

PUBLIC

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



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

Docket No. 9372

ORIGINAL

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE THE TESTIMONY
OF DR. NEIL WIELOCH, A FACT WITNESS OF RESPONDENT**

By this motion, Complaint Counsel respectfully move the Court for an order precluding Respondent, 1-800 Contacts from calling Dr. Neil Wieloch as a fact witness at trial.

The ground for this motion, as more fully set forth in the attached memorandum, is that Respondent did not give adequate notice that it might call Dr. Wieloch as a fact witness; the testimony of Dr. Wieloch therefore, would be prejudicial to Complaint Counsel; and Respondent cannot show good cause why it should be given leave to call Dr. Wieloch.

A proposed order is attached.

Dated: March 29, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov
Counsel Supporting the Complaint

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

**In the Matter of
1-800 CONTACTS, INC.,
a corporation.**

Docket No. 9372

**COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE*
TO PRECLUDE THE TESTIMONY OF NEIL WIELOCH**

Dr. Neil Wieloch is an employee of 1-800 Contacts (“1-800”) whom Respondent has included on its trial witness list. Respondent did not name Dr. Wieloch in its initial disclosures or its preliminary witness list. Respondent did not include Dr. Wieloch as a document custodian in responding to our document requests. Respondent did not produce documents from his files, despite Requests for Production requesting “all documents” relating to the very topics on which Respondent will now call Dr. Wieloch to testify at trial. Dr. Wieloch has not been deposed in his individual capacity. And, in forty-six depositions and investigational hearings, witnesses mentioned Dr. Wieloch only three times. 1-800 did not suggest that Dr. Wieloch might have knowledge relevant to this litigation until, two weeks before the close of discovery, it designated him as a “supplemental” witness on one topic specified in our deposition notice *of the corporation* under Rule 3.33(c)(1). Importantly, during the 49-minute deposition of 1-800, Dr. Wieloch could not give any relevant testimony on his designated topic.

Now, however, Respondent has identified Dr. Wieloch as one of only three current employees of 1-800 whom it will call at trial. Suddenly, this 49-minute, “supplemental” afterthought has *personal knowledge* about important aspects of 1-800’s operations and will

testify about *all* topics “relevant to the allegations of Complaint Counsel’s Complaint, the proposed relief, or Respondent’s defenses.”

Respondent’s effort to blindsides Complaint Counsel is unacceptable. Complaint Counsel respectfully asks the Court to preclude Dr. Wieloch from testifying at trial.

BACKGROUND

The Rule 3.33(c)(1) Deposition of Dr. Wieloch

On December 28, 2016, Complaint Counsel noticed a corporate deposition of 1-800 on nine topics, pursuant to Rule 3.33(c)(1). *See* Exhibit A. Topic 9 is the only one relevant to this motion:

The effect of each Unilateral Pricing Policy on 1-800 Contacts, including the effect on its retail prices, revenue, cost of goods sold, units sold, and EBITDA for each of the past four years.

As defined in the deposition notice, a “Unilateral Pricing Policy” (“UPP”) is the policy of certain contact lens manufacturers governing *the prices they charge 1-800*.

1-800 designated Scott Osmond, 1-800’s director of financial planning and analysis, on this topic. 1-800 then designated Dr. Wieloch merely to “supplement” Mr. Osmond’s testimony on this topic. Wieloch Deposition at 23 (January 18, 2017) (Exhibit B). But Dr. Wieloch provided no such “supplement;” he testified that he had no knowledge about UPPs or their impact on 1-800’s finances, and he reviewed only two documents to prepare, which revealed nothing about the impact of UPP on 1-800. Exhibit B at 20:25-24:22. Because UPPs were the only Rule 3.33(c)(1) topic on which Dr. Wieloch was designated to testify, Complaint Counsel ended our questioning. *Id.*

Respondent then examined Dr. Wieloch as a Rule 3.33(c)(1) witness. Respondent examined Dr. Wieloch about two surveys that counsel had shared with Dr. Wieloch the previous day, although counsel would not share those reports with us.¹ Complaint Counsel challenged the relevance of these surveys to the ninth topic specified in our Rule 3.33(c)(1) notice for which Dr. Wieloch was being deposed. E.g., Exhibit B at 26, 27. Significantly, other than eliciting testimony regarding these surveys, Respondent did not question Dr. Wieloch on any other matters. And, after the deposition, Complaint Counsel informed Respondent's counsel that Complaint Counsel would object if Dr. Wieloch were named to Respondent's final witness list.

Respondent's Final Witness List

Respondent 1-800 Contacts' Final Witness List on March 14, 2017, listed Dr. Wieloch as one of its three principal witnesses. (Exhibit C). And, rather than testifying on the discrete Rule 3.33(c)(1) topic for which he was designated, Respondent stated that Dr. Wieloch may testify on any facts relevant to the case:

Dr. Neil Wieloch. Dr. Wieloch is Respondent's Director of Marketing Strategy and Insights. Respondent anticipates that Dr. Wieloch will testify regarding: (1) Respondent's pricing strategies, and consumer's perceptions of these strategies; (2) consumer surveys conducted by Respondent regarding brand awareness, consumer perceptions, market competition, and customer buyer patterns; (3) the effect of the unilateral pricing policies of contact lens manufacturers on the retail market for contact lenses, including those policies [sic] effect on consumer perceptions; and (4) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

¹ 1-800's attorney would not provide copies at the deposition: "No, I don't have them. You have them already. We produced them to you." Exhibit B at 26.

ARGUMENT**DR. WIELOCH SHOULD NOT BE PERMITTED TO TESTIFY AT TRIAL.****Summary**

Complaint Counsel recognizes that the Court disfavors *in limine* motions. This motion, however, does not raise the type of problems that the Court discounts in a bench trial. Instead, Respondent wants the Court to hear a witness who escaped the scrutiny of discovery such that Complaint Counsel's very ability either to cross-examine the witness at trial or to gather evidence to rebut his testimony is irrevocably compromised. And, it is Respondent's fault.

Respondent had repeated opportunities to notify us that Dr. Wieloch was a person with knowledge about the case; that he might be a witness; and that he had custody of and would produce documents relevant to the case. But, 1-800 did not do this. Instead, 1-800 protected Dr. Wieloch from fact discovery such that it has denied Complaint Counsel any meaningful opportunity to prepare for Dr. Wieloch testifying at trial.

I. A Rule 3.33(c)(1) witness is limited to testifying at trial on the topic for which he was designated.

Like Federal Rules of Civil Procedure 30(b)(6), Rule 3.33(c)(1) is a specialized discovery provision. Under either rule, a party can notice the deposition of a corporation on a particular topic, which must then designate a person who will testify "on its behalf" on that topic. These rules are necessary because a corporation, obviously, cannot itself be deposed, and because an outsider frequently cannot identify the corporate employee who has knowledge of the topic.

The rules distinguish the deposition of a corporation's designee and the deposition of the same person who testifies individually. For example, the testimony of a corporate designee binds the corporation; the testimony of that person as an individual does not. *Estate of Thompson v.*

Kawasaki Heavy Indus., 291 F.R.D. 297, 304 (N.D. Iowa 2013). And, a person named under Rule 3.33(c)(1) can be deposed twice -- once as the corporate representative and once as an individual, Rule 3.33(c)(1) -- because the two depositions are legally distinct. The corporate designee is deposed as a surrogate of the corporation, not as an individual:

When a corporation or association designates a person to testify on its behalf, *the corporation appears vicariously through that agent.*

Resolution Trust Corp. v. S. Union, 985 F.2d 196, 197 (5th Cir. 1993). Or, as conclusively confirmed in *Williams v. Sprint/United Mgmt, Co.*, 2006 U.S. Dist. LEXIS 4937, at *4 (D. Kan. 2006), “. . . a Rule 30(b)(6) deposition is not the deposition of a person but rather of an entity.”

II. Dr. Wieloch’s should be precluded from testifying on any topic other than Topic Nine on the Rule 3.33(c)(1) deposition notice.

1-800 designated Dr. Wieloch to testify as its Rule 3.33(c)(1) surrogate regarding the impact of UPPs on specific aspects of 1-800’s financial performance. This does not open the door for Dr. Wieloch to testify at trial about any other topics in his personal capacity. Such a result would materially prejudice Complaint Counsel. Respondent failed to produce documents from Dr. Wieloch’s files despite Requests for Production seeking “all documents” related to the very topics on which Respondent would have Dr. Wieloch testify – namely, “surveys conducted of customers and potential customers.” *See* Exhibit D at 5 (Request 19). Complaint Counsel clarified that this Request sought all documents “concerning surveys regarding two broad categories of information: consumer confusion, and *competitive information, such as surveys regarding satisfaction with the company’s, service or prices; surveys comparing 1-800 to other retailers; and surveys asking how customers heard about 1-800 . . . etc.*” Exhibit E at 8. Our Request 19 and subsequent correspondence describe almost precisely the topics on which Respondent would now have Dr. Wieloch testify, which include, but are not limited to, “consumer surveys conducted by Respondent

regarding brand awareness, consumer perceptions, market competition, and customer buyer patterns.” *See* Exhibit C. Yet Dr. Wieloch was not named as a document custodian, and 1-800 did not produce documents from his files.

In light of its failure to disclose Dr. Wieloch as a witness during discovery, the principal argument that Respondent has for maneuvering him onto its Final Witness List is paragraph 15 of the Scheduling Order, which provides,

The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties or, if the parties do not consent, by order of the Administrative Law Judge upon a showing of good cause, except that a party may include on its final witness list any person deposed after that party exchange its preliminary witness list....

However, here, 1-800 designated Dr. Wieloch to testify on its behalf on a single issue, and he *appeared vicariously as 1-800*. In the words of *Williams*, Dr. Wieloch’s deposition was “not the deposition of a person but rather of an entity.” Therefore, Dr. Wieloch can testify about the topic for which he was designated. But paragraph 15 of the Scheduling Order does not extend the right to 1-800 to call Dr. Wieloch in his personal capacity.

The only other argument that 1-800 has for shoehorning Dr. Wieloch onto its witness list is that, in one email, 1-800 suggested that it “plan[ned] to ask” Mr. Osmond and Dr. Wieloch “*some* questions in their individual capacity as well as following up on the topics for which they are designated.” *See* Exhibit F. This informal representation did not constitute notice that Dr. Wieloch was suddenly on 1-800’s fact witness list. Respondent never amended that list.

More importantly, at the deposition, Respondent did not present or depose Dr. Wieloch in his individual capacity. Instead, both sides deposed him exclusively as a Rule 3.33(c)(1) witness for 1-800. Thus, Complaint Counsel started by reviewing our Rule 3.33(c)(1) deposition notice with Dr. Wieloch; and confirmed that he was appearing as 1-800’s designee. Exhibit B at 14-15. Neither Dr.

Wieloch nor 1-800's counsel suggested otherwise. Respondent's counsel then continued the deposition of Dr. Wieloch as a corporate representative. Exhibit B at 25. After the completion of the Rule 3.33(c)(1) deposition of Dr. Wieloch, neither party suggested that they then should commence the deposition of Dr. Wieloch in his individual capacity.² And, if 1-800 had asked to do that, we would have objected: due to 1-800's exclusion of Dr. Wieloch from the discovery process prior to the deposition, *Complaint Counsel knew nothing about Dr. Wieloch except his designation as a Rule 3.33(c)(1) witness.*

Absent our consent, Paragraph 15 of the Scheduling Order provides that Dr. Wieloch can appear only on a showing of good cause. Very practical concerns dictate against allowing 1-800 to call Dr. Wieloch as a witness. If a respondent may convert a Rule 3.33(c)(1) witness into a fact witness in this manner, all future Rule 3.33(c)(1) depositions will become a shell game. Any party served with a Rule 3.33(c)(1) notice could designate multiple individuals to testify on its behalf as to a discrete topic. The respondent could then hide these designated corporate representatives in the bushes, ready to testify based on their personal knowledge on any topic, even though they were not included on the initial disclosures or preliminary witness lists, and even though relevant documents in their custody were not produced. The deposing party could either waste time examining each designee about all matters relevant to the litigation, or it could limit the deposition to the Rule 3.33(c)(1) topic and face unexpected testimony at trial. Faced with this dilemma, few parties would proceed with Rule 3.33(c)(1) depositions, despite the endorsement of this efficient litigation tool by the courts and litigants, at least if it is not abused.

² This is a routine practice. As noted above, the ramifications of the testimony of a corporate representative and the testimony of the same person in his individual capacity are different, and therefore parties routinely conduct two separate depositions of the witness to eliminate any dispute as to the nature of the witness's testimony.

III. Dr. Wieloch should be precluded from testifying on Topic Nine of the Rule 3.33(c)(1) notice.

Finally, the transcript confirms that Dr. Wieloch was never prepared to testify on Topic 9, even though 1-800 designated him as a “supplemental” witness on that topic. Our deposition notice sought testimony from 1-800 regarding the impact of UPP on 1-800s “retail prices, revenue, cost of goods sold, units sold, and EBITDA for each of the past four years.”³ But, despite the obligations of a Rule 3.33(c)(1) witness to familiarize himself “as to matters known or reasonably available to the organization,” Dr. Wieloch testified repeatedly that he did not have any knowledge regarding those matters, and that Mr. Osmond was the person who did. Exhibit B at 21-24, 35-36. Respondents have included Mr. Osmond on their trial witness list to testify on this topic. Thus, there is no reason that Respondent should be permitted to call Dr. Wieloch.

³ As a matter of convenience, after being informed that Dr. Wieloch would supplement Mr. Osmond’s testimony on topic 9, we served a second deposition notice for Mr. Osmond and Dr. Wieloch, which was combined with the notice of 1-800’s fact witnesses under Rule 3.33(a). This notice was identical to our original Rule 3.33(c)(1) notice. *Compare* Exhibit A *with* Exhibit G. The combination of the two notices did not conveniently transform Dr. Wieloch into a witness in his individual capacity -- just as it did not suddenly transform the fact witnesses from 1-800 on that notice into corporate representatives under Rule 3.33(c)(1).

CONCLUSION

Complaint Counsel should not pay the price for a problem created by 1-800, whether it was intentional or inadvertent.⁴ For the foregoing reasons, Complaint Counsel respectfully move the Court to strike Dr. Wieloch from Respondent's witness list.

Dated: March 29, 2017

Respectfully submitted,

/s/ Daniel J. Matheson_____

Daniel J. Matheson
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov
Counsel Supporting the Complaint

⁴ We considered seeking leave to depose Dr. Wieloch before trial, but it is not a viable alternative. Dr. Wieloch's documents have not been produced, and if they were now, we do not have the time to digest them, to take any other fact discovery to address his deposition testimony, or to incorporate new discovery into expert reports.

STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL

Pursuant to paragraph 4 of the Additional Provisions of the Scheduling Order, Complaint Counsel states that, as set forth in the motion, we have conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.

Dated: March 29, 2017

/s/ Daniel J. Matheson
Daniel J. Matheson

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

**In the Matter of
1-800 CONTACTS, INC.,
a corporation.**

Docket No. 9372

[PROPOSED] ORDER

On motion of Complaint Counsel, and the Court having considered the memorandum submitted by the parties in support and in opposition thereto, it is hereby,

ORDERED, that Respondent 1-800 Contacts may not call Dr. Neil Wieloch as a fact witness at trial.

ORDERED:

Dated: _____

D. Michael Chappell
Chief Administrative Law Judge

EXHIBIT A

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

In the Matter of

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

Docket No. 9372

COMPLAINT COUNSEL’S NOTICE OF DEPOSITION TO 1-800 CONTACTS, INC.

Pursuant to the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.33(a) and (c)(1), Complaint Counsel will take the deposition of 1-800 Contacts, Inc. (“1-800 Contacts”) or its designee(s), who shall testify on behalf of 1-800 Contacts about matters known or reasonably available to 1-800 Contacts.

DEPOSITION TOPICS

1-800 Contacts is advised that it must designate one or more officer, director, managing agent, or other person who consents to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to 1-800 Contacts relating to the following deposition topics:

1. The obligations imposed on each party to a Settlement Agreement, and the meaning of each provision of each Settlement Agreement, including 1-800 Contacts’s interpretation of each word used in each Settlement Agreement.
2. The factual basis for 1-800 Contacts’ Response to Complaint Counsel Request for Admission No. 4, in particular but not limited to the meaning of the phrase “not all User Queries containing a term on which 1-800 Contacts claims a trademark” as used therein. See 1-800 Contacts’ Response to Complaint Counsel Request for Admission No. 4 (asserting that 1-800 Contacts “anticipated, at the time it executed each Settlement Agreement, that the Settlement Agreement would prohibit a Settlement Party from presenting paid ads or sponsored links . . . on Search Engine Results Pages in response to certain User Queries, but not all User Queries, containing a term on which 1-800 Contacts claims a trademark.”). This Topic requires a witness able to identify, for each Settlement Agreement, specific “User Queries containing a term on which 1-800 Contacts claims a trademark” in response to which each “Settlement Party” was not prohibited by a Settlement Agreement from presenting paid ads or sponsored links on Search Engine Results Pages.

3. The meaning of 1-800 Contacts' Response to Complaint Counsel's Interrogatory No. 14, and each term used therein, in particular but not limited to the meaning of the phrases "purchase of Keywords" and "used, following their purchase, to trigger a display of a paid advertisement or sponsored link."
4. Each Price Match Policy, and each version of each such Policy, 1-800 Contacts has implemented from January 1, 2004 to the present, including: the terms of each such Price Match Policy, the date on which each such Price Match Policy was implemented, the date on which each such Price Match Policy was discontinued, the identity of each Competitor whose prices 1-800 Contacts committed to meet or beat under each such Price Match Policy, and the reasons for each term of each Price Match Policy.
5. The identity of each Settlement Partner that was informed by 1-800 Contacts that the Negative Keywords identified in the Settlement Partner's Settlement Agreement should be implemented as Exact-Matched Negative Keywords, and the date of such communication.
6. Each benefit 1-800 Contacts received from a Settlement Agreement, and the pecuniary value of each such benefit.
7. Each procompetitive efficiency produced by each Settlement Agreement, and the pecuniary benefit each such procompetitive efficiency produced for (a) 1-800 Contacts, (b) customers of 1-800 Contacts, and/or (c) any other Person.
8. Each Negative Keyword 1-800 Contacts implemented as a result of a Settlement Agreement, and the date each such Negative Keyword was implemented.
9. The effect of each Unilateral Pricing Policy on 1-800 Contacts, including the effect on its retail prices, revenue, cost of goods sold, units sold, and EBITDA for each of the past four years.

For the purpose of these Requests, the following definitions and instructions apply without regard to whether the defined terms used herein are capitalized or lowercase and without regard to whether they are used in the plural or singular forms:

DEFINITIONS

1. The terms “1-800 Contacts,” “1-800,” “Company” or “Respondent” mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The terms “and” and “or” have both conjunctive and disjunctive meanings.
3. The term “Campaign” has the same meaning set forth by Google in connection with its AdWords product: “[a] set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and other settings.” *See* <https://support.google.com/adwords/answer/6304?hl=en>.
4. The term “Competitor” means any Person other than 1-800 Contacts engaged in the business of selling contact lenses to consumers.
5. The terms “each,” “any,” and “all” mean “each and every.”
6. The term “Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[w]ords or phrases describing [an advertiser’s] product that [the advertiser] choose[s] to help determine when and where [the advertiser’s] ad can appear” in response to an internet search by an end user. *See* <https://support.google.com/adwords/answer/6323?hl=en>.
7. The term “Negative Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[a] type of keyword that prevents [and advertiser’s] ad from being triggered by certain words or phrases.” *See* <https://support.google.com/adwords/answer/105671?hl=en>. The term Exact-Matched Negative Keywords has the same meanings set forth by Google in connection with its AdWords product. *See, e.g.,* <https://support.google.com/adwords/answer/2453972>.
8. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
9. The terms “Plan” or “Plans” mean proposals, strategies, recommendations, analyses, reports, or considerations, whether or not tentative, preliminary, precisely formulated, finalized, authorized, or adopted.

10. The term “Price Match Policy” means any 1-800 Contacts Plan, policy, or strategy involving offering customers the opportunity to pay a discounted price determined by the price that a Competitor offers for the same product. This term includes each version of each such Policy implemented at any time from January 1, 2004 to the present.
11. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
12. The terms “Settlement Agreement” or “Settlement Agreements” mean, in whole or in part, in singular or plural, any agreement entered into by or between 1-800 Contacts and a Competitor to resolve any allegation, dispute, litigation, or other matter concerning the appearance of advertisements on search engine results pages for searches containing 1-800 Contacts’ trademark and variations. “Settlement Agreements” include but are not limited to 1-800F_00003062 (Aug. 19, 2002 Agreement between 1-800 Contacts and JSJ Enterprises); 1800_FTC-00000019 (June 24, 2004 Agreement between 1-800 Contacts and Vision Direct); 1800_FTC-00000001 (Oct. 29, 2004 Agreement between 1-800 Contacts and Coastal Contacts); 1800_FTC-00000027 (May 12, 2008 Agreement between 1-800 Contacts and EZ Contacts USA); 1-800F_00021153 (Dec. 18, 2009 Agreement between 1-800 Contacts and Lensfast); 1800_FTC-00000071 (March 10, 2010 Agreement between 1-800 Contacts and AC Lens); 1800_FTC00000103 (March 23, 2010 Agreement between 1-800 Contacts and Lenses for Less) 1800_FTC-00000079 (March 29, 2010 Agreement between 1-800 Contacts and Contact Lens King); 1800_FTC-00000089 (May 13, 2010 Agreement between 1-800 Contacts and Empire Vision Center); 1800_FTC-00000112 (May 18, 2010 Agreement between 1-800 Contacts and Tram Data); 1800_FTC-00000129 (June 29, 2010 Agreement between 1-800 Contacts and Walgreen); 1800_FTC-00000130 (Sept. 3, 2010 Agreement between 1-800 Contacts and Web Eye Care); 1800_FTC-00000148 (Feb. 4, 2011 Agreement between 1-800 Contacts and Standard Optical); 1800_FTC-00000161 (Nov. 26, 2013 Settlement Agreement between 1-800 Contacts and Memorial Eye). For the purpose of this definition, “Search Engine Results Page” means a webpage displayed by a Search Engine in response to a User Query.
13. The term “Settlement Party” means any party, other than 1-800 Contacts, that was subject to a Settlement Agreement.
14. The term “Unilateral Pricing Policy” means any policy, practice, or announcement by a manufacturer of contact lenses relating to the price at which retailers sell contact lenses to consumers, in particular the policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014. *See, e.g., Contact Lens Makers and Discounters Tussle Over Price Setting*, New York Times (March 26, 2015), available at http://www.nytimes.com/2015/03/27/business/contact-lens-makers-and-discounters-tussle-over-price-setting.html?_r=0 (“[O]pponents [of unilateral pricing policies], which include big discounters such as Costco and 1-800 Contacts as well as the nonprofit group Consumers Union, say the policies amount to illegal price-fixing and are restricting consumer choice in an industry that has long been accused of anticompetitive

practices.”), *Debate about contact-lens prices revives Florida’s eye wars*, Tampa Bay Times (March 24, 2015) (“Influential Tallahassee lobbyist Marc Reichelderfer, a GOP strategist representing 1-800-CONTACTS, is leading the effort to do away with the pricing policies.”), *available at* <http://www.tampabay.com/news/politics/stateroundup/debate-about-contact-lens-prices-revives-floridas-eye-wars/2222578>.

CERTIFICATE OF SERVICE

I certify that on December 28, 2016, 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
355 South Grand Avenue
35th 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.rafael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

Dated: December 28, 2016

By: /s/ Daniel J. Matheson
Attorney

EXHIBIT B

In the Matter of:

1-800 Contacts, Inc.

January 18, 2017
Neil Francis Weiloch

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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1 FEDERAL TRADE COMMISSION

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3

4 IN THE MATTER OF: : Docket No. 9372

5 1-800 CONTACTS : :

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9 Wednesday, January 18, 2017

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11 Parr Brown Gee & Loveless

12 101 South 200 East, #700

13 Salt Lake City, Utah

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15

16 The above-entitled matter came on for investigational

17 hearing, pursuant to notice, at 12:55 p.m.

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1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 MIKA IKEDA

5 DAN MATHESON

6 Federal Trade Commission

7 400 7th Street, S.W.

8 Washington, D.C. 20024

9 Tel: (202) 326-2435

10 miked@ftc.gov

11 dmatheson@ftc.gov

12

13 ON BEHALF OF 1-800 CONTACTS AND THE WITNESS:

14 SEAN P. GATES

15 CHARIS LEX P.C.

16 16 North Marengo Avenue, Suite 300

17 Pasadena, California 91101

18 Tel: (626) 508-1717

19 Fax: (626) 508-1730

20 sgates@charislex.com

21

22

23

24

25

3

1 I N D E X

2 NEIL FRANCIS WIELOCH PAGE

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1 Thereupon,

2 NEIL FRANCIS WIELOCH

3 was called for examination and, after having been

4 sworn by the notary, was examined and testified as

5 follows:

6 EXAMINATION BY COUNSEL FOR THE FTC

7 BY MS. IKEDA:

8 Q. Good afternoon, Mr. Wieloch. Am I

9 pronouncing that right?

10 A. "Wee-lok."

11 Q. Good afternoon. My name is Mika Ikeda,

12 and I'm appearing here on behalf of the Federal Trade

13 Commission. I'm also joined by my colleague Dan

14 Matheson.

15 Have you ever been deposed before?

16 A. Never.

17 Q. Okay. So this is going to feel very much

18 like a conversation -- a lot of questions, a lot of

19 answers. The only difference is we have a court

20 reporter here who's typing down everything that we

21 say. So there are a few rules that we have to keep

22 in mind to keep the record clear.

23 The first is I'm going to ask you to

24 please provide verbal answers to any of my questions,

25 so, for example, saying "yes" instead of nodding or

5

1 saying "uh-huh." Let's try to avoid talking over one
 2 another. Try to let me finish the question before
 3 you answer, and I'll try to wait for you to finish
 4 before I ask the next question. Okay?
 5 A. Makes sense.
 6 Q. If you don't understand my question, just
 7 let me know and I'll try to rephrase the question.
 8 A. Okay.
 9 Q. And we will probably be taking some
 10 breaks. If you need a break at any time, feel free
 11 to ask. My only request is that if we have a
 12 question pending, please answer the question before
 13 we go on the break.
 14 A. Makes sense.
 15 Q. I see that you're represented by counsel
 16 today. Who is this?
 17 A. This is Sean Gates.
 18 Q. And is Mr. Gates also representing your
 19 employer, 1-800 Contacts?
 20 THE WITNESS: Sean, you can probably
 21 answer that.
 22 MR. GATES: She's asking you. I can't
 23 answer for you.
 24 THE WITNESS: Is Sean representing my
 25 employer? I'm assuming.

6

1 Can I ask, Sean, are you representing --
 2 MR. GATES: Just answer from your own
 3 knowledge.
 4 THE WITNESS: My guess is yes.
 5 Q. (By Ms. Ikeda) Okay. And has your
 6 employer, 1-800, paid for your representation today
 7 at this deposition?
 8 A. No. Well, I'm on their -- you know, I get
 9 paid as a salary. So maybe technically it's part of
 10 my time, but not anything different than my normal
 11 salary.
 12 Q. Oh, I'm sorry. Not for your time here
 13 today, but for Mr. Gates representing you. Is 1-800
 14 paying for Mr. Gates's --
 15 A. Oh, yes.
 16 Q. -- representation? Yes, okay. And are
 17 you getting any additional compensation or benefits
 18 for being here today?
 19 A. No.
 20 Q. Can you please state your full name for
 21 the record.
 22 A. My full name is Neil Francis Wieloch.
 23 Q. Frances with an E?
 24 A. I-s.
 25 Q. And what is your address?

7

1 A. 2430 Beacon, B-e-a-c-o-n, Drive, Salt Lake
 2 City, Utah.
 3 Q. And you understand you're under oath
 4 today?
 5 A. Yes.
 6 Q. And is there anything that would prevent
 7 you from testifying truthfully?
 8 A. No.
 9 Q. Why don't we start with just an overview
 10 of your education and work history, starting with
 11 college.
 12 A. Okay. So post-college you mean? College
 13 graduation?
 14 Q. Or including college.
 15 A. All right. So undergrad was Denison
 16 University in Grandville, Ohio. Graduated in 1991.
 17 After that moved to the Bay Area, worked in a number
 18 of advertising agencies for just over four years as
 19 account management side. Then went to graduate
 20 school at SUNY Buffalo, SUNY University Buffalo for a
 21 master's and Ph.D. in sociology. While I was there I
 22 also did student teaching in areas of research
 23 methods, social research methods, and sort of intro
 24 to sociology.
 25 Graduated and got a professorship at Utah

8

1 State University in Logan. That was in 2001. And
 2 was in the sociology department full time, you know,
 3 tenure track research professor. Did that for four
 4 years and then decided to get into market and
 5 marketing research. So just combined my past
 6 background experience with advertising and marketing
 7 and my research capabilities and did kind of mostly
 8 consulting, so reached out to contacts I had made and
 9 did some other work directly in consulting work, and
 10 part-time shorter term work with marketing and
 11 marketing research companies until -- let's see. I
 12 have to do the backwards math here.
 13 Well, I can do the math if you want to
 14 know the years, but my next step was a move to New
 15 York as -- worked with -- was hired as a research
 16 director for a brand strategy firm in Manhattan
 17 called CoreBrand. I did that for just about two and
 18 a half years, and then found this position at
 19 1-800 Contacts as a customer insights, you know,
 20 market, market research. The title is director of
 21 insights and strategy in the marketing department.
 22 That was just over three years ago.
 23 Also, I'm an adjunct professor of market
 24 research at BYU.
 25 Q. So you joined 1-800 Contacts in what year?

