PUBLIC

ORIGINAL

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**

RESPONDENT 1-800 CONTACTS, INC.'S CORRECTED REPLIES TO COMPLAINT COUNSEL'S CORRECTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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RESPONDENT 1-800 CONTACTS, INC.'S REPLIES TO COMPLAINT COUNSEL'S CORRECTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW

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General Responses Applicable to All Proposed Findings of Fact

1. Many of Complaint Counsel's proposed findings of fact are not facts but are instead a mixture of argument, legal conclusions, unsupported assertions, and mischaracterizations of the evidence. Respondent 1-800 Contacts, Inc. objects to all such findings.

2. Many of Complaint Counsel's proposed findings of fact rely solely on testimony from the Investigational Hearing (IH), a proceeding at which Respondent had no opportunity to cross-examine any of the witnesses. All such testimony should be accorded little or no weight, particularly in instances where the witness appeared at trial and testified differently or where Complaint Counsel chose not to elicit the same testimony from the witness at trial.

3. Many of Complaint Counsel's proposed findings of fact are basely solely on hearsay or on exhibits with no sponsoring witness. Other proposed findings are general in nature and refer only to groups of findings that are much narrower than the broad proposition which they supposedly support. These proposed findings should be disregarded.

4. Complaint Counsel's proposed findings based solely on the testimony or the report of an expert violate this Court's Order on Post-Trial Briefs, dated May 16, 2017, to the extent that the findings address factual propositions that should be proven by fact witnesses or reliable exhibits. Respondent will address these findings in its specific responses and reserves the right to file a motion to strike.

5. Pursuant to the Court's Order on Post-Trial Briefs, Respondent's replies "use the same outline headings as used by [Complaint Counsel] in [their] opening proposed findings of fact." Order on Post-Trial Briefs at 4. Respondent does not endorse or adopt the positions taken by Complaint Counsel in those headings.

I. Jurisdiction

1. 1-800 Contacts, Inc., ("1-800 Contacts") is headquartered at 261 West Data Drive, Draper, Utah. (JX0001 (¶ 1) (Joint Stipulations of Jurisdiction, Law, and Facts)).

Response to Finding No. 1:

Respondent has no specific response.

2. 1-800 Contacts is a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (JX0001 (¶ 2) (Joint Stipulations of Jurisdiction, Law, and Facts)).

Response to Finding No. 2:

Respondent has no specific response.

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

Response to Finding No. 3:

Respondent has no specific response.

II. Contact Lens Retail Industry Participants

A. Online Retailers

1. 1-800 Contacts

a. Company Basics

4. 1-800 Contacts was founded in 1995, and completed an IPO in 1998. The company was acquired by a private equity firm, Fenway Partners, in 2007. (CX0525 at 007; Coon, Tr. 2672, 2665; CX9001 (Bethers, IHT at 23-24)).

Response to Finding No. 4:

Respondent has no specific response other than to clarify that the company that is now known as 1-800 Contacts, Inc. was started by Jonathan Coon in 1992 under the name Eye Supply. (Coon, Tr. 2649-51). That company acquired the phone number "1-800 Contacts" in 1995 and subsequently changed the name of the company to 1-800 Contacts. (Coon, Tr. 2658, 2661).

5. [redacted] (CX1446 at 023, *in camera*). In January, 2016, AEA Investors acquired a majority stake in 1-800 Contacts, which it still holds. (Evans, Tr. 1588; Steven Perry, Tr. 25-26).

Response to Finding No. 5:

Respondent has no specific response to the first sentence of Complaint Counsel's Proposed Finding No. 5. Respondent does not dispute that AEA Investors acquired a majority interest in 1-800 Contacts in or about January 2016, and that AEA Investors continues to hold a majority interest in 1-800 Contacts today. Respondent, however, notes that the record citations in support of the second sentence of proposed Finding No. 5 are improper and inaccurate. Complaint Counsel presented Dr. Evans as an expert economist; Dr. Evans is not a fact witness with personal knowledge sufficient to establish the ownership of 1-800 Contacts. In addition, 1-800 Contacts' counsel, Steven Perry, is not mentioned on pages 25-26 of the trial transcript.

6. In 2004, 1-800 Contacts' internet sales surpassed its phone sales. (CX1775 at 001).

Response to Finding No. 6:

Respondent has no specific response.

7. In 2007, 1-800 Contacts launched its first mobile ads. (CX1775 at 001).

Response to Finding No. 7:

Respondent has no specific response.

8. In 2011, 1-800 Contacts launched its mobile web site. (CX1775 at 001).

Response to Finding No. 8:

Respondent has no specific response.

9. In 2012, 1-800 Contacts was the largest retailer of contact lenses in the US. (CX0526 at 007).

Response to Finding No. 9:

Respondent has no specific response.

10. As of 2012, 1-800 Contacts had an estimated 10% share, by revenue, of all contact lenses sold in the United States. (CX0526 at 007).

Response to Finding No. 10:

Complaint Counsel's Proposed Finding No. 10 does not accurately reflect the information in the cited exhibit. The cited exhibit, CX 526 at 7, is dated February 2012 and provides 1-800 Contacts' estimates of market shares for all US contact lens retails sales in 2011. (CX 526 at 7-17). A more accurate description would be: In 2012, 1-800 Contacts estimated its own market share for 2011 to be 10% of all retail sales of contact lenses in the United States.

11. [redacted] (CX1446 at 005, *in camera*).

Response to Finding No. 11:

Respondent has no specific response.

12. The annual volume of contact lenses sold via the internet to U.S. consumers by 1-800 Contacts currently exceeds the annual volume of contact lenses sold via the internet to

U.S. consumers by any other single company. (JX0001 (¶ 5) (Joint Stipulations of Jurisdiction, Law, and Facts)).

Response to Finding No. 12:

Respondent has no specific response.

13. In 2015, 1-800 Contacts had revenues of approximately $460 million. (JX0001 (¶ 6) (Joint Stipulations of Jurisdiction, Law, and Facts)).

Response to Finding No. 13:

Respondent has no specific response.

b. Key Employees & Agents: Chief Executive Officers

i. Jonathan Coon

14. Jonathan Coon founded 1-800 Contacts in 1992. (Coon, Tr. 2649).

Response to Finding No. 14:

Respondent has no specific response other than to clarify that the company that is now known as 1-800 Contacts, Inc. was started by Jonathan Coon in 1992 under the name Eye Supply. (Coon, Tr. 2649-51). That company acquired the phone number "1-800 Contacts" in 1995 and subsequently changed the name of the company to 1-800 Contacts. (Coon, Tr. 2658, 2661).

15. Mr. Coon was the Chief Executive Officer (CEO) of 1-800 Contacts from 1992 until approximately January 2014. (Coon, Tr. 2649).

Response to Finding No. 15:

Respondent has no specific response.

16. Mr. Coon has no current role or interest in 1-800 Contacts. (Coon, Tr. 2649).

Response to Finding No. 16:

Respondent has no specific response.

ii. Brian Bethers

17. Brian Bethers currently serves as the CEO of 1-800 Contacts. (Bethers, Tr. 3506).

Response to Finding No. 17:

Respondent has no specific response.

18. Mr. Bethers has been the CEO of 1-800 Contacts since January 2014. (Bethers, Tr. 3506-3507).

Response to Finding No. 18:

Respondent has no specific response.

19. Mr. Bethers began his career with 1-800 Contacts in 2003 as a Chief Financial Officer (CFO). (Bethers, Tr. 3507).

Response to Finding No. 19:

Respondent has no specific response.

20. Mr. Bethers became president of 1-800 Contacts in 2004. (Bethers, Tr. 3507).

Response to Finding No. 20:

Respondent has no specific response.

c. Key Employees & Agents: Chief Marketing Officers

i. Tim Roush

21. Tim Roush currently serves at the Chief Marketing Officer (CMO) at 1-800 Contacts. (CX9034 (Roush, Dep. at 6)).

Response to Finding No. 21:

Respondent has no specific response.

22. Mr. Roush began work for 1-800 Contacts in February 2013. (CX9034 (Roush, Dep. at 6)).

Response to Finding No. 22:

Respondent has no specific response.

ii. Joan Blackwood

23. Joan Blackwood began working at 1-800 Contacts in October 2009. (CX9017 (Blackwood, Dep. at 10)).

Response to Finding No. 23:

Respondent has no specific response.

24. Ms. Blackwood left 1-800 Contacts in December 2012. (CX9017 (Blackwood, Dep. at 10)).

Response to Finding No. 24:

Respondent has no specific response.

25. Throughout her time at 1-800 Contacts, Ms. Blackwood served as the company's Chief Marketing Officer. (CX9017 (Blackwood, Dep. at 10)).

Response to Finding No. 25:

Respondent has no specific response.

26. As CMO at 1-800 Contacts, Ms. Blackwood was accountable for the website and all media, including TV, print, radio, display, search and email, as well as public relations, and for understanding customer demographics. (CX9017 (Blackwood, Dep. at 11-12)).

Response to Finding No. 26:

Respondent has no specific response.

d. Key Employees & Agents: Marketing Staff

i. Laura Schmidt

27. Laura Schmidt currently serves as the marketing director for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 6)).

Response to Finding No. 27:

Respondent has no specific response.

28. Ms. Schmidt started working for 1-800 Contacts in November 2010. (CX9032 (L. Schmidt, Dep. at 6)).

Response to Finding No. 28:

Respondent has no specific response.

29. When she was hired in November 2010, Ms. Schmidt reported to Joan Blackwood. (CX9032 (L. Schmidt, Dep. at 6)).

Response to Finding No. 29:

Respondent has no specific response.

30. From December 2012 to February 2013, Ms. Schmidt reported to Brian Bethers. (CX9032 (L. Schmidt, Dep. at 7)).

Response to Finding No. 30:

Respondent has no specific response.

31. From February 2013 through the present, Ms. Schmidt has reported to Tim Roush. (CX9032 (L. Schmidt, Dep. at 7)).

Response to Finding No. 31:

Respondent has no specific response.

32. Ms. Schmidt's responsibilities as marketing director, from November 2010 through October 2012, included overseeing paid search. (CX9032 (L. Schmidt, Dep. at 7)).

Response to Finding No. 32:

Respondent has no specific response.

33. From November 2012 through August 2013, Ms. Schmidt did not oversee paid search for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 7)).

Response to Finding No. 33:

Respondent has no specific response.

34. From September 2013 through April 2015, Ms. Schmidt's responsibilities included overseeing paid search. (CX9032 (L. Schmidt, Dep. at 7-8)).

Response to Finding No. 34:

Respondent has no specific response.

35. Since May, 2015 Ms. Schmidt's responsibilities have not included overseeing paid search. (CX9032 (L. Schmidt, Dep. at 8)).

Response to Finding No. 35:

Respondent has no specific response.

36. Currently Ms. Schmidt oversees natural search for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 9)).

Response to Finding No. 36:

Respondent has no specific response.

ii. Brady Roundy

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

Response to Finding No. 37:

Respondent has no specific response.

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

Response to Finding No. 38:

Respondent has no specific response.

iii. Bryce Craven

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

Response to Finding No. 39:

Respondent has no specific response.

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

Response to Finding No. 40:

Respondent has no specific response.

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

Response to Finding No. 41:

Respondent has no specific response.

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

Response to Finding No. 42:

Respondent has no specific response.

iv. Amy Guymon Larson

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

Response to Finding No. 43:

Respondent has no specific response.

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

Response to Finding No. 44:

Respondent has no specific response.

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

Response to Finding No. 45:

Respondent has no specific response.

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

Response to Finding No. 46:

Respondent has no specific response.

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

Response to Finding No. 47:

Respondent has no specific response.

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

Response to Finding No. 48:

Respondent has no specific response.

v. Patrick Galan

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

Response to Finding No. 49:

Respondent has no specific response.

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

Response to Finding No. 50:

Respondent has no specific response.

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

Response to Finding No. 51:

Respondent has no specific response.

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

Response to Finding No. 52:

Respondent has no specific response.

vi. Jordan Judd

53. Jordan Judd worked for 1-800 Contacts from 2005 to 2012. (CX9016 (Judd, Dep. at 5)).

Response to Finding No. 53:

Respondent has no specific response.

54. Ms. Judd was hired as a customer service representative for 1-800 Contacts in 2005. (CX9016 (Judd, Dep. at 5)).

Response to Finding No. 54:

Respondent has no specific response.

55. In October 2007 Ms. Judd took a position within 1-800 Contacts as an online marketing coordinator. (CX9016 (Judd, Dep. at 7)).

Response to Finding No. 55:

Respondent has no specific response.

56. In her position as an online marketing coordinator, Ms. Judd reported to Bryce Craven. (CX9016 (Judd, Dep. at 7)).

Response to Finding No. 56:

Respondent has no specific response.

57. Ms. Judd's position as online marketing coordinator involved keyword research and paid search. (CX9016 (Judd, Dep. at 8)).

Response to Finding No. 57:

Respondent has no specific response.

58. In her position as an online marketing coordinator, Ms. Judd's responsibilities included putting together a weekly report on search performance numbers from the prior week. (CX9016 (Judd, Dep. at 15)).

Response to Finding No. 58:

Respondent has no specific response.

59. Ms. Judd left 1-800 Contacts in June or July 2012. (CX9016 (Judd, Dep. at 156)).

Response to Finding No. 59:

Respondent has no specific response.

vii. Amber Powell

60. Amber Powell worked for 1-800 Contacts between June 2005 and 2014. (CX9030 (Powell, Dep. at 10, 14-15)).

Response to Finding No. 60:

Respondent has no specific response.

61. In October, 2007, Ms. Powell started working as an online marketing coordinator at 1-800 Contacts. (CX9030 (Powell, Dep. at 12)).

Response to Finding No. 61:

Respondent has no specific response.

62. Ms. Powell's responsibilities as an online marketing coordinator included preparing Excel "dashboards" which provided data and analysis of 1800 contacts' search advertising performance, and creating monthly reports regarding sales and other performance metrics. (CX9030 (Powell, Dep. at 12)).

Response to Finding No. 62:

Complaint Counsel's Proposed Finding No. 62 is inaccurate and mischaracterizes the cited deposition testimony. Ms. Powell testified that her responsibilities as online marketing coordinator started mostly as reporting for the website, which included Excel "dashboards" and "weekly and monthly reports," but that testimony does not contain the detail or content of those "dashboards" or "weekly and monthly" reports that is in Complaint Counsel's Proposed Finding No. 62. (CX 9030 (Powell, Dep. at 12)).

63. Ms. Powell worked as an online marketing coordinator and online marketing manager for approximately three and a half years. (CX9030 (Powell, Dep. at 13)).

Response to Finding No. 63:

Respondent has no specific response.

64. Ms. Powell began working for Glasses.com in 2014. (CX9030 (Powell, Dep. at 14-15)).

Response to Finding No. 64:

Respondent has no specific response.

viii. Clint Schmidt

65. Clint Schmidt began work as an independent contractor for 1-800 Contacts in January 2004. (C. Schmidt, Tr. 2935).

Response to Finding No. 65:

Respondent has no specific response.

66. Mr. Schmidt was hired by 1-800 Contacts as director of E-Commerce in April 2004. (C. Schmidt, Tr. 2889, 2936).

Response to Finding No. 66:

Respondent has no specific response.

67. Mr. Schmidt left 1-800 Contacts in the first week of January 2006. (C. Schmidt, Tr. 2936).

Response to Finding No. 67:

Respondent has no specific response.

68. Mr. Schmidt had no business dealings with 1-800 Contacts after he left the company in the first week of January 2006. (C. Schmidt, Tr. 2936).

Response to Finding No. 68:

Respondent has no specific response.

69. Mr. Schmidt worked for 1-800 Contacts for less than two years. (C. Schmidt, Tr. 2936).

Response to Finding No. 69:

Respondent has no specific response.

70. During his time employed by 1-800 Contacts, Mr. Schmidt served as the company's Director of E-Commerce. (C. Schmidt, Tr. 2889).

Response to Finding No. 70:

Respondent has no specific response.

71. Mr. Schmidt was responsible for acquiring new customers to transact on the 1-800 Contacts website, for getting repeat purchases and customer retention on the website, and for ensuring ease of use of the website. (C. Schmidt, Tr. 2889).

Response to Finding No. 71:

Complaint Counsel's Finding No. 71 is incomplete. As Director of e-Commerce at 1-800 Contacts, Mr. Schmidt was also responsible for designing, participating in, and reporting on qualitative consumer research. (C. Schmidt, Tr. 2917-2921; RX 781).

ix. Josh Aston

72. Josh Aston worked at 1-800 Contacts between April or May 2002 and April or May 2004. (CX9013 (Aston, Dep. at 8)).

Response to Finding No. 72:

Respondent has no specific response.

73. Mr. Aston began at 1-800 Contacts as a call center representative, then transitioned to the marketing team after a year. (CX9013 (Aston, Dep. at 8-9)).

Response to Finding No. 73:

Respondent has no specific response.

74. Mr. Aston worked in the manager level of the marketing department. (CX9013 (Aston, Dep. at 9)).

Response to Finding No. 74:

Respondent has no specific response.

75. Mr. Aston reported to Jason Mathison initially, and later to Clint Schmidt. (CX9013 (Aston, Dep. at 9)).

Response to Finding No. 75:

Respondent has no specific response.

e. Key Employees & Agents: Legal

i. Joseph Zeidner

76. Joseph Zeidner joined 1-800 Contacts in September 2000. (CX9009 (J. Zeidner, IHT at 8)).

Response to Finding No. 76:

Respondent has no specific response.

77. Joseph Zeidner left 1-800 Contacts in September 2014. (CX9009 (J. Zeidner, IHT at 8-9)).

Response to Finding No. 77:

Respondent has no specific response.

78. While at 1-800 Contacts, Joseph Zeidner served as the Chief Legal Officer and Corporate Secretary for 1-800 Contacts. (CX9009 (J. Zeidner, IHT at 8)).

Response to Finding No. 78:

Respondent has no specific response.

ii. David Zeidner

79. David Zeidner worked as a full-time employee at 1-800 Contacts from May 2003 to December 2013. (CX9006 (D. Zeidner, IHT at 9, 56)).

Response to Finding No. 79:

Respondent has no specific response.

80. Prior to joining 1-800 Contacts as a full-time employee, David Zeidner did research work on a contract basis for 1-800 Contacts. (CX9006 (D. Zeidner, IHT at 11)).

Response to Finding No. 80:

Respondent has no specific response.

81. David Zeidner was hired as a legal counsel at 1-800 Contacts in May 2003. (CX9006 (D. Zeidner, IHT at 15)).

Response to Finding No. 81:

Respondent has no specific response.

82. David Zeidner eventually took over and managed the Intellectual Property ("IP") legal portfolio for 1-800 Contacts. (CX9006 (D. Zeidner, IHT at 25, 28-29)).

Response to Finding No. 82:

Respondent has no specific response.

83. At the time David Zeidner managed the IP legal portfolio for 1-800 Contacts, he had not taken any courses related to trademarks or trademark law. (CX9006 (D. Zeidner, IHT at 29)).

Response to Finding No. 83:

Complaint Counsel's Proposed Finding No. 83 is inaccurate and misleading. In the referenced portion of Mr. Zeidner's investigative hearing testimony, Mr. Zeidner was not asked whether he had ever taken any courses related to trademarks or trademark laws. (CX9006 (D. Zeidner, IHT at 29-32)). Instead, he was asked whether he took any such courses during the time he was managing 1-800 Contacts' IP portfolio. (CX 9006 (D. Zeidner, IHT at 29-32)). Mr. Zeidner testified that during the time he was managing 1-800 Contacts' IP portfolio, he attended conferences hosted by AIPLA (American Intellectual Property Association) and INTA (International Trademark Association) for "continuing legal education in the patent area and in the trademark area," and that he attended "cyber Bar classes" through the Utah Bar. (CX 9006 (D. Zeidner, IHT at 29-32)).

84. David Zeidner took over managing the IP legal portfolio for 1-800 Contacts because "[t]here was a need, and . . . I was the best fit there. . . . there were things moving so fast that it was kind of divide and conquer as far as what needed to be done. And that's – that's how we did it. I jumped in and started doing it." (CX9006 (D. Zeidner, IHT at 29-30)).

Response to Finding No. 84:

Complaint Counsel's Proposed Finding No. 84 mischaracterizes the testimony from Mr. Zeidner's investigative hearing. Mr. Zeidner was asked about the qualifications or background that 1-800 Contacts relied up to elevate him into the position of managing the IP portfolio, and Mr. Zeidner testified: "There was a need, and I was the – I understood it and – I mean, that was, I was obvious – I was the best fit there." (CX 9006 (D. Zeidner, IHT at 29-30)).

iii. Mark Miller

85. Mark Miller is an attorney with Holland and Hart, located in Salt Lake City, Utah. (CX9040 (Miller, Dep. at 7-8)).

Response to Finding No. 85:

Respondent has no specific response.

86. Mr. Miller is a member of the Utah State Bar. (CX9040 (Miller, Dep. at 8)).

Response to Finding No. 86:

Respondent has no specific response.

87. 1-800 Contacts is currently a client of Holland and Hart. (CX9040 (Miller, Dep. at 10)).

Response to Finding No. 87:

Respondent has no specific response.

88. Mr. Miller represented 1-800 Contacts on IP litigation matters, including trademark matters, from 2009 until at least 2014. (CX9040 (Miller, Dep. at 10-11); CX0800).

Response to Finding No. 88:

Complaint Counsel's Proposed Finding No. 88 is incomplete. In the cited deposition testimony, Mr. Miller testified that he handled IP litigation matters for 1-800 Contacts, including "trademark matters, patent infringement matters," and some copyright cases. (CX 9040 (Miller, Dep. at 10-11)). In the cited deposition testimony, Mr. Miller did not state a specific time period during which he represented 1-800 Contacts in those matters.

89. During the time he represented 1-800 Contacts, Mr. Miller negotiated trademark litigation settlement agreements on behalf of 1-800 Contacts. (CX9040 (Miller, Dep. at 73)).

Response to Finding No. 89:

Complaint Counsel's Proposed Finding Nol. 89 is incomplete and misleading because it does not specify which trademark litigation settlement agreements Mr. Miller negotiated on behalf of 1-80 Contacts and which he did not. Respondent agrees that Mr. Miller negotiated certain trademark litigation settlements on behalf of 1-800 Contacts, but there are some

trademark litigation settlement agreements at issue in this case that Mr. Miller testified he had no involvement with. (CX 9040 (Miller, Dep. at 13)).

iv. Bryan Pratt

90. Bryan Pratt is an intellectual property attorney with Holland and Hart in Salt Lake City, Utah. (Pratt, Tr. 2490-2491).

Response to Finding No. 90:

Respondent has no specific response.

91. Mr. Pratt has practiced at Holland and Hart for eight years. (Pratt, Tr. 2491).

Response to Finding No. 91:

Respondent has no specific response.

92. Mr. Pratt is a partner at Holland and Hart. (Pratt, Tr. 2493).

Response to Finding No. 92:

Respondent has no specific response.

93. Mr. Pratt has represented and still currently represents 1-800 Contacts. (Pratt, Tr. 2493).

Response to Finding No. 93:

Respondent has no specific response.

94. Mr. Pratt worked with the law firm Rader Fishman & Grauer prior to working at Holland and Hart. (Pratt, Tr. 2491).

Response to Finding No. 94:

Respondent has no specific response.

95. Mr. Pratt came to represent 1-800 Contacts in 2005. (Pratt, Tr. 2494-2495).

Response to Finding No. 95:

Respondent has no specific response.

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

Response to Finding No. 96:

Respondent has no specific response.

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

Response to Finding No. 97:

Complaint Counsel's Proposed Finding No. 97 is misleading because Mr. Pratt did not testify that he "managed" 1-800 Contacts' patent portfolio and trademark portfolio. Mr. Pratt testified that in addition to representing 1-800 Contacts with respect to its patent portfolio, 1-800 Contacts asked him "to take care of prosecuting and maintaining their trademark portfolio, intellectual property agreements, copyright issues, IP transaction agreements, things of that nature." (Pratt, Tr. 2495).

f. Key Employees & Agents: Finance

i. Scott Osmond

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

Response to Finding No. 98:

Respondent has no specific response.

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

Response to Finding No. 99:

Respondent has no specific response.

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

Response to Finding No. 100:

Respondent has no specific response.

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

Response to Finding No. 101:

Respondent has no specific response, other than to note that the third to last word should be "for," not "or."

2. AC Lens

a. Company Basics

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

Response to Finding No. 102:

The proposed finding is misleading and incomplete by referring only to United States sales. ACLens owns a contact lens website in the United Kingdom called LensCatalogue.co.uk (CX 9018 (Drumm, Dep. at 63)). ACLens ships contact lenses from the United States to its customers in the United Kingdom. (CX 9018) (Drumm, Dep. at 63)). Moreover, the exhibit that Complaint Counsel cite (CX 1623) does not support their proposed finding. CX 1623 is a 2010 letter from counsel for 1-800 Contacts to ACLens that does not describe the geographic scope of ACLens' sales.

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

Response to Finding No. 103:

Respondent has no specific response.

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

Response to Finding No. 104:

Respondent has no specific response.

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

Response to Finding No. 105:

The proposed finding erroneously states that Mr. Clarkson's brother-in-law was a co-owner of ACLens "from its founding." Mr. Clarkson explained in his deposition that there were three owners at the time of the founding and that the brother-in-law was subsequently given some equity. (CX 9039 (Clarkson, Dep. at 9-10)). Respondent has no other specific response.

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

Response to Finding No. 106:

Respondent has no specific response.

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

Response to Finding No. 107:

The proposed finding misspells the name and url of ACLens' U.K.-based website. The correct spelling is LensCatalogue.co.uk (CX 9018 (Drumm, Dep. at 63)). Respondent has no other specific response.

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

Response to Finding No. 108:

Respondent has no specific response.

109. AC Lens competes with other online retailers of contact lenses, including 1-800 Contacts, Vision Direct, Coastal, and Lens.com. (Clarkson, Tr. 187-188; CX9039 (Clarkson, Dep. at 90-91, 184)).

Response to Finding No. 109:

The proposed finding is incomplete and misleading. The record shows that ACLens competes with ECPs and brick and mortar stores, as well as all online sellers of contact lenses. (CX 9018 (Drumm, Dep. at 47, 50-58); Clarkson Tr. at 296-297 (agreeing that online buyers "tend to go back and forth between online, brick-and-mortar and ECPs.")); (CX 9039 (Clarkson, Dep. at 21-22) (Clarkson testimony that the "rising tide" of online sales "works against" the sales of brick and mortar retailers)).

110. AC Lens also provides "wholesale contact lens services" to several companies, including Sam's Club and Walmart. (Clarkson, Tr. 175).

Response to Finding No. 110:

Respondent has no specific response.

111. AC Lens's wholesale service entails shipping to stores or making shipments to partners' customers based on in-store orders. (Clarkson, Tr. 176-177).

Response to Finding No. 111:

Respondent has no specific response.

112. In addition to its wholesale service, AC Lens provides "white label services" to several partners. (Clarkson, Tr. 176).

Response to Finding No. 112:

Respondent has no specific response.

113. White label service is an e-commerce service that entails building a website for its partner, providing customer service such as answering telephone calls on the partner's behalf, fulfilling orders, providing prescription verification, and providing customer retention services such as sending emails to existing customers. (Clarkson, Tr. 176-177; CX9003 (Clarkson, IHT at 9-10); (CX9039 (Clarkson, Dep. at 192-193)).

Response to Finding No. 113:

Respondent has no specific response.

114. Neither wholesale services nor white label service entails marketing on the partner's behalf, with the exception of providing customer retention emails. (Clarkson, Tr. 177).

Response to Finding No. 114:

Respondent has no specific response.

115. AC Lens provides white label services to partners including CVS, Sam's Club, Walmart and Giant Eagle. (CX9003 (Clarkson, IHT at 9-10); (CX9039 (Clarkson, Dep. at 192-193)).

Response to Finding No. 115:

Respondent has no specific response.

116. White label services account for over half of AC Lens's business. (CX9003 (Clarkson, IHT at 10)).

Response to Finding No. 116:

Respondent has no specific response.

117. AC Lens's 2010 contact lens sales were $23.1 million. (CX1488).

Response to Finding No. 117:

The sole exhibit cited in support of this proposed finding is a spreadsheet (CX 1488) that was not the subject of any testimony at or prior to trial. The spreadsheet is not self-explanatory, lacks foundation, and is unreliable. For example, no witness provided a guide to the meaning of the column headers, such as "Product Total," "Online Product Total" and "Online Ship Total." It is also unclear whether the document was created for purposes of the litigation and if so, whether it was created by Complaint Counsel or by ACLens. As a consequence, the proposed finding should be disregarded.

118. AC Lens's 2011 contact lens sales were $24.1 million. (CX1488).

Response to Finding No. 118:

The sole exhibit cited in support of this proposed finding is a spreadsheet (CX 1488) that was not the subject of any testimony at or prior to trial. The spreadsheet is not self-explanatory, lacks foundation, and is unreliable. For example, no witness provided a guide to the meaning of the column headers, such as "Product Total," "Online Product Total" and "Online Ship Total." It is also unclear whether the document was created for purposes of the litigation and if so, whether it was created by Complaint Counsel or ACLens. As a consequence, the proposed finding should be disregarded.

119. AC Lens's 2012 contact lens sales were $26.0 million. (CX1488).

Response to Finding No. 119:

The sole exhibit cited in support of this proposed finding is a spreadsheet (CX 1488) that was not the subject of any testimony at or prior to trial. The spreadsheet is not self-explanatory, lacks foundation, and is unreliable. For example, no witness provided a guide to the meaning of

the column headers, such as "Product Total," "Online Product Total" and "Online Ship Total." It is also unclear whether the document was created for purposes of the litigation and if so, whether it was created by Complaint Counsel or ACLens. As a consequence, the proposed finding should be disregarded.

120. AC Lens's 2013 contact lens sales were $27.4 million. (CX1488).

Response to Finding No. 120:

The sole exhibit cited in support of this proposed finding is a spreadsheet (CX 1488) that was not the subject of any testimony at or prior to trial. The spreadsheet is not self-explanatory, lacks foundation, and is unreliable. For example, no witness provided a guide to the meaning of the column headers, such as "Product Total," "Online Product Total" and "Online Ship Total." It is also unclear whether the document was created for purposes of the litigation and if so, whether it was created by Complaint Counsel or ACLens. As a consequence, the proposed finding should be disregarded.

121. AC Lens's 2014 contact lens sales were $29.2 million. (CX1488).

Response to Finding No. 121:

The sole exhibit cited in support of this proposed finding is a spreadsheet (CX 1488) that was not the subject of any testimony at or prior to trial. The spreadsheet is not self-explanatory , lacks foundation, and is unreliable. For example, no witness provided a guide to the meaning of the column headers, such as "Product Total," "Online Product Total" and "Online Ship Total." It is also unclear whether the document was created for purposes of the litigation and if so, whether it was created by Complaint Counsel or ACLens. As a consequence, the proposed finding should be disregarded.

122. AC Lens's 2015 contact lens sales were $28.9 million. (CX1488).

Response to Finding No. 122:

The sole exhibit cited in support of this proposed finding is a spreadsheet (CX 1488) that was not the subject of any testimony at or prior to trial. The spreadsheet is not self-explanatory , lacks foundation, and is unreliable. For example, no witness provided a guide to the meaning of the column headers, such as "Product Total," "Online Product Total" and "Online Ship Total." It is also unclear whether the document was created for purposes of the litigation and if so, whether it was created by Complaint Counsel or ACLens. As a consequence, the proposed finding should be disregarded.

The proposed finding is also inconsistent with the testimony of ACLens CEO Peter Clarkson that in 2015, ACLens would ship "about 2 million customer orders, which would have a retail value of about $180 million." (CX 9003 (Clarkson, IHT at 9)).

b. Key Employees

123. Peter Clarkson is the president, CEO, and founder of AC Lens. (CX9039 (Clarkson, Dep. at 8)).

Response to Finding No. 123:

Respondent has no specific response.

124. Robert James Drumm has been with AC Lens since 2006. As of December 2016, he had been the marketing director for approximately three years. (CX9018 (Drumm, Dep. at 10-12)).

Response to Finding No. 124:

Respondent has no specific response.

c. Agreement(s)

125. In June or July 2005, AC Lens informed 1-800 Contacts that it did not bid on search queries containing 1-800 Contacts' trademark terms ("1-800 Contacts Branded Queries"),

and that AC Lens had implemented negative keywords to prevent its search advertisements from appearing in response to consumer searches that included "800" or "express." (RX0052; Clarkson, Tr. 238-240).

Response to Finding No. 125:

The proposed finding is incomplete and misleading. By 2002, ACLens had unilaterally decided not to use 1-800 Contacts' trademarks as keywords in paid search. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91)). ACLens CEO Peter Clarkson made this unilateral decision in part because he had a general concern that it "may not be legal" to use a competitor's trademark as keywords in paid search advertising. (CX 9003 (Clarkson, IHT at 90-91)). Mr. Clarkson also testified that he had not been asked by 1-800 Contacts to adopt anyone's trademarks as negative keywords prior to ACLens' decision, on its own volition, to adopt 1-800 Contacts' trademarks as negative keywords in 2005. (CX 9039 (Clarkson, Dep. at 80-82)).

126. If it had not received a threatening letter from 1-800 Contacts, AC Lens would not have implemented negative keywords to prevent its search advertisements from appearing in response to consumer searches that included "800" or "express." (Clarkson, Tr. 240; *see also* RX0052).

Response to Finding No. 126:

The proposed finding is incomplete, inaccurate and misleading. Mr. Clarkson testified that he had not been asked by 1-800 Contacts to adopt anyone's trademarks as negative keywords prior to ACLens' decision, on its own volition, to adopt 1-800 Contacts' trademarks as negative keywords. (CX 9039 (Clarkson, Dep. at 80-82)). The proposed finding is also inconsistent with the fact that as of 2015, ACLens had voluntarily implemented negative keywords for numerous contact lens retailers, including very well-known retailers such as Walgreens, Target, Pearle Vision, Lens Express, LensCrafters, CVS, Costco and Coastal Contacts. (RX 33 at 1; (CX 9018 (Drumm, Dep. at 108-109)).

127. 1-800 Contacts and AC Lens entered an agreement dated March 10, 2010 to resolve a trademark dispute initiated by 1-800 Contacts. (RX0028 (Settlement agreement by and between 1-800 Contacts and AC Lens dated March 10, 2010) (hereinafter "AC Lens Agreement")).

Response to Finding No. 127:

The proposed finding is incomplete because it does not include the full relevant passage from the Settlement Agreement in question, which states that the agreement was entered into because "the Parties have determined that, in order to avoid the expense, inconvenience and disruption of pursuing and defending a litigation, it is desirable and in their respective best interests to settle any claims related" to 1-800 Contacts' allegations of trademark infringement and unfair competition. (RX 28 at 1).

128. The AC Lens Agreement prohibits the parties from "using the other Party's trademark keywords or URLS (as listed in Exhibit 1) to target or trigger the appearance of delivery of advertisements of other content to the user." (RX0028 at 002 (AC Lens Agreement)).

Response to Finding No. 128:

The proposed finding is incomplete and misleading. The ACLens settlement agreement does not prohibit, and specifically excludes from the language that Complaint Counsel recite, the "use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contacts,' 'contact lens,' 'lenses' and 'lens.'" (RX 28 at 2).

129. The AC Lens Agreement prohibits the parties from "using generic, non-trademarked keywords as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1) without also using negative keywords as set forth in subsection (C) [of the agreement], unless the particular internet search provider does not permit use of negative keywords." (RX00028 at 002 (AC Lens Agreement)).

Response to Finding No. 129:

Respondent has no specific response.

130. The AC Lens Agreement requires the parties, when "using generic, non-trademarked keywords as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1)," to implement negative keywords "to the fullest extent possible…in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1). Specifically, for each internet search provider from which a Party purchases keywords to display advertising and/or internet links, the other Party's trademark keywords and URLs listed in Exhibit 1 shall be provided to such internet search provider as negative keywords, such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website." (RX0028 at 002 (AC Lens Agreement)).

Response to Finding No. 130:

The proposed finding is inaccurate and misleading and should be disregarded because Complaint Counsel have apparently mashed together parts of various paragraphs from different pages, while only citing a single page.

3. Vision Direct

a. Company Basics

131. Vision Direct is an online retailer of contact lenses and vision care supplies (Hamilton, Tr. 388-390; *see also* CX8002 at 001 (¶ 2) (Hamilton, Decl.)).[1]

Response to Finding No. 131:

Respondent has no specific response.

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

132. Vision Direct has been a subsidiary of Walgreen Boots Alliance, Inc. ("Walgreens") since 2011. (Hamilton, Tr. 389; CX9007 (Fedele, IHT at 5, 7)).

Response to Finding No. 132:

Respondent has no specific response.

133. Before being acquired by Walgreens, Vision Direct was owned by Drugstore.com. (Hamilton, Tr. 469).

Response to Finding No. 133:

Respondent has no specific response.

134. Vision Direct sells contact lenses through its website only and does not have brick-and-mortar stores. (Hamilton, Tr. 388-390).

Response to Finding No. 134:

Respondent has no specific response.

135. Vision Direct competes with other online retailers of contact lenses including 1-800 Contacts, Lens.com, Discount Contact Lenses, Contact Lens King, Coastal, "and some of the other smaller ones as well." (Hamilton, Tr. 392; *see also* CX8002 at 001 (¶ 3) (Hamilton, Decl.)).

Response to Finding No. 135:

Complaint Counsel's Proposed Finding No. 135 is incorrect, incomplete, and misleading. VisionDirect competes with all companies that, and all persons who, sell contact lenses at retail. In addition, Mr. Hamilton testified that VisionDirect competes with Walgreens.com, despite being owned by Walgreens, and Walgreens is neither listed nor a small online retailer. (CX 9007 (Fedele, IHT at 26-28); Hamilton, Dep. 11).

136. Vision Direct's sales in 2015 were [redacted]. (RX1842 (FY2015 Revenue Analysis (August 24, 2014-August 23, 2015), *in camera*)).

Response to Finding No. 136:

Complaint Counsel's Proposed Finding No. 136 is not supported by the record evidence cited.

b. Key Employees

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

Response to Finding No. 137:

Respondent has no specific response.

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

Response to Finding No. 138:

Respondent has no specific response.

139. In June 2004, Alesia Pinney was employed by Vision Direct and Drugstore.com as the Vice President and General Counsel, and was the signatory on the agreement by and between 1-800 Contacts and Vision Direct dated June 24, 2004. (CX0311 (Settlement agreement between 1-800 Contacts and Vision Direct dated June 24, 2004)).

Response to Finding No. 139:

Respondent has no specific response.

140. For a time period including at least the period of time in or around October and November 2007, Cindy L. Caditz was outside counsel for Vision Direct, and a lawyer employed at Klarquist Sparkman, LLP located in Seattle, Washington. (CX0138).

Response to Finding No. 140:

Respondent has no specific response.

141. Ms. Caditz is the Vision Direct outside counsel who wrote to 1-800 Contacts attorney Bryan Pratt, in a November 5, 2007 letter, that implementing negative keywords in the manner 1-800 Contacts was asking Vision Direct to do was "a possible violation of the

Sherman Act" that raised concerns "under the Sherman Act with respect to restrictions on advertising." (CX0138 at 001-002).

Response to Finding No. 141:

Complaint Counsel's Proposed Finding No. 141 is incomplete and misleading. Despite any "possible" concerns that were mentioned in a single November 5, 2007 letter from its outside counsel, Vision Direct signed a subsequent settlement agreement with 1-800 Contacts in 2009 that required Vision Direct to implement negative keywords. In addition, that agreement stated "[i]f any Party in good faith believes after consulting with outside antitrust counsel that the Antitrust Opinion is sufficiently related to some of the actions required by this Settlement Agreement and makes the required conduct illegal, that Party may suspend its implementation of those actions pending the outcome of [certain specified]." The 2009 agreement remains in force and has not been suspended pursuant to this "Antitrust Opinion" process. (CX 314; Hamilton, Tr. 405)

142. For a time period including at least the period of time in or around January 2008, Scott Sher was outside counsel for Vision Direct, and a lawyer employed at Wilson Sonsini Goodrich & Rosati in Washington, DC. (CX0141; CX0142).

Response to Finding No. 142:

Respondent has no specific response.

c. Agreement(s)

143. 1-800 Contacts, Inc. and Vision Direct, Inc. entered an agreement dated June 24, 2004 to resolve a trademark dispute initiated by 1-800 Contacts. (CX0311 (Settlement agreement between 1-800 Contacts and Vision Direct dated June 24, 2004 (hereinafter "2004 Vision Direct Agreement"))).

Response to Finding No. 143:

Complaint Counsel's Proposed Finding No. 143 is incomplete. The dispute between 1-800 contacts did not only involve trademark claims; it also alleged other claims under the

Lanham Act, as well as unfair competition and tortious interference with prospective economic advantage claims. (CX 1614).

144. The 2004 Vision Direct Agreement prohibits both parties from "causing a Party's brand name, or link to the Party's restricted Websites to appear in a search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs." (CX0311 at 004 (2004 Vision Direct Agreement)).

Response to Finding No. 144:

Complaint Counsel's Proposed Finding No. 144 is incomplete, misleading, and inaccurate. The 2004 Vision Direct Agreement provides that "Prohibited Acts shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses; and (ii) the purchase by either Party of the key words that are generic words such as 'contacts,' 'contact lens,' and 'lens' (and both Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement." (CX 311 at 4-5 (2004 Vision Direct Agreement)).

145. The 2004 Vision Direct Agreement prohibits both parties from "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs." (CX0311 at 004 (2004 Vision Direct Agreement)).

Response to Finding No. 145:

Complaint Counsel's Proposed Finding No. 145 is incomplete, misleading, and inaccurate. The 2004 Vision Direct Agreement provides that "Prohibited Acts shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses; and (ii) the purchase by either Party of the key words that are generic words such as 'contacts,' 'contact lens,' and 'lens' (and both Parties

acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement." (CX 311 at 4-5 (2004 Vision Direct Agreement)).

146. 1-800 Contacts, Inc. and Vision Direct, Inc./Drugstore.com entered into a second agreement effective May 8, 2009. (CX0314 (Settlement Agreement and Mutual Release between 1-800 Contacts and Vision Direct effective May 8, 2009 (hereinafter "2009 Vision Direct Agreement"))).

Response to Finding No. 146:

Respondent has no specific response.

147. The 2009 Vision Direct Agreement provides that "[t]he 2004 Settlement Agreement shall remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords shall be to comply with the terms of this Settlement Agreement." (CX0314 at 004 (2009 Vision Direct Agreement)).

Response to Finding No. 147:

Respondent has no specific response.

148. The 2009 Vision Direct Agreement provides that a Stipulated Order be filed with the Court so as to "require the Parties to implement the Negative Keywords Lists," and "[i]f the Court refuses to enter the Order . . . then the Parties shall confer in good faith to determine whether they will agree to proceed with a settlement." (CX0314 at 004-005 (2009 Vision Direct Agreement)).

Response to Finding No. 148:

Respondent has no specific response.

4. Coastal Contacts

a. Company Basics

149. Coastal Contacts, Inc. ("Coastal" or "Coastal Contacts"), headquartered in Vancouver, British Columbia, is an online retailer of vision care products and services, including contact lenses. (CX1615 at 2 (¶ 4)).

Response to Finding No. 149:

The proposed finding is not supported by the cited evidence. CX 1615 is a complaint filed in district court in 2004. (CX 1615). The cited paragraph is an allegation made upon "information and belief." (CX 1615 at 2 (¶ 4)). Further, Coastal Contacts was purchased by Essilor, which is one of the world's largest optical companies. (Bethers, Tr. 3516-3517, 3540).

150. Coastal operates a U.S. website at the URL coastalcontacts.com and a Canadian website at the URL clearlycontacts.ca. Coastal has also operated the websites ClearlyContacts.com, TheContactLensStore.com, Lensway.com, NordicLenses.com, and CoastalContacts.ca. (CX0310 at 018).

Response to Finding No. 150:

The proposed finding is not supported by the cited evidence. CX 310 is a settlement agreement entered into in 2004; it does not show what sites Coastal Contacts currently operates.

151. In 2015, Coastal Contacts had contact lens sales revenue of [redacted] (CX1465 (Coastal Contacts CL Revenue (total revenue), *in camera*)).

Response to Finding No. 151:

The proposed finding is not supported by the evidence. The cited document purports to show revenue associated with the [redacted], but there is no evidence indicating what [redacted] represents. (CX 1465). Complaint Counsel assert that Coastal Contacts "operates a U.S. website at the URL coastalcontacts.com." (CC Proposed Finding No. 150.)

b. Key Employees

152. Steve Bochen, Chief Operating Officer at Coastal Contacts, Inc. was the signatory on the agreement by and between Coastal Contacts, Inc. and 1-800 Contacts dated November 8, 2004. (CX0310 at 010 (Settlement Agreement by and between 1-800 Contacts and Coastal Contacts dated November 8, 2004)).

Response to Finding No. 152:

Respondent has no specific response.

153. Michael Suh, Search Engine Marketing Manager of Coastal Contacts, was contacted by 1-800 Contacts employees related to implementation of negative keywords and other bidding agreement compliance issues. (CX0432).

Response to Finding No. 153:

The evidence does not support the proposed finding. The cited email does not show that Michael Suh "was contacted by 1-800 Contacts employees." Nor does the cited email make any reference to any agreement, let alone a "bidding agreement." (CX 432).

c. Agreement(s)

154. 1-800 Contacts and Coastal entered into an agreement dated November 8, 2004. (CX0310 (Settlement Agreement by and between 1-800 Contacts and Coastal Contacts dated November 8, 2004) (hereinafter "Coastal Agreement")).

Response to Finding No. 154:

The proposed finding is inaccurate and incomplete. The cited agreement is a settlement of an action filed by 1-800 Contacts against Coastal Contacts captioned: *"1-800 Contacts, Inc. v. Coastal Contacts Inc.*, Action No. 204CV00249DAK." (CX 310 at 1). The agreement states that "is made and entered into as of October 29, 2004." (CX 310 at 1).

155. The Coastal Agreement is governed under New York State laws. (CX0310 (Coastal Agreement)).

Response to Finding No. 155:

Respondent has no specific response.

156. The Coastal Agreement prohibits the parties to the agreement from "causing a website or Internet advertisement to appear in response to any Internet search for another Party's brand name, trademarks, or URLS but not through a search employing Generic or Descriptive Terms." (CX0310 at 003 (Coastal Agreement)).

Response to Finding No. 156:

Respondent has no specific response.

157. The Coastal Agreement prohibits the parties from "causing a Party's brand name, or link to that Party's websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLS." (CX0310 at 003 (Coastal Agreement)).

Response to Finding No. 157:

Respondent has no specific response.

5. Lens.com

a. Company Basics

158. Lens.com, Inc. ("Lens.com") is an online retailer of contact lenses that sells throughout the United States. It is a Nevada corporation. Lens.com's mailing addresses include PO Box 366, Louisiana, MO 63353. (CX1125 at 003).

Response to Finding No. 158:

The proposed finding misstates the cited exhibit and should be disregarded. The cited exhibit is a copy of a complaint filed by 1-800 Contacts in 2007. The cited exhibit thus only supports a finding with respect to Lens.com's activities as of 2007.

159. Lens.com sells online through the website www.lens.com. In 2005, Lens.com search ads were appearing in response to searches on Google containing 1-800 Contact's trademarks. (CX0462 at 001).

Response to Finding No. 159:

Respondent has no specific response.

b. Key Employees

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

Response to Finding No. 160:

The proposed finding is inconsistent with the cited deposition testimony. The deposition in question was taken in April 2008, and the testimony supports a finding that Mr. Samourkachian was the CEO of Lens.com as of April 2008. The cited testimony does not support a finding that Mr. Samourkachian was (or is) the owner of Lens.com. The testimony on the ownership question was ambiguous.

> "Q. Who would be the best person to ask about the ownership of Lens.com, Inc.?
>
> A. It would be myself. I would have to look at records to kind of –
>
> Q. What records?
>
> A. Personal records maybe, kind of reflect, think about it. I'm not prepared right now to discuss those items, because I'm not prepared for that.
>
> Q. So you're not prepared to tell me who owns Lens.com, Inc.?
>
> A. I said I haven't prepared myself, refreshed myself as to the details of your question. I was under the impression we are here for a different matter."

(CX 1673 (Samourkachian Dep. in *1-800 Contacts v. Lens.com*, at 31-32)).

6. Memorial Eye

a. Company Basics

161. Memorial Eye P.A. ("Memorial Eye") is based in Houston, Texas, and sells glasses, contact lenses, and optometry services through several brick and mortar facilities. (Holbrook, Tr. 1851; RX0072 at 002-003 (¶¶ 7-8) (1-800 Contacts, Inc. v. Memorial Eye, PA Complaint)).

Response to Finding No. 161:

Respondent has no specific response.

162. Memorial Eye currently employs six optometrists and approximately 38 employees. (Holbrook, Tr. 1854-1855).

Response to Finding No. 162:

Respondent has no specific response.

163. Memorial Eye sold contact lenses online directly to consumers throughout the United States through the internet from December 2004 through December 2013. (Holbrook, Tr. 1856-1859, 1873; CX9024 (Holbrook, Dep. at 10-11); RX0072 at 004 (¶ 17) (1-800 Contacts, Inc. v. Memorial Eye, PA Complaint)).

Response to Finding No. 163:

Complaint Counsel's Proposed Finding No. 163 is incomplete. Although Memorial Eye stopped selling contact lenses online in December 2013, Memorial Eye had decided to cease selling contact lenses online over a year earlier, in 2012. (Holbrook, Tr. 1940–1941).

164. During the time it sold contact lenses online, Memorial Eye did so through two websites: ShipMyContacts.com and IWantContacts.com. (Holbrook, Tr. 1858-1859).

Response to Finding No. 164:

Complaint Counsel's Proposed Finding No. 164 is incorrect, incomplete, and not supported by the record evidence cited. Memorial Eye did not begin selling contact lenses through IWantContacts.com until approximately November 2007. (Holbrook, Tr. 1859). Although Memorial Eye stopped selling contact lenses through the internet in December 2013, Memorial Eye decided to cease selling contact lenses online in 2012. (Holbrook, Tr. 1940–1941).

165. Memorial Eye began selling contact lenses online through the website ShipMyContacts.com in December 2004. (Holbrook, Tr. 1859; CX9024 (Holbrook, Dep. at 10-11)).

Response to Finding No. 165:

Respondent has no specific response.

166. Memorial Eye began selling contact lenses online through the website IWantContacts.com in November 2007. (Holbrook, Tr. 1859; CX9024 (Holbrook, Dep. at 10-11)).

Response to Finding No. 166:

Respondent has no specific response.

b. Key Employees

167. Eric Holbrook is the co-founder and general manager of Memorial Eye. (Holbrook, Tr. 1850-1851).

Response to Finding No. 167:

Complaint Counsel's Proposed Finding No. 167 is incorrect, incomplete, and not supported by the record evidence cited. Eric Holbrook never referred to himself as a "co-founder" of Memorial Eye. Memorial Eye is owned by Dr. Amelia Holbrook, Mr. Holbrook's wife. (Holbrook, Tr. 1854). Dr. Amelia Holbrook is the President of Memorial Eye. (Holbrook, Tr. 1884). Eric Holbrook is not, and never has been, an officer of Memorial Eye. (Holbrook, Tr. 1884–1885). Dr. Amelia Holbrook owned and controlled Memorial Eye's business functions, including its sale of contact lenses online. (Holbrook, Tr. 1885).

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

Response to Finding No. 168:

Complaint Counsel's Proposed Finding No. 168 is incorrect, incomplete, and not supported by the record evidence cited. Memorial Eye is owned by Dr. Amelia Holbrook, Mr. Holbrook's wife. (Holbrook, Tr. 1854). Dr. Amelia Holbrook is the President of Memorial Eye. (Holbrook, Tr. 1884). Eric Holbrook is not, and never has been, an officer of Memorial Eye.

(Holbrook, Tr. 1884–1885). Dr. Amelia Holbrook owned and controlled Memorial Eye's business functions, including its sale of contact lenses online. (Holbrook, Tr. 1885).

c. Agreement(s)

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

Response to Finding No. 169:

Complaint Counsel's Proposed Finding No. 169 is incorrect and incomplete. The Memorial Eye Agreement does not prohibit, and expressly excludes from the language quoted by Complaint Counsel, "the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyeglasses, eyewear, frame or other, similar generic terms as long as the appropriate negative keywords are implemented pursuant to section 3(b)." (CX 326 at 3). Moreover, Complaint Counsel's Finding No. 169 does not accurately quote from CX 326, introducing several word changes that do not appear in the cited exhibit.

7. Luxottica

a. Company Basics

170. Luxottica is based in Milan, Italy. Its U.S. subsidiary, Luxottica North America, is based in Ohio. ((CX0331 at 006 (Sourcing Agreement by and between 1-800 Contacts and Luxottica)).

Response to Finding No. 170:

Complaint Counsel's Proposed Finding No. 170 is not supported by the cited exhibit. CX 331 at 6 does not mention that Luxottica is based in Milan, Italy or is a subsidiary of

Luxottica named Luxottica North America. CX 331 at 6 refers to an entity – a party to the "Contact Lens Sourcing and Services Agreement" – named "Luxottica Retail North America, an Ohio Corporation," but the cited page does not indicate that entity's corporate affiliation or ownership.

171. Luxottica's subsidiaries include, but are not limited to, Luxottica Retail North America Inc., LensCrafters International, Inc., EYEXAM of California, Inc., and EyeMed Vision Care LLC, among others. ((CX0331 (Sourcing Agreement by and between 1-800 Contacts and Luxottica)).

Response to Finding No. 171:

Respondent does not dispute that CX 331 is a "Contact Lens Sourcing and Service Agreement" entered into by 1-800 Contacts with Luxottica Retail North America Inc., an Ohio corporation, Luxottica Retail Canada, an Ontario corporation, LensCrafters International, Inc., an Ohio corporation, EYEXAM of California, Inc., a California corporation, and EyeMed Vision Care LLC, a Delaware limited liability company. Nevertheless, Complaint Counsel's Proposed Finding No. 171 is not, as far as Respondent can tell, supported by the cited exhibit. Complaint Counsel's Proposed Finding No. 171 cites Exhibit CX 331, which has 167 pages, but the proposed finding does not provide any page number.

172. Luxottica's primary business in the United States is operating optical chains such as LensCrafters, Pearl Vision, Sears Optical, and Target Optical and distributing optical products including eyeglasses and contact lenses. ((CX0331 at 006 (Sourcing Agreement by and between 1-800 Contacts and Luxottica)).

Response to Finding No. 172:

Complaint Counsel's Proposed Finding No. 172 is not supported by the cited exhibit. CX 331 at 6 does not purport to identify Luxottica's "primary business" in the United States. Instead, CX 331 at 6 states that "LUX is in the business of operating optical chains of retail stores in the United States and Canada, under the brands, including but not limited to

LensCrafters, Pearle Vision, Sears Optical, and Target Optical and operating internet websites for the Stores," and that "through those stores, LUX primarily markets, sells and distributes optical products, including eyeglasses, sunglasses, accessories, contact lenses, and products related thereto." (CX 331 at 6).

173. Luxottica's volume of sales for contact lenses in the United States in 2016 was [redacted]. (CX1817, *in camera*).

Response to Finding No. 173:

Respondent has no specific response.

b. Agreement(s)

174. In May 2005, 1-800 Contacts and Luxottica entered into an agreement whereby each party agreed not to use the other's trademarks in search advertising, and to have affiliates stop using the other party's trademarks in search advertising as well. (CX0174, CX1378).

Response to Finding No. 174:

Complaint Counsel's Proposed Finding No. 174 is inaccurate, misleading, and not supported by the cited exhibits. CX 174 does not reflect an agreement between 1-800 Contacts and Luxottica regarding the use of each other's trademarks in search advertising. CX 174 is an email discussion between Seth Mclaughlin of Luxottica and Kevin McCallum of 1-800 Contacts relating to whether some of 1-800 Contacts' affiliates were "inappropriately using [the] LensCrafters trademark." CX 174 at 2. As the top email demonstrates, the email discussion in CX 174 related specifically to marketing affiliates: "Like most companies, we have thousands of affiliates in our affiliate program." CX 174 at 1.

Similarly, CX 1378 does not support Complaint Counsel's Proposed Finding No. 174 because CX 1378 is an email chain in which Clint Schmidt of 1-800 Contacts states to Connie Ross of Luxottica merely that he is "glad to have amicable correspondence to resolve any search

or trademark issues in the future." CX 1378 does not reflect any specific agreement between 1-800 Contacts and Luxottica.

175. 1-800 Contacts and Luxottica entered into a sourcing and services agreement, dated December 23, 2013 that prohibited both parties and their affiliates (including, for Luxottica, retailers such as EyeMed, LensCrafters, Pearle Vision, Sears Optical, and Target Optical) from the "purchase or use of any of the [other party's] Trademarks or confusingly similar variations . . . as triggering keywords in any internet search engine advertising campaign," and further required each party to enter the other party's trademarks as negative keywords in all advertising campaigns. (CX0331 (Sourcing Agreement by and between 1-800 Contacts and Luxottica §§ 17.10-11); Bethers, Tr. 3721-22; CX9001 (Bethers, IHT at 221-222)).

Response to Finding No. 175:

Complaint Counsel's Proposed Finding No. 175 is incomplete. 1-800 Contacts entered into a "Contact Lens Sourcing and Services Agreement" with certain Luxottica companies on December 23, 2013, pursuant to which 1-800 Contacts would provide contact lens fulfillment services for those Luxottica companies to "assist . . . in managing and operating [their] contact lenses business" and the parties would work together in sourcing contact lens. (CX 331 at 6; Bethers, Tr. 3524-25, 3694-95). The Contact Lens Sourcing and Services Agreement has two major parts: one is that 1-800 Contacts provides fulfillment services by shipping contact lens products directly to the Luxottica companies' stores or customers; the second is a joint sourcing arrangement for purchasing contact lenses from the four manufactures. (Bethers, Tr. 3524-25, 3694-95). [redacted] One of many components in the Contact Lens Sourcing and Services Agreement is a section that contains provisions prohibiting the parties from purchasing or using the other party's trademarks or confusingly similar variations "as triggering keywords in any

internet search engine advertising campaign" and requiring each party to enter the other party's trademarks as "exact match" negative keywords. (CX 331 at 45-46; Bethers, Tr. 3695-3700).

8. EZ ContactsUSA

a. Company Basics

176. EZContactsUSA is an online seller of contact lenses, sunglasses, and eyeglasses, and takes purchases both online and over the telephone. (CX0313).

Response to Finding No. 176:

The proposed finding misstates the cited exhibit and should be disregarded. The cited exhibit, CX 313, is a settlement agreement dated May 12, 2008. The agreement does not state that EZContactsUSA was in 2008 an online seller of contact lenses, sunglasses and eyeglasses. The agreement also does not state that EZContactsUSA in 2008 took purchases both online and over the telephone. And, of course, the May 2008 settlement agreement provides no support for the proposed finding, which purports to speak to EZContactsUSA's current business activities.

177. EZContactsUSA is located at 4111 Glenwood Road, Brooklyn, NY and at 544 Park Avenue, Brooklyn, NY. (CX0313).

Response to Finding No. 177:

The proposed finding misstates the cited exhibit and should be disregarded. CX 313 is a copy of a settlement agreement dated May 12, 2008. The most that the exhibit could support is a finding that as of May 12, 2008, EZContactsUSA was located at the referenced address.

178. On or about December 6, 2007, 1-800 Contacts filed a lawsuit against EZ Contacts, alleging trademark infringement. (CX0313).

Response to Finding No. 178:

Complaint Counsel's Proposed Finding No. 178 is incomplete. 1-800 Contacts filed a lawsuit against EZContactsUSA alleging more than just trademark infringement. 1-800 Contacts

also brought claims for federal unfair competition, common law unfair competition, misappropriation, copyright infringement and unjust enrichment. (CX 1617 at 14-17; Pratt, Tr. 2536-37).

a. Key Employees

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

Response to Finding No. 179:

Respondent has no specific response.

b. Agreement(s)

180. EZ Contacts and 1-800 Contacts, Inc. entered into an agreement effective May 12, 2008 to resolve a trademark dispute initiated by 1-800 Contacts. (CX0313).

Response to Finding No. 180:

Respondent has no specific response, other than to note that the settlement agreement also resolved the other federal and state claims that 1-800 Contacts had asserted in the lawsuit. (CX 313).

181. EZ Contacts and 1-800 Contacts, Inc. entered into an agreement effective May 12, 2008 which prohibits the parties from, "performing any action or omission of actions that would cause advertisements, internet links, and/or other promotion material related to a Party's website to appear in response to an entry of any one of the other Party's prohibited keywords listed in Exhibit 3." (CX0313 at 004).

Response to Finding No. 181:

The proposed finding is incomplete, misleading, and inaccurate. The EZContactsUSA agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use in the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) uses made by third parties not

contracted or otherwise affiliated with a Party which result in the third party listing together the Party's and the other Party's trademarks; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "buy," "lenses," and "lens."" (CX 313 at 4-5).

182. EZ Contacts and 1-800 Contacts, Inc. entered into an agreement effective May 12, 2008 which required, for any keyword purchase, including generic, non-trademark keywords, "the Parties shall use the prohibited keywords (as listed in Exhibit 3) as negative keywords in order to prevent the generation of advertisements and internet links triggered by keywords that are prohibited under [the] agreement," and that the negative keywords must be implemented, "such that advertisements will not be generated when the negative keywords are used on the website of an internet search provider," and that "use of generic, non-trademarked words without use of negative keywords shall be considered a prohibited act." (CX0313 at 005).

Response to Finding No. 182:

The proposed finding inaccurately quotes the cited exhibit, CX 313 at 5, and should be disregarded as written. Section 5(B) of the settlement agreement provides that "Prohibited Acts shall not include… (iii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "buy," "lenses," and "lens" (and both Parties acknowledge that any advertisements triggered by such key words are not prohibited under this Agreement)." The very next sentence then specifies that "when any keyword purchase of any kind, including the purchase of generic, non-trademarked keywords, is made through any internet search provider, the Parties shall use the prohibited key words (as listed in Exhibit 3) as negative keywords in order to prevent the generation of advertisements and internet links *triggered by keywords* that are prohibited under this agreement," not "triggered by *negative* keywords" as quoted by Complaint Counsel. (CX 313 at 4-5) (emphasis added).

9. Lensfast

a. Company Basics

183. Lensfast, LLC ("Lensfast") is an online retailer of contact lenses, with operations throughout the United States, and with a mailing address of P.O. Box 1001, Meredith, New Hampshire, 03253. (CX0315 at 006).

Response to Finding No. 183:

The proposed finding misstates the cited exhibit and should be disregarded. The cited exhibit is a settlement agreement dated January 2010. The agreement does not state that Lensfast was in 2010 or is now an online retailer of contacts, with operations throughout the United States, as the proposed finding contends. The agreement does contain (at page 6) the cited mailing address, but the exhibit could only support a finding that Lensfast was using that address as of January 2010.

184. Lensfast sells contact lenses online at the websites lensfast.com, contactlens.com, and E-Contacts.com. (CX0315 at 010).

Response to Finding No. 184:

The proposed finding misstates the cited exhibit and should be disregarded. The cited exhibit is a January 2010 settlement agreement; it cannot support a finding that Lensfast currently sells contact lenses through the website addresses set out in the finding.

185. Lensfast had sales in 2011 of $1,351,592. (CX1480).

Response to Finding No. 185:

Respondent objects to the proposed finding on the ground that the cited spreadsheet is unreliable hearsay within hearsay, was not the subject of any declaration or testimony, and is not self-explanatory. For example, there is no explanation of what products were being sold or whether the sales were made online or over the phone.

186. Lensfast had sales in 2012 of $1,583.339. (CX1481).

Response to Finding No. 186:

Respondent objects to the proposed finding on the ground that the cited spreadsheet is unreliable hearsay within hearsay, was not the subject of any declaration or testimony, and is not self-explanatory. For example, there is no explanation of what products were being sold or whether the sales were made online or over the phone.

187. Lensfast had sales in 2013 of $1,747,547. (CX1482).

Response to Finding No. 187:

Respondent objects to the proposed finding on the ground that the cited spreadsheet is unreliable hearsay within hearsay, was not the subject of any declaration or testimony, and is not self-explanatory. For example, there is no explanation of what products were being sold or whether the sales were made online or over the phone.

188. Lenstast had sales in 2014 of $1,696,954. (CX1483).

Response to Finding No. 188:

Respondent objects to the proposed finding on the ground that the cited spreadsheet is unreliable hearsay within hearsay, was not the subject of any declaration or testimony, and is not self-explanatory. For example, there is no explanation of what products were being sold or whether the sales were made online or over the phone.

189. Lensfast had sales in 2015 of $2,058,000. (CX1484).

Response to Finding No. 189:

Respondent objects to the proposed finding on the ground that the cited spreadsheet is unreliable hearsay within hearsay, was not the subject of any declaration or testimony, and is not

self-explanatory. For example, there is no explanation of what products were being sold or whether the sales were made online or over the phone.

b. Key Employees

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

Response to Finding No. 190:

The proposed finding misstates the cited exhibit and should be disregarded. The signature of the person who signed the agreement for Lensfast is indecipherable. In addition, the person who signed the agreement for Lensfast did *not* state that he or she was CEO and President, as the proposed finding states. Instead, he or she signed as an "LLC Member."

c. Agreement(s)

191. On January 4, 2010, 1-800 Contacts and Lensfast, Inc. into an agreement to resolve a trademark dispute initiated by 1-800 Contacts. (CX0315 (Settlement Agreement by and between 1-800 Contacts, Inc. and Lensfast, Inc. dated January 4, 2010 (hereinafter "Lensfast Agreement"))).

Response to Finding No. 191:

Respondent has no specific response.

192. The Lensfast Agreement prohibits either party from "causing a Party's brand name, or Internet link to the Party's Restricted Websites to appear as a listing in the search results page of Internet search engine, when the user specifically searches for the other Party's brand name, trademark, or URLS (as listed in Exhibit 2)." (CX0315 at 003 (Lensfast Agreement)).

Response to Finding No. 192:

The proposed finding is incomplete, misleading, and inaccurate. The Lensfast agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, any "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute

an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 315 at 4).

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

Response to Finding No. 193:

The proposed finding is incomplete and misleading. The Lensfast agreement does not prohibit the generation of advertisements and internet links triggered by any "use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses." (CX 315 at 4).

10. Lenses for Less

a. Company Basics

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

Response to Finding No. 194:

Respondent has no specific response.

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

Response to Finding No. 195:

The proposed finding is incomplete and should reflect the fact that as an ECP, Oakwood Eye Clinic provides eye exams and optometry services and sells both glasses and contact lenses. (CX 8000 at 1 (¶¶ 2-4)).

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

Response to Finding No. 196:

Respondent has no specific response.

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

Response to Finding No. 197:

Respondent has no specific response.

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

Response to Finding No. 198:

Complaint Counsel's Proposed Finding No. 198 is incomplete and misleading because Lenses for Less does not itself "utilize" paid search advertising; it hires another company to do that. The Studebaker declaration states that since 2010, Lenses for Less has outsourced its search advertising to a third party, which manages and makes the selections for search advertising campaigns. (CX 8000 at 1 (¶ 6) (Studebaker, Decl.)).

b. Key Employees

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

Response to Finding No. 199:

The proposed finding misstates the cited exhibit and should be disregarded. While Mr. Studebaker's declaration does state that he is "the Owner" of Oakwood Eye Clinic, it nowhere states that he "operates" Lenses for Less. Indeed, the fact that Lenses for Less has outsourced "web support and search advertising management" to a third party for the past seven years strongly suggests that he does not "operate" Lenses for Less. (CX 8000 at 1 (¶ 6) (Studebaker, Decl.)).

c. Agreement(s)

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

Response to Finding No. 200:

The proposed finding is incomplete. 1-800 Contacts filed a lawsuit against Lenses for Less alleging trademark infringement and unfair competition, among other claims, on January 20, 2010. The "agreement" to which Complaint Counsel refer in proposed finding no. 200 is the settlement agreement entered into between 1-800 Contacts and Lenses for Less to resolve the dispute in order to "avoid the expense, inconvenience, and disruption of pursuing and defending the Action." (CX 320 at 2).

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

Response to Finding No. 201:

The proposed finding is incomplete, misleading, and inaccurate. The Lenses for Less Agreement does not prohibit, and specifically excludes from the language quoted by Complaint

Counsel, any "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase or use by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens,"" so long as the appropriate negative keywords are also in place if permitted by the internet search provider. (CX 320 at 4).

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

Response to Finding No. 202:

The proposed finding is incomplete and misleading because the quoted language must be read in the context of the entire agreement and in the context of the underlying purpose of protecting the parties' trademark rights. For example, the parties to the agreement are only required to implement negative keywords in a manner that would prevent advertisements from being displayed in response to searches specifically for the other party's trademarks and variations thereof, and not for queries that are not navigational in nature and "would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses." (CX 320 at 4; CX 9040 (Miller, Dep. at 37-39, 66); CX 9031 (Schmidt, Dep. at 115); CX 9020 (Craven, Dep. at 18-19)).

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

Response to Finding No. 203:

The proposed finding is incomplete and misleading. The full sentence, which must be read in the context of the entire agreement, follows directly after the passage quoted in proposed finding no. 202 and provides: "Specifically, for each internet search provider from which a Party purchases keywords to display advertising and/or internet links, the other Party's trademark keywords and URLs listed in Exhibit 2 shall also be provided to such internet search provider as negative keywords, such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website, unless the particular internet search provider does not permit use of negative keywords." (CX 320 at 4). Additionally, the Lenses for Less agreement does not prohibit, and specifically excludes from the language quoted above, any "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase or use by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 320 at 4).

11. Contact Lens King

a. Company Basics

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

Response to Finding No. 204:

Respondent has no specific response.

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

Response to Finding No. 205:

Respondent has no specific response.

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

Response to Finding No. 206:

Respondent has no specific response.

b. Key Employees

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

Response to Finding No. 207:

The proposed finding misstates the cited exhibit and should be disregarded. While the May 26, 2009 letter that was admitted as CX 1801 can support a finding that Mr. Matte was President and CEO of Contact Lens King as of May 2009, it cannot support the language in the proposed finding that he was CEO and President "at all times relevant to this matter."

c. Agreement(s)

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

Response to Finding No. 208:

Complaint Counsel's Proposed Finding No. 208 is incomplete and misleading. 1-800 Contacts filed a lawsuit against Contact Lens King alleging trademark infringement and unfair competition on March 8, 2010. The "agreement" to which Complaint Counsel refer in the proposed finding is a settlement agreement entered into between 1-800 Contacts and Contact

Lens King to resolve the parties' trademark dispute, in order to "avoid the expense, inconvenience, and disruption of pursuing and defending the Action." (CX 323 at 1).

12. Empire Vision / VisionWorks

a. Company Basics

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

Response to Finding No. 209:

Respondent has no specific response.

210. Empire Vision / Visionworks operates more than 700 optical retail stores in 42 states and the District of Columbia. (CX0943 at 001 (¶ 5) (Duley, Decl.), *in camera*; *see also* CX9036 (Duley, Dep. at 23 , 119-120), *in camera*)).

Response to Finding No. 210:

Respondent has no specific response.

211. Empire Vision / Visionworks has sold contact lenses online since 2005 through websites including www.lens123.com and www.visionworkscontacts.com. (CX0943 at 001 (¶ 6) (Duley, Decl.), *in camera*; *see also* CX9036 (Duley, Dep. at 30-32 , 119-120 , *in camera*)).

Response to Finding No. 211:

Respondent has no specific response.

212. [redacted] (CX1477, *in camera*).

Response to Finding No. 212:

Respondent has no specific response.

b. Key Employees

213. Jared Duley is the Director of Marketing for Visionworks of America, Inc. (CX0943 at 001 (¶ 1) (Duley, Decl.), *in camera*; *see also* CX9036 (Duley, Dep. at 119-120)).

Response to Finding No. 213:

Respondent has no specific response.

c. Agreement(s)

214. On May 13, 2010, Empire Vision entered into an agreement with 1-800 Contacts that prohibits Empire Vision/Visionworks from bidding for trademark keywords, and requires implementation of negative keywords that are contained in a list. (CX0319 (Settlement agreement between 1-800 Contacts and Empire Vision/Visionworks) (hereinafter "Empire Vision / Visionworks Agreement")).

Response to Finding No. 214:

Complaint Counsel's Proposed Finding No. 214 is incomplete, misleading, and inaccurate. The May 13, 2014 agreement between Empire Vision and 1-800 Contacts also provides: "Prohibited Acts shall not include (i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing, uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contacts,' 'contact lens,' and 'lens.' The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C) below."

13. ReplaceMyContacts

a. Company Basics

215. Tram Data, LLC d/b/a ReplaceMyContacts.com ("ReplaceMyContacts") was an online seller of contact lenses and, according to 1-800 Contacts, provided, "directly competitive services" to 1-800 Contacts. (CX0638 at 002).

Response to Finding No. 215:

Respondent has no specific response.

b. Key Employees

216. At all times relevant to the agreement at issue in this case, Todd Messinger was the President of ReplaceMyContacts. (CX0321).

Response to Finding No. 216:

Respondent has no specific response.

217. At all times relevant to the agreement at issue in this case, Kevin Drucker, counsel for Tram Data was an attorney with Mendelsohn, Drucker and Associates, P.C. located in Philadelphia, Pennsylvania. (CX0828).

Response to Finding No. 217:

Respondent has no specific response.

c. Agreement(s)

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

Response to Finding No. 218:

Complaint Counsel's Proposed Finding No. 201 is incomplete and misleading in multiple respects. First, the "agreement" to which Complaint Counsel refer is a settlement agreement

between 1-800 Contacts and ReplaceMyContacts.com to resolve a trademark infringement dispute between the parties. (CX 321 at 1). Second, the quoted language must be read in the context of the settlement agreement as a whole.. The parties are specifically *not* prohibited from "(i) using the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; (ii) the use of descriptive words on the Internet such as "contact", "contacts", "contact lens", "lenses", and "lens;" and" (iii) purchasing or using "keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens"" so long as the appropriate negative keywords are also in place if permitted by the internet search provider. (CX 321 at 2-3).

14. Walgreens

a. Company Basics

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

Response to Finding No. 219:

Respondent has no specific response.

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

Response to Finding No. 220:

Respondent has no specific response.

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

Response to Finding No. 221:

Complaint Counsel's Proposed Finding No. 221 is not supported by the record evidence because [redacted] (RX 153 at 18-20, *in camera*; (Hamilton, Tr. 470)).

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

Response to Finding No. 222:

Complaint Counsel's Proposed Finding No. 222 is incomplete and as written, is not supported by the record evidence cited. Mr. Hamilton's testimony noted that the competitors he "focused on were the online competitors." Complaint Counsel's proposed finding misleadingly suggests that Walgreens does not compete with brick-and-mortar or other sellers of contact lenses. (CX 9038 (Hamilton, Dep. at 40-41); Hamilton, Tr. 391; RX 149 at 4-5).

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

Response to Finding No. 223:

Respondent has no specific response.

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

Response to Finding No. 224:

Respondent has no specific response.

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

Response to Finding No. 225:

Complaint Counsel's Proposed Finding No. 225 is not supported by the cited exhibit. The spreadsheet in question is not self-explanatory, and the figure set forth in the proposed finding does not appear on the document as produced to Respondent.

b. Key Employees

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

Response to Finding No. 226:

Respondent has no specific response.

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

Response to Finding No. 227:

Respondent has no specific response.

c. Agreement(s)

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

Response to Finding No. 228:

Complaint Counsel's Proposed Finding No. 228 is incomplete. The agreement between 1-800 Contacts and Walgreens also provided that the agreement "shall" not "be construed to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, or other, similar generic terms as long as the appropriate negative keywords are implemented."

(CX 322 at 2 (Settlement Agreement by and between 1-800 Contacts and Walgreen Co. dated June 29, 2010)).

15. WebEyeCare

a. Company Basics

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

Response to Finding No. 229:

Complaint Counsel's Proposed Finding No. 229 is incorrect. Mr. Batushansky [redacted] (CX 9000 (Batushansky, IHT at 6)). Respondent has no further specific response.

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

Response to Finding No. 230:

Complaint Counsel's Proposed Finding No. 230 is not supported by the record evidence cited. In [redacted]. There is no evidence in the record as to how many employees it has as of 2017 or where it is located in 2017. (CX 9000 (Batushansky, IHT at 8-9), *in camera*). Respondent has no further specific response.

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

Response to Finding No. 231:

Respondent has no specific response.

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

Response to Finding No. 232:

Complaint Counsel's Proposed Finding No. 232 is not supported by the record evidence cited. In [redacted]. (CX 9000 (Batushansky, IHT at 9), *in camera*). There is no evidence in the record as to whether WebEyeCare's eyeglasses sales, after that date, have increased, decreased, or stayed the same, whether in actual dollars or as a percentage of WebEyeCare's overall sales, and there is no evidence of what percentage of WebEyeCare's sales were accounted for by the sale of contact lenses as of 2017. (CX 9000 (Batushansky, IHT at 9), *in camera*). Respondent has no further specific response.

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

Response to Finding No. 233:

Complaint Counsel's Proposed Finding No. 233 is incorrect, incomplete, and not supported by the record evidence cited. WebEyeCare competes with all companies that, and all persons who, sell contact lenses at retail, including independent ECPs, [redacted]. (CX 9014 (Batushansky, Dep. at 170, 171, 175), *in camera*; CX 9039 (Clarkson, Dep. at 60); RX 739 at 7-9, 37-43 (Murphy Report); Murphy, Tr. 4092, 4148; Respondent's Proposed Findings of Fact at ¶¶ 540-563). Mr. Batushansky described the companies specifically identified in Complaint Counsel's Proposed Finding No. 233 only as the [redacted] of WebEyeCare, along with [redacted]. (CX 9000 (Batushansky, IHT at 19-20), *in camera*; CX 9014 (Batushansky, Dep. at 170, 171, 175, 195-202), *in camera*; RX 4, *in camera*). Mr. Batushansky also testified that WebEyeCare's market share was [redacted]

[redacted]

[redacted]. (CX 9014 (Batushansky, Dep. at 201-202), *in camera*).

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

Response to Finding No. 234:

Respondent has no specific response.

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

Response to Finding No. 235:

Complaint Counsel's Proposed Finding No. 235 is misleading and inaccurate. In 2015, WebEyeCare had [redacted] million in revenue; its profit or net revenue was much lower. (CX 9014 (Batushansky, Dep. at 71-72), *in camera*).

b. Key Employees

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

Response to Finding No. 236:

Respondent has no specific response.

c. Agreement(s)

237. 1-800 Contacts and WebEyeCare entered into an agreement effective September 3, 2010, which prohibits the parties from "engaging in internet search advertising that causes any website, advertisement … to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 2)." (CX0324 at 002 (Settlement Agreement by and between 1-800 Contacts and Web Eye Care, Inc. dated September 3, 2010 (hereinafter "WebEyeCare Agreement"))).

Response to Finding No. 237:

Complaint Counsel's Proposed Finding No. 237 is incomplete, misleading, and inaccurate. The WebEyeCare Agreement does not prohibit and specifically excludes from the provision and language quoted by Complaint Counsel, "(i) the use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; (ii) the use of descriptive words on the Internet such as 'contact', 'contacts', 'contact lens', 'lenses', and 'lens', and (iii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contact,' 'contact lens,' 'lenses,' and 'lens.'" (CX 324 at 3).

16. Standard Optical

a. Company Basics

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

Response to Finding No. 238:

Respondent has no specific response.

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

Response to Finding No. 239:

Respondent has no specific response.

b. Agreement(s)

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

Response to Finding No. 240:

Complaint Counsel's Proposed Finding No. 240 is incomplete. The settlement agreement entered into between 1-800 Contacts and Standard Optical expired two years after the Effective Date of February 4, 2011. (CX 325 at 1). The settlement agreement was never renewed, and therefore it is no longer in force. (CX 9040 (Miller, Dep. at 111)).

17. Walmart

a. Company Basics

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

Response to Finding No. 241:

Respondent has no specific response.

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

Response to Finding No. 242:

Respondent has no specific response.

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

Response to Finding No. 243:

The proposed finding is incomplete. Although the Walmart witnesses stated that selling contact lenses is not a priority in "the scope of total Walmart" because there are "bigger businesses within Walmart," Mr. Owens, who is the Senior Buyer responsible for Walmart's contact lens business, testified that selling contact lenses online ***is*** a priority for Walmart. (CX 9037 (Owens, Dep. at 8, 19-20)).

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

Response to Finding No. 244:

The proposed finding is not supported by the evidence. Mr. Owens testified that he did not "know whether or not Walmart advertises the fact that it sells contact lenses outside of the stores." (CX 9037 (Owens, Dep. at 46)). Ms. Mohan, whose responsibilities are limited to search advertising, testified that she was aware of paid search advertising but did not know whether Walmart had "tried anything else." (CX 9033 (Mohan, Dep. at 9-10, 17)).

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

Response to Finding No. 245:

The proposed finding is incomplete. The alliance entailed far more than "some co-branding and marketing and a revenue-share arrangement." During the alliance, 1-800 Contacts ran Walmart's contact lens business on the 1-800 Contacts' website and handled fulfillment for the approximately 2,500 Walmart retail locations. (Coon, Tr. 2675-76; CX 9037 (Owens, Dep. at 37)).

246. AC Lens began providing white label fulfillment services to Walmart in 2013 after the dissolution of the alliance with 1-800 Contacts. (CX9037 (Owens, Dep. at 40)). Under the arrangement, AC Lens fulfilled orders placed on Walmart's websites and handled customer retention efforts for Walmart customers. Walmart conducted its own marketing activities, including internet search marketing. (CX9037 (Owens, Dep. at 41-42); CX9018 (Drumm, Dep. at 53-54)).

Response to Finding No. 246:

Respondent has no specific response.

247. Walmart's purpose in selling contact lenses online is simply to provide online ordering as an added service for its in-store customers. (CX9033 (Mohan, Dep. at 18-19 ("we don't want to be – to become irrelevant, like say Sears…we want to make sure we always have the online presence…"); CX9037 (Owens, Dep. at 19-20)).

Response to Finding No. 247:

The proposed finding is not supported by the evidence. Mr. Owens, who is the Senior Buyer responsible for Walmart's contact lens business, testified that selling contact lenses online is a means by which Walmart seeks to distinguish itself from some of its competitors. (CX 9037 (Owens, Dep. at 8, 19-20)). Mr. Owens also testified that it is important for Walmart to sell online because some customers prefer the convenience of ordering online. (CX 9037 (Owens, Dep. at 12-13)).

b. Key Employees

248. David Owens is a Senior Buyer for Walmart, responsible for Walmart's in-store contact lens business, including its budgets, inventories, and promotions. He joined Walmart 15 years ago. (CX9037 (Owens, Dep. at 7-8)).

Response to Finding No. 248:

Respondent has no specific response.

249. Sandhya Mohan is a Senior Product Manager for Walmart. She joined Walmart in 2013 and has been responsible for search engine advertising for Walmart's online contact lens sales since 2015. (CX9033 (Mohan, Dep. at 8-12)).

Response to Finding No. 249:

Respondent has no specific response.

18. LensDirect

a. Company Basics

250. LensDirect LLC is an online retailer of contact lenses and direct competitor of 1-800 Contacts, headquartered in Garden City, New York. (Alovis, Tr. 977, 979; CX1241).

Response to Finding No. 250:

Respondent has no specific response.

251. LensDirect sells contact lenses, glasses, and other eye care products through its website at Lensdirect.com. (Alovis, Tr. 979).

Response to Finding No. 251:

Respondent has no specific response.

252. LensDirect had approximately $1.4 million in sales in 2015. (CX1463).

Response to Finding No. 252:

Complaint Counsel's Proposed Finding No. 252 is incomplete. Although the document cited by Complaint Counsel suggests that LensDirect had approximately $1.4 million in sales in 2015, the document cited by Complaint Counsel does not specify what proportion of those sales were attributable to contact lenses. (CX 1463). Moreover, LensDirect was not profitable in 2015. (Alovis, Tr. 1019.)

253. LensDirect had approximately $3.3 million in sales in 2016. (Alovis, Tr. 983; CX9023 (Alovis, Dep. at 27)).

Response to Finding No. 253:

Complaint Counsel's Proposed Finding No. 253 is incomplete. Although the testimony cited by Complaint Counsel suggests that LensDirect had approximately $3.3 million in sales in 2016, the testimony cited by Complaint Counsel does not specify what proportion of those sales were attributable to contact lenses. (CX 1463). Moreover, LensDirect was not profitable in 2016. (Alovis, Tr. 1019.)

254. LensDirect's closest competitors are 1-800 Contacts, Vision Direct, Coastal Contacts and Lens.com. (Alovis, Tr. 988; CX9023 (Alovis, Dep. at 108, 110)).

Response to Finding No. 254:

Complaint Counsel's Proposed Finding No. 254 is inaccurate and misleading. Although each of the listed companies sells contact lenses online, there is no basis in the cited testimony to conclude that the listed companies are the "closest" competitors to LensDirect.

b. Key Employees

255. Ryan Alovis is the CEO of LensDirect. (Alovis, Tr. 968; CX9023 (Alovis, Dep. at 10-11)).

Response to Finding No. 255:

Respondent has no specific response.

256. Mr. Alovis communicates regularly with Dale Kim, who manages LensDirect's search advertising, and participates directly in the formulation of LensDirect's search advertising strategy. (Alovis, Tr. 994-995, 997-998).

Response to Finding No. 256:

Complaint Counsel's Proposed Finding No. 256 is inaccurate, incomplete, and misleading. Ryan Alovis' testimony makes clear that he did not participate in the formulation of LensDirect's search advertising strategy. Indeed, Mr. Alovis expressly testified that he does not "manage the paid search" operations of LensDirect. (CX 9023 (Alovis, Dep. at 69)). He also testified that he is "not involved in the paid search aspect of the company." (CX 9023 (Alovis, Dep. at 80)). Mr. Alovis also testified that he does not "create the strategies" that Lens Direct employs with respect to paid search advertising. (CX 9023 (Alovis, Dep. at 60, 116)).

19. Lens Discounters

a. Company Basics

257. LD Vision Group, Inc. ("Lens Discounters") was founded in 2002. (CX8003 at 001 (¶¶ 2-3) (Mitha, Decl.)).

Response to Finding No. 257:

Respondent has no specific response.

258. Shaneef Mitha, LenDiscounters' Chief Operating Officer, declared under penalty of purjury that LensDiscounters sells contact lenses over the internet through websites, including LensDiscounters.com, in the United States. (CX8003 at 001 (¶ 3) (Mitha, Decl.)).

Response to Finding No. 258:

Respondent has no specific response.

259. Mr. Mitha, LenDiscounters' Chief Operating Officer, declared under penalty of perjury that LensDiscounters' closest competitors are other companies that sell contact lenses online, such as Lens.com, AC Lens, and Vision Direct. (CX8003 at 001 (¶ 4) (Mitha, Decl.)).

Response to Finding No. 259:

Complaint Counsel's Proposed Finding No. 259 is incomplete. Mr. Mitha noted Lens.com, AC Lens, and Vision Direct as examples of "discounters," not examples of the universe of companies that sell contact lenses online or all contact lens sellers that may be considered competition. (CX 8003 at 1 (¶ 4) (Mitha, Decl.)).

260. Mr. Mitha, LenDiscounters' Chief Operating Officer, declared under penalty of perjury that LensDiscounters' preferred method of acquiring new customers is online paid search advertising. (CX8003 at 002 (¶ 6) (Mitha, Decl.)).

Response to Finding No. 260:

Respondent has no specific response.

b. Key Employees

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

Response to Finding No. 261:

Respondent has no specific response.

20. LensWorld

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

Response to Finding No. 262:

Respondent has no specific response.

B. Non-Online Retailers (Brick and Mortar)

263. Several types of non-online (brick-and-mortar) businesses sell contact lenses: independent eye care professionals, optical retail chains, mass merchants, and club stores. (Bethers, Tr. 3509; *see also infra* ¶¶ 264-74).

Response to Finding No. 263:

Complaint Counsel's Proposed Finding No. 263 is misleading to the extent it suggests that independent eye care professions, optical retail chains, mass merchants, and club stores do not also sell contact lenses online. Many independent eye care professional sell contact lenses online (Bethers, Tr. 3514-19; RX 1117 at 4, 0031); many optical retail chains sell contact lenses online (Bethers, Tr. 3522); all, or nearly all, mass merchants sell contact lenses online (Bethers, Tr. 3529, 3583); and all of the major club stores (Costo, Sam's Club, and BJ's Wholesale Club) sell contact lenses online (Bethers, Tr. 3525-26, 3530).

264. A 2015 report prepared at the direction of 1-800 Contacts' owner states that [redacted] (CX0439 at 003-005, 007-009 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).[2]

[2] The AEA "Staff Final Update" report, CX0439, *in camera*, was prepared as part of AEA's diligence during its acquisition of 1-800 Contacts. For every potential investment, over the course of months or longer, AEA performs detailed due diligence, on the basis of which AEA's decision makers give final approval to commit hundreds of millions of dollars. *See* AEA Investors LP's Motion for In Camera Treatment, Mar. 24, 2017, Exhibit C, Declaration of Barbara Burns, ¶ 5. The Staff Final Update summarized the findings of AEA's diligence efforts

Response to Finding No. 264:

Complaint Counsel's Proposed Finding No. 264 mischaracterizes the source of the cited exhibit. CX 439 is a document prepared by AEA Investors as part of its consideration of an investment in 1-800 Contacts; CX 439 therefore was prepared by AEA Investors before it acquired a majority interest in 1-800 Contacts and thus before it became "1-800 Contacts' owner." *See* AEA Investors LP's Motion for In Camera Treatment, Mar. 24, 2017, Exhibit C, Declaration of Barbara Burns, ¶ 5.

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

265. Independent Eye Care Professionals ("IECPs") are one channel through which consumers can purchase contact lenses. (Clarkson, Tr. 188).

Response to Finding No. 265:

Respondent has no specific response.

266. IECPs have traditionally sold at the highest prices among the various types of contact lens retailers. (Bethers, Tr. 3543-3544).

Response to Finding No. 266:

Complaint Counsel's Proposed Finding No. 266 mischaracterizes the cited trial testimony. Mr. Bethers testified that independent ECPs on average have the highest retail prices for contact lenses in the industry, but "not every [independent ECP] has the same pricing strategy, so you may find an eyecare practice, an independent practice, that has prices that are lower." (Bethers, Tr. 3543-44).

267. IECPs tend to charge approximately 25 percent more for contact lenses than the next highest priced retail channel: brick-and-mortar optical chains. (Clarkson, Tr. 170-171).

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and cost at least $1 million to develop. *Id.* ¶ 7. Further, the document is an ordinary AEA business record. *See* Order on Non-Parties' Motions for In Camera Treatment at 4; JX0002-A-011 (CX0439 admitted for all purposes).

Response to Finding No. 267:

Complaint Counsel's Proposed Finding No. 267 is inaccurate and unsupported by the cited trial testimony. At pages 170-71 of the trial transcript, Mr. Clarkson did not testify that independent ECPs charge approximately 25 percent more for contact lenses than optical retail chains. (Clarkson, Tr. 170-71). In any event, Complaint Counsel's Proposed Finding No. 267 is contrary to the substantial weight of the evidence. For example, Dr. Murphy performed a detailed analysis of average prices by retail channel that shows [redacted] (RX 739 at 88-89).

268. A 2015 report prepared at the direction of 1-800 Contacts' owner stated that the independent eye care professional channel accounted for [redacted] of overall retail sales of contact lenses in the U.S. at the time of the report. (CX0439 at 009 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).

Response to Finding No. 268:

Complaint Counsel's Proposed Finding No. 264 mischaracterizes the source of the cited exhibit. CX 439 is a document prepared by AEA Investors as part of its consideration of an investment in 1-800 Contacts; CX 439 therefore was prepared by AEA Investors before it acquired a majority interest in 1-800 Contacts and thus before it became "1-800 Contacts' owner." *See* AEA Investors LP's Motion for In Camera Treatment, Mar. 24, 2017, Exhibit C, Declaration of Barbara Burns, ¶ 5.

b. Brick and Mortar Optical Chains/ High Street Retailers

269. Brick and mortar chain retailers, such as LensCrafters and PearleVision, offer an alternative channel for the sale of contact lenses. (Clarkson, Tr. 188).

Response to Finding No. 269:

The proposed finding is unreliable and should be disregarded because the term "alternative channel" is undefined, ambiguous, and misleading. Mr. Clarkson did not use the phrase in the cited testimony.

270. These retail optical chains provide eye care professionals on location. (Bethers, Tr. 3509-3511, 3520-3521).

Response to Finding No. 270:

Respondent has no specific response.

c. Brick and Mortar Mass Merchants and Club Stores

271. Mass merchant or "big box" retailers, which include Walmart and Target stores, offer a different channel through which consumers may by contact lenses. (Clarkson, Tr. 188-189).

Response to Finding No. 271:

Respondent objects to the term "different channel" as undefined, ambiguous, and misleading. Respondent does not dispute that mass merchants or "big box" retailers, such as Walmart and Target, sell contact lenses both in their physical retail stores and online. (Bethers, Tr. 3529, 3583; CX 8007 at 42).

272. Mass merchants that sell contact lenses in their brick-and-mortar either employ or have other relationships with ECPs that allow them to sell contact lenses. (Murphy, Tr. 4096-4097).

Response to Finding No. 272:

Complaint Counsel's Proposed Finding No. 272 is misleading to the extent that it suggests a mass merchant must employ or have a relationship with an ECP in order to sell contact lenses. In the cited trial testimony, Dr. Murphy testified that mass merchants typically have an onsite ECPs, which allows that mass merchant to sell contact lenses and conduct eye

exams. (Murphy, Tr. 4096-97). Dr. Murphy was not providing an opinion as to any laws, rules, or regulations regarding the relationship that a mass merchant must or must not have with an ECP in order to be permitted to sell contact lenses.

273. Club or membership stores such as Costco and Sam's Club constitute a separate channel for the sale of contact lenses. (Clarkson, Tr. 189).

Response to Finding No. 273:

Respondent objects to the term "separate channel" as undefined, ambiguous, and misleading. Respondent does not dispute that club or membership stores, such as Costco and Sam's Club, sell contact lenses both in their physical retail stores and online. (Bethers, Tr. 3525-26, 3530).

274. A 2012 presentation prepared by 1-800 Contacts stated that Costco makes 4 percent of all sales of contact lenses. (CX0201 at 017).

Response to Finding No. 274:

Complaint Counsel's Proposed Finding No. 274 mischaracterizes the cited exhibit. CX 201 is a 2012 presentation prepared by 1-800 Contacts. CX 201 at 17 shows that in 2012, 1-800 Contacts estimated that Costco accounted for 4 percent of contact lens retail sales for 2011 in the United States, "[b]ased on estimated 2007 revenues grown at industry growth from 2007 to 2011." (CX 201 at 17).

C. Manufacturers

275. There are four major manufacturers of the contact lenses sold in the United States: Johnson and Johnson, Alcon, Bausch and Lomb, and CooperVision. (Clarkson, Tr. 183 ("[T]here are four major manufacturers that represent probably 95 percent-plus of the U.S. market. They are Johnson & Johnson, Alcon, CooperVision and Bausch & Lomb."); Holbrook, Tr. 1880; *see also* CX1214 (Walgreens product pricing data), *in camera*).

Response to Finding No. 275:

Respondent has no specific response.

276. Vistakon is a division within Johnson and Johnson. (Holbrook, Tr. 1880).

Response to Finding No. 276:

Respondent has no specific response.

277. Vistakon manufactures [redacted] (CX1214 (Walgreens product pricing data), *in camera*).

Response to Finding No. 277:

Respondent has no specific response.

278. Alcon manufactures [redacted] (CX1214 (Walgreens product pricing data), *in camera*).

Response to Finding No. 278:

Respondent has no specific response.

279. Bausch and Lomb manufactures [redacted] (CX1214 (Walgreens product pricing data), *in camera*).

Response to Finding No. 279:

Respondent has no specific response.

280. CooperVision manufactures [redacted] (CX1214 (Walgreens product pricing data), *in camera*).

Response to Finding No. 280:

Respondent has no specific response.

III. Contact Lens Industry Background

A. Contact Lens Consumers

281. One in four visually corrected Americans use contact lenses. (CX0055 at 004).

Response to Finding No. 281:

Complaint Counsel's Proposed Finding No. 281 is misleading because it does not reflect the time period of the cited exhibit. CX 55 is a document dated July 23, 2004, thirteen years ago, and cannot reliably be used to describe the current time period.

282. In 2004, nearly 36 million Americans wore contact lenses. (RX0566 at 002).

Response to Finding No. 282:

Respondent has no specific response.

283. In 2012, approximately 38 million Americans wore contact lenses. (CX0525 at 037).

Response to Finding No. 283:

Respondent has no specific response.

284. Contact lens users are younger than the general population needing vision correction. [redacted] (CX0439 at 020 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*); CX9004 at 004 (Coon, IHT at 10)).

Response to Finding No. 284:

Complaint Counsel's Proposed Finding No. 284 mischaracterizes the cited exhibit and investigative hearing testimony. CX 439 shows that [redacted] (CX 439). Similarly, Mr. Coon's investigative hearing testimony stated that college students wear contact lenses at a higher percentage than the average population. (CX 9004 (Coon, IHT at 10)).

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

285. Contact lenses are a medical device. (Clarkson, Tr. 159-160).

Response to Finding No. 285:

Respondent has no specific response.

286. In the United States, contact lenses cannot be sold to a consumer without a prescription. (RX0566 at 002; Clarkson, Tr. 178).

Response to Finding No. 286:

Respondent has no specific response.

287. State licensing boards, which regulate the practice of optometry, set conditions for the sale of contact lenses and eyeglasses in each state. (Joint Stipulations of Jurisdiction, Law and Facts, JX0001 ¶ 4; RX0566 at 002).

Response to Finding No. 287:

Complaint Counsel's Proposed Finding No. 287 is misleading and unsupported by the cited stipulation and exhibit. The proposed finding is misleading because it neglects the role played by federal statutes and federal agency rules in setting conditions for the sale of contact lenses in each state. The proposed finding also is misleading because it does not identify any particular type of "conditions" set by state licensing boards. Paragraph 4 of the Joint Stipulations of Jurisdiction, Law and Facts states simply that ECPs "are licensed and authorized to write such prescriptions pursuant to the laws of the states in which they deliver their services." JX1 ¶ 4. It does not purport to address any conditions imposed by state licensing board on the sale of contact lenses. RX 566 at 2 further contradicts the proposed finding because it is the FTC's proposed rule to implement the Fairness to Contact Lens Consumers Act, which shows that state licensing boards are not the sole authority governing the sale of contact lenses in each state.

288. Eye Care Professionals write the prescriptions required for the purchase of contact lenses, and all such Eye Care Professionals are licensed and authorized to write such prescriptions pursuant to the laws of the states in which they deliver their services. (JX0001 ¶ 4 (Joint Stipulations of Jurisdiction, Law and Facts); *see also* Bethers, Tr. 3511-3512, 3526-3527 (testifying that ECPs, who write contact lens prescriptions, are "gatekeepers" for contact lens wearers)).

Response to Finding No. 288:

Respondent has no specific response.

289. Eye care professionals select a suitable lens product for the patient, write a prescription for a certain brand, size, and refraction, and then check the patient every year or two to see whether her needs have changed. (RX0569 at 0009-0010; CX0439 at 040 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).

Response to Finding No. 289:

Complaint Counsel's Proposed Finding No. 289 is inaccurate and unsupported by the cited exhibit. Eye care professionals (optometrists and ophthalmologists) conduct eye exams, contact lens fittings, and write contact lens prescriptions. (RX 569 at 9, n.16). The contact lens prescription contains a lens power, curvature, and diameter. (RX 569 at 9, n.16). "Although not required in all states, a contact lens prescription will almost invariably include a brand name because different brands of contact lenses that have the same prescription will produce different fits." (RX 569 at 9, n.15). Pursuant to the Fairness to Contact Lens Consumers Act, a standard contact lens prescription typically must last at least one year. (RX 569 at 10). In most states, a contact lens prescriptions typically expires in one year; but, in seven states, a contact lens prescription typically expires in two years. (Bethers, Tr. 3601; CX 8006 at 21). [redacted] (CX 439 at 40).

290. The Fairness in Contact Lens Consumers Act, 15 U.S.C. 7601-7610, requires that contact lens prescribers – such as optometrists and ophthalmologists – provide contact lens prescriptions to their patients upon completion of a contact lens fitting. (RX0566 at 002).

Response to Finding No. 290:

Respondent has no specific response.

291. The FTC issued a final rule in June 2004 to implement the Fairness in Contact Lens Consumers Act, 16 CFR Parts 315 and 456. (RX0566 at 001-012 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

Response to Finding No. 291:

Complaint Counsel's Proposed Finding No. 291 mischaracterizes the cited exhibit. The FTC issued a final rule implementing the Fairness to Contact Lens Consumers Act in July 2004, 16 CFR Parts 315 and 456. RX 566, however, is the notice of proposed rulemaking and request for public comment that was published in the Federal Register on February 4, 2004, not the "final rule" issued by the FTC.

292. The FTC's final rule is called "The Contact Lens Rule." (RX0566 at 002-003 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

Response to Finding No. 292:

Respondent has no specific response.

C. Prescription Verification

293. Before selling contact lenses to a customer, contact lens retailers must either obtain a copy of the prescription or verify the information in the prescription with the prescribing doctor. (Clarkson, Tr. 177-178; *see also* RX0566 at 011 (Section 315.5(a) of the Contact Lens Rule, entitled "Prescription Requirement," explaining that a seller cannot sell contact lenses to a consumer unless the seller has obtained a copy of the patient's contact lens prescription, or verified the prescription, or verified the prescription through a direct communication with the prescriber)).

Response to Finding No. 293:

Complaint Counsel's Proposed Finding No. 293 improperly states a proposed legal conclusion—that is, the legal requirements under federal law for contact lens retailers to obtain

or verify a prescription. To the extent Complaint Counsel's Proposed Finding No. 293 is appropriate as a factual finding, it should accurately and directly quote from the applicable federal rule, not consist of Complaint Counsel's interpretation and characterization of that rule. 16 C.F.R. section 315.5(a) states: "*Prescription requirement.* A seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication."

Respondent further notes that Complaint Counsel's Proposed Finding No. 293 cites RX 566, which is not the final rule adopted by the FTC but rather the notice of proposed rulemaking and request for public comment.

294. Section 315.5(b) of the Contact Lens Rule, entitled "Information for Verification," states that the information that a seller must provide to the prescriber is: (1) the patient's full name and address; (2) the contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate; (3) the quantity of the lenses ordered; (4) the date of the patient request; (5) the date and time of the verification request; and (6) the name of the contact person at the seller's company, including a facsimile and a telephone number. (RX0566 at 004 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

Response to Finding No. 294:

Complaint Counsel's Proposed Finding No. 294 improperly sets forth a proposed legal conclusion—that is, the legal requirements under federal law for contact lens retailers to verify a contact lens prescription. To the extent Complaint Counsel's Proposed Finding No. 294 is appropriate as a factual finding, it should accurately and directly quote from the applicable federal rule, not consist of Complaint Counsel's interpretation and characterization of that rule. 16 C.F.R. section 315.5(b) states: "*Information for verification.* When seeking verification of a contact lens prescription, a seller shall provide the prescriber with the following information through direct communication: (1) The patient's full name and address; (2) The contact lens

power, manufacturer, base curve or appropriate designation, and diameter when appropriate; (3) The quantity of lenses ordered; (4) The date of patient request; (5) The date and time of verification request; (6) The name of a contact person at the seller's company, including facsimile and telephone numbers; and (7) If the seller opts to include the prescriber's regular business hours on Saturdays as ''business hours'' for purposes of paragraph (c)(3) of this section, a clear statement of the prescriber's regular Saturday business hours."

Respondent further notes that Complaint Counsel's Proposed Finding No. 294 cites RX 566, which is not the final rule adopted by the FTC but rather the notice of proposed rulemaking and request for public comment.

295. A contact lens prescription is verified if one of the following occurs: (1) the prescriber confirms the prescription is accurate by direct communication with the seller; (2) the prescriber informs the seller through direct communication that the prescription is inaccurate and provides the accurate prescription; or (3) the prescriber fails to communicate with the seller within eight business hours after receiving from the seller the information for verification described in Section 315.5(b) of the Contact Lens Rule. 16 CFR §315.5. (RX0566 at 011 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

Response to Finding No. 295:

Complaint Counsel's Proposed Finding No. 295 improperly sets forth a proposed legal conclusion—that is, the legal requirements under federal law for contact lens retailers to verify a contact lens prescription. To the extent Complaint Counsel's Proposed Finding No. 295 is appropriate as a factual finding, it should accurately and directly quote from the applicable federal rule, not consist of Complaint Counsel's interpretation and characterization of that rule. 16 C.F.R. section 315.5(c) states: "*Verification events*. A prescription is verified under paragraph (a)(2) of this section only if one of the following occurs: (1) The prescriber confirms the prescription is accurate by direct communication with the seller; (2) The prescriber informs the seller through direct communication that the prescription is inaccurate and provides the

accurate prescription; or (3) The prescriber fails to communicate with the seller within eight (8) business hours after receiving from the seller the information described in paragraph (b) of this section. During these eight (8) business hours, the seller shall provide a reasonable opportunity for the prescriber to communicate with the seller concerning the verification request."

Respondent further notes that Complaint Counsel's Proposed Finding No. 295 cites RX 566, which is not the final rule adopted by the FTC but rather the notice of proposed rulemaking and request for public comment.

296. If a prescriber does not actively verify the prescription within eight business hours of notice, the prescription is treated as verified. This is called passive verification. (Clarkson, Tr. 178).

Response to Finding No. 296:

Complaint Counsel's Proposed Finding No. 296 improperly sets forth a proposed legal conclusion—that is, the legal requirements under federal law for contact lens retailers to verify a contact lens prescription. To the extent Complaint Counsel's Proposed Finding No. 296 is appropriate as a factual finding, it should accurately and directly quote from the applicable federal rule, 16 C.F.R. section 315.5(c), not consist of Complaint Counsel's interpretation and characterization of that rule.

Respondent further notes that while Mr. Clarkson described the verification process as "passive verification," other fact witnesses used the term "presumed verification." (*Compare* Clarkson, Tr. 178 *with* Coon, Tr. 2719-20; Bethers, Tr. 3714).

297. The prescription verification process is "administratively burdensome" for 1-800 Contacts, which has [redacted] employees dedicated to prescription verification. (CX0439 at 014 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).

Response to Finding No. 297:

Complaint Counsel's Proposed Finding No. 297 mischaracterizes the cited document and is unsupported by the substantial weight of the evidence in the record. CX 439 is a document prepared by AEA Investors while it was considering an investment in 1-800 Contacts. The statements in CX 439 therefore should be attributed to a third-party, unaffiliated with 1-800 Contacts at the time the statements were made.

The record evidence shows that the prescription verification process is relatively easy. (Clarkson, Tr. 181 ("And if it's a small business, then you could handle this prescription verification in a fairly manual way, but once you get to any kind of size, you would need to be able to automate it to some extent."); [redacted]). There are a number of new entrants to the contact lens retail business that are selling contact lenses online (Simple Contacts, Sightbox, and Hubble Contacts) and they apparently did not find the prescription verification process too burdensome for them to handle as new, startup companies. (Bethers, Tr. 3584, 3588-90, 3593-95).

298. AC Lens purchased the database of doctors with their phone and fax numbers that it uses for prescription verification, and AC Lens has continued to refine the database based on customer interaction over the years. (Clarkson, Tr. 361). *See also* Clarkson, Tr. 180-181; CX9003 (Batushansky, IHT at 26) ("larger companies now would have an online database of all of the doctors in the United States" for prescription verification).

Response to Finding No. 298:

Respondent has no specific response.

D. Contact Lenses are a Commodity Product

299. Contact lenses are a commodity product. (*Infra* ¶¶ 300-304).

Response to Finding No. 299:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Complaint Counsel's Proposed Finding No. 299 also should be disregarded because it is vague and ambiguous. Complaint Counsel provide no definition of "commodity product." Complaint Counsel's Proposed Finding No. 299 could be erroneously interpreted as suggesting that all contact lenses – all brands and models, as well as all modalities (*i.e.*, monthly, bi-weekly, weekly, and daily contact lenses) – are identical or easily interchangeable. (CX 9039 (Clarkson, Dep. at 99 ("[E]very contact lens manufacturer would say that their lenses are special and different and not a commodity at all."))).

Complaint Counsel Proposed Finding No. 299 is also inaccurate, misleading, and unsupported by the record evidence. Contact lenses are a prescribed medical device. (CX 9027 (Larson, Dep. at 65)). Manufacturers sell many different types and models of contact lenses. Consumers have a variety of preferences in selecting a contact lens retailer; and many consumers consider trust, reliability, ease of shopping, convenience, and speed of delivery when selecting a contact lens retailer. (CX 9017 (Blackwood, Dep. at 46, 61, 74, 224); CX 9032 (L. Schmidt, Dep. at 237); RX 106 at 1; RX 1108 at 10; [redacted]). And consumers are willing to pay a wide range of prices for contact lenses as a result of those preferences. (Coon, Tr. 2708-10; CX 9001 (Bethers, IHT at 80); RX 904 at 16; CX 525 at 17; [redacted]

300. At the point that a consumer has a prescription and is shopping for contact lenses, the lenses are a commodity product. (Clarkson, Tr. 202-203 ("[A] contact lens might be a

highly differentiated product when it's manufactured, but the moment the doctor writes a prescription for it, it becomes a pure commodity. I mean, a box of ACUVUE is a box of ACUVUE and it really doesn't matter where you buy it."); Coon, Tr. 2688; Alovis Tr. 994; CX9039 (Clarkson, Dep. at 99); Athey, Tr. 725-726, Evans, Tr. 1696).

Response to Finding No. 300:

Complaint Counsel's Proposed Finding No. 300 is incomplete, misleading, inaccurate, and not supported by the substantial weight of evidence. It is generally accurate that once a consumer receives a contact lens prescription, she or he is shopping for the specific product contained on the prescription. However, the characterization of the specific product contained on the prescription as a "commodity" is misleading and inaccurate to the extent that term implies that consumers are indifferent as to the retailer from which they obtain their prescribed contact lenses. Complaint Counsel's Proposed Finding No. 300 neither provides a definition of the term "commodity," nor cites record testimony or evidence that provides an accepted definition of the term "commodity" as it may relate to the contact lens industry.

Mr. Clarkson testified that "a box of Acuvue [is] a box of Acuvue and it really doesn't matter where you buy it," but he immediately then testified that where the consumer decides to buy depends on at least three different factors—"convenience, service, [and] price." (Clarkson, Tr. 202-03). Although Mr. Clarkson further testified that the contact lenses are a "very price-sensitive market" (Clarkson, Tr. 203), the record evidence demonstrates that there are thousands of different contact lens retailers, with physical stores and/or online stores, that charge a wide range of retail prices for the same contact less, varying by as much (if not more) than [redacted] (RX 739 at 17-18, 88-89.)

In the cited record testimony by Mr. Coon, he testified that a contact lens retailer cannot compete based on the type of product, but does compete based on service and price. (Coon, Tr. 2688). Mr. Coon testified that 1-800 Contacts' employees were taught that service matters

("every interaction . . . with a customer" matters) because the company was ***not*** "just in this commodity business . . . of putting stuff in a box and sending it to the customer." (Coon, Tr. 2688-89). Mr. Coon further testified about the substantial efforts and large investments that 1-800 Contacts put into providing excellent service and developing a brand and reputation that consumers recognized as a trustworthy source for contact lenses. (Coon, Tr. 2690-92).

Mr. Alovis (LensDirect) testified that LensDirect sells a "commodity," but also testified that LensDirect tries to differentiate itself based on customer service and an auto-refill program. (Alovis Tr. 979-81; CX 9023 (Alovis, Dep. at 106-7)). Mr. Alovis further testified that LensDirect tries to set its retail prices in the middle of the industry and that it does not attempt to have the lowest retail prices for contact lenses. (CX 9023 (Alovis Dep. at 108)). Again, Mr. Alovis's testimony shows that, at least from his perspective, it does matter to consumers where they buy contact lenses, and price is not their only consideration.

In the cited record testimony by Dr. Athey, she merely testified that contact lenses "are a commodity product in the sense that . . . if you have a prescription for a particular contact lens, it's going to come in the box from the manufacturer, and you're going to get that same box no matter where you but it from." (Athey, Tr. 725-726). The Court subsequently sustained an objection to that testimony by Dr. Athey. (Judge Chappell, Tr. 726-29).

Dr. Evans testified that "contact lenses themselves are a commodity product" in his opinion. (Evans, Tr. 1696). However, Dr. Evans readily admitted that contact lens retailers differentiate themselves by many different attributes, including "convenience," "service," "trust," "reputation," and "reliability." (Evans, Tr. 1697).

301. A contact lens prescription specifies the power, base curve, and brand of contact lens. (Clarkson, Tr. 186); CX8007 at 012 (¶ 27) (Athey Expert Report)).

Response to Finding No. 301:

Respondent has no specific response.

302. Even if multiple manufacturers manufacture contact lenses with the same parameters, there can be differences between the brands in terms of fit and comfort, which can be associated with slight differences in the materials used in the lens or the thickness of the lens, thus a consumer "cannot switch brands" once a prescription is written. (Clarkson, Tr. 167, 293; CX9000 (Batushanky, IHT at 13)).

Response to Finding No. 302:

Complaint Counsel's Proposed Finding No. 302 is incomplete and unsupported by cited testimony. On page 186 of the trial transcript (not page 167 or 293), Mr. Clarkson testified that a contact lens prescription specifies the brand of contact lenses and thus consumers generally "cannot switch brands," but at least one exception exists for "private label" contact lenses. (Clarkson, Tr. 186).

303. More than ninety percent of contact brand decisions are made by doctors instead of consumers. (CX0055 at 004).

Response to Finding No. 303:

Complaint Counsel's Proposed Finding No. 281 is incomplete and misleading because it does not reflect the time period of the cited exhibit. CX 55 is a document dated July 23, 2004, thirteen years ago, and it cannot support the finding as written.

304. 1-800 Contacts sells the same products as other retailers of contact lenses. (CX9029 (Bethers, Dep. at 22-23) (contact lens retailers "sell a commodity that [is] a mass produced product. A consumer can only buy one product. They have no ability to buy a different product. And the product we sell is the exact same product they can buy from any other retailer."); CX9035 (Coon, Dep. at 111) ("[Y]ou can't compete on the product because there is no alternative, unless somebody can get a prescription for a different brand. So once a prescription's been written, you're only left with two things that you can compete on, price and service . . . ."); CX9034 (Roush, Dep. at 177) ("[W]e sell the same contact lenses other retailers sell."); CX9043 (Athey, Dep. at 64-65) (1-800 Contacts' competitors "deliver the exact same shrinkwrapped box to the consumer" as 1-800 Contacts)).

Response to Finding No. 304:

Respondent does not object to Complaint Counsel's Proposed Finding No. 304 to the extent it is limited to the fact that "1-800 Contacts sells the same products as other retailers of contact lenses." The record testimony cited and quoted in Complaint Counsel's Proposed Finding No. 304 is incomplete and misleading to the extent that those quotations, taken out of context, suggest that there is no differentiation among contact lens retailers or that consumers are indifferent as to the retailer from which they obtain contact lenses.

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

305. Contact lens consumers are able to decide where to purchase their contact lenses. (Clarkson, Tr. 186).

Response to Finding No. 305:

Respondent has no specific response.

306. As of 2004, the contact lens market had undergone significant change in that the development of disposable soft contact lenses, followed by the growth of different retail channels, gave consumers a greater choice of sellers and means of delivery when they purchase contact lenses. (RX0566 at 002).

Response to Finding No. 306:

Respondent has no specific response.

307. Online contact lens retailers compete on the basis of price and service. (Clarkson, Tr. 202-203 ("[A] contact lens might be a highly differentiated product when it's manufactured, but the moment the doctor writes a prescription for it, it becomes a pure commodity. I mean, a box of ACUVUE is a box of ACUVUE and it really doesn't matter where you buy it. Then it really comes down only to convenience, service, and price."); CX9014 (Batushansky, Dep. at 91), *in camera*; Alovis, Tr. 994 ("We know we sell a commodity. We sell the same thing that the other guys sell; we just offer it at a better price and what we believe to be a better service, so it is compelling."); CX9018 (Drumm, Dep. at 113 (AC Lens tries to distinguish itself "with price, service, ability to ship quickly, return policies, and customer service. Contact lenses are a commodity item, so it's kind of difficult to differentiate manufacturers."); CX9039 (Clarkson, Dep. at 89) ("We try to distinguish ourselves by being pretty fanatical about service, by trying very

hard to make the process convenient and quick."); Alovis, Tr. 990 (LensDirect matches prices for any "credible" competitors)).

Response to Finding No. 307:

The proposed finding is incomplete and misleading. As Complaint Counsel concede in their proposed finding no. 308, contact lens retailers also compete on their ability to instill and maintain trust on the part of customers and potential customers.

308. Ways that online contact lens retailers seek to distinguish themselves from competitors include inventory, shipping, return policies, trust, and customer service. (CX9014 (Batushansky, Dep. at 103-104), *in camera*; CX9039 (Clarkson, Dep. at 89); CX9018 (Drumm, Dep. at 113-114)).

Response to Finding No. 308:

Respondent has no specific response.

1. Inventory

309. Some online retailers carry large inventories of contact lenses. (CX9003 (Clarkson, IHT at 21); CX0439 at 010 (Staff Final Update), *in camera*).

Response to Finding No. 309:

Complaint Counsel's Proposed Finding No. 309 should be disregarded because the cited evidence does not support the proposed finding. The cited exhibit states only that [redacted]. (CX 439 at 10), *in camera*. The cited exhibit thus only supports a finding that 1-800 Contacts carries a large inventory. The proposed finding should also be disregarded because Mr. Clarkson, whose IH testimony is cited in support of the proposed finding, conceded at trial that he "can't speak for other online retailers" with respect to the size of their inventory. (Clarkson, Tr. 192). Mr. Clarkson's IH testimony therefore lacks foundation.

310. Carrying a large inventory ensures that potential customers would be satisfied with the selection available, and allows the customers to receive their lenses more quickly. (CX9024 (Holbrook, Dep. at 22)).

Response to Finding No. 310:

Respondent has no specific response.

311. A 2015 report prepared at the direction of 1-800 Contacts' owner states that significant scale is required to compete online through investment in inventory. (CX0439 at 014 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).

Response to Finding No. 311:

Respondent has no specific response.

312. During the time that it was selling contact lenses online, Memorial Eye needed to stock many more contact lenses for its online business than it did for its ECP business, requiring it to order a much larger inventory. (Holbrook, Tr. 1861-1863). See also (CX9024 (Holbrook, Dep. at 21)) (Memorial Eye strived to have a large selection of lenses available).

Response to Finding No. 312:

The proposed finding in incomplete and misleading. Mr. Holbrook testified that Memorial Eye did not simply focus on having a large inventory but also considered "what contact lenses we could turn around in a reasonable amount of time because we didn't want to have all that product sitting there and just burning up money. . . ." (Holbrook, Tr. at 1860-1861).

313. During the time that it was selling contact lenses online, Memorial Eye "wanted as many contact lenses available so that [it] could have a quick turnaround time to the customers that were looking for contact lenses." (CX9024 (Holbrook, Dep. at 22)).

Response to Finding No. 313:

The proposed finding in incomplete and misleading. Mr. Holbrook testified that Memorial Eye did not simply focus on having a large inventory but also considered "what

contact lenses we could turn around in a reasonable amount of time because we didn't want to have all that product sitting there and just burning up money. . . ." (Holbrook, Tr. at 1860-1861).

314. During the time that it was selling contact lenses online, Memorial Eye had the vast majority of lenses customers ordered in stock. (Holbrook, Tr. 1895).

Response to Finding No. 314:

Respondent has no specific response.

315. Generally, customers were satisfied with Memorial Eye's online selection. (CX9024 (Holbrook, Dep. at 22); Holbrook, Tr. 1895-1896 ("Q. In your experience, were customers generally satisfied with Memorial Eye's selection of contact lenses? A. Yeah. We got quite a few, lots and lots of positive comments about that, both . . . people calling us and e-mailing us and also from the—from the sites that were out there that rated services.")).

Response to Finding No. 315:

The proposed finding is based on improper and unfounded lay opinion testimony that is itself based solely on inadmissible hearsay statements by unnamed third parties. The proposed finding is also inconsistent with Mr. Holbrook's testimony on cross-examination regarding customer service, where he admitted that he was not aware of any awards to Memorial Eye for customer service by *any* third-party consumer organization other than "Biz-something." (Holbrook, Tr. 2059).

316. AC Lens currently has 37,000 SKUs (stock keeping units) in stock. (Clarkson, Tr. 192).

Response to Finding No. 316:

Respondent has no specific response.

317. Having 37,000 SKUs in stock allows AC Lens to "fill about 96 percent of our orders from inventory." (Clarkson, Tr. 192).

Response to Finding No. 317:

The proposed finding is misleading and incomplete because it misstates Mr. Clarkson's testimony at trial, where he stated that despite the 37,000 SKUs in stock, "we still can *only* fill about 96 percent of our orders from inventory, because there are so many SKUs in the business." (Clarkson, Tr. 192) (emphasis added).

318. For orders covered by the 37,000 SKUs AC Lens has in stock from customers that already have a verified prescription on file, AC Lens can ship the same day the order was placed. (Clarkson, Tr. 194).

Response to Finding No. 318:

The proposed finding is misleading and incomplete because it misstates Mr. Clarkson's testimony at trial, where he stated that only those in-stock orders "that are released to our distribution center by 2:00 p.m. Eastern" can be shipped the same day that the customer's order is placed. (Clarkson, Tr. 194).

319. When AC Lens ships an order the same day, the customer can receive the lenses between one and three days from the day the order was placed. (CX9039 (Clarkson, Dep. at 92) ("It's hard for me to think that anyone else could be exceeding that in terms of speed of delivery.")).

Response to Finding No. 319:

Respondent has no specific response.

320. Web Eye Care is able to fill the vast majority of orders quickly from its stock or through distributors, with only approximately [redacted] of orders going on backorder. (CX9014 (Batushansky, Dep. at 109), *in camera*).

Response to Finding No. 320:

Complaint Counsel's Proposed Finding No. 320 is misleading, inaccurate, and not supported by the cited testimony. Mr. Batushansky did not testify that WebEyeCare was able to get [redacted] of its orders to customers "quickly." Rather, he testified only that WebEyeCare could

fill [redacted] of its orders without having to backorder. He further testified that WebEyeCare was able to do this only because of its distributors and not based on its inventory alone. (CX 9014 (Batushansky, Dep. at 109), *in camera*). In fact, WebEyeCare only [redacted]. (CX 9014 (Batushansky, Dep. at 36-37), *in camera*).

2. Shipping

321. Fast shipping is a competitive advantage because the faster customers receive the contact lenses they order, the happier they're going to be. (CX9018 (Drumm, Dep. at 114) ("There's a good book about the founder of LensCrafters, and he built LensCrafters entirely on the ability people to get people eyeglasses in a very, very quick amount of time. And we kind of adopted that model for the online world. The faster we can get contact lenses to the customers, the more—happier they're going to be, especially if you're out.")).

Response to Finding No. 321:

Respondent has no specific response.

322. A 2015 report prepared at the direction of 1-800 Contacts' owner states that 1-800 Contacts "offers quick delivery straight to customer's door and convenient ordering." (CX0439 at 010 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).

Response to Finding No. 322:

Respondent has no specific response.

323. One of the metrics AC Lens cares about specifically regarding service is getting orders shipped the day they arrive. (CX9039 (Clarkson, Dep. at 89); Clarkson, Tr. 193 ("We provide—we strive to ship as many orders as quickly as possible, so we have metrics to ship orders that are released to our distribution center on the day that they arrive so that we get the—we get the product into the consumer's hands as quickly as possible.")).

Response to Finding No. 323:

The proposed finding is misleading and incomplete because it misstates Mr. Clarkson's testimony at trial, where he stated that only those in-stock orders "that are released to our distribution center by 2:00 p.m. Eastern" can be shipped the same day that the customer's order is placed. (Clarkson, Tr. 194). That means, for example, that *no* orders that ACLens receives after 11:00 in the morning Pacific time from any western state will be shipped the same day. (Clarkson, Tr. 194).

324. AC Lens tries to ship fast generally, and also offers a variety of shipping options. (CX9018 (Drumm, Dep. at 114) ("So for shipping, we try to ship fast, also a variety of offers")).

Response to Finding No. 324:

Respondent has no specific response.

325. AC Lens offers overnight shipping, which not all of its competitors offer. (CX9018 (Drumm, Dep. at 114)).

Response to Finding No. 325:

Respondent has no specific response.

326. AC Lens is able to ship "in-stock orders that are released to our distribution center by 2:00 p.m. Eastern" on the same day the order is placed. (Clarkson, Tr. 194).

Response to Finding No. 326:

Respondent has no specific response.

327. At AC Lens, orders for products that are not in stock are overnighted from the manufacturers, and unless there is a back order from the manufacturer, AC Lens would get them the day after the order was placed by the customer and would be shipped that same day. (Clarkson, Tr. 194).

Response to Finding No. 327:

Respondent has no specific response.

328. Web Eye Care seeks to distinguish itself from other contact lens sellers through convenience, and shipping is a component of convenience. (CX9014 (Batushansky, Dep. at 103), *in camera*).

Response to Finding No. 328:

Complaint Counsel's Proposed Finding No. 328 is misleading, inaccurate, and not supported by the cited testimony. Mr. Batushansky actually testified that [redacted]. (CX 9014 (Batushansky, Dep. at 102), *in camera*). He then went on to say that WebEyeCare does not distinguish itself from other sellers of contact lenses [redacted]. (CX 9014 (Batushansky, Dep. at 102), *in camera*). Elsewhere in his testimony Mr. Batushansky testified that WebEyeCare competed with other retailers of contact lenses on the basis of [redacted]. (CX 9014 (Batushansky, Dep. at 103-104), *in camera*).

329. [redacted] (CX9014 (Batushansky, Dep. at 107), *in camera*).

Response to Finding No. 329:

Complaint Counsel's Proposed Finding No. 329 is misleading and inaccurate. WebEyeCare is only open Monday through Friday, 9:00 to 5:00, and even on those days of the week it only [redacted], it does not [redacted]. (CX 9014 (Batushansky, Dep. at 33-34, 107), *in camera*).

330. During the time that it sold contact lenses online, Memorial Eye would sometimes offer free shipping for online orders, and generally "tried to stay competitive" compared to what other online retailers were offering regarding free shipping. (CX9024 (Holbrook, Dep. at 23-24)).

Response to Finding No. 330:

Respondent has no specific response.

331. Fast shipping was a high priority for Memorial Eye's online business. (Holbrook, Tr. 1894).

Response to Finding No. 331:

The proposed finding is incomplete and misleading and lacks foundation because Mr. Holbrook testified at his deposition that he was "not sure" if the percentage of orders that were shipped to arrive the next day was a small percentage, or a large percentage. (CX 9024 (Holbrook, Dep. at 142)).

332. Memorial Eye tried to ship out online orders as quickly as possible. (Holbrook, Tr. 1894-1895). Orders could be shipped the same day if the customer already had a valid prescription on file and the lenses were in stock. (Holbrook, Tr. 1895).

Response to Finding No. 332:

The proposed finding is incomplete and misleading and lacks foundation because Mr. Holbrook testified at his deposition that he was "not sure" if the percentage of orders that were shipped to arrive the next day was a small percentage, or a large percentage. (CX 9024 (Holbrook, Dep. at 142)).

3. Many of 1-800 Contacts' Rivals Offer Excellent Customer Service.

333. Though generally at a lower price point, AC Lens competes with 1-800 on service. (CX9039 (Clarkson, Dep. at 90-92)).

Response to Finding No. 333:

The proposed finding is ambiguous. If the finding is intended to support the header of this section and/or to compare ACLens' customer service with 1-800 Contacts' customer service, it is not supported by the cited deposition testimony, which is limited in scope. Mr. Clarkson

testified that he does not "actually know," for example, what 1-800 Contacts' "order turnaround" is. (CX 9039 (Clarkson, Dep. at 91-92)).

334. AC Lens strives to provide excellent service in order to distinguish itself from competitors and to capture repeat orders. (Clarkson, Tr. 193; CX9039 (Clarkson, Dep. at 91) (providing good customer service has been "a principle since day one" for AC Lens in part because AC Lens typically loses money on an initial order because of the cost of marketing, and the only way that works as a business model is if they can "take very good care of the customers so they keep coming back.").

Response to Finding No. 334:

Respondent has no specific response.

335. AC Lens employs customer service agents to handle responding to customer service calls, emails, and prescription verification. (CX9039 (Clarkson, Dep. at 89)).

Response to Finding No. 335:

Respondent has no specific response.

336. AC Lens empowers its customer service agents "to take care of the customer and to accept returns under any circumstances, to offer discounts, to give people free shipping upgrades, whatever it takes basically." (CX9039 (Clarkson, Dep. at 91); Clarkson, Tr. 195 (AC Lens's return policy used to be less than 365 days but it empowered its customer care agents to "basically ignore the policy and always take the order back anyway" and so AC Lens decided to extend its returns policy to a full year)).

Response to Finding No. 336:

Respondent has no specific response.

337. CX9039 (Clarkson, Dep. at 90) (AC Lens customer service agents are empowered to accept returns even when they fall outside the stated return policy).

Response to Finding No. 337:

Respondent has no specific response.

338. AC Lens has tried to make its stated return policy "at least as generous as anyone else's." (CX9039 (Clarkson, Dep. at 89-90)).

Response to Finding No. 338:

Respondent has no specific response.

339. AC Lens seeks to distinguish itself by offering "extended returns and various returns that other retailers may not offer." (CX9018 (Drumm, Dep. at 114)).

Response to Finding No. 339:

Respondent has no specific response.

340. During the time that it sold contact lenses online, Memorial Eye allowed customers to return unopened boxes of contacts ordered from Memorial Eye, although it did not happen very often. (Holbrook, Tr. 1896).

Response to Finding No. 340:

Respondent has no specific response.

341. During the time that it sold contact lenses online, Memorial Eye bent the rule that customers could only return unopened boxes in 90 percent of the cases because the company wanted to provide good customer service. (Holbrook, Tr. 1896).

Response to Finding No. 341:

Respondent has no specific response.

342. AC Lens's call center is designed to have consumers talking live with an agent within 20 seconds. (Clarkson, Tr. 306).

Response to Finding No. 342:

The proposed finding should be disregarded because it is not supported by the cited testimony. Mr. Clarkson stated only that ACLens' call center personnel were "incented" to be talking live to the consumer within 20 seconds; he did *not* provide the actual average wait time. (Clarkson, Tr. 305-306). Mr. Clarkson also testified that ACLens' call center does not respond to calls on a 24/7 basis but instead shuts down at 11:00 p.m. (Eastern) on weekdays, with even

shorter hours on the weekend. (Clarkson, Tr. 306). That means that consumers must sometimes wait nine hours (or more), not 20 seconds, to be "talking live with an agent."

343. AC Lens's call center is open from 8:00 a.m. to 11:00 p.m., Eastern time, during the week, and from 9:00 a.m. to 9:00 p.m., Eastern time, on Saturdays and Sundays. (Clarkson, Tr. 306).

Response to Finding No. 343:

Respondent has no specific response.

344. AC Lens's target time to respond to customer emails is two hours. (Clarkson, Tr. 306).

Response to Finding No. 344:

Respondent has no specific response.

345. During AC Lens's call center operating hours the average time to respond to an email is significantly shorter than two hours. (Clarkson, Tr. 308-309).

Response to Finding No. 345:

Respondent has no specific response.

346. In general, AC Lens tries to answer customer service calls quickly and provide a good customer service experience, make sure that it can deal with custom problems as expediently as possible, and make sure that the customer is as happy as possible. (CX9018 (Drumm, Dep. at 113-114)).

Response to Finding No. 346:

Respondent has no specific response.

347. Web Eye Care endeavors to provide service to do its best to meet customer expectations. (CX9014 (Batushansky, Dep. at 105-106), *in camera*).

Response to Finding No. 347:

348. Web Eye Care maintains a call center and also accepts customer service emails at the call center. (CX9014 (Batushansky, Dep. at 106), *in camera*).

Response to Finding No. 348:

Respondent has no specific response.

349. [redacted] (CX9014 (Batushansky, Dep. at 107), *in camera*).

Response to Finding No. 349:

Complaint Counsel's Proposed Finding No. 349 is misleading, inaccurate, and not supported by the cited testimony. Mr. Batushansky actually testified that WebEyeCare [redacted]. (CX 9014 (Batushansky, Dep. at 107), *in camera*). Further, WebEyeCare's call center, [redacted]. (CX 9014 (Batushansky, Dep. at 33-34), *in camera*). Thus, its responses to emails will only occur [redacted].

350. [redacted] (CX9014 (Batushansky, Dep. at 108), *in camera*).

Response to Finding No. 350:

Complaint Counsel's Proposed Finding No. 350 is misleading, inaccurate, and not supported by the cited testimony. Mr. Batushansky actually testified that he was [redacted]

[redacted]. (CX 9014 (Batushansky, Dep. at 108), *in camera*).

351. Vision Direct has a call center that is open 24 hours. (CX9038 (Hamilton, Dep. at 49)).

Response to Finding No. 351:

The proposed finding lacks foundation and is incomplete and misleading in light of Mr. Hamilton's testimony that he had only "vague" knowledge regarding the Nova Scotia call center, which was shared with Drugstore.com. (CX 9038 (Hamilton, Dep. at 48-49)).

352. LensDirect has recently made changes that has cemented it as a leader in service for the optical space. (Alovis, Tr. 979-980).

Response to Finding No. 352:

The proposed finding should be disregarded because it is based on inadmissible lay opinion testimony by Mr. Alovis. No foundation was laid regarding Mr. Alovis' knowledge of the level of service supposedly provided by other retailers "in the optical space." (Alovis, Tr. 979-980). Moreover, Mr. Alovis likely lacks the necessary foundation to provide reliable or current testimony on that subject, because he conceded at his deposition that in 2016 and 2017, he devoted 70% of his time to a different business called InTouchMD that is not in the "optical space." (CX 9023 (Alovis, Dep. at 16-17)).

353. LensDirect uses dedicated account reps so that every customer has a one-to-one relationship with a specific customer service representative. (Alovis, Tr. 980).

Response to Finding No. 353:

Respondent has no specific response.

354. LensDirect has offers a subscription program called AutoRefill that allows customers to set a date for a subsequent shipment of lenses and have the arrive automatically without placing a new order. (Alovis, Tr. 980-981).

Response to Finding No. 354:

Respondent has no specific response.

355. Customers using LensDirect's AutoRefill also receive discounts. (Alovis, Tr. 980-981).

Response to Finding No. 355:

Respondent has no specific response.

356. LensDirect maintains a customer service email address. (Alovis, Tr. 981).

Response to Finding No. 356:

Respondent has no specific response.

357. LensDirect's CEO, Ryan Alovis, used to personally review every single customer service email to ensure that the conversation was up to his standards. (Alovis, Tr. 981).

Response to Finding No. 357:

Respondent has no specific response.

358. Ensuring that LensDirect continues to provide good customer service is the most important priority for Mr. Alovis. (Alovis, Tr. 981).

Response to Finding No. 358:

The proposed finding should be disregarded because it is not supported by Mr. Alovis' testimony, which did not refer to Mr. Alovis' supposed "priorities." Moreover, the proposed finding is inconsistent with Mr. Alovis' deposition testimony that, in 2016 and 2017, he devoted 70% of his time to an entirely different business called InTouchMD; that business was clearly Mr. Alovis' highest priority in the past two years. (CX 9023 (Alovis, Dep. at 16-17)). Furthermore, Mr. Alovis testified in January 2017 that he and his partners were considering the sale of LensDirect. (CX 9023 (Alovis, Dep. at 27)).

359. LensDirect competes on service in a number of ways. It has dedicated account representatives for each customer; it offers free shipping on almost every order; it offers an auto-refill program; it has very low rate of returns; and CEO Alovis is directly copied on every consumer complaint. (Alovis, Tr. 979-982; CX9023 (Alovis, Dep. at 29, 45, 50, 52, 63, 106)).

Response to Finding No. 359:

Respondent has no specific response.

360. Mr. Alovis reads every customer review of LensDirect on Trustpilot and Google, in order to determine whether LensDirect's customer service efforts are working as intended. (Alovis, Tr. 981-982).

Response to Finding No. 360:

Respondent has no specific response.

361. Trustpilot is a service that emails customers after an order has shipped giving them the opportunity to review their shopping experience, whether it is negative or positive. (Alovis, Tr. 982).

Response to Finding No. 361:

Respondent has no specific response.

362. Mr. Alovis regards customer service as the heart and soul of LensDirect. (Alovis, Tr. at 981).

Response to Finding No. 362:

Respondent has no specific response.

363. LensDirect has made changes to improve its service in response to Trustpilot and Google reviews by customers. (Alovis, Tr. 982-983).

Response to Finding No. 363:

Respondent has no specific response.

364. Customer service was very important to Memorial Eye's online business. (Holbrook, Tr. 1890-1891 ("[W]e were trying to—it was very important for us to get repeat customers, and if you don't provide really good customer service, you're not going to get repeat

customers. Plus we wanted to distinguish ourselves that way, so we . . . put a lot of effort in providing top-notch customer service.").

Response to Finding No. 364:

The proposed finding is not supported by the cited testimony and is contradicted by other testimony. Mr. Holbrook testified, for example, that ShipMyContacts (a dba for Memorial Eye) did not have any customer service representatives available 24/7, and did not offer consumers the opportunity to chat with a customer service representative while on the ShipMyContacts website. (Holbrook, Tr. 2059). Mr. Holbrook also admitted that he was not aware of ShipMyContacts ever getting an award for its customer service from a third party consumer organization, except one "certification" from "Biz-something." (Holbrook, Tr. 2059). In addition, Memorial Eye did not strive to have every SKU available in inventory but instead considered "what contact lenses we could turn around in a reasonable amount of time because we didn't want to have all that product sitting there and just burning up money. . . ." (Holbrook, Tr. at 1860-1861). Finally, Mr. Holbrook was, at his deposition, unable to say if Memorial Eye shipped a small, or a large, percentage of orders the day after the order was placed. (CX 9024 (Holbrook, Dep. at 142)). In sum, this is not the "excellent" service referenced in the header to this section.

365. During the time that it sold contact lenses online, Memorial Eye put a lot of effort into providing good service, including responding quickly, answering questions, finding creative solutions to issues and concerns, and using the doctors it had on staff to answer specific questions from customers about contacts. (Holbrook, Tr. 1891; CX9024 (Holbrook, Dep. at 13 ("We were a small, nimble company. So we spent a lot of time paying attention to the customer service responses. We also had opticians and doctors available on staff to be able to call on if there were any technical questions about contacts or diseases or things like that. If the customers had any questions, we could call on them anytime and get professional guidance on that . . . [e]ven for customers who weren't patients."); Holbrook, Dep. at 13-14 ("[W]e trained our customer service reps quite a bit. We watched them like a hawk, listened in to their conversations and tried to make sure that they were providing the best customer service possible. And we always responded to any issues immediately and we just felt like we were, you know, providing top-notch customer service.").

Response to Finding No. 365:

The proposed finding is not supported by the cited testimony and is contradicted by other testimony. Mr. Holbrook testified, for example, that ShipMyContacts (a dba for Memorial Eye) did not have any customer service representatives available 24/7, and did not offer consumers the opportunity to chat with a customer service representative while on the ShipMyContacts website. (Holbrook, Tr. 2059). Mr. Holbrook also admitted that he was not aware of ShipMyContacts ever getting an award for its customer service from a third party consumer organization, except one "certification" from "Biz-something." (Holbrook, Tr. 2059). In addition, Memorial Eye did not strive to have every SKU available in inventory but instead considered "what contact lenses we could turn around in a reasonable amount of time because we didn't want to have all that product sitting there and just burning up money. . . ." (Holbrook, Tr. at 1860-1861). Finally, Mr. Holbrook was, at his deposition, unable to say if Memorial Eye shipped a small, or a large, percentage of orders the day after the order was placed. (CX 9024 (Holbrook, Dep. at 142)). In sum, this is not the "excellent" service referenced in the header to this section.

366. Memorial Eye maintained a customer service center for its online business that was staffed from 9:00 to 7:00 during the week, 9:00 to 1:00, or sometimes 2:00, 3:00, or 4:00 on Saturdays. (Holbrook, Tr. 1892).

Response to Finding No. 366:

Respondent has no specific response other than to note that the facts set out in the proposed finding do not support the header of this section, which refers to "excellent" service. In comparison to the service provided by 1-800 Contacts' 24/7 customer service call center, this is poor service.

367. Memorial Eye's customer service representatives regularly kept notes of calls with customers. (Holbrook, Tr. 1893).

Response to Finding No. 367:

Respondent has no specific response.

368. Memorial Eye maintained a customer service email address that customers could use for assistance. (Holbrook, Tr. 1893).

Response to Finding No. 368:

Respondent has no specific response.

369. Responding to customer emails was a high priority for Memorial Eye's online business, and they were usually answered on the same day except for weekends. (Holbrook, Tr. 1893).

Response to Finding No. 369:

The facts set out in the proposed finding do not support the finding or the header of this section, which refers to "excellent" service. In comparison to the service provided by 1-800 Contacts' 24/7 customer service representatives (*e.g.*, answering emails within 10 minutes) (Coon, Tr. 2701-2708; RX 904 at 19; CX 525 at 20; RX 590 at 2; Goodstein, Tr. 2396-97), this is poor service.

370. Net Promoter Scores ("NPS") are a way of measuring customer satisfaction by asking customers how likely they are to recommend a company to someone else. (Clarkson, Tr. 207).

Response to Finding No. 370:

Respondent has no specific response.

371. AC Lens customers are generally highly satisfied, based on Net Promoter Scores. (Clarkson, Tr. 208). AC Lens routinely has NPS scores in the low 80s. (Clarkson, Tr. 208).

Response to Finding No. 371:

The proposed finding is incomplete and misleading and should be disregarded because the evidence shows that ACLens did not calculate its Net Promoter Scores using the industry-

standard approach described by Prof. Goodstein. *Compare* Clarkson, Tr. 207-208 *with* Goodstein, Tr. 2391-2395. The proposed finding should also be disregarded because ACLens' purported Net Promoter scores are hearsay if offered for the truth. The proposed finding does not cite to any contemporaneous business record that reflects the purported scores, and there is no evidence that would support a finding that the customer surveys at issue were conducted using accepted principles of survey research. (Tr., 169 (Court Order regarding reliability of survey evidence)).

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

Response to Finding No. 372:

Complaint Counsel's Proposed Finding No. 372 should be disregarded (and stricken) because it violates the Court's May 16, 2017 Order on Post-Trial Briefs by citing to an exhibit (CX 430) that the Court had "excluded as unreliable." Tr. at 169. The Court squarely held that CX 430 "cannot be used as proof that the surveys or reports or charts contained in the report are true and accurate" and "cannot be used as proof that the information contained in those documents are statements by 1-800 Contacts." (Tr., 169-170 (Court Order)).

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

Response to Finding No. 373:

The proposed finding misstates the cited testimony, is inconsistent with the weight of the evidence, and should be disregarded. The proposed finding cites, for example, pages 91-92 of Mr. Clarkson's deposition, where he was asked the question: "How does AC Lens compare to 1-800 Contacts when it comes to order turnaround time?" In response, Mr. Clarkson

acknowledged that "I don't actually know what 1-800's is. I can only tell you what ours is." (CX 9039 (Clarkson, Dep. at 91-92). Any opinion by Mr. Clarkson that ACLens provides customer service that is "comparable" to that of 1-800 Contacts would therefore lack the necessary foundation.

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

Response to Finding No. 374:

Complaint Counsel's Proposed Finding No. 374 is incomplete, inaccurate, misleading, and based on unreliable and inadmissible expert testimony. It should be disregarded. First, the proposed finding refers to Dr. Athey's opinion based on her consideration of one slide from a Berkshire Partners document that shows a comparison of Net Promoter Scores for various contact lens retailers. There is no record evidence that Dr. Athey has any experience or expertise in administering Net Promoter Score surveys or interpreting the results of Net Promoter Score surveys. Dr. Athey is not a marketing expert or an expert in consumer research. Second, Dr. Athey incorrectly equates a Net Promoter Score with service levels. [redacted] (Goodstein, Tr. 2391). The Net Promoter Score is based on one question: "How likely is it that you would recommend our company to a friend or colleague?" (RX 736 at 13 (Goodstein Expert Report)). The response is provided on a scale of 0 to 10. (RX 736 at 13 (Goodstein Expert Report)). Costco, a no-frills warehouse club, often has one of the highest Net

Promoter Scores in comparisons across companies in all different industries. (RX 736 at 14 (Goodstein Expert Report)). Thus, a company that provides very little service can achieve a high Net Promoter Score as a result of its pricing or other characteristics. Similarly, a company with extremely high service levels could achieve a low Net Promoter Score if consumers perceived, for example, the prices to be unreasonably high. Third, Dr. Athey mischaracterizes and omits key points of the Berkshire Partners' slide. That slide shows that 1-800 Contacts' Net Promoter Score (0.45) was actually double the Net Promoter Score of "Other Retailers" (0.23). (CX 1109 at 47). Dr. Athey relies on the fact that the slide shows that one other contact lens retailer, Vision Direct, had a Net Promoter Score similar to 1-800 Contacts to suggest that many other online retailers had similar Net Promoter Scores as well. Fourth, Dr. Athey provides no analysis to show that the Berkshire Partners' slide is even a complete or reliable measure of Net Promoter Scores: there were only 101 respondents for 1-800 Contacts, 41 for Vision Direct, and 84 for all other retailers. (CX 1109 at 47).

Fifth, Dr. Athey's opinion that other online retailers offer similar enough service levels to 1-800 Contacts is based on her incomplete and inaccurate interpretation of the documents (as described above) and, in any event, cannot support her conclusions with respect to any "price premium" for 1-800 Contacts. In those instances where 1-800 Contacts' price was higher than the price of other retailers, its service and convenience were obviously sufficiently better than that of its rivals to make its quality-adjusted price more attractive. This is fully consistent with well-settled economic principles and with 1-800 Contacts having a stronger trademark than other online retailers. (RX 737 at 19 (Landes Report); CX 9050 (Landes, Dep. at 73)). [redacted]

[redacted] (Athey, Tr. 2072, *in camera*). [redacted] *Id*. [redacted] (Athey, Tr. 2072-73, *in camera*). Thus, that service differences alone may not justify the entire price differential for all customers is not surprising; the remainder of the price differential is accounted for by other differences such as differences in brand name and trademark.

IV. Search Advertising Background

A. Description of Search Advertising

1. What are Search Engines?

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

Response to Finding No. 375:

Respondent has no specific response.

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

Response to Finding No. 376:

Respondent has no specific response.

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

Response to Finding No. 377:

Respondent has no specific response.

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

Response to Finding No. 378:

The proposed finding is misleading. The cited evidence regarding the frequency of ads appearing pertains to only Google; there is no cited evidence regarding the frequency of ads appearing on other search engines, such as Bing, Yahoo!, and others.

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

Response to Finding No. 379:

Respondent has no specific response.

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

Response to Finding No. 380:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." (Order on Post-Trial Briefs at 3).

2. What is Search Advertising?

381. Search engines are free for users. Their revenue comes from advertising. (Juda, Tr. 1065 ("Q. Does Google charge users to use the search engine? A. No. The service is free. Q. So how does Google make money? A. So Google makes money predominantly by showing ads on the search results page…"); *see also* CX8005 at 001 (¶ 7) (Iyer, Decl.), *in camera*).

Response to Finding No. 381:

Respondent has no specific response.

382. Unlike other types of advertisements online, search engine advertisements are text only. (Jt. Stip. Regarding Search Engines and Glossary ¶ 10; *see, e.g.*, CX0296 at 015 (Feb. 6, 2015, 1-800 Contacts Affiliate and Paid Search Overview presentation), *in camera*).

Response to Finding No. 382:

Respondent has no specific response.

383. On Google, search engine advertisements consist of a blue headline, followed by a green box with the word "Ad" in it and the actual URL of the site being advertised, followed by the ad copy, which is text that the advertiser provides to Google. (Jt. Stip. Regarding Search Engines and Glossary ¶11; *see, e.g.*, CX0296 at 015 (Feb. 6, 2015, 1-800 Contacts Affiliate and Paid Search Overview presentation), *in camera*).

Response to Finding No. 383:

The proposed finding is incomplete. Although the proposed finding accurately describes the format of paid search advertisements at the time of trial, the format of Google's paid search advertisements has gone through multiple changes over the course of time. The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [redacted]; see also RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)).

384. Search engines "only generate revenue when an ad is clicked." (Juda, Tr. 1068); *see also* CX8005 at 001 (¶ 7) (Iyer, Decl.), *in camera*); Clarkson, Tr. 217 ("[W]hen you bid on a search term and a user clicks on your ad, you pay."); Hamilton, Tr. 396 ("Q. Does Vision Direct pay the search engine to display ad impressions related to online keyword search advertising? A. No. Q. Under what circumstances does Walgreens pay the search engine in connection with online keyword search advertising? A. Only when there's a click. It's cost-per-click advertising.")).

Response to Finding No. 384:

Respondent has no specific response.

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

385. Search engines have a strong incentive to show only search advertisements that are relevant and useful to users. (*Infra* ¶¶ 386-41).

Response to Finding No. 385:

The proposed finding is incomplete, misleading, and inaccurate. (*See* responses to proposed findings 386-41).

386. Search engines attempt to balance the interests of users, advertisers, and the search engines themselves. (Ghose, Tr. 3999) (search engines "would like to have satisfied consumers, advertisers, and themselves. So search engines are trying to balance multiple things."); (CX9019 (Juda, Dep. at 181), *in camera*) [redacted] ;(CX9019 (Juda, Dep. at 129-30), *in camera*) [redacted] ; (CX8005 at 001 (¶ 7) (Iyer, Decl.), *in camera*) [redacted]); (CX8005 at 001 (¶ 8) (Iyer, Decl.), *in camera*) [redacted] .

Response to Finding No. 386:

Respondent has no specific response.

387. As a result of search advertising being purchased on a pay-per-click basis, Google has a "strong economic incentive to show useful ads" (Juda, Tr. 1072) and only useful ads. (Juda, Tr. 1084 (". . . advertisers are only charged when a user interacts with their ad. It creates a nice economic incentive for advertisers to try and create high-quality content, as well as a strong incentive for Google to only show an ad when it's useful.")); RX0612A-0002 (". . . users don't want to be bothered with ads that aren't closely related to what they're searching for, and advertisers want to show relevant ads so users will actually click on them"); RX0612A-0005-0006 (users want to see relevant ads. Advertisers want to present relevant ads to users and Google wants both advertisers and users to have a good experience so they come back and continue to use our system.").

Response to Finding No. 387:

The proposed finding is not supported by the cited evidence because the Google witnesses lack personal knowledge of what ads are "useful" to users. The evidence shows that search engines use complex algorithms to determine which ads to show based on a number of factors, none of which is whether the ad is "useful" to the user. (RF 781-840). In Google's system, which ads are shown is determined by a combination of "[the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats," in addition to other factors. (RX 716 at 1; RF 781-840).

388. Search engines do not benefit from showing ads that are not relevant to users. (Juda, Tr. 1081, 1083-1084 (We actually believe there's a whole variety of ads in the system where the short-term revenue those ads would generate would actually be dwarfed by negative ramifications of users not clicking on ads in the future, and so it's neither a relevant ad to the user nor something in our economic interest to want to show.")) RX0612A-0002. See also (CX8005 at 001 (¶ 8) (Iyer, Decl.), *in camera*) [redacted]).

Response to Finding No. 388:

The proposed finding is not supported by the evidence. The evidence shows that search engines benefit by earning revenue any time a user clicks on an ad. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 12; RX 716 at 26; *see also* RX 704 (Iyer, Decl. ¶ 9 (Microsoft earns revenue [redacted]))). The search engine earns this revenue regardless of whether the ad is "relevant" to users; in fact "ad relevance" is only one of many factors determining whether search engines display an ad. (RX 716 a 001 (Google's system determines which ads to shown by a combination of "[the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate)], ad

relevance, landing page experience, and the expected impact of extensions and other ad formats"); *see also* RX 704 (Iyer, Decl. ¶ 10); RF 781-856).

389. Search engines do not benefit over the long term from showing ads that are not relevant to users. (Juda, Tr. 1081, 1083-1084 (explaining that there are ads in the system that would generate clicks and revenue, but over time over-delivery of ads results in a declining rate of clicks by customers); RX0612A-0002; *see also* CX8005 at 001 (¶ 8) (Iyer, Decl .), *in camera*) [redacted] .

Response to Finding No. 389:

The proposed finding is misleading. The evidence shows that search engines benefit by earning revenue any time a user clicks on an ad. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 12; RX 716 at 26; *see also* RX 704 (Iyer, Decl. ¶ 9 (Microsoft earns revenue [redacted])). The search engine earns this revenue regardless of whether the ad is "relevant" to users; in fact "ad relevance" is only one of many factors determining whether search engines display an ad. (RX 716 at 1 (Google's system determines which ads to shown by a combination of "[the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats"); *see also* RX 704 (Iyer, Decl. ¶ 10); RF 781-856).

390. "[Google] observed on a number of occasions that users' propensity for clicking on ads over time can also be influenced based on the quality…of ads that they are presented, so by increasing the quality of ads that [Google] present[s] to users, [Google] can actually see their likelihood of clicking on ads in the future steadily increase over time." (Juda, Tr. 1073).

Response to Finding No. 390:

The proposed finding is misleading and incomplete. The proposed finding leaves out a factor in the cited testimony, which is "users' propensity for clicking on ads over time can also

be influenced based on the quality ***and quantity*** of ads that they are presented." (Juda, Tr. 1073). The proposed finding is misleading because Google defines "quality" for paid search ads using complex algorithms that combine three "quality signals," which are predicted click-through-rate, ad relevance, and landing page experience. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 37; *see also* CX 9019 (Juda Dep. at 30-43)). Each of these signals [redacted] (Juda Tr. 1340-41).

391. [redacted] (Juda, Tr. 1341).

Response to Finding No. 391:

The proposed finding is misleading. In Google's system, which ads are shown is determined by a combination of "[the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats," in addition to other factors. (RX 716 at 1; RF 781-840; Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶¶ 36-38). Moreover Google defines "quality" for paid search ads using complex algorithms that combine three "quality signals," which are predicted click-through-rate, ad relevance, and landing page experience. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 37; *see also* CX 9019 (Juda Dep. at 30-43)). Each of these signals [redacted] (Juda Tr. 1340-41).

392. [redacted] (Juda, Tr. 1341).

Response to Finding No. 392:

The proposed finding is not supported by the cited evidence and is against the weight of the evidence. In Google's system, which ads are shown is determined by a combination of "[the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats," in addition to other factors. (RX 716 at 1; RF 781-840). Moreover Google defines "quality" for paid search ads using complex algorithms that combine three "quality signals," which are predicted click-through-rate, ad relevance, and landing page experience. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 37; *see also* CX 9019 (Juda Dep. at 30-43)). Each of these signals [redacted] (Juda Tr. 1340-41).

393. [redacted] (CX8005 at 002 (¶ 13) (Iyer, Decl.), *in camera*).

Response to Finding No. 393:

The proposed finding is not supported by the evidence. Microsoft's Bing takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

In general and within reason, [redacted] (RX 704 (Iyer, Decl. ¶ 11)). Accordingly, a paid search advertisement for a website [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 11)).

394. [redacted] (CX9019 (Juda, Dep. at 206), *in camera*; Juda, Tr. 1343).

Response to Finding No. 394:

The proposed finding is incomplete. Google defines "misleading" as "making untruthful statements regarding like, what's going to happen to the user or what the content of the landing page may be." (CX 9019 (Juda Dep. at 226-227). But Google has [redacted] (Juda, Tr. 1241-42). In fact, Google [redacted] (Juda, Tr. 1242).

395. [redacted] (CX9019 (Juda, Dep. at 207), *in camera*).

Response to Finding No. 395:

The proposed finding is incomplete. Google defines "misleading" as "making an untruthful statement regarding like, what's going to happen to the user or what the content of the landing page may be." (CX 9019 (Juda Dep. at 226-227). But Google has [redacted] (Juda, Tr. 1242). In fact, Google [redacted] (Juda, Tr. 1242).

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

396. Selecting relevant ads for users is an important priority for search engines. (Juda, Tr. 1072 ("Q. Is selecting relevant ads for users an important priority for Google? A. It is."); *see also* CX8005 at 002 (¶ 9) (Iyer, Decl.), *in camera* [redacted]).

Response to Finding No. 396:

The proposed finding is inaccurate and misleading. "Ad relevance" is only one of many factors determining whether Google displays an ad. (RX 716 at 1 (Google's system determines which ads to shown by a combination of "[the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats"); Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶¶ 36-38). In Microsoft's Bing system, the relevance of an ad [redacted] (RX 704 (Iyer, Decl. ¶ 10)).

397. Google [redacted] created a multi-signal system to select relevant ads. (Juda, Tr. 1077; CX8005 at 002 (¶ 13) (Iyer, Decl.), *in camera*).

Response to Finding No. 397:

The proposed finding is inaccurate and misleading. Google uses a multi-signal algorithm to determine which ads to display. (CX 9019 (Juda, Dep. at 30-31). "Ad relevance" is only one of many factors determining whether Google displays an ad. (RX 716 at 1 (Google's system determines which ads to shown by a combination of "the advertiser's bid, auction-time measurements of expected CTR (click-through rate), ad relevance, landing page experience, and the expected impact of extensions and other ad formats"); Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶¶ 36-37). In Microsoft's Bing system, the relevance of an ad [redacted] (RX 704 (Iyer, Decl. ¶ 10)).

398. [redacted] system for selecting relevant ads is based on records of user's responses to—for instance, either clicking or not clicking on—each advertisement on the SERP. (CX9019 (Juda Dep. at 30); CX8005 at 002 (¶ 16) (Iyer, Decl.), *in camera*)**.**

Response to Finding No. 398:

The proposed finding is inaccurate, incomplete, and misleading. Google's system determines which ads to shown by a combination of "the advertiser's bid, auction-time measurements of expected CTR (click-through rate), ad relevance, landing page experience, and the expected impact of extensions and other ad formats"); Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶¶ 36-38). In addition, the ads shown as well as the number of ads shown [redacted] (Juda, Tr. 1265-1266; CX 9019 (Juda, Dep. at 134-136)).

Microsoft's Bing determines which ads to display based on [redacted] (RX 704 (Iyer, Decl. ¶ 10)). Microsoft's algorithm for determining [redacted] (RX 704 (Iyer, Decl. ¶ 12)).

In many cases, Microsoft's algorithm [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 13)).

399. Google considers four signals when choosing ads for the SERP: an assessment of predicted click-through rate, ad text relevance (also known as creative quality), landing page experience, and the advertiser's bid. (Juda, Tr. 1077); *see* RX00612A at 0006-0008.

Response to Finding No. 399:

The proposed finding is incomplete. Google's algorithms also [redacted] (CX 9019 (Juda, Dep. at 40-41); Juda, Tr. 1113). In addition, the ads shown as well as the number of ads shown [redacted] (Juda, Tr. 1265-1266; CX 9019 (Juda, Dep. at 134-136)).

400. [redacted] (Juda, Tr. 1098).

Response to Finding No. 400:

The proposed finding is incomplete, inaccurate, and misleading. Google [redacted] (Juda, Tr. 1096-1098).

