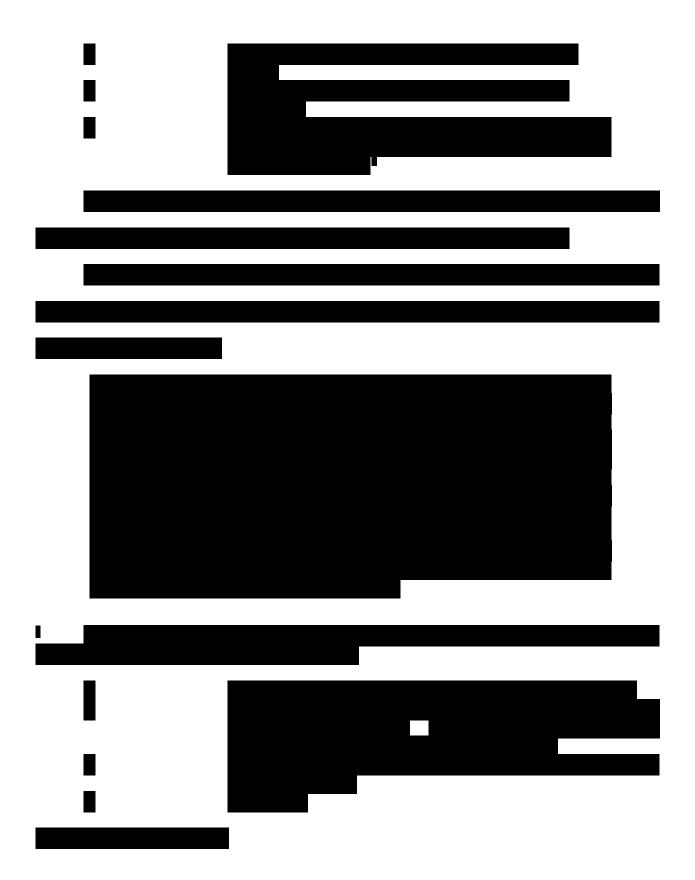
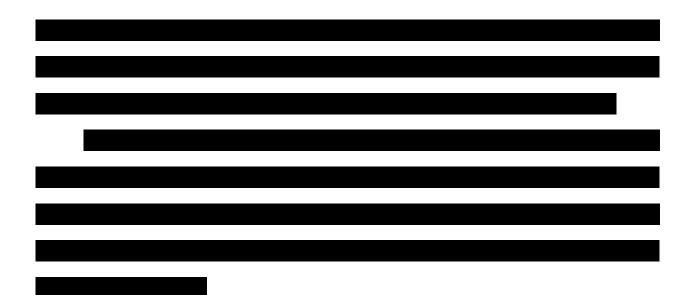
### UNITED STATES OF AMERICA

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#### B. Mr. Hamilton's and Dr. Evans' Hearing Testimony

During Mr. Hamilton's trial testimony on April 12, 2017, Respondent objected to testimony related to Mr. Hamilton's use of Google's Keyword Planner on two grounds: (1) a violation of the best evidence rule, *see, e.g., New Show Studies LLC v. Needle*, No. 2:14-cv-01250, 2014 WL 12495640, at \*13 (C.D. Cal. Dec. 29, 2014); and (2) Complaint Counsel's failure to disclose information it received from either Mr. Hamilton or his counsel related to Mr. Hamilton's use of the Google Keyword Planner.

In response, Complaint Counsel explained for the first time that this information was orally provided to Complaint Counsel by Mr. Hamilton's attorneys but was not shared with Respondent. The Court then questioned Complaint Counsel about this oral transmission of information:

JUDGE CHAPPELL: You think there's an exception that information merely provided orally doesn't get passed on in a supplement if it's something you're going to try to bring out in trial.

MR. LOUGHLIN: Your Honor, everything I'm bringing out in trial was placed in a declaration that they have. There's nothing – there's nothing that I'm bringing out.

Trial Tr. 4/12/17 at 423:19-424:1.

