

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

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

Docket No. 9372

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

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

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

A proposed order is attached.

Dated: March 29, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

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**UNITED STATES OF AMERICA  
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**In the Matter of  
1-800 CONTACTS, INC.,  
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**Docket No. 9372**

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

Dr. Neil Wieloch is an employee of 1-800 Contacts (“1-800”) whom Respondent has included on its trial witness list.

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

Respondent then examined Dr. Wieloch as a Rule 3.33(c)(1) witness. Respondent

## ARGUMENT

### DR. WIELOCH SHOULD NOT BE PERMITTED TO TESTIFY AT TRIAL.

#### Summary

Complaint Counsel recognizes that the Court disfavors *in limine* motions. This motion, however, does not raise the type of problems that the Court discounts in a bench trial. Instead, Respondent wants the Court to hear a witness who escaped

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

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

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

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

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

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

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

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

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



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

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

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<sup>3</sup> As a matter of convenience, after being informed that Dr. Wieloch would supplement Mr. Osmond’s testimony on topic 9, we serb.02 Tw 13.86 h73.5/0.48 -0013 TwfatheD /1.73.58 Tm(r5lombJTJ1ed0.0

**CONCLUSION**

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

Dated: March 29, 2017

Respectfully submitted,

/s/ Daniel J. Matheson\_\_\_\_\_

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Counsel Supporting the Complaint

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

**STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL**

Pursuant to paragraph 4 of the Additional Provisions of the Scheduling Order, Complaint Counsel states that, as set forth in the motion, we have conferred with opposing counsel in an

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**[PROPOSED] ORDER**

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

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

ORDERED:

Dated: \_\_\_\_\_

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

# **EXHIBIT A**

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

**In the Matter of**

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

**Docket No. 9372**

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

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

**DEPOSITION TOPICS**

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

1. The obligations imposed on each party to a Settlement Agreement, and the meaning of each provision of each Settlement Agreement, including 1-800 Contacts’s interpretation of each word used in each Settlement Agreement.

2.

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

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

### **DEFINITIONS**

1. The terms “1-800 Contacts,” “1-800,” “Company” or “Respondent” mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The terms “and” and “or” have both conjunctive and disjunctive meanings.
3. The term “Campaign” has the same meaning set forth by Google in connection with its AdWords product: “[a] set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and other settings.” § <https://support.google.com/adwords/answer/6304?hl=en>.
4. The term “Competitor” means any Person other than 1-800 Contacts engaged in the business of selling contact lenses to consumers.
5. The terms “each,” “any,” and “all” mean “each and every.”
6. The term “Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[w]ords or phrases describing [an advertiser’s] product that [the advertiser] choose[s] to help determine when and where [the advertiser’s] ad can appear” in response to an internet search by an end user. § <https://support.google.com/adwords/answer/6323?hl=en>.
7. The term “Negative Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[a] type of keyword that prevents [and advertiser’s] ad from being triggered by certain words or phrases.” § <https://support.google.com/adwords/answer/105671?hl=en>. The term Exact-Matched Negative Keywords has the same meanings set forth by Google in connection with its AdWords product. See, e.g., <https://support.google.com/adwords/answer/2453972>.
8. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
- 9.



10. The term “Price Match Policy” means any 1-800 Contacts Plan, policy, or strategy involving offering customers the opportunity to pay a discounted price determined by the price that a Competitor offers for the same product. This term includes each version of each such Policy implemented at any time from January 1, 2004 to the present.
11. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, deal

practices.”), ~~Florida~~, Tampa Bay Times (March 24, 2015) (“Influential Tallahassee lobbyist Marc Reichelderfer, a GOP

**CERTIFICATE OF SERVICE**

I certify that on December 28, 2016, I delivered via electronic mail a copy of the foregoing document to:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
Stuart N. Senator  
Gregory M. Sergi  
Munger, Tolles & Olson LLP  
355 South Grand Avenue  
35<sup>th</sup>

# EXHIBIT B

In the Matter of:  
1-800 Contacts, Inc.