401. Google uses the predicted click through rate signal because click-through rate is "a fairly good proxy for whether an ad may be relevant…" (Juda, Tr. 1068).

Response to Finding No. 401:

The proposed finding is not supported by the cited evidence. The cited testimony does not explain why Google uses the predicted click through rate signal.

402. [redacted] (Juda, Tr. 1113-1114, *in camera*) [redacted])

Response to Finding No. 402:

The proposed finding is not supported by the cited evidence. The cited testimony merely states that [redacted] (Juda, Tr. 1113-1114).

403. [redacted] (Juda, Tr. 1096, *in camera*; CX8005 at 002 (¶ 12) (Iyer, Decl.), *in camera*).

Response to Finding No. 403:

The proposed finding is inaccurate and misleading. Mr. Juda testified only that Google [redacted] (Juda, Tr. 1096). Google cannot peek into the minds of individual users. (CX 9019 (Juda, Dep. at 15)). Moreover, Google has no means to determine [redacted] (Juda, Tr. 1242).

404. [redacted] (Juda, Tr. 1103).

Response to Finding No. 404:

The proposed finding is not supported by the cited evidence, which relates to [redacted] (Juda, Tr. 1103.)

405. [redacted] (Juda, Tr. 1089-1091, *in camera*; *see also* (CX8005 at 2 (¶ 13) (Iyer, Decl.), *in camera* [redacted].

Response to Finding No. 405:

The proposed finding is inaccurate and misleading. In Google's AdWords, there is no cutoff relating to [redacted] All ads with an Ad Rank greater than zero are eligible to be shown. (CX 9019 (Juda, Dep. at 42)). Ad Rank is determined by algorithms that [redacted] (CX 9019 (Juda, Dep. at 41-42)).

The finding misstates the cited evidence [redacted] (CX 8005 at 2). Beyond that, Microsoft takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted] (RX 704 (Iyer, Decl. ¶ 11)). In general and within reason, [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

406. Google's assessment of ad text relevance examines how relevant the ad copy, or ad text, is to the user's search query. (Juda, Tr. 1077); RX0612A at 0007 ("Google determines ad relevance. By analyzing the language in your ad, they determine how well it relates to the query. This is a way to measure the ads relevance to the users search and to make sure that only useful ads are shown.").

Response to Finding No. 406:

Respondent has no specific response.

407. Google's assessment of landing page experience measures how relevant the landing page—the website the user is taken to after clicking the ad—is to the user's search query. (Juda, Tr. 1077; RX0612A at 0006).

Response to Finding No. 407:

Respondent has no specific response.

408. Google considers the landing page experience in its ad selections because it [redacted] (Juda, Tr. 1099, *in camera*).

Response to Finding No. 408:

The proposed finding is incomplete. Google considers landing page experience in its algorithms [redacted] (CX 9019 (Juda, Dep. at 121-122)).

409. [redacted] (Juda, Tr. 1102).

Response to Finding No. 409:

Respondent has no specific response.

410. [redacted] (Juda, Tr. 1103).

Response to Finding No. 410:

The proposed finding is misleading. In context, the cited testimony of Mr. Juda [redacted] (Juda, Tr. 1103). As Mr. Juda testified elsewhere, whether a paid search ad is displayed by Google depends on its Ad Rank, which [redacted] (Juda, Tr. 1210-1211, 1263) and is influenced by a number of factors other than landing page experience, including the advertiser's bid, auction-time measurements of expected CTR, ad relevance, and the expected impact of extensions and other ad formats." (RX 716 at 1). These other factors may [redacted]. (Juda, Tr. 1260-1261).

411. [redacted] (CX9019 (Juda, Dep. at 113-114), *in camera*).

Response to Finding No. 411:

The proposed finding is not supported by the cited evidence, which relates only to [redacted] **(**CX 9019 (Juda, Dep. at 113-115).

412. [redacted] (CX8005 at 002 (¶ 14) (Iyer, Dec.), *in camera*).

Response to Finding No. 412:

Respondent has no specific response.

413. Advertisers compete for higher positions on the page. (Juda, Tr. 1077 ("Whichever ad has the highest score will appear first, followed by subsequent ads"); Athey, Tr. 718 ("Another reason that search advertisements are so effective is that those advertisements are the result of a competitive auction.")).

Response to Finding No. 413:

The finding is inaccurate and misleading. In Google's AdWords system, each advertiser indicates its maximum willingness to pay (maximum CPC) to have its ad shown in response to a search containing a particular keyword. (RX 716 at 41). The position of an ad is based Google's algorithms that compare each advertiser's bid, auction-time measurements of expected click-through rate, ad relevance, landing page experience, and the expected impact of extensions and other ad formats. (RX 716 at 1; Juda, Tr. 1077; CX 9019 (Juda, Dep. at 42)). Advertisers may decide to set the maximum CPC such that their ads ***do not*** appear in higher positions on the page because they are unwilling to pay for that positioning. (CX 9033 (Mohan, Dep. at 155-156, 160-164); RX 181). Walmart, for instance, lowered its maximum CPC for ads showing on competitor trademark keywords (such as 1-800 Contacts) because it was too expensive, knowing that the lower bid would put its ads below the first page of search results. (CX 9033 (Mohan, Dep. at 155-156, 160-164); RX 181).

414. Advertisers want to appear higher on the page because higher positions receive more clicks. (CX9014 (Batushansky, Dep. at 66-67); Juda, Tr. 1277-1278).

Response to Finding No. 414:

The finding is inaccurate and misleading. In Google's AdWords system, each advertiser indicates its maximum willingness to pay (maximum CPC) to have its ad shown in response to a search containing a particular keyword. (RX 716 at 41). The position of an ad is based Google's algorithms that compare each advertiser's bid, auction-time measurements of expected click-through rate, ad relevance, landing page experience, and the expected impact of extensions and

other ad formats. (RX 716 at 1; Juda, Tr. 1077; CX 9019 (Juda, Dep. at 42)). Advertisers may decide to set the maximum CPC such that their ads ***do not*** appear in higher positions on the page because they are unwilling to pay for that positioning. (CX 9033 (Mohan, Dep. at 155-156, 160-164); RX 181). Walmart, for instance, lowered its maximum CPC for ads showing on competitor trademark keywords (such as 1-800 Contacts) because it was too expensive, knowing that the lower bid would put its ads below the first page of search results. (CX 9033 (Mohan, Dep. at 155-156, 160-164); RX 181).

415. To appear high on the page, advertisers must have strong assessments from Google on the three quality signals compared to other auction participants and must have high bids relative to other participants on a keyword related to the user's search. (Juda, Tr. 1077) RX0612A-0005 ("we [Google] want to show more useful ads in a higher position on the results page").

Response to Finding No. 415:

The proposed finding is incomplete. In addition to the three quality signals (predicted CTR, ad relevance, and landing page quality), Google's algorithms also take into account the predicted effect of ad extensions and other formatting. (RX 716 at 1, 030; *see also* CX 9019 (Juda, Dep. at 41); Juda, Tr. 1113). Moreover, Google's algorithms may also take into account [redacted] (Juda, Tr. 1265-1266; CX 9019 (Juda, Dep. at 134-136)). Lastly, because ad positon is influenced by the advertiser's bid, an ad may be placed higher on the page than other ads even though it has *lower* assessments of the quality signals, i.e., advertisers may buy their way to the top of the page. (Juda, Tr. 1331).

Microsoft's Bing takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 11)). In general and within reason, [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

416. [redacted] (Juda, Tr. 1198, *in camera*).

Response to Finding No. 416:

The proposed finding is incomplete and misleading. Google [redacted] (Juda, Tr. 1198).

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

Response to Finding No. 417:

The proposed finding is incomplete and misleading. As Dr. Iyer explained, [redacted] (CX 8005 at 3 (Iyer, Decl. ¶ 19)). In general, a paid search advertisement's rank in response to a user query depends on [redacted] (RX 704 (Iyer, Decl. ¶ 10)). Microsoft's Bing takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 11)). In general and within reason, [redacted] (RX 704 (Iyer, Decl. ¶ 11))

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

a. Auction Process

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

Response to Finding No. 418:

Respondent has no specific response.

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

Response to Finding No. 419:

The proposed finding is inaccurate and misleading. Google's AdWords [redacted] use a *modified* second price auction to determine cost-per-click. (RX 612A, Varian Video, Tr. 5; [redacted]). In Google's AdWords, for each advertiser, Google's algorithms determine the lowest bid the advertiser could have made to still have an Ad Rank greater than the advertiser whose ad is in the position below. (CX 9019 (Juda, Dep. at 54)). Ad Rank is a combination of [redacted] (CX 9019 (Juda, Dep. at 41-42)).

In Bing's system, an advertiser pays Microsoft [redacted] (RX 704 (Iyer, Decl. ¶ 9)). In general, a paid search advertisement's rank in response to a user query depends on [redacted] (RX 704 (Iyer, Decl. ¶ 10)).

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

Response to Finding No. 420:

The proposed finding is inaccurate and misleading. In Google's AdWords [redacted] an advertiser pays only if the user clicks on the advertiser's ad, which is the actual cost-per-click. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 12.) For each advertiser, Google's algorithms determine the lowest bid the advertiser could have made to still have an Ad Rank greater than the advertiser whose ad is in the position below. (CX 9019 (Juda, Dep. at 54)). Ad Rank is a combination of [redacted] (CX 9019 (Juda, Dep. at 41-42)).

In Bing's system, an advertiser pays Microsoft [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 9)). In general, a paid search advertisement's rank in response to a user query depends on [redacted] (RX 704 (Iyer, Decl. ¶ 10)).

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

Response to Finding No. 421:

The proposed finding is inaccurate, misleading, and not supported by the evidence. The number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-

1208, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [redacted] (Juda, Tr. 1215-1217).

Moreover, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a

complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273),

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms explained that an agreement resulting in fewer bidders is [redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted]

[redacted]

(RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted] (RX 704 (Iyer, Decl. ¶ 22)).

422. 1-800's own executives confirmed that more advertisers bidding leads to higher costs. (CX9001 (Bethers, IH at 196) ("if you have less competition in terms of trademarks, with Google, costs will be lower. That's true with any search that is a paid search with Google, Yahoo, or anyone else."); Bethers, Tr. 3768 ("I'm certain that there were times when cost per click may have gone up in response to competitive ads appearing on our trademark term. Yes."); CX0915 at 001 (July 28, 2008 email from Bryce Craven (former 1-800) to Brandon Dansie et al containing Weekly Dashboard Summary) ("There were more advertisers on our marks this week…which increased competition and CPCs…"); CX0051 at -004: "Low competition = low cost"; CX0296, *in camera* (marketing team presentation stating that [redacted]); CX9020 (Craven, Dep. at 26) ("[I]n general, the more competitive a term, or, in other words, the more advertisers that are competing for a search term, in general, the cost per click for that term will go up. And so in this instance, I'm referring to there were more competitors for our top trademarked keywords, which would have pushed the cost per clicks higher for those specific terms.") (discussing CX0915)); CX9016 (Judd, Dep. at 138 (testifying that keywords on which more advertisers bid tend to be more expensive than keywords on which fewer advertisers bid); CX0424 (June 5, 2013 email from Rick Galan (1-800) to Jonathan Coon and Tim Roush (1-800) stating in part: "It's true – certain high-volume (and thus high-competition) keywords have gotten extremely expensive."); CX0218 at 002 ("[Pay Per Click] is a dynamic bidding environment where costs and CTR are dependent upon what the competition is doing.")).

Response to Finding No. 422:

The proposed finding is inaccurate, misleading, and not supported by the evidence. The executives at 1-800 Contacts lack personal knowledge of the algorithms used by the search engines to set cost-per-click (CPC).

The evidence from the search engines shows that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [redacted] (Juda, Tr. 1215-1217).

Moreover, as set out below, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price

advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted]

[redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273),

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms explained that an agreement resulting in fewer bidders is [redacted]

[redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted]

(RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 22)).

423. [redacted] (Juda, Tr. 1114-1115, *in camera*; CX8005 at 003 (¶ 18) (Iyer, Decl.), *in camera*).

Response to Finding No. 423:

The proposed finding is not supported by the cited evidence. Neither Mr. Juda nor Dr. Iyer stated [redacted] (Juda, Tr. 1114-1115; CX 8005 at 3 (Iyer, Decl. ¶ 18)).

424. [redacted] (Juda, Tr. 1338, *in camera*).

Response to Finding No. 424:

The proposed finding is not supported by the cited evidence. At the cited pages, Mr. Juda testified that [redacted]

(Juda, Tr. 1337-1338).

In addition, the evidence from the search engines shows that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

425. Google includes the bid together with the three ad quality signals to determine the ad rank score. Then Google uses the ad rank score to determine the order of the advertisements on the page. (Juda, Tr. 1077); RX0612A at 0008 ("Google combines your bid with multiple quality factors, the clickthrough rate, the landing page, the ad relevancy, as well as the expected impact of ad formats -- to calculate a score for your ad called ad rank.").

Response to Finding No. 425:

The proposed finding is incomplete. In addition to the three quality signals (predicted CTR, ad relevance, and landing page quality), Google's algorithms also take into account the predicted effect of ad extensions and other formatting. (RX 716 at 1, 030; *see also* CX 9019 (Juda, Dep. at 41); Juda, Tr. 1113). Moreover, Google's algorithms may also take into account [redacted] (Juda, Tr. 1265-1266; CX 9019 (Juda, Dep. at 134-136)). Lastly, because ad position is influenced by the advertiser's bid, an ad may be placed higher on the page than other ads even though it has *lower* assessments of the quality signals, i.e., advertisers may buy their way to the top of the page. (Juda, Tr. 1331).

426. [redacted] (CX8005 at 003 (¶ 19) (Iyer, Decl.), *in camera*).

Response to Finding No. 426:

The proposed finding is incomplete. In many cases, Microsoft's algorithm [redacted]

(RX 704 (Iyer, Decl. ¶ 13)).

427. [redacted] (Juda, Tr. 1338, *in camera*).

Response to Finding No. 427:

Respondent has no specific response.

b. Keywords and Match Types

428. Advertisers use keywords to indicate which auctions they would like to enter. (Juda, Tr. 1084, 1081-1082; Hamilton, Tr. 395; *see also* CX8005 at 002 (¶ 10) (Iyer, Decl.), *in camera*).

Response to Finding No. 428:

The proposed finding is inaccurate. Keywords are words or phrases the advertiser believes potential customers are likely to use when searching for products or services provided by the advertiser. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 19). The advertiser matches the keywords with an ad or ads in an "Ad Group." (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 19). An advertiser's ad may be shown when the ad's keywords "match" a user's search query. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 20; RX 119 at 2 ("The relationship between queries and keywords is at the heart of search advertising with AdWords.")).

429. Advertisers can choose the match types they would like applied to those keywords to further delineate which auctions they would like to enter. (Juda, Tr. 1082)

Response to Finding No. 429:

The proposed finding is inaccurate. At the cited page, Mr. Juda said nothing about auctions. Rather, he testified that "match types are a way for an advertiser to express how broad of a set of search terms a particular keyword should match." (Juda, Tr. 1082).

430. Google's Exact Match function enters the ad into auctions for searches that are "roughly equivalent" to the keyword. (Juda, Tr. 1082).

Response to Finding No. 430:

The proposed finding is inaccurate. At the cited page, Mr. Juda said nothing about auctions. Moreover, even if a keyword matches a query, the advertiser may not be able to participate in an auction. The AdWords system "ignores" any ads that the system determines are

not eligible to appear, "like ads that target a different country or are disapproved." (RX 716 at 38). Exact match allows an ad to be matched to searches that include the ad's exact keyword, or close variants of the exact keyword, exclusively. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 29; RX 716 at 92).

431. Google's Phrase Match function enters the ad into auctions for "searches where the search term contains the keyword inside of it." (Juda, Tr. 1082 (further testifying, by way of example, that bidding on the word "toys" in phrase match would enter an advertiser's ad into auctions for searches such as "cheap toys").

Response to Finding No. 431:

The proposed finding is inaccurate. At the cited page, Mr. Juda said nothing about auctions. Moreover, even if a keyword matches a query, the advertiser may not be able to participate in an auction. The AdWords system "ignores" any ads that the system determines are not eligible to appear, "like ads that target a different country or are disapproved." (RX 716 at 38). "Phrase match" allows an ad to be matched to searches that include the ad's "exact keyword and close variants of [the] exact keyword, with additional words before or after." (RX 716 at 94; RX 716 at 117; Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 27).

432. Google's Broad Match function enters the ad into auctions for searches "that are topically relevant" to the keyword. (Juda, Tr. 1082).

Response to Finding No. 432:

The proposed finding is inaccurate. At the cited page, Mr. Juda said nothing about auctions. Moreover, even if a keyword matches a query, the advertiser may not be able to participate in an auction. The AdWords system "ignores" any ads that the system determines are not eligible to appear, "like ads that target a different country or are disapproved." (RX 716 at 38). Broad match allows an ad to be matched to relevant variations of the ad's keywords, including synonyms, singular or plural forms, possible misspellings, stemmings (such as floor

and flooring), related searches, and other relevant variations. (RX 716 at 90; Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 23).

433. [redacted] (Juda, Tr. 1124, *in camera*).

Response to Finding No. 433:

Respondent has no specific response.

434. [redacted] (Juda, Tr. 1124-1125, *in camera*).

Response to Finding No. 434:

The proposed finding is inaccurate and not supported by the evidence. Nothing in Mr. Juda's testimony speaks of [redacted] (Juda, Tr. 1124-1125).

435. [redacted] (Juda, 1126-1127, *in camera*).

Response to Finding No. 435:

The proposed finding is inaccurate and misleading. In response to the hypothetical presented by Complaint Counsel, [redacted] (Juda, Tr. 1125-1126). He then gave his [redacted] (Juda, Tr. 1125-1126).

436. [redacted] (CX8005 at 004 (¶ 26) (Iyer, Decl.), *in camera*).

Response to Finding No. 436:

The proposed finding is inaccurate and misleading. The cited evidence does not show that [redacted] (CX 8005 at 4 (Iyer, Dec. ¶ 26)).

437. Advertisers can indicate which auctions they want to avoid entering by using negative keywords. (CX9019 (Juda, Dep. at 72); Juda, Tr. 1131, *in camera*; CX8005 at 005 (¶ 28) (Iyer, Decl.), *in camera*).

Response to Finding No. 437:

The proposed finding is inaccurate and not supported by the cited evidence. None of the cited evidence refers to entering auctions. Negative keywords are a type of keyword that prevents an "ad from being triggered by a certain word or phrase." (RX 716 at 67).

438. [redacted] (Juda, Tr. 1133-1134, *in camera*; CX8005 at 005 (¶ 28) (Iyer, Decl.), *in camera*)

Response to Finding No. 438:

The proposed finding is not supported by the cited evidence pertaining to Google.

439. [redacted] (CX9019 (Juda, Dep. at 79), *in camera*; Juda, Tr. 1131, *in camera*).

Response to Finding No. 439:

Respondent has no specific response.

440. [redacted] (Juda, Tr. 1131, *in camera*).

Response to Finding No. 440:

The proposed finding is incomplete. Negative keyword match types have differences from the normal match types. (RX 119 at 11). Queries "that are close variations of exact match negative keywords won't be excluded." (RX 119 at 11). Because of this matching behavior, an advertiser must separately add close variations as negative keywords. (RX 119 at 11).

441. [redacted] (Juda, Tr. 1131-1132, *in camera*).

Response to Finding No. 441:

The proposed finding is incomplete. Negative keyword match types have differences from the normal match types. (RX 119 at 11). Queries "that are close variations of phrase match negative keywords won't be excluded." (RX 119 at 11). Because of this matching behavior, an advertiser must separately add close variations as negative keywords. (RX 119 at 11).

442. [redacted] (Juda, Tr. 1132, *in camera*).

Response to Finding No. 442:

The proposed finding is incomplete. Negative keyword match types have differences from the normal match types. (RX 119 at 11). Negative broad match will not "exclude queries that are synonyms or close variations of the negative keyword. It will only exclude queries that include all words within a keyword, irrespective of the order in which the words appear." (RX 119 at 11).

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

443. Online contact lens retailers' decisions about how to allocate their search advertising expenditures are made based return on investment, which the retailers often express in terms of the cost of acquiring a customer, the cost of acquiring an order, and/or the cost of a conversion. (*Infra* §§ 6.a–6.c).

Response to Finding No. 443:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

444. Online contact lens retailers calculate the Return on Investment ("ROI") for a keyword by comparing the advertising expenditures "on a certain keyword as compared to the orders attributable to that keyword." (Hamilton, Tr. 398; Hamilton, Tr. 396-397 (Walgreens and Vision Direct determined "return on investment" for particular keywords based on "cost per order," which means "total amount of the ad spend divided by the number of orders."); CX 9005 (Dansie, IHT at 16) (at 1-800 Contacts, ROI was evaluated in at least two ways: it was calculated as the ratio between the amount spent on search advertising and the revenue on sales, and also the amount spent on advertising and the number of new customers acquired)).

Response to Finding No. 444:

The proposed finding misstates the cited testimony and should be disregarded. Mr. Hamilton did not use the quoted language, which was part of a question by Complaint Counsel. His answer noted that his analysis was based "on the keyword match type combination as a unit." (Hamilton, Tr. 397). Mr. Dansie also did not use the quoted language in his testimony. (CX 9005 (Dansie, IHT at 16)).

445. Cost per acquisition, sometimes referred to as "acquisition cost" or "CPA," refers to the the amount spent per order received; calculating the amount spent divided by the number of orders received. (Clarkson, Tr. 226-227; Alovis, Tr. at 995; CX9036 (Duley, Dep. at

134), *in camera* [redacted]; CX9039 (Clarkson, Dep. at 166); CX 9038 (Hamilton, Dep. at 9-10); CX9028 (Roundy, Dep. at 216-218); CX9034 (Roush, Dep. at 216-217).

Response to Finding No. 445:

The proposed finding is incomplete and misleading. Depending on the context, cost per acquisition may be based on the costs for a particular paid search ad campaign, all advertising costs, or all marketing costs, divided by the number of orders. The proposed finding should also be disregarded because most of the cited testimony does not support the finding as framed. Mr. Roush, for example, described a "very sophisticated regression analysis where you take a lot of different inputs in terms of your advertising spend, your search information, your affiliate information, all of the different data that you have in your business . . . ." (CX 9034 (Roush, Dep. at 217-218)). Mr. Roundy's deposition transcript ends at page 117, so the citation to his testimony is inaccurate and unhelpful. Mr. Clarkson testified that the "concept of acquisition cost" is "not a pure measure" of the average cost for a new customer "because sometimes repeat customers come back in through that channel. . . ." (Clarkson, Tr. 226). Mr. Alovis did not talk of "cost per acquisition" as only focusing on new customers, as the finding states. (Alovis, Tr. 995). And Mr. Duley testified that his company, Visionworks, [redacted] (CX 9036, Duley, Dep. at 134), *in camera*.

446. "Cost per order" refers to "the total amount of the ad spend divided by the number of orders." (Hamilton, Tr. at 397).

Response to Finding No. 446:

The proposed finding is incomplete and misleading. The finding is based on the testimony of a single retailer and does not support a finding of a general definition of "cost per order."

447. "Cost per conversion" is the cost divided by the number of orders, or "conversions." (Clarkson, Tr. 227; see also CX9033 (Mohan, Dep. at 153-154)).

Response to Finding No. 447:

The proposed finding is incomplete and misleading. Depending on the context, cost per conversion may be based on the costs for a particular paid search ad campaign, all advertising costs, or all marketing costs, divided by the number of orders or "conversions."

448. With respect to contact lens customers, the term "lifetime value" refers to the amount of revenue a company expects to generate from a customer over the life of the business relationship between the retailer and the customer. It is calculated by the probability that the customer will come back multiplied with the expected sales revenue from multiple orders. (Clarkson, Tr. 232; CX9039 (Clarkson, Dep. at 126-127); CX9017 (Blackwood, Dep. at 178-179); CX9033 (Mohan, Dep. at 35-36); CX9034 (Roush, Dep. at 29).

Response to Finding No. 448:

The proposed finding inaccurately describes the cited testimony. For example, Mr. Clarkson pointed out that the calculation of a customer's lifetime value is an "estimate" that also includes a "discount[ ] for the future value of money" and "of course, you have to deduct the initial cost of marketing to acquire the customer from the – from that valuation." (CX 9039 (Clarkson, Dep. at 126-127). Ms. Blackwood described even more factors, (CX 9017 (Blackwood Dep. at 178-179), and Mr. Roush noted that customer lifetime value estimates "vary significantly from customer to customer, so that . . . you can't just look at that one metric and make many conclusions about a particular program." (CX 9034 (Roush, Dep. at 29). Ms. Mohan, when asked to "give us some insight about how lifetime value might be calculated," testified that "I have to guess here." (CX 9033 (Mohan, Dep. at 36).

a. ROI Drives Decisions Regarding Advertising Expenditures

449. According to Yahoo, "[a]n active bid management program with a clear understanding of ROI and traffic goals is critical to optimizing a campaign." (CX1806-038 at 030 (Yahoo Category Overview, Agency Training, June 15-16, 2005)).

Response to Finding No. 449:

Respondent has no specific response.

450. Vision Direct and Walgreens.com made decisions about how to allocate their search advertising expenditures based on return on investment. (Hamilton, Tr. 396 ("My responsibility [with respect to Walgreens' and Vision Direct's use of keywords related to contact lenses] was to manage the ad spend budget related to the portfolio of keywords that we placed bids on within the auction and to manage that to acceptable return on investment goals from that advertising spend.")).

Response to Finding No. 450:

Respondent has no specific response.

451. In 2012, 1-800 Contacts evaluated the ROI or effectiveness of marketing spend for search advertising by looking at NI orders, CAC, CPO and CPC. (CX0040 at 001-002 (May 1, 2012 e-mail from Laura Schmidt to Joan Blackwood re: Due Diligence: Advertising)).

Response to Finding No. 451:

Respondent objects to Finding No. 451 on the ground that the only document cited in support of the finding (CX 40) was not admitted. *See* JX 0002-A-006; Order on Post-Trial Briefs, p. 2 and footnote 1. This proposed finding should be disregarded. *Id*.

452. In making decisions about how to allocate its search advertising expenditures, Vision Direct and Walgreens bid on keywords that "demonstrated a strong return on investment." (Hamilton, Tr. 397 ("Q. In general, how did you determine which keywords to bid on? A. In general, terms that we – that demonstrated a strong return on investment, largely as measured by a low cost per order, ad spend per order.")).

Response to Finding No. 452:

Respondent objects to Finding No. 452 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion.

453. In making decisions about how much to bid on specific keywords, Vision Direct and Walgreens "tend[ed] to focus on the ones that drive the greatest amount of orders" because "there's a time value. You can only manage so many keywords effectively." (Hamilton, Tr. 398-399).

Response to Finding No. 453:

Respondent objects to Finding No. 453 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion.

454. For keywords for which Vision Direct and Walgreens had some "performance history," Vision Direct and Walgreens made decisions regarding how much money to bid on specific keywords by "review[ing] regularly the performance history" of keyword-match type combinations, focusing on "cost per order" as "the basic key performance indicator." (Hamilton, Tr. 398).

Response to Finding No. 454:

Respondent objects to Finding No. 454 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion.

455. For keywords that Vision Direct and Walgreens had not used in the past, Vision Direct and Walgreens made decisions regarding how much money to bid on specific keywords by performing research using "tools that are available for that purpose," setting an initial bid in the auction, and then assessing performance on an ongoing basis. (Hamilton, Tr. 398).

Response to Finding No. 455:

Respondent objects to Finding No. 713 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion.

456. AC Lens makes decisions about what types of advertising to use and how much to spend on particular advertising efforts using an "acquisition cost model." (CX9018 (Drumm, Dep. at 22-23); *see also* Clarkson, Tr. 231 ("Q. And how do you go about making decisions about how much to spend on a particular type of advertising? A. We have a target customer acquisition cost, which does very by lens, and we work sort of in a fairly disciplined way against that."); Clarkson, Tr. 222 ("[E]verything we do in marketing is targeted or is geared by a target customer acquisition cost.")).

Response to Finding No. 456:

Respondent has no specific response.

457. AC Lens takes a customer's expected "lifetime value" to the company into account in determining target customer acquisition costs. (Clarkson, Tr. 231-232).

Response to Finding No. 457:

Respondent has no specific response.

458. If AC Lens is unable to meet its target customer acquisition cost using a particular advertising campaign, AC Lens will "discontinue" the campaign." (CX9018 (Drumm, Dep. at 22-23 ("[O]ur model is based on an acquisition cost model . . . [W]e try "to fit into an acquisition cost for a new customer. And if we can't track that and if we can't hit the metrics that we need to reach, then we discontinue a campaign.")).

Response to Finding No. 458:

Respondent has no specific response.

459. Lenses for Less "select[s] keywords by assessing the return on investment." (CX8000 at 001 (¶ 6) (Studebaker, Decl.)).

Response to Finding No. 459:

The proposed finding should be disregarded because Mr. Studebaker's declaration reveals that he lacks the necessary foundation for the quoted statement, which is framed in the present tense. Mr. Studebaker's declaration states that "[i]n about 2010 we outsourced our bidding on search advertising to a third party which charges a monthly fee to provide web support and search advertising management." (CX 8000 at 1 (¶ 6) (Studebaker, Decl.)). Because the declaration nowhere states that Mr. Studebaker has played any role in search advertising management over the last seven years, there is an insufficient foundation for the proposed finding.

460. WebEyeCare [redacted] (CX9014 (Batushansky, Dep. at 51), *in camera*).

Response to Finding No. 460:

Complaint Counsel's proposed Finding No. 460 is irrelevant and should be disregarded. There is no evidence that Mr. Batushansky evaluated the performance of bidding on 1-800 Contacts' trademarked terms to determine whether or not it "hit" Web Eye Care's cost-per-acquisition target. Furthermore, it was established that he lacked sufficient information upon which to make such an analysis, even if he had attempted such an analysis. When asked about the performance of ads presented as the result of bidding on 1-800 Contacts' trademarked terms, Mr. Batushansky's testified that [redacted] (CX9000 (Batushansky, IHT at 66), *in camera*). Moreover, as Mr. Batushansky admitted, [redacted]. (CX9000 (Batushansky, IHT at 64-65), *in camera*). Mr. Batushansky thus lacked personal knowledge to testify on this topic and was merely speculating. Second, Mr. Batushansky's testimony from his investigational hearing is contradicted by his deposition testimony, where he was subject to cross-examination, and where he acknowledged that he [redacted]. (CX9014 (Batushansky, Dep. at 45-48), *in camera*).

461. [redacted] (CX9014 (Batushansky, Dep. at 51), *in camera*).

Response to Finding No. 461:

Respondent has no specific response.

462. LensDirect determines how to allocate its advertising expenditures within the paid search channel by "spend[ing] money on the keywords that convert the best." (Alovis, Tr. 998).

Response to Finding No. 462:

The proposed finding is incomplete. Mr. Alovis also testified that LensDirect places a daily limit on its paid search expenses, which is currently $1000 per day. (Alovis, Tr. 1000).

463. LensDirect calculates a target cost per acquisition for the company based on average revenue and margins. (Alovis, Tr. 998-999).

Response to Finding No. 463:

The proposed finding misstates the cited testimony and should be disregarded. The testimony refers to average margins, not revenue.

464. Metrics that LensDirect's CEO focuses on include the conversion rate, representing the percentage of users who made a purchase during their visit to the website, and the cost per acquisition, representing how much LensDirect spends to get an order. (Alovis, Tr. 995-996; CX9023 (Alovis Dep. at 108)).

Response to Finding No. 464:

The proposed finding misstates the cited testimony and should be disregarded. Mr. Alovis testified at trial that "[e]verything matters I would say equally as much," not that he focused in particular on just two items. (Alovis, Tr. 996). Moreover, the cited deposition testimony by Mr. Alovis contains no mention at all of the subject matter of the proposed finding. (CX 9023 (Alovis, Dep. at 108)).

465. "Lens Discounters selects keywords based on how well they perform on a 'cost per conversion' basis, that is, how much Lens Discounters spends on any advertisement that results in a sale." (CX8003 at 002 (¶ 8) (Mitha, Decl.); *see also id.* ("Lens Discounters continually evaluates the performance of the keywords on which we bid. If a keyword

performs well, that is, if the keyword helps Lens Discounters secure customer orders at a favorable cost per conversion, then we continue to bid on that keyword.").

Response to Finding No. 465:

Respondent has no specific response.

b. The Desire to Drive Repeat Business Affects Retailers' Target Acquisition Costs

466. Repeat sales, that is, the retention of customers, is an important goal for online contact lens retailers. (Alovis, Tr. 984-985; *see also infra* ¶¶ 467-81).

Response to Finding No. 466:

Respondent has no specific response.

467. A large percentage of Walgreens and Vision Direct's contact lens orders came from repeat orders of contact lenses. (Hamilton, Tr. 401).

Response to Finding No. 467:

Complaint Counsel's Proposed Finding No. 467 is incomplete and misleading. As an initial matter, Mr. Hamilton testified that he is only generally aware of Vision Direct's repeat business because "[i]t's not the area of my responsibility directly. That's retention marketing. And I'm not responsible for that." (CX 9038 (Hamilton, Dep. at 42)). In addition, this finding fails to indicate that Mr. Hamilton testified at his deposition that a certain percentage of those making repeat orders of contact lenses come to Vision Direct's website through navigational searches, i.e., they "come through trademark-related terms, whether its 'VisionDirect.com' or 'Vision,' space, 'Direct,' exact match." (CX 9038 (Hamilton, Dep. at 42, 72).

468. Vision Direct and Walgreen's Functional Manager of Digital Marketing, Mr. Hamilton, testified that "this particular business is a strong repeat business." (Hamilton, Tr. 401).

Response to Finding No. 468:

Mr. Hamilton lacks a sufficient foundation for any opinion regarding whether a particular business is a "strong repeat business." Mr. Hamilton previously testified that he is only generally aware of Vision Direct's repeat business because "[i]t's not the area of my responsibility directly. That's retention marketing. And I'm not responsible for that." (CX 9038 (Hamilton, Dep. at 42)).

469. Vision Direct and Walgreen's Functional Manager of Digital Marketing, Mr. Hamilton, testified that the reason it was important for Walgreens to develop or increase consumer awareness of its online contact lens business was "not only direct marketing to [consumers] to acquire that order, it's really to acquire a customer that then Walgreens or Vision Direct can have an ongoing dialogue with." (Hamilton, Tr. 401).

Response to Finding No. 469:

Mr. Hamilton lacks a sufficient foundation for any opinion regarding whether a particular business is a "strong repeat business." Mr. Hamilton previously testified that he is only generally aware of Vision Direct's repeat business because "[i]t's not the area of my responsibility directly. That's retention marketing. And I'm not responsible for that." (CX 9038 (Hamilton, Dep. at 42)).

470. AC Lens often spends more to acquire a new customer than the company expects to earn from that new customer's first purchase because the company has observed, in historical data, the proportion of those new customers who will return to make future purchases. (Clarkson, Tr. 231 (noting also that "in that sense, we're building an annuity of future revenue by overspending a little bit on that first purchase, but we can't overspend beyond the lifetime value or otherwise it's a losing proposition"); CX9039 (Clarkson, Dep. at 34 ("[I]f you only buy from me once, I may actually lose money on the sale because of my marketing expense and may not become profitable until they make a second or subsequent purchase.")); Clarkson, Tr. 231-232 (noting that AC Lens takes a customer's expected "lifetime value" to the company into account in determining its target customer acquisition cost)).

Response to Finding No. 470:

The proposed finding should be disregarded because the cited testimony does not support the statement that ACLens "often" spends more to acquire a new customer than it expects to earn on the first purchase. Mr. Clarkson testified only that "I *may* actually lose money" on the customer's first sale. (CX 9039 (Clarkson, Dep. at 34)) (emphasis added).

471. AC Lens CEO Mr. Clarkson testified that "when we get a new customer, we very much want them to become a repeat customer." (CX9039 (Clarkson, Dep. at 33)).

Response to Finding No. 471:

Respondent has no specific response.

472. LensDirect sometimes spends more money to acquire a new customer than it makes on an initial sale. (Alovis, Tr. 984).

Response to Finding No. 472:

Respondent has no specific response.

473. The reason that LensDirect sometimes spends more money to acquire a new customer than it makes on an initial sale is that the sale of contact lenses is "a retention business" in which the retailer's "goal" is for a new customer to make not only an initial but also subsequent purchases from the retailer. (Alovis, Tr. 984-985 ("Q. Why would you spend more money than you make on an initial sale? A. The goal is – it's a retention business. You got to hope that they'll come back for a second, third, fourth, fifth, you know, forever time.")).

Response to Finding No. 473:

Respondent has no specific response.

474. LensDirect is willing to sell at a loss by spending more money to acquire a new customer than it will earn from its first sale to that customer because LensDirect has concluded that "the customer will enjoy working with us enough that they will continue to buy from LensDirect." (Alovis, Tr. 1011).

Response to Finding No. 474:

Respondent has no specific response.

475. LensDirect was willing to sell at a loss by spending more money to acquire a new customer than it earned from its first sale to that customer because LensDirect "believe[s] in the long-term relationship." (Alovis, Tr. 1011).

Response to Finding No. 475:

Respondent has no specific response.

476. [redacted] (CX9014 (Batusahansky, Dep. at 148), *in camera*).

Response to Finding No. 476:

Complaint Counsel's Proposed Finding No. 476 is misleading, inaccurate, and not supported by the cited testified. Mr. Batushansky was asked to compare [redacted] (CX 9014 (Batushansky, Dep. at 148), *in camera*).

477. [redacted] (CX9014 (Batushansky, Dep. at 148), *in camera*).

Response to Finding No. 477:

Complaint Counsel's Proposed Finding No. 477 is misleading, inaccurate, and not supported by the cited testified. Mr. Batushansky was asked about [redacted]

[redacted] (CX 9014 (Batushansky, Dep. at 148), *in camera*).

478. [redacted] (CX9014 (Batushansky, Dep. at 148), *in camera*).

Response to Finding No. 478:

Complaint Counsel's Proposed Finding No. 478 is misleading, inaccurate, and not supported by the cited testimony. Mr. Batushansky was asked about [redacted] (CX 9014 (Batushansky, Dep. at 51, 57-60, 148), *in camera*).

479. [redacted] (CX9014 (Batushanksy, Dep. at 148), *in camera*).

Response to Finding No. 479:

Complaint Counsel's Proposed Finding No. 479 is misleading, inaccurate, and not supported by the cited testimony. Mr. Batushansky was asked to compare [redacted]

[redacted] (CX 9014 (Batushansky, Dep. at 148), *in camera*). Respondent does not dispute that it was financially beneficial for Web Eye Care to retain existing customers.

480. Customer Service was important for Memorial Eye's online business to get repeat customers. (Holbrook, Tr. 1890-1891).

Response to Finding No. 480:

Respondent has no specific response.

481. The profit margin on a repeat customer is better because it costs less to provide service and orders, and foregoes the need to advertise to the consumer. (Holbrook, Tr. 1891-1892).

Response to Finding No. 481:

Respondent has no specific response.

c. Contact Lens Retailers Increase Spending on Search Advertising in Response to Return on Investment

482. [redacted] (Juda, Tr. 1120, 1122, *in camera*).

Response to Finding No. 482:

The proposed finding is incomplete and misleading. On cross-examination, Mr. Juda clarified that his testimony [redacted] (Juda, Tr. 1270-1272). He had [redacted] (Juda, Tr. 1272).

483. [redacted]

[redacted] (Juda, Tr. 1123, *in camera*).

Response to Finding No. 483:

The proposed finding is incomplete and misleading. Immediately following the cited testimony, Mr. Juda admitted that [redacted] (Juda, Tr. 1123).

484. Peter Clarkson of AC Lens explained that AC Lens does not strictly limit its AdWords budget. As long as the cost-per-click is profitable, "there would be no limit" to the amount AC Lens would want to spend. On the other hand, "if we can't garner customers at the acquisition cost we're targeting, then we'll spend less than the budget." (Clarkson, Tr. 233-234).

Response to Finding No. 484:

The proposed finding should be disregarded because it misstates the cited testimony. Mr. Clarkson did not testify that as long as the cost-per-click is profitable, "there would be no limit" to ACLens' spending. Instead, the quoted portion was specific to an extreme situation where "the marketing director came to me and said, I can get a million customers at $10 per customer. . . ." (Clarkson, Tr. 234). There is no evidence that ACLens could obtain *any* customers at $10 per customer through paid search advertisements using 1-800 Contacts' trademarks as keywords, much less 1,000,000 customers.

485. Memorial Eye did not set a "hard budget" for its marketing expenses for its online businesses. (Holbrook, Tr. 1901).

Response to Finding No. 485:

Respondent has no specific response.

486. Fluctuations in Memorial Eye's marketing budget were based "primarily on return on investment, what kind of return we were getting on the search advertising primarily." (Holbrook, Tr. 1901-1902 (also testifying that "If we got a good return on it, we'd

obviously want to spend more – I would want to spend more money on it. If we didn't get a good return on it, I want to spend less money on it.")).

Response to Finding No. 486:

Respondent has no specific response.

487. Memorial Eye's budget for marketing expenses "did fluctuate" as the search manager was empowered to seek additional funds "if he saw a good reason for it." (Holbrook, Tr. 1901).

Response to Finding No. 487:

Respondent has no specific response.

488. Lens Discounters' "paid search advertising budget is flexible. (CX8003 at 002 (¶ 7) (Mitha, Decl.) ("If we see strong returns on investment from our online paid search advertising, we are able to allocate more money into the budget. In theory, if we consistently meet our goals in terms of return on investment, we would have an unlimited budget. In practice, our spend on online paid search advertising has gone up dramatically in the last several years.").

Response to Finding No. 488:

Respondent has no specific response.

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

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

489. Search advertising accounts for a significant portion of online contact lens retailers' advertising expenditures, because it is a highly cost-efficient means of acquiring customers. (*See infra* §§ IV.B.2-IV.B.6).

Response to Finding No. 489:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

490. Some of 1-800 Contacts' online competitors advertise exclusively online, and a majority of that goes to paid search. (*See infra* ¶¶ 492-505).

Response to Finding No. 490:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

491. Dr. Murphy admits that [redacted] (RX0739 at 0092 (Murphy Expert Report Exhibit 8), *in camera*).

Response to Finding No. 491:

The proposed finding misstates the cited chart and, in particular, appears to misconstrue the column labeled "Paid Search as a Share of Internet Expenses." (RX 739 at 92 (Murphy Expert Report)).

492. During Mr. Hamilton's tenure at Vision Direct, Vision Direct advertised "almost exclusively online." (CX9038 (Hamilton, Dep. at 23)). Most of Vision Direct's advertising budget was spent on search advertising. (Hamilton, Tr. 402-403).

Response to Finding No. 492:

Respondent has no specific response.

493. During Mr. Hamilton's tenure at Vision Direct, [redacted] (Hamilton, Tr. 431-432, *in camera* [redacted]; *see also* CX8002 at 002 (¶ 6) (Hamilton, Decl.), *in camera* [redacted]).

Response to Finding No. 493:

Respondent has no specific response.

494. Most of Walgreens' contact lens advertising budget was spent on search advertising. (Hamilton, Tr. 402-403; *see also* Hamilton, Tr. 400 (testifying that search advertising "was how Walgreens advertised the fact that it sold contact lenses. . . . [S]ince we only sold them online, no one would know about it unless we advertised it. And we advertised it online.")).

Response to Finding No. 494:

Complaint Counsel's Proposed Finding No. 494 is incomplete and misleading. Mr. Hamilton previously testified, for example, that print media was a "material" portion of Walgreen's advertising. And he testified that there is nothing "that would prevent Walgreens from advertising the sale of contact lenses on television if it wanted to." (CX 9008 (Hamilton, IHT at 65)).

495. Search advertising accounts for between 60 and 70 percent of AC Lens's advertising expenditures, not including search advertising that AC Lens' affiliates engage in on AC Lens' behalf. (Clarkson, Tr. 220).

Response to Finding No. 495:

Respondent has no specific response.

496. AC Lens also does some advertising via "affiliates," which are companies that drive traffic to an internet retailer's website using a variety of methods, including paid search among other things. (Clarkson, Tr. 221 (an "affiliate" is "generally another website that, using one method or another, drives traffic to [an internet retailer's] website, and then that affiliate will receive a commission on any sales that result from traffic that they drove to the website."); CX9039 (Clarkson, Dep. at 171, 173-174 (explaining that some

affiliates "are themselves engaged in pay-per-click advertising")); CX9018 (Drumm, Dep. at 100)). Affiliate advertising accounts for approximately 15% of AC Lens' advertising expenditures. (Clarkson, Tr. 221; CX9039 (Clarkson, Dep. at 171, 173); CX9018 (Drumm, Dep. at 100)).

Response to Finding No. 496:

Respondent has no specific response.

497. Other than search and affiliate marketing, AC Lens does very little other advertising. (CX9039 (Clarkson, Dep. at 172)).

Response to Finding No. 497:

The proposed finding is inaccurate and misleading and should be disregarded.

Mr. Clarkson and Mr. Drumm testified that ACLens engages in numerous other forms of advertising in addition to search and affiliate marketing. For example, ACLens uses "email prospecting," which involves email advertising to consumers who visit ACLens' websites but do not make an immediate purchase. (Clarkson, Tr. 222-223). Mr. Clarkson testified that email prospecting had been "surprisingly productive" for ACLens. (Clarkson, Tr. 223). In addition, Mr. Drumm testified that for retaining customers, email marketing "is our best option" and generates more returning customer orders than any other form of marketing. (CX 9018 (Drumm, Dep. at 113, 123-124)). Mr. Drumm also testified that ACLens uses Product Listing Ads ("PLAs") on Google and that PLAs "are a very important piece of the puzzle." (CX 9018 (Drumm, Dep. at 65)). *See also* RX 19 (September 2015 ACLens marketing document stating that "PLAs have become the main driver of traffic and orders for almost every account"). ACLens also places advertisements on Facebook. (CX 9018 (Drumm, Dep. at 24).

498. Paid search advertising accounts for a significant majority of LensDirect's marketing expenditures. (CX9023 (Alovis, Dep. at 53 (in 2016, search advertising accounted for "the vast majority," approximately 85 to 90 percent, of LensDirect's marketing expenditures)); Alovis, Tr. 992 (LensDirect spends more money on paid search advertising through Google than on any other marketing channel)).

Response to Finding No. 498:

Respondent has no specific response.

499. Memorial Eye "primarily relied on search advertising, online search advertising" for its online contact lens business. (Holbrook, Tr. 1903; *see also* CX9024 (Holbrook, Dep. at 27) (testifying that "online advertising, search advertising" was the "vast, vast, vast majority" of its advertising spend)).

Response to Finding No. 499:

Complaint Counsel's Finding No. 499 is misleading and incomplete. The only witness to provide sworn testimony on behalf of Memorial Eye, Eric Holbrook, testified that Memorial Eye [redacted] (Holbrook, Tr. 2043). Memorial Eye [redacted] (Holbrook, Tr. 2043). And it [redacted] (Holbrook, Tr. 2043). Memorial Eye also [redacted] (Holbrook, Tr. 2043). Thus, when Complaint Counsel state that Memorial Eye "primarily relied" on search advertising, they mean that Memorial Eye [redacted] Moreover, with respect to paid search advertising, Mr. Holbrook [redacted] (Holbrook, Tr. 2039–2040). He also [redacted] (Holbrook, Tr. 2042). Although Mr. Holbrook vaguely testified that having Memorial Eye's ads appear in response to searches for 1-800 Contacts' trademarks was "important," he also acknowledged that he did not manage Memorial Eye's paid search advertising (CX9024 (Holbrook, Dep. at 47–48)); that he

[redacted] (Holbrook, Tr. 2042); and that he [redacted] (Holbrook, Tr. 1966). Indeed, during the entire time that Memorial Eye sold contact lenses online, [redacted] (Holbrook, Tr. 1966).

500. **{WebEyeCare does not engage in any advertising other than online advertising.}** (CX9014 (Batushansky, Dep. at 109), *in camera*).

Response to Finding No. 500:

Respondent has no specific response.

501. [redacted] (CX9014 (Batushansky, Dep. at 110, 115-16), *in camera*).

Response to Finding No. 501:

Complaint Counsel's Proposed Finding No. 501 is misleading and inaccurate and should be disregarded. When asked why WebEyeCare [redacted] (CX 9014 (Batushansky, Dep. at 116), *in camera*).

502. Search advertising is the only type of online advertising for contact lenses that Walmart uses. (CX9033 (Mohan, Dep. at 18)).

Response to Finding No. 502:

The proposed finding is not supported by the evidence. Ms. Mohan, whose responsibilities are limited to search advertising, testified that she was aware of paid search

advertising but did not know whether Walmart had "tried anything else." (CX 9033 (Mohan, Dep. at 9-10, 17)).

503. Lenses for Less "engage[s] in no other forms of internet advertising" other than search advertising. (CX8000 at 001 (¶ 8) (Studebaker, Decl.)).

Response to Finding No. 503:

Respondent has no specific response.

504. [redacted] (CX9036 (Duley, Dep. at 54), *in camera*).

Response to Finding No. 504:

The proposed finding overstates Mr. Duley's testimony on the issue described. Mr. Duley qualified the quoted language [redacted] (CX 9036 (Duley, Dep. at 54)).

505. "Online paid search advertising is the main form of advertising that Lens Discounters purchases." (CX8003 at 002 (¶ 6) (Mitha, Decl.); see also id. ¶ 7 (Lens Discounters' "spend on online paid search advertising has gone up dramatically in the last several years. Today, we spend five times more on online paid search advertising than we did in 2010.").

Response to Finding No. 505:

Respondent has no specific response.

2. Search Advertising Accounts for a Significant Portion of Online Contact Lens Retailers' Orders

506. Search advertising accounts for a significant portion of online contact lens retailers' orders. (*See infra* ¶¶ 507-509).

Response to Finding No. 506:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by

specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

507. Search advertising "was a major driver" of traffic to Vision Direct and Walgreens' online contact lens retail websites, and "drove new customers as well as supported with repeat customers." (Hamilton, Tr. 399).

Response to Finding No. 507:

Respondent objects to Finding No. 507 as lacking foundation and as being incomplete and misleading. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion. In addition, this finding fails to indicate that Mr. Hamilton testified at his deposition that a certain percentage of those making repeat orders of contact lenses come to Vision Direct's website through navigational searches, i.e., they "come through trademark-related terms, whether its 'VisionDirect.com' or 'Vision,' space, 'Direct,' exact match." (CX 9038 (Hamilton, Dep. at 72)).

508. Pay-per-click search advertising "is the dominant portion of [AC Lens'] new customer acquisition." (CX9039 (Clarkson, Dep. at 174); CX9018 (Drumm, Dep. at 123-24 (among marketing channels currently used by AC Lens, pay-per-click generates the most new customer orders and the most revenue))).

Response to Finding No. 508:

The proposed finding is incomplete and misleading and should be disregarded. Immediately after Mr. Clarkson referred to pay-per-click search advertising as a "dominant portion of our new customer acquisition" (as quoted in the proposed finding), he reversed course and stated that he was "*assum[ing]* that it remains the dominant piece, but I would hesitate to put a percentage on it." (CX 9039 (Clarkson, Dep. at 174)) (emphasis added).

509. Search advertising "was the way [Memorial Eye's online businesses] attracted new customers and increased our volume." (Holbrook, Tr. 1903-1904); see also (CX9024 (Holbrook, Dep. at 30-31)) ("[t]he typical way that we attracted new customers was through the online search advertising.").

Response to Finding No. 509:

Complaint Counsel's Finding No. 509 is misleading and incomplete. The only witness to provide sworn testimony on behalf of Memorial Eye, Eric Holbrook, testified that Memorial Eye [redacted] (Holbrook, Tr. 2043). Memorial Eye [redacted] (Holbrook, Tr. 2043). And it [redacted] (Holbrook, Tr. 2043). Memorial Eye also [redacted] (Holbrook, Tr. 2043). Thus, when Complaint Counsel state that Memorial Eye primarily utilized search advertising to attract new customers, they mean that Memorial Eye [redacted] Moreover, with respect to paid search advertising, Mr. Holbrook [redacted] (Holbrook, Tr. 2039–2040). He also [redacted] (Holbrook, Tr. 2042). Although Mr. Holbrook vaguely testified that having Memorial Eye's ads appear in response to searches for 1-800 Contacts' trademarks was "important," he also acknowledged that he did not manage Memorial Eye's paid search advertising (CX9024 (Holbrook, Dep. at 47–48)); that he [redacted] (Holbrook,

Tr. 2042); and that he [redacted] (Holbrook, Tr. 1966). Indeed, during the entire time that Memorial Eye sold contact lenses online, [redacted] (Holbrook, Tr. 1966).

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

Response to Finding No. 510:

Complaint Counsel's Proposed Finding No. 510 is misleading, inaccurate, and should be disregarded. Complaint Counsel fail to acknowledge that what Mr. Batushansky actually testified to was that WebEyeCare had tried [redacted] (CX 9014 (Batushansky, Dep. at 109-111, 117), *in camera*.) [redacted] (CX 9014 (Batushansky, Dep. at 111), *in camera*.)

3. Search Advertising is Essential for Online Contact Lens Retailers

511. Online contact lens retailers view search advertising as an essential form of advertising for their businesses. (*See infra* ¶¶ 512-522).

Response to Finding No. 511:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

512. Pay-per-click search advertising is the most effective and important marketing channel AC Lens has for growing and maintaining its business. (Clarkson, Tr. 230 (pay-per-click "has been historically the lifeblood of [AC Lens'] growth.") CX9039 (Clarkson, Dep. at 175-76 (search advertising has played a "tremendous role" in AC Lens's success)); CX9018 (Drumm, Dep. at 124-125 ("Pay-per-click" search advertising is the most effective marketing channel that AC Lens uses and is "the easiest way to get in front of new customers.")); CX9018 (Drumm, Dep. at 124-25 (search advertising is particularly effective because it is "high volume," in that it presents AC Lens with a high "[t]otal number of potential impressions." The "volume from search is massive, so that's why it's the most important probably.")); (CX9018 (Drumm, Dep. at 112 (pay-per-click search advertising and affiliate marketing are two of the "three best ways to get new customers."))).

Response to Finding No. 512:

The proposed finding is incomplete and should be disregarded because it is not supported in full by the cited testimony. The proposed finding states that pay-per-click search advertising is "the most effective and important marketing channel ACLens has for growing and maintaining its business." However, *none* of the cited testimony supports the proposition that pay-per-click search advertising is the most effective, or the most important, marketing channel for ACLens to *maintain* its business. Mr. Drumm (ACLens' Director of Marketing) testified that for retaining customers, "email is our best option." (CX 9018 (Drumm, Dep. at 113)); CX 9018 (Drumm,

Dep. at 123-124 (testifying that e-mail marketing generates the most returning customer orders). Mr. Drumm also testified that affiliate marketing is "probably more cost-effective" than paid search advertising. (CX 9018 (Drumm, Dep. at 124)).

513. For Memorial Eye, search advertising was "vital" for building its online contact lens retail business. (CX9024 (Holbrook, Dep. at 30-31); Holbrook, Tr. 1903 (search advertising was critical for Memorial Eye's growth); CX9024 (Holbrook, Dep. at 39-40 (Memorial Eye built the brands of its online contact lens retail websites ShipMyContacts and IWantContacts "primarily through . . . online search advertising.")).

Response to Finding No. 513:

Complaint Counsel's Finding No. 513 is misleading and incomplete. The only witness to provide sworn testimony on behalf of Memorial Eye, Eric Holbrook, testified that [redacted] (Holbrook, Tr. 2043). Memorial Eye [redacted] (Holbrook, Tr. 2043). And it [redacted] (Holbrook, Tr. 2043). Memorial Eye also [redacted] (Holbrook, Tr. 2043). Thus, when Complaint Counsel state that search advertising was "vital" to Memorial Eye's online business, they mean that Memorial Eye [redacted] Moreover, with respect to paid search advertising, Mr. Holbrook [redacted] (Holbrook, Tr. 2039–2040). He also [redacted] (Holbrook, Tr. 2042). Although Mr. Holbrook vaguely testified that having

Memorial Eye's ads appear in response to searches for 1-800 Contacts' trademarks was "important," he also acknowledged that he did not manage Memorial Eye's paid search advertising (CX9024 (Holbrook, Dep. at 47–48)); that he [redacted] (Holbrook, Tr. 2042); and that he [redacted] (Holbrook, Tr. 1966). Indeed, during the entire time that Memorial Eye sold contact lenses online, [redacted] (Holbrook, Tr. 1966).

514. Paid search advertising through Google and Bing is the most important of LensDirect's marketing channels, and has been effective in generating growth for LensDirect. (Alovis, Tr. 992-93 (LensDirect's CEO views paid search advertising through Google as the single most important marketing channel for LensDirect); (Alovis, Tr. 992).

Response to Finding No. 514:

Respondent has no specific response.

515. Search advertising "[d]efinitely" helped Walgreens increase consumer awareness of its contact lens business on Walgreens.com." (Hamilton, Tr. 400).

Response to Finding No. 515:

Respondent objects to Finding No. 515 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion.

516. It was "important" to Walgreens "to reach that particular audience who had the ability and showed the intent through their searching for our products and services, to be able to reach them and to allow them to with one click get to our site and with a few more clicks purchase." (Hamilton, Tr. 400-401).

Response to Finding No. 516:

Respondent objects to Finding No. 516 as lacking foundation and as being incomplete and misleading. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for

his conclusory lay opinion. In addition, this finding fails to indicate that Mr. Hamilton testified at his deposition that a certain percentage of those making repeat orders of contact lenses come to Vision Direct's website through navigational searches, i.e., they "come through trademark-related terms, whether its 'VisionDirect.com' or 'Vision,' space, 'Direct,' exact match." (CX 9038 (Hamilton, Dep. at 72)).

517. "[O]nline paid search advertising has been a major driver in building Vision Direct's business over the years" and is "an essential tool to a company that wants to become a significant online seller of contact lenses." (CX8002 at 003 (¶¶ 8-9) (Hamilton, Decl.), *in camera*).

Response to Finding No. 517:

Respondent objects to Finding No. 517 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion, especially regarding what tools are essential to a company.

518. Online paid search advertising "is an essential form of advertising for Walgreens in order to remain competitive with other online resellers of contact lenses, and grow its online contact lens retail market share." (CX8001 at 003 (¶ 8) (Hamilton, Decl.), *in camera*).

Response to Finding No. 518:

Respondent objects to Finding No. 518 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion about what tools are essential for a company to grow its market share.

519. Search advertising was "[e]specially" important for Walgreens at the time that it began selling contact lenses online because the company "needed to let people know that Walgreens was a retailer that offered contacts and to leverage the brand equity that Walgreens had and the good brand goodwill of the brand to let people know that this is one other prescription product that they could purchase from an already trusted retail brand." (Hamilton, Tr. 401; *see also* CX8001 at 003 (¶ 9) (Hamilton, Decl., *in camera*) ("[B]ecause Walgreens' ads appear when consumers conduct online searches related to contact lenses, online paid search advertising has helped to increase consumer awareness that Walgreens sells contact lenses through Walgreens.com. This was particularly

important when Walgreens first entered into the business of selling contact lenses online because Walgreens was already a well-known, trusted brand, but was not known as a retailer of contact lenses.")).

Response to Finding No. 519:

Respondent objects to Finding No. 517 as lacking foundation. Neither Complaint Counsel nor Mr. Hamilton have provided any foundation for his conclusory lay opinion regarding what tools are necessary for a company to "leverage [its] brand equity." Mr. Hamilton also testified that there is nothing "that would prevent Walgreens from advertising the sale of contact lenses on television if it wanted to." (CX 9008 (Hamilton, IHT at 65)). Having not tested other forms of advertising that a company the size of Walgreens can engage in, Mr. Hamilton lacks the proper foundation to testify as to what kinds of advertising are "especially" important.

520. Online paid search advertising is "essential" to Lens Discounters' business. (CX8003 at 002 (¶ 6) (Mitha, Decl.) (paid search is Lens Discounter "essential to [Lens Discounters'] ability to attract new customers" because it allows the company "to reach a large number of customers who are seeking to learn about or purchase contact lenses online.")).

Response to Finding No. 520:

The proposed finding misstates the cited declaration and should be disregarded. The declarant, Mr. Mitha, opined that online paid search advertising is "essential" *not* to its overall business, but to its ability to attract new customers. (CX 8003 at 2 (¶ 6) (Mitha, Decl.)). Moreover, Mr. Mitha did not lay a foundation for that opinion and did not describe any other forms of advertising that LensDiscounters had tested. He also did not state that using 1-800 Contacts' trademarks as keywords was "essential" or "necessary" for his company to compete.

521. Lenses for Less owner Mr. Studebaker declared under penalty of perjury that "[i]n my experience, search advertising is the most important form of advertising for selling contact lenses over the internet." (CX8000 at 001 (¶ 8) (Studebaker, Decl.)).

Response to Finding No. 521:

The proposed finding should be disregarded because Mr. Studebaker's declaration reveals that he lacks the necessary foundation for the quoted statement, which is framed in the present tense. Mr. Studebaker's declaration states that "[i]n about 2010 we outsourced our bidding on search advertising to a third party which charges a monthly fee to provide web support and search advertising management." (CX 8000 at 1 (¶ 6) (Studebaker, Decl.)). Because the declaration nowhere states that Mr. Studebaker has played any role in search advertising management over the last seven years, there is an insufficient foundation for the proposed finding.

522. Dr. Evans concluded that "Search advertising was an important method for competing for online sales online contact lens retailers. All of the parties that entered into the agreements used this method of advertising; several have testified that search accounted for the majority of their advertising spending." (CX8006 at 011 (¶ 23) (Evans Expert Report)).

Response to Finding No. 522:

Complaint Counsel's Proposed Finding No. 522 is incomplete and misleading. It is correct that all of the settling parties used search advertising and that several testified that it accounted for a majority of their advertising spending. Thus, many found it be an important tool. But, three facts are omitted. *First*, as Dr. Evans testified, more than 98% of the online searches that were contact lens-related did not involve 1-800 Contacts trademarks. (Evans, Tr. 1724-25). Thus, one cannot and should not infer from the language quoted from Dr. Evans' report that search advertising in response to searches for 1-800 Contacts' trademarks was an important method for competing for online sales by online contact lens retailers. It was not, as the success of the online retailers who entered into settlement agreements makes clear. For instance, WebEyeCare grew significantly. CX 9000 [redacted] at 8, 34, 38-40); CX 324).

After settling in 2010, [redacted] grew from 50 employees to 170 as of December 2016 and shipped [redacted] orders with a retail value of [redacted] in 2015. (CX 9039 ([redacted] at 11); CX 9003 [redacted] at 9-10)). The company's settlement agreement with 1-800 Contacts did not deter National Vision from acquiring AC Lens in 2011. (Clarkson, Tr. 174). And [redacted] and [redacted] had compound annual growth rates from 2011 of [redacted]. (RX 153 at 7).

Second, many of the settling parties did not try other forms of advertising or marketing, and thus it cannot accurately be said that search advertising was any more important than any other form of advertising, marketing, or competing. For example, Mr. Batushansky of WebEyeCare testified that there were [redacted] (CX 9014 (Batushansky, Dep. at 116-118), *in camera*.)

Third, search advertising in response to searches for 1-800 Contacts' trademarks did not account for a significant percentage of any settling parties advertising budget, not even of 1-800 Contacts. 1-800 Contacts generally spent less than [redacted] of its advertising budget on paid search advertising on its own trademark. (RX 739 at 28, 092; Murphy, Tr. 4108-4113; Bethers, Tr. 3702; Coon, Tr. 2723).

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

523. Search advertising is particularly effective because it is particularly targeted, reaching consumers very near the point of purchase. (*See infra* ¶¶ 525-32).

Response to Finding No. 523:

The proposed finding is not supported by the evidence. There are a number of advertising products that reach consumers near the time of the purchase decision. (Juda, Tr. 1295-1296). In addition to search engines, "there are various websites that users may go to with lower funnel purchasing intents." (Juda, Tr. 1296; *see also* Juda, Tr. 1294 (explaining that "low in the purchase funnel" means closer to making a purchase decision)). Facebook also provides advertisers the opportunity to display their ads near the time of consumers' purchase decisions. (Juda, Tr. 1296-1297). Google offers the ability for advertisers to target display advertising at consumers near the time of the purchase decision. (Juda, Tr. 1299-1300). For instance, Google allows advertisers to target in-market audiences, which are users determined by Google to be interested or potentially interested in purchasing a particular product. (Juda, Tr. 1300).

524. Search advertising is uniquely valuable to advertisers because it puts an advertisement in front of a consumer at the precise moment the consumer is signaling her interest or intent by telling the search engine what she is seeking. (See infra ¶¶ 525-32).

Response to Finding No. 524:

The proposed finding is not supported by the evidence. There are a number of advertising products that reach consumers near the time of the purchase decision. (Juda, Tr. 1295-1296). In addition to search engines, "there are various websites that users may go to with lower funnel purchasing intents." (Juda, Tr. 1296; *see also* Juda, Tr. 1294 (explaining that "low in the purchase funnel" means closer to making a purchase decision)). Facebook also provides advertisers the opportunity to display their ads near the time of consumers' purchase decisions. (Juda, Tr. 1296-1297). Google offers the ability for advertisers to target display advertising at consumers near the time of the purchase decision. (Juda, Tr. 1299-1300). For instance, Google

allows advertisers to target in-market audiences, which are users determined by Google to be interested or potentially interested in purchasing a particular product. (Juda, Tr. 1300).

525. 1-800 Contacts' employees viewed search advertising an important way to reach customers who are in the market because the advertiser is giving them what they are looking for. (CX 9016 (Judd, Dep. at 46-48, 50).

Response to Finding No. 525:

The proposed finding is not supported by the cited pages of testimony and should be disregarded.

526. 1-800 Contacts' employees viewed search advertising an important way for customers to find products in the ecommerce world. (CX 9016 (Judd, Dep. at 41).

Response to Finding No. 526:

The proposed finding is not supported by the cited page of testimony and should be disregarded.

527. Search advertising a particularly valuable type of advertising for AC Lens because it can be used to target customers who are looking to purchase contact lenses. (CX9039 (Clarkson, Dep. at 173-175) ("[B]road-based marketing that does not target is inherently far less efficient in reaching a target audience. Search is beautiful in the sense that you get right in front of the customer who's looking to buy your product, and you don't pay unless they click on your ad. It's a wonderful thing.")).

Response to Finding No. 527:

Respondent has no specific response.

528. The owner of Lenses for Less declared under penalty of perjury that "[s]earch advertising is valuable because it displays our advertisements to potential customers at the time they have expressed interest in the products we sell." (CX8000 at 001 (¶ 8) (Studebaker, Decl.)).

Response to Finding No. 528:

The proposed finding should be disregarded because Mr. Studebaker's declaration reveals that he lacks the necessary foundation for the quoted statement, which is framed in the

present tense. Mr. Studebaker's declaration states that "[i]n about 2010 we outsourced our bidding on search advertising to a third party which charges a monthly fee to provide web support and search advertising management." (CX 8000 at 1 (¶ 6) (Studebaker, Decl.)). Because the declaration nowhere states that Mr. Studebaker has played any role in search advertising management over the last seven years, there is an insufficient foundation for the proposed finding.

529. The Chief Operating Officer of LD Vision Group, Inc. (Lens Discounters) declared under penalty of perjury that "Online paid search advertising allows us to reach a large number of consumers who are seeking to learn about or purchase contact lenses online." (CX8003 at 002 (¶ 6) (Mitha, Decl.)).

Response to Finding No. 529:

Respondent has no specific response.

530. Search advertising helps Walmart acquire new contact lens customers because "search engine marketing is very bottom of the funnel. You've already decided what you want to buy, and then you go on the search engine and search for it, unlike, like say T.V. advertising, when we don't even know if that person is going to buy something. So search engine marketing it's also easier to acquire customers." (CX9033 (Mohan, Dep. at 18-20)).

Response to Finding No. 530:

The proposed finding is incomplete, inaccurate, and misleading. There are a number of advertising products that reach consumers near the time of the purchase decision. (Juda, Tr. 1295-1296). In addition to search engines, "there are various websites that users may go to with lower funnel purchasing intents." (Juda, Tr. 1296; *see also* Juda, Tr. 1294 (explaining that "low in the purchase funnel" means closer to making a purchase decision)). Facebook also provides advertisers the opportunity to display their ads near the time of consumers' purchase decisions. (Juda, Tr. 1296-1297). Google offers the ability for advertisers to target display advertising at consumers near the time of the purchase decision. (Juda, Tr. 1299-1300). For instance, Google

allows advertisers to target in-market audiences, which are users determined by Google to be interested or potentially interested in purchasing a particular product. (Juda, Tr. 1300).

531. Consumers "using search to look for products to buy online . . . are often ready to buy. Therefore, if the company doesn't make a sale during that search session it may not make that sale later." (CX9019 (Juda, Dep. at 18 (also testifying by way of example: "…a user would like to come to Google, and it's Mother's Day, and they're doing a search for flowers on sale. And that, potentially, is a strong signal that the user is interested in purchasing some flowers right around the corner."); *see also* CX8006 at 033-034 (¶ 76) (Evans Expert Report))

Response to Finding No. 531:

The proposed finding is incomplete, inaccurate, and misleading. There are a number of advertising products that reach consumers near the time of the purchase decision. (Juda, Tr. 1295-1296). In addition to search engines, "there are various websites that users may go to with lower funnel purchasing intents." (Juda, Tr. 1296; *see also* Juda, Tr. 1294 (explaining that "low in the purchase funnel" means closer to making a purchase decision)). Facebook also provides advertisers the opportunity to display their ads near the time of consumers' purchase decisions. (Juda, Tr. 1296-1297). Google offers the ability for advertisers to target display advertising at consumers near the time of the purchase decision. (Juda, Tr. 1299-1300). For instance, Google allows advertisers to target in-market audiences, which are users determined by Google to be interested or potentially interested in purchasing a particular product. (Juda, Tr. 1300).

Moreover, the assertion that "if the company doesn't make a sale during that search session it may not make that sale later" is unsupported by the evidence. Data from Google regarding contact-lens related searchs shows that the vast majority of users who click on an ad do not make a purchase at that time. (RX 733 at 95).

532. If a consumer is performing an internet search, a company unable to reach that via search advertising "cannot readily substitute another type of advertising to reach that user—such as bidding on a different keyword for search, buying an ad that would be inserted in the

Facebook Newsfeed ad, buying a banner ad on the Yahoo homepage—because it is unlikely that the user will see that ad right before she buys." (CX8006 at 033-034 (¶ 76) (Evans Expert Report).

Response to Finding No. 532:

The proposed finding should be disregarded because Dr. Evans, an economist, is not qualified to opine on consumer behavior.

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

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

Response to Finding No. 533:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

534. Online contact lens retailers view search advertising as a particularly effective form of advertising because it allows firms to easily monitor their expenditures and return on investment. (*See infra* ¶¶ 42-545, 548-549).

Response to Finding No. 534:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

535. 1-800 Contacts' employees viewed search advertising as a particularly effective form of advertising because it allows firms to easily monitor their expenditures and return on investment. (CX 9016 (Judd, Dep. at 41).

Response to Finding No. 535:

The proposed finding is not supported by the cited evidence, which consists solely of the testimony of a single employee and says nothing about the efficacy of paid search advertising, monitoring expenditures, or return on investment. (CX 9016 (Judd, Dep. at 41).

536. "Search advertising is a particularly efficient method of marketing for small firms because they do not have to make any significant investment in using this channel. The search engines provide all the necessary software for using paid search advertising for free, do not impose any entry or minimum fees for using the service, and charge advertisers only when people click on an ad." (CX8006 at 028 (¶ 64) (Evans Expert Report)).

Response to Finding No. 536:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." (Order on Post-Trial Briefs at 3).

537. During Mr. Hamilton's tenure, search advertising allowed Vision Direct [redacted] (Hamilton, Tr. 432, *in camera*).

Response to Finding No. 537:

Respondent has no specific response.

538. During Mr. Hamilton's tenure, search advertising allowed Walgreens [redacted] (Hamilton, Tr. 432, *in camera*).

Response to Finding No. 538:

Respondent has no specific response.

539. AC Lens' Director of Marketing views search advertising as "cost-effective" as compared to "other marketing channels." (CX9018 (Drumm, Dep. at 124-125)).

Response to Finding No. 539:

The proposed finding should be disregarded because it misstates Mr. Drumm's testimony. Mr. Drumm testified that paid search advertising is "cost-effective to an extent" but that affiliate marketing is "probably more cost-effective" and that for retaining customers, "email is our best option." (CX 9018 (Drumm, Dep. at 113, 125).

540. The reason AC Lens spends a large portion of its advertising budget on pay-per-click search advertising is that pay-per-click search advertising is "consistently the channel that [AC Lens] ha[s] found productive in terms of bringing in customers at an acquisition cost that [the company has determined] is consistent with [its] financial goals." (Clarkson, Tr. 220-221).

Response to Finding No. 540:

Respondent has no specific response.

541. Search advertising allows advertisers to measure how their search advertising is performing, by providing "a reporting interface" that allows advertisers to view the entire account or "drill down on specific campaigns and act on those and even at the keyword level see how many people have seen the ad, how many of them clicked, what it's costing you and how many of them ended up buying something." (Clarkson, Tr. 230-231; CX9018).

Response to Finding No. 541:

Respondent has no specific response.

542. Pay-per-click advertising allows AC Lens to track performance "at the ad group level and the campaign level" and even "down to the keyword level." (Drumm, Dep. at 118-121).

Response to Finding No. 542:

The proposed finding should be disregarded because Mr. Drumm conceded that he lacked personal knowledge on the issue addressed in the proposed finding. (CX 9018 (Drumm, Dep. at 119)) (prefacing his answer with "I haven't operated the account in quite some time").

543. Search advertising allows advertisers to measure how the actual cost of acquiring a customer through a given search advertising method compares to the company's goal acquisition cost. (CX9018 (Drumm, Dep. at 118-121 (noting that "what we look at" is "ultimately at the end of the day cost and orders and how the acquisition cost relates to our goal acquisition cost.")); Clarkson, Tr. at 226 ("So if I can use an example as, say, Google, a certain number of people will see an ad that will display for certain keyword searches. A certain number of people will click that ad. We will pay a cost per click that will give me a total spend, but we're able to track how many of those people who clicked made a purchase, and so in rough terms we calculate an acquisition cost based on the ratio of those two numbers.")).

Response to Finding No. 543:

Respondent has no specific response.

544. {One reason that WebEyeCare focuses most of its advertising expenditures on search advertising is because search advertising is "relatively easy to administer."} (CX9014 (Batushansky, Dep. at 117-118), *in camera*).

Response to Finding No. 544:

Complaint Counsel's Proposed Finding No. 544 is misleading and inaccurate, and should be disregarded. Mr. Batushansky testified that there were [redacted] (CX 9014 (Batushansky, Dep. at 116-118), *in camera*.)

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

Response to Finding No. 545:

Complaint Counsel's Proposed Finding No. 545 is misleading and inaccurate, and should be disregarded. Mr. Batushansky testified that there were [redacted] (CX 9014 (Batushansky, Dep. at 116-118), *in camera*.)

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

Response to Finding No. 546:

Complaint Counsel's Proposed Finding No. 546 is misleading and inaccurate, and should be disregarded. Mr. Batushansky testified that there were [redacted] (CX 9014 (Batushansky, Dep. at 116-118), *in camera*.)

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

Response to Finding No. 547:

Complaint Counsel's Propossed Finding No. 547 is incomplete, misleading, and not supported by record evidence. The only evidence cited in support of this fact is the testimony of

Eric Holbrook. Eric Holbrook testified that [redacted] (Holbrook, Tr. 2039–2040). He also [redacted] (Holbrook, Tr. 2042). Although Mr. Holbrook testified that displaying searches in responses to searches for 1-800 Contacts was "efficient," he also acknowledged that he did not manage Memorial Eye's paid search advertising (CX 9024 (Holbrook, Dep. at 47-48)); that he [redacted] (Holbrook, Tr. 2042); and that [redacted] (Holbrook, Tr. 1966). Indeed, during the entire time that Memorial Eye sold contact lenses online, [redacted] (Holbrook, Tr. 1966).

Complaint Counsel's Finding No. 547 is also irrelevant. Whether or not Memorial Eye benefited from displaying paid search advertisements in response to searches for 1-800 Contacts' trademarks is not relevant if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX0733-0027–41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34). Mr. Holbrook acknowledges that, [redacted]

[redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). There is evidence [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

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

Response to Finding No. 548:

The proposed finding misrepresents the cited testimony and should be disregarded. Mr. Alovis did not mention any "search advertising tools provided by the search engines" at all; he spoke only of a daily email that he receives from his marketing director, who did not testify.

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

Response to Finding No. 549:

Respondent has no specific response.

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

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

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

Response to Finding No. 550:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

551. LensDirect has used only internet advertising during Mr. Alovis' tenure as CEO. (Alovis, Tr. 991-992 (the only marketing channels LensDirect uses to sell contact lenses, apart from paid search advertising through Google, Bing, and Yahoo, are social media advertising through Facebook, email-marketing, and one commercial that LensDirect ran online); CX9023 (Alovis, Dep. at 26, 45)). During Mr. Alovis's tenure, LensDirect has not advertised on offline channels such as television, radio, billboards, magazines, or newspapers because, in Mr. Alovis's business judgment, these advertising channels are inefficient compared to internet advertising. (Alovis, Tr. 1029 (television advertising is "too expensive"); CX9023 (Alovis, Dep. at 45 (same)); Alovis, Tr. 1029 (no radio advertising); CX9023 (Alovis, Dep. at 48 (same)); Alovis, Tr. 1029 (no billboard advertising); CX9023 (Alovis, Dep. at 45 ("I'm not sure if it's [billboards] a vertical or channel that makes sense for us")); Alovis, Tr. 1029 (no magazine advertising); Alovis, Tr. 1029 (no newspaper advertising); CX9023 (Alovis, Dep. at 46 (print advertising would not have a great return on investment for LensDirect))).

Response to Finding No. 551:

The proposed finding should be disregarded because, as written, it is directly contradicted by the cited testimony of Mr. Alovis. It is simply not true that LensDirect has used "only" internet advertising during Mr. Alovis' tenure as CEO, as most witnesses have used that term.

Mr. Alovis testified, for example, that LensDirect has used and does use email marketing and affiliate marketing. (CX 9023 (Alovis, Dep. at 26)).

552. AC Lens does "[n]ot routinely" use non-internet advertising methods. (Clarkson, Tr. 219-220). AC Lens has tested various non-internet advertising methods including direct mail, Valpak, radio, Google TV and concluded that they would not bring in customers at an attractive cost. (Clarkson, Tr. 219-220; CX9039 (Clarkson, Dep. at 212 (customer acquisition cost of magazine advertising was not consistent with company goals)); CX9018 (Drumm, Dep. at 23-24 (AC Lens attempted radio advertising and found it to be unsuccessful); CX9039 (Clarkson, Dep. at 178 (AC Lens tested a Google TV ad that turned out to be "quite ineffective in terms of its acquisition cost")). AC Lens has not used TV or billboard advertising because they are expensive and target too broad of a population to result in a customer acquisition cost that aligns with AC Lens's business goals. (CX9039 (Clarkson, Dep. at 178-79 (National Vision customers have a higher potential lifetime value than AC Lens customers because National Vision sells more products and services than just contact lenses, which is one reason why TV advertising is effective for National Vision but would not be for AC Lens)); CX9039 (Clarkson, Dep. at 210-213 (Mr. Clarksons's directive from AC Lens's parent company is to run at no worse than break-even, and television advertising for the would be insufficiently cost-effective to achieve that goal)); CX9039 (Clarkson, Dep. at 211 (AC Lens has not attempted billboard advertising because it is very expensive and targets a very broad population))).

Response to Finding No. 552:

The proposed finding should be disregarded because it misstates and misrepresents the cited testimony. For example, the very first sentence in the proposed finding states that ACLens "does not routinely" use non-internet advertising methods. The trial transcript shows, however, that Mr. Clarkson used that phrase *after* he had described various non-internet advertising methods that ACLens *did* use. (Clarkson, Tr. 219). The question that Complaint Counsel asked Mr. Clarkson that generated the quoted phrase was whether ACLens used non-internet forms of advertising "*other than*" the efforts that Mr. Clarkson had already described. (Clarkson, Tr. 219-220).

The remainder of the proposed finding is also based on misrepresentations and overstatements. The proposed finding falsely states that ACLens has concluded that non-internet advertising methods "would not bring in customers at an attractive cost." The evidence is to the

contrary. Mr. Clarkson and Mr. Drumm testified that ACLens engages in numerous other forms of advertising that are cost-effective. For example, ACLens uses "email prospecting," which involves email advertising to consumers who visit ACLens' websites but who do not make an immediate purchase. (Clarkson, Tr. 222-223). Mr. Clarkson testified that email prospecting had been "surprisingly productive" for ACLens. (Clarkson, Tr. 223). In addition, Mr. Drumm testified that for retaining customers, email marketing "is our best option" and generates *more returning customer orders than any other form of marketing*. (CX 9018 (Drumm, Dep. at 113, 123-124)). Mr. Drumm also testified that ACLens uses Product Listing Ads ("PLAs") on Google and that PLAs "are a very important piece of the puzzle." (CX 9018 (Drumm, Dep. at 65). *See also* RX 19 at 10 (September 2015 ACLens marketing document stating that "PLAs have become the main driver of traffic and orders for almost every account")). ACLens also places advertisements on Facebook. (CX 9018 (Drumm, Dep. at 24). ACLens also has "a fairly large affiliate program." (Clarkson, Tr. 219). Affiliate marketing is "more cost-effective" than paid search advertising for ACLens. (CX 9018 (Drumm, Dep. at 125)).

The proposed finding also misrepresents the evidence regarding ACLens' reasons for not running a TV ad campaign. Mr. Clarkson testified that ACLens' owner, National Vision, spends "30-plus million a year on television advertising," which has been "very successful" for National Vision. (CX 9039 (Clarkson, Dep. at 178)). Mr. Clarkson also indicated that he would like National Vision to spend some of those TV advertising dollars on ACLens:

> "Q. Now that you have a much larger parent company, a billion dollars in revenues per year, and they're already doing a lot of television advertising for one of their brands, why don't they give you a little money for TV ads?

A. Could you come with me to the board meeting and we'll ask them? No, I mean, I'm sorry, I don't mean to be facetious. The reality is that I've been given direction to run the subsidiary at no worse than break-even. That's been the direction of the parent company."

(CX 9039 (Clarkson, Dep. at 213)). As this passage demonstrates, ACLens could, using the substantial financial resources of its corporate parent, build up its own brand awareness. The fact that broad-scale advertising would not be immediately profitable does not mean, as the proposed finding implies, that ACLens has no way to reach customers other than through paid search advertising.

553. Memorial Eye ran direct mail advertisements for its online business "[f]or a very brief period of time," approximately "less than two months." This direct mail campaign was not effective for Memorial Eye "[a]nd that's why we didn't run it anymore." (CX9024 (Holbrook, Dep. at 27-28)).

Response to Finding No. 553:

Respondent has no specific response.

554. WebEyeCare has never attempted television, radio, or print advertising, because it has limited resources as a small company. (CX9014 (Batushansky, Dep. at 117-18)).

Response to Finding No. 554:

Complaint Counsel's proposed Finding No. 554 is incomplete and misleading. Mr. Batushansky actually testified that Web Eye Care [redacted] (CX 9014 (Batushansky, Dep. at 117-18), *in camera*). Mr. Batushansky further testified that there were [redacted]

[redacted] (CX 9014 (Batushansky, Dep. at 116-118), *in camera*.)

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

555. For online contact lens retailers, organic search is not an effective substitute for paid search advertising. (*Infra* ¶¶ 555-60).

Response to Finding No. 555:

Respondent has no specific response.

556. "Search engine optimization" refers to "a process of trying to get your website to show towards the top of the search page in the natural or organic or unpaid section of the search results page." (Clarkson, Tr. at 224).

Response to Finding No. 556:

Respondent has no specific response.

557. Organic search has becoming become less effective in driving business to AC Lens over time, increasing the importance of pay-per-click advertising. (CX9018 (Drumm, Dep. at 65, 112, 129-30); Clarkson, Tr. at 225; CX9039 (Clarkson, Dep. at 175-176)).

Response to Finding No. 557:

The proposed finding should be disregarded because most of the cited testimony does not make or support the causal connection stated in the finding. Instead, most of the testimony refers to the increasing utilization of Product Listing Ads ("PLAs"). *See, e.g.*, (CX 9018 (Drumm, Dep. at 65 (agreeing that PLAs have become "the main driver of traffic and orders for almost every account")); (CX 9018 (Drumm, Dep. at 129 (stating that "product listing ads has drawn a lot of traffic into it and less people are going into organic from what we can tell")). The proposed finding should also be disregarded because the phrase "has becoming become" renders the finding ambiguous.

558. The commercial nature of ads "can at times result in increased utility for a user" as compared to organic results. (Juda, Tr. 1167-1168).

Response to Finding No. 558:

The proposed finding is not supported by the evidence. The cited testimony is only Mr. Juda's belief.

559. An advertiser has "more control over" the placement of its advertisements as compared to the placement of the advertiser's organic links. (Juda, Tr. 1330).

Response to Finding No. 559:

The proposed finding is incomplete. Paid search advertising allows advertisers to buy their way to the top of the page. (Juda, Tr. 1331).

Microsoft's Bing takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

In general and within reason, in Bing, [redacted] (RX 704 (Iyer, Decl. ¶ 11)). Accordingly, a paid search advertisement for a website [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

560. In his trial testimony, Google's Mr. Juda explained the value of commercial advertising results over organic results by way of the following example: if a user "is searching for 'flowers' the day before Mother's Day," "many of those users in practice are looking to

purchase flowers." As such, advertisements, which have "a very, oftentimes, clear objective to try and sell that user flowers, . . . are going to very directly assist the users toward fulfilling their intent. By contrast, the organic results may indeed include people who sell flowers, but they could also include websites like a Wikipedia website where you can learn about the anatomy of a flower, which is relevant to the search but isn't necessarily as directly relevant to the user's intent, which is more commercial at that moment in time." (Juda, Tr. 107-1068).

Response to Finding No. 560:

The proposed finding is incomplete. Paid search advertising allows advertisers to buy their way to the top of the page. (Juda, Tr. 1331).

Microsoft's Bing takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

In general and within reason, in Bing, [redacted] (RX 704 (Iyer, Decl. ¶ 11)). Accordingly, a paid search advertisement for a website [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

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

561. For online contact lens retailers, email marketing is not an effective substitute for search advertising. (*See infra* ¶¶ 563-65).

Response to Finding No. 561:

The proposed summary finding should be disregarded because it is substantially broader than the few individual findings it cites, and it is not supported by those individual findings.

562. Email marketing is used primarily by online contact lens retailers most effectively for customer retention rather than for attracting new customers. (*See infra* ¶¶ 563-65).

Response to Finding No. 562:

The proposed summary finding should be disregarded because it is substantially broader than the few individual findings it cites, and it is not supported by those individual findings. For example, the cited findings refer only to ACLens, while this summary finding refers to some or even all "online contact lens retailers."

563. AC Lens attempted using email marketing to target new customers via "email blasts," by "purchas[ing] email lists of people who were not [AC Lens] customers, and it was another unsuccessful experiment in that [AC Lens] had . . . a greatly increased rate of unsubscribes and not a lot of sales." (CX9039 (Clarkson, Dep. at 210-213)).

Response to Finding No. 563:

The proposed finding is incomplete and misleading and should be disregarded. The *single* test that the cited testimony references occurred "a long time ago," "years ago," and Mr. Clarkson is "not sure if we've done a more recent experiment under Bob [Drumm]'s stewardship." (CX 9039 (Clarkson, Dep. at 212)). A single test conducted "years ago" does not support the broad conclusion proposed in this finding and in proposed findings 561-562.

564. AC Lens no longer purchases any external e-mail lists. (Clarkson, Tr. 222).

Response to Finding No. 564:

Respondent has no specific response.

565. AC Lens uses email instead only for "retention marketing . . . to our own customers" and for marketing to people who have already "visit[ed] the site," and "sign[ed] up [to] receive special offers." (Clarkson, Tr. 222-223; CX9039 (Clarkson, Dep. at 171)).

Response to Finding No. 565:

The proposed finding is incomplete and misleading and should be disregarded.

Mr. Clarkson testified, contrary to the two summary findings (561-562) that began this section, that "email prospecting" is "surprisingly productive," (Clarkson, Tr. 223), and that "our single, most effective form of marketing actually is e-mailing our own customers . . .;" in part because "e-mail is a very efficient way to talk to your own customers." (CX 9003 (Clarkson, IHT at 66)).

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

566. For online contact lens retailers, display advertising is not an effective substitute for search advertising. (*Infra* ¶¶ 567-69).

Response to Finding No. 566:

The proposed summary finding should be disregarded because it is substantially broader than the few individual findings it cites, and it is not supported by those individual findings.

567. Display advertising has "generally not been very successful" for AC Lens. (Clarkson, Tr. 229).

Response to Finding No. 567:

The proposed finding is incomplete and misleading and should be disregarded.

Mr. Clarkson testified that ACLens *does* use display ads in its "retargeting" campaigns and that some of ACLens' social media advertising efforts could also qualify as "display advertising." (Clarkson, Tr. 229).

568. Display advertising is less effective than search advertising because display advertising is less targeted. (Clarkson, Tr. 229-230 ("[I]f you buy a banner [advertisement] on, say, the Yahoo health page, you're targeting a pretty broad section of the population, and only roughly 10 percent of people in America wear contact lenses. And of the ones that wear

them, quite a lot are happy with their – buying them from their eye doctor. And even the ones that are potentially willing to make a change may not be in the market to buy them right now. So it's far less targeted than when you put in a search term. If someone searches 'buy contact lenses,' that is a very, very targeted customer.").

Response to Finding No. 568:

Respondent has no specific response.

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

Response to Finding No. 569:

The proposed finding is inaccurate and should be disregarded. Mr. Alovis testified at trial that LensDirect does do some display advertising. (Alovis, Tr. 1030) ("Q. And you do some display advertising, right? A. Yes. Q. Including remarketing? A. Yes.")).

e. Online Marketplaces are Not Available for Prescription Contact Lenses

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

Response to Finding No. 570:

The proposed finding should be disregarded because no foundation was laid for Mr. Clarkson's testimony regarding the internal policies of Amazon or eBay.

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

Response to Finding No. 571:

Respondent has no specific response.

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

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

Response to Finding No. 572:

This summary finding should be disregarded because it is not supported by the six individual findings that it cites. Each of those individual findings refers *only* to ACLens. In contrast, the summary finding refers broadly and inaccurately to many or even all "online contact lens retailers." The evidence at trial showed, for example, that Hubble Contacts, a new entrant in the contact lens marketplace, is "spending a lot of money on consumer marketing, *especially on Facebook and Instagram*, and they're using that to drive customer demand. They're actually having consumers going into eye doctors' offices saying, I want the Hubble contact lens." (Clarkson, Tr. 290-291) (emphasis added). (*See, e.g.*, RX 1222 at 22 (showing Coastal Contacts obtaining from approximately $400,000 to over $570,000 in revenue through social media)).

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

Response to Finding No. 573:

Respondent has no specific response.

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

Response to Finding No. 574:

Respondent has no specific response.

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

Response to Finding No. 575:

Respondent has no specific response.

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

Response to Finding No. 576:

Respondent has no specific response.

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

Response to Finding No. 577:

Respondent has no specific response.

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

Response to Finding No. 578:

Respondent has no specific response.

g. Comparison Shopping Websites are Not an Effective Substitute for Search Advertising and are of Limited Efficacy for Advertising Contact Lenses Online

579. For online contact lens retailers, comparison shopping websites are not an effective substitute for search advertising. (*Infra* ¶¶ 580-89).

Response to Finding No. 579:

This broadly worded summary finding should be disregarded because it is not supported by the ten individual findings it cites. Eight of the ten individual findings refer only to ACLens' experience, and Complaint Counsel provide no foundation at all for a finding that every contact lens retailer did have, or would have, the same experience as ACLens.

580. A "comparison shopping engine" is "a website that will list different website offers of the same product with their price, so it allows a consumer to go to a single page and do a price comparison between different websites." (Clarkson, Tr. at 224).

Response to Finding No. 580:

Respondent has no specific response.

581. Examples of comparison shopping engines include Shopping.com and Shopzilla.com. (CX9018 (Drumm, Dep. at 14)).

Response to Finding No. 581:

Respondent has no specific response.

582. AC Lens has been using comparison shopping engines less frequently than it used to. (Clarkson, Tr. at 224).

Response to Finding No. 582:

Respondent has no specific response.

583. The amount of business that AC Lens has been able to derive from comparison shopping engines has declined over time. (Clarkson, Tr. at 224).

Response to Finding No. 583:

Respondent has no specific response.

584. In AC Lens's experience, comparison shopping engines "used to do better" than they do now in driving business to AC Lens. (Clarkson, Tr. at 224).

Response to Finding No. 584:

Respondent has no specific response.

585. AC Lens has "seen higher rates of fraud coming from the operators of some of those" comparison shopping engines. (Clarkson, Tr. at 224).

Response to Finding No. 585:

This proposed finding should be disregarded because Mr. Clarkson provided no explanation or foundation for his allegation of fraudulent behavior.

586. The customers who reach AC Lens "through price comparison shopping engines are. more price-sensitive" than other customers. (CX9039 (Clarkson, Dep. at 123); *see also* CX9039 (Clarkson, Dep. at 177 ("Comparison shopping engines almost, by definition, are for price-sensitive shoppers."))).

Response to Finding No. 586:

Respondent has no specific response.

587. AC Lens CEO Mr. Clarkson testified that "the downside" of using comparison shopping engines as an advertising tool is that "if you're priced above the competition, you're likely to get a lot of clicks that you'll pay for but not a lot of sales."

Response to Finding No. 587:

This proposed finding should be disregarded because, in violation of the Court's post-trial Order, it contains no citation to any testimony or other evidence. Order on Post-Trial Briefs, p. 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.").

588. Google offers its own comparison shopping engine referred to by advertisers as Product Listing Ads. (Hamilton, Tr. 402-403).

Response to Finding No. 588:

Respondent has no specific response.

589. "[S]earch engines like Google show these product listing ads…when they infer that the intent of the consumer who puts in a generic query can be, in fact, to look for the price of the same product across multiple retailers." (Ghose, Tr. 3875).

Response to Finding No. 589:

Respondent has no specific response.

V. Advertising in Response to Searches Including 1-800 Contacts' Branded Queries is a Successful, Commercially Significant Strategy for Online Contact Lens Retailers

590. Displaying search advertising triggered by 1-800 Contacts' branded queries is a successful, commercially significant strategy for online contact lens retailers. (*See infra* §§ V.A-V.B).

Response to Finding No. 590:

Complaint Counsel's Proposed Finding No. 590 is overbroad and unsupported by the evidence cited in this section. Complaint Counsel's only support for their broad statement is "see infra §§ V.A-V.B." Section V.A. contains no reference to 1-800 Contacts' trademarks, and it offers no support at all for the proposition that competitors' advertisements triggered by searches for 1-800 Contacts are a "successful" or "commercially significant" strategy for online contact lens retailers.

Proposed finding no. 590 is also not supported by section V.B., as described in more detail in 1-800 Contacts' responses to individual findings in that section. In addition, Respondent notes that Complaint Counsel concede in proposed finding no. 612 that at least 5 of the 14 contact lens retailers that supposedly entered into "formal agreements with 1-800 Contacts regarding keyword bidding" *never* bid on 1-800 Contacts' trademarks in Adwords, even before the purported agreements became effective. Complaint Counsel's broad statement that such bidding was or is supposedly a "successful" and significant" strategy for online contact lens retailers is clearly inaccurate as to those five companies.

A. Search Advertising Trademark Policies

591. Prior to April 2004, Google permitted a trademark owner to restrict the use of its trademark by third parties both in the text of advertisements and as keywords in AdWords advertising auctions. (CX1148; Charlston Dep. at 19-21).

Response to Finding No. 591:

Respondent has no specific response.

592. While Google's pre-April 2004 trademark policy allowed trademark owners to restrict rivals from bidding directly on keywords comprising trademark terms, Google did not provide any way for trademark owners to limit rivals' ads resulting from broad-match or phrase-match advertisements triggered by queries comprising or containing trademark terms. (CX9022 (Charlston, Dep. at 179 ("…so pre April 2004 in the U.S. and Canada

and post April 2004 in the rest of the world, which scaled back over time, even if we had a trademark complaint on file for a trademark term, we would still serve ads if the user's query included the trademark term and another nontrademark term on which the advertiser had broad matched.")); CX0789 at 003 (Trademark Complaint Procedure – Trademark rights outside the US and Canada ("please be aware that we do not take any action in situations where an advertisement is being triggered by non-trademarked terms even though the search query contains a trademarked term.")); CX8006 at 035 (¶ 80) (Evans Expert Report)).

Response to Finding No. 592:

The proposed finding is not supported by the evidence. The testimony of Mr. Charlston lacks foundation. Mr. Charlston was not at Google in 2004; he joined Google in 2012. (CX 9022 (Charlston, Dep. at 8)). Despite Respondent's objection, Complaint Counsel failed to establish that Mr. Charlston had personal knowledge of Google's policies pre-2004, and Mr. Charlston testified only to his "understanding." (CX 9022 (Charlston, Dep. at 179)). The cited document, CX 789, does not support the contention that "Google did not provide any way for trademark owners to limit rivals' ads resulting from broad-match or phrase-match advertisements triggered by queries comprising or containing trademark terms." And Complaint Counsel cannot rely on their expert to establish factual propositions. Order on Post-Trial Briefs at 3.

593. [redacted] (CX1773 at 002 (Mar. 11, 2004 email from Prashant Fuloria to Maria Stone, others reporting results of study), *in camera*).

Response to Finding No. 593:

The proposed finding is incomplete, misleading, and not supported by the evidence.

[redacted] (RX 1632 at 2).

[redacted] (RX 1632 at 5). [redacted] (RX 1639 at 2).

Moreover, the [redacted]

[redacted] (CX 9022 (Charlston, Dep. at 84-117)).

594. [redacted] (CX0470 at 002 (Feb. 23, 2004, Domestic Trademark Policy Change Transition Plan Discussion presentation), *in camera*); (CX9022 (Charlston, Dep. at 23, 24)). [redacted] (CX9022 (Charlston, Dep. at 23, 24).

Response to Finding No. 594:

The proposed finding is incomplete. As the [redacted] (RX 1729 at 33). [redacted] (RX 1729 a 33). Accordingly, the [redacted]

[redacted] (RX 1729 at 43). The [redacted] (RX 1729 at 44-47.)

595. In April 2004, Google changed its policy to permit all advertisers to bid on trademarks as keywords, including on their competitors' trademarks. (CX1148; CX9022 (Charlston, Dep. at 19-21); CX1785 at 003-004 (April 9, 2004 email from Daniel Daugherty (Google) to Josh Aston (1-800 Contacts) informing Mr. Aston of policy change).

Response to Finding No. 595:

Respondent has no specific response.

596. Under the new April 2004 policy, advertisers were still prohibited from using trademarks in the text of their ads without authorization. (CX1148; CX9022 (Charlston, Dep. at 19-21); CX0471 ("the new AdWords trademark policy does not limit the use of trademark terms keywords. However, the new policy is designed to reduce user confusion by prohibiting advertisers from using trademarks in their ad text or ad titles unless the advertiser is authorized to do so by the trademark owner.")).

Response to Finding No. 596:

The proposed finding is inaccurate. Under the new April 2004 policy, advertisers were still prohibited from using *others'* trademarks in the text of their ads without authorization.

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

Response to Finding No. 597:

Respondent has no specific response.

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

Response to Finding No. 598:

Respondent has no specific response.

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

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

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

Response to Finding No. 599:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Complaint Counsel's Proposed Finding No. 599 also should be disregarded because the term "commercially significant" is vague and ambiguous.

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

Response to Finding No. 600:

Respondent has no specific response.

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

Response to Finding No. 601:

Respondent has no specific response.

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

Response to Finding No. 602:

Respondent has no specific response.

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

Response to Finding No. 603:

Respondent has no specific response.

604. The trademark paid search channel accounts for the substantial majority of 1-800 Contacts' new customer orders attributable to paid search advertising. (CX0051 at 006 ("About 75% of all paid search orders come through our trademark terms"); CX0646 at 005 (in 1-800 Contacts' fiscal year 2011[3], 74.6 percent of 1-800 Contacts' NI customer orders attributable to search advertising were generated by TM Paid Search; as reported in "FY 2011 Totals" row of "NI" (new internet) tab of Excel, 125,220 NI orders compared to 42,729 NI orders attributable to "Other Paid Search"); CX0646 at 005 (in 1-800 Contacts' fiscal year 2012, 72.5 percent of 1-800 Contacts' NI customer orders attributable to paid search attributable to TM Paid Search (138,951) compared to 52,771 NI orders attributable to "Other Paid Search")); CX0646 at 005 (in 1-800 Contacts' fiscal year 2013 through the end of the third quarter, 69.2 percent of 1-800 Contacts NI customer orders attributable to paid search attributable to TM Paid Search (85,648) compared to 38,129 NI orders attributable to "Other Paid Search")); CX0094 at 001 (for the week ending May 31, 2014, trademark paid search orders represented 11,931 out of 13,014 total paid search orders for 1-800 Contacts)).

[3] During the years of 1-800 Contacts' alliance with Walmart (2008 through January 1, 2013), 1-800 Contacts followed Walmart's conventions regarding fiscal years, in which a given fiscal year referred to the previous calendar year. (CX9017 (Blackwood, Dep. at 213 ("Q. Now the date of this email is July 1, 2010. A. Right. Q. Is that in your fiscal year 2011, the way 1-800 Contacts keeps track of things? A. Yeah, so we were on Walmart's fiscal year, so it ran February to January . . . Q. So just to make sure we're all on the same page, so February of 2010, under the Walmart calendar, would be in fiscal year 2011? A. Correct. . . . I know it was a little odd.")).

Response to Finding No. 604:

Respondent has no specific response.

605. Each year for 2008, 2007, and 2006, 1-800 attributed far more orders to "TM Orders" than to "Non-TM Orders." (CX0423 (reporting, in "2008" Tab, 2008 weekly and quarterly orders for Google, Yahoo, and other search engines. For Google, the quarterly numbers total to 140,923 TM Orders and 47,933 Non-TM Orders; for Yahoo the totals are 35,960 TM Orders and 11,799 Non-TM Orders); (CX0423 (reporting same information for 2007 in in "2007" Tab, plus annual totals showing 112,696 "TM Orders" and 44,138 "Non-TM Orders" through Google; 25,802 "TM Orders" and 9,529 "Non-TM Orders" through Yahoo); (CX0423 (reporting, in "2006" Tab, 90,748 TM Orders through Google, compared to 40,035 Non-TM Orders[4])).

Response to Finding No. 605:

Respondent has no specific response.

606. In 2010, 1-800 Contacts' cost per click for clicks on advertisements appearing in response to 1-800 Contacts branded queries was under $0.30. (CX0051 at 006 (Presentation entitled "Search Overview November 2010" ("Big Orders, Little Cost. . . . TM CPCs are under $0.30."))).

Response to Finding No. 606:

Respondent has no specific response.

607. 1-800 Contacts considers "Paid Search on 1-800 CONTACTS Trademark" to be a "Direct Traffic Source" that is "much less susceptible to competitive advertising or offers" than "Non-Direct Traffic Sources" such as "Other Paid Search." (CX0429 at 013 (Presentation entitled "Management Presentation" dated November 2013)).

Response to Finding No. 607:

Complaint Counsel's Proposed Finding No. 607 is incomplete and misleading. The cited exhibit shows that 1-800 Contacts considers "Direct Traffic Sources" to include "Email, Typed URL/Bookmark, Paid Search on 1-800 Contacts Trademark, Mobile Apps" and "Non-Direct Traffic Sources" to include "Natural Search, Other, Affiliates, Other Paid Search, Media

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

Part[n]ers, Portals, & Wellpoint." The cited exhibit does not make any direct comparison between "Paid Search on 1-800 Contacts Trademark" and "Other Paid Search," but rather makes a comparison more broadly between direct and non-direct traffic to 1-800 Contacts' website.

608. Due to the commercial importance of the trademark paid search channel to 1-800 Contacts, and the fact that that channel is "much less susceptible to competitive advertising or offers" than other channels such as non-trademark paid search, the appearance of rivals' advertisements in response to searches for 1-800 Contacts' trademark terms represented a competitive threat to 1-800 Contacts. (*See infra* § VI).

Response to Finding No. 608:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Complaint Counsel's Proposed Finding No. 608 also should be disregarded because the terms "commercial importance" and "competitive threat" are vague and ambiguous.

Complaint Counsel's Proposed Finding No. 608 is also inaccurate, misleading, and contrary to the record evidence. The record evidence shows that 1-800 Contacts' concerns with other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark terms were not about any purported "competitive threat," but rather the harm to consumers from confusion and the harm to the value of 1-800 Contacts' trademarks. Specifically, 1-800 Contacts had three main business concerns: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001

(Bethers, IHT at 105-06, 149); Coon, Tr. 2727-38 (citing concerns about consumers being frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)).

609. Trademark paid search advertising was of concern to 1-800 Contacts because orders through trademark paid search accounted "for such a large percentage of [1-800 Contacts'] orders," and therefore "small decreases in [trademark] can have large effects overall." (CX0863 at 001 (in one week in October 2012, for example, trademark keywords accounted for 73% of 1-800 Contacts' paid search orders, which was below the historical average of 82-83% of paid search orders).

Response to Finding No. 609:

Complaint Counsel's Proposed Finding No. 609 mischaracterizes the cited exhibit. CX 863 does not state that trademark paid search advertising "was of concern" to 1-800 Contacts, let alone explain the nature or extent of any such concern. CX 863 is a regular weekly summary generated by one employee (in this case, Rick Galan) within 1-800 Contacts' marketing department that discusses certain metrics from the particular week ending September 28, 2012. CX 863 at 1 contains the statements and impressions of its author (Rick Galan) that the apparent decrease in click-through rates and conversion rates for trademark paid search may have been attributable to clicks on 1-800 Contacts' natural search listings ("We're currently doing investigation to determine how much of this drop is because of cannibalization by our Natural Search listings as those rankings continue to climb.") as opposed to clicks on other retailers' advertisements.

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

Response to Finding No. 610:

Complaint Counsel's Proposed Finding No. 610 is incomplete and misleading. The cited exhibit, CX 864, is an email from Laura Schmidt, who at the time of the cited email (August

2012), held the title of "marketing director" at 1-800 Contacts. (CX 9032 (L. Schmidt, Dep. at 225)). Complaint Counsel's Proposed Finding No. 610 cites no record evidence characterizing Ms. Schmidt as a "senior 1-800 Contacts marketing executive."

Furthermore, Complaint Counsel's Proposed Finding No. 610 fails to explain the actual context of Ms. Schmidt's quoted statement. In CX 864, Ms. Schmidt wrote: "The decline in TM is scary and I think it has a lot to do with our broadcast message being tired and old . . ." (CX 864 at 1). Ms. Schmidt is clearly referring to the direct relationship between 1-800 Contacts' broadscale advertising (such as television advertisements) and traffic to 1-800 Contacts' website from trademark paid search. (CX 9017 (Blackwood, Dep. at 176); CX 9029 (Bethers, Dep. at 98); CX 9032 (L. Schmidt, Dep. at 247); RX 736 at 8)).

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

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

Response to Finding No. 611:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Respondent also directs the Court to its Proposed Findings Nos. 1985-2030 ("Paid Search Advertising in Response to 1-800 Contacts' Trademarks is Not Competitively Significant").

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

Response to Finding No. 612:

Respondent has no specific response.

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

Response to Finding No. 613:

Complaint Counsel's Proposed Finding No. 613 is incorrect, incomplete, misleading and not based on admissible evidence. Complaint Counsel's Proposed Finding No. 613 is based entirely on Dr. Evans' opinion in his report. Dr. Evans, however, did not conduct any analysis of whether any contact lens retailer found it profitable to advertise in response to searches for 1-800 Contacts' trademarks or any contact lens retailer's rate of return from doing so. Accordingly, Dr. Evans' testimony regarding any "rate o[f] return" is inadmissible speculation.

Further, the proposed finding inaccurately states that "Google determined based on the quality scores of these rivals that it was worthwhile to serve their ads to users who entered search queries related to 1-800 Contacts keywords." It is instead undisputed that Google's algorithm determines which ads to display based on factors in addition to an ad's Quality Score, including the bid by the firm making the advertisement. (RX 716 at 38; RF 781-826; Stipulation, ¶ 55 ("To rank in a high position on the SERP, advertisers must have strong assessments from Google on the three quality signals compared to other auction participants, *and* must have high bids relative to other participants on a keyword related to the user's search.")). Indeed, Complaint

Counsel's own Proposed Finding No. 1300 states that "the algorithm ranks ads by 'ad rank,' which incorporates not only the amount of the bid, but also an ad's quality score, so that a bidder with a lower bid but higher quality score can win an auction over a bidder with a higher bid but lower quality score."

In addition, Complaint Counsel's use of the word "worthwhile" to describe any conclusion reached by Google or any consequence of its decision is misleading to the extent that it implies that Google's decision to display ads reflects efficiency or maximizes consumer welfare. Dr. Evans testified that Google seeks to maximize long-term profits and that its policy of permitting advertising in response to searches for another firm's trademark is not socially optimal. (Evans, Tr. 1817).

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

Response to Finding No. 614:

Respondent has no specific response.

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

Response to Finding No. 615:

Respondent has no specific response.

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

Response to Finding No. 616:

Complaint Counsel's Proposed Finding No. 616 is incorrect, incomplete, misleading and not based on admissible evidence for the reasons set forth in 1-800 Contacts' Response to Proposed Finding No. 613.

a. AC Lens

617. In the business judgment of AC Lens' CEO Mr. Clarkson, showing AC Lens advertisements to customers who have entered 1-800 Contacts related search queries would increase AC Lens sales. (*Infra* ¶¶ 618-36).

Response to Finding No. 617:

Respondent objects to proposed Finding No. 617 on the ground that it violates the Court's May 16, 2017 order, which requires that "[a]ll proposed findings of fact shall be supported by specific references to the evidentiary record". Order on Post-Trial Briefs, p. 2. The proposed finding is also inaccurate and not supported by the individual findings it cites.

618. AC Lens has an interest in its marketing messages reaching consumers who currently shop at other contact lens retailers, including those who currently shop at 1-800 Contacts. (Clarkson, Tr. 217-218; CX9003 (Clarkson, IHT at 35-36 ("It would be" valuable to get AC Lens' brand names in front of consumers who entered searches for rivals' brand names because "[c]learly, they are looking for contact lenses.")); CX9003 (Clarkson, IHT at 37-38 (testifying that bidding on another company's trademark is valuable because "you are providing an alternative supply to the consumer. You're making them aware that there's somewhere else they could purchase their contact lenses, and you may have a point of differentiation, whether it's service, convenience, or price compared to that competitor."))).

Response to Finding No. 618:

The proposed finding is incomplete and misleading because it omits Mr. Clarkson's testimony (on the same cited pages) that regardless of whether such bidding could be "valuable," ACLens does not "advertise on rival brands' terms" because "historically we thought that that

might not be legal" and because "[w]e've always focused on running the business . . . rather than focusing on disputes with other folks." (CX 9003 (Clarkson, IHT at 34, 36)).

619. Absent the threat of litigation from 1-800 Contacts, AC Lens would have shown ads to consumers searching for 1-800 Contacts. (CX9039 (Clarkson, Dep. at 104, 155-156); *see also* CX9039 (Clarkson, Dep. at 167-168); Clarkson, Tr. 253-254 (testifying that if AC Lens were not subject to its agreement with 1-800 Contacts, then, "[s]ubject to blessing from my corporate counsel," AC Lens would bid on 1-800 Contacts related terms and remove the 1-800 Contacts related negative keywords that AC Lens uses)).

Response to Finding No. 619:

The proposed finding is incomplete and misleading because it misstates Mr. Clarkson's testimony and cites to answers that Mr. Clarkson retracted, in both his December 2, 2016 deposition and his trial testimony. Mr. Clarkson testified at trial that he would want to "test" the use of 1-800 Contacts' trademarks as keywords in paid search advertising "if it was considered to be a legal practice." (Clarkson, Tr. 343). Mr. Clarkson also testified in his deposition that he would not undertake such tests just because the Settlement Agreement was no longer in existence; he would need, in addition, to be assured by his counsel that there were *no* "potential" legal "entanglements" *before* he would "test bidding on 1-800 Contacts' trademarked terms." (CX 9039 (Clarkson, Dep. at 157)).

620. The "business instinct" of AC Lens' CEO is that he "would expect a significant sales boost from" bidding on 1-800 Contacts branded queries "with ads that were clearly stating 'Try us, we're cheaper." (CX9039 (Clarkson, Dep. at 167-168)).

Response to Finding No. 620:

The proposed finding should be disregarded because it is unsupported; the purported testimony by Mr. Clarkson does not appear anywhere in the cited pages of Mr. Clarkson's deposition.

621. AC Lens' CEO Mr. Clarkson testified that the reason AC Lens has an interest in its marketing messages reaching consumers who currently shop at 1-800 Contacts is that "[w]e think we offer comparable service and convenience at a lower price, so we think we would be attractive to those customers." (Clarkson, Tr. 218).

Response to Finding No. 621:

Respondent has no specific response.

622. AC Lens' CEO Mr. Clarkson testified that he wanted to use "1-800 Contacts" as a keyword in AC Lens' paid search advertising campaigns "because we think people who type that are looking to buy contact lenses, and we sell them." (Clarkson, Tr. 343-344).

Response to Finding No. 622:

The proposed finding is incomplete and misleading and should be disregarded.

Mr. Clarkson testified at his December 2016 deposition that he wanted to test the use of "1-800 Contacts" as a keyword because consumers who search for 1-800 Contacts are looking for 1-800 Contacts. (CX 9039 (Clarkson, Dep. at 222). Mr. Clarkson also testified that he would only want to "test" the use of 1-800 Contacts' trademarks as keywords in paid search advertising "if it was considered to be a legal practice." (Clarkson, Tr. 343). (*See also* CX 9039 (Clarkson, Dep. at 223: "[Y]ou want to pay Google to use that trademark to develop – to deliver to you a population that is looking for 1-800 CONTACTS, right? A. Yes. Q. And you want to then, having used their trademark to get this population, you want to show them an ad for your company, right? A. Assuming it's legal.")). Mr. Clarkson also testified that he would not undertake such tests just because the Settlement Agreement was no longer in existence; he would need, in addition, to be assured by his counsel that there were *no* potential legal "entanglements" *before* he would "test bidding on 1-800 Contacts' trademarked terms." (CX 9039 (Clarkson, Dep. at 157)).

623. AC Lens CEO Mr. Clarkson testified that he would like to show AC Lens advertisements in response to consumer searches for 1-800-CONTACTS, if the company could do so

without fear of cease and desist letters, because "we know from public data that there are an awful lot of people who search for 1-800-CONTACTS. We think that some portion of them would be interested in an offer that said, 'We're 20 percent cheaper.' So it – we think it would be a compelling proposition to consumers." (CX9039 (Clarkson, Dep. at 104))

Response to Finding No. 623:

The proposed finding is incomplete and misleading and should be disregarded. Mr. Clarkson testified that he wanted to test the use of "1-800 Contacts" as a keyword precisely because consumers who search for 1-800 Contacts are looking for 1-800 Contacts, (CX 9039 (Clarkson, Dep. at 222), but only "if it was considered to be a legal practice." (Clarkson, Tr. 343). Mr. Clarkson also testified that he would not undertake such tests just because the Settlement Agreement was no longer in existence; he would need, in addition, to be assured by his counsel that there were *no* potential legal "entanglements," not just cease-and-desist letters, before he would "test bidding on 1-800 Contacts' trademarked terms." (CX 9039 (Clarkson, Dep. at 157)).

624. In October 2015, AC Lens Marketing Director Mr. Drumm expressed "hope" that the AC Lens Agreement was "void at this point" and asked AC Lens CEO Mr. Clarkson whether there was "any chance we can start to bid on their brand." (CX1087).

Response to Finding No. 624:

The proposed finding is incomplete and misstates the exhibit (CX 1087). Mr. Drumm stated that "[w]ith 1800 Contacts moving up on our brand terms, is there any chance we can start to bid on their brand . . .?" (CX 1087). It was ACLens' policy at the time not to use a competitor's trademarks as keywords unless the competitor was using ACLens' marks as keywords. (CX 9018 (Drumm, Dep. at 94-96).

625. The reason that AC Lens Marketing Director Mr. Drumm asked Mr. Clarkson whether AC Lens could "start to bid on" 1-800 Contacts' brand in October 2015 was for the purpose of obtaining "more sales." (CX9018 (Drumm, Dep. at 152)).

Response to Finding No. 625:

The proposed finding is incomplete and misstates the testimony. Mr. Drumm was asked "Why were you asking Peter Clarkson if you were permitted to start bidding on 1-800 Contacts' brand?" Mr. Drumm replied:

> "Q. With them putting pressure on us, it felt that – and the Lens.com ruling, we felt like we should potentially bid on 1-800 Contacts terms.
>
> I'm pretty sure that's probably what I was thinking at the time."

(CX 9018 (Drumm, Dep. at 152)). Mr. Drumm's thinking was consistent with ACLens' policy at the time not to use a competitor's trademarks as keywords unless the competitor was using ACLens' trademarks as keywords. (CX 9018 (Drumm, Dep. at 94-96)).

626. AC Lens' Marketing Director testified that "1-800 Contacts obviously is a large company with a lot of people that know about them. Bidding on their terms would provide us an opportunity to show those people that there's an alternative." (CX9018 (Drumm, Dep. at 152)).

Response to Finding No. 626:

Respondent has no specific response.

627. In the business judgment of AC Lens Marketing Director Mr. Drumm, "[i]t would be beneficial for" AC Lens to have the option for an AC Lens advertisement to appear on the search engine results page in response to a search for "1-800 Contacts" or related terms. (CX9018 (Drumm, Dep. at 197)).

Response to Finding No. 627:

The proposed finding is inaccurate and misleading. Mr. Drumm was not asked about his "business judgment" in the quoted passage of the deposition, and depositions are not considered the regular course of business for a company. ACLens' own contemporaneous business records do, however, reflect Mr. Drumm's actual business judgment on these subjects, as he expressed that judgment in his business dealings. In March 2010, Mr. Drumm wrote that "I've worked in

several industries and in my experience I don't think affiliates bidding on competitors trademarks add a large enough volume to be worth the hassle." (CX 9018 (Drumm, Dep. at 93); RX 27 at 2).

628. Mr. Drumm testified that the reason he testified that "[i]t would be beneficial" to AC Lens to show advertisements in response to search queries for "1-800 Contacts" or related terms was that "[t]here are a lot of people that search for '1-800 Contacts' from what we can tell via the keyword tool and other sources. Those are people who are most likely looking for contact lenses to purchase, and it would be definitely relevant and helpful to advertise our sites in that location." (CX9018 (Drumm, Dep. at 197)).

Response to Finding No. 628:

The proposed finding is inaccurate and misleading. ACLens' own contemporaneous business records reflect Mr. Drumm's contemporaneous business judgment on these subjects. In March 2010, Mr. Drumm wrote that "I've worked in several industries and in my experience I don't think affiliates bidding on competitors trademarks add a large enough volume to be worth the hassle." (CX 9018 (Drumm, Dep. at 93); RX 27 at 2).

629. AC Lens' CEO Mr. Clarkson testified that, regardless of what a person's intentions were at the time that person entered a search query for "1-800 Contacts," AC Lens could benefit from showing its advertisements to such a person "[b]ecause we sell the same products and we sell them at a lower price." (Clarkson, Tr. 378).

Response to Finding No. 629:

The proposed finding should be disregarded because the cited testimony by Mr. Clarkson lacked foundation and constituted improper lay opinion. ACLens had not used 1-800 Contacts' trademarks as keywords since at least 2002. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91) (testimony about ACLens' unilateral decision by 2002 not to use 1-800 Contacts' trademarks as keywords, in part because of a general concern that it "may not be legal.")). As a consequence, Mr. Clarkson had no basis for concluding that ACLens could or would benefit from such use.

630. AC Lens' CEO Mr. Clarkson testified that "from a business perspective," AC Lens "absolutely" has an interest in showing its advertisements to consumers who entered the search query "1-800 Contacts" into a search engine even if those consumers did so because the consumers intended to navigate directly to 1-800 Contact's website. (CX9039 (Clarkson, Dep. at 158)).

Response to Finding No. 630:

The proposed finding is incomplete and misleading. Mr. Clarkson was asked a series of questions about whether ACLens would "test" or "consider" using 1-800 Contacts' trademarks as keywords if there were no "potential legal ramifications." (CX 9039 (Clarkson, Dep. at 156-157)). The proposed finding fails to acknowledge the true nature of the questioning.

631. AC Lens' CEO Mr. Clarkson testified that the reason AC Lens has a business interest in showing its advertisements to consumers who entered the search query "1-800 Contacts" for the purpose of navigating directly to 1-800 Contacts website is that "our pricing is sufficiently attractive that we would have a decent shot at converting that customer to shop with us." (CX9039 (Clarkson, Dep. at 158)).

Response to Finding No. 631:

The proposed finding is incomplete and misleading. Mr. Clarkson was asked a series of questions about whether ACLens would "test" or "consider" 1-800 Contacts' trademarks as keywords if there were no "potential legal ramifications." (CX 9039 (Clarkson, Dep. at 156-157)); the proposed finding fails to acknowledge the true nature of the questioning.

632. Mr. Clarkson testified that AC Lens' agreement with 1-800 Contacts "hurt us in terms of sales we likely could have gotten by offering a lower price on the same product to consumers." (CX9039 (Clarkson, Dep. at 163-164)).

Response to Finding No. 632:

The proposed finding should be disregarded because the cited testimony by Mr. Clarkson lacked foundation and constituted improper lay opinion. ACLens had not used 1-800 Contacts' trademarks as keywords since at least 2002. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91) (testimony about ACLens' unilateral decision by 2002 not to use 1-800 Contacts'

trademarks as keywords, in part because of a general concern that it "may not be legal.")). As a consequence, Mr. Clarkson had no basis for concluding that ACLens had likely lost any sales as a result of Mr. Clarkson's decision in 2002 not to bid on 1-800 Contacts' trademarks or his decision in 2010 to settle the lawsuit brought by 1-800 Contacts.

633. Mr. Clarkson testified that "I think that we would certainly have garnered more sales in a world in which we were free to advertise on [1-800 Contacts'] marks" and that "given the size of their company and the volume of monthly searches," the amount of such sales would have been "significant." (Clarkson, Tr. 260).

Response to Finding No. 633:

The proposed finding should be disregarded because the cited testimony by Mr. Clarkson lacked foundation and constituted improper lay opinion. ACLens had not used 1-800 Contacts' trademarks as keywords since at least 2002. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91) (testimony about ACLens' unilateral decision by 2002 not to use 1-800 Contacts' trademarks as keywords, in part, because of a general concern that it "may not be legal.")). As a consequence, Mr. Clarkson had no basis for concluding that ACLens had likely lost any sales as a result of Mr. Clarkson's decision in 2002 not to bid on 1-800 Contacts' trademarks or his decision in 2010 to settle the lawsuit brought by 1-800 Contacts.

634. The only reason AC Lens adopted negative key words related to 1-800 Contact's trademarks was in response to threatening letters from 1-800 Contacts, not the relative performance of such advertising. (CX9039 (Clarkson, Dep. at 135-136)).

Response to Finding No. 634:

The proposed finding is incomplete, inaccurate and misleading. Mr. Clarkson testified that prior to ACLens' decision in 2005 to adopt 1-800 Contacts' trademarks as negative keywords, he had *not* been asked by 1-800 Contacts to adopt anyone's trademarks as negative keywords. (CX 9039 (Clarkson, Dep. at 80-82)). The proposed finding is also inconsistent with

the fact that as of 2015, ACLens had voluntarily implemented negative keywords for numerous contact lens retailers, including very well-known retailers such as Walgreens, Target, Pearle Vision, Lens Express, LensCrafters, CVS, Costco and Coastal Contacts. (RX 33 at 1; (CX 9018 (Drumm, Dep. at 108)).

635. AC Lens did adopt negative key words for some brick and mortar retailers because it expected most consumers searching for such retailers were interested in eye exams. (CX9039 (Clarkson Dep. at 194-5)).

Response to Finding No. 635:

The proposed finding is misleading because it suggests that there are more than just two or perhaps three retailers who are subject to such an expectation on ACLens' part, which is not supported by the cited testimony.

636. AC Lens bids on trademarks of Lens.com, Vision Direct and ShipMyContacts. (CX9039 (Clarkson, Dep. at 197).

Response to Finding No. 636:

The proposed finding is incomplete. Mr. Clarkson testified that ACLens' policy was to use a competitor's trademarks as keywords only if the competitor was using ACLens trademarks as keywords. (CX 9039 (Clarkson, Dep. at 15-16); CX 9003 (Clarkson, IHT at 34) (testifying that "we don't routinely advertise of rival brands' terms," but "[t]here is an exception or two, which is if someone else is running our terms, we'll run on theirs.")).

b. Memorial Eye

637. Memorial Eye did not bid on the keyword "1-800 Contacts" in search advertising auctions, but Memorial Eye ads frequently appeared in response to 1-800 Contacts branded queries as a result of Memorial Eye bidding on other terms (such as "contacts") in broad match or phrase match. (Holbrook, Tr. 1905-1907; CX8006 at 012, *in camera* (¶ 26) (Evans Expert Report) ("Between January 2010 and December 2011, Google showed Memorial Eye text ads on approximately [redacted] search results pages generated by queries related to 1-800 Contacts brand name keywords."); CX8006 at 012 (¶ 26)

(Memorial Eye's ads appeared on [redacted] of the search results pages generated by queries that included 1-800 Contacts branded queries between January 2010 and December 2011)).

Response to Finding No. 637:

Complaint Counsel's Proposed Finding No. 637 is vague, incomplete, and misleading. Memorial Eye [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

638. It was important to Memorial Eye that ads for its websites be displayed in response to search queries that included the term "1-800 Contacts" because Memorial Eye's online businesses were getting a large number of conversions and new customers in response to displaying ads from generic keywords being broad-matched and phrase-matched to 1-800 Contacts terms. (Holbrook, Tr. 1907-1908 (those ads generated "a lot of conversions" for Memorial Eye); CX9024 (Holbrook, Dep. at 70-71) (when Memorial Eye was showing advertisements in response to searches for 1-800 Contacts related terms, its online business "did reap a lot of benefits from that," and "benefited from the fact that the people looking for contact lenses, that relevant traffic would be sent to our site; and it was a large amount."); (CX8006 at 012, *in camera* (¶ 26) (Evans Expert Report)) (between January 2010 and December 2011, clicks on Memorial Eye ads appearing on

search results pages following queries that included 1-800 Contacts branded queries accounted for [redacted] of Memorial Eye's search-advertising related sales)).

Response to Finding No. 638:

Complaint Counsel's Proposed Finding No. 638 is vague, incomplete, and misleading. As an initial matter, the phrases "important" and "large number of conversions and new customers" are vague in this context. At best, the evidence that Complaint Counsel cite in support of this proposed finding demonstrates that Memorial Eye diverted customers by displaying its paid search advertisements in response to search terms containing 1-800 Contacts' trademarks. Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

Complaint Counsel's Proposed Finding No. 638 is also not supported by the weight of the evidence. Memorial Eye did not execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. at 1879). Yet, Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024

(Holbrook, Dep. at 176); Holbrook, Tr. 2034). Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). Thus, it is neither possible nor probable that the effects of the settlement agreement (e.g., no longer being permitted to display its advertisements in response to searches for 1-800 Contacts' trademarks) caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

Complaint Counsel's Proposed Finding No. 638 is also irrelevant. Whether or not Memorial Eye benefited from displaying paid search advertisements in response to searches for 1-800 Contacts' trademarks is not relevant if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

639. The ability to show advertisements in response to searches for 1-800 Contacts "was extremely important" and "critical" to Memorial Eye's online contact lens retail business. (CX9024 (Holbrook, Dep. at 74)).

Response to Finding No. 639:

Complaint Counsel's Proposed Finding No. 639 is vague, incomplete, and misleading. As an initial matter, the phrases "extremely important" and "critical" are vague in this context. At best, the evidence that Complaint Counsel cite in support of this proposed finding demonstrates that Memorial Eye diverted customers by displaying its paid search advertisements

in response to search terms containing 1-800 Contacts' trademarks. Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

Complaint Counsel's Proposed Finding No. 639 is also not supported by the weight of the evidence. Memorial Eye did not execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. at 1879). Yet, Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). The decision to shut down Memorial Eye's online business "was made during the period when the litigation was stayed." (Holbrook, Tr. 2034). Thus, it is neither possible nor probable that the effects of the settlement agreement (e.g., no longer being permitted to display its advertisements in response to searches for 1-800 Contacts' trademarks) caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to

close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

Complaint Counsel's Proposed Finding No. 639 is also irrelevant. Whether or not Memorial Eye benefited from displaying paid search advertisements in response to searches for 1-800 Contacts' trademarks is not relevant if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

640. Even if a customer entering a search for 1-800 Contacts intended to only go to 1-800 Contacts website, Memorial Eye would benefit from its ad appearing on the search engine result page because doing so helped improve Memorial Eye's brand recognition. (Holbrook, Tr. 1910-1911).

Response to Finding No. 640:

Complaint Counsel's Proposed Finding No. 640 is vague, incomplete, and not supported by record evidence. As an initial matter, the phrase "benefit" is vague in this context. Complaint Counsel do not cite any data or expert testimony supporting the proposition that Memorial Eye "benefitted" from displaying its ads to consumers who "intended to only go to 1-800 Contacts website." To the contrary, Complaint Counsel cites only the unsubstantiated testimony of Eric Holbrook, who has no relevant expertise to determine whether a particular type of advertising caused a "benefit."

Complaint Counsel's Proposed Finding No. 640 is also irrelevant. Whether or not Memorial Eye benefited from displaying paid search advertisements in response to searches for

1-800 Contacts' trademarks is not relevant if such conduct constituted trademark infringement or dilution. Regardless whether such conduct "benefitted" Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers "who "intended to only go to 1-800 Contacts website," Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

641. Memorial Eye determined that implementing the negative keywords for 1-800 Contacts related terms that 1-800 Contacts was asking Memorial Eye to use "would destroy [the] business." (Holbrook, Tr. at 1876-1877).

Response to Finding No. 641:

Complaint Counsel's Proposed Finding No. 641 is vague, incomplete, misleading, and not supported by the weight of the evidence. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). But Memorial Eye did not even execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. 1879). In other words, Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). The decision to shut down Memorial Eye's online business "was made during the period when the litigation was stayed." (Holbrook, Tr. 2034). Thus, it is neither possible nor probable that the effects of the settlement agreement caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

Moreover, Memorial Eye's decision to enter the settlement agreement with 1-800 Contacts was motivated by its assessment of the "legal uncertainty" and "financial risks" of continuing the litigation. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Eric Holbrook testified that one of the reasons that Memorial Eye decided to settle the trademark infringement litigation with 1-800 Contacts was because the appellate courts had not resolved the question of whether "broad match[ing]" constituted trademark infringement. (Holbrook, Tr. 1875). That unresolved question "was the most important thing" to Memorial Eye; "it was a big deal." (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Mr. Holbrook testified that unresolved question created "a lot of legal uncertainty" and "financial risk" for Memorial Eye that motivated Memorial Eye to settle its litigation with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875).

Mr. Holbrook also testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

Complaint Counsel's Proposed Finding No. 641 is also irrelevant. Whether or not Memorial Eye would suffer from being prohibited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark

infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

642. The reason Memorial Eye determined that implementing the negative keywords for 1-800 Contacts related terms that 1-800 Contacts was asking Memorial Eye to use "would destroy [the] business" was that "we got a vast amount of conversions from" "search terms that included the 1-800 Contacts-related terms," "which yielded a vast amount of sales. And we knew that if – if we had to file those negative keywords that 1-800 Contacts was demanding that we would no longer be able to get those conversions, those sales." (Holbrook, Tr. at 1876-1877).

Response to Finding No. 642:

Complaint Counsel's Proposed Finding No. 642 is vague, incomplete, misleading, and not supported by the weight of the evidence. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). But Memorial Eye did not even execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. 1879). In other words, Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). The decision to shut down Memorial Eye's online business "was made during the period when the litigation was stayed." (Holbrook, Tr. 2034). Thus, it is neither possible nor probable that the effects of the settlement agreement caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

Moreover, Memorial Eye's decision to enter the settlement agreement with 1-800 Contacts was motivated by its assessment of the "legal uncertainty" and "financial risks" of continuing the litigation. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Eric Holbrook testified that one of the reasons that Memorial Eye decided to settle the trademark infringement litigation with 1-800 Contacts was because the appellate courts had not resolved the question of whether "broad match[ing]" constituted trademark infringement. (Holbrook, Tr. 1875). That unresolved question "was the most important thing" to Memorial Eye; "it was a big deal." (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Mr. Holbrook testified that unresolved question created "a lot of legal uncertainty" and "financial risk" for Memorial Eye that motivated Memorial Eye to settle its litigation with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875).

Mr. Holbrook also testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

Complaint Counsel's Proposed Finding No. 642 is also irrelevant. Whether or not Memorial Eye would suffer from being prohibited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark

infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

643. For the period from January 1, 2005 through December 31, 2013, [redacted] of the ten search queries responsible for Memorial Eye's largest number of conversions through Google AdWords were search queries that contained 1-800 Contact's name or a variation thereof. (CX1626, *in camera*; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 643:

Complaint Counsel's Proposed Finding No. 643 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the exact documents that they now cite in support of this proposed finding. (Tr. 1990 ("[CX 1626] is excluded."), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted]

(Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "responsible for Memorial Eye's largest number of conversions") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 643 is incomplete and misleading. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). But Memorial Eye did not even execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. 1879). In other words, Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). The decision to shut down Memorial Eye's online business "was made during the period when the litigation was stayed." (Holbrook, Tr. 2034). Thus, it is neither possible nor probable that the effects of the settlement agreement caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

644. For the period from January 1, 2005 through December 31, 2013, [redacted] of the ten search queries responsible for Memorial Eye's largest number of clicks through Google AdWords were search queries that contained 1-800 Contact's name or a variation thereof. (CX1625, *in camera*; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 644:

Complaint Counsel's Proposed Finding No. 644 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "responsible for Memorial Eye's largest number of clicks") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical

expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 644 is incomplete and misleading. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). But Memorial Eye did not even execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. 1879). In other words, Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). The decision to shut down Memorial Eye's online business "was made during the period when the litigation was stayed." (Holbrook, Tr. 2034). Thus, it is neither possible nor probable that the effects of the settlement agreement caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

645. As Dr. Evans explained: "[t]he fact that Memorial Eye had an average position of **{6.0}** on non 1-800 Contacts BKW searches and an average position of **{2.1}** on 1-800 Contacts BKW searches suggests that, in the absence of the bidding agreements, other firms would likely have performed better on 1-800 Contacts BKW searches." (CX8006 at 100, *in camera* (¶ 218) (Evans Expert Report)).

Response to Finding No. 645:

Complaint Counsel's Proposed Finding No. 645 is not supported by record evidence, incomplete and misleading. The fact that Memorial Eye had a higher average position for searches containing 1-800 Contacts' trademarks than for other searches simply reflects the fact that Memorial Eye's advertisements were assigned a higher AdRank by the Google AdWords algorithm than other advertisers' advertisements for searches containing 1-800 Contacts'

trademarks. (RX 716 at 30). AdRank is assigned based on a variety of factors, including the advertiser's "auction-time measurements of expected [click-through rate], ad relevance, landing page experience, and the expected impact of extensions and other ad formats." (RX 716 at 1). Because AdWords takes into account a number of factors other than the bid amount, advertisers that obtain the top ad positions may not be the highest bidders. (RX 612A, Varian Video, Tr. 9). Given the dynamic nature of the AdWords algorithms, the quality score for a particular advertiser with a particular ad [redacted] (Juda, Tr. 1262).

i. Best Performing Generic Queries

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

Response to Finding No. 646:

Complaint Counsel's Proposed Finding No. 646 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was

created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "highest performing search queries") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

(A) "Contact Lenses"

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

Response to Finding No. 647:

Complaint Counsel's Proposed Finding No. 647 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "[redacted]") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this

proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

(B) "Contacts"

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

Response to Finding No. 648:

Complaint Counsel's Proposed Finding No. 648 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "[redacted]") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

(C) "Contact Lens"

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

Response to Finding No. 649:

Complaint Counsel's Proposed Finding No. 649 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted]

[redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "[redacted]") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

ii. "1800contacts"

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

Response to Finding No. 650:

Respondent has no specific response to Complaint Counsel's Proposed Finding No. 650.

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

Response to Finding No. 651:

Complaint Counsel's Proposed Finding No. 651 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the

documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

Complaint Counsel's Proposed Finding No. 651 is also irrelevant. Whether or not Memorial Eye benefited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

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

Response to Finding No. 652:

Complaint Counsel's Proposed Finding No. 652 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "highest performing search query") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert

opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Complaint Counsel's Proposed Finding No. 652 is also irrelevant. Whether or not Memorial Eye benefited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

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

Response to Finding No. 653:

Complaint Counsel's Proposed Finding No. 653 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the

specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

654. Memorial Eye's average conversion rate in Google AdWords for the search query "1800contacts" (based on broad match for the keyword "contacts" alone) during the period from January 1, 2005, through December 31, 2013, was 10.11%, which is greater than the average conversion rates for the generic search queries "contact lenses" (8.55%), "contacts" (8.9%), or "contact lens" (7.68%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)). Memorial Eye's average conversion rate for "1800contacts" (based on broad match for the keyword "contacts" alone) was also higher than Memorial Eye's overall average conversion rate for all search queries (7.9%) for the same time period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 654:

Complaint Counsel's Proposed Finding No. 654 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint

Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

655. Memorial Eye's click-through rate in Google AdWords for the search query "1800contacts" (based on broad match for the keyword "contacts" alone) for the period from January 1, 2005, through December 31, 2013, was 0.98%, which is greater than the click-through rate for the generic search query "contacts" (0.77%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

iii. "1800 contacts"

Response to Finding No. 655:

Complaint Counsel's Proposed Finding No. 655 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was

created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

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

Response to Finding No. 656:

Respondent has no specific response.

657. For the period from January 1, 2005, through December 31, 2013, the search query "1800 contacts" was the third highest performing search query for Memorial Eye in Google AdWords, in terms of conversions, and the second highest performing in terms of number of clicks. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 657:

Complaint Counsel's Proposed Finding No. 657 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye

authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

The deficiencies in Complaint Counsel's evidence are particularly acute with respect to this proposed finding, which makes value judgments (e.g., "highest performing search query") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Complaint Counsel's Proposed Finding No. 657 is also irrelevant. Whether or not Memorial Eye benefited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements

appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

658. Memorial Eye's average cost per conversion for conversions associated with the search query "1800 contacts" in Google AdWords for the period from January 1, 2005, through December 31, 2013, was $18.36, which is less than the average costs per conversion for conversions associated with the generic searches "contact lenses" ($18.98) or "contact lens" ($20.60) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 658:

Complaint Counsel's Proposed Finding No. 658 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

Complaint Counsel's Proposed Finding No. 658 is also irrelevant. Whether or not Memorial Eye benefited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

659. Memorial Eye's average conversion rate in Google AdWords for the search query "1800 contacts" during the period from January 1, 2005, through December 31, 2013, was 10.74%, which is greater than the average conversion rates for the generic search queries "contact lenses" (8.55%), "contacts" (8.9%), or "contact lens" (7.68%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)). Memorial Eye's average conversion rate for "1800 contacts" was also higher than Memorial Eye's overall average conversion rate for all search queries (7.9%) for the same time period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 659:

Complaint Counsel's Proposed Finding No. 659 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye

authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

Complaint Counsel's Proposed Finding No. 659 is also irrelevant. Whether or not Memorial Eye benefited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

660. Memorial Eye's click-through rate in Google AdWords for the search query "1800 contacts" for the period from January 1, 2005, through December 31, 2013, was 1.39%, which is greater than the click-through rates for the generic search queries "contact lenses" (1.17%) or "contacts" (0.77%) during the same period. (CX1626; CX1625; *see also* CX8012 at 001-004 (¶¶ 1-10) (Nguon, Decl.)).

Response to Finding No. 660:

Complaint Counsel's Proposed Finding No. 660 is not supported by record evidence. At the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the

documents that they now cite in support of this proposed finding. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1626 and 1625) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from Memorial Eye authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. Indeed, the only witness from Memorial Eye who provided sworn testimony, [redacted] (Holbrook, Tr. 1966–1967). The cited evidence is, therefore, plainly insufficient to support the proposed finding. For that reason, the Court excluded it. (Tr. 1990).

Complaint Counsel's Proposed Finding No. 660 is also irrelevant. Whether or not Memorial Eye benefited from displaying its advertisements in response to searches for 1-800 Contacts' trademarks is immaterial if such conduct constituted trademark infringement or dilution. Regardless whether such conduct benefitted Memorial Eye, it harmed consumers. By displaying irrelevant advertisements to consumers, Memorial Eye increased those consumers' search costs and reduced the value of the search engine results page. (RX 733 at 27-41). Moreover, a significant number of such consumers were confused by such advertisements appearing in response to a search for 1-800 Contacts' trademarks. (RX 735 at 21; RX 736 at 17-34).

c. LensDirect

661. [redacted] (CX8006 at 061 (¶ 132) (Evans Expert Report)).

Response to Finding No. 661:

Complaint Counsel's Proposed Finding No. 661 is not supported by the cited evidence. Complaint Counsel cite only to a report of one of their expert witnesses for a factual proposition, in violation of this Court's May 16, 2017 Order On Post-Trial Briefs. Complaint Counsel do not cite any factual evidence or percipient testimony to support this finding. Even the cited portions of Complaint Counsel's expert's report do not support the proposed finding. The cited portion of Dr. Evans' report refers, in a footnote, only to unspecified "calculations from 1-800 BKW Data Set." (CX 8006 at 61). By Dr. Evans' own admission, however, the "BKW Data Set" does not include data regarding the appearance of ads in response to specific search queries. To the contrary, according to Dr. Evans, the "BKW Data Set" only includes data "by advertiser account and keyword." (CX 8006 at 54). Thus, it is not possible to draw any conclusions from the cited evidence about LensDirect's advertisements appearing, or not appearing, in response to specific search queries.

662. [redacted] (CX8006 at 061 (¶ 132) (Evans Expert Report)).

Response to Finding No. 662:

Complaint Counsel's Proposed Finding No. 662 is not supported by the cited evidence. Complaint Counsel cite only to a report of one of their expert witnesses for a factual proposition, in violation of this Court's May 16, 2017 Order On Post-Trial Briefs. Complaint Counsel do not cite any factual evidence or percipient testimony to support this finding. Even the cited portions

of Complaint Counsel's expert's report do not support the proposed finding. The cited portion of Dr. Evans' report refers, in a footnote, only to unspecified "calculations from 1-800 BKW Data Set." (CX 8006 at 61). By Dr. Evans' own admission, however, the "BKW Data Set" does not include data regarding the appearance of ads in response to specific search queries. To the contrary, according to Dr. Evans, the "BKW Data Set" only includes data "by advertiser account and keyword." (CX 8006 at 54). Thus, it is not possible to draw any conclusions from the cited evidence about LensDirect's advertisements appearing, or not appearing, in response to specific search queries.

663. [redacted] (CX8006 at 061 (¶ 132) (Evans Expert Report)).

Response to Finding No. 663:

Complaint Counsel's Proposed Finding No. 663 is not supported by the cited evidence. Complaint Counsel cite only to a report of one of their expert witnesses for a factual proposition, in violation of this Court's May 16, 2017 Order On Post-Trial Briefs. Complaint Counsel do not cite any factual evidence or percipient testimony to support this finding. Even the cited portions of Complaint Counsel's expert's report do not support the proposed finding. The cited portion of Dr. Evans' report refers, in a footnote, only to unspecified "calculations from 1-800 BKW Data Set." (CX 8006 at 61). By Dr. Evans' own admission, however, the "BKW Data Set" does not include data regarding the appearance of ads in response to specific search queries. To the contrary, according to Dr. Evans, the "BKW Data Set" only includes data "by advertiser account and keyword." (CX 8006 at 54). Thus, it is not possible to draw any conclusions from the cited evidence about LensDirect's advertisements appearing, or not appearing, in response to specific search queries.

664. [redacted] (CX8006 at 061 (¶ 132) (Evans Expert Report)).

Response to Finding No. 664:

Complaint Counsel's Proposed Finding No. 664 is not supported by the cited evidence. Complaint Counsel cite only to a report of one of their expert witnesses for a factual proposition, in violation of this Court's May 16, 2017 Order On Post-Trial Briefs. Complaint Counsel do not cite any factual evidence or percipient testimony to support this finding. Even the cited portions of Complaint Counsel's expert's report do not support the proposed finding. The cited portion of Dr. Evans' report refers, in a footnote, only to unspecified "calculations from 1-800 BKW Data Set." (CX 8006 at 61). By Dr. Evans' own admission, however, the "BKW Data Set" does not include data regarding the appearance of ads in response to specific search queries. To the contrary, according to Dr. Evans, the "BKW Data Set" only includes data "by advertiser account and keyword." (CX 8006 at 54). Thus, it is not possible to draw any conclusions from the cited evidence about LensDirect's advertisements appearing, or not appearing, in response to specific search queries.

665. LensDirect "find[s] great value in bidding on '1-800 Contacts.'" (Alovis, Tr. 1014).

Response to Finding No. 665:

Complaint Counsel's Proposed Finding No. 665 is vague, inaccurate, incomplete, and misleading. As an initial matter, it is unclear what "great value" means in this context. Moreover, the proposed finding is unsupported by the record evidence. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's

target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

666. LensDirect "would not bid" on 1-800 Contacts related keywords in search advertising auctions if doing so amounted to a waste of money. (Alovis, Tr. 1015).

Response to Finding No. 666:

Complaint Counsel's Proposed Finding No. 666 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" was $45.07. (Alovis, Tr. 1043–1044). And

LensDirect's average cost per conversion for the phrase "1800 contacts" was $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

667. During Mr. Alovis' time as CEO of LensDirect, LensDirect's bidding on 1-800 Contacts terms "absolutely" drove a significant amount of business for LensDirect." (Alovis, Tr. 1014).

Response to Finding No. 667:

Complaint Counsel's Proposed Finding No. 667 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr.

1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

668. The large "volume" of searches for 1-800 Contacts related terms—that is, the fact that "[a] lot of people were searching for" such terms—is one reason LensDirect began to bid on those terms. (CX9023 (Alovis, Dep. at 121); *see also* Alovis, Tr. 1006; *see also* Alovis, Tr. 1014 (testifying that one reason LensDirect finds "great value" in bidding on '1-800 Contacts' is that "[a] a lot of people search for '1-800 Contacts.'")).

Response to Finding No. 668:

Respondent has no specific response.

669. LensDirect's CEO further testified that the volume of searches for 1-800 Contacts related terms made bidding on those terms attractive because "[w]e figured we offered a better solution" for customers "and we should go where there are other people." (CX9023 (Alovis, Dep. at 122)).

Response to Finding No. 669:

Complaint Counsel's Proposed Finding No. 669 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for

LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

670. The volume of searches for 1-800 Contacts and LensDirect's ability to offer customers a "better" offering is why LensDirect bids on 1-800 Contacts related terms. (CX9023 (Alovis, Dep. at 122)).

Response to Finding No. 670:

Complaint Counsel's Proposed Finding No. 670 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–

1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

671. LensDirect's CEO testified that he believes the message "Same Contacts, Better Prices" is "[a]bsolutely" an appealing message to a consumer who searched for "1-800 Contacts." (Alovis, Tr. 993-994).

Response to Finding No. 671:

Complaint Counsel's Proposed Finding No. 671 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for

paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

672. LensDirect's CEO testified that it makes business sense for LensDirect to show advertisements in response to a search for "1800contacts" because "[a] lot of people search for "1800contacts' and we want to be there when they do. . . . We hope to get those interested people to become customers of LensDirect because we believe we're offering . . . a better price for the same product." (Alovis, Tr. 1006).

Response to Finding No. 672:

Complaint Counsel's Proposed Finding No. 672 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for

paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

673. LensDirect has no plans to stop using 1-800 Contacts terms as search advertising keywords. (Alovis, Tr. 1015-1016 ("Q. Sitting here today, do you think LensDirect will continue to use 1-800 Contacts terms as search advertising keywords? A. God willing, we will. Q. Have you discussed any plans with your marketing team to stop using 1-800 Contacts terms a search advertising keywords? A. I have not and I hope I don't have to ever have that conversation.")).

Response to Finding No. 673:

Complaint Counsel's Proposed Finding No. 673 is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for

paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

674. In the year 2016, terms related to 1-800 Contacts generated revenue for LensDirect. (CX9023 (Alovis Dep. at 128)).

Response to Finding No. 674:

Complaint Counsel's Proposed Finding No. 674 is inaccurate, incomplete, and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-

800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

675. In the year 2016, terms related to 1-800 Contacts had high conversion rates for LensDirect. (CX9023 (Alovis Dep. at 128)).

Response to Finding No. 675:

Complaint Counsel's Proposed Finding No. 675 is inaccurate, incomplete, and misleading. As an initial matter, it is not apparent what "high conversion rates" means in this context. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Moreover, LensDirect's conversion rate for the search term "LensDirect" was nearly double its conversion rate for the search term "1800contacts." (CX 1640.) Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.)

676. LensDirect's marketing personnel reported to LensDirect's CEO Mr. Alovis that in the year 2016, the keyword "1 800 contacts" and other terms related to 1-800 Contacts were "performing well," meaning that they had high conversion rates and brought in revenue for LensDirect. (CX9023 (Alovis Dep. at 128)).

Response to Finding No. 676:

Complaint Counsel's Proposed Finding No. 676 is inaccurate, incomplete, and misleading. As an initial matter, it is not apparent what "performing well" and "high conversion rates" means in this context. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search

advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Moreover, LensDirect's conversion rate for the search term "LensDirect" was nearly double its conversion rate for the search term "1800contacts," meaning that the conversion rate for "1800contacts" was not high relative to the conversion rate for "LensDirect." (CX 1640.) Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.)

677. In order to measure the importance of a marketing strategy, LensDirect evaluates "[o]verall conversions," meaning "how many sales we actually got from a specific keyword, and what that cost per acquisition was." Specifically, "[i]f it was a low cost per acquisition, [and] we got a lot of conversions, we're very happy." (Alovis, Tr. 1014).

Response to Finding No. 677:

Complaint Counsel's Proposed Finding No. 677 is inaccurate, incomplete, and misleading. In this context, the phrase "importance of a marketing strategy" is ambiguous; that phrase was never used by Ryan Alovis or any other witness for LensDirect. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts"

is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

678. The cost per conversion figures reported in LensDirect's AdWords account (including in, for example, the document bearing the exhibit number CX1641) represent LensDirect's cost per acquisition, that is, the "[c]ost for a new customer." (Alovis, Tr. 1004-1005 ("Q. And what does the abbreviation 'Cost/conv.' Refer to? A. That's really a cost per acquisition. Q. An so it's – does 'conv.' Mean conversion here? A. Yes. Cost per conversion. Cost for a new customer. Q. Do you think of those two terms interchangeably? A. Definitely. Same thing.")).

Response to Finding No. 678:

Respondent has no specific response.

679. In terms of overall conversions, bidding on 1-800 Contacts terms has been a successful strategy for LensDirect. (Alovis, Tr. 1014).

Response to Finding No. 679:

Complaint Counsel's Proposed Finding No. 679 is inaccurate, incomplete, and misleading. As an initial matter, the use of the term "successful" in this context is ambiguous. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is

"not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

680. For the period from January 1, 2010, through December 31, 2016, four of the ten search queries responsible for LensDirect's largest number of conversions through Google AdWords were search queries that contained 1-800 Contact's name or a variation thereof. (CX1641; CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl)).

Response to Finding No. 680:

Complaint Counsel's Proposed Finding No. 680 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from

Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded.

Moreover, Complaint Counsel's Proposed Finding No. 680 is incomplete and misleading. The cited evidence reflects the fact that the cost per conversion for 1-800 Contacts' trademark keywords is dramatically higher than other keywords bid on by LensDirect. (CX 1641). This is confirmed by record testimony. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr.

1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

681. For the period from January 1, 2010, through December 31, 2016, 17 of the 50 search queries responsible for LensDirect's largest number of conversions through Google AdWords were search queries that contained 1-800 Contact's name or a variation thereof. (CX1641; CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl)).

Response to Finding No. 681:

Complaint Counsel's Proposed Finding No. 681 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded.

Moreover, Complaint Counsel's Proposed Finding No. 680 is incomplete, and misleading. The cited evidence reflects the fact that the cost per conversion for 1-800 Contacts'

trademark keywords is dramatically higher than other keywords bid on by LensDirect. (CX 1641). This is confirmed by record testimony. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

682. LensDirect uses the terms "cost per conversion" and "cost per acquisition" interchangeably. (Alovis, Tr. 1004-1005).

Response to Finding No. 682:

Respondent has no specific response.

683. LensDirect's target cost per acquisition for paid search advertising in the year 2016 "ranged anywhere from $45 to even some days $60 per new customer." (Alovis, Tr. 1000).

Response to Finding No. 683:

Complaint Counsel's Proposed Finding No. 683 is incomplete and misleading. Although Mr. Alvois testified that LensDirect had a higher target cost per acquisition for 2016, the company has since revised its target dramatically lower. For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044).

684. LensDirect's target cost per acquisition for 2017 was between $20 and $25. (Alovis, Tr. 999-1000 ("We aim to spend around $20 to $25 per acquisition, per new customer.")).

Response to Finding No. 684:

Respondent has no specific response to Complaint Counsel's Proposed Finding No. 684.

685. A higher conversion rate is better for business than a lower conversion rate. (Alovis, Tr. 1013 ("The higher the conversion rate, the better for business, absolutely. We hope that it is higher than it is today and continues to grow.")).

Response to Finding No. 685:

Complaint Counsel's Proposed Finding No. 685 is incomplete, misleading, and not supported by record evidence. The only record evidence cited by Complaint Counsel for this proposed finding is testimony from Mr. Alovis, the CEO of LensDirect. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid

search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, it is not possible to draw an inference from Mr. Alovis' testimony that a higher conversion rate is always "better for business" than a lower conversion rate. For example, if the cost per click is higher for a particular keyword, it might be less efficient for an advertiser than a keyword with a lower cost per click, even if the first keyword's conversion rate is higher. That is why Mr. Alovis subsequently testified that the "cost per acquisition" must be considered in evaluating the performance of a particular keyword. (Alovis, Tr. 1005, 1014).

i. Best Performing Generic Queries

686. For the period from January 1, 2010 through December 31, 2016, the two highest performing search queries for LensDirect in terms of number of conversions (other than search terms that contained a variation of LensDirect's or 1-800 Contacts' brand names) were "contacts" and "order contacts online." (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 686:

Complaint Counsel's Proposed Finding No. 686 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document

prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which makes value judgements (e.g., "highest performing search queries") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

687. For the period from January 1, 2010, through December 31, 2016, the search query "contacts" was the seventh highest performing search query for LensDirect, in terms of number of conversions. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 687:

Complaint Counsel's Proposed Finding No. 687 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint

Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which makes value judgements (e.g., "highest performing search query") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

688. For the period from January 1, 2010, through December 31, 2016, the search query "order contacts online" was the eleventh highest performing search query for LensDirect, in terms of number of conversions. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 688:

Complaint Counsel's Proposed Finding No. 687 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court

already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which makes value judgements (e.g., "highest performing search query") regarding the referenced, unsubstantiated data. Drawing such judgments requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

689. LensDirect's click-through rate for the search query "contacts" for the period from January 1, 2010, through December 31, 2016 was 0.75%. (Alovis, Tr. 1052-1053; CX1640; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl)).

Response to Finding No. 689:

Complaint Counsel's Proposed Finding No. 689 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is documents they generated for the specific purpose of this litigation (CX 1640, CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding,

which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

ii. "1800contacts"

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

Response to Finding No. 690:

Respondent has no specific response.

691. The term "1800contacts" is one of the "keywords/search terms" that 1-800 Contacts, in a June 6, 2011 letter and proposed agreement attached thereto, asked LensDirect to implement as a negative keyword. (CX1241).

Response to Finding No. 691:

Complaint Counsel's Proposed Finding No. 691 is inaccurate, incomplete, and not supported by the cited evidence. In the document cited by Complaint Counsel, CX 1241, 1-800 Contacts merely requested that LensDirect "implement appropriate negative keywords." (CX 1241 at 3). It did not specify specific phrases or terms that LensDirect should implement as negative keywords.

692. In a June 6, 2011 letter and proposed agreement attached thereto, 1-800 Contacts asked LensDirect to stop showing advertisements in response to searches for "1800contacts." (CX1241).

Response to Finding No. 692:

Respondent has no specific response.

693. During the period from January 1, 2010, through December 31, 2016, LensDirect bid on the keyword "1800contacts" in "exact match" as part of at least two Google AdWords campaigns: a campaign identified as "Competitors – 1800 Contacts" and a campaign identified as "Competitors." (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 693:

Complaint Counsel's Proposed Finding No. 693 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data (e.g., the match type and campaign of specific keywords employed by LensDirect). Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

694. To the extent that bidding on the keyword "1800contacts" in exact match resulted in LensDirect advertisements being shown in response to the search query "1800contacts," information regarding those advertisement impressions is reported separately in LensDirect's Google AdWords data for each of the campaigns in which LensDirect bid on "1800contacts" in exact match. (*See* CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 694:

Complaint Counsel's Proposed Finding No. 694 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data (e.g., what data or results would be reflected on which metric within the document generated by Complaint Counsel). Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

695. For the period from January 1, 2010, through December 31, 2016, the single search query "1800contacts" (as part of the LensDirect AdWords campaign titled "Competitors – 1-800-Contacts") was the fifth highest performing search query for LensDirect, in terms of conversions. (Alovis, Tr. 1005-1006; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 695:

Complaint Counsel's Proposed Finding No. 695 is not supported by record evidence. The cited trial testimony of Ryan Alovis does not support the proposition that the query "1800contacts" was the fifth "highest performing search query" for Lens Direct. The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data (e.g., what data or results would be reflected on which metric within the document generated by Complaint Counsel). Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any

individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

696. LensDirect's average cost per conversion for conversions associated with the search query "1800contacts" (as part of the LensDirect AdWords campaign titled "Competitors – 1-800-Contacts") for the period from January 1, 2010, through December 31, 2016, was $43.13, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the same period. (Alovis, Tr. 1010; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 696:

Complaint Counsel's Proposed Finding No. 696 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800contacts" is $45.07. Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

Moreover, Complaint Counsel's Proposed Finding No. 696 is not supported by record evidence. The cited trial testimony of Ryan Alovis does not support the proposed finding. The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a

document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data (e.g., what data or results would be reflected on which metric within the document generated by Complaint Counsel). Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

697. A cost per conversion of $43.13 is "in line with what we were spending in 2016" per conversion. (Alovis, Tr. 1010).

Response to Finding No. 697:

Complaint Counsel's Proposed Finding No. 697 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr.

