tr. 2182 (“What you want them to do is . . . act as they normally would.”)).

Further, as described in Response to Proposed Finding No. 1680, Dr. Van Liere allowed respondents to take up to 39 minutes to complete his survey, with “no explanation of how he

arrived at this seemingly arbitrary time limit.” CX8011 at 019 n. 38 (Jacoby Rebuttal Expert Report).

1684. Respondents in Dr. Jacoby’s survey were not limited in the amount of time they could take to respond to the survey question. (Jacoby, Tr. 2306). Dr. Jacoby did not build into the survey anything that would ensure that respondents would try to only take the amount of time that they would take in the real world when they searched on something and picked a link. (Jacoby, Tr. 2306).

#### **Response to Proposed Finding No. 1684**

Proposed Finding No. 1684 is inaccurate, contradicted by the weight of the evidence, and misleading insofar as it suggests that the lack of an arbitrary time limit imposed on respondents somehow undermined the “real world” nature of Dr. Jacoby’s survey. First, as explained previously, Jacoby did include a mechanism to ensure that survey respondents “would try to only take the amount of time that they would take in the real world when they searched on something.” He specifically instructed survey respondents to “[p]lease take as much time looking at this screen as you *normally* would when thinking about ordering contact lenses on-line” (CX8008 at 429-434 (Appendix H) (Jacoby Expert Report) (emphasis added)). Dr. Jacoby also imposed a five second pause to ensure that respondents read that instruction to take the amount of time and act as they normally would in the real world marketplace: “It took an average of six seconds to read that instruction. I wanted to make sure they read that instruction, and then they were free to go ahead and do what they normally do.” (Jacoby, Tr. 2303). Because all individuals are different, ensuring that respondents view the SERP in as much time as they “normally would” is a more reliable tool to simulate the “real world” than imposing an arbitrary time limit on *all* respondents. (Jacoby, Tr. 2182 (“What you want them to do is . . . act as they normally would.”)). This type of instruction is standard practice in trademark surveys. (CX9041 (Jacoby, Dep. at 97)). It is also less intrusive than an arbitrary time limit. (Jacoby, Tr. 2306 (“[Y]ou don't want to be intrusive. You want to let these people do what they naturally do.”)).

Further, as described in Response to Proposed Finding No. 1680, the only manner in which Dr. Van Liere “limited” his respondents in the amount of time they could review his mock-up SERP was by limiting the total time a respondent could spend on the survey to *39 minutes*. To the extent that this imposes any practical limit, Dr. Van Liere provided “no explanation of how he arrived at this seemingly arbitrary time limit.” CX8011 at 019 n. 38 (Jacoby Rebuttal Expert Report).

1685. Despite requiring respondents to view the search results page through two sets of instructions, one of which precluded respondents from moving on for five seconds, Dr. Jacoby did not know how long respondents spent viewing the search results. (Jacoby, Tr. 2303-04).

#### **Response to Proposed Finding No. 1685**

Proposed Finding No. 1685 is vague as to what “two sets of instructions” are referenced, and is inaccurate, misleading, and contradicted by the weight of the evidence because Dr. Jacoby did not “require respondents to view the search results page.” Dr. Jacoby instructed survey respondents to “[p]lease take as much time looking at this screen as you *normally* would when thinking about ordering contact lenses on-line” (CX8008 at 429-434 (Appendix H) (Jacoby Expert Report) (emphasis added)). As Dr. Jacoby explained, “[t]hey took as much or as little time as they wanted.” (Jacoby, Tr. 2306).

The five second pause in Dr. Jacoby’s survey was neither intended to require, nor had the effect of requiring, respondents to view the search results page. It was programmed to ensure that respondents read the instruction to take the amount of time and act as they normally would in the real world marketplace: “It took an average of six seconds to read that instruction. I wanted to make sure they read that instruction, and then they were free to go ahead and do what they normally do.” (Jacoby, Tr. 2303).

This proposed finding is also vague as to the meaning of “the search results,” and misleading to the extent it suggests that Dr. Jacoby did not have this information or was not

willing to make such information available to Respondent. When Respondent's counsel asked Dr. Jacoby at trial, after hours of testimony, how long respondents spent on one web page of his survey (out of nearly one hundred screen shots that Dr. Jacoby provided in his report), Dr. Jacoby, could not provide an accurate answer *without referring to the data from his survey*. (Jacoby, Tr. 2303; *see also* Jacoby, Tr. 2307 (“Q. And so you can't tell us how long on average respondents spent looking at the page before answering that question; right? A. *I can because I have those data*. Sitting here, I cannot tell you.”) (emphasis added).

1686. As Dr. Jacoby admitted, if a respondent is allowed to view it for an unrealistic length of time, that might undermine the validity of the survey. (Jacoby, Tr. 2300). People can be confused by something that they look at and they can concentrate on for a very short period of time, when they wouldn't be confused by the very same thing if they could concentrate on it for a longer period of time. (CX 9041 (Jacoby, Dep. 115-116)).

#### **Response to Proposed Finding No. 1686**

Proposed Finding No. 1686 is irrelevant because there is no evidence that respondents in Dr. Jacoby's survey viewed the search results page in his survey “for an unrealistic length of time” or that respondents “concentrate[d]” on the search results page “for a longer period of time.” *See* Responses to Proposed Findings Nos. 1679, 1681, 1684. Moreover, to the extent that this is correct, it applies equally to Dr. Van Liere's survey, who “limited” his total survey time to 39 minutes. In his (unexplained) view, it would be realistic for a respondent to view a test page for half an hour (assuming a few minutes would have been devoted to reading the general instructions and screening questions). *See* Response to Proposed Finding No. 1680.

#### **Response to Proposed Finding No. 1687**

Proposed Finding No. 1687 is irrelevant because, whether or not Dr. Van Liere was able to find data regarding the amount of time respondent spent on each page of Dr. Jacoby's survey, Dr. Jacoby did not rely on any such data in formulating his opinion in this case. (Jacoby, Tr. 2353). Respondent also provides no support for the proposed finding that Dr. Jacoby's testimony is not

credible merely because he expressed “criticism of Dr. Van Liere.” As discussed in Complaint Counsel’s Post-Trial Reply Brief, at 41-53, Dr. Jacoby’s report and testimony provide reliable and credible evidence of an unlikelihood of confusion when consumers view rivals’ sponsored advertisement that appear in response to a search query for a 1-800 Contacts’ trademarked term.

(v) ***The Survey Questions Are Divorced From The Search Task***

1688. In addition, Dr. Jacoby’s survey failed to replicate marketplace conditions because the questions were divorced from the search task. Respondents in Dr. Jacoby’s survey entered the search term only once, at the beginning of the main part of the questionnaire. (Jacoby, Tr. 2308). Respondents then go through a number of screens and are asked about links in several survey questions, none of which refer to the search term. (CX 8008-115, 465, 471, 481, 487; Jacoby, Tr. 2308-2310).

**Response to Proposed Finding No. 1688**

Proposed Finding No. 1688 is an unsupported legal conclusion insofar it suggests that Dr. Jacoby’s survey did not simulate an online search query in material respects. *See* Responses to Proposed Findings Nos. 1653, 1657. The proposed finding is also irrelevant and misleading to the extent it suggests that the Dr. Jacoby’s survey should have asked respondents to enter the search term more than once, or to find a particular website or engage in some other “search process.” As Dr. Van Liere admitted (and Dr. Jacoby agreed), “[t]he question is not whether the trademarked term is confusing, but whether the *sponsored advertisements* that appear *in response* to the search for the trademarked term are likely to be confusing.” (RX0735 at 0026 (¶ 52) (Van Liere Expert Report) (emphases added); Jacoby, Tr. 2219).

1689. Dr. Jacoby did not know how much time elapsed from the time respondents entered the search term and the various questions asked in the survey. (Jacoby, Tr. 2308-2310).

**Response to Proposed Finding No. 1689**

Proposed Finding No. 1689 is misleading to the extent it suggests that Dr. Jacoby should have known the answer to a very specific question about the length of time that respondents spent

on a particular web page from his survey. When Respondent's counsel asked Dr. Jacoby at trial, after hours of testimony, how long respondents spent on one web page of his survey (out of nearly one hundred screen shots that Dr. Jacoby provided in his report), Dr. Jacoby could not provide an accurate answer *without referring to the data from his survey*. (Jacoby, Tr. 2303; *see also* Jacoby, Tr. 2307 (“Q. And so you can’t tell us how long on average respondents spent looking at the page before answering that question; right? A. I can because I have those data. Sitting here, I cannot tell you.”)). The proposed finding that Dr. Jacoby could not recall the minutiae of his survey data is unremarkable. It is also irrelevant because, in formulating his opinion in this case, Dr. Jacoby did not rely on data regarding the amount of time that elapsed between when respondents entered a search term and when they answered certain questions. (Jacoby, Tr. 2353).

1690. Moreover, as Dr. Van Liere testified, “So the way [Dr. Jacoby has] done and set up the exercise is he’s asked the respondent to scroll and look for the green arrow on the page, so at the beginning of the process he’s essentially asking you to look for a very specific thing on the page that has a green arrow and indeed tells you you might have to scroll down to find it. Then -- that sort of divorces the whole exercise from the search process, because now he’s having you go up and down the page and find very specific things.” (Van Liere, Tr. 3084-3085).

#### **Response to Proposed Finding No. 1690**

Proposed Finding No. 1690 merely asserts an opinion of Dr. Van Liere as a proposed finding of fact. Furthermore, Dr. Van Liere’s opinion is unsupported, contradicted by the weight of the evidence, and misleading insofar as it suggests that the use of arrows as a pointing device to clarify the subject of Dr. Jacoby’s questioning was improper. *See* Response to Proposed Finding No. 1676. Dr. Jacoby’s use of arrows as a “pointing device” to “identify to the respondent the link that was being asked about” is one of the many reasons why his survey constitutes reliable evidence of an unlikelihood of confusion when consumers view sponsored advertisements that appear in response to a search query for “1800contacts.” (Jacoby, Tr. 2200; CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). This is a widely accepted survey practice and analogous to “having an

interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)). Whether or not a survey respondent would have focused her attention on the particular link in the real world is irrelevant. “[I]f you want to know whether or not that link is likely to be confusing, you ask a question.” (CX9041 (Jacoby, Dep. at 153)). And only by testing whether “*each* of the sponsored links was likely to cause confusion as to source, business affiliation, or sponsorship” was Dr. Jacoby able to determine “whether it was the ‘1-800 Contacts’ search term or the particular sponsored ad that likely was responsible for any confusion that would be manifested.” (CX8011 at 032 (¶ 44) (Jacoby Rebuttal Report)).

Dr. Van Liere’s opinion is also unsupported insofar it suggests that Dr. Jacoby’s survey did not simulate an online search query in all material respects. *See* Responses to Proposed Findings Nos. 1653, 1657.

1691. Accordingly, Dr. Jacoby’s survey failed to sufficiently replicate marketplace conditions and is therefore unreliable. It will be accorded no weight.

**Response to Proposed Finding No. 1691**

Proposed Finding No. 1691 improperly states a legal conclusion regarding the reliability of Dr. Jacoby’s survey. This legal conclusion is also unsupported and contradicted by the weight of the evidence. For the reasons stated in Complaint Counsel’s Post-Trial Reply Brief, at 41-53, Dr. Jacoby’s survey is reliable and credible evidence of an unlikelihood of confusion when consumers view rivals’ sponsored advertisement that appear in response to a search query for a 1-800 Contacts’ trademarked term.

**(vi) *Dr. Jacoby Used An Improper Control Condition***

1692. Respondents in the control condition in Dr. Jacoby’s survey are not asked to search using the term “1800contacts,” as did the respondents in the test condition, but instead were asked to do an entirely different search using the term “contact lenses.” (CX 8008-014-015).

Respondents in both conditions are then shown the very same search results with the very same sponsored links. (*Compare CX 8008-435 with CX 8008-438*).

### **Response to Proposed Finding No. 1692**

Proposed Finding No. 1692 is inaccurate and mischaracterizes both the factual and legal issues in this case. First, none of the respondents in Dr. Jacoby's survey or Dr. Van Liere's survey were asked to perform a live online search. The surveys ask respondents to *type in* certain keywords, and then view certain advertisements that appear on a search engine results page in response to those keywords.

The survey was designed to *simulate* a search by asking respondents to *type in* certain keywords, and then view certain advertisements that appear on a search engine results page in response to those keywords. (*See RX0735 at 0012 (¶ 24) (Van Liere Expert Report)* ("The main questionnaire was designed to simulate searching the internet . . . ."; respondents were "instructed to type the word '1-800 Contacts' into the Google or Yahoo search box. . . . The assigned search result appeared to respondents as though they had just conducted a search . . . .").

Second, Dr. Jacoby's control was the only possible control that could actually test 1-800 Contacts' (implausible) assertion, that is, when a consumer types in the search term "1-800 Contacts," he or she *expects* to see only ads relating to 1-800 Contacts and will therefore be confused by the mere presence of any other ad, regardless of content. *See RX0735 at 0026 (¶ 52) (Van Liere Expert Report)* ("The question is . . . whether the sponsored advertisements that appear in response to the search for the trademarked term are likely to be confusing."). If 1-800 Contacts' confusion hypothesis were correct, one would expect that consumers who were not confused by ads displayed in response to a generic search query, like "contact lenses," would be confused by those *same ads* when they were displayed in response to a search query for "1-800 Contacts." (CX9017 (Blackwood, Dep. at 284-285) (testifying that the identical ads could be confusing when

returned in response to a search to “1-800 Contacts,” but *not* confusing when returned in response for a search for “contact lenses”); CX9047 (Hogan Dep. at 132-133) (“Well, I think the very premise of these cases is that by inducing a search engine to serve up a sponsored link at the top of a page in response to a search for 1-800 Contacts, these advertisers were in effect communicating to consumers that they were 1-800 Contacts or were affiliated or endorsed or sponsored by 1-800 Contacts. . . .”). Therefore, the only way to test 1-800 Contacts’ theory of confusion is to compare respondents’ confusion regarding the source, sponsorship or affiliation of the rival advertisements when they appear in response to the search term “1-800 Contacts” (or similar variation) versus respondents’ confusion regarding the source, sponsorship or affiliation of the *same* ads when they appear in response to a *different* search term (CX8008 at 014-015 (Jacoby Expert Report); *accord* CX9044 (Tushnet, Dep. at 201-202) (“1-800’s theory of liability that it has articulated, and 1-800’s theory of liability depends on the idea that no matter what the ads say, if the consumer has typed in ‘1-800 Contacts,’ she’s going to be confused about the source, sponsorship or affiliation of non-1-800 Contacts ads that show up in response to her having typed that. The only way to test that is to actually test the thing that you say is confusing, and that’s why a true control for that theory would involve ‘1-800 Contacts’ as a search term versus something that was not ‘1-800 Contacts’ as a search term.”).

Accordingly, respondents in Dr. Jacoby’s survey were asked to type in certain assigned keywords (“1800contacts” or “contact lenses”) into the Google search box, depending on which group of the survey to which they were randomly assigned. (CX8008 at 014 (Design Overview) (Jacoby Expert Report)). Respondents in both groups were then shown the same search results, regardless of which keyword they typed. (CX8008 at 014 (Design Overview) (Jacoby Expert Report)).

1693. Dr. Jacoby’s control stimulus is thus exactly the same as the test stimulus, sharing every characteristic (i.e., the sponsored advertisements) whose influence is being assessed on the test stimulus. (RX 735-0027).

### **Response to Proposed Finding No. 1693**

Proposed Finding No. 1693 is inaccurate and misleading because it mischaracterizes both the evidence and the relevant legal issue. As a threshold matter, Dr. Jacoby’s stimulus consisted of two parts: (1) typing in a search term, and (2) a SERP. (CX8011 at 035 (¶ 50) (Jacoboy Rebuttal Report)). The first part of the stimulus was different (respondents in the test group typed (“1800contacts”; respondents in the control group typed “contact lenses”), while the *second* part of Dr. Jacoby’s stimulus (the resulting SERP) was identical in the test and control groups. (CX8008 at 014 (Design Overview) (Jacoboy Expert Report)). Thus, it is inaccurate to say that Dr. Jacoby’s “control stimulus is . . . exactly the same as the test stimulus.” Indeed, Respondent concedes that Dr. Jacoby’s test and control stimuli used different search terms in Proposed Finding No. 1696.

Moreover, the statement that “the characteristic whose influence is being assessed” is the “sponsored advertisements” betrays a fundamental misunderstanding of proper survey design and the factual background in this case. As Dr. Jacoby explained, and as Dr. Van Liere agreed, the issue that needed to be tested in this case is “whether, *having typed in the search term ‘1-800 Contacts,’* consumers are confused into thinking that clicking on one or more of the resulting advertisements will take them to the website for 1-800 Contacts, or that the operators of one or more of the advertisements (other than one for 1-800 Contacts) has a business affiliation with, or is sponsored by, 1-800 Contacts.” (CX8011 at 008 (¶ 13) (Jacoboy Rebuttal Report)). Therefore, the characteristic whose influence is being assessed is “the use of a 1-800 Contacts trademark (or variation thereof) as a keyword.” (CX8008 at 014-015 (Jacoboy Expert Report); *see also* Jacoboy, Tr. 2150-2151). Dr. Van Liere agreed on the relevant question, although he failed to test it. (RX0735 at 0026 (¶ 52) (Van Liere Expert Report) (“The question is . . . whether the sponsored

advertisements that appear in response to the search for the trademarked term are likely to be confusing.”)). As described above (and more fully in Complaint Counsel’s Post-Trial Reply Brief, at 44-46), only by showing *identical* SERPs to users who typed in *different* search terms could Dr. Jacoby properly test whether a user who types “1-800 Contacts” (or similar variation) as a search term would be confused by non-1800 Contacts advertisements that appear in response to that search term. *See also* CX9044 (Tushnet, Dep. at 201-202) (“The only way to test that is to actually test the thing that you say is confusing, and that’s why a true control for that theory would involve ‘1-800 Contacts’ as a search term versus something that was not ‘1-800 Contacts’ as a search term.”). *See* Response to Proposed Finding No. 1692.

1694. In his survey, Dr. Jacoby does not ask one question about respondents’ opinions about the term searched, rather he asks only about the sponsored advertisements. (RX 735-0027).

#### **Response to Proposed Finding No. 1694**

Proposed Finding No. 1694 is irrelevant because, as Respondent’s own survey expert admitted, “[t]he question is not whether the trademarked term is confusing, but whether the sponsored advertisements that appear in response to the search for the trademarked term are likely to be confusing.” (RX0735 at 0026 (¶ 52) (Van Liere Expert Report)).

1695. Because there is no difference between the test and control conditions, any confusion found in the control condition is caused by the same elements as the test condition, and any net calculation based on the control is inappropriate. (RX 735-0027).

#### **Response to Proposed Finding No. 1695**

Proposed Finding No. 1695 is inaccurate because it is based on the false premise that “there is no difference between the test and control conditions” in Dr. Jacoby’s survey. As explained in Response to Proposed Finding No. 1693, the test and control stimulus in Dr. Jacoby’s survey were identical, “with the key exception of the characteristic whose influence is being assessed.” (CX8008 at 014 (Design Overview) (Jacoby Expert Report) (quoting Shari S.

Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed.) at 399)). Here, the characteristic that needed to be assessed was the use of “1-800 Contacts” (or similar variation) as a search term. See CX8008 at 014-015 (Design Overview) (Jacoby Expert Report). See Response to Proposed Finding 1692. Thus, Dr. Jacoby showed identical SERPs to users who typed in *different* search terms in the test and control groups. See *generally* Response to Proposed Finding No. 1693. Indeed, Respondent concedes that Dr. Jacoby’s test and control stimuli used different search terms in Proposed Finding No. 1696.

Because the only difference in Dr. Jacoby’s test and control stimuli was the search term that users typed, the statement that “any confusion found in the control condition is caused by the same elements as the test condition” is false and contradicted by the weight of the evidence. Specifically, “[b]y comparing these levels of confusion [in the test and control groups], we can determine whether any confusion that arises is attributable to the use of ‘1800contacts’ as a search term (the crux of 1-800 Contacts’ infringement claims against its rivals).” (CX8008 at 015 (Jacoby Expert Report)).

1696. By having respondents in his control condition search using “contact lenses” rather than “1800contacts,” respondents in the control group are conducting a different exercise than those in the test group. (Van Liere, Tr. 3089-3090 (“In Dr. Jacoby’s study, he actually has the respondents search on a different term, and the consequence of that is he’s asking the respondents in the test to do one type of exercise, but he’s asking the respondents in the control to do a different exercise.”)).

### **Response to Proposed Finding No. 1696**

Proposed Finding No 1696 is misleading and inaccurate, because, as described above, Dr. Jacoby isolated the variable that needed to be tested, the search term. Contrary to Dr. Van Liere, who changed multiple variables (and failed to answer *any* question, let alone the only relevant question), Dr. Jacoby isolated the one variable that needed to be tested, and kept other factors the

same. *See* Response to Proposed Finding 1692; *see also* Complaint Counsel’s Post-Trial Reply Brief at 46.

1697. Dr. Jacoby admitted that it is critical to ensure that the survey seek to put the test and control groups are in the same state of mind. (Jacoby, Tr. 2321-2322).

#### **Response to Proposed Finding No. 1697**

Complaint Counsel has no specific response, other than to note that Dr. Jacoby testified that a survey must be designed to put respondents in appropriate frame of mind, not “state” of mind, and that respondents in the test and control groups must have the same frame of mind. (Jacoby, Tr. 2321-2322). Dr. Jacoby designed his survey to achieve this principle by instructing all respondents in his survey as follows: “Suppose you wanted to order contact lenses over the Internet using the search term that appears above [either ‘1800contacts’ or ‘contact lenses’].” (CX8008 at 034 (Jacoby Expert Report); *see also* Jacoby, Tr. 2322-2323).

1698. Dr. Jacoby did no research to determine whether or not people who type in a search term like “1-800 Contacts” have a different intent or a different state of mind than people that type in a generic term like “contact lenses.” (Jacoby, Tr. 2322-2323).

#### **Response to Proposed Finding No. 1698**

Proposed Finding No. 1698 is irrelevant and misleading insofar as it suggests that Dr. Jacoby should have conducted research to determine whether or not people who type in a search term like ‘1-800 Contacts’ have a different intent or a different state of mind than people that type in a generic term like ‘contact lenses.’” Dr. Jacoby did not need to conduct such research because he provided all of the respondents in his survey with the appropriate and identical frame of mind by instructing them as follows: “Suppose you wanted to order contact lenses over the Internet using the search term that appears above [either ‘1800contacts’ or ‘contact lenses’].” (CX8008 at 034 (Jacoby Expert Report); *see also* Jacoby, Tr. 2322-2323); Response to Proposed Finding 1692).

1699. The evidence shows that consumers searching using the 1-800 Contacts trademark are typically seeking to navigate to the 1-800 Contacts website. (RX 733-0045-52 (Ghose Report); CX 9046 (Ghose, Dep. at 116-117)).

**Response to Proposed Finding No. 1699**

Proposed Finding No. 1699 is irrelevant to the survey conducted by Dr. Jacoby because Dr. Jacoby provided all of the respondents in his survey with the appropriate and identical frame of mind by instructing them as follows: “Suppose you wanted to order contact lenses over the Internet using the search term that appears above [either ‘1800contacts’ or ‘contact lenses’].” (CX8008 at 034 (Jacoby Expert Report); *see also* Jacoby, Tr. 2322-2323).

As a substantive matter, the proposed finding is contradicted by the weight of the evidence, which shows that navigational intent of consumers is not monolithic. More importantly, the record evidence, including testimony from Dr. Ghose, shows that it is effective for an advertiser to target a customer at the moment when that customer’s intent is to engage with a rival of the advertiser because advertising has the capacity to *change* a consumer’s commercial intent. (Ghose, Tr. 3962; *see also* CCPTB at 138 n.443). *See also* Response to Proposed Finding Nos. 946, 1766.

1700. Dr. Jacoby was unaware of this evidence. (Jacoby, Tr. 2323-2325).

**Response to Proposed Finding No. 1700**

Proposed Finding No. 1700 is irrelevant to the survey conducted by Dr. Jacoby for the reasons stated in Responses to Proposed Findings Nos. 1698 and 1699. Further, this purported “evidence” is fiction. *See* Response to Proposed Finding No. 1699; Complaint Counsel’s Reply Brief at 60.

1701. Using the different search terms—one a variation of 1-800 Contacts’ trademark and one a generic term—put the respondents in the test and control groups in Dr. Jacoby’s survey in a different state of mind or frame of reference. (Van Liere, Tr. 3089-3090).

**Response to Proposed Finding No. 1701**

Proposed Finding No. 1701 is unsupported and contradicted by the weight of the evidence, as explained in Response to Proposed Findings No. 1698-1699.

1702. Because respondents in the control group search using “contact lenses” rather than “1800contacts,” they are likely to interact with the results differently, rendering the study unreliable. (Van Liere, Tr. 3089-3090 (“So in my opinion, that change in the frame of reference makes the way in which the respondent would interact with the search results page change the nature of the exercise such as it’s not a reliable indicator of how much guessing or background noise is in the test condition.”); *see also* Van Liere, Tr. 3093 (“using the search term in the control different than the search term in the test, respondents bring a different frame of reference to it, and therefore it is not measuring the degree to which in the test the confusion is elevated by forms of error or noise”)).

### **Response to Proposed Finding No. 1702**

Proposed Finding No. 1702 is an unsupported opinion (not a proposed finding of fact) by Dr. Van Liere regarding the reliability of Dr. Jacoby’s survey. This opinion is premised on the false statement that respondents in Dr. Jacoby’s control group are “likely to interact with the results differently” because they typed in a different search term than respondents in Dr. Jacoby’s test group. This assertion is unsupported and contradicted by the weight of the evidence, as explained in Response to Proposed Findings No. 1698-1699.

1703. In prior keyword advertising studies, Dr. Jacoby used the same search term for his test and control conditions. (CX 9041 (Jacoby Dep. 29, 88-89)).

### **Response to Proposed Finding No. 1703**

Proposed Finding No. 1703 is vague as to which “prior keyword advertising studies” are referenced. To the extent this proposed finding references two prior keyword advertising surveys that were discussed in Dr. Jacoby’s deposition, this proposed finding is unsupported because Dr. Jacoby designed several control groups for both surveys. (CX9041 (Jacoby, Dep. at 30-31, 87)). In fact, in one of the control conditions in Dr. Jacoby’s study in a prior keyword advertising case, *GEICO v. Google*, Dr. Jacoby used different search terms in his test and control conditions. (CX9041 (Jacoby, Dep. at 88)). Conversely, the plaintiff’s survey, which did *not* use different

search terms in its test and control conditions, was criticized by the court for that error. *See* Complaint Counsel’s Reply Br. at 33-34 (citing *GEICO*).

Regardless of which prior study or control group this proposed finding references, this proposed finding is irrelevant because “[e]ach case brings its own fact pattern and questions that are unique.” (Jacoby, Tr. 2352). In fact, as Dr. Jacoby pointed out regarding two prior keyword advertising surveys he conducted, the question that he needed to test was different: “[i]n the two previous cases, the question was where would you go to first. In contrast, in this matter, the question is would any of these sponsored links be confusing.” (Jacoby, Tr. 2352).

1704. Dr. Jacoby’s use of a control condition using a search for “contact lenses,” rather than using the same search term as the test condition, rendered Dr. Jacoby’s study unreliable. Accordingly, the study will be given no weight.

#### **Response to Proposed Finding No. 1704**

Proposed Finding No. 1704 is a legal conclusion regarding the reliability of Dr. Jacoby’s survey. As described more fully in Complaint Counsel’s Post-Trial Reply Brief, at 44-46, only by showing identical SERPs to users who typed in *different* search terms could Dr. Jacoby properly test whether a user who types “1-800 Contacts” (or a similar variation) as a search term would be confused by non-1800 Contacts advertisements that appear in response to that search term. *See also* CX9044 (Tushnet, Dep. at 201-202) (“1-800’s theory of liability that it has articulated, and 1-800’s theory of liability depends on the idea that no matter what the ads say, if the consumer has typed in ‘1-800 Contacts,’ she’s going to be confused about the source, sponsorship or affiliation of non-1-800 Contacts ads that show up in response to her having typed that. The only way to test that is to actually test the thing that you say is confusing, and that’s why a true control for that theory would involve ‘1-800 Contacts’ as a search term versus something that was not ‘1-800 Contacts’ as a search term.”).

(vii) ***Dr. Jacoby Used Improper Leading Questions***

1705. Dr. Jacoby also improperly uses leading questions in his control condition. (RX 735-0027-0028). In survey methodology, a “leading” question is one that may cause consumers to think about or evaluate an association between companies that they otherwise wouldn’t have had in their minds, so in that sense it’s causing them to look for an association that may not otherwise have been there. (Van Liere, Tr. 3093-3094).

#### **Response to Proposed Finding No. 1705**

Proposed Finding No. 1705 is an opinion (not a proposed finding of fact) copied from Dr. Van Liere’s report. Dr. Van Liere provides no factual support or other record citation to support his opinion that Dr. Jacoby used leading questions in his control condition. *See* RX0735 at 027-028 (Van Liere Expert Report)). Moreover, Dr. Van Liere’s “definition” of a “leading” question is inaccurate and unreliable because it reflects a fundamental misunderstanding of what constitutes a leading question and is contrary to the generally accepted understanding of the term in the field of consumer surveys. *See* CX8011 at 037-038 (¶ 54) (Jacoby Rebuttal Report) (“I am unaware of a single text on questionnaire construction that has labeled a question that asks a respondent to think about the subject matter of the question before responding as a leading question. Instead, a leading question is generally considered to be one that leads the respondent *to answer or respond* to the question one way rather than another.”).

1706. Respondents in Dr. Jacoby’s control condition were instructed initially to search on “contact lenses” and “1-800 Contacts” was not mentioned to them. (RX 735-0027-0028). Yet after they searched on “contact lenses,” respondents in Dr. Jacoby’s control condition were then asked questions that in three out of four instances explicitly mention and direct them to focus on 1-800 Contacts, or ask explicitly about advertisements in relationship to 1-800 Contacts. (RX 735-0027-0028).

#### **Response to Proposed Finding No. 1706**

Proposed Finding No. 1706 is unsupported and misleading to the extent it suggests that the “three of four instances” of questions posed in Dr. Jacoby’s survey were “leading,” because it is premised on Dr. Van Liere’s misunderstanding of the term “leading question” as used in survey research. *See* Response to Proposed Finding No. 1705. In two instances, Dr. Jacoby asked an

open-ended question: “If you click on this listing, which company’s website will it take you to?” (CX8008 at 034-035 (Jacoby Expert Report)). Nothing in this question leads respondents to answer “1-800 Contacts” any more than it leads them to answer anything else. (CX8011 at 038 (Jacoby Rebuttal Report)). In the other two instances, Dr. Jacoby followed key sources on questionnaire construction by asking neutral and balanced multiple-choice questions. (CX8008 at 045, 050 (Jacoby Expert Report); Jacoby, Tr. 2178-2179, 2206-2208).

1707. These questions are leading in the context of the control condition because these respondents did not previously have any reason to focus on 1-800 Contacts. (RX 735-0027-0028). In this manner, Dr. Jacoby has transformed his control condition into no more than a slight variant of a keyword search for 1-800 Contacts. (RX 735-0027-0028). It is no surprise, therefore, that Dr. Jacoby’s control condition and his test condition get similar results and therefore net to practically nothing. (RX 735-0028; Van Liere, Tr. 3093-3096).

#### **Response to Proposed Finding No. 1707**

Proposed Finding No. 1707 is inaccurate and unsupported because it is premised on Dr. Van Liere’s misunderstanding of the term “leading question” as used in survey research. *See* Response to Proposed Finding No. 1705. In two instances, Dr. Jacoby asked an open-ended question: “If you click on this listing, which company’s website will it take you to?” (CX8008 at 034-035 (Jacoby Expert Report)). Nothing in this question leads respondents to answer “1-800 Contacts” any more than it leads them to answer anything else. (CX8011 at 038 (Jacoby Rebuttal Report)). In the other two instances, Dr. Jacoby followed key sources on questionnaire construction by asking neutral and balanced multiple-choice questions. (CX8008 at 045, 050 (Jacoby Expert Report); Jacoby, Tr. 2178-2179, 2206-2208). Further, as described in Response to Proposed Finding No. 1692, this is was the only proper control to be used to test the question at issue. *See also* Complaint Counsel’s Post-Trial Reply Brief at 33-34, 46 (citing *GEICO*).

**(viii) *Dr. Jacoby’s Study Is Limited To, At Most, 32% Of The Market***

1708. Dr. Jacoby agreed that the formatting of ads and the formatting of the SERP may affect consumer confusion. (Jacoby, Tr. 2346).

**Response to Proposed Finding No. 1708**

Complaint Counsel has no specific response, except to add that Dr. Jacoby properly formatted his ads consistent with how they appear on a desktop or laptop computer, while Dr. Van Liere inexplicably enlarged the font size on the ads, artificially changing their appearance in comparison to the real world. Van Liere, Tr. 3209.

1709. Dr. Jacoby agreed that ads appear differently on a mobile device versus a desktop or a laptop. (Jacoby, Tr. 2346).

**Response to Proposed Finding No. 1709**

Complaint Counsel has no specific response, other than to note that Dr. Van Liere also did not format a test for mobile usage.

1710. Dr. Jacoby's survey was conducted by respondents using desktop or laptop computers. (Jacoby, Tr. 2346). He did not test any respondents using mobile devices. (Jacoby, Tr. 2346).

**Response to Proposed Finding No. 1710**

Complaint Counsel has no specific response, other than to note that Dr. Van Liere also excluded consumers using mobile devices from his survey. (Van Liere, Tr. 2987-2988).

1711. The evidence shows that more than 50% of searches are done on mobile devices. (RX 715-734).

**Response to Proposed Finding No. 1711**

Proposed Finding No. 1711 is unsupported. Page 734 of RX0715, which appears to consist of 1,859 pages of Google blog posts, contains no information about the share of searches done on mobile devices. Regardless, neither Dr. Jacoby nor Dr. Van Liere tested mobile users, so any proposed finding that criticizes Dr. Jacoby on this point applies equally to Respondent's own expert.

1712. Dr. Jacoby did not test for confusion using any search engines other than Google. (Jacoby, Tr. 2347).

**Response to Proposed Finding No. 1712**

Complaint Counsel has no specific response, except to add that Google is the largest search engine, by a wide margin, in the United States, by both search advertising revenue and query share, and as such, is a good proxy for search engines generally. *See* CCPTB at 9 & nn.34-35.

1713. Dr. Jacoby agreed that the formatting of the search engine results pages on Yahoo and other search engine providers differs from the formatting of Google SERPs. (Jacoby, Tr. 2347).

**Response to Proposed Finding No. 1713**

Complaint Counsel has no specific response, except to note that Dr. Van Liere's testing of respondents using a Yahoo! SERP is highly suspect, given that he did not test users of the Bing search engine, with a significantly higher market share, and did not weight his results based on market share. Yahoo! is clearly not representative of search engines at large, with a 12 percent query share and a significantly smaller share of search advertising revenues. CCPTB at 9 n.37.

1714. According to statistics relied upon by Dr. Jacoby, Google's market share of search queries is 64%. (Jacoby, Tr. 2347).

**Response to Proposed Finding No. 1714**

Complaint Counsel has no specific response, except to add that Google's search advertising revenue share is 82 percent as of February 2016. (CCPTB at 9 & n.34).

1715. Accordingly, Dr. Jacoby's survey tested for confusion in only 32% of the market a most.

**Response to Proposed Finding No. 1715**

Complaint Counsel is unsupported, misleading, and contradicted by the weight of the evidence to the extent it suggests that Dr. Jacoby's survey findings only speak to 32% of the market. Notably, Respondent provides no evidentiary support for this statement. First, Google's

search advertising revenues represent 82 percent (as of February 2016) of the market, which is a reasonable proxy for market share. *See* CCPTB at 9 & n.34. Further, as Dr. Jacoby testified, it was reasonable to extrapolate the findings from his survey to other consumers using mobile devices or consumers using different search engines: “[W]e can extrapolate from what we found with the other people. That is, these are human beings. And we’re talking about comprehension and miscomprehension. They’re not going to be that different. Yes, the format may differ, and yes, we would expect different results, but we wouldn’t expect them to be dramatically different.” (Jacoby, Tr. 2347). This is consistent with what Respondent’s own survey expert did; Dr. Van Liere excluded mobile device users from his survey, yet extrapolated from his findings to opine on the “potential for real world confusion among [all] consumers in the relevant population.” (Van Liere, Tr. 2987-2988); RX0735 at 0006 (Van Liere Expert Report)). Further, if Dr. Van Liere were concerned about query share or market share, he certainly would not have selected Yahoo! as his search engine of choice, given its extremely limited share. *See* Response to Proposed Finding No. 1713.

**3. *Prof. Goodstein Addressed The Procompetitive Effects Of The Settlement Agreements In His Expert Report And Trial Testimony.***

**1716.** Respondent’s expert, Professor Ronald C. Goodstein, is an Associate Professor of Marketing at Georgetown University who provided testimony in this matter regarding certain procompetitive effects of the Settlement Agreements. (Goodstein, Tr. 2365-2488; RX 736).

**Response to Proposed Finding No. 1716:**

This proposed finding is misleading because it characterizes Professor Goodstein’s trial testimony as addressing “certain procompetitive effects of the Settlement Agreements.” That was not Professor Goodstein’s assignment, and he did not offer any opinions about the impact of the 1-800 Contacts’ settlement agreements on competition or the competitive process.

Professor Goodstein testified that his first assignment “was to determine the brand equity of the 1-800 Contacts brand, what was its equity, what was its brand strength, based on its marketing efforts in terms of money, dollars spent, advertising, communications, service, et cetera.” (Goodstein, Tr. 2379). Next, he “was asked to determine would there be a reasonable – would there be a reasonable expectation that consumers, about at the time of these agreements in question here, whether they were likely to be confused when they saw sponsored ads that appeared as a result of someone having searched for ‘1-800 Contacts.’” (Goodstein, Tr. 2379). He was also asked to address the same question of consumer confusion under today’s conditions. (Goodstein, Tr. 2380). Finally, Professor Goodstein was asked to determine, “whether there’s a reasonable expectation that people would be – that the brand could be diluted based on those same factors.” (Goodstein, Tr. 2380; *see also* Goodstein, Tr. 2381–2382 (describing the opinions reached); RX0736 at 003–004 (¶ 6) (description of assignment from 1-800 Contacts’ counsel) & III (Summary of Opinions) (Goodstein Expert Report)).

Nowhere does Professor Goodstein offer any opinion regarding the settlement agreements themselves. Indeed, at trial he acknowledged that he was not offering an opinion, for example, on the motivation of 1-800 Contacts’ executives and those of its competitors in entering into the settlement agreements. (Goodstein, Tr. 2427; *see also* CX9045 at 055 (Goodstein, Dep. 214–215) (Q: “[A]m I correct that you are using that framework [that 1-800 Contacts has very high brand awareness within the product category] to justify why 1-800 Contacts would enter into these agreements to prevent these other retailers from bidding on its trademarks?” COUNSEL: “Objection. *Beyond the scope of his report and his opinions.*” A: “Well, it – I completely agree. It’s – I don’t have – I don’t know the company motivations for these settlements.... But the motivation for these agreements, that’s something 1-800 Contacts and these other companies decided, you know, eight, ten years ago, *so I really don’t have an opinion as to why specifically*

*they're doing this.*") (emphases added)). And Professor Goodstein would be unqualified to offer any opinion on the impact of the settlement agreements on competition, given that he does not have any knowledge, skill, experience, training, or education relating to antitrust law or antitrust economics. (*See, e.g.*, Goodstein, Tr. 2426 (no law degree or legal experience)).

**1717.** In particular, Prof. Goodstein provided testimony that supports a conclusion that the Settlement Agreements at issue had procompetitive effects by lessening the likelihood of consumer confusion and related harms. (Goodstein, Tr. 2365-2488; RX 736-017-042).

**Response to Proposed Finding No. 1717:**

This proposed finding is misleading because it characterizes Professor Goodstein's trial testimony as "support[ing] a conclusion that the Settlement Agreements at issue had procompetitive effects." That was not Professor Goodstein's assignment, and he did not offer any opinions about the impact of the 1-800 Contacts' settlement agreements on competition or the competitive process for the reasons set forth in response to Proposed Finding No. 1716. To the extent that this proposed finding is inviting this Court to base a finding of procompetitive effects on opinions that Professor Goodstein did offer, it fails to cite to any evidence of the record that would allow the Court to make such a connection.

Complaint Counsel also incorporates by reference its Response to Proposed Finding No. 1716.

(a) ***Prof. Goodstein's Qualifications.***

**1718.** Prof. Goodstein has a Ph.D. in Marketing from Duke University. He has taught marketing and related courses to MBA students and undergraduates at Georgetown University since 1998. (Goodstein, Tr. 2365-2366; RX 736-044). Prof. Goodstein teaches a variety of courses at Georgetown, including marketing strategy and analytics, integrated marketing communications, marketing strategy, advertising and promotion, and marketing management. (Goodstein, Tr. 2365-2366; RX 736-044).

**Response to Proposed Finding No. 1718:**

Complaint Counsel has no specific response to this proposed finding.

**1719.** Prof. Goodstein has co-written and published approximately twenty-five articles in peer-reviewed journals (RX 736-045-046). Prof. Goodstein's principal focus in his writing is consumer behavior and consumer reactions to marketing communications. (Goodstein, Tr. 2371; RX 736-045-046).

**Response to Proposed Finding No. 1719:**

Complaint Counsel has no specific response except to note that Professor Goodstein testified, "But my main area is *in the area of consumer behavior*, understanding mainly how consumers react to marketing communications." (Goodstein, Tr. 2371 (emphasis added).) In other words, Professor Goodstein focuses on understanding how consumers react to marketing communications, which falls in the area of consumer behavior. Professor Goodstein is not claiming, and cannot claim, to be an expert in *all aspects* of consumer behavior.

**1720.** In addition to his teaching and writing, Prof. Goodstein spends ten to twenty hours per month reviewing articles by other authors that are under consideration for publication in various academic journals. (Goodstein, Tr. 2369-2370). Prof. Goodstein's role is to review the quality of the research described in an article before it is accepted for publication. (Goodstein, Tr. 2369-2370).

**Response to Proposed Finding No. 1720:**

Complaint Counsel has no specific response.

**1721.** Prof. Goodstein has personally designed or analyzed hundreds of surveys and questionnaires pertaining to consumers' opinions and behaviors relating to marketing and branding. (RX 736-003). Most of that research examines how consumers react to marketing stimuli. (Goodstein, Tr. 2373). Prof. Goodstein has also consulted with various companies about how to build their brands and make them more effective by analyzing their marketing strategies from the customers' perspectives. (Goodstein, Tr. 2368).

**Response to Proposed Finding No. 1721:**

Complaint Counsel has no specific response to this proposed finding.

**1722.** Prof. Goodstein has previously served as an expert witness on issues involving, *inter alia*, marketing communications, consumer confusion, and consumer survey research. (RX 736-003). Two of those lawsuits involved trademark infringement claims arising from the use of trademarks in keyword advertising. (Goodstein, Tr. 2377-2378).

**Response to Proposed Finding No. 1722:**

Complaint Counsel has no specific response to this proposed finding other than to note that the two lawsuits in question both involved American Airlines; that Professor Goodstein's assignment in both lawsuits was "to look at the science of the field, at that time as well as empirical data, to determine whether ... people who used 'American Airlines' as a search term, ... were they confused or likely to be confused based on sponsored ads that appeared as a result of that search," and that Professor Goodstein prepared expert reports but did not testify in either lawsuit. (Goodstein, Tr. 2377–2378).

Furthermore, any reliance on the studies in the *American Airlines* case is inappropriate for the reasons set forth in response to Proposed Finding No. 1498. Specifically, the *American Airlines* surveys are flawed in several respects and do not provide a sufficient basis for Professor Goodstein's opinions, as Rule 702 requires. Professor Tushnet testified that the study asked "the wrong question with the wrong controls and the wrong stimuli." (Tushnet, Tr. 4444.) Specifically, if the question is whether a consumer searching for "American Airlines" will think that sponsored ads appearing in response to her search come from American Airlines, then the survey should have tested whether the fact that the search query is for "American Airlines," as opposed to a generic search term like "airlines," is causing confusion about the sponsored ads that appear as search results. (Tushnet, Tr. 4445; CX8014 at 031 (¶ 67) (Tushnet Rebuttal Expert Report).)

Furthermore, the study could not properly control for confusion arising from inattention or guessing because the test stimulus included additional links not present in the control stimulus. (Tushnet, Tr. 4445-4446; CX 8014 at 029 (¶ 62) (Tushnet Rebuttal Expert Report).) Professor Tushnet explained, "When you ask your test group 18 questions and your control group 12, it's as if you gave them math problems and you find out that, in the test group, some of the test group got

some of the extra six wrong and you conclude, well, they're worse at math than the control group.... [T]hat conclusion just isn't supported by your evidence." (Tushnet, Tr. 4446.)

Professor Tushnet testified about two additional flaws with the *American Airlines* surveys that impact Professor Goodstein's reliance on them. One is that in the control group, the study arbitrarily chose not to count respondents who thought that the Wikipedia page about American Airlines was affiliated with the company as confused, even though there is no such affiliation. (Tushnet, Tr. 4446-47; CX8014 at 030 (¶¶ 63-65) (Tushnet Rebuttal Expert Report).) Not counting these responses in the control drove down the level of confusion reported in the control. (*Id.*) The other is that the study failed to replicate real-world stimuli, in which respondents would have seen an ad from American Airlines as part of the stimulus, appearing as the first listed result. (Tushnet, Tr. 4447; CX8014 at 030 (¶ 66) (Tushnet Rebuttal Expert Report).)

Professor Tushnet also testified that the flaws she has identified in the *American Airlines* survey were repeated by Dr. Van Liere in his 1-800 Contacts survey performed for this case, and Professor Goodstein therefore should not have relied on the 1-800 Contacts survey either. (Tushnet, Tr. 4449; CX8014 at 031-032 (¶ 68) (Tushnet Rebuttal Expert Report).)

**1723.** Prof. Goodstein is well qualified to provide expert testimony in this matter regarding consumer behavior, consumer reactions to marketing stimuli, and brand management.

**Response to Proposed Finding No. 1723:**

This proposed finding is improper because whether an individual is qualified to testify as an expert is a question of law, not one of fact. FED. R. EVID. 104(a); *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *Kinsler v. Gehl Co.*, 184 F.3d 1259, 1269 (10th Cir. 1999).

Even if the question of Professor Goodstein's qualifications were properly lodged as a finding of fact, this proposed finding is nonetheless vague and overbroad as to "consumer

behavior.” As noted in Complaint Counsel’s Response to Proposed Finding No. 1719, Professor Goodstein testified that his research focuses on understanding how consumers react to marketing communications, which falls *in the area of consumer behavior*. Professor Goodstein is not claiming, and cannot claim, to be an expert in *all aspects* of consumer behavior.

Furthermore, whether Professor Goodstein is qualified to provide expert testimony about a particular subject matter depends on the area of testimony. *See Gladhill v. Gen. Motors Corp.*, 749 F.2d 1049, 1052 (4th Cir. 1984) (“Whether a witness is qualified can only be determined by the nature of the opinion he offers.”).

**(b) *There Is Substantial Evidence That The Settlement Agreements Have Reduced The Likelihood Of Consumer Confusion.***

**1724.** Prof. Goodstein provided testimony regarding consumer confusion both in his expert report, which he signed under penalty of perjury, and in his testimony at trial. (Goodstein, Tr. 2402-2425; RX 736-017-042).

**Response to Proposed Finding No. 1724:**

This proposed finding is immaterial and irrelevant because, as highlighted, for example, in Complaint Counsel’s Response to Proposed Finding No. 1727, the type of consumer confusion addressed by Professor Goodstein’s testimony—consumer confusion about the elements appearing on a search engine results page in response to a search query (e.g., sponsored ads vs. organic links) and their placement or arrangement on that page (e.g., listing of sponsored ads as the top search results)—is not the type of confusion cognizable under trademark law, i.e., confusion as to source, sponsorship, or affiliation of a company’s products or services. 15 U.S.C. § 1125(a)(1)(A). For example, in *Designer Skin, LLC v. S&L Vitamins, Inc.*, the district court held:

Designer Skin contends that internet users who type “Designer Skin” into a search engine will falsely believe that S & L Vitamins is affiliated with Designer Skin because of the mere fact that the links to S & L Vitamins’ websites will

sometimes appear near the top (or even at the top) of the results page. To begin with, Designer Skin has offered no evidence that S & L Vitamins' websites appear near the top of results pages. And secondly, assuming such evidence does exist, the Court concludes that such users, if any, will be the naïve few. S & L Vitamins' domain names – “*www.thesupplenet.com*” and “*www.bodysourceonline.com*” – bear no resemblance whatsoever to “Designer Skin” or its domain name – “*www.designerskin.com*.”

560 F. Supp. 2d 811, 819 (D. Ariz. 2008).

“Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.” *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (citations omitted). *See also Superior Prod'n P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

Complaint Counsel also notes that the citations to this proposed finding include testimony from Professor Goodstein on other issues besides consumer confusion.

**1725.** In particular, Prof. Goodstein opined that certain factors that were present at the time that 1-800 Contacts entered into the Settlement Agreements created a serious potential for consumer confusion from sponsored ads that appear in response to a search for a particular company brand name. (Goodstein, Tr. 2381-2382; RX 736-034). Prof. Goodstein also opined that as a result, it would have been reasonable in the time period in which the Settlement Agreements were executed to expect that a significant percentage of consumers searching for “1-800 Contacts” were confused as to the source, sponsorship, or affiliation of the sponsored ads from other retailers that appeared in search results for the search “1-800 Contacts.” (Goodstein, Tr. 2381-2382; RX 736-034).

**Response to Proposed Finding No. 1725:**

This proposed finding is immaterial and irrelevant because, as explained by Professor Tushnet and in Complaint Counsel’s Responses to Proposed Findings Nos. 1726–1745, the factors that purportedly “created a serious potential for consumer confusion from sponsored ads that appear in response to a search for a particular company brand name” are ones that have nothing to do with confusion cognizable under trademark law. (*See* Tushnet, Tr. 4392, 4398–4399; CX8014 at 005, 009–010, 023–034 (¶¶ 9, 19, 46–72) (Tushnet Rebuttal Expert Report).) Professor Goodstein’s purported conclusion that “it would have been reasonable ... to expect that a significant percentage of consumers searching for ‘1-800 Contacts’ were confused as to the source, sponsorship, or affiliation of the sponsored ads from other retailers” therefore lacks any empirical support.

To the extent that Professor Goodstein is simply parroting Dr. Van Liere’s purported findings of consumer confusion, in this case or in the *American Airlines v. Google* case, his testimony is cumulative of Dr. Van Liere’s, and the Court should evaluate Dr. Van Liere’s testimony on its own merits, without any approbation from Professor Goodstein. *See, e.g., PODS Enters., Inc. v. U-Haul Int’l, Inc.*, No. 8:12-cv-01479-T, 2014 U.S. Dist. LEXIS 193898, at \*7 (M.D. Fla. July 1, 2014) (holding that “Dr. Winer’s references to Dr. Ericksen’s surveys in his Supplemental Report are inadmissible because Dr. Winer does nothing more than parrot Dr. Ericksen’s findings and opinions, suggesting that they ‘corroborate’ his own opinion that PODS is

a well-known brand”) (citing cases); *see also Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-cv-3113-GET, 2008 U.S. Dist. LEXIS 110202, at \*16 (N.D. Ga. Mar. 21, 2008) (explaining that Rule 703 “does not permit an expert to simply parrot the opinions of other experts”); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808–09 (N.D. Ill. 2005) (highlighting the problem when an “expert is vouching for the truth of what another expert told him – he is merely that expert’s spokesman”) (citing cases). In this case, 1-800 Contacts could have retained Professor Goodstein to design and conduct a confusion study but it did not. Instead, it retained Dr. Van Liere, who also performed a similar confusion study in *American Airlines v. Google*. Any testimony regarding these studies should come from Dr. Van Liere, not Professor Goodstein.

Furthermore, any reliance on the *American Airlines* studies is inappropriate for the reasons set forth in response to Proposed Findings No. 1498 and 1722.

**1726.** Prof. Goodstein also opined that the factors that contributed to the potential for consumer confusion that he had identified as being present at the time that the Settlement Agreements were reached continue to exist today and are likely to cause confusion when an Internet user sees sponsored ads from other contact lens retailers in response to a search for “1-800 Contacts.” (RX 736-018-019; RX 736-036; Goodstein, Tr. 2381-2382). Prof. Goodstein’s testimony regarding the factors in question is summarized herein.

**Response to Proposed Finding No. 1726:**

This proposed finding is immaterial and irrelevant because, as explained by Professor Tushnet and in Complaint Counsel’s Responses to Proposed Findings Nos. 1726–1745, the factors that purportedly “created a serious potential for consumer confusion from sponsored ads that appear in response to a search for a particular company brand name” are ones that have nothing to do with confusion cognizable under trademark law. (*See* Tushnet, Tr. 4392, 4398–4399; CX8014 at 005, 009–010, 023–034 (¶¶ 9, 19, 46–72) (Tushnet Rebuttal Expert Report)). Professor Goodstein’s purported conclusion that “it would have been reasonable ... to expect that a significant percentage of consumers searching for ‘1-800 Contacts’ were confused as to the

source, sponsorship, or affiliation of the sponsored ads from other retailers” therefore lacks any empirical support.

To the extent that Professor Goodstein is simply parroting Dr. Van Liere’s purported findings of consumer confusion, in this case or in the *American Airlines v. Google* case, his testimony is cumulative of Dr. Van Liere’s, and the Court should evaluate Dr. Van Liere’s testimony on its own merits, without any approbation from Professor Goodstein. *See, e.g., PODS Enters., Inc. v. U-Haul Int’l, Inc.*, No. 8:12-cv-01479-T, 2014 U.S. Dist. LEXIS 193898, at \*7 (M.D. Fla. July 1, 2014) (holding that “Dr. Winer’s references to Dr. Ericksen’s surveys in his Supplemental Report are inadmissible because Dr. Winer does nothing more than parrot Dr. Ericksen’s findings and opinions, suggesting that they ‘corroborate’ his own opinion that PODS is a well-known brand”) (citing cases). *See also Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-cv-3113-GET, 2008 U.S. Dist. LEXIS 110202, at \*16 (N.D. Ga. Mar. 21, 2008) (explaining that Rule 703 “does not permit an expert to simply parrot the opinions of other experts”); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808–09 (N.D. Ill. 2005) (highlighting the problem when an “expert is vouching for the truth of what another expert told him – he is merely that expert’s spokesman”) (citing cases). In this case, 1-800 Contacts could have retained Professor Goodstein to design and conduct a confusion study but it did not. Instead, 1-800 Contacts retained Dr. Van Liere, who also performed a similar confusion study in *American Airlines v. Google*, to conduct a study. Any testimony regarding these studies should come first-hand from Dr. Van Liere, not Professor Goodstein.

Furthermore, any reliance on the *American Airlines* studies is inappropriate for the reasons set forth in response to Proposed Findings No. 1498 and 1722.

**1727.** Two of the factors that create a serious potential for consumer confusion are that: (1) many consumers expect that the top results for an Internet search will be the most relevant to their search query; and (2) many consumers do not recognize that sponsored ads are actually paid

advertisements and therefore confuse the sponsored ads for unbiased, impartial organic links. (Goodstein, Tr. 2404-2414; RX 736-018-021). These two factors act in combination to create a substantial risk of consumer confusion. (Goodstein, Tr. 2404-2414; RX 736-025).

**Response to Proposed Finding No. 1727:**

This proposed finding should be rejected to the extent that Professor Goodstein is basing his opinion not on any independent study and analysis by him of consumer behavior relating to search queries using “1-800 Contacts,” but on third-party studies, which he summarized and reiterated in his expert report and on the witness stand. (Goodstein, Tr. 2405 (testifying that the first factor is based on “studies that have been done both in the science community and by the search engines looking at eye-tracking studies as to where people look”) & 2407 (testifying that the second factor is based “on science done both within the science of my field as well as by the search engine companies themselves, their own research”); RX0736 at 020–029 (¶¶ 43–64 (describing and relying on numerous third-party studies)) (Goodstein Expert Report); CX9045 at 005–006 (Goodstein, Dep. 15–17) (testifying that he “did an analysis of the secondary research that exists,” which “is relevant research that someone else conducted,” and reviewed “primary research that was made available in this case,” which is “data that’s collected particularly for this issue” and includes the study conducted by Dr. Van Liere); CX9045 at 014 (Goodstein, Dep. 50) (referring to his summary as a “meta-analysis”)).

Although Rule 703 permits an expert to rely on facts and data obtained by others, he must still conduct his own independent analysis; he may not merely summarize the results of studies that have been conducted by others and present that summary as his own opinion. *Bagher v. Auto-Owners Ins. Co.*, No. 1:12-cv-00980-REB-KLM, 2014 U.S. Dist. LEXIS 39238, at \*16–17 (D. Colo. Mar. 25, 2014) (holding that an expert may not present “a summary reiteration of peer-reviewed medical literature” as his own opinion) (“The fact that Mr. Cooper has many estimable qualifications, including in epidemiology, does not mean he can simply reiterate the expert

opinions of others, *a fortiori*, when those opinions do not form a significant part of an independent, expert analysis Mr. Cooper applied to the facts of this case. Ratiocination may not be replaced by reiteration.”).

This proposed finding is immaterial and irrelevant because the type of consumer confusion embodied in the two purported factors is not the type of confusion cognizable under trademark law, i.e., confusion as to source, sponsorship, or affiliation of a company’s products or services. 15 U.S.C. § 1125(a)(1)(A); *Designer Skin, LLC v. S&L Vitamins, Inc.*, 560 F. Supp. 2d 811, 819 (D. Ariz. 2008) (concluding that links to competitor websites appearing in response to a search for the plaintiff’s company do not create confusion as to source or affiliation). “Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.” *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (citations omitted); *see also Superior Prod’n P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

Here, the two purported factors at issue (that many consumers expect that the top results for an internet search will be the most relevant to their search query, and that many consumers do not recognize that sponsored ads are actually paid advertisements and therefore confuse the

sponsored ads for organic links) are plainly confusion about the elements (ads v. organic links) and layout (ordering of search results) on a search engine results page, and not confusion as to the source, sponsorship, or affiliation of the sponsored ads from other retailers that appeared in search results for the search “1-800 Contacts.” (See CX8014 at 009–010 (¶ 19) (Tushnet Rebuttal Expert Report); Tushnet, Tr. 4416). See, e.g., *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 938 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1231 (2016) (“In light of the clear labeling Amazon uses on its search results page, no reasonable trier of fact could conclude that Amazon’s search results page would likely confuse a reasonably prudent consumer accustomed to shopping online as to the source of the goods being offered.”).

**1728.** Various studies conducted since 2002 have found that there are a substantial number of Internet users who do not recognize that sponsored ads are actually paid advertisements, including the following studies:

- A 2002 Princeton Survey Research Associates study that found more than 60 percent of respondents were unaware search engines accepted payment to list certain sites more prominently than others in search results;
- A 2003 Consumer WebWatch study that found that consumers have difficulty in distinguishing paid search results from organic search results and that even well informed users may not know whether a listing is a paid ad;
- A 2005 Pew Internet & American Life Project research study that found that 62 percent of consumers could not differentiate between sponsored and non-sponsored links;
- A 2005 iCrossing study that reported that 56 percent of Internet users do not know the difference between a paid search listing and a natural search listing;
- A 2012 SEOBook study in which 1,000 Internet searchers were shown search results pages with between three and four sponsored ads and asked, “Does this search result have ads on it?” Between 37 percent and 55 percent of respondents answered “no.” The study’s author explained: “For most search engines, people are generally unaware of ads vs. organic results if there are no ads in the right column . . . most of these yes/no questions came down to about a 50/50 vote, even though all of them had ads on them. It is every bit as true today as it was in 2003”; and

- An April 2016 research report by the UK Office of Communications (“Ofcom”) that found “[h]alf of search engine users could not identify sponsored links in search engine results.”

(Goodstein, Tr. 2406-2407; RX 736-023-024).

**Response to Proposed Finding No. 1728:**

This proposed finding should be rejected because Professor Goodstein is basing his opinion on third-party studies, which he summarizes and reiterates in his expert report and on the witness stand. Although Rule 703 permits an expert to rely on facts and data obtained by others, he must still conduct his own independent analysis; he may not merely summarize the results of studies that have been conducted by others and present that summary as his own opinion. *Bagher v. Auto-Owners Ins. Co.*, No. 1:12-cv-00980-REB-KLM, 2014 U.S. Dist. LEXIS 39238, at \*16–17 (D. Colo. Mar. 25, 2014) (holding that an expert may not present “a summary reiteration of peer-reviewed medical literature” as his own opinion) (“The fact that Mr. Cooper has many estimable qualifications, including in epidemiology, does not mean he can simply reiterate the expert opinions of others, *a fortiori*, when those opinions do not form a significant part of an independent, expert analysis Mr. Cooper applied to the facts of this case. Ratiocination may not be replaced by reiteration.”).

Furthermore, this proposed finding invites this Court to accept each of the cited third-party studies as expert testimony based simply on the fact that Professor Goodstein thinks they are scientifically valid, reliable, and helpful. As also noted in Complaint Counsel’s Response to Proposed Finding No. 1726, however, “Rule 703 was never intended to allow oblique evasions of the hearsay rule.” *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005). Although an expert may rely on facts and data obtained by others, it is a wholly different proposition when the expert incorporates wholesale studies and analyses conducted by others. At that point, an “expert is vouching for the truth of what another expert told him – he is

merely that expert's spokesman." *Id.* at 808–09 (citing cases). *See also Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-cv-3113-GET, 2008 U.S. Dist. LEXIS 110202, at \*16 (N.D. Ga. Mar. 21, 2008) (explaining that Rule 703 “does not permit an expert to simply parrot the opinions of other experts”). Each of the studies cited in this proposed finding constitutes inadmissible hearsay, and the Court should not rely on them simply because they come with Professor Goodstein's seal of approval.

This proposed finding is also immaterial and irrelevant because the type of consumer confusion addressed by these studies – confusion between organic links and paid ads – is not the type of confusion cognizable under trademark law, i.e., confusion as to source, sponsorship, or affiliation of a company's products or services. 15 U.S.C. § 1125(a)(1)(A); *Designer Skin, LLC v. S&L Vitamins, Inc.*, 560 F. Supp. 2d 811, 819 (D. Ariz. 2008) (concluding that links to competitor websites appearing in response to a search for the plaintiff's company do not create confusion as to source or affiliation). Rather, it is plainly confusion about the elements on a search engine results page, which would be present in a relevant population of consumers even if sponsored ads from other retailers were to appear in search results for a generic term such as “contact lenses.” Moreover, a consumer's failure to recognize whether a search result is organic or paid does not mean that she will be confused, if she clicks on a result that is in fact a paid ad, as to whose ad it is. *See, e.g., CollegeSource, Inc. v. Academyone, Inc.*, No. 10-cv-03542, 2012 U.S. Dist. LEXIS 153197, at \*52–53 (E.D. Pa. Oct. 25, 2012) (finding that “the entire context of the advertisement's appearance, especially the clearly differentiated text boxes and the fact that CollegeSource's name does not appear within the language of the advertisement,” weighs against likely confusion); *J.G. Wentworth, S.S.C. Ltd. P'ship v. Settlement Funding, LLC*, No. 06-cv-00597, 2007 U.S. Dist. LEXIS 288, at \*23–24 (E.D. Pa. Jan. 4, 2007) (“Due to the separate and distinct nature of the links

created on any of the search results pages in question, potential consumers have no opportunity to confuse defendant's services, goods, advertisements, links or websites for those of plaintiff.”).

“Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.” *Loeffel Steel*, 387 F. Supp. 2d at 806 (citations omitted). *See also Superior Prod’n P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

**1729.** The Commission addressed the question of whether Internet users recognize the difference between sponsored ads and organic links in its 2002 and in 2013 letters to search engines. The Commission’s 2002 letter to search engines cited a Consumers Union national survey that found that 60% of Internet users “had no idea that certain search engines were paid fees to list some sites more prominently than others in their search results.” (RX 598-001; RX 736-025). The Commission’s 2013 letter to search engines similarly stated that “consumers ordinarily expect that natural search results are included and ranked based on relevance to a search query, not based on payment from a third party. . . .” (RX 597-0001; RX 736-026). The Commission’s 2013 letter cited the same Pew Research Center survey that Prof. Goodstein cited and relied on in his report. (RX 597-001-002, footnotes 2 and 3; RX 736-026).

**Response to Proposed Finding No. 1729:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel’s Responses to Proposed Findings Nos. 1727–1728. Professor Goodstein is merely summarizing third-party studies and giving them his seal of approval instead of conducting his own independent

analysis of consumer confusion. In any event, the purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

Furthermore, Mr. Hogan, 1-800 Contacts' trademark lawyer-expert, testified that he does "not recall the focus of those letters being about source or affiliation confusion," and he is not aware of any cases for trademark infringement based on keyword bidding "specifically citing the FTC letter." (Hogan, Tr. 3359–3360.)

**1730.** Internal studies and reports conducted by { [REDACTED] } and Yahoo also found that Internet users could not distinguish sponsored ads and organic links. (RX 736-024-025; RX 1887-0002-0005; RX 1877-0031; { [REDACTED] })

**Response to Proposed Finding No. 1730:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1727–1728. Professor Goodstein is merely summarizing third-party studies and giving them his seal of approval instead of conducting his own independent analysis of consumer confusion. In any event, the purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

**1731.** An internal study by Yahoo conducted in 2009 found that fewer than 50% of users, on average, considered Yahoo's "North" ads (the sponsored ads at the top of a search results page) as a form of advertising. (RX 736-024-025; RX 1887-0002). Yahoo found that awareness of advertising depended on users' expertise and education levels, but even in the best case scenario, over 40% of users were unaware that "North" ads were sponsored ads. (RX 736-024-025; RX 1887-0002). Yahoo also found that those most likely to click on sponsored ads had the least awareness that they were, in fact, paid advertisements. (RX 736-025; RX 1887-0005).

**Response to Proposed Finding No. 1731:**

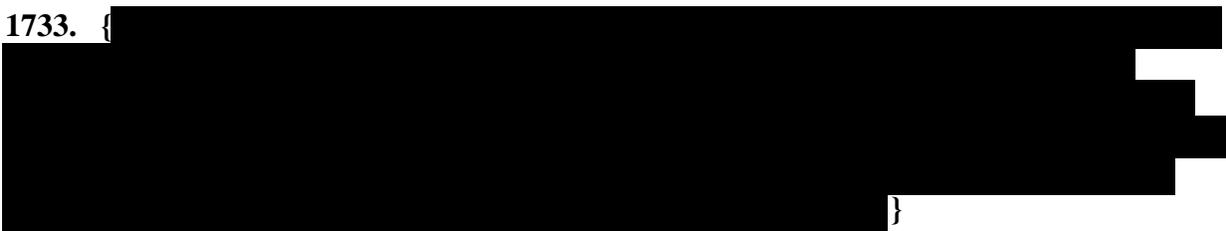
This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1727–1728. Professor Goodstein is merely summarizing third-party studies and giving them his seal of approval instead of conducting his own independent analysis of consumer confusion. In any event, the purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

**1732.** A 2006 internal report by Yahoo found that less than half of all respondents considered Yahoo's "North" ads as sponsored links and that the Yahoo users who clicked on the most sponsored ads were less aware of sponsored search links advertising. (RX 736-024; RX 1877-0031).

**Response to Proposed Finding No. 1732:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1727–1728. Professor Goodstein is merely summarizing third-party studies and giving them his seal of approval instead of conducting his own independent analysis of consumer confusion. In any event, the purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

**1733.** {



}

**Response to Proposed Finding No. 1733:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1727–1728. Professor Goodstein is merely summarizing third-party studies and giving them his seal of approval instead of conducting his own independent analysis of consumer confusion. In any event, the purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

**1734.** Search engines made various changes to search engine results pages between 2002 and 2013 that made it more difficult for Internet users to distinguish paid ads from organic search results. (Goodstein, Tr. 2413-2414; RX 736-025-029). The Commission's 2013 letter to search engines stated that "the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers, especially for advertising located immediately above the natural results ('top ads')." (RX 597-001; RX 736-026). In support of that conclusion, the Commission's 2013 letter relied in part upon the SEOBook survey that Prof. Goodstein cited in his report. (RX 597-002, footnote 3; RX 736-026).

**Response to Proposed Finding No. 1734:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1727–1728. Professor Goodstein is merely summarizing third-party studies and giving them his seal of approval instead of conducting his own independent analysis of consumer confusion. In any event, the purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant..

**1735.** Since the Commission sent its 2013 letter to search engines, the changes made by search engines to the appearance of their search pages have exacerbated the potential for confusion between organic links and sponsored ads. (RX 736-028). As Prof. Goodstein explained, "things have gotten worse for consumers, not better," because the differences between organic links and sponsored advertising "have become more blurred, not less." (Goodstein, Tr. 2413-2414).

**Response to Proposed Finding No. 1735:**

This proposed finding is immaterial and irrelevant because the type of consumer confusion addressed by these studies – confusion between organic links and paid ads – is not the type of confusion cognizable under trademark law, i.e., confusion as to source, sponsorship, or affiliation of a company’s products or services. 15 U.S.C. § 1125(a)(1)(A); *Designer Skin, LLC v. S&L Vitamins, Inc.*, 560 F. Supp. 2d 811, 819 (D. Ariz. 2008) (concluding that links to competitor websites appearing in response to a search for the plaintiff’s company do not create confusion as to source or affiliation). Rather, it is plainly confusion about the elements on a search engine results page, which would be present in a relevant population of consumers even if sponsored ads from other retailers were to appear in search results for a generic term such as “contact lenses.” Moreover, a consumer’s failure to recognize whether a search result is organic or paid does not mean that she will be confused, if she clicks on a result that is in fact a paid ad, as to whose ad it is. *See, e.g., CollegeSource, Inc. v. Academyone, Inc.*, No. 10-cv-03542, 2012 U.S. Dist. LEXIS 153197, at \*52–53 (E.D. Pa. Oct. 25, 2012) (finding that “the entire context of the advertisement’s appearance, especially the clearly differentiated text boxes and the fact that CollegeSource’s name does not appear within the language of the advertisement,” weighs against likely confusion); *J.G. Wentworth, S.S.C. Ltd. P’ship v. Settlement Funding, LLC*, No. 06-cv-00597, 2007 U.S. Dist. LEXIS 288, at \*23–24 (E.D. Pa. Jan. 4, 2007) (“Due to the separate and distinct nature of the links created on any of the search results pages in question, potential consumers have no opportunity to confuse defendant’s services, goods, advertisements, links or websites for those of plaintiff.”).

“Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.” *Loeffel Steel*, 387 F. Supp. 2d at 806 (citations omitted). *See also Superior Prod’n P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that

admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

**1736.** The search engines have made sponsored ads and organic links less distinguishable in part by eliminating color distinctions and in part by moving more ads to the top of the page, where consumers are more likely to expect to find organic listings. (Goodstein, Tr. 2413-2414; RX 736-026; RX 1877-0002; RX 597-0001; { [REDACTED] })

**Response to Proposed Finding No. 1736:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel’s Responses to Proposed Finding No. 1735. The purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

**1737.** Google’s own personnel have also expressed concerns about the company’s changes to the appearance of Google’s search pages. In an email to council@google.com, Google’s Jeff Dean explained that as a result of changes that Google had made to its search pages, the shading on the background for the top ads was so light that the background appeared white and looked like organic results. (RX 1623-0001). Dean stated that the change was “dangerous,” because the only possible reason for the change was that “we want users to not realize that these are ads and to click on them, which would seem to go against any policy that we give people the best search experience possible.” (RX 1623-0001).

**Response to Proposed Finding No. 1737:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel’s Responses to Proposed Finding No. 1735. The purported confusion involving whether a search

result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

**1738.** According to Google's company website, Mr. Dean is currently a Google Senior Fellow in Google's Research Group, where he leads the Google Brain project. *See* <https://research.google.com/pubs/jeff.html> (last accessed on June 9, 2017).

**Response to Proposed Finding No. 1738:**

This proposed finding should be rejected because it is based on inadmissible hearsay and on information obtained after the close of the record. There is no independent evidence in the record to support this finding. It is also irrelevant.

**1739.** The fast-growing percentage of Internet users who search using mobile devices also contributes to consumer confusion regarding sponsored ads, because mobile devices often display only sponsored ads, and not organic results, on the initial search results screen (without actively scrolling down). (RX 736-036). As a result, mobile users have less ability to compare sponsored ads with organic results. (RX 736-036).

**Response to Proposed Finding No. 1739:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Finding No. 1735. The purported confusion involving whether a search result is an organic result or a sponsored (paid) ad has nothing to do with confusion as to source, sponsorship, or affiliation of any particular ad that a consumer may click and is therefore irrelevant.

Moreover, this proposed finding should be considered in conjunction with (1) other proposed findings regarding 1-800 Contacts' development and release of a mobile app to make it easier and simpler for customers to order contact lenses online (Coon, Tr. 2678-2679, 2691-2692) and (2) the evidence and expert analysis explaining why 1-800 Contacts' advertisement can be expected to consistently appear in the top slot on the search results page (CCPTF Section XI.D.2 (¶¶ 1938-1945) and would be particularly prominent on mobile device screens. (CCPTF ¶ 1943)).

**1740.** The potential for consumer confusion also increases when an Internet search is “navigational” in nature, meaning that the user’s intent is to reach a particular website. (RX 736-019, 027-028; Goodstein, Tr. 2414-2417). The navigational nature of a search increases the potential for consumer confusion for two principal reasons: (1) there is a higher probability that the consumer will believe that the top result on the search page is affiliated with the brand website that the consumer was trying to navigate to; and (2) when consumers are conducting a navigational search, they spend less time scrutinizing a link before clicking on it. (Goodstein, Tr. 2414-2417; RX 736-031).

**Response to Proposed Finding No. 1740:**

This proposed finding should be rejected because Professor Goodstein is again basing his opinion on third-party studies, which he summarizes and reiterates in his expert report, as well as on the witness stand. (RX0736 at 029–031 (¶¶ 65–71) (Goodstein Expert Report) (relying third-party sources for what constitutes a “navigational search” and how much time users spend to decide which link to click)). Professor Goodstein did not undertake any independent analysis to support the conclusion that consumer confusion is more likely because a search for “1-800 Contacts” is one that he classifies as a “navigational search.” (See Goodstein, Tr. 2414-2417, 2433-2434).

Although Rule 703 permits an expert to rely on facts and data obtained by others, he must still conduct his own independent analysis; he may not merely summarize the results of studies that have been conducted by others and present that summary as his own opinion. *Bagher v. Auto-Owners Ins. Co.*, No. 1:12-cv-00980-REB-KLM, 2014 U.S. Dist. LEXIS 39238, at \*16–17 (D. Colo. Mar. 25, 2014) (holding that an expert may not present “a summary reiteration of peer-reviewed medical literature” as his own opinion) (“The fact that Mr. Cooper has many estimable qualifications, including in epidemiology, does not mean he can simply reiterate the expert opinions of others, *a fortiori*, when those opinions do not form a significant part of an independent, expert analysis Mr. Cooper applied to the facts of this case. Ratiocination may not be replaced by reiteration.”).

As noted above, Professor Goodstein did not conduct any independent analysis or study of how consumers use search engines. And in any event Respondent has not established that Professor Goodstein would even be qualified to do that.

Furthermore, this proposed finding invites this Court to accept each of the third-party studies that form the basis of Professor Goodstein's opinion just because Professor Goodstein thinks they are scientifically valid, reliable, and helpful. As also noted in Complaint Counsel's Response to Proposed Finding No. 1726, however, "Rule 703 was never intended to allow oblique evasions of the hearsay rule." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005). Although an expert may rely on facts and data obtained by others, it is a wholly different proposition when the expert incorporates wholesale studies and analyses conducted by others. At that point, an "expert is vouching for the truth of what another expert told him – he is merely that expert's spokesman." *Id.* at 808–09 (citing cases); *see also Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-cv-3113-GET, 2008 U.S. Dist. LEXIS 110202, at \*16 (N.D. Ga. Mar. 21, 2008) (explaining that Rule 703 "does not permit an expert to simply parrot the opinions of other experts"). Each of the studies cited in Professor Goodstein's expert report constitutes inadmissible hearsay, and the Court should not rely on them simply because they come with Professor Goodstein's seal of approval.

This proposed finding should also be rejected as irrelevant and unsupported because classifying a search as "navigational" does not reveal what the consumer's ultimate intent was—at most, it reveals an intermediate intent, and no evidence in this case suggests that consumers who search for 1-800 Contacts' trademark terms because they intend to navigate to 1-800 Contacts' website—even if any such consumers happen to have the ultimate intent of purchasing from 1-800 Contacts specifically—are in any way harmed by the presence of competing advertisements appearing below the 1-800 Contacts advertisement. (*See* Response to Proposed Finding No. 1766).

Professor Goodstein’s cited testimony regarding “a higher probability” of confusion after a navigational search occurring if “what appears at the top” is “not affiliated with that [searched-for] brand,” is unsupported and contradicted by the evidence that (1) even but for the Bidding Agreements, 1-800 Contacts’ advertisement would still appear at the top of the search results page in response to a search for 1-800 Contacts, and (2) rival ads that appear in response to searches for 1-800 Contacts are relevant and useful to consumers who have performed that search. (CCPTF Sections IV.3-4 (¶¶ 385-417), V.B (¶¶ 599-802), XI.D (¶¶ 1928-1954)).

Professor Goodstein acknowledged that there are some studies that find consumers have diverse preferences and expectations when they use brand names as search terms. (Goodstein, Tr. 2428). Specifically, listed among the materials he had considered in forming his opinions is an article by David Franklyn and David Hyman, entitled “Trademarks as Search Engine Keywords: Much Ado About Something?,” published in the *Harvard Journal of Law and Technology* in 2013. (RX0736 at 081 (List of Materials Considered) (Goodstein Expert Report); see Goodstein, Tr. 2428–2429.) Professor Goodstein agreed, based on the Franklyn and Hyman study, that not everybody who uses a brand name or a trademark as a search term is looking only for information about that brand. (Goodstein, Tr. 2431). Indeed, according to the study, over half of the people either wanted more information or they didn’t have a preference about what was returned. (Goodstein, Tr. 2431). In summary, Professor Goodstein’s opinion, as embodied in this proposed finding, is based on a faulty working premise about the intent of consumers who search for “1-800 Contacts.”

**1741.** Survey evidence confirms that sponsored ads triggered by competitors’ use of trademarks as keywords created a serious potential for consumer confusion at the time that 1-800 Contacts entered into the Settlement Agreements. (Goodstein, Tr. 2417-2421; RX 736-031-033).

**Response to Proposed Finding No. 1741:**

This proposed finding should be rejected because Professor Goodstein is basing his opinion solely on a surveys conducted by *other experts*, including Dr. Van Liere, in the *American*

*Airlines v. Google* and *American Airlines v. Yahoo!* cases, which he summarizes and reiterates in his expert report, as well as on the witness stand. (Goodstein, Tr. 2418–2419; RX0736 at 0031–0032 (¶¶ 73–75) (Goodstein Expert Report); RX0736 at 83–84 (Goodstein Expert Report, List of Materials Considered) (listing the expert reports of Dr. Van Liere and his expert report in *American Airlines v. Google* case among the materials considered); CX9045 at 006 (Goodstein, Dep. 17) (treating the *American Airlines* surveys as “secondary data”).) Although Rule 703 permits an expert to rely on facts and data obtained by others, he must still conduct his own independent analysis; he may not merely summarize the results of studies that have been conducted by others and present that summary as his own opinion. *Bagher v. Auto-Owners Ins. Co.*, No. 1:12-cv-00980-REB-KLM, 2014 U.S. Dist. LEXIS 39238, at \*16–17 (D. Colo. Mar. 25, 2014) (holding that an expert may not present “a summary reiteration of peer-reviewed medical literature” as his own opinion) (“The fact that Mr. Cooper has many estimable qualifications, including in epidemiology, does not mean he can simply reiterate the expert opinions of others, *a fortiori*, when those opinions do not form a significant part of an independent, expert analysis Mr. Cooper applied to the facts of this case. Ratiocination may not be replaced by reiteration.”).

In looking to the *American Airlines* surveys, Professor Goodstein is not even relying on work that someone else performed for this case, or for a prior case involving 1-800 Contacts and its trademark rights in the relevant time period, which he could have done. *See, e.g., 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1246–47 (10th Cir. 2013) (reviewing 1-800 Contacts’ argument that its consumer-confusion survey had been wrongly excluded by the district court). Importantly, Professor Goodstein acknowledged that the *American Airlines* surveys involved companies in the airline industry, and that buying airline tickets online is distinguishable from buying contact lenses. (Goodstein, Tr. 2434–2435; CX9045 at 044 (Goodstein, Dep. 171) (“This study is not about, you know, is a contact lens the same as an airline.”)). Yet, Respondent has not

explained why that study may be at all probative here despite distinctions between the airline and the contact lens industries. Nor has Respondent explained why the *American Airlines* study may be at all probative or reliable in spite of the several flaws and idiosyncrasies in its design that render it inapplicable to search advertising in the online contact lens industry. (See CX8014 at 028-031 (¶¶ 61-67) (Tushnet Rebuttal Expert Report)). Moreover, because the *American Airlines* cases settled, Professor Goodstein has no way of knowing whether the court in those cases would have credited the surveys conducted by American Airlines' experts or the surveys conducted by Google and Yahoo!'s respective experts. (Goodstein, Tr. 2438–2439; see also Van Liere, Tr. 2974 (“In the *American Airlines* case, the work was done and the depositions were conducted, but the case settled, but I don't know behind the scenes whether there was specific rulings about my work in that matter.”)).

Furthermore, this proposed finding invites this Court to accept the third-party surveys that form the basis of Professor Goodstein's opinion just because Professor Goodstein thinks they are scientifically valid, reliable, and helpful. As also noted in Complaint Counsel's Response to Proposed Finding No. 1726, however, “Rule 703 was never intended to allow oblique evasions of the hearsay rule.” *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005). Although an expert may rely on facts and data obtained by others, it is a wholly different proposition when the expert incorporates wholesale studies and analyses conducted by others. At that point, an “expert is vouching for the truth of what another expert told him – he is merely that expert's spokesman.” *Id.* at 808–09 (citing cases). See also *Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-cv-3113-GET, 2008 U.S. Dist. LEXIS 110202, at \*16 (N.D. Ga. Mar. 21, 2008) (explaining that Rule 703 “does not permit an expert to simply parrot the opinions of other experts”). The *American Airlines* surveys cited in Professor Goodstein's expert report constitute inadmissible hearsay, and the Court should not rely on them simply because they come with

Professor Goodstein's seal of approval. Dr. Van Liere testified as an expert in this case, yet 1-800 Contacts' counsel chose not to ask him to testify first-hand about his own survey in the *American Airlines v. Google* case. Professor Goodstein should not testify instead as Dr. Van Liere's mouthpiece.

Furthermore, any reliance on the *American Airlines* studies is inappropriate for the reasons set forth in response to Proposed Findings No. 1498 and 1722.

**1742.** As Prof. Goodstein, who has personally designed or analyzed hundreds of surveys and questionnaires in the course of his marketing research, explained, the consumer surveys conducted by Dr. Van Liere in the *American Airlines* cases in 2008-2009 are useful in considering the likelihood of confusion at around the time the Settlement Agreements were entered into, because "it is impossible to ask people what their state of mind is today based on stimuli that are 8-10 years old." (Goodstein, Tr. 2419).

**Response to Proposed Finding No. 1742:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Finding No. 1741.

**1743.** Dr. Van Liere's consumer surveys in the *American Airline* cases support the conclusion that a significant number of users performing a navigational search in the 2008-2009 time period could be confused as to the source, affiliation, or sponsorship of sponsored ads by other companies that appear in response to that search. (RX 736-032).

**Response to Proposed Finding No. 1743:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Finding No. 1741.

**1744.** The Van Liere surveys conducted in the *American Airlines* cases support the conclusion that sponsored ads placed at the top of a search engine results page are likely to cause an even greater amount of confusion, at least in the 2008-2009 time period. (RX 736-032; Goodstein, Tr. 2420).

**Response to Proposed Finding No. 1744:**

This proposed finding is vague and nonsensical as it appears to not be a complete sentence; it appears to present a comparison without making clear what two situations are being compared to

one another. This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Finding No. 1741. This proposed finding is also immaterial and irrelevant because consumer confusion as between sponsored ads and organic results is not the type of confusion cognizable under trademark law, i.e., confusion as to source, sponsorship, or affiliation of a company's products or services. 15 U.S.C. § 1125(a)(1)(A); *Designer Skin, LLC v. S&L Vitamins, Inc.*, 560 F. Supp. 2d 811, 819 (D. Ariz. 2008) (concluding that links to competitor websites appearing in response to a search for the plaintiff's company do not create confusion as to source or affiliation). Rather, it is plainly confusion about the layout on a search engine results page, which would be present in a relevant population of consumers even if the sponsored ads were to appear in search results for a generic term such as "contact lenses." Moreover, a consumer's confusion as to the appearance of sponsored ads at the top of a search engine results page does not mean that she will be confused, if she clicks on one of those ads, as to whose ad it is. *See, e.g., CollegeSource, Inc. v. Academyone, Inc.*, No. 10-cv-03542, 2012 U.S. Dist. LEXIS 153197, at \*52–53 (E.D. Pa. Oct. 25, 2012) (finding that "the entire context of the advertisement's appearance, especially the clearly differentiated text boxes and the fact that CollegeSource's name does not appear within the language of the advertisement," weighs against likely confusion); *J.G. Wentworth, S.S.C. Ltd. P'ship v. Settlement Funding, LLC*, No. 06-cv-00597, 2007 U.S. Dist. LEXIS 288, at \*23–24 (E.D. Pa. Jan. 4, 2007) ("Due to the separate and distinct nature of the links created on any of the search results pages in question, potential consumers have no opportunity to confuse defendant's services, goods, advertisements, links or websites for those of plaintiff.").

"Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact." *Loeffel Steel*, 387 F. Supp. 2d at 806 (citations omitted). *See also Superior Prod'n P'ship v. Gordon Auto Body Parts Co.*,

784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

**1745.** In sum, the record evidence supports a conclusion that the Settlement Agreements have reduced the likelihood of consumer confusion to the extent that they restricted the display of other retailers’ ads that were triggered by a search for the 1-800 Contacts trademark.

**Response to Proposed Finding No. 1745:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel’s Responses to Proposed Findings Nos. 1724–1744.

(c) *There Is Substantial Evidence That The Settlement Agreements Have Lessened The Likelihood That Sponsored Ads By Other Retailers That Appear In Response To A Search For “1-800 Contacts” Would Cause That Trademark To Become Less Distinctive To Consumers And/Or Less Associated With High Quality And Excellent Service.*

**1746.** Prof. Goodstein has an extensive research background regarding the ways in which brand equity is built and the ways in which that brand equity can be diminished. (RX 736-003-005; Goodstein, Tr. 2383).

**Response to Proposed Finding No. 1746:**

This proposed finding is vague as to what constitutes an “extensive” research background and is therefore unverifiable. The cited portions of the record do not appear to support the assertion that Professor Goodstein has an “extensive research background” in brand equity. At

trial, when asked whether he studies the strength of companies' brands, Professor Goodstein replied: "Yes. I do that a lot." (Goodstein, Tr. 2383). No additional or more specific information was provided regarding the extent of Professor Goodstein's research background in brand equity. Professor Goodstein's expert report similarly does not provide any specificity as to his experience researching brand equity, other than his statement that "I have substantial experience in issues relating to brand equity." (RX0736 at 003 (¶ 2) (Goodstein Expert Report)).

**1747.** The strength of a brand – its "brand equity" – can be critical to attracting and retaining customers and to the long-term success of a company. (RX 736-005).

**Response to Proposed Finding No. 1747:**

This proposed finding is vague and untethered from the facts and issues in this case in its use of the subjective and undefined word "critical" and the vague word "can." Complaint Counsel does not disagree with the general proposition that a strong brand can be valuable to a company. But Complaint Counsel notes that this proposed finding, as expressed in Professor Goodstein's expert report, is unsupported by any record evidence. (RX0736 at 005 (¶ 9) (Goodstein Expert Report)).

**1748.** A powerful brand can allow a company to command premium prices because the brand is afforded a higher value by the customer. (Goodstein, Tr. 2383).

**Response to Proposed Finding No. 1748:**

This proposed finding is an unsupported opinion that Professor Goodstein expressed at trial. (*See* Goodstein, Tr. 2383)). Although Complaint Counsel does not dispute that Professor Goodstein in fact expressed this opinion at trial, this Court should not base a finding of fact on Professor Goodstein's opinion because it was not disclosed in his expert report, as this Court requires, and, in any event, it is unsupported by any record evidence, as Rule 703 require and Rule 3.31A(c) require. FED. R. EVID. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."); 16 C.F.R. § 3.31A(c) ("Each

report shall ... contain a complete statement of all opinions to be expressed and the basis and reasons therefor[.]”).

To the extent this proposed finding suggests that 1-800 Contacts’ price premium over other online contact lens retailers is fully explained by the strength of its brand, it is contrary to the weight of the evidence. (*E.g.*, CCPTF Section IX.A.2 (¶¶ (1318-1343))).

**1749.** A brand’s equity is a function of four principal components: (1) brand awareness; (2) a loyal franchise; (3) positive perceived quality; and (4) positive associations related to the brand. (Goodstein, Tr. 2383-2385; RX 736-005).

**Response to Proposed Finding No. 1749:**

This proposed finding is an unsupported opinion from Professor Goodstein’s expert report in this case, which he also expressed at trial. (RX0736 at 005 (¶ 9) (Goodstein Expert Report); Goodstein, Tr. 2385.) Although Complaint Counsel does not dispute that Professor Goodstein in fact expressed this opinion in his report, this Court should not base a finding of fact on Professor Goodstein’s opinion because it is unsupported by any record evidence, as Rule 703 require and Rule 3.31A(c) require. FED. R. EVID. 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.”); 16 C.F.R. § 3.31A(c) (“Each report shall ... contain a complete statement of all opinions to be expressed and the basis and reasons therefor[.]”).

**1750.** “Brand association” in this context refers to the image that the company holds in the minds of consumers. (Goodstein, Tr. 2382-2383; 2423-2424; RX 736-037).

**Response to Proposed Finding No. 1750:**

This proposed finding is an unsupported opinion from Professor Goodstein’s expert report in this case, which he also purportedly expressed at trial. (RX0736 at 037 (¶ 90) (Goodstein Expert Report); Goodstein, Tr. 2382–2383.) Although Complaint Counsel does not dispute that Professor Goodstein in fact expressed this opinion in his report, this Court should not base a finding of fact

on Professor Goodstein’s opinion because it is unsupported by any record evidence, as Rule 703 require and Rule 3.31A(c) require. FED. R. EVID. 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.”); 16 C.F.R. § 3.31A(c) (“Each report shall ... contain a complete statement of all opinions to be expressed and the basis and reasons therefor[.]”).

Moreover, the proposed finding that “brand association” is “the image that the company holds in the minds of consumers” appears to be: (i) an inaccurate restatement of Professor Goodstein’s opinion disclosed in his expert report; and (ii) a statement that is inconsistent with the opinion that he gave at trial. In his report, Professor Goodstein wrote that “[a]ssociations are *based on* the image that the company holds in the minds of *its constituencies*,” not in the minds of all consumers. (RX0736 at 037 (¶ 90) (Goodstein Expert Report) (emphasis added)). At trial, Professor Goodstein testified that “brand association” refers to “trying to link two brands together, usually a second-tier brand with a – with a high-equity, strong, top-tier brand, trying to bring them to mind together so that they get paired.” (Goodstein, Tr. 2382). The two statements mean different things and cannot be reconciled.

**1751.** “Association” or “associating” is also a marketing tactic whereby a less well-known competitor tries to link, or pair, its brand with a stronger brand, in order to create an association between the two brands in the minds of consumers. (Goodstein, Tr. 2382; RX 736-037-038).

**Response to Proposed Finding No. 1751:**

This proposed finding is immaterial and irrelevant because it describes a tactic that does not meet the statutory definition of trademark infringement or trademark dilution. Importantly, the Lanham Act defines “dilution by blurring” as an “*association arising from the similarity between a mark or trade name and a famous mark* that impairs the distinctiveness of the famous mark.” 15 U.S.C. § 1125(c)(2)(B) (2016) (emphasis added). As this definition makes clear, the type of “association” that constitutes actionable “blurring” under federal antidilution law arises from the

defendant's use of a mark or trade name that is *similar* to the plaintiff's famous mark, with such association impairing the distinctiveness of the famous mark. *See, e.g., Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002) (giving the example of "Tiffany" being used with an upscale restaurant, which causes consumers, "when [they] next see the name 'Tiffany' [perhaps to] think about both the restaurant and the jewelry store, and if so the efficacy of the name as an identifier of the store will be diminished"). Mere association by linking or pairing of a weaker brand (e.g., Coastal Contacts) that is *dissimilar* to the stronger brand (1-800 Contacts) does not satisfy the Lanham Act's definition.

Furthermore, the Lanham Act excludes comparative advertising from the scope of dilution by characterizing it as a form of fair use. 15 U.S.C. § 1125(c)(3)(A)(i) (2016); *Rosetta Stone, Ltd. v. Google, Inc.*, 676 F.3d 144, 167 (4th Cir. 2012) ("The statute specifically provides comparative advertising and parody as examples of non-dilutive fair uses."). For example, in *Cumberland Packing Co. v. Monsanto Co.*, the district court held:

Plaintiff does not claim that defendant has distorted plaintiff's mark. It says only that the "physical association" of the Sweet'N Low trademark with the Sweetmate trademark will cause blurring. "Physical association" in a comparative advertisement is hardly likely to cause dilution. "As long as the mark is not altered, such use serves the beneficial purpose of imparting factual information about the relative merits of competing products and poses no risk of diluting the selling power of the competitor's mark."

32 F. Supp. 2d 561, 581 (E.D.N.Y. 1999) (quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 44 (2d Cir. 1994)).

"Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact." *Loeffel Steel*, 387 F. Supp. 2d at 806

(citations omitted). *See also Superior Prod'n P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

Even Professor Goodstein has recognized that “association” engenders procompetitive comparative advertising:

... By their very nature, strategies associating brands suggest that more substitutes exist in the market, because comparative advertising evokes less psychological difference between the advertised and the “compared to” brands (Gorn and Weinberg 1984). Therefore, the evoked set for consumers now contains more substitutes and increases awareness of the multiple alternatives available in the market. The comparative advertisement also reduces the search costs of information by including two brands directly in the copy and should increase the competitive nature of the market (Kanetkar, Weinberg, and Weiss 1992)....

*See also* Ajay Kalra & Ronald C. Goodstein, *The Impact of Advertising Positioning Strategies on Consumer Price Sensitivity*, 35 J. MARKETING RES. 210, 212 (1998) (cited in RX0736 at 0038 (¶ 91 n.185) (Goodstein Expert Report)).

**1752.** If a less well-known competitor is successful in creating an association between its brand and a stronger brand, the brand equity of the stronger brand will be diminished, and that brand will become less valuable. (Goodstein, Tr. 2424; RX 736-037-039).

**Response to Proposed Finding No. 1752:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1751.

**1753.** The persistent use of 1-800 Contacts' trademark as a keyword in paid search advertising by a less well-known competitor can be expected over time to build an association in consumers' minds between the two brands. (RX 736-038-039).

**Response to Proposed Finding No. 1753:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1751.

**1754.** An association between the 1-800 Contacts brand and a less well-known brand would likely erode the value of the 1-800 Contacts trademark. (RX 736-039).

**Response to Proposed Finding No. 1754:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1751.

**1755.** The use of 1-800 Contacts' trademark to trigger sponsored ads can also be expected to diminish the value of that trademark by causing negative associations with other retailers. (RX 736-039-041).

**Response to Proposed Finding No. 1755:**

This proposed finding is irrelevant because there is no evidence of "negative associations" between 1-800 Contacts and its rivals occurring as a result of rivals showing truthful, nonmisleading advertisements in response to 1-800 Contacts Branded Queries.

This proposed finding is immaterial and irrelevant because it describes a tactic that does not meet the statutory definition of trademark infringement or trademark dilution. Importantly, the Lanham Act defines "dilution by tarnishment" as an "*association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.*"

15 U.S.C. § 1125(c)(2)(C) (2016) (emphasis added). As this definition makes clear, the type of “association” that constitutes actionable “tarnishment” under federal antidilution law arises from the defendant’s use of a mark or trade name that is *similar* to the plaintiff’s famous mark, with such association harming the reputation of the famous mark. *See, e.g., Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002) (giving the example of “Tiffany” being used with a striptease joint, which causes consumers, “because of the inveterate tendency of the human mind to proceed by association, every time they think of the word ‘Tiffany’ their image of the fancy jewelry store will be tarnished by the association of the word with the strip joint”). Mere association by linking or pairing of a weaker brand (e.g., Coastal Contacts) that is *dissimilar* to the stronger brand (1-800 Contacts) does not satisfy the Lanham Act’s definition.

Furthermore, the Lanham Act excludes comparative advertising from the scope of dilution by characterizing it as a form of fair use. 15 U.S.C. § 1125(c)(3)(A)(i) (2016); *Rosetta Stone, Ltd. v. Google, Inc.*, 676 F.3d 144, 167 (4th Cir. 2012) (“The statute specifically provides comparative advertising and parody as examples of non-dilutive fair uses.”). For example, in *Cumberland Packing Co. v. Monsanto Co.*, the district court held:

Plaintiff does not claim that defendant has distorted plaintiff’s mark. It says only that the “physical association” of the Sweet’N Low trademark with the Sweetmate trademark will cause blurring. “Physical association” in a comparative advertisement is hardly likely to cause dilution. “As long as the mark is not altered, such use serves the beneficial purpose of imparting factual information about the relative merits of competing products and poses no risk of diluting the selling power of the competitor’s mark.”

32 F. Supp. 2d 561, 581 (E.D.N.Y. 1999) (quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 44 (2d Cir. 1994)).

“Expert opinions that are contrary to law are inadmissible.... They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.” *Loeffel Steel*, 387 F. Supp. 2d at 806 (citations omitted). *See also Superior Prod’n P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 324–25 (6th Cir. 2015) (agreeing with the district court and defendants that admitting an expert opinion on predatory pricing based on a “disturbing” proximity test or a “no economic sense” test is “flatly contrary” to the law); *Southard v. United Regional Health Care Sys.*, No. 7-06-cv-00011-L, 2008 U.S. Dist. LEXIS 87599, at \*4 (N.D. Tex. Aug. 5, 2008) (“Although a qualified expert is not necessarily prohibited from expressing an opinion on an ultimate issue of fact, where as here, the expert’s opinion is based on an erroneous legal premise, it is appropriate to exclude such testimony.”); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 572–73 (S.D.N.Y. 2007) (excluding an expert’s trademark dilution study for lack of “fit” with the substantive law of dilution).

Even Professor Goodstein has recognized that “association” engenders procompetitive comparative advertising:

... By their very nature, strategies associating brands suggest that more substitutes exist in the market, because comparative advertising evokes less psychological difference between the advertised and the “compared to” brands (Gorn and Weinberg 1984). Therefore, the evoked set for consumers now contains more substitutes and increases awareness of the multiple alternatives available in the market. The comparative advertisement also reduces the search costs of information by including two brands directly in the copy and should increase the competitive nature of the market (Kanetkar, Weinberg, and Weiss 1992)....

*See also* Ajay Kalra & Ronald C. Goodstein, *The Impact of Advertising Positioning Strategies on Consumer Price Sensitivity*, 35 J. MARKETING RES. 210, 212 (1998) (cited in RX0736 at 0038 (¶ 91 n.185) (Goodstein Expert Report)).

**1756.** Negative associations can arise if a consumer has a negative experience with the less well-known brand that has become associated in the consumer's mind with 1-800 Contacts. (Goodstein, Tr. 2424; RX 736-039-040).

**Response to Proposed Finding No. 1756:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1755. It is also irrelevant because there is no evidence of such "negative experience[s]" with 1-800 Contacts' rivals "becom[ing] associated in the consumer's mind with 1-800 Contacts" as a result of rivals showing truthful, nonmisleading advertisements in response to 1-800 Contacts Branded Queries.

**1757.** Negative associations can arise if a consumer believes that the ads presented by the less well-known retailer is deceptive or misleading. (RX 736-040-041).

**Response to Proposed Finding No. 1757:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1755. It is also irrelevant because there is no evidence of "negative associations" between 1-800 Contacts and its rivals occurring as a result of rivals showing truthful, nonmisleading advertisements in response to 1-800 Contacts Branded Queries.

**1758.** Retailers testified at trial that some online sellers of contact lenses engage in unethical or deceptive business practices. For example, Ryan Aloviz, CEO of online retailer LensDirect, testified that "[t]here's a lot of companies out there that are [selling contact lenses online] in a way that isn't ethically correct. . . ." (Aloviz, Tr. 1032).

**Response to Proposed Finding No. 1758:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1755.

This proposed finding also lacks foundation to the extent that it invites the Court to find that the unethical practices of which Mr. Aloviz spoke are practices that could somehow harm 1-

800 Contacts under a “negative association” theory. There is no evidence in the record on which to make such a connection.

**1759.** Peter Clarkson, CEO of online retailer ACLens, testified that some online retailers of contact lenses add hidden handling charges that are not revealed to the customers until the end of the purchasing process. (Clarkson, Tr. 360-361; CX 9039-047 (Clarkson, Dep. at 184)). Mr. Clarkson considers that to be an “unethical and probably a deceptive trade practice.” (Clarkson, Tr. 360-361; CX 9039-057 (Clarkson, Dep. at 224)).

**Response to Proposed Finding No. 1759:**

This proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel’s Response to Proposed Finding No. 1755. Moreover, to the extent that a trademark owner like 1-800 Contacts believes that deceptive or misleading ads are likely to damage to its business, that owner would potentially have recourse for false advertising under the Lanham Act. 15 U.S.C. § 1125(a)(1)(B) (2016).

This proposed finding also lacks foundation to the extent that it invites the Court to find that the unethical practices of which Mr. Clark spoke are practices that could somehow harm 1-800 Contacts under a “negative association” theory. There is no evidence in the record on which to make such a connection.

**1760.** The Commission has recently criticized retailers’ use of hidden handling and shipping charges, for such practices have “the potential to mislead and harm consumers, causing them to pay too much and to waste too much time searching for” various products. (RX 767-0004).

**Response to Proposed Finding No. 1760:**

This proposed finding is immaterial and irrelevant because the quoted statement comes from opening remarks that then-Chairman Leibowitz delivered at a conference on the economics of drip pricing, held in June 2012. (RX0767 at 0001 & 0003.) In his remarks, then-Chairman Leibowitz makes no mention of drip pricing being an issue in the online sale of contact lenses. (See RX0767 at 004 (specifically mentioning only cell phone plans, airline or concert tickets, hotel

rooms, and rental cars)). Accordingly, any attempt to characterize these remarks as a critique of business practices in the online sale of contact lenses amounts to rank speculation.

Furthermore, this proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1755.

**1761.** Other potentially deceptive or misleading business practices by online retailers of contact lenses that would diminish the value of the 1-800 Contacts brand if consumers had associated the two companies' brands include: (1) offering manufacturer rebates that the consumers cannot redeem through online retailers; (2) making unverified claims to offer the "cheapest" prices; and (3) offering "70% off" or similar claims of substantial savings without any effort to verify that such claims are valid or applicable to a substantial group of consumers. (RX 736-039-041).

**Response to Proposed Finding No. 1761:**

This finding consists of pure speculation and is therefore irrelevant. To the extent this proposed finding suggests that any consumers associated 1-800 Contacts' brand with the brand of a company that took any of the actions enumerated in the finding—or that any such association has been (or but for the Bidding Agreements would be) harmful to 1-800 Contacts and/or consumers, it is speculative and lacks foundation. That is, to the extent that this proposed finding invites the Court to find that these "potentially deceptive or misleading business practices by online retailers of contact lenses" could somehow harm 1-800 Contacts under a "negative association" theory, it lacks foundation because there is no evidence in the record on which to make such a connection.

Additionally, this proposed finding, to the extent it cites Professor Goodstein's report, constitutes inadmissible hearsay. The cited portion of Professor Goodstein's report does not appear to present any opinion from Professor Goodstein. Rather, it appears to present third-party statements, offered for the truth of the matter asserted, regarding "potentially deceptive or misleading business practices by online retailers of contact lenses." The proposed finding is therefore objectionable.

More importantly, this proposed finding is immaterial and irrelevant for the reasons set forth in Complaint Counsel's Response to Proposed Finding No. 1755.

**1762.** The record evidence supports the conclusion that the Settlement Agreements have lessened the likelihood that negative associations between 1-800 Contacts' brand and the brands of lesser-known retailers have become associated in consumers' minds.

**Response to Proposed Finding No. 1762:**

This proposed finding should be rejected for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1746–1761.

(d) *Prof. Tushnet Is Not Qualified To Rebut The Opinions Of Prof. Goodstein Regarding The Potential For Consumer Confusion Or Harm To 1-800 Contacts' Trademarks*

**1763.** Complaint Counsel offered the opinions of Prof. Tushnet in rebuttal to certain opinions offered by Respondent's expert Prof. Goodstein. (Tushnet, Tr. 4392-93).

**Response to Proposed Finding No. 1763:**

Complaint Counsel has no specific response to this proposed finding other than to note that Professor Tushnet's opinions in rebuttal to Professor Goodstein are set forth in her rebuttal expert report as well as her trial testimony. (*See* CX8014 (Tushnet Rebuttal Expert Report)). At trial, Professor Tushnet limited her testimony, per the Court's direction, to rebuttal of opinions that were elicited through Professor Goodstein's direct examination. (Tushnet, Tr. 4368, 4371.) To the extent that 1-800 Contacts now proposes to have the Court make certain findings based on what is set forth in Professor Goodstein's expert report, but was not elicited on direct examination at trial, Complaint Counsel cites in response herein to Professor Tushnet's rebuttal expert report, to the extent that the issue or matter was addressed in her report.

**1764.** Prof. Tushnet is not qualified to offer an opinion on the potential for consumer confusion from sponsored ads or the potential for sponsored ads to harm the value of a company's trademarks. Accordingly, the Court will not consider Prof. Tushnet's rebuttal to Prof. Goodstein or any of Prof. Tushnet's other opinions regarding the potential for consumer confusion from sponsored ads or the potential for sponsored ads to harm the value of a company's trademarks.

**Response to Proposed Finding No. 1764:**

This proposed finding is improper because whether an individual is qualified to testify as an expert is a question of law, not one of fact. FED. R. EVID. 104(a); *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *Kinser v. Gehl Co.*, 184 F.3d 1259, 1269 (10th Cir. 1999).

Even if the question of Professor Tushnet's qualifications were properly lodged as a finding of fact, this proposed finding is unsupported and contrary to the weight of the evidence (and the case law) for the reasons set forth in Complaint Counsel's Responses to Proposed Findings Nos. 1592–1600.

Even if the question of Professor Tushnet's qualifications were properly lodged as a finding of fact, this proposed finding is devoid of any citations to supporting evidence in the record. It should therefore be disregarded.

**1765.** Prof. Tushnet lacks the background or expertise in survey design, survey methodology or marketing necessary to serve as an expert witness in those areas. Prof. Tushnet does not have sufficient qualifications to opine on, or rebut, the opinions by Prof. Goodstein set forth in his expert report and testimony regarding the potential for consumer confusion from sponsored ads and the potential for sponsored ads to dilute or harm the value of 1-800 Contacts trademarks. (Tushnet, Tr. 4402, 4408, 4419, 4430).

**Response to Proposed Finding No. 1765:**

This proposed finding is improper because whether an individual is qualified to testify as an expert is a question of law, not one of fact. FED. R. EVID. 104(a); *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *Kinser v. Gehl Co.*, 184 F.3d 1259, 1269 (10th Cir. 1999).

Even if the question of Professor Tushnet's qualifications were properly lodged as a finding of fact, this proposed finding is unsupported and contrary to the weight of the evidence (and the case law) for the reasons set forth in Complaint Counsel's Responses to Proposed

Findings Nos. 1592–1600. The citations in this proposed finding relate to whether Professor Tushnet, as a law professor, possesses any specialized knowledge that would assist this Court as a trier of fact in understanding the flaws in Professor Goodstein’s opinions regarding consumer confusion and harm to the value of 1-800 Contacts’ trademarks. As explained above, the fact that Professor Tushnet is a law professor with a law degree does not mean she does not have knowledge, skill, and experience within the meaning of Rule 702 to rebut certain aspects of Professor Goodstein’s opinions.

***D. The Settlement Agreements Reduced Customers’ Search Costs***

***1. Most Consumers Who Search For 1-800 Contacts’ Trademark Intend To Navigate To 1-800 Contacts’ Website***

**1766.** Consumers who search for a retailer’s trademark typically intend to navigate to that retailer’s website rather than searching for alternatives. (Ghose, Tr. 3869-70; RX 733-0031 to -0037 (Ghose Report)).

**Response to Proposed Finding No. 1766:**

This proposed finding is vague, irrelevant, misleading, unsupported, and contradicted by the weight of the evidence insofar as (1) it is qualified by the undefined word “typically,” (2) it suggests that intent to navigate to a retailer’s website is incompatible with an interest in comparison shopping or “searching for alternatives,” (3) it suggests that the intent to navigate to a retailer’s website is the ultimate intent of consumers rather than only an intermediate intent, and/or (4) its inclusion under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that even consumers with the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically – to the extent any such consumers exist – are in any way harmed by the presence of competing advertisements appearing, below the 1-800 advertisement, in response to a 1-800 Contacts Branded Query.

First, by qualifying itself with the word “typically,” without defining or clarifying its meaning, this proposed finding leaves vague and unstated what proportion of “[c]onsumers who search for a retailer’s trademark” are indeed “searching for alternatives” and/or do not intend to navigate to that retailer’s website—rendering the proposed finding meaningless. The use of the word “typically” also renders the proposed finding irrelevant and misleading insofar as it implies that the number of consumers searching for a retailer’s trademark who intend to navigate to that retailer’s website is material to any issue in the case, as even consumers who type such a query solely because they intend a visit to 1-800 Contacts’ website as their end goal can still benefit from seeing competing retailers’ ads below 1-800 Contacts’ ad (*see* CCPTF Section XI.D.2.b-c (¶¶ 1946-1954)).

The evidence shows that consumers who search for 1-800 Contacts’ name in fact do—when presented with ads from competing retailers below the 1-800 Contacts ad—often click on and purchase from those competing retailers. (*See* CCPTF Sections V.B.2 – V.B.4 (¶¶ 611-783)). Indeed, Dr. Ghose testified that advertising—including advertising from rival retailers offering lower prices for the same product—has the capacity to change consumers’ commercial intent, and that seeing “a price-competitive rival ad” can benefit consumers. (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.”), 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.”), 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.”)). (*See also generally* CCPTF Section XI.D.2.b (¶¶ 1946-1951)).

Second, insofar as the proposed finding suggests that the intent to navigate to a retailer's website is the ultimate intent of consumers rather than only an intermediate intent, it is unsupported and indeed contradicted by the relevant academic literature—including the very academic literature upon which Dr. Ghose (whose testimony and report are the only sources cited in support of this proposed finding) relies for his discussion of navigational intent. Specifically, in the portion of Dr. Ghose's report cited in support of this proposed finding, Dr. Ghose relies on the work of Broder (2002) and several publications by Jansen et al., calling Broder's work "seminal" and relying on Jansen et al. (2008) for the definitions of "informational," "navigational, and "transactional" search used in his report. (RX0733 at 031-037 (¶¶ 74-87) (Ghose Expert Report)). As Dr. Athey pointed out, "Broder himself warned of the challenge in inferring search intent," stating that "We need to clarify that there is no assumption here that this intent can be inferred with any certitude from the query" and that "inferring the user intent from the query is at best an inexact science, but usually a wild guess" and Jansen et al. (2008) explained that "One can view navigational searching as an expression of an intermediate intent aimed at satisfying some larger searching goal" and "articulate[d] subcategories of navigational queries: 'navigation to transactional' and 'navigation to informational.'" (CX8010 at 006-007 (¶¶ 16-17) (Athey Rebuttal Expert Report) (quoting Broder (2002) and Jansen et al. (2008))). Dr. Athey also explained that other relevant academic literature has shown researchers' observations that people who used "queries comprised of unambiguous company names or URLs and typically thought of as navigational" "not only to navigate to the corresponding homepage, but also to navigate to related pages (e.g., 17% of all queries for weather.com end up at <http://weather.yahoo.com>)." As Dr. Athey explained, "[i]n the weather.com example above, the logical conclusion is the subset of users who landed at weather.yahoo.com were ultimately seeking to understand the weather. Their apparent expressed preference for obtaining that information from weather.com was not a reliable

indicator of their underlying intent. They may understand that weather.com is one way to meet their needs, but are open to other, potentially superior ways to learn about the weather.” (CX8010 at 008 (¶ 18) (Athey Rebuttal Expert Report)). Insofar as the proposed finding suggests that the intent to navigate to a retailer’s website is the ultimate intent of consumers rather than only an intermediate intent, it is further contradicted by the evidence that in this case, navigational searchers who enter 1-800 Contacts’ Branded Queries ultimately have a transactional intent: the purchase of contact lenses. (See CCPTF Section XI.D.1 (¶¶ 1928-1936)).

Indeed, as Dr. Athey has explained, “[a]ll firms receive a higher CTR [click-through rate] when they are the owner of the brand related to the user query. This higher CTR is not surprising given that users have already indicated familiarity with the brand name. *It does not prove that . . . branded search queries for 1-800 Contacts correspond exclusively to user intent that can only be satisfied by visiting 1800contacts.com.* In addition, it does not exclude that the main intent of users is transactional (to buy contact lenses), and it certainly does not imply that they are disinterested in, or could not benefit from, conducting their transaction (in this case, for a pre-specified product) at a lower price.” (CX8007 at 012-013 (¶ 34) (Athey Expert Report) (emphasis added)).

Third, no evidence suggests that consumers who search for 1-800 Contacts’ trademark terms because they intend to navigate to 1-800 Contacts website—even if any such consumers happen to have the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically—are in any way harmed by the presence of competing advertisements appearing below the 1-800 advertisement in response to a 1-800 Contacts Branded Query. The evidence shows that if the Bidding Agreements were to be rescinded, (a) users who want to find 1-800 Contacts’ website would still be able to do so easily, as 1-800 Contacts’ advertisement would remain in the first position (see CCPTF Section XI.D.2.a (¶¶ 1938-1945)), (b) users who initially intend to purchase

from 1-800 Contacts would benefit from the additional information and additional choices provided by rival ads (*see* CCPTF Section XI.D.2.b (¶¶ 1946-1951)), and (c) even consumers who still ultimately purchase from 1-800 Contacts would benefit from the existence of competing offers (*see* CCPTF Section XI.D.2.c (¶¶ 1952-1954)).

**1767.** Consumers who search for 1-800 Contacts’ trademark typically intended to navigate to 1-800 Contacts’ website. (RX 733-0045 to -0052 (Ghose Report); CX 9046 (Ghose, Dep. at 116-117)).

**Response to Proposed Finding No. 1767:**

This proposed finding is vague, irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth above in response to Proposed Finding No. 1766.

**1768.** Dr. Athey agrees that typing “1-800 Contacts” into the search bar is a navigational search. (Athey, Tr. 851).

**Response to Proposed Finding No. 1768:**

This proposed finding is irrelevant for the reasons set forth above in response to Proposed Finding No. 1766.

**1769.** Dr. Athey’s model of the counterfactual world includes a variable called “Is searched for” that associates a higher click probability when a search query and an ad are associated with the same firm. (RX 733-0052 (Ghose Report); CX 8007-062-067, -069-070, -077-080, -108-109 (Athey Report)).

**Response to Proposed Finding No. 1769:**

This proposed finding is irrelevant except to the extent that it describes the process Dr. Athey used in constructing her empirical model. Specifically, Complaint Counsel notes that Dr. Athey used the variable called “Is searched for” in order to model, based on observed data—rather than making assumptions about—the effect that users performing navigational queries had on their likelihood of clicking on the ads of the firms they searched for. (*See* CCPTF ¶¶ 1436-1439; 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.”); 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”).

More specifically, the proposed finding is irrelevant to questions regarding whether the Bidding Agreements reduced consumer search costs and whether any claimed procompetitive benefits of the Bidding Agreements outweigh their anticompetitive effects because, even accounting for what the observed data showed about the effect that consumers’ entering 1-800 Contacts Branded Queries had on their likelihood of clicking on 1-800 Contacts’ ad after performing such a search, Dr. Athey’s model still predicted that, in a counterfactual world without the Bidding Agreements, in response to 1-800 Contacts Branded Queries, consumer clicks on ads for 1-800 Contacts’ competitors would increase and consumer clicks on the 1-800 Contacts’ ad would decline. (See CCPTF ¶¶ 1442-1443; Athey, Tr. 782-785; 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)).

**1770.** Peter Clarkson of ACLens agreed that a substantial number of people who type “1-800 Contacts” into a search bar are looking for 1-800 Contacts. (Clarkson, Tr. 347).

**Response to Proposed Finding No. 1770:**

This proposed finding is inaccurate insofar as it suggests that Mr. Clarkson testified that he knows it to be true that “a substantial number of people who type “1-800 Contacts” into a search bar are looking for 1-800 Contacts” – or that if he did, such testimony would be supported by sufficient foundation. Complaint Counsel agrees that Mr. Clarkson answered “Yes” to the

question “Do you **believe** that a substantial number of people who type in ‘1-800 Contacts’ are looking for 1-800 Contacts.” (Clarkson, Tr. 347 (emphasis added)).

This proposed finding is also vague and irrelevant. It is vague because the word “substantial” has not been defined either in the proposed finding or in the cited portions of the trial transcript. Complaint Counsel notes that the meaning of the word “substantial” as reflected in Mr. Clarkson’s response to this question must be understood in reference to the question and answer that immediately preceded this one at trial, in which Mr. Clarkson was asked by Respondent’s counsel “Do you believe that people who type in ‘AC Lens’ in a search bar are looking for your website?” and Mr. Clarkson responded “I believe that many of them are repeat customers who are looking, but I also think some of them are just looking for contact lenses because they’re not all repeat customers.” (Clarkson, Tr. 347).

This proposed finding is also irrelevant for the reasons set forth above in response to Proposed Finding No. 1766 and is irrelevant in light of the evidence that it was Mr. Clarkson’s business judgment, as CEO of AC Lens, that:

- (a) 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);
- (b) “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));

- (c) 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);
- (d) 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));
- (e) “[i]t 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 35-36);
- (f) 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” (CX9003 (Clarkson, IHT at 37-38)); and
- (g) 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)).

*(a) Search Engine Data On Consumer Behavior Strongly Indicate Consumers’ Navigational Intent*

**1771.** Navigational queries are typically associated with click-through rates on links to the website of the retailer the user searched for that are much higher than click-through rates on other sites or ads. (Ghose, Tr. 3880 (“click-through rates are a good proxy for, you know, consumer

engagement with the ad, and it shows the typical intent of the person and what he or she might want to do after engaging with the ad”); RX 733-0036, 0037 (Ghose Report)).

**Response to Proposed Finding No. 1771:**

This proposed finding is irrelevant for the reasons set forth above in response to Proposed Finding No. 1766.

**1772.** Consumers who search for 1-800 Contacts’ trademarks are far more likely to click on a link to 1-800 Contacts’ website than on an ad for another retailer. (RX 733-0046 to -0048 (Ghose Report); RX 733-0050-0052 (Ghose Report)).

**Response to Proposed Finding No. 1772:**

This proposed finding is irrelevant for the reasons set forth above in response to Proposed Finding No. 1766.

**1773.** [REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3881; RX 739-0029, -0096 (Murphy Report)).

**Response to Proposed Finding No. 1773:**

This proposed finding is irrelevant to questions regarding whether the Bidding Agreements reduced consumer search costs and whether any claimed procompetitive benefits of the Bidding Agreements outweigh their anticompetitive effects because the click-through rate reported in the proposed finding reflects in part the effect of the Bidding Agreements on click-through rates of ads for both 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this click-through rate should take account of:

- (a) the testimony of Google Director of Product Management Mr. Juda that { [REDACTED] } (Juda, Tr. 1220-1222, *in camera*); that { [REDACTED] } (Juda, Tr. 1221, *in camera*) and that { [REDACTED] } (Juda, Tr. 1221-1222, *in camera*);

(b) Dr. Evans' conclusion that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Evans, Tr. 1625); and

(c) the conclusions of Dr. Athey's (unrebutted) empirical model which—after taking into account what the observed data showed about how the likelihood of consumers clicking on 1-800 Contacts' ad was affected by, *inter alia*, brand strength, ad position, and whether consumers had searched for 1-800 Contacts Branded Queries—predicted that, in a counterfactual world without the Bidding Agreements, in response to 1-800 Contacts Branded Queries:

- i. consumer clicks on ads for 1-800 Contacts' competitors would increase and consumer clicks on the 1-800 Contacts ad would decline (*see* CCPTF ¶¶ 1442-1443; Athey, Tr. 782-785; 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)), and
- ii. the set of firms whose ads would appear in response to 1-800 Contacts Branded Queries would be “a stronger set of firms with higher conversion rates generally the counterfactual is “a stronger set of firms,” with “strength” measured by click predictions that take into account brand effects. (CCPTF ¶¶ 1444-1448; 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.”); 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.”), Athey Tr. 2081, *in camera* { [REDACTED] } that show ads in response to 1-800 Contacts Branded Queries in the counterfactual), Athey Tr. 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 mix of brand effects, similar to what I see in the counterfactual.”)).

**1774.** [REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3881).

**Response to Proposed Finding No. 1774:**

This proposed finding is irrelevant to questions regarding whether the Bidding Agreements reduced consumer search costs and whether any claimed procompetitive benefits of the Bidding Agreements outweigh their anticompetitive effects because the click-through rates reported in the proposed finding:

- (a) do not reflect clicks on ads displayed in response to 1-800 Contacts Branded Queries as a result of phrase match or broad match (“Matched Ads”) and instead reflect only clicks resulting from advertisers bidding directly on keywords containing both { [REDACTED] } and either { [REDACTED] } or { [REDACTED] } (with certain keywords containing variations of { [REDACTED] } removed). (RX0733 at 095 (Ex. 4D) (Ghose Expert Report), *in camera*), and
- (b) reflect in part the effect of the Bidding Agreements on click-through rates of ads for each 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from these click-through rates should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

**1775.** [REDACTED] (RX 733-0095 (Ghose Report); RX 739-0029, -0096 (Murphy Report)).

**Response to Proposed Finding No. 1775:**

This proposed finding is irrelevant, as it does not reflect “Matched Ads,” and also reflects the impact of the Bidding Agreements on 1-800 Contacts itself – i.e., the prohibition on showing its ads in response to user queries including many of its rivals’ trademark terms. *See* Response to Proposed Finding No. 1773. It is also inaccurate as stated. Complaint Counsel notes that the data cited in the referenced portion of the Ghose expert report shows that { [REDACTED] }

[REDACTED] } (RX0733 at 095, *in camera* (emphasis added)).

**1776.** [REDACTED]  
[REDACTED] } (RX 733-0096 (Ghose Report); Ghose, Tr. 3884).

**Response to Proposed Finding No. 1776:**

This proposed finding is irrelevant, as it does not reflect “Matched Ads,” and also reflects the impact of the Bidding Agreements on 1-800 Contacts’ rivals – i.e., it prevented them from displaying ads that would have received clicks from consumers. *See* Response to Proposed Finding No. 1773. *See also* Responses to Proposed Finding Nos. 1766 and 1769.

**1777.** [REDACTED]  
[REDACTED] } (RX 733-0096 (Ghose Report); Ghose, Tr. 3884-85).

**Response to Proposed Finding No. 1777:**

This proposed finding is irrelevant, as it does not reflect “Matched Ads,” and also reflects the impact of the Bidding Agreements on 1-800 Contacts’ rivals – i.e., it prevented them from displaying ads that would have received clicks from consumers. *See* Response to Proposed Finding No. 1773. *See also* Responses to Proposed Finding Nos. 1766 and 1769.

**1778.** The disparity in click-through rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts’ trademarks { [REDACTED] } (RX 733-0046, 0048 (Ghose Report); Ghose, Tr. 3886, 3892-93).

**Response to Proposed Finding No. 1778:**

This proposed finding is unsupported and irrelevant, as it does not reflect “Matched Ads,” and also reflects the impact of the Bidding Agreements on 1-800 Contacts’ rivals – i.e., it prevented them from displaying ads that would have received clicks from consumers. *See* Response to Proposed Finding No. 1773. *See also* Responses to Proposed Finding Nos. 1766 and 1769.

**1779.**

(RX 733-0095 (Ghose Report); Ghose, Tr. 3887-88). This disparity in average click-through rates existed regardless of the ad rank of the retailer bidding on its own trademark. (RX 733-0047 (Ghose Report)).

**Response to Proposed Finding No. 1779:**

This proposed finding is irrelevant for the reasons set forth above in response to Proposed Finding No. 1766. Complaint Counsel further notes that even accounting for what the observed data showed about the effect that consumers’ searching for a firm’s name had on their likelihood of clicking on that firm’s ad after performing such a search, Dr. Athey’s model still predicted that, in a counterfactual world without the Bidding Agreements, in response to 1-800 Contacts Branded Queries, consumer clicks on ads for 1-800 Contacts’ competitors would increase and consumer clicks on the 1-800 Contacts ad would decline. (*See* CCPTF ¶¶ 1442-1443; Athey, Tr. 782-785; 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)).

**1780.** According to Dr. Evans and Dr. Athey, any retailer will have a higher click-through rate on searches related to its own brand than on searches related to competing brands. (CX 8010-012 (Athey Report); CX 8009-082 (Evans Rebuttal Report)).

**Response to Proposed Finding No. 1780:**

This proposed finding is irrelevant for the reasons set forth above in response to Proposed Finding No. 1766. Complaint Counsel further notes that even accounting for what the observed

data showed about the effect that consumers' searching for a firm's name had on their likelihood of clicking on that firm's ad after performing such a search, Dr. Athey's model still predicted that, in a counterfactual world without the Bidding Agreements, in response to 1-800 Contacts Branded Queries, consumer clicks on ads for 1-800 Contacts' competitors would increase and consumer clicks on the 1-800 Contacts ad would decline. (See CCPTF ¶¶ 1442-1443; Athey, Tr. 782-785; 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)).

**1781.** [REDACTED] } (Ghose, Tr. 3888; RX 733-0047 (Ghose Report)).

**Response to Proposed Finding No. 1781:**

This proposed finding is rendered nonsensical by the inclusion of the apparently extraneous word "other" in the phrase "for ads for that other retailer."

This proposed finding is also misleading, unsupported, and contradicted by the evidence and expert analysis described in Response to Proposed Finding No. 1773 insofar as it does not take into account the effect of the Bidding Agreements on click-through rates of ads for both 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries.

Further, this proposed finding is also irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in the response to Proposed Finding No. 1766.

**1782.** According to data from Google regarding ads displayed in response to searches for 1-800 Contacts' trademarks between 2010 and 2016, the average click-through rate on ads for 1-800 Contacts was [REDACTED]. (RX 733-0046 (Ghose Report); Ghose, Tr. 3883).

**Response to Proposed Finding No. 1782:**

Insofar as the inclusion of this proposed finding under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that consumers who search for 1-800 Contacts’ name and intend to navigate to 1-800 Contacts website are in any way harmed by the presence of competing advertisements appearing below the 1-800 advertisement in response to a 1-800 Contacts Branded Query, it is misleading and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding Nos. 1766 and 1769.

This proposed finding is also irrelevant because the click-through rate it reports reflects in part the effect of the Bidding Agreements on click-through rates of ads for both 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this click-through rate should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

**1783.**

(RX 733-0051 (Ghose Report); Ghose, Tr. 3883).

**Response to Proposed Finding No. 1783:**

The proposed finding that {

} is unsupported by the cited record references: RX 733-0046 (Ghose Report) and Ghose, Tr. 3883. Moreover, it is irrelevant because the click-through rates reported in the proposed finding reflect in part the effect of the Bidding Agreements on click-through rates of ads for each 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from these click-through rates should take account of the evidence and expert analysis described further in response to Proposed Finding No. 1773.

**1784.** [REDACTED]  
[REDACTED] }. (RX 733-0103 (Ghose Report); Ghose, Tr. 3885).

**Response to Proposed Finding No. 1784:**

This proposed finding is also irrelevant because the click-through rate it reports reflects in part the effect of the Bidding Agreements on click-through rates of ads for both 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this click-through rate should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

**1785.** [REDACTED]  
[REDACTED] } (RX 733-0103 (Ghose Report)).

**Response to Proposed Finding No. 1785:**

This proposed finding is irrelevant because the click-through rates reported in the proposed finding reflect in part the effect of the Bidding Agreements on click-through rates of ads for each 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from these click-through rates should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

**1786.** [REDACTED]  
[REDACTED] } (RX 733-0104 (Ghose Report)).

**Response to Proposed Finding No. 1786:**

Complaint Counsel has no specific response, other than to note that the click-through rate it reports reflects in part the effect of the Bidding Agreements on click-through rates of ads for both 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this click-through rate should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

**1787.** [REDACTED]

(RX 733-0104 (Ghose Report)).

**Response to Proposed Finding No. 1787:**

Complaint Counsel has no specific response, other than to note that the click-through rates reported in the proposed finding reflect in part the effect of the Bidding Agreements on click-through rates of ads for each 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from these click-through rates should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

**1788.** [REDACTED]

(RX 733-0050 to -0052 (Ghose Report); Ghose, Tr. 3886, 3892-93).

**Response to Proposed Finding No. 1788:**

This proposed finding is unsupported and irrelevant, as it does not reflect “Matched Ads,” and also reflects the impact of the Bidding Agreements on 1-800 Contacts’ rivals – i.e., it prevented them from displaying ads that would have received clicks from consumers. *See* Response to Proposed Finding No. 1773. *See also* Responses to Proposed Finding Nos. 1766 and 1769.

**1789.** [REDACTED]

[REDACTED] (Ghose, Tr. 3890-91; RX 733-051 (Ghose Report)).

**Response to Proposed Finding No. 1789:**

Complaint Counsel has no specific response, other than to note that the click-through rates reported in the proposed finding reflect in part the effect of the Bidding Agreements on click-through rates of ads for each 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from these click-through rates should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.1790. [REDACTED]

[REDACTED] } (RX 733-0051 (Ghose Report); Ghose , Tr. 3891-92).

**Response to Proposed Finding No. 1790:**

Complaint Counsel has no specific response, other than to note that the click-through rates reported in the proposed finding reflect in part the effect of the Bidding Agreements on click-through rates of ads for each 1-800 Contacts and rival retailers that appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from these click-through rates should take account of the evidence and expert analysis described further in Response to Proposed Finding No. 1773.

1791. [REDACTED]

[REDACTED] (Ghose, Tr. 3892).

**Response to Proposed Finding No. 1791:**

This proposed finding is unsupported by the cited evidence because the only testimony cited in support consists of speculation by Respondent's expert Dr. Ghose. Dr. Ghose did not express these opinions in his Report, instead he expressed for the first time at trial the view (in

response to leading questions) that consumers who enter 1-800 Contacts branded queries and do not click on either a paid advertisement for 1-800 Contacts or the 1-800 Contacts website “*could be*” instead clicking on a link to 1-800 Contacts’ Facebook page, “*could be*” instead clicking on a link to download 1-800 Contacts’ mobile app, and “*could be potentially*” clicking on “a listing on the knowledge graph, one of the social media profiles, or . . . any of the other organic listings.”

(Ghose, Tr. 3892, *in camera* { [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] })

(emphasis added)).

This proposed finding is also misleading insofar as it describes the consumers in Dr. Athey’s comScore data who performed what Dr. Athey classified as “1-800 Contacts branded searches” as consumers who “searched *for* 1-800 Contacts” because the searches that Dr. Athey classified as “1-800 Contacts branded searches” consists of any searches that “include[d]” 1-800 Contacts’ brand name. (*See* CX8007 at 027, 030-031 (¶¶ 77, 91) (Athey Rebuttal Expert Report)).

**1792.** [REDACTED] } (Ghose, Tr. 3868, 3899-900 , 3927; RX 733-0048 to 0050 (Ghose Report)).

**Response to Proposed Finding No. 1792:**

This proposed finding is vague, irrelevant, misleading, unsupported, and contradicted by the weight of the evidence.

First, the finding is vague because “meaningfully engage” is undefined in the proposed finding and in the cited record references and a fair reading of the cited record references leaves

unclear whether or not “meaningfully engage,” as 1-800 Contacts and its expert Dr. Ghose use the term, means something other than purchase contact lenses, and if so, what it might mean.

Second, insofar as the proposed finding suggests that intent to “meaningfully engage with” 1-800 Contacts’ website is incompatible with an interest in “meaningfully engag[ing]” with other websites that offer the same products and services, it is irrelevant, misleading, unsupported, and contradicted by:

- (a) the evidence that consumers who search for 1-800 Contacts’ name in fact do—when presented with ads from competing retailers below the 1-800 Contacts ad—often click on and purchase from those competing retailers (*see* CCPTF Sections V.B.2 – V.B.4 (¶¶ 611-783));
- (b) Dr. Ghose’s own testimony that advertising—including advertising from rival retailers offering lower prices for the same product—has the capacity to change consumers’ commercial intent, and that seeing “a price-competitive rival ad” can benefit consumers (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.”), 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.”), 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.”)) (*see also generally* CCPTF Section XI.D.2.b (¶¶ 1946-1951)); and
- (c) Dr. Ghose’s and Dr. Athey’s conclusions that consumers’ purchasing the products they seek at desirable commercial terms—not any additional utility or fulfillment consumers may derive from visiting particular websites in the process of making such purchases—is what ultimately what matters when examining consumer welfare (Ghose, Tr. 3900 (█

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

}), *in camera*; (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.”)); and

- (d) Dr. Athey’s conclusion that it is likely that users who enter 1-800 Contacts Branded Queries 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; 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.*”) (emphasis added)).

Third, insofar as the inclusion of this proposed finding under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that consumers who search for 1-800 Contacts’ name because they intend to “meaningfully engage” with 1-800 Contacts website—even if any such consumers happen to have the ultimate intent of purchasing contact lenses *from 1-800 Contacts specifically*—are in any way harmed by the presence of competing advertisements appearing below the 1-800 advertisement in response to a 1-800 Contacts Branded Query, it is misleading and contradicted by the evidence set forth in response to Proposed Finding No. 1769, to wit: the evidence that if the Bidding Agreements were to be rescinded, (a) users who want to find 1-800 Contacts’ website would still be able to do so easily, as 1-800 Contacts’ advertisement would remain in the first position (*see* CCPTF Section XI.D.2.a (¶¶ 1938-1945)), (b) users who initially intend to purchase from 1-800 Contacts would benefit from the additional information and additional choices provided by rival ads (*see* CCPTF Section XI.D.2.b (¶¶ 1946-1951)), and (c) even consumers who still ultimately purchase from 1-800 Contacts would benefit from the existence of competing offers (*see* CCPTF Section XI.D.2.c (¶¶ 1952-1954)).

**1793.**

} (RX 733-0095 (Ghose Report); Ghose, Tr. 3897).

**Response to Proposed Finding No. 1793:**

Complaint Counsel has no specific response, other than to note that the conversion rates reported in the proposed finding reflect in part the effect of the Bidding Agreements.

**1794.**

} (RX 733-0095 (Ghose Report); Ghose, Tr. 3897).

**Response to Proposed Finding No. 1794:**

Complaint Counsel has no specific response other than to note that the conversion data reported in the proposed finding:



into account brand effects. (CCPTF ¶¶ 1444-1448; 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.”); 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.”), Athey Tr. 2081, *in camera* { [REDACTED] [REDACTED] } that show ads in response to 1-800 Contacts Branded Queries in the counterfactual), Athey Tr. 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 mix of brand effects, similar to what I see in the counterfactual.”) (emphasis added)); and

iii. the evidence that { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CX8010 at 064 (Exhibit J) (Athey Rebuttal Expert Report),  
*in camera* (showing that { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] })).

**1795.** [REDACTED]  
[REDACTED] (RX 733-0095 (Ghose Report))

**Response to Proposed Finding No. 1795:**

This proposed finding is inaccurate as stated. Complaint Counsel notes that the data cited in the referenced portion of the Ghose expert report shows that { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] } (RX0733 at 095, *in camera* (emphasis added)).

Further, insofar as the inclusion of this proposed finding under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that consumers who search for 1-800 Contacts’ name and intend to navigate to 1-800 Contacts website are in any way harmed by the presence of competing advertisements appearing below the 1-800 advertisement in response to a 1-800 Contacts Branded Query, it is misleading and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding Nos. 1766, 1769, and 1792.

**1796.** [REDACTED]  
[REDACTED] } (RX 733-0096 (Ghose Report); Ghose, Tr. 3898).

**Response to Proposed Finding No. 1796:**

Complaint Counsel has no specific response, other than to note that the conversion rates reported in the proposed finding reflect in part the effect of the Bidding Agreements. **1797.**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (RX 733-0096 (Ghose Report); Ghose, Tr. 3898).

**Response to Proposed Finding No. 1797:**

Complaint Counsel has no specific response, other than to note that the conversion rates reported in the proposed finding reflect in part the effect of the Bidding Agreements. *See* Response to Proposed Finding 1794.

**1798.** [REDACTED]  
 [REDACTED] }  
 (RX 733-0049, 0095 (Ghose Report)).

**Response to Proposed Finding No. 1798:**

This proposed finding is inaccurate. The cited portions of Dr. Ghose's report show that  
 { [REDACTED]  
 [REDACTED] } (RX 733 at  
 0049, 0095 (Exhibit 4D) (Ghose Expert Report), *in camera* (emphasis added)). Also, Complaint  
 Counsel notes that the conversion rates reported in the proposed finding reflect in part the effect of  
 the Bidding Agreements.

**1799.** According to data from Google regarding ads displayed based on bids on 1-800 Contact's trademarks between 2002 and 2016, consumers did not convert on more than 0.3% of such ads for any other retailer. (RX 733-0049, 0095 (Ghose Report)).

**Response to Proposed Finding No. 1799:**

This proposed finding is irrelevant for the reasons set forth in response to Proposed  
 Finding 1794.

**1800.** The disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts' trademarks indicates that consumers who search for 1-800 Contacts' trademarks intend to navigate to its website and meaningfully engage with 1-800 Contacts. (RX 733-0048 to 0050 (Ghose Report); Ghose, Tr. 3899, 3899-900, 3927).

**Response to Proposed Finding No. 1800:**

This proposed finding is misleading, unsupported, and contradicted by the weight of the evidence insofar as it suggests that "the disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts' trademarks" that is observed in the presence of the Bidding Agreements is entirely attributable to the phenomenon of consumers who search for 1-800 Contacts' trademarks intending to navigate to 1-800 Contacts' website because the conversion data referred to in the proposed finding reflects in part the effect of the Bidding

Agreements on the mix of firms whose ads appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this conversion rate should take account of the evidence and expert analysis set forth in response to Proposed Finding No. 1794.

This proposed finding is also irrelevant and misleading because the conversion data referred to in the proposed finding does not reflect conversions that occur in response to clicks on ads displayed in response to 1-800 Contacts Branded Queries as a result of phrase match or broad match (“Matched Ads”) and instead reflects only conversions that occur in response to clicks resulting from advertisers bidding directly on keywords containing both { } and either { } or { } (with certain keywords containing variations of { } or { } removed). (RX0733 at 095 (Ex. 4D) (Ghose Expert Report), *in camera*).

This proposed finding is also irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in the Response to Proposed Finding No. 1766.

**1801.** The disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts’ trademarks also supports the inference that consumers who clicked on other retailers’ ads did so by mistake. (RX 733-0049 (Ghose Report)).