<p style="text-align: right;">9</p> <p>1 A. 2014. 2 Q. Okay. 3 A. It was September. 4 Q. And, I'm sorry, what was your position 5 when you joined? 6 A. It was associate director of insights and 7 strategy. 8 Q. And today you are director of insights and 9 strategy? 10 A. Correct. 11 Q. So starting with the associate director 12 position, what were your duties and responsibilities? 13 A. Primarily collecting and analyzing 14 customer market and consumer data. So it's -- and 15 this is mostly around -- this isn't data around 16 transactional, it's primarily for customers, mostly 17 survey data and additional sort of demographic data 18 in order to segment and market towards different 19 customer and consumer types. 20 Q. Okay. Were there any other duties you had 21 besides collecting and analyzing customer market 22 data -- customer and market data? 23 A. That's -- everything would probably fit 24 under -- everything would fit under that umbrella. I 25 think the only thing that might not quite would be</p>	<p style="text-align: right;">11</p> <p>1 A. He left a little over a year ago. But I 2 stopped reporting to him about another six months 3 into being director. I started reporting directly to 4 Tim Roush, who's our CMO. 5 Q. What was Dane Folster's title? 6 A. He was director of CRM. 7 Q. CRM? 8 A. Yes. 9 Q. Customer relationship management? 10 A. Exactly. 11 Q. Have you had any responsibilities related 12 to pricing? 13 A. Just -- not really. I think the closest 14 thing to any sort of pricing I've done has been 15 pricing perceptions among customers and consumers. 16 So -- does that make sense? 17 Q. So it's not -- if I understood correctly, 18 your responsibilities had to do with actual pricing 19 of -- 20 A. Correct. 21 Q. -- products, more to do with how customers 22 perceive your prices? 23 A. Correct. Exactly. 24 Q. Any other aspect of pricing that you've 25 been involved in?</p>
<p style="text-align: right;">10</p> <p>1 some marketing mix modeling, which is more about 2 media spend. And have been exploring and done some 3 attribution modeling, which is about -- similar to 4 marketing mix, it's about media contribution to 5 conversion, or sales. So it's more about media 6 spend. 7 Q. And when did you become the director of 8 insights and strategy? 9 A. I think that was probably about six months 10 into the -- so probably in March or April 2015. 11 Q. And were your duties and responsibilities 12 pretty much the same as when you were associate 13 director? 14 A. Yes. 15 Q. Anything new that was added? 16 A. Just some overseeing, managing others. So 17 I hired two -- I have two people that work for me. 18 Q. And who are those people? 19 A. It's Garred Sheppard, G-a-r-e-d, 20 S-h-e-p-a-r-d; and Veronica Newmann, N-e-w-m-a-n-n. 21 Q. And who did you report to as associate 22 director? 23 A. He's no longer with the company. His name 24 is Dane, D-a-n-e, Folster, F-o-l-s-t-e-r. 25 Q. And when did Dane Folster leave?</p>	<p style="text-align: right;">12</p> <p>1 A. No. 2 Q. Have you had any involvement with 3 financial planning for the company? 4 A. Again, similar; only indirectly. So if 5 there is any sort of analyses on the data that I have 6 from surveys that is a request, or ad hoc requests 7 like, here, we're thinking of moving this direction, 8 do we have a sense of what customers or consumers are 9 doing or thinking, then I'll do analyses of that. 10 But it's usually just not direct relationship to 11 financial planning. 12 Q. Do you work with anybody in the financial 13 planning group? 14 A. Again, it's indirectly when those requests 15 come in. It will often be through like Scott Osmond. 16 But no, not directly. 17 Q. So Scott Osmond would rely on any data 18 that you have? 19 A. Yeah. Well, it's -- it's sort of more 20 supplemental. So most of Scott's world is just in 21 strictly finance and transactional data. But if 22 there is something about a certain customer type that 23 he wants to help support, sort of the support frames 24 or financial implications, then he'll ask me to 25 analyze some of the data I have. Does that make</p>

1 sense?
 2 **Q. Okay. All right. I am handing you a**
 3 **document that's been marked as CX1347. I believe**
 4 **everybody else has a copy already. But take as much**
 5 **time as you need, and let me know when you're ready.**
 6 **(Exhibit CX1347 was identified.)**
 7 A. So you just want me to review it? Is that
 8 what you're asking?
 9 **Q. Sure. And I'll just ask you some**
 10 **questions about it.**
 11 MR. GATES: Primarily the first two pages.
 12 THE WITNESS: You said primarily the first
 13 two?
 14 **Q. (By Ms. Ikeda) Well, actually, I'd like**
 15 **you to review the whole document, and I'll let you**
 16 **know which pages. I'll ask about them. I think it's**
 17 **in your interest --**
 18 A. May I use this for reference for
 19 questions? Because there's a lot of information
 20 here.
 21 **Q. Sure.**
 22 A. (The witness reviews the document.)
 23 Okay.
 24 **Q. Have you seen CX1347 before?**
 25 A. No.

1 **Q. Do you know what CX1347 is?**
 2 A. I have a sense of what it is, so just from
 3 having just read it just now. Are you asking me
 4 to define it, or --
 5 **Q. Sure. Whatever information you have.**
 6 THE WITNESS: Can I just do my
 7 interpretation of what I think it is?
 8 MR. GATES: That's what you're here for.
 9 THE WITNESS: Okay.
 10 So primarily it looks like an outline of
 11 definitions of review of what subject matter is in
 12 terms of what our conversation is for this particular
 13 deposition, and definitions of some of the keywords
 14 or phrases that are used in the definition.
 15 Does that sound fair?
 16 **Q. (By Ms. Ikeda) Sure. So this -- I didn't**
 17 **mean to make this a quiz, but this is a notice that**
 18 **complaint counsel sent to 1-800 Contacts, your**
 19 **company, in this litigation.**
 20 A. Okay.
 21 **Q. And yes, it lists topics that we asked the**
 22 **company to cover in the form of -- by designating one**
 23 **or more people in the company to testify on behalf of**
 24 **the company.**
 25 **So I understand that you have been**

1 **designated as someone who could testify on behalf of**
 2 **1-800 on Topic 9, which is on page 2.**
 3 A. Correct.
 4 **Q. Okay. And Topic 9 says: "The effect of**
 5 **each Unilateral Pricing Policy on 1-800 Contacts,**
 6 **including the effect on its retail prices, revenue,**
 7 **cost of goods sold, units sold, and EBITDA for each**
 8 **of the past four years." Do you see that?**
 9 A. Yes.
 10 **Q. Did you see Topic 9 prior coming into the**
 11 **deposition today?**
 12 A. Yes.
 13 **Q. Okay. And who -- how did you see Topic 9?**
 14 A. Our counsel, Sean Gates, covered what
 15 my -- the reason for my being here in a conversation
 16 we had yesterday.
 17 **Q. Okay. And what did you do to prepare for**
 18 **today's deposition?**
 19 A. Just personally was informed yesterday, so
 20 was walked through kind of what the -- what this
 21 process is and what defines, you know, what I'm to
 22 speak about, which is the UPP or unilateral pricing
 23 policy, and specifically a quick review of the type
 24 of research that I did that directly related to
 25 unilateral pricing policy, or have done historically.

1 **Q. And when you said you were informed**
 2 **yesterday, what were you informed of yesterday?**
 3 A. Oh, specifically this, but the subject
 4 matter for which I would be talking today.
 5 **Q. Okay. So were you informed yesterday that**
 6 **you were going to be the one testifying on this**
 7 **topic?**
 8 A. I was informed prior to yesterday, but
 9 yesterday I was -- it was clarified what the specific
 10 topic was that I was going to be discussing.
 11 **Q. Okay. So prior to yesterday, what was**
 12 **your understanding of what you would be testifying**
 13 **about?**
 14 MR. GATES: Objection. That calls for
 15 privileged information, so you don't have to answer
 16 that one.
 17 THE WITNESS: Okay.
 18 MR. MATHESON: I would ask him, and of you
 19 want to instruct him not to answer, I would say then
 20 follow the instruction. Ask him again.
 21 **Q. (By Ms. Ikeda) So what was your**
 22 **understanding of what you would testify to prior to**
 23 **yesterday?**
 24 MR. GATES: Same objection. Instruct you
 25 not to answer.

1 THE WITNESS: I'm not answering under --
 2 **Q. (By Ms. Ikeda) You're not answering**
 3 **because of your attorney's --**
 4 A. Counsel's instruction.
 5 **Q. Did you have any discussions with anybody**
 6 **who wasn't your attorney about what you would be**
 7 **testifying to today?**
 8 A. No.
 9 **Q. So you only spoke with Mr. Gates about**
 10 **what you were going to be testifying to today?**
 11 A. Well, there were two other attorneys
 12 present when this was presented yesterday.
 13 **Q. And prior to yesterday, who informed you**
 14 **that you would be testifying today?**
 15 MR. GATES: You can answer that.
 16 THE WITNESS: I received an e-mail from
 17 Stephanie -- I forget her last name. She's the
 18 assistant to our general counsel. An invitation for
 19 yesterday's meeting.
 20 **Q. (By Ms. Ikeda) And who is Stephanie?**
 21 A. She's our -- she's 1-800 Contacts' --
 22 she's an assistant for the 1-800 Contacts general
 23 counsel. She's the administrative assistant.
 24 **Q. And you said there was an e-mail from**
 25 **Stephanie?**

1 A. An e-mail invitation. So, yeah, on
 2 Outlook, basically. Calendar.
 3 **Q. Oh, scheduling this deposition?**
 4 A. Yesterday's meeting before deciding the
 5 definition, and this deposition.
 6 **Q. Okay. And, sorry; when was that?**
 7 A. When did I get the e-mail?
 8 **Q. Right.**
 9 A. I'm not sure. I can check.
 10 **Q. Was it like two days ago or --**
 11 A. Probably about a week ago.
 12 **Q. Okay. So about a week ago you received an**
 13 **e-mail saying you're going to be testifying on behalf**
 14 **of the company; please attend this prep session the**
 15 **day before?**
 16 A. Correct.
 17 **Q. Okay. And did you do anything else to**
 18 **prepare for the deposition at that time a week ago?**
 19 A. No.
 20 **Q. Did you speak with anybody else in the**
 21 **company about the deposition at that time?**
 22 A. Yes. Our general counsel, Cindy Williams,
 23 just said --
 24 MR. GATES: Hold on. Just -- other than
 25 just --

1 THE WITNESS: Oh. It was just for
 2 scheduling.
 3 MR. GATES: Yeah. Nothing about the
 4 substance she told you. Just scheduling?
 5 THE WITNESS: Scheduling.
 6 MR. GATES: That's fine.
 7 THE WITNESS: Explained what that was,
 8 explained that it was for a deposition.
 9 **Q. (By Ms. Ikeda) And anybody besides Cindy**
 10 **Williams that you talked to?**
 11 A. No.
 12 **Q. Did you review any documents to prepare**
 13 **for the deposition today?**
 14 A. No.
 15 **Q. Including in yesterday's session with the**
 16 **attorneys?**
 17 A. Correction. We -- there was -- we did
 18 walk through a highlight of two -- actually, yeah,
 19 there were two research reports that we had that were
 20 directly related to the UPP.
 21 **Q. So besides the two reports, did you review**
 22 **anything else?**
 23 A. No.
 24 **Q. Did you do anything on your own to prepare**
 25 **for the deposition today?**

1 A. No.
 2 **Q. And you said that you met yesterday with**
 3 **counsel; is that right?**
 4 A. Correct.
 5 **Q. And how long did you meet for?**
 6 A. About 40 minutes.
 7 **Q. Did you have any other discussions with**
 8 **counsel besides the 40-minute meeting?**
 9 A. No.
 10 **Q. Did you have any other meetings besides**
 11 **yesterday?**
 12 A. No.
 13 **Q. Did you interview anybody at the company**
 14 **to prepare for today's deposition?**
 15 A. Other than yesterday's conversation with
 16 counsel, no.
 17 **Q. And the other two counsel, were they**
 18 **in-house people at 1-800?**
 19 A. No. I can provide names. So it was Greg
 20 Stone and Garth Vincent.
 21 **Q. So besides Greg Stone, Garth Vincent, and**
 22 **Sean Gates, did you meet with anybody else to prepare**
 23 **for today?**
 24 A. No.
 25 **Q. And you mentioned there were two reports**

21

1 **that you reviewed. Were these reports that you had**
2 **prepared?**

3 A. Yes.

4 **Q. What did they relate to?**

5 A. They specifically related -- there were
6 components of them that related to pricing
7 perception. One was from a consumer -- customer
8 experience report, and the other was from what we
9 call a dead file research project. It was an ad hoc
10 research project survey among customers that we refer
11 to as dead file.

12 **Q. And how did that relate to UPP?**

13 A. The customer experience report was -- we
14 reviewed perceptions of price by our customers, and
15 we split the customers based on those who at the time
16 were purchasing products that classified as UPP and
17 those that didn't to see if their perceptions of the
18 price they paid were different. And the dead file
19 was a survey conducted among customers we thought
20 were no longer customers to see if they may have gone
21 to a -- moved to a competitor due to lower pricing.

22 **Q. Was it lower pricing or perception of**
23 **lower pricing?**

24 A. Perception of lower pricing. Yeah,
25 correct.

22

1 **Q. Did the two documents you reviewed discuss**
2 **the effect of UPP on revenue?**

3 A. No.

4 **Q. Did the two documents you reviewed discuss**
5 **the effect of UPP on cost of goods sold?**

6 A. I'm trying to think. Let me think about
7 how the -- no.

8 **Q. Did the documents that you reviewed**
9 **discuss units sold?**

10 A. No.

11 **Q. Did the documents discuss the effect of**
12 **UPP on EBITDA?**

13 A. I'm answering no in terms of directly,
14 because they didn't specifically -- again, they're
15 about the perception because we wanted to track that.
16 So any of those may have been implied, but they
17 weren't directly addressed. Does that make sense?