1043). Yet, LensDirect's average cost per conversion for the phrase "1800contacts" is $45.07. Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

698. LensDirect's average cost per conversion for conversions associated with the search query "1800contacts" (as part of the LensDirect AdWords campaign titled "Competitors") for the period from January 1, 2010, through December 31, 2016, was $39.97, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the same period. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 698:

Moreover, Complaint Counsel's Proposed Finding No. 698 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel

for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 698 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800contacts" is $45.07. Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

699. LensDirect's average conversion rate for the search query "1800contacts" (as part of the LensDirect AdWords campaign titled "Competitors – 1-800-Contacts") for the period

from January 1, 2010, through December 31, 2016, was 7.88%, which is greater than its average conversion rate for the generic search query "contacts" (5.96%) during the same period. (Alovis, Tr. 1013; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)). The average conversion rate for "1800contacts" (as part of the LensDirect AdWords campaign titled "Competitors – 1-800-Contacts") is also greater than LensDirect's overall average conversion rate for all search queries (5.89%) for the same period. (Alovis, Tr. 1004, 1013; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 699:

Complaint Counsel's Proposed Finding No. 699 is not supported by record evidence. The cited trial testimony of Ryan Alovis does not support the proposed finding. The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical

expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 699 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800contacts" is $45.07. Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

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

Response to Finding No. 700:

Complaint Counsel's Proposed Finding No. 700 is not supported by record evidence. The cited trial testimony of Ryan Alovis does not support the proposed finding. The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration

from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 700 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800contacts" is $45.07. Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified

that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

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

Response to Finding No. 701:

Complaint Counsel's Proposed Finding No. 701 is not supported by record evidence. The cited trial testimony of Ryan Alovis does not support the proposed finding. The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding,

which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 701 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800contacts" is $45.07. Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

iii. "1800contacts coupon"

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

Response to Finding No. 702:

Complaint Counsel's Proposed Finding No. 702 is inaccurate, incomplete, and not supported by the cited evidence. In the document cited by Complaint Counsel, CX 1241, 1-800 Contacts merely requested that LensDirect "implement appropriate negative keywords." (CX 1241 at 3). It did not specify specific phrases or terms that LensDirect should implement as negative keywords. The cited testimony of Ryan Alovis does not support the proposed finding.

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

Response to Finding No. 703:

Complaint Counsel's Proposed Finding No. 703 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such

conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 703 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

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

Response to Finding No. 704:

Complaint Counsel's Proposed Finding No. 704 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these

documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 704 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800

Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

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

Response to Finding No. 705:

Complaint Counsel's Proposed Finding No. 705 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical

expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 705 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

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

Response to Finding No. 706:

Complaint Counsel's Proposed Finding No. 706 is inaccurate, incomplete, and misleading. The only record evidence cited by Complaint Counsel for this proposed finding is testimony from Mr. Alovis, the CEO of LensDirect. From that testimony alone, it is not possible to draw the inference that a $18.73 is "a very attractive price for a new customer" for all contact lens retailers. Moreover, Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double

LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

707. LensDirect's average cost per conversion for conversions associated with the search query "1800contacts coupon" in exact match for the period from January 1, 2010, through December 31, 2016, was $9.92, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the same period. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 707:

Complaint Counsel's Proposed Finding No. 707 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding,

which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 707 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

708. LensDirect's average conversion rate for the search query "1800contacts coupon" in broad match for the period from January 1, 2010, through December 31, 2016, was 13.2%, which is greater than its average conversion rates for the generic search queries "contacts" (5.96%) or "order contacts online" (11.2%) during the same period. (Alovis, Tr. 1012; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)). A conversion rate of 13.2% is "more than double" LensDirect's average conversion rate for all search terms for the period from January 1, 2010, through December 31, 2016. (Alovis, Tr. 1012.)

Response to Finding No. 708:

Complaint Counsel's Proposed Finding No. 708 is not supported by record evidence. The cited testimony of Ryan Alvois does not support Complaint Counsel's proposed finding.

The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 708 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few

customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

709. LensDirect's average conversion rate for the search query "1800contacts coupon" in exact match for the period from January 1, 2010, through December 31, 2016, was 13.63%, which is greater than its average conversion rates for the generic search queries "contacts" (5.96%) or "order contacts online" (11.2%) during the same period. (CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)). The average conversion rate for the search query "1800contacts coupon" in exact match is also greater than LensDirect's average conversion rate for all search terms (5.89%) for the same period. (Alovis, Tr. 1004; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 709:

Complaint Counsel's Proposed Finding No. 709 is not supported by record evidence. The cited testimony of Ryan Alvois does not support Complaint Counsel's proposed finding. The only remaining evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint

Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 709 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

710. For the period from January 1, 2010 through December 31, 2016, LensDirect's average click-through rate for the search query "1800contacts coupon" in both broad match (8.32%) and exact match (7.67%) was higher than its average click-through rate for common generic search queries such as "contacts" (0.75%) and "order contacts online" (4.3%). (CX1640; CX1641; *see also* CX8012 at 001-002, 010 (¶¶ 1-6, 25-26) (Nguon, Decl.)).

Response to Finding No. 710:

Complaint Counsel's Proposed Finding No. 710 is not supported by record evidence. The only evidence that Complaint Counsel cite in support of this proposed finding is a document they generated for the specific purpose of this litigation (CX 1641) and a declaration from Complaint Counsel's "research analyst" (CX 8012). There is no evidence or testimony from LensDirect authenticating these documents, explaining how the data contained in these documents was created or stored, or explaining the meaning of the various fields of data in these documents. The cited evidence is, therefore, plainly insufficient to support the proposed finding. Indeed, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on nearly identical evidence and declarations that were generated by Complaint Counsel for the purpose of this litigation. (Tr. 1989-1990 (excluding testimony regarding "a document prepared by complaint counsel"), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The cited documents are nearly identical to the evidence the Court already excluded. Such deficiencies are particularly acute with respect to this proposed finding, which attempts to draw conclusions from the referenced, unsubstantiated data. Drawing such conclusions requires technical expertise and is the subject of expert opinion. Yet Complaint Counsel do not offer any expert opinion, or any testimony from any individual with technical expertise, in support of this proposed finding. To the contrary, Complaint Counsel cite only documents their staff generated for the purpose of this litigation.

Moreover, Complaint Counsel's Proposed Finding No. 705 is incomplete and misleading. Ryan Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800

Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

d. Vision Direct

711. Vision Direct has not implemented negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (Hamilton, Tr. 417; CX8002 at 005 (¶ 17) (Hamilton, Decl.) ("I am not aware of Vision Direct implementing negative keywords with respect to any online contact lens retailer other than 1-800 Contacts.")).

Response to Finding No. 711:

The proposed finding is not supported by Mr. Hamilton's testimony, which shows only that he is not *personally* aware of such activities.

712. Absent the settlement with 1-800 Contacts, Vision Direct would not have implemented any negative keywords related to 1-800 Contacts. (CX8001 at 005 (¶ 16) (Hamilton, Decl.),).

Response to Finding No. 712:

The proposed finding overstates Mr. Hamilton's testimony. Mr. Hamilton provided an opinion at trial that he believes it to be "highly unlikely"—but not certain, as suggested in Complaint Counsel's finding—that absent the settlement with 1-800 Contacts, Vision Direct would not have implemented any negative keywords related to 1-800 Contacts. (Hamilton, Tr. 417). He did not testify that the decision was within his authority to decide. As a result, his opinion is speculative and without foundation.

713. During Mr. Hamilton's tenure at Vision Direct, [redacted] (CX8002 at 006 (¶ 20) (Hamilton, Decl.), *in camera*).

Response to Finding No. 713:

The proposed finding cites only Mr. Hamilton's unsupported opinion; no sufficient foundation was laid for such an opinion.

714. During Mr. Hamilton's tenure at Vision Direct, [redacted] (CX8002 at 006 (¶ 20) (Hamilton, Decl.), *in camera*).

Response to Finding No. 714:

The proposed finding cites only Mr. Hamilton's unsupported opinion; no sufficient foundation was laid for such an opinion.

715. Other contact lens retailers have bid on Vision Direct's trademarks as keywords. (Hamilton, Tr. 417).

Response to Finding No. 715:

Respondent has no specific response.

716. "Google AdWords Keyword Planner" is a tool that Google provides that companies engaged in search advertisers can use "to research new keywords to add to their account." (Hamilton, Tr. 418; *see also* CX8002 at 005 (¶ 18) (Hamilton, Decl.)).

Response to Finding No. 716:

1-800 Contacts objects to this proposed finding on the ground that Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*).

717. The Google AdWords Keyword Planner allows an advertiser to input keywords and then provides the advertiser with estimates of the number of impressions and clicks (as well as other information such as cost per click and at times, expected number of orders or conversions) that would result from that advertiser bidding on those keywords. (Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 82-83); *see also* CX8002 at 005-006 (¶ 18) (Hamilton, Decl.)).

Response to Finding No. 717:

1-800 Contacts objects to this proposed finding on the ground that Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*).

718. Vision Direct's Functional Manager, Digital and Marketing, Mr. Hamilton, input the keywords "that were specifically prohibited" by Vision Direct's agreement with 1-800 Contacts into the Google AdWords Keyword Planner. (Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 81-82 ("Q. Going back to Paragraph 18 of the declaration we were looking at marked CX8002, the last sentence states, 'Nonetheless, based on information from the Google AdWords Keyword Planner, absent the settlement with 1-800 Contacts, I believe it would be beneficial to Vision Direct to test the prohibited keywords in online paid search advertising in Google, Bing, and Yahoo Gemini." In that sentence, what are the prohibited keywords? A. The keywords that I put into the Google Ad Planner, I believe, were the 40-odd keywords that were in the settlement agreement that were specifically prohibited."); *see also* CX8002 at 005-006 (¶ 18) (Hamilton, Decl.)).

Response to Finding No. 718:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*) In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 Contacts and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details

related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445).

719. The results of Mr. Hamilton inputting the keywords specifically prohibited by the Vision Direct-1-800 Contacts agreement into the keyword planner tool "suggested that there would be a significant volume of clicks and that the cost per click and the conversion rate would be such that the cost per order would be lower than [Vision Direct's] average cost per order on the account." (Hamilton, Tr. 427).

Response to Finding No. 719:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*) In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 Contacts and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

720. The results of the keyword planner tool suggested to Mr. Hamilton that Vision Direct "should test these keywords and see if that in fact would be the case in the actual auction." (Hamilton, Tr. 427; *see also* CX8002 at 005-006 (¶ 18) (Hamilton, Decl.) ("[B]ased on information from the Google AdWords Keyword Planner, absent the settlement agreement with 1-800 Contacts, I believe it would be beneficial to Vision

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

Response to Finding No. 720:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*) In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 Contacts and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, It is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

721. Mr. Hamilton testified that [redacted] (Hamilton, Tr. 431, *in camera*; *see also* CX8002 at 006 (¶¶ 18-19) (Hamilton, Decl.), *in camera*).

Response to Finding No. 721:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted]

[redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality scores. (Hamilton, Tr. 445-447).

In addition, this proposed finding is misleading because it excludes Mr. Hamilton's testimony that Vision Direct [redacted] (CX 9038 (Hamilton, Dep. at 101-102); Hamilton, Tr. 466-468, *in camera*).

722. The reason that Mr. Hamilton concluded [redacted] (Hamilton, Tr. 431, *in camera*).

Response to Finding No. 722:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks

foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

In addition, this proposed finding is misleading because it excludes Mr. Hamilton's testimony that Vision Direct [redacted] (CX 9038 (Hamilton, Dep. at 101-102); Hamilton, Tr. 466-468, *in camera*).

e. Walgreens

723. Walgreens has not implemented negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (Hamilton, Tr. 417; CX8001 at 005 (¶ 17) (Hamilton, Decl.)) ("I am not aware of Walgreens implementing negative keywords with respect to any online contact lens retailer other than 1-800 Contacts.")).

Response to Finding No. 723:

The proposed finding is not supported by the cited testimony, because the testimony only shows that Mr. Hamilton is personally not aware of such conduct on the part of Walgreens. No foundation was laid for the much broader language contained in the proposed finding.

724. Other contact lens retailers have bid on Walgreens' trademarks as keywords. (Hamilton, Tr. 417).

Response to Finding No. 724:

Respondent has no specific response.

725. Walgreens's Functional Manager, Digital and Marketing Mr. Hamilton input the 1-800 Contacts related keywords on which bidding is prohibited by the terms of Walgreens' agreement with 1-800 Contacts into the Google AdWords Keyword Planner. (Hamilton, Tr. 418; CX8001 at 006 (¶ 19) (Hamilton, Decl.)).

Response to Finding No. 725:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445).

726. The results of inputting the keywords prohibited by the Walgreens-1-800 Contacts agreement into the keyword planner tool, "suggested that there would be a significant

volume of clicks and that the cost per click and the conversion rate would be such that the cost per order would be lower than [Walgreens'] average cost per order on the account." (Hamilton, Tr. 427; *see also* CX8001 at 006 (¶ 19) (Hamilton, Decl.) ("[B]ased on information from the Google AdWords Keyword Planner, absent the settlement agreement with 1-800 Contacts, I believe it would be beneficial to Walgreens to test the prohibited keywords in online paid search advertising in Google, Bing, and Yahoo Gemini.")).

Response to Finding No. 726:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447). And most critical to this finding of fact, Mr. Hamilton conceded that the Google AdWords Keyword Planner "needs to calculate cost per order" to "determine … whether it would be profitable or yielded positive return on investment," but he does not know what the Keyword Planner bases its conversion on. (Hamilton, Tr. 445-446). This lack of a basic understanding of how the Google AdWords Keyword Planner works renders Mr. Hamilton's testimony about it, and this finding of fact, unreliable.

727. The results of the keyword planner tool suggested to Mr. Hamilton, Functional Manager, Digital and Marketing for Walgreens, "that we should test these keywords and see if that in fact would be the case in the actual auction." (Hamilton, Tr. 427).

Response to Finding No. 727:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable, misleading, and lacks foundation. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

In addition, this proposed finding is misleading because it excludes Mr. Hamilton's testimony that Vision Direct [redacted] (CX 9038 (Hamilton, Dep. at 101-102); Hamilton, Tr. 466-468, *in camera*).

728. [redacted] (Hamilton, Tr. 429, *in camera*).

Response to Finding No. 728:

Respondent has no specific response.

729. [redacted] (Hamilton, Tr. 429-430, *in camera*).

Response to Finding No. 729:

The proposed finding lacks foundation; Mr. Hamilton provided no foundation to support the conclusory statement that the activities in question was [redacted]. (Hamilton, Tr. 430), *in camera*).

730. Mr. Hamilton testified that [redacted] (Hamilton, Tr. 430, *in camera*; *see also* CX8001 at 006-007 (¶¶ 19-20) (Hamilton, Decl.), *in camera*).

Response to Finding No. 730:

1-800 Contacts objects to this proposed finding because Mr. Hamilton's testimony regarding the Google AdWords Keyword Planner is unreliable and misleading. Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848 (Order); Hamilton, Tr. 426). Even if this evidence were to be considered, it is unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords

Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know on what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

In addition, this proposed finding is misleading because it excludes Mr. Hamilton's testimony that Vision Direct [redacted] (CX 9038 (Hamilton, Dep. at 101-102); Hamilton, Tr. 466-468, *in camera*).

731. Walgreens does not implement negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (CX8001 at 005 (¶ 17) (Hamilton Decl.)).

Response to Finding No. 731:

The proposed finding is not supported by the cited testimony, because the testimony only shows that Mr. Hamilton is personally not aware of such conduct on the part of Walgreens. No foundation was laid for the much broader language contained in the proposed finding.

732. [redacted] (Hamilton, Tr. 431, *in camera*).

Response to Finding No. 732:

[redacted]

[redacted] (Hamilton, Tr. 431, *in camera*).

733. [redacted] (Hamilton, Tr. 431, *in camera*).

Response to Finding No. 733:

[redacted] (Hamilton, Tr. 431, *in camera*).

734. [redacted] (Hamilton, Tr. 431, *in camera*)

Response to Finding No. 734:

[redacted] (Hamilton, Tr. 431, *in camera*).

735. [redacted] (Hamilton, Tr. 430-431, *in camera*).

Response to Finding No. 735:

Respondent has no specific response.

736. [redacted]

[redacted] (Hamilton, Tr. 431, *in camera*).

Response to Finding No. 736:

Respondent has no specific response.

737. In the business judgment of Mr. Hamilton, who was at the time Walgreens' Functional Manager, Digital and Marketing, if Walgreens were entering the online contact lens anew and was able to bid on the 1-800 Contacts trademark keywords that are the subject of the Walgreens Agreement, Walgreens "would likely do that. And we would likely test those out." (CX9008 (Hamilton, IHT at 63)).

Response to Finding No. 737:

1-800 Contacts objects to this proposed finding as misleading, unreliable, and incomplete. Complaint Counsel do not define the term "business judgment;" it misleadingly suggests that Mr. Hamilton would have actually played any role in making the decision that he describes. The proposed finding is also unreliable and misleading because Mr. Hamilton's testimony during his investigational hearing was influenced by his use of the Google AdWords Keyword Planner *the night before* that hearing, which provided a basis for his conclusion that Walgreens would likely test the use on 1-800 Contacts' trademarks as keywords. (CX 9008 (Hamilton, IHT at 41-42)). Counsel for 1-800 Contacts was not present at the hearing and was not able at that time to object to the testimony or to the witness's failure to testify on the basic inputs and outputs that are necessary to any analysis of the keyword Planner results. And, of course, Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848; Hamilton, Tr. 426). Even if this evidence were to be considered, it would be unreliable because Mr. Hamilton could not recall critical details related

to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445.) Mr. Hamilton also did not know what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

738. The reason that Walgreens would "likely test . . . out" bidding on 1-800 Contacts' trademark terms if Walgreens were entering the online contact lens business anew is because doing so "would be a way to make sure that, for the universe of contact lens wearers that have a prescription that do go to the search engines to do research on the options that they have available to them, that they would learn that Walgreens is a contact lens seller online." (CX9008 (Hamilton, IHT at 63-64) (testifying also that "we would definitely want to test the terms that are related to our competitors, and if we're legally able to do that, to be able to let those folk know that they have yet one more option online")).

Response to Finding No. 738:

1-800 Contacts objects to this proposed finding as misleading, unreliable, and incomplete because Mr. Hamilton's answer during his investigational hearing was influenced by his use of the Google AdWords Keyword Planner *the night before* that hearing, which provided a basis for his conclusion that Walgreens would likely test the use on 1-800 Contacts' trademarks as keywords. (CX 9008 (Hamilton, IHT at 41-42)). Counsel for 1-800 Contacts was not present at the hearing and was not able at that time to object to the testimony or to the witness's failure to testify on the basic inputs and outputs that are necessary to any analysis of the keyword Planner results. And, of course, Mr. Hamilton testified at trial that [redacted] (Hamilton, Tr. 451-52, *in camera*). In addition, the Court has excluded evidence related to Mr. Hamilton's use of the Google AdWords Keyword Planner because that evidence was not disclosed to 1-800 Contacts and so it could not "properly defend against it." (Evans, Tr. 1628, Tr. 1848; Hamilton, Tr. 426). Even if this

evidence were considered, it would be unreliable because Mr. Holbrook could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he input for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445). Mr. Hamilton also did not know what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447).

f. Walmart

739. Google data shows that Walmart, which does not have an agreement with 1-800 Contacts regarding keyword bidding, has placed advertisements on searches for 1-800 Contacts' brand name terms as a result of both direct bidding on 1-800 Contacts trademark keywords and being matched into such searches when bidding on other keywords. (CX8006 at 060 (¶ 130) (Evans Expert Report)).

Response to Finding No. 739:

Respondent has no specific response.

740. Google data shows that between September 2015 and March 2016, Walmart showed approximately [redacted] each month in response to searches for 1-800 Contacts' brand name terms. (CX8006 at 060 (¶ 130) (Evans Expert Report), *in camera*).

Response to Finding No. 740:

Respondent has no specific response.

741. Walmart Senior Product Manager Ms. Mohan testified that Walmart considers bidding on the brand name terms of its contact lens retailer competitors as keywords to be "a general best practice." (CX9033 (Mohan, Dep. at 54) ("[w]e have [bids on competing retailer brand names] everywhere," even outside the contact lens space. For example, she testified that "[w]e have Target in our main account. . . . Usually, when we set it up, we add a campaign. . . . We just add all our competitor names." (CX9033 (Mohan, Dep. at 54)).

Response to Finding No. 741:

Respondent has no specific response.

742. Walmart has a search advertising campaign focused on bidding on the names of competing contact lens retailers as keywords, including 1-800 Contacts, Vision Direct, and AC Lens. (CX9033 (Mohan, Dep. at 53-54)).

Response to Finding No. 742:

The proposed finding is incomplete. Although Walmart has a search advertising campaign in Google focused on a limited set of names of competing contact lens retailers as keywords, Walmart significantly lowered its bids in May 2016 in that "Competitors" campaign, reducing the average payment per click from around $4 to $0.31, because the cost per conversion using the trademark keywords was too high. (CX 9033 (Mohan, Dep. at 152-156); RX 180 at 1; RX 181 at 1). Prior to the change in bidding strategy, the monthly average cost per conversion in Walmart's "Competitors" campaign ranged from $31.40 to $88.09. (RX 180 at 1; CX 9033 (Mohan, Dep. at 154-155). Walmart's target cost per conversion is $15. (CX 9033 (Mohan, Dep. at 154). The change resulted in clicks per month on ads served in the "Competitors" campaign dropping from a range of 2000 to 3000 down to 35. (CX 9033 (Mohan, Dep. at 155); RX 180 at 1). Subsequent to Walmart's change in its bidding strategy, conversions per month for the "Competitors" campaign dropped from a range of 140 to 291 down to 3 to 5. (RX 180 at 1).

743. Six percent of Walmart's contact lens orders currently come from the "Competitors" ad campaign, which consists of competitors' brand names as keywords. (CX9033 (Mohan, Dep. at 54-56)).

Response to Finding No. 743:

The proposed finding is incomplete. In May 2016, Walmart significantly lowered its bids in its "Competitors" ad campaign, reducing the average payment per click from around $4 to

$0.31, because the cost per conversion using the trademark keywords was too high. (CX 9033 (Mohan, Dep. at 152-156); RX 180 at 1; RX 181 at 1). Prior to the change in bidding strategy, the monthly average cost per conversion in Walmart's "Competitors" campaign ranged from $31.40 to $88.09. (RX 180 at 1; CX 9033 (Mohan, Dep. at 154-155). Walmart's target cost per conversion is $15. (CX 9033 (Mohan, Dep. at 154). The change resulted in clicks per month on ads served in the "Competitors" campaign dropping from a range of 2000 to 3000 down to 35. (CX 9033 (Mohan, Dep. at 155); RX 180 at 1). Subsequent to Walmart's change in its bidding strategy, conversions per month for the "Competitors" campaign dropped from a range of 140 to 291 down to 3 to 5. (RX 180 at 1).

744. One reason that Walmart considers bidding on competing retailer brand names to be a "best practice" is because it helps to attract "newer traffic." (CX9033 (Mohan, Dep. at 54) ("[I]f you want to get some newer traffic, then it makes sense to say, okay, let me add some competitor terms.")).

Response to Finding No. 744:

The proposed finding is incomplete. Although Walmart bids on a few competing contact lens retailer brand names in its "Competitors" campaign, Walmart significantly lowered its bids in May 2016 in that ad campaign, reducing the average payment per click from around $4 to $0.31, because the cost per conversion using the trademark keywords was too high. (CX 9033 (Mohan, Dep. at 152-156); RX 180 at 1; RX 181 at 1). Prior to the change in bidding strategy, the monthly average cost per conversion in Walmart's "Competitors" campaign ranged from $31.40 to $88.09. (RX 180 at 1; CX 9033 (Mohan, Dep. at 154-155). Walmart's target cost per conversion is $15. (CX 9033 (Mohan, Dep. at 154). The change resulted in clicks per month on ads served in the "Competitors" campaign dropping from a range of 2000 to 3000 down to 35. (CX 9033 (Mohan, Dep. at 155); RX 180 at 1). Subsequent to Walmart's change in its bidding

strategy, conversions per month for the "Competitors" campaign dropped from a range of 140 to 291 down to 3 to 5. (RX 180 at 1).

745. Walmart Senior Product Manager Ms. Mohan testified that 1-800 Contacts related keywords would "bring us a lot of clicks" and "bring a lot of people who are looking in the market for contact lenses to our website, and then we'll take the offer, we'll take that." (CX9033 (Mohan, Dep. at 61)).

Response to Finding No. 745:

The proposed finding is incomplete. Although Walmart includes 1-800 Contacts related keywords (along with keywords related to a few other contact lens retailers) in a campaign, Walmart significantly lowered its bids in May 2016 in that campaign, reducing the average payment per click from around $4 to $0.31, because the cost per conversion using the trademark keywords was too high. (CX 9033 (Mohan, Dep. at 152-156); RX 180 at 1; RX 181 at 1). Prior to the change in bidding strategy, the monthly average cost per conversion in Walmart's "Competitors" campaign ranged from $31.40 to $88.09. (RX 180 at 1; CX 9033 (Mohan, Dep. at 154-155). Walmart's target cost per conversion is $15. (CX 9033 (Mohan, Dep. at 154). The change resulted in clicks per month on ads served in the "Competitors" campaign dropping from a range of 2000 to 3000 down to 35. (CX 9033 (Mohan, Dep. at 155); RX 180 at 1). Subsequent to Walmart's change in its bidding strategy, conversions per month for the "Competitors" campaign dropped from a range of 140 to 291 down to 3 to 5. (RX 180 at 1).

746. Walmart does not implement the brand names of any contact lens retailer competitors as negative keywords. (CX9033 (Mohan, Dep. at 64)).

Response to Finding No. 746:

Respondent has no specific response.

747. If bidding on competitor brand names in the contact lens industry were not successful for Walmart, Walmart would lower its bids on those terms to "a very low bid, or one cent." (CX9033 (Mohan, Dep. at 72-73)).

Response to Finding No. 747:

The proposed finding is incomplete. Walmart in fact lowered its bid on competitor contact lens retailer brand names. In May 2016, Walmart significantly lowered its bids in that ad campaign, reducing the average payment per click from around $4 to $0.31, because the cost per conversion using the trademark keywords was too high. (CX 9033 (Mohan, Dep. at 152-156); RX 180 at 1; RX 181 at 1). Prior to the change in bidding strategy, the monthly average cost per conversion in Walmart's "Competitors" campaign ranged from $31.40 to $88.09. (RX 180 at 1; CX 9033 (Mohan, Dep. at 154-155). Walmart's target cost per conversion is $15. (CX 9033 (Mohan, Dep. at 154). The change resulted in clicks per month on ads served in the "Competitors" campaign dropping from a range of 2000 to 3000 down to 35. (CX 9033 (Mohan, Dep. at 155); RX 180 at 1). Subsequent to Walmart's change in its bidding strategy, conversions per month for the "Competitors" campaign dropped from a range of 140 to 291 down to 3 to 5. (RX 180 at 1).

More specifically, Walmart lowered its bid (i.e., max. CPC) to one cent for all but two of its 1-800 Contacts related keywords. (RX 181 at 1; CX 9033 (Mohan, Dep. at 160-165)). For one of the other two, which contains the term "Walmart" in addition to "1-800 Contacts," Walmart bid only 39 cents. (RX 181 at 1; CX 9033 (Mohan, Dep. at 160-165)).

g. WebEyeCare

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

Response to Finding No. 748:

Complaint Counsel's Proposed Finding No. 748 is incomplete, misleading, and inaccurate. [redacted] (CX 9014 (Batushansky, Dep. at 45-46, 162-163), *in camera*).

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

Response to Finding No. 749:

Complaint Counsel's Proposed Finding No. 749 is incomplete, misleading, and inaccurate. [redacted] (CX 9014 (Batushansky, Dep. at 162), *in camera*). Further, the phrase [redacted] is vague and ambiguous, and should be disregarded.

750. [redacted] (CX9000 (Batushanksy, IHT at 64), *in camera*).

Response to Finding No. 750:

Complaint Counsel's Proposed Finding No. 750 is not supported by the cited testimony in two respects. First, [redacted]. Second, [redacted]

[redacted]. (CX 9000 (Batushansky, IHT at 64-65), *in camera*). Third, the phrases [redacted] are vague and ambiguous, and should be disregarded.

751. [redacted] (CX9000 (Batushanksy, IHT at 66), *in camera*).

Response to Finding No. 751:

Complaint Counsel's Proposed Finding No. 751 is incomplete, misleading, and not supported by the cited testimony. [redacted]. (CX 9000 (Batushansky, IHT at 64-65), *in camera*). [redacted]. (CX 9000 (Batushansky, IHT at 66), *in camera*).

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

Response to Finding No. 752:

Complaint Counsel's Proposed Finding No. 752 is incomplete, misleading, and not supported by the cited testimony. Mr. Batushansky's actual testimony on this issue was that [redacted] (CX 9000 (Batushansky, IHT at 66), *in camera*). Mr. Batushansky thus lacked personal knowledge to testify on this topic and was merely speculating. Moreover, [redacted]. (CX 9000 (Batushansky, IHT at 64-65), *in camera*).

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

Response to Finding No. 753:

Complaint Counsel's Proposed Finding No. 753 is not admissible and is incomplete and misleading. The testimony on which it purports to be based is inadmissible lay opinion testimony and should be disregarded. Moreover, Mr. Batushansky has no foundation and no personal knowledge on which to base the testimony quoted. As he testified, [redacted] (CX 9014 (Batushansky, Dep. at 162), *in camera*) [redacted]

[redacted] (CX 9000 (Batushansky, IHT at 64-65), *in camera*). The testimony quoted by Complaint Counsel is thus inadmissible lay opinion testimony and inadmissible speculation.

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

Response to Finding No. 754:

Complaint Counsel's Proposed Finding No. 754 is incomplete and incorrect.

[redacted] (CX 9014 (Batushansky, Dep. at 45-46, 162-163), *in camera*). Further, [redacted]. (CX 9014 (Batushansky, Dep. at 45-48), *in camera*). Further, Mr. Batushansky's testimony regarding what WebEyeCare's sales would have been in the absence of the settlement agreement is inadmissible; it is improper lay opinion testimony, is speculative, and lacks proper foundation. This testimony should therefore be disregarded.

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

Response to Finding No. 755:

Respondent has no specific response.

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

Response to Finding No. 756:

Complaint Counsel's Proposed Finding No. 756 is incomplete, misleading, inaccurate, and not supported by admissible testimony. First, it is not supported by the cited testimony. Second, Mr. Batushansky has no foundation and no personal knowledge on which to base the cited testimony. Third, the cited testimony is inadmissible lay opinion testimony and inadmissible speculation. Fourth, [redacted]. (CX 9014 (Batushansky, Dep. at 45-48), *in camera*).

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

Response to Finding No. 757:

Complaint Counsel's Proposed Finding No. 757 is incomplete, misleading, inaccurate, and not supported by admissible testimony. First, Mr. Batushansky's testimony is not based on personal knowledge, it lacks foundation, and it consists of inadmissible lay opinion testimony. (CX 9014 (Batushansky, Dep. at 24-25), *in camera*). Second, to the extent that the Court credits Mr. Batushansky's testimony that [redacted], such testimony established that 1-800 Contacts very much needed to bring the challenged litigation and enter into the challenged settlement agreements in order to avoid the risk that its trademarks would become [redacted]. *See*, *Elliott v. Google, Inc.*, 2017 WL 2655528 at *2-3 (9th Cir., May 16, 2017) (explaining that "[o]ver time, the holder of a valid trademark may become a 'victim of genericide.' (citations omitted). Genericide occurs when the public appropriates a trademark and uses it as a generic name for particular types of goods or services irrespective of its source." (citing, for example, aspirin, cellophane, and escalator as "victims of genericide"). Third, the quoted testimony is not Mr. Bushansky's "business judgment"; it is his "personal view" based on speculation and conjecture. (CX 9014 (Batushansky, Dep. at 24-25, 165), *in camera*). Fourth, Mr. Batushansky's speculation regarding the [redacted] is completely at odds with reality, as explained by Dr. Ghose (RX 733 at 54 (Ghose Report)) (According to data from Google regarding ads displayed

between 2012 and 2016 based on bids on keywords related to contact lenses, only [redacted] of such ads appeared based on bids on bids for 1-800 Contacts' trademarks and [redacted] of such ads appeared based on bids on terms other than 1-800 Contacts' trademarks. Similarly, as Dr. Evans conceded, searches for "contact lens," "contacts" and "contact lenses" are far more prevalent than searches for 1-800 Contacts' trademarks. (CX 9042 (Evans, Dep. at 103)). In fact, as Dr. Evans further conceded, over 98 percent of contact lens-related searches were for terms other than 1-800 Contacts' trademarks and thus less than two percent of contact lens-related searches were for 1-800 Contacts' trademarks. (Evans, Tr. 1724-25).

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

Response to Finding No. 758:

Complaint Counsel's Proposed Finding No. 758 is incomplete, misleading, inaccurate, and not supported by admissible testimony. First, Mr. Batushansky's testimony is speculative, not based on personal knowledge, lacking foundation, and consists of inadmissible lay opinion testimony. Mr. Batushansky's actual testimony was on this issue was that [redacted] (CX 9000 (Batushansky, IHT at 66), *in camera*). Moreover, as Mr. Batushansky admitted, [redacted]. (CX 9000 (Batushansky, IHT at 64-65), *in*

camera). Mr. Batushansky thus lacked personal knowledge to testify on this topic and was merely speculating. Second, Mr. Batushansky's testimony from his investigational hearing is contradicted by his deposition testimony, where he was subject to cross-examination, and where he acknowledged that he [redacted]. (CX 9014 (Batushansky, Dep. at 45-48), *in camera*).

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

Response to Finding No. 759:

Complaint Counsel's Proposed Finding No. 758 is incomplete, misleading, inaccurate, and not supported by admissible testimony. First, Mr. Batushansky's testimony is speculative, not based on personal knowledge, lacking foundation, and consists of inadmissible lay opinion testimony. Mr. Batushansky's actual testimony was on this issue was that [redacted] (CX 9000 (Batushansky, IHT at 66), *in camera*). Moreover, as Mr. Batushansky admitted, [redacted]

[redacted]. (CX 9000 (Batushansky, IHT at 64-65), *in camera*). Mr. Batushansky thus lacked personal knowledge to testify on this topic and was merely speculating. Second, Mr. Batushansky's testimony from his investigational hearing is contradicted by his deposition testimony, where he was subject to cross-examination, and where he acknowledged that he [redacted]. (CX 9014 (Batushansky, Dep. at 45-48), *in camera*).

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

Response to Finding No. 760:

Complaint Counsel's Proposed Finding No. 760 is based on speculative testimony that is lacking foundation and personal knowledge. The amount spent on internet advertising by any company depends on the number of times a company's ads are clicked on by users. Mr. Batushansky has no basis on which to opine, and is merely speculating, that if [redacted].

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

Response to Finding No. 761:

Complaint Counsel's Proposed Finding No. 761 is incomplete, misleading, and incorrect. What Mr. Batushansky actually said is that [redacted] (CX 9014 (Batushansky, Dep. at 164), *in camera*).

h. Lens Discounters

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

Response to Finding No. 762:

The proposed finding mischaracterizes the cited declaration and should be disregarded. The proposed finding uses the phrase "[n]o later than 2005" to imply incorrectly that LensDiscounters used 1-800 Contacts' trademarks as keywords throughout and after 2005. The cited declaration and other admitted evidence show that LensDiscounters had stopped purchasing 1-800 Contacts' trademarks as keywords by July 11, 2005, shortly after 1-800 Contacts discovered the alleged infringement in June 2005. (RX 67 at 13). Mr. Mitha declared under penalty of perjury that LensDiscounters "unilaterally decided to stop bidding on 1-800 Contacts' term and variations thereof" after receiving a cease and desist letter from 1-800 Contacts on June 28, 2005. (CX 8003 at 3 (¶ 12)).

This unilateral policy remained consistent over the years. On November 12, 2009, LensDiscounters stated that "we do not use any 1-800 Contacts trademarks or similar variations

thereof as keywords in our ad campaigns." (RX 69 at 1; *see also* CX 8003 at 4 (¶ 20)). Mr. Mitha declared under penalty of perjury that as a result of this unilateral policy, "[f]rom approximately September 2005 through December 2016, Lens Discounters did not bid on any of the keywords identified by 1-800 Contacts." (CX 8003 at 3 (¶ 17)).

763. For Lens Discounters, "bidding on the term '1-800 Contacts' and variations thereof was a profitable strategy." (CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.)).

Response to Finding No. 763:

The proposed finding is misleading and inconsistent with the weight of the evidence in this case, and the quoted statement by Mr. Mitha lacks the foundation necessary for it to be reliable. As explained in response to proposed finding no. 762, LensDiscounters did not use 1-800 Contacts trademarks as keywords between approximately July 2005 and January 2017. (RX 67 at 13; CX 800 at 3-5). As the Mitha Declaration, which was signed on or before January 10, 2017, (CX 8003 at 6), makes clear, LensDiscounters used 1-800 Contacts' trademarks as keywords for at most a few months in 2005 and then for approximately one week in early January 2017.

Complaint Counsel offer no evidentiary support for the statement in the proposed finding that LensDiscounters' bidding practices were profitable in May or June 2005. It is unlikely that the time periods of bidding activity were even long enough to derive any statistically relevant conclusion. Mr. Mitha also appears to concede that the one week of trademark use in January 2017 was too short; he merely declares that he is "hopeful" that the company's bidding strategy *will* be successful. (CX 8003 at 3 (¶ 30)).

In addition, Mr. Mitha's statement that LensDiscounters' use of 1-800 Contacts' trademarks as keywords was "profitable" in 2005 is inadmissible under the Best Evidence rule because LensDiscounters produced no business records at all to support the bald assertion that

using the term "1-800 Contacts" and variations thereof as keywords was a profitable strategy. *See Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199, 221-222 (3d Cir. 2009) (upholding district court ruling under Fed. R. Evid. § 1002 barring testimony regarding the contents of "contracts not submitted into evidence or even produced for review at the trial.").

In addition, the weight of the evidence regarding the experience of other retailers in this matter strongly suggests that it was unlikely that LensDiscounters' use of 1-800 Contacts' trademark terms as keywords was a profitable strategy. (Alovis, Tr. 1019-21, 1043-44; RX 739 at 51-99 (Murphy Rep.); Murphy, Tr. 4191 (non-settling parties received [redacted] of clicks on paid search advertisements related to contact lenses based on bids for 1-800 Contacts' trademarks), 4187-90; CX 9043 (Athey, Dep. at 144, 296 (no specific analysis of whether it would be profitable for a third party to display ads in response to searches for 1-800 Contacts searches)). Moreover, since LensDiscounters "believed that Lens Discounters had done nothing unlawful" but nonetheless "unilaterally decided to stop bidding on 1-800 Contacts' terms," LensDiscounters must have believed that advertising in response to searches for 1-800 Contact's trademark was less economically significant than the costs of defending a trademark infringement case. (CX 8003 at 3 (¶ 12); RX 739 at 49-50 (Murphy Rep.); Murphy, Tr. 4205-07).

764. At the time that Lens Discounters was bidding on 1-800 Contacts and related terms, "the cost per conversion for those terms was low, and [Lens Discounters'] conversion rates were good. [Lens Discounters] received a good amount of traffic, as well as resulting orders, from bidding on those keywords." (CX8003 at 002 (¶ 10) (Mitha, Decl.)).

Response to Finding No. 764:

The proposed finding is misleading and inconsistent with the weight of the evidence in this case, and the quoted statement by Mr. Mitha lacks the foundation necessary for it to be reliable. As explained in response to proposed finding no. 762, LensDiscounters did not use 1-

800 Contacts trademarks as keywords between approximately July 2005 and January 2017. (RX 67 at 13; CX 800 at 3-5). As the Mitha Declaration, which was signed on or before January 10, 2017, (CX 8003 at 6), makes clear, LensDiscounters used 1-800 Contacts' trademarks as keywords for at most a few months in 2005 and then for approximately one week in early January 2017.

Complaint Counsel offer no evidentiary support for the statement in the proposed finding that LensDiscounters' bidding practices were profitable in May or June 2005. It is unlikely that the time periods of bidding activity were even long enough to derive any statistically relevant conclusion. Mr. Mitha also appears to concede that the one week of trademark use in January 2017 was too short; he merely declares that he is "hopeful" that the company's bidding strategy *will* be successful. (CX 8003 at 3 (¶ 30)).

In addition, Mr. Mitha's statement that LensDiscounters' use of 1-800 Contacts' trademarks as keywords was "profitable" in 2005 is inadmissible under the Best Evidence rule because LensDiscounters produced no business records at all to support the bald assertion that using the term "1-800 Contacts" and variations thereof as keywords was a profitable strategy. *See Acumed LLC v. Advanced Surgical Services, Inc*., 561 F.3d 199, 221-222 (3d Cir. 2009) (upholding district court ruling under Fed. R. Evid. § 1002 barring testimony regarding the contents of "contracts not submitted into evidence or even produced for review at the trial.").

In addition, the weight of the evidence regarding the experience of other retailers in this matter strongly suggests that it was unlikely that LensDiscounters' used of 1-800 Contacts' trademark terms as keywords was a profitable strategy. (Alovis, Tr. 1019-21, 1043-44; RX 739 at 51-99 (Murphy Rep.); Murphy, Tr. 4191 (non-settling parties received [redacted] of clicks on paid search advertisements related to contact lenses based on bids for 1-800 Contacts'

trademarks), 4187-90; CX 9043 (Athey, Dep. at 144, 296 (no specific analysis of whether it would be profitable for a third party to display ads in response to searches for 1-800 Contacts searches)). Moreover, since LensDiscounters "believed that Lens Discounters had done nothing unlawful" but nonetheless "unilaterally decided to stop bidding on 1-800 Contacts' terms," LensDiscounters must have believed that advertising in response to searches for 1-800 Contact's trademark was less economically significant than the costs of defending a trademark infringement case. (CX 8003 at 3 (¶ 12); RX 739 at 49-50 (Murphy Rep.); Murphy, Tr. 4205-07).

Additionally, Mr. Mitha provides no definition or specification for what a "good" conversion rate, amount of traffic, or amount of resulting orders would be, and he does not define what constitutes "low" cost per conversion. (CX 8003 at 2 (¶ 10)). The testimony is thus too ambiguous to be reliable.

765. Lens Discounters COO Mr. Mitha declared under penalty of perjury that at the time Lens Discounters was bidding on 1-800 Contacts and related terms "I believe that we attracted customers who used 1-800 Contacts-related terms in their searches because our prices were better than 1-800 Contacts' prices." (CX8003 at 002 (¶ 10) (Mitha, Decl.)).

Response to Finding No. 765:

The proposed finding is vague and ambiguous, unsupported by reliable or corroborated testimony, and contrary to the weight of the evidence. As stated above in response to finding nos. 762-764, LensDiscounters only engaged in the practice of bidding on 1-800 Contacts trademark keywords for a few short months in the spring of 2005 and approximately one week in early January 2017. There is no corroborating evidence to suggest that during either of these short time periods LensDiscounters "attracted customers who used 1-800 Contacts-related terms in their searches because [LensDiscounters] prices were better than 1-800 Contacts' prices." (CX 8003 at 2 (¶ 10)).

In fact, the qualitative and quantitative evidence in this case shows that customers conducting searches for the 1-800 Contacts trademark have a navigational intent, i.e., they intend to navigate to the 1-800 Contacts website or find information relevant to 1-800 Contacts. (Ghose, Tr. 3869-70, 3880-86; RX 733 at 31-37, 0045-52 (Ghose Rep.); Athey, Tr. 851; Coon, Tr. 2723-24; CX 9031 (Schmidt, Dep. at 96); CX 9017 (Blackwood, Dep. at 276); Craven, Tr. 680-81; CX 9029 (Bethers, Dep. at 14, 18-19)). The evidence strongly suggests that many if not a majority of customers searching for 1-800 Contacts who did select a link for another contact lens retailer that appeared in response to a search for 1-800 Contacts did so by mistake, specifically because they thought that link would take them to 1-800 Contacts or that the advertiser was affiliated with or sponsored by 1-800 Contacts, and not because they saw a price. (RX 733 at 49 (Ghose Rep.); RX 735 at 6 (Van Liere Rep.); Van Liere, Tr. 2976-78; Goodstein, Tr. 2381-82). Thus, it is more likely than not that a Lens Discounter advertisement would not contain relevant information for many consumers, so that those advertisements did not attract many 1-800 Contacts customers but in fact performed poorly in conversions and clicks. (Ghose, Tr. 3883, 3904-05, 3929-31, 3955-56; RX 733 at 46 (Ghose Rep.); RX 739 at 51-99 (Murphy Rep.); Murphy, Tr. 4191).

766. One reason Lens Discounters chose to bid on 1-800 Contacts and related terms was that "by bidding on 1-800 Contacts' terms, [Lens Discounters was] able to generate a significant number of ad impressions, which meant that, even if consumers did not purchase from [Lens Discounters] in response to any particular search query, [the company was] able to get the Lens Discounters name in front of a large audience of potential customers." (CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.)).

Response to Finding No. 766:

The proposed finding is vague and ambiguous, unsupported by reliable or corroborated testimony, and contrary to the weight of the evidence. As stated above in response to finding nos. 762-765, LensDiscounters only engaged in the practice of bidding on 1-800 Contacts

trademark keywords for a few short months in the spring of 2005 and approximately one week in early January 2017. There is no corroborating evidence to suggest that during either of these short time periods LensDiscounters "[was] able to generate a significant number of ad impressions." (CX 8003 at 2 (¶ 9)). By contrast, substantial evidence in the record indicates that LensDiscounters would not have received a large share of ad impressions by bidding on the trademark terms of a third party such as 1-800 Contacts. (RX 733 at 70, 0105 (Ghose Rep.); RX 739 (Murphy Rep.) ¶ 121). In addition, LensDiscounters' failure to provide documentation regarding the purported profitability of the keyword purchases means that Mr. Mitha's testimony about the contents of those documents is inadmissible under the Best Evidence rule, Fed.R.Evidence § 1002. *See Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199, 221-222 (3d Cir. 2009) (upholding district court ruling barring testimony regarding the contents of "contracts not submitted into evidence or even produced for review at the trial.").

767. In or around December 2016, after having for a time ceased bidding on 1-800 Contacts related terms and implementing negative keywords at the request of 1-800 Contacts, Lens Discounters decided to remove those negative keywords relating to 1-800 Contacts and to begin bidding on 1-800 Contacts related terms once again. (CX8003 at 005 (¶ 30) (Mitha, Decl.)).

Response to Finding No. 767:

The proposed finding misstates the cited declaration and should be disregarded. Mr. Mitha repeatedly states in his declaration that LensDiscounters refrained from using 1-800 Contacts' trademarks as keywords "through December 2016." (¶¶ 19, 22); (CX 8003 at 5 (¶¶ 25-28)).

768. The reason that Lens Discounters decided to begin bidding on 1-800 Contacts related terms and to remove 1-800 Contacts related negative keywords in December 2016 is "because it was previously successful." (CX8003 at 005 (¶ 30) (Mitha, Decl.)).

Response to Finding No. 768:

The proposed finding misstates the cited declaration; Mr. Mitha repeatedly states in his declaration that LensDiscounters refrained from using 1-800 Contacts' trademarks as keywords "through December 2016." (¶¶ 19, 22); (CX 8003 at 5 (¶¶ 25-28)). The proposed finding attempts improperly to extend the length of time that LensDiscounters was purchasing 1-800 Contacts' trademarks as keywords before Mr. Mitha signed his declaration on January 10, 2017, because Complaint Counsel are aware that a one-week period is too short to provide any reliable information. Complaint Counsel could have called Mr. Mitha as a live witness at trial about LensDiscounters' practices, and (if LensDiscounters had continued to use 1-800 Contacts' trademarks as keywords after January 10, 2017) Complaint Counsel could have subpoenaed the records that would prove whether or not those practices were "successful." Their decision to take neither step suggests that LensDiscounters's actual experience was far from successful. In any event, as it stands now and as explained in detail in Respondent's replies to proposed finding nos. 762-767, LensDiscounters did not have sufficient experience with the use of 1-800 Contacts' trademarks as keywords to make a judgment about whether that use was "successful" or "unsuccessful," and any testimony about the contents of the (non-produced) business records that reflect that keyword use is inadmissible under the Best Evidence rule.

769. Lens Discounters believes that having its ads appear in response to searches for other online sellers of contact lenses to be beneficial because these keywords are cost effective and have resulted in a strong return on investment. (CX8003 at 005-006 (¶ 31) (Mitha, Decl.)).

Response to Finding No. 769:

As explained in detail in Respondent's replies to proposed finding nos. 762-767, LensDiscounters did not have sufficient experience with the use of 1-800 Contacts' trademarks as keywords to make a judgment about whether that use was "successful" or "unsuccessful," and

any testimony about the contents of the (non-produced) business records reflecting that keyword use is inadmissible under the Best Evidence rule.

i. Lenses for Less

770. The owner of Lenses for Less, Mr. Studebaker, declared under penalty of perjury that Lenses for Less has not entered into any agreements similar to its agreement with 1-800 Contacts regarding participation in search engine auctions. (CX8000 at 003 (¶ 19) (Studebaker, Decl.)).

Response to Finding No. 770:

Respondent has no specific response.

771. The owner of Lenses for Less, Mr. Studebaker, declared under penalty of perjury that "[b]ut for the settlement agreement, and the threat of 1-800 Contacts su[]ing us based on the appearance of Lenses for Less advertisements on a search engine results page in response to a search query that includes their trademark, we would periodically test to see if it would be profitable to bid on the term ' 1-800 Contacts' or similar terms, and/or remove the negative keywords we have implemented as a result of our agreement with 1-800 Contacts." (CX8000 at 002 (¶ 16) (Studebaker, Decl.)).

Response to Finding No. 771:

The proposed finding is not supported by reliable evidence because the declarant lacks the necessary foundation to opine on the matters described in the proposed finding. Mr. Studebaker stated in his declaration that Lenses for Less "outsourced [its] bidding on search advertising to a third party which charges a monthly fee to provide web support and search advertising management." (CX 8000 at 1 (¶ 6)). Mr. Studebaker therefore lacks the necessary foundation for any opinions expressed in his declaration regarding Lenses for Less' current or future search advertising strategies.

772. The owner of Lenses for Less, Mr. Studebaker, declared under penalty of perjury that "[i]f the settlement agreement were terminated, and threat of 1-800 Contacts suing us based on the appearance of Lenses for Less advertisements on a search engine results page in response to a query that includes their trademark were removed, we would periodically test to see if it would be profitable to bid on the term '1-800 Contacts' or

similar terms, and/or remove the negative keywords we have implemented as a result of our agreement with 1-800 Contacts." (CX8000 at 002 (¶ 17) (Studebaker, Decl.)).

Response to Finding No. 772:

The proposed finding is not supported by reliable evidence because the declarant lacks the necessary foundation to opine on the matters described in the proposed finding. Mr. Studebaker stated in his declaration that Lenses for Less "outsourced [its] bidding on search advertising to a third party which charges a monthly fee to provide web support and search advertising management." (CX 8000 at 1 (¶ 6)). Mr. Studebaker therefore lacks foundation for any opinions expressed in his declaration regarding Lenses for Less' current or future search advertising strategies.

j. Coastal

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

Response to Finding No. 773:

Respondent has no specific response.

k. Visionworks/Empire Vision

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

Response to Finding No. 774:

1-800 objects to this finding as misleading and unreliable. Complaint Counsel does not define the term "business judgment," and so it misleadingly suggests that Mr. Duley had a more expansive role at Visionworks than his limited role with the company. In addition, Mr. Duley testified at his deposition that an outside consultant, Apollo Interactive, decided which [redacted] and that "keywords was all managed completely by Apollo." (CX 9036 (Duley, Dep. at 60, 134)). Mr. Duley also testified that despite making representations about keyword selection in his Declaration, including in the passage quoted in Complaint Counsel's finding No. 774, he never showed the declaration to anyone at Apollo to determine whether there was a basis for his statements. (CX 9036 (Duley, Dep. at 162-164)). Mr. Duley therefore cannot reliably attest to what would happen with respect to keyword search advertising if Visionworks' settlement agreement with 1800 Contacts were terminated since he does not manage it for Visionworks and the entity that does so did not review this statement before Mr. Duley included it in his declaration.

3. Expert Analysis

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

Response to Finding No. 775:

Complaint Counsel's Proposed Finding No. 775 is not based on admissible evidence. The cited testimony is based on Dr. Evans' personal experience rather than any economic expertise or analysis. (*See* Evans, Tr. 1477-78 ("Well, when you say 'investigate,' the 'investigate' is obviously I have lived for a long time, and I know it happens in physical

environments, so I don't want to suggest that I went off and did a new empirical study on this. We've all experienced this.").

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

Response to Finding No. 776:

Complaint Counsel's Proposed Finding No. 776 is incorrect and inconsistent with the record, including Dr. Evans' testimony. Dr. Evans and Dr. Athey each testified that Google's policy of permitting advertising in response to searches for another firm's trademark was not socially optimal. (Evans, Tr. 1817; CX 9043 (Athey, Dep. at 192-193)).

777. Dr. Evans concluded that "[b]ased on an analysis of data provided by Google, I found that, since the early 2000s, most significant online contact lens retailers that compete with 1-800 Contacts have chosen to pay to place text ads in front of consumers who have searched on terms that include 1-800 Contacts brand name keywords such as 1800contacts—when they have not been restricted from doing so." (CX8006 at 7 (¶ 10) (Evans Expert Report)).

Response to Finding No. 777:

Complaint Counsel's Proposed Finding No. 777 is incorrect, incomplete and misleading. As Dr. Evans found, Memorial Eye, Standard Optical, Contact Lens King and Walgreens did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts (CX 8006-057). Further, Lens.com does not purchase 1-800 Contacts, or any other competitors', trademarks in search advertising auctions as a general practice, because such purchases do not result in conversions and are therefore inefficient allocations of advertising expenditures. (CX 1673 (April 28, 2008 deposition of Cary Samourkachian in the *1-800 Contacts v. Lens.com* case, at 171 ("we're not in the business of purchasing our competitor's trademarks"), 175 ("our intent is not to be bidding on [1-800's] trademark or show up on their

trademark"), 182 ("Traffic that is coming from these [trademark] terms are not going to convert to us, because they're looking for your client, not us.")).

778. Dr. Evans concluded that "[a]dvertising on search results pages following queries on 1-800 Contacts brand name key words was an important competitive strategy for online contacts lens retailers based on the testimony and documents I have reviewed." (CX8006 at 011 (¶ 23) (Evans Expert Report)).

Response to Finding No. 778:

Complaint Counsel's Proposed Finding No. 778 is incomplete, incorrect, misleading and does not reflect any economic analysis. As the proposed finding notes, Dr. Evans conceded that he was merely characterizing "the testimony and documents I have reviewed." Respondent directs the Court to its Proposed Findings Nos. 1985-2030 ("Paid Search Advertising in Response to 1-800 Contacts' Trademarks is Not Competitively Significant"). Dr. Evans was not qualified as an expert in this area and should not be permitted to opine as to his summary of the evidence presented to the Court. This invades the Court's province and, in any event, the Court is better qualified to find the facts than is Dr. Evans, including because the Court heard all of the live testimony presented at trial.

779. One reason that Dr. Athey concluded that search queries containing 1-800 Contacts' brand name terms are "an extremely attractive place to bid" is that "the 1-800 search term is the largest, single branded search term" meaning that "it's a hard one to pass up . . . you wouldn't forget about it." (Athey, Tr. 764-765).

Response to Finding No. 779:

Complaint Counsel's Proposed Finding No. 779 is incomplete, incorrect, and misleading. Dr. Athey's testimony does not reflect any economic analysis, and she was not and is not qualified as an expert regarding factual issues involving the marketing of contact lenses. Further, her testimony is lacking in foundation and is vague and ambiguous; she did no analysis to find that 1-800 Contacts is the "largest, single branded search term," it is not clear what that means,

and she did not compare it, for instance, to "Acuvue Oasys," which also is a branded search term.

780. Another reason that Dr. Athey concluded that search queries containing 1-800 Contacts' brand name terms are "an extremely attractive place to bid" is that "[w]e also see that for the firms that are currently bidding on '1-800 Contacts,' their conversion rate are higher when they bid against 1-800 Contacts then when they are on other search terms, so they convert the best against 1-800 versus other firms." (Athey, Tr. 764-765).

Response to Finding No. 780:

Complaint Counsel's Proposed Finding No. 780 is incomplete, incorrect, misleading and lacks any basis. Dr. Athey's testimony regarding conversion is inadmissible because she only looked at conversion rates for two firms on ads in response to searches for 1-800 Contacts' trademarks. (Athey, Tr. 842; CX 8010 at 41, 64). Dr. Ghose did analyze conversion rates, and found that numerous online contact lens retailers have *lower* conversion rates on ads based on bids for 1-800 Contacts' trademarks than they do on ads based on bids for other terms. (RX 733 at 95). Such retailers include [redacted]. (RX 733 at 95). Further, Dr. Athey's testimony that searches for 1-800 Contacts' trademarks are "an extremely attractive place to bid" lacks foundation and is misleading for the reasons set forth in 1-800 Contacts' Response to Proposed Finding No. 779. Among other things, Dr. Athey did no analysis of the profitability of such searches for the firms that utilized them.

781. Another reason that Dr. Athey concluded that search queries containing 1-800 Contacts' brand name terms are "an extremely attractive place to bid" is that "any competitor other than 1-800 is generally going to have lower prices and be a tougher competitor for this online consumer coming for a search." (Athey, Tr. 764-765).

Response to Finding No. 781:

Dr. Athey's testimony that searches for 1-800 Contacts' trademarks are "an extremely attractive place to bid" is incomplete, incorrect, and misleading for the reasons set forth in 1-800 Contacts' Responses to Proposed Finding Nos. 779 and 780.

4. Evidence from Search Engines

782. [redacted] (CX1172, *in camera*).

Response to Finding No. 782:

The cited document and data do not support Complaint Counsel's Proposed Finding that [redacted] and the Proposed Finding is misleading and not supported by record evidence to the extent it implies anything about the relative frequency of searches using 1-800 Contacts' trademarks and searches for 1-800 Contacts' trademarks alone or other searches related to contact lenses. Further, the challenged settlement agreements do not prohibit any of the settling parties from advertising in response to a search such as "1-800 Contacts reviews." (RF 776-780, 1238-39).

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

Response to Finding No. 783:

Complaint Counsel's Proposed Finding No. 783 is not supported by the cited document. CX 1804 is an internal Microsoft document reflecting "Proposal Language" for communications

with advertisers. Nothing in the document indicates what, if anything, Microsoft communicated to any advertiser.

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

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

Response to Finding No. 784:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

785. Memorial Eye considered it a value to consumers to show an ad for Memorial Eye, even if the consumer did not click on the ad, because showing such advertisements "helped build our brand" and "put our brand in [the consumer's] mind." (Holbrook, Tr. 1904-1905 (testifying also that "the next time they were looking for contact lenses they would be more likely to remember our name, our brand, and possibly look for us again"); *see also* Holbrook, Tr. 1910-1911 (testifying that even if a customer entering a search for 1-800 Contacts intended to only go to 1-800 Contacts website, Memorial Eye would benefit from its ad appearing on the search engine result page because doing so helped improve Memorial Eye's brand recognition)).

Response to Finding No. 785:

Complaint Counsel's Finding No. 785 is incomplete and misleading. It is not beneficial, and is in fact detrimental, for advertisers to display paid search advertisements that consumers do not click on. [redacted]

[redacted] (Juda, Tr. 1096). Expected click-through rate is a measurement of "how likely it is that [the advertiser's] ads will get clicked on when shown for [a particular] keyword." (RX716-0049). Google's algorithms calculate [redacted] (Juda, Tr. 1096). Thus, in the event an advertisement is repeatedly displayed and not clicked on by consumers, its expected click-through rate will fall. This will result in the advertiser's cost increasing in order to maintain the same ad position, resulting in a financial detriment to the advertiser.

To the extent Mr. Holbrook provided contrary testimony, that testimony lacks foundation and is unreliable. Mr. Holbrook never conducted any analyses to determine whether paid search advertising was effective for Memorial Eye. For example, he never conducted any study or analysis to determine how implementing negative keywords for 1-800 Contacts' trademarks would impact Memorial Eye's business. (Holbrook, Tr. 2039–2040). He also never sought to determine what the cost per-click or cost per-conversion would be for keywords containing 1-800 Contacts' trademarks. (Holbrook, Tr. 2042). Moreover, Mr. Holbrook testified that he did not manage Memorial Eye's paid search advertising (CX9024 (Holbrook, Dep. at 47–48)); that he does not know how Memorial Eye decided which keywords to prioritize in its paid search advertising campaigns (Holbrook, Tr. 2042); and that he has no relevant expertise or training interpreting Google AdWords data (Holbrook, Tr. 1966). Indeed, during the entire time that Memorial Eye sold contact lenses online, Mr. Holbrook *never* accessed Memorial Eye's AdWords account. (Holbrook, Tr. 1966).

786. Walmart considered it useful to show its contact lens advertisements in search advertising results even when users did not click on the ads because showing impressions builds brand awareness and awareness that Walmart sells contact lenses. (CX9033 (Mohan, Dep. at 71-72) ("[T]he impression also counts. . . . 'Cause it's getting your name out

there, and [the consumer] can say 'Oh, Walmart sells contacts?' And, you know, they might not click on it immediately, but a small percentage of people might go in the store, or they might open it next day, or on a different window.")).

Response to Finding No. 786:

Respondent has no specific response.

787. Even if a consumer enters a search for "1-800-CONTACTS" because the consumer intends to directly navigate to 1-800 Contacts' website and an AC Lens ad appears in response to that search but the consumer does not click on the AC Lens ad, there is still "a net benefit" to AC Lens of having shown that advertisement because "you could argue that it helps to increase awareness of the brand" and "in a pay-per-click wor[l]d, we wouldn't pay for the view." (CX9039 (Clarkson, Dep. at 158)).

Response to Finding No. 787:

The proposed finding misstates the cited testimony and should be disregarded. Although Mr. Clarkson testified that "you *could* argue that it helps to increase awareness of the brand," he then stated that that would not benefit ACLens because "we've always been a direct seller, so we value the click much higher." (CX 9039 (Clarkson, Dep. at 158). As a consequence, Mr. Clarkson's further testimony about a "net benefit" therefore meant only that given that ACLens would not pay anything to a search engine if a consumer didn't click on the ad, even a miniscule impact on brand awareness would be more than nothing.

Mr. Clarkson also had no foundation for any opinion about any possible value to ACLens from using 1-800 Contacts' trademarks as keywords, because ACLens has not engaged in that practice since 2002 as a result of Mr. Clarkson's concern that such use might not be legal. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91)).

788. Even if the consumer does not click on the LensDirect ad, having advertisements appear in responses to a search for 1-800 Contacts can improve LensDirect's brand visibility, which helps Lens Direct because "the more times people see LensDirect, the better chance there is of them becoming a customer one day." (Alovis, Tr. 1006-1007) ("[b]rand visibility is always good. We don't spend anything and we get to sit next to or sit at the

table with the larger players."); *see also* CX9023 (Alovis, Dep. at 122-123) (discussing benefit of "visibility")).

Response to Finding No. 788:

The proposed finding is not supported by the cited testimony, although that testimony does demonstrate the harm to 1-800 Contacts' brand equity that Prof. Goodstein described in his expert report and trial testimony as likely to result from the conduct set forth in the finding. As the proposed finding states, Mr. Alovis expressed a desire and intent to use 1-800 Contacts' trademarks as keywords in order to have the LensDirect brand "sit next to or sit at the table with the larger players." (Alovis, Tr. 1006-10007). Prof. Goodstein explained in detail why such an "association" strategy on the part of smaller contact lens retailers would likely harm and dilute the strength of the 1-800 Contacts brand. (Goodstein, Tr. 2422:23-2425:1) (testimony by Prof. Goodstein that "if I do things to associate more brands in with my brand, if they get tied together in memory, then the power of the product category to bring up my brand alone gets weakened. So if other ads – if other companies or retailers in this case do things to associate their brand based on the positive equity I have to bring them together into the mind, then I weaken the link to my brand in memory. That hurts the brand equity." (Goodstein, Tr. 2424); *see also* (RX 736 at 35-41 (Goodstein Expert Report)). Prof. Goodstein also explained that "if any of those brands that have been associated by doing this do anything that's negative, and people think they're related to, affiliated or . . . somehow go together . . .," that "hurts" the "perceived quality of my brand. . . ." (Goodstein, Tr. 2424); *see also* (RX 736 at 35-41 (Goodstein Expert Report)).

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

789. 1-800 Contacts has significantly higher brand awareness than other online contact lens retailers. (*See infra* ¶¶ 790-791).

Response to Finding No. 789:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

790. [redacted] (CX1446 at 011, *in camera*).

Response to Finding No. 790:

[redacted] (CX 1446 at 11), *in camera.*

791. In 2013, 1-800 Contacts claimed that it had 30% unaided brand awareness, which was based on a third party survey where participants were asked on an unaided basis "When you think about places to buy contact lenses, what places come to mind?" They claimed that this unaided brand awareness was eight times higher than that of their nearest online competitor. (CX0429 at 010).

Response to Finding No. 791:

The proposed finding is incomplete because it fails to include the immediately prior sentence, which stated that 1-800 Contacts' "$413 million cumulative advertising investment (as of 9/2013) has built the leading brand in contact lens retailing." (CX 429 at 10).

792. A 2008 presentation to 1-800 Contacts' Board of Directors noted that Lens.com's "ability to divert customers using 1-800 trademarks increases as [1-800 Contacts] increase[s] brand awareness." (CX0621 at 123 (Agenda and attached documents for consideration at October 30, 2008 1-800 Contacts Board of Directors Meeting)).

Response to Finding No. 792:

Complaint Counsel's Proposed Finding No. 792 is incomplete and misleading. The quoted statement from the cited exhibit (CX 621 at 123) improperly omits the entire sentence: "Their ability to divert customers using our trademark increases as we increase 1-800 brand awareness, *and their infringement is directly correlated with our advertising spending*." (CX 621 at 123) (emphasis added). The omission in the proposed finding is material because by referring explicitly to "infringement," the second half of the sentences plainly shows that the context was a discussion relating to the effects of potentially unlawful trademark infringement. Indeed, the title of the cited exhibit is "Lens.com's Trademark Infringement." (CX 621 at 123). The proposed finding is thus misleading to the extent it suggests the quoted statement from the cited exhibit was made outside the context of a discussion relating specifically to trademark infringement.

793. There are far more searches for 1-800 Contacts brand terms than there are for any other online contact lens retailers' brand terms. (Alovis, Tr. 1006, 1015 (testifying that more people search for 1-800 Contacts than for other online contact lens retailer brand names); *supra* § V.B.2.b-c).

Response to Finding No. 793:

The proposed finding should be disregarded because Mr. Alovis does not have the necessary foundation to support a finding that addresses all other online contact lens retailers; he can only speak to LensDirect. Even as to Lensdirect, Mr. Alovis conceded that he does not "do the marketing," that he doesn't "create the strategies" for paid search or "manage the paid search," and that he devotes about 70% of his time to a completely different company that is not in the optical space. (CX 9023 (Alovis, Dep. at 60, 67, 69)).

794. While LensDirect bids on the names of contact lens retailers other than 1-800 Contacts in paid search advertising, such bidding is "[n]ot as significant for us" as bidding on 1-800

Contacts terms because more people search for 1-800 Contacts related terms than other retailers' terms. (Alovis, Tr. 1006; 1014-1015).

Response to Finding No. 794:

The proposed finding is inaccurate, incomplete, and misleading. The cited testimony is unreliable and lacks foundation because Mr. Alovis testified that he is "not involved in the paid search aspect of the company (CX 9023 (Alovis, Dep. at 80)) and that he does not "create the strategies" for the company's paid search advertising (CX 9023 (Alovis, Dep. at 60, 116)). Moreover, Mr. Alovis testified that it was not profitable for LensDirect to bid on keywords that contained 1-800 Contacts' trademarks. (Alovis, Tr. 1018–1019; CX 9023 (Alovis, Dep. at 129)). For 2017, LensDirect's target cost per conversion for paid search advertising is $20 to $25. (Alovis, Tr. 1043). Yet, LensDirect's average cost per conversion for the phrase "1800Contacts" is $45.07. (Alovis, Tr. 1043–1044). And LensDirect's average cost per conversion for the phrase "1800 contacts" is $45.26. (Alovis, Tr. 1044). Mr. Alovis confirmed that both of these amounts are nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Indeed, Mr. Alovis confirmed that the average cost per conversion for each of the most popular 1-800 Contacts trademarked keywords bid on by LensDirect was nearly double LensDirect's 2017 target customer acquisition cost. (Alovis, Tr. 1044). Mr. Alovis also testified that very few customers who searched for 1-800 Contacts were attempting to navigate to LensDirect's website. (Alvois, Tr. 1042.) Moreover, notwithstanding the fact that LensDirect was never subject to any restrictions on displaying advertisements in response to searches for 1-800 Contacts, LensDirect has never been profitable. (CX 9023 (Alovis, Dep. at 28); Alovis, Tr. 1018–1021).

795. In the business judgment of AC Lens CEO Mr. Clarkson, there is "considerably more" value to his company in showing an advertisement in response to a search query for a 1-

800 Contacts related term than in response to a search query for the brand name of another online contact lens retailer. (Clarkson, Tr. 253; CX9039 (Clarkson, Dep. at 156)).

Response to Finding No. 795:

The proposed finding should be disregarded because the cited testimony by Mr. Clarkson lacked foundation and constituted improper lay opinion. ACLens had not used 1-800 Contacts' trademarks as keywords since at least 2002. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91) (testimony about ACLens' unilateral decision by 2002 not to use 1-800 Contacts' trademarks as keywords, in part because of a general concern that it "may not be legal.")). As a consequence, Mr. Clarkson had no basis for concluding that ACLens could or would benefit from such use. In addition, the proposed finding misstates the cited testimony. Mr. Clarkson did not use the phrase "business judgment," and he conditioned his testimony by referring to "potential value," not "value" alone, as the proposed finding states. (Clarkson, Tr. 253).

796. Mr. Clarkson testified that one reason it would be more valuable to show advertisements in response to search queries for 1-800 Contacts related terms than in response to search queries for the brand names of other online contact lens retailers is that "the amount of brand awareness of 1-800 dwarfs that of all the other online competitors, so when you look at the number of monthly searches for 1-800 terms, it's orders of magnitude greater than it would be for other competitors." (Clarkson, Tr. 253); see also (CX9039 (Clarkson, Dep. at 156) (value that AC Lens can obtain from bidding on the trademark term of a competitor "depends on the strength of the competitor's brand, because it clearly will depend on the total number of searches attached . . . to that brand.").

Response to Finding No. 796:

The proposed finding is incomplete and misleading and should be disregarded. Mr. Clarkson testified that he wanted to test the use of "1-800 Contacts" as a keyword precisely because consumers who search for 1-800 Contacts are looking for 1-800 Contacts, (CX 9039 (Clarkson, Dep. at 222), but only "if it was considered to be a legal practice." (Clarkson, Tr. 343). Mr. Clarkson also testified that he would not undertake such tests just because the Settlement Agreement was no longer in existence; he would need, in addition, to be assured by

his counsel that there were *no* potential legal "entanglements," not just cease-and-desist letters, before he would "test bidding on 1-800 Contacts' trademarked terms." (CX 9039 (Clarkson, Dep. at 157)). Moreover, ACLens has not used 1-800 Contacts' trademarks as keywords since at least 2002, when Mr. Clarkson made a unilateral decision not to engage in that practice. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91). As a consequence, Mr. Clarkson has no basis for concluding that such a practice would be valuable.

797. 1-800 Contacts' price premium over other online contact lens retailers makes searches for 1-800 Contacts brand terms more attractive targets for rivals' search advertising than searches for other online retailers' brand terms. (*See infra* § VI.A.1).

Response to Finding No. 797:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

798. Mr. Clarkson testified that one other reason it would be more valuable to show advertisements in response to search queries for 1-800 Contacts related terms than in response to search queries for the brand names of other online contact lens retailers is "the price advantage that we enjoy" relative to 1-800 Contacts. (CX9039 (Clarkson, Dep. at 156); *see also* Clarkson, Tr. 253 ("Also, there's less value in advertising on, say a Vision Direct term because they're in roughly the same price point, so there isn't quite the same incentive for consumers to switch.")).

Response to Finding No. 798:

The proposed finding should be disregarded because the cited testimony by Mr. Clarkson lacked foundation and constituted improper lay opinion. ACLens has not used 1-800 Contacts' trademarks as keywords since at least 2002. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91) (testimony about ACLens' unilateral decision by 2002 not to use 1-800 Contacts'

trademarks as keywords, in part, because of a general concern that it "may not be legal.")). As a consequence, Mr. Clarkson had no basis for concluding that ACLens would find it valuable to bid on 1-800 Contacts' trademarks.

799. Walmart's brand recognition as an online contact lens retailer is lower than that of other online contact lens retailers. (CX9033 (Mohan, Dep. at 57-58) (Walmart "doesn't have enough brand recognition in the contact lens case. As in when you think 'I want to buy contact lenses,' you don't say 'Let me go to Walmart contacts.' You would probably think of some other bigger competitors of that."); CX9033 (Mohan, Dep. at 90-91) ("[I]n contact lenses I would think that we don't have unaided brand awareness, because you would think of Walmart as a store where you can buy groceries, where you can buy certain types of electronics like T.V.s, and so on. You would not think of it as your first choice of destination when you are wanting to buy contact lenses.")).

Response to Finding No. 799:

The proposed finding is against the weight of the evidence. The finding is based solely on the testimony of a single Walmart employee. [redacted] (RX 1094 at 1-8 [redacted]).

800. Walmart Senior Product Manager Ms. Mohan testified that "1-800" as a keyword would bring more visitors to Walmart contacts' website than "Vision Direct" "[b]ecause a lot more people know the brand." (CX9033 (Mohan, Dep. at 61)).

Response to Finding No. 800:

Respondent has no specific response.

801. Walmart Senior Product Manager Ms. Mohan testified that it is better to advertise against a competitor when one has a better offering than that competitor, as opposed to when one has a less advantageous offering than that competitor. (CX9033 (Mohan, Dep. at 63 ("I'll give you an example. We can buy the keyword 'Amazon' today. We'll get a ton of traffic, but nobody will buy anything on our site because Amazon has two-day shipping. We don't have that. So it might not immediately be great for us. But, I mean, assuming all the other factors are the same, we have the same price, we have the same shipping and everything, we'll definitely go after Amazon, we'll pay a lot to get those customers. Q.

So is it better to advertise against a competitor when you have a better offering than they do? A. Yes.")).

Response to Finding No. 801:

Respondent has no specific response.

802. Walmart Senior Product Manager Ms. Mohan testified that Walmart will "definitely go after" a competing retail brand and "pay a lot to get" customers of that competing retail brand if Walmart's offering is comparable to that of its competitor in price, shipping, and other factors. (CX9033 (Mohan, Dep. at 63)).

Response to Finding No. 802:

The proposed finding is incomplete. Ms. Mohan testified that if bidding on competitor brand names in the contact lens industry were not successful for Walmart, Walmart would lower its bids on those terms to "a very low bid, or one cent." (CX 9033 (Mohan, Dep. at 72-73)). Walmart in fact lowered its bid on competitor contact lens retailer brand names. In May 2016 Walmart significantly lowered its bids in that ad campaign, reducing the average payment per click from around $4 to $0.31, because the cost per conversion using the trademark keywords was too high. (CX 9033 (Mohan, Dep. at 152-156); RX 180 at 1; RX 181 at 1). Prior to the change in bidding strategy, the monthly average cost per conversion in Walmart's "Competitors" campaign ranged from $31.40 to $88.09. (RX 180 at 1; CX 9033 (Mohan, Dep. at 154-155). Walmart's target cost per conversion is $15. (CX 9033 (Mohan, Dep. at 154). The change resulted in clicks per month on ads served in the "Competitors" campaign dropping from a range of 2000 to 3000 down to 35. (CX 9033 (Mohan, Dep. at 155); RX 180 at 1). Subsequent to Walmart's change in its bidding strategy, conversions per month for the "Competitors" campaign dropped from a range of 140 to 291 down to 3 to 5. (RX 180 at 1).

With regard to 1-800 Contacts specifically, Walmart lowered its bid (i.e., max. CPC) to one cent for all but two of its 1-800 Contacts related keywords. (RX 181 at 1; CX 9033 (Mohan,

Dep. at 160-165)). For one of the other two, which contains the term "Walmart" in addition to "1-800 Contacts," Walmart bid only 39 cents. (RX 181 at 1; CX 9033 (Mohan, Dep. at 160-165)).

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

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

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

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

Response to Finding No. 803:

Complaint Counsel's Proposed Finding No. 803 is incomplete and inaccurate. In the cited trial testimony of Mr. Bethers, he testified that 1-800 Contacts' retail prices "are higher than . . . many of our pure-play online competitors." (Bethers, Tr. 3773-74). Complaint Counsel's Proposed Finding No. 803, however, is not limited to "pure-play online competitors" but rather purports to encompass all retailers that sell contact lenses online. The record shows that many independent ECPs sell contact lenses online and generally have retail prices above 1-800 Contacts. (Bethers, Tr. 3513-14, 3544). The record shows that many optical retail chains sell contact lenses online and generally have retail prices above 1-800 Contacts. (Bethers, Tr.

3522, 3544). The record shows that Walmart sells contact lenses online (Bethers, Tr. 3529) and [redacted]

The cited trial testimony from Mr. Coon and Dr. Athey does not compare 1-800 Contacts' retail prices to those of all other contact lens retailers who sell online. (Coon, Tr. 2711-13; Athey, Tr. 821-23, *in camera*). The cited trial testimony from Mr. Clarkson states only that his retail prices (*i.e.* AC Lens' retail prices) are "lower in general" than 1-800 Contacts' retail prices, and that "that was not true on UPP lenses." (Clarkson, Tr. 197). The cited trial testimony of Mr. Alovis compared only LensDirect's retail prices to 1-800 Contacts' retail prices, not 1-800 Contact's retail prices to all other contact lens retailers who sell online. (Alovis, Tr. 989).

[redacted]

The cited exhibit CX 429 at 15 does not provide any time period or specific price comparison. CX 429 at 15 contains a diagram showing that 1-800 Contacts retail prices are generally lower than "Luxottica" and "Doctors" (*i.e.* independent ECPs) and higher than VisionDirect, "Online Discounters," and Costco, but CX 429 at 15 also notes that 1-800 Contacts provides "Competitive pricing," "Opportunity for quantity price breaks," and "Price matching." (CX 429 at 15).

[redacted] The cited exhibit CX 1211 at 7 is a document produced by Walgreens/Vision Direct that provides a comparison of the prices only for Vision Direct, 1-800 Contacts, and Coastal Contacts. (CX 1211 at 7). The cited exhibit CX 1459 at 1 provides no actual comparison of retail prices comparison and does not specify any particular online retailers.

The cited portion of Dr. Evans' report, CX 8006 at 85, cites only the document CX 547 at 32 that, as discussed above, [redacted]

As Complaint Counsel's Proposed Finding No. 803 also cites their own Proposed Findings Nos. 807-821, Respondent incorporates its replies to those Proposed Findings herein.

804. Walmart's prices for contact lenses are not significantly lower than 1-800's. (CX1449 at 026).

Response to Finding No. 804:

Complaint Counsel's Proposed Finding No. 804 mischaracterizes the cited exhibit. CX 1449 at 26 shows that Walmart's average online net price was [redacted] than 1-800 Contact's average online net price.

805. A 2015 report prepared at the direction of 1-800 Contacts' owner states that 1-800 Contacts "is the most expensive online retailer," and that "1-800 is not – and does not try to be – the lowest-cost retailer, as other online discount and retailers such as Costco are cheaper." (CX0439 at 010, 036, *in camera*).

Response to Finding No. 805:

Complaint Counsel's Proposed Finding No. 805 mischaracterizes the source of the cited exhibit. CX 439 is a document prepared by AEA Investors as part of its consideration of an

investment in 1-800 Contacts; CX 439 therefore was prepared by AEA Investors before its acquired a majority interest in 1-800 Contacts and thus before it became "1-800 Contacts' owner." *See* AEA Investors LP's Motion for In Camera Treatment, Mar. 24, 2017, Exhibit C, Declaration of Barbara Burns, ¶ 5.

806. 1-800 Contacts' price premium over competing online retailers is significant, with the exception of products with manufacturer-imposed price floors. (*Infra* ¶¶ 810-811).

Response to Finding No. 806:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Complaint Counsel's Proposed Finding No. 806 is contrary to the record evidence that shows 1-800 Contacts' retail prices are often in between the prices of independent ECPs and optical retail chains (many of which sell contact lenses online), and mass merchants (all, or nearly all, of which sell contact lenses online), club stores (all of which sell contact lenses online), and pure-play online retailers. (Bethers, Tr. 3513-14, 3522, 3529, 3544-45).

807. Dr. Athey calculated that 1-800 Contacts' prices were 21% higher than online competitors' prices, on average, for its top ten selling products between 2010 and 2016. (CX8007 at 014, 045-051 (¶ 32, Exhibit D-1 to D-7) (Athey Expert Report)).

Response to Finding No. 807:

Complaint Counsel's Proposed Finding No. 807 is incomplete and mischaracterizes the cited expert report. In the cited expert report, Dr. Athey calculated average prices for [redacted] (CX 8007 at 45-51). Thus, Dr. Athey's comparison of prices included only four contact lens retailers other than 1-800 Contacts, whereas there are many other contact lens retailers that sell contact lenses online, including independent ECPs, optical retail chains, mass merchants (including Walmart, Target, Sears, and JC Penny), club stores (including Costco, Sam's Club, and BJ's Wholesale), and a large number of other pure-play online retailers. (Bethers, Tr. 3513-14, 3522, 3529, 3525-26, 3530, 3538-41; CX 8007 at 42).

Complaint Counsel's Proposed Finding No. 807 is also misleading because it does not accurately describe the calculations in the cited expert report by Dr. Athey. Dr. Athey compared 1-800 Contacts' average retail prices to an "average" ("Competitor Average") of the average retail prices of four or five other contact lens retailers. Thus, Dr. Athey did not show, as Complaint Counsel's Proposed Finding No. 807 suggests, that 1-800 Contacts retail prices were 21 percent higher than any other specific retailer, let alone all other contact lens retailers that sell online.

808. In April 2004, 1-800 Contacts' prices were the "highest of all entities on the Web." (CX0055 at 015).

Response to Finding No. 808:

Respondent has no specific response with respect to the April 2004 time period specified in the proposed finding.

809. In 2005, 1-800 Contacts noted that it had "no appeal" to extremely price sensitive consumers because they were "not the lowest priced alternative." (CX0299 at 003).

Response to Finding No. 809:

Complaint Counsel's Proposed Finding No. 809 is incomplete because it omits the definition of "extremely price sensitive buyers" contained in the cited exhibit. CX 299 at 3 states that "[e]xtreme price sensitive buyers" "will go to great lengths, foregoing convenience, to ensure they are getting the best per box price for their lenses. They do not factor credibility; price is their only driver." (CX 299 at 3).

810. In January 2006, 1-800 Contacts' single box and four-box pricing were higher than either Coastal or Vision Direct's pricing for each of the following products: Acuvue 2, Acuvue Advance, Soflens 66 Toric, Focus Dailies, and Freshlook Colors. (CX0535 ("US Retail 2006 Business Plan") at 012-013).

Response to Finding No. 810:

Respondent has no specific response.

811. In June 2010, Coastal, Vision Direct, Lens.com, and AC Lens all offered lower prices than 1-800 Contacts for three top-selling lens products Acuvue Oasys, Acuvue Oasis for Astigmatism, and Acuvue 2, not accounting for rebates. (CX0904 at CX0904_NATIVE_1-800F_00034658, "Top 3 Product Online Price Comparison.xlsx").

Response to Finding No. 811:

Complaint Counsel's Proposed Finding No. 811 is inaccurate and unsupported by the cited exhibit. The cited exhibit shows that 1-800 Contacts' retail prices for "Acuvue 2" at the particular time were, in numerous instances, lower than the retail prices of Coastal Contacts and Lens.Com. (CX 904, CX 904_NATIVE_1-800F_00034658.XLSX (Tab labeled "#3 Acuvue 2 / 5.86%) (showing 1-800 Contacts' retail price for an "Actual Year Supply" for Acuvue 2 to be $127.92 compared to $135.35 for Coastal Contacts and $139.92 for Lens.com; showing 1-800 Contacts' retail price for "1 Box w/Standard Shipping" for Acuvue 2 to be $25.98 compared to $26.01 for Coastal Contacts and $26.00 for Lens.com; showing 1-800 Contacts' retail price for

"4 Boxes Initial / Actual w Standard Shipping" for Acuvue 2 to be $75.96 compared to $80.21 for Coastal Contacts, $76.94 for Vision Direct, and $80.16 for Lens.com).

812. As of November 2011, 1-800 Contacts would avoid "mentioning price in [its] text ads given that all [its] online competitors [were] usually much cheaper." (CX0033 at 002).

Response to Finding No. 812:

Complaint Counsel's Proposed Finding No. 812 is incomplete and mischaracterizes the cited exhibit. CX 33 reflects an internal discussion; it does not reflect a decision by 1-800 Contacts with respect to future inclusion of its prices in the text of ads. CX 33 at 2 contains a statement by a 1-800 Contacts employee, Bryce Craven, that "so far we've [1-800 Contacts] avoided mention[ing] price in our text ads . . . ." Furthermore, Complaint Counsel's Proposed Finding No. 812 is misleading because it omits a key portion of CX 33 at 1, where Amy Larson (a 1-800 Contacts employee) states: "Our price will be searchable anyway, as it is going to be listed in web text below." (CX 33 at 1).

813. By June 2013, 1-800 Contacts' prices had been higher than those of other internet competitors for many years. (CX1459 at 001-002 (Mr. Roush, 1-800 Contacts' Chief Marketing Officer, further explained that 1-800 Contacts "must not alter [its] premium pricing strategy." His email responded to observations by 1-800 Contacts marketing executive Phil Barrett 1-800 Contacts' conversion rate in search "dropped immediately once google made price more visible.")).

Response to Finding No. 813:

Complaint Counsel's Proposed Finding No. 813 is incomplete and unsupported by the cited exhibit. In the cited exhibit, CX 1459, Mr. Roush stated that "we must not alter our premium pricing strategy. However, we can and will adjust our rebate plan as needed. . . . We can also change our website to make our pricing after rebates more visible in searches." (CX 1459 at 1). The cited exhibit does not state, let alone provide any specific analysis showing,

a comparison of 1-800 Contacts' retail prices to those of other online contact lens retailers "for many years."

814. In or around June 2013, 1-800 had a "premium pricing strategy." (CX 1459 at 001-002).

Response to Finding No. 814:

Complaint Counsel's Proposed Finding No. 814 is incomplete and misleading. Despite the many exhibits constituting 1-800 Contact's business plans, strategy documents, and management presentations, as well as the extensive testimony from 1-800 Contacts' top executives (in investigative hearings, depositions, and trial), Complaint Counsel's Proposed Finding No. 814 purports to characterize 1-800 Contact's pricing strategy based solely on one comment in one email chain. To the extent a finding addresses 1-800 Contacts' overall pricing strategy, it should explain the components and reasons for that strategy. As the testimony of 1-800 Contacts' former and current CEOs and many documents demonstrate, 1-800 Contacts' deliberately positions itself within the contact lens retail industry to have the highest levels of service and convenience with retail prices lower than independent ECPs and optical retail chains. (Coon, Tr. 2708-10; CX 9001 (Bethers, IHT at 80); RX 904 at 16; CX 525 at 17; CX 1446 at 12, *in camera*). 1-800 Contacts recognized that its strategy meant it would not try to match prices with some discount retailers, such as club stores like Costco or online discount retailers. (Coon, Tr. 2708-09).

815. In October 2013, 1-800 Contacts' prices online were not competitive compared to those of other online retailers. (CX0983 at 002) (Mr. Galan explained that a Google feature showing product ads with prices negatively affected 1-800 Contacts' sales via paid search due to 1-800 Contacts' "lack of competitive prices in the online space").

Response to Finding No. 815:

Complaint Counsel's Proposed Finding No. 815 is incomplete and mischaracterizes the record evidence cited. Specifically, Complaint Counsel's Proposed Finding No. 815 improperly omits the subsequent statements in CX 983 at 2 that explain the context of Mr. Galan's observations, which included the concern that Google's feature of showing product price comparisons for contact lenses failed to account for "values such as rebates." (CX 983 at 2). Mr. Galan further explained that 1-800 Contacts tried to address the problems in how Google presented product price comparisons with "several iterations of value messaging around rebates and total savings, as well as our lack of hidden fees . . . ." (CX 983 at 2). Furthermore, Mr. Galan's statements in CX 983 do not contain any specific analysis of 1-800 Contacts' retail prices compared to other retailers, and do not mention what other retailers he was considering with the term "online space."

816. In October 2013, 1-800 Contacts' [position], Mr. Galan, noted that 1-800 Contacts "lack[ed]" "competitive prices in the online space." (CX0983 at 002).

Response to Finding No. 816:

Complaint Counsel's Proposed Finding No. 816 is incomplete and mischaracterizes the cited exhibit. Specifically, Complaint Counsel's Proposed Finding No. 816 improperly omits the subsequent statements in CX 983 at 2 that explain the context of Mr. Galan's observations, which included the concern that Google's feature of showing product price comparisons for contact lenses failed to account for "values such as rebates." (CX 983 at 2). Mr. Galan further explained that 1-800 Contacts tried to address the problems in how Google presented product price comparisons with "several iterations of value messaging around rebates and total savings, as well as our lack of hidden fees . . . ." (CX 983 at 2). Furthermore, Mr. Galan's statements in CX 983 do not contain any specific analysis of 1-800 Contacts' retail prices compared to other

retailers, and do not mention what other retailers he was considering with the term "online space."

817. [redacted] (CX0295 at 063, *in camera*).

Response to Finding No. 817:

[redacted]

818. [redacted] (CX0295 at 064, *in camera*).

Response to Finding No. 818:

[redacted]

819. Douglas Haber, Managing Director of the firm (Thomas Lee Partners) that owned 1-800 Contacts at the time, observed in 2015 that analysis and data provided by a consulting firm was [redacted] (CX1162 at 001, *in camera*) (discussing his May 2015 review of a 2013 analysis from consulting firm Bain and Company).

Response to Finding No. 819:

Respondent has no specific response.

820. [redacted] (CX1449 at 026, *in camera*).

Response to Finding No. 820:

Complete Counsel's Proposed Finding No. 820 is incomplete because it omits the second half of the quoted sentence, which states: [redacted] (CX 1449 at 26). Furthermore, the cited exhibit shows 1-800 Contacts' [redacted] (CX 1449 at 26). The analysis by Bain and Company shows [redacted] (CX 1449 at 26). The analysis by Bain and Company further shows [redacted] (CX 1449 at 26).

821. 1-800 Contacts' prices today remain higher than those of other online contact lens retailers. (CX9034 (Roush, Dep. at 142) ("When I think of our pricing, you know, clearly our prices are higher than the online players. Certainly they are.")).

Response to Finding No. 821:

Complaint Counsel's Proposed Finding No. 821 is incomplete and misleading because it fails to reflect Mr. Roush's entire answer to the question during his deposition. In fact, Mr. Roush explained his view that 1-800 Contacts is "actually [] lower priced than [its] online competitors" once its policy to "beat any price" is taken into account: "When I think of our pricing, you know, clearly our prices are higher than the online players. Certainly they are. And that's true except for the fact that when customers come to our site, they—we do have a—we have a policy that we beat any price. So for any customer that wants to—that wants to match the price or beat the price, if they're aware that another competitor has a lower price, we have a policy where we actually will beat that price. So when you take that policy into effect, we actually are lower priced than our online competitors." (CX 9034 (Roush, Dep. at 142)).

Complaint Counsel's Proposed Finding No. 821 is also incomplete and misleading because it does not specify which retailers are included in the term "online contact lens retailers." As the record shows, there are many retailers who sell contact lenses online that have retail prices higher than 1-800 Contacts. (CX 1449 at 26, *in camera*).

2. 1-800 Contacts Consistently Recognized that Online Search Advertising from its Lower-Priced Rivals Threatened its Sales, and that its Results Improved When it Eliminated Rivals' Trademark Advertising

822. 1-800 Contacts' business records reflect a consistent concern over time that online competitors' advertising on searches for 1-800 Contacts' trademarks hurt 1-800 Contacts' sales. (*See infra* ¶¶ 825-826, 829-837, 840-844, 846-847, 850-852, 856, 860-865).

Response to Finding No. 822:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Complaint Counsel's Proposed Finding No. 622 is also inaccurate, misleading, and contrary to the record evidence. The record evidence shows that 1-800 Contacts' concerns with other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark terms were not directly about lost sales, but rather the harm to consumers from confusion and the harm to the value of 1-800 Contacts' trademarks. Specifically, 1-800 Contacts had three main business concerns: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06, 149); Coon, Tr. 2727-38 (citing concerns about consumers being frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)).

823. 1-800 Contacts' business records also reflect a consistent acknowledgement over time that the absence of competitor ads on searches for 1-800 Contacts' trademarks significantly improved 1-800 Contacts' sales, as well as the click-through rates of 1-800 Contacts' trademark paid search ads. (*See infra* ¶¶ 828, 838-839, 845, 848-849, 853-855, 857).

Response to Finding No. 823:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

824. During Jonathan Coon's tenure, 1-800 Contacts' competitors running search advertising triggered by 1-800 Contacts' trademark terms imposed costs on 1-800 Contacts in the form of lost sales and higher costs per click, which, according to Mr. Coon, exceeded 1% of 1-800 Contacts' total advertising budget in size. (Coon, Tr. 2851-2853).

Response to Finding No. 824:

Complaint Counsel's Proposed Finding No. 824 is inaccurate, misleading, and unsupported by the trial testimony cited. In response to question from Complaint Counsel (Mr. Matheson), Mr. Coon explained that the actual costs per click for sponsored ads that appeared on searches for 1-800 Contacts' own trademark accounted for less than 1 percent of 1-800 Contacts' total annual advertising expenditures. (Coon, Tr. 2849). Mr. Coon then explained that there were costs to 1-800 Contacts from sponsored ads by other retailers on searches for 1-800 Contacts' trademarks that caused consumers to be confused or misdirected: "I'm saying that confusing and misdirecting people and tricking them into buying from them has a cost." (Coon, Tr. 2853). In the cited trial testimony, Mr. Coon did not attribute other retailers' sponsored advertisements to "higher costs per click," as stated in Complaint Counsel's Proposed Finding No. 824.

825. 1-800 Contacts contacted Google in 2011, inquiring about an online article (that turned out to be incorrect) reporting that Google would allow trademark owners to limit the entities that could purchase their trademarks as keywords. Bryce Craven told Google that this would be "a welcome feature." (CX0029).

Response to Finding No. 825:

Respondent has no specific response.

826. 1-800 Contacts' trademark keywords are among the "biggest contributors to orders." (CX0732 at 004).

Response to Finding No. 826:

Complaint Counsel's Proposed Finding No. 826 is incomplete and misleading. First, the cited exhibit consists of a memo by then-1-800 Contacts employee Bryce Craven containing a summary and instructions for "Search Reports, Tasks, and Contact Information" that states "Talk about Big 3 and TM performance vs. last week and last year. These two keyword groups are the biggest contributors to orders." (CX 732 at 4). The "Big 3" refers to the generic search terms "contacts," "contact lens," and "contact lenses." (Bethers, Tr. 3654-55). Second, Complaint Counsel's Proposed Finding No. 826 fails to reflect the substantial record evidence showing that the use of 1-800 Contacts' trademark as a search term by a consumer is often caused by (or the result of) other forms of advertising, such as television advertising, or marketing efforts by 1-800 Contacts. (CX 9017 (Blackwood, Dep. at 176, 230); CX 9029 (Bethers, Dep. at 98); CX 9032 (L. Schmidt, Dep. at 97, 247); RX 736 at 8). Thus, the proposed finding is misleading to the extent that it implies trademark keywords are, standing alone, a major contributor to orders. Mr. Craven's perspective as a 1-800 Contacts employee focused entirely on Internet search marketing does not accurately or completely reflect 1-800 Contacts' understanding of the extent to which different types of marketing, advertising, or other efforts contribute to (or drive) customer orders.

827. Because of the importance of 1-800 Contacts' trademark keywords, 1-800 Contacts' weekly paid search reporting separately discussed trademark paid search performance. (CX0732 -004; *see infra* ¶¶ 829-830, 833-839, 845, 848-865).

Response to Finding No. 827:

Complaint Counsel's Proposed Finding No. 827 is inaccurate, incomplete and unsupported by the record evidence cited. Respondent does not dispute that 1-800 Contacts regularly tracked the performance of trademark paid search as a separate category in its metrics

for Internet marketing. As reflected in the cited exhibit, 1-800 Contacts also tracked performance related to the "Big 3" search terms ("contacts," "contact lens," and "contact lenses"), natural search, and affiliate marketing. (CX 732 at 4-5). There are many reasons why 1-800 Contacts tracked trademark paid search separately, including that consumers who navigate to 1-800 Contacts' website by an internet search for 1-800 Contacts' trademark behave differently than those who found 1-800 Contacts' website by an internet search for a non-trademark term. (Coon, Tr. 2726; Craven, Tr. 688-89 ("trademark keywords performed significantly different from the rest of the keywords"); CX 14 at 2). Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

828. When reporting search advertising performance, 1-800 Contacts' specifically identified competitor activity in the form of competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks as a factor affecting results on 1-800 Contacts' trademark keywords. (Craven, Tr. 530 ("we looked at competitor activity as a possible contributor"); *see infra* ¶¶ 829-830, 833-839, 845, 848-865).

Response to Finding No. 828:

Complaint Counsel's Proposed Finding No. 828 is incomplete, inaccurate, and mischaracterizes the cited trial testimony. Mr. Craven testified that competitor activity on searches for 1-800 Contacts trademark was one of *many factors* that *could* impact the performance of 1-800 Contacts' trademark keywords: 1-800 Contacts "looked at competitor activity as a possible contributor, and . . . called that out on occasion, so that's one of . . . many factors that could impact our results on trademark keywords." (Craven, Tr. 530). Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

829. In his instructions for preparing weekly paid search reports, Bryce Craven, 1-800 Contacts' paid search manager, identified "more competitors showing up on searches for our best TM words" as the first factor to consider as an explanation for paid search performance. (CX0732 at 004; Craven, Tr. 515 (Mr. Craven testified that CX0732 was "something that I prepared to help my team when I left 1-800 Contacts . . . it was to help my team take over my responsibilities.")).

Response to Finding No. 829:

Complaint Counsel's Proposed Finding No. 829 is incomplete, inaccurate, and mischaracterizes the cited exhibit. CX 732 at 4 provides a suggested list of "[q]uestions to address for paid search," it does not state that those questions represent specific factors to consider as explanations for paid search performance. Furthermore, there is no indication that the list of "questions to address for paid search" in CX 732 at 4 were placed in any particular, deliberate order in terms of their relevance to paid search performance.

830. 1-800 Contacts believed that fewer competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks "always helps improve performance" of 1-800 Contacts' paid search. (CX0855).

Response to Finding No. 830:

Complaint Counsel's Proposed Finding No. 830 is incomplete, inaccurate, and mischaracterized the record evidence cited. First, CX 855 contains the statements of one 1-800 Contacts' employee, Bryce Craven, not a senior executive, let alone an employee whose statements could fairly be attributed to the company as a whole. Second, Complaint Counsel's Proposed Finding No. 830 improperly disregards the main factor identified in CX 855 as contributing to an increase in paid search traffic, which was the flexible spending season ("FSA season"). (CX 855; Craven, Tr. 538-40).

831. 1-800 Contacts' concern about the impact of online competitor ads on queries for 1-800 Contacts' trademarks was evident as early as 2003, at which point 1-800 Contacts began complaining to Google about its competitors' advertising. (*See infra* §VI.A.4).

Response to Finding No. 831:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

832. In 2004, 1-800 Contacts spoke with Google about preventing competitors from bidding on its branded queries, after a 1-800 executive referred to "controlling' bids on 1-800's trademark name as a "battle." (CX1397 at 001-002).

Response to Finding No. 832:

Complaint Counsel's Proposed Finding No. 832 is incomplete, inaccurate, and mischaracterizes the cited exhibit. CX 1397 is an email chain among then-1800 Contacts employees that describes a concern primarily with 1-800 Contacts' marketing affiliates using 1-800 Contacts' trademarks as keywords. (CX 1397 at 1-2). There is no mention in CX 1397 that Mr. McCallum's concern, or his discussion with Google, related to competing contact lens retailers' use of 1-800 Contacts' trademark as a keyword. (CX 1397 at 1-2). Furthermore, CX 1397 begins with an email by then-1-800 Contacts employee Josh Aston that frames his concern in terms of the search engines' understanding their "responsibility and liability" in the situation where one company uses another company's trademark as a keyword for search advertising. (CX 1397 at 1).

833. In the week ending July 28, 2007, 1-800 Contacts received fewer orders than the previous week on its most popular trademark keyword, 1800contacts, which it attributed to "probably been loosing [sic] some traffic to Lens.com, LensWorld, VisionDirect and a few other advertisers" who were "consistently showing up on" the term 1800contacts. (CX0606 at -002; CX0606 ("Search Dashboard 073007.xls")).

Response to Finding No. 833:

Complaint Counsel's Proposed Finding No. 833 is incomplete and misleading because it fails to incorporate the deposition testimony of Mr. Craven, who authored the quoted statements in CX606 ("Bryce's Comments about Search). Mr. Craven testified that by the phrase "losing some traffic" in CX 606 he was referring to the possibility that "customers who were searching for . . . 1800contacts . . . were getting diverted": "there's probably a lot of people who simply click on results that are top of the search results page regardless of who the advertiser is." (CX 9020 (Craven, Dep. at 47-48) (discussing CX 606)).

834. On August 7, 2007 (less than one week before 1-800 Contacts sued Lens.com, see below), the 1-800 Contacts employee responsible for search advertising sent his supervisors an analysis of "how Lens.com has affected [1-800 Contacts'] business by advertising on [1-800 Contacts'] trademarks in Google." (CX0613 at 001). Among other things, he estimated that 1-800 Contacts may have lost around $426,000 in revenue to Lens.com, year to date, as a result of Lens.com ads appearing in response to searches for 1-800 Contacts trademarks. (CX0613 at 001).

Response to Finding No. 834:

Respondent has no specific response to the first sentence of Complaint Counsel's Proposed Finding No. 834. The second sentence of Complaint Counsel's Proposed Finding No. 834 is incomplete and misleading because it fails to incorporate the testimony of the author of the cited exhibit (Bryce Craven) that explains the estimate in CX 613 was a "guesstimation," was based on "some assumptions" that he could not remember, and that he could not "speak to the accuracy of the" estimates. (CX 9002 (Craven, IHT at 154-58); CX 9020 (Craven, Dep. at 82-84)). Furthermore, the second sentence of Complaint Counsel's Proposed Finding No. 834 is inaccurate and misleading because it cites to an estimate by Bryce Craven before 1-800 Contacts' litigation with Lens.com that is based on an assumption "that 5% of those who search for us [1-800 Contacts] by our TM name end up instead ordering with Lens.com" (CX 613 at 1),

even though the record from the litigation ultimately showed that the ads by Lens.com and its associated websites on searches for 1-800 Contacts resulted in click-through rate of 1.5 percent (25 clicks out of 1,626 impressions). *1-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1244 (10th Cir. 2013). Thus, the 5 percent assumption by Mr. Craven in the estimate contained in the second sentence of Complaint Counsel's Proposed Finding No. 834 was inaccurate and the resulting estimate unreliable, given the 1.5 percent click-through rate found in the litigation and the fact that only a fraction of those consumers who click on an ad will actually end up placing an order with that advertiser.

835. As of September 2007, Lens.com had grown to 5,000 order per week from 1,000 orders per week three years earlier because of its ability to display search advertising in response to searches for 1-800 Contacts' trademarks. (Coon, Tr. 2826-2827). 1-800 Contacts' founder and CEO personally raised this development in an email to his boss from the private equity firm that owned 1-800 Contacts at the time. (Coon, Tr. 2823-2824; CX0300).

Response to Finding No. 835:

Complaint Counsel's Proposed Finding No. 835 is inaccurate and mischaracterizes the cited trial testimony and exhibit. Mr. Coon testified that he authored an email stating that "Lens.com has grown from 1,000 orders per week to 5,000 orders per week in the last three years," and that it was his belief that Lens.com growth during that time was connected to its display of search advertising in response to searches for 1-800 Contacts' trademarks. (Coon, Tr. 2826-27). Mr. Coon did not testify that it was his belief that all of Lens.com's growth during that time was attributable to (because of) its display of search advertising in response to searches for 1-800 Contacts' trademarks. (Coon, Tr. 2826-27). The cited exhibit does not attribute Lens.com's growth to its display of search advertising in response to searches for 1-800 Contacts' trademarks. (CX 300 at 1).

In addition, Mr. Bethers specifically testified that it was not accurate to attribute Lens.com's growth to its display of search advertising in response to searches for 1-800 Contacts trademarks. (Bethers, Tr. 3664-65). Although Complaint Counsel's Proposed Finding No. 835 relates to purported growth of Lens.com's orders and the reasons for that growth, Complaint Counsel does not cite any testimony or other record evidence from Lens.com itself. As Mr. Bethers testified, 1-800 Contacts' information about Lens.com's orders was based on 1-800 Contacts own internal estimates from the amount of traffic to Lens.com's website, not any specific information directly from Lens.com about its number of orders. (Bethers, Tr. 3665). Finally, the record from 1-800 Contacts' litigation against Lens.com, in which Lens.com's own information was available through discovery, made it clear, based on actual company data, that Lens.com's growth was definitely not attributable to advertisements on searches for 1-800 Contacts' trademarks. *1-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1244 (10th Cir. 2013); *1-800 Contacts, Inc. v. Lens.com*, 755 F. Supp. 2d 1151, 1160 (D. Utah 2010).

836. During the week ending September 22, 2007, 1-800 Contacts attributed a 6% week over week drop in trademark paid search orders to competition from Vision Direct, which had been "advertising in the 2nd position on many of [1-800 Contacts'] branded terms in Google." (CX0616 at 001).

Response to Finding No. 836:

Complaint Counsel's Proposed Finding No. 836 is inaccurate and mischaracterizes the cited exhibit. In CX 616, then-1-800 Contacts employee, Bryce Craven, did not "attribute" a drop in trademark paid search order to advertisements from Vision Direct. (CX 616 at 1) ("Bryce's Comments about Search"). Mr. Craven stated that a decline in trademark paid search orders "*may be partially caused by Vision Direct*, who has been advertising in the 2nd position on many of our branded terms in Google . . . ." (CX 616 at 1) (emphasis added).

837. During the week ending April 11, 2008, 1-800 Contacts experienced a 9% week over week decline in new customer orders through MSN, leading its search marketing manager to "step up . . . monitoring in this engine" going forward because the decline "could be a sign of increased affiliate and/or competitive trademark activity in MSN." (CX0931 at 001).

Response to Finding No. 837:

Respondent has no specific response.

838. During the week of June 20, 2008, 1-800 Contacts experienced a "bump" in trademark orders, which helped improve "weekly NI performance" (referring to new internet customers). (CX0558 at 001). Trademark orders for that week were "helped somewhat by LensWorld finally removing all their ads from all of [1-800 Contacts'] trademark keywords." (CX0558 at 001).

Response to Finding No. 838:

Respondent has no specific response to the first sentence of Complaint Counsel's Proposed Finding No. 838. The second sentence of Complaint Counsel's Proposed Finding No. 838 is incomplete and misleading because it fails to reflect the trial testimony of the author of the cited exhibit, Mr. Bryce Craven, who testified that the quoted statement in CX 558 regarding LensWorld was not based on any "concrete data" but rather reflected his thoughts as to the possible factors influencing the performance of trademark paid search. (Craven, Tr. 536-38).

839. During the week ending September 12, 2008, 1-800 Contacts attributed improved performance to the absence of advertisements from Lens.com and JustLenses ads on 1-800 Contacts' trademarks. (CX0231 at 001 ("We may be seeing some benefit from the absence of Lens.com and JustLenses ads on our best marks.," discussing "improved NI order volume . . . largely due to a jump in each engine from trademark searches and orders.")).

Response to Finding No. 839:

Complaint Counsel's Proposed Finding No. 839 is incomplete, inaccurate, and mischaracterizes the cited exhibit. In the cited exhibit, the author of the document, then-1-800 Contacts employee Bryce Craven, suggested that 1-800 Contacts "may be seeing some benefit"

from the absence of Lens.com and JustLenses ads (CX 231 at 1), which is far more speculative and far less decisive than the characterization in Complaint Counsel's Proposed Finding No. 839 that 1-800 Contacts attributed the perceived improvement in performance to the absence of those ads. Complaint Counsel's Proposed Finding No. 839 improperly neglects the very next sentence in CX 231 at 1 that states "[t]here were about 10% more trademark searches/impressions this week and roughly 3% more TM orders," which provides an obvious alternative explanation for an increase in NI [new internet] orders (*i.e.*, there were significantly more searches that week for 1-800 Contacts' trademarks). Lastly, CX 231 contains the statements and impressions of Bryce Craven, not 1-800 Contacts as a whole.

840. On October 17, 2008, an analysis of "Competitor on TM Cost Estimates" sent to Allen Hwang, 1-800 Contacts' Chief Marketing Officer, showed 1-800 Contacts was losing $68,604 in revenue per month due to competitor ads showing up on searches for 1-800 Contacts' trademark keywords. (CX0211; CX0213 at NATIVE_1-800F_00024851.xls).

Response to Finding No. 840:

Complaint Counsel's Proposed Finding No. 840 is incomplete, inaccurate, and mischaracterizes the cited exhibit. CX 211 is an email chain between Bryce Craven and a Google employee with the first name Paige. CX 211 contains no analysis or estimate of 1-800 Contacts' lost revenues from the use of its trademarks as keywords by other retailers.

CX 213 is an email from then-1-800 Contacts employee Amy Larson to Allen Hwang that attached a document named "Competitor on TM Cost Estimates.xls." As the document's name reflects, that was an "estimate" apparently prepared by someone at 1-800 Contacts. There is no foundation in the record for that "estimate" purportedly contained in CX 213. Complaint Counsel's Proposed Finding No. 840 does not identify the author of the "estimate" purportedly contained in CX 213, or any of the assumptions or others inputs used to generate that "estimate." There is no evidence in the record as to whether the "estimate" purportedly in CX 213 was a

draft, preliminary, or final; there is no evidence in the record that the "estimate" purportedly in CX 213 was used or relied upon in anyway by 1-800 Contacts. And, Complaint Counsel's Proposed Finding No. 840 does not identify any record evidence that supports or corroborates the estimates in CX 213.

841. 1-800 Contacts' founder and CEO personally had business concerns with competitor advertising appearing in response to searches for 1-800 Contacts' trademarks, because competitor advertising created "friction" that made it less "easy and quick" for 1-800 Contacts to convert consumers, which negatively impacted 1-800 Contacts' business. (Coon, Tr. 2726-2727, 2733, 2738). Mr. Coon attended a Board of Directors presentation in 2008 discussing the "growing and serious problem" of competitor trademark advertising. (Coon, Tr. 2730-2733; CX0621).

Response to Finding No. 841:

The first sentence of Complaint Counsel's Proposed Finding No. 841 is incomplete, inaccurate, misleading, and mischaracterizes the cited testimony. Mr. Coon testified about multiple concerns that he had with other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademarks. The first sentence of Complaint Counsel's Proposed Finding No. 841 takes, and misinterprets, only a few select quotes from Mr. Coon's trial testimony, out of context. Contrary to Complaint Counsel's characterization, Mr. Coon was referring to the "friction" for consumers, not any "friction" for 1-800 Contacts. Mr. Coon testified that his concern was that the 1-800 Contacts was "all about trying to make it simple and easy and quick" for consumers to purchase contact lenses. (Coon, Tr. 2727). Mr. Coon further testified that his concerns were that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademarks created "friction that was getting in the way," by which he meant that customers were "getting . . . misdirected" and that they were "confused." (Coon, Tr. 2727-29). Mr. Coon specifically testified: "[W]e saw people getting misdirected to companies that were not ours. [W]e know people were confused because we heard about it. They thought

they'd done business with us. They'd call us to check the status of an order and they weren't in our system. They thought they'd ordered from us and they hadn't, so pretty strong evidence that they were confused. You know, no, I insist, I ordered, I ordered from you, we'd hear them call in, and they hadn't in fact ordered from us. And . . . they're frustrated. [W]e're all about trying to remove friction, and here is this group of customers that are being frustrated and confused and misdirected." (Coon, Tr. 2728-29). Mr. Coon further testified that his concerns regarding other retailers' advertisements appearing on a search for 1-800 Contacts' trademarks included not wanting 1-800 Contacts to be associated with practices that 1-800 Contacts thought were misleading to consumers (Coon, Tr. 2729) and that such advertisements were "undermining the investment [1-800 Contacts was] making in building [its] brand." (Coon, Tr. 2731).

The second sentence of Complaint Counsel's Proposed Finding No. 841 is incomplete and misleading because it fails to identify why Mr. Coon believed that other retailers' advertisements appearing on a search for 1-800 Contacts trademarks was a "growing and serious problem." Mr. Coon explained in response to the next question that he believed such advertisements were confusing ("It's obviously confusing."). (Coon, Tr. 2733).

842. On October 30, 2008, 1-800 Contacts' board of directors held a meeting at which 1-800 Contacts' executives discussed how search advertising triggered by 1-800 Contacts' trademarks was restraining 1-800 Contacts' growth and allowing competitors to grow rapidly with limited marketing expenditures. (CX0621 at 118; Coon, Tr. 2753-2755). Lens.com, the fastest-growing online contact lens seller at the time, was using "trademark advertising on 1-800 Contacts as their primary marketing tool for growth." (CX0621 at 118, 121). From 2004 to 2007, Lens.com's sales "increased 475%, making them the third largest online seller." (CX0621 at 121). Unlike Lens.com, as of 2008, Coastal had "ceased trademark advertising as a result of a settlement agreement with 1-800," and its market share declined from 12% in 2005 to 6% in 2007. (CX0621 at 122; *see infra* § VI.B.2.a).

Response to Finding No. 842:

The first sentence of Complaint Counsel's Proposed Finding No. 842 is incomplete, inaccurate, and misleading. Respondent does not dispute that 1-800 Contacts' board of directors held a meeting on October 30, 2008, during which one of the topics discussed was other retailers' advertisements appearing on searches for 1-800 Contacts trademarks. The trial testimony by Coon and the cited exhibit show that the concerns expressed about those advertisements at the board of directors meeting included the negative impact on the value of 1-800 Contacts' trademarks ("Expansion of trademark triggered ads by other competitors will further reduce the value of our trademark(s)"). (CX 621-118).

The very next slide in CX 621, titled "The Problem" shows a Google search for "1800contacts" and highlights a sponsored ad by "JustLenses.com" (a website affiliated with Lens.com) with the heading "1-800 Contacts." (CX 621-119; Coon, Tr. 2731-32). The sponsored ad above that one is by Lensworld and similarly has a heading "1800contacts." (CX 621 at 119). There is another ad from LensWorld claiming "75% Off." (CX 621-119). And there is an ad by Lens.com with the generic heading "Great deals: Acuvue" (CX 621 at 119) that Mr. Coon testified he thought could mislead and confuse people who trust that Google is providing links that will take them where they intend to go. (Coon, Tr. 2732-33). Mr. Coon further testified that Google's decision to label sponsored ads as "Sponsored Links" was problematic because it did not say "Advertisement" and instead could be confusing to consumers: "Sponsored by whom? Sponsored by 1-800 Contacts?" (Coon, Tr. 2734).

Thus, Mr. Coon's trial testimony and the content of CX 621 clearly demonstrate that the presentation to the 1-800 Contacts' board of directors on this issue was framed in the context of the potential harm to the value of 1-800 Contacts' trademarks and the potential harm to

consumers from misdirection and confusion caused by other retailers advertisements appearing in response to a search for 1-800 Contacts' trademarks.

The second sentence of Complaint Counsel's Proposed Finding No. 842 reflects a belief or theory that 1-800 Contacts had at the time regarding Lens.com's advertising strategies, not an actual fact supported by record evidence as suggested in Complaint Counsel's Proposed Finding. The record evidence cited, CX 621 at 118-121, is an internal presentation created by 1-800 Contacts, without any indication that it was based on actual or reliable information from or about Lens.com. Complaint Counsel does not cite any record evidence or testimony from Lens.com in support of the second sentence of Proposed Finding No. 842, even though that proposed finding purports to identify a fact regarding Lens.com's particular and specific advertising strategies. Furthermore, Mr. Bethers testified that he does not believe the statement from CX 621 at 121 quoted in the second sentence of Complaint Counsel's Proposed Finding No. 842 is correct or complete: "At this time[,] I don't believe that that was correct or a complete description of [Lens.com's] primary marketing tool for growth during that time frame." (Bethers, Tr. 3664). Finally, the record from 1-800 Contacts' litigation against Lens.com, in which Lens.com's own information was available through discovery, made it clear, based on actual company data, that Lens.com's growth was definitely not attributable to advertisements on searches for 1-800 Contacts' trademarks. *1-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1244 (10th Cir. 2013); *1-800 Contacts, Inc. v. Lens.com*, 755 F. Supp. 2d 1151, 1160 (D. Utah 2010).

The third sentence of Complaint Counsel's Proposed Finding No. 842 is misleading and unsupported by the cited record evidence. The cited exhibit, CX 621 at 121, contains 1-800 Contacts' estimate of Lens.com's sales from 2004 through 2007 based on the traffic to Lens.com's website. (Bethers, Tr. 3665). The third sentence of Complaint Counsel's Proposed

Finding No. 842 is not supported by any cited testimony or other record evidence from Lens.com.

The fourth sentence of Complaint Counsel's Proposed Finding No. 842 is inaccurate and misleading. As shown above with respect to the other sentences in Complaint Counsel's Proposed Finding No. 842, the record evidence does not support attributing Lens.com's growth to use of 1-800 Contacts' trademarks as keywords for search advertisements. In addition, the fourth sentence of Complaint Counsel's Proposed Finding No. 842 reflects a belief of 1-800 Contacts at the time of the cited exhibit as to the amount of Coastal Contacts' sales and the reasons for any various changes in Coastal's sales and market share. That belief by 1-800 Contacts is not a fact supported by any cited testimony or record evidence from Coastal Contacts,. Mr. Bethers testified that 1-800 Contacts subsequently learned that Coastal Contacts had changed the focus of its business during this time period, placing greater emphasis on international sales and sales of glasses. (Bethers, Tr. 3668-70).

843. Vision Direct's market share decreased from 31% in 2003 to 20.3% in 2007, after entering into a settlement agreement with 1-800 Contacts. (CX0621 at 120; *see infra* § VI.B.2.b).

Response to Finding No. 843:

Complaint Counsel's Proposed Finding No. 843 is incomplete and misleading. The cited exhibit, CX 621 at 120, shows an estimate by 1-800 Contacts of Vision Direct's sales as a percentage of total "Web Sales" by "Online Contact lens Sellers." (CX 621 at 120). CX 621 at 120 further shows that, based on 1-800 Contacts' estimates at the time, Vision Direct's share of web sales by online contact lens sellers continued to decrease despite what 1-800 Contacts identified as Vision Direct's violation of the settlement agreement from "9/06 through the present." (CX 621 at 120).

844. In October 2008, 1-800 Contacts was concerned that the more money it spent on television advertising, the more its competitors were running search advertisements triggered by 1-800 Contacts' trademarks and stealing its potential customers, a concern which was also presented to 1-800 Contacts' board of directors. (Coon, Tr. 2763-2764, 2767; CX0621 at 123).

Response to Finding No. 844:

Complaint Counsel's Proposed Finding No. 844 is incomplete, misleading, and unsupported by the cited trial testimony and exhibit. Mr. Coon testified that the cited exhibit, CX 621 at 123, reflected his concern that "the more [1-800 Contacts] advertised, the more [Lens.com or other retailers] got to divert and misdirect those customers using [1-800 Contacts'] trademark" as an internet search term. (Coon, Tr. 2764). Thus, the concern expressed by Mr. Coon and in CX 621 at 123 was explicitly more specific than just other retailers stealing potential customers, his concern was the stealing of potential customers through deceptive and confusing means. Mr. Coon made this point repeatedly in response to Complaint Counsel's questions: "These are people who are trying to navigate to 1-800 Contacts and are being confused and misdirected. . . . The more we would advertise, the more people would type in '1-800 Contacts' in attempt to go to our site . . . [and] they would be exposed to [other retailers'] confusing them and misdirecting them and trying to get them to go somewhere else." (Coon, Tr. 2767-68).

In addition, the cited exhibit specifically puts 1-800 Contacts' concerns in the context of trademark infringement (*i.e.*, in the context of the "likelihood of confusion" among consumers). The title of the cited exhibit is "Lens.com's Trademark Infringement." (CX 621 at 123). The text of the cited exhibit, improperly omitted from Complaint Counsel's Proposed Finding No. 844, is that Lens.com's "*infringement* is directly correlated with our advertising spending." (CX 621 at 123) (emphasis added).

845. The week of March 6, 2009, was "a very strong week" for paid search for 1-800 Contacts, due in part to a "boost in TM orders" caused by a reduction in competitor ads appearing on searches for 1-800 Contacts' trademarks. (CX0914 at 001). The conversion rate and order volume for orders coming through trademark paid search ads increased because there were "substantially less competitors showing up on [1-800 Contacts'] list of monitored TM words." (CX0914 at 001; Craven, Tr. 529 ("I meant that when we did our trademark monitoring process, we saw fewer instances of competitor ads showing up"); Craven, Tr. 529-520 ("TM CR" meant conversion rate on 1-800 Contacts' trademark keywords, and "TM order volume" meant the total order volume that came through 1-800 Contacts' trademark keywords)). No other explanation that accounted for the improved trademark search performance for the week of March 6, 2009, was given. (Craven, Tr. 530-531).

Response to Finding No. 845:

Complaint Counsel's Proposed Finding No. 845 is inaccurate, misleading, and unsupported by the record evidence cited. The cited exhibit states, "There are substantially less competitors showing up on our list of monitored TM words . . . in Google which is likely helping improve our TM CR and TM order volume." (CX 914 at 1). The phrase "likely helping" is far more speculative and far less decisive than the characterization in Complaint Counsel's Proposed Finding No. 845. The author of CX 914, Bryce Craven, testified that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact 1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven further explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537).

846. In December 2009, competitors of 1-800 Contacts were taking "advantage of the extra ad space" on searches for phrases such as "1800contacts coupon code" in place of 1-800 Contacts' own affiliates. CX0279 at 002; CX9016 (Judd, Dep. at 106 ("I don't remember the exact terms that affiliates could bid on, but at one point they could bid on brand-plus coupon code terms, which I think is what this is talking about"); CX9016 (Judd, Dep. at 108 ("[T]hose were the terms that they'd monitor for affiliates. And like I said, I think at one point affiliates could bid on those terms, but I believe that changed over time.")). 1-800 Contacts became concerned that potential customers would begin ordering from

competitors, in particular because the competitor ads identified emphasized savings. (CX0279 at 001-002)).

Response to Finding No. 846:

Complaint Counsel's Proposed Finding No. 846 is misleading because it mischaracterizes the record evidence cited. The final sentence of Complaint Counsel's Proposed Finding No. 846 improperly purports to attribute the statements of one former 1-800 Contacts employee, Ms. Jordan Judd, to the company as the whole. But there is no cited evidence that Ms. Judd's statements in CX 279 at 2 were forwarded to, or adopted by, 1-800 Contacts' senior executives or the company as a whole.

847. In response to the concerns raised in December 2009 regarding competitor ads appearing on "trademark + coupon" searches such as "1800contacts coupon code," 1-800 Contacts added the "top four TM+Coupon terms" to its weekly trademark monitoring report on January 8, 2010, and began to monitor those terms in addition to its other trademark keywords. (CX0279 at 001; *see infra* § VI.B.4).

Response to Finding No. 847:

Respondent has no specific response.

848. During the week ending January 8, 2010, 1-800 Contacts achieved "an all-time record high" for orders through its trademark keywords, due in part to the fact that fewer advertisers were appearing on 1-800 Contacts' monitored trademark terms that week. (CX0855 at 001). As 1-800 Contacts marketing manager Bryce Craven observed, having fewer organizations appear on searches for the trademark keywords "always helps improve performance." (CX0855 at 001; Craven, Tr. 538-540).

Response to Finding No. 848:

Complaint Counsel's Proposed Finding No. 848 is incomplete, inaccurate, and mischaracterizes the record evidence cited. First, CX 855 contains the statements of one 1-800 Contacts' employee, Bryce Craven, not a senior executive, let alone an employee whose statements could fairly be characterized as reflecting the views of the company as a whole. Second, Complaint Counsel's Proposed Finding No. 848 improperly disregards the main factor

identified in CX 855 as contributing to an increase in paid search traffic, which was the flexible spending season ("FSA season"). (CX 855; Craven, Tr. 538-40). Third, the author of CX 855, Bryce Craven, testified that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact 1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven further explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537).

849. During the week ending February 19, 2010, 1-800 Contacts experienced the "biggest weekly (+25%) and yearly (+21%) improvement in TM orders" on Bing so far that year, because "very few competitors and affiliates" were appearing on 1-800 Contacts' trademark keywords on Bing, which was a "big contributor to the recent order improvement" for 1-800 Contacts' trademark paid search on Bing. (CX0925 at 001).

Response to Finding No. 849:

Complaint Counsel's Proposed Finding No. 849 is incomplete, misleading, and mischaracterizes the cited exhibit. The cited exhibit states, "We're seeing very few competitors and affiliates on these terms recently, which could be a big contributor to the recent order improvement." (CX 925 at 1). The phrase "which could be" is far more speculative and far less decisive than the characterization of the cited exhibit in Complaint Counsel's Proposed Finding No. 849. The author of CX 925, Bryce Craven, testified that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact 1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven further explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537).

850. During the week ending March 12, 2010, 1-800 Contacts' trademark paid search orders fell and its click-through rate for trademark paid search "wasn't as strong as the five weeks prior," which 1-800 Contacts attributed to "additional competitor's [sic] ads (VisionDirect, StandardOptical, ShipMyContacts) showing up on [1-800 Contacts'] best terms such as *1800contacts* and *1800 contacts*." (CX0510 at 001) (italics in original)).

Response to Finding No. 850:

Complaint Counsel's Proposed Finding No. 850 is incomplete because it omits the trial testimony of the cited exhibit's author, Bryce Craven, who explained that with respect to whether other retailers' advertisements were reducing 1-800 Contacts' click-through rate, "we didn't know if that was actually happening," it "was a theory that we had because of customers potentially getting diverted . . . just by the mere fact that [those advertisements] were appearing close to [1-800 Contacts] ad." (Craven, Tr. 569-70). Complaint Counsel's Proposed Finding No. 850 also mischaracterizes the cited exhibit by improperly attributing the statements of one former 1-800 Contacts employee, Mr. Craven, to the company as a whole.

851. During the week ending April 30, 2010, 1-800 Contacts' click-through rate for trademark keywords was "lower" compared to other weeks, due to "[a]n increase in competitor's [sic] showing up on [1-800 Contacts'] branded terms." (CX0924 at 001).

Response to Finding No. 851:

Complaint Counsel's Proposed Finding No. 851 is inaccurate, incomplete, and mischaracterizes the cited exhibit. The cited exhibit, CX 924 at 1, states, "An increase in competitor's showing up on our branded terms may have contributed to lower TM CTR this week." (CX 924 at 1). The phrase "may have contributed" is far more speculative and far less decisive than the characterization of the cited exhibited in Complaint Counsel's Proposed Finding No. 851. In addition, Complaint Counsel's Proposed Finding No. 851 fails to reflect the testimony of the author of CX 924, Bryce Craven, that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact

1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven further explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537).

852. During the week ending June 11, 2010, 1-800 Contacts' trademark paid search orders through Google, and click-through rates for trademark ads, "were slightly softer than [the preceding week] because of increased competition on [1-800 Contacts'] best branded terms." At the time, searches on Google for 1-800 Contacts' most profitable keyword, 1800-contacts, were yielding "ads for six other advertisers." (CX0906 at 001).

Response to Finding No. 852:

Complaint Counsel's Proposed Finding No. 852 is incomplete because it fails to reflect the testimony of the author of CX 906, Bryce Craven, that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact 1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven further explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537).

853. During the week ending June 18, 2010, 1-800 Contacts' orders through its' trademark paid search ads improved significantly, which 1-800 Contacts concluded was due to "the removal of a few competitors who had been showing up on [1-800 Contacts'] best TM terms." (CX0564 at 001). Among those competitors, "Walgreens was the most notable." (CX0564 at 001). Walgreens "dropped off" of 1-800 Contacts' trademark searches on June 15, 2010. (CX0564 at 001; *see infra* § VI.B.15).

Response to Finding No. 853:

Complaint Counsel's Proposed Finding No. 853 is inaccurate, incomplete, and mischaracterizes the cited record evidence. The cited exhibit, CX 564 at 1, states, "Contributing to the TM success was the removal of a few competitors who had been showing up on our best

TM terms," which does not, as suggested in Complaint Counsel's Proposed Finding No. 853, attribute the success solely and exclusively to the number of other retailers' ads appearing on those TM terms, but rather notes the reduction in the number of those ads as a "contributing" factor. In addition, Complaint Counsel's Proposed Finding No. 853 fails to reflect the testimony of the author of CX 564, Bryce Craven, that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact 1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven further explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537).

854. During the week ending June 25, 2010, 1-800 Contacts experienced "another very solid week" for trademark paid search orders, and "the highest TM CTRs (27.2%)" that 1-800 Contacts' had ever seen, which 1-800 Contacts attributed to, among other factors, "[t]he removal of ShipMyContacts from [1-800 Contacts'] trademarks . . . contributed to [1-800 Contacts'] excellent TM CTR." (CX0927 at 001).

Response to Finding No. 854:

Complaint Counsel's Proposed Finding No. 854 is incomplete and mischaracterizes the cited exhibit. The cited exhibit (CX 927 at 1) points to multiple factors that affected the number of "TM" orders, including "the highest TM [click-through rates] we've ever seen," "[t]he removal of ShipMyContacts from our trademarks," removal of a "low-[click-through rate] TM ad" (i.e., a 1-800 Contacts' ad that generated a low click-through rate), and "increased media exposure." The exhibit (CX 927 at 1) also states that all of those factors "contributed to our excellent TM CTR this week." Complaint Counsel's Proposed Finding No. 854 mischaracterizes the cited exhibit by improperly attributing the statements of one former 1-800 Contacts employee, Mr. Craven, to the company as a whole.

855. In late August 2010, orders from new customers coming through search ads on searches for 1-800 Contacts' trademarks "jumped to the highest level of the year," due in part to the appearance of "fewer competitors on [1-800 Contacts'] best TM words such as *1800contacts 1800 contacts* and *1800 contacts*." (CX0836 at -001 (emphasis in original)). The removal of ads by Standard Optical "from the paid listings . . . was likely a big help" to 1-800 Contacts' paid search performance in late August 2010. (CX0836 at 001; Craven, Tr. 534-535 ("I was trying to . . . connect the dots to provide an explanation behind not having [Standard Optical's] ad there could have potentially helped our—could have potentially helped our metrics for those keywords . . . We had our own search engine data, we have the trademark monitoring reports, so that was offering up one explanation behind why orders potentially look better.")).

Response to Finding No. 855:

Complaint Counsel's Proposed Finding No. 855 mischaracterizes the cited exhibit. The cited exhibit, CX 836, contains the thoughts and impressions of one 1-800 Contacts employee, Bryce Craven, who testified that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark was one of many factors that could impact 1-800 Contacts' results on trademark keywords. (Craven, Tr. 530). Mr. Craven explained that he "didn't have concrete data" to support any causal connection between 1-800 Contacts' results on trademark keywords and the appearance of other retailers' advertisements. (Craven, Tr. 537). Mr. Craven further explained that his statements in CX 836 were based on "limited data" and reflected simply his attempts to "offer[] up one explanation why orders potentially look better." (Craven, Tr. 535).

856. In May 2011, 1-800 Contacts believed it might be losing new internet customers to "aggressive competitor offers" by competitors in ads appearing on 1-800 Contacts' trademarked searches. LensDirect and ShipMyContacts were specifically identified. (CX0044 at 010; CX0044 at 016 "[m]ore competitors on [its] TM ads YoY" using "[a]ggressive 'price' messaging," and overall there was "[m]ore paid search TM activity" that caused a reduction in new internet orders compared to the same period in 2010.).

Response to Finding No. 856:

Complaint Counsel's Proposed Finding No. 856 is inaccurate, incomplete, and mischaracterizes the cited exhibit. The cited exhibit, CX 44 at 10, states: "Losing NI customers to aggressive competitor offers?" The question mark in the document suggests this was

presented as a question for consideration, which is not reflected in Complaint Counsel's Proposed Finding No. 856. (CX 44 at 10; CX 9017 (Blackwood, Dep. at 129)). Complaint Counsel's Proposed Finding No. 856 is also incomplete because it fails to reflect the testimony from Joan Blackwood (1-800 Contacts' former Chief Marketing Officer) explaining that the cited exhibit (CX 44 at 10) depicted "very aggressive offers" in advertisements by other retailers that Ms. Blackwood testified were, in her opinion, unsubstantiated and "somewhat misleading to the consumer, because they don't tell you what 70 percent off means. If they want to advertise something that I believe is potentially misleading to the consumer, we're not going to change our strategy and be misleading." (CX 9017 (Blackwood, Dep. at 128)).

The cited quotes (from CX 44 at 16) in Complaint Counsel's Proposed Finding No. 856 are misleading because they do not reflect the actual text of CX 44 at 16 that shows the quoted bullet points fell under the heading "Losing Natural Search NI customers," which does not necessarily relate only to trademark paid search. (CX 44 at 16; CX 9017 (Blackwood, Dep. at 134-35) (explaining why the text of the cited exhibit (CX 44 at 16) is unclear and confusing)).

857. During the week ending August 5, 2011, 1-800 Contacts' trademark paid search orders improved, as it "saw fewer instances of ShipMyContacts on [its] TM searches which may have helped . . . CTR" for trademark paid search. (CX0918 at 001).

Response to Finding No. 857:

Respondent has no specific response.

858. In April 2012, Coastal, Vision Direct, and Walgreens were offering "aggressive discounts on top of lower prices," compared to 1-800 Contacts' prices. (CX0875 at 001; CX9015 (Galan, Dep. at 101) ("[A]ll of these companies [referring to Coastal, Vision Direct, and Walgeens] had a . . . base price per contact lens box, and then there were volume discounts, and then they would throw on top of that discounts for new customers . . . [T]heir base box price was lower than ours, and then they would throw aggressive new customer discounts on top of that base price.")).

Response to Finding No. 858:

Complaint Counsel's Proposed Finding No. 858 is misleading and mischaracterizes the cited exhibit. The cited exhibit (CX 875 at 1) contains the statements of one former 1-800 Contacts employee, Rick Galan, regarding his impressions of certain pricing by Coastal, Vision Direct, and Walgreens, but Complaint Counsel mischaracterize those impressions as established fact as to the actual pricing of three other retailers. Complaint Counsel's Proposed Finding No. 858 does not cite any testimony or other record evidence showing the actual prices offered by Coastal, Vision Direct, or Walgreens at the time of Mr. Galan's statements.

859. Around July 2012, Google was "releasing a lot of product-specific ad units and changing some of the layouts to include a product and a price, which did lead to more price transparency," when 1-800 Contacts' single box price was "higher than" the single-box price for 1-800 Contacts' "competitors' [equivalent] products." (CX9015 (Galan, Dep. at 108, 110)).

Response to Finding No. 859:

Complaint Counsel's Proposed Finding No. 859 is incomplete for two reasons. First, it fails to specify that Google's "product-specific ad units" did not relate to searches for 1-800 Contacts' trademarks, but instead were additional ads that Google placed on searches for specific contact lens product names. (CX 9015 (Galan, Dep. at 110) ("These product[] ads only showed . . . when someone typed in . . . a product specific."")). Second, it fails to include Mr. Galan's full explanation regarding Google's display of single-box pricing: "[I]t reflected our price in a way that was not beneficial to our organization because of our volume discounts. So the price transparency basically means that [Google was] showing the price per single box, which is our worst possible price." (CX 9015 (Galan Dep. at 109-10)).

The proposed finding also is misleading because it fails to incorporate the record evidence explaining that 1-800 Contacts' concerns with "price transparency" in internet

advertisements related to deceptive tactics by other retailers artificially to lower their displayed price for a single box, which did not accurately reflect the real single-box price that a consumer would pay: "[O]ur online competitors specifically would do some things that weren't – they were kind of shady in our opinion. So, they would charge the handling fee of 7 percent . . . they would offer rebates that very few people could actually get . . . . [B]ut then they would claim a really, really low per [box] price, because the price per box was cheap after a rebate you couldn't actually get and before charging 7 percent for handling fees and really expensive shipping charges, et cetera." (CX 9010 (Larson, IHT at 169-70)).

860. Around July 2012, 1-800 Contacts was experiencing a "decrease" in click-through rates and conversion rates in paid search compared to the same period in 2011 that was in part due to "more competitive pressure and price transparency in the search engines." (CX0410 at 001).

Response to Finding No. 860:

Complaint Counsel's Proposed Finding No. 860 is incomplete and mischaracterizes the cited exhibit. First, it fails to specify that the cited portion of CX 410 at 1 discusses paid search overall, not trademark paid search in particular. Second, it includes just one of the factors mentioned in the cited exhibit (CX 410 at 1) while omitting the other factors that the cited exhibit suggests were more significant. The exhibit states that the perceived decrease in paid search was "due primarily to the Free Shipping promotion run last year . . . . A lot of this can be accounted for by the promotion last year artificially increasing our conversion metrics . . . ." (CX 410 at 1). Third, it fails to include Mr. Galan's full explanation regarding Google's display of single-box pricing: "[I]t reflected our price in a way that was not beneficial to our organization because of our volume discounts. So the price transparency basically means that [Google was] showing the price per single box, which is our worst possible price." (CX 9015 (Galan Dep. at 109-10)).

The proposed finding also is misleading because it fails to incorporate the record evidence explaining that 1-800 Contacts' concerns with "price transparency" in internet advertisements related to deceptive tactics by other retailers artificially to lower their displayed price for a single box, which did not accurately reflect the real single-box price that a consumer would pay: "[O]ur online competitors specifically would do some things that weren't – they were kind of shady in our opinion. So, they would charge the handling fee of 7 percent . . . they would offer rebates that very few people could actually get . . . . [B]ut then they would claim a really, really low per [box] price, because the price per box was cheap after a rebate you couldn't actually get and before charging 7 percent for handling fees and really expensive shipping charges, et cetera." (CX 9010 (Larson, IHT at 169-70)).

861. In August 2012, 1-800 Contacts faced many online competitors with "much lower" prices, leading search marketing executives to wonder, "I don't know how we still get orders from your channel [paid search]. Look at all the prices that are much lower than ours." (CX1086 at 003).

Response to Finding No. 861:

Complaint Counsel's Proposed Finding No. 861 is incomplete and mischaracterizes the cited exhibit. The proposed finding attributes a quoted statement to "search marketing executives," but the cited exhibit (CX 1086 at 3) clearly shows that the quoted statement was made by just one person, Amber Powell, not multiple marketing executives. The proposed finding fails to specify that the quoted statement from Ms. Powell related specifically to non-trademark paid search, as shown by the screenshot in the exhibit (CX 1086 at 3) (an internet search for the generic term "contact lenses") and explained by Ms. Powell in her deposition (CX 9030 (Powell, Dep. at 94) ("Q: What was 'your channel' referring to? A: Well, in this case it would be non-trademarked paid search."). The proposed finding selectively quotes one part of an extensive email chain, improperly omitting Ms. Powell's other statements in which she

does provide strategic suggestions for increasing orders from the paid search channel: "We DO actually have the lowest price on contacts – you just have to do a price match to get it. How can we leverage our trustworthy reputation (compared with other online sellers) along with price matching to carry people forward? Maybe we should increase messaging about 'If you find a lower price, price matching is easy.' It's somewhat similar to Walmart's recent messaging strategy in broadscale where they are doing easy ad matching. We could include this messaging in the body of product pages." (CX 1086 at 1).

862. In August 2012, 1-800 Contacts was experiencing a drop in conversion rate for new customers coming through paid search that was "disproportionate to other channels," specifically disproportionate to direct channels (such as visitors who type in the website address or have the website bookmarked in their browser) in which "customers aren't exposed to other websites' pricing before coming to [www.1800contacts.com] which likely makes them less sensitive to pricing." (CX1086 at 002).

Response to Finding No. 862:

Complaint Counsel's Proposed Finding No. 862 is incomplete and misleading. The proposed finding does not identify whether the term "paid search" relates to trademark paid search or non-trademark paid search. The proposed finding also fails to reflect the deposition testimony of the author of the quoted statement from CX 1086 at 2, Amber Powell, who explained, that she actually did not know whether customers navigating to 1-800 Contacts' website by typing the URL or using a bookmark did in fact see pricing from other contact lens retailers: "they might have actually seen some other pricing at some point that we don't have the option to track. . . . I have no way of knowing if they'd seen other websites' pricing or not." (CX 9030 (Powell, Dep. at 101-02)).

863. In late October 2012, 1-800 Contacts found it "extremely difficult" to capture extra orders in the non-trademark paid search channel "because of the amount of transparency around price" in non-trademark paid search. (CX0646 at 002 (the prices of 1-800's competitors were "shown prominently on Google and [were] usually much lower than [1-

800 Contacts']"); CX0874 at 003 ("Coastal, Vision Direct, and Walgreens are all offering aggressive discounts on top of lower prices which is making winning [New Internet] customers more difficult.")).

Response to Finding No. 863:

Complaint Counsel's Proposed Finding No. 863 is incomplete, misleading, and mischaracterizes the cited exhibits. The cited exhibit (CX 646 at 2) contains the statements and impressions of one former 1-800 Contacts employee, Amber Powell, which cannot fairly be characterized as reflecting the views of the company as a whole. The proposed finding omits the actual context of the cited exhibit (CX 646 at 2) that shows that 1-800 Contacts actually experienced a significant increase in new internet visitors from non-trademark paid search: "Over the last four weeks, NI [new internet] non-TM paid search visitors have increased by 42%. The increase in visitors has resulted in a 3% lift in orders for this channel." (CX 646 at 2). The finding also fails to reflect the testimony of 1-800 Contacts' employees explaining that "transparency around price" related to the fact that Google's display of product ads showed only single-box pricing, which did not account for the volume discounts that 1-800 Contacts offered to consumers. (CX 9015 (Galan Dep. at 109-10); CX 9010 (Larson, IHT at 169-70)).

864. During the week ending July 4, 2015, [redacted] (CX0648 at 001, *in camera*), **at the same time 1-800 Contacts observed** [redacted] (CX0648 at 001, *in camera*) [redacted].

Response to Finding No. 864:

Complaint Counsel's Proposed Finding No. 864 is inaccurate and mischaracterizes the cited exhibit. The cited exhibit (CX 648 at 1) states, [redacted]

[redacted] (CX 648 at 1). Thus, the author of CX 648, [redacted]

[redacted] (CX 648 at 1). Indeed, Roundy further states, [redacted]

[redacted] (CX 648 at 2).

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

Response to Finding No. 865:

Complaint Counsel's Proposed Finding No. 865 mischaracterizes the cited exhibit because it improperly attributes the statements and impressions of one 1-800 Contacts employee, Brady Roundy, to the company as a whole.

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

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

Response to Finding No. 866:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 867:

Complaint Counsel's Proposed Finding No. 867 is incomplete, misleading, and mischaracterizes the cited trial testimony. The proposed finding improperly omits any reference to Mr. Coon's testimony in the cited pages of the trial transcript, explaining that the effects of other retailers' advertisements on searches for 1-800 Contacts' trademark terms, as well as the settlement agreements, related primarily to confusion among consumers: "Having customers that were trying to navigate to us redirected somewhere else and confused reduced our returns. . . Yeah. I think [the settlement agreements] helped address the confusion. Yes." (Coon, Tr. 2838). The suggestion in the proposed finding that 1-800 Contacts entered into settlement agreements with other retailers in order to fix a problem with decreased returns on advertising investments is both contrary to Mr. Coon's trial testimony and contrary to the weight of the evidence.

For example, the proposed finding is contrary to the testimony of other 1-800 Contacts employees, including Mr. Coon and Mr. Bethers, that 1-800 Contacts' concerns with other retailers' advertisements on searches for 1-800 Contacts' trademark terms included: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06, 149);

Coon, Tr. 2727-38 (citing concerns about consumers being frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)).

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

Response to Finding No. 868:

Complaint Counsel's Proposed Finding No. 868 is incomplete, misleading, and mischaracterizes the cited trial testimony. The proposed finding improperly omits any reference to Mr. Coon's testimony in the cited pages of the trial transcript that any increase in customer acquisition cost related to "[h]aving customers that were trying to navigate to us redirected somewhere else and confused." (Coon, Tr. 2838). The proposed finding also improperly omits any reference to Mr. Coon's testimony that the settlement agreements provided an "[a]ncillary benefit" in terms of customer acquisition costs, but "first you have to start with the reputation and the customer and making sure that people aren't confused." (Coon, Tr. 2838). The suggestion in the proposed finding that 1-800 Contacts entered into settlement agreements with other retailers in order to fix a problem with customer acquisition costs is plainly incomplete and contrary to Mr. Coon's trial testimony.

The proposed finding is further contrary to the testimony of numerous 1-800 Contacts employees, including Mr. Coon and Mr. Bethers, that 1-800 Contacts' concerns with other retailers' advertisements on searches for 1-800 Contacts' trademark terms included: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers,

Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06, 149); Coon, Tr. 2727-38 (citing concerns about consumers being frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)).

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

Response to Finding No. 869:

Complaint Counsel's Proposed Finding No. 869 is incomplete, inaccurate, and mischaracterizes the cited trial testimony. Mr. Coon testified that other retailers' advertisements appearing in response to a search for 1-800 Contacts' trademark terms could have increased 1-800 Contacts' customer acquisition costs because "[h]aving customers that were trying to navigate to us redirected somewhere else and confused reduced our returns," (Coon, Tr. 2838); "it would absolutely increase our customer acquisition cost if some of these people were misdirected and confused and sent somewhere else," (Coon, Tr. 2839-40). Mr. Coon further testified that the settlement agreements could have an "[a]ncillary benefit" with respect to customer acquisition costs, but the primary concern was the company's reputation and preventing customer confusion: "I mean, first you have to start with the reputation and the customer and making sure that people aren't confused." (Coon, Tr. 2838). The proposed finding is therefore misleading in that it fails to explain that any increase in customer acquisition costs was a result of consumer confusion.

870. During the week ending July 28, 2007, 1-800 Contacts' observed that its "[t]rademarked keyword costs jumped up 20% from" the previous week "because of higher CPCs on [its] TM terms." (CX0606 at 002; CX0606 ("Search Dashboard 073007.xls/1-800F_00028705)). 1-800 Contacts concluded that this increase in trademark keyword costs was "most likely caused by Lens.com, LensWorld, and other companies increasing the competition on our TM terms." (CX0606 at 002).

Response to Finding No. 870:

Complaint Counsel's Proposed Finding No. 870 is incomplete, misleading, and mischaracterizes the cited exhibit. The cited exhibit (CX 606 at 2) contains the statements and impressions of one former 1-800 Contacts employee, Bryce Craven, not the company as a whole. Furthermore, the proposed finding is incomplete to the extent that it fails to reflect the record evidence showing that [redacted] Bethers, Tr. 3702; Coon, Tr. 2723, 2847).

871. As of August 7, 2007, "additional competition from Lens.com" was causing 1-800 Contacts "to pay about $2,000 more each week in trademarked keyword costs" ($3,500, as compared to the $1,500 a week 1-800 Contacts used to pay in the absence of competition from Lens.com). (CX0613 at 001).

Response to Finding No. 871:

Complaint Counsel's Proposed Finding No. 871 is incomplete and misleading because it fails to reflect the testimony of the cited exhibit's author, Bryce Craven, that the figures provided in the exhibit (CX 613 at 1) were an "estimate[]." (CX 9002 (Craven, IHT at 155-56)). The proposed finding also is unreliable and unsupported by the record evidence because the Mr. Craven testified that he did not "know if [the estimates were] accurate" and could not "remember how [he] exactly came up with that" estimate. (CX 9002 (Craven, IHT at 156)).

872. During the week ending September 22, 2007, 1-800 Contacts experienced an 11% week over week increase in trademark paid search cost which it attributed to competition from Vision Direct, who had "been advertising in the 2nd position on many of [1-800 Contacts'] branded terms in Google and pushing up [1-800 Contacts'] TM cpcs." (CX0616 at 001; CX0616 at CX0616_NATIVE_1-800F_00028655.xls).

Response to Finding No. 872:

Complaint Counsel's Proposed Finding No. 872 mischaracterizes the cited exhibit (CX 616 at 1) which contains the statements and impressions of one former 1-800 Contacts employee, Bryce Craven, that cannot properly be attributed to the company as a whole. The proposed finding is also inaccurate because the cited exhibit (CX 616 at 1) states, "This may be partially caused by Vision Direct . . .," which is far more speculative and far less decisive than the characterization of the statement in the proposed finding.

873. During the week ending April 11, 2008, 1-800 Contacts' customer acquisition cost for new customers arriving through MSN paid search ads increased by 6%, which 1-800 Contacts' search marketing manager concluded that "could be a sign of increased affiliate and/or competitive trademark activity in MSN." (CX0931 at 001).

Response to Finding No. 873:

Respondent has no specific response.

874. In July 2008, 1-800 Contacts experienced a "jump" in the cost per click of its trademark terms of 18% compared to the previous week, because "[t]here were more advertisers on [its] marks . . . which increased competition and CPCs for [its] top terms." (CX0915 at 001).

Response to Finding No. 874:

Complaint Counsel's Proposed Finding is incomplete and misleading. The author of the quoted statement from CX 915, Bryce Craven, testified: "In some instances, more competitors could increase your cost per click. In some instances, more competitors would have no impact our cost per click. But I was just calling out the fact that it was a potential factor in our increase in CPC." (Craven, Tr. 541). Mr. Craven further testified that he "never did any studies around that matter. . . . I could think of examples where more competitors would not have more impact or increase your CPC, and I can also think of examples where it would, so it's kind of hard to say in general." (Craven, Tr. 542). Thus, the proposed finding is contrary to the testimony of the

cited exhibit's author to the extent it fails to reflect that Mr. Craven was identifying one potential factor that may or may not actually have impacted costs per click.

875. In May and June 2010, costs for 1-800 Contacts' trademark keywords shot up because of "rising CPCs in Google for [its] most popular" trademark keyword, 1800-contacts. (CX0907 at 001) (On June 7, 2010, Bryce Craven wrote: "We've seen TM costs shoot up in the past few weeks.")). 1-800 Contacts believed the increase in CPCs could have been caused by added competition from Walgreens.com. (CX0907 at 001).

Response to Finding No. 875:

Complaint Counsel's Proposed Finding No. 875 mischaracterizes the cited exhibit, CX 907 at 1, which contains the statements and impressions of one former 1-800 Contacts employee, Bryce Craven, that are not properly attributed to the company as a whole. The proposed finding is also incomplete and inaccurate because it fails to reflect Mr. Craven's testimony that the cited statements (CX 907 at 1) were intended "to provide an explanation of the increase in cost per click, and that's one potential factor, is Walgreens showing up in bidding on that same term." The proposed finding also fails to reflect Mr. Craven's testimony that he did not actually know and could not actually know the effect of Walgreens' advertisements on 1-800 Contacts' costs per click for its trademark terms: "I think it's important to state that we didn't know, and we couldn't know." (Craven, Tr. 556). It is notable that Complaint Counsel do not cite the actual data despite the lengthy third party discovery effort in this matter (including the investigational hearing stage).

876. During the week ending April 8, 2011, 1-800 Contacts' cost per click and cost per order for its trademark keywords "increased . . . by 20%" due to "increased competitive activity on those types of keywords." (CX0923 at 001).

Response to Finding No. 876:

Complaint Counsel Proposed Finding No. 876 is incomplete, misleading, and mischaracterizes the cited exhibit. The cited exhibit (CX 923 at 1) states, trademark costs per

click " increased this week by 20% with increased competitive activity on those types of keywords." (CX 923 at 1). The cited exhibit does not say "due to," as the proposed finding does. The proposed finding also fails to reflect Mr. Craven's testimony that he did not actually know and could not actually know the effect of other retailers' advertisements on 1-800 Contacts' costs per click for its trademark terms: "I think it's important to state that we didn't know, and we couldn't know." (Craven, Tr. 556).

877. During the week ending July 1, 2011, fewer paid search ads by 1-800 Contacts' competitors were shown in response to the trademark keywords 1-800 Contacts monitored. (Craven, Tr. 559-561; CX0658 at 001).

Response to Finding No. 877:

Complaint Counsel's Proposed Finding No. 877 is incomplete and misleading. The cited exhibit (CX 658 at 1) states, "we saw fewer competitors showing our TM keywords this week." That is an observation by a single 1-800 Contacts' employee, and should be presented as such. The proposed finding notably cites no data or other statistics showing the actual number of ads that appeared in response to searches for 1-800 Contacts' trademark terms during the week ending July 1, 2011. It is notable that Complaint Counsel do not cite the actual data despite the lengthy third party discovery effort in this matter (including the investigational hearing stage).

878. During the week ending July 1, 2011, 1-800 Contacts was able to drop its spend for trademark keywords because there were "fewer competitors showing on [its] TM terms." (CX0658 at 001; Craven, Tr. 561). No other explanation accounting for the decline in spending on trademark keywords by 1-800 Contacts during the week ending July 1, 2011, was given. (Craven, Tr. 561).

Response to Finding No. 878:

Complaint Counsel's Proposed Finding No. 878 is incomplete, misleading, and mischaracterizes the cited exhibit and trial testimony. The cited exhibit (CX 658 at 1) states, "we saw fewer competitors showing on our TM keywords this week which helped drop our spend on

those terms." The phrase "which helped" is far more speculative and far less decisive than the characterization of CX 658 in the proposed finding. The proposed finding is also incomplete and misleading because it fails to reflect the testimony of the author of CX 658, Bryce Craven, who explained that he though "it was generally understood that what I wrote wasn't comprehensive of every possible explanation behind the numbers." (Craven, Tr. 561). The proposed finding also fails to reflect Mr. Craven's testimony that he "never did any studies around that matter. . . . I could think of examples where more competitors would not have more impact or increase your CPC, and I can also think of examples where it would, so it's kind of hard to say in general." (Craven, Tr. 542). The proposed finding also fails to reflect Mr. Craven's testimony that he did not actually know and could not actually know the effect of other retailers' advertisements on 1-800 Contacts' costs per click for its trademark terms: "I think it's important to state that we didn't know, and we couldn't know." (Craven, Tr. 556). It is notable that Complaint Counsel do not cite the actual data despite the lengthy third party discovery effort in this matter (including the investigational hearing stage).

879. In July 2011, competition for 1-800 Contacts' trademark keywords was "lighter than recent history," which was "likely a contributing factor" in 1-800 Contacts' achieving a lower trademark CPO during the week ending July 8, 2011. (CX0657 at 001).

Response to Finding No. 879:

Complaint Counsel's Proposed Finding No. 879 mischaracterizes the cited exhibit, which contains the statements and impressions of one former 1-800 Contacts employee, Bryce Craven, that are not properly attributed to the company as a whole. The proposed finding fails to reflect Mr. Craven's testimony that he "never did any studies around that matter. . . . I could think of examples where more competitors would not have more impact or increase your CPC, and I can also think of examples where it would, so it's kind of hard to say in general." (Craven, Tr. 542).

The proposed finding also fails to reflect Mr. Craven's testimony that he did not actually know and could not actually know the effect of other retailers' advertisements on 1-800 Contacts' costs per click for its trademark terms: "I think it's important to state that we didn't know, and we couldn't know." (Craven, Tr. 556). It is notable that Complaint Counsel do not cite the actual data despite the lengthy third party discovery effort in this matter (including the investigational hearing stage).

880. During the week ending October 28, 2011, 1-800 Contacts' spending on its trademark keywords "jumped up by 7%," the highest level of spend on trademark keywords during the quarter so far, because, as Mr. Craven explained to his colleagues: "We're seeing more advertisers on our best TM keywords (1800contacts, 1800 contacts, 1800-contacts) recently, which is pushing up our CPCs and cost for these terms." (CX0916 at 001; Craven, Tr. 558-559); *see also* CX0916 at 001 (1-800 Contacts also experienced "softer conversion rates" on its trademark keywords, which "led to a weekly 3% drop in TM orders.").

Response to Finding No. 880:

Complaint Counsel's Proposed Finding No. 8880 mischaracterizes the cited exhibit, which contains the statements and impressions of one former 1-800 Contacts employee, Bryce Craven, that are not properly attributed to the company as a whole. The proposed finding fails to reflect Mr. Craven's testimony that he "never did any studies around that matter. . . . I could think of examples where more competitors would not have more impact or increase your CPC, and I can also think of examples where it would, so it's kind of hard to say in general." (Craven, Tr. 542). The proposed finding also fails to reflect Mr. Craven's testimony that he did not actually know and could not actually know the effect of other retailers' advertisements on 1-800 Contacts' costs per click for its trademark terms: "I think it's important to state that we didn't know, and we couldn't know." (Craven, Tr. 556). It is notable that Complaint Counsel do not cite the actual data despite the lengthy third party discovery effort in this matter (including the investigational hearing stage).

881. In an email dated May 14, 2014 Natalia Bohm of Google wrote to 1-800 Contacts to address an issue concerning a rise CPC's, and expressed that "1800contacts coupon" and "1800contacts coupon code" were causing a dramatic increase in CPC's, and stated that "increased auction intensity due to a new competitor" entering the auction starting in April, 2014 which had a high impression share and overlap rate and "is the biggest change to the competitive landscape around the period where the CPC's started rising." CX1120. Two weeks after 1-800 Contacts received the information from Natalia Bohm of Google, 1-800 Contacts sent letters to Contact Lens King, Coastal Contacts, AC Lens, Lensfast demanding that new keywords be added to the Bidding Agreements. (CX0800 (Letter from Mark Miller to Contact Lens King dated May 20, 2014); CX0323 (Settlement agreement by and between 1-800 Contacts and Contact Lens King dated March 29, 2014 at 10); CX0703 at 1; CX0310 (Settlement Agreement between 1-800 Contacts, Inc., and Coastal Contacts, Inc. dated October 29, 2004); (CX0006; CX0317 (Settlement Agreement between 1-800 Contacts and Arlington Contact Lens Services, Inc. dated March 10, 2010 at 8); (CX0453; CX0315 (Settlement Agreement between 1-800 Contacts and Lensfast, Inc. dated December 9, 2009 at 9)).

Response to Finding No. 881:

Complaint Counsel's Proposed Finding No. 881 is incomplete and misleading. The cited exhibit, an email from Ms. Bohm of Google, identified a "new competitor" but the proposed finding improperly leaves out the identify of that "new competitor" who Ms. Bohm identified as "definitivedeals.com." (CX 1120 at 1). The proposed finding cites no record evidence explaining who "definitivedeals.com" was and cites no record evidence suggesting that "definitivedeals.com" was actually a contact lens retailer, let alone one associated with any of the parties to the settlement agreements at issue. The proposed finding also is incomplete and misleading because fails to acknowledge that the cited exhibit provided a list of URLs for which ads appeared on search terms for "1-800 Contacts" + "coupon," which included "offers.com, jc.penney.com, definitivedeals.com, lensdirect.com, groupon.com, and omgcoupons.com." (CX 1120 at 5).

