



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

ORIGINAL

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

DOCKET NO. 9372

COMPLAINT COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S APPEAL BRIEF

D. Bruce Hoffman
Acting Director

Geoffrey M. Green
Assistant Director

Barbara R. Blank
Deputy Assistant Director

Charles A. Loughlin
Chief Trial Counsel

Bureau of Competition

Daniel J. Matheson
Kathleen M. Clair
Gustav P. Chiarello
Joshua B. Gray
W. Stuart Hirschfeld
Nathaniel M. Hopkin
Mika Ikeda
Aaron S. Ross
Charlotte S. Slaiman
Attorneys

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

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REFERENCES

IDF	ALJ Findings of Fact
ID	Initial Decision
CCPFF	Complaint Counsel's (Corrected) Proposed Findings of Fact
CCPTB	Complaint Counsel's (Corrected) Post-Trial Brief
CCPTRB	Complaint Counsel's Post-Trial Reply Brief
RPTRB	Respondent's (Corrected) Post-Trial Reply Brief
RAB	Respondent's Appeal Brief
CX	Complaint Counsel Exhibit
RX	Respondent Exhibit
Tr.	Trial Transcript
{bold}	<i>In Camera</i> Material

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I. STATEMENT OF THE CASE

For over a decade, Respondent 1-800 Contacts, Inc. (“1-800”) has sold a commodity product (pre-packaged boxes of contact lenses) at an excessive price, alongside a range of equally capable but lower-price online sellers – and all the while has maintained a predominant share of the market. 1-800 has been able to accomplish this impressive feat because its customers commonly *do not know* that they are paying a significant premium. Consumers are in the dark because 1-800 methodically secured from all of its major competitors commitments to suppress competitive advertising.

This scheme dates from the early days of online sales. 1-800 started out selling contact lenses to consumers over the telephone, and later adapted to the emergence of online commerce. 1-800 used television advertising to develop brand recognition, and search advertising to draw computer users to its website. Over time, 1-800 became the nation’s leading seller of contact lenses.

As early as 2003, 1-800 recognized a major problem. Rival internet sellers of contact lenses were also using search advertising to attract customers. As compared to 1-800, many of these rivals offered much lower prices, with equivalent service and quality. Search advertising made these retailers visible to consumers and facilitated price comparison. Facing competitive pressure from these online rivals, 1-800’s advertising costs were increasing, and its contact lens sales were declining.

Search advertising refers to advertisements that appear on a search engine results page (“SERP”); the advertising space is sold by the major search engines (Google and Bing) via auction. For example, suppose a consumer typed into the Google search box the query “1-800

Contacts” or “cheaper than 1-800contacts.” Google conducted an instantaneous computerized auction to allocate advertising space on the SERP. Bidders in these auctions included 1-800 *and* multiple rival online retailers of contact lenses. (More bidders competing in the auction meant higher advertising costs for the “winning” bidder.) Google’s algorithms then designed and displayed to the consumer a SERP, typically featuring (along with the unpaid “organic” links) a prominent advertisement for 1-800, followed by advertisements for several competing online sellers of contact lenses. The text of competitors’ advertisements often promised “lower prices” or “20 percent off,” leading many consumers to bypass the 1-800 link and instead to purchase identical contact lenses from a rival’s website. In order to stave off these competitive losses, 1-800 determined that it would have to lower its own prices, or else find a way to impede its competitors. 1-800 pursued the latter option.

Starting in 2004, 1-800 threatened and/or filed lawsuits against competing online sellers of contact lenses, alleging that particular search advertisements infringed trademarks owned by 1-800. The gravamen of every trademark claim is that the defendant is “*using*” the plaintiff’s trademark in a manner that causes *confusion* as to the source, affiliation, or sponsorship of the advertised product. If consumers are not confused, then there is no trademark infringement, even if (as often occurred here) the defendant “uses” a rival’s trademark by bidding on the trademark as a keyword in a search advertising auction.

For antitrust purposes, the Commission need not determine whether 1-800’s infringement claims had merit, or who would have won any lawsuit. The critical point is that 1-800 and its rivals agreed to resolve these trademark disputes with contract terms that indiscriminately bar both potentially infringing advertising and a broad range of legitimate, procompetitive, non-

infringing advertising. The agreements prohibit advertising where the competitor uses 1-800's trademark in a manner that is *not* confusing. The agreements prohibit advertising even where the competitor *does not use* 1-800's trademark. And the agreements are reciprocal, prohibiting non-confusing advertising by 1-800, the nominal plaintiff in these trademark disputes.

1-800 executed written agreements restricting bidding in search advertising auctions with all of its major rivals (the "Challenged Agreements"). With this web of agreements, 1-800 accomplished two anticompetitive objectives. First, 1-800 eliminated rival bidders in literally millions of online auctions for advertising space on the SERP, thus reducing its advertising costs. Second, and more importantly, 1-800 eliminated millions of advertisements for its lower-price competitors, helping 1-800 to sustain its business model of selling overpriced contact lenses to under-informed consumers.

At the initial hearing, Complaint Counsel established a *prima facie* case of competitive injury in three independent ways. First, antitrust precedent and economic learning establish that agreements among competitors that restrict advertising are inherently suspect. Second, the collective market power of the conspirators, combined with the nature of the restraints, shows indirectly that the Challenged Agreements likely harm competition. Third, direct evidence (including two empirical economic models) supports a finding that the Challenged Agreements caused competitive injury by reducing advertising, raising consumer search costs, diverting sales from low-price retailers to high-price 1-800, and easing competitive pressure that would otherwise have impelled 1-800 to lower its prices. The ALJ found liability based on the direct evidence, and did not address the other two theories of harm.

1-800 now appeals this decision to the Commission. First, 1-800 argues that “commonplace” settlement agreements are immune from antitrust scrutiny. No court has ever found antitrust immunity on this basis. The proffered authority for this immunity, *FTC v. Actavis*, 133 S. Ct. 2223 (2013), contradicts 1-800’s assertion. And, in any event, the Challenged Agreements are not “commonplace.” 1-800 has identified no comparable settlement agreements or court orders.

Second, 1-800 argues that the record evidence of competitive harm is insufficient. 1-800 disregards (but does not rebut) the ALJ’s findings of fact, and misreads the cases that define actionable competitive injury.

Third, 1-800 asserts that the Challenged Agreements are reasonably necessary to protect the company’s trademarks against infringement. In fact, the Challenged Agreements are facially and unreasonably overbroad, far exceeding 1-800’s property right and prohibiting a wide range of legitimate, truthful, non-confusing advertising. Case law identifies less restrictive means that firms may use to ensure that consumers are not confused by search advertising, including employing non-confusing advertising text and/or including in advertisements clear disclosure of the identity of the advertiser. (The ALJ’s Order incorporates these concepts.)

The Commission should reject each of 1-800’s defenses and affirm the Initial Decision. In addition, in order to avoid the possibility of remand, we urge the Commission to affirm the decision on alternative grounds as well:

- The Commission should hold – based on substantial precedent and the ALJ’s findings – that the Challenged Agreements are inherently suspect.

- The Commission should find that the settling parties collectively have power in the relevant market defined by the ALJ.
- The Commission should make findings affirming the anticompetitive effect of the Challenged Agreements on search engines (separate from the anticompetitive effect on consumers of contact lenses).

Finally, the Commission should affirm the ALJ’s Order, but with one important modification. The ALJ’s Order generally prohibits 1-800 from entering agreements with competitors that unreasonably restrain search advertising. However, at the urging of 1-800, the Order includes a carve-out that permits anticompetitive agreements when approved by a court in the form of a consent order. The Commission and multiple courts have held that consent orders are not exempt from antitrust standards. Accordingly, the Commission should modify the Order.

II. STATEMENT OF FACTS

A. Industry Background

1. Overview of the Contact Lens Industry

Approximately 40 million consumers in the United States wear contact lenses. IDF 6. A prescription from an eye care professional (“ECP”), valid for one or two years, is required to purchase contact lenses. IDF 9-10, 18-19. Contact lenses are a commodity product: the prescription specifies not only the strength of the lens, but also the brand and product line. IDF 23-27, 733. Contact lenses are distributed principally through three channels: (i) ECPs (consisting of independent practitioners and optical retail chains); (ii) general merchandise retailers; and (iii) online retailers. IDF 73-98.

The online sale of contact lenses accounts for about 17 percent of all contact lens sales in the United States. IDF 491. Online merchants typically offer the lowest prices for contact lenses. IDF 442. 1-800, the largest online seller of contact lenses in the United States (with a share of {█} percent, IDF 495), is the exception. While 1-800 prices below traditional ECPs, its price is typically higher than that of other online retailers, often by a substantial amount. IDF 434, 691-693. 1-800's customers are generally unaware of this price gap, and mistakenly believe that 1-800's prices are comparable to those of other online retailers. IDF 694-698.

2. Overview of Search Advertising

Search engines provide information to consumers without charge, while obtaining revenues from advertisers. IDF 140. A SERP displays advertisements (or “sponsored” listings), which may appear at the top, bottom, or right-hand side of the SERP. IDF 148, 151. Search engines operate on a “cost-per-click” basis, receiving payment from the advertiser only if a consumer clicks on the advertisement. IDF 154-155. This incentivizes search engines to display only advertisements that consumers are likely to find relevant and helpful. *See* IDF 181-185, 193-199, 202, 205-206, 209-210, 213, 224, 238-240.

Correspondingly, search advertising is uniquely valuable to advertisers because it places an advertisement in front of a consumer at the precise moment the consumer is signaling (through a search query) her interest in a product. The search engines' sophisticated algorithms attempt to ensure it is the *right* ad for the *right* consumer at the *right* time. *See* IDF 498, 562; ID 140-141. Search advertising is especially valuable to firms that sell products online. *See* IDF 497-564; ID 140-141.

Advertisers indicate their interest in displaying advertisements against search queries by “bidding” on keywords in an auction. IDF 158-159, 186-187. For example, a bid on the keyword “contact lenses” instructs Google that the advertiser wishes to display an advertisement to any consumer who enters a search query relating to contact lenses. Google offers different types of keyword matching (IDF 166-174), but its default setting is “broad match.” CX8006-031 (¶72) (Evans Expert Report). A “broad match” bid instructs Google to employ its algorithms and data to determine whether the advertisement is relevant to a particular search query, regardless of the keyword on which the advertiser bids. CCPFF 432-434; *see* IDF 167-168. For example, Google may determine that an advertiser bidding on the generic keyword “contact lenses” is relevant to a consumer search for “Acuvue Oasys” (a brand of contact lenses), and enter the advertiser in the auction for this query, even though the advertiser has not bid on the trademark “Acuvue Oasys.”

Google determines which advertisements to display, and in what order, based on the amount each advertiser has bid, combined with Google’s own analysis of the relevance of each advertisement to the query entered by the consumer. CCPFF 396-427; *see* IDF 158-161, 181-214. An advertiser can also instruct Google *not* to display its advertisement in response to a particular search query through the use of “negative keywords.” IDF 175. An advertiser that implements negative keywords overrides Google’s judgment that a particular advertisement is relevant to a particular search query. IDF 176.

B. Evolution of 1-800’s Campaign to Restrain Competitor Advertising

1. 1-800 Charges High Prices, Creating a Business Opportunity for Online Rivals

As internet commerce exploded in the early 2000s, numerous online contact lens sellers emerged, offering identical products at prices considerably lower than 1-800 (IDF 691-693), with

comparable service. *See* CCPFF 305-374. Search advertising made the lower-price online retailers visible to potential customers and facilitated price comparison. *See* ID 140-141.

It was against this backdrop that 1-800 began to notice ads for lower-price competitors appearing on SERPs generated by queries relating to “1-800 Contacts.” *See* IDF 302-303, 319, 323. This trademark search advertising, accounting for {█} percent of the company’s total orders, was a critical source of business. IDF 566, 570-573, 578, 580. Thus, 1-800 was quite concerned about competitors advertising against its trademarks. *See* IDF 710-732; CCPFF 822-890.

2. 1-800 Enters into 14 Agreements with Rivals to Restrain Advertising

In response to the burgeoning competitive threat, 1-800 launched a series of lawsuits, ultimately reaching settlement agreements with all of its “major competitors.” IDF 415 (citing Bethers testimony).

1-800’s general practice was *not* to evaluate whether competitors’ advertising caused consumer confusion before suing (or threatening to sue) its rivals. *See* CCPTB 143 & n.454 (citing 1-800 executives’ testimony). In the only trademark infringement case against a competitor that 1-800 fully litigated, it lost decisively. ID 150-151; CCPTB 23-26. And the ALJ determined in this matter that 1-800 proffered no reliable evidence that its rivals’ ads infringed. ID 172-184 (rejecting 1-800’s proffered evidence); *see* CCPTB 143-146. Yet, between 2004 and 2013, 1-800 entered into at least 14 written agreements that reciprocally restrained advertising. IDF 343, 393-396.¹

¹ Each Challenged Agreement involved litigation or the threat of litigation, except for 1-800’s agreement with Luxottica. IDF 343, 393-396.

Although the precise language of the Challenged Agreements varies slightly, each agreement imposes the same functional restrictions on the parties. IDF 361, 363-364. First, the agreement forbids the competitor of 1-800 from using 1-800's trademark (and variations thereof) as a search advertising keyword. The competitor cannot bid on 1-800's trademark under any circumstances. IDF 361, 363.

Second, each agreement requires the competitor of 1-800 affirmatively to prevent its ads from appearing any time a consumer's search query relates to 1-800 – through the use of negative keywords. IDF 364. This is true even when the competitor is *not* bidding on 1-800's trademark and the ad appears due to the search engine's determination that the ad is relevant and useful to the consumer. *See* IDF 368.

Third, all of the agreements impose identical (reciprocal) restrictions on 1-800. IDF 361, 363-364.

1-800 enforced the Challenged Agreements broadly and aggressively, continuously monitoring competitors' compliance and regularly contacting them regarding so-called "violations." IDF 371-392; CCPFF 985-1000, 1219-1270.

3. Competitive Effects on Online Contact Lens Industry

As described earlier, search advertising is uniquely valuable to online sellers of contact lenses because of its effectiveness in targeting customers who have a present interest in purchasing contact lenses. *See* IDF 497-564; ID 140-141. Online contact lens sellers attest that search advertising is, by far, the most effective and efficient means for reaching new customers and making sales. *E.g.*, IDF 499-520, 522-561. Numerous online retailers testified that search

advertising was critical to growing their businesses. *E.g.*, IDF 502, 523, 528-529, 537, 542-543, 545, 549-550.

Moreover, many online retailers found it beneficial to bid on 1-800's trademark (*e.g.*, IDF 596, 600-603, 610-612, 614, 638, 640, 642, 644-646, 670-680; ID 142-143), or to place ads in response to search queries relating to 1-800 (through "broad match") even where they did not affirmatively bid on 1-800's trademark. *E.g.*, IDF 617-622, 626-627, 662-669; ID 141-146. This is because 1-800's online rivals charge prices significantly below 1-800 for identical products, creating an attractive opportunity both for 1-800's rivals *and* for consumers. IDF 586-587, 591, 603, 611, 646, 691-694.

Several of 1-800's online rivals testified that not being able to advertise against search queries relating to 1-800 has significantly hampered their ability to compete effectively for consumers. *E.g.*, IDF 623, 647; CCPFF 617-645, 712-722, 725-738, 748-769, 773; CCPTB 47-48. Indeed, one competitor (Memorial Eye) shut down its online business because of 1-800's conduct. CCPTB 49-52.

C. Challenged Agreements Result in Competitive Harm to Consumers of Contact Lenses and to Search Engines

1. Challenged Agreements Harm Consumers

As the ALJ concluded, the Challenged Agreements directly harm consumers by (i) reducing the quality and quantity of informative advertising displayed to consumers; (ii) causing consumers to pay higher prices for contact lenses; and (iii) artificially elevating online contact lens prices across the board. IDF 710-732, 735-742; ID 153-160.

"[A]dmissions in 1-800 Contacts' internal documents make clear [that] reducing the appearance of competitor ads appearing in response to a search for 1-800 Contacts' trademark

terms tends to increase sales for 1-800 Contacts, the higher-priced competitor.” ID 155. 1-800’s business documents are replete with references to the “remov[al]” of competitive advertising against 1-800’s trademark resulting in more sales for 1-800. ID 155 (citing IDF 719, 723, 725, 730). *See also* CCPFF 830, 838-839, 845, 848-849, 853-855, 857. 1-800’s documents show, conversely, that “an *increase* in competitor ads appearing in response to a search for 1-800 Contacts’ trademark terms tends to *decrease* sales for 1-800 Contacts.” ID 155 (citing IDF 717, 718, 727) (emphasis added). *See also* CCPFF 829, 833-837, 840-844, 846-847, 850-852, 856, 860-865.

This documentary evidence is bolstered by two separate empirical models constructed by Complaint Counsel’s economic experts, Dr. David Evans and Dr. Susan Athey. IDF 743-756; ID 156-160. Using different data sets and methodologies, the two economists reach results consistent with one another, and consistent with the conclusion that the agreements substantially harm competition. Dr. Evans’ empirical economic model shows that, absent the agreements, between January 2010 and June 2015: (1) the number of competitor ads appearing on searches for 1-800’s trademarks would increase by some 114 million ads; (2) consumer clicks on 1-800 ads would decline substantially; (3) consumer clicks on ads for 1-800’s rivals would increase substantially (by some 145,000 clicks); and (4) this shift in consumer interest from 1-800 to its online rivals would result in roughly a 12.3 percent increase in sales for 1-800’s rivals. IDF 752-756; ID 159.

Dr. Athey’s independent empirical economic model shows that, absent the agreements: (1) the number of competitor ads appearing on searches for 1-800’s trademarks would increase substantially, from 0.54 to 1.85 competitor ads per search (an increase of 242 percent); (2)

consumer clicks on 1-800 ads would decline by 2 clicks per hundred searches; and (3) consumer clicks on ads for competitors of 1-800 would increase by 3.5 clicks per hundred searches. IDF 743-751; ID 157-158.

As the ALJ concluded, the best explanation for 1-800's ability to charge a price premium for a commodity product is that consumers lack sufficient information about the presence of lower-price competitors. IDF 737-741; ID 155-156. Unleashing millions of advertisements on behalf of numerous discount sellers would reduce this information deficit, and Drs. Evans' and Athey's models each show that consumers would respond positively to this information. IDF 743-756; ID 156-160.

