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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,

/s/ Steven M. Perry

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# 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  
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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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