The proposed finding also mischaracterizes the cited letters by incorrectly suggesting that they related specifically to the particular search terms—"1800contacts coupon" and "1800contacts coupon code"—identified in Ms. Bohm's email. For example, in CX 6 at 1,

Mr. Miller wrote to AC Lens noting that its sponsored ads had appeared in response to searches for the term "www800contacts." (CX 6 at 1). In CX 453 at 1, Mr. Miller wrote to LensFast noting that its sponsored ads had appeared in response to a search for "1800 contact lenses," which Mr. Miller explained was not previously included in "Exhibit 2" to the settlement agreement but "is clearly a confusingly similar variation of 1-800 CONTACTS' registered trademarks." (CX 453 at 1).

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

882. In approximately late 2003 and early 2004, 1-800 Contacts expressed concern to Google about competitors using 1-800 Contacts' trademarks as search advertising keywords in a series of emails and conversations. 1-800 Contacts asked Google to prevent any other advertiser from using 1-800 Contacts' trademarks as search advertising keywords, pursuant to Google's then-existing trademark policy. (*See supra*, §VI.A.). Google ultimately did not do so, and on April 9, 2004, Google told 1-800 Contacts that it had adopted a new trademark policy under which it would not prevent use of trademarks as keywords. (*See* ¶¶ 887-888).

Response to Finding No. 882:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

883. On January 28, 2004, Josh Aston, the 1-800 Contacts employee in charge of paid search advertising at that time, emailed his contact at Google asking whether anything could be done to stop competitors from using 1-800 Contacts' trademarks as search advertising keywords. Mr. Aston explained that 1-800 Contacts was spending "millions of dollars in advertising on television, internet, radio" and that competitors were "spending a few dollars per click and in exchange . . . receiving the benefits of millions of dollars we devote to branding. People see our commercials, search on '1800contacts' on the web, and see Coastal contacts." (CX1396 at 001-002).

Response to Finding No. 883:

The proposed finding is incomplete and misleading. Mr. Aston's request was consistent with Google's then-existing trademark policy, which Mr. Aston had on prior occasions discussed with Google as well as with others who were using 1-800 Contacts trademarks as keywords. (CX 1396 at 1; CX 9013 (Aston, Dep. at 21-22)). Under Google's then-existing trademark policy, Google would, in response to a complaint by a trademark holder, prevent advertisers from using the holder's trademarks as keywords. (CX 1148).

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

Response to Finding No. 884:

The proposed finding is incomplete. Under Google's then-existing trademark policy, Google would, in response to a complaint by a trademark holder, prevent advertisers from using the holder's trademarks as keywords. (CX 1148).

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

Response to Finding No. 885:

The proposed finding is incomplete. Under Google's then-existing trademark policy, Google would, in response to a complaint by a trademark holder, prevent advertisers from using the holder's trademarks as keywords. (CX 1148).

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

Response to Finding No. 886:

The proposed finding is incomplete. Under Google's then-existing trademark policy, Google would, in response to a complaint by a trademark holder, prevent advertisers from using the holder's trademarks as keywords. (CX 1148).

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

Response to Finding No. 887:

Respondent has no specific response.

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

Response to Finding No. 888:

Respondent has no specific response.

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

Response to Finding No. 889:

Respondent has no specific response.

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

Response to Finding No. 890:

The proposed finding is incomplete and misleading. Mr. Schmidt testified that that the Google representatives informed him that "Google would no longer resolve disputes around bids for trademarked keywords, that the responsibility for resolving those disputes was now that of the trademark holder to resolve directly, and that the negative keywords tool on Google's AdWords platform would be effective in implementing any subsequent agreements." (Schmidt, Tr. 2904). He further testified that hearing a Google representative explaining "the effective nature of negative keywords with respect to an ad for a competitor showing up when a … the search is for the trademark term '1-800 Contacts'" confirmed his understanding that "[n]egative keywords is the only tool that you have to effectively address the type of resolution to a trademark dispute that -- it's the only tool that Google gives you." (Schmidt, Tr. 2905-2906). Mr. Schmidt's testimony was offered for the non-hearsay purpose of showing the impact on 1-800 Contacts, the listener, and to explain actions it took as a result. (Schmidt, Tr. 2903). Mr. Schmidt testified that he passed on the Google representative's statements to his superiors, Messrs. McCallum and Aston. (Schmidt, Tr. 2906).

Google made similar representations to other companies regarding trademark rules on AdWords. (CX 9031 (Schmidt, Dep. at 21-23 (describing experience at Half.com), 33-34 ("They had a very clear set of three messages that they were conveying to all of their advertisers, including 1-800 Contacts")); CX 9013 (Aston, Dep. at 173-74)).

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

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

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

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

Response to Finding No. 891:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Order at 2. Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed summary finding is also misleading. 1-800 Contacts protected its trademark rights through search engine policies and procedures and petitioning activity in the federal courts via *bona fide* litigation where necessary. (RX 680 at 13 (Response to Interrogatory No. 6); RX 678 at 7-8 (Response to Request for Admission Nos. 9 & 10). These protection efforts involved cease-and-desist letters and the filing of complaints against certain contact lens retailers regarding those retailers' unauthorized use of 1-800 Contacts' trademarks. It is well-settled that these efforts are proper. As one District Court recently explained, "[p]re-suit warning letters are 'a common, if not universal, feature of modern litigation,' especially in the context of enforcing intellectual property rights. . . . Such pre-suit warning letters are not only permissible, but in some cases they may actually be required. For example, *trademark law requires that a defendant in a trademark infringement action have notice of the registered trademark. See* 15 U.S.C. § 1111 (2006). Further, *it is sound public policy to encourage the use of pre-suit warning letters, rather than mandate a straight line to the court whenever a potential dispute arises. Often such warnings result in final resolution of the dispute without the intervention of the courts*. Even if they do not, they still can 'streamlin[e] any subsequent litigation" and "reduc[e] legal costs and facilitate[e] access to the courts.'" *Select Comfort Corp.*

v. Sleep Better Store, LLC, 838 F.Supp.2d 889, 895 (D. Minn. 2012) (emphasis added) (citations omitted).

Proposed finding no. 891 also misstates the evidence when it states that in 2004, 1-800 Contacts raised concerns with competitors about "their advertising on Google and other search engines." In fact, 1-800 Contacts sued Coastal Contacts in March 2004 for trademark infringement, trademark dilution, copyright infringement, and other claims in connection with Coastal Contacts' *pop-up advertising*. (CX 1615). Coastal Contacts answered and filed counterclaims. (CX 310 at 1). 1-800 Contacts and Coastal ultimately settled the trademark litigation on terms that addressed both pop-up advertising and other issues that had arisen after Google changed its policies with respect to trademarks. *See* (CX 310 at 3, § 3(A)a-c (prohibiting pop-up advertising practices), § 3(A)e (prohibiting the causing of a sponsored link to appear as a listing in the search results page of a search engine when the user specifically searches for the other party's trademark)).

The challenged agreement between Vision Direct and 1-800 Contacts also arose in the context of a larger trademark dispute between those two companies. In 2002, 1-800 Contacts sued Vision Direct and WhenU for trademark infringement in connection with pop-up advertisements. (CX 1614). 1-800 Contacts initially prevailed in its request for injunctive relief. *1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003). After the Court entered the injunction, Vision Direct and 1-800 Contacts continued to discuss issues involving potentially confusing Vision Direct sponsored links appearing in response to searches for 1-800 Contacts trademark terms. (RX 100). Vision Direct suggested that 1-800 Contacts file a trademark complaint with Google requesting that the search engine take down advertising on 1-800 Contacts' trademarks. (RX 100).

1-800 Contacts attempted to resolve the trademark dispute by submitting a complaint with Google. (Schmidt, Tr. 2896; RX 796). However, in April 2004, Google modified its policies, indicating that it would no longer resolve disputes over trademark use between advertisers. (Schmidt, Tr. 2948-49; CX 9031 (Schmidt, Dep. at 34); CX 9013 (Aston, Dep. at 168-170); CX 9022 (Charlston, Dep. at 19-20); CX 1148). Instead, Google informed 1-800 Contacts and other companies that trademark owners would now be responsible to settle any grievances related to the use of trademark terms and it encouraged advertisers to work out trademark disputes among themselves, including through the implementation of the negative keyword tool. (CX 1148; CX 9031 (Schmidt, Dep. at 21-23, 33-35); Schmidt, Tr. 2900-05). After these discussions with Google, 1-800 Contacts and Vision Direct began negotiations to resolve their trademark disputes in April 2004, reaching a settlement in June 2004. (CX 58; CX 311).

Finally, Complaint Counsel's use of the term "bidding agreements" in the proposed finding is deceptive. Neither the Vision Direct settlement agreement nor the Coastal Contacts settlement agreement mentions or deals specifically with "bidding." (CX 311; CX 310). Rather, they were standard trademark non-use agreements that emerged out of contentious litigation and restrained potentially confusing and unlawful conduct using the counterparty's trademarks. (CX 9040 (Miller, Dep. at 211-213); RX 691; CX 310 § 3(A)e; CX 311 § 4(A)e; CX 9040 (Miller, Dep. at 202-04, 220)).

892. 1-800 Contacts also corresponded with at least four other competitors in 2005 and reached unwritten agreements barring competitive trademark bidding with each. (*Infra* § VI.B.3).

Response to Finding No. 892:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The unsupported statement is also incomplete, inaccurate, misleading, and ambiguous. 1-800 Contacts specifically denies that it ever "reached unwritten agreements" of any kind with LensDiscounters or Lens.com regarding paid search advertising, for the reasons discussed in response to Complaint Counsel's finding nos. 930-967.

893. Later, 1-800 Contacts implemented a formal process within the marketing department for monitoring search results pages for competitors, and referring the information to legal counsel. 1-800 Contacts' marketing employees also directly contacted competitors with whom 1-800 Contacts had agreements to enforce the terms of those agreements. (*Infra* § VI.B.4).

Response to Finding No. 893:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Order at 2. Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

894. Writing to a 1-800 Contacts investor in 2007, 1-800 Contacts' CEO called his company's efforts in "going after people" who advertised on 1-800 Contacts' trademarks "a worthwhile investment." (CX0068 at 001 (April 12, 2007 email from Jonathan Coon (former 1-800) to Mario Cibelli re "Google, Utah on collision course over Web 'keywords'"); CX9035 (Coon, Dep. at 288-89)). 1-800 Contacts did not like "having competitors hijack and steal [its] customers before they get to checkout." (CX0068 at 001).

Response to Finding No. 894:

The proposed finding misstates the cited exhibit by taking only a few words from a sentence and connecting them to words from a different sentence. Mr. Coon's April 2007 email (CX 68) noted that 1-800 Contacts had acquired a reputation of "going after people" after the lawsuits against Vision Direct and Coastal Contacts were settled. (CX 68 at 1). Those two lawsuits arose from the use by those two companies of "pop-up ads" for those companies that would appear as add-ons on the 1-800 Contacts website itself. (CX 1614; CX 1615). The email cited in the proposed finding (CX 68) noted that because of 1-800 Contacts' reputation, "spammers, poppers, spyware/adware companies tend to steer clear of our website. Not a bad thing." The proposed finding ignores the context of the email and incorrectly pretends that the "reputation" addressed in the email was driven by disputes regarding paid search advertising.

895. By 2014, 1-800 Contacts had secured fourteen written agreements barring rivals from advertising on 1-800 Contacts' trademarks, and vice versa. (*Infra* § VI.B.2-17).

Response to Finding No. 895:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Order at 2. Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed summary finding is also incomplete, misleading, overbroad, and ambiguous as to the meaning of "barring rivals from advertising" on 1-800 Contacts' trademarks. The non-use trademark settlement agreements that resolved lawsuits between 1-800 Contacts and thirteen of its competitors only restrict advertising using trademarks in one medium: internet paid search. (CX 9040 (Miller, Dep. at 117-18); Hogan, Tr. 3275-79). Within the universe of

paid search advertising, the agreements affected only certain trademark terms out of thousands of internet search terms pertaining to contact lenses, such as the brand names of the particular contact lens that a consumer needs to purchase pursuant to his or her prescription. (CX 9042 (Evans, Dep. at 102-03); RX 739 (Murphy Rep.) ¶ 121; RX 733 (Ghose Rep.) ¶¶ 141-43; CX 9044 (Tushnet, Dep. at 40). Further, the agreements contained exceptions to explicitly permit lawful, non-confusing advertising practices, including the purchase of generic or descriptive terms and comparative advertising against the other party's trademark. (CX 317 § 2(B); CX 310 § 3(A)e (restraining the parties from causing the appearance of advertisements in response to searches specifically for the other parties trademark "but not through a search employing Generic or Descriptive Terms"); CX 311 § 4(B) ("Prohibited Acts shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in [a] non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses"); CX 9042 (Evans, Dep. at 102, 105); Hamilton, Tr. 453-54; Pratt, Tr. 2551).

896. Although the precise language of the agreements varies slightly, each imposes the same functional restrictions. (*Infra* § VI.B.2-17).

Response to Finding No. 896:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

897. Each agreement forbids the counterparty from using 1-800 Contacts' brand name, URLs, and variations, as search advertising keywords. (*Infra* § VI.B.2-17).

Response to Finding No. 897:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

898. Each agreement requires the counterparty to take further steps to prevent search ads from appearing any time a search query includes 1-800 Contacts' brand name, URLs, or variations. (*Infra* § VI.B.2-17).

Response to Finding No. 898:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Respondent further specifically responds that the proposed summary finding is misleading and ambiguous as to the term "further steps." The settlement agreements prohibit one limited form of allegedly infringing behavior at issue: "causing a Party's brand name, or link to the Party's Restricted Websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name." (CX 311 § 4(A)e). An advertiser may "cause" an advertisement to appear in response to a search for the trademark "1-800 Contacts" in a number of ways: they may select the trademark term, "1-800 Contacts," in their Google AdWords account or equivalent in exact match, which may trigger an advertisement in response to a search for "1-800 Contacts;" or alternatively, they may

select the generic term "contacts" in a phrase or broad match type, as opposed to an exact match type, which may cause their advertisement to trigger in response to a search for the search string "1-800 Contacts." (CX 9033 (Mohan, Dep. at 185-87); CX 9040 (Miller, Dep. at 28, 66); CX 1787; CX 135). Through experience, 1-800 Contacts and other retailers determined that if parties select generic industry terms such as "contacts" in phrase or broad match in their paid search advertising campaigns, they must also incorporate negative keywords in the match type of their preference for the counterparty's brand name and trademarks to avoid causing the appearance of their potentially confusing and infringing advertisements in response to restricted terms. (CX 9040 (Miller, Dep. at 28, 66); CX 9031 (Schmidt, Dep. at 44-46, 48, 116); CX 9020 (Craven, Dep. at 117-121); CX 9039 (Clarkson, Dep. at 81 (testimony by ACLens' CEO Peter Clarkson that ACLens had voluntarily adopted 1-800 Contacts' trademarks as negative keywords, without being asked to do so, because "[t]here wasn't really a way to squash the offending ads without adopting negative keywords."))). Negative keywords are a free and simple way to mitigate the potentially confusing consequences of third party advertisements appearing in response to trademark terms and avoid future disputes. (Hogan, Tr. 3304-05; CX 9038 (Hamilton, Dep. at 105); [redacted]; CX 9039 (Clarkson, Dep. at 81)).

Moreover, the unsupported statement is inaccurate because the agreements specifically excepted certain lawful, non-confusing advertising that may include the other party's trademark from the prohibited acts. (CX 311 § 4(B)). The agreement's provisions were intended to pertain only to searches specifically for the other party's trademark or brand name where the intent of the user was to navigate to or receive information specifically about 1-800 Contacts. (CX 9040 (Miller, Dep. at 26); Coon, Tr. 2742-43). Parties were not required to take any steps

to address or remove advertising in response to the many other searches where the user was not using 1-800 Contacts' trademarks as a search term. (Coon, Tr. 2741; CX 9031 (Schmidt, Dep. at 111-13); CX 9040 (Miller, Dep. at 18-20, 217-220)).

899. All fourteen of the written agreements impose identical restrictions on 1-800 Contacts, regarding the counterparty's brand name, URLS, and variations. (*Infra* § VI.B.2-17).

Response to Finding No. 899:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

a. Coastal

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

Response to Finding No. 900:

Respondent has no specific response.

901. 1-800 Contacts and Coastal reached a settlement agreement effective October 29, 2004. (CX0310).

Response to Finding No. 901:

Respondent has no specific response.

902. Pursuant to the Coastal agreement, 1-800 Contacts and Coastal agreed to refrain from and not to cause in the future certain "Prohibited Acts," which include, among other things,

"causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs." (CX0310 at 002-003).

Response to Finding No. 902:

The finding is incomplete. The full language of the quoted sentence reads: "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs ***but not through a search employing Generic or Descriptive terms***." (CX 310 at 3 (emphasis added)).

903. The Coastal agreement Prohibited Acts include, among other things, "causing a Party's brand name, or link to that Party's websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs." (CX0310 at 003).

Response to Finding No. 903:

The finding is incomplete. The full language of the quoted sentence reads: "causing a Party's brand name, or link to that Party's websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs ***but not through a search employing Generic or Descriptive terms***." (CX 310 at 3 (emphasis added)).

904. The Coastal agreement provides that it the terms of the agreement should be construed by the parties "to include all future Internet advertising techniques and advertisement delivery technologies that are substantially similar to the Prohibited Acts as a result of their use of trademarks, brand names, or URLs. (CX0310 at 004).

Response to Finding No. 904:

The finding is incomplete. The full language of the quoted sentence reads: "to include all future Internet advertising techniques and advertisement delivery technologies that are substantially similar to the Prohibited Acts as a result of their use of trademarks, brand names, or

URLs or the Restricted Websites, ***but not as a result of their use of Generic or Descriptive terms***." (CX 310 at 3 (emphasis added)).

905. The Coastal agreement never expires. (CX0310).

Response to Finding No. 905:

Respondent has no specific response.

906. Both 1-800 Contacts and Coastal enforced the terms of the agreement against each other. (*See infra* § VI.C.2). In particular, 1-800 Contacts and Coastal enforced the agreement by asking for, and agreeing to, the use of negative keywords to prevent the appearance of ads due to broad matching. (*See infra* § VI.C.2).

Response to Finding No. 906:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

b. Vision Direct

907. 1-800 Contacts filed a complaint in federal court against Vision Direct and WhenU.com, Inc., on October 9, 2002, alleging trademark infringement, among other causes of action. (CX1614). The complaint alleged in part that Vision Direct had caused pop-up advertisements for Vision Direct to appear when internet users visited the www.1800contacts.com website. (CX1614 at 011-012). The complaint did not contain any allegations regarding the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements. (CX1614).

Response to Finding No. 907:

Respondent has no specific response.

908. By April 2004, attorneys representing Vision Direct and 1-800 Contacts were exchanging draft settlement agreements. (*See* CX0058 at 004).

Response to Finding No. 908:

Respondent has no specific response.

909. 1-800 Contacts informed Drugstore.com (VisionDirect's corporate parent at the time) that it was "interested in global peace, not partial. Thus, an agreement that has a limitation on either pop-ups only or only 5 years holds no interest for us." (CX0058 at 003).

Response to Finding No. 909:

Respondent has no specific response.

910. 1-800 Contacts' interest in settling with Vision Direct was to prevent Vision Direct from using 1-800 Contacts in any manner, regardless of whether the use was likely to confuse. Mr. Zeidner wrote to Ms. Pinney on May 20, 2004, transmitting a revised draft settlement agreement. He explained that he "added some substantive items you and I discussed—mainly the prohibition to use each other's trademarks or IP in any manner." (CX0058 at 002).

Response to Finding No. 910:

The proposed finding is incomplete, inaccurate, and misleading. Complaint Counsel cite no evidence to support the (incorrect) statement that "1-800 Contacts' interest in settling with Vision Direct was to prevent Vision Direct from using 1-800 Contacts in any manner, regardless of whether the use was likely to confuse." The overwhelming weight of the evidence supports the opposite proposition, namely, that one of the principal concerns of 1-800 Contacts was avoiding consumer confusion, so that the settlement terms were specifically designed to address advertisements on 1-800 Contacts' trademarks that were likely to cause consumer confusion. (*See, e.g.*, CX 9031 (Schmidt, Dep. at 14-15, 57-58); Bethers, Tr. 3691; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT 105-06); Coon, Tr. 2727-29; CX 9020 (Craven, Dep. at 93); CX 9027 (Larson, Dep. at 87); CX 9021 (Pratt, Dep. at 78-79, 129-130, 134-35); CX 9040 (Miller, Dep. at 132)).

The cited exhibit, CX 58, refutes Complaint Counsel's erroneous claim. In the exchange, 1-800 Contacts and Vision Direct agreed that any lawful use in the non-internet context would be excepted from the prohibitions imposed by other provisions in the agreement, in part because those searches do not pertain to a consumer trying to navigate specifically to a retailer's website, and the advertisements appearing in response are less likely to give rise to consumer confusion. (CX 58; Coon, Tr. 2742-43; CX 311 § 4(B) (implementing the proposed language permitting comparative advertising and other lawful advertising using the trademark)).

911. 1-800 Contacts and Vision Direct entered into a settlement agreement effective June 24, 2004. (CX0311) ("2004 Vision Direct Agreement"). The agreement was signed on June 24, 2004, by Joe Zeidner on behalf of 1-800 Contacts, and Alesia Pinney, on behalf of Vision Direct. (CX0311 at 008).

Response to Finding No. 911:

Respondent has no specific response.

912. Pursuant to the settlement agreement, Vision Direct agreed to pay 1-800 Contacts one dollar in consideration. (CX0311 at 002). That demand came directly from 1-800 Contacts' CEO, Jonathan Coon, who testified that he "would ask the people bring [sic] a check for a dollar and then the terms of the settlement . . . would allow us to say that we settled for an undisclosed amount." (CX9004 (Coon, IHT at 294); CX0058 at 001 (Joe Zeidner wrote to Alesia Pinney during negotiation of the agreement asking her to "please send the check for one dollar," noting that it was "actually very important to Jonathan [Coon]"). Coon elaborated that they wouldn't want future settlement parties to know that "somebody else paid nothing." (CX9004 (Coon, IHT at 295)).

Response to Finding No. 912:

Respondent has no specific response.

913. Pursuant to the 2004 Vision Direct Agreement, 1-800 Contacts and Coastal agreed to refrain from and not to cause in the future certain "Prohibited Acts." (CX0311 at 003).

Response to Finding No. 913:

The proposed finding is inaccurate and misstates the cited exhibit. The cited exhibit is the 2004 settlement agreement between 1-800 Contacts and Vision Direct (CX 311), which does not mention Coastal Contacts.

914. The 2004 Vision Direct Agreement Prohibited Acts include, among other things, "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs." (CX0310 at 003).

Response to Finding No. 914:

The proposed finding is inaccurate and misstates the cited exhibit. The cited exhibit (CX 310) does not refer to a settlement agreement with Vision Direct.

915. The 2004 Vision Direct Agreement Prohibited Acts include, among other things, "causing a Party's brand name, or link to that Party's websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs." (CX0310 at 003).

Response to Finding No. 915:

The proposed finding is inaccurate and misstates the cited exhibit. The cited exhibit (CX 310) does not refer to a settlement agreement with Vision Direct.

916. The 2004 Vision Direct Agreement prohibited certain advertising regardless of whether Vision Direct used "a trademark to achieve" the result prohibited the by agreement. (CX0135 at 002 ("there is no requirement" in the 2004 Vision Direct Agreement "that drugstore.com . . . specifically use a trademark to achieve the prohibited result.")).

Response to Finding No. 916:

The proposed finding is incomplete, inaccurate, misleading and should be disregarded. As Mr. Pratt makes clear in the cited exhibit, the position taken by 1-800 Contacts was that Vision Direct was "causing" the appearance of its results by both selecting generic terms such as "contacts" (in phrase or broad match such that the search engine may trigger ads in response to the trademark term) *and* deliberately ceasing to incorporate the necessary negative keywords. (CX 135 at 1).

917. The 2004 Vision Direct agreement provides that the terms of the agreement should be construed by the parties "to include as Prohibited Acts all future Internet advertising techniques and advertisement delivery technologies that are substantially similar to the Prohibited Acts." (CX0310 at 005).

Response to Finding No. 917:

The proposed finding is inaccurate and misstates the cited exhibit. The cited exhibit (CX 310) does not refer to a settlement agreement with Vision Direct.

918. The 2004 Vision Direct agreement never expires. (CX0310; CX0314 at 004 (a subsequent settlement agreement entered into by 1-800 Contacts and Vision Direct in 2009 provided that the June 24, 2004 settlement agreement "shall remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords shall be to comply with the terms of" the 2009 agreement)).

Response to Finding No. 918:

The proposed finding misstates the first cited exhibit (CX 310), which does not refer to Vision Direct. The second cited exhibit (CX 314) does refer to a settlement agreement with Vision Direct and does contain the quoted language that appears in the parenthetical. Respondent has no other specific response.

919. The agreement between 1-800 Contacts and Vision Direct successfully achieved 1-800 Contacts' goals, which included permanently stopping Vision Direct from displaying ads

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

Response to Finding No. 919:

The proposed finding is incomplete and misleading. Complaint Counsel cite to a question by Complaint Counsel in the transcript, not a statement by a witness, and in doing so they ignore the witness' response. To illustrate, when asked whether 1-800 Contacts' goal in negotiating the settlement agreement with Vision Direct was "to permanently stop Vision Direct from displaying ads in response to searches that contained 1-800 Contacts' trademark terms," Mr. Coon corrected Complaint Counsel, explaining that the goal was "to make sure that people who were trying to navigate to 1-800 Contacts could get there without being confused or misdirected." (Coon, Tr. 2777-78). Mr. Coon made the same representations and corrections to Complaint Counsel's misleading language at his deposition. (CX 9035 (Coon, Dep. at 137 ("Q: Let me as you. One goal of the trademark enforcement activity, of which you are aware, was to prevent competitors from displaying links on search engine results pages triggered by searches for the trademark term "1-800 Contacts." Right? … A: Our goal was to have our customers not be confused or misdirected by other people using our trademark")). Complaint Counsel also omit that the witness, Mr. Jonathan Coon, repeatedly pointed out that the Vision Direct agreement did not in fact "permanently sto[p] Vision Direct from displaying ads in response to searches that contained 1-800 Contacts' trademark terms," in part because the agreement specifically permits comparative advertising. (Coon, Tr. 2777-78).

When asked a fourth time at trial to agree that except for comparative advertising, 1-800 Contacts' "goal in negotiating with Vision Direct was to permanently stop Vision Direct from displaying ads in response to searches that contained 1-800 Contacts' trademark terms," Mr. Coon testified that "if I have to answer yes or no, the answer is – is yes," but he also noted

that he disagreed with Complaint Counsel's characterizations, for reasons he had previously explained. (Coon, Tr. 2778-79); *see also* (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32)).

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

Response to Finding No. 920:

The proposed finding is incomplete, inaccurate, and misleading and fails to describe Mr. Coon's consistent testimony at trial that it was necessary both with regard to Vision Direct, and more generally, to protect consumers seeking to navigate to 1-800 Contacts from becoming confused. (Coon, Tr. 2727-29, 2767, 2773, 2778, 2787-88, 2790-91, 2797-2800). Mr. Coon did not testify that it was necessary for 1-800 Contacts to prevent Vision Direct or any other party from displaying ads in response to queries that contained both a 1-800 Contacts trademark and generic terms even though such queries would not cause any confusion, as the proposed finding implies. (Coon, Tr. 2809-10). He merely indicated that the inverse was not true: it was not "fair" to say that it would never be necessary to prevent Vision Direct from displaying ads in response to any searches that consisted of 1-800 Contacts plus a generic term: some strings of the trademark plus a generic term indicate a navigational intent where confusion is more likely, and others do not. (Coon, Tr. 2809 (pointing out he "could think of examples both ways" where 1-800 Contacts plus a generic term would cause confusion or would not cause confusion)). Complaint Counsel attempted the same gimmick at Mr. Coon's deposition and faced the same unsatisfying result. (CX 9035 (Coon, Dep. at 138 ("Q: Did 1-800 Contacts have the goal of preventing competitors from displaying links on search engine results pages triggered by

searches with the trademark term "1-800 Contacts," regardless of the text that accompanied the link? … A: I'm pretty sure I'll end up saying the same thing. But our goal was that people shouldn't be redirected or confused. Right? I wouldn't go so broad as to say there wasn't any way that somebody could find a way to have it not be confusing."); (CX 9035 (Coon, Dep. at 10, 137-38 ("That's more broad than what I would say")). For example, at trial Mr. Coon provided an example of a navigational query that consisted of both the trademark and a generic term, "1800contacts coupon code," because in making that search, "clearly somebody is just looking for coupon codes for 1-800 Contacts." (Coon, Tr. 2809-11; *cf.* Hogan, Tr. 3471-72 (since 1-800 Contacts is the only company that can offer coupons to 1-800 Contacts, "it would be deceptive and misleading for a competitor" to advertise coupons for 1-800 Contacts)).

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

a. AC Lens

921. 1-800 Contacts sent a cease and desist letter dated June 28, 2005, to AC Lens, stating that advertisements for www.discountcontactlenses.com were "triggered upon a search for '1800 CONTACTS' and 'LENS EXPRESS,'" which 1-800 Contacts claimed was trademark infringement. (RX0051 at 001). 1-800 Contacts demanded that AC Lens cease "all infringing activities" and "remove **ALL** sponsored advertisements" on any search engine that were triggered by 1-800 Contacts' trademarks. (RX0051 at 0002 (emphasis in original)). 1-800 Contacts stated that it would take further legal action if it did not receive a satisfactory response from AC Lens within seven days. (RX0051 at 0002).

Response to Finding No. 921:

The proposed finding is incomplete and incorrectly describes the cited exhibit (RX 51) that it relies upon. The letter that the proposed finding relies upon is addressed to Discount Contact Lenses, not ACLens, and the repeated references to ACLens in the proposed finding are inaccurate. (RX 51 at 1).

922. 1-800 Contacts also sent a cease and desist letter to AC Lens regarding advertisements for www.aclens.com, containing nearly identical allegations and demands as those contained in the June 28, 2005 letter. (Clarkson, Tr. 235 (referring to the June 28, 2005 cease and desist letter marked RX0051: "I think there were two, and one of them went to Phil and one went to me. I think they sent one to AC Lens and one to Discount Contact Lenses.")).

Response to Finding No. 922:

The proposed finding is not supported by the cited testimony. Mr. Clarkson was not asked, and did not testify, whether the letter that 1-800 Contacts sent to ACLens in June 2005 contained "nearly identical" allegations and demands to those contained in the June 2005 letter addressed to Discount Contact Lenses, as the proposed finding claims. (Clarkson, Tr. 235).

923. In early July 2005, Peter Clarkson responded in writing to 1-800 Contacts' letters of June 28, 2005. (RX0052 at 0002; CX9039 (Clarkson, Dep. at 80-81)).

Response to Finding No. 923:

The proposed finding is not supported by the cited testimony. Mr. Clarkson testified that he had responded in writing to the letter sent to ACLens. (CX 9039 (Clarkson, Dep. at 80-81); RX 52 at 2). Mr. Clarkson did not testify that he responded to the letter addressed to Discount Contact Lenses, as the proposed finding states. Instead, he testified that he forwarded the letter he sent on behalf of ACLens (RX 52 at 2) to a gentleman named Phil Dietrich. (CX 9039 (Clarkson, Dep. at 80); RX 52 at 1).

924. Mr. Clarkson explained that AC Lens had "no advertisements that trigger for searches for '800contacts', '1800contacts' or Lens Express'." (CX1759 at 002). He further explained that AC Lens did use generic terms including "contacts" and "lens," which may have caused AC Lens ads to appear "in relation to searches that included the generic term" like "lens express." (RX0052 at 0002). Mr. Clarkson wrote that AC Lens added "'negative terms' for the words 'express' and/or '800' which should result in no generic search results of ours appearing in response to searches for your trademarked terms." (RX0052 at 0002; CX9039 (Clarkson, Dep. at 81)).

Response to Finding No. 924:

The proposed finding is incomplete and misleading because it does not reflect Mr. Clarkson's testimony that ACLens *voluntarily* chose in 2005 to use 1-800 Contacts' trademarks as negative keywords, without being asked by 1-800 Contacts to do so. (CX 9039 (Clarkson, Dep. at 81-82)).

925. Since receiving the June 2005 cease and desist letters from 1-800 Contacts, AC Lens has adopted a policy of implementing negative keywords to prevent its ads from appearing in response to searches for 1-800 Contacts, and to avoid further cease and desist letters from 1-800 Contacts. (Clarkson, Tr. 239; CX1759 at 001; CX9039 at 023 (Clarkson, Dep. at 85); RX0053 at 0001).

Response to Finding No. 925:

The proposed finding is incomplete and misleading because it does not reflect Mr. Clarkson's testimony that ACLens *voluntarily* chose in 2005 to use 1-800 Contacts' trademarks as negative keywords, without being asked by 1-800 Contacts to do so. (CX 9039 (Clarkson, Dep. at 81-82)).

926. Between July 2005 and February 2010, AC Lens and 1-800 Contacts confirmed their understanding that AC Lens would not to purchase 1-800 Contacts' trademarks as search advertising keywords and would implement appropriate negative keywords to prevent its ads from appearing in response to searches for 1-800 Contacts. (Clarkson, Tr. 241-242). During that time period, 1-800 Contacts contacted AC Lens multiple times concerning AC Lens ads that appeared in response to online searches for 1-800 Contacts' trademarks. (Clarkson, Tr. 241). Each time, AC Lens agreed to do what 1-800 asked it to do. (Clarkson, Tr. 242). By February 2010, AC Lens understood that it was obligated to prevent its advertisements from appearing in response to 1-800 Contacts searches. (Clarkson, Tr. 242; CX1759 at 002; RX0053 at 0001).

Response to Finding No. 926:

The proposed finding misstates the cited testimony and exhibits, which do not refer to the existence of any "understanding" between the parties in the July 2005 – February 2010 time period regarding paid search advertising. Mr. Clarkson testified instead that ACLens had made a

unilateral decision by 2002 not to use 1-800 Contacts' trademarks as keywords, in part because of a general concern that it "may not be legal." (CX 9003 (Clarkson, IHT at 90-91); Clarkson, Tr. 324-326). ACLens also made a unilateral decision in 2005 to use 1-800 Contacts' trademarks as negative keywords, without being asked to do so. (CX 9039 (Clarkson, Dep. at 81-82)).

927. In September 2006, Bryan Pratt, an attorney for 1-800 Contacts, complained to AC Lens that ads for DiscountContactLenses were infringing upon 1-800 Contacts' trademarks on Google Adwords. (RX0023 at 0001). Mr. Pratt threatened further legal action against AC Lens if it did not remove the advertising within seven days. (RX0024 at 0001).

Response to Finding No. 927:

The proposed finding misstates and misrepresents the exhibits it cites. Neither RX 23 nor RX 24 is a communication from 1-800 Contacts to ACLens or Discount Contact Lenses. RX 23 contains a September 26, 2006 email from Mr. Drumm at Discount Contact Lenses to Mr. Pratt. (RX 23 at 1). Mr. Drumm stated on behalf of Discount Contact Lenses that he had discovered that "an affiliate of ours" was "masking" their identity and was purchasing 1-800 Contacts' trademarks as keywords while pretending to be Discount Contact Lenses. (RX 23 at 1). Mr. Drumm also stated that Discount Contact Lenses "is a firm believer in fair business practices and do[es] not condone or permit unfair competition or false advertising in any way," and that the affiliate had been told to stop its activities. (RX 23 at 1). That same day, Mr. Drumm sent an email to Mr. Clarkson that stated that the affiliate was "violating 1800contacts trademark." (RX 24 at 1).

928. On September 26, 2006, Robert Drumm, the affiliate program manager for AC Lens, emailed an affiliate, instructing it to "remove all bidding on paid search engines for the terms 1800contacts.com" and "other variations" of 1-800 Contacts' trademarks," explaining that AC Lens had "just been notified by 1800Contacts.com that [the affiliate] used our name to violate their trademark rights on Google Adwords [sic] and other paid

search engines." (RX0024 at 0001; CX9018 (Drumm, Dep. at 82-83)). The requests made of the affiliate were satisfied. (CX9018 (Drumm, Dep. at 82-83)).

Response to Finding No. 928:

The proposed finding misstates cited exhibits and testimony. In particular, although the proposed finding states that the requests Mr. Drumm had made of the affiliate "were satisfied," Mr. Drumm actually testified that he did not recall if they were satisfied and that he could only "assume" that they were. (CX 9018 (Drumm, Dep. at 83)). Mr. Drumm also stated at the time, internally, that the affiliate's activities were "violating 1800contacts trademark." (RX 24 at 1).

929. Mr. Drumm notified Mr. Pratt that he had "notified the offending affiliate in writing to remove all advertisements" using 1-800 Contacts' trademarks and variations. RX0023 at 002; CX9018 (Drumm, Dep. at 78-82)).

Response to Finding No. 929:

The proposed finding is materially incomplete; Mr. Drumm also "urge[d] Mr. Pratt to contact him "if future instances of infringement among our affiliated sites occur." (RX 23 at 2).

b. Lens Discounters

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

Response to Finding No. 930:

Respondent has no specific response.

931. Lens Discounters responded to Mr. Montclair's June 28, 2005 letter by letter dated July 11, 2005, in which it expressed a willingness to immediately remove ads triggered by 1-800 Contacts' trademarks. (CX1238 at 001).

Response to Finding No. 931:

The proposed finding is misleading because it cites a letter (CX 1238) from David Zeidner at 1-800 Contacts to Mr. Abdulla at LensDiscounters, *not* the July 11, 2005 response from LensDiscounters to Mr. Montclair. The July 11, 2005 letter from LensDiscounters is exhibit RX 67; the letter states that LensDiscounters has "removed any known infringing advertising" and requests that if 1-800 Contacts "should notice any missed ads now, or in the future," it should contact LensDiscounters. (RX 67 at 1).

932. On September 6, 2005, David Zeidner, in-house counsel for 1-800 Contacts, responded to Lens Discounters' July 11, 2005 letter. (CX1238 at 001). Mr. Zeidner stated that there were still three advertisements that had been purchased for the term "1800 CONTACTS," which triggered a link to www.LensDiscounters.com." (CX1238 at 001). Mr. Zeidner attached screenshots showing the LensDiscounter ads to his September 6, 2005 letter. (CX1238 at 001, 003, 005). Mr. Zeidner asked Lens Discounters to confirm that it had removed all ads purchased through Google, Yahoo, and any other search engine, triggered by 1-800 Contacts' trademarks. (CX1238 at 001).

Response to Finding No. 932:

Respondent has no specific response.

933. Mr. Zeidner's September 6, 2005 letter enclosed a list of twenty "Forbidden Keywords/Terms" on which Lens Discounters was told to stop bidding. (CX1238 at 002; CX8003 at 003 (¶ 13) (Mitha, Decl.)). Mr. Zeidner asked Lens Discounters to confirm that it had removed all ads purchased on any search engine triggered by 1-800 Contacts' trademarks. (CX1238 at 001).

Response to Finding No. 933:

The proposed finding is incomplete and misleading. In its July 11, 2005 letter, LensDiscounters asked that 1-800 Contacts "please forward us a complete list of search terms that are covered by this trademark, so that if necessary, we can remove them accordingly."

(RX 67 at 13). Mr. Zeidner then included a list of "Forbidden Keywords/Terms" that reflect 1-800 Contacts' registered trademarks and variations thereof, per LensDiscounters' explicit request. (RX 67 at 8-9).

934. In response to Mr. Zeidner's September 6, 2005 letter, Lens Discounters stopped bidding on the twenty "Forbidden Keywords/Terms" in all of its search advertising campaigns. (CX8003 at 003 (¶ 14) (Mitha, Decl.)).

Response to Finding No. 934:

Respondent has no specific response.

935. In response to Mr. Zeidner's September 6, 2005 letter, Lens Discounters implemented the "Forbidden Keywords/Terms" as negative keywords in all of its search advertising campaigns. Lens Discounters implemented the terms as "phrase match" negative keywords. Prior to September 2005, Lens Discounters had not used any of the "Forbidden Keywords/Terms" as negative keywords. (CX8003 at 003 (¶ 14) (Mitha, Decl.); *see supra* § IV.A.5.b).

Response to Finding No. 935:

Respondent incorporates herein its responses to the findings that Complaint Counsel purport to cross-reference from Section IV.A.5.b. Respondent has no further specific response.

936. On September 20, 2005, Bryan Pratt, an attorney for 1-800 Contacts, sent a cease and desist letter to Lens Discounters. (CX1235 at 001; CX8003 at 003 (¶ 15) (Mitha, Decl.)). The letter alleged that Lens Discounters had infringed upon 1-800 Contacts' trademarks by purchasing sponsored advertisements "for at least one of the 1800 CONTACT or 1800CONTACTS trademarks, or a confusingly similar variation thereof, to trigger a link to . . . www.lensdiscounters.com." (CX1235 at 001). 1-800 Contacts requested that Lens Discounters "immediately remove **ALL** sponsored advertisements" triggered by "the 1800 CONTACTS trademark or a confusingly similar variation thereof." (CX1235 at 002 (emphasis in original); CX8003 at 003 (¶ 15) (Mitha, Decl.)).

Response to Finding No. 936:

Respondent has no specific response.

937. On September 23, 2005, Lens Discounters responded to the September 20, 2005 letter, stating that Lens Discounters would comply with 1-800 Contacts' request "to remove any

sponsored search engine advertisements that may be triggered by the 1800 CONTACTS trademark or any confusingly similar variations thereof." (CX1230; CX8003 at 003 (¶ 16) (Mitha, Decl.)). Lens Discounters explained that "[i]t was not our intention or policy to mislead your client's traffic to our site, but to offer them an alternative in the interest of fair competition." (CX1230).

Response to Finding No. 937:

Respondent has no specific response.

938. From approximately September 2005 through December 2016, Lens Discounters did not bid on any of the keywords identified by 1-800 Contacts in the September 6, 2005 letter. (CX8003 at 003 (¶ 17) (Mitha, Decl.)).

Response to Finding No. 938:

The proposed finding misstates the cited declaration. Mr. Mitha's declaration explains that in response to the June 28, 2005 cease-and-desist letter from 1-800 Contacts, LensDiscounters "unilaterally decided to stop bidding on 1-800 Contacts' terms and variations thereof." (CX 8003 at 3 (¶ 12) (Mitha, Decl.)).

939. From approximately September 2005 through December 2016, Lens Discounters maintained the terms identified by 1-800 Contacts in the September 6, 2005 letter, as negative keywords. (CX8003 at 003 (¶ 17) (Mitha, Decl.)).

Response to Finding No. 939:

Respondent has no specific response.

940. On May 12, 2009, Mr. Pratt, on behalf of 1-800 Contacts, sent an additional cease and desist letter to Lens Discounters that was nearly identical to his September 20, 2005 letter. (CX1229; CX8003 at 003, 004 (¶ 18) (Mitha, Decl.); CX1235). The letter again accused Lens Discounters of infringing upon 1-800 Contacts' trademarks by purchasing sponsored advertisements on a 1-800 Contacts trademark "or a confusingly similar variation thereof," to trigger a link to www.Lensdiscounters.com." (CX1229 at 001). 1-800 Contacts requested that Lens Discounters "immediately remove ALL sponsored advertisements" that were triggered by a 1-800 Contacts trademark or a confusingly similar variation thereof. (CX1229 at 002 (emphasis in original); CX8003 at 003-004 (¶ 18) (Mitha, Decl.)).

Response to Finding No. 940:

Respondent has no specific response.

941. 1-800 Contacts "demanded" that Lens Discounters incorporate a list of nine negative keywords attached to the May 12, 2009 letter. (CX1229 at 002, 003; CX8003 at 004 (¶ 18) (Mitha, Decl.)).

Response to Finding No. 941:

Respondent has no specific response.

942. Lens Discounters added the terms listed in Mr. Pratt's May 12, 2009 letter as "phrase-match" negative keywords in all of its search advertising campaigns. (CX8003 at 004 (¶ 19) (Mitha, Decl.)). Lens Discounters maintained those terms as negative keywords until December 2016. (CX8003 at 004 (¶ 19) (Mitha, Decl.)).

Response to Finding No. 942:

Respondent has no specific response.

943. On June 4, 2009, Arshil Abdulla, CEO of Lens Discounters, replied to Mr. Pratt's May 12, 2005 letter, stating that Lens Discounters had not purchased any of the keywords listed in the May 12, 2009 letter, and that Lens Discounters would comply with 1-800 Contacts' request to remove the sponsored advertisements appearing in response to a user query for a 1-800 Contacts' trademark term or variation thereof. (CX1186 at 001; CX8003 at 004 (¶ 20) (Mitha, Decl.)). Lens Discounters confirmed that it had added the negative keywords listed in the May 12, 2009 letter. (CX1186 at 001).

Response to Finding No. 943:

Respondent has no specific response, other than to note that CX 1186, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matters stated therein. (JX2-A-027).

944. On November 9, 2009, Mark Miller, an attorney for 1-800 Contacts, sent a cease and desist letter to Lens Discounters. (CX1232; CX8003 at 004 (¶ 21) (Mitha, Decl.)). Mr. Miller, on behalf of 1-800 Contacts, accusing Lens Discounters of infringing upon 1-800 Contacts' trademarks by purchasing sponsored advertisements "for at least one of the 1800 CONTACTS marks, or a confusingly similar variation thereof," to trigger a link to www.Opticontacts.com and Lensdiscounters.com. (CX1232 at 001). 1-800 Contacts

demanded that Lens Discounters "remove **ALL** sponsored advertisements" triggered by a 1-800 Contacts' trademark "or a confusingly similar variation thereof" (CX1232 at 002).

Response to Finding No. 944:

Respondent has no specific response.

945. On November 12, 2009, Mr. Abdulla, on behalf of Lens Discounters, responded to Mr. Miller's November 9, 2009 letter. (CX1233; CX8003 at 004 (¶ 23) (Mitha, Decl.)). Mr. Abdulla stated that Lens Discounters was not using 1-800 Contacts' trademarks as keywords. (CX1233 at 001; CX8003 at 004 (¶ 23) (Mitha, Decl.)). Lens Discounters agreed to add 1-800 Contacts' trademarks and "any reasonable confusing variations thereof" as negative keywords in Lens Discounters' ad campaigns. (CX1233 at 001).

Response to Finding No. 945:

Respondent has no specific response, other than to note that CX 1233, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matters stated therein. (JX2-A-027).

946. On December 29, 2009, Mr. Miller, on behalf of 1-800 Contacts, responded to Mr. Abdulla's November 12, 2009 letter, alleging that Lens Discounters continued to purchase at least fifteen "infringing keywords" containing a 1-800 Contacts trademark term. (CX1234 at 001, 002; CX8003 at 004-005 (¶ 24) (Mitha, Decl.)). Mr. Miller demanded that Lens Discounters cease and desist from purchasing as keywords the 1-800 Contacts trademark terms and phrases listed in his letter and all other keywords "confusingly similarly to the 1-800 Contacts, Inc. trademarks." (CX1234 at 002; CX8003 at 004-005 (¶ 24). Mr. Miller also demanded that Lens Discounters implement as negative keywords the fifteen terms and phrases identified in his letter, along with thirty additional terms and phrases relating to 1-800 Contacts, its trademarks, and websites. (CX1234 at 002-003).

Response to Finding No. 946:

Respondent has no specific response.

947. Lens Discounters implemented the terms identified in the December 29, 2009 letter as phrase-match negative keywords. (CX8003 at 005 (¶ 25) (Mitha, Decl.); CX1234 at 001-003 (the list of terms)).

Response to Finding No. 947:

Respondent has no specific response.

948. On December 30, 2009, Mr. Abdulla responded to Mr. Miller's December 29, 2009 letter, again stating that Lens Discounters "do[es] not purchase any keywords relating to 1-800 Contacts trademarks or any similar variations thereof." (CX1239 at 001). Mr. Abdullah also stated that Lens Discounters had already added negative keywords that had been previously identified by 1-800 Contacts and had added "all the additional negative keywords" mentioned in Mr. Miller's December 29, 2009 letter. (CX1239 at 001).

Response to Finding No. 948:

Respondent has no specific response, other than to note that CX 1239, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matters stated therein. (JX2-A-028).

949. As of December 30, 2009, Lens Discounters was using nine Ad group-level exact-match and phrase-match negative keywords in its Google AdWords campaign. (CX1239 at 002; CX8003 at 005 (¶ 26) (Mitha, Decl.)).

Response to Finding No. 949:

Respondent has no specific response, other than to note that CX 1239, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matters stated therein. (JX2-A-028).

950. As of December 30, 2009, Lens Discounters was using 43 campaign-level phrase-match negative keywords in its Google AdWords campaign. (CX1239 at 002-003; CX8003 at 005 (¶ 26) (Mitha, Decl.)).

Response to Finding No. 950:

Respondent has no specific response, other than to note that CX 1239, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matters stated therein. (JX2-A-028).

951. On February 17, 2010, Mr. Miller, an attorney for 1-800 Contacts, sent a letter to Lens Discounters, stating that Lens Discounters' ads were being triggered by the search term "1800contacs." (CX1236 at 001; CX8003 at 005 (¶ 27) (Mitha, Decl.)). 1-800 Contacts requested that Mr. Abdulla add the term "1800contacs" to its negative keyword list. (CX1236 at 002; CX8003 at 005 (¶ 27) (Mitha, Decl.)).

Response to Finding No. 951:

Respondent has no specific response.

952. In response to Mr. Miller's letter dated February 17, 2010, Lens Discounters implemented the term "1800contacs" as a phrase match negative keyword. (CX8003 at 005 (¶ 28) (Mitha, Decl.)). Lens Discounters maintained the additional term as a negative keyword until December 2016.

Response to Finding No. 952:

Respondent has no specific response.

953. On February 18, 2010, Mr. Abdulla responded to Mr. Miller's February 17, 2010 letter, confirming that Lens Discounters had added the term "1800contacs" to its list of negative keywords. (CX1227 at 001). As of February 18, 2010, Lens Discounters had in place 45 negative keywords relating to 1-800 Contacts, its websites, and its trademarks. (CX1227 at 001; CX8003 at 005 (¶ 29) (Mitha, Decl.)). All of the negative keywords were implemented as "phrase-match" negative keywords. (CX8003 at 005 (¶ 29) (Mitha, Decl.)).

Response to Finding No. 953:

Respondent has no specific response, other than to note that CX 1227, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matters stated therein. (JX2-A-027).

c. Lens.com

954. On September 1, 2005, David Zeidner, in-house counsel at 1-800 Contacts, sent a cease and desist letter to Lens.com, alleging that Lens.com was infringing upon 1-800 Contacts' trademark by purchasing sponsored advertisements "triggered by" a 1-800 Contacts trademark search term. (CX0462 at 001). 1-800 Contacts demanded that Lens.com "immediately remove **ALL** sponsored advertisements" on any search engine which were "triggered by" 1-800 Contacts trademark search terms. (CX0462 at 002

(emphasis in original)). The letter included copies of screen shots purporting to show "each of the infringing actions" by Lens.com. (CX0462 at 001, 003-006).

Response to Finding No. 954:

Respondent has no specific response.

955. On September 20, 2005, Bryan Pratt, an attorney representing 1-800 Contacts, sent a cease and desist letter to Cary Samourkachian, owner and CEO of Lens.com. (CX1513). The letter alleged that Lens.com had "continually purchased sponsored advertisements at Google, and possibly other search engines" that were "triggered upon a search for '1800 Contacts.'" (CX1513 at 001). 1-800 Contacts demanded that Lens.com cease and desist "from further use of the mark 1800 CONTACTS, and confusingly similar variations thereof in the United States." It further demanded that Lens.com "immediately remove ALL sponsored advertisements" on "Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark." (CX1513 at 002 (emphasis in original)).

Response to Finding No. 955:

Respondent has no specific response.

956. Mr. Pratt sent the letter of September 20, 2005 (CX1513), for the purpose of inducing Lens.com "to stop having their sponsored advertisements come up in response to searches for 1-800 Contacts' registered trademarks." (Pratt, Tr. 2500).

Response to Finding No. 956:

The proposed testimony misstates the cited testimony; Mr. Pratt did not use the word "inducing" in his testimony, and no "inducements" appear in the letter that Mr. Pratt was describing (CX 1513).

957. Mr. Pratt understood that as a result of his September 2005 letter (CX1513), Lens.com agreed that it "would do whatever they needed to" to prevent the appearance of advertisements from being displayed in response to searches for 1-800 Contacts' trademarks. (Pratt, Tr. 2568).

Response to Finding No. 957:

The proposed finding misstates Mr. Pratt's trial testimony. The cited testimony does not support the statement in the finding that there was any direct tie between the September 2005

letter (CX 1513) and any purported agreement between 1-800 Contacts and Lens.com. In addition, Mr. Pratt testified that a description similar to the proposed finding "adds a lot more details than my understanding of the agreement or the commitment by Lens.com." (Pratt, Tr. 2570-2571). Finally, the proposed finding is incomplete because it fails to reference Mr. Pratt's testimony that his understanding in 2005 about Lens.com's purported commmmitment was mistaken. (Pratt, Tr. 2572-2576; *see also 1-800 Contacts v. Lens.com*, 755 F. Supp. 2d 1151, 1188-89 (D. Utah 2010) (holding that Lens.com and 1-800 Contacts "had not reached a meeting of the minds")).

958. On September 22, 2005, Mr. Pratt sent to counsel for Lens.com "a list of negative search terms that, when correctly implemented, prevent unintentional advertisements from displaying in response to keyword searches." (Pratt, Tr. 2580 (discussing CX1184 at -017)).

Response to Finding No. 958:

Respondent has no specific response.

959. Mr. Pratt understood that, in 2005, "both parties agreed to implement negative terms to prevent sponsored advertisements from appearing" in response to searches for the other party's trademark terms. (Pratt, Tr. 2578-2579).

Response to Finding No. 959:

Complaint Counsel's Proposed Finding No. 959 is vague and misleading as phrased and is not supported by the cited testimony. The cited testimony only supports a finding that Mr. Pratt held the belief *in 2005* that the parties had reached such an agreement. Mr. Pratt testified that it was his "belief at the time" that the parties had reached an agreement, but as he clarified, he did not at the time of trial believe there had ever been an agreement with Lens.com. (Pratt, Tr. 2576 ("Q: My question is, sitting here today, yes or no, is it the case that there was an agreement between Lens.com and 1-800 Contacts that was memorialized in writing on

September 22, 2005. A: Sitting here today, I don't believe that there was."), 2578-79 ("Q: And the simplicity of the agreement was that both parties agreed to implement negative terms to prevent sponsored advertisements from appearing; right?... A: Yeah. *That was my belief at the time*.")). If and to the extent that Complaint Counsel intended this proposed finding to suggest that Mr. Pratt believes in 2017 that the parties reached an agreement in 2005, the cited testimony is to the contrary.

960. The agreement reached between 1-800 Contacts and Lens.com in 2005 "explicitly contemplated that Lens.com would look into any future advertisements brought to its attention by 1-800 Contacts and take the steps necessary to prevent advertisements from appearing in response to searches for 1-800 Contacts. Depending upon the respond the investigation, such steps would either be implementation of negative keywords or informing affiliates to alter its keyword purchases." (CX1184 at 003 (Declaration of Bryan Pratt, *1-800 Contacts, Inc. v. Lens.com, Inc.*)).

Response to Finding No. 960:

The proposed finding is inaccurate, misleading and contrary to law. Complaint Counsel cite to a declaration submitted during the *1800 Contacts, Inc. v. Lens.com, Inc.* litigation, (CX 1184), while completely ignoring the fact that the court in the Lens.com case squarely found that there was no such agreement between 1-800 Contacts and Lens.com. *See 1-800 Contacts, Inc. v. Lens.com*, 755 F. Supp. 2d 1151, 1188-89 (D. Utah 2010); (Pratt, Tr. 2575-76). Complaint Counsel do not explain why this Court should ignore that ruling and reach a different result, especially since they provide no new evidence that such an agreement existed.

961. On September 21, 2005, an attorney representing Lens.com emailed Mr. Pratt, stating that he had investigated the matter and determined that some of Lens.com's "affiliates appear to be involved in the problems [Mr. Pratt] outlined." (CX0591 at 004). The Lens.com attorney stated that he would advise the affiliate "to cease purchasing 1-800CONTACTS from Google." (CX0591 at 004).

Response to Finding No. 961:

Respondent has no specific response.

962. Shortly after the September 21, 2005 email from Lens.com's attorney, Lens.com and 1-800 Contacts "agreed not to purchase sponsored advertisements using the other parties' names." (CX1182 (*1-800 Contacts v. Lens.com* Complaint) at 008 (¶ 26)).

Response to Finding No. 962:

The proposed finding is inaccurate, misleading, and contrary to law. Complaint Counsel cite to a complaint filed during the *1800 Contacts, Inc. v. Lens.com, Inc.* litigation, (CX 1182), while completely ignoring the fact that the court in that very case squarely found that there was no such agreement between 1-800 Contacts and Lens.com. *See 1-800 Contacts, Inc. v. Lens.com*, 755 F. Supp. 2d 1151, 1188-89 (D. Utah 2010); (Pratt, Tr. 2575-76). Complaint Counsel do not explain why this Court should ignore that ruling and reach a different result, especially since they provide no new evidence that such an agreement existed.

963. On November 30, 2005, Mr. Pratt emailed Lens.com's attorney, stating that Lens.com was "again showing up as a sponsored advertisement on Google and Yahoo triggered by the search terms 1-800contacts and 1-800contacts.com." (CX0591 at 003). Mr. Pratt acknowledged "the prompt action" that Lens.com had taken in the past "in resolving these situations with your affiliates." (CX0591 at 003).

Response to Finding No. 963:

Respondent has no specific response.

964. In response to Mr. Pratt's November 30, 2005 email, Lens.com removed the sponsored advertisement that had been appearing on Google in response to searches for "1800contacts." (CX0591 at 003).

Response to Finding No. 964:

Respondent has no specific response.

965. On December 7, 2005, Mr. Pratt emailed Lens.com's attorney again, stating that "sponsored advertisements for Lens.com are still present on search.aol.com" and requesting "detail of the actions you plan to take to remedy the situation." (CX0591 at 003).

Response to Finding No. 965:

Respondent has no specific response.

966. According to 1-800 Contacts, Lens.com "appeared to comply with 1-800 Contacts' request [of December 2005] and ceased" displaying advertisements. (CX1182 (*1-800 Contacts v. Lens.com* Complaint) at 008 (¶¶ 27-28)).

Response to Finding No. 966:

Respondent has no specific response.

967. From 2005 until April 2007, Lens.com prevented Lens.com ads from appearing in response to searches for 1-800 Contacts pursuant to an agreement with 1-800 Contacts. (*See supra* ¶¶ 954-966; CX1673 (Samourkachian, *1-800 Contacts v. Lens.com* Dep. at 178-181); CX0591 at 002; CX1254 at 001 (1-800 Contacts' outside counsel Bryan Pratt referred to Lens.com's "past and continued cooperation" with 1-800 Contacts' requests to prevent Lens.com ads from appearing on searches for 1-800 Contacts); (CX1182 (*1-800 Contacts v. Lens.com* Complaint) at 008 (¶¶ 26-31) (describing 2005 agreement, alleging that when 1-800 Contacts contacted Lens.com in April 2007 after observing search advertisements, "this time Lens.com took no action.")).

Response to Finding No. 967:

The proposed finding is inaccurate and misleading to the extent that it is based on the proposition that there was an agreement between 1-800 Contacts and Lens.com regarding paid search advertising. The court in the Lens.com case held squarely that Lens.com never entered into such an agreement with 1-800 Contacts. *See 1-800 Contacts v. Lens.com*, 755 F. Supp. 2d 1151, 1188-89 (D. Utah 2010) (holding that the parties "had not reached a meeting of the minds"). Moreover, Mr. Samourkachian testified that he had made a unilateral decision not to purchase 1-800 Contacts' trademark terms as keywords in search advertising auctions. (CX 1673 (Samourkachian deposition in *1-800 Contacts v. Lens.com* at 171)). He also testified that Lens.com does not purchase 1-800 Contacts or any other competitors' trademarks in search advertising as a general practice, because such purchases do not result in conversions and are therefore inefficient allocations of advertising spend. (CX 1673 (Samourkachian deposition in *1-*

800 Contacts v. Lens.com at 171 ("we're not in the business of purchasing our competitor's trademarks"), 175 ("our intent is not to be bidding on [1-800's] trademark or show up on their trademark"), 182 ("Traffic that is coming from these [trademark] terms are not going to convert to us, because they're looking for your client, not us.")).

Complaint Counsel's proposed finding no. 967 relies on the correspondence and statements of Mr. Bryan Pratt prior to the filing of the complaint against Lens.com in 2007. Mr. Pratt has testified that he was incorrect in his position at the time. (Pratt, Tr. 2575-76 ("Q: Is it the case that there was an agreement between Lens.com and 1-800 Contacts that was memorialized in writing on September 22, 2005? A: That was my understanding at the time I filed this declaration…Sitting here today, I don't believe that there was."); *see also* Bethers, Tr. 3693-94 ("Q: Is there any agreement in place today between 1-800 Contacts and Lens.com with respect to paid advertising? A: There is no agreement and has not been an agreement with Lens.com")). Respondent also incorporates its responses to Complaint Counsel's proposed finding nos. 956-966.

d. Luxottica

968. On April 25, 2005, Karen Gaunt, an attorney representing LensCrafters, sent a cease and desist letter to 1-800 Contacts, alleging infringement of LensCrafter's trademark. (CX0087). Ms. Gaunt stated that 1-800 Contacts had "purchased sponsored advertisements at Google and possibly at other search engines" that were "triggered upon a search for 'LensCrafters.'" (CX0087 at 001). Ms. Gaunt demanded that 1-800 Contacts "immediately remove any and all sponsored listings that you have purchased relating to the LENSCRAFTERS trademark" within seven days. (CX0087 at 002).

Response to Finding No. 968:

Respondent has no specific response.

969. On May 5, 2005, Kevin McCallum, then Chief Marketing Officer of 1-800 Contacts, spoke with Seth Mclaughlin of Luxottica (LensCrafters' parent company), regarding the alleged trademark infringement by 1-800 Contacts. (CX0681 at 001-002). Aspects of the

conversation were memorialized in emails exchanged between Mr. McCallum and Mr. Mclaughlin on May 5, 2005 and May 6, 2005. (CX0681 at 001-002).

Response to Finding No. 969:

Respondent has no specific response.

970. On May 5, 2005, Mr. Mclaughlin wrote that he and Mr. McCallum agreed that some of 1-800 Contacts' affiliates were inappropriately using the LensCrafters trademark, and provided a list of such affiliates. (CX0681 at 002).

Response to Finding No. 970:

Complaint Counsel's Proposed Finding No. 970 mischaracterizes the cited evidence and is incomplete. CX 681 is a communication between Mr. McLaughlin and Mr. McCallum regarding Mr. McLaughlin's allegation that he and Mr. McCallum had agreed "that some of [1-800 Contacts'] affiliates are inappropriately using our LensCrafters trademark (which is a violation of your contract with them)," to which Mr. McCallum responded by stating that "I think there is a need for additional sharing of information before our two organizations agree on anything with respect to this situation" and goes on to state that "I have to respectfully disagree that this is occurring."

971. Mr. McCallum replied to Mr. McLaughlin on May 6, 2005, stating that 1-800 Contacts had not served ads on searches containing LensCrafters or "for any term containing the word 'craft' just incase [sic] there were searches for any variation of the LensCrafters trademark." (CX0681 at 001). Mr. McCallum also explained that none of the entities identified in Mr. McLaughlin's May 5, 2005 email were current affiliates of 1-800 Contacts, and that one of the identified entities was Vision Direct, 1-800 Contacts' "largest competitor." Mr. McCallum viewed it as "comical" to imply that 1-800 Contacts' "largest competitor would be redirecting traffic to [its] website for any reason." (CX0681 at 002).

Response to Finding No. 971:

Respondent has no specific response to the first two sentences of Complaint Counsel's Proposed Finding No. 971. The third sentence mischaracterizes Mr. McCallum's e-mail

(CX 681), which states "[t]o suggest that our largest competitor would be redirecting traffic to our website for any reason is comical."

972. In his May 6, 2005 email, Mr. McCallum suggested that LensCrafters provide screen shots "and the specific redirecting link's target URL" to "confirm what is happening and who the violator is." (CX0681 at 002). He agreed to "take immediate action to rectify it." (CX0681 at 002).

Response to Finding No. 972:

Complaint Counsel's Proposed Finding No. 972 mischaracterizes the cited evidence and is misleading to the extent it implies that 1-800 Contacts had agreed with Luxottica to do something beyond its pre-existing policy. The referenced exhibit actually states "[w]hat is most helpful in this situation to demonstrate the activities you are suggesting is to provide us with screen shots and the specific redirecting link's target URL" because "[i]t is with this information we can confirm what is happening and who the violator is" and "[i]f in fact, this is what we find, we will take immediate action to rectify it." (CX 681). As Mr. McCallum elaborated upon further in a subsequent email on that same date, 1-800 Contacts already had a "simple method" in place to deal with affiliates who violated its pre-existing policy which included these particular steps. (CX 174). Mr. Schmidt likewise testified that 1-800 Contacts' pre-existing policy already prohibited the conduct alleged by Luxottica and that 1-800 Contacts did not change its practices in any way as a result of its 2005 correspondence with Luxottica. (CX 9031 (Schmidt, Dep. at 67-69, 72, 74)).

973. On May 6, 2005, David Zeidner, in-house counsel for 1-800 Contacts, replied to Ms. Gaunt's April 25, 2005 cease and desist letter. (CX0088). Mr. Zeidner asserted that 1-800 Contacts had done none of the things alleged in Ms. Gaunt's letter, as confirmed by the emails between Kevin McCallum and Seth McLaughlin. (CX0088 at 001). He wrote that, based on the emails between Mr. McCallum and Mr. McLaughlin, that he "deemed this matter closed." (CX0088 at 001).

Response to Finding No. 973:

Respondent has no specific response to the first sentence of Complaint Counsel's Proposed Finding No. 973. The second and third sentences mischaracterize the cited exhibit (CX 88), which states "[p]er the emails between Kevin McCallum, the Senior Vice President of Marketing at 1-800 CONTACTS and Seth McLaughlin, at Luxottica Retail, you will note that 1-800 CONTACTS in fact has done nothing you have alleged in your letter. Based upon the email exchanges between Mr. McCallum and Mr. McLaughlin, I have deemed this matter closed."

974. On May 10, 2005, Clint Schmidt and Brandon Dansie of 1-800 Contacts spoke with Connie Ross of LensCrafters regarding search and trademark issues. (CX1378 at 001; CX0442 at 001).

Response to Finding No. 974:

Complaint Counsel's Proposed Finding No. 974 is not supported by the cited evidence. CX 1378 is a communication from 1-800 Contacts' Clint Schmidt thanking Luxottica's Connie Ross for taking time to talk with him and Mr. Dansie that day, but it does not reference the substance of their conversation. CX 442 purports to be an internal Luxottica document regarding supposed communications between Luxottica and 1-800 Contacts during a May 10, 2005 call, but the contents of that internal Luxottica document lack foundation and constitute unreliable hearsay.

975. Ms. Ross memorialized the May 10, 2005 call in an email to Mr. McLaughlin and Patricia Sharp. (CX0442).

Response to Finding No. 975:

Complaint Counsel's Proposed Finding No. 975 is not supported by any reliable evidence. CX 442 purports to be an internal Luxottica document regarding supposed

communications between Luxottica and 1-800 Contacts during a May 10, 2005 call but the contents of that internal Luxottica document lack foundation and constitute unreliable hearsay.

976. On the May 10, 2005 call with Ms. Ross, Mr. Schmidt explained that 1-800 Contacts' ads appearing on Google and Overture on searches for LensCrafters were placed by affiliates and not by 1-800 Contacts itself, and that it was difficult to monitor affiliates. (CX0442 at 001).

Response to Finding No. 976:

Complaint Counsel's Proposed Finding No. 975 is not supported by any reliable evidence and is contrary to the weight of the record evidence. CX 442 purports to be an internal Luxottica document regarding supposed communications between Luxottica and 1-800 Contacts during a May 10, 2005 call, but the contents of that internal Luxottica document lack foundation and constitute unreliable hearsay.

The record evidence, on the other hand, reflects that Luxottica's allegations that affiliates of 1-800 Contacts had placed ads on searches for LensCrafters lacked merit. *See, e.g.*, (CX 681 (McCallum responding to McLaughlin's claim that they had agreed "that some of [1-800 Contacts'] affiliates are inappropriately using our LensCrafters trademark" by stating "I think there is a need for additional sharing of information before our two organizations agree on anything with respect to this situation" and that "I have to respectfully disagree that this is occurring."); CX 88 ("Per the emails between Kevin McCallum, the Senior Vice President of Marketing at 1-800 CONTACTS and Seth McLaughlin, at Luxottica Retail, you will note that 1-800 CONTACTS in fact has done nothing you have alleged in your letter. Based upon the email exchanges between Mr. McCallum and Mr. McLaughlin, I have deemed this matter closed.")).

977. On the May 10, 2005 call with Ms. Ross, Mr. Schmidt, and Mr. Dansie, 1-800 Contacts and Luxottica "agreed to a friendly policy of co-policing" trademark keyword advertising by affiliates. (CX0206 at 001; CX0442 at 001, 002 (email from Connie Ross to Seth McLaughlin memorializing May 10, 2005 call with 1-800 Contacts); CX0418 (On July

26, 2005, Clint Schmidt wrote: "We already had that 'let's be civil' conversation with Luxottica with regard to bidding on trademarks."). LensCrafters would notify 1-800 Contacts if affiliates were appearing on LensCrafters' searches through paid ads, and 1-800 Contacts would deal with the affiliate, and vice versa. (CX0206 at-001; CX0442 at 001-002).

Response to Finding No. 977:

Complaint Counsel's Proposed Finding No. 977 is not supported by the cited evidence and is misleading and inaccurate to the extent it implies there was a substantive agreement between 1-800 Contacts and Luxottica in 2005 regarding the use of each other's trademarks in paid search advertising, rather than an agreement merely to utilize a more collegial process to communicate alleged misbehavior by each other's affiliates.

CX 206 refers to an agreement to utilize a more collegial process to communicate alleged misbehavior by each other's affiliates as "a friendly policy of co-policing" and says nothing about a May 10, 2005 call or substantive trademark agreement between the parties themselves.

CX 442 purports to be an internal Luxottica document regarding supposed communications between Luxottica and 1-800 Contacts during a May 10, 2005 call, but the contents of that internal Luxottica document lack foundation and constitute unreliable hearsay. Even if the substance were admissible, it likewise merely refers to discussions about a process for communicating affiliate misbehavior.

CX 418 merely refers to the fact that 1-800 Contacts had a "let's be civil conversation" with Luxottica but says nothing about a May 10, 2005 call or any substantive trademark agreement between the parties.

Any implication that there was a substantive agreement between 1-800 Contacts and Luxottica regarding the use of each other's trademarks in 2005 is directly contrary to the record evidence. Clint Schmidt, the sole witness involved in the 2005 discussions, testified unambiguously that he was not aware of any trademark settlement agreement entered into

between Luxottica and 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 74)). He also testified that 1-800 Contacts' pre-existing policy already prohibited the conduct alleged by Luxottica and that 1-800 Contacts did not change its practices in any way as a result of its 2005 correspondence with Luxottica. (CX 9031 (Schmidt, Dep. at 67-69, 72, 74)). Likewise, Mr. Bethers repeatedly testified that 1-800 Contacts had no preexisting trademark agreement or any trademark protection with regard to Luxottica prior to the December 23, 2013 Luxottica Sourcing Agreement. (CX 9001 (Bethers, IHT at 228 ("We had no agreement with Luxottica."), 229 ("We didn't have trademark protection" with regard to Luxottica) and 232 ("We didn't have an agreement with Luxottica.")).

978. On August 24, 2005, Kevin McCallum of 1-800 Contacts sent to Connie Ross and Seth McLaughlin, both of Luxottica, a .pdf of some search engine results captured on Google. (CX0715 at 002).

Response to Finding No. 978:

Respondent has no specific response.

979. On August 25, 2005, Connie Ross replied to Kevin McCallum's email dated August 24, 2005, and stated that she had investigated the issue, determined that LensCrafters had not purchased the "1800contacts" keyword, but, "we have purchased the term 'contacts' as a broad match term," and that "[a]ccording to Google," the Lenscrafterscontacts.com ad could come up when a search is performed under "1800contacts" because "contacts" is part of 1-800 Contacts' tradename, and any retailer purchasing "contacts" as a broad match can potentially display an ad under "1800contacts." (CX0715 at 002).

Response to Finding No. 979:

Respondent has no specific response.

980. On August 25, 2005, Mr. McCallum replied and asked whether "negative key words" were something Luxottica would consider to prevent its ads from appearing on searches for 1-800 Contacts. (CX0715 at 001).

Response to Finding No. 980:

Complaint Counsel's Proposed Finding No. 980 mischaracterizes the cited document (CX 715), which states "Let me no if negative key words (Google vernacular) or excluded key words (yahoo vernacular) is something you're not willing to consider."

981. Between August 25, 2005, and August 29, 2005, Connie Ross and Brandon Dansie discussed the operation and use of negative keywords. (CX0715 at 001 (August 25, 2005 email from Mr. Dansie: "I left a voicemail with Connie offering to explain how negative keywords can be used to limit the way broad match ads are displayed."); CX0117 at 001 (August 29, 2005 email from Ms. Ross to Brandon Dansie referring to "our phone conversation on Friday.")).

Response to Finding No. 981:

Respondent has no specific response.

982. In August 2005, 1-800 Contacts and Luxottica reached an agreement to add each other's trademarks as negative keywords to their advertising accounts and to the lists of negative keywords affiliates would be required to use. (CX0117 at 001-002 (August 29, 2005 email from Ms. Ross to Mr. Dansie: "As per our phone conversation on Friday, below are the LensCrafters terms we would like for you to add to your list of excluded terms for use by 1800 Contacts and its affiliates . . . We are in the process of adding exact negative matches/excluded words to the following terms which will address your request")).

Response to Finding No. 982:

Complaint Counsel's Proposed Finding No. 982 is not supported by the cited evidence and is misleading and inaccurate to the extent it implies there was a substantive agreement between 1-800 Contacts and Luxottica in August 2005 regarding the use of each other's trademarks in paid search advertising.

CX 117 is correspondence from Luxottica's Connie Ross stating that she would like 1-800 Contacts to include certain negative keywords on its existing list of negative keywords. Any implication that there was a substantive agreement between 1-800 Contacts and Luxottica regarding the use of each other's trademarks in August 2005 is directly contrary to the record

evidence. Clint Schmidt, the sole witness involved in the 2005 discussions, testified unambiguously that he was not aware of any trademark settlement agreement entered into between Luxottica and 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 74)). He also testified that 1-800 Contacts' pre-existing policy already prohibited the conduct alleged by Luxottica and that 1-800 Contacts did not change its practices in any way as a result of its 2005 correspondence with Luxottica. (CX 9031 (Schmidt, Dep. at 67-69, 72, 74)). Likewise, Mr. Bethers repeatedly testified that 1-800 Contacts had no preexisting trademark agreement or any trademark protection with regard to Luxottica prior to the December 23, 2013 Luxottica Sourcing Agreement. (CX 9001 (Bethers, IHT at 228 ("We had no agreement with Luxottica."), 229 ("We didn't have trademark protection" with regard to Luxottica) and 232 ("We didn't have an agreement with Luxottica.")).

983. 1-800 Contacts and Luxottica abided by their agreement to use each other's trademarks as negative keywords. (CX0117 at 001 (Mr. Dansie confirmed to his supervisors on September 7, 2005 that he added the term "lenscrafters" and certain variations in spelling as negative keywords 1-800 Contacts' Google and Yahoo campaigns, and recommended asking LensCrafters to add "1-800," "1 800," "express," "contacts.com," and "1800contacts.com," to their negative keyword lists in addition to the terms Ms. Ross listed in her August 29, 2005 email)).

Response to Finding No. 983:

Complaint Counsel's Proposed Finding No. 983 is not supported by the cited evidence and is misleading and inaccurate to the extent it implies there was a substantive agreement between 1-800 Contacts and Luxottica in August 2005 regarding the use of each other's trademarks in paid search advertising. The communication referenced in CX 117 is an internal 1-800 Contacts communication from Mr. Dansie indicating he had added some of the negative keywords proposed by Ms. Ross to his list and would "recommend" asking LensCrafters to add certain negative keywords as well. The email says nothing about a substantive trademark

agreement having been reached between 1-800 Contacts and Luxottica or anything suggesting that the parties were abiding by any such purported agreement.

Any implication that there was a substantive agreement between 1-800 Contacts and Luxottica regarding the use of each other's trademarks in August 2005 is directly contrary to the record evidence. Clint Schmidt, the sole witness involved in the 2005 discussions, testified unambiguously that he was not aware of any trademark settlement agreement entered into between Luxottica and 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 74)). He also testified that 1-800 Contacts' pre-existing policy already prohibited the conduct alleged by Luxottica and that 1-800 Contacts did not change its practices in any way as a result of its 2005 correspondence with Luxottica. (CX 9031 (Schmidt, Dep. at 67-69, 72, 74)). Likewise, Mr. Bethers repeatedly testified that 1-800 Contacts had no preexisting trademark agreement or any trademark protection with regard to Luxottica prior to the December 23, 2013 Luxottica Sourcing Agreement. (CX 9001 (Bethers, IHT at 228 ("We had no agreement with Luxottica."), 229 ("We didn't have trademark protection" with regard to Luxottica) and 232 ("We didn't have an agreement with Luxottica.")).

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

Response to Finding No. 984:

Complaint Counsel's Proposed Finding No. 984 is incomplete, mischaracterizes the cited evidence and is misleading. CX 66 includes a January 30, 2006 communication from 1-800

Contacts' Joe Zeidner to Luxottica's Wally Lovejoy indicating that 1-800 Contacts has been "vigilant in keeping competitors from bidding on our trademarks" and that "[l]ikewise, we don't bid on the trademarks of other retailers (for example, we do not bid on the keyword "LensCrafters")." (CX 66). Mr. Zeidner explained that "[d]uring our routine searching for offenders of our own marks, we found that another online contact lens seller is the top bidder on the keyword "lenscrafters" on Google" and noted "[i]t is our understanding that LensCrafters does not approve of competitive businesses linking ads to its trademark, but want to make sure this policy has not changed." (CX 66). CX 119 contains a response from Mr. Lovejoy thanking Mr. Zeidner for bringing the matter to his attention and indicating that "[Luxottica's] policies remain the same" and that Luxottica "objects to any third party making use of Luxottica's trademarks in any type of advertising, including the use of Luxottica's trademarks in domain names, meta-tags, keyword advertising, and sponsored links."

4. Trademark Monitoring

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

Response to Finding No. 985:

Complaint Counsel's Proposed Finding No. 985 is not supported by the cited evidence, is incomplete and mischaracterizes 1-800 Contacts' monitoring process. The record evidence establishes that 1-800 Contacts internal marketing personnel monitored rivals' advertisements that were showing up in responses to searches for 1-800 Contacts key trademark terms and

provided that information to the legal team for a determination by counsel about which ads were legally actionable. (Craven, Tr. 685-86; CX 9002 (Craven, IHT at 121, 128-29); CX 9020 (Craven, Dep. at 45); Pratt, Tr. 2513 ("I received reports, periodic reports, from my client as they monitored those results. They monitored – they did searches for their trademarks themselves on Google and other search engines. They kept track of who was coming up in response to those searches.)).

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

Response to Finding No. 986:

Respondent has no specific response.

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

Response to Finding No. 987:

Respondent has no specific response.

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

Response to Finding No. 988:

Respondent has no specific response.

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

Response to Finding No. 989:

Respondent has no specific response.

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

Response to Finding No. 990:

Respondent has no specific response.

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

Response to Finding No. 991:

Respondent has no specific response.

992. The information in the trademark monitoring reports was gathered by running a search for each term, recording the identity of every advertiser whose ad appeared, and the position on the search engine results page in which their ad appeared. (CX9016 (Judd, Dep. at 65-75); CX9015 (Galan, Dep. at 131); Craven, Tr. 529; CX0732 at 009 (Nov. 2011 transition document prepared by Mr. Craven for his successor)). The person preparing the report would also click on the ad, generate a web page privacy report, and create a screenshot of that privacy report which was added to the spreadsheet. (CX9016 (Judd, Dep. at 93-95)).

Response to Finding No. 992:

Respondent has no specific response.

993. After each search, the employee would clear the browser of cookies and cache information, and move on to the next term. (CX9016 (Judd, Dep. at 73-74)).

Response to Finding No. 993:

Respondent has no specific response.

994. The trademark monitoring process was repeated for each major search engine. (CX9016 (Judd, Dep. at 91) (in November 2008, monitoring was conducted on Google and Yahoo)).

Response to Finding No. 994:

Respondent has no specific response.

995. The trademark monitoring process required at least 6 hours of employee time every week. (CX9016 (Judd, Dep. at 87; CX0732 at 009 ("Takes about 6-7 hours weekly to compile.")).

Response to Finding No. 995:

Complaint Counsel's Proposed Finding No. 995 is not supported by the cited evidence and is incomplete and misleading because it omits the fact that the tools used, and the time needed to complete the monitoring process, changed over time. Although there were time periods where this process took 6-7 hours per week to complete, the cited evidence does not support that it required at least 6 hours of employee time every week, and that evidence says nothing about current statistics.

996. BrandVerity was also used as of 2009 for some trademark monitoring. (CX0935 at 001; Craven, Tr. 529 ("Later on, I know we used a software service called BrandVerity"); CX9020 (Craven, Dep. at 62)).

Response to Finding No. 996:

Respondent has no specific response.

997. On January 8, 2010, 1-800 Contacts added its "top four TM+Coupon terms" to the list of terms monitored. (CX0279 at 001).

Response to Finding No. 997:

Respondent has no specific response.

998. Mr. Galan, who was responsible for trademark monitoring during his tenure at the company from early 2012 to early 2014, routinely add new terms to the list he monitored, such as variations in spelling or phrases with additional words like "coupon" or "order code." (CX9015 (Galan, Dep. at 134, 180-81); *infra* VI.C.2-4). Mr. Galan recalls monitoring somewhere between 20 and 100 terms. (CX9015 (Galan, Dep. at 133)).

Response to Finding No. 998:

Complaint Counsel's Proposed Finding No. 998 mischaracterizes the cited testimony. The cited testimony states that Mr. Galan oversaw trademark monitoring during his tenure at 1-

800 Contacts. When asked whether he added any terms to the list he monitored, he testified "[p]ossibly variations in spelling that would crop up" or "if I found something that was clearly 1-800 Contacts but we hadn't already had, I would add that to the list," but "I don't recall a specific example." (CX 9015 (Galan, Dep. at 134)). Likewise, when asked how many terms were on the list, he testified "I don't recall" and "that it's probably more than 20 but he is not sure beyond that, but probably fewer than a hundred." (CX 9015 (Galan, Dep. at 133)).

999. The trademark monitoring process was regarded as one of 1-800 Contacts' "levers" for optimizing its paid search performance. (CX0555 at 002; CX0051 at 003). One of the bid management techniques 1-800 Contacts employed was keeping "competition out of results" for trademark keywords in order to "bid as low as possible" on those terms. (CX0555 at 003; CX0051 at 004 ("Low competition = low cost" for trademark keywords); (CX0296 at 034, *in camera* [redacted].

Response to Finding No. 999:

Complaint Counsel's Proposed Finding No. 999 mischaracterizes the cited evidence and is incomplete and misleading to the extent it implies that the reason 1-800 Contacts enforced its trademark rights was to "bid as low as possible" on trademark keywords. The cited evidence identifies "trademark protection from affiliates and competitors" as one of five levers in paid search advertising. While one of many consequences of trademark enforcement may be lower costs on trademark keywords, depending on the particular circumstances, the record evidence establishes that 1-800 Contacts enforced its trademark rights to address three main business concerns: (1) that consumers would be confused or misdirected; (2) that the ads could dilute the value of 1-800 Contacts' brand and its investments in broadscale advertising; and (3) that other online retailers would be free-riding on the investments that 1-800 Contacts had made in broadscale advertising. (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06, 149); Coon, Tr. 2727-38 (citing concerns about consumers being

frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)). Those business concerns were appropriately addressed by retaining experienced outside counsel to make a determination as to any actual legal claims to be asserted regarding any particular ad. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133)).

1000. 1-800 Contacts enforced its "trademark policy to remove competitors which in turn drives down how much [it pays] per click." (CX0935 at 001).

Response to Finding No. 1000:

Complaint Counsel's Proposed Finding No. 1000 is incomplete and misleading to the extent it implies that 1-800 Contacts enforced its trademark policy in order to drive down how much it pays per click. While that may be one of many consequences of trademark enforcement, depending on the particular circumstances, the record evidence establishes that 1-800 Contacts enforced its trademark rights to address three main business concerns: (1) that consumers would be confused or misdirected; (2) that the ads could dilute the value of 1-800 Contacts' brand and its investments in broadscale advertising; and (3) that other online retailers would be free-riding on the investments that 1-800 Contacts had made in broadscale advertising. (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06, 149); Coon, Tr. 2727-38 (citing concerns about consumers being frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)). Those business concerns were appropriately addressed by retaining experienced outside counsel to make a determination as to any actual legal claims to be asserted regarding any particular ad. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133)).

5. Commencement of Lens.com Litigation

1001. In April 2007, 1-800 Contacts identified ads for LensWorld and Lens.com's website "JustLenses.com" appearing in response to searches for "1800contacts" through 1-800 Contacts' trademark monitoring. (CX0078 at 001).

Response to Finding No. 1001:

Respondent has no specific response.

1002. Brandon Dansie, a search marketing employee at 1-800 Contacts, explained that, of the two companies identified in the April 9, 2007 search monitoring report, "Lens.com . . . is a more important offender because they are a more viable competitor." (CX0078 at 001).

Response to Finding No. 1002:

The proposed finding misstates the cited exhibit and should be disregarded. The cited search monitoring report identifies six companies, not two, and the report set out several additional reasons (not quoted in the proposed finding) why 1-800 Contacts would be concerned about Lens.com and its alternative website, JustLenses.com. (CX 78 at 1 (stating that "JustLenses.com and Lens.com [are] both operated by the same parent company . . . . You can see below JustLenses' ad is being triggered by one of our most productive TM keywords and they are even using our name in the first line of their ad"); CX 78 at 2 (ad by JustLenses.com with the header "1800 Contacts: Buy Online")).

1003. Mr. Dansie recommended that 1-800 Contacts' counsel "prioritize the list" of companies to contact regarding their advertising on 1-800 Contacts' brand name "with Lens.com/JustLenses.com at the top." (CX0078 at 001).

Response to Finding No. 1003:

Respondent has no specific response.

1004. On April 16, 2007, Bryan Pratt emailed Anthony DeGidio, an attorney for Lens.com, explaining that 1-800 Contacts had recently contacted him and informed him that "Lens.com is again showing up as a sponsored advertisement on Google and Yahoo triggered by the search terms 1 800 contacts, 1800 contact, 800 contacts, 800.contacts, 1-

800contacts.com, lens express, and lensexpress." (CX0591 at 002). Mr. Pratt attached screen shots purporting to show the sponsored advertisements. Mr. Pratt alluded also to Lens.com's "prompt action . . . taken in the past in resolving these situations" and expressed "hope for a continued amicable relationship." (CX0591 at 002).

Response to Finding No. 1004:

Respondent has no specific response, other than to note that the cited exhibit (CX 591) does not include the advertisements that Mr. Pratt had attached.

1005. Mr. DeGidio emailed Mr. Pratt on April 16, 2007, writing that he would speak with Lens.com and see if they could "determine why these sponsored listings are appearing." He further wrote that Lens.com "has a trademark for LENS and I assume you do not expect him to take any steps to stop his links from coming up when the word lens is a search term." (CX1254 at 001).

Response to Finding No. 1005:

Respondent has no specific response.

1006. Mr. Pratt emailed Mr. DeGidio again on April 16, 2007, thanking him for his "prompt response." He wrote that 1-800 Contacts was "aware of [Lens.com's] trademark application for LENS" and that 1-800 Contacts had "taken measures to have affiliates remove sponsored advertisements associated with lens.com" when notified in the past. (CX1254 at 001).

Response to Finding No. 1006:

Respondent has no specific response.

1007. Lens.com took no action to remedy the conduct alleged in Mr. Pratt's April 16, 2007 email. (CX1125 at 009). Instead, Lens.com's so-called "infringement . . . actually increased." (CX1125 at 009).

Response to Finding No. 1007:

Respondent has no specific response.

1008. On August 18, 2007, 1-800 Contacts filed a complaint against Lens.com in the U.S. District Court for the District of Utah alleging trademark infringement and breach of contract. (CX1125).

Response to Finding No. 1008:

Complaint Counsel's Proposed Finding No. 1008 is incomplete. 1-800 Contacts also brought claims for federal unfair competition, common law unfair competition, misappropriation, violation of the Utah Unfair Practices Act (Utah Code Ann. § 13-5-1 *et seq.*), and unjust enrichment. (CX 1125 at 12-14).

1009. In 1-800 Contacts' infringement claim against Lens.com was based on the appearance of Lens.com's advertisements on search engine results pages in response to searches for the "1-800 Contacts" trademark and related terms. (CX1125 at 005-013).

Response to Finding No. 1009:

The proposed finding is incomplete. The trademark infringement claim against Lens.com was "based" on the "unauthorized appropriation and use by Lens.com in commerce of the 1-800 CONTACTS Marks" to trigger advertising on search engine results pages in such a manner that "is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of Lens.com's services and commercial activities." (CX 1125 at 12).

1010. 1-800 Contacts' breach of contact claim against Lens.com was based on the agreement between 1-800 Contacts and Lens.com to refrain from purchasing each other's names as search advertising keywords. (CX1125 at 008-010).

Response to Finding No. 1010:

Complaint Counsel's Proposed Finding No. 1010 is inaccurate, incomplete, and misleading. The breach of contract claim was based on the *belief at the time* of Mr. Pratt, outside counsel for 1-800 Contacts, that an agreement had been reached between himself and counsel for Lens.com. (Pratt, Tr. 2575, 2578-79; CX 1125). In fact, this was a one-sided belief; there was no meeting of the minds and no agreement had ever existed, as the court held. (Pratt, Tr. 2576); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1188-89 (D. Utah 2010).

1011. On December 14, 2010, the court issued an opinion granting summary judgment in favor of Lens.com on 1-800 Contacts' trademark infringement and breach of contract claims. (*1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010)).

Response to Finding No. 1011:

Respondent has no specific response other than to note that the District Court subsequently held that 1-800 Contacts' claims "involve[d] an unsettled area of law given the emerging and changing nature of Internet competition" and that "1-800 Contacts had a legitimate interest in clarifying its rights." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 2012 WL 113812 at *3 (D. Utah Jan. 13, 2012)..

1012. 1-800 Contacts appealed to the Tenth Circuit Court of Appeals. (*1-800 Contacts v. Lens.com*, 722 F.3d 1229 (10th Cir. 2013)).

Response to Finding No. 1012:

Respondent has no specific response.

1013. On July 16, 2013, the Tenth Circuit Court of Appeals upheld the district court's decision granting Lens.com's summary judgment motion except with respect to issues regarding Lens.com's potential secondary liability for its affiliates advertisements that used 1-800 trademark terms in the text of advertisements. (*1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013)).

Response to Finding No. 1013:

Respondent has no specific response.

1014. After the Tenth Circuit opinion in *1-800 Contacts v. Lens.com*, Lens.com refrained from bidding on 1-800 Contacts' trademarks. (CX9004 (Coon, IHT at 183)).

Response to Finding No. 1014:

The proposed finding is incomplete and misleading; it should be revised to state that Lens.com "continued to refrain from bidding on 1-800 Contacts' trademarks." Lens.com's CEO testified that Lens.com chose, unilaterally, not to use 1-800 Contacts' trademarks in paid search

advertising. (CX 1673 (Samourkachian deposition in *1-800 Contacts v. Lens.com*, at 171 ("we're not in the business of purchasing our competitor's trademarks"), 175 ("our intent is not to be bidding on [1-800's] trademark or show up on their trademark"), 182 ("Traffic that is coming from these [trademark] terms are not going to convert to us, because they're looking for your client, not us.")).

1015. Lens.com and 1-800 Contacts have an unwritten agreement not to use one another's trademarks for search advertising and to take steps to prevent the display of their ads in response to searches for the other's trademarks, similar to 1-800 Contacts' agreements with Coastal, Vision Direct, and others. (CX9035 (Coon, Dep. at 135 ("I thought there was an agreement with lens—with Lens.com, and I—I would assume there would have been at least a couple of others")); CX9004 (Coon, IHT at 183 ("I don't know when we entered into the agreement with Lens.com")); CX9001 (Bethers, IHT at 231 ("I don't advertise on Lens.com's trademark. They don't advertise on ours. We dropped the litigation between our two parties with no prejudice. But neither party advertises. We know that. They know that. Now we understand it, we know how to work together. So I've got limited concern about Lens.com.")); CX9001 (Bethers, IHT at 305 ("So what we have right now [with Lens.com] is what I would describe as a détente . . . if they respect our trademark, we respect theirs.")); Bethers, Tr. 3656-57 (referring to "the settlement agreement" 1-800 Contacts had with Lens.com)).

Response to Finding No. 1015:

The proposed finding is misleading and is inconsistent with the overwhelming weight of the evidence. The proposed finding also violates the Court's Order on Post-Trial Briefs by relying on trial testimony (Bethers, Tr. 3656-57) that the Court held would be disregarded. (See Order on Post-Trial Briefs at 2; Bethers, Tr. 3656-57 (Judge Chappell: "All right. Here's what we're going to do. Going back to this objection three objections ago, the first objection some minutes ago, I'm going to disregard all of those answers")).

Moreover, as Mr. Bethers testified, "[t]here is no agreement and has not been an agreement with Lens.com" with respect to paid advertising. (Bethers, Tr. 3693-94). The CEO of Lens.com, Mr. Samourkachian, also explained that Lens.com does not bid on competitors' trademarks, including 1-800 Contacts' trademarks, as a business policy and not because of any

agreement. (CX 1673 (Samourkachian deposition in *1-800 Contacts v. Lens.com*, at 171, 182 ("Traffic that is coming from these [trademark] terms are not going to convert to us, because they're looking for your client, not us.")). Mr. Pratt, the attorney that drafted the complaint against Lens.com, including the breach of contract claim, has repeatedly testified that there was and is no agreement between Lens.com and 1-800 Contacts and that he had previously been mistaken about a purported agreement between the parties. (Pratt, Tr. 2520, 2576). Finally, Judge Waddoups specifically found that no agreement regarding paid search advertising existed between Lens.com and 1-800 Contacts. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1188-89 (D. Utah 2010).

The only evidence that Complaint Counsel cite for the proposition that an unwritten agreement existed between Lens.com and 1-800 Contacts is testimony by Jonathan Coon that he "thought" there was an agreement, although he was unaware of when it may have been reached. (CX 9035 (Coon, Dep. at 130); CX 9004 (Coon, IHT at 183)). Mr. Coon was not in charge of trademark litigation and has no personal knowledge of the litigations and the settlement agreements. (Coon, Tr. 2796); CX 9035 (Coon, Dep. at 135, 139)).

6. Memorial Eye Litigation and Settlement

1016. 1-800 Contacts contacted Memorial Eye numerous times regarding advertisements that Memorial Eye was displaying in response to search queries relating to 1-800 Contacts, beginning 9 to 10 months after Memorial Eye first launched its online business. (Holbrook, Tr. at 1914).

Response to Finding No. 1016:

Respondent has no specific response.

1017. On September 13, 2005, David Zeidner, in-house counsel for 1-800 Contacts, sent a cease and desist letter to Memorial Eye, alleging trademark infringement (CX1751 at 001; Holbrook, Tr. at 1914-15). Mr. Zeidner stated that Memorial Eye infringed on 1-800 Contacts' trademarks by purchasing sponsored advertisements that were "triggered upon

a search for '1800 CONTACTS.'" (CX1751 at 001). Mr. Zeidner enclosed a screenshot of "the infringing action," an AOL search engine results page which allegedly appeared in response to the query "1800contacts.com" and showed an ad for ShipMyContacts.com. (CX1751 at 001, 003; Holbrook, Tr. at 1917). Mr. Zeidner demanded that Memorial Eye "immediately remov[e] **ALL** sponsored advertisements" purchased on any search engine "which are triggered by the 1800 CONTACTS trademark." (CX1751 at 001).

Response to Finding No. 1017:

Respondent has no specific response.

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

Response to Finding No. 1018:

Complaint Counsel's Proposed Finding No. 1018 is incomplete and misleading.

[redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted]

[redacted] (Holbrook, Tr. 1999).

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

Response to Finding No. 1019:

Complaint Counsel's Proposed Finding No. 1019 is incomplete and misleading.

[redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

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

Response to Finding No. 1020:

Respondent has no specific response.

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

Response to Finding No. 1021:

Complaint Counsel's Proposed Finding No. 1021 is incomplete and misleading.

[redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775;

RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

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

Response to Finding No. 1022:

Respondent has no specific response.

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

Response to Finding No. 1023:

Respondent has no specific response.

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

Response to Finding No. 1024:

Complaint Counsel's Proposed Finding No. 1024 is incomplete and misleading.

[redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted]

[redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

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

Response to Finding No. 1025:

Respondent has no specific response.

1026. On February 27, 2008, Mr. Pratt sent a "near identical letter" to Memorial Eye claiming that Memorial Eye was "once more engaged in a targeted scheme to infringe upon the 1800 CONTACTS and 1800CONTACTS trademarks," specifically by purchasing "sponsored advertisements at Google, and possibly other search engines, for at least one of the 1800 CONTACTS or 1800CONTACTS trademarks, or a confusingly similar variation thereof, to trigger a link to . . . www.shipmycontacts.com." (RX0072 at 008; CX1318 at 001).

Response to Finding No. 1026:

Complaint Counsel's Proposed Finding No. 1026 is incomplete and misleading. The referenced letter was sent "after another noticeable increase in [Memorial Eye's] infringing

acts." (RX 72 at 8). [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

1027. Through Mr. Pratt's February 27, 2008 letter, 1-800 Contacts demanded that Memorial Eye "immediately remove **ALL** sponsored advertisements . . . purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark or a confusingly similar variation thereof." (CX1318 at 002 (emphasis in original)). It further demanded that Memorial Eye incorporate a list of negative keywords (enclosed with the letter) "in any continued sponsored advertisement campaigns." (CX1318 at 002).

Response to Finding No. 1027:

Complaint Counsel's Proposed Finding No. 1027 is incomplete and misleading. The referenced letter was sent "after another noticeable increase in [Memorial Eye's] infringing

acts." (RX 72 at 8). [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

1028. On March 17, 2008, Randall Luckey, counsel for Memorial Eye, wrote to Mr. Pratt in response to the letter dated February 27, 2008. (CX1755). Mr. Luckey stated that "Memorial Eye has never used . . . 1800 Contacts, Inc.'s trademarks in its sponsored advertisements, or even as a search phrase trigger." (CX1755 at 001).

Response to Finding No. 1028:

Complaint Counsel's Proposed Finding No. 1028 is incomplete and misleading.

[redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted]

[redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999).

1029. On December 23, 2008, 1-800 Contacts sued Memorial Eye for trademark infringement. (RX0072; Holbrook, Tr. 1872). 1-800 Contacts alleged that Memorial Eye "had purchased sponsored advertisements from Google, and other search engines, for [1-800 Contacts' trademarks] to trigger advertising and/or a link to" Memorial Eye's websites. (RX0072 at 005).

Response to Finding No. 1029:

Respondent has no specific response.

1030. Litigation between 1-800 Contacts and Memorial Eye continued until late 2013. (CX0326 (Nov. 26, 2013 Memorial Eye settlement agreement)).

Response to Finding No. 1030:

Complaint Counsel's Proposed Finding No. 1030 is incomplete and misleading. In December 2010, Memorial Eye and 1-800 Contacts agreed to stay the litigation between them.

(Holbrook, Tr. 2021; RX 1793). The stay lasted for a period of approximately three years. (Holbrook, Tr. 2028).

1031. The lawsuit expended a great deal of financial and human resources, and removed focus on running Memorial Eye's business. (Holbrook Tr. at 1872).

Response to Finding No. 1031:

Complaint Counsel's Proposed Finding No. 1031 is incomplete, misleading, and not supported by the record evidence. There is no evidence that the litigation between 1-800 Contacts and Memorial Eye consumed an atypical amount of Memorial Eye's resources, or that the litigation imposed any more burden on Memorial Eye than is typical in a trademark infringement lawsuit. Indeed, in December 2010, Memorial Eye and 1-800 Contacts agreed to stay the litigation between them. (Holbrook, Tr. 2021; RX 1793). The stay lasted for a period of approximately three years. (Holbrook, Tr. 2028). During that period, the litigation was essentially paused, and the costs imposed on Memorial Eye were insignificant. (Holbrook, Tr. 2028).

1032. Memorial Eye knew that Lens.com had spent more than $2,000,000 already on its case, and the court had not put to rest the issues related to ads appearing as a result of broad match. (Holbrook, Tr. at 1874-76).

Response to Finding No. 1032:

Complaint Counsel's Proposed Finding No. 1032 is incomplete. Eric Holbrook testified that one of the reasons that Memorial Eye decided to settle the trademark infringement litigation with 1-800 Contacts was because the appellate courts had not resolved the question of whether "broad match[ing]" constituted trademark infringement. (Holbrook, Tr. 1875). That unresolved question "was the most important thing" to Memorial Eye; "it was a big deal." (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Mr. Holbrook testified that unresolved question

created "a lot of legal uncertainty" and "financial risk" for Memorial Eye. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875).

1033. Memorial Eye knew that by entering the negative keywords, it would no longer be able to get valuable conversions. (Holbrook ,Tr. at 1876-77).

Response to Finding No. 1033:

Complaint Counsel's Proposed Finding No. 1033 is incomplete and misleading.

[redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998). He also acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

The only way to avoid this confusion was for Memorial Eye to implement 1-800 Contacts' trademarks as negative keywords. Indeed, Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 1999). Mr. Holbrook also testified that, one of the primary

reasons that Memorial Eye settled the litigation was due to the "legal uncertainty" and "financial risk" it faced in the litigation. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Thus, he testified that one of the reasons that Memorial Eye decided to settle the trademark infringement litigation with 1-800 Contacts was because the appellate courts had not resolved the question of whether "broad match[ing]" constituted trademark infringement. (Holbrook, Tr. 1875). That unresolved question "was the most important thing" to Memorial Eye; "it was a big deal." (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Mr. Holbrook testified that that unresolved question created "a lot of legal uncertainty" and "financial risk" for Memorial Eye. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875).

1034. Memorial Eye began thinking about shutting down its online business in the summer of 2013. (Holbrook, Tr. at 1879-80).

Response to Finding No. 1034:

Complaint Counsel's Proposed Finding No. 1034 is inaccurate, incomplete and not supported by the record evidence. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)).

1035. Memorial Eye laid off a customer service representative in the summer of 2013 in anticipation of shutting down the online business. (Holbrook, Tr. at 1879-80).

Response to Finding No. 1035:

Complaint Counsel's Proposed Finding No. 1035 is inaccurate, incomplete and not supported by the record evidence. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176);

Holbrook, Tr. 2034). Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). Memorial Eye laid off one of its employees in "early 2012." (Holbrook, Tr. 1879).

1036. 1-800 Contacts and Memorial Eye entered into a settlement agreement effective November 26, 2013 ("Memorial Eye Agreement"). (CX0326; Holbrook, Tr. at 1879).

Response to Finding No. 1036:

Respondent has no specific response.

1037. Memorial Eye shut down its ShipMyContacts and IWantContacts websites on December 7, 2013, after which it did not accept any new orders. (Holbrook, Tr. at 1873-74).

Response to Finding No. 1037:

Complaint Counsel's Proposed Finding No. 1037 is incomplete and misleading. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)).

1038. Memorial Eye shut down the online business because it was concerned about the financial risk involved with continuing the 1-800 Contacts lawsuit. (Holbrook, Tr. at 1874-76).

Response to Finding No. 1038:

Complaint Counsel's Proposed Finding No. 1038 is incomplete. Eric Holbrook testified that one of the reasons that Memorial Eye decided to settle the trademark infringement litigation with 1-800 Contacts was because the appellate courts had not resolved the question of whether "broad match[ing]" constituted trademark infringement. (Holbrook, Tr. 1875). That unresolved question "was the most important thing" to Memorial Eye; "it was a big deal." (CX 9024

(Holbrook, Dep. at 63); Holbrook, Tr. 1875). Mr. Holbrook testified that Memorial Eye was "disappointed" that the appellate court in the Lens.com case did not resolve whether broad matching constituted trademark infringement. (CX 9024 (Holbrook, Dep. at 159)). Mr. Holbrook testified that unresolved question created "a lot of legal uncertainty" and "financial risk" for Memorial Eye. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875).

1039. Pursuant to the Memorial Eye Agreement, 1-800 Contacts and Memorial Eye agreed not to purchase or use any of the other party's trademarks or websites/URLs (listed in an exhibit to the Memorial Eye Agreement) as triggering keywords in any internet search engine advertising campaign." (CX0326 at 003).

Response to Finding No. 1039:

Complaint Counsel's Proposed Finding No. 1039 is incomplete and misleading. The settlement agreement between Memorial Eye and 1-800 Contacts expressly allows Memorial Eye to use generic keywords to advertise its products and services. (CX 326 at 3). Thus, the agreement states that it shall not be construed "to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyeglasses, eyewear, frames or other, similar generic terms as long as the appropriate negative keywords are implemented." (CX 326 at 3). The agreement only requires the parties to refrain from purchasing the trademarked keywords listed in Exhibit 2 to the agreement. (CX 326 at 3, 10).

1040. The Memorial Eye Agreement also required each party to adopt the other party's trademarks and websites as negative keywords. (CX0326 at 3).

The Memorial Eye Agreement required Memorial Eye to use broad match for the specified negative keyword implementation. (Holbrook, Tr. at 2053).

Response to Finding No. 1040:

Complaint Counsel's Proposed Finding No. 1040 is inaccurate, incomplete, and not supported by record evidence. The settlement agreement between Memorial Eye and 1-800

Contacts does not require Memorial Eye to implement negative keywords using a specific match type. (CX 326). Indeed, the agreement does not even mention match types. (CX 326). In their correspondence with the settling parties, 1-800 Contacts' personnel consistently communicated that the settling parties could implement negative keywords in the match type of their choice, including exact match. (CX 9040 (Miller, Dep. at 66); CX 9031 (Schmidt, Dep. at 116); CX 9020 (Craven, Dep. at 117-121); Craven, Tr. 635-36 ("when any questions arose, from what I remember, the suggestion was exact match should be fine"); CX 9021 (Pratt, Dep. at 109); Bethers, Tr. 3699; CX 1786; CX 709; CX 234 (exact match would be sufficient)). No party testified that they were ever told by 1-800 Contacts to implement negative keywords in any particular match type. (Pratt, Tr. 2560-61; Hamilton, Tr. 475-76; CX 9039 (Clarkson, Dep. at 147); [redacted] Thirteen of the fourteen challenged settlement agreements do not specify a match type in which the settling parties must implement negative keywords. The one challenged agreement that does specify a match type, the Luxottica Contact Lens Sourcing and Services Agreement, requires only exact match negative keywords — not broad match. (CX 331, § 17.10).

Moreover, the settlement agreement between Memorial Eye and 1-800 Contacts expressly allows Memorial Eye to use generic keywords to advertise its products and services. (CX 326 at 3). Thus, the agreement states that it shall not be construed "to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyeglasses, eyewear, frames or other, similar generic terms as long as the appropriate negative keywords are implemented." (CX 326 at 3). The agreement only requires the parties to refrain from purchasing the trademarked keywords listed in Exhibit 2 to the agreement. (CX 326 at 3, 10).

1041. The Memorial Eye Agreement lists over forty trademark terms and websites on which the parties are prohibited from bidding as "triggering keywords" and are required to implement as "broad match" negative keywords. (CX0326 at 010).

Response to Finding No. 1041:

Complaint Counsel's Proposed Finding No. 1041 misstates the record, is inaccurate, incomplete, and not supported by record evidence. Although Complaint Counsel's proposed finding puts quotations marks around "broad match," that phrase does not appear *anywhere* in the settlement agreement between Memorial Eye and 1-800 Contacts. (CX 326). The settlement agreement between Memorial Eye and 1-800 Contacts does not require Memorial Eye to implement negative keywords using a specific match type. (CX 326). In their correspondence with the settling parties, 1-800 Contacts' personnel consistently communicated that the settling parties could implement negative keywords in the match type of their choice, including exact match. (CX 9040 (Miller, Dep. at 66); CX 9031 (Schmidt, Dep. at 116); CX 9020 (Craven, Dep. at 117-121); Craven, Tr. 635-36 ("when any questions arose, from what I remember, the suggestion was exact match should be fine"); CX 9021 (Pratt, Dep. at 109); Bethers, Tr. 3699; CX 1786; CX 709; CX 234 (exact match would be sufficient)). No party testified that they were ever told by 1-800 Contacts to implement negative keywords in any particular match type. (Pratt, Tr. 2560-61; Hamilton, Tr. 475-76; CX 9039 (Clarkson, Dep. at 147); [redacted]. Thirteen of the fourteen challenged settlement agreements do not specify a match type in which the settling parties must implement negative keywords. The one challenged agreement that does specify a match type, the Luxottica Contact Lens Sourcing and Services Agreement, requires only exact match negative keywords — not broad match. (CX 331, § 17.10).

1042. The Memorial Eye agreement never expires. (CX0326).

Response to Finding No. 1042:

Respondent has no specific response.

1043. Without the settlement agreement with 1-800 Contacts, Memorial Eye would not have implemented negative keywords against 1-800 Contacts' trademarks, but would have continued to seek to display advertisements in response to queries related to 1-800 Contacts. (Holbrook, Tr. at 1992-93).

Response to Finding No. 1043:

Respondent has no specific response.

1044. But for the settlement agreement with 1-800 Contacts, Memorial Eye would still be operating online today. (Holbrook, Tr. at 1994-95).

Response to Finding No. 1044:

Complaint Counsel's Proposed Finding No. 1044 is inaccurate, incomplete, and not supported by the weight of the record evidence. Mr. Holbrook testified that Memorial Eye decided to shut down its online business "sometime in early 2012." (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). But Memorial Eye did not even execute the settlement agreement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. 1879). In other words, Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177)). Thus, it is neither possible nor possible that the effects of the settlement agreement caused Memorial Eye to shutter its online business, which Memorial Eye had already decided to close more than a year and a half before it signed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176-177); CX 326).

Moreover, Memorial Eye's decision to enter the settlement agreement with 1-800 Contacts was motivated by its assessment of the "legal uncertainty" and "financial risks" of continuing the litigation. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Eric

Holbrook testified that one of the reasons that Memorial Eye decided to settle the trademark infringement litigation with 1-800 Contacts was because the appellate courts had not resolved the question of whether "broad match[ing]" constituted trademark infringement. (Holbrook, Tr. 1875). That unresolved question "was the most important thing" to Memorial Eye; "it was a big deal." (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875). Mr. Holbrook testified that unresolved question created "a lot of legal uncertainty" and "financial risk" for Memorial Eye. (CX 9024 (Holbrook, Dep. at 63); Holbrook, Tr. 1875).

7. EZ Contacts

1045. On December 6, 2007, 1-800 Contacts sued Premier Holdings, Inc. (which operated the website www.ezcontactsusa.com), alleging trademark infringement. (CX1617). The complaint alleged that EZ Contacts was purchasing "keywords consisting of at least one of [1-800 Contacts' trademarks,] such that ads for EZ Contacts will be generated when consumers specifically search for . . . 1-800 Contacts." (CX1617 at 002).

Response to Finding No. 1045:

The proposed finding is incomplete and misleading in stating or implying that only a single basis for liability was asserted in the cited complaint (CX 1617). 1-800 Contacts sued EZContactsUSA for, *inter alia*, trademark infringement, copyright infringement, federal unfair competition, common law unfair competition, misappropriation, state unfair competition, and unjust enrichment. (CX 1617 at 14-17). The complaint also addressed more than just the use of 1-800 Contacts's trademarks as keywords, for EZContactsUSA had also made unauthorized use of 1-800 Contacts' intellectual property on its website, and in its advertising materials. (Pratt, Tr. 2538; CX 1617 at 8-11 (¶¶ 26-29)).

The cited complaint also alleged that "consumers have purchased contact lenses from EZ Contacts USA based on its misrepresentations and false statements," and that the "wholesale copying of portions of [1-800 Contacts'] website, including [1-800 Contacts'] Marks, reflects

Defendants' intent to trade on the goodwill inherent in such marks and on [1-800 Contacts'] reputation, to associate the EZ Contacts USA entity with [1-800 Contacts], and to pass off its goods as emanating from [1-800 Contacts]." (CX 1617 at 8-12). The cited complaint further alleged that EZContactsUSA's actions "reinforce the association between the EZ Contacts USA entity and Plaintiff through their adoption and use of Plaintiff's 1800 CONTACTS trademark through their purchase of keywords consisting of such mark, which are then used to generate advertising for Defendants' EZ Contacts USA entity on the Internet." (CX 1617 at 11).

1046. 1-800 Contacts and EZ Contacts entered into a settlement agreement effective May 12, 2008 ("EZ Contacts Agreement"). (CX0313).

Response to Finding No. 1046:

Respondent has no specific response.

1047. Pursuant to the EZ Contacts Agreement, EZ Contacts agreed not to use, as a keyword or otherwise, 1-800 Contacts' trademarks. (CX0313 at 003). 1-800 Contacts agreed not to use, as a keyword or otherwise, EZ Contacts' trademarks. (CX0313 at 003).

Response to Finding No. 1047:

Respondent has no specific response.

1048. The EZ Contacts Agreement prohibited the parties from "causing a Party's website, Internet link, or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs" (as listed in exhibits to the EZ Contacts Agreement) (CX0313 at 003).

Response to Finding No. 1048:

The proposed finding is incomplete and misleading. The EZContactsUSA settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, "(i) the use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and

similar non-Infringing uses; and (ii) uses made by third parties not contracted or otherwise affiliated with a Party which result in the third party listing together the Party's and the other Party's trademarks; and (iii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contact,' 'contact lens,' 'buy,' 'lenses,' and 'lens.'" (CX 313 at 4-5).

1049. The EZ Contacts Agreement prohibited the parties from "causing a Party's brand name, or Internet link to the Party's Restricted Websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademark, or URLs" (which were listed in exhibits to the EZ Contacts Agreement). (CX0313 at 003-004).

Response to Finding No. 1049:

The proposed finding is incomplete and misleading. The EZContactsUSA settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, "(i) the use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; and (ii) uses made by third parties not contracted or otherwise affiliated with a Party which result in the third party listing together the Party's and the other Party's trademarks; and (iii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contact,' 'contact lens,' 'buy,' 'lenses,' and 'lens.'" (CX 313 at 4-5).

1050. The EZ Contacts Agreement requires the Parties to implement certain negative keywords listed in an exhibit to the agreement. (CX0313 at 005).

Response to Finding No. 1050:

The proposed finding is incomplete, misleading, and inaccurate. The settlement agreement requires that the parties use the prohibited key words listed in Exhibit 3 as negative

keywords *when that party makes a purchase of keywords through an internet search provider*. (CX 313 at 5). Further, the parties are only required to implement negative keywords if the internet search provider utilizes negative keywords in its search parameters. (CX 313 at 5).

1051. Exhibits to the EZ Contacts Agreement list seventy brand names, trademarks, and websites of 1-800 Contacts and EZ Contacts, on which the parties are prohibited from bidding and are required to implement as negative keywords. (CX0313 at 027-028).

Response to Finding No. 1051:

The proposed finding is ambiguous, misleading, and inaccurate. The referenced agreement lists thirty-five (35) keywords of 1-800 Contacts and fifteen (15) keywords of EZ Contacts USA in Exhibit 3. (CX 313 at 27). Each term is a trademark or confusingly similar variation thereof belonging to that party. (CX 313 at 5). These are the only terms that the other party must implement as negative keywords if they purchase keywords in an internet search advertising campaign. (CX 313 at 5-6). The agreement then lists fourteen (14) Restricted Websites of 1-800 Contacts, Inc., and five (5) restricted websites of EZ Contacts USA in Exhibit 4. (CX 313 at 28). This terms listed on this exhibit are not made subject to the negative keyword provision of the settlement, and in any event, are duplicative of the websites listed as trademarked search terms on Exhibit 3. (CX 313 at 5, 027-28).

1052. The EZ Contacts Agreement never expires. (CX0313).

Response to Finding No. 1052:

Respondent has no specific response.

8. 2009 Vision Direct Agreement

1053. From June 2004 until September 2007, both Vision Direct and 1-800 Contacts enforced the 2004 Vision Direct agreement by notifying the other directly when ads appeared or by directing their attorneys to send letters alleging breach of the agreement. (*Infra* VI.C.3).

Response to Finding No. 1053:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual proposed findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1054. Between June 2004 and September 2007, Vision Direct and 1-800 Contacts had an "established practice between the parties" of using negative keywords to ensure no ads would show up on branded queries. (CX0843 at 012; CX0134 at 001; CX0137 at 002 ("As illustrated by over 30 email communications, Vision Direct and 1-800 Contacts, Inc. have both interpreted the Settlement Agreement as requiring each party to implement negative keywords"); CX1062 at 008 (1-800 Contacts alleged in its 2007 complaint against Vision Direct that "until sometime just before July 13, 2007, both 1-800 CONTACTS and [Vision Direct] clearly understood that the Settlement Agreement required use of negative keywords); *see infra* VI.C.3).

Response to Finding No. 1054:

Respondent incorporates herein its responses to any and all proposed findings to which Complaint Counsel purport to cross-reference from Section VI.C.3. Respondent has no further specific response.

1055. Until late 2007, Vision Direct and 1-800 Contacts both interpreted the 2004 agreement "as requiring each party to implement negative keywords" and both parties were "very proactive in resolving matters and immediately stopping offending practices." (CX0137 at 002).

Response to Finding No. 1055:

Respondent has no specific response.

1056. In July and August 2007, Vision Direct ads appeared on occasion in response to searches for 1-800 Contacts' trademarks. (*Infra* ¶¶ 1234-1236;CX0133; CX0627).

Response to Finding No. 1056:

Respondent incorporates herein any and all responses to proposed finding nos. 1234-1236. Respondent has no further specific response.

1057. In late October 2007, Vision Direct represented to 1-800 Contacts that Vision Direct did not believe that the 2004 Vision Direct Agreement required Vision Direct to use negative keywords to prevent its ads from appearing on searches for 1-800 Contacts' trademarks. (CX0136; CX1062 at 008 (complaint alleged Vision Direct "recently informed 1-800 CONTACTS that they were no longer going to use negative keywords to prevent the appearance of Vision Direct advertisements")}).

Response to Finding No. 1057:

Respondent has no specific response other than to note that CX 136, cited in the proposed finding, was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008).

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

Response to Finding No. 1058:

The proposed finding is incomplete and misleading. The cited exhibit (CX 140) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008). In addition, the Settlement Agreement that Vision Direct and 1-800 Contacts entered into in 2009, which requires the use of negative keywords, includes a clear statement by Vision Direct that "it has executed this Settlement Agreement with the consent and on the advice of [its] independent legal counsel." (CX 314 at 5)

1059. On December 28, 2007, 1-800 Contacts sued Vision Direct for breach of contract. 1-800 Contacts alleged that Vision Direct was "violating the Settlement Agreement by purchasing advertisements without utilizing negative keywords to prevent the appearance

of Vision Direct advertisements when users search for 1-800 CONTACTS' brand name." (CX0162 at 008).

Response to Finding No. 1059:

The proposed finding misstates the cited exhibit (CX 162), which is a default judgment involving LensWorld, not Vision Direct.

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

Response to Finding No. 1060:

Respondent has no specific response.

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

Response to Finding No. 1061:

The proposed finding is inaccurate, misleading, and not supported by the cited exhibit. At no time did Mr. Dansie instruct Vision Direct to use phrase or broad match negative keywords, and "phrase match" and "broad match" do not appear in the text of the cited email. (CX 134). Indeed, at the time of the cited email correspondence, there may not have been any such function as a "phrase match" or "broad match" negative keyword made available by Google. After Google created the functionality of match type for negative keywords, 1-800

Contacts personnel took the consistent position that other parties could implement negative keywords in the match type of their choice, including exact match. (CX 9040 (Miller, Dep. at 66); CX 9031 (Schmidt, Dep. at 116); CX 9020 (Craven, Dep. at 117-121); Craven, Tr. 635-36 ("when any question arose, from what I remember, the suggestion was exact match should be fine"); CX 9021 (Pratt, Dep. at 109); Bethers, Tr. 3699; CX 1786; CX 709; CX 234 (exact match would be sufficient)). No party has testified that they were ever told by 1-800 Contacts to implement negative keywords in any particular match type. (Pratt, Tr. 2560-61; Hamilton, Tr. 475-76; CX 9039 (Clarkson, Dep. at 147); [redacted].

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

Response to Finding No. 1062:

Respondent has no specific response.

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

Response to Finding No. 1063:

Respondent has no specific response.

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

1 800 contacts
1800 contacts
1-800 contacts
1800.contacts
1800contacts

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

Response to Finding No. 1064:

Respondent has no specific response.

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

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

Response to Finding No. 1065:

Respondent has no specific response.

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

Response to Finding No. 1066:

Respondent has no specific response.

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

Response to Finding No. 1067:

Respondent has no specific response.

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

Response to Finding No. 1068:

Respondent has no specific response.

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

Response to Finding No. 1069:

Respondent has no specific response.

1070. On October 22, 2007, counsel for 1-800 Contacts represented to Vision Direct that the 2004 Vision Direct Agreement prohibited certain advertising regardless of whether Vision Direct used "a trademark to achieve" the result prohibited by the agreement. (CX0135 at 002 ("there is no requirement" in the 2004 Vision Direct Agreement "that drugstore.com . . . specifically use a trademark to achieve the prohibited result.")).

Response to Finding No. 1070:

The proposed finding is duplicative of proposed finding no. 916 and (like no. 916) is incomplete, inaccurate, and misleading. Complaint Counsel mischaracterize the quoted remarks by Mr. Pratt, who did not reference the entire agreement in the quoted sentence but instead wrote: "Please note that there is no requirement *in these prohibited acts* that state that drugstore.com will specifically use a trademark to achieve the prohibited result." (CX 135 at 2) (emphasis added). It does not follow that Vision Direct does not need to cause the appearance of their advertisements in response to a search for a trademark in order to violate the settlement agreement. As Mr. Pratt makes clear in the same email chain, the position taken by 1-800

Contacts was that Vision Direct was "causing" the appearance of its results by both selecting generic terms such as "contacts" (in phrase or broad match such that the search engine may trigger ads in response to the trademark term) *and* ceasing to incorporate negative keywords. (CX 135 at 1).

1071. 1-800 Contacts' position was "that by ceasing to incorporate negative keywords, as ha[d] been the established practice of the parties under the agreement, Vision Direct [was] 'causing'" its ads to appear in violation of the agreement. (CX0135 at 001).

Response to Finding No. 1071:

Respondent has no specific response.

1072. On October 25, 2007, counsel for Vision Direct wrote to 1-800 Contacts stating that the "[2004] agreement obligates neither party to implement negative keywords" and that Vision Direct had "implemented negative keywords solely to enable the parties to focus on reaching an amicable resolution." (CX0136 at 002).

Response to Finding No. 1072:

Respondent has no specific response other than to note that the cited exhibit (CX 136) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008).

1073. On November 1, 2007, counsel for 1-800 Contacts informed Vision Direct that 1-800 Contacts his law firm currently represented 1-800 Contacts "in several litigation matters related to 1-800 Contacts, Inc.'s valuable trademarks." (CX0137 at 001-002). Counsel for 1-800 Contacts asked Vision Direct to reconsider its request that Vision Direct "continue to use negative keywords and other reasonable measures to avoid the Prohibited Acts of the [2004] Settlement Agreement," and reiterated that the parties had previously both "interpreted the [2004] Settlement Agreement as requiring each party to implement negative keywords." (CX0137 at 002).

Response to Finding No. 1073:

Respondent has no specific response.

1074. On November 5, 2007, counsel for Vision Direct stated its position that the 2004 Vision Direct agreement did not require the use of negative keywords and that it regarded 1-800 Contacts' request to implement negative keywords as a "possible violation of the Sherman Act." (CX0138 at 001).

Response to Finding No. 1074:

The proposed finding is incomplete and misleading. The cited exhibit (CX 138) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008). In addition, the Settlement Agreement that Vision Direct and 1-800 Contacts entered into in 2009, which requires the use of negative keywords, includes a clear statement by Vision Direct that "it has executed this Settlement Agreement with the consent and on the advice of [its] independent legal counsel." (CX 314 at 5)

1075. In her letter dated November 5, 2007, Vision Direct's counsel suggested that both parties "discuss the possible competition law issue more thoughtfully." (CX0138 at -002). She wrote: "We urge you to ask your competition law attorney to contact Scott Sher at Wilson Sonsini . . . to discuss the facts at hand and what the limits might be to what 1-800 Contacts can require, and [Vision Direct] can accept, under the Sherman Act and other relevant law." (CX0138 at 002).

Response to Finding No. 1075:

The proposed finding is incomplete and misleading. The cited exhibit (CX 138) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008). In addition, the Settlement Agreement that Vision Direct and 1-800 Contacts entered into in 2009, which requires the use of negative keywords, includes a clear statement by Vision Direct that "it has executed this Settlement Agreement with the consent and on the advice of [its] independent legal counsel." (CX 314 at 5)

1076. On December 11, 2007, 1-800 Contact's counsel, Bryan Pratt, emailed Scott Sher, requesting to speak regarding concerns Vision Direct had about 1-800 Contacts' request that Vision Direct implement negative keywords. They set up a call for December 13, 2007. (CX0270 at 002-003).

Response to Finding No. 1076:

Respondent has no specific response.

1077. On December 21, 2007, Scott Sher emailed Mr. Pratt, referring to a discussion from the previous week regarding the issues surrounding the negative keyword restrictions that Mr. Pratt had previously demanded of Vision Direct. (CX0140 at 001). Mr. Sher wrote: "As Jonathan and I discussed with you both during our call, we believe that there are serious antitrust implications surrounding an agreement to implement such restrictions" and asked him to confirm his "understanding of [their] conclusions." (CX0140 at 001).

Response to Finding No. 1077:

The proposed finding is incomplete and misleading. The cited exhibit (CX 140) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008). In addition, the Settlement Agreement that Vision Direct and 1-800 Contacts entered into in 2009, which requires the use of negative keywords, includes a clear statement by Vision Direct that "it has executed this Settlement Agreement with the consent and on the advice of [its] independent legal counsel." (CX 314 at 5)

1078. On December 28, 2007, 1-800 Contacts filed a complaint against Vision Direct in Utah state court for breach of the 2004 Vision Direct agreement. (CX1062).

Response to Finding No. 1078:

Respondent has no specific response.

1079. 1-800 Contacts alleged that Vision Direct was "violating the Settlement Agreement by purchasing advertisements without utilizing negative keywords to prevent the appearance of Vision Direct advertisements when users search for 1-800 CONTACTS' brand name." (CX1062 at 008). 1-800 Contacts alleged that Vision Direct's actions violated the provision of the agreement that prohibited the parties from "causing a party's brand name . . . to appear as a listing in the search results page of an Internet search engine when the user specifically searches for the other party's brand name." (CX1062 at 008-009).

Response to Finding No. 1079:

Respondent has no specific response.

1080. On January 7, 2008, Mr. Sher wrote to Mr. Pratt and stated that Vision Direct had "serious concerns regarding the enforceability of the Agreement, particularly as it relates to the implementation of negative keywords." (CX0141 at 001). He wrote that Vision Direct believed that "any agreement between the parties with regard to the implementation of negative key words create[d] an unacceptable risk of violating Section 1 of the Sherman Act. Any such agreement would appear to represent a restraint unrelated to the terms of the Agreement, and one that depresses the price of key words to search companies such as Google, Yahoo! And Microsoft." (CX0141 at 001; Pratt, Tr. at 2609-2610).

Response to Finding No. 1080:

The proposed finding is incomplete and misleading. The cited exhibit (CX 141) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008). In addition, the Settlement Agreement that Vision Direct and 1-800 Contacts entered into in 2009, which requires the use of negative keywords, includes a clear statement by Vision Direct that "it has executed this Settlement Agreement with the consent and on the advice of [its] independent legal counsel." (CX 314 at 5)

1081. In his January 7, 2008 letter, Mr. Sher wrote that Vision Direct had "unilaterally decided to implement the negative key words at issue—in part to forestall litigation with 1-800 Contacts" and that it would "no longer continue to implement negative keywords, effective immediately." (CX0141 at 002).

Response to Finding No. 1081:

Respondent has no specific response other than to note that the cited exhibit (CX 141) was admitted for non-hearsay purposes and should not be used for the truth of the matters asserted. (JX2-A-008).

1082. Mr. Pratt responded to Mr. Sher's January 7, 2008 letter on January 11, 2008. (CX0724).

Response to Finding No. 1082:

Respondent has no specific response.

1083. Mr. Pratt's letter dated January 11, 2008, stated that Vision Direct's "failure to implement negative key words constitutes a violation of the settlement agreement, as interpreted by both parties and that 1-800 Contacts reserves all of its available remedies." (CX0724 at 002).

Response to Finding No. 1083:

Respondent has no specific response.

1084. On January 24, 2008, Mr. Sher wrote to Joe Zeidner, 1-800 Contacts' general counsel, and Mr. Pratt, alleging that 1-800 Contacts had breached the 2004 Vision Direct agreement by filing its breach of contract claim against Vision Direct in Utah state court in violation of the forum selection clause. (CX0142 at 001-002).

Response to Finding No. 1084:

Respondent has no specific response other than to note that the cited exhibit (CX 142) was admitted for non-hearsay purposes and should not be used for the truth of the matters asserted. (JX2-A-008).

1085. In his January 24, 2008 letter, Mr. Sher also wrote that that 1-800 Contacts was "engaged in the very behavior that its complaint alleges constitutes a breach of contract" by Vision Direct, and enclosed screenshots purporting to show that 1-800 Contacts was not implementing negative keywords. (CX0142 at 002, 004-005).

Response to Finding No. 1085:

Respondent notes that the cited exhibit (CX 142) was admitted for non-hearsay purposes and should not be used for the truth of the matters asserted. (JX2-A-008). Respondent also notes that the screenshots attached to the cited exhibit as Exhibits A and B are too blurry to make out the search term purportedly entered by Vision Direct that allegedly triggered the appearance of a 1-800 Contacts advertisement. (CX 142 at 4-5). Respondent therefore cannot confirm whether the advertisement appeared "when a user specifically searche[d] for the other Party's brand name, trademarks, or URLS," as required under the settlement agreement, or appeared as

a result of a different search, such as a comparative or informational query, in which case it would likely not constitute a violation of the settlement. (CX 311; CX 142 at 4).

1086. In his January 24, 2008 letter, Mr. Sher also wrote that Vision Direct had serious concerns regarding enforceability of the agreement, "particularly as it relate[d] to the implementation of negative keywords," and that any agreement between the parties regarding implementation of negative keywords would create "an unacceptable risk of violating Section 1 of the Sherman Act." (CX0142 at 003).

Response to Finding No. 1086:

The proposed finding is incomplete and misleading. The cited exhibit (CX 142) was admitted for non-hearsay purposes and should not be used for the truth of the matter. (JX2-A-008). In addition, the Settlement Agreement that Vision Direct and 1-800 Contacts entered into in 2009, which requires the use of negative keywords, includes a clear statement by Vision Direct that "it has executed this Settlement Agreement with the consent and on the advice of [its] independent legal counsel." (CX 314 at 5)

1087. On February 26, 2008, 1-800 Contacts filed a complaint against Vision Direct in the U.S. District Court for the District of Utah, based on alleged breach of the 2004 Vision Direct Agreement. (CX0314 at 001-002).

Response to Finding No. 1087:

Respondent has no specific response.

1088. On February 27, 2008, 1-800 Contacts filed a complaint against Vision Direct in the U.S. District Court for the Southern District of New York, based on alleged breach of the 2004 Vision Direct Agreement. (CX0314 at 001-002).

Response to Finding No. 1088:

Respondent has no specific response.

1089. 1-800 Contacts and Vision Direct entered into a settlement agreement effective May 8, 2009 ("2009 Vision Direct Agreement"). (CX0314).

Response to Finding No. 1089:

Respondent has no specific response.

1090. The 2009 Vision Direct Agreement required the parties to jointly submit an order of permanent injunction and to jointly request its entry. (CX0314).

Response to Finding No. 1090:

The proposed finding is incomplete in failing to note that the requested Order of Permanent Injunction would be jointly submitted to the Court in the New York action referenced in Complaint Counsel's proposed finding no. 1088.

1091. The order of permanent injunction, provided for in the 2009 Vision Direct Agreement, was to require the parties to implement negative keyword lists "for the purpose of preventing a party's internet advertising from appearing in response to a search for another party's" trademarks, URLs, or variations. (CX0314 at 004). An exhibit to the order of permanent injunction would contain the initial negative keyword lists. (CX0314 at 004).

Response to Finding No. 1091:

The proposed finding is incomplete in failing to state that the Order of Permanent Injunction "shall act as a final adjudication of the Dispute," a defined term that referred to all claims and counterclaims asserted in the New York and Utah actions. (CX 314 at 1, 004).

1092. The 2009 Vision Direct Agreement provided that the 2004 Vision Direct agreement would "remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords" would be governed by the 2009 Vision Direct Agreement. (CX0314 at 004).

Response to Finding No. 1092:

The proposed finding is duplicative of Complaint Counsel's Proposed Finding No. 147. Respondent has no further specific response.

1093. On May 25, 2009, the U.S. District Court for the Southern District of New York issued the order of permanent injunction required by the 2009 Vision Direct Agreement on

stipulation of 1-800 Contacts and Vision Direct ("Vision Direct Permanent Injunction"). (CX0316).

Response to Finding No. 1093:

Respondent has no specific response.

1094. The Vision Direct Permanent Injunction requires 1-800 Contacts and Vision Direct to implement negative keywords for the purpose of preventing their internet ads from appearing in response to a search for the other's trademarks, variations of trademarks, domain names containing trademarks or variations of trademarks, and URLs containing trademarks or variations of trademarks. (CX0316 at 002).

Response to Finding No. 1094:

Respondent has no specific response.

1095. The Vision Direct Permanent Injunction requires Vision Direct to implement 42 negative keywords (set forth in Exhibit A to the injunction) related to 1-800 Contacts' trademarks, domain names, and URLs, or variations thereof. (CX0316 at 004).

Response to Finding No. 1095:

Respondent has no specific response.

1096. The Vision Direct Permanent Injunction requires 1-800 Contacts to implement 29 negative keywords (set forth in Exhibit B to the injunction) related to Vision Direct's trademarks, domain names, and URLs, or variations thereof. (CX0316 at 005).

Response to Finding No. 1096:

Respondent has no specific response.

1097. The Vision Direct Permanent Injunction "shall expire . . . upon the submission to the Court by the Parties of a Joint Stipulation to Dissolve Injunction." (CX0316 at 002).

Response to Finding No. 1097:

Respondent has no specific response other than to note that the District Court could also, through "a further order by this Court," dissolve the injunction.

1098. The Vision Direct Permanent Injunction remains in force.

Response to Finding No. 1098:

Respondent has no specific response, other than to note that the District Court "retain[s] continuing jurisdiction over this matter for purposes of enforcing, implementing or construing this Order of Permanent Injunction." (CX 316 at 3).

9. Lensfast

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

Response to Finding No. 1099:

The proposed finding is incomplete. Mr. Pratt stated that 1-800 Contacts was "concerned" that the purchase of sponsored advertisements from search engines that are triggered upon a search for 1-800 Contacts' federally registered trademarks "may constitute trademark infringement under state and federal law in that it is likely to cause initial interest confusion, or likely to cause the public to mistakenly assume that your business activities originate from, are sponsored by, or are in some way associated with 1800 CONTACTS, INC." (CX 1618 at 32). The letter further noted that such unauthorized use "may constitute unfair competition and false advertising under state law" and "may also violate the Federal Dilution Act of 1995." (CX 1618 at 32).

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

Response to Finding No. 1100:

Respondent has no specific response.

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

Response to Finding No. 1101:

Respondent has no specific response.

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

Response to Finding No. 1102:

The proposed finding is incomplete and misleading. 1-800 Contacts sued Lensfast for federal and state trademark infringement in addition to federal unfair competition, common law unfair competition, state unfair competition, misappropriation, and unjust enrichment. (CX 1618 at 10-12).

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

Response to Finding No. 1103:

Respondent has no specific response.

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

Response to Finding No. 1104:

Respondent has no specific response.

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

Response to Finding No. 1105:

The proposed finding is incomplete, misleading, and inaccurate. The Lensfast settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 315 at 4).

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

Response to Finding No. 1106:

Respondent has no specific response.

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

Response to Finding No. 1107:

The proposed finding is incomplete, misleading, and inaccurate. The Lensfast settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 315 at 4).

1108. The Lensfast Agreement Prohibited Acts include "causing a Party's brand name, or Internet link to the Party's Restricted Websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademark, or URLs (as listed in Exhibit 2)." (CX0315 at 003).

Response to Finding No. 1108:

The proposed finding is incomplete, misleading, and inaccurate. The Lensfast settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 315 at 4).

1109. The Lensfast Agreement Prohibited Acts include "performing any action or omission of actions that would cause advertisements, internet links, and/or any other promotional material to appear in response to an entry of any one of the prohibited keywords listed in Exhibit 2." (CX0315 at 004).

Response to Finding No. 1109:

The proposed finding is incomplete, misleading, and inaccurate. The Lensfast settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 315 at 4).

1110. The Lensfast Agreement requires 1-800 Contacts and Lensfast to "use the prohibited keywords (as listed in Exhibit 2) as negative keywords to the extent practicable in the internet search provider's system in order to prevent the generation of advertisements and

internet links triggered by keywords that are prohibited under [the agreement]." (CX0315 at 004). Under the agreement, "[u]se of generic, non-trademarked words without use of negative keywords shall be considered a Prohibited Act . . . unless the internet search provider does not permit use of negative keywords." (CX0315 at 005).

Response to Finding No. 1110:

Respondent has no specific response.

1111. Exhibit 2 to the Lenfast Agreement lists 1-800 Contacts' and Lensfast's prohibited keywords—the terms each party was prohibited from using as search advertising keywords and which each party was required to implement as negative keywords. (CX0315 at 010).

Response to Finding No. 1111:

Respondent has no specific response.

1112. Exhibit 2 to the Lensfast Agreement lists dozens of brand names, trademarks, and websites of 1-800 Contacts and Lensfast, on which the parties are prohibited from bidding and are required to implement as negative keywords.

Response to Finding No. 1112:

Respondent has no specific response.

1113. The Lensfast agreement never expires. (CX0315).

Response to Finding No. 1113:

Respondent has no specific response.

10. Lenses for Less

1114. In a letter dated November 9, 2009, Mark Miller, counsel for 1-800 Contacts, wrote to Lenses for Less claiming that Lenses for less was infringing upon 1-800 Contacts' "trademark rights through [its] purchase of sponsored advertisements at Google, and possibly other search engines, for at least one of the 1800 CONTACTS marks, or a confusingly similar variation" to trigger advertisements for www.lenses.forless.com. (CX0637 at 001).

Response to Finding No. 1114:

The proposed finding is incomplete. The cited exhibit (CX 637) also stated that "the law is well established that the purchase of a trademark as a keyword in a search engine's advertising program constitutes a use in commerce for purposes of trademark infringement," and therefore, Lenses for Less' "purchase of the 1800 CONTACTS marks constitutes trademark infringement under state and federal law in that it is likely to cause initial interest confusion and likely to cause the public to mistakenly assume that your business activities originate from, are sponsored by, or are in some way associated with 1800 CONTACTS, INC." (CX 637 at 2). The letter further noted that such unauthorized use "constitutes unfair competition and false advertising under state law" and "violate[s] the Federal Dilution Act of 1995." (CX 637 at 2).

1115. In a letter dated November 9, 2009, Mark Miller, counsel for 1-800 Contacts, demanded that Lenses for Less remove "ALL sponsored advertisements . . . purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademarks or any confusingly similar variations thereof." (CX0637 at 002).

Response to Finding No. 1115:

Respondent has no specific response.

1116. On January 20, 2010, 1-800 Contacts, by and through its counsel including Mr. Miller, filed a complaint against Lenses for Less in the U.S. District Court for the District of Utah for trademark infringement and certain other state and federal claims. (CX0452 at 003-013).

Response to Finding No. 1116:

Respondent has no specific response.

1117. On January 21, 2010, Mark Miller wrote to Lenses for Less stating that 1-800 Contacts was "willing to resolve this matter informally" and enclosed "a settlement agreement that would resolve [1-800 Contacts'] claims against Lenses For Less." (CX0452 at 001, 014-021).

Response to Finding No. 1117:

Respondent has no specific response.

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

Response to Finding No. 1118:

Respondent has no specific response.

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

Response to Finding No. 1119:

The cited page of the cited exhibit (CX 452 at 1) does not contain the quoted passage, although Mr. Miller did state on that page that "[w]e remain willing to resolve this matter informally without resorting to litigation." (CX 452 at 1).

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

Response to Finding No. 1120:

Respondent has no specific response.

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

Response to Finding No. 1121:

Respondent has no specific response.

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

Response to Finding No. 1122:

Respondent has no specific response.

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

Response to Finding No. 1123:

The proposed finding is incomplete, misleading, and inaccurate. The Lenses for Less settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 320 at 4).

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

Response to Finding No. 1124:

The proposed finding is incomplete, misleading, and inaccurate. The Lenses for Less settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by

either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 320 at 4).

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

Response to Finding No. 1125:

The proposed finding is incomplete, misleading, and inaccurate. The quoted language must be read in the context of the entire agreement. For example, the parties are only required to implement negative keywords in a manner that would prevent advertisements from being displayed in response to searches specifically for the other party's trademarks and variations thereof, and not for queries that may include the trademark but are not navigational in nature and "would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses." (CX 320 at 4; CX 9040 (Miller, Dep. at 37-39, 66); CX 9031 (Schmidt, Dep. at 115); CX 9020 (Craven, Dep. at 18-19)).

1126. Pursuant to the Lenses For Less Agreement, Lenses For Less and 1-800 Contacts "mutually agree to use the other Party's trademark keywords and URLs . . . as negative keywords in all of their respective keyword advertising campaigns for any internet search provider that allows the use of negative keywords, to the fullest extent allowable by the internet search provider, in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs." (CX0320 at 004).

Response to Finding No. 1126:

The proposed finding is incomplete and misleading because the quoted language must be read in the context of the entire agreement and the underlying purpose of protecting the parties' trademark rights. For example, the parties are only required to implement negative keywords in

a manner that would prevent advertisements from being displayed in response to searches specifically for the other party's trademarks and variations thereof, and not for queries that are not navigational in nature and "would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses." (CX 320 at 4; CX 9040 (Miller, Dep. at 37-39, 66); CX 9031 (Schmidt, Dep. at 115); CX 9020 (Craven, Dep. at 18-19)).

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

Response to Finding No. 1127:

The proposed finding is incomplete and misleading because the quoted language must be read in the context of the entire agreement and the underlying purpose of protecting the parties' trademark rights. For example, the parties are only required to implement negative keywords in a manner that would prevent advertisements from being displayed in response to searches specifically for the other party's trademarks and variations thereof, and not for queries that are not navigational in nature and "would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses." (CX 320 at 4; CX 9040 (Miller, Dep. at 37-39, 66); CX 9031 (Schmidt, Dep. at 115); CX 9020 (Craven, Dep. at 18-19)). Additionally, parties are only required to implement negative keywords "to the extent practicable" or "to the fullest extent allowable by the internet search provider," meaning that if the search engine has capped the number of negative keywords or placed a character limitation on negative keywords, the party would not be required to remove others to make room or go beyond the capability of the search engine. (CX 9040 (Miller, Dep. at 62-63)).

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

Response to Finding No. 1128:

Respondent has no specific response.

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

Response to Finding No. 1129:

The proposed finding is incomplete and misleading. In interpreting the language of the settlement agreements, the parties kept in mind that "the settlement agreements are defined narrowly" to only address circumstances when "somebody is searching for 1-800 Contacts' trademark as a source." (CX 9040 (Miller, Dep. at 117-118)). In other words, the agreements did not preclude the parties from placing advertisements that did not "implicate trademark rights." (CX 9040 (Miller, Dep. at 117)). Mr. Miller pointed out that the language of the settlement agreements must be read "in the context of the entire agreement," and that most of the agreements specifically contemplated that non-infringing uses such as comparative advertising would not be prohibited. (CX 9040 (Miller, Dep. at 119-120); CX 320 at 4). For these reasons, Mr. Miller clarified at his deposition that the language "includes" does not broaden the scope of the prohibitions in the settlement agreement beyond the terms listed in Exhibit 2 and supplementary terms that indicate the same intent. (CX 9040 (Miller, Dep. at 117); *see also* CX 9040 (Miller, Dep. at 52, 65)).

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

Response to Finding No. 1130:

The proposed finding is incomplete and misleading. Mr. Miller did state at his deposition that the query "contact lenses 1-800 Contacts" had "1-800 Contacts" as part of the query, but he clarified that this would not necessarily capture the query "contact lenses 1-800 Contacts" within the prohibitions of the settlement agreement when read in the context of the agreement as a whole. (CX 9040 (Miller, Dep. at 38-39 ("I know it could potentially be one. I don't think that search would necessarily have been prohibited… if you were implementing these negative keywords in Exhibit 3 for 1-800 Contacts, I don't think it would really preclude that search. But if later on it was determined that this search was performed enough and there was indications that that's likely somebody searching specifically for 1-800 Contacts that could lead to confusion, then there's a mechanism in the agreement to request that that be added to the list of keywords, this phrase 'contact lenses 1-800 Contacts'").

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

Response to Finding No. 1131:

Respondent has no specific response.

11. Contact Lens King

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

Response to Finding No. 1132:

The proposed finding is incomplete. Mr. Pratt clarified that 1-800 Contacts was "concerned" that Contact Lens King's purchase of sponsored advertisements from search engines that are triggered upon a search for 1-800 Contacts federally registered trademarks "may constitute trademark infringement under state and federal law in that it is likely to cause initial interest confusion, or likely to cause the public to mistakenly assume that your business activities originate from, are sponsored by, or are in some way associated with 1800 CONTACTS, INC." (CX 1472 at 2). Mr. Pratt further noted that such unauthorized use "may constitute unfair competition and false advertising under state law" and "may also violate the Federal Dilution Act of 1995." (CX 1472 at 2).

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

Response to Finding No. 1133:

Respondent has no specific response.

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

Response to Finding No. 1134:

Respondent has no specific response.

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

Response to Finding No. 1135:

The proposed finding is inaccurate and misleading. On page 2 of the cited letter, Mr. Miller provided a list of nineteen search terms to which possibly infringing advertisements for Contact Lens King had purportedly appeared in response. (CX 448 at 2). Complaint Counsel are incorrect in stating that the letter demanded that those terms be implemented as negative keywords separate and apart from the list of terms on pages 3 and 4 of the letter.

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

Response to Finding No. 1136:

The proposed finding is incomplete and misleading. Each of the 36 terms specified in the letter to be added as negative keywords is a federally registered trademark owned by 1-800 Contacts or a confusingly misspelled variation thereof. (CX 448 at 2).

1137. In his February 18, 2010 letter to Contact Lens King, Mr. Miller did not allege that the 36 additional negative keywords specified in the letter were terms that Contact Lens King had used to infringe 1-800 Contacts trademarks. (CX0448 at 001-004).

Response to Finding No. 1137:

The proposed finding is inaccurate and misleading. Mr. Miller *did* assert that possibly infringing advertisements for Contact Lens King had appeared in response to searches for "at least" nineteen (19) variations of a 1-800 Contacts federally registered trademark. (CX 448 at 2). Many of these variations and confusing misspellings of the trademark also feature on the list of thirty-six (36) terms specified to be implemented as negative keywords, such as "1800 contacts." (CX 448 at 3-4). Further, each of these confusingly similar variations of trademark terms receive equivalent protection under the Lanham Act for the purpose of determining infringement. (RX 734 at 109-114 (Hogan Rep.)).

1138. In a letter dated March 11, 2010, Mark Miller, counsel for 1-800 Contacts, informed Contact Lens King that 1-800 Contacts had filed a complaint in federal court against Contact Lens King, Inc. and enclosed a copy "of our standard settlement agreement for these matters." (CX0799 at 001).

Response to Finding No. 1138:

Respondent has no specific response.

1139. Mr. Miller worked on the settlement agreement between 1-800 Contacts and Contact Lens King. (CX9040 (Miller, Dep. at 83).

Response to Finding No. 1139:

Respondent has no specific response.

1140. 1-800 Contacts and Contact Lens King, Inc., entered into a settlement agreement on March 29, 2010. (CX0323 at 009 ("Contact Lens King Agreement")).

Response to Finding No. 1140:

Respondent has no specific response.

1141. Pursuant to the Contact Lens King Agreement, Contact Lens King was required to adopt 36 negative keywords listed in an exhibit to the agreement. (CX0323 at 010). The list of 36 negative keywords that Contact Lens King was required to implement is the exact same list of terms that Mark Miller demanded be adopted as negative keywords but which he did not allege were causing infringement in his letter to Contact Lens King dated February 18, 2010. (CX0448 at 002; CX0323 at 010).

Response to Finding No. 1141:

The proposed finding is inaccurate, misleading and irrelevant. In his February 18, 2010 letter, Mr. Miller *did* allege that possibly infringing advertisements for Contact Lens King had appeared in response to searches for "at least" nineteen (19) variations of a 1-800 Contacts federally registered trademark. (CX 448 at 2). Many of these variations and confusing misspellings of the trademark also feature on the list of thirty-six (36) terms agreed to be implemented as negative keywords, such as "1800 contacts." (CX 323 at 10; CX 448 at 2-4).

Further, confusingly similar variations of trademark terms receive the same protection under the Lanham Act as the trademark term itself for the purpose of determining infringement and are commonplace terms in non-use agreements. (RX 734 (Hogan Rep.) at 109-114).

1142. None of the terms which Mark Miller previously alleged were causing trademark infringement by Contact Lens King were included in the Contact Lens King Agreement as required negative keywords. (CX0448 (February 18, 2010 letter from Mark Miller to Jacque Matte of Contact Lens King) at 002); CX323 (March 29, 2010 Contact Lens King Agreement) at 10).

Response to Finding No. 1142:

The proposed finding is inaccurate, misleading, and irrelevant. Complaint Counsel are incorrect in stating that "[n]one of the terms which Mark Miller previously alleged were causing trademark infringement by Contact Lens King were included in the Contact Lens King Agreement as required negative keywords." For example, Mr. Miller alleged that Contact Lens King's potentially infringing advertisements had appeared in response to a search for "1 800 contact," the *first term* listed on Exhibit 2 of the settlement agreement. (*Compare* CX 320 at 10 *and* CX 448 at 2). Other terms that Mr. Miller had previously identified as causing trademark infringement were also included on the exhibit to the settlement agreement. (CX 320 at 10).

Complaint Counsel's proposed finding is as irrelevant as it is false: each term included in Mark Miller's February 18, 2010 letter and incorporated into the settlement agreement is a federally registered trademark or a confusingly similar variation thereof, all of which receive protection under the Lanham Act in this context and are commonplace terms in non-use agreements. (RX 734 (Hogan Rep.) at 109-114). The settlement agreement also provides for the addition of terms that meet the criteria established under trademark law as registered trademarks, owned URLs, and confusingly similar variations thereof. (CX 323 at 4-5).

1143. Of the nine terms which, in his letter dated May 12, 2009, Bryan Pratt demanded be adopted as negative keywords to solve the alleged infringement issue and to "ensure that Contact Lens Kings' broad match advertisements for general keywords are not displayed on searches for 1-800 Contacts, Inc.'s trademarks," only four terms ("800 contacts," "1-800 contacts," "1-800-contacts," and "1800contacts.com) were included in the final settlement agreement dated March 29, 2010. (CX1472 (May 12, 2009 letter from Bryan Pratt to Contact Lens King) at 001-008)); CX323 (March 29, 2010 Contact Lens King Agreement) at 10).

Response to Finding No. 1143:

The proposed finding is inaccurate, misleading, and irrelevant. For example, Complaint Counsel erroneously omit the term "1800contacts", which was listed in Mr. Pratt's May 12, 2009 letter and later included in Exhibit 2 of the settlement agreement between Contact Lens King and 1-800 Contacts. Moreover, Complaint Counsel's proposed finding is irrelevant, since each term incorporated into the settlement agreement is a federally registered trademark or a confusingly similar variation thereof, all of which receive protection under the Lanham Act in this context and are commonplace terms in non-use agreements. (RX 734 at 109-114 (Hogan Rep.)). The settlement agreement also provides for the addition of terms that meet the criteria established under trademark law as registered trademarks, owned URLs, and confusingly similar variations thereof. (CX 323 at 4-5).

12. AC Lens

1144. As of February 2010, AC Lens already understood that it was obligated to avoid showing up in response to searches for 1-800 Contacts' trademarks. (CCPTF ¶ 125).

Response to Finding No. 1144:

The proposed finding is not supported by the finding it cites (No. 125), which merely states that in 2005, ACLens was not using 1-800 Contacts' trademarks as keywords in paid search and had added them as negative keywords. Those decisions were made unilaterally by Mr. Clarkson, without even being asked. *See* 1-800 Contacts' Response to Complaint Counsel's

Proposed Finding No. 125. If in February 2010, Mr. Clarkson felt an obligation not to use competitors' trademarks as keywords, that is likely the result of his concern in and after 2002 that ACLens might be *legally* obligated to avoid that conduct. (CX 9003 (Clarkson, IHT at 90-91).

1145. Mark Miller, counsel for 1-800 Contacts, sent a letter to Peter Clarkson and Phillip Dietrich of AC Lens, dated February 2, 2010. (CX1623). Mr. Miller acknowledged previous correspondence between AC Lens and 1-800 Contacts, explaining his understanding that each time 1-800 Contacts had contacted them in the past, AC Lens "agreed to stop purchasing the 1800 CONTACTS marks and variations thereof as keywords and to implement appropriate negative keywords to prevent" its ads from appearing. (CX1623 at 001).

Response to Finding No. 1145:

Respondent has no specific response other than to note that the cited letter (CX 1623) is addressed not to ACLens but to Discount Contact Lenses and that the letter also references Discount Contact Lenses, not ACLens, in the body of the letter.

1146. In his letter dated February 2, 2010, Mr. Miller wrote that AC Lens had purchased "sponsored advertisements at Google, and possibly other search engines, for at least one of the 1800 CONT . . www.discountcontaclenses.com." (CX1623 at 001-002). He demanded, on behalf of 1-800 Contacts, that AC Lens remove "ALL sponsored advertisements . . . purchased through Google, Yahoo Search, Bing, and any other search engines which are triggered by the 1800 CONTACTS trademarks or any confusingly similar variations or misspellings thereof" and cease purchasing 1800 CONTACTS trademarks and confusingly similar variations as keywords. (CX1623 at 002-003). Mr. Miller also demanded that AC Lens "implement the 1800 CONTACTS trademarks and confusingly similar variations and misspellings thereof as negative keywords" in all of AC Lens' search engine advertising campaigns. (CX1623 at 003).

Response to Finding No. 1146:

Respondent has no specific response other than to note that the cited letter (CX 1623) is addressed not to ACLens but to Discount Contact Lenses and that the letter also references Discount Contact Lenses, not ACLens, in the body of the letter.

1147. The letter dated February 2, 2010, from Mr. Miller enclosed a draft settlement agreement. (CX1623 at 005-012).

Response to Finding No. 1147:

Respondent has no specific response.

1148. Mr. Clarkson responded to the letter from Mr. Miller dated February 2, 2010, on February 4, 2010. (CX1623 at 013). Mr. Clarkson wrote that AC Lens had not placed paid advertisements on Google or other search engines for 1-800 Contacts trademark terms. (CX1623 at 013). He stated that AC Lens had added "negative terms" to prevent AC Lens ads from appearing in response to 1-800 Contacts' terms. (CX1623 at 013). Mr. Clarkson wrote that he was "unable to determine what specific issue" Mr. Miller was referring to because his letter did "not provide any specific instances of [AC Lens] ads appearing in response to trademark searches." (CX1623 at 013).

Response to Finding No. 1148:

The proposed finding is incomplete. Mr. Clarkson also requested that Mr. Miller forward any "specific instances where you believe our advertisements have appeared in response to trademark term searches. . . ." (CX 1623 at 13). As noted in Complaint Counsel's proposed finding no. 1149, Mr. Miller responded to that request.

1149. Mr. Miller responded to Mr. Clarkson's letter in a letter dated February 10, 2010. (CX1623 at 014). His letter enclosed "eight screen shots taken on January 29, 2010 showing advertisements for Discount Contact Lenses under the sponsored links section of Google in response to searches for [1-800 Contacts]," and a report generated by KeywordSpy allegedly showing that AC Lens and its affiliates were currently purchasing 1-800 Contacts' trademarks as keywords on Google. (CX1623 at 014).

Response to Finding No. 1149:

The proposed finding is inaccurate in asserting that the report and screenshots provided by Mr. Miller only "allegedly" showed that ACLens or its affiliates were purchasing 1-800 Contacts' trademarks as keywords. The very day after Mr. Miller sent his letter, ACLens' Marketing Manager, Mr. Drumm, wrote to Google and stated that the screenshots that Mr. Miller had sent showed what "appear to be affiliates using our domain to bid on [1-800 Contacts'] marks." (RX 1174 at 3). In other words, ACLens was aware when it decided to settle with 1-800 Contacts that its affiliate had in fact purchased 1-800 Contacts' trademarks for use as keywords and that the affiliate had done so by masking its identity. (RX 1174 at 1-3; Clarkson, Tr. 342-342).

1150. In his letter dated February 10, 2010, Mr. Miller demanded, on behalf of 1-800 Contacts, that AC Lens comply with the demands made in his February 2 letter and return the settlement agreement enclosed with that letter by February 19, 2010. (CX1623 at 014). Mr. Miller characterized the settlement agreement as a "bi-lateral agreement imposing mutually beneficial obligations on both parties." (CX1623 at 014).

Response to Finding No. 1150:

Respondent has no specific response.

1151. Mr. Clarkson responded to Mr. Miller's February 10, 2010 letter in a letter dated February 12, 2010. (CX1623 at 016). Mr. Clarkson wrote that his company had "never removed negative keywords applied to [1-800 Contacts'] trademarks," and attributed the ads shown in the enclosures to Mr. Miller's February 10, 2010 letter to "rogue affiliates." (CX1623 at 016). Mr. Clarkson wrote that AC Lens already had a bilateral letter agreement with 1-800 Contacts from November 2002 "which would presumably obviate the need for an additional understanding."

Response to Finding No. 1151:

Respondent has no specific response other than to note that Mr. Clarkson testified at trial that the November 2002 agreement referenced in the proposed finding did not mention paid search advertising. (Clarkson, Tr. 322-323).

1152. On February 18, 2010, 1-800 Contacts filed a complaint against AC Lens in the United States District Court for the District of Utah, alleging trademark infringement, among other claims. (CX1623 at 029-039). 1-800 Contacts alleged that AC Lens "has purchased, continues to purchase, and has caused to be purchased, the 1-800 Contacts marks and/or confusingly similar variations or misspellings thereof as keywords that trigger the display of sponsored advertisements for" AC Lens' goods and services. (CX1623 at 032).

