

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

ORIGINAL

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE TESTIMONY  
FROM RESPONDENT'S OUTSIDE COUNSEL, BASED ON PREVIOUS  
INVOCATIONS OF ATTORNEY-CLIENT PRIVILEGE**

By this motion, Complaint Counsel respectfully moves the Court for an order precluding Respondent 1-800 Contacts from calling Messrs. Bryan Pratt, Esq. and Mark Miller, Esq. as fact witnesses at trial. The grounds for this motion, as more fully set forth in the attached memorandum, is that Respondent is using attorney-client privilege as both a sword and shield by putting two of its lawyers on the witness stand.

Attached is a statement declaring that, pursuant to paragraph 4 of the Additional Provisions of the Scheduling Order, Complaint Counsel states that we have conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.

A proposed order is attached.

Dated: March 29, 2017

Respectfully submitted,

*/s/ Daniel J. Matheson*

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**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**

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION *IN LIMINE*  
TO PRECLUDE TESTIMONY FROM RESPONDENT'S OUTSIDE COUNSEL, BASED  
ON PREVIOUS INVOCATIONS OF ATTORNEY-CLIENT PRIVILEGE**

Respondent seeks to flout clear precedent forbidding a litigant in this Court from using attorney-client privilege as both a sword and shield by putting two of its lawyers on the witness stand. Specifically, Respondent seeks to use its attorney-witnesses as a sword to support its defense regarding the merits of the litigations that led to the Challenged Agreements, while hiding behind the shield of privilege to prevent discovery as to the very same issues. This Court should preclude testimony by Respondent's outside counsel Mark Miller and Bryan Pratt, who have previously refused to answer questions regarding the merits of the relevant litigations on the basis of attorney-client privilege.

**I. BACKGROUND**

Respondent's final witness list indicates that Mark Miller and Bryan Pratt, both of whom have served as outside counsel for Respondent, may be called to testify as to "(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 contact lens 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." *See* Respondent 1-800 Contacts Final Proposed Witness List.

Complaint Counsel deposed both Mr. Pratt (Dec. 15, 2016 and Jan. 5, 2017) (*see* Exhibits A and A-1) and Mr. Miller (Feb. 8, 2017) (*see* Exhibit B) during the fact discovery period. In each deposition, Respondent repeatedly instructed these attorney-witnesses not to answer on the grounds of attorney-client privilege. This included questions concerning the witnesses' work in monitoring, protecting, and enforcing the trademarks underlying the agreements that are the crux of this litigation.

The {instructions not to answer} specifically concerned the topics for which the attorney-witnesses are designated to provide trial testimony. Thus, although Mr. Pratt and Mr. Miller are designated to testify regarding 1-800 Contacts' "trademarks and brand," when Complaint Counsel asked how 1-800 Contacts and others valued the trademark, 1-800 Contacts' counsel instructed Mr. Pratt not to answer. Pratt Dep. Tr. 48:17-23; 51:13-52:10.

Similarly, Mr. Pratt and Mr. Miller are designated to testify regarding 1-800 Contacts' "monitoring, protection and enforcement of its trademarks." But Complaint Counsel issued an interrogatory asking 1-800 Contacts to identify allegedly infringing advertisements and the factual basis for its contention that the litigations constituted "bona fide trademark litigation." 1-800 Contacts refused to answer, stating that "[T]he process and thought processes used by 1-800 Contacts and its attorneys to determine that any particular advertisement infringed 1-800 Contacts' trademark rights and the factual basis for 1-800 Contacts' conclusion or determination that the advertisement infringed 1-800 Contacts' trademark rights are protected from discovery

by the attorney-client privilege and/or the work product protection or work product doctrine and, on that basis, will not be disclosed in response to this Interrogatory.”<sup>1</sup>

In addition, consider the following examples regarding the underlying factual predicates and merits of 1-800 Contacts’ monitoring, protection and enforcement of its trademarks, including cease-and-desist letters sent to alleged infringers, communications and correspondence with alleged infringers and their counsel, trademark litigation, and trademark settlement agreements:

1. Complaint Counsel asked the deponent to identify the information reviewed prior to bringing infringement allegations. 1-800 Contacts’ counsel instructed Mr. Pratt not to answer. Pratt Dep. Tr. 69:11-70:19; 99:16-100:14.<sup>2</sup>
2. Complaint Counsel asked about the infringement analysis undertaken prior to suing competitors. 1-800 Contacts’ counsel instructed Mr. Miller not to reveal work product. Miller Dep. Tr. 128:14-129:13.
3. Complaint Counsel asked the deponent about the factual predicate of allegations identifying instances of trademark use and/or how a list of allegedly infringing keywords was assembled, 1-800 Contacts’ counsel instructed Mr. Pratt and Mr. Miller not to answer. Pratt Dep. 189:8-190:1; 190:20-194:7; Miller Dep. Tr. 90:13-91:11.
4. Complaint Counsel asked whether the deponent could identify any evidence of consumer confusion that might have formed the basis of a complaint. 1-800 Contacts’ counsel instructed Mr. Pratt and Mr. Miller not to answer. Pratt Dep. Tr. 197:3-11; Miller Dep. Tr. 154:13-155:11.
5. Complaint Counsel asked the deponent to explain why he chose *not* to pursue an action in some cases where ads appeared. 1-800 Counsel instructed Mr. Pratt not to answer. Pratt Dep. 212:12 - 213:14.
6. Complaint Counsel asked the deponent why 1-800 Contacts’ employees suggested selectively suing “more viable” competitors for infringement. 1-800 Contacts’ counsel instructed Mr. Pratt not to answer. Pratt Dep. Tr. 227:7-18.

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<sup>1</sup> See Amended Responses of 1-800 Contacts, Inc. to Complaint Counsel’s First Set of Interrogatories, at Interrogatories Nos. 8, 9, 10 and 13. (Exhibit C).

<sup>2</sup> Likewise, when Complaint Counsel asked if the lawyer ever concluded there was trademark infringement solely on the basis of the appearance of an ad on a search engine results page, 1-800 Contacts’ counsel instructed Mr. Pratt not to answer. Pratt Dep. Tr. 111:14-112:1.

Having asserted privilege during discovery, Respondent cannot now ask this Court to permit the attorney-witnesses to testify generally and thereby deny Complaint Counsel the opportunity to conduct a full cross-examination of them. But the issue is even more fundamental than that: even if there is non-privileged testimony that these witnesses could provide, that evidence is completely irrelevant in the first instance. To the extent Respondent intends to have the attorney-witnesses testify about the existence or threat of lawsuits against its rivals, or the existence of the agreements at issue in this litigation, there is no factual issue for them to testify about: these facts are not in dispute. Moreover, if Respondent intends to have the attorney-witnesses testify about the purported *bona fide* nature of the lawsuits, the Commission has already ruled that this topic is not at issue. Thus, these witnesses cannot provide any relevant, non-privileged testimony.

## **II. ARGUMENT**

### **A. Orders *In Limine* are Granted to ensure even-handed management of a trial and to promote a fair assessment of the facts.**

The Administrative Law Judge is the gatekeeper who exercises control over the proceedings and evidence to ensure the “ascertainment of truth” and “avoid needless consumption of time.” 16 C.F.R. §3.43(d). One way for the Court to do so is via Rule 3.43(b) which provides that evidence, even when it is relevant, “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, ... or needless presentation of cumulative evidence.” 16 C.F.R. §3.43(b)(1).

### **B. 1-800 Contacts Cannot Use Privilege as Both a Sword and a Shield When Advancing Claims and Evidence**

To the extent that Messrs. Miller and Pratt have any relevant testimony to offer at all, Respondent has abjured its right to tender such evidence at trial in light of its repeated

invocations of privilege at deposition. To be clear, Complaint Counsel does not, in this motion, challenge the substance of Respondent’s privilege claims—it is possible that some, none, or all of these objections were well founded. But a party cannot seek to use privilege as both sword and shield; that is, to have a witness testify about topics over which it has already asserted claims of privilege (i.e. “monitoring, protecting, and enforcing” the trademarks underlying the agreements at issue here) and indeed, where it has already asserted privilege over the substance of those very topics. *See, e.g., In re Lidoderm Antitrust Litigation*, 2016 WL 4191612, \*1 (N.D. Cal. 2016) (holding that a party cannot testify to its subjective beliefs about the reasons for entering into the settlement and preclude its adversaries from discovering the content of the lawyers’ advice....”); *see also Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (“[P]arties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials.”); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (“The privilege which protects attorney-client communications may not be used both as a sword and a shield.”). Other cases have similarly precluded testimony in whole or part where a party attempts to use privilege as both sword and shield. *See e.g., Engineered Prods. Co. v. Donaldson Co., Inc.*, 313 F. Supp. 951, 1022 (N.D. Iowa 2004) (allowing only limited trial testimony after defendant invoked advice of counsel defense); *Galaxy Comp. Servs. v. Baker*, 325 B.R. 544, 559 (E.D. Va. 2005) (allowing only testimony within scope of deposition at trial).<sup>3</sup>

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<sup>3</sup> This Court is well aware of the issues presented and has considered such issues in a number of contexts. *See e.g., In the Matter of McWane, Inc.*, No. 9351 (July 13, 2012) (Order Granting in Part and Denying in Part Complaint Counsel’s Motion to Exclude Evidence or in the Alternative to Compel Discovery) at 4, *citing In re OSF Healthcare System*, 2012 FTC LEXIS 70 at \*4-6 (March 19, 2012 (citations omitted)).

**C. 1-800 Contacts Cannot Introduce the Attorney-Witnesses to Provide Irrelevant and Inadmissible Evidence**

The Commission's Rules of Practice are clear: Irrelevant, immaterial, and unreliable evidence shall be excluded. 16 C.F.R. 3.43. Apart from the topics above, where Respondent attempts to use privilege as both sword and shield, anything these attorney-witnesses could possibly testify to is both irrelevant and immaterial. There is no dispute that Respondent threatened (and brought) lawsuits against its competitors, and that Respondent entered into agreements with those competitors. The cease-and-desist letters, lawsuits and settlement agreements are in the record and speak for themselves. No testimony is required to establish those facts.

With regard to the purportedly *bona fide* nature of the lawsuits underlying some settlement agreements, any testimony on that topic would be irrelevant. The Commission has already ruled that, whether or not the underlying litigations were "bona fide," sham, or otherwise has no bearing on the legality of the restraints contained within the settlement agreements. *See* Opinion and Order of the Commission, Docket No. 9372 at 4(Feb. 1, 2017) ("[I]f 1-800 Contacts restricted competition beyond the scope of any property right that 1-800 Contacts may have in its trademarks then the *bona fide* nature of the underlying trademark dispute could not be a defense.") (internal quotation omitted). Thus, any testimony proffered by the attorney-witnesses on this topic is, by definition, irrelevant and should be excluded.

**III. CONCLUSION**

This Court has the authority to ensure that only relevant evidence is heard, and that this trial proceeds efficiently and with the administration of justice firmly in mind. Given the assertions of privilege invoked by 1-800 Contacts over their deposition testimony, neither



attorney-witness can provide relevant testimony to this Court, and therefore, Complaint Counsel asks that their testimony be precluded.<sup>4</sup>

Dated: March 29, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

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<sup>4</sup> To the extent the court does allow any testimony at trial by the attorney-witnesses, Complaint Counsel should be permitted to reopen both depositions to compel the attorney-witnesses to provide testimony as to those issues previously objected to as privileged, and compel 1-800 Contacts to produce any relevant documents previously withheld on grounds of privilege. *See Chevron Corp.* 974 F.2d at 1162 (9th Cir.1992) (“Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.”).

**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 effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.

Dated: March 29, 2017

/s/ Daniel J. Matheson  
Daniel J. Matheson

**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**

**[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 Mr. Bryan Pratt, Esq. and/or Mr. Mark Miller, Esq. as fact witnesses at trial.

ORDERED:

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

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

# **EXHIBIT A**

**In the Matter of:**

**1-800 Contacts**

*December 15, 2016*  
*Bryan Pratt - Confidential*

**Condensed Transcript with Word Index**



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

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34

3

1 APPEARANCES:  
2  
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22  
23  
24  
25

2

1 FEDERAL TRADE COMMISSION  
2  
3  
4 IN THE MATTER OF: : File No. 141-0200  
5 :  
6 1-800 CONTACTS :  
7 :  
8  
9 Thursday, December 15, 2016  
10  
11 Holland & Hart  
12 222 South Main Street  
13 Salt Lake City, Utah  
14  
15 The above-entitled matter came on for investigational  
16 hearing, pursuant to notice, at 8:29 a.m.  
17  
18  
19  
20 \*\*\*CONFIDENTIAL\*\*\*  
21  
22  
23  
24  
25

4

1 Thereupon,  
2 BRYAN G. PRATT  
3 was called for examination and, after having been  
4 sworn by the notary, was examined and testified as  
5 follows:  
6 EXAMINATION BY COUNSEL FOR THE FTC  
7 BY MR. MATHESON:  
8 Q. Good morning, Mr. Pratt. My name is Dan  
9 Matheson, on behalf of the Federal Trade Commission.  
10 MR. CHIARELLO: I'm Gus Chiarello, on  
11 behalf of the Federal Trade Commission.  
12 Q. (By Mr. Matheson) Are you represented  
13 here by counsel?  
14 MR. STONE: Gregory Stone of Munger,  
15 Tolles & Olson on behalf of 1-800 Contacts and on  
16 behalf of the witness.  
17 MR. BEACH: Julian Beach of Munger, Tolles  
18 & Olson on behalf of 1-800 Contacts and on behalf of  
19 the witness.  
20 MR. MATHESON: Nice to meet you.  
21 Q. (By Mr. Matheson) Mr. Pratt, you are  
22 admitted to the bar?  
23 A. That's correct.  
24 Q. When did you graduate from Utah -- when  
25 did you graduate from law school?

5

1 A. In 2003.  
 2 **Q. And when were you admitted to the bar?**  
 3 A. In 2003 as well.  
 4 **Q. You're admitted in the state of Utah?**  
 5 A. That is correct.  
 6 **Q. And also to the patent bar?**  
 7 A. Yes.  
 8 **Q. Where were you employed after -- where**  
 9 **were you first employed after your graduation from**  
 10 **law school?**  
 11 A. At the law firm of Rader, Fishman &  
 12 Grauer.  
 13 **Q. You were employed there beginning in 2003?**  
 14 A. I actually was employed there during law  
 15 school as a patent agent and then employed there in  
 16 2003. That employment continued.  
 17 **Q. And when did that employment come to an**  
 18 **end?**  
 19 A. That ended late 2008, early 2009.  
 20 **Q. And at that point did you find other**  
 21 **employment?**  
 22 A. I did.  
 23 **Q. Where?**  
 24 A. At Holland & Hart.  
 25 **Q. And you're employed there now?**

6

1 A. Correct.  
 2 **Q. You're a partner at Holland & Hart?**  
 3 A. I am.  
 4 **Q. Does Holland & Hart have equity**  
 5 **partnership?**  
 6 A. Yes.  
 7 **Q. Are you an equity partner at Holland &**  
 8 **Hart?**  
 9 A. I am.  
 10 **Q. Does that mean you are entitled to some**  
 11 **share of the profits of the organization?**  
 12 A. Yes.  
 13 **Q. Were you an equity partner at Rader**  
 14 **Fishman?**  
 15 A. No, I was not.  
 16 **Q. When did you become a partner at Holland &**  
 17 **Hart?**  
 18 A. I became a partner at Holland & Hart --  
 19 let's see. That would have been -- I believe it was  
 20 2012.  
 21 **Q. When did you first -- have you ever**  
 22 **represented 1-800 Contacts?**  
 23 A. I have.  
 24 **Q. When did you first represent**  
 25 **1-800 Contacts?**

7

1 A. I believe it was 2005.  
 2 **Q. When was the last time you represented**  
 3 **1-800 Contacts in a legal capacity?**  
 4 A. It's ongoing.  
 5 **Q. So you currently represent 1-800 Contacts**  
 6 **in a legal capacity?**  
 7 A. For certain matters, yeah.  
 8 **Q. Which matters?**  
 9 MR. STONE: So I'm going to designate the  
 10 testimony at this point as confidential pursuant to  
 11 the terms of the protective order.  
 12 And I caution you, Mr. Pratt, in  
 13 responding to the question not to disclose any  
 14 representations that would be protected by the  
 15 attorney-client privilege.  
 16 THE WITNESS: Okay. So -- and this is  
 17 public documents in -- with filing and prosecuting  
 18 trademark applications.  
 19 **Q. (By Mr. Matheson) Any litigations?**  
 20 A. No.  
 21 **Q. Not at the present time?**  
 22 A. No.  
 23 **Q. You haven't previously represented**  
 24 **1-800 Contacts in litigations?**  
 25 A. Yes.

8

1 **Q. Just so we're clear on the attorney-client**  
 2 **privilege instruction, one of the main reasons we're**  
 3 **here today is just to understand where that line is**  
 4 **going to be drawn. So if I ask you a question that**  
 5 **you cannot answer based on attorney-client privilege,**  
 6 **please just invoke it. That's fine.**  
 7 I would ask, though, that if you withhold  
 8 information from a question -- or from your answer in  
 9 order to protect the attorney-client privilege, could  
 10 you please let me know that there is information  
 11 you're not providing in order to protect the  
 12 privilege?  
 13 MR. STONE: We may or may not, depending  
 14 on the nature of the question and the answer. But  
 15 you can ask us, if you want, whether we've done that,  
 16 and we'll be able to respond or not as we see in the  
 17 circumstances. I can't have the witness give you a  
 18 blanket agreement to something when we don't  
 19 understand the context.  
 20 **Q. (By Mr. Matheson) Okay. The last**  
 21 **response you gave to me regarding your representation**  
 22 **of 1-800 Contacts in trademark matters, did you**  
 23 **withhold any information from your response in order**  
 24 **to protect the attorney-client privilege?**  
 25 A. No.

9	<p>1 <b>Q. When did you first have contact with</b> 2 <b>Mr. Stone?</b> 3 A. I don't recall the exact date, but it was 4 probably six weeks ago, eight weeks ago. 5 <b>Q. When was the first time you had contact</b> 6 <b>with any attorney from Munger, Tolles &amp; Olson?</b> 7 A. 2005. 8 <b>Q. When was the -- when did you first learn</b> 9 <b>that you would be included on 1-800 Contacts' witness</b> 10 <b>list in this matter?</b> 11 A. For certain that I was going to be 12 included, again, I would say that was probably eight 13 weeks ago, possibly. 14 <b>Q. Were you informed you would be included --</b> 15 <b>when was the first time you were informed that you</b> 16 <b>might be included on 1-800 Contacts' witness list?</b> 17 A. That would have been possibly eight to ten 18 months ago, guessing. Not certain, but somewhere in 19 that time frame. 20 <b>Q. So prior to the time the complaint in this</b> 21 <b>matter was filed, which was August of 2016?</b> 22 A. That it was contemplated that I might be? 23 <b>Q. Correct.</b> 24 A. Yeah. It was -- it was prior to August 25 2016.</p>	11	<p>1 <b>Q. Who did you travel with to Washington,</b> 2 <b>D.C.?</b> 3 A. My recollection is I traveled with a 4 partner at our firm, Jim Hartley. 5 <b>Q. Anyone else?</b> 6 A. Once we were there, we reunited with -- we 7 were united with Garth Vincent. And Joe Zeidner also 8 attended. 9 <b>Q. Okay. Why did you attend that event?</b> 10 A. I was asked to. 11 <b>Q. Did you attend in order to provide</b> 12 <b>information to the Federal Trade Commission?</b> 13 A. Yes. 14 <b>Q. Did you discuss the information you would</b> 15 <b>provide with Mr. Vincent prior to traveling to</b> 16 <b>Washington?</b> 17 A. Yes. 18 <b>Q. Did you talk to Mr. Joe Zeidner after the</b> 19 <b>meeting with the Federal Trade Commission regarding</b> 20 <b>that meeting?</b> 21 A. Not that I recall. 22 <b>Q. Did you speak with Mr. Vincent after that</b> 23 <b>meeting regarding the meeting with the Federal Trade</b> 24 <b>Commission?</b> 25 A. I believe I did.</p>
10	<p>1 <b>Q. What was the first matter you worked on</b> 2 <b>for 1-800 Contacts, just the general nature of the</b> 3 <b>matter? Was it litigation? Was it a trademark</b> 4 <b>application?</b> 5 A. It was a patent prosecution matter. 6 <b>Q. Now, how did that come about? Did you</b> 7 <b>have a relationship with 1-800 Contacts, or was it a</b> 8 <b>relationship that Rader Fishman -- that predated your</b> 9 <b>arrival at Rader Fishman?</b> 10 MR. STONE: Objection. Improper as to 11 form. 12 You can answer. 13 THE WITNESS: It was -- it came about 14 based on a relationship, a law school friend who was 15 in-house counsel at 1-800 Contacts. 16 <b>Q. (By Mr. Matheson) And who is that?</b> 17 A. David Zeidner. 18 <b>Q. You traveled to Washington, D.C., in</b> 19 <b>connection with the investigation in this matter,</b> 20 <b>right?</b> 21 A. Yes. 22 <b>Q. Were you compensated by 1-800 Contacts for</b> 23 <b>the time you spent traveling to Washington, D.C., and</b> 24 <b>appearing in front of the Federal Trade Commission?</b> 25 A. Yes.</p>	12	<p>1 <b>Q. Do you recall what you discussed?</b> 2 A. I don't. 3 <b>Q. You said you were asked to go to that</b> 4 <b>meeting. Who asked you to go?</b> 5 A. If I recall correctly, it would have been 6 Joe Zeidner. 7 <b>Q. Did he tell you why he wanted you to go?</b> 8 A. I don't remember the conversation 9 specifically. 10 <b>Q. Do you recall any conversations you had</b> 11 <b>with Mr. Zeidner regarding that particular meeting</b> 12 <b>with the Federal Trade Commission?</b> 13 A. No. 14 <b>Q. Have you ever discussed with -- is</b> 15 <b>Mr. Zeidner currently employed by 1-800 Contacts?</b> 16 MR. STONE: Objection. Lacks foundation; 17 calls for speculation. 18 You can answer if you know. 19 THE WITNESS: Not that I'm aware of. 20 <b>Q. (By Mr. Matheson) Do you know if he's</b> 21 <b>currently employed anywhere?</b> 22 A. I have no knowledge of that. 23 <b>Q. When did you first become aware that the</b> 24 <b>Federal Trade Commission was investigating</b> 25 <b>1-800 Contacts' agreements with its competitors</b></p>



1 **regarding search advertising?**  
 2 MR. STONE: Objection. Misstates the  
 3 record. Improper as to form.  
 4 THE WITNESS: My recollection would be  
 5 when the CID was issued to 1-800 Contacts.  
 6 **Q. (By Mr. Matheson) Do you recall**  
 7 **approximately when that was?**  
 8 A. I don't.  
 9 **Q. Have you ever seen a copy of that CID?**  
 10 A. I have.  
 11 **Q. How did you come into possession of it?**  
 12 A. It was provided to me by 1-800 Contacts.  
 13 **Q. Who specifically at 1-800 Contacts? Do**  
 14 **you recall?**  
 15 A. I don't recall exactly who.  
 16 **Q. Have you discussed -- did you discuss the**  
 17 **CID issued by the Federal Trade Commission with**  
 18 **anyone employed by 1-800 Contacts?**  
 19 A. Yes.  
 20 **Q. Who?**  
 21 A. It would have been -- my recollection is  
 22 Roy Montclair.  
 23 **Q. Anyone else?**  
 24 A. Not that I recall.  
 25 **Q. What did Mr. Montclair tell you about**

1 **1-800 Contacts' opinion of the CID issued by the**  
 2 **Federal Trade Commission?**  
 3 MR. STONE: Objection. Assumes facts not  
 4 in evidence.  
 5 Instruct the witness not to answer on the  
 6 grounds of attorney-client privilege.  
 7 **Q. (By Mr. Matheson) Will you follow that**  
 8 **instruction?**  
 9 A. I am.  
 10 **Q. Did you express any view to Mr. Montclair**  
 11 **regarding the CID issued by the Federal Trade**  
 12 **Commission?**  
 13 MR. STONE: You can answer that yes or no.  
 14 THE WITNESS: Yes.  
 15 **Q. (By Mr. Matheson) What did you express to**  
 16 **Mr. Montclair regarding your view of the CID issued**  
 17 **by the Federal Trade Commission?**  
 18 MR. STONE: Instruct the witness not to  
 19 answer on the grounds of attorney-client privilege.  
 20 **Q. (By Mr. Matheson) Will you follow that**  
 21 **instruction, sir?**  
 22 A. I am.  
 23 **Q. Have you had an opportunity to review the**  
 24 **administrative complaint issued by the Federal Trade**  
 25 **Commission in this matter?**

1 A. Yes.  
 2 **Q. Have you viewed the unredacted version?**  
 3 A. I don't believe so.  
 4 **Q. Are you aware of the settlement partners**  
 5 **that the Federal Trade Commission alleges entered**  
 6 **into agreements with 1-800 Contacts regarding search**  
 7 **advertising?**  
 8 A. Not the specific partners as in the  
 9 complaint.  
 10 **Q. Are you aware of the subjects for which**  
 11 **you've been designated to testify for 1-800 Contacts?**  
 12 A. Not specifically. I haven't seen a  
 13 specific listing; but generally, yes.  
 14 **Q. What is your general understanding of the**  
 15 **subject matter of the testimony 1-800 Contacts**  
 16 **anticipates you will provide in this matter?**  
 17 A. My understanding is that it is regarding  
 18 communications with third parties, opposing counsel.  
 19 **Q. Anything else?**  
 20 A. Potentially history regarding the filings  
 21 themselves.  
 22 **Q. When you say "filings," what do you mean?**  
 23 A. Complaints and possibly litigation.  
 24 **Q. Are you familiar with -- well, strike**  
 25 **that.**

1 **Just so we're communicating clearly:**  
 2 **Mr. Stone and I had an e-mail exchange that, to the**  
 3 **Federal Trade Commission's understanding, delineates**  
 4 **the testimony you might offer in this matter. So**  
 5 **I'll just read what we understand to be the testimony**  
 6 **you might offer in this matter, and I just want to**  
 7 **ask you what you know about each portion of it.**  
 8 **So it's our understanding that**  
 9 **1-800 Contacts anticipates that Mr. Pratt will**  
 10 **testify regarding monitoring of the unauthorized use**  
 11 **by others, including the settlement parties**  
 12 **identified in the complaint, Lens.com Incorporated**  
 13 **and Lensworld.com Incorporated, of 1-800 Contacts'**  
 14 **trademarks and the efforts to address those trademark**  
 15 **uses in connection with Internet searches, pop-up**  
 16 **advertisements on the Internet, paid advertisements**  
 17 **on the Internet, and sponsored links on the Internet.**  
 18 **Now, there's a second sentence. We're**  
 19 **going to leave it aside right now. I just want to**  
 20 **unpack that sentence for a minute. Is that**  
 21 **reasonably clear to you?**  
 22 A. Yes.  
 23 **Q. So, monitoring. We've been provided with**  
 24 **a description. I hand you what's been marked as**  
 25 **CX1185.**

17	<p>1 (Exhibit CX1185 was identified.)</p> <p>2 <b>Q. Have you ever seen this document before?</b></p> <p>3 A. I have.</p> <p>4 <b>Q. Did you help draft this document?</b></p> <p>5 A. I provided input on this document, yes.</p> <p>6 <b>Q. When did you provide that input?</b></p> <p>7 A. Prior to its transmission to the FTC.</p> <p>8 <b>Q. Now, this document states it's</b></p> <p>9 <b>confidential and nonpublic, and it's entitled</b></p> <p>10 <b>"Description of Monitoring Activities." Right?</b></p> <p>11 A. Yes, that's what the document says.</p> <p>12 <b>Q. Is it your understanding that this</b></p> <p>13 <b>document is intended to represent the scope of the</b></p> <p>14 <b>testimony you will offer regarding monitoring of the</b></p> <p>15 <b>unauthorized use by others of 1-800 Contacts'</b></p> <p>16 <b>trademarks?</b></p> <p>17 A. Yes, that's my understanding.</p> <p>18 <b>Q. Now, this document states: "Mark Miller</b></p> <p>19 <b>and Bryan Pratt represented 1-800 Contacts, Inc. in a</b></p> <p>20 <b>variety of disputes with other contact lens</b></p> <p>21 <b>retailers. Over the course of that representation,</b></p> <p>22 <b>Miller and Pratt monitored use by others of</b></p> <p>23 <b>1-800 Contacts' trademarks as follows. They</b></p> <p>24 <b>reviewed, from time to time, trademark monitoring</b></p> <p>25 <b>reports prepared by personnel at 1-800 Contacts.</b></p>	19	<p>1 transcript at that point?</p> <p>2 MR. MATHESON: Please do.</p> <p>3 MR. STONE: Mr. Matheson has acted --</p> <p>4 MR. MATHESON: Please stop interrupting</p> <p>5 me.</p> <p>6 MR. STONE: -- in a manner that is</p> <p>7 improper.</p> <p>8 MR. MATHESON: I am not acting</p> <p>9 inappropriately in any way.</p> <p>10 MR. STONE: I want to mark the record,</p> <p>11 please.</p> <p>12 MR. MATHESON: I'm asking you to stop</p> <p>13 interrupting my examination.</p> <p>14 MR. STONE: I want to mark the record.</p> <p>15 MR. MATHESON: Go ahead.</p> <p>16 MR. STONE: Thank you. Do you have a</p> <p>17 question?</p> <p>18 MR. MATHESON: I do have a question.</p> <p>19 <b>Q. (By Mr. Matheson) So Mr. Miller -- or</b></p> <p>20 <b>Mr. Pratt, this states that you reviewed from time to</b></p> <p>21 <b>time trademark monitoring reports prepared by</b></p> <p>22 <b>personnel at 1-800 Contacts. Were those reports</b></p> <p>23 <b>given any particular title?</b></p> <p>24 A. Not that I recall.</p> <p>25 <b>Q. How often did you review such reports?</b></p>
18	<p>1 <b>They also would, from time to time, conduct Internet</b></p> <p>2 <b>searches themselves. In addition, they would review</b></p> <p>3 <b>reports and information prepared by or obtained from</b></p> <p>4 <b>BrandVerity and Keyword Spy."</b></p> <p>5 <b>Did I read that correctly?</b></p> <p>6 MR. STONE: Oh, boy. That's a really good</p> <p>7 question. No, you didn't.</p> <p>8 MR. MATHESON: Okay. Can you read this</p> <p>9 for me, sir?</p> <p>10 MR. STONE: It's marked as an exhibit.</p> <p>11 It's in the record, Dan. Why do you want him to read</p> <p>12 it on the transcript?</p> <p>13 MR. MATHESON: I just want to unpack</p> <p>14 exactly what we're talking about.</p> <p>15 MR. STONE: Well, reading it doesn't</p> <p>16 unpack it.</p> <p>17 MR. MATHESON: It's my deposition. Please</p> <p>18 let me do whatever I want to do. You can object and</p> <p>19 you can instruct --</p> <p>20 MR. STONE: I'm not going to let you do</p> <p>21 whatever you want to do.</p> <p>22 MR. MATHESON: Mr. Stone --</p> <p>23 MR. STONE: Mr. Matheson.</p> <p>24 MR. MATHESON: -- please butt out.</p> <p>25 MR. STONE: Okay. Can we mark the</p>	20	<p>1 A. As often as they were provided.</p> <p>2 <b>Q. How often were they provided?</b></p> <p>3 A. The timing varied over the span of the</p> <p>4 representation.</p> <p>5 <b>Q. Who transmitted the reports to you?</b></p> <p>6 A. A number of different people from</p> <p>7 1-800 Contacts, including David Zeidner. My</p> <p>8 recollection is other people as well. Brandon</p> <p>9 Dansie, I believe.</p> <p>10 <b>Q. Bryce Craven, did he ever transmit such a</b></p> <p>11 <b>report to you?</b></p> <p>12 A. Possible. I can't recall specifically.</p> <p>13 <b>Q. Why were those reports sent to you?</b></p> <p>14 A. To review the results that would come up</p> <p>15 in response for searches for 1-800 Contacts and</p> <p>16 variations.</p> <p>17 <b>Q. Why did you review -- strike that.</b></p> <p>18 <b>When you say the results would come up in</b></p> <p>19 <b>searches, are you referring to search advertisements</b></p> <p>20 <b>that would appear on search engine results pages?</b></p> <p>21 A. Those would be included.</p> <p>22 <b>Q. What else would be included?</b></p> <p>23 A. Natural search results.</p> <p>24 <b>Q. Anything else?</b></p> <p>25 A. There would be other -- other information</p>

21	<p>1 such as time -- time of the searches, dates.</p> <p>2 <b>Q. For what purpose did you review these</b></p> <p>3 <b>reports?</b></p> <p>4 A. To --</p> <p>5 MR. STONE: In answering the question,</p> <p>6 just be careful not to disclose anything privileged.</p> <p>7 But otherwise, I think you can answer that question.</p> <p>8 THE WITNESS: Right. To evaluate the --</p> <p>9 well, to review and look at what response -- what</p> <p>10 results were displayed in response to searches.</p> <p>11 <b>Q. (By Mr. Matheson) What do you mean by</b></p> <p>12 <b>"evaluate"?</b></p> <p>13 A. To use those to review for potential</p> <p>14 infringement, potential misappropriation of goodwill,</p> <p>15 things of that nature.</p> <p>16 <b>Q. Was the basic purpose of reviewing these</b></p> <p>17 <b>trademark monitoring reports to decide whether</b></p> <p>18 <b>1-800 Contacts would take legal action against the</b></p> <p>19 <b>advertisers whose advertisements appeared on search</b></p> <p>20 <b>engine results pages?</b></p> <p>21 MR. STONE: Objection. Improper as to</p> <p>22 form.</p> <p>23 THE WITNESS: It was to provide legal --</p> <p>24 legal guidance to 1-800 Contacts.</p> <p>25 <b>Q. (By Mr. Matheson) When I asked you for</b></p>	23	<p>1 THE WITNESS: I'm not sure what you mean.</p> <p>2 <b>Q. (By Mr. Matheson) Well, these trademark</b></p> <p>3 <b>monitoring reports contain information regarding</b></p> <p>4 <b>1-800 Contacts' rivals' search advertising. Fair?</b></p> <p>5 MR. STONE: Objection. Vague and</p> <p>6 ambiguous. Improper as to form.</p> <p>7 THE WITNESS: Can you restate the</p> <p>8 question?</p> <p>9 <b>Q. (By Mr. Matheson) The trademark</b></p> <p>10 <b>monitoring reports referred to in CX1185 contain</b></p> <p>11 <b>information regarding search advertising by</b></p> <p>12 <b>1-800 Contacts' rivals. Fair?</b></p> <p>13 MR. STONE: Objection. Improper as to</p> <p>14 form. Vague and ambiguous.</p> <p>15 THE WITNESS: It contains search results</p> <p>16 based on -- I mean, there's -- for people that have</p> <p>17 advertised and come up in response to a search for</p> <p>18 those trademarks on the reports.</p> <p>19 <b>Q. (By Mr. Matheson) Have you ever seen a</b></p> <p>20 <b>trademark monitoring report that contained an</b></p> <p>21 <b>advertisement for one of 1-800 Contacts' commercial</b></p> <p>22 <b>rivals?</b></p> <p>23 MR. STONE: Objection. Vague and</p> <p>24 ambiguous.</p> <p>25 THE WITNESS: Yes.</p>
22	<p>1 <b>what purpose you reviewed the reports, Mr. Stone</b></p> <p>2 <b>instructed you to be careful not to disclose anything</b></p> <p>3 <b>privileged. Did that instruction alter in any way</b></p> <p>4 <b>the answer you provided to my question?</b></p> <p>5 A. No.</p> <p>6 <b>Q. So you didn't withhold any information</b></p> <p>7 <b>based on a desire to protect a privileged</b></p> <p>8 <b>communication?</b></p> <p>9 A. No.</p> <p>10 <b>Q. When is the last time, approximately, you</b></p> <p>11 <b>reviewed a trademark monitoring report referred to in</b></p> <p>12 <b>CX1185?</b></p> <p>13 A. Tuesday of this week.</p> <p>14 <b>Q. So is it the case that you continue to</b></p> <p>15 <b>represent 1-800 Contacts for the purpose of providing</b></p> <p>16 <b>legal advice regarding trademark -- potential</b></p> <p>17 <b>trademark infringement?</b></p> <p>18 A. Yes.</p> <p>19 <b>Q. And it's the case that you continue to</b></p> <p>20 <b>represent 1-800 Contacts for the purpose of providing</b></p> <p>21 <b>legal advice regarding the potential that its rivals'</b></p> <p>22 <b>search advertising infringes 1-800 Contacts</b></p> <p>23 <b>trademarks. Is that fair?</b></p> <p>24 MR. STONE: Objection. Vague and</p> <p>25 ambiguous and improper as to form.</p>	24	<p>1 <b>Q. (By Mr. Matheson) When was the last time</b></p> <p>2 <b>you saw a trademark monitoring report that contained</b></p> <p>3 <b>an advertisement for one of 1-800 Contacts'</b></p> <p>4 <b>commercial rivals?</b></p> <p>5 MR. STONE: Objection. Vague and</p> <p>6 ambiguous.</p> <p>7 THE WITNESS: What do you mean by</p> <p>8 "commercial rivals"?</p> <p>9 <b>Q. (By Mr. Matheson) When is the last time</b></p> <p>10 <b>you saw a trademark monitoring report that contained</b></p> <p>11 <b>advertising for a retailer of contact lenses?</b></p> <p>12 A. Would have been this Tuesday.</p> <p>13 <b>Q. Do you recall which retailer of contact</b></p> <p>14 <b>lenses report you saw this Tuesday?</b></p> <p>15 A. Which report?</p> <p>16 <b>Q. Which retailer of contacts lenses</b></p> <p>17 <b>advertisement was included in the report to which you</b></p> <p>18 <b>just referred.</b></p> <p>19 A. I don't recall.</p> <p>20 <b>Q. Do you recall if that retailer of contact</b></p> <p>21 <b>lenses sold contact lenses over the Internet?</b></p> <p>22 A. I don't recall. It was a very quick look.</p> <p>23 <b>Q. Prior to this Tuesday, when was the next</b></p> <p>24 <b>most recent trademark monitoring report you reviewed?</b></p> <p>25 A. The Tuesday before that.</p>

25	<p>1 <b>Q. So is it the case you continue to review</b> 2 <b>trademark monitoring reports prepared by personnel at</b> 3 <b>1-800 Contacts on a regular basis?</b> 4 A. Yes. 5 <b>Q. Now, you were issued a subpoena duces</b> 6 <b>tecum in this matter, Right?</b> 7 A. Correct. 8 <b>Q. Did you produce any of these trademark</b> 9 <b>monitoring reports in response to that subpoena duces</b> 10 <b>tecum?</b> 11 A. I don't recall if I did or not. 12 <b>Q. Did you produce any documents at all in</b> 13 <b>response to that subpoena duces tecum?</b> 14 A. Yes. 15 <b>Q. Which documents?</b> 16 A. There's lots. So in response specific to 17 the duces tecum, there were e-mail communications -- 18 <b>Q. Okay.</b> 19 A. -- that I produced. 20 <b>Q. Do you recall any of those e-mail</b> 21 <b>communications?</b> 22 A. Not specifically. 23 <b>Q. Continuing with the description of</b> 24 <b>monitoring activities. The second to last sentence</b> 25 <b>states that you and Mr. Miller would, from time to</b></p>	27	<p>1 advertisements looked like. 2 <b>Q. Can you recall any specific advertising</b> 3 <b>that appeared in response to such searches?</b> 4 A. I can't. 5 <b>Q. Can you recall any specific advertiser</b> 6 <b>whose advertisements appear on a trademark monitoring</b> 7 <b>report?</b> 8 A. Yes. 9 <b>Q. Which advertisers can you recall?</b> 10 A. I can recall Walmart. That's all that I 11 can recall at this point. 12 <b>Q. The final sentence of the description of</b> 13 <b>monitoring activities states that you and Mr. Miller</b> 14 <b>would review reports and information prepared by or</b> 15 <b>obtained from BrandVerity and Keyword Spy. How did</b> 16 <b>you obtain the reports prepared by or obtained from</b> 17 <b>BrandVerity and Keyword Spy? Were those sent to you</b> 18 <b>by 1-800 Contacts?</b> 19 MR. STONE: Objection. Improper as to 20 form. 21 THE WITNESS: Were those sent to me by 22 1-800 Contacts? My recollection is that I may have 23 gotten some BrandVerity reports from 1-800 Contacts. 24 <b>Q. (By Mr. Matheson) What about Keyword Spy?</b> 25 <b>Have you ever seen a Keyword Spy report?</b></p>
26	<p>1 <b>time, conduct Internet searches yourselves. Is that</b> 2 <b>accurate?</b> 3 A. That's what it says, yes. 4 <b>Q. What Internet searches are referred to in</b> 5 <b>this description of monitoring activities?</b> 6 A. You're asking for specific searches or a 7 general description of those searches? 8 <b>Q. General description would be great.</b> 9 A. A general description would include 10 searches for 1-800 Contacts. 11 <b>Q. That would include -- so by that do you</b> 12 <b>mean you would type "1-800 Contacts" into a search</b> 13 <b>engine and execute the search?</b> 14 A. Generally, at times, yeah. 15 <b>Q. Why did you do that?</b> 16 A. To see what kind of search results would 17 come up. 18 <b>Q. When is the last time you performed a</b> 19 <b>search for that purpose?</b> 20 A. I don't know for certain, but it was 21 likely four or five months ago. 22 <b>Q. Why did you want to see what kind of</b> 23 <b>search results would come up?</b> 24 A. I was interested to see who was appearing 25 in response to those searches and what the</p>	28	<p>1 A. Yes, I have seen a Keyword Spy report. 2 <b>Q. How did you come into possession of that</b> 3 <b>report?</b> 4 A. I would have seen that report after Mark 5 Miller ran the report. 6 <b>Q. When you say Mark Miller ran the report,</b> 7 <b>what does that mean?</b> 8 A. That he had the report. 9 <b>Q. But when you say he ran it, what do you</b> 10 <b>mean "ran"?</b> 11 A. He would have conducted a search on 12 Keyword Spy. 13 <b>Q. What is Keyword Spy?</b> 14 MR. STONE: Objection. Lacks foundation. 15 But testify to whatever you know. 16 THE WITNESS: Yeah. So my understanding, 17 based on their website, the front page of their 18 website, is it is a tool that gives you information 19 regarding keyword advertisements, including keywords 20 used, frequency. It's a -- it's a search 21 optimization tool that companies use for 22 intelligence, for search intelligence. 23 <b>Q. (By Mr. Matheson) Why did you review the</b> 24 <b>report?</b> 25 A. To -- to evaluate the information provided</p>

29

1 by Keyword Spy regarding keywords used by -- by  
2 advertisers.

3 **Q. Why did you want to evaluate the**  
4 **information provided by Keyword Spy?**

5 A. As a -- as a data point to understand,  
6 hopefully get a glimpse on what was happening and why  
7 search results were coming up.

8 **Q. Why did you -- when you say search results**  
9 **were coming up, which search results do you mean?**

10 A. Paid search results in Google.

11 **Q. Paid search results means advertisements,**  
12 **right?**

13 A. Correct.

14 **Q. Who do those advertisements relate to?**  
15 **Which companies?**

16 A. I don't recall specifically which  
17 companies.

18 **Q. Were they retailers of contact lenses?**

19 A. So my general recollection is that some  
20 were retailers of contact lenses.

21 **Q. Based on the Keyword Spy report, are you**  
22 **able to ascertain whether an advertiser bids on a**  
23 **particular keyword?**

24 MR. STONE: Objection. Lacks foundation.  
25 THE WITNESS: Based on a Keyword Spy --

30

1 can you restate the question one more time?

2 **Q. (By Mr. Matheson) Based on a Keyword Spy**  
3 **report, are you able to ascertain whether an**  
4 **advertiser bids on a particular keyword?**

5 MR. STONE: Objection. Lacks foundation.  
6 THE WITNESS: My understanding, based on  
7 Keyword Spy's front page, is that that's what's  
8 provided.

9 **Q. (By Mr. Matheson) Okay. The description**  
10 **testimony we went through earlier states you'll**  
11 **testify regarding monitoring the unauthorized use by**  
12 **others of 1-800 Contacts' trademarks. Other than**  
13 **what's contained on CX1185, have you engaged in any**  
14 **activities that constitute monitoring of the**  
15 **unauthorized use by others of 1-800 Contacts'**  
16 **trademarks?**

17 MR. STONE: Objection. Vague and  
18 ambiguous.

19 THE WITNESS: How would you define "other"  
20 monitoring activities?

21 **Q. (By Mr. Matheson) Well, we talked about**  
22 **reviewing trademark monitoring reports, right? And**  
23 **we talked about conducting Internet searches**  
24 **yourself, and we talked about reviewing BrandVerity**  
25 **and Keyword Spy reports, right?**

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1 **Other than those activities I just listed,**  
2 **can you think of anything you have done that**  
3 **constitutes monitoring of the unauthorized use by**  
4 **others of 1-800 Contacts' trademarks?**

5 MR. STONE: Objection. Improper as to  
6 form. Vague and ambiguous.

7 THE WITNESS: Not that I can recall, based  
8 on that question. If you have a specific example I'm  
9 happy to look at it, but not that I recall.

10 **Q. (By Mr. Matheson) Now, the testimony that**  
11 **you anticipate providing on behalf of 1-800 Contacts**  
12 **does not relate to monitoring activities performed by**  
13 **employees of 1-800 Contacts. Is that fair?**

14 MR. STONE: Objection. Vague and  
15 ambiguous and improper as to form. Leading.

16 THE WITNESS: Restate that question,  
17 please.

18 **Q. (By Mr. Matheson) Let's try this. The**  
19 **second sentence of --**

20 MR. STONE: Do you have a written copy  
21 that he could look at? Would that be in helpful, as  
22 opposed to him trying to keep in mind the long  
23 description you read? I'm just offering it to make  
24 it easier on the witness. I'm not trying to tell you  
25 how to do your exam.

32

1 MR. MATHESON: I didn't want to show it to  
2 him because I wasn't sure that it was permissible  
3 because it was communication between the two of us,  
4 and I didn't realize he's still representing  
5 1-800 Contacts. So that's why I didn't print it out.  
6 I'd be happy to show it to you on the screen. If  
7 Mr. Stone wants me to show it, it's totally fine with  
8 me.

9 MR. STONE: Whatever you want.

10 **Q. (By Mr. Matheson) Okay. But the second**  
11 **sentence of our agreement states that Mr. Pratt and**  
12 **Mr. Miller's testimony will encompass such**  
13 **monitoring, protection, and enforcement efforts as**  
14 **performed by Messrs. Miller and Pratt, their**  
15 **colleagues and staff, and other outside counsel,**  
16 **including cease and desist letters and other**  
17 **communications and correspondence with such users and**  
18 **their counsel, litigation and settlement agreements.**

19 **I don't want to unpack that entire thing.**  
20 **I just want to clarify that there are no monitoring**  
21 **and protection and enforcement efforts performed by**  
22 **employees of 1-800 Contacts that you anticipate**  
23 **testifying about. Is that fair? I mean, your**  
24 **anticipated testimony goes to monitoring, protection,**  
25 **enforcement performed by yourself, your colleagues**

33

1 **and staff, and other outside counsel?**

2 MR. STONE: I'm going to object. It's  
3 over broad.

4 Go ahead and answer. I'm happy to try to  
5 clarify this. I don't want you to miss anything that  
6 might be the subject of his testimony. But you go  
7 ahead and answer, and if you want me to try to  
8 clarify it, I will.

9 THE WITNESS: Yeah. So my anticipated  
10 testimony is with regards to my experience and my  
11 knowledge.

12 MR. MATHESON: And I'll be happy to  
13 discuss it further. But I'm trying to --

14 MR. STONE: My point is, like the  
15 trademark monitoring reports were prepared by  
16 somebody at 1-800 Contacts. He got them. In the  
17 correspondence that was exchanged with other parties,  
18 sometimes there was correspondence that came to or  
19 from people at 1-800 Contacts that later would  
20 include or might earlier have included Mr. Pratt in  
21 the chain.

22 So there's some overlap in terms of what  
23 they were doing or sending and what he was doing or  
24 sending. He's going to talk about what he was doing  
25 or sending; but sometimes, as you'll see, he saw a

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1 letter from somebody at 1-800 Contacts that went out  
2 to somebody, and he later was involved in the chain.

3 So it's not that he's ignorant of what was  
4 going on at 1-800 Contacts; but that's not going to  
5 be -- he's not going to testify to what they did, but  
6 he has knowledge of what they did, if it preceded or  
7 it was involved as part of what he did.

8 Does that make sense?

9 MR. MATHESON: I understand he has  
10 knowledge. I just want to clarify, he's not going to  
11 testify, you know, Mr. Zeidner did this, Mr. Craven  
12 did this. We just want to make sure he's going to  
13 testify about what he recalls.

14 MR. STONE: Well, but he may say -- just  
15 to be clear, I mean, he may say Mr. Zeidner wrote  
16 this letter to somebody; I saw the letter; I followed  
17 up on it or something. So --

18 MR. MATHESON: Included on the  
19 correspondence, and it speaks for itself. That's  
20 fair. I just want to make sure we understand.

21 MR. STONE: Okay.

22 **Q. (By Mr. Matheson) Okay. Now, the efforts**  
23 **to address trademark uses that your testimony relates**  
24 **to were performed, according to our agreement, in**  
25 **connection with Internet searches, pop-up**

35

1 **advertisements on the Internet, paid advertisements**  
2 **on the Internet, and sponsored links on the Internet,**  
3 **I just want to understand how these terms are used.**  
4 **So what are the pop-up advertisements on the Internet**  
5 **to which your monitoring activities related?**

6 A. So are you asking me the definition of  
7 pop-up advertisements and what those are --

8 **Q. Yes, I'd like your understanding.**

9 A. -- based on my understanding?

10 My understanding of pop-up advertisements  
11 would be advertisements that appear on a user screen  
12 in response to a search or in response to a use or a  
13 website visit. Oftentimes there's metadata or  
14 something included that it will trigger an ad to  
15 appear on the user's screen based on some use that  
16 they performed on the Internet or on the computer.