**Response to Proposed Finding No. 1801:**

This proposed finding should be rejected because it goes beyond the scope of Dr. Ghose’s report and is not supported by Dr. Ghose’s testimony. The portion of Dr. Ghose’s report cited in support of the proposed finding does nothing more than speculate that the disparity in conversion rates “supports the inference that consumers who clicked on other retailers’ ads *might* have done so by mistake” and in fact goes on to speculate about other possible explanations for the disparity, including that consumers “*might* have preferred the experience of shopping on 1-800 Contacts’

website,” among others. (RX733 at 049 (¶ 109 & n.224) (Ghose Expert Report) (emphasis added)). The report does not offer an opinion as to which of the possible explanations identified is correct, disclose any tests performed to examine the likelihood of any of the possible explanations being correct, cite any sources supporting the likelihood of any of the proffered explanations, or state that the possible explanations mentioned constitute an exhaustive list. (RX733 at 049 (¶ 109 & n.224) (Ghose Expert Report) (emphasis added)). A non-exhaustive list of speculations does not constitute an expert opinion that there is any support for an inference that any one of those explanations is correct. Further, Dr. Ghose has no expertise in and did not conduct a study of consumer confusion, and thus is not qualified to draw conclusions about the existence of consumer confusion.

Second, this proposed finding is contradicted by the weight of the evidence, including the lack of evidence of actual confusion caused by the mere appearance of competitive ads in response to a 1-800 Contacts Branded Query (*see* CCPTF Section XI.C.1), the expert analysis and survey evidence demonstrating that the mere appearance of competitive ads in response to a 1-800 Contacts Branded Query is not likely to cause confusion (*see* CCPTF Section XI.C.4), and the evidence that 1-800 Contacts’ competitors had no incentive to confuse consumers about their identities and identified their own brand names in their search advertisements (*see* CCPTF Sections XI.C.2-3).

Third, this proposed finding is also misleading, unsupported, and contradicted by the weight of the evidence because the conversion data referred to in the proposed finding reflects in part the effect of the Bidding Agreements on the mix of firms whose ads appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this conversion rate should take account of the evidence and expert analysis set forth in response to Proposed Finding No. 1794.

This proposed finding is also irrelevant and misleading because the conversion data referred to in the proposed finding does not reflect conversions that occur in response to clicks on ads displayed in response to 1-800 Contacts Branded Queries as a result of phrase match or broad match (“Matched Ads”) and instead reflects only conversions that occur in response to clicks resulting from advertisers bidding directly on keywords containing both { } and either { } or { } (with certain keywords containing variations of { } or { } removed). (RX0733 at 095 (Ex. 4D) (Ghose Expert Report), *in camera*).

And fourth, this proposed finding is also irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in the Response to Proposed Finding No. 1766.

**1802.** The disparity in conversation rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts’ trademarks also supports the inference that consumers who clicked on other retailers’ ads found those retailers’ website less appealing or useful than 1-800 Contacts’ website. (RX 733-0049 (Ghose Report)).

**Response to Proposed Finding No. 1802:**

This proposed finding should be rejected because it goes beyond the scope of Dr. Ghose’s report and is not supported by Dr. Ghose’s testimony. The portion of Dr. Ghose’s report cited in support of the proposed finding does nothing more than speculate that the disparity in conversion rates “supports the inference that” consumers “*might* have preferred the experience of shopping on 1-800 Contacts’ website” and in fact speculates about other possible explanations for the disparity as well. (RX733 at 049 (¶ 109 & n.224) (Ghose Expert Report) (emphasis added)). The report does not offer an opinion as to which of the possible explanations identified is correct, disclose any tests performed to examine the likelihood of any of the possible explanations being correct, cite any sources supporting the likelihood of any of the proffered explanations, or state that the

possible explanations mentioned constitute an exhaustive list. (RX0733 at 049 (¶ 109 & n.224) (Ghose Expert Report) (emphasis added)). A non-exhaustive list of speculations does not constitute an expert opinion that there is any support for an inference that any one of those explanations is correct.

This proposed finding is also misleading, unsupported, and contradicted by the weight of the evidence insofar as it suggests that “the disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts’ trademarks” that is observed in the presence of the Bidding Agreements is entirely attributable to the phenomenon of consumers who search for 1-800 Contacts’ trademarks intending to navigate to 1-800 Contacts’ website because the conversion data referred to in the proposed finding reflects in part the effect of the Bidding Agreements on the mix of firms whose ads appear in response to 1-800 Contacts Branded Queries. Any conclusions to be drawn from this conversion rate should take account of the evidence and expert analysis set forth in response to Proposed Finding No. 1794.

This proposed finding is also irrelevant and misleading because the conversion data referred to in the proposed finding does not reflect conversions that occur in response to clicks on ads displayed in response to 1-800 Contacts Branded Queries as a result of phrase match or broad match (“Matched Ads”) and instead reflects only conversions that occur in response to clicks resulting from advertisers bidding directly on keywords containing both { } and either { } or { } (with certain keywords containing variations of { } or { } removed). (RX0733 at 095 (Ex. 4D) (Ghose Expert Report), *in camera*).

Insofar as the inclusion of this proposed finding under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that consumers who search for 1-800 Contacts’ name and intend to navigate to 1-800 Contacts website are in any way harmed by the

presence of competing advertisements appearing below the 1-800 advertisement in response to a 1-800 Contacts Branded Query, it is misleading and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding Nos. 1766, 1769, and 1792.

**1803.** [REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3900-01). This disparity in average conversion rates existed regardless of the ad rank of the retailer bidding on its own trademark. (RX 733-0049 (Ghose Report)).

**Response to Proposed Finding No. 1803:**

The second sentence of this proposed finding is unsupported by the referenced record citation (RX0733 at 049 (Ghose Expert Report)) and is also unsupported by any other portion of that section of Dr. Ghose’s report (Section VII.B, which discusses comparative conversion rates).

The first sentence of this proposed finding is nonsensical and irrelevant as stated because it compares conversion rates to click-through rates. Assuming, however, that the reference to click-through rates is erroneous and was intended to be a reference to conversion rates, the statement

that { [REDACTED] } is not accurate for all of the retailers

whose data is reported in the cited portion of Dr. Ghose’s report (Exhibit 4D). For instance, Dr.

Ghose’s Exhibit 4D shows { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX0733 at 095 (Exhibit 4D) (Ghose Expert Report),

*in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX0733 at 095

(Exhibit 4D) (Ghose Expert Report), *in camera*).

Additionally, this proposed finding is irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in the Response to Proposed Finding No. 1766 and because:

- (a) the conversion data referred to in the proposed finding does not reflect conversions that occur in response to clicks on ads displayed in response to 1-800 Contacts Branded Queries as a result of phrase match or broad match (“Matched Ads”) and instead reflects only conversions that occur in response to clicks resulting from advertisers bidding directly on keywords containing both { [REDACTED] } and either { [REDACTED] } or { [REDACTED] } (with certain keywords containing variations of { [REDACTED] } or { [REDACTED] } removed). (RX0733 at 095 (Ex. 4D) (Ghose Expert Report), *in camera*); and
- (b) even accounting for what the observed data showed about the effect that consumers’ entering 1-800 Contacts Branded Queries had on their likelihood of clicking on 1-800

Contacts' ad after performing such a search, Dr. Athey's model still predicted that, in a counterfactual world without the Bidding Agreements, in response to 1-800 Contacts Branded Queries, consumer clicks on ads for 1-800 Contacts' competitors would increase and consumer clicks on the 1-800 Contacts' ad would decline. (See CCPTF ¶¶ 1442-1443; Athey, Tr. 782-785; 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)); and

- (c) insofar as the inclusion of this proposed finding under the heading "The Settlement Agreements Reduced Consumers' Search Costs" suggests that consumers who search for 1-800 Contacts' name and intend to navigate to 1-800 Contacts website are in any way harmed by the presence of competing advertisements appearing below the 1-800 advertisement in response to a 1-800 Contacts Branded Query, it is misleading and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding Nos. 1766, 1769, and 1792.

**1804.** The fact that the average conversion rate on ads for each retailer in response to the retailer's bid on its own trademarks was [REDACTED] (RX 733-0049 (Ghose Report); Ghose, Tr. 3901-02).

**Response to Proposed Finding No. 1804:**

The factual premise of this proposed finding is inaccurate and unsupported for the reasons set forth in response to Proposed Finding No. 1804. Additionally, this proposed finding is irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding Nos. 1766 and 1804.

**1805.** Dr. Athey agreed that the data show that among consumers who search for 1-800 Contacts' trademarks, the conversion rate for ads for 1-800 Contacts is much higher than for ads for other retailers. (CX 9043 (Athey, Dep. at 282-83)).

**Response to Proposed Finding No. 1805:**

This proposed finding is irrelevant and misleading for the reasons set forth in response to Proposed Finding No. 1766.

This proposed finding is also irrelevant and misleading because:

- (a) as Dr. Athey pointed out, comparing conversion rates across firms presents potential distortions because “conversion rate is defined differently by different firms.” (CX9043 (Athey, Dep. at 283));
- (b) as Dr. Athey has explained, “the benefit to consumers of additional advertising information is not limited to purchases from firms that advertise. Increasing the availability of competitive information increases the knowledge of consumers as they make purchasing decisions. It also tends to reduce prices. This benefit applies to consumers who purchase from 1-800 Contacts, from an online competitor, or from another option.” (CX8010 at 040 (¶ 95) (Athey Rebuttal Expert Report));
- (c) Dr. Athey’s (unrebutted) empirical model—after taking into account what the observed data showed about how the likelihood of consumers clicking on 1-800 Contacts’ ad was affected by, *inter alia*, brand strength, ad position, and whether consumers had searched for 1-800 Contacts Branded Queries—“predicts the likely change in the overall competition on 1-800 Contacts’ branded searches. The results show that more competitors would appear on 1-800 Contacts’ branded searches and consumers would click on those results. Based on historical evidence, the likely effect of this increase in competition would be an increase in sales by competitors of 1-800 Contacts to consumers who perform 1-800 Contacts’ branded searches.” (CX8010 at 041 (¶ 96) (Athey Rebuttal Expert Report));
- (d) Dr. Athey’s (unrebutted) empirical model—after taking into account what the observed data showed about how the likelihood of consumers clicking on 1-800 Contacts’ ad was

affected by, *inter alia*, brand strength, ad position, and whether consumers had searched for 1-800 Contacts Branded Queries—predicted that, in a counterfactual world without the Bidding Agreements, in response to 1-800 Contacts Branded Queries, the set of firms whose ads would appear in response to 1-800 Contacts Branded Queries would be “***a stronger set of firms with higher conversion rates generally***” the counterfactual is “a stronger set of firms,” with “strength” measured by click predictions that take into account brand effects. (CCPTF ¶¶ 1444-1448; 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.”); 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.”), Athey Tr. 2081 { [REDACTED] [REDACTED] [REDACTED] }, Athey Tr. 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 mix of brand effects, similar to what I see in the counterfactual.”)

(emphasis added));

(e) { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CX8010 at 064 (Exhibit J) (Athey Rebuttal Expert Report), *in camera* (showing that { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] })); Athey, Tr. 765); and

(f) “[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. As my analysis shows, the information presented to consumers through competitor ads on 1-800 Contacts’ Trademark searches is

relevant to their am, and lead to a change in click behavior. Furthermore, conversion rates for retailers' ads on 1-800 Contacts' trademark searches are non-zero, and appear to be higher relative to the conversion rate for those retailers' on other firms' branded searches." (CX8010 at 051 (¶ 133) (Athey Rebuttal Expert Report)).

**1806.** Dr. Athey's only explanation for this disparity was that some existing 1-800 Contacts customers might not have their prescription nearby. (CX 9043 (Athey, Dep. at 284-85)).

**Response to Proposed Finding No. 1806:**

This proposed finding is inaccurate and unsupported. During the final moments of Respondent's questioning of Dr. Athey during her deposition, Respondent's counsel asked Dr. Athey the following question: "Q. So if 1-800-CONTACTS -- if more consumers buy from 1-800-CONTACTS after they click on an ad for 1-800-CONTACTS after searching for 1-800-CONTACTS, th[a]n buy from other retailers after clicking on those retailers' ads at the same search, what do you think would account for that?" (CX9043 (Athey, Dep. at 284)). In response, Dr. Athey identified the fact that a customer ordering from a rival to 1-800 Contacts for the first time, after performing a search for 1-800 Contacts' name, would need to obtain his or her prescription information and perhaps "come back later" to enter it into the website as "*one* important institutional fact" and as "*a* very plausible explanation" relevant to the question she had been asked. (CX9043 (Athey, Dep. at 284) (emphasis added)). Respondent's counsel asked two follow-up questions about this particular "plausible explanation" that Dr. Athey offered—acknowledging in doing so that Dr. Athey had suggested that this explanation might be "*one reason*" for any difference in conversion rates as between 1-800 Contacts and its rivals—before Respondent's counsel ran out of time and had to stop his questioning. (CX 9043 (Athey, Dep. at 285-286) (emphasis added)). Dr. Athey was never asked to provide an exhaustive list of reasons, nor did she undertake to do so because she did not consider this fact to be material. (See CX8010

at 013 (¶ 36) (Athey Rebuttal Expert Report) (“Dr. Ghose has merely shown that consumers who search for 1-800 Contacts’ trademark are more likely to purchase from 1-800 Contacts than other retailers; he has not proven such users’ end goal is to visit the website, as opposed to purchasing contact lenses.”)).

This proposed finding is also irrelevant and misleading for the reasons set forth in response to Proposed Finding No. 1806.

**1807.** However, Dr. Athey did not point to any evidence about how many consumers who search for 1-800 Contacts’ trademarks and click on an ad for another retailer do not have their prescription nearby. (CX 9043 (Athey, Dep. at 286)).

**Response to Proposed Finding No. 1807:**

This proposed finding is irrelevant for the reasons set forth in response to Proposed Finding Nos. 1805 and 1806.

**(b) *Industry Sources Confirm That Searches For A Retailer’s Name Are Navigational***

**1808.** According to Bing, “navigational queries are queries where users typically navigate to a single site or web page.” (RX 658-0003).

**Response to Proposed Finding No. 1808:**

Complaint Counsel agrees that in a publication entitled “Bing blogs: Bing Search Quality Insights: Minimizing Answer Defects,” Dr. Kieran McDonald, who was identified in the publication as “Principal Development Manager, Bing,” wrote the sentence quoted above. (RX0658 at 0003).

To the extent that (1) this proposed finding suggests that intent to navigate to a retailer’s website is incompatible with an interest in comparison shopping, (2) this proposed finding suggests that the intent to navigate to a retailer’s website is the ultimate intent of consumers rather than only an intermediate intent, and/or (3) the inclusion of this proposed finding under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that even

consumers with the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically – to the extent any such consumers exist – are in any way harmed by the presence of competing advertisements appearing, below the 1-800 advertisement, in response to a 1-800 Contacts Branded Query, it is vague, irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 1766.

**1809.** Bing has cited searches for “target” and “amazon” as examples of navigational queries.” (RX 658-0004).

**Response to Proposed Finding No. 1809:**

Complaint Counsel agrees that in a publication entitled “Bing blogs: Bing Search Quality Insights: Minimizing Answer Defects,” Dr. Kieran McDonald, who was identified in the publication as “Principal Development Manager, Bing,” described “target” and “amazon” as navigational queries. (RX0658 at 0003).

This proposed finding is, however, irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 1766 to the extent that (1) this proposed finding suggests that intent to navigate to a retailer’s website is incompatible with an interest in comparison shopping, (2) this proposed finding suggests that the intent to navigate to a retailer’s website is the ultimate intent of consumers rather than only an intermediate intent, and/or (3) the inclusion of this proposed finding under the heading “The Settlement Agreements Reduced Consumers’ Search Costs” suggests that even consumers with the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically – to the extent any such consumers exist – are in any way harmed by the presence of competing advertisements appearing, below the 1-800 advertisement, in response to a 1-800 Contacts Branded Query.

**1810.** [REDACTED] } (CX 1669; RX 704-0005 (Iyer Decl.) ¶ 18).

**Response to Proposed Finding No. 1810:**

Complaint Counsel has no specific response.

**1811.** { [REDACTED] } (CX 1670, RX 704-0005 (Iyer Decl.) ¶ 19).

**Response to Proposed Finding No. 1811:**

Complaint Counsel does not disagree that the cited sources show that 1-800 Contacts participated in Bing’s Dominant Advertiser Program.

**1812.** Google’s Search Quality Rating Guidelines recognize that consumers who search for the term “amazon” have “clear intent to go to the amazon.com website.” (RX 121-080).

**Response to Proposed Finding No. 1812:**

This proposed finding is misleading because it quotes selectively from the cited document, leaving out the sentence immediately following the quoted material. The entire quote, presented in a chart under the column “Fully Meets Explanation,” is: “The query has clear intent to go to the amazon.com website. *While there may be other interpretations for the query*, the dominant one is by far the website.” (RX0121 at 080 (emphasis added)). Complaint Counsel further notes that this second sentence is not present in the document’s “Fully Meets Explanation” column for the immediately preceding and following queries: “amazon.com,” and “target website.” (RX0121 at 080-081).

**1813.** Google’s Search Quality Rating Guidelines indicate that a link to Amazon’s website will “fully meet” the needs of a consumer who searches for the term “amazon.” (RX 121-080).

**Response to Proposed Finding No. 1813:**

The proposed finding should be rejected because it misleadingly represents that Google’s use of a term of art (“Fully Meets”) is equivalent to the ordinary English use of the term. To the extent this proposed finding suggests that a link to Amazon’s website will fully meet the needs of all consumers who search for the term “amazon,” it is misleading, unsupported, and contradicted by:

- (a) the cited document itself, which defines “Fully Meets” as a category to be used when “[a]ll *or almost all* users would be completely satisfied by the result” and expressly notes, in its “Fully Meets Explanation” column, that “there may be other interpretations for the query.” (RX0121 at 079-080 (emphasis added)); and
- (b) academic literature regarding search intent, such as the literature showing researchers’ observations that people used ““queries comprised of unambiguous company names or URLs and typically thought of as navigational” “not only to navigate to the corresponding homepage, but also to navigate to related pages (e.g., 17% of all queries for weather.com end up at <http://weather.yahoo.com>)” because As Dr. Athey explained, “[i]n the weather.com example above, the logical conclusion is the subset of users who landed at weather.yahoo.com were ultimately seeking to understand the weather. Their apparent expressed preference for obtaining that information from weather.com was not a reliable indicator of their underlying intent. They may understand that weather.com is one way to meet their needs, but are open to other, potentially superior ways to learn about the weather.” (CX8010 at 008 (¶ 18) (Athey Rebuttal Expert Report)).

**1814.** Google’s Search Quality Rating Guidelines define a search result that “Fully Meets” the user’s need as one in which “[a]lmost all mobile users would be immediately and fully satisfied by the result and would not need to view other results to satisfy their need.” (RX 121-076).

**Response to Proposed Finding No. 1814:**

Complaint Counsel has no specific response, but notes that Google’s conclusion is limited to what would satisfy the single-search desire of a mobile user.

**1815.** Google’s search result page for a search for “1-800 Contacts” displays the Knowledge Graph. (CX 8007-010 (Athey Report)).

**Response to Proposed Finding No. 1815:**

This finding is not supported by any admissible evidence. It improperly cites to expert reports to establish underlying facts, when the expert reports do not purport to offer any opinion or conclusion regarding whether a search results page displays a Knowledge Graph. Complaint Counsel does not disagree that, at the time the search captured in the screen shot included as Figure 2 to Dr. Athey's February 6, 2017 Report ((CX8007-010 (Athey Report)) was conducted, Google's search results page for a search for "1-800 Contacts" displayed the Knowledge Graph.

**1816.** Google's search results page for a search for "contact lenses" does not display the Knowledge Graph. (CX 8007-009 (Athey Report); RX 733-0034 (Ghose Report)).

**Response to Proposed Finding No. 1816:** This finding is not supported by any evidence. It improperly cites to expert reports to establish underlying facts, when the expert reports do not purport to offer any opinion or conclusion regarding whether a search results page generated by a search for "contact lenses" displays a Knowledge Graph. **1817.** The circumstances in which Google displays the Knowledge Graph indicate that consumers searching for 1-800 Contacts typically are interested in information about 1-800 Contacts. (Ghose, Tr. 3873-74, 3875-3876; RX 733-0034 (Ghose Report)).

**Response to Proposed Finding No. 1817:**

This proposed finding is vague, irrelevant, misleading, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 1766 insofar as (1) it is qualified by the undefined word "typically," (2) it suggests that interest in information about 1-800 Contacts is incompatible with an interest in comparison shopping or with learning information about other contact lens retailers, (3) it suggests that the intent to navigate to a retailer's website is the ultimate intent of consumers rather than only an intermediate intent, and/or (4) the inclusion of this proposed finding under the heading "The Settlement Agreements Reduced Consumers' Search Costs" suggests that even consumers with interest in 1-800 Contacts or with the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically – to the extent any such consumers exist – are in any way harmed by the presence of competing

advertisements appearing, below the 1-800 advertisement, in response to a 1-800 Contacts Branded Query.

**1818.** Google’s search results page for a search for “contact lenses” displays Product Listing Advertisements. (CX 8007-009 (Athey Report); RX 733-0034 (Ghose Report)).

**Response to Proposed Finding No. 1818:**

Complaint Counsel does not disagree that in some instances and during some of the time period relevant to this case, Google’s search results page for a search for “contact lenses” has displayed Product Listing Advertisements. Complaint Counsel notes that PLAs could not be purchased at all until 2009, and at that time could only be purchased by select retailers. (RX0715 at 0593-0594).

**1819.** Google’s search results page for a search for “1-800 Contacts” does not display Product Listing Advertisements. (CX 8007-010 (Athey Report); RX 733-0034 (Ghose Report)).

**Response to Proposed Finding No. 1819:**

This finding is not supported by any evidence. It improperly cites to expert reports to establish underlying facts, when the expert reports do not purport to offer any opinion or conclusion regarding whether a search results page generated by a search for “1-800 Contacts” results in the display of a Product Listing Advertisement. Complaint Counsel does not disagree that, at the time the search captured in the screen shot included as Figure 2 to Dr. Athey’s February 6, 2017 Report ((CX8007-010 (Athey Report)) was conducted, Google’s search results page for a search for “1-800 Contacts” did not display Product Listing Advertisements.

**1820.** The circumstances in which Google displays Product Listing Advertisements indicates that consumers searching for 1-800 Contacts are not typically interested in comparative price information. (Ghose, Tr. 3874-76; RX 733-0034 (Ghose Report)).

**Response to Proposed Finding No. 1820:**

This proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence, including the evidence that:

- (a) search engines, which absent the Bidding Agreements, have and would continue to show rivals' advertisements in response to 1-800 Contacts' Branded Queries, have a strong incentive to, and take pains to, show only search advertisements that are relevant and useful to users (CCPTF Sections IV.A.3-5, IX.B); if consumers searching for 1-800 Contacts were not typically interested in comparative price information, consumers would not click on rivals' advertisements in response to 1-800 Contacts Branded Queries and the search engines would stop showing such advertisements in response to such searches;
- (b) advertising in response to 1-800 Contacts' Branded Queries is a successful, commercially significant strategy for online contact lens retailers (CCPTF Section V); if consumers searching for 1-800 Contacts were not typically interested in comparative price information, they would not purchase from these rivals after clicking on their ads that appear in response to 1-800 Contacts Branded Queries, and rivals would find that running their ads in response to such queries was not profitable and would cease doing so;
- (c) 1-800 Contacts consistently recognized that search advertising from its lower-priced rivals on 1-800 Contacts Branded Queries threatened its sales, and its sales improved when it eliminated such advertising (CCPTF Section VI.A.2) if consumers searching for 1-800 Contacts were not typically interested in comparative price information, they would not purchase from these rivals after clicking on their ads that appear in response to 1-800 Contacts Branded Queries, and 1-800 Contacts would not lose sales to these rivals in response to such searches; and
- (d) contact lenses are a commodity-like product, 1-800 Contacts charges a price premium that cannot be fully explained by higher service levels, consumers are not well informed about

relative prices of online contact lens retailers, online contact lens consumers value and act on price information, and the restricted advertisements are relevant and useful to online contact lens consumers (CCPTF Section IX.A).

**2. *Additional Ads Are Likely To Be Only Minimally Relevant To Consumers Searching With Navigational Intent***

**1821.** Determining the effect of the settlements on consumers requires evaluating the effect of the settlements on the value of search results. (RX 739-0065 (Murphy Report)).

**Response to Proposed Finding No. 1821:**

This proposed finding should be rejected because it offers an unsupported conclusion of law regarding the factors relevant to an antitrust analysis.

**1822.** Determining the effect of the settlements on the value of search results requires comparing the value of any information made unavailable to consumers with the potential benefits of reducing distraction and confusion. (RX 739-0065 (Murphy Report)).

**Response to Proposed Finding No. 1822:**

This proposed finding should be rejected because it offers an unsupported conclusion of law regarding the factors relevant to an antitrust analysis. In addition, this proposed finding should be rejected because it is vague vague, inaccurate, misleading, irrelevant, speculative, unsupported, and contrary to the weight of the evidence insofar as (1) in this finding, Respondent proposes that the value of information that truthful, nonmisleading advertisements provide to consumers must be discounted by some measure of “the potential benefits of reducing distraction,” yet Respondent provides no support for the existence of “distraction” and has offered, at most, unclear and shifting explanations of what type of “distraction” is purportedly relevant to this case; (2) the proposed finding conflates distraction with confusion; (3) the proposed finding purports to suggest that a consumer who enters a 1-800 Contacts Branded Query and then—absent confusion—looks at and/or clicks on a rival contact lens retailer’s truthful, non-misleading ad that appears *below* the 1-

800 Contacts ad and offers the exact same product for what is usually a lower price, is somehow harmed by the “distraction” of being presented with this additional choice; and (4) the proposed finding assumes without proving that—even if there were some number and arrangement of truthful, nonmisleading, non-confusing advertisements for retailers selling the precise product that the consumer is looking for that might be large enough to harm consumers—economically rational search engines and retailers would ever display that number and arrangement of advertisements on the search engine results page in response to a 1-800 Contacts Branded Query.

**First**, this proposed finding is vague, misleading, and irrelevant because in it Respondent proposes that the value of information that truthful, nonmisleading advertisements provide to consumers must be discounted by some measure of “the potential benefits of reducing distraction,” yet Respondent has refused to make clear what it means by “distraction,” offering shifting and unclear explanations of what type of “distraction” it believes may be relevant to this case.

Specifically, Respondent’s expert Dr. Murphy, the only source relied on in support of this finding, testified that “I don’t think there’s a precise definition of everything fits into distraction or not distraction bucket. . . . I don’t really see classifying something as this is quote, distraction versus something else is really that helpful. . . . We’re trying to say, well, why would it have an effect on consumers. Well, one of the things it could have, it could be distracting in the sense that I think people understand distraction. That’s all I’m saying. It’s not intended to be a deep scientific concept.” (Murphy, Tr. 4339-4340).

Dr. Murphy acknowledged that he did not know or have an opinion about what number of ads would be “distracting” to consumers. (CX9048 (Murphy, Dep. at 74 (“Q. Is there a number of ads that you believe is not distracting to consumers? A. No. . . . we kind of know as a matter of economics that there could be too many, there could be too few. And I don’t think we can say that,

you know, one is the optimal number, five is the optimal number. I don't think you really know.'')).

And he described the harms of “distraction” as both the time and effort spent by consumers evaluating alternative choices—even when they are not confused about what those choices are—(CX9048 (Murphy, Dep. at 87-91)) and as the simple mental distraction of seeing alternative ads even if the consumer spends no time or effort investigating the rival offers. (Murphy, Tr. 4336- (“‘Distracting’ means you’re pulled off of the thing you’re interested in. Whether you go to another activity or not is a different question. Q. So you don’t have to be diverted from your activity, you just have to be temporarily interrupted; is that what you mean? A. I’m not a linguist, but the way I understand distraction is, you can be distracted without being diverted to a different activity. You’re just distracted from what you’re doing. Like a noise like we just heard can be distracting. It just breaks your train of thought, moves you away from your current activity. It need not move you to something else. Q. But it diverts your attention. A. Yes. Something away from – it’s not so much it has to go somewhere. It’s away from the activity you were focused on. That’s usually what we mean by ‘distraction.’ You have in mind you should be doing X. You’re distracted. You’re doing – your mind is moving away from X. That’s kind of what we mean by ‘distraction.’”)).

These shifting descriptions of “distraction” and Dr. Murphy’s refusal to define the concept as it applies in this case make it impossible to accept the proposed finding, which would require that the value of information that truthful, nonmisleading advertisements provide to consumers must be discounted by some measure of “the potential benefits of reducing distraction.” As such, the proposed finding is vague, misleading, and irrelevant.

**Second**, the proposed finding is vague, inaccurate, misleading, and speculative insofar as it conflates “distraction” with “confusion”—a topic that is addressed at length by the parties in other

proposed findings and responses thereto. (CCPTF Section XI.C; Responses to Respondent’s Proposed Findings No. 1484-1766). In attempting to explain what he meant by distraction, Dr. Murphy struggled to come up with even hypothetical examples that did not conflate distraction with confusion. (CX9048 (Murphy, Dep. at 72 (“Q. What do you meant by distraction? A. You know, that is if you just – just because you have more ads there you might then – once you have done your search you might say, well, let me click on that one and find out that is not what you are looking for. That would be a distraction. Then maybe I have to go back and go to 1-800, maybe I say I ran out of time, I am going to go do something else, and I come back another time or either online or my eye care professional, whatever, that is the kind of notion of distraction.”)); CX9048 (Murphy, Dep. at 79 (“Q. In that example are you positing that the consumer thought he was going to 1-800 and realized he wasn’t or that he went somewhere else and realized I don’t actually want to buy from this company or something else? A. It could be either one.”)); CX9048 (Murphy, Dep. at 85-87 (“[L]et’s say, for example, I had somebody who was searching for 1-800 Contacts because they knew absolutely that was where they wanted to buy their contacts, that at the end of the day if they clicked on anything else they would end upcoming [*sic*] back to 1-800 and that is where they would buy their contacts. Then for them it would only be a distraction, right, it could only cause them to do something they would otherwise doesn’t want to do. . . . Q. Even for people that you described who know they want to buy from 1-800 Contacts, are those ads necessarily a distraction or can they just ignore them and go straight to 1-800? A. No, that is the problem, is it cost less to ignore things or do you say, gee, *that showed up that must have showed up for a reason, maybe I should go check that out, maybe that actually is a better way to buy contacts from 1-800 Contacts.*”))).

Even those hypothetical confusion-as-distraction situations were, according to Dr. Murphy himself, speculative and rare. (CX9048 (Murphy, Dep. at 85-86 (“*I am not saying everybody is*

*like that or that that is the typical person*, but there certainly *could be* people for whom it would surely be a distraction. . . . I am not saying that is likely. I think I am not saying that is going to typically happen. *I think the vast majority of cases people say, oh, there is 1-800, I will just go there, that is where I want to go.*”) (emphasis added))).

**Third**, the proposed finding is inaccurate, misleading, speculative, unsupported, and contrary to the weight of the evidence insofar as it purports to suggest that a consumer who enters a 1-800 Contacts Branded Query and then—absent confusion—looks at and/or clicks on a rival contact lens retailer’s truthful, non-misleading ad that appears below the 1-800 Contacts ad and offers the exact same product for what is usually a lower price, is somehow harmed by the “distraction” of being presented with this additional choice.

When he was not conflating confusion with distraction, Dr. Murphy struggled to describe “distraction” as anything at all distinguishable from competition itself. Dr. Murphy’s description of the supposed problem posed by “distraction” relies on an assumption that consumers who choose to spend some amount of their time comparison shopping are irrational to do so and that consumers cannot be trusted to make decisions for themselves about whether or when those consumers mind it worthwhile to comparison shop. Dr. Murphy speculates that consumers *might*, before choosing to spend some amount of time engaged in comparison shopping, make an incorrect estimation about whether the money they can save while comparison shopping is, subjectively, to the consumers themselves, worth the time spent on that comparison shopping. Accordingly, Respondent posits, it is better for consumers to not give them the chance to make such a choice at all. This is the essence of Respondent’s “distraction” argument.

Specifically, Dr. Murphy described distraction as a consumer having the following experience: “I understand what all the other options are, but the fact that I have to filter through those other options makes me less likely to use the option that I would have – that I really wanted.

In other words, that is what we mean by distraction, right? . . . I give you six options, you fully understand the other five, but the fact that you have six options and you have to go through all six of them because you don't know which is the one you want makes it less likely you will find the one that you do want, you can't devote as much time to looking at the one you do want. That is what we mean by distraction. It kind of diverts your attention away from something else.”

(CX9048 (Murphy, Dep. at 91)). And in discussing the hypothetical situation of a consumer who, having entered a 1-800 Contacts Branded Query, chooses to investigate other options by clicking on a rival ad, but in the end does not purchase from that rival at that moment, Dr. Murphy testified that such a consumer “spent the time and effort to go look at it and they may have gotten something out of it but they certainly didn't get a purchase in that case. ***Q. What if they used that click to learn information about other contact lens sellers and went to 1-800 and said can you match that price, are they better off? A. They could be. Q. Is there a way they might not be? A. Depends on how much time and effort it took and how much of a discount they got by doing that, you have to take those things in account. Q. The fact they did it, doesn't it suggest to you they thought it was worth doing? A. I mean, ex ante – ex ante they might have thought it was worth doing, it doesn't mean ex post they mean to do. It doesn't mean after the fact it turned out to be worth it. . . . [L]et's say they clicked on [the rival ad] intentionally so I am going to go check that out. The fact that they come back and get some benefit doesn't mean it outweighed the cost, it just means they expected to get some benefit when they clicked on it in the first place.*** Whether they ultimately got enough benefit to justify that, you don't know.” (CX9048 (Murphy, Dep. at 87-88)).

This proposed finding, and the assumptions on which it is based, are contradicted by the conclusion of Dr. Athey that “the circumstances of this case suggest consumers would benefit from increased consumer information and choice” because “[c]onsumers in this case are

purchasing a specific brand of contact lenses that has already been determined by their prescription; so they only need to have enough ‘expertise’ to compare prices for identical objects across stores. Consumers who shop online typically have enough expertise to compare prices.” (CX8010 at 024 (¶ 57) (Athey Rebuttal Expert Report); *see also* Evans, Tr. 1426 (testifying that a search engine is “a product that consumers use multiple times a day. It is a product that consumers know, have experience with, you know more so than any other product that I can think of almost. So consumers have a lot of experience looking at search results pages, and I would give consumers credit to be able to look at search results pages and make sensible decisions. And just to finish this, I cannot imagine, as an economist, a reason to prevent consumers from seeing competing offers on a search results page.”)).

Fundamentally, the treatment of “distraction” in this proposed finding rests on an assumption that more choice is *worse*—not better—for consumers. This assumption runs counter to the principles of economics and antitrust law. (CX8010 at 024 (¶ 58) (Athey Rebuttal Expert Report) (“From a general economic standpoint, antitrust principles aim to preserve the benefits of additional competitive choices to consumers.”)). As such, the proposed finding should not be accepted absent a convincing and empirically supported explanation about why that additional choice is, *in this situation*, worse for consumers than seeing fewer advertisements would be.

Yet, Respondent provides no such explanation. Indeed, Dr. Murphy also acknowledged that if a consumer who searches for “1-800 Contacts” and decides to click on a rival ad rather than on 1-800 Contacts’ ad, that “may or may not” constitute distraction and “[o]n a case-by-case basis its’ hard to know.” (Murphy, Tr. 4341-4342). Dr. Murphy acknowledged that he had not performed any analysis to determine whether or to what extent the ads that were excluded by the Bidding Agreements were distracting to consumers (Murphy, Tr. 4334 (“I don’t think we measured actual distraction.”)); CX9048 (Murphy, Dep. at 77-79)).

Dr. Murphy stated only that “the closest thing to doing” an analysis to determine whether the excluded ads were “distracting” was his analysis of Dr. Athey’s results and conclusion that “there would be fewer successful completions in the but-for world.” (CX9048 (Murphy, Dep. at 77-78); Murphy, Tr. 4342-4344). Indeed, Dr. Murphy’s trial testimony made clear that the entirety of Respondent’s “distraction” “analysis” is simply a repackaged version of its analysis of conversions and output. That analysis, as set forth in response to Proposed Findings No. 1861-1876, that analysis is deeply flawed and factually inaccurate. Even if that analysis were accurate (and it is not), it would still not show anything more than that fewer completed sales would be made in the but-for world; it would not show that this was due to what Dr. Murphy calls “distraction.”

**Fourth**, the proposed finding is inaccurate, misleading, speculative, unsupported, and contrary to the weight of the evidence insofar as it assumes without proving that—even if there were some number and arrangement of truthful, nonmisleading, non-confusing advertisements for retailers selling the precise product that the consumer is looking for that might be large enough to harm consumers—economically rational search engines and retailers would ever display that number and arrangement of advertisements on the search engine results page in response to a 1-800 Contacts Branded Query. Specifically, the proposed finding is contrary to:

- (a) Dr. Murphy’s acknowledgement that “[s]earch engines do not display advertisements for all companies that bid on particular keywords. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX0739 at 025 (¶ 56) (Murphy Expert Report), *in*

*camera*). As Dr. Evans has explained, Dr. Murphy “has provided no economic analysis that would explain why search engines, subject to the incentives to avoid confusion and distraction described in ¶ 56 of his report, would then provide widely available advertising services that would cause the significant confusion, distraction, and clutter described in ¶ 142 of his report.” (CX8009 at 025 (¶ 36) (Evans Expert Report));

- (b) the evidence that search engines have a strong incentive to show only search advertisements that are relevant and useful to users and attempt to display advertisements relevant to users’ interests (CCPTF Sections IV.A.3-5, IX.B);
- (c) Dr. Evans’ and Dr. Athey’s conclusions that search engine incentives are well-aligned with those of consumers, and those incentives drive the search engines to display results pages with that will be responsive to consumer feedback and provide a good consumer experience. (Evans, Tr. 1426 (“[T]he search engines – yes, they want to make money, but they also want consumers to keep coming back. So the search engines have a very strong financial incentive to make sure that they’re showing search results pages to consumers, including advertisements on search results pages to consumers, that are going to benefit those consumers. So I would put my trust in the search engines to make a sensible judgment as to whether it’s appropriate to show competitive ads following a query for a brand-name keyword.”); Evans, Tr. 1562-1563 (“[S]earch engines have incentives to present consumers with search results pages that consumers value, and search engine companies spend lots of resources in order to . . . do that. . . . If they provide consumers with better search results pages – that’s the product that they’re providing to consumers – then consumers are more likely to come back to the search engine, to use the search engine more, and that makes it possible for the search engine to sell more . . . ads. . . . [T]he search engines have an incentive to make sure that consumers aren’t getting overwhelmed with

information. Search engines obviously don't put everything on the search results pages that they could. There are a lot of search results pages where they don't put any ads at all. So they're making decisions to in effect cull down or curate the choices available for consumers, and that's' – that's how they have succeeded in running successful businesses, by providing search results pages that ultimately make consumers want to use those search engines.”); CX8009 at 099 (¶ 198-200) (Evans Expert Report) (“Search engines design their advertising services and SERPs to take into account the collective interests of advertisers, users, and websites. They invest considerable time and money into designing SERPs that will benefit users, keep them coming back, and using the search engine more.”); CX8009 at 022 (¶ 31) (Evans Expert Report) (“Search engines take consumer value into account in deciding on the selection of paid search results for the SERP” and have every incentive to do so because “[b]y adopting the cost-per-click model, they only earn revenue when consumers decide that the paid search result is sufficiently relevant to them to click on it. That is unlike most physical advertising and some online advertising where the platform is paid regardless of whether the consumer ever takes any action or even pays any attention to the ad.” ); CX8009 at 105 (¶ 200) (Evans Expert Report) (“Professors Ghose and Murphy are claiming, in effect, that they are better judges of what would benefit consumers than the search engines whose business depends on satisfying customers.”); CX9043 (Athey, Dep. at 291-294 (search engines “have a strong incentive to create a good consumer experience to attract – continue to attract users to come to the search engine”; “when evaluating ads alone as well as when evaluating the entire page, [search engines] pay a lot of attention to user experience”; apart from certain situation not applicable here, specifically, the search engine owning a “vertical property” that competes

with some of the content providers and advertisers whose results Google presents, search engine results pages “are very responsive to consumer experience”)); and

- (d) Dr. Athey’s conclusions that search engines, as the advertising platforms, are much better suited to creating a search engine results page that meets the needs and interests of consumers than a group of rival advertisers would be. (Athey, Tr., 2100-2101 (“Q. ...[D]o you recall being asked on cross-examination whether search engine auctions, quote, result in a selection of ads that necessarily align with consumer welfare? A. I believe so. Yeah. Q. And do you recall responding, ‘No. Consumer welfare is a major consideration, but it’s not the only consideration’? A. Yes. Q. Does your testimony that, in search engine auctions, consumer welfare is not the only consideration, as a general matter, change any of your opinions about the consumer welfare impact of the agreements in this case? A. No. Q. Why not? A. Well, first of all, when you imagine the difference between what happens in practice and what might be ideal from a consumer welfare perspective, . . . those differences might be, you know, a bit of reranking of the ads, maybe showing a few less ads or a few more ads. It’s not even always clear which direction that goes. . . . [B]ut what 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. . . . [T]he counterfactual that I conduct is based on data from generic searches. Those also may not be perfectly consumer welfare maximizing, but they create value for consumers, and that’s the value that I’m measuring in my report.”); CX9043 (Athey, Dep. at 292-293 (“[O]ne way to think of it is by an analogy. So a supermarket could decide the variety of products in a certain category to put on the shelf, or you can imagine that the – the manufacturers of products could make agreements about how many products should be on the shelf. The manufacturer[s’] incentive would be to divide the market and have a small number of products on the shelf

in each store and perhaps have different products in different stores. A supermarket certainly does maximize profits. It doesn't maximize the welfare of consumers. But the distortions introduced by a supermarket in terms of putting up maybe a few too many or a few too few products or positioning them in ways that maximize supermarket revenue, those distortions, while present, are small relative to distortions that you might get if the manufacturers could – could restrict – could make agreements to restrict competition among themselves.”)).

**1823.** Ads for other retailers in response to searches for 1-800 Contacts' trademarks are only minimally relevant to many consumers. (Ghose, Tr. 3904-05, 3929-31, 3955-56; RX 733-0006, -0024 to -0025).

**Response to Proposed Finding No. 1823:**

This proposed finding should be rejected because it is not expressed in Dr. Ghose's report. At trial, Complaint Counsel objected to Dr. Ghose's effort to offer this opinion, and Respondent's counsel was unable to cite any portion of Dr. Ghose's report expressing any such opinion. *See* Ghose, Tr. 3905-3908.

RX 733-006 does not contain or support this opinion – indeed, it only contains one substantive paragraph, which reads:

12. First, while organic results in search engine result pages are based solely on elements related to relevance to the user's query, paid ads are displayed based on multiple factors that include bid prices, with the objective of generating revenues for the search engine. Moreover, search engines can have incentives to display search ads that may not be highly relevant to consumers. If the presence of these ads makes organic links less visible to consumers,

2. The only vaguely relevant statement is “search engines *can* have incentives to display search ads that may not be highly relevant to consumers,” which does not support the proposed finding, or any opinion relevant to the proposed finding.



improved when it eliminated such advertising; and (4) that contact lenses are a commodity-like product, 1-800 Contacts charges a price premium that cannot be fully explained by higher service levels, consumers are not well informed about relative prices of online contact lens retailers, online contact lens consumers value and act on price information, and the restricted advertisements are relevant and useful to online contact lens consumers.

**1824.** Because search engines display organic links based on websites' relevance and usefulness as well as advertisers' bids, the rankings of paid ads and organic links can be very different. (RX 733-0024 (Ghose Report); Ghose, Tr. 3909-10).

**Response to Proposed Finding No. 1824:**

This proposed finding is inaccurate and appears to contain a typographical error because it states that search engines display organic links based on, among other things, advertisers' bids. It is paid search advertisements, not organic links, that use advertisers' bids as part of the process of determining the placement of links on the search engine results page. Complaint Counsel agrees that paid ads and organic links can be different from one another and that only paid links involve bidding; however, the proposed finding is unsupported, inaccurate, and contrary to the weight of the evidence insofar as it (1) suggests that the paid search advertisements that appear in response to 1-800 Contacts Branded Queries are not relevant or useful to consumers, (2) suggests that the role of bids in paid search advertisements is the only factor that explains any differences between paid and organic links that appear on a given search engine results page, or (3) suggests that the role of bids in paid search advertisements detracts from rather than serves as an additional signal of the relevance of the paid advertisements.

First, insofar as this proposed finding suggests that the paid search advertisements for rival contact lens retailers that appear in response to 1-800 Contacts Branded Queries are not relevant or useful to consumers, it is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766, 1820 and 1823.

Second, the proposed finding is unsupported, inaccurate, and contrary to the weight of the evidence insofar as it suggests that the role of bids in paid search advertisements is the only factor that explains any differences between paid and organic links that appear on a given search engine results page or that search advertisements and other types of results serve precisely the same purposes. As Dr. Athey has explained, this is not the case.

- (a) First, “***one reason that the search engines have lots of different blocks of content***” is that “many different consumers with many different consumer intents can enter the same query” and “***the search engine is trying to sort of meet the needs of all the different types of consumers who enter the same query***. Some consumers, say, who typed in ‘contact lens’ might be interested in just understanding what contact lenses are. They might be interested in health issues. Someone could be interested in doing research about the industry. So there are many different intents that could come with – with the entering a single query. ***The ads, as I’ve discussed in my academic research, are providing a particular type of information. The ads are a signal of the – of the commercial quality of the company.*** And so the ads in particular will reflect companies that – that bid and win the auction and appear in the ads are companies that can convert the consumer, that can make a sale and make that advertisement profitable for them. ***And so when you look at the algorithmic search results for these types of queries*** [that is, commercial queries], ***you see a lot of informational background research types of stuff in the algorithmic link, depending on the query.*** So for the purpose of finding firms that sell contact lenses online, the advertisements are particularly salient. So I’m understanding that, you know, of those ***algorithmic clicks, those are meeting a variety of different consumer needs.***” (CX9043 (Athey, Dep. at 46-47); CX8007 at 025 (¶ 68) (Athey Rebuttal Expert Report) (noting that “on searches for contact lenses, a substantial proportion of clicks (34% in the comScore

dataset) go to paid search results. . . . This compares to studies [of click behavior generally] which found that 6% and 10% of clicks on average were on paid search results. ***A primary reason for the discrepancy is the previously documented fact, that search engines may not show many links to retailers in the algorithmic links; and the click evidence shows that consumers tend to focus on the ads,*** perhaps because these consumers have the intent to make a purchase online and the fact that the ads clearly indicate that the retailers are in the business of selling contact lenses online.”) (emphasis added));

- (b) “Algorithmic search results do not compensate for the suppressed advertisements. . . . [E]vidence suggests that across a variety of industries, when an advertiser removes its search advertisements, it loses traffic. A meta-analysis in 2011 of several hundred examples where advertising campaigns were paused on Google found that over 89% of ad clicks are incremental to algorithmic clicks: when ad advertiser’s campaign was paused, algorithmic clicks did not replace the lost ad clicks. Although the relative importance of advertisements and algorithmic links can vary across industries and keywords, my analysis of the comScore dataset suggests that algorithmic links do not play an important role in contact lens searches.” (CX8007 at 024 (¶ 67) (Athey Rebuttal Expert Report)).
- (c) “[F]or new entrants into a market, algorithmic results are not a likely route to reach consumers. Less well-known, newly established firms are less likely to be listed at the top of algorithmic results,” as Mr. Juda of Google also explained. “Paid search results are a way for new entrant firms to present themselves prominently to consumers near the point of purchase, even if [they] cannot achieve similar exposure to consumers in the algorithmic search results.” (CX8007 at 025 (¶ 69) (Athey Rebuttal Expert Report) (citing CX9019 (Juda, Dep. at 20-22))).

Third, insofar as this proposed finding suggests that the role of bids in paid search advertisements detracts from the relevance of the paid advertisements, it is misleading, speculative, inaccurate, unsupported, and contrary to the weight of the evidence, which shows that the fact that advertisers place bids to display search advertisements is a signal of the relevance of those advertisements and bolsters, rather than undermines, the evidence that those advertisements are relevant.

Specifically, the fact that an advertiser has entered a bid in a search advertising auction for a search query means that the advertiser is willing to pay for consumer clicks on its advertisements appearing in response to that query. The evidence has also shown that contact lens retailers make advertising decisions on the basis of return on investment, seeking to meet cost-per-acquisition targets (CCPTF Section IV.A.6) and use search engine tools to carefully monitor, adjust, and control their advertising expenditures. (CCPTF Section IV.B.5). Contact lens retailers have no incentive to pay for ads that are not likely to lead to sales—that is, they are not willing to pay for ads that will be irrelevant to consumers. (CCPTF Section XI.C.2). The fact that they bid—indicating a willingness to pay—is a signal of the relevance of their advertisements, not a factor that detracts from it.

The testimony of Dr. Athey also explained the phenomenon that the above evidence shows. (Athey, Tr. 719-720 (“Q. You talked about the bid and the role it plays. What does the fact that an advertiser has to pay to show an ad in response to search advertising have to do with the ad’s relevance to the user? A. So in this industry, the advertisers are going to be placing bids on each keyword based on the performance of those advertisements. They’re going to look at their value per click, and their bid is going to be reflective of that value, because they’re going to have to pay for each click that they receive. And so the advertisers that bid and win in a competitive auction, especially on a highly commercial term, will not be able to afford to continue to bid and

pay for those clicks unless they can turn those clicks into profits. *And so an advertiser won't be able to afford to be in those high positions on the page unless they are relevant in the sense that they can convert those users.* And that was part of the subject of my theoretical work, to try to help understand the way this industry works, to point out that indeed a key – *a key purpose of these online advertising auctions is to surface relevant advertisements that are a good match for consumers.* And that theory was of course based on the way this works in practice.”), 760-761 (“*[P]articularly for commercial searches, the advertisements are a really important source of information because the advertisers themselves are the ones that have the key thing that both the search engines and consumers need to know; that is, the advertisers know they can fulfill a consumer's need for this search query. And they know that because they can measure their own conversion data and their profitability, and they express that through their bids.* And so particularly for commercial searches, you can get the – the selection of firms that today can meet your needs through the advertisements.”), Athey Tr. 2089 (“[T]he advertisements convey a different type of information than the organic results. In order to appear in the advertisements, the firm has to bid in the auction, and they need to generate a sufficient click-through rate and have a sufficiently high quality score that they are competitive in the auction. *So when the ad appears in a high position, it's an indicator that – it's a signal, in economic terms, of the ad's quality, especially in a highly commercial context or in a competitive context.*”) (emphasis added); *see also* CX8007 at 024-025 (¶¶ 67-68) (Athey Expert Report); CX9043 (Athey, Dep. at 46-48); CX8006 at 033 (¶76) (Evans Expert Report) (“It makes economic sense to pay for advertising, and to increase the advertising budget accordingly, so long as doing so keeps generating profitable sales.”)).

**1825.** Google's algorithms for organic results are a reliable method for assessing what websites will be relevant and useful for a consumer. (CX 9046 (Ghose, Dep. at 47); RX 733-0010 to -011, -0024 to -0025 (Ghose Report)).

**Response to Proposed Finding No. 1825:**

This proposed finding is misleading, inaccurate, unsupported, and contrary to the weight of the evidence insofar as it suggests that Google's algorithms for organic results are *the only* reliable method for assessing what websites will be relevant and useful for a consumer or even that they are a particularly reliable method for assessing what *paid search advertisements* will be relevant and useful for a *consumer*.

Specifically, Complaint Counsel agrees that Google's algorithms for organic results are, as a general matter, designed to produce organic results that are relevant and useful for searchers, but notes that such a finding would be incomplete and misleading in the context of this case if it did not also note that Google's algorithms for paid search results are likewise designed to produce paid search results that are relevant and useful for searchers. (*E.g.*, CCPTF Section IV.A).

Further, this proposed finding is misleading, inaccurate, unsupported, and contrary to the evidence and expert analysis, as sets forth in response to Proposed Finding No. 1824, that (1) paid search advertisements that appear in response to 1-800 Contacts Branded Queries are relevant and useful to consumers and (2) that the fact that advertisers submit bids in search advertising auctions—indicating a willingness to pay in the event of a click—is evidence that their ads are relevant to consumers and that they will be able to meet those consumers' needs.

Finally, this proposed finding is misleading, inaccurate, unsupported, and contrary to the evidence and expert analysis to the extent it ignores the ways that paid search results, in contrast to organic listings, can be particularly valuable to *consumers*, that is, search engine users who are shopping, and are particularly well suited for matching consumers with firms that sell the products the consumers want to purchase. Specifically, it is contrary to:

- (a) the evidence that search advertising is a uniquely important marketing channel in the online sale of contact lenses (CCPTF Section IV.B);
- (b) the testimony of Google Director of Product Management Mr. Juda that the commercial nature of ads “can at times result in increased utility for a user” as compared to organic results (Juda, Tr. 1167-1168) and 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 towards 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. 1167-1168);
- (c) the testimony of Mr. Juda that 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) and the evidence and expert analysis making clear that this control helps match consumers with firms that sell the products the consumers want to purchase. For instance, it allows consumers to discover smaller, newer companies or companies who happen to be running favorable promotions. CX9019 (Juda, Dep. 20-21 (“[O]rganic results may list a particular advertiser relatively low on a search results page,” particularly if that company’s competitors are “very large brand that are very well-established and very well known.” “Therefore, in order for a small business to actually be able to really be featured prominently in front of a user, and that user giving that small business a healthy amount of

attention, the advertising system can oftentimes be a very efficient way for the small business to get their message in front of a user, where that message may not be nearly as prominent, at least within the product that is Google.com, if the advertiser were to rely solely on trying to optimize their landing page to get a high ranking within the organic results. And, in effect, because advertisements take both advertiser bids and creative copy into control, in addition to our quality signals, it gives the small advertiser, and really any advertiser, a lot more control over whether their message can appear, relative to the functionality that organic results provide.”); Athey, Tr. 2089-2090 (a “new advertiser” or an advertiser “that had really good deals” wouldn’t have any way to tell Google, Hey, we’ve got really good deals right now, so you should put me in the ‘People also search for’ box. But . . . if an online retailer has a good sale, a good introductory discount, if it – if it’s – if it wants to acquire new consumers and believes that it can convert those users, it can present that information in an ad with deep links with ad text that tells a consumer something about the firm and that also are sort of a signal of what kind of experience that the consumer would have by – they can try to signal that they’re a low-priced firm by putting that in the ad text, which they would realize would attract consumers who are looking for low price, and they would tend to want to do that if they were able to convert those users. So all of that information, the prominence, the positioning, is information that’s not conveyed in these other types of boxes.”); *see also* CX8006 at 026-028 (¶ 61, 64) (Evans Expert Report) (“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.);

- (d) Dr. Athey’s testimony that “[f]or commercial searches in particular, there’s a variety of reasons it can be challenging for a search engine to do the best job ranking commercial

searches. Just for one reason is that firms engage consultants and services to optimize against the algorithms. It's called search engine optimization. And so firms are constantly trying to game the algorithms to get into the algorithmic results, for example, which can undermine the relevance of the algorithmic results. And that happens more often for commercial searches.” (Athey, Tr. 760); and

- (e) Dr. Athey’s analysis showing that “[a]lthough the relative importance of advertisements and algorithmic [that is, organic] links can vary across industries and keywords, my analysis of the comScore dataset suggests that algorithmic links do not play an important role in contact lens searches.” “[O]n searches for contact lenses, a substantial proportion of clicks go to paid search results. In the comScore dataset, on average 34% of consumer clicks were on paid search results and 66% were on algorithmic (not paid) search results. This compares to studies which found that 6% and 10% of clicks on average were on paid search results. A primary reason for the discrepancy is the previously documented fact, that search engines may not show many links to retailers in the algorithmic links; and the click evidence shows that consumers tend to focus on the ads, perhaps because these consumers have the intent to make a purchase online and the fact that the ads clearly indicate that the retailers are in the business of selling contact lenses online.” (CX8007 at 024-025 (¶¶ 67-68) (Athey Expert Report)).

**1826.** In many cases, search engines display ads for websites at the top of the search results page that would be ranked below many other websites in the organic search results. (RX 733-0024 (Ghose Report); RX 733-0156-0194; Ghose, Tr. 3908-11, 4003; RX 739-0055 to -0056, -0093 to -0094 (Murphy Report)).

**Response to Proposed Finding No. 1826:**

This proposed finding is does not make sense to the extent it asserts that “ads for websites” would be ranked in the organic search results, because advertisements are not ranked against

organic search results. Complaint Counsel agrees that paid search results in response to a given query are not entirely repetitive or duplicative of or identical to the organic search results in response to the same query and that, at times, paid search results allow an opportunity for consumers to discover links to firms, particularly new entrants or firms that happen to be running a favorable promotion, whose links might otherwise appear relatively low in organic search results, as described further in response to Proposed Finding No. 1825. To the extent that this proposed finding suggests that the above-described distinctions between paid and organic search results undermine the relevance of paid search results (particularly, those that appear and/or would—but for the Bidding Agreements—appear in response to 1-800 Contacts Branded queries), the proposed finding is misleading, inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1824 and 1825.

**1827.** Search engines do not display organic links to other retailers on the first page of organic search results in response to a search for 1-800 Contacts’ trademarks. (RX 733-0025 (Ghose Report)).

**Response to Proposed Finding No. 1827:**

This proposed finding is unsupported, as the cited material shows only that, in a search run on Google and a search run on Bing on February 20, 2017, the first page of organic results for the query “1-800 contacts” did not include links to the web pages of other online contact lens retailers. The cited material does not show this to have been the case on any other day in the more than a decade long period relevant to this case.

Moreover, insofar as this proposed finding suggests that links to rival contact lens retailers’ websites are not relevant to consumers who search for “1-800 contacts,” it is misleading, inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1820 and 1823 through 1825.

**1828.** Google displays ads at the top of the search results page for a search for 1-800 Contact's trademark that do not appear in the first 20 pages of organic links. (Ghose, Tr. 3910-11; RX 733-0024, RX 733-0156-0190 (Ghose Report)).

**Response to Proposed Finding No. 1828:**

This proposed finding is vague as to time period and unsupported to the extent it purports to apply to the entire time period relevant to this case. Moreover, insofar as this proposed finding suggests that links to rival contact lens retailers' websites are not relevant to consumers who search for "1-800 contacts," it is misleading, inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1820 and 1823 through 1825.

**1829.** The fact that search engines display ads for websites at the top of the search results page that would be ranked below many other websites in the organic search results indicates that links to other retailers in response to searches for 1-800 Contact's trademarks are only minimally relevant to many consumers. (Ghose, Tr. 3911-12; RX 733-0006, -0024-0025; CX 9046 (Ghose, Dep. at 49)).

**Response to Proposed Finding No. 1829:**

This proposed finding "that links to other retailers in response to searches for 1-800 Contact's trademarks are only minimally relevant to many consumers" should be rejected because it is not expressed in Dr. Ghose's report, as explained in response to Proposed Finding No. 1823. At trial, Complaint Counsel objected to Dr. Ghose's effort to offer this opinion, and Respondent's counsel was unable to cite any portion of Dr. Ghose's report expressing any such opinion. *See* Ghose, Tr. 3905-3908.

Moreover, the proposed finding is misleading, inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1820 and 1823 through 1825.

3. ***Displaying Minimally Relevant Additional Ads To Consumers Searching For 1-800 Contacts Is Likely To Increase Their Search Costs***

**1830.** Every consumer is not better off when he or she has more paid ads to choose from in response to a search for 1-800 Contacts. (Ghose, Tr. 3913; RX 733-0038-0040 (Ghose Report); CX 9048 (Murphy, Dep. at 79-82); CX 9046 (Ghose, Dep. at 84, 151-52, 175)).

**Response to Proposed Finding No. 1830:**

This proposed finding is misleading to the extent it suggests that the additional paid ads that would appear in response to a search for 1-800 Contacts but for the Bidding Agreements would either (1) make any consumers worse off or (2) only benefit the consumers who purchase from the companies that serve those additional ads, for the reasons set forth in response to Proposed Finding No. 1766 and 1820. Specifically, as set forth in response to Proposed Finding No. 1766, if the Bidding Agreements were to be rescinded, (a) users who want to find 1-800 Contacts' website would still be able to do so easily, as 1-800 Contacts' advertisement would remain in the first position (*see* CCPTF Section XI.D.2.a (¶¶ 1938-1945)), (b) users who initially intend to purchase from 1-800 Contacts would benefit from the additional information and additional choices provided by rival ads (*see* CCPTF Section XI.D.2.b (¶¶ 1946-1951)), and (c) even consumers who still ultimately purchase from 1-800 Contacts would benefit from the existence of competing offers (*see* CCPTF Section XI.D.2.c (¶¶ 1952-1954)).

And as set forth in response to Proposed Finding No. 1820, the rival advertisements that would appear in response to 1-800 Contacts Branded Queries but for the agreements would be relevant and useful to consumers because, among other things, (a) search engines, which absent the Bidding Agreements, have and would continue to show rivals' advertisements in response to 1-800 Contacts' Branded Queries, have a strong incentive to, and take pains to, show only search advertisements that are relevant and useful to users; (b) advertising in response to 1-800 Contacts' Branded Queries is a successful, commercially significant strategy for online contact lens retailers;

(c) 1-800 Contacts consistently recognized that search advertising from its lower-priced rivals on 1-800 Contacts Branded Queries threatened its sales, and its sales improved when it eliminated such advertising; and (d) contact lenses are a commodity-like product, 1-800 Contacts charges a price premium that cannot be fully explained by higher service levels, consumers are not well informed about relative prices of online contact lens retailers, online contact lens consumers value and act on price information, and the restricted advertisements are relevant and useful to online contact lens consumers.

**1831.** Additional advertisements regarding the prices of 1-800 Contacts’ rivals would not necessarily raise welfare for a consumer that is not looking for that information. (RX 739-0082 (Murphy Report)).

**Response to Proposed Finding No. 1831:**

This proposed finding is vague and therefore irrelevant due to its use of the word “necessarily.” The proposed finding is also misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766 and 1820. Specifically, the proposed finding is contradicted by the evidence and expert analysis demonstrating that users who initially intend to purchase from 1-800 Contacts would benefit from the additional information and additional choices provided by rival ads (*see* CCPTF Section XI.D.2.b (¶¶ 1946-1951)), and even consumers who still ultimately purchase from 1-800 Contacts would benefit from the existence of competing offers (*see* CCPTF Section XI.D.2.c (¶¶ 1952-1954)).

**1832.** A large fraction of consumers who search for 1-800 Contacts are very likely harmed by additional ads for other retailers. (Ghose, Tr. 3928-30, 4080-81; RX 733-0038 to 0040 (Ghose Report)).

**Response to Proposed Finding No. 1832:**

This proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding Nos. 1766 and 1820.

**1833.** Presenting consumers that have an intent to navigate to a particular website with additional ads is likely to increase their search costs. (RX 733-0007, RX 733-0037-0041 (Ghose Report); CX 9046 (Ghose, Dep. at 89, 151-52)).

**Response to Proposed Finding No. 1833:**

This proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766 and 1820.

Additionally, the proposed finding is further unsupported and contradicted by the very literature that Dr. Ghose cites in support of his opinions regarding search costs. Specifically:

- (a) Dr. Ghose cited a 1999 paper by George Lowenstein to support of his claim that “when consumers need to search before making their choices, more alternatives may increase those costs and thus harm consumers.” (RX0733 at 030 (¶¶ 71-72) (Ghose Expert Report)). But this paper does not support Dr. Ghose’s conclusions. The Lowenstein paper showed only that in the example of “individuals designing their own Social Security savings policy,” “[t]he increased choice inherent in this policy design exercise would lead individuals to face complex decisions relating to long-term, unpredictable outcomes” and that “require gambling about the future rate of inflation, how long one will live, and how long one’s spouse will live” and “predict[ing] one’s success in investing the money during retirement and resisting the temptation to spend it too fast” and concluded that “[e]xpanded choices are inadvisable *when they require expertise that people don’t possess.*” The Lowenstein paper did *not* support the notion that increased choice is always harmful to consumers or even the notion that it can be harmful to consumers in situations when the choices to be made do not “require expertise that people don’t possess,” such as choosing a retailer from which to purchase the contact lenses for which a consumer already have a prescription. Indeed, Lowenstein’s paper made clear that “more choice can be beneficial if it promotes competition among providers that leads to lower prices or

improved quality” and that “for the benefits of competition to be realized, . . . consumers must be reasonably well informed about price and quality.” (CX8010 at 023-024 (¶ 57) (Athey Rebuttal Expert Report) (quoting George Lowenstein, *Is More Choice Always Better?*,

[https://www.andres.cmu.edu/user/gl20/GeorgeLowenstein/Papers\\_files/pdf/too\\_much\\_choice.pdf](https://www.andres.cmu.edu/user/gl20/GeorgeLowenstein/Papers_files/pdf/too_much_choice.pdf)) (emphasis added)). Dr. Ghose also admitted that while the Lowenstein paper “suggest[ed] that the costs can outweigh the benefits when new choices require expertise that people lack, introduce new risks when people want security, and require that people predict an inherently unpredictable future,” Dr. Ghose himself had cited no evidence that choosing an online supplier of contact lenses (i) requires expertise that people lack, (ii) introduces new risks when people want security, or (iii) requires people to predict an inherently unpredictable future. (Ghose, Tr. 4015-4018).

- (b) Dr. Ghose also cited a 2012 paper by L. Quincy and J. Silas in support of the proposition that expanded choices can impose costs on decision makers, absorbing scarce time that people would prefer to spend on other activities, resulting in decision errors and producing anxiety and regret. (RX0733 at 030 (¶ 71 & n.149) (Ghose Expert Report)). But Dr. Ghose admitted that (i) the Quincy and Silas report concerned “high-stakes decisions involving health insurance”; (2) even in that situation, Quincy and Silas concluded only that “as a guideline, . . . it appears that *more than fifteen choices* reduces a consumer’s ability to make a healthcare plan in their best interest”; and (3) Dr. Ghose had “not analyzed” whether “a consumer who can comfortably handle selecting among 15 health insurance plans” “can choose among ads for two online sellers of contact lenses without experiencing anxiety and regret.” (Ghose, Tr. 4022-4024).

- (c) Dr. Ghose cited a 2009 paper by Oulasvirta et al. in support of the proposition that consumers were more satisfied with their choice when choosing from a search engine results page with six results than a page with 24 results. (RX0733 at 031 (¶ 73) (Ghose Expert Report)). But Dr. Ghose acknowledged that this study involved only organic links and no advertisements; informational, non-commercial searches (specifically, users were asked to pick a website to answer the questions: why are Russia and Georgia at war and which country is located at the highest altitude); users given 30 seconds to choose the best result in order to answer the questions at issue, rather than unlimited time to look for a specific link to which they already had decided to navigate; consumers rating their own satisfaction with their choice; and—importantly—the “small” choice set that was rated as more favorable consisting of *six* results. (Ghose, Tr. 4025-4027).
- (d) Dr. Ghose cited a 2013 study by Pan et al in support of the proposition that “consumers facing a larger choice set spent more time overall on the search process but paid less attention to each option.” (RX0733 at 031 (¶ 73) (Ghose Expert Report)). In the Pan study, users were shown four lists of hotels (some lists of 5 and some lists of 20) on a mockup web page from an online travel agency and asked to pick a hotel room they could book from each of the four sets. (Ghose, Tr. 4027-4028). Dr. Ghose admitted that the Pan study (i) did not involve any array of results that showed only one choice; (ii) “does not show that consumers will be more satisfied with a search engine results page with one mainline ad versus four mainline ads”; (iii) cautioned that “accommodation purchases [such as hotel reservations] are more complex and cognitively demanding than consumer goods” and that “choosing a hotel might be significantly different from making a decision about everyday consumer products”); and (iv) noted that a “recent meta-analysis on choice overload, drawing on fifty experiments, shows *there is insufficient evidence of adverse effects of*

*increased choices*” and that “when consumers have a well-defined preference prior to choice, they consider it better to have more options.” (Ghose, Tr. 4029-4030). (e)Dr. Ghose cites Simonov, A., C. Nosko, and J. Rao, “Competition and Crowd-out for Brand Keywords in Sponsored Search, Working Paper (Sept. 8, 2016). (RX0733 at 0026.) This study employed a large-scale field experiment using the Bing search engine to test whether consumers who use a trademark in a search query are affected by competitor advertisements on the search results page. The study found that, when a full slate of (three) competitive ads appear below the ad for the trademark owner, the competitors took from the website of the trademark owner 4.3 clicks per 100 searches. *Id.* at 15. This confirms that users find additional competitors’ advertisements useful and valuable. Indeed, the authors concluded: “Smaller firms use the focal brand’s [consumer] awareness as a form of targeting . . . . [T]his enhances competition in a way that smaller firms, who get very little search traffic themselves, and the platforms [search engines] tend to like and larger firms tend to dislike.” *Id.* at 20.

(f) Dr. Ghose also cites Bechtold, S. and C. Tucker, “Trademarks, Triggers and Online Search,” 11 *Journal of Empirical Legal Studies* 718 (Dec. 2014). (RX0733 at 0038.) This study relied on real-world Google data to compare clicks both before and after Google changed its trademark policy in Europe. The authors tracked consumer click behavior on so-called “navigational” queries (those queries where the consumer is thought to be primarily interested in navigating to the trademark owner’s website). The study concluded that, “after the [Google] policy change, there was a 9.2 percent decrease in consumers visiting the trademark owners websites who used a search phrase that exactly matched the trademark.” *Id.* at 733. Again, this confirms that consumers benefit from additional links even if the queries entered by the consumers could be called “navigational.”