Response to Finding No. 1152:

The proposed finding is incomplete. The complaint also alleged that ACLens was "secondarily liable for the infringing acts of its affiliates that likewise purchase the 1-800 Contacts marks . . . in order to display advertisements for" ACLens, and that ACLens' conduct was "likely to cause public confusion, mistake, or deception as to the origin, sponsorship or approval" by 1-800 Contacts of ACLens' products and services. (CX 1623 at 34).

1153. Mr. Miller sent a letter to Mr. Clarkson dated February 19, 2010, stating that AC Lens was continuing to purchase 1-800 Contacts' trademarks as keywords, and enclosing screen shots purporting to show AC Lens advertisements appearing in response to searches for "1800 contacts." (CX1623 at 017). Mr. Miller explained that 1-800 Contacts had filed a complaint, enclosed with the letter, in federal court. He reiterated 1-800 Contacts' demand that AC Lens sign the draft settlement agreement proposed by 1-800 Contacts. (CX1623 at 017-018). He stated that 1-800 Contacts would serve the complaint and move forward with litigation if AC Lens did not accept 1-800 Contacts' "standard agreement." (CX1623 at 018).

Response to Finding No. 1153:

Respondent has no specific response other than to note that the letter cited in the proposed finding is dated February 18, not February 19. (CX 1623 at 17).

1154. Mr. Clarkson signed 1-800 Contacts' "standard agreement" on March 9, 2010, and returned it to 1-800 Contacts. (RX0028 at 007; Clarkson, Tr. 244).

Response to Finding No. 1154:

Respondent has no specific response.

1155. Mr. Clarkson signed the 1-800 Contacts' agreement because his company was faced with fighting a lawsuit in a faraway jurisdiction, with limited resources against a much larger company. (Clarkson, Tr. 244-245). It was not a "tough decision" for him at the time, given that AC Lens was a small family business. (Clarkson, Tr. 245).

Response to Finding No. 1155:

The proposed finding is incomplete and misleading. Mr. Clarkson testified that outside counsel for ACLens told Mr. Clarkson in February 2010 that "the outcome was uncertain, that we may win or we may lose, but that either way it would be very expensive to fight it." (Clarkson, Tr. 339). Mr. Clarkson also testified that he was "not willing to undertake a large litigation expense in an environment where I didn't know whether or not the case would be won." (Clarkson, Tr. 343).

1156. Mr. Clarkson consulted local counsel regarding 1-800 Contacts' threatened litigation. (Clarkson, Tr. 245). Mr. Clarkson testified that his counsel said that AC Lens might be able to win the case but would definitely spend "at least six figures, may more." (Clarkson, Tr. 245).

Response to Finding No. 1156:

The proposed finding is incomplete and misleading. Mr. Clarkson testified that outside counsel for ACLens told Mr. Clarkson in February 2010 that "the outcome was uncertain, that we may win or we may lose, but that either way it would be very expensive to fight it." (Clarkson, Tr. 339). Mr. Clarkson also testified that he was "not willing to undertake a large litigation expense in an environment where I didn't know whether or not the case would be won." (Clarkson, Tr. 343).

1157. 1-800 Contacts and AC Lens entered into a settlement agreement effective March 10, 2010. (RX0028) ("AC Lens Agreement").

Response to Finding No. 1157:

Respondent has no specific response.

1158. Pursuant to the AC Lens Agreement, 1-800 Contacts and AC Lens agreed to refrain from certain "Prohibited Acts." (RX0028 at 001).

Response to Finding No. 1158:

Respondent has no specific response.

1159. The AC Lens Agreement Prohibited Acts include, among other things, "engaging in or participating in internet advertising or any other action that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1)." (RX0028 at 001-002).

Response to Finding No. 1159:

The proposed finding is incomplete and misleading. The settlement agreement between ACLens and 1-800 Contacts expressly allows ACLens and 1-800 Contacts to use generic keywords to advertise their products and services. (RX 28 at 2). The agreement states that the "Prohibited Acts" shall *not* include the:

> "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, e.g., comparative advertising, parodies, and similar non-infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C) below."

(RX 28 at 2).

1160. The AC Lens Agreement Prohibited Acts include, among other things, "using the other Party's trademark keywords or URLs (as listed in Exhibit 1) to target or trigger the appearance or delivery of advertisements or other content to the user." (RX0028 at 002).

Response to Finding No. 1160:

The proposed finding is incomplete and misleading. The settlement agreement between ACLens and 1-800 Contacts expressly allows ACLens and 1-800 Contacts to use generic keywords to advertise their products and services. (RX 28 at 2). The agreement states that the "Prohibited Acts" shall *not* include the:

> "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, e.g., comparative advertising, parodies, and similar non-infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C) below."

(RX 28 at 2).

1161. The AC Lens Agreement Prohibited Acts include, among other things, "using generic, non-trademarked words as keywords in any internet advertising campaign that causes any website, advertisement, including pop-up advertisements, and/or a link to any website to be displayed in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1) without also using negative keywords as set forth in [Section 2(C) of the Agreement,] unless the particular internet search provider does not permit use of negative keywords." (RX0028 at 002).

Response to Finding No. 1161:

The proposed finding is incomplete and misleading. The settlement agreement between ACLens and 1-800 Contacts expressly allows ACLens and 1-800 Contacts to use generic keywords to advertise their products and services. (RX 28 at 2). The agreement states that the "Prohibited Acts" shall *not* include the:

> "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, e.g., comparative advertising, parodies, and similar non-infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C) below."

(RX 28 at 2).

1162. Section 2(C) of the AC Lens Agreement provides that each Party agreed to "use the other Party's trademark keywords and URLs (as listed in Exhibit 1) as negative keywords in all of their respective keyword advertising campaigns for any internet search provider that allows the use of negative keywords, to the fullest extent allowable by the internet search provider, in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URLs (as listed in Exhibit 1)." (RX0028 at 002-003). Specifically, each party must provide the other Party's trademark keywords and URLs listed in Exhibit 1 to search engine providers as negative keywords, "such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website." (RX0028 at 003).

Response to Finding No. 1162:

The proposed finding is incomplete and misleading. The settlement agreement between ACLens and 1-800 Contacts expressly allows ACLens and 1-800 Contacts to use generic

keywords to advertise their products and services. (RX 28 at 2). The agreement states that the "Prohibited Acts" shall *not* include the:

> "(i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, e.g., comparative advertising, parodies, and similar non-infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C) below."

(RX 28 at 2).

1163. Pursuant to the AC Lens Agreement, 1-800 Contacts and AC Lens agreed to extend the agreed-to restrictions on search advertising to all similar technologies that might arise in the future. Specifically, 1-800 Contacts and AC Lens agreed to construe the agreement "such that all future internet advertising techniques and advertisement delivery technologies that are substantially similar to the foregoing Obligations and Prohibited Acts shall also be considered Obligations and Prohibited Acts under" the AC Lens Agreement. (RX0028 at 003).

Response to Finding No. 1163:

The proposed finding is incomplete and misleading. The cited passage merely set out the parties' "intent . . . to construe this Section 2 in good faith" so that if and when "new internet advertising techniques and technologies" that were then "unknown," they would be covered if "substantially similar." (RX 28 at 3).

1164. The AC Lens Agreement provides a procedure for enforcement, which requires the enforcing party to notify the breaching party in writing, and allows the breaching party time to respond or to remedy an alleged breach. (RX0028).

Response to Finding No. 1164:

Respondent has no specific response.

1165. The AC Lens Agreement provides that, in event of a breach that is not cured in time, the enforcing party is entitled to damages of $1,000 per day of the breach. (RX0028 at 004). If the agreement is breached by one party "more than once in any given six-month period," the non-breaching party is entitled to damages of $5,000 per day of breach. (RX0028 at 005).

Response to Finding No. 1165:

The proposed finding is incomplete. As the Settlement Agreement states, the parties agreed that the damage amount constituted "a reasonable estimate of the minimum damages that would result from a breach of th[e] Agreement." (RX 28 at 4). Moreover, and contrary to the proposed finding, the parties agreed that the damages period would not start until the sixth day after notice was given, to provide sufficient time to address and cure any breach. (RX 28 at 4).

1166. The AC Lens Agreement provides a separate provision for breaches by affiliates, which also entitles the enforcing party to damages $1,000 for each day of the breach if the breaching affiliate is not terminated in time. (RX0028 at 005).

Response to Finding No. 1166:

The proposed finding is incomplete. The parties agreed to a separate breach provision for affiliates that included a longer cure period and a provision that "[n]either party shall have an affirmative duty to police Affiliate advertising for potential violations of the other party's intellectual property rights." (RX 28 at 5).

1167. Exhibit 1 to the AC Lens Agreement lists 37 terms as negative keywords related to 1-800 Contacts' trademarks, brand names, or URLs. (RX0028 at 008).

Response to Finding No. 1167:

The proposed finding is misleading in that it omits the fact that approximately 27 of the 37 terms are close misspellings of "1-800 Contacts" or of "www.1800Contacts.com" (RX 28 at 8).

13. Empire Vision/Visionworks

1168. On February 25, 2010, 1-800 Contacts sued Empire Vision Center, Inc., in federal district court in Utah alleging trademark infringement. (CX0808).

Response to Finding No. 1168:

Respondent has no specific response.

1169. In a letter dated February 26, 2010, Mark Miller, counsel for 1-800 Contacts wrote to David Holmberg of Empire Vision Center, Inc., alleging that Empire Vision infringed upon 1-800 Contacts' trademarks through the purchase of sponsored advertisements. (CX0449 at 001-022).

Response to Finding No. 1169:

Respondent has no specific response.

1170. In his February 26, 2010 letter, Mr. Miller included a list of 24 keywords that were allegedly causing infringement, although he listed several of the terms multiple times. (CX0449 at 002).

Response to Finding No. 1170:

Respondent has no specific response.

1171. Only six of the 24 listed terms listed in Mr. Miller's February 26, 2010 letter were unique: "800contacts" "www.1800contacts" "1-800 contacts", "1800contacts coupon code", "1800contacts", and "800 contacts." (CX0449 at 002).

Response to Finding No. 1171:

Respondent has no specific response.

1172. In his February 26, 2010 letter to Empire Vision, Mr. Miller enclosed "a copy of our standard settlement agreement for these types of matters," which included a list of 24 keywords to be implemented as negative keywords (CX0449 at 001-022). The list of negative keywords did not include "www.1800contacts," "1800contacts coupon code," or "1800contacts." (CX0449 at 001-022).

Response to Finding No. 1172:

Complaint Counsel's Proposed Finding No. 1172 is incorrect and incomplete. The list of keywords in Exhibit 1 of the agreement included "1800contacts," and it included variations of www.1800contacts," such as "www.1800contacts.com" and www.1800contacts.net. (CX 449 at 1-22).

1173. On May 13, 2010, Empire Vision entered into a settlement agreement with 1-800 Contacts that prohibits Empire Vision/Visionworks from bidding for trademark keywords, and requires implementation of negative keywords that are contained in a list. (CX0319 ("Empire Vision Agreement").

Response to Finding No. 1173:

Complaint Counsel's Proposed Finding No. 1173 is incomplete. The agreement contained provisions clarifying and limiting the prohibitions stated in Complaint Counsel's Finding No. 1173, including but not limited to a provision stating: "Prohibited Acts shall not include (i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contacts,' 'contact lens,' 'lenses,' and 'lens.' The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C) below." (CX 319).

1174. Pursuant to the Empire Vision Agreement, Empire Vision/Visionworks was required to implement a list of 23 negative keywords related to 1-800 Contacts' brand names and

trademarks, across all of its search advertising campaigns "in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party's trademark keywords or URL's (as listed in Exhibit 2); specifically implementing negative keywords "such that advertisements and/or links will not be displayed when the negative keywords are part of a search performed on the internet search provider's website." (CX0319 at 003).

Response to Finding No. 1174:

Respondent has no specific response.

1175. The Empire Vision Agreement requires each party not to bid on any of the keywords identified by the other party, and to adopt the same as negative keywords so to instruct the search engine not to deliver an ad, even if relevant to the consumer, if any of the party's keywords are in any way, "part of a search performed on the internet search provider's website." (CX0319 at 003).

Response to Finding No. 1175:

Complaint Counsel's Proposed Finding No. 1175 is misleading. The agreement between 1-800 contacts and Empire Vision says nothing about what is or is not relevant to consumers. The agreement speaks for itself and does not require Complaint Counsel's characterization of it.

1176. The list of 1-800 Contacts' terms to be implemented as negative keywords proposed by Mark Miller in his letter to Empire Vision dated February 26, 2010 is the exact same list of 1-800 Contacts brand negative keywords adopted in the final settlement agreement. (CX0449 at 001-022); CX0319 at 010-012).

Response to Finding No. 1176:

Respondent has no specific response.

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

Response to Finding No. 1177:

Respondent has no specific response.

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

Response to Finding No. 1178:

Respondent has no specific response.

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

Response to Finding No. 1179:

Complaint Counsel's Proposed Finding No. 1179 is misleading. Parties may always terminate their agreements with each other in the event circumstances change, and a special provision within an existing agreement is not needed for them to do so.

14. Replace My Contacts

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

Response to Finding No. 1180:

The proposed finding is inaccurate, incomplete and misleading. Mr. Miller's cease-and-desist letter referred to several claims in addition to trademark infringement, including unfair competition and false advertising. Moreover, the proposed finding's description of the cease-and-desist letter as containing "threat[s]" is inconsistent with the "sound public policy to encourage the use of pre-suit warning letters," in part because "[o]ften such warnings result in final resolution of the dispute without the intervention of the courts." *Select Comfort Corp. v. Sleep Better Store, LLC*, 838 F.Supp.2d 889, 895 (D. Minn. 2012).

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

Response to Finding No. 1181:

Respondent has no specific response.

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

Response to Finding No. 1182:

The proposed finding is incomplete and misleading. Mr. Drucker asserted that 1-800 Contacts had infringed his client's trademark rights through the purchase of sponsored advertisements that were triggered in response to Replace My Contacts' trademark keywords. (CX 828 at 1). Mr. Drucker proposed that in order to resolve the parties' separate claims of trademark infringement and related claims, settlement would be appropriate. (CX 828 at 1; CX 321). Respondent also notes that the cited exhibit (CX 828) was admitted for non-hearsay matters and should not be used for the truth of the matters asserted.

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

Response to Finding No. 1183:

The proposed finding is incomplete, misleading, and inaccurate. The Replace My Contacts settlement agreement does not prohibit, and specifically excludes from the language quoted by Complaint Counsel, the "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the

Internet of comparative advertising, parodies, and similar non-Infringing uses; and (ii) the use of descriptive words on the Internet such as "contact", "contacts", "contact lens", "lenses", and "lens", and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as "contacts," "contact lens," "lenses," and "lens." (CX 321 at 3-4).

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

Response to Finding No. 1184:

The proposed finding is incomplete because the quoted language must be read in the context of the entire agreement. For example, the parties are only required to implement negative keywords in a manner that would prevent advertisements from being displayed in response to searches specifically for the other party's trademarks and variations thereof, and not for queries that may include the trademark but are not navigational in nature and "would not constitute an infringing use in a non-Internet context, *e.g.*, the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses." (CX 321 at 2-3; CX 9040 (Miller, Dep. at 37-39, 66); CX 9031 (Schmidt, Dep. at 115); CX 9020 (Craven, Dep. at 18-19)).

1185. The list of designated "trademark" keywords that Replace My Contacts was required to adopt as negative keywords under the The Replace My Contacts Agreement was nearly identical to the list that was proposed by 1-800 Contacts' counsel in his initial letter to Tram Data/Replace My Contacts dated May 6, 2010. (CX0321 at 010; CX0638 at 024).

Response to Finding No. 1185:

Respondent has no specific response.

15. Walgreens

1186. Early in 2010, 1-800 Contacts notified Walgreens of "issues found by [1-800 Contacts'] marketing group" concerning the appearance of Walgreens advertisements in response to

search queries containing variants of 1-800 Contacts' trademarks (CX0482 at 002 (March 1, 2010 email from David Zeidner to Cary Pumphrey at Walgreens).

Response to Finding No. 1186:

Respondent has no specific response.

1187. In April of 2010, David Zeidner of 1-800 Contacts emailed Cary Pumphrey of Walgreens, forwarding an email that noted "a spike in Walgreens ads showing up on our [1-800 Contacts] marks," told Cary that "it appears that the problem has started back up again," and asked him to "[p]lease let me know … how your company is handling the situation." (CX1177 at 001).

Response to Finding No. 1187:

Respondent has no specific response.

1188. In May 2010, 1-800 Contacts' in-house counsel, David Zeidner, sent Mr. Pumphrey of Walgreens a list of companies that 1-800 Contacts had sued and a list of 36 required negative keywords that 1-800 Contacts included in its "standard agreement" with competitors. (CX0494 at 002-003).

Response to Finding No. 1188:

Respondent has no specific response.

1189. In May 2010, counsel for Walgreens represented that Walgreens was not, at that time, bidding on the name "1-800 Contacts" but that its ads may have been appearing in response to the generic keyword "contacts," on which Walgreens was bidding. (CX0460).

Response to Finding No. 1189:

Respondent has no specific response, other than to note that the cited exhibit (CX 460) was admitted for non-hearsay purposes and should not be used for the truth of the matter asserted.

1190. Walgreens rejected 1-800's request to implement negative search terms, stating its view that there was "no basis in law for such a request." (CX0460 at 001). Counsel for Walgreens noted that the Walgreens advertisement at issue was "clearly identified as a link to Walgreens' goods and services and displays a link to Walgreens' web page." (CX0460 at 001).

Response to Finding No. 1190:

The proposed finding is incomplete, inaccurate, and misleading. The cited exhibit (CX 460) was admitted for non-hearsay purposes and should not be used for the truth of the matter asserted. Moreover, Walgreens did not "reject 1-800's request to implement negative search terms," as the proposed finding erroneously states. In fact, Walgreens signed a settlement agreement with 1-800 Contacts "to avoid the expense, inconvenience, and disruption of pursuing and defending the Action." (CX 322 at 1). In that agreement, Walgreens agreed to implement negative keywords for certain of 1-800 Contacts trademark terms and confusingly similar variations. (CX 322).

In addition, Complaint Counsel's economist conceded that Walgreens is not capital constrained and is an economically rational actor. (Evans, Tr. 1831-32; CX 9042 (Evans, Dep. at 119-120, 133-134). That means that Walgreens is presumed to have determined that it was in its best interest to settle a case with an uncertain legal outcome (on terms that included negative keywords) given the comparative value, if any, of its advertisements appearing in response to searches for another retailer. (CX 322 at 1; Evans, Tr. 1830-31; RX 737 at 17 (Landes Rep.); RX 739 at 53, 0034 (Murphy Rep.); Murphy, Tr. 4203-05).

1191. 1-800 sued Walgreens in June 2010 for trademark infringement. The parties quickly entered into a settlement agreement. (CX0322).

Response to Finding No. 1191:

Respondent has no specific response other than to note that the referenced complaint contained several other claims for relief in addition to trademark infringement.

16. Web Eye Care

1192. On August 10, 2010, shortly after it started advertising against 1-800 Contacts, WebEyeCare received a letter from Mark Miller, counsel for 1-800 Contacts. (CX0643).

Mr. Miller stated that he had filed a complaint in federal court alleging that Web Eye Care was infringing upon 1-800 Contacts' trademarks "through your online advertising campaigns with Google, and possibly other search engines," that used a list of 1-800 Contacts trademark-related keywords/search terms "to trigger advertisements" for Web Eye Care's services and website. (CX0643).

Response to Finding No. 1192:

Respondent has no specific response.

1193. In his August 10, 2010 letter to Web Eye Care, Mr. Miller enclosed a draft settlement agreement, and demanded that WebEyeCare cease any use of the 1-800 Contacts trademark, and adopt negative keywords to prevent its ads from appearing when a user entered a query in a search engine that included any variant of the term 1-800 Contacts. (CX0643). Mr. Miller also demanded that WebEyeCare pay 1-800 Contacts $10,000. (CX0643).

Response to Finding No. 1193:

Complaint Counsel's Proposed Finding No. 1193 is inaccurate and misleading and should be disregarded. All that Mr. Miller demanded in that letter was that WebEyeCare provide a written response within ten calendar days from the date of the letter. He made no other demands in that letter. (CX 643 at 1-3).

1194. [redacted] (CX9000 (Batushansky, IHT at 82)).

Response to Finding No. 1194:

Complaint Counsel's Proposed Finding No. 1194 is inaccurate and misleading, is not supported by the cited testimony, and should be disregarded. [redacted]

[redacted] (CX 9000 (Batushansky, IHT at 80-83); CX 9014 (Batushansky, Dep. at 41-48)).

1195. [redacted] (CX9000 (Batushansky, IHT at 73-75); CX9014 (Batushansky, Dep. at 44-46)).

Response to Finding No. 1195:

Complaint Counsel's Proposed Finding No. 1195 is inaccurate and misleading, is not supported by the cited testimony, and should be disregarded. [redacted]

(CX 9000 (Batushansky, IHT at 74-75); CX 9014 (Batushansky, Dep. at 41-48)).

1196. On September 3, 2010 WebEyeCare and 1-800 Contacts entered into a settlement agreement to resolve 1-800's allegations of infringement. [redacted] (CX0324 ("Web Eye Care Agreement"); CX9000 (Batushansky, IHT at 73-75); CX9014 (Batushansky, Dep. at 44-46)).

Response to Finding No. 1196:

Other than noting that the draft settlement agreement provided to Mr. Batushansky (CX 643) requested a payment of $8,000, which was negotiated by Mr. Batushansky down to $2,000 in the final settlement agreement (CX 324), Respondent has no further specific response.

1197. The Web Eye Care Agreement prohibits WebEyeCare from seeking to advertise against the 1-800 Contacts name (and similar identified terms) through search advertising in perpetuity. (CX0324). The agreement also requires WebEyeCare to use in perpetuity negative keywords in all of its search advertising campaigns so as to prevent display of all, "advertisements and/or internet links in response to or as a result of any internet search that includes [1-800 Contacts'] trademark keywords or URL." (CX0324 at 003; CX9000 (Batushansky, IHT at 74-75), *in camera*).

Response to Finding No. 1197:

Complaint Counsel's Proposed Finding No. 1197 is incomplete, misleading, and inaccurate. The WebEyeCare settlement agreement does not prohibit and specifically permits "(i) the use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; (ii) the use of descriptive words on the Internet such as 'contact', 'contacts', 'contact lens', 'lenses', and 'lens', and (iii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contact,' 'contact lens,' 'lenses,' and 'lens.'" (CX 324 at 3).

1198. The Web Eye Care Agreement makes no reference to or exception for WebEyeCare advertisements that are truthful and non-misleading. (CX0324).

Response to Finding No. 1198:

Complaint Counsel's Proposed Finding No. 1198 is incomplete, misleading, and inaccurate. The WebEyeCare settlement agreement does not prohibit and specifically permits "(i) the use of the other Party's trademarks on the Internet in a manner that would not constitute

an infringing use in a non-Internet context, *e.g.*, comparative advertising, parodies, and similar non-Infringing uses; (ii) the use of descriptive words on the Internet such as 'contact', 'contacts', 'contact lens', 'lenses', and 'lens', and (iii) the purchase by either Party of keywords that are generic, non-trademarked words, such as 'contact,' 'contact lens,' 'lenses,' and 'lens.'" (CX 324 at 3).

1199. [redacted] (CX9014 (Batushansky, Dep. at 204-205), *in camera*).

Response to Finding No. 1199:

Complaint Counsel's Proposed Finding No. 1199 is inaccurate and misleading, and should be disregarded. Mr. Batushansky testified only that he was [redacted] (CX 9014, Dep. at 204-205), *in camera*).

17. Luxottica

1200. By August 2005, 1-800 Contacts and Luxottica had reached an agreement to add each other's trademarks as negative keywords to their advertising accounts and to the lists of negative keywords that their affiliates would be required to use. (CX0117 at 001-002; CX0174; CX1378).

Response to Finding No. 1200:

Complaint Counsel's Proposed Finding No. 1200 is not supported by the cited evidence and is misleading and inaccurate to the extent it implies there was a substantive agreement between 1-800 Contacts and Luxottica by August 2005 regarding the use of each other's trademarks in paid search advertising. CX 174 is a communication between the parties regarding Luxottica's claim that the parties had agreed "that some of [1-800 Contacts'] affiliates are

inappropriately using our LensCrafters trademark (which is a violation of your contract with them," to which 1-800 Contacts' Kevin McCallum responds by stating that "I think there is a need for additional sharing of information before our two organizations agree on anything with respect to this situation" then goes on to state that "I have to respectfully disagree that this is occurring."

CX 1378 is a communication from 1-800 Contacts' Clint Schmidt thanking Luxottica's Connie Ross for taking time to talk and stating "I'm glad to have amicable correspondence to resolve any search or trademark issues in the future."

CX 117 is correspondence from Luxottica's Connie Ross stating that she would like 1-800 Contacts to include certain negative keywords on its existing list of negative keywords.

Any implication that there was a substantive agreement between 1-800 Contacts and Luxottica regarding the use of each other's trademarks by August 2005 is directly contrary to the record evidence. Clint Schmidt, the sole witness involved in the 2005 discussions, testified unambiguously that he was not aware of any trademark settlement agreement entered into between Luxottica and 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 74)). He also testified that 1-800 Contacts' pre-existing policy already prohibited the conduct alleged by Luxottica and that 1-800 Contacts did not change its practices in any way as a result of its 2005 correspondence with Luxottica. (CX 9031 (Schmidt, Dep. at 67-69, 72, 74)). Likewise, Mr. Bethers repeatedly testified that 1-800 Contacts had no preexisting trademark agreement or any trademark protection with regard to Luxottica prior to the December 23, 2013 Luxottica Sourcing Agreement. (CX 9001 (Bethers, IHT at 228 ("We had no agreement with Luxottica."), 229 ("We didn't have trademark protection" with regard to Luxottica) and 232 ("We didn't have an agreement with Luxottica.")).

1201. On December 23, 2013, 1-800 Contacts and Luxottica entered into a sourcing and services agreement ("Luxottica Sourcing Agreement"). (CX0331; CX9001 (Bethers, IHT at 221-222 (CX0331 is "a sourcing and fulfillment agreement between 1-800 CONTACTS and Luxottica")).

Response to Finding No. 1201:

Respondent has no specific response.

1202. 1-800 Contacts' CEO, Brian Bethers, led the negotiation for the Luxottica Sourcing Agreement. (CX9001 (Bethers, IHT at 222)).

Response to Finding No. 1202:

Respondent has no specific response.

1203. Pursuant to the Luxottica Sourcing Agreement, 1-800 Contacts supplies contact lenses, including trial lenses, for Luxottica retail stores, and provides logistics support, and provides other services to support Luxottica's contact lens retail business. (CX0331 at -016-017; CX9001 (Bethers, IHT at 225)).

Response to Finding No. 1203:

Complaint Counsel's Proposed Finding No. 1203 is incomplete, vague and misleading. As both the Luxottica Sourcing Agreement itself and other record evidence make clear, the agreement is "a fulfillment and sourcing agreement" whereby 1-800 Contacts: (1) ships contact lenses to Luxottica retail stores or to their customers' homes in boxes labeled and packaged under the relevant Luxottica brand name, and (2) takes the lead to jointly source contact lenses from the manufacturers on behalf of both parties in an effort to get better terms based on the volume purchased. (Bethers, Tr. 3524-25, 3694-95; CX 331). The agreement also contemplated that either Luxottica or 1-800 Contacts would take over certain of Luxottica's e-commerce services which at that time were being provided by Vision Direct. (CX 9001 (Bethers, IHT at 223-25)).

1204. 1-800 Contacts does not provide any services for Luxottica's e-commerce business. (CX9001 (Bethers, IHT at 223 ("No, we are not providing internet fulfillment services for Luxottica")).

Response to Finding No. 1204:

Complaint Counsel's Proposed Finding No. 1204 is not supported by the cited testimony and is incomplete and misleading. The cited testimony merely states that 1-800 Contacts was not currently "providing internet fulfillment services" for Luxottica. (CX 9001 (Bethers, IHT at 223)). The proposed finding is also incomplete and misleading since the agreement contemplates that either Luxottica or 1-800 Contacts would be taking over certain of Luxottica's e-commerce services which at that time were being provided by Vision Direct. (CX 9001 (Bethers, IHT at 223-25)).

1205. 1-800 Contacts does not provide any search marketing services for Luxottica. (CX9001 (Bethers, IHT at 227-228 ("So we structured the agreement in a way that kept separate all decisions related to marketing, advertising. We focused the relationship that we had on sourcing and fulfillment."); CX9001 (Bethers, IHT at 235 ("In the case of Luxottica, we did not create an alliance. So in areas of pricing, in areas of advertising, we were completely separate. No involvement, no discussion, no meetings, no topics. So we do not work with them in advertising, whether it's broad scale, whether it's in a store, whether it's online, digital, doesn't matter. We don't work with Luxottica in those areas.")).

Response to Finding No. 1205:

Respondent has no specific response.

1206. Vision Direct provides e-commerce services to Luxottica, including front end services like Internet marketing. (CX9001 (Bethers, IHT at 224) (Luxottica asked Mr. Bethers if he would give them "permission to allow Vision Direct to continue to provide [e-commerce] services" and he gave them verbal permission)).

Response to Finding No. 1206:

Complaint Counsel's Proposed Finding No. 1206 is not supported by the cited testimony and is incomplete and misleading. The cited testimony merely states that the parties discussed

having Vision Direct continue to provide Luxottica's e-commerce services temporarily. (CX 9001 (Bethers, IHT at 224)). The testimony that immediately precedes and follows the cited portion expressly states that Mr. Bethers did not know whether Vision Direct was still providing such services to Luxottica and that the parties contemplated that either Luxottica or 1-800 Contacts would be taking over certain of Luxottica's e-commerce services. (CX 9001 (Bethers, IHT at 223-25)).

1207. Pursuant to the Luxottica Sourcing Agreement, Luxottica and 1-800 Contacts agreed not to use each other's trademarks as search advertising keywords, and agreed to implement each other's trademarks as negative keywords. (CX0331 at 045-048).

Response to Finding No. 1207:

Complaint Counsel's Proposed Finding No. 1207 is incomplete and misleading. As part of a broader commercial relationship whereby 1-800 Contacts provided fulfillment services and sourced product for Luxottica, the parties agreed not to use each other's "trademarks or confusingly similar variations as listed in [the agreement] as triggering keywords in any internet search engine advertising campaign" and to "implement [them] as exact match negative keywords…." (CX 331 at 45-48; Bethers, Tr. 3697-99).

1208. Pursuant to the Luxottica Sourcing Agreement, Luxottica agreed that it "shall not purchase or use any of the 1-800 Trademarks or confusingly similar variations as listed in Schedule 17.10 as triggering keywords in any internet search engine advertising campaign." (CX0331 at 045).

Response to Finding No. 1208:

Respondent has no specific response.

1209. Pursuant to the Luxottica Sourcing Agreement, Luxottica agreed to "implement all of the 1-800 Trademarks or confusingly similar variations as listed in Schedule 17.10 as exact match negative keywords in all internet search engine advertising campaigns" accessible in the relevant territories. (CX0331 at 045-046).

Response to Finding No. 1209:

Respondent has no specific response.

1210. Schedule 17.10 of the Luxottica Sourcing Agreement lists certain trademarks of 1-800 Contacts and variations in spelling of those trademarks, along with a list of URLs owned by 1-800 Contacts. (CX0331 at 160-161).

Response to Finding No. 1210:

Respondent has no specific response.

1211. Pursuant to the Luxottica Sourcing Agreement, 1-800 Contacts agreed that it shall not "purchase or use any of the [Luxottica] Trademarks or confusingly similar variations as listed in Schedule 17.11 as triggering keywords in any internet search engine advertising campaign." (CX0331 at 047).

Response to Finding No. 1211:

Respondent has no specific response.

1212. Pursuant to the Luxottica Sourcing Agreement, 1-800 Contacts agreed to "implement all of the [Luxottica] Trademarks or confusingly similar variations as listed in Schedule 17.11 as exact match negative keyword sin all internet search engine advertising campaigns." (CX0331 at 047).

Response to Finding No. 1212:

Respondent has no specific response.

1213. Schedule 17.11 of the Luxottica Souring Agreement lists certain trademarks of Luxottica and variations in spelling of those trademarks, along with a list of URLs owned by Luxottica. (CX0331 at 162-167).

Response to Finding No. 1213:

Respondent has no specific response.

1214. 1-800 Contacts considered the trademark keyword advertising restrictions in the Luxottica Sourcing Agreement as an important "absolute" that Brian Bethers "insisted on having in the agreement." (CX9001 (Bethers, IHT at 228)). 1-800 Contacts' general counsel, Joe Zeidner, was "very concerned about it, as well." (CX9001 (Bethers, IHT at 230)).

Response to Finding No. 1214:

Complaint Counsel's Proposed Finding No. 1214 is incomplete and misleading. The cited testimony of Mr. Bethers states that one of the "few absolutes, things that he insisted on having in the agreement" was "how [the parties] treat each other's trademarks" because he "did not want to get into a situation where, as partners on a portion of our business, we were arguing over how you conduct trademarks and defend trademarks." (CX 9001 (Bethers, IHT at 228-29)). Other record evidence makes this clear as well. (CX 9001 (Bethers, IHT at 232-33 ("I didn't want [trademark disputes] to interfere with our partnership relation on sourcing and fulfillment.") & 235 (Bethers didn't want to "get into an argument and a dispute with a partner over how the two parties are advertising"); Bethers, Tr. 3696 ("as a prospective partner but also competitor, I wanted to make clear that trademark advertising was an area of serious concern for 1-800 Contacts, so I requested that the section be in the agreement")).

1215. Before the Luxottica Sourcing Agreement, Vision Direct was providing internet marketing services for Luxottica's e-commerce business. (CX9001 (Bethers, IHT at 228-229)).

Response to Finding No. 1215:

Complaint Counsel's Proposed Finding No. 1215 is not supported by the cited testimony. The cited testimony merely states that Mr. Bethers believed that Vision Direct had been providing e-commerce services to Luxottica for some period before the Luxottica Sourcing Agreement.

1216. 1-800 Contacts believed that it had "trademark protection" from Luxottica before entering into the Luxottica Sourcing Agreement because of its agreements with Vision Direct, who operated Luxottica's e-commerce business. (CX9001 (Bethers, IHT at 228-229) ("Vision Direct was subject to an agreement with us that mutually respected our trademarks. To our knowledge, they were the ones that were running the search program previously for Luxottica . . . They expressed to me an intention to take over the front end, which included search advertising, all advertising digital. We had no agreement with

Luxottica. We did have an agreement with Vision Direct. They represented that they were going to terminate the agreement with Vision Direct and do it themselves. We didn't have trademark protection."); CX9001 (Bethers, IHT at 231 ("With Vision Direct in place providing the service to Luxottica, I had not concerns about trademark violations and their intents.")).

Response to Finding No. 1216:

Complaint Counsel's Proposed Finding No. 1216 mischaracterizes the cited testimony and is both inaccurate and contrary to the record evidence. The cited testimony merely states that 1-800 Contacts did not have trademark concerns with Vision Direct providing e-commerce services for Luxottica because Vision Direct had not created issues for 1-800 Contacts while providing such services for Luxottica in the past. (CX 9001 (Bethers, IHT at 230-231 ("Vision Direct had not, on behalf of their client, Luxottica, created an issue for us in the past. So we were quite comfortable that Vision Direct, had they remained in place, we would have been protected because they … hadn't done it up until then.")). Mr. Bethers specifically testified that he did *not* know whether 1-800 Contacts' agreement with Vision Direct was applicable to, or enforceable against, Luxottica. (CX 9001 (Bethers, IHT at 232 ("I can't tell you whether [the Vision Direct] agreement -- how it applied to Luxottica, I don't know.) and 233 ("I don't know whether [the Vision Direct agreement] was enforceable" against Luxottica).

1217.1-800 Contacts sought "trademark protection" from Luxottica through the Luxottica Sourcing because it believed that Luxottica was going to take over its e-commerce business from Vision Direct and 1-800 Contacts did not yet have a written agreement with Luxottica. (CX9001 (Bethers, IHT at 228-229)).

Response to Finding No. 1217:

Complaint Counsel's Proposed Finding No. 1217 mischaracterizes the cited testimony and is incomplete and misleading. The cited testimony indicates that Mr. Bethers insisted on including in the Luxottica Sourcing agreement a provision regarding how the parties were going to treat each other's trademarks because he "did not want to get into a situation where, as

partners on a portion of our business, we were arguing over how you conduct trademarks and defend trademarks." (CX 9001 (Bethers, IHT at 228-29)). The cited testimony further indicates that 1-800 Contacts had no preexisting trademark agreement or trademark protection with regard to Luxottica. (CX 9001 (Bethers, IHT at 228 ("We had no agreement with Luxottica.") & 229 ("We didn't have trademark protection" with regard to Luxottica)). Other record evidence makes this clear as well. (CX 9001 (Bethers, IHT at 232 ("We didn't have an agreement with Luxottica.")). The cited testimony does not refer to the absence of a "written agreement," which is both misleading and inaccurate to the extent it implies that 1-800 Contacts had some other form of trademark agreement or trademark protection with Luxottica prior to the Luxottica Sourcing agreement.

1218. Luxottica and 1-800 Contacts continue to compete on the front end, and Luxottica may advertise freely except "when it comes to trademark." (CX9001 (Bethers, IHT at 235-36) ("We need to be free and clear to advertise any way we want to, however we want to. They [Luxottica] can spend whatever they want to. They can run any programs they want to. But when it comes to trademark, we agree to mutually respect our trademark. And that's the intent of the discussion or the agreement and the language we had.")).

Response to Finding No. 1218:

The proposed finding mischaracterizes the cited testimony and is misleading. The cited testimony states that Mr. Bethers did not want to "get into an argument and a dispute with a partner over how the two parties were advertising" and that the intent behind the Luxottica Sourcing Agreement was that the parties would "be free and clear to advertise any way [they] want to" but that "when it comes to trademark, we agree to mutually respect [each other's] trademark." (CX 9001 (Bethers, IHT at 235-36)).

C. 1-800 Contacts Enforced the Agreements

1. AC Lens

1219. In April of 2010, Mark Miller, counsel for 1-800 Contacts, wrote to Peter Clarkson of AC Lens claiming that AC Lens had breached the settlement agreement between the two parties. (CX1107 at 001). Mr. Miller included screenshots that, he said, "demonstrate[] the breach by affiliates of AC Lens." (CX1107).

Response to Finding No. 1219:

The proposed finding is incomplete because it fails to describe Mr. Clarkson's May 2, 2010 response to Mr. Miller, where he confirmed that an ACLens affiliate had violated its affiliate agreement. (CX 9039 (Clarkson, Dep. at 187-189) (discussing RX 56)). Mr. Clarkson testified that the affiliate had breached the affiliate agreement by "effectively spoof[ing] our site" by "pretend[ing] to be Discount Contact Lenses." (CX 9039 (Clarkson, Dep. at 189).

1220. In April of 2013, Mr. Miller wrote to Mr. Clarkson that 1-800 Contacts had discovered a breach of the settlement agreement by AC Lens, in the form of advertisements for the Walmart Contacts website appearing in response to a Google search for "1800 contacts lenses" and "through searches on Facebook for the 1800CONTACTS trademark terms." (CX0007 at 001-002).

Response to Finding No. 1220:

Respondent has no specific response.

1221. In response to the April 2013 claim of breach by Mr. Miller, James Trigg, counsel for AC Lens, denied the breach, saying that AC Lens was not responsible for the advertisements by Walmart Contacts. (CX0007 at 004-005).

Response to Finding No. 1221:

The proposed finding is incomplete and misleading, for it ignores the initial response by Mr. Trigg, counsel for ACLens, who stated that ACLens "is investigating the facts underlying your assertions" and would respond in a "substantive" fashion "as soon as that investigation is complete." (CX 7 at 3). In the subsequent letter that the proposed finding refers to, Mr. Trigg

acknowledged that the Walmart Contacts website stated that it was "Powered by Arlington Lens Supply" *and* that National Vision, ACLens' sole owner, *was* also the owner of the url www.walmartcontacts.com (RX 7 at 4). Mr. Trigg explained that National Vision was in the process of transferring the URL to Walmart and that ACLens did not place advertising for or on behalf of Walmart. (RX 7 at 4).

1222. In a May 30, 2014 letter, Mr. Miller notified Mr. Clarkson of a claimed breach of the AC Lens Agreement, claiming that "sponsored links for the aclens.com and discountcontactlenses.com websites" had been "triggered by searches for the term 'www800contacts.'" (CX0006 at 001).

Response to Finding No. 1222:

Respondent has no specific response.

1223. In a letter dated June 4, 2014, Peter Clarkson, President and CEO of AC Lens responded to Mr. Miller's May 30, 2014 letter, stating that "[t]he search term you describe is not on the list attached to our agreement, so we do not think there is a breach. Regardless, we have added the term as a negative keyword." (CX0740).

Response to Finding No. 1223:

Respondent has no specific response.

2. Coastal

1224. In August of 2006, Ed McCready of 1-800 Contacts sent an email to Coastal Contacts stating that "[s]earch engine advertisements from Coastal Contacts and their affiliates are being triggered by searches on variations of 1-800 CONTACTS' trademarks…in violation of the settlement agreement…" and asked Coastal to "ensure the proper steps are taken to remedy this." (CX0260).

Response to Finding No. 1224:

Respondent has no specific response.

1225. In response to the August 2006 email from Mr. McCready that alleged breach of the 2004 Coastal Agreement, Sarah Villeneuve Bundy of Coastal Contacts responded that Coastal was "not aware of this discrepancy" and would stop its ads from appearing "immediately." (CX0260).

Response to Finding No. 1225:

Respondent has no specific response.

1226. In November of 2006, Mr. McCready of 1-800 Contacts wrote to Ms. Villenueve Bundy of Coastal Contacts again, claiming that Coastal had breached the 2004 Coastal Agreement and attached screenshots of the allegedly "violating ads." These screenshots showed Coastal Contacts advertisements appearing in response to searches for "800 contacts;" "800contacts;" "1800 contacts;" and "1-800 contacts." (CX0751 at 002-008).

Response to Finding No. 1226:

Respondent has no specific response.

1227. After receiving Ms. Villenueve Bundy's assurance that the complained-of ads had been removed, Mr. McCready wrote again to Ms. Villeneuve Bundy, stating that the allegedly "infringing ads are still active and they appear to be from your company and not an affiliate." He asked her to "please ensure the necessary steps, such as the use of negative keywords as described by your Marketing Specialist" would be "taken as soon as possible to prevent your ads from showing on these searches." (CX0751 at 001). The negative keyword "described by [Coastal's] Marketing Specialist" to which Mr. McCready referred was "800." (CX0751 at 001).

Response to Finding No. 1227:

Respondent has no specific response.

1228. On March 2, 2011, Bryce Craven of 1-800 Contacts emailed Curtis Petersen of Coastal Contacts to notify him that "Lensway.com ads" were "showing up on our trademarked terms…" Mr. Craven asked Mr. Petersen to "double check to ensure the appropriate negatives are implemented…" (CX0432 at 002). Mr. Petersen responded that he had complied. (CX0432 at 001).

Response to Finding No. 1228:

Respondent has no specific response.

1229. On March 31, 2011, Mr. Craven again emailed Mr. Peterson, claiming that advertisements for ClearlyContacts, a property of Coastal Contacts, were "appearing on our term *1-800contacts* in the Google Canada search results" and telling him to "add the necessary negative keywords…" (CX0236).

Response to Finding No. 1229:

Respondent has no specific response.

1230. In June of 2011 Mr. Petersen responded to Mr. Craven to let him know, the "issue has been addressed" and that the list of negative keywords had been added, "across the entire US Google Contacts account" for Coastal. (CX0757).

Response to Finding No. 1230:

Respondent has no specific response.

1231. In February of 2012, Jordan Judd of 1-800 Contacts emailed Mr. Petersen claiming another instance of "a Coastal.com ad…on our trademark KW." In this instance the 1-800 Contacts trademark allegedly infringed was "contacts.com." (CX0719). Ms. Judd asked Coastal to "get that bid removed and/or add the appropriate negative keywords…" (CX0719).

Response to Finding No. 1231:

Respondent has no specific response.

1232. In February of 2013, Mark Miller sent a letter to Steven Bochen of Coastal Contacts notifying him of an alleged breach of the 2004 Coastal Agreement. Mr. Miller included screenshots of the alleged violations and stated, "we expect that you will take immediate actions to remedy this breach pursuant to the terms of the Agreement." (CX0746).

Response to Finding No. 1232:

Respondent has no specific response.

1233. In June of 2014 Brady Roundy of 1-800 Contacts emailed Braden Hoeppner of Coastal Contacts to follow up on an earlier communication. Mr. Roundy "listed the terms that are in violation and attached screenshots, stating that "[a] few negative keywords should take care of the problem," and requesting that Mr. Hoeppner, "[p]lease let me know when these are added to the account." (CX0703 at 001). Mr. Hoeppner replied that he had complied. (CX 0703 at 001).

Response to Finding No. 1233:

Respondent has no specific response.

3. Vision Direct

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

Response to Finding No. 1234:

Respondent has no specific response.

1235. In his July of 2007 email alleging a breach of the 2004 Vision Direct Agreement, Mr. Dansie asked Mr. Veach to "please address this as soon as possible." (CX0627 at 002).

Response to Finding No. 1235:

Respondent has no specific response.

1236. The July 2007 communications between Mr. Dansie and Mr. Veach eventually led to the amended settlement agreement signed by the two parties on May 8, 2009. (*See supra* § VI.B.8; CX0314 (2009 Vision Direct Agreement)).

Response to Finding No. 1236:

Respondent incorporates herein all responses to any and all findings to which Complaint Counsel report to cross-reference in Section VI.B.8, none of which draws the line of causality referenced in the proposed finding.

1237. In October of 2007, Brandon Dansie of 1-800 Contacts sent a list of negative keywords to Colin Veach of Vision Direct, stating that "[i]f you were to ensure the following negative keywords were consistently used for all of VisionDirect's search campaigns, I am sure we could eliminate this issue and save ourselves some time." (CX0556).

Response to Finding No. 1237:

Respondent has no specific response.

1238. In December of 2009, David Zeidner of 1-800 Contacts emailed Yukio Morikubo of Vision Direct, stating that Vision Direct "has been showing up on several terms for the last two weeks, and my marketing guy has not been heard back from Colin. . . . We need to get this resolved ASAP, as it has already been up for two weeks." Mr. Morikubo replied that Coastal had complied with Mr. Zeidner's request. (CX0481 at 002-003).

Response to Finding No. 1238:

The proposed finding misstates the cited emails (CX 481), which show that Yukio Morikubo's reply stated "Let me look into this." (CX 481 at 3).

1239. In March of 2010, Bryce Craven of 1-800 Contacts told Rick Mitchell of Drugstore.com (then owned by Vision Direct) that, "We've seen VisionDirect ads showing up periodically for these terms," referencing a list of 1-800 Contacts related terms, "during the past few weeks" and asked Mr. Mitchell to "double check [the] negative keywords" in place. (CX0845 at 002).

Response to Finding No. 1239:

The proposed finding is incomplete and misleading. On December 22, 2009, Rick Mitchell, the senior marketing manager for Drugstore.com, wrote to Bryce Craven at 1-800 Contacts to introduce himself and tell Mr. Craven that he should "feel free to contact me regarding any possible trademark infringement." (CX 845 at 2). At that time, a U.S. District Court had entered a permanent injunction that required Vision Direct to implement negative keywords for certain variations of 1-800 Contacts trademark terms to prevent possible trademark infringement. (CX 311; CX 314; CX 316). Mr. Craven responded to Mr. Mitchell's email on March 22, 2010 and provided Mr. Mitchell with a list of 1-800 Contacts trademark terms and confusingly similar variations covered by the settlement agreement between the parties. (CX 845 at 2).

1240. In August of 2010 Mr. Craven again contacted Mr. Mitchell by email, attaching a screenshot of a Vision Direct advertisement appearing on Bing in apparent response to a search for "800contacts." (CX0845 at 001).

Response to Finding No. 1240:

Respondent has no specific response.

1241. In his August 2010 email claiming that a Vision Direct advertisement had appeared in response to a Bing search for "800contacts," Mr. Craven insisted that Vision Direct add the term "800contacts" as a negative keyword. (CX0845 at 001).

Response to Finding No. 1241:

The proposed finding is incomplete and misleading in that it fails to acknowledge that the Permanent Injunction entered by the U.S. District Court for the Southern District of New York required that Vision Direct include that term as a negative keword. (CX 316 at 4).

1242. In January of 2013, Mr. Miller sent a notice of "Breach of…Settlement Agreement" to Drugstore.com, then owned by Vision Direct. (CX0837 at 001).

Response to Finding No. 1242:

Respondent has no specific response.

1243. In his January 2013 notice of breach to Drugstore.com, Mr. Miller alleged that Vision Direct had breached the agreement because, Mr. Miller claimed, Vision Direct's ad appeared on the Yahoo! and Google search engine results pages in response to a search for "1800contacts coupon", and on the Google search engine results page in response to a search for "1800contacts contact lenses." (CX0837 at 001-003).

Response to Finding No. 1243:

Respondent has no specific response.

1244. In his January 2013 notice of breach to Drugstore.com, Mr. Miller stated, "we trust that you will immediate actions to remedy this breach." (CX0837 at 003).

Response to Finding No. 1244:

Respondent has no specific response, other than to note that the cited letter included the word "take" after the word "will." (CX 837 at 3).

1245. In January of 2013, Cabrelle Abel, an attorney at drugstore.com, the owner of Vision Direct, responded to a letter from Mark Miller in which Mr. Miller accused Walgreens of breaching the 2004 Vision Direct Agreement. (CX1217).

Response to Finding No. 1245:

Respondent has no specific response, other than to note that the cited exhibit (CX 1217) was admitted for non-hearsay purposes and should not be used for the truth of the matters asserted. (JX2-A-027).

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

Response to Finding No. 1246:

Respondent has no specific response, other than to note that the cited exhibit (CX 1217) was admitted for non-hearsay purposes and should not be used for the truth of the matters asserted. (JX2-A-027).

4. Walgreens

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

Response to Finding No. 1247:

Respondent has no specific response.

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

Response to Finding No. 1248:

Respondent has no specific response.

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

Response to Finding No. 1249:

Respondent has no specific response.

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

Response to Finding No. 1250:

Respondent has no specific response.

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

Response to Finding No. 1251:

The proposed finding is inaccurate and misleading. In his May 31, 2011 email, Mark Miller acknowledged that Walgreens had informed him that it had "implemented various negative keywords relating to 1-800 Contacts beyond those required in the Settlement Agreement." (RX 1029). The email does not state that Mr. Miller or anyone else on the part of 1-800 Contacts had requested that Walgreens do so. The testimony of Mr. Hamilton reflects that Walgreens understood it had implemented negative keywords beyond the requirements imposed by the agreement itself. (CX 9008 (Hamilton, IHT at 74-75 ("we're probably overly restrictive")).

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

Response to Finding No. 1252:

Respondent has no specific response.

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

Response to Finding No. 1253:

Respondent has no specific response.

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

Response to Finding No. 1254:

Respondent has no specific response.

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

Response to Finding No. 1255:

Respondent has no specific response.

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

Response to Finding No. 1256:

Respondent has no specific response.

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

Response to Finding No. 1257:

Respondent has no specific response.

5. EZ Contacts

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

Response to Finding No. 1258:

Respondent has no specific response.

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

Response to Finding No. 1259:

Respondent has no specific response.

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

Response to Finding No. 1260:

Respondent has no specific response.

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

Response to Finding No. 1261:

Respondent has no specific response other than to note that the cited email also stated that the advertisements in question had been removed. (CX 816 at 1).

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

Response to Finding No. 1262:

Respondent has no specific response.

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

Response to Finding No. 1263:

Respondent has no specific response.

6. Lensfast

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

Response to Finding No. 1264:

The proposed finding is incomplete and misleading. The Lensfast settlement agreement included a provision whereby the parties could supplement the exhibits to the agreement with additional terms, as long as the term was a party's trademark, brand name, URL, or a variation thereof. (CX 315 at 5-6; CX 9040 (Miller, Dep. at 89-90 (describing the amendment procedure for additional restricted terms)). Mr. Miller thus properly notified Lensfast that 1-800 Contacts was adding the trademark variations "1800 contact" and "1800 contact lenses" under the relevant provision of the settlement agreement. (CX 453).

7. Contact Lens King

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

Response to Finding No. 1265:

Respondent has no specific response.

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

Response to Finding No. 1266:

The proposed finding is incomplete and misleading. Mr. Miller's May 2014 letter provided notice that four variations of the 1-800 Contacts trademark had triggered sponsored links for Contact Lens King. (CX 800). The settlement agreement already included two of the terms ("1 800 contact" and "1800contact"), but the parties had not included the term "1800 contact" and other closely-related navigational variants. (CX 323). As Mr. Miller noted, under the settlement agreement between 1-800 Contacts and Contact Lens King, the parties could amend the exhibits to the agreement by adding additional restricted terms pursuant to Section 4(F)(b). (CX 800; CX 323; CX 9040 (Miller, Dep. at 89-90)). Mr. Miller provided notice of such an amendment. (CX 800).

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

Response to Finding No. 1267:

Respondent has no specific response.

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

Response to Finding No. 1268:

The proposed finding is incomplete and misleading. Mr. Miller's May 2014 letter provided notice that four variations of the 1-800 Contacts trademark had triggered sponsored links for Contact Lens King. (CX 800). The settlement agreement already included two of the terms ("1 800 contact" and "1800contact"), but the parties had not included the term "1800 contact" and other closely-related navigational variants. (CX 323). As Mr. Miller noted, under

the settlement agreement between 1-800 Contacts and Contact Lens King, the parties could amend the exhibits to the agreement by adding additional restricted terms pursuant to Section 4(F)(b). (CX 800; CX 323; CX 9040 (Miller, Dep. at 89-90)). Mr. Miller provided notice of such an amendment. (CX 800).

8. Empire Vision

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

Response to Finding No. 1269:

The proposed finding is incomplete and misleading. The cited exhibit (CX 810) was admitted for non-hearsay purposes and should not be used for the truth of the matters asserted. In addition, the cited letter by Mr. Harkins on behalf of Empire Vision does not purport to characterize the Mark Miller letter referenced in the finding in the manner set out in the finding. Complaint Counsel should have instead cited to Mr. Miller's letter, in evidence as CX 811, which refers to the amendment process that the parties had agreed to as part of their resolution of litigation and which explains that the search term at issue ("1800 contact") is "a confusingly similar variation/misspelling of my client's federally-registered mark." (CX 811 at 1).

9. Lenses For Less

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

Response to Finding No. 1270:

The proposed finding is incomplete because it fails to note that Mr. Miller addressed his letter to both Mr. Studebaker and his counsel, Matthew Jenkins. (CX 822 at 2).

D. Parties Enforced the Agreements Against 1-800 Contacts

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

Response to Finding No. 1271:

Respondent has no specific response.

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

Response to Finding No. 1272:

Respondent has no specific response.

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

Response to Finding No. 1273:

Respondent has no specific response.

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

Response to Finding No. 1274:

Respondent has no specific response.

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

Response to Finding No. 1275:

Respondent has no specific response.

1276. As of April 12, 2012, Walgreens had in place a master list of negative keywords relating to 1-800 Contacts. (CX1218). Walgreens would "implement this master list of 1800 contacts negatives" every time it launched new contacts campaigns. (CX1218). Implementation of the negative keywords was "of the upmost importance" to Walgreens because of the Walgreens Agreement. Walgreens' search marketing manager admonished a colleague that "under no circumstances can [we] show for these terms." (CX1218).

Response to Finding No. 1276:

Respondent has no specific response.

1277. The master list maintained by Walgreens as of April 2012 comprised 121 negative keywords relating to 1-800 Contacts. CX1219.

Response to Finding No. 1277:

Respondent has no specific response.

1278. The master list maintained by Walgreens as of April 2012 included two phrase match negative keywords, as indicated by the use of quotation marks on the keywords. (CX1219; Jt. Stip. re Terms ¶ 28). Those keywords were:

"1800Contacts"
"1800 Contacts"

Response to Finding No. 1278:

Complaint Counsel's Proposed Finding No. 1278, referring to items identified within the list of negative keywords purportedly attached to the email discussed in Finding No. 1276, is incomplete and misleading for the same reasons discussed above in response to Finding Nos. 1276 and 1277. It remains unclear which of these 121 negative keyword terms were required under the settlement agreement and which were added for another reason. (CX 1218; CX 1219; Hamilton, Tr. 472-75; CX 9008 (Hamilton, IHT at 74-75)).

1279. The master list maintained by Walgreens as of April 2012 included 119 exact match negative keywords. (CX1219). The majority of those exact match negative keywords were multiple-word phrases containing the term 1800Contacts along with additional generic words. (CX1219). Examples of the exact match negative keywords Walgreens was using in April 2012 due to the Walgreens Agreement include:

[1800contacts review]

[free shipping 1800contacts]
[1800contacts discounts]
[1800 contact lenses]
[1800contacts coupon]
[1800 contacts discount]
[1800 color contacts]
[1800 eyecontact]
[ciba contacts 1800contacts]
[1800contacts insurance]
[sofmed breathables 1800contacts]
[1800contacts store brands]
[acuvue oasys astigmatism 1800 contacts]
[1800contacts in tucson az]
[vp1005 1800contacts]
[1800contacts coupon code air optix]
[is 1800 contact]
[1800contacts coupon code acuvue oasys]
[coupons for acuvue lenses 1800contacts]
[cheap avaira contacts 1800 contacts]

(CX1219).

Response to Finding No. 1279:

Complaint Counsel's Proposed Finding No. 1279, referring to items identified within the list of negative keywords purportedly attached to the email discussed in Finding No. 1276, is incomplete and misleading for the same reasons discussed above in response to Finding Nos. 1276 and 1277. It remains unclear which of these 121 negative keyword terms were required under the settlement agreement and which were added for another reason. (CX 1218; CX 1219; Hamilton, Tr. 472-75; CX 9008 (Hamilton, IHT at 74-75)).

1280. In February of 2010, Shan Shan Li of 1-800 Contacts asked the 1-800 Contacts affiliate coordinator to instruct an affiliate, Lenshopper.com, to add negative keywords relating to Contact Lens King. (CX0604 at 002).

Response to Finding No. 1280:

Respondent has no specific response.

1281. In response to Mr. Li's February 2010 email asking Commission Junction to instruct Lenshopper.com to add negative keywords relating to Contact Lens King, Commission

Junction conveyed the message back from Lenshopper.com that they were already complying with the request. (CX0604 at 002).

Response to Finding No. 1281:

Respondent has no specific response.

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

Response to Finding No. 1282:

Respondent has no specific response.

VII. Horizontal Restraints are Likely to Cause Competitive Harm

A. Horizontal Bidding Restraints are Likely to Harm Search Engines

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

Response to Finding No. 1283:

Complaint Counsel's Proposed Finding No. 1283 is incorrect and inconsistent with the record. Dr. Evans testified that economists do not believe that "collusion" always harms consumers. (Evans, Tr. 1466). The proposed finding is also irrelevant; Complaint Counsel offered no evidence to show that the sort of price-fixing cartels that are discussed in the cited articles are comparable to the individual settlement agreements at issue here. Dr. Evans' attempt to summarize academic writings is improper and inadmissible; those writings are not in evidence

and, if they were, they would be the best evidence of their contents. The writings do not, in any event, support the purported conclusion of Complaint Counsel's Proposed Finding No. 1283. For instance, research joint ventures act collusively, yet it is well understood that they enhance social welfare and do not violate the antitrust laws. But under the overbroad statement in Complaint Counsel's Proposed Finding No. 1283, Complaint Counsel necessarily would contend that they "invariably" decrease economic efficiency.

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

Response to Finding No. 1284:

The proposed finding is irrelevant; Complaint Counsel offered no evidence to show that the sort of price-fixing cartels that are discussed in the cited articles are comparable to the individual settlement agreements at issue here. In addition, Dr. Evans' attempt to summarize academic writings is improper and inadmissible; those writings are not in evidence and, if they were, they would be the best evidence of their contents. In any event, the writings do not support the purported conclusion of Complaint Counsel's Proposed Finding No. 1284.

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

Response to Finding No. 1285:

Complaint Counsel's Proposed Finding No. 1285 is incorrect and inconsistent with the record. Dr. Evans testified that economists do not believe that collusion always harms consumers. (Evans, Tr. 1466). The proposed finding is also inadmissible and irrelevant and should be disregarded for the reasons set forth in 1-800 Contacts' Response to Proposed Finding Nos. 1283 and 1284.

B. Horizontal Advertising Restraints are Likely to Harm Consumers

1286. Dr. Evans reviewed the relevant economic literature, including dozens of empirical studies, and concluded that economics provides a strong presumption that horizontal agreements to prevent informative advertising are harmful to consumers and competition. Evans, Tr. 1422-1423; 1651; CX8006 at 081-082, 084, 179-185 (¶¶ 180-181, 186 & Appendix E.) (Evans Expert Report) (Timothy J. Muris, *California Dental Association v Federal Trade Commission: The Revenge of Footnote 17*, Supreme Court Economic Review (2000) at 265-310. ("A large empirical literature already provides the evidence that the court sought that restraining professional advertising raises prices without improving quality."); In re Polygram Holding, 136 F.T.C. 310, 355 n.52 (2003)). Appendix E of Dr. Evans Report lists and summarizes more than 20 articles supporting Dr. Evans' conclusions.

Response to Finding No. 1286:

Complaint Counsel's Proposed Finding No. 1286 is incorrect, incomplete and misleading. None of the studies on which Dr. Evans relied involves paid search advertising or advertising for contact lenses. Further, the cited testimony from Page 1651 of the trial transcript is inconsistent with Dr. Evans' testimony that economists do not believe that collusion always harms consumers. (Evans, Tr. 1466).

Also, Complaint Counsel's Proposed Finding No. 1286 is improper to the extent it is based on empirical studies performed in *In re Polygram Holding*, 136 F.T.C. 310, 355 n.52 (2003), or described in Timothy J. Muris, *California Dental Association v Federal Trade*

Commission: The Revenge of Footnote 17, 8 Sup. Ct. Econ. Rev. 265 (2000), none of which are in evidence.

Complaint Counsel's Proposed Finding No. 1286 also is inconsistent with Dr. Evans' own prior writings regarding the Supreme Court decision discussed in the article by Mr. Muris: "In some literal sense, it could certainly be argued that [the] advertising restrictions restrained competition—competitors certainly faced restrictions on the type of advertising they could engage in. In the absence of empirical evidence, that literal argument fails to show that consumers were harmed." David S. Evans, *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases*, 75 St. John's L. Rev. 545, 549 (2001).

1287. Dr. Evans concluded that because Google and Bing have policies allowing trademark owners to prevent the use of their trademarks in the text of any rival advertisement, the Bidding Agreements are not necessary to prevent any consumer confusion related to trademarks. (CX8006 at 138 (¶ 298) (Evans Expert Report)).

Response to Finding No. 1287:

Complaint Counsel's Proposed Finding No. 1287 is not based on admissible evidence, is inconsistent with the record and should be disregarded. Dr. Evans did not undertake any study of consumer confusion and is not qualified to do so. Dr. Evans testified that he is "not a confusion expert," (CX 9042 (Evans, Dep. at 205)), and that he has "not presented evidence on confusion." (CX 9042 (Evans, Dep. at 207). He further testified that "I'm not going to present testimony on distraction or confusion in the technical sense that we're talking -- you're talking about with respect to a trademark infringement matter." (CX 9042 (Evans, Dep. at 206)). Dr. Evans merely testified that 1-800 Contacts' justification that the agreements prevented confusion "don't ring true." (CX 9042 (Evans, Dep. at 205)). Accordingly, Dr. Evans' testimony regarding consumer confusion is inadmissible. Further, both Dr. Evans and Dr. Athey testified that Google's policy

of permitting advertising in response to searches for another firm's trademark was not socially optimal. (Evans, Tr. 1817; CX 9043 (Athey, Dep. at 192-193)).

1288. Dr. Evans further concluded that because the Bidding Agreements restrict the flow of accurate information necessary for the efficient functioning of the market for online contact lenses, they lack any plausible efficiency justification. (Evans, Tr. 1382, 1561; CX8006 at 138 (¶¶298-299) (Evans Expert Report)).

Response to Finding No. 1288:

Complaint Counsel's Proposed Finding No. 1288 is incorrect, not supported by the cited testimony and not based on admissible evidence. As set forth in 1-800 Contacts' Proposed Findings , the challenged settlement agreements had significant procompetitive benefits. The cited evidence does not support Complaint Counsel's Proposed Finding No. 1288 because it consists of Dr. Evans' conclusory statement that he did not find the efficiency justifications plausible. Dr. Evans did not conduct any analysis to support these opinions. He simply testified that the efficiency justifications "don't ring true." (CX 9042 (Evans, Dep. at 205-208)).

Dr. Evans' testimony also is flatly inconsistent with his own writings. Dr. Evans wrote: "it is not enough to just claim that the action harms the competitive process even if that is supported by a Nobel Prize winning economist who has divined what the competitive process should be." David S. Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John's L. Rev. at 558. He also wrote: "The government made other statements that have come to characterize this genre of antitrust claims, such as antitrust is really about preserving 'consumer choice' and preserving the 'competitive process.' But when agencies immediately disavow the need to present evidence of consumer harm after repeating those phrases, they are substituting slogans for analysis." *Id.* at 552 (footnote omitted). Dr. Evans failed to do here what he has said should have been done in other cases, that is, he failed to conduct a quantitative analysis of the effects of

the claimed constraint so as to measure the actual procompetitive and alleged anti-competitive effects on the competitive process.

1289. Dr. Evans further found that the Bidding Agreements' anticompetitive effects outweigh 1-800 Contacts asserted efficiency justifications. (Evans, Tr. 1382,1564; CX8006 at 138 (¶¶298-299) (Evans Expert Report)).

Response to Finding No. 1289:

Complaint Counsel's Proposed Finding No. 1289 is incorrect, not supported by the cited testimony and not based on admissible evidence for the reasons set forth in 1-800 Contacts' Response to Proposed Finding No. 1288.

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

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

1290. The Bidding Agreements were effective in changing online contact lens retailers advertising behavior. (*See infra* ¶¶ 1291-1297).

Response to Finding No. 1290:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1291. Parties to the Bidding Agreements testified (or declared under penalty of perjury) that if the Bidding Agreements were not in place, they would bid on, or test bidding on 1-800 Contacts' trademarks as keywords in their search advertising campaigns. (Clarkson, Tr. 252-254, 344; Hamilton, Tr. 430-432; CX9003 (Clarkson, Dep. at 156); CX9008 (Hamilton, Dep. at 111); CX8002 at 005-006 (¶ 18) (Hamilton, Decl.) ("[A]bsent the settlement with 1-800 Contacts, I believe it would be beneficial to Vision Direct to test the prohibited keywords in online search advertising in Google, Bing and Yahoo Gemini"); (CX9014 (Batushansky, Dep. at 164-165, 168-169), *in camera*;

CX0943 at 003 (¶ 17) (Duley, Decl.) ("If the Settlement Agreement were terminated or otherwise invalidated, it is possible that Visionworks would test to see if the [prohibited keywords]…would be desirable to use for online marketing purposes"); CX8000 at 002 (¶ 16) (Studebaker, Decl.) ("But for the Settlement Agreement,…we would periodically test to see if it would be profitable to bid on the term "1-800 Contacts" or similar terms….")).

Response to Finding No. 1291:

Complaint Counsel's Proposed Finding No. 1291 is incorrect and misleading to the extent that it implies anything about parties to the settlement agreements other than those whose testimony has been cited. Further, it misstates the misinterprets the testimony of certain of the settling parties. For instance, what Mr. Batushansky actually said is that [redacted] (CX9014 (Batushansky, Dep. at 164), in camera).

1292. Parties to the Bidding Agreements testified (or declared under penalty of perjury) that if the Bidding Agreements were not in place, they would not implement 1-800 Contacts' trademarks as negative keywords in their search advertising campaigns. (Clarkson, Tr. 252-253; Hamilton, Tr. 417; CX9014 (Batushansky, Dep. at 168-169), *in camera*; CX0943 at 003 (¶ 18) (Duley, Decl.) ("If the Settlement Agreement were terminated or otherwise invalidated, Visionworks would also cease using the negative keywords listed in the Settlement Agreement."); CX8002 at 004-005 (¶ 15-17) (Hamilton, Decl.) ("Absent the settlement, Vision Direct would not have implemented any of the negative keywords attached to the 2008 settlement agreement, or any of the negative keywords related to 1-800 Contacts that have subsequently been implemented.")).

Response to Finding No. 1292:

Complaint Counsel's Proposed Finding No. 1292 is incorrect and misleading to the extent that it implies anything about parties to the settlement agreements other than those whose testimony has been cited. Further, it misstates the misinterprets the testimony of certain of the settling parties. For instance, what Mr. Batushansky actually said is that [redacted]

[redacted] (CX9014 (Batushansky, Dep. at 164), in camera).

1293. All counterparties to the agreements stopped bidding on 1-800 Contacts trademark keywords almost entirely following the agreements. (Evans, Tr. 1414-1415 (referencing CCXD0005-021); CX8006 at 071 (¶ 157) (Evans Expert Report) (showing that Google bidding data demonstrates that counterparties to the agreements who were bidding directly on 1-800 Contacts brand-name keywords before the agreements ceased bidding almost entirely following the agreements)).

Response to Finding No. 1293:

The proposed finding is inaccurate in its breadth. For example, Peter Clarkson, ACLens' CEO, testified that he had voluntarily ceased any use of 1-800 Contacts' trademarks as keywords in 2002, without being asked to do so, and ACLens continued to avoid such use throughout the 2000's. (Clarkson, Tr. 324-326; CX 9003 (Clarkson, IHT at 90-91)).

1294. Counterparties to the agreements who were appearing on search results pages for 1-800 Contacts brand-name keywords through their use of "matched ad" bids ceased this practice following the agreements. (Evans, Tr. 1410-1411; CX8006 at 071-072 (¶ 158) (Evans Expert Report)).

Response to Finding No. 1294:

Respondent has no specific response.

1295. Dr. Evans concluded that "1-800 Contacts targeted its major rivals, who were likely to be the most effective in competing with 1-800 Contacts and therefore the likely bidder just below them in the ad ranks." These firms had been engaged in the most advertising on 1-800 Contacts' trademark keywords. (Evans, Tr. 1416, 1424-1425; CX8006 at 071 (¶ 157) (Evans Expert Report)).

Response to Finding No. 1295:

Complaint Counsel's Proposed Finding No. 1295 is incorrect and not based on admissible evidence. Dr. Evans is not an expert on 1-800 Contacts' intent in enforcing its trademarks, and cannot offer expert testimony on that subject as a matter of law. *See, e.g.*, *Scott*

v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33, 45 (S.D.N.Y. 2016) ("experts may not offer opinions regarding the intent or motive of parties as part of their analysis"); *Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F. Supp. 2d 1069, 1077-78 (D. Or. 2013) ("Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind"); *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (expert "could not testify *as an expert* that GM had a particular motive").

Further, the cited evidence does not support the proposed finding. The cited evidence does not include any analysis of any online retailer's sales, bids or advertising based on bidding on 1-800 Contacts' trademarks as keywords. Accordingly, the cited evidence does not support any finding about whether any retailer against which 1-800 Contacts enforced its trademarks was "effective in competing with 1-800 Contacts," "the likely bidder just below them in the ad ranks" or "engaged in the most advertising on 1-800 Contacts' trademark keywords."

1296. Thus, the bidding agreements removed over a dozen advertisers from the auctions that determined which advertisements would appear on search results pages for 1-800 Contacts' trademark keywords. (Evans, Tr. 1424-1425; CX8006 at 064, 070-071 (¶¶ 139, 156-57) (Evans Expert Report)).

Response to Finding No. 1296:

The proposed finding is improper because it cites only to expert testimony to support factual propositions. Order on Post-Trial Briefs at 3. Moreover, some of the "advertisers" in question had decided voluntarily not to engage in the identified activity, as their testimony and documents explain. (*See, e.g.*, Clarkson, Tr. 324-326); CX 9003 (Clarkson, IHT at 90-90); CX 8003 (Mitha Decl. at 3, ¶ 12)).

1297. Dr. Evans defined the term "Informal Agreement" to describe what he observed regarding Lens.com and Lens Discounters. Both "got cease and desist letters, and there was also a dialogue between 1-800 [Contacts] and those two firms … concerning the advertising activity" followed by cessation of advertising observed in the Google data.

Evans Tr. 1408-1409; CX8006 at 008, 037-038, 023, 047, 130-132 (¶¶ 14, 84, 104 n.112, 279, 285 & Table 1) (Evans Expert Report); CX8009 at 098 (¶ 186) (Evans Rebuttal Expert Report)).

Response to Finding No. 1297:

Complaint Counsel's Proposed Finding No. 1297 is incorrect, misleading, contradicted by the record and inconsistent with the law. Dr. Evans cannot offer an opinion with a legal conclusion regarding whether two parties entered into an agreement. He cannot offer an opinion that contradicts the clear ruling of the District Court in the *Lens.com* case that "as a matter of law that no enforceable agreement was entered into between the parties." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1189 (D. Utah 2010). Mr. Bethers also testified under oath that there is no such agreement.

Moreover, Mr. Mitha of LensDiscounters testified that that company "*unilaterally* decided to stop bidding on 1-800 Contacts' terms and variations thereof." (CX 8003 (Mitha Decl. at 003, ¶ 12) (emphasis added)). The cited testimony also contradicts Dr. Evans' testimony that "it would not be correct" to "infer from the absence of paid advertising in response to a search for a competitor that there's an agreement between the two companies not to purchase paid advertising." (CX 9042 (Evans, Dep. at 9)).

B. Reduced Competition Among Advertisers Lowered Search Engine Revenues

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

Response to Finding No. 1298:

The proposed finding is not supported by the evidence. Dr. Evans' analysis does not support his conclusions.

The evidence from witnesses who work for the search engines shows that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an

instance, Google would make [redacted] (Juda, Tr. 1215-1217).

Moreover, as set out below, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273),

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms explained that an agreement resulting in fewer bidders is [redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted] (RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 22)).

C. Reduced Competition Allowed Advertisers to Pay Lower Prices

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

Response to Finding No. 1299:

The proposed finding is not supported by the evidence. The evidence from witnesses who work for the search engines shows that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted]

(Juda, Tr. 1206-1210, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [redacted] (Juda, Tr. 1215-1217).

Moreover, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part,

on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted]

[redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273),

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms explained that an agreement resulting in fewer bidders is [redacted]

[redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted] (RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 22)).

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

Response to Finding No. 1300:

The proposed finding is incomplete and misleading. For its ad to be considered in Google's AdWords system, an advertiser must bid the amount necessary for its ad's Ad Rank be greater than zero. (CX 9019 (Juda, Dep. at 168-169)). Ad Rank is a combination of [redacted] (CX 9019 (Juda, Dep. at 41-42)). The minimum bid is determined on an auction-by-auction basis, and each advertiser may have a different minimum bid. (CX 9019 (Juda, Dep. at 169)). The minimum bid for an advertiser to [redacted] (Juda, Tr. 1266-1267).

In Bing's system, an advertiser pays Microsoft [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 9)). In general, a paid search advertisement's rank in response to a user query depends on [redacted] (RX 704 (Iyer, Decl. ¶ 10)).

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

Response to Finding No. 1301:

The proposed finding is inaccurate, misleading, and not supported by the evidence. The statement that when "one bidder drops out of a second-price auction, if that bidder has an ad rank of greater than zero and was previously awarded a position in the auction, at least one of the remaining bidders will pay less" is contrary to the evidence. First, none of the bidders pays anything unless its ad is clicked by the user. (Jt. Stip. Regarding Search Engine Mechanics and Glossary of Terms at ¶ 12; RX 716 at 26). Second, if the bidder that drops out would have won the top position, the CPCs of the other advertisers would not be affected. Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not

[redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)).

The statement that "generally, more advertisers result in higher cost per click payments" is contrary to the weight of the evidence. Mr. Juda, who is the Director of Product Management overseeing Google's search advertising program, admitted that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [redacted] (Juda, Tr. 1215-1217).

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

Response to Finding No. 1302:

The finding is not supported by the evidence. When faced with additional ads showing up, advertisers may take an number of actions, which may increase or decrease its CPC and increase or decrease the CPC's of other advertisers. For example, an advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

In response to additional ads showing up next to theirs, advertisers could also [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda,

Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] Juda, Tr. 1273),

1303. 1-800 Contacts recognized that competition for keywords related to its trademarks increased its prices, and that less competition lowered its costs. (*Supra* § VI.A.3; *see also* CX9034 (Roush, Dep. at 60-62); CX9001 (Bethers, IHT at 196); CX9012 (L. Schmidt, IHT at 211); CX9020 (Craven, Dep. at 26-27, 30, 37-38); CX9032 (L. Schmidt, Dep. at 188); CX0655 (May 16, 2011 email from Bryce Craven to Laura Schmidt: "We've seen an increase in competitor activity on our marks during the last few weeks which may be responsible for our increased TM CPCs.")).

Response to Finding No. 1303:

The proposed finding is misleading. Personnel at 1-800 Contacts did not have personal knowledge of the search engines' proprietary algorithms for determining cost-per-click. The evidence from witnesses who work for the search engines shows that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted]

[redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [redacted] (Juda, Tr. 1215-1217).

Moreover, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the

Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted]

[redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273),

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms explained that an agreement resulting in fewer bidders is [redacted]

[redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, (RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require (RX 704 (Iyer, Decl. ¶ 22)).

1304. . (Juda, Tr. 1178-1179, 1336, 1349, *in camera*; CX8005 at 006 (¶¶ 35-37) (Iyer, Decl.), *in camera*).

Response to Finding No. 1304:

The proposed finding is not supported by the evidence. Mr. Juda's testimony (Juda, Tr. 1178-1179, 1336, 1349). The Court repeatedly

upheld Respondent's objections to Complaint Counsel's attempts to elicit testimony from Mr. Juda [redacted] (Juda, Tr. 1156-1160, 1173-1174, 1174-1175, 1191, 1192-1194, 1357-1360).

In addition, Mr. Juda admitted that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser **{may have a lower CPC (i.e., it may pay less for a click) than the advertiser previously in the top position.}** (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make **{less money if the user clicked on the top ad.}** (Juda, Tr. 1215-1217).

Moreover, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price

advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted]

[redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273).

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms, Dr. Iyer, explained that an agreement resulting in fewer bidders is [redacted]

[redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted] (RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 22)).

1305. Trade literature on search advertising recognizes that less competition lowers advertising costs. (CX8006 at 073-074 (¶ 162) (Evans Expert Report) (citing WordStream,"PPC Keyword Research Guide: How to Find the Words for Your Paid Search Campaigns," http://marketing.wordstream.com/WSContentDLKeywordResearchGuide.html; Armin Laidre, "How to Lower Your CPC Costs in AdWords Advertising Platform," My Ads Agency, July 3, 2015, http://myads.agency/guides/lower-cpc; Matt Redford, "How to Find Lowe Competition, High ROI Keywords," Keyword Eye, October 15, 2014, http://www.keywordeye.com/blog/how-to-find-low-competition-high-roi-keywords/; WordStream, "How Much Does Google AdWords Cost?" December 8, 2016, http://www.wordstream.com/blog/ws/2015/05/21/how-much-does-adwords-cost)).

Response to Finding No. 1305:

The proposed finding is not supported by evidence in the record. The cited articles were not admitted into evidence.

1306. Dr. Evans's empirical analysis of the relationship between intensity of competition and the prices 1-800 Contacts paid demonstrates that, absent the bidding agreements, 1-800 Contacts' would have paid [redacted] for each click on its advertisements, while in fact it paid only [redacted] cents. The agreements reduced 1-800's cost per click by $0.54 to $0.80 per click, [redacted]:

Table 5: Effect of Competition on 1-800 Contacts

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

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

(CX 8006 at 077 (¶ 168) (Evans Expert Report)).

Response to Finding No. 1306:

The proposed finding is not supported by the evidence. Dr. Evans' analysis does not support his conclusions.

The evidence from witnesses who work for the search engines shows that the number of bidders in an auction [redacted] (CX 9019 (Juda, Dep. at 55)). The addition of an additional bidder for a keyword [redacted] (CX 9019 (Juda, Dep. at 137-138)). If additional bidders [redacted] (Juda, Tr. 1204-1205).

Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). Similarly, the addition of an additional bidder who wins an ad position will not [redacted] (Juda, Tr. 1206-1208, 1211-1213 (explaining hypothetical); *see also* RXD 26-001-002 (illustrating effect of additional bidder)). The addition of an additional bidder who wins an ad position will [redacted] (Juda, Tr. 1206-1210, 1211-1213 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [redacted]

[redacted] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [redacted] (Juda, Tr. 1215-1217).

Moreover, the Chief Economist at Google and the Principal Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

The Chief Economist at Google has explained that for Google's paid search engine advertising program, AdWords, "every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue." (RX 701 (Varian, Decl. ¶ 6)). Therefore, "[i]n the world of AdWords advertising, any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that "the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue." (RX 701 (Varian, Decl. ¶ 16)). To "determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in

each of the auctions would have behaved differently (if at all) as a result of that new input." (RX 701 (Varian, Decl. ¶ 16)).

An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [redacted] (Juda, Tr. 1254-1259; *see also* RXD 26-005-007 (illustrating testimony)).

For example, in response to additional ads showing up next to theirs, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could also [redacted] (Juda, Tr. 1272-1274). In addition, advertisers could [redacted] (Juda, Tr. 1272-1274). Advertisers could [redacted] (Juda, Tr. 1272-1274). These advertiser actions [redacted] (Juda, Tr. 1274-1275).

There are also a number of advertiser-controlled settings in AdWords that [redacted] (Juda, Tr. 1267-1268). Among the advertiser-controlled settings are: [redacted] (Juda, Tr. 1267-1270). Advertisers may also [redacted]

[redacted] (Juda, Tr. 1267-1270). Google's algorithms cannot [redacted] (Juda, Tr. 1273),

The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms explained that an agreement resulting in fewer bidders is [redacted]

[redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted] (RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 22)).

Dr. Evans' opinion does not undertake the required analyses.

D. Reduced Competition Resulted in Lower-Quality Results Pages

1307. Keyword advertising auctions are designed to ensure the user is presented only with relevant ads, and ensure that ads more relevant to the consumer appear on the first search results page and in higher position. (CX8006 at 066 (¶ 145) (Evans Expert Report); *see supra* § IV.A.3.

Response to Finding No. 1307:

The proposed finding is contrary to the evidence. The evidence shows that in both Google and Bing auctions, advertisers with *lower* quality ads can increase their bids to move to the top of the page. In Google's AdWords, because ad positon is influenced by the advertiser's bid, an ad may be placed higher on the page than other ads even though it has *lower* assessments of the quality signals, i.e., advertisers may buy their way to the top of the page. (Juda, Tr. 1331).

Microsoft's Bing takes each advertiser's [redacted] (RX 704 (Iyer, Decl. ¶ 11)). This affects [redacted] (RX 704 (Iyer, Decl. ¶ 11)). In general and within reason, [redacted] (RX 704 (Iyer, Decl. ¶ 11)).

1308. By removing potentially relevant ads from the auction, the bidding agreements reduced the quality of the results pages search engines were able to show to their users, [redacted]

(CX8006 at 078 (¶ 171) (Evans Expert Report); CX8005 at 006 (¶¶ 31-34) (Iyer, Decl.), *in camera*).

Response to Finding No. 1308:

The proposed finding is not supported by the evidence. The Principal Scientist at Microsoft who oversees Bing's search advertising auction algorithms, Dr. Iyer, explained that an agreement resulting in fewer bidders is [redacted]

(RX 704 (Iyer, Decl. ¶ 20)).

To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft's Principal Scientist explained, [redacted] (RX 704 (Iyer, Decl. ¶ 21)).

To do such an analysis would require [redacted]

[redacted] (RX 704 (Iyer, Decl. ¶ 22)).

1309. [redacted]. (CX9022 (Charlston, Dep. at 40, *in camera* [redacted]); *see also* CX9022 (Charlston, Dep. at 42-43, *in camera*)).

Response to Finding No. 1309:

The proposed finding is not supported by the cited evidence. When a search engine displays additional paid advertisements in the search results, the organic results are pushed further down the results page. (RX 733 at 40-41 (Ghose Expert Report); Athey, Tr. 2082)). The organic listings are based on the relevance or usefulness of the website to the user's search query. (Ghose, Tr. 3909; Jt. Stip. Regarding Search Engine Mechanics ¶ 5). When organic listings are pushed further down the search results page, they are less accessible to consumers and their value to consumers is thereby decreased. (RX 733 at 40-41 (Ghose Expert Report)). Consumers incur greater search costs when they must scroll further down the search results page to find the most relevant organic listings. (Ghose, Tr. 3913, 3917). Search costs are heightened on mobile devices, where the visible results are limited by reduced screen size and the consumer must scroll further down the page to see the relevant organic listings. (RX 733 at 38-41 (Ghose Expert Report); see also Ghose, Tr. 3916-3917)).

1310. [redacted]. (Juda, Tr. 1220-1222, *in camera*).

Response to Finding No. 1310:

The proposed finding is incomplete. [redacted] (Ghose, Tr. 3893-94; RX 733 at 25-27 (Ghose Expert Report)). [redacted] (Ghose, Tr. 3894 [redacted] (RX 733 at 25 (Ghose Expert Report); Ghose, Tr. 3894; RX 716 at 26, 68).

1311. [redacted]. (Juda, Tr. 1221, *in camera*).

Response to Finding No. 1311:

Respondent has no specific response.

1312. [redacted]. (Juda, Tr. 1221-1222, *in camera*).

Response to Finding No. 1312:

The proposed finding is not supported by the cited evidence. Mr. Juda qualified his testimony by stating only that this [redacted] (Juda, Tr. 1221-1222).

IX. Competitive Effects of the Restraints: Direct Evidence of Harm to Consumers

A. The General Concern About the Effect of Restrictions on Advertising Competition Applies with Force to the Online Retail Sale of Contact Lenses

1. The General Concern About the Effect of Restrictions on Advertising Competition Applies with Force to Restrictions on Search Advertising

1313. Dr. Evans concluded that restrictions on advertising, and on search advertising in particular, are likely to be more harmful in online markets than in physical markets. In physical markets, businesses reduce search costs for consumers in part through their locations, such as a main street, shopping malls, strip malls, or other locations that attract foot, and drive-by, traffic. As a result, consumers learn about the existence of choices during their shopping trips, and comparison-shop by walking between stores. (CX8006 at 082-083 (¶ 182) (Evans Expert Report)).

Response to Finding No. 1313:

Complaint Counsel's Proposed Finding No. 1313 is not supported by admissible evidence and should be disregarded. The cited statements from Dr. Evans' report are unsupported by any economic analysis, reasoning or literature. *See* Order on Post-Trial Briefs at 3. Furthermore, Dr. Evans is not an expert on various forms of advertising or on consumer behavior, and these purported opinions are outside his areas of expertise.

1314. By contrast, Dr. Evans found that online markets do not allow for these physical interactions and visual clues. Online commerce has thrived because of the development of other ways for consumers to discover and reach vendors, including prominently search engines and search advertising. Consumers have come to depend on these search engines to help them find and compare products and services. (CX8006 at 083 (¶ 183) (Evans Expert Report)).

Response to Finding No. 1314:

Complaint Counsel's Proposed Finding No. 1314 is not supported by admissible evidence and should be disregarded. The cited statements from Dr. Evans' report are unsupported by any economic analysis, reasoning or literature. *See* Order on Post-Trial Briefs at 3. Furthermore, Dr. Evans is not an expert on various forms of advertising or on consumer behavior, and these purported opinions are outside his areas of expertise.

1315. Dr. Evans also reviewed several studies that examined the relationship between greater availability of price information for online shopping and the prices that consumers pay. These studies find a positive relationship between price information and lower transaction prices. (CX8006 at 084 (¶ 185) (Evans Expert Report) (citing Jeffrey R. Brown and Austan Goolsbee, "Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry," *Journal of Political Economy*, Vol. 110, No. 3 (June 2002), pp. 481-507; Florian Zettelmeyer, Fiona Scott Morton, and Jorge Silva-Risso. "How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data," *Journal of Marketing Research*, Vol. 43, No. 3 (2006), pp. 168-181; and Glenn Ellison and Sara Fisher Ellison. "Search, Obfuscation, and Price Elasticities on the Internet," *Econometrica,* Vol. 77, No. 2, (2009), pp. 427-452.)).

Response to Finding No. 1315:

Complaint Counsel's Proposed Finding No. 1315 is incomplete and misleading. Two of the articles on which Dr. Evans relied involve analyses of how the Internet affected prices offered by firms overall or by offline firms, not analyses of the effect of increased Internet advertising on prices offered by online firms. *See* Florian Zettelmeyer, Fiona Scott Morton, and Jorge Silva-Risso. "How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data," *Journal of Marketing Research*, Vol. 43, No. 3 (2006), pp. 168-181 (analyzing effect of Internet usage on price paid at offline car dealerships); Jeffrey R. Brown and Austan Goolsbee, "Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry," *Journal of Political Economy,* Vol. 110, No. 3 (June 2002), pp. 481-507 (analyzing effect of Internet usage on price of life insurance policies purchased offline); *see id.* at 485 ("Importantly, in almost all cases, the individual does not buy the product on-line directly from these sites."). In fact, one of the cited articles appears inconsistent with Complaint Counsel's theory of this case: "information enables consumers to negotiate a low price at a given dealership. Internet information does not seem to help consumers find low-price dealerships." Zettelmeyer, Morton and Silva-Risso, at 169; *see also id.* at 179 ("we can find no evidence that consumers benefit from using the Internet because it helps them find low-price dealers").

The third article, Glenn Ellison and Sara Fisher Ellison. "Search, Obfuscation, and Price Elasticities on the Internet," *Econometrica,* Vol. 77, No. 2, (2009), pp. 427-452, finds that "the extent to which the Internet will reduce consumer search costs is not clear." *Id.* at 450. The authors note that Internet search can reduce the consumer benefits generally associated with the Internet by "creat[ing] an inferior quality good that can be offered at a very low price." *Id.* The authors also note that "[a]lthough the Internet clearly facilitates search, it also allows firms to adopt a number of strategies that make search more difficult."

1316. Dr. Evans concluded there is a strong economic presumption, based on the economic evidence on the effect of advertising restrictions and the nature of online competition, that prohibitions on advertising, particularly search-based advertising, will increase prices and harm competition between online sellers. (CX8006 at 084 (¶ 186) (Evans Expert Report)).

Response to Finding No. 1316:

Complaint Counsel's Proposed Finding No. 1316 is incorrect, misleading and not supported by the cited testimony. Dr. Evans did not cite any study examining the effect on prices of restrictions on paid search advertising. Nor did Dr. Evans cite any study examining the effect on prices of restrictions on advertising giving rise to a potential claim for trademark infringement. Dr. Evans, however, testified that trademark policies "reflect a balance between the benefits of encouraging investment in trademarks that are valuable for the competitive process and the benefits encouraging the free flow of information." (CX 8006 at 137 (Evans Expert Report)).

1317. Search advertising, like many forms of advertising, increases price transparency in the market, which is something 1-800 Contacts was trying to reduce relative to its competition. (CX9039 (Clarkson, Dep. at 118 ("[I]t is hard to support higher pricing in a commoditized market, and the internet, in general, made comparison shopping easier."), Schmidt, Tr. 2928-2931; CX0063 at 21 (1-800 Contacts Marketing Presentation dated April 29, 2005).

Response to Finding No. 1317:

Complaint Counsel's Proposed Finding No. 1317 is not supported by the evidence cited and is premised on inadmissible evidence. Nothing in Dr. Clarkson's cited testimony mentions price transparency. And nothing in Mr. Schmidt's testimony or CX 63 says that 1-800 Contacts was trying to reduce price transparency relative to its competition by filing trademark claims.

2. 1-800 Contacts' Price Premium Over Other Online Contact Lens Retailers Cannot be Fully Explained by Higher Service Levels

1318. 1-800 Contacts' price premium over other online contact lens retailers cannot be fully explained by higher service levels. (*See infra* ¶¶ 1323-1343).

Response to Finding No. 1318:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1319. Contact lenses are a commodity product. (*See supra* § III.D; *see also* Athey, Tr. 743-748).

Response to Finding No. 1319:

Complaint Counsel's Proposed Finding No. 1319 is incomplete and contradicted by Dr. Evans' testimony that, while the contact lenses that retailers sell are a commodity, sellers of contact lenses are differentiated by various attributes other than the contact lenses that they sell. (Evans, Tr. 1696-97 ("Q. But the sellers of contact lenses are differentiated one from another by various other attributes; correct? A. That is correct. Q. And those attributes include convenience; correct? A. Yes. Q. Service? A. Yes. Q. Trust? A. Yes. Q. Reputation? A. Yes.

Q. Reliability? A. Yes. Q. And probably some other intangibles that are difficult to describe each one, but there's a series of attributes; right? A. That's correct.")). To the extent that Complaint Counsel's Proposed Finding No. 1319 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. To the extent that the proposed finding relies on testimony by Dr. Athey, it violates the requirement in the Order on Post-Trial Briefs (at p. 3) that the parties shall "not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."

1320. Dr. Athey reviewed relevant economic literature regarding markets for commodity products, which are sometimes referred to as "commoditized product markets." (CX8007 at 010-011 (¶¶ 23-26) (Athey Expert Report)).

Response to Finding No. 1320:

Complaint Counsel's Proposed Finding No. 1321 is incomplete and misleading. As Dr. Murphy explained, Dr. Athey did not analyze the literature on price dispersion, which shows that "a variety of characteristics beyond access to information, such as consumer trust, retailer brand, market and category characteristics, can play an important role in explaining price dispersion." (RX 739 at 81 (¶ 224) (Murphy Expert Report)).

1321. The relevant literature regarding commoditized product markets finds that "[c]ommoditized product markets typically have strong price competition" and "price has more significance as a purchasing decision factor in commoditized markets than in non-commoditized markets as there are few other sources of product differentiation." (CX8007 at 011 (¶ 25) (Athey Expert Report)).

Response to Finding No. 1321:

Complaint Counsel's Proposed Finding No. 1321 is not based on admissible evidence. The cited statements from Dr. Athey's report are unsupported by any economic analysis, reasoning or literature.

1322. In the "typical" functioning of commoditized product markets, "[f]or retail goods, consumers are able to shop around to find the retailer with the lowest price." (CX8007 at 011 (¶ 25) (Athey Expert Report)).

Response to Finding No. 1322:

Complaint Counsel's Proposed Finding No. 1322 is not based on admissible evidence. The cited statements from Dr. Athey's report are unsupported by any economic analysis, reasoning or literature. Moreover, Dr. Athey does not have expertise in retail marketing or consumer behavior, and thus has no basis upon which to express admissible opinion testimony regarding all markets for retail goods or how all consumers shop for all retail goods.

1323. 1-800 Contacts' prices are, on average, higher than those of its online competitors. (*See supra* § VI.A.1; *see also* Bethers, Tr. 3543-3545 (distinguishing 1-800 Contacts from "other pure-play online contact lens sellers" when describing the pricing structure of contact lens retailers); RX1228 at 036, *in camera* (listing [redacted]); CX8006 at 085 (¶ 188) (Evans Expert Report), *in camera*; CX8007 at 013-014, 045-051 (¶¶ 31-32 & Exhibits D1-D7) (Athey Expert Report), *in camera*; Athey, Tr. 740-742 (testifying that she reached a conclusion that 1-800 Contacts charged a price premium over other online contact lens retailers based on both the observations of market participants and her own analysis of market data)).

Response to Finding No. 1323:

Complaint Counsel's Proposed Finding No. 1323 is incomplete and misleading. The cited evidence reflects only a subset of contact lens prices offered by 1-800 Contacts and other online retailers. 1-800 Contacts sets its retail prices for contact lenses on a product-by-product basis. (Bethers, Tr. 3773). Accordingly, the difference between 1-800 Contacts' prices and the

prices offered by other online retailers vary by contact lens brand, model and SKU, as well as by the amount of contact lenses that a consumer purchases. [redacted] (CX 8007 at 45 (prices for Acuvue Oasys 12-pack); Athey, Tr. 2071-72 [redacted]

To the extent that Complaint Counsel's Proposed Finding No. 1323 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1324. Dr. Athey examined "1-800 Contacts' claims that the price premium could be explained by a customer service differential." (CX8007 at 014 (¶ 34) (Athey Expert Report); Athey, Tr. 749).

Response to Finding No. 1324:

Complaint Counsel's Proposed Finding No. 1324 is incorrect, incomplete and misleading. Dr. Athey testified that she did no quantitative analysis to determine what factors explain any price premium that 1-800 Contacts charges for any particular contact lens. (Athey, Tr. 2072-73 [redacted] CX 9043 (Athey, Dep. at 215 ("Q. Did you do any empirical analysis to determine whether the price premium charged by 1-800-CONTACTS compared to other online retailers is explained by a service-quality differential? A. No. I relied on other case materials."); CX 9043 (Athey, Dep. at

252-53)). To the extent that Dr. Athey's "examination" amounted to simply repeating what she found in documents in the record, it is improper expert opinion and should be disregarded.

1325. In order to examine the contention that the price premium 1-800 Contacts charges could be fully explained by a customer service differential, Dr. Athey examined information available in the record regarding "consumer perspectives on firms" that sell contact lenses online and examined how investors, 1-800 Contacts, and rival online contact lens sellers used that information in their business decision making. (CX8007 at 014 (¶ 34) (Athey Expert Report); Athey, Tr. 749).

Response to Finding No. 1325:

Complaint Counsel's Proposed Finding No. 1324 is incorrect, incomplete and misleading. Dr. Athey testified that she did no quantitative analysis to determine what factors explain any price premium that 1-800 Contacts charges for any particular contact lens. (Athey, Tr. 2072-73 [redacted] CX 9043 (Athey, Dep. at 215 ("Q. Did you do any empirical analysis to determine whether the price premium charged by 1-800-CONTACTS compared to other online retailers is explained by a service-quality differential? A. No. I relied on other case materials."); CX 9043 (Athey, Dep. at 252-53)).

To the extent that Dr. Athey's "examination" amounted to simply repeating what she found in documents in the record, it is improper expert opinion and should be disregarded.

Further, the "information available in the record" on which Dr. Athey relied on this issue included a Bain survey that the Court ruled was not reliable. (Tr. 168-69 (On CX 1162 and CX 430, "the exhibits are excluded as unreliable")); *see also* Athey, Tr. 827 (Q: "Was [CX 1162] one of the pieces of information that you looked at in reaching your conclusion about consumers' interest in pricing information? A: Yes"), Tr. 828 ("JUDGE CHAPPELL: Excuse me. Is she using data from the Bain survey which I excluded from evidence? A: … Our understanding of

Your Honor's order was of course that this information could not be included for hearsay purposes, meaning for the truth of the matter, but rather could be included -- could be introduced for the fact that it occurred. And also our understanding of course is that experts are able to rely on documents and data that are not in evidence in court, but they are what an expert relies on for its conclusions -- JUDGE CHAPPELL: I also determined that those surveys were unreliable based on the way they were offered.")); RF 1977-1984). Complaint Counsel conceded that the underlying survey contained in CX 1162 that the Court ruled to be unreliable "absolutely formed the basis for some" of Dr. Athey's conclusions. (Tr. 829; CX 547 (incorporating the unreliable Bain survey)).

Finally, Dr. Athey's opinion that any price premium that 1-800 Contacts commands with respect to any particular contact lens cannot be fully explained by a customer service differential is based on the premise that 1-800 Contacts does not offer superior service. Indeed, Dr. Athey opined that "[o]nline competitors achieve similar levels of customer satisfaction as 1-800 Contacts, but charge lower prices." (CX 8007 at ¶ 44) (Athey Expert Report). However, unlike Respondent's expert, Dr. Goodstein, for example, Dr. Athey is not a marketing expert and is not qualified to opine on whether one company offers better customer service than another. Thus, Complaint Counsel stated in open court that "Dr. Athey has not testified and has not offered an opinion that there is no service differentiation in this industry." (Tr. 733). Dr. Athey therefore lacks the expertise to opine on whether 1-800 Contacts' service explains its price premium.

1326. In examining the contention that the price premium 1-800 Contacts charges could be fully explained by a customer service differential, Dr. Athey relied on her economic expertise and experience regarding pricing and product differentiation, including the finding of economic theory that "when consumers are fully informed," "you need to have product differentiation of some sort to sustain a price premium" and her economic and statistical expertise and experience regarding internet search, including experience in "how to conduct surveys that would help elicit consumer information about their preferences and the factors that lead to those preferences." (Athey, Tr. 2102-2103).

Response to Finding No. 1326:

Complaint Counsel's Proposed Finding No. 1326 is not supported by the cited evidence, not supported by admissible evidence and should be disregarded. The "expertise" on which Dr. Athey purportedly relied is that "generally what economic theory shows is that you need to have product differentiation of some sort to sustain a price premium when consumers are fully informed." (Athey, Tr. 2103). That principle, however, cannot support an opinion about whether 1-800 Contacts' service can sustain its price premium without an opinion that there is no "product differentiation" between 1-800 Contacts' service and the service provided by other retailers. Indeed, Dr. Athey opined that "[o]nline competitors achieve similar levels of customer satisfaction as 1-800 Contacts, but charge lower prices." (CX 8007 at ¶ 44) (Athey Expert Report). However, unlike Respondent's expert, Dr. Goodstein, for example, Dr. Athey is not a marketing expert and is not qualified to opine on whether one company offers better customer service than another. Indeed, Complaint Counsel stated in open court that "Dr. Athey has not testified and has not offered an opinion that there is no service differentiation in this industry." (Tr. 733). Dr. Athey therefore lacks the expertise to opine on whether 1-800 Contacts' service explains its prices.

The proposed finding should also be disregarded because Complaint Counsel did not disclose any of Dr. Athey's supposed "business work on Internet search" in which she supposedly considered surveys. Dr. Athey's "experience" appears to consist entirely with work related to consumer surveys. However, the only survey on which Dr. Athey relied for her opinion regarding whether 1-800 Contacts' service differential could explain its prices, assuming it was reliable, was a Stax survey prepared in 2012 and based on only 226 total respondents: 101 respondents for 1-800 Contacts, 41 respondents for Vision Direct, and 84 respondents for all

other online contact lens retailers. (CX 1109 at 47). The results of the Stax survey, assuming they were reliable, show that 1-800 Contacts' Net Promoter Score was almost twice the Net Promoter Score of other contact lens retailers except for Vision Direct. (CX 1109 at 47). Accordingly, Dr. Athey's reliance on surveys to support her opinion that 1-800 Contacts' superior service cannot explain its prices was clearly incorrect and her opinion should be disregarded.

1327. Dr. Athey concluded that "differences in customer service quality between online contact lens retailers, if any, cannot rationalize 1-800 Contacts' entire price premium." (CX8007 at 014 (¶ 34) (Athey Expert Report); Athey, Tr. 754 ("Q. Dr. Athey, to be clear, did you reach a conclusion that 1-800's service isn't any better than anyone else's in the online contact lens retail space? A No. There was lots of material that supported that 1-800 provides excellent customer service and it provides better service than some of the online competitors. The conclusion was that the price premium is not supported by the service differential, particularly for consumers that are doing – that are coming through the Internet search channel.")).

Response to Finding No. 1327:

Complaint Counsel's Proposed Finding No. 1327 is not supported by admissible evidence and should be disregarded. Dr. Athey conceded that (1) firms that offer high-quality customer service can charge higher prices than firms that offer lower-quality service. (CX 9043 (Athey, Dep. at 214; CX 8007 at 15) (Athey Expert Report)), and that the price difference between 1-800 Contacts and other online retailers could be due at least in part to differences in service levels provided by 1-800 Contacts and other online retailers. (Athey, Tr. 2072). Though Dr. Athey sought to opine that service did not fully explain the price difference between 1-800 Contacts and other online retailers, Dr. Athey had no opinion on what portion of the price difference was not attributable to service. (CX 9043 (Athey, Dep. at 215)).

Dr. Athey also acknowledged that part of the price difference between 1-800 Contacts and other online retailers could be due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (Athey, Tr. 2072). However, Dr. Athey did nothing to measure what

part of the price difference between 1-800 Contacts and other online retailers was due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (CX 9043 (Athey, Dep. at 256 ("Did you do anything to measure whether the portion of 1-800-CONTACTS' trademarks familiarity or success accounts – that is not attributable to the settlement agreements in this case, accounts for the price premium that it charges over other online retailers? . . . THE WITNESS: I didn't try to decompose the sources of the price premium quantitatively.")).

Further, the only survey on which Dr. Athey relied for her opinion regarding whether 1-800 Contacts' service differential could explain its prices, assuming it was reliable, was a Stax survey based on only 226 total respondents: 101 respondents for 1-800 Contacts, 41 respondents for Vision Direct, and 84 respondents for all other online contact lens retailers. (CX 1109 at 47). The results of the Stax survey, assuming they were reliable, show that 1-800 Contacts' Net Promoter Score was almost twice the Net Promoter Score of every other contact lens retailers in the survey except for Vision Direct. (CX 1109 at 47).

Dr. Athey sits on the Board of Directors of Expedia, the travel booking website. Dr. Athey testified that Expedia does not sell "last-minute capacity at a lower price" as other brands such as Hotels.com do because "that's not the business model of Expedia.com." (CX 9043 (Athey, Dep. at 156). Similarly, 1-800 Contacts' CEO Brian Bethers testified that 1-800 Contacts' business model is different than most other online contact lens retailers. (CX 9029 (Bethers, Dep. at 10)). 1-800 Contacts' business model is to provide best-in-class service, not to provide the absolute lowest price on all contact lenses. (Coon, Tr. 2708-09; CX 9031 (Schmidt, Dep. at 87-88; CX 9013 (Aston, Dep. at 193)).

For these reasons, Dr. Athey lacks any basis to draw any conclusion about what explains any price premium that 1-800 Contacts may charge for any particular contact lens as compared to the price offered by another particular retailer.

Further, Dr. Athey's opinion that any price premium that 1-800 Contacts commands with respect to any particular contact lens cannot be fully explained by a customer service differential is based on the premise that 1-800 Contacts does not offer superior service. Indeed, Dr. Athey opined that "[o]nline competitors achieve similar levels of customer satisfaction as 1-800 Contacts, but charge lower prices." (CX 8007 at ¶ 44) (Athey Expert Report). However, unlike Respondent's expert, Dr. Goodstein, for example, Dr. Athey is not a marketing expert and is not qualified to opine on whether one company offers better customer service than another. Thus, Complaint Counsel stated in open court that "Dr. Athey has not testified and has not offered an opinion that there is no service differentiation in this industry." (Tr. 733). Dr. Athey therefore lacks the expertise to opine on whether 1-800 Contacts' service explains its price premium.

1328. Many of 1-800 Contacts' online rivals offer customer service that rivals 1-800 Contacts' service. (*See supra* § III.E).

Response to Finding No. 1328:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1329. 1-800 Contacts' online rivals often carry a large inventory of contact lenses to ensure customer satisfaction with selection and speedy delivery. (*See supra* § III.E.1).

Response to Finding No. 1329:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1330. 1-800 Contacts' online rivals ship customer orders quickly, in many cases the day the customers place the orders. (*See supra* § III.E.2).

Response to Finding No. 1330:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1331. Many of 1-800 Contacts' online rivals offer excellent customer service, including generous return policies and quick responses to customer telephone calls and emails. (*See supra* § III.E.3).

Response to Finding No. 1331:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1332. Because online contact lens retailers' business models often rely on customers making more than one purchase (*see supra* Section V.A.6.b), they invest in service in order to ensure that customers return. (*E.g.*, Holbrook, Tr. 1890-1891 [redacted]; Alovis, Tr. 1011 (LensDirect is willing to spend more money to acquire a new customer than it will earn from its first sale to that customer because LensDirect has concluded that "the customer will enjoy working with us enough that they will continue to buy from LensDirect."); CX9014 (Batushansky, Dep. at 148), *in camera* [redacted] **).**

Response to Finding No. 1332:

To the extent that Complaint Counsel's Proposed Finding No. 1332 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1333. Many of 1-800 Contacts' online rivals earn high levels of customer satisfaction and high net promoter scores (NPS, a measure of consumers' willingness to recommend their businesses to friends.) (*See supra* § III.E.3).

Response to Finding No. 1333:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1334. In an August 7, 2012 email, 1-800 Contacts' online marketing manager, when discussing the difficulty of attracting consumers through the paid search channel, wrote: "the only other option I see is trying to convince customers that our existing prices are better than

they really are or worth the cost. Tough challenge considering that we sell the exact same thing as everyone else." (CX1086 at 001 (Email from Amber Powell to Laura Schmidt and Rick Galan); *see also* CX1086 at 003 ("I'm sure you don't need me to tell you this, but I don't know how we still get orders from your channel. Look at all the prices that are much lower than ours.")).

Response to Finding No. 1334:

Complaint Counsel's Proposed Finding No. 1334 is incomplete and misleading because it does not refer to the deposition testimony of the author of the relevant portions of the August 2012 email (Amber Powell) cited therein. Ms. Powell explained that 1-800 Contacts was concerned with the misleading nature of Internet comparison-shopping tools that only showed retail prices for a single box of contact lenses, which failed to accurately reflect consumers' true costs. (CX 9030 (Powell, Dep. at 113-15)).

1335. 1-800 Contacts' price match policy suggests its service is not substantially better than service offered by its rivals. "If the customer service differential between 1-800 Contacts and online competitors was sufficient to support the price differential, the Price Match program would not be required." (CX8007 at 018 (¶ 46) (Athey Expert Report)).

Response to Finding No. 1335:

Complaint Counsel's Proposed Finding No. 1335 is not supported by admissible evidence and should be disregarded. Dr. Athey conceded that (1) firms that offer high-quality customer service can charge higher prices than firms that offer lower-quality service. (CX 9043 (Athey, Dep. at 214; CX 8007 at 15) (Athey Expert Report)), and that the price difference between 1-800 Contacts and other online retailers could be due at least in part to differences in service levels provided by 1-800 Contacts and other online retailers. (Athey, Tr. 2072). Though Dr. Athey sought to opine that service did not fully explain the price difference between 1-800 Contacts and other online retailers, Dr. Athey had no opinion on what portion of the price difference was not attributable to service. (CX 9043 (Athey, Dep. at 215)).

Dr. Athey also acknowledged that part of the price difference between 1-800 Contacts and other online retailers could be due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (Athey, Tr. 2072). However, Dr. Athey did nothing to measure what part of the price difference between 1-800 Contacts and other online retailers was due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (CX 9043 (Athey, Dep. at 255 ("Did you do anything to measure whether the portion of 1-800-CONTACTS' trademarks familiarity or success accounts – that is not attributable to the settlement agreements in this case, accounts for the price premium that it charges over other online retailers? . . . THE WITNESS: I didn't try to decompose the sources of the price premium quantitatively.")).

Accordingly, Dr. Athey lacks any basis to draw any conclusion about what explains any price premium that 1-800 Contacts may charge for any particular contact lens as compared to the price offered by another particular retailer.

Further, Dr. Athey's opinion that any price premium that 1-800 Contacts commands with respect to any particular contact lens cannot be fully explained by a customer service differential is based on the premise that 1-800 Contacts does not offer superior service. Indeed, Dr. Athey opined that "[o]nline competitors achieve similar levels of customer satisfaction as 1-800 Contacts, but charge lower prices." (CX 8007 at ¶ 44) (Athey Expert Report). However, unlike Respondent's expert, Dr. Goodstein, for example, Dr. Athey is not a marketing expert and is not qualified to opine on whether one company offers better customer service than another. Thus, Complaint Counsel stated in open court that "Dr. Athey has not testified and has not offered an opinion that there is no service differentiation in this industry." (Tr. 733). Dr. Athey therefore lacks the expertise to opine on whether 1-800 Contacts' service explains its price premium.

1336. Customers who switch from 1-800 Contacts to other online retailers do not switch back. (CX1117 at 023 (January 2013 1-800 Contacts presentation entitled "Where's the love?

Deadfile Customer Survey" reporting that "If they've gone online somewhere else – we've lost them."))

Response to Finding No. 1336:

Complaint Counsel's proposed finding is not supported by the evidence. The cited document does not support the proposition that consumers "who switch from 1-800 Contacts to other online retailers do not switch back."

The cited document is a survey of consumers' likely future intentions for their next purchase, not for all future purchases. The survey asked consumers who had previously purchased contacts from 1-800 Contacts but made their last purchase elsewhere to rate on a scale of 0 to 10 the "likelihood you will use 1-800 CONTACTS for your next lens purchase." (CX 1117 at 18 (emphasis added)). The survey defined customers "not likely to come back to us" as those who responded in the range of 0 to 5; 18% of the respondents answered with a 5 (right in the middle of the scale). (CX 1117 at 18).

Contrary to the proposed finding, the survey shows that 60% of consumers who had previously purchased contacts from 1-800 Contacts but made their last purchase elsewhere intend to purchase again from 1-800 Contacts. (CX 1117 at 18).

The proposed finding is also misleading because the survey shows that only a fraction of the so-called "lost" customers go to pure-play online retailers. (CX 1117 at 21). Of the consumers who rated from 0 to 5 their likelihood of making their next purchase from 1-800 Contacts, 70% had made their last purchase from a retailer other than an online supplier. (CX 1117 at 21). In fact, 37% had made their last purchase from an eye doctor and 18% from a national general retailer. (CX 1117 at 21). When asked from where they would likely make their next purchase, these 62% indicated they would likely purchase from a retailer other than an online supplier. (CX 1117 at 24).

1337. The fact that [redacted] suggests that 1-800 Contacts does not offer sufficiently better service than rivals to justify its price premium. (Athey, Tr. 825-826, *in camera* (testifying that [redacted]); CX8007 at 018 (¶ 47) (Athey Expert Report)).

Response to Finding No. 1337:

Complaint Counsel's Proposed Finding No. 1337 is incorrect, incomplete, misleading, and based on unreliable and inadmissible evidence. It should be disregarded. Respondent does not dispute that some retail customers purchase from it on one or more occasions and then purchase from other retail sellers of contact lenses for one or more of their purchases. However, there is no evidence in the record that any particular purchaser, or any particular group of purchasers, who first purchased from 1-800 Contacts and then later purchase from another retail seller will not return as customers of 1-800 Contacts at some later point in time. Further, the fact that some customers purchase from 1-800 Contacts for some period of time and then purchase from other retail sellers for some period of time simply illustrates that at the time they purchased from other retail sellers they found the quality-adjusted price (adjusted by such factors as convenience and service) to be more attractive to them than the quality-adjusted price that 1-800 Contacts then was charging. Since different customers value convenience, service, and price differently, it is not surprising that different customers will, at different times, purchase from different retailers. [redacted]. This fact says nothing about whether the "gold standard" service offered by 1-800 Contacts was or was not sufficient to justify its price premium. Obviously, for those who continued to purchase from it, 1-800 Contacts' quality-adjusted price was more attractive that the quality-adjusted price of all other retail sellers of contact lenses. In those instances where 1-800 Contacts' price was higher than

the price of these other retailers, its service and convenience were obviously sufficiently better than that of its rivals to make its quality-adjusted price more attractive. This is fully consistent with well-settled economic principles and with 1-800 Contacts having a stronger trademark than other online retailers. (RX 737 at 19 (Landes Expert Report); CX 9050 (Landes, Dep. at 73)). Further, [redacted] (Athey, Tr. 2072, *in camera*). [redacted] *Id.* [redacted] (Athey, Tr. 2072-73, *in camera*). Thus, that service differences alone may not justify the entire price differential for all customers is not surprising; the remainder of the price differential is accounted for by other differences such as differences in brand name and trademark.

In relying on CX 1117, cited in Dr. Athey's expert report at ¶ 47, it is important to note the following facts: [redacted]

[redacted]. (CX 1117 at 23).

[redacted] (Athey, Tr. 829, *in camera*).

1338. In 2012, Berkshire Partners, then parent to National Vision (the parent company of AC Lens), considered an acquisition of 1-800 Contacts. In its evaluation, it determined that the price premium 1-800 enjoyed at the time was likely not sustainable because its service levels were not sufficiently distinguishable from those of its lower-priced rivals. (CX1109 at 003 ("Our findings have been mixed. . . . we are concerned that 1-800 Contacts' premium pricing positioning versus its competitors is unsustainable in the medium to long term given the commodity-like nature of contact lenses and 1-800 Contacts' insufficiently distinguishable service."), 009 ("Another challenge for 1-800 is that despite its strong culture around customer service, contact lenses are a fundamentally difficult market in which to differentiate an offering. NPS data aggregated from a variety of sources suggests that while 1-800's customers are generally highly satisfied, so are customers of AC Lens and Vision Direct. Similarly, the Stax online competitor comb chart (slides 37-38), shows that 1-800 is at best marginally superior to its peers on metrics such as ease of purchase price, trust, delivery speed and customer service."), 008-009 ("[W]e are acutely concerned with 1-800's relative retail pricing, which is ~10% less than [IECPs]s and non-discount chain retailers and ~15%-30% more than online discounters"), 009 ("[T]he Company has significant churn – approximately 50% of customers don't return to make a second purchase"); CX9039 (Clarkson, Dep. at 97-98)).

Response to Finding No. 1338:

Complaint Counsel's Proposed Finding No. 1338 is incorrect, incomplete and misleading. The founder and president of ACLens.com (which is owned by National Vision) recognized that 1-800 Contacts' service is distinguishable, at least in his view as the president of an online contact lens retailer, when he testified that "1-800 Contacts has excellent service and we [ACLens.com] *aspire* to a similar level." (Clarkson, Tr. 172-73, 188) (emphasis added). The Berkshire Partners' memorandum itself concedes a lack of understanding regarding what contact lens consumers actually care about in selecting a retailer: "we believe that 1-800 has best-in-class

service, but we remain uncertain of the degree to which customers care." (CX 1109 at 9.) Moreover, the Stax survey referred to in the proposed finding was based on only 226 total respondents: 101 respondents for 1-800 Contacts, 41 respondents for Vision Direct, and 84 respondents for all other online contact lens retailers. (CX 1109 at 47). The results of the Stax survey, assuming they were reliable, show that 1-800 Contacts' Net Promoter Score was almost twice the Net Promoter Score of every other contact lens retailers in the survey except for Vision Direct. (CX 1109 at 47).

1339. Berkshire Partners' decision to make a bid despite this concern was driven by its desire to arrange a meeting with Walmart (when then was in an alliance with 1-800 Contacts) in order to enable National Vision to expand its relationship with Walmart. (CX1109 at 003-004 ("[A] key valuation consideration for us is how an acquisition of 1-800 could enable NVI to further its relationship with Walmart. Unfortunately, sell-side banker Sonenshine Partners has thus far been unwilling to grant us direct access to Walmart management . . . Our bid strategy is guided by our desire to arrange such a meeting – only by making it to the final stage of this process and having the opportunity to meet with Walmart will we be able to fully determine 1-800's value to NVI [National Vision], inclusive of the financial profile of a new Alliance agreement and/or additional retail vision centers that Walmart would enable NVI to operate in exchange for acquiring 1-800 and preserving some form of the contact lens Alliance."), 005 (describing 1-800 Contacts "Alliance" with Walmart)).

Response to Finding No. 1339:

Respondent has no specific response.

1340. In the due diligence process in connection with Berkshire Partners' potential acquisition of 1-800 Contacts in 2012, 1-800 Contacts managers "admit[ted] they haven't done enough to differentiate their service recently and acknowledge[d] that others such as Vision Direct do a good job servicing their customers." (CX1109, at 009).

Response to Finding No. 1340:

Complaint Counsel's Proposed Finding No. 1340 is not based on admissible evidence and should be disregarded. Berkshire Partners' statements about statements purportedly made by 1-800 Contacts managers are unreliable hearsay. Nothing in the document identifies either the

"1-800 Contacts" managers who supposedly made the purported admissions or acknowledgements or the circumstances in which they were supposedly made. In addition, statements made in 2012 cannot establish anything about current service differentiation in the contact lens marketplace.

1341. In the due diligence process in connection with Berkshire Partners' potential acquisition of 1-800 Contacts in 2012, 1-800 Contacts "concede[d] that it has not adjusted price sufficiently in response to its disadvantaged pricing position and growing competitive intensity. Pending a renegotiation or termination of the Walmart Alliance, however, 1-800 plans to pull two key pricing and margin levers: Lower prices [and] . . . Return to rebates." (CX1109 at 010-011).

Response to Finding No. 1341:

Complaint Counsel's Proposed Finding No. 1341 is not based on admissible evidence and should be disregarded. Berkshire Partners' statements about statements purportedly made by 1-800 Contacts managers are unreliable hearsay. Nothing in the document identifies either the "1-800 Contacts" managers who supposedly made the purported concession or the circumstances in which they were supposedly made. In addition, statements made in 2012 cannot establish anything about the current service differentiation in the contact lens marketplace.

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

Response to Finding No. 1342:

Respondent has no specific response.

1343. Mr. Clarkson concurred with Berkshire Partners' concern that 1-800's price premium would not be sustainable as consumers learned about less expensive offerings. (CX9039 (Clarkson, Dep. at 98) ("Q. Could you elaborate a bit more on – what is your understanding of that concern, that 1-800's price premium was not sustainable? A. Well, I think it's more or less, you know, what I was saying, that 1-800 has – because of their

sort of unmatched brand awareness has been able to charge a premium over what contact lenses are available for in other internet competitors, including people like AC Lens. The nervousness is around whether or not that would be sustainable. As more and more people learned about – consumers learned about less expensive offerings, would 1-800's businesses necessarily suffer when there were much cheaper options available?")).

Response to Finding No. 1343:

Complaint Counsel's Proposed Finding No. 1343 is not based on admissible evidence and should be disregarded. Any testimony by Mr. Clarkson, who has not worked at 1-800 Contacts, regarding whether 1-800 Contacts' "price premium" was based on their "unmatched brand awareness" or a service differential or a blend of factors, would necessarily be an expert opinion. Complaint Counsel, however, did not identify Mr. Clarkson as an expert witness or comply with the requirements of Rule 3.31A. Accordingly, Mr. Clarkson's cited testimony is inadmissible. *See* Order Granting Motion *In Limine* to Limit the Testimony of Eric Johnson, *In re LabMD, Inc.*, 2014 WL 2331056 (May 8, 2014).

Even if Mr. Clarkson were qualified to give such opinions, moreover, Complaint Counsel's summary of those opinions is inaccurate. Mr. Clarkson did not, in the cited testimony, "concur" with anything that someone at Berkshire Partners had expressed. Mr. Clarkson was asked, and answered, a question about the nature of *Berkshire Partners'* concern, not whether he agreed with it.

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

1344. Many consumers are not aware of the price discrepancy between 1-800 Contacts and its online competitors. (RX1228 at 036, *in camera* [redacted]; CX8006 at 081-082 (¶ 189 & nn.198-199) (Evans Expert Report), *in camera*; CX8007 at 021 (¶ 56) (Athey Expert Report) ("Consumers are not aware in general of the price distribution among online contact lens sellers."); *see also infra* ¶¶ 1349-1354).

Response to Finding No. 1344:

Complaint Counsel's Proposed Finding No. 1344 is not supported by the cited evidence. Dr. Evans' cited testimony relied on a slide from CX 466, which is not in the record. That slide, and the chart cited in RX 1228, appear virtually identical to the chart that appears in CX 1343, on which Dr. Athey relied for her opinion that "[c]onsumers are not aware in general of the price distribution among online contact lens sellers." (Athey, Tr. 826-27; *compare* CX 1343 at 36, *with* RX 1228 at 36). [redacted] (Athey, Tr. 944-46). Indeed, Dr. Athey conceded that the price perceptions of the gap between Vision Direct and 1-800 Contacts are more accurate than the same price perceptions of the gap between ECPs and 1-800 Contacts. (Athey, Tr. 945-46). Accordingly, [redacted] (Athey, Tr. 946; CX 1343).

To the extent that Complaint Counsel's Proposed Finding No. 1351 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed

summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1345:

Respondent has no specific response.

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

Response to Finding No. 1346:

Complaint Counsel's Proposed Finding No. 1346 is incorrect, misleading and not supported by reliable evidence. [redacted]

The cited document does not indicate who Stax surveyed, how it selected the respondents or what questions it asked them. (Athey, Tr. 896-97). The cited slide also indicates that only 101

1-800 Contacts customers, 41 Vision Direct customers and 84 customers of other retailers participated in the survey.

1347. In the Stax consumer survey, 34.7% of respondents, asked why they decided to initially purchase from 1-800 Contacts, responded that "It Was the Only Online Contacts Site of Which I Was Aware." (RX0041 at 019; CX9039 (Clarkson, Dep. at 41-42)).

Response to Finding No. 1347:

Complaint Counsel's Proposed Finding No. 1347 is incorrect, misleading and not supported by the cited evidence. [redacted]

The cited document does not indicate who Stax surveyed, how it selected the respondents or what questions it asked them. (Athey, Tr. 896-97). The cited slide also indicates that only 101 1-800 Contacts customers participated. As Dr. Athey admitted, respondents who simply could not remember the name of any other contact lens retailer were likely to select the response, "It Was the Only Online Contacts Site of Which I Was Aware." (Athey, Tr. 899). Thus, as Dr. Athey admitted, the Stax survey could simply indicate that 34% of people who became 1-800 Contacts customers were only aware of 1-800 Contacts at the time they first became a customer because they were relying on TV and radio advertising. (Athey, Tr. 906).

1348. In conducting its due diligence regarding a potential acquisition of 1-800 Contacts in 2012, Berkshire Partners considered the following question to be "particularly relevant to 1-800's dilemma: are customers of high-priced, low cost-to-serve products truly loyal, or are they uninformed?" (CX1109 at 011).

Response to Finding No. 1348:

Complaint Counsel's Finding No. 1348 is not based on reliable evidence and should be disregarded. [redacted]

1349. In conducting its due diligence regarding its potential acquisition of 1-800 Contacts in 2012, Berkshire Partners' investment analysis team concluded that "a sizeable segment" of consumers were uninformed about lower-priced options for purchasing contact lenses online. (CX1109 at 011 ("Investment Concern Summary . . . The team believes that 1-800 likely benefits from a sizable segment of uninformed buyers who are simply unaware of the other (and growing) low-priced choices on the internet.")).

Response to Finding No. 1349:

Complaint Counsel's Finding No. 1349 is not based on reliable evidence and should be disregarded. [redacted]

[redacted]

1350. 1-800 Contacts itself made business decisions based on its understanding that consumers misunderstood prices. (CX1086 at 001 (Email from Amber Powell to Laura Schmidt and Rick Galan, noting that: "We actually have found success in the past when we used 'We'll beat any price'. Our past thought was that the customer than [sic] interpreted this to mean we had lower prices.")).

Response to Finding No. 1350:

Complaint Counsel's Proposed Finding No. 1350 is not supported by the document cited, which does not say anything about anyone's understanding that any consumers misunderstood prices.

1351. 1-800 Contacts considers "Paid Search on 1-800 CONTACTS Trademark" to be a "Direct Traffic Source" that is "much less susceptible to competitive advertising or offers" than "Non-Direct Traffic Sources" such as "Other Paid Search." (CX0429 at 013 ("Management Presentation" dated November 2013); *see also supra* §§ V.B.1 and VI.A).

Response to Finding No. 1351:

To the extent that Complaint Counsel's Proposed Finding No. 1351 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1352. Between **{20% and 31%}** of 1-800 Contacts' initial web orders came from users searching on a 1-800 Contacts trademark. (RX0428 at 030, *in camera* [redacted]; Bethers, Tr. 3802 [redacted]

[redacted]**;** CX8006 at 088-089 (¶ 193 & Figure 1) (Evans Expert Report), *in camera*).

Response to Finding No. 1352:

Respondent has no specific response, other than to note that the conclusion is limited to the time periods for which data is summarized in RX 428 and CX 8006.

1353. Dr. Athey concluded, "the price premium is not fully explained by other factors like differentiation and service…" (Athey, Tr. 756).

Response to Finding No. 1353:

Complaint Counsel's Proposed Finding No. 1353 is incorrect and not based on admissible evidence and should be disregarded. As Dr. Murphy explained, Dr. Athey did not analyze literature on price dispersion which shows that "a variety of characteristics beyond access to information, such as consumer trust, retailer brand, market and category characteristics, can play an important role in explaining price dispersion." (RX 739 at 81 (¶ 224) (Murphy Expert Report)). Dr. Athey conceded that (1) firms that offer high-quality customer service can charge higher prices than firms that offer lower-quality service. (CX 9043 (Athey, Dep. at 214; CX 8007 at 15) (Athey Expert Report), and that the price difference between 1-800 Contacts and other online retailers could be due at least in part to differences in service levels provided by 1-800 Contacts and other online retailers. (Athey, Tr. 2072). Though Dr. Athey sought to opine that service did not fully explain the price difference between 1-800 Contacts and other online retailers, Dr. Athey had no opinion on what portion of the price difference was not attributable to service. (CX 9043 (Athey, Dep. at 215)). Dr. Athey also acknowledged that part of the price difference between 1-800 Contacts and other online retailers could be due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (Athey, Tr. 2072). However, Dr. Athey did nothing to measure what part of the price difference between 1-800 Contacts and other

online retailers was due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (CX 9043 (Athey, Dep. at 255 ("Did you do anything to measure whether the portion of 1-800-CONTACTS' trademarks familiarity or success accounts – that is not attributable to the settlement agreements in this case, accounts for the price premium that it charges over other online retailers? . . . THE WITNESS: I didn't try to decompose the sources of the price premium quantitatively.")).

Moreover, Dr. Athey is not a marketing expert and is not qualified to opine on whether one company offers better customer service than another. Indeed, Complaint Counsel conceded in open court that "Dr. Athey has not testified and has not offered an opinion that there is no service differentiation in this industry." (Tr. 733).

1354. Dr. Athey found that, "economic theory suggests, especially in this type of industry, that lack of information about prices … is the leading alternative for a source of a price premium of this type." (Athey, Tr. 756-757).

Response to Finding No. 1354:

Complaint Counsel's Proposed Finding No. 1354 is incomplete, incorrect and misleading. As Dr. Murphy explained, Dr. Athey did not analyze literature on price dispersion which shows that "a variety of characteristics beyond access to information, such as consumer trust, retailer brand, market and category characteristics, can play an important role in explaining price dispersion." (RX 739 at 81 (¶ 224) (Murphy Expert Report)). Dr. Athey conceded that (1) firms that offer high-quality customer service can charge higher prices than firms that offer lower-quality service. (CX 9043 (Athey, Dep. at 214; CX 8007 at 15) (Athey Expert Report), and that the price difference between 1-800 Contacts and other online retailers could be due at least in part to differences in service levels provided by 1-800 Contacts and other online retailers. (Athey, Tr. 2072). Though Dr. Athey sought to opine that service did not fully explain the price

difference between 1-800 Contacts and other online retailers, Dr. Athey had no opinion on what portion of the price difference was not attributable to service. (CX 9043 (Athey, Dep. at 215)). Dr. Athey also acknowledged that part of the price difference between 1-800 Contacts and other online retailers could be due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (Athey, Tr. 2072). However, Dr. Athey did nothing to measure what part of the price difference between 1-800 Contacts and other online retailers was due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (CX 9043 (Athey, Dep. at 255 ("Did you do anything to measure whether the portion of 1-800-CONTACTS' trademarks familiarity or success accounts – that is not attributable to the settlement agreements in this case, accounts for the price premium that it charges over other online retailers? . . . THE WITNESS: I didn't try to decompose the sources of the price premium quantitatively.")).

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

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

Response to Finding No. 1355:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1356. 1-800 Contacts recognized that consumers act on price information in advertisements. (CX1086 at 002-003 (August 7, 2012 email from Amber Powell to Laura Schmidt and Rick Galan stating "I think it's very likely" that "all the prices that are much lower than ours" in the paid search channel were responsible for "paid search experiencing a drop in NI [new internet] CR [conversion rate] that is disproportionate to other channels" and noting that, by contrast, "[t]yped/bookmarked customers aren't exposed to other

websites' pricing before coming to our site which likely makes them less sensitive to pricing.")).

Response to Finding No. 1356:

Complaint Counsel's Proposed Finding No. 1356 is incomplete and misleading. The cited document makes clear that the prices referred to by Ms. Powell were prices listed in Google Shopping results for a search for the term "contact lenses" that were not affected by the challenged settlement agreements. Nothing in the document suggests that 1-800 Contacts recognized that consumers searching for 1-800 Contacts' trademarks act on pricing information in advertisements for other retailers. Nor have Complaint Counsel adduced or cited any evidence that any advertisements displayed in response to searches for 1-800 Contacts' trademarks offer actual prices for contact lenses similar to those presented in the Google Shopping results displayed in the cited document.

1357. The fact that consumers who switch from 1-800 Contacts to other online retailers do not switch back to 1-800 Contacts suggests that consumers do value and act on information about 1-800 Contacts' rivals offering lower-priced options for purchasing contact lenses online. (*See supra* § IX.A.2; CX1117 at 023; Athey, Tr. 762-763 ("I also examined other types of documents in the case, internal e-mail chains, as well as a survey that 1-800 conducted, also to answer the same type of question, called the deadfile customer survey that looked at why consumers stopped using 1-800 Contacts. Q. What did those 1-800 materials you just referenced tell you about consumers' interest in pricing information? A. So one important piece of information that came out of this, 1-800 documents, is that – that they mention that customers that aren't exposed to other websites before coming back to their site are less sensitive to pricing and that consumers typically don't come back to 1-800 once they purchase from online competitors, so once they become aware of other alternatives, they don't come back. And the context for this document is important. This is where 1-800 was doing surveys of their customers to understand . . . why they don't come back after they leave. And so they . . find that if they've gone to another online retailer, they're not going to get them back, which is consistent with the idea that those other firms are offering enough service, making a trade-off that makes the customers better off.")).

Response to Finding No. 1357:

Complaint Counsel's Proposed Finding No. 1357 is not supported by the cited document. The document reports the result of a survey of only 54 respondents who made their last purchase from 1-800 Contacts regarding where they were likely to buy next. Nothing in the cited portion of the document indicates that any 1-800 Contacts customer that switched from 1-800 Contacts to another online retailer did not switch back, let alone that this is generally the case. Accordingly, Dr. Athey's testimony based on that premise is unreliable and should be disregarded as support for the proposed finding. To the extent that Complaint Counsel's Proposed Finding No. 1357 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1358. Many online contact lens retailer advertisements contain information regarding prices or discounts. (*See infra* Section IX.A.5.a; Athey, Tr. 761; CX8010 at 058 (Exhibit E) (Athey Rebuttal Report) (showing that in the comScore data set that Dr. Athey used, 50% of contact lens related advertisements' "text contains either "$" or "% off" in the ad description or title")).

Response to Finding No. 1358:

Complaint Counsel's Proposed Finding No. 1358 is based on testimony on which Dr. Athey lacks credibility. In her opening report, Dr. Athey determined that 12% of ads displayed in response to generic searches, 15% of ads in response to searches for contact lens retailers' trademarks, and 25% of ads in response to searches for contact lens manufacturers contained price information. (CX 8007 at 88) (Athey Expert Report). In her rebuttal report, however, relying on the same data set, Dr. Athey opined that 55% of ads displayed in response to generic

searches, 36% of ads in response to searches for contact lens retailers' trademarks and 54% of ads in response to searches for contact lens manufacturers contained price information. (CX 8010 at 58) (Athey Rebuttal Expert Report). Dr. Athey offered no explanation for this significant increase in the percentage of ads that supposedly contain price information.

Further, Dr. Athey has not conducted any analysis of the importance of this price information for consumers. Dr. Athey testified that she could not identify what the price or discount referred to in the text of advertisements meant and that a consumer would need additional information to make that determination. (Athey, Tr. 857-859). For example, she testified that she did not know what discount was offered by an ad simply stating "Contact lenses up to 70% off." (Athey, Tr. 859).

To the extent that Complaint Counsel's Proposed Finding No. 1358 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1359. The fact that many online contact lens retailer advertisements contain information regarding prices suggests that, to the extent these firms are rational, price information is important to consumers. (Athey, Tr. 761 ("Are consumers of contact lenses in the online space interested in information about prices? A. Yes. I find that they are. And I find that they do respond to the availability of this information. And so, again, I look at that from a couple of different perspectives. The first perspective is direct market data. In my comScore data set, I can observe the text of the advertisement that was shown to the consumers. They only have a small space in which to present their information, and they choose to promote price information, and so that choice suggests that the firms themselves believe and have evidence that price information is important to consumers.")).

Response to Finding No. 1359:

Complaint Counsel's Proposed Finding No. 1359 is based on an expert opinion that Dr. Athey provided at trial but that Complaint Counsel did not disclose in either Dr. Athey's opening report or rebuttal report. The opinion therefore should not be considered. Further, there is no basis to infer from any evidence that advertisers include price information in the text of their ads that consumers actually are interested in such information when they conduct searches related to contact lenses, let alone when they search for 1-800 Contacts' trademarks. Dr. Athey did not conduct any investigation to determine anything about how consumers view price information for contact lenses. (CX 9043 (Athey Dep., at 261) ("Q. Let me just ask you this: Did you undertake any investigation, independent of reading about investigations that others conducted, to determine anything about how consumers view price information for contact lenses? . . . THE WITNESS: I relied on the case material overall, some of which were studies, some of which were people's direct experience, some of which were opinions of the industry participants, but I did not conduct independent empirical research for any of those.").

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

Response to Finding No. 1360:

Complaint Counsel's Proposed Finding No. 1360 is incomplete and misleading. The cited testimony does not contain any evidence regarding the amount, if any, by which AC Lens's sales increased.

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

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

Response to Finding No. 1361:

The proposed finding is based solely on unreliable hearsay and should be disregarded. The cited Bain presentation slides were not prepared for 1-800 Contacts' owner at the time that it was the owner. The report was prepared by Bain on December 1, 2015; Complaint Counsel concede in their Proposed Finding No. 5 that AEA Investors did not acquire a majority stake until January 2016.

Complaint Counsel have also not demonstrated that the survey on which the cited document was based was reliable. The report's conclusion contradicts other survey evidence and testimony in the record finding that consumers consider convenience, ease and speed of delivery as well as price, and that more consumers consider these other factors than consider price. (RX 1117 at 28; RX 1108 at 10).

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

Response to Finding No. 1362:

The proposed finding is based solely on unreliable hearsay and should be disregarded. The cited Bain presentation slides were not prepared for 1-800 Contacts' owner at the time that it was the owner. The report was prepared by Bain on December 1, 2015; Complaint Counsel concede in their Proposed Finding No. 5 that AEA Investors did not acquire a majority stake until January 2016.

Complaint Counsel have also not demonstrated that the survey on which the cited document was based was reliable. The report's conclusion contradicts other survey evidence and testimony in the record finding that consumers consider convenience, ease and speed of delivery

as well as price, and that more consumers consider these other factors than consider price. (RX 1117 at 28; RX 1108 at 10).

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

Response to Finding No. 1363:

The proposed finding is based solely on unreliable hearsay and should be disregarded. The cited Bain presentation slides were not prepared for 1-800 Contacts' owner at the time that it was the owner. The report was prepared by Bain on December 1, 2015; Complaint Counsel concede in their Proposed Finding No. 5 that AEA Investors did not acquire a majority stake until January 2016.

Complaint Counsel have not demonstrated that the survey on which the cited document was based was reliable. The report's conclusion contradicts other survey evidence in the record finding that consumers consider convenience, ease and speed of delivery as well as price, and that more consumers consider these other factors than consider price. (RX 1117 at 28; RX 1108 at 10).

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

Response to Finding No. 1364:

The proposed finding is unreliable hearsay (a Bain presentation). The cited presentation slides were not prepared for 1-800 Contacts' owner at the time that it was the owner. The report was prepared by Bain & Company on December 1, 2015. As Complaint Counsel themselves

concede in their Proposed Finding No. 5, AEA Investors acquired a majority stake in January 2016.

Complaint Counsel have not demonstrated that the survey on which the cited document was based was reliable. The report's conclusion contradicts other survey evidence in the record finding that consumers consider convenience, ease and speed of delivery as well as price, and that more consumers consider these other factors than consider price. (RX 1117 at 28; RX 1108 at 10).

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

Response to Finding No. 1365:

The proposed finding is unreliable hearsay (a Bain presentation). The cited presentation slides were not prepared for 1-800 Contacts' owner at the time that it was the owner. The report was prepared by Bain & Company on December 1, 2015. As Complaint Counsel themselves concede in their Proposed Finding No. 5, AEA Investors acquired a majority stake in January 2016.

Complaint Counsel have not demonstrated that the survey on which the cited document was based was reliable. The report's conclusion contradicts other survey evidence in the record finding that consumers consider convenience, ease and speed of delivery as well as price, and that more consumers consider these other factors than consider price. (RX 1117 at 28; RX 1108 at 10).

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

[redacted])).

Response to Finding No. 1366:

Respondent has no specific response.

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

Response to Finding No. 1367:

Complaint Counsel's Proposed Finding No. 1367 is based on improper expert testimony and should be disregarded. Complaint Counsel have not cited the full statement in Dr. Athey's report: "*The evidence in the record indicates* that consumers who search for 1-800 Contacts queries are interested in comparing prices and would use pricing information if it was provided." (CX8007 at 21 (¶ 58).) Dr. Athey's testimony regarding what the "evidence in the record" indicates should be disregarded. Order on Post-Trial Briefs at 3.

1368. 1-800 Contacts' online rivals valued advertising in response to search queries including 1-800 Contacts' brand terms because consumers act on information provided by those ads. (*See supra* § V.B.2).

Response to Finding No. 1368:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

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

Response to Finding No. 1369:

To the extent that Complaint Counsel's Proposed Finding No. 1369 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1370. Google strives to ensure that search advertising is "useful and relevant to user's search" and "aspire[s] to show relevant and useful commercial information to users." (Juda, Tr. 1072).

Response to Finding No. 1370:

Complaint Counsel's Proposed Finding No. 1370 is incomplete and misleading. It is undisputed that the optimal level of trademark protection for search engines will typically differ from the optimal level of trademark protection for the companies owning such trademarks. (RX 739 at 35). Complaint Counsel's economist, Dr. David Evans, admitted that with respect to trademark protection, search engines are not seeking to maximize the interests of trademark holders; search engines are seeking to maximize profit. (Evans, Tr. 1817). Dr. Evans further admitted that he would not look to the search engines as making the optimal decisions with respect to the enforcement of trademark law. (Evans, Tr. 1817). When asked whether she would be offering an opinion as to whether Google's trademark policy is socially optimal, Complaint

Counsel's expert, Dr. Susan Athey, testified at her deposition, "Is it perfectly socially optimal? No." (CX 9043 (Athey, Dep. at 192-193)).

1371. Selecting relevant advertisements for users is an important priority for Google. (Juda, Tr. 1072).

Response to Finding No. 1371:

Complaint Counsel's Proposed Finding No. 1370 is incomplete and misleading. It is undisputed that the optimal level of trademark protection for search engines will typically differ from the optimal level of trademark protection for the companies owning such trademarks. (RX 739 at 35). Complaint Counsel's economist, Dr. David Evans, admitted that with respect to trademark protection, search engines are not seeking to maximize the interests of trademark holders; search engines are seeking to maximize profit. (Evans, Tr. 1817). Dr. Evans further admitted that he would not look to the search engines as making the optimal decisions with respect to the enforcement of trademark law. (Evans, Tr. 1817). When asked whether she would be offering an opinion as to whether Google's trademark policy is socially optimal, Complaint Counsel's expert, Dr. Susan Athey, testified at her deposition, "Is it perfectly socially optimal? No." (CX 9043 (Athey, Dep. at 192-193)).

1372. The fact that an advertiser is willing to pay for each click received is a strong signal of relevance to users. (Athey, Tr. 719-720 ("[A]n advertiser won't be able to afford to be in those high positions on the page unless they are relevant."); CX8006 at 33 (¶ 75) (Evans Expert Report) ("It often makes economic sense for online sellers to pay for search ads so long as they are making a large enough margin on each sale net of the cost of the search advertising that results in that sale.")).

Response to Finding No. 1372:

Complaint Counsel's Proposed Finding No. 1372 is incorrect and not supported by admissible evidence and therefore should be disregarded. To the extent that the proposed finding is based on Dr. Athey's opinion, it is based on an expert opinion that Complaint Counsel did not

disclose in either Dr. Athey's opening report or rebuttal report, and therefore should not be considered. Further, the cited testimony appears to be based on the premise that advertisers would not be bidding on 1-800 Contacts' trademark unless doing so was profitable. But neither Dr. Athey nor Dr. Evans analyzed any retailer's profits from bidding on 1-800 Contacts' trademark. (CX 9043 (Athey, Dep. at 296) ("Q. So my question was, though, whether there's any analysis that you've done in this case that I could look at and it would tell me what the profit margin was for any of the parties to the settlement agreements in bidding on any keyword? . . . THE WITNESS: "I did not provide specific profit calculations for any bidder."). Further, Complaint Counsel did not present evidence that each of the settling parties had conducted an analysis of the profitability of bidding on 1-800 Contacts' trademarks, as opposed to the profitability of search advertising in general, and also did not present any evidence that the settling parties had compared the profitability of search advertising to other forms of advertising. Since the settling parties did not perform such analyses, one cannot draw any conclusion about the profitability of bidding on 1-800 Contacts' trademarks from the fact that some of the settling parties engaged in such behavior from time to time, or for limited periods of time.

1373. The fact that an ad consistently appears in paid search results is itself a strong signal of relevance to users. (Athey, Tr. 707-708 ("I have a paper that shows that, in equilibrium, the search advertisements that are ranked most highly are also those that are most relevant for consumers."), 718-719; *see also supra* § IV.A.4 (explaining the signals of relevance—including click through rate, ad text relevance, and landing page experience—that search engines use to determine an advertisement's ad rank and thus placement on the search engine results page)).

Response to Finding No. 1373:

Complaint Counsel's Proposed Finding No. 1373 is incorrect and should be disregarded. In many cases, search engines display ads for websites at the top of the search results page that would be ranked below many other websites in the organic search results. (RX 733 at 24 (Ghose

Expert Report); RX 733 at 156-194; Ghose, Tr. 3908-11, 4003; RX 739 at 55-56, 93-94 (Murphy Expert Report)). Search engines do not display organic links to other retailers on the first page of organic search results in response to a search for 1-800 Contacts' trademarks. (RX 733 at 25 (Ghose Expert Report)). Google displays ads at the top of the search results page for a search for 1-800 Contact's trademark that do not appear in the first 20 pages of organic links. (Ghose, Tr. 3910-11; RX 733 at 24, RX 733 at 156-190 (Ghose Expert Report)). The fact that search engines display ads for websites at the top of the search results page that would be ranked below many other websites in the organic search results indicates that links to other retailers in response to searches for 1-800 Contact's trademarks are only minimally relevant to many consumers. (Ghose, Tr. 3911-12; RX 733 at 6, 24-25; CX 9046 (Ghose, Dep. at 49)).

Further, it is undisputed that the optimal level of trademark protection for search engines will typically differ from the optimal level of trademark protection for the companies owning such trademarks. (RX 739 at 35) (Murphy Expert Report). Complaint Counsel's economist, Dr. David Evans, admitted that with respect to trademark protection, search engines are not seeking to maximize the interests of trademark holders; search engines are seeking to maximize profit. (Evans, Tr. 1817). Dr. Evans further admitted that he would not look to the search engines as making the optimal decisions with respect to the enforcement of trademark law. (Evans, Tr. 1817). When asked whether she would be offering an opinion as to whether Google's trademark policy is socially optimal, Complaint Counsel's expert, Dr. Susan Athey, testified at her deposition, "Is it perfectly socially optimal? No." (CX 9043 (Athey, Dep. at 192-193)).

To the extent that Complaint Counsel's Proposed Finding No. 1373 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary

record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1374. When contact lens retailers have shown advertisements in response to 1-800 Contacts branded queries, those advertisements have resulted in clicks and conversions. (*See supra* § V.B.2.).

Response to Finding No. 1374:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

a. Contact lens retailer advertisements provide relevant information to consumers, including price information.

1375. Many online contact lens retailer advertisements contain information regarding prices or discounts. (*See infra* ¶¶ 1376-1382; Athey, Tr. 761; CX8010 at 058 (Exhibit E) (Athey Rebuttal Report) (showing that in the comScore data set that Dr. Athey used, 50% of contact lens related advertisements' "text contains either "$" or "% off" in the ad description or title")).

Response to Finding No. 1375:

To the extent that Complaint Counsel's Proposed Finding No. 1375 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1376. In its marketing efforts, AC Lens focuses on informing potential customers about "service, convenience and price," and considers price information to be a particularly important message to send to potential customers. (Clarkson, Tr. 218).

Response to Finding No. 1376:

Respondent has no specific response.

1377. In its internet advertising, the message that LensDirect attempts to convey is: "Same product, better prices, better service." (Alovis, Tr. 993).

Response to Finding No. 1377:

Respondent has no specific response.

1378. The primary marketing message that LensDirect seeks to send to customers is a message that "We sell the same contact lenses that the other guys are selling, but we do it with better pricing and we do it without doubt with better service." (Alovis, Tr. 1017).

Response to Finding No. 1378:

Respondent has no specific response.

1379. Memorial Eye promoted its lower prices and discounts in its search advertising messages. (Holbrook, Tr. 1904).

Response to Finding No. 1379:

Complaint Counsel's Proposed Finding No. 1379 is not supported by the cited testimony. As indicated in Complaint Counsel's own Finding No. 1380, Mr. Holbrook testified regarding what "Memorial Eye focus[ed] on in its search advertising for online sales," not the content of any search advertising messages.

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

Response to Finding No. 1380:

Respondent has no specific response.

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

Response to Finding No. 1381:

Respondent has no specific response.

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

Response to Finding No. 1382:

Complaint Counsel's Proposed Finding No. 1382 is incomplete, misleading, not supported by the cited evidence and should be disregarded. The cited evidence does not include any direct evidence regarding consumers' interest in price information. Dr. Athey did not conduct any analysis of whether the presence of what she calls price information in a paid search advertisement affected consumers' willingness to click on an ad or to purchase after doing so. Nor did she undertake any analysis to determine anything about how consumers view price information for contact lenses. (CX 9043 (Athey Dep., at 261) ("Q. Let me just ask you this: Did you undertake any investigation, independent of reading about investigations that others conducted, to determine anything about how consumers view price information for contact lenses? . . . THE WITNESS: I relied on the case material overall, some of which were studies, some of which were people's direct experience, some of which were opinions of the industry participants, but I did not conduct independent empirical research for any of those."). To the extent that Dr. Athey refers in the cited testimony to certain surveys, her testimony improperly seeks to summarize evidence in the record, which is not proper expert testimony. Further, none of those surveys indicate that consumers are interested in seeing price information in the text of

paid search advertisements when they conduct searches related to contact lenses let alone when they search for 1-800 Contacts' trademarks.

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

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

Response to Finding No. 1383:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1384:

Respondent has no specific response.

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

Response to Finding No. 1385:

To the extent that Proposed Finding No. 1385 is a summary finding, it should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. Further, the cited testimony of Dr. Athey is not admissible. Complaint Counsel's citation to testimony of an expert witness for a factual proposition that would be the proper subject of lay witness testimony violates this Court's May 16, 2017 Order On Post-Trial Briefs. Dr. Athey also cannot offer a proper expert opinion on what 1-800 Contacts' competitors "want" or intend. *See, e.g.*, *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 45 (S.D.N.Y. 2016) ("experts may not offer opinions regarding the intent or motive of parties as part of their analysis"); *Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F. Supp. 2d 1069, 1077-78 (D. Or. 2013) ("Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind"); *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (expert "could not testify *as an expert* that GM had a particular motive").

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

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

Response to Finding No. 1386:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1387:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1388:

Respondent has no specific response.

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

Response to Finding No. 1389:

Respondent has no specific response.

1. Analysis Based on Memorial Eye Experience

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

Response to Finding No. 1390:

Respondent has no specific response.

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

Response to Finding No. 1391:

Complaint Counsel's Proposed Finding No. 1391 is incorrect and misleading. Dr. Athey's own methods and testimony indicate that Dr. Evans' exclusive reliance on data regarding Memorial Eye is unreliable. According to Dr. Athey, a model that incorporates data regarding multiple advertisers was the "right choice." (CX 9043 (Athey, Dep. at 167-169)). Dr. Athey's model incorporated data regarding multiple advertisers. (CX 9043 (Athey, Dep. at 167-69)). Dr. Athey did the analysis that she thought was best. (CX 9043 (Athey Dep.) at 169).

Further, according to Google data, [redacted] (RX 733 at 70, 105 (Ghose Expert Report)). Dr. Evans offered no reason to think that Memorial Eye was representative of other online sellers of contact lenses. Dr. Evans offered no reason to think that Memorial Eye was representative of other online sellers of contact lenses. Dr. Evans did not offer any explanation for why he extrapolated data for Memorial Eye to predict behavior by

other retailers despite this significant disparity in their behavior in the actual world. (RX 733 at 70-71 (Ghose Expert Report)). For these reasons, it is unreasonable for Dr. Evans to rely entirely on data for Memorial Eye. (CX 9046 (Ghose, Dep. at 166-67); RX 733 at 69-71 (Ghose Expert Report)).

Finally, the Google data on which Dr. Evans relied indicate that [redacted] each paid for more than 1 million ads in response to searches for 1-800 Contacts' trademarks, and collectively paid for more than 8.5 million ads in response to those searches. (RX 733 at 102) (Ghose Expert Report). Dr. Evans, however, did not analyze any of these firms' ads. Instead, Dr. Evans focused exclusively on the roughly [redacted] ads paid for by Memorial Eye in response to searches for 1-800 Contacts' trademarks.

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

Response to Finding No. 1392:

Complaint Counsel's Proposed Finding No. 1391 is misleading. The Google data that included data on what Dr. Evans called "matched ads" included data on numerous online retailers that were not bound by the settlement agreements. (RX 733 at 102). Dr. Evans did not analyze any "matched" ads by these retailers.

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

Response to Finding No. 1393:

Respondent has no specific response.

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

Response to Finding No. 1394:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." The citation to the Evans report does not solve this problem, because experts cannot provide "factual propositions that should be established by fact witnesses or documents." Order on Post Trial Briefs at 3. Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. The proposed finding is also misleading and incomplete by omitting Mr. Holbrook's testimony that Memorial Eye decided "to stop selling contact lenses online more than a year before entering the settlement agreement" with 1-800 Contacts. (CX 9024 (Holbrook, Dep. at 177).

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

Response to Finding No. 1395:

Respondent has no specific response.

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

Response to Finding No. 1396:

Complaint Counsel's Proposed Finding No. 1396 is incorrect, incomplete and misleading. In the very testimony relied upon by Complaint Counsel, Mr. Holbrook testified as to bidding on 1-800 Contacts' trademarks that "at the beginning, when we first opened up, we just -- we were learning and didn't -- it never -- it never came up, quite frankly." (Holbrook, Tr. 1906). In other words, Mr. Holbrook testified that Memorial Eye did not think to bid on 1-800 Contacts' trademarks before it received any cease-and-desist letter. [redacted] (Holbrook, Tr. 2042).

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

Response to Finding No. 1397:

Respondent has no specific response.

1398. Dr. Evan's analysis of Memorial Eye's experience shows that [redacted] (Evans, Tr. 1605, *in camera* [redacted]).

Response to Finding No. 1398:

Complaint Counsel's Proposed Finding No. 1398 is incorrect and not supported by admissible evidence and should be disregarded. Dr. Evans has no basis to opine on whether advertising in response to searches for 1-800 Contacts' was an "effective" strategy because he did not conduct any analysis of Memorial Eye's profits. (RX 739 at 70 (Murphy Report)).

Dr. Evans therefore did not analyze whether Memorial Eye could have earned more profit by spending the funds that it spent on advertising in response to searches for 1-800 Contacts' trademarks on other forms of advertising, such as advertising in response to searches for other terms. [redacted] (Evans, Tr. 1668).

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

Response to Finding No. 1399:

Complaint Counsel's Proposed Finding No. 1399 is incomplete and misleading. While the proposed finding is that "Memorial Eye gain[ed] broad exposure" from advertising in response to searches for 1-800 Contacts trademarks because it appeared on [redacted] SERPs in response to those searches, the record shows that Memorial Eye generated more than 72 million impressions in response to other searches (RX 733 at 92) (Ghose Expert Report), and that more than 98% of searches were for terms other than 1-800 Contacts' trademarks. (Evans, Tr. 1724-25).

1400. Second, [redacted]. (Evans, Trial Tr. 1606, *in camera*). People who clicked also [redacted]. Memorial Eye converted, or made an initial sale on, [redacted] of the clicks on matched ads, which was [redacted]. (Evans, Trial Tr. 1605,

in camera [redacted] ; CX8009 at 084 (n.193) (Evans Rebuttal Expert Report).

Response to Finding No. 1400:

Respondent has no specific response.

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

Response to Finding No. 1401:

Complaint Counsel's Proposed Finding No. 1401 is incomplete and misleading. [redacted] (Evans, Tr. 1668).

1402. Dr. Evans further concluded that consumers, who purchased from Memorial Eye paid less than they would have paid 1-800 Contacts for the same contact lenses. (Evans, Tr. 1607, *in camera*; CX8006 at 095 (¶ 205) (Evans Expert Report); CX9024 (Holbrook, Dep. at 138 ("1-800 Contacts was generally typically a lot higher than we were."). In this respect, Memorial Eye's pricing is consistent with the pricing strategy taken by the other pure play online firms, which also offered discount pricing. (Murphy, Tr. 4115 (pure-play online "focused more on a price play"), 4119 (1-800 Contacts' prices were "higher than many of the pure-play online sellers")).

Response to Finding No. 1402:

Complaint Counsel's Proposed Finding No. 1402 is not supported by the cited evidence. All of the cited testimony by Dr. Evans relied entirely on the cited testimony by Mr. Holbrook. However, Complaint Counsel omit from the cited testimony that Mr. Holbrook testified that the difference between 1-800 Contacts' and Memorial Eye's prices "depended on the specific type of contact lens and the modality of that contact lens as to what the price difference would be." (CX 9024 (Holbrook, Dep. at 138-39)). None of the cited evidence indicates that any Memorial

Eye customer paid less for his or her contact lenses than that customer would have paid for contact lenses from 1-800 Contacts.

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

Response to Finding No. 1403:

Complaint Counsel's Proposed Finding No. 1403 is not supported by the cited evidence. Nowhere in Dr. Evans' cited testimony did he offer any testimony that "[c]onsumers who were aware of 1-800 Contacts were able to learn that Memorial Eye was another source of contact lenses online, which typically offered lower prices." The cited testimony does not discuss consumers' awareness at all. Nor is there any support in Dr. Evans' testimony that any Memorial Eye customer paid less for his or her contact lenses than that customer would have paid for contact lenses from 1-800 Contacts. Mr. Holbrook of Memorial Eye testified that the difference between 1-800 Contacts' and Memorial Eye's prices "depended on the specific type of contact lens and the modality of that contact lens as to what the price difference would be." (CX 9024 (Holbrook, Dep. at 138-39)).

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

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

Response to Finding No. 1404:

Respondent does not concede that Dr. Evans' estimates or models were proper or reliable.

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

Response to Finding No. 1405:

Respondent has no specific response.

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

Response to Finding No. 1406:

Respondent does not concede that Dr. Evans' estimates were proper or reliable.

1407. Dr. Evans made reasonable, conservative assumptions to estimate the number of impressions and clicks that would have occurred absent the bidding agreements. First, he assumed that Google would show up to five ads on the SERP following a query containing a 1-800 brand term. (Evans, Tr. 1623, *in camera*). Because he assumed that 1-800 would always have a top ad itself, Dr. Evans analysis added four other advertisements. (Evans, Tr. 1623-1624, *in camera*). That figure is conservative because the number of ads Google shows on generic searches on average is **{6}**. (Evans, Tr. 1624, *in camera*).