17 **Q. What distinguishes a pop-up advertisement**  
18 **from paid search advertisement?**

19 A. My understanding would be that a pop-up  
20 advertisement appears on a user's screen. Both  
21 appear in response to searches. But to distinguish  
22 the two terms, in my experience, what I've seen is a  
23 pop-up advertisement will appear over a window rather  
24 than included in a window.

25 **Q. So a pop-up advertisement appears in a**

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1 **distinct window as opposed to appearing within the**  
2 **search engine results page. Is that fair?**

3 A. Sometimes. There have been cases where  
4 banner ads and things like that appear to be in the  
5 window; but, yeah, generally.

6 **Q. Now, what are sponsored links on the**  
7 **Internet?**

8 A. Sponsored links -- again, my understanding  
9 is that sponsored links are results or URLs,  
10 selectable URLs that appear in response to a search  
11 result, and that those are a paid -- a paid  
12 advertisement or a paid appearance to encourage  
13 someone based on a search to redirect to another  
14 website or landing page.

15 **Q. Sponsored links, do they appear on a**  
16 **search engine results page?**

17 A. Oftentimes. Sometimes.

18 **Q. What distinguishes a sponsored link from a**  
19 **paid search advertisement?**

20 A. In my mind, I don't know that there's a  
21 specific distinction other than a sponsored link is  
22 an actual link that may be contained within a search  
23 result.

24 **Q. So a sponsored link is a link that could**  
25 **be contained within a paid search advertisement?**

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1 A. So I would say, you know, that -- yeah.  
 2 The term "link" is a URL or another item that is  
 3 linked to another page, so it could be contained in a  
 4 search advertisement. I think at times the phrases  
 5 are used, maybe not completely precisely, but  
 6 interchangeably at times.  
 7 **Q. You anticipate offering testimony**  
 8 **regarding the settlement parties identified in the**  
 9 **complaint, Lens.com Inc. and LensWorld Inc. Right?**  
 10 A. Yes.  
 11 **Q. Which settlement parties identified in the**  
 12 **complaint can you think of?**  
 13 MR. STONE: Objection. Lacks foundation.  
 14 THE WITNESS: Again, I don't recall the  
 15 exact parties that were identified in the complaint.  
 16 **Q. (By Mr. Matheson) Which parties do you**  
 17 **intend to testify about?**  
 18 A. I would anticipate Lens.Com, Memorial Eye,  
 19 Lens Discounters, Contact Lens King. LensWorld, as  
 20 you mentioned.  
 21 **Q. What about Arlington Contact Lens Service,**  
 22 **Incorporated?**  
 23 A. Is that AC Lens?  
 24 **Q. Yes.**  
 25 A. I'm aware of them, yeah.

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1 **Q. Do you intend to offer any testimony**  
 2 **regarding AC Lens?**  
 3 A. Yeah, if asked.  
 4 **Q. What about Coastal Contacts?**  
 5 A. Yes.  
 6 **Q. Empire Vision Center?**  
 7 A. If asked a question that I can offer  
 8 testimony on.  
 9 **Q. Do you recall any interaction with Empire**  
 10 **Vision Center?**  
 11 A. Empire Vision Center, I'm trying to recall  
 12 exactly who they are.  
 13 **Q. How about Visionworks?**  
 14 A. I've heard the name.  
 15 **Q. Do you recall interacting with**  
 16 **Visionworks?**  
 17 A. I don't recall if I interacted with them  
 18 specifically, but I do recall the name.  
 19 **Q. Lenses For Less?**  
 20 A. Yes.  
 21 **Q. Lensfast?**  
 22 A. Yeah, I recall Lensfast.  
 23 **Q. Do you recall having interactions with**  
 24 **Memorial Eye?**  
 25 A. I do.

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1 **Q. Do you recall having interactions with**  
 2 **easycontactsusa.com?**  
 3 A. I do.  
 4 **Q. Do you recall interactions with Standard**  
 5 **Optical Company?**  
 6 A. I don't recall specifically having  
 7 interaction with Standard Optical.  
 8 **Q. Do you recall having interactions with**  
 9 **replacemycontacts.com? Their parent corporation name**  
 10 **is Tram Data, LLC.**  
 11 A. I remember having a conversation about  
 12 them, at least, yeah.  
 13 **Q. Do you recall having interaction with**  
 14 **Vision Direct?**  
 15 A. I do.  
 16 **Q. Do you recall any interactions with**  
 17 **Walgreens?**  
 18 A. I do.  
 19 **Q. Do you recall any interactions with Web**  
 20 **Eye Care?**  
 21 A. Web Eye Care, I've heard the name. I  
 22 remember having conversations about them, but maybe  
 23 not necessarily with them.  
 24 **Q. Do you have an understanding of the**  
 25 **retailers of contact lenses with which 1-800 Contacts**

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1 **currently has agreements that relate to the display**  
 2 **of search advertising?**  
 3 MR. STONE: Objection. Vague and  
 4 ambiguous.  
 5 THE WITNESS: Are you asking do I have an  
 6 understanding of who they are or to what degree?  
 7 **Q. (By Mr. Matheson) Yes. I'm asking: Do**  
 8 **you have an understanding of which retailers of**  
 9 **contact lenses 1-800 Contacts currently has**  
 10 **agreements with that relate to the display of search**  
 11 **advertising?**  
 12 MR. STONE: Objection. Improper as to  
 13 form. Vague and ambiguous.  
 14 THE WITNESS: I would say that I have an  
 15 understanding of a number of the parties that we  
 16 discussed before, just recently, just previously.  
 17 **Q. (By Mr. Matheson) So which retailers does**  
 18 **1-800 Contacts currently have agreements with that**  
 19 **relate to search advertising, to the best of your**  
 20 **knowledge?**  
 21 MR. STONE: Objection. Lacks foundation,  
 22 calls for a legal conclusion, and improper as to  
 23 form.  
 24 You can answer.  
 25 THE WITNESS: Yeah, without -- so can you

1 restate that question one more time, please?  
 2 **Q. (By Mr. Matheson) To the best of your**  
 3 **knowledge, with which retailers does 1-800 Contacts**  
 4 **currently have agreements that relate to search**  
 5 **advertising?**  
 6 MR. STONE: Same objections.  
 7 THE WITNESS: So I would have to review  
 8 the agreements themselves to know whether they're  
 9 ongoing or not. But I am aware that there have been  
 10 some agreements made with a number of the parties  
 11 that we just discussed, but not all.  
 12 **Q. (By Mr. Matheson) But not all?**  
 13 A. Correct.  
 14 **Q. Which ones are you referring to when you**  
 15 **say "not all"?**  
 16 MR. STONE: Same objections.  
 17 THE WITNESS: Yeah. To my recollection, I  
 18 believe there's -- we mentioned Lens.com. I'm not  
 19 aware of an agreement with Lens.com. Lens  
 20 Discounters. Did we discuss Lens Discounters?  
 21 **Q. (By Mr. Matheson) You mentioned them.**  
 22 A. I mentioned them. I'm not aware of an  
 23 agreement between 1-800 Contacts and Lens  
 24 Discounters.  
 25 **Q. Are you aware if an agreement was ever in**

1 **place between Lens.com and 1-800 Contacts?**  
 2 A. I am not.  
 3 **Q. So, to the best of your knowledge, there**  
 4 **was never an agreement in place between Lens.com and**  
 5 **1-800 Contacts that related to the display of search**  
 6 **advertising?**  
 7 MR. STONE: Same objections.  
 8 You can answer.  
 9 THE WITNESS: Yeah, I'm trying to think  
 10 specifically of a formal written agreement, and I  
 11 can't think of one.  
 12 **Q. (By Mr. Matheson) I didn't ask about a**  
 13 **formal written agreement. To the best of your**  
 14 **knowledge, was there ever an agreement in place**  
 15 **between Lens.com and 1-800 Contacts that related to**  
 16 **the display of search advertising?**  
 17 MR. STONE: Objection. Improper as to  
 18 form; lacks foundation; calls for a legal conclusion.  
 19 You can answer.  
 20 THE WITNESS: Yeah, I would have to look  
 21 at -- look at a document to make that legal  
 22 conclusion, or some type of record. If there's  
 23 something you're thinking of, I'm happy to look at  
 24 it.  
 25 **Q. (By Mr. Matheson) So, yes or no: As you**

1 **sit here, to the best of your knowledge, was there**  
 2 **ever an agreement in place between Lens.com and**  
 3 **1-800 Contacts that relates to the display of search**  
 4 **advertising?**  
 5 MR. STONE: Same objections as to the  
 6 preceding question. Also asked and answered.  
 7 THE WITNESS: Yeah, I'll maintain that --  
 8 the answer.  
 9 **Q. (By Mr. Matheson) And what was your**  
 10 **answer? Yes or no?**  
 11 A. My answer was -- was -- I would have to  
 12 look at a document or a record to evaluate whether  
 13 there's an agreement to make a legal conclusion.  
 14 **Q. So is it the case you cannot currently**  
 15 **recall whether or not there was an agreement in place**  
 16 **between Lens.com and 1-800 Contacts that related to**  
 17 **the display of search advertising?**  
 18 MR. STONE: Same objections as to the  
 19 preceding questions.  
 20 THE WITNESS: I can recall a pleading in  
 21 the Lens.com case that talked about a -- a public  
 22 record that talks about an oral agreement.  
 23 **Q. (By Mr. Matheson) What do you recall**  
 24 **about that oral agreement?**  
 25 A. That -- my recollection is in the

1 pleadings, again, that there was communication with  
 2 Tony DeGidio, counsel for Lens.com, a phone  
 3 conversation.  
 4 **Q. A communication between Mr. DeGidio and**  
 5 **whom?**  
 6 A. And me.  
 7 **Q. You said there was a phone conversation.**  
 8 **What do you recall about that phone conversation?**  
 9 A. My recollection is that it was -- again,  
 10 it's 11 years ago -- that he agreed not to use  
 11 1-800 Contacts as a keyword. Well, not to have his  
 12 client -- that his client would not use  
 13 1-800 Contacts as a keyword for search advertising.  
 14 **Q. So based on that phone conversation, did**  
 15 **you conclude that there was an agreement on the part**  
 16 **of Lens.com not to use 1-800 Contacts as a keyword**  
 17 **for search advertising?**  
 18 MR. STONE: Objection. Improperly calls  
 19 for legal opinion. Improper as to form.  
 20 You can answer.  
 21 THE WITNESS: Yeah, I'd have to -- I'd  
 22 have to just -- just given the amount of time, I  
 23 can't recall the actual discussion itself to conclude  
 24 whether there was a contract, an agreement made.  
 25 **Q. (By Mr. Matheson) I'm not asking for a**



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1 **legal conclusion. You previously testified that**  
 2 **Mr. DeGidio agreed that his client would not use**  
 3 **1-800 Contacts as a keyword for search advertising.**  
 4 **I'm asking, based on that statement, did you conclude**  
 5 **that Lens.com had committed not to use 1-800 Contacts**  
 6 **as a keyword for search advertising?**

7 MR. STONE: Objection. Improper as to  
 8 form; misstates the witness's prior testimony;  
 9 improperly calls for a legal conclusion.

10 You can answer.

11 THE WITNESS: I would say that based on  
 12 our discussion, there was a commitment that they  
 13 would not use 1-800 Contacts as a negative keyword --  
 14 or, sorry -- as a keyword for search advertising.

15 **Q. (By Mr. Matheson) Lens Discounters. You**  
 16 **stated that -- strike that.**

17 **Is it your recollection that there was**  
 18 **never an agreement in place between 1-800 Contacts**  
 19 **and Lens Discounters relating to the display of**  
 20 **search advertising?**

21 MR. STONE: Objection. Improperly calls  
 22 for a legal conclusion; improper as to form.

23 THE WITNESS: I'm not currently aware of  
 24 one that's in place, but I'd be happy to look at any  
 25 documents that suggest otherwise.

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1 **Q. (By Mr. Matheson) To the best of your**  
 2 **recollection, was there ever a commitment by Lens**  
 3 **Discounters to 1-800 Contacts relating to the display**  
 4 **of search advertising?**

5 MR. STONE: Objection. Vague and  
 6 ambiguous; improper as to form; improperly calls for  
 7 a legal conclusion.

8 THE WITNESS: What do you mean by  
 9 "commitment"?

10 **Q. (By Mr. Matheson) You used the word**  
 11 **"commitment" when you were testifying regarding**  
 12 **Lens.com's relationship with 1-800 Contacts. What**  
 13 **did you mean by "commitment" when you used that word?**

14 A. Again, to the best of my recollection,  
 15 seeing this was a number of years ago, the general --  
 16 the general -- my general recollection of that phone  
 17 conversation was that they agreed that -- committed  
 18 that they would not use 1-800 Contacts as a keyword  
 19 for the search advertising.

20 **Q. To the best of your recollection, did Lens**  
 21 **Discounters ever make such a commitment?**

22 MR. STONE: Objection. Over broad; vague  
 23 and ambiguous. Improperly calls for a legal  
 24 conclusion; improper as to form.

25 THE WITNESS: To the best of my

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1 recollection, I would say that, as far as I can  
 2 remember, that Lens Discounters committed not to --  
 3 well, I can't remember if they committed not to use  
 4 1-800 Contacts as a keyword. My general recollection  
 5 is that they would not come up in a search for  
 6 1-800 Contacts.

7 **Q. (By Mr. Matheson) Are you planning to**  
 8 **offer any testimony regarding the value of**  
 9 **1-800 Contacts' trademark?**

10 A. If asked a question, I could provide my  
 11 knowledge.

12 **Q. Where did you acquire your knowledge about**  
 13 **the value of 1-800 Contacts' trademark?**

14 A. That would have been made of record in the  
 15 trademark litigation.

16 **Q. Which trademark litigation are you**  
 17 **referring to?**

18 A. The Lens.com litigation.

19 **Q. What do you recall about the value of**  
 20 **1-800 Contacts' trademark that was made of record in**  
 21 **the Lens.com litigation?**

22 A. My recollection is that there was comment  
 23 regarding the amount of advertising and time spent on  
 24 the trademark to establish consumer recognition and  
 25 value of the trademark.

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1 **Q. Are you aware, other than the information**  
 2 **that was made of record in the Lens.com litigation,**  
 3 **of any other information that relates to the amount**  
 4 **of advertising and time spent on 1-800's trademark?**

5 MR. STONE: Objection. Improper as to  
 6 form.

7 THE WITNESS: Am I aware of any other  
 8 valuation? Is that what you're asking me?

9 **Q. (By Mr. Matheson) That's a good question.**  
 10 **Are you aware of any other valuation other than the**  
 11 **one that was made of record in the Lens.com**  
 12 **litigation?**

13 A. I would say that I've had discussions with  
 14 my client about their trademark and what it means to  
 15 them, as well as the actions they've taken to -- to  
 16 use it as a trademark.

17 **Q. What did your client tell you about their**  
 18 **trademark and what it means to them?**

19 MR. STONE: Instruct the witness not to  
 20 answer on the grounds of attorney-client privilege.

21 **Q. (By Mr. Matheson) Will you follow the**  
 22 **instruction?**

23 A. I am.

24 **Q. Are you planning to offer any testimony at**  
 25 **the administrative hearing in this matter regarding**

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1 **your client's trademark and what it means to them?**

2 A. If asked a question on that topic that I  
3 can answer without divulging confidential information  
4 or attorney-client privileged conversations.

5 **Q. What do you know, sitting here today,  
6 about what your client's trademark means to them?**

7 MR. STONE: Objection. Over broad;  
8 improper as to form.

9 You can answer so long as you don't  
10 disclose any privileged communications.

11 THE WITNESS: Right. I know that it's --  
12 it's valuable to them, that it is who they are -- in  
13 essence, that that's how people know them. It's  
14 their brand.

15 **Q. (By Mr. Matheson) Anything else?**

16 A. Not as I sit here.

17 **Q. How do you know that 1-800 Contacts'  
18 trademark is valuable to them? Did your client tell  
19 you that?**

20 MR. STONE: Which question do you want him  
21 to answer?

22 **Q. (By Mr. Matheson) What has your client  
23 told you about how valuable 1-800 Contacts' trademark  
24 is to them?**

25 MR. STONE: So if you've been told things,

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1 Mr. Pratt, that you would not consider to be  
2 confidential, you should feel free to disclose those.  
3 If you were told things that you consider to be  
4 confidential and privileged, you should not disclose  
5 those. If you have a question about a particular  
6 communication, we can take a break and I'll help  
7 counsel you through it.

8 THE WITNESS: Yeah. So I'm going to --  
9 I've been told, and it's -- I was -- I mean, I was  
10 present at Jonathan Coon's deposition. It was -- and  
11 he's talked a number of times about his trademark  
12 "1-800 Contacts," that it was -- it was important to  
13 the success of the company.

14 **Q. (By Mr. Matheson) Other than what you  
15 heard at Jonathan Coon's deposition, has your client  
16 told you any information regarding how valuable  
17 1-800 Contacts' trademark is to them?**

18 MR. STONE: Same instruction.

19 THE WITNESS: I'm not clear on the  
20 question -- on the part of the question that says how  
21 valuable it is to them. Do you have an example or a  
22 way to clarify that?

23 **Q. (By Mr. Matheson) Well, you said that --  
24 I asked you, What do you know sitting here today  
25 about what your client's trademark means to them?**

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1 **You were instructed to answer as long as you don't  
2 disclose any privileged communications. And your  
3 answer, I believe, was, "I know it's valuable to  
4 them."**

5 **So I'm trying to explore what you meant by  
6 "valuable to them." What did you mean when you said  
7 your client's trademark was valuable to them?**

8 A. So my understanding is that it is an  
9 important part of the company because it's who they  
10 are. It's the -- they've built up goodwill and  
11 invested in advertising, invested in -- it's the name  
12 of the company. It's the face of who they are.

13 **Q. What is the source for your information  
14 regarding the value of your client's trademark to  
15 your client?**

16 A. The source would be my ongoing  
17 representation and relationship with them and  
18 observing their strategies and their protection of  
19 the trademark.

20 **Q. Other than the information you heard at  
21 Mr. Coon's deposition, what has your client told you  
22 regarding the value of your client's trademarks to  
23 them?**

24 MR. STONE: Same instructions regarding  
25 whether it's information you would consider told to

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1 you in confidence as part of a privileged  
2 communication.

3 THE WITNESS: Yeah, I can't think of  
4 any -- any specific conversations that would fit  
5 within that question.

6 **Q. (By Mr. Matheson) Are there any  
7 communications you are not revealing in response to  
8 my question based on a desire to protect the  
9 attorney-client privilege?**

10 A. Yes.

11 **Q. Who made that communication to you?**

12 A. David Zeidner.

13 **Q. When did that communication occur?**

14 A. I don't recall specifically.

15 **Q. Was the communication written?**

16 A. No.

17 **Q. Was the communication oral?**

18 A. Yes, as I recall.

19 **Q. Who else was present when that  
20 communication occurred?**

21 A. I don't recall anyone else being present.

22 **Q. What did Mr. Zeidner tell you?**

23 MR. STONE: Instruct you not to answer on  
24 the grounds of attorney-client privilege.

25 **Q. (By Mr. Matheson) Are you going to follow**

1 that instruction?  
 2 A. I am.  
 3 **Q. Other than the communication from**  
 4 **Mr. Zeidner we just discussed and the information you**  
 5 **heard at Mr. Coon's deposition, are there any other**  
 6 **communications from your client to you relating to**  
 7 **the value of 1-800 Contacts' trademark?**  
 8 MR. STONE: Objection. Improper as to  
 9 form.  
 10 THE WITNESS: As I sit here today, I can't  
 11 recall any.  
 12 **Q. (By Mr. Matheson) I'd like to hand you a**  
 13 **document that has been marked CX0135.**  
 14 **(Exhibit CX0135 was identified.)**  
 15 **Q. Please take whatever time you need to**  
 16 **review it. My only questions will be directed to the**  
 17 **very -- the first three lines of the document.**  
 18 A. (The witnesses reviews the document.)  
 19 MR. STONE: I will just note for the  
 20 record that CX1185 and CX0135 are designated  
 21 confidential and should be bound in accordance with  
 22 the protective order.  
 23 **Q. (By Mr. Matheson) Do you recognize this**  
 24 **document, sir?**  
 25 A. I do.

1 **Q. What is it?**  
 2 A. It is an e-mail communication.  
 3 **Q. Who wrote it?**  
 4 A. I did.  
 5 **Q. Who did you send it to?**  
 6 A. Sent to Cindy L. Caditz.  
 7 **Q. How were you acquainted with Cindy L.**  
 8 **Caditz?**  
 9 A. My recollection is that Cindy Caditz  
 10 represented Vision Direct.  
 11 **Q. When you say "represented Vision Direct,"**  
 12 **in what capacity did she represent Vision Direct?**  
 13 MR. STONE: Objection. Lacks foundation;  
 14 calls for speculation; improper as to form.  
 15 THE WITNESS: I believe that she was their  
 16 outside counsel.  
 17 **Q. (By Mr. Matheson) Why were you**  
 18 **communicating with Ms. Caditz in October 2007?**  
 19 A. To discuss actions by Vision Direct, her  
 20 client.  
 21 **Q. Which actions?**  
 22 A. According to this document and from what I  
 23 recall, their appearance in response to searches for  
 24 1-800 Contacts, an appearance of sponsored  
 25 advertisements.

1 **Q. When you say "an appearance of sponsored**  
 2 **advertisements," you mean an appearance on a search**  
 3 **engine results page; is that right?**  
 4 A. Yes.  
 5 **Q. The first three lines of this document**  
 6 **state, as far as I can read, "Hi, Cindy. It is our**  
 7 **client's position that by ceasing to incorporate the**  
 8 **negative keywords, as has been the established**  
 9 **practice of the parties under the agreement, Vision**  
 10 **Direct is 'causing' the results shown in the**  
 11 **previously transmitted document."**  
 12 **What did you mean when you referred to**  
 13 **"the results shown in the previously transmitted**  
 14 **document"?**  
 15 MR. STONE: Objection. Lacks foundation;  
 16 improper as to form.  
 17 You can answer.  
 18 THE WITNESS: My recollection is that the  
 19 results shown were, as I mentioned, a display of a  
 20 sponsored ad in a search engine, in an Internet  
 21 search engine.  
 22 **Q. (By Mr. Matheson) A display of a**  
 23 **sponsored ad for Vision Direct?**  
 24 A. For Vision Direct.  
 25 **Q. What did you mean when you wrote "ceasing**

1 **to incorporate the negative keywords"?**  
 2 A. I would -- I would say stopping the  
 3 incorporation of negative keywords.  
 4 **Q. Incorporating negative keywords into what?**  
 5 A. Into an AdWords campaign.  
 6 **Q. So what did you mean when you referred to**  
 7 **the established practice of the parties under the**  
 8 **agreement?**  
 9 A. Again, my recollection is that established  
 10 practice of the parties under the agreement would  
 11 refer to the ongoing conduct between the two parties  
 12 in response to the agreement between 1-800 Contacts  
 13 and Vision Direct.  
 14 **Q. So is it fair that it was your**  
 15 **understanding that at some point Vision Direct**  
 16 **incorporated negative keywords into a Google AdWords**  
 17 **campaign and that it ceased to do so?**  
 18 MR. STONE: Objection. Improper as to  
 19 form. Lacks foundation.  
 20 THE WITNESS: So looking at this today, I  
 21 would -- I would say that at that point in time my  
 22 understanding was that there was a change in their ad  
 23 campaign strategy.  
 24 **Q. (By Mr. Matheson) And that change**  
 25 **consisted -- sorry. Didn't mean to interrupt you.**

1 A. I was going to say that resulted in Vision  
2 Direct's advertisements coming up in response to a  
3 search for 1-800 Contacts.

4 **Q. And you suspected the change you referred  
5 to consisted of the -- of ceasing the practice of  
6 incorporating negative keywords into an AdWords  
7 campaign?**

8 MR. STONE: Objection. Improper as to  
9 form.

10 THE WITNESS: That's -- that's what I read  
11 there, yes.

12 **Q. (By Mr. Matheson) And you believe that  
13 violated -- strike that.**

14 **It was your position at the time that the  
15 appearance of an advertisement for Vision Direct in  
16 response to a search for a 1-800 Contacts trademark  
17 violated an agreement in place between the parties.  
18 Is that fair?**

19 A. Yes. At that time, yes.

20 **Q. And it was your position that this  
21 violated an agreement whether or not Vision Direct  
22 affirmatively placed a bid on your client's trademark  
23 in AdWords?**

24 A. Yes, that was our position.

25 **Q. Have you communicated that position to any**

1 **other seller of contact lenses other than Vision  
2 Direct?**

3 A. I can't recall of a specific instance  
4 where I communicated that.

5 **Q. It's generally been 1-800 Contacts'  
6 position that parties to its agreements violate --  
7 and you know which agreements I mean, right? Just so  
8 we're communicating clearly: the agreements that the  
9 Federal Trade Commission is challenging in this  
10 matter. You have an understanding of what the  
11 universe of those agreements are, right?**

12 A. I believe I do.

13 **Q. And it's generally -- not just generally.  
14 It is 1-800 Contacts' position that the parties to  
15 those agreements violate the agreements when their  
16 ads are displayed on search engine results pages in  
17 response to a search for 1-800 Contacts' trademarked  
18 term, right?**

19 MR. STONE: Objection. Over broad,  
20 improper as to form, and lacks foundation.

21 THE WITNESS: I can say as a general  
22 matter that that would be an indication, yes.

23 **Q. (By Mr. Matheson) And your position is  
24 that the parties to the agreements we're discussing  
25 violate those agreements when their advertisements**

1 **appear, even if they have not affirmatively placed a  
2 bid on a keyword term that represents 1-800 Contacts'  
3 trademark?**

4 MR. STONE: Objection.

5 **Q. (By Mr. Matheson) Is that fair?**

6 MR. STONE: Objection. Over broad,  
7 compound, improper as to form, and lacks foundation.  
8 But you can answer.

9 THE WITNESS: Yes.

10 **Q. (By Mr. Matheson) I mean, you're not  
11 confused by that question? I just want to make sure  
12 we're communicating clearly.**

13 A. Yeah. Given my understanding of your  
14 question is that, you know, is if a party to an  
15 agreement has committed to incorporate negative  
16 keywords and exact-matched negative keywords, that if  
17 there is a search for 1-800 Contacts' trademark and  
18 their ad shows up, that they're in violation of the  
19 agreement.

20 **Q. Is it your understanding that Vision  
21 Direct is currently obligated to implement negative  
22 keywords?**

23 MR. STONE: Objection. Lacks foundation;  
24 calls for speculation; improperly calls for opinion  
25 testimony, legal opinion testimony.

1 But you can answer.

2 THE WITNESS: Yeah, my recollection and  
3 understanding is that they're obligated to  
4 incorporate negative keywords. And again, that's my  
5 current understanding. I'd be happy to look at  
6 documents to -- that may vary that. I mean, I don't  
7 recall expiration dates, necessarily, of agreements  
8 or anything of that nature, terms.

9 **Q. (By Mr. Matheson) Yeah. But in general,  
10 not just Vision Direct but the party to the  
11 agreements that are being challenged are obligated to  
12 implement negative keywords to prevent their  
13 advertisements from being displayed in response to a  
14 search that constitutes a 1-800 Contacts trademark  
15 term?**

16 MR. STONE: Objection. Compound; over  
17 broad; improper as to form; lacks foundation.  
18 Improperly calls for a legal opinion.

19 You can answer.

20 THE WITNESS: That's my understanding of  
21 the agreements.

22 **Q. (By Mr. Matheson) I hand you a document  
23 that's been marked CX0724.**

24 **(Exhibit CX0724 was identified.)**

25 MR. STONE: I will note that this one is

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1 also marked confidential under the protective order.  
2 (The witness reviews the document.)

3 **Q. (By Mr. Matheson) Have you had an**  
4 **opportunity to review this, sir?**

5 A. I have.

6 **Q. Do you recognize this document?**

7 A. I do.

8 **Q. What is it?**

9 A. It is a letter sent by -- sent from me to  
10 Scott Sher of Wilson Sonsini.

11 **Q. Why did you send this letter to Scott Sher**  
12 **on January 11, 2008?**

13 A. My recollection is that this is a  
14 communication from an ongoing discussion with  
15 Mr. Sher with regards to Vision Direct's -- Vision  
16 Direct's conduct, and in continuation of the letter  
17 that we previously looked at.

18 **Q. The second paragraph of this letter, it**  
19 **appears you're quoting from a previous communication**  
20 **by Mr. Sher to yourself. Is that accurate?**

21 A. Correct.

22 **Q. And is it your recollection that Mr. Sher**  
23 **communicated to you that Vision Direct's position was**  
24 **that "an agreement to implement negative keywords,"**  
25 **quote, "creates an unacceptable risk of violating of**

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1 **[sic] Section 1 of the Sherman Act"?**

2 MR. STONE: Objection. Lacks foundation;  
3 improper as to form.

4 THE WITNESS: That's my recollection based  
5 on this writing.

6 **Q. (By Mr. Matheson) You didn't agree with**  
7 **Mr. Sher's position, did you?**

8 A. Based on the document, what I just read,  
9 no.

10 **Q. You don't have any recollection other than**  
11 **this document of whether or not you agree with**  
12 **Mr. Sher's position?**

13 A. I recall -- I recall this point in time,  
14 yes.

15 **Q. And it was your belief at this point in**  
16 **time that Mr. Sher was incorrect; is that right?**

17 A. I would say that, based on the information  
18 and counsel that we received, that yes, I believe  
19 that he was incorrect.

20 **Q. Which counsel that you received are you**  
21 **referring to?**

22 A. As you note on the -- the people that are  
23 copied on the bottom of the page. Richard Liebeskind  
24 is who I'm referring to.

25 **Q. Who is Mr. -- who was Mr. Liebeskind in**

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1 **relation to you on January 11, 2008?**

2 A. So Mr. Liebeskind was -- as acknowledged  
3 in communications with Scott Sher and phone calls, he  
4 was the antitrust counsel for 1-800 Contacts at the  
5 time.

6 **Q. He was an outside counsel?**

7 A. Correct.

8 **Q. What did Mr. Liebeskind tell you regarding**  
9 **Mr. Sher's position that implementing negative**  
10 **keywords -- strike that.**

11 **What did Mr. Liebeskind tell you regarding**  
12 **Mr. Sher's position that an agreement to implement**  
13 **negative keywords creates an unacceptable risk of**  
14 **violating Section 1 of the Sherman Act?**

15 MR. STONE: Objection. Instruct the  
16 witness not to answer to the extent you would reveal  
17 any privileged communications that go beyond the  
18 communications that were communicated to Vision  
19 Direct.

20 THE WITNESS: Yeah. The -- Mr. Liebeskind  
21 reviewed and approved of this -- of this  
22 communication, and so it reflects his position.

23 **Q. (By Mr. Matheson) My question was what**  
24 **did Mr. Liebeskind tell you regarding Mr. Sher's**  
25 **position about an agreement to implement negative**

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1 **keywords creates an unacceptable risk of violating**  
2 **Section 1 of the Sherman Act?**

3 MR. STONE: Same objection and same  
4 instruction.

5 THE WITNESS: To the extent I don't reveal  
6 any confidential information, it's reflected in this  
7 document.

8 **Q. (By Mr. Matheson) Do you have any**  
9 **confidential information in mind that you have not**  
10 **provided in response to my question?**

11 A. Yes.

12 **Q. Why didn't you provide that confidential**  
13 **information?**

14 A. The information was communication between  
15 Mr. Liebeskind, me, and our client.

16 **Q. So providing that information would**  
17 **threaten the attorney-client privilege, in your view?**

18 A. Yes.

19 **Q. The third paragraph -- in the third**  
20 **paragraph you state disagreement with Mr. Sher's**  
21 **position. You state, "To the contrary, it is well**  
22 **settled that an agreement in the context of a**  
23 **settlement of litigation -- or threatened**  
24 **litigation -- is analyzed under the ancillary**  
25 **restraints doctrine and is not subject to per se**

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1 condemnation."

2 Do you recall having that view in January  
3 of 2008?

4 A. Yeah. It's included in the document.

5 Q. What was your basis for that view, other  
6 than the paragraph in Herbert Hovenkamp's Antitrust  
7 Law treatise you cite here?

8 MR. STONE: Again, to the extent you had  
9 privileged communications with anyone that might be  
10 disclosed that should remain confidential, don't  
11 disclose those. Otherwise, you can answer.

12 THE WITNESS: Yeah, I think answering that  
13 would violate the attorney-client privilege.

14 Q. (By Mr. Matheson) So you do have a basis  
15 other than Mr. Hovenkamp's antitrust law treatise;  
16 but providing that basis would threaten the  
17 attorney-client privilege, so you decline to provide  
18 it. Is that fair?

19 A. That's fair.

20 Q. Is it still your view that an agreement in  
21 the context of a settlement of litigation is analyzed  
22 under the ancillary restraints doctrine and is not  
23 subject to per se condemnation?

24 MR. STONE: Objection. Improper as to  
25 form. Assumes facts not in evidence.

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1 THE WITNESS: Yeah, I don't have  
2 opinion -- an opinion with regards to that. I'd have  
3 to do some research on the current state of the law.

4 Q. (By Mr. Matheson) Have you ever discussed  
5 with your client whether an agreement in the context  
6 of the settlement of litigation should be analyzed  
7 under the ancillary restraints doctrine and therefore  
8 not be subject to per se condemnation?

9 MR. STONE: At any point in time and other  
10 than in the context of this letter? I mean, I  
11 don't -- what do you mean?

12 MR. MATHESON: Just at any point in time.

13 MR. STONE: Over broad. Instruct the  
14 witness not to answer to the extent that you've had  
15 any privileged communications regarding that subject.

16 THE WITNESS: Yeah, any communications  
17 regarding that subject would have been  
18 attorney-client privileged communications.

19 Q. (By Mr. Matheson) So such communications  
20 might have occurred, but you're not going to describe  
21 them because that would violate the attorney-client  
22 privilege. Is that fair?

23 A. That's fair.

24 Q. The final sentence of this paragraph  
25 states, "I have no reason to believe (and you have

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1 provided no reason to claim) that an agreement to  
2 implement negative keywords, in settlement of  
3 litigation or threatened litigation, would violate  
4 the rule of reason."

5 Does that accurately state your view in  
6 January of 2008?

7 A. As written in the document -- I mean, I  
8 wrote the document, so my assumption is yes.

9 Q. What do you understand it to mean to  
10 violate the rule of reason?

11 A. To violate the rule of reason, my  
12 understanding would be -- and again, I'm not an  
13 antitrust attorney, obviously -- but that it would --  
14 there are per se violations that are per se  
15 violations because -- based on their nature; and that  
16 under rule of reason that the equities are considered  
17 of whether the action is reasonable under the law.

18 Q. When you say "equities," what do you mean?  
19 Are you referring to competitive effects?

20 MR. STONE: Objection. Improper as to  
21 form.

22 THE WITNESS: I'm referring to all -- a  
23 various number of considerations: competitive  
24 effects, also benefits to society, to consumers,  
25 things of that nature.

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1 Q. (By Mr. Matheson) Did you conduct any  
2 analysis of those factors to which you've just  
3 referred prior to writing this letter?

4 MR. STONE: Did he personally?

5 MR. MATHESON: Yes.

6 Q. (By Mr. Matheson) Did you personally  
7 conduct any analysis of the factors you referred to  
8 as competitive effects, benefits to society, to  
9 consumers, that related to your statement that you  
10 had no reason to believe an agreement to implement  
11 negative keywords would violate the rule of reason?

12 MR. STONE: Answer that yes or no as of  
13 that time.

14 THE WITNESS: As of that time?

15 Q. (By Mr. Matheson) Correct, yes or no as  
16 of that time.

17 A. My recollection is I don't recall specific  
18 research.

19 Q. Have you ever conducted an analysis of the  
20 competitive effects of an agreement between  
21 1-800 Contacts and one of its rivals relating to  
22 negative keywords?

23 MR. STONE: Without revealing the  
24 substance of the analysis, if you've done one, you  
25 can answer that yes or no.

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1 THE WITNESS: Yes.  
 2 **Q. (By Mr. Matheson) When was that analysis**  
 3 **conducted?**  
 4 A. That would have been -- again, I don't  
 5 know of the exact date, but it would have been after  
 6 receiving the CID.  
 7 **Q. By CID you mean Civil Investigative Demand**  
 8 **issued by Federal Trade Commission in connection with**  
 9 **this matter?**  
 10 A. That's correct.  
 11 **Q. What did your analysis reveal regarding**  
 12 **the competitive effects of an agreement between**  
 13 **1-800 Contacts and its rivals to implement negative**  
 14 **keywords?**  
 15 MR. STONE: Objection. Instruct the  
 16 witness not to answer on the grounds of attorney work  
 17 product and attorney-client privilege.  
 18 **Q. (By Mr. Matheson) Are you going to follow**  
 19 **that instruction, sir?**  
 20 A. I am.  
 21 **Q. Who conducted the analysis?**  
 22 A. I did, along with one of my other  
 23 partners, Jim Hartley; and an associate, Ginger  
 24 Utley.  
 25 **Q. What information did you analyze?**

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1 MR. STONE: Objection. Instruct the  
 2 witness not to answer on the grounds of  
 3 attorney-client privilege and attorney work product.  
 4 **Q. (By Mr. Matheson) Follow that**  
 5 **instruction, sir?**  
 6 A. I am.  
 7 **Q. The attorney-client privilege you're**  
 8 **relating to, who is the client whose privilege is**  
 9 **being protected there?**  
 10 A. 1-800 Contacts.  
 11 **Q. Did you communicate the results of your**  
 12 **analysis to 1-800 Contacts?**  
 13 A. Yes.  
 14 **Q. What did you tell them?**  
 15 MR. STONE: Objection. Instruct the  
 16 witness not to answer on the grounds of  
 17 attorney-client privilege.  
 18 MR. MATHESON: Following the instruction?  
 19 THE WITNESS: I am.  
 20 **Q. (By Mr. Matheson) How long did it take**  
 21 **you to analyze -- to conduct the analysis of**  
 22 **competitive effects we were just discussing?**  
 23 MR. STONE: Instruct the witness not to  
 24 answer on the grounds of attorney work product.  
 25 **Q. (By Mr. Matheson) Are you going to follow**

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1 **that instruction, sir?**  
 2 A. I am.  
 3 MR. MATHESON: If you'd like to take a  
 4 break, now is not a bad time. We've been going for  
 5 about 90 minutes.  
 6 MR. STONE: Fine with me.  
 7 (Recess from 9:58 a.m. to 10:14 a.m.)  
 8 **Q. (By Mr. Matheson) Other than the analysis**  
 9 **of competitive effects arising from 1-800 Contacts'**  
 10 **agreements regarding negative keywords that you**  
 11 **conducted after the Federal Trade Commission issued**  
 12 **CID in this matter, are you aware of any analysis**  
 13 **conducted by your client regarding the same topic?**  
 14 MR. STONE: You can answer yes or no.  
 15 THE WITNESS: Yes.  
 16 **Q. (By Mr. Matheson) When was that analysis**  
 17 **conducted?**  
 18 A. To my knowledge, the analysis that I'm  
 19 aware of would have also been pretty close to after  
 20 the issuance of the CID.  
 21 **Q. Who conducted it?**  
 22 A. I don't know all the parties, but I'm  
 23 aware that -- Munger Tolles.  
 24 **Q. Anyone else you're aware of who was**  
 25 **involved in that other than outside counsel from**

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1 **Munger Tolles?**  
 2 A. Not that I'm aware of.  
 3 **Q. I'll hand you a document we have marked as**  
 4 **CX0078.**  
 5 **(Exhibit CX0078 was identified.)**  
 6 **Q. Take whatever time you need to review it,**  
 7 **and let me know when you've had an adequate**  
 8 **opportunity to do so.**  
 9 **(The witness reviews the document.)**  
 10 MR. STONE: I would guess that this is a  
 11 privileged communication that was inadvertently  
 12 produced. So I need to take a break and check on  
 13 that before we allow any questions on it.  
 14 MR. MATHESON: That's fine. We can go off  
 15 the record, but I'd be happy to clarify on the record  
 16 what we think this is.  
 17 MR. STONE: Yeah.  
 18 MR. MATHESON: We thought the same thing.  
 19 But this was attached to a motion in the Lens.com  
 20 matter, as far as we can tell, which is why it has  
 21 this A795 designation on it and the PL012345. So we  
 22 assumed that you guys had intentionally done it. We  
 23 weren't trying to ambush you.  
 24 MR. STONE: Yeah, I'm not sure. Let me  
 25 check.

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1 MR. MATHESON: Okay. Let's go off the  
2 record.  
3 (Recess from 10:16 a.m. to 10:20 a.m.)  
4 MR. MATHESON: Mr. Stone, what's your  
5 position, sir?  
6 MR. STONE: Thank you. Our position is  
7 that the text of the e-mail beginning with "Hi Dave  
8 and Bryan," continuing to the end of that text where  
9 it ends with "first line of their ad" is a privileged  
10 communication that was inadvertently produced and  
11 should be redacted. You're free to ask the witness  
12 questions about the screenshots that are included,  
13 but we will not permit any questioning on the text of  
14 the e-mail which consists of the two paragraphs that  
15 I referenced.  
16 MR. MATHESON: Okay. We respect that  
17 position.  
18 It is our understanding this document has  
19 previously been publicly disclosed to Lens.com and  
20 others, which is why we think it has all these  
21 designations. It was produced in different  
22 litigations and attached to a brief. So that's why  
23 we believe it is not privileged. We will respect  
24 your position, and we will meet at a future time if  
25 necessary.

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1 MR. STONE: Thanks.  
2 **Q. (By Mr. Matheson) Disregarding the text**  
3 **that we're all going to redact in our minds, do you**  
4 **recognize this document?**  
5 A. I don't recognize it specifically.  
6 **Q. What do you understand it to be as you sit**  
7 **here today?**  
8 A. I understand it to be a screenshot of -- a  
9 screenshot of results that were produced in response  
10 to a search for 1-800 Contacts is what I would assume  
11 this -- generated this image, or the screenshot.  
12 **Q. And this was sent to you, among others?**  
13 A. Yes.  
14 **Q. Why was it sent to you?**  
15 MR. STONE: Objection. Lacks foundation;  
16 calls for speculation.  
17 THE WITNESS: Yeah, my impression as I sit  
18 here is that it was sent to me to review and to give  
19 legal advice to 1-800 Contacts.  
20 **Q. (By Mr. Matheson) Was it sent to you in**  
21 **your capacity as an attorney responsible for**  
22 **monitoring and enforcing the unauthorized use of**  
23 **1-800 Contacts' trademarks?**  
24 MR. STONE: Objection. Improper as to  
25 form.

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1 You can answer.  
2 THE WITNESS: Yes.  
3 **Q. (By Mr. Matheson) Turning our attention**  
4 **to the screenshot displayed on the first page,**  
5 **CX0078-001. Which advertisers' advertisements appear**  
6 **on that screenshot?**  
7 MR. STONE: Objection. Lacks foundation.  
8 THE WITNESS: Can you define what you mean  
9 by "advertisements"?  
10 **Q. (By Mr. Matheson) Let's look at the**  
11 **yellow shaded portion. There are blue letters**  
12 **underlined, "1800contacts.com." You understand that**  
13 **to be an advertisement for 1800contacts.com?**  
14 A. I understand it to be a sponsored link or  
15 a generated sponsored link in response to the search  
16 for 1800contacts.com.  
17 **Q. And what about the sponsored link that**  
18 **appears underneath that? Do you see a sponsored link**  
19 **underneath the one for 1800contacts.com?**  
20 A. I do.  
21 **Q. Which company was responsible for that**  
22 **sponsored link?**  
23 MR. STONE: Objection. Lacks foundation;  
24 calls for speculation; improper as to form.  
25 THE WITNESS: Initially, I assume that

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1 it's LensWorld.com, but I can't be certain.  
2 **Q. (By Mr. Matheson) Is there anything**  
3 **confusing about that sponsored link in your mind as**  
4 **you sit here today?**  
5 MR. STONE: Objection. Improper as to  
6 form; vague and ambiguous.  
7 THE WITNESS: There's a possibility of  
8 confusion in my mind, yes.  
9 **Q. (By Mr. Matheson) You said you assume**  
10 **it's for LensWorld.com. What causes you to assume**  
11 **it's for LensWorld.com?**  
12 A. Two things. Based on my experience -- it  
13 says LensWorld.com, so that's the initial impression.  
14 But based on my experience, I've also seen sponsored  
15 links that have a landing page that is not accurate,  
16 so it's redirected to a different source. I've seen  
17 and had experience with Google AdWords and note that  
18 that can be manipulated and doesn't have to be  
19 consistent with the actual entity that either put the  
20 ad or consistent with where you will be redirected if  
21 you click on that.  
22 **Q. So the basis for your assumption is the**  
23 **text written on the search engine results page that**  
24 **says www.LensWorld.com?**  
25 MR. STONE: What's the question? I'm



1 sorry.  
 2 **Q. (By Mr. Matheson) I asked about your**  
 3 **assumption that this sponsored link was sponsored by**  
 4 **LensWorld.com. I'm just asking. So I understand**  
 5 **that you had experience that suggests some ads may**  
 6 **take you to a different search engine results page.**  
 7 **I'm not asking about that experience; I'm**  
 8 **asking you --**  
 9 A. To clarify, if I can.  
 10 **Q. Sure.**  
 11 A. My position is that it will take you to a  
 12 different landing page, not a different search  
 13 results page. So it will take you to an actual  
 14 website by a different provider than who was  
 15 potentially listed on the URL.  
 16 **Q. But how did you identify the provider**  
 17 **listed on the URL?**  
 18 MR. STONE: Objection. Misstates the  
 19 witness's prior testimony; improper as to form.  
 20 THE WITNESS: So my assumption that it's  
 21 LensWorld is because it says LensWorld.com, and I am  
 22 aware of the company LensWorld.com based on previous  
 23 litigation and communications.  
 24 **Q. (By Mr. Matheson) Over on the right**  
 25 **there's a red box. Is there a sponsored link that**

1 **appears inside that box?**  
 2 A. There is.  
 3 **Q. And who sponsored that link?**  
 4 MR. STONE: Objection. Lacks foundation;  
 5 improper as to form.  
 6 THE WITNESS: Yeah, I haven't investigated  
 7 this specific link. Based on my knowledge of  
 8 interaction with Lens.com, it would be a subsidiary  
 9 of Lens.com.  
 10 **Q. (By Mr. Matheson) Do you believe that**  
 11 **sponsored link is confusing?**  
 12 A. Yes, I do.  
 13 MR. STONE: Objection.  
 14 Oh. Go ahead.  
 15 **Q. (By Mr. Matheson) Why do you believe that**  
 16 **the LensWorld.com sponsored link could give rise to**  
 17 **confusion?**  
 18 MR. STONE: Objection. Improperly calls  
 19 for opinion testimony.  
 20 But you can answer.  
 21 THE WITNESS: Okay. So, again, based on  
 22 my knowledge and experience, there are a number of  
 23 reasons that I believe the LensWorld.com ad could  
 24 give rise to confusion. A couple of those include --  
 25 I mean, could give confusion to an ordinary consumer

1 based on the name recognition and the lack of name  
 2 recognition for LensWorld. I'm aware of some studies  
 3 to that effect.  
 4 The use of the word "sponsored" could give  
 5 rise to confusion as to who sponsors it, or if  
 6 there's some sponsorship or affiliation in relation  
 7 to the search term. The placement as well, and its  
 8 placement in conjunction with 1-800 Contacts.  
 9 **Q. You said you were aware of studies related**  
 10 **to confusion arising from lack of name recognition.**  
 11 **Is that fair?**  
 12 A. So I said I'm aware of studies related to  
 13 unaided awareness and name recognition of contact  
 14 lens providers.  
 15 **Q. Which studies are you referring to?**  
 16 A. So I am aware of a Synovate study of  
 17 unaided awareness. I believe it's Synovate. I may  
 18 be incorrect on that. But I'm aware of an unaided  
 19 awareness study that was conducted by 1-800 Contacts.  
 20 **Q. Any other studies?**  
 21 A. Not with regards to unaided awareness, no.  
 22 **Q. Now, the study that relates to unaided**  
 23 **awareness, did that attempt to assess the likelihood**  
 24 **that consumers would become confused based on**  
 25 **advertisements appearing on a search engines results**

1 **page?**  
 2 MR. STONE: Objection. Best evidence.  
 3 Improper as to form.  
 4 THE WITNESS: Can you restate that  
 5 question, please?  
 6 **Q. (By Mr. Matheson) The study you're**  
 7 **referring to regarding unaided awareness, did that**  
 8 **study attempt to assess the likelihood that consumers**  
 9 **would become confused based on advertisements**  
 10 **appearing on a search engine results page?**  
 11 MR. STONE: Same objections as to the  
 12 preceding question.  
 13 THE WITNESS: My understanding of the  
 14 study is that it tested unaided awareness by  
 15 consumers of contact lens providers.  
 16 **Q. (By Mr. Matheson) What does that have to**  
 17 **do with the likelihood that consumers would become**  
 18 **confused --**  
 19 MR. STONE: Objection. Improper as to  
 20 form and argumentative.  
 21 **Q. (By Mr. Matheson) -- as a result of the**  
 22 **appearance of sponsored links on a search engine**  
 23 **results page?**  
 24 MR. STONE: Sorry. I didn't mean to  
 25 interrupt.