18 **Q. So none of the documents directly**
19 **addressed the effect of UPP on EBITDA?**

20 A. Not directly.

21 **Q. And did the documents discuss the effect**
22 **of UPP on actual retail prices?**

23 A. No.

24 **Q. Can you discuss the effect of UPP on**
25 **1-800's EBITDA?**

23

1 A. Can I discuss it? I can -- I can sort of
2 speculate based on the perception.

3 MR. GATES: It lacks foundation.

4 **Q. (By Ms. Ikeda) That's okay. We don't**
5 **need you to speculate.**

6 **What effect did UPP have on the cost of**
7 **goods sold, on 1-800's cost of goods sold?**

8 A. Yeah.

9 MR. GATES: It lacks foundation, calls for
10 speculation.

11 **Q. (By Ms. Ikeda) But you were the person**
12 **who was designated to speak on behalf of 1-800 on**
13 **this topic; is that correct?**

14 MR. GATES: So let's be clear. Mr. Osmond
15 was designated on Topic 9 as well, and you got all
16 kinds of financial information from him. The topic
17 also says the effect on 1-800, and Mr. Wieloch is
18 here because he did some studies about the effect on
19 1-800 that is different from what you heard from
20 Mr. Osmond this morning. He's supplemental to
21 Mr. Osmond.

22 **Q. (By Ms. Ikeda) Okay. So what I'm trying**
23 **to understand is what -- what did the -- the two**
24 **reports that you reviewed to prepare for today's**
25 **deposition, what did those two reports reveal about**

24

1 **the impact of UPP on 1-800 Contacts actually as**
2 **opposed to the impact on customers' perceptions?**

3 A. As opposed to the impact on customers'
4 perceptions? It wasn't anything directly beyond the
5 impact on customers' perception. That wasn't the
6 intent. The intent was to track -- the UPP only
7 lasted for a particular period of time, so it wasn't
8 a lot -- enough time to kind of actually see any
9 direct impact beyond the perception. If that makes
10 sense.

11 **Q. Do you have any knowledge of the impact of**
12 **UPP on 1-800 Contacts other than the information that**
13 **was in those two reports that you reviewed yesterday?**

14 A. Not directly. It was conversational, but
15 not directly.

16 **Q. Okay. I mean, at this point I don't**
17 **know -- I don't think it's worth proceeding with the**
18 **topic, and I am going to object to the designation of**
19 **Mr. Wieloch as 1-800's corporate designee on Topic 9**
20 **on UPP, because Mr. Wieloch does not have any**
21 **information on the effect of UPP on 1-800 Contacts.**

22 MR. GATES: Okay. You done?

23 All right. So I'll ask you a few

24 questions.

25 THE WITNESS: Okay.

1 EXAMINATION
 2 BY MR. GATES:
 3 **Q. In the surveys that you did, did one of**
 4 **them explore the impact of UPP on the customer --**
 5 MS. IKEDA: Object to scope.
 6 **Q. (By Mr. Gates) -- satisfaction, the**
 7 **satisfaction of 1-800's customers? You can answer**
 8 **it.**
 9 A. I'm totally confused here.
 10 **Q. So I'm going to start asking you**
 11 **questions.**
 12 A. Right. Am I supposed to pay attention to
 13 the objection, or is that just for the record?
 14 **Q. She might make some objections. That's**
 15 **for the record.**
 16 A. Okay.
 17 **Q. So you still answer the question. So**
 18 **let's start again.**
 19 **You did some surveys with regard to the**
 20 **effect of UPP on 1-800's customers. Is that true?**
 21 A. Yes.
 22 MS. IKEDA: Objection. Do you have these
 23 documents?
 24 MR. GATES: Yes, we do.
 25 MS. IKEDA: Do you have them today so we

1 can look at them?
 2 MR. GATES: No. You have them. We
 3 produced them to you already.
 4 MS. IKEDA: Well, can you give us the
 5 Bates numbers so we can refer to them? So you did
 6 not bring them to this deposition?
 7 MR. GATES: No, I don't have them. You
 8 have them already. We produced them to you.
 9 MS. IKEDA: This deposition is not about
 10 surveys. This deposition is about UPP.
 11 MR. GATES: You can object, but I'm not
 12 going to get into an argument with you about this.
 13 I'm going to ask him the questions, and then you can
 14 do -- we can fight over what it is, what we do with
 15 it. But I'm not going to get into a long
 16 conversation with you about whether you have the
 17 documents, whether you should have brought the
 18 documents, or who should have brought the documents.
 19 Okay? So you can do the same objection or however
 20 you want to do it.
 21 MS. IKEDA: Yes. This is a standing
 22 objection to scope.
 23 MR. GATES: We can have motions on
 24 whatever you want to do; but I'm going to ask the
 25 questions, he's going to answer them. Okay. So --

1 MS. IKEDA: Just for the record, this is a
 2 standing objection on scope and best evidence.
 3 **Q. (By Mr. Gates) All right. So you did**
 4 **some surveys on the impact of UPP on 1-800's**
 5 **customers?**
 6 A. Correct.
 7 **Q. What were you trying to measure?**
 8 A. We wanted to track general customer and
 9 market awareness of UPP as well as perceptions of UPP
 10 on pricing.
 11 **Q. Do you generally do surveys on perceptions**
 12 **on pricing?**
 13 A. Yes.
 14 **Q. How often do you do those?**
 15 A. We have two types of pricing perception
 16 surveys. One is just for customers, and that's a
 17 post-transactional survey which occurs every month.
 18 The other is a -- actually, we have three. Sorry.
 19 The other two, one is a biannual market pulse,
 20 general market survey. And that's among 2,000 just
 21 contact lens -- adult contact lens wearers. And then
 22 the third -- and it's twice a year. And the third is
 23 a monthly brand tracker which goes out to about --
 24 every week goes out to 210 U.S. adult contact lens
 25 wearers.

1 **Q. Okay. So let me understand. You have**
 2 **three surveys that look at pricing perception?**
 3 A. Correct.
 4 MS. IKEDA: Objection.
 5 **Q. (By Mr. Gates) And how often do those go**
 6 **out?**
 7 A. Two of them go out once a month, and one
 8 goes out -- one goes out twice a year.
 9 **Q. And when you say "pricing perception,"**
 10 **what does that mean?**
 11 A. Specifically it's customers' and
 12 non-customers' perception of our price relative to
 13 competitors.
 14 **Q. Which competitors?**
 15 A. There's a list of 11. We start with just
 16 independent eye doctors, which are our biggest
 17 competitor. Then there are contact lens or glasses
 18 retailers, you know, like LensCrafters or
 19 Visionworks. There's big box, would be like Walmart
 20 or Sam's Club. There's general retailers like Sears
 21 or Target optical, and online, other online retailers
 22 like Coastal and Lens.com.
 23 **Q. And as part of those surveys did you try**
 24 **to at some point in time measure the impact of UPP?**
 25 MS. IKEDA: Objection.

29

1 THE WITNESS: Specifically, yes. In the
2 biannual market pulse we asked, have people heard of
3 UPP. And in our, as I've referenced earlier, our
4 post-transactional survey, we actually divide the
5 data among our customers for customers who have
6 purchased products, their last purchase was a UPP
7 product, compared to those whose purchase was not.

8 So let me just rephrase that part. For
9 the customer survey, the customer experience survey
10 that was -- we looked at pricing perceptions and
11 split our customers into two groups. One group are
12 the customers whose last purchase was a UPP product,
13 and the other group was customers whose last purchase
14 was not a UPP product.

15 **Q. (By Mr. Gates) And what were you trying**
16 **to measure?**

17 A. If there were any change -- first of all,
18 any difference in their perception of the price they
19 paid. Did they feel like it was higher, lower, the
20 same as what they expected. And then tracking this
21 over time with this -- does this perception changed
22 over time.

23 **Q. In the three surveys that you mentioned,**
24 **what other things are you trying to measure in those**
25 **surveys?**

30

1 A. Just surveys in general?

2 **Q. The three that you mentioned that go out**
3 **on a periodic basis.**

4 A. So the brand tracker mentions market brand
5 perceptions, so awareness and perceptions of our
6 brand relative to other competitor brands. The
7 post-transactional customer -- we call it the
8 customer experience survey primarily is generally
9 satisfaction with their experience with us and
10 elements of the experience, as well as the
11 perceptions of price is one of those.

12 And the biannual market pulse survey is --
13 it's perceptions of brands and competitor brand
14 behavior in terms of purchase, behavior around eye
15 exam behavior, relationship with an eye doctor. And
16 we usually throw in sort of some ad hoc questions at
17 the time that's kind of related to what we're
18 interested in knowing about contact lens wearers in
19 general.

20 **Q. And who designs these surveys?**

21 A. I do.

22 **Q. And who implements them?**

23 A. For our customers, we administer them
24 through Qualtrics. So Qualtrics is a survey software
25 tool that they actually -- that we utilize. If there

31

1 are -- for the post-transactional survey, the
2 customer experience survey -- it has two names -- we
3 administer them directly through Qualtrics for the
4 market pulse among our customers. We have Qualtrics
5 actually distribute the surveys, because they
6 actually distribute any incentive.

7 For non-customers, which is the brand
8 tracker and the non-customers among the market pulse,
9 we have a company -- we either use Qualtrics or we go
10 directly to SSI, Survey Sampling International. They
11 use their panel participants. So we use a third
12 party for data administration -- or data collection,
13 survey administration, and disbursement of findings.

14 **Q. One of the things you mentioned that**
15 **you're trying to measure is customer satisfaction.**
16 **Did you try to measure customers -- how that was**
17 **impacted vis-à-vis the UPP policies?**

18 A. Yes.

19 **Q. In your surveys are you trying -- do you**
20 **have anything to try to figure out where your**
21 **customers are coming from, like if they're switching**
22 **or they're brand-new contact lens wearers?**

23 A. Yes.

24 **Q. And how do you measure that? What do you**
25 **call that measure?**

32

1 A. I don't have a name for that measure, but
2 we do ask places that they've purchased contact
3 lenses -- you know, in the market pulse we ask in the
4 past year and where they last purchased. For the
5 post-transactional survey we ask where they -- where
6 else they purchased besides from us. And in some
7 ad hoc studies, actually, like the dead file that
8 we've discussed, we have a question we ask, if they
9 have purchased or are purchasing elsewhere, where
10 they're going to, sort of where they -- if they've
11 left us, where they purchased from.

12 **Q. So that was the dead file -- you called it**
13 **the dead file. Is that different from the three**
14 **surveys that you've been doing on a periodic basis?**

15 A. That was one of -- yes. It is sort of an
16 ad hoc survey based on we wanted to directly look at
17 our dead file customers. So it was an ad hoc survey
18 that was not one of those other three.

19 **Q. What's a dead file?**

20 A. Dead file is what we call customers that
21 haven't purchased from us in the past two years.

22 **Q. And you survey them for the purpose of**
23 **discovering what?**

24 A. If they haven't purchased, we want to know
25 are they going to come back; and if they're not

33

1 coming back, why; and if they're not going to come
2 back, where they've gone.

3 **Q. Do you survey in those -- in your periodic**
4 **surveys try to figure out what motivates consumers to**
5 **purchase from you?**

6 A. Yes.

7 **Q. What are the factors that you ask them**
8 **about?**

9 A. There is price, you know, to get a lower
10 price. There's convenience, the convenience of
11 buying online and receiving anytime. There's the
12 ease of ordering, which is a little bit different,
13 which is sort an order process, because we have to
14 have customer satisfaction. And there's how
15 important insurance plays in their purchase process.
16 Pretty much the four things.

17 **Q. And how long have you been doing these**
18 **surveys?**

19 A. Well, let's see. The -- I started -- I
20 started the customer experience survey in 2015,
21 probably right around the beginning of 2015. So
22 that's been all of '15, all of '16, so a little over
23 two years. I started the market pulse shortly after
24 I got there, so that's been a little over -- that's
25 been going on about three years. And the brand

34

1 tracker has -- there was a form of it before I got
2 there, but I made it more robust. That's been for
3 about two and a half years.

4 **Q. The brand tracker. So do you know how**
5 **long that was implemented before you came?**

6 A. I don't. I don't.

7 **Q. The three periodic surveys and the dead**
8 **file one. Are there any other surveys that you've**
9 **done during your time at 1-800 Contacts, whether on**
10 **an ad hoc or periodic basis?**

11 A. Yes.

12 **Q. Okay.**

13 A. I get ad hoc or requests like the dead
14 file survey I mentioned probably about four times a
15 year.

16 **Q. To whom do you provide the surveys? Which**
17 **departments within 1-800 Contacts?**

18 A. It's all primarily within marketing. I
19 would say actually for ad hoc surveys, it is
20 primarily within marketing. There are -- yes.

21 **Q. And you said that you sometimes got**
22 **requests from Scott Osmond?**

23 A. That's more for an analysis of the data we
24 have. So it would be if I -- if he asks for -- he's
25 doing -- he's looking into something and exploring

35

1 it, he may say, do you have any data that can help
2 form kind of -- this is what we're thinking of doing;
3 do you have any data that would help us form it? So
4 not a different survey, but just an analysis, a
5 different analysis.

6 **Q. Have you heard of something called a**
7 **funnel report?**

8 A. I've heard of it. I'm not exactly sure
9 what it is.

10 MR. GATES: Okay. Good. That's all I
11 have.

12 FURTHER EXAMINATION

13 BY MS. IKEDA:

14 **Q. Just a couple follow-up questions.**

15 **The customer perception surveys that you**
16 **discussed with Mr. Gates earlier, those don't measure**
17 **the effect of UPP on actual prices, correct?**

18 A. Correct.

19 **Q. And earlier today Mr. Osmond, director of**
20 **financial planning and analysis, testified on the**
21 **effect of UPP on 1-800 Contacts. Just want to make**
22 **sure, Mr. Osmond would be therefore the appropriate**
23 **person who can speak to the effect of UPP on actual**
24 **pricing; is that right?**

25 MR. GATES: Lacks foundation.

36

1 **Q. (By Ms. Ikeda) Is Mr. Osmond -- sorry.**
2 **You can answer the question.**

3 A. So the question is Mr. Osmond, can he
4 answer on the financial impact of UPP?

5 **Q. Right.**

6 A. Yes.

7 MS. IKEDA: Okay. No further questions.

8 MR. GATES: Okay. You're done.

9 (Proceedings concluded at 1:44 p.m.)