Response to Finding No. 1407:

Complaint Counsel's Proposed Finding No. 1407 is incorrect and misleading. As Dr. Ghose noted, Dr. Evans does not explain why the search engines would have displayed so many ads in the but-for world even though they did not fill all ad positions in the actual world despite the existence of other bidders. (RX 733 at 71-72 (¶ 167) (Ghose Expert Report)). Dr. Evans simply assumes without any basis that the settling parties would have filled all of the ad positions even though other retailers not bound by the settlement agreements are not filling those positions

today. Further, Dr. Evans offered no reason to think that Memorial Eye was representative of other online sellers of contact lenses and offered no explanation as to why, despite its many differences from other online sellers, it was appropriate to extrapolate from Memorial Eye to other companies.

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

Response to Finding No. 1408:

Complaint Counsel's Proposed Finding No. 1408 is incorrect and unsupported by any admissible evidence. Dr. Evans did not provide any basis for his assumption that consumers who search for 1-800 Contacts' trademarks would click on ads for other retailers in the counterfactual world at the same at which they clicked on ads for Memorial Eye in the actual world. Search engine data demonstrate that it is neither correct nor conservative to make this assumption. For example, while Complaint Counsel's Proposed Finding No. 1408 suggests that consumers who search for 1-800 Contacts' trademarks would click on ads for Vision Direct at a higher rate than they clicked on ads for Memorial Eye, Google data show that the overall click-through rate for ads for Vision Direct in response to searches for 1-800 Contacts' trademarks was [redacted], *less than* the [redacted] click-through rate for Memorial Eye.

1409. Third, Dr. Evans observed user clicking behavior on results for queries containing a 1-800 Contacts brand term where multiple competitive ads appeared, and found the relative decline in CTRs for ads in positions 3, 4, and 5. Starting with the [redacted] for position 2, Dr. Evans estimated the CTRs for the lower positions – [redacted]. (CX8006 at 100-101 (¶ 218) (Evans Expert Report, *in camera*). These estimates are all conservative because they are based on the **{1.84%}** Memorial Eye click through rate figure for position 2, which is itself conservative. (CX8006 at 100-101 (¶ 218) (Evans Expert Report), *in camera*).

Response to Finding No. 1409:

Complaint Counsel's Proposed Finding No. 1409 is incorrect and unsupported by any admissible evidence. Dr. Evans did not provide any basis for his assumption that consumers who search for 1-800 Contacts' trademarks would click on ads for other retailers in the counterfactual world at the same at which they clicked on ads for Memorial Eye in the actual world. Search engine data demonstrate that it is neither correct nor conservative to make this assumption. For example, while Complaint Counsel's Proposed Finding No. 1408 suggests that consumers who search for 1-800 Contacts' trademarks would click on ads for Vision Direct at a higher rate than they clicked on ads for Memorial Eye, Google data show that the overall click-through rate for ads for Vision Direct in response to searches for 1-800 Contacts' trademarks was **{1%}**, *less than* the **{1.5%}** click-through rate for Memorial Eye.

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

Estimates of Competitive Advertising in Absence of Restrictions

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

Response to Finding No. 1410:

Complaint Counsel's Proposed Finding No. 1410 is incorrect and misleading. In his report, Dr. Ghose explained the flaws in Dr. Evans' model. (RX 733 at 69-72 (¶¶ 161-168) (Ghose Expert Report)). Among other things, Dr. Evans improperly extrapolated his estimates of impressions and clicks for all retailers entirely from data on one retailer [redacted] (RX 733 at 69-70 (¶ 161-164) (Ghose Expert Report)). Dr. Evans also improperly excluded the effects of ads for retailers that he says do not sell in the U.S., which caused him to overestimate the number of incremental impressions by 24% and incremental clicks by 26.7%. (RX 733 at 71 (¶ 166) (Ghose Expert Report)). Further, because the number of queries would have remained the same in his model, Dr. Evans' predicted increase in impressions assumes that Google would have displayed more ads in the counterfactual world even though numerous retailers are free to pay for those ads in the actual world. Dr. Evans does not explain why the search engines would have displayed so many ads in the but-for world even though they did not fill all ad positions in the actual world despite the existence of other bidders. (RX 733 at 71-72 (¶ 167) (Ghose Expert Report)). Dr. Evans simply assumes without any basis that the settling parties would have filled all of the ad positions even though other retailers not bound by the settlement agreements are not filling those positions today.

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

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

Response to Finding No. 1411:

Dr. Athey's model is unreliable for the reasons explained by Dr. Ghose. (RX 733 (¶¶ 149-154)).

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

Response to Finding No. 1412:

Respondent has no specific response.

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

Response to Finding No. 1413:

Respondent has no specific response.

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

Response to Finding No. 1414:

Complaint Counsel's Proposed Finding No. 1414 is not supported by Dr. Athey's testimony. Dr. Athey did not know whether respondents in the comScore data set that she used were representative of the U.S. population, the contact lens-wearing population or customers of 1-800 Contacts. (Athey, Tr. 850; CX 9043 (Athey, Dep. at 109)). Further, the fact that, according to Dr. Athey, "67% of consumers make only one search related to contact lenses during the period observed in the dataset" (CX 8010 at 30 (¶ 75) (Athey Rebuttal Report)), strongly indicates that the comScore data do not provide a full picture of users' entire search behavior. Indeed, the comScore dataset may not have captured the fact, testified to by Mr. Juda

of Google, that "consumers will make multiple searches related to a particular product over multiple days, on multiple devices." (Juda, Tr. 1304-05).

1415. The data that Dr. Athey received from comScore consisted of detailed online search information from 377,002 internet users in the United States from July 11, 2013, through August 14, 2016, covering all the search queries those users performed on all major search engines and reported at a query-by-query level. (CX8007 at 026-029 (¶¶ 074-084) (Athey Expert Report); Athey Tr. 767-769, 2107).

Response to Finding No. 1415:

Dr. Athey did not know whether respondents in the comScore data set that she used were representative of the U.S. population, the contact lens-wearing population or customers of 1-800 Contacts. (Athey, Tr. 850; CX 9043 (Athey, Dep. at 109)). Further, the fact that, according to Dr. Athey, "67% of consumers make only one search related to contact lenses during the period observed in the dataset" (CX8010 ¶ 75) strongly indicates that the comScore data do not provide a full picture of users' entire search behavior. Indeed, the comScore dataset may not have captured the fact, testified to by Mr. Juda of Google, that "consumers will make multiple searches related to a particular product over multiple days, on multiple devices. (Juda, Tr. 1305).

1416. The comScore data Dr. Athey used provides included the search queries that the users typed during that time period, the paid search results that were displayed to the users (including the number ads displayed, the text of the ads, and information about ad position), and which paid or algorithmic results the users clicked on, if any. (CX8007 at 026-029 (¶¶ 74-84) (Athey Expert Report); Athey, Tr. 768-769).

Response to Finding No. 1416:

Respondent has no specific response.

1417. Dr. Athey divided the search data in her model into several categories of search queries: "branded" queries that included the name of an online contact lens retailer, "manufacturer" queries that included the name of a contact lens manufacturer or brand, "generic" queries that related to contact lenses but were not classified as branded or manufacturer queries, and "unrelated" queries, which did not relate to contact lenses and were removed from the data set. (CX8007 at 027 (¶ 77) (Athey Expert Report)).

Response to Finding No. 1417:

Respondent has no specific response.

1418. In the first step of her empirical model, Dr. Athey constructed ad layouts that she predicted consumers would likely see in response to 1-800 Contacts Branded Queries, absent the Bidding Agreements. (Athey, Tr. 766-767; CX8007 at 030 (¶ 89) (Athey Expert Report)).

Response to Finding No. 1418:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Expert Report)).

1419. Dr. Athey derived the counterfactual ad layouts in her model from data showing the actual ad layouts displayed in response to the set of queries for generic search terms related to contact lenses that appeared in the available data. (Athey, Tr. 770; CX8007 at

030 (¶ 90) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).

Response to Finding No. 1419:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Expert Report)).

1420. One reason that Dr. Athey used the generic search term queries from her dataset for constructing her counterfactual ad layouts is that those queries were "not affected by the agreements." (Athey, Tr. 770; CX8007 at 030 (¶ 90) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).

Response to Finding No. 1420:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of

her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Expert Report)).

1421. Another reason that Dr. Athey used the generic search term queries from her dataset for constructing her counterfactual ad layouts because "the volume of generic searches is comparable to the volume of 1-800 Contacts branded searches." (Athey, Tr. 770; CX8007 at 030 (¶ 90) (Athey Expert Report); CX8010 at 032 (¶ 82) (Athey Rebuttal Expert Report)).

Response to Finding No. 1421:

Complaint Counsel's Proposed Finding No. 1421, and the testimony of Dr. Athey on which it is based, are based on a demonstrably incorrect premise that the volume of generic searches is comparable to the volume of searches for 1-800 Contacts' trademarks. Dr. Athey's own analysis of comScore data found that consumers conducted 9,450 generic searches but only 2,769 searches for 1-800 Contacts' trademarks. (CX 8007 at 28). Further, Dr. Evans conceded that only 2% of searches related to contact lenses are for 1-800 Contacts' trademarks. (Evans,

Tr. 1724-25). The discrepancy between Dr. Athey's stated assumption and the facts as revealed in her own report is one reason why her model and opinions are unreliable.

1422. The generic search queries presented a set of queries "where the advertisers were bidding in a way that would be similar to what we would expect in the counterfactual world"; that is, they reflect "the outcome of the equilibrium" in which the advertisers "were bidding against one another," "users were clicking," search engines were "computing quality scores," and "those were entered into an auction." (Athey, Tr. 769-770).

Response to Finding No. 1422:

Complaint Counsel's Proposed Finding No. 1422 is incorrect ; Dr. Athey's use of generic queries to construct her counterfactual ad layouts was not reliable. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Report)).

1423. To construct the counterfactual ad layouts using the observed generic ad layouts, Dr. Athey modified the observed generic ad layouts in two ways. (*See infra* ¶¶ 1424-1429).

Response to Finding No. 1423:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Report)).

1424. In the first step of constructing counterfactual ad layouts from observed generic ad layouts, Dr. Athey discarded any observed generic search ad layouts in her dataset that did not include an advertisement for 1-800 Contacts. (Athey, Tr. 770-771; CX8007 at 030-031 (¶ 91) (Athey Expert Report)).

Response to Finding No. 1424:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged

settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Report)).

1425. In the second step of constructing counterfactual ad layouts from observed generic ad layouts, Dr. Athey moved the 1-800 Contacts advertisement to the top ad position in each of the remaining layouts. (Athey, Tr. at 770-771; CX8007 at 030-031 (¶ 91) (Athey Expert Report)).

Response to Finding No. 1425:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the

counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Report)).

1426. Dr. Athey took the steps described in the two immediately preceding paragraphs in order to reflect 1-800 Contacts' high click-through rates and high quality score on searches for its own name, testimony from 1-800 Contacts personnel that 1-800 Contacts would take steps to "always appear on top" in response to searches for the company's name, the fact that it is "economically rational" for 1-800 Contacts to take such steps and to participate in auctions for its branded terms, and search engines policies "designed specifically to keep the branded firms on top" in response to searches for their brand names. (Athey, Tr. 770-773).

Response to Finding No. 1426:

Respondent does not concede that Dr. Athey's use of generic queries to construct her counterfactual ad layouts was proper or led to reliable results. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Report)).

1427. In the second step of Dr. Athey's empirical model, Dr. Athey "built a statistical model that predicts consumer click behavior as a function of the ads presented to the consumer." (Athey, Tr. 774; *see also* CX8007 at 029-030 (¶¶ 85-88) (Athey Expert Report)).

Response to Finding No. 1427:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report)). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1428. The data that Dr. Athey used in the second step of her empirical model consisted of observed consumer click behavior in response to searches for 1-800 Contacts' and other online contact lens retailers' brand name terms. (Athey, Tr. 775-776).

Response to Finding No. 1428:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-60 (¶¶ 155-160) (Ghose Expert Report)). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1429. Dr. Athey used this data to model how the likelihood of a consumer clicking on any given advertisement is affected by each of several factors. (Athey, Tr. 775-780; CX8007 at 029-031 (¶¶ 85-91) (Athey Expert Report)).

Response to Finding No. 1429:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's

multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1430. The type of methodology that Dr. Athey used in constructing her statistical model of consumer clicking behavior is referred to by economists as a multinomial logistic regression model (MNL model). (CX8007 at 029-030 (¶ 86) (Athey Expert Report)).

Response to Finding No. 1430:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1431. In a MNL model, "[o]nce the structural parameters of the model are estimated, the model can predict the [click through rate] for any ad given on any hypothetical layout for a search result." (CX8007 at 030 (¶ 86) (Athey Expert Report); *see also* Athey, Tr. 780 ("[T]hat variation in the data, the fact that the same query is showing different layouts at different times, allows me to statistically estimate the parameters of the model. And then those parameters in turn allow me to make counterfactual predictions.")).

Response to Finding No. 1431:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1432. The factors that Dr. Athey's model of consumer clicking behavior account for are: (i) the consumer appeal of the advertised brand ("brand effect"), (ii) the position of the ad on the search results page ("position effect"), (iii) whether the ad clicked on was served by the firm searched for by the user ("searched-for firm" effect), (iv) whether the ad clicked on was an ad for 1-800 Contacts (specifically, Dr. Athey calculated distinct position effects

and searched-for firm effects for 1-800 branded searches, allowing for the possibility that the other effects may be stronger for 1-800 Contacts' ads than they are for other competitors' ads), and (v) the propensity of the particular user to click on any ad (the consumer's "clickiness"). (Athey, Tr. 775-780; CX8007 at 030 (¶ 88) (Athey Expert Report)).

Response to Finding No. 1432:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1433. Dr. Athey modeled each of these effects based on observed data, rather than making assumptions about them. (Athey, Tr. 777-780 (testifying that her model includes "indicator variables for each of the factors" and used "variation[s] in the data" "to statistically estimate the parameters of the model")).

Response to Finding No. 1433:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1434. For example, Dr. Athey modeled brand effects based on observations of variations in click-through rates of "different brands [that] appear in the same position on the same query." and modeled position effects based on observations of variations in click-through rates of the same firm's ad appearing in different positions. (Athey, Tr. 778-780).

Response to Finding No. 1434:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr.

Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1435. Indeed, Dr. Athey's model took into account the value consumers may place on 1-800 Contacts' brand strength—or, stated otherwise, the possibility that some of 1-800 Contacts' price premium may be explained by the strength of 1-800 Contacts' brand—in her empirical model and other parts of her analysis. (Athey, Tr. 755-756 ("Q. So far you've talked about differentiation in product and differentiation in service and whether they fully explain the difference in 1-800's prices from its online competitors, but did you take into account whether 1-800's well-known brand or trustworthy reputation explain its price premium? A. Absolutely. It's accounted for in really every part of my analysis. Starting with the review of, say, the Net Promoter Score data or other consumer surveys in the documents, when consumers answer a survey about whether they would recommend a brand, they're including in that their value of the brand, so the consumer survey evidence absolutely accounts for that. The conclusions of the investors, the conclusions of the industry participants also account for that. They account for – when somebody is asking the question can I support this price premium, how can I convince consumers to pay a price premium, they are – one of the possible answers is that the consumers like the brand, and if they are still finding it hard, that suggests that at least for the consumers under consideration the brand is not sufficient to support the price premium. Then, in my empirical model, I don't make any assumptions about brand. I estimate consumer preferences for different brands using consumer choice data. And indeed, I find and incorporate consumer preference for 1-800 Contacts.")).

Response to Finding No. 1435:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1436. Similarly, rather than making assumptions about the effect of users performing navigational queries on those users' likelihood of clicking on ads of the firms they searched for, Dr. Athey modeled that likelihood based on observations . (Athey, Tr. 777-778 ("[T]his model explicitly accounts for the fact that when a user searches for a term, . . . they potentially are more likely to click on an advertisement from that [firm]. But there's no assumptions here. The data is going to tell me how important that effect is.")).

Response to Finding No. 1436:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1437. Dr. Athey's model also allowed for the possibility that the searched-for effect may be stronger for 1-800 Contacts than for other rivals. (Athey, Tr. 777 ("I allowed [the searched-for firm effect] to be distinct for 1-800 just in case that effect is stronger for 1-800")).

Response to Finding No. 1437:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1438. Dr. Athey's model does not make any assumptions about the extent to which a consumer's likelihood of clicking on a retailer's ad is affected by the fact that a consumer searched for that retailer's brand name (that is, conducted what is sometimes called a "navigational query"). (Athey, Tr. 777).

Response to Finding No. 1438:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1439. Dr. Athey testified that rather than making assumptions about the effect of a navigational query on a consumer's likelihood of clicking on the searched-for firm, she modeled it. (Athey, Tr. 777 ("[T]his model explicitly accounts for the fact that when a user searches for a term, . . . they potentially are more likely to click on an advertisement from that [firm]. But there's no assumptions here. The data is going to tell me how important that effect is. . . . And in particular, I allowed it to be distinct for 1-800 just in case that effect is stronger for 1-800.")).

Response to Finding No. 1439:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1440. Dr. Athey applied the statistical model of click behavior derived in step two of her empirical model to the counterfactual ad layouts derived in step one of her empirical model. (Athey, Tr. 780-782; CX8007 at 030-031 (¶ 91) (Athey Expert report).

Response to Finding No. 1440:

Respondent does not concede that Dr. Athey's statistical model was proper or led to reliable results. Dr. Athey's statistical model was not reliable for the reasons explained by Dr. Ghose. (RX 733 at 67-69 (¶¶ 155-160) (Ghose Expert Report). Most notably, Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)).

1441. Specifically, Dr. Athey's model predicted that absent the Bidding Agreements, the number of competitor ads appearing in response to 1-800 Contacts Branded Queries (in addition to the one 1-800 Contacts ad that would still appear in the first position on each such results page) would increase from 0.54 to 1.85 competitor ads per search (an increase of 242 percent). (Athey, Tr. 783-784; CX8007 at 032, 112 (¶ 92 & Table 2; Errata to February 6, 2017 Expert Report and March 8, 2017 Rebuttal Expert Report of Dr. Susan Athey) (Athey Expert Report)).

Response to Finding No. 1441:

Respondent has no specific response.

1442. Dr. Athey's model also predicted that absent the Bidding Agreements, "[t]here would be more clicks on those competitor ads. . . . In addition, there would be fewer clicks on 1-800 ads." (Athey, Tr. 782-783).

Response to Finding No. 1442:

Respondent has no specific response.

1443. Specifically, Dr. Athey's model predicted that absent the Bidding Agreements, in response to 1-800 Contacts Branded Queries, consumer clicks on ads for competitors of 1-800 Contacts would increase by 3.5 clicks per 100 searches (an increase of 350%) and consumer clicks on the 1-800 Contacts ad would decline by 2 clicks per 100 searches. (CX8007 at 032 (¶ 92 & Table 2) (Athey Expert Report) (showing that clicks on competitor ads would increase from 1 click per 100 searches to 4.5 clicks per 100 searches and clicks on 1-800 Contacts ads would decrease from 45.8 clicks per 100 searches to 43.8 clicks per 100 searches); Athey, Tr. 784-785).

Response to Finding No. 1443:

Respondent has no specific response.

1444. In addition to predicting the change in the quantity of competitor advertisements and clicks on those advertisements, Dr. Athey's model also predicted changes in the strength of competitors whose advertisements would, but for the Bidding Agreements, appear on the results pages for 1-800 Contacts Branded Queries. (*See infra* ¶¶ 1445-1448).

Response to Finding No. 1444:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1445. As described *supra*, Dr. Athey's comScore data set revealed that when different firms appear in the same position on the search results screen, some have higher click-through rates than others, and Dr. Athey used these variations to estimate "brand effect" coefficients for each competitor. (*See supra* ¶ 1434; *see also* CX8007 at 107-108 (App'x D)).

Response to Finding No. 1445:

Respondent has no specific response.

1446. Dr. Athey used this brand effect information to determine how "strong" a competitor is. (Athey, Tr. 833 ("Q. How did you determine how strong a competitor is? A. In this case I was discussing specifically the predictions . . . of my click model, and so my click model has factors for the brand of different firms, . . . and it makes predictions about how different firms would do if they appeared in position two.")).

Response to Finding No. 1446:

Complaint Counsel's Proposed Finding No. 1446 should be disregarded because it is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Athey's opening report or rebuttal report; that opinion therefore should not be considered. Complaint Counsel do not identify portion of Dr. Athey's opening report or rebuttal report in which she explained that the "brand effect" was a proxy for how "strong" a competitor is.

1447. Dr. Athey's model, in constructing counterfactual ad layouts, predicted not only how many competitor ads would appear but also "the likely change in the nature of competition," that is, "the broad characteristics,"—specifically the strength based on observed click through rate data—of the set of firms whose ads would appear on 1-800 Contacts Branded Searches in the counterfactual. (CX8010 at 044-045 (¶ 111) (Athey Rebuttal Expert Report) ("My estimate is based on a model which predicts the likely change in the nature of competition, using data which included observations across a range of competitors to 1-800 Contacts. My approach allows that stronger competitors, with larger market share and consumer awareness, and who also therefore tended to have higher CTR, could be shown."); Athey, Tr. 2101 ("[W]hat we do know is that the mix of firms that is available in the absence of the agreements is a strong set of firms that on average offers lower prices."), 2081, *in camera* [redacted] 817 ("My model was not designed to make specific predictions about the specific firms that appear and exactly what will happen by firm. Instead, what my model was designed to do was to predict the collection of advertisers that would appear and their broad characteristics. So

> in equilibrium, say generic [queries, on which counterfactual ad layouts are based], in equilibrium today I see a mix of firms appearing. . . . [T]hose firms have a mix of click-through rates, a mix of brand effects. They have a mix of price discounts. That's the mix that we see in equilibrium. . . . [I]t's not important the exact identities of the firms. What's important is that – that in the counterfactual I'm predicting there's going to be [a] mix of firms with a mix of price discounts and a mis of brand effects, similar to what I see in the counterfactual.")).

Response to Finding No. 1447:

Complaint Counsel's Proposed Finding No. 1446 should be disregarded because it is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Athey's opening report or rebuttal report; that opinion therefore should not be considered. Complaint Counsel do not identify portion of Dr. Athey's opening report or rebuttal report in which she explained that the "brand effect" was a proxy for how "strong" a competitor is. Further, Dr. Athey's opinion regarding how "strong" a competitor is was based on click-through rates for only two retailers other than 1-800 Contacts (Athey, Tr. 826), which is an insufficient basis to draw any conclusions.

1448. Because Dr. Athey's click prediction model accounts for brand effects, the strength of the firms that Dr. Athey's model predicts would show ads in response to 1-800 Contacts Branded Searches in the Counterfactual is built into, and reflected in, her model's prediction of the number of clicks that competitor ads would receive in the counterfactual. (*See supra* ¶¶ 1418-1434).

Response to Finding No. 1448:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. Further, Dr. Athey's opinion regarding how "strong" a

competitor is was based on click-through rates for only two retailers other than 1-800 Contacts (Athey, Tr. 826), which is an insufficient basis to draw any conclusions.

4. These Analyses are Consistent with One Another

1449. Dr. Athey and Dr. Evans used different methodologies and sources of data for their analyses. Further, only Dr. Athey modeled the change in advertiser quality that would result from ending the Bidding agreements. Nevertheless, their results are quite close, and both show that the advertising restrictions had a significant impact on impressions and clicks. (CX8009 at 079-080 (¶¶ 142-143) (Evans Rebuttal Expert Report); CX8010 at 044-046 (¶¶ 109-115) (Athey Rebuttal Expert Report) ("Each of our analyses rests on conservative assumptions: my model is particularly conservative in the number of ad impressions per page, while Dr. Evans' approach to estimating CTR [click-through rate] is conservative. "We have followed complementary approaches, and it is striking that the final results regarding changes in clicks are remarkably comparable."); Athey, Tr. 814-818).

Response to Finding No. 1449:

Complaint Counsel's Proposed Finding No. 1449 is incorrect. Dr. Evans' and Dr. Athey's analyses yield very different predictions about the extent to which eliminating the settlement agreements would change click-through rates. As Dr. Ghose explained, while Dr. Athey estimates an increase in the click-through rate by all advertisers other than 1-800 Contacts on queries containing 1-800 Contacts' trademarks from 1.0% (in the actual world) to 4.5% (in her counterfactual world), as the average number of competitors' ads per query increases from 0.54 to 1.62, which yields an incremental click-through rate of 3.2%. On the other hand, Dr. Evans estimates a click-through rate on the additional impressions of 1.3 %. (RX 733 at 73-74 (¶ 171) (Ghose Expert Report)). Further, the statement that "only Dr. Athey modeled the change in advertiser quality that would result from ending the" challenged settlement agreements is not supported by any record evidence and should be disregarded.

1450. Drs. Athey and Evans used different methodologies, in part, because they used different sources of data. (Athey, Tr. 815-816 ("The approaches were different because we relied on different data, so we really couldn't have used exactly the same approaches. . . . It's

important to note that his data is aggregated . . . he uses an approach tailored to that data. . . . I have data on individual searches conducted by consumers. I see exactly which ads were in which position and how consumers chose among those individual ads. So my model makes full use of the disaggregated data that I have.")).

Response to Finding No. 1450:

Respondent has no specific response.

1451. But for the Bidding Agreements, for each one hundred 1-800 Contacts Branded Queries, Dr. Athey's model predicts 3.5 additional clicks on competitor ads and Dr. Evans' model predicts 3.7 additional clicks on competitor ads. (Athey, Tr. 814 ("We came to very similar conclusions in terms of the counterfactual clicks on competitor ads in a world without the agreements. I said there would be 3.5 additional clicks on competitor ads. Dr. Evans' model predicted 3.7. And of course, both of our models account for statistical uncertainty, and so on, so they're statistically, you know, indistinguishable."); CX8010 at 046 (¶ 115) (Athey Rebuttal Expert Report)).

Response to Finding No. 1451:

Complaint Counsel's Proposed Finding No. 1451 is misleading. The fact that Dr. Evans and Dr. Athey both predict somewhat similar click-through rates in the counterfactual world does not mean that their analyses are consistent because their analyses yield very different predictions about the extent to which eliminating the settlement agreements would change click-through rates. As Dr. Ghose explained, while Dr. Athey estimates an increase in the click-through rate by all advertisers other than 1-800 Contacts on queries containing 1-800 Contacts' trademarks from 1.0% (in the actual world) to 4.5% (in her counterfactual world), as the average number of competitors' ads per query increases from 0.54 to 1.62, which yields an incremental click-through rate of 3.2%. On the other hand, Dr. Evans estimates a click-through rate on the additional impressions of 1.3 %. (RX 733 at 73-74 (¶ 171) (Ghose Expert Report)).

1452. While Dr. Evans and Dr. Athey used different approaches an apples-to-apples comparison of their results shows that they are "very much in line." (CX8010 at 046 (¶ 115) (Athey Rebuttal Expert Report) ("A meaningful comparison between my results and Dr. Evans considers the number of clicks on competitor ads which have been lost, due to the Agreements. My model predicts 3.5 additional clicks on competitor ads for every one

> hundred counterfactual searches; Dr. Evans' analysis predicts 3.7 additonal clicks per one hundred searches. These results are very much in line. The fact that two unrelated approaches produce results which are in agreement underlines the reliability of the results.")).

Response to Finding No. 1452:

Complaint Counsel's Proposed Finding No. 1452 is incorrect and misleading. As Dr. Ghose explained, Dr. Athey's and Dr. Evans's results differed in significant ways. *First*, while Dr. Athey estimates an increase in the click-through rate by all advertisers other than 1-800 Contacts on queries containing 1-800 Contacts' trademarks from 1.0% (in the actual world) to 4.5% (in her counterfactual world), as the average number of competitors' ads per query increases from 0.54 to 1.62, which yields an incremental click-through rate of 3.2%. On the other hand, Dr. Evans estimates a click-through rate on the additional impressions of 1.3 %. (RX 733 at 73-74 (¶ 171) (Ghose Expert Report)). *Second*, while Dr. Athey calculates a counterfactual average number of ads on 1-800 Contacts' queries of 2.62, Dr. Evans practically assumes that most of the time a total of 5 ads would be displayed in response to each query. (RX 733 at 73-74 (¶ 170) (Ghose Expert Report)).

5. The Reduction in Advertising Is Commercially Significant

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

Response to Finding No. 1453:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

1454. The results of Dr. Evans impact study permitted him to estimate the effect of the Bidding Agreements on overall competition and prices. To account for the impact of the Bidding Agreements on sales, Dr. Evans assumed that the online retailers would have the same conversion rate as Memorial Eye on the clicks they would have received absent the bidding agreements. Accounting for repeat sales, Dr. Evans estimated that 1-800 Contacts' rivals would have realized an increase in sales of 8.3 percent over the period from January 2010 to June 2015, and of 12.3 percent over the period from January 2015 to June 2015. (Evans, Tr. 1620-1621, *in camera;* CX8009 at 084 (¶ 155) (Evans Rebuttal Expert Report).

Response to Finding No. 1454:

Complaint Counsel's Proposed Finding No. 1454 is not supported by the cited evidence and is based on unreliable testimony. It is incorrect that Dr. Evans was able "to estimate the effect" of the challenged agreements on "overall competition and prices."

Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep., at 257)).

Further, Dr. Evans' estimates of the sales that other retailers supposedly would gain if the settlement agreements were eliminated are based on unsupported and unreliable assumptions.

First, Dr. Evans assumes that all of the other settling parties would have behaved the same as Memorial Eye did and that consumers viewing these other retailers' ads would have behaved exactly the same as Memorial Eye did. He begins with an estimate of incremental clicks on ads in response to searches for 1-800 Contacts' trademarks for all advertisers that is based entirely on data from Memorial Eye and then applies Memorial Eye's conversion rate on ads displayed in response to such searches. (CX 8009 at 84 n.193) (Evans Rebuttal Report)). But Dr. Evans provides no support for these assumptions.

Second, Dr. Evans assumes that other retailers would indefinitely earn sales from 71% of the consumers who supposedly would have clicked on an for another retailer and converted. (CX 8009 at 84 n.193) (Evans Rebuttal Report)). Dr. Evans bases this assumption on a slide from a survey (CX 117 at 23) conducted for 1-800 Contacts which he claims shows that "71 percent of customers who switch to a rival online retailer are unlikely to switch back to 1-800 Contacts." (CX 8009 at 84 n.193) (Evans Rebuttal Report)). But the survey does not show that. Only 54 respondents who made their last purchase from another online retailer were surveyed. Accordingly, the survey itself says: "Numbers to be purely directional -- sample sizes are not large enough to be statistically significant." Some 71% of the 54 respondents surveyed regarding ranked themselves between 0 and 5 on a 0 to 10 scale 0 being extremely unlikely to buy from 1-800 Contacts and 10 being extremely likely to buy from 1-800 Contacts. Since the survey question is not identified, there is no evidence that the consumers were asked whether they would *ever* buy from 1-800 Contacts. Even assuming they were, 24% of the respondents ranked themselves at 5. Subtracting that figure from Dr. Evans reduces to 47% his assumption

that 71% of consumers who would convert after clicking on ad for another retailer in response to a search for 1-800 Contacts would continue buying from that retailer.

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

Response to Finding No. 1455:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1456:

Complaint Counsel's Proposed Finding No. 1456 is based on unreliable testimony. Dr. Evans' estimates of the sales that other retailers supposedly would gain if the settlement agreements were eliminated are based on unsupported and unreliable assumptions.

First, Dr. Evans assumes that all of the other settling parties would have behaved the same as Memorial Eye did and that consumers viewing these other retailers' ads would have behaved exactly the same as Memorial Eye did. He begins with an estimate of incremental clicks on ads in response to searches for 1-800 Contacts' trademarks for all advertisers that is based entirely on data from Memorial Eye and then applies Memorial Eye's conversion rate on ads displayed in response to such searches. (CX 8009 at 84 n.193) (Evans Rebuttal Report)). But Dr. Evans provides no support for these assumptions.

Second, Dr. Evans assumes that other retailers would indefinitely earn sales from 71% of the consumers who supposedly would have clicked on an for another retailer and converted. (CX 8009 at 84 n.193) (Evans Rebuttal Report)). Dr. Evans bases this assumption on a slide from a survey (CX 117 at 23) conducted for 1-800 Contacts which he claims shows that "71 percent of customers who switch to a rival online retailer are unlikely to switch back to 1-800 Contacts." (CX 8009 at 84 n.193) (Evans Rebuttal Report)). But the survey does not show that. Only 54 respondents who made their last purchase from another online retailer were surveyed. Accordingly, the survey itself says: "Numbers to be purely directional -- sample sizes are not large enough to be statistically significant." Some 71% of the 54 respondents surveyed regarding ranked themselves between 0 and 5 on a 0 to 10 scale 0 being extremely unlikely to buy from 1-800 Contacts and 10 being extremely likely to buy from 1-800 Contacts. Since the survey question is not identified, there is no evidence that the consumers were asked whether they would *ever* buy from 1-800 Contacts. Even assuming they were, 24% of the respondents ranked themselves at 5. Subtracting that figure from Dr. Evans reduces to 47% his assumption that 71% of consumers who would convert after clicking on ad for another retailer in response to a search for 1-800 Contacts would continue buying from that retailer.

Regardless, Dr. Evans' calculations of the percentage of 1-800 Contacts' sales that would be accounted for by the sales he estimates other retailers supposedly would gain if the settlement agreements were eliminated assume that every sale that other retailers gained would have gone to 1-800 Contacts. Dr. Evans provides no support for that assumption

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

Response to Finding No. 1457:

Complaint Counsel's Proposed Finding No. 1457 is based on unreliable testimony.

Dr. Evans' estimates of the sales that other retailers supposedly would gain if the settlement agreements were eliminated are based on unsupported and unreliable assumptions.

First, Dr. Evans assumes that all of the other settling parties would have behaved the same as Memorial Eye did and that consumers viewing these other retailers' ads would have behaved exactly the same as Memorial Eye did. He begins with an estimate of incremental clicks on ads in response to searches for 1-800 Contacts' trademarks for all advertisers that is based entirely on data from Memorial Eye and then applies Memorial Eye's conversion rate on ads displayed in response to such searches. (CX 8009 at 84 n.193) (Evans Rebuttal Report)). But Dr. Evans provides no support for these assumptions.

Second, Dr. Evans assumes that other retailers would indefinitely earn sales from 71% of the consumers who supposedly would have clicked on an for another retailer and converted. (CX 8009 at 84 n.193) (Evans Rebuttal Report)). Dr. Evans bases this assumption on a slide from a survey (CX 117 at 23) conducted for 1-800 Contacts which he claims shows that "71 percent of customers who switch to a rival online retailer are unlikely to switch back to 1-800 Contacts." (CX 8009 at 84 n.193) (Evans Rebuttal Report)). But the survey does not show that. Only 54 respondents who made their last purchase from another online retailer were surveyed. Accordingly, the survey itself says: "Numbers to be purely directional -- sample sizes are not large enough to be statistically significant." Some 71% of the 54 respondents surveyed regarding ranked themselves between 0 and 5 on a 0 to 10 scale 0 being extremely unlikely to buy from 1-800 Contacts and 10 being extremely likely to buy from 1-800 Contacts. Since the survey question is not identified, there is no evidence that the consumers were asked whether

they would *ever* buy from 1-800 Contacts. Even assuming they were, 24% of the respondents ranked themselves at 5. Subtracting that figure from Dr. Evans reduces to 47% his assumption that 71% of consumers who would convert after clicking on ad for another retailer in response to a search for 1-800 Contacts would continue buying from that retailer.

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

Response to Finding No. 1458:

Complaint Counsel's Proposed Finding No. 1458 is incorrect and misleading. The proposed finding consists entirely of speculation. Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep. at 257)).

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

Response to Finding No. 1459:

The proposed finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific

references to the evidentiary record." The proposed finding also is incorrect. Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep. at 257)).

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

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

Response to Finding No. 1460:

Complaint Counsel's Proposed Finding No. 1460 should be disregarded because it is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Athey's opening report or rebuttal report, and therefore should not be considered. The proposed finding also is incorrect, incomplete and misleading. Dr. Athey has no basis to opine that any change in clicks was "commercially significant." Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts' price match guarantee. (Athey, Tr. 796 ("I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.")).

Accordingly, Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23

("Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.")).

Dr. Athey therefore did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")). Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 ("Q. So you've done no empirical analysis of price elasticity, correct? A. I've done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.")).

Accordingly, Dr. Athey's opinion that any change in clicks would be "commercially significant" lacks any basis and should be disregarded.

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

Response to Finding No. 1461:

Complaint Counsel's Proposed Finding No. 1461 is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Athey's opening report or rebuttal report, and therefore should not be considered. The proposed finding also is incorrect, incomplete and

misleading. Dr. Athey has no basis to opine that any predicted change in clicks would be "significant." Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts' price match guarantee. (Athey, Tr. 796 ("I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.")).

Accordingly, Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 ("Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.")).

Dr. Athey therefore did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")). Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 ("Q. So you've done no empirical analysis of price elasticity, correct? A. I've done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.")).

Accordingly, Dr. Athey's opinion that any predicted change in clicks would be "significant" lacks any basis and should be disregarded.

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

Response to Finding No. 1462:

Respondent has no specific response other than that, for the reasons already explained, Dr. Athey's model is unreliable and the results inadmissible.

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

Response to Finding No. 1463:

The proposed finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." The proposed finding also is incorrect, incomplete and misleading. Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts' price match guarantee. (Athey, Tr. 796 ("I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.")).

Accordingly, Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 ("Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to

competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.")).

Dr. Athey therefore did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")). Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 ("Q. So you've done no empirical analysis of price elasticity, correct? A. I've done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.")).

Accordingly, Dr. Athey's opinion that any predicted change in clicks would be "significant" lacks any basis and should be disregarded.

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

Response to Finding No. 1464:

Complaint Counsel's Proposed Finding No. 1464 is incorrect, incomplete and misleading.

Dr. Athey has no basis to opine that additional advertisements for other retailers in response to searches for 1-800 Contacts' trademarks would provide consumers with more beneficial information. Dr. Athey acknowledges that the display of additional paid search advertisements displaces organic search results. (Athey, Tr. 2082). Dr. Athey, however, did not quantify the value to consumers of the organic results that are displaced by the appearance of additional paid search advertisements. (Athey, Tr. 2082-23; see also CX 9043 (Athey, Dep. at 180, 278-281)). Nor did Dr. Athey consider the harm to consumers that arises when additional paid advertisements displace organic listings on a search engine results page. (Athey, Tr. 2082-23; see also CX 9043 (Athey, Dep. at 180, 278-281)).

Dr. Athey also has no basis to opine regarding whether increasing advertising for other retailers in response to searches for 1-800 Contacts' trademarks would benefit consumers because she did not perform any analysis of customer purchasing behavior in a world without the settlement agreements. Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts' price match guarantee. (Athey, Tr. 796 ("I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.")).

Accordingly, Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 ("Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.")).

Dr. Athey therefore did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")). Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 ("Q. So you've done no empirical analysis of price elasticity, correct? A. I've done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.")).

6. Both Analyses Are Conservative

a. Dr. Evans' analysis is conservative

1465. Dr. Evans impact analysis of lost advertising is conservative because his benchmark was Memorial Eye. Memorial Eye is a small firm compared to several of the better-known, lager, bound rivals. (Evans, Tr. 1625, *in camera* ([redacted]; *see also* CX8010 at 044 (¶ 111) (Athey Rebuttal Expert Report) ("Dr. Evans' approach is conservative since Memorial Eye was a small company who later stopped selling contact lenses online, and therefore could be considered a weaker competitor than many other of the Bound Competitors."); Athey, Tr. 816 ("[T]he advertiser that Dr. Evans considered, Memorial Eye, is not a particularly strong advertiser, so when I compare the performance of Memorial Eye in terms of performance might be something like Walmart, . . . which had a lower click through rate than average.")).

Response to Finding No. 1465:

Complaint Counsel's Proposed Finding No. 1465 is not based on admissible evidence and should be disregarded. The record shows that Dr. Evans' use of Memorial Eye as a benchmark was not conservative because, according to Google data, [redacted]

[redacted] in response to such searches. (RX 733—070, 0105 (Ghose Report)). Dr. Evans did not offer any explanation for why he extrapolated data for Memorial Eye to predict behavior by other retailers despite this significant disparity in their behavior in the actual world. (RX 733 at 70-71 (Ghose Expert Report)).

Further, Dr. Evans did not make any determination as to what the quality score of any firm's website would be or what any firm would bid to display an ad in response to a search for 1-800 Contacts in a world without the settlement agreement. (Evans, Tr. 1827-28). Accordingly, Dr. Evans has no basis to predict that any other firm would have a higher quality score than Memorial Eye or that any difference in quality score would result in a retailer other than Memorial Eye having a higher ad position in response to a search for 1-800 Contacts' trademarks than Memorial Eye had.

1466. [redacted]. (Evans, Tr. 1642-1643, *in camera*). [redacted]. (Evans, Tr. 1643, *in camera*).

Response to Finding No. 1466:

Complaint Counsel's Proposed Finding No. 1466 is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Evans's opening report or rebuttal report, and therefore should not be considered.

b. Dr. Athey's analysis is conservative

1467. Dr. Athey took a conservative approach in her empirical model and was "particularly conservative in the number of ad impressions per page" that the model predicted. (CX8010 at 044-045 (¶ 110-112) (Athey Rebuttal Expert Report); Athey, Tr. 789-791; *see infra* § IX.B.6).

Response to Finding No. 1467:

Complaint Counsel's Proposed Finding No. 1468 is incorrect. Dr. Athey has no basis to opine that the number of impressions per page that her model predicted was conservative. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67 (Ghose Expert Report)).

1468. Dr. Athey's use of generic search queries in determining the counterfactual ad layouts in her model meant that, to the extent her analysis reflects uncertainty over the but-for world, Dr. Athey would have erred if at all in the direction of underestimating the impact of the Bidding Agreements, and so in reality the effects of the agreements would be even larger than the effects Dr. Athey found. (*See infra* § IX.B.6.b; *see also* Athey, Tr. 789)).

Response to Finding No. 1468:

Complaint Counsel's Proposed Finding No. 1468 is incorrect. In the cited testimony, Dr. Athey identified the fact that "firms that do currently bid against 1-800 have higher conversion rates there than they do on other firms" as the basis for her opinion that using generic searches to construct her counterfactual world of searches for 1-800 Contacts' trademarks was conservative. (Athey, Tr. 790). Google data, however, suggest that Dr. Athey is incorrect. [redacted]

Further, Dr. Athey has no basis to opine that her use of generic searches to model searches for 1-800 Contacts' trademarks in the counterfactual world was conservative because her use of generic searches, in fact, significantly overestimated the number of advertisements in the counterfactual world. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey,

Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66-67(Ghose Expert Report)).

1469. One reason Dr. Athey's use of generic search queries in determining the counterfactual ad layouts in her model was conservative is that the generic terms that Dr. Athey used included not only queries that, like 1-800 Contacts branded terms, are searched with high frequency, but also less frequently searched terms to which advertisers pay less attention than they do to frequently searched queries. (Athey, Tr. 773-774, 786 ("[S]ome of the less frequently searched generics are probably not the best indication of what would occur. They may be conservative because advertisers are not paying as much attention to those terms."); CX8010 at 033 (¶ 83) (Athey Rebuttal Expert Report) ("The long tail of less common, less profitable generic search keywords means that in fact, using generic searches as a proxy for the counterfactual is likely to under-estimate, rather than over-estimate, the range and number of ads appearing on 1-800 Contacts' Trademark searches in the counterfactual. Retailers can be expected to manage their bids more and the performance of their advertising copy for 1-800 Contacts' trademarks more closely than for the broad set of keywords related to generic terms, because of the high volume of searches and higher expected returns across a smaller set of keywords")).

Response to Finding No. 1469:

Complaint Counsel's Proposed Finding No. 1468 is not based on admissible evidence and should be disregarded. Dr. Athey has no evidence, and did no analysis, regarding what "attention" advertisers are paying to any given keywords, let alone any comparison of the "attention" advertisers are paying to some keywords versus others. Dr. Athey made no comparison for any retailer, for example, of the relative click-through rate, conversion rate or cost-per-conversion of ads based on searches for what she calls "less common" generic searches and ads based on searches for 1-800 Contacts' trademarks. Further, Dr. Athey did no analysis of

any retailer's profit on advertising based on any search term. (CX 9043 (Athey, Dep. at 296) ("Q. So my question was, though, whether there's any analysis that you've done in this case that I could look at and it would tell me what the profit margin was for any of the parties to the settlement agreements in bidding on any keyword? . . . THE WITNESS: "I did not provide specific profit calculations for any bidder."). Dr. Athey therefore has no basis to opine that any generic searches are "less profitable."

1470. Another reason that use of all generic queries in construction of the counterfactual ad layouts was conservative in predicting the number of competitor ads that would appear in response to 1-800 Contacts Branded Queries but for the agreements is that 1-800 Contacts Branded Queries are "special" in their commercial appeal to rivals and thus would likely garner more attention from rivals than the average generic search term. (Athey, Tr. 789-790 ("1-800 is kind of special in terms of the specific attention the advertisers would give to it because the advertisers' value proposition, the thing they have to offer, is particularly high relative to 1-800. Many of the competing firms are offering the same contact lenses that fill your prescription at lower prices and similar shipping, and so if they can just tell the consumers about it, they're particularly likely to convert, so they're going to pay special attention to that. And again, in my data, I saw that the firms that do currently bid against 1-800 have higher conversion rates there than they do on other firms[' branded queries]. They would also specifically want to customize their ad text in the – in the way that they present themselves to the consumer to emphasize the fact that they do have lower prices for those firms that – which many of them do. So . . . that would generally result in more clicks, that all that customization results in more clicks and better performance than I used in the click model.")).

Response to Finding No. 1470:

Complaint Counsel's Proposed Finding No. 1469 is not based on admissible evidence and should be disregarded. Dr. Athey has no evidence, and did no analysis, regarding what "attention" advertisers are paying to any given keywords, let alone any comparison of the "attention" advertisers are paying to some keywords versus others. Dr. Athey made no comparison for any retailer, for example, of the relative click-through rate, conversion rate or cost-per-conversion of ads based on searches for what she calls "less common" generic searches

and ads based on searches for 1-800 Contacts' trademarks. Further, Dr. Athey did no analysis of any retailer's profit on advertising based on any search term.

1471. Another way that Dr. Athey's construction of the counterfactual ad layouts was conservative is that she only considered ads in "mainline 1 through 4" that is, the top ads that appear at the top of the page above the algorithmic results." (Athey, Tr. 790-791 ("While those account for most of the clicks, there's absolutely non-zero clicks on the ads on the side and . . . we expect, based on what we see on generics, and so on, that there also would be ads appearing on the side in the counterfactual world. So I entered a zero for those ads and those clicks even though . . . it's almost certain that there would be positive clicks.")).

Response to Finding No. 1471:

Complaint Counsel's Proposed Finding No. 1469 is misleading. Dr. Athey did not conduct any analysis of consumer behavior with respect to ads other than those appearing at the top of the search results page. (CX 8007 ¶ 78 ("In my analysis, I focus only on ads in Mainline positions 1 through 4.")). Dr. Athey focused exclusively on such ads because "this is where the majority of clicks happen: 88% of the clicks in the comScore Dataset are on ads in one of these positions." (CX 8007 ¶ 82). Accordingly, Dr. Athey has no basis to make any prediction that accounting for consumer behavior with respect to other ads would meaningfully change her conclusion in any way.

1472. To check the robustness of her results, Dr. Athey repeated the process of constructing counterfactual ad layouts using each of two alternate sets of queries: branded queries for firms other than 1-800 Contacts and the subset of generic terms that were most often searched in the comScore data set. The results of these two alternate approaches were very similar to (and in fact showed the Bidding Agreements having a larger effect than) the methodology that Dr. Athey used in her initial report. (Athey, Tr. 786-787; CX8010 at 033-035 (¶¶ 84-85) (Athey Rebuttal Expert Report) ("These results are very similar to the results I presented in my February report . . . This confirms my model's robustness to changes in the method of constructing the counterfactual ad layouts."); Athey Tr. 2112 (testifying that checking results for "robustness" "means checking the sensitivity of the results to changes in the way the models are constructed"); *see also infra* ¶¶ 1473-1477).

Response to Finding No. 1472:

Complaint Counsel's Proposed Finding No. 1472 is misleading and unreliable. Dr. Athey has no basis to opine that her use of generic searches to model searches for 1-800 Contacts' trademarks in the counterfactual world was conservative because her use of generic searches, in fact, significantly overestimated the number of advertisements in the counterfactual world. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32). Dr. Athey, however, did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)). Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39). Tellingly, Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world, which makes no sense and confirms that Dr. Athey's model is unreliable. (RX 733 at 66, 67 (Ghose Report)).

1473. As noted above, constructing counterfactual ad layouts for Dr. Athey's model using the generic queries in the comScore dataset, then applying the click model to those layouts, resulted in 3.5 more predicted clicks per 100 searches on competitor ads in the counterfactual compared to the status quo. (CX8007 at 032 (¶ 92 & Table 2) (Athey Expert Report); Athey, Tr. 784-785; CX8010 at 033 (¶ 83 & Table 1) (Athey Rebuttal Expert Report)).

Response to Finding No. 1473:

Respondent does not concede that Dr. Athey's calculations are reliable.

1474. Constructing counterfactual ad layouts for Dr. Athey's model using only the three most commonly searched generic queries in the comScore dataset, then applying the click model to those layouts, resulted in a predicted increase of 4.6 clicks on competitor ads per 100 searches as compared to the status quo. (CX8010 at 033-035 (¶ 84 & Table 2) (Athey Rebuttal Expert Report)).

Response to Finding No. 1474:

Respondent does not concede that Dr. Athey's calculations are reliable.

1475. Constructing counterfactual ad layouts for Dr. Athey's model using the branded queries for firms other than 1-800 Contacts from the comScore dataset, then applying the click model to those layouts, resulted in a predicted increase of 3.6 clicks on competitor ads per 100 searches as compared to the status quo. (CX8010 at 033-035 (¶ 84 & Table 2) (Athey Rebuttal Expert Report)).

Response to Finding No. 1475:

Respondent does not concede that Dr. Athey's calculations are reliable.

1476. To ensure robustness for her click behavior model, Dr. Athey used the simplest model (out of a family of models of consumer choice behavior) that fit the data, because, as she explained, "all else equal, simplicity is more robust and reliable." (Athey, Tr. 788-789; CX8010 at 041-042 (¶ 100) (Athey Rebuttal Expert Report) ("Generally, more complex models can be more fragile and more prone to over-fitting, so typically the simplest model that fits the data well is preferred, all else equal, particularly in an environment with limited data.")).

Response to Finding No. 1476:

Complaint Counsel's Proposed Finding No. 1476 is not based on admissible evidence and should be disregarded. Dr. Athey did not cite any literature or other source for her broad statement that simpler models are more reliable than complex models. This unsupported, broad statement is not reliable given Dr. Athey's own testimony that consumers' search costs in using search engines depend on their intent (CX 9043 (Athey, Dep. at 47-48)), and the testimony from Dr. Ghose and [redacted] that modeling a counterfactual world for a search engine is a highly complex problem. (Ghose, Tr. 4075; CX 9046 (Ghose, Dep. at 144, 165-66); RX 704 at 6 [redacted] ¶ 20-21).) Further, as Dr. Ghose explained, Dr. Athey's multinomial logit

model does not employ econometric techniques that account for user heterogeneity. (RX 733 at 69 (¶ 160) (Ghose Expert Report)). Dr. Athey, however, did not identify any reasons why it would be improper to use these techniques.

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

Response to Finding No. 1477:

Complaint Counsel's Proposed Finding No. 1477 is incorrect and should be disregarded. Dr. Ghose explained at his deposition that Dr. Athey's "nested logit model" did not cure the flaws in her MNL model. (CX9046, Ghose Dep. at 160-62, 233-35).)

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

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

Response to Finding No. 1478:

At most, Dr. Evans testified to what he claims is a correlation between prices charged and advertisements placed by Memorial Eye. However, he did not control for other events and he failed to conduct any investigation of the process by which 1-800 Contacts established its prices. Dr. Evans did nothing to demonstrate that 1-800 Contacts took the prices charged by Memorial Eye into account when it set its prices and when choosing to adopt and implement a particular price match program.

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

Response to Finding No. 1479:

Complaint Counsel's Proposed Finding No. 1479 is incomplete. Consumers can make use of 1-800 Contacts' price match program on the 1-800 Contacts website by online chat with a customer service representative. (Bethers, Tr. 3798).

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

Response to Finding No. 1480:

Complaint Counsel's Proposed Finding No. 1480 is misleading, unclear and partly mischaracterizes the evidence on which it is based. None of the cited documents or testimony concluded that 1-800 Contacts' was facing any "pressure" from ads in response to searches for its trademarks. Further, the phrase "competitive pressure" is unclear. 1-800 Contacts' position is that it faced competition from ECPs, optical chains, club stores as well as online retailers.

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

Response to Finding No. 1481:

Complaint Counsel's Proposed Finding No. 1481 is misleading and mischaracterizes the evidence on which it is based. None of the evidence indicates that any 1-800 Contacts executive expressed "concern." Further, the record shows that the advertisements referred to in the cited document made unreliable statements regarding discounts. The document states: [redacted] (CX 94 at 2). Mr. Bethers, the author of this e-mail, testified that the ad could be "confusing" in that consumers "don't know what 1-800 Contacts' prices are" but "[o]ne could presume that it means 70 percent off 1-800 Contacts' prices." (CX 9029 (Bethers, Dep. at 105)). Further, Joan Blackwood, who was part of the e-mail discussion in the document, testified that she "wasn't concerned" about the fact that other retailers purported to advertise lower prices but was concerned that "those claims could be misleading to a consumer, depending on what they were actually referring to." (CX 9017 (Blackwood, Dep. at 117-118)). Indeed, Dr. Athey testified that she did not know what an advertiser meant by an ad with copy stating "Contact lenses up to 70 percent off." (Athey, Tr. 859).

1482. In response to that competitive pressure, 1-800 Contacts changed its price match program by switching to what its executives called "more aggressive" online ad copy to highlight that, rather than matching rivals' lower prices, it would beat them by 2 percent. (CX0946 at 001 (reply email from then-Chief of Marketing Ms. Blackwood); Evans, Tr. 1612, *in camera*).

Response to Finding No. 1482:

Complaint Counsel's Proposed Finding No. 1482 is misleading to the extent it implies that 1-800 Contacts made any change to its advertising copy in response to ads appearing in response to searches for 1-800 Contact's trademarks. Dr. Evans testified that ads in response to generic queries were sufficient to give 1-800 Contacts an incentive to make the change. (Evans,

Tr. 1671 ([redacted]). Further, the phrase "competitive pressure" is unclear. 1-800 Contacts' position is that it faced competition from ECPs, optical chains, club stores as well as online retailers.

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

Response to Finding No. 1483:

Respondent has no specific response.

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

Response to Finding No. 1484:

Respondent has no specific response.

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

Response to Finding No. 1485:

Respondent has no specific response.

1486. Dr. Evans concluded that [redacted]

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

Response to Finding No. 1486:

Complaint Counsel's Proposed Finding No. 1486 is misleading and unclear with respect to its use of the term "competitive brand name keyword advertising." Dr. Evans testified that ads in response to generic queries were sufficient to give 1-800 Contacts an incentive to make the change. (Evans, Tr. 1671 ([redacted]).

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

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

Response to Finding No. 1487:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. The proposed finding also is incorrect and lacks any support in the record.

Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep., at 257)).

Likewise, Dr. Athey did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")).

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

Response to Finding No. 1488:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1489:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1490. Dr. Evans concluded from his impact study that the Bidding Agreements harmed competition and consumers in general. He concluded that, consistent with economic theory and historical experience, removing the advertising restrictions would have increased price competition between 1-800 Contacts and the online discounters in three distinct ways. (1) Sales would have shifted from 1-800 Contacts to online discounters with lower average prices; (2) using its price match program, 1-800 Contacts would have continued to selectively lower prices to retain individual customers; and (3) 1-800 Contacts would have lowered its average prices generally in response to the increased competitive pressure from the online discounters. (Evans, Tr. 1644-1645; CX8006 at 105-109 (¶¶ 230-240) (Evans Expert Report); CX8009 at 084-85 (¶¶ 156-159) (Evans Rebuttal Expert Report)).

Response to Finding No. 1490:

Complaint Counsel's Proposed Finding No. 1490 is incorrect and not based on admissible evidence. Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep., at 257)). Accordingly, Dr. Evans' opinion regarding the challenged agreements' effect on prices should be disregarded.

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

Response to Finding No. 1491:

Complaint Counsel's Proposed Finding No. 1491 is incorrect and not based on admissible evidence. Dr. Athey did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")). Accordingly, Dr. Athey's' opinion regarding the challenged agreements' effect on prices should be disregarded.

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

of price comparison information and the rate of consumer switching from 1-800 Contacts to competitors would put downward pressure on prices.")).

Response to Finding No. 1492:

Complaint Counsel's Proposed Finding No. 1491 is incorrect and not based on admissible evidence. Dr. Athey did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay. And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.")).

Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts' price match guarantee. (Athey, Tr. 796 ("I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.")). Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 ("Q. So you've done no empirical analysis of price elasticity, correct? A. I've done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.")). Dr. Athey therefore did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 ("Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would

put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.")).

Accordingly, Dr. Athey's' opinion regarding the challenged agreements' effect on prices should be disregarded.

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

Response to Finding No. 1493:

Complaint Counsel's Proposed Finding No. 1491 is incorrect and not based on admissible evidence. Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 ("Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.")).

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

Response to Finding No. 1494:

Complaint Counsel's Proposed Finding No. 1494 should be disregarded because it is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Evans's opening report or rebuttal report; that opinion therefore should not be considered.

1495. Dr. Evans concluded that competition for these additional sales would lead to greater competition generally, which benefits user who navigate directly to 1-800 Contacts' website. (Evans, Tr. 1720-1720 ("[T]o the extent that there's an intensification of competition for consumers, then that leads 1-800 Contacts to lower its price and for more price competition to take place in the business. And the result of that is that even if you have a consumer who is never using search but is going directly to the website, once you had that intensification of competition, they're then an indirect beneficiary of the opening of the competitive advertising.")).

Response to Finding No. 1495:

Complaint Counsel's Proposed Finding No. 1490 is incorrect and not based on admissible evidence. Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep., at 257)). Accordingly, Dr. Evans' opinion regarding the challenged agreements' effect on prices should be disregarded.

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

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

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

Response to Finding No. 1496:

Complaint Counsel's Proposed Finding No. 1496 is incomplete to the extent that it implies that Dr. Murphy based his opinion that the challenged agreements did not have a substantial impact on competition entirely on the fact that the settling parties settled without compensation. (RX 739 at 45-51, 56-64 (¶¶ 119-132, 150-159, 160-171) (Murphy Expert Report)).

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

Response to Finding No. 1497:

Complaint Counsel's Proposed Finding No. 1497 is misleading and incomplete. Dr. Murphy based his model for analyzing the economics of the settlement agreements on economic literature and a test that the Commission itself has proposed. (RX 739 at 50-51 (¶¶ 131-132) (Murphy Expert Report)). Dr. Evans agreed that economists analyzing a settlement generally assume that, in deciding whether to proceed with litigation, parties evaluate the cost of litigation and the likely benefits of a favorable outcome, accounting for the likelihood of that outcome. (Evans, Tr. 1830-1831; CX 8009 at 45 (Evans Rebuttal Report at n.103) ("As a purely general matter I agree that parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason.")). Dr. Evans did not identify any reason in this case to depart from the general economic assumption that firms act rationally in settling litigation. (Evans, Tr. 1830). Dr. Evans

testified that the settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")).

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

Response to Finding No. 1498:

Respondent has no specific response.

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

Response to Finding No. 1499:

Complaint Counsel's Proposed Finding No. 1496 is incomplete to the extent that it purports to identify the entire basis for Dr. Murphy's opinion that the challenged agreements did not have a substantial impact on competition. (RX 739 at 45-51, 56-64 (¶¶ 119-132, 150-159, 160-171) (Murphy Expert Report)).

1500. Dr. Evans explained that, like all economic models, Dr. Murphy's model of settlement economics rests on a series of assumptions. Assumptions behind an economic model are accurate when they "match the reality of the phenomenon that [the economist is] trying to understand. So, the more accurate the assumptions are, the more reliable the model will

typically be." (Evans, Tr. 1549-1550; *see also* Evans, Tr. 1549 ("in order for an economic model to be predictive to help explain the real world, you want it to reflect the reality of what's happening in the real world"); CX8009 at 045 (¶ 76) (Evans Rebuttal Expert Report)).

Response to Finding No. 1500:

Complaint Counsel's Proposed Finding No. 1500 is incomplete. Dr. Evans agreed that economists analyzing a settlement generally assume that, in deciding whether to proceed with litigation, parties evaluate the cost of litigation and the likely benefits of a favorable outcome, accounting for the likelihood of that outcome. (Evans, Tr. 1830-1831; CX 8009 at 45 (Evans Rebuttal Report at n.103) ("As a purely general matter, I agree that parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason.")). Dr. Evans did not identify any reason in this case to depart from the general economic assumption that firms act rationally in settling litigation. (Evans, Tr. 1830).

Further, Dr. Evans testified that, from the settling parties' perspective, the settlements were economically rational. (CX 9042 (Evans, Dep. at 119-120). Dr. Evans also testified that the settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")).

1501. Dr. Evans identified assumptions that would have to be true for Dr. Murphy's model to be relevant or reliable to predict the likelihood of harm in this case. He also explained why the assumptions are not accurate as applied to this case, because they do not "match the reality of the phenomenon [that Dr. Murphy was] trying to understand." (Evans, Tr. 1549-1550).

Response to Finding No. 1501:

Complaint Counsel's Proposed Finding No. 1501 is incomplete and misleading. Dr. Evans agreed that economists analyzing a settlement generally assume that, in deciding whether to proceed with litigation, parties evaluate the cost of litigation and the likely benefits of a favorable outcome, accounting for the likelihood of that outcome. (Evans, Tr. 1830-1831; CX 8009 at 45 (Evans Rebuttal Report at n.103) ("As a purely general matter, I agree that parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason.")). Dr. Evans did not identify any reason in this case to depart from the general economic assumption that firms act rationally in settling litigation. (Evans, Tr. 1830).

Further, Dr. Evans testified that, from the settling parties' perspective, the settlements were economically rational. (CX 9042 (Evans, Dep. at 119-120). Dr. Evans also testified that the settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")).

1502. First, for Dr. Murphy's model to be relevant or reliable, each of the settling parties would need to be able to obtain funds to finance the litigation. (Evans, Tr. 1551 ("Implicit in that calculation is that the online retailer could actually fund the lawsuit"); CX8009 at 047 (¶ 78) (Evans Rebuttal Expert Report)).

Response to Finding No. 1502:

Complaint Counsel's Proposed Finding No. 1501 is incomplete and misleading. Dr. Evans did not calculate the costs to the settling parties of defending against 1-800 Contacts' trademark litigation. (CX 9042 (Evans, Dep. at 135)). Nor did Dr. Evans investigate the capital

available to any of the settling parties to determine whether they were capital-constrained. (Evans, Tr. 1832; CX 9042 (Evans, Dep. at 135)). Dr. Evans also did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts' trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133). Accordingly, any suggestion that accounting for the settling parties' access to capital would have changed the results of Dr. Murphy's calculations is pure speculation that should be disregarded.

1503. As Dr. Evans explained, for most of the settling parties – and for all the discount, pure-play online retailers – funding litigation would have been impossible at the time of the decision to settle. (Evans, Tr. 1551-1552 (Dr. Murphy "doesn't demonstrate …that in fact these firms … could go out and come up with the $2 million")).

Response to Finding No. 1503:

Complaint Counsel's Proposed Finding No. 1503 is incorrect and not based on admissible evidence. Dr. Evans did not calculate the costs to the settling parties of defending against 1-800 Contacts' trademark litigation. (CX 9042 (Evans, Dep. at 135)). Nor did Dr. Evans investigate the capital available to any of the settling parties to determine whether they were capital-constrained. (Evans, Tr. 1832; CX 9042 (Evans, Dep. at 135)). Dr. Evans also did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts' trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133). Accordingly, Dr. Evans has no basis to determine whether any of the settling parties had access to funds to pay for litigation against 1-800 Contacts and the proposed finding should be disregarded.

1504. Second, for Dr. Murphy's model to be relevant or reliable each of the settling parties would need to be able to calculate the expected profits from using competitive ads in the distant future at the time it made the decision to settle. (Evans, Tr. 1553 ("requires them to be able to forecast how successful that advertising activity would be but also requires

them to forecast their competitive situation in this business."); CX8009 at 046-049 (¶¶ 77, 79) (Evans Rebuttal Expert Report)).

Response to Finding No. 1504:

Complaint Counsel's Proposed Finding No. 1504 is incomplete and misleading. To the extent that any of the settling parties was unable to calculate its profits from advertising in response to searches for 1-800 Contacts' trademarks, that would undermine Dr. Evans' and Complaint Counsel's theory that such advertising was important for their ability to compete against 1-800 Contacts. Dr. Evans, however, did not cite any evidence, or conduct any analysis, suggesting that the settling parties were any more unable to accurately predict their future profits than any other firms operating under uncertainty. Dr. Evans did not conduct any analysis of any retailer's expected profits; he did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts' trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133). And Dr. Evans testified that the settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")). Accordingly, any suggestion that Dr. Murphy's model of the economics of the settlements is unreliable because the settling parties would need to be able to calculate the expected profits from using competitive ads in the distant future at the time it made the decision to settle is pure speculation that should be disregarded.

1505. As Dr. Evans explained, particularly for the early settlements with AC Lens and Vision Direct, the settling parties lacked the information to come up with reliable forecasts of expected profits. (Evans, Tr. 1553 ("At that point in time, particularly the 2004-2006

> period of time, … before these firms got a cease and desist letter, they actually had very little experience with the direct bid or matched ads; therefore, they didn't have the ability to really come up with good estimates of how successful it would be."), 1554 ("there's a lot of risk in terms of how successful these competitive ads are going to be"), 1553 ("there's also a lot of uncertainty as to how competition in this industry will evolve over time. So it's difficult to come up with a reliable forecast of profits.")).

Response to Finding No. 1505:

Complaint Counsel's Proposed Finding No. 1504 is incomplete and misleading. To the extent that any of the settling parties was unable to calculate its profits from advertising in response to searches for 1-800 Contacts' trademarks, that would undermine Dr. Evans' and Complaint Counsel's theory that such advertising was important for their ability to compete against 1-800 Contacts. Dr. Evans, however, did not cite any evidence, or conduct any analysis, suggesting that the settling parties were any more unable to accurately predict their future profits than any other firms operating under uncertainty. Dr. Evans did not conduct any analysis of any retailer's expected profits; he did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts' trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133). And Dr. Evans testified that the settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")). Accordingly, any suggestion that Dr. Murphy's model of the economics of the settlements is unreliable because the settling parties would need to be able to calculate the expected profits from using competitive ads in the distant future at the time it made the decision to settle is pure speculation that should be disregarded.

1506. Third, for Dr. Murphy's model to be relevant or reliable, each of the settling parties would need assurance that, following a successful defense, it could make a profit from the sales associated with the competitive advertising sufficient to pay for the costs incurred in the trademark litigation. (Evans, Tr. 1555-1556; CX8009 at 047-048 (¶¶ 78-79) (Evans Rebuttal Expert Report)).

Response to Finding No. 1506:

Complaint Counsel's Proposed Finding No. 1506 is incomplete and misleading. To the extent that any of the settling parties lacked assurance that it could make a profit from sales associated with the competitive advertising sufficient to pay for the costs incurred in the trademark litigation, that would undermine Dr. Evans' and Complaint Counsel's theory that such advertising was important for their ability to compete against 1-800 Contacts. Dr. Evans, however, did not conduct any analysis of any retailer's expected profits; he did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts' trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133). And Dr. Evans testified that [t]he settlements reflected the parties' best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. ("Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that's – that's fine.")). Accordingly, any suggestion that Dr. Murphy's model of the economics of the settlements is unreliable because the settling parties lacked assurance about the volume of their profits is pure speculation that should be disregarded.

1507. As Dr. Evans explained, if a firm expects to make a normal competitive profit, it will not be able to afford to spend millions of dollars on the litigation for the opportunity to make additional sales at normal profits. (Evans, Tr. 1554-1555 ("for Dr. Murphy's calculation to make any sense, it has to be tied down to a precise definition of what we mean by 'profits.'[A settling firm is] not going to be willing to spend $2 million just to get a competitive rate of return. So, in order for it to be willing to spend money to get these

profits, those profits have to be in effect super competitive profits. And, Dr. Murphy hasn't really done any analysis or been specific about what he's assuming about the ability of these online firms to be able to get super competitive profits in order to make it worth their while to put money up front to fund a lawsuit.")).

Response to Finding No. 1507:

Complaint Counsel's Proposed Finding No. 1507 is incomplete and misleading. Dr. Evans did not calculate the costs to the settling parties of defending against 1-800 Contacts' trademark litigation. (CX 9042 (Evans, Dep. at 135)). Nor did Dr. Evans investigate the capital available to any of the settling parties to determine whether they were capital-constrained. (Evans, Tr. 1832; CX 9042 (Evans, Dep. at 135)). Dr. Evans also did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts' trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133). Accordingly, any suggestion that Dr. Murphy's model of the economics of the settlements is unreliable because the settling parties could not afford to incur the costs of the litigations that they settled is pure speculation that should be disregarded.

1508. Fourth, for Dr. Murphy's model to be relevant or reliable the incentives of 1-800 Contacts and each settling party must be symmetrical, and informed by the costs and benefits of settling each individual case. (Evans, Tr. 1555-1556; CX8009 at 046-048 (¶¶ 77-79) (Evans Rebuttal Expert Report)).

Response to Finding No. 1508:

Complaint Counsel's Proposed Finding No. 1508 is not supported by the cited evidence, and is based on an expert opinion that Complaint Counsel did not disclose in either Dr. Evans's opening report or rebuttal report, and therefore should not be considered. Nowhere in the cited portion of Dr. Evans' rebuttal report does he offer the opinion that for Dr. Murphy's model to be relevant or reliable the incentives of 1-800 Contacts and each settling party must be symmetrical.

1509. As Dr. Evans explained, because 1-800 Contacts had a strategy of threatening or suing all firms that engaged in competitive ads on its queries, it had an incentive to be a tough negotiator. In contrast, all the other settling parties considered the costs and benefits of settling each litigation from a stand-alone perspective. (Evans, Tr. 1556 ("1-800 [Contacts] is not negotiating just with one firm, it is pursuing a strategy where it's negotiating with multiple firms, … and needs to take into account the possibility that if it were to pay something out that that would attract other firms to just come in and engage in this activity to get a payment."); CX8009 at 046 (¶ 77) (Evans Rebuttal Expert Report)). Conversely, a successful defense could embolden other rivals to increase their advertising spending on 1-800 brand queries, which may further limit the returns to the successful defendant.

Response to Finding No. 1509:

Complaint Counsel's Proposed Finding No. 1509 is incomplete and misleading. Dr. Evans' criticism based on the supposed fact that 1-800 Contacts and the settling parties had different incentives was that "[t]his situation is very different from the routine commercial and criminal cases analyzed in the literature on the economics of settlement." (CX 8009 at 46 (¶ 77) (Evans Rebuttal Report)). Dr. Evans, however, does not explain this statement or cite any literature, and therefore his criticism should be disregarded. Further, nothing in the cited portion of Dr. Evans' rebuttal report says anything about the supposed fact that "all the other settling parties considered the costs and benefits of settling each litigation from a stand-alone perspective." Since Complaint Counsel did not disclose that opinion in either Dr. Evans's opening report or rebuttal report, it should not be considered. In addition, Dr. Evans did not conduct any analysis of how accounting for the settling parties' supposedly differing incentives would have changed the outcome of Dr. Murphy's analysis. Accordingly, any suggestion that Dr. Murphy's model of the economics of the settlements is unreliable because the settling parties had different incentives is pure speculation that should be disregarded.

1510. For these reasons, Dr. Evans concluded that the settling parties did not take account of consumers' interest. (Evans, Tr. 1559 ("the settling firm is not benefiting from all the competition and lower prices that consumers are going to get, so the settling firm doesn't take into account the benefits of competition to consumers.")). Thus, while each

settlement may be "privately efficient" within the context of the information available to the parties at the time of settlement, that is not a basis for Dr. Murphy to conclude as a matter of economics that the settlements are "socially efficient" or do not harm consumers. (Evans, Tr. 1557 (agreement is "privately efficient for the two parties")). To the contrary, Dr. Evans concluded that by blocking informative advertising, the agreements impose costs on, and harm, consumers. (CX8006 at 107-110 (¶¶ 234-240) (Evans Expert Report)).

Response to Finding No. 1510:

Complaint Counsel's Proposed Finding No. 1510 is incorrect and based on expert testimony not properly disclosed by Complaint Counsel. The cited paragraphs from Dr. Evans' report do not contain any opinion that the settling parties did not take account of consumers' interest or that this makes the settlements inefficient. Accordingly, Dr. Evans' testimony to this effect should be disregarded. Regardless, Dr. Evans agreed that settlements of litigation promote efficiency without referring to any need to account for third parties' interests. (CX 9042 (Evans, Dep. at 196).

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

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

Response to Finding No. 1511:

Respondent has no specific response.

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

Response to Finding No. 1512:

Respondent has no specific response.

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

Response to Finding No. 1513:

Complaint Counsel's Proposed Finding No. 1513 is incomplete to the extent that it purports to identify the entire basis for Dr. Murphy's opinion that the agreements did not enable 1-800 Contacts to increase its margins. Specifically, the proposed finding omits any reference to Dr. Murphy's analysis of 1-800 Contacts' margins based on bidding activity by Walmart, which was not bound by the challenged settlement agreements. (RX 739 at 63-64 (¶ 171) (Murphy Expert Report)).

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

Response to Finding No. 1514:

Complaint Counsel's Proposed Finding No. 1514 is misleading to the extent it suggests that Dr. Murphy's conclusion that the settlement agreements did not enable 1-800 Contacts to increase its margins is unreliable because Dr. Murphy did not perform a regression analysis. Complaint Counsel have not adduced any evidence that any proper regression analysis demonstrates that the challenged settlement agreements enabled 1-800 Contacts to increase its margins. Dr. Evans testified that he would not rely on his own regression to draw any conclusions regarding prices or margins: "Q. So the regression that you presented in your rebuttal report is not something you would rely on as evidence of what the impact of the settlement agreements was on price. A. That is correct." (CX9042 (Evans, Dep. at 275); *see id.* at 273-74 ("I'm not suggesting that that -- that analysis is necessarily probative of anything

concerning margins"). Accordingly, there is no evidence in the record showing that the challenged settlement agreements enabled 1-800 Contacts to increase its margins.

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

Response to Finding No. 1515:

Respondent has no specific response.

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

Response to Finding No. 1516:

Respondent has no specific response.

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

Response to Finding No. 1517:

Respondent has no specific response.

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

Response to Finding No. 1518:

Complaint Counsel's Proposed Finding No. 1518 is misleading to the extent it suggests that Dr. Murphy's conclusion that the settlement agreements did not enable 1-800 Contacts to increase its margins is unreliable because Dr. Murphy did not perform a regression analysis. Complaint Counsel have not adduced any evidence that any proper regression analysis demonstrates that the challenged settlement agreements enabled 1-800 Contacts to increase its

margins. Dr. Evans testified that he would not rely on his own regression to draw any conclusions regarding prices or margins: "Q. So the regression that you presented in your rebuttal report is not something you would rely on as evidence of what the impact of the settlement agreements was on price. A. That is correct." (CX9042 (Evans, Dep. at 275); *see id.* at 273-74 ("I'm not suggesting that that -- that analysis is necessarily probative of anything concerning margins"). Accordingly, there is no evidence in the record showing that the challenged settlement agreements enabled 1-800 Contacts to increase its margins.

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

Response to Finding No. 1519:

Complaint Counsel's Proposed Finding No. 1519 is misleading to the extent it suggests that Dr. Murphy's conclusion that the settlement agreements did not enable 1-800 Contacts to increase its margins is unreliable because Dr. Murphy did not perform a regression analysis. Complaint Counsel have not adduced any evidence that any proper regression analysis demonstrates that the challenged settlement agreements enabled 1-800 Contacts to increase its margins. Dr. Evans testified that he would not rely on his own regression to draw any conclusions regarding prices or margins: "Q. So the regression that you presented in your rebuttal report is not something you would rely on as evidence of what the impact of the settlement agreements was on price. A. That is correct." (CX9042 (Evans, Dep. at 275); *see id.* at 273-74 ("I'm not suggesting that that -- that analysis is necessarily probative of anything concerning margins"). Accordingly, there is no evidence in the record showing that the challenged settlement agreements enabled 1-800 Contacts to increase its margins.

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

Response to Finding No. 1520:

Complaint Counsel's Proposed Finding No. 1520 is misleading to the extent it suggests that Dr. Evans' criticism renders unreliable Dr. Murphy's opinion that the settlement agreements did not enable 1-800 Contacts to increase its margins. Complaint Counsel have not adduced any evidence that what Dr. Evans contends is a proper regression analysis demonstrates that the challenged settlement agreements enabled 1-800 Contacts to increase its margins. Dr. Evans testified that he would not rely on his own regression to draw any conclusions regarding prices or margins: "Q. So the regression that you presented in your rebuttal report is not something you would rely on as evidence of what the impact of the settlement agreements was on price. A. That is correct." (CX9042 (Evans, Dep. at 275); *see id.* at 273-74 ("I'm not suggesting that that -- that analysis is necessarily probative of anything concerning margins"). Accordingly, there is no evidence in the record showing that the challenged settlement agreements enabled 1-800 Contacts to increase its margins.

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

Response to Finding No. 1521:

Complaint Counsel's Proposed Finding No. 1521 is not supported by the record evidence and directly contradicts Dr. Evans' own testimony: "Q. So the regression that you presented in your rebuttal report is not something you would rely on as evidence of what the impact of the settlement agreements was on price. A. That is correct." (CX9042 (Evans, Dep. at 275); *see id.*

at 273-74 ("I'm not suggesting that that -- that analysis is necessarily probative of anything concerning margins"). Accordingly, Complaint Counsel's Proposed Finding No. 1521 should be disregarded.

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

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

Response to Finding No. 1522:

Respondent has no specific response, other than to note that, for the reasons previously explained, Dr. Athey's model is unreliable and inadmissible.

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

Response to Finding No. 1523:

Respondent has no specific response.

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

Response to Finding No. 1524:

Respondent has no specific response.

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

Response to Finding No. 1525:

Complaint Counsel's Proposed Finding No. 1525 is a highly misleading attempt to cast doubt on Dr. Murphy's credibility. In fact, Dr. Murphy accurately characterized his analysis in the very testimony that Complaint Counsel have cited: "I am saying if you put her [redacted] clicks per

100 together with the [redacted] percent, that would give you the [redacted]. That would be more correct to say that is an implication of her number combining those two pieces." (CX9048 (Murphy Dep., at 263)). Dr. Murphy clearly explained what data in his calculations came from Dr. Athey's model. (Murphy, Tr. 4129-4139).

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

Response to Finding No. 1526:

Respondent has no specific response.

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

Response to Finding No. 1527:

Complaint Counsel have not adduced any evidence showing that the lost clicks that 1-800 Contacts experienced *did* come disproportionately from the [redacted] of those customers who click on a 1-800 Contacts ad appearing in response to a search of its brand terms and do not convert. Accordingly, any implication that the fact that Dr. Murphy did not ascertain that fact undermines the reliability of his analysis is pure speculation that should be disregarded.

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

Response to Finding No. 1528:

Complaint Counsel have not adduced any evidence showing that the lost clicks that 1-800 Contacts experienced *did* come disproportionately from the [redacted] of those customers who click on a 1-800 Contacts ad appearing in response to a search of its brand terms and do not convert. Accordingly, any implication that the fact that Dr. Murphy did not ascertain that fact undermines the reliability of his analysis is pure speculation that should be disregarded.

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

Response to Finding No. 1529:

Complaint Counsel have not adduced any evidence showing that the conversion rate on the incremental clicks was higher or lower than the average conversion rate. Accordingly, any implication that the fact that Dr. Murphy did not do so undermines the reliability of his analysis is pure speculation that should be disregarded. The only evidence in the record on this point is Dr. Murphy's own testimony that he [redacted] (Murphy, Tr. 4231).

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

Response to Finding No. 1530:

Complaint Counsel's Proposed Finding No. 1530 is incorrect. Dr. Athey did not offer any reason why Dr. Murphy's calculations applying Dr. Athey's model to conversion rates from Google, which showed that Dr. Athey's model predicts that additional advertisements in response to searches for 1-800 Contacts' trademarks will cause consumers to be less successful in purchasing contact lenses, were incorrect. Instead, in the cited paragraph of her report, Dr. Athey simply argued that "it is more instructive to consider the information available to consumers, and whether that information is relevant to the purchase process." (CX 8010 at 50-51 (¶ 133) (Athey Rebuttal Expert Report). But this is not a valid criticism of Dr. Murphy's application of her own model showing that the information is not valuable to consumers because it makes them less successful in purchasing contact lenses.

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

Response to Finding No. 1531:

Complaint Counsel's Proposed Finding No. 1531 is incorrect. Dr. Athey did not offer any reason why Dr. Murphy's calculations applying Dr. Athey's model to conversion rates from Google, which showed that Dr. Athey's model predicts that additional advertisements in response to searches for 1-800 Contacts' trademarks will cause consumers to be less successful in purchasing contact lenses, were incorrect. Dr. Athey's sole reason why Dr. Murphy's calculations are "ill-suited to the case at hand" is that "[c]onsumers looking to purchase contact

lenses are unlikely to not purchase contact lenses." (CX 8010 at 50-51 (¶ 133) (Athey Rebuttal Expert Report). Dr. Athey, however, has no evidence, and conducted no analysis, to support this statement. Regardless, to the extent that consumers who were less successful purchasing contact lenses online nevertheless purchased contact lenses, the evidence suggests that many would purchase from ECPs, who, on average, offer higher prices than online retailers. (Bethers, Tr. 3552-56; RX 904 at 39; CX 525 at 40; [redacted] RX 736 at 9 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739 at 86 (showing that the average market share for 2012-2015 of independent ECPs was 39.7 percent)).

Further, Dr. Athey's statement that "it is more instructive to consider the information available to consumers, and whether that information is relevant to the purchase process" (CX 8010 at 51 (¶ 133) (Athey Rebuttal Expert Report) is not a valid criticism of Dr. Murphy's application of her own model showing that the information is not valuable to consumers because it makes them less successful in purchasing contact lenses.

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

Response to Finding No. 1532:

Complaint Counsel's Proposed Finding No. 1532 is incomplete and misleading. The cited portion of Dr. Athey's report does not cite any evidence or analysis showing that additional ads in response to searches for 1-800 Contacts' trademarks provide consumers with any information about the existence and relative process of other sellers that they do not already have. In fact, Dr. Athey did not have any evidence that any consumers believed that 1-800 Contacts is the only online retailer of contact lenses. (CX 9043 (Athey, Dep. at 262 ("Q. I asked

whether you have any evidence that there are any consumers that held the belief that there are no other online contact lens retailers other than 1-800-CONTACTS? A. No.")). And she testified that most consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses. (Athey. Tr. 913-14).

Further, in her opening report, Dr. Athey determined that 12% of ads displayed in response to generic searches, 15% of ads in response to searches for contact lens retailers' trademarks, and 25% of ads in response to searches for contact lens manufacturers contained price information. (CX 8007 at 88) (Athey Expert Report). (In her rebuttal report, relying on the same data set, Dr. Athey opined that 55% of ads displayed in response to generic searches, 36% of ads in response to searches for contact lens retailers' trademarks and 54% of ads in response to searches for contact lens manufacturers contained price information. (CX 8010 at 58 (Athey Rebuttal Expert Report)).

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

Response to Finding No. 1533:

Complaint Counsel's Proposed Finding No. 1533 is not supported by the cited evidence. Paragraph 106 of Dr. Athey's report does not say anything about consumers clicking on ads for other retailers. The proposed finding is also misleading because it suggests that consumers seeing additional advertisements for other retailers in response to searches for 1-800 Contacts would receive information about the existence and relative process of other sellers that they do not already have. In fact, Dr. Athey did not have any evidence that any consumers believed that 1-800 Contacts is the only online retailer of contact lenses. (CX 9043 (Athey, Dep. at 262 ("Q. I asked whether you have any evidence that there are any consumers that held the belief that there

are no other online contact lens retailers other than 1-800-CONTACTS? A. No.")). And she testified that most consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses. (Athey. Tr. 913-14).

Further, in her opening report, Dr. Athey determined that 12% of ads displayed in response to generic searches, 15% of ads in response to searches for contact lens retailers' trademarks, and 25% of ads in response to searches for contact lens manufacturers contained price information. (CX 8007 at 88 (Athey Expert Report). (In her rebuttal report, relying on the same data set, Dr. Athey opined that 55% of ads displayed in response to generic searches, 36% of ads in response to searches for contact lens retailers' trademarks and 54% of ads in response to searches for contact lens manufacturers contained price information. (CX 8010 at 58 (Athey Rebuttal Expert Report)).

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

Response to Finding No. 1534:

Complaint Counsel's Proposed Finding No. 1534 is misleading because it suggests that consumers seeing additional advertisements for other retailers in response to searches for 1-800 Contacts would receive information about the existence and relative process of other sellers that they do not already have. In fact, Dr. Athey did not have any evidence that any consumers believed that 1-800 Contacts is the only online retailer of contact lenses. (CX 9043 (Athey, Dep. at 262 ("Q. I asked whether you have any evidence that there are any consumers that held the belief that there are no other online contact lens retailers other than 1-800-CONTACTS? A. No.")). And she testified that most consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses. (Athey. Tr. 913-14).

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

Response to Finding No. 1535:

Complaint Counsel's Proposed Finding No. 1535 is incorrect. Consumers can make use of 1-800 Contacts' price match program on the 1-800 Contacts website by online chat with a customer service representative. (Bethers, Tr. 3798).

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

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

Response to Finding No. 1536:

Complaint Counsel's Proposed Finding No. 1536 is incomplete to the extent that it purports to identify the entire basis for Dr. Murphy's opinion that ads for other retailers in

response to searches for 1-800 Contacts' trademarks are not competitively significant for other retailers.

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

Response to Finding No. 1537:

Complaint Counsel's Proposed Finding No. 1537 is incomplete to the extent that it purports to identify the entire basis for Dr. Murphy's opinion that ads for other retailers in response to searches for 1-800 Contacts' trademarks are not competitively significant for other retailers.

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

Response to Finding No. 1538:

Respondent has no specific response.

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

Response to Finding No. 1539:

Complaint Counsel's Proposed Finding No. 1539 is incomplete and misleading. Dr. Murphy did not concede, either in the cited testimony or elsewhere, that he misclassified any impressions. Further, because Complaint Counsel have not adduced any evidence that accounting for what Dr. Evans calls "matched ads" would affect the proper inference from the search engine data, any implication that the fact that Dr. Murphy did not specifically account for

those "matched ads" undermines the reliability of his analysis is pure speculation that should be disregarded.

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

Response to Finding No. 1540:

Complaint Counsel's Proposed Finding No. 1540 is incomplete and misleading. Because Complaint Counsel have not adduced any evidence that accounting for what Dr. Evans calls "matched ads" would affect the proper inference from the search engine data, any implication that the fact that Dr. Murphy did not specifically account for those "matched ads" undermines the reliability of his analysis is pure speculation that should be disregarded.

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

Response to Finding No. 1541:

Respondent has no specific response.

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

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

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

Response to Finding No. 1542:

Complaint Counsel's Proposed Finding No. 1542 is inaccurate and contrary to the weight of the record evidence. (*See, e.g.,* Murphy, Tr. 4149-74; RX 739 at 39-44 (Murphy Expert Report); (Clarkson, Tr. at 296-297 (agreeing that online buyers tend to go back and forth between online, brick and mortar and ECPs); (CX 9037 (Owens, Dep. at 13-15, 60) (Walmart

views ECPs, brick and mortar stores and online retailers as competitors))). Respondent incorporates herein its responses to Complaint Counsel's Proposed Findings set forth in this section, X.A.

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

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

Response to Finding No. 1543:

Complaint Counsel's Proposed Finding No. 1543 is inaccurate and contrary to the weight of the record evidence. (*See, e.g.*, Murphy, Tr. 4149-74; RX 739 at 39-44 (Murphy Expert Report)); (Clarkson, Tr. at 296-297 (agreeing that online buyers tend to go back and forth between online, brick and mortar and ECPs); (CX 9037 (Owens, Dep. at 13-15, 60) (Walmart views ECPs, brick and mortar stores and online retailers as competitors))). Respondent incorporates herein its responses to Complaint Counsel's Proposed Findings set forth in this section, X.A.1

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

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

Response to Finding No. 1544:

Complaint Counsel's Proposed Finding No. 1544 is unsupported by the cited record evidence and contrary to the weight of the record evidence. The proposed finding is directly contradicted by the cited source — Complaint Counsel's own expert witness — whose report states: "A consumer may still find it convenient to buy from the ECP for an initial purchase even

if it does not have her prescription in stock at the time of her initial visit, and may also find it convenient to purchase refills, [if] she frequently visits that store. That is likely the case with a membership club store, such as Costco, or if the ECP is located conveniently to other stores she frequents, such as in a shopping center or mall." (CX 8006 at 113 (¶ 248) (Evans Report)). Dr. Evans also testified: "[T]ravel is an element in their decision as well. So if they're --. ordering online, obviously they don't have to . . . travel. On the other hand . . . if I'm a consumer who really likes my ECP, and my ECP is pretty convenient, maybe it's right next to my office or it's right next to my home, then for that consumer, the travel . . . and inconvenience cost of going to the ECP is lower. If, on the other hand, I'm a consumer who's ordering a refill and my ECP is inconvenient to get to, then . . . there is travel cost involved, and that's much more inconvenient." (Evans, Tr. 1440 & 1731 (explaining there is not much difference in the convenience between an online retailer and physical store for consumers who regularly visit the physical store)).

In sum, Dr. Evans' opinion shows that convenience is a factor in consumers' selection of a contact lens retailer, but the impact of "convenience" is different for each consumer and dependent on their particular individual circumstances. Dr. Evans' opinion further shows that some consumers find it more "convenient" to purchase contact lenses from their ECP, both for the initial purchase and refills, whereas some other consumers may find it more "convenient" to purchase contact lenses from an online retailer in certain circumstances. Dr. Evans' opinions in this regard strongly support a definition of a relevant market that includes ECPs (retailers with physical stores) and online retailers.

The cited statements by Dr. Evans' also are pure speculation, not based on any facts, any analysis, or any particular expertise. Dr. Evans merely offered his opinions on what consumers

may or may not find convenient in various circumstances. Those opinions were not based on any analysis of data, consumer surveys, or other reliable information.

The proposed finding is also unsupported by any cited facts or reliable analysis. Complaint Counsel cite no record evidence reflecting actual consumers' preferences or willingness to substitute between physical and online contact lens retailers. Complaint Counsel cite no record evidence reflecting whether consumers believe an online contact lens retailer is more convenient than a physical store, the extent of any such convenience, the circumstances in which a consumer may find an online retailer more convenient than a physical store, or the percentage of contact lens consumers that hold such beliefs. Complaint Counsel cite no record evidence relating to where or how consumers actually purchase contact lenses.

Neither Complaint Counsel nor their expert, Dr. Evans, performed any analysis or cited any record evidence addressing the percentage of customers who find it convenient to purchase contact lenses from a physical store. Neither Complaint Counsel nor their expert, Dr. Evans, address the record evidence showing that physical stores selling contact lenses are pervasive, including 16,000 independent ECP practices, optical retail chains, approximately 2,500 Walmart stores that sell contact lenses, other mass merchant retailers (including Target and JC Penney), and club stores like Costco, Sam's Club, and BJ's Wholesale. (Bethers, Tr. 3509-10, 3520-30 & 3546; Coon, Tr. 2672-74). Neither Complaint Counsel nor their expert, Dr. Evans, performed any analysis of how far away the closest physical store selling contact lenses is for any segment of consumers. Neither Complaint Counsel nor their expert, Dr. Evans, performed any analysis or cited any record evidence regarding how far away the closest physical store selling contact lenses must to be find that it is not a viable or reasonable alternative for consumers to an online store.

The proposed finding is contradicted by the record evidence showing that 1-800 Contacts considers independent ECPs to be its principal competitor. (Bethers, Tr. 3542 (A: "Our principal competitor is the independent eyecare practice . . . ."); Bethers, Tr. 3600-01; Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)). [redacted] Witnesses from other online retailers also testified that they compete with all other retailers of contact lenses. (Clarkson, Tr. at 296-297 (agreeing that online buyers tend to go back and forth between online, brick and mortar and ECPs); (CX 9037 (Owens, Dep. at 13-15, 60) (Walmart views ECPs, brick and mortar stores and online retailers as competitors))).

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

Response to Finding No. 1545:

Complaint Counsel's Proposed Finding No. 1545 is incomplete and misleading. The cited record evidence shows that online contact lens retailers compete not only with each other but also with physical retail stores on the basis of convenience and price. [redacted]

[redacted] Trust is also a key factor. (Alovis, Tr. at 1032-1033) (testifying that it is "important" for an online retailer to convince customers that it is "trustworthy" because "[t]here's a lot of companies out there that are doing it in a way that isn't ethically correct, so yeah, we have to make sure that we make it clear to the consumer that we are a trustworthy company").

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

Response to Finding No. 1546:

Complaint Counsel's Proposed Finding No. 1546 is unsupported by the cited record evidence and contrary to the weight of the record evidence.

First, Dr. Evans' expert report and testimony do not support the proposed finding. Dr. Evans stated in his report: "Consumers *may* find that it is inconvenient to order contact lenses at a physical store in some circumstances. If they aren't already at the store for an eye exam they may have to make a separate trip to the store to fill a prescription that wasn't in stock or to get a refill." (CX 8006 at 113 (¶ 249) (Evans Expert Report) (emphasis added)). Dr. Evans also stated in his report: "A consumer may still find it convenient to buy from the ECP for an initial purchase even if it does not have her prescription in stock at the time of her initial visit, and may also find it convenient to purchase refills, [if] she frequently visits that store. That is likely the case with a membership club store, such as Costco, or if the ECP is located conveniently to other stores she frequents, such as in a shopping center or mall." (CX 8006 at 113 (¶ 248) (Evans Report)). Dr. Evans' testimony was substantially similar. (Evans, Tr. 1440 & 1731).

Second, the cited statements by Dr. Evans' are pure speculation, not based on any facts, any analysis, or any particular expertise. Dr. Evans merely offered his opinions on what

consumers may or may not find convenient in various circumstances. Those opinions were not based on any analysis of data, consumer surveys, or other reliable information.

[redacted]

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

Response to Finding No. 1547:

[redacted]

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

Response to Finding No. 1548:

Complaint Counsel's Proposed Finding No. 1548 is contrary to the weight of the record evidence. The proposed finding reflects the opinion of one fact witness, but there is no foundation in the record for Mr. Clarkson's opinion on this issue with respect to all, most, or any percentage of contact lens consumers. Mr. Clarkson simply testified that online stores are "generally more convenient because you're not having to actually go to the store." (Clarkson, Tr. 189). But, as Complaint Counsel's own expert witness testified, many consumers may find it convenient to purchase contact lenses at the stores they visit frequently (such as Walmart) or at an ECP located conveniently to a place they visit frequently (such as a shopping center or mall). (Evans, Tr. 1440 & 1731; CX 8006 at 113 (¶ 248) (Evans Report)). And Mr. Clarkson himself testified that online buyers tend to go back and forth between online, brick and mortar and ECPs (Clarkson, Tr. at 296-297).

[redacted]

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

Response to Finding No. 1549:

Complaint Counsel's Proposed Finding No. 1549 is vague, ambiguous, and unsupported by the record evidence. Neither the proposed finding nor the cited record evidence explain the nature of the "specific purchase occasions" referenced. Neither the proposed finding nor the cited evidence explain the frequency of the "specific purchase occasions" referenced. Without knowing the nature or frequency of such "specific purchase occasions," the proposed finding provides no support for Complaint Counsel's alleged market definition. In fact, the inability of Complaint Counsel (or their experts) to define, let alone quantify in any manner, the "specific purchase occasions," or the particular circumstances, for which an online retailer may be more convenient than a physical store severely undermines Complaint Counsel's argument that online sales constitute a separate relevant market.

[redacted]

The proposed finding fails to account for the fact that physical stores selling contact lenses are pervasive, including 16,000 independent ECP practices, optical retail chains, approximately 2,500 Walmart stores that sell contact lenses, other mass merchant retailers (including Target and JC Penney), and club stores like Costco, Sam's Club, and BJ's Wholesale. (Bethers, Tr. 3509-10, 3520-30 & 3546; Coon, Tr. 2672-74).

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

Response to Finding No. 1550:

Respondent has no specific response to this proposed finding. The parenthetical from CX 547, however, is incomplete and misleading. [redacted] the record evidence shows that 1-800 Contacts vigorously competes for consumers who would otherwise purchase contact lenses from their ECP, and that most of 1-800 Contacts customers come from purchasing contact lenses from their ECP. (Bethers, Tr. 3542, 3547, 3601, 3625; CX 9017 (Blackwood, Dep. at 156); [redacted] RX 1108 at 6).

1551. [redacted]. (RX1228 at 0025, *in*

camera; Evans, Tr. 1568-1569, *in camera*; CX8006 at 115 (¶ 253) (Evans Expert Report), *in camera*).

Response to Finding No. 1551:

Complaint Counsel's Proposed Finding No. 1551 is incomplete, inaccurate, and contrary to the record evidence. [redacted] But, the record evidence shows that 1-800 Contacts vigorously competes for consumers who would otherwise purchase contact lenses from their ECP, and that most of 1-800 Contacts customers come from purchasing contact lenses from their ECP. (Bethers, Tr. 3542, 3547, 3601, 3625; CX 9017 (Blackwood, Dep. at 156); [redacted] RX 1108 at 6).

Dr. Evans's testimony and expert report do not support the proposed finding, as his testimony (Evans, Tr. 1568-69) and paragraph 253 of Dr. Evans' report merely summarize the contents of RX 1228-25.

In addition, the proposed finding is contrary to the weight of the record evidence. First, the record shows that "pure-play" online retailers have grown their market share, primarily at the expense of ECPs and optical retail chains. (Bethers, Tr. 3554-55). Second, the record evidence shows that 1-800 Contacts vigorously competes for consumers who would otherwise purchase contact lenses from their ECP, and that most of 1-800 Contacts customers come from purchasing

contact lenses from their ECP. (Bethers, Tr. 3542, 3547, 3601, 3625; CX 9017 (Blackwood, Dep. at 156); [redacted] RX 1108 at 6). Third, [redacted]

Moreover, Complaint Counsel's Proposed Finding No. 1551 is plainly contrary to Complaint Counsel's Proposed Finding No. 1548, which states that "[o]nline purchasing is more convenient than any purchasing from any other channel because the consumer does not need to return to the store to pick up her purchase." Here, Complaint Counsel proposes a finding that most physical store sales—which constitute at least 70-80 percent of contact lens sales (Bethers, Tr. 3552-56))—are more convenient for the consumer than an online retailer. This obvious inconsistency demonstrates that Complaint Counsel's proposed market definition, based largely on a theory of convenience to consumers, is untenable and unsupported by the actual record evidence.

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

Response to Finding No. 1552:

Complaint Counsel's Proposed Finding No. 1552 is incomplete, misleading, and unsupported by the record evidence. Dr. Evans testified simply that a consumer with vision insurance would typically find it more convenient to purchase from an "in-network" ECP compared to an "out-of-network" online retailer. (Evans, Tr. 1440-41). The proposed finding

does not cite any evidence or analysis of how vision insurance typically applies to contact lens purchases or even the percentage of contact lens wearers who have vision insurance. Respondent does not contest that generally ECPs have a competitive advantage with respect to consumers with vision insurance that covers all or part of the cost of contact lenses, but 1-800 Contacts actively competes for consumers with vision insurance by offering to "process their insurance out of network" and encouraging those consumers "to look at [1-800 Contacts'] prices compared to their insurance program." (Bethers, Tr. 3630). Moreover, Dr. Evans has no expertise in the field of consumer behavior or insurance-related purchasing.

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

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

Response to Finding No. 1553:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

In addition, the proposed finding is inaccurate and unsupported by the record evidence. Complaint Counsel rely primarily on a few documents from 1-800 Contacts that primarily analyze the market for contact lenses based on total contact lens sales by all retailers, while just briefly noting 1-800 Contacts' share of online sales. Notably, those particular documents were created for purposes of selling the company; thus, those documents were not "ordinary course" business documents prepared by 1-800 Contacts for its own internal analysis and market

strategy. The substantial weight of evidence produced by 1-800 Contacts, including documents and testimony, show that it viewed the relevant market as one that consists of all retailers of contact lenses and that it viewed its principal competitor as the independent ECPs. (Bethers, Tr. 3552-56; RX 904 at 39; CX 525 at 40; [redacted]). The record evidence further shows that 1-800 Contacts built its fundamental business strategy in order to compete most effectively with ECPs and that 1-800 Contacts set its pricing based primarily on independent ECPs and optical retail chains. (CX 9029 (Bethers, Dep. at 23); Coon, Tr. 2708-10; CX 9001 (Bethers, IHT at 80); RX 904 at 16; CX 525 at 17; [redacted]).

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

Response to Finding No. 1554:

Complaint Counsel's Proposed Finding No. 1554 is incomplete, misleading, and contrary to the weight of the record evidence. The cited exhibits consist of three documents prepared in the context of a potential acquisition of 1-800 Contacts. The cited exhibits are not ordinary course business documents prepared by 1-800 Contacts for its own internal analysis and market strategy. [redacted] Notably, the proposed finding does not cite any of the thousands of ordinary

course business documents by 1-800 Contacts in the record, and does not cite any of the investigative hearing, deposition, or trial testimony of 1-800 Contacts employees.

[redacted]

[redacted] The proposed finding is based on improperly cherry picking a few brief statements out of lengthy documents, while ignoring many contrary statements and the complete context of those documents.

Lastly, the proposed finding is contrary to the weight of the evidence. 1-800 Contacts' former and current employees repeatedly and consistently testified that it views independent ECPs as its principal competitor, and that 1-800 Contact's business strategy is based primarily on winning contact lens customers from independent ECPs. (Bethers, Tr. 3542 ("Our principal competitor is the independent eyecare practice"), 3547, 3600-01, 3610-11; Coon, Tr. 2666-67, 2687, 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99); [redacted]; RX 1108 at 6).

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

Response to Finding No. 1555:

Complaint Counsel's Proposed Finding No. 1555 is incomplete and misleading. The cited exhibit was not using the term "market" in the antitrust sense. The cited exhibit clearly shows that 1-800 Contacts' plan was based largely on how to compete better with ECPs. (CX 55 at 11, 13, 15). Indeed, the cited exhibit identifies the number one "threat" to 1-800 Contacts as "Doctors – sell what they prescribe, manufacturer rebates, service/pricing improvements." (CX 55 at 15).

1556. In addition to 1-800 Contacts, other online retailers consistently identify online retailers as their closest competitors. (Clarkson, Tr. 187-188; Hamilton, Tr. 391-393; Holbrook, Tr. 1887-1888, 1898-1900; CX9018 (Drumm, Dep. at 115-116); CX9000 (Batushansky, IHT at 19-20), *in camera*; CX9036 (Duley, Dep. at 127); (CX8003 at 001 (¶ 4) (Mitha, Decl.) ("Lens Discounters' closest competitors are other companies that sell contact lenses online"); CX8001 at 001 (¶ 3) (Hamilton, Walgreens Decl.), *in camera*; CX8002 at 001 (¶ 3) (Hamilton, Vision Direct Decl.), *in camera*); CX9003 (Clarkson, IHT at 23-24)).

Response to Finding No. 1556:

Complaint Counsel's Proposed Finding No. 1556 is inaccurate and unsupported by the cited record evidence. First, there is no cited record evidence that 1-800 Contacts identifies (or has identified) other online retailers as its closest competitors. Quite the contrary, 1-800 Contacts has always considered independent ECPs to be its principal competitors. (Bethers, Tr. 3542 ("Our principal competitor is the independent eyecare practice"), 3600-01; Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)). Second, the cited deposition transcript of [redacted] does not support the proposed finding, [redacted]. *See also* (Clarkson, Tr. at 296-297 (agreeing that online buyers tend to go back and forth between online,

brick and mortar and ECPs); (CX 9037 (Owens, Dep. at 13-15, 60) (Walmart views ECPs, brick and mortar stores and online retailers as competitors))).

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

Response to Finding No. 1557:

The proposed finding misstates the cited testimony. Mr. Alovis simply answered with "the ones that come to mind," (Alovis, Tr. 988); Complaint Counsel have added the word "exclusively" to the mix, with no foundation for it.

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

Response to Finding No. 1558:

Complaint Counsel's Proposed Finding No. 1558 is inaccurate and misleading to the extent it assumes the existence of an "online market." The cited trial testimony does not contain the term "online market," but rather described "pure-play" online retailers as those contact lens retailers that sell contact lenses online and do not have a physical retail presence. (Bethers, Tr. 3536-37).

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

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

Response to Finding No. 1559:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by

specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed summary finding also should be disregarded because it is vague and ambiguous because it does not specify the "unique facilities" referred to or provide any definition for the term "significant scale."

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

Response to Finding No. 1560:

[redacted]

1561. [redacted]

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

Response to Finding No. 1561:

Respondent has no specific response.

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

Response to Finding No. 1562:

Complaint Counsel's Proposed Finding N0. 1562 is incomplete and inaccurate. The cited record evidence shows that an online contact lens retailer may decide to invest in its website, as one means of differentiating its service. The cited record evidence does not suggest that online contact lens retailers must "invest in . . . and maintain sophisticated websites," rather that reflects Complaint Counsel's characterization. The record evidence shows that many independent ECPs have built websites that offer consumers the ability to purchase contact lenses online, and that those websites are relatively easy and simple to create through services provided by ABB and Essilor. (Bethers, Tr. 3515-17).

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

Response to Finding No. 1563:

Complaint Counsel's Proposed Finding No. 1563 is incomplete, inaccurate, and mischaracterizes the cited record evidence. Mr. Clarkson did not testify about "increasingly sophisticated prescription verification systems." (Clarkson, Tr. 180-81). Instead, that phrase is Complaint Counsel's improper characterization of the evidence. Mr. Clarkson testified that "if it's a small business, then you could handle this prescription verification in a fairly manual way, but once you get to any kind of size, you would need to be able to automate it to some extent." (Clarkson, Tr. 181). The proposed finding does not cite any record evidence explaining how a

retailer could "automate" the prescription verification process, the investment needed to "automate" the process, or the resources need to maintain such an "automate[d]" process. Furthermore, Mr. Clarkson and Mr. Batushansky testified about the use of a database of doctors, but the proposed finding does not cite any record evidence explaining the cost of obtaining or maintaining such a database.

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

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

Response to Finding No. 1564:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

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

Response to Finding No. 1565:

Complaint Counsel's Proposed Finding No. 1565 is inaccurate and misleading. Contrary to the implication of the proposed finding, many independent ECPs, optical retail chains, and mass merchandisers sell contact lenses online. (Bethers, Tr. 3513-14, 3522, 3525-26, 3529-30). The proposed finding is misleading because it does not identify any specific "online retailer" whose prices are being compared. The cited trial testimony of Mr. Bethers makes clear that he was explaining the pricing relationship for "pure-play online contact lens sellers," and he further

noted that "[t]here may be some online contact lens sellers that have prices in between that range and fall elsewhere, but again using an average, they tend to be lower than us." (Bethers, Tr. 3544-45). The proposed finding is also incomplete in that it fails to note that club stores (Costco, Sam's Club, and BJ's Wholesale) typically are "the cheapest place to buy contact lenses." (Bethers, Tr. 3545).

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

Response to Finding No. 1566:

Complaint Counsel's Proposed Finding No. 1566 is vague, incomplete, and inaccurate. Mr. Clarkson's cited deposition testimony was referring to "offline" retailers as Walmart, Sam's Club, Costco, and LensCrafters, but Mr. Clarkson's characterization was plainly wrong because the fact is that each of those retailers sells contact lenses in their physical retail stores and online. (Bethers, Tr. 3513-14, 3522, 3525-26, 3529-30). In the contact lens retail industry, there is not a strict dichotomy between "offline" and "online" retailers, as suggested inaccurately by the proposed finding.

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

Response to Finding No. 1567:

Complaint Counsel's Proposed Finding No. 1567 is incomplete, inaccurate, and mischaracterizes the cited testimony. First, Mr. Alovis did not testify that LensDirect's prices are "always" below 1-800 Contacts. (Alovis, Tr. 989). Mr. Alovis used the terms "sometimes" and "incredibly competitive." (Alovis, Tr. 989). Furthermore, there was no foundation for Mr. Alovis to testify that LensDirect's prices are always lower than 1-800 Contacts. The proposed

finding does not cite any analysis by LensDirect, for any particular time period, that compares the actual net price to consumers for each contact lens product sold by LensDirect and 1-800 Contacts.

The proposed finding is also incomplete because it provides only part of the story. Respondent does not dispute that Mr. Alovis testified that LensDirect sets its prices, at least in part, by looking at 1-800 Contacts' prices. (Alovis, Tr. 989). But, 1-800 Contacts sets its prices by looking primarily at independent ECPs' and optical retail chains' prices. (Bethers, Tr. 3542, 3549-50). Thus, LensDirect, by looking at 1-800 Contacts' prices, is indirectly also taking into account the prices of independent ECPs and optical retail chains.

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

Response to Finding No. 1568:

[redacted]

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

[redacted] The proposed finding is also misleading because it fails to mention the factors identified by consumers who shop for contact lenses at brick-and-mortar stores, as those consumers continue to represent the vast majority of the contact lens market. (Bethers, Tr. 3552-56; RX 904 at 39; CX 525 at 40; [redacted] RX 736 at 9 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739 at 86).

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

Response to Finding No. 1569:

[redacted]

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

Response to Finding No. 1570:

[redacted]

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

Response to Finding No. 1571:

[redacted]

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

Response to Finding No. 1572:

Complaint Counsel's Proposed Finding No. 1572 is unsupported by the cited deposition testimony. Mr. Batushanksy testified that he thinks (CX 9014 (Batushanksy, Dep. at 145-46)). Furthermore, even if Mr. Batushansky's deposition testimony supported the proposed finding (it does not), there is no foundation for Mr. Batushansky's views as what "many online consumers" are aware of or interested in.

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

Response to Finding No. 1573:

Complaint Counsel's Proposed Finding No. 1573 is unsupported by the record evidence. In his cited trial testimony, Mr. Bethers testified that 1-800 Contacts' price-matching program (or price guarantee) tries to address price sensitivity, as do 1-800 Contacts' volume discounts.

(Bethers, Tr. 3629). In that context, Mr. Bethers did not refer to "online retailers," but rather he was referring specifically to Costco and the fact that "Costco actually has the lowest price in the industry." (Bethers, Tr. 3629). Contrary to the proposed finding, Mr. Bethers testified the "one of the reasons that we instituted a price-matching offer" was to compete with lower-priced online retailers, but he specifically explained that it was "not just for online but also for brick-and-mortar companies and independent eyecare providers." (Bethers, Tr. 3774).

The proposed finding also is contradicted by the record evidence [redacted]

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

Response to Finding No. 1574:

Complaint Counsel's Proposed Finding No. 1574 is incomplete and misleading. [redacted]

1575. Dr. Evans concluded that the price difference between online retailers and physical stores was strong evidence that the online channel is a separate relevant market: "the doctors

and other physical retailers, that are charging higher prices and offer less convenience and service. It is not possible for that situation to exist in a market where they're all close substitutes and they're competing." (Evans, Tr. 1522-1524).

Response to Finding No. 1575:

Complaint Counsel's Proposed Finding No. 1575 characterizes an expert opinion that is unreliable and contrary to the weight of the record evidence. The proposed finding is based on an opinion by Dr. Evans that necessarily implies that 1-800 Contacts is not "competing" with doctors and other retailers with physical stores. That opinion is contradicted by the record evidence showing that 1-800 Contacts considers independent ECPs to be its principal competitor. (Bethers, Tr. 3542 (A: "Our principal competitor is the independent eyecare practice . . . ."); Bethers, Tr. 3600-01; Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)).

Dr. Evans' opinion was also based in large part on his erroneous view that consumers only purchase contact lenses from their eye doctor at the time of their eye exam. (Evans, Tr. 1524). Dr. Evans's view is [redacted]

Dr. Evans' opinion is contradicted by his own testimony. The proposed finding cites Dr. Evans' testimony that assumes online retailers are always more convenient than ECPs or other retailers with physical stores. (Evans, Tr. 1523-24). But, Dr. Evans testified, and stated in his expert report, that some consumers may find it most convenient to purchase contact lenses, both as an initial purchase and as refills, from their ECP or other physical retail store located near a place that they visit often. (CX 8006-112 (Evans Expert Report); Evans, Tr. 1440 & 1731).

Dr. Evans' opinion is also unreliable because it is based solely on consideration of price and convenience as factors affecting consumers' selection of a contact lens retailer. (Evans, Tr.

1522-24). But, the record evidence shows that consumers are much more sophisticated and take into account a variety of other factors, including trust and credibility given that contact lenses are a medical devices that goes into your eye. (CX 9017 (Blackwood, Dep. at 46, 61, 73-74, 223-224); CX 9032 (L. Schmidt, Dep. at 237); RX 106 at 1; [redacted]).

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

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

Response to Finding No. 1576:

Complaint Counsel's Proposed Finding No. 1576 is incomplete, inaccurate, and contrary to the weight of the record evidence. (RX 739 at 77-79 (Murphy Expert Report); Murphy, Tr. 4160-63). The proposed finding cites Dr. Evans' trial testimony based on his analysis of CX 1117 that relates only to 1-800 Contacts' customers. CX 1117 does not provide any information about the lost customers of any other retailer, let alone another online retailer. Furthermore, Dr. Evans' analysis is based on one slide from CX 1117 that does not relate to actual "lost customers," but rather customers who indicated "the likelihood [they] will use 1-800 Contacts for [their] next contact lens purchase." (CX 1117 at 15). Dr. Evans ignores the very next slide of CX 1117 that actually addresses "lost customers" and shows the largest percentage of 1-800 Contacts' lost customers went to "eye doctor[s]." (CX 1117 at 16).

The record evidence contains a variety of different estimates as to where 1-800 Contacts' past customers made their most recent purchase. (RX 739 at 102). "Under other plausible assumptions about diversion ratios based on similar evidence, Dr. Evans' critical loss analysis

actually suggests that the relevant market is broader than just online retailers." RX 739 at 14 (Murphy Expert Report)

Dr. Evans' analysis is also fundamentally flawed because he relies on survey results that did not ask customers whether they would switch contact lens retailers in response to a certain type of price increase, which is the type of question relevant to an analysis of market definition. (Murphy, Tr. 4161, 4163; Evans, Tr. 1777).

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

Response to Finding No. 1577:

Complaint Counsel's Proposed Finding No. 1577 is incomplete, inaccurate, and misleading. The cited statements from Dr. Evans' report are dependent on his assumptions as to the "diversion ratios" that, as described above in Respondent's response to Complaint Counsel's Proposed Finding No. 1576, are unreliable and unsupported by the record evidence.

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

Response to Finding No. 1578:

Complaint Counsel's Proposed Finding No. 1578 is unsupported by the cited record evidence. The proposed finding mischaracterizes Dr. Evans' own expert report, where he states that "critical loss analysis" is just one piece of evidence to be considered in defining the relevant market: "'critical loss analysis' . . . can provide probative evidence on the relevant market, in combination with other available evidence." (CX 8006-117 (Evans Expert Report)). Dr. Evans

further stated that "critical loss analysis" is a "quick-and-dirty, rough approximation, of markets." (CX 8006-117 (Evans Expert Report)).

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

Response to Finding No. 1579:

Complaint Counsel's Proposed Finding No. 1579 is imprecise, incomplete, and misleading. First, Dr. Evans' report defines a specific type of "contribution margin." (CX 8006-123 (Evans Expert Report)). A "margin" can be defined in many different ways for different purposes. The proposed finding should, at the least, have been tailored to the particular type of margin that Dr. Evans identified. Second, Dr. Evans calculated contribution margins for only a few online retailers other than 1-800 Contacts. (CX 8006-123, n.294 (Evans Expert Report)). The proposed finding, however, is not limited to the specific online retailers for which Dr. Evans calculated a contribution margin. Instead, the proposed finding improperly purports to reflect the margin of all other online retailers.

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

Response to Finding No. 1580:

Complaint Counsel's Proposed Finding No. 1580 is contrary to the weight of the record evidence. As Dr. Murphy demonstrated, the critical loss analysis points to the existence of different potential relevant markets (including a relevant market consisting of 1-800 Contacts and ECPs), thus the appropriate finding from an economic perspective is that the relevant market consists of all retailers of contact lenses. (Murphy, Tr. 4168-71).

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

Response to Finding No. 1581:

Complaint Counsel's Proposed Finding is inaccurate and contrary to the weight of the evidence. Dr. Evans' estimate of a 40 percent diversion ratio is based on CX 1117 at 15, which as described above in Respondent's response to Complaint Counsel's Proposed Finding No. 1576 does not reflect an actual diversion ratio and is contradicted by other record evidence. The record evidence contains a variety of different estimates as to where 1-800 Contacts' past customers made their most recent purchase. (RX 739 at 102 (Murphy Expert Report)). There is no support for Dr. Evans' decision to use 40 percent, rather than the other estimates in the record evidence.

In his trial testimony, Dr. Evans agreed that the respondents depicted in CX 1117 at 15 were not asked "what they would do if 1-800 Contacts were to raise prices." (Evans, Tr. 1777). Dr. Evans did not know whether the respondents depicted in CX 1117 at 15 were randomly selected, how many declined to respond, or whether they were even representative of 1-800 Contacts' customers. (Evans, Tr. 1777-78). CX 1117 at 15 depicts customers' likelihood of using 1-800 Contacts for their next contact lens purchase on a scale of 0 to 10, but Dr. Evans could not explain why those who responded "5" should be classified as unlikely or likely to use 1-800 Contacts for their next purchase. (Evans, Tr. 1782, 1787). This is significant because the consumers who responded "5" represent a substantial portion of those that Dr. Evans counted for purposes of estimating his diversion ratio

Dr. Evans' reliance on CX 1117 at 15 is also fundamentally flawed because those survey results are not based on asking customers whether they would switch contact lens retailers in response to a certain type of price increase, which is the critical question for this type of relevant market analysis. (Murphy, Tr. 4161-63). As Dr. Murphy testified, the record evidence showing

that most of 1-800 Contacts' customers come from ECPs and that 1-800 Contacts generally prices about 5 to 10 percent below average independent ECP prices in order to attract those customers suggests that a hypothetical price increase by 1-800 Contacts of 5 to 10 percent is likely to result in its loss of customers primarily back to the ECPs. (Murphy, Tr. 4161-62). "The ability to attract new customers is critically important. The ability to maintain your price advantage relative to these, call them, cycling customers who are going back and forth to the ECPs. That would push you in this direction of a lower diversion ratio." (Murphy, Tr. 4167).

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

Response to Finding No. 1582:

Complaint Counsel's Proposed Finding is incomplete as it does not state the "diversion ratio" that is being applied. Respondent does not dispute that Dr. Evans' critical loss analysis suggests that a hypothetical monopolist controlling all online contact lens retailers would increase prices by 12.1 percent. As stated above in Respondent's responses to Complaint Counsel's Proposed Findings Nos. 1576-1581, Respondent disputes the validity and reliability of the inputs used (including the diversion ratio) by Dr. Evans for the critical loss analysis; and Respondent disputes the conclusions that Dr. Evans draws from his critical loss analysis.

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

Response to Finding No. 1583:

Complaint Counsel's Proposed Finding No. 1583 is inaccurate. Dr. Murphy explained that Dr. Evans' analysis of the SSNIP tests is highly dependent on the diversion ratio used: "if the diversion ratios in both directions are relatively high . . . it passes the SSNIP test . . . . But if

the diversion ratio is below the mid-20s," then it would not pass the SSNIP test. (Murphy, Tr. 4168). Dr. Murphy also disagreed with the assumptions that Dr. Evans used in his analysis: "So I'm not saying these are the right answers; I'm saying these are other numbers you could come up with, because it's not clear from the evidence exactly what the diversion ratio ought to be." (Murphy, Tr. 4167). Furthermore, Dr. Murphy explained that Dr. Evans' analysis was entirely incomplete and inappropriate because Dr. Evans did not bother performing the SSNIP test with respect to other potential candidate markets. (Murphy, Tr. 4169-70). As Dr. Murphy testified, this omission by Dr. Evans is significant and material because when the SSNIP test points to different plausible market definitions, "[y]ou should look beyond that, look to what we would call direct evidence of effects . . . you have to really look at a broader marketplace." (Murphy, Tr. 4170-71).

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

Response to Finding No. 1584:

Complaint Counsel's Proposed Finding No. 1584 is inaccurate and mischaracterizes the cited record evidence. Dr. Murphy explained that Dr. Evans' analysis of the SSNIP tests is highly dependent on the diversion ratio used: "if the diversion ratios in both directions are relatively high . . . it passes the SSNIP test . . . . But if the diversion ratio is below the mid-20s," then it would not pass the SSNIP test. (Murphy, Tr. 4168). Dr. Murphy also disagreed with the assumptions that Dr. Evans used in his analysis: "So I'm not saying these are the right answers; I'm saying these are other numbers you could come up with, because it's not clear form the evidence exactly what the diversion ratio ought to be." (Murphy, Tr. 4167).

Furthermore, Dr. Murphy explained that Dr. Evans' analysis was entirely incomplete and inappropriate because Dr. Evans did not bother performing the SSNIP test with respect to other potential candidate markets. (Murphy, Tr. 4169-70). As Dr. Murphy testified, this omission by Dr. Evans is significant and material because when the SSNIP test points to different plausible market definitions, "[y]ou should look beyond that, look to what we would call direct evidence of effects . . . you have to really look at a broader marketplace." (Murphy, Tr. 4170-71).

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

Response to Finding No. 1585:

Complaint Counsel's Proposed Finding No. 1585 is incomplete, misleading, and unsupported by the cited trial testimony. Dr. Evans testified that lost sales reports are a common source of evidence that economists use for diversion ratios. Dr. Evans, however, did not explain how economists use information on lost sales in order to estimate diversion ratios, and he did not testify that economists use lost sales reports directly as diversion ratios without making any adjustments or taking into account exactly what the lost sales reports depict.

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

Response to Finding No. 1586:

Complaint Counsel's Proposed Finding No. 1586 is inaccurate and mischaracterizes the cited record evidence. Dr. Murphy explained that the record evidence—particularly the facts that most of 1-800 Contacts' customers come from ECPs and that 1-800 Contacts generally prices about 5 to 10 percent below average independent ECP prices in order to attract those customers—suggests that the proper diversion ratio reflecting where 1-800 Contacts' customers would go in response to a price increase is lower to other online retailers than the assumption used by Dr. Evans. (Murphy, Tr. 4160-62, 4167). One of the flaws that Dr. Murphy identified in Dr. Evans's analysis is that his assumption for the diversion ratio was based on a survey that did not attempt to gauge where 1-800 Contacts' customers would go in response to a price increase. (Murphy, Tr. 4161, 4163). Furthermore, Dr. Evans' assumption for the diversion ratio is based on a survey that did not reflect any actual lost sales, rather it reflected consumers' indication of their likelihood of making their next purchase from 1-800 Contacts. (CX 1117 at 15).

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

Response to Finding No. 1587:

Complaint Counsel's Proposed Finding No. 1587 is unsupported by the cited record evidence. Dr. Murphy's trial testimony is perfectly consistent with RX 1228 at 25. Dr. Murphy testified that because contact lens consumers regularly return to their ECP, it is important for 1-800 Contacts to be "price competitive with the ECPs" in order to "induce customers to continue to purchase from 1-800 [Contacts] even if they purchased from them historically." (Murphy, Tr.

4151). Dr. Murphy then testified that the need for 1-800 Contacts to be price competitive with the ECPs suggests a lower diversion ratio than Dr. Evans used for customers that would switch from 1-800 Contacts to other online retailers in response to a price increase, because the record evidence suggests many customers would respond to a price increase by simply purchasing contact lenses from their ECP. (Murphy, Tr. 4167). In sum, a hypothetical price increase by 1-800 Contacts would reduce its price competitiveness with ECPs, thereby reducing the incentive for consumers to purchase from 1-800 Contacts rather than their ECP. [redacted]

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

Response to Finding No. 1588:

Complaint Counsel's Proposed Finding No. 1588 mischaracterizes the cited deposition testimony. In the cited deposition testimony, Dr. Murphy testified that even considering the 40 percent figure that Dr. Evans used as a diversion ratio of customers from 1-800 Contacts to other online retailers, that suggests that 60 percent of 1-800 Contacts customers went to a non-online retailer. (CX 9048 (Murphy, Dep. at 198-99)). Dr. Murphy explained that when a significant number of customers are going somewhere other than online retailers, you cannot just ignore where most of the customers are going. (CX 9048 (Murphy, Dep. at 199-200)).

1589. However, Dr. Murphy deviates from standard practice in comparing switching to the full set of sellers in one category (ECPs) with switching to a subset of sellers in another category (non 1-800 Contacts online sellers). (Evans, Tr. 1445).

Response to Finding No. 1589:

Complaint Counsel's Proposed Finding No. 1589 is unsupported by the cited trial testimony. On page 1445 of the trial transcript, Dr. Evans' testimony says nothing about Dr. Murphy's analysis of switching patterns among contact lens consumers.

4. The Imposition of Unilateral Pricing Policies Creates a Natural Experiment that Separately Shows Physical Retailers are Not Close Substitutes for Online Retailers

1590. The effects of manufacturer-imposed unilateral pricing policies ("UPP") further confirm that brick and mortar sellers are not close substitutes for online sellers and that online sellers of contact lenses represent a market. (Evans, Tr. 1445, 1571, *in camera*).

Response to Finding No. 1590:

Complaint Counsel's Proposed Finding No. 1590 is inaccurate and contrary to the weight of the record evidence. Dr. Evans' analysis of UPP is based on his assumptions that UPP did not cause ECPs to raise prices, did not cause optical retail chains to raise prices, and did not cause mass merchants to raise prices. (Evans, Tr. 1445). [redacted]

Dr. Evans' analysis of UPP is also flawed because UPP does not provide a natural experiment showing what would happen if 1-800 Contacts and all other online retailers raised their prices by 5 or 10 percent. (Murphy, Tr. 4172-73). "So because [UPP] doesn't cover in this uniform way all the players in [Dr. Evans'] candidate market and it covers people outside the candidate market, it's kind of simultaneously too narrow and too broad. It doesn't really provide a natural experiment." (Murphy, Tr. 4173).

In addition, Dr. Evans' analysis of UPP is entirely inconsistent with the manufacturers' own intent and purpose with UPP, which was to help ECPs be more competitive against non-ECP retailers. (Murphy, Tr. 4154-55). The manufacturers' reason for instituting UPP in fact emphasizes the importance of competition between online sellers and other discount sellers and ECPs. (Murphy, Tr. 4173). Thus, "the existence of UPP actually cuts against thinking about competition narrowly in terms of online players alone." (Murphy, Tr. 4173).

1591. UPP refers to resale price maintenance programs in which "major contact lens manufacturers prohibited retailers that bought their products from reselling certain of those products at prices below specified levels." (CX8006 at 125 (¶ 271) (Evans Expert Report); CX1336 at 130, *in camera*).

Response to Finding No. 1591:

Respondent has no specific response.

1592. [redacted] (CX8006 at 125 (¶ 271) (Evans Expert Report), *in camera*; CX1336 at 130, *in camera*). Johnson & Johnson terminated its UPP program on April 13, 2016. (CX8006 at 125 (¶ 271) (Evans Expert Report)).

Response to Finding No. 1592:

Respondent has no specific response.

1593. Online discounters and club stores had to raise their prices by roughly 20-25 percent to meet the new minimum prices for products covered by UPP policies. (Evans Tr. 1442-1443; CX8006 at 125 (¶ 272) (Evans Expert Report)).

Response to Finding No. 1593:

Respondent has no specific response.

1594. Physical sellers other than membership clubs were generally not required to increase their prices because their prices were already near or above the UPP-mandated prices. (Evans, Tr. 1445); CX8006 at 125-126 (¶ 272) (Evans Expert Report)).

Response to Finding No. 1594:

Complaint Counsel's Proposed Finding No. 1594 is inaccurate and contrary to the weight of the record evidence. Dr. Evans did not perform any actual analysis of the effect of UPP on the retail prices of independent ECPs, optical retail chains, club stores, or even 1-800 Contacts.

[redacted]

1595. 1-800 Contacts, which sets its prices at a small discount to ECPs, did not need to increase its prices significantly in response to UPP. (Evans, Tr. 1445)

Response to Finding No. 1595:

Complaint Counsel's Proposed Finding No. 1595 is incomplete and inaccurate. UPP forced 1-800 Contacts to raise some of its retail prices on contact lenses. (CX 9025 (Osmond, Dep. at 70-71)). UPP also forced 1-800 Contacts to reduce some of the rebates that it offered to consumers. (CX 9025 (Osmond, Dep. at 71)). Dr. Evans performed no actual analysis of the effect of UPP on 1-800 Contacts' actual retail prices or the rebates, discounts, or other incentives offered by 1-800 Contacts to consumers.

1596. Dr. Evans examined the change in profits on sales of Johnson & Johnson products at four discount online retailers that were forced to substantially increase their prices. (Evans, Tr. 1443-1444; CX8006 at 125-126 (¶ 272) (Evans Expert Report)).

Response to Finding No. 1596:

Respondent has no specific response.

1597. Dr. Evans found that profits increased substantially at these online sellers as a result of these price increases. (Evans, Tr. 1443-1444; CX8006 at 126-127 (¶ 273) (Evans Expert Report)). [redacted] (CX8006 at 127, 194-200 (¶ 273, Appendix H) (Evans Expert Report), *in camera*).

Response to Finding No. 1597:

Respondent has no specific response.

1598. Scott Osmond, 1-800 Contacts' Director of Financial Planning and Analysis, testified that UPP reduced the company's overall discounts, which had a favorable impact on the company's margins. (CX9025 (Osmond, Dep. at 82)).

Response to Finding No. 1598:

Respondent has no specific response.

1599. A February 2015 marketing presentation for 1-800 Contacts states that [redacted] (CX0296 at 008 ("Affiliate and Paid Search Overview"), *in camera*).

Response to Finding No. 1599:

Respondent has no specific response.

1600. Dr. Evans explained that this increase in profits shows "the physical retailers were not a sufficiently significant constraint to prevent the profits [at the discount online sellers] from going up as a result of the price increase." (Evans, Tr. 1445; (CX8006 at 127 (¶ 274) (Evans Expert Report)).

Response to Finding No. 1600:

Complaint Counsel's Proposed Finding No. 1600 is incomplete and misleading. Dr. Evans' analysis covered a relatively short period during which UPPs were in effect. The record evidence shows that 1-800 Contacts, other online retailers, mass merchants, and club stores were vehemently opposed to UPP because of the threat it posed to their business. (Bethers, Tr. 3673, 3680-81, 3686). Mr. Bethers testified that UPP concerned 1-800 Contacts because it took away the concept of consumers' shopping around to find a lower price and because it threatened 1-800 Contacts' principal source of new customers by reducing the incentives for consumers to shop for contact lenses beyond their ECP. (Bethers, Tr. 3673, 3686).

Mr. Clarkson testified similarly that the effect of UPP on AC Lens was "perverse": "In the short term, we actually made more profit because customers were paying higher prices, and so we had more margin. But we found it incredibly difficult to attract new customers. . . . You need new customers coming in and then you need to keep them. When prices go up, existing customers tend to be more loyal. They're not happy, but they tend to be more loyal, but it gets very difficult to attract new customers. ***So UPP was a long-term disaster for us, a short-term boost to margin.***" (Clarkson, Tr. 198-99) (emphasis added)).

Thus, the proposed finding and the cited analysis by Dr. Evans is incomplete and contrary to the record evidence of actual business realities regarding the effects of UPP.

1601. Respondent's expert, Dr. Murphy, argues that, because the UPP-mandated price increases 1) did not cover all online sales in a uniform way; and 2) also affected club stores, they are simultaneously too narrow and too broad to represent a "natural experiment" for the hypothetical monopolist test. (Murphy, Tr. 4172-4173).

Response to Finding No. 1601:

Complaint Counsel's Proposed Finding No. 1601 mischaracterizes the cited trial testimony. Dr. Murphy did explain that UPP does not provide a useful "natural experiment" for the hypothetical monopolist test because it did not impact all retailers in Dr. Evans' candidate market (*i.e.*, 1-800 Contacts and other online retailers) in the same way. (Murphy, Tr. 4172-73). The proposed finding mischaracterizes Dr. Murphy's testimony that UPP impacted retailers outside of the candidate market, which was not limited to "club stores" as suggested in the proposed finding. (Murphy, Tr. 4172-73).

1602. In his first point, Dr. Murphy ignores standard economic practice for defining a market in arguing that the UPP mandated price increases are uninformative because they did not apply uniformly to all online contact lens sellers. Horizontal Merger Guidelines §4.1.1 ("[The hypothetical monopolist] test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.").

Response to Finding No. 1602:

Complaint Counsel's Proposed Finding No. 1602 is inaccurate. The cited portion of the Horizontal Merger Guidelines does not contradict Dr. Murphy's testimony in any way. In fact, the cited portion of the Horizontal Merger Guidelines firmly supports Dr. Murphy's point that UPP is not an adequate natural experiment because UPP had different effects on the prices of the

retailers in Dr. Evans' candidate market that would constitute the so-called hypothetical monopolist.

1603. Dr. Murphy's second point ignores Dr. Evans own analysis of Costco and other club stores. Dr. Evans acknowledged that the "natural experiment" where discount online sellers and club stores were forced to raise price does not - by itself - provide information about substitution between online sellers and club stores. (Evans, Tr. 1446).

Response to Finding No. 1603:

Complaint Counsel's Proposed Finding No. 1603 mischaracterizes the record evidence. The proposed finding mischaracterizes Dr. Murphy's testimony that UPP impacted retailers outside of the candidate market, which was not limited to "club stores" as suggested in the proposed finding. (Murphy, Tr. 4172-73). As shown in Respondent's response to Complaint Counsel's Proposed Finding No. 1594, a major flaw in Dr. Evans' analysis is that UPP had a much broader effect than just raising prices of online retailers and club stores.

1604. However, Dr. Evans concludes that other information indicates that there is little substitution between online sellers of contact lenses and club stores. (CX8006 at 127-128 (¶ 276) (Evans Expert Report)).

Response to Finding No. 1604:

Complaint Counsel's Proposed Finding No. 1604 is contrary to the record evidence. First, the cited portion of Dr. Evans' expert report relies primarily on CX 1162, which this Court held was inadmissible. (Trial, Tr. 168-170). [redacted] Dr. Evans' failure to consider that evidence—despite his discussion of 1-800 Contacts' price-match policy in his expert report (CX 8006-127-28 (Evans Expert Report))—severely undermines the reliability of the evidence cited in support of the proposed finding.

Finally, the proposed finding simply ignores Dr. Evans' testimony that 1-800 Contacts, if it were considering a price hike, *would* consider whether it would lose customers to Costco because the price gap between the two companies would increase. (Evans, Tr. at 1731-1732).

1605. Because club stores require a paid membership, club stores are only an option for members of the club store. (Clarkson, Tr. 196-197; CX9039 (Clarkson, Dep. at 183-185 ("[Club stores are] not quite in our competitive set because you pay a membership fee to join, and the membership fee could be as much as $100 for a year, and you wouldn't join it just to buy contacts."); CX8006 at 127-128 (¶ 276) (Evans Expert Report)).

Response to Finding No. 1605:

Respondent has no specific response.

1606. 1-800 Contacts' stated price-match policy is that it does not match club stores. (CX1334 at 013 (Sept. 2016 Price Matching Review), *in camera*; CX9029 (Bethers, Dep. at 37); CX8006 at 127-128 (¶ 276) (Evans Expert Report). Price matches to club stores were made on a limited discretionary basis by call center personnel though 1-800 Contacts has recently reaffirmed that price-matches to club stores would not be offered and instructed call center personnel to follow this policy." (CX9025 (Osmond, Dep. at 17-18)).

Response to Finding No. 1606:

Complaint Counsel's Proposed Finding No. 1606 is incomplete and misleading. Although 1-800 Contacts' price guarantee does not apply, as written, to retail prices for contact lenses offered by club stores, 1-800 Contacts has in fact matched prices to club stores for some consumers. (CX 9025 (Osmond, Dep. at 18-19); CX 9029 (Bethers, Dep. at 37-38)). [redacted]

1607. Whether or not individual online retailers thought the UPP program was harmful in the long term does not affect the UPP analysis; the UPP may have prevented individual retailers from winning business from other online providers (such as 1-800 Contacts) but there is no evidence that the online retail market on the whole would have lost enough business to defeat the price increase the UPP represented. (Evans, Tr. 1753-1734).

Response to Finding No. 1607:

Complaint Counsel's Proposed Finding No. 1607 mischaracterizes the cited trial testimony and is contrary to the weight of the record evidence. Dr. Evans testified that the fact the one online retailer—Mr. Clarkson/AC Lens—may see long-term harm from UPP did not necessarily alter his view. (Evans, Tr. 1752-54). The problem is that Mr. Clarkson's testimony did not just reflect AC Lens' circumstances. Mr. Bethers testified that 1-800 Contacts had the exact same concern about UPP as Mr. Clarkson, that UPP would make it more difficult to attract new customers. (Bethers, Tr. 3673, 3686). And Mr. Bethers' testimony directly contradicts the proposed finding because his concern was not that 1-800 Contacts would have trouble competing with other online retailers as a result of UPP, but rather that 1-800 Contacts would have trouble competing with ECPs as a result of UPP. (Bethers, Tr. 3673, 3686). Complaint Counsel and their expert, Dr. Evans, cannot ignore the actual concerns of the business people who had to deal with UPP. Complaint Counsel and their expert, Dr. Evans, fail to offer any explanation that would reconcile their views of the effects of UPP with the fact that 1-800 Contacts, along with Luxottica, Walmart, Sam's Club, Costco, and Visionworks, actively opposed UPP. (Bethers, Tr. 3680-82). There is absolutely no basis for Dr. Evans' presumption that all of those retailers were acting contrary to their own business interests.

5. Direct Effects Evidence Indicates that the Online Sale Of Contact Lenses is the Relevant Market

1608. Direct evidence of competitive effects can also inform market definition. (Merger Guidelines, Section IV).

Response to Finding No. 1608:

Complaint Counsel's Proposed Finding No. 1608 is improper because it states a legal conclusion, not a fact.

1609. Instances of head-to-head competition between 1-800 Contacts and its online rivals indicate the online sale of contact lenses is the relevant product market. (*See supra* § 6.A).

Response to Finding No. 1609:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1610. Rivals' search advertising forced 1-800 Contacts to modify its price matching policy to highlight that it would beat rivals' prices by 2 percent. (Evans Tr. 1608-1617; (CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report); CX0634 at 001-002, 011-012; CX9032 (L. Schmidt, Dep. at 132-133); *see supra* § 9.D).

Response to Finding No. 1610:

Complaint Counsel's Proposed Finding No. 1610 is not supported by the cited record evidence. First, Dr. Evans is an expert witness not a fact witness, he has no ability to establish facts relating to what actions 1-800 Contacts took or why it took those actions. Second, the cited exhibit and deposition testimony of Laura Schmidt do not support the proposed finding. CX 634, which is not admitted into evidence but is also referred to as CX 946, simply says that 1-800 Contacts would test the ad copy "we beat any price," which was not something new but rather "was our number 1 producing search copy" that it had not "advertised . . . for the past years as th[e] program was turned off." (CX 946 at 1). Neither CX 634/946 nor the cited deposition testimony of Laura Schmidt state that 1-800 Contacts modified its price matching policy for any reason; the explanation was that 1-800 Contacts was going to test prior advertising copy that had been successful. Moreover, there is no suggestion in CX 634/946 or the cited deposition

testimony of Laura Schmidt that the decision to test prior advertising copy had anything to do with searches for 1-800 Contacts trademark, as opposed to generic or product-name searches.

6. Respondent's Expert, Dr. Murphy, was Unable to Provide Support for his Claim that the Relevant Product Market is All Retail Sales of Contact Lenses

a. Dr. Murphy provided no support for his claim that trademarks tie online sales and ECP (brick & mortar) sales into a single market

1611. Dr. Murphy claimed that the strongest evidence supporting a market that includes all retail sales of contact lenses is the "overall history of 1-800's business and its business model. And its business model in developing its brand name and its investment in advertising has been to win customers away from these other channels . . ." Murphy, Tr. 4153-4154; (CX9048 (Murphy, Dep. at 188).

Response to Finding No. 1611:

Complaint Counsel's Proposed Finding No. 1611 is incomplete and mischaracterizes the cited trial and deposition testimony. During his deposition, Dr. Murphy did testify that he thought the "strongest evidence" that online sales and ECP sales belong in the same relevant market was the "overall history of 1-800's business and its business model." (CX 9048 (Murphy, Dep. at 187-88). However, Dr. Murphy's complete answer to the question shows that he considered many pieces of evidence, in addition to 1-800 Contacts' history and business model. (CX 9048 (Murphy, Dep. at 187-88). Dr. Murphy's trial testimony further shows that he considered many different types of evidence in analyzing the market definition. (Murphy, Tr. 4152-55).

1612. Elaborating on this, Dr. Murphy claimed "[t]he agreements in this case are about trademarks. If you think about how that affects competition it is going to affect competition not just between 1-800 Contacts and other online retailers, but trademarks, and 1-800 trademark in particular is a critical element of their competition against those other players." (CX9048 (Murphy, Dep. at 114-115)).

Response to Finding No. 1612:

Respondent has no specific response.

1613. Dr. Murphy elsewhere criticized Dr. Evans for not tying together the role of trademarks and the definition of the market. (CX9048 (Murphy, Dep. at 253)).

Response to Finding No. 1613:

Respondent has no specific response.

1614. However, in his deposition, Dr. Murphy conceded that the effect of greater competition on a firm's incentive to develop a brand is ambiguous. (CX9048 (Murphy, Dep. at 45-13)). And, Dr. Murphy conceded that he did not try to explicitly measure the effect of greater competition on 1-800's branding incentives. (CX9048 (Murphy, Dep. at 47-52)).

Response to Finding No. 1614:

Respondent has no specific response.

1615. Moreover, Dr. Murphy's expert report did not discuss his theory that trademarks mean the market is broad. (CX9048 (Murphy, Dep. at 156-157)). And, when asked whether he was familiar with "any economic articles that discuss how trademarks affect market definition," Dr. Murphy could only respond "I don't recall any off the top of my head." (CX9048 (Murphy, Dep. at 255)).

Response to Finding No. 1615:

Complaint Counsel's Proposed Finding No. 1615 is inaccurate and mischaracterizes the cited deposition testimony. Dr. Murphy explained that his report discusses extensively the "competition that occurs between 1-800 [Contacts] and the other players in the marketplace, the ECPs." (CX 9048 (Murphy, Dep. at 156). And, on page 156 of the deposition transcript, Dr. Murphy specifically pointed to the place in his report where he explained how a "tax on trademark protection would . . . reduce firms' incentives to make investments in their brands." (CX 9048 (Murphy, Dep. at 156). For these reasons, as Dr. Murphy explained at trial: "Trademarks play an important role there" in analyzing market definition because "the protection of 1-800's trademarks can—will enhance 1-800's ability to compete in the marketplace, that a stronger trademark protection makes them a stronger competitor and in particular in this marketplace will help them compete against ECPs." (Murphy, Tr. 4152-53).

b. Dr. Murphy assertion that that competition with ECPs determines 1-800's prices ignores price match evidence

1616. Dr. Murphy claimed that 1-800's price setting practices support his definition of a market that includes all sales of contact lenses. (Murphy, Tr. 4151; RX0739 at 041 (¶104) (Murphy Expert Report) ("[T]he fact that it [1-800] sets its prices based on a discount off ECP prices is direct evidence that its prices are constrained by ECP prices and, therefore, that ECPS are in the same market as 1-800.”))

Response to Finding No. 1616:

Respondent has no specific response.

1617. However, Dr. Murphy conceded that 1-800 tends to price match other online sellers much more than ECPs in its price match program because "even if they [1-800] are competing aggressively against ECPs, they [1-800] are competing against them [ECPs] on other bases [than price]." (CX9048 (Murphy, Dep. at 189-190)).

Response to Finding No. 1617:

Complaint Counsel's Proposed Finding No. 1617 is incomplete and mischaracterizes the cited deposition testimony. Dr. Murphy did not concede the point set forth in the proposed finding. Dr. Murphy said "I don't know, I don't know for sure." (CX 9048 (Murphy, Dep. at 189). Dr. Murphy then testified that he would not expect that 1-800 Contacts' price matches for many ECPs "because [1-800 Contacts is] generally below the ECPs so I would say it is less likely you are going to have a price match with an ECP even if [1-800 Contacts is] competing aggressively against ECPs, they are competing against them on other bases. [1-800 Contacts is the one] competing with a lower price, so, you wouldn't expect a price match to show up there very often." (CX 9048 (Murphy, Dep. at 189-90).

[redacted]

c. Dr. Murphy failed to show that competition between online sellers and ECPs was sufficient to include them the same market

1618. Dr. Murphy claimed the Fairness to Contact Lens Consumers Act (FCLCA) supports the conclusion that the relevant market in which the analyze 1-800 Contacts' Bidding Agreements consists of all sales of contact lenses. (Murphy Tr. 4154; see also RX0793 at 042 (¶111) (Murphy Expert Report) ("[t]he economic logic behind the FCLCA . . . was that requiring ECPs to provide patients with their prescriptions would make it easier for those patients to substitute between ECPs and lower priced alternatives, such as online or mass merchant contact lens retailers.").

Response to Finding No. 1618:

Respondent has no specific response.

1619. Dr. Murphy conceded that "the fact that there is some substitution doesn't mean you are in the same market automatically." (CX9048 (Murphy, Dep. at 193)).

Response to Finding No. 1619:

Respondent has no specific response.

1620. Dr. Murphy admitted he did not perform any empirical analysis to quantify the amount of substitution that would occur from online retailers to ECPs if some set of online retailers increased their prices. (CX9048 (Murphy, Dep. at 195-196).

Response to Finding No. 1620:

Complaint Counsel's Proposed Finding No. 1620 is incomplete. Dr. Murphy did testify that he did not perform any empirical analysis to quantify the amount of substitution that would occur specifically from online retailers to ECPs if some set of online retailers increases their prices. (CX 9048 (Murphy, Dep. at 195-96)). However, Dr. Murphy explained that such an analysis was unnecessary in his opinion because the relevant question is what constrains 1-800 Contacts' ability to raise prices. (CX 9048 (Murphy, Dep. at 196)).

1621. Dr. Murphy suggested that the introduction of UPP shows contact lens manufacturers wanted to help "ECPs compete more effectively with people who were selling online and other mass merchants who were offering discount sales." (Murphy, Tr. 4154-4155). The

manufacturers' imposition of UPP shows that ECPs were unable to constrain the pricing of online sellers through the ordinary give and take of the marketplace.

Response to Finding No. 1621:

Respondent has no specific response to the first sentence of Complaint Counsel's Proposed Finding No. 1621. The second sentence of Complaint Counsel's Proposed Finding No. 1621 is entirely inaccurate and misleading, and is plainly improper and should be disregarded because it has no citation to record evidence.

1622. J&J terminated its UPP in early 2016. (CX8006 at 125 (¶ 271) (Evans Expert Report)). Dr. Murphy did not discuss what implications Johnson & Johnson's termination of its UPP program has for market definition.

Response to Finding No. 1622:

Respondent has no specific response.

B. The Relevant Geographic Market is the United States

1623. The relevant geographic market for the online sale of contact lenses consists of all relevant products sold to consumers in the United States. (CX8006 at 022-023, 019 (¶54 & n5) (Evans Expert Report)).

Response to Finding No. 1623:

Respondent has no specific response, other than to note that retailers outside of the United States are allowed by law to sell contact lenses to U.S. customers, and there is record evidence that Canadian retailers have a competitive advantage when doing so. (Alovis, Tr. at 1027-1028).

1624. The relevant geographic market does not extend to products sold to consumers outside the United States because contact lenses are healthcare products subject to regulation by national authorities, and because consumers in other jurisdictions require differing storefronts in order to purchase (such as the option to purchase in foreign currency or the option to navigate a website written in a language other than English).

Response to Finding No. 1624:

Respondent has no specific response.

1625. The relevant geographic market extends to the entire United States because many online contact lens retailers ship their products nationally. (Holbrook, Tr. 1860; Evans Tr. 1690, 1692; CX8006 at 092 (¶ 199) (Evans Expert Report)).

Response to Finding No. 1625:

Respondent has no specific response.

1626. Dr. Murphy admits that he did not define a geographic market in his report. (Murphy, Tr. 4318).

Response to Finding No. 1626:

Respondent has no specific response.

1627. From the perspective of a United States consumer, the contact lenses sold by one online retailer are interchangeable with those sold by another online retailer located elsewhere. The product is purchased online and delivered by mail, making the consumer relatively indifferent to the location of the retailer.

Response to Finding No. 1627:

Complaint Counsel's Proposed Finding No. 1627 is incomplete and misleading to the extent it suggests that there is no differentiation among contact lens retailers, or that consumers view all contact lens retailers as perfectly interchangeable. The proposed finding is also improper and should be disregarded because there is no citation to record evidence. *See* Order on Post-Trial Briefs at 2.

C. 1-800 Contacts and the Settling Firms Collectively Have Market Power in the Online Market

1628. 1-800 Contacts and the settling firms jointly have market power in the online contact lens retail market. (Evans, Tr. 1540; CX8006 at 130 (¶ 279) (Evans Expert Report) ("The parties to the agreements account for the substantial majority all of the sales in the relevant antitrust market defined above. That provides a strong presumption that the parties to the agreement, collectively, have significant market power.")).

Response to Finding No. 1628:

Complaint Counsel's Proposed Finding No. 1628 is inaccurate and contrary to the weight of record evidence. For the reasons explained in Respondent's responses to Complaint Counsel's Proposed Findings Nos. 1542-1622, the record evidence does not support the existence of a separate "online contact lens retail market." The proposed finding is also inaccurate because the Settlement Agreements do not apply to a significant number of online contact lens retailers (including thousands of independent ECPs who have online retail websites, optical chains such as America's Best and MyEyeDr, Walmart, JC Penney, Costco, Sam's Club, BJ's Wholesale, CVS, and more than 10 other "pure-play" online retailers). (Bethers, Tr. 3513-14, 3520-21, 3529, 3525-26, 3530, 3538-41). The proposed finding is also inaccurate because of low barriers for new entrants selling contact lenses online. (CX 9029 (Bethers, Dep. at 132-33). The record evidence of numerous recent entrants such as Hubble Contacts confirms the low barriers to entry. (Bethers, Tr. 3584-95; Clarkson, Tr. 290-91, 296).

1. Collectively, 1-800 Contacts and the Settling Firms Account for a High Share of the Online Market

1629. 1-800 has maintained a market share exceeding [redacted] even though its prices are roughly [redacted] higher than prices at other online contact lens sellers. (Murphy, Tr. 4260, 4261, *in camera*).

Response to Finding No. 1629:

Complaint Counsel's Proposed Finding No. 1629 is inaccurate and contrary to the weight of the record evidence. For the reasons explained in Respondent's responses to Complaint Counsel's Proposed Findings Nos. 1542-1622, the record evidence does not support the existence of a separate online contact lens retail market. The record evidence shows that 1-800 Contacts regularly tracks its own market based on all contact lens sales in the United States, for

which 1-800 Contacts market share is about 10 percent. (Bethers, Tr. 3551-56; RX 904 at 39; CX 525 at 40; CX 1446 at 9; RX 1117 at 24).

1630. Collectively, 1-800 Contacts and the settling firms have a market share of 79% of the online contact lens market. (Evans, Tr. 1376; CX8006 at 130 (¶ 279) (Evans Expert Report)).

Response to Finding No. 1630:

Complaint Counsel's Proposed Finding No. 1630 is inaccurate and contrary to the weight of the record evidence. For the reasons explained in Respondent's responses to Complaint Counsel's Proposed Findings Nos. 1542-1622, the record evidence does not support the existence of a separate "online contact lens retail market."

1631. Accounting for what Dr. Evans concluded were Informal Agreements with Lens.com and Lens Discounters, 1-800 Contacts and the settling firms have a market share of 91% of the online contact lens market. (CX8006 at 130 (¶ 279) (Evans Expert Report)).

Response to Finding No. 1631:

Complaint Counsel's Proposed Finding No. 1631 is improper and should be disregarded because Dr. Evans is an expert witness who is not in a position to establish facts as to the existence or lack of an "agreement" between 1-800 Contacts and another retailer. Order on Post-Trial Briefs at 3.

1632. 1-800 Contacts alone has controlled roughly half or more of the market during the relevant period and most recently had 53.6% of the market in 2015. (CX8006 at 023, 131 (¶ 54, Table 1, ¶ 282) (Evans Expert Report); *see also* CX9001 (Bethers, IHT at 159) (1-800 Contacts CEO testifying that 1-800 Contacts' sales constituted approximately 62 percent of the online contact lens market); (RX0428 at 005, 008, *in camera*) (September 2015 management presentation reporting that 1-800 Contacts had a [redacted])).

Response to Finding No. 1632:

Complaint Counsel's Proposed Finding No. 1632 is inaccurate and contrary to the weight of the record evidence. For the reasons explained in Respondent's responses to Complaint Counsel's Proposed Findings Nos. 1542-1622, the record evidence does not support the existence of a separate online contact lens retail market. The record evidence shows that 1-800 Contacts regularly tracks its own market based on all contact lens sales in the United States, for which 1-800 Contacts market share is about 10 percent. (Bethers, Tr. 3551-56; RX 904 at 39; CX 525 at 40; CX 1446 at 9; RX 1117 at 24).

1633. The settling firms' market power is enhanced by the fact that firms outside of the market have little incentive to compete by bidding on keyword advertising. (*See supra* ¶ 243; *infra* § X.C.2.a.i).

Response to Finding No. 1633:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

2. Barriers to Entry Sufficient to "Deter or Counteract" the Consumer Harm

1634. Dr. Evans testified that the anticompetitive effect of concern in this case is the loss of competition due to the suppression of comparative internet search advertising. (Evans, Tr. 1541-1543).

Response to Finding No. 1634:

Complaint Counsel's Proposed Finding No. 1634 is inaccurate and mischaracterizes the cited trial testimony. In the cited trial testimony, Dr. Evans did not say anything about "comparative" advertising. (Evans, Tr. 1541-43). Rather, in the cited trial testimony, Dr. Evans

gave his opinion, as an economist, that the relevant question is the extent to which the settlement agreements at issue suppress price competition among contact lens retailers. (Evans, Tr. 1541-43).

1635. Dr. Evans and Dr. Athey concluded that 1-800 Contacts' course of conduct resulted in a reduction in the number of ad impression and quality of the ads shown on SERPs in response to 1-800 Contacts Branded Queries since about 2005. (*See supra* § IX.B).

Response to Finding No. 1635:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1636. [redacted] (Evans, Tr. 1581, *in camera*).

Response to Finding No. 1636:

[redacted]

1637. [redacted] (Evans, Tr. 1581, *in camera*).

Response to Finding No. 1637:

[redacted]

1638. Because of the large number of quality advertisers excluded by the bidding agreements, effective entry requires several new firms with the resources to advertise consistently on 1-800 Contacts' brand name terms. (Evans, Tr. 1401-1403; 1625; CX8006 at 099 (¶ 216) (Evans Expert Report)).

Response to Finding No. 1638:

Complaint Counsel's Proposed Finding No. 1638 mischaracterizes the cited record evidence. In the cited trial testimony, Dr. Evans did not opine that effective entry would require several new firms with the resources to advertise consistently on 1-800 Contacts' trademark terms. (Evans, Tr. 1401-03, 1625). Rather, Dr. Evans testified simply that he [redacted] (Evans, Tr. 1625). Dr. Evans' testimony

related to the assumptions he used in his model, not to what "effective entry" would require, as the proposed finding suggests.

Furthermore, the proposed finding is inaccurate and incomplete. The question about new entrants is not whether they would effectively replace the exact same advertisements. (Murphy, Tr. 4171). The question about new entrants is more broadly whether they can enter the market and expand their sales to fill any void in competition that might exist as a result of the challenged settlement agreements. (Murphy, Tr. 4171-72). [redacted] New entrants could replace a purported loss in competition in many different ways, including, but not limited to, engaging in the exact same type of advertisements that the agreements restrict, engaging in other types of advertising (such as new entrant Hubble's effective use of social media (Bethers, Tr. 3594) or Warby Parker's effective use of earned media (Bethers, Tr. 3827)), or bringing an established, recognized retail brand (such as Walmart or Costco) into the sale of contact lenses online.

1639. Further, because leading search engines display results with multiple advertising slots, including the most prominent four top slots, entry by multiple advertisers would be required to replace the lost advertising competition and fill empty ad slots. (*See supra* § IV.A, VIII.D).

Response to Finding No. 1639:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Furthermore, the proposed finding is inaccurate and incomplete. The question about new entrants is not whether they would effectively replace the exact same advertisements. (Murphy, Tr. 4171). The question about new entrants is more broadly whether they can enter the market and expand their sales to fill any void in competition that might exist as a result of the challenged settlement agreements. (Murphy, Tr. 4171-72). [redacted] New entrants could replace a purported loss in competition in many different ways, including, but not limited to, engaging in the exact same type of advertisements that the agreements restrict, engaging in other types of advertising (such as new entrant Hubble's effective use of social media (Bethers, Tr. 3594; Clarkson, Tr. 289-296) or Warby Parker's effective use of earned media (Bethers, Tr. 3827)), or bringing an established, recognized retail brand (such as Walmart or Costco) into the sale of contact lenses online.

1640. Further, the requisite group of entrants must include several firms of the size and quality of Vision Direct and AC Lens to restore the quality of the advertising shown on a typical SERP. (*See supra* § IV.A, VIII.D).

Response to Finding No. 1640:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Furthermore, the proposed finding is inaccurate and incomplete. The question about new entrants is not whether they would effectively replace the exact same advertisements. (Murphy, Tr. 4171). The question about new entrants is more broadly whether they can enter the market and expand their sales to fill any void in competition that might exist as a result of the challenged settlement agreements. (Murphy, Tr. 4171-72). [redacted] New entrants could replace a purported loss in competition in many different ways, including, but not limited to, engaging in the exact same type of advertisements that the agreements restrict, engaging in other types of advertising (such as new entrant Hubble's effective use of social media (Bethers, Tr. 3594; Clarkson, Tr. 289-296) or Warby Parker's effective use of earned media (Bethers, Tr. 3827)), or bringing an established, recognized retail brand (such as Walmart or Costco) into the sale of contact lenses online.

a. Entrants must have the incentive and ability to provide comparative advertising

1641. To replace the lost competition, entrants must have both the ability and incentive to cause ads to consistently appear on SERPs for queries containing 1-800 Contacts brand terms with ad text that contains information and offers comparable to the advertising lost because of the Bidding Agreements. (Evans, Tr. 1541-1544; *see also infra* §§ X.C.2.a.i - iii).