81	<p>1 Improper as to form; argumentative; asked 2 and answered. 3 THE WITNESS: So, again, I would -- I 4 would -- I think I would say it in terms of because 5 there's not consumer awareness as high for LensWorld 6 as there is for 1-800 Contacts; that a consumer would 7 not know necessarily immediately if there was a 8 sponsorship or an affiliation between LensWorld and 9 1-800 Contacts. There could be ambiguity as to 10 whether, again, 1-800 Contacts sponsors LensWorld, 11 whether there's some type of affiliation with 12 LensWorld, whether LensWorld is a discount supplier 13 for 1-800 Contacts. 14 The recognition by consumers of a 15 trademark and of a source, if it's a strong 16 recognition, I believe would indicate more 17 recognition and knowledge of relationships. 18 <b>Q. (By Mr. Matheson) Are you aware of any 19 empirical study that your view is based on?</b> 20 MR. STONE: Objection. Asked and 21 answered; argumentative; improper as to form. 22 <b>Q. (By Mr. Matheson) I just want to be sure 23 we're communicating clearly. I'm not trying to trap 24 you. I understand you're aware of a study of unaided 25 awareness. I understand the connection you draw</b></p>	83	<p>1 that is, as I mentioned, I'm aware of the Synovate 2 study, that the other items that inform my view and 3 perception of this would include survey evidence, for 4 example, in the Lens.com case, that would inform my 5 view. Also, cases -- and I can't remember all the 6 names, but cases that use the strength of a mark as a 7 factor when regarding likelihood of confusion. 8 <b>Q. Other than the survey evidence in the 9 Lens.com case, are you aware of consumer surveys that 10 inform your view regarding the likelihood that 11 consumers will become confused as a result of a 12 sponsored link appearing on a search engine results 13 page?</b> 14 A. I can say that I can recall -- and it's 15 vague because of the time; but I can recall initially 16 when looking at this concept that I did review just 17 kind of online searches of the effects of -- and I do 18 recall reading some things online about whether 19 consumer recognition and strength of mark would 20 impact a likelihood of confusion. But specific 21 empirical studies, I can't recall any specific. 22 <b>Q. Did you form the view at the time you 23 looked at this document that consumers would likely 24 be confused as a result of the sponsored link for 25 LensWorld.com we discussed?</b></p>
82	<p>1 <b>between unaided awareness and the likelihood of 2 confusion. I'm just trying to understand --</b> 3 THE REPORTER: Sorry. I lost you there. 4 MR. MATHESON: That's okay. This doesn't 5 even matter. It would all get struck anyway. 6 <b>Q. (By Mr. Matheson) We're on the same page 7 there. The question is, are you aware of an 8 empirical study that assesses the likelihood that 9 consumers would become confused by sponsored links on 10 a search engine results page?</b> 11 MR. STONE: Okay. So are you -- are you 12 asking just about this one, about why he thought 13 this, or have you now broadened it to pick up 14 anything else he knows? 15 <b>Q. (By Mr. Matheson) Let's broaden it. I 16 just want to understand what studies you're aware of, 17 and then I want to ask you questions about those 18 studies.</b> 19 <b>So I understand there's an unaided 20 awareness study. What I'm trying to get at is just, 21 are you aware of a study that informs your view 22 regarding the likelihood that consumers will become 23 confused as a result of sponsored links on a search 24 engine results page?</b> 25 A. Okay. The way that I would characterize</p>	84	<p>1 A. Yes. 2 <b>Q. Why did you form that view?</b> 3 A. I would refer back to some of the things 4 that I mentioned: the survey evidence that, depending 5 on who that consumer is, their experience with the 6 Internet, their past history purchasing contact 7 lenses online, the frequency in which they use the 8 Internet, and their familiarity with the Google 9 AdWords process are all variables that could -- could 10 provide an opportunity for someone to be confused in 11 this situation. 12 <b>Q. Did you --</b> 13 A. Sorry. I was going to say as well as the 14 care that someone may provide or the care which 15 someone may use in making this type of a decision, or 16 whether they would investigate further and scrutinize 17 whether it is affiliated or not. 18 <b>Q. And I asked you the basis for your view 19 that consumers would likely be confused. What did 20 you believe consumers would be confused regarding, 21 based on this LensWorld.com ad we discussed?</b> 22 MR. STONE: Objection. Improper as to 23 form and asked and answered. 24 You can answer. 25 THE WITNESS: I would say that</p>

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1 specifically -- I'd just reiterate that some of the  
2 things that may be confusing are whether there's a  
3 sponsorship or affiliation between the two. What the  
4 source of the advertisement is. You know, the fact  
5 that they are co-joined in the sponsored links box  
6 that has a distinct color are factors that could  
7 influence a user to make assumptions or to assume  
8 sponsorship affiliation or mistake source.

9 **Q. (By Mr. Matheson) Let's take a look at**  
10 **the sponsored link off to the right. There are blue**  
11 **letters, "Acuvue \$11.24 a box."**

12 MR. STONE: You mean the furthest  
13 sponsored link? Sorry.

14 MR. MATHESON: Yeah, the one on the right  
15 above the URL www.lensforless.com.

16 **Q. (By Mr. Matheson) At the time you viewed**  
17 **this document, did you form the view that that**  
18 **sponsored link was likely to lead to consumer**  
19 **confusion?**

20 MR. STONE: Objection. Lacks foundation;  
21 improper as to form.

22 You can answer.

23 THE WITNESS: As I viewed that link  
24 specifically and as I look at it now, yes, I think  
25 that could lead to consumer confusion based on a

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1 number of factors.

2 **Q. (By Mr. Matheson) What are those factors?**

3 A. One would be -- in my view, as I look at  
4 it, one of the things that jumps off the page to me  
5 is that it's an ad for Acuvue, which is a product and  
6 not necessarily a source. So the title indicates a  
7 product.

8 Second, the fact that it's under a  
9 sponsored link; so, again, whether there's a  
10 sponsorship or affiliation between that and  
11 1-800 Contacts, which is the search term.

12 Also, the use of Lenses For Less to a  
13 consumer could very much be an indicator that they're  
14 getting Lenses For Less, not necessarily a source  
15 identifier. I mean, it could be a link to a sub-page  
16 of 1-800 Contacts, and they have some Lenses For Less  
17 if you go through certain routes. I think there are  
18 opportunities for misperceptions.

19 **Q. So in this instance, the text of the**  
20 **sponsored link itself is relevant to your view that**  
21 **consumers would likely be confused?**

22 A. I think it's one factor.

23 **Q. Is the text of a sponsored link always a**  
24 **factor that should be considered when assessing**  
25 **whether a consumer is likely to become confused?**

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1 MR. STONE: Objection. Improper as to  
2 form, calls for an opinion testimony, outside the  
3 witness's area of expertise, and over broad.

4 You can answer.

5 THE WITNESS: Personally, I think it's a  
6 factor that -- it's evidence that should be  
7 considered. It will form the impression of the  
8 consumer -- will help form it, among other things.

9 **Q. (By Mr. Matheson) Now, you're not**  
10 **planning to offer any testimony in this case**  
11 **regarding the likelihood that consumers would become**  
12 **confused by paid search advertising, are you?**

13 A. Would you restate that question, just so I  
14 understand the scope of what you're asking?

15 **Q. Are you planning to offer any testimony in**  
16 **this case regarding the likelihood that consumers**  
17 **could become confused by paid search advertising?**

18 A. I would say that I'm not planning on  
19 giving evidence of research or quantifying anything  
20 of that nature. I would anticipate speaking with  
21 regards to my experience and positions taken at  
22 trial, but not any research or analysis that -- of an  
23 independent study or anything of that nature.

24 **Q. When you say "positions taken at trial,"**  
25 **what are you referring to?**

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1 A. I'm referring to factors that are used to  
2 make the argument that there's a likelihood of  
3 confusion.

4 **Q. But which trial? When you said "positions**  
5 **taken at trial," I'm trying to understand which trial**  
6 **you have in mind.**

7 A. So I didn't -- I didn't immediately think  
8 of a trial. Again, I was trying to focus on your  
9 question of generally a scope of testimony.

10 **Q. Based on everything -- strike that.**  
11 **Is it your view that it is impossible for**  
12 **a competitor of 1-800 Contacts to display a sponsored**  
13 **link in response to a search query for a**  
14 **1-800 Contacts trademarked term without creating an**  
15 **unacceptable likelihood that consumers could become**  
16 **confused?**

17 MR. STONE: Objection. Improper as to  
18 form; vague and ambiguous; improperly calls for  
19 opinion testimony; over broad.

20 You can answer.

21 THE WITNESS: No. I think there are  
22 sponsored ads that competitors could provide that  
23 would not create a likelihood of confusion.

24 **Q. (By Mr. Matheson) Have you ever seen such**  
25 **an ad?**

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1 MR. STONE: Same objections.  
 2 THE WITNESS: My recollection is that I  
 3 have.  
 4 **Q. (By Mr. Matheson) Do you recall which**  
 5 **company sponsored the ad you have in mind?**  
 6 A. I don't specifically, no.  
 7 **Q. Do you recall when you saw the ad you have**  
 8 **in mind?**  
 9 A. Not specifically. I know it's been some  
 10 time ago.  
 11 **Q. Some time ago. Is it more than six months**  
 12 **ago?**  
 13 A. Yes.  
 14 **Q. More than six years ago?**  
 15 A. The specific instance I'm thinking of is  
 16 probably within that six-year range.  
 17 **Q. Do you recall any communications you had**  
 18 **with the sponsor of that advertisement?**  
 19 A. No.  
 20 **Q. Do you recall if you had any**  
 21 **communications with the sponsor of that**  
 22 **advertisement?**  
 23 A. I don't recall for sure. My recollection  
 24 is that we did not.  
 25 **Q. Turning our attention to the second page**

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1 **of the document, CX0078-002, do you see sponsored**  
 2 **links displayed on this snapshot of the search engine**  
 3 **results page?**  
 4 A. I do.  
 5 **Q. Turning your attention to the sponsored**  
 6 **link in the top right that appears above the**  
 7 **hyperlink www.LensDiscounters.com. Is it your view**  
 8 **that -- strike that.**  
 9 **When you received this document, did you**  
 10 **form the view that this sponsored link could lead to**  
 11 **consumer confusion?**  
 12 MR. STONE: Objection. Lacks foundation;  
 13 improper as to form.  
 14 You can answer.  
 15 THE WITNESS: When I received the  
 16 document, I did not specifically look at that  
 17 advertisement.  
 18 **Q. (By Mr. Matheson) Sitting here today, do**  
 19 **you have a view on whether this sponsored link could**  
 20 **create an unacceptable likelihood of consumer**  
 21 **confusion?**  
 22 MR. STONE: Objection. Improper as to  
 23 form; improperly calls for opinion testimony.  
 24 THE WITNESS: So are you asking me to  
 25 analyze this currently as to whether this would

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1 create a likelihood of confusion?  
 2 **Q. (By Mr. Matheson) Yes. I'm asking you**  
 3 **for your view sitting here today.**  
 4 MR. STONE: Same objections.  
 5 You can answer.  
 6 THE WITNESS: I think sitting here  
 7 today -- again, going back to the factors that  
 8 there's -- depending on the user's experience and  
 9 their frequency of use of online advertising and  
 10 sponsored links, that there could be a likelihood of  
 11 confusion. But it depends on the care given by the  
 12 consumer, their experience and use of the Internet,  
 13 those types of things, and what has formed their  
 14 impression of what's going on in having this  
 15 advertisement be produced.  
 16 **Q. (By Mr. Matheson) Do you believe that the**  
 17 **appearance of this specific sponsored link in**  
 18 **response to a search for a term on which**  
 19 **1-800 Contacts owns a trademark would justify a**  
 20 **lawsuit for trademark infringement against the**  
 21 **sponsor of this ad?**  
 22 MR. STONE: Objection. Improper as to  
 23 form. Improperly calls for opinion testimony,  
 24 including legal opinion testimony.  
 25 THE WITNESS: I personally don't feel that

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1 I have enough information based on this screenshot to  
 2 decide whether I would -- it would warrant a  
 3 complaint or anything of that nature.  
 4 **Q. (By Mr. Matheson) What other information**  
 5 **was it your practice to acquire before filing**  
 6 **litigation against the sponsors of search advertising**  
 7 **other than a screenshot?**  
 8 MR. STONE: Objection. Assumes facts not  
 9 in evidence; improper as to form.  
 10 And I think this question is -- the way  
 11 it's framed gets into if there was -- if he did have  
 12 a practice -- I don't know whether he did or he  
 13 didn't, but if he did have a practice, I think this  
 14 gets into his work product.  
 15 And so if you think this is causing you to  
 16 reveal your work product, Mr. Pratt, you should  
 17 decline to answer on the grounds of the work product  
 18 privilege. And if you need to confer with me before  
 19 you answer the question, we can do that.  
 20 THE WITNESS: Yeah, I'd like to confer  
 21 with you.  
 22 MR. STONE: Okay. Why don't we go off the  
 23 record.  
 24 MR. MATHESON: So are you declining to  
 25 answer the question so you can consult with your

23 (Pages 89 to 92)

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1 attorney?  
 2 MR. STONE: No. We're taking a break so  
 3 that we can confer to decide whether he's going to  
 4 answer the question.  
 5 MR. MATHESON: There's a question pending.  
 6 MR. STONE: I understand --  
 7 MR. MATHESON: I would just be happy with  
 8 the answer "I would like to decline to answer in  
 9 order to consult with my attorney." But I don't  
 10 think we can just stop.  
 11 MR. STONE: We can, and we are.  
 12 MR. MATHESON: We're not.  
 13 MR. STONE: And that's the way we do it.  
 14 MR. MATHESON: No, we're not.  
 15 **Q. (By Mr. Matheson) Answer the question.**  
 16 MR. STONE: Come on.  
 17 MR. MATHESON: All right, go off the  
 18 record. We're going to take this up later.  
 19 (Mr. Stone and the witness left the  
 20 deposition room.)  
 21 MR. MATHESON: Let the record reflect  
 22 counsel has exited the room with a question pending  
 23 after coaching the witness for two, three minutes.  
 24 Now we can go off the record.  
 25 (Recess from 10:47 a.m. to 10:49 a.m.)

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1 **Q. (By Mr. Matheson) Do you recall the**  
 2 **question pending when you left the room, sir?**  
 3 MR. STONE: Yeah. Could you read it back  
 4 for us?  
 5 **Q. (By Mr. Matheson) What other information**  
 6 **was it your practice to acquire before filing**  
 7 **litigation on behalf of 1-800 Contacts against the**  
 8 **sponsors of search advertising, other than a**  
 9 **screenshot?**  
 10 MR. STONE: Was that the -- was that  
 11 the -- you read back the prior question?  
 12 MR. MATHESON: I thought so.  
 13 MR. STONE: Okay. Okay.  
 14 So I'm going to instruct you, Mr. Pratt,  
 15 not to disclose information that would reveal work  
 16 product, including what you normally did in terms of  
 17 your practices, if you had a general practice. But  
 18 if you can respond to the question without revealing  
 19 that, you should respond to whatever extent you can.  
 20 THE WITNESS: Okay. I would respond by  
 21 saying that it was not our practice to file suit  
 22 based solely on a screenshot. There were other --  
 23 other things that we did to investigate the ad itself  
 24 and a likelihood of confusion.  
 25 **Q. (By Mr. Matheson) What other things are**

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1 **you referring to?**  
 2 MR. STONE: Instruct the witness not to  
 3 answer, on the grounds of attorney work product.  
 4 **Q. (By Mr. Matheson) What other things did**  
 5 **you investigate prior to filing a lawsuit against**  
 6 **Lens.com?**  
 7 MR. STONE: Instruct the witness not to  
 8 answer, on the grounds of work product.  
 9 Yeah, this is an interesting one, because  
 10 in the connection with Lens.com there may have been  
 11 some disclosure because of the filing of the  
 12 counterclaim for malicious prosecution.  
 13 So if you have -- if you have evidence of  
 14 information that was disclosed in response to that  
 15 claim that would be responsive here, you can provide  
 16 it. But otherwise, I think the actual investigation  
 17 that was done there is protected by the attorney work  
 18 product.  
 19 **Q. (By Mr. Matheson) Are you able to answer**  
 20 **the question, sir? Do you recall what the question**  
 21 **was?**  
 22 **I think we should read it back. With your**  
 23 **counsel's instruction in mind, we'll take the**  
 24 **instruction as read. And the question is, what other**  
 25 **things did you investigate prior to filing a lawsuit**

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1 **against Lens.com?**  
 2 A. And I'll refuse to answer that based on  
 3 attorney-client privilege, work product.  
 4 **Q. Did you always investigate factors other**  
 5 **than a screenshot indicating the appearance of an**  
 6 **advertisement on a search engine results page prior**  
 7 **to filing a lawsuit on behalf of 1-800 Contacts**  
 8 **relating to the display of search advertising?**  
 9 MR. STONE: I think you can answer that  
 10 yes or no.  
 11 THE WITNESS: Yes.  
 12 **Q. (By Mr. Matheson) If I asked you in any**  
 13 **specific case what were those factors, would you**  
 14 **decline to answer in order to protect a privilege?**  
 15 A. Unless there's an instance where the  
 16 privilege has already been waived, yes.  
 17 **Q. Did you investigate any factors other than**  
 18 **the appearance of a sponsored link on a search engine**  
 19 **results page before contacting Lens Discounters on**  
 20 **behalf of 1-800 Contacts regarding the alleged**  
 21 **unauthorized use of 1-800 Contacts' trademark?**  
 22 MR. STONE: Objection. Assumes facts not  
 23 in evidence; vague and ambiguous; improper as to  
 24 form.  
 25 You can answer yes or no, if you know.

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1 THE WITNESS: Yes.

2 **Q. (By Mr. Matheson) What were those**  
3 **factors?**

4 MR. STONE: Instruct the witness not to  
5 answer on the grounds of attorney work product.

6 **Q. (By Mr. Matheson) Follow the instruction,**  
7 **sir?**

8 A. Yes.

9 MR. STONE: I'm just trying to be helpful.  
10 I mean, there may well be information that was  
11 disclosed in the conduct of communications with Lens  
12 Discounters, or there may be information disclosed  
13 that's in complaints or attached to complaints. So  
14 there's a lot of information that probably results  
15 from an investigation that he has already disclosed  
16 that would not be subject to the privilege, if you  
17 want to get at it that way.

18 Again, I'm not trying to tell you how to  
19 ask the questions; I'm just trying to suggest that  
20 the work product privilege that I'm asserting now is  
21 because I don't think the witness can, as he sits  
22 here today, distinguish between what work they did  
23 that they shared with the other side or shared with  
24 the court and what work they did that they may not  
25 have shared.

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1 So I don't know that he can draw that  
2 distinction today; but it's there in the record if  
3 you want to go at it that way.

4 **Q. (By Mr. Matheson) And to be candid, I'm**  
5 **not aware of anything you've disclosed regarding**  
6 **other investigation. I'm just trying to understand,**  
7 **to the extent it relates to monitoring activity, what**  
8 **else did you review besides screenshots. So that's**  
9 **why I'm asking these questions. It's not because I**  
10 **have something I'm going to pull out and say, ha, ha,**  
11 **what about this. I'm just trying to understand,**  
12 **other than looking at screenshots, what did you do?**  
13 **And if the answer is it's privileged, then that's**  
14 **fine.**

15 MR. STONE: So I guess my point is to you,  
16 Mr. Pratt -- let me instruct you this way. The work  
17 that you did in conducting your investigation would  
18 be protected by the work product privilege. If you  
19 can recall an instance where you shared some of the  
20 results of that investigation with the other side or  
21 with the court or otherwise publicly disclosed it, if  
22 you have a recollection of that, you should provide  
23 that to Mr. Matheson. If you don't recall for  
24 certain what it is you may have shared or not shared,  
25 then you should decline to answer on the grounds of

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1 privilege.

2 THE WITNESS: Okay. I think I can answer  
3 generally, because I don't recall specifically if it  
4 was Lens Discounters or not. But I know that at  
5 times we've shared with either the court or with  
6 another party the use of Keyword Spy. I think that  
7 we've also disclosed with the court the use of WHOIS  
8 data and information to research who they were and to  
9 investigate who actually owns the landing pages,  
10 assuming the landing pages were accurate and correct.

11 **Q. (By Mr. Matheson) Anything else other**  
12 **than data from Keyword Spy and WHOIS?**

13 A. Those are the only things that, as I sit  
14 here today, I can recollect have been disclosed  
15 either to the other party or to the court.

16 **Q. Is there anything else that you reviewed**  
17 **that falls into a category that was not disclosed to**  
18 **another party or a court?**

19 MR. STONE: Objection. Instruct the  
20 witness not to answer on the grounds of work product,  
21 if I understand it.

22 You're asking him did he do anything else  
23 besides that?

24 MR. MATHESON: Precisely.

25 **Q. (By Mr. Matheson) Was there any other**

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1 **basis for your decision to file a lawsuit other than**  
2 **screenshots, Keyword Spy, and information from WHOIS**  
3 **that you cannot reveal in order to protect a**  
4 **privilege?**

5 MR. STONE: I think you can answer that  
6 question.

7 THE WITNESS: Yes.

8 **Q. (By Mr. Matheson) And you're not going to**  
9 **reveal that? Just to make sure the record is clear,**  
10 **what is that information --**

11 A. Correct.

12 **Q. -- you're not going to reveal what that**  
13 **information is?**

14 A. Correct.

15 **Q. Gotcha. Okay.**

16 **Going to hand you a document we've marked**  
17 **as CX1186.**

18 **(Exhibit CX1186 was identified.)**

19 **Q. And my -- I gave you three pages because**  
20 **that's how it was produced to us. I don't really**  
21 **understand why the latter two pages were attached to**  
22 **the first page. I have no questions regarding those**  
23 **two pages. This is just the manner in which the**  
24 **document was produced. All of my questions relate to**  
25 **the first page.**

101	<p>1 MR. STONE: And this was produced by Lens 2 Discounters, not by 1-800? 3 MR. MATHESON: That is correct. 4 MR. STONE: Okay. 5 MR. MATHESON: Yeah, I'm showing it to you 6 because I believe you've seen it before. It is 7 confidential, should be maintained as confidential. 8 MR. STONE: I don't know. He may not have 9 seen the USPS Track &amp; Confirm slip that is page 3. 10 MR. MATHESON: It wasn't clear to me if 11 this was attached to it or not. I don't know. 12 MR. STONE: Fine. I'm joking with that 13 comment. 14 (The witness reviews the document.) 15 <b>Q. (By Mr. Matheson) Do you recognize this</b> 16 <b>document, sir?</b> 17 A. Yes, I have a recollection of this 18 document. 19 <b>Q. What is this document?</b> 20 A. This document is a response from the CEO 21 of LensDiscounters.com. 22 <b>Q. A response to what?</b> 23 A. A response to -- I believe, as indicated 24 in the document, a letter from me dated May 12th, 25 2009.</p>	103	<p>1 locations that were searched. 2 <b>Q. Were you aware of the intent of the</b> 3 <b>search, what you were trying to produce?</b> 4 A. Yes, I'm aware. 5 <b>Q. What was the goal of the production?</b> 6 A. The intent of the production was to be 7 fully responsive to the document requests in both 8 scope and breadth. 9 <b>Q. There was also a subpoena duces tecum</b> 10 <b>addressed to you personally. Are you aware of any</b> 11 <b>search conducted in response to that subpoena duces</b> 12 <b>tecum?</b> 13 A. Yes. 14 <b>Q. Do you know the locations of documents</b> 15 <b>that were searched in response to that subpoena duces</b> 16 <b>tecum?</b> 17 A. Yes. 18 <b>Q. Did those locations include your</b> 19 <b>correspondence files?</b> 20 A. The correspondence files that I was in 21 possession of, yes. 22 <b>Q. How far back did those files go?</b> 23 A. I don't have a certain knowledge of that 24 right now as we sit here, but I have an impression 25 that they went back to probably 2005.</p>
102	<p>1 <b>Q. Do you, in the ordinary course of</b> 2 <b>corresponding with parties against whom litigation is</b> 3 <b>contemplated, keep a copy of letters you send to such</b> 4 <b>parties?</b> 5 MR. STONE: Objection. Improper as to 6 form; compound; vague and ambiguous. 7 You can answer. 8 THE WITNESS: Yes. 9 <b>Q. (By Mr. Matheson) Do you know whether or</b> 10 <b>not you kept a copy of the letter dated May 12th,</b> 11 <b>2009, referred to in this document?</b> 12 A. As I sit here today, I don't know. 13 <b>Q. You're aware that documents were produced</b> 14 <b>from the files of Holland &amp; Hart --</b> 15 A. Yes. 16 <b>Q. -- in response in this matter?</b> 17 A. Yes. 18 <b>Q. Did you -- are you aware of the search</b> 19 <b>that was conducted in order to produce such</b> 20 <b>documents?</b> 21 A. I'm aware of some of the aspects of that 22 search, yes. 23 <b>Q. What aspects are you aware of? Are you</b> 24 <b>aware of locations that were searched?</b> 25 A. Generally. I'm aware of some of the</p>	104	<p>1 <b>Q. I'll represent we're not aware if the</b> 2 <b>letter dated May 12th -- we're not aware that it was</b> 3 <b>produced. Is it your understanding that an attempt</b> 4 <b>was made to gather documents including the letter</b> 5 <b>referred to dated May 12th, 2009?</b> 6 A. Yes. 7 <b>Q. The second paragraph of this letter</b> 8 <b>states, and I quote, "We will comply with your</b> 9 <b>request and remove the sponsored advertisements that</b> 10 <b>appear when a user searches for one of 1800contacts</b> 11 <b>trademarked terms or a variation thereof."</b> 12 <b>And the last sentence of that paragraph</b> 13 <b>reads, "We have now added the negative keywords as</b> 14 <b>you have listed in your letter."</b> 15 <b>Based on this communication from the CEO</b> 16 <b>of Lens Discounters to yourself, did you understand</b> 17 <b>that they had attempted to ensure that their</b> 18 <b>advertisements did not appear on search engine</b> 19 <b>results pages in response to searches for</b> 20 <b>1-800 Contacts' trademarked terms?</b> 21 A. I don't have a specific recollection of 22 what my impression was at the time. 23 <b>Q. Sitting here today, do you think that's a</b> 24 <b>fair reading of the document?</b> 25 MR. STONE: Objection. Improper as to</p>

105	<p>1 form. Document speaks for itself.</p> <p>2 THE WITNESS: Yeah. I mean, as I read it,</p> <p>3 those sentences that you read said that we've now</p> <p>4 added the negative keywords as you have listed in</p> <p>5 your letter. I don't have any reason to believe</p> <p>6 otherwise.</p> <p>7 <b>Q. (By Mr. Matheson) Did you communicate to</b></p> <p>8 <b>your client that LensDiscounters.com had implemented</b></p> <p>9 <b>negative keywords?</b></p> <p>10 A. I don't have a recollection of that,</p> <p>11 necessarily, right now. It's my practice to inform</p> <p>12 my client of going-ons in cases and matters.</p> <p>13 <b>Q. Why did you contact Lens Discounters on</b></p> <p>14 <b>behalf of 1-800 Contacts?</b></p> <p>15 MR. STONE: At this time? You mean in May</p> <p>16 of 2009?</p> <p>17 <b>Q. (By Mr. Matheson) Yes. In May of 2009,</b></p> <p>18 <b>why did you contact Lens Discounters on behalf of</b></p> <p>19 <b>1-800 Contacts?</b></p> <p>20 A. I don't have a specific recollection of</p> <p>21 why the contact was made in this instance.</p> <p>22 <b>Q. Did your contact relate to display of</b></p> <p>23 <b>search advertising on search engine results pages?</b></p> <p>24 MR. STONE: Objection. Lacks foundation;</p> <p>25 improper as to form.</p>	107	<p>1 A. I don't recall a specific -- any specific</p> <p>2 facts regarding an investigation as I sit here.</p> <p>3 <b>Q. Do you recall any information you reviewed</b></p> <p>4 <b>prior to contacting LensDiscounters.com regarding</b></p> <p>5 <b>your client's trademark rights?</b></p> <p>6 A. I don't have any specific recollection,</p> <p>7 just other than my general practice and procedures.</p> <p>8 <b>Q. Do you recall whether or not prior to the</b></p> <p>9 <b>time you contacted LensDiscounters.com you reviewed</b></p> <p>10 <b>any information other than a screenshot displaying</b></p> <p>11 <b>sponsored links from LensDiscounters.com?</b></p> <p>12 A. As I mentioned previously, it's my</p> <p>13 practice and procedures to look at a number of other</p> <p>14 things besides that before sending a letter.</p> <p>15 <b>Q. But you can't recall -- can you recall any</b></p> <p>16 <b>such sources? Can you recall any such information</b></p> <p>17 <b>you reviewed prior to contacting LensDiscounters.com?</b></p> <p>18 A. Not specific to LensDiscounters.com.</p> <p>19 <b>Q. I hand you a document we've marked as</b></p> <p>20 <b>CX0709.</b></p> <p>21 <b>(Exhibit CX0709 was identified.)</b></p> <p>22 <b>Q. I don't have any detailed questions about</b></p> <p>23 <b>this document -- feel free to review it -- other than</b></p> <p>24 <b>just generally what this document is and the bolded</b></p> <p>25 <b>text after "II. Negative Phrase-Matched Keywords."</b></p>
106	<p>1 THE WITNESS: That's an assumption I'd</p> <p>2 make based on the language of this letter.</p> <p>3 <b>Q. (By Mr. Matheson) Do you recall in</b></p> <p>4 <b>general having interactions with LensDiscounters.com</b></p> <p>5 <b>at approximately this time period regarding the</b></p> <p>6 <b>display of search advertisements on search engine</b></p> <p>7 <b>results pages?</b></p> <p>8 A. In general, yes.</p> <p>9 <b>Q. Do you recall in general that you informed</b></p> <p>10 <b>LensDiscounters.com they were violating your client's</b></p> <p>11 <b>trademark rights in 2009?</b></p> <p>12 A. I don't have a specific recollection of</p> <p>13 the content of a letter that was sent -- of this</p> <p>14 letter.</p> <p>15 <b>Q. Do you recall discussing your client's</b></p> <p>16 <b>trademark rights with LensDiscounters.com in 2009?</b></p> <p>17 A. Generally, yes.</p> <p>18 <b>Q. Do you recall informing</b></p> <p>19 <b>LensDiscounters.com at any point in time that they</b></p> <p>20 <b>were violating your client's trademark rights?</b></p> <p>21 A. I don't have a specific recollection, but</p> <p>22 it was likely in a letter dated May 12th, 2009.</p> <p>23 <b>Q. Do you recall any investigation you</b></p> <p>24 <b>performed prior to discussing with</b></p> <p>25 <b>LensDiscounters.com your client's trademark rights?</b></p>	108	<p>1 A. (The witness reviews the document.)</p> <p>2 Okay.</p> <p>3 <b>Q. Do you recognize this document, sir?</b></p> <p>4 A. I do.</p> <p>5 <b>Q. What is it?</b></p> <p>6 A. This is an e-mail to Matt, counsel for</p> <p>7 Lenses For Less.</p> <p>8 <b>Q. Did you write this e-mail?</b></p> <p>9 A. I did.</p> <p>10 <b>Q. Does this e-mail provide information to</b></p> <p>11 <b>counsel for Lenses For Less regarding the</b></p> <p>12 <b>implementation of negative phrase-matched keywords in</b></p> <p>13 <b>Google?</b></p> <p>14 MR. STONE: Objection. The document</p> <p>15 speaks for itself.</p> <p>16 THE WITNESS: I was going to say that's</p> <p>17 what the document appears to do, yes.</p> <p>18 <b>Q. (By Mr. Matheson) Why did you send that</b></p> <p>19 <b>information to counsel for Lenses For Less?</b></p> <p>20 A. My current recollection is that counsel</p> <p>21 for Lenses For Less expressed a concern that</p> <p>22 implementing negative keywords would exclude them</p> <p>23 from showing up on searches for generic terms.</p> <p>24 <b>Q. How did sending him information regarding</b></p> <p>25 <b>negative phrase-matched keywords address the concern</b></p>



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1 **he expressed to you?**

2 A. Because this document, one, it expresses,  
3 as noted above, the intent for it to focus on  
4 searches for registered, federally registered  
5 trademarks and confusingly similar variations, one,  
6 as far as intent. And then, second, identifying ways  
7 that negatives can be implemented such that their  
8 searches would only be excluded in response to those  
9 exact-matched terms.

10 **Q. Returning to the first exhibit we looked**  
11 **at, "Description of Monitoring Activities," the**  
12 **trademark monitoring reports you received from**  
13 **1-800 Contacts, what information do these reports**  
14 **contain, other than screenshots indicating sponsored**  
15 **links or other paid search advertising appearing on**  
16 **search engine results pages?**

17 A. So those would vary. They varied  
18 throughout the representation. At times it would  
19 illustrate the time the snapshot was taken. They  
20 would list at times a string of basically server  
21 bounces and where -- when a link was selected, where  
22 you were taken and what credit was given to  
23 affiliates, for example, to show whether it was a  
24 principal party or an affiliate network. And there  
25 was oftentimes contact information for the parties

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1 that would show up.

2 **Q. Any other information contained in these**  
3 **periodic reports beyond what you just listed?**

4 A. Not that I recall.

5 **Q. Was there any information contained in**  
6 **these reports regarding an empirical analysis of the**  
7 **likelihood that consumers would become confused by**  
8 **the paid search advertising displayed in the reports?**

9 MR. STONE: Objection. Vague and  
10 ambiguous.

11 You can answer.

12 THE WITNESS: Not that I recall.

13 **Q. (By Mr. Matheson) Do you recall ever**  
14 **conducting a survey or another empirical analysis**  
15 **using the screenshot included in one of these**  
16 **reports?**

17 A. I'm trying to recall whether there was an  
18 actual screenshot from a report used in the Lens.com  
19 survey or not. I'm not positive.

20 **Q. Other than the Lens.com survey, do you**  
21 **recall ever conducting a survey or another empirical**  
22 **analysis -- or, strike that.**

23 **Other than the Lens.com survey, are you**  
24 **aware of another survey or empirical analysis using a**  
25 **screenshot included in one of the periodic reports**

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1 **transmitted to you?**

2 MR. STONE: Objection. Improper as to  
3 form.

4 But you can answer.

5 THE WITNESS: I think in response to that,  
6 I would say that I'm not aware of any specifically  
7 using the screenshots used in those reports, other  
8 than the Lens.com survey, possibly.

9 **Q. (By Mr. Matheson) It was not your**  
10 **practice to run a survey in order to determine**  
11 **whether the screenshots sent to you by your client**  
12 **would likely result in consumer confusion?**

13 A. Other than the Lens.com survey, no.

14 **Q. Did you ever conclude that an advertiser**  
15 **infringed one of 1-800 Contacts' trademarks solely on**  
16 **the basis of the appearance of its advertisement on a**  
17 **search engine results page?**

18 MR. STONE: Give me just a second.

19 I'm going to instruct the witness not to  
20 answer on the grounds that that would invade the  
21 attorney work product privilege and perhaps the  
22 attorney-client privilege as the question is  
23 currently framed.

24 **Q. (By Mr. Matheson) Are you going to follow**  
25 **your attorney's instructions, sir?**

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1 A. I am.

2 **Q. Does Holland & Hart track billable hours**  
3 **in the ordinary course of business, billable hours as**  
4 **attorneys bill?**

5 A. Yes.

6 **Q. Are you -- do you have a good sense for**  
7 **how many billable hours you have recorded this year?**

8 A. Not to an exact number, but generally,  
9 yes.

10 **Q. What's your sense? A range.**

11 A. Between 1,700 and 1,800 hours.

12 **Q. And the year is not quite over, but close**  
13 **to over?**

14 A. Excuse me? The year -- correct.

15 **Q. You're on a calendar year?**

16 A. Yes. On a calendar year, the year is  
17 almost over, yes.

18 **Q. Okay. Do you have a sense for what**  
19 **portion of those hours were billed to 1-800 Contacts?**

20 A. I have a general sense.

21 **Q. Are you billing your time today to**  
22 **1-800 Contacts?**

23 A. I haven't had that discussion with the  
24 client yet.

25 **Q. Did you meet with Mr. Stone prior to this**

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1 **deposition?**  
 2 A. I did.  
 3 **Q. How long did you meet with him for?**  
 4 A. It was probably about four and a half  
 5 hours.  
 6 **Q. When did this meeting occur?**  
 7 A. Yesterday.  
 8 **Q. Did you bill that time to 1-800 Contacts?**  
 9 A. I haven't had that discussion with the  
 10 client, either.  
 11 **Q. Have you recorded that time in any**  
 12 **fashion?**  
 13 A. I've recorded it.  
 14 **Q. What do you mean by "recorded it"?**  
 15 A. I've written it down.  
 16 **Q. When you write it down -- we used to have**  
 17 **Carpe Diem. Do you guys have a time entry system?**  
 18 A. We do.  
 19 **Q. Do you enter your own time to the time**  
 20 **entry system?**  
 21 A. I do.  
 22 **Q. You've entered that time in a time entry**  
 23 **system?**  
 24 A. Yeah.  
 25 THE REPORTER: I'm not sure what --

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1 MR. MATHESON: You have entered the time  
 2 into a time entry system.  
 3 MR. STONE: I think she didn't understand  
 4 Carpe Diem.  
 5 (Off the record briefly.)  
 6 **Q. (By Mr. Matheson) Okay. So just to make**  
 7 **sure the record's clear: you have entered the time**  
 8 **into your time entry system that you spent yesterday**  
 9 **with Mr. Stone preparing for this deposition?**  
 10 A. Correct.  
 11 **Q. Did you assign that time a billing**  
 12 **designation of any sort?**  
 13 A. No.  
 14 **Q. You're not required to assign time a**  
 15 **billing designation when it's entered into your time**  
 16 **tracking system?**  
 17 A. No, you can. You can also include a  
 18 temporary number and a temporary assignment until  
 19 things are figured out.  
 20 **Q. Why did you include a temporary number?**  
 21 A. Because I haven't discussed it with the  
 22 client yet.  
 23 **Q. You haven't discussed what with the client**  
 24 **yet?**  
 25 A. Whether I would bill my time for meeting

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1 with Mr. Stone.  
 2 **Q. Likewise, you haven't discussed with the**  
 3 **client whether you'll bill your time for this**  
 4 **deposition today?**  
 5 A. That's correct.  
 6 **Q. I think we're wrapped up. I do have one**  
 7 **question I want to ask, but it's going to be on a**  
 8 **complaint that you signed. And I'm happy to give you**  
 9 **all the time in the world to review this complaint,**  
 10 **but I'm afraid if we do it on the record, it's going**  
 11 **to soak up like an hour. I'd be happy to hand it to**  
 12 **you and you can review it at your leisure, and then**  
 13 **we can discuss it after a break. If you want to take**  
 14 **lunch --**  
 15 MR. STONE: Well, we're not going to take  
 16 an hour of his time to review something. That's not  
 17 leisure.  
 18 MR. MATHESON: Well, it's literally -- I'm  
 19 going to ask about one paragraph. I'm just  
 20 worried --  
 21 MR. STONE: You can show him the  
 22 complaint. You could have given it to us earlier, as  
 23 you know. You could have given us the documents  
 24 earlier for him to review if you had wanted him to  
 25 review them. I think the manual provides for that,

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1 and prior orders of the ALJ have provided for that.  
 2 But you can give it to him now, and he'll review it  
 3 as quickly as he can to whatever extent he feels he  
 4 needs to.  
 5 MR. MATHESON: All right. So you're not  
 6 amenable to reviewing this complaint during a break  
 7 so I can ask about one paragraph?  
 8 MR. STONE: No, we're not.  
 9 MR. MATHESON: All right. In that case,  
 10 we will turn it over.  
 11 How long have we been on the record?  
 12 MR. CHIARELLO: I have two hours and 20  
 13 minutes.  
 14 MR. MATHESON: Okay. We'd like to reserve  
 15 an hour and ten minutes or whatever is appropriate  
 16 after Mr. Stone has an opportunity to question.  
 17 (A discussion was held off the record.)  
 18 EXAMINATION  
 19 BY MR. STONE:  
 20 **Q. Good morning, Mr. Pratt.**  
 21 A. Good morning.  
 22 **Q. Take a look at the exhibit that you were**  
 23 **shown earlier, CX0709. Do you have that in front of**  
 24 **you?**  
 25 A. I do.

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1 **Q. Okay. Mr. Matheson asked you about**  
 2 **phrase-matched -- negative phrase-matched keywords.**  
 3 **Do you remember that questioning?**  
 4 A. I do.  
 5 **Q. Does this document, Exhibit CX0709, also**  
 6 **talk about negative exact-matched keywords?**  
 7 MR. MATHESON: Objection to the leading.  
 8 Document speaks for itself.  
 9 THE WITNESS: It does.  
 10 **Q. (By Mr. Stone) Where on the document is**  
 11 **there a discussion of negative exact-matched**  
 12 **keywords?**  
 13 A. It's located directly below a heading III,  
 14 "Negative Exact-Matched Keywords," in bold.  
 15 **Q. And what's a negative exact-matched**  
 16 **keyword?**  
 17 MR. MATHESON: Objection to foundation.  
 18 THE WITNESS: So my understanding is that  
 19 a negative exact-matched keyword when implemented in  
 20 a keyword ads campaign would restrict a user's  
 21 advertisement or sponsored link from being displayed  
 22 in response to a search for that exact keyword  
 23 without variation.  
 24 **Q. (By Mr. Stone) The information that's**  
 25 **contained in Exhibit CX0709 that has these two Roman**

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1 **numeral headings, Roman numeral II, Roman numeral**  
 2 **III, do you recall where this information came from?**  
 3 A. My recollection is that it came from  
 4 Google AdWords, from their web page.  
 5 **Q. And what was the source of your**  
 6 **understanding of how negative keywords worked as**  
 7 **between exact match and phrase match?**  
 8 A. So my understanding was based on the  
 9 review of Google's online tutorial as well as  
 10 discussions with employees at 1-800 Contacts.  
 11 **Q. If you look at the second page of Exhibit**  
 12 **CX0709, there's a URL address there.**  
 13 A. I see that.  
 14 **Q. What did you -- what was the reason for**  
 15 **including that URL address in this e-mail?**  
 16 A. I don't have an exact recollection. My  
 17 belief, as I sit here, is it provides Mr. -- it  
 18 provides Matt with the resource himself to see the  
 19 different ways that the negative keywords can be  
 20 implemented and to see -- and to give him a resource  
 21 to ask additional questions. It's a support for him.  
 22 **Q. (By Mr. Stone) Was this the only**  
 23 **communication you ever had with Matt?**  
 24 A. I don't recall. I believe so, but I'm not  
 25 positive.

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1 **Q. Okay. Well, let me see if I can show you**  
 2 **some documents.**  
 3 **Let me ask the reporter to mark as RX64 a**  
 4 **document bearing the production number**  
 5 **1-800F\_00081723-24.**  
 6 **(Exhibit RX0064 was marked.)**  
 7 **Q. The reporter has handed you what we've**  
 8 **marked for identification as RX0064. Could you take**  
 9 **a moment to review that.**  
 10 A. (The witness reviews the document.)  
 11 Okay.  
 12 **Q. Have you seen this document before?**  
 13 A. I have.  
 14 **Q. What is it?**  
 15 A. This is a communication between Mark  
 16 Miller and Matt Jenkins.  
 17 **Q. Were you copied on this communication?**  
 18 A. I was.  
 19 **Q. And who is Matt Jenkins?**  
 20 A. Matt Jenkins is an attorney, counsel for  
 21 Lenses For Less.  
 22 **Q. And if you go back to Exhibit CX0709, is**  
 23 **he the same Matt referred to there?**  
 24 A. He is.  
 25 **Q. Having now looked at these two documents,**

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1 **CX0709 and RX0064, do you have a recollection as to**  
 2 **whether there had been a communication with Lenses**  
 3 **For Less about prior infringements of the**  
 4 **1-800 Contacts trademarks?**  
 5 A. Yes.  
 6 **Q. What do you recall about those prior**  
 7 **communications?**  
 8 A. I recall that there was a cease and desist  
 9 letter sent; and then my recollection is ongoing  
 10 communications with Mark Miller, between Mark Miller  
 11 and their counsel regarding potential settlement.  
 12 **Q. If you look at CX0709, the document that**  
 13 **you were shown earlier by Mr. Matheson, you'll see in**  
 14 **the second paragraph it says that "The general intent**  
 15 **and focus of the settlement agreement is to prevent**  
 16 **sponsored ads from being displayed in response to**  
 17 **searches for the other party's registered trademarks**  
 18 **and exact URLs."**  
 19 **Do you see that?**  
 20 A. I do.  
 21 **Q. After reading that sentence, does this**  
 22 **suggest to you that a settlement agreement had been**  
 23 **sent out prior to January 25 of 2010?**  
 24 MR. MATHESON: Objection to the foundation  
 25 and the leading.

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1 THE WITNESS: That's my takeaway from that  
2 sentence, yes, that a settlement agreement had been  
3 sent and that these communications were ongoing  
4 communications to clarify that agreement.  
5 **Q. (By Mr. Stone) In the context of**  
6 **settlement agreements, were the settlement agreements**  
7 **that you -- let me ask you this way. Were you**  
8 **involved in negotiating some settlement agreements on**  
9 **behalf of 1-800 Contacts with other companies?**  
10 A. Yes.  
11 **Q. Were those agreements ones in which there**  
12 **was an actual negotiation, that is, you would present**  
13 **a proposal, they would respond, and there would be**  
14 **back and forth and changes to the agreement before it**  
15 **was finalized?**  
16 MR. MATHESON: Objection to the form.  
17 THE WITNESS: Yes. There were -- there  
18 were often e-mail exchanges, redline versions sent  
19 back and forth clarifying language and modifying the  
20 terms of the agreement.  
21 **Q. (By Mr. Stone) In terms of the**  
22 **communications you had regarding the settlement**  
23 **agreements, did you ever find any of the other**  
24 **parties who were eager to sign the agreements?**  
25 A. No, not to my recollection.

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1 **Q. Did the other parties resist, push back,**  
2 **or otherwise try to either avoid signing the**  
3 **agreement or change the terms of the agreement?**  
4 A. Yes, in every instance that I can recall.  
5 **Q. Take a look at CX0709 still, if you would.**  
6 **There's a listing of trademarks with bullet points in**  
7 **front of them on that.**  
8 A. I see that.  
9 **Q. Were you involved in obtaining the**  
10 **trademark registration for any of those trademarks?**  
11 A. Yes.  
12 **Q. Which ones, if you recall?**  
13 A. I recall the Aquasoft trademarks, both of  
14 those, being involved in the prosecution of those.  
15 And I recall some ongoing prosecution and maintenance  
16 of a number of the others.  
17 **Q. Do you know whether any of those**  
18 **trademarks are incontestable?**  
19 A. Yes.  
20 **Q. What's it mean to be incontestable for a**  
21 **trademark?**  
22 A. An incontestable trademark is one that's  
23 been registered and a declaration has been filed with  
24 the USPTO. It's been registered and not been  
25 invalidated or contested for a period of time. And

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1 after that period of time, if the owner submits a  
2 declaration there's been ongoing use, uninterrupted  
3 use, that it is -- it becomes incontestable.  
4 **Q. Which of these marks did you understand**  
5 **were incontestable at the time?**  
6 A. So at the time, my understanding were that  
7 1-800 Contacts, that both registration No. 2,731,114  
8 and 2,675,866 were incontestable at that time.  
9 **Q. And have any of these trademarks become**  
10 **incontestable since that time, if you know?**  
11 A. I don't know for sure. My informed  
12 belief, based on timing, would be that the Aquasoft  
13 trademark as well as The World's Largest Contact Lens  
14 Store, and possibly We Deliver You Save as well.  
15 **Q. On the first page of Exhibit CX0709 -- I**  
16 **had earlier directed you to the URL on the second**  
17 **page, but there's a URL about halfway down on the**  
18 **first page. Do you see that?**  
19 A. Uh-huh.  
20 **Q. And what was your purpose of including**  
21 **that URL in this particular e-mail to Matt Jenkins?**  
22 A. Again, it was to provide him with a  
23 source, a third-party source that he could identify  
24 and obtain additional information on how negative  
25 keywords work to inform himself and his client.

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1 **Q. Let me show you another document. We'll**  
2 **mark this as RX0065.**  
3 **(Exhibit RX0065 was marked.)**  
4 **Q. The reporter has handed you what we've**  
5 **marked for identification as Exhibit RX0065. Is this**  
6 **a document you've seen before?**  
7 A. Yes.  
8 **Q. What is it?**  
9 A. This is a letter received April 20th,  
10 2010, directed to 1-800 Contacts, and specifically  
11 Joe Zeidner, from Matt Jenkins regarding the  
12 settlement agreement that was signed between  
13 1-800 Contacts and Lenses For Less.  
14 **Q. And what do you understand this to relate**  
15 **to?**  
16 A. My understanding, looking at the document,  
17 is that it relates to a -- it's a notice to  
18 1-800 Contacts of a potential breach of the  
19 settlement agreement by one of their affiliates.  
20 **Q. By one of whose affiliates?**  
21 A. One of 1-800 Contacts' affiliates, based  
22 on advertisement that came up in response to a  
23 search.  
24 **Q. And were you involved --**  
25 A. Actually, let me correct. It's not in

31 (Pages 121 to 124)

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1 response to a search, it's a link to an affiliate  
2 site, an affiliate's website.

3 **Q. And were you involved in responding to  
4 this letter from Mr. Jenkins?**

5 A. My recollection, I believe I was.

6 **Q. And what did you -- what was the  
7 resolution of that, if you recall?**

8 A. I believe that -- my recollection is that  
9 this affiliate was they call it terminated from the  
10 affiliate program, meaning that the affiliate was no  
11 longer associated with 1-800 Contacts because the  
12 affiliate violated the terms and conditions that  
13 1-800 Contacts had provided those affiliates to avoid  
14 these types of situations that violate the  
15 agreements.

16 MR. STONE: Let me ask the reporter to  
17 mark as RX0066 a letter dated April 22nd, 2010.  
18 (Exhibit RX0066 was marked.)

19 **Q. (By Mr. Stone) The reporter has handed  
20 you what we've marked for identification as RX0066.  
21 Do you recognize this document?**

22 A. I do.

23 **Q. And what is this document?**

24 A. This document is a response --  
25 communication to Matt Jenkins in response to the

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1 previous letter that we discussed, the April 15th  
2 letter.