(g) Finally, Dr. Ghose cites a blog post from “a behavioral scientist at Bing,” Matt Wallaert, to define “the choice overload problem” and to support the proposition that “Bing has also recognized the possibility of ‘choice overload’ and tried to find ways to minimize it.” (RX0733 at 031 (¶ 73) (Ghose Expert Report); Ghose, Tr. 3914-3915, 4019), *in camera*. But this blog post does not in any way suggest that Bing search advertising results generally—or search advertising results that appear in response to “navigational” queries—suffer from “the choice overload problem.” To the contrary, the blog explains the steps the search engines take to show relevant results *avoids* the choice overload problem: “There are over five million pages for the search ‘best salad dressing’ and each one is a potential option. A search engine’s job is to determine the few that may be most helpful: we reduce the number of choices from millions down to the few that matter most. In search technology, this is often called ‘relevance, and it is something that search engines are always looking to improve.” (RX1963 at 001).

**1834.** Presenting additional ads for other retailers to consumers that have an intent to navigate to 1-800 Contacts’ website is likely to increase their search costs. (Ghose, Tr. 3928-31, 3989, 4007, 4009; RX 733-0038-0040 (Ghose Report); CX 9046 (Ghose, Dep. at 84, 151-52)).

**Response to Proposed Finding No. 1834:**

This proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766, 1820, and 1833.

**1835.** Presenting additional ads for other retailers to consumers that have an intent to navigate to a particular website has the potential to harm those consumers. (RX 733-0038-040 (Ghose Report); Ghose, Tr. 3928-30, 4080-81; CX 9046 (Ghose, Dep. at 84, 151-52, 175)).

**Response to Proposed Finding No. 1835:**

This proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766, 1820, and 1833.

**1836.** If presenting additional ads for other retailers to consumers that have an intent to navigate to 1-800 Contacts’ website is likely to increase their search costs, having settlement agreements in place to prevent such ads can be helpful to consumers. (Ghose, Tr. 3960, 3994; CX 9046 (Ghose, Dep. at 186)).

**Response to Proposed Finding No. 1836:**

The factual premise of this proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766, 1820, and 1833, and therefore this proposed finding is irrelevant.

**1837.** Economists have long recognized that the process of searching through alternatives before making a choice is costly. (RX 733-0028 (Ghose Report)).

**Response to Proposed Finding No. 1837:**

This proposed finding is vague in its use of the undefined and unqualified word “costly” and misleading (for the reasons set forth in response to Proposed Findings No. 1766 and 1820) insofar as it suggests that presenting consumers who enter 1-800 Contacts Branded Queries with a small number of additional advertisements, which would appear *below* the 1-800 Contacts advertisement, would be more “costly” than it would be beneficial to consumers.

**1838.** Consumers using search engines experience search costs. (RX 733-0028 to -0029 (Ghose Report); Ghose, Tr. 3912; Athey, Tr. 913, 949; CX 9043 (Athey, Dep. at 188); CX 8007-020 (Athey Report)).

**Response to Proposed Finding No. 1838:**

Complaint Counsel has no specific response.

**1839.** Empirical studies indicate that online search is costly for consumers. (RX 733-0029-0030 (Ghose Report); Ghose, Tr. 3912-13; CX 9046 (Ghose, Dep. at 74-75)).

**Response to Proposed Finding No. 1839:**

This proposed finding is vague in its use of the undefined and unqualified word “costly” and misleading (for the reasons set forth in response to Proposed Findings No. 1766 and 1820) insofar as it suggests that presenting consumers who enter 1-800 Contacts Branded Queries with the option to, if they so choose, search through a small number of additional advertisements, which would appear *below* the 1-800 Contacts advertisement and present truthful, nonmisleading information about retailers that sell the exact same products as 1-800 Contacts, often at lower prices, would be more “costly” than it would be beneficial to consumers.

**1840.** Dr. Athey agreed that consumers experience search costs online. (Athey, Tr. 913, 949; CX 9043 (Athey, Dep. at 188); CX 8007-020 (Athey Report)).

**Response to Proposed Finding No. 1840:**

Complaint Counsel has no specific response.

**1841.** Consumers’ search costs of using search engines on a mobile device are higher than on computers because the devices’ screens are smaller. (RX 733-00230 (Ghose Report); Ghose, Tr. 3916-17).

**Response to Proposed Finding No. 1841:**

This proposed finding is irrelevant to any issue in this case and should be rejected. With or without the agreements, 1-800 Contacts’ advertisement will consistently appear in the number one (i.e., top) advertising slot in response to 1-800 Contacts Branded Queries, making it easy for anyone seeking to visit 1-800 Contacts’ website to do so. (CCPTF Section XI.D.2.a (¶¶ 1938-1945)). On mobile devices, even if the screen size causes users who enter a 1-800 Contacts Branded Query see only a single result without scrolling, that result will be the 1-800 Contacts advertisement—essentially making 1-800 Contacts advertisement as prominent and in one sense even more prominent on mobile devices than on desktop computers. (Athey, Tr. 2092 (“Does the screen size of mobile devices affect this opinion that you gave here that even consumers intent on purchasing from 1-800 Contacts will be well-served absent the agreements? A. I hold this opinion

both for mobile and for PC, that the consumers will be well-served. Q. Why is that? A. Well, in all cases, the 1-800 Contacts link will be the most prominent, and generally that ad has useful information. It has deep links to the site. It has the links chosen by 1-800, so those will all – those will be there . . . that ad will take consumers to the landing page created by 1-800 and linked to the ad to give the best possible experience for the users coming to 1-800.”); CX8010 at 027 (¶ 65) (Athey Rebuttal Expert Report) (“Both sets of consumers – those interested in alternative retailers, and those intent on purchasing from 1-800 Contacts – will be well-served absent the Agreements. A user who, with the intent of purchasing contact lenses, submits a search query containing 1-800 Contacts trademark terms will see the 1-800 Contacts ad at the top followed by highly relevant competing ads, instead of less relevant organic links. On mobile devices, the smaller screen will present paid search results even more prominently above organic search results.”)).

**1842.** Screen size is particularly important given the trend that more and more searches are being done on mobile devices. (Athey, Tr. 911; Ghose, Tr. 3917).

**Response to Proposed Finding No. 1842:**

This proposed finding should be rejected because it is vague in its use of “particularly important” without any explanation of what issue or topic screen size is “particularly important” to. While Dr. Athey agreed with this general proposition, as Dr. Athey has explained—screen size is not “particularly important” to 1-800 Contacts’ arguments in this case about search costs; rather, it is irrelevant to those arguments for the reasons set forth in response to Proposed Finding No.

1841.

**1843.** Today, with respect to searches on mobile devices, paid ads are filling up the entirety of the screen. (Athey, Tr. 911).

**Response to Proposed Finding No. 1843:**

This proposed finding is unsupported and should be rejected. The sole source cited is the testimony of Dr. Athey, who, in response to the question “And one of the results of mobile devices

is that the paid ads are now filling up the entirety of the screen and the algorithmic search results are pushed further down in terms of the screen itself; correct?” replied “Yes . . . Well, sometimes they’ll – they’ll also show fewer ads on mobile . . . so it’s not a direct one-for-one.” (Athey, Tr. 911). This testimony does not support the finding that paid ads are filling up “*the entirety*” of the screen on mobile devices or that they are doing so in all instances.

Moreover, this proposed finding is irrelevant for the reasons set forth in response to Proposed Finding No. 1841.

**1844.** Approximately 50 percent of searches are conducted on mobile devices. (Athey, Tr. 912; Ghose, Tr. 3917; RX 733-0010 (Ghose Report)).

**Response to Proposed Finding No. 1844:**

This proposed finding is vague as to time, irrelevant to 1-800’s search costs arguments for the reasons set forth in response to Proposed Finding No. 1841, and irrelevant in that it describes all searches rather than either 1-800 Contacts Branded Queries or contacts lens related queries generally.

**1845.** Consumers’ search costs in using search engines depend on their intent. (Ghose, Tr. 3903-04; CX 9043 (Athey, Dep. at 47-48)).

**Response to Proposed Finding No. 1845:**

This proposed finding is exceedingly vague and therefore irrelevant.

This proposed finding is also unsupported entirely by the citation to Dr. Athey’s deposition at pages 47-48. At those pages, Dr. Athey noted only that the importance of paid search ads (as opposed to organic results) depends whether or not the person searching is “interested in engaging in a commercial transaction” because “if you’re shopping, the advertisements may be more likely to come from companies who can actually fulfill your shopping needs, while the algorithmic results might meet a wider range of possible consumer needs. So for a consumer who is shopping,

the advertisements are particularly relevant.” (CX9043 (Athey, Dep. at 47)). This testimony has nothing to do with search costs.

This proposed finding is also unsupported, misleading, and irrelevant because, while Dr. Ghose did testify at the cited pages that { [REDACTED]

[REDACTED]

[REDACTED] } and that { [REDACTED]

[REDACTED] }

(Ghose, Tr. 3904), *in camera*, this testimony—to the extent it is at all relevant to this case—relies on factual premises that are inaccurate, unsupported, and contrary to the weight of the evidence.

Specifically, if this testimony is at all relevant to this case, it relies on the premises that (1) intent

to navigate to a retailer’s website is incompatible with an interest in comparison shopping or

“searching for alternatives”; (2) the intent to navigate to a retailer’s website is the ultimate intent

of consumers rather than only an intermediate intent; and (3) even consumers with the ultimate

intent of purchasing contact lenses from 1-800 Contacts specifically – to the extent any such

consumers exist – are in any way harmed by the presence of competing advertisements appearing,

below the 1-800 advertisement, in response to a 1-800 Contacts Branded Query. For the reasons

set forth in response to Proposed Finding No. 1766, each of these premises is inaccurate,

unsupported, and contrary to the weight of the evidence.

Further, it is unclear what precise research Dr. Ghose’s testimony is referring to, Complaint Counsel notes that Dr. Ghose’s conclusions about search costs are unsupported and contradicted by much of the search-costs literature he cites in his report, as set forth in response to Proposed Finding No. 1833.

**1846.** Providing consumers with additional search results can reduce consumers’ satisfaction. (Ghose, Tr. 4013; RX 733-0030, -0031 (Ghose Report); Athey. Tr. 913).

**Response to Proposed Finding No. 1846:**

This proposed finding is vague in its use of the undefined and unqualified term “additional.” To the extent that the intention of the proposed finding is intended to mean that the additional advertisements from 1-800 Contacts’ rivals that would appear in response to 1-800 Contacts Branded Queries absent the Bidding Agreements are likely to reduce consumers’ “satisfaction” or welfare, the finding is inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1766 and 1820.

To the extent this proposed finding has any relevance to this case, it is further unsupported and contradicted by the very literature that Dr. Ghose cites in the testimony and the portion of his report cited above, as set forth in response to Proposed Finding No. 1833.

Finally, this proposed finding is unsupported entirely by the citation to Dr. Athey’s testimony that is cited in support. At page 913 of the trial transcript, Dr. Athey was asked: “if you go to your neighbor and say, ‘How do I get to Walmart? I need some supplies,’ and your neighbor says, ‘You know, we had the greatest picnic last Saturday’ and launches into a long story about the picnic and then finally gets around to telling you where the Target is and still hasn’t told you where Walmart is, you might become frustrated and dissatisfied; correct? A. Agreed.” (Athey, Tr. 913). This testimony—about being presented with a lengthy exposition of irrelevant information that is not responsive to her request before being given one piece of information that is relevant to her request (directions to the Target (*see* Athey, Tr. 714-716))—has no relation to the proposed finding. The proposed finding concerns “additional search results,” which presumably refers to the search results that appear on a search engine results page after a user enters a query. As abundant evidence in this case has made clear, the search results that a user can expect to receive are highly likely to be relevant to the user’s query and useful to the user who entered it. (*E.g.*, CCPTF Section IV).

**1847.** Empirical literature indicates that increasing the number of search engine results may reduce consumers' satisfaction with the search process. (RX 733-0031 (Ghose Report); Ghose, Tr. 4013).

**Response to Proposed Finding No. 1847:**

This proposed finding is so vague as to be rendered irrelevant insofar as it refers to "increasing" "the number of search engine results" without any description of:

- (a) what increase (from what number to what number) is being referred to,
- (b) what type of "results" are being referred to (paid or organic),
- (c) what type of search query is involved, or
- (d) if it is a commercial query, what type of product or service is involved.

This proposed finding is also vague and therefore irrelevant insofar as it states only that this nondescript increase "may" reduce consumers' satisfaction. The vague nature of this proposed finding, untethered as it is to the facts of this case, makes it unhelpful and irrelevant.

To the extent this proposed finding is intended to have any relevance to this case, and is intended to suggest that the increase in advertisements by rival contact lens retailers that would appear in response to 1-800 Contacts Branded Queries but for the Bidding Agreements would reduce consumer satisfaction or (more relevant) reduce consumer welfare, it is unsupported and contradicted by the very empirical literature that Dr. Ghose cites in the portions of his testimony and report cited in support of the proposed finding (the work of Oulasvirtaa et al. and Pan et al.), as set forth in response to Proposed Finding No. 1833.

**1848.** Dr. Athey agreed that search costs can cause consumers to become frustrated and dissatisfied and reduce consumer welfare. (Athey. Tr. 913).

**Response to Proposed Finding No. 1848:**

This proposed finding is misleading and unsupported by the cited testimony for the reasons set forth in response to Proposed Finding No. 1846.

**1849.** Many consumers find advertising annoying. (Ghose, Tr. 3936).

**Response to Proposed Finding No. 1849:**

This proposed finding is vague and irrelevant. It is particularly irrelevant in light of:

- (a) the economic principle that informative advertising benefits consumers. (Evans, Tr. 1422-1423 (“There is a very long list, consistent list of economic studies that look at the roles of informative advertising as price competition. . . . This is an area where virtually every economist who has studied this issue – there are now more than 20 studies – has found that informative advertising increases price competition and benefits consumers.”));
- (b) the evidence that all contact lens consumers—regardless of search intent—can benefit from seeing competing retailers’ ads below 1-800 Contacts’ ad (*see* CCPTF Section XI.D.2.b-c (¶¶ 1946-1954));
- (c) the evidence that consumers who search for 1-800 Contacts’ name in fact do—when presented with ads from competing retailers below the 1-800 Contacts ad—often click on and purchase from those competing retailers (*see* CCPTF Sections V.B.2 – V.B.4 (¶¶ 611-783));
- (d) the evidence that in this case, navigational searchers who enter 1-800 Contacts’ Branded Queries ultimately have a transactional intent: the purchase of contact lenses (*see* CCPTF Section XI.D.1 (¶¶ 1928-1936)); and
- (e) the evidence that rival ads are relevant to consumers who enter 1-800 Contacts Branded Queries, and that these consumers are interested in comparative price information, as set forth in response to Proposed Finding No. 1820.

**1850.** Consumers often pay to avoid seeing advertisements. (RX 739-0082 (Murphy Report)).

**Response to Proposed Finding No. 1850:**

This proposed finding is irrelevant for the reasons set forth in response to Proposed Finding No. 1849.

**1851.** The choice overload problem refers to the fact that when users have to make choices from a number of offers, the task often becomes complex and complicated, and additional information can be overwhelming. (Ghose, Tr. 3913-14; RX 733-0031 (Ghose Report); RX 1963-001).

**Response to Proposed Finding No. 1851:**

Complaint Counsel has no specific response except to note that there is no evidence or expert analysis supporting the proposition that “choice overload” exists (or would, but for the Bidding Agreements, exist) in the search advertisements that appear in response to 1-800 Contacts Branded Queries, for the reasons set forth in response to Proposed Findings No. 1766, 1820, and 1833.

**1852.** According to a behavioral scientist at Bing, “even though it seems like more choices should always be better, we are actually less happy when we have too many choices. This is because of a phenomenon psychologists call choice overload and if you’ve ever stood in the salad dressing aisle at your local supermarket, you know exactly what it is.” (RX 1963-001).

**Response to Proposed Finding No. 1852:**

This proposed finding should be rejected because it is inadmissible for the truth of the matter, as “a behavioral scientist at Bing” is not qualified as an expert in this matter and possesses no relevant personal knowledge. In addition, no evidence or expert analysis supporting the proposition that “choice overload” exists (or would, but for the Bidding Agreements, exist) in the search advertisements that appear in response to 1-800 Contacts Branded Queries, for the reasons set forth in response to Proposed Findings No. 1766, 1820, and 1833.

**1853.** According to a behavioral scientist at Bing, there are “several reasons that having too many choices can make us unhappy: “First, it can create post-decisional regret, sometimes called buyer’s remorse: that feeling you get after you make a decision and instantly start worrying that another option might have been better. The more options, the more worry.” (RX 1963-001).

**Response to Proposed Finding No. 1853:**

This proposed finding should be rejected for the same reason as Proposed Finding No.

1852.

**1854.** According to a behavioral scientist at Bing, “even if we end up with choice we are confident about, more choices mean that searching takes longer. So even when we find something that makes us happy, our enjoyment is reduced by the time we spent sorting through the options.” (RX 1963-001).

**Response to Proposed Finding No. 1854:**

This proposed finding should be rejected for the same reason as Proposed Finding No.

1852.

**1855.** According to a behavioral scientist at Bing, “when the choice set gets too big, we may just give up. It is like looking at a line of people outside a theater and leaving because you feel like you’ll just never get inside; too much choice can cause us to abandon the things that we truly want.” (RX 1963-001).

**Response to Proposed Finding No. 1855:**

This proposed finding should be rejected for the same reason as Proposed Finding No.

1852, and for the additional reason that this analogy is totally inapposite. A line outside a movie theater might indeed mean that “you’ll just never get inside” because all the seats will fill up. This has absolutely nothing to do with search advertising.

**1856.** A user who suffers from the choice overload problem may completely abandon the search process. (Ghose, Tr. 3915; RX 733-0031 (Ghose Report); RX 1963-001).

**Response to Proposed Finding No. 1856:**

This proposed finding should be rejected because it is outside the scope of the opinions offered in Dr. Ghose expert report. See Ghose, Tr. 3915-3916 (objection that it is outside the scope of Dr. Ghose’s report). The opinion that consumers may abandon the search does not appear on the cited page. At trial, Respondent’s counsel suggested the opinion was contained in footnote 153 of Dr. Ghose’s report, but that footnote does not express an opinion, it simply offers an

extended quote from a blog post by “a behavioral scientist at Bing.” See RX 733-0031 at n. 153 (Ghose Report). The quotes from this blog post are not admissible evidence, as detailed above in Responses to Proposed Findings 1852-1855. And the suggestion that consumers may abandon the search process because it’s like a long line outside a movie theater is particularly objectionable, unsupported, and does not constitute an opinion Dr. Ghose expressed in this matter. See Response to Proposed Finding 1855; see also RX1963 (blog post attributed “to a behavioral scientist at Bing”).

**1857.** According to a behavioral scientist at Bing, psychologists have developed strategies to deal with “choice overload” that “focus on narrowing down the set of options,” or “choice reduction.” (RX 1963-001).

**Response to Proposed Finding No. 1857:**

This proposed finding should be rejected for the same reason as Proposed Finding No. 1852.

**4. *Additional Ads Would Deprive Consumers Of Information That Complaint Counsel Have Not Valued***

**1858.** When more paid ads appear on a search engine results page, organic results are pushed further down the page. (Athey, Tr. 2082).

**Response to Proposed Finding No. 1858:**

Complaint Counsel has no specific response except to note that insofar as this proposed finding suggests that the appearance of ads from rivals to 1-800 Contacts, below the ad for 1-800 Contacts itself, in response to 1-800 Contacts Branded Queries causes harm to consumers by pushing the organic link to 1-800 Contacts “further down the page,” it is unsupported, misleading, inaccurate and contradicted by the weight of the evidence for the reasons set forth in response to Proposed Finding No. 1766, including the evidence that if the Bidding Agreements were to be rescinded, (a) users who want to find 1-800 Contacts’ website would still be able to do so easily, as 1-800 Contacts’ advertisement would remain in the first position (see CCPTF Section XI.D.2.a

(¶¶ 1938-1945)), (b) users who initially intend to purchase from 1-800 Contacts would benefit from the additional information and additional choices provided by rival ads (*see* CCPTF Section XI.D.2.b (¶¶ 1946-1951)), and (c) even consumers who still ultimately purchase from 1-800 Contacts would benefit from the existence of competing offers (*see* CCPTF Section XI.D.2.c (¶¶ 1952-1954)).

**1859.** Dr. Athey did not quantify the value in terms of social welfare of organic results that would be pushed down the search results page by the additional paid ads for other retailers that she says would appear in response to a search for 1-800 Contacts absent the settlement agreements. (Athey, Tr. 2082-83; CX 9043 (Athey, Dep. at 180)).

**Response to Proposed Finding No. 1859:**

This proposed finding is irrelevant for the reasons set forth in response to Proposed Finding No. 1859. It is also misleading in that, while Dr. Athey did not “quantify” the value of the organic results pushed down the page in the sense that she “didn’t come up with a bottom-line number,” she did consider “facts relevant to” the value of those organic results in her analysis. (Athey, Tr. 2082-2083), as described in more detail in the response to Proposed Finding No. 1824.

**1860.** Dr. Athey did not compare the value of additional paid ads for other retailers that she says would appear in response to a search for 1-800 Contacts absent the settlement agreements with the value of any organic results that such ads would push down the search result page. (Athey, Tr. 2083; CX 9043 (Athey, Dep. at 281-82)).

**Response to Proposed Finding No. 1860:**

This proposed finding is irrelevant and misleading for the reasons set forth in response to Proposed Findings No. 1859 and 1860.

***E. Applying Dr. Athey’s Own Model Demonstrates That The Settlements Increased Output Of Online Contact Lens Sales***

**1861.** Assessing whether total consumer welfare was reduced as a result of the settlements requires a determination of the impact of the settlements on all buyers. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 1861:**

Complaint Counsel objects that the proposed finding is a legal conclusion concerning what proof is required in an antitrust case. The proposed finding is also unclear to the extent that it refers to “total consumer welfare” because the term of art “consumer welfare” is typically used in economics to distinguish consumer welfare from total welfare, which combines the welfare of both producers and consumers. The following proposed finding (Proposed Finding No. 1862), which references “total welfare,” without the word “consumers,” compounds the lack of clarity.

Moreover, even if the proposed finding is intended to apply to consumer welfare only, it is not relevant—and it has been addressed by Complaint Counsel’s experts. Any savings achieved by one group of consumers from purchasing contact lenses at a lower price will lower the average price paid and improve average consumer welfare. (*See* CCPTF Section IX.D (¶¶ 1487-1495)). And there is no evidence in this case that the benefit from lower prices also caused another group of consumers to pay higher prices or bear higher search costs. (*See* CCPTF Section XI.D (¶¶ 1928-1954); *see also, e.g.*, CX8010 at 024-028 (¶¶ 59-68) (Athey Rebuttal Expert Report)). Thus, there is no tradeoff of harms and benefits as the finding suggest.

Additionally, this proposed finding is inaccurate and unsupported insofar as its use of the vague and undefined term “impact” suggests that any claimed procompetitive efficiencies of the agreements must be weighed against the Bidding Agreements’ anticompetitive effects even if the claimed efficiencies are not cognizable as a matter of law, are not recognized as procompetitive efficiencies under the principles of antitrust economics, or have not been proven in this case as a factual matter.

Finally, this proposed finding and all findings in this section are misleading, inaccurate, and unsupported as they appear under a heading titled “Applying Dr. Athey’s Own Model Demonstrates That The Settlements Increased Output Of Online Contact Lens Sales.” As

explained further below, the analysis that Dr. Murphy conducted regarding conversion rates does *not* show that the Bidding Agreements increased the output of contact lenses or the output of “contact lens sales.” And Dr. Murphy even disclaimed that this analysis was intended to make such a showing. Dr. Murphy has expressly denied that the “analysis” referred to in this section of Respondent’s proposed finding supports Respondent’s assertion that but for the bidding agreements, consumers who searched for 1-800 Contacts’ trademarks would have made fewer purchases of contact lenses. (Murphy, Tr. 4235 (“Q. Now, Dr. Murphy, are you suggesting that your analysis shows that in a but-for world, absent the settlements, that fewer people are going to buy contact lenses? A. I don’t think that’s the way you would interpret this.”)). Indeed, Dr. Murphy has candidly explained that the “analysis” which Respondent now calls a “predict[ion]” was an illustration of a point, using illustrative rather than predictive numbers. (CX9048 (Murphy, Dep. at 265-266 (“the effect on sales could go either way . . . *I am not saying this proves sales would go down in a but-for world*, it just says if you use the averages they go down and it illustrates my point that just having more ads you would say isn’t unambiguous that it just creates more [sales]. That is all I am saying. That is what it [sic] point of this is.”) (emphasis added)); *see also* Response to Proposed Finding No. 1871).

**1862.** It is not sufficient to assess whether the settlements reduced total welfare to analyze the settlements’ effects only on buyers who may have purchased from lower priced competitors in a but-for world without the settlements. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 1862:**

This proposed finding is objectionable, vague, and irrelevant for the reasons set forth in response to Proposed Finding No. 1861. Moreover, to be clear, Complaint Counsel’s experts have analyzed the effect of the Bidding Agreements on all consumers, including specifically considering those who wish to navigate directly to 1-800 Contacts’ website and have (and retain) the ultimate intent of purchase specifically from 1-800 Contacts. (*See* CCPTF Section XI.D ¶¶

1928-1954); *see also, e.g.*, CX8010 at 027 (¶ 65) (Athey Rebuttal Expert Report) (“Both sets of consumers – those interested in alternative retailers, and those intent on purchasing from 1-800 Contacts – will be well-served absent the Agreements. A user who, with the intent of purchasing contact lenses, submits a search query containing 1-800 Contacts trademark terms will see the 1-800 Contacts ad at the top followed by highly relevant competing ads, instead of less relevant organic links. On mobile devices, the smaller screen will present paid search results even more prominently above organic search results.”)).

**1863.** Even if in the but-for world average contact lens prices paid by users would be lower, consumers as a whole still could be harmed because in quality adjusted terms average contact lens prices could be higher. (RX 739-0083 (Murphy Report); CX 9042 (Evans Dep. at 202)).

**Response to Proposed Finding No. 1863:**

Complaint Counsel objects that the proposed finding is a legal conclusion concerning what proof is required in an antitrust case. The proposed finding is also unsupported by the citation to Dr. Evans’ deposition. In the cited portion of his deposition, Dr. Evans was responding to a hypothetical question, over an objection that it called for a legal conclusion, and in doing so was discussing one approach (which his testimony made clear was not the only approach) for evaluating anticompetitive harm in an antitrust case. He was not opining about this case or the online contact lens market specifically, and even if he had been, his statements still would not support the proposed finding here. (*See* CX9042 (Evans, Dep. at 201-202)).

The proposed finding is also inaccurate, unsupported, misleading, and contrary to the weight of the evidence to the extent it suggests that prices “in quality adjusted terms” would in fact be higher in the but-for world than they are today. There is no evidence to support the speculative statement that “in quality adjusted terms average contact lens prices could be higher.” There is also no reason to believe that consumers would switch from one contact lens retailer to another if they did not prefer the combination of price and service the new retailer offered; as

such, there is no reason to believe that a consumer making such a choice is worse off than the consumer would be if she did not have the information available to make that choice. Presented with additional information, consumers switch because the offering (including price and quality) of the lower-priced retailer is preferable to the price and quality offered by 1-800 Contacts. (See CX8010 at 047 (¶¶ 119-120) (Athey Rebuttal Expert Report) (“Dr. Murphy claims that since there is evidence of a customer service quality differential between 1-800 Contacts and competitors, if consumers purchase from competing retailers in the counterfactual, consumer welfare would decrease due to lower average quality. *Dr. Murphy ignores the process by which consumers make purchasing decisions. When a consumer is aware of the range of retailers available and the price differentials between them, the decision to purchase from a lower-priced retailer is made because it provides maximum overall utility.* As detailed in my report, the price premium charged by 1-800 Contacts is not justified by the service provided to that consumer. [But e]ven if it were, providing consumers with information on competitive offerings allows them to make better informed purchase decisions. . . . Consumers who are willing to pay the price premium charged by 1-800 Contacts are well-served by paid search results absent the Agreements . . . Other consumers benefit from information about lower-priced offerings, and of course *in the long run, competitive forces incentivize firms to provide both low prices and high quality. This competitive process relies crucially on consumers having enough information to compare alternative offerings.*”) (emphasis added)).

**1864.** The typical way economists evaluate whether particular conduct causes quality adjusted prices to be higher or lower is to investigate whether the conduct caused an increase or decrease in total output. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 1864:**

Complaint Counsel objects that the proposed finding is a legal conclusion concerning what proof is required in an antitrust case. Complaint Counsel disagrees that there is a “typical way” for

economists to investigate allegedly anticompetitive conduct. Because this case involves a facially anticompetitive advertising restraint, the proposed finding is incorrect as to the appropriate antitrust or economic analysis of the Bidding Agreements. In addition, there is strong direct and indirect evidence of harms resulting from suppressed advertising and price competition.

**1865.** [REDACTED]

[REDACTED] (RX 739-0083 (Murphy Report); CX 8007-032 (Athey Report); Murphy, Tr. 4135-36).

**Response to Proposed Finding No. 1865:**

Complaint Counsel has no specific response. (*See also* CCPTF ¶ 1442).

**1866.** [REDACTED]

[REDACTED] (RX 739-0083 (Murphy Report); Murphy, Tr. 4136)).

**Response to Proposed Finding No. 1866:**

Complaint Counsel has no specific response except to note that Dr. Murphy also reported that 1-800 Contacts conversion rate as reported in its own “internal AdWords data was 22% for its trademark terms” (RX0739 at 029 (¶ 68 n.80) (Murphy Expert Report)) and that Dr. Athey concluded, based on some of the same 1-800 Contacts data files that Dr. Murphy cited, that its conversion rate on such terms was 20.7% (CX8010 at 064 (Exhibit J) (Athey Rebuttal Expert Report)).

**1867.** [REDACTED]

[REDACTED] (RX 739-0083 (Murphy Report); Murphy, Tr. 4134-36).

**Response to Proposed Finding No. 1867:**

This proposed finding is irrelevant, misleading, and unsupported. While Complaint Counsel does not disagree that 0.27 conversions per click multiplied by 2 clicks equals 0.54

conversions, this calculation is irrelevant unless one assumes that every consumer who clicks on a 1-800 Contacts ad is equally likely to convert (make a purchase) at 1-800 Contacts after clicking on its advertisement. But there is no support for assuming that this average conversion rate is appropriate to apply to the two clicks per 100 searches that switch from the 1-800 Contacts ad to the rival ad. Specifically, Respondent has not produced any evidence or expert analysis to exclude the possibility that the 2 clicks per 100 searches that are made on the 1-800 ad in the status quo but made on a lower-priced rival's ad in the counterfactual represent clicks made by particularly price-sensitive shoppers (the consumer at the margin), that such marginal consumers are less likely to convert at 1-800 Contacts website after clicking on its ad than the average person who clicks on 1-800 Contacts' ad, or that such marginal consumers are more likely to convert after clicking on a lower-priced rival's ad in the counterfactual than is the average person who clicks on a rival's ad in the status quo. Without excluding or explaining away these or other possibilities, the application of an average conversion rate at 1-800 Contacts to these marginal consumers is irrelevant, and the conclusion that but for the agreements, 1-800 Contacts would have lost sales to .54 customers per 100 searches is misleading and unsupported.

**1868.** [REDACTED]  
[REDACTED] (RX 739-0083 (Murphy Report); CX 8007-032 (Athey Report);  
Murphy, Tr. 4135-36).

**Response to Proposed Finding No. 1868:**

Complaint Counsel has no specific response. (*See also* CCPTF ¶ 1442).

**1869.** [REDACTED]  
[REDACTED] (RX 739-0083 (Murphy Report); Murphy, Tr. 4136).

**Response to Proposed Finding No. 1869:**

This proposed finding is vague, irrelevant, misleading, unsupported, and contrary to the weight of the evidence. First, this proposed finding is vague as to which particular retailers' conversion rates it is referring to. It is therefore irrelevant.

Second, to the extent this proposed finding purports to represent the conversion rate of any particular firm or any group of firms whose ads would appear in response to 1-800 Contacts Branded Queries in the but-for world (without the Bidding Agreements), it is misleading, inaccurate, unsupported, and contradicted by the weight of the evidence because:

- (a) This “approximately 10 percent” figure is based on data from *only three firms*: Lens Direct, Wal-Mart, and Memorial Eye. (RX0739 at 030-031 (¶ 73 & n.82) (Murphy Expert Report)). There is no support for applying this conversion rate figure to any other firms. In fact, it is inadvisable to compare conversion rates across firms because firms (including those in this industry) do not all define conversion in the same way. (CX8010 at 041 (¶ 98 n.103) (Athey Rebuttal Expert Report) (describing the different ways that Walmart and Lens Direct define conversions); CX9043 (Athey, Dep. at 283 (“[I]t’s a little bit difficult to compare conversion rates across firms because the conversion rate is defined differently by different firms . . . Q. And fair to say that most of the firms at issue in this case define a ‘conversion’ as a purchase, right? A. So I think some define ‘conversions’ including app downloads. Others define ‘conversion as reaching a secure page. So there’s a range of definitions among firms in the case”))).
- (b) The “approximately 10 percent” figure is based on the observed performance of Lens Direct, Wal-Mart, and Memorial Eye *in the status quo* (that is, with most other firms subject to the Bidding Agreements). To use these observed conversion rates to make predictions about conversion rates in the but-for world requires assuming that, but for the Bidding Agreements, these same firms (or firms with identical conversion rates) would be

the only firms showing advertisements in response to 1-800 Contacts Branded Queries. But there is no support for such an assumption. Indeed, that assumption would suggest that the Bidding Agreements had no effect whatsoever on which firms' advertisements appear in response to 1-800 Contacts Branded Queries. As described below, this assumption is also directly contradicted by Dr. Athey's model.

Respondent compounds this error by (in Proposed Findings No. 1870 and 1871) multiplying these *observed, status-quo* conversion rates by *predicted, counterfactual* changes in click-through rates. Such an exercise would make sense only if one assumed *both* that the Bidding Agreements had no effect whatsoever on which firms' advertisements appear in response to 1-800 Contacts Branded Queries, *and* that the agreements somehow still managed to change where on the page users click. That is nonsensical, internally inconsistent, and certainly not the prediction of Dr. Athey's model—on which Dr. Murphy's conversion rate analysis is supposedly based.

What Dr. Athey's model *did* predict was a change in the set of firms whose ads would be displayed in response to 1-800 Contacts Branded Queries, and a *resulting* change in the clicks that each 1-800 Contacts' and rivals' ads on those results pages would receive. (CCPTF ¶¶ 1444-1448). Dr. Murphy is being inconsistent in accepting Dr. Athey's prediction that removing the settlement agreements would increase the number of rival clicks by allowing stronger rivals to bid without also allowing for the possibility that these stronger rivals would obtain higher conversion rates than would current bidders.

(c) Moreover, Dr. Athey not only predicts that the rival firm advertisements that would appear in response to 1-800 Contacts Branded Queries in the counterfactual would be more numerous than and different from those that appear today; she also specifically predicts that the set of firms that would show advertisements in response to 1-800 Contacts

Branded Queries in the counterfactual would be “a strong set of firms with *higher conversion rates* generally” than the firms that appear in the status quo—that is, conversion rates higher than those of Lens Direct, Walmart, and (during the time before it signed its agreement) Memorial Eye. (CCPTF ¶¶ 1444-1448; Athey, Tr. 2081 (“I’m predicting that there’s a stronger set of firms with higher conversion rates generally” that show ads in response to 1-800 Contacts Branded Queries in the counterfactual); *see also* 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.”)).

As explained further in Complaint Counsel’s Proposed Findings of Fact and Dr. Athey’s testimony and reports, her model predicted this increase in firm quality or strength based on information that her comScore data revealed about different firms’ “brand effects,” that is, differences in how firms perform when they each appear in the same ad position. (*See* CCPTF ¶¶ 1444-1448).

The specific firms whose status quo conversion rates Dr. Murphy relies on had relatively weak brand effects compared to other firms. (*E.g.*, Athey, Tr. 816 (“Memorial Eye, is not a particularly strong advertiser, so when I compare the performance of Memorial Eye in Dr. Evans’ data to performance of advertisers in my data, an advertiser that looks more similar to Memorial Eye in terms of performance might be something like Walmart, . . . which had a lower click-through rate than average.”); 833-834 (testifying

that, in terms of brand effects, only two firms about which Dr. Athey had data were “weaker” than Memorial Eye while 21 were “stronger”); 836 (testifying that Walmart was “comparable to Memorial Eye” “in terms of its click-through rates,” which “incorporate[] name recognition as revealed by consumer behavior”); CX8007 at 107-108 (App’x D: Multinomial logit results) (showing the brand effect coefficients about which Dr. Athey testified, which reflect average consumer preference for each retailer, controlling for the ad position on the page, whether the retailer was searched for, and other factors, with larger (less negative) coefficients reflecting stronger brand effects and smaller (more negative) coefficients reflecting weaker brand effects; specifically showing that, for example, 1-800 Contacts (coefficient -4.593) has a stronger brand effect than Web Eye Care (coefficient -4.801), which in turn has a stronger brand effect than either Walmart (-5.507) or Lens Direct (-5.534)).

(d) Other evidence is consistent with the prediction that Memorial Eye, Lens Direct, and Walmart’s observed performance on 1-800 Contacts Branded Queries *underestimates* the performance that can be expected of rival contact lens firms on 1-800 Contacts Branded Queries in the counterfactual world, once the parties to the Bidding Agreements are free to show their ads in response to those queries. For example:

- i. Out of a group of twelve firms for which online contact lens sales revenue information was available, Lens Direct had the lowest 2015 revenue (ranking twelfth out of the twelve firms) and Walmart also was in the lower half of performers (ranking eighth out of the twelve firms). (CX8007 at 044 (Exhibit C: Revenue Comparison of Contact Lens Retailers Selling Online) (Athey Rebuttal Expert Report)).

- ii. Other evidence shows that Memorial Eye is a small firm compared to several better known, larger rivals. (CCPTF ¶ 1465).
- iii. Walmart is “not an effective proxy for how online competitors would have performed in the but-for world” because “Walmart’s prices are not significantly lower than those of 1-800 Contacts” and Walmart has historically not focused heavily on its online contact lens business, which it sees largely “as a service for in-store customers rather than as an important standalone business.” (CX8006 at 090 (¶ 196 n.211) (Evans Expert Report); CX9037 (Owens, Dep. at 19-20); CX9033 (Mohan, Dep. at 17 (the contact lens business is not a priority for Walmart), 19, 40-41 (unlike other departments such as electronics and groceries, the contact lens business is not seen by Walmart as a way to keep customers coming back to Walmart), 93-95, 167, 170 (contact lenses are not a “bread and butter” business for Walmart))).
- iv. While data on conversions for ads shown on 1-800 Contacts Branded Queries do not exist for most of the parties to the Bidding Agreements (because the Bidding Agreements prevented their ads from appearing on those queries), the evidence suggests that these firms’ conversion rates on 1-800 Contacts Branded Queries would be equal to or higher than their conversion rates are on other queries. For the few firms that did show ads on 1-800 Contacts Branded Queries, { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Athey, Tr. 764-765; CX8010 at 064 (Exhibit J) (Athey Rebuttal Expert Report), *in camera* (showing that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }); *see also generally* CCPTF Section V.B (compiling qualitative and quantitative evidence of the particularly commercially significant nature of 1-800 Contacts Branded Queries, owing to their volume, 1-800 Contacts' prominence, and the price gap between 1-800 Contacts and its rivals, among other factors).

If 1-800 Contacts' lower priced rivals generally perform better on 1-800 Contacts Branded Queries than they do on generic queries and branded queries for other firms, and if the brand strength of many parties to the Bidding Agreements is stronger than that of Walmart, Lens Direct, and Memorial Eye (as measured by performance in response to queries unaffected by the agreements, and as set forth above), both of these findings point in the direction of many of the parties to the Bidding Agreements tending to have better conversion rates on 1-800 Contacts Branded Queries than Walmart, Lens Direct, and Memorial Eye do.

- (e) Because the 10% figure is an underestimate of what rival conversions would likely be in the but-for world, Dr. Evans' use of Memorial Eye's status-quo conversion rate in his predictions about conversion in the but-for world was an exercise in conservatism, used only to estimate a lower bound.<sup>2</sup> (CX8009 at 084 (¶¶ 155-156 & n.193); Murphy, Tr. 1619-

---

<sup>2</sup> Note also that in contrast to Dr. Athey, Dr. Evans' model did not try to capture the change in advertiser quality in the but-for world. Rather, Dr. Evans examined the actual historical

1620, 1625; *see also generally* CCPTF Section IX.B.6.a (¶¶ 1465-1466)). By contrast, Respondent attempts to use Dr. Murphy’s illustrative analysis for a task requiring much more precision with respect to predicted conversions: drawing a comparison between predicted increased sales by rivals and predicted decreased sales by 1-800 Contacts. As described herein and in response to Proposed Finding No. 1871, the conservative 10% conversion figure is inappropriate and misleading as used in Dr. Murphy’s analysis.

- (f) Finally, this proposed finding is irrelevant and misleading because conversions are not the only or even the best measure to use in evaluating the effect of the Bidding Agreements on consumer welfare.

As Dr. Athey explained “impressions, clicks and conversions are all independently relevant.” Regarding impressions, “if a consumer sees your advertisement, they become aware of your firm. And often the advertisements have additional information, like information about free shipping, introductory discounts to consumers, availability, things about service, and so on, and so the impression has value. And that’s one reason advertisers will track that separately.” Regarding clicks, “[w]hen a user clicks, that means the user has visited your website. And so once a consumer visits your website, they’re more likely to purchase there both now and in the future. And by visiting the website, the consumer gains additional information. There’s going to be more information about pricing and availability by visiting the website. Regarding conversions, while “[o]f course, every firm care about sales . . . not all conversions will occur in the window tracked by this

---

experience of one advertiser over a long period of time. Accordingly, his use of that advertiser’s average conversion rate is consistent with the scope and purpose of his analysis. Dr. Athey, however, modeled a change in advertiser quality, making it inappropriate to use an historical conversion rate for only three advertisers, none of which reflects the change in advertiser quality captured by the model.

click. So the conversions that you will see here in the – in the metrics don't include the full value of the user visiting the website.” (Athey, Tr. 722-723).

Dr. Athey chose to focus her analysis on clicks “because clicks are the common currency of search engine advertising. Indeed, it's called pay-per-click advertising. . . . even though advertisers care about conversions as well, the click is the currency for several reasons. Clicks are what you pay for partly because both the advertiser and the search engine can observe a click, so they both – everybody knows when a click occurs. That's completely unambiguous. While the conversions per click can be affected by the advertiser, for example, you know, if they stocked out or their website crashed or their checkout crashed or something else happened, that would be outside the search engine's control, but it would affect the conversions per click. In addition, conversions occur less often, and so the search engine needs to measure how good this ad is, how well it's performing, and it would be harder to do that accurately and to break that data out by position and by firm and by query on . . . a less frequent metric. So clicks, in summary, are easier to measure, occur more often, can be measured more reliably and consistently.” (Athey, Tr. 723-724).

Dr. Athey further explained that Dr. Murphy's “attempt[] to examine the change in consumer welfare by considering change in total output, proxied by measured conversions” “is ill-suited to the case at hand” because “[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. Thus, it is more instructive to consider the information available to consumers, and whether that information is relevant to the purchase process. . . . By focusing solely on measured conversion rates, Dr. Murphy misses important factors which affect consumer welfare, namely information and reduced search costs, and ignores

relevant aspects of the case at hand, namely that contact lenses are not typically a discretionary product and the consumer has significant incentive not to abandon her purchase.” (CX8010 at 051 (¶ 133) (Athey Rebuttal Expert Report)).

For these reasons, Dr. Murphy’s “analysis” of conversions does not actually show that the Bidding Agreements increased *output* of contact lenses or that in the but-for world, output would be lower than it is in the presence of agreements, as explained further in response to Proposed Finding No. 1871.

**1870.**

[REDACTED] (RX 739-0083, -0084 (Murphy Report); Murphy, Tr. 4136)).

**Response to Proposed Finding No. 1870:**

This proposed finding is irrelevant, misleading, nonsensical, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1867 and 1869.

This proposed finding is also irrelevant and misleading because, for the same reasons that it is inappropriate to use a 10% conversion rate (as set forth in response to Proposed Finding No. 1870), it is not appropriate to apply the 10% conversion rate to only the *incremental* 3.5 clicks per 100 searches that Dr. Athey’s model predicts rival ads would receive in the counterfactual. In doing each of these things, Dr. Murphy ignores the change in competitive dynamics and improvement in quality for the whole page that are predicted by Dr. Athey’s model—revealing his lack of understanding of the counterfactual model.

Dr. Athey’s model does not predict that, but for the Bidding Agreements, the same few rival ads that do currently appear on 1-800 Contacts Branded Queries would still appear in the same positions with the same number of clicks and conversions they currently receive, and that the

only change would be that a few more ads would also appear. Such an understanding of the model would be mistaken.

What Dr. Athey's model actually predicts is entirely new page layouts in the counterfactual, based on the result of competitive dynamics that would play out in the auctions for the 1-800 Contacts Branded Queries when more and stronger firms are freed from the Bidding Agreements and able to compete for placement those queries. (*E.g.*, 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. 769-770 (explaining that the counterfactual ad layouts she constructed would 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"); *see also* CCPTF ¶¶ 1411-1426; CX8007 at 030-031 (¶¶ 89-91) (Athey Expert Report)).

As such, to the extent one seeks to examine conversions in the counterfactual, it is not supported, logical, or appropriate to examine only the conversions occurring in response to the incremental clicks—and to hold constant the conversions that we see today as a result of the few rival ads that do appear. There is no reason to believe that those same ads would appear or appear in the same positions (or that if they did, they would yield the same conversions they do today). Rather, as a result of the competitive dynamics of more and stronger firms vying for ad space on 1-800 Contacts Branded queries, it is to be expected that some weaker firms' ads that appear today would be pushed down the page or replaced entirely by ads from stronger competitors—competitors with higher conversion rates, as described in response to Proposed Finding No. 1869.

1871. [REDACTED]

[REDACTED] Report)).

(RX 739-0084 (Murphy

**Response to Proposed Finding No. 1871:**

This proposed finding is irrelevant, misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1866, 1867, 1869, and 1870 and because:

- (a) Dr. Murphy has expressly denied that the “analysis” referred to in the proposed finding supports Respondent’s assertion that but for the bidding agreements, consumers who searched for 1-800 Contacts’ trademarks would have made fewer purchases of contact lenses. (Murphy, Tr. 4235 (“Q. Now, Dr. Murphy, are you suggesting that your analysis shows that in a but-for world, absent the settlements, that fewer people are going to buy contact lenses? A. I don’t think that’s the way you would interpret this.”)). Indeed, Dr. Murphy has candidly explained that the “analysis” which Respondent now calls a “predict[ion]” was an illustration of a point, using illustrative rather than predictive numbers. (CX9048 (Murphy, Dep. at 265-266 (“the effect on sales could go either way . . . **I am not saying this proves sales would go down in a but-for world**, it just says if you use the averages they go down and it illustrates my point that just having more ads you would say isn’t unambiguous that it just creates more [sales]. That is all I am saying. That is what it [sic] point of this is.”) (emphasis added))).
- (b) And in fact, his analysis does not make any showing that the Bidding Agreements increased *output* of contact lenses (or the output of “contact lens sales”). As Dr. Athey has explained, there is no evidence—and it would be illogical and contrary to the weight of the evidence available to conclude—that any consumers who went to the trouble of obtaining a

contact lens prescription would be unlikely to purchase contact lenses at all. (CX8010 at 051 (¶ 133) (Athey Rebuttal Expert Report) (Dr. Murphy’s “attempt[] to examine the change in consumer welfare by considering change in total output, proxied by measured conversions” “is ill-suited to the case at hand” because “[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. . . . By focusing solely on measured conversion rates, Dr. Murphy . . . ignores relevant aspects of the case at hand, namely that contact lenses are not typically a discretionary product and the consumer has significant incentive not to abandon her purchase.”)). Thus, not only are Dr. Murphy’s calculations regarding conversion rates flawed as described herein, but also, the leap that he and Respondent make from that flawed conversion rate to a conclusion about the output of contact lenses is unsupported and contrary to the weight of the evidence.

- (c) Another reason that Dr. Murphy’s work does not support any conclusion regarding the Bidding Agreement’s impact on overall sales is that the analysis he presented was limited to an estimate of orders “per one hundred searches” for a 1-800 Contacts trademark term, and Dr. Murphy expressed no opinion regarding the total number of searches that would be run in the counterfactual world. (Murphy, Tr. 4232 (“That’s per hundred searches. Because everything is done here per hundred searches.”); CX9048 (Murphy, Dep. at 58-59) (“you can tell me they can go do another [search], that is fine, they can do another [search] . . . [m]aybe they go back to their eye care professional, maybe they do it another way, maybe they do another search another day.”)). In the counterfactual world, consumers who searched for 1-800 Contacts’ trademarked term would see additional ads. This could increase the frequency with which consumers would engage in comparison shopping – i.e., click on 1-800 Contacts’ rival’s link to check prices, and then run a new search (or click

the back button) to see how those prices compare to 1-800 Contacts' prices. An increase in this behavior would increase the total number of searches, thus in order to make a prediction regarding total sales in the counterfactual world, Dr. Murphy would have had to model how consumers' comparison shopping behavior would change in the counterfactual world. He did not do so, nor did he provide any reason to believe that comparison shopping behavior would not change or conduct any analysis of the issue in an effort to make a prediction regarding sales in the but-for world. This is work that Dr. Murphy undoubtedly would have performed if his analysis was intended to, or sufficient to, support Respondent's suggestion that his analysis "predicts that the settlement agreements increased conversions in response to searches for 1-800 Contacts' trademarks." (*See* Proposed Finding No. 1872).

- (d) Dr. Murphy lacked the information necessary to make any prediction regarding *sales* (or conversions) based on Dr. Athey's evidence regarding *clicks*, and he made no attempt to arrive at reliable estimates of the necessary information, which would necessarily include an assessment of the conversion rates of that both 1-800 Contacts and its rivals would experience in the counterfactual world. (Murphy, Tr. 4237). As noted above, estimating such a conversion rate would be complex because in the counterfactual world predicted by Dr. Athey's model, conversion rates would "[a]bsolutely" differ from the conversion rates in the "actual world" distorted by the Bidding Agreements, as advertisements from "a stronger set of firms" would appear. (Athey, Tr. 2079-2080; *see also* Response to Proposed Finding No. 1869).

Instead of attempting to calculate a reliable rate for an appropriate set of competitors in the counterfactual world, Dr. Murphy casually assumed that an appropriate conversion rate for "all competitors" in the counterfactual world would be {█}, based

on incomplete data relating to three relatively unsuccessful competitors in the “actual world” and made no effort to assess whether the stronger rivals that would be able to display advertisements in the counterfactual world (e.g., Walgreens, AC Lens, Vision Direct) would attract conversions at a higher rate than {█}. (Murphy Tr., 4226-4227; Murphy, Tr. 4228-4230; Response to Proposed Finding No. 1869). Indeed, he did not even provide any reason to believe that the {█} rate was indicative of other competitors whose ads are shown in the “actual world.” For example, Dr. Murphy conceded that the far higher conversion rate attained by Lens Discounters ({█}) in the “actual world” would lead to an increase in the total number of orders in the counterfactual world, if applied—per his method of “analysis”—to the incremental {█} that rivals would achieve in the but-for world. (Murphy, Tr. 4240).

Likewise, Dr. Murphy readily acknowledged that he did not know the conversion rate that 1-800 Contacts would have recognized on the incremental {█} {█} it would lose in the counterfactual world. (CX9048 (Murphy, Dep. 265) (“I don’t think you know whether the conversion rate on those incremental ones would be higher or lower than {█}, I don’t think you know which way it goes.”)). As noted above, even if status-quo conversion rates were appropriate (and Dr. Murphy has not shown that they are), Dr. Murphy’s analysis would be unreliable: Dr. Athey reported a 20.7% conversion rate for 1-800 Contacts advertisements appearing in response to searches for its trademark terms and Dr. Murphy himself reported not only a 27% figure but also an alternate 22% figure. (Response to Proposed Finding No. 1866). Dr. Murphy’s reporting of both a higher and lower 1-800 Contacts conversion rate and use of the higher one in his analysis without any explanation about why it might be more reliable only underscores the vulnerability of his analysis and that the casual, non-rigorous “illustration” he engaged in

cannot support a finding that in the but-for world, overall conversions would be lower than they are in the presence of the Bidding Agreements.

- (e) Additionally, Dr. Murphy's analysis also fails to account for one of the main ways that consumers would benefit from removal of 1-800's advertising restrictions. Both Dr. Evans and Dr. Athey explained that additional information provided by ads placed on 1-800 Contacts Branded Queries likely would prompt additional customers to secure lower prices through 1-800s' price match program. Because 1-800 Contacts requires that customers seeking a price match complete their purchase using 1-800's call center, these transactions would not be counted as conversions in Professor Murphy's analysis.

**1872.** Applying average conversion rates from Google data to Dr. Athey's counterfactual model predicts that the settlement agreements increased conversions in response to searches for 1-800 Contacts' trademarks. (RX 739-0084 (Murphy Report); Murphy, Tr. 4137-4139).

**Response to Proposed Finding No. 1872:**

This proposed finding is misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1866, 1867, and 1869 through 1871.

**1873.** Applying average conversion rates from Google data to Dr. Athey's counterfactual model predicts that the settlement agreements made consumers who searched for 1-800 Contact's trademarks more successful in purchasing contact lenses. (RX 739-0084 (Murphy Report); Murphy, Tr. 4127-4137).

**Response to Proposed Finding No. 1873:**

This proposed finding is misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1866, 1867, and 1869 through 1871.

**1874.** Applying average conversion rates from Google data to Dr. Athey's counterfactual model predicts that the settlement agreements increased consumer welfare. (RX 739-0084 (Murphy Report)).

**Response to Proposed Finding No. 1874:**

This proposed finding is misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1866, 1867, and 1869 through 1871.

**1875.** Applying a conversion rate of 7 percent based on data regarding the conversion rate on ads for Walmart in response to searches for 1-800 Contacts' trademarks would not change the predictions of Dr. Athey's model regarding the number of conversions or output based on searches for 1-800 Contacts' trademarks. (Murphy, Tr. 4362-63).

**Response to Proposed Finding No. 1875:**

This proposed finding is misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1866, 1867, and 1869 through 1871.

This proposed finding is misleading, inaccurate, and unsupported in its use of the phrase "the predictions of Dr. Athey's model regarding the number of conversions or output based on searches for 1-800 Contacts' trademarks." As described above in response to Proposed Findings No. 1866-1867 and 1869-1871, Dr. Athey's model did not make any such predictions, and Dr. Murphy's discussion of conversion rates is built on deeply flawed misrepresentations (or misunderstandings) of Dr. Athey's work.

**1876.** Applying a conversion rate of 8 percent based on data regarding the conversion rate on ads for Lens Direct in response to searches for 1-800 Contacts' trademarks would not change the predictions of Dr. Athey's model regarding the number of conversions or output based on searches for 1-800 Contacts' trademarks. (Murphy, Tr. 4362-63).

**Response to Proposed Finding No. 1876:**

This proposed finding is misleading, inaccurate, unsupported, and contrary to the weight of the evidence for the reasons set forth in response to Proposed Findings No. 1866, 1867, and 1869 through 1871.



Respondent's expert, Professor Murphy, concluded that the punishment for violating an agreement doesn't have to occur in the same market where collusion is occurring. (CX9048 (Murphy, Dep. at 270-271)).

**1878.** The settlement agreements are not economically analogous to collusive bidding agreements. (RX 739-0057 to -0059 (Murphy Report)).

**Response to Proposed Finding No. 1878**

The proposed finding should be rejected because agreements not to participate in auctions have the same economic impact as any other type of collusive bidding agreement – they distort market prices, prevent competition that otherwise would have occurred, and artificially reduce payments to suppliers (in this case, search engines).

**1879.** The features of the settlement agreements are not consistent with bid rigging cartel arrangements. (RX 739-0057 to -0059 (Murphy Report); Murphy, Tr. 4178-79).

**Response to Proposed Finding No. 1879**

The proposed finding should be rejected because agreements not to participate in auctions have the same economic impact as any other type of collusive bidding agreement – they distort market prices, prevent competition that otherwise would have occurred, and artificially reduce payments to suppliers (in this case, search engines). To the extent that the proposed finding suggests a legal conclusion concern what types of collusive conduct are likely to be harmful, it is improper and incorrect.

**1880.** As a matter of economics, if the settlements were designed to rig bids rather than protect trademarks, it would be more effective for the settlement agreements to restrict advertising in response to searches for terms other than the parties' trademarks. (RX 739-0058 (Murphy Report)).

**Response to Proposed Finding No. 1880**

Respondent's proposed finding is not supported by the evidence cited. Respondent cites the following statement in Professor Murphy's report: "When firms compete on multiple

dimensions, economics tells us that we would not expect to see them collude on only one dimension because doing so can induce cartel members to compete more aggressively on other dimensions, thereby reducing or even eliminating cartel profits.” (RX 739-0058 (Murphy Report)). Yet, in his deposition, Professor Murphy conceded there are instances where firms can profitably restrict competition on just one dimension of competition. (CX9048 (Murphy, Dep. at 277) (“It would be possible . . . particularly if it was a very important dimension of competition, that would have an effect.”)).

The proposed finding does not reflect the economic understanding of harmful and illegal collusive conduct, which can take many forms. It is not a defense or justification for harmful and illegal collusive conduct that the participants could have engaged in other types of harmful conduct. To the extent that the proposed finding suggests a legal conclusion concerning what types of collusive conduct are likely to be harmful, it is improper and incorrect.

**1881.** For a bidding cartel to be effective, the cartel must include a high share of potential bidders. (RX 739-0058 (Murphy Report)).

**Response to Proposed Finding No. 1881**

The proposed finding should be rejected because it is inaccurate. An agreement between only two of many “potential bidders” could still be effective if the two colluders would have been high bidders absent the agreement. Dr. Evans made this point clear: “My definition of ‘collusion’ doesn’t necessarily require multiple participants.” (Evans, Tr. 1467). Collusion between two strong bidders alone in a search engine second price auction will affect the paid search results viewed by users, and will affect the CPC paid by advertisers any time the combined bid and quality score of the abstaining advertiser is higher than those of any advertiser that takes its place.

Moreover, this finding is unclear as to the meaning of the terms “bidding cartel,” “effective” and “a high share of potential bidders.” The proposed finding also does not reflect the

economic understanding of harmful and illegal collusive conduct, which can take many forms. Bid rigging and other types of cartel conduct are illegal whether or not the conduct is fully “effective.” Further, Complaint Counsel has shown that 1-800 Contacts and the fourteen parties to the Bidding Agreements collectively held a high share of the market for the sale of contact lenses online. So, even if “high share of potential bidders” were required to find 1-800 Contacts liable, that burden of proof was met.

**1882.** Gains from having an individual bidder join a cartel rise as the number of current members increases because any individual non-member can hold up the existing members and extract all of the cartel profits. (RX 739-0058 (Murphy Report)).

**Response to Proposed Finding No. 1882**

This finding is false in that it is not generally true as a matter of economics. For example, a high cost firm facing capacity constraints cannot hold up a cartel and extract all of its profits. Otherwise, Great Britain (a small oil producer) could have extracted all of OPEC’s cartel profits from 1970 to the present. The proposed finding also does not reflect the economic understanding of harmful and illegal collusive conduct, which can take many forms. Bid rigging and other types of cartel conduct are illegal whether or not “any individual non-member can hold up the existing members and extract all of the cartel profits.” Even if it were true that agreements with different, or additional members, would be more or less profitable, that fact does not affect 1-800 Contacts liability for the conduct that actually occurred.

**1883.** If members of a bidding cartel do not include a high share of bidders, non-cartel members are more likely to win or obtain high placements in auctions that would limit or prohibit the cartel members from increasing their profits. (RX 739-0058 (Murphy Report)).

**Response to Proposed Finding No. 1883**

The proposed finding should be rejected because it is inaccurate. An agreement between only two of many “potential bidders” could still be effective if the two colluders would have been high bidders absent the agreement. Dr. Evans made this point clear: “My definition of ‘collusion’

doesn't necessarily require multiple participants.” (Evans, Tr. 1467). Collusion between two strong bidders alone in a search engine second price auction will affect the paid search results viewed users, and will affect the CPC paid by advertisers any time the combined bid and quality score of the abstaining advertiser is higher than those of any advertiser that takes its place.

Moreover, this finding is ambiguous as to the meaning of “bidding cartel” and “a high share of bidders.” The proposed finding also does not reflect the economic understanding of harmful and illegal collusive conduct, which can take many forms. Further, Complaint Counsel has shown that 1-800 Contacts and the fourteen parties to the Bidding Agreements collectively held a higher share of the market for the sale of contact lenses online and composed the strongest bidders for 1-800’s BNKWs.

**1884.** An effective bidding cartel generally involves a multilateral agreement among firms representing a large share of potential buyers. (RX 739-0058 (Murphy Report)).

**Response to Proposed Finding No. 1884**

The proposed finding should be rejected because it is inaccurate. An agreement between only two of many “potential bidders” could still be effective if the two colluders would have been high bidders absent the agreement. Dr. Evans made this point clear: “My definition of ‘collusion’ doesn't necessarily require multiple participants.” (Evans, Tr. 1467). Collusion between two strong bidders alone in a search engine second price auction will affect the paid search results viewed users, and will affect the CPC paid by advertisers any time the combined bid and quality score of the abstaining advertiser is higher than those of any advertiser that takes its place. Moreover, this finding is unclear as to the meaning of the terms “bidding cartel,” “effective” and “a large share of potential buyers.” The proposed finding does not reflect the economic understanding of harmful and illegal collusive conduct, which can take many forms. It is not a

defense or justification for harmful and illegal collusive conduct that the participants could have engage in other types of harmful conduct.

**1885.** The settlement agreements were bilateral, not multilateral. (Evans, Tr. 1711-12; CX 9042 (Evans, Dep. at 114); RX 739-0059 (Murphy Report)).

**Response to Proposed Finding No. 1885**

Complaint Counsel has no specific response.

**1886.** In a bidding cartel, some members do not win bids even though it would be profitable for them to do so at the winning price. (RX 739-0059 (Murphy Report)).

**Response to Proposed Finding No. 1886**

Complaint Counsel has no specific response.

**1887.** Cartel members who do not win bids even though it would be profitable for them to do so at the winning price must be compensated for suppressing their bid in order to make it profitable for the members to remain in the cartel. (RX 739-0059 (Murphy Report)).

**Response to Proposed Finding No. 1887**

The proposed finding is misleading since the compensation could take the form of not being punished for bidding more aggressively. Indeed, as Professor Murphy concedes, “[y]ou can certainly construct cases where there is a punishment that happens in one place in exchange for violating an agreement on something that has nothing to do with that market or otherwise.” (CX9048 (Murphy, Dep. at 271-272)). Put differently, the proposed finding does not reflect the economic understanding of harmful and illegal collusive conduct, which can take many forms. It is not a defense or justification for harmful and illegal collusive conduct that the participants could have engaged in other types of harmful conduct.

**1888.** A cartel therefore must devise a method for distributing cartel profits among members that have agreed to limit their bidding. (RX 739-0059 (Murphy Report)).

**Response to Proposed Finding No. 1888**

The proposed finding is also incorrect for the reasons stated in response to Proposed Finding No. 1887.

**1889.** The settlement agreements in this case did not include any mechanism for sharing cartel profits. (RX 739-0059 (Murphy Report)).

**Response to Proposed Finding No. 1889**

The proposed finding is incorrect for the reasons stated in response to Proposed Finding No. 1887.

**1890.** Economists do not believe that collusion always harms consumers. (Evans, Tr. 1466).

**Response to Proposed Finding No. 1890**

The proposed finding is not relevant to Respondent’s liability, and Dr. Evans statement expressly did not apply to the fact of this case. The question was { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Later, Dr. Evans explained that the conduct

at issue does not fall within any “exception.” To the contrary, he concluded that a course of cooperative conduct to restrict informative advertising is presumptively harmful. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]”}

(Evans, Tr. 1651, *in camera*).

**B. *The Settlement Agreements Did Not Deprive Consumers Of Information About Other Retailers Or Their Prices***

**1891.** In order to have harmed competition, the settlements must have prevented consumers from finding information about 1-800 Contacts' rivals. (RX 733-0062 (Murphy Report)).

**Response to Proposed Finding No. 1891**

The proposed finding should be rejected. First, it is ambiguous because the meaning of the word "prevented." If "prevented" means that the bidding agreements made it impossible for consumers to find "information about 1-800 Contacts' rivals," then it is economically incorrect. The Bidding Agreements withheld useful information from a commercially important group of online contact lens customers precisely at the moment when that information would have been most useful to them. Informative advertising to search engine users who are aware of 1-800 Contacts brand would have provided timely information about the names, prices, and services offered by rivals. As a result of the lost advertising, the online market for the sale of contact lenses was less competitive, and, on average, consumers paid higher prices for contact lenses. Specifically, Dr. Evans showed that the bidding agreements prevented 114 million ad impressions on SERPs returned for searches including 1-800 Contacts brand terms. [REDACTED]

[REDACTED]

[REDACTED] (Evans, Tr. 1619, *in camera*). For the period January to June 2015, Dr. Evans calculated that [REDACTED]

[REDACTED]

[REDACTED] (Evans, Tr. 1622, *in camera*). Over time, the information, clicks, and diverted sales would have put downward pressure on 1-800 Contacts prices.

**1892.** The challenged settlement agreements did not deprive consumers interested in comparing price information from obtaining that information. (RX 733-0059 to -0064 (Ghose Report); Ghose, Tr. 3917, 3919; RX 739-0062-63 (Murphy Report); Murphy, Tr. 4094).

**Response to Proposed Finding No. 1892**

The proposed finding should be rejected because it is nonsensical. The words “deprive . . . from obtaining that information” have no meaning in the ordinary use of the English language. If this is intended to suggest that the Bidding Agreements did not make it impossible for consumers “consumers interested in comparing price information from obtaining that information,” it should be rejected for the reasons stated above in response to Proposed Finding No. 1891.

**1893.** [REDACTED] } (RX 739-0097, -0099 (Murphy Report)).

**Response to Proposed Finding No. 1893**

Complaint Counsel has no specific response, except to note that this statistic is irrelevant, and that the cited “contact lens retailers” sell products other than contact lenses. Many sell glasses, and some large retailers such as Walmart and Walgreens sell a broad range of products.

*1. The Settlement Agreements Did Not Alter The Relative Mix Of Paid Search Advertising By 1-800 Contacts And Its Competitors*

**1894.** [REDACTED] } (RX 739-0062 to -0063 (Murphy Report); Murphy, Tr. 4195-98).

**Response to Proposed Finding No. 1894**

The proposed finding is incorrect and unsupported by the material cited. { [REDACTED]

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

Moreover, the finding is irrelevant to whether the Bidding Agreements harmed competition for many reasons, including that it ignores the importance of search advertising triggered by user queries for 1-800 Contacts trademark terms, and weaker rivals’ advertisements are not as valuable to consumers as the stronger rivals which were constrained by the bidding agreements.

**1895.** [REDACTED]  
[REDACTED]  
(RX 733-0062, -0105 (Murphy Report); Murphy, Tr. 4195-98).

**Response to Proposed Finding No. 1895**

The proposed finding is irrelevant. (*See* Response to Proposed Finding No. 1894).

**1896.** As reflected in the below chart, { [REDACTED]  
[REDACTED]  
(RX 733-0063, -0105 (Murphy Report); Murphy, Tr. 4195-98). { [REDACTED]



}  
(RX 739-0105 (Murphy Report)).

**Response to Proposed Finding No. 1896**

The proposed finding is irrelevant. (*See* Response to Proposed Finding No. 1894).

**1897.** [REDACTED]  
[REDACTED]

[REDACTED] } (RX 739-0063, 0106 (Murphy Report);  
Murphy, Tr. 4200-01).

**Response to Proposed Finding No. 1897**

The proposed finding is irrelevant. (See Response to Proposed Finding No. 1894).

**1898.** [REDACTED]  
[REDACTED]

(RX 739-0048, -0069, -0104 (Murphy Report)).

**Response to Proposed Finding No. 1898**

The proposed finding is irrelevant. Dr. Evans demonstrated that the increase in rival ad impressions on SERPs for queries with 1-800 Contacts brand terms would have a competitive impact for the reasons stated above in the response to Proposed Finding No. 1891.

**1899.** [REDACTED]  
[REDACTED]

[REDACTED] } (RX 739-  
0048, -0069, -0104 (Murphy Report)).

**Response to Proposed Finding No. 1899**

The proposed finding is irrelevant. Dr. Evans demonstrated that the increase in clicks on rival ad impressions on SERPs for queries with 1-800 Contacts brand terms would have a competitive impact for the reasons stated above in the response to Proposed Finding No. 1891.

**1900.** According to data from comScore relied upon by Dr. Athey, only 14 percent of ads displayed in response to a search for 1-800 Contacts' trademarks displayed information on the price of contact lenses. (CX 8007-035, -111 (Athey Report); RX 733-0063 (Ghose Report)).

**Response to Proposed Finding No. 1900**

The proposed finding is irrelevant. If the Bidding Agreements were terminated, price information in ads would increase, because the leading online line discounters would be able to compete directly for customers searching for 1-800 Contacts brand terms. (Athey, Tr. 761-763).

**1901.** Accordingly, as to the vast majority of ads displayed in response to a search for 1-800 Contacts' trademarks, consumers who did not click on those ads would not obtain any information about the price of contact lenses. (RX 733-0063 (Ghose Report)).

**Response to Proposed Finding No. 1901**

The proposed finding is irrelevant, because it ignores the change in the amount of competitive advertising and price information that would occur if the Bidding Agreements were terminated. Dr. Athey concluded that price information was a significant aspect of search advertising competition, which would increase if the Bidding Agreements were terminated and the leading online line discounters were able to compete directly for customers searching for 1-800 Contacts brand terms. (Athey, Tr. 761-763).