The Challenged Agreements cause consumers to pay higher prices for contact lenses for several reasons. First, presented with competitor advertising, some consumers would shift their purchases from 1-800 to a lower-price seller. IDF 740; ID 155-156, 160, 164. When consumers switch from 1-800 to a lower-price seller, they tend not to switch back (CCPFF 1336), meaning that 1-800 loses (and its competitors gain) not just one sale per diverted click, but many subsequent sales as well. CCPFF 1483. Second, armed with better information, some consumers would seek and receive a price-match from 1-800. IDF 436, 452, 740, 742; ID 164. Third, when consumers change their purchasing behavior, this places "downward pressure on prices" across the board, and more likely than not, prices would fall. IDF 741; *see* IDF 738-742; ID 156-160.

The record shows that search advertising (even restrained by the Challenged Agreements) affects market prices for contact lenses. Competitive search advertising placed by rival online sellers forced 1-800 to modify its own online advertising policy to promote that it would beat rivals' prices by two percent (IDF 436, 742), and thus to { [REDACTED] } the percentage of orders that it

price-matched. CCPFF 1482-1483. Dr. Evans calculated that this single change was the equivalent of a one percent price decrease overall. CCPFF 1484-1485.

2. Challenged Agreements Harm Search Engines

The Challenged Agreements also result in competitive harm to search engines. Dr. Evans' economic model shows that, by eliminating rival bidders from search advertising auctions, the agreements reduced 1-800's cost-per-click by { [REDACTED] } percent. CCPFF 1306.

Dr. Evans' conclusion is bolstered by 1-800's contemporaneous documents, which directly link a reduction in the number of bidders to lower advertising prices (CCPFF 866-881, 1301, 1303), and by testimony from both Google and Bing, whose real-world experience shows that reduced competition in search advertising auctions reduces the price received by the search engine from the winning advertiser. *See* IDF 220 (“[I]n general, more advertisers bidding on keywords results in higher CPCs [costs per click].”); CCPFF 1300-1302, 1304.

Further, the Challenged Agreements reduce the quality of the SERP displayed by the search engines. Because they have fewer relevant ads to choose from, the search engines are unable to display the full range of information that is useful to consumers. In addition, these artificially-imposed restraints hamper the search engines' ability to learn by analyzing what users are choosing to click on (or not to click on), and, in this way, over time, to improve the SERP. CCPFF 1307-1312; CCPTB 64-67.

III. STANDARD OF REVIEW

“The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering ‘such parts of the record as are cited or as may be necessary to resolve the issues presented.’” *In re McWane, Inc.*, 2014 FTC LEXIS 28, *29 (Jan. 30, 2014) (quoting 16 C.F.R.

§3.54), *aff'd*, 783 F.3d 814 (11th Cir. 2015). “The Commission ‘may exercise all the powers which it could have exercised if it had made the initial decision.’” *In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 654 (2011) (quoting 16 C.F.R. §3.54), *aff'd*, 135 S. Ct. 1101 (2015) (“*N.C. Bd.*”).

IV. ARGUMENT

1-800’s appeal focuses primarily on its defenses. Those defenses are addressed in Section IV.C. First, we explain that the ALJ correctly concluded that Complaint Counsel proved a *prima facie* case of anticompetitive harm.

A. The Challenged Agreements are *Prima Facie* Anticompetitive

The ALJ properly concluded that the Challenged Agreements restrain truthful, non-confusing contact lens advertising and are *prima facie* anticompetitive. The ALJ relied on the direct evidence of anticompetitive effects. ID 138-139, 153-160, 166. (Section IV.A.2.)

The record also supports the conclusion that the agreements are *prima facie* anticompetitive under two alternative modes of analysis: (i) the restraints are inherently suspect (Section IV.A.1); and (ii) the collective market power of the parties to the agreements, combined with the nature of the restraints, satisfy Complaint Counsel’s *prima facie* burden (Section IV.A.3). *See In re Realcomp II, Ltd.*, 2007 WL 6936319, *17-18 (Oct. 30, 2009) (describing three variations of rule of reason), *aff'd*, 635 F.3d 815 (6th Cir. 2011).

As noted above, Complaint Counsel urges the Commission to make findings supporting each mode of analysis.

1. 1-800's Advertising Restraints are Inherently Suspect

In a limited but significant category of cases, where judicial experience and economic learning indicate that a challenged practice is inherently likely to suppress competition, proof of the restraint itself is sufficient to establish a *prima facie* violation. *Realcomp*, 2007 WL 6936319, at *18; accord *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (“*CDA*”) (certain restraints “give rise to an intuitively obvious inference of anticompetitive effect”). Horizontal restraints on advertising are one such category of “inherently suspect” restraints.

For more than half a century, courts have recognized that truthful and non-deceptive advertising plays an important role in facilitating efficient markets, and conversely that restraints on truthful and non-deceptive advertising raise consumers’ search costs, impair competition, and harm consumers. *See CDA*, 526 U.S. at 773 (“[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price.”) (internal quotation omitted); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (“[I]t is clear as an economic matter that . . . restrictions on fare advertising have the forbidden significant effect upon fares.”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (advertising “performs an indispensable role in the allocation of resources in a free enterprise system”); *Blackburn v. Sweeney*, 53 F.3d 825, 829 (7th Cir. 1995) (advertising restraint judged *per se* unlawful); *United States v. Gasoline Retailers Ass’n*, 285 F.2d 688, 691 (7th Cir. 1961) (same). *See also* Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW* (4th ed. 2017), ¶2023b2 (“Areeda & Hovenkamp”) (“Truthful advertising is an important part of the output of any firm, and in many markets it is essential to effective distribution. . . . As such, an

agreement among competitors that . . . they will restrict the content of their advertising even if it is truthful is ordinarily illegal per se.”).

Economic learning fully supports a finding of presumptive injury. In *In re Polygram Holding*, the Commission relied on uncontroversial economic theory and multiple academic studies to conclude that an agreement between music companies not to advertise two recordings for a period of six weeks was inherently suspect. 136 F.T.C. 310, 355-57 & n.52 (2003) (collecting empirical studies), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). Many of the studies cited in *Polygram* were also relied upon by Dr. Evans in this matter. *Compare* 136 F.T.C. 310 at n.52 with CX8006-179-185 (App. E) (Evans Expert Report).

The Commission has held that partial restraints on advertising may be presumed anticompetitive. For example, in *Realcomp*, the Commission concluded that an agreement among real estate brokers to impede the dissemination of house listings “operated as a restraint on advertising.” 2007 WL 6936319, at *26-27. The Commission found the advertising restriction to be inherently suspect where, as here, it eliminated a competitively significant category of advertising, but did not bar *all* advertising. *See id.* at *23 (“Without the Realcomp MLS, home buyers . . . and home sellers . . . would have to rely on a variety of less comprehensive sources of information, including newspaper ads, television advertising, sales flyers, and word-of-mouth advertising.”). *See also In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 606-07 (1988) (regulatory board’s ban on certain types of advertising judged inherently suspect); *Am. Med. Ass’n*, 94 F.T.C. 701, 1002-03 (1979) (agreement among physicians not to advertise judged inherently suspect), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by equally divided Court*, 455 U.S. 676 (*per curiam*) (1982) (“AMA”).

In this case, the ALJ's findings regarding the market context reinforce the conclusion that 1-800's restraints on search advertising are likely to have an anticompetitive effect. The ALJ found that, in the online contact lens industry, search advertising is a competitively important marketing tool serving to promote brand awareness and reach potential customers at the moment they are likely to buy. IDF 497-498, 562-564; ID 140-141. 1-800's online competitors devote all, or nearly all, of their marketing budgets to search advertising. IDF 499, 521, 522, 527, 531, 534, 540, 546, 552, 555-556. 1-800's online competitors rely on search advertising to inform consumers of their low prices. IDF 565. Many consumers are not aware of the price gap between 1-800 and its online competitors. IDF 694-698. Prior to entering into the Challenged Agreements, the constrained competitors successfully employed trademark search advertising to gain sales and to grow their businesses. *E.g.*, IDF 593, 600-609, 611-612, 619-623, 645-647; ID 141-146. As a direct result of the Challenged Agreements, the constrained competitors lost sales (*e.g.*, IDF 588, 593, 623, 647; CCPFF 617-645, 712-722, 725-738, 748-761, 762-769, 773; CCPTB 47-48), and one rival was forced to exit the market. CCPTB 49-52. *See* IDF 623. The Challenged Agreements suppress price transparency, impair competition, and harm consumers. IDF 735-739. Absent the Challenged Agreements, consumers would have benefited from more competition and lower prices. IDF 740-741.

1-800 cites *CDA* for the proposition that advertising restraints are not inherently suspect. RPTRB 36-41. But the Commission rejected this overbroad reading of *CDA* in *Polygram*, 136 F.T.C. at 340-44, and again in *Realcomp*, 2007 WL 6936319, at *20. The Commission explained that the *CDA* court's skepticism that unregulated advertising for professional services will benefit consumers does not apply to advertising for an ordinary commercial product. *Id.* Indeed,

CDA endorsed the “general rule” that “restrictions on advertisement of price and quality generally” have anticompetitive tendencies. *CDA*, 526 U.S. at 771. *See id.* at 773-74 (considering “the possibility that the particular restrictions on professional advertising could have different effects from those normally found in the commercial world”). *See also* CCPTB 84-88.

2. The ALJ Properly Concluded that there is Direct Evidence of Actual Anticompetitive Effects

The ALJ correctly found, on the basis of direct evidence, that the Challenged Agreements cause anticompetitive effects, manifested in two ways. First, consumers pay higher prices for contact lenses. Second (and related), consumers are exposed to far less search advertising for contact lenses. ID 153-160.

a. Direct Evidence of Higher Consumer Prices for Contact Lenses

A showing that consumers have paid, or will pay, higher prices as a result of a challenged restraint is the “paradigmatic example[.]” of antitrust harm (*NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984)), and is sufficient to establish a *prima facie* antitrust violation. *See, e.g., FTC v. Superior Trial Court Lawyers Ass’n*, 107 F.T.C. 510, 573 (1986) (boycott having the “purpose and effect of raising prices” is unlawful), *aff’d*, 493 U.S. 411 (1990); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 788-89 (6th Cir. 2002) (price effect constitutes competitive harm); *Law v. NCAA*, 134 F.3d 1010, 1019-20 (10th Cir. 1998) (same); *Toys “R” Us, Inc. v. FTC*, 126 F.T.C. 415, 610-11 (1998) (“*TRU*”) (price effect shown where, as a result of the challenged restraints, defendant was “able to avoid . . . price cuts”), *aff’d*, 221 F.3d 928 (7th Cir. 2000); *United States v. Brown University*, 5 F.3d 658, 668 (3d Cir. 1993) (plaintiff meets initial burden under rule of reason by proving an “increase in price”). Complaint Counsel is not required also to show a decrease in output. *O’Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015).

Direct evidence shows that “consumers have paid, or will pay, prices that are higher than they would otherwise be, absent the Challenged Agreements.” ID 153. The relevant evidence includes:

(i) Data showing that “1-800 Contacts’ prices are approximately { [REDACTED] }% higher than other online retailers’ prices” (IDF 692; ID 155);

(ii) Documents showing that “[m]any consumers are not aware of the price discrepancy between 1-800 Contacts and its online competitors” (IDF 694; ID 155);

(iii) Documents and testimony showing that pre-packaged contact lenses are a commodity product, and that the service provided by 1-800 does not differ appreciably from that of its competitors (IDF 23-27, 733; CCPFF 305-374);

(iv) 1-800’s internal analyses showing that the appearance of competitor ads in response to a search for 1-800’s trademark decreases sales for 1-800, and conversely, that restraining such ads increases sales for 1-800 (IDF 710-731; ID 155-156);

(v) Documents and testimony showing that search advertising placed by rival online sellers forced 1-800 to modify its own online advertising policy to highlight that it would beat rivals’ prices by two percent (IDF 436-438, 452; ID 130; CCPFF 1482-1486), and that this change in its ad copy led to a { [REDACTED] } of the percentage of orders that it price-matched (CCPFF 1483);

(vi) Dr. Evans’ testimony and economic model showing that, absent the agreements, between January 2010 and June 2015, the number of competitor ads appearing on searches for 1-800’s trademarks would increase by some 114 million additional ads; consumer clicks on 1-800 ads would decline substantially; consumer clicks on ads for 1-800’s rivals would increase

substantially (by some 145,000 clicks); and this shift in consumer interest from 1-800 to its online rivals would result in roughly a 12.3 percent increase in sales for 1-800's rivals (IDF 752-756; ID 159);

(vii) Dr. Athey's testimony and economic model showing that, absent the agreements, the number of competitor ads appearing on searches for 1-800's trademarks would increase substantially, from 0.54 to 1.85 competitor ads per search (an increase of 242 percent); consumer clicks on the 1-800 ads would decline by 2 clicks per hundred searches; and consumer clicks on ads for competitors of 1-800 would increase by 3.5 clicks per hundred searches (IDF 743-751; ID 157-158); and

(viii) Economic literature and theory and expert testimony confirming the intuitively obvious proposition that this change in consumer behavior would place "downward pressure on prices," more likely than not causing prices to fall. IDF 740-741; ID 153-156.

1-800's representation that Complaint Counsel's experts disclaimed any proof that the Challenged Agreements caused higher prices (RAB 21-22) is false. *See* IDF 740-742. And the ALJ did not, as 1-800 implies (RAB 25), rely on raw price data without a relevant benchmark. The ALJ compared actual prices paid by consumers with the Challenged Agreements to prices that would be paid absent the Challenged Agreements (*i.e.*, competitive prices), and concluded that actual prices exceed competitive prices. *See* ID 153-160. That the ALJ did not precisely quantify the price increase is immaterial. *See N.C. Bd.*, 152 F.T.C. at 686 ("In light of the restraints' obvious disruption of the proper functioning of the price-setting mechanism of the market, a precise quantification of the price increase was unnecessary.") (internal quotation omitted). *See also* Br. of Amicus Curiae FTC, *In re Nexium (Esomeprazole) Antitrust Litig.*, No.

12-md-02409-WGY, U.S. Court of Appeals for the First Circuit, *13 (Feb. 12, 2016) (explaining that whereas private plaintiffs seeking monetary relief must show actual damages, the federal government seeking injunctive relief need not do so).

1-800 asserts that compelling consumers to pay elevated prices to 1-800 (as compared to the price that would be paid in the unrestrained marketplace) is not competitive harm absent proof that 1-800 garnered abnormal margins and profits. RAB 22, 26. This is incorrect. Even if 1-800 were a less efficient (higher-cost) seller than its rivals (with the effect that 1-800 did not earn supracompetitive profits from this conspiracy), consumers are no less harmed by the elevated prices attributable to the Challenged Agreements. The inefficiency or higher costs of one or more conspirators is not a defense for a restraint that raises consumer prices. Indeed, it is common for courts to find antitrust liability where less efficient competitors impede, exclude, or raise the costs of more efficient rivals. *E.g.*, *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988) (exclusion of innovative electrical conduit); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914) (exclusion of vertically-integrated seller); *TRU*, 126 F.T.C. at 527-28, 609-11 (exclusion of warehouse clubs).

1-800 asserts that its prices (and costs) are higher than those of its rivals not due to inefficiency, but because of its “superior service.” RAB 25. This claim is contrary to the evidence, which shows that the service offered by 1-800 is matched by its lower-price rivals. CCPFF 305-374; *see* IDF 740 (citing Athey testimony that price premium not accounted for by service differential). But even if 1-800 did provide superior service, this would not negate a showing of consumer harm. In a competitive market, consumers are free “to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between.”

Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 890 (2007). A horizontal restraint that takes this choice away from consumers – and forces them to pay for unwanted higher quality – decreases consumer welfare. Thus, it is common for courts to find antitrust liability where higher-price/higher-quality competitors exclude lower-price/lower-quality alternatives. *E.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (condemning trade association rule aimed at low-price/low-quality engineers); *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013) (condemning exclusion of non-dentist providers of teeth whitening); *Realcomp*, 635 F.3d at 830-31 (condemning exclusion of limited-service real estate brokers).

Likewise, 1-800's contention that its margins have { [REDACTED] } (RAB 22) does not contradict a finding of competitive harm. The purpose and effect of the Challenged Agreements was to enable 1-800 to avoid erosion of its prices and margins in the face of lower-price rivals. Thus, the fact that 1-800 { [REDACTED] } supports a finding of injury. *See, e.g., McWane, Inc. v. FTC*, 783 F.3d 814, 839 (11th Cir. 2015) (“evidence that McWane’s prices did not fall is consistent” with finding of anticompetitive harm); *TRU*, 126 F.T.C. at 610-11 (price effect shown where, as a result of the challenged restraints, defendant was “able to avoid . . . price cuts”).

Finally, 1-800 implausibly asserts that the Challenged Agreements *increased* the sales of contact lenses. RAB 8-9. But, as the ALJ observed, the report of 1-800's economic expert Dr. Murphy “fails to support [such] a conclusion” (ID 188), and Dr. Murphy himself “clearly disclaimed that his analysis was intended to show that the Challenged Agreements increased the sales of contact lenses. . . .” ID 189 (citing Murphy testimony).

b. Direct Evidence of Reduction in Advertising

The ALJ correctly concluded that direct evidence shows a significant restriction in the dissemination of advertising for low-price online sellers of contact lenses, and that this is a second actionable form of antitrust harm. *See* ID 151-153 (collecting cases).

In *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (“*IFD*”), the Commission challenged an agreement among dentists to withhold x-rays requested by dental insurers in order to evaluate bills and determine payment. The Supreme Court’s liability finding was based on direct evidence of actual marketplace effects. “[T]he evidence that the Court accepted as direct proof of adverse effect ... [was] simply that in two localities, over a period of years, insurers were ‘actually unable to obtain compliance with their requests for submission of x[-]rays.’” *Realcomp*, 2007 WL 6936319, at *19 (quoting *IFD*, 476 U.S. at 460). The Court explained: “A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices.” *IFD*, 476 U.S. at 461-462. *See also Polygram*, 136 F.T.C. at 372-73 (discussing direct evidence that advertising restraint disrupted competition in sale of recordings).