3 **Q. So RX0066 is a response to RX0065?**

4 A. Correct.

5 **Q. And this is a document you've seen before?**

6 A. It is.

7 **Q. Do you know of any further communications  
8 regarding this particular issue that came after  
9 RX0066?**

10 A. Not that I'm aware of.

11 **Q. You mentioned earlier today a survey that  
12 was done in connection with the Lens.com litigation.**

13 A. Yes.

14 **Q. Who did that survey, if you know?**

15 A. Trying to remember if it was -- Carl  
16 Degen, I believe. I'm not positive.

17 **Q. What was the purpose of that survey, if  
18 you recall?**

19 A. The purpose of that survey was to  
20 demonstrate a likelihood of confusion based on the  
21 display of a sponsored link in response to a search  
22 for a trademarked word and to evaluate the different  
23 factors that would influence the level of confusion.

24 **Q. And what did that -- was that survey made  
25 public? Or, in other words -- or was it kept**

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1 **confidential to 1-800 Contacts, or was it shared with  
2 Lens.com?**

3 A. That survey was shared with Lens.com as  
4 part of the Lens.com litigation.

5 **Q. And what were the conclusions that you  
6 recall from that survey?**

7 MR. MATHESON: Objection to the  
8 foundation.

9 THE WITNESS: My recollection -- and the  
10 numbers could be wrong, but my recollection was that  
11 there was a -- based on the survey, that there was a  
12 control and then other instances of displaying an ad  
13 word based on that search, and that the control  
14 illustrated some confusion in the 10 percent range,  
15 that the lowest level of confusion outside of the  
16 control was generally around 17 percent.

17 I remember -- I recall it being around a 7  
18 percent delta between the two with varying levels of  
19 confusion, depending on which factors -- as I  
20 mentioned previously, exposure to the Internet,  
21 frequency of using the Internet, and purchases of  
22 contact lenses.

23 **Q. (By Mr. Stone) Okay. In the Lens.com  
24 case, was there other evidence that you learned about  
25 of actual confusion?**

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1 MR. MATHESON: Objection to the  
2 characterization.

3 THE WITNESS: Yes.

4 **Q. (By Mr. Stone) What other evidence did  
5 you learn about in the course of that case that you  
6 can share that was not covered by any privilege or  
7 confidentiality agreement?**

8 A. I believe this was made of record in the  
9 appeal, that there was evidence of actual confusion  
10 provided by Lens.com on the eve of the summary  
11 judgment hearing that related to a call center agent  
12 who received a call from someone who thought that  
13 they were 1-800 Contacts.

14 MR. MATHESON: Objection to the foundation  
15 based on the answer.

16 **Q. (By Mr. Stone) Thought that who was --**

17 A. Thought that Lens.com was actually  
18 1-800 Contacts. It was Lens.com's call center, and  
19 they track calls for quality control, I would assume,  
20 and the call came in regarding an order. The call  
21 center agent, whoever that was, my recollection is  
22 that they kept a note that said that customer  
23 requested to cancel the order because they thought  
24 that Lens.com was 1-800 Contacts.

25 MR. MATHESON: Objection to foundation.

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1 Best evidence.

2 MR. STONE: Let me ask the reporter to  
3 mark as 67, I think -- RX0067 a set of documents  
4 bearing production Nos. 1-800F\_00084017 through  
5 84043.

6 (Exhibit RX0067 was marked.)

7 **Q. (By Mr. Stone) I want to start with, if  
8 we can, the next to the last page, which is dated --  
9 which is Bates numbered 84042. So you see there's a  
10 letter dated June 28, 2005 --**

11 A. I do.

12 **Q. -- "To whom it may concern," and then it  
13 continues on?**

14 A. Yes.

15 **Q. Can you tell us what these two pages of  
16 Exhibit RX0067 are?**

17 A. These appear to be a letter from Roy  
18 Montclair, who is legal counsel at 1-800 Contacts, to  
19 Lens Discounters notifying them that it's his belief  
20 that there's a targeted scheme to infringe on  
21 1-800 Contacts' trademark by purchasing  
22 advertisements for the 1-800 Contacts trademark to  
23 trigger their competing ad.

24 MR. MATHESON: Objection to the  
25 foundation.

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1 **Q. (By Mr. Stone) And then look, if you  
2 would, at the portion of this document that begins  
3 with the Bates No. 84035.**

4 A. Okay.

5 **Q. Do you have that document in front of you?**

6 A. I do.

7 **Q. And what is this document, the pages 84035  
8 and 84036?**

9 A. So this document is a letter from David  
10 Zeidner, who is legal counsel for 1-800 Contacts, to  
11 Lens Discounters, dated September 1st, 2005.

12 MR. MATHESON: Objection to foundation.  
13 No foundation's been laid that the witness is  
14 familiar with this document other than reading it.

15 **Q. (By Mr. Stone) The same recipient as the  
16 prior letter that we looked at?**

17 MR. MATHESON: Objection to foundation.  
18 It's not clear the witness has any knowledge that  
19 this letter was received by anyone.

20 THE WITNESS: That's correct.

21 **Q. (By Mr. Stone) Then look, if you would,  
22 at the screenshot on 84037. Do you have that one in  
23 front of you?**

24 A. I do.

25 **Q. What is the search for here?**

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1 A. Here the search for is -- the search is  
2 for the term "1-800 contacts."

3 **Q. Okay. And then beneath that we see a  
4 heading that says "Sponsored Links." Do you see  
5 that?**

6 A. I do see that.

7 **Q. Earlier you were asked about -- I think in  
8 the description of your testimony, perhaps, that you  
9 were read by Mr. Matheson, you were asked about the  
10 phrase "sponsored links"?**

11 A. Correct.

12 **Q. And you talked about it, I believe, at  
13 that time in terms of URLs or web addresses?**

14 A. Yes.

15 **Q. When the term "sponsored link" is used  
16 here on a search results page, is that also a subject  
17 on which you may testify?**

18 A. Yes.

19 **Q. Okay. And earlier when you talked about  
20 indicia of confusion, you were being asked about the  
21 reference to sponsored links, the terminology in the  
22 far right-hand side of some pages. Do you recall  
23 that?**

24 A. I do.

25 **Q. When the sponsored links appears on the**

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1 **left-hand side as it does on this Exhibit RX67 on the  
2 page ending in 84037, is that, in your view, also an  
3 indicia of confusion or not?**

4 A. Yes, it is.

5 **Q. How so?**

6 A. Well, if you look at this page  
7 specifically, if you look at the search term and the  
8 tab, you can search specifically for sponsored links.  
9 And the field is 1-800 Contacts, so I believe that it  
10 would be easy for someone to consider that you are  
11 searching for links that are sponsored by  
12 1-800 Contacts, because that's what's in the field  
13 when you're searching for sponsored links.

14 **Q. And do we see an ad here that shows up for  
15 what would appear to be LensDiscounters.com?**

16 A. That's what it would appear to be. Again,  
17 I would investigate further; but it appears, based on  
18 the landing URL, which is not always consistent.

19 **Q. Okay. And if we turn to the next page,  
20 84038, do we see a similar presentation of search  
21 results with the search query being slightly  
22 different?**

23 A. We do.

24 **Q. And how did the search query differ?**

25 A. So the search query has an additional

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1 hyphen. It has "1-800-contacts." So there's an  
2 addition of a hyphen rather than a space.  
3 **Q. Okay. And if we look at the next page,**  
4 **84039 is the Bates number, do we see search results**  
5 **displayed in response to again another search query?**  
6 A. Yes, we do.  
7 **Q. And is there a difference in that search**  
8 **query from the prior ones?**  
9 A. There is. There are no hyphens, and  
10 "1800" is a single term with a space, and then the  
11 term "contacts."  
12 **Q. Now, look, if you would, at the page**  
13 **beginning in 84021, a letter dated September 20,**  
14 **2005, and look at the next -- the three pages that**  
15 **constitute that letter.**  
16 A. Okay.  
17 **Q. Is this a letter that you have seen**  
18 **before?**  
19 A. It is.  
20 **Q. Did you write this letter?**  
21 A. I did.  
22 **Q. On the second page of the letter in the**  
23 **last full paragraph, it says, "Additionally, we are**  
24 **aware that you have communicated directly." Do you**  
25 **see that paragraph?**

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1 A. The last full paragraph? Yeah, "We are  
2 aware that you have communicated" -- yes, I do see  
3 that paragraph.  
4 **Q. Okay. What do you recall, if anything,**  
5 **about the communications that had been had directly**  
6 **with 1-800 Contacts that are referenced here?**  
7 A. My only recollection is that there had  
8 been communications directly between David Zeidner,  
9 Roy Montclair, and Lens Discounters, Mr. Abdulla  
10 specifically.  
11 **Q. And when you say that the -- "However, as**  
12 **of September 16, the above-mentioned practices have**  
13 **not been curtailed," what were you referring to?**  
14 A. I was referring to the appearance of their  
15 sponsored advertisements or sponsored links in  
16 response to searches for 1-800 Contacts' trademarks.  
17 **Q. Okay. In the preceding paragraph on this**  
18 **letter you say, "Your use of the 1800 CONTACTS**  
19 **trademark as a triggering keyword." Do you see that?**  
20 A. I do.  
21 **Q. What do you mean -- or what did you mean**  
22 **at the time by the phrase "triggering keyword"?**  
23 A. I meant that they used -- that essentially  
24 that they're -- a triggering keyword is a keyword  
25 that's entered into a campaign that triggers an

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1 advertisement.  
2 **Q. So -- and when you say "to advertise your**  
3 **directly competitive goods and services," what were**  
4 **you referring to there?**  
5 A. I was referring to their sponsored ads  
6 that were showing up in the previous screenshots that  
7 we had seen.  
8 **Q. And then you say, "Is an obvious attempt**  
9 **to trade off the goodwill established by**  
10 **1800 CONTACTS in its famous 1800 CONTACTS trademark."**  
11 **What were you referring to there when you**  
12 **talk about "the goodwill of 1800 CONTACTS"?**  
13 A. So at that point I was referring to the  
14 investment and the consumer recognition of the  
15 1-800 Contacts trademark itself based on  
16 1-800 Contacts' investment, based on the, again, the  
17 Synovate survey that I had mentioned previously in my  
18 testimony, that there is consumer awareness to that  
19 trademark, and that in this instance particularly  
20 that LensDiscounters.com was trying to leverage or  
21 misappropriate that goodwill to their advantage  
22 without paying the same price, without compensation  
23 to 1-800 Contacts, so that they could direct  
24 consumers to them.  
25 **Q. In the preceding paragraph you talk about**

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1 **"our client's contact lens distribution services."**  
2 **Do you see that?**  
3 A. Yes.  
4 **Q. And you say they are "well known and**  
5 **highly regarded by consumers and competitors alike."**  
6 A. Correct.  
7 **Q. What are the contact lens distribution**  
8 **services you were referring to? What was that a**  
9 **reference to?**  
10 A. So that was a reference to 1-800 Contacts,  
11 the way they operate their business and what they're  
12 known for. They're inwardly and outwardly facing  
13 concepts that they sell service and that they are the  
14 best service provider on the market for contact  
15 lenses, that they will ship them promptly, that a  
16 user will have a certain experience when they contact  
17 1-800 Contacts to place orders. And those are the  
18 things that go into that goodwill component.  
19 MR. MATHESON: Objection to foundation of  
20 that response.  
21 **Q. (By Mr. Stone) You go on in the paragraph**  
22 **to say, "In addition, our client has expended**  
23 **considerable resources in promoting its contact lens**  
24 **distribution services and eye care products under**  
25 **these marks through various media, including**

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1 newspapers, magazines, other print advertisements,  
2 radio and television advertisements, and the World  
3 Wide Web."

4 **Do you see that sentence?**

5 A. I do.

6 **Q. What were you referring to when you listed  
7 all of those media?**

8 MR. MATHESON: Objection to foundation.

9 THE WITNESS: So I was referring to the  
10 investment in advertising efforts that 1-800 Contacts  
11 had put into generating that consumer recognition and  
12 establishing that goodwill, both in media that I had  
13 seen personally and that I was aware of since they  
14 were a client.

15 **Q. (By Mr. Stone) What had you seen  
16 personally?**

17 A. So I had personally heard radio  
18 advertisements; I had personally seen advertisements  
19 on the television; and I had also seen mailers, so  
20 print media.

21 **Q. Okay. And if you look at the next  
22 documents going forward in the stack, so we get to  
23 the page 84017, we see a letter from Mr. Abdulla to  
24 you. Do you see that?**

25 A. I do.

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1 **Q. And do you recall having seen that letter  
2 before?**

3 A. I do recall that.

4 **Q. Okay. And what is this document?**

5 A. This is a document from Mr. Abdulla, the  
6 CEO for Lens Discounters, in response to my letter to  
7 him requesting that he cease and desist those  
8 advertising practices.

9 **Q. So these letters that are included as  
10 RX0067 were all in the year 2005?**

11 A. I believe so.

12 **Q. Okay. And then you were shown by  
13 Mr. Matheson CX1186, which is dated 2009.**

14 A. Yes, I have that.

15 **Q. Okay. And does the fact that you -- there  
16 was this communication in 2009 following these  
17 communications in 2005 indicate to you that something  
18 about Lens Discounters' conduct changed from 2005 to  
19 2009?**

20 A. Yeah. This would indicate that between  
21 September 23rd, 2005 and the date of, you know,  
22 May 12th, 2009, that as of that date, 2009, there was  
23 a change in their -- again, their advertising  
24 practices.

25 **Q. And then let me show you and have marked**

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1 as RX0068, a document dated November 9, 2009.  
2 (Exhibit RX0068 was marked.)

3 **Q. Do you recognize Exhibit RX0068?**

4 A. I do.

5 **Q. What is RX0068?**

6 A. It's a cease and desist letter drafted by  
7 Mark Miller to OptiContacts and LensDiscounters.com.

8 **Q. And is the LensDiscounters.com referred to  
9 in this letter the same as the one we saw referred to  
10 in CX1186 and RX0067?**

11 A. That's my understanding.

12 **Q. Do you have an understanding as to why  
13 this particular letter was sent?**

14 A. My understanding is that, again, this is  
15 in response to keywords being displayed, sponsored  
16 advertisements being displayed in response to  
17 searches for 1-800 Contacts' trademarks.

18 **Q. And at the time of this letter, November 9  
19 of 2009, which law firm were you with?**

20 A. I was with Holland & Hart.

21 MR. STONE: Then let me ask the reporter  
22 to mark as RX0069 a document dated November 12, 2009.  
23 (Exhibit RX0069 was marked.)

24 **Q. (By Mr. Stone) Do you recognize RX0069?**

25 A. I do.

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1 **Q. What is it?**

2 A. It's a response to Mark Miller's letter  
3 that was dated November 9th from, again, the same  
4 party, the CEO from Lens Discounters.

5 **Q. So this was Mr. Abdulla again responding?**

6 A. Correct.

7 MR. STONE: Let me ask the court reporter  
8 to mark as RX0070 a letter dated December 29, 2009.  
9 (Exhibit RX0070 was marked.)

10 **Q. (By Mr. Stone) Do you recognize this  
11 document?**

12 A. I do.

13 **Q. What is it?**

14 A. It's a response from Mark Miller to  
15 Mr. Abdulla discussing his previous letter regarding  
16 their Google ad campaigns.

17 **Q. On the first page of this letter of  
18 RX0070, there's a reference to "Our recent Internet  
19 searching and a recent Keyword Spy report." Do you  
20 see that?**

21 A. I do.

22 **Q. What's the Keyword Spy report referenced  
23 here?**

24 A. So --

25 **Q. In general, not in specific.**



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1 A. Generally, that would be a report  
2 generated by the software Keyword Spy. It's a  
3 service provider, as I mentioned, to identify  
4 advertising campaigns and keywords used by  
5 competitors.  
6 **Q. And is that a company that makes that**  
7 **available, Keyword Spy?**  
8 A. Yeah. There's a website, and you get  
9 access to the website and you can run searches.  
10 **Q. And where it refers here to recent**  
11 **Internet searching, can you tell us if you know what**  
12 **that refers to?**  
13 A. I don't have a specific recollection of  
14 the Internet searching. Based on, again, general  
15 practice, it's searching the variations of the  
16 trademark keywords and analyzing those results, among  
17 other things.  
18 **Q. So typing into a search engine a**  
19 **particular search term and seeing what the results**  
20 **are?**  
21 A. Yes.  
22 **Q. And finally, let me show you a letter**  
23 **dated December 30, 2009, which I'll ask the reporter**  
24 **to mark as RX0071.**  
25 (Exhibit RX0071 was marked.)

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1 **Q. Do you recognize RX0071?**  
2 A. I do.  
3 **Q. What is that?**  
4 A. This is a response from Mr. Abdulla to  
5 Mr. Miller based on his previous letter, indicating  
6 actions that were taken by Lens Discounters in  
7 response to Mr. Miller's letter.  
8 MR. STONE: Okay. It's noon. Why don't  
9 we take a lunch break now, and then we'll come back  
10 and finish up my questioning.  
11 MR. MATHESON: Sounds good.  
12 (Recess from 12:02 p.m. to 12:52 p.m.)  
13 MR. STONE: Let's go back on the record.  
14 I'll ask the reporter to mark as RX0071 a  
15 document bearing production No. 1-800F00082023  
16 through 82067.  
17 (Exhibit RX0072 was marked.)  
18 **Q. (By Mr. Stone) I misspoke earlier, and**  
19 **we've marked this document as RX0072.**  
20 **Can you take a look at this document,**  
21 **Mr. Pratt, and tell us what it is?**  
22 A. So this is a complaint filed by  
23 1-800 Contacts, Inc., against Memorial Eye.  
24 **Q. Okay. If you look at the 14th page of the**  
25 **document, you'll see a signature line?**

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1 A. Yes.  
2 **Q. And does that signature line indicate that**  
3 **you signed the complaint?**  
4 A. It does.  
5 **Q. And this was on December 23 of 2008?**  
6 A. Correct.  
7 **Q. And who was the defendant in this case?**  
8 A. The defendant in this case was Memorial  
9 Eye. And they had a number of d/b/a's listed on the  
10 cover of the complaint: Shipmycontacts,  
11 ship-my-contacts.com, and iwantcontacts.com.  
12 **Q. And was this case litigated after it was**  
13 **filed?**  
14 A. Yeah, to some extent it was.  
15 **Q. Was there discovery taken in the case?**  
16 A. There was discovery taken.  
17 **Q. Were there motions filed?**  
18 A. I believe there were some motions  
19 regarding discovery practice, yes.  
20 **Q. Okay. And were you counsel throughout the**  
21 **case?**  
22 A. I participated for much of the case, yes.  
23 After coming to Holland & Hart, the majority of the  
24 responsibilities were taken over by Mark Miller.  
25 **Q. Was the case ultimately resolved?**

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1 A. It was.  
2 **Q. And was it resolved by settlement or in**  
3 **some other fashion?**  
4 A. By settlement.  
5 **Q. Okay. Take a look, if you would, at the**  
6 **third page of the complaint, which is page No. 2. So**  
7 **it's page 3 of 15. It says there that "See excerpts**  
8 **from the Memorial Eye Websites at Exhibits A and B."**  
9 **Do you see that?**  
10 A. I do see that.  
11 **Q. And if we look further back in the**  
12 **document, are the referenced Exhibits A and B at the**  
13 **pages with the Bates number ending in 82040 and 41?**  
14 A. Yes, they are.  
15 **Q. And can you describe for us what we see**  
16 **there?**  
17 A. So Exhibit A at 82040, it looks like it's  
18 a screen capture of a frequently asked questions from  
19 the shipmycontacts.com web page.  
20 **Q. Okay. And why was this attached to the**  
21 **complaint, if you recall?**  
22 A. My recollection is that it was attached to  
23 the complaint to show -- to establish that they  
24 shipped contact lenses to Utah.  
25 **Q. Okay. And then look further down on the**

145	<p>1 page ending in 82025, which is the third page in of</p> <p>2 the document under the parties.</p> <p>3 A. Okay.</p> <p>4 Q. Down at the very bottom it says "See Whois</p> <p>5 record at Exhibit C."</p> <p>6 A. Yes.</p> <p>7 Q. I think you earlier in your testimony</p> <p>8 mentioned WHOIS?</p> <p>9 A. I did.</p> <p>10 Q. What's WHOIS?</p> <p>11 A. So WHOIS is a way to identify the -- many</p> <p>12 times the person who registered a website or who owns</p> <p>13 a website or controls it, or at least the registrant</p> <p>14 of that domain. So you can get behind and -- my</p> <p>15 understanding is that you can get behind and</p> <p>16 understand who owns the websites if you know the URL.</p> <p>17 Q. Okay. So if you then flip back to</p> <p>18 Exhibit C to this complaint, do we see a results, a</p> <p>19 WHOIS results?</p> <p>20 A. We do.</p> <p>21 Q. And explain to us what we see under C, if</p> <p>22 you could.</p> <p>23 A. So Exhibit C, if you look at the top,</p> <p>24 Network Solutions, they are one of the companies.</p> <p>25 There are multiple companies that offer this type of</p>	147	<p>1 A. I do see that.</p> <p>2 Q. Where did you get that information that's</p> <p>3 included there?</p> <p>4 A. So that is based on information I received</p> <p>5 from the client, 1-800 Contacts. I believe much of</p> <p>6 it is publicly available on their -- on their</p> <p>7 website, about -- under the "About Us" tab. And it's</p> <p>8 information that they -- that they provide as well.</p> <p>9 It's information from the client themselves.</p> <p>10 Q. And is the information that's in</p> <p>11 paragraph 13 there, the next paragraph down, would</p> <p>12 that also be information you obtained from</p> <p>13 1-800 Contacts?</p> <p>14 A. Yes. As I mentioned previously, it would</p> <p>15 be information that I gained from 1-800 Contacts and</p> <p>16 my own experience.</p> <p>17 Q. Okay. And then look at paragraph 14 and</p> <p>18 15. These refer to two registration numbers. Do you</p> <p>19 see that?</p> <p>20 A. I do see that.</p> <p>21 Q. Are these the same ones we looked at</p> <p>22 earlier?</p> <p>23 A. They are.</p> <p>24 Q. And what do these trademark registration</p> <p>25 numbers relate to?</p>
146	<p>1 a service. Network Solutions, when you enter the</p> <p>2 domain name into their search tab, then they will</p> <p>3 give you -- based on their search database, whoever</p> <p>4 the registrant is, they will look at GoDaddy or</p> <p>5 WHOIS.</p> <p>6 And if you look down in the middle of the</p> <p>7 page to the left, it identifies the registrant of --</p> <p>8 again, of the -- of that domain to be Memorial Eye,</p> <p>9 P.A., located in Houston, Texas.</p> <p>10 Q. I see.</p> <p>11 A. It's registered through GoDaddy.com, so --</p> <p>12 Q. And what's the URL that you ran this</p> <p>13 search on or that this search reflects?</p> <p>14 A. Shipmycontacts.com. It's indicated on</p> <p>15 82042 towards the top under the WHOIS search results.</p> <p>16 Q. And is that one of the d/b/a's for</p> <p>17 Memorial Eye?</p> <p>18 A. Yes. According to the complaint, it is.</p> <p>19 Q. Okay. If you would turn to the page</p> <p>20 ending in 26, which is page number -- the fourth page</p> <p>21 in. I'm sorry. With the Bates number ending in 26.</p> <p>22 A. Okay.</p> <p>23 Q. So in paragraph 12 of the complaint, you</p> <p>24 give some description of the business of</p> <p>25 1-800 Contacts. Do you see that?</p>	148	<p>1 A. These relate to the 1-800 Contacts marks</p> <p>2 themselves.</p> <p>3 Q. Is there a description beginning on</p> <p>4 paragraph 17 and continuing on through -- for several</p> <p>5 paragraphs of the conduct that was the basis for this</p> <p>6 complaint?</p> <p>7 A. There is.</p> <p>8 Q. So let's walk through, if we can, those</p> <p>9 various allegations.</p> <p>10 A. Okay.</p> <p>11 Q. In paragraph 18, what was the allegation</p> <p>12 there that provided a portion of the basis for the</p> <p>13 complaint?</p> <p>14 A. So the allegation there is that Memorial</p> <p>15 Eye had purchased ads from Google and other search</p> <p>16 engines that triggered Memorial Eye-based</p> <p>17 advertisements or links to their websites in response</p> <p>18 to searches for 1-800 Contacts.</p> <p>19 Q. So what you had discovered was that if you</p> <p>20 typed in a trademark, 1-800 Contacts trademark into</p> <p>21 the search bar, ads of Memorial Eye would come up?</p> <p>22 A. That's correct.</p> <p>23 Q. Okay. And that was -- you say here that</p> <p>24 such infringing activity was brought to the attention</p> <p>25 of Memorial Eye. Do you see that?</p>

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1 A. I do.

2 **Q. And is the sum of the efforts to bring it**  
3 **to their attention described in this complaint**  
4 **beginning at paragraph 22?**

5 A. It is. Beginning with paragraph 22, it  
6 talks about the history and the various  
7 communications, both from in-house counsel at  
8 1-800 Contacts and by Rader, Fishman and Grauer, I  
9 believe, asking them to cease those actions.

10 **Q. Okay. And in paragraph 19 you go on to**  
11 **say, "notwithstanding the receipt of the cease and**  
12 **desist letter, Memorial Eye refused to cease using**  
13 **1-800 Contacts marks to trigger advertising."**

14 **Do you see that?**

15 A. I do see that.

16 **Q. Explain to us, just so we're all clear,**  
17 **when you say use 1-800 Contacts' marks to trigger**  
18 **advertising, what does that mean?**

19 A. So based on -- based on the information  
20 that we had gathered in preparing for the litigation,  
21 it meant that Memorial Eye had advertising campaigns  
22 such that if a user would search for 1-800 Contacts'  
23 trademarks, that their advertisements would be  
24 displayed in response to that search.

25 **Q. Okay. And you show an example of the**

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1 **screenshot on the next page as part of paragraph 19,**  
2 **correct?**

3 A. Correct.

4 **Q. Was this the only piece of evidence you**  
5 **had gathered before this complaint was filed, this**  
6 **single screenshot?**

7 A. No.

8 **Q. Okay. In the description here you say,**  
9 **"For example, as shown in the below screenshot, which**  
10 **was prepared on April 30, 2008, when 1-800 Contacts**  
11 **entered into the search box" -- I think it means "is**  
12 **entered" into the search box -- "links to**  
13 **www.shipmycontacts.com appear on the right side of**  
14 **the screen under the 'Sponsored Links' section."**

15 **Do you see that?**

16 A. I do.

17 **Q. So looking at this screenshot, then, that**  
18 **follows, show us what it is in the screenshot, if you**  
19 **would, that is referenced in the paragraph.**

20 A. So if you will look at -- again, the  
21 search term in the search box is "1800contacts" with  
22 no spaces, no dashes. Shipmycontacts.com is shown  
23 previously as a d/b/a of Memorial Eye. And if you  
24 look at the top sponsored link on the right-hand side  
25 of that screenshot, Discount Contact Lenses,

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1 www.shipmycontacts.com is listed on the top.

2 **Q. So I just want to -- so if we look on the**  
3 **right-hand column, under where the heading says**  
4 **"Sponsored Links," we see in blue and underlined the**  
5 **words "Discount Contact Lenses"?**

6 A. Correct.

7 **Q. And then it says "Save up to 70 percent on**  
8 **contact lenses?**

9 A. Yes.

10 **Q. Do you know, based on the investigation**  
11 **you did, what the -- save up to 70 percent off of**  
12 **what, what the base price was that they said you**  
13 **would save up to 70 percent off of?**

14 A. I don't.

15 **Q. Was there any indication of whether or not**  
16 **that was -- they would -- an ad that would indicate**  
17 **that you would save 70 percent off of prices at**  
18 **1-800 Contacts?**

19 A. I don't recall anything of that nature.

20 **Q. Okay. And then it goes on to say "Get**  
21 **fast services and free shipping"?**

22 A. That's correct.

23 **Q. And then it has the URL**  
24 **www.shipmycontacts.com?**

25 A. Correct.

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1 **Q. And that's what you were referring to in**  
2 **paragraph 19?**

3 A. Yes.

4 **Q. Okay. And in paragraph 20, did you allege**  
5 **that, in essence, Memorial Eye was using the**  
6 **1-800 Contacts trademarks to trick consumers into**  
7 **visiting the Memorial Eye website?**

8 A. Yes.

9 **Q. And is that allegation of tricking them**  
10 **something that you think is important or relevant to**  
11 **the claims that were made in this lawsuit?**

12 A. I do.

13 **Q. How so?**

14 A. Well, there are multiple claims in the  
15 lawsuit, obviously. There's a federal trademark  
16 infringement claim that's made. There's an unjust  
17 enrichment claim that's made. I believe that there  
18 are unfair competition, false designation of origin  
19 claims.

20 So it's relevant for those claims  
21 whether -- that, in our view at that time, that  
22 Memorial Eye was using the 1-800 Contacts marks to  
23 trick consumers.

24 **Q. And then in paragraph 21 you say that**  
25 **their actions -- "Memorial Eye's actions are**

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1 specifically aimed at diverting web users who are  
2 expressly looking for 1-800 Contacts and  
3 1-800 Contacts goods and services."  
4 Do you see that?  
5 A. I do.  
6 Q. And did you also allege that Memorial Eye  
7 goes even so far as to represent to consumers that it  
8 is 1-800 Contacts and/or that there is an affiliation  
9 between 1-800 Contacts and Memorial Eye by using a  
10 number of variations and misspellings of the marks?  
11 A. We did, yes.  
12 Q. Okay. Beginning in paragraph 22 and  
13 continuing through to paragraph 27, do you describe  
14 some of the communications between the parties?  
15 A. I do.  
16 Q. Take a look, if you would, at Exhibit G to  
17 the complaint. What's Exhibit G?  
18 A. Exhibit G is a letter from David Zeidner,  
19 in-house counsel at 1-800 Contacts, to Memorial Eye  
20 asking them to cease from using 1-800 Contacts'  
21 trademark to generate their advertisements.  
22 Q. And does it have any examples of  
23 screenshots attached to it?  
24 A. It does.  
25 Q. Take a look at the page with the Bates

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1 number ending in 55, which is Exhibit G-003, if you  
2 would.  
3 A. Okay.  
4 Q. What do you see shown in that particular  
5 search result page?  
6 A. So in that search results page we see --  
7 this is an AOL search for the term  
8 "1800contacts.com." And there are sponsored links --  
9 there's an advertisement for 1-800 Contacts as well  
10 as additional sponsored links including Contact Lens  
11 Sale, alleging to direct to shipmycontacts.com.  
12 Q. Okay. So you're referring under the "More  
13 Sponsored Links" heading? Is that where you're  
14 looking?  
15 A. That is where I'm looking, yes.  
16 Q. And of the four that are there, which one  
17 are you looking at?  
18 A. So I'm looking at the second one down, the  
19 second bullet point down from the "More Sponsored  
20 Links" section where it says "Contact Lens Sale" and  
21 then "contact lenses up to 40 percent off, free  
22 shipping with four boxes, www.shipmycontacts.com."  
23 Q. And then go back, if you would, to  
24 paragraph 23. There's a reference there to a  
25 communication sent by Randall Luckey. Is that how

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1 you pronounce his name?  
2 A. I believe so.  
3 Q. Sent to Mr. Zeidner. Do you see that?  
4 A. I do.  
5 Q. And if you turn to Exhibit H to the  
6 complaint, is this the communication that was  
7 referred to?  
8 A. It is.  
9 Q. This is the letter from Mr. Luckey back to  
10 Mr. Zeidner?  
11 A. It is.  
12 Q. Okay. And then is there a further  
13 response, Exhibit I, that is a communication from  
14 Mr. Zeidner back to Mr. Luckey?  
15 A. It is.  
16 Q. And have you attached that as -- to the  
17 complaint in order to lay out the history of the  
18 communications?  
19 A. That was the purpose, yes.  
20 Q. Okay. And then what is Exhibit J?  
21 A. So Exhibit J is a cease and desist letter  
22 from me to Memorial Eye requesting that they cease  
23 and desist from their advertising practices.  
24 Q. So this comes two years after the  
25 correspondence we just looked at?

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1 A. Correct.  
2 Q. And did you get a response to this letter?  
3 A. I did.  
4 Q. And where is the response?  
5 A. The response is attached as Exhibit K.  
6 Q. And was there some intervening  
7 correspondence? Do you know?  
8 A. I don't recall.  
9 Q. Okay. I see a reference in Exhibit K to a  
10 letter dated February 27, 2008. Do you know whether  
11 there was such communication?  
12 A. I'm not positive, but I assume there is  
13 based on the content of that letter.  
14 Q. Okay. And then go back to the complaint  
15 itself, if you would. In paragraph 25 you say --  
16 after these communications that were marked as H and  
17 I, you go, "Memorial Eye's infringement was reduced."  
18 Do you see that in paragraph 25?  
19 A. I do.  
20 Q. What does it mean when you say  
21 "infringement was reduced"?  
22 A. That would indicate that after the  
23 communication exchange, the frequency with which  
24 their sponsored advertisements came up went down; the  
25 appearance of those sponsored advertisements in

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1 response to searches for 1-800 Contacts or its  
2 variations would have reduced.

3 **Q. Okay. And then at paragraph 26, if you**  
4 **would. It says here, "On or about September 12,**  
5 **2007, 1-800 Contacts noted an increase in Memorial**  
6 **Eye's level of infringement." Do you see that?**

7 A. I do.

8 **Q. What does that refer to, an increase in**  
9 **the level of infringement?**

10 A. So that would indicate an increase in  
11 impressions or in appearances of their advertisements  
12 in response to searches for 1-800 Contacts.

13 **Q. Okay. And then a copy of the letter --**  
14 **you then say you sent a letter to them, a copy of**  
15 **which is attached as Exhibit J. Do you see that?**

16 A. I do.

17 **Q. And then it says, "No response was**  
18 **received," and "a near identical letter was**  
19 **subsequently sent on February 27." Do you see that**  
20 **reference?**

21 A. Yes, I do.

22 **Q. Does that jog your recollection at all as**  
23 **to whether there was a subsequent letter from you?**

24 A. Yeah. Yeah. So because there was no  
25 response and because the infringing displays

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1 continued, then a subsequent letter was sent to them.

2 **Q. Okay. And then it says -- in paragraph 28**  
3 **you go, "In spite of its previous recognition of the**  
4 **infringement, its knowledge of how to correct and**  
5 **stop the infringement as evidenced by its previous**  
6 **corrective measures, Memorial Eye took no action to**  
7 **remedy the infringement. In fact, upon receiving**  
8 **this communication, infringement by Memorial Eye**  
9 **actually increased."**

10 **Do you see that?**

11 A. I do.

12 **Q. And does that refer to the number of**  
13 **impressions going up even more?**

14 A. It does, and the frequency.

15 **Q. Okay. And then tell us what you described**  
16 **in paragraph 29.**

17 A. So paragraph 29 explains the -- when we  
18 monitored the keywords and how their advertisements  
19 were coming up to look at it, we would do searches  
20 for not only the trademarks but also for variations  
21 of the trademark; so misspellings, common fat finger  
22 typing errors, omissions of spaces or different ways  
23 that the trademark could be confused with variations  
24 of the trademark. And we would search those as well  
25 to see if Memorial Eye's ads were coming up for those

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1 variations as well.

2 **Q. And what did you find?**

3 A. And we found out that they did come up for  
4 those variations, including misspellings.

5 **Q. So if you look at the very last line on**  
6 **that page, it has a search term that is**  
7 **"1800contacts." Do you see that?**

8 A. I do.

9 **Q. By including that, does that mean to**  
10 **indicate that Memorial Eye's ads would come up in**  
11 **response to that particular search term?**

12 A. Yes. That would be why it's included.

13 **Q. Okay. And then what is shown in the**  
14 **screenshot that is part of paragraph 30?**

15 A. So paragraph 30 was included to show that  
16 there had not been a change in the actions or the  
17 practice by Memorial Eye as of December 17th. So  
18 just prior to the filing of the complaint, it  
19 actually shows that Memorial Eye is coming up in  
20 response to a search for "1800contacts," no spaces,  
21 no dashes.

22 **Q. And which is the ad that we see there that**  
23 **is from Memorial Eye?**

24 A. So the shipmycontacts.com ad, if you'll  
25 look under the -- in the "Sponsored Links" box,

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1 again, the yellow box in the center, there is --  
2 "1800CONTACTS.com" is the leading advertisement.

3 Also included next to and with 1-800  
4 Contacts in the sponsored links box is Discount  
5 Contact Lenses with the URL www.ShipMyContacts.com  
6 and the comment "Save up to 70 percent on contact  
7 lenses. Get fast service and free shipping," which  
8 is the same -- the same content as previously.

9 **Q. Okay. And at this time, were paid ads or**  
10 **sponsored links designated in this particular**  
11 **instance by that being in that yellow box?**

12 A. Sometimes. They were designated as being  
13 in the yellow box; and also, if you'll see off to the  
14 right-hand side, there are additional sponsored links  
15 that are indicated on the right-hand side.

16 **Q. Okay. Now, in paragraph 31 of the**  
17 **complaint and continuing on through 32 and 33, did**  
18 **you describe or allege some of the things that you**  
19 **believed constituted injury to both 1-800 Contacts**  
20 **and to the public?**

21 A. We did.

22 **Q. Tell us, if you would, what you alleged**  
23 **was the injury to 1-800 Contacts and the public.**

24 A. Well, as noted in the document, it talks  
25 about, first, confusing consumers; that if a consumer

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1 experienced -- if they're confused by the results and  
2 by who they're clicking on, their impression or  
3 their -- the concept of 1-800's service and their  
4 goodwill could be damaged and injured, especially,  
5 and particularly their service. Because  
6 1-800 Contacts prided itself in such a high level of  
7 service that was -- in their opinion, wasn't matched.  
8 And so anything less than that they believed would  
9 injure that goodwill that they'd worked hard to  
10 establish.

11 Again, confusion as to source.  
12 Misappropriation of their goodwill, of  
13 1-800 Contacts' goodwill by -- again, by confusion of  
14 a consumer having -- thinking that there may be a  
15 sponsorship or an affiliation. And, by extension, a  
16 part of that goodwill extended to Memorial Eye.

17 MR. MATHESON: If I might interrupt. I'd  
18 like to object to the foundation of that response to  
19 the extent that it -- I understood the question to be  
20 asking what was alleged. To the extent those were  
21 statements that are for the truth of the matter, so  
22 to speak, rather than what was alleged, then object  
23 to foundation.

24 **Q. (By Mr. Stone) What facts did you have in**  
25 **mind at the time that were not covered by any**

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1 **privilege as to the quality of service that**  
2 **1-800 Contacts offered its consumers?**

3 MR. MATHESON: Objection to the extent the  
4 question is designed to elicit an incomplete  
5 response.

6 THE WITNESS: The things that I was aware  
7 of, and without violating privilege, are the public  
8 statements and the public representation that they  
9 made of their quality of service and their shipping,  
10 promises of shipping, quality of goods, the service  
11 and responsiveness of their call center agents,  
12 things of that nature.

13 MR. STONE: Okay.

14 MR. MATHESON: Object to the foundation.

15 **Q. (By Mr. Stone) You then go on to say, "If**  
16 **permitted to continue, Memorial Eye's use of the**  
17 **1-800 Contacts Marks will continue to irreparably**  
18 **injure 1-800 Contacts, the 1-800 Contacts Marks, the**  
19 **reputation and goodwill associated therewith,**  
20 **1-800 Contacts' reputation for exceedingly**  
21 **high-quality services and products, and the public**  
22 **interest in being free from confusion, mistake or**  
23 **deception."**

24 **Do you see that?**  
25 A. I do see that.

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1 **Q. And were those part of what you allege to**  
2 **be the injury that would be suffered both by the**  
3 **company and by the public if Memorial Eye's conduct**  
4 **was allowed to continue?**

5 A. Yes.

6 **Q. Okay. What is alleged in paragraph 32?**  
7 A. So paragraph 32 alleges that the practices  
8 identified previously will cause confusion and  
9 mistake with regards to Memorial Eye's goods and  
10 services, whether there's a sponsorship affiliation  
11 connection, some type of -- again, it says  
12 endorsement or association of their goods and  
13 services with 1-800 Contacts based on potential  
14 confusion of a consumer.

15 **Q. Okay. And what is alleged in**  
16 **paragraph 33?**

17 A. And 33 similarly talks about their use  
18 of -- their advertisements coming up in response to  
19 misspellings of 1-800 Contacts, and that that will  
20 also benefit Memorial Eye and indicate some type of a  
21 sponsorship or affiliation.

22 **Q. Okay. And what are the legal theories of**  
23 **liability that are asserted in this complaint based**  
24 **upon the facts as alleged?**

25 A. So asserted in this complaint is federal

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1 trademark infringement, violation of the Lanham Act  
2 in the first count.

3 The second count is federal unfair  
4 competition, false designation of origin, and passing  
5 off or false advertising.

6 There's a third count of common law unfair  
7 competition, misappropriation, and trademark  
8 infringement, which is also included in that common  
9 law trademark infringement.

10 And then, lastly, the unjust enrichment  
11 claim.

12 **Q. And what's the Unfair Practices Act that**  
13 **is referenced in Count III?**

14 A. In Count III, it's a Utah -- Utah state  
15 Unfair Practices Act, Utah Code.

16 **Q. In other cases have you on similar facts**  
17 **asserted other claims, such as claims for trademark**  
18 **dilution, other types of unfair competition?**

19 A. I believe so. We've made reference to  
20 dilution and effects on the goodwill of the  
21 trademark.

22 **Q. So should we look at this and say, well,**  
23 **these are the only theories of liability that you**  
24 **thought could be alleged? Or is it -- or could we**  
25 **look at this and say these are the theories of**

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1 **liability you chose to allege?**  
 2 A. Yeah, these are the theories we chose to  
 3 allege. We considered a number of others as well.  
 4 **Q. Now, did any -- did the Court in this case**  
 5 **ever take a look at the complaint and dismiss any of**  
 6 **these counts as having -- being legally insufficient?**  
 7 A. Not that I recall, no.  
 8 **Q. No motion to dismiss being granted?**  
 9 A. No, not that I recall.  
 10 **Q. Okay.**  
 11 **Take a look, if you would, at the demand**  
 12 **for relief here. So if we look at page with the**  
 13 **Bates number ending in 2035, beginning at B1 and then**  
 14 **B2. Can you describe for us the relief that was**  
 15 **sought in B1 or B2?**  
 16 A. So B1 and B2 are asking for the Court to  
 17 enter an injunction to the effect that Memorial Eye  
 18 not be able to use 1-800 Contacts's trademarks, you  
 19 know, in section 1, both 1-800 Contacts' marks and  
 20 confusingly similar variations that dilute  
 21 distinctiveness of the marks. We talk about  
 22 different ways that those can be used -- meta tags,  
 23 sponsored advertisements, identifiers -- that  
 24 would -- anything that they would include to secure  
 25 higher placement or placement of 1-800 Contacts

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1 within search engine results.  
 2 And then, secondly, in the second  
 3 paragraph, in B2, that -- from representing that they  
 4 are associated with, endorsed, or sponsored by  
 5 1-800 Contacts.  
 6 **Q. And would those provisions include within**  
 7 **their scope preventing Memorial Eye from using a**  
 8 **1-800 Contacts trademark as a trigger for Memorial**  
 9 **Eye ads?**  
 10 A. Definitely so.  
 11 **Q. And then there was a request that there be**  
 12 **a determination in C that Memorial Eye had willfully**  
 13 **violated 1-800 Contacts' rights?**  
 14 A. That's correct.  
 15 **Q. And that's the basis for the request in G,**  
 16 **that any damages awarded be trebled?**  
 17 A. Correct.  
 18 **Q. When 1-800 Contacts and Memorial Eye**  
 19 **ultimately settled this case, did the settlement**  
 20 **provide for relief that was greater than what was**  
 21 **asked for in the complaint, less than what was asked**  
 22 **for in the complaint, or the same?**  
 23 MR. MATHESON: Objection to the  
 24 foundation, to the extent it calls for a legal  
 25 conclusion.

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1 Objection; foundation. And objection to  
 2 the extent it calls for a legal conclusion. I want  
 3 to make sure the record's clear.  
 4 THE WITNESS: I think the -- my  
 5 recollection of the settlement agreement with  
 6 Memorial Eye is that its limitation is less broad  
 7 than the relief that's requested in B1 and B2.  
 8 **Q. (By Mr. Stone) Do you recall whether**  
 9 **there were damages paid by Memorial Eye?**  
 10 A. I don't recall.  
 11 **Q. If there were any damages paid, would they**  
 12 **have been less than the amount that was sought in the**  
 13 **complaint?**  
 14 MR. MATHESON: Objection to the leading  
 15 and objection to the foundation. Assumes facts.  
 16 THE WITNESS: Again, I don't recall; but  
 17 based on what was sought, yes.  
 18 **Q. (By Mr. Stone) Okay. In terms of the**  
 19 **settlement agreements that you're familiar with and**  
 20 **some of which you were asked about earlier by**  
 21 **Mr. Matheson, was the relief in any of those**  
 22 **settlement agreements greater than the relief that**  
 23 **you believed could have been sought in the**  
 24 **complaints?**  
 25 MR. MATHESON: Objection to the

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1 foundation. Objection to the extent it calls for a  
 2 legal conclusion. Objection; outside the scope of  
 3 personal knowledge.  
 4 **Q. (By Mr. Stone) So let me reframe it. I**  
 5 **don't think I'll address any of the objections by**  
 6 **reframing, but let me reframe it otherwise.**  
 7 **You were asked earlier about settlement**  
 8 **agreements by Mr. Matheson. Do you recall that?**  
 9 A. I do.  
 10 **Q. So he didn't identify them one by one; he**  
 11 **just asked you about them as a group. I'm going to**  
 12 **ask you about the same group you had in mind when he**  
 13 **asked you.**  
 14 A. Okay.  
 15 **Q. Did some of those settlement agreements**  
 16 **follow the filing of complaints?**  
 17 A. Yes.  
 18 **Q. Were there some that didn't follow the**  
 19 **filing of complaints?**  
 20 A. Yes.  
 21 **Q. Okay. Let's break them into two groups,**  
 22 **if we can. Let's talk about the group that followed**  
 23 **the filing of the complaint. Okay?**  
 24 A. Okay.  
 25 **Q. With respect to the group of settlement**

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1 agreements that followed the filing of the complaint  
2 that you had in mind when Mr. Matheson was asking you  
3 questions, did the relief included in those  
4 settlement agreements exceed the relief that was  
5 sought in the complaints, was it the same as the  
6 relief sought in the complaints, or was it less than  
7 the relief sought in the complaints?

8 MR. MATHESON: Objection to the form.  
9 Objection; outside the scope of personal knowledge.  
10 Objection to the extent it calls for a legal  
11 conclusion. Objection to the extent it calls for an  
12 expert opinion.

13 THE WITNESS: To my recollection, they  
14 were less.

15 **Q. (By Mr. Stone) Okay. And in the**  
16 **settlement agreements that didn't follow complaints,**  
17 **did they seek -- did they obtain relief for**  
18 **1-800 Contacts that was greater than the settlement**  
19 **agreements that did follow complaints?**

20 MR. MATHESON: Same objections.

21 THE WITNESS: I believe they were less.

22 **Q. (By Mr. Stone) Okay. In any of the**  
23 **settlement agreements that you were aware of or were**  
24 **involved with, was there any payment by**  
25 **1-800 Contacts to the settling party?**

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1 A. Not that I'm aware of, no.

2 **Q. You were asked earlier -- it's**  
3 **Exhibit 0724, but I don't know that you need to find**  
4 **it to answer this question -- about Mr. Liebeskind.**  
5 **Do you recall that?**

6 A. I do recall that.

7 **Q. And you described -- you identified him as**  
8 **antitrust counsel to 1-800 Contacts?**

9 A. Yes.

10 **Q. Was he at a firm at the time of this**  
11 **correspondence in 2008?**

12 A. He was.

13 **Q. And what firm was he with?**

14 A. I believe he was with Gibson Dunn.

15 **Q. And did you have any understanding of**  
16 **where else he had practiced as an antitrust lawyer?**

17 A. Yes.

18 **Q. Where was that?**

19 A. My recollection is that he practiced for I  
20 believe it was seven years at the FTC as a deputy  
21 commissioner, and that he practiced for another eight  
22 years at the DOJ.

23 **Q. In the antitrust division?**

24 A. Correct.

25 **Q. Okay. So you understood him at the time**

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1 to have substantial years of experience as an  
2 antitrust lawyer?

3 A. That was my understanding.

4 MR. STONE: Let me ask the reporter to  
5 mark as RX0073 a letter dated May 13th, 2010.  
6 (Exhibit RX0073 was marked.)

7 **Q. (By Mr. Stone) The reporter has handed**  
8 **you what we've marked for identification as RX0073.**  
9 **Take a minute to look at it, if you would, and then**  
10 **tell us if you recognize it.**

11 A. I do recognize it.

12 **Q. What is it?**

13 A. This is a letter to Mark Miller from Kevin  
14 Drucker in response to a letter that Mr. Miller sent  
15 him.

16 **Q. And in there, there's a statement in this**  
17 **letter on the first page of RX0073. There's a**  
18 **statement that "Tram Data is fully prepared to file a**  
19 **counterclaim against 1-800 Contacts to seek redress**  
20 **for this infringement."**

21 **Do you see that?**

22 A. I do see that.

23 **Q. What is it that Tram Data was contending**  
24 **1-800 Contacts had done that was infringement?**

25 A. So it says that -- I mean, it's -- and

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1 it's in the letter, that they allege that

2 1-800 Contacts had been purchasing sponsored  
3 advertisements from search engines -- Bing, Google,  
4 Yahoo -- that were triggered by keywords that  
5 incorporate variants of "replace my contacts," which  
6 was their registered trademark, "their" being Tram  
7 Data's.