January 18, 2017  
Neil Francis Weiloch

Condensed Transcript with Word Index



**For The Record, Inc.**  
**(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555**



5

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

---

6

- 1 A. 2014.
- 2 Q. Okay.
- 3 A. It was September.
- 4



1 sense?  
2

17

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

18

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

Weiloch

1                    EXAMINATION  
2    BY MR. GATES:  
3

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1 THE WITNESS: Specifically, yes. In the  
 2 biannual market pulse we asked, have people heard of  
 3 UPP. And in our, as I've referenced earlier, our  
 4 post-transactional survey, we actually divide the  
 5 data among our customers for customers who have  
 6 purchased products, their last purchase was a UPP  
 7 product, compared to those whose purchase was not.  
 8 So let me just rephrase that part. For  
 9 the customer survey, the customer experience survey  
 10 that was -- we looked at pricing perceptions and  
 11 split our customers into two groups. One group are  
 12 the customers whose last purchase was a UPP product,  
 13 and the other group was customers whose last purchase  
 14 was not a UPP product.  
 15 Q. (By Mr. Gates) And what were you trying  
 16 to measure?  
 17 A. If there were any change -- first of all,  
 18 any difference in their perception of the price they  
 19 paid. Did they feel like it was higher, lower, the  
 20 same as what they expect? And then tracking this  
 21 over time with this -- does this perception changed  
 22 over time.  
 23 Q. In the three surveys that you mentioned,  
 24 what other things are you trying to measure in those  
 25 surveys?

30

1 A. Just surveys in general?  
 2 Q. The three that you mentioned that go out  
 3 on a periodic basis.  
 4 A. So the brand tracker mentions market brand  
 5 perceptions, so awareness and perceptions of our  
 6 brand relative to other competitor brands. The  
 7 post-transactional customer -- we call it the  
 8 customer experience survey primarily is generally  
 9 satisfaction with their experience with us and  
 10 elements of the experience, as well as the  
 11 perceptions of price is one of those.  
 12 And the biannual market pulse survey is --  
 13 it's perceptions of brands and competitor brand  
 14 behavior in terms of purchase, behavior around eye  
 15 exam behavior, relationship with an eye doctor. And  
 16 we usually throw in sort of some ad hoc questions at  
 17 the time that's kind of related to what we're  
 18 interested in knowing about contact lens wearers in  
 19 general.  
 20 Q. And who designs these surveys?  
 21 A. I do.  
 22 Q. And who implements them?  
 23 A. For our customers, we administer them  
 24 through Qualtrics. So Qualtrics is a survey software  
 25 tool that they actually -- that we utilize. If there

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1 are -- for the post-transactional survey, the  
 2 customer experience survey -- it has two names -- we  
 3 administer them directly through Qualtrics for the  
 4 market pulse among our customers. We have Qualtrics  
 5 actually distribute the surveys, because they  
 6 actually distribute any incentive.  
 7 For non-customers, which is the brand  
 8 tracker and the non-customers among the market pulse,  
 9 we have a company -- we either use Qualtrics or we go  
 10 directly to SSI, Survey Sampling International. They  
 11 use their panel participants. So we use a third  
 12 party for data administration -- or data collection,  
 13 survey administration, and disbursement of findings.  
 14 Q. One of the things you mentioned that  
 15 you're trying to measure is customer satisfaction.  
 16 Did you try to measure customers -- how that was  
 17 impacted vis-à-vis the UPP policies?  
 18 A. Yes.  
 19 Q. In your surveys are you trying -- do you  
 20 have anything to try to figure out where your  
 21 customers are coming from, like if they're switching









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# EXHIBIT C

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

In the Matter of

1-800 Contacts, Inc.,  
a corporation

Docket No. 9372

RESPONDENT 1-800 CONTACTS' FINAL

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

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

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

I. RESPONDENT'S CURRENT EMPLOYEES

1. Brian Bethers. Mr. Bethers is Respondent's Chief Executive Officer and Chairman. Prior to becoming CEO, Mr. Bethers served as Respondent's Chief Financial Officer from 2003 to 2004, and President from 2002 to 2014. Respondent anticipates that Mr. Bethers will testify regarding (1) Respondent's history, operations, sales, service, marketing and advertising, including paid search advertising; (2) Respondent's business model, pricing and general strategies; (3) the market for contact lenses, including Respondent's competitors and actual or potential customers; (4) Respondent's trademarks and brand, their value, and Respondent's substantial investments therein; (5) Respondent's monitoring, protection and enforcement of its trademarks, including cease and desist letters sent to offending parties, trademark litigation, trademark settlements, agreements and communications and correspondence with search engines, contact lens retailers and others relating to the unauthorized use of its trademarks; and (6) any other topics that were addressed in his prior investigational Hearing testimony, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

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







all aspects of its operations. Respondent anti

5. Amy Larson. Ms. Larson was Respondent Vice President of E-Commerce

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

III. CERTAIN OF RESPONDENT'S OUTSIDE COUNSEL

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

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

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

#### IV. OTHER THIRD-PARTY WITNESSES

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

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

2. Sandhya Mohan. Ms. Mohan is Senior Product Manager for Walmart, where she has responsibility for supervising Walmart's paid search advertising campaigns. Respondent anticipates that Ms. Mohan will testify regarding (1) Walmart's ecommerce marketing; (2) Walmart's marketing of contact lenses, including through paid search advertising; (3) the effects of ad position; (4) differences between paid and organic links; (5) Walmart's budgeting for paid search advertising, including for its contact lens business; (6) Walmart's agreements with other companies to bid on certain keywords; (7) Walmart's relationship with AC Lens; and (8) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