Here, the Challenged Agreements have been quite effective in restricting the dissemination of trademark search advertising. Industry data analyzed by Dr. Evans shows that competitor advertisements that had been appearing in response to consumer searches for “1-800 Contacts” disappeared “almost entirely” after the agreements were entered. ID 154-155. Dr.

Evans concludes that, in the absence of the agreements, the number of competitor ads appearing on searches for 1-800 between January 2010 and June 2015 would have increased by some 114 million ads, thus providing considerably more information to consumers regarding lower-price competitors. IDF 755-756; ID 159. Using a different data set, Dr. Athey reaches the same basic conclusion. IDF 749-750; ID 157-158. Additional direct evidence that the reduction in trademark search advertising engineered by 1-800 “is likely enough to disrupt the proper functioning of the price-setting mechanism” (*IFD*, 476 U.S. at 461-62) is summarized on p. 19-20, *supra*.

1-800 contends that even a substantial restriction on advertising is “insufficient” as a matter of law to prove actual adverse effects. RAB 22-23 (citing *CDA*, 526 U.S. 756). This is incorrect. *See* ID 151-153. *CDA* teaches that, when evaluating an advertising restraint, the court must consider the link between advertising and competition for the product being advertised. The advertising rules challenged in *CDA* were tailored to address potentially misleading claims in a professional services market where sellers (dentists) had far more relevant information than their consumers (patients). Given the context, the Court concluded that the advertising regulations’ effect on competition in the market for dental services was not at all obvious. The Court did not overrule *IFD*’s holding that a substantial restriction on truthful, non-deceptive information may prove competitive injury in a traditional setting. To the contrary, *IFD* is cited with approval. *CDA*, 526 U.S. at 770.

1-800 further asserts that the ALJ’s reliance on *IFD*, 476 U.S. 447, is “misplaced” because a horizontal conspiracy among dentists to withhold x-rays from insurance companies is an “express restriction on output,” whereas the Challenged Agreements restrain only advertising. RAB 23. 1-800 misunderstands *IFD*. The Supreme Court was not concerned about the effect of

the defendants' conduct on the market for dental x-rays. Rather, the Court understood that withholding x-rays interfered with insurers' efforts to identify "the least expensive adequate course of dental treatment." 476 U.S. at 461. In economic terms, both x-rays and contact lens advertising represent information useful to their respective consumers and important to effective competition. *See* Areeda & Hovenkamp ¶2023b ("Agreements restricting advertising are a form of output restriction in the production of information useful to consumers."). Hence, the *IFD* analogy is appropriate.

1-800 asserts that "virtually *every* restriction on the use of a trademark" can be characterized as "a restriction on advertising," and, hence, the ALJ's opinion has the effect of outlawing "every settlement of a trademark case." RAB 23 (emphasis in original). This mischaracterizes the Initial Decision. Antitrust law distinguishes between broad, indiscriminate restrictions on advertising and reasonably tailored restraints targeting improper advertising. *See* Section IV.C.2, *infra*. The ALJ followed this precedent, and correctly concluded that the Challenged Agreements are facially and unreasonably overbroad. The ALJ did not treat an ordinary agreement not to infringe a rival's trademark as *prima facie* anticompetitive.

1-800 also misreads *Clorox Co. v. Sterling-Winthrop*, 117 F.3d 50 (2d Cir. 1997). Contrary to 1-800's claims (RAB 23-24), *Clorox* does not hold that all trademark settlements are "presumptively procompetitive." *Clorox* is about product *labeling*, not advertising. The settlement agreement in *Clorox* barred the defendant from labeling its product with a trademark similar to the plaintiff's trademark. The Second Circuit understood that if a seller agrees not to label its product "Pine-Sol," it may label the product "Brand Z" instead, and the competitive process is not obviously impaired. Employing a standard rule of reason analysis, the Second

Circuit concluded that no harm flowed from such an agreement. *See Clorox*, 117 F.3d at 57. The *Clorox* settlement is fundamentally different from the Challenged Agreements, which prevent lower-price competitors from *advertising* their properly-labeled products in a non-confusing manner. *See* ID 140-146, 153-160.

1-800 further asserts that Complaint Counsel’s proof of competitive injury relies on “predictive notions” and testimony regarding “theoretical effects” (RAB 24), rather than actual evidence of competitive harm. 1-800 simply ignores the substantial direct evidence cited by the ALJ and catalogued above. The economic models constructed by Drs. Evans and Athey are powered by actual industry data; the experts did not rely on an “abstract understanding of market conditions” (RAB 24).

Finally, 1-800 labels the harm resulting from the Challenged Agreements as *de minimis*, claiming that only two percent of contact lens-related internet searches are for 1-800’s trademark. RAB 8. The ALJ properly rejected this assertion, explaining: “Respondent’s argument is invalid as a matter of law. ‘A court applying the Rule of Reason asks whether a practice produces net benefits for consumers; it is no answer to say that a loss is ‘reasonably small.’” ID 162-163 (*quoting Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)).

1-800’s assertion of *de minimis* injury is also factually incorrect. Industry data analyzed by Dr. Athey shows that internet searches for 1-800’s trademark terms comprise approximately 17 percent of search queries relating to contact lenses, similar in volume to searches for the top three generic terms (“contact,” “contact lenses,” and “contacts”) *combined*. IDF 657-659. And Dr. Evans’ empirical model shows that, absent the Challenged Agreements, the additional ads

seen by consumers would result in an increase in sales of roughly 12.3 percent for 1-800’s lower-price rivals. IDF 756; ID 159. Moreover, when 1-800 was forced to advertise price-matching in response to “aggressive” messaging from lower-price rivals (IDF 436, 452, 742; ID 130), 1-800 { [REDACTED] } the percentage of orders that it price-matched. CCPFF 1483. As the ALJ concluded, “[t]his is not *de minimis* or insignificant.” ID 164.

3. Although Not Required, Parties to Challenged Agreements Have Market Power

a. No Finding of Market Power is Necessary Where Anticompetitive Effects Have Been Established

The Supreme Court has held that a plaintiff need not define a market or independently establish market power where it proves “actual detrimental effects,” such as elevated prices or a restriction in the dissemination of truthful information. *IFD*, 476 U.S. at 460-61. *Accord Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477-78 (1992); *TRU*, 221 F.3d at 937; *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *Realcomp*, 2007 WL 6936319, at *19, *32; Br. for the United States as Respondent, *Ohio v. American Express Co.*, No. 16-1454, *16 (Dec. 8, 2017) (“[W]hen a court finds that a restraint has had ‘actual, sustained adverse effects on competition,’ ‘specific findings concerning the definition of the market are unnecessary.’ This Court thus need not resolve the market-definition question in order to hold that the United States . . . carried [its] initial burden.”) (quoting *IFD*, 476 U.S. at 460-61).

Because the ALJ found direct evidence of anticompetitive effects (ID 138-166), Complaint Counsel is not obligated to independently prove market power through the indirect means of demonstrating high market shares in a properly defined relevant market.

b. Parties to Challenged Agreements Collectively Have Power in Market for Online Sale of Contact Lenses

Nevertheless, Complaint Counsel proved that the online sale of contact lenses in the United States is a relevant antitrust market, and that the settling parties collectively have power in that market.

i. ALJ Properly Concluded That Online Sale of Contact Lenses in the United States is a Relevant Antitrust Market

As the ALJ concluded, each of the “analytical tools” at the court’s disposal (*United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017)) supports the conclusion that the online sale of contact lenses in the United States constitutes a relevant market.

The ALJ credited Dr. Evans’ empirical work showing that the online market for the sale of contact lenses in the United States is the appropriate antitrust market in this case. ID 133-138. Dr. Evans conducted two economic analyses. First, he implemented the hypothetical monopolist test (in the same manner as 1-800’s expert, Dr. Murphy). IDF 454-475; ID 133-136. *See* FTC AND U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (2010) (“2010 MERGER GUIDELINES”) §§4.1.1, 4.1.3.

1-800’s primary criticism of Dr. Evans’ analysis is that his diversion estimate of 40 percent is based on switching data from a 1-800 survey; 1-800 contends that the survey does not show what consumers would do in response to a price increase. RAB 31-32. However, as the ALJ recognized, Dr. Evans “bolstered his selection of 40% as the most reasonable estimate of a diversion ratio” by citing, among other things, a 1-800 document concluding that “[p]rice-driven lapsers are more likely to move to another online player,” and showing 50 percent of price-driven lapsers shifting to other online retailers. ID 134. While certain other 1-800 surveys find

consumer-switching rates of 26 or 34 percent, 1-800's expert Dr. Murphy conceded that diversion ratios based on these numbers *also support* an online-only market. ID 134-136; IDF 460, 464. Indeed, Dr. Murphy acknowledged that the online sale of contact lenses satisfies the hypothetical monopolist test. CCPFF 1583-1584.

Second, Dr. Evans analyzed a natural experiment: the substantial price increase across online contact lens retailers following the manufacturers' adoption of "unilateral pricing policies" ("UPPs"). ID 136-138. This manufacturer-imposed price increase affected online contact lens retailers as well as membership clubs, but did not impact other physical retailers, whose prices were already at or above the UPP level. IDF 479-480. Dr. Evans' analysis shows that a hypothetical monopolist consisting of online retailers and club stores could profitably impose a SSNIP. IDF 485-486. While this experiment, on its own, does not show that club stores should be excluded from the relevant market (IDF 487), the ALJ properly found that other evidence supports the conclusion that physical retailers, including club stores, are not close substitutes for online contact lens retailers. ID 127-133.

In addition to Dr. Evans' empirical work, the ALJ found direct evidence that head-to-head competition between 1-800 and its online rivals affected market outcomes. Specifically, competitive search advertising placed by rival online sellers forced 1-800 to advertise online that it would beat rivals' prices by two percent. IDF 436-440, 452. Dr. Evans determined that this change in its ad copy { [REDACTED] } the percentage of orders that were price-matched. CCPFF 1483.

The ALJ also relied on factors identified as probative by the Supreme Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). RAB 33. For example, 1-800's rivals consider prices of online retailers – not brick-and-mortar retailers – when setting their prices. IDF 442-

447; ID 129-130. And 1-800's price-match program was crafted to address competition from online, not brick-and-mortar, retailers. IDF 436, 440, 450, 452; ID 129-130. 1-800 criticizes the ALJ for using information about distinct prices to help identify the product market. RAB 35. But distinct prices that result from head-to-head competition are precisely the type of direct evidence the Merger Guidelines identify as relevant in defining a market. 2010 MERGER GUIDELINES §§2.1.4, 4. *See also FTC v. Swedish Match*, 131 F. Supp. 2d 151, 165 (D.D.C. 2000); *Avnet, Inc. v. FTC*, 511 F.2d 70, 77 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975).

Attempting to show that 1-800 competes more closely with ECPs than with other online sellers, 1-800 states that it sets retail (not price-match) prices “at a discount to ECPs’ prices” (RAB 30), and substantially above most online prices. IDF 692-693. Complaint Counsel does not dispute this point: 1-800 charges consumers who are unaware of lower-price alternatives significantly higher prices than it charges consumers who *are* aware of lower-price alternatives (and who take advantage of 1-800's price-match program). *See* IDF 681-685, 691-698, 704-742; ID 153-160. This shows a lack of information in the market. It is not evidence of price competition between 1-800 and ECPs.

1-800 also criticizes the ALJ for relying on evidence of a product's distinct characteristics and customers to help identify the product market. RAB 34-35. However, a product's characteristics, along with a set of distinct customers who highly value those characteristics, provide a reason why certain customers may be relatively insensitive to differences in price. In this case, the ALJ explained that “[o]nline purchasing is more convenient than purchasing from brick and mortar sites because the customer does not need to return to the store to pick up his or her purchase,” and then described a set of well-defined circumstances that

cause some customers strongly to prefer online over in-store, or vice-versa. ID 128-129; *see* IDF 398-409, 465; CCPFF 1544-1552.

Finally, 1-800 suggests that industry recognition of an online market is limited solely to “a radio interview and occasional references to an ‘online contact lens market’ in documents.” RAB 34. Once again, 1-800 ignores substantial evidence indicating that industry participants, including 1-800, recognize the online sale of contact lenses as a separate market. IDF 410-417; ID 127, 132-133; CCPFF 1554-1558, 1661-1665. *See Aetna*, 240 F. Supp. 3d at 10, 24; *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132-33 (D.D.C. 1986) (“Analysis of the market is a matter of business reality – a matter of how the market is perceived by those who strive for profit in it”), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987).

1-800 advances several other misleading or irrelevant claims. 1-800 asserts, without citation, that Dr. Evans testified that “offline firms constrain 1-800 Contacts’ ability to raise prices above competitive levels.” RAB 30. This is contrary to Dr. Evans’ actual testimony. *See* IDF 397-398, 454-487; ID 133-138; Evans, Tr. 1530, 1542-1543.

1-800 also claims that its price guarantee was { [REDACTED] }, purportedly supporting the conclusion that consumers compare prices of online and offline retailers. RAB 30. But, as the ALJ found, 1-800 designed its price-match program specifically to compete against online, not brick-and-mortar, retailers. IDF 436-438, 440, 450, 452; ID 130. 1-800’s price-matching data confirms this: In 2016, only { [REDACTED] } percent of the orders on which customers received discounts were attributable to { [REDACTED] }, while the { [REDACTED] } were attributable to online rivals. CX1334-007, *in camera*. Further, 1-800’s stated policy is (and has always been) *not* to price-match club stores. IDF 450.

Although, at some point, price matches may have been made on a discretionary basis by call center personnel, 1-800's senior management team recently reaffirmed its stated policy of not price-matching club stores, and instructed employees to follow this policy. CCPFF 1606; CCPTB 106 & n.349.

1-800 contends that its business model is to persuade ECP customers to buy online. RAB 30. That 1-800 seeks to win business from ECPs shows only that "1-800 Contacts sees itself competing in two markets." ID 133. This fact is neither exceptional nor germane. *See, e.g., FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008) ("courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers") (citing cases).

ii. Collectively, Parties to Challenged Agreements Have a Dominant Share of the Relevant Market

The collective market share of the parties to the Challenged Agreements is overwhelming, accounting for approximately 79 percent of online contact lens sales in the United States. IDF 495-496. Given these market shares, a strong presumption of market power arises unless "entry into the market is so easy" that the parties could not profitably raise prices. 2010 MERGER GUIDELINES §9.

iii. Entry is Insufficient to Offset Competitive Harm

1-800 asserts that there are only limited barriers to entry (RAB 26-28), but overlooks the requirement that entry must be sufficient to offset the anticompetitive harm. *See Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 430 (5th Cir. 2008) (relying on Commission's findings that "entrants in this market also appear vastly overmatched by [respondent]," and that testimony

“does not demonstrate that [the entrants] are adequate replacement for competition that has been lost”). *See also* CCPFF 1634-1668.

Specifically, 1-800 ignores substantial evidence showing that, in order to compete effectively, a new entrant would need to { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED] } RX1228-014, *in camera*. The { [REDACTED] }
[REDACTED]
[REDACTED] } *Id.* *See* IDF 419-427 (new entrants must build large distribution facilities; have “robust infrastructure” supporting their fulfillment services; carry extensive inventories of contact lenses; and build sophisticated websites); CCPFF 1660-1668. Indeed, many of the supposedly independent competitors touted by 1-800 (RAB 28) have been forced to purchase fulfillment and distribution services from two established online retailers: National Vision (AC Lens) and 1-800 itself. IDF 420-423; RX1228-014, *in camera*; CX0331-071 (Luxottica websites). 1-800 also ignores the effect that the Challenged Agreements themselves have on an entrant’s ability to build brand awareness. *See, e.g.*, IDF 498-565, 586-589, 600-603, 611-612, 621-622, 626-627, 637, 640-642, 645-646; CCPFF 1653-1659. 1-800’s own documents describe such brand awareness { [REDACTED] }. CX1449-048, *in camera*; *see* RX1228-014, *in camera*.

Given these barriers, it is unsurprising that there has been no recent successful entry into the market by pure-play online merchants. *See* CCPFF 1669-1674. An analysis prepared by 1-800’s owner, AEA Investors, cites { [REDACTED] }

██████████ } CCPFF 1670. The experience of one online entrant touted by 1-800 – Web Eye Care – reinforces this conclusion. Six years after entering the market, Web Eye Care captured only {██████} percent of the market. CCPFF 1672.

These facts confirm that new entry is unlikely to remedy the anticompetitive harm inflicted by 1-800 and the settling parties.

iv. ALJ’s Findings Support Conclusion that Settling Parties Have Market Power

As discussed above, proof of anticompetitive effects obviates the necessity of independently proving market power. Proof of anticompetitive effects also supports a finding of market power. *See Eastman Kodak*, 504 U.S. at 477-478 (“It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.”); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-240 (2d Cir. 2003) (upholding finding of credit card companies’ market power based on direct evidence that no merchants discontinued acceptance of the cards despite price increases); *United States v. Microsoft*, 253 F.3d 34, 57 (D.C. Cir. 2001) (“if evidence indicates that a firm has in fact” profitably raised prices substantially above competitive levels, “the existence of monopoly power is clear”).

Thus, in addition to their collective dominant market share and the existence of substantial barriers to entry, 1-800 and the settling parties should be found to have market power based on evidence that the Challenged Agreements had significant and lasting anticompetitive effects. They “disrupted the ordinary give and take of the marketplace by restricting competing advertisements from appearing” (ID 154), causing many consumers unwittingly to pay more for

contact lenses than they would have if they had seen such advertising. ID 153-156. Such lasting effects were possible only because 1-800 and the settling parties collectively had market power.

B. Bidding Restraints are *Prima Facie* Anticompetitive

In the Challenged Agreements, 1-800's rivals commit that they will not bid in specified search advertising auctions. In return, 1-800 likewise withdraws from other specified search advertising auctions. Because the ALJ concluded that the Challenged Agreements are *prima facie* anticompetitive based on their effect on consumers of contact lenses, he did not "further determine whether or not the Challenged Agreements have anticompetitive effects in the form of harm to search engines." ID 166. The Commission should address this issue, and find that the Challenged Agreements' impact on search engines independently establishes a *prima facie* case of competitive harm in two ways. First, the Challenged Agreements operate as naked restraints on competitive bidding, which are inherently suspect (Section IV.B.1). In addition, direct evidence demonstrates actual harm to search engines (Section IV.B.2).