**2. *The Settlement Agreements Did Not Bind Numerous Major Retailers Who Paid For More Than 260 Million Search Advertisements***

**1902.** Numerous online retailers of contact lenses were not bound by any settlement agreement with 1-800 Contacts that restricted their ability to advertise in response to searches for 1-800 Contacts' trademarks. (Athey, Tr. 854; CX 9043 (Athey, Dep. at 113)).

**Response to Proposed Finding No. 1902**

The proposed finding is unsupported by the testimony cited. The cited testimony refers to Exhibit B of Dr. Athey's report, which includes "online retailers of contact lenses" which were constrained by the Bidding Agreement of an already-bound competitor (because of an affiliation between the two firms). For example, Sears Optical, Target Optical, Pearle Vision, and Contacts Direct are all restricted by 1-800 Contacts' Bidding Agreement with Luxottica because Luxottica runs the website for each company. (Bethers, Tr. 3721-3722; *see also* CX8007 at 042 (listing each company as "unbound" because they did not have a written agreement with 1-800 Contacts)). Likewise, Exhibit B of Professor Athey's report includes retailers which were restrained by threats from 1-800 Contacts, such as Lens Discounters. There is no dispute that Lens Discounters ceased bidding on 1-800 Contacts' trademark terms and implemented negative keywords as a result of litigation threats from 1-800 Contacts. (*See* CX8003 at 003-005 (¶¶ 11-28) (Mitha, Decl.)). In any event, the proposed finding is irrelevant and incorrect to the extent that it suggests that the group

of unbound competitors could replace the lost advertising and competition that resulted from the Bidding Agreements. The group of firms not bound by the settlement agreements were not as effective competitors to 1-800 Contacts as the bound firms. Individually and collectively, the unbound firms lacked the incentive and ability to replace the lost advertising competition resulting from the 14 Bidding Agreements. (Evans, Tr. 1541-1544; CCPTF ¶¶ 1641-1668).

**1903.** America's Best was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007 at 042 (Athey Expert Report)).

**Response to Proposed Finding No. 1903**

The proposed finding is irrelevant. America's Best is not a substantial competitor to 1-800 Contacts. America's Best operates a chain of brick and mortar ECPs, and its sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included America's Best in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)). Further, Dr. Evan found that America's Best had only 4 percent of the clicks received by Vision Direct. (CX8006 at 061 (n.151) (Evans Expert Report)).

**1904.** BJ's was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1904**

The proposed finding is irrelevant. BJ's is a membership club store, which makes few sales of contact lenses online. Its sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included BJ's in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)).

**1905.** Contact Direct was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1905**

The proposed finding is incorrect and should be rejected. Contacts Direct is restricted by 1-800 Contacts' Bidding Agreement with Luxottica because Luxottica runs its website, as Mr. Bethers testified. (Bethers, Tr. 3721-3722).

**1906.** Costco was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1906**

The proposed finding is irrelevant. Costco is a membership club store, which makes few sales of contact lenses online and does not use search advertising. (CCPTF ¶¶ 1605, 1644-1646). Costco has only recently begun selling contact lenses online as a service to its members. (CCPTF ¶¶ 1644-1646). Costco's sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included Cost in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)).

**1907.** CVS was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1907**

The proposed finding is irrelevant. CVS is a brick and mortar pharmacy chain, which makes few sales of contact lenses online. CVS's does not compete online as a discounter, and contracts with AC Lens for white label services including internet fulfillment. CCPTF ¶ 115. CVS's sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included Cost in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)).

**1908.** Discount Lens was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1908**

The proposed finding is irrelevant. Discount Lens' sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included Discount Lens in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)).

**1909.** Eyeconic was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1909**

The proposed finding is irrelevant. Eyeconic's sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included Eyeconic in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)).

**1910.** JC Penney was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1910**

The proposed finding is irrelevant. JC Penney is a physical retailer, which makes few sales of contact lenses online. JC Penney's sale of contact lenses online is so small that Dr. Murphy and Dr. Evans both included JC Penney in the category "Other" when calculating market share. (RX0739 at 087 (Ex. 3) (Murphy Expert Report)).

**1911.** Lens.com was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report); Bethers, Tr. 3693-94).

**Response to Proposed Finding No. 1911**

The proposed finding is false. As Respondent's expert, Professor Murphy, acknowledged: "[m]ost cases we look at don't involve written agreements, . . . when people talk about collusion in most cases I think they think about things other than written agreements." (CX9048 (Murphy, Dep. at 279)). There is clear evidence of an agreement between Lens.com and 1-800 Contacts that restricted Lens.com's ability to advertise in response to searches for 1-800 Contacts' trademarks.

In 2005, 1-800 Contacts reached an agreement with Lens.com that “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.” (CX1184 at 003 (¶ 8) (Declaration of Bryan Pratt, 1-800 Contacts, Inc. v. Lens.com, Inc.); CCPTF ¶¶ 954-963). 1-800 Contacts subsequently took steps to enforce the agreement including complaining to Lens.com about the appearance of ads in brand term search results, and filing a contract enforcement action in Federal Court. (CCPTF ¶¶ 964-967, 1001-1009).

In addition, 1-800 Contacts CEO Mr. Bethers testified at trial “[a]pproximately two years ago” he met with the CEO of Lens.com, explained that he “regretted the litigation that we had had about trademarks, and that the Lens.com CEO “responded that he did not believe in trademark search advertising, it’s not something that he was supportive of or that he had wanted to use in the past.” (Bethers, Tr. 3666). At his Deposition, Mr. Bethers explained: “During a portion of the litigation we offered to settle the litigation, and he offered to sign a settlement agreement. We went through the process of negotiating price. He was asking more; we offered less than we were willing to pay. We never reached a settlement agreement, and so the costs continued. And I simply apologized for the fact that we hadn’t done it. I said, in hindsight, it probably would have been good for both of our parties had we entered into a settlement agreement. And he agreed completely. ... He subsequently over dinner at one point told me he did not believe in trademark search and that it is not something that he supported. That was his conversation. I took comfort in that, because I told him that that was incredibly important to us.” (CX9029 (Bethers, Dep. at 102). Mr. Bethers’ testimony is evidence that 1-800 Contacts and Lens.com continue to have an informal agreement or understanding not to purchase search advertising on each other’s trademark terms.

**1912.** Lens Discounters was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts’ trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1912**

The proposed finding is false. As Respondent’s expert, Professor Murphy, acknowledged: “[m]ost cases we look at don’t involve written agreements, . . . when people talk about collusion in most cases I think they think about things other than written agreements.” (CX9048 (Murphy, Dep. at 279)). There is substantial evidence of an agreement between Lens Discounters and 1-800 Contacts that restricted Lens Discounter’s ability to advertise in response to searches for 1-800 Contacts’ trademarks From approximately September 2005 through December 2016, Lens Discounters did not bid on any of the 1-800 Contacts brand keywords, and entered 45 brand negative keywords because of threatened litigation by 1-800 Contacts. (CCPTF ¶¶ 767, 938, 953, 1297; Evans, Tr. 1408-1409). Prior to receiving the Cease and Desist letter from 1-800 Contacts, Lens Discounters found that “bidding on the term ‘1-800 Contacts’ and variations thereof was a profitable strategy.” (CCPTF ¶¶ 763; CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.)). Thus, notwithstanding the lack of a formal, written settlement agreement, 1-800 Contacts conduct restricted Lens Discounters advertising. (CCPTF ¶¶ 930-953). While Lens Discounters has recently re-started advertising on searches for 1-800 Contacts brand terms, Lens Discounters remains a small online retailer, which lacks the ability to replace the lost advertising competition resulting from the 14 Bidding Agreements.

**1913.** Sam’s Club was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts’ trademarks. (CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 1913**

The proposed finding is irrelevant. Sam’s Club is a membership club store, which makes few sales of contact lenses online. Sam’s Club’s sale of contact lenses online is so small that Dr.



**1917.** [REDACTED]

[REDACTED] (RX 739-0099 (Murphy Report)).

**Response to Proposed Finding No. 1917**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1918.** [REDACTED]

[REDACTED] (RX-739-0099 (Murphy Report)).

**Response to Proposed Finding No. 1918**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891. The proposed finding is also misleading because the 8 million ads cited by respondents are only a small fraction of the 114 million ads that Dr. Evans estimates would have been placed by rivals absent the agreement. (CCPTF ¶ 1891). Additionally, non-settling rivals were not as strong as the settling rivals. (See CCPTF ¶¶ 1902-1910, 1913, and 1916).

***3. Consumers Saw Millions Of Advertisements For The Settling Parties Despite The Settlement Agreements***

**1919.** The challenged settlement agreements had little impact on the settling parties' ability to promote their services. (RX 739-0047 (Murphy Report)).

**Response to Proposed Finding No. 1919**

The proposed finding should be rejected because it is contrary to the weight of the evidence. As detailed in over two hundred of Complaint Counsel's proposed findings of fact, there is extensive evidence that advertising on 1-800 Contacts brand term queries is a successful, commercially significant strategy for rivals of 1-800 Contacts, particularly for online discounters. CCPTF ¶¶ 590-802. This evidence includes business documents and consistent testimony from rivals (CCPTF ¶¶ 611-774), from the two major search engines (CCPTF ¶¶ 590-598, 782-788), and from 1-800 Contacts itself (CCPTF ¶¶ 599-610). This evidence also shows advertising on 1-

800 Contacts brand term queries is more valuable than advertising on any other contact lens retailers brand terms. (CCPTF ¶¶ 789-802).

Ignoring this extensive factual evidence, the proposed finding purports to rely only on Dr. Murphy's opinion that the volumes of lost impressions and lost clicks found by Dr. Evans are not commercially significant. In doing so, Dr. Murphy offers an incomplete description of Dr. Evan's analysis and findings. Dr. Murphy asserts "those incremental impressions would only have been about 7 percent of total impressions and those incremental clicks would represent only about 3 percent of total clicks in the but-for world." (RX0739 at 0048 (¶ 124 & Ex. 17) (Murphy Expert Report). Neither the 7 percent or 3 percent statistics accurately reflect the lost competition. Even without accounting for dynamic effects of advertising over time, Dr. Evans concluded that, using a conservative estimate of repeat purchases, by the first half of 2015, because of the new advertising, rival sales would have increased by 12.3 percent. (CCPTF ¶ 1410 (citing Evans, Tr. 1622, *in camera*; CX8009 at 084 (¶ 155 & n.193) (Evans Rebuttal Expert Report), *in camera*)).

**1920.** The challenged settlement agreements were bilateral, not multilateral. (Evans, Tr. 1711-12; CX 9042 (Evans, Dep. at 114)).

**Response to Proposed Finding No. 1920**

Complaint Counsel has no specific response.

**1921.** The challenged settlement agreements did not restrict causing paid search advertisements to be displayed in response to searches for the trademarks of the other settling parties other than 1-800 Contacts. (Evans, Tr. 1712).

**Response to Proposed Finding No. 1921**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891. In addition, because the settlement agreements were reciprocal, the settlement agreements prevented 1-800 from placing ads on searches for other settling parties trademarks. Thus, the

proposed finding is incomplete and wrong as the effect of the agreements on 1-800 Contacts' advertising on rivals' trademarks.

**1922.** The challenged settlement agreements did not affect bidding on generic terms except to the extent that they required negative keywords to prevent ads appearing in response to searches for a firm's trademarks. (CX 9042 (Evans, Dep. at 102); Bethers, Tr. 3703).

**Response to Proposed Finding No. 1922**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1923.** [REDACTED] (RX 739-0097 (Murphy Report)).

**Response to Proposed Finding No. 1923**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1924.** [REDACTED] (RX 739-0097 (Murphy Report)).

**Response to Proposed Finding No. 1924**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1925.** [REDACTED] (RX 739-0097 (Murphy Report)).

**Response to Proposed Finding No. 1925**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1926.** [REDACTED] (RX 739-0097 (Murphy Report)).

**Response to Proposed Finding No. 1926**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891. In addition, the proposed finding is ambiguous because it does not specify whether the impressions are limited to contact lens advertising or all search advertising by multiproduct retailers, such as Walmart or Walgreens.

**1927.** [REDACTED] (RX 739-0097 (Murphy Report)).

**Response to Proposed Finding No. 1927**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1928.** [REDACTED] (RX 739-0097 (Murphy Report)).

**Response to Proposed Finding No. 1928**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1929.** [REDACTED] (RX 739-0030, 097 (Murphy Report)).

**Response to Proposed Finding No. 1929**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1930.** A number of the settling retailers obtained more impressions in response to bids on keywords related to contact lenses after they entered into the settlement agreements than they had obtained before doing so. (RX 733-0096 (Ghose Report); CX 9046 (Ghose, Dep. at 35, 156-58)).

**Response to Proposed Finding No. 1930**

The proposed finding is not relevant for the reasons stated above in response to Finding 1891.

**1931.** On average, impressions based on bidding for 1-800 Contacts' trademarks represented { [REDACTED] } of a settling party's impressions in the year before it settled with 1-800 Contacts. (RX 739-0047, - 0103 (Murphy Report)).

**Response to Proposed Finding No. 1931**

The proposed finding should be rejected because it is irrelevant. Data regarding advertiser *bidding* does not measure the frequency with which an advertiser's ads were shown in response to *user queries* relating to 1-800 Contacts' trademark. The default "broad match" setting provided by search engines results in ads triggered in response to relevant searches even where the advertiser did not bid on the user query. Dr. Murphy conceded that he lacked data that would allow him to calculate the number of ads returned in response to any query. { [REDACTED]

[REDACTED] (Murphy, Tr. 4188, 4217 *in camera*).

Thus, the supposed { [REDACTED] } estimate materially understates the actual volume of a settling party's impressions triggered by user queries including 1-800 Contacts' trademarks in the year before it settled with 1-800 Contacts.

**4. *Consumers Can Easily Obtain Information About 1-800 Contacts' Competitors***

**1932.** Most consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses. (Athey. Tr. 913-14).

**Response to Proposed Finding No. 1932**

The cited testimony does not support the proposed finding. Respondent's counsel asked Dr. Athey about a box that appeared on Google's SERP identifying four contact lens retailers as

“Also searched for.” Dr. Athey did not testify that any, much less most, consumers are aware of those firms, or that most users read the results provided in the “Also searched for” box. Athey, Tr. 914.

In any event, the proposed finding is irrelevant. “Somewhere else” could mean the customer’s ECP. And even if the customer were generally aware of other online discount outlets, she may not have information about the specific available options in mind at the time of purchase. Thus, advertising may serve as a helpful reminder. If a substantial number of consumers have no specific knowledge of other options, they could suffer material harms even if more than half of online consumers know of other retail brands.

Dr. Athey’s conclusions do not depend on customers being ignorant of other online contact lens retailers. She testified that { [REDACTED] } (Athey, Tr. 826-827.), *in camera* That fact is consistent with consumers having a general awareness of other options. (Athey, Tr. 2114:19-2115:9) (fact that people who type “1-800 Contacts” into a search engine and see the search engine results page are unaware of the existence of any other online contact lens retailers is “relevant to the opinion that consumers lack information about prices from competitors.” In other words, Dr. Athey’s conclusions depends only on some consumers not having an accurate specific understanding of prices and price differences whether or not they know that there is “somewhere else to buy contact lenses.” The proposed finding also ignores the importance of the marginal customers who would want to switch to other retailers, and places too much importance on “most” consumers, who are already well served by search engine results. (Athey, Tr. 2092).

**1933.** As Dr. Athey admitted, more than 70 percent of online contact lens shoppers compare prices. (Athey, Tr. 941; CX 1449-057).

**Response to Proposed Finding No. 1933**

The proposed finding is irrelevant it does not state whether they compare ECP prices to 1-800 Contacts prices or compare prices among multiple vendors online. Dr. Athey considered CX1449 as one source of evidence that online contact lens shoppers care about low prices. For example, Dr. Athey's analysis considered the statement that { [REDACTED] } [REDACTED] } Athey Tr. 939), *in camera*; CX1449 at 055, *in camera*. However, the chart on CX1449 at 055 expressly includes { [REDACTED] } { [REDACTED] } { [REDACTED] } { [REDACTED] }.

**1934.** As Dr. Athey admitted, more than half of online contact lens shoppers check prices at three, four or five stores or websites. (Athey, Tr. 941; CX 1449-057).

**Response to Proposed Finding No. 1934**

The proposed finding is irrelevant, incomplete, and misleading for the reasons stated in response to Proposed Findings 1932 and 1933. The only inference that can be reasonable drawn from CX 1449 is that { [REDACTED] } are particularly price sensitive and care about low prices. (CX1449 at 057, *in camera*). CX 1449 does not rebut the substantial evidence that contact lens consumers lack information about price differences in the marketplace.

**1935.** 1-800 Contacts operated its business based on the belief that consumers knew how to find other retailers of contact lenses. (Bethers, Tr. 3710-11).

**Response to Proposed Finding No. 1935**

The proposed finding is unsupported by the cited testimony, which does not contain any information about the manner in which 1-800 Contacts operated its business, or the manner in which any such operations were "based on" any belief.

**1936.** Consumers interested in finding information about 1-800 Contacts' competitors had a number of ways to do so other than searching for 1-800 Contacts' trademarks. (RX 733-0059 to -0064 (Ghose Report); CX 9048 (Murphy, Dep. at 56)).

**Response to Proposed Finding No. 1936**

Complaint Counsel has no specific response.

**1937.** Users tracked in Dr. Athey’s comScore data clicked on an algorithmic result rather than a paid result two-thirds of the time. (Athey, Tr. 881; CX 8007-025 (Athey Report)).

**Response to Proposed Finding No. 1937**

Complaint Counsel has no specific response.

**1938.** Clicks on algorithmic links accounted for two-thirds of the clicks in the comScore dataset that Dr. Athey used. (Athey, Tr. 881).

**Response to Proposed Finding No. 1938**

Complaint Counsel has no specific response.

**1939.** The settlement agreements did not limit algorithmic results on any search. (Athey, Tr. 881-882).

**Response to Proposed Finding No. 1939**

Complaint Counsel has no specific response.

**1940.** Consumers often start with generic searches and then narrow their searches to names of manufacturers and retailers. (Ghose, Tr. 4072-73).

**Response to Proposed Finding No. 1940**

The proposed finding is unsupported by the testimony cited. Dr. Ghose has no personal knowledge, and offered no opinion, regarding how “often” consumers “start with generic searches and then narrow their searches to names of manufacturers and retailers.” He testified to “his understanding,” which was not disclosed in his expert report. (Ghose, Tr. 4072-73). Moreover, the only evidence in the record shows that generalization does not apply to the specific case of contact lens searches. Dr. Ghose provided no information specific to users who search for contact lenses online. Dr. Athey, however did provide specific data as to contact lens searches. Dr. Athey “observe[d] that in the comScore Dataset, 67% of the users in the comScore dataset search only once, 18% search twice and the remaining 15% search three or more times.” (CX8007 at 028 (¶ 80) (Athey Expert Report)). Dr. Athey also showed that portion of users entering one search for

contact lenses is lower than the average across all comScore data not related to contact lenses. For, those non-contact lens searches, 49% searched only once, 19% search twice, and 32% search three or more times. (CX8007 at 028 (¶ 80) (Athey Expert Report)). Accordingly, even if Dr. Ghose's generalization were true of all commercial internet searches generally, Dr. Athey provided specific data showing that the generalization does not apply to the specific case of contact lens searches.

**1941.** All consumers interested in finding out about 1-800 Contacts' online competitors had to do to learn about pricing options and compare prices was search for "cheap contacts" or the name of his or her contact lens. (RX 733-0060 (Ghose Report); CX 9048 (Murphy, Dep. at 56); CX 9046 (Ghose, Dep. at 78-80)).

**Response to Proposed Finding No. 1941**

The proposed finding is not relevant. Dr. Ghose testified that he "could only speculate" as to the "portion of consumers who searched using a 1-800 trademark query [which] actually performed a subsequent search for the term "cheap contacts." (Ghose, Tr. 4073). The proposed finding is also misleading, because consumers who do not know that lower-priced retailers exist will not know to search for "cheap contacts." 1-800 Contacts' Marketing Director, Laura Schmidt, wrote: "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." (CX1086 at 001). The consumers who Ms. Schmidt describes as misunderstanding the "We'll beat" claim would not know to enter a search for cheap contacts.

**1942.** [REDACTED] } (Athey, Tr. 2120).

**Response to Proposed Finding No. 1942**

The proposed finding is not supported by the cited testimony. Professor Athey testified that Google has information that for { [REDACTED] } (Athey, Tr. 2120).

1943. [REDACTED]

[REDACTED] (Athey, Tr. 2119-20).

**Response to Proposed Finding No. 1943**

The proposed finding of fact is ambiguous and misleading as to the phrase { [REDACTED] } Dr.

Athey did not testify about the frequency with which users must search for the listed firms for those firms to appear in the Knowledge Graph results. Thus, there is no basis to conclude that

{ [REDACTED] } or such search patterns are frequent. Professor Athey testified that Google has information that for

{ [REDACTED] } (Athey, Tr. 2120).

**1944.** Dr. Athey was not aware of any evidence that any consumer who searched for 1-800 Contacts did not know how to use generic searches. (CX 9043 (Athey, Dep. at 261 (“Q. Do you have any evidence that any consumer that searches for 1-800-CONTACTS did not know how to use generic searches for contact lenses? . . . THE WITNESS: I don’t have any direct evidence about – no.”))).

**Response to Proposed Finding No. 1944**

The proposed finding is not relevant to Respondent’s liability for the reasons stated above in response to Proposed Findings No. 1891 and 1932-1938.

**1945.** Consumers search for generic terms more often than they search for 1-800 Contacts’ trademark. (Ghose, Tr. 3919-20; RX 733-0061, -0062; Athey RX 733-0060, -0061 (Ghose Report); Ghose, Tr. 3920; CX 8007-028 (Athey Report); CX 9046 (Ghose, Dep. at 210-11)).

**Response to Proposed Finding No. 1945**

The proposed finding is not relevant to Respondent’s liability for the reasons stated above in response to Proposed Findings No. 1891 and 1932-1938.

**1946.** Over 98 percent of contact lens-related searches were for terms other than 1-800 Contacts’ trademarks. (Evans, Tr. 1724-25).

**Response to Proposed Finding No. 1946**

The proposed factual finding that “98 percent of contact lens-related searches were for terms other than 1-800 Contacts’ trademarks” is false. The proposed finding mischaracterizes Dr. Evans answer to a misleading question on cross-examination, and the question itself misstated the evidence in the record. Further, the question and answer are outside the scope of Dr. Evans Report, which did not include any information analysis or conclusions about query-level search data. As detailed below, Dr. Evans consistently testified that he did not have any basis to reach a conclusion about classification or preponderance of different types of search queries.

The relevant data and testimony in the record consistently show that queries containing 1-800 Contacts comprise about 30 percent of the volume of all generic queries combined, and are roughly equal to the volume of queries for the “Big Three” generic query terms combined. (Athey Tr. 845-846, 2107; CX8007 at 027-028 (¶ 81 & Table 1) (Athey Expert Report); CX8010 at 033-034, 056-057 (¶¶ 83-84, Ex. C (number of searches for top 10 1-800 contacts branded search queries) & Ex. D (most commonly observed generic search queries)) (Athey Rebuttal Expert Report)).

In his two reports, his deposition and his direct testimony, Dr. Evans did not analyze or express any opinion concerning the percentage of internet search queries that contained a 1-800 Contacts brand term. (*See, e.g.*, CX9042 (Evans, Dep. at 103-104 (Q. “What percentage of the queries that are, in your opinion, contact lens related are accounted for by [contacts, contact lens and contact lenses]? A. I don't have that number for you. Q. Can you give me an estimate? A. No.”))). Neither did Dr. Murphy. (Murphy, Tr. 4218: (“ If I'm trying to measure the number of clicks based on which people searched for, you can't really do that from this table.”); Murphy, Tr. at 4222 { [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]); Murphy Tr. at 4360 (“You can categorize them based on the term that the advertiser bid on.”)).

Dr. Evans and Dr. Murphy did not have data that would permit them to calculate or to compare the types or volumes of search queries. Google produced data to the FTC that aggregated on a weekly basis *impression* and *clicks* for each *keyword* entered by the advertisers. The Google data did not include any information about the query. And, the aggregated weekly data on impressions and clicks combined different queries that had matched to each keyword reported in the dataset.

Thus, Drs. Evans and Murphy consistently testified that, using the Google dataset, it is not possible to figure out whether the queries contained brand or generic terms. As Dr. Murphy explained in his direct testimony, { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Murphy, Tr. 4188). Further, because the Google dataset is organized by the number of weekly ad impression related to each keyword, it is also impossible to determine the number of queries that generated the reported impressions. By way of illustration, if there were ten searches for the most common 1-800 Contacts brand query, 1800contacts, with one ad impression for the keyword 1800contacts, and ten searches for the generic term contacts with ten ad impressions for the keyword contacts, the dataset would show ten impressions for the keyword 1800 Contacts compared to 100 impressions for the generic term contacts. There would be no way to determine that half of the queries that generated these impressions were for the brand query term 1800contacts.

Dr. Ghose was the only one of Respondent's experts in this matter who presented any analysis or conclusions concerning the prevalence or volumes of generic or branded keywords in the Google dataset, and he clearly explained that his results concerned impressions and clicks that matched to *keywords*, not to *queries*. In Paragraph 126 of his Report, Dr. Ghose wrote that “*Impressions* triggered by *keywords* that include 1-800 Contacts' trademarks represent a small proportion of *all impressions* on *keywords* relating to contact lenses. Between 2002 and 2016, Google AdWords bids on keywords containing 1-800 Contacts' trademark resulted in only {█} percent of all impressions in the data...” (RX733 at 0055 (¶ 126 (Ghose Report), *in camera* (emphasis added)). Respondent's own proposed findings 1994 to 2000 correctly follow Dr. Ghose's description of the Google data by referencing the percentage “of paid search advertisements for retailers unrestricted by the settlement agreements that were displayed *based on bids* for 1-800 Contacts' trademarks.”

Further, in that same paragraph, Dr. Ghose explained that Dr. Athey's comScore data – the only dataset in the record with information about queries entered by users – shows that queries with brand terms are more prevalent than are ad impressions attributable to 1-800 Contacts brand keywords. Dr. Ghose wrote: “I also find that queries relating to 1-800 Contacts' trademarks account for {█} percent of all queries in Dr. Athey's comScore dataset (before she applies any of her filters) and result in {█} percent of impressions.” By comparing his {█} percent portion of trademark queries to {█} percent portion of impressions in response to those queries, Dr. Ghose's finding also shows that on average fewer than half as many ads appear in response to 1-800 Contacts brand queries compared to the average of all other queries. This confirms that the number of impression cannot be used as a proxy for the number of queries. Finally, in footnote 278 of his Report, Dr. Ghose explains: “the quantity of generic searches is 3.4 times the quantity of 1-800 Contacts searches.” (RX733 at 0055 (¶ 126) (Ghose Expert Report) (citing Athey Expert

Report, ¶ 90 & Table 1)). Thus, Dr. Ghose also found that the ratio of 1-800 contacts brand queries to all generic queries is about .29, which is inconsistent with the 2 percent (0.02) figure in Respondent's proposed finding.

Respondent's false proposed finding that "98 percent of contact lens-related searches were for terms other than 1-800 Contacts' trademarks" cites only to two pages from Respondent's cross-examination of Dr. Evans. (Evans, Tr. 1724-1725). Respondent's counsel asked the following (mis)leading question: In your data that you looked at, over 98 percent of the searches were for generic terms; correct? And, Dr. Evans answered: A. Yes. Evans, Tr. 1724:13-16. The only evidence in the record that could substantiate counsel's assertion that "over 98 percent of the searches were for generic terms" is Dr. Ghose calculation that "bids on *keywords* containing 1-800 Contacts' trademark resulted in only 2.1 percent of all impressions in the data." Further, both Drs. Evans and Murphy consistently testified that in "[his] data" that Dr. Evan "looked at" it was not possible to identify the queries or the volume or prevalence of any type of query. Given this context, Dr. Evans reasonably understood the question to refer to the prevalence measured by impressions of 1-800 Contacts brand term keywords in the entire Google dataset, and answered that question affirmatively reflecting his understanding of Dr. Ghose's analysis. Dr. Evans' ambiguous answer to a misleading question by Respondent's counsel cannot change the facts that 1) Dr. Ghose reported only ad impressions by keyword, and that 2) Dr. Ghose agreed with Dr. Athey that queries containing 1-800 Contacts comprise about [30 percent] of the volume of all generic queries combined.

**1947.** Less than two percent of contact lens-related searches were for 1-800 Contacts' trademarks. (Evans, Tr. 1724).

**Response to Proposed Finding No. 1947**

The proposed finding is false for the reason stated in response to proposed finding 1946.

**1948.** Accordingly, as Dr. Evans admitted, some 98 percent of the time, what consumers searching for contact lens-related information see in response to their search is not affected by the challenged settlement agreements. (Evans, Tr. 1725).

**Response to Proposed Finding No. 1948**

The proposed finding is false for the reason stated in response to proposed finding 1946.

**1949.** The challenged settlement agreements only affect information seen on less than two percent of searches related to contact lenses. (Evans, Tr. 1725-26).

**Response to Proposed Finding No. 1949**

The proposed finding is false for the reason stated in response to proposed finding 1946.

**1950.** According to data from comScore compiled by Dr. Athey regarding searches related to contact lenses, approximately 70 percent of searches were for either generic terms or the names of contact lens manufacturers. (RX 733-0060, -0061 (Ghose Report); Ghose, Tr. 3920; CX 8007-028 (Athey Report)).

**Response to Proposed Finding No. 1950**

Complaint counsel agrees with the proposed finding. The cited Table 1 from Dr. Athey’s report showing the “Number of observations per category of search query” for generic, 1-800 Trademark, and Bound Competitor Trademark. The numbers in Table 1 show that the ratio of 1-800 Contacts trademark searches to generic queries is .29 ( $2769 / 9450 = .29$ ). The ratio of 1-800 Contacts trademark searches to generic and bound competitor trademark searches combined is .25 ( $2769 / (9450 + 1434) = .25$ ). Accordingly, this finding contradicts the ratios stated in proposed findings 1946 and 1948.

Category of Search	Generic	1-800 Contacts Trademark	Bound Competitor Trademark
Number of searches	9,450	2,769	1,434
% of total searches	59.5%	17.4%	9.0%

**1951.** The challenged settlement agreements did not restrict a firm from placing advertisements on Facebook targeting customers who “liked” competitors. (CX 9042 (Evans, Dep. at 104)).

**Response to Proposed Finding No. 1951**

Complaint Counsel has no specific response.

**1952.** The settlement agreements did not restrict television or radio advertising. (Evans, Tr. 1714).

**Response to Proposed Finding No. 1952**

Complaint Counsel has no specific response.

**1953.** Dr. Evans' proposed market for online retail sales of contact lenses [REDACTED] } (Evans, Tr. 1694-95).

**Response to Proposed Finding No. 1953**

Complaint Counsel has no specific response.

**1954.** The challenged settlement agreements did not affect directly typing a URL, bookmarks, e-mail advertising, banner ads or product listing advertisements.

**Response to Proposed Finding No. 1954**

Complaint Counsel has no specific response.

**1955.** Display advertising is one way for firms to increase brand awareness. (CX 9043 (Athey, Dep. at 170)).

**Response to Proposed Finding No. 1955**

Complaint Counsel has no specific response.

**5. *Dr. Athey's Opinion That Consumers Believe 1-800 Contacts Is The Only Online Contact Lens Retailer Is Baseless And Unreliable***

**1956.** Dr. Athey did not have any evidence that any consumers believed that 1-800 Contacts is the only online retailer of contact lenses. (CX 9043 (Athey, Dep. at 262 ("Q. I asked whether you have any evidence that there are any consumers that held the belief that there are no other online contact lens retailers other than 1-800-CONTACTS? A. No."))).

**Response to Proposed Finding No. 1956**

Complaint Counsel has no specific response. See Response to Proposed Finding 1932.

**1957.** Dr. Athey did not do any survey regarding whether there are consumers who believe that 1-800 Contacts is the only online retailer of contact lenses. (Athey, Tr. 925-27).

**Response to Proposed Finding No. 1957**

Complaint Counsel has no specific response. See Response to Proposed Finding 1932.

**1958.** Dr. Athey did not conduct any user survey. (CX 9043 (Athey, Dep. at 60)).

**Response to Proposed Finding No. 1958**

Complaint Counsel has no specific response. See Response to Proposed Finding 1932

**1959.** The only survey information that Dr. Athey cited regarding whether consumers believe that 1-800 Contacts is the only online retailer of contact lenses were the results of a question reflected on a single page of a presentation by the private equity firm Berkshire Partners—page 39 of CX 1109. (Athey Tr., 926-27; CX 1109-0039).

**Response to Proposed Finding No. 1959**

This proposed finding is misleading and should be rejected, as Dr. Athey did not offer an opinion that consumers believe that 1-800 Contacts is the only online retailer of contact lenses. The presentation by Berkshire Partners was one of several sources of information Dr. Athey identified as showing that “[c]onsumers are not aware in general of the price distribution among online contact lens sellers.” (CX8007 at 021 (¶ 56) (Athey Expert Report); CCPTF ¶¶ 1344-1354; (RX1228 at 036, *in camera* (AEA analysis entitled “Staff Final Update,” stating that, based on a consumer survey, {

\_\_\_\_\_

\_\_\_\_\_ })).

**1960.** The survey reflected in the Berkshire Partners presentation was conducted by Stax (Athey, Tr. 894-95).

**Response to Proposed Finding No. 1960**

Complaint Counsel does not disagree with the proposed finding.

**1961.** Stax was a third party retained by Berkshire Partners to perform some research as an adjunct to Berkshire Partners’ evaluation of the potential acquisition of 1-800 Contacts. (CX 9039 (Clarkson, Dep. at 35)).

**Response to Proposed Finding No. 1961**

Complaint Counsel does not disagree with the proposed finding.

1962. [REDACTED]

[REDACTED] )}.}

**Response to Proposed Finding No. 1962**

The proposed finding is not supported by the testimony cited, which relates only to Mr. Bethers' perceptions, he has no foundation to state what is "often" relied upon by "those in the relevant industry." Moreover, Mr. Bethers' self-interested assertion is not credible, and is contrary to the weight of the evidence and Mr. Bethers' own behavior in the ordinary course of business.

Mr. Bethers admits that { [REDACTED]

[REDACTED]

[REDACTED] } (Bethers, Tr. 3840 {( [REDACTED]

[REDACTED] )}).

1963. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1963**

The proposed finding is not supported by the testimony cited, which relates only to Mr. Bethers' perceptions, he has no foundation to state what "often is intended" by buy-side consultants. Moreover, Mr. Bethers' self-interested assertion is not credible, and is contrary to the weight of the evidence and Mr. Bethers' own behavior in the ordinary course of business. Mr. Bethers admits that { [REDACTED]

[REDACTED] } (Bethers, Tr. 3840 { [REDACTED] [REDACTED] })).

**1964.** A slide in the Berkshire Partners presentation that purports to summarize some of the Stax survey results states under the header, "Online Buyers Reasons for Initially Choosing Their Online Retailer," that 34.7% of respondents who were 1-800 Contacts customers selected the option, "It Was the Only Online Contacts Site of Which I Was Aware." (CX 1109-0039).

**Response to Proposed Finding No. 1964**

Complaint Counsel has no specific response.

**1965.** Dr. Athey did not know who Stax surveyed, how it selected the respondents or what questions it asked them. (Athey, Tr. 896-97).

**Response to Proposed Finding No. 1965**

The proposed finding is irrelevant. For the reasons stated above in response to 1932, none of Dr. Athey's analysis or conclusions depend on whether any consumers believe that 1-800 Contacts is the only online contact lens retailer.

**1966.** The slide on which Dr. Athey relied indicates that only 101 1-800 Contacts customers participated. (CX 1109-0039).

**Response to Proposed Finding No. 1966**

The proposed finding is irrelevant. For the reasons stated above in response to 1932, none of Dr. Athey's analysis or conclusions depend on whether any consumers believe that 1-800 Contacts is the only online contact lens retailer.

**1967.** As Dr. Athey admitted, respondents who simply could not remember the name of any other contact lens retailer were likely to select the response, "It Was the Only Online Contacts Site of Which I Was Aware." (Athey, Tr. 899).

**Response to Proposed Finding No. 1967**

The proposed finding is not supported by the testimony cited. Dr. Athey was not asked, and did not offer any testimony regarding, what respondents "were likely to select" in the event they "simply could not remember the name of any other contact lens retailer." (Athey, Tr. 899).

**1968.** As Dr. Athey admitted, the Stax survey could simply indicate that 34 percent of people who became 1-800 Contacts customers were only aware of 1-800 Contacts at the time they first became a customer because they were relying on TV and radio. (Athey, Tr. 906).

**Response to Proposed Finding No. 1968**

The proposed finding is irrelevant. For the reasons stated above in response to 1932, none of Dr. Athey's analysis or conclusions depend on whether any consumers believe that 1-800 Contacts is the only online contact lens retailer.

**1969.** For these reasons, Dr. Athey's opinion that some consumers believe that 1-800 Contacts is the only online contact lens retailer is unreliable and entitled to no weight.

**Response to Proposed Finding No. 1969**

The proposed finding is irrelevant. For the reasons stated above in response to 1932, none of Dr. Athey's analysis or conclusions depend on whether any consumers believe that 1-800 Contacts is the only online contact lens retailer.

**6. *Dr. Athey's Analysis Of The Price Premium Is Not Reliable***

**1970.** Dr. Athey relies on a comment in a memorandum prepared by Berkshire Partners for National Vision stating that they are "concerned that 1-800's premium pricing position versus its competitors is unsustainable in the medium- to long-term given the commodity-like nature of contact lenses and 1-800's insufficiently distinguishable service." (CX 8007-019; CX 1109-003.)

**Response to Proposed Finding No. 1970**

The proposed finding is incorrect to the extent that the word “relies” suggests that the quoted document was the only source of evidence considered by Dr. Athey. As stated in the response to proposed finding 1976, Dr. Athey relied on multiple sources of evidence for this part of her analysis. Complaint Counsel agrees that the quoted statement describe a conclusion reached by Berkshire Partners in connection with its work for National Vision.

**1971.** Berkshire Partners, a private equity firm, owned National Vision at the time and was considering whether to make a bid for 1-800 Contacts. (Clarkson, Tr. 199-200).

**Response to Proposed Finding No. 1971**

Complaint Counsel agrees with the proposed finding.

**1972.** Despite the concerns expressed by Berkshire Partners regarding 1-800 Contacts’ price premium, Berkshire Partners believed that an acquisition of 1-800 Contacts by National Vision *could* be attractive. (CX 1109-003).

**Response to Proposed Finding No. 1972**

The proposed finding is misleading because the highlighted word “could” requires additional explanation. Berkshire Partners believed that the acquisition of 1-800 contact was attractive only as a means to build a relationship with Walmart. Because Berkshire Partners viewed 1-800 Contact’s price premium as fragile, it did not recommend an acquisition of 1-800 Contacts on the basis of the value of its business alone. (CX 1109 at 003).

**1973.** The founder and president of ACLens.com (which is owned by National Vision) recognized that 1-800 Contacts’ service is distinguishable, at least in his view as the president of an online contact lens retailer, when he testified that “1-800 Contacts has excellent service and we [ACLens.com] *aspire* to a similar level.” (Clarkson, Tr. 172-73, 188) (emphasis added).

**Response to Proposed Finding No. 1973**

The proposed finding is not supported by the testimony. Mr. Clarkson identified 1-800 Contacts and AC Lens as “close competitors” on service, along with Vision Direct and Coastal, and testified that “there is not a ton of differentiation.” See Clarkson, Tr. 172 (“Q. Are there other companies that AC Lens considers close competitors, aside from price, when it comes to service offerings? A. Yeah. I mean, so -- so in terms of service, you know, we -- we -- we think that 1-800 has excellent service and we aspire to a similar level. But we also think Vision Direct and Coastal probably do a pretty good job, too. There's not a ton of differentiation.”). Further, even if true the proposed finding is irrelevant, because Complaint Counsel’s experts conclusions do not depend on service levels being similar. (Athey Tr. 754).

**1974.** The Berkshire Partners’ memorandum itself concedes a lack of understanding regarding what contact lens consumers actually care about in selecting a retailer: “we believe that 1-800 has best-in-class service, but we remain uncertain of the degree to which customers care.” (CX 1109-009.)

**Response to Proposed Finding No. 1974**

The proposed finding is misleading because the phrase “concedes a lack of understanding” is not supported by statement quoted to support it. A fair reading of “remain uncertain of the degree to which customers care” is that Berkshire Partners was not convinced by the evidence it reviewed that 1-800 Contacts “best-in-class service” justified its premium prices. That is the same conclusion reached by Dr. Athey and Dr. Evans from their reviews of the evidence.

**1975.** There is ample evidence in the record of this case that consumers have diverse preferences in selecting a contact lens retailer, and many consumers consider trust, reliability, ease of shopping, convenience, and speed of delivery when selecting a contact lens retailer. (CX 9017 (Blackwood, Dep. at 46, 61, 74, 224); CX 9032 (L. Schmidt, Dep. at 237); RX 106-0001; RX 1128-0121; RX 1108-0010; { ██████████ }).

**Response to Proposed Finding No. 1975**

Complaint counsel agrees with the proposed finding. The fact that consumers have “diverse preferences” concerning the listed services and attributes is the reason why the relevant product market for this case is the sale of contact lenses online. Online retailers meet a unique set consumer “preferences,” which cannot be met by other channels.

**1976.** In relying on the comments in the Berkshire Partners’ memorandum, Dr. Athey did not consider or address any of the other evidence in the record of this case regarding why consumers select a particular contact lens retailer or why consumers might be willing to pay a premium for one contact lens retailer over other retailers. (CX 8007-019).

**Response to Proposed Finding No. 1976**

The proposed finding is incorrect. Dr. Athey considered and relied on multiple sources of evidence to understand why consumers might be willing to pay a premium for one contact lens retailer over other retailers, as described in Complaint Counsel’s responses to proposed findings 1959 and 2064. Further, Dr. Athey testified that, even if there were new evidence that some group of consumer were willing to pay a premium for 1-800 Contacts services, it would not change her conclusions. Athey Tr. 755 (“if the agreements go away, some consumers will be ... exposed to price information and better alternatives for them, and I provide evidence that a set of consumers will indeed avail themselves of that information and receive lower prices. The idea that some consumers value high service is completely consistent with that conclusion.”)).

7. *Dr. Athey’s Reliance On The Discredited Bain Surveys Makes Her Opinion On Consumer Interest In Pricing Information Unreliable*

**1977.** [REDACTED]  
[REDACTED] } (CX 1162-004; Tr. 169).

**Response to Proposed Finding No. 1977**

Complaint Counsel objects to the proposed finding as misleading and incorrect as to the reported surveys. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (see CX1162 at 006, *in camera*). The “not to be

relied on by any 3rd party” disclaimer expressly applies to “any 3rd party,” but not to Bain’s

client. Accordingly, it is not relevant to its reliability, as the { [REDACTED] } statement

does not apply to the intended audience for the documents, it limits only Bain’s potential liability

to third parties who did not pay Bain for the study and were not its intended audience.

**1978.** Complaint Counsel offered no evidence to support a finding that the survey was conducted using accepted principles of survey research. (Tr. 169).

**Response to Proposed Finding No. 1978**

The proposed finding should be rejected to the extent it implies that evidence in the record fails to support the reliability of the underlying surveys. The document in question { [REDACTED] [REDACTED] }. (See CX1162 at 006, *in camera* { (“ [REDACTED] )}). Results from the underlying surveys are reported in the record in other documents which are not labeled draft and which indicate that 1-800 Contacts viewed underlying information as reliable. See (CX0547 at 028, *in camera* [REDACTED] [REDACTED] ). In addition, the document was relied upon by two of Respondent’s experts (*see* RX0739 (¶ 106 & n.105) (Murphy Expert Report); RX0736 (¶¶ 14 & n.20, 15 & n.22, 22 & nn.41–42) (Goodstein Expert Report))—indicating they, too, view the results as reliable.

**1979.** The Court ruled that the Bain surveys prepared in connection with THLee’s contemplated acquisition of 1-800 Contacts were not reliable. (Tr. 168-69 (On CX 1162 and CX 430, “the exhibits are excluded as unreliable”).

**Response to Proposed Finding No. 1979**

This proposed finding should be rejected. The Court ruled that two particular *documents* (CX1162 and CX0430) could be relied on only for limited purposes. See JX0002-A. The Court has not ruled on, and has never been given the opportunity to rule on, “the Bain surveys” *themselves*. Further, the proposed finding’s factual statement is incorrect as to when and how TH Lee Partners used the Bain surveys. TH Lee Partners was 1-800 Contacts’ primary-owner at the time that it used the Bain survey to evaluate a potential further acquisition of Vision Direct.

**1980.** The Court further ruled that since forwarding an email is not an adoption of the contents therein without additional statements or context that demonstrate clearly and manifest an adoption or belief in their truth, the Bain presentation is not a statement of a party opponent. (Tr. 169-70).

**Response to Proposed Finding No. 1980**

This proposed finding should be rejected. The Court ruled that two particular *documents* (CX1162 and CX0430) could be relied on only for limited purposes. See JX0002-A. The Court has not ruled on, and has never been given the opportunity to rule on, “the Bain presentation.” Complaint Counsel notes that CX1162 shows on its face that it was forwarded by a 1-800 Contacts’ Board of Directors member with additional statements demonstrating a belief in its truth. Specifically, { [REDACTED] } was a 1-800 Contacts board member. (CX1162 at 001, *in camera*). Thus, the document was a communication from one 1-800 Contact board member to senior executives at 1-800 Contacts and other members of its board of directors.

**1981.** The Court admitted CX 430 and CX 1162 only for the limited purpose to show that Bain prepared a report and that the report was distributed within 1-800 Contacts. CX 430 and CX 1162 cannot be used as proof that the surveys or reports or charts contained in the report are true and accurate. (Tr. 170).

**Response to Proposed Finding No. 1981**

The Court’s legal ruling speaks for itself. Complaint Counsel notes that CX1162 shows on its face that it was forwarded by a 1-800 Contacts’ Board of Directors member with additional statements demonstrating a belief in its truth. Specifically, { [REDACTED] } was a 1-800 Contacts board member. (CX1162 at 001, *in camera*). Thus, the document was a communication from one 1-800 Contact board member to senior executives at 1-800 Contacts and other members of its board of directors.

**1982.** Despite the Court’s ruling, Dr. Athey relied upon CX 1162 and the surveys and documents contained therein that appeared in other exhibits to reach her conclusions about consumer’s interest in pricing information. (Athey, Tr. 827 (Q: “Was [CX 1162] one of the pieces of information that you looked at in reaching your conclusion about consumers’ interest in pricing information? A: Yes”), Tr. 828 (“JUDGE CHAPPELL: Excuse me. Is she using data from the Bain survey which I excluded from evidence? A: ... Our understanding of Your Honor's order was of course that this information could not be included for hearsay purposes, meaning for the truth of the matter, but rather could be included -- could be introduced for the fact that it occurred. And

also our understanding of course is that experts are able to rely on documents and data that are not in evidence in court, but they are what an expert relies on for its conclusions -- JUDGE CHAPPELL: I also determined that those surveys were unreliable based on the way they were offered.”)).

### **Response to Proposed Finding No. 1982**

The Court admitted CX 1162 only for the limited purpose. CX1162 was “*one of the pieces of information*” Dr. Athey reviewed that corroborated consumers’ interest in price information. In addition to CX1162, Dr. Athey cited in her report other evidence, admissible for all purposes, that confirm the obvious and common-sense proposition that consumers are interested in prices. *See, e.g.,* CX1449-050 (““Low prices” is the top purchasing criterion”; “Online Shoppers are Primarily Focused on Price”). (*See* CX8007 (Athey Report) -012 n.21 (identifying slide by Bates Number as “1-800F\_00096401 at 448”)).

**1983.** Complaint Counsel conceded that the underlying survey contained in CX 1162 that the Court ruled to be unreliable “absolutely formed the basis for some” of Dr. Athey’s conclusions. (Tr. 829; CX 547 (incorporating the unreliable Bain survey)).

### **Response to Proposed Finding No. 1983**

This proposed finding should be rejected. The Court ruled that two particular *documents* (CX1162 and CX0430) could be relied on only for limited purposes. See JX0002-A. The Court has not ruled on, and should not rule, that all documents that incorporate such information is inherently unreliable. For example, CX0547 incorporates certain data generated by Bain, but it is admitted for all purposes (see JX0002-A), and there is no basis to doubt the document’s reliability. First, the document itself was prepared by 1-800 Contacts personnel, not by Bain. *See* Bethers, Tr. 3842-3843 (slides were titled “us” when referring to 1-800 Contacts). Moreover, the CEO of 1-800 Contacts, Mr. Bethers, specifically directed that the material be distributed to the highest executives of 1-800 Contacts in order to “educate the executive leadership team.” (Bethers, Tr.

3833-3834, 3839 (“The purpose is to educate the executive leadership team, who were the principal presenters at those meetings, of background information. That was the intent.”)).

**1984.** For these reasons, to the extent Dr. Athey’s opinion regarding consumers’ interest in prices relies upon survey evidence displayed in CX 1162, CX 547, CX 430, and other documents containing the flawed and unreliable surveys Bain & Company prepared in 2013 in connection with THLee’s contemplated acquisition of 1-800 Contacts, it is unreliable and entitled to no weight.

**Response to Proposed Finding No. 1984**

This proposed finding should be rejected. First, the proposition that consumers are interested in prices is entirely unremarkable. Second, Professor Athey’s opinion relied on a great deal of admissible evidence apart from the CX1162 and CX0430, as discussed in response to Proposed Finding No. 1982. Third, the Court has not ruled that CX0547 or any other admissible documents “containing” information sourced from Bain are “unreliable. No such ruling would be warranted or defensible, as explained in response to Proposed Finding No. 1983.

***C. Paid Search Advertising In Response To 1-800 Contacts’ Trademarks Is Not Competitively Significant***

**1985.** The challenged settlement agreements had at most a *de minimis* effect on **competition**. (RX 739-0047 to -0052 (Murphy Report); CX 9048 (Murphy, Dep. at 46-47, 50-51)).

**Response to Proposed Finding No. 1985**

The proposed finding of fact is contrary to the weight of the evidence and should be rejected for the reasons explained in Complaint Counsel’s Post-Trial Brief, Post-Trial Reply Brief, and in its responses to Proposed Finding No. 1891, *et seq.*

**1986.** The fact that the settling parties settled indicates that they believed that advertising in response to searches for 1-800 Contact’s trademark was less economically significant than the costs of litigation. (RX 739-0049 to -0050 (Murphy Report); Murphy, Tr. 4205-07).

**Response to Proposed Finding No. 1986**

The proposed finding is wrong as a matter of economics and false because it ignores the context in which these parties decided to settle. First, many of the parties subject to Bidding Agreements did not have sufficient funds, or access to funds, to litigate, even had they wished to do so. For example, Memorial Eye general manager Eric Holbrook testified that Memorial Eye's litigation with 1-800 Contacts was financially ruinous for Memorial Eye's online business; and, even though Mr. Holbrook *clearly understood* that losing this traffic would be devastating, he simply *could not afford* to continue fighting 1-800 Contacts. (Holbrook, Tr. 1933, 1942, 1947-1948, 2065-2066. *See* CC Br. at 22, 48-52).

Moreover, even if it were true that each individual party settled because it believed that the costs of litigating exceeded the profits it could attain from successfully litigating, this does not support the economic conclusion that advertising in response to searches on 1-800 Contacts brand terms would not be economically significant. The reason for this is that any one rival that successfully litigated against 1-800 Contacts would capture only a small share of the benefits of advertising on 1-800 Contacts' brand terms. For example, to the extent that consumers would use the information from a rival's ad to obtain lower prices through 1-800 Contact's price match program, the rival who successful litigated against 1-800 would obtain no benefit, although consumers might obtain a large benefit. Additionally, unlike 1-800 Contacts, the rival would not be setting supracompetitive prices; in order to induce 1-800 Contacts customers to switch, a rival would need to offer a significant price discount. (Evans Tr. 1554-1555 (explaining why the private benefit differs from the social benefit from the lost advertising)).

In addition, the proposed finding ignores the context in which these parties decided to settle. Dr. Murphy wrongly assumes that, at the time of settlement, the settling parties could calculate the future value of advertising in response to searches for 1-800 Contact's trademark, and could calculate the cost of litigation. As Dr. Evans explained, neither of these factual assumptions applies to the Bidding Agreements. (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." (CCPTF ¶¶ 1496-1510)).

**1987.** Between 2011 and 2015, 1-800 Contacts' share of all contact lens sales was less than 10 percent. (RX 739-0087 (Murphy Report)).

**Response to Proposed Finding No. 1987**

Complaint Counsel agrees that 1-800 Contact's share of all sales of contact lenses in the United States between 2011 and 2015 is roughly 10 percent. However, 10 percent is not a valid or useful market share for antitrust analysis, because the relevant antitrust product market in which to analyze the conduct at issue in this case is the market for the sale of contact lenses online, and 1-800 Contacts primarily competes with other online vendors, particular on price and service. In a properly defined relevant product market, 1-800 Contacts' market share is greater than 50 percent. (CCPTF ¶¶ 1542-1610).

**1988.** 1-800 Contacts earns approximately { [REDACTED] } of its sales from paid search advertising. (RX 739-0049 (Murphy Report); RX 428-0030)

**Response to Proposed Finding No. 1988**

The proposed finding of fact should be rejected because it understates the importance of paid search advertising on 1-800 Contacts business. As preliminary matter, the {█} figure refers only to sales made as a result of clicks on advertisements triggered by user queries for 1-800 Contacts trademark terms, and does not include any sales made as a result of clicks on advertisements triggered by user queries for generic terms, which account for at least another {█} of initial sales. RX0428 at 030. Further, the proposed finding also ignores the fact that an initial sale, which typically comes from paid search leads to follow-on sales from e-mails or apps. (CX8006 at 104 (¶ 227) (Evans Expert Report)).

**1989.** Even if the challenged settlement agreements restricted all other retailers from competing for sales who search for 1-800 Contacts' trademarks, the settlement agreements would have foreclosed {█} of contact lens sales. (RX 739-0049 (Murphy Report); CX 9048 (Murphy, Dep. at 174-75)).

#### **Response to Proposed Finding No. 1989**

The proposed finding is incorrect. The {█} figure refers only to sales made as a result of clicks on advertisements triggered by user queries for 1-800 Contacts trademark terms, it does not include any sales made as a result of clicks on natural results triggered by user queries for generic terms, which account for at least another {█} of 1-800 Contacts' initial sales. RX0428 at 030; *see also* Bethers, Tr. 3814-3816 ({█}). Moreover, it assumes a broad market, which incorrectly combines all channels for the retail sale of contact lenses. 1-800 Contacts primarily competes with other online vendors, particular on price and service. (CCPTF ¶¶ 1542-1610). The proposed finding also ignores the fact that an initial sale – which might come from paid search – leads to follow-on sales from e-mails or apps). (CX8006 at 104 (¶ 227) (Evans Expert Report)).

**1990.** An agreement that affects only { [REDACTED] } of sales does not restrict activity likely to pose a significant competitive constraint. (CX 9048 (Murphy, Dep. at 175-76; RX 739-0049 (Murphy Report)).

**Response to Proposed Finding No. 1990**

The proposed finding of fact is irrelevant because it assumes a broad market, which incorrectly combines all channels for the retail sale of contact lenses. 1-800 Contacts primarily competes with other online vendors, particular on price and service. (CCPTF ¶¶ 1542-1610). Within the relevant market for sale of contact lenses online, search advertising is the most important method of advertising, promotion, and customer acquisition. (CCPTF ¶¶ 489-589). This point can also be seen by noting that 1-800 obtains roughly half of online sales. In Respondent’s own words, { [REDACTED] } (CX1446 at 030, *in camera*). Thus, removing 1-800 Contacts’ bidding agreements so that rivals could bid on 1-800’s BNKWs would expand substantially the opportunities that rivals have to reach 1-800 Contacts’ customer base with comparative price information. As noted elsewhere, such comparative price information previously prompted 1-800 Contacts to offer better deals to consumers. (*See* CCPTF ¶ 1573; *see also* CCPTF ¶¶ 1478-1486).

**1991.** Between 2004 and 2014, paid search advertising for keywords containing 1-800 Contacts’ trademark accounted for between 6 percent and 14 percent of 1-800 Contacts’ total paid search advertising budget. (RX 739-0028, -0092 (Murphy Report)).

**Response to Proposed Finding No. 1991**

Complaint Counsel has no specific response except to note that “the 6 percent and 14 percent of 1-800 Contacts’ total paid search advertising budget” is misleading because the cost of this advertising was depressed by the Bidding Agreements.

**1992.** [REDACTED]  
[REDACTED] (RX 739-0028, -0092 (Murphy Report; Murphy, Tr. 4112-13)).

**Response to Proposed Finding No. 1992**

Complaint Counsel has no specific response except to note that “the 2 percent of 1-800 Contacts’ total advertising budget” is misleading because the cost of this advertising was depressed by the Bidding Agreements.

1993. [REDACTED]

**Response to Proposed Finding No. 1993**

Complaint Counsel has no specific response except to note that “the 1 percent of 1-800 Contacts’ total advertising budget” is misleading because the cost of this advertising was depressed by the Bidding Agreements.

1994. [REDACTED]

[REDACTED] } (RX 739-0099 (Murphy Report); Murphy, Tr. 4187-90).

**Response to Proposed Finding No. 1994**

The proposed finding of fact is misleading and irrelevant. Data regarding advertiser *bidding* does not measure the frequency with which an advertiser’s ads were shown in response to *user queries* relating to 1-800 Contacts’ trademark. The default “broad match” setting provided by search engines results in ads triggered in response to relevant searches even where the advertiser did not bid on the user query. This proposed finding states that the ad impressions were “based on *bids for 1-800 Contacts’ trademarks*” – not for *queries* containing 1-800 Contacts’ trademarks. See Response to Proposed Findings No. 1946 to 1949. Moreover, the 3% number is irrelevant for several reasons. First, it incorrectly classifies broad match ad impressions, which undercounts the number of ads that appeared on brand queries and overcounts the number of ads that appeared on

generic queries. Second, it ignores the fact that the bidding agreements themselves prevented the most important advertisers from bidding in auctions for 1-800 Contacts brand terms.

**1995.** [REDACTED] } (RX 739-0099 (Murphy Report)).

**Response to Proposed Finding No. 1995**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994.

**1996.** [REDACTED] } (RX 739-0099 (Murphy Report); Murphy, Tr. 4191).

**Response to Proposed Finding No. 1996**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994.

**1997.** [REDACTED] (RX 739-0099 (Murphy Report); Tr. 4187).

**Response to Proposed Finding No. 1997**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994.

**1998.** According to data from Google regarding ads displayed between 2012 and 2016 based on bids on keywords related to contact lenses, only { [REDACTED] } of such ads appeared based on bids on bids for 1-800 Contacts' trademarks. (RX 733-0054 (Ghose Report)).

**Response to Proposed Finding No. 1998**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994.

**1999.** According to data from Google regarding ads displayed between 2012 and 2016 based on bids on keywords related to contact lenses, { [REDACTED] } of such ads appeared based on bids on terms other than 1-800 Contacts' trademarks. (RX 733-0054 (Ghose Report)).

**Response to Proposed Finding No. 1999**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994.

**2000.** According to data from Google, between 2012 and 2016, ads displayed based on bids on 1-800 Contacts' trademarks and ads for Memorial Eye displayed in response to searches for 1-800 Contacts' trademark based on broad matching together accounted for only { [REDACTED] } of all ads displayed based on bids on keywords related to contact lenses. (CX 9046 (Ghose, Dep. at 132-33)).

**Response to Proposed Finding No. 2000**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994.

**2001.** According to data from Google regarding ads displayed between 2012 and 2016 based on bids on keywords related to contact lenses, { [REDACTED] } of such ads appeared based on bids on the term "contacts." (RX 733-0054 (Ghose Report)).

**Response to Proposed Finding No. 2001**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to Proposed Finding No. 1994. Further, many of the ad impressions for contacts were for search queries containing brand terms. Dr. Evans Memorial Eye analysis illustrates the competitive importance of these omitted broad match impressions to 1-800 Contacts' rivals and to consumers of contact lenses.

**2002.** Even if the settlements affected searches for 1-800 Contacts and comparative words, they would have very little effect. (RX 733-0058, -059 (Ghose Report)).

**Response to Proposed Finding No. 2002**

The proposed finding of fact is incorrect. 1-800 Contacts obtains roughly half of online sales from search queries containing its brand terms. In Respondent's own words, { [REDACTED] }

[REDACTED]



testimony, Dr. Ghose admitted { [REDACTED] } (Ghose, Tr. 3925).

**2005.** According to data from comScore compiled by Dr. Athey regarding searches containing 1-800 Contacts' trademarks, only two out of { [REDACTED] } such searches included both 1-800 Contacts' trademark and "cheaper," "better," "vs," "expensive," or "competitor." (RX 733-0059 (Ghose Report)).

**Response to Proposed Finding No. 2005**

The proposed finding of fact is irrelevant for the reasons stated in response to proposed finding 1994.

**2006.** Data from Google regarding searches containing 1-800 Contacts' trademarks between 2010 and 2016 did not include any searches for the phrase "1-800 Contacts cheaper competitors." RX 733-0059 (Ghose Report); Ghose, Tr. 3925-26).

**Response to Proposed Finding No. 2006**

The proposed finding of fact is misleading and irrelevant for the reasons stated in response to proposed finding 1994. Because the aggregated Google data did not include information about individual queries, it is not possible to know the prevalence of a particular type of query.

**2007.** Contact Lens King did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

**Response to Proposed Finding No. 2007**

Complaint Counsel does not disagree with the proposed finding, but notes that this merely demonstrates that Contact Lens King was not "using" 1-800 Contacts trademark. Moreover, it is not relevant for the reasons stated above in response to Proposed Finding No. 1994.

**2008.** Walgreens did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

**Response to Proposed Finding No. 2008**

Complaint Counsel does not disagree with the proposed finding, but notes that this merely demonstrates that Walgreens was not "using" 1-800 Contacts trademark. Moreover, it is not relevant for the reasons stated above in response to Proposed Finding No. 1994.

**2009.** Standard Optical did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

**Response to Proposed Finding No. 2009**

Complaint Counsel does not disagree with the proposed finding, but notes that this merely demonstrates that Standard Optical was not "using" 1-800 Contacts trademark. Moreover, it is not relevant for the reasons stated above in response to Proposed Finding No. 1994.

**2010.** Memorial Eye did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

**Response to Proposed Finding No. 2010**

Complaint Counsel does not disagree with the proposed finding, but notes that this merely demonstrates that Memorial Eye was not "using" 1-800 Contacts trademark. Moreover, it is not relevant for the reasons stated above in response to Proposed Finding No. 1994. In fact, because Dr. Evans was able to analyze the large volume of broadmatch impression achieved by Memorial Eye, it provides an illustration of why findings 2007 to 2010 are not relevant, in part, because of the omission of a substantial volume of broadmatch impression, which were the life blood of Memorial Eye's business. (CCPTF ¶¶ 1390-1403).

**2011.** Dr. Evans did not conduct any analysis of Memorial Eye's profits. (RX 739-0070 (Murphy Report)).

**Response to Proposed Finding No. 2011**

The proposed finding is incorrect. In paragraph 184 of his rebuttal report, Dr. Evans explained: "Professor Murphy suggests that Memorial Eye exited because it was losing money. In fact, Memorial Eye earned about { [REDACTED] [REDACTED] [REDACTED] } (CX8009 (¶ 184) (Evans Rebuttal Report, *in camera*)). In addition, the manager of Memorial Eye testified that the cost of

litigation with 1-800 Contacts reduced its profits and viability, and that if the business grew and reached greater scale it would become more profitable. (Holbrook Tr. 1945 (“Well, increasing the sales volume helps with your profitability.”); 1948 (“we were trying to recoup some of the losses that we had had during the -- during the lawsuit, as a result of the lawsuit)).

**2012.** Dr. Athey did not analyze whether, absent the settlement agreements, any firm would find it profitable to bid to have an ad displayed in response to a search for 1-800 Contacts. (CX 9043 (Athey, Dep. at 144); CX 9043 (Athey, Dep. at 296) (“Q. So my question was, though, whether there’s any analysis that you’ve done in this case that I could look at and it would tell me what the profit margin was for any of the parties to the settlement agreements in bidding on any keyword? . . . THE WITNESS: “I did not provide specific profit calculations for any bidder.”)).

### **Response to Proposed Finding No. 2012**

The proposed finding is incomplete and misleading. Dr. Athey did not analyze the profitability of any single firm bidding “to have an ad displayed in response to a search for 1-800 Contacts” because she reached the conclusion that would be profitable for many of the bound competitors. (CX9043 (Athey, Dep. at 123 (“the agreements in many cases stopped them from engaging in a profitable activity.”), 113 (“the -- a variety of the competitors for whom those -- that bidding would be most profitable have entered into agreements with 1-800 not to bid.”))).

**2013.** The fact that Contact Lens King, Walgreens, Standard Optical and Memorial Eye did not bid on 1-800 Contacts’ trademarks prior to entering into settlement agreements with 1-800 Contacts indicates that these settling parties did not believe that doing so was profitable. (RX 739-0051 (Murphy Report)).

### **Response to Proposed Finding No. 2013**

The proposed finding is incorrect. First, it does not account for broad match ads from these advertisers. Second, it draws an incorrect inference, because other factors may have influenced the firms’ conduct, including the threats of litigation by 1-800 Contacts. In fact, Memorial Eye’s manager testified that the only reason it did not bid on 1-800 Contacts brand terms was due to the threats and litigation by 1-800 Contacts. (Holbrook, Tr. 1905-1906; CCPTF ¶ 1396).

**2014.** 1-800 Contacts and WebEyeCare entered into a settlement agreement on September 3, 2010. (CX 324).

**Response to Proposed Finding No. 2014**

Complaint Counsel agrees with the proposed finding.

**2015.** { [REDACTED] }  
(RX 1849; CX 9000 (Batushansky, IH at 8, 34, 38-40)).

**Response to Proposed Finding No. 2015**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability. { [REDACTED] }  
{ [REDACTED] } (Murphy, Tr. 4263).

**2016.** 1-800 Contacts and ACLens entered into a settlement agreement on March 10, 2010. (RX 28).

**Response to Proposed Finding No. 2016**

Complaint Counsel agrees with the proposed finding.

**2017.** ACLens grew from 50 employees in 2010 to 170 as of December 2016. (CX 9039 (Clarkson Dep., at 11)).

**Response to Proposed Finding No. 2017**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability. This finding is also incomplete and misleading because it does not reflect growth at AC Lens' website. (CX9003 (Clarkson, IHT at 9-10)). Rather, AC Lens began providing back-end service to Walmart on January 1, 2013. (CX9003 (Clarkson IH at 139)). Recently, more than 50 percent of AC Lens' business involves performing the back-end service for companies such as Walmart and CVS. (CX9003 (Clarkson, IHT at 9-10)).

**2018.** ACLens shipped 2 million orders with a retail value of \$180 million in 2015. (CX 9003 (Clarkson, IH at 9-10)).

**Response to Proposed Finding No. 2018**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability. This finding is misleading because it does not reflect growth from AC Lens' website. (CX9003 (Clarkson, IH at 9-10)). More than 50 percent of AC Lens' business involves performing the back-end service for companies such as Walmart and CVS. (CX9003 (Clarkson, IHT at 9-10)).

**2019.** National Vision acquired ACLens in June 2011. (Clarkson, Tr. 174).

**Response to Proposed Finding No. 2019**

Complaint Counsel agrees with the proposed finding.

**2020.** [REDACTED] (RX 153-007).

**Response to Proposed Finding No. 2020**

This proposed finding is false and misleading. { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

**2021.** [REDACTED] (CX 1309).

**Response to Proposed Finding No. 2021**

The proposed finding is false. As Memorial Eye's manager testified at trial, for most of the time it operated as a national discount online contact lens retailer, Memorial Eye was profitable. In addition, Memorial Eye would have been more profitable if it did not have to pay the costs of defending litigation by 1-800 Contacts. (Holbrook Tr. 1948 ("we were trying to recoup some of the losses that we had had during the -- during the lawsuit, as a result of the lawsuit)).

**2022.** [REDACTED] (CX 1309).

**Response to Proposed Finding No. 2022**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability.

**2023.** Memorial Eye was too small of a company to constrain 1-800 Contacts prices. (RX 739-0071 (Murphy Report)).

**Response to Proposed Finding No. 2023**

Complaint Counsel agrees with the proposed finding, which explains one reason why entry on the scale of Memorial Eye would not offset the anticompetitive effects of the 14 Bidding Agreements. (CCPTF ¶¶ 1647-1652).

**2024.** Dr. Athey identified numerous companies that were not bound by any settlement agreement with 1-800 Contacts. (Athey, Tr. 854; CX 9043 (Athey, Dep. at 113); CX 8007-042 (Athey Report)).

**Response to Proposed Finding No. 2024**

The proposed finding is unsupported by the testimony cited. The cited testimony refers to Exhibit B of Dr. Athey's report, which includes "online retailers of contact lenses" which were constrained by the Bidding Agreement of an already-bound competitor (because of an affiliation between the two firms). For example, Sears Optical, Target Optical, Pearle Vision, and Contacts Direct are all restricted by 1-800 Contacts' Bidding Agreement with Luxottica because Luxottica runs the website for each company. (Bethers, Tr. 3721-3722. *See* CX8007 at 042 (listing each company as "unbound" because they did not have a written agreement with 1-800 Contacts)).

Likewise, Exhibit B of Professor Athey's report includes retailers which were restrained by threats from 1-800 Contacts, such as Lens Discounters. There is no dispute that Lens Discounters ceased bidding on 1-800 Contacts' trademark terms and implemented negative keywords as a result of litigation threats from 1-800 Contacts. (*See* CX8003 at 003-005 (¶¶ 11-28) (Mitha, Decl.)).

**2025.** Most of the unbound competitors that Dr. Athey identified did not have ads appear frequently in response to a search for 1-800 Contacts' trademarks. (Athey, Tr. 955).