3. Cary Samourkachian. Mr. Samourkachian is the President and Chief Executive Officer of Lens.com, an online retailer of contact lenses. Respondent anticipates that Mr. Samourkachian will testify regarding: (1) the market for contact lenses, including competitors and actual or potential customers; (2) marketing or advertising of contact lenses, including paid search advertising; (3) the unauthorized use of competitor trademarks in advertising, including the appropriateness and effectiveness of such uses in paid search advertising; (4) communications with Respondent or others about the unauthorized use of trademarks in advertising, including any cease and desist correspondence or trademark litigation; (5) the reasons behind any decision about whether to engage in the unauthorized use of a competitor's trademark in paid search advertising; and (6) any other topic relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

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

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



V. RESPONDENTS' EXPERT WITNESSES

1. Howard Hogan.

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

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

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

4. Dr. Kent Van Liere. Dr. Van Liere is a well-known expert in administering

confusion. He has personally designed and analyzed hundreds of surveys and questionnaires pertaining to consumers' opinions and behaviors relating to marketing and branding. Dr.

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

DATED: March 14, 2017

Respectfully submitted,

/s/ Steven Perry

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic mail delivery, to each

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



# EXHIBIT D

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

In the Matter of

1-800 CONTACTS, INC.,  
a corporation

Docket No. 9372

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

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

1. All Documents Relating to correspondence between 1-800 Contacts and any other Person related to Negative Keyword 1-800F\_00033564 (referring to a "recommended list" of negative keywords provided in 2011 to Cibana and Vistakon).
2. For each Negative Keyword 1-800 Contacts implemented during the Relevant Period, Documents Sufficient to Show the date on which 1-800 Contacts instructed a Search Engine to implement such a Negative Keyword.
3. For each Negative Keyword 1-800 Contacts implemented during the Relevant Period, Documents Sufficient to Show any date which 1-800 Contacts instructed a Search Engine to cease implementing such a Negative Keyword.
4. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any filing made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party. This request includes documents submitted by 1-800 Contacts, as well as documents submitted by any other person who made a filing relating to a transaction to which 1-800 Contacts was a party.
5. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any Request for Additional Information made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party.

6. All Documents Relating to any Unilateral Pricing Policy adopted by a manufacturer of contact lenses such as the Unilateral Pricing Policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014, including but not limited to: (a) Documents discussing the impact of a Unilateral Pricing Policy on 1-800 Contacts; and (b) Documents discussing the impact of a Unilateral Pricing Policy on any Competitor, Affiliate, or group of Competitors or Affiliates of 1-800 Contacts.
7. All documents related to correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding: trademarks, litigation, advertising (including but not limited to search advertising), or a contractual relationship between 1-800 Contacts and any other seller of contact lenses (including but not limited to actual, potential, or claimed breaches of existing contracts).
8. All Documents Relating to contact lens purchases by customers or former customers of 1-800 Contacts from any retailer selling contact lenses other than 1-800 Contacts, including documents analyzing switching by 1-800 Contacts' customers and former customers and/or switching by customers of other contact lens retailers.
9. All data used, presented, or summarized by Bain and Company in connection with due diligence or competitive analysis of Vision Direct on behalf of 1-800 Contacts, including but not limited to responses to surveys of contact lens consumers such as the data summarized in the draft presentation "Vision Direct Competitive Positioning," dated May 2015, Bates number 1-800F\_00056323.
10. All analyses comparing 1-800 Contacts' prices to the prices of a Competitor.
11. All documents analyzing the effect of increased price visibility on 1-800 Contacts' sales, pricing, or profitability. This request includes, but is not limited to, all documents created in response to Tim Roush's request for analysis in 1-800F\_00055885. The term "price visibility" has the same meaning as in 1-800F\_00055885.
12. All documents, except for documents which have already been produced to the Federal Trade Commission, responsive to Specifications 1, 4, 5, 6, 11, 12, 13, and 15 of the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015, in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200, found in the following locations:
- a. the files of former 1-800 Contacts employee Josh Aston, including but not limited to shared file locations Mr. Aston accessed in the ordinary course of business; and
  - b. backup tapes which were restored in connection with the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015 or in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200.
13. All documents relating to the existence, terms, scope, or implementation of any Price Match Policy including but not limited to:

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

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

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

- a. Date of sale;
- b. UPC or SKU number;
- c.
- d.
- d. d. oTd flindiscount;tive costs.

- i. Cost USD;
- j.