1. 1-800's Bidding Restraints are Inherently Suspect

A restraint on price competition is the archetypical example of inherently suspect conduct. As the Supreme Court has consistently held, any "agreement that [interferes] with the setting of price by free market forces is illegal on its face." *Prof'l Eng'rs*, 435 U.S. at 692 (internal quotation omitted). As a matter of law, courts presume that a horizontal restraint on price competition is anticompetitive. *NCAA*, 468 U.S. at 109-10; *Polygram*, 416 F.3d at 36.

Agreements, like those here, that restrain competitors from participating in an auction are referred to as "bid-rigging," and are a form of price-fixing. *See Prof'l Eng'rs*, 435 U.S. at 692; *see also* CCPTB 73-74 (listing additional cases). "No elaborate industry analysis is required to

demonstrate the anticompetitive character” of an “absolute ban on competitive bidding.” *Prof'l Eng'rs*, 435 U.S. at 692. This presumption is supported by the economic consensus that bid-rigging inflicts competitive injury by distorting prices: the seller receives (and the buyer pays) a non-competitive price. *See* CCPFF 1283-85.

2. There is Direct Evidence of Actual Harm to Search Engines

The Challenged Agreements also resulted in actual harm to search engines. The agreements distorted the search engines' advertising auctions; decreased their revenues; and diminished the quality of their product.

As described earlier, Dr. Evans constructed an empirical model showing that, as a result of the Challenged Agreements, 1-800's cost-per-click on trademark keywords was reduced by between { [REDACTED] } percent. CCPFF 1306. 1-800's “savings” represents a financial loss to the search engines – and a direct form of competitive injury. 1-800's internal documents acknowledge that a key purpose and effect of its agreements was to reduce its advertising costs. Referring to the practice of “[k]eep[ing] competitors . . . off” its trademark terms, 1-800 observed that “[l]ow competition = low cost.” CX0051-004. *See* CCPFF 866-881, 1301, 1303 (citing additional documents). Unsurprisingly, “[k]eep[ing] competitors . . . off” its trademark terms was important to 1-800 since its policy was to “spend as much as necessary when bidding on its trademark keywords to meet its goal of ensuring that 1-800 Contacts' advertisement was the first advertisement displayed in response to searches for its trademark.” IDF 575.

1-800's admissions are consistent with the conclusions of both Google and Bing that, all other things equal, a reduction in the number of auction participants reduces the price paid by the auction winner and reduces the revenues to the search engines. CCPFF 1300-1302, 1304. *See*

IDF 220 (“[I]n general, more advertisers bidding on keywords results in higher CPCs [costs per click].”).

In addition to the direct monetary injury, the Challenged Agreements also harm the search engines by removing relevant, valuable advertisements that would otherwise have been presented to consumers on the SERP, thus resulting in a lower-quality product. The harm to product quality is not limited to one specific auction. Rather, it compounds over time, as the restraints interfere with the ability of search engine algorithms to determine organically which advertisements are relevant and which are not. CCPFF 1307-1312; CCPTB 64-67. Degradation of the SERP harms both the search engines *and* consumers.

C. 1-800’s Defenses Were Properly Rejected

“Where, as here, a challenged agreement is demonstrated to have anticompetitive effects, the burden shifts to the respondent to prove legitimate, countervailing justifications.” ID 166 (citing *Realcomp*, 635 F.3d at 825; *Polygram*, 416 F.3d at 36). The ALJ properly rejected 1-800’s defenses.

1. Actavis Does Not Shield the Challenged Agreements from Scrutiny

1-800’s principal defense is based on an egregious misreading of the Supreme Court’s decision in *Actavis*, 133 S. Ct. 2223, a misreading already rejected by the Commission in this case. *In re 1-800 Contacts, Inc.*, 2017 WL 511541, *3 (Feb. 1, 2017). The premise of 1-800 Contacts’ argument is that, until “reverse payment” cases came along, antitrust law had never been applied to agreements settling legal disputes. Wary about venturing into the unknown, the *Actavis* court erected two “threshold” tests that a plaintiff must surmount in order to bring an antitrust claim against a settlement agreement. First, only “unusual” settlement agreements are

subject to scrutiny; “commonplace” agreements are exempt. Second, even if the Challenged Agreements are “unusual,” five additional “threshold” considerations must be satisfied to “outweigh” the procompetitive presumption accorded to settlement agreements. RAB 10-20.

Of course, antitrust courts have been reviewing settlement agreements for the better part of the last century without applying any “threshold” test. “While public policy wisely encourages settlements,” some settlements can impose “too high a price.” *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994). “[T]here is nothing magical about a settlement that immunizes an agreement that may otherwise violate the antitrust laws.” ID 168 (quoting *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1309 (S.D. Fla. 2005)).

In *Actavis*, a brand-name drug owner sued two generic drug manufacturers for patent infringement. In settlement of these claims, (i) the generic companies agreed to delay launching competing products, while allowing generic entry five years *before* the expiration of the patent, and (ii) the brand company agreed to pay the generic company millions of dollars. 133 S. Ct. at 2227. The FTC argued that the agreement was presumptively unlawful because the large cash payment from the patent holder to the alleged infringer (a “reverse payment”) demonstrated that the compromise entry date did not reflect the parties’ assessment of the strength of the patent claim. The Court disagreed, holding that the existence of a reverse payment *by itself* was not sufficient to confidently conclude that the agreement “would have an anticompetitive effect” on the market. *Id.* at 2237 (internal quotation omitted). However, the Court held that, even where a settlement provided for generic entry *earlier* than such entry would be permitted if the patent-holder won its infringement suit (*i.e.*, arguably within the scope of the patent holder’s property right), such settlement agreement should be subject to antitrust scrutiny. *Id.* at 2237-38.

Actavis certainly did not purport to overturn an entire body of jurisprudence relating to antitrust review of settlements. Indeed, 1-800's immunity argument is "contrary to authorities cited with approval by the *Actavis* court," including *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963), *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952), and *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), each holding that a facially overbroad patent settlement was *per se* unlawful – without evaluating whether the agreement was novel or rare. ID 122.

Actavis uses the term "commonplace" as shorthand to refer to a settlement in which a patentee with a claim for damages "receives a sum equal to or less than the value of its claim." 133 S. Ct. at 2233. The Court's message is that there are ways of settling patent infringement disputes that are commonly employed and also competitively benign: the litigants can settle without a "reverse payment." This does *not* mean (as 1-800 contends) that repeated use of particular settlement terms makes them "commonplace" and, thus, immune to antitrust review. *See, e.g., United States v. Masonite*, 316 U.S. 265 (1942) (multiple similar agreements settling patent infringement claims held *per se* unlawful).

The lower court, post-*Actavis* cases cited by 1-800 (RAB at 15) likewise do not hold that frequently used settlements are immune from antitrust liability. None of the cited cases analyzes a frequently used settlement; these are all reverse payment cases. These courts follow *Actavis* and use the term "commonplace" as shorthand to refer to the hypothetical settlement described above.

Even if there were an "exemption" for "commonplace" agreements (there is not), the Challenged Agreements would not qualify. The three key terms of the Challenged Agreements are: (i) the rival may not bid for designated trademarks in a search advertising auction, even

where consumers are not confused; (ii) the rival must designate certain negative keywords in its search advertising campaigns; and (iii) the settlement terms are reciprocal, constraining both 1-800 and each settling party. IDF 361, 363-364.

If “commonplace” means occurring frequently or usually, then the Challenged Agreements do not embody “commonplace” terms. 1-800’s “trademark expert” testified gingerly that the “form of the settlement agreements at issue is very typical” (RAB 13 (quoting Hogan, Tr. 3274)). Let us be more precise. Aside from 1-800’s own agreements with rivals, 1-800 and its expert failed to identify a *single other agreement* in which all three of the salient characteristics of the Challenged Agreements are present. *See* CCPTRB 7-10. 1-800 asserts that the Challenged Agreements are “materially indistinguishable” from the settlement in *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10 (1st Cir. 1999). RAB 12. But the *MGM* agreement has *zero* of the three salient characteristics of the Challenged Agreements.

1-800 invents five additional “threshold” considerations. RAB 16-20. None has any bearing on the facially overbroad trademark settlements challenged here. *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 551 n.12 (1st Cir. 2016) (“the five [*Actavis*] considerations should not overhaul the rule of reason, nor should they create a new five-part framework in antitrust cases”). Furthermore, all five of these considerations support antitrust review. *See* CCPTRB 15-17.

Unable to show that the Challenged Agreements are “commonplace,” 1-800 next contends that the Challenged Agreements are immune because they “provided for relief that a court could have ordered if 1-800 Contacts had prevailed.” RAB 12. This, too, is incorrect. Neither *Actavis* nor any other authority suggests that a court’s plenary power to issue an

injunction is a relevant consideration when assessing a private settlement agreement. For good reason: There are few limits (and certainly no antitrust limits) on what a federal court has the power to order in an appropriate case. So, effectively, 1-800 is back to the untenable claim that all settlements are immune from antitrust scrutiny.

Finally, 1-800 cannot claim that a court would have ordered comparable relief if it had prevailed in its lawsuits. Just as the Challenged Agreements are not “commonplace” settlements, they are unseen in the world of judicially-imposed remedies. 1-800 has pointed to no other injunction with the three salient terms. The Challenged Agreements restrain competition well beyond what any court has ordered, or would order, in similar circumstances. *See* CCPTB 147 & n.468 (reviewing cases); CCPTRB 11-12 (same).

2. 1-800’s Trademark Rights Do Not Justify the Challenged Agreements

A *prima facie* anticompetitive restraint can be redeemed only if reasonably necessary to achieve a legitimate, procompetitive objective. “To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives.” *Areeda & Hovenkamp* ¶1505. *Accord Realcomp*, 635 F.3d at 825. In other words, the restraint “must be reasonably ‘tailored’ to serve the asserted procompetitive interests.” *Polygram*, 136 F.T.C. at 335 (citing *NCAA*, 468 U.S. at 118-19).

Any settlement agreement will save “litigation costs.” RAB 37. In order to satisfy the reasonable necessity requirement, an agreement that restricts advertising must also “distinguish[] the truthful from the false, the helpful from the misleading.” *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 478 (1988) (internal citation omitted). *See Mass. Bd.*, 110 F.T.C. at 607 (“Prohibiting

truthful statements . . . cannot be justified on the ground that some advertising may seek to deceive the public.”); *AMA*, 94 F.T.C. at 1009-10 (same).

1-800 contends that here, unlike in *Mass. Bd.* and *AMA*, there is no less restrictive alternative; and that a complete ban on trademark search advertising by competitors is reasonably necessary to protect 1-800’s trademark rights. *See* RAB 37-39. Oddly enough, 1-800 fails to specify the contours of the “rights” it seeks to protect. 1-800 asserts instead that trademark jurisprudence is a “highly unsettled” area of law yielding “unpredictable” outcomes. RAB 2. Actually, the relevant legal rules are well established, and can and should guide the Commission’s assessment of what constitutes a reasonable trademark settlement.

A plaintiff in a trademark infringement action must show that the defendant used the plaintiff’s trademark in a manner likely to cause consumer confusion. *Multi Time Machine, Inc. v. Amazon, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015). “A trademark right does not grant its owner the right to stamp out every competitor advertisement.” ID 150 (quoting *1-800 Contacts v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1188 (D. Utah 2010), *aff’d*, 722 F.3d 1229 (10th Cir. 2013)). Thus, trademark law does not categorically prevent a firm from bidding on its rival’s trademark in a search advertising auction, or from placing its advertisement on the SERP. *Lens.com*, 755 F. Supp. 2d at 1173-74. In evaluating the likelihood that search advertising results in confusion, a court must consider both the use of the keyword *and* the content of the resulting advertisement. *See Amazon*, 804 F.3d at 937-39. No court has found liability based on trademark keyword bidding, absent a demonstration that the *content* of the triggered advertisement confuses consumers as to the advertisement’s source, sponsorship, or affiliation. *See* CCPTB 136-137 &

n.440, 140-143 & n.453 (citing cases); CCPTRB 27-29 (same). *See also* CX8013-011-022 (¶¶24-44) (Tushnet Rebuttal Expert Report) (citing additional cases).

Given this legal framework, 1-800 could have settled its trademark disputes with rival online sellers of contact lenses on terms that are significantly less restrictive of competition (as compared to the Challenged Agreements), while still protecting the company's legitimate trademark interests. The first step toward reasonable settlement terms is eliminating the indefensible negative keyword requirement in the Challenged Agreements. Where a rival is not "using" 1-800's trademark, "[i]t is beyond dispute" that the rival cannot infringe. *Lens.com*, 755 F. Supp. 2d at 1174; *see Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1302745, *5 (D. Ariz. May 2, 2007).

The next step is eliminating the blanket prohibition on bidding on trademarks even where consumers are not likely to be confused. *See* ID 151 (when advertisement "clearly identifies the source, which has a name quite different from the business being searched for," consumers are highly unlikely to be confused) (quoting *Lens.com*, 722 F.3d at 1245). Complaint Counsel has identified a range of less restrictive alternatives:

- (1) Bar the rival from using specific text alleged by 1-800 to engender confusion.²

The cases cited by 1-800 for the proposition that trademark injunctions should avoid "amorphous standards" (RAB at 40-41) favor such a precise remedy. *See* CCPTRB 76-77 (citing cases). *See also Toyota Motor Sales, USA, Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010) (trademark injunction should be "tailored to eliminate only the specific harm alleged") (internal quotation omitted); CX8014-038-040 (¶¶84-85) (Tushnet Expert Rebuttal Report) (citing additional cases).

² This includes barring a rival from using a name that is confusingly similar to its own. *See Clorox*, 117 F.3d at 57.

(2) Require clear disclosure in each search advertisement of the identity of the rival seller. Trademark law teaches that this precaution likely eliminates any potential confusion. *Amazon.com*, 804 F.3d at 937-39 (confusion unlikely where advertisement is “clearly labeled” as to source of product); *Lens.com*, 722 F.3d at 1245 (search advertisement that “clearly identifies the source [of the advertisement]” is highly unlikely to confuse consumers). See CCPTB 136-137 & n.440 (citing additional cases); CCPTRB 125 (same).³

(3) Require the rival to avoid confusing or deceptive language in the text of its search ads. Cf. *Internet Specialties West, Inc. v. Milon-Digiorgio Enters.*, 559 F.3d 985, 993 (9th Cir. 2009) (approving injunction barring defendant from using plaintiff’s trademark in a manner “which would give rise to a likelihood of confusion”). This is akin to Commission orders in previous antitrust cases challenging advertising restraints. E.g., *Mass. Bd.*, 110 F.T.C. at 633 (enjoining association from interfering with truthful, non-misleading advertising, but permitting the adoption of “reasonable rules” to prevent advertising that is “fraudulent, false, deceptive, or misleading within the meaning of [state law]”); *AMA*, 94 F.T.C. at 1037-38 (enjoining broad restraint on advertising, but permitting association rules prohibiting false advertising).

1-800 objects that these alternatives are “merely theoretical” and have not been commonly adopted by settling parties. RAB 40. This argument fails for two reasons. First, Complaint Counsel is not required to show that litigants have chosen these settlement terms. The issue here is how adequately, albeit narrowly, to remedy an alleged violation of law. Thus, it is entirely appropriate to rely on the judgment and experience of the Commission and federal courts

³ Contrary to 1-800’s claim (RAB 41), identifying the competing seller is not a “disclaimer” of an otherwise false representation. See CCPTRB 126-27.

in assessing practical solutions. This is particularly so where, as here, courts have provided guidance on this precise issue.

Second, 1-800 has offered no evidence that the proposed alternatives are unworkable. *See Areeda & Hovenkamp* ¶1914c (“The most workable allocation [of burden] gives the plaintiff the burden of suggesting, or proffering a particular alternative claimed to achieve the same benefits but less restrictive of competition. The defendant then has the burden of showing that the proffered alternative is either unworkable or not less restrictive.”).

1-800 complains that the less restrictive alternatives identified by Complaint Counsel do not guarantee that 1-800 will forever be free of disputes with competitors. *See* RAB 40-41. But 1-800 is not entitled to such a guarantee; rather, a competitor’s private quest to eliminate speculative, future occurrences of arguably unfair competition must operate within the bounds of antitrust reasonableness. *Cf. Fashion Originators’ Guild v. FTC*, 312 U.S. 457, 467-68 (1941) (condemning clothing designers’ boycott aimed at eliminating “pirating of original designs”); *N.C. Bd.*, 152 F.T.C. at 642-43 (condemning agreement among dentists to exclude unlicensed providers of teeth whitening); *Lens.com*, 755 F. Supp. 2d at 1188 (opining that 1-800 settlement agreement barring bids on trademark keywords is overbroad and unreasonable).

This analysis, and the ALJ’s opinion, does not require 1-800 to “prove” that it would have prevailed on the claims it settled. *See* RAB 37-38. Whether 1-800 would have been able to demonstrate that any particular competitor advertisement challenged in its lawsuits infringed the company’s trademark is immaterial. What matters is that the agreements settling these lawsuits

are facially and unreasonably overbroad, far exceeding 1-800's property right. The ALJ's Order embodies less restrictive alternatives.⁴

3. 1-800's Constitutionality Challenges to the Order and to the Proceeding Should be Rejected

1-800 raises an assortment of constitutional claims, none well founded.

(1) An Order barring 1-800 from enforcing its existing settlement agreements does not interfere with the constitutional authority of the federal judiciary. *See* RAB 42-43. 1-800 cites no legal authority for its contention. Consent agreements are subject to antitrust review, and unreasonable agreements are unenforceable. *See infra* p. 49-50. Lastly, the Order constrains only 1-800, and does not affect the prerogatives of any court.