10 * * *

1 STATE OF UTAH)
 2) ss.
 3 COUNTY OF SALT LAKE)
 4 I, Vicky McDaniel, Registered Professional
 5 Reporter and Notary Public in and for the State of
 6 Utah, do hereby certify:
 7 That prior to being examined, the witness,
 8 NEIL FRANCIS WIELOCH, was by me duly sworn to tell
 9 the truth, the whole truth, and nothing but the
 10 truth;
 11 That said examination was taken down by me
 12 in stenotype on January 18, 2017, at the place herein
 13 named and was thereafter transcribed, and that a true
 14 and correct transcription of said testimony is set
 15 forth in the preceding pages.
 16 I further certify that a request was made
 17 for the witness review the transcript, a reading copy
 18 to be sent to Mr. Gates for the witness to read and
 19 sign and then return for filing.
 20 I further certify that I am not of kin or
 21 otherwise associated with any of the parties to said
 22 cause of action and that I am not interested in the
 23 outcome thereof.
 24 WITNESS MY HAND this 22nd day of January, 2017
 25 Vicky McDaniel, CSR, RMR

1 WITNESS CERTIFICATE
 2 I, NEIL FRANCIS WIELOCH, HEREBY DECLARE:
 3 That I am the witness in the foregoing
 4 transcript; that I have read the transcript and know
 5 the contents thereof; that with these corrections I
 6 have noted, this transcript truly and accurately
 7 reflects my testimony.
 8 PAGE/LINE CHANGE/CORRECTION REASON
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 15 ___No corrections were made.
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 18 I, NEIL FRANCIS WIELOCH, HEREBY DECLARE UNDER
 19 THE PENALTIES OF PERJURY OF THE LAWS OF THE UNITED
 20 STATES OF AMERICA AND THE LAWS OF THE STATE
 21 OF THAT THE FOREGOING IS TRUE AND
 22 CORRECT.
 23
 24
 25 DATE NEIL FRANCIS WIELOCH

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EXHIBIT C

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

In the Matter of

1-800 Contacts, Inc.,
a corporation

Docket No. 9372

RESPONDENT 1-800 CONTACTS' FINAL PROPOSED TRIAL WITNESS LIST

Pursuant to the Scheduling Order, Respondent hereby lists those persons whom Respondent currently contemplates calling to testify as witnesses by live testimony at the hearing in this matter, with a brief summary of the proposed testimony that is anticipated will be elicited from each witness. Respondent reserves the following rights:

- A. to present testimony, by deposition or live witness, from any other person who has been identified by Complaint Counsel in their final proposed trial witness list;
- B. to call the custodian of records of any party or non-party from which documents or records have been obtained to the extent necessary to demonstrate the authenticity or admissibility of documents, in the event Respondent is unable to establish the authenticity or admissibility of such documents or records through other means, such as a stipulation, affidavit, request for admission, or deposition;
- C. to decide not to call any of the persons listed;
- D. to examine any of the persons listed about any topic that is the subject of testimony by any witness called by Complaint Counsel;
- E. to examine the persons listed about any topic about which the person testified previously during an Investigational Hearing or any deposition, or about any matter referenced in any document to which the person had access;

F. to call any of the persons listed, or any other person, for rebuttal testimony; and

G. to present written testimony from any other person, by any of the declarations, deposition transcripts, or investigational hearing transcripts listed on Respondent's exhibit list.

Subject to the foregoing reservations, Respondent provides the following proposed witness list:

I. RESPONDENT'S CURRENT EMPLOYEES

1. **Brian Bethers**. Mr. Bethers is Respondent's Chief Executive Officer and Chairman. Prior to becoming CEO, Mr. Bethers served as Respondent's Chief Financial Officer from 2003 to 2004, and President from 2004 to 2014. Respondent anticipates that Mr. Bethers will testify regarding: (1) Respondent's history, operations, sales, service, marketing and advertising, including paid search advertising; (2) Respondent's business model, pricing and general strategies; (3) the market for contact lenses, including Respondent's competitors and actual or potential customers; (4) Respondent's trademarks and brand, their value, and Respondent's substantial investments therein; (5) Respondent's monitoring, protection and enforcement of its trademarks, including cease and desist letters sent to offending parties, trademark litigation, trademark settlement agreements and communications and correspondence with search engines, contact lens retailers and others relating to the unauthorized use of its trademarks; and (6) any other topics that were addressed in his prior Investigational Hearing testimony, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

2. **Scott Osmond**. Mr. Osmond is Respondent's Director of Financial Planning and Analysis. Prior to assuming that role, Mr. Osmond was Respondent's Associate Director of Financial Planning and Analysis from 2012 to 2013, and Senior Financial Analyst from 2010

to 2012. Respondent anticipates that Mr. Osmond will testify regarding: (1) Respondent's business model and pricing strategies; (2) Respondent's competitors; (3) the market for contact lenses; (4) Respondent's marketing and advertising, including Respondent's price match guarantee; (5) the effect of the unilateral pricing policies of contact lens manufacturers on the retail market for contact lenses, including those policies effect on Respondent's pricing, demand, and operations; and (6) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

3. **Dr. Neil Wieloch**. Dr. Wieloch is Respondent's Director of Marketing Strategy and Insights. Respondent anticipates that Dr. Wieloch will testify regarding: (1) Respondent's pricing strategies, and consumer's perceptions of those strategies; (2) consumer surveys conducted by Respondent regarding brand awareness, consumer perceptions, market competition, and customer buyer patterns; (3) the effect of the unilateral pricing policies of contact lens manufacturers on the retail market for contact lenses, including those policies effect on consumer perceptions; and (4) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

II. RESPONDENT'S FORMER EMPLOYEES OR REPRESENTATIVES

1. **Josh Aston**. Mr. Aston was Online Acquisition Manager for Respondent from 2002 through 2004. During that time, Mr. Aston implemented certain of Respondent's marketing campaigns, including paid search. Respondent anticipates that Mr. Aston will testify regarding: (1) Respondent's marketing and advertising, including paid search advertising; (2) Respondent's trademarks and brand, and its substantial investments therein;

(3) Respondent's monitoring, protection, and enforcement of its trademarks, including its communications and correspondence with search engines, contact lens retailers, and others relating to the unauthorized use of its trademarks; (4) communications of a similar nature on behalf of other companies; and (5) any other topics relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

2. **Joan Blackwood.** Ms. Blackwood was Respondent's Chief Marketing Officer from 2009 to 2013. During that time, Ms. Blackwood had responsibility for overseeing Respondent's brand development and marketing campaigns, including Respondent's paid search advertising. Respondent anticipates that Ms. Blackwood will testify regarding:

(1) Respondent's marketing and advertising, including paid search advertising; (2) Respondent's business model, pricing and general strategies; (3) the market for contact lenses, including Respondent's competitors and actual or potential customers; (4) Respondent's trademarks and brand, and its substantial investments therein; (5) Respondent's monitoring, protection and enforcement of its trademarks, including cease and desist letters sent to offending parties, trademark litigation, trademark settlement agreements and communications and correspondence with search engines, contact lens retailers and others relating to the unauthorized use of its trademarks; (6) communications of a similar nature on behalf of other companies; and (7) any other topics that were addressed in her prior deposition testimony, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

3. **Jonathan Coon.** Mr. Coon is the co-founder of 1-800 Contacts. He founded the company in 1992, initially selling contact lenses on college campuses. From 1992 to 2014, Mr. Coon served as the company's Chief Executive Officer, overseeing its tremendous growth and

all aspects of its operations. Respondent anticipates that Mr. Coon will testify regarding:

(1) Respondent's history, operations, sales, service, marketing and advertising, including paid search advertising; (2) Respondent's business model, pricing, and general strategies; (3) the market for contact lenses, including Respondent's competitors and actual or potential customers; (4) Respondent's trademarks and brand, their value, and Respondent's substantial investments therein; (5) Respondent's monitoring, protection, and enforcement of its trademarks, including cease and desist letters sent to offending parties, trademark litigation, trademark settlement agreements and communications and correspondence with search engines, contact lens retailers and others relating to the unauthorized use of its trademarks; and (6) any other topics that were addressed in his prior Investigational Hearing testimony, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

4. **Rick Galan**. Mr. Galan was Respondent's Associate Director of Search Marketing from 2012 through 2014. During that period, he was responsible for implementing Respondent's paid search advertising campaigns. Respondent anticipates that Mr. Galan will testify regarding: (1) Respondent's marketing and advertising, including paid search advertising; (2) Respondent's trademarks and brand, and its substantial investments therein; (3) Respondent's monitoring, protection, and enforcement of its trademarks, including its communications and correspondence with search engines, contact lens retailers, and others relating to the unauthorized use of its trademarks; (4) communications of a similar nature on behalf of other companies; and (5) any other topics relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

5. **Amy Larson.** Ms. Larson was Respondent's Vice President of E-Commerce and Mobile from 2012 through 2014. Before assuming that position, Ms. Larson was Respondent's Marketing Director from 2006 to 2012 and Associate Director of Online Acquisition from 2004 to 2005. Respondent anticipates that Ms. Larson will testify regarding: (1) Respondent's marketing and advertising, including paid search advertising; (2) Respondent's business model, pricing and general strategies; (3) the market for contact lenses, including Respondent's competitors and actual or potential customers; (4) Respondent's trademarks and brand, and its substantial investments therein; (5) Respondent's monitoring, protection and enforcement of its trademarks, including cease and desist letters sent to offending parties, trademark litigation, trademark settlement agreements and communications and correspondence with search engines, contact lens retailers and others relating to the unauthorized use of its trademarks; (6) communications of a similar nature on behalf of other companies; and (7) any other topics that were addressed in her prior Investigational Hearing testimony, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

6. **Clint Schmidt.** Mr. Schmidt was Respondent's Head of E-Commerce from 2004 to 2006. During that period, he oversaw Respondent's digital marketing campaigns and website. Respondent anticipates that Mr. Schmidt will testify regarding: (1) Respondent's marketing and advertising, including paid search advertising; (2) Respondent's trademarks and brand, and its substantial investments therein; (3) Respondent's monitoring, protection, and enforcement of its trademarks, including its communications and correspondence with search engines, contact lens retailers, and others relating to the unauthorized use of its trademarks; and

(4) any other topics relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

III. CERTAIN OF RESPONDENT'S OUTSIDE COUNSEL

1. Mark Miller. Mr. Miller is a partner at Holland & Hart LLP. His practice focuses on the enforcement of trademarks, copyrights, trade secrets, and patents in federal court. Mr. Miller graduated from law school in 2002 and served as a law clerk for Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit and Judge Dee Benson of the U.S. District Court for the District of Utah. He began representing Respondent in trademark matters around 2009. Mr. Miller was involved in various aspects of Respondent's trademark litigation, including the negotiation, drafting, and enforcement of several of the challenged settlement agreements between 2009 and 2013. Respondent anticipates that Mr. Miller will testify regarding: (1) Respondent's trademarks and brand; (2) Respondent's monitoring, protection and enforcement of its trademarks, including as performed by Messrs. Miller and Pratt, their colleagues and staff, and other outside counsel, and including cease and desist letters sent to offending parties, communications and correspondence with offending parties and their counsel, trademark litigation, trademark settlement agreements, the enforcement of trademark settlement agreements, and contact lens retailers and others relating to the unauthorized use of its trademarks; and (3) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

2. Bryan Pratt. Mr. Pratt is a partner at Holland & Hart LLP. His practice focuses on the enforcement, management, and licensing of intellectual property. Mr. Pratt graduated from law school in 2003 and began representing Respondent in trademark matters as an attorney at Rader, Fishman & Grauer LLP around 2005. In 2009, Mr. Pratt joined Holland & Hart LLP,

and continued to be involved in various aspects of Respondent's trademark litigation, including the negotiation, drafting, and enforcement of several of the challenged settlement agreements. Respondent anticipates that Mr. Pratt will testify regarding: (1) Respondent's trademarks and brand; (2) Respondent's monitoring, protection, and enforcement of its trademarks, including as performed by Messrs. Miller and Pratt, their colleagues and staff, and other outside counsel, and including cease and desist letters sent to offending parties, communications and correspondence with offending parties and their counsel, trademark litigation, trademark settlement agreements, the enforcement of trademark settlement agreements, and communications and correspondence with search engines, contact lens retailers and others relating to the unauthorized use of its trademarks; and (3) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

IV. OTHER THIRD-PARTY WITNESSES

1. **Robert Drumm**. Mr. Drumm is the Marketing Director for AC Lens, an online retailer of contact lenses. Respondent anticipates that Mr. Drumm will testify regarding: (1) the market for contact lenses, including competitors and actual or potential customers; (2) marketing or advertising of contact lenses, including paid search advertising; (3) the unauthorized use of competitor trademarks in advertising, including the appropriateness and effectiveness of such uses in paid search advertising; (4) communications with Respondent or others about the unauthorized use of trademarks in advertising, including any cease and desist correspondence, trademark litigation or trademark settlement agreements; (5) the reasons behind any decision about whether or not to engage in the unauthorized use of a competitor's trademark in paid search advertising; (6) the effect of the unilateral pricing policies of contact

lens manufacturers on the retail market for contact lenses; and (7) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

2. **Sandhya Mohan.** Ms. Mohan is Senior Product Manager for Walmart, where she has responsibility for supervising Walmart's paid search advertising campaigns.

Respondent anticipates that Ms. Mohan will testify regarding (1) Walmart's ecommerce marketing; (2) Walmart's marketing of contact lenses, including through paid search advertising; (3) the effects of ad position; (4) differences between paid and organic links; (5) Walmart's budgeting for paid search advertising, including for its contact lens business; (6) Walmart's agreements with other companies not to bid on certain keywords; (7) Walmart's relationship with AC Lens; and (8) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

3. **Cary Samourkachian.** Mr. Samourkachian is the President and Chief Executive Officer of Lens.com, and online retailer of contact lenses. Respondent anticipates that Mr. Samourkachian will testify regarding: (1) the market for contact lenses, including competitors and actual or potential customers; (2) marketing or advertising of contact lenses, including paid search advertising; (3) the unauthorized use of competitor trademarks in advertising, including the appropriateness and effectiveness of such uses in paid search advertising; (4) communications with Respondent or others about the unauthorized use of trademarks in advertising, including any cease and desist correspondence or trademark litigation; (5) the reasons behind any decision about whether or not to engage in the unauthorized use of a competitor's trademark in paid search advertising; and (6) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

4. **David Owens**. Mr. Owens is a Senior Buyer at Walmart, with responsibility for overseeing promotions and supply agreements for Walmart's contact lens products. Respondent anticipates that Mr. Owens will testify regarding (1) Walmart's competitors for the sale of contact lenses; (2) Walmart's pricing of contact lenses; (3) consumer perceptions and preferences with respect to contact lenses; (4) Walmart's marketing of contact lenses; (5) Walmart's relationship with AC Lens; and (6) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

5. **Rukmini Iyer (Microsoft)**. Mr. Iyer is a Partner Scientist at Microsoft with responsibility for research and development, prediction and optimization for Bing Ads. Respondent anticipates that Mr. Iyer will testify regarding: (1) the history, operation, and characteristics of search advertising; (2) Bing's policies regarding an advertiser's use of a competitor's trademark to trigger competing ads in paid search advertising and/or an advertiser's purchase of Keywords so as to trigger presentation of a paid ad in response to a search term that consists of another company's trademark or a variant thereof; (3) Bing's policies regarding, and the operation of, its search advertising auctions; (4) communications with Respondent and other trademark holders or advertisers regarding such policies and practices, including suggestions for resolving disputes among them; (5) Bing's knowledge of and position regarding the challenged settlement agreements; and (6) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

V. RESPONDENTS' EXPERT WITNESSES

1. **Howard Hogan.** Mr. Hogan is a partner at Gibson, Dunn & Crutcher LLP. He is an accomplished trademark lawyer with more than 17 years of experience advising clients regarding the enforcement of their trademarks and defending against allegations of trademark infringement. Mr. Hogan will testify regarding the contents and opinions offered in his expert report dated February 23, 2017. In particular, Respondent anticipates that Mr. Hogan will testify regarding: (1) the nature of keyword advertising, including its history, changes to the appearance of search engine results pages, and search engine's policies regarding the use of trademarks; (2) the legal protections related to the use of trademarks in search advertising, and the development of those protections, including other litigation regarding the use of trademarks in search advertising; (3) the reasonableness of Respondent's challenges to the conduct of the other retailers with whom Respondent ultimately settled by the agreements at issue in this action, (4) the reasonableness and commonplace nature of the agreements settling 1-800 Contacts' complaints; (5) the narrowness and appropriateness of the relief provided by those agreements; and (6) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses, including responding to Complaint Counsel's rebuttal expert testimony.