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

### DEFINITIONS

1. The terms “1-800 Contacts,” “1-800,” “Company” or “Respondent” mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The term “Ad Group” has the same meaning set forth by Google in connection with its AdWords product: a collection of advertisements that “contains one or more ads which target a shared set of keywords.” <https://support.google.com/adwords/answer/6298>.
3. The term “Ad Rank” has the same meaning set forth by Google in connection with its AdWords product: “A value that’s used to determine [an advertiser’s] ad position (where ads are shown on a page) and whether [an advertiser’s] ads will show at all.” <https://support.google.com/adwords/answer/1752122?hl=en>
4. The term “Affiliate” means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.
5. The terms “and” and “or” have both conjunctive and disjunctive meanings.
6. The term “Campaign” has the same meaning set forth by Google in connection with its AdWords product: “[a] set of ad groups (a keywords, and bids) that share a budget, location targeting, and other settings.” <https://support.google.com/adwords/answer/6304?hl=en>
7. The term “Click” has the same meaning set

computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If Respondent believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel's need for Documents and information, you are c0.00 wint



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

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

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

## INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2002, to the present.
2. Respondent need not produce responsive documents that Respondent has previously produced to the Commission in relation to the prior investigation, FTC No. 141-0200.

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

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

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

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

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

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

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

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

Custodian                      The name of the custodian of the file.

iii.

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

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



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

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

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

Dated: September 8, 2016

Respectfully Submitted:           /s/ Dan Matheson

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

*ph*                      *ph*   *h*   *g*   *h*   *ph*



# EXHIBIT E



Letter to Garth Vincent and Greg Sergi  
October 26, 2016  
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Other Requests:

RFP 1: You stated that 1-800 will ~~co~~duct a search among the custodial files identified above for relevant search terms (~~in~~cluding, at the least, the terms “NKW,” “negative keyword,” and “negative keywords”) and produce responsive ~~docu~~ments resulting from those searches.

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

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

CC Response: We agree this is a reasonable approach.

RFP 6:

Letter to Garth Vincent and Greg Sergi  
 October 26, 2016  
 Page 4

- x Domain Names: You also proposed that Plaintiff Counsel provide a list of domain names for this search. We believe that 800 should undertake the responsibility to identify the relevant domain names used at any point during the relevant time period, but we believe that the list should cover at the least all known or reasonably ascertainable domain names used by the following companies (including their relevant predecessors, parents, or subsidiaries with which 800 may have corresponded, and including domain names associated with any relevant "doing business as" names for any such entities) from 2004 through the present:

- x 2weekdisposables
- x America's Best
- x Arlington Contact Lens Service, d/b/a AC Lens or Discount Contact Lenses
- x BJ's
- x Coastal Contacts
- x Contact Lens King
- x Contacts Direct
- x Costco
- x Empire Vision, d/b/a ECCA
- x EZ Contacts USA, d/b/a Provision Supply
- x Luxottica, d/b/a LensCrafters, Pearleson, Sears Optical, or Target Optical
- x Lens.com
- x LensDirect
- x Lens Discounters
- x Lenspure
- x Price Smart Contacts
- x Memorial Eye, d/b/a ShipMyContacts.com
- x Oakwood Eye Clinic, d/b/a Lenses for Less
- x Sam's Club
- x Save On Lens
- x Standard Optical
- x Tram Data, d/b/a Replace My Contacts or Lensfast
- x Vision Direct, d/b/a Lensworld
- x Walgreens
- x Walmart
- x Web Eye Care

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





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

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

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

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

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

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

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

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

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

RFP 16: You mentioned that your transactional data responsive to RFP 16 contains personally

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We also refer you to the discussion in ~~Ma~~ Matheson's October 18, 2016 letter of Request

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Sincerely,

/s/ Kathleen Clair  
Kathleen Clair  
Attorney

cc: Geoffrey Green  
Barbara Blank  
Dan Matheson

# EXHIBIT F

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

Dan,

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

Greg

Sent from my BlackBerry 10 smartphone.

---

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

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

Greg

# EXHIBIT G



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

In the Matter of

1-800 Contacts, Inc.,  
a corporation

DOCKET NO. 9372

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

PLEASE TAKE NOTICE, that pursuant to ~~16~~ 15 C.F.R. 33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the depositions of the individuals listed below. The depositions will be conducted before a person ~~authorized~~ authorized to administer oaths and will be recorded by stenographic means.

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

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

Dated: January 11, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson

Kathleen M. Clair

Barbara Blank

Thomas H. Brock

Gustav P. Chiarello

Joshua B. Gray

Nathaniel M. Hopkin

Mika Ikeda

Charlotte S. Slaiman

Charles Loughlin

Geoffrey M. Green

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, I f