(2) An Order barring 1-800 from enforcing its unlawful agreements is not a "taking" proscribed by the Fifth Amendment. *See* RAB 43-45. None of the cases invoked by 1-800 supports this far-reaching proposition, and one of the cited cases flatly rejects this argument. *SEC v. Chenery Corp.*, 332 U.S. 194, 203-204 (1947) (upholding retroactive effect of SEC order affecting the value of past stock purchases). The sole case cited by 1-800 that denied retroactive application of an agency order did so because the order reversed the *agency's* own prior position. *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972). The Commission has never taken a position contrary to the Order under appeal here. This case involves only the application of standard antitrust law to a particular fact pattern. Thus, an Order preventing 1-800 "from enforcing restrictions that have been determined to be unlawful is necessary and appropriate to remedy the violations found to exist." ID 197 (citing cases). *See, e.g., In re L. G. Balfour Co.*, 74 F.T.C. 345 (1968), *aff'd in relevant part*, 442 F.2d 1 (7th Cir.

⁴ For a discussion of 1-800's claims based on trademark dilution and state law, *see* CCPTB 150-152.

1971) (Commission order requiring defendant to terminate all existing contracts for certain products).

(3) 1-800 contends, in a single sentence, that the entire Part 3 process is “unconstitutional.” RAB 45. The Commission is not obliged to consider “far-reaching constitutional contentions presented in so off-hand a manner.” *See Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986). In any event, the Commission should disregard this argument because 1-800 raises it for the first time on appeal; hence, the argument has been waived. *See Order Denying Respondent LabMD, Inc.’s Motion to Dismiss, In re Lab MD*, Dkt. No. 9357 (Sep. 14, 2015), slip. op. at *2-3.

(4) 1-800’s three-member “quorum” argument is meritless. *See* RAB 46. “The Federal Trade Commission Act does not specify the number of Commissioners who may constitute a quorum,” and therefore the Commission can establish a quorum by regulation. *FTC v. Flotill Prod.*, 389 U.S. 179, 181, 189-90 (1967). When *Flotill* was decided, the FTC rule expressly required three commissioners for a quorum. *Id.* at 181-82 (citing 16 C.F.R. §1.7 (1966)). The Commission’s current rule – 16 C.F.R. §4.14(b) – provides that a “majority” of the commissioners in office is sufficient to transact business. Further, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), is irrelevant: the Taft-Hartley Act established, *by statute*, a quorum of three NLRB members. *Id.* at 676.

D. The Commission Should Adopt a Modified Version of the ALJ’s Order

The Commission should adopt a modified version of the ALJ’s Order (Appendix A) to close an obvious path for future anticompetitive agreements. The Commission has “wide latitude” to modify or extend an order entered by the ALJ, *N.C. Bd.*, 152 F.T.C. at 688,

particularly where, as here, such modification is “essential to prevent recurrence of the [illegal] practices” evidenced by the record. *See AMA*, 94 F.T.C. 701, 1031 (1979); *N.C. Bd.*, 152 F.T.C. at 688-89.

The ALJ’s Order generally prohibits 1-800 from agreeing with a competing seller of contact lenses to restrain participation in search advertising auctions, or otherwise to restrain search advertising. ID 203 (Order, ¶¶II.A-B). However, at the urging of 1-800, the ALJ included a broad “carve-out” that modifies Complaint Counsel’s proposed Order in an important way. The Order, as currently drafted, permits 1-800 to enter into and enforce a litigation settlement agreement that unreasonably restrains bidding and advertising where such agreement is adopted by a court as a consent order. This carve-out appears in both Paragraphs II.A and II.B.

As drafted, then, the ALJ’s Order does not bar recurrence of the very conduct judged in this proceeding to be illegal. 1-800 can file lawsuits, exact the same agreements with rivals, and place them before a court – where they will likely be approved. Indeed, this is the very strategy that 1-800 pursued with Vision Direct in 2009. IDF 345; CCPFF 1089-1098.

1-800 asserts that, absent the carve-out, the Order would interfere with “the prerogatives of a court overseeing litigation.” ID 193. This is not even technically correct. Only the prerogatives of 1-800 are being curtailed. Under Complaint Counsel’s proposed Order, 1-800 is barred from agreeing with a competitor to submit to a court an agreement that unreasonably restrains competition. The court retains the authority to enter any relief it deems fit.

Settlement agreements are often approved by a court with little scrutiny, and without regard to whether that agreement is procompetitive or in the public interest. This is because “a court’s role in entering a consent judgment differs fundamentally from its role in actually

adjudicating a dispute.” *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 264 (3d Cir. 2017) (citing *Local No. 93, Int’l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 519-22 (1986)). A court’s province in approving settlements is quite limited. *See id.* at 265 (“[C]ourts construe terms of the settlement based on the intent of the parties, not of the court.”). As the Supreme Court has observed, when a court enters a consent judgment, “it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in the consent decree.” *Local No. 93*, 478 U.S. at 522. Thus, the entry of a consent decree “does not . . . reflect a court’s assent to the substantive terms found therein.” *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 398 (D. Mass. 2013).

A Commission order restricting the ability of 1-800 to seek anticompetitive consent orders is entirely proper. The Supreme Court has repeatedly concluded that the interest in protecting competition takes precedence over the public policy favoring deference to settlements. *See Actavis*, 133 S. Ct. at 2232 (holding that patent settlements can violate the antitrust laws). *See also In re 1-800 Contacts*, 2017 WL 511541, at *3.

Thus, in analogous circumstances, lower courts have rejected the argument that consent judgments resolving disputes between private parties should be immune from antitrust scrutiny. For example, in *Lipitor*, the Third Circuit rejected the application of *Noerr* to a consent judgment, observing that consents between private parties are simply “*voluntary agreements* negotiated by the parties for their own purposes.” *Lipitor*, 868 F.3d at 265 (emphasis in original). *See also In re Androgel Antitrust Litig.*, 2014 WL 1600331, *8 (N.D. Ga. Apr. 21, 2014) (rejecting *Noerr* defense where “the consent decree was formed by [the parties] to settle their dispute, not by the Court in order to terminate pending litigation . . . [therefore] the ‘source . . . of

the anticompetitive restraint at issue’ is the parties’ . . . agreement itself, not the governmental action.”) (quoting *Allied Tube*, 486 U.S. at 499 (1988)); *Nexium*, 968 F. Supp. 2d at 396 (rejecting *Noerr* defense because the means by which private parties obtain a consent judgment are essentially “the same as those used to enter into private settlement or any private commercial contract.”); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 212 (E.D.N.Y. 2003) (rejecting *Noerr* defense because the challenged agreements were “private agreements between the defendants,” in which the judge “played no role other than signing the Consent Judgment”).

For these reasons, the Commission should adopt a modified version of the ALJ’s Order that protects against circumvention by 1-800 of the liability finding in this case.

V. CONCLUSION

For the reasons stated above, Complaint Counsel requests that the Commission affirm the Initial Decision entered by the ALJ, and enter the ALJ’s Order, as modified (Appendix A), as the Order of this Commission.

Dated: February 9, 2018

Respectfully Submitted,

/s/ Daniel Matheson
 Daniel J. Matheson
 Geoffrey M. Green
 Barbara R. Blank
 Kathleen M. Clair
 Gustav P. Chiarello
 Joshua B. Gray
 W. Stuart Hirschfeld
 Nathaniel M. Hopkin
 Mika Ikeda
 Charles A. Loughlin
 Aaron S. Ross
 Charlotte S. Slaiman

Federal Trade Commission
 Bureau of Competition
Counsel Supporting the Complaint

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

_____)	
In the Matter of)	
)	
1-800 CONTACTS, INC.,)	
a corporation,)	DOCKET NO. 9372
)	
Respondent)	
_____)	

[PROPOSED] ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “1-800 Contacts” means 1-800 Contacts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Communicate,” “Communicating,” or “Communication” means the exchange, transfer, or dissemination of any information, without regard to the manner or means by which it is accomplished.
- D. “Entering Into” means entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.
- E. “Keyword” means a word or phrase used to instruct a Search Engine to display specified Search Advertising.
- F. “Negative Keyword” means a word or phrase used to instruct a Search Engine not to display specified Search Advertising.
- G. “Person” means both natural persons and artificial persons, including, but not limited to, corporations and unincorporated entities.
- H. “Search Advertising” means online advertisements displayed on a Search Engine Results Page in response to a user query.

- I. “Search Engine” means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.
- J. “Search Engine Results Page” means a web page displayed by a Search Engine in response to a user query.
- K. “Seller” means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.
- L. “Trademark Infringement Claim” means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the advertising, marketing, sale, or distribution of contact lenses in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from:

- A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller’s participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.

Provided that nothing in this Paragraph II.A shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent’s intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation.

- B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B shall prohibit Respondent from entering into or complying with a written agreement providing that a:
 - 1. Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or

2. Seller's Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation.

- C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion.
- D. Attempting to engage in any conduct that is prohibited by Paragraph II of this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that imposes a condition on a Seller that is not consistent with Paragraph II of this Order.
- B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any and all provisions, terms, or requirements in any court order or agreement that imposes a condition on a Seller that is not consistent with Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date this Order is issued:
 1. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;
 2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:

- (a) To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and
 - (b) With whom Respondent entered into any agreement prohibited by Paragraph II of this Order.
- B. For a period of five (5) years from the date this Order is issued:
- 1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;
 - 2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1 of this Order no later than the time Respondent initially Communicates with such Person;
 - 3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement; and
 - 4. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position.
 - 5. Provide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order.
- C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

- A. No later than ninety (90) days from the date this Order is issued, and

- B. One (1) year from the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission may request.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger, or consolidation of Respondent; or
- C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

Appendix A

[Letterhead of 1-800 Contacts]

[Name and Address of the Recipient]

Dear (Recipient):

As you may know, the Federal Trade Commission issued an administrative complaint in 2016 against 1-800 Contacts, Inc. (“1-800 Contacts”) challenging several agreements between 1-800 Contacts and other contact lens sellers that restrict the ability of such sellers to purchase trademark keywords in search advertising auctions, or to place search advertising triggered by those keywords on internet search engine results pages.

The Federal Trade Commission has issued a Decision and Order (“Order”) against 1-800 Contacts in connection with its complaint. This Order provides, in part, that 1-800 Contacts may not prohibit competing sellers of contact lenses from engaging in truthful, non-deceptive advertising or solicitation through the display of search advertising. Specifically, 1-800 Contacts may not:

1. Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords; or
2. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising.

The Order further requires 1-800 Contacts to take whatever action is necessary to have vacated all court orders or other restraints related to trademark infringement claims initiated to accomplish any of the above-listed prohibited activities.

The Order does not prohibit 1-800 Contacts from entering into an agreement with a seller of contact lenses that requires certain disclosures in the *text* of an advertisement, including a clear identification of the seller placing the advertisement.

For more specific information, you should refer to the FTC order itself. The Federal Trade Commission’s Complaint and Decision and Order are available on the Commission’s website, <http://www.ftc.gov>.

APPENDIX B

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

In the Matter of)
)

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

Respondent)
_____)

DOCKET NO. 9372

[PROPOSED] ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

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- A. "1-800 Contacts" means 1-800 Contacts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Commission" means the Federal Trade Commission.
- C. "Communicate," "Communicating," or "Communication" means the exchange, transfer, or dissemination of any information, without regard to the manner or means by which it is accomplished.
- D. "Entering Into" means entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.
- E. "Keyword" means a word or phrase used to instruct a Search Engine to display specified Search Advertising.
- F. "Negative Keyword" means a word or phrase used to instruct a Search Engine not to display specified Search Advertising.
- G. "Person" means both natural persons and artificial persons, including, but not limited to, corporations and unincorporated entities.
- H. "Search Advertising" means online advertisements displayed on a Search Engine Results Page in response to a user query.

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- I. “Search Engine” means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.
- J. “Search Engine Results Page” means a web page displayed by a Search Engine in response to a user query.
- K. “Seller” means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.
- L. “Trademark Infringement Claim” means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the advertising, marketing, sale, or distribution of contact lenses in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from:

- A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller’s participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.

Provided ~~further~~ that nothing in this Paragraph II.A shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent’s intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, ~~including an order approving at the conclusion of a contested litigation settlement.~~

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- B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B shall prohibit Respondent from entering into or complying with a written agreement providing that a:
 - 1. Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or

2. Seller's Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, ~~including an order approving at the conclusion of a contested litigation settlement.~~

- C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion.
- D. Attempting to engage in any conduct that is prohibited by Paragraph II of this Order.

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III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that imposes a condition on a Seller that is not consistent with Paragraph II of this Order.
- B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any and all provisions, terms, or requirements in any court order or agreement that imposes a condition on a Seller that is not consistent with Paragraph II of this Order.

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IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date this Order is issued:
- Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;
 - Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:

- (a) To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and
- (b) With whom Respondent entered into any agreement prohibited by Paragraph II of this Order.

B. For a period of five (5) years from the date this Order is issued:

1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;
2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1 of this Order no later than the time Respondent initially Communicates with such Person;
3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement; and
4. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position.
5. Provide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order.

C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV.

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V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

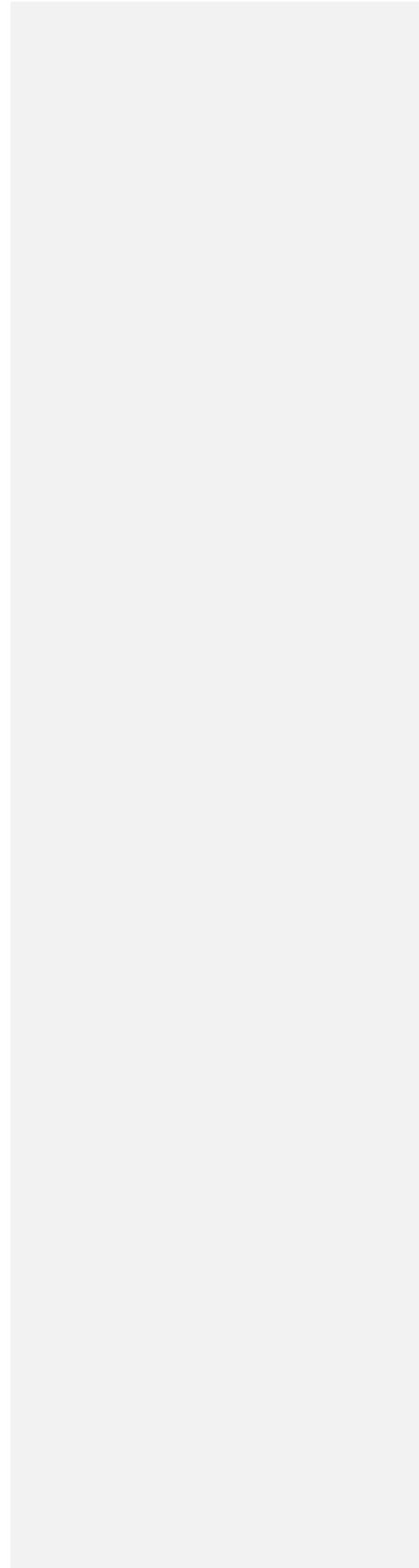
A. No later than ninety (90) days from the date this Order is issued, and

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:



Appendix A

[Letterhead of 1-800 Contacts]

[Name and Address of the Recipient]

Dear (Recipient):

As you may know, the Federal Trade Commission issued an administrative complaint in 2016 against 1-800 Contacts, Inc. (“1-800 Contacts”) challenging several agreements between 1-800 Contacts and other contact lens sellers that restrict the ability of such sellers to purchase trademark keywords in search advertising auctions, or to place search advertising triggered by those keywords on internet search engine results pages.

The Federal Trade Commission has issued a Decision and Order (“Order”) against 1-800 Contacts in connection with its complaint. This Order provides, in part, that 1-800 Contacts may not prohibit competing sellers of contact lenses from engaging in truthful, non-deceptive advertising or solicitation through the display of search advertising. Specifically, 1-800 Contacts may not:

1. Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords; or
2. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising; or
- ~~3. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller to allocate or divide markets or customers; or to raise, fix, maintain, or stabilize prices or price levels.~~

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The Order further requires 1-800 Contacts to take whatever action is necessary to have vacated all court orders or other restraints related to trademark infringement claims initiated to accomplish any of the above-listed prohibited activities.

The Order does not prohibit 1-800 Contacts from entering into an agreement with a seller of contact lenses that requires certain disclosures in the *text* of an advertisement, including a clear identification of the seller placing the advertisement.

For more specific information, you should refer to the FTC order itself. The Federal Trade Commission’s Complaint and Decision and Order are available on the Commission’s website, <http://www.ftc.gov>.

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APPENDIX C

Pursuant to Rules 3.45(e) and 3.52(f) of the Commission's Rules of Practice, attached is a copy of the pages from Complaint Counsel's Answering Brief containing *in camera* material.

Notice of the Commission's intent to disclose in a Final Decision the *in camera* material on p. 33-34 of Complaint Counsel's Answering Brief relating to AEA Investors should be made to counsel for AEA Investors in this proceeding: Matthew E. Joseph, Fried Frank Harris Shriver & Jacobson LLP, 801 17th Street NW, Washington, DC 20006.

Notice of the Commission's intent to disclose in a Final Decision the *in camera* material on p. 34 of Complaint Counsel's Answering Brief relating to Web Eye Care should be made to counsel for Web Eye Care in this proceeding: Daliah Saper, Saper Law Offices, LLC, 505 N. LaSalle Street, Ste. 350, Chicago, IL 60654.

Notice of the Commission's intent to disclose in a Final Decision any other *in camera* material should be made to Respondent 1-800 Contacts' counsel in this proceeding: Steven M. Perry, Munger, Tolles & Olson LLP, 350 South Grand Avenue, 50th Floor, Los Angeles, CA 90071.

The online sale of contact lenses accounts for about 17 percent of all contact lens sales in the United States. IDF 491. Online merchants typically offer the lowest prices for contact lenses. IDF 442. 1-800, the largest online seller of contact lenses in the United States (with a share of █████ percent, IDF 495), is the exception. While 1-800 prices below traditional ECPs, its price is typically higher than that of other online retailers, often by a substantial amount. IDF 434, 691-693. 1-800's customers are generally unaware of this price gap, and mistakenly believe that 1-800's prices are comparable to those of other online retailers. IDF 694-698.

2. Overview of Search Advertising

Search engines provide information to consumers without charge, while obtaining revenues from advertisers. IDF 140. A SERP displays advertisements (or “sponsored” listings), which may appear at the top, bottom, or right-hand side of the SERP. IDF 148, 151. Search engines operate on a “cost-per-click” basis, receiving payment from the advertiser only if a consumer clicks on the advertisement. IDF 154-155. This incentivizes search engines to display only advertisements that consumers are likely to find relevant and helpful. *See* IDF 181-185, 193-199, 202, 205-206, 209-210, 213, 224, 238-240.