**Response to Proposed Finding No. 2025**

The proposed finding is unsupported by the testimony cited. The cited testimony refers to Exhibit B of Dr. Athey's report, which includes "online retailers of contact lenses" which were constrained by the Bidding Agreement of an already-bound competitor (because of an affiliation between the two firms). For example, Sears Optical, Target Optical, Pearle Vision, and Contacts Direct are all restricted by 1-800 Contacts' Bidding Agreement with Luxottica because Luxottica runs the website for each company. (Bethers, Tr. 3721-3722. *See* CX8007 at 042 (listing each company as "unbound" because they did not have a written agreement with 1-800 Contacts)). Likewise, Exhibit B of Professor Athey's report includes retailers which were restrained by threats from 1-800 Contacts, such as Lens Discounters. There is no dispute that Lens Discounters ceased bidding on 1-800 Contacts' trademark terms and implemented negative keywords as a result of litigation threats from 1-800 Contacts. (*See* CX8003 at 003-005 (¶¶ 11-28) (Mitha, Decl.)).

**2026.** Dr. Athey agreed that the fact that unbound competitors did not have ads appear frequently in response to a search for 1-800 Contacts' trademarks indicates that these unbound competitors believed that the economic benefits of bidding an amount sufficient to have their ad appear would not justify the cost of doing so. (Athey, Tr. 959; RX 739-0048 (Murphy Report)).

**Response to Proposed Finding No. 2026**

The proposed finding is incomplete and misleading. Dr. Athey testified that the threat of litigation with its uncertain associated costs was a factor that deterred unbound competitors from bidding. (Athey, Tr. 958 ("it was not in their economic interest to bid a sufficient amount and incur the risk of a lawsuit"), 959 ("Incorporating the – all the economic costs that a firm considers.")). In addition, Dr. Athey explained that "the causality can run the other way. It's the fact that they weren't bidding that makes them unbound." (Athey, Tr. 956).

**2027.** Dr. Athey did not conduct any analysis of whether any unbound competitor would be chilled by the possibility of litigation by 1-800 Contacts. (CX 9043 (Athey, Dep. at 117)).

**Response to Proposed Finding No. 2027**

The proposed finding is incorrect. Dr. Athey cited evidence that competitors included in Exhibit B of her report (referred to as “unbound competitors” in Proposed Finding No. 2027 and in the cited testimony) were restrained by threats from 1-800 Contacts, such as Lens Discounters. See CX8007 (Athey Report) at -007 n. 9 (discussing Lens Discounters and Lens.com). There is no dispute that Lens Discounters ceased bidding on 1-800 Contacts’ trademark terms and implemented negative keywords as a result of litigation threats from 1-800 Contacts. (See CX8003 at 003-005 (¶¶ 11-28) (Mitha, Decl.)). In addition, asked why ads for the unbound competitors do not fill the SERP, Dr. Athey testified that “[o]ne leading reason could be that the agreements that did exist created a sort of chilling effect for the rest of the industry. That is, firms understood that if they were aggressive and if they -- if they started to actually make a material impact on 1-800, that 1-800 might litigate against them and they would incur costs. And, you know, it -- so the -- this could help them sustain something like a tacit collusion. The set of firms had an explicit agreement, and they felt that they needed an explicit agreement to refrain from the conduct, but it could be that some of the other firms, you know, once the threat of litigation was added in, found it not worthwhile to do so.” (CX9043 (Athey, Dep. at 114-116)).

**2028.** Memorial Eye’s advertisements appeared in response to only {█} of searches for 1-800 Contacts’ trademarks. (CX 8006-094 (Evans Opening Report)).

**Response to Proposed Finding No. 2028**

Complaint Counsel agrees with the proposed finding with the exception of the word “only” to the extent it suggests that appearing half the time is not significant. Further, Complaint Counsel notes that Memorial Eye had an average position of {█} on 1-800 Contacts BKW searches compared to an average position of {█} on non 1-800 Contacts BKW searches. (CCPTF ¶ 645).

**2029.** Dr. Evans had no explanation for why Memorial Eye’s ads did not appear in response to 100% of searches for 1-800 Contacts’ trademarks other than that Memorial Eye had an advertising budget and cut off its bids. (CX 9042 (Evans, Dep. at 80)).

**Response to Proposed Finding No. 2029**

The proposed finding mischaracterizes Dr. Evan's testimony, which states that he did not know and any of a variety of factors could explain when Memorial Eye's ads appear.

**2030.** According to Dr. Evans's analysis of Google data, Memorial Eye obtained approximately { } sales from the { } impressions for its ads in response to searches for 1-800 Contacts' trademarks. (CX 8006-094, CX 8006-095 (Evans Opening Report)). Thus, only roughly { } people who searched for 1-800 Contacts and saw an ad for Memorial Eye purchased contact lenses from Memorial Eye.

**Response to Proposed Finding No. 2030**

The proposed finding is wrong on the math, and incomplete and misleading on the facts. First, the statement "only roughly { } people who searched for 1-800 Contacts and saw an ad for Memorial Eye" is wrong because { } divided by { } equals { }, not { }. Second, in this context { } is commercially and competitively significant. Memorial Eye continued to advertise and make sales to new and returning customers, and Google thought the ads were beneficial to consumers since it continued to show them.

***D. The Settlement Agreements Did Not Enable 1-800 Contacts To Raise Prices Or Reduce Output***

**2031.** The ultimate antitrust inquiry is whether there is competitive harm, also referred to as consumer harm. (Evans, Tr. 1703-04).

**Response to Proposed Finding No. 2031**

Complaint Counsel objects that the proposed finding is a legal conclusion concerning "[t]he ultimate antitrust inquiry," not a statement of fact. While Complaint counsel agrees about the importance of harm to consumers and competition to antitrust analysis, evidence of such harms takes many forms, can be direct or indirect, and should account for the specific circumstances of each case.

**2032.** Economists analyzing a restraint on competition analyze whether there are other competitive forces that limit the harm to competition or consumers from the restraint. (Evans, Tr. 1704).

**Response to Proposed Finding No. 2032**

The proposed finding is vague and misleading because it omits the fact that the cited testimony by Dr. Evans concerned how economists analyze market power. Complaint Counsel agrees with the proposed finding concerning Dr. Evans testimony concerning market power, which is not a necessary element of all antitrust analysis. Complaint Counsel also objects that the proposed finding is a legal conclusion, not a statement of fact.

**2033.** The primary way that economists investigate whether allegedly anticompetitive conduct harmed competition is to investigate the effect of the conduct on rivals' ability to compete and to examine whether the conduct allowed the defendant to raise prices, earn higher margins, or restrict output. (RX 739-0061, -0068 (Murphy Report)).

**Response to Proposed Finding No. 2033**

This proposed finding should be rejected because there is no "primary way" for economists to investigate allegedly anticompetitive conduct. While some or all of the factors Dr. Murphy listed may be relevant for some cases, they are not all relevant to all cases. Because this case involves a facially anticompetitive advertising restraint, the proposed finding is incorrect as to the appropriate antitrust or economic analysis of the Bidding Agreements. The record also contains evidence of price effects resulting from changes in advertising and consumer behavior. Complaint Counsel also objects that the proposed finding is a legal conclusion, not a statement of fact. In addition, while Complaint Counsel agrees that the metrics described by Dr. Murphy are used by economists to assess competitive effects, the phrase "raise prices" must be read to include practices that raise prices compared to the but-for world absent the restraint (or else it would excuse all practices that enable already supra-competitive prices to be maintained). In this case, Professor Murphy conceded that 1-800 Contacts was able to maintain over a 50 percent share of online sales for many years despite charging prices much higher than those of rival sellers. (Murphy, Tr. 4261-4262, 4260, *in camera*).

**2034.** Dr. Evans agrees that economists look for “empirical evidence of actual anticompetitive effects from a practice—such as increases in prices or decreases in output following the implementation of the practice.” (CX 8006-110 (Evans Report)).

**Response to Proposed Finding No. 2034**

The proposed finding should be rejected because it omits the fact that the quoted footnote from Dr. Evans Report concerned market definition and market power analysis, which is not a necessary element of all antitrust cases. In addition, this finding mischaracterizes Dr. Evans’ testimony in this case. Dr. Evans testified: “My view of this case, in fact, is that the settlement agreements and the ongoing discussion between 1-800 and the rivals is a form of collusion for which I would not ordinarily get into an analysis of the exercise of market power.” (Evans, Tr. 1702-1703). Thus, while some or all of the factors Dr. Evans listed may be relevant for some cases, they are not all relevant to all cases. Because this case involves a facially anticompetitive advertising restraint, the proposed finding is incorrect as to the appropriate antitrust or economic analysis of the Bidding Agreements. The record also contains evidence of price effects resulting from changes in advertising and consumer behavior. Complaint Counsel also objects that the proposed finding is legal conclusion, not a statement of fact.

**2035.** Assessing whether total consumer welfare was reduced as a result of the settlements requires a determination of the impact of the settlements on all buyers. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 2035**

This proposed finding is a verbatim copy of proposed finding No. 1861 and should be rejected for the same reasons.

**2036.** It is not sufficient to assess whether the settlements reduced total welfare to analyze the settlements’ effects only on buyers who may have purchased from lower priced competitors in a but-for world without the settlements. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 2036**

This proposed finding is a verbatim copy of proposed finding No. 1862 and should be rejected for the same reasons.

**2037.** Even if in the but-for world average contact lens prices paid by users would be lower, consumers as a whole still could be harmed because in quality adjusted terms average contact lens prices could be higher. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 2037**

This proposed finding is a verbatim copy of proposed finding No. 1863 (except Proposed Finding No. 1863 contains an additional cite to Dr.Evans’s deposition). It should be rejected for the same reasons Proposed Finding No. 1863 should be rejected.

**2038.** The typical way economists evaluate whether particular conduct causes quality adjusted prices to be higher or lower is to investigate whether the conduct caused an increase or decrease in total output. (RX 739-0083 (Murphy Report)).

**Response to Proposed Finding No. 2038**

This proposed finding is a verbatim copy of proposed finding No. 1864, and should be rejected for the same reasons. The proposed finding is also incorrect about the economics. Economists commonly observe whether particular conduct causes quality-adjusted prices to be higher or lower by examining prices. (*See e.g.*, CX8006 at 179-185 (Evans Expert Report) (summary of studies of advertising bans); Farrell, Joseph, Paul A. Pautler, and Michael G. Vita. “Economics at the FTC: retrospective merger analysis with a focus on hospitals.” Review of Industrial Organization 35.4 (2009): 369-385)). In some of these cases, economists try to control for difference in quality either by explicitly including a measure of quality or using a control group that might experience similar changes in quality. In other cases, economists implicitly assume that the change in quality is not significant.

**2039.** Dr. Evans did not form any opinion that the settlement agreements reduced output of contact lenses. (CX 9042 (Evans, Dep. at 263 (“Q. Do you intend to express an opinion at the trial or hearing in this matter that the output, that is, the number of contact lenses sold, has been reduced as a result of the settlement agreements? A. I do not plan to do so.”))).

**Response to Proposed Finding No. 2039**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability. Because this case involves a facially anticompetitive advertising restraint, the proposed finding is incorrect as to the appropriate antitrust or economic analysis of the Bidding Agreements. In addition, Dr. Evans and Dr. Athey both offered analysis and direct and indirect evidence of harm to competition, including evidence of harmful price effects. (CCPTF ¶¶ 1313-1495).

**2040.** Dr. Athey did not form any opinion that the settlement agreements reduced output of contact lenses. (Athey, Tr. 799 (Q. Dr. Athey, did you estimate any change in the output of contact lenses? A. No.); CX 9043 (Athey, Dep. at 194-95 (“Q. Have you conducted any analysis in this case of whether the challenged settlement agreements reduced the output of contact lenses? A. No, I did not present empirical analysis that quantified reduction in output.”))).

**Response to Proposed Finding No. 2040**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability. Because this case involves a facially anticompetitive advertising restraint, the proposed finding is incorrect as to the appropriate antitrust or economic analysis of the Bidding Agreements. In addition, Dr. Evans and Dr. Athey both offered analysis and direct and indirect evidence of harm to competition, including evidence of harmful price effects. (CCPTF ¶¶ 1313-1495).

**2041.** { [REDACTED] } (RX 739-0064, -0107 (Murphy Report)).

**Response to Proposed Finding No. 2041**

Complaint Counsel agrees with the proposed finding's description of Dr. Murphy's analysis of 1-800 Contacts gross margins. Dr. Murphy, however, did not control for any of the factors that one would expect to affect gross retail margins over 14 years. Dr. Evans explained this makes it unreliable as economic evidence. (CX 9042 (Evans, Dep. at 273-275)).

**2042.** [REDACTED]  
[REDACTED] }  
(RX 739-0064 (Murphy Report)).

**Response to Proposed Finding No. 2042**

The proposed finding is incorrect for several reasons described at CCPTF ¶¶ 1511-1521.

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

In addition, because { [REDACTED]  
[REDACTED] }, his findings is not reliable as economic evidence.  
(Murphy, Tr. 4269-4272, *in camera*).

**2043.** Between July 2015 and June 2016, { [REDACTED]  
[REDACTED] } (RX 739-0064 (Murphy Report)).

**Response to Proposed Finding No. 2043**

The proposed finding appears to be incorrect because Professor Murphy's calculations appear to be incorrect. Prof. Athey predicted there would be 0.55 additional ads in the but-for world. (CX8007 at 032 (Athey Expert Report)). Prof. Murphy reports that 1-800 had 5,029,202 impressions on its own trademarks in 2015. (RX0739-0095). Multiplying these two numbers (0.55 \* 5,029,202) yields an estimate of 2,766,061 additional impressions in 2015. Prof. Murphy's Exhibit 13A shows non-settling retailers with 776,440 impressions in 2014, 1,629,002 impressions in 2015, and 2,315,410 impressions in 2016. (RX0739 at 099). So, even the increase between 2014 and 2016 is below the additional impressions predicted by Prof. Athey. Alternatively, Prof. Murphy's Exhibit 21 appears to show impressions increasing from about 50,000 per month during the first six months of 2015 to perhaps 230,000 during the twelve months from July 2015 to July 2016. (RX0739 at 108). But, even this would show an increase in impressions of 2,160,000

impressions, which is again below Prof. Athey's prediction of additional impressions. In addition, even if the finding were true, it would be irrelevant. As Dr. Murphy explained, Walmart is mainly responsible for this change in advertising. Because Walmart is not an online discounter, it cannot replace the lost advertising competition resulting from the bidding agreements. Finally, Dr. Murphy does not account for effect of Johnson & Johnson's introduction of a retail price maintenance policy during this period.

**2044.** Between July 2015 and June 2016, { [REDACTED] } (RX 739-0064 (Murphy Report)).

**Response to Proposed Finding No. 2044**

The proposed finding is incorrect for the reasons stated in response to proposed finding 2042.

**2045.** Dr. Evans would not rely on a the regression related to 1-800 Contacts' margins that he included in his rebuttal report as evidence of the impact of the settlement agreements on prices. (CX 9042 (Evans, Dep. at 275)).

**Response to Proposed Finding No. 2045**

Complaint Counsel agrees with the proposed finding. As Dr. Evans testified in the cited passage, Dr. Murphy also did not control for factors that could explain any relationship between the settlement agreements and 1-800 Contacts' gross margins. Thus, Dr. Evans use of this regression – and respondent's criticism of it - shows that Dr. Murphy's analysis is not reliable economic evidence. (CX9042 (Evans, Dep. at 273-275)).

**2046.** Dr. Evans' regression did not control for any factors that could explain any relationship between the settlement agreements and 1-800 Contacts' gross margins. (CX9042 (Evans, Dep. at 273)).

**Response to Proposed Finding No. 2046**

Complaint Counsel agrees with the proposed finding. As Dr. Evans testified in the cited passage, Dr. Murphy also did not control for factors that could explain any relationship between

the settlement agreements and 1-800 Contacts' gross margins. Thus, Dr. Evans sue of this regression – and respondent's criticism of it - shows that Dr. Murphy's analysis is not reliable economic evidence. (CX9042 (Evans, Dep. at 273-275)).

**2047.** The settlement agreements did not play any role in 1-800 Contacts' pricing. (Bethers, Tr. 3712-13; CX 9025 (Osmond, Dep. at 98-100)).

**Response to Proposed Finding No. 2047**

The proposed finding should be rejected because it is contrary to the weight of the evidence, including the analysis and conclusion of Dr. Evans and Dr. Athey. (CCPTF 1313-1495). In particular, Dr. Evans concluded that the Bidding Agreements played a role in 1-800 Contacts pricing to consumers. Absent the Bidding Agreements, 1-800 Contacts would have continued to selectively lower prices using its price match program to retain individual customers, and 1-800 Contacts would have lowered its average prices generally in response to the increased competitive pressure from the online discounters, or lost market share. (Evans, Tr. 1644-1645; CX8006 at 105-109 (¶¶ 230-240) (Evans Expert Report); CX8009 at 084-85 (¶¶ 156-159) (Evans Rebuttal Expert Report); *see also* CCPTF ¶¶ 1490, 1494, 1495).

**2048.** Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not.")); CX 9042 (Evans Dep., at 257)).

**Response to Proposed Finding No. 2048**

Complaint Counsel has no response to the proposed finding other than to note that while Dr. Evans did not quantify the changes in price, 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); *see also* CCPTF ¶¶ 1490, 1494, 1495).

**2049.** Dr. Evans testified that it was “not necessarily” his opinion that the prices charged by online retailers such as Memorial Eye and Vision Direct would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1722).

**Response to Proposed Finding No. 2049**

The proposed finding should be rejected because it contains a partial quotation of Dr. Evans’ testimony on this issue, and, as a result, is misleading. Dr. Evans’ full answer to the question concerning prices charged by companies such as Memorial Eye and Vision Direct was: “Not necessarily. I think it's more likely that the prices of 1-800 Contacts would have gone down, but it's possible that for some of – so there’s a price spread we observe across the online discounters. I haven't calculated the precise competitive level, but *it's possible that some of those prices could go down, too*, as a result of increased competition.” (Evans, Tr. 1722 (emphasis added)).

**2050.** Dr. Evans did not know what methodology was used to compare prices in the data that he relied on. (CX 9042 (Evans, Dep. at 82)).

**Response to Proposed Finding No. 2050**

Complaint Counsel agrees with the proposed finding but it is irrelevant because Dr. Evans relied on several sources of consistent information about price differences. Further, Dr. Murphy

agreed with information concerning price differences based on his evaluation of those same sources. (Murphy Tr. 1450-1454). Finally, Dr. Athey also reached the same conclusions based on her independent analysis of prices. (Athey, Tr. 748-749).

**2051.** Dr. Athey did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")).

**Response to Proposed Finding No. 2051**

Complaint Counsel agrees with the proposed finding. As Dr. Athey testified in the cited passage, she did not quantify the changes in price as would be required for a calculation of damages. (Of course, in this action for injunctive relief, Complaint Counsel is required only to show a likelihood of harm, not prove a specific quantity of damages.) Dr. Athey concluded from her analysis that a reduction in average prices charged by 1-800 Contacts was more likely than not. (Athey, Tr. 797-798 ("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); CCPTF ¶ 1492).

**2052.**

(Evans, Tr. 1671).

**Response to Proposed Finding No. 2052**

The proposed finding mischaracterizes Dr. Evan's testimony and is misleading. Dr. Evans testified that an increase in competitive advertising on both generic queries and brand term queries contributed to 1-800 Contacts decision to change its price match policy to "we beat by 2%." "As I've testified, I attributed it to a combination of the competitive ads that appeared on generic search queries as well as the competitive ads, including from Memorial Eye, that appeared on the 1-800

queries. I didn't attempt to parse out the portion that was attributable just to Memorial Eye.”

(Evans, Tr. 1670-1671). To the extent that the proposed finding suggests that Dr. Evans made an assessment of just “[a]ds that appear in response to generic queries” alone, it is false.

**2053.** According to Dr. Evans, [REDACTED] } (Evans, Tr. 1671).

### **Response to Proposed Finding No. 2053**

The proposed finding mischaracterizes Dr. Evan’s testimony and is misleading for the reasons stated in response to proposed finding 2052.

**2054.** Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts’ price match guarantee. (Athey, Tr. 796 (“I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.”)).

### **Response to Proposed Finding No. 2054**

Complaint Counsel agrees with the proposed finding. Dr. Athey’s conclusions concern price effects are described in response to Proposed Finding 2051 and CCPTF ¶ 1492.

**2055.** Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 (“Q. So you’ve done no empirical analysis of price elasticity, correct? A. I’ve done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.”))).

### **Response to Proposed Finding No. 2055**

Complaint Counsel agrees with the proposed finding. Dr. Athey’s conclusions concern price effects are described in response to proposed finding 2051 and CCPTF ¶ 1492.

**2056.** Accordingly, Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 (“Let’s go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven’t qualified the rate of consumer switching in that sentence, have you? A. Exactly.”))).

### **Response to Proposed Finding No. 2056**

Complaint Counsel agrees with the proposed finding. Dr. Athey’s conclusions concern price effects are described in response to Proposed Finding 2051 and CCPTF ¶ 1492.

**2057.** Dr. Athey did not make any particular prediction or forecast of what conversion rates for 1-800 Contacts would be in a world without the settlement agreements. (Athey, Tr. 2079-81).

**Response to Proposed Finding No. 2057**

Complaint Counsel agrees with the proposed finding. Dr. Athey’s conclusions concern price effects are described in response to Proposed Finding 2051 and CCPTF ¶ 1492.

**2058.** Dr. Athey did not make any particular prediction or forecast of what conversion rates for other online retailers would be in a world without the settlement agreements. (Athey, Tr. 2081).

**Response to Proposed Finding No. 2058**

The proposed finding should be rejected because the phrase “any particular prediction” is unclear and misstates the record. Dr. Athey testified that, although she {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Athey Tr. 2080). Dr. Athey predicted that in the counterfactual conversion rates would be higher.

**2059.** A variety of characteristics beyond access to information can play an important role in explaining price dispersion. (RX 739-0081 (Murphy Report)).

**Response to Proposed Finding No. 2059**

Complaint Counsel does not disagree with this proposed finding, but notes that the terms “important” and “can play” are vague. Further, the importance of any “characteristic” varies depending on the context and circumstance.

**2060.** Firms that offer high-quality customer service can charge higher prices than firms that offer lower-quality service. (CX 9043 (Athey, Dep. at 214; CX 8007-015 (Athey Report); RX 739-0081 (Murphy Report)).

**Response to Proposed Finding No. 2060**

Complaint Counsel has no specific response.

**2061.** Dr. Athey recognized that the price difference between 1-800 Contacts and other online retailers could be due at least in part to differences in service levels provided by 1-800 Contacts and other online retailers. (Athey, Tr. 2072).

**Response to Proposed Finding No. 2061**

Complaint Counsel does not disagree with this proposed finding, but notes that Dr. Athey testified that lack of awareness and information about price levels is one of the reasons for 1-800 Contacts premium pricing. (Athey, Tr. 738).

**2062.** Though Dr. Athey sought to opine that service did not fully explain the price difference between 1-800 Contacts and other online retailers, Dr. Athey had no opinion on what portion of the price difference was not attributable to service. (CX 9043 (Athey, Dep. at 215)).

**Response to Proposed Finding No. 2062**

Complaint Counsel does not disagree with this proposed finding, but notes that Dr. Athey testified that lack of awareness and information about price levels is one of the reasons for 1-800 Contacts premium pricing. (Athey, Tr. 738).

**2063.** As Dr. Athey acknowledged, part of the price difference between 1-800 Contacts and other online retailers could be due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (Athey, Tr. 2072).

**Response to Proposed Finding No. 2063**

Complaint Counsel does not disagree with this proposed finding, but notes that Dr. Athey testified that lack of awareness and information about price levels is one of the reasons for 1-800 Contacts premium pricing. (Athey, Tr. 738).

**2064.** Dr. Athey did nothing to measure what part of the price difference between 1-800 Contacts and other online retailers was due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (CX 9043 (Athey, Dep. at 255 (“Did you do anything to measure whether the portion of 1-800-CONTACTS’ trademarks familiarity or success accounts – that is not attributable to the settlement agreements in this case, accounts for the price premium that it charges over other online retailers? . . . THE WITNESS: I didn’t try to decompose the sources of the price premium quantitatively.”))).

**Response to Proposed Finding No. 2064**

Complaint Counsel disagrees with the proposed finding because the statement “nothing to measure” is incorrect. While she did not quantify the components of the price difference, Dr. Athey’s model does account for brand effects, which directly measure “the fact that the brand name and trademark of 1-800 Contacts was well-known” through the actions taken by internet search engine users. 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.”); CCPTF ¶ 1686).

**2065.** Dr. Athey could not quantify which causes explained the differences in prices between 1-800 Contacts and other online retailers. (Athey, Tr. 2074).

**Response to Proposed Finding No. 2065**

Complaint Counsel does not disagree with this proposed finding, but notes that Dr. Athey testified that lack of awareness and information about price levels is one of the reasons for 1-800 Contacts premium pricing. (Athey, Tr. 738).

**2066.** [REDACTED] }  
 (Athey, Tr. 2072-73 { [REDACTED] }  
 [REDACTED] ; }  
 CX 9043 (Athey, Dep. at 215 (“Q. Did you do any empirical analysis to determine whether the price premium charged by 1-800-CONTACTS compared to other online retailers is explained by a service-quality differential? A. No. I relied on other case materials.”); CX 9043 (Athey, Dep. at 252-53)).

**Response to Proposed Finding No. 2066**

This proposed finding should be rejected for the reasons stated in response to Proposed Findings No. 2064 and 2065. In addition, the phrase “**did not try to determine**” is wrong, because Dr. Athey’s model and overall analysis did take account of factors that “**accounted for the price differences**” as described in responses to Proposed Findings No. 2064 and 2065.

**2067.** [REDACTED] } (Athey, Tr. 941-46; CX 1343-036).

**Response to Proposed Finding No. 2067**

Complaint counsel agrees with the proposed finding, and note that the survey was not the only piece of information Dr. Athey considered for this part of her analysis.

**2068.** [REDACTED] }  
 [REDACTED] (Athey, Tr. 826-27; CX 1343-036).

**Response to Proposed Finding No. 2068**

Complaint counsel agrees with the proposed finding, but notes the survey was one of several sources of evidence that informed her analysis.



and conclusion. { [REDACTED] } (Athey Tr. 946) indicates her view that consumers can compare prices when { [REDACTED] } Further, the phrase “**despite the availability of accurate information**” mischaracterizes Dr. Athey’s testimony and conclusions, which consistently state that informational search advertising will improve consumers apprehension and understanding of actual price differences as stated above in responses to Proposed Findings No. 2064 to 2070.

*E. Complaint Counsel Have Not Proven Harm In Any Advertising Market*

*1. Complaint Counsel’s Focus On Advertising Alone Is Economically Flawed*

**2072.** Dr. Evans did not define any relevant antitrust market for any type of advertising. (Evans, Tr. 1818; CX 9042 (Evans, Dep. at 34)).

**Response to Proposed Finding No. 2072**

Complaint Counsel agrees with the proposed finding. As Dr. Evans testified in the cited passages, he did not need to define a relevant market for search advertising to concluded that search engines where harmed by the Bidding Agreements.

**2073.** Whether any injury suffered by advertisers results from anticompetitive conduct depends on the effect of that conduct in the market for the product or service being advertised. (RX 739-0037, -0038 (Murphy Report); Murphy, Tr. 4174-76; CX 9048 (Murphy, Dep. at 248-50)).

**Response to Proposed Finding No. 2073**

This proposed finding should be rejected. Complaint Counsel has shown that the Bidding Agreements distorted the competitive process and caused harm to both consumers and to search engines and their users. The fact that “advertisers,” *i.e.*, 1-800 Contacts’ rivals, may have been harmed as well is probative of the anticompetitive harm caused by the Bidding Agreements, but is not the basis of the violation of the FTC Act. For the same reason, the proposed finding of fact is

irrelevant. To the extent that the finding suggests a legal argument regarding the meaning of “anticompetitive conduct,” it is an improper and incorrect statement of law.

**2074.** It is economically incorrect to infer harm to competition in a market for an advertised product or service simply because a restraint has reduced advertising for that product or service by some amount. (RX 739-0039 (Murphy Report); Murphy, Tr. 4174-76).

**Response to Proposed Finding No. 2074**

The proposed finding should be rejected. To the extent that the proposed finding suggests a legal requirement, it is an improper and incorrect statement of law that is addressed in Complaint Counsel’s Post-Trial Reply Brief. Complaint Counsel has proven antitrust harms to consumers and to search engines and their users, including two empirical studies that demonstrated changes in consumer behavior in response to increased informational advertising. These studies are consistent with the empirical literature concerning advertising restraints, which consistently finds a tight causal relationship between informational advertising and the competitive vigor of retail markets. (CCPTF 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)).

**2075.** Since firms compete on multiple dimensions, a reduction in advertising on one dimension could induce firms to compete more aggressively on other dimensions. (RX 739-0039 (Murphy Report)).

**Response to Proposed Finding No. 2075**

The proposed finding should be rejected. While a restriction on advertising might prompt firms to compete more aggressively on other dimensions, it could also prompt firms to compete less aggressively since, for example, a firm seemingly would have less incentive to offer lower prices if it cannot advertise that it offers such lower prices. In his expert report, Dr. Evans summarized a large number of studies that examined the effects of advertising restrictions. These studies found that restrictions on advertising – one form of competition – often led to reduced

competition on other forms of competition such as price or entry. (Evans, Tr. 1616:23-25; CX8006 at 081-082, 179-185 (Evans Expert Report)). Thus, the proposed finding does not reflect the economic understanding of harmful and illegal collusive conduct, which can take many forms. In fact, the academic article Dr. Murphy cites to support his argument confirm this. At paragraph 153 of his report, Dr. Murphy argues: “When firms compete on multiple dimensions, economics tells us that we would not expect to see them collude on only one dimension because doing so can induce cartel members to compete more aggressively on other dimensions, thereby reducing or even eliminating cartel profits.” To support this sentence, Dr. Murphy cites in a footnote: “See especially N. Fershtman and N. Gandal, “Disadvantageous semicollusion,” *International Journal of Industrial Organization* 12 (1994), pp. 141-154.” (RX0739 at 058 (¶ 153 & n. 144) (Murphy Expert Report)). The final sentence of that cited article concludes with the following caution to antitrust authorities: “Finally, we showed that even when semicollusion is disadvantageous to the firms, consumers do not necessarily benefit. *Hence, regulators still need to be diligent in the enforcement of antitrust laws.*” N. Fershtman and N. Gandal, “Disadvantageous semicollusion,” p. 152.

**2076.** Establishing that trademark restrictions reduced some amount of advertising, without more, simply shows that the restrictions were effective. (RX 739-0039 (Murphy Report); Murphy Tr. 4175; CX 9048 (Murphy, Dep. at 43-44, 69)).

**Response to Proposed Finding No. 2076**

The proposed finding should be rejected. (*See* Response to Proposed Findings No. 2074 and 2075).

**2077.** Most of any revenue that the search engines may have lost if the settlement agreements reduced 1-800 Contacts’ cost-per-click on ads displayed in response to searches for its own trademark reflects a transfer of profits from 1-800 Contacts’ trademark. (RX 739-0072 (Murphy Report)).

**Response to Proposed Finding No. 2077**

The proposed finding should be rejected. It is unclear and incomprehensible as to the meaning of the phrases “most of any revenue,” “may have lost if the settlement agreements reduced 1-800 Contacts’ cost-per-click,” and “transfer of profits.” Further, it is unsupported by the material cited, as Dr. Murphy cites to no evidence the described effect occurred in this case. The contemporaneous business documents show that 1-800 Contacts believed the Bidding Agreements reduced the prices paid for ads to appear in response to 1-800 Contacts brand-term queries. (CCPTF ¶ 422). To the extent that the finding suggests a legal conclusion that a “transfer of profits” is not cognizable antitrust harm, the proposed finding is an improper and incorrect legal conclusion.

**2078.** By allowing 1-800 Contacts’ rivals to display ads in response to searches for 1-800 Contacts’ trademark, search engines can earn more revenue if the additional ads shift clicks by users who conduct that search from 1-800 Contacts’ organic link to its paid ads. (RX 739-0072 (Murphy Report)).

**Response to Proposed Finding No. 2078**

Complaint Counsel has no specific response.

**2079.** Any revenue that search engines would earn from a shift in clicks by users who search for 1-800 Contacts’ trademark from 1-800 Contacts’ organic link to its paid ad reflects a transfer of profits from 1-800 Contacts’ trademark. (RX 739-0072-0073 (Murphy Report)).

**Response to Proposed Finding No. 2079**

The proposed finding is speculative, unclear, and irrelevant for the reason stated in response to Proposed Finding No. 2077.

***2. Analyzing Effects On Search Engines Is A Complex Problem***

**2080.** Modeling paid search advertising in a counterfactual world without the settlement agreements is very complex. (CX 9046 (Ghose, Dep. at 44)).

**Response to Proposed Finding No. 2080**

The proposed finding should be rejected. It is unclear as to the meaning of the phrase “very complex.” To the extent that the finding suggests that it is difficult or impossible to predict the impact of the Bidding Agreements, it is false, as Dr. Athey and Dr. Evans demonstrated.

2081. { [REDACTED] }  
(RX 704-0006 (Iyer Decl.) ¶ 20).

**Response to Proposed Finding No. 2081**

The proposed finding should be rejected. It is unclear as to the meaning of the phrase { [REDACTED] } The proposed finding is also irrelevant because it expressly addresses the effect { [REDACTED] } 1-800 Contact’s liability turns on the effect of a group of 14 agreements, not one particular agreement. Complaint Counsel is not required to prove “specific impact” of each individual agreement. { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (CX8005 at 004 (¶¶ 31-40) (Iyer, Decl.), *in camera*).

2082. { [REDACTED] }  
(RX 704-0006 (Iyer Decl.) ¶ 20).

**Response to Proposed Finding No. 2082**

The proposed finding is irrelevant because it addresses a reduction in bidders { [REDACTED] } and { [REDACTED] } 1-800 Contact’s liability turns on the effect of a group of 14 agreements, not “a particular agreement.” Complaint Counsel is not required to prove the “specific

effect” of each individual agreement. { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CX8005 at 005-007 (¶¶ 31-40) (Iyer, Decl.),  
*in camera*).

**2083.** [REDACTED]  
[REDACTED] } (RX 704-0006 (Iyer Decl.) ¶ 21).

**Response to Proposed Finding No. 2083**

The proposed finding is irrelevant because it addresses { [REDACTED] }  
[REDACTED] } 1-800 Contact’s  
liability turns on the effect of a group of 14 agreements, not “a particular agreement.” Further, the  
quoted statement describes what Microsoft would do, but does not rule out any other approaches.  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CX8005 at 005-007 (¶¶ 31-40) (Iyer, Decl.), *in camera*).

**2084.** [REDACTED]  
[REDACTED] }  
(RX 704-0006 (Iyer Decl.) ¶ 21).

**Response to Proposed Finding No. 2084**

The proposed finding is unclear as to the meaning of { [REDACTED] }  
[REDACTED] } and irrelevant because the quoted statement

describes what Microsoft would do in an undefined situation without explaining the purpose of the analysis. It, therefore, does not rule out any other approaches.

**2085.** [REDACTED] } (RX 704 (Iyer Decl.) ¶ 23).

**Response to Proposed Finding No. 2085**

The proposed finding is irrelevant, as there is no foundation to believe that the person referred to has undertaken any investigation into the matter. Indeed, in paragraph 23 of Dr. Iyer’s declaration, she states that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (CX8005 at 005-007 (¶¶ 31-40) (Iyer, Decl.), *in camera*).

**2086.** According to Hal Varian, chief economist at Google, “any effort to determine what advertisers ‘would have paid’ under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed.” (RX 701 (Varian Decl.) ¶ 6).

**Response to Proposed Finding No. 2086**

The proposed finding should be rejected. The quoted statement from a declaration Dr. Varian provided in a different lawsuit concerned a challenge to Google’s *disclosures* of its advertising policies to its advertising clients, an issue that bears no similarity to the Bidding Agreements or to agreements to abstain from search advertising auctions generally.

**2087.** Adding bidders to an auction will change the behavior of existing bidders. (CX 9043 (Athey, Dep. at 135)).

**Response to Proposed Finding No. 2087**



(Murphy Report)). However, Dr. Evans said that the information provided by the advertising is valuable to some users even when they are not actively seeking it out at the time. For example, he described the common practice in physical stores of placing rival products on the shelf next to heavily-advertised brands. “These intermediaries have determined that is economically efficient to present consumers with alternatives near the best-selling product even though many consumers are coming with the intent of buying the best-selling product.” (CX8009 at 034-035 (¶54) (Evans Rebuttal Expert Report)). Likewise, search engine users benefit from learning about other options, even when they are not aware of them, or not seeking them out.

**2090.** Dr. Athey does not account for any consumer substitution to other searches. (RX 739-0082 (Murphy Report)).

**Response to Proposed Finding No. 2090**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent’s liability.

**2091.** Dr. Evans does not account for any consumer substitution to other searches. (RX 739-0067 (Murphy Report)).

**Response to Proposed Finding No. 2091**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent’s liability.

**2092.** If consumers substituted to other ways of finding information on prices charged by other online retailers as a result of the settlement agreements, contact lens retailers would have an incentive to substitute their advertising to searches other than searches for 1-800 Contacts’ trademarks. (RX 739-0067 (Murphy Report); CX 9046 (Ghose, Dep. at 135-36, 196-97); RX 733-0067 (Ghose Report)).

**Response to Proposed Finding No. 2092**

The proposed finding of fact is incorrect for the reasons stated in response to finding 2089.

**2093.** If the settlement agreements led to higher prices for contact lenses, paid search advertising would be more profitable and the settling parties would have incentives to substitute to search terms other than 1-800 Contacts’ trademarks, even if their advertising budgets were completely flexible. (RX 739-0067, -0068 (Murphy Report)).

**Response to Proposed Finding No. 2093**

The proposed finding should be rejected. First, it is irrelevant that the anticompetitive effect created by the Bidding Agreements might cause some rivals to take other actions. Second, it is unsupported by the cited source as Dr. Murphy did not present any analysis to support this speculative statement, or account for the fact that advertising on the most frequent generic keywords is more costly than advertising on 1-800 Contacts brand terms. Finally, it is unclear as to the meaning of “more profitable,” “incentives to substitute to search terms other than 1-800 Contacts’ trademarks,” and “even if their advertising budgets were completely flexible.”

**2094.** [REDACTED]

[REDACTED] } (Ghose Report, RX 733-0096; CX 9046 (Ghose, Dep. at 35, 156-58)).

**Response to Proposed Finding No. 2094**

The proposed finding is substantively the same as proposed finding 1930 and should be rejected for the same reasons.

**2095.** Dr. Athey does not account for any advertiser substitution to other searches. (RX 739-0082 (Murphy Report); RX 733-0067 (Ghose Report)).

**Response to Proposed Finding No. 2095**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent’s liability for the reasons stated above in response to Proposed Finding No. 1891.

**2096.** Dr. Athey did not analyze any effects on advertising in response to generic queries unaffected by the settlement agreements. (RX 733-0066, 0067 (Ghose Report)).

**Response to Proposed Finding No. 2096**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent’s liability for the reasons stated above in response to Proposed Finding No. 1891.

**2097.** Dr. Evans does not account for any advertiser substitution to other searches. (RX 739-0067 , -0068 (Murphy Report)).

**Response to Proposed Finding No. 2097**

Complaint Counsel does not disagree with the proposed finding, but it is not relevant to Respondent's liability for the reasons stated above in response to Proposed Finding No. 1891.

3. *Dr. Athey's Model Of The Counterfactual World Is Unreliable*

**2098.** Dr. Athey did not know whether respondents in the comScore data set that she used were representative of the U.S. population, the contact lens-wearing population or customers of 1-800 Contacts. (Athey, Tr. 850; CX 9043 (Athey, Dep. at 109)).

**Response to Proposed Finding No. 2098**

The proposed finding of fact is unclear as to the meaning of the phrase "representative of." 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. (CCPTF ¶¶ 1413, 1414; Athey, Tr. 767, 853, 2106; Athey, Dep. at 109) (broadly over a period of years, myself and others compared behavior across, say, Bing internal data from comScore and found it to be reliable).

**2099.** Dr. Athey based her counterfactual model of ads in response to searches for 1-800 Contacts' trademarks on data regarding the results of searches for generic terms. (CX 8007-030 (Athey Report) ("I use ad layouts of generic searches to inform counterfactual layouts on 1-800 Contact-related searches.")).

**Response to Proposed Finding No. 2099**

Complaint Counsel agrees with the proposed finding. The reason 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)). Another reason that Dr. Athey used the generic search term queries from her dataset for constructing her counterfactual ad layouts is 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); CCPTF ¶¶ 1418-1422).

**2100.** Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32).

**Response to Proposed Finding No. 2100**

The proposed finding should be rejected. It mis-states Dr. Athey's analysis to state that it "assumed" anything was attributable to the Bidding Agreements. Instead, Dr Athey controlled for numerous factors in order to empirically investigate the impact of the Bidding Agreements, and she tested her model on other groups of search results: branded queries for firms other than 1-800 Contacts and the subset of generic terms that were most often searched in the comScore dataset. Further, even as to "the number of ads displayed in response to searches for certain generic terms related to contact lenses." Dr. Athey's testified that she only considered search results that included an ad from 1-800 Contacts.

**2101.** Dr. Athey did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)).

**Response to Proposed Finding No. 2101**

The proposed finding should be rejected. It is ambiguous as to the meaning of phrase "search engines generally show." If that phrase refers to search engine result in general, or even results for only commercial searches in general, it is irrelevant because of the wide variety of searches and results, and the sophistication with which search engines tailor results to the user and query. Further, 1-800 Contacts avers that it has a uniquely strong brand for the sale of contact lenses online, which makes its trademarks uniquely valuable to advertisers. A comparison to other search results in general would miss this unique characteristic. As Dr. Athey explained, "in this particular industry, I have a lot more information. I have information that these specific bound competitors bid aggressively and search broadly, are effective at bidding and search, are profitable

at bidding and search, and that the agreements in many cases stopped them from engaging in a profitable activity. ... And I also have direct consumer evidence about how those specific firms and firms like them perform in terms of attaining clicks from consumers including on non-1-800-branded searches. So I have a lot of data and evidence about whether additional firms would bid that aren't bidding today." (CX9043 (Athey, Dep. at 024-025). If the phrase "search engines generally show" refers to results for commercial searches concerning contact lenses, the proposed finding is wrong as a description of Dr. Athey's analysis, because she also tested her model on other groups of search terms as well and reached the same conclusion. "I looked at a couple of different queries in terms of which ads appear. The high-frequency generic terms, the general generic terms, and the searches, non-1-800-branded searches, each of those groups is going to have slightly different bidding dynamics. We got the similar answers for all of them which was reassuring because it suggested, you know, any differences in bidding dynamics and bidding equilibrium from those sets of queries being slightly different weren't substantial enough to change the example." (CX9043 (Athey, Dep. at 134-135); CCPTF ¶¶ 1472-1474).

**2102.** Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39).

**Response to Proposed Finding No. 2102**

The proposed finding is wrong as a description of Dr. Athey's analysis, because she also tested her model on other groups of search terms as well and reached the same conclusion. 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.”); *see also* (CCPTF ¶¶ 1472-1474 (describing results of the alternative approaches); CX9043 (Athey, Dep. at 134)).

**2103.** Dr. Athey’s model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world. (RX 733-0066, 0067 (Ghose Report)).

**Response to Proposed Finding No. 2103**

The proposed find of fact is incorrect and misleading as a description of Dr. Athey’s analysis. 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,”—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)). Thus, as she explained, “[m]y model was not designed to make specific predictions about the specific firms that appear and exactly what will happen firm by firm. Instead, what my model was designed to do was to predict the collection of advertisers that would appear and their broad characteristics. (Athey, Tr. 817, 2081 (“I’m predicting that there’s a stronger set of firms with higher conversion rates generally” that show ads in response to 1-800 Contacts Branded Queries in the counterfactual); CCPTF ¶ 1447).

**2104.** Dr. Athey’s multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733-0066, 0068 (Ghose Report)).

**Response to Proposed Finding No. 2104**

The proposed finding is incorrect and incomplete as a description of Dr. Athey’s analysis. To ensure robustness for her 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.”)). However, Dr. Athey also tested her results for robustness including tests that account for heterogeneity of preferences. 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”). Specifically, 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) (discussing heterogeneity); CCPTF ¶¶ 1476, 1477).

**2105.** For these reasons, Dr. Athey’s model of the counterfactual world is unreliable and entitled to no weight.

**Response to Proposed Finding No. 2105**

The proposed finding is wrong for the reasons stated in response to findings 2098 to 2104.

***4. Dr. Evans’ Model Of The Counterfactual World Is Unreliable***

**2106.** Dr. Evans’ model of the counterfactual world relies entirely on data regarding advertising by Memorial Eye. (CX 8006-079, -096 to -105 (Evans Report)).

**Response to Proposed Finding No. 2106**

The proposed finding should be rejected. Dr. Evans’ model of the counterfactual world relied on all of the information cited in his report, including but not limited to actual historical data from Memorial Eye. { [REDACTED]

[REDACTED]

[REDACTED] } (Evans, Tr. 1601-1602, *in camera*; CX8006 at 090-091 (¶ 196) (Evans Expert Report); CCPTF ¶ 1391).

**2107.** According to Google data, while Memorial Eye averaged 227,473 impressions per month in response to searches for 1-800 Contacts’ trademarks, no other retailer averaged more than 30,000 impressions per month in response to such searches. (RX 733—070, 0105 (Ghose Report)).

**Response to Proposed Finding No. 2107**

The proposed finding is based on incomplete data, makes inapt comparisons, and, as a result, is misleading. Dr. Ghose’s report at Exhibit 11 & paragraph 164 discusses “peak level of activity based on monthly impressions” for the 16 firms with formal and informal Bidding Agreements with 1-800 Contacts. (RX0377 at 0070-0071 & 0105 (¶164 & Ex. 11) (Ghose Report)). For the firms that entered Bidding Agreements with 1-800 Contacts before 2010, there is no data concerning what Dr. Evans defined as Matched Ads. For those firms, it is impossible to determine their actual number of ad impression. Further, Dr. Ghose misclassifies broad match ad impressions, which undercounts the number of ads that appeared on brand queries and overcounts the number of ads that appeared on generic queries. See response to Proposed Findings No. 1931, 1994. Because Dr. Ghose did not calculate the number of relevant ad impressions, and lacks data to make such a calculation for the large, online contact lens retailers who settled before 2010, his monthly comparisons are invalid. Further, Dr. Ghose analysis expressly excludes non-settling firms, including Lens Direct and Walmart, which obtained substantial impressions on queries containing 1-800 Contacts’ trademarks.

**2108.** Dr. Evans did not offer any explanation for why he extrapolated data for Memorial Eye to predict behavior by other retailers despite this significant disparity in their behavior in the actual world. (RX 733-0070 to -0071 (Ghose Report)).



the consumer saw as well as what they clicked on. That data set also had available the identities of the advertisers, and so it made sense to estimate the quality of those advertisers in my dataset. (CX9043 (Athey, Dep. at 167-168)). Thus, Dr. Athey's modeled changes to the quality of the advertisers, and her statement regarding data from multiple advertisers was the "right choice" means that it was correct for that purpose. Because Dr. Evans did not model or estimate changes to the quality of advertisers, Dr. Athey's study has no implications for Dr. Evan's analysis.

**2111.** Dr. Athey's model incorporated data regarding multiple advertisers. (CX 9043 (Athey, Dep. at 167-69)).

**Response to Proposed Finding No. 2111**

Complaint counsel agrees with the proposed finding, which is irrelevant for the reason stated in response to proposed finding 2110.

**2112.** Dr. Athey did the analysis that she thought was best. (CX 9043 (Athey Dep.) at 169).

**Response to Proposed Finding No. 2112**

The proposed finding is ambiguous as to the meaning of the word "best." To the extent that the proposed finding suggests that Dr. Evans' analysis was not the "best," the proposed finding is incorrect for the reason stated in response to proposed finding 2010.

**2113.** Dr. Evans' theory that the settlement agreements harmed search engines by reducing the revenue paid for clicks on ads in response to searches for 1-800 Contacts' trademarks assumes that a firm whose ad was shown in the second position would have bid a higher price in a world without the settlement agreements than the firm whose ad was shown in second position in the actual world. (CX 9042 (Evans, Dep. at 267)).

**Response to Proposed Finding No. 2113**

The proposed finding should be rejected because it incorrectly characterizes Dr. Evans testimony. Dr. Evans testified on the quoted page of his deposition that he "did an analysis that looked at the relationship between what 1-800 Contact paid and the extent to which it was facing competition. And that provided an estimate of the relationship between what it paid and the extent

of competition in ads.” (CX9042 (Evans, Dep. at 267-268)). That empirical analysis did not require him to identify the firm “whose ad was shown in the second position” or the amount of its bid. Further, in a search advertising auction, a firm with a higher quality score would increase the amount paid by first bidder even its CPC was the same as the firm it replaced. Finally, if the Bidding Agreements resulted in only two ads, then the firm whose ad appeared in the second place did not need to beat an advertiser who would have appeared in third place in the but-for world. Thus the search engine would receive less each time the second-place ad is clicked on than it would have received in the but-for world.

**2114.** Dr. Evans could not identify any firm that would have bid more for 1-800 Contact’s trademarks in the counterfactual world than in the actual world. (CX 9042 (Evans, Dep. at 267)).

**Response to Proposed Finding No. 2114**

The proposed finding incorrectly characterizes Dr. Evans testimony for the reasons stated in response to finding 2113.

**2115.** Depending on a firm’s website’s quality score, a firm whose ad appears in fourth position could have bid more than the firm whose ad appears in third position. (Athey, Tr. 954-55).

**Response to Proposed Finding No. 2115**

The proposed finding should be rejected because it is unsupported by the cited portion of Dr. Athey’s testimony, which does not directly support the assertion that “a firm whose ad appears in fourth position could have bid more than the firm whose ad appears in third position.” As the finding indicates, both a higher bid and a higher quality score can affect position and CPC.

**2116.** Dr. Evans did not make any determination as to what the quality score of any firm’s website would be or what any firm would bid to display an ad in response to a search for 1-800 Contacts in a world without the settlement agreement. (Evans, Tr. 1827-28).

**Response to Proposed Finding No. 2116**

Complaint counsel agrees with the proposed finding, which is irrelevant for the reason stated in response to proposed finding 2113.

**2117.** For these reasons, Dr. Evans' model of the counterfactual world is unreliable and entitled to no weight.

**Response to Proposed Finding No. 2117**

The proposed finding is incorrect for the reasons stated in response to Proposed Findings No. 2113 to 2116.

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

**In the Matter of**

**1-800 CONTACTS, INC.,  
a corporation,**

**Respondent.**

**Docket No. 9372**

**COMPLAINT COUNSEL'S RESPONSES TO RESPONDENT 1-800 CONTACTS, INC.'S  
PROPOSED CONCLUSIONS OF LAW**

1. The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law.

**Response to Proposed Conclusion No. 1**

Complaint Counsel has no specific response.

2. Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a).

**Response to Proposed Conclusion No. 2**

Complaint Counsel has no specific response.

3. Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).

**Response to Proposed Conclusion No. 3**

Complaint Counsel has no specific response.

4. The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes ' . . . the traditional preponderance-of-the evidence standard.'" *In re Rambus Inc.*, 2006 FTC LEXIS 101, at \*45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)); *see also In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1027 n.4 (2005) ("[W]e take it as settled law that regardless of the standard under which a reviewing court must accept the Commission's findings of fact, the Commission (and the Administrative Law Judge ("ALJ")) normally must base findings upon a 'preponderance of the evidence.'" (citing *Carter Prods., Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959)); *In re Automotive Breakthrough Sciences, Inc.*, 1998 FTC LEXIS 112, at \*37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist HealthSystem/West*, 1994 FTC LEXIS 54, at \*28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence.").

**Response to Proposed Conclusion No. 4**

Complaint Counsel has no specific response.

5. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Section 1 of the Sherman Act. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999).

**Response to Proposed Conclusion No. 5**

Complaint Counsel has no specific response.

6. Principles of antitrust law developed under the Sherman Act apply to Commission cases alleging restraints of trade or unfair competition. *E.g., Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986).

**Response to Proposed Conclusion No. 6**

Complaint Counsel has no specific response.

7. Accordingly, it is appropriate to rely upon Sherman Act jurisprudence in determining whether the challenged conduct violated Section 5 of the FTC Act. *E.g., Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005) (“[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act.”).

**Response to Proposed Conclusion No. 7**

Complaint Counsel has no specific response.

8. The challenged agreements are settlements of litigation brought or threatened by 1-800 Contacts.

**Response to Proposed Conclusion No. 8**

This proposed conclusion is incorrect and should be rejected, as the Bidding Agreement between Luxottica and 1-800 Contacts did not arise as a result of litigation brought or threatened by 1-800 Contacts (or by Luxottica). Moreover this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

9. If 1-800 Contacts had prevailed in the litigations that were settled and obtained relief equivalent to the settlement terms, 1-800 Contacts would not be subject to antitrust liability for the agreements.

**Response to Proposed Conclusion No. 9**

This proposed conclusion should be rejected, as the Bidding Agreement between Luxottica and 1-800 Contacts did not arise as a result of litigation brought or threatened by 1-800 Contacts (or by Luxottica). Moreover this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Also, this proposed conclusion does not make any sense. If a court had ordered relief after a contested

litigation, there would be no “agreements” at issue, thus it doesn’t make any sense to say that “1-800 Contacts would not be subject to antitrust liability for the agreements.”

10. “If anticompetitive harm is caused by the decision of a court, even though granted at the request of a private party, no private restraint of trade occurs because the intervening government action breaks the causal chain.” *Andrx Pharm., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 818 (D.C. Cir. 2001); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (“[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.”) (quotation marks omitted).

### **Response to Proposed Conclusion No. 10**

Complaint Counsel has no specific response.

11. The settlements prohibit causing advertising to be displayed in response to searches for 1-800 Contacts’ trademarks, a standard non-use injunction that is “the order of the day” in infringement actions. *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996); *see also* 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th ed.) (“A permanent injunction is the usual and normal remedy once trademark infringement has been found in a final judgment.”); Restatement (Third) of Unfair Competition § 35 (1995) (“In cases of . . . trademark infringement, or trademark dilution, a prevailing plaintiff is ordinarily awarded injunctive relief to protect both the plaintiff and the public from the likelihood of future harm.”).

### **Response to Proposed Conclusion No. 11**

This proposed conclusion should be rejected, because a requirement to implement negative keywords is not a “standard non-use injunction.” The implementation of negative keywords prevents the display of search advertising even where the party implementing the negative keywords does not make any “use” of the trademark term. For example, a party that bids on the term “contacts” and is broad-matched in to a search for “1-800 Contacts” has not “used” the trademark term “1-800 Contacts.” To the contrary: “It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder’s mark in any way, even if that competitor’s advertisement appeared when a *consumer* entered a trademarked *search term*.” *1-800 Contacts v. Lens.com, Inc.*, 755 F. Supp. 2d

1151, 1174 (D. Utah 2010). *See also Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1302745 (D. Ariz. May 2, 2007), at \*5 (rejecting claim that a sports equipment company’s purchase of generic keywords “courts” and “basketball court” violated permanent injunction against use of plaintiff’s SPORT COURT trademark, concluding that “a contrary interpretation of the permanent injunction would not be reasonable because it would preclude [defendant] from using these generic terms as keywords”).

Moreover, a prohibition on the use of a keyword to trigger search advertising is not a “standard non-use injunction,” and no legal authority suggests that it is. A “standard non-use injunction” prohibits the use of a trademark *in an advertisement*. A prohibition on the use of keywords in bidding prevents the display of *any* advertisement, regardless of whether it uses the trademark. It is not “standard” for courts to order such remedies.

In addition, the settlements imposed reciprocal obligations on the plaintiff and the defendant. This is not a “standard non-use injunction,” and no legal authority suggests that it is.

12. In one of the litigations giving rise to the challenged agreements, a court issued an injunction providing for the same relief agreed to in the challenged settlement agreements. RX0401 (*1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-1949, Dkt. 27 (S.D.N.Y. May 15, 2009)).

### **Response to Proposed Conclusion No. 12**

This proposed conclusion should be rejected, because in the litigation cited the court entered a consent judgment. Private agreements resolving litigation are subject to antitrust scrutiny even when incorporated into a consent judgment entered by a court. For example, in *In re Androgel Antitrust Litigation*, No. 1:09-CV-955-TWT, 2014 WL 1600331 (N.D. Ga. Apr. 21, 2014), the court rejected the argument that an agreement providing for a “reverse payment” from one drug manufacturer to another was “protected by the Noerr-Pennington doctrine because the underlying litigation was terminated by a consent judgment.” *Id.* at \*1. The court explained that

“the consent decree was formed by [the parties] to settle their dispute, not by the Court in order to terminate pending litigation. . . . [therefore] the ‘source . . . of the anticompetitive restraint at issue’ is the parties’ reverse payment agreement itself, not the governmental action. The Defendants’ private agreement should not be due *Noerr-Pennington* immunity.” *Id.* at \*8 (quoting *Allied Tube*, 486 U.S. at 499). *See also In re Nexium*, 968 F. Supp. 2d at 396 (“The entry of a consent judgment cannot be construed as conduct that is ‘incidental’ to litigation.”).

13. Courts across the country have issued similar injunctions barring entities from using another’s trademark in the specific context of paid internet searches. *See, e.g., Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, No. 14-1557, 2015 WL 1936502, at \*9 (E.D. Va. Apr. 28, 2015); *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, No. 14-30288, 2015 WL 11197741, at \*4 (S.D. Fla. Feb. 27, 2015); *Rolex Watch U.S.A., Inc. v. Hernandez*, No. 1:13-cv-20643, Order at 4 (Dkt. 14) (S.D. Fl. Aug. 20, 2013); *Partners for Health and Home, LP v. Yang*, No. 2:09-cv-7849, Dkt. 146, at 2 (C.D. Cal. June 21, 2012); *Select Mgmt. Res., Inc., et. al v. D & D Mktg., Inc. et. al*, No. 2:10-cv-10008, Dkt. 39 (C.D. Cal. July 15, 2011); *Quidgeon v. Olsen*, No. 10-1168, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011); *World Entm’t, Inc. v. Brown*, No. 09-5365, 2011 WL 2036686 (E.D. Pa. May 20, 2011); *Skydive Ariz., Inc. v. Quattrocchi*, No. 05-2656, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010); *Transamerica Corp. v. Moniker Online Servs. LLP*, No. 09-60973, 2010 WL 1416979, at \*7 (S.D. Fla. Apr. 7, 2010); *MasterCard Int’l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009); *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 07-1753, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008).

### **Response to Proposed Conclusion No. 13**

This proposed conclusion should be rejected because no courts have issued “similar injunctions.”

First, no court has ordered reciprocity among parties, which the Bidding Agreements require (excepting the consent judgment in *I-800 Contacts, Inc. v. Vision Direct, Inc.* – see Response to Proposed Conclusion No. 12). *See CX9047* (Hogan Dep., at 197-198) (no courts have ordered reciprocity).

Second, no court has ordered any defendant to implement negative keywords in any circumstances, except for three consent judgments (*Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (Dkt. 22) (M.D. Fla. Mar. 16, 2010); *Probar, LLC v. Onebody*, No. 14-cv-

166 (Dkt. 18) (M.D. Fla. Oct. 29, 2014), *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 807CV1753T26MAP, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008)) and one default judgment (*Transamerica Corp. v. Moniker Online Servs., LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010)). Hogan, Tr. 3486. And none of those injunctions were “similar” because the circumstances were completely different.

14. Complaint Counsel have admitted “that the obligations of 1-800 Contacts’ counterparties to the Challenged Settlement Agreements under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case.” RX0679A.

#### **Response to Proposed Conclusion No. 14**

Complaint Counsel has no specific response, except to note that there are few limits on what a federal court has the legal authority to order *in an appropriate case* (including forfeiture of life, liberty, and property). *See* Response to Proposed Conclusion No. 15.

15. Though Complaint Counsel deny “that such relief would have been appropriate or supported under either trademark law or antitrust law, would have been supported by relevant precedent in analogous cases, or could reasonably have been expected to be ordered in the cases that Respondent filed,” RX0679A, that simply reflects a dispute about whether 1-800 Contacts would have won its trademark litigations, not whether the relief would have been appropriate if it did prevail.

#### **Response to Proposed Conclusion No. 15**

This proposed conclusion should be rejected. As Respondent acknowledges, Complaint Counsel specifically denied that “such relief would have been appropriate.” Thus, Complaint Counsel denied such relief would have been appropriate even if 1-800 Contacts had tried a trademark infringement claim on the merits and prevailed. As explained in Complaint Counsel’s post-trial brief, no court has ever ordered such relief in a case involving keyword bidding. *See* CC Post-Trial Br. at 147-148 (citing authorities establishing that “the Bidding Agreements restrained competition well beyond what *any* court has ordered, or *would* order, in similar circumstances.”) (emphasis in original).

16. As such, the relief provided for in the settlement agreements is the same kind of relief that 1-800 Contacts could obtain if it had prevailed in the litigations that the agreements resolved.

**Response to Proposed Conclusion No. 16**

This proposed conclusion should be rejected. First, not all of the Bidding Agreements resolved litigations. *See* Response to Proposed Conclusion No. 8. Second, while a court might have the legal authority to order such relief “in an appropriate case,” no court would have done so, thus 1-800 Contacts could not have obtained the same kind of relief if it had prevailed in a litigation. *See* CC Post-Trial Br. at 147-148 (citing authorities establishing that “[t]he Bidding Agreements restrained competition well beyond what *any* court has ordered, or *would* order, in similar circumstances.”) (emphasis in original).

17. “[L]itigation,” however, “breeds a litany of direct and indirect costs, ranging from attorney and expert fees to the expenses associated with discovery compliance.” *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1075 (11th Cir. 2005).

**Response to Proposed Conclusion No. 17**

Complaint Counsel has no specific response.

18. Public policy therefore strongly supports private settlements of legal disputes to reduce litigation costs and conserve judicial resources. *See Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) (“Compromises of disputed claims are favored by the courts.”); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898) (“[S]ettlements of matters in litigation or in dispute without recourse to litigation are generally favored.”); *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting “paramount policy of encouraging settlements”).

**Response to Proposed Conclusion No. 18**

This proposed conclusion should be rejected, because it cites out-of-context snippets from inapposite cases that deal with enforcing settlement agreements against the parties to the agreements. None of the cited cases suggest that settlement agreements are not subject to the same antitrust scrutiny as other commercial agreements. To the contrary, in *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898), the Court held that the settlement of a

mining land claim should be upheld as the resolution of the claim “appears upon its face to have been satisfactory to the parties when made, and should be upheld *unless contravening some statute or some fundamental principle of law recognized as the basis of public policy.*” (Emphasis added.)

This case thus supports the scrutiny of settlement agreements to see whether they contravene a statute, such as the FTC Act or the Sherman Act, consistent with the rule “[w]hile public policy wisely encourages settlements,” some settlements can impose “too high a price.” *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994)

*Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) is entirely inapposite, in that case the Court held only that no federal question was raised by a settlement agreement where sufficient consideration was provided to render the contract enforceable against the parties. *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) upheld the settlement of a shareholder derivative suit in the face of a large number of objectors; it does not in any way suggest that settlement agreements among horizontal competitors should be given any deference, or any antitrust immunity.

19. “[S]ettlement agreements are to be upheld whenever possible.” *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986). “Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute.” *Id.*

### **Response to Proposed Conclusion No. 19**

This proposed conclusion should be rejected, because it cites an inapposite case that deals with enforcing settlement agreements against the parties to the agreements. The cited case has nothing to do with antitrust law, and in no way suggests that settlement agreements are not subject to the same antitrust scrutiny as other commercial agreements. *See Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1057 (D.C. Cir. 1986) (refusing a party’s request to be “released from

an undertaking he now regrets” involving the settlement of a claim for legal malpractice and breach of fiducity duty).

20. In particular, “trademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation.” *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997); *see also, e.g., T & T Mfg. Co. v. A. T. Cross Co.*, 587 F.2d 533, 539 (1st Cir. 1978) (noting the “judicial policy of encouraging extra-judicial settlement of trademark litigation”); *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1080-81 (D. Or. 2008); *Fuddrucker, Inc. v. Fudpucker’s, Inc.*, 436 F. Supp. 2d 1260, 1265 (N.D. Fla. 2006) (“Trademark agreements, in which two parties agree on their respective rights in a mark are favored under the law.”) (internal quotation marks and citations omitted).

### **Response to Proposed Conclusion No. 20**

This proposed conclusion should be rejected to the extent that it suggests that agreements involving trademarks are not subject to the same antitrust scrutiny as any other commercial agreement. The *Clorox* court subjected the agreement challenged by the plaintiff to standard antitrust analysis. *Clorox*, 117 F.3d 50, 55-56 (observing that either the per se rule or the rule of reason might apply to a trademark agreement, depending on the nature of the restraint at issue). The *Clorox* court applied rule of reason scrutiny, and held that the plaintiff had failed to establish that the agreement had any adverse effects on competition. *Id.* at 59.

Thus, *Clorox* establishes only that trademark agreements are subject to ordinary antitrust scrutiny, just like other commercial agreements. So does *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1080-81 (D. Or. 2008). In that case, a shoe retailer claimed that two shoe manufacturers (adidas and K-Swiss) conspired with one another to refrain “from selling their respective products at value-based retail outlets like Payless ShoeSource, and to assist one another in the enforcement of their respective rights.” *Id.* at 1080. The Court applied exactly the same scrutiny to the agreement that would have been applied if trademarks were *not* at issue, first assessing whether the agreement constituted a per se illegal group boycott, *id.* at 1080-181, and then assessing whether the agreement violated the rule of reason. *Id.* at 1081.

The other two cases Respondent cites have nothing to do with antitrust law, and fail to support a conclusion that trademark litigation settlements are not subject to the same antitrust scrutiny as any other commercial agreement. *T & T Mfg. Co. v. A. T. Cross Co.*, 587 F.2d 533, 539 (1st Cir. 1978) dealt with a contract in which one party (Cross) promised not to sue the other party (First Quill) for trademark infringement. The Court rejected Cross's argument that the contract should not be enforced because "public confusion between its products and those of First Quill" would result if Cross was held to its contractual commitments. *Id.* Likewise, there were no antitrust issues involved in *Fuddrucker, Inc. v. Fudpucker's, Inc.*, 436 F. Supp. 2d 1260 (N.D. Fla. 2006), which dealt with the interpretation and enforcement of a contract against the parties to the contract.

21. Parties to a trademark settlement agreement "are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves." *Clorox Co.*, 117 F.3d at 60. And "it is usually unwise for courts to second-guess such decisions. In the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive." *Id.*

### **Response to Proposed Conclusion No. 21**

This proposed conclusion should be rejected because it quotes out-of-context dicta from a case that did *not* "presume" that the trademark agreement at issue was "pro-competitive." See Response to Proposed Conclusion No. 20. Neither *Clorox* nor any other authority stands for the proposition that trademark settlement agreements are presumptively procompetitive. To the contrary, the *Clorox* Court held that plaintiff failed to establish an actual adverse effect on competition in a relevant market, and thus that the plaintiff had failed to shift to the defendant the burden of establishing a procompetitive justification. See *Clorox* at 59-60 ("Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its procompetitive redeeming virtues. Accordingly, as *Clorox* has not

shown that the 1987 Agreement can significantly affect competition as a whole, *it is immaterial* whether the Agreement is entirely necessary to protect the senior LYSOL mark.”).

22. “Where large competitors each represent their respective trademark interests, unless one party is irrational, the result should accord with how the parties view their respective rights.” *Clorox Co.*, 117 F.3d at 61.

### **Response to Proposed Conclusion No. 22**

Lifted from any context, it is unclear what this quote means. It is not a conclusion of law. Moreover, this proposed conclusion is irrelevant and should be rejected. The *Clorox* court dealt with two large and powerful competitors who had each filed lawsuits against the other. *Clorox*, 117 F.3d at 53 (the owner of the Pine-Sol mark sued the owner of the Lysol mark in 1983 for marketing a product called “LYSOL PINE ACTION,” while the owner of the Lysol mark sued the owner of the Pine-Sol mark in 1987 for marketing a non-aerosol spray disinfectant). The settlement at issue resolved both lawsuits, in a compromise that *permitted* both parties to engage in the competitive behavior at issue in the lawsuits: “In return for allowing [the owner of the Pine-Sol mark] to market the disinfectant spray, [the owner of the Lysol mark] obtained [the owner of the Pine-Sol mark’s] permission to market LYSOL PINE ACTION CLEANER.” *Id.* at 54.

The fact that the settlements increased rather than prohibited competition, and the fact that the parties were both well-financed and had competing claims, was important to the *Clorox* Court’s view that the result accorded “with how the parties view their respective rights.” Indeed, the Court emphasized that the intent of the parties was not to stifle competition. *See Clorox*, 117 F.3d at 60 (“knowledge of intent may help the court to interpret facts and to predict consequences.”) (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)). In the instant case, it is clear that the intent of 1-800 Contacts’ trademark enforcement program was to reduce its search advertising cost per click and prevent its lower-cost rivals from informing

consumers about their lower-priced products. Unlike in *Clorox*, the Bidding Agreements did not resolve two competing lawsuits nor *add* to the competitive activities in the market.

23. As noted in the Court's findings of fact, Complaint Counsel's expert concedes, and the testimony from the settling parties shows, that the settling parties acted rationally in weighing the costs and benefits of further litigation.

### **Response to Proposed Conclusion No. 23**

This proposed conclusion should be rejected because it is irrelevant, and because this is not a conclusion of law "supported by applicable legal authority," as required by the Court's Order.

*See* Order on Post-Trial Briefs at 2.

24. Accordingly, "in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors . . . and absent exceptional circumstances, we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight." *Clorox Co.*, 117 F.3d at 60.