8 **Q. So if we look at Exhibit A which is**  
9 **attached to the letter, and we go to the screenshot.**  
10 **Do you have that one in front of you?**

11 A. I do.

12 **Q. Is that a Yahoo search?**

13 A. It is.

14 **Q. What was the search term that was entered?**

15 A. So replacemycontacts.com

16 **Q. And then do you see a 1-800 Contacts ad**  
17 **that comes up in response?**

18 A. I see one on the right-hand side. It says  
19 "1800CONTACTS.com, Order Contact Lenses."

20 **Q. And is that one of the ads that you**  
21 **understood Mr. Drucker to be contending was**  
22 **infringing on the trademark of replacemycontacts.com?**

23 MR. MATHESON: Object to the foundation  
24 and to the assumption that he understood Mr. Drucker  
25 at the time to be contending anything.



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1 THE WITNESS: That's my understanding  
2 reading the letter now.  
3 **Q. (By Mr. Stone) Okay, fair enough.**  
4 A. I don't have a recollection of it.  
5 **Q. Let me re-ask it. When you look at this**  
6 **letter and the information that's attached, what on**  
7 **Exhibit A, the first page of the Yahoo search page,**  
8 **do you understand to be the claimed trademark**  
9 **infringement by 1-800 Contacts?**  
10 A. I would understand it to be on the  
11 right-hand side, the second -- the second entry down,  
12 "1800CONTACTS.com, Order Contact Lenses."  
13 **Q. Okay. And if you look at the next page of**  
14 **Exhibit A, the Bing search, can you tell us what is**  
15 **being searched there?**  
16 A. So it's -- replacemycontacts.com is in the  
17 search field.  
18 **Q. Okay. And do you see an entry here that**  
19 **you understand to be one of the ones that Mr. Drucker**  
20 **was complaining constituted infringement?**  
21 MR. MATHESON: Object to foundation.  
22 THE WITNESS: So looking at the document,  
23 my understanding would be the third entry down on  
24 that main column. It says "1800CONTACTS.com, Lenses,  
25 Unbeatable Price Guarantee plus Free Shipping plus

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1 Satisfaction Guarantee."  
2 **Q. (By Mr. Stone) And if you turn to the**  
3 **next page, which is ending in the number 3614, what**  
4 **was the search term here?**  
5 A. Here it was "replace my contacts" with  
6 spaces in between each of the words.  
7 **Q. What do you understand to be the paid ad**  
8 **or sponsored link that Mr. Drucker was complaining of**  
9 **that shows up on this page?**  
10 A. My understanding would be the third entry  
11 in the center column that says  
12 "1800CONTACTS.com-lenses." Looks like there's  
13 something I just can't read. And then "Unbeatable  
14 online prices on contact lenses. Satisfaction  
15 guaranteed."  
16 **Q. Okay. And then turn, if you would, to the**  
17 **page ending in 2316 -- I'm sorry -- 23616.**  
18 A. Okay.  
19 **Q. What is shown on this page?**  
20 A. So on this page is shown a Google search  
21 results in response to the search for the term  
22 "replacemy" with no spaces, then a space, and then  
23 the word "contacts."  
24 **Q. And what is on this page that you**  
25 **understood Mr. Drucker to claim constituted**

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1 **infringement?**  
2 MR. MATHESON: Objection to the foundation  
3 and to the assumption of facts.  
4 THE WITNESS: So my assumption -- my  
5 interpretation would be that it would be the first  
6 sponsored link on the right-hand side that says  
7 "1800CONTACTS.com-Lenses. Why bother with mail-in  
8 rebates? Instant savings on contact lenses," with  
9 the URL "www.1800contacts.com."  
10 MR. STONE: Okay. Let me ask the reporter  
11 to mark as RX0074 a letter dated May 17th, 2010.  
12 (Exhibit RX0074 was marked.)  
13 **Q. (By Mr. Stone) The reporter has handed**  
14 **you what has been marked as RX0074. Take a moment to**  
15 **look at it, if you would.**  
16 A. Okay.  
17 **Q. Can you identify what this document is?**  
18 A. Yeah. This is a letter from Mark Miller  
19 to Kevin Drucker in -- it appears in response, and --  
20 and as it says, in response to his letter, and  
21 stating that the issues raised by Mr. Drucker in his  
22 letter had been looked into.  
23 **Q. Okay.**  
24 A. And then it explains the remedy that was  
25 taken to rectify that issue; specifically, "My client

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1 had negative keywords in place for your client's  
2 trademark, but had not anticipated some of the  
3 variations thereof."  
4 **Q. Okay. Do you know whether there**  
5 **ultimately was a settlement agreement entered into**  
6 **between 1-800 Contacts and Replace My Contacts?**  
7 A. I don't know for sure.  
8 **Q. Okay. During the time that you were**  
9 **doing -- representing -- strike that.**  
10 A. My recollection is I think that there was  
11 one there between these two parties.  
12 **Q. Okay. That's fine.**  
13 **You were asked earlier about various**  
14 **trademark monitoring reports that you would see.**  
15 A. Correct.  
16 **Q. Would you send what you might characterize**  
17 **as a cease and desist letter to every company whose**  
18 **ads showed up in response to a search for**  
19 **1-800 Contacts or similar trademark terms?**  
20 A. No.  
21 **Q. Was every set of -- let me rephrase that.**  
22 **Were there some companies to whom you did send cease**  
23 **and desist letters?**  
24 A. Yes.  
25 **Q. Did every company to whom you sent cease**

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1 **and desist letters end up signing a settlement**  
 2 **agreement?**  
 3 A. No.  
 4 MR. STONE: I'm going to reserve the rest  
 5 of my time.  
 6 MR. MATHESON: Okay. Off the record.  
 7 (Recess from 1:43 p.m. to 1:54 p.m.)  
 8 FURTHER EXAMINATION  
 9 BY MR. MATHESON:  
 10 **Q. Mr. Pratt, thanks for joining us again.**  
 11 **I'm going to ask you some things I heard you testify**  
 12 **to when Mr. Stone was asking you questions. If we**  
 13 **need to scroll back in the realtime to try to**  
 14 **understand exactly when those occurred, I'm happy to**  
 15 **do that. But I might ask some questions that will**  
 16 **sound vague at the beginning just to see if I**  
 17 **understand what you testified to.**  
 18 **I believe Mr. Stone asked you about what**  
 19 **you referred to as a change in ad practices on the**  
 20 **part of Lens Discounters at some point between 2005,**  
 21 **when we looked at some Lens Discounters**  
 22 **correspondence, and 2009?**  
 23 A. I recall the question, yeah.  
 24 **Q. What did you mean by a change in Lens**  
 25 **Discounters' ad practices?**

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1 A. My recollection is that it was a change in  
 2 frequency and of them showing up in response to  
 3 1-800 Contacts' trademarks.  
 4 **Q. Their advertisements began to show up more**  
 5 **frequently on search engine results pages in response**  
 6 **to searches for 1-800 Contacts' trademarked terms?**  
 7 A. That's my recollection.  
 8 MR. STONE: Object to the form.  
 9 **Q. (By Mr. Matheson) Has that problem**  
 10 **continued since 2009?**  
 11 MR. STONE: Objection. Vague and  
 12 ambiguous and improper as to form.  
 13 THE WITNESS: Not that I'm aware of.  
 14 **Q. (By Mr. Matheson) What did you understand**  
 15 **me to mean by "that problem continued"?**  
 16 A. The -- their frequent display in response  
 17 to searches for 1-800 Contacts.  
 18 **Q. So since 2009, it's been your observation**  
 19 **that their ads have not appeared as frequently in**  
 20 **response to searches for 1-800 Contacts' trademarks**  
 21 **as was the case prior to the 2009 correspondence we**  
 22 **reviewed?**  
 23 MR. STONE: Objection. Lacks foundation,  
 24 improper as to form, and over broad.  
 25 You can answer.

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1 THE WITNESS: I think I would say it as  
 2 I'm not aware of an increase since 2009.  
 3 **Q. (By Mr. Matheson) Are you aware of a**  
 4 **decrease since 2009?**  
 5 MR. STONE: Same objections.  
 6 THE WITNESS: I'm not.  
 7 **Q. (By Mr. Matheson) You monitor trademark**  
 8 **monitoring reports periodically, right?**  
 9 A. I do.  
 10 **Q. You do that for the purpose of**  
 11 **understanding how frequently advertisers' search**  
 12 **advertisements appear in response to searches for**  
 13 **1-800 Contacts' trademark terms, right?**  
 14 MR. STONE: Objection. Misstates the  
 15 witness's prior testimony; improper as to form.  
 16 THE WITNESS: So I reviewed the trademark  
 17 reports, yes.  
 18 **Q. (By Mr. Matheson) And you do it to**  
 19 **understand if advertisers such as Lens Discounters**  
 20 **are appearing frequently or infrequently in response**  
 21 **to searches for 1-800 trademark terms, right?**  
 22 MR. STONE: Objection. Improper as to  
 23 form; leading.  
 24 THE WITNESS: So I do it for a number of  
 25 reasons; but, yeah, to see -- to observe in response

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1 to searches for 1-800 Contacts' trademarks who comes  
 2 up and what they look like.  
 3 **Q. (By Mr. Matheson) So based on your review**  
 4 **of these trademark reports, do you believe that the**  
 5 **actions you and Mr. Miller took in an effort to, in**  
 6 **2009, address the frequent appearance of Lens**  
 7 **Discounters' ads in response to searches for**  
 8 **1-800 trademarked terms, were those actions**  
 9 **effective?**  
 10 MR. STONE: Objection. Improper as to  
 11 form. Calls for -- lacks foundation, calls for  
 12 speculation. Improper in that it calls for opinion  
 13 testimony.  
 14 THE WITNESS: As I said before, I'm not  
 15 aware of an increase that it needs to have a remedy  
 16 or further communication with them.  
 17 **Q. (By Mr. Matheson) And these agreements**  
 18 **worked, in your experiences, right? You had a**  
 19 **problem because people's -- or because competitors'**  
 20 **advertisements were appearing frequently in response**  
 21 **to searches for 1-800 trademark terms, and you**  
 22 **contacted these competitors, and it was generally**  
 23 **your experience that they stopped what you wanted**  
 24 **them to stop doing. Right?**  
 25 MR. STONE: Objection. Vague and

<p style="text-align: right;">181</p> <p>1 ambiguous; over broad. 2 THE WITNESS: So just to clarify: when you 3 say these -- "these trademark agreements worked"? Is 4 that what you said? 5 <b>Q. (By Mr. Matheson) Well, just the</b> 6 <b>agreements we've been discussing today, the</b> 7 <b>agreements between 1-800 Contacts and its rivals</b> 8 <b>regarding the use of 1-800's trademark terms as</b> 9 <b>keywords in search advertising.</b> 10 MR. STONE: Objection. 11 <b>Q. (By Mr. Matheson) Same group Mr. Stone</b> 12 <b>was asking you about. Do we understand the group of</b> 13 <b>agreements we're discussing? Directing my question</b> 14 <b>to that group of agreements, has it been your</b> 15 <b>experience that these agreements are effective in</b> 16 <b>reducing the frequency with which other advertisers'</b> 17 <b>search advertising is displayed on search engine</b> 18 <b>results pages in response to searches for</b> 19 <b>1-800 Contacts' trademarked terms?</b> 20 MR. STONE: Objection. Over broad. 21 Improper as to form. 22 THE WITNESS: I think in response to that 23 question, I don't know what reduced relative to, 24 whether -- what their plans, what their advertising 25 strategies were.</p>	<p style="text-align: right;">183</p> <p>1 different things that we've included in our letters. 2 <b>Q. (By Mr. Matheson) What do you mean by</b> 3 <b>"the content of certain ads"?</b> 4 A. The content meaning examples where we 5 talked about -- that we've talked about previously 6 today where it has 1-800 Contacts' trademarks in the 7 title or text of the ad, things like that. 8 <b>Q. So you were successful in getting rid of</b> 9 <b>those ads for search engine results pages?</b> 10 MR. STONE: Objection. Vague and 11 ambiguous. Improper as to form. 12 THE WITNESS: In some instances. 13 <b>Q. (By Mr. Matheson) You just reviewed the</b> 14 <b>trademark report Tuesday, right?</b> 15 A. Yes. 16 <b>Q. Did you see any advertisements on that</b> 17 <b>trademark report that included a 1-800 Contacts</b> 18 <b>trademark in the text of the ad?</b> 19 A. I don't recall seeing one. 20 <b>Q. So what you do is working. What you have</b> 21 <b>done for 1-800 Contacts has succeeded in removing</b> 22 <b>advertisements from search engine results pages that</b> 23 <b>1-800 Contacts believes infringed its trademark</b> 24 <b>rights. Is that fair?</b> 25 MR. STONE: Objection. Improper as to</p>
<p style="text-align: right;">182</p> <p>1 <b>Q. (By Mr. Matheson) I mean, all this effort</b> 2 <b>that you guys have done on behalf of 1-800 Contacts,</b> 3 <b>do you think that the lawsuits you have brought, the</b> 4 <b>agreements 1-800 Contacts has reached, have those</b> 5 <b>delivered any value to 1-800 Contacts?</b> 6 MR. STONE: Objection. Improper as to 7 form; argumentative; over broad, vague and ambiguous. 8 You can answer. 9 THE WITNESS: So I don't suppose to know 10 what value is to 1-800 Contacts specifically. My 11 impression is that they have clarified who is 12 1-800 Contacts' ad when you search for their 13 trademark keywords by reducing the instances that 14 we've highlighted to, to the competitors. 15 <b>Q. (By Mr. Matheson) When you say the</b> 16 <b>instances you've highlighted to the competitors, you</b> 17 <b>mean the appearance of rivals' advertisements on</b> 18 <b>search engine results pages in response to queries</b> 19 <b>for 1-800 Contacts' trademarked terms, right?</b> 20 MR. STONE: Objection. Improper as to 21 form; leading. Misstates the witness's testimony. 22 Over broad. 23 THE WITNESS: Inclusive in the response is 24 the appearance of ads in response to searches for 25 trademarks, the content of certain ads and the</p>	<p style="text-align: right;">184</p> <p>1 form, argumentative, improperly calls for opinion 2 testimony, and calls for speculation. 3 THE WITNESS: Again, as I stated, I don't 4 know exactly what people's strategies would or would 5 not have been. Are they effective? I think that we 6 have seen compliance by some people with the 7 agreements. 8 <b>Q. (By Mr. Matheson) Do you have any people</b> 9 <b>in mind? By "people" I assume you meant advertisers.</b> 10 <b>Do you have any advertisers --</b> 11 A. Advertisers. 12 <b>Q. -- in mind that have complied?</b> 13 A. Memorial Eye doesn't show up. That's one 14 I can think of. 15 <b>Q. Do you have in mind sitting here today any</b> 16 <b>advertisers who have failed to comply in the past</b> 17 <b>12 months with their obligations to 1-800?</b> 18 A. I don't have any in mind. 19 <b>Q. I'd like to take a look at RX0073 and</b> 20 <b>0074. Now, RX0073 is a letter you've identified as</b> 21 <b>being directed from Tram Data to Mr. Miller, correct?</b> 22 A. Yes. 23 <b>Q. The letter, in substance, claims that</b> 24 <b>1-800 Contacts has had advertisements triggered by</b> 25 <b>keywords that incorporate or are variants of the</b></p>

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1 **trademark term "Replace My Contacts." Right?**

2 MR. STONE: Objection. Best evidence.  
3 Misstates the document and the witness's prior  
4 testimony regarding the document.

5 THE WITNESS: So the document says 1-800  
6 has been purchasing. The allegation is from -- from  
7 Mr. Drucker that 1-800 has been purchasing in Bing,  
8 Yahoo, and Google advertisements triggered by  
9 keywords that incorporate "Replace My Contacts."

10 **Q. (By Mr. Matheson) Now, are you familiar**  
11 **with whether or not Mr. Miller, or were you yourself**  
12 **involved in investigating whether this claim by Tram**  
13 **Data was true?**

14 A. I don't have any knowledge as to that.

15 **Q. Now, do you understand Tram Data to be**  
16 **alleging that 1-800 Contacts was placing bids on the**  
17 **term "replace my contacts" with Google and Bing?**

18 A. My recollection at the time -- I don't  
19 know what my impression was at the time, necessarily.  
20 Looking at the document, "the advertisements are  
21 triggered by keywords" would indicate to me that  
22 those keywords -- they say -- they're allegations,  
23 but the keywords incorporate variants of "Replace My  
24 Contacts."

25 **Q. What does it mean to be triggered by a**

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1 **keyword? It means that the keyword is typed into a**  
2 **search engine and an advertisement is displayed. Is**  
3 **that what you understand that to mean?**

4 A. It could mean two things. It can mean  
5 triggered by the keyword because it's typed into the  
6 search box, or it could be triggered as it's a term  
7 or phrase that's part of the campaign.

8 **Q. And when you say "part of the campaign,"**  
9 **does that mean that a bid is affirmatively placed on**  
10 **that term as a keyword?**

11 A. So explain to me what you mean by a bid is  
12 placed on a keyword.

13 **Q. Well, what I'm trying to get at is, it is**  
14 **entirely possible that 1-800 Contacts' ads appeared**  
15 **in response to searches for keywords that incorporate**  
16 **or are variants of the mark "Replace My Contacts"**  
17 **because they were broad matched in by Google. Is**  
18 **that consistent with your experience?**

19 A. So my experience is that that would --  
20 that would be possible.

21 **Q. And turning our attention to RX0074.**  
22 **Mr. Miller tells Mr. Drucker that -- in the last**  
23 **sentence of the first paragraph Mr. Miller states,**  
24 **"My client had negative keywords in place for your**  
25 **client's trademark, but had not anticipated some of**

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1 **the variations thereof."**

2 **Do you understand that to mean that**  
3 **1-800 Contacts had some negative keywords implemented**  
4 **in ad campaigns in order to prevent its ads from**  
5 **showing up in response to searches for "Replace My**  
6 **Contacts"?**

7 A. So my understanding as I sit here and look  
8 at the document is that they would have negative  
9 keywords to that effect, that they would have in  
10 their campaigns negative keywords such that their  
11 advertisements did not show up for searches for  
12 Replace My Contacts, and that those negative keywords  
13 did not include a misspelling that was identified by  
14 Mr. Drucker.

15 **Q. And so it's not the case that 1-800 was**  
16 **out there affirmatively bidding on the misspelling**  
17 **identified by Mr. Drucker; instead, it's probably the**  
18 **case that, as a result of the broad match setting or**  
19 **function in Google, the ad was broad matched into the**  
20 **result?**

21 MR. STONE: Objection. Improper as to  
22 form. Calls for speculation.

23 **Q. (By Mr. Matheson) Is that fair?**

24 A. So I don't --

25 MR. STONE: Objection.

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1 THE WITNESS: I was going to say I don't  
2 know what they did or didn't have, but in my  
3 experience, it's possible.

4 **Q. (By Mr. Matheson) So you understand as**  
5 **the term "triggered by keywords" as used in RX0073,**  
6 **that could include instances in which an**  
7 **advertisement appears because it's broad matched in?**

8 MR. STONE: Objection. Asked and  
9 answered, improper as to form, calls for opinion  
10 testimony, and calls for speculation.

11 THE WITNESS: Again, my understanding as I  
12 sit here and look at it is that they're claiming that  
13 advertisements are triggered by keywords, that the  
14 advertisements come up in response to keywords which,  
15 as we talked about, could occur in a number of  
16 different ways.

17 **Q. (By Mr. Matheson) And one way it could**  
18 **occur is as a result of Google broad matching an**  
19 **advertisement into a search result?**

20 MR. STONE: Same objections as to the  
21 preceding question.

22 THE WITNESS: It's my understanding that,  
23 yes, Google has a broad match feature where they can  
24 broad match results in based on a search term.

25 **Q. (By Mr. Matheson) And that is one way.**

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1 **And my question was, and not sure I got an answer to**  
 2 **it, one way that you referred to previously could**  
 3 **occur is as a result of Google broad matching an**  
 4 **advertisement into a search result?**

5 MR. STONE: Same objections as the  
 6 preceding question. Also asked and answered.

7 THE WITNESS: Is that possible? Yes.

8 **Q. (By Mr. Matheson) So you were involved in**  
 9 **the Memorial Eye litigation for some time. Was it**  
 10 **your allegation that Memorial Eye affirmatively bid**  
 11 **on 1-800 Contacts's keywords?**

12 A. Our allegation initially was that we had  
 13 reason to believe that they were.

14 **Q. And what reason did you have to believe**  
 15 **that they were?**

16 MR. STONE: I'm going to instruct you to  
 17 not disclose any information in response to that  
 18 question, which would be protected by the attorney  
 19 work product privilege. But to the extent you had  
 20 information which has been shared and is no longer  
 21 held in confidence, you can certainly provide that.

22 THE WITNESS: And I'm not aware of any of  
 23 that information being shared or --

24 **Q. (By Mr. Matheson) So is there information**  
 25 **you're aware of that you are not providing a response**

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1 **to the question in order to protect the attorney work**  
 2 **product privilege as your counsel has instructed you?**

3 A. Yes, because I'm unsure of what has or has  
 4 not been disclosed.

5 **Q. Take a look at RX0072. Paragraph 19 of**  
 6 **the complaint that you signed, the first sentence**  
 7 **states, "Notwithstanding the receipt of the cease and**  
 8 **desist letter, Memorial Eye refused to cease using**  
 9 **the 1-800 Contacts Marks to trigger advertising."**

10 **What did you mean by "using the**  
 11 **1-800 Contacts Marks to trigger advertising"?**

12 A. So; as I recall now, currently, because I  
 13 recall currently, sitting here, Memorial Eye using  
 14 the 1-800 Contacts mark to trigger, meaning their  
 15 advertisements were coming up in one of two ways: In  
 16 response to the 1-800 Contacts mark being entered  
 17 into the search field, and then knowing that that was  
 18 triggering the advertisement. In other words, they  
 19 knew how to stop it based on the cease and desist  
 20 letters and discussions. Or using it as a keyword,  
 21 an affirmative keyword that they were seeking as part  
 22 of an advertisement campaign.

23 **Q. Do you know whether or not, sitting here**  
 24 **today, Memorial Eye actually used any particular**  
 25 **terms on which 1-800 Contacts owns a trademark as an**

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1 **affirmative keyword that they were seeking as part of**  
 2 **an advertising campaign?**

3 MR. STONE: I need to give you two  
 4 instructions on this, Mr. Pratt. One is not to  
 5 reveal any information protected by the attorney work  
 6 product privilege. And the second is not to reveal  
 7 any information protected by the protective order in  
 8 the Memorial Eye litigation. Because there you're  
 9 under a court order to maintain that information in  
 10 confidence.

11 THE WITNESS: Given those instructions,  
 12 I'll -- I won't answer that question.

13 **Q. (By Mr. Matheson) My only question was**  
 14 **whether or not you know sitting here today. I'm not**  
 15 **asking for the basis of that information.**

16 MR. STONE: Yeah. But the question, as I  
 17 understood the question, it was framed in a certain  
 18 way that answering it would reveal that he had such  
 19 information. That would be revealing the substance  
 20 of the information.

21 I may have misunderstood your question.  
 22 Feel free to --

23 MR. MATHESON: No, that's fair. I mean,  
 24 you're right. I'm asking him yes or no, do you know;  
 25 and if your answer is you can't tell me whether you

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1 know or not without revealing a privileged  
 2 communication or something on the protective order --

3 MR. STONE: Well, that's how I'm  
 4 understanding your question. Look, I'm not trying to  
 5 be argumentative here. How I'm understanding your  
 6 question is if he said, "Yes, I know," and the basis  
 7 for saying, "Yes, I know" about such information is  
 8 information that he's not supposed to disclose, he  
 9 would have effectively disclosed the information.

10 MR. MATHESON: Okay. But just we're going  
 11 around in circles. All I'm asking is whether you  
 12 know or not. I'm not asking is it true or is not  
 13 true. I'm asking, sitting here today --

14 MR. STONE: Why don't you ask it again,  
 15 and let me see if he can answer.

16 MR. CHIARELLO: Can we go off the record  
 17 for just a second?

18 (A discussion was held off the record.)

19 **Q. (By Mr. Matheson) The question is,**  
 20 **sitting here today, do you know whether it is the**  
 21 **case that Memorial Eye actually used any particular**  
 22 **term on which 1-800 Contacts owned a trademark as an**  
 23 **affirmative keyword that they were seeking as part of**  
 24 **an advertising campaign?**

25 MR. STONE: Give me a second.

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1 I think that has the same problem as  
2 before. I'm going to instruct the witness not to  
3 answer. But can I take a minute and talk to the  
4 witness?

5 MR. MATHESON: Sure.

6 **Q. (By Mr. Matheson) Are you going to follow  
7 that instruction?**

8 THE WITNESS: I am.  
9 (Recess from 2:16 p.m. to 2:18 p.m.)

10 **Q. (By Mr. Matheson) Are you ready,  
11 Mr. Pratt?**

12 A. I am.

13 **Q. I believe earlier you testified that there  
14 were causes of action you considered bringing but did  
15 not include in the Memorial Eye complaint. Is that a  
16 fair statement of your testimony?**

17 A. Yes.

18 **Q. Which causes of action did you consider  
19 bringing but then not include in the complaint?**

20 MR. STONE: So I don't want you to reveal  
21 attorney work product. So I don't want you to talk  
22 about what you considered and decided not to do or  
23 what you considered and decided what to do, because  
24 that reveals your work product.

25 I think the way I had asked it was other

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1 claims he had brought on other occasions. I may be  
2 wrong, but I was trying not to ask your thought  
3 process, but I don't want you to reveal your thought  
4 process in response to the question. So I think as  
5 framed, there's no way you can answer it without  
6 doing that, so I'm going to instruct you not to  
7 answer that particular question.

8 **Q. (By Mr. Matheson) Okay. Are you going to  
9 follow that instruction, sir?**

10 A. I am.

11 **Q. Paragraph 20 of the complaint we discussed  
12 previously, the final sentence -- or you discussed  
13 with Mr. Stone. The final sentence of that paragraph  
14 reads: In essence, Memorial Eye is using the 1-800  
15 contact marks to trick consumers into visiting the  
16 Memorial Eye website.**

17 **All right. What facts supported the  
18 allegation that Memorial Eye -- strike that.**

19 **How many consumers did Memorial Eye  
20 successfully trick into visiting Memorial Eye  
21 websites by using 1-800 Contacts's marks?**

22 MR. STONE: Objection. Lacks foundation;  
23 calls for speculation; improper as to form.

24 Again, if you can answer that question  
25 without revealing work product information, you

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1 should feel free to do so.

2 THE WITNESS: I can't answer it without  
3 revealing work product or information subject to that  
4 protective order.

5 **Q. (By Mr. Matheson) Prior to filing a  
6 complaint in this matter, what evidence did you have  
7 that Memorial Eye has successfully tricked consumers  
8 into visiting its websites by using 1-800 Contacts'  
9 marks?**

10 MR. STONE: Instruct you not to answer on  
11 the grounds of attorney work product.

12 **Q. (By Mr. Matheson) Are you going to follow  
13 that instruction, sir?**

14 A. I am.

15 **Q. Next paragraph, paragraph 21, Memorial  
16 Eye's actions are specifically aimed at diverting web  
17 users who are expressly looking for 1-800 Contacts  
18 and the 1-800 Contacts goods and services is the  
19 first sentence of that paragraph. Did I read that  
20 correctly?**

21 MR. STONE: Objection. Improper as to  
22 form. Document speaks for itself. Best evidence.

23 THE WITNESS: So far as I tracked it.

24 **Q. (By Mr. Matheson) Okay. What evidence  
25 did you have before you filed this complaint that**

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1 **Memorial Eye's actions were specifically aimed at  
2 diverting web users who were expressly looking at  
3 1-800 Contacts?**

4 MR. STONE: Instruct you not to answer on  
5 the grounds of attorney work product.

6 **Q. (By Mr. Matheson) Follow that  
7 instruction?**

8 A. I am.

9 **Q. What empirical evidence have you seen that  
10 web users who are expressly looking for  
11 1-800 Contacts were actually diverted by Memorial  
12 Eye's actions?**

13 MR. STONE: Same objection; same  
14 instruction.

15 **Q. (By Mr. Matheson) Are you going to refuse  
16 to answer based on the advice of counsel?**

17 A. I am.

18 **Q. Paragraph 31, the allegation in the first  
19 sentence states that "Memorial Eye's unauthorized use  
20 of the 1-800 Contacts marks has and will continue to  
21 irreparably injure 1-800 Contacts by confusing  
22 customers, diverting sales and diluting the  
23 distinctiveness of the 1-800 Contacts marks."**

24 **Did I read that correctly?**

25 MR. STONE: Objection. Improper as to

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1 form. Best evidence.  
 2 THE WITNESS: So far as I tracked it, yes.  
 3 **Q. (By Mr. Matheson) What evidence did you**  
 4 **have before you filed this complaint that Memorial**  
 5 **Eye's unauthorized use of the 1-800 Contacts marks**  
 6 **actually confused consumers?**  
 7 MR. STONE: Objection. Instruct you not  
 8 to answer, on the grounds of attorney work product.  
 9 **Q. (By Mr. Matheson) Going to follow that**  
 10 **instruction, sir?**  
 11 A. I am.  
 12 **Q. How many sales were diverted from**  
 13 **1-800 Contacts by Memorial Eye's unauthorized use of**  
 14 **1-800 Contacts' marks as those terms are used in this**  
 15 **paragraph?**  
 16 MR. STONE: Objection. Lacks foundation;  
 17 calls for speculation.  
 18 To the extent it calls for information you  
 19 developed in the course of the litigation either  
 20 before or after filing the complaint, instruct you  
 21 not to answer on the grounds of attorney work  
 22 product. And to the extent any such information was  
 23 obtained under the terms of the protective order, you  
 24 should not answer or reveal that information if doing  
 25 so would violate that court order.

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1 THE WITNESS: Under guidance of counsel, I  
 2 won't answer that question.  
 3 **Q. (By Mr. Matheson) Paragraph 26 we**  
 4 **discussed earlier, I believe, the first sentence**  
 5 **states: "On or about September 12th, 2007,**  
 6 **1-800 Contacts noted an increase in Memorial Eye's**  
 7 **level of infringement."**  
 8 **It's my understanding that you were asked**  
 9 **about this by Mr. Stone, and you said the**  
 10 **infringement -- increase in infringement meant an**  
 11 **increase in the frequency of appearances of Memorial**  
 12 **Eye advertisements on search engine results page. Is**  
 13 **that fair?**  
 14 MR. STONE: Objection. Improper as to  
 15 form.  
 16 You can answer.  
 17 THE WITNESS: Yeah, I would say that it's  
 18 an increase in frequency of their advertisements  
 19 appearing in response to a search for 1-800 Contacts  
 20 trademarks.  
 21 **Q. (By Mr. Matheson) And was each appearance**  
 22 **of Memorial Eye advertisement and infringement of**  
 23 **1-800 Contacts trademarks?**  
 24 MR. STONE: Objection. Improperly calls  
 25 for opinion testimony. Lacks foundation as to

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1 which -- as to "each." What do you mean by "each"?  
 2 Calls for speculation. Improper as to form.  
 3 You can answer in your opinion.  
 4 THE WITNESS: Currently sitting here, I  
 5 don't have a recollection of all of the other  
 6 advertisements that I viewed.  
 7 **Q. (By Mr. Matheson) Is it your recollection**  
 8 **that you viewed some of their advertisements, the**  
 9 **appearance of which on a search engine results page**  
 10 **did not infringe 1-800 Contacts' trademarks?**  
 11 MR. STONE: Objection. Improperly calls  
 12 for opinion testimony; lacks foundation; improper as  
 13 to form.  
 14 THE WITNESS: I don't have a recollection  
 15 of such an occurrence.  
 16 **Q. (By Mr. Matheson) Can you recall any**  
 17 **Memorial Eye advertisements that appeared on a search**  
 18 **engine results page triggered by a term on which**  
 19 **1-800 Contacts owned a trademark that did not**  
 20 **infringe 1-800 Contacts' trademark rights?**  
 21 MR. STONE: Same objections as to the last  
 22 question. Also asked and answered.  
 23 THE WITNESS: As I sit here today, I can't  
 24 think of a specific example, no.  
 25 **Q. (By Mr. Matheson) Is it possible that**

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1 **Memorial Eye could display an advertisement on a**  
 2 **search engine results page triggered by a term on**  
 3 **which 1-800 Contacts owns a trademark and avoid**  
 4 **infringing 1-800 Contacts' trademark rights?**  
 5 MR. STONE: Objection. Improperly calls  
 6 for opinion testimony. Improperly calls for the  
 7 witness really to provide expert opinion testimony.  
 8 Lacks foundation; calls for speculation; improper as  
 9 to form.  
 10 THE WITNESS: I hesitate to create an  
 11 instance or an example. It would take an analysis of  
 12 infringement factors.  
 13 **Q. (By Mr. Matheson) Taking a look at page 8**  
 14 **of the complaint, the screenshot which you included.**  
 15 **Paragraph 30 of the complaint that you drafted notes**  
 16 **"the website www.shipmycontacts.com is featured on**  
 17 **the top left portion of the page." I just want to**  
 18 **direct my question to that particular sponsored link.**  
 19 **Ultimately the case between Memorial Eye**  
 20 **and 1-800 Contacts settled, right?**  
 21 A. That's my understanding.  
 22 **Q. It's your understanding that under the**  
 23 **terms of the settlement agreement, Memorial Eye**  
 24 **agreed to implement negative keywords in order to**  
 25 **prevent its advertisements from being displayed on**

201	<p>1 search engine results pages in response to searches 2 for 1-800 Contacts' trademarked terms. Right? 3 MR. STONE: Objection. Best evidence. 4 THE WITNESS: Yeah. As I sit here, that's 5 my -- my understanding as I sit here. I mean, I 6 don't have a copy of that, but that's my 7 understanding. 8 <b>Q. (By Mr. Matheson) That's your best 9 response?</b> 10 A. Yeah. 11 <b>Q. Have you seen an ad for 12 www.shipmycontacts.com triggered by a keyword term on 13 which 1-800 Contacts owned a trademark since the 14 Memorial Eye settlement agreement was reached?</b> 15 MR. STONE: Objection. Improper as to 16 form. 17 THE WITNESS: To the best of my 18 recollection, no. 19 <b>Q. (By Mr. Matheson) Paragraph 38 of the 20 agreement, which I think we discussed -- sorry -- the 21 complaint that we discussed earlier, paragraph 38 of 22 the complaint you drafted refers to the valuable 23 goodwill of 1-800 Contacts. Correct?</b> 24 A. As I look at it, yes, it does say "the 25 valuable goodwill established therein."</p>	203	<p>1 counsel for a period of time in 1-800 Contacts' 2 litigation against Lens.Com, right? 3 A. Yes. 4 <b>Q. You referred to a study by a Mr. Degen; is 5 that right?</b> 6 A. Yes. 7 <b>Q. Have you ever spoken with Mr. Degen?</b> 8 A. My recollection is that I was on some 9 phone calls with Mr. Degen. 10 <b>Q. Were you involved -- did you ever discuss 11 the expert report Mr. Degen submitted in that matter 12 with Mr. Degen?</b> 13 A. My recollection is only in regards to a 14 phone call. 15 <b>Q. So you discussed the expert report with 16 Mr. Degen on a phone call at some point in time?</b> 17 A. Right now it's unclear whether it was with 18 him or with other counsel in the case. 19 <b>Q. The phone call you have in mind, what were 20 you told regarding Mr. Degen's expert report on that 21 call?</b> 22 MR. STONE: I instruct the witness not to 23 answer on the grounds of attorney work product and 24 attorney-client communication. 25 <b>Q. (By Mr. Matheson) Are you going to follow</b></p>
202	<p>1 <b>Q. What information has your client provided 2 you regarding the dollar value of the goodwill 3 associated with 1-800 Contacts' trademarks?</b> 4 MR. STONE: So you can answer to the 5 extent any such information has been provided to you 6 for the purpose of including it in complaints, 7 interrogatory answers, motions, court filings, or 8 other public disclosures. 9 THE WITNESS: I don't recall an exact 10 dollar amount, other than I know that they have 11 provided, for example, ad expenditures. 12 <b>Q. (By Mr. Matheson) But you're not planning 13 to offer testimony in this matter regarding the 14 dollar value of the goodwill embodied in 15 1-800 Contacts' trademarks?</b> 16 A. I'm not. 17 MR. STONE: If you keep asking him about 18 it -- 19 MR. MATHESON: I just want to understand 20 what he's going to testify about. 21 MR. STONE: I'll just designate the depo 22 transcript. 23 MR. MATHESON: Well, we'll see. We do 24 have an agreement regarding the scope of testimony. 25 <b>Q. (By Mr. Matheson) And you were a trial</b></p>	204	<p>1 the instruction? 2 A. I'm going to follow that instruction, yes. 3 <b>Q. What aspects of Mr. Degen's report did you 4 find most vulnerable to cross-examination during the 5 Lens.Com litigation?</b> 6 MR. STONE: Objection. Assumes facts not 7 in evidence; lacks foundation. But to the extent it 8 would call for the disclosure of any of your attorney 9 work product or thought process, I would instruct you 10 not to answer. 11 THE WITNESS: I can't think of anything to 12 share that would not include thought process and 13 attorney work product. 14 <b>Q. (By Mr. Matheson) Can you provide -- 15 strike that. 16 Ultimately, the Court in Lens.Com did not 17 credit Mr. Degen's report. Is that right?</b> 18 MR. STONE: Objection. Improper as to 19 form. Mischaracterizes the evidence and testimony. 20 You can answer. 21 The record speaks for itself. 22 THE WITNESS: Yeah, the record -- the 23 trial record is in place. As far as the Court 24 crediting it, I think that on the appeal, the appeal 25 court looked at it and considered it.</p>



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1 **Q. (By Mr. Matheson) The trial court failed**  
2 **to credit the results of Mr. Degen's survey to the**  
3 **extent Mr. Degen opined that they showed consumers**  
4 **would likely be confused. Is that consistent with**  
5 **your recollection?**

6 MR. STONE: Objection. The record speaks  
7 for itself, mischaracterizes the record, improper as  
8 to form, and best evidence as to what the trial  
9 court's ruling was.

10 To make that more clear: The best  
11 evidence of the trial court's ruling would be the  
12 trial court's ruling.

13 THE WITNESS: As I recall thinking about  
14 the decision -- again, it has been some time since I  
15 reviewed it -- my best recollection is that there  
16 wasn't a lot of deference given to it.

17 **Q. (By Mr. Matheson) Did you agree with the**  
18 **trial court's determination to not credit Mr. Degen's**  
19 **suggestion that consumer confusion was likely?**

20 MR. STONE: Objection. I think that  
21 probably calls for the witness's thought processes as  
22 an attorney, in which case it would invade the  
23 attorney work product privilege. So I instruct the  
24 witness not to answer to the extent this would reveal  
25 your thought processes as an attorney in the matter.

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1 THE WITNESS: I'm going to take counsel's  
2 advice.

3 **Q. (By Mr. Matheson) You decline to answer**  
4 **the question --**

5 A. Correct.

6 **Q. -- because you can't answer the question**  
7 **without revealing work product?**

8 A. Correct.

9 **Q. I believe earlier, Mr. Stone asked you to**  
10 **describe any evidence of actual confusion you became**  
11 **aware of that you could reveal without revealing**  
12 **privileged information, And he was asking those**  
13 **questions in connection with the Lens.Com litigation.**  
14 **Is that consistent with your recollection?**

15 A. I recall him asking if there was -- if --  
16 and it's obviously going to be on the transcript. My  
17 recollection is that he asked if there was any  
18 evidence of actual confusion that was public,  
19 something of that nature.

20 **Q. What evidence of actual confusion came to**  
21 **your attention in the Lens.Com litigation that you**  
22 **believe is protected by the attorney-client or work**  
23 **product privileges?**

24 MR. STONE: Obviously he can't answer that  
25 question as framed, so I'm going to instruct him not

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1 to answer.

2 **Q. (By Mr. Matheson) What evidence came to**  
3 **your attention during the Lens.Com litigation that**  
4 **might suggest consumers were not confused by**  
5 **advertisements on search engine results pages?**

6 MR. STONE: To the extent there was any  
7 such information, if it was not protected by the  
8 attorney work product privilege and not subject to  
9 the protective order in that case, you can provide it  
10 to Mr. Matheson.

11 THE WITNESS: I can't, sitting here, think  
12 of any instances that would fall under that  
13 categorization.

14 **Q. (By Mr. Matheson) So is it your testimony**  
15 **that of all the evidence you became aware of in the**  
16 **Lens.Com litigation, none of that evidence suggested**  
17 **consumers were not confused by advertisements on**  
18 **search engine results pages?**

19 MR. STONE: Same objections as to the  
20 preceding question, and same instructions. Further  
21 object: asked and answered.

22 THE WITNESS: Yeah. And I can't think of  
23 any instances that expressly -- you know, sitting  
24 here today, I can't think of any instances that  
25 expressly evidence that.

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1 **Q. (By Mr. Matheson) So you reached the**  
2 **conclusion based on all of the evidence you became**  
3 **aware of during the Lens.Com litigation that**  
4 **consumers are not confused -- strike that.**

5 **So based on all of the evidence you became**  
6 **aware of during the Lens.Com litigation, did you**  
7 **reach the conclusion that consumers are confused by**  
8 **advertisements that appear on search engine results**  
9 **pages?**

10 MR. STONE: His conclusions are protected  
11 by the attorney work product privilege. And to the  
12 extent he communicated them to his clients, if he had  
13 any such conclusions and communicated them, it would  
14 be protected by the attorney-client privilege. So I  
15 don't see how he can answer that question without  
16 invading the privilege, and I instruct him not to  
17 answer.

18 **Q. (By Mr. Matheson) Are you going to follow**  
19 **that instruction?**

20 A. I am.

21 **Q. Were you involved in the design of the**  
22 **survey that Mr. Degen conducted in connection with**  
23 **his report?**

24 A. I was.

25 **Q. What was your role in designing the survey**

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1 **that Mr. Degen conducted in connection with his**  
2 **report?**

3 MR. STONE: I'm going to instruct the  
4 witness not to answer on the grounds of attorney work  
5 product, and on the further ground that I think any  
6 communications he had with Mr. Degen at that time  
7 probably were protected by the privilege for  
8 communications between counsel and experts. I  
9 haven't checked the latter, but I think it would be  
10 attorney work product regardless.

11 **Q. (By Mr. Matheson) Going to follow that**  
12 **instruction?**

13 A. I am.

14 **Q. So it's not your intent to offer any**  
15 **testimony at the administrative hearing regarding the**  
16 **survey conducted by Mr. Degen, is it?**

17 A. I think to the extent that testimony can  
18 be provided that's not protected by work product or  
19 attorney-client privilege, I think I could answer.

20 **Q. You think you could answer what?**

21 A. I could answer those questions that  
22 wouldn't reveal confidential information.

23 **Q. So you believe at the administrative**  
24 **hearing you will be able to answer questions**  
25 **regarding the survey performed by Mr. Degen?**

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1 A. Again, if they don't require the  
2 disclosure of confidential information and if I have  
3 information that I could testify about.

4 **Q. I believe earlier you said, approximately,**  
5 **that the advertisers you contact on behalf of**  
6 **1-800 Contacts generally, quote, resisted or, quote,**  
7 **pushed back against your request that they enter into**  
8 **settlements. Is that a fair summary of your**  
9 **testimony?**

10 A. I believe I said that they would want  
11 changes and would negotiate changes, something to  
12 that effect, yes.

13 **Q. Why did they tell you they did not want to**  
14 **accept the settlement agreements you proposed to**  
15 **them?**

16 MR. STONE: Objection. Over broad and  
17 inherently compound. Improperly as to form.

18 You can answer.

19 THE WITNESS: I don't recall any specific  
20 objections that people had, as I sit here. If there  
21 was a document or an e-mail, I'd be happy to look at  
22 it. It's a general recollection that there were  
23 negotiations, that there were things that wanted to  
24 be changed, and suggested modifications.

25 **Q. (By Mr. Matheson) You previously**

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1 **testified that you have seen on the trademark**  
2 **monitoring reports advertisements appear and have not**  
3 **contacted those advertisers alleging they infringed**  
4 **1-800 Contacts' trademark rights. Right?**

5 A. I believe I testified to that, right.

6 **Q. Which retailers of contact lenses**  
7 **advertisements have you viewed on trademark**  
8 **monitoring reports that you have not subsequently**  
9 **contacted regarding those advertisements?**

10 A. I can't recall any of those names.

11 **Q. In those instances when you did not**  
12 **contact -- strike that.**

13 **Can you recall any retailer of contact**  
14 **lenses whose advertisements you viewed in a trademark**  
15 **monitoring report that you did not subsequently**  
16 **contact regarding that advertisement?**

17 A. Could you restate that?

18 **Q. Can you recall any -- strike that.**

19 **Can you recall any instance in which you**  
20 **saw an ad for a retailer of contact lenses appear in**  
21 **a trademark monitoring report when you did not**  
22 **subsequently contact that advertiser regarding that**  
23 **advertisement?**

24 A. I can recall instances, yes.

25 **Q. When did those instances occur?**

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1 A. I don't know the exact dates when those  
2 instances occurred. I recall the instances  
3 themselves. If I had to put a time range on it,  
4 again, it's loose. It would probably be between 2006  
5 and 2010. I know that's a wide range.

6 **Q. How many instances do you have in mind,**  
7 **roughly?**

8 A. Roughly three that I specifically recall.

9 **Q. Can you recall the identity of any of the**  
10 **advertisers?**

11 A. I cannot.

12 **Q. Can you recall in any of those instances**  
13 **why you did not subsequently contact the advertiser**  
14 **regarding the advertisement you viewed?**

15 MR. STONE: You can answer that yes or no.

16 THE WITNESS: Yes.

17 **Q. (By Mr. Matheson) How many of the three**  
18 **instances -- strike that.**

19 **For how many of the three instances can**  
20 **you recall why you did not subsequently contact the**  
21 **advertiser regarding the advertisement you viewed?**

22 A. I would say all three.

23 **Q. So we're using the same nomenclature,**  
24 **would it be helpful to refer to these as the first,**  
25 **second, third in time? What's the best way to make**

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1 sure we're discussing each one individually, in your  
 2 point of view?  
 3 A. Yeah. First, second, or third in time is  
 4 fine.  
 5 Q. Okay. The first instance you had in mind,  
 6 why didn't you contact the advertiser regarding the  
 7 advertisement you saw on a trademark infringement  
 8 report?  
 9 MR. STONE: Calls for disclosure of an  
 10 attorney work product. Instruct the witness not to  
 11 answer.  
 12 Q. (By Mr. Matheson) Are you going to follow  
 13 the instruction?  
 14 A. I am.  
 15 Q. The second instance you have in mind where  
 16 you did not contact an advertiser regarding an ad you  
 17 saw in a trademark monitoring report, why did you  
 18 choose not to contact that advertiser?  
 19 MR. STONE: Same objection and same  
 20 objection.  
 21 Q. (By Mr. Matheson) Are you going to follow  
 22 that instruction?  
 23 A. I am.  
 24 Q. The third instance you have in mind where  
 25 you've not contacted an advertiser regarding an ad

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1 you saw in a trademark monitoring report, why did you  
 2 choose not to contact that advertiser?  
 3 MR. STONE: Same instruction and same  
 4 objection.  
 5 Q. (By Mr. Matheson) Are you going to follow  
 6 that instruction, sir?  
 7 A. I am.  
 8 MR. STONE: Shouldn't have broken them up  
 9 in three, to save time.  
 10 Q. (By Mr. Matheson) In each of the three  
 11 instances, was your reason the same?  
 12 MR. STONE: Objection. Let me think about  
 13 that.  
 14 MR. MATHESON: Come on. It's a good  
 15 question.  
 16 MR. STONE: You can answer that.  
 17 THE WITNESS: Just to clarify, are you  
 18 asking in all three instances were all three reasons  
 19 the same?  
 20 Q. (By Mr. Matheson) Correct.  
 21 A. No.  
 22 Q. You referred a few times, if I heard you  
 23 correctly, to television advertisements or other  
 24 advertisements you personally view in your day-to-day  
 25 life that relate to 1-800 Contacts. Right?