Response to Finding No. 1641:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by

specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed finding mischaracterizes the cited trial testimony. In the cited trial testimony, Dr. Evans did not opine, as an economist, that entry must have the ability and incentive to cause ads to consistently appear in response to searches for 1-800 Contacts trademark terms with ad text that contains comparable information to the advertisements that otherwise would have existed but for the challenged settlement agreement. Rather, in the cited trial testimony, Dr. Evans gave his opinion, as an economist, that the relevant question is the extent to which the settlement agreements at issue suppress price competition among contact lens retailers. (Evans, Tr. 1541-43).

Furthermore, the proposed finding is inaccurate and incomplete. The question about new entrants is not whether they would effectively replace the exact same advertisements. (Murphy, Tr. 4171). The question about new entrants is more broadly whether they can enter the market and expand their sales to fill any void in competition that might exist as a result of the challenged settlement agreements. (Murphy, Tr. 4171-72). [redacted] New entrants could replace a purported loss in competition in many different ways, including, but not limited to, engaging in the exact same type of advertisements that the agreements restrict, engaging in other types of advertising (such as new entrant Hubble's effective use of social media (Bethers, Tr. 3594; Clarkson, Tr. 289-296) or Warby Parker's

effective use of earned media (Bethers, Tr. 3827)), or bringing an established, recognized retail brand (such as Walmart or Costco) into the sale of contact lenses online.

i. Many Online Contact Lens Sellers Lack The Incentive to Provide The Lost Comparative Advertising

1642. Many existing online contact lens sellers lack the incentive either to compete aggressively online or to provide significant comparative advertising. [redacted] (Evans Tr. 1748, *in camera*; CX9042 (Evans, Dep. at 140)).

Response to Finding No. 1642:

Complaint Counsel's Proposed Finding No. 1642 is unsupported by the cited record evidence. The cited trial and deposition testimony of Dr. Evans does not relate to "[m]any existing online contact lens sellers." On page 1748 of the trial transcript, Dr. Evans does not say anything that supports the proposed finding. In his cited deposition testimony, Dr. Evans is merely talking about the particular case of Walmart. (CX9042 (Evans, Dep. at 140)).

The proposed finding is also incomplete and inaccurate. First, the proposed finding does not cite any record evidence regarding the number or extent of sponsored ads placed by online contact lens retailers, who have not entered a settlement agreement with 1-800 Contacts, on searches for 1-800 Contacts' trademark terms. Second, the proposed finding contains no support for the proposition that many existing online contact lens sellers lack the incentive to compete aggressively online. Third, the proposed finding is contrary to the record evidence that Walmart in fact has placed sponsored ads on searches for 1-800 Contacts' trademark terms. (Bethers, Tr. 3770-71 ("So there were periods of time where we saw our costs per click go up while Walmart was advertising on our trademark. There were also times when Walmart was advertising on our trademark where our price did not go up.")).

1643. An eye doctor that offers online ordering "is unlikely to offer prices that are competitive with other online players because he or she is probably going to keep the pricing comparable with what the customer would pay in store." (Clarkson, Tr. 192).

Response to Finding No. 1643:

Complaint Counsel's Proposed Finding No. 1643 is unsupported by any admissible or reliable record evidence. Mr. Clarkson's testimony about how independent ECPs may set their prices for online contact lens sales is pure speculation and without any foundation. (Clarkson, Tr. 192). There is no record evidence that Mr. Clarkson had sufficient knowledge of independent ECPs' online pricing to support the quoted testimony. There is no record evidence cited that Mr. Clarkson has the expertise to opine as to how thousands of independent ECPs with online retail stores may set their prices.

1644. Likewise "Costco considers its online optical store to be a service for Costco members." (CX8004 at 002 (¶ 6) (Salas, Decl.)).

Response to Finding No. 1644:

Respondent objects to the word "likewise" in Complaint Counsel's Proposed Finding No. 1644 because it is not clear what that word refers to. Respondent has no other specific response to this proposed finding.

1645. When it began selling contact lenses online, Costco chose to advertise largely by sending emails to existing Costco members. (CX8004 at 002 (¶ 7) (Salas, Decl.)).

Response to Finding No. 1645:

Respondent has no specific response.

1646. Costco has not yet engaged in search advertising to market its online contact lens ordering option. (CX8004 at 002 (¶ 7) (Salas, Decl.)).

Response to Finding No. 1646:

Complaint Counsel's Proposed Finding No. 1646 is incomplete because it is not limited to the time period covered by the cited record evidence. Respondent does not dispute that as of January 23, 2017 (the date of Mr. Salas's declaration), Costco has "not yet done internet search advertising for the online service" relating to contact lens sales. (CX 8004 at 2 (Salas Decl.)).

ii. Potential Entrants Lack The Ability To Provide The Lost Comparative Advertising

1647. The barriers to entry into online contact lens retail are greater today than they were 15 years ago, when AC Lens entered the market, due to established competitors, decreased effectiveness of organic search, and increased expenses related to data security. (CX9039 (Clarkson, Dep. at 185-187)).

Response to Finding No. 1647:

Complaint Counsel's Proposed Finding No. 1647 is inaccurate, unsupported by the cited deposition testimony, and is contrary to the weight of the record evidence. First, Mr. Clarkson testified at his deposition that when he started (AC Lens) there was less competition, no need to engage in paid marketing, and less need for technological expertise. (CX 9039 (Clarkson, Dep. at 186)). In the cited deposition testimony, Mr. Clarkson did not say anything about the "effectiveness of organic search." (CX 9039 (Clarkson, Dep. at 186)). In the cited deposition testimony, Mr. Clarkson did not say anything about "established competitors," rather he simply mentioned that "there was very little competition" when he started. (CX 9039 (Clarkson, Dep. at 186)).

Second, Mr. Clarkson's testimony is insufficient to support the proposed finding. In the cited deposition testimony, Mr. Clarkson mentioned that a new entrant would need "technological expertise" but he provided no specific detail as to what that would require or cost today. (CX 9039 (Clarkson, Dep. at 186)). In the cited deposition testimony, Mr. Clarkson

referred to the need for online security but again he provided no specific detail as to what that would require or cost today. (CX 9039 (Clarkson, Dep. at 186)). In the cited deposition testimony, Mr. Clarkson referred to the "need for capital" to engage in marketing but he provided no specific details as to how difficult it would be to obtain the necessary "capital" or any specific details on the type of marketing or the costs of such marketing that would be required. (CX 9039 (Clarkson, Dep. at 186)).

Third, the proposed finding and the cited deposition testimony of Mr. Clarkson are contrary to the weight of the record evidence. It is relatively easy to enter the business of selling contact lenses online. (CX 9029 (Bethers, Dep. 132-33)). A number of new, entrants (new startup companies) have begun selling contact lenses online, including Simple Contacts, Sightbox, and Hubble Contacts. (Bethers, Tr. 3588-90, 3593-95). Hubble Contacts is an example of a new, startup company that has been able to raise significant capital. (Clarkson, Tr. 290). Mr. Bethers' testimony shows that a new entrant need not engage in paid internet search marketing to reach consumers and be successful. (Bethers, Tr. 3594 (discussing the use of social media by Hubble Contacts), 3827 (discussing the effective use of "earned media" by Warby Parker, an online seller of glasses); (Clarkson, Tr. 291 (testimony that Hubble Contacts is using Facebook and Instagram "to drive consumer demand")). Furthermore, the cited deposition testimony of Mr. Clarkson is directly contradicted by the deposition testimony of Complaint Counsel's own expert, Dr. Evans, who testified: "There are not barriers to entry in that market [online sales of contact lenses] in the sense that anyone can set up a . . . website and anyone can start selling contact lenses and can go to a manufacturer and buy things. . . . [T]here are no barriers in terms of capital equipment like you would have in a physical environment." (CX 9042 (Evans, Dep. at 137-38).

1648. Entry on the scale of Memorial Eye could not replace the lost advertising competition, because Memorial Eye lacked the ability to replace the lost advertising. *see also infra* ¶¶ 1648-1651).

Response to Finding No. 1648:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

Furthermore, the proposed finding is inaccurate and incomplete. The question about new entrants is not whether they would effectively replace the exact same advertisements. (Murphy, Tr. 4171). The question about new entrants is more broadly whether they can enter the market and expand their sales to fill any void in competition that might exist as a result of the challenged settlement agreements. (Murphy, Tr. 4171-72). [redacted] New entrants could replace a purported loss in competition in many different ways, including, but not limited to, engaging in the exact same type of advertisements that the agreements restrict, engaging in other types of advertising (such as new entrant Hubble's effective use of social media (Bethers, Tr. 3594; Clarkson, Tr. 289-296) or Warby Parker's effective use of earned media (Bethers, Tr. 3827)), or bringing an established, recognized retail brand (such as Walmart or Costco) into the sale of contact lenses online.

1649. As Dr. Evans explained: "[t]he fact that Memorial Eye had an average position of [redacted] on non 1-800 Contacts BKW searches and an average position of [redacted] on 1-800 Contacts

BKW searches suggests that, in the absence of the bidding agreements, other firms would likely have performed better on 1-800 Contacts BKW searches." (CX8006 at 100-101 (¶ 218) (Evans Expert Report), *in camera*).

Response to Finding No. 1649:

Complaint Counsel's Proposed Finding No. 1649 should be disregarded because it is based entirely on unreliable, unsupported speculation. The cited record evidence does not contain any analysis supporting Dr. Evans' "suggestion" that other retailers' sponsored ads may have performed better than Memorial Eye's sponsored ads. Notably, Dr. Evans' analysis does not take into consideration any of the record evidence relating to the actual performance of other retailers' sponsored ads on searches for 1-800 Contacts' trademark terms.

1650. When Memorial Eye advertised most actively in response to 1-800 Contacts related searches, its ads appeared on average in the [redacted]. (Evans, Tr. 1605, *in camera*).

Response to Finding No. 1650:

Complaint Counsel's Proposed Finding No. 1650 mischaracterizes the cited trial testimony. [redacted]

1651. Because only [redacted] search engine users saw Memorial Eye's comparative ads, Memorial Eye did not replace the advertising competition that would have occurred if several larger online discount advertisers were competing to advertise on those queries. (CX9042 (Evans, Dep. at 70-71), *in camera*).

Response to Finding No. 1651:

Complaint Counsel's Proposed Finding No. 1651 is unsupported by the cited deposition testimony. In the cited deposition testimony, Dr. Evans did not say anything about whether Memorial Eye's sponsored ads replaced any advertising that would have occurred absent the settlement agreements. (CX9042 (Evans, Dep. at 70-71)). Moreover, in the cited deposition testimony, Dr. Evans does not say anything about what sponsored ads, in his opinion, would have occurred absent the settlement agreements. (CX9042 (Evans, Dep. at 70-71)). Instead, in the cited deposition testimony Dr. Evans is addressing an entirely different question about the percentage or frequency of "matched ads" (i.e., broad match) that appeared on searches for 1-800 Contacts' trademark terms. (CX9042 (Evans, Dep. at 70-71)).

1652. Thus, entry by one or more firms with resources comparable to Memorial Eye could not replace the advertising competition lost as a result of the Bidding Agreements.

Response to Finding No. 1652:

Complaint Counsel's Proposed Finding No. 1652 should be disregarded because it cites no record evidence. For the reasons explained in Respondent's responses to Complaint Counsel's Proposed Findings Nos. 1648-51, the proposed finding is inaccurate and unsupported by the record evidence.

iii. 1-800 Contacts' Litigation Threats Curb Entrants' Incentive And Ability To Replace The Lost Advertising

1653. 1-800 Contacts' litigation threats raise entrants' cost of replacing the lost advertising and of building brand awareness online. (*See infra* ¶¶ 1653-1658).

Response to Finding No. 1653:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by

specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1654. Online paid search advertising is a critical means of developing brand awareness for online sellers. (Hamilton, Tr. 401; Clarkson Tr. 220-221; Holbrook Tr. 1903-1904; CX1449 at 048 [redacted], *in camera*).

Response to Finding No. 1654:

Complaint Counsel's Proposed Finding No. 1654 is incomplete, misleading, and contrary to the weight of the record evidence. First, the proposed finding does not distinguish between trademark and non-trademark search advertising, which is an important distinction in the marketplace and for this case. [redacted] Third, the record evidence from 1-800 Contacts, who typically has the highest brand awareness, shows that paid search advertising is not an effective means for developing actual brand awareness; rather television and other forms of broadscale advertising have been the means that 1-800 Contacts has used to develop high brand awareness. (CX 9001 (Bethers, IHT at 60-61); Coon, Tr. 2727-29; CX 9002 (Craven, IHT at 40); CX 9017 (Blackwood, Dep. at 61-62); RX 736 at 8). [redacted]

[redacted]

[redacted]**;** RX 736 at 9-11).

1655. "[B]eing an online seller in anything does require the ability to use paid advertising effectively, at least when you're just starting out." (CX9042 (Evans, Dep. at 137)).

Response to Finding No. 1655:

Complaint Counsel's Proposed Finding No. 1655 is unsupported by admissible testimony. In the cited deposition testimony, Dr. Evans opines, as an economist, what an online seller requires to be successful. (CX9042 (Evans, Dep. at 137)). Dr. Evans is an economist, not an expert in the business of online retail businesses, and not an expert in marketing strategies. Neither Dr. Evans' testimony nor Dr. Evans' expert reports provide any analysis or foundation for his sweeping opinion as to the need for online sellers to engage in paid search advertising.

1656. Historically, 1-800 Contacts' rivals have sought to build their brands by highlighting their lower price offerings. (Clarkson, Tr. 218; Holbrook, Tr. 1904).

Response to Finding No. 1656:

Complaint Counsel's Proposed Finding No. 1656 is incomplete, misleading, and unsupported by the cited trial testimony. First, the proposed finding is not limited to AC Lens and Memorial Eye, the only two retailers covered by the cited trial testimony. The term "1-800 Contacts' rivals" in the proposed finding is therefore incomplete and misleading because it encompasses independent ECPs, optical retail chains, mass merchants, club stores, and a large number of pure-play online retailers. Second, the proposed finding is unsupported by the cited trial testimony of Mr. Clarkson and Mr. Holbrook, who testified that their advertising often focused on price, but did not mention anything about "build[ing] their brands." (Clarkson, Tr. 218; Holbrook, Tr. 1904).

1657. Entrants would require brand recognition or brand awareness. (CX9042 (Evans, Dep. at 137-138 (describing one barrier to successful entry as the "challenge" of "getting noticed online" by "making oneself visible to a large enough audience"); CX1449 at 048 [redacted], *in camera*; RX1228 at 014 (AEA Analysis titled "Staff Final Update," concludes: [redacted]), *in camera*).

Response to Finding No. 1657:

Complaint Counsel's Proposed Finding No. 1657 is unsupported by the cited record evidence. There is an obvious and significant difference between Dr. Evans' deposition testimony that a barrier to successful entry is "getting noticed" or "making oneself visible" and "brand recognition or brand awareness." A retailer can make itself visible in many ways, without necessarily obtaining brand recognition or brand awareness. [redacted]; RX 736 at 9-11).

1658. Even established firms with well-known brands must have the ability to become known as online vendors of contact lenses. (Hamilton, Tr. 401 ("[W]e needed to let people know that Walgreens was a retailer that offered contacts and to leverage the brand equity that Walgreens had and the good brand goodwill of the brand to let people know that this is one other prescription product that they could purchase from an already trusted retail brand.")).

Response to Finding No. 1658:

Respondent has no specific response.

1659. 1-800 Contacts' strategy of targeting for litigation firms whose ads appear on searches containing 1-800 Contacts' brand terms deters firms from replacing the lost advertising

competition and raises barriers to entry or expansion. (Evans, Tr. 1583; CX8006 at 130 (¶ 280-281) (Evans Expert Report); Holbrook Tr. 1876-1877; 1907-1908; 1910-1911).

Response to Finding No. 1659:

Complaint Counsel's Proposed Finding No. 1659 is inaccurate, incomplete, and contrary to the weight of the record evidence. For example, LensDirect received a cease-and-desist letter from 1-800 Contacts (CX 1241 at 1), yet continued to place sponsored ads on searches for 1-800 Contacts' trademark terms (Alovis, Tr. 1018-20). Although LensDirect has no settlement agreement with 1-800 Contacts, Mr. Alovis testified that he expects LensDirect to significantly increase its revenues in 2017 as a result of a redesigned website, dedicated account representatives, a subscription program, and organic growth, not any form of internet search advertising. (Alovis, Tr. 983-85). The cited record evidence from Dr. Evans, however, takes no account of the actual testimony from Mr. Alovis. (Evans, Tr. 1583; CX 8006 at 130 (¶ 280-281) (Evans Expert Report)). The cited record evidence from Dr. Evans also does not account for the significant number of new entrants selling contact lenses online. (Evans, Tr. 1583; CX 8006 at 130 (¶ 280-281) (Evans Expert Report)). The cited testimony from Mr. Holbrook related only to the particular experience of Memorial Eye, not any other retailer or the industry as a whole.

Finally, the cited record evidence does not support the notion that any legal action by 1-800 Contacts deters entry or expansion. The cited record evidence does not show that placing sponsored ads on searches for 1-800 Contacts' trademark terms is necessary for entry or expansion.

b. At least some entrants must have substantial scale

1660. For a set of entering firms to replace the lost advertising competition, some of the entrants must possess assets needed to be effective online sellers of contact lenses, at least comparable to firms such as Vision Direct or AC Lens. (*See infra* ¶¶ 1660-1667; *see also* [redacted], *in camera*).

Response to Finding No. 1660:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

[redacted]

1661. [redacted].

Response to Finding No. 1661:

[redacted]

1662. .

Response to Finding No. 1662:

Complaint Counsel's Proposed Finding No. 1662 is incomplete because it fails to incorporate the record evidence that online contact retailers can obtain access to a large inventory, as well as fulfillment and distribution capabilities, from major contact lens distributors. (Alovis, Tr. 1026).

1663. 1-800 Contacts had 133 full-time employees devoted to prescription verification as of August 2015. (RX0428 at 038).

Response to Finding No. 1663:

Respondent has no specific response.

1664. (RX1228 at 014 ( ), *in camera*).

Response to Finding No. 1664:

Respondent has no specific response.

1665. [redacted] (CX0439 at 014 (Report entitled "1-800 Contacts: Staff Final Update"), *in camera*).

Response to Finding No. 1665:

[redacted]

1666. [redacted] (CX1343 at 010, *in camera*).

Response to Finding No. 1666:

Respondent has no specific response.

1667. AC Lens stocks 37,000 SKUs. (Clarkson, Tr. 192).

Response to Finding No. 1667:

Respondent has no specific response.

1668. Entrants must have scale and bargaining power with contact lens suppliers sufficient to secure a steady supply of lenses at competitive wholesale prices, which smaller pure-play online firms cannot do. (; Holbrook, Tr. 1863-1866).

Response to Finding No. 1668:

[redacted]

c. There is no history of effective entry in this market

1669. The actual history of entry into the online sales of contacts lenses confirms that entry by new firms or expansion of smaller firms could not offset the anticompetitive harm from the settlement agreements. (Evans, Tr. 1578 ("in terms of online discounters, there has been no firm that's entered since 2000… that has entered and obtained a significant share of online sales")).

Response to Finding No. 1669:

Complaint Counsel's Proposed Finding No. 1669 is inaccurate and contrary to the weight of the record evidence. The record evidence shows a number of significant new entrants. (Bethers, Tr. 3588-90, 3593-95; Clarkson, Tr. 290). The failure of Dr. Evans to even recognize those new entrants renders his cited trial testimony incomplete and unreliable. Dr. Evans also failed to recognize, let alone analyze in any way, the expansion of many independent ECPs into online sales of contact lenses. (Bethers, Tr. 3513-14; Clarkson, Tr. 289-296).

The proposed finding's reference to "anticompetitive harm from the settlement agreements" is unsupported by any record evidence, including the cited record evidence.

1670. A recent analysis prepared by AEA investors, 1-800's owner, cites [redacted] (CX1343 at 014, *in camera*; CX0439 at 014, *in camera*).

Response to Finding No. 1670:

[redacted]

1671. An examination of the experience of the four firms that Dr. Murphy pointed to as examples of entrants shows that none of those firms were effective entrants.

Response to Finding No. 1671:

Complaint Counsel's Proposed Finding No. 1671 should be disregarded because it fails to cite any record evidence. For the reasons described in Respondent's responses to Complaint

Counsel's Proposed Findings Nos. 1672-74, the proposed finding is inaccurate, incomplete, and contrary to the weight of the evidence.

1672. Dr. Murphy claimed that WebEyeCare, which was founded in 2009, has been able [redacted] (RX0739 at 045 (¶ 115) (Murphy Expert Report), *in camera*). But, on cross examination, Dr. Murphy conceded that WebEyeCare only had a [redacted] percent share of online sales six years later. (Murphy, Tr. 4262-4263, *in camera*; RX0739 at 087, *in camera*).

Response to Finding No. 1672:

Complaint Counsel's Proposed Finding No. 1672 is inaccurate and mischaracterizes the cited record evidence. [redacted]

1673. Dr. Murphy also conceded that he grouped Contact Lens King, Walmart, and Costco into a category he labeled "other online" when he calculated market shares for his report. (Murphy, Tr. 4263-4264).

Response to Finding No. 1673:

Complaint Counsel's Proposed Finding No. 1673 is inaccurate and mischaracterizes the cited trial testimony. Dr. Murphy did not testify that he grouped Walmart and Costco into a category labeled "other online," rather he testified that Walmart was "not listed here" (referring to Exhibit 3 of his expert report (RX 739 at 87) and that he did not have Costco in the dataset at all. (Murphy, Tr. 4264).

1674. Likewise, Dr. Murphy could not show that any of his four examples of entry consistently advertised on 1-800 Contacts Branded Queries, gained market share, or disciplined 1-800 Contacts' competitive conduct. (Murphy, Tr. 4262-4266).

Response to Finding No. 1674:

Complaint Counsel's Proposed Finding No. 1674 is unsupported by the cited trial testimony. In the cited trial testimony, Dr. Murphy was not asked about the extent to which any retailer placed sponsored ads on searches for 1-800 Contacts' trademark terms and he was not asked anything about "discipline[]" on 1-800 Contacts. The cited trial testimony of Dr. Murphy only relates to what he was able to calculate, based on the available data, in terms of specific retailer's share of online and total contact lens sales. (Murphy, Tr. 4262-66; RX 739 at 87).

D. The Bidding Agreements had Anticompetitive Effects Within this Market

1675. The Bidding Agreements had anticompetitive effects on consumers who purchased contact lenses online. (*Supra* § IX).

Response to Finding No. 1675:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

XI. No Procompetitive Effects Outweigh Anticompetitive Effects of Restraints

A. The Fact that the Bidding Agreements Settled Lawsuits Does Not Provide a Procompetitive Justification for Their Restrictions

1676. The fact that the Bidding Agreements settled lawsuits does not provide a procompetitive justification for the agreements' restrictions on competition. (*See infra* § XI.A; *supra* § IX.D.1).

Response to Finding No. 1676:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by

specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed summary finding also should be disregarded because it sets forth a proposed legal conclusion, not a proposed factual finding.

1677. Respondent's claimed efficiencies from the settlements are private benefits that accrue to 1-800 Contacts or to the settling parties, but do not offset the harm to consumers from the reduction in informational advertising. (*See supra* § IX.D.1).

Response to Finding No. 1677:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1678. As described in further detail above, an appropriate economic analysis of settlement confirms that the Bidding Agreements harmed consumers without justification. (*See supra* § IX.D.1).

Response to Finding No. 1678:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

B. 1-800 Contacts' Claim that the Bidding Agreements are Justified Because They Incentivize Investment in 1-800 Contacts' Brand and Advertising is Unsupported by Facts or Economic Theory

1679. Dr. Murphy and Dr. Landes claim that the Bidding Agreements are procompetitive because they have the "the potential to . . . increase interbrand competition," which, Drs. Murphy and Landes argue, "can increase consumer welfare by reducing search costs and increasing the quality of products or services." (Murphy, Tr. 4124-4125; RX0739 at 010, 082-083 (¶ 18, 228) (Murphy Expert Report); *see also* RX0737 at 019 (¶ 52) (Landes Expert Report)).

Response to Finding No. 1679:

Complaint Counsel's Proposed Finding No. 1679 does not accurately or completely summarize the relevant testimony of Dr. Murphy and Dr. Landes. Dr. Murphy testified that one cannot infer that the settlements necessarily harmed competition and consumers because they had a clear potential for procompetitive effects, including by reducing distraction and potential confusion and reducing search costs, enhancing the value of trademarks and intensifying interbrand competition by increasing the incentives of retailers to invest in promoting their brands, and enabling the parties to forego costly litigation. (RX 739 at 10 (¶ 18) (Murphy Expert Report)). Dr. Landes testified that trademarks benefit both consumers and firms by, among other things, reducing consumer search costs and creating incentives for firms to create products and services that benefit consumers, and that settlements of trademark disputes reduces costs and increases the frequency of trademark enforcement, thereby increasing trademark protection and creating incentives for firms to compete in ways that benefit consumers. (RX 737 at 19 (¶ 56) (Landes Expert Report)).

1680. Dr. Murphy further claims that the Bidding Agreements are procompetitive because they incentivize 1-800 Contacts' investment in television advertising to bring consumers into the online channel and away from higher-priced eye care professionals. (Murphy, Tr. 4098-4099, 4122-4123); CX9048 (Murphy, Dep. at 146, 234-235)).

Response to Finding No. 1680:

Complaint Counsel's Proposed Finding No. 1680 does not accurately summarize Professor Murphy's testimony on this particular topic. Professor Murphy testified that competition between 1-800 Contacts and ECPs was enhanced by 1-800 Contacts' investment in television advertising (CX 9048 (Murphy, Dep. at 146-147)) and to the extent its return on that investment was reduced because consumers were confused and not finding the 1-800 Contacts' website or not getting to that website for any reason, 1-800 Contacts' incentive to invest in television advertising is reduced and that will be detrimental to consumers because there will be less competition between 1-800 Contacts and ECPs (Murphy, Tr. 4122-4123).

1681. The claims that, but for the Bidding Agreements, 1-800 Contacts would have less incentive to invest in its brand or television advertising lack factual support. (*See infra* ¶¶ 1682-1686).

Response to Finding No. 1681:

Complaint Counsel's Proposed Finding No. 1681 should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, Complaint Counsel's Proposed Finding No. 1681 is not supported by the evidence cited in support of Complaint Counsel's Proposed Finding Nos. 1682-1686 and those individual findings are incorrect, misleading, and unreliable for the reasons set out in Respondent's replies to those findings. In addition, there is substantial evidence and overwhelming factual support, as well as well-settled economic principles, that when the return on investment in brand or television advertising is reduced, the incentive to make that investment is reduced. (*E.g.*, RX 739 at 34 (Murphy Report); Murphy, Tr. 4122; CX 9048 (Murphy, Dep. at 46-49, 146-149); Coon, Tr. 2829-2831, 2833, 2834, 2837-2839). In the absence of the settlement agreements, 1-800 Contacts' return on its

investment in television advertising would have been less and that would have reduced its incentive to invest in such advertising. Dr. Athey's own model predicted that in the absence of the settlement agreements [redacted]. (RX 739 at 83 (Murphy Expert Report); Murphy, Tr. 4134-36). Thus, 1-800 Contacts' return on its investment in television advertising would have been reduced. As, Professors Murphy and Landes testified, when the return on investment is reduced, a firm such as 1-800 Contacts would have less incentive to make that investment. (RX 739 at 10 (¶ 18) (Murphy Expert Report); RX 737 at 21 (¶ 56) (Landes Expert Report)).

1682. In his deposition, Dr. Murphy conceded that the effect of greater competition on a firm's incentive to develop a brand is ambiguous. (CX9048 (Murphy, Dep. at 45)).

Response to Finding No. 1682:

Complaint Counsel's Proposed Finding No. 1682 is misleading, incorrect, and not supported by the cited deposition testimony. Professor Murphy in fact testified that whether competition results in increased investment in developing a brand depends on the nature of the competition and whether additional investment increases the marginal value of the brand, or of having a brand. (CX 9048 (Murphy, Dep. at 44-45)). Professor Murphy went on to testify that, in this case, competition did encourage 1-800 Contacts to invest more in its brand. (CX 9048 (Murphy, Dep. at 45-46) ("I think there is evidence, and good evidence in this case, that that margin of investing in the brand was an important part of the marketplace.")).

1683. Dr. Murphy also conceded that he did not try to explicitly measure the effect of greater competition on 1-800 Contacts' branding incentives. (CX9048 (Murphy, Dep. at 47-52)).

Response to Finding No. 1683:

Complaint Counsel's Proposed Finding No. 1683 is incorrect, misleading, and not supported by the cited deposition testimony. Professor Murphy in fact testified that while he did

not go through all of the steps of determine precisely how things would have changed in the but-for world, he did analyze the effects of competition on 1-800 Contacts' investment in its brand and determined the relative magnitude of the effect and that, directionally, increased protection for 1-800 Contacts' trademarks resulted in increased investment in its brand. (CX 9048 (Murphy, Dep. at 47-52); RX 739 at 36-37 (¶¶ 89-90), Ex. 8) (Murphy Expert Report)).

1684. But for the Bidding Agreements, 1-800 Contacts' ad would still appear in the first position on search results pages appearing in response to 1-800 Contacts Branded Queries. (*See infra* Section XI.D.2.a).

Response to Finding No. 1684:

Complaint Counsel's Proposed Finding No. 1684 should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. Further, 1-800 Contacts' ad did not always appear in the first position on search results pages appearing in response to 1-800 Contacts Branded Queries. (*e.g.*, CX 845 at 1).

1685. Appearing in the number one position confers significant benefits to an advertiser. (Athey, Tr. 917).

Response to Finding No. 1685:

Complaint Counsel's Proposed Finding No. 1685 is vague and ambiguous in its use of the word "significant" to modify "benefits." Respondent further objects that the term "benefits" is vague and ambiguous in this context. Respondent does not dispute that being in the first position will usually result in more clicks for that ad than if that same ad were to appear in the second, third, or other lower position. (CX 9043 (Athey, Dep. at 96-97)). Whether or not

obtaining additional clicks confers "significant benefits" or any "benefits" depends on a number of factors, including the CPC, the conversion rate, who else is bidding, and what ads other bidders are presenting. (*E.g.*, RX 701 (Varian, Decl. ¶¶ 6, 16); RX 704 (Iyer, Decl. ¶¶ 20-22))

1686. Dr. Athey's model has shown that, but for the Bidding Agreements, the position effect of appearing in the number one ad position, the brand effect of being 1-800 Contacts, and the searched-for firm effect of being the firm whose name appears in the search query all provide large benefits to 1-800 Contacts in 1-800 Contacts Branded Queries. Taking these factors into account, her model shows that but for the Bidding Agreements, 1-800 Contacts would still receive 43.8 clicks for each 100 1-800 Contacts Branded Queries. (CX8007 at 030, 032 (¶ 88, 92, Table 2) (Athey Expert Report)).

Response to Finding No. 1686:

Complaint Counsel's Proposed Finding No. 1686 is vague and ambiguous in its use of the word "large" to modify "benefits." Respondent further objects that the term "benefits" is vague and ambiguous in this context. The first sentence of Complaint Counsel's Proposed Finding No. 1686 is vague, ambiguous, inaccurate, and not supported by the cited pages from Dr. Athey's report, or by the cited table. Complaint Counsel offer no factual support for the first sentence, and there is none. The second sentence of Complaint Counsel's Proposed Finding No. 1686 is inaccurate and misleading. What Dr. Athey's model purports to show is that in the actual world with the settlement agreements in place, 1-800 Contacts would get 45.8 clicks for each 100 searches for 1-800 Contacts' trademarks and that in the but-for world without the settlement agreements 1-800 Contacts would get 43.8 clicks for each 100 searches for 1-800 Contacts' trademarks. (CX 8007 at 32 (Table 2) (Athey Expert Report)). However, as noted earlier, what actually matters is the number of conversions, not the number of clicks, and Dr. Athey's model estimates that in the but-for world without the settlement agreements [redacted]. (RX 739 at 83 (Murphy Expert Report); Murphy, Tr. 4134-4136). Dr. Athey's model also

estimates that in the but-for world without the settlement agreements all other on-line sellers of contact lenses would have gotten [redacted]. (RX 739 at 83, 0084 (Murphy Expert Report); Murphy, Tr. 4136). Thus, according to Dr. Athey's model, in the but-for world without the settlement agreements there would have been [redacted] than in the actual world with the settlement agreements. (RX 739 at 84 (Murphy Expert Report); Murphy, Tr. 4136-4139).

1687. The claim that but for the Bidding Agreements, 1-800 Contacts would have less incentive to invest in its brand is contrary to economic principles. (*See infra* ¶¶ 1688-1690).

Response to Finding No. 1687:

Complaint Counsel's Proposed Finding No. 1687 should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual cited findings, Complaint Counsel's Proposed Finding Nos. 1688-1690, do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those particular findings. Further, Complaint Counsel's Proposed Finding No. 1687 is inaccurate and not supported by the cited evidence, or any evidence.

1688. The premise underlying Dr. Murphy and Dr. Landes' assertions that the Bidding Agreements increase consumer welfare by enhancing the "value of 1-800 Contacts' trademark" is that "reducing advertising competition supports inter-brand competition." (CX8010 at 050 (¶ 130) (Athey Rebuttal Expert Report)).

Response to Finding No. 1688:

Complaint Counsel's Proposed Finding No. 1688 should be rejected because Dr. Athey is not qualified to testify to her opinion as to what the premise or premises were underlying opinions of Dr. Murphy and Dr. Landes. If Complaint Counsel had wanted to know the premises

underlying certain of the opinions of Drs. Murphy and Landes, they should have asked them. Furthermore, Complaint Counsel's Proposed Finding No. 1688 is inaccurate, misleading, and inconsistent with the opinions actually expressed by Dr. Murphy and Dr. Landes. As, Dr. Murphy opined in his expert report, the settlements had the potential to enhance the value of 1-800's trademarks and increase interbrand competition. Increasing interbrand competition can increase consumer welfare by reducing search costs and increasing the quality of the products or services sold. (RX 739 at 81-82 (Murphy Expert Report)). Dr. Landes' opinions were similar. (RX 737 at 13-15, 0021 (¶¶ 32-37 56) (Landes Expert Report)).

1689. The notion that reducing advertising competition supports inter-brand competition is contrary to the findings of the economic literature, including dozens of empirical studies, regarding horizontal restraints on advertising. (*See supra* Section VII.B (discussing the economic literature and Dr. Evans conclusion based on that literature that economics provides a strong presumption that horizontal agreements to prevent informative advertising are harmful to consumers and competition)).

Response to Finding No. 1689:

Complaint Counsel's Proposed Finding No. 1689 should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual cited findings do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those particular findings. Further, Complaint Counsel's Proposed Finding No. 1689 incorrectly and inaccurately describes the economic principle at issue. That principle is that reducing ***trademark infringement*** and protecting trademarks will enhance interbrand competition and increase consumer welfare. This economic principle is well established and well-recognized in the economic literature. (RX 739 at 32-33, 0034-36 (¶¶ 78-82, 87-90) (Murphy Expert Report); RX 737 at 5-18, 0021 (¶¶ 9-49, 56) (Landes Expert Report)).

1690. Indeed, it is increasing advertising competition by removing restrictions on advertising—not decreasing such competition by implementing horizontal advertising restrictions—that incentivizes firms to invest in the value of their trademarks. (CX8010 at 050 (¶¶ 130-131) (Athey Rebuttal Expert Report) ("I consider it more likely that competing with other brands will increase the incentive for each retailer to invest in their trademark, and the consistent, high quality products that support trademark investment, as identified by Dr. Murphy. . . . [T]he value of trademarks and the role of trademarks in signaling to consumers and reducing search costs should be higher if advertising is not restricted. Faced with attracting a consumer who is presented with attractive alternatives from other retailers, 1-800 Contacts' incentive to invest in the value of their trademark will increase, rather than decrease.")); Athey, Tr. 807-808 ("Q. Why did you reach the conclusion that faced with attracting a consumer who is presented with attractive alternatives from other retailers, 1-800 Contacts' incentive to invest in the value of their trademark will increase rather than decrease? A. When a consumer sees two very similar products at different prices and has information about that, they're going to be very likely to choose the lower-priced product, and so in that scenario, a key way to retain consumers is to convince them that you have a great product.")).

Response to Finding No. 1690:

Complaint Counsel's Proposed Finding 1690 should be disregarded. It misses the point. The restrictions imposed by the settlement agreements were imposed in response to conduct that was likely to confuse consumers and that constituted trademark infringement, unfair competition, and various other legal wrongs. The settlement agreements narrowly restrict conduct so as to reduce the risk of trademark infringement (and other legal wrongs), avoid the harm to consumers that flows from such wrongful conduct, and increase consumer welfare by, among other things, reducing search costs. By ignoring the fact that the conduct in question constitutes trademark infringement (and runs afoul of other legal doctrines as well), Dr. Athey misses the point. (*E.g.*, RX 737 at 18-19 (¶¶ 51-53) (Landes Expert Report); RX 739 at 81 (¶ 224) (Murphy Expert Report)).

C. 1-800 Contacts' Claim That the Bidding Agreements Are Justified Because They Reduce Consumer Confusion Lacks Factual Basis

1. There Is No Evidence Of Actual Confusion Caused By The Mere Appearance Of Competitive Ads In Response To A 1-800 Contacts Branded Query

a. 1-800 Contacts did not monitor its rivals' advertisements for confusing text or uses of its trademarks in the ad text

1691. 1-800 Contacts did not monitor other companies' advertisements for confusing text or uses of its trademarks in the ad text. (*See infra* § X.C.1.a).

Response to Finding No. 1691:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1692. Jonathan Coon, 1-800 Contacts' CEO when 1-800 Contacts entered into the challenged bidding agreements with its competitors, believed that "confusion" occurred whenever a competitor's advertisement appeared in response to a search for a 1-800 Contacts trademark term, whether or not a 1-800 Contacts trademark term appeared in the text of the advertisement. (CX9035 (Coon, Dep. at 10)).

Response to Finding No. 1692:

Complaint Counsel's Proposed Finding No. 1692 mischaracterizes the cited deposition testimony. In the cited deposition testimony, Mr. Coon clearly explained his view that the use of 1-800 Contacts' trademark in the text of a sponsored ad by another retailer was not strictly necessary for consumers to be confused: "From my point of view, confusion was taking place, you know, whether our trademark appeared in the text of the ad or not. Somebody could type in '1-800 Contacts' and an ad could just say . . . 'Save 50 percent,' and somebody would think that they're clicking—I mean, Google ads don't really look like ads. Right? They're just text links,

and those text links look pretty much like the natural search text links. They're almost indistinguishable from each other. So I don't think that's a—from my business perspective, that wasn't a requirement that our trademark appear in the text. Somebody could still be confused, and we frequently saw evidence of it." (CX 9035 (Coon, Dep. at 10)).

1693. When he was CEO of 1-800 Contacts, Mr. Coon never conducted any empirical analysis to establish the correctness or incorrectness of his view that any advertisement that appears in response to a consumer typing in the term "1-800contacts" is likely to be confusing. (Coon, Tr. 2872-2873).

Response to Finding No. 1693:

Complaint Counsel's Proposed Finding No. 1693 is incomplete and misleading. Mr. Coon did testify that he never conducted an "empirical analysis," but he explained that his views as to whether consumers would be confused by certain types of ads were based on his extensive experience in the "direct marketing business" and information that 1-800 Contacts received regarding consumers' confusion between different contact lens retailers. Mr. Coon testified: "[W]e didn't do an empirical study. It's very clear to me, based on my 20 years of experience in a direct marketing business, spending hundreds of millions of dollars on advertising, that people were confused. That's my point of view." (Coon, Tr. 2873). "[W]e know people were confused because we heard about it. They thought they'd done business with us. They'd call us to check the status of an order and they weren't in our system. They thought they'd ordered from us and they hadn't, so pretty strong evidence that they were confused." (Coon, Tr. 2728).

1694. Mr. Coon never evaluated the text of a competitor's advertisement that appeared in response to a search for 1-800 Contacts' trademark terms to determine whether or not it was confusing. (CX9004 (Coon, IHT at 157)).

Response to Finding No. 1694:

Complaint Counsel's Proposed Finding No. 1694 is inaccurate and mischaracterizes the cited investigative hearing testimony. In the cited testimony, Mr. Coon was asked whether he had evaluated the text of a sponsored ad appearing in response to a search for 1-800 Contacts' trademark terms and concluded that it would not be confusing to anyone. (CX 9004 (Coon, IHT at 157)). Mr. Coon was not asked, as suggested in the proposed finding, whether or not he had ever evaluated the text of competitors' advertisements to determine whether they were confusing. Clearly, Mr. Coon has evaluated the text of advertisements. (CX 9004 (Coon, IHT at 157)). Mr. Coon testified that, in his view, "I don't think people stop and really read through the results [i.e., the text of the sponsored ads]," thus he did not believe that the text of a sponsored ad could necessarily eliminate all potential confusion. (CX 9004 (Coon, IHT at 157)). The documentary evidence shows that, in 2008, Mr. Coon and 1-800 Contacts' Board of Directors did look at the actual text of sponsored ads and that they were considering the entire problem of sponsored ads appearing on searches for 1-800 Contacts' trademark terms in the context of a legal question about the likelihood of confusion among consumers. (CX 621-119).

1695. Mr. Coon did not recall Vision Direct ever using 1-800 Contacts' trademarks in the text of its advertisement. (Coon, Tr. 2855).

Response to Finding No. 1695:

Respondent has no specific response, other than to note that the proposed finding is misleading to the extent that it suggests Mr. Coon could reasonably be expected in 2017 to recall the text of Vision Direct's sponsored ads that may have run any time over the last 14 years (since 2004).

1696. Mr. Coon did not recall Walgreens.com ever using 1-800 Contacts' trademarks in the text of its advertisement. (Coon, Tr. 2855).

Response to Finding No. 1696:

Respondent has no specific response, other than to note that the proposed finding is misleading to the extent that it suggests Mr. Coon could reasonably be expected in 2017 to recall the text of Walgreens' sponsored ads that may have run any time over the last 14 years (since 2004).

1697. 1-800 Contacts never discussed whether competitors' advertisements were confusing because the relevant question in 1-800 Contacts' trademark enforcement efforts was "not a question of the content of the ad. It's the placement of the ad." (CX9001 (Bethers, IHT at 123-124)).

Response to Finding No. 1697:

Complaint Counsel's Proposed Finding No. 1697 is incomplete and misleading. First, the proposed finding is misleading to the extent it suggests the discussion or concern was not about confusion. Mr. Bethers clearly testified that the concern was that the placement of the ad itself made it confusing to consumers: "And so the confusion is the mere placement in that space. The competitors that we have at one point used confusing content. But it's not just confusing content. It's also sheer placement." (CX 9001 (Bethers, IHT at 124)). Second, the question asked during Mr. Bethers investigative hearing explicitly recognized that this was not Mr. Bethers' area of "primary responsibility." (CX 9001 (Bethers, IHT at 123)). Third, the proposed finding improperly extends to the whole company 1-800 Contacts and its "trademark enforcement efforts," but the proposed finding should be limited to Mr. Bethers' personal views. Fourth, the proposed finding is misleading because many of the discussions or analyses conducted by 1-800 Contacts or its outside counsel on this issue would be protected by the attorney-client privilege or the attorney work product doctrine. The proper evidence for 1-800 Contacts' position on this issue would be the complaints actually filed by 1-800 Contacts in

federal courts and/or the legal briefs submitted by 1-800 Contacts in the course of litigating the trademark disputes.

1698. 1-800 Contacts' position was that "confusion" resulted from the "mere placement" of a competitors' advertisement in response to a 1-800 Contacts' trademark term. (CX9001 (Bethers, IHT at 123-124)).

Response to Finding No. 1698:

Complaint Counsel's Proposed Finding No. 1698 is incomplete and misleading. First, the question asked during Mr. Bethers investigative hearing explicitly recognized that this was not Mr. Bethers' area of "primary responsibility." (CX 9001 (Bethers, IHT at 123)). Second, the proposed finding improperly extends to the whole company 1-800 Contacts, but the proposed finding should be limited to Mr. Bethers' personal views. Many of the discussions or analyses conducted by 1-800 Contacts or its outside counsel on this issue would be protected by the attorney-client privilege or the attorney work product doctrine. The proper evidence for 1-800 Contacts' position on this issue would be the complaints actually filed by 1-800 Contacts in federal courts and/or the legal briefs submitted by 1-800 Contacts in the course of litigating the trademark disputes.

1699. Laura Schmidt, 1-800 Contacts' marketing director, generated reports of every competitor whose advertisements appeared in response to a search containing a 1-800 Contacts trademark. (CX9032 (L. Schmidt, Dep. at 95)).

Response to Finding No. 1699:

Complaint Counsel's Proposed Finding No. 1699 mischaracterizes the cited deposition testimony. Laura Schmidt testified during her deposition that screenshots were taken of other retailers' sponsored ads that appeared in response to a search for 1-800 Contacts' trademark terms. (CX 9032 (L. Schmidt, Dep. at 95)). Ms. Schmidt did not testify, nor could she, that 1-

800 Contacts was able to generate a screenshot of every advertisement that appeared in response to a search for 1-800 Contacts' trademark terms.

1700. Ms. Schmidt reported to 1-800 Contacts' legal department every competitive advertisement that appeared in response to a search containing a 1-800 Contacts trademark. (CX9032 (L. Schmidt, Dep. at 95-96)).

Response to Finding No. 1700:

Complaint Counsel's Proposed Finding No. 1700 mischaracterizes the cited deposition testimony. Laura Schmidt testified during her depositions that screenshots were taken of other retailers' sponsored ads that appeared in response to a search for 1-800 Contacts' trademark terms, and that those screenshots were provided "to legal." (CX 9032 (L. Schmidt, Dep. at 95-96)). Ms. Schmidt did not testify, nor could she, that 1-800 Contacts was able to generate a screenshot of every advertisement that appeared in response to a search for 1-800 Contacts' trademark terms.

1701. Ms. Schmidt never made a determination that a particular advertisement should not be reported to the legal department based on the content of the advertisement. (CX9032 (L. Schmidt, Dep. at 95)).

Response to Finding No. 1701:

Complaint Counsel's Proposed Finding No. 1701 is incomplete and misleading. Ms. Schmidt never testified that it was her job, responsibility, or role to review the advertisements in screenshots and make a determination whether or not they should be sent to legal for consideration. Ms. Schmidt testified that the process was simply that screenshots containing an advertisements from another retailer on a search for 1-800 Contacts' trademark terms would be sent to legal. (CX 9032 (L. Schmidt, Dep. at 95-96)). Indeed, Ms. Schmidt specifically testified that she "wasn't involved in determining" whether any particular advertisement was likely to cause consumer confusion. (CX 9012 (L. Schmidt, IHT at 151)).

1702. Ms. Schmidt never made a determination that a particular advertisement should not be reported to the legal department because the advertisement clearly identified the advertiser. (CX9032 (L. Schmidt, Dep. at 95)).

Response to Finding No. 1702:

Complaint Counsel's Proposed Finding No. 1702 is incomplete and misleading. Ms. Schmidt never testified that it was her job, responsibility, or role to review the advertisements in screenshots and make a determination whether or not they should be sent to legal for consideration. Ms. Schmidt testified that the process was simply that screenshots containing an advertisements from another retailer on a search for 1-800 Contacts' trademark terms would be sent to legal. (CX 9032 (L. Schmidt, Dep. at 95-96)). Indeed, Ms. Schmidt specifically testified that she "wasn't involved in determining" whether any particular advertisement was likely to cause consumer confusion. (CX 9012 (L. Schmidt, IHT at 151)).

1703. Ms. Schmidt did not recall ever evaluating the text of an advertisement that appeared in response to a 1-800 Contacts' trademark search term. (CX9012 (L. Schmidt, IHT at 148)).

Response to Finding No. 1703:

Complaint Counsel's Proposed Finding No. 1702 is incomplete and misleading. Ms. Schmidt never testified that it was her job, responsibility, or role to review the advertisements in screenshots and make a determination whether or not they should be sent to legal for consideration. Ms. Schmidt testified that the process was simply that screenshots containing an advertisements from another retailer on a search for 1-800 Contacts' trademark terms would be sent to legal. (CX 9032 (L. Schmidt, Dep. at 95-96); CX 9012 (L. Schmidt, IHT at 148)). Indeed, Ms. Schmidt specifically testified that she "wasn't involved in determining" whether any particular advertisement was likely to cause consumer confusion. (CX 9012 (L. Schmidt, IHT at 151)).

1704. Any competitive advertisement that appeared in response to a 1-800 Contacts' trademark search query was considered a concern to send to 1-800 Contacts' legal department. (CX9012 (L. Schmidt, IHT at 151-152)).

Response to Finding No. 1704:

Complaint Counsel Proposed Finding No. 1704 is inaccurate and mischaracterizes the cited testimony. Ms. Schmidt testified that her role and the process was simply to provide screenshots of any advertisement from another retailer that appeared in response to a search for 1-800 Contacts' trademark terms to the legal department. (CX 9012 (L. Schmidt, IHT at 151-52)). Indeed, Ms. Schmidt specifically testified that she "wasn't involved in determining" whether any particular advertisement was likely to cause consumer confusion. (CX 9012 (L. Schmidt, IHT at 151)).

1705. When compiling 1-800 Contacts' weekly trademark monitoring reports, which identified every competitive advertisement that appeared in response to 1-800 Contacts Branded Queries (*see supra* VI.B.4), 1-800 Contacts' senior search marketing manager was never asked to assess whether any of the competitive advertisements were misleading. (Craven, Tr. 585, 588).

Response to Finding No. 1705:

Complaint Counsel's Proposed Finding No. 1705 is inaccurate and misleading to the extent it suggests that 1-800 Contacts' monitoring reports were able to capture "every competitive advertisements that appeared in response to" a search for 1-800 Contacts' trademark terms. Respondent has no other specific response.

1706. 1-800 Contacts' former senior search marketing manager did not recall ever determining that certain advertisements that appeared in response to a 1-800 Contacts Branded Query were permissible because the content of the advertisement was not confusing. (CX9002 (Craven, IHT at 129).

Response to Finding No. 1706:

Complaint Counsel's Proposed Finding No. 1706 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved making a determination as to whether an advertisement was confusing or not. The proposed finding does not cite any record evidence in which Mr. Craven testified that his role or responsibility, or even that it was within his capabilities or expertise, to make a determination as to whether an advertisement was confusing or not. Mr. Craven testified that his role was simply to monitor the appearance of advertisements by other retailers on searches for 1-800 Contacts' trademark terms and send those "over to legal." (CX 9002 (Craven, IHT, at 129)).

1707. When 1-800 Contacts' senior search marketing manager, Bryce Craven, contacted Coastal Contacts requesting that Coastal remove an advertisement that appeared in response to a 1-800 Contacts trademark term, Mr. Craven did not make any prior independent determination that the advertisement was actually confusing. (CX9002 (Craven, IHT at 173-174).

Response to Finding No. 1707:

Complaint Counsel's Proposed Finding No. 1707 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved making a determination as to whether an advertisement was confusing or not. The proposed finding does not cite any record evidence in which Mr. Craven testified that his role or responsibility, or even that it was within his capabilities or expertise, to make a determination as to whether an advertisement was confusing or not.

b. 1-800 Contacts made no effort to evaluate whether, or to what extent, consumers were confused in any way by competitors' advertisements

1708. 1-800 Contacts made no effort to evaluate whether, or to what extent, consumers were confused in any way by competitors' advertisements. (*See infra* § XI.C.1.b).

Response to Finding No. 1708:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1709. 1-800 Contacts' former CEO, Jonathan Coon, could not recall collecting any information about consumer confusion among brands while he was at 1-800 Contacts. (CX9004 (Coon, IHT at 136)).

Response to Finding No. 1709:

Complaint Counsel's Proposed Finding No. 1709 is inaccurate and incomplete. Mr. Coon testified during trial: "we know people were confused because we heard about it. They though they'd done business with us. They'd call us to check the status of an order and they weren't in our system. They thought they'd ordered from us and they hadn't, so pretty strong evidence that they were confused." (Coon, Tr. 2728).

1710. Aside from a survey conducted during its litigation with Lens.com, 1-800 Contacts did not conduct any analysis of consumer confusion. (CX9029 (Bethers, Dep. at 167-168)).

Response to Finding No. 1710:

Complaint Counsel's Proposed Finding No. 1710 is inaccurate and misleading to the extent that it suggests that a survey is the only method by which to conduct an analysis of consumer confusion. The relevant test under federal trademark law is "a likelihood of confusion," which is determined based on analysis of a number of factors, including: "(a) the degree of similarity between the marks; (b) the intent of the alleged infringer in adopting its mark; (c) evidence of actual confusion; (d) the relation in use and the manner of marketing

between the goods or services marketed by the competing parties; (e) the degree of care likely to be exercised by purchasers; and (f) the strength or weakness of the marks." *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1239 (10th Cir. 2013).

The proposed finding is also inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)).

1711. 1-800 Contacts has conducted several consumer research sessions since its current CEO, Mr. Bethers, has been with the company. (Bethers, Tr. 3690-3691).

Response to Finding No. 1711:

Respondent has no specific response.

1712. None of the consumer research sessions conducted by 1-800 Contacts were intended to assess whether consumers were confused by the presence of competitors' advertisements in response to searches for 1-800 Contacts' trademark terms. (Bethers, Tr. 3854).

Response to Finding No. 1712:

Complaint Counsel's Proposed Finding No. 1712 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)).

1713. None of the consumer research sessions conducted by 1-800 Contacts studied whether consumers were confused by the presence of competitors' advertisements in response to searches for 1-800 Contacts' trademark terms. (Bethers, Tr. 3854-3855).

Response to Finding No. 1713:

Complaint Counsel's Proposed Finding No. 1713 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or

other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)).

1714. Timothy Roush, 1-800 Contacts' Chief Marketing Officer, was unaware of any system within 1-800 Contacts that was used for recording instances of customer confusion. (CX9034 (Roush, Dep. at 70)).

Response to Finding No. 1714:

Respondent has no specific response.

1715. 1-800 Contacts' former CEO, Jonathan Coon, could not recall any study that 1-800 Contacts performed to assess whether customers were diverted to Coastal because they were confused about the identity of the seller from which they purchased contact lenses. (CX9035 (Coon, Dep. at 39-40)).

Response to Finding No. 1715:

Complaint Counsel's Proposed Finding No. 1715 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)). The proposed finding is also inaccurate and mischaracterizes the cited deposition testimony. Mr. Coon testified that he did not recall "seeing a study," but with respect to the number of customers who were diverted to Coastal or Vision Direct because they were confused about the identity of the seller, Mr. Coon testified: "We know that it happened because we had . . . discussions about it happening. We know that it happened some of the time. Again, we make lots of business decisions based on what we think is right for the customer, not based on any specific data." (CX 9035 (Coon, Dep. at 39)).

1716. 1-800 Contacts' former CEO, Mr. Coon, could not recall any study that 1-800 Contacts performed to assess whether customers were diverted to Vision Direct because they were confused about the identity of the seller from which they purchased contact lenses. (CX9035 (Coon, Dep. at 39-40)).

Response to Finding No. 1716:

Complaint Counsel's Proposed Finding No. 1716 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)). The proposed finding is also inaccurate and mischaracterizes the cited deposition testimony. Mr. Coon testified that he did not recall "seeing a study," but with respect to the number of customers who were diverted to Coastal or Vision Direct because they were confused about the identity of the seller, Mr. Coon testified: "We know that it happened because we had . . . discussions about it happening. We know that it happened some of the time. Again, we make lots of business decisions based on what we think is right for the customer, not based on any specific data." (CX 9035 (Coon, Dep. at 39)).

1717. Brandon Dansie, a former 1-800 Contacts employee, did not recall ever looking into whether competitors' advertisements appearing in response to 1-800 Contacts trademark search terms were confusing to customers. (CX9005 (Dansie, IHT at 161).

Response to Finding No. 1717:

Complaint Counsel's Proposed Finding No. 1717 is incomplete and misleading to the extent it suggests that Mr. Dansie's role or responsibility was ever to determine whether advertisements were confusing to customers. Mr. Dansie specifically testified that was not his role, and that his role was to monitor searches for 1-800 Contacts' trademark terms in order "to understand performance." (CX 9005 (Dansie, IHT at 157-58)).

1718. 1-800 Contacts labeled any advertisement that appeared in response to a 1-800 Contacts Branded Query as "confusing" to customers. (CX9006 (D. Zeidner, IHT at 173)).

Response to Finding No. 1718:

Complaint Counsel's Proposed Finding No. 1718 is inaccurate and mischaracterizes the cited investigative hearing testimony. Mr. David Zeidner did not testify that every advertisement was labeled as confusing. He testified that he considered any ad that appeared in response to a search for 1-800 Contacts' trademark terms that was "confusing to a consumer" was "an issue," from his perspective as in-house counsel for 1-800 Contacts. (CX 9006 (D. Zeidner, IHT at 173)).

c. 1-800 Contacts gathered no evidence of actual confusion regarding competitors' advertisements that appeared in response 1-800 Contacts Branded Queries

1719. 1-800 Contacts gathered no evidence of actual confusion regarding competitors' advertisements that appeared in response to online searches for 1-800 Contacts. **(***See infra* ¶¶ XI.C.1.c)

Response to Finding No. 1719:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1720. 1-800 Contacts' former CEO, Mr. Jonathan Coon, could not recall any evidence of consumer confusion as between 1-800 Contacts and various other brands. (CX9004 (Coon, IHT at 136).

Response to Finding No. 1720:

Complaint Counsel's Proposed Finding No. 1720 is inaccurate and incomplete. Mr. Coon testified during trial: "we know people were confused because we heard about it. They though they'd done business with us. They'd call us to check the status of an order and they

weren't in our system. They thought they'd ordered from us and they hadn't, so pretty strong evidence that they were confused." (Coon, Tr. 2728).

1721. Mr. Coon could not recall any evidence of consumer confusion as between LensCrafters and 1-800 Contacts. (CX9004 (Coon, IHT at 136).

Response to Finding No. 1721:

Respondent has no specific response.

1722. Mr. Coon could not recall any evidence of consumer confusion as between Walgreens and 1-800 Contacts. (CX9004 (Coon, IHT at 136).

Response to Finding No. 1722:

Respondent has no specific response.

1723. Mr. Coon could not recall any evidence of consumer confusion as between Vision Direct and 1-800 Contacts. (CX9004 (Coon, IHT at 136).

Response to Finding No. 1723:

Respondent has no specific response.

1724. Mr. Coon could not recall any documents indicating that any individual ordered from a competitor of 1-800 Contacts because that individual was confused as a result of search advertising. (CX9035 (Coon, Dep. at 14)).

Response to Finding No. 1724:

Respondent has no specific response.

1725. The only information that Mr. Coon had about 1-800 Contacts' customers becoming confused came from statements made by other people during management meetings while he was at 1-800 Contacts. (Coon, Tr. 2776-2777).

Response to Finding No. 1725:

Respondent has no specific response.

1726. Mr. Coon lacked any empirical study to support his opinion that all of the sales that 1-800 Contacts lost to its rivals results from consumers becoming confused. (Coon, Tr. 2865).

Response to Finding No. 1726:

Complaint Counsel's Proposed Finding No. 1726 is inaccurate and mischaracterizes the cited trial testimony because Mr. Coon's testimony related solely to customers who had specifically searched for 1-800 Contacts' trademark terms, not all sales that 1-800 Contacts may have lost to other retailers in any context. (Coon, Tr. 2861-65).

1727. Mr. Coon never conducted any empirical analysis to establish the correctness or incorrectness of his view that any advertisement that appears in response to a consumer typing in the term "1-800contacts" is likely to be confusing. (Coon, Tr. 2872-2873).

Response to Finding No. 1727:

Respondent has no specific response.

1728. Mr. Bryce Craven, former senior search marketing manager at 1-800 Contacts, was not aware of any customers being confused after searching for "1-800 Contacts" and subsequently visiting the Walgreens website. (Craven, Tr. 600).

Response to Finding No. 1728:

Complaint Counsel's Proposed Finding No. 1728 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining or tracking confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't . . . part of my job. I never interacted with customers or anything." (Craven, Tr. 600).

1729. Mr. Craven had no personal knowledge of any customer searching for "1-800 Contacts" and subsequently visiting the Vision Direct website because the customer was confused about the identity of the advertiser sponsoring the Vision Direct advertisement. (Craven, Tr. 600).

Response to Finding No. 1729:

Complaint Counsel's Proposed Finding No. 1729 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining or tracking confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600).

1730. Mr. Craven had no personal knowledge of any customer searching for "1-800 Contacts" and subsequently visiting the Walmart website because the customer was confused about the identity of the advertiser sponsoring the Walmart advertisement. (Craven, Tr. 600).

Response to Finding No. 1730:

Complaint Counsel's Proposed Finding No. 1730 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining or tracking confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600).

1731. Mr. Craven was never presented with any empirical evidence regarding customers being confused by the appearance of competitive advertisements nor regarding the impact of any such confusion on 1-800 Contacts' click-through rate. (Craven, Tr. 603-604).

Response to Finding No. 1731:

Complaint Counsel's Proposed Finding No. 1731 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining, tracking, or even considering confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600). The proposed finding also is misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83).

1732. Mr. Craven was never made aware of any instance in which a customer confused an advertisement for any competitor of 1-800 Contacts with an advertisement for 1-800 Contacts. (CX9020 (Craven, Dep. at 92)).

Response to Finding No. 1732:

Complaint Counsel's Proposed Finding No. 1732 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining, tracking, or even considering confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600).

1733. Mr. Craven was never made aware of any instance in which a potential customer confused an advertisement for any competitor of 1-800 Contacts with an advertisement for 1-800 Contacts. (CX9020 (Craven, Dep. at 92-93)).

Response to Finding No. 1733:

Complaint Counsel's Proposed Finding No. 1733 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining, tracking, or even considering confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600).

1734. Mr. Craven did not recall any instance of consumer confusion as between any competitor and 1-800 Contacts. (CX9002 (Craven, IHT at 201-202)). In particular, he did not recall any instance of a customer confusing 1-800 Contacts with Walgreens, LensCrafters, Drugstore.com, Vision Direct, or Coastal Contacts. (CX9002 (Craven, IHT at 201)).

Response to Finding No. 1734:

Complaint Counsel's Proposed Finding No. 1734 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining, tracking, or even considering confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600).

1735. While at 1-800 Contacts, Mr. Craven was not personally concerned about customers confusing 1-800 Contacts with LensCrafters and could not recall any other 1-800 Contacts employees being concerned about customers confusing 1-800 Contacts with LensCrafters. (CX9002 (Craven, IHT at 202)).

Response to Finding No. 1735:

Complaint Counsel's Proposed Finding No. 1735 is misleading to the extent it suggests that Mr. Craven's role or responsibility ever involved determining, tracking, or even considering confusion among consumers. Mr. Craven specifically testified at trial: "That wasn't part of my job." (Craven, Tr. 600).

1736. 1-800 Contacts gathered no evidence of customers being confused about the distinction between 1-800 Contacts and its competitors. (CX9012 (L. Schmidt, IHT at 60-64)).

Response to Finding No. 1736:

Complaint Counsel's Proposed Finding No. 1736 is inaccurate and mischaracterizes the cited testimony. Laura Schmidt did not testify that 1-800 Contacts gathered no evidence relating to confusion, rather she testified that she did not "keep track of brand confusion complaints" and that her particular staff did not do so. (CX9012 (L. Schmidt, IHT at 61)).

1737. Brandon Dansie, 1-800 Contacts' former paid search coordinator, was never made aware of an example in which a customer confused 1-800 Contacts with another company. (CX9005 (Dansie, IHT at 30)).

Response to Finding No. 1737:

Complaint Counsel's Proposed Finding No. 1737 is incomplete and misleading to the extent it suggests that Mr. Dansie's role or responsibility was ever to determine whether advertisements were confusing to customers. Mr. Dansie specifically testified that was not his role, and that his role was to monitor searches for 1-800 Contacts' trademark terms in order "to understand performance." (CX 9005 (Dansie, IHT at 157-58)).

1738. Mr. Dansie could not recall any instance in which an individual expressed a concern that customers might confuse 1-800 Contacts with another company. (CX9005 (Dansie, IHT at 30)).

Response to Finding No. 1738:

Complaint Counsel's Proposed Finding No. 1738 is incomplete and misleading to the extent it suggests that Mr. Dansie's role or responsibility was ever to determine whether advertisements were confusing to customers. Mr. Dansie specifically testified that was not his role, and that his role was to monitor searches for 1-800 Contacts' trademark terms in order "to understand performance." (CX 9005 (Dansie, IHT at 157-58)).

1739. Mr. Dansie is not aware of any evidence of consumer confusion as between 1-800 Contacts and any competitor. (CX9005 (Dansie, IHT at 30)).

Response to Finding No. 1739:

Complaint Counsel's Proposed Finding No. 1739 is incomplete and misleading to the extent it suggests that Mr. Dansie's role or responsibility was ever to determine whether advertisements were confusing to customers. Mr. Dansie specifically testified that was not his role, and that his role was to monitor searches for 1-800 Contacts' trademark terms in order "to understand performance." (CX 9005 (Dansie, IHT at 157-58)).

1740. David Zeidner, 1-800 Contacts' former in-house legal counsel, testified that 1-800 Contacts did not gather information about consumers being confused by other companies' advertisements appearing in response to a query for a 1-800 Contacts trademark. (CX9006 (D. Zeidner, IHT at 168)).

Response to Finding No. 1740:

Respondent has no specific response.

1741. David Zeidner did not instruct 1-800 Contacts' call center to keep track of any complaints of consumer confusion based on the appearance of other companies' advertisements appearing in response to a query for a 1-800 Contacts trademark. (CX9006 (D. Zeidner, IHT at 168-169)).

Response to Finding No. 1741:

Respondent has no specific response.

1742. John Aston, a former employee of 1-800 Contacts' marketing department, was not aware of any evidence of actual consumer confusion resulting from competitive advertisements appearing in response to a 1-800 Contacts' trademark search term. (CX9013 (Aston, Dep. at 234)).

Response to Finding No. 1742:

Complaint Counsel's Proposed Finding No. 1742 is incomplete because Mr. Aston testified, "I'd say it is [confusing] in my opinion, but I have not seen evidence." (CX 9013 (Aston, Dep. at 234)). Mr. Aston further testified that "[t]he use of sponsored links [the label Google previously gave to sponsored ads] could cause confusion. It's unclear what that actually means." (CX 9013 (Aston, Dep. at 143)). Furthermore, the proposed finding does not cite any record evidence that suggests Mr. Aston's role or responsibility was ever to track or evaluate evidence of consumer confusion from sponsored ads.

1743. 1-800 Contacts' former Chief Marketing Offer, Joan Blackwood, never conducted a consumer confusion study. (CX9017 (Blackwood, Dep. at 276)).

Response to Finding No. 1743:

The proposed finding is misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion (or other type of confusion study) before or outside the context of litigation. (RX 734 at 77-83).

The proposed finding is also incomplete because it fails to reflect Ms. Blackwood's entire answer to the cited line of deposition questions. Ms. Blackwood testified that she did consider data showing "that almost 95 percent of the people who did a search for 1-800 Contacts clicked on 1-800 Contacts" and, in her experience, "if someone is typing in a Branded Search term, the high intent is they actually want to go to that website . . . . They are not expecting to see a

different ad. It's something that they typically do very quickly, so the expectation is 'I typed in '1-800 Contacts,' [t]he link to 1-800 Contacts is going to be right there, and I am going to go ahead and click.'" (CX 9017 (Blackwood, Dep. at 275-76)).

1744. No one at 1-800 Contacts ever presented its former Chief Marketing Offer Ms. Blackwood with any evidence that consumers were confused when they clicked on a link other than a link to 1-800 Contacts. (CX9017 (Blackwood, Dep. at 276)).

Response to Finding No. 1744:

Complaint Counsel's Proposed Finding No. 1744 is misleading to the extent it suggests or implies that anyone at 1-800 Contacts would likely receive a report or other evidence of a consumer being confused by sponsored ads from other retailers that appeared in response to a search for 1-800 Contacts trademarks. (CX 9034 (Roush, Dep. at 175)).

1745. Amy Larson, 1-800 Contacts' former Director of Online Marketing and later Director of Marketing, was not aware of any actual examples in which a customer was confused by a competitive advertisement appearing on searches for 1-800 Contacts' trademarks. (CX9027 (Larson, Dep. at 8-10, 131)).

Response to Finding No. 1745:

The proposed finding is inaccurate and mischaracterizes Ms. Larson's deposition. Ms. Larson answered "Yeah" to the question "Were there any other instances of customer confusion that you recall during your time at 1-800?," and Ms. Larson further explained: "It's easy to get confused. I remember there were times when customers would call the call center and try to check the status of an order, and then we would find out that they had actually placed an order with one of our competitors, not with us. And so obviously that was an instance of customer confusion." (CX 9027 (Larson, Dep. at 57-58)).

Ms. Larson further testified: "We were concerned a lot about customer confusion, so a lot of people don't read when—well, when they're navigating the web, they just don't read, they just click. So we were very concerned that if a customer searched for 1-800 Contacts and the first thing that came up that they clicked on was a competitor, that they might think that that competitor was 1-800 Contacts. And we didn't want to be associated with them. Like I said, we felt like they had very misleading and deceptive practices, and so we wanted to be sure to steer very clear of any association that a customer might have between 1-800 Contacts and some of those competitors. So that was one concern." (CX 9027 (Larson, Dep. at 87)).

The proposed finding also is misleading to the extent it suggests or implies that anyone at 1-800 Contacts would likely receive a report or other evidence of a consumer being confused by sponsored ads from other retailers that appeared in response to a search for 1-800 Contacts trademarks. (CX 9034 (Roush, Dep. at 175)).

1746. 1-800 Contacts' marketing director, Laura Schmidt, who oversees paid search advertising, is not aware of any consumer being confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 101-102)).

Response to Finding No. 1746:

Complaint Counsel's Proposed Finding No. 1746 is misleading to the extent it suggests that Ms. Schmidt's role ever involved determining or evaluating consumer confusion relating to search advertising. Ms. Schmidt specifically testified that she "wasn't involved in determining" whether any particular advertisement was likely to cause consumer confusion. (CX 9012 (L. Schmidt, IHT at 151)).

The proposed finding also is misleading to the extent it suggests or implies that anyone at 1-800 Contacts would likely receive a report or other evidence of a consumer being confused by

sponsored ads from other retailers that appeared in response to a search for 1-800 Contacts trademarks. (CX 9034 (Roush, Dep. at 175)).

1747. 1-800 Contacts did not have a system in place to record instances of consumers being confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 102)).

Response to Finding No. 1747:

Respondent has no specific response.

1748. As 1-800 Contacts' marketing director, Ms. Schmidt would want to be aware of any instances in which a consumer was confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 102-103)).

Response to Finding No. 1748:

Respondent has no specific response.

1749. Ms. Schmidt could not recall any instance in which an employee from 1-800 Contacts' call center made her aware of a consumer who was confused into thinking another company's advertisement was an advertisement for 1-800 Contacts. (CX9032 (L. Schmidt, Dep. at 102)).

Response to Finding No. 1749:

Complaint Counsel's Proposed Finding No. 1749 is misleading to the extent it suggests or implies that anyone at 1-800 Contacts would likely receive a report or other evidence of a consumer being confused by sponsored ads from other retailers that appeared in response to a search for 1-800 Contacts trademarks. (CX 9034 (Roush, Dep. at 175)).

1750. 1-800 Contacts' Chief Marketing Officer, Tim Roush, is not aware of any instances of a consumer being confused by clicking on another company's advertisement thinking it was an advertisement for 1-800 Contacts. (CX9034 (Roush, Dep. at 69-70)).

Response to Finding No. 1750:

Complaint Counsel's Proposed Finding No. 1750 is misleading to the extent it suggests or implies that anyone at 1-800 Contacts would likely receive a report or other evidence of a consumer being confused by sponsored ads from other retailers that appeared in response to a search for 1-800 Contacts trademarks. (CX 9034 (Roush, Dep. at 175)).

1751. Mr. Roush is not aware of any system to record any instances of consumers being confused by clicking on another company's advertisement thinking it was an advertisement for 1-800 Contacts. (CX9034 (Roush, Dep. at 70)).

Response to Finding No. 1751:

Respondent has no specific response.

1752. Although Mr. Roush believes that consumers are confused, he is not aware of any actual instances of consumer confusion. (CX9034 (Roush, Dep. at 175-176)).

Response to Finding No. 1752:

Complaint Counsel's Proposed Finding No. 1752 is incomplete and misleading. Mr. Roush testified that he "believe[s] that clearly there's consumer confusion," but that it is unlikely he would receive any information about particular instances of consumer confusion because a consumer is not going to report the type of confusion that arises with sponsored ads from other retailers that appear in response to a search for 1-800 Contacts trademark terms. (CX 9034 (Roush, Dep. at 175)).

1753. 1-800 Contacts' trademark litigation counsel, Bryan Pratt and Mark Miller, testified that they did not have any evidence of actual consumer confusion regarding competitors' advertisements that appeared in response to a search query containing a 1-800 Contacts trademark. (CX9021 (Pratt, Dep. at 19-20, 110-111); CX9040 (Miller, Dep. at 154-155)).

Response to Finding No. 1753:

Complaint Counsel's Proposed Finding No. 1753 is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83). The proposed finding also is incomplete because it improperly omits Mr. Miller's testimony in response to the cited deposition question in which he explained, "[w]e would have considered the same tools and sources and information that I said earlier with regard to evaluating potential infringement. . . . [W]e rely on the same . . . factors of [the] nature of the market and all those factors I said earlier and data points and other information we'd consider in evaluating the potential for a claim." (CX 9040 (Miller, Dep. at 154-55)). For example, Mr. Miller testified that the similarity of the services or goods being offered is one of the many factors to be considered and that it "tilt[s] the scale towards trademark infringement" based on "decades-old trademark infringement law." (CX 9040 (Miller, Dep. at 151)).

1754. Mr. Pratt, an attorney who represented 1-800 Contacts in a variety of disputes with other contact lens retailers, reviewed periodic trademark monitoring reports that were prepared by 1-800 Contacts personnel. (CX1185; CX9021 (Pratt, Dep. at 19-20)).

Response to Finding No. 1754:

Respondent has no specific response.

1755. The trademark monitoring reports that Mr. Pratt reviewed included screenshots of alleged "violators" whose ads were seen in response to search queries that included 1-800 Contacts' top monitored keywords. (*Supra* § VI.B.4).

Response to Finding No. 1755:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited

section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1756. Mr. Pratt could not recall any information in the trademark monitoring reports from 1-800 Contacts regarding an empirical analysis of the likelihood that consumers would become confused by the paid search advertising displayed in those reports. (CX9021 (Pratt, Dep. at 110)).

Response to Finding No. 1756:

Complaint Counsel's Proposed Finding No. 1756 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion or some other type of empirical analysis of the likelihood of confusion before or outside the context of litigation. (RX 734 at 77-83). The proposed finding is also misleading to the extent it erroneously suggests that the legal test for "likelihood of confusion" in trademark law is based on any type of "empirical analysis."

1757. Mr. Pratt did not recall ever conducting a survey or other empirical analysis of any type to assess confusion regarding any of the screenshots that were included in any of the periodic trademark monitoring reports that Mr. Pratt received from 1-800 Contacts personnel. (CX9021 (Pratt, Dep. at 110-111)).

Response to Finding No. 1757:

Complaint Counsel's Proposed Finding No. 1757 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion or some other type of empirical analysis of the likelihood of confusion before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)). The proposed finding is also misleading to the extent it erroneously suggests that the legal test for "likelihood of confusion" in trademark law is based on any type of "empirical analysis."

1758. Mr. Pratt testified that it was not his practice to run any surveys to determine whether the screenshots sent to him by 1-800 Contacts result in consumer confusion. (CX9021 (Pratt, Dep. at 111)).

Response to Finding No. 1758:

Complaint Counsel's Proposed Finding No. 1758 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion or some other type of empirical analysis of the likelihood of confusion before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)).

1759. Mr. Pratt could not recall any empirical studies to support his assessment of the likelihood of consumer confusion as a result of a sponsored link appearing on a search engine results page. (CX9021 (Pratt, Dep. at 83)).

Response to Finding No. 1759:

Complaint Counsel's Proposed Finding No. 1759 is inaccurate and misleading to the extent it erroneously suggests that trademark owners typically conduct a survey of confusion or some other type of empirical analysis of the likelihood of confusion before or outside the context of litigation. (RX 734 at 77-83 (Hogan Expert Report)).

1760. Mr. Mark Miller is an attorney who represented 1-800 Contacts in a variety of intellectual property litigation matters. (CX9040 (Miller, Dep. at 10-11)).

Response to Finding No. 1760:

Respondent has no specific response.

1761. Mr. Miller testified that he could not recall having any evidence of actual confusion when he sent cease and desist letters to 1-800 Contacts' competitors on behalf of 1-800 Contacts, asserting trademark infringement claims. (CX9040 (Miller, Dep. at 154-155)).

Response to Finding No. 1761:

Complaint Counsel's Proposed Finding No. 1761 is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark

owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83 (Hogan Expert Report)).

d. When threatening to enforce its trademark rights against competitors, 1-800 Contacts did not provide evidence that the mere appearance of competitor advertisements in response to 1-800 Contacts Branded Queries was likely to cause consumer confusion

1762. In many of its complaints against competitors, 1-800 Contacts did not allege that the content of its competitors' ads was confusing. **(**CX1062 (Vision Direct Complaint); CX1617 (EZContacts Complaint); CX1618 (Lensfast Complaint); CX1622 (LensWorld Complaint); 1620 (Walgreens Complaint); CX1621 (Web Eye Care Complaint); CX1180 (AC Lens Complaint); CX9039 (Clarkson, Dep. at 138)).

Response to Finding No. 1762:

The proposed finding is inaccurate. Each of the cited complaints contained allegations that the challenged advertising was likely to cause confusion. (*See, e.g.*, CX 1621 at 6) (WebEyeCare Complaint) (alleging that the challenged advertising was "likely to cause public confusion, mistake, or deception as to the affiliation, connection, or association of Plaintiff with Defendant.").

1763. 1-800 Contacts did not provide its competitors with any evidence of consumer confusion caused by the mere appearance of a competitors' advertisement in response to a search query for a 1-800 Contacts' trademark term. (*See infra* ¶¶ 1764-1772).

Response to Finding No. 1763:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1764. 1-800 Contacts never showed Web Eye Care any evidence that users were confused by Web Eye Care's advertisements appearing in response to search queres containing the phrase "1-800 Contacts." (CX9014 (Batushansky, Dep. at 151-152); CX9000 (Batushansky, IHT at 92)).

Response to Finding No. 1764:

The proposed finding is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83 (Hogan Expert Report)).

1765. Web Eye Care's President, Peter Batushansky, was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking Web Eye Care was 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).

Response to Finding No. 1765:

The proposed finding is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83 (Hogan Expert Report)).

Moreover, simply because [redacted] (CX 9014 (Batushansky, Dep. at 152)).

1766. Mr. Batushansky was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking WebEyeCare was affiliated with 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).

Response to Finding No. 1766:

The proposed finding is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83 (Hogan Expert Report)). Moreover, simply because [redacted] (CX 9014 (Batushansky, Dep. at 152)).

1767. Mr. Batushansky was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking WebEyeCare was sponsored by 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).

Response to Finding No. 1767:

The proposed finding is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83 (Hogan Expert Report)). Moreover, simply because [redacted] (CX 9014 (Batushansky, Dep. at 152)).

1768. Mr. Batushansky was not aware of 1-800 Contacts ever presenting him with any language in any of Web Eye Care's advertisements that misled consumers into thinking WebEyeCare was approved by 1-800 Contacts. (CX9014 (Batushansky, Dep. at 152)).

Response to Finding No. 1768:

The proposed finding is inaccurate and misleading to the extent it suggests that it is common or typical for a trademark infringement suit for the trademark owner to have evidence of actual consumer confusion before litigation. (CX 734 at 77-83 (Hogan Expert Report)). Moreover, simply because [redacted] (CX 9014 (Batushansky, Dep. at 152)).

1769. When 1-800 Contacts filed its complaint against AC Lens, 1-800 Contacts did not supply AC Lens with any data or reports that stated that consumers were routinely being confused. (CX9003 (Clarkson, IHT at 124-125)).

Response to Finding No. 1769:

It is common and proper for trademark infringement suits to be filed prior to conducting surveys or other data collections to prove actual confusion. (RX 734 at 77-85 (Hogan Expert Report)). Moreover, common sense tells us that it may be the defendant, not the plaintiff, that is likely to be aware that consumers who contact it are confused.

1770. During the course of all of its dealings with AC Lens, 1-800 Contacts never supplied AC Lens with any data or reports of consumers being confused by AC Lens's advertisements. (CX9039 (Clarkson, Dep. at 129).

Response to Finding No. 1770:

Respondent has no specific response, other than to note that it is common and proper for trademark infringement suits to be filed prior to conducting surveys or other data collections to prove actual confusion. (RX 734 at 78-85 (Hogan Expert Report)). Moreover, common sense tells us that it may be the defendant, not the plaintiff, that is likely to be aware that consumers who contact it are confused.

1771. During the course of its lawsuit against Memorial Eye, 1-800 Contacts did not present Memorial Eye with evidence that consumers had been confused by the presence of Memorial Eye advertisements appearing in response to search queries containing the phrase "1-800 Contacts." (CX9024 (Holbrook, Dep. at 54)).

Response to Finding No. 1771:

Complaint Counsel's Proposed Finding No. 1771 is inaccurate, misleading, and not supported by record evidence. 1-800 Contacts provided voluminous evidence to Memorial Eye that consumers actually confused Memorial Eye's websites (ShipMyContacts and IWantContacts) with 1-800 Contacts. Indeed, [redacted]

[redacted] Given this evidence, there can be no serious dispute that customers confused Memorial Eye and 1-800 Contacts.

1772. [redacted] (Holbrook, Tr. at 1958, *in camera*).

Response to Finding No. 1772:

Complaint Counsel's Proposed Finding No. 1772 is inaccurate, misleading, and not supported by record evidence. 1-800 Contacts provided voluminous evidence to Memorial Eye that consumers actually confused Memorial Eye's websites (ShipMyContacts and IWantContacts) with 1-800 Contacts. Indeed, [redacted] Given this evidence, there can be no serious dispute that customers confused Memorial Eye and 1-800 Contacts.

e. 1-800 Contacts' competitors had no knowledge of any instances of customers confusing their advertisements for 1-800 Contacts' advertisements

1773. 1-800 Contacts' competitors had no knowledge of any instances of customers confusing their advertisements for 1-800 Contacts' advertisements. (CX9000 (Batushansky, IHT at 90-91); CX9003 (Clarkson, IHT at 105-106); CX9039 (Clarkson, Dep. at 128-129); CX9007 (Fedele, IHT at 14); CX9008 (Hamilton, IHT at 80); Hamilton, Tr. 404-405); (CX9033 (Mohan, Dep. at 202-203); CX9036 (Duley, Dep. at 124), *in camera* ([redacted]); *see also infra* ¶¶ 1774-1785).

Response to Finding No. 1773:

The proposed finding is inaccurate for the reasons set out in the replies to individual findings nos. 1771-72 and 1774-91.

1774. Mr. Batushanky, the co-owner and president of WebEyeCare, was unaware of any instance in which any customer had mistaken a WebEyeCare advertisement for an advertisement for 1-800 Contacts. (CX9000 (Batushansky, IHT at 90-91)).

Response to Finding No. 1774:

Respondent has no specific response, other than to note that simply because [redacted] (CX 9014 (Batushansky, Dep. at 151)).

1775. Mr. Clarkson of AC Lens had not seen or heard evidence of consumers being confused as to affiliation when they search for one brand and see a rival brand's advertisement. (CX9003 (Clarkson, IHT at 105-106)).

Response to Finding No. 1775:

The proposed finding is overbroad and misleading. In the cited testimony, Mr. Clarkson simply said that he had "no recollection" of such evidence and that he would not have been notified of such instances unless there was a "pattern" of "egregious" instances occurring. (CX 9003 (Clarkson, IHT at 105-106)).

1776. Mr. Clarkson of AC Lens was not aware of any complaints from consumers who believed that AC Lens was 1-800 Contacts because of AC Lens' advertisements. (CX9039 (Clarkson, Dep. at 128-129)).

Response to Finding No. 1776:

The proposed finding is overbroad and misleading. Mr. Clarkson simply said that he had "no recollection" of such evidence and that he would not have been notified of such instances unless there was a "pattern" of "egregious" instances occurring. (CX 9003 (Clarkson, IHT at 105-106)).

1777. Mr. Clarkson stated that if there had been any pattern of complaints from consumers who believed that AC Lens was 1-800 Contacts because of AC Lens' advertisements, he would have been made aware of it. (CX9039 (Clarkson, Dep. at 129); CX9003 (Clarkson, IHT at 105-106)).

Response to Finding No. 1777:

The proposed finding is overbroad and misleading. In the cited testimony, Mr. Clarkson simply said that he had "no recollection" of such evidence and that he would not have been notified of such instances unless there was a "pattern" of "egregious" instances occurring. (CX 9003 (Clarkson, IHT at 105-106)).

1778. Mr. Stephen Fedele, Senior Manager, Digital and Marketing, at Walgreens and formerly of Vision Direct, testified that he was unaware of any complaints about Vision Direct's search advertising being confusing or causing consumers to land on Vision Direct's website when they intended to go to a different website. (CX9007 (Fedele, IHT at 14)).

Response to Finding No. 1778:

Again, simply because Mr. Fedele wasn't "aware" that something happened, that does not mean it didn't happen.

1779. Mr. Hamilton, Functional Manager, Digital and Marketing, at Walgreens and formerly of Vision Direct, was unaware of any instance in which a Vision Direct advertisement confused a consumer into believing they were clicking on an advertisement for 1-800 Contacts. (Hamilton, Tr. 404); CX9008 (Hamilton, IHT at 80)).

Response to Finding No. 1779:

Complaint Counsel's Proposed Finding No. 1779 is incomplete. Mr. Hamilton has testified [redacted] (CX 9038 (Hamilton, Dep. at 80)). In addition, Mr. Hamilton testified [redacted] (CX 9038 (Hamilton, Dep. at 116)). As such, any testimony that Mr. Hamilton's purported unawareness was related to consumer complaints or customer service surveys, as described in Complaint Counsel's Finding No. 1779, lacks foundation and is misleading.

1780. Mr. Hamilton was not aware of any consumer complaining about confusion resulting from any Vision Direct advertisement for contact lenses. (Hamilton, Tr. 404).

Response to Finding No. 1780:

Complaint Counsel's Proposed Finding No. 1780 is incomplete, inaccurate, misleading, and lacks foundation. Mr. Hamilton testified [redacted] (CX 9038 (Hamilton, Dep. at 116)). As such, any testimony that Mr. Hamilton's purported unawareness was related to consumer complaints or customer service surveys, as described in Complaint Counsel's Finding No. 1780, is incorrect and unreliable.

1781. Mr. Hamilton was not aware of any consumer being confused by a Vision Direct advertisement regarding the source of their contact lens purchase. (Hamilton, Tr. 404).

Response to Finding No. 1781:

Complaint Counsel's Proposed Finding No. 1781 is incomplete, inaccurate, misleading, and lacks foundation. Mr. Hamilton testified [redacted] (CX 9038 (Hamilton, Dep. at 116)). As such, testimony that Mr. Hamilton's purported unawareness was related to consumer complaints or customer service surveys, as described in Complaint Counsel's Finding No. 1781, is incorrect and unreliable.

1782. Mr. Hamilton was unaware of any instance in which a Walgreens advertisement confused a consumer into believing that the consumer was clicking on an advertisement for 1-800 Contacts. (Hamilton, Tr. 404); CX9008 (Hamilton, IHT at 80)).

Response to Finding No. 1782:

Complaint Counsel's Proposed Finding No. 1782 is incomplete, inaccurate, misleading, and lacks foundation. Mr. Hamilton testified [redacted] (CX 9038 (Hamilton, Dep. at 116)). As such, testimony that Mr. Hamilton's purported unawareness was related to consumer complaints or customer service surveys, as described in Complaint Counsel's Finding No. 1782, is incorrect and unreliable.

1783. Mr. Hamilton was not aware of any consumer complaining about confusion resulting from any Walgreens advertisement for contact lenses. (Hamilton, Tr. 404).

Response to Finding No. 1783:

Complaint Counsel's Proposed Finding No. 1783 is incomplete, inaccurate, misleading, and lacks foundation. Mr. Hamilton testified [redacted] (CX 9038 (Hamilton, Dep. at 116)). As such, testimony that Mr. Hamilton's

purported unawareness was related to consumer complaints or customer service surveys, as described in Complaint Counsel's Finding No. 1783, is incorrect and unreliable.

1784. Mr. Hamilton was not aware of any consumer being confused by a Walgreens advertisement regarding the source of the consumer's contact lens purchase. (Hamilton, Tr. 404).

Response to Finding No. 1784:

Complaint Counsel's Proposed Finding No. 1784 is incomplete, inaccurate, misleading, and lacks foundation. Mr. Hamilton testified [redacted] (CX 9038 (Hamilton, Dep. at 116)). As such, testimony that Mr. Hamilton's purported unawareness was related to consumer complaints or customer service surveys, as described in Complaint Counsel's Finding No. 1784, is incorrect and unreliable.

1785. Ms. Mohan was not aware of any examples of a person being confused by a contact lens ad that appeared on the Google search engine. (CX9033 (Mohan, Dep. at 202-203)).

Response to Finding No. 1785:

Respondent has no specific response.

f. 1-800 Contacts' competitors were unaware of any evidence of customers buying from their companies under the impression that the competitors were 1-800 Contacts

1786. 1-800 Contacts' competitors were unaware of any evidence of customers buying from them under the impression that the competitors were 1-800 Contacts. (CX9007 (Fedele, IHT at 14); CX9014 (Batushansky, Dep. at 151); Hogan, Tr. 3356; *see also infra* ¶¶ 1787-1791).

Response to Finding No. 1786:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by

specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed finding is also inaccurate and misleading because it cites record evidence from only two other retailers (Vision Direct/Fedele and Web Eye Care/Batushansky) but purports to encompass all of 1-800 Contacts' competitors.

The proposed finding is also incomplete and mischaracterizes the cited testimony. Mr. Fedele, for example, testified he probably would not have been made aware of any evidence that Vision Direct's advertising was confusing. (CX 9007 (Fedele, IHT at 14)). Thus, Mr. Fedele's testimony does not support the proposed finding.

1787. Stephen Fedele, Senior Digital and Marketing Manager at Walgreens and formerly of Vision Direct, was unaware of any instance in which customers complained that they purchased from Vision Direct thinking that it was a different company. (CX9007 (Fedele, IHT at 14)).

Response to Finding No. 1787:

Complaint Counsel's Proposed Finding No. 1787 is incomplete, inaccurate, and misleading. Mr. Stephen Federal explicitly testified that complaints about search advertising being confusing were probably not the type he would have heard about in his role. (CX 9007 (Fedele, IHT at 14)).

1788. Mr. Batushansky of Web Eye Care was not aware of any complaints from consumers who believed WebEyeCare was 1-800 Contacts. (CX9014 (Batushansky, Dep. at 151)).

Response to Finding No. 1788:

Complaint Counsel's Proposed Finding No. 1788 is misleading, inaccurate, and speculative. [redacted]

[redacted] (CX 9014 (Batushansky, Dep. at 75)). [redacted]

1789. Mr. Batushansky was not aware of anyone accidentally ordering from Web Eye Care believing that WebEyeCare was 1-800 Contacts. (CX9014 (Batushansky, Dep. at 151)).

Response to Finding No. 1789:

Complaint Counsel's Proposed Finding No. 1789 is misleading, inaccurate, and speculative. [redacted] (CX 9014 (Batushansky, Dep. at 75)). [redacted] (CX 9014 (Batushansky, Dep. at 75)). Mr. Batushansky also testified that [redacted] (CX 9014 (Batushansky, Dep. at 144) *in camera*). Mr. Batushansky just could not recall whether in any of these instances the customers who mistakenly ordered from WebEyeCare thought they were in fact ordering from 1-800 Contacts or from some other company. Given the relative market share of 1-800 Contacts and the fact that for one to two weeks WebEyeCare was presenting its ads in responses to searches for 1-800 Contacts, it is reasonable to infer that some of these instances of orders placed by accident, by mistaken, or as the result of confusion involved persons who had intended to order, or thought they were in fact ordering, from 1-800 Contacts.

1790. Walmart Senior Product Manager Sandhya Mohan had "not heard of" any complaints from consumers who believed because of one of Walmart's ads that Walmart was actually 1-800 Contacts. (CX9033 (Mohan, Dep. at 91-92)).

Response to Finding No. 1790:

Respondent has no specific response.

1791. Ms. Mohan had never heard about any complaints from consumers who believed because of one of Walmart's ads that Walmart was affiliated with 1-800 Contacts. (CX9033 (Mohan, Dep. at 92)).

Response to Finding No. 1791:

Respondent has no specific response.

2. 1-800 Contacts' Competitors Had No Incentive To Confuse Consumers About Their Identities

1792. 1-800 Contacts' competitors had no incentive to confuse consumers about their identities. (*See infra* § XI.C.2).

Response to Finding No. 1792:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1793. AC Lens has no interest in tricking customers into thinking they are dealing with 1-800 Contacts instead of AC Lens because it would create a "disastrous customer service experience for that consumer" and would be ethically "very questionable." (CX9039 (Clarkson, Dep. at 127)).

Response to Finding No. 1793:

Respondent has no specific response other than to agree that consumer confusion is likely to lead to a poor experience for the consumer.

1794. Visionworks' Director of Marketing, Mr. Duley, testified that [redacted] (CX9036 (Duley, Dep. at 180-181); *see also* CX9036 (Duley, Dep. at 124, *in camera*) ([redacted]).

Response to Finding No. 1794:

Respondent has no specific response.

1795. Walmart has no interest in showing search advertisements to consumers who will not find those advertisements relevant. (CX9033 (Mohan, Dep. at 88)).

Response to Finding No. 1795:

The proposed finding is incomplete and not supported by the cited evidence. Ms. Mohan testified, "It's hard to make sure that we never show up for an irrelevant search…. Because the intent is not always known. Like today I could search 'astigmatic lenses,' not because I want to buy, but because I want to know what it is." (CX 9033 (Mohan, Dep. at 88-89)).

1796. The reason that Walmart has no interest in showing search advertisements to consumers who will not find those advertisements relevant is that "we might – end up wasting some money there. . . . [b]ecause we are still paying for the click, even – and then they'll come to the site and bounce back immediately, and so the engines will think this is probably a bad site, too. So in both ways we are wasting money." (CX9033 (Mohan, Dep. at 88-89)).

Response to Finding No. 1796:

Respondent has no specific response.

1797. LensDirect "has not and does not use the 1-800 Contacts trademarks in its advertising." (CX1242 at 001, June 14 2011 Letter from LensDirect outside counsel to Mark Miller responding to 1-800 cease and desist letter.)

Response to Finding No. 1797:

The proposed finding should be disregarded because it is inaccurate and because the cited lawyer letter was admitted only for non-hearsay purposes. (JX2-A-27). In any event,

LensDirect's lawyer was simply wrong about the law. It is by now well settled that the use of another company's trademark as a keyword in paid search advertising is a "use in commerce" of the trademark under the Lanham Act. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006).

1798. LensDirect does not use the names of any of its competitors in the text of its advertisements. (CX9023 (Alovis, Dep. at 60)).

Response to Finding No. 1798:

The proposed finding should be disregarded because Mr. Alovis did not have any foundation for the statement attributed to him and because his actual testimony was only that the "believe[d]" that LensDirect did not engage in the conduct described. On the same page of the transcript (CX 9023 (Alovis, Dep. at 60)), Mr. Alovis stated that he does not "create the strategies" for paid search. He also testified that he devotes 70% of his time to an entirely different business that he owns that is not in the optical space. (CX 9023 (Alovis, Dep. at 16-17)).

1799. Advertisements for the ShipMyContacts website never included the 1-800 Contacts trademark in the title or text of the ad. (Holbrook, Tr. at 1913; *see also* CX9024, Holbrook, Dep. at 50)).

Response to Finding No. 1799:

Complaint Counsel's Proposed Finding No. 1799 is incomplete and misleading. ShipMyContacts [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted]

[redacted] (Holbrook, Tr. 1998). Regardless whether the text of the advertisement contained 1-800 Contacts' trademarks, there is ample evidence that consumers found the advertisements confusing. Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

1800. Advertisements for the IWantContacts website (run by Memorial Eye) never included the 1-800 Contacts trademark in the title or text of the ad. (Holbrook, Tr. at 1914; CX9024 (Holbrook, Dep. at 50)).

Response to Finding No. 1800:

Complaint Counsel's Proposed Finding No. 1800 is incomplete and misleading. IWantContacts [redacted] (Holbrook, Tr. 1998-1999). Mr. Holbrook acknowledges that, [redacted] (Holbrook, Tr. 1998-1999). Regardless whether the text of the advertisement contained 1-800 Contacts' trademarks, there is ample evidence that consumers found the advertisements confusing. Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777).

1801. Memorial Eye, which sold contacts online primarily through its IWantContacts and ShipMyContacts websites, had no incentive to confuse consumers because doing so "deteriorates the image that customers have of the company, "and they're less likely to come back and see us if we do that." (CX9024 (Holbrook, Dep. at 41)).

Response to Finding No. 1801:

Complaint Counsel's Proposed Finding No. 1801 is incomplete and misleading. Memorial Eye had a financial incentive to divert consumers attempting to navigate to 1-800 Contacts website to Memorial Eye's websites by displaying confusing advertisements. Indeed, Mr. Holbrook repeatedly testified that Memorial Eye "did reap a lot of benefits from" displaying its advertisements to consumers who were attempting to navigate to 1-800 Contacts' website. (CX9024 (Holbrook, Dep. at 70-71); Holbrook, Tr. 1907-1908). Moreover, Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). There is no evidence that Memorial Eye took any affirmative steps to dispel this confusion.

1802. If WebEyeCare's advertisements are confusing, customers are less likely to want to buy from WebEyeCare. (CX9014 (Batushansky, Dep. at 144)).

Response to Finding No. 1802:

Complaint Counsel's Proposed Finding No. 1802 is misleading, inaccurate, speculative, and not supported by the cited testimony, or by any admissible testimony. Mr. Batushansky admitted that WebEyeCare had [redacted] (CX 9014 (Batushansky, Dep. at 143-44) *in camera*). He went on to acknowledge that [redacted]

[redacted] (CX 9014 (Batushansky, Dep. at 144) *in camera*).

1803. WebEyeCare never identified 1-800 Context in the text of its own ads. (CX9014 (Batushansky, Dep. at 152-153)).

Response to Finding No. 1803:

Complaint Counsel's Proposed Finding No. 1803 is misleading, inaccurate, speculative, and not supported by the cited testimony, or by any admissible testimony. [redacted] (CX 9014 (Batushansky, Dep. at 153)).

1804. Vision Direct has no intent to confuse consumers with its online advertisements. (CX9038 (Hamilton, Dep. at 80)).

Response to Finding No. 1804:

Complaint Counsel's Proposed Finding No. 1804 is incomplete and misleading. Mr. Hamilton stated that [redacted] (CX 9038 (Hamilton, Dep. at 79-80)). He further testified that he would have "no way of knowing" whether consumers would "believe that Vision Direct is affiliated with" or "sponsored by" 1-800 Contacts if a "Vision Direct sponsored ad were to appear in response to a search for '1-800 Contacts.' (CX 9038 (Hamilton, Dep. at 81)).

3. 1-800 Contacts' Competitors Identified Their Own Brand Names In Their Search Advertisements

1805. Walmart aims to directly identify itself in its search engine advertisements.(CX9033 (Mohan, Dep. at 89)).

Response to Finding No. 1805:

The proposed statement is incomplete. Ms. Mohan continued, "It's probably very beneficial for us to do that, because everybody has heard of Walmart at some point." (CX 9033 (Mohan, Dep. at 89-90)).

1806. Memorial Eye always included the name of its website in its search advertisements. (Holbrook, Tr. 1914; CX9024 (Holbrook, Dep. at 40-41)).

Response to Finding No. 1806:

Complaint Counsel's Proposed Finding No. 1806 is incomplete and misleading. Memorial Eye frequently ran paid search advertisements in response to searches for 1-800 Contacts trademark that did not include the name of Memorial Eye's company in the text of the advertisement. Although all Google sponsored advertisements contain a URL in small green print at the end of the advertisement, Memorial Eye did not include the name of its companies in the text of the advertisement copy. (CX 1313 at 3; CX 9024 (Holbrook, Dep. at 224).) To the extent Mr. Holbrook provided contrary testimony, that testimony is not reliable. Mr. Holbrook testified that he did not review Memorial Eye's advertisements before they were published and, therefore, he cannot say whether the text of the advertisements contained the name of Memorial Eye's websites:

> **Q. (By Mr. Briers) In the text -- what is your recollection as to whether in every one of Memorial Eye's online search advertisements the text of the ad included either IWantContacts or ShipMyContacts?**
>
> A. Well, I didn't review every one of them. I didn't even review most of them. So I can't answer that.

(CX 9024 (Holbrook, Dep. at 221)). Moreover, Mr. Holbrook testified that, [redacted] (Holbrook, Tr. 2000). [redacted] (Holbrook, Tr. 2002-2015; RX 850; RX 1772; RX 1774; RX 1775; RX 1776; RX 1777). There is no evidence that Memorial Eye took any affirmative steps to dispel this confusion.

1807. WebEyeCare identifies its brand in the text of its advertisements as well as its URL listed in the advertisement. (CX9014 (Batushansky, Dep. at 130)).

Response to Finding No. 1807:

Complaint Counsel's Proposed Finding No. 1807 is misleading, inaccurate, speculative, and not supported by the cited testimony, or by any admissible testimony. Mr. Batushansky actually testified **only** that [redacted]. (CX 9014 (Batushansky, Dep. at 130)).

1808. [redacted] (CX9036 (Duley, Dep, at 137-138), *in camera*)).

Response to Finding No. 1808:

Respondent has no specific response.

1809. [redacted] (CX9036 (Duley, Dep, at 137-138), *in camera*) ([redacted]).

Response to Finding No. 1809:

Complaint Counsel's Finding No. 1809 is incomplete and misleading. Mr. Duley also testified that 1) he had not "seen any studies indicating potential confusion for customers by typing in certain … trade names into the search bar and getting different results from their trade name; and 2) that it is possible for a "customer to be confused when they search for a particular trade name but [are] faced with ads from other competitors." Accordingly, Mr. Duley lacks the proper foundation to testify reliably about whether the presence of Visionworks' brands in the body of search advertisements confuses consumers or adequately indicates what the ad is for. (CX 9036 (Duley, Dep. at 181)).

1810. Visionworks Director of Marketing Mr. Duley testified that [redacted] (CX9036 (Duley, Dep. at 139), *in camera*)).

Response to Finding No. 1810:

Respondent has no specific response.

1811. AC Lens wants customers who click on its ads to know that they are clicking on an AC Lens ad. (CX9039 (Clarkson, Dep. at 128)).

Response to Finding No. 1811:

Respondent has no specific response.

4. The Mere Appearance Of Competitive Ads In Response To A 1-800 Contacts Branded Query Is Not Likely to Cause Confusion

1812. Consumer survey findings in this litigation indicate an unlikelihood of confusion when consumers view competitive advertisements in response to a search query for "1800contacts." (*See infra* § XI.C.4).

Response to Finding No. 1812:

The proposed finding is not supported by the evidence. (See replies § XI.C.4).

1813. Dr. Jacob Jacoby conducted a consumer survey to assess whether consumers are likely to be confused by advertisements for competitors appearing in response to a query for the search term "1800contacts." (CX8008 at 004, 007 (Background) (Jacoby Expert Report)).

Response to Finding No. 1813:

Respondent has no specific response.

1814. Dr. Jacoby's survey findings were based on responses from 1,272 contact lens users between the ages 18 and 74 who live in the continental United States and indicated that they were likely to purchase contact lenses online during the next 12 months. (CX8008 at 007 (Principal Findings) (Jacoby Expert Report)).

Response to Finding No. 1814:

Respondent has no specific response.

1815. Dr. Jacoby's survey tested two versions of the Google search engine results page (a "pre-2016" version and a "2016" version) to account for a relevant formatting change to the Google search results page layout that occurred in early 2016. (CX8008 at 015, 018 (Use of Two Different SERP Formats) (Jacoby Expert Report)).

Response to Finding No. 1815:

The proposed finding is incomplete, misleading, and not supported by the evidence. The evidence at trial revealed that the Google search engine results pages he used in his survey did not replicate marketplace conditions.

For his 2016 test stimulus, Dr. Jacoby intended create a search results page to look as much as possible as would look like in real life for a real-life person doing a real-life search for "1-800 Contacts." (Jacoby, Tr. 2266-2267 ("Q. And what you did when you designed this search engine result page is you wanted to have a page to look as much as possible as would look like in real life for a real life person doing a real-life search for '1-800 Contacts'; right? A. Yes. Recognizing that the page changes as Google changes its format, but to do something that exemplified what Google has typically done."); *see also* Jacoby, Tr. 2273 ("Q. And your intent

in using that was to reasonably reflect what would come up when a person searches on '1-800 Contacts'; right? A. Yes.").

Despite Dr. Jacoby's repeatedly stated intent to create a search results page that replicated the results of a search for "1-800 Contacts," his 2016 test stimulus fails to do so. Rather than using an actual SERP for the query "1-800 Contacts" as the basis for his 2016 test stimulus, Dr. Jacoby used an actual SERP for the query "contact lenses." (Jacoby, Tr. 2270-2275; *compare* RX 1993 (actual SERP for search query "contact lenses") *with* RX8008-429-430 (2016 test stimuli); Jacoby, Tr. 2270-2275 (admitting that actual SERP and 2016 test stimulus have numerous identical elements)).

A comparison of Dr. Jacoby's 2016 test stimulus with an actual SERP for the query "1-800 Contacts" shows significant differences. (Jacoby, Tr. 2275-2280; *compare* CX 8011 at 57 (actual SERP in Jacoby rebuttal report) *with* CX 8008 at 429-430 (2016 test stimulus)).
Dr. Jacoby's 2016 test stimulus includes PLAs, or Shopping ads on the right side of the SERP. (CX 8008 at 429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" does not have PLA, or Shopping ads on the right side. (CX 8011-057). Instead, it includes a Knowledge Graph for 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2281).
Dr. Jacoby's 2016 test stimulus includes organic links for competitors of 1-800 Contacts. (CX 8008 at 429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" does not have any organic links for competitors of 1-800 Contacts. (CX 8011 at 57; Jacoby, Tr. 2275-2280). Dr. Jacoby's 2016 test stimulus includes one organic link for 1-800 Contacts. (CX 8008 at 429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" has five organic links for 1-800 Contacts. (CX 8011 at 57; Jacoby, Tr. 2275-2280).

Because of the significant differences between Dr. Jacoby's 2016 test stimulus and the actual SERP for the query "1-800 Contacts," Dr. Jacoby admitted that his 2016 test stimulus did not test the question of whether rivals ads shown in response to the query "1-800 Contacts" on a SERP with the characteristics of an actual SERP for the query "1-800 Contacts":

> QUESTION: So if the relevant question in this case is whether there would be confusion caused by rival ads showing up on a search engine result page that had, like in the real world, a Knowledge Graph for 1-800 Contacts on the right-hand side, no organic links for rival sellers of contact lenses, and only organic links that related to 1-800 Contacts, your test stimulus did not test that question, did it?"
>
> THE WITNESS: The answer is, if that was the question, I don't agree, but if that was the question, my stimulus did not represent that….

(Jacoby, Tr. 2281).

Dr. Jacoby further admitted that he could not tell us, without running a different test, whether or not there would be significant confusion on a search engine results page caused by rival ads in response to a search on "1-800 Contacts" and showing on a page that has a Knowledge Graph about 1-800 Contacts, organic results that all related to 1-800 Contacts, and no organic links for rival companies." (Jacoby, Tr. 2282).

Dr. Jacoby's pre-2016 test stimulus (CX 8008 at 431) also fails to replicate market conditions. According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 ("And what you tried to do here with CX 8008 at page 431 was to create a search engine results page that is what you would see in the real world in the beginning of 2016; right? A. Yeah. To exemplify it, right."); RX 715 at 1734 (Google SERP format changed in February 2016)). As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: "[I]t is important to understand that we are testing consumers on a

SERP that existed *last year*, not on pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol." (CX 8011 at 29-30).

Dr. Jacoby's pre-2016 test stimulus does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 ("Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes."); *compare* CX 8008 at 431-432 (pre-2016 stimulus) *with* RX 414 at 7 (SERP in 2008 complaint)).

The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [redacted]; see also RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)). As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, "You really can't go back in time." (Jacoby, Tr. 2286-2287). Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby's pre-2016 test stimulus rendered his study unreliable.

1816. Dr. Jacoby's survey findings showed *de minimis* levels of likelihood of confusion as to source, affiliation, or sponsorship caused by a rival advertisement appearing in response to a search query for "1800contacts." (CX8008 at 008, 009, 010) (Principal Findings) (Jacoby Expert Report)).

Response to Finding No. 1816:

The proposed finding is not supported by the evidence. The evidence shows that Dr. Jacoby's survey was unreliable.

First, the test stimuli used by Dr. Jacoby failed to sufficiently replicate market conditions. Despite Dr. Jacoby's repeatedly stated intent to create a search results page that replicated the results of a search for "1-800 Contacts," his 2016 test stimulus fails to do so. Rather than using an actual SERP for the query "1-800 Contacts" as the basis for his 2016 test stimulus, Dr. Jacoby used an actual SERP for the query "contact lenses." (Jacoby, Tr. 2270-2275; *compare* RX 1993 (actual SERP for search query "contact lenses") *with* RX 8008 at 429-430 (2016 test stimuli); Jacoby, Tr. 2270-2275 (admitting that actual SERP and 2016 test stimulus have numerous identical elements)).

A comparison of Dr. Jacoby's 2016 test stimulus with an actual SERP for the query "1-800 Contacts" shows significant differences. (Jacoby, Tr. 2275-2280; *compare* CX 8011 at 57 (actual SERP in Jacoby rebuttal report) *with* CX 8008 at 429-430 (2016 test stimulus)). Because of the significant differences between Dr. Jacoby's 2016 test stimulus and the actual SERP for the query "1-800 Contacts," Dr. Jacoby admitted that his 2016 test stimulus did not test the question of whether rivals ads shown in response to the query "1-800 Contacts" on a SERP with the characteristics of an actual SERP for the query "1-800 Contacts." (Jacoby, Tr. 2281).

Dr. Jacoby's pre-2016 test stimulus (CX 8008 at 431) also fails to replicate market conditions. According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 ("And what you tried to do here with CX 8008 at page 431 was to create a search engine results page that is what you would see in the

real world in the beginning of 2016; right? A. Yeah. To exemplify it, right."); RX 715 at 1734 (Google SERP format changed in February 2016)). As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: "[I]t is important to understand that we are testing consumers on a SERP that existed *last year*, not on pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol." (CX 8011 at 29-30).

Dr. Jacoby's pre-2016 test stimulus does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 ("Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes."); *compare* CX 8008 at 431-432 (pre-2016 stimulus) *with* RX 414 at 7 (SERP in 2008 complaint)).

The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [redacted]; see also RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)). As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, "You really can't go back in time." (Jacoby, Tr. 2286-2287). Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby's pre-2016 test stimulus rendered his study unreliable.

Second, Dr. Jacoby's survey failed to sufficiently replicate market conditions in a number of ways, making his survey unreliable. In its "main question," the survey improperly drew respondents' attention to, and asked about, a single sponsored ad by inserting into the stimulus a large green arrow. (Jacoby, Tr. 2310-2311; CX 8008-445). The survey thus does not replicate a real search environment in which consumers are free to scan as much or as little of the search results page as they wish before making their own selections. (RX 735 at 23). Consumers reviewing actual search results pages are able to select the natural, or organic, listings as well as sponsored advertisements if they wish. (RX 735 at 23). By using the green arrow to identify specific elements of the SERP for respondents to look at, the survey leads respondents "to inspect it to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole," causing respondents to "consider certain parts of the stimulus that you've decided they should pay attention to rather than let them look at the stimulus as they normally would …. creating a very artificial way for them to look at the results that they see." (Van Liere., Tr. 3080-3081). Dr. Jacoby's use of the green arrows and asking about a single ad makes the survey unreliable. (Van Liere, Tr. 3080-3082).

In addition, by using the green arrow to draw attention to a single ad, and asking only about that ad, the survey did not allow respondents to, as they would in the real-world, select and click on any link on the screen. (Jacoby, Tr. 2308-2312). Dr. Jacoby's survey therefore did not allow respondents to engage with the search results in a realistic way.

Dr. Jacoby's survey was also unreliable because by asking respondents to look at the particular ad indicated by the green arrow and to type into a box the company's website clicking on the ad will it take you to, Dr. Jacoby's survey amounted to reading test. (RX 735 at 24-25). The data show that respondents in Dr. Jacoby's survey simply read the ad copy or URL and

typed it into the box. (RX 735 at 24; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087). Dr. Jacoby's data show that 53% of respondents asked "If you click on this listing, which company's website will it take you to?" simply typed into the supplied box the URL of the link in the ad indicated by the green arrow. (RX 735 at 24; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087). Dr. Jacoby's data also show that 8% of respondents asked "If you click on this listing, which company's website will it take you to?" simply typed into the supplied box a portion of the ad copy from the ad indicated by the green arrow. (RX 735 at 24; Jacoby, Tr. 2317-2321). Dr. Jacoby's survey thus improperly "leads the respondent to inspect the particular link with the big green arrow and essentially parrot back what they saw next to the big green arrow rather than any evidence that they're considering whether the thing they searched on is a website that -- whether this is a website that they would have gone to as 1-800 Contacts . . . . So it's not really measuring whether the consumer is confusing this link with 1-800 Contacts. It's simply asking the respondent to look at this ad and tell them what company it would go to with a big green arrow next to the URL of that company." (Van Liere, Tr. 3085-86).

Dr. Jacoby's survey also failed to replicate marketplace conditions by requiring respondents to view the test stimuli for an unrealistic amount of time. The survey improperly slowed the decisionmaking process. (Jacoby, Tr. 2302-2306). As Dr. Jacoby admitted, if a respondent is allowed to view it for an unrealistic length of time, that might undermine the validity of the survey. (Jacoby, Tr. 2300). People can be confused by something that they look at and they can concentrate on for a very short period of time, when they wouldn't be confused by the very same thing if they could concentrate on it for a longer period of time. (CX 9041 (Jacoby, Dep. 115-116)).

In addition, Dr. Jacoby's survey failed to replicate marketplace conditions because the questions were divorced from the search task. Respondents in Dr. Jacoby's survey entered the search term only once, at the beginning of the main part of the questionnaire. (Jacoby, Tr. 2308). Respondents then go through a number of screens and are asked about links in several survey questions, none of which refer to the search term. (CX 8008 at 115, 465, 471, 481, 487; Jacoby, Tr. 2308-2310). The survey thus "divorces the whole exercise from the search process," making it unreliable. (Van Liere, Tr. 3084-3085).

Third, Dr. Jacoby used an improper control condition. Respondents in the control condition in Dr. Jacoby's survey are not asked to search using the term "1800contacts," as did the respondents in the test condition, but instead were asked to do an entirely different search using the term "contact lenses." (CX 8008 at 14-15). Respondents in both conditions are then shown the very same search results with the very same sponsored links. (Compare CX 8008 at 435 with CX 8008 at 438). Dr. Jacoby's control stimulus is thus exactly the same as the test stimulus, sharing every characteristic (i.e., the sponsored advertisements) whose influence is being assessed on the test stimulus. (RX 735 at 27). Dr. Jacoby does not ask one question about respondents' opinions about the term searched, rather he asks only about the sponsored advertisements. (RX 735 at 27).

Because there is no difference between the test and control conditions, any confusion found in the control condition is caused by the same elements as the test condition, and any net calculation based on the control is inappropriate. (RX 735 at 27). By having respondents in his control condition search using "contact lenses" rather than "1800contacts," respondents in the control group are conducting a different exercise than those in the test group. (Van Liere, Tr. 3089-3090).

Using the different search terms—one a variation of 1-800 Contacts' trademark and one a generic term—put the respondents in the test and control groups in Dr. Jacoby's survey in a different state of mind or frame of reference. (Van Liere, Tr. 3089-3090). Because respondents in the control group search using "contact lenses" rather than "1800contacts," they are likely to interact with the results differently, rendering the study unreliable. (Van Liere, Tr. 3089-3090).

Fourth, Dr. Jacoby also improperly uses leading questions in his control condition. (RX 735 at 27-28). Respondents in Dr. Jacoby's control condition were instructed initially to search on "contact lenses" and "1-800 Contacts" was not mentioned to them. (RX 735 at 27-28). Yet after they searched on "contact lenses," respondents in Dr. Jacoby's control condition were then asked questions that in three out of four instances explicitly mention and direct them to focus on 1-800 Contacts, or ask explicitly about advertisements in relationship to 1-800 Contacts. (RX 735 at 27-28). These questions are leading in the context of the control condition because these respondents did not previously have any reason to focus on 1-800 Contacts. (RX 735 at 27-28). In this manner, Dr. Jacoby has transformed his control condition into no more than a slight variant of a keyword search for 1-800 Contacts. (RX 735 at 27-28).

1817. Dr. Jacoby found a net confusion rate (that is, confusion as to source, affiliation, or sponsorship caused by a rival advertisement appearing in response to a search query for "1800contacts") of 1.1% for the pre-2016 version of his survey. (CX8008 at 056 (Overall Likelihood of Confusion) (Jacoby Expert Report); Jacoby, Tr. 2139, 2143).

Response to Finding No. 1817:

The proposed finding is not supported by the evidence. The evidence shows that Dr. Jacoby's survey was unreliable.

First, Dr. Jacoby's pre-2016 test stimulus (CX 8008 at 431) fails to replicate market conditions. According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-

hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 ("And what you tried to do here with CX 8008 at page 431 was to create a search engine results page that is what you would see in the real world in the beginning of 2016; right? A. Yeah. To exemplify it, right."); RX 715 at 1734 (Google SERP format changed in February 2016)). As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: "[I]t is important to understand that we are testing consumers on a SERP that existed *last year*, not on pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol." (CX 8011 at 29-30).

Dr. Jacoby's pre-2016 test stimulus does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 ("Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes."); *compare* CX 8008 at 431-432 (pre-2016 stimulus) *with* RX 414 at 7 (SERP in 2008 complaint)).

The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [redacted]; see also RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)). As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, "You really can't go back in time." (Jacoby, Tr. 2286-2287). Given the numerous changes to

the Google SERP since 2007, the use of Dr. Jacoby's pre-2016 test stimulus rendered his study unreliable.

Second, Dr. Jacoby's survey failed to sufficiently replicate market conditions in a number of ways, making his survey unreliable. In its "main question," the survey improperly drew respondents' attention to, and asked about, a single sponsored ad by inserting into the stimulus a large green arrow. (Jacoby, Tr. 2310-2311; CX 8008 at 445). The survey thus does not replicate a real search environment in which consumers are free to scan as much or as little of the search results page as they wish before making their own selections. (RX 735 at 23). Consumers reviewing actual search results pages are able to select the natural, or organic, listings as well as sponsored advertisements if they wish. (RX 735 at 23). By using the green arrow to identify specific elements of the SERP for respondents to look at, the survey leads respondents "to inspect it to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole," causing respondents to "consider certain parts of the stimulus that you've decided they should pay attention to rather than let them look at the stimulus as they normally would …. creating a very artificial way for them to look at the results that they see." (Van Liere., Tr. 3080-3081). Dr. Jacoby's use of the green arrows and asking about a single ad makes the survey unreliable. (Van Liere, Tr. 3080-3082).

In addition, by using the green arrow to draw attention to a single ad, and asking only about that ad, the survey did not allow respondents to, as they would in the real-world, select and click on any link on the screen. (Jacoby, Tr. 2308-2312). Dr. Jacoby's survey therefore did not allow respondents to engage with the search results in a realistic way.

Dr. Jacoby's survey was also unreliable because by asking respondents to look at the particular ad indicated by the green arrow and to type into a box the company's website clicking

on the ad will it take you to, Dr. Jacoby's survey amounted to reading test. (RX 735 at 24-25). The data show that respondents in Dr. Jacoby's survey simply read the ad copy or URL and typed it into the box. (RX 735 at 24; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087). Dr. Jacoby's data show that 53% of respondents asked "If you click on this listing, which company's website will it take you to?" simply typed into the supplied box the URL of the link in the ad indicated by the green arrow. (RX 735 at 24; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087). Dr. Jacoby's data also show that 8% of respondents asked "If you click on this listing, which company's website will it take you to?" simply typed into the supplied box a portion of the ad copy from the ad indicated by the green arrow. (RX 735 at 24; Jacoby, Tr. 2317-2321). Dr. Jacoby's survey thus improperly "leads the respondent to inspect the particular link with the big green arrow and essentially parrot back what they saw next to the big green arrow rather than any evidence that they're considering whether the thing they searched on is a website that -- whether this is a website that they would have gone to as 1-800 Contacts . . . . So it's not really measuring whether the consumer is confusing this link with 1-800 Contacts. It's simply asking the respondent to look at this ad and tell them what company it would go to with a big green arrow next to the URL of that company." (Van Liere, Tr. 3085-86).

Dr. Jacoby's survey also failed to replicate marketplace conditions by requiring respondents to view the test stimuli for an unrealistic amount of time. The survey improperly slowed the decisionmaking process. (Jacoby, Tr. 2302-2306). As Dr. Jacoby admitted, if a respondent is allowed to view it for an unrealistic length of time, that might undermine the validity of the survey. (Jacoby, Tr. 2300). People can be confused by something that they look at and they can concentrate on for a very short period of time, when they wouldn't be confused by

the very same thing if they could concentrate on it for a longer period of time. (CX 9041 (Jacoby, Dep. 115-116)).

In addition, Dr. Jacoby's survey failed to replicate marketplace conditions because the questions were divorced from the search task. Respondents in Dr. Jacoby's survey entered the search term only once, at the beginning of the main part of the questionnaire. (Jacoby, Tr. 2308). Respondents then go through a number of screens and are asked about links in several survey questions, none of which refer to the search term. (CX 8008 at 115, 465, 471, 481, 487; Jacoby, Tr. 2308-2310). The survey thus "divorces the whole exercise from the search process," making it unreliable. (Van Liere, Tr. 3084-3085).

Third, Dr. Jacoby used an improper control condition. Respondents in the control condition in Dr. Jacoby's survey are not asked to search using the term "1800contacts," as did the respondents in the test condition, but instead were asked to do an entirely different search using the term "contact lenses." (CX 8008 at 14-15). Respondents in both conditions are then shown the very same search results with the very same sponsored links. (Compare CX 8008 at 435 with CX 8008 at 438). Dr. Jacoby's control stimulus is thus exactly the same as the test stimulus, sharing every characteristic (i.e., the sponsored advertisements) whose influence is being assessed on the test stimulus. (RX 735 at 27). Dr. Jacoby does not ask one question about respondents' opinions about the term searched, rather he asks only about the sponsored advertisements. (RX 735 at 27).

Because there is no difference between the test and control conditions, any confusion found in the control condition is caused by the same elements as the test condition, and any net calculation based on the control is inappropriate. (RX 735 at 27). By having respondents in his control condition search using "contact lenses" rather than "1800contacts," respondents in the

control group are conducting a different exercise than those in the test group. (Van Liere, Tr. 3089-3090).

Using the different search terms—one a variation of 1-800 Contacts' trademark and one a generic term—also put the respondents in the test and control groups in Dr. Jacoby's survey in a different state of mind or frame of reference. (Van Liere, Tr. 3089-3090). Because respondents in the control group search using "contact lenses" rather than "1800contacts," they are likely to interact with the results differently, rendering the study unreliable. (Van Liere, Tr. 3089-3090).

Fourth, Dr. Jacoby also improperly uses leading questions in his control condition. (RX 735 at 27-28). Respondents in Dr. Jacoby's control condition were instructed initially to search on "contact lenses" and "1-800 Contacts" was not mentioned to them. (RX 735 at 27-28). Yet after they searched on "contact lenses," respondents in Dr. Jacoby's control condition were then asked questions that in three out of four instances explicitly mention and direct them to focus on 1-800 Contacts, or ask explicitly about advertisements in relationship to 1-800 Contacts. (RX 735 at 27-28). These questions are leading in the context of the control condition because these respondents did not previously have any reason to focus on 1-800 Contacts. (RX 735 at 27-28). In this manner, Dr. Jacoby has transformed his control condition into no more than a slight variant of a keyword search for 1-800 Contacts. (RX 735 at 27-28).

1818. Dr. Jacoby found a net confusion rate of 6.1% for the 2016 version of his survey. (CX8008 at 056 (Overall Likelihood of Confusion) (Jacoby Expert Report); Jacoby, Tr. 2139-2140, 2143).

Response to Finding No. 1818:

The proposed finding is not supported by the evidence. The evidence shows that Dr. Jacoby's survey was unreliable.

First, the test stimuli used by Dr. Jacoby failed to sufficiently replicate market conditions.

Despite Dr. Jacoby's repeatedly stated intent to create a search results page that replicated the results of a search for "1-800 Contacts," his 2016 test stimulus fails to do so. Rather than using an actual SERP for the query "1-800 Contacts" as the basis for his 2016 test stimulus, Dr. Jacoby used an actual SERP for the query "contact lenses." (Jacoby, Tr. 2270-2275; *compare* RX 1993 (actual SERP for search query "contact lenses") *with* RX 8008 at 429-430 (2016 test stimuli); Jacoby, Tr. 2270-2275 (admitting that actual SERP and 2016 test stimulus have numerous identical elements)).

A comparison of Dr. Jacoby's 2016 test stimulus with an actual SERP for the query "1-800 Contacts" shows significant differences. (Jacoby, Tr. 2275-2280; *compare* CX 8011 at 57 (actual SERP in Jacoby rebuttal report) *with* CX 8008 at 429-430 (2016 test stimulus)). Because of the significant differences between Dr. Jacoby's 2016 test stimulus and the actual SERP for the query "1-800 Contacts," Dr. Jacoby admitted that his 2016 test stimulus did not test the question of whether rivals ads shown in response to the query "1-800 Contacts" on a SERP with the characteristics of an actual SERP for the query "1-800 Contacts." (Jacoby, Tr. 2281).

Second, Dr. Jacoby's survey failed to sufficiently replicate market conditions in a number of ways, making his survey unreliable. In its "main question," the survey improperly drew respondents' attention to, and asked about, a single sponsored ad by inserting into the stimulus a large green arrow. (Jacoby, Tr. 2310-2311; CX 8008 at 445). The survey thus does not replicate a real search environment in which consumers are free to scan as much or as little of the search results page as they wish before making their own selections. (RX 735 at 23). Consumers reviewing actual search results pages are able to select the natural, or organic, listings as well as sponsored advertisements if they wish. (RX 735 at 23). By using the green arrow to identify specific elements of the SERP for respondents to look at, the survey leads respondents "to

inspect it to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole," causing respondents to "consider certain parts of the stimulus that you've decided they should pay attention to rather than let them look at the stimulus as they normally would …. creating a very artificial way for them to look at the results that they see." (Van Liere., Tr. 3080-3081). Dr. Jacoby's use of the green arrows and asking about a single ad makes the survey unreliable. (Van Liere, Tr. 3080-3082).

In addition, by using the green arrow to draw attention to a single ad, and asking only about that ad, the survey did not allow respondents to, as they would in the real-world, select and click on any link on the screen. (Jacoby, Tr. 2308-2312). Dr. Jacoby's survey therefore did not allow respondents to engage with the search results in a realistic way.

Dr. Jacoby's survey was also unreliable because by asking respondents to look at the particular ad indicated by the green arrow and to type into a box the company's website clicking on the ad will it take you to, Dr. Jacoby's survey amounted to reading test. (RX 735 at 24-25). The data show that respondents in Dr. Jacoby's survey simply read the ad copy or URL and typed it into the box. (RX 735 at 24; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087). Dr. Jacoby's data show that 53% of respondents asked "If you click on this listing, which company's website will it take you to?" simply typed into the supplied box the URL of the link in the ad indicated by the green arrow. (RX 735 at 24; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087). Dr. Jacoby's data also show that 8% of respondents asked "If you click on this listing, which company's website will it take you to?" simply typed into the supplied box a portion of the ad copy from the ad indicated by the green arrow. (RX 735 at 24; Jacoby, Tr. 2317-2321). Dr. Jacoby's survey thus improperly "leads the respondent to inspect the particular link with the big green arrow and essentially parrot back what they saw next to the big green

arrow rather than any evidence that they're considering whether the thing they searched on is a website that -- whether this is a website that they would have gone to as 1-800 Contacts . . . . So it's not really measuring whether the consumer is confusing this link with 1-800 Contacts. It's simply asking the respondent to look at this ad and tell them what company it would go to with a big green arrow next to the URL of that company." (Van Liere, Tr. 3085-86).

Dr. Jacoby's survey also failed to replicate marketplace conditions by requiring respondents to view the test stimuli for an unrealistic amount of time. The survey improperly slowed the decisionmaking process. (Jacoby, Tr. 2302-2306). As Dr. Jacoby admitted, if a respondent is allowed to view it for an unrealistic length of time, that might undermine the validity of the survey. (Jacoby, Tr. 2300). People can be confused by something that they look at and they can concentrate on for a very short period of time, when they wouldn't be confused by the very same thing if they could concentrate on it for a longer period of time. (CX 9041 (Jacoby, Dep. 115-116)).

In addition, Dr. Jacoby's survey failed to replicate marketplace conditions because the questions were divorced from the search task. Respondents in Dr. Jacoby's survey entered the search term only once, at the beginning of the main part of the questionnaire. (Jacoby, Tr. 2308). Respondents then go through a number of screens and are asked about links in several survey questions, none of which refer to the search term. (CX 8008 at 115, 465, 471, 481, 487; Jacoby, Tr. 2308-2310). The survey thus "divorces the whole exercise from the search process," making it unreliable. (Van Liere, Tr. 3084-3085).

Third, Dr. Jacoby used an improper control condition. Respondents in the control condition in Dr. Jacoby's survey are not asked to search using the term "1800contacts," as did the respondents in the test condition, but instead were asked to do an entirely different search

using the term "contact lenses." (CX 8008 at 14-15). Respondents in both conditions are then shown the very same search results with the very same sponsored links. (Compare CX 8008 at 435 with CX 8008 at 438). Dr. Jacoby's control stimulus is thus exactly the same as the test stimulus, sharing every characteristic (i.e., the sponsored advertisements) whose influence is being assessed on the test stimulus. (RX 735 at 27). Dr. Jacoby does not ask one question about respondents' opinions about the term searched, rather he asks only about the sponsored advertisements. (RX 735 at 27).

Because there is no difference between the test and control conditions, any confusion found in the control condition is caused by the same elements as the test condition, and any net calculation based on the control is inappropriate. (RX 735 at 27). By having respondents in his control condition search using "contact lenses" rather than "1800contacts," respondents in the control group are conducting a different exercise than those in the test group. (Van Liere, Tr. 3089-3090).

Using the different search terms—one a variation of 1-800 Contacts' trademark and one a generic term—put the respondents in the test and control groups in Dr. Jacoby's survey in a different state of mind or frame of reference. (Van Liere, Tr. 3089-3090). Because respondents in the control group search using "contact lenses" rather than "1800contacts," they are likely to interact with the results differently, rendering the study unreliable. (Van Liere, Tr. 3089-3090).

Fourth, Dr. Jacoby also improperly uses leading questions in his control condition. (RX 735 at 27-28). Respondents in Dr. Jacoby's control condition were instructed initially to search on "contact lenses" and "1-800 Contacts" was not mentioned to them. (RX 735 at 27-28). Yet after they searched on "contact lenses," respondents in Dr. Jacoby's control condition were then asked questions that in three out of four instances explicitly mention and direct them to

focus on 1-800 Contacts, or ask explicitly about advertisements in relationship to 1-800 Contacts. (RX 735 at 27-28). These questions are leading in the context of the control condition because these respondents did not previously have any reason to focus on 1-800 Contacts. (RX 735 at 27-28). In this manner, Dr. Jacoby has transformed his control condition into no more than a slight variant of a keyword search for 1-800 Contacts. (RX 735 at 27-28).

1819. Regarding the inclusion of a pre-2016 version of his survey, Dr. Jacoby Expert Reported that "the world in which 1-800 Contacts challenged its rivals' ads was a world in which the Google SERP looked markedly different, specifically, with regard to the placement of ads on the right-hand side of the SERP. As of February 2016, ads no longer appear on the right-hand side of the SERP. To test consumer confusion on a SERP that contained ads at the top of the page only would thus not appropriately reflect the real-world marketplace conditions in which these agreements were consummated." (CX8011 at 029 (¶39) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1819:

The proposed finding is not supported by the evidence. The evidence shows that Dr. Jacoby's pre-2016 test stimulus (CX 8008 at 431) fails to replicate market conditions. According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 ("And what you tried to do here with CX 8008 at page 431 was to create a search engine results page that is what you would see in the real world in the beginning of 2016; right? A. Yeah. To exemplify it, right."); RX 715 at 1734 (Google SERP format changed in February 2016)). As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: "[I]t is important to understand that we are testing consumers on a SERP that existed *last year*, not on pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol." (CX 8011 at 29-30).

Dr. Jacoby's pre-2016 test stimulus, however, does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 ("Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes."); *compare* CX 8008 at 431-432 (pre-2016 stimulus) *with* RX 414 at 7 (SERP in 2008 complaint)).

The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [redacted]; see also RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)). As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, "You really can't go back in time." (Jacoby, Tr. 2286-2287). Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby's pre-2016 test stimulus rendered his study unreliable.

1820. Dr. Jacoby Expert Reported that "[g]iven the circumstances, particularly the timing of 1-800 Contacts' agreements with its rivals, it would be irresponsible *not* to test consumer confusion based on this pre-2016 SERP layout." (CX8011 at 029(¶ 37) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1820:

The proposed finding is not supported by the evidence. The evidence shows that Dr. Jacoby's pre-2016 test stimulus (CX 8008 at 431) fails to replicate market conditions. According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 ("And what you tried to do here with CX 8008 at page 431 was to

create a search engine results page that is what you would see in the real world in the beginning of 2016; right? A. Yeah. To exemplify it, right."); RX 715 at 1734 (Google SERP format changed in February 2016)). As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: "[I]t is important to understand that we are testing consumers on a SERP that existed *last year*, not on pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol." (CX 8011 at 29-30).

Dr. Jacoby's pre-2016 test stimulus, however, does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 ("Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes."); *compare* CX 8008 at 431-432 (pre-2016 stimulus) *with* RX 414 at 7 (SERP in 2008 complaint)).

The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [redacted]; see also RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)). As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, "You really can't go back in time." (Jacoby, Tr. 2286-2287). Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby's pre-2016 test stimulus rendered his study unreliable.

1821. Dr. Van Liere conducted a survey that purported to measure the extent to which sponsored advertisements that appear in response to search requests for "1-800 Contacts" are likely to cause confusion as to source or affiliation. (RX0735 at 005(¶ 10) (Van Liere Report); Van Liere, Tr. 2977).

Response to Finding No. 1821:

Respondent has no specific response.

1822. Dr. Van Liere acknowledged that the relevant question to be tested was "whether the sponsored advertisements that appear in response to the search for the trademarked term are likely to be confusing." (RX0735 at 026(¶ 52) (Van Liere Report)).

Response to Finding No. 1822:

Respondent has no specific response.

1823. Dr. Van Liere's survey purportedly showed a net overall confusion rate of 21%. (RX0735 at 006, 021 (¶¶ 12, 40) (Van Liere Report)).

Response to Finding No. 1823:

Respondent has no specific response.

1824. Dr. Jacoby reviewed Dr. Kent Van Liere's report and survey materials. (CX8011 (Jacoby Rebuttal Expert Report); RX0735 (Van Liere Report)).

Response to Finding No. 1824:

Respondent has no specific response.

1825. Dr. Jacoby identified flaws in Dr. Van Liere's survey that, in Dr. Jacoby's opinion, rendered Dr. Van Liere's survey results meaningless and his conclusions unreliable. (CX8011 at 002-028) (¶¶ 1-35) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1825:

The proposed finding is incomplete and not supported by the evidence. Dr. Van Liere addressed each of Dr. Jacoby's criticisms, demonstrating that his survey is robust and reliable. (Respondent's Proposed Findings of Fact 1566-1590.)

1826. Dr. Jacoby testified that Dr. Van Liere's survey failed to test the question that needed to be addressed. (Jacoby, Tr. 2218-2222; CX8011 at 007-009 (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1826:

The proposed finding is incomplete and not supported by the evidence. Dr. Jacoby contended that Dr. Van Liere should not have used the search term "1-800 Contacts" in his control conditions. (Jacoby, Tr. 2219-22). According to Dr. Jacoby, respondents in Dr. Van Liere's control condition should not have searched using the query "1-800 Contacts" but should have used a generic term, such as "contact lenses." (Jacoby, Tr. 2219-22). These contentions are wrong. As discussed above, Dr. Jacoby's use of a different search term in his control condition was a fundamental flaw in his own study, rendering that study unreliable.

Dr. Van Liere appropriately had respondents in both the test and control conditions search using the query "1-800 Contacts." (Van Liere, Tr. 3035-36). As Dr. Van Liere explained, the basic idea in a trademark confusion study "is that the test and the control should be identical except for the allegedly confusing elements, so here we want the respondents in both conditions to come to the exercise with the same frame of reference. That means they're both searching on '1-800 Contacts' and then evaluating the search results page based on having done that exercise." (Van Liere, Tr. 3035). Respondents in the control and the test conditions must be asked to think about what they're looking at the same way. (Van Liere, Tr. 3036).

In this case, the appropriate frame of reference is a consumer looking at results after having searched using the term "1-800 Contacts." (Van Liere, Tr. 3036). As Dr. Van Liere explained, "the searching on '1-800 Contacts' is a key element of the alleged confusion, so we want both the test and control to do that." (Van Liere, Tr. 3036).

1827. Dr. Jacoby testified that Dr. Van Liere designed a flawed control group that rendered his "net confusion" results meaningless. (Jacoby, Tr. 2227-2229; CX8011 at 011) (¶20-21) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1827:

The proposed finding is incomplete and not supported by the evidence. Dr. Jacoby contended that Dr. Van Liere should not have used the search term "1-800 Contacts" in his control conditions. (Jacoby, Tr. 2219-22). According to Dr. Jacoby, respondents in Dr. Van Liere's control condition should not have searched using the query "1-800 Contacts" but should have used a generic term, such as "contact lenses." (Jacoby, Tr. 2219-22). These contentions are wrong. As discussed above, Dr. Jacoby's use of a different search term in his control condition was a fundamental flaw in his own study, rendering that study unreliable.

Dr. Van Liere appropriately had respondents in both the test and control conditions search using the query "1-800 Contacts." (Van Liere, Tr. 3035-36). As Dr. Van Liere explained, the basic idea in a trademark confusion study "is that the test and the control should be identical except for the allegedly confusing elements, so here we want the respondents in both conditions to come to the exercise with the same frame of reference. That means they're both searching on '1-800 Contacts' and then evaluating the search results page based on having done that exercise." (Van Liere, Tr. 3035). Respondents in the control and the test conditions must be asked to think about what they're looking at the same way. (Van Liere, Tr. 3036).

In this case, the appropriate frame of reference is a consumer looking at results after having searched using the term "1-800 Contacts." (Van Liere, Tr. 3036). As Dr. Van Liere explained, "the searching on '1-800 Contacts' is a key element of the alleged confusion, so we want both the test and control to do that." (Van Liere, Tr. 3036).

Dr. Jacoby contended that Dr. Van Liere's control condition was improper because it has fewer links than the test condition. (Jacoby, Tr. 2225-26). This contention is invalid. By making

the test and control stimuli identical except for the presence of the sponsored ads, the test stimuli have overall more links on the page. (Van Liere, Tr. 3030-31). Having fewer links in the control condition does not affect the reliability of the study. (Van Liere, Tr. 3030-31). As Dr. Van Liere explained, both stimuli are "realistic replications of what those search results pages would look like if you had one that had no sponsored links and one that had a typical number of sponsored links, so in that sense, both the test and the control replicate marketplace conditions." (Van Liere, Tr. 3030-3031; compare RX 730 at 11 (control stimulus) with RX 310 at 634-35 (actual search result), RX 310 at 636-37 (actual search result)). Because of this, including fewer links in the control condition enhanced the realism, and therefore the reliability, of the study.

Dr. Jacoby's criticism would only have weight if respondents were randomly clicking on links. But the survey data show that respondents were not randomly clicking on links; the data show respondents were looking at the control search results and reacting to the content on the page. (Van Liere, Tr. 3031-3035). The survey data show that the average number of links clicked by respondents in the test group and the control group were very close. (RX 735 at 20). For instance, respondents in the Google test group clicked on an average of 1.8 links in response to the Source Question and those in the Google control group clicked on an average of 1.7 links for that question. (RX 735 at 20; Van Liere, Tr. 3034). These data show that having fewer links in the control stimulus than the test stimulus did not affect the reliability of the study. (Van Liere, Tr. 3031-3035).

1828. Dr. Jacoby testified that Dr. Van Liere's test and control conditions artificially inflated his reported confusion levels by removing advertisements for 1-800 Contacts that should have appeared on the mock-up search engine results pages (or "stimuli") in Dr. Van Liere's survey. (Jacoby, Tr. 2229-2234; CX8011 at 007 (¶11) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1828:

The proposed finding is incomplete and not supported by the evidence. Dr. Jacoby contended that Dr. Van Liere's test and control stimuli were improper because they did not include an advertisement for 1-800 Contacts. (Jacoby, Tr. 2231-2232). This contention is incorrect.

Dr. Jacoby's contention assumes that (1) 1-800 Contacts should be required in the but-for world to pay to have its ads placed in response to other advertisers bidding on its trademarks as keywords and (2) the search engines would always place 1-800 Contacts ads in response to queries using its trademarks. Neither assumption is valid.

As Dr. Van Liere explained, "we're being asked to measure confusion in this case in a but-for world in the future where the agreements weren't in place and the sponsored ads of the competitors are now appearing. We want to test that, whether those ads themselves are confusing, whether 1-800 Contacts chose to buy their way to the top of or into the sponsored links or not. So in this case and in prior of these cases I've worked on, the basic idea is you want to measure the impact of those ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area, so that's why we've designed these, both in other cases and here, without the trademark owner's sponsored link in the pool that's tested." (Van Liere, Tr. 3037-3038; *see also* CX 9049 (Van Liere, Dep. at 187-188 ("confusion has to be measured whether 1-800 Contacts is forced to purchase its own names as the first sponsored link or it is not."); (Van Liere, Tr. 3214 ("After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off. But it wasn't a unilateral decision by counsel . . . it was never unilateral. I discussed at some length with them what we've done in prior cases and why it wasn't necessarily

appropriate to assume that the trademark owner had to purchase the top spot or one of the upper links as an assumption in how you design the test and control conditions.")).

Moreover, given the complexities of the search engine auctions, it is not appropriate to assume that the search engines would always place 1-800 Contacts ads even if 1-800 Contacts bid on its trademarks as keywords. In fact, although 1-800 Contacts has bid on its own trademarks as keywords, its ads do not always appear in response to searches using those trademark terms. (*See, e.g.*, RX 310 at 318, RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 426-27, and RX 311 at 579-80).

1829. Dr. Jacoby testified that Dr. Van Liere's test and control conditions failed to replicate real-world conditions by removing advertisements for 1-800 Contacts that should have appeared on the stimuli in Dr. Van Liere's survey. (Jacoby, Tr. 2229-2234; CX8011 at 007 (¶11) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1829:

The proposed finding is incomplete and not supported by the evidence. Dr. Jacoby contended that Dr. Van Liere's test and control stimuli were improper because they did not include an advertisement for 1-800 Contacts. (Jacoby, Tr. 2231-2232). This contention is incorrect.

Dr. Jacoby's contention assumes that (1) 1-800 Contacts should be required in the but-for world to pay to have its ads placed in response to other advertisers bidding on its trademarks as keywords and (2) the search engines would always place 1-800 Contacts ads in response to queries using its trademarks. Neither assumption is valid.

As Dr. Van Liere explained, "we're being asked to measure confusion in this case in a but-for world in the future where the agreements weren't in place and the sponsored ads of the competitors are now appearing. We want to test that, whether those ads themselves are

confusing, whether 1-800 Contacts chose to buy their way to the top of or into the sponsored links or not. So in this case and in prior of these cases I've worked on, the basic idea is you want to measure the impact of those ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area, so that's why we've designed these, both in other cases and here, without the trademark owner's sponsored link in the pool that's tested." (Van Liere, Tr. 3037-3038; *see also* CX 9049 (Van Liere, Dep. at 187-188 ("confusion has to be measured whether 1-800 Contacts is forced to purchase its own names as the first sponsored link or it is not."); (Van Liere, Tr. 3214 ("After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off. But it wasn't a unilateral decision by counsel . . . it was never unilateral. I discussed at some length with them what we've done in prior cases and why it wasn't necessarily appropriate to assume that the trademark owner had to purchase the top spot or one of the upper links as an assumption in how you design the test and control conditions.")).

Moreover, given the complexities of the search engine auctions, it is not appropriate to assume that the search engines would always place 1-800 Contacts ads even if 1-800 Contacts bid on its trademarks as keywords. In fact, although 1-800 Contacts has bid on its own trademarks as keywords, its ads do not always appear in response to searches using those trademark terms. (*See, e.g.*, RX 310 at 318, RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 426-27, and RX 311 at 579-80).

1830. Dr. Van Liere testified that it is important for survey stimuli to replicate marketplace conditions as much as possible. (Van Liere, Tr. 3004-3005; CX9049 (Van Liere, Dep. at 192-193)).

Response to Finding No. 1830:

Respondent has no specific response.

1831. At his deposition, Dr. Van Liere testified that he was asked to design his stimuli without a 1-800 Contacts advertisement appearing on the mock-up SERP. (CX9049 (Van Liere, Dep. at 189-190)).

Response to Finding No. 1831:

The proposed finding is misleading and not supported by the evidence. Dr. Van Liere testified, "After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off. But it wasn't a unilateral decision by counsel . . . it was never unilateral. I discussed at some length with them what we've done in prior cases and why it wasn't necessarily appropriate to assume that trademark owner had to purchase the top spot or one of the upper links as an assumption in how you design the test and control conditions." (Van Liere, Tr. 3214).

As Dr. Van Liere explained, "we're being asked to measure confusion in this case in a but-for world in the future where the agreements weren't in place and the sponsored ads of the competitors are now appearing. We want to test that, whether those ads themselves are confusing, whether 1-800 Contacts chose to buy their way to the top of or into the sponsored links or not. So in this case and in prior of these cases I've worked on, the basic idea is you want to measure the impact of those ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area, so that's why we've designed these, both in other cases and here, without the trademark owner's sponsored link in the pool that's tested." (Van Liere, Tr. 3037-3038; *see also* CX 9049 (Van Liere, Dep. at 187-188 ("confusion has to be measured whether 1-800 Contacts is forced to purchase its own names as the first sponsored link or it is not.")).

1832. At trial, Dr. Van Liere testified that in order to create his stimuli, he ran a "wide variety of searches," including searches on the terms "1-800 Contacts," other brand names, and generic terms (such as "contact lenses"). (Van Liere, Tr. 3002-3003).

Response to Finding No. 1832:

The proposed finding is misleading and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The parties' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "in order to create his stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used of the control in that matter." (Van Liere, Tr. 3218-19.)

1833. Dr. Van Liere testified that he searched on the term "1-800 Contacts" to create his test and control stimuli. (Van Liere, Tr. 3005-3006).

Response to Finding No. 1833:

Respondent has no specific response.

1834. Dr. Van Liere testified that his control stimulus, which contained no sponsored listings, reflects "marketplace conditions" because "we did have searches on '1-800 Contacts' where there was [sic] no sponsored links." (Van Liere, Tr. 3004).

Response to Finding No. 1834:

The proposed finding is incomplete and misleading. Dr. Van Liere testified of "searches on '1-800 Contacts' where there was no sponsored links and then some where there was lots of sponsored links." (Van Liere, Tr. 3004). The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

Moreover, Dr. Van Liere testified that he removed all paid search ads from his control stimulus in order to properly measure confusion caused by the paid search ads in the test stimulus. (Van Liere, Tr. 3025-3026). Dr. Van Liere's stimuli were designed to test the presence of the allegedly confusing elements, the sponsored ads. (Van Liere, Tr. 3027-3030). In this study, a search using the trademark "1-800 Contacts" which generates only organic listings would be the non-infringing alternative to the test stimuli because it would not include any allegedly confusing sponsored links. (RX 735 at 15). Thus, the appropriate controls for this study are identical to the test screenshots in every way except that they do not include any of the sponsored links (or any of the other features of the Google or Yahoo search results pages that are used to distinguish the sponsored links such as the heading "Ad" on Google or "Ad related to:" on Yahoo). (RX 735 at 15).

1835. Dr. Van Liere testified that there is no record to support his testimony that he saw search engine results pages in which a 1-800 Contacts advertisement did not appear. (Van Liere, Tr. 3133).

Response to Finding No. 1835:

The proposed finding is misleading and incomplete. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1836. Testimony from current and former 1-800 Contacts employees, as well as contemporaneous documents, contradict Dr. Van Liere's testimony that a search for "1-800 Contacts" occasionally yields search results pages in which no sponsored advertisements appear. (Bethers, Tr. 3787-3788; CX0296 at 035 [redacted] *in camera*; CX9028 (Roundy Dep. at 086-088); CX9031 (C. Schmidt Dep. at 125-127); CX9020 (Craven at 123-125)).

Response to Finding No. 1836:

The proposed finding is not supported by the evidence and is misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1837. According to the testimony of Brady Roundy, a former 1-800 Contacts employee, 1-800 Contacts allocates as much of its budget to bidding on its trademark keywords as is necessary to ensure that 1-800 Contacts' website is the first advertisement displayed in response to searches for its own trademark. (CX9028 (Roundy, Dep. at 86-88)).

Response to Finding No. 1837:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous

examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1838. According to the testimony of Clint Schmidt, a former 1-800 Contacts employee,during his time at the company, 1-800 Contacts allocated as much of its budget to bidding on its trademark keywords as was necessary to ensure that 1-800 Contacts' website was the first advertisement displayed in response to searches for its own trademark. (CX9031 (C. Schmidt, Dep. at 125-127)).

Response to Finding No. 1838:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1839. According to the testimony of Bryce Craven, 1-800 Contacts' former senior paid search marketing manager, 1-800 Contacts "would maximize [its] spend on the trademarked keywords and then use the rest on the other types of keywords." (CX9020 (Craven, Dep. at 125)).

Response to Finding No. 1839:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-

41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1840. According to a February 2015 internal 1-800 Contacts marketing document, it was 1-800 Contacts' goal for its advertisement to "show up in position 1 every time" for "trademark keywords." (CX0296 at 035, *in camera*).

Response to Finding No. 1840:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1841. [redacted] (Bethers, Tr. 3787-3788 **(**referencing CX0296 at 035), *in camera*).

Response to Finding No. 1841:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1842. 1-800 Contacts' "goal" was to always have its advertisement appear in the first position in response to a search for one of its trademarks. (CX9032 (L. Schmidt, Dep. at 092)).

Response to Finding No. 1842:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1843. Laura Schmidt, 1-800 Contacts' marketing director, could not recall a single instance in which 1-800 Contacts' advertisement was not the first advertisement that appeared in response to a 1-800 Contacts trademark search query. (CX9032 (L. Schmidt, Dep. at 91-92)).

Response to Finding No. 1843:

The proposed finding is incomplete and misleading. Ms. Schmidt testified that 1-800 Contacts' ad would show up "a lot of the time we show up number one," but she could not recall at that time an instance that it did not. (CX 9032 (L. Schmidt, Dep. at 91-92). The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1844. An internal 1-800 Contacts marketing email describes 1-800 Contacts' trademark keyword management process as follows: "Ensure top ad placement by giving each TM keyword a high CPC . . . All trademark keywords are given a relatively high CPC bid, in order to ensure we will stay in the first position despite competitors." (CX0935 at 001); CX9020 (Craven, Dep. at 123 (discussing CX0935: "I meant that we wanted to always be in the first position for our trademarked keywords, and so we would bid higher than what we actually would have to pay in the event that another competitor or affiliate bid on those trademarked keywords, so that we could stay in number one – in the number one position for those terms."); Craven, Tr. 670-672).

Response to Finding No. 1844:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1845. Mr. Craven testified that 1-800 Contacts typically bid to be in the first position on its trademark terms. (CX9020 (Craven, Dep. at 124 ("We wanted to be number one.")).

Response to Finding No. 1845:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1846. In 2011, Mr. Craven wrote that "TM keywords convert drastically different than our other terms and should always be around position number one." (CX0014 at 002); CX9020 (Craven, Dep. at 136 (discussing CX0014: "I meant that we wanted our ad, our paid search ad to always show up in the first position for those queries" because trademark keywords "had significantly better" conversion rates and click-through rates than other keywords.).

Response to Finding No. 1846:

The proposed finding is incomplete and misleading. The cited testimony is with regard to 1-800 Contacts' paid search strategy, not actual outcomes. The record contains numerous examples of searches for "1-800 Contacts" or variations thereof that contain no 1-800 Contacts

paid search ads. (*See, e.g.*, RX 310 at 318; RX 310 at 634-35, RX 310 at 636-37, RX 310 at 640-41, RX 311 at 7-8, RX 311 at 9-10, RX 311 at 34-35, RX 311 at 422-423, and RX 311 at 579-80.)

1847. Mr. Craven testified that "at 1-800, we tried to be the only advertiser for our own trademark keywords." (CX9002 (Craven, IHT at 122)).

Response to Finding No. 1847:

The proposed finding is incomplete and misleading. Mr. Craven testified that he simply passed information regarding competitor ads to the legal team. (CX 9002 (Craven, IHT at 122)).

1848. Dr. Van Liere testified that he used one of his searches on "1-800 Contacts" where no sponsored ads appeared as the basis for his control stimulus. (Van Liere, Tr. 3010-3011).

Response to Finding No. 1848:

Respondent has no specific response.

1849. Dr. Van Liere testified that he did not know how many searches he conducted to develop his test and control stimuli. (Van Liere, Tr. 3099).

Response to Finding No. 1849:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1850. Dr. Van Liere testified that he "didn't keep a count" of how many searches he ran where a 1-800 Contacts sponsored ad did not appear. (Van Liere, Tr. 3099, 3100).

Response to Finding No. 1850:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly

testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in

this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1851. Dr. Van Liere testified that he could not recall if there were more than 10 searches that he conducted where a 1-800 Contacts sponsored ad did not appear. (Van Liere, Tr. 3100).

Response to Finding No. 1851:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id.* 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the

most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1852. Dr. Van Liere testified that he could not recall if there were more than 500 searches that he conducted where a 1-800 Contacts sponsored ad did not appear. (Van Liere, Tr. 3100).

Response to Finding No. 1852:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX

9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van

Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1853. Dr. Van Liere testified that he provided information about the searches that he ran in his report, "only to the extent that we looked at other searches." (Van Liere, Tr. 3100).

Response to Finding No. 1853:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the

competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1854. Dr. Van Liere's report does not discuss any searches that he conducted or relied upon to design his survey stimuli. (RX0735 (Van Liere Report); RX0729 (Van Liere Report, Ex. B (Documents Relied Upon))).

Response to Finding No. 1854:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id.* 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id.* 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1855. Dr. Van Liere testified that the searches he relied on to create his test and control stimuli "are in the test and control documents" themselves. (Van Liere, Tr. 3100).

Response to Finding No. 1855:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1856. Dr. Van Liere testified that he did not produce any "additional searches" beyond what was in the test and control stimuli. (Van Liere, Tr. 3100).

Response to Finding No. 1856:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1857. Dr. Van Liere testified that he did not maintain any copies of the searches that he ran to develop his test and control stimuli. (Van Liere, Tr. 3133).

Response to Finding No. 1857:

The proposed finding is inaccurate, misleading, and not supported by the evidence. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). The experts' conduct makes sense because survey experts routinely look into the marketplace (for instance, an expert may visit a store to see how products are displayed) but do not "rely upon" this background.

Dr. Van Liere did not run the searches "to develop his test and control stimuli." The absence of any reliance on the search results is clear in his testimony. Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts had nothing to do with his viewing search results pages. Rather, the decision was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049, Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").)

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
> . . . .
> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

In fact, when asked by Complaint Counsel whether he would have changed any element of the stimuli in his study based on information showing a "de minimis number of such searches [searches for "1-800 Contacts"] that did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded he would not: "I don't think so . . . . [W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used for the control in that matter." (Van Liere, Tr. 3218-19.)

1858. Dr. Jacoby testified that Dr. Van Liere's survey results were inflated because Dr. Van Liere failed to remove nonresponsive "verbatim" responses provided by survey participants, a standard practice in consumer surveys that show nontrivial levels of confusion. (Jacoby, Tr. 2234-2238; CX8011 at 019-020 (¶ 33) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1858:

The proposed finding is not supported by the evidence. Dr. Jacoby's contention that Dr. Van Liere should have considered respondents' verbatims in coding for confusion is not correct. Dr. Van Liere counted respondents as confused or not confused based their click behavior not on the verbatims for a number of reasons: (1) any effects of respondents who are inattentive or guessing is netted off because respondents are randomly assigned to the test and control conditions; (2) respondents vary in their ability to articulate their reasons why they have an opinion; (3) doing so would require the researcher "to impose too much of their own judgment on who they're going to count as confused or not." (Van Liere, Tr. 3056-3058).

Dr. Jacoby himself admitted that "it is much easier for individual respondents to tell us their state of mind as opposed to why or how they came to be in that state of mind." (Jacoby, Tr. 2341). He further admitted that "there is considerable empirical evidence, both from cognitive, consumer and other research psychologists, that people have an inability to observe directly or identify how their own minds work." (Jacoby, Tr. 2341). Accordingly, Dr. Jacoby has written, "it is an illusion to think that answers respondents give to questions seeking to measure their mental processes, such as whether or not they were confused, what caused them to be confused, it's an illusion to think that those are reliable indicators of the actual influence of the stimuli on the responses." (Jacoby, Tr. 2341).

1859. Dr. Jacoby testified that Dr. Van Liere's survey results were inflated because Dr. Van Liere failed to appropriately weight his data to reflect real-world usage of the two search engines that Dr. Van Liere purported to test. (Jacoby, Tr. 2238-2243); CX8011 at 019, 020, 023 (¶33) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1859:

The proposed finding is not supported by the evidence. Dr. Van Liere reported his Google and Yahoo! results separately and then a combined number for the respondents in the

study. (RX 735 at 21). As Dr. Van Liere explained, "[W]hen you have multiple conditions, multiple versions of a product, multiple versions of the -- a trademark on different types of products, so on and so forth, you just report the results for the conditions that you tested and then -- and then you give an overall result, so that's simply what I did here." (Van Liere, Tr. 3074). Dr. Jacoby's suggestion that the results should have been weighted by the search engine's share of search queries is wrong; those data do not reflect the shares of users, which would be the relevant measure. (Van Liere, Tr. 3229-3230). Moreover, even if appropriate, Dr. Jacoby's weighting using search results yields a net confusion of 15.68%, which is still significant. (Jacoby, Tr. 2240-2241).

1860. Dr. Van Liere testified that he designed two versions of his survey using different search engines, Google and Yahoo. (Van Liere, Tr. 3102).

Response to Finding No. 1860:

Respondent has no specific response.