### **Response to Proposed Conclusion No. 24**

This proposed conclusion should be rejected because it relies on dicta from a case that did *not* hold that the parties' views on the "scope of needed trademark protections" was relevant to whether the restraints were reasonably necessary to achieve a procompetitive purpose. Neither *Clorox* nor any other authority stands for such a proposition. To the contrary, the *Clorox* court held that plaintiff failed to establish an actual adverse effect on competition in a relevant market, and thus that the plaintiff had failed to shift to the defendant the burden of establishing a procompetitive justification. *See* *Clorox* at 59-60 ("Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its procompetitive redeeming virtues. Accordingly, as *Clorox* has not shown that the 1987 Agreement can significantly affect competition as a whole, *it is immaterial* whether the Agreement is entirely necessary to protect the senior LYSOL mark.") (emphasis added).

Moreover, the quoted portion of *Clorox* substitutes an ellipsis for the phrase “such as the territorial market division condemned in *Timken*.” See 117 F.3d at 60. The Bidding Agreements are subject to inherently suspect scrutiny because they constitute horizontal bid-rigging agreements and horizontal restraints on advertising that fail to distinguish between confusing and non-confusing advertising. So even if the dicta from the *Clorox* court was meant to support a rule, it would not be applicable to the Bidding Agreements.

25. Consistent with these principles, “traditional” and/or “commonplace” settlements are not “subject to antitrust liability.” *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2233 (2013); see also *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015) (*Actavis* holding “should not be read to subject to antitrust scrutiny ‘commonplace forms’ of settlement.”); *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523, 537 (D.N.J. 2014) (“The Supreme Court provided two types of ‘commonplace forms’ of settlement that are not subject to *Actavis* scrutiny.”); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F.Supp.3d 560, 567 (D.N.J. 2014) (“[*Actavis*] explains that there is ‘something quite different’ about reverse payment settlements, as opposed to ‘traditional’ and ‘commonplace forms’ of settlement, which is why only the former are subject to antitrust scrutiny.”), *vacated and remanded on other grounds by King Drug Co.*, 791 F.3d 388; see also *In re Loestrin 24 Fe Antitrust Litigation*, 814 F.3d 538, 544 n.4 (1st Cir. 2016) (“The court noted that it did not intend to disturb commonplace settlement forms.”).

### **Response to Proposed Conclusion No. 25**

This proposed conclusion should be rejected, because it mis-states the holding of *Actavis*. See CC Post-Trial Reply Br. at 3-8. Neither *Actavis* nor the other cases Respondent cites hold that frequently used settlements are immune from antitrust scrutiny. These are all reverse payment cases that use the term “commonplace” as shorthand to refer to a specific situation where a firm “with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim.” *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2233 (2013). See *In re Lipitor Antitrust Litig.*, 46 F. Supp.3d 523, 537 (D.N.J. 2014) (the two “commonplace” settlements referred to by the *Actavis* Court are “[1]A sues B for patent infringement and demands \$100 million in damages; and then B pays A \$40 million as settlement . . . [2] B has a counterclaim for damages against A, the patentee, and A pays B to settle B's counterclaim.”).

26. The Commission itself has argued that there is no reason for antitrust concern where “an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled.” *FTC v. Actavis*, No. 12-416, Br. for Pet’r, 2013 WL 267027, at \*27 (U.S. Jan. 22, 2013).

### **Response to Proposed Conclusion No. 26**

This proposed conclusion should be rejected, because it mis-represents the argument the Commission made. In the material cited by Respondent, the Commission stated: “When the parties to a Hatch-Waxman settlement *simply agree upon a compromise date of generic entry*, with no money or similar consideration flowing from the brand-name to the generic manufacturer, the settlement is unlikely to raise antitrust concerns . . . . an agreement of that nature fits comfortably within traditional understandings of the way in which private litigation is generally settled.” *FTC v. Watson Pharmaceuticals, Inc.*, No. 12-416, Br. for Pet’r, 2013 WL 267027, at \*27 (U.S. Jan. 22, 2013) (emphasis added).

Thus, Respondent inaccurately suggests that the Commission argued for a general rule that would exempt from antitrust scrutiny *any* agreement that “fits comfortably within traditional understandings of the way in which private litigation is generally settled.” *See id.* The Commission did not say that. The Commission said that when a patentee claims “legal right to prevent competition,” and the parties to a litigation agree on a *compromise* date for generic entry to resolve “the underlying dispute,” such a settlement is unlikely to raise antitrust concerns. *Id.* at \*28.

27. A contrary rule that every settlement agreement is subject to antitrust scrutiny would chill settlement because parties seeking to eliminate the uncertainty of their present litigation would have to take on the uncertainty of future antitrust litigation. Thus, absent suspicious circumstances, “to prevent a cloud from being cast over the settlement process a third party should not be permitted to haul the parties to the settlement over the hot coals of antitrust litigation.” *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 992 (N.D. Ill. 2003); accord *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 205, 208 (2d Cir. 2006), *abrogated on other grounds by Actavis*, 133 S.Ct. 2223.

**Response to Proposed Conclusion No. 27**

This proposed conclusion should be rejected because all agreements are subject to antitrust scrutiny, and no precedent suggests otherwise. As the Commission has already ruled in this case, so long as the Bidding Agreements exceed the scope of the 1-800 Contacts trademarks, there is no immunity. Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), slip op. at 3-4. The cited authorities do not express a rule that immunizes litigation settlement agreements from antitrust *liability* if they restrict competition beyond the scope of the intellectual property rights at issue in the litigation settled. Instead the quote expresses a limited policy that Rule 12(b)(6) motions should be granted if private plaintiffs challenging patent settlement agreements are unable to provide a reason to believe that a patent settlement agreement violates the antitrust laws.

The *Tamoxifen* court adopted a rule, since abrogated by *Actavis*, that patent settlement agreements between branded and generic drug manufacturers could not violate the antitrust laws “unless the exclusionary effects of the agreement exceed the scope of the patent’s protection.” *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 212 (2d Cir. 2006) (internal quotation and citation omitted). According to the *Tamoxifen* court, “[u]nless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing antitrust law, as long as competition is restrained only within the scope of the patent.” *Id.* at 213 (quoting *Cipro III*, 363 F.Supp.2d at 535). The *Tamoxifen* court concluded that the plaintiffs had failed to plead any facts suggesting that a settlement agreement restrained competition outside the scope of the patent (or that fraud or objectively baseless litigation were at issue) and thus upheld the lower court’s decision to grant a motion to dismiss. In contrast, in the instant case, Complaint Counsel has shown that the Bidding Agreements restrained competition beyond the scope of 1-800 Contacts’ intellectual property

rights. If the *Tamoxifen* plaintiffs had been able to plead such facts, they would have survived a motion to dismiss, and the settlement agreement at issue in that case would have been found to violate the antitrust laws, regardless of concerns about dragging settling parties over the hot coals of antitrust litigation.

The same is true of *Asahi Glass*. In that case, the court granted defendants' motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) for the same reasons. The court first held the plaintiff did not have standing to challenge a brand-generic patent settlement. 289 F.Supp.2d 986, 991. The court then found, in the alternative, that the plaintiff's claim should be dismissed because no allegations suggested that the agreement was "suspicious." This holding, adopting the same approach as the *Tamoxifen* court, made sense under a (pre-*Actavis*) rule that a brand-generic agreement was immune from antitrust challenge as long as it did not exceed the scope of the patent's term, absent objectively baseless litigation or fraud in the procurement of the patent. But the approach adopted in *Tamoxifen* and *Asahi Glass*, even if it survives *Actavis*, has no applicability in a case where the Bidding Agreements have been shown to exceed the scope of the intellectual property rights at issue.

28. No features of the challenged settlement agreements are unusual or provide reason for antitrust suspicion that the parties to them were engaged in a collusive attempt to split monopoly profits from reduced competition. *Actavis*, 133 S.Ct. at 2236.

### **Response to Proposed Conclusion No. 28**

This proposed conclusion should be rejected because the Bidding Agreements are unusual because: (1) they require negative keywords, which no court has ever done in a case based on keyword bidding; (2) they are reciprocal despite the fact that no claims for trademark infringement were brought *against* 1-800 Contacts; and (3) they prohibit the parties to the Bidding Agreements from bidding for designated trademarks in a search advertising auction, even where consumers are not confused.

29. As set forth in the Court’s findings of fact, the settlement agreements challenged by Complaint Counsel are not auxiliary to some other agreement. Rather, the settlement agreements reflect only an agreement to restrict allegedly infringing use of trademarks and URLs and do not reflect or constitute an agreement to limit output, to fix prices, to restrict the amounts that are bid or paid for advertising, or to achieve any other purpose.

**Response to Proposed Conclusion No. 29**

This proposed conclusion should be rejected because the Bidding Agreements restrict the parties from bidding in auctions for search advertising, and reduce the amounts paid for advertising. Also, the Bidding Agreements restrict non-infringing use of trademarks. Moreover this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

30. 1-800 Contacts’ settlements were standard non-use agreements whereby a party agreed not to use the other’s trademark, a form of settlement routinely used to resolve trademark disputes. *See, e.g.,* 3 McCarthy on Trademarks & Unfair Competition § 18:82 (4th ed. 2016 update) (“An agreement not to use or register a mark, usually entered into to settle an infringement dispute, is not against public policy and is an enforceable promise.”); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986) (upholding a non-use trademark settlement agreement as consistent with the “overriding public interest in settling and quieting litigation”) (internal quotation marks and citation omitted).

**Response to Proposed Conclusion No. 30**

This proposed conclusion should be rejected because the Bidding Agreements are not “standard non-use agreements.” First, the Bidding Agreements require negative keywords, and thus are more restrictive than a “standard” non-use agreement. Moreover, a “standard” non-use agreement prevents a party from advertising its products under a particular name, or from placing a particular trademark in the text of an ad. Here, the Bidding Agreements prevented the parties from displaying *any* advertisements in response to a competitively critical group of searches, regardless of content and regardless of the name used to advertise.

31. The Lanham Act itself envisages and authorizes non-use trademark agreements. *See, e.g., Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 965 (C.C.P.A. 1979); *see also SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996)

(“complete injunctions against the infringing party are the order of the day” in infringement actions); 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th Ed. 2016 update).

### **Response to Proposed Conclusion No. 31**

The proposed conclusion should be rejected because the Bidding Agreements do not constitute the type of “non-use trademark agreement” contemplated or referred to by the authorities cited.

32. The Supreme Court in *Actavis* pointed to non-use trademark settlements as an example of a “commonplace” settlement. *Actavis*, 133 S.Ct. at 2233 (citing *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10 (1st Cir. 1999)) (party agreed to pay damages to a trademark holder, to not use a registered trademark, and to abandon a pending application for his competing trademark).

### **Response to Proposed Conclusion No. 32**

This proposed conclusion should be rejected because *Actavis* did not identify “non-use trademark settlements as an example of a ‘commonplace’ settlement.” The *Actavis* Court said nothing about non-use trademark settlements. In the cited portion of *Actavis*, the majority noted that the:

authorities [cited by the dissent] also indicate that if B has a counterclaim for damages against A, the original infringement plaintiff, A might end up paying B to settle B’s counterclaim. *Cf. Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10, 13 (CA1 1999) (describing trademark dispute and settlement) [cited by the dissent]. Insofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding.

33. As noted in the Court’s findings of fact, court records indicate that parties have frequently settled disputes regarding the use of trademarks in paid search advertising by prohibiting paid search advertising in response to searches for the plaintiff’s trademark.

### **Response to Proposed Conclusion No. 33**

This proposed conclusion should be rejected, because it is irrelevant, and also inaccurate. Moreover this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

34. In addition, the challenged settlement agreements here, unlike the settlements in *Actavis*, provided for relief within the range of what a court could have ordered. *Compare Actavis*, 133 S.Ct. at 2231.

**Response to Proposed Conclusion No. 34**

This proposed conclusion should be rejected, because it is irrelevant. Whether or not a court “could have ordered” parties to take a particular action is irrelevant to the question of whether an agreement between private parties to take the same actions violates the antitrust laws. *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), slip op. at 2 (“The *Noerr-Pennington* doctrine immunizes non-sham petitioning of the government from antitrust liability . . . [i]t does not, however, reach private agreements that harm competition independent of governmental action.”).

Moreover, this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

35. The record evidence shows that settlements of trademark cases involving paid search advertising generally prohibit the defendant from purchasing the plaintiff’s trademark as a keyword and require the defendant to use negative keywords.

**Response to Proposed Conclusion No. 35**

This proposed conclusion should be rejected, because it is irrelevant, and also inaccurate. Moreover, this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

36. Complaint Counsel did not present any evidence of any trademark settlement agreement in any case involving paid search advertising that did not contain such provisions. As noted in the Court’s findings of fact, Ms. Tushnet’s testimony to the contrary lacks any basis and

is not reliable: she has never settled a trademark case, did not review the challenged settlement agreements and did not review any settlements agreements other than those on which Mr. Hogan based his opinions.

**Response to Proposed Conclusion No. 36**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is also both irrelevant and inaccurate.

37. Also as noted in the Court’s findings of fact, it is irrelevant whether *some* of the agreements relied upon by Mr. Hogan were executed in cases where the plaintiff did not expressly assert a claim based on paid search advertising in response to searches for its trademark; if anything, this makes the settlement agreements here more narrowly tailored and therefore less suspect.

**Response to Proposed Conclusion No. 37**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is also both irrelevant and inaccurate.

38. Since the settlement agreements here take commonplace forms and contain no provisions that suggest a collusive attempt to split monopoly profits from reduced competition, they cannot give rise to antitrust liability.

**Response to Proposed Conclusion No. 38**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is also irrelevant that the agreements here “take commonplace forms,” as explained above in response to Respondent’s Proposed Conclusion of Law No. 25. *See also* CC Post-Trial Reply Br. at 5-12.

39. Even if Complaint Counsel could demonstrate that the form of the challenged settlements is unusual or not commonplace, the “general legal policy favoring settlement of disputes” forecloses antitrust liability for the settlement agreements unless several additional considerations are present. *Actavis*, 133 S.Ct. at 2226.

**Response to Proposed Conclusion No. 39**

This proposed conclusion should be rejected because antitrust scrutiny of facially overbroad and facially anticompetitive settlement agreements is not novel and does not require this special justification. *E.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (overly broad patent settlement agreement held *per se* unlawful); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (same); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948) (same); *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (same). *See also* Opinion and Order of the Commission Granting Complaint Counsel’s Motion for Partial Summary Judgment Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), slip. op. at 4 (1-800 Contacts’ settlement agreements are subject to antitrust review). In particular, the concern expressed in *Actavis* that antitrust review of reverse payment settlements may prove excessively “time consuming, complex, and expensive” (*Actavis*, 133 S. Ct. at 2234) should have no traction where, as here, the already-completed trial presented no unusual difficulties.

40. The first *Actavis* consideration is whether the “specific restraint at issue has the ‘potential for genuine adverse effects on competition.’” 133 S.Ct. at 2234 (quoting *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986)).

#### **Response to Proposed Conclusion No. 40**

This proposed conclusion should be rejected because it is irrelevant. There is no such thing as an “*Actavis* consideration” that presents a bar to antitrust liability, as explained above in response to Respondent’s Proposed Conclusion of Law No. 39.

41. Here, there is little risk that a trademark settlement would be used to divide monopoly profits because “trademarks are by their nature non-exclusionary.

#### **Response to Proposed Conclusion No. 41**

This proposed conclusion should be rejected because the Bidding Agreements have the “‘potential for genuine adverse effects on competition.’” *Actavis*, 133 S. Ct at 2234 (*quoting FTC v. Indiana Federation of Dentists*, 476 U.S. at 460-61 (1986)). The Bidding Agreements restrain

bidding and advertising – two fundamental dimensions of rivalry – beyond the scope of 1-800 Contacts’ trademark rights. It is beyond dispute that horizontal restraints on bidding and advertising have a genuine potential to harm competition by increasing prices, reducing output, and restricting consumer choice. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (holding that any “agreement that [interferes] with the setting of price by free market forces is illegal on its face,” and that “no elaborate industry analysis is required to demonstrate the anticompetitive character” of an “absolute ban on competitive bidding”) (internal quotation omitted); *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 773 (1999) (“[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price.”) (internal quotation omitted).

42. A trademark, unlike other intellectual property rights, does not confer a legal monopoly on any good or idea; it confers rights to a name only.” *Clorox Co.*, 117 F.3d at 56.

#### **Response to Proposed Conclusion No. 42**

Respondent contends, incorrectly, that a trademark confers an exclusive right to bid in certain search advertising auctions.

43. Further, unlike the patents at issue in *Actavis*, the trademark rights in this case are not buttressed by a regulatory framework that governs competition in the market.

#### **Response to Proposed Conclusion No. 43**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

44. Thus, for these and other reasons described further below and in the Court’s findings of fact, the restraints imposed by the settlement agreements do not create a potential for genuine adverse effects on competition.

#### **Response to Proposed Conclusion No. 44**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

45. The second *Actavis* consideration is whether any anticompetitive consequences associated with the settlements at issue “will at least sometimes prove unjustified.” 133 S.Ct. at 2235-36. Complaint Counsel have not satisfied this factor with respect to 1800 Contacts’ settlements.

#### **Response to Proposed Conclusion No. 45**

This proposed conclusion should be rejected because there is no such thing as an “*Actavis* consideration” that presents a bar to antitrust liability, as explained above in response to Respondent’s Proposed Conclusion of Law No. 39. Moreover, the “anticompetitive consequences” of the challenged restraints on price competition and advertising “will at least sometimes prove unjustified.” *Actavis*, 133 S. Ct. at 2235-36. 1-800 Contacts had an opportunity to show that the Bidding Agreements are reasonably necessary to achieve a legitimate efficiency, and failed to do so. The competitive harm flowing from the Bidding Agreements is unjustified because the restraints on competition are facially and substantially overbroad, far exceeding 1-800 Contacts’ rights under trademark law.

46. This Court need not address whether, as a theoretical matter, some settlements related to keyword search advertising will sometimes be unjustified. To obtain the disruptive post hoc injunctive relief they are seeking in this enforcement action, Complaint Counsel are required under this factor to show that 1800 Contacts’ settlements, in particular, are unjustified. They have not done so here.

#### **Response to Proposed Conclusion No. 46**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

47. As the Court in *Actavis* explained, an agreement will sometimes amount to “no more than a rough approximation of the litigation expenses saved through the settlement.” *Id.* at

2236. When a restraint “reflects traditional settlement considerations, such as avoided litigation costs, or fair value for services, this is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement.” *Id.*

**Response to Proposed Conclusion No. 47**

This proposed conclusion should be rejected, because an antitrust plaintiff challenging an overbroad settlement agreement is not required to show that the defendants had “bad” motives. Instead, “if 1-800 Contacts restricted competition beyond the scope of any property right that 1-800 Contacts may have in its trademarks,” the agreement is subject to antitrust scrutiny. Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), slip op. at 3. “[I]t is well settled that good motives themselves ‘will not validate an otherwise anticompetitive practice.’” *United States v. Brown University*, 5 F.3d 658, 672 (1993) (quoting *NCAA*, 468 U.S. at 101 n. 23).

48. As noted in the Court’s findings of fact, the settling parties testified, and Complaint Counsel’s own expert, Dr. Evans, essentially conceded, that the settlements here reflected rational decisions to avoid litigation costs. Accordingly, the Court has no “concern” that the settlements were designed to enable 1-800 Contacts and the settling parties to share “monopoly profits.”

**Response to Proposed Conclusion No. 48**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Further, the proposed conclusion should be rejected, because the reasons that the parties entered the bidding agreements does not control the analysis of competitive effects. While “courts often look at a party’s intent to help it judge the likely effects of challenged conduct,” “it is well settled that good motives themselves ‘will not validate an otherwise anticompetitive practice.’” *United States v. Brown University*, 5 F.3d 658, 672 (quoting *NCAA*, 468 U.S. at 101 n. 23).

49. The third *Actavis* consideration is that “where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice.” *Actavis*, 133 S.Ct. at 2236.

**Response to Proposed Conclusion No. 49**

This proposed conclusion should be rejected because there is no such thing as an “*Actavis* consideration” that presents a bar to antitrust liability, as explained above in response to Respondent’s Proposed Conclusion of Law No. 39. In any event, 1-800 Contacts and the settling parties plainly possess sufficient market power to harm competition. *See* CC Post-Trial Brief at 121-122. In any event, as the Supreme Court’s has observed, where competitors agree to restrain price competition, only a small degree of market power is needed to injure competition. *See FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 434-36 (1990). The same is true of advertising restraints. *See Polygram I*, 136 F.T.C. at 342-43.

50. Trademarks, however, only protect names and not goods or services, so trademark settlements without substantial monetary payments provide no indication of market power. *See Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (“Market power, if any, is derived from the product, not from the name or symbol as such.”).

**Response to Proposed Conclusion No. 50**

Complaint Counsel has no specific response.

51. Further, as described in the findings of fact and elsewhere in these conclusions of law, the settling parties lack the power to bring about anticompetitive harm by reducing output or raising prices and Complaint Counsel have failed to present credible evidence to demonstrate otherwise.

**Response to Proposed Conclusion No. 51**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Moreover, 1-800 Contacts and the settling parties plainly possess sufficient market power to harm competition. *See* CC Post-Trial Brief at 121-122. In any event, as the Supreme Court has observed, where competitors agree to restrain price competition, only a small

degree of market power is needed to injure competition. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434-36 (1990).

52. The fourth *Actavis* factor addresses the administrative feasibility of antitrust challenges to reverse payment settlements.

**Response to Proposed Conclusion No. 52**

This proposed conclusion should be rejected because there is no such thing as an “*Actavis* consideration” that presents a bar to antitrust liability, as explained above in response to Respondent’s Proposed Conclusion of Law No. 39.

53. Whereas in *Actavis* “the size of the unexplained payment can provide a workable surrogate for a patent’s weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself,” *Actavis*, 133 S.Ct. at 2236-37, here, there is no shortcut that makes the “antitrust game . . . worth th[e] litigation candle,” *id.* at 2234, as reflected in Complaint Counsel’s belabored attempt to litigate the merits of 1-800 Contacts’ trademark claims.

**Response to Proposed Conclusion No. 53**

This proposed conclusion should be rejected because, as the antitrust action has now been concluded, it is clear that the antitrust action against 1-800 Contacts was “feasible administratively.” *Actavis*, 133 S. Ct. at 2236. The Court need not determine whether the 1-800 Contacts trademarks were valid or infringed to resolve the antitrust issues. Not all Bidding Agreements arose from litigation, *see* Response to Proposed Conclusion No. 8. And it is not necessary to assess the merits of any of the trademark litigations initiated by 1-800 Contacts. Even assuming for the sake of argument that one or more of the litigations brought by 1-800 Contacts would have resulted in a judgment of trademark infringement, the Bidding Agreements are overbroad and not reasonably necessary to achieve any procompetitive purpose.

54. Indeed, the Commission has stated that “[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable.” *Schering-Plough*, 136 F.T.C. 956, 997 (2003).

**Response to Proposed Conclusion No. 54**

This proposed conclusion should be rejected because it is irrelevant. The Court need not determine whether the 1-800 Contacts trademarks were valid or infringed to resolve the antitrust issues. Not all Bidding Agreements arose from litigation, *see* Response to Proposed Conclusion No. 8. And it is not necessary to assess the merits of any of the trademark litigations initiated by 1-800 Contacts. Even assuming for the sake of argument that one or more of the litigations brought by 1-800 Contacts would have resulted in a judgment of trademark infringement, the Bidding Agreements are overbroad and not reasonably necessary to achieve any procompetitive purpose.

55. The Commission, instead, has placed its “focus on the state of the world as it was perceived by the parties at the time that they entered into the settlement agreement, when they could not be sure how the litigation would turn out.” 136 F.T.C. at 995. As noted in the Court’s findings of fact, the settling parties expressed uncertainty about their ability to defend against 1-800 Contacts’ trademark claims.

#### **Response to Proposed Conclusion No. 55**

This proposed conclusion should be rejected because it is irrelevant. Not all Bidding Agreements arose from litigation, *see* Response to Proposed Conclusion No. 8. And the contemporaneous perceptions of the parties to the Bidding Agreements do not determine the antitrust assessment of the Bidding Agreements. Even assuming for the sake of argument that every party sued by 1-800 Contacts actually thought they might lose the lawsuit, the Bidding Agreements are overbroad and not reasonably necessary to achieve any procompetitive purpose.

56. The Commission has also noted “the serious uncertainties that would confront parties who seek to settle patent litigation if the Commission undertook to examine the underlying merits itself later on, and gave them conclusive weight.” 136 F.T.C. at 995. The same uncertainties would exist if the Court undertook to examine the merits of 1-800 Contacts’ trademark claims.

#### **Response to Proposed Conclusion No. 56**

This proposed conclusion should be rejected because the Court need not “examine the merits of 1-800 Contacts’ trademark claims” to resolve the antitrust issues. Not all Bidding Agreements arose from litigation, *see* Response to Proposed Conclusion No. 8. And it is not

necessary to assess the merits of any of the trademark litigations initiated by 1-800 Contacts. Even assuming for the sake of argument that one or more of the litigations brought by 1-800 Contacts would have resulted in a judgment of trademark infringement, the Bidding Agreements are overbroad and not reasonably necessary to achieve any procompetitive purpose.

57. Indeed, given that there is no aspect of the challenged settlement agreements comparable to a large, unexplained payment by the plaintiff to a defendant, the only way to demonstrate that the challenged settlement agreements at issue here are not *bona fide* settlements would be to litigate the merits of the underlying claims in each of the cases giving rise to a challenged settlement agreement. This would not be feasible or even possible to do given the passage of time and the lack of complete discovery.

#### **Response to Proposed Conclusion No. 57**

This proposed conclusion should be rejected because the Court need not determine “that the challenged settlement agreements at issue here are not *bona fide* settlements” to resolve the antitrust issues. As the Commission has already held, Respondent’s assertion that the Bidding Agreements are *bona fide* settlements is not a defense. Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), slip op. at 4 (“if 1-800 Contacts restricted competition beyond “the scope of any property right that 1-800 Contacts may have in its trademarks,” Compl. ¶ 32, then the *bona fide* nature of the underlying trademark dispute could not be a defense.”). *See* Response to Proposed Conclusion No. to Proposed Conclusion of Law No. 56.

58. Thus, the antitrust challenge brought here by Complaint Counsel is not administratively feasible.

#### **Response to Proposed Conclusion No. 58**

This proposed conclusion should be rejected for the reasons explained in Complaint Counsel’s Response to Proposed Conclusion Nos. 52, 53, 54, 55, 56, 57.

59. Moreover, the evidence that has been adduced shows that the settlement was within the scope of the relief available to Respondent it had it prevailed in the underlying actions and that

the settlement was justified by the cost of litigation and the uncertainty and probability of the outcome had the litigation proceeded through trial and appeal.

#### **Response to Proposed Conclusion No. 59**

This proposed conclusion should be rejected for the reasons explained in Complaint Counsel's Response to Proposed Conclusion Nos. 13, 14, 15, 16.

60. Finally, the Court in *Actavis* reasoned that subjecting large, unjustified reverse payments to antitrust scrutiny "does not prevent litigating parties from settling their lawsuit because they could "settle in other ways." *Actavis*, 133 S.Ct. at 2237.

#### **Response to Proposed Conclusion No. 60**

This proposed conclusion should be rejected because the snippets taken from *Actavis* are not relevant. The Bidding Agreements, like all agreements settling litigation or disputes, are subject to standard antitrust analysis. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997) (agreements that settle trademark litigation are subject to ordinary antitrust analysis); *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1080-81 (D. Or. 2008) (agreements that settle trademark disputes are subject to ordinary antitrust analysis). The *Actavis* Court did not suggest that litigation settlements that fail to provide for a reverse payment are somehow immunized from antitrust scrutiny. The Court merely said: "the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. They may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Actavis*, 133 S.Ct. at 2237.

61. Mr. Howard Hogan testified un rebutted as a practitioner that subjecting non-use trademark settlements to antitrust scrutiny would significantly limit the latitude of parties to a trademark dispute to settle their claims, and Complaint Counsel have not presented evidence of any alternative form of settlement that would have provided relief to Respondent for the scope of the infringement that it alleged occurred.

#### **Response to Proposed Conclusion No. 61**

This proposed conclusion should be rejected because agreements that settle trademark litigation are subject to antitrust scrutiny. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997) (agreements that settle trademark litigation are subject to ordinary antitrust analysis); *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1080-81 (D. Or. 2008) (agreements that settle trademark disputes are subject to ordinary antitrust analysis). Mr. Hogan's view that this limits the latitude of parties to reach anticompetitive agreements does not overrule or undermine this clear law, and should be disregarded. Complaint Counsel has submitted evidence sufficient to conclude that there are less restrictive alternatives that would protect 1-800 Contacts' trademark rights. This proposed conclusion should be rejected, because this is not a conclusion of law "supported by applicable legal authority," as required by the Court's Order. *See* Order on Post-Trial Briefs at 2.

62. A settlement prohibiting only paid search advertisements that used 1-800 Contacts' mark in the text of the ad would not fully protect 1-800 Contacts' potential trademark rights. *See, e.g., Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009); *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760-61 (D. Minn. 2009).

**Response to Proposed Conclusion No. 62**

This proposed conclusion should be rejected because it is unsupported by the authorities cited. Neither case held that a search advertisement triggered by a plaintiff's mark was actually confusing. *Hearts on Fire* denied a motion to dismiss plaintiff's claim; it did not hold or suggest that any confusion existed. *See* 603 F. Supp. 2d 274, 278 (holding "[i]f the Plaintiff can show that the resulting sponsored links and the content of the Blue Nile website likely led to consumer confusion, Blue Nile's purchase of the [trademark keyword as a] search term would meet the requirements of the Act."). *Fair Isaac Corp.* held that summary judgment was inappropriate where evidence in the form of an expert report supported the plaintiff's claim that the challenged ads caused confusion. 645 F. Supp. 2d 734, 761.

Neither case suggests that a prohibition on the use of its trademark in the text of competitors' advertisements would not be a helpful component of the many less restrictive alternatives available to 1-800 Contacts. *See* Areeda & Hovenkamp, Antitrust Law ¶1914c (“The most workable allocation [of burden] gives the plaintiff the burden of suggesting, or proffering a particular alternative claimed to achieve the same benefits but less restrictive of competition. The defendant then has the burden of showing that the proffered alternative is either unworkable or not less restrictive.”).

63. Nor have Complaint Counsel presented any evidence that requiring labeling would eliminate any potential for confusion giving rise to an infringement claim. *Cf. Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006) (“heavy burden” to prove that altering the allegedly infringing materials “would significantly reduce the likelihood of consumer confusion”); *Weight Watchers Int’l, Inc. v. Luigino’s, Inc.*, 423 F.3d 137, 143–44 (2d Cir. 2005).

**Response to Proposed Conclusion No. 63**

This proposed conclusion should be rejected because it is unsupported by the cited authorities. The citation to *Australian Gold* is simply misleading. That case does not hold that any party has a “heavy burden” to show that altering “allegedly infringing materials” would reduce confusion. Instead, the *Australian Gold* court observed that after a defendant has been found to infringe a plaintiff’s trademark and a district court has issued an injunction, the “proponent of a disclaimer” claiming that the disclaimer justifies relief from the injunction bears a “heavy burden” “to come forward with evidence sufficient to demonstrate that any proposed materials would significantly reduce the likelihood of consumer confusion.” *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006). Thus, the statements Respondent quotes are inapplicable to “allegedly infringing materials,” and are only relevant after infringement has been proved and an injunction has already issued.

Importantly, the statements Respondent attributes to the *Australian Gold* Court were directly quoted (although not acknowledged in Respondent’s Proposed Conclusion) from *Home*

*Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315 (2d Cir. 1987). In that case, the Court of Appeals held that after the district court had concluded the defendant had committed trademark infringement and enjoined it from using the plaintiff's mark, "in further proceedings before the district court, [the defendant] should be free to apply for relief from the injunction, on the basis of its use of disclaimers or otherwise . . . Upon such an application there would be a heavy burden on [defendant] to come forward with evidence sufficient to demonstrate that any proposed materials would significantly reduce the likelihood of consumer confusion." *Id.* at 1316. The *Home Box Office* Court of Appeals justified this "allocation of burdens between these parties for several reasons. First, [because] by granting the preliminary injunction, the district court found that HBO had adequately proved that the slogan as Showtime first employed it was likely to cause consumer confusion." *Id.*

The only other authority Respondent provides, *Weight Watchers* stands for the same proposition. In that case, the Court of Appeals considered a motion to modify a preliminary injunction issued against a trademark infringer. *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137 143 (2d Cir. 2005). ("The district court already had determined, in granting the preliminary injunction, that [the defendant's] use of the [plaintiff's] mark on the front of its packaging was confusing. . . . the motion to modify raised a different question: whether the addition of the disclaimer to the front panel of the new packaging was sufficient to avoid confusing customers . . ."). Relying on *Home Box Office*, the Court of Appeals held that in a motion to modify an injunction, the party guilty of infringement bore the burden to establish a disclaimer's effectiveness. *Id.* at 143-144 (where "an infringer attempts to avoid a substantial likelihood of consumer confusion by adding a disclaimer, it must establish the disclaimer's effectiveness.").

Thus, neither Australian Gold nor Weight Watchers (nor Home Box Office, on which they both relied) suggests that “allegedly infringing materials” that have not yet been found to actually infringe a trademark bear any sort of burden to show that clear labeling will resolve any confusion concerns. To the contrary, courts consider clear identification of the advertiser in the text of the search ad to be the appropriate way to avoid any confusion that may arise from competitors bidding on trademark keywords. *E.g.*, *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 933 (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 the trademark owner is the source of a rival ad] 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.”) (following *Network Automation, Inc. v. Advanced Systems Concept, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011) (emphasis added); *Playboy Enters., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1025 n. 16 (9th Cir. 2004) (“Note that if a banner advertisement clearly identified its source, or even better, overtly compared [plaintiff’s] products to the sponsor’s own, no confusion would occur under [plaintiff’s] theory.”) (emphasis added).

64. In sum, none of the factors that led the Supreme Court in *Actavis* to hold that unusual settlements do not necessarily enjoy the law’s traditional deference to settlements suggests that the settlements here pose a sufficient risk of anticompetitive harm to warrant antitrust scrutiny. The settlement agreements therefore cannot give rise to antitrust liability.

**Response to Proposed Conclusion No. 64**

This proposed conclusion should be rejected for the reasons explained in Complaint Counsel’s Response to Proposed Conclusions of Law Nos. 39 through 63.

65. The challenged settlement agreements are not inherently suspect or presumptively anticompetitive.

**Response to Proposed Conclusion No. 65**

This proposed conclusion should be rejected for the reasons explained in Complaint Counsel's Response to Proposed Conclusions of Law Nos. 66-87, *infra*.

66. “[A]bandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Actavis, Inc.*, 133 S.Ct. at 2237.

**Response to Proposed Conclusion No. 66**

Complaint Counsel has no specific response.

67. “The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of the restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.” *Cal. Dental Ass’n*, 526 U.S. at 781.

**Response to Proposed Conclusion No. 67**

Complaint Counsel has no specific response.

68. A restraint is inherently suspect only if “it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram Holding, Inc.*, 416 F.3d at 35. Only “[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition” can “the restraint [be] presumed unlawful. . . .” *Id.* at 36.

**Response to Proposed Conclusion No. 68**

Complaint Counsel has no specific response.

69. Trademark settlement agreements are not inherently suspect because “it is reasonable to presume that such arms-length agreements are pro-competitive.” *Clorox Co.*, 117 F.3d at 60.

**Response to Proposed Conclusion No. 69**

This proposed conclusion should be rejected because it quotes out-of-context dicta from a case that did *not* “presume” that the trademark agreement at issue was “pro-competitive.” See Response to PCOL No. 20. Neither *Clorox* nor any other authority stands for the proposition that trademark settlement agreements are presumptively procompetitive. To the contrary, the *Clorox* Court held that plaintiff failed to establish an actual adverse effect on competition in a relevant market, and thus that the plaintiff had failed to shift to the defendant the burden of establishing a procompetitive justification. See *Clorox* at 59-60.

Indeed, *Clorox* supports application of inherently suspect analysis to the Bidding Agreements because *Clorox* applied rule of reason scrutiny to the agreements at issue in that case. The Commission has explained that each of Complaint Counsel’s three alternative ways of establishing its *prima facie* case “are related, although distinct, variations of the antitrust “rule of reason.”” *In the Matter of Realcomp II, Ltd.* Dkt. No. 9320, 2007 WL 6936319 (Oct. 30, 2009) (Opinion of the Commission) (hereinafter “*Realcomp, Comm. Op.*”), at \*17-19 (explaining that the “inherently suspect mode of analysis” is a variant of the rule of reason).

70. Indeed, as noted, “because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns.” *Clorox Co.*, 117 F.3d at 57 (citation omitted).

**Response to Proposed Conclusion No. 70**

Removed from context it is not clear what the term “unfavorable trademark agreement” refers to. Therefore, the Court should not adopt this proposed conclusion.

71. Rather, “[n]ational protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985).

**Response to Proposed Conclusion No. 71**

Complaint Counsel has no specific response.

72. “[T]rademark law, by preventing others from copying a source-identifying mark, ‘reduce[s] the customer’s costs of shopping and making purchasing decisions for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.’” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995).

**Response to Proposed Conclusion No. 72**

Complaint Counsel has no specific response.

73. “At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product. The law thereby encourage[s] the production of quality products, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer’s inability quickly to evaluate the quality of an item offered for sale.” *Qualitex Co.*, 514 U.S. at 164 (internal citation and quotation marks omitted) (citing, *inter alia*, Landes & Posner, *The Economics of Trademark Law*, 78 T.M. Rep. 267, 271–72 (1988)).

**Response to Proposed Conclusion No. 73**

Complaint Counsel has no specific response.

74. For these reasons, trademark law incentivizes procompetitive interbrand competition and protects against anticompetitive harm from a reduction in such activity. *See S.*

REP. 100-515, 4, 1988 U.S.C.C.A.N. 5577, 5580 (“Trademarks encourage competition, promote economic growth and can raise the standard of living of an entire nation.”); 1 McCarthy on Trademarks and Unfair Competition § 2:3 (4th ed. 2004) (“if freely permitted,” trademark confusion “would eventually destroy the incentive of trademark owners to make the investments in quality control, promotion and other activities necessary to establishing strong marks and brand names. It is this result that would have severe anticompetitive consequences.”).

**Response to Proposed Conclusion No. 74**

Complaint Counsel has no specific response.

75. Relatedly, “[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies.” *Clorox Co.*, 117 F.3d at 61.

**Response to Proposed Conclusion No. 75**

Complaint Counsel has no specific response.

76. Even settlement agreements involving alleged payments by an intellectual property owner to competitors to stay out of the market must be evaluated under the rule of reason. *Actavis, Inc.*, 133 S.Ct. at 2237. The settlements here did not involve anything resembling such an agreement to keep a competitor from offering a competing product and dividing the incumbent’s monopoly profits.

**Response to Proposed Conclusion No. 76**

Complaint Counsel has no specific response to the first sentence of this proposed conclusion, other than to note that the Commission has explained that each of Complaint Counsel’s three alternative ways of establishing its *prima facie* case “are related, although distinct, variations of the antitrust “rule of reason.”” *See Realcomp*, Comm. Op. at \*17-19 (explaining that the “inherently suspect mode of analysis” is a variant of the rule of reason). The second sentence of this proposed conclusion is not a legal conclusion and moreover is unrelated to *Actavis*, because in that case the Court did *not* determine that the patent settlement represented an “agreement to keep a competitor from offering a competing product and dividing the incumbent’s monopoly profits.”

77. For these reasons, even if a commonplace settlement agreement is subject to antitrust scrutiny, a trademark settlement agreement that is “common, and favored, under the law” has procompetitive potential and should be analyzed under the rule of reason. *Clorox Co.*, 117 F.3d at 55.

**Response to Proposed Conclusion No. 77**

Complaint Counsel agrees that standard antitrust analysis is appropriate, and notes that the Commission has explained that each of Complaint Counsel’s three alternative ways of establishing its *prima facie* case “are related, although distinct, variations of the antitrust “rule of reason.”” *See*

*Realcomp*, Comm. Op. at 15-16 (explaining that the “inherently suspect mode of analysis” is a variant of the rule of reason).

78. There are numerous others. “The plausibility of competing claims about the effects of” challenged “advertising restrictions rules out the indulgently abbreviated review” advocated by Complaint Counsel. *Cal. Dental Ass’n*, 526 U.S. at 778.

**Response to Proposed Conclusion No. 78**

This proposed conclusion should be rejected because the “indulgently abbreviated review” referred to by the *Cal. Dental* Court referenced the Court of Appeals’ review of the record, not the manner in which Complaint Counsel satisfies its prima facie case under the reason. Moreover, here there are no plausible competing claims about the impact of the challenged restrictions, because these restrictions do not relate to the special context of professional services, and therefore will have the predictable effects “normally found in the commercial world.” *See Cal. Dental*, 526 U.S. at 773.

79. Inherently suspect treatment is not appropriate where “advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Cal. Dental Ass’n*, 526 U.S. at 771.

**Response to Proposed Conclusion No. 79**

This proposed conclusion should be rejected because in *Cal. Dental*, the Court held that an advertising regulation impacting dentists should be condemned as inherently suspect if it “*obviously tends to limit the total delivery of dental services.*” 526 U.S. at 776 (emphasis added). In the particular context of that case, the Court held that, because the regulations addressed potentially misleading claims and impacted the special context of professional services, the *tendency* of the advertising regulations on the output of dental services was not obvious, and the restraints “could have different effects from those “normally” found in the commercial world.” *Id.* at 773.

80. As noted in the Court’s findings of fact, restraining paid search ads for other retailers when consumers search for 1-800 Contacts has well-documented potential to benefit consumers by, for example, reducing their search costs and limiting confusion.

**Response to Proposed Conclusion No. 80**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

81. While Complaint Counsel have challenged the extent of those benefits and contend that they do not outweigh the harm, in the context of the complex and evolving paid search advertising at issue in this case, evaluating the balance of consumer effects is “a question susceptible to empirical but not *a priori* analysis,” *Cal. Dental Ass’n*, 526 U.S. at 774, as reflected in the parties’ presentation of survey and other empirical evidence.

**Response to Proposed Conclusion No. 81**

This proposed conclusion should be rejected because a restriction on search advertising will have the predictable anticompetitive effects ““normally” found in the commercial world.” *Cal. Dental Ass’n*, 526 U.S. at at 773. In *Cal Dental*, the Court held that, because the regulations addressed potentially misleading claims and impacted the special context of professional services, the *tendency* of the advertising regulations on the output of dental services was not obvious, and the restraints “could have different effects from those “normally” found in the commercial world.” *Id.* at 773. No precedent suggests that the special rule developed in the professional services context should be applied to restrictions that operate in the ordinary commercial world, such as search advertising.

82. As the Supreme Court has explained, “before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.” *Cal. Dental Ass’n*, 526 U.S. at 775 n.12.

**Response to Proposed Conclusion No. 82**

This proposed conclusion should be rejected because a restriction on search advertising will have the predictable anticompetitive effects ““normally’ found in the commercial world.” *Cal. Dental Ass’n*, 526 U.S. at at 773. In *Cal Dental*, the Court held that, because the regulations addressed potentially misleading claims and impacted the special context of professional services,

the *tendency* of the advertising regulations on the output of dental services was not obvious, and the restraints “could have different effects from those “normally” found in the commercial world.” *Id.* at 773. No precedent suggests that the special rule developed in the professional services context should be applied to restrictions that operate in the normal commercial world, such as search advertising.

83. Inherently suspect treatment is inappropriate because the “economic learning and the experience of the market” with paid search advertising is relatively limited. *Polygram Holding, Inc.*, 416 F.3d at 36.

**Response to Proposed Conclusion No. 83**

This proposed conclusion should be rejected because a restriction on search advertising will have the predictable anticompetitive effects “‘normally’ found in the commercial world.” *Cal. Dental Ass’n*, 526 U.S. at at 773. Economic and learning, the experience of the market, and the evidence before the court confirm that the restrictions on paid search advertising have predictable effects.

84. According to Complaint Counsel’s own experts, search engines are “[t]wo-sided markets were first clearly identified in the early 2000s.” *United States v. Am. Express Co.*, 838 F.3d 179, 186 n.3 (2d Cir. 2016).

**Response to Proposed Conclusion No. 84**

This proposed conclusion should be rejected, because this is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

85. Courts have scarcely applied the economics of two-sided markets in antitrust cases or applied antitrust analysis to paid search advertising.

**Response to Proposed Conclusion No. 85**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

86. Further, in light of the myriad complexities and many factors involved in measuring effects on search engine algorithms set forth in the Court’s findings of fact, “an observer with even a rudimentary understanding of economics” could not “conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Actavis, Inc.*, 133 S.Ct. at 2237.

**Response to Proposed Conclusion No. 86**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

87. The challenged agreements must be judged under the rule of reason.

**Response to Proposed Conclusion No. 87**

Complaint Counsel agrees that standard antitrust analysis is appropriate, and notes that the Commission has explained that each of Complaint Counsel’s three alternative ways of establishing its *prima facie* case “are related, although distinct, variations of the antitrust “rule of reason.”” *See Realcomp*, Comm. Op. at \*17-19 (explaining that the “inherently suspect mode of analysis” is a variant of the rule of reason).

88. Complaint Counsel are wrong that the settlements are inherently suspect because they “exceed the scope of any property right that 1-800 Contacts may have in its trademarks.” *Cmplt.*, ¶ 32.

**Response to Proposed Conclusion No. 88**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

89. Before analyzing Complaint Counsel’s attempt to litigate the merits of 1-800 Contacts’ trademark litigation, the Court notes that the challenges associated with doing so ten years after the fact as to multiple advertisements by multiple parties over multiple years confirms the Commission’s view that “[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable.” *Schering-Plough*, 136 F.T.C. at 997.

**Response to Proposed Conclusion No. 89**

This proposed conclusion should be rejected for the reasons explained above in Complaint Counsel’s Response to Proposed Conclusion of Law No. 54.

90. As noted, that counsels against recognizing antitrust claims premised on trademark settlement agreements that take commonplace forms.

**Response to Proposed Conclusion No. 90**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Complaint Counsel has already explained why it is irrelevant that agreements that “take commonplace forms,” as explained above in its response to Respondent’s Proposed Conclusion of Law No. 25.

91. Complaint Counsel’s overbreadth argument fails at the threshold because they “cannot make a case under the antitrust laws unless it demonstrates that the [settlement agreement] may significantly harm competition as a whole, *regardless of whether the agreement is entirely necessary to protect [the defendant’s] trademark rights.*” *Clorox Co.*, 117 F.3d at 57 (emphasis added).

**Response to Proposed Conclusion No. 91**

This proposed conclusion should be rejected because it misleadingly quotes an irrelevant portion of a case that held that standard antitrust analysis applies to trademark settlement agreements. In the quoted portion, the Court was offering the uncontroversial observation that a plaintiff must demonstrate that a restraint *may* result in competitive harm before the burden shifts to the defendant to justify a restraint. In other words, harm to competition rather than harm to a single rival is an element of an antitrust claim. *See Clorox Co.*, 117 F.3d at 57 (“the plaintiff must show more than just that he was harmed by the defendant's conduct.”) (quotation omitted). Here, Complaint Counsel has established competitive harm, through each of three alternative means, thus shifting to 1-800 Contacts to burden to justify the Bidding Agreements. *Cf.* *Clorox* at 59-60 (“Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its procompetitive redeeming virtues. ... Accordingly, as *Clorox* has not shown that the 1987 Agreement can significantly affect

competition as a whole, *it is immaterial* whether the Agreement is entirely necessary to protect the senior LYSOL mark.”) (emphasis added; citation omitted).

92. Indeed, in the context of applying antitrust law to patent settlements, the Commission itself has “agree[d] the antitrust analysis of a Hatch-Waxman settlement should not turn on a judicial assessment of the strength or scope of the *particular* patent involved in the case.” *FTC v. Actavis*, No. 12-416, Reply Br. for Pet’r, 2013 WL 1099171, at \*6 (U.S. Mar. 18, 2013).

#### **Response to Proposed Conclusion No. 92**

This proposed conclusion should be rejected for the reasons explained above in Complaint Counsel’s Response to Proposed Conclusion of Law No. 54.

93. So, too, the antitrust analysis of the parties’ trademark settlements here should not turn on the application of trademark law to particular paid search advertisements.

#### **Response to Proposed Conclusion No. 93**

This proposed conclusion should be rejected for the reasons explained above in Complaint Counsel’s Response to Proposed Conclusion of Law No. 54. Also, this proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

94. Complaint Counsel’s argument that the settlement agreements exceed the scope of 1-800 Contacts’ property rights also fails because trademark law recognizes the claims that 1-800 Contacts filed.

#### **Response to Proposed Conclusion No. 94**

This proposed conclusion should be rejected for the reasons explained above in Complaint Counsel’s Response to Proposed Conclusion of Law No. 54. Also, this proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

95. 1-800 Contacts alleged, among other things, that various retailers of contact lenses infringed its trademark by purchasing paid search advertisements that appear when users search for its trademark or confusingly similar variants thereof.

#### **Response to Proposed Conclusion No. 95**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

96. To establish a claim for trademark infringement, a plaintiff must prove that it has a protectable ownership interest in the mark and that the defendant’s unauthorized use of the mark in commerce is likely to cause consumer confusion. *E.g., Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 599 (9th Cir. 2014); 15 U.S.C. §§ 1125(a), 1127.

#### **Response to Proposed Conclusion No. 96**

This proposed conclusion should be rejected because it provides an incomplete statement that fails to define the “consumer confusion” addressable by trademark law. Trademarks seek to prevent 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)). The *Air Aromatics* case cited by 1-800 Contacts did not have occasion to address the types of confusion addressable by trademark law, it dealt with whether or not the plaintiff had alleged “continuous, public usage of a trademark that serves to identify the marked goods to the public as those of the mark’s owner.” 744 F.3d 595, 600.

97. There is no dispute that 1-800 Contacts has a protectable interest in the trademarks and variants thereof asserted in the litigations that it settled and that are protected by the settlement agreements.

#### **Response to Proposed Conclusion No. 97**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. There is, in fact, a dispute as to whether the Bidding Agreements protect any protectable interest 1-800 Contacts may have in its trademarked terms.

98. A transaction involving the purchase of keywords that are trademarked by another firm is a use in commerce subject to the Lanham Act. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011); *Rescuecom Corp. v. Google Inc.*, 562

F.3d 123 (2d Cir. 2009); *Australian Gold, Inc.*, 436 F.3d at 1239; *Edina Realty, Inc. v. TheMLSonline.com*, No. CIV. 04-4371JRTFLN, 2006 WL 737064, at \*3 (D. Minn. Mar. 20, 2006).

### **Response to Proposed Conclusion No. 98**

Complaint Counsel has no specific response, except to note that 1-800 Contacts filed multiple lawsuits that targeted rivals who were not actually purchasing “keywords that are trademarked by another firm.” Many firms, including Memorial Eye, never bid on any of 1-800 Contacts’ trademarks, but frequently “broad matched” into search queries relating to 1-800 Contacts trademarks. *See* CC Post-Trial Reply Br. 104.

99. Accordingly, the issue implicated by the trademark claims settled by the challenged agreements is whether 1-800 Contacts could prove that paid search ads displayed in response to searches for its trademarks were likely to cause consumer confusion. *See Rescuecom Corp.*, 562 F.3d at 130-31.

### **Response to Proposed Conclusion No. 99**

This proposed conclusion should be rejected. This inappropriately ignores the lawsuits 1-800 Contacts filed that targeted rivals who were not actually purchasing “keywords that are trademarked by another firm.” Many firms, including Memorial Eye, never bid on any of 1-800 Contacts’ trademarks, but frequently “broad matched” into search queries relating to 1-800 Contacts trademarks. *See* CC Post-Trial Reply Br. 104. Thus, 1-800 Contacts would have had to prove both that its rivals were using its trademarks by placing bids on trademark terms, and also that the terms caused 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)). In addition, not all of the Bidding Agreements involved lawsuits. *See* Response to Proposed Conclusion of Law No. 8.

100. Displaying advertisements in response to a search for another firm’s trademark can cause initial interest confusion, which occurs “when a consumer seeks a particular trademark holder’s product and instead is lured to the product of a competitor by the competitor’s use of the

same or a similar mark.” *Australian Gold, Inc.*, 436 F.3d at 1238.

### **Response to Proposed Conclusion No. 100**

This proposed conclusion should be rejected because it is incomplete. Initial interest confusion arises where a defendant uses the plaintiff’s trademark in a confusing manner calculated to capture initial consumer attention and direct the now-confused consumer to the defendant’s store (or website), “even though no actual sale is finally completed as a result of the confusion.” *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Nissan Motor Co. v. Nissan Computer Co.*, 378 F.3d 1002, 1018 (9th Cir. 2004)). In other words, the difference between initial interest confusion and a traditional trademark infringement claim is one of timing: in a traditional trademark claim, the consumer is allegedly confused as to the source, sponsorship, or affiliation of the product or service at the time the purchase is made, whereas in an initial interest confusion claim, the consumer is allegedly confused at the point she is directed to the defendant’s store (or website), but the confusion dissipates prior to the point of sale. In either case, however, no trademark infringement occurs unless at some point a consumer is confused as to source, sponsorship, or affiliation.

101. Actionable initial interest confusion can arise when, for example, “a consumer enters a query for ‘1-800 Contacts’ on Google; sees a screen with an ad for [a rival retailer such as] Lens.com that is generated because of Lens.com’s purchase of one of the nine Challenged Keywords; becomes confused about whether Lens.com is the same source as, or is affiliated with, 1-800; and therefore clicks on the Lens.com ad to view the site.” *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1244 (10th Cir. 2013).

### **Response to Proposed Conclusion No. 101**

The proposed conclusion is unsupported by authority and should be rejected because it suggests that that confusion of a single consumer would be “actionable.” To the contrary, the *Lens.com* court held that alleged initial interest confusion cannot support a claim unless the evidence shows that such confusion is likely to impact significant numbers of consumers. *See I-*

*800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1244 (10th Cir. 2013) (rejecting 1-800 Contacts’ trademark infringement claim where “initial-interest confusion occurred at most 1.5% of the time . . . [which] cannot support an inference that Lens.com’s keyword activity was *likely* to ‘lure’ consumers away from 1-800 [Contacts’ website].” (emphasis in original).

102. In the context of paid search advertising, the likelihood of confusion is “an inherently factual issue that depends on the facts and circumstances in each case.” *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012).

### **Response to Proposed Conclusion No. 102**

Complaint Counsel has no specific response, other than to note that confusion is unlikely when the advertiser is clearly identified. *E.g.*, *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 933 (9<sup>th</sup> 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); *Lens.com*, 722 F.3d at 1245 (“[An] inference [that the trademark owner is the source of a rival ad] 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.*”) (following *Network Automation, Inc. v. Advanced Systems Concept, Inc.*, 638 F.3d 1137, 1154 (9<sup>th</sup> Cir. 2011) (emphasis added); *Playboy Enters., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1025, n. 16 (9<sup>th</sup> Cir. 2004) (“Note that if a banner advertisement *clearly identified its source* or, even better, overtly compared [plaintiff’s] products to the sponsor’s own, *no confusion would occur* under [plaintiff’s] theory.”) (emphasis added).

103. Courts in different Circuits apply different multi-factor tests to determine whether advertisements that appear in response to searches for a firm’s trademark are likely to confuse consumers. *See Checkpoint Sys., Inc. v. Check Point Software Techs.*, 269 F.3d 270, 280 (3d Cir. 2001); *Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-CV-00250, 2016 WL 4074121, at \*6 (D. Conn. July 29, 2016); *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning*,

*Inc.*, 103 F. Supp. 3d 1032, 1041 (D. Minn. 2015); *Lens.com.*, 722 F.3d at 1244; *Network Automation, Inc.*, 638 F.3d at 1148-49; *Rosetta Stone*, 676 F.3d at 154-55.

### **Response to Proposed Conclusion No. 103**

Complaint Counsel has no specific response.

104. The traditional multi-factor tests are applied flexibly in the keyword advertising context, with no one factor considered determinative. *See Network Automation*, 638 F.3d at 1154; *Checkpoint Sys.*, 269 F.3d at 280 (no single factor is “determinative”).

### **Response to Proposed Conclusion No. 104**

Complaint Counsel has no specific response, other than to note that confusion is unlikely when the advertiser is clearly identified. *See* Response to PCOL No. 102.

105. “The weight of any given factor can depend very much on context” and there is a “the danger of applying the factors mechanically without attention to context.” *Lens.com*, 722 F.3d at 1243-44.

### **Response to Proposed Conclusion No. 105**

Complaint Counsel has no specific response.

106. Courts have rejected fair use as the appropriate framework in which to analyze paid search advertising trademark disputes. *E.g.*, *Network Automation*, 638 F.3d at 1152.

### **Response to Proposed Conclusion No. 106**

This proposed conclusion should be rejected because “fair use” is not a “framework” and this statement does not make any sense. Moreover, it is not supported by the sole authority cited. In *Network Automation*, the court observed that “Network has not argued that nominative fair use applies here.” *Network Automation*, 638 F.3d at 1152, n. 5. Thus, the *Network Automation* court did *not* “reject[] fair use as the appropriate framework.”

107. Other courts that have considered nominative fair use in the context of trademark infringement claims for the use or sale of trademarks as keywords declined to endorse it as a substitute for a multi-factor likelihood of confusion test. *Rosetta Stone Ltd.*, 676 F.3d at 155 (“We hasten to add that we are not adopting a position about the viability of the nominative fair

use doctrine as a defense to trademark infringement or whether this doctrine should formally alter our likelihood-of-confusion test in some way”).

### **Response to Proposed Conclusion No. 107**

This proposed conclusion should be rejected because it is not supported by the sole authority cited. In *Rosetta Stone*, the Court of Appeals held that the district court’s failure to address “all nine of the traditional likelihood-of-confusion factors” did not constitute reversible error, because “[t]his judicially created list of factors is not intended to be exhaustive or mandatory.” *See* 676 F.3d at 154. The Court did not reach any conclusion about whether nominative fair use should impact the normal likelihood of confusion factors. 1-800 Contacts omits a critical portion from the passage it quotes, which reads in full: “We hasten to add that we are not adopting a position about the viability of the nominative fair-use doctrine as a defense to trademark infringement or whether this doctrine should formally alter our likelihood-of-confusion test in some way. *That question has not been presented here and we leave it for another day.*”

*Rosetta Stone Ltd.*, 676 F.3d at 155 (emphasis added).

108. Complaint Counsel are incorrect that the law is clear that a paid search advertisement can only infringe if it includes the trademark in the text of the ad. *E.g.*, *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288; *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61.

### **Response to Proposed Conclusion No. 108**

This proposed conclusion should be rejected because it mis-states Complaint Counsel’s position. However, there are some circumstances in which an ad cannot constitute infringement if it does not include a trademark in the text of an ad, namely:

It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder’s mark in any way, even if that competitor’s advertisement appeared when a *consumer* entered a trademarked *search term*.”

*1-800 Contacts v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1174 (D. Utah 2010).

109. Courts have denied motions to dismiss claims for trademark infringement based on paid search advertising in response to a search for a firm’s trademark in cases in which the ads themselves did not contain the mark. *See, e.g., LBF Travel, Inc. v. Fareportal, Inc.*, No. 13 CIV. 9143 LAK GWG, 2014 WL 5671853, at \*9 (S.D.N.Y. Nov. 5, 2014); *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288 (“While these advertisements may not have displayed the mark itself, the surrounding context supplies a sufficient basis to support allegations of consumer confusion at this early stage of the litigation.”); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2005 WL 832398, at \*7 (N.D. Cal. Mar. 30, 2005).

#### **Response to Proposed Conclusion No. 109**

Complaint Counsel has no specific response.

110. Courts also have denied motions for summary judgment on such claims, in at least one case expressly rejecting the argument that “as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff’s] trademarks in the text.” *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61; *see also, e.g., Pensacola Motor Sales v. E. Shore Toyota, LLC*, No. 3:09CV571/RS-MD, 2010 WL 3781552, at \*3 (N.D. Fla. Sept. 23, 2010); *Rosetta Stone Ltd.*, 676 F.3d at 160.

#### **Response to Proposed Conclusion No. 110**

This conclusion should be rejected because “such claims” is ambiguous. Moreover, the court in *Fair Isaac Corp.* held only that summary judgment was inappropriate where evidence in the form of an expert report affirmatively supported the plaintiff’s claim that the challenged ads created a likelihood of confusion. 645 F. Supp. 2d 734, 761.

111. The cases upon which Complaint Counsel rely for their proposed single-factor test for paid search advertising cases—whether the trademark appears in the text of the advertisement—do not reach that conclusion, but suggest instead that given the specific factual circumstances presented to the court, advertisements that are sufficiently clearly labeled in the surrounding context of the entire search engine webpage may not give rise to a likelihood of initial interest confusion. *See Network Automation*, 638 F.3d at 1153-54 (“the labeling and appearance of the advertisements as they appear on the results page includes more than the text of the advertisement, and must be considered as a whole”); *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 938 (9th Cir. 2015) (in the Amazon sales page context, the fact that “Amazon clearly labels each of the products for sale by brand name and model number accompanied by the photograph of the item,” in combination with other factors, makes it “unreasonable to suppose that a reasonably prudent consumer accustomed to shopping online would be confused about the source of the goods”); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1245 (noting that the inference of confusion is unnatural where a link both “clearly identifies [its] source” and is “clearly labeled as an advertisement”) (emphasis added).

#### **Response to Proposed Conclusion No. 111**

This proposed conclusion should be accepted by the Court to the extent it proposes that “advertisements that are sufficiently clearly labeled in the surrounding context of the entire search engine webpage may not give rise to a likelihood of initial interest confusion.” This proposed conclusion should be rejected to the extent that it misrepresents Complaint Counsel’s position as proposing a “single-factor test.”

112. Indeed, in *Network Automation*, the court did not determine whether the advertisements were likely to cause consumer confusion but instead remanded the case back to the district court with instructions to consider the four “most relevant factors” to the analysis in the paid search advertising context, which include “(1) the strength of the mark; (2) the evidence of actual confusion; (3) the type of goods and degree of care likely to be exercised by the purchaser; and (4) the labeling and appearance of the advertisements and the surrounding context on the screen displaying the search results page.” *Network Automation*, 638 F.3d at 1154.

#### **Response to Proposed Conclusion No. 112**

Complaint Counsel has no specific response.

113. Complaint Counsel presented no evidence regarding the nature or effect of how paid search advertisements are labeled.

#### **Response to Proposed Conclusion No. 113**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

114. As noted in the Court’s findings of fact, however, the Commission has expressed concerns that search engines have not labeled paid search advertisements with sufficient clarity. (*See* RX0512 ((Letter from Mary K. Engle, FTC, Bureau of Consumer Protection (June 24, 2013)); RX0599 (Letter from H. Hipsley, FTC, Division of Advertising Practices, to Mr. Gary Ruskin (June 27, 2002)).

#### **Response to Proposed Conclusion No. 114**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

115. Further, there is legal uncertainty regarding whether the purchase by a defendant of a generic keyword term that results in the display of advertisements in response to search queries for the plaintiff's trademarks constitutes a use in commerce of the trademark, though there is some authority suggesting that this, too, is potentially actionable infringement. See *Buying for the Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310, 322 (D.N.J. 2006) (finding that the "purchase and/or sale of keywords that trigger advertising constitutes the type of 'use' contemplated by the Lanham Act" where an advertisement may have appeared because plaintiff purchased as a keyword the generic term "bedroom"); *1-800Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-cv-983 TS, 2010 WL 988524, at \*5 (D. Utah Mar. 15, 2010).

### **Response to Proposed Conclusion No. 115**

This proposed conclusion should be rejected because it falsely represents the authority cited. Respondent suggests that *Buying for the Home* held that the the defendant's mark might have been "used" where an advertisement may have appeared because plaintiff purchased as a keyword the generic term "bedroom." This is a truly egregious misrepresentation. In fact, the court denied summary judgment because a genuine issue of material fact existed as to whether the defendant had purchased as a keyword the plaintiff's trademark, "total bedroom." The Court held as follows:

taking into account the fact that the Court must consider all facts and logical inferences in favor of the non-moving party, a fair inference may be drawn that Humble purchased the sponsored advertisement to be triggered by the search phrase "total bedroom."

Defendants point to an email from "Frankie and the Google AdWords Team" that states that Defendants have never purchased from Google the term "total bedroom" as a keyword and it was possible that Humble's ad appeared during a search of the phrase "total bedroom" because "bedroom" was a keyword that had been purchased by Humble. However, Plaintiff correctly points out this email is hearsay, and generally may not be considered on a motion for summary judgement. [citations omitted] Nevertheless, even if the Court were to consider the contents of the email, the Court finds that the letter only creates a genuine issue of material fact and does not itself entitle Defendant to summary judgment.

*Buying for the Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310, 320-321 (D.N.J. 2006).

Likewise, the court denied the motion to dismiss in *1-800Contacts, Inc. v. Memorial Eye* not because Memorial Eye might have been liable for bidding on generic terms, but because the

Court, at the motion to dismiss stage, could not *exclude* the possibility that the defendant had bid on the plaintiff's trademark terms. *1-800Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-cv-983 TS, 2010 WL 988524, at \*6 (D. Utah Mar. 15, 2010) (“In the case currently facing the Court, Plaintiff has alleged that Defendant purchased some keywords related to Plaintiff's website ***and or trademark***. Therefore, according to *Rescuecom*, the allegations in Plaintiff's Complaint plead a use in commerce. . . . Defendant argues that its appearance among the sponsored links list is due to the search engine's own algorithms and not on its purchase of keywords. Analysis of this argument would require the Court to make evidentiary findings which is not permissible in a motion to dismiss.”) (emphasis added).

116. At least two courts held, as Complaint Counsel concede, that 1-800 Contacts' trademark claims were not sham. *See 1-800Contacts, Inc. v. Mem'l Eye, P.A.*, 2010 WL 988524, at \*6; *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014), ECF No. 91, at 2.

#### **Response to Proposed Conclusion No. 116**

This proposed conclusion should be rejected because Complaint Counsel do not “concede” that “1-800 Contacts' trademark claims were not sham.” To the contrary, Complaint Counsel has expressly rejected this assertion as wholly irrelevant to this case, and no discovery has been conducted on the issue. *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 4 (“In short, to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham. For example, if 1-800 Contacts restricted competition beyond “the scope of any property right that 1-800 Contacts may have in its trademarks,” Compl. ¶ 32, then the *bona fide* nature of the underlying trademark dispute could not be a defense.”). Complaint Counsel “need not show that the underlying lawsuits . . . are sham”). Complaint Counsel is clearly not required to take, nor has it taken, any position on this issue. *See* CC Post-Trial Br. at 148.

117. Complaint Counsel have not demonstrated that 1-800 Contacts' trademark claims were “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

#### **Response to Proposed Conclusion No. 117**

Complaint Counsel has no specific response, as the Commission has already held that “to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham.” *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 4.

118. Complaint Counsel have not demonstrated that any lawsuit asserting that any form of conduct prohibited by the settlement agreement constituted trademark infringement would be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof'l Real Estate Inv'rs, Inc., Inc.*, 508 U.S. at 60.

**Response to Proposed Conclusion No. 118**

Complaint Counsel has no specific response, as the Commission has already held that “to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham.” *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 4.

119. As noted in the Court’s findings of fact, 1-800 Contacts introduced evidence from Dr. Goodstein and Dr. Van Liere, among others, that consumers who searched for 1-800 Contacts were likely to be confused by advertisements for other retailers.

**Response to Proposed Conclusion No. 119**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

120. Dr. Van Liere’s finding of confusion among approximately 20% (15% if weighted according to Complaint Counsel’s approach) of the relevant population of consumers would be sufficient to establish likelihood of confusion for trademark infringement purposes. *See BellSouth Corp. v. Internet Classifieds of Ohio*, No. 1:96-CV-0769-CC, 1997 WL 33107251, at \*20 (N.D. Ga. Nov. 12, 1997); *Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir. 1979); 6 McCarthy on Trademarks and Unfair Competition § 32:188 (4th ed.) (“Where other evidence is supportive, courts have found a likelihood of confusion when survey results are between 10% and 20%”).

**Response to Proposed Conclusion No. 120**

Complaint Counsel has no specific response, other than to deny that Dr. Van Liere provided the Court with any evidence of any actionable confusion.

121. Dr. Van Liere conducted his survey with respect to the current time frame and did not attempt to replicate conditions that existed at the time the events giving rise to the underlying litigation occurred. This was entirely proper. It would not have been possible to have replicated those past conditions or to have conducted a survey of today’s consumers that would have

accurately represented their understanding of various paid advertisements as of earlier time periods.

**Response to Proposed Conclusion No. 121**

This proposed conclusion should be rejected because it is not a conclusion of law

“supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

122. However, what Dr. Van Liere’s survey and the testimony of Dr. Goodstein did persuasively show was that 1-800 Contacts would have been able to present evidence to a trier of fact that could reasonably have persuaded the trier of fact that the conduct of the settling parties at issue in the underlying litigations had created a likelihood of confusion such that 1-800 Contacts was entitled to relief such as the relief it obtained in the settlement agreements.

**Response to Proposed Conclusion No. 122**

This proposed conclusion should be rejected because it is not a conclusion of law

“supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

123. Complaint Counsel’s expert Dr. Jacoby did not find significant confusion based on his survey, and criticized Dr. Van Liere’s survey. The Court did not find Dr. Jacoby’s testimony to be credible and does not credit his survey, as explained in the preceding findings of fact. Further, the Court does not agree with Dr. Jacoby’s criticisms of Dr. Van Liere’s survey.

**Response to Proposed Conclusion No. 123**

This proposed conclusion should be rejected because it is not a conclusion of law

“supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

124. Even if the Court did give weight to Dr. Jacoby’s testimony and his survey, it could not find that it should disregard entirely the survey and testimony of Dr. Van Liere or that it should disregard the testimony of Dr. Goodstein. The Court still would find that a triable issue regarding the likelihood of confusion could have been presented in each of the underlying litigations—and could be presented in a litigation today if the settlements were not in effect—and thus that the trier of fact in those cases might have found a likelihood of confusion sufficient to support the relief that 1-800 Contacts was seeking.