Correspondingly, search advertising is uniquely valuable to advertisers because it places an advertisement in front of a consumer at the precise moment the consumer is signaling (through a search query) her interest in a product. The search engines' sophisticated algorithms attempt to ensure it is the *right* ad for the *right* consumer at the *right* time. *See* IDF 498, 562; ID 140-141. Search advertising is especially valuable to firms that sell products online. *See* IDF 497-564; ID 140-141.

comparable service. *See* CCPFF 305-374. Search advertising made the lower-price online retailers visible to potential customers and facilitated price comparison. *See* ID 140-141.

It was against this backdrop that 1-800 began to notice ads for lower-price competitors appearing on SERPs generated by queries relating to “1-800 Contacts.” *See* IDF 302-303, 319, 323. This trademark search advertising, accounting for █████ percent of the company’s total orders, was a critical source of business. IDF 566, 570-573, 578, 580. Thus, 1-800 was quite concerned about competitors advertising against its trademarks. *See* IDF 710-732; CCPFF 822-890.

2. 1-800 Enters into 14 Agreements with Rivals to Restrain Advertising

In response to the burgeoning competitive threat, 1-800 launched a series of lawsuits, ultimately reaching settlement agreements with all of its “major competitors.” IDF 415 (citing Bethers testimony).

1-800’s general practice was *not* to evaluate whether competitors’ advertising caused consumer confusion before suing (or threatening to sue) its rivals. *See* CCPTB 143 & n.454 (citing 1-800 executives’ testimony). In the only trademark infringement case against a competitor that 1-800 fully litigated, it lost decisively. ID 150-151; CCPTB 23-26. And the ALJ determined in this matter that 1-800 proffered no reliable evidence that its rivals’ ads infringed. ID 172-184 (rejecting 1-800’s proffered evidence); *see* CCPTB 143-146. Yet, between 2004 and 2013, 1-800 entered into at least 14 written agreements that reciprocally restrained advertising. IDF 343, 393-396.¹

¹ Each Challenged Agreement involved litigation or the threat of litigation, except for 1-800’s agreement with Luxottica. IDF 343, 393-396.

consumer clicks on 1-800 ads would decline by 2 clicks per hundred searches; and (3) consumer clicks on ads for competitors of 1-800 would increase by 3.5 clicks per hundred searches. IDF 743-751; ID 157-158.

As the ALJ concluded, the best explanation for 1-800's ability to charge a price premium for a commodity product is that consumers lack sufficient information about the presence of lower-price competitors. IDF 737-741; ID 155-156. Unleashing millions of advertisements on behalf of numerous discount sellers would reduce this information deficit, and Drs. Evans' and Athey's models each show that consumers would respond positively to this information. IDF 743-756; ID 156-160.

The Challenged Agreements cause consumers to pay higher prices for contact lenses for several reasons. First, presented with competitor advertising, some consumers would shift their purchases from 1-800 to a lower-price seller. IDF 740; ID 155-156, 160, 164. When consumers switch from 1-800 to a lower-price seller, they tend not to switch back (CCPFF 1336), meaning that 1-800 loses (and its competitors gain) not just one sale per diverted click, but many subsequent sales as well. CCPFF 1483. Second, armed with better information, some consumers would seek and receive a price-match from 1-800. IDF 436, 452, 740, 742; ID 164. Third, when consumers change their purchasing behavior, this places "downward pressure on prices" across the board, and more likely than not, prices would fall. IDF 741; *see* IDF 738-742; ID 156-160.

The record shows that search advertising (even restrained by the Challenged Agreements) affects market prices for contact lenses. Competitive search advertising placed by rival online sellers forced 1-800 to modify its own online advertising policy to promote that it would beat rivals' prices by two percent (IDF 436, 742), and thus to { [REDACTED] } the percentage of orders that it

price-matched. CCPFF 1482-1483. Dr. Evans calculated that this single change was the equivalent of a one percent price decrease overall. CCPFF 1484-1485.

2. Challenged Agreements Harm Search Engines

The Challenged Agreements also result in competitive harm to search engines. Dr. Evans' economic model shows that, by eliminating rival bidders from search advertising auctions, the agreements reduced 1-800's cost-per-click by { [REDACTED] } percent. CCPFF 1306.

Dr. Evans' conclusion is bolstered by 1-800's contemporaneous documents, which directly link a reduction in the number of bidders to lower advertising prices (CCPFF 866-881, 1301, 1303), and by testimony from both Google and Bing, whose real-world experience shows that reduced competition in search advertising auctions reduces the price received by the search engine from the winning advertiser. *See* IDF 220 (“[I]n general, more advertisers bidding on keywords results in higher CPCs [costs per click].”); CCPFF 1300-1302, 1304.

Further, the Challenged Agreements reduce the quality of the SERP displayed by the search engines. Because they have fewer relevant ads to choose from, the search engines are unable to display the full range of information that is useful to consumers. In addition, these artificially-imposed restraints hamper the search engines' ability to learn by analyzing what users are choosing to click on (or not to click on), and, in this way, over time, to improve the SERP. CCPFF 1307-1312; CCPTB 64-67.

III. STANDARD OF REVIEW

“The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering ‘such parts of the record as are cited or as may be necessary to resolve the issues presented.’” *In re McWane, Inc.*, 2014 FTC LEXIS 28, *29 (Jan. 30, 2014) (quoting 16 C.F.R.

Direct evidence shows that “consumers have paid, or will pay, prices that are higher than they would otherwise be, absent the Challenged Agreements.” ID 153. The relevant evidence includes:

(i) Data showing that “1-800 Contacts’ prices are approximately { [REDACTED] }% higher than other online retailers’ prices” (IDF 692; ID 155);

(ii) Documents showing that “[m]any consumers are not aware of the price discrepancy between 1-800 Contacts and its online competitors” (IDF 694; ID 155);

(iii) Documents and testimony showing that pre-packaged contact lenses are a commodity product, and that the service provided by 1-800 does not differ appreciably from that of its competitors (IDF 23-27, 733; CCPFF 305-374);

(iv) 1-800’s internal analyses showing that the appearance of competitor ads in response to a search for 1-800’s trademark decreases sales for 1-800, and conversely, that restraining such ads increases sales for 1-800 (IDF 710-731; ID 155-156);

(v) Documents and testimony showing that search advertising placed by rival online sellers forced 1-800 to modify its own online advertising policy to highlight that it would beat rivals’ prices by two percent (IDF 436-438, 452; ID 130; CCPFF 1482-1486), and that this change in its ad copy led to a { [REDACTED] } of the percentage of orders that it price-matched (CCPFF 1483);

(vi) Dr. Evans’ testimony and economic model showing that, absent the agreements, between January 2010 and June 2015, the number of competitor ads appearing on searches for 1-800’s trademarks would increase by some 114 million additional ads; consumer clicks on 1-800 ads would decline substantially; consumer clicks on ads for 1-800’s rivals would increase

Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 890 (2007). A horizontal restraint that takes this choice away from consumers – and forces them to pay for unwanted higher quality – decreases consumer welfare. Thus, it is common for courts to find antitrust liability where higher-price/higher-quality competitors exclude lower-price/lower-quality alternatives. *E.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (condemning trade association rule aimed at low-price/low-quality engineers); *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013) (condemning exclusion of non-dentist providers of teeth whitening); *Realcomp*, 635 F.3d at 830-31 (condemning exclusion of limited-service real estate brokers).

Likewise, 1-800's contention that its margins have { [REDACTED] } (RAB 22) does not contradict a finding of competitive harm. The purpose and effect of the Challenged Agreements was to enable 1-800 to avoid erosion of its prices and margins in the face of lower-price rivals. Thus, the fact that 1-800 { [REDACTED] } supports a finding of injury. *See, e.g., McWane, Inc. v. FTC*, 783 F.3d 814, 839 (11th Cir. 2015) (“evidence that McWane’s prices did not fall is consistent” with finding of anticompetitive harm); *TRU*, 126 F.T.C. at 610-11 (price effect shown where, as a result of the challenged restraints, defendant was “able to avoid . . . price cuts”).

Finally, 1-800 implausibly asserts that the Challenged Agreements *increased* the sales of contact lenses. RAB 8-9. But, as the ALJ observed, the report of 1-800's economic expert Dr. Murphy “fails to support [such] a conclusion” (ID 188), and Dr. Murphy himself “clearly disclaimed that his analysis was intended to show that the Challenged Agreements increased the sales of contact lenses. . . .” ID 189 (citing Murphy testimony).

seen by consumers would result in an increase in sales of roughly 12.3 percent for 1-800’s lower-price rivals. IDF 756; ID 159. Moreover, when 1-800 was forced to advertise price-matching in response to “aggressive” messaging from lower-price rivals (IDF 436, 452, 742; ID 130), 1-800 { [REDACTED] } the percentage of orders that it price-matched. CCPFF 1483. As the ALJ concluded, “[t]his is not *de minimis* or insignificant.” ID 164.

3. Although Not Required, Parties to Challenged Agreements Have Market Power

a. No Finding of Market Power is Necessary Where Anticompetitive Effects Have Been Established

The Supreme Court has held that a plaintiff need not define a market or independently establish market power where it proves “actual detrimental effects,” such as elevated prices or a restriction in the dissemination of truthful information. *IFD*, 476 U.S. at 460-61. *Accord Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477-78 (1992); *TRU*, 221 F.3d at 937; *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *Realcomp*, 2007 WL 6936319, at *19, *32; Br. for the United States as Respondent, *Ohio v. American Express Co.*, No. 16-1454, *16 (Dec. 8, 2017) (“[W]hen a court finds that a restraint has had ‘actual, sustained adverse effects on competition,’ ‘specific findings concerning the definition of the market are unnecessary.’ This Court thus need not resolve the market-definition question in order to hold that the United States . . . carried [its] initial burden.”) (quoting *IFD*, 476 U.S. at 460-61).

Because the ALJ found direct evidence of anticompetitive effects (ID 138-166), Complaint Counsel is not obligated to independently prove market power through the indirect means of demonstrating high market shares in a properly defined relevant market.

consumer-switching rates of 26 or 34 percent, 1-800's expert Dr. Murphy conceded that diversion ratios based on these numbers *also support* an online-only market. ID 134-136; IDF 460, 464. Indeed, Dr. Murphy acknowledged that the online sale of contact lenses satisfies the hypothetical monopolist test. CCPFF 1583-1584.

Second, Dr. Evans analyzed a natural experiment: the substantial price increase across online contact lens retailers following the manufacturers' adoption of "unilateral pricing policies" ("UPPs"). ID 136-138. This manufacturer-imposed price increase affected online contact lens retailers as well as membership clubs, but did not impact other physical retailers, whose prices were already at or above the UPP level. IDF 479-480. Dr. Evans' analysis shows that a hypothetical monopolist consisting of online retailers and club stores could profitably impose a SSNIP. IDF 485-486. While this experiment, on its own, does not show that club stores should be excluded from the relevant market (IDF 487), the ALJ properly found that other evidence supports the conclusion that physical retailers, including club stores, are not close substitutes for online contact lens retailers. ID 127-133.

In addition to Dr. Evans' empirical work, the ALJ found direct evidence that head-to-head competition between 1-800 and its online rivals affected market outcomes. Specifically, competitive search advertising placed by rival online sellers forced 1-800 to advertise online that it would beat rivals' prices by two percent. IDF 436-440, 452. Dr. Evans determined that this change in its ad copy { [REDACTED] } the percentage of orders that were price-matched. CCPFF 1483.

The ALJ also relied on factors identified as probative by the Supreme Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). RAB 33. For example, 1-800's rivals consider prices of online retailers – not brick-and-mortar retailers – when setting their prices. IDF 442-

cause some customers strongly to prefer online over in-store, or vice-versa. ID 128-129; *see* IDF 398-409, 465; CCPFF 1544-1552.

Finally, 1-800 suggests that industry recognition of an online market is limited solely to “a radio interview and occasional references to an ‘online contact lens market’ in documents.” RAB 34. Once again, 1-800 ignores substantial evidence indicating that industry participants, including 1-800, recognize the online sale of contact lenses as a separate market. IDF 410-417; ID 127, 132-133; CCPFF 1554-1558, 1661-1665. *See Aetna*, 240 F. Supp. 3d at 10, 24; *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132-33 (D.D.C. 1986) (“Analysis of the market is a matter of business reality – a matter of how the market is perceived by those who strive for profit in it”), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987).

1-800 advances several other misleading or irrelevant claims. 1-800 asserts, without citation, that Dr. Evans testified that “offline firms constrain 1-800 Contacts’ ability to raise prices above competitive levels.” RAB 30. This is contrary to Dr. Evans’ actual testimony. *See* IDF 397-398, 454-487; ID 133-138; Evans, Tr. 1530, 1542-1543.

1-800 also claims that its price guarantee was { [REDACTED] }, purportedly supporting the conclusion that consumers compare prices of online and offline retailers. RAB 30. But, as the ALJ found, 1-800 designed its price-match program specifically to compete against online, not brick-and-mortar, retailers. IDF 436-438, 440, 450, 452; ID 130. 1-800’s price-matching data confirms this: In 2016, only { [REDACTED] } percent of the orders on which customers received discounts were attributable to { [REDACTED] }, while the { [REDACTED] } were attributable to online rivals. CX1334-007, *in camera*. Further, 1-800’s stated policy is (and has always been) *not* to price-match club stores. IDF 450.

“does not demonstrate that [the entrants] are adequate replacement for competition that has been lost”). *See also* CCPFF 1634-1668.

Specifically, 1-800 ignores substantial evidence showing that, in order to compete effectively, a new entrant would need to { [REDACTED] }
 [REDACTED]
 [REDACTED]
 [REDACTED] } RX1228-014, *in camera*. The { [REDACTED] }
 [REDACTED]
 [REDACTED] } *Id.* *See* IDF 419-427 (new entrants must build large distribution facilities; have “robust infrastructure” supporting their fulfillment services; carry extensive inventories of contact lenses; and build sophisticated websites); CCPFF 1660-1668. Indeed, many of the supposedly independent competitors touted by 1-800 (RAB 28) have been forced to purchase fulfillment and distribution services from two established online retailers: National Vision (AC Lens) and 1-800 itself. IDF 420-423; RX1228-014, *in camera*; CX0331-071 (Luxottica websites). 1-800 also ignores the effect that the Challenged Agreements themselves have on an entrant’s ability to build brand awareness. *See, e.g.*, IDF 498-565, 586-589, 600-603, 611-612, 621-622, 626-627, 637, 640-642, 645-646; CCPFF 1653-1659. 1-800’s own documents describe such brand awareness { [REDACTED] }. CX1449-048, *in camera*; *see* RX1228-014, *in camera*.

Given these barriers, it is unsurprising that there has been no recent successful entry into the market by pure-play online merchants. *See* CCPFF 1669-1674. An analysis prepared by 1-800’s owner, AEA Investors, cites { [REDACTED] }

██████████ } CCPFF 1670. The experience of one online entrant touted by 1-800 – Web Eye Care – reinforces this conclusion. Six years after entering the market, Web Eye Care captured only {██████} percent of the market. CCPFF 1672.

These facts confirm that new entry is unlikely to remedy the anticompetitive harm inflicted by 1-800 and the settling parties.

iv. ALJ’s Findings Support Conclusion that Settling Parties Have Market Power

As discussed above, proof of anticompetitive effects obviates the necessity of independently proving market power. Proof of anticompetitive effects also supports a finding of market power. *See Eastman Kodak*, 504 U.S. at 477-478 (“It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.”); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-240 (2d Cir. 2003) (upholding finding of credit card companies’ market power based on direct evidence that no merchants discontinued acceptance of the cards despite price increases); *United States v. Microsoft*, 253 F.3d 34, 57 (D.C. Cir. 2001) (“if evidence indicates that a firm has in fact” profitably raised prices substantially above competitive levels, “the existence of monopoly power is clear”).

Thus, in addition to their collective dominant market share and the existence of substantial barriers to entry, 1-800 and the settling parties should be found to have market power based on evidence that the Challenged Agreements had significant and lasting anticompetitive effects. They “disrupted the ordinary give and take of the marketplace by restricting competing advertisements from appearing” (ID 154), causing many consumers unwittingly to pay more for

demonstrate the anticompetitive character” of an “absolute ban on competitive bidding.” *Prof'l Eng'rs*, 435 U.S. at 692. This presumption is supported by the economic consensus that bid-rigging inflicts competitive injury by distorting prices: the seller receives (and the buyer pays) a non-competitive price. *See* CCPFF 1283-85.

2. There is Direct Evidence of Actual Harm to Search Engines

The Challenged Agreements also resulted in actual harm to search engines. The agreements distorted the search engines' advertising auctions; decreased their revenues; and diminished the quality of their product.

As described earlier, Dr. Evans constructed an empirical model showing that, as a result of the Challenged Agreements, 1-800's cost-per-click on trademark keywords was reduced by between { [REDACTED] } percent. CCPFF 1306. 1-800's “savings” represents a financial loss to the search engines – and a direct form of competitive injury. 1-800's internal documents acknowledge that a key purpose and effect of its agreements was to reduce its advertising costs. Referring to the practice of “[k]eep[ing] competitors . . . off” its trademark terms, 1-800 observed that “[l]ow competition = low cost.” CX0051-004. *See* CCPFF 866-881, 1301, 1303 (citing additional documents). Unsurprisingly, “[k]eep[ing] competitors . . . off” its trademark terms was important to 1-800 since its policy was to “spend as much as necessary when bidding on its trademark keywords to meet its goal of ensuring that 1-800 Contacts' advertisement was the first advertisement displayed in response to searches for its trademark.” IDF 575.

1-800's admissions are consistent with the conclusions of both Google and Bing that, all other things equal, a reduction in the number of auction participants reduces the price paid by the auction winner and reduces the revenues to the search engines. CCPFF 1300-1302, 1304. *See*

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

In the Matter of)
)
1-800 Contacts, Inc.,)
a corporation,)
)
Respondent.)