1861. Dr. Van Liere testified that Google has the highest market share of all search engines. (Van Liere, Tr. 3107).

Response to Finding No. 1861:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1862. Dr. Van Liere testified that Google's share of the search market was approximately 65 percent in October 2016, according to a web page cited in Dr. Van Liere's expert report. (Van Liere, Tr. 3103-3105; RX0735 at 022 (¶ 45) (Van Liere Report)).

Response to Finding No. 1862:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1863. 1-800 Contacts spent most of its paid search marketing funds on Google. (Craven, Tr. 509).

Response to Finding No. 1863:

The proposed finding is not supported by the cited evidence. Mr. Craven was only at 1-800 Contacts from 2005 to 2011. (Craven, Tr. 495-496).

1864. Dr Van Liere testified that Bing is the second largest search engine. (Van Liere, Tr. 3107).

Response to Finding No. 1864:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1865. Dr. Van Liere testified that Bing's share of the search market was approximately 25 percent in October 2016, according to a web page cited in Dr. Van Liere's expert report. (Van Liere, Tr. 3106; RX0735 at 024 (¶45) (Van Liere Report)).

Response to Finding No. 1865:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1866. Dr. Van Liere testified that Yahoo is the third largest search engine. (Van Liere, Tr. 3107).

Response to Finding No. 1866:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1867. Dr. Van Liere testified that Yahoo's share of the search market was approximately 14 percent in October 2016, according to a web page cited in Dr. Van Liere's expert report. (Van Liere, Tr. 3106; RX0735 at 024 (¶45) (Van Liere Report)).

Response to Finding No. 1867:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1868. Dr. Van Liere testified that he considered the respective market shares of Google, Bing, and Yahoo in deciding which search engines to use in his survey. (Van Liere, Tr. 3106).

Response to Finding No. 1868:

Respondent has no specific response.

1869. Dr. Van Liere did not use Bing, the second largest search engine, in his survey. (Van Liere, Tr. 3107, 3108).

Response to Finding No. 1869:

The proposed finding violates this Court's Order on Post-Trial Briefs by improperly citing "to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Briefs at 3.

1870. Dr. Van Liere testified that he assigned approximately 50 percent of his survey respondents to the Google version of his survey. (Van Liere, Tr. 3118; CX9049 (Van Liere, Dep. at 99)).

Response to Finding No. 1870:

Respondent has no specific response.

1871. Dr. Van Liere testified that he assigned approximately 50 percent of his survey respondents to the Yahoo version of his survey. (Van Liere, 3118; CX9049 (Van Liere, Dep. at 99)).

Response to Finding No. 1871:

Respondent has no specific response.

1872. Dr. Van Liere testified that weighting is a statistical technique that can be used to adjust for over- or under-represented samples. (Van Liere, Tr. 3114).

Response to Finding No. 1872:

Respondent has no specific response.

1873. Dr. Van Liere testified that he did not do any weighting to adjust for his Google and Yahoo results. (Van Liere, Tr. 3116).

Response to Finding No. 1873:

The proposed finding is incomplete and misleading. Dr. Van Liere reported his Google and Yahoo! results separately and then a combined number for the respondents in the study. (RX 735 at 21 (Van Liere Expert Report)). As Dr. Van Liere explained, "[W]hen you have multiple conditions, multiple versions of a product, multiple versions of the -- a trademark on different types of products, so on and so forth, you just report the results for the conditions that you tested and then -- and then you give an overall result, so that's simply what I did here." (Van Liere, Tr. 3074). The suggestion that the results should have been weighted by the search engine's share of search queries is wrong; those data do not reflect the shares of users, which would be the relevant measure. (Van Liere, Tr. 3229-3230). Moreover, even if appropriate,

Dr. Jacoby's weighting using search results yields a net confusion figure of 15.68%, which is still significant. (Jacoby, Tr. 2240-2241).

1874. Dr. Van Liere testified that if he had weighted his survey results in accordance with Google's and Yahoo's actual market shares, that would have made a difference in Dr. Van Liere's final confusion numbers. (Van Liere, Tr. 3119).

Response to Finding No. 1874:

The proposed finding is incomplete and misleading. Dr. Van Liere reported his Google and Yahoo! results separately and then a combined number for the respondents in the study. (RX 735 at 21 (Van Liere Expert Report)). Dr. Van Liere testified, "I don't think weighting would normally apply here. The results are separately presented so that the court can review them individually, and they're reported as an aggregate experiment of the total percent of people that were confused, so the data I don't -- is how it would normally be presented." (Van Liere, Tr. 3119). As Dr. Van Liere explained, "[W]hen you have multiple conditions, multiple versions of a product, multiple versions of the -- a trademark on different types of products, so on and so forth, you just report the results for the conditions that you tested and then -- and then you give an overall result, so that's simply what I did here." (Van Liere, Tr. 3074). The suggestion that the results should have been weighted by the search engine's share of search queries is wrong; those data do not reflect the shares of users, which would be the relevant measure. (Van Liere, Tr. 3229-3230). Moreover, even if appropriate, Dr. Jacoby's weighting using search results yields a net confusion figure of 15.68%, which is still significant. (Jacoby, Tr. 2240-2241).

1875. Dr. Van Liere testified that the net confusion levels reported in his survey would have been reduced if he had weighted his survey results in accordance with Google's and Yahoo's actual market shares. (Van Liere, Tr. 3120-3121).

Response to Finding No. 1875:

The proposed finding is incomplete and misleading. Dr. Van Liere reported his Google and Yahoo! results separately and then a combined number for the respondents in the study. (RX 735 at 21 (Van Liere Expert Report)). Dr. Van Liere testified, "I don't think weighting would normally apply here. The results are separately presented so that the court can review them individually, and they're reported as an aggregate experiment of the total percent of people that were confused, so the data I don't -- is how it would normally be presented." (Van Liere, Tr. 3119). As Dr. Van Liere explained, "[W]hen you have multiple conditions, multiple versions of a product, multiple versions of the -- a trademark on different types of products, so on and so forth, you just report the results for the conditions that you tested and then -- and then you give an overall result, so that's simply what I did here." (Van Liere, Tr. 3074). The suggestion that the results should have been weighted by the search engine's share of search queries is wrong; those data do not reflect the shares of users, which would be the relevant measure. (Van Liere, Tr. 3229-3230). Moreover, even if appropriate, Dr. Jacoby's weighting using search results yields a net confusion figure of 15.68%, which is still significant. (Jacoby, Tr. 2240-2241).

1876. Dr. Jacoby testified that Dr. Van Liere undermined the reliability of his survey results by failing to assign respondents to use a search engine that they had actually used or would use in the future. (Jacoby, Tr. 2243-2247; CX8011 at 013-014 (¶¶25-26) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1876:

The proposed finding is inaccurate, misleading, and not supported by the evidence. Dr. Jacoby contended that certain of respondents in Dr. Van Liere's study were improperly put in the Yahoo! condition. (Jacoby, Tr. 2243-2244). But this issue had no effect on the reliability of Dr. Van Liere's study. As Dr. Van Liere explained, "We had an issue where a small number of people were assigned to the wrong Google versus Yahoo condition, but if you remove those

respondents, they don't change my overall results or my opinions. And the individuals were equally randomly assigned to the test and the control conditions, and as a consequence, if they had had an effect, it was equally affecting both the test and the control, so therefore, it didn't change anything about my opinions." (Van Liere, Tr. 3096-3097).

1877. Dr. Van Liere testified that there was a programming error with his survey that resulted in assigning respondents to the Yahoo version of his survey, when such respondents had never used the Yahoo search engine. (Van Liere, Tr. 3126).

Response to Finding No. 1877:

The proposed finding is inaccurate, misleading, and not supported by the evidence. This issue had no effect on the reliability of Dr. Van Liere's study. As Dr. Van Liere explained, "We had an issue where a small number of people were assigned to the wrong Google versus Yahoo condition, but if you remove those respondents, they don't change my overall results or my opinions. And the individuals were equally randomly assigned to the test and the control conditions, and as a consequence, if they had had an effect, it was equally affecting both the test and the control, so therefore, it didn't change anything about my opinions." (Van Liere, Tr. 3096-3097).

1878. Dr. Van Liere testified that approximately 10 percent (32 of 342 individuals) of respondents who were assigned to the Yahoo version of his survey were subject to the programming error. (Van Liere, Tr. 3127).

Response to Finding No. 1878:

The proposed finding is inaccurate, misleading, and not supported by the evidence. This issue had no effect on the reliability of Dr. Van Liere's study. As Dr. Van Liere explained, "We had an issue where a small number of people were assigned to the wrong Google versus Yahoo condition, but if you remove those respondents, they don't change my overall results or my opinions. And the individuals were equally randomly assigned to the test and the control

conditions, and as a consequence, if they had had an effect, it was equally affecting both the test and the control, so therefore, it didn't change anything about my opinions." (Van Liere, Tr. 3096-3097).

1879. Dr. Jacoby testified that Dr. Van Liere undermined the reliability of his survey results by failing to define a proper universe of survey respondents (Jacoby, Tr. 2247-2252; CX8011 at -014, -015 (¶27) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1879:

The proposed finding is not supported by the evidence. Dr. Jacoby contended that Dr. Van Liere should only have included future purchasers in his survey and should not have included past purchasers. (Jacoby, Tr. 2250). That is incorrect. Dr. Van Liere explained that the relevant population includes past purchasers because such purchasers are also often future purchasers. (Van Liere, Tr. 2993-2994). In fact, in response to the responses to the screening questions, many respondents indicated they were past purchasers and that they also intended to search on the internet to purchase contact lenses in the future. (Van Liere, Tr. 2993-2994).

Dr. Van Liere also explained that the relevant population includes past purchasers because people who have purchased contact lenses online in the past, even if they don't intend to purchase them again in the next twelve months, are part of the group of people whose perceptions of the sponsored links would matter. (Van Liere, Tr. 2993-2994). As he explained, these consumers have "been online, they know about contact lens buying online, so we want to know -- we want them as part of the population that we use to measure whether consumers are likely to be confused by the sponsored ads." (Van Liere, Tr. 2993-2994).

Dr. Van Liere also included past purchasers in the relevant population because the study sought to measure initial interest confusion (as he has done in other keyword advertising cases). (Van Liere, Tr. 2994-2996). Initial interest confusion occurs when a consumer is in the process

of searching for information about products and services. (Van Liere, Tr. 2994-2995). Initial interest confusion is distinct from point-of-sale confusion, which has to do with whether consumers at the point of making a purchase are likely to be confused by a trademark or a trade dress or advertising. (Van Liere, Tr. 2994). The perceptions of both past and future purchasers are relevant to the question of whether there is potential initial interest confusion. (Van Liere, Tr. 2996).

1880. Dr. Van Liere defined the relevant universe for his survey as consumers 18 years or older in the United States who "had purchased contact lenses online in the past twelve months" or "would consider searching on the internet to purchase contact lenses in the next 12 months." (RX0735 at 009 (¶19) (Van Liere Report); Van Liere, Tr. 2982).

Response to Finding No. 1880:

Respondent has no specific response.

1881. Dr. Jacoby testified that Dr. Van Liere inappropriately defined his universe by including contact lens purchasers who had only purchased contact lenses online in the past but would not likely to purchase contact lenses online in the future. (Jacoby, Tr. 2250, 2252).

Response to Finding No. 1881:

The proposed finding is not supported by the evidence. Dr. Van Liere explained the relevant population includes past purchasers because such purchasers are also often future purchasers. (Van Liere, Tr. 2993-2994). In fact, in response to the responses to the screening questions, many respondents indicated they were past purchasers and that they also intended to search on the internet to purchase contact lenses in the future. (Van Liere, Tr. 2993-2994).

Dr. Van Liere also explained that the relevant population includes past purchasers because people who have purchased contact lenses online in the past, even if they don't intend to purchase them again in the next twelve months, are part of the group of people whose perceptions of the sponsored links would matter. (Van Liere, Tr. 2993-2994). As he explained,

these consumers have "been online, they know about contact lens buying online, so we want to know -- we want them as part of the population that we use to measure whether consumers are likely to be confused by the sponsored ads." (Van Liere, Tr. 2993-2994).

Dr. Van Liere also included past purchasers in the relevant population because the study sought to measure initial interest confusion (as he has done in other keyword advertising cases). (Van Liere, Tr. 2994-2996). Initial interest confusion occurs when a consumer is in the process of searching for information about products and services. (Van Liere, Tr. 2994-2995). Initial interest confusion is distinct from point-of-sale confusion, which has to do with whether consumers at the point of making a purchase are likely to be confused by a trademark or a trade dress or advertising. (Van Liere, Tr. 2994). The perceptions of both past and future purchasers are relevant to the question of whether there is potential initial interest confusion. (Van Liere, Tr. 2996).

1882. Dr. Jacoby testified that the proper universe consists of potential purchasers, rather than past purchasers, of the product at issue. (Jacoby, Tr. 2168-2170, 2250).

Response to Finding No. 1882:

The proposed finding is not supported by the evidence. Dr. Van Liere explained the relevant population includes past purchasers because such purchasers are also often future purchasers. (Van Liere, Tr. 2993-2994). In fact, in response to the responses to the screening questions, many respondents indicated they were past purchasers and that they also intended to search on the internet to purchase contact lenses in the future. (Van Liere, Tr. 2993-2994).

Dr. Van Liere also explained that the relevant population includes past purchasers because people who have purchased contact lenses online in the past, even if they don't intend to purchase them again in the next twelve months, are part of the group of people whose perceptions of the sponsored links would matter. (Van Liere, Tr. 2993-2994). As he explained,

these consumers have "been online, they know about contact lens buying online, so we want to know -- we want them as part of the population that we use to measure whether consumers are likely to be confused by the sponsored ads." (Van Liere, Tr. 2993-2994).

Dr. Van Liere also included past purchasers in the relevant population because the study sought to measure initial interest confusion (as he has done in other keyword advertising cases). (Van Liere, Tr. 2994-2996). Initial interest confusion occurs when a consumer is in the process of searching for information about products and services. (Van Liere, Tr. 2994-2995). Initial interest confusion is distinct from point-of-sale confusion, which has to do with whether consumers at the point of making a purchase are likely to be confused by a trademark or a trade dress or advertising. (Van Liere, Tr. 2994). The perceptions of both past and future purchasers are relevant to the question of whether there is potential initial interest confusion. (Van Liere, Tr. 2996).

1883. Dr. Van Liere testified that in order to qualify for his survey, respondents had to indicate that they "would consider searching on the internet to purchase contact lenses" in the next 12 months. (Van Liere, Tr. 3148; RX0730 at 0003 (Van Liere Report, Ex. C).

Response to Finding No. 1883:

Respondent has no specific response.

1884. Dr. Jacoby testified that Dr. Van Liere's question asking whether respondents "would consider searching on the internet to purchase contact lenses" in the next 12 months did not appropriately identify potential purchasers of contact lenses. (Jacoby, Tr. 2252; CX8011 at 015 (¶29) (Jacoby Rebuttal Expert Report).

Response to Finding No. 1884:

The proposed finding is not supported by the evidence. In this case, the Complaint alleges that 1-800 Contacts entered into agreements that prevented certain retailers of contact lenses from displaying paid search advertisements in response to consumer searches that

included 1-800 Contact's trademark in the search query. (CX 1132 (Complaint ¶¶ 17-25, 27)). According to the Complaint, one relevant market can be defined as "the sale of search advertising by auction in response to user queries signaling the user's interest in contact lenses, or smaller relevant markets therein." (CX 1132 (Complaint ¶ 28)). The Complaint alleges a second relevant market as "no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses." (CX 1132 (Complaint ¶ 29)).

Based on the allegations in the Complaint, the consumers whose perceptions would matter are those who would be searching the Internet for information regarding contact lens retailers and who could encounter sponsored ads of competitors to 1-800 Contacts. (Van Liere, Tr. 2981-2982). As Dr. Van Liere explained, because the case involves initial interest confusion, "we're looking to see if consumers in their information-seeking behavior are likely to be confused by the sponsored links, not just people who are in the process of making the purchase." (Van Liere, Tr. 2996).

1885. Dr. Van Liere testified that his question, which asked, "In the next 12 months, would you consider searching on the internet to purchase contact lenses?," did not ask whether individuals were actually potential purchasers. (Van Liere, Tr. 3148).

Response to Finding No. 1885:

The proposed finding is incomplete. In this case, the Complaint alleges that 1-800 Contacts entered into agreements that prevented certain retailers of contact lenses from displaying paid search advertisements in response to consumer searches that included 1-800 Contact's trademark in the search query. (CX 1132 (Complaint ¶¶ 17-25, 27)). According to the Complaint, one relevant market can be defined as "the sale of search advertising by auction in response to user queries signaling the user's interest in contact lenses, or smaller relevant markets therein." (CX 1132 (Complaint ¶ 28)). The Complaint alleges a second relevant market

as "no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses." (CX 1132 (Complaint ¶ 29)).

Based on the allegations in the Complaint, the consumers whose perceptions would matter are those who would be searching the Internet for information regarding contact lens retailers and who could encounter sponsored ads of competitors to 1-800 Contacts. (Van Liere, Tr. 2981-2982). As Dr. Van Liere explained, because the case involves initial interest confusion, "we're looking to see if consumers in their information-seeking behavior are likely to be confused by the sponsored links, not just people who are in the process of making the purchase." (Van Liere, Tr. 2996).

1886. Dr. Van Liere testified that he intended to include screening questions in his survey to find out whether respondents usually use glasses or contact lenses to read, and then to remind those respondents to put them on before taking the survey. (CX9049 (Van Liere, Dep. at 075)).

Response to Finding No. 1886:

Respondent has no specific response.

1887. Instead of reminding respondents to put on their glasses or contact lenses if they used them to read, Dr. Van Liere's survey excluded contact lens users who did not use contact lenses when they read. (Van Liere, Tr. 2992, 3142-3143; CX9049 (Van Liere, Dep. at 74-75); RX0730 at 003 (Exhibit C) (Van Liere Report)).

Response to Finding No. 1887:

The proposed finding is incomplete and misleading. Dr. Van Liere testified, "My intention was to find consumers who were a reasonable cross-section of the relevant market and the -- I didn't have an understanding there was a large group of people whose -- who wear contact lenses for distance and take them out when they read, so I don't understand that this question is somehow excluding some rare type of person. So I think the question is getting us the broad cross-sections of consumers who would potentially be on the Internet and being --

encounter these ads, so that's my intention." (Van Liere, Tr. 3144). There is no evidence in the record that any contact lens wearer takes his or her contacts out to read.

1888. Dr. Jacoby testified that Dr. Van Liere's survey results were rendered less reliable because he excluded a segment of the proper universe. (Jacoby, Tr. 2248; CX8011 at 015 (¶28) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1888:

The proposed finding is incomplete and misleading. Dr. Van Liere testified, "My intention was to find consumers who were a reasonable cross-section of the relevant market and the -- I didn't have an understanding there was a large group of people whose -- who wear contact lenses for distance and take them out when they read, so I don't understand that this question is somehow excluding some rare type of person. So I think the question is getting us the broad cross-sections of consumers who would potentially be on the Internet and being -- encounter these ads, so that's my intention." (Van Liere, Tr. 3144). There is no evidence in the record that any contact lens wearer takes his or her contacts out to read.

1889. Dr. Jacoby testified that Dr. Van Liere undermined the reliability of his survey findings because he used problematic questions, including leading and ambiguous questions. (Jacoby, Tr. 2253-2257; CX8011 at 016-017 (¶31) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1889:

The proposed finding is not supported by the evidence.

1890. Dr. Van Liere testified that his question on source confusion, which states "Using your mouse, please point and click on the link or links, if any, that you think will take you to the website of the company that you searched for," does not indicate what respondents should do if they did not think any of the links on the stimulus would take them to the website of the company they searched for. (Van Liere, Tr. 3174).

Response to Finding No. 1890:

The proposed finding is incomplete and misleading. The survey instruction asks respondents to click on "the link or links, ***if any***, that you think will take you to the website of the company you searched for." (RX 730 at 18 (emphasis added)). The instruction also states, "When you are finished please click on the forward button." (RX 730 at 18.)

If a respondent did not believe that any of the links on the page would take the respondent to the website of the company searched for, the respondent could either check a box next to "None of these" at the bottom of the page or simply hit the "next" button. (Van Liere, Tr. 3048-3049). If a respondent did so, he or she was counted as not confused. (Van Liere, Tr. 3051).

Moreover, the survey instructs respondents that if they need not give an answer if they have no opinion and that they should not guess. (RX 730 at 2, 0013 ("If for any question you have no opinion, please feel free to choose the 'don't know' option. Please do not guess."); RX 730 at 2, 0016 ("If you don't know the answer to any of the questions, that's okay, just say you don't know or that you do not have an opinion.")).

1891. Dr. Van Liere testified that his question on source confusion does not indicate that respondents have the option of clicking on the "next" button to move to the next screen without selecting any links. (Van Liere, Tr. 3176-3177).

Response to Finding No. 1891:

The proposed finding is incomplete and misleading. The survey instruction asks respondents to click on "the link or links, ***if any***, that you think will take you to the website of the company you searched for." (RX 730 at 18 (emphasis added)). The instruction also states, "When you are finished please click on the forward button." (RX 730 at 18.)

If a respondent did not believe that any of the links on the page would take the respondent to the website of the company searched for, the respondent could either check a box next to "None of these" at the bottom of the page or simply hit the "next" button. (Van Liere, Tr. 3048-3049). If a respondent did so, he or she was counted as not confused. (Van Liere, Tr. 3051).

Moreover, the survey instructs respondents that if they need not give an answer if they have no opinion and that they should not guess. (RX 730 at 2, 0013 ("If for any question you have no opinion, please feel free to choose the 'don't know' option. Please do not guess."); RX 730 at 2, 0016 ("If you don't know the answer to any of the questions, that's okay, just say you don't know or that you do not have an opinion.")).

1892. Dr. Van Liere testified that the font of the first three advertisements on his Yahoo test stimulus appeared larger than the font on the organic listings. (Van Liere, Tr. 3209).

Response to Finding No. 1892:

The proposed finding is not supported by the cited evidence. Dr. Van Liere testified, "I can't tell with certainty. They look a little bit larger." (Van Liere, Tr. 3209.)

1893. Dr. Jacoby testified that Dr. Van Liere failed to observe proper protocols for handling the survey data that he collected. (Jacoby, Tr. 2257-2259, 2261; CX8011 at 023-027 (¶34-35) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1893:

The proposed finding is incomplete, misleading, and not supported by the evidence. Dr. Jacoby pointed to nothing in the protocols or handling of the data that made the survey unreliable. Dr. Van Liere implemented a range of quality control procedures were used throughout the survey process to assure reliable data. (RX 735 at 18-19 (Van Liere Expert Report)). First, the survey respondents could only enter the survey directly from their emailed

invitation, to ensure that only sampled Critical Mix panelists were included. (RX 735 at 18-19 (Van Liere Expert Report)). Second, a number of quality control measures are regularly employed by the panel provider. (RX 735 at 18-19 (Van Liere Expert Report)). Precautions such as digital fingerprinting, the use of proprietary software to identify duplicate respondents, internal and third-party data validation, and automated checks of inconsistent or illogical respondent behavior prevent unqualified respondents from being included in the survey. (RX 735 at 18-19 (Van Liere Expert Report)). Third, he asked respondents to adhere to a set of instructions to insure that they would: take the survey in one session; take the survey only on specified devices (the survey vendor provided validation by an operating system check); not open any other windows or tabs while taking the survey; not use any mobile or smart phone while taking the survey; not consult or talk with any person while taking the survey; and, to maximize their browser window for the entire survey. (RX 735 at 18-19 (Van Liere Expert Report)). Fourth, he used screening questions to ensure that respondents were a part of the relevant population.

Fifth, after the data were collected, he analyzed response patterns as an additional quality control measure. (RX 735 at 18-19 (Van Liere Expert Report)). Specifically, he reviewed the data for respondents who appeared to be "straightlining"– for example, selecting every answer, or answering "don't know" to every response. (RX 735 at 18-19 (Van Liere Expert Report)). Respondents who appeared to be "straightlining" or who gave inconsistent responses were excluded. (RX 735 at 18-19 (Van Liere Expert Report)). Also excluded were those respondents whose completion time appeared to be too long to have taken the study in one sitting as required by the instructions. (RX 735 at 18-19 (Van Liere Expert Report)). Any respondents who failed the Quality Control checks were removed from the final data. (RX 735 at 18-19 (Van Liere

Expert Report)). Finally, surveys which included gibberish or other indications that the respondent was not attending to the survey in the open-ended responses were excluded. (RX 735 at 18-19 (Van Liere Expert Report)).

1894. Dr. Jacoby Expert Reported that Dr. Van Liere's data did not include a date or time stamp on the individual records. (CX8011 at 024 (¶34b) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1894:

The proposed finding is incomplete, misleading, and not supported by the evidence. Dr. Jacoby pointed to nothing regarding date or time stamps that made the survey unreliable. Dr. Van Liere implemented a range of quality control procedures were used throughout the survey process to assure reliable data. (RX 735 at 18-19 (Van Liere Expert Report)). First, the survey respondents could only enter the survey directly from their emailed invitation, to ensure that only sampled Critical Mix panelists were included. (RX 735 at 18-19 (Van Liere Expert Report)). Second, a number of quality control measures are regularly employed by the panel provider. (RX 735 at 18-19 (Van Liere Expert Report)). Precautions such as digital fingerprinting, the use of proprietary software to identify duplicate respondents, internal and third-party data validation, and automated checks of inconsistent or illogical respondent behavior prevent unqualified respondents from being included in the survey. (RX 735 at 18-19 (Van Liere Expert Report)). Third, he asked respondents to adhere to a set of instructions to insure that they would: take the survey in one session; take the survey only on specified devices (the survey vendor provided validation by an operating system check); not open any other windows or tabs while taking the survey; not use any mobile or smart phone while taking the survey; not consult or talk with any person while taking the survey; and, to maximize their browser window for the entire survey. (RX 735 at 18-19 (Van Liere Expert Report)). Fourth, he used screening questions to ensure that respondents were a part of the relevant population.

Fifth, after the data were collected, he analyzed response patterns as an additional quality control measure. (RX 735 at 18-19 (Van Liere Expert Report)). Specifically, he reviewed the data for respondents who appeared to be "straightlining"– for example, selecting every answer, or answering "don't know" to every response. (RX 735 at 18-19 (Van Liere Expert Report)). Respondents who appeared to be "straightlining" or who gave inconsistent responses were excluded. (RX 735 at 18-19 (Van Liere Expert Report)). Also excluded were those respondents whose completion time appeared to be too long to have taken the study in one sitting as required by the instructions. (RX 735 at 18-19 (Van Liere Expert Report)). Any respondents who failed the Quality Control checks were removed from the final data. (RX 735 at 18-19 (Van Liere Expert Report)). Finally, surveys which included gibberish or other indications that the respondent was not attending to the survey in the open-ended responses were excluded. (RX 735 at 18-19 (Van Liere Expert Report)).

1895. Dr. Jacoby Expert Reported that Dr. Van Liere failed to include any data records state the reasons why certain individuals' survey results (11 cases) were excluded. (CX8011 at 025(¶34b) (Jacoby Rebuttal Expert Report)).

Response to Finding No. 1895:

The proposed finding is incomplete, misleading, and not supported by the evidence. Dr. Jacoby pointed to nothing in the exclusion of the 11 cases that made the survey unreliable. Dr. Van Liere implemented a range of quality control procedures were used throughout the survey process to assure reliable data. (RX 735 at 18-19 (Van Liere Expert Report)). First, the survey respondents could only enter the survey directly from their emailed invitation, to ensure that only sampled Critical Mix panelists were included. (RX 735 at 18-19 (Van Liere Expert Report)). Second, a number of quality control measures are regularly employed by the panel provider. (RX 735 at 18-19 (Van Liere Expert Report)). Precautions such as digital

fingerprinting, the use of proprietary software to identify duplicate respondents, internal and third-party data validation, and automated checks of inconsistent or illogical respondent behavior prevent unqualified respondents from being included in the survey. (RX 735 at 18-19 (Van Liere Expert Report)). Third, he asked respondents to adhere to a set of instructions to insure that they would: take the survey in one session; take the survey only on specified devices (the survey vendor provided validation by an operating system check); not open any other windows or tabs while taking the survey; not use any mobile or smart phone while taking the survey; not consult or talk with any person while taking the survey; and, to maximize their browser window for the entire survey. (RX 735 at 18-19 (Van Liere Expert Report)). Fourth, he used screening questions to ensure that respondents were a part of the relevant population.

Fifth, after the data were collected, he analyzed response patterns as an additional quality control measure. (RX 735 at 18-19 (Van Liere Expert Report)). Specifically, he reviewed the data for respondents who appeared to be "straightlining"– for example, selecting every answer, or answering "don't know" to every response. (RX 735 at 18-19 (Van Liere Expert Report)). Respondents who appeared to be "straightlining" or who gave inconsistent responses were excluded. (RX 735 at 18-19 (Van Liere Expert Report)). Also excluded were those respondents whose completion time appeared to be too long to have taken the study in one sitting as required by the instructions. (RX 735 at 18-19 (Van Liere Expert Report)). Any respondents who failed the Quality Control checks were removed from the final data. (RX 735 at 18-19 (Van Liere Expert Report)). Finally, surveys which included gibberish or other indications that the respondent was not attending to the survey in the open-ended responses were excluded. (RX 735 at 18-19 (Van Liere Expert Report)).

1896. Dr. Van Liere acknowledged that his demographic sample distribution undersampled younger people and oversampled older people as compared to CDC data on contact lens wearers. (RX0735 at 010 (Van Liere Report)).

Response to Finding No. 1896:

The proposed finding is incomplete, misleading, and not supported by the evidence. Dr. Van Liere verified that the sample population was representative of the relevant population by comparing the demographics of the sample population against data regarding contact lens wearers from the Center for Disease Control as well as against data regarding the customers of 1-800 Contacts. (RX 735 at 10-11 (Van Liere Expert Report); Van Liere, Tr. 2999-3002)). Based on these comparisons, Dr. Van Liere concluded that the study sample population can be considered representative of the relevant population. (RX 735 at 11 (Van Liere Expert Report); Van Liere, Tr. 3001-3002)).

1897. Dr. Van Liere's noted in Table 1 of his report that his demographic sample distribution oversampled women as compared to CDC data on contact lens wearers. (RX0735 at 011 (Table 1) (Van Liere Report)).

Response to Finding No. 1897:

The proposed finding is incomplete, misleading, and not supported by the evidence. Dr. Van Liere verified that the sample population was representative of the relevant population by comparing the demographics of the sample population against data regarding contact lens wearers from the Center for Disease Control as well as against data regarding the customers of 1-800 Contacts. (RX 735 at 10-11; Van Liere, Tr. 2999-3002). Based on these comparisons, Dr. Van Liere concluded that the study sample population can be considered representative of the relevant population. (RX 735 at 11; Van Liere, Tr. 3001-3002). As he testified, "Our data is 34 percent males. The CDC has 39 percent of contact wearers are male. The 1-800 data shows 26 percent of their purchasers are male…. [N]either of those is the exact same population we're

looking for, but the demography is fairly similar, so based on that, we feel like the sample is representative of the population we're looking for." (Van Liere, Tr. 3001-3002).

5. Confusion Regarding Other Aspects of Online Advertisements Is Not Confusion Regarding Source, Sponsorship, Or Affiliation

1898. Ms. Rebecca Tushnet, a trademark law professor at Georgetown University testified that in many cases, consumers may be confused about why they are seeing an online advertisement, yet very few of those consumers are confused about the source, sponsorship or affiliation of those advertisements. (Tushnet, Tr. 4439-4440; CX8014 at 005, 009-010 (¶ 9, ¶¶ 17-19) (Tushnet Rebuttal Report)).

Response to Finding No. 1898:

Complaint Counsel's Proposed Finding No. 1898 is unsupported by reliable or admissible testimony and is contrary to the weight of the record evidence. Prof. Tushnet lacks the qualifications necessary to offer an expert opinion on determinants of consumer confusion. Prof. Tushnet has no relevant background in consumer surveys or consumer research. (Tushnet, Tr. 4399). Professor Tushent has no relevant background in marketing or marketing research. (Tushnet, Tr. 4479-80). Professor Tushnet has no relevant background in psychology or specifically consumer psychology. (Tushnet, Tr. 4479-80).

Furthermore, the proposed finding is based on Prof. Tushnet's testimony that consisted entirely of her personal characterization of a law review article by Professors Franklyn and Hyman (an article that is not in evidence). (Tushnet, Tr. 4439-40). That is classic inadmissible hearsay. An expert witness should not be permitted to explain the contents of a third-party study for the truth of those contents, especially in the case (as it is here) when that third-party study is not otherwise admissible and has not been admitted into evidence.

The proposed finding and Prof. Tushnet's cited testimony are also contrary to the weight of the record evidence. Prof. Ronald Goodstein is a marketing professor at Georgetown's McDonough School of Business, whose research and expertise focuses on determinants of

consumer confusion and how consumers respond to various types of advertising. (Goodstein, Tr. 2365-68, 2371 ("[M]y main area is in the area of consumer behavior, understanding mainly how consumers react to marketing communications."); RX 736 at 3, 43-49). Prof. Goodstein has conducted many consumer surveys and studies, primarily outside the context of litigation although he has conducted consumer surveys for the purpose of litigation and previously served as an expert witness. (Goodstein, Tr. 2373; RX 736 at 3). Prof. Goodstein has published many articles in peer-reviewed journals relating to marketing, consumer research, and consumer psychology; he also has published an article in a peer-reviewed journal that specifically discusses the potential for consumer confusion in the context of sponsored ads that appear in response to a search for a trademark term. (RX 736 at 45-46; Goodstein, Tr. 2418 (explaining that the article he published, with a number of co-authors, in the Trademark Reporter in 2015—"Using Trademarks as Keywords: Empirical Evidence of Confusion"—was a peer-reviewed publication)).

Prof. Goodstein provided the opinion that "it's reasonable to expect that both at the time of the agreements and today that there's a likelihood that a significant percentage of consumers would be confused by the sponsored ads that appear as a result of people looking for '1-800 Contacts'." (Goodstein, Tr. 2381-82). Prof. Goodstein specifically explained why the fact that many consumers cannot distinguish sponsored ads from organic links makes it more likely that they will believe a sponsored ad from another retailer that appears in response to a search for 1-800 Contacts is "affiliated" with or "sponsored" by 1-800 Contacts: "But when people enter into the Internet a term for a brand they'd like to get or use it as a navigational term, then, if you look at both of the factors I've talked about, the expectation of the information that comes up from the search engine, the expectation is that it is relevant to their search, and if I don't know what's an

ad and what's an organic link, there's a much higher probability that what comes appears towards the top left northern area, I would be confused into thinking that that's related to my search, is affiliated, sponsored, whichever of those words you'd want to use." (Goodstein, Tr. 2410; RX 736 at 17-29).

Finally, the proposed finding and Prof. Tushnet's cited testimony are not even supported by the inadmissible third-party law review article that Prof. Tushnet was attempting to summarize. That law review article by Professors Franklyn and Hyman specifically contradicts Prof. Tushnet's proffered opinion that whether consumers can distinguish sponsored ads from organic links is irrelevant to whether they may be confused about the source, affiliation, or sponsorship of a sponsored ad when using a trademark term as a search term. *See* D. Franklyn & D. Hyman, *Trademarks As Search Engine Keywords: Much Ado About Something?*, 26 Harv. J. L. & Tech. 481, 529 (2013). Professors Franklyn and Hyman explained that courts have found consumers' knowledge about the organization of search pages and the labels used to signal the difference between sponsored ads and organic links is relevant in determining the likelihood of confusion in a trademark infringement case, but that some courts have assumed *incorrectly* that consumers can readily distinguish sponsored ads from organic links. *See* D. Franklyn & D. Hyman, *Trademarks As Search Engine Keywords: Much Ado About Something?*, 26 Harv. J. L. & Tech. 481, 529 (2013) ("These findings suggest that judges should not assume a high level of consumer knowledge of search page architecture and labeling."). Just as Prof. Goodstein testified (and contrary to Prof. Tushnet's proffered opinion), Professors Franklyn and Hyman stated: "A change in the assumed level of consumer knowledge [regarding the distinction between sponsored ads and organic links] *has obvious implications for the analysis of the likelihood of confusion, at least when someone other than the trademark owner purchases a*

trademark as a keyword. More concretely, the likelihood of diversion and/or confusion is higher when consumers are unable to identify which content constitutes ads." *See* D. Franklyn & D. Hyman, *Trademarks As Search Engine Keywords: Much Ado About Something?*, 26 Harv. J. L. & Tech. 481, 529 (2013) (emphasis added).

1899. Mr. Howard Hogan, a practicing trademark attorney hired as an expert by 1-800 Contacts in this litigation, testified that it is possible that a consumer could be confused about whether a listing is sponsored or organic, yet still understand the source of the listing. (Hogan, Tr. 3356).

Response to Finding No. 1899:

Respondent has no specific response.

6. 1-800 Contacts' Trademark Settlement Agreements Go Beyond Prohibiting Confusing Uses Of 1-800 Contacts' Trademarks

1900. 1-800 Contacts' trademark enforcement program was not limited to addressing confusing uses of its trademarks. (*See supra* § IV.B.7 – 17; *infra* § XI.C.6).

Response to Finding No. 1900:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

The proposed summary finding also should be disregarded because it is vague, ambiguous, incomplete, and misleading. The proposed summary finding does not distinguish between 1-800 Contacts' internal process of collecting screenshots to provide the legal department and the legal determinations made by 1-800 Contacts' counsel. The proposed summary finding is misleading to the extent it is premised on a mischaracterization of trademark

law, which requires a trademark owner to show a "likelihood of confusion" based on the analysis of a many factors.

1901. 1-800 sought to prevent all advertising on its trademark terms. (CX0935 at 001 ("Enforce trademark policy to remove competitors"); CX9020 (Craven, Dep. at 43) (discussing CX0935: "remove competitors" meant removing competitors' paid search ads that appears in response to user queries for 1-800 Contacts' trademark terms); CX9001 (Bethers, IHT at 299-300); CX9004 (Coon, IHT at 273); CX9020 (Craven, Dep. at 94) ("[I]n general, I feel like I was concerned about any advertisement that was showing up near the top of the search results in response to a trademark query . . . .")).

Response to Finding No. 1901:

Complaint Counsel's Proposed Finding No. 1901 is incomplete and misleading because it omits the fact that 1-800 Contacts' legal trademark claims were determined by outside counsel—experienced intellectual properly attorneys. (CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)). The proposed finding is also misleading to the extent it mischaracterizes the cited record evidence, which shows (as the parenthetical quote from Mr. Craven's deposition testimony illustrates) that 1-800 Contacts had "concerns" with all sponsored ads that appeared in response to searches for 1-800 Contacts trademark terms. Specifically, 1-800 Contacts had three main business concerns: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers, Tr. 3688-91; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06, 149); Coon, Tr. 2727-38 (citing concerns about consumers being frustrated, confused, and misdirected); CX 9004 (Coon, IHT at 152, 178-79, 182); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112)). Those business "concerns" were appropriately addressed by retaining experienced outside counsel to make a determination as to

any actual legal claims to be asserted. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133)).

1902. Mr. Bryce Craven, former senior paid search marketing manager at 1-800 Contacts, understood that 1-800 Contacts' agreements with its rivals required its rivals to prevent their advertisements from appearing, through whatever means necessary, in response to queries containing 1-800 Contacts' trademark terms. (CX9020 (Craven, Dep. at 181)).

Response to Finding No. 1902:

Respondent has no specific response.

1903. 1-800 Contacts' [redacted] was to [redacted] its trademark keywords (CX0051 at 004, 007 (Nov. 2010 Search Overview); CX9001 (Bethers, IHT at 196-197); Bethers, Tr. 3787-3788, *in camera*).

Response to Finding No. 1903:

Complaint Counsel's Proposed Finding No. 1903 is inaccurate, misleading, and mischaracterizes the cited record evidence. First, there is absolutely no evidence that the top objective of 1-800 Contacts, as an entire company, had anything to do with trademark keywords. Mr. Bethers—1-800 Contacts' former President and current CEO—testified that he did not focus on the issues discussed in the cited exhibit. (Bethers, Tr. 3788). Second, the cited exhibit (CX 51 at 4, 7), is a presentation that relates solely to "Search Overview," which was one of many parts of 1-800 Contacts' business and just one, relatively small aspect of the marketing department. (RX 739 at 28, 92 (Murphy Report); Murphy, Tr. 4108-4113; Bethers, Tr. 3702; Coon, Tr. 2723). Third, the cited exhibit (CX 51 at 4, 7) does not identify any of the bullet points as the "top" or "number one" objective, and Mr. Bethers testified that the authors of that exhibit "didn't identify one as being more important than the other." (Bethers, Tr. 3787).

1904. Mr. Coon believed that any advertisement that appears in response to a consumer typing in the term "1-800contacts," is likely to be confusing. (Coon, Tr. 2784-2785).

Response to Finding No. 1904:

Respondent has no specific response, other than to note that the proposed finding is misleading to the extent it erroneously suggests that Mr. Coon ever made the determination for 1-800 Contacts as to what legal claims of trademark infringement to assert against other retailers. There is no cited record evidence that Mr. Coon ever made that determination; the record evidence clearly establishes that the determination as to what, if any, legal claims to assert were made by 1-800 Contacts' outside counsel, who were experienced intellectual property attorneys. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133); CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)).

1905. Mr. Coon believed that an advertisement that appears in response to a consumer typing in the term "1-800contacts" is likely to be confusing, even if the text of the advertisement states "This is not 1-800 Contacts' website." (Coon, Tr. 2787, 2872).

Response to Finding No. 1905:

Respondent has no specific response, other than to note that the proposed finding is misleading to the extent it erroneously suggests that Mr. Coon ever made the determination for 1-800 Contacts as to what legal claims of trademark infringement to assert against other retailers. There is no cited record evidence that Mr. Coon ever made that determination; the record evidence clearly establishes that the determination as to what, if any, legal claims to assert were made by 1-800 Contacts' outside counsel, who were experienced intellectual property attorneys. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133); CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)).

1906. 1-800 Contacts' goal when it negotiated a settlement agreement with Vision Direct was to stop advertisements from being displayed, regardless of the text of the advertisement. (Coon, Tr. 2788-2790).

Response to Finding No. 1906:

Complaint Counsel's Proposed Finding No. 1906 mischaracterizes the cited trial testimony. In the cited trial testimony, Mr. Coon was asked, "And 1-800 Contacts' goal when it negotiated the agreement with Vision Direct was to stop advertisements that confused people; right?" (Coon, Tr. 2788). Mr. Coon answered, "Our goal was to reduce or eliminate to the extent possible confusion for people who were trying to navigate to us." (Coon, Tr. 2788). Mr. Coon further testified in response to the same line of questioning: "Our goal was to stop people from being misdirected and confused who were clearly just trying to navigate to our site . . . . [Y]ou've tried to illustrate examples where maybe all confusion could be eliminated. You haven't come up with one yet where all confusion could be eliminated, so it seemed like the only way to fix it was for that to not happen." (Coon, Tr. 2788). The cited trial testimony by Mr. Coon clearly shows that the goal for the Vision Direct agreement was to prevent confusion.

1907. Mr. Coon believed that in order to achieve 1-800 Contacts' goals, it was necessary to prevent the display of search advertising triggered by a user typing in "1-800 Contacts," even if the brand displayed in the advertising is "Walgreens or Walmart or any other brand." (Coon, Tr. 2800-2801).

Response to Finding No. 1907:

Complaint Counsel's Proposed Finding No. 1907 is inaccurate, misleading, and mischaracterizes the cited trial testimony. Mr. Coon testified that he believed a sponsored from Walgreens or Walmart that appeared in response to a search for 1-800 Contacts trademark terms would be confusing to consumers. (Coon, Tr. 2800-01). The proposed finding is misleading in that it suggests Mr. Coon had some goal with respect to Walgreens' or Walmart's ads unrelated to his beliefs—both as a consumer and a person who worked in the contact lens retail business for 20 years (Coon, Tr. 2800)—as to what consumers searching for 1-800 Contacts' trademark terms would find confusing. (Coon, Tr. 2800-01).

The proposed finding is also misleading to the extent it erroneously suggests that Mr. Coon ever made the determination for 1-800 Contacts as to what legal claims of trademark infringement to assert against other retailers. There is no cited record evidence that Mr. Coon ever made that determination; the record evidence clearly establishes that the determination as to what, if any, legal claims to assert were made by 1-800 Contacts' outside counsel, who were experienced intellectual property attorneys. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133); CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)).

1908. Mr. Pratt's goal in corresponding with 1-800 Contacts rivals was to prevent the display of any sponsored advertisements appearing in response to consumers' searches for 1-800 Contacts' trademarks, even though Mr. Pratt agrees that "it's possible for a competitor of 1-800 Contacts to display a search advertisement in response to a query for a 1-800 Contacts trademark term that would not create an unacceptable likelihood that consumers would become confused," and indeed has personally seen such advertisements. (Pratt, Tr. 2597-2598; s*ee also* Pratt, Tr. 2621-2622 (Mr. Pratt's goal in negotiating with LensFast "was for LensFast to commit and be contractually bound to not have their sponsored advertisements appear in response to searches for 1-800 Contacts' trademark terms"); Pratt, Tr. 2622-2623 (Mr. Pratt's goal in negotiating with Contact Lens King was "to have a contract that they were obligated not to have their sponsored advertisements be displayed in response to searches for 1-800 Contacts' trademarks"); Pratt, Tr. 2526, 2623 (Memorial Eye)).

Response to Finding No. 1908:

Complaint Counsel's Proposed Finding No. 1908 is incomplete and misleading. The cited record evidence provides absolutely no detail as to the type of sponsored ad that Mr. Pratt thought "would not create an unacceptable likelihood that consumers would become confused." (Pratt, Tr. 2597-98). The cited record evidence provides no indication whether, in Mr. Pratt's views, such ads are rare, extremely unusual, or contain specific features unique to a particular retailer. Without those details—or even any indication as to the type of ad that Mr. Pratt was referring to—the proposed finding is incomplete and misleading.

The proposed finding also is misleading in its use of the term "corresponding" to the extent that term is vague or ambiguous as to Mr. Pratt's communications with other retailers. As the trial testimony shows, the question was specifically about Mr. Pratt's goals "in negotiating" settlement agreements. (Pratt, Tr. 2622-23).

1909. Mr. Pratt's goal in sending a cease and desist letter to Memorial Eye on behalf of 1-800 Contacts was to "have them remove their sponsored advertisements that appear in response to consumer searches for 1-800 Contacts' trademarks." (Pratt, Tr. 2623). Another goal in sending a cease and desist letter to Memorial Eye on behalf of 1-800 Contacts was to prevent Memorial Eye from placing "***any*** future sponsored advertisements appearing in response to consumers' searches for 1-800 Contacts' trademarks." (Pratt, Tr. 2623 (emphasis added)).

Response to Finding No. 1909:

Respondent has no specific response.

1910. In May 2009, Mr. Pratt sent a cease and desist letter on behalf of 1-800 Contacts to IWantContacts.com, one of the websites operated by Memorial Eye. (CX1313 at 001).

Response to Finding No. 1910:

Respondent has no specific response.

1911. The May 2009 cease and desist letter to IWantContacts/Memorial Eye requested that IWantContacts.com "immediately remove ALL sponsored advertisements that you have purchased through Google, Yahoo Search, and any other search engines which are triggered by the 1800 CONTACTS trademark or a confusingly similar variation thereof." (CX1313 at 002; Pratt, Tr. 2632).

Response to Finding No. 1911:

Respondent has no specific response. However, to accurately reflect the context of the cease and desist letter cited in the proposed finding, it is necessary to include the reasons stated in the letter for the request that is quoted in the proposed finding. Specifically, Mr. Pratt's letter states: "Your use of the 1800 CONTACTS trademark as a triggering keyword to advertise for your directly competitive goods and service is an obvious attempt to trade off the goodwill

established by 1-800 CONTACTS, INC. in its famous 1800 CONTACTS trademark. The use of the mark . . . may constitute trademark infringement under state and federal law in that it is likely to cause initial interest confusion . . . . For the same reasons, such use may constitute unfair competition and false advertising under state law and similarly may violate Section 43(a) of the Trademark Act . . . . Your activities may also violate the Federal Dilution Act of 1995, 15 U.S.C. § 1125(c)." (CX 1313 at 2).

1912. Mr. Bethers believes that the "sheer placement" of competitive advertisements would cause a consumer to be confused "because they exist . . . not simply because of the content of the ads." (CX9029 (Bethers, Dep. at 032-033)).

Response to Finding No. 1912:

Respondent has no specific response, other than to note that the proposed finding is misleading to the extent it erroneously suggests that Mr. Bethers ever made the determination for 1-800 Contacts as to what legal claims of trademark infringement to assert against other retailers. There is no cited record evidence that Mr. Bethers ever made that type of determination; the record evidence clearly establishes that the determination as to what, if any, legal claims to assert were made by 1-800 Contacts' outside counsel, who were experienced intellectual property attorneys. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133); CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)).

1913. Mr. Hogan, a trademark law expert hired by 1-800 Contacts in this litigation, testified that he was not aware of any claims brought by 1-800 Contacts that involved the text "1-800 Contacts" in the text of a defendant's advertisement. (Hogan, Tr. 3386).

Response to Finding No. 1913:

Complaint Counsel's Proposed Finding No. 1913 mischaracterizes the cited trial testimony and is misleading. Mr. Hogan testified that he did "not recall seeing '1-800 Contacts' in the text of any of the ads that were cited," but that he understood the claims asserted by 1-800

Contacts "were broader and involved the use of the trademark in search engine advertising and weren't limited." (Hogan, Tr. 3387-88). Furthermore, the proposed finding is misleading to the extent it incorrectly suggests that Mr. Hogan was counsel for 1-800 Contacts in the underlying trademark disputes.

The proposed finding also is misleading to the extent it suggests that 1-800 Contacts' infringement claims were never based, at least in part, on the use of its trademark in the text of sponsored ads, as well as a keyword to trigger sponsored ads. The one trademark infringement case that 1-800 Contacts litigated to conclusion—and Complaint Counsel's has cited repeatedly—clearly shows that 1-800 Contacts' did assert claims that involved the term "1-800 Contacts" in the text of a defendants' sponsored ad. *See 1-800 Contacts v. Lens.com, Inc.*, 722 F.3d 1229, 1241, 1250 (10th Cir. 2013) (discussing the ads by Lens.com's affiliate "whose text *did* feature some variation of the [1-800 Contacts] mark"). The record evidence also contains numerous examples of sponsored ads by retailers that used the 1-800 Contacts trademark in the text of their ad. (CX 1513 at 2 ("Additionally, a number of your sponsored ads include titles and/or text, such as "1-800-Discount Contacts," that may be confusingly similar to the above-mentioned federally registered trademarks"); CX 1125 at 7 (screenshots contained in the complaint against Lens.com showing advertisement for "JustLenses.com" using "1800Contacts" as its title); CX 78 (Apr. 9, 2007 email from Brandon Dansie to Bryan Pratt attaching screenshot with LensWorld, owned by Vision Direct, advertising as "1 800 Contacts")).

1914. Mr. Hogan testified that he was not aware of any evidence that any of the defendants in the trademark cases brought by 1-800 Contacts were using the name 1-800 Contacts on the defendant's website. (Hogan, Tr. 3413).

Response to Finding No. 1914:

Complaint Counsel's Proposed Finding No. 1914 is misleading to the extent it incorrectly suggests that Mr. Hogan was counsel for 1-800 Contacts in the underlying trademark disputes. The proposed finding also is misleading to the extent it incorrectly suggests that there is no record evidence that other retailers were using the name 1-800 Contacts on their website, as Mr. Pratt (who was counsel for 1-800 Contacts in the underlying trademark disputes) testified that he did recall EZContacts' website contained entire sections copied from 1-800 Contacts' website that included 1-800 Contacts' trademark terms. (CX 1617 (Complaint against EZContactsUSA); Pratt, Tr. 2538 ("So as I recall, EZContacts also on their website had included copied sections that were lifted directly from 1-800 Contacts' website. Those sections included 1-800 Contacts' trademarks")).

1915. Mr. Hogan testified that he was not aware of any evidence that any of the defendants in the trademark cases brought by 1-800 Contacts named themselves 1-800 Contacts. (Hogan, Tr. 3413-3414).

Response to Finding No. 1915:

Respondent has no specific response, other than to note that the proposed finding is misleading to the extent it incorrectly suggests that Mr. Hogan was counsel for 1-800 Contacts in the underlying trademark disputes.

1916. 1-800 Contacts' competitors understood that 1-800 Contacts' trademark enforcement program was not limited to confusing uses of 1-800's trademarks. ([redacted]; CX9003 (Clarkson, IHT at 125-126; [redacted].

Response to Finding No. 1916:

Complaint Counsel's Proposed Finding No. 1916 is inaccurate, incomplete, and unsupported by the cited testimony. [redacted]

[redacted]

Second, Mr. Clarkson's cited investigative hearing testimony similarly does not support the proposed finding. Mr. Clarkson merely testified about what in his opinion would be a confusing use or not. (CX 9003 (Clarkson, IHT at 125-26)). Mr. Clarkson's testimony notably reveals that (even in 2015) he did not have a proper understanding of the scope of trademark infringement law, which is broader than instances where AC Lens confused consumers into thinking it, in fact, was 1-800 Contacts and includes instances where a consumer was confused that AC Lens's ad was affiliated with or sponsored by 1-800 Contacts. (CX 9003 (Clarkson, IHT at 125-26)).

[redacted].

Fourth, the proposed finding is incomplete and misleading to the extent it purports to cover all of 1-800 Contacts' competitors, as opposed to being limited to the three specific retailers represented by the cited record evidence (which, as explained above, does not even support the proposed finding).

1917. Any ad that appeared in response to a search for 1-800 Contacts was prohibited. . (CX9003 (Clarkson, IHT at 125-126); (CX9000 (Batushansky, IHT at 76, *in camera*); (CX9008 (Hamilton, IHT at 24-25)).

Response to Finding No. 1917:

Complaint Counsel's Proposed Finding No. 1917 is incomplete and incomprehensible. The proposed finding does not state what prohibited any ad from appearing, whether it was the settlement agreements, negative keywords, or trademark law itself. The proposed finding also is unsupported by the record evidence: Mr. Clarkson's cited investigative hearing testimony does not state what was prohibited or what caused that particular prohibition (CX9003 (Clarkson, IHT at 125-126); [redacted]; and [redacted].

1918. [redacted] (CX9000 (Batushansky, IHT at 76), *in camera*).

Response to Finding No. 1918:

Respondent has no specific response, other than to note that trademark infringement, unfair competition, and false advertising, among other conduct, are in fact "illegal." (RX 2).

1919. [redacted] (CX9014 (Batushansky, Dep. at 152), *in camera*).

Response to Finding No. 1919:

Respondent has no specific response, other than to note that simply because

[redacted] (CX 9014 (Batushansky, Dep. at 152)).

1920. [redacted] (CX9014 (Batushansky, Dep. at 152), *in camera*).

Response to Finding No. 1920:

Respondent has no specific response, other than to note that simply because

[redacted] (CX 9014 (Batushansky, Dep. at 152)).

1921. [redacted] (CX9014 (Batushansky, Dep. at 152), *in camera*).

Response to Finding No. 1921:

Respondent has no specific response, other than to note that simply because

[redacted] (CX 9014 (Batushansky, Dep. at 152)).

1922. [redacted] (CX9014 (Batushansky, Dep. at 152), *in camera*).

Response to Finding No. 1922:

Respondent has no specific response, other than to note that simply because

[redacted] (CX 9014 (Batushansky, Dep. at 152)).

1923. Mr. Clarkson of AC Lens did not recall any allegation by 1-800 Contacts that AC Lens was trying to confuse consumers into thinking that AC Lens was 1-800 Contacts. (CX9003 (Clarkson, IHT at 125)).

Response to Finding No. 1923:

Respondent has no specific response, other than noting that simply because Mr. Clarkson could not remember whether something happened, that does not mean it didn't happen.

1924. Mr. Clarkson's understanding was that all advertisements in response to a search for 1-800 Contacts were prohibited. (CX9003 (Clarkson, IHT at 125-126)).

Response to Finding No. 1924:

The proposed finding is not supported by the cited testimony and is inconsistent with the testimony by Mr. Clarkson that he had taken a "broad brush approach" to the settlement agreement that resulted in "overly broad provisioning." (CX 9039 (Clarkson, Dep. at 163-164)). It is also undisputed that in 2002, Mr. Clarkson unilaterally decided that ACLens would not use 1-800 Contacts' trademarks as keywords, and that he unilaterally decided in 2005 to adopt 1-800 Contacts' trademarks as negative keywords, without being asked to do so, in part because of Mr. Clarkson's concern that such use might not be legal. (Clarkson, Tr. 324-326; (CX 9003 (Clarkson, IHT at 9091))).

1925. [redacted] (CX9008 (Hamilton, IHT at 26, *in camera*).

Response to Finding No. 1925:

Respondent has no specific response.

1926. [redacted] (CX9008 (Hamilton, IHT at 26, *in camera*).

Response to Finding No. 1926:

Complaint Counsel's Proposed Finding No. 1926 is incomplete, misleading, lacks foundation, and is not supported by the cited evidence. Mr. Hamilton testified at trial that he did not read Vision Direct's agreement with 1-800 Contacts and is not a lawyer, so he cannot testify completely, accurately, or credibly about what that agreement requires. In addition, Mr. Hamilton testified at trial that he never consulted with anyone at Vision Direct about the question whether Vision Direct was required under the agreement to implement negative keywords using exact or phrase match, nor did he ask any representatives from 1-800 Contacts about this question. The answer to this question would implicate whether Vision Direct advertisements could appear in response to 1-800 Contacts trademark search terms under the agreement with 1-800 Contacts. (Hamilton, Tr. 474-477). In addition, Vision Direct's agreement with 1-800 Contacts specifically contemplates and permits the use of comparative advertising, which under some circumstances would permit Vision Direct's advertisements to appear in response to 1-800 Contacts trademark search terms. In particular, the 2004 Vision Direct Agreement provides that "Prohibited Acts shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses. (CX 311 at 4-5 (2004 Vision Direct Agreement); Hamilton, Dep. 110-112).

1927. The effect of the negative keywords requirements imposed by Vision Direct's settlement agreement with 1-800 Contacts was to "prevent any Vision ad from showing up on any of these [trademark] terms when a consumer would search for them on a major search engine[.]" (CX9008 (Hamilton, IHT at 24-25)).

Response to Finding No. 1927:

Complaint Counsel's Proposed Finding No. 1927 is incomplete, misleading, lacks foundation, and is not supported by the cited evidence. Mr. Hamilton testified at trial that he did not read Vision Direct's agreement with 1-800 Contacts and is not a lawyer, so he cannot testify completely, accurately, or credibly about what that agreement requires. In addition, Mr. Hamilton testified at trial that he never consulted with anyone at Vision Direct about the question whether Vision Direct was required under the agreement to implement negative keywords using exact or phrase match, nor did he ask any representatives from 1-800 Contacts about this question. The answer to this question would implicate whether Vision Direct advertisements could appear in response to 1-800 Contacts trademark search terms under the agreement with 1-800 Contacts. (Hamilton, Tr. 474-477). In addition, Vision Direct's agreement with 1-800 Contacts specifically contemplates and permits the use of comparative advertising, which under some circumstances would permit Vision Direct's advertisements to appear in response to 1-800 Contacts trademark search terms. In particular, the 2004 Vision Direct Agreement provides that "Prohibited Acts shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses. (CX 311 at 4-5 (2004 Vision Direct Agreement); Hamilton, Dep. 110-112).

D. Describing 1-800 Contacts Branded Queries as "Navigational Searches" Does Nothing to Justify the Bidding Agreements

1. "Navigational" Searchers Who Enter 1-800 Contacts Branded Queries Ultimately Have a "Transactional" Intent: the Purchase of Contact Lenses

1928. Dr. Ghose relies on a classification of search intents as either informational, transactional, and navigational. (Ghose, Tr. 3869; CX8010 at 006 (Athey Rebuttal Report ¶¶ 15-16)).

Response to Finding No. 1928:

Respondent has no specific response.

1929. As described in Dr. Ghose' testimony and report and the academic literature on which he relies, a user who runs a search looking for information has an "informational" intent. (CX8010 at 007 (Athey Rebuttal Report ¶ 16)).

Response to Finding No. 1929:

Respondent has no specific response.

1930. As described in Dr. Ghose' testimony and report and the academic literature on which he relies, a user who runs a search looking to complete a transaction has a "transactional" intent. (CX8010 at 007 (Athey Rebuttal Report ¶ 16)).

Response to Finding No. 1930:

Respondent has no specific response.

1931. As described in Dr. Ghose' testimony and report and the academic literature on which he relies, a user who runs a search looking to navigate to a specific predetermined website has a "navigational" intent. (CX8010 at 007 (Athey Rebuttal Report ¶ 16)).

Response to Finding No. 1931:

Respondent has no specific response.

1932. That same academic literature on which Dr. Ghose relies regarding this classification system undercuts Dr. Ghose' conclusions about what inferences can be drawn about a user's ultimate intent that can be drawn from the mere classification of a query as "navigational." (CX8010 at 007-010 (¶¶ 6-25) (Athey Rebuttal Report) (explaining how the literature on which Dr. Ghose relies and other relevant literature regarding the categorization of searches warn of "the challenge in inferring search intent"); Athey, Tr.

713 ("I concluded that Dr. Ghose improperly relied on a very narrow reading of the literature that he cited and indeed drew conclusions from [it] that were not appropriate for the specific industry and also did not represent the richer conclusions of the literature to which he refers.")).

Response to Finding No. 1932:

Complaint Counsel's Finding No. 1932 is incorrect. The cited portion of Dr. Athey's report misconstrues the relevant literature. The study she cites, Jansen, B., D. Booth, and A. Spink (2008), "Determining the Information, Navigational, and Transactional Intent of Web Queries," Information Processing and Management, 44, pp. 1251-1266, finds that "approximately 75% of queries can be classified into a single category of intent (i.e., informational, navigational, or transactional) with a high degree of certainty." The study also notes that, "from a user perspective, there may be follow-on goals once the user arrives at a particular destination." This indicates that a user's intent in using a navigational query is, first of all, to arrive to a particular website. Indeed, Dr. Athey's reasoning would make it superfluous for the literature to define a separate category of navigational searches. Further, Dr. Athey agrees that typing "1-800 Contacts" into the search bar is a navigational search. (Athey, Tr. 851).

In the cited portion of Dr. Athey's testimony, she discusses a search for the term "Samsung Galaxy." (CX 8010 ¶ 20). That search has no bearing on a consumer's intent in searching for the name of a retailer, because Samsung is not a retailer.

1933. The industry literature accepts that users may have multiple intents when running a search query, and users who search with navigational intent are ultimately either informational or transactional in their intent. (Athey, Tr. 811; CX8010 at 007 (Athey Rebuttal Report ¶ 17 & nn.11-12)).

Response to Finding No. 1933:

Complaint Counsel's Finding No. 1933 is incorrect. Evidence in the record from search engines indicates that they consider searches for a retailer's name to be navigational. Bing has

cited searches for "target" and "amazon" as examples of navigational queries." (RX 658 at 4). Further, Google's Search Quality Rating Guidelines recognize that consumers who search for the term "amazon" have "clear intent to go to the amazon.com website." (RX 121 at 80). Those Guidelines indicate that a link to Amazon's website will "fully meet" the needs of a consumer who searches for the term "amazon." (RX 121 at 80). The Guidelines define a search result that "Fully Meets" the user's need as one in which "[a]lmost all mobile users would be immediately and fully satisfied by the result and would not need to view other results to satisfy their need." (RX 121 at 76). Dr. Athey did not account for this evidence. Further, Dr. Athey agrees that typing "1-800 Contacts" into the search bar is a navigational search. (Athey, Tr. 851).

1934. It is not possible to infer that users searching for brand name keywords have navigational intent simply because the search is for a brand name. (Juda, Tr. 1230; CX8010 at 008-009 (Athey Rebuttal Report ¶¶ 18-20)).

Response to Finding No. 1934:

Complaint Counsel's Finding No. 1934 is incorrect. In the cited portion of Dr. Athey testimony, she discusses a search for the term "Samsung Galaxy." (CX 8010 ¶ 20). That search has no bearing on a consumer's intent in searching for the name of a retailer, because Samsung is not a retailer. Complaint Counsel also have distorted Mr. Juda's testimony. [redacted] (Ghose, Tr. 3890-91).

Further, Google's Search Quality Rating Guidelines recognize that consumers who search for the term "amazon" have "clear intent to go to the amazon.com website." (RX 121 at

80). Those Guidelines indicate that a link to Amazon's website will "fully meet" the needs of a consumer who searches for the term "amazon." (RX 121 at 80). The Guidelines define a search result that "Fully Meets" the user's need as one in which "[a]lmost all mobile users would be immediately and fully satisfied by the result and would not need to view other results to satisfy their need." (RX 121 at 76). Dr. Athey did not account for this evidence. Further, Dr. Athey agrees that typing "1-800 Contacts" into the search bar is a navigational search. (Athey, Tr. 851).

1935. Even if a search engine user does have intent to navigate to 1-800 Contacts' website, that fact alone does not tell us that that person's ultimate intent is to visit the 1-800 Contacts website. (Athey, Tr. 811-812 ("Q. What does calling a search navigational tell an economist who studies search advertising about that user's ultimate intent? A. Well, as is clear in the academic literature as well as in business practice, every search query corresponds to a range of intents. . . . When somebody types in the name of a website, by far, the most common thing they do is visit the website of the company whose name they typed in. But that doesn't mean that they intrinsically derive pleasure from visiting the website.")).

Response to Finding No. 1935:

Complaint Counsel's Finding No. 1935 is incorrect and not supported by the cited testimony or the record. Dr. Athey did not conduct any analysis or survey of the "ultimate" intent of users who search for 1-800 Contacts' website or any "pleasure" they derive from any search activity or website. Her opinion simply reflects a word game or assumption that every consumer that has a navigational intent to visit 1-800 Contacts' website intends to do something there, either find information or buy contact lenses. Even if true, this observation obscures the point of classifying a search query as navigational, namely, that understanding users' intent to find a particular result is important for understanding their behavior. (Ghose, Tr. 3903-04). Indeed, Dr. Athey's reasoning would make it superfluous for the literature to define a separate category of navigational searches. Further, Dr. Athey agrees that typing "1-800 Contacts" into the search bar is a navigational search. (Athey, Tr. 851).

Moreover, to the extent that Complaint Counsel intend to imply that consumers who intend to navigate to 1-800 Contacts' website would benefit from ads for other retailers because they are trying to buy contact lenses, Dr. Athey's own model of the counterfactual world undermines the point. Running search data through Dr. Athey's model, Dr. Murphy demonstrated that eliminating the settlement agreements would make consumers who search for 1-800 Contacts' trademarks less successful in purchasing contact lenses. (RX 739 at 84 (Murphy Report); Murphy, Tr. 4127-4137).

1936. It is likely that users searching for 1-800 Contacts keywords have the ultimate intent to purchase contact lenses, either in addition to or instead of any intent to navigate to 1800contacts.com. (Athey, Tr. 811-812 ("[A]s an economist, when I think about what makes a consumer well off, their fundamental preferences are over the goods they consume, the time they consume them, the price they pay for them. Those are the fundamentals of consumer welfare. So they – they may get something from visiting a web page, but . . . if I have more information about a specific navigational query, then I can draw more conclusions about what their ultimate goal is. If I know that the main activity available at 1-800 Contacts' website is to purchase contact lenses and have them shipped to my house, then, again, maybe not all, but most of the consumers who thought they might potentially like to visit that website could also have their needs served other places."); CX8010 at 009-012 (¶¶ 21, 26-32) (Athey Rebuttal Report) ("While I do not dispute the likelihood that many users who perform a branded 1-800 Contacts search do expect that they will visit 1800contacts.com, it is also inescapable that most visitors to the site have a specific intent: purchasing the specific brand and type of contact lens for which the consumer has a prescription. For a user whose initial intent was to go to 1-800 Contacts' website and purchase, the consumer's ultimate intent is transactional; navigation to 1800contacts.com is just a means to an end.")).

Response to Finding No. 1936:

Complaint Counsel's Finding No. 1936 is incorrect and not supported by the cited testimony or the record. Dr. Athey did not conduct any analysis or survey of the "ultimate" intent of users who search for 1-800 Contacts' website. Her opinion simply reflects a word game or assumption that every consumer that has a navigational intent to visit 1-800 Contacts' website intends to do something there, either find information or buy contact lenses. Even if true, this observation obscures the point of classifying a search query as navigational, namely, that

understanding users' intent to find a particular result is important for understanding their behavior. (Ghose, Tr. 3903-04). Indeed, Dr. Athey's reasoning would make it superfluous for the literature to define a separate category of navigational searches. Further, Dr. Athey agrees that typing "1-800 Contacts" into the search bar is a navigational search. (Athey, Tr. 851).

Moreover, to the extent that Complaint Counsel intend to imply that consumers who intend to navigate to 1-800 Contacts' website would benefit from ads for other retailers because they are trying to buy contact lenses, Dr. Athey's own model of the counterfactual world undermines the point. Running search data through Dr. Athey's model, Dr. Murphy demonstrated that eliminating the settlement agreements would make consumers who search for 1-800 Contacts' trademarks less successful in purchasing contact lenses. (RX 739 at 84 (Murphy Report); Murphy, Tr. 4127-4137).

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

1937. Even users with the ultimate intent of purchasing contact lenses from 1-800 Contacts specifically (to the extent such users exist) are not harmed by the display of rival ads in response to 1-800 Contacts Branded Queries. (*See infra* §§ XI.D.2.a-c).

Response to Finding No. 1937:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

a. Were the Bidding Agreements to be rescinded, users who want to find 1-800 Contacts website will still be able to do so easily, because 1-800 Contacts' advertisement would remain in the first position

1938. Were the Bidding Agreements to be rescinded, 1-800 Contacts' advertisements would remain in the first position on the search results page in response to 1-800 Contacts Branded Queries. (*See supra* § XI.C.4; *infra* §XI.D.2.a).

Response to Finding No. 1938:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1939. 1-800 Contacts' advertising policy was to bid a sufficient amount to win the top advertising slot on its own trademarks. (CX9020 at 123 (Craven Dep.)).

Response to Finding No. 1939:

Respondent has no specific response.

1940. As the trademark owner, 1-800 Contacts advertisements on its own trademarks will have a higher quality score than advertisements from competitors. (CX8010 at 025 (¶ 61) (Athey Rebuttal Report).

Response to Finding No. 1940:

Respondent has no specific response.

1941. Due to its willingness to bid any required amount and its higher quality score, in the absence of the bidding agreements, 1-800 Contacts would have remained in the first advertising slot on its own trademarks. (CX8010 at 025-026 (¶ 62 & Figure 5) (Athey Rebuttal Report).

Response to Finding No. 1941:

Complaint Counsel's Finding No. 1941 is misleading and based on a false presumption. So long as 1-800 Contacts was willing to bid whatever was required to remain in the first

advertising slot, it would have done so. However, it might not always choose to do so. It had no control over what the cost would be to stay in that position. The cost was within the control of Google and 1-800 Contacts' rivals. Depending on what the cost was, 1-800 Contacts might decide to bid a lower amount and for that reason to no longer be in the first advertising slot.

1942. Users searching on 1-800 Contacts keywords with navigational intent would be able to navigate directly to the 1-800 Contacts website by clicking on the first advertising result. (CX8010 at 026 (¶ 63) (Athey Rebuttal Report).

Response to Finding No. 1942:

Respondent has no specific response.

1943. On mobile devices, the fact that 1-800 Contacts is the first advertising result would have made it even more prominent relevant to competitors' ads than it would have been on desktop devices. (CX8010 at 027 (¶ 65) (Athey Rebuttal Report).

Response to Finding No. 1943:

Respondent has no specific response.

1944. If users searching on 1-800 Contacts keywords with the intent to navigate to 1-800 Contacts did not find advertising for other retailers informative, the inclusion of other ads which are not relevant to those searchers below 1-800 Contacts' advertisement would not have changed the competitive dynamics. (CX9043 (Athey Dep.) at 75-76).

Response to Finding No. 1944:

Complaint Counsel's Finding No. 1944 is not supported by the cited testimony and is incorrect. Dr. Athey testified that displaying additional advertisements in response to a search for 1-800 Contacts' trademarks "wouldn't really affect the consumers' final quantities." (CX 9043 (Athey, Dep. at 75)). Dr. Athey's own model of the counterfactual world, however, disproves this. Running search data through Dr. Athey's model, Dr. Murphy demonstrated that eliminating the settlement agreements would make consumers who search for 1-800 Contacts' trademarks less successful in purchasing contact lenses. (RX 739 at 84 (Murphy Report);

Murphy, Tr. 4127-4137). Of course, 1-800 Contacts has explained at length in its post-trial submissions why displaying additional advertisements in response to a search for 1-800 Contacts' trademarks would harm consumers and why prohibiting those advertisements did not affect the competitive dynamics of the contact lens industry.

1945. Users who clicked on other ads were, therefore, not generally confused, but were instead likely legitimately diverted to consider competing offers. (CX8010 at 027-028 (¶ 66-68) (Athey Rebuttal Report).

Response to Finding No. 1945:

Complaint Counsel's Finding No. 1945 is not supported by the cited evidence or any testimony from Dr. Athey. The cited testimony does not reflect any analysis of consumer confusion. Dr. Athey did not undertake any such analysis and lacks the necessary qualifications to do so.

b. Were the Bidding Agreements to be rescinded, users who initially intend to purchase from 1-800 Contacts will benefit from the additional information—and additional choices—provided by rival ads.

1946. Were the Bidding Agreements to be rescinded, users who initially intend to purchase from 1-800 Contacts will benefit from the additional information—and additional choices—provided by rival ads. (*See infra* § XI.D.2.b).

Response to Finding No. 1946:

The proposed summary finding should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings.

1947. Some consumers looking to purchase contact lenses would find the existence of competing retailers, as well as the potential of lower-priced offers, to be relevant

information. (Athey, Tr. 807-812; CX8010 at 009 (¶ 21 & n.18) (Athey Rebuttal Report); Ghose, Tr. 3968-3969 ("[A]gain, as a general proposition, is it possible that some consumers benefit from seeing a price-comparative rival ad? Yes. I don't think, you know, I have argued that -- against that.")).

Response to Finding No. 1947:

Complaint Counsel's Finding No. 1947 is incomplete and misleading to the extent it includes consumers who searched for 1-800 Contacts' trademarks. The cited testimony does not reflect any analysis whatsoever showing how many such consumers, if any, would find information about other retailers relevant.

1948. Some consumers who have an intent to visit a certain retailer to complete a transaction will, when presented with competing offers, prefer to complete their transaction with competing retailers. (Ghose, Tr. 3962 ("Q. Okay. And advertising has the capacity to change the consumer's commercial intent. Isn't that right? A. Sure. Sometimes it can be.")).

Response to Finding No. 1948:

Complaint Counsel's Finding No. 1948 is incomplete and misleading to the extent it includes consumers who searched for 1-800 Contacts' trademarks. The cited testimony does not reflect any analysis whatsoever showing how many such consumers, if any, would prefer to complete their transaction with another retailer.

1949. Competing offers which fulfill a consumer's transactional intent at a lower price will be particularly relevant. (CX8010 at 011-012 (¶ 31) (Athey Rebuttal Report); Ghose, Tr. 3964 ("Q. Okay. What can reliably change the consumer's mind is the opportunity to purchase the desired product at a lower price, correct? A. Yes. I do mention price -- lowering of price as a factor.")).

Response to Finding No. 1949:

Complaint Counsel's Finding No. 1949 is not supported by the cited testimony. The cited testimony by Dr. Athey consists of bald statements of her supposed "opinion" that do not cite any data, analysis, evidence in the record or economic literature. Such an opinion should be

disregarded. And Dr. Ghose did not say anything about transactional intent or relevance in the cited testimony, which was not about paid search advertising.

1950. Firms commonly target their competitors' customers to take advantage of this sales opportunity. (CX8010 at 016 (¶ 43) (Athey Rebuttal Report); CX8009 at 028-030 (¶ 45 & Table 1) (Evans Expert Report (listing retailers advertising on competitors' brand-name queries)); Ghose, Tr. 3960-3961 ("Okay. Q. Okay. So as a general proposition, is it often effective for an advertiser to target a customer at the very time that that customer intends to engage with a rival of the advertiser? A. Yes."), 3974 ("I can see scenarios where, you know, companies who know their customers are going to buy from them anyway, they might find it, you know, attractive to target some of their rivals' customers, sure.")).

Response to Finding No. 1950:

Complaint Counsel's Finding No. 1950 is incomplete and misleading to the extent it includes retailers other than 1-800 Contacts advertising to consumers who searched for 1-800 Contacts' trademarks. Dr. Ghose's testimony did not refer to such advertising. Nor does Paragraph 43 of Dr. Athey's rebuttal report or Table 1 of Dr. Evans' report.

1951. Contact lens retailers, in particular, have commonly found that they were able to attract customers by presenting competitive offers in response to searches for or containing competing retailers' brand names. (CX8010 at 013-14 (¶¶ 35, 38-40) (Athey Rebuttal Report); CX8006 at 091 (¶ 205) (Evans Expert Report)).

Response to Finding No. 1951:

Complaint Counsel's Finding No. 1951 is not supported by the cited testimony. Nothing in Dr. Athey's cited testimony provides any analysis or evidence supporting the inference that retailers "commonly" were able to attract customers. Dr. Athey does not cite any data, figures or analysis of sales by any retailer from ads displayed in response to searches for 1-800 Contacts' trademarks. Dr. Athey's only discussion of sales in the cited testimony cites testimony by only three retailers, including Glenn Hamilton of Vision Direct. (CX 8010 ¶ 38).

But Mr. Hamilton's testimony was based on his use of Google's Keyword Planner. Mr. Hamilton testified at trial, however, that [redacted]

[redacted] (Hamilton, Tr. 451-52). He could not recall critical details related to his use of the Google AdWords Keyword Planner, including the specific bid amounts he inputted for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Google AdWords Keyword Planner. (Hamilton, Tr. 444-445.) And he did not know what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447). At the hearing, the Court stated: "When it comes time to decide on these issues, I'm going to decide what weight, if any, to give this evidence." (Tr. 426). 1-800 Contacts' respectfully submits that Mr. Hamilton's estimate based on the Keyword Planner is entitled to no weight.

The cited testimony by Dr. Evans also does not support a finding that retailers "commonly" were able to attract customers. Dr. Evans only discusses a single retailer, Memorial Eye. (CX 8006 ¶ 205). According to Dr. Evans's analysis of Google data, Memorial Eye obtained approximately [redacted] sales from the [redacted] impressions for its ads in response to searches for 1-800 Contacts' trademarks. (CX 8006 at 94, CX 8006 at 95 (Evans Opening Report)). Thus, only roughly [redacted] people who searched for 1-800 Contacts and saw an ad for Memorial Eye purchased contact lenses from Memorial Eye.

c. <u>Were the Bidding Agreements to be rescinded, even consumers who still ultimately choose to purchase from 1-800 Contacts will benefit from the existence of competing offers</u>

1952. Even if a consumer does not purchase from a competing website, consumers who search with the intent of navigating to 1-800 Contacts' website may benefit from the knowledge that competition exists. (CX8010 at 013 (¶ 35) (Athey Rebuttal Report)).

<u>Response to Finding No. 1952</u>:

Complaint Counsel's Finding No. 1952 is not supported by the cited testimony and is not correct. In Paragraph 35 of Dr. Athey's report, she purports to opine that "[e]ven for consumers

who do not click on the other firms' ads, they are provided with information on the competition that exists in the online market for contact lenses, information that may affect their decision-making in the future." Nothing in this Paragraph refers to whether consumers will benefit from such information and Dr. Athey performed no study of that question. Indeed, Dr. Athey's own model of the counterfactual world, in fact, shows that consumers would not benefit from additional ads. Running search data through Dr. Athey's model, Dr. Murphy demonstrated that eliminating the settlement agreements would make consumers who search for 1-800 Contacts' trademarks less successful in purchasing contact lenses. (RX 739 at 84 (Murphy Report); Murphy, Tr. 4127-4137). Further, there is no evidence suggesting that additional ads would provide consumers with any additional information they did not already have. Thus, Dr. Athey testified that she did not have any evidence that any consumers believed that 1-800 Contacts is the only online retailer of contact lenses. (CX 9043 (Athey, Dep. at 262 ("Q. I asked whether you have any evidence that there are any consumers that held the belief that there are no other online contact lens retailers other than 1-800-CONTACTS? A. No.")). And she testified that most consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses. (Athey. Tr. 913-14).

1953. When 1-800 Contacts price match policy has been in effect, consumers who purchased from 1-800 Contacts benefited from informational advertising from lower-priced competitors because those consumers had the option to take advantage of a price match at 1-800 Contacts if they wished to do so. (CX8006 at 104-105 (¶ 228) (Evans Expert Report)).

Response to Finding No. 1953:

Complaint Counsel's Finding No. 1953 is not supported by the record evidence. Nothing in the cited paragraph of Dr. Evans' report provides any data, analysis or evidence of how consumers who took advantage of 1-800 Contacts' price match policy became aware of other

retailers' prices, let alone that all or any significant portion of them became aware of those prices through advertising or paid search advertising.

1954. In addition, as described elsewhere, Dr. Evans found that the suppression of advertising likely had an effect on 1-800 Contacts' pricing. Even consumers who intended to navigate to 1-800 Contacts and had no desire to consider competing offers would have benefitted from the lower prices they would have obtained had there been additional competing offers on 1-800 Contacts' brand-name keywords. (*Supra* §§ IX.D).

Response to Finding No. 1954:

Complaint Counsel's Finding No. 1954 should be disregarded because it violates the Court's Order on Post-Trial Briefs, which required that "[a]ll proposed findings shall be supported by specific references to the evidentiary record." Moreover, the individual findings in the cited section do not support the proposed summary finding and are unreliable for the reasons set out in Respondent's replies to those findings. Further, the proposed finding contradicts Dr. Evans' own testimony that he did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not."); CX 9042 (Evans Dep., at 257)).

1-800 CONTACTS' REPLIES TO COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW

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CONCLUSION 48

A. GENERAL

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent 1-800 Contacts, Inc. ("1-800 Contacts").

Response to Conclusion No. 1:

Respondent has no specific response.

2. 1-800 Contacts is, and at all relevant times has been, a corporation as "corporation" is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, as amended ("FTC Act").

Response to Conclusion No. 2:

Respondent has no specific response.

3. 1-800 Contacts' written agreements with rival contact lens retailers ("Bidding Agreements") constitute acts or practices in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

Response to Conclusion No. 3:

Respondent has no specific response.

4. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

Response to Conclusion No. 4:

Respondent has no specific response.

5. Conduct that violates Section 1 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

Response to Conclusion No. 5:

Respondent has no specific response.

B. COMPLAINT COUNSEL MAY ESTABLISH A *PRIMA FACIE* CASE THAT THE BIDDING AGREEMENTS VIOLATE SECTION 5 OF THE FTC ACT THROUGH THREE ALTERNATIVE METHODS

6. Complaint Counsel may establish a *prima facie* case that the Bidding Agreements violate Section 5 of the FTC Act through three alternative methods.

Response to Conclusion No. 6:

The proposed summary conclusion should be disregarded because it violates the Court's Order on Post-Trial Briefs requiring that "[a]ll conclusions of law, including, but not limited to, liability and the proposed remedy, shall be supported by applicable legal authority." Moreover, the other proposed conclusions of law in this section do not support this proposed conclusion for the reasons set out in Respondent's replies to those proposed conclusions.

In addition, the proposed conclusion is inaccurate and incomplete. The Supreme Court has held that settlement agreements that take a traditional or "commonplace form" are not subject to antitrust scrutiny. *FTC v. Actavis*, 133 S.Ct. 2223, 2233 (2013). Under the Court's reasoning, a party alleging that a private settlement constitutes a violation of the antitrust laws first bears the burden of establishing why a particular "form" of settlement is sufficiently "unusual" to warrant antitrust scrutiny. *Id.* at 2236. Thus, Complaint Counsel must establish that the challenged settlements even warrant antitrust scrutiny under *Actavis* before getting to their purported "*prima facie*" case under Section 5 of the FTC Act.

7. First, restraints on certain fundamental forms of rivalry are "inherently suspect" and are presumed to be anticompetitive. Inherently suspect restraints may be condemned without proof of market power or actual marketplace effects. *See In re Realcomp II., Ltd.*, No. 9320, 2007 WL 6936319, at *18 (F.T.C. Oct. 30, 2009), *aff'd*, 635 F.3d 815 (6th Cir. 2011) ("*Realcomp*").

Response to Conclusion No. 7:

Complaint Counsel's Proposed Conclusion No. 7 is incomplete, misleading, and unsupported by the cited legal authority. The cited page of the Commission's decision in *Realcomp II* merely mentions that the "assessment of 'inherently suspect' restraints" was "explored in depth in our decision in *Polygram* and *North Texas Specialty Physicians*." *In re Realcomp II Ltd.*, 2007 WL 6936319, at *18 (FTC 2009). The proposed conclusion is incomplete because it fails to explain the criteria and standards for determining that a particular restraint is "inherently suspect." *See id*. at *21-22. For example, in *Realcomp II*, the Commission explained that "'inherently suspect' conduct 'ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation.'" *Id*. at *22 (quoting *In re Polygram Holding, Inc.*, 2003 WL 25797195, at *15 (FTC 2003)). *See also Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36-37 (DC Cir. 2005).

8. Second, in the alternative, Complaint Counsel may show direct evidence of "actual marketplace effects." *Id.* at *19 (citing *Fed. Trade Comm'n v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) [hereinafter, "*Indiana Federation*"]). If a plaintiff shows actual marketplace effects, "that would be a basis for condemnation regardless of whether market power is shown." *Id.*

Response to Conclusion No. 8:

Complaint Counsel's Proposed Conclusion No. 8 is incomplete, misleading, and unsupported by the cited legal authority. The Supreme Court's decision in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), held that "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule Reason" in light of "the finding of ***actual, sustained adverse effects on competition*** in those ***areas where IFD dentists predominated***, viewed in light of ***the reality that markets for dental services tend to be relatively localized***." *Id*. at 460-61 (emphasis added). Thus, Complaint Counsel's reliance on *Indiana Federation* does not support the proposed conclusion that a plaintiff may simply show

some vague form of "actual marketplace effects." The legal analysis in *Indiana Federation* considered the evidence regarding the nature and duration of actual adverse effects on competition combined with evidence that the challenged restraint applied to the predominant number of dentists in a particular area for a service that itself was relatively localized.

9. Third, in the alternative, Complaint Counsel may establish that market power, together with the nature of the restraint, is likely to have "the potential for genuine adverse effects on competition." *Id.* at *19 (citing *Indiana Federation*, 476 U.S. at 460).

Response to Conclusion No. 9:

Complaint Counsel's Proposed Conclusion No. 9 is incomplete, inaccurate, and unsupported by the cited legal authority. First, the cited page of the Commission's decision in *Realcomp II* explains that "'the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition.'" 2007 WL 2936319, at *19 (quoting *Indiana Federation*, 476 U.S. at 460)). The Commission further interpreted *Indiana Federation* as permitting a tribunal to find that "the defendants had market power and that their conduct tended to reduce competition." *Id*. Second, the proposed conclusion is incomplete and misleading because it fails to explain what Complaint Counsel must prove with respect to the "nature of the restraint" and how the restraint is likely to impact competition.

10. If Complaint Counsel, using any one of these methods, proves its *prima facie* case, then the burden shifts to 1-800 Contacts to proffer justifications. *See id.* at *21.

Response to Conclusion No. 10:

For the reasons set forth in Respondent's responses to Complaint Counsel's Proposed Conclusions Nos. 6-9, this proposed conclusion is inaccurate and misleading. Furthermore, the proposed conclusion is unsupported by the cited legal authority, which does not discuss the burden-shifting framework of the antitrust analysis. As explained by the DC Circuit in

Polygram, the nature and extent of the burden that shifts to the defendant to provide a procompetitive justification differs depending on, among other things, whether the challenged restraint is correctly deemed "inherently suspect" as opposed to an actual showing that anticompetitive effects are in fact likely. *Polygram*, 416 F.3d at 36.

C. IF COMPLAINT COUNSEL ESTABLISHES A *PRIMA FACIE* CASE, RESPONDENT MUST ADVANCE COGNIZABLE AND PLAUSIBLE JUSTIFICATIONS SUPPORTED BY RECORD EVIDENCE, DEMONSTRATING THAT THE BIDDING AGREEMENTS ARE REASONABLY NECESSARY TO ACHIEVE A PROCOMPETITIVE OUTCOME

11. If Complaint Counsel establishes a *prima facie* case, the burden shifts to 1-800 Contacts to advance cognizable and plausible justifications that outweigh any anticompetitive harm. *See Realcomp*, No. 9320, 2007 WL 6936319, at *17, *31; *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 344-48 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

Response to Conclusion No. 11:

For the reasons set forth in Respondent's responses to Complaint Counsel's Proposed Conclusions Nos. 6-9, this proposed conclusion is inaccurate and misleading to the extent it incorporates Complaint Counsel's proposed definition of a "prima face" case. Furthermore, the proposed conclusion is unsupported by the cited pages in the *Realcomp II* decision, which do not discuss the burden-shifting framework of the antitrust analysis. As explained by the DC Circuit in *Polygram*, the nature and extent of the burden that shifts to the defendant to provide a procompetitive justification differs depending on, among other things, whether the challenged restraint is correctly deemed "inherently suspect" as opposed to an actual showing that anticompetitive effects are in fact likely. *Polygram*, 416 F.3d at 36. For example, if a restraint is correctly deemed "inherently suspect," the defendant "need only articulate a legitimate justification. While the defendant at this point is not obligated to prove competitive benefits, the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible." *Polygram*, 2003 WL 25797195, at *15 (FTC 2003); *Polygram*, 416 F.3d at 36.

12. 1-800 Contacts' efficiency justifications must satisfy three separate requirements.

Response to Conclusion No. 12:

The proposed summary conclusion should be disregarded because it violates the Court's Order on Post-Trial Briefs requiring that "[a]ll conclusions of law, including, but not limited to, liability and the proposed remedy, shall be supported by applicable legal authority." Moreover, the other proposed conclusions of law in this section do not support this proposed conclusion for the reasons set out in Respondent's replies to those proposed conclusions.

Complaint Counsel's Proposed Conclusion No. 12 is inaccurate and misleading in its use of the term "efficiency justifications," which is vague, inaccurate, and unsupported by any cited legal authority. The DC Circuit in *Polygram* referred to "competitive justifications," 416 F.3d at 36, and the Commission's decision in *Polygram* referred to "plausible reasons why practices . . . may not be expected to have adverse consequences in the context of the particular market in question" or "reasons why the practices are likely to have beneficial effects for consumers," 2003 WL 2597195, at * 15 (FTC 2003).

13. First, the efficiencies advanced must be (i) cognizable and (ii) plausible.

Response to Conclusion No. 13:

The proposed summary conclusion should be disregarded because it violates the Court's Order on Post-Trial Briefs requiring that "[a]ll conclusions of law, including, but not limited to, liability and the proposed remedy, shall be supported by applicable legal authority."

Complaint Counsel's Proposed Conclusion No. 13 is also inaccurate, misleading, and unsupported by any cited legal authority in its use of the term "efficiencies." Respondent does not dispute that, to the extent a defendant is required to offer a justification for a challenged

restraint under the applicable legal framework, that justification must be "plausible (and legally cognizable)." *Polygram*, 416 F.3d at 36. *See also Polygram*, 2003 WL 25797195, at *15 ("the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible").

14. "Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Polygram*, 136 F.T.C. at 345-46.

Response to Conclusion No. 14:

Complaint Counsel's Proposed Conclusion No. 14 is incomplete and misleading. Respondent does not dispute that the proposed conclusion accurately quotes one sentence from the Commission's decision in *Polygram*. The proposed conclusion is misleading because it omits the Commission's actual definition, in the preceding sentence, that the requirement of a "cognizable justification" "allows the deciding tribunal to reject proffered justification that, as a matter of law, are incompatible with the goal of antitrust law to further competition." *Polygram*, 2003 WL 25797195, at *15.

15. "A justification is plausible if it cannot be rejected without extensive factual inquiry." *Id.* at 347.

Response to Conclusion No. 15:

Respondent has no specific response.

16. Second, these efficiencies must be supported by actual record evidence. *Realcomp*, No. 9320, 2007 WL 6936319, at *17.

Response to Conclusion No. 16:

Complaint Counsel's Proposed Conclusion No. 16 is inaccurate and misleading. As explained by the DC Circuit in *Polygram*, the nature and extent of the burden that shifts to the defendant to provide a procompetitive justification differs depending on, among other things, whether the challenged restraint is correctly deemed "inherently suspect" as opposed to an actual

showing that anticompetitive effects are in fact likely. *Polygram*, 416 F.3d at 36. For example, if a restraint is correctly deemed "inherently suspect," the defendant "need only articulate a legitimate justification. While the defendant at this point is not obligated to prove competitive benefits, the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible." *Polygram*, 2003 WL 25797195, at *15 (FTC 2003); *Polygram*, 416 F.3d at 36.

The proposed conclusion also is not supported by the cited legal authority. The cited page of the Commission's decision in *Realcomp II* states simply that: "We assess whether those purported justifications are legitimate (i.e. 'cognizable' and 'plausible'); whether they are supported by evidence in the record; and whether the restraints they impose are a reasonably necessary means to achieve a legitimate, procompetitive end." 2007 WL 6936319, at *17.

17. Third, 1-800 Contacts must demonstrate that the restraints are a "reasonably necessary means to achieve a legitimate, procompetitive end." *Id*. (emphasis added). If there is a significantly less restrictive alternative, then a challenged restraint is not reasonably necessary. *See id.*; *Polygram*, 136 F.T.C. at 335.

Response to Conclusion No. 17:

Complaint Counsel's Proposed Conclusion No. 17 is incomplete and inaccurate. First, as explained by the DC Circuit in *Polygram*, the nature and extent of the burden that shifts to the defendant to provide a procompetitive justification differs depending on, among other things, whether the challenged restraint is correctly deemed "inherently suspect" as opposed to an actual showing that anticompetitive effects are in fact likely. *Polygram*, 416 F.3d at 36. Second, to the extent that a respondent does have the burden to support any proffered justification, the cited decision by the Commission in *Polygram*, discussing the Supreme Court's decision in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), states that "a proffered justification for an otherwise unlawful restraint must be reasonably 'tailored' to serve the asserted procompetitive interests."

2003 WL 25797195, at *11. Third, the proposed conclusion is inaccurate in its assignment of the burdens. *See, e.g.*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) ("If the defendants do so, the government must prove either that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition."). Fourth, the proposed conclusion is incomplete in its reference to less restrictive alternatives. *See, e.g.*, *Am. Motors Inns v. Holiday Inns*, 521 F.2d 1230, 1249-50 (3d Cir. 1975) ("Application of the rigid 'no less restrictive alternative' test in cases such as this one would place an undue burden on the ordinary conduct of business. Entrepreneurs such as HI would then be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide 'adequate' protection for legitimate commercial interests.").

D. AGREEMENTS THAT SETTLE LITIGATION ARE SUBJECT TO ANTITRUST SCRUTINY

18. Private agreements entered in settlement of actual or threatened litigation are commercial agreements subject to the antitrust laws.[7] *Noerr-Pennington* defense (which applies to the *filing* of non-sham lawsuits as First Amendment-protected petitioning activity) does not apply to private parties' settlement agreements. *See* Opinion and Order of the Commission Granting Complaint Counsel's Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4 ("the Complaint alleges liability based only on private agreements that do not constitute

[7] *See, e.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (settlement of patent interference claim before the PTO held to violate Sherman Act); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (holding that a dissolution agreement between former law partners settling a state court lawsuit was a horizontal agreement to allocate markets among competitors and thus a per se violation of the Sherman Act); *Duplan Corp. v. Deering Milliken, Inc.*, 594 F.2d 979, 981 (4th Cir. 1979) (finding a patent settlement agreement to be the core of a horizontal agreement in violation of the antitrust laws).

government petitioning.").[8] *Noerr* protection is also unavailable for private settlement agreements that have been entered by a court as stipulated injunctions or consent decrees.[9]

Response to Conclusion No. 18:

The proposed conclusion of law is not supported. The Supreme Court has held that settlement agreements that take a traditional or "commonplace form" are not subject to antitrust scrutiny. *FTC v. Actavis*, 133 S.Ct. 2223, 2233 (2013). Under the Court's reasoning, a party alleging that a private settlement constitutes a violation of the antitrust laws first bears the burden of establishing why a particular "form" of settlement is sufficiently "unusual" to warrant antitrust scrutiny. *Id.* at 2236.

None of the cases cited by Complaint Counsel hold otherwise. The agreement in *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 (1963), was not a traditional patent settlement agreement. It included an obligation that one of the parties "enforce the patent to the benefit of all three parties," *id.* at 194, which the Court found to be part of a "conspiracy to exclude Japanese competitors," *id.* at 175. The covenant not to compete in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), was not within the range of potential judicial remedies in the at-issue

[8] *See also N.M. Nat. Gas Antitrust Litig.*, 1982 U.S. Dist. LEXIS 9452, at *16 (D.N.M. Jan. 26, 1982) (when litigants "voluntarily withdraw their dispute from the court and resolve it by agreement among themselves there would be no purpose served by affording *Noerr-Pennington* protection. The parties by doing so must abide with any antitrust consequences that result from their settlement."); *F.T.C. v. Actavis*, 133 S.Ct. 2223, 2230, 2232 (2013) (holding, where the underlying suit was not claimed to be a sham, that "patent-related settlements can sometimes violate the antitrust laws"); *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 818 (D.C. Cir. 2001)*; In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 635, 641 (E.D. Mich. 2000), *aff'd on other grounds*, 332 F.3d 896 (6th Cir. 2003).

[9] *See In re Androgel Antitrust Litig.*, No. 1:09-cv-955, 2014 WL 1600331, at *6-9 (N.D. Ga. Apr. 21, 2014); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 395-98 (D. Mass. 2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 212-13 (E.D.N.Y. 2003) (*Cipro*). While government advocacy is protected by *Noerr*, simply seeking government approval of a private agreement is not. *E.g.*, *Ticor Title Ins. Co. v. F.T.C.*, 998 F.2d 1129, 1138 (3d Cir. 1993).

partnership dissolution. And the scope of the agreement in *Duplan Corp. v. Deering Milliken* Inc., 594 F.2d 979 (4th Cir. 1979), went beyond the settlement: "The conduct of the parties following the settlement showed their cooperation in adhering to the program of fixed and stabilized royalty rates and their cooperation in keeping out competition." *Duplan Corp. v. Deering Milliken, Inc.*, 444 F. Supp. 648, 686 (D.S.C. 1977).

Complaint Counsel is also wrong with regard to the effect of a consent judgment. Depending on the facts of the case, *Noerr* immunity may apply to a consent judgment. *See MedImmune, Inc. v. Genentech, Inc.*, No. CV 03-2567 MRP, 2003 U.S. Dist. LEXIS 23443, at *21 (C.D. Cal. Dec. 22, 2003).

19. If a restraint represents the type of agreement subject to inherently suspect analysis, the fact that it is contained in a settlement agreement resolving litigation does not change the appropriate mode of analysis.[10]

Response to Conclusion No. 19:

The proposed conclusion of law is not supported. The Supreme Court has held that settlement agreements that take a traditional or "commonplace form" are not subject to antitrust scrutiny. *FTC v. Actavis*, 133 S.Ct. 2223, 2233 (2013). Under the Court's reasoning, a party

[10] *See Clorox v. Sterling Winthrop*, 117 F.3d 50, 55-56 (2d Cir. 1997) (agreements settling trademark litigation are subject to per se condemnation where they "effect any of the types of restraints that have historically been condemned as illegal per se"); *In re Cardizem Antitrust Litig.*, 332 F.3d 896, 907-908 (6th Cir. 2003) (considering and rejecting defendants' attempt to avoid *per se* condemnation of patent settlement where the settlement restrained a competitor from marketing both the allegedly infringing version of a drug and "noninfringing and/or potentially noninfringing versions of" the drug); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (patent settlement agreement *per se* illegal where "the exclusionary effects of the challenged provision of the [agreement] exceeded the exclusionary potential of the [patent]."); *see also Singer*, 374 U.S. at 195-97 (holding *per se* illegal patent license agreements that exceeded limits of the patent monopoly by obligating Singer to enforce the patents of the other parties to the agreement, in order to exclude competition from other rivals); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 373-74, 379 (1952) (holding *per se* illegal a settlement among competing patent owners); *United States v. Line Material Co.*, 333 U.S. 287, 310-15 (1948) (condemning as *per se* illegal a patent settlement and cross-licensing agreement).

alleging that a private settlement constitutes a violation of the antitrust laws first bears the burden of establishing why a particular "form" of settlement is sufficiently "unusual" to warrant antitrust scrutiny. *Id.* at 2236.

The cases cited by Complaint Counsel are not to the contrary. None involved a traditional or commonplace settlement. *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 374 (1952), involved an agreement to form a new company, transfer patents to the new entity, and for the new patent owner "to grant patent licenses, incorporating agreements which fixed the minimum prices at which all licensed manufacturers might sell, to the manufacturers in the wrinkle finish industry." *Id.* at 374. Similarly, *United States v. Line Material Co.*, 333 U.S. 287 (1948), involved a situation in which "two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents." *Id.* at 311. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), merely rewords the "traditional or commonplace form" formulation by stating that settlements that "effect any of the types of restraints that have historically been condemned as illegal *per se*, such as price fixing, market divisions, tying arrangements, or boycotts" would be subject to scrutiny. *Id.* at 56.

E. THE BIDDING AGREEMENTS ARE INHERENTLY SUSPECT

20. Certain categories of restraints almost always tend to raise price or reduce output, and hence are treated as "inherently suspect," or presumptively anticompetitive. *Realcomp*, No. 9320, 2007 WL 6936319 at *21; *Polygram*, 136 F.T.C. at 344-45.

Response to Conclusion No. 20:

Respondent has no specific response to this conclusion.

21. 1-800 Contacts' Bidding Agreements are presumptively anticompetitive for two independent reasons, either of which alone is sufficient to characterize the Bidding Agreements as inherently suspect.

Response to Conclusion No. 21:

Complaint Counsel's Proposed Conclusion No. 21 is incorrect for the reasons stated in 1-800 Contacts' post-trial briefing and proposed findings of fact and conclusions of law. *See* 1-800 Contacts Post-Trial Br. at 62-75; 1-800 Contacts Post-Trial Reply Br. at Part III.A.1.

> 22. First, the Bidding Agreements restrict competitive bidding, in that they allocate among competing bidders the right to participate in search advertising auctions and thus restrain price competition within those auctions. The Supreme Court has held that agreements suppressing bidding are presumptively unlawful. *Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978).

Response to Conclusion No. 22:

Complaint Counsel's Proposed Conclusion No. 22 is incorrect and unsupported by the record.

There is absolutely no evidence that any of the settling parties was engaged in bid rigging, let alone evidence to support a bid rigging conspiracy. Party after party testified that they entered into the challenged agreements in order to settle legal claims and avoid the costs of litigation. (CX 9000 ([redacted] at 93-94); CX 9014 ([redacted] at 46-48); CX 9024 ([redacted] at 62-64, 75-77, 160-165); CX 9039 ([redacted] at 86-87, 144); CX 9003 ([redacted] at 108-109); CX 943 ([redacted]) ¶ 10). And Dr. Evans testified that the settlements "are the result of parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation." (Evans, Tr. 1831). Dr. Murphy therefore gave unrebutted testimony that the challenged settlement agreements lack the economic indicia of bid rigging agreements. (RX 739-0057 to -0059); Murphy, Tr. 4178-79).

Complaint Counsel have conceded, as two courts have held, that 1-800 Contacts' trademark claims were *bona fide*. (RX 680; *1-800Contacts, Inc. v. Mem'l Eye, P.A.*, 2010 WL 988524, at *6; *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014),

ECF No. 91, at 2)). Accordingly, Complaint Counsel cannot dispute that the challenged agreements were *bona fide* settlements of trademark litigation. "[I]it is reasonable to presume that [trademark settlement] agreements are pro-competitive." *Clorox Co.*, 117 F.3d at 60.

The settlements were non-use agreements, a form of settlement that is routinely used to resolve trademark disputes, whether by settlement or injunction. (RF 1275-89). *See* 3 McCarthy on Trademarks & Unfair Competition § 18:82 (4th Ed. 2016 update). *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996); 5 McCarthy on Trademarks & Unfair Competition § 30:1 (4th ed.); Restatement (Third) of Unfair Competition § 35 (1995). To be sure, one mechanism by which the settlements achieved their goals of resolving the litigation and preventing future infringement was to limit the settling parties' bids on 1-800 Contacts' trademarks as keywords. (*E.g.*, RX 28 (ACLens Settlement) § 2(A)b).) But because search engines sell advertising via auctions, the only way to implement a non-use trademark settlement agreement regarding keyword advertising is to restrict auction bids on keywords. Without doing so, there could be no settlements in this area of the law.

Accordingly, restraining "bidding" was "only an incident to the main purpose" of the agreements to settle litigation and prevent potential infringement. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898). The restrictions on keyword bidding were "subordinate and collateral to a separate, legitimate transaction" and simply "serv[e] to make the main transaction," the settlements, "more effective in accomplishing [their] purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). Such ancillary restrictions are "necessary to make that transaction effective" and not inherently suspect. *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 471 (2003) (quoting *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984)). Complaint Counsel fail to

"distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985).

Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679 (1978), clearly is distinguishable. That case involved "an absolute ban on competitive bidding," which "prevent[ed] *all customers* from making price comparisons in the initial selection of an engineer." *Id.* at 692, 694-95 (emphasis added). As explained in 1-800 Contacts' proposed findings of fact, the challenged settlement agreements did not prevent any customers from making price comparisons, (1-800 Post-Trial Br. at 103-105; RF 960-984, 1932-1955), and contained express carve outs for comparative advertising. (RF 1174).

23. Second, the Bidding Agreements restrict truthful, non-deceptive advertising by lower-price contact lens retailers. *See Realcomp*, No. 9320, 2007 WL 6936319 at *26 (holding that agreement among real estate brokers to impede the dissemination of real estate listings "operated as a restraint on advertising" and "thus was inherently suspect; observing that "[c]ourts have long treated agreements among competitors to restrict advertising as posing serious dangers to competition and as having a great capacity to affect prices"); *Polygram*, 136 F.T.C. at 354-55 ("[r]estrictions on truthful and nondeceptive advertising harm competition, because they make it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors' incentives to compete with each other with respect to such features").

Response to Conclusion No. 23:

Complaint Counsel's Proposed Conclusion No. 23 is incorrect and unsupported by the record for the reasons stated in 1-800 Contacts' post-trial briefing. *See* 1-800 Contacts Post-Trial Br. at 45-51, 63-68; 1-800 Contacts Post-Trial Reply Br. at Part III.A.1.b.

24. Restraints on truthful and nonmisleading advertising are inherently suspect even if they restrain only a portion of advertising by rivals. *See Realcomp*, No. 9320, 2007 WL 6936319, at *38, *41.

Response to Conclusion No. 24:

Complaint Counsel's Proposed Conclusion No. 24 is incomplete and incorrect. The Commission in *Realcomp* determined that restricting a competitor's access to the MLS "put it at a considerable competitive disadvantage, particularly in the context of the increasing competitive importance of certain key Internet websites to disseminate listing information to consumers." 2007 WL 6936319, at *25. Their effect was "limiting access to an input - *i.e.* full exposure on the approved websites - necessary for limited service brokers to compete effectively." *Id.*

Further, the Supreme Court's decision in *California Dental* makes clear that not all restrictions on advertising are inherently suspect. *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). "The plausibility of competing claims about the effects of" challenged "advertising restrictions rules out the indulgently abbreviated review" advocated by Complaint Counsel. Inherently suspect treatment is not appropriate where "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," *id.* at 771, or where the context shows that evaluating the balance of consumer effects is "a question susceptible to empirical but not *a priori* analysis." *Id.* at 774.

As the Supreme Court has explained, "before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do." *Cal. Dental Ass'n*, 526 U.S. at 775 n.12. "The plausibility of competing claims about the effects of" challenged "advertising restrictions rules out the indulgently abbreviated review" advocated by Complaint Counsel. *Id.* at 778.

25. The origin of the Bidding Agreements in settlement of threatened or actual litigation does not change the mode of analysis. *See FTC v. Actavis*, 133 S. Ct. 2223, 2231-32 (2013) (citing *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948)); *Clorox v. Sterling Winthrop*, 117 F.3d 50, 55-56 (2d Cir. 1997) (agreements settling trademark litigation are subject to per se condemnation where they "effect any of the types of restraints that have historically been condemned as illegal per se"); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶1907b (3d ed. 2007) ("[T]he following defenses to a horizontal restraint affecting price or output are unacceptable: . . . that collusion or market division is necessary to prevent firms from violating one another's intellectual property rights, or to discipline others who are violating them.").

Response to Conclusion No. 25:

Complaint Counsel's Proposed Conclusion No. 25 is incorrect. The cited cases themselves demonstrate that an agreement's character as a settlement of *bona fide* litigation does change the mode of analysis.

That is why the Supreme Court in *Actavis* rejected the Commission's argument that alleged reverse payment settlements should be subject to quick look analysis. 133 S. Ct. at 2237. And that is why the Second Circuit in *Clorox* held that a trademark settlement agreement that is "common, and favored, under the law" has procompetitive potential and should be analyzed under the rule of reason. 117 F.3d at 55. Indeed, the court in *Clorox* reasoned that [parties to a trademark settlement agreement "are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves." *Clorox Co.*, 117 F.3d at 60. And "it is usually unwise for courts to second-guess such decisions." *Id.* Thus, the court held that "in the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive." *Id.*

Complaint Counsel's reliance on cases finding certain restraints *per se* unlawful is misplaced because Complaint Counsel do not contend that the settlements here were *per se*

unlawful. Nor is there any evidence that the settlements involved "collusion or market division." Dr. Evans testified that the "settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation." (Evans, Tr. 1831). And as Dr. Evans admitted in response to the Court's questioning, an agreement settling litigation that a defendant could not afford to fight is not collusion at all. (Evans, Tr. 1466.)

26. Because the Bidding Agreements are inherently suspect, the burden shifts to 1-800 Contacts to proffer a cognizable and plausible efficiency justification for the Bidding Agreements. *See Realcomp*, No. 9320, 2007 WL 6936319, at *27; *Polygram*, 136 F.T.C. at 345-46.

Response to Conclusion No. 26:

Complaint Counsel's Proposed Conclusion No. 26 is incorrect. The challenged settlement agreements are not inherently suspect for the reasons set forth in 1-800 Contacts' post-trial briefing. *See* 1-800 Contacts Post-Trial Br. at 62-75; 1-800 Contacts Post-Trial Reply Br. at Part III.A.1.

F. THE BIDDING AGREEMENTS HAVE ANTICOMPETITIVE EFFECTS

27. As an alternative to demonstrating that the agreements are inherently suspect, Complaint Counsel may also establish its *prima facie* case either by offering direct evidence of actual anticompetitive effects; or, through a showing of market power, in combination with a restraint that has the tendency to harm competition. *See Realcomp*, No. 9320, 2007 WL 6936319, at *21.

Response to Conclusion No. 27:

Complaint Counsel's Proposed Conclusion No. 27 is incorrect. Under the rule of reason, Complaint Counsel had to prove market power in a relevant market—*i.e.*, the ability to raise prices significantly without going out of business—without which 1-800 Contacts could not cause anticompetitive effects. *See Agnew v. NCAA*, 683 F.3d 328, 335-36 (7th Cir. 2012); *see also Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

"Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996); *see also Menasha Corp.*, 354 F.3d at 663 ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Any given firm may cut its own output, but rivals will increase production in response.") (citation omitted). "Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without power bear no burden of justification." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334-5 (7th Cir. 1986).

Complaint Counsel therefore had to identify and prove the relevant market. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004). "Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011); *see also Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006).

1. DIRECT EVIDENCE

28. First, Complaint Counsel may meet its burden under the rule of reason by showing "direct evidence of anticompetitive effect," which "'obviate[s] the need for an inquiry into market power'" and does not require "elaborate econometric proof." *Realcomp*, No. 9320, 2007 WL 6936319, at *19 (quoting *Indiana Federation*, 476 U.S. at 460-62).

Response to Conclusion No. 28:

Complaint Counsel's Proposed Conclusion No. 28 is incorrect. Under the rule of reason, Complaint Counsel had to prove market power in a relevant market—*i.e.*, the ability to raise prices significantly without going out of business—without which 1-800 Contacts could not cause anticompetitive effects. *See Agnew v. NCAA*, 683 F.3d 328, 335-36 (7th Cir. 2012); *see also Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

"Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996); *see also Menasha Corp.*, 354 F.3d at 663 ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Any given firm may cut its own output, but rivals will increase production in response.") (citation omitted). "Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without power bear no burden of justification." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334-5 (7th Cir. 1986).

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29. Direct evidence may consist of evidence of higher prices or lower output, or it may consist of evidence of a marketplace distortion that is likely to result in higher prices or lower output. *See Indiana Federation*, 476 U.S. at 460-62; *Realcomp*, No. 9320, 2007 WL 6936319, at *32.

Response to Conclusion No. 29:

Complaint Counsel's Proposed Conclusion No. 29 is incorrect. "[O]utput is a sound general measure of anticompetitive effect, and several Supreme Court decisions have emphasized it." Areeda, at ¶ 1503b(1); *see California Dental Ass'n*, 526 U.S. at 776 (asking "whether the limitation on advertisements obviously tends to limit the total delivery of dental services"). Indeed, "[t]he core question in antitrust is output. Unless a contract reduces output in

some market, to the detriment of consumers, there is no antitrust problem." *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 597; *see also Rebel Oil Co.*, 51 F.3d at 1433.

30. Because Complaint Counsel has shown, by direct evidence, that the Bidding Agreements harm competition, the burden shifts to 1-800 Contacts to proffer a cognizable and plausible efficiency justification for the Agreements.

Response to Conclusion No. 30:

Complaint Counsel's Proposed Conclusion No. 30 is incorrect and not supported by record evidence. As explained in 1-800 Contacts' post-trial briefing and proposed findings of fact and conclusions of law, Complaint Counsel have no direct evidence that the settlement agreements harmed competition. *See* 1-800 Contacts Post-Trial Br. at 95-105; 1-800 Contacts Post-Trial Reply Br. at Part III.A.2. Most notably, Complaint Counsel's economic experts conceded that they have no proof that the settlement agreements resulted in lower output or higher prices for contact lenses. (Evans, Tr. 1723-24; CX 9042 (Evans, Dep. at 257, 263); Athey, Tr. 799; CX 9043 (Athey, Dep. at 194-95, 201)). *See, e.g.*, *California Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000) (vacating Commission order where "the FTC has never quantified any increase in price or reduction in output").

2. INDIRECT EVIDENCE

31. Alternately, Complaint Counsel may meet its burden under the rule of reason by showing that the parties to the challenged agreements "had market power and that their conduct tended to reduce competition." *Realcomp*, No. 9320, 2007 WL 6936319, at *19. That is, Complaint Counsel may show that "defendant's market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects." *Realcomp*, No. 9320, 2007 WL 6936319, at *34.[11] If Complaint Counsel

[11] *See also Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement" – direct proof of "actual adverse effect on competition" or "indirectly by establishing . . . sufficient market power to cause an adverse effect on competition"); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market . . . ").

makes such a showing, "it is unnecessary to demonstrate directly that [Respondent's] practices had adverse effects on competition."[12]

Response to Conclusion No. 31:

Respondent has no specific response.

a. Market Definition

32. An antitrust market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

Response to Conclusion No. 32:

Respondent has no specific response.

33. A well-defined antitrust market consists of "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level." *United States v. Am. Express Co.*, 838 F.3d 179, 198–99 (2d Cir. 2016); *Brown Shoe Co., v. United States*, 370 U.S. 294, 325-26 (1962); 2010 Horizontal Merger Guidelines at § 4.1.1.

Response to Conclusion No. 33:

Complaint Counsel's Proposed Conclusion No. 33 is incomplete and inaccurate. First, as the Second Circuit explained in *United States v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016), the relevant market is defined "as all products reasonably interchangeable by consumers for the same purposes." *Id*. at 196. "Market definition is a deeply fact-intensive inquiry because its purpose is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output." *Id*. (internal citations and quotation marks omitted). "The proper market definition thus can be determined only after a factual inquiry into the commercial realities faced by consumers. ***The basic principle is that the***

[12] *Realcomp*, No. 9320, 2007 WL 6936319, at *18; *Realcomp*, 635 F.3d at 828 ("'The purpose of the inquiries into market definition and marker power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition' and this is so precisely because actual anticompetitive effects may be difficult to demonstrate.") (quoting *Indiana Federation*, 476 U.S. at 460)).

relevant market definition must encompass the realities of competition." *Id*. (internal citations and quotation marks omitted) (emphasis added).

Second, the Second Circuit stated that it "often applies" the "hypothetical monopolist test" under which "[a] market is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. ***If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market****."* *Id*. at 198-99 (emphasis added).

34. The key factors in identifying the bounds of a relevant product market are "(1) the reasonable interchangeability of use" by consumers and "(2) the cross-elasticity of demand between the product itself and substitutes for it." *FTC v. Arch Coal, Inc*., 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *Brown Shoe*, 370 U.S. at 325); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).

Response to Conclusion No. 34:

Complaint Counsel's Proposed Conclusion No. 34 is incomplete and inaccurate. The federal district court in *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004), explained that "[i]n determining relevant product markets, courts have traditionally emphasized two factors: the reasonable interchangeability of use by consumers and the cross-elasticity of demand between the product itself and substitutes for it. The general question is whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other. Relevant markets will generally include producers who, given product similarity, have the ability to take significant business from each other." *Id*. at 119 (internal citations and quotation marks omitted).

35. The relevant geographic market is "the 'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

Response to Conclusion No. 35:

Complaint Counsel's Proposed Conclusion No. 35 is incomplete. "The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he seeks. Determined with the specific context of each case, a market's geographic scope must 'correspond to the commercial realities in the industry' being considered and 'be economically significant.'" *FTC v. Penn. State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962)).

36. A relevant product market or line of commerce in which to analyze the competitive effects of the Bidding Agreements is the online retail sale of contact lenses.

Response to Conclusion No. 36:

Complaint Counsel's Proposed Conclusion No. 36 is inaccurate and unsupported by the record evidence as shown in Respondent's Proposed Findings of Fact 370-670 and for the reasons explained in Respondent's Post-Trial Brief, section III.B.1.

37. The relevant geographic market in which to analyze the competitive effects of the Bidding Agreements is the United States.

Response to Conclusion No. 37:

Respondent has no specific response, other than to note that Complaint Counsel's characterization of 1-800 Contacts' settlement agreements as "Bidding Agreements" is unsupported by the record evidence and the applicable law.

b. Market Power

38. Market power is the collective "ability [of firms] to significantly affect prices and other outcomes in the [] market." *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1154 (9th Cir. 2011).

Response to Conclusion No. 38:

Complaint Counsel's Proposed Conclusion No. 38 is incomplete and misleading. The cited legal authority explained in a footnote to the quoted passage that: "No precise standard

exists for determining when a firm or a group of firms controls enough of a market that its actions might cause anticompetitive effects." *Cal. ex rel. Harris v. Safeway*, 651 F.3d 1118, 1154 n.7 (9th Cir. 2011).

39. The parties to the Bidding Agreements, including 1-800 Contacts, have market shares sufficient to give rise to a strong presumption of market power unless "entry into the market is so easy" that the parties, either unilaterally or collectively, "could not profitably raise price or otherwise reduce competition compared to" the but-for world. 2010 Horizontal Merger Guidelines at § 9; *see also id.* ("Entry is easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern. . . .").

Response to Conclusion No. 39:

Complaint Counsel's Proposed Conclusion No. 39 is inaccurate and unsupported by the record evidence. First, Complaint Counsel's proposed relevant market is unsupported by the record evidence for the reasons shown in Respondent's Proposed Findings of Fact 370-670 and for the reasons explained in Respondent's Post-Trial Brief, section III.B.1. Second, Complaint Counsel have not shown that 1-800 Contacts and the other settling parties, collectively, have sufficient market power in a properly defined relevant market of all contact lens retailers. The record evidence shows that 1-800 Contacts' market share is about 10 percent of total contact lens sales in the United States (Bethers, Tr. 3552-53); and that the market share of all pure-play online retailers, including 1-800 Contacts, is about 17 percent of total contact lens sales in the United States (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; [redacted] RX 736-009 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739-0086). Third, Complaint Counsel cite no legal authority suggesting that a market share of, at most, 17 percent is sufficient to presume market power.

40. The parties to the Bidding Agreements, including 1-800 Contacts, have market power in a relevant market for the online retail sale of contact lenses in the United States, as

> entry into the market is not so easy as to prevent the parties from profitably raising price or otherwise reducing competition.

Response to Conclusion No. 40:

The proposed summary conclusion should be disregarded because it violates the Court's Order on Post-Trial Briefs requiring that "[a]ll conclusions of law, including, but not limited to, liability and the proposed remedy, shall be supported by applicable legal authority."

The proposed conclusion also is inaccurate and unsupported by the record evidence. First, Complaint Counsel's proposed relevant market is unsupported by the record evidence for the reasons shown in Respondent's Proposed Findings of Fact 370-670 and for the reasons explained in Respondent's Post-Trial Brief, section III.B.1. Second, Complaint Counsel have not shown that 1-800 Contacts and the other settling parties, collectively, have sufficient market power in a properly defined relevant market of all contact lens retailers. The record evidence shows that 1-800 Contacts' market share is about 10 percent of total contact lens sales in the United States (Bethers, Tr. 3552-53); and that the market share of all pure-play online retailers, including 1-800 Contacts, is about 17 percent of total contact lens sales in the United States (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; [redacted] RX 736-009 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739-0086). Third, Complaint Counsel cite no legal authority suggesting that a market share of, at most, 17 percent is sufficient to presume market power.

In addition, the proposed conclusion with respect to the ease of entry is unsupported by the record evidence that explains entry is relatively easy and contains examples of numerous recent entrants selling contact lenses online. Respondents Proposed Findings of Fact 463-487 & 621-661.

> 41. "In light of [this] market power, and the facially restrictive nature of the [Bidding Agreements] at issue, no more is required, under the rule of reason, to support [the]

> conclusion that the [Bidding Agreements] are unreasonable because they will predictably result in harm to competition." *Realcomp*, No. 9320, 2007 WL 6936319, at *37.

Response to Conclusion No. 41:

Complaint Counsel's Proposed Conclusion No. 41 is inaccurate, misleading, unsupported by the cited legal authority, and unsupported by the record evidence. As explained in Respondent's response to Complaint Counsel's Proposed Conclusion No. 39, Complaint Counsel have not shown that 1-800 Contacts (with or without the other parties to the settlement agreements) has market power. As explained in Respondent's Post-Trial Brief, Complaint Counsel cannot show that the settlement agreements are subject to antitrust scrutiny under *Actavis*, or that the settlement agreements could be deemed "inherently suspect" or "facially restrictive." Furthermore, the proposed conclusion is incomplete and misleading because it provides no reference to the fact the challenged restraints are settlement agreements of litigation or to the other justifications by 1-800 Contacts set out thoroughly in the record evidence.

> 42. Because the evidence shows that the parties to the Bidding Agreements have market power and that the Bidding Agreements have a tendency to harm competition, the burden shifts to 1-800 Contacts to proffer a cognizable and plausible efficiency justification for the Agreements. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011) ("If Realcomp's challenged policies are shown to have an anticompetitive effect, or if Realcomp is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to Realcomp to provide procompetitive justifications for the policies.") (italics in original).

Response to Conclusion No. 42:

Complaint Counsel's Proposed Conclusion No. 42 is inaccurate, misleading, unsupported by the cited legal authority, and unsupported by the record evidence. As explained in Respondent's response to Complaint Counsel's Proposed Conclusion No. 39, Complaint Counsel have not shown that 1-800 Contacts (with or without the other parties to the settlement agreements) has market power. As explained in Respondent's Post-Trial Brief, Complaint

Counsel cannot show that the settlement agreements are subject to antitrust scrutiny under *Actavis*, or that the settlement agreements have any tendency to harm competition. Furthermore, the proposed conclusion is incomplete and misleading because it provides no reference to the fact the challenged restraints are settlement agreements of litigation or to the other justifications by 1-800 Contacts set out thoroughly in the record evidence.

G. 1-800 CONTACTS HAS NOT MET ITS BURDEN TO PROFFER COGNIZABLE, PLAUSIBLE EFFICIENCY JUSTIFICATIONS FOR THE BIDDING AGREEMENTS

43. As Complaint Counsel has satisfied its *prima facie* case, the burden shifts to 1-800 Contacts to show a valid efficiency justification for the restraint. That is, Respondent must show that the Bidding Agreements were and are reasonably necessary in order to promote competition and benefit consumers.

Response to Conclusion No. 43:

Complaint Counsel's Proposed Conclusion No. 43 is incorrect and does not cite any authority. Complaint Counsel have not satisfied their *prima facie* case for the reasons set forth in 1-800 Contacts' post-trial briefing. Further, even if Complaint Counsel could show the settlement agreements warrant antitrust scrutiny under *Actavis*, this case would be analyzed under the rule of reason and it is incorrect that 1-800 Contacts has the burden to "show that the [settlement] agreements were and are reasonably necessary in order to promote competition and benefit consumers." The law is that, under the rule of reason, "if respondents are able to demonstrate procompetitive effects, complaint counsel then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 476 (2003).

44. It is not sufficient for Respondent merely to advance a plausible hypothesis as to why a suspect restraint could have been efficiency enhancing. Respondent must demonstrate that actual record evidence supports the existence of the procompetitive efficiency. *Realcomp*, No. 9320, 2007 WL 6936319, at *17.

Response to Conclusion No. 44:

Complaint Counsel's Proposed Conclusion No. 44 is incorrect and not supported by the cited authority, which does not say that a respondent must demonstrate that actual record evidence supports the existence of the procompetitive efficiency. In fact, "[i]f the challenged restrictions are of a sort that generally pose significant competitive hazards and thus can be called inherently suspect, then the defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. Such justifications may consist of *plausible* reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers." *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 345 (2003) (emphasis added).

Contrary to Complaint Counsel's proposed conclusion of law, the Commission has made clear that "[a]t this early stage of the analysis, the defendant need only articulate a legitimate justification." *Polgyram*, 136 F.T.C. at 345. "[T]he defendant at this point is not obligated to prove competitive benefits"; all that is required is that "the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible." *Id.* Indeed, "the defendant *need not* produce detailed evidence at this stage" but simply "must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition." *Id.* at 347.

When a respondent does so, Complaint Counsel must "provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely, before the evidentiary

burden shifts to the defendant." *Id.* at 350. Only if Complaint Counsel meet that burden does respondent take on "the burden of producing factual evidence in support of its contentions, including documents within its control." *Id.*

45. In addition, Respondent must demonstrate that the restraint is reasonably necessary to achieve its plausible and cognizable justification. *Realcomp,* No. 9320, 2007 WL 6936319, at *17.

Response to Conclusion No. 45:

Complaint Counsel's Proposed Conclusion No. 45 is incorrect. Even if Complaint Counsel could show the settlement agreements warrant antitrust scrutiny under *Actavis*, this case would be analyzed under the rule of reason and it is incorrect that 1-800 Contacts has the burden to "show that the [settlement] agreements were and are reasonably necessary in order to promote competition and benefit consumers." Under the rule of reason, "if respondents are able to demonstrate procompetitive effects, complaint counsel then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 476 (2003).

46. Respondent has not met its burden of (i) identifying a plausible and cognizable efficiency justification for the challenged restraints, (ii) supported by record evidence, (iii) that is reasonably necessary to achieve the justification.

Response to Conclusion No. 46:

Complaint Counsel's Proposed Conclusion No. 46 is incorrect and not supported by the cited authority, which does not say that a respondent must demonstrate that actual record evidence supports the existence of the procompetitive efficiency. In fact, "[i]f the challenged restrictions are of a sort that generally pose significant competitive hazards and thus can be called inherently suspect, then the defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. Such justifications may consist of

plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers." *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 345 (2003).

Contrary to Complaint Counsel's proposed conclusion of law, the Commission has made clear that "[a]t this early stage of the analysis, the defendant need only articulate a legitimate justification." *Polygram*, 136 F.T.C. at 345. "[T]he defendant at this point is not obligated to prove competitive benefits"; all that is required is that "the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible." *Id.* Indeed, "the defendant *need not* produce detailed evidence at this stage" but simply "must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition." *Id.* at 347.

When a respondent does so, Complaint Counsel must "provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely, before the evidentiary burden shifts to the defendant." *Id.* at 350. Only if Complaint Counsel meet that burden does respondent take on "the burden of producing factual evidence in support of its contentions, including documents within its control." *Id.* Because Complaint Counsel have not adduced sufficient evidence of likely anticompetitive effects, *see* 1-800 Contacts Post-Trial Br. at 95-1505; 1-800 Contacts Post-Trial Br. at Part III.A.2, 1-800 Contacts had no burden to adduce proof of its procompetitive justifications. At any rate, 1-800 Contacts did so for the reasons set forth in its post-trial briefing and findings of fact.

1. THE BIDDING AGREEMENTS CANNOT BE JUSTIFIED ON THE GROUNDS THAT THEY PREVENT "FREE RIDING"

47. Free riding is not a cognizable defense to the Bidding Agreements because the agreements are among independent horizontal competitors, and not ancillary to any substantial business integration. *Polygram*, 136 F.T.C. at 366-68.

Response to Conclusion No. 47:

Complaint Counsel's Proposed Conclusion No. 47 is incorrect for the reasons set forth in 1-800 Contacts' Post-Trial Brief, section II.B (discussing the procompetitive benefits of trademark protection). Complaint Counsel's reliance on *Polygram* is misplaced and inapplicable. Neither the Commission's decision, nor the DC Circuit's opinion, in *Polygram* addressed any issue relating to trademark protection

2. 1-800 CONTACTS' TRADEMARK RIGHTS DO NOT JUSTIFY THE BIDDING AGREEMENTS BECAUSE THE AGREEMENTS ARE OVERBROAD

48. Trademark law permits the holder to prevent uses of a trademark that cause consumer confusion "as to the source, affiliation, or sponsorship of [a company's] products or services." *Fetzer Co. v. House of Vacuums*, 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id*. § 1125(a)).

Response to Conclusion No. 48:

Complaint Counsel's Proposed Conclusion No. 48 is incomplete, inaccurate and misleading. Among other types of confusion, courts in paid search advertising cases focus on a species of confusion known as "initial interest confusion," which occurs "when a consumer seeks a particular trademark holder's product and instead is lured to the product of a competitor by the competitor's use of the same or a similar mark." *Australian Gold, Inc.*, 436 F.3d at 1238. Such confusion does not require the consumer to remain confused as to the source, affiliation, or sponsorship of the product through completion of purchase. *1-800 Contacts, Inc. v. Lens.com,*

Inc., 722 F.3d 1229, 1244 (10th Cir. 2013); *SanMedica International v. Amazon.com, Inc.*, No. 2:13-cv-00169-DN, 2015 WL 1786104, *7-8 (D. Utah Apr. 15, 2015).

Additionally, trademark law permits the holder of a famous mark to prevent uses of a trademark that are likely to cause dilution by blurring or dilution by tarnishment of the mark, "regardless of the presence or absence of actual or likely confusion." 15 U.S.C.A. § 1125(c); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 167 (4th Cir. 2012) ("Dilution is not concerned with confusion in the marketplace").

49. Because the Bidding Agreements are overbroad, 1-800 Contacts' trademark rights do not justify the Bidding Agreements.

Response to Conclusion No. 49:

The proposed conclusion of law should be disregarded because it violates the Court's Order on Post-Trial Briefs, which requires that "[a]ll conclusions of law … shall be supported by applicable legal authority." Order at 2. There is no legal authority provided to support the proposition that "1-800 Contacts' trademark rights do not justify the bidding agreements."

Moreover, the proposed conclusion of law contains an erroneous factual statement that is not supported by the evidentiary record. 1-800 Contacts' settlement agreements are narrowly tailored to address the parties' trademark rights, and are not overbroad. *See* Respondent's Post-Trial Reply Brief § IV. B. 1 & 4.

a. The Bidding Agreements Restrict Non-Infringing Uses of the Trademark

50. The Bidding Agreements exceed the scope of any property right that 1-800 Contacts may have in its trademarks because they prevent non-confusing (and therefore lawful) advertising using 1-800 Contacts' trademarks. Specifically, the Bidding Agreements prevent rivals' advertisements from appearing in response to user queries for 1-800 Contacts' trademark and variations thereof, even though many such advertisements would not be confusing within the meaning of trademark law. *See Cardizem*, 332 F.3d 896, 907, 908 n.13 (condemning a patent settlement as *per se* illegal where the settlement restrained a competitor from marketing both the allegedly infringing

version of a drug and "noninfringing and/or potentially noninfringing versions of" the drug).

Response to Conclusion No. 50:

Complaint Counsel's Proposed Conclusion No. 50 is improper and should be disregarded because it contains a series of inaccurate factual statements regarding the scope of 1-800 Contacts' trademark settlement agreements in addition to legal conclusions not supported by the cited legal authority.

Complaint Counsel claim as a predicate fact that the settlement agreements "prevent non-confusing" advertising. This is less a legal conclusion than an unsupported misstatement of the factual record. 1-800 Contacts has presented voluminous evidence that sponsored links that appear in response to searches for 1-800 Contacts are likely to cause consumer confusion. *See* 1-800 Post-Trial Br. at 51-55; RPF 994-1000, 1040-1053, 1133-1145, 1484-1565, 1716-1745. The underlying lawsuits were brought due to a concern over consumer confusion as to the source or affiliation of the sponsored links, and those lawsuits settled on terms designed to reflect the parties' trademark rights. *See* 1-800 Post-Trial Reply Br. § IV. B. 1; *see also* (Bethers, Tr. 3691, Coon, Tr. 2726-29, CX9040 (Miller, Dep. at 42, 211-213); Hogan, Tr. 3274-75). As a matter of law, courts have held that the paid search advertisements appearing in response to searches for trademark terms can infringe the holder's property right. *See, e.g., Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288; *Fair Isaac Corp.*, 645 F. Supp. 2d at 760-61; *Rescuecom, Inc. v. Google, Inc.*, 562 F.3d 123 (9th Cir. 2009).

Further, Complaint Counsel's legal authority is unavailing and does not support their contentions regarding the scope of 1-800 Contacts' settlement agreements. *Cardizem* turned on the existence of reverse payments in the patent settlements at issue. 332 F.3d at 908. Complaint Counsel do not contend any such reverse payments exist in this case. *Cardizem* did

not, as Complaint Counsel suggest, create a distinct legal rule dividing the competitive consequences of "noninfringing and/or potentially noninfringing" uses of intellectual property from infringing uses—certainly not a rule that would apply to the context of a standard trademark non-use agreement. Further, the Supreme Court has overturned the *Cardizem* ruling that such patent settlements are *per se* illegal by holding in *Actavis* that a rule of reason analysis should apply. 133 S. Ct. at 2237.

51. The Bidding Agreements further exceed the scope of 1-800 Contacts' trademark rights by requiring the use of "negative keywords" that restrict the appearance of rival advertising even when the rivals have not bid on (or "used") 1-800 Contacts' trademarks.

Response to Conclusion No. 51:

The proposed conclusion of law should be disregarded because it violates the Court's Order on Post-Trial Briefs, which requires that "[a]ll conclusions of law … shall be supported by applicable legal authority." Order at 2. There is no legal authority provided to support the proposition that the requirement to use negative keywords exceeds the scope of 1-800 Contacts' trademark rights.

By contrast, courts have ordered the implementation of negative keywords as a remedy in trademark infringement cases. *See, e.g., Happy Feet USA, Inc. v. Serenity "2000" Corp.*, Case No. 6:09-cv-1832, Dkt. 22 (M.D. Fla Mar. 16, 2010); *1-800 Contacts, Inc. v. Lensworld, Inc.*, Civil No. 2:08-cv-015-SA, Dkt. 30 (D. Utah Sep. 8, 2008). Negative keywords are a necessary and easy to administer tool to prevent the appearance of potentially confusing sponsored links in response to searches for trademark terms. (CX 9033 (Mohan, Dep. at 185-87); CX9040 (Miller, Dep. at 28, 66); Hogan, Tr. 3304-05). No American court has addressed whether the purchase of a generic term, without the implementation of the corresponding negative keywords, that causes an advertisement to appear in response to a search for a trademark term constitutes infringement

under the Lanham Act. (Hogan, Tr. 3476, 3478, 3480). This issue awaits further judicial consideration, although there is some authority suggesting that the practice constitutes infringement. *See Buying for the Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310, 322 (D.N.J. 2006); *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-cv-983 TS, 2010 WL 988524, at *5 (D. Utah Mar. 15, 2010).

52. The Bidding Agreements further exceed the scope of 1-800 Contacts' trademark rights because they are reciprocal agreements, untethered to any claim that 1-800 Contacts infringed the trademarks of the settling parties.

Response to Conclusion No. 52:

The proposed conclusion of law should be disregarded because it violates the Court's Order on Post-Trial Briefs, which requires that "[a]ll conclusions of law … shall be supported by applicable legal authority." Order at 2. There is no legal authority provided to support the proposition that the reciprocal nature of the settlement agreements causes them to exceed the scope of the parties' trademark rights.

Further, it is not relevant whether the reciprocal requirements "exceed the scope of 1-800 Contacts' trademark rights." Obviously terms restricting 1-800 Contacts' conduct protect the trademark rights of the other party to the settlement agreement, not 1-800 Contacts' own property rights. What is relevant is whether the terms of the settlement agreements take a commonplace form. *Actavis*, 133 S. Ct. at 2233. Whereas "[c]ourt judgments are typically one-way," "[s]ettlement agreements are typically reciprocal." (Hogan, Tr. 3493); *see* CX 9047 (Hogan, Dep. 195 ("The nature of an agreement is reciprocal undertakings. It would be an exception that swallowed the rule if courts would only enforce agreements based on an analysis of whether each side has claims against the other.")). Besides, it is false as a factual matter that all of the settlement agreements were "untethered" to allegations that 1-800 Contacts had infringed the trademark rights of the other party. (CX 828; CX 9021 (Pratt, Dep. at 171-75)).

53. The Bidding Agreements also exceed the scope of 1-800 Contacts' right to prevent trademark dilution because they apply to advertisements where the rival does not identify itself by a name that is confusingly similar to any trademark claimed by 1-800 Contacts. *See Dallas Cowboys Football Club v. Am.'s Team Properties*, 616 F. Supp. 2d 622, 643 (N.D. Tex. 2009) (finding dilution where the defendant adopted plaintiff's "America's Team" trademark to identify its own goods).

Response to Conclusion No. 53:

Complaint Counsel's Proposed Conclusion No. 53 is incorrect and misleading. The settlement agreements properly reflect the concerns of the trademark dilution statute and Complaint Counsel misstate the appropriate standard. Trademark dilution occurs when someone other than the trademark owner uses the trademark in a way that weakens the strength of the association between a famous trademark and the goods or services that the mark is used to promote. 1125 U.S.C. § 1125(c). The use of the trademark in question is not simply how the other party has labeled their products, but also the well-recognized use in commerce of the trademark itself as a triggering keyword in paid search advertising. *See Rescuecom, Inc. v. Google, Inc.*, 562 F.3d 123, 131-32 (9th Cir. 2009). As Professor Goodstein remarked, "[a]llowing multiple parties to buy rights to use another party's trademarks as keywords in paid search advertising raises the precise kinds of associational concerns that dilution law was designed to address." (RX 734-0030). The conduct at issue in the settlement agreements involves 1-800 Contacts' rivals associating themselves with the 1-800 Contacts mark by appearing in prominent positions on the search engine results page in response to searches for the trademark and variations without clearly identifying that the links are not 1-800 Contacts. (CX9031 (Schmidt, Dep. at 108); CX 9021 (Pratt, Dep. at 86, 151-52); CX9040 (Miller, Dep. at 130)). For these reasons, courts have affirmed the viability of 1-800 Contacts' theory of dilution as applied to the keyword advertising context. *See Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012).

b. The Bidding Agreements Are Not Reasonably Necessary to Achieve Any Cognizable Efficiencies

54. A restraint may be justified by a cognizable and plausible procompetitive efficiency only if the restraint is reasonably necessary to achieve this objective.[13] Broad restrictions on non-confusing uses of a trademark are not necessary to achieve any efficiencies cognizable under trademark law; instead, in trademark cases relief is "tailored to eliminate only the specific harm alleged"[14] and is "no broader than necessary to cure the effects of the harm caused."[15]

Response to Conclusion No. 54:

Complaint Counsel's Proposed Conclusion No. 54 is inaccurate, unsupported by the cited legal authority, and unsupported by the record evidence. First, Respondent incorporates herein its response to Complaint Counsel's Proposed Conclusion No. 17, with respect to the first sentence of this proposed conclusion. Second, the record evidence is clear and undisputed that court-ordered injunctions in trademark disputes commonly include non-use provisions that broadly prohibit use of the trademark at issue, and that non-use provisions are a common means by which parties resolve trademark disputes. *See* Respondent's Post-Trial Br. at 20-27; (RX 734 at 95-119 (Hogan Expert Report)).

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[13] *Realcomp*, No. 9320, 2007 WL 6936319, at *17 (restraint must be a "reasonably necessary means" to achieve a legitimate procompetitive objective); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1416 (7th Cir. 1995), *as amended on denial of reh'g* (Oct. 13, 1995) (territorial division unlawful unless essential to the provision of a lawful service); *Brown University*, 5 F.3d 658, 679 (3d Cir. 1993) (restraint must be "reasonably necessary to achieve the legitimate objectives proffered by the defendant"); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1018-19 (10th Cir. 1998) (same).

[14] *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010) (citing *E. & J. Gallow Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992)).

[15] *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1542 (2d Cir. 1992) (quoting *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325, 1329-30 (2d Cir. 1987)); *Hypertherm, Inc. v. Precision Prods., Inc.*, 832 F.2d 697, 701 (1st Cir. 1987) (holding that courts in the First Circuit will vacate any provision in an injunction that, instead of "affirmatively mandating that [a party] better identify the genealogy of its wares, . . . effectively took [its] products off the market").

Complaint Counsel's reliance on *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010), is misplaced and inapplicable. The Ninth Circuit was specifically discussing the circumstances of "nominative fair use," *id*. at 1176, which the Ninth Circuit itself held is not applicable to the use of a trademark as a keyword to trigger internet search advertisements, *Network Automation v. Advanced Sys. Concepts*, 638 F.3d 1137, 1152 n.5 (9th Cir. 2011) (distinguishing *Tabari*).

The proposed conclusion is also inaccurate and misleading because it fails to reflect the case law stating that an injunction must be clear and must not simply contain a mandate to "obey the law." *See Swift & Co. v. United States*, 196 U.S. 375, 401 (1905) ("The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. . . . The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning, that it was our duty to avoid."); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 984-85 (11th Cir. 1983) (injunction prohibiting use of trade dress "which is confusingly similar" or "likely to cause confusion" is improper); *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 83–84 (3d Cir. 1982) (injunction "unreasonably require[d] the parties to guess at the kinds of conduct that will be deemed infringement" by generally enjoining "any other activity constituting an infringement of plaintiff's trademarks"). "A court order should be phrased in terms of objective actions, not legal conclusions. An injunction which merely forbids the defendant from performing 'acts of unfair competition,' or from 'infringing on plaintiff's trademarks and trade secrets' adds nothing to what the law already requires." 5 McCarthy on Trademarks & Unfair Competition § 30:13 (4th ed. 2017).

55. Claims of confusion based on discrete types of infringing conduct should not result in broad injunctions that proscribe truthful, non-deceptive advertising.[16]

[16] *E.g. PODS Enters., LLC v. U-Haul Int'l, Inc.*, 126 F. Supp. 3d 1263, 1287-93 (M.D. Fla. 2015) (holding that plaintiff's proposed injunction was too broad because it "would prohibit the use of comparative advertising, which

Response to Conclusion No. 55:

Complaint Counsel's Proposed Conclusion No. 55 is inaccurate, misleading, unsupported by the cited legal authority, and unsupported by the record evidence. The record evidence is clear and undisputed that court-ordered injunctions in trademark disputes commonly include non-use provisions that broadly prohibit use of the trademark at issue, and that non-use provisions are a common means by which parties resolve trademark disputes. *See* Respondent's Post-Trial Br. at 20-27; (RX 734 at 95-119 (Hogan Expert Report)).

Complaint Counsel's reliance in *PODS Enterprises, LLC v. U-Haul Int'l*, 126 F. Supp. 3d 1263 (M.D. Fla. 2015), contradicts the proposed conclusion and fully supports Respondent's views. The district court held that it was appropriate to enter a permanent injunction prohibiting U-Haul's use of the them "pod" and "pods" when used as "trade names, business names, descriptors, product names, domain names, **keywords**, metatags, or on websites (whether as part of hidden or visible text), Internet sites (including without limitation social media sites), products, or on any other electronic or printed material for the purpose of advertising, promoting, marketing, or describing any products or services." *Id*. at 1288 (emphasis added). The district court found that it would be appropriate to allow an exception for "comparative advertising, which one of PODS' experts admitted at trial was acceptable and non-confusing." *Id*.

As is evident in the *PODS* decision, the use of a trademark as a keyword is not a form of "comparative advertising." (Goodstein, Tr. 2471; CX 9031 (Schmidt, Dep. at 237, 239-40)). Notably, Complaint Counsel's proposed conclusion does not cite any legal authority suggesting the that the use of a trademark as a keyword to trigger sponsored ads is, in any manner, a form of

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one of PODS' experts admitted at trial was acceptable and non-confusing" and revising the injunction to allow use of a trademark in "comparative advertising in a manner that is not likely to confuse the public as to the source of the goods in question").

"comparative advertising." The Ninth Circuit expressly rejected that notion. *Network Automation v. Advanced Sys. Concepts*, 638 F.3d 1137, 1152 n.5 (9th Cir. 2011) (stating the keyword advertising issue should be considered under the "initial interest confusion analysis" not under the concept of "nominative fair use"). Furthermore, the label "comparative advertising" is itself a legal standard subject to interpretation based on the specific facts. The courts often conclude that advertisements characterized by a defendant as "comparative advertising" are unlawfully confusing or deceptive. *See, e.g., Charles of the Ritz Group Ltd. v. Quality King Distribs.*, 636 F. Supp. 433, 436–37 (S.D.N.Y. 1986) (preliminary injunction granted prohibiting use of "If you like Opium, you'll love Omni" for fragrance); *Bausch & Lomb, Inc. v. Nevitt Sales Corp.*, 810 F. Supp. 466, 477 (W.D.N.Y. 1993) (preliminary injunction prohibiting use of "If you love Ray-Ban, you'll LOVE Rayex" for sunglasses). The FTC's Policy Statement on Comparative Advertising provides a very specific and narrow definition of comparative advertising "as advertising that compares alternative brands on objectively measurable attributes of price, and identifies the alternative brand by name, illustration or other distinctive information." 16 C.F.R. § 14.15 n.1. The use of another company's trademark as a keyword to trigger sponsored ads does not provide an "objectively measurable" comparison between two brands.

56. In particular, Courts considering remedies in trademark infringement matters routinely conclude that clear labeling as to the source of advertisements is an appropriate and sufficient remedy that sufficiently reduces any likelihood of consumer confusion.[17]

[17] *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930 (9th Cir. 2015) (affirming that disclosure of the seller's name in the text of advertisements triggered by search queries including plaintiff's trademark was sufficient to prevent confusion "[b]ecause Amazon's search results page *clearly labels the name and manufacturer of each product* offered for sale") (emphasis added); *1-800 Contacts v. Lens.com*, 722 F.3d 1229, 1245 (10th Cir. 2013) (an inference that a trademark owner is the source of a competitor's webpage "is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for").

Response to Conclusion No. 56:

Complaint Counsel's Proposed Conclusion No. 56 is inaccurate, misleading, and contrary to established legal principles.

First, Complaint Counsel do not cite to any legal authority for the proposition that clear labeling "is an appropriate and sufficient *remedy*." In fact, neither *Multi Time Machine* nor *1-800 Contacts v. Lens.com* speak at all to the proper remedy for trademark infringement. Rather, these are cases where a plaintiff trademark-owner sued a defendant for trademark infringement and did not prevail because the court found that in specific factual circumstances, advertisements that were sufficiently clearly labeled in the surrounding context of the entire search engine webpage might not give rise to a likelihood of confusion. *See Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 938 (9th Cir. 2015) (in the Amazon sales page context, the fact that "Amazon clearly labels each of the products for sale by brand name and model number accompanied by the photograph of the item," in combination with other factors, makes it "unreasonable to suppose that a prudent consumer accustomed to shopping online would be confused about the source of the goods"); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1245 (finding that the click-through rates presented for certain Lens.com advertisements were too low to give rise to a likelihood of confusion). But likelihood of confusion in the context of paid search advertising is "an inherently factual issue that depends on the facts and circumstances in each case." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012). This Court therefore recognized that the authorities cited by Complaint Counsel do not and cannot establish that 1-800 Contacts could not prove a likelihood of confusion from the appearance of different advertisements under different factual circumstances. Feb. 21, 2017 Order Denying Complaint Counsel's Motion to Bar Testimony and Argument, at 4.

The proper form of restraints parties may impose in a settlement agreement is an altogether different question. *See Clorox*, 117 F.3d at 56; 1-800's Post-Trial Reply Br. § IV. B. 5. Here the law favors clear, categorical rules against certain kinds of behavior to avoid future disputes as opposed to the case-specific analyses performed by courts. (CX9050 (Landes, Dep. at 67); Hogan, Tr. 3271). Trademark cases settle with non-use agreements precisely to avoid the legal uncertainty and cost of a protracted and fact-intensive litigation over a multi-factor likelihood of confusion test, and courts accord substantial deference to the terms of these agreements. (Hogan, Tr. 3271-73). This is especially true in the case of paid search advertising, where the search engines, and not the advertisers, have control over many aspects of how "clear" the "labeling" will be in the context of the entire search engine results page. *See Network Automation*, 638 F.3d at 1153-54 ("the labeling and appearance of the advertisements as they appear on the results page includes more than the text of the advertisement, and must be considered as a whole"); *Lens.com, Inc.*, 722 F.3d at 1245 ("clearly labeled *as an advertisement*").

As for the efficient form of remedy to achieve finality in a trademark dispute, the record is unimpeachable. Complaint Counsel offer *no* examples of a settlement agreement where the parties agreed to resolve a dispute involving keyword advertising by agreeing not to make their advertisements "clearly labeled", or even of a case where a judge *ordered relief* along those lines. (Tushnet, Tr. 4484). By contrast, 1-800 Contacts has pointed to over *fifty* publicly available court judgments and settlement agreements that included as a remedy a prohibition on the purchase of trademarked keywords (RX 734-0058-0119). This result makes sense considering the weakness of a remedy that requires parties to adopt an opaque and undefined

standard such as "clear labeling" or avoiding "confusing" advertisements." (Hogan, Tr. 3272, 3305, 3495; RX 734-0119-23).

57. "To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives."[18] Here, less restrictive alternatives are, and at all relevant times have been, available to 1-800 Contacts to safeguard any legitimate interest the company may have or may have had under trademark law, such as:
    - Requiring clear and conspicuous disclosure of the identity of the seller (for example, a requirement that the text of the advertisement or the URL appearing with the advertisement clearly disclose "walgreens.com");
    - Prohibiting rival sellers from using its trademarks (or a confusingly similar variation thereof) in the *text* of their ads, absent appropriate disclosures;
    - Prohibiting rival sellers from identifying themselves with names that might be confusingly similar to 1-800 Contacts;
    - Requiring clear and conspicuous comparative language.

Response to Conclusion No. 57:

Complaint Counsel's Proposed Conclusion No. 57 is inaccurate, incomplete, and misleading. At the outset, the proposed less restrictive alternatives are inadmissible at this stage in the litigation. 1-800 Contacts' Interrogatory No. 1 to Complaint Counsel asked them to "[i]dentify each of the 'less restrictive alternatives' that was 'available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law,' as alleged in Paragraph 32 of the Complaint." (RX 680 at 4). In their response, Complaint Counsel identified only one alternative: "redressing the purportedly confusing text of the challenged advertisement rather than prohibiting the display of search advertising altogether." (RX 680 at 4). Therefore, at least three of the four proposed alternatives in Conclusion of Law No. 57—"[r]equiring clear and conspicuous disclosure of the identity of the seller," "[p]rohibiting rival sellers from identifying themselves with names that might be confusingly similar to 1-800 Contacts," and

[18] Areeda & Hovenkamp ¶ 1505; *Competitor Collaboration Guidelines* § 3.36(b); *see also PolyGram*, 136 F.T.C. at *349 ("The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.").

"[r]equiring clear and conspicuous comparative language" —are inappropriate and should not be adopted by the Court. *See* Fed. R. Civ. P. 26(e)(1) (A party "who has responded to an interrogatory … must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect"); *Dahlberg v. MCT Transp., LLC*, 571 F. App'x 641, 645 (10th Cir. 2014) (when a party "fails to provide information" as required by Rule 26(e), "the party is not allowed to use that information…at a trial").

Regardless, each of Complaint Counsel's proposed less restrictive alternatives are legally flawed since none of them fully "safeguard" 1-800 Contacts' property rights in its trademarks. The test for trademark infringement is whether the use of the mark in commerce would be likely to cause consumer confusion. 15 U.S.C. § 1114; *id*. § 1125(a). Complaint Counsel have not introduced any evidence, or provided any legal authority, to meet their "heavy burden" to show that any of the supposedly less restrictive alternatives would "significantly reduce the likelihood of consumer confusion" as much as the challenged settlement agreements. *Australian Gold, Inc. v. Hatfield,* 436 F.3d 1228, 1243 (10th Cir. 2006). For example, Complaint Counsel have failed to produce a single settlement agreement that took the form of any of their proposed less restrictive alternatives. (Tushnet, Tr. 4844). Moreover, they offer no authorities to suggest that any of these alternatives would cure the possibility of infringement as effectively as the settlement agreements in this case.

Indeed, the case law and record evidence evince why a standard that requires "disclosure" or particular labeling of an advertisement would be legally insufficient to protect 1-800 Contacts' trademark rights. The mere presence of a disclaimer cannot eliminate the risk of consumer confusion. *Weight Watchers Int'l, Inc. v. Luigino's, Inc.,* 423 F.3d 137, 143-44 (2d Cir. 2005).

And no courts have held that an advertiser alone precludes infringement by labeling their advertisement in a particular fashion. Rather, the leading cases relied upon by Complaint Counsel hold that when analyzing confusion, courts must consider the entire context of the search engine results page, and not just the text of the advertisement. *See Network Automation*, 638 F.3d at 1154; *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 938 (9th Cir. 2015) (in the Amazon sales page context, the fact that "Amazon clearly labels each of the products for sale by brand name and model number accompanied by the photograph of the item," in combination with other factors, makes it "unreasonable to suppose that a prudent consumer accustomed to shopping online would be confused about the source of the goods"); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1245.

Complaint Counsel's fourth purported less restrictive alternative, "[r]equiring clear and conspicuous comparative language," is moot: the agreements explicitly permit the parties to use trademarks for comparative advertising, parodies, and other non-infringing uses. (CX 311 § 4(B); CX 9020 (Craven, Dep. at 18-19); Coon, Tr. 2743). Complaint Counsel provide no further guidance or authority as to what form an acceptable agreement would take incorporating this less restrictive alternative beyond the agreements as they stand.

That leaves Complaint Counsel's proposed rule that an advertisement can only be infringing if it uses the trademark in the *text* of the advertisement. But as no courts have recognized such a rule, it remains academic and does not sufficiently protect 1-800 Contacts' trademark rights under what the law actually is. *Fair Isaac Corp.*, 645 F. Supp. 2d at 760-61 ("[w]hether Defendants' sponsored advertisements actually include [the plaintiff's trademarks in the text ***is not determinative*** of whether there has been any infringement"); *see also LBF Travel, Inc. v. Fareportal, Inc.*, No. 13 CIV. 9143 LAK GWG, 2014 WL 5671853, at *9 (S.D.N.Y. Nov.

5, 2014); *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288 ("While these advertisements may not have displayed the mark itself, the surrounding context supplies a sufficient basis to support allegations of consumer confusion at this early stage of the litigation.") In sum, none of Complaint Counsel's purported less restrictive alternatives would properly safeguard 1-800 Contacts' trademark rights.

58. The Bidding Agreements do not protect 1-800 Contacts' trademark rights or otherwise reduce consumer confusion in a manner "significantly better" than these less restrictive alternatives.[19]

Response to Conclusion No. 58:

Complaint Counsel's Conclusion of Law No. 58 is inaccurate, misleading, and contrary to both the legal authority and factual record in this case. First, three of Complaint Counsel's purported "less restrictive alternatives" are inadmissible because Complaint Counsel failed to disclose or supplement them in response to 1-800 Contacts' Interrogatory No. 1. (RX 680 at 4); Fed. R. Civ. P. 26(e)(1). Moreover, for the reasons discussed at length in response to conclusion no. 58, none of the less restrictive alternatives could properly eliminate the likelihood of consumer confusion from the unauthorized use of 1-800 Contacts' trademark terms in paid search advertising. Therefore, none of them address the scope of possible advertising that could infringe 1-800 Contacts trademark rights as well as, not to mention "significantly better" than, the challenged settlement agreements.

Even if Complaint Counsel met their burden to prove the existence of less restrictive alternatives, *Polygram,* 136 F.T.C. at 476, 1-800 Contacts provided unrebutted evidence that the settlement agreements were the standard and reasonable way to achieve the goals that

[19] Areeda & Hovenkamp ¶ 1505.

practitioners seek to accomplish in a trademark settlement agreement by clearly defining the scope of the prohibited conduct. (Hogan, Tr. 3276).

CONCLUSION

59. The acts or practices of Respondent were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. These acts or practices may recur in the absence of the Proposed Order entered in this proceeding.

Response to Conclusion No. 59:

The proposed summary conclusion should be disregarded because it violates the Court's Order on Post-Trial Briefs requiring that "[a]ll conclusions of law, including, but not limited to, liability and the proposed remedy, shall be supported by applicable legal authority." Moreover, Complaint Counsel's other proposed conclusions of law do not support this proposed conclusion for the reasons set out in Respondent's replies to those other proposed conclusions.

60. Entry of the Proposed Order is necessary and appropriate to remedy and prevent the violations of law found to exist. *FTC* v. *Nat'l Lead Co.*, 352 U.S. 419 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegal & Co.* v. *FTC*, 327 U.S. 608 (1946); *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (2003).

Response to Conclusion No. 60:

Complaint Counsel's Proposed Conclusion No. 60 is wrong, unsupported by any cited legal authority, and unsupported by the record evidence. For the reasons set forth in Respondent's Post-Trial Brief, Complaint Counsel have not shown any violations of law that require a remedy. For the reasons explained in Respondent's Post-Trial Reply Brief, Complaint Counsel's Proposed Order is contrary to law.

DATED: July 20, 2017

Respectfully submitted,

/s/ Steven M. Perry

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PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I served via electronic mail a copy of the foregoing document on:

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DATED: July 20, 2017

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CERTIFICATE FOR ELECTRONIC FILING

I hereby 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.

DATED: July 20, 2017

By: */s/ Steven M. Perry*
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35248226.2

Notice of Electronic Service

I hereby certify that on July 20, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Corrected Replies to Complaint Counsel's Corrected Proposed Findings of Fact and Conclusions of Law, with:

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I hereby certify that on July 20, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Corrected Replies to Complaint Counsel's Corrected Proposed Findings of Fact and Conclusions of Law, upon:

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