**Response to Proposed Conclusion No. 124**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

125. It also is important to note that Dr. Jacoby’s survey and stimuli did not sufficiently replicate market conditions.

**Response to Proposed Conclusion No. 125**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

126. This was improper, as courts have recognized in discrediting Dr. Jacoby’s work. *See Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1043 (S.D. Ind. 2000) (rejecting “survey [that]does not ask respondent to view actual search engine results containing hyperlinks to these sites in a way that might actually occur in the marketplace”); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1327-29 (N.D. Ga. 2008) (criticizing Jacoby for artificially manipulating respondents’ interest in a particular internet link, which “did not sufficiently reflect actual marketplace conditions or typical consumer shopping behavior”).

**Response to Proposed Conclusion No. 126**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

127. At most, Dr. Jacoby's survey and his testimony supports the conclusion that 1-800 Contacts might not have prevailed on summary judgment in the underlying litigations, *i.e.*, that the defendant in each case might have been able to present trial issues of material fact.

**Response to Proposed Conclusion No. 127**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

128. In sum, giving credit to the survey and testimony of Dr. Jacoby, which the Court would not do, and also giving credit to the survey of Dr. Van Liere and the testimony of Dr. Van Liere and Dr. Goodstein, the Court concludes that Complaint Counsel have failed to establish that 1-800 Contacts could not have presented evidence in the underlying cases that would have satisfied the likelihood of confusion standard.

**Response to Proposed Conclusion No. 128**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

129. Moreover, even in the absence of any survey testimony such as Dr. Van Liere’s, 1-800 Contacts could have prevailed in the underlying litigations. “Surveys do not measure the degree of actual confusion by real consumers making mistaken purchases. Rather, surveys create an experimental environment from which we can get useful data from which to make informed inferences about the likelihood that actual confusion will take place.” 6 McCarthy on Trademarks and Unfair Competition § 32:184 (4th ed.) (citing Jacoby, Trademark Surveys, § 3.70 (ABA 2014) (“Even at their very best, trademark surveys are unlike the real world marketplace in a number of key respects.”)).

**Response to Proposed Conclusion No. 129**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

130. Survey evidence of actual confusion is not necessary to prevail on a trademark infringement claim. *See, e.g., Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 190 (3d Cir. 2010); *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll v. Smack Apparel Co.*, 550 F.3d 465, 483 (5th Cir. 2008); *Visible Sys. Corp. v. Unisys Corp.*, 551 F.3d 65, 74 (1st Cir. 2008); *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed Cir. 2002); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002); 15 U.S.C. § 1114(1)(a).

#### **Response to Proposed Conclusion No. 130**

Complaint Counsel has no specific response.

131. Likewise, courts uphold findings of infringement absent consumer surveys demonstrating actual confusion. *See, e.g., Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 120 (1st Cir. 2006); *Montgomery v. Noga*, 168 F.3d 1282, 1302 (11th Cir. 1999); *Smack Apparel Co.*, 550 F.3d at 483; *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir. 1986); *see also* Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. Pa. J. Bus. L. 1013, 1035 (2012) (“no evidence that surveys are used by a majority or even a large plurality of litigants to prove likelihood of confusion in federal court”).

#### **Response to Proposed Conclusion No. 131**

Complaint Counsel has no specific response.

132. While “the parties to trademark disputes frequently as here hire professionals in marketing or applied statistics to conduct surveys of consumers,” in fact “[t]he battle of experts that ensues is frequently unedifying.” *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P’ship.*, 34 F.3d 410, 414–15 (7th Cir. 1994) (Posner, J.), *abrogated on other grounds by Ad. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014).

#### **Response to Proposed Conclusion No. 132**

Complaint Counsel has no specific response.

133. The salient point for this antitrust case is not which party’s expert more effectively used the “tricks of the survey researcher’s black arts,” *Indianapolis Colts, Inc.*, 34 F.3d at 416, but that the claims that 1-800 Contacts settled involved *bona fide* trademark disputes that would require a fact-finder to assess evidence of confusion, taking into account the specific circumstances and context of the paid search advertising at issue.

#### **Response to Proposed Conclusion No. 133**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

134. Dr. Goodstein's testimony would have created such an issue of fact.

**Response to Proposed Conclusion No. 134**

This proposed conclusion should be rejected because it is not a conclusion of law "supported by applicable legal authority," as required by the Court's Order. *See* Order on Post-Trial Briefs at 2.

135. Further, as set forth in the findings of fact, 1-800 Contacts did adduce evidence in the underlying actions of actual confusion that was not based on survey evidence but rather was based on contemporaneous events and documents. Had each of the underlying cases proceeded through discovery and to trial, 1-800 Contacts might have developed additional evidence of actual confusion that would have been sufficient to persuade a trier of fact that the requisite likelihood of confusion had been shown. Complaint Counsel made no effort to show otherwise.

**Response to Proposed Conclusion No. 135**

This proposed conclusion should be rejected because it is not a conclusion of law "supported by applicable legal authority," as required by the Court's Order. *See* Order on Post-Trial Briefs at 2.

136. In sum, 1-800 Contacts might have prevailed in each of the underlying litigations had they proceeded through trial.

**Response to Proposed Conclusion No. 136**

This proposed conclusion should be rejected because it is not a conclusion of law "supported by applicable legal authority," as required by the Court's Order. *See* Order on Post-Trial Briefs at 2.

137. As such, even if Complaint Counsel's position that the settlement agreements were unreasonably broad vis-à-vis the scope of trademark protection were relevant, Complaint Counsel are wrong that the settlement agreements are categorically broader than any clear demarcation in trademark law.

**Response to Proposed Conclusion No. 137**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

138. Even if the settlement agreements were broader than necessary to protect 1-800 Contacts’ rights under federal trademark law, and the Court finds that they were not, Complaint Counsel failed to show, or to offer any evidence, that they were broader than necessary to protect 1-800 Contacts’ rights under state and other federal laws.

**Response to Proposed Conclusion No. 138**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

139. In the underlying litigations, in addition to claims for trademark infringement, 1-800 Contacts also asserted various additional claims, including claims for unfair competition, false advertising, misappropriation, and unjust enrichment. *See, e.g.,* RX0072 (*1-800 Contacts, Inc. v. Memorial Eye, P.A.*); CX1617 (*1-800 Contacts, Inc. v. EZ Contacts USA*); CX1615 (*1-800 Contacts, Inc. v. Coastal Contacts, Inc.*); CX1618 (*1-800 Contacts, Inc. v. Lensfast, Inc.*); CX1620 (*1-800 Contacts, Inc. v. Walgreens, Inc.*); CX1621 (*1-800 Contacts, Inc. v. Web Eye Care, Inc.*); RX1821 (*1-800 Contacts, Inc. v. Standard Optical Company, Inc.*); RX1822 (*1-800 Contacts, Inc. v. Empire Vision Center, Inc.*); CX0638 (*1-800 Contacts, Inc. v. Tram Data, LLC*).

**Response to Proposed Conclusion No. 139**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is, instead, a factual assertion regarding “the underlying litigations” that does not provide citations to all of the litigations 1-800 filed that led to Bidding Agreements.

140. In this context, claims for unfair competition, false advertising, misappropriation, and unjust enrichment were viable. Indeed, courts regularly deny motions to dismiss these causes of action in litigations involving keyword advertising. *See, e.g., Morningware, Inc. v. Hearthware Home Prods., Inc.*, 673 F. Supp. 2d 630, 639 (N.D. Ill. 2009) (denying defendant advertiser’s motion to dismiss deceptive trade practices and unfair competition claims, among others); *Google Inc. v. Am. Blind*, 2005 WL 832398, at \*7 (denying Google’s motion to dismiss false representation and unfair competition claims, among others); *Gov’t Employees Ins. Co. v. Google*,

*Inc.*, 330 F. Supp. 2d 700, 703–04 (denying Google’s motion to dismiss false representation and unfair competition claims, among others); *Am. Airlines, Inc. v. Google, Inc.*, No. 4:07-CV-487-A (N.D. Tex. Oct. 24, 2007) (D.E. 19) (denying Google’s motion to dismiss claims for false representation, misappropriation, and unfair competition, among others); *CNG Fin. Corp. v. Google, Inc.*, No. 1:06-cv-040 (S.D. Ohio Nov. 21, 2006) (D.E. 35) (denying Google’s motion to dismiss claims of false representation and misappropriation, among others).

#### **Response to Proposed Conclusion No. 140**

The first sentence of this proposed conclusion should be rejected because it is unconnected to the legal authority cited, unsupported by any facts, and is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Complaint Counsel has no specific response to the second sentence of this proposed conclusion, which is not relevant to any issue before the Court.

141. Complaint Counsel have not demonstrated that 1-800 Contacts’ claims for unfair competition, false advertising, misappropriation, or unjust enrichment were “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Inv’rs, Inc.*, 508 U.S. at 60.

#### **Response to Proposed Conclusion No. 141**

Complaint Counsel has no specific response.

142. Complaint Counsel have not demonstrated that any lawsuit asserting that any form of conduct prohibited by the settlement agreement constituted unfair competition, false advertising, misappropriation, or unjust enrichment would be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Inv’rs, Inc., Inc.*, 508 U.S. at 60.

#### **Response to Proposed Conclusion No. 142**

Complaint Counsel has no specific response, as the Commission has already held that “to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham.” *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 4.

143. In the underlying litigations, in addition to claims under federal law, 1-800 Contacts also asserted claims under Utah Code An. § 13-5a-102 for “unfair competition.” *See, e.g.,* CX1620-009 (*1-800 Contacts, Inc. v. Walgreens, Inc.*); CX1618-011 (*1-800 Contacts, Inc. v. Lensfast*); CX1621-009 (*1-800 Contacts, Inc. v. Web Eye Care, Inc.*).

**Response to Proposed Conclusion No. 143**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is, instead, a factual assertion regarding “the underlying litigations” that cites to only two complaints.

144. In Utah, “unfair competition” is defined under Utah’s Unfair Competition Act as “an intentional business act or practice that: (i)(A) is unlawful, unfair, or fraudulent; and (B) leads to a material diminution in value of intellectual property; and (ii) is one of the following: (A) malicious cyber activity; (B) infringement of a patent, trademark, or trade name; (C) a software license violation; or (D) predatory hiring practices.” Utah Code An. § 13-5a-102.

**Response to Proposed Conclusion No. 144**

Complaint Counsel has no specific response.

145. Utah’s unfair competition regime is broader than the federal regime because the defendant’s activity is implicated under the statute if it is “unlawful, unfair, or fraudulent”; it need not be likely to cause confusion or misrepresent the nature or quality of goods or services. Utah Code An. § 13-5a-102.

**Response to Proposed Conclusion No. 145**

The proposed conclusion should be rejected because the claim that Utah’s regime is “broader” than the federal regime is unsupported by the authority cited, which suggests at most that the Utah statute uses different words.

146. For this reason, Utah courts have described unfair competition as an “open-ended” category that encompasses a number of different torts, noting that “nameless forms of unfair competition may be recognized at any time for the protection of commercial values.” *Proctor & Gamble Co. v. Haugen*, 947 F. Supp. 1551, 1554, 1554 n.4 (D. Utah 1996).

**Response to Proposed Conclusion No. 146**

The proposed conclusion should be rejected because the ambiguous claim that the cited dicta exists “for this reason” is unsupported by the authority cited. *See also* Response to PCOL No. 145.

147. Complaint Counsel have not demonstrated that 1-800 Contacts’ claims for unfair competition under Utah law were “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

**Response to Proposed Conclusion No. 147**

Complaint Counsel has no specific response, as the Commission has already held that “to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham.” *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 4.

148. Complaint Counsel have not demonstrated that any lawsuit asserting that any form of conduct prohibited by the settlement agreement constituted unfair competition under Utah law would be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof'l Real Estate Inv'rs, Inc., Inc.*, 508 U.S. at 60 (1993).

**Response to Proposed Conclusion No. 148**

Complaint Counsel has no specific response, as the Commission has already held that “to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham.” *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 4.

149. Yet, even if the settlement agreements did in some respect restrain conduct that might not, standing alone, infringe on 1-800 Contacts' property rights, that does not mean that the agreements would harm competition.

**Response to Proposed Conclusion No. 149**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

150. It is quite common for the scope of settlement agreements to exceed the scope of the infringing conduct for reasons of administrative efficiency and to ensure that similar infringing conduct does not occur in the future. Mr. Hogan offered un rebutted testimony that trademark owners seek clear settlement provisions that minimize the risk of recurring disputes.

**Response to Proposed Conclusion No. 150**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

151. Any overbreadth of the settlement agreements was justified by the need to make the settlements administratively feasible and to ensure that future violations would be clearly prohibited so that future litigation would likely be avoided.

**Response to Proposed Conclusion No. 151**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

152. Courts decline to limit trademark relief to prohibit only advertisements proven to be “confusing” because they “require[] the defendant to guess at what kind of conduct would be deemed trademark infringement.” *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 667 & 669 (8th Cir. 1987); *see also Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 146 (3d Cir. 1994) (rejecting reading of consent decree that “would require the district court . . . to make determinations on . . . whether there was likelihood of confusion arising from any of [defendant]’s acts”); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 984; 5 McCarthy on Trademarks and Unfair Competition § 30:13 (“An injunction which merely forbids a defendant from . . . ‘infringing upon plaintiff’s trademarks and trade secrets’ adds nothing to what the law already requires. If an injunction is so worded, then the factual elements of what exactly is . . .

‘trademark infringement’ must be re-hashed all over again in a contempt hearing.”).

**Response to Proposed Conclusion No. 152**

This proposed conclusion should be rejected because it is irrelevant. What courts may order in an appropriate case is irrelevant to whether a private agreement that imposes the same conditions violates the antitrust laws.

153. Further, “an infringer, once caught, must expect some fencing in,” and “a court can frame an injunction which will keep a proven infringer safely away from the perimeter of future infringement.” *Tamko Roofing Prod., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 40 (1st Cir. 2002) (quoting 5 McCarthy on Trademarks and Unfair Competition § 30:4, at 30–12 (4th ed. 2002)); *see also, e.g., Internet Specialties W., Inc. v. Milon-DiGiorgio Enterprises, Inc.*, 559 F.3d 985, 993 (9th Cir. 2009) (rejecting argument that defendant “should not be prohibited from using it to market its other services which did not prompt [plaintiff’s] lawsuit”); *PRL USA Holdings, Inc. v. U.S. Polo Ass’n, Inc.*, 520 F.3d 109, 118 (2d Cir. 2008) (“safe distance” rule “useful in contempt proceedings” for “relieving the reviewing court of the need to retry the entire range of issues that may be relevant in an infringement action for each small variation the defendant makes to the enjoined mark”).

**Response to Proposed Conclusion No. 153**

This proposed conclusion should be rejected because while a court might have the legal authority to order fencing-in relief in an appropriate case, what courts may order in an appropriate case is irrelevant to whether a private agreement that imposes the same conditions violates the antitrust laws. Further, none of the settlement agreements involve a proven infringer.

154. It cannot be that 1-800 Contacts has no leeway in protecting its cognizable trademark rights when the Commission “is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past” but can engage in some “fencing in.” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 39 (1965).

**Response to Proposed Conclusion No. 154**

This proposed conclusion should be rejected because while a court might have the legal authority to order fencing-in relief in an appropriate case, what courts may order in an appropriate

case is irrelevant to whether a private agreement that imposes the same conditions violates the antitrust laws.

155. Condemning a settlement agreement as inherently suspect whenever “an alternative would be less restrictive of competition no matter to how small a degree” “would place an undue burden on the ordinary conduct of business.” *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1995 [sic]).

#### **Response to Proposed Conclusion No. 155**

This proposed conclusion should be rejected because it is unsupported by the authority cited. *American Motor Inns* was decided in 1975, not 1995, as the citation represents. At that point in time the Commission had not yet articulated the “inherently suspect” variant of the rule of reason, and the *American Motor Inns* Court had no occasion to consider how the availability of less restrictive alternatives might impact its application.

Moreover, the proposed conclusion is irrelevant. The fact that alternatives would be less restrictive of competition is not the *reason* that the Bidding Agreements are subject to inherently suspect analysis; instead, inherently suspect treatment is appropriate because the Bidding Agreements bear a close family resemblance to horizontal restraints that predictably cause anticompetitive effects. Thus, the Court is not being asked to adopt a rule that would condemn a settlement agreement as inherently suspect “whenever” a less restrictive alternative is available.

156. Unduly burdening trademark protection that the Supreme Court has clearly recognized as procompetitive would “chill the very conduct the antitrust laws are designed to protect.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

#### **Response to Proposed Conclusion No. 156**

This proposed conclusion should be rejected because it is unsupported by the authority cited. *Verizon Commc’ns* has nothing to do with “burdening trademark protection that the Supreme Court has clearly recognized as procompetitive.”

157. “The cost of false positives counsels against an undue expansion of [antitrust] liability.” *Trinko*, 540 U.S. at 414.

#### **Response to Proposed Conclusion No. 157**

This proposed conclusion should be rejected because it is irrelevant, as Complaint Counsel is not proposing an “undue expansion of [antitrust] liability,” but instead seeks the application of well-established principles to clearly anticompetitive behavior.

158. As noted, “because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns.” *Clorox Co.*, 117 F.3d at 57 (citation omitted).

#### **Response to Proposed Conclusion No. 158**

This proposed conclusion should be rejected to the extent that it suggests that agreements involving trademarks are not subject to the same antitrust scrutiny as any other commercial agreement. The *Clorox* court subjected the agreement challenged by the plaintiff to standard antitrust analysis. *See* Response to Proposed COL No. 20.

159. The standard framework for analyzing an action’s anticompetitive effects on a market is the rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”); *see also Agnew v. NCAA*, 683 F.3d 328, 335-36 (7th Cir. 2012).

#### **Response to Proposed Conclusion No. 159**

This conclusion should be rejected, because the “standard” framework for analyzing horizontal restraints includes an assessment of whether the restraint falls within a category of restraints, including horizontal price-fixing, bid-rigging, and market allocation agreements among competitors, which “because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, (1958).

Moreover, Complaint Counsel notes that the Commission has explained that each of Complaint Counsel’s three alternative ways of establishing its *prima facie* case “are related,

although distinct, variations of the antitrust ‘rule of reason.’” *See Realcomp*, Comm. Op. at \* 17-19 (explaining that the “inherently suspect mode of analysis” is a variant of the rule of reason).

160. Under this framework, Complaint Counsel bore the burden of showing that the challenged settlement agreements produce significant anticompetitive effects within a relevant market. *See Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010).

**Response to Proposed Conclusion No. 160**

This proposed conclusion should be rejected. First, it is not supported by the cited authority, which nowhere uses the word “significant” to describe anticompetitive effects. More importantly, in *Realcomp*, the Commission identified three alternative methods through which Complaint Counsel may satisfy its *prima facie* case under the rule of reason. *Realcomp*, Comm. Op. at \*17-19. *See* CC Post-Trial Br. at 71-72. Once Complaint Counsel makes its *prima facie* case, Respondent bears the burden of proving that the harm to competition is outweighed by cognizable and plausible procompetitive efficiencies, if any. *United States v. Visa*, 344 F.3d 229, 238 (2d Cir. 2003); *Law v. NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998).

161. Complaint Counsel thus had to show anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services. *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993).

**Response to Proposed Conclusion No. 161**

This conclusion should be rejected to the extent it suggests that these are the only manifestations of harm to consumer welfare that might establish Complaint Counsel’s *prima facie* case. The Commission instructed in *Realcomp* that “[u]nder this framework, a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded innovation, or other manifestations of harm to consumer welfare.” *Realcomp*, Comm. Op. at \*31. *See also Indiana Federation*, 476 U.S. at 460-461 (accepting as direct proof of anticompetitive effects evidence that in two localities, over a period of years, insurers were “actually unable to obtain compliance with their requests for submission of x rays”).

162. As a threshold matter, Complaint Counsel had to prove market power in a relevant market—*i.e.*, the ability to raise prices significantly without going out of business—without which 1-800 Contacts could not cause anticompetitive effects. *See Agnew*, 683 F.3d at 335-36; *see also Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

#### **Response to Proposed Conclusion No. 162**

This proposed conclusion should be rejected. In *Realcomp*, the Commission identified three alternative methods through which Complaint Counsel may satisfy its *prima facie* case, only one of which requires Complaint Counsel to demonstrate directly the existence of market power. *Realcomp*, Comm. Op. at \*17-19. *See* CC Post-Trial Br. at 71-72. Moreover, when assessing the capacity of the Bidding Agreements to result in competitive harm, the relevant issue is the market power possessed collectively by the parties to the Bidding Agreements collectively, not 1-800 Contacts' power to raise prices on its own. Also, the proposed definition of market power is incorrect. Market power is the power to profitably raise price above the competitive level.

163. Complaint Counsel therefore had to identify and prove the relevant market. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).

#### **Response to Proposed Conclusion No. 163**

This proposed conclusion should be rejected. The Commission has made clear that Complaint Counsel need not prove a relevant antitrust market when inherently suspect practices are at issue that lack a legitimate justification, or where there is direct evidence of harm. *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 771 (F.T.C. Nov. 29, 2005) (“proof of market definition and market power is not required in this case because Respondent did not meet its burden of establishing a legitimate justification for NTSP's inherently suspect practices.”).

164. “Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.” *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011); *see also Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006).

#### **Response to Proposed Conclusion No. 164**

This proposed conclusion should be rejected. The Commission has made clear that Complaint Counsel need not prove a relevant antitrust market when inherently suspect practices are at issue that lack a legitimate justification or where there is direct evidence of harm. *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 771 (F.T.C. Nov. 29, 2005) (“proof of market definition and market power is not required in this case because Respondent did not meet its burden of establishing a legitimate justification for NTSP's inherently suspect practices.”).

165. Complaint Counsel failed to meet their burden under the rule of reason.

**Response to Proposed Conclusion No. 165**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

166. “The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Any given firm may cut its own output, but rivals will increase production in response.” *Menasha Corp.*, 354 F.3d at 663.

**Response to Proposed Conclusion No. 166**

This proposed conclusion should be rejected. *See* Response to PCOL No. 162.

167. Complaint Counsel have not proven that 1-800 Contacts has market power for two reasons: (1) the relevant market is all retail sales of contact lenses, in which 1-800 Contacts’ market share is only 10% and 1-800 Contacts and the settling parties together make less than 20% of sales, and (2) even if the relevant market is limited to online sales of contact lenses, there are no barriers to expansion or entry that would enable 1-800 Contacts to exercise market power.

**Response to Proposed Conclusion No. 167**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

168. “To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market.” *Reifert*, 450 F.3d at 320.

**Response to Proposed Conclusion No. 168**

Complaint Counsel has no specific response.

169. “The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output.” *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004); *see also Am. Express Co.*, 838 F.3d at 199 (“If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market.”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 81 (D.D.C. 2006).

**Response to Proposed Conclusion No. 169**

This proposed conclusion should be rejected. The correct methodology for defining a market is to identify a grouping of sellers which, “if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of *the hypothetical cartel*, these others are part of the market.” *American Express*, 838 F.3d 179, 198-199 (emphasis added). *See* Resp. Post-Trial Br. at 77 (quoting same language). 1-800 Contacts confuses the appropriate methodology with a “goal in defining the relevant market” to the extent it suggests that market definition methodology turns on identifying the “competitive pressures that restrain *an individual firm’s* ability to raise prices or restrict output.” *Geneva Pharm. Tech. Corp.*, 386 F.3d 485, 496 (emphasis added). *Geneva Pharm.*, it should be noted, dealt with a monopolization claim under Section 2 of the Sherman Act, as did *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 81 (D.D.C. 2006).

170. The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. *Geneva Pharms. Tech. Corp.*, 386 F.3d at 496 (quotation marks omitted); *see also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 n.4 (D.C. Cir. 1986); *Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc.*, 714 F.2d 351, 356 (4th Cir. 1983).

**Response to Proposed Conclusion No. 170**

This proposed conclusion should be rejected. The correct methodology for defining a market is to identify a grouping of sellers which, “if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of *the hypothetical cartel*, these others are part of the market.” *American Express*, 838 F.3d 179, 198-199 (emphasis added). *See* Resp. Post-Trial Br. at 77 (quoting same language).

171. Thus, “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

**Response to Proposed Conclusion No. 171**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

172. “‘Interchangeability’ implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively.” *Allen-Myland, Inc. v. Int’l Bus. Machs. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994).

**Response to Proposed Conclusion No. 172**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

173. Accordingly, “products or services need not be identical to be part of the same market.” *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999); *see also United States v. Cont’l Can Co.*, 378 U.S. 441, 449 (1964); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956) (cellophane in same market as other flexible wrapping because “despite cellophane’s advantages it has to meet competition from other materials in every one of its uses”); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 563d at 389 (3d. ed. 2007) (“Areeda”) (“Most courts correctly define the presumptive market to include similar products, though differentiated by brand or features.”).

**Response to Proposed Conclusion No. 173**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

174. “An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other.” *E. I. du Pont de Nemours & Co.*, 351 U.S. at 400; *see also Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017) (“If two products share a high cross-elasticity of demand—in that an increase in the price of one product causes consumers to switch to the other, and vice versa—then those products likely are interchangeable and may properly be considered part of the same product market.”); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992) (defining “cross-elasticity of demand” as “the extent to which consumers will change their consumption of one product in response to a price change in another”).

**Response to Proposed Conclusion No. 174**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

175. However, “[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to recognize competition where, in fact, competition exists.” *Cont’l Can Co.*, 378 U.S. at 453 (quotation marks omitted).

**Response to Proposed Conclusion No. 175**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

176. Ultimately, the determination of the relevant market is “a matter of business reality—[ ]of how the market is perceived by those who strive for profit in it.” *Cardinal Health, Inc.*, 12 F. Supp. 2d at 46.

**Response to Proposed Conclusion No. 176**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

177. “The basic principle is that the relevant market definition must encompass the realities of competition.” *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (internal quotation marks omitted); *see also Eastman Kodak Co.*, 504 U.S. at 482 (“proper market definition . . . can be determined only after a factual inquiry into the commercial realities faced by consumers”) (quotation marks omitted).

**Response to Proposed Conclusion No. 177**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

178. Here, as noted in the Court’s findings of fact, evidence of the commercial realities of the contact lens industry point strongly to the conclusion that ECPs and other offline retailers constrain 1-800 Contacts from raising prices and that all of these sellers compete in a market for retail contact lens sales.

**Response to Proposed Conclusion No. 178**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

179. For market definition purposes, “we assume that economic actors usually have accurate perceptions of economic realities.” *Rothery Storage & Van Co.*, 792 F.2d at 218 n.4. **Response to Proposed Conclusion No. 179**

Complaint Counsel has no specific response. *See* Response to PCOL No. 169, 170.

180. As noted in the Court’s findings of fact, 1-800 Contacts’ entire business model and value proposition are based on attracting customers from ECPs, to whom customers must return periodically for prescriptions, and 1-800 Contacts sets its prices at a discount to ECPs. Thus, only a “broader national market . . . reflects the reality of the way in which [the party to the challenged conduct] built and conduct their business.” *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966).

**Response to Proposed Conclusion No. 180**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is, instead, an argument that is rebutted in Complaint Counsel’s Post-Trial Reply Brief.

181. Also as noted in the Court’s findings of fact, Congress and the Commission also appeared to recognize meaningful competition between ECPs and other retailers, including online retailers, when they enacted the Fairness to Contact Lens Consumers Act, Pub. L. 108–164, 117 Stat. 2024, codified at 15 U.S.C. § 7601 et seq., and promulgated the Contact Lens Rule, 16 C.F.R. Part 315.

**Response to Proposed Conclusion No. 181**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is, instead, an argument that is rebutted in Complaint Counsel’s Post-Trial Reply Brief.

182. In addition, the contact lens manufacturers’ decision to institute retail price maintenance reflects an economic reality of competition between ECPs and online retailers, for resale price maintenance assumes, and seeks to reduce, “competition among retailers selling the same brand.” *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 890.

**Response to Proposed Conclusion No. 182**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is, instead, an argument that is rebutted in Complaint Counsel’s Post-Trial Reply Brief.

183. Further, consistent with these economic realities, Dr. Murphy’s application of the SSNIP test defined a market that included both 1-800 Contacts and ECPs.

**Response to Proposed Conclusion No. 183**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. It is, instead, an argument that is rebutted in Complaint Counsel’s Post-Trial Reply Brief.

184. Complaint Counsel point to Dr. Evans’ “critical loss” analysis as proof of a market limited to online sales of contact lenses. But that analysis is flawed as a matter of law.

**Response to Proposed Conclusion No. 184**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-

Trial Briefs at 2. It is, instead, an argument that is rebutted in Complaint Counsel’s Post-Trial Reply Brief.

185. Critical loss analysis is used most often to define antitrust markets in merger cases. Daniel P. O’Brien, Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 Antitrust L.J. 161 (2003); *see generally id.* at 166; *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015). Accordingly, it has limited utility outside of the merger context.

**Response to Proposed Conclusion No. 185**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. No authority is provided for the suggestion that critical loss has “limited utility outside of the merger context,” which is argument that should be reserved for Respondent’s Post-trial Brief.

186. Regardless, as noted in the Court’s findings of fact, because a critical loss analysis seeks to determine whether firms in a candidate market acting as a single monopolist would find it profitable to increase prices, it is important to calculate the diversion ratio based on data regarding consumer behavior in response to a likely price increase.

**Response to Proposed Conclusion No. 186**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

187. Indeed, Dr. Evans identified a survey conducted in other circumstances that sought to ascertain how consumers would respond to a price increase as a good example of the type of survey that could and should be done in order to determine what the diversion ratio would be for purposes of a critical loss analysis. Evans, Tr. 1777-78. Dr. Evans did not conduct such a survey in this case, nor did Complaint Counsel present evidence of any such survey.

**Response to Proposed Conclusion No. 187**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

188. Dr. Evans thus did not calculate the diversion ratio based on information about whether consumers would switch from 1-800 Contacts to online retailers if 1-800 Contacts raised prices.

**Response to Proposed Conclusion No. 188**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

189. Instead, as noted in the Court’s findings of fact, Dr. Evans relied on a survey of only a few hundred consumers who reported they were unlikely to buy from 1-800 Contacts about where they would buy instead. Dr. Evans did not know the question that the respondents were asked or whether they were representative.

**Response to Proposed Conclusion No. 189**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

190. A critical loss analysis based on a “miniscule” sample of the “entire universe” of customers is unreliable, particularly where it “does not indicate whether the customers . . . are representative of the entire universe.” *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 191-92 (D.D.C. 2001).

**Response to Proposed Conclusion No. 190**

This proposed conclusion should be rejected because it is not supported by the cited authority. The portion of the authority cited does not deal with a critical loss analysis, but instead considered a case in which the plaintiff submitted 50 declarations stating that customers could not substitute away from the proposed relevant product in response to a price increase, and the defendant submitted 90 declarations stating the opposite. *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 191-92 (D.D.C. 2001). The Court’s holding had nothing to do with the sample size necessary for a critical loss analysis, it simply held: “The sampling of customer statements before the Court is minuscule when compared with the entire universe of defendants’ [relevant] customers. Although the government has submitted approximately 50 statements from

customers stating that they either would not or could not switch from [the proposed relevant product], there are more than 7,500 customers that currently use defendants' [proposed relevant product]. Without more information, the Court simply cannot determine whether these 50 declarations are representative of the [relevant] client base.”

191. Further, a critical loss analysis, like Dr. Evans’, which is based on surveys or data about “switching” in general rather than switching based on a price increase is unreliable because consumers can switch for reasons other than prices. *See Sysco Corp.*, 113 F. Supp. 3d at 36-37 (declining to rely on FTC expert’s critical loss analysis based on switching data that did not “describe[e] whether [defendants] lost a customer for a price-based reason or some reason having nothing to do with price”); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 69-71 (D.D.C. 2011) (declining to rely on critical loss analysis based on survey about switching, “not diversion based solely on a price change”).

**Response to Proposed Conclusion No. 191**

This proposed conclusion should be rejected because it is not supported by the cited authority. As explained in Complaint Counsel’s Post-Trial Reply Brief, this argument mischaracterizes the holdings of both *Sysco Corp.* and *H&R Block*, and should be rejected entirely. *See* CC Post-Trial Reply Br. at 91-93.

192. Even where, unlike here, the data about switching in general consists of a comprehensive database of millions of consumers maintained by the government, a critical loss analysis based on upon it is not “conclusive.” *H & R Block, Inc.*, 833 F. Supp. 2d at 65 (expressing doubt about reliability of critical loss analysis of market for tax preparation based on IRS database of all taxpayers’ returns). Nor is Dr. Evans’s analysis.

**Response to Proposed Conclusion No. 192**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

193. Also, Dr. Evans’ application of the critical loss analysis only to online retailers despite evidence that more 1-800 Contacts customers switch to ECPs is inconsistent with the Commission’s Merger Guidelines. *See* Merger Guidelines, § 4.1.1 (“if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.”).

**Response to Proposed Conclusion No. 193**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

194. At any rate, even if Dr. Evans’ critical loss analysis is reliable, it cannot sustain Complaint Counsel’s online-only market because, as Dr. Murphy showed, a critical loss analysis also would define a market in which 1-800 Contacts competes with ECPs.

#### **Response to Proposed Conclusion No. 194**

Complaint Counsel agrees that Dr. Murphy showed that a critical loss analysis can be used to properly define both a “market in which 1-800 Contacts competes with ECPs,” and also a market limited to the online sale of contact lenses. As explained in Complaint Counsel’s Post-Trial Brief at 116-118, this means that Professor Evans’s narrower market is the appropriate one in which to assess competitive effects in this case. The proposed conclusion should be rejected to the extent that it contends that Dr. Evans’ reliable critical loss analysis does not support the use of an online-only market to analyze the competitive effects of the Bidding Agreements.

195. “[T]he fact that the test could still confirm multiple relevant markets means that the Court must rely on additional evidence in reaching the single, appropriate market definition.” *H & R Block, Inc.*, 833 F. Supp. 2d at 64; *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41 (D.D.C. 2009) (relying on “real-world evidence” rather than critical loss analysis). That is particularly true where the Court lacks any information to determine the reliability of the surveys underlying the parties’ competing diversion ratio estimates.

#### **Response to Proposed Conclusion No. 195**

The proposed conclusion should be rejected to the extent that it contends that Dr. Evans’ reliable critical loss analysis does not support the use of an online-only market to analyze the competitive effects of the Bidding Agreements. As explained in Complaint Counsel’s Post-Trial Brief at 116-118, the narrowest cognizable market is the appropriate one in which to assess the competitive effects of the Bidding Agreements.

196. Finally, as noted in the Court’s findings of fact, Dr. Evans’ UPP analysis purporting to define a market limited to online sales shows nothing of the kind.

**Response to Proposed Conclusion No. 196**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

197. For all of these reasons, the relevant market is the market for the retail sale of contact lenses in the United States.

**Response to Proposed Conclusion No. 197**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. This is argument that should be reserved for Respondent’s Post-trial Brief.

198. It is undisputed that 1-800 Contacts’ share of all retail contact lens sales in the United States is approximately 10%.

**Response to Proposed Conclusion No. 198**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

199. It is undisputed that, together, 1-800 Contacts and the other settling parties make less than 20% of all retail contact lens sales in the United States.

**Response to Proposed Conclusion No. 199**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

200. That market share is insufficient as a matter of law to support a conclusion that 1-800 Contacts has market power. “[W]hile high market shares may give rise to presumptions of market power, a market share of less than 20% is woefully short under any metric from which to infer market power.” *Cohlma v. St. John Med. Ctr.*, 693 F.3d 1269, 1283 (10th Cir. 2012); *see also Retina Associates, P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1997); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (“Market share analyses in section 1 cases have led to conclusions that approximately 70%-75% of market share constitutes market power, and that a 20%-25% market share or less does not

constitute market power”) (internal citations omitted); *Minnesota Ass’n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 708 (D. Minn. 1998).

**Response to Proposed Conclusion No. 200**

Complaint Counsel has no specific response.

201. Even if Complaint Counsel were correct that there is a separate market for online sales of contact lenses, 1-800 Contacts does not have market power in that market.

**Response to Proposed Conclusion No. 201**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

202. The fact that 1-800 Contacts and the other settling parties account for a very high share of online contact lens sales “is just the starting point for assessing market power. A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors.” *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (quotation marks and citations omitted).

**Response to Proposed Conclusion No. 202**

Complaint Counsel has no specific response.

203. “Market power comes from the ability to cut back the market’s total output and so raise price; consumers bid more in competing against one another to obtain the smaller quantity available.” *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986).

**Response to Proposed Conclusion No. 203**

Complaint Counsel has no specific response.

204. However, “the ability to control output and prices . . . depends largely on the ability of other firms to increase their own output in response to a contraction by the defendants.” *Ball Mem’l Hosp., Inc.*, 784 F.2d at 1336.

**Response to Proposed Conclusion No. 204**

Complaint Counsel has no specific response.

205. “If firms are able to enter, expand, or import sufficiently quickly, that may counteract a reduction in output by existing firms. And if current sales are not based on the ownership of productive assets . . . the existing firms may have no power at all to cut back the

market's output." *Ball Mem'l Hosp., Inc.*, 784 F.2d at 1335. Thus, "the lower the barriers to entry, and the shorter the lags of new entry, the less power existing firms have." *Id.*

**Response to Proposed Conclusion No. 205**

Complaint Counsel has no specific response.

206. Accordingly, "[t]o show market power, a plaintiff must establish that the defendant's sales loom so large in relation to rivals' sales and production capacity that a reduction in output by the defendant could not quickly be made up by other firms' increased output." *L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1997).

**Response to Proposed Conclusion No. 206**

Complaint Counsel has no specific response.

207. For that reason, "it is usually best to derive market share *from* ability to exclude other sources of supply." *Ball Mem'l Hosp., Inc.*, 784 F.2d at 1336.

**Response to Proposed Conclusion No. 207**

This proposed conclusion should be rejected to the extent it suggests that the share of sales in a relevant market are not indicative of market power. In *Ball Mem'l Hosp.*, the Court said: "Indeed it is usually best to derive market share *from* ability to exclude other sources of supply. This is the method the Department of Justice adopted in its Merger Guidelines. [citations omitted] If the definition of the market builds in a conclusion that there are no significant additional sources of supply and no substitutes from the consumers' perspective, then the market share indicates power over price." 784 F.2d at 1336.

208. The upshot is that "[u]nless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n. 3 (7th Cir. 1985); *see also Allen-Myland, Inc.*, 33 F.3d at 209 ("Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the power to raise prices."); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) ("It is also important to examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.") (quotations omitted); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (reversing finding of market power where defendant had 50% market share but entry was easy).

**Response to Proposed Conclusion No. 208**

Complaint Counsel has no specific response.

209. Complaint Counsel therefore had the burden not only to “(1) define the relevant market,” and “(2) show that the defendant owns a dominant share of that market” but also to “(3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.” *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *see also Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 197 (1st Cir. 1996).

**Response to Proposed Conclusion No. 209**

This proposed conclusion should be rejected to the extent it suggests that Complaint Counsel must prove that 1-800 Contacts, by itself, “owns a dominant share” of the relevant market. The relevant question regarding marketing power is whether the parties to the Bidding Agreements collectively have market power in the relevant market.

210. More specifically, Complaint Counsel “ha[d] the burden of establishing barriers to entry into a properly defined relevant market” and “must not only show that barriers to entry protect the properly defined . . . market, but that those barriers are ‘significant.’” *United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001).

**Response to Proposed Conclusion No. 210**

Complaint Counsel has no specific response.

211. “‘Entry barriers’ are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.” *Microsoft Corp.*, 253 F.3d at 51.

**Response to Proposed Conclusion No. 211**

Complaint Counsel has no specific response.

212. Complaint Counsel have failed to prove that there are any significant barriers to entry or expansion in the business of selling online contact lenses. They have not adduced any evidence that the major retailers such as Walmart and Costco that already sell contacts online could not expand their business, or that other major retailers such as Amazon could not enter the business, if 1-800 Contacts raised prices.

**Response to Proposed Conclusion No. 212**

This proposed conclusion should be rejected because it is not a conclusion of law

“supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

213. Complaint Counsel’s and Dr. Evans’ suggestion that brand awareness is a barrier to entry is incorrect as a matter of law. *See Clorox Co.*, 117 F.3d at 58 (“[E]stablished buyer preferences . . . will not ordinarily be a serious entry barrier.”) (quoting 2 Philip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 409d, at 302 (1978)); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) (“Of course, virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose.”); *Waste Mgmt., Inc.*, 743 F.2d at 983-84 (reversing finding of market power where Court “fail[ed] to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition”); *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9026 (Commission erroneously “assumed that consumer preference for [Respondent] necessarily constituted an anticompetitive barrier protecting [Respondent’s] monopoly position from erosion by new entrants”).

**Response to Proposed Conclusion No. 213**

This proposed conclusion should be rejected because it suggests that rivals’ ability to make sales and constrain the pricing of the parties to the Bidding Agreements is not a relevant consideration. The relevant question is whether barriers prevent entry on a “sufficient scale adequate to constrain prices.” *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 429–30 (5th Cir. 2008) (holding that “the Commission applied the correct legal standard and rightfully concluded that potential entrants would not be of a sufficient scale to compete on the same playing field as [the respondent] and thus would be unable to constrain the likely anti-competitive effects.”). All barriers that inhibit rivals from entering on such a scale are properly considered when assessing the market power of the parties to the Bidding Agreements.

214. “Market power is a necessary ingredient in every case under the Rule of Reason. Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without power bear no burden of justification.” *Ball Mem’l Hosp., Inc.*, 784 F.2d at 1334–35; *see also Menasha Corp.*, 354 F.3d at 663.

**Response to Proposed Conclusion No. 214**

This proposed conclusion should be rejected. In *Realcomp*, the Commission identified three alternative methods through which Complaint Counsel may satisfy its *prima facie* case, only one of which requires Complaint Counsel to demonstrate directly the existence of market power. *Realcomp*, Comm. Op. at \*17-19. *See* CC Post-Trial Br. at 70. Where a restraint is inherently suspect, the it must be justified regardless of market power. Moreover, where competitors agree to restrain price competition, only a small degree of market power is needed to injure competition. *See FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 434-35 (1990). Also, a *prima facie* case may be established through direct evidence of harm.

215. That is because “[f]irms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market.” *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993).

**Response to Proposed Conclusion No. 215**

This proposed conclusion should be rejected. *See* Response to Proposed COL No. 214.

216. Having failed to prove market power, Complaint Counsel cannot meet their burden under the rule of reason because, absent market power, 1-800 Contacts could not have harmed consumers by raising prices or restricting output as a result of the settlement agreements. *See Clorox Co.*, 117 F.3d at 58 (plaintiff failed to prove harm to competition where “[n]othing here suggests that the other large companies that produce cleaning products are incapable of successfully investing their resources, in the form of capital and brand name equity, to enter the markets [the defendant’s] products allegedly dominate”).

**Response to Proposed Conclusion No. 216**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument addressed in Complaint Counsel’s Post-Trial Brief and Reply Brief.

217. Complaint Counsel also failed to prove that the challenged settlements actually harmed consumers.

**Response to Proposed Conclusion No. 217**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument addressed in Complaint Counsel’s Post-Trial Brief and Reply Brief.

218. “[O]utput is a sound general measure of anticompetitive effect, and several Supreme Court decisions have emphasized it.” *Areeda*, at ¶ 1503b(1); *see California Dental Ass’n*, 526 U.S. at 776 (asking “whether the limitation on advertisements obviously tends to limit the total delivery of dental services”).

**Response to Proposed Conclusion No. 218**

Complaint Counsel has no specific response.

219. “The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.” *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 597 (7th Cir. 1996); *see also Rebel Oil Co.*, 51 F.3d at 1433 (“[A]n act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.”).

**Response to Proposed Conclusion No. 219**

This proposed conclusion should be rejected to the extent it suggests Complaint Counsel must demonstrate a reduction in output. The very authorities on which 1-800 Contacts relies state that “[a] reduction in output is not the *only* measure of anticompetitive effect.” *Areeda & Hovenkamp* ¶ 1503b(1) (emphasis added). As the Ninth Circuit Court of Appeals recently held, a defendant’s “contention that the plaintiffs’ claim fails because they did not show a decrease in output in the [relevant] market is simply incorrect . . . Although output reductions are one common kind of anticompetitive effect in antitrust cases, a “reduction in output is not the *only* measure of anticompetitive effect.”” *O’Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting *Areeda & Hovenkamp* ¶ 1503b(1)) (emphasis in original). Indeed, “[i]n most cases it would be impossible for the court to measure the actual impact of a restraint on output. Rather, the test is whether the practice would “*tend to restrict competition and decrease output.*”” *Areeda & Hovenkamp* ¶ 1503b(1) (quoting *Broadcast Music*, 441 U.S. at 20) (emphasis added).

220. Complaint Counsel, however, did not introduce any evidence that the settlement agreements resulted in lower output of contact lenses. To the contrary, applying their own

expert's (Dr. Athey's) model of the counterfactual world suggests that removing the settlement agreements would cause output of online sales to go down.

**Response to Proposed Conclusion No. 220**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. The incorrect and misleading argument regarding Dr. Athey’s model of the counterfactual world is addressed in Complaint Counsel’s Post-Trial Reply Brief, Section II.E. And Complaint Counsel was not obligated to demonstrate a reduction in output. *See* Response to PCOL No. 219.

221. Proof of supracompetitive prices also can suffice to prove harm to competition in some circumstances. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 668 (3d Cir. 1993).<sup>3</sup>

---

<sup>3</sup> 1-800 Contacts preserves the argument that proof of reduced output is required.

**Response to Proposed Conclusion No. 221**

Complaint Counsel has no specific response, except to note that the proposed conclusion is inconsistent with any suggestion that Complaint Counsel is obligated to show a reduction in output. *See* Response to PCOL No. 219.

222. Complaint Counsel also failed to meet their burden. There is no evidence that the settlement agreements enabled 1-800 Contacts or any other contact lens retailer to raise contact lens prices.

**Response to Proposed Conclusion No. 222**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Complaint Counsel was not obligated to show that “that the settlement agreements enabled 1-800 Contacts or any other contact lens retailer to raise contact lens prices,” as the appropriate question is whether consumers pay prices that are higher “than they would otherwise be” absent the restraint. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107 (1984).

223. Complaint Counsel’s case is insufficient under the rule of reason as a matter of law because Complaint Counsel failed to prove that output was reduced or that contact lens prices were higher across the market as a result of the challenged settlement agreements. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (no proof of anticompetitive harm where plaintiff alleged “potentially” higher prices, but did not demonstrate that prices were actually higher across the market or that quality had actually decreased); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d. Cir. 1995) (no proof of harm to competition absent “empirical demonstration concerning the adverse effect of the defendants’ arrangement on price or quality”) (internal quotation marks and alterations omitted).

**Response to Proposed Conclusion No. 223**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. *See* Response to PCOL Nos. 219, 222; Complaint Counsel Post-Trial Reply Brief at 114.

224. Both of Complaint Counsel’s alternative theories of anticompetitive harm fail as a matter of law.

**Response to Proposed Conclusion No. 224**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

225. Complaint Counsel contend that the challenged agreements reduced the information available to consumers. That is speculation because Complaint Counsel have not introduced any evidence about the effect of the challenged agreements on advertising on search terms other than 1-800 Contacts’ trademarks, which may have increased if advertisers substituted to advertising in response to other searches.

**Response to Proposed Conclusion No. 225**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

226. As noted in the Court’s findings of fact, Complaint Counsel also have not introduced any evidence that any consumer was unable to, or did not, obtain from other sources any information restricted by the settlement agreements.

**Response to Proposed Conclusion No. 226**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

227. To the extent that Dr. Athey or Dr. Evans offered opinions to the contrary, they are unreliable and unsupported by the record.

**Response to Proposed Conclusion No. 227**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

228. At any rate, under Supreme Court precedent, the measure of anticompetitive harm from a restraint on advertising is the effect on the output of the product being advertised (here, contact lenses), not the amount of advertising that allegedly did not occur. *Cal. Dental Ass’n*, 526 U.S. at 776 (“The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services.”); *see also Clorox Co.*, 117 F.3d at 59.

**Response to Proposed Conclusion 228**

This proposed conclusion should be rejected because it is not supported by the cited authorities, and conflicts with binding Commission precedent. *See* Complaint Counsel Post-Trial Reply Brief at 113-114. In *Cal. Dental*, the Court held that an advertising regulation impacting dentists should be condemned as inherently suspect only if it “*obviously tends* to limit the total delivery of dental services.” 526 U.S. at 776 (emphasis added). The Court held that, because the regulations addressed potentially misleading claims and impacted the special context of professional services, the *tendency* of the advertising regulations on the output of dental services was not obvious, and the restraints “could have different effects from those ‘normally’ found in the commercial world.” *Id.* at 773. The Court did not hold, or in any way imply, that a plaintiff who is able to demonstrate a reduction in advertising that *does* have an obvious tendency to impact competition needs to make an additional showing by demonstrating the “effect on the output of the product being advertised.” *Clorox* likewise provides no support for the proposition.

229. As noted, Complaint Counsel failed to show that the settlement agreements reduced retail sales, or online retail sales, of contact lenses.

**Response to Proposed Conclusion No. 229**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

230. Complaint Counsel contend that the challenged settlement agreements harmed search engines by reducing the cost-per-click in bidding auctions for paid search advertising. Again, Complaint Counsel have not adduced sufficient evidence regarding the complex calculations required to determine the effect of the challenged agreements on the search engines’ revenue, including by accounting for any substitution to advertising in response to searches not covered by the agreement.

**Response to Proposed conclusion No. 230**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

231. Complaint Counsel’s theory of search engine harm also fails as a matter of law.

**Response to Proposed Conclusion No. 231**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

232. Complaint Counsel have not defined any market for paid search advertising, which is not legally cognizable. *See Lasoff v. Amazon.com Inc.*, No. C16-151 BJR, 2017 WL 372948, at \*9 (W.D. Wash. Jan. 26, 2017); *Person v. Google, Inc.*, No. C06-7297 JF(RS), 2007 WL 1831111, at \*5 (N.D. Cal. June 25, 2007), *aff’d*, 346 F. App’x 230 (9th Cir. 2009).

**Response to Proposed Conclusion No. 232**

This proposed conclusion should be rejected. The argument that “Complaint Counsel have not defined any market for paid search advertising” it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2.

The argument that a market for paid search advertising “is not legally cognizable” is not supported by the cited authorities. In *Person*, the plaintiff alleged that Google monopolized a market for “keyword-targeted Internet advertising,” but the court held that the plaintiff provided “no basis for distinguishing the Search Ad Market from the larger market for Internet advertising.” *Person v. Google, Inc.*, No. C06-7297 JF(RS), 2007 WL 1831111, at \*4, and at \*1 n.3 (N.D. Cal. June 25, 2007). The court did not hold that such a market was “not legally cognizable.”

In *Lasoff*, the plaintiff alleged monopsonization of a market for “advertising of artificial turf in online search engines.” The court did not hold that such a market was “not legally cognizable.” Instead, citing *Person*, the court held that the allegations provided by the plaintiff were insufficient because the plaintiff provided no “basis for distinguishing the ‘search engine advertising’ market from the larger market of all internet advertising.” *Lasoff v. Amazon.com Inc.*, No. C16-151 BJR, 2017 WL 372948, at \*9 (W.D. Wash. Jan. 26, 2017). Likewise, the court held that the plaintiff had not made any “attempt, beyond general ‘monopolization’ allegations, to

address the interchangeability of purchasers of online search engine advertising for artificial turf products.” *Id.*

Finally, it is irrelevant that Complaint Counsel did not attempt to define a market for search engine advertising, because the restraints that impacted search engines are inherently suspect or illegal per se bid-rigging. In *Kentucky Household Goods Carriers*, the Commission considered a per se illegal restraint, and held “[i]t is obviously necessary to identify the goods or services that are subject to the price-fixing or other anticompetitive restraint ... [i]t is not necessary, however to show that these goods or services constitute a relevant antitrust product market, as described, for example, in the Horizontal Merger Guidelines.” *Kentucky Household Goods Carriers*, Docket No. 9309, 2005 WL 1541547 at \*11. *See also In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 771 (F.T.C. Nov. 29, 2005) (“[P]roof of market definition and market power is not required in this case because Respondent did not meet its burden of establishing a legitimate justification for NTSP's inherently suspect practices.”).

233. Complaint Counsel’s focus only on revenue from advertisements in response to searches for 1-800 Contacts also is improper because “[p]roduct markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product.” *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999); *see also Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 480 (3d Cir. 1992) (“Except in rare circumstances, courts reject market definitions consisting of one supplier’s products where other brands compete.”); *Seidenstein v. Nat’l Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985) (“absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.”).

**Response to Proposed Conclusion No. 233**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief at 117-118.

234. Finally, under the rule of reason, agreements among buyers of inputs that lack market power in the downstream output market do not cause anticompetitive harm but merely transfer profits on the inputs from the sellers of the inputs to the buyers of them.

**Response to Proposed Conclusion No. 234**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief. Moreover, even if this were a rule of law (which it is not), it would be irrelevant here because the parties to the Bidding Agreements collectively have market power in the “downstream output market” for the online retail sale of contact lenses.

235. Any agreement by contact lens retailers limiting paid search advertising would reflect monopsony, a “market situation in which there is a single buyer or a group of buyers making joint decisions.” *United States v. Syfy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990).

**Response to Proposed No. 235**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

236. The common “consequence of monopsony power is reduced output on the monopsonist’s selling side: that is, since the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less.” *Areeda*, at ¶ 575 (emphasis in original); *see also Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995). In other words, the concern with restraints by buyers of advertising (an input) is reduced output of the product being advertised (the output).

**Response to Proposed Conclusion No. 236**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

237. However, “if the monopsonist resells in a competitive market, price and output in the output market will be unaffected by the exercise of monopsony power.” *Areeda*, at ¶ 575; *see also Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995) (noting that “[o]nly with control of a downstream market can the monopsonist decrease output and raise prices”); *Kamine/Besicorp Allegany L.P.*, 908 F. Supp. at 1203; *Areeda* at ¶ 2011 (sellers’ loss is a “mere wealth transfer that the antitrust laws were not designed to remedy.”).

**Response to Proposed Conclusion No. 237**

This proposed conclusion is irrelevant and should be rejected, because the parties to the Bidding Agreements collectively have market power in the “downstream output market” for the online retail sale of contact lenses.

238. Since 1-800 Contacts lacks market power in the sale of contact lenses, the only effect of a restraint on advertising inputs to competition for those sales is to redistribute revenue from advertising based on 1-800 Contacts’ trademark from Google to 1-800 Contacts. In the case of advertising on 1-800 Contacts’ trademark, there is nothing problematic about 1-800 Contacts capturing revenue from the sale of services using its own trademark.

**Response to Proposed Conclusion No. 238**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief, and moreover it should be rejected because the parties to the Bidding Agreements collectively have market power in the “downstream output market” for the online retail sale of contact lenses.

239. Complaint Counsel have failed to prove that the settlement agreements caused any legally cognizable harm to consumers as required to prevail under the rule of reason.

**Response to Proposed Conclusion No. 239**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

240. Even if Complaint Counsel had met their burden under the rule of reason to prove anticompetitive harm, that would merely shift the burden to 1-800 Contacts to prove that the settlement agreements had procompetitive benefits. *See Am. Express Co.*, 838 F.3d at 195; *Deutscher Tennis Bund*, 610 F.3d at 830; *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *Microsoft Corp.*, 253 F.3d at 95–96.

**Response to Proposed Conclusion No. 240**

Complaint Counsel has no specific response.

241. 1-800 Contacts introduced significant evidence that the settlement agreements benefitted consumers in a number of ways, including by reducing litigation costs, minimizing consumers’ search costs, limiting consumer confusion, protecting incentives for procompetitive activity created by trademark protection, and channeling rivals’ activities into interbrand competition rather than free-riding.

**Response to Proposed Conclusion No. 241**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

242. Accordingly, under the rule of reason, the burden shifted back to Complaint Counsel to prove that the settlement agreements were not reasonably necessary to achieve their procompetitive benefits and that 1-800 Contacts could achieve those benefits through reasonably less restrictive means. *See Am. Express Co.*, 838 F.3d at 195; *Deutscher Tennis Bund*, 610 F.3d at 830; *Craftsmen Limousine, Inc.*, 491 F.3d at 388; *Schering-Plough Corp.*, 402 F.3d at 1065; *Microsoft Corp.*, 253 F.3d at 95–96.

**Response to Proposed Conclusion No. 242**

This proposed conclusion should be rejected because it mis-states the burden. *See* Areeda & Hovenkamp, Antitrust Law ¶1914c (“The most workable allocation [of burden] gives the plaintiff the burden of suggesting, or proffering a particular alternative claimed to achieve the same benefits but less restrictive of competition. The defendant then has the burden of showing that the proffered alternative is either unworkable or not less restrictive.”).

243. Complaint Counsel failed to meet their burden to prove a reasonably less restrictive alternative.

**Response to Proposed Conclusion No. 243**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. *See* Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief at 119-124.

244. Complaint Counsel’s proposed alternative settlement that would restrict only paid search ads that use 1-800 Contacts’ trademarks in ad text would not fully protect 1-800 Contacts’ trademarks because courts have rejected the proposition that “as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff’s] trademarks in the text.” *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61.

**Response to Proposed Conclusion No. 244**

This proposed conclusion should be rejected it mis-states the less restrictive alternatives advanced by Complaint Counsel. *See* Complaint Counsel Post-Trial Reply Brief at 119-124.

245. Complaint Counsel's other proposed alternative settlement prohibiting only ads that are not clearly labeled also fails as a matter of law and lacks evidentiary support.

**Response to Proposed Conclusion No. 245**

This proposed conclusion should be rejected it mis-states the less restrictive alternatives advanced by Complaint Counsel. See Complaint Counsel Post-Trial Reply Brief at 119-124.

246. A party challenging the scope of trademark relief that contends that a disclaimer would be sufficient has a "heavy burden" to prove that altering the allegedly infringing materials "would significantly reduce the likelihood of consumer confusion." *Australian Gold, Inc.*, 436 F.3d at 1243; *see also Weight Watchers Int'l, Inc.*, 423 F.3d at 143-44 ("Where, as here, an infringer attempts to avoid a substantial likelihood of consumer confusion by adding a disclaimer, it must establish the disclaimer's effectiveness.").

**Response to Proposed Conclusion No. 246**

This proposed conclusion should be rejected because it is unsupported by the cited authorities, as explained in response to PCOL No. 63. The citation to Australian Gold is simply misleading. That case does not hold that any party has a “heavy burden” to show that altering “allegedly infringing materials” would reduce confusion. Instead, the Australian Gold court observed that after a defendant has been found to infringe a plaintiff’s trademark and a district court has issued an injunction, the “proponent of a disclaimer” claiming that the disclaimer justifies relief from the injunction bears a “heavy burden” “to come forward with evidence sufficient to demonstrate that any proposed materials would significantly reduce the likelihood of consumer confusion.” *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006). Thus, the statements Respondent quotes are inapplicable to “allegedly infringing materials,” and are only relevant after infringement has been proved and an injunction has already issued.

247. Complaint Counsel, however, did not introduce any evidence that labeling ads in response to searches for 1-800 Contacts would reduce consumer confusion. *See CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 596 (6th Cir. 2015) (reversing trademark injunction where “the district court pointed to no evidence that a disclaimer would be effective in eliminating the risk of confusion”); *Australian Gold, Inc.*, 436 F.3d at 1243 (where “Defendants offer only conclusory allegations that ‘if there were any evidence of a likelihood of confusion, it could be remedied by a simple disclaimer,’” injunction not limited to disclaimers was “not overly broad”); *Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315-17 (2d Cir. 1987) (vacating injunction requiring disclaimers for lack of evidence) (citing *Jacoby & Raskoff, Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 Trademark Rept. 35 (1986)).

**Response to Proposed Conclusion No. 247**

This proposed conclusion should be rejected because it mis-states the burden. See *Areeda & Hovenkamp* ¶1913b (“Proffered less restrictive alternatives should either be based on actual experience in analogous situations or else be fairly obvious.”). Complaint Counsel has identified less restrictive alternatives that are fairly obvious, in light of extensive precedent holding that clear

disclosure and clear labeling remove any risk of confusion. See Complaint Counsel Post-Trial Reply Brief at 119-124.

248. Even if Complaint Counsel could identify some other conceivable way in which 1-800 Contacts could protect its trademarks by other means, that would not meet Complaint Counsel's burden under the rule of reason.

**Response to Proposed Conclusion No. 248**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. See Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief at 119-124.

249. An alternative that requires additional litigation costs is not, as it must be, “virtually as effective in serving the legitimate objective *without significantly increased cost.*” *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001).

**Response to Proposed Conclusion No. 249**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. See Order on Post-Trial Briefs at 2. The snippet of authority cited consists of a direct quote from a treatise (unacknowledged in the citation Respondent provides). That treatise section discussed the assessment of procompetitive justifications for tying arrangements (which was the restraint at issue in *Cty. Of Tuolumne*). This does not express the framework applicable to the assessment of whether a horizontal restraint is reasonably necessary to achieve a legitimate business purpose, which is addressed in Complaint Counsel’s Post-Trial Reply Brief at 119-124.

250. Complaint Counsel presented no evidence that any other form of protection of 1-800 Contacts’ property rights would effectively provide protection. For instance, they presented no evidence that different forms of disclosure would be effective. Nor did they conduct a survey to show that other disclosures or other forms of remedy would eliminate the confusion that was identified by various witnesses, including Dr. Van Liere and Dr. Goodstein.

**Response to Proposed Conclusion No. 250**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. See Order on Post-Trial Briefs at 2.

251. A challenged restraint need only be “reasonably necessary.” *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), *overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *see also Anderson v. American Auto. Ass’n*, 454 F.2d 1240, 1246 (9th Cir. 1972).

**Response to Proposed Conclusion No. 251**

Complaint Counsel has no specific response, other than to note that a restraint must be reasonably necessary to achieve a legitimate and cognizable pro-competitive objective.

252. Indeed, as noted, “the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree” “would place an undue burden on the ordinary conduct of business.” *American Motor Inns, Inc.*, 521 F.2d at 1249.

**Response to Proposed Conclusion No. 252**

This proposed conclusion should be rejected because it is does not make any coherent proposal. See also Response to PCOL No. 155.

253. Complaint Counsel themselves highlighted through cross-examination of Mr. Hogan that parties to trademark cases agree to settle on terms that prohibit paid search advertising in response to searches for trademark terms even in cases that do *not* involve express claims based upon that practice. It therefore cannot have been unreasonable for 1-800 Contacts and the settling parties to settle cases that *did* involve claims based on that practice by agreeing to the same prohibitions.

**Response to Proposed Conclusion No. 253**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. See Order on Post-Trial Briefs at 2.

254. No relief is warranted because Complaint Counsel have failed to prove that 1-800 Contacts violated the FTC Act.

**Response to Proposed Conclusion No. 254**

This proposed conclusion should be rejected because it is not a conclusion of law “supported by applicable legal authority,” as required by the Court’s Order. See Order on Post-Trial Briefs at 2.

255. Even if Complaint Counsel had proved a violation, the First Amendment to the U.S. Constitution bars relief limiting 1-800 Contacts’ ability to enforce its trademark rights, including through litigation.

**Response to Proposed Conclusion No. 255**

This proposed conclusion should be rejected because it is not relevant. The Proposed Order specifically provides that it does not “prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent’s intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation.” See Proposed Order Par. II.B.

256. Complaint Counsel have averred that “the only acts or practices challenged by the Complaint are Respondent’s *agreements* with its rivals.” Complaint Counsel’s Reply in Support of Its Motion for Partial Summary Decision (Nov. 25, 2016), at 1.

**Response to Proposed Conclusion No. 256**

Complaint Counsel has no specific response.

257. Absent proof that 1-800 Contacts’ litigation was sham, the First Amendment protects 1-800 Contacts’ right to file that litigation. *Prof’l Real Estate Inv’rs, Inc.*, 508 U.S. 49; *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *E. Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

**Response to Proposed Conclusion No. 257**

This proposed conclusion should be rejected because it is not relevant. See Response to PCOL No. 255.

258. Good faith pre-litigation activities, including sending cease-and-desist letters and making threats to sue, are similarly protected by the First Amendment under the *Noerr-Pennington* doctrine. See *Sweet St. Desserts, Inc. v. Chudleigh’s Ltd.*, 2016 WL 3924239, at \*4 (3d Cir. Jul. 21, 2016) (unpublished); *Rock River Commc’ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343 (9th Cir. 2013); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006); *Globetrotter Software v. Elan Computer Grp.*, 362 F.3d 1367 (Fed. Cir. 2004); *Coastal States Mktg. v. Hunt*,

694 F.2d 1358 (5th Cir. 1983) (same).

**Response to Proposed Conclusion No. 258**

This proposed conclusion should be rejected because it is not relevant. See Response to PCOL No. 255. Also, not all good faith pre-litigation activities are Noerr protected.

259. The Commission may not enjoin a future lawsuit unless that lawsuit is both objectively baseless and brought for a subjectively anticompetitive purpose. *Cf. BE & K Construction Co. v. NLRB*, 122 S.Ct. 2390, 2398-2400 (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741-744 (1983) (same).

**Response to Proposed Conclusion No. 259**

This proposed conclusion should be rejected because it is not relevant. See Response to PCOL No. 255.

260. As noted, trademark law recognizes the claims that 1-800 Contacts filed and two courts have held, as Complaint Counsel concede, that 1-800 Contacts' litigations were not sham.

**Response to Proposed Conclusion No. 260**

This proposed conclusion should be rejected because Complaint Counsel does not concede that 1-800 Contacts' litigations were not sham. See CC Post-Trial Br. at 148, n. 471. In addition, this proposed conclusion should be rejected because it is not a conclusion of law "supported by applicable legal authority," as required by the Court's Order. See Order on Post-Trial Briefs at 2. Instead, it is an argument rebutted in Complaint Counsel Post-Trial Reply Brief.

261. The Court therefore cannot prevent 1-800 Contacts from exercising its rights to petition the courts order relief for those claims and protect its trademark rights. *Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. 49.

**Response to Proposed Conclusion No. 261**

This proposed conclusion should be rejected because it is not relevant. See Response to PCOL No. 255.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2017, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

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 document to:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
Stuart N. Senator  
Gregory M. Sergi  
Munger, Tolles & Olson LLP  
350 South Grand Avenue  
50<sup>th</sup> Floor  
Los Angeles, CA 90071  
gregory.stone@mto.com  
steven.perry@mto.com  
garth.vincent@mto.com  
stuart.senator@mto.com  
gregory.sergi@mto.com

Justin P. Raphael  
Munger, Tolles & Olson LLP  
560 Mission Street, 27th Floor  
San Francisco, CA 94105  
justin.raaphael@mto.com

Sean Gates  
Charis Lex P.C.  
16 N. Marengo Avenue, Suite 300  
Pasadena, CA 91101  
sgates@charislex.com

*Counsel for Respondent 1-800 Contacts, Inc.*

**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.

July 19, 2017

By: s/ Daniel J. Matheson

Notice of Electronic Service

**I hereby certify that on July 19, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Post-Trial Reply Findings of Fact (Public), with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on July 19, 2017, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Post-Trial Reply Findings of Fact (Public), upon:**

Thomas H. Brock  
Attorney  
Federal Trade Commission  
TBrock@ftc.gov  
Complaint

Barbara Blank  
Attorney  
Federal Trade Commission  
bblank@ftc.gov  
Complaint

Gustav Chiarello  
Attorney  
Federal Trade Commission  
gchiarello@ftc.gov  
Complaint

Kathleen Clair  
Attorney  
Federal Trade Commission  
kclair@ftc.gov  
Complaint

Joshua B. Gray  
Attorney  
Federal Trade Commission  
jbgray@ftc.gov  
Complaint

Geoffrey Green  
Attorney  
Federal Trade Commission  
ggreen@ftc.gov  
Complaint

Nathaniel Hopkin  
Attorney  
Federal Trade Commission  
nhopkin@ftc.gov

## Complaint

Charles A. Loughlin  
Attorney  
Federal Trade Commission  
cloughlin@ftc.gov  
Complaint

Daniel Matheson  
Attorney  
Federal Trade Commission  
dmatheson@ftc.gov  
Complaint

Charlotte Slaiman  
Attorney  
Federal Trade Commission  
cslaiman@ftc.gov  
Complaint

Mark Taylor  
Attorney  
Federal Trade Commission  
mtaylor@ftc.gov  
Complaint

Gregory P. Stone  
Attorney  
Munger, Tolles & Olson LLP  
gregory.stone@mto.com  
Respondent

Steven M. Perry  
Attorney  
Munger, Tolles & Olson LLP  
steven.perry@mto.com  
Respondent

Garth T. Vincent  
Munger, Tolles & Olson LLP  
garth.vincent@mto.com  
Respondent

Stuart N. Senator  
Munger, Tolles & Olson LLP  
stuart.senator@mto.com  
Respondent

Gregory M. Sergi  
Munger, Tolles & Olson LLP  
gregory.sergi@mto.com  
Respondent

Justin P. Raphael  
Munger, Tolles & Olson LLP  
Justin.Raphael@mto.com  
Respondent

Sean Gates

Charis Lex P.C.  
sgates@charislex.com  
Respondent

Mika Ikeda  
Attorney  
Federal Trade Commission  
mikeda@ftc.gov  
Complaint

Zachary Briers  
Munger, Tolles & Olson LLP  
zachary.briers@mto.com  
Respondent

Chad Golder  
Munger, Tolles, and Olson  
chad.golder@mto.com  
Respondent

Julian Beach  
Munger, Tolles & Olson LLP  
julian.beach@mto.com  
Respondent

Aaron Ross  
Attorney  
Federal Trade Commission  
aross@ftc.gov  
Complaint

Thomas Dillickrath  
Attorney  
Federal Trade Commission  
tdillickrath@ftc.gov  
Complaint

Jessica S. Drake  
Attorney  
Federal Trade Commission  
jdrake@ftc.gov  
Complaint

W. Stuart Hirschfeld  
Attorney  
Federal Trade Commission  
shirschfeld@ftc.gov  
Complaint

David E. Owyang  
Attorney  
Federal Trade Commission  
dowyang@ftc.gov  
Complaint

Henry Su  
Attorney  
Federal Trade Commission  
hsu@ftc.gov

Complaint

Daniel Matheson  
Attorney