2. **Dr. William Landes.** Dr. Landes is the Clifton R. Musser Professor Emeritus of Law and Economics at the University of Chicago Law School. He has published extensively on the general subject of economic analysis of law, including intellectual property, litigation, and settlements. He is the co-author with Richard A. Posner of a book entitled *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003), which contains two chapters on the economics of trademarks. Dr. Landes will testify regarding the contents and

opinions offered in his expert report dated February 23, 2017. In particular, Respondent anticipates that Dr. Landes will testify regarding: (1) the economics of trademarks, including the benefits trademarks provide to consumers by reducing search costs and the value that trademarks provide to firms; (2) the application of economic principles to trademark protections, including the pro-competitive effect of trademark protection; (3) the failure of Complaint Counsel's experts, Drs. Athey and Evans, to adequately address the benefits of trademarks in their analyses; and (4) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses, including responding to Complaint Counsel's rebuttal expert testimony.

3. **Dr. Anindya Ghose.** Dr. Ghose is a Professor of Information, Operations, and Management Sciences and a Professor of Marketing, at New York University Stern School of Business. The principal focus of Dr. Ghose's research is the economic consequences of the Internet on industries and markets. He has authored or co-authored various publications on issues related to the economics of search engines and search engine advertising. Dr. Ghose will testify regarding the contents and opinions offered in his expert report dated February 23, 2017. In particular, Respondent anticipates that Dr. Ghose will testify regarding: (1) the nature and mechanics of search engines, including organic results and paid search advertising; (2) academic research and industry sources indicating that Respondent's settlement agreements reduced consumers' online search costs; (3) academic literature and industry sources indicating that consumers who search for a retailer's trademark generally intend to navigate to the retailer's website; (4) an empirical analysis of Google and Bing ad auction and query data indicating that consumers who searched for Respondent's trademarks intended to navigate to Respondent's website; (5) an empirical analysis indicating that the challenged settlement

agreements had a limited effect on the market for contact lenses; (6) the failure of Complaint Counsel's experts, Drs. Athey and Evans, to properly evaluate the impact of the settlement agreements on paid search advertising; and (7) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses, including responding to Complaint Counsel's rebuttal expert testimony.

4. **Dr. Kent Van Liere.** Dr. Van Liere is a well-known expert in administering consumer surveys. He is a Managing Director at NERA Economic Consulting. Over the course of his 30-year career, Dr. Van Liere has conducted several hundred surveys for leading corporations and government agencies, and has published articles in leading peer-reviewed journals in which consumer attitudes, choices, and behavior have been the focus. Dr. Van Liere will testify regarding the contents and opinions offered in his expert report dated February 23, 2017. In particular, Respondent anticipates that Dr. Van Liere will testify regarding: (1) the methodology, implementation, and result of a survey he conducted 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 are the same as or affiliated with Respondent; (2) the inadequacies and unreliability of the survey conducted by Complaint Counsel's expert, Dr. Jacoby; and (3) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses, including responding to Complaint Counsel's rebuttal expert testimony.

5. **Dr. Ronald Goodstein.** Dr. Goodstein is an Associate Professor of Marketing at Georgetown University's McDonough School of Business. Dr. Goodstein is an expert on issues relating to marketing and brand equity and in analyzing determinants and evidence of consumer

confusion. He has personally designed or analyzed hundreds of surveys and questionnaires pertaining to consumers' opinions and behaviors relating to marketing and branding. Dr. Goostein is the co-author of a recent article in Trademark Reporter (the only peer-reviewed journal dedicated to trademark law) that analyzes the use of trademarks as keywords in paid search advertising. Dr. Goodstein will testify regarding the contents and opinions offered in his expert report dated February 23, 2017. In particular, Respondent anticipates that Dr. Goodstein will testify regarding: (1) the distinctive nature of Respondent's trademarks, and the value thereof; (2) the consumer confusion that can reasonably be expected from sponsored ads by other retailers appearing in response to a search for Respondent's trademarks; (3) the dilution of Respondent's trademarks that reasonably can be expected from sponsored ads by other retailers appearing in response to a search for Respondent's trademarks; (4) the navigational quality of searches for Respondent's trademarks and brand; and (5) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses, including responding to Complaint Counsel's rebuttal expert testimony.

6. **Dr. Kevin Murphy.** Dr. Murphy is the George J. Stigler Professor of Economics in the Booth School of Business and the Department of Economics at the University of Chicago. He is also a Senior Consultant at Charles River Associates. Dr. Murphy is an expert in the field of integrating economic principles with empirical analysis, including the analysis of the competitive effects of agreements between firms. Dr. Murphy will testify regarding the contents and opinions offered in his expert report dated February 23, 2017. In particular, Respondent anticipates that Dr. Murphy will testify regarding: (1) the economics of trademarks and competition; (2) the relevant antitrust market for retail sales of contact lenses; (3) Respondent's lack of monopoly power in any relevant market; (4) his analysis of the

economic evidence and economic literature indicating that one cannot infer from the challenged settlement agreements that they had more than a *de minimis* effect on competition; (5) his empirical analysis indicating that the challenged settlement agreements did not, in fact, harm competition in the market for retail sales of contact lenses or consumers of those lenses; (6) the procompetitive effects of the challenged settlement agreements; (7) the inadequacies and unreliability of conclusions reached by Complaint Counsel's experts, Drs. Evans and Athey; and (8) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses, including responding to Complaint Counsel's rebuttal expert testimony.

DATED: March 14, 2017

Respectfully submitted,

/s/ Steven Perry

Gregory P. Stone (gregory.stone@mto.com)
Steven M. Perry (steven.perry@mto.com)
Garth T. Vincent (garth.vincent@mto.com)
Stuart N. Senator (stuart.senator@mto.com)
Gregory M. Sergi (gregory.sergi@mto.com)
Zachary M. Briers (zachary.briers@mto.com)
Julian M. Beach (julian.beach@mto.com)

Munger Tolles & Olson LLP
350 South Grand Ave, 50th Floor
Los Angeles, CA 90071
Phone: (213) 683-9100
Fax: (213) 687-3702

Justin P. Raphael (justin.rafael@mto.com)
Munger Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105

Chad Golder (chad.golder@mto.com)
Munger, Tolles & Olson LLP
1155 F Street, NW
Washington, D.C. 20004

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave., Suite 300
Pasadena, CA 91101
Counsel for 1-800 Contacts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic mail delivery, to each person designated on the official service list compiled by the Secretary in this proceeding.

Executed in Los Angeles, California on March 14, 2017.

Respectfully submitted,

/s/ Steven Perry

Gregory P. Stone
(gregory.stone@mto.com)
Steven M. Perry
(steven.perry@mto.com)
Garth T. Vincent
(garth.vincent@mto.com)
Stuart N. Senator
(stuart.senator@mto.com)
Gregory M. Sergi
(gregory.sergi@mto.com)
Zachary M. Briers
(zachary.briers@mto.com)
Julian M. Beach
(julian.beach@mto.com)
Munger, Tolles & Olson LLP
350 South Grand Ave, 50th Floor
Los Angeles, CA 90071
Phone: (213) 683-9100
Fax: (213) 683-5161

Justin P. Raphael, Esq.
(justin.raaphael@mto.com)
Munger Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105

Chad Golder (chad.golder@mto.com)
Munger, Tolles & Olson LLP
1155 F Street, NW
Washington, D.C. 20004

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave., Suite 300
Pasadena, CA 91101

Counsel for 1-800 Contacts, Inc.

EXHIBIT D

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

In the Matter of

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

Docket No. 9372

**COMPLAINT COUNSEL'S FIRST SET OF REQUESTS
FOR PRODUCTION TO RESPONDENT 1-800 CONTACTS, INC.**

Pursuant to the Federal Trade Commission's Rule of Practice, 16 C.F.R. § 3.37, and the Definitions and Instructions set forth below, Complaint Counsel hereby requests that Respondent 1-800 Contacts, Inc. ("1-800 Contacts") produce within 30 days all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests:

1. All Documents Relating to correspondence between 1-800 Contacts and any other Person related to Negative Keywords. *See, e.g.*, 1-800F_00033564 (referring to a "recommended list" of negative keywords provided in 2011 to Ciba and Vistakon).
2. For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show the first date on which 1-800 Contacts instructed a Search Engine to implement such a Negative Keyword.
3. For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show any dates on which 1-800 Contacts instructed a Search Engine to cease implementing such a Negative Keyword.
4. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any filing made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party. This request includes documents submitted by 1-800 Contacts, as well as documents submitted by any other person who made a filing relating to a transaction to which 1-800 Contacts was a party.
5. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any Request for Additional Information made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party.

6. All Documents Relating to any Unilateral Pricing Policy adopted by a manufacturer of contact lenses, such as the Unilateral Pricing Policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014, including but not limited to: (a) Documents discussing the impact of a Unilateral Pricing Policy on 1-800 Contacts; and (b) Documents discussing the impact of a Unilateral Pricing Policy on any Competitor, Affiliate, or group of Competitors or Affiliates of 1-800 Contacts.

7. All documents related to correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding: trademarks, litigation, advertising (including but not limited to search advertising), or a contractual relationship between 1-800 Contacts and any other seller of contact lenses (including but not limited to actual, potential, or claimed breaches of existing contracts).

8. All Documents Relating to contact lens purchases by customers or former customers of 1-800 Contacts from any retailer seller of contact lenses other than 1-800 Contacts, including documents analyzing switching by 1-800 Contacts' customers and former customers and/or switching by customers of other contact lens retailers.

9. All data used, presented, or summarized by Bain and Company in connection with due diligence or competitive analysis of Vision Direct on behalf of 1-800 Contacts, including but not limited to responses to surveys of contact lens consumers such as the data summarized in the draft presentation "Vision Direct Competitive Positioning," dated May 2015. *See* Bates number 1-800F_00056323.

10. All analyses comparing 1-800 Contacts' prices to the prices of a Competitor.

11. All documents analyzing the effect of increased price visibility on 1-800 Contacts' sales, pricing, or profitability. This request includes, but is not limited to, all documents created in response to Tim Roush's request for analysis in 1-800F_00055885. The term "price visibility" has the same meaning as in 1-800F_00055885.

12. All documents, except for documents which have already been produced to the Federal Trade Commission, responsive to Specifications 1, 4, 5, 6, 11, 12, 13, and 15 of the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015, in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200, found in the following locations:

- a. the files of former 1-800 Contacts employee Josh Aston, including but not limited to shared file locations Mr. Aston accessed in the ordinary course of business; and
- b. backup tapes which were restored in connection with the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015 or in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200.

13. All documents relating to the existence, terms, scope, or implementation of any Price Match Policy including but not limited to:

- a. Documents distributed to 1-800 Contacts employees with responsibility for speaking with customers or potential customers, including but not limited to scripts or other guidance provided to employees working within a call center;
- b. Documents created to inform any customer or potential customer about the existence or terms of any Price Match Policy, including but not limited to copies of all advertising relating to any Price Match Policy;
- c. Documents tracking, analyzing, or discussing the implementation, use, or effectiveness of any Price Match Policy, including, but not limited to, any log(s) that record price-match requests and fulfillment; and
- d. Documents Sufficient to Show the following information relating to 1-800's Price-Match Policies: (i) the inception date and reasons for implementing each Price Match Policy; (ii) any periods of time during which any Price Match Policy was terminated, suspended, paused, not honored, or otherwise not in effect; (iii) any actual or considered modifications in advertising policies related to the Price Match Policy, and the reasons therefor, (iv) the process required for consumers to take advantage of each Price Match Policy; and (v) the identity of the contact lens sellers whose prices were matched each time a 1-800 Contacts customer paid a price pursuant to any Price Match Policy.
- e. Documents Sufficient to Show the following information for each sale made since January 1, 2004 pursuant to any Price Match Policy: (1) SKU or UPC of product; (2) shipped date; (3) type of Competitor;¹ (4) discount provided due to price match; (5) order revenues after price match; (6) identity of Competitor; (7) whether Competitor was an internet seller; (8) customer ID number; (9) Order Number.

14. Documents Sufficient to Show the Company's quarterly and annual sales revenue for contact lenses in total, and separately, for each of the following consumer channels:

- a. Online;
- b. Telephone mail-order;
- c. In-store; and
- d. Other (identify "Other" channels).

15. Documents Sufficient to Show on a quarterly and annual basis, for contact lens sales both in total, and for each channel listed in Specification 14:

- a. Contribution Margins (defined as selling price minus variable cost);
- b. Net revenue (defined as revenue net of discounts and returns);

¹ This Request seeks the most precise available information regarding the Competitor's line of business (e.g., internet seller, Eye Care Professional, mass market retailer, club store).

- c. Cost of goods sold;
- d. Credit card fees;
- e. Variable selling, general and administrative costs.

16. Documents Sufficient to Show, either by transaction or on a weekly basis, for each UPC or SKU number sold by 1-800 Contacts:

- a. Date of sale;
- b. UPC or SKU number;
- c. Description of the product;
- d. All classification variables and product descriptors;
- e. Package size;
- f. Sales revenue;
- g. Total promotional discount;
- h. Unit sales (i.e., quantity of each item sold);
- i. Acquisition cost of the product; and
- j. The distributor from which the item was acquired.