DOCKET NO. 9372

SECOND ORDER ON NON-PARTIES'
MOTIONS FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC”) and the April 4, 2017 Order on Non-Parties’ Motions for *In Camera* Treatment (April 4 Order), several non-parties filed renewed motions for *in camera* treatment for materials that FTC Complaint Counsel and/or Respondent 1-800 Contacts (“Respondent” or “1-800 Contacts”) have listed on their exhibit lists as materials that might be introduced into evidence at the trial in this matter.

The specific motions of each of the non-parties are analyzed using the legal standards set forth in the April 4 Order and are addressed below in alphabetical order.

II.

AEA Investors LP (“AEA”)

The April 4 Order granted *in camera* treatment, for a period of five years, for RX1228, CX0439, and CX1343, which are three different versions of a presentation that AEA created in relation to a proposed acquisition. AEA renews its request and asks that these exhibits be granted indefinite *in camera* treatment. In support of its motion, AEA provides a declaration from its General Counsel and Chief Compliance Officer.

The declaration explains why certain portions of these documents are highly sensitive, that the documents reveal strategic planning that extends beyond five years, how the disclosure of these portions would cause material harm to AEA if publicly disclosed, and why the need to protect these materials will not diminish in the next five

years. Specifically, the declaration explicitly states that the materials will remain highly sensitive until AEA no longer holds an ownership interest in 1-800 Contacts. Thus, the declaration explains why the need to protect these materials will not diminish over time.

Accordingly, AEA has met its burden of demonstrating that the documents meet the Commission's standards for indefinite *in camera* treatment. Indefinite *in camera* treatment is GRANTED for: RX1228, CX0439, and CX1343.

Memorial Eye, PA ("Memorial Eye")

The April 4 Order denied without prejudice Memorial Eye's original motion for *in camera* treatment. Memorial Eye has filed a renewed motion, seeking *in camera* treatment for documents and portions of deposition testimony that Complaint Counsel and Respondent intend to introduce into evidence.

Memorial Eye supports its motion with a declaration from its General Manager. The motion and the declaration explain that, in a lawsuit that was ultimately settled between 1-800 Contacts and Memorial Eye, the United States District Court of Utah entered two orders covering certain categories of Memorial Eye documents for which Memorial Eye seeks *in camera* treatment and that the protective order entered in that case does not have an expiration date. The declaration further explains the competitively sensitive nature of other materials for which Memorial Eye seeks *in camera* treatment. Memorial Eye has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection, except as set forth below.

With respect to the settlement agreement entered into in *1-800 Contacts, Inc. v. Memorial Eye, PA, et al.* No. 208-cv-00983-TS, Memorial Eye asserts only that it has a contractual obligation not to disclose the settlement or its terms. During trial proceedings in this matter on April 11, 2017, Counsel for Respondent 1-800 Contacts affirmed on the record that 1-800 Contacts was releasing Memorial Eye of this obligation. The settlement agreement does not otherwise meet the Commission's standards for *in camera* treatment. Therefore, Memorial Eye's motion is DENIED as to: CX0326, CX1316, RX0409, RX1795, RX1797, and as to the following portions of the deposition of Eric Holbrook concerning the settlement agreement: CX9024 (61:18-71:17, 76:2-15, 78:13-21, 84:5-85:5, 166:9-177:23, 188:15-201:13 and corrections to those passages in the attached errata sheet). However, the record does not show that 1-800 Contacts has released Memorial Eye of its obligation with respect to the deposition transcripts in that action. Therefore, indefinite *in camera* is GRANTED for the documents identified as: RX0676 and RX0677/CX1300.

With respect to internal Memorial Eye documents, financial statements, internal communications, business analyses, data on customer orders and search terms, and other communications, Memorial Eye has demonstrated that the documents contain information, which if publicly disclosed, would cause Memorial Eye competitive harm. Accordingly, *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: RX0855, RX0856, RX0857, RX0858,

RX0860, RX1774, RX1775, RX1776, RX1777, RX1789, CX1309, CX1310, CX1311, CX1324, RX0849, RX0850, RX0851, RX0852, RX0853, RX0854, RX0859, RX1769, RX1770, RX1771, RX1772, RX1773, RX1785, RX1801, CX1301, RX1768, RX 1781, RX 1782, RX1783, RX1784, RX1788, RX1790, RX1800, CX1624, CX1625, CX1626, CX1627, CX1628, CX1629, CX1630, CX1631, CX1632, CX1633, CX1634, CX1635, CX1636, CX1637, CX1638, and portions of CX9024 (33:5-35:1-19, 54:24-57:1, 80:18-82:19, 99:3-121:19, 149:2-16, 211:24-217:1-22, 229:1-17, 232:10-234:25, 241:24-244:2 and corrections to those passages in the attached errata sheet).

In addition, Memorial Eye has demonstrated that the following documents, which contain personal email addresses, account numbers, and/or medical history, contain “sensitive personal information,” as that term is defined under Rule 3.45(b) and the April 4 Order, and thus are entitled to indefinite *in camera* treatment: RX1786, RX1802, RX1803, RX1804, and portions of CX9024 (93:14, 99:22, 101:3, 108:18-23, 110:3, 113:22, 114:4-9, 115:2, 116:12-24, 120:1).

Microsoft Corporation (“Microsoft”)

The April 4 Order granted *in camera* treatment, for a period of five years, for three sets of data. In its renewed motion, Microsoft reasserts its request that these data sets be accorded indefinite *in camera* treatment. Microsoft supports its motion with a declaration from its Assistant General Counsel. The declaration avers that the data sets contain highly confidential data on customer bids, ad campaigns, user clicks, ad impressions, and page views. The renewed motion and declaration further explain that the data provides unencrypted personal information and that revealing the data will expose Microsoft’s proprietary algorithms.

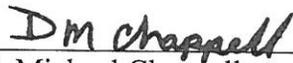
Microsoft has now demonstrated that the three data sets are likely to remain sensitive and that the need for confidentiality is not likely to decrease over time. Accordingly, Microsoft’s motion is GRANTED. Indefinite *in camera* treatment is GRANTED for the three data sets identified as: MSFT-FTC0001-3057, FTC-MSOFT-00001-000006, and MS00000002-MS00017106. If a party seeks to introduce these data sets as exhibits, counsel shall prepare a proposed order indicating that each data set has been granted indefinite *in camera* treatment by this Order and identifying it by its CX or RX number.

III.

Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court

reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 12, 2017

(Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review.

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only “in unusual circumstances,” including circumstances in which “the need for confidentiality of the material . . . is not likely to decrease over time. . . .” 16 C.F.R. § 3.45(b)(3). “Applicants seeking indefinite *in camera* treatment must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990). In *DuPont*, the Commission rejected the respondent’s request for indefinite *in camera* treatment, but noting “the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry,” the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C.

at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. See *Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996). Where *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. E.g., *McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). “Sensitive personal information” is defined as including, but not limited to, “an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.” 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals’ names and addresses, and witness telephone numbers have been found to be “sensitive personal information” and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (September 17, 2012). See also *In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers’ names or other personal data where it was not relevant). “[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law.” 16 C.F.R. § 3.45(b)(3).

III.

As set forth below, each of the non-parties listed herein filed separate motions for *in camera* treatment. With two exceptions, each motion was supported by an affidavit or declaration of an individual within the company who had reviewed the documents at issue. These affidavits and declarations supported the applicants’ claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. With one exception, the motions included the documents or deposition testimony for which *in camera* treatment was sought. Where *in camera* treatment for deposition testimony was sought, the non-parties narrowed their requests to specific page and line numbers. The specific motions of each of the non-parties are analyzed using the standards set forth above and are addressed below in alphabetical order.

AEA Investors LP (“AEA”):

Non-party AEA seeks *in camera* treatment for three documents that Complaint Counsel and Respondent intend to introduce into evidence. AEA states that these three documents are three different versions of a presentation AEA made related to a proposed acquisition. These documents are: RX1228, CX0439, and CX1343. AEA states that CX1343 is a version of the presentation that had been redacted for sharing with AEA’s portfolio company, 1-800 Contacts. AEA seeks permanent *in camera* treatment for all three documents. In addition, with respect to RX1228 and CX0439, AEA requests that the court limit distribution to outside counsel only.

AEA supports its motion with a declaration from its General Counsel and Chief Compliance Officer. The declaration describes in detail the confidential nature of the documents, which contain evaluations of market factors, market risks, company advantages, company disadvantages, and company risks, and which also review future strategic plans, including financial metrics, customer and supplier data, and market growth indicators. The declaration also describes in detail the measures that AEA has taken to protect the confidentiality of the documents for which AEA seeks *in camera* treatment and explains the competitive harm AEA would suffer if these documents were made publicly available. Accordingly, AEA has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. However, AEA has not met its burden of demonstrating that RX1228, CX0439, and CX1343, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: RX1228, CX0439, and CX1343.

With respect to AEA’s request that distribution of RX1228 and CX0439 be limited to outside counsel only, disclosure of RX1228 and CX0439 may be made only as permitted under the Protective Order entered in this case.¹

Coastal Contact, Inc. (“Coastal”)

Non-party Coastal seeks *in camera* treatment for documents and witness testimony that Complaint Counsel and Respondent intend to introduce into evidence. Coastal seeks *in camera* treatment for a period of three years.

¹ Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question. Protective Order ¶ 7.

Coastal supports its motion with a declaration from its Chief Financial Officer. The declaration describes in detail the confidential nature of the documents, which contain information on Coastal's pricing, competitive positioning, marketing and bidding strategies, and internal analyses of customer demographics and buying patterns. The declaration also describes in detail the measures that Coastal has taken to protect the confidentiality of the documents for which Coastal seeks *in camera* treatment and explains the competitive harm Coastal would suffer if these documents were made publicly available. Accordingly, with the exception of RX1222, Coastal has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. RX1222 is a 2012 Powerpoint presentation and Coastal has not demonstrated that this document meets the Commission's strict standards.

Coastal states it is seeking *in camera* treatment for 50 documents. A review of the documents shows that many of the documents are duplicates of each other, such that there are only 19 unique documents at issue.² Furthermore, although Coastal seeks *in camera* treatment for a period of three years, in order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency,³ *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the 18 documents identified as: CX1465, CX1471, CX1686, CX1695, CX1698, CX1699, CX1700, CX1701, CX1702, CX1710/RX1209, CX1711, CX1714, CX1792, CX1793, RX1208, RX1210, RX1220, and "nonparty submission 00010405"⁴.

In camera treatment is DENIED WITHOUT PREJUDICE for the document identified as RX1222. If Coastal wishes to file a renewed motion demonstrating that RX1222 meets the Commission's strict standards, Coastal shall have until April 10, 2017 to file a renewed motion for *in camera* treatment in accordance with this order.

Contact Lens King, Inc. ("CLK")

Non-party CLK seeks *in camera* treatment for four documents that Complaint Counsel intends to introduce into evidence. CLK seeks *in camera* treatment for a period of two to five years for CX1473 and CX1474, and indefinite *in camera* treatment for CX1476 and CX1794.

CLK supports its motion with an affidavit from its President. The affidavit explains that CX1473 and CX1474 contain sales and pricing data and that CX1476 and CX1794 contain "negative keyword" reports and information relative to bidding on competitors' keywords. The

² With one exception, the duplicates that Coastal lists are documents which do bear a CX or RX number that are duplicative of documents which do not bear a CX or RX number. The one exception is CX1710 and RX1209, which are duplicates of each other and which both bear a CX or RX number.

³ See *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, *20 n.1 (May 25, 2011).

⁴ It is unclear whether nonparty submission 00010405 has been assigned a CX or RX number. If either party seeks to introduce nonparty submission 00010405 as an exhibit, counsel shall prepare a proposed order indicating that nonparty submission 00010405 has been granted *in camera* treatment by this Order and identifying it by its CX or RX number.

affidavit describes in detail the confidential nature of the documents. The affidavit also describes in detail the measures that CLK has taken to protect the confidentiality of the documents for which CLK seeks *in camera* treatment and explains the competitive harm CLK would suffer if these documents were made publicly available. Accordingly, CLK has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. However, CLK has not met its burden of demonstrating that CX1476 and CX1794, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency, *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: CX1473, CX1474, CX1476 and CX1794.

Google, Inc. (“Google”)

Non-party Google seeks *in camera* treatment for 242 documents and deposition testimony that Complaint Counsel and Respondent intend to introduce into evidence. Google seeks indefinite *in camera* treatment.

Google supports its motion with a declaration from its Director of Product Management and from its Senior Competition Counsel. The declarations explain that there are seven categories of documents for which Google seeks *in camera* treatment. These groups are: (1) datasets that contain customer data and Google search query data, including keywords that customers bid on, costs-per-click bid by customer, and click-through rates; (2) internal documents related to studies Google conducted to optimize formatting search engine results pages; (3) internal documents related to design and results of experiments conducted by Google, including systems used to implement policies reflecting Google’s proprietary algorithms; (4) two documents which Google describes in the *in camera* version of its motion and declaration; (5) transcripts of depositions of Google employees in this matter, portions of which and the exhibits thereto included confidential and competitively sensitive information; (6) internal communications related to Google’s responses to questions about AdWords raised by 1-800 Contacts, which reveal analysis and confidential data about bids and bidding strategies; and (7) a single internal document discussing quality score on AdWords. The declarations describe in detail the confidential nature of the documents. The declarations also describe in detail the measures that Google has taken to protect the confidentiality of the documents for which Google seeks *in camera* treatment and explains the competitive harm Google would suffer if these documents were made publicly available. Accordingly, Google has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection.

With respect to documents in groups 1, 6, and 7, Google has not met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as in groups 1, 6, and 7.

With respect to documents in groups 2, 3, 4, and 5, Google has met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. Indefinite *in camera* treatment is GRANTED for the documents identified as in groups 2, 3, 4, and 5.

Google has not identified the documents for which it seeks *in camera* treatment by CX or RX number. If either party seeks to introduce these documents as exhibits, counsel shall prepare a proposed order indicating that, by this Order, the document has been granted *in camera* treatment, the length of time *in camera* treatment has been extended, and identifying each document by its CX or RX number.

Lens.com, Inc. (“Lens.com”)

Non-party Lens.com seeks *in camera* treatment for one document that Complaint Counsel intends to introduce into evidence: CX1464. Lens.com seeks *in camera* treatment for a period of five years.

Lens.com supports its motion with a declaration from its Chief Executive Officer. The declaration explains that CX1464 details highly sensitive information regarding Lens.com’s prices, sales, and financial performance. The declaration also describes in detail the measures that Lens.com has taken to protect the confidentiality of the document for which Lens.com seeks *in camera* treatment and explains the competitive harm Lens.com would suffer if the document were to be made publicly available. Accordingly, Lens.com has met its burden of demonstrating that the material for which it seeks *in camera* treatment should be given such protection.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the document identified as CX1464.

LensDirect LLC (“LensDirect”)

Non-party LensDirect seeks *in camera* treatment for 26 documents and deposition testimony that Complaint Counsel intends to introduce into evidence. LensDirect does not indicate a specific time period for which it seeks *in camera* treatment.

In its motion and in its proposed order, LensDirect seeks *in camera* treatment for the following 26 documents: CX1639, CX1640, CX1641, CX1642, CX1643, CX1644, CX1645, CX1646, CX1647, CX1648, CX1649, CX1650, CX1651, CX1652, CX1653, CX1654, CX1655, CX1656, CX1657, CX1658, CX1659, CX1660, CX1661, CX1779, CX1780, CX1784, and for certain portions of the deposition of Ryan Aloviz.

In support of its motion, LensDirect provides a declaration from its Chief Executive Officer. The declaration does not provide the information necessary to support a finding that any of the 26 documents are sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury, and should therefore receive *in camera*

treatment.⁵ Further, “there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old.” *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 100, *4 (May 6, 2009). With respect to the documents that are more than three years old and the portions of the testimony from the deposition of Ryan Alovic about those documents, LensDirect has not demonstrated that public disclosure is likely to cause serious competitive injury.

For these reasons, LensDirect’s motion is DENIED WITHOUT PREJUDICE. By April 10, 2017, LensDirect may file a renewed motion for *in camera* treatment which includes an affidavit or declaration from an individual within the company who has reviewed the documents demonstrating that the documents for which it seeks *in camera* treatment are sufficiently secret and material to the applicant’s business that disclosure would result in serious competitive injury.

LensDiscounters.com (“LD Vision”)

Non-party LD Vision seeks *in camera* treatment for four documents that Complaint Counsel intends to introduce into evidence. LD Vision seeks indefinite *in camera* treatment.

LD Vision supports its motion with a declaration from its Chief Operating Officer. The declaration explains that the documents include information related to LD Vision’s financial condition, pricing strategies, investment strategies, and techniques for marketing and advertising its products. A review of the documents shows that CX1479, CX1812, and CX1813 contain competitively sensitive information, the disclosure of which would cause competitive harm. Accordingly, LD Vision has met its burden of demonstrating that CX1479, CX1812, and CX1813 should be given *in camera* protection. However, LD Vision has not met its burden of demonstrating that CX1479, CX1812, and CX1813, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as CX1479, CX1812, and CX1813.

CX8003 is a declaration prepared by an LD Vision employee and attached exhibits, many of which are dated 2005, and many of which appear to have been widely disseminated. A review of the declaration and the documents attached shows that CX8003 does not meet the Commission’s strict standards for *in camera* treatment.

In camera treatment is DENIED WITHOUT PREJUDICE for the document identified as CX8003. LD Vision shall have until April 10, 2017, to file a renewed motion for *in camera* treatment seeking *in camera* treatment only for those paragraphs of the declaration and those exhibits attached thereto that meet the Commission’s strict *in camera* standards.

⁵ The declaration provides information relative to whether certain documents (CX1242, CX1463, and CX1241) are business records. These exhibits are not listed in the motion as documents for which LensDirect is seeking *in camera* treatment.

Luxottica Retail North America, Inc. (“Luxottica”)

Non-party Luxottica seeks *in camera* treatment for one document that Complaint Counsel intends to introduce into evidence. Luxottica seeks indefinite *in camera* treatment, or in the alternative, for a period of five years.