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1 A. Yes, that's correct.  
 2 Q. Are you planning to provide any testimony  
 3 regarding advertisements for 1-800 Contacts that you  
 4 have viewed in your day-to-day life?  
 5 A. Not in my personal capacity in day-to-day  
 6 life, no.  
 7 Q. Are you planning to provide any testimony  
 8 at all regarding advertisements for 1-800 Contacts of  
 9 which you're aware?  
 10 A. Not that I'm currently aware of.  
 11 Q. Now, you're not planning to testify  
 12 regarding any harm that 1-800 Contacts suffered as a  
 13 result of competitors' advertisements appearing on  
 14 search engines results pages, are you?  
 15 A. Not that I'm aware of.  
 16 MR. MATHESON: Okay. We can go off the  
 17 record for one second.  
 18 (Recess from 2:48 p.m. to 2:54 p.m.)  
 19 MR. MATHESON: I don't have any questions.  
 20 MR. STONE: I don't have any further  
 21 questions of Mr. Pratt.  
 22 We discussed off the record that you can  
 23 send the original transcript directly to Mr. Pratt  
 24 for his review and signing.  
 25 I assume it's satisfactory if he signs

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1 under penalty of perjury?  
 2 MR. MATHESON: That's fine with us.  
 3 Thanks for your time, Mr. Pratt.  
 4 (The deposition concluded at 2:54 p.m.)  
 5 \* \* \*  
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1 REPORTER'S CERTIFICATE  
 2 STATE OF UTAH )  
 ) ss.  
 3 COUNTY OF SALT LAKE )  
 4  
 I, Vicky McDaniel, Registered Professional  
 5 Reporter and Notary Public in and for the State of  
 Utah, do hereby certify:  
 6  
 That prior to being examined, the witness,  
 7 BRYAN G. PRATT, was by me duly sworn to tell the  
 truth, the whole truth, and nothing but the truth;  
 8  
 That said deposition was taken down by me  
 9 in stenotype on December 15, 2016, at the place  
 herein named and was thereafter transcribed, and that  
 10 a true and correct transcription of said testimony is  
 set forth in the preceding pages.  
 11  
 I further certify that, a request having  
 12 been made to review the transcript, a reading copy  
 was requested to be sent to the witness, Mr. Pratt,  
 13 to read and sign and then return for filing with  
 Mr. Matheson.  
 14  
 I further certify that I am not of kin or  
 15 otherwise associated with any of the parties to said  
 cause of action and that I am not interested in the  
 16 outcome thereof.  
 17 WITNESS MY HAND this 26th day of December,  
 2016.  
 18  
 19  
 20  
 21  
 22 Vicky McDaniel, CSR, RMR  
 Notary Public  
 Residing in Salt Lake County  
 23  
 24  
 25

1 Case: 1-800 Contacts  
 File No. 141-0200  
 2 Reporter: Vicky McDaniel  
 Date taken: December 15, 2016  
 3  
 WITNESS CERTIFICATE  
 4 I, BRYAN G. PRATT, HEREBY DECLARE:  
 That I am the witness in the foregoing  
 5 transcript; that I have read the transcript and know  
 the contents thereof; that with these corrections I  
 6 have noted, this transcript truly and accurately  
 reflects my testimony.  
 7  
 8 PAGE/LINE CHANGE/CORRECTION REASON  
 9  
 10 \_\_\_\_\_  
 11 \_\_\_\_\_  
 12 \_\_\_\_\_  
 13 \_\_\_\_\_  
 14 \_\_\_\_\_  
 15 \_\_\_\_\_  
 16 \_\_\_\_\_  
 17 \_\_\_\_\_  
 18 \_\_\_\_\_  
 19  
 \_\_\_No corrections were made.  
 20  
 I, BRYAN G. PRATT, HEREBY DECLARE UNDER THE  
 21 PENALTIES OF PERJURY OF THE LAWS OF THE UNITED STATES  
 OF AMERICA AND THE LAWS OF THE STATE OF  
 22 THAT THE FOREGOING IS TRUE AND CORRECT.  
 23  
 24 DATE BRYAN G. PRATT  
 25

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# **EXHIBIT A-1**

**In the Matter of:**

1-800 Contacts

*January 5, 2017*  
*Bryan Pratt - Confidential*

**Condensed Transcript with Word Index**



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1 FEDERAL TRADE COMMISSION  
2  
3 IN THE MATTER OF: :  
4 : D09372  
5 1-800 CONTACTS :  
6 \_\_\_\_\_  
7  
8  
9  
10  
11 CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER  
12  
13  
14 Thursday, January 5, 2017  
15  
16  
17 Holland & Hart  
18 222 South Main Street, #2200  
19 Salt Lake City, Utah 84101  
20  
21  
22  
23 The above-entitled matter came on for investigational  
24  
25 hearing, pursuant to notice, at 11:00 a.m.

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1 APPEARANCES:  
2  
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25

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1 FEDERAL TRADE COMMISSION  
2 I N D E X  
3 WITNESS: PAGE  
4 BRYAN G. PRATT  
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1  
2 Thereupon,  
3 BRYAN PRATT,  
4 was called for examination and, after having  
5 been sworn by the court reporter, was examined and  
6 testified as follows:  
7  
8 EXAMINATION BY COUNSEL FOR THE FTC  
9 BY MR. MATHESON:  
10 Q. Good afternoon, Mr. Pratt. This is Dan  
11 Matheson again. Thank you for joining us.  
12 Could you pull out CX0078, please?  
13 A. Yes, I have that.  
14 Q. Do you recognize this document?  
15 A. I do.  
16 Q. What is this document?  
17 A. So this document is an email from Brandon  
18 Dansie to David Zeidner and myself, copying Amy  
19 Larson and Bryce Craven.  
20 Q. All right. This is an email dated April  
21 9, 2007?  
22 A. Yes, I see that.  
23 Q. And turning your attention to the first  
24 sentence after the salutation, Mr. Dansie represents  
25 he's sending you "a new list of companies advertising  
on our trademarks in search engines."

1 **Did I read that correctly?**  
 2 A. That's how I read it, yes.  
 3 **Q. Did you understand him to mean that the**  
 4 **list to which he refers identifies companies whose**  
 5 **advertisements appear on a search engine results page**  
 6 **in response to a search for 1-800 Contacts trademark**  
 7 **term?**  
 8 MR. STONE: Objection, improper as to  
 9 form, but you can answer.  
 10 THE WITNESS: Okay. As I read that, it  
 11 appears that he means companies -- I mean, just what  
 12 it says, companies that are advertising on trademarks  
 13 in search engines, and by "our trademarks," I think  
 14 he means, my impression is he means 1-800 Contacts  
 15 trademarks.  
 16 **Q. (By Mr. Matheson) And by "advertising on**  
 17 **trademarks," what do you mean by that?**  
 18 MR. STONE: Objection, improper as to  
 19 form, calls for speculation.  
 20 You can testify to your understanding.  
 21 THE WITNESS: Yeah. As I look at it, my  
 22 impression is that he means companies that are  
 23 causing their advertisements or sponsored ads to  
 24 appear in response to a search for 1-800 Contacts  
 25 trademarks.

1 company, possibly.  
 2 **Q. A greater competitive threat; is that**  
 3 **fair?**  
 4 MR. STONE: Objection, improper to form,  
 5 argumentative.  
 6 THE WITNESS: Yeah. I mean, I don't  
 7 really have an opinion on a company's threat to the  
 8 company. To me, a viable company is one that has a  
 9 certain size or a health to it.  
 10 **Q. (By Mr. Matheson) What do you understand**  
 11 **a "viable competitor" to mean?**  
 12 MR. STONE: Objection, asked and answered.  
 13 You can answer.  
 14 THE WITNESS: Okay. Yeah. Again, I don't  
 15 know what Brandon intended. As I sit here, it's a  
 16 competitor, someone who provides a similar product.  
 17 And viable, again, is a company that has company  
 18 health or is more likely to be around or larger in  
 19 size.  
 20 **Q. (By Mr. Matheson) Did you ask Mr. Dansie**  
 21 **what he meant?**  
 22 A. Not to my recollection.  
 23 **Q. Do you recall discussing with any of the**  
 24 **other individuals copied on this email what a "viable**  
 25 **competitor" meant?**

1 **Q. (By Mr. Matheson) And by "appear," you**  
 2 **mean appear on search engine results page, fair?**  
 3 A. That's fair, yeah.  
 4 **Q. Turn your attention to the first or next**  
 5 **paragraph. The second sentence, Mr. Dansie**  
 6 **communicates that Lens.com, and I quote, "is a more**  
 7 **important offender because they are a more viable**  
 8 **competitor."**  
 9 **Did I read that right?**  
 10 MR. STONE: Objection, improper as to  
 11 form. The document speaks for itself.  
 12 You can answer.  
 13 THE WITNESS: Yeah, I think you read it  
 14 right off the document.  
 15 **Q. (By Mr. Matheson) And you understood it**  
 16 **to mean that Lens.com was a more viable competitor**  
 17 **than LensWorld?**  
 18 MR. STONE: Objection, improper as to  
 19 form, calls for speculation.  
 20 THE WITNESS: You know, as I sit here, I  
 21 don't recall what my impression was of what he meant  
 22 there.  
 23 **Q. (By Mr. Matheson) Okay. What do you**  
 24 **understand "viable" to mean as you sit here today?**  
 25 A. A more viable competitor. A larger

1 A. Not that I recall, no.  
 2 **Q. Which are the competitors who you believe**  
 3 **were viable competitors in 2007?**  
 4 MR. STONE: Objection, improperly calls  
 5 for opinion testimony, lacks foundation, calls for  
 6 speculation.  
 7 You can answer to the extent you had  
 8 opinions that were not revealing of your attorney  
 9 work product or any privileged communications you had  
 10 with the client which provided a basis for your  
 11 belief at the time.  
 12 THE WITNESS: Given that discussion, Dan,  
 13 can you please reask that question just so I  
 14 understand, so I can think through that?  
 15 **Q. (By Mr. Matheson) I believe the question**  
 16 **-- actually, which other companies do you believe**  
 17 **were viable competitors to 1-800 Contacts in 2007?**  
 18 MR. STONE: Okay. Same objections and  
 19 instructions, which I will repeat if you need me to.  
 20 THE WITNESS: No. I don't think I need  
 21 you to repeat the objections or instructions.  
 22 You know, as I sit here today thinking  
 23 back to 2007, yeah, the only impression that I would  
 24 have had would have been from my own -- my own  
 25 experience of optometrists and other online

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1 retailers.

2 **Q. (By Mr. Matheson) Okay. Do you recall --**  
3 **strike that.**

4 **Would the desire to protect a privileged**  
5 **communication impact the answer you just gave?**

6 A. Yes, there were -- yes.

7 **Q. So there were communications your client**  
8 **had with you that influenced your view of which**  
9 **competitors were viable, but revealing those**  
10 **communications would threaten the attorney-client**  
11 **protection; is that fair?**

12 MR. STONE: I instruct the witness not to  
13 answer on the grounds the question as framed  
14 constitutes a disclosure of attorney-client  
15 privileged communications.

16 So I instruct you not to answer,  
17 Mr. Pratt.

18 THE WITNESS: I'll take that instruction.

19 **Q. (By Mr. Matheson) Okay. Just to be**  
20 **clear, I'm just asking were there any communications**  
21 **with your client that impacted your view of which**  
22 **competitors were viable competitors in 2007?**

23 MR. STONE: I think he answered that he  
24 was -- that there was privileged information that he  
25 withheld from the prior answer. I think he answered

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1 and calls for speculation, but you can answer.

2 THE WITNESS: As I sit here today, my  
3 recollection is I would have had a general  
4 understanding of competitors due to the nature of my  
5 work for them, but not a specific discussion or  
6 understanding of most viable competitors based on a  
7 discussion with the client, no.

8 **Q. (By Mr. Matheson) Now, in this email,**  
9 **CX0078, Mr. Dansie suggests that you prioritize**  
10 **contacting Lens.com over contacting LensWorld; is**  
11 **that fair?**

12 MR. STONE: Objection, improper as to  
13 form.

14 THE WITNESS: So as I read it, he says  
15 that he -- he would prioritize the list with Lens.com  
16 at the top.

17 **Q. (By Mr. Matheson) Did you understand that**  
18 **to be a request to you to prioritize contacting**  
19 **Lens.com over contacting LensWorld?**

20 A. Not as I recall. I didn't take direction  
21 from him, from Brandon.

22 **Q. Do you recall any other occasions on which**  
23 **Mr. Dansie asked you to prioritize contacting a**  
24 **particular competitor whose advertisements appeared**  
25 **on a search engine results page?**

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1 that question, if I recall correctly. I don't have  
2 LiveNote, so I'm sort of basing it on my  
3 recollection.

4 **Q. (By Mr. Matheson) Yeah. And I'm in the**  
5 **same boat. I understand his answer. I was trying to**  
6 **confirm what that answer meant. I'm just trying to**  
7 **confirm that there was any privileged communication.**  
8 **I'm not trying to pry into the privileged**  
9 **communication. So you can strike that little speech**  
10 **I just gave and see if this question is one you can**  
11 **answer.**

12 **Was there a communication in 2007 that**  
13 **impacted your view on which competitors were viable**  
14 **competitors of 1-800 Contacts?**

15 MR. STONE: Let me think about that for a  
16 minute, Mr. Pratt.

17 I'll allow you to answer yes or no.

18 THE WITNESS: I can't recall a specific  
19 discussion.

20 **Q. (By Mr. Matheson) Do you recall that in**  
21 **2007 -- or strike that.**

22 **In 2007, was your view of which**  
23 **competitors were viable competitors impacted by**  
24 **information you received from your client?**

25 MR. STONE: Objection, lacks foundation

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1 A. Not that I recall as I sit here, no.

2 **Q. Do you recall ever receiving any**  
3 **instruction from any other employee of 1-800 Contacts**  
4 **to contact a competitor?**

5 MR. STONE: You can answer that yes or no  
6 without getting into the substance of any instruction  
7 you received which might be privileged.

8 THE WITNESS: Yes.

9 **Q. (By Mr. Matheson) When was that?**

10 A. So my understanding is you're asking when  
11 I would have received instructions from an employee  
12 of 1-800 Contacts to contact a competitor?

13 **Q. Yes, that is my question.**

14 A. Okay. I can think of various ranging  
15 from 2005 to probably 2008, 2009.

16 **Q. On how many of those occasions was the**  
17 **request to contact a competitor based on the**  
18 **appearance of the competitor's advertisement on a**  
19 **search engine results page?**

20 MR. STONE: Mr. Pratt, if you think that  
21 reveals privileged information you should be careful  
22 not to reveal any privileged information. I would  
23 also object that as the question is framed is  
24 overbroad, lacks foundation and improper as to form,  
25 but you can answer as best you can, to the extent you

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1 can do so without revealing anything that you  
2 consider to be privileged.  
3 THE WITNESS: Okay. I can't -- I couldn't  
4 speak to an exact number, but I know there were  
5 multiples. I mean, there were -- at times they would  
6 fall into that category.  
7 **Q. (By Mr. Matheson) Were any of those**  
8 **requests, other than this one, based on the viability**  
9 **of the competitor?**  
10 MR. STONE: Objection, calls for  
11 speculation as to whatever the question is based on.  
12 And if you're asking whether somebody said  
13 those words to him, you need to determine, Mr. Pratt,  
14 whether anybody that said those words to you was  
15 doing so in the context of a privileged  
16 communication, in which case you should not reveal  
17 it.  
18 I object to the question as to improper as  
19 to form, but subject to that question, you can  
20 answer.  
21 THE WITNESS: Okay. I don't recall any  
22 specific discussions about the viability of a  
23 competitor.  
24 **Q. (By Mr. Matheson) What did you understand**  
25 **Mr. Dansie to mean by "contact Lens.com" in CX0078?**

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1 MR. STONE: Objection, lacks foundation,  
2 improper as to form.  
3 You can answer.  
4 THE WITNESS: (Reading) You know, as I  
5 read through it today again, he says, "I'm sure you  
6 have very limited time to contact these  
7 organizations," so I don't know that he expressly  
8 asked me to contact anyone.  
9 **Q. (By Mr. Matheson) Did you take any action**  
10 **as a result of receiving CX0078?**  
11 A. My recollection is that I likely did.  
12 **Q. What did you do?**  
13 A. My recollection is that I would have  
14 reached out to counsel for Lens.com.  
15 **Q. Why did you do that?**  
16 A. To discuss their client coming up in a  
17 search for 1-800 Contacts as shown on this  
18 screenshot.  
19 **Q. When you say "discuss," did you ask them**  
20 **to take any action to prevent advertisements from**  
21 **appearing in response to searches for 1-800 Contacts**  
22 **trademark terms?**  
23 A. I don't recall a specific request. I do  
24 recall some communication that was attached to the  
25 Lens.com Complaint that was about this time,

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1 notifying him that they were coming up.  
2 **Q. Did you take any other action in responses**  
3 **to receiving CX0078?**  
4 A. Not that I recall directly in response to  
5 this email, no.  
6 **Q. You mentioned the Complaint against**  
7 **Lens.com. Do you have that there with you?**  
8 A. I do.  
9 **Q. Okay, so I believe this is a document with**  
10 **Bates number 1-800F\_0008879 through 8997.**  
11 **Can we mark this as CX-1125, please?**  
12 **(EXHIBIT CX-1125 WAS MARKED.)**  
13 **Q. (By Mr. Matheson) This is a very long**  
14 **document, Mr. Pratt. Take whatever time you need.**  
15 **My only question will be directed to the page that**  
16 **ends 8960.**  
17 A. Okay. And begins?  
18 **Q. Do you recognize the document displayed on**  
19 **page 1-800F\_00008960 through -- a long document --**  
20 **8991?**  
21 A. That is a long document.  
22 **Q. Yes. The question is related to 8960. If**  
23 **I understand you correct, this is just an attachment.**  
24 A. Give me just a second to look at it,  
25 please.

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1 **Q. Sure thing.**  
2 A. (Reading) Okay. I have read that page.  
3 **Q. Great. Do you recognize the email that**  
4 **begins on page 1-800F\_00008960?**  
5 A. I do.  
6 **Q. What is this email?**  
7 A. So this is an email dated April 16th of  
8 2007, an email from me to Tony DeGidio, who was  
9 counsel for Lens.com.  
10 **Q. Why did you write this email?**  
11 MR. STONE: Again, Mr. Pratt, just I  
12 caution you to not disclose any privileged  
13 communications in response to that question.  
14 THE WITNESS: Sure. As it says in the  
15 email, it was sent to inform Lens.com that they are  
16 showing up in response -- in sponsored advertisements  
17 on both Google and Yahoo, triggered by search terms,  
18 various search terms related to 1-800 Contacts.  
19 **Q. (By Mr. Matheson) Was your response to my**  
20 **question influenced by your desire to protect the**  
21 **attorney-client privilege?**  
22 A. No.  
23 **Q. Do you recall any communications you had**  
24 **between April 9, 2007 and April 16, 2007 with any**  
25 **employee of 1-800 Contacts that related to Lens.com?**

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1 A. I don't.

2 **Q. Do you recall any communications at all**  
3 **between April 9th and April 16th of 2007 with any**  
4 **employees of Lens.com?**

5 A. I don't recall any.

6 MR. STONE: Can I have that back? I'm  
7 sorry. Could I have the reporter read that back,  
8 please?

9 THE REPORTER: Question: "Do you  
10 recall any communications at all  
11 between April 9th and April 16th  
12 of 2007 with any employees of  
13 Lens.com?"

14 MR. STONE: Thank you.

15 THE WITNESS: No, I do not.

16 **Q. (By Mr. Matheson) Do you recall any**  
17 **communications between April 9th and April 16th of**  
18 **2007 with any employee of 1-800 Contacts?**

19 A. Yes.

20 **Q. Which communications do you recall?**

21 MR. STONE: So, Mr. Pratt, in responding  
22 to this question, you can identify the person with  
23 whom you had the communication if you recall that.  
24 You can identify the date or time of the  
25 communication, but don't reveal the substance of the

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1 communication to the extent it might be privileged.

2 THE WITNESS: Understood. I recall a  
3 discussion with David Zeidner in that identified time  
4 period.

5 **Q. (By Mr. Matheson) What did you discuss**  
6 **with Mr. Zeidner?**

7 MR. STONE: So you need to -- you can give  
8 a very, very general description, Mr. Pratt, if you  
9 can do so without revealing the substance of the  
10 communications. But if you think even a general  
11 description would reveal the substance of a  
12 privileged communication, don't disclose that. If  
13 you need to confirm with me, let me know and we can  
14 do that.

15 THE WITNESS: Yeah. Given that counsel, I  
16 will decline to answer based on attorney-client  
17 privilege.

18 **Q. (By Mr. Matheson) Okay. Fair enough.**

19 **Okay. In CX-1125, the page we have been**  
20 **discussing, your email to Mr. DeGidio in the**  
21 **second -- directing your attention to the second**  
22 **paragraph, in the last sentence you ask Mr. DeGidio**  
23 **to, quote, "reply to this message with the**  
24 **confirmation of its receipt and a detail of the**  
25 **action you plan to take to remedy the situation."**

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1 **Did I read that right?**

2 A. That's how I read it.

3 MR. STONE: Objection, improper as to  
4 form, the document speaks for itself.

5 You can answer.

6 THE WITNESS: That's how I read it.

7 **Q. (By Mr. Matheson) What actions did you**  
8 **have in mind?**

9 MR. STONE: Objection, lacks foundation,  
10 calls for speculation.

11 You can answer.

12 THE WITNESS: Yeah. I don't recall any  
13 specific actions that I may have had in mind other  
14 than for his client to identify why they were coming  
15 up and to prevent those ads from coming up, however  
16 he felt was appropriate.

17 **Q. (By Mr. Matheson) The previous sentence**  
18 **states, "We appreciate the prompt action you have**  
19 **taken in the past in resolving these situations with**  
20 **your affiliates."**

21 **What did you mean by "prompt action you**  
22 **have taken in the past"?**

23 A. My recollection is that in the past when  
24 these advertisements had come up and we had contacted  
25 Mr. DeGidio, that they had -- he had worked with his

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1 client to have the ads removed.

2 **Q. And you wanted him to take those same**  
3 **actions in this instance to produce the same result?**

4 MR. STONE: Objection, improper as to  
5 form.

6 THE WITNESS: I think it is possible the  
7 -- you know, I asked him to provide information on  
8 what actions they planned to take.

9 **Q. (By Mr. Matheson) You wanted him to**  
10 **produce the same result he had produced in previous**  
11 **instances to whatever actions were necessary?**

12 MR. STONE: Objection as to form, asked  
13 and answered, argumentative.

14 THE WITNESS: As it says in the document,  
15 I asked him to detail what actions they plan to take  
16 based on the information I provided him.

17 **Q. (By Mr. Matheson) By "remedy the**  
18 **situation," the situation you are referring to was**  
19 **that the appearance of advertisements for Lens.com in**  
20 **response to searches for 1-800 trademark terms?**

21 MR. STONE: Objection, asked and answered.  
22 You can answer.

23 THE WITNESS: Yeah. As I sit here today,  
24 my understanding is that this situation was the -- as  
25 I said in the email, they are showing up as a

5 (Pages 235 to 238)

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1 sponsored advertisement on Google and Yahoo, being  
2 triggered by those terms related to 1-800 Contacts  
3 trademarks.

4 **Q. Lens.com failed to take action that**  
5 **satisfied 1-800 Contacts, fair?**

6 A. That's my recollection.

7 **Q. Turn your attention to the first page of**  
8 **this document. Your recollection is that 1-800**  
9 **Contacts filed suit against Lens.com in August of**  
10 **2007?**

11 A. Yes.

12 **Q. Looking at CX0078 -- strike that.**  
13 **You represented 1-800 Contacts in the**  
14 **lawsuit filed in 2007 against Lens.com, right?**

15 A. Yes.

16 **Q. Now, CX0078, that was made part of the**  
17 **record in the Lens.com litigation; is that correct?**

18 A. That's my understanding.

19 **Q. How did it come to be part of the record?**

20 A. I'm not sure.

21 **Q. Do you have any recollection of whether**  
22 **this document was produced by 1-800 Contacts to**  
23 **Lens.com in that litigation?**

24 A. I don't have a recollection of that, no.

25 MR. MATHESON: That is all I have for the

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1 moment. I'm happy to turn it over to Mr. Stone.  
2 EXAMINATION BY COUNSEL FOR 1-800 CONTACTS AND THE  
3 WITNESS  
4 BY MR. STONE:

5 **Q. Thank you. Just take a look, if you**  
6 **would, at Exhibit CX0078, which is the email.**

7 A. Okay.

8 **Q. There's a sponsored link on the right-hand**  
9 **side showing on the search results portion of this**  
10 **email that is in a box and it starts at the top "1800**  
11 **Contacts: Buy Online."**

12 **Do you see that?**

13 A. I do see that.

14 **Q. And then below that at the very bottom it**  
15 **says, "www.JustLenses.com."**

16 **Do you see that?**

17 A. I do.

18 **Q. Was JustLenses.com related in any way to**  
19 **Lens.com?**

20 A. Yes. My understanding was that  
21 JustLenses.com was a dba of Lens.com.

22 MR. MATHESON: Objection to foundation.

23 **Q. (By Mr. Stone) And look, if you would, at**  
24 **Exhibit CX1125, and turn if you would to the page**  
25 **ending in 8885.**

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1 A. Okay. Is that the page that has "A44" on  
2 the bottom?

3 **Q. Yes, it is.**

4 A. Okay.

5 **Q. Look, if you would, at the search results**  
6 **page that is shown there and on the right-hand column**  
7 **under "Sponsored Links," do you see another one at**  
8 **the bottom which says, "1-800 Contacts - Simple**  
9 **online ordering of lenses. Compare our prices and"**  
10 **-- something.**

11 A. "Save."

12 **Q. I can't read the last word. Can you read**  
13 **that?**

14 A. I believe it says "save."

15 "Compare our prices and save."

16 **Q. And then the URL at the bottom is again**  
17 **"www.JustLenses.com"?**

18 MR. MATHESON: Object to the question.  
19 The Complaint speaks for itself.

20 THE WITNESS: I do see that.

21 **Q. (By Mr. Stone) And was that, in paragraph**  
22 **21 of this Complaint, which is on the top of the page**  
23 **you're looking at, 8885 and the bottom of the**  
24 **preceding page, is this particular ad that we have**  
25 **just been discussing the one that is referred to in**

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1 **the text of paragraph 21 of the Complaint?**

2 MR. MATHESON: Objection to foundation,  
3 the document and Complaint speaks for itself.

4 THE WITNESS: It is.

5 **Q. (By Mr. Stone) W have no further**  
6 **questions. Well, I do for a moment. I'm sorry.**

7 **Back to some questions you were asked**  
8 **earlier. Did you ever take direction from**  
9 **Mr. Brandon Dansie; in other words, did you consider**  
10 **him to be your client for purposes of giving you**  
11 **direction as to what legal services you should or**  
12 **should not provide?**

13 A. No, I did not.

14 **Q. Prior to being shown Exhibit CX0078 at the**  
15 **first session of your deposition and being shown it**  
16 **again today, did you have any independent**  
17 **recollection of receiving that email from Mr. Dansie**  
18 **back in April of 2007?**

19 A. No, I did not.

20 **Q. Who was it at 1-800 Contacts in 2007 who**  
21 **you considered your client for purposes of providing**  
22 **you direction or requesting that you perform**  
23 **particular legal services?**

24 A. It would have been either David Zeidner,  
25 Joe Zeidner, or Roy Montclair.



1 MR. STONE: Thank you. I have no further  
 2 questions at this time. Thank you.  
 3 MR. MATHESON: That's all we have as well.  
 4 Thanks for your time, Mr. Pratt. We  
 5 appreciate it.  
 6 THE WITNESS: Thank you, guys.  
 7 (Deposition concluded at 11:34 a.m.)  
 8 -o0o-

1 Case: Re: 1-800 Contacts  
 Reporter: Lisa Bernardo  
 2 Date taken: January 5, 2017  
 3 WITNESS CERTIFICATE  
 4 I, BRYAN G. PRATT, HEREBY DECLARE:  
 That I am the witness in the foregoing  
 5 transcript; that I have read the transcript and know  
 the contents thereof; that with these corrections I  
 6 have noted this transcript truly and accurately  
 reflects my testimony.

7 PAGE-LINE	CHANGE/CORRECTION	REASON
8		
9		
10		
11		
12		
13		

14 \_\_\_\_\_ No corrections were made.

15  
 16 I, BRYAN G. PRATT, HEREBY DECLARE UNDER THE  
 17 PENALTIES OF PERJURY OF THE LAWS OF THE UNITED STATES  
 OF AMERICA AND THE LAWS OF THE STATE OF UTAH THAT THE  
 18 FOREGOING IS TRUE AND CORRECT.

19  
 20  
 21 BRYAN G. PRATT

22  
 23 Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2017.  
 24  
 25

1 REPORTER'S CERTIFICATE  
 2  
 3 STATE OF UTAH )  
 ) ss.  
 4 COUNTY OF SALT LAKE )  
 5  
 6 I, Lisa Bernardo, Registered Professional  
 Reporter and Notary Public in and for the State of  
 Utah, do hereby certify:  
 7  
 8 That prior to being examined, the witness,  
 BRYAN G. PRATT, was by me duly sworn to tell the  
 truth, the whole truth, and nothing but the truth;  
 9  
 10 That said deposition was taken down by me  
 in stenotype on January 5, 2017, at the place therein  
 named, and was thereafter transcribed and that a true  
 and correct transcription of said testimony is set  
 forth in the preceding pages;  
 11  
 12 I further certify that, in accordance with  
 Rule 30(e), a request having been made to review the  
 transcript, a reading copy was sent to Mr. Stone for  
 the witness to read and sign and then return to me  
 for filing with Mr. Matheson.  
 13  
 14 I further certify that I am not kin or  
 otherwise associated with any of the parties to said  
 cause of action and that I am not interested in the  
 outcome thereof.  
 15  
 16 WITNESS MY HAND AND OFFICIAL SEAL this 6th  
 day of January, 2017.  
 17  
 18  
 19  
 20  
 21  
 22  
 23 Lisa Bernardo, CSR, RPR  
 24  
 25

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*February 8, 2017*  
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Wednesday, February 8, 2016

Holland & Hart  
222 South Main Street  
Salt Lake City, Utah

Deposition of Mark Miller was taken in above-entitled matter, pursuant to notice, at 8:46 a.m.

2

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18 CX1441 ..... 115  
19 CX1442 ..... 12  
20 CX1468 ..... 149  
21 CX1470 ..... 141  
22 \* \* \*  
23  
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1 APPEARANCES:  
2  
3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
4  
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13  
14 ON BEHALF OF 1-800 CONTACTS AND THE WITNESS:  
15  
16 GREGORY P. STONE  
17 JULIAN MICHAEL BEACH  
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23 Julian.Beach@mto.com  
24  
25

5	<p>1 Thereupon, 2 MARK MILLER 3 was called for examination and, after having been 4 sworn by the notary, was examined and testified as 5 follows: 6 EXAMINATION BY COUNSEL FOR THE FTC 7 BY MR. CHIARELLO: 8 <b>Q. Would you please state your name for the</b> 9 <b>record.</b> 10 A. Mark Miller. 11 <b>Q. Mr. Miller, my name is Gus Chiarello, and</b> 12 <b>I'm here on behalf of the Federal Trade Commission.</b> 13 <b>Also on behalf is --</b> 14 MR. HOPKIN: Nate Hopkin. 15 MR. CHIARELLO: And, Counsel, would you -- 16 MR. STONE: Gregory Stone of Munger, 17 Tolles &amp; Olson on behalf of 1-800 Contacts and also 18 on behalf of the witness. 19 MR. BEACH: Julian Beach of Munger, Tolles 20 &amp; Olson, also on behalf of the witness. 21 <b>Q. (By Mr. Chiarello) Mr. Miller, have you</b> 22 <b>been deposed before?</b> 23 A. No. 24 <b>Q. Have you ever been to a deposition?</b> 25 A. Yes. Several.</p>	7	<p>1 <b>Q. Is there any other reason that you cannot</b> 2 <b>testify truthfully today?</b> 3 A. No. 4 <b>Q. Who is representing you here today?</b> 5 A. Munger, Tolles attorneys here, Greg and 6 Julian. 7 MR. CHIARELLO: And, Counsel, you also 8 represent 1-800 Contacts? 9 MR. STONE: Yes. 10 <b>Q. (By Mr. Chiarello) Is 1-800 Contacts</b> 11 <b>paying for your appearance here today?</b> 12 A. They are not paying me, no. 13 <b>Q. Do you still -- do you represent</b> 14 <b>1-800 Contacts as an attorney?</b> 15 A. They are still a client of Holland &amp; Hart, 16 yes. 17 <b>Q. I'm going to give you an exhibit premarked</b> 18 <b>CX1429 --</b> 19 <b>(Exhibit CX1429 was identified.)</b> 20 <b>Q. -- and ask you to review it. And my first</b> 21 <b>question is, what is this?</b> 22 A. Well, it looks like my bio that Holland &amp; 23 Hart has up on their website. 24 <b>Q. As you look at it today, is it accurate as</b> 25 <b>to representing your educational background?</b></p>
6	<p>1 <b>Q. You know we're making a record of today's</b> 2 <b>hearing. Please provide verbal answers to my</b> 3 <b>questions. Please avoid nodding and gestures which</b> 4 <b>can't be recorded.</b> 5 <b>Do you understand?</b> 6 A. Right. 7 <b>Q. To get the record clear, let's avoid</b> 8 <b>talking over each other. Please wait for me to</b> 9 <b>finish my question before answering, and I'll try to</b> 10 <b>wait for you to finish your answer before I start my</b> 11 <b>next question.</b> 12 A. Sounds great. 13 <b>Q. If you don't understand my question or</b> 14 <b>it's not clear, please let me know and I'll clarify.</b> 15 <b>And we are scheduled to take breaks today.</b> 16 <b>If you need to take a break at any time, please let</b> 17 <b>me know. If there's a question pending, please</b> 18 <b>answer the question before we take the break.</b> 19 A. Okay. 20 <b>Q. And you understand you're under oath?</b> 21 A. Yes. 22 <b>Q. Are you taking any medication that would</b> 23 <b>interfere with your ability to testify truthfully</b> 24 <b>today?</b> 25 A. No.</p>	8	<p>1 A. Well, let me see here. Where's the 2 educational background? 3 <b>Q. Oh. To the left under your picture.</b> 4 A. Yes. 5 <b>Q. Okay. And you're admitted to the bar in</b> 6 <b>Utah?</b> 7 A. Yes. 8 <b>Q. Are you admitted to any other state bars?</b> 9 A. I don't -- I don't believe so. 10 <b>Q. Have you ever applied for admission to any</b> 11 <b>other state bars?</b> 12 A. I'm pausing because I have this vague 13 recollection that I may have done some sort of 14 reciprocity application once. But I might have only 15 been thinking about that. Whether I was admitted to 16 D.C. or not through reciprocity, I don't recall. I 17 don't think so. 18 <b>Q. Do you presently pay dues to any other</b> 19 <b>state --</b> 20 A. No. 21 <b>Q. -- bar besides the Utah State Bar?</b> 22 A. No, I don't. 23 <b>Q. Did you meet with 1-800 Contacts' counsel</b> 24 <b>before today's deposition?</b> 25 A. Yes.</p>

1 **Q. Who did you meet with?**  
 2 A. Greg Stone and Julian -- is it Beach?  
 3 MR. BEACH: That's right.  
 4 **Q. (By Mr. Chiarello) When did you meet with**  
 5 **them?**  
 6 A. Yesterday.  
 7 **Q. And any other times before yesterday?**  
 8 A. I have met Greg before, I don't recall how  
 9 long ago, just briefly.  
 10 **Q. What did you discuss with counsel**  
 11 **yesterday?**  
 12 MR. STONE: Instruct the witness not to  
 13 answer on the grounds of attorney-client privilege.  
 14 THE WITNESS: I'll follow that  
 15 instruction.  
 16 **Q. (By Mr. Chiarello) Other than any**  
 17 **discussions with outside counsel, did you discuss**  
 18 **this deposition with anybody else?**  
 19 A. No, other than the fact that I am having a  
 20 deposition. But substantively, no.  
 21 **Q. Who did you discuss the fact that you're**  
 22 **having --**  
 23 A. Well, just my partners here. I've  
 24 mentioned I'm being deposed today.  
 25 **Q. Did you discuss this matter with anyone**

1 **else besides counsel?**  
 2 A. When you say "this matter," what do you  
 3 mean? Just the case in general?  
 4 **Q. This case in general, yes.**  
 5 A. Well, I mean, I've discussed the case with  
 6 Bryan Pratt before. I may have mentioned some  
 7 aspects of the case with some other of my partners  
 8 here. That's about it.  
 9 **Q. Did you discuss it with any employees of**  
 10 **1-800 Contacts?**  
 11 A. Yeah. I probably -- over the years I  
 12 probably have. But that would be privileged  
 13 communication, I would think.  
 14 **Q. Have you discussed this present FTC action**  
 15 **with any individuals at 1-800 Contacts?**  
 16 A. I don't believe I have.  
 17 **Q. And what is your current relationship with**  
 18 **1-800 Contacts?**  
 19 A. They are a client of the firm, Holland &  
 20 Hart, so we still represent them in certain matters.  
 21 I don't have any current cases I'm handling for them,  
 22 so I'm not currently actively representing them in  
 23 any matter. So --  
 24 **Q. In what types of matters did you represent**  
 25 **1-800 Contacts?**

1 A. I would do IP litigation matters for them.  
 2 So trademark matters, patent infringement matters.  
 3 There's some copyright cases. Just a number of  
 4 things like that.  
 5 **Q. I'm handing you an exhibit marked CX1347.**  
 6 **(Exhibit CX1347 was identified.)**  
 7 **Q. This is Complaint Counsel's Notice of**  
 8 **Deposition to 1-800 Contacts, Inc. Have you seen**  
 9 **this document before?**  
 10 A. Yeah, I think I have seen this before.  
 11 **Q. It's our understanding that you're here to**  
 12 **testify on behalf of 1-800 Contacts pursuant to the**  
 13 **Federal Trade Commission's Rules of Practice, 16 CFR**  
 14 **Section 3.33(a) and (c)(1), and specifically to**  
 15 **the -- these topics identified below.**  
 16 **The first one is No. 1.**  
 17 **Do you see that?**  
 18 A. Uh-huh.  
 19 **Q. Are you prepared to testify as to that**  
 20 **topic today?**  
 21 A. Yes.  
 22 **Q. The second topic I understand you're**  
 23 **testifying to is No. 2. I'll give you a second to**  
 24 **read that if you need to. But are you prepared to**  
 25 **testify to that topic today?**

1 A. I believe so, yes.  
 2 **Q. And the third topic area I understand**  
 3 **you're to testify to is No. 5, which is on page 2.**  
 4 **Do you see that?**  
 5 MR. STONE: I don't know that that's the  
 6 case.  
 7 THE WITNESS: No, I don't recall  
 8 discussing topic 5.  
 9 MR. CHIARELLO: Let's go off the record  
 10 for a moment.  
 11 (A discussion was held off the record.)  
 12 MR. CHIARELLO: We just had a conversation  
 13 off the record, and counsel indicates that Mr. Miller  
 14 was not designated to testify as to No. 5.  
 15 And just on the record, we'll take this  
 16 matter up later in the day and resolve it one way or  
 17 the other.  
 18 **Q. (By Mr. Chiarello) I'm handing you an**  
 19 **exhibit marked CX1442 --**  
 20 **(Exhibit CX1442 was identified.)**  
 21 **Q. -- which is entitled Respondent's**  
 22 **Preliminary Witness List, and I draw your attention**  
 23 **to page 4, under Roman numeral II, No. 1, which**  
 24 **identifies you, Mr. Miller.**  
 25 **Do you see that?**

1 A. Uh-huh.  
 2 **Q. Are you prepared to testify today on the**  
 3 **topics discussed and described herein in this**  
 4 **paragraph Roman numeral No. II, No. 1?**  
 5 A. Yeah. I have, you know, a knowledge and  
 6 understanding that I can testify in that -- in this  
 7 category of information.  
 8 **Q. You can set that aside. I'm going to give**  
 9 **you a document marked CX310 and also CX311. These**  
 10 **are two settlement agreements with different parties,**  
 11 **both dated in 2004.**  
 12 **(Exhibits CX310 and CX311 were identified.)**  
 13 **Q. Okay. My first questions are going to**  
 14 **focus on CX310.**  
 15 A. Okay.  
 16 **Q. Have you seen this document before?**  
 17 A. Yeah, I believe I have.  
 18 **Q. What is it?**  
 19 A. Looks like a settlement agreement between  
 20 1-800 Contacts and Coastal Contacts from 2004.  
 21 **Q. Did you represent 1-800 Contacts in the --**  
 22 **when it undertook this settlement agreement?**  
 23 A. No. I was not part of this case or the  
 24 negotiation of this agreement at all.  
 25 **Q. If you would please turn to page**

1 was there was software out there available that  
 2 would -- if you installed it on a computer and you  
 3 rolled over a certain term on a website or on a  
 4 document, you would roll over a certain word and then  
 5 an advertisement would just pop up over the top of  
 6 whatever you're looking at relating to that word.  
 7 So my understanding of a pop-up  
 8 advertisement is that it's an advertisement that  
 9 actually comes up over the top of whatever screen  
 10 you're looking at in response to clicking on a  
 11 certain word or typing in a certain word or something  
 12 like that.  
 13 **Q. If you would advance down to the next page**  
 14 **and to paragraph c. The header above says**  
 15 **"Specifically, the Prohibited Acts include," colon.**  
 16 **And then letter c reads, "using the other**  
 17 **Party's URLs, trademarks, or brand name, as listed on**  
 18 **Exhibit 2 hereto, to target or trigger the appearance**  
 19 **or delivery of Pop-Up Advertisements on top of, over,**  
 20 **underneath, or behind, or in any way that obstructs**  
 21 **the on-screen view of the other Party's Websites."**  
 22 **Do you see that?**  
 23 A. Uh-huh.  
 24 **Q. What does the "using" -- term "using" mean**  
 25 **here?**

1 **CX310-002. Under the third paragraph it says**  
 2 **"Prohibited Acts."**  
 3 A. Uh-huh.  
 4 **Q. And the third line -- well, I'll read into**  
 5 **the record the first sentence.**  
 6 **It says, "from the Effective Date of this**  
 7 **Agreement, each Party, its subsidiaries, agents,**  
 8 **servants, employees, officers, and other entities**  
 9 **controlled by such Party mutually agree to refrain**  
 10 **from and not to cause in the future any other entity**  
 11 **to engage in Internet advertising that causes or**  
 12 **displays advertisements to appear on top of, over,**  
 13 **underneath or behind the other Party's websites" --**  
 14 **there's a parentheses in the middle that says**  
 15 **"hereafter 'Pop-Up Advertisements'" -- "as listed in**  
 16 **Exhibit 2 hereto."**  
 17 **And then it says, "or to modify or alter**  
 18 **the other Party's Restricted Websites as described**  
 19 **more fully below," period. And I skipped over the**  
 20 **two parentheses there.**  
 21 **What I'm wondering is, what are pop-up --**  
 22 **if you could define what this means, particularly to**  
 23 **what pop-up advertisements are.**  
 24 A. Well, my understanding -- I wasn't part of  
 25 this case. Back in that time frame, my understanding

1 A. In c?  
 2 MR. STONE: Objection. The document  
 3 speaks for itself.  
 4 But you can answer as to your  
 5 understanding.  
 6 THE WITNESS: Just the word "using" in  
 7 paragraph c, the very first word?  
 8 **Q. (By Mr. Chiarello) Yeah. What does it**  
 9 **mean to use the other party's URLs, trademarks, or**  
 10 **brand name?**  
 11 A. I think it just means what it says, to use  
 12 their trademark or brand name. I don't understand  
 13 what you're trying to ask there. I think it's pretty  
 14 clear.  
 15 **Q. Okay. In what ways would one use another**  
 16 **party's URL, trademark, or brand name to target or**  
 17 **trigger the appearance of delivery, or delivery of a**  
 18 **pop-up ad?**  
 19 A. Well, they would -- they would implement,  
 20 you know, software procedures or, I don't know, some  
 21 sort of technical device that would cause a pop-up ad  
 22 to come up in response to somebody -- I mean, with  
 23 pop-up ads it could be in response to somebody  
 24 clicking on the trademark or somebody typing in the  
 25 trademark. That's how they would use it to trigger

17

1 their ads; they would implement some sort of  
 2 technical feature that would cause their pop-up  
 3 advertisement to come up when the user interacts with  
 4 the trademark somehow. Whether it's already on the  
 5 screen and they click it or whether they type it in,  
 6 that's how you would use it.  
 7 **Q. If you look at letter d below, it says,**  
 8 **"causing a Party's website or Internet advertisement**  
 9 **to appear in response to any Internet search for the**  
 10 **other Party's brand name, trademarks, or URL but not**  
 11 **through" -- "but not through a search employing**  
 12 **Generic or Descriptive Terms."**  
 13 **Do you see where I read that?**  
 14 A. Yeah.  
 15 **Q. What does that mean?**  
 16 A. Well, you know, I think that one's pretty  
 17 clear too. It's, you know, causing your Internet  
 18 advertisement to come up when somebody searches for  
 19 the other party's trademark, but doesn't -- you know,  
 20 but not through just a generic or descriptive term  
 21 search, but somebody searches for that trademark as a  
 22 source and then using that search to trigger the  
 23 appearance of your Internet advertisement. That's  
 24 what that means.  
 25 MR. CHIARELLO: Could you read back -- I'm

18

1 sorry.  
 2 **Q. Your -- your phrase, I'm reading back:**  
 3 **But somebody searches for that trademark as a source**  
 4 **and using that search to trigger the appearance of**  
 5 **your Internet ad.**  
 6 **Unraveling that a little bit, when you say**  
 7 **"but somebody searches for that trademark," what do**  
 8 **you mean by "searches for"?**  
 9 A. They type in the trademark. They type in  
 10 "1-800 Contacts" or they type in "Vision Direct," or  
 11 in this case they type in "Coastal Contacts." That  
 12 -- if that's that party's trademark or brand name and  
 13 somebody types into a search engine that trademark or  
 14 brand name, they're searching for that source.  
 15 And so what this means is in the  
 16 prohibited acts, the purpose of this provision  
 17 appears to be not allowing either party to trigger  
 18 the appearance of their advertisements when a user  
 19 searches for the other party's brand name or  
 20 trademark.  
 21 **Q. How -- how does a party know what a user**  
 22 **is searching for when they enter a trademark into the**  
 23 **search query?**  
 24 A. Well --  
 25 MR. STONE: Objection. Vague and

19

1 ambiguous. Improper as to form. And calls for  
 2 speculation.  
 3 THE WITNESS: Nobody can know exactly  
 4 what's in every user's head. But when -- I think  
 5 it's pretty intuitive and common sense that if  
 6 somebody goes into Google and types in somebody's  
 7 trademark, they're searching for that brand.  
 8 **Q. (By Mr. Chiarello) And why is it**  
 9 **intuitive and common sense?**  
 10 MR. STONE: Same objections.  
 11 THE WITNESS: I just think it is. If I  
 12 want to -- if I want to find Delta Airlines, I go in  
 13 and I type in "Delta Airlines" because I'm looking  
 14 for Delta Airlines. That's just how search engines  
 15 work. I mean, I think it's pretty intuitive. I know  
 16 I've read a lot of -- there's been scholarly articles  
 17 and there's been articles written for years just  
 18 about search engines, how they work, how users  
 19 interact with them. And I think that's generally  
 20 what a user's thinking.  
 21 **Q. (By Mr. Chiarello) But I take from your**  
 22 **answer that -- I believe you said you can't know what**  
 23 **is in someone's head. Is that -- I don't want to**  
 24 **misstate your testimony.**  
 25 A. Well, you can -- you can infer what

20

1 someone's -- what's in someone's head by what they're  
 2 searching for. You know, if somebody types in  
 3 "1800Contacts," I know they're not searching for, you  
 4 know, microwave ovens, and I know they're not  
 5 searching for Vision Direct and I know they're not  
 6 searching for Walgreens, or else they would have  
 7 typed in "Vision Direct" or "Walgreens" or "microwave  
 8 ovens." So you can infer what they're likely  
 9 thinking.  
 10 **Q. Is anywhere in agreement that term -- is**  
 11 **it defined in the agreement what the term "for" would**  
 12 **mean as far as searching for a party's brand name or**  
 13 **trademark?**  
 14 MR. STONE: Objection. The document  
 15 speaks for itself.  
 16 THE WITNESS: I can't give you a  
 17 definition for the word "for." I think it's pretty  
 18 clear.  
 19 **Q. (By Mr. Chiarello) And I know you**  
 20 **testified earlier that you weren't part of the**  
 21 **discussions in this agreement, but are you aware of**  
 22 **discussions between the parties as to what that term**  
 23 **would mean?**  
 24 A. I'm not aware of any discussions that  
 25 specifically discussed the meaning of the word "for,"