Complaint Counsel represented that it would "only" ask Mr. Hamilton "questions that are in [his] declaration. I haven't asked him anything that was not in the declaration." *Id.* at 424:24-425:1. Complaint Counsel further represented that "all the testimony" Mr. Hamilton would "be giving" was "in general terms that [Mr. Hamilton] put this in [a] Keyword Planner and [he] got results." *Id* 

to Complaint Counsel, and then by Complaint Counsel to Dr. Evans or his assistants." If Complaint C

As this Court rightly recognized, Complaint Counsel cannot assert work-product privilege to "prevent providing information to respondent while trying to utilize testimony on this subject." Rough Trial Tr. 4/21/17 at 117:5-7; *see In re McWane, Inc.*, Dkt. No. 9351, 2012 FTC LEXIS 126, at \*7-8 (July 13, 2012) (quoting *In re Motor Up Corp., Inc.*, Dkt. No. 9291, 1999 FTC LEXIS 262, at \*5 (Aug. 5, 1999)) (discussing the "sword and shield" doctrine). This commonsense ruling should not be reconsidered. Respondent would be unfairly prejudiced if it is denied access to the inputs and outputs of an exercise performed by a third party (who could not recall what he did) and yet Complaint Counsel's expert is allowed to testify about what he was told were the results of that exercise—an exercise that he, too, cannot describe in terms of its inputs, methodology, or other outputs.

DATED: April 25, 2017	Respectfully submitted,
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### /s/ Steven M. Perry

Gregory P. Stone (gregory.stone@mto.com)
Steven M. Perry (steven.perry@mto.com)
Garth T. Vincent (garth.vincent@mto.com)
Stuart N. Senator (stuart.senator@mto.com)
Gregory M. Sergi (gregory.sergi@mto.com)
Zachary Briers (zachary5uN.2 Tw /MCID 11 >>BDC

# **EXHIBIT** A

## EXHIBIT B

### **CERTIFICATE OF SERVICE**

#### Notice of Electronic Service

I hereby certify that on April 27, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Reply in Support of Its Trial Brief Regarding Anticipated Objections to the Testimony of Dr. David S. Evans, with:

D. Michael Chappell Chief Administrative Law Judge 600 Pennsylvania Ave., NW Suite 110 Washington, DC, 20580

Donald Clark 600 Pennsylvania Ave., NW Suite 172 Washington, DC, 20580

I hereby certify that on April 27, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Reply in Support of Its Trial Brief Regarding Anticipated Objections to the Testimony of Dr. David S. Evans, upon:

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Federal Trade Commission nhopkin@ftc.gov Complaint

Charles A. Loughlin Attorney Federal Trade Commission cloughlin@ftc.gov Complaint

Daniel Matheson Attorney Federal Trade Commission dmatheson@ftc.gov Complaint

Charlotte Slaiman Attorney Federal Trade Commission cslaiman@ftc.gov Complaint

Mark Taylor Attorney Federal Trade Commission mtaylor@ftc.gov Complaint

Gregory P. Stone Attorney Munger, Tolles & Olson LLP gregory.stone@mto.com Respondent

Steven M. Perry Attorney Munger, Tolles & Olson LLP steven.perry@mto.com Respondent

Garth T. Vincent Munger, Tolles & Olson LLP garth.vincent@mto.com Respondent

Stuart N. Senator Munger, Tolles & Olson LLP stuart.senator@mto.com Respondent

Gregory M. Sergi Munger, Tolles & Olson LLP gregory.sergi@mto.com Respondent

Justin P. Raphael Munger, Tolles & Olson LLP Justin.Raphael@mto.com Respondent Sean Gates Charis Lex P.C. sgates@charislex.com Respondent

Mika Ikeda Attorney Federal Trade Commission mikeda@ftc.gov Complaint

Zachary Briers Munger, Tolles & Olson LLP zachary.briers@mto.com Respondent

Chad Golder Munger, Tolles, and Olson chad.golder@mto.com Respondent

Julian Beach Munger, Tolles & Olson LLP julian.beach@mto.com Respondent

Aaron Ross Attorney Federal Trade Commission aross@ftc.gov Complaint

Thomas Dillickrath Attorney Federal Trade Commission tdillickrath@ftc.gov Complaint

Jessica S. Drake Attorney Federal Trade Commission jdrake@ftc.gov Complaint

W. Stuart Hirschfeld Attorney Federal Trade Commission shirschfeld@ftc.gov Complaint

David E. Owyang Attorney Federal Trade Commission dowyang@ftc.gov Complaint

Henry Su Attorney Federal Trade Commission hsu@ftc.gov Complaint

 $\frac{Steven\ Perry}{Attorney}$