17. Documents Sufficient to Show, on a weekly, quarterly, and annual basis, the number of orders and dollar volume of sales that 1-800 Contacts attributes to each of the following advertising channels:

- a. Paid search advertising attributable to search terms on which 1-800 claims trademark protection;
- b. Paid search advertising attributable to search terms on which 1-800 does **not** claim trademark protection;
- c. Other online advertising (and identify other online channels);
- d. Television;
- e. Print;
- f. Radio;
- g. In-store advertising;
- h. Other advertising.

18. For each Ad Group 1-800 Contacts has used on any Search Engine, provide Documents Sufficient to Show: the Campaign associated with the Ad Group, each Keyword used in the Ad Group, and for each Keyword, the following data, on a daily basis:

- a. Impressions;
- b. Clicks;
- c. Clickthrough Rate (CTR);
- d. Maximum Cost Per Click Bid;
- e. Keyword Matching Option (e.g., exact match, phrase match, or broad match);
- f. Cost Per Click;
- g. Cost Per Action;
- h. Cost Per Impression;

- i. Cost USD;
- j. Average Ad Rank;
- k. Conversion Rate; and
- l. Conversion Value.

19. All documents Relating to surveys conducted of customers and potential customers, and comments provided by customers or potential customers. *See, e.g.*, 1-800F_00075522; 1-800F_00075523; 1-800F_00075524; 1-800F_00075525.

20. All documents Relating to communications or reports received from Hitwise Pty. Ltd., Experian Hitwise, or any entity referred to as Hitwise in the ordinary course of Your business. *See, e.g.*, 1-800F_00072892; 1-800F_00072921.

For the purpose of these Requests, the following definitions and instructions apply without regard to whether the defined terms used herein are capitalized or lowercase and without regard to whether they are used in the plural or singular forms:

DEFINITIONS

1. The terms “1-800 Contacts,” “1-800,” “Company” or “Respondent” mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The term “Ad Group” has the same meaning set forth by Google in connection with its AdWords product: a collection of advertisements that “contains one or more ads which target a shared set of keywords.” See <https://support.google.com/adwords/answer/6298>.
3. The term “Ad Rank” has the same meaning set forth by Google in connection with its AdWords product: “A value that’s used to determine [an advertiser’s] ad position (where ads are shown on a page) and whether [an advertiser’s] ads will show at all.” See <https://support.google.com/adwords/answer/1752122?hl=en>.
4. The term “Affiliate” means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.
5. The terms “and” and “or” have both conjunctive and disjunctive meanings.
6. The term “Campaign” has the same meaning set forth by Google in connection with its AdWords product: “[a] set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and other settings.” See <https://support.google.com/adwords/answer/6304?hl=en>.
7. The term “Click” has the same meaning set forth by Google in connection with its AdWords product. See <https://support.google.com/adwords/answer/31799?hl=en>.
8. The term “Clickthrough rate” (CTR) has the same meaning set forth by Google in connection with its AdWords product: “the number of clicks [an] ad receives divided by the number of times [the] ad is shown.” See <https://support.google.com/adwords/answer/2615875?hl=en>.
9. The term “Competitor” means any person other than 1-800 Contacts engaged in the business of selling contact lenses to consumers.
10. The term “Computer Files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Respondent should produce Documents that exist in machine-readable form, including Documents stored in personal

computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the Respondent believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel's need for Documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel identified on the last page of this request. Complaint Counsel will consider modifying this instruction to:

- a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Respondent;
 - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel; or
 - c. include other proposals consistent with Commission policy and the facts of the case.
11. The term "Containing" means containing, describing, or interpreting in whole or in part.
 12. The terms "Conversion Rate" and "Conversion Value" have the same meanings set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/2684489?hl=en>; <https://support.google.com/adwords/answer/6095947?hl=en>.
 13. The terms "Cost per Click", "Cost Per Action," "Cost Per Impression," and "Cost USD" has the same meaning set forth by Google in connection with its AdWords product.
 14. The terms "Discuss" or "Discussing" mean in whole or in part constituting, Containing, describing, analyzing, explaining, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. A document that "Discusses" another document includes the other document itself.
 15. The term "Documents" means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Respondent. The term "Documents" includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or Relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person's files; and copies of documents the originals of which are not in the possession, custody, or control of the Respondent.

Unless otherwise specified, the term "Documents" excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely

transactional nature; (b) architectural Plans and engineering blueprints; and (c) documents solely Relating to environmental, tax, human resources, OSHA, or ERISA issues.

16. The term “Documents Sufficient to Show” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
17. The terms “each,” “any,” and “all” mean “each and every.”
18. The term “Impression” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6320?hl=en>.
19. The term “Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[w]ords or phrases describing [an advertiser’s] product that [the advertiser] choose[s] to help determine when and where [the advertiser’s] ad can appear” in response to an internet search by an end user. *See* <https://support.google.com/adwords/answer/6323?hl=en>.
20. The term “Keyword Matching Option” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/2497836?hl=en>.
21. The term “Maximum Cost Per Click Bid” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6326?hl=en>
22. The term “Negative Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[a] type of keyword that prevents [and advertiser’s] ad from being triggered by certain words or phrases.” *See* <https://support.google.com/adwords/answer/105671?hl=en>.
23. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
24. The terms “Plan” or “Plans” mean proposals, strategies, recommendations, analyses, reports, or considerations, whether or not tentative, preliminary, precisely formulated, finalized, authorized, or adopted.
25. The term “Price Match Policy” means any 1-800 Contacts Plan, policy, or strategy involving offering customers the opportunity to pay a discounted price determined by the price that a Competitor offers for the same product.
26. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining,

describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

27. “Search Engine” means a computer program, available to the public without charge, to search for and identify websites on the World Wide Web based on a User Query.
28. “Search Engine Results Page” means a webpage displayed by a Search Engine in response to a User Query.
29. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.
30. The term “Unilateral Pricing Policy” means any policy, practice, or announcement by a manufacturer of contact lenses relating to the price at which retailers sell contact lenses to consumers, in particular the policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014. *See, e.g., Contact Lens Makers and Discounters Tussle Over Price Setting, New York Times* (March 26, 2015), available at http://www.nytimes.com/2015/03/27/business/contact-lens-makers-and-discounters-tussle-over-price-setting.html?_r=0 (“[O]pponents [of unilateral pricing policies], which include big discounters such as Costco and 1-800 Contacts as well as the nonprofit group Consumers Union, say the policies amount to illegal price-fixing and are restricting consumer choice in an industry that has long been accused of anticompetitive practices.”), *Debate about contact-lens prices revives Florida’s eye wars, Tampa Bay Times* (March 24, 2015) (“Influential Tallahassee lobbyist Marc Reichelderfer, a GOP strategist representing 1-800-CONTACTS, is leading the effort to do away with the pricing policies.”), available at <http://www.tampabay.com/news/politics/stateroundup/debate-about-contact-lens-prices-revives-floridas-eye-wars/2222578>.
31. “User Query” means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2002, to the present.
2. Respondent need not produce responsive documents that Respondent has previously produced to the Commission in relation to the prior investigation, FTC No. 141-0200. **Respondent must produce all other responsive documents, including any otherwise responsive documents that may have been produced by Respondent to the Commission in relation to any other investigation conducted by the Commission.**
3. This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by the Respondents up to fifteen (15) calendar days prior to the date of the Company's full compliance with this request.
4. Except for privileged material, the Company will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
5. Unless modified by agreement with Complaint Counsel, these Requests require a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Complaint Counsel with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's Electronically Stored Information.
6. Form of Production. The Company shall submit all documents as instructed below absent written consent signed by Complaint Counsel.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
 - ii. Submit emails in image format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Parent ID	The Document ID of the parent email.

Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.

Hash	The Secure Hash Algorithm (SHA) value for the original native file.
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- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.
- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Company intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact Complaint Counsel to discuss whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.
- d. Produce electronic file and image submissions as follows:
- i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and

- iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with this subpoena.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹
 - e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
7. All documents responsive to these requests:
- a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files;
 - b. Shall be marked on each page with corporate identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. Complaint Counsel will provide a sample index upon request.
8. If any documents are withheld from production based on a claim of privilege, the Respondent shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not

¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege.

9. If the Respondent is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Respondent to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation “est.” If there is no reasonable way for the Respondent to make an estimate, provide an explanation.
10. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company’s document retention policy but the Respondent has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
11. The Company must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and
 - a. if the company utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - b. if the company utilized Technology Assisted Review software;
 - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the company utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the company handled exceptions (“uncategorized documents”); and if the company’s documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and
 - ii. provide all statistical analyses utilized or generated by the company or its agents related to the precision, recall, accuracy,

validation, or quality of its document production in response to this subpoena; and identify the person(s) able to testify on behalf of the company about information known or reasonably available to the organization, relating to its response to this specification.

- c. if the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this subpoena, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena

12. Any questions you have relating to the scope or meaning of anything in subpoena or suggestions for possible modifications thereto should be directed to Katie Clair at (202) 326-3435, kclair@ftc.gov. The response to the request shall be addressed to the attention of Katie Clair, Federal Trade Commission, 400 7th Street SW, Washington, D.C. 20024, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

Dated: September 8, 2016

Respectfully Submitted:

/s/ Dan Matheson
Dan Matheson
Katie Clair
Barbara Blank
Charlotte Slaiman
Gus Chiarello
Nathaniel Hopkin
Joshua Gray
Thomas Brock
Charles Loughlin
Geoffrey Green

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on SEPTEMBER 8, 2016 I served COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION via electronic mail on the following counsel for Respondents:

Steven Perry, Steven.Perry@mto.com
Justin Raphael, Justin.Raphael@mto.com
Stuart Senator, Stuart.Senator@mto.com
Gregoy Stone, Gregory.Stone@mto.com
Gregory Sergi, Gregory.Sergi@mto.com
Garth Vincent, Garth.Vincent@mto.com

Date: September 8, 2016

By: /s/Dan Matheson
Dan Matheson

EXHIBIT E



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Anticompetitive Practices Division

October 26, 2016

VIA EMAIL

Garth Vincent
Greg Sergi
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Garth.Vincent@mto.com
Gregory.Sergi@mto.com

Re: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Garth and Greg,

I write to follow up from our conversation on Friday, October 21, 2016 regarding 1-800's objections and responses to Complaint Counsel's First and Second Sets of Requests for Production.

Scope of Search and Collection Efforts:

You proposed that, to the extent you are responding to the below requests by applying search terms to and reviewing custodial documents, you plan to search the files of each of the 20 individual custodians and 3 centralized servers (departmental custodians) listed in your October 19, 2016 email to Dan Matheson for the following time periods: (1) January 1, 2004 through December 31, 2005 and (2) January 1, 2013 (or the end of the period for which that custodian's files were searched and reviewed in connection with your CID response) through the date that custodian's files were collected in connection with your response to the CID (which you stated was in most cases a date in 2015 or 2016).

Complaint Counsel Response: This general approach is acceptable to Complaint Counsel, subject to the following modifications:

Letter to Garth Vincent and Greg Sergi
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- (1) We believe it is also appropriate for 1-800 to refresh its collections to the present for the following five custodians: Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, and Kevin Hutchings and include these custodians' files among those searched in response to Complaint Counsel's requests. To be clear, we are not asking you to refresh the collections for other current employees (Jay Magure, Nathan Blair, John Graham, and Roy Montclair) or for departmental custodians.
- (2) As noted below, we request that your searches response to RFPs 11 and 13(d)(iii), and your production of at least certain types of files in response to RFP 17, include files of the above-referenced custodians from the 2006-2012 time period that were collected but not previously produced.

Finally, to the extent you are responding to the below requests not by applying search terms to and then conducting a review of custodial files but rather by pulling a targeted set of responsive documents (i.e., treating the requests as what are sometimes referred to "go-gets"), we expect a production for the entire time period from 2004 to present.

Timing of Productions

For each request below, except those for which you have already completed your response, please inform us of the date by which you expect to complete your production.

Recent Production:

We received and are reviewing your most recent production, which you indicated during Friday's call would contain the following materials:

- Search Advertising data, including change history, in response to RFPs 2, 3, and 18;
 - It was not clear from our meet and confer whether this production would contain only data from your search engine advertising accounts dating back two years or would also any ad hoc responsive files, such as print outs from AdWords data. We will continue to review this production, but to the extent these ad hoc files are not included in today's production, please advise when they will be produced.
- Consolidated financial reports in response to RFPs 14 and 15;
- Spreadsheets reporting on the incidence of price matching dating back to either 2007 or 2009, portions of 1-800's website explaining its price match policy, portions of employee training manuals regarding methods for implementing the price match policy, in partial response to RFP 13; and
- Hitwise reports in partial response to RFP 20.

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Other Requests:

RFP 1: You stated that 1-800 will conduct a search among the custodial files identified above for relevant search terms (including, at the least, the terms “NKW,” “negative keyword,” and “negative keywords”) and produce responsive documents resulting from those searches.

CC Response: Subject to our modification regarding a limited refresh as described above, we agree that this is a reasonable approach.

RFPs 4 and 5: You stated that 1-800 will produce responsive documents in the format in which they exist in 1-800’s files, even if in some instances, the files are in redacted form.

CC Response: We agree this is a reasonable approach.

RFP 6: You proposed searching and reviewing only the files of Tim Roush and Laura Schmidt for reports or analysis of the impact of UPP policies on 1-800. You stated that these individuals were the two people within the company responsible for analysis of UPP’s impact on 1-800’s business and of 1-800’s responses thereto, and that any responsive materials in the custodial files of individuals junior to Mr. Roush and Ms. Schmidt would have also been shared or summarized at a higher level with Mr. Roush and Ms. Schmidt.

CC Response: We agree this is a reasonable approach (a) subject to our modification regarding a limited refresh as described above and (b) so long as the files of 1-800’s CEO Mr. Bethers are also included.

RFP 7: You proposed conducting a search, for the custodians and time periods identified above, for domain names used in the email addresses of relevant sellers of contact lenses and, within the results, applying a reasonable set of search terms to identify documents regarding search advertising and trademark usage.

CC Response: We agree this is a reasonable approach (a) subject to our modification regarding a limited refresh as described above and (b) subject to the following guidance regarding search terms and domain names:

- Search Terms: While you mentioned potential search terms such as “AdWords,” “sponsored link,” and “trademark,” we did not come to any concrete agreement on a complete set of search terms that would be reasonable for this request. These three terms are reasonable as examples (but not a complete list) of the terms that Complaint Counsel believes would be reasonable to use for this purpose. We would appreciate if you would propose a list of search terms. In our view, a reasonable list would include at least the three terms above plus “infringement,” “infringe,” “infringing,” “infringed,” “paid search,” “Bing Ads,” “Yahoo Search,” “advertising,” “advertisement,” “ad,” “keyword” “KW,” “TM,” “search engine,” and variations of these terms as appropriate (e.g., plural versions).