<p style="text-align: right;">21</p> <p>1 no.</p> <p>2 <b>Q. Are you aware of any discussions related</b></p> <p>3 <b>to any other terms in this settlement agreement?</b></p> <p>4 A. No. I can't off the top of my head think</p> <p>5 of any. I -- it may come to me later, but right now</p> <p>6 I can't think of any specific written negotiations or</p> <p>7 discussions that I've reviewed relating to this.</p> <p>8 <b>Q. In the course of any of your</b></p> <p>9 <b>representation with 1-800 Contacts, have you been</b></p> <p>10 <b>involved with any modifications, or are you aware of</b></p> <p>11 <b>any changes to this settlement agreement since --</b></p> <p>12 <b>since the date it was enacted, October 29th, 2004?</b></p> <p>13 A. Of the Coastal Contacts settlement</p> <p>14 agreement?</p> <p>15 <b>Q. Yes.</b></p> <p>16 A. No. I know I've read it and considered it</p> <p>17 before, but I don't remember a modification to the</p> <p>18 Coastal Contacts settlement agreement.</p> <p>19 <b>Q. If you would please turn to the back of</b></p> <p>20 <b>the exhibit, Exhibit 2. And do you see where it says</b></p> <p>21 <b>"Restricted Websites of 1-800 Contacts"?</b></p> <p>22 A. Yeah.</p> <p>23 <b>Q. And then below it, it says "Restricted</b></p> <p>24 <b>Websites of Coastal Contacts"?</b></p> <p>25 A. Right.</p>	<p style="text-align: right;">23</p> <p>1 because to include misspellings, common misspellings</p> <p>2 of the trademark that would indicate the user is</p> <p>3 searching for that brand name even though they</p> <p>4 misspelled it slightly.</p> <p>5 And so they started adding that into the</p> <p>6 attached exhibit. It wasn't part of this early</p> <p>7 agreement, but the intent and the mindset was the</p> <p>8 same. They just started addressing it more, I guess,</p> <p>9 specifically later on.</p> <p>10 <b>Q. And you're talking about settlement</b></p> <p>11 <b>agreements that they entered into after this one?</b></p> <p>12 A. Subsequently, yes. With other parties</p> <p>13 over similar issues.</p> <p>14 <b>Q. But this one, you're not aware of any</b></p> <p>15 <b>defined brand names or trademarks as to what this</b></p> <p>16 <b>agreement says?</b></p> <p>17 A. No. I don't -- I'm not aware of it</p> <p>18 listing them out in an exhibit specifically other</p> <p>19 than just on that page it mentions the party's brand</p> <p>20 name trademarks -- and trademarks. So just can</p> <p>21 figure those out without it being listed, I guess.</p> <p>22 <b>Q. Okay. You can set that exhibit aside for</b></p> <p>23 <b>now. If you would please look at CX311 --</b></p> <p>24 A. Okay.</p> <p>25 <b>Q. -- which has the title "Settlement</b></p>
<p style="text-align: right;">22</p> <p>1 <b>Q. Are you aware of any additions to the</b></p> <p>2 <b>restrictions on this settlement agreement?</b></p> <p>3 A. It's possible. I can't say for certain,</p> <p>4 but it's possible there may have been later on a</p> <p>5 request to add a website. I know with -- with other</p> <p>6 settlement agreements there was a time where the</p> <p>7 Glasses.com website was requested to be added to the</p> <p>8 list of some of the agreements. I don't know if this</p> <p>9 is one of them.</p> <p>10 <b>Q. I also noticed that this agreement also</b></p> <p>11 <b>has recited websites but does not include brand names</b></p> <p>12 <b>or trademarks listed. Are you aware if those terms</b></p> <p>13 <b>were ever added to the settlement agreement?</b></p> <p>14 A. I don't -- I'm not sure. I'm not sure if</p> <p>15 they were or not. I know that back in this time</p> <p>16 frame the evaluation on how to settle these trademark</p> <p>17 lawsuits was an evolving thing, and this is one of</p> <p>18 the early efforts. And these provisions in</p> <p>19 subsections d and e, I guess, one of them that you</p> <p>20 just read, are intended to just focus on parties'</p> <p>21 brand names and trademarks as -- as triggering --</p> <p>22 searches for the brand name or trademark as</p> <p>23 triggering Internet ads.</p> <p>24 And I think as time progressed, they</p> <p>25 started adding specific trademark terms, probably</p>	<p style="text-align: right;">24</p> <p>1 <b>Agreement," and it's dated June 24th, 2004. It</b></p> <p>2 <b>appears to be between 1-800 Contacts and Vision</b></p> <p>3 <b>Direct.</b></p> <p>4 <b>Do you see that?</b></p> <p>5 A. Yeah.</p> <p>6 <b>Q. Okay. If you would please look to page 4</b></p> <p>7 <b>and 5.</b></p> <p>8 A. Okay.</p> <p>9 <b>Q. And I'm -- 4 into 5. I'm looking at the</b></p> <p>10 <b>prohibited acts.</b></p> <p>11 <b>Do you see those?</b></p> <p>12 A. Yeah. Which -- what are you asking?</p> <p>13 Which one?</p> <p>14 <b>Q. Well, I'm just asking, do you see those?</b></p> <p>15 A. Well, I see page 4.</p> <p>16 <b>Q. Okay. If you would please -- at the</b></p> <p>17 <b>bottom of page 4 it reads "The Prohibited Acts</b></p> <p>18 <b>include."</b></p> <p>19 <b>Do you see that?</b></p> <p>20 A. Oh. You know what, I was looking at the</p> <p>21 CX311, page 4. Sorry. The actual page 4.</p> <p>22 <b>Q. I'm sorry. Yes, page 4 of the agreement.</b></p> <p>23 A. I gotcha.</p> <p>24 <b>Q. Okay. Yes. It's CX003 at the bottom.</b></p> <p>25 A. Yeah.</p>

25

1 **Q. And it says "The Prohibited Acts include."**  
 2 **Do you see that?**  
 3 A. Yes.  
 4 **Q. Okay. Turn the page over to the next**  
 5 **page --**  
 6 A. Okay.  
 7 **Q. -- and where it says -- in letter e it**  
 8 **says, "causing a Party's brand name, or link to the**  
 9 **Party's Restricted Websites to appear as a listing in**  
 10 **the search results page of an Internet search engine,**  
 11 **when a user specifically searches for the other**  
 12 **Party's brand name."**  
 13 **Do you see that?**  
 14 A. Yes.  
 15 **Q. And what does it mean, the term**  
 16 **"specifically searches for the other party's brand**  
 17 **name"?**  
 18 A. Well, the -- the purpose of this agreement  
 19 and these type of settlement agreements 1-800 entered  
 20 into is to restrict searches where the indication is  
 21 the user is searching for that party, that party as a  
 22 source. So when a user specifically searches for the  
 23 other party's brand name, if somebody is searching  
 24 for 1-800 Contacts, they -- that's what they search  
 25 for. Or they search for Vision Direct. As opposed

26

1 to somebody searching, you know, more in a  
 2 comparative sense, we want to search for  
 3 1-800 Contacts versus Vision Direct or who's cheaper,  
 4 or somebody doing a search like that that may include  
 5 1-800 Contacts in it. But that's not a specific  
 6 search just for 1-800 Contacts; it's more of a  
 7 comparative search.  
 8 So I believe the intent when it says  
 9 "specifically searches for the other party's brand  
 10 name" is they're trying to restrict or target  
 11 searches where the user is searching for that party  
 12 and that party's brand. And those are -- that's  
 13 generally done because the party has some sort of  
 14 goodwill or brand recognition that they've developed  
 15 through their advertising and that leads a user to  
 16 have the ability to know that I'm going to type in  
 17 their brand name. I'm not just searching for contact  
 18 lenses in general, I'm searching for a specific  
 19 retailer because I know their name.  
 20 **Q. At the point when this agreement was**  
 21 **entered -- and let me go back to establish the**  
 22 **foundation. Did you participate in this settlement**  
 23 **agreement?**  
 24 A. No, I did not.  
 25 **Q. Do you know if 1-800 or the counsel**

27

1 **representing 1-800 or any of the people involved**  
 2 **would know when a user goes out to, say, Google or**  
 3 **what was at the time MSN to conduct a search, what**  
 4 **the searcher would specifically be searching for when**  
 5 **they enter a brand name into a query?**  
 6 A. Well, I think --  
 7 MR. STONE: Objection. Improper as to  
 8 form. Calls for speculation.  
 9 You can answer.  
 10 THE WITNESS: The intent -- I've read some  
 11 communications relating to this agreement, and -- and  
 12 the intent in reaching this agreement was to limit  
 13 the appearance of your advertisements when somebody  
 14 searches for your brand, types in "1800Contacts" or  
 15 "Vision Direct." But, you know, that's about it.  
 16 So I think the use of "specifically  
 17 searches for the other party's brand" is meant to  
 18 limit it to searches where the search is for that  
 19 brand rather than contact lenses in general or  
 20 comparative understanding of the industry in general.  
 21 **Q. (By Mr. Chiarello) What -- what**  
 22 **communications did you read related to this**  
 23 **settlement agreement?**  
 24 A. Well, I believe -- and, you know, this  
 25 might be a memory quiz, so don't hold me to this, but

28

1 I believe there were some communications back in 2004  
 2 between 1-800's in-house counsel and Vision Direct's  
 3 in-house counsel about this agreement, and they  
 4 talked about how comparative advertising is not  
 5 something that should be prohibited.  
 6 They talked about -- after the  
 7 implementation of this, I think they talked about,  
 8 you know, the best way to accomplish this goal of  
 9 subsection e would be using negative keywords for  
 10 each other's brand name. I think it was Vision  
 11 Direct's suggestion is we're using a negative keyword  
 12 for 1-800 Contacts' trademarks, and -- and we should  
 13 have them do the same thing. That's the easiest way  
 14 to comply with this and make sure we're not doing  
 15 this.  
 16 So that indicates to me that the intent  
 17 was if you just prevent the ad from coming up on  
 18 searches for the brand name itself, that's it. Not  
 19 just like a big -- a big phrase that may include the  
 20 brand name, but for the brand name, that's what  
 21 they're intending to do, and negative keywords could  
 22 accomplish that. That's my understanding from  
 23 reading those communications and reading this term.  
 24 **Q. What is a negative keyword?**  
 25 A. My understanding is a negative keyword is

29

1 a term that you can implement in Google's AdWords  
2 program and maybe other search engines that will make  
3 it -- that will prevent your advertisement, your --  
4 your paid advertisement from coming up when somebody  
5 searches for that keyword, that negative keyword. So  
6 it's a way that the advertiser can control when their  
7 ads come up and when they don't come up. And that's  
8 so that they can -- it's -- they can target and --  
9 surgically target and carve out areas where they  
10 don't want their ad to come up that may be  
11 encompassed by their other settings.

12 **Q. Do you have an example you could share?**

13 A. Yeah, I can. I mean, I can give you one  
14 specific to this issue, 1-800 Contacts. If you --  
15 when you go into your Google AdWords account, Google  
16 has structured it -- and back in 2004 was actually  
17 changing their policies to make sure advertisers were  
18 the ones that could control when their ads came up so  
19 that Google could say, it's not on us, you guys have  
20 full control, here's all the buttons and levers you  
21 can push. One of those is you pick a keyword.  
22 Another one of those is you pick a match type. You  
23 can exact match it, you can phrase match it, you can  
24 broad match it. And by choosing the match type, you  
25 are choosing a subset of searches that a user will

30

1 enter into, and those are the searches you're using  
2 to trigger your advertisement.

3 And then within that group of searches you  
4 can go in and target and carve out things that would  
5 be encompassed by your match type that you don't want  
6 your ad to appear in. So if you broad match "contact  
7 lenses," that's going to encompass a bunch of stuff,  
8 including 1-800 Contacts, including Coastal Contacts,  
9 including the brand names of retailers. And then a  
10 negative keyword tool is one where you can go in and  
11 take out, surgically, those brand names you don't  
12 want to be encompassed by your broad match of contact  
13 lenses.

14 So there's just a lot of different ways to  
15 accomplish the same thing. You could exact match a  
16 thousand different keywords that you're interested  
17 in.

18 **Q. What does "exact match" mean?**

19 A. It means that you are targeting one -- the  
20 search of one term exactly, and your ad will only  
21 come up if the user types in that exact term and  
22 nothing else. If you exact match "contacts," your ad  
23 will never come up unless the only thing in the  
24 search bar is "contacts."

25 If you phrase match it -- this is my

31

1 understanding. I'm not, you know, a Google expert  
2 and I don't draft their algorithms, but my  
3 understanding is if you phrase match it, your ad will  
4 come up when "contacts" is part of the phrase, but  
5 other words can be there.

6 When you broad match it your ad will come  
7 up when the search term relates to contacts, even if  
8 the word "contacts" isn't necessarily in there. If  
9 it relates to contact lenses or even sales contacts,  
10 you know, things like that could potentially be  
11 encompassed by broad-matching "contacts."

12 So that's my understanding of exact match,  
13 phrase match, and broad match. And, you know, broad  
14 match lets you easily target a big universe of  
15 searches with one term and then surgically carve out  
16 what you don't want with negative keywords.  
17 Alternatively, you can exact match 5,000 terms you're  
18 interested in relating to contact lenses  
19 individually, which is more of a hassle. So there's  
20 different ways you can accomplish the same goal.

21 **Q. Is it fair to say under your understanding  
22 that "exact match" means to match to a user query?**

23 MR. STONE: Objection. Improper as to  
24 form.

25 And I would just say that this is an area

32

1 in which -- you're welcome to examine the witness as  
2 you are, but this is outside his area of expertise  
3 and not a topic on which he's been designated.

4 But you can still --

5 **Q. (By Mr. Chiarello) You can answer. You  
6 said "exact match," so I'm trying to understand what  
7 you mean by "exact match" from what your  
8 understanding is.**

9 A. What is -- is exact match a user query?  
10 Is that what you said?

11 **Q. Yeah. You said that if you pick exact  
12 match, then if the user types in exactly that  
13 keyword, then it will -- it will deliver an ad to  
14 that -- that -- the keyword as long as that's exactly  
15 what the user typed in. I'm trying to understand if  
16 you were saying the keyword matches the query.**

17 A. I believe -- I believe that's -- that's my  
18 understanding of exact matching the keyword would  
19 only deliver the ad if the user search exactly  
20 matched the keyword that you selected.

21 **Q. Okay. And back to this Vision Direct  
22 agreement. As it's written here, there's no  
23 provisions for negative keywords; is that correct?**

24 MR. STONE: Objection. The document  
25 speaks for itself.



33

1 You can answer.  
 2 THE WITNESS: I don't know if the word  
 3 "negative keyword" appears in this agreement. I  
 4 think subsection e, when it talks about each party is  
 5 not supposed to cause their websites to appear as a  
 6 listing in response to a user specifically searching  
 7 for the other party's brand names or trademarks, I  
 8 believe that's just an overarching -- under the  
 9 prohibited acts, negative keywords would be one tool  
 10 in which the parties understood they could implement  
 11 that prohibited act. But it doesn't say "negative  
 12 keywords" that I can see in here.

13 **Q. I'm handing you an exhibit marked CX313.**  
 14 **(Exhibit CX313 was identified.)**

15 **Q. And my first question, what is this?**

16 A. This looks like the settlement agreement  
 17 between 1-800 Contacts and EZ Contacts.

18 **Q. Did you represent 1-800 Contacts when they**  
 19 **entered into this agreement?**

20 A. No, I did not.

21 **Q. Would you please turn to paragraph 5 --**

22 MR. STONE: Can we go off the record for  
 23 one second?

24 MR. CHIARELLO: Yeah.

25 (A discussion was held off the record.)

34

1 **Q. If you would please turn to paragraph 5(A)**  
 2 **under "The Prohibited Acts include."**

3 **Do you see that at the bottom of the page?**

4 A. Yeah. I'm just reading the first part of  
 5 5(A) first.

6 Okay.

7 **Q. And I'm going to ask you a similar**  
 8 **question I asked you on the other two agreements as**  
 9 **far as what -- what is meant by causing the party's**  
 10 **website, Internet link, or Internet advertisement to**  
 11 **appear in response to any Internet search for the**  
 12 **party's brand name, trademarks or URLs.**

13 A. Where are you reading that?

14 **Q. I'm -- I'm sorry. Paragraph (A), sub a**  
 15 **under "The Prohibited Acts include."**

16 A. Okay. It -- it's the same concept. They  
 17 don't -- they want to -- this is preventing each  
 18 party from causing their advertisements to appear  
 19 when a user searches for the other party's brand name  
 20 or trademarks. Yeah, I think it's the same thing.

21 **Q. Has -- has the meaning for this changed**  
 22 **over the years since this agreement was adopted?**

23 MR. STONE: Objection. Vague and  
 24 ambiguous.

25 You can answer.

35

1 THE WITNESS: Yeah, my understanding is  
 2 that the -- the goal and intent and meaning of what  
 3 the parties tried to accomplish when they had these  
 4 trademark infringement issues and they wanted to  
 5 prevent any confusion or problems with their  
 6 trademarks, their goodwill, their brand names was  
 7 just to make it so that when a user searches for the  
 8 other party's brand, the -- their advertisements  
 9 wouldn't be triggered by a search for the other  
 10 party's brand. I think that's always been the goal.  
 11 That's always been the intent.

12 And the way they implement it may have  
 13 become more sophisticated over time, meaning, you  
 14 know, maybe later agreements expressly put in  
 15 negative keyword issues, but the use of negative  
 16 keywords was always an available tool that was  
 17 understood to be part of being able to accomplish the  
 18 goal here of making sure that there wouldn't be any  
 19 trademark infringement or consumer confusion when --  
 20 when somebody's searching for one brand name and  
 21 they're seeing placement of a link to another website  
 22 that they may think might be affiliated with or  
 23 sponsored with the brand name they searched for.

24 So that is always the intent and goal, and  
 25 that's what this subsection (A) seeks to accomplish.

36

1 And I don't think that's changed materially over the  
 2 years.

3 **Q. Okay. I'm handing you an exhibit marked**  
 4 **CX1430.**

5 **(Exhibit CX1430 was marked.)**

6 **Q. And I'll describe the exhibit as something**  
 7 **we've created to help facilitate discussion today.**  
 8 **And the first page represents a Google search page**  
 9 **with the query "1-800 Contacts."**

10 **Do you see that?**

11 A. Yeah.

12 **Q. This is meant to be a screenshot of**  
 13 **that -- it's a screenshot of that page. You're**  
 14 **welcome to look through this if you'd like.**

15 A. It doesn't look like it's a real  
 16 screenshot because there's no content below it. I  
 17 mean, I don't know how this was created, so --

18 **Q. I'll describe it to you. It's meant to be**  
 19 **where the user has entered the query but has not hit**  
 20 **"enter" yet.**

21 A. Right.

22 **Q. You see the Google name?**

23 A. Okay.

24 **Q. At the top in the left-hand corner it says**  
 25 **"Google," and underneath it says "1-800 Contacts."**

37

1 **Do you see that on the first page?**  
 2 A. Sure.  
 3 **Q. Where it says "User Query No. 1," we've**  
 4 **added that. Again, it's to facilitate discussion**  
 5 **today. And do you see underneath "1-800 Contacts"**  
 6 **there are two things, one that says "Google search"**  
 7 **on the left-hand side --**  
 8 A. Uh-huh.  
 9 **Q. -- and the second word says "I'm feeling**  
 10 **lucky."**  
 11 **Do you see that?**  
 12 A. Right.  
 13 **Q. Do you know what that means?**  
 14 MR. STONE: Objection. Lacks foundation;  
 15 calls for speculation. Not a topic on which this  
 16 witness has been designated.  
 17 You can answer.  
 18 THE WITNESS: I don't know what that  
 19 button does, how Google uses that button. I don't  
 20 know when they first started using that. So I really  
 21 don't have any idea.  
 22 **Q. (By Mr. Chiarello) But going back to the**  
 23 **EZ Contacts settlement agreement where you're talking**  
 24 **about a search for another party's brand name, you**  
 25 **see the query "1-800 Contacts." Is that what you**

38

1 **mean --**  
 2 A. That would be --  
 3 **Q. -- by a search for another party's brand**  
 4 **name?**  
 5 A. That would be a search for 1-800 Contacts'  
 6 brand.  
 7 **Q. And then if you would flip to Query No. 5.**  
 8 A. Okay.  
 9 **Q. And do you see where the query reads**  
 10 **"contact lenses 1-800 Contacts"?**  
 11 A. Uh-huh.  
 12 **Q. Is that a search for another party's**  
 13 **trademark or brand name?**  
 14 MR. STONE: Objection. Calls for  
 15 speculation. Improper as to form.  
 16 You can answer.  
 17 **Q. (By Mr. Chiarello) And by the limitation**  
 18 **on that question, I'm asking as it pertains to the**  
 19 **EZ Contacts settlement agreement.**  
 20 A. Oh. I know it could potentially be one.  
 21 I don't think that search would necessarily have been  
 22 prohibited by the EZ Contacts agreement. I think  
 23 if --  
 24 **Q. What are you looking at here?**  
 25 A. I'm looking at Exhibit 3 to the

39

1 EZ Contacts agreement, so where it lists the  
 2 keywords.  
 3 **Q. Uh-huh.**  
 4 A. So I don't think if you -- if you were  
 5 implementing these negative keywords in Exhibit 3 for  
 6 1-800 Contacts, I don't think it would really  
 7 preclude that search. But if later on it was  
 8 determined that this search was performed enough and  
 9 there was indications that that's likely somebody  
 10 searching specifically for 1-800 Contacts that could  
 11 lead to confusion, then there's a mechanism in the  
 12 agreement to request that that be added to the list  
 13 of keywords, this phrase "contact lenses  
 14 1-800 Contacts."  
 15 **Q. Okay. In the phrase "contact lenses 1-800**  
 16 **Contacts," 1-800 Contacts is included in that query,**  
 17 **right? Is that correct?**  
 18 A. Sure.  
 19 **Q. Okay. And you said if later it was**  
 20 **determined that this search was performed enough and**  
 21 **there was indication that that's likely somebody**  
 22 **searching specifically for 1-800 Contacts that could**  
 23 **lead to confusion, what did you mean by that?**  
 24 **Let me strike that.**  
 25 **What did you mean -- how would it be**

40

1 **discovered that -- how would it later be determined**  
 2 **that this search was performed enough that there was**  
 3 **indications that it's likely somebody searching --**  
 4 **somebody was searching specifically for**  
 5 **1-800 Contacts?**  
 6 MR. STONE: You misstated his testimony  
 7 slightly. I think he had those in the -- I think  
 8 those were two separate concepts that he included a  
 9 conjunctive "and" between.  
 10 But you can go ahead and answer.  
 11 THE WITNESS: Yeah. I mean, I don't know  
 12 how it would be determined. My point was just this  
 13 phrase -- when this says in the EZ Contacts  
 14 agreement, subsection "a," causing your internet  
 15 advertisement to appear in response to any internet  
 16 search for the other Party's brand name, trademarks  
 17 as listed in Exhibits 3 and 4.  
 18 So you go to Exhibits 3 and 4, it's the  
 19 search for one of those. And -- and my understanding  
 20 is this is not a search for something listed in  
 21 Exhibit 3. This is a search for something for a  
 22 different search query.  
 23 So my -- my understanding would be if this  
 24 search query became something 1-800 Contacts wanted  
 25 to be part of this agreement, there's a mechanism

41	<p>1 they could have it added to Exhibit 3 if they wanted</p> <p>2 it to be. I don't think this search query is</p> <p>3 necessarily precluded by this agreement.</p> <p>4 <b>Q. (By Mr. Chiarello) And for clarity: by</b></p> <p>5 <b>"this search query is precluded by this agreement,"</b></p> <p>6 <b>does that mean EZ Contacts is -- you're saying is not</b></p> <p>7 <b>precluded from delivering an ad in response to this?</b></p> <p>8 A. Yeah, I don't think they are necessarily</p> <p>9 precluded from delivering an ad when that's the</p> <p>10 search. I think if they just implemented, or if --</p> <p>11 the express intent of this agreement, as I read it,</p> <p>12 is if somebody types in these searches, these search</p> <p>13 queries listed on Exhibit 3 or 4 for the websites</p> <p>14 specifically, that is what they are not allowed to</p> <p>15 serve up an ad for, and that's not what query No. 5</p> <p>16 shows.</p> <p>17 <b>Q. If the query said -- and it's not written</b></p> <p>18 <b>in No. 5 right here -- but the query says expressly,</b></p> <p>19 <b>"I am looking for 1-800 Contacts," would they be able</b></p> <p>20 <b>to deliver an ad to that query?</b></p> <p>21 MR. STONE: Objection. Calls for</p> <p>22 speculation. Incomplete hypothetical.</p> <p>23 You can answer as best you know.</p> <p>24 THE WITNESS: The problem with your</p> <p>25 hypothetical is these -- these agreements are written</p>	43	<p>1 MR. STONE: This particular version is</p> <p>2 missing Exhibit 1.</p> <p>3 THE WITNESS: Yeah, it does seem to go</p> <p>4 straight to Exhibit 2. Unless there's really not an</p> <p>5 Exhibit 1. Yeah, there should be. The proposed</p> <p>6 dismissal should be Exhibit 1.</p> <p>7 MR. CHIARELLO: Well --</p> <p>8 MR. STONE: That's fine. I just noted it.</p> <p>9 MR. CHIARELLO: No, no, no. My questions</p> <p>10 are -- weren't going to focus on Exhibit 1.</p> <p>11 MR. STONE: I know they weren't.</p> <p>12 MR. CHIARELLO: But I noticed that the</p> <p>13 page sequence was at least sequentially on the Bates</p> <p>14 number. And, Counsel, I'm not sure if that's one of</p> <p>15 ours or one of your Bates numbers, but it's -- it is</p> <p>16 lacking Exhibit 1. It doesn't matter for our</p> <p>17 purposes here. And --</p> <p>18 MR. STONE: I'm fine.</p> <p>19 MR. CHIARELLO: -- this might be how it</p> <p>20 was produced to us.</p> <p>21 MR. STONE: I just noted it.</p> <p>22 <b>Q. (By Mr. Chiarello) And, Mr. Miller, what</b></p> <p>23 <b>is this exhibit?</b></p> <p>24 A. This looks like the settlement agreement</p> <p>25 between 1-800 Contacts and Lensfast.</p>
42	<p>1 with a context of real-world understanding of what</p> <p>2 happens. And there's probably not a thought that</p> <p>3 somebody sits down to Google and says, "I am looking</p> <p>4 for 1-800 Contacts." Who's going to take the time to</p> <p>5 type out that sentence? If you're looking for Delta</p> <p>6 Airlines, have you ever typed in "I'm looking for</p> <p>7 Delta Airlines"? So based on the real-world</p> <p>8 operation of search engines, that's what they have in</p> <p>9 their mindset.</p> <p>10 So could they put in Exhibit 3 thousands</p> <p>11 of iterations? They could, but they -- I believe the</p> <p>12 intent was let's put in the ones that are meaningful</p> <p>13 with relation to searching for our trademark and --</p> <p>14 and navigational in the context of looking for us.</p> <p>15 And that's what we want to preclude.</p> <p>16 Are there -- are there searches that could</p> <p>17 be looking for us that we're not expressly precluding</p> <p>18 here? Yes; but, you know, you don't want -- you</p> <p>19 don't have to preclude everything to get the</p> <p>20 protection of your trademark that you're trying to</p> <p>21 get and to avoid the consumer confusion you're trying</p> <p>22 to avoid.</p> <p>23 <b>Q. (By Mr. Chiarello) I'm handing you an</b></p> <p>24 <b>exhibit marked CX315.</b></p> <p>25 <b>(Exhibit CX315 was identified.)</b></p>	44	<p>1 <b>Q. And did you participate in representing</b></p> <p>2 <b>1-800 Contacts in this -- in terms of resolution of</b></p> <p>3 <b>this dispute in this settlement agreement?</b></p> <p>4 A. Yes.</p> <p>5 <b>Q. In what way did you participate in the --</b></p> <p>6 <b>in reaching this settlement agreement?</b></p> <p>7 A. Well, I wasn't part of this case when it</p> <p>8 was originally filed; but sometime in 2009 when</p> <p>9 1-800 Contacts became a Holland &amp; Hart client, I took</p> <p>10 over this case and interacted with Lensfast counsel</p> <p>11 through some litigation and discovery issues and then</p> <p>12 resolving it through this settlement agreement.</p> <p>13 <b>Q. Were you involved in drafting this</b></p> <p>14 <b>settlement agreement?</b></p> <p>15 A. Yes, I believe I was.</p> <p>16 <b>Q. If you would please turn to page 3. I</b></p> <p>17 <b>think in the paragraph that begins "The Prohibited</b></p> <p>18 <b>Acts include" --</b></p> <p>19 A. Uh-huh.</p> <p>20 <b>Q. -- in this Lensfast agreement, does the</b></p> <p>21 <b>term "causing a Party's website, Internet link, or</b></p> <p>22 <b>Internet advertisement to appear in response to any</b></p> <p>23 <b>Internet search for the other Party's brand name,</b></p> <p>24 <b>trademarks or URLs" -- is the definition there any</b></p> <p>25 <b>different than in the previous example you talked</b></p>

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1 **about with EZ Contacts and Coastal and Vision Direct?**  
 2 MR. STONE: Objection. Improper as to  
 3 form. And the documents speak for themselves.  
 4 You can answer.  
 5 THE WITNESS: Yeah, I think the language  
 6 says what it says. I think the intent is the same.  
 7 So I don't know how to answer you any further than  
 8 that.  
 9 **Q. (By Mr. Chiarello) Does the term**  
 10 **"causing" -- strike that.**  
 11 **Does a party have to actually actively**  
 12 **cause -- do something to cause their party's website**  
 13 **or Internet link to appear in response to an Internet**  
 14 **search query, or can they do something passively that**  
 15 **would cause it to appear?**  
 16 MR. STONE: Object.  
 17 **Q. (By Mr. Chiarello) I think that question**  
 18 **actually came out vague.**  
 19 A. I was going to say --  
 20 **Q. I object to the form of the question.**  
 21 **Do they have to actually bid on the**  
 22 **1-800 Contacts keyword, for example, to cause a**  
 23 **party's website or Internet link to appear in**  
 24 **response to an Internet search for the other party's**  
 25 **brand name?**

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1 A. You know, I'm not sure how the bidding all  
 2 works in Google. That was never my area of focus.  
 3 Or choosing a keyword or selecting a keyword in the  
 4 AdWords program. That's one way they can cause it.  
 5 It's not the only way you can cause it.  
 6 **Q. Well, go back to CX1430 that I showed you**  
 7 **before that has the query on the front of**  
 8 **"1-800 Contacts," on the front -- first page.**  
 9 A. Okay.  
 10 **Q. User Query 1. If Lensfast never bid on**  
 11 **the term "1-800 Contacts," could they still cause**  
 12 **their advertisement to appear in response to a search**  
 13 **query such as this one on Internet User Query No. 1?**  
 14 A. Absolutely.  
 15 MR. STONE: Objection. Calls for sort of  
 16 a technical expertise about AdWords that is outside  
 17 this witness's area of expertise. And I object that  
 18 it calls for speculation.  
 19 But you can answer based on your  
 20 understanding.  
 21 THE WITNESS: My understanding is  
 22 absolutely you can.  
 23 **Q. (By Mr. Chiarello) How?**  
 24 MR. STONE: Same objection.  
 25 You can still answer.

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1 THE WITNESS: My limited experience with  
 2 AdWords indicates that when you get into your AdWords  
 3 account, like I said, you have all these tools. You  
 4 can pick the keyword, you can pick the match type,  
 5 and then you can use negative keywords. And there  
 6 are areas in AdWords where you can determine -- for  
 7 example, let's say you broad match a term. There are  
 8 areas where you can analyze what that's doing and you  
 9 can bring up a search query report, which actually  
 10 shows the top user searches that were entered into  
 11 the Google search engine that were being triggered by  
 12 your broad matching of a keyword. So you can  
 13 understand what search queries you are using via your  
 14 broad match keyword to trigger your advertisement.  
 15 So, you know, an advertiser certainly  
 16 could use or cause their ad to appear in response to  
 17 1-800 Contacts by broad matching "contacts," for  
 18 example. And they would know they're doing that.  
 19 It's not out of their control. It's -- it's right in  
 20 their AdWords data. And they could stop it from  
 21 happening by using a negative keyword for  
 22 1-800 Contacts in keeping the broad match in place.  
 23 So, yes, in my view, from my experience --  
 24 and I'm not a guru in how Google's algorithm works,  
 25 but from my experience with AdWords, you can cause

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1 your ad to come up in response to a search like that  
 2 User Query No. 1 without identifying 1-800 Contacts  
 3 as the keyword itself.  
 4 **Q. And is it fair to say the way you cause**  
 5 **your ad to come up in response to a search like User**  
 6 **Query No. 1 would be by not adopting negative**  
 7 **keywords?**  
 8 MR. STONE: Objection. Incomplete  
 9 hypothetical. Improper as to form.  
 10 You can answer.  
 11 THE WITNESS: No, not just by not adopting  
 12 negative keywords. By using a keyword that will  
 13 encompass that search, that's how you cause it.  
 14 That's my understanding.  
 15 **Q. (By Mr. Chiarello) In our conversation on**  
 16 **this point, the keyword was the generic term**  
 17 **"contacts."**  
 18 A. Well, that was the keyword; but when you  
 19 combine -- you know, that's not the only search term  
 20 you're actually targeting with that keyword if you  
 21 choose a broad match. So, I mean, this is just me.  
 22 This is just Mark Miller. But when I look at  
 23 keywords, keywords are not the only issue. It's the  
 24 combination of a keyword and a match type that  
 25 identifies what search terms you are going to use to

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1 trigger your advertisement. And so it's that two  
2 combination. If you just focus on the keyword,  
3 that's not your only use -- that's not the only thing  
4 you're using to trigger your ads. It is if you do an  
5 exact match type, then you can say just the keyword  
6 matters.

7 MR. CHIARELLO: Let's take a break.  
8 (Recess from 9:55 a.m. to 10:02 a.m.)

9 MR. CHIARELLO: We're back on the record.

10 **Q. (By Mr. Chiarello) I've handed you CX-- a**  
11 **document marked CX324.**

12 **(Exhibit CX324 was identified.)**

13 **Q. What is this?**

14 A. Looks like the settlement agreement  
15 between 1-800 Contacts and Web Eye Care.

16 **Q. And the date at the top of the agreement,**  
17 **September 3rd, 2010, is that accurate, to the best of**  
18 **your recollection?**

19 A. As far as I recall.

20 **Q. And on page 8 of the agreement, under the**  
21 **signature for 1-800 Contacts, it says -- the title is**  
22 **"legal counsel." Do you know whose signature that**  
23 **is?**

24 A. Oh. I think it's probably David Zeidner.

25 **Q. And who is David Zeidner?**

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1 A. He was in-house counsel for  
2 1-800 Contacts.

3 **Q. Did you work with David --**

4 A. I did.

5 **Q. -- on these matters?**

6 A. I did.

7 **Q. Who at 1-800 Contacts came to hire your**  
8 **law firm to represent them in these matters?**

9 MR. STONE: Objection. Lacks foundation.  
10 Calls for speculation.

11 You can answer.

12 THE WITNESS: 1-800 Contacts used Bryan  
13 Pratt as outside counsel when he was at Rader  
14 Fishman; and after Bryan Pratt decided to come here  
15 to Holland & Hart, they decided they wanted to come  
16 here too with him. They had a strong relationship  
17 with Bryan. Who makes that decision inside, I don't  
18 know.

19 **Q. (By Mr. Chiarello) Was Mr. Zeidner,**  
20 **Mr. David Zeidner, your primary contact at**  
21 **1-800 Contacts?**

22 A. He was the one I had the most contact  
23 with.

24 **Q. Okay. In this agreement, if you would**  
25 **please turn to the second page. And in section 4 it**

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1 says "Obligations and Prohibited Acts."

2 **Do you see that?**

3 A. Yes.

4 **Q. Okay. Under "Prohibited Acts include," it**  
5 **says, small letter "a," "engaging in internet search**  
6 **advertising that causes any website, advertisement,**  
7 **including pop-up advertisement, and/or a sponsored**  
8 **link to any website to be displayed in response to or**  
9 **as a result of any internet search that includes the**  
10 **Party's trademarks or URLs (as listed in Exhibit 2)."**

11 **Do you see that?**

12 A. Uh-huh.

13 **Q. Similar questions I was asking before, but**  
14 **what is meant in the Web Eye Care agreement with this**  
15 **phrase that says "advertising that causes any**  
16 **website, advertisement" -- or, I'm sorry -- "search**  
17 **engine advertising that causes any website." Again,**  
18 **going to the term "cause," what does -- what does it**  
19 **mean here to be engaged in internet search engine**  
20 **advertising that causes an advertisement to appear in**  
21 **response or as a result of any Internet search that**  
22 **includes the other party's trademark or keywords?**

23 MR. STONE: Objection. Improper as to  
24 form.

25 You can answer.

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1 THE WITNESS: I think it's pretty clear.  
2 I mean, it says what it says. I don't know how to  
3 explain any better.

4 **Q. (By Mr. Chiarello) Did you draft this**  
5 **language?**

6 A. You know, I recall being involved in  
7 drafting this language.

8 **Q. What does the word "includes" mean in the**  
9 **fourth line down in sub letter "a" where it says "as**  
10 **a result of any internet search that includes the**  
11 **other Party's trademark"?**

12 A. Again, I think "includes" is a pretty  
13 plain term. I think it means what it means. I mean,  
14 at a minimum it would say that the search term or the  
15 search query box is filled with one of these terms on  
16 Exhibit 2.

17 **Q. So looking back at CX1430 and User Query**  
18 **No. 1, does that query include "1-800 Contacts"?**

19 A. User Query No. 1?

20 **Q. Yeah.**

21 A. Yes.

22 **Q. And if you look at User Query No. 5, does**  
23 **that query include "1-800 Contacts"?**

24 A. Well --

25 MR. STONE: Objection. Calls for

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1 speculation.  
 2 You may answer.  
 3 THE WITNESS: Well, it has  
 4 "1-800 Contacts" as part of the query.  
 5 **Q. (By Mr. Chiarello) Looking down at lower**  
 6 **case letter "b," it reads, "using the other Party's**  
 7 **trademark keywords or URLs (as listed in Exhibit 2)**  
 8 **to target or trigger the appearance or delivery of**  
 9 **advertisements or other content to the user."**  
 10 **What is meant in this phrase by using the**  
 11 **other Party's trademarks to trigger the appearance or**  
 12 **delivery of advertisements?**  
 13 A. Well, again, I think it's -- it's plain  
 14 from the language. It's similar to what we discussed  
 15 earlier. It's -- it's implementing your AdWords  
 16 settings in a way that uses a search for the other  
 17 party's trademark keywords to trigger your  
 18 advertisement.  
 19 **Q. Okay. Now, paragraph c, lower case letter**  
 20 **"c," on the same page reads, under "The Prohibited**  
 21 **Acts include: using generic, non-trademarked words**  
 22 **as keywords in any Internet search engine advertising**  
 23 **campaign that causes any website, advertisement,**  
 24 **including pop-up advertisements, and/or a sponsored**  
 25 **link to any website to be displayed in response to or**

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1 **as a result of any internet search that includes the**  
 2 **other Party's trademark keywords or URLs (as listed**  
 3 **in Exhibit 2) without also using negative keywords as**  
 4 **set forth in subsection (C) below, unless the**  
 5 **particular internet search provider does not permit**  
 6 **use of negative keywords."**  
 7 A. Right.  
 8 **Q. Did I read that correctly?**  
 9 A. Yes, you did.  
 10 **Q. And what does that mean?**  
 11 A. Well, I think that is -- you know, means  
 12 similar to what we were discussing earlier. When you  
 13 go into an AdWords account, the user, the AdWords  
 14 advertiser, knows what searches their settings are  
 15 going to use to trigger an advertisement.  
 16 And so in this -- this is saying that if  
 17 you're going to use settings broad matching  
 18 "contacts" or "contact lenses," for example, that are  
 19 going to encompass searches for the other party's  
 20 trademarks, then you need to use a negative keyword  
 21 for the other party's trademark. That -- that's what  
 22 it means.  
 23 **Q. Okay.**  
 24 A. And that was -- that was the -- I think  
 25 that's always been the mindset, and that's the way

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1 it's worded in this one.  
 2 **Q. In the beginning of the sentence it says**  
 3 **"using generic, non-trademarked words." What does**  
 4 **that mean, to use generic non-trademarked words in**  
 5 **this context here?**  
 6 A. Well, I think -- it says "using generic,  
 7 non-trademarked words as keywords."  
 8 **Q. Okay.**  
 9 A. So what it's saying is if you're going to  
 10 pick a generic term as the keyword in your AdWords  
 11 setting, like "contacts" or "contact lenses," and  
 12 then it says if you use those keywords in a way  
 13 that's going to cause your ad to come up in response  
 14 to a search that includes the other party's  
 15 trademarks.  
 16 So, in other words, you pick that keyword.  
 17 If you're going to broad match it or something so  
 18 that it's going to encompass searches for the other  
 19 party's trademark, then you need to use a negative  
 20 keyword to carve out the party's trademark from that  
 21 universe of searches that you're targeting.  
 22 And -- and that's really easy to do, and  
 23 Google AdWords teaches the user exactly what searches  
 24 they're encompassing. You can do a list and find  
 25 your top ten. And usually the top ten searches,

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1 search terms that are being encompassed are not going  
 2 to be the exact keyword that you've chosen when you  
 3 broad match.  
 4 **Q. Do you know -- with AdWords, are you**  
 5 **familiar with the concept of bidding on a keyword?**  
 6 A. I -- I've heard that. I don't know  
 7 exactly how the bidding works. I know that you have  
 8 to pay Google. You know, I don't -- my  
 9 understanding, sometimes it's pay per click or you  
 10 can choose other ways to pay. But I don't know how  
 11 their bidding structure works. I don't think I've  
 12 ever been familiar with that.  
 13 **Q. I'm wondering if -- in this sentence, if**  
 14 **using generic, non-trademark keywords as keywords --**  
 15 **trademarked words as keywords as written here is a**  
 16 **way of saying, telling Google to deliver an ad if**  
 17 **that keyword appears in a query for requesting. Is**  
 18 **"using" the same as "requesting" --**  
 19 MR. STONE: Objection.  
 20 **Q. -- delivery of an ad for that keyword?**  
 21 MR. STONE: Sorry. Objection. Vague and  
 22 ambiguous. Improper as to form.  
 23 THE WITNESS: The import of this, using  
 24 the generic or non-trademarked words as keywords, is  
 25 just selecting that as the keyword in your AdWords

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1 setting.

2 **Q. (By Mr. Chiarello) Okay.**

3 A. That's all I know. Because you've got

4 those three tools. You get the keyword, you get the

5 match type, and you get negative keywords. That's my

6 understanding of the primary three tools. I know

7 there's geographic limitations you can put on it as

8 well; but my -- the import of this is what keyword do

9 you select.

10 **Q. Okay.**

11 A. And then the import of the next phrase

12 where it talks about if it causes it to come up in

13 response to a trademark term, that's going to refer

14 to what match type did you select.

15 **Q. Going back up to letter b where it says**

16 **"using the other Party's trademark keywords or URLs**

17 **(as listed in Exhibit 2) to target or trigger the**

18 **appearance," does "using" there also mean selecting**

19 **the other party's trademarks as you were using it to**

20 **describe it in subparagraph c?**

21 MR. STONE: Objection. Misstates the

22 witness's prior testimony.

23 You can answer.

24 Also asked and answered, but you can

25 answer it again.

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1 THE WITNESS: Well, it -- it's phrased a

2 little differently, so I think I already answered.

3 It says what it says, "using the other Party's

4 trademark keywords or URLs (as listed in Exhibit 2)

5 to target or trigger the appearance of the

6 advertisements." That -- that part c says using

7 generic trademark words as keywords.

8 **Q. (By Mr. Chiarello) Right. And what I'm**

9 **asking is when you say using -- "using generic,**

10 **non-trademarked words as keywords" -- "using generic,**

11 **non-trademarked words as keywords," you described it**

12 **as selecting the generic.**

13 A. As a keyword, right.

14 **Q. And now what I'm asking here is in the**

15 **context of above, is using the other party's**

16 **trademarked keywords the same as selecting the other**

17 **party's --**

18 A. That's part of it. This doesn't say using

19 the other party's trademarked keywords as the

20 keyword. This says -- because you've got to look at

21 this -- the definition of -- in this agreement. When

22 it says the term "trademarked" -- "the Party's

23 trademark keywords or URLs (as listed in Exhibit 2)."

24 Okay. So it's not saying using the other party's

25 trademark as the keyword; it's saying using the other

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1 party's trademark keywords as listed in Exhibit 2 to

2 trigger.

3 So one way you use it for sure is

4 selecting that trademark as the keyword. Another way

5 to use it -- and maybe c is a little bit duplicative

6 or redundant. Another way to do it is broad matching

7 a generic without using negatives. Both of those are

8 using the trademarked keywords the same.

9 **Q. Okay. If you look at capital letter B in**

10 **the next paragraph down, what does -- what does this**

11 **paragraph mean?**

12 A. This -- this is a paragraph that clarifies

13 that none of the prohibited acts are going to

14 prohibit anything that is akin to -- you know, that

15 is not a trademark infringement concern. So

16 comparative advertising or parodies or things like

17 that.

18 So, in other words, if -- if a user is

19 doing a search that is demonstrating an intent to

20 compare different retailers or different products,

21 that's not something you have to, you know, try to

22 foreclose using your AdWords settings. That's

23 allowable. That's -- that's comparative advertising.

24 So if you -- you have to take the

25 prohibited acts 4(A) in conjunction with 4(B). Say,

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1 even if something may appear to have been prohibited

2 under the plain language of 4(A), it isn't if it

3 falls into the nature of a comparative advertisement

4 or a search that wouldn't result in potential

5 trademark infringement issues.

6 **Q. The last sentence of paragraph B reads,**

7 **"The Parties acknowledge that any advertisements**

8 **triggered by such keywords are not prohibited under**

9 **this agreement as long as the appropriate negative**

10 **keywords are also being used as set forth in**

11 **subsection (C) below."**

12 **Do you see that?**

13 A. Yeah.

14 **Q. And what does that mean?**

15 MR. STONE: Objection. The document

16 speaks for itself.

17 You can answer.

18 THE WITNESS: Well, B -- 4(B) gives three

19 different carve-outs from the prohibited acts. One

20 of them is comparative advertising. Next one says

21 using descriptive terms. The next one says using

22 generic terms. And then it says if you're going to

23 use those keywords like those descriptive terms and

24 generic terms in sub-- you know, Roman numeral ii and

25 iii, you've got to use negative keywords as explained

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1 below.

2 **Q. (By Mr. Chiarello) Okay. And in**  
3 **paragraph (C) below, is it fair to say that describes**  
4 **the implementation of negative keywords?**

5 MR. STONE: Objection. Improper as to  
6 form.

7 You can answer.

8 THE WITNESS: I think it speaks for  
9 itself. If it talks about implementing negative  
10 keywords, then that's what the purpose of that clause  
11 is.

12 **Q. (By Mr. Chiarello) Okay. To understand**  
13 **the clause a little bit better, reading the first**  
14 **sentence, it says, "From the Effective Date of this**  
15 **Agreement, each Party, its parent, subsidiaries,**  
16 **agents, servants, employees, officers, affiliates,**  
17 **and other entities controlled by such Party mutually**  
18 **agree to use the Party's trademarked keywords" --**

19 MR. STONE: The other party.

20 MR. CHIARELLO: Appreciate the correction.  
21 Thank you, Greg.

22 **Q. (By Mr. Chiarello) "The other Party's**  
23 **trademark keywords and URLs (as listed in Exhibit 2)**  
24 **as negative keywords in all of their respective**  
25 **keyword advertising campaigns for any internet search**

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1 **provider that allows the use of negative keywords, to**  
2 **the fullest extent allowable by the internet search**  
3 **provider, in order to prevent the display of**  
4 **advertisements and/or internet links in response to**  
5 **or as a result of any internet search that includes**  
6 **the other Party's trademark keywords or URLs (as**  
7 **listed in Exhibit 2)."**

8 **Did I read that correctly --**

9 A. Yes, you did.

10 **Q. -- with Mr. Stone's correction there?**

11 **What -- what do the parties mean by "the**  
12 **fullest extent allowable by the internet search**  
13 **provider"?**

14 A. Well, I didn't have an understanding as to  
15 whether all, you know, search engines did negative  
16 keywords and how they allowed negative keywords. So  
17 we were just saying if it's -- if it's a feature  
18 that's there and they allow you to do that, some --  
19 some Internet search engines capped the negative  
20 keywords numerically, like you could only use -- you  
21 could only use 20 negative keywords. That's it.  
22 Like, I don't know if that was Google or I have a  
23 vague -- not Google, but I have a vague recollection  
24 of maybe Yahoo or somebody had a cap.

25 And if it got to the point that we don't

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1 have -- we can't use any more negative keywords, then  
2 the party wouldn't have to implement more or bump  
3 others that they're using for other purposes. It was  
4 just if they allow you unlimited negative keywords,  
5 like Google I believe did.

6 So the intent with that provision was, you  
7 know, if you can implement a negative keyword, then  
8 you can implement it. And the negative keywords you  
9 have to implement are in Exhibit 2, and as long as  
10 you put these as your negative keyword, then you're  
11 in compliance.

12 That was always the understanding. But I  
13 remember in this context that there were some search  
14 engines that would put a cap on how many negative  
15 keywords you could use. So "the fullest extent" just  
16 meant if you have room for more negative keywords,  
17 then you are obligated to use these. That's my  
18 understanding.

19 **Q. But there was no priority -- in that**  
20 **instance you're thinking of with that search engine**  
21 **provider, there's no priority that 1-800 Contacts had**  
22 **to supplant perhaps other negative keywords that**  
23 **might have been selected?**

24 A. You know, it just never came up as an  
25 issue. I think we put that language in there just

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1 because we knew that there -- you know, it might have  
2 been put in there mostly for 1-800, because 1-800 is  
3 using negative keywords for a lot of different  
4 advertisers, and they may run into a search engine  
5 that said you've got to cap it. And we're like -- so  
6 we'll do the best we can.

7 But we just knew that some engines --  
8 maybe today they're unlimited with all the engines.  
9 I don't know. Because maybe things have evolved.  
10 Back then we knew that there were some that limited  
11 how many negative keywords we could use, and that's  
12 what we put in there.

13 **Q. After that clause, "in order to prevent**  
14 **the display of advertisements and/or internet links**  
15 **in response to or as a result of any internet search**  
16 **that includes the other Party's trademark keywords,"**  
17 **the word "include" as we talked about before, does it**  
18 **mean the same thing here as you testified earlier?**

19 MR. STONE: Objection. Improper as to  
20 form.

21 You can answer.

22 THE WITNESS: I don't know if I really  
23 testified as to what "includes" means. I just said  
24 "includes" has a pretty common meaning. It's  
25 something that's included.



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1 **Q. (By Mr. Chiarello) What would be an**  
 2 **Internet -- an advertisement that -- and/or Internet**  
 3 **link that appears in response to or is a result of**  
 4 **any Internet search that includes the other party's**  
 5 **trademark? What would be an example?**

6 A. Well, any -- any search for those terms in  
 7 Exhibit 2. That was the focus. That's why we put  
 8 Exhibit 2 there. In other words, those terms are  
 9 included in the search bar when you -- when you  
 10 search. I mean, the focus and intent was always just  
 11 if you prevent searches for those terms, those exact  
 12 searches, that's how you comply.

13 Now, I know that from time to time, in  
 14 fact, pretty often, the opposing parties that I would  
 15 talk to in these cases would indicate, you know, we  
 16 don't really care if we come up in response to a  
 17 search for 1-800 Contacts. It's not a big deal to  
 18 us. So we're happy to do negative keywords.

19 And so, you know, some may implement more  
 20 negative keywords than is required in Exhibit 2.  
 21 Some may implement them as more of a broad match  
 22 negative keyword when they didn't have to. So some  
 23 may have taken that course just because, from their  
 24 perspective, it wasn't that much of a commercial  
 25 benefit or really helpful to anybody to -- for them

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1 to pay Google to come up on those. So they would do  
 2 that themselves.

3 But I think the requirement here is just  
 4 if you -- if you implement the terms on Exhibit 2 as  
 5 a negative keyword of any kind, a negative keyword of  
 6 any match, you're in compliance as long as it is a  
 7 negative keyword. That's why it doesn't expressly  
 8 state you have to exact match it or broad match it as  
 9 a negative.