Luxottica supports its motion with an affidavit from its Senior Director. The affidavit describes in detail the confidential nature of the document, which consists of a detailed monthly breakdown of Luxottica’s contact lens sales, separated by individual retail brands. The affidavit also describes in detail the measures that Luxottica has taken to protect the confidentiality of the document for which Luxottica seeks *in camera* treatment and explains the competitive harm Luxottica would suffer if this material were to be made publicly available. Accordingly, Luxottica has met its burden of demonstrating that the material for which it seeks *in camera* treatment should be given such protection. However, Luxottica has not met its burden of demonstrating that CX1817, which consists of an ordinary business record, is entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the document identified as CX1817.

Memorial Eye, PA (“Memorial Eye”)

Non-party Memorial Eye seeks *in camera* treatment for documents Complaint Counsel and Respondent intend to introduce into evidence. Memorial Eye does not indicate a specific time period for which it seeks *in camera* treatment.

Memorial Eye supports its motion with a declaration from its General Manager. The declaration avers generally that the documents include financial statements that detail profit and loss, marketing reports, communications with customers and vendors, and documents related to previous litigation with 1-800 Contacts that contain confidential business information. However, the declaration does not explain specifically that each document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. Furthermore, Memorial Eye did not provide a set of the exhibits for which it seeks *in camera* treatment and thus no determination can be made as to whether any of the documents meets the Commission’s strict standards. Therefore, Memorial Eye’s Motion is DENIED WITHOUT PREJUDICE.

Memorial Eye shall have until April 10, 2017, to file a renewed motion for *in camera* treatment seeking *in camera* treatment in accordance with this order.

Microsoft Corporation (“Microsoft”)

Non-party Microsoft seeks *in camera* treatment for 16 documents and 3 sets of data that Complaint Counsel and Respondent intend to introduce into evidence. Microsoft seeks indefinite *in camera* treatment.

Microsoft supports its motion with an affidavit from its Assistant General Counsel. The affidavit describes the documents, some of which contain sensitive legal and client information, including statistics of the pricing impact on brand discounts, brand clicks and investment rates. The affidavit further avers that studies made by Microsoft’s search engine Bing regarding brand term bidding for advertisements contain confidential information about how Microsoft’s users click and evaluate bids on brand terms. With respect to the three sets of data, the declaration avers that the sets contain data on customer bids, ad campaigns, user clicks, ad impressions, and page views. The declaration states that public disclosure of its documents would harm its ability to compete with other search advertising platforms.

With respect to MSFT-108-127 (2004 settlement agreement) and MSFT-129-132 (2009 advertising agreement), these documents are over three years old and Microsoft has not demonstrated that they remain competitively sensitive. In addition, because these two documents do not bear a CX or RX number, it is not clear whether either party intends to introduce these exhibits at trial. With respect to CX1454, a review of the document shows that it is a cover email and does not contain confidential information. Microsoft’s motion is DENIED WITHOUT PREJUDICE as to CX1454, MSFT-108-127, and MSFT-129-132. If Microsoft intends to renew its request for *in camera* treatment for these documents, Microsoft shall ascertain whether these documents are intended trial exhibits before filing such motion and such renewed motion shall be filed by April 10, 2017.

With respect to CX1662, CX1663, CX1664, CX1665, CX1666, CX1667, CX1668, CX1669, CX1670, RX0837, MSFT-001-19 (2015 litigation documents), and the 3 data sets identified as MSFT-FTC0001-FTC3057; FTC-MSOFT-0001-FTC0006; MSFT-FTC0001-FTC1879, a review of the declaration and the documents indicates that the documents contain confidential information, the disclosure of which would cause harm to Microsoft. However, Microsoft has not demonstrated that these documents reveal proprietary formulas or algorithms, or other information sufficiently secret and material to merit indefinite *in camera* treatment. Accordingly, *in camera* treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for these documents. With respect to MSFT-001-19 and the 3 data sets identified as MSFT-FTC0001-FTC3057, FTC-MSOFT-0001-FTC0006, and MSFT-FTC0001-FTC1879, if a party seeks to introduce these documents as exhibits, counsel shall prepare a proposed order indicating that the document has been granted *in camera* treatment by this Order and identifying it by its CX or RX number.

With respect to CX8005 (a January 2017 declaration of Rukmini Iyer, Scientist Manager at Microsoft) and to a February 2017 declaration of Rukmini Iyer, Scientist Manager at Microsoft that does not bear a CX or RX number, Microsoft has demonstrated that these declarations contain highly sensitive commercial information, including information pertaining to proprietary formulas or algorithms. Accordingly, with respect to these documents,

Microsoft's motion is GRANTED and indefinite *in camera* treatment is GRANTED for the documents identified as: CX8005 and the February 2017 declaration of Rukmini Iyer. If a party seeks to introduce the February 2017 declaration as an exhibit, counsel shall prepare a proposed order indicating that the document has been granted *in camera* treatment by this Order and identifying it by its CX or RX number.

Visionworks of America, Inc. ("Visionworks")

Non-party Visionworks seeks *in camera* treatment for eight documents that Complaint Counsel and Respondent intend to introduce into evidence. Visionworks seeks *in camera* treatment for varying time periods, discussed below.

Visionworks supports its motion with a declaration from its Director of Marketing. The declaration describes in detail the confidential nature of the documents, which contain pricing strategies and data, sales data, revenues, documents concerning marketing strategies and budgets, and information on incentives, discounts, and rebates. The declaration also describes in detail the measures that Visionworks has taken to protect the confidentiality of the material for which Visionworks seeks *in camera* treatment and explains the competitive harm Visionworks would suffer if this information were to be made publicly available. Accordingly, Visionworks has met its burden of demonstrating that the material for which it seeks *in camera* treatment should be given such protection.

Of the eight exhibits, Visionworks seeks indefinite *in camera* treatment for one – CX1477. Visionworks has not met its burden of demonstrating that CX1477, which consists of an ordinary business record relating to its pricing strategy, margins, discounts, and sales, is entitled to indefinite *in camera* treatment. Accordingly, *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the document identified as: CX1477.

Of the remaining exhibits, Visionworks seeks *in camera* treatment for either three or five years. In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency, *in camera* treatment for a period of five years is granted as described below.

With respect to CX1796, RX245, and RX246, which reveals the keywords Visionware bids on in Google Adwords, Visionworks has narrowly tailored its request to only the information set forth in column D of these documents. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for column D of CX1796, RX245, and RX246.

With respect to CX943, CX1778, and RX241, which constitute or include the June 3, 2016 declaration of Jared Duley, Visionworks has narrowly tailored its request to only paragraph 16 of the Duley declaration. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for paragraph 16 in CX943, CX1778, and RX241.

With respect to CX9036, the deposition of Jared Duley, Visionworks has narrowly tailored its request to only certain portions. *In camera* treatment for a period of five years, to

expire on April 1, 2022, is GRANTED for the following portions of CX9036: 22:22-23:23; 52:2-54:1; 54:2-56:5; 60:5-82:17; 101:10-14; 119:9-20; 120:21-132:15, 136:17-137:5, 149:9-155:13; 164:12-165:18; 167:3-12; 168:5-25; and 175:10-176:24.

Walgreens, Inc. (“Walgreens”)

Non-party Walgreens seeks *in camera* treatment for 41 documents Complaint Counsel and Respondent intend to introduce into evidence, including portions of investigational hearing transcripts (“IHTs”) and deposition transcripts. Walgreens seeks indefinite *in camera* treatment, or, in the alternative, with respect to one category of documents, ten years, and, with respect to another category, three years.

Walgreens supports its motions with a declaration from the Manager of Digital Marketing for Vision Direct, a subsidiary of Walgreens. The declaration describes in detail the confidential nature of the documents, which fall into two categories: (1) keyword lists, which the declaration states represent the business judgment of a team of digital marketing experts, and (2) strategic analysis of advertising and pricing strategy, including performance, pricing, margins, and costs. The declaration also describes in detail the measures that Walgreens has taken to protect the confidentiality of the documents for which Walgreens seeks *in camera* treatment and explains the competitive harm Walgreens would suffer if these materials were made publicly available. Except as noted below, Walgreens has met its burden of demonstrating that many of its documents should be given *in camera* protection. Walgreens has not, however, met its burden of demonstrating that any of its documents, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

A number of documents for which Walgreens seeks *in camera* treatment are over three years old and Walgreens has not demonstrated that these documents remain competitively sensitive. Therefore, Walgreen’s motion is DENIED WITHOUT PREJUDICE as to the following documents: CX1206 (WAG-031), CX1207 (WAG-032), CX1210 (WAG-037), CX1211 (WAG-038), CX1213 (WAG-046), CX1805, and RX0149 (WAG-047). If Walgreens wishes to file a renewed motion demonstrating that these documents meet the Commission’s strict standards, Walgreens shall do so no later than April 10, 2017.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: CX1214 (WAG-051), CX1215 (WAG-053), CX1216 (WAG-054), CX1222 (WAG-003), CX1489⁶ (WAG-074), CX 1490 (WAG-075), CX1510 (WAG-076), CX1797 (WAG-008), CX1798 (WAG-009), CX1799 (WAG-223), CX1814 (WAG-073), CX1815 (WAG-077), RX0151(WAG-215), RX0152(WAG-232), and RX0148 (WAG-251).

There are a number of documents for which Walgreens seeks *in camera* treatment that do not bear CX or RX numbers. From the list of potential trial exhibits identified by Complaint Counsel, these are: WAG-062, WAG-080, WAG-084, WAG-085, WAG-086, and WAG-087.

⁶ It appears that the documents identified as CX1489 (WAG-074), CX1490 (WAG-075), and CX1510 (WAG-076) were also listed as documents that Respondent intends to introduce at trial, but Walgreens did not identify the documents by their corresponding RX numbers.

From the list of potential trial exhibits identified by Respondent, these are: WAG-016, WAG-017, WAG-018, WAG-019, WAG-020, WAG-028, WAG-202, and WAG-214. *In camera* treatment, for a period of five years, will be given to these documents if they are offered into evidence by either party. If a party seeks to introduce any of these documents as exhibits, counsel shall prepare a proposed order indicating that the document has been granted *in camera* treatment by this Order and identifying the document by its CX or RX number.

With respect to CX8001 and CX8002, declarations provided by Glen Hamilton, Walgreens has narrowly limited its request to only specific paragraphs discussing confidential material. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for paragraphs 6, 20 and 21 of CX8001 and paragraphs 6, 19 and 20 of CX8002.

With respect to CX9007, CX9008 and CX9038, the IHTs and deposition transcripts of Stephen Fedele and Glen Hamilton, Walgreens has limited its request to only specific page and line numbers discussing confidential material. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the following portions of CX9007: 21:19-22; 22:12-13; 23:1; 41:8; 53:3, 9; CX9008: 9:12-13; 12:18-25; 13:1, 6-8; 35:2-10, 15-16; 36:1-2, 19-21; 44:5-9; 51:11-14; and CX9038: 27:24-25; 28:1, 32:13-20; 34:5, 10, 14, 18; 37:9-10, 20, 22; 39:8-10, 12, 17; 41:25; 42:3, 22, 25; 43:17; 44:12-14, 19-20, 25; 45:25; 45:1-7; 53:22-25; 54-55; 56:1-19; 60:21-25; 61:1, 22-24; 65:13-25; 66:1-23; 67:12-25; 68-69; 75:24-25; 76-77; 78:1-9; 79:25; 80:1, 13, 16, 22, 23; 90:18-23; 92:17-18, 21-24; 93:5, 19, 22; 94:1-16; 97:20-21; 98:5; 101:22; 102:5-10; 103:21-23; 113:17-22; 114:7-9; 116:3-25; 117:1, 9-22; 118:14-17; 119:9-10; 120:7-8; 121:6-25 and 122:1-3.

WebEyeCare, Inc. (“WEC”)

Non-party WEC seeks *in camera* treatment for three documents and for portions of an IHT and a deposition transcript that Complaint Counsel and Respondent intend to introduce into evidence. WEC seeks indefinite *in camera* treatment, or in the alternative, for a period of five years.

WEC supports its motion with a declaration from its co-owner. The declaration describes in detail the confidential nature of the documents, which contain information about WEC’s product sales and revenue, as well as its marketing and advertising practices, including statistics pertaining to its online search advertising efforts through keywords and search terms. The declaration further states that the IHT and deposition contain information related to WEC’s marketing and advertising practices, customer acquisition methods and strategies, and WEC’s internal views and analysis. The declaration also describes in detail the measures that WEC has taken to protect the confidentiality of the documents for which WEC seeks *in camera* treatment and explains the competitive harm WEC would suffer if these materials were made publicly available. With respect to the IHT and deposition of Peter Batushansky, WEC has limited its request to only specific page and line numbers discussing confidential material. Accordingly, WEC has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. However, WEC has not met its burden of

demonstrating that the materials, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: CX1467, CX1819, and CX1820/RX1849.

With respect to CX9000 and CX9014, the IHT and deposition transcript of Peter Batushansky, WEC has limited its request to only specific page and line numbers discussing confidential material. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the following portions of CX9000: 6:18-21; 8:23-25; 9:1-4, 13-25; 10:1-8, 24-25; 11:1-15; 14:4-25; 15-69; 70:1-22; 73:13-25; 74:1-25; 75-91; 92:1-19; 93-102; 103:25; 104-122; 123:18-25; 124-126; 128:15-25; 129-132:1-12, and for the following portions of CX9014: 14:3-25; 15-19; 20:1-4; 21:1-24; 23:9-25; 24; 25:1-4; 26:22-25; 27-32; 33:1-2, 12-25; 34-39; 40:1-3; 41:5-25; 42-46; 47:1-3; 48-52; 53:1-8, 14-25; 54-64; 65:1-17; 67:18-25; 68-85; 86:1-2, 13-25; 87; 88:1-19; 89-100; 101:1-10; 102:16-25; 103-194; 195:1-12; 197:11-25; 198:1-16; 201:20-25; 202-208 and 209:1-11.

IV.

Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

It is apparent from the non-parties' motions that Complaint Counsel and Respondent seek to introduce duplicative copies of the same underlying document. For example, according to AEA, CX0439 and RX1228 are duplicates of the same document; according to WEC, CX1820 and RX1849 are duplicates of the same document. The parties are reminded of their obligation, pursuant to the Scheduling Order, to confer and eliminate duplicative exhibits in advance of the final prehearing conference.

ORDERED:



 D. Michael Chappell
 Chief Administrative Law Judge

Date: April 4, 2017

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
)	
Respondent.)	

ORDER ON RESPONDENT’S MOTION
FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the Scheduling Order entered in this matter, Respondent 1-800 Contacts, Inc. (“Respondent” or “1-800 Contacts”) filed a motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter (“Motion”). Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel has not filed an opposition. For the reasons set forth below, Respondent’s Motion is GRANTED.

II.

The legal standards governing Respondent’s Motion are set forth in the Order on Non-Parties’ Motions for *In Camera* Treatment, issued on April 4, 2017. Of the 2,100 proposed trial exhibits, Respondent has tailored its request to 86 documents, each of which were created between 2014 and 2017, and each of which, Respondent asserts, contains competitively sensitive business records that, if publicly disclosed, would significantly harm Respondent’s competitive position. Respondent requests *in camera* treatment for a period of five years.

To support its Motion, Respondent provides the declaration of the Vice President of Finance and Treasurer of 1-800 Contacts, Brett Gappmayer. The Gappmayer declaration explains that he reviewed the documents at issue and that the documents fall into five categories: (1) documents reflecting 1-800 Contacts’ confidential pricing strategies; (2) documents reflecting 1-800 Contacts’ confidential marketing strategies; (3) documents reflecting 1-800 Contacts’ non-public analyses and due diligence of

contemplated mergers and acquisitions; (4) presentations given to 1-800 Contacts' board of directors containing confidential financial and strategic information; and (5) documents reflecting confidential keywords that 1-800 Contacts bids on, and the amount of 1-800 Contacts' maximum bid for these keywords.

The Gappmayer declaration avers that each of these documents is a confidential business record that 1-800 Contacts has maintained as secret and has not disclosed publicly, and that if these documents were made public, 1-800 Contacts' competitive position would be significantly harmed. The Gappmayer declaration further avers that, due to the sensitivity of the information contained in these documents, 1-800 Contacts has maintained the secrecy and confidentiality of the documents and restricted access within the company.

III.

Respondent has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. Accordingly, *in camera* treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as:

CX94, CX295, CX296, CX428, CX430/RX429, CX547, CX549, CX605, CX648, CX954, CX1160, CX1162/RX444, CX1334, CX1335/RX1116, CX1336, CX1346, CX1391, CX1446, CX1447/RX1117, CX1449/RX447/RX1122, CX1546, CX1743, CX1783/RX451, RX425, RX953, RX983, RX958, RX959, RX1046, RX1047, RX1048, RX1049, RX1050, RX1051, RX1053, RX1061, RX1062, RX1063, RX1064, RX1067, RX1068, RX1069, RX1070, RX1079, RX1080, RX1081, RX1082, RX1083, RX1084, RX1085, RX1086, RX1087, RX1088, RX1089, RX1090, RX1091, RX1092, RX1093, RX1094, RX1095, RX1096, RX1097, RX1098, RX1099, RX1100, RX1101, RX1102, RX1103, RX1104, RX1105, RX1106, RX1107, RX1109, RX1111, RX1112, RX1113, RX1114, RX1115, RX1118, RX1119, RX1120, RX1121, RX1131 and RX1141.

IV.

Respondent shall inform its testifying current or former employees and experts that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

It is apparent from the Motion that Complaint Counsel and Respondent seek to introduce duplicative copies of the same underlying documents. For example, according to Respondent, CX430 and RX429 are duplicates of the same document. The parties are

reminded of their obligation, pursuant to the Scheduling Order, to confer and eliminate duplicative exhibits in advance of the final prehearing conference.

ORDERED:

DM Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: April 4, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I filed the foregoing documents 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., N.W., Rm. H-113
Washington, D.C. 20580
ElectronicFilings @ftc.gov

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-110

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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)
Munger, Tolles & Olson LLP
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071

Justin P. Raphael (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 N.W., 7th Floor
Washington, D.C. 20004

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

Counsel for Respondent 1-800 Contacts, Inc.

Dated: February 9, 2018

By: /s/ Barbara Blank
Barbara Blank
Counsel Supporting the Complaint

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.

February 9, 2018

By: /s/ Barbara Blank
Barbara Blank
Counsel Supporting the Complaint