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- Domain Names: You also proposed that Complaint Counsel provide a list of domain names for this search. We believe that 1-800 should undertake the responsibility to identify the relevant domain names used at any point during the relevant time period, but we believe that the list should cover at the least all known or reasonably ascertainable domain names used by the following companies (including their relevant predecessors, parents, or subsidiaries with which 1-800 may have corresponded, and including domain names associated with any relevant “doing business as” names for any such entities) from 2004 through the present:
 - 2weekdisposables
 - America’s Best
 - Arlington Contact Lens Service, d/b/a AC Lens or Discount Contact Lenses
 - BJ’s
 - Coastal Contacts
 - Contact Lens King
 - Contacts Direct
 - Costco
 - Empire Vision, d/b/a ECCA
 - EZ Contacts USA, d/b/a Provision Supply
 - Luxottica, d/b/a LensCrafters, Pearle Vision, Sears Optical, or Target Optical
 - Lens.com
 - LensDirect
 - Lens Discounters
 - Lenspure
 - Price Smart Contacts
 - Memorial Eye, d/b/a ShipMyContacts.com
 - Oakwood Eye Clinic, d/b/a Lenses for Less
 - Sam’s Club
 - Save On Lens
 - Standard Optical
 - Tram Data, d/b/a Replace My Contacts or Lensfast
 - Vision Direct, d/b/a Lensworld
 - Walgreens
 - Walmart
 - Web Eye Care

RFP 8: You stated that your client has pointed you to certain types of reports as the files likely to contain responsive information and that we can have a further discussion about these files after you are able to better understand what is in these reports.

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CC Response: Please let us know when you will be ready to make this production or further discuss this request.

RFP 9: You stated that you will produce any responsive documents and data that are in 1-800's possession, not including documents and data in the possession of 1-800's corporate parent, AEA; that 1-800 will not produce anything in AEA's possession on the grounds that some [REDACTED] materials that AEA procured before AEA's purchase of 1-800 have been considered confidential to AEA; that because [REDACTED] was retained by AEA rather than 1-800 directly, 1-800 will not ask [REDACTED] for the responsive materials; and that 1-800 will not ask AEA for assistance obtaining any of the requested data from [REDACTED].

CC Response: As we stated on the call, we are not convinced that the distinction between 1-800 and its corporate parent is of any relevance to 1-800's practical ability or legal obligation to produce the requested materials and believe that nothing prevents 1-800 from asking AEA to produce any responsive materials in its possession or from asking AEA to request that Bain provide any responsive materials still in Bain's possession.

We have a few follow up questions:

- 1) What is the factual and legal basis for your claim that Bain-produced materials regarding the potential acquisition of [REDACTED] are confidential to AEA (to the exclusion of 1-800) and not in the possession, custody, or control of 1-800?
- 2) How are the requested materials differently situated than the Bain-produced materials that are already in the record in this litigation, for example, the report referenced in Request 9?
- 3) To the extent responsive materials are confidential to AEA alone, is there any reason that production of the materials as AEA-confidential (on an outside counsel basis under the protective order) would not resolve any concerns about confidentiality?

RFP 10: You stated that you have begun to discuss this request with your client but need to continue further discussions with 1-800 personnel to identify which analyses or reports are the appropriate ones to produce.

CC Response: Please let us know when you will be ready to make this production or further discuss this request.

RFP 11: 1-800 proposed undertaking the following:

- A targeted search using email threading or a similar technology to identify all emails sent in response to the communication referenced in the Request (1-800F_00055885); and

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- Separately, a search across the custodial files identified above for the term “price” within three words of the term “visibility.” You stated that you will conduct this search for the entire time period—even including the 2006-2012 period—and either review the results and produce responsive documents or let us know whether you have concerns with the volume of the results and wish to narrow the search.

CC Response: We agree this is a reasonable approach subject to our modification regarding a limited refresh as described above.

RFP 12: You stated that, regarding Request 12(a), responsive files from Josh Aston have already been produced, and that, regarding Request 12(b), the only backup tape that was restored previously was restored only in part, not in its entirety; that the parts that have been restored contained the files of Messrs. Craven and Dansie, which have since been reviewed and produced, as well as entirely irrelevant files (for example, personal photos); and that there are consequently no remaining unrestored portions of the tape that can be searched and reviewed in connection with this request.

CC Response: Based on these representations, this is acceptable to Complaint Counsel. But, for the avoidance of doubt, to the extent that the previously restored portions of this backup tape contain files of any of the 20 individual and 3 departmental custodians identified above that have not yet been produced, they should be among the files searched in response to the other requests discussed in this letter. For example, the restored files of Messrs. Craven and Dansie (who are among the custodians identified above) from this tape that have not been produced are part of these individuals’ custodial files and should be among those searched in response to other requests.

RFP 13: In addition to the materials to be included in 1-800’s forthcoming production in response to several sub-parts of Request 13, which are described above, we also discussed Request 13(d)(iii), which seeks production of materials discussing “any actual or considered modifications in advertising policies related to the Price Match Policy, and the reasons therefor.” While we discussed some of the types of policy changes that you believe have occurred over time, we did not close the loop on a plan for reviewing and producing materials discussing these changes.

Additionally, you noted that certain information (such as the identity of the competitor whose price was matched) is unavailable except where it appears, ad hoc, in the notes field of customer call notes. I asked about the feasibility of producing 1-800’s underlying customer call notes files, including whether these are kept in electronic format, whether they consist of handwritten or typed notes, whether they are searchable (such that 1-800 or Complaint Counsel could search them for terms related to 1-800’s price matching policies).

CC Response: Please tell us your plan for responding to Request 13(d)(iii). We believe that a response should apply a reasonable set of search terms to the files of the custodians identified above (a) subject to our modification regarding a limited refresh as described above

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and (b) including files collected but not produced from the 2006-2012 time period. To the extent that responsive files have already been produced for the 2006-201 period, applying a reasonable set of search terms to the unproduced 2006-2012 files will pose little-to-no additional burden. To the extent that files responsive to Request 13(d)(iii) from that period were not included in earlier productions, they should be produced here.

Additionally, please provide further information about the customer call notes files in response to the questions I raised on the call, as noted above.

RFP 16: You mentioned that your transactional data responsive to RFP 16 contains personally identifiable information (PII), but that in the past, you have removed or anonymized names and addresses and propose doing the same for this production in order to avoid producing PII.

You also mentioned that 1-800 has responsive information but that it is voluminous and may take several weeks to produce, and asked whether we might consider narrowing our request.

CC Response: As noted on the call, we agree that production of transactional data with individual customer names and addresses removed or rendered anonymous is our preferred approach and we appreciate your ability to produce in this manner.

We have also considered possible ways to narrow our request for transactional data and have a proposal: While the request seeks data “for each UPC or SKU number sold by 1-800 Contacts,” we will accept (and in fact, would prefer) to receive data by product code instead of the more granular UPC or SKU data. We understand that producing by product code rather than UPC or SKU is likely to be less burdensome and result in a less voluminous production.

Further, as you noted that the main concern with this request is a matter of timing, we propose a production on a rolling basis, with the last five years of data produced first, followed by productions from earlier time periods. Also, as I noted on the call, if there are particular aspects of the request that are causing any particular logistical concerns, we remain open to hearing what those particular concerns are.

RFP 17: You proposed that 1-800:

- produce “last click” data, and
- search custodian files (as described above) for ad-hoc reporting of the requested information, review the results, and produce responsive information.

CC Response: Assuming a reasonable set of search terms and search methodology (which we did not discuss in our meet and confer with respect to this request), and assuming your search captures both formal and informal reporting of responsive information and includes not only PowerPoints but also at the least, emails and Excel files, this approach is acceptable subject to our modification regarding a limited refresh as described above.

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We also refer you to the discussion in Dan Matheson's October 18, 2016 letter of Request 17 and the types of files we believe should be appropriately included in the responsive production. In compiling ensuring a complete set of the types of files we referenced in that letter, we believe that the 2006-2012 period should not be excluded.

RFP 19: You stated that 1-800 possesses materials regarding many types of surveys about a wide variety of topics and sought clarification about the types of surveys we are seeking. We stated that we are seeking responsive materials concerning surveys regarding two broad categories of information:

- Consumer confusion, and
- Competitive information, such as surveys regarding satisfaction with the company's service or prices; surveys comparing 1-800 to other retailers; and surveys asking how customers heard about 1-800, why customers chose to purchase from 1-800, or where they purchased contact lenses before purchasing from 1-800, etc.

You stated that you now understand better what we are looking for and confer with your client to identify responsive materials.

CC Response: Please let us know when you will be ready to make your production or further discuss this request.

RFP 20: In addition to the Hitwise reports you indicated are included in today's production, we also discussed documents reflecting analyses of Hitwise reports. You stated that these are not included in today's production but you will endeavor to search for and produce these as well.

CC Response: Please let us know when you will be ready to make this production or further discuss this request.

RFP 21: You stated that it is your understanding that 1-800's counsel at Holland and Hart is not at this point intentionally withholding any documents on the basis that they are Memorial Eye confidential and is looking through its files to determine whether it possesses any responsive documents other than those Complaint Counsel identified in its previous correspondence on this issue.

CC Response: Please let us know when this search will be completed and when this production will be ready. To the extent that de-duplicating files we have already received is taking time, we are happy to receive Holland and Hart's entire set of responsive Memorial Eye-produced litigation materials and handle de-duplication ourselves.

If you have any concerns, or wish to discuss this issue further, please contact me at 202-326-3435 or Dan Matheson at 202-326-2075.

Letter to Garth Vincent and Greg Sergi
October 26, 2016
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Sincerely,

/s/ Kathleen Clair
Kathleen Clair
Attorney

cc: Geoffrey Green
Barbara Blank
Dan Matheson

EXHIBIT F

From: Stone, Gregory <Gregory.Stone@mto.com>
Sent: Tuesday, January 10, 2017 12:20 PM
To: Matheson, Daniel
Cc: Vincent, Garth; Ikeda, Mika
Subject: Re: Depositions on January 18

Dan,

Since Mr. Osmond will cover more subject matter, I think it makes sense to start with him at 8. We have asked him to plan on that. Will that work for you?

Greg

Sent from my BlackBerry 10 smartphone.

From: Matheson, Daniel
Sent: Tuesday, January 10, 2017 5:51 AM
To: Stone, Gregory
Cc: Vincent, Garth; Ikeda, Mika
Subject: RE: Depositions on January 18

Greg,

Thanks very much. We will plan to proceed as you have suggested. I agree that consecutively should work well, starting the first deposition at 8:00 and the second at 1:00. We will send out deposition notices today or tomorrow.

Regards,

Dan

From: Stone, Gregory [<mailto:Gregory.Stone@mto.com>]
Sent: Monday, January 09, 2017 10:25 PM
To: Matheson, Daniel
Cc: Vincent, Garth
Subject: Depositions on January 18

Dan,

Thanks for the call earlier today in regard to the draft 3.33(c)(1) deposition notice. I felt we had a very productive conversation. As Garth noted in his recent email, we will be designating two witnesses who you are not already scheduled to depose. They will be made available for deposition on January 18. You can take them concurrently or consecutively. I think their depositions will be fairly short and that you could easily take them consecutively. For example, we could start the first deposition at 8, go to noon, and then start the second deposition at 1 and finish by 5. But however you want to schedule them would be fine with

us. The two witnesses will be Scott Osmond and Neil Wieloch. Mr. Osmond will be designated as to topics 4 and 9 in the draft notice; Mr. Wieloch will be designated just as to topic 9. I expect you will depose them in their individual capacities at the same time as you depose them as designees, and we plan to ask each of them some questions in their individual capacity as well as following up on the topics for which they are designated. However, we do not anticipate that our questioning will be lengthy. Once you decide whether to take them concurrently or consecutively, will you send out deposition notices for them? We will arrange a conference room or conference rooms for the depositions once you decide how you want to schedule them.

Greg

EXHIBIT G

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

In the Matter of

1-800 Contacts, Inc.,
a corporation

DOCKET NO. 9372

**COMPLAINT COUNSEL'S NOTICE OF DEPOSITION
TO 1-800 CONTACTS, INC.**

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the depositions of the individuals listed below. The depositions will be conducted before a person authorized to administer oaths and will be recorded by stenographic means.

<u>Deponent</u>	<u>Date</u>	<u>Time</u>	<u>Location</u>
Scott Osmond	Wednesday, January 18, 2017	8:00am	Parr Brown Gee & Loveless 101 South 200 East, Suite 700 Salt Lake City, UT 84111
Neil Wieloch	Wednesday, January 18, 2017	1:00pm	Parr Brown Gee & Loveless 101 South 200 East, Suite 700 Salt Lake City, UT 84111
Amy Larson	Thursday, January 19, 2017	9:00am	Parr Brown Gee & Loveless 101 South 200 East, Suite 700 Salt Lake City, UT 84111
Brady Roundy	Thursday, January 19, 2017	9:00am	Parr Brown Gee & Loveless 101 South 200 East, Suite 700 Salt Lake City, UT 84111
Brian Bethers	Friday, January 20, 2017	8:00am	Parr Brown Gee & Loveless 101 South 200 East, Suite 700 Salt Lake City, UT 84111
Amber Powell	Monday, January 23, 2017	9:00am	Hatch, James & Dodge, P.C. 10 West Broadway, Suite 400 Salt Lake City, UT 84101
Laura Schmidt	Tuesday, January 24, 2017	9:00am	Hatch, James & Dodge, P.C. 10 West Broadway, Suite 400 Salt Lake City, UT 84101

Tim Roush	Wednesday, January 25, 2017	8:00am	Hatch, James & Dodge, P.C. 10 West Broadway, Suite 400 Salt Lake City, UT 84101
Jonathan Coon	Thursday, January 26, 2017	9:00am	TBD Austin, Texas

Dated: January 11, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson

Kathleen M. Clair

Barbara Blank

Thomas H. Brock

Gustav P. Chiarello

Joshua B. Gray

Nathaniel M. Hopkin

Mika Ikeda

Charlotte S. Slaiman

Charles Loughlin

Geoffrey M. Green

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby 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
355 South Grand Avenue
35th 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.rafael@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.

January 11, 2017

By: /s/ Daniel Matheson
Daniel Matheson
Federal Trade Commission
Bureau of Competition
400 7th Street SW
Washington, DC 20024
dmatheson@ftc.gov
Telephone: (202) 326-2075

*Counsel Supporting the
Complaint*

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 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
355 South Grand Avenue
35th 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.rafael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

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.

March 29, 2017

By: /s/ Daniel J. Matheson
Attorney