10 If that term is listed as a negative  
 11 keyword of any match type, you're in compliance. And  
 12 that's the only thing that was required by these  
 13 agreements. That's the only way -- my understanding  
 14 of how it was ever monitored or checked was just  
 15 exact searches like that.

16 So that's the context of using the term  
 17 "included," from my perspective.

18 **Q. And the next sentence reads,**  
 19 **"Specifically, for each internet search provider from**  
 20 **which a Party purchases keywords to display**  
 21 **advertising and/or internet links, the other Party's**  
 22 **trademark keywords and URLs listed in Exhibit 2 shall**  
 23 **also be provided to such internet search provider as**  
 24 **negative keywords, such that the advertisements**  
 25 **and/or links will not be displayed when the negative**

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1 **keywords are part of a search performed on the**  
 2 **internet search provider's website."**

3 **Do you see that? Did I read that**  
 4 **correctly?**

5 A. Yeah, uh-huh.

6 **Q. It says -- the last clause of that**  
 7 **sentence says, "such that the advertisements and/or**  
 8 **links will not be displayed when the negative**  
 9 **keywords," and I'll stop there. By "negative**  
 10 **keywords," those are those listed in Exhibit 2; is**  
 11 **that correct?**

12 A. I believe so, yeah.

13 **Q. Okay. "Are part of a search performed on**  
 14 **the internet search provider's website." What is**  
 15 **meant by "part of a search performed on the internet**  
 16 **search provider's website"?**

17 A. I think it means just what it says, are  
 18 part of the search.

19 **Q. I want to go back up to paragraph (B)**  
 20 **above, and I believe you used the term "comparative**  
 21 **advertising." It's written here in the text.**

22 A. Right.

23 **Q. I failed to ask you, but what is meant**  
 24 **here by "comparative advertising"?**

25 A. Well, the term "comparative advertising"

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1 and the term "parodies," that's -- that's language  
 2 just taken from trademark infringement case law that  
 3 identifies uses of another trademark that is not a  
 4 trademark infringement. And the whole concept of  
 5 these agreements is we're trying to prevent trademark  
 6 infringement. We don't want to prevent anything that  
 7 is fair use and non-infringing uses, such as  
 8 comparative advertising; for example, we are better  
 9 than 1-800 Contacts or we -- we are -- we're cheaper  
 10 than 1-800 Contacts or -- you know, you're using the  
 11 term "1-800 Contacts," but you're using it in a way  
 12 to compare yourself to them. So that's not something  
 13 that leads to confusion.

14 So the reason those terms are used in here  
 15 is because that's how the case law has described  
 16 non-infringing fair use of a mark, and that's not  
 17 what was intended to be prohibited by any of these  
 18 agreements.

19 **Q. Is it fair to say that -- that -- your**  
 20 **testimony is that the terms "comparative advertising"**  
 21 **and "parodies" as used here are the -- as defined**  
 22 **under trademark law? Is that -- is that a fair**  
 23 **summary of your understanding?**

24 MR. STONE: Objection. Improper as to  
 25 form.

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1 But you can answer.  
 2 THE WITNESS: Well, it was -- it was used  
 3 to explain examples of non-infringing uses.  
 4 **Q. (By Mr. Chiarello) Back to paragraph (C).  
 5 In the middle of the first sentence it reads that the  
 6 parties "mutually agree to use the other Party's  
 7 trademark keywords and URLs as negative keywords in  
 8 all of their respective keyword advertising campaigns  
 9 for any internet search provider."**  
 10 **What did -- what is meant by "all of their  
 11 respective keyword advertising campaigns"?**  
 12 A. What -- my understanding of what we had  
 13 encountered in the past, or actually what  
 14 1-800 Contacts may have encountered in the past, is  
 15 when parties had agreed to use negative keywords for  
 16 certain terms and then suddenly they would find some  
 17 advertisements coming up when that search is done,  
 18 they'd contact that party. And it was a common thing  
 19 for the party to say, oh, we started a new campaign.  
 20 And a campaign in your AdWords account  
 21 is -- you can create as many ad campaigns as you  
 22 want. You create ad text, and then you pick all your  
 23 keyword and match type and negative keyword settings  
 24 for that ad text. That's a campaign.  
 25 And when you implement negative keywords,

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1 you can select it so that the negative keywords apply  
 2 to all of your campaigns. And sometimes people would  
 3 implement one campaign and put the negative keywords  
 4 in, and when they started a new campaign they  
 5 wouldn't carry over the negative keywords.  
 6 So it was a pretty common thing for people  
 7 to say, oh, we started a new campaign, sorry about  
 8 that, and then they'd do it. So we just wanted to  
 9 have some clarity in here that we're talking about  
 10 all -- every advertising campaign you have in any  
 11 search engine is -- is what we're looking for here.  
 12 MR. CHIARELLO: You can set that exhibit  
 13 aside.  
 14 Off the record for a moment.  
 15 (A discussion was held off the record.)  
 16 **Q. (By Mr. Chiarello) I've handed you an  
 17 exhibit marked CX317. What is this?  
 18 (Exhibit CX317 was identified.)**  
 19 A. This looks like the settlement agreement  
 20 between 1-800 Contacts and Arlington Contact Lens  
 21 Service from March 2010.  
 22 **Q. Did you work on this settlement agreement  
 23 on behalf of 1-800 Contacts?**  
 24 A. I did.  
 25 **Q. If you would please turn to the first page**

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1 **where it says "Obligations and Prohibited Acts."**  
 2 A. Okay.  
 3 **Q. The term -- the first term here that says  
 4 "Prohibited Acts include engaging in or participating  
 5 in internet advertising or any other action that  
 6 causes any website, advertisement, including pop-up  
 7 advertisements," do you see that paragraph?**  
 8 A. Uh-huh.  
 9 **Q. Does that paragraph mean about the same as  
 10 you testified about as to the Web Eye Care agreement?**  
 11 A. Yeah. I think they have the same  
 12 language, and I think they would have the same intent  
 13 and meaning.  
 14 **Q. Okay. Is that true across the board for  
 15 many of these settlement agreements?**  
 16 A. I believe in this time frame we tried to  
 17 use -- we used very similar language most of the time  
 18 in that context.  
 19 **Q. In paragraph b, which reads, "using the  
 20 other Party's trademarks or URLs," does that phrase  
 21 "using the other Party's trademarks or URLs" under  
 22 the prohibited acts mean about the same thing that it  
 23 says in -- that you testified to as to Web Eye Care?**  
 24 A. I think it's the same language, so it  
 25 would have the same meaning.

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1 **Q. And I believe that paragraph c, or small  
 2 letter "c," using generic, non-trademarked keywords  
 3 in an internet advertising campaign in that paragraph  
 4 is about the same language.**  
 5 A. If that's the same as Web Eye Care, it  
 6 would have the same meaning.  
 7 **Q. And the requirement to add negative  
 8 keywords in the second half of that section means  
 9 about the same thing as in Web Eye Care?**  
 10 A. In subsection (C) in -- in -- at the  
 11 bottom of page 2, is that what you're talking about?  
 12 **Q. I was looking at small letter c.**  
 13 A. Oh, small letter c.  
 14 **Q. It says "using generic, non-trademarked  
 15 keywords"; and then jumping ahead in the clause,  
 16 "without also using negative keywords as set forth in  
 17 subsection (C) below."**  
 18 **Does that have the same requirement as in  
 19 the Web Eye Care agreement?**  
 20 A. Yeah, I believe so.  
 21 **Q. And in capital letter C, 4(C),  
 22 paragraph 4(C), the last sentence -- this begins on  
 23 page 3 at the top of the page -- one, two, three,  
 24 four -- fifth line down reads, "specifically, for  
 25 each internet search provider from which a Party**

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1 **purchases keywords to display advertising and/or**  
2 **Internet links."**

3 **Do you see that sentence?**

4 A. Oh, okay. Yeah.

5 **Q. Does that sentence mean the same as the**  
6 **same sentence in the Web Eye Care agreement?**

7 A. Well, if it's the same language, then  
8 yeah, I would think so. I mean, I think I can  
9 generally agree that if the clauses are the same from  
10 one agreement to the other, they're going to have the  
11 same application.

12 **Q. Okay. You can set the AC Lens agreement**  
13 **aside. And CX319.**

14 **(Exhibit CX319 was identified.)**

15 **Q. What is this?**

16 A. Looks like a settlement agreement between  
17 1-800 Contacts and Empire Vision, May of 2010.

18 **Q. Did you work on this settlement agreement**  
19 **on behalf of 1-800 Contacts?**

20 A. I did.

21 **Q. And did you draft this agreement?**

22 A. I believe I assisted in drafting it, yeah.

23 **Q. Under the Prohibited Acts on page 2 of the**  
24 **agreement, read them, particularly subsections (A),**  
25 **(B), (C), and tell me if they mean substantively the**

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1 **same as the agreements that we've just talked about**  
2 **with AC Lens and Web Eye Care.**

3 A. They appear to have the same import from  
4 what I'm comparing the Web Eye Care to the Empire  
5 Vision one. If similar language, it would seem to  
6 have the same general meaning and restrictions, from  
7 my view.

8 **Q. Do you recall any terms being negotiated**  
9 **differently?**

10 A. With regard to Empire Vision?

11 **Q. With regard to Empire Vision.**

12 A. Well, the -- the thing I recall the most  
13 about Empire Vision is they had such a broad reach,  
14 they had so many subsidiaries and companies involved  
15 that they wanted to be involved in this that their --  
16 their list of trademark keywords was really long, and  
17 we had to include multiple signatories and multiple  
18 entities. And we had to do some due diligence where  
19 we evaluated all of the terms that they were giving  
20 us to make sure they were registered trademarks and  
21 not just terms they wanted to throw out there.

22 Because one thing that was really  
23 important in these agreements is we were limiting  
24 them to actual trademark rights. It wasn't just pick  
25 a term that we want you to not to come up under.

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1 There wasn't any legitimate reason to do that. This  
2 is a trademark infringement issue.

3 So we went through and checked all the  
4 terms they gave us to make sure that they had  
5 trademark rights in them, and they had so many  
6 different entities that had trademarks that their  
7 list was huge. And as long as we could confirm that  
8 they had legitimate trademark rights -- I don't -- I  
9 don't remember if they were all registered  
10 trademarks, or some of them they could show we have  
11 common law trademark rights in this or something like  
12 that, we would agree to include them.

13 So that's the thing I remember most about  
14 Empire Vision is we did a lot of due diligence to  
15 make sure we were limiting this to, you know,  
16 websites' names, which are distinct, and then  
17 trademark rights.

18 I don't recall any view of it being the --  
19 the prohibited acts or things operating differently.  
20 I don't recall negotiating a different operation for  
21 those.

22 **Q. So these sections under paragraph 2,**  
23 **"Obligations and Prohibited Acts," (A), (B), and (C),**  
24 **but particularly B and C, do you recall any**  
25 **negotiations with them on the requirements of**

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1 **prohibited acts and how to treat them and with the**  
2 **requirements of negative keywords?**

3 A. No, not specifically. I don't recall  
4 specific negotiation -- I mean, I recall discussing  
5 them with them like, this is the concept; this is  
6 what we're looking for if you just throw these terms  
7 into negative keywords. I would often have the other  
8 side request or ask, what does negative keyword mean?  
9 Like, this wasn't common knowledge to everybody.  
10 We'd just say, you just add it as a negative so if  
11 somebody searches for that it doesn't come up.

12 And some of them were wondering -- there  
13 was a couple times that it would come up. You know,  
14 early on I didn't even know negative keywords could  
15 be matched differently. I always thought it was just  
16 that term. But we would have discussions on that.  
17 We would always explain as long as you exact match  
18 that, that's all you need to do. That's the intent.

19 **Q. By "early on," what do you mean?**

20 A. I don't know. When I first started  
21 dealing with this stuff with 1-800, I didn't  
22 really -- when they first became a client and I first  
23 started learning about their keyword advertising  
24 trademark infringement lawsuits and doing my own  
25 research on the case law to figure out, you know, how

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1 this all worked, I didn't understand negative  
2 keywords that well.

3 **Q. They came to you when Bryan Pratt joined  
4 the firm?**

5 A. Yes.

6 **Q. Okay. If you turn to page 8 and 9, you  
7 mention that they had many sub-entities. Is that  
8 right?**

9 A. Yes, they did. This one was a very -- I  
10 remember this one took a long time to finalize just  
11 because of -- like, where's the signatory page?  
12 Yeah. See, we had to have Empire Vision, ECCA,  
13 Davis, Viva, Eye Care Centers of America, Eye Care  
14 Holdings. This is just a really big one with a lot  
15 of different entities that held all those trademark  
16 rights. And they were all held under this umbrella  
17 of -- ECCA Enterprises was what I remember being the  
18 main one. Maybe it was Empire Vision. But --

19 **Q. So you had to get all these signatures as  
20 well?**

21 A. Yeah. We had to get all those signatures  
22 so that they -- they kind of wanted to have all the  
23 signatures there. Maybe it was us, but we wanted to  
24 make sure that every party, if -- if the trademark  
25 that they wanted in the agreement in Exhibit 2 was

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1 owned by a different entity, we just wanted the  
2 entity that owned the trademark rights to be a  
3 signatory.

4 And that's how this happened, because they  
5 had all these -- I mean, tons and tons of trademarks  
6 that we had to verify were legitimate trademarks; and  
7 then we said, whoever owns a trademark on this list  
8 has to sign the agreement. We don't want it to just  
9 be through one entity and all these trademarks are  
10 part of it.

11 **Q. Did it take a while to get that done?**

12 A. I don't know how long it took. If I saw  
13 when we first sent the letter out and this date in  
14 the agreement, that would help me. I remember it  
15 felt like it took a long time, or at least it felt  
16 like it was a large undertaking.

17 **Q. If you would please turn to CX320.**

18 A. Okay.

19 **Q. I'm sorry. Go back to the Empire Vision  
20 agreement, 319. I believe I asked you if there was  
21 negotiation over paragraph 2, subsections (A), (B),  
22 and (C) that would make these terms -- I believe at  
23 first I asked if there was a negotiation, and didn't  
24 sound like there was. Is that accurate?**

25 A. Well, I mean, this was seven years ago, so

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1 I know that we had lots of phone calls. I don't  
2 recall negotiations on that issue -- not  
3 negotiations. I recall discussing what these  
4 provisions mean, maybe, with them. But I don't  
5 recall negotiations where they were pushing back or  
6 asking for different language, necessarily. If  
7 there's e-mail communications that show that, maybe  
8 it happened; but I don't have a recollection that it  
9 did.

10 **Q. Do these provisions mean anything  
11 differently -- different substantively than they did  
12 in the Web Eye Care agreement?**

13 MR. STONE: Objection. Improper as to  
14 form.

15 You can answer.

16 THE WITNESS: Well, like I said, I -- if  
17 you compare the language, it's relatively similar. I  
18 think they probably have the same import and intent,  
19 yeah. If you can point me to any specific difference  
20 that you're concerned about, I can see if I feel like  
21 there's a different interpretation. But --

22 **Q. (By Mr. Chiarello) I'll represent that I  
23 didn't see a difference. Just trying to understand  
24 what the meeting of the minds between the parties  
25 was.**

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1 A. Right. I think the language says what it  
2 says.

3 **Q. Okay, back to CX320.  
4 (Exhibit CX320 was identified.)**

5 A. Okay.

6 **Q. What is this?**

7 A. Looks like a settlement agreement between  
8 1-800 Contacts and Lenses For Less, March 2010.

9 **Q. Did you work on this settlement agreement?**

10 A. Yes.

11 **Q. If you'd turn to the second page,  
12 paragraph 4, it says "Obligations and Prohibited  
13 Acts."**

14 A. Uh-huh.

15 **Q. Paragraphs (A), (B), and (C) appear  
16 identical to the last three settlement agreements  
17 we've been talking about with AC Lens, Web Eye Care,  
18 and Empire Vision.**

19 A. Yeah, I think that's about right. We were  
20 using --

21 **Q. Do you recall any negotiation as to the  
22 terms of this with Lenses For Less?**

23 A. With Lenses For Less? Don't specifically  
24 recall negotiations about --

25 **Q. These terms?**

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1 A. -- language alterations that they  
2 requested. I know that we provided them in the  
3 settlement agreement, and I don't recall if they  
4 requested changes or -- not that I recall. I know we  
5 would have discussed what it means if they had  
6 questions, but I don't have a specific recollection  
7 of these guys.

8 **Q. Do the terms in paragraphs 4(A), (B), and  
9 (C) mean the same as they do in the other settlement  
10 agreements with Web Eye Care, AC Lens, Empire Vision?**

11 MR. STONE: Objection. Improper as to  
12 form.

13 You can answer.

14 THE WITNESS: To the extent they use the  
15 same language, I would say they have the same  
16 meaning, yes.

17 **Q. (By Mr. Chiarello) Please turn to CX321.  
18 (Exhibit CX321 was identified.)**

19 **Q. What is this?**

20 A. Settlement agreement between  
21 1-800 Contacts and Tram Data, May 2010.

22 **Q. Did you work on this settlement agreement?**

23 A. I believe I did. I don't have a huge  
24 recollection of dealing with Tram Data that much.  
25 Maybe Bryan dealt with them a little bit too, but --

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1 or maybe they were just a really quick one where we  
2 didn't interact a whole lot. But I believe I would  
3 have worked on this, yes.

4 **Q. If you turn to page 2, paragraph 3, it  
5 says "Obligations and Prohibited Acts." Paragraphs  
6 (A), (B), and (C) there are the same as the ones the  
7 Lenses For Less, Web Eye Care, and Empire Vision and  
8 AC Lens.**

9 **Do you see that?**

10 A. Yeah. To the extent they have the same  
11 language, I would say they have the same meaning.

12 **Q. These settlement agreements that contain  
13 the restrictions on search -- using terms or keywords  
14 in search advertising that require negative keywords,  
15 they don't have term limits on them, do they?**

16 A. I don't believe --

17 MR. STONE: You mean in time?

18 MR. CHIARELLO: In time.

19 THE WITNESS: I don't believe most of them  
20 have any temporal limitation, no.

21 **Q. (By Mr. Chiarello) Is there any reason  
22 why?**

23 A. Well, trademark rights don't have an  
24 expiration date. So I've never seen a settlement of  
25 a trademark action where they say you -- you can't

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1 use our trademark just for a period of time because  
2 our trademark rights are going to expire.

3 Now, you know, we did negotiate one that  
4 was limited in time with -- I can't remember which  
5 one. It may have been Standard Optical.

6 But the settlement agreements are based on  
7 enforcing trademark rights, and trademark rights  
8 don't expire. So as long as you're using the  
9 trademark, 1-800 Contacts isn't going to stop using  
10 the trademark "1-800 Contacts." If they did, then I  
11 guess these settlement agreements would turn out to  
12 be moot and not important anymore if they abandoned  
13 that trademark for some reason. But that's why there  
14 was no reason to add a temporal portion in it.

15 **Q. I've just handed you Exhibit CX323.  
16 (Exhibit CX323 was identified.)**

17 A. Okay.

18 **Q. And what is this?**

19 A. Settlement agreement between  
20 1-800 Contacts and Contact Lens King in March 2010.

21 **Q. Did you work on this settlement agreement?**

22 A. I did.

23 **Q. And if you turn to page 2, it says  
24 "Obligations and Prohibited Acts."**

25 A. Yeah.

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1 **Q. These terms in paragraphs 4(A), (B), and  
2 (C) appear to be identical to those in the Lensfast  
3 and -- I'm sorry, Lenses For Less, Web Eye Care,  
4 AC Lens, and Empire Vision settlement agreements?**

5 A. Yeah. And -- and just to be clear, you  
6 keep saying 4(A), (B) and (C). I think you mean 4 a,  
7 little a, b, and c, right? Those are the paragraphs  
8 you're talking about?

9 **Q. No. Let's be perfectly clear. 4 capital  
10 A, capital B, and capital C.**

11 A. Okay. Those entire ones. Okay. Yes.

12 Yeah, to the extent those carry the same  
13 language, they're going to have the same meaning.  
14 And I think in these -- all the ones you've been  
15 showing me are all in this spring of 2010 time frame,  
16 and so we were operating under these agreement terms.  
17 And so I would say they -- they carry the same  
18 meaning to the extent they have the same language.

19 **Q. Okay. Is it fair to say, just so we're  
20 clear about what you were testifying before on the  
21 other settlement agreements, that to the extent they  
22 have the same language in the relevant obligations  
23 and prohibited acts paragraphs, that they have the  
24 same meaning?**

25 A. Yes.

21 (Pages 81 to 84)

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1 **Q. In some of those settlement agreements it**  
 2 **was paragraph 2, in some it appears to be paragraph**  
 3 **4, but the content below is the same?**  
 4 A. Right, uh-huh.  
 5 **Q. Okay.**  
 6 A. Yeah. To the extent they have the same  
 7 language, they would have the same meaning and  
 8 import.  
 9 MR. CHIARELLO: Okay. Let's take a quick  
 10 break.  
 11 MR. STONE: Sure.  
 12 (Recess from 10:55 a.m. to 11:07 a.m.)  
 13 **Q. (By Mr. Chiarello) I've handed you an**  
 14 **exhibit marked CX322.**  
 15 **(Exhibit CX322 was identified.)**  
 16 **Q. What is this?**  
 17 A. This is the settlement agreement between  
 18 1-800 Contacts and Walgreens from June 2010.  
 19 **Q. Okay. And did you work on this settlement**  
 20 **agreement?**  
 21 A. I did partially, yes.  
 22 **Q. Who else worked on it?**  
 23 A. I know that earlier on I think Bryan Pratt  
 24 interacted with these guys a lot, because this is in  
 25 a time frame when I was involved in preparing for

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1 being in a patent infringement trial, so I wasn't  
 2 always available. So I think Bryan Pratt may have  
 3 communicated with these guys for part of the time,  
 4 and then I came in and communicated -- I do recall  
 5 having calls with their counsel and -- and  
 6 negotiating this agreement with them. And Bryan  
 7 might have done some of that too while I was involved  
 8 in trial.  
 9 **Q. Did you -- did you draft the agreement?**  
 10 A. Well, I think -- I think their counsel  
 11 drafted some of this agreement. My recollection  
 12 is -- and, you know, I'm horrible with names on  
 13 memory and stuff like that, but their in-house guy I  
 14 think -- or whoever I was interacting with was a  
 15 real -- real commonsense guy, and he saw our proposed  
 16 agreement and he says, "This thing is huge. What  
 17 does all this shit mean?" Sorry about the language.  
 18 But he was like, this is -- this is -- what -- what's  
 19 the purpose of this agreement?  
 20 And I would say, here's the purpose. We  
 21 list out these keywords in Exhibit 2. Says, this is  
 22 the intent and purpose of all these agreements. All  
 23 it is is you can't select these keywords and websites  
 24 as your triggering keyword in search engine  
 25 advertising, and you also have to use them as a

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1 negative keyword. That's it.  
 2 He says, if that's it, then let's just say  
 3 that. And so he -- he struck out a bunch of the more  
 4 wordy paragraphs and said, if that's what we mean --  
 5 he wanted to word it differently. And so he put it  
 6 in these two simple things on page 2.  
 7 So I remember --  
 8 **Q. "These two simple things," you're looking**  
 9 **at paragraph 3, "Obligations and Prohibited Acts"?**  
 10 A. Yes.  
 11 **Q. Okay. And so under 3, paragraph "a," it**  
 12 **reads, "refrain from purchasing or using any of the**  
 13 **terms the other Party has listed in Exhibit 2 as**  
 14 **triggering keywords in any internet search engine**  
 15 **advertising campaign."**  
 16 **Do you see that?**  
 17 A. Correct.  
 18 **Q. Okay. So what does he mean -- what --**  
 19 **what does it mean to say "refrain from purchasing"?**  
 20 A. Well, he -- he -- I guess the concept is  
 21 keywords, you pay Google every time the keyword is --  
 22 or that keyword campaign triggers your ad. So, you  
 23 know, some people use the term "purchasing a keyword"  
 24 sometimes. It's just common parlance. So that's  
 25 what he put in there.

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1 **Q. Does "purchasing" mean the same thing as**  
 2 **"using," where it says "purchasing or using"? Or do**  
 3 **you know if they're different terms?**  
 4 A. Well, I think they -- they refer to the  
 5 same thing. They refer to selecting that as your  
 6 keyword that will trigger your advertisements.  
 7 **Q. Okay. Subparagraph b says "implement all**  
 8 **of the terms the other Party has listed in Exhibit 2**  
 9 **as negative keywords in all internet search**  
 10 **advertising campaigns."**  
 11 A. Right.  
 12 **Q. You see that?**  
 13 A. Yes.  
 14 **Q. What does that mean?**  
 15 A. That means just what it says. You take  
 16 the list of -- from Exhibit 2 and use those as  
 17 negative keywords in all the search engine  
 18 advertising campaigns. And that just means as long  
 19 as those terms are identified as a negative keyword  
 20 in your engine -- search engine advertising  
 21 campaigns, then you're in compliance with the  
 22 agreement.  
 23 **Q. If you could please look at Exhibit 2 at**  
 24 **the back of the agreement. And the list on the**  
 25 **right-hand side says "Walgreens' Trademark Keywords."**

22 (Pages 85 to 88)

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1 A. Uh-huh.

2 **Q. Are those words that they supplied to the**  
3 **agreement?**

4 A. I believe so, yeah. We wouldn't have --  
5 we would have them choose whatever they want on  
6 there. And we would always explain to them, it's got  
7 to be a registered trademark or URL website. Those  
8 were our focus. It couldn't just be any term they  
9 were interested in.

10 **Q. So is "Walgreen" and "Walgreens," do you**  
11 **know if those are both registered trademarks?**

12 A. Well, when I say "registered trademarks,"  
13 the concept here -- if you look over at  
14 1-800 Contacts' list, those aren't all registered  
15 trademarks, but they're confusingly similar  
16 misspellings. In other words, somebody typing in "1  
17 800 contact" I think has just misspelled "1  
18 800 contacts." And so registered trademarks and/or  
19 confusingly similar misspellings or common  
20 misspellings of it, that's how these are selected.

21 **Q. The term "confusingly similar," what does**  
22 **that -- I mean, does that have a legal meaning as**  
23 **well --**

24 A. Well, yeah. It comes from --

25 **Q. -- as a trademark lawyer?**

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1 A. Sorry. I didn't mean to talk over you.

2 It comes from trademark case law.  
3 That's -- that's just kind of a legal term that  
4 refers to a term that is -- that could infringe the  
5 mark, because it could cause consumer confusion  
6 because it's so similar.

7 So that's -- that's just the language  
8 we're using to identify this is how we're selecting  
9 what goes on Exhibit 2. It's your registered  
10 trademarks; and if there's any common misspellings or  
11 things out there that you want to include related to  
12 your trademark, then that's okay too.

13 **Q. And this list that 1-800 Contacts has**  
14 **supplied here, how did -- how did that list get**  
15 **generated?**

16 A. I don't know if that's a privileged issue  
17 or not.

18 MR. STONE: Can we take a short break?

19 MR. CHIARELLO: Well, I've got the -- an  
20 answer could be "I don't know." So --

21 MR. STONE: Well, but I don't know if  
22 that's his answer. So I'm going to instruct him not  
23 to reveal any privileged information in response to  
24 that.

25 And if you need a break to discuss whether

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1 information you have is or is not privileged, we can  
2 do that.

3 THE WITNESS: I have an understanding of  
4 how it happened, but my understanding just came from  
5 communications between me and David Zeidner on how  
6 that list was generated. So that's what --

7 MR. STONE: I don't think you should  
8 reveal it.

9 **Q. (By Mr. Chiarello) Okay. So --**

10 A. So I'm following that advice, and I think  
11 it's privileged that I can't reveal.

12 **Q. Okay. I'm handing you CX326.**  
13 **(Exhibit CX326 was identified.)**

14 **Q. And first question is, what is this?**

15 A. This is a settlement agreement between  
16 Memorial Eye and 1-800 Contacts from November 2013.

17 **Q. And did you work on this settlement**  
18 **agreement?**

19 A. I did.

20 **Q. If you look at page 2 and 3, it says**  
21 **"Obligations and Prohibited Acts."**

22 **Do you see that?**

23 A. Yes.

24 **Q. And the first paragraph under 3, 3a says,**  
25 **"refrain from purchasing or using any of the terms**

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1 **the other Party has listed in Exhibit 2 as triggering**  
2 **keywords in any internet search engine advertising**  
3 **campaign."**

4 **Do you see that?**

5 A. Yes.

6 **Q. What does that mean?**

7 A. Well, I think that's similar to the  
8 Walgreens agreement. It's going to mean the same  
9 thing. I think when we settled with Memorial Eye, we  
10 used the Walgreens agreement because they also wanted  
11 a more simplified explanation. And so I think this  
12 agreement was kind of patterned after the Walgreens  
13 agreement.

14 **Q. In paragraph b it says, "implement all of**  
15 **the" -- I'm sorry. Paragraph 3b, which reads,**  
16 **"implement all of the terms the other Party has**  
17 **listed in Exhibit 2 as negative keywords in all**  
18 **internet search engine advertising campaigns with**  
19 **respect to those internet search engines that allow**  
20 **the implementation of negative keywords by the**  
21 **Party."**

22 **Do you see that?**

23 A. Yes.

24 **Q. Does that mean the same thing that it does**  
25 **in the Walgreens exhibits?**

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1 MR. STONE: Objection. Improper as to  
2 form.  
3 THE WITNESS: Well, it's worded a little  
4 different. I think it has the same general meaning.  
5 I remember the Memorial Eye counsel, you know, wanted  
6 the caveat of making sure it's just as long as it's  
7 allowed to do it. And that kind of goes to that same  
8 concept of sometimes, you know, Internet search  
9 engines can change their policies and some of them  
10 had limits on how many negative keywords you could  
11 use, and he just wanted to make sure there was that  
12 caveat that said to the extent it's allowed, then you  
13 got to use them.  
14 **Q. (By Mr. Chiarello) If you would please**  
15 **turn to Exhibit 2 of the Memorial Eye exhibit --**  
16 **agreement. I'm sorry. On the left-hand side it says**  
17 **"1-800 Contacts' Trademark Keywords."**  
18 A. Okay.  
19 **Q. And I notice that that list appears**  
20 **shorter than it did in Exhibit 2 attached to CX322,**  
21 **the Walgreens exhibit.**  
22 A. Oh, yeah. Yes, it is shorter.  
23 **Q. My question is going to be why?**  
24 A. I'm -- I don't recall if Memorial Eye  
25 counsel asked for that or pushed back on anything, or

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1 if -- or if we had just decided to simplify it based  
2 on probably stuff I can't reveal, privileged analysis  
3 or thoughts. I don't specifically recall.  
4 It is something I'm sure I spoke with  
5 Anthony Hong about, who was Memorial Eye's counsel.  
6 So I wish I had a specific recollection.  
7 **Q. If -- if it's helpful for this next**  
8 **question or two, you may want to lay the Exhibit 2**  
9 **for the Walgreens side by side with this one. I**  
10 **noticed that in the Walgreens exhibit there's the**  
11 **phrase "We Deliver You Save." Is that a trademarked**  
12 **term?**  
13 A. Yes. All of these -- anything in this --  
14 my understanding is anything in this list is  
15 something that 1-800 had obtained a federal  
16 registration for -- or possibly applied for a federal  
17 registration, but I think had obtained a federal  
18 registration for. I know early on there was a term  
19 in there called -- I can't even remember the term,  
20 but there was a term that they used on their list  
21 early on that they had a registration on, but then  
22 they had kind of decided it wasn't a trademark they  
23 wanted to keep pursuing. And so in subsequent  
24 agreements we took it off and it wasn't there. I  
25 can't remember exactly what it was, but --

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1 **Q. And just to make sure the record's clear,**  
2 **1-800 Contacts didn't seek federal registry of all of**  
3 **these terms in this list under 1-800 Contacts'**  
4 **Trademark Keywords. Again, we're looking at the**  
5 **Walgreens exhibit. Is that right?**  
6 A. Well, if you -- if you go for the first  
7 group that all has 800 in it, that's all the  
8 registered trademark of 1-800 Contacts and  
9 misspellings or common misspellings that are going to  
10 be, you know, basically indicating somebody searching  
11 for 1-800 Contacts, for that trademark.  
12 The other ones from Aquasoft down I  
13 believe are registered trademarks.  
14 **Q. The other terms that have I guess spawned**  
15 **from 1-800 Contacts' trademark that were not carried**  
16 **over to the Memorial Eye agreement -- do you follow**  
17 **me?**  
18 A. Uh-huh.  
19 **Q. Those terms, was there a reason that they**  
20 **wouldn't apply to potential queries for Memorial Eye**  
21 **as they do for Walgreen?**  
22 A. Again, I don't exactly recall why they  
23 were removed. It could have been part of the  
24 negotiation pushback, and those trademarks are not as  
25 commonly searched and so it's less important to have

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1 them on there. And that was kind of a give-and-take  
2 in order to get Memorial Eye to settle. That could  
3 be the case.  
4 **Q. By saying that those trademarks are not as**  
5 **commonly searched, do you mean those spellings of**  
6 **1-800 Contacts' trademarks?**  
7 A. Oh, are you talking about the misspellings  
8 that were not carried over, the 1-800 misspellings?  
9 MR. STONE: I think he was answering  
10 Aquasoft.  
11 THE WITNESS: I was thinking -- yeah, I  
12 was thinking of the Aquasoft down.  
13 **Q. (By Mr. Chiarello) When I asked you**  
14 **before, the -- the list of keywords -- and let's look**  
15 **at the -- let's just be precise about this. And on**  
16 **the Walgreens exhibit, the -- one, two, three, four,**  
17 **five --- first 17 keywords listed in 1-800 Contacts,**  
18 **Inc.'s trademark keywords.**  
19 A. Uh-huh.  
20 **Q. It begins with 1 space, 800 space, Contact**  
21 **and goes down to "800contacts."**  
22 A. Right.  
23 **Q. Do you see those?**  
24 A. Yeah.  
25 **Q. Limiting our conversation to those**



97	<p>1 <b>keywords --</b></p> <p>2 A. Okay.</p> <p>3 <b>Q. -- not all of those carried over to the</b></p> <p>4 <b>Memorial Eye agreement.</b></p> <p>5 A. Correct.</p> <p>6 <b>Q. And my question is, why not?</b></p> <p>7 A. Again, it could be a similar concept. You</p> <p>8 know, there's data available to figure out how often</p> <p>9 these misspellings are used, and over time it may</p> <p>10 change.</p> <p>11 So there may be a high rate of searches</p> <p>12 that misspell "1-800 Contacts" a certain way that</p> <p>13 would make 1-800 Contacts want that included as a</p> <p>14 misspelling. Over time some of those misspellings</p> <p>15 may not happen as often, and they're not as important</p> <p>16 in protecting the trademark rights to the</p> <p>17 1-800 Contacts trademark, so you would need less</p> <p>18 misspellings on the list for 1-800 Contacts.</p> <p>19 So, you know, that's -- I can see that as</p> <p>20 a reason to simplify it, take it down, lessen the</p> <p>21 burden on the other party to put in negative</p> <p>22 keywords, if necessary, things like that. So --</p> <p>23 <b>Q. Is it fair to say, then, that by lessening</b></p> <p>24 <b>the burden, this agreement from Memorial Eye was less</b></p> <p>25 <b>restrictive than the agreement on -- for Walgreen</b></p>	99	<p>1 sometimes we'd do some informal -- sometimes I'd do a</p> <p>2 letter to a party that says, please add this to</p> <p>3 Exhibit 2. Sometimes we'd do an informal phone call</p> <p>4 and say, coming up on this, it's not on Exhibit 2,</p> <p>5 but are you willing to add it as a negative. And</p> <p>6 they'll just say yes.</p> <p>7 And we may not formally -- we may not</p> <p>8 formally modify it because a lot of the -- the</p> <p>9 implementation or, I guess, compliance with these</p> <p>10 agreements was done party to party, marketing</p> <p>11 department to marketing department between the two</p> <p>12 parties of just coordinating and agreeing to do --</p> <p>13 you know, agreeing how to -- how to accomplish</p> <p>14 things. Lawyers weren't involved and there weren't</p> <p>15 express revisions to the agreements.</p> <p>16 <b>Q. When you said sometimes you do an informal</b></p> <p>17 <b>call to say "coming up on this," what does it mean,</b></p> <p>18 <b>"coming up on this"?</b></p> <p>19 A. Well, we'll send a notice of breach, and</p> <p>20 then they want to comply and correct it. And a lot</p> <p>21 of times that would be done just through -- their</p> <p>22 marketing department would call ours or vice versa.</p> <p>23 Like Bryce Craven, for example, at 1-800 Contacts</p> <p>24 would talk to their marketing guy, and their</p> <p>25 marketing guy would say, what's the best way to make</p>
98	<p>1 <b>because the list was not as long?</b></p> <p>2 MR. STONE: Objection. Improper as to</p> <p>3 form. Vague and ambiguous.</p> <p>4 You can answer.</p> <p>5 THE WITNESS: I don't know what you mean</p> <p>6 by "less restrictive." I mean, it is true that there</p> <p>7 are less keywords identified in Exhibit 2. I think</p> <p>8 the application of the agreements themselves require</p> <p>9 the same thing. You have to include a list of these</p> <p>10 keywords as negative keywords in all your campaigns,</p> <p>11 and you can't select these terms as a keyword itself.</p> <p>12 So I don't think "less restrictive" is really a good</p> <p>13 term unless you're just saying it had -- there</p> <p>14 were -- there were less keywords identified in</p> <p>15 Exhibit 2.</p> <p>16 <b>Q. (By Mr. Chiarello) Looking at both the</b></p> <p>17 <b>Walgreens and the Memorial Eye agreement, are you</b></p> <p>18 <b>aware of whether or not these agreements have ever</b></p> <p>19 <b>been changed or modified?</b></p> <p>20 A. What do you mean? By adding terms to</p> <p>21 Exhibit 2?</p> <p>22 <b>Q. That could be one example.</b></p> <p>23 A. It could have. I don't have a specific</p> <p>24 recollection if we have. But I know there are times</p> <p>25 when we would talk about potential breaches, and</p>	100	<p>1 sure this happens across all -- is there a way you</p> <p>2 can do it so that it automatically applies to all</p> <p>3 campaigns when we start a new campaign? And Bryce</p> <p>4 might say, yeah, this is how we do it. And they</p> <p>5 would just coordinate on best practices, on a best</p> <p>6 practices concept to comply with the agreements on an</p> <p>7 informal basis.</p> <p>8 <b>Q. As outside counsel, did you have any</b></p> <p>9 <b>supervisory role as to what these best practices were</b></p> <p>10 <b>or how to implement them?</b></p> <p>11 A. No.</p> <p>12 <b>Q. Did you provide any guidance as to when</b></p> <p>13 <b>such a call to say you're coming up should be made?</b></p> <p>14 A. Well, I may have. I think that would be</p> <p>15 privileged. I know I interacted with Bryce Craven.</p> <p>16 Dave Zeidner obviously supervised Bryce Craven in</p> <p>17 compliance with these agreements. But --</p> <p>18 <b>Q. Did you ever -- did you provide formal</b></p> <p>19 <b>training to 1-800 Contacts?</b></p> <p>20 A. Did I personally?</p> <p>21 <b>Q. Yeah, on implementation of these</b></p> <p>22 <b>agreements.</b></p> <p>23 A. I don't know what the word "training"</p> <p>24 would imply. I'm not a Google expert. I -- I might</p> <p>25 counsel them on the scope of the agreement and -- and</p>

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1 what their obligations were, but to get specific into  
2 that would be more privileged that I shouldn't  
3 reveal.

4 But I would -- I know that I interacted  
5 with Bryce Craven and Dave Zeidner on the nature of  
6 these agreements or on the potential for a breach by  
7 another party or on whether they were identified as  
8 having breached and having to remedy that.

9 **Q. Were there any compliance or audit  
10 obligations between the parties relative to these  
11 agreements?**

12 MR. STONE: Objection. Vague and  
13 ambiguous. Improper as to form.

14 THE WITNESS: I don't think so. I don't  
15 recall any audit obligations.

16 **Q. (By Mr. Chiarello) I hand you CX325.  
17 (Exhibit CX325 was identified.)**

18 **Q. I want to ask you, what is this?**

19 A. Settlement agreement between  
20 1-800 Contacts and Standard Optical, February 2011.

21 **Q. Did you work on this agreement with  
22 1-800 Contacts?**

23 A. Yes.

24 **Q. And if you would please turn to the  
25 "Obligations and Prohibited Acts" on page 2,**

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1 **that back. Under "Obligations and Prohibited Acts,"**  
2 **you see it says "refrain from purchasing or using any**  
3 **of the terms."**

4 **Do you see that.**

5 A. Yeah.

6 **Q. And here it says "engaging in internet  
7 search engine advertising that causes any website,  
8 advertisement, including a sponsored link,"**  
9 **et cetera.**

10 A. Right.

11 **Q. And if you could explain, how is the  
12 phrase as used here in the Standard Optical agreement  
13 "engaging in internet search advertising that causes  
14 any website" different from "refrain from purchasing  
15 or using any of the key terms" that was agreed to in  
16 the Walgreens?**

17 **I can simplify the question and say, how  
18 are these two prohibited acts different?**

19 A. Well, I think substantively, in practice,  
20 I don't think there's really a difference.

21 There's -- there's a difference in phraseology.

22 Sometimes you'll say, are you engaging in Internet  
23 search engine advertising that causes an  
24 advertisement to come up, or are you using a term to  
25 trigger your advertisement? I think those are two

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1 **paragraph 5.**

2 A. Yeah.

3 **Q. And the phrase that -- the first one says,  
4 "engaging in internet search advertising that causes  
5 any website, advertisement, including a sponsored  
6 link to any website to be displayed in response to or  
7 as a result of any internet search that includes the  
8 other Party's trademark keywords or URLs, as  
9 specifically identified in Exhibit 2 hereto."**

10 **Do you see that?**

11 A. Uh-huh.

12 **Q. What does that mean?**

13 A. I think it means pretty much what it says.  
14 Very similar to the -- the intent of all the other  
15 agreements, that you can't engage in Internet  
16 advertising that causes your sponsored link to be  
17 displayed when they search for one of the terms  
18 listed on Exhibit 2.

19 **Q. The prohibited acts, if you go back to  
20 CX322, the Walgreens exhibit --**

21 A. Uh-huh.

22 **Q. And I believe that was entered into in  
23 June 2010. Right?**

24 A. Right.

25 **Q. That -- that prohibited acts -- I take**

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1 different ways of saying the same thing.

2 And so I know that in this agreement with  
3 Standard Optical the opposing counsel, you know, did  
4 some edits of his own, and I don't know if this is  
5 language that I proposed or that he edited and  
6 proposed or not. I don't know if he changed the  
7 language that we sent him. I can't recall.

8 But I believe those two -- those two  
9 provisions are saying the same thing, that you can't,  
10 you know, implement your search engine settings in a  
11 way that is going to cause your advertisement to be  
12 displayed when there's a search for one of the terms  
13 in Exhibit 2. I think that's what they both mean.

14 **Q. If you would, please turn to the bottom of  
15 page 3. Paragraph (C) says, "For the term of this  
16 Agreement, each Party, its parent, subsidiaries,  
17 agents, servants, employees, officers, affiliates,  
18 and other entities controlled by such Party mutually  
19 agree to use the other Party's trademark keywords and  
20 URLs as specifically identified in Exhibit 2 hereto  
21 as negative keywords in all of their respective  
22 keyword advertising campaigns for any internet search  
23 provider that allows the use of negative keywords, to  
24 the fullest extent allowable by the internet search  
25 provider without additional monetary charges, in**

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1 **order to prevent the display of advertisements and/or**  
 2 **internet links in response to or as a result of any**  
 3 **internet search that includes the other Party's**  
 4 **trademark keywords or URLs (as specifically listed in**  
 5 **Exhibit 2)."**

6 **Do you see where I read that?**

7 A. Yes.

8 **Q. The question here is, "other entities**  
 9 **controlled by such Party," what does that mean?**

10 A. Well, I think it just means what it says.  
 11 There's-- there's a common practice in search engine  
 12 advertising where you hire out a third-party firm to  
 13 manage your search engine advertising. If -- if you  
 14 have control over them on how they manage your  
 15 advertising, then, you know -- or just if you control  
 16 the way a party does search engine advertising on  
 17 your behalf, then you should be required to have them  
 18 implement these negative keywords. I mean --  
 19 that's -- that's my understanding. It was just kind  
 20 of standard contract language in there where you're  
 21 talking about a party, and anybody that that party  
 22 controls or their subsidiaries or anything like that  
 23 should have to follow the obligations of this  
 24 agreement.

25 **Q. The next sentence reads similar to the**

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1 **ones we read about with Web Eye Care and Lensfast and**  
 2 **others before that begins, "Specifically, for each**  
 3 **internet search provider from which a Party purchases**  
 4 **keywords to display advertising and/or internet**  
 5 **links, the other Party's trademark keywords and URLs**  
 6 **listed in Exhibit 2 shall also be provided to such**  
 7 **internet search provider as negative keywords, such**  
 8 **that the advertisements and/or links will not be**  
 9 **displayed when the negative keywords are part of a**  
 10 **search performed on the internet search provider's**  
 11 **website." And then there's a semicolon, "provided**  
 12 **that the Parties understand that the applicable**  
 13 **Internet search provider's actions thereafter are**  
 14 **beyond the control of the respective Party."**

15 **First I want to ask you about that**  
 16 **sentence up to the semicolon. It reads very similar**  
 17 **to those other agreements in that -- again, with the**  
 18 **"specifically." And I want to know, does it mean**  
 19 **something different than here as far as the -- what**  
 20 **it means to adopt a negative keyword relative to user**  
 21 **queries?**

22 MR. STONE: Objection. Improper as to  
 23 form.

24 You can answer.

25 THE WITNESS: Yeah, I think it says

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1 specifically you have to use these negative keywords  
 2 to make sure you're not displayed when they search  
 3 for the --

4 **Q. (By Mr. Chiarello) It says, "when the**  
 5 **negative keywords are part of a search performed on**  
 6 **the internet search provider's website," which I**  
 7 **believe is the same language in those other**  
 8 **settlement agreements. Does it mean the same thing**  
 9 **here?**

10 A. Yeah. It's got the same -- the same  
 11 intent, that a search for those terms on Exhibit 2  
 12 should not be triggering the other party's  
 13 advertisements. And so if you implement those as a  
 14 negative keyword, then -- then you're good to go.  
 15 That was always the view and intent.

16 **Q. Okay. So the next sentence says,**  
 17 **"Provided that the Parties understand that the**  
 18 **applicable Internet search provider's actions**  
 19 **thereafter are beyond the control of the respective**  
 20 **Party."**

21 **What does that mean?**

22 A. I think that's language that Standard  
 23 Optical wanted in there. In other words, they --  
 24 he -- I recall talking to John Delaney at Parsons  
 25 Behle. He represented Standard Optical, and he

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1 just -- one of his concerns was Google is in charge  
 2 of its algorithm and Google is in charge of how  
 3 things work on its search engine, and Google can  
 4 change its search engine any day. And so he wanted  
 5 to make it clear that as long as we have these terms,  
 6 and he was very specific on the scope of, you know,  
 7 our intent -- the intent of these agreements was  
 8 always to just, if you implement these terms as  
 9 negative keywords, these exact terms, an exact match  
 10 negative keyword, you're using the negative keyword  
 11 and you're in compliance.

12 And he -- I remember a conversation with  
 13 him where he was saying, well, if I put -- how do  
 14 these negative keywords work? If I put in "the  
 15 world's largest Contact Lens Store," is that going to  
 16 make "contact lens" somehow negative out somehow?  
 17 And he was just like, I want to just make it clear  
 18 that all we have to do is these exact terms as a  
 19 negative keyword.

20 So he put in this clause at the top of  
 21 Exhibit 2, and that was his way of expressing all we  
 22 have to do is make sure that a search -- this exact  
 23 search, "1-800 Contacts," in these quotes doesn't  
 24 trigger our ad, and as long as we're doing that,  
 25 we're in compliance. And if Google changes how their

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1 thing operates but we still have these as negative  
 2 keywords, that's not our fault. That's -- we're in  
 3 compliance.  
 4 That was his big concern. So he added  
 5 that language. He added this.  
 6 And I said, that's totally fine. That's  
 7 how all these agreements are intended to be applied.  
 8 That's how everything is. If you want to add that in  
 9 there to give you a comfort factor, we don't have any  
 10 objection, because that's how we've been operating  
 11 under all these agreements anyway.  
 12 So that's how those -- that's my  
 13 recollection of those negotiations.  
 14 **Q. Did you, if you recall, suggest the**  
 15 **similar terms that you did with Walgreens, which were**  
 16 **those -- basically those two clauses to simplify?**  
 17 MR. STONE: Objection. Improper as to  
 18 form.  
 19 You can answer.  
 20 THE WITNESS: I don't recall if I used  
 21 Walgreen as a template for this one or not. I may  
 22 have. You know, and as you progress through, you're  
 23 doing these settlement agreements over a period of,  
 24 you know, from 2004 to 2012 and '13. So you're over  
 25 a decade. The overall import and intent of the

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1 agreements was always the same. Language and stuff  
 2 modified understanding of how Google may work or  
 3 simplified language or different parties suggesting  
 4 things that we hadn't thought of that helps.  
 5 That's why the agreements alter over time,  
 6 but the intent and operation and compliance with the  
 7 agreements from my perspective never changed. It was  
 8 always, if you don't -- you know, we'll identify our  
 9 trademark keyword list. If you don't choose those as  
 10 your triggering keyword and you also make those a  
 11 negative keyword of any kind -- it's up to you, just  
 12 a negative keyword -- you are in compliance with the  
 13 agreement. And that is what we felt would prevent  
 14 the trademark infringement and protect each other's  
 15 goodwill and trademark rights. And that was always  
 16 the intent.  
 17 **Q. Bottom of the -- turn to the first page of**  
 18 **the agreement, paragraph 2 at the bottom.**  
 19 A. Standard Optical agreement?  
 20 **Q. Standard Optical agreement. I'm sorry.**  
 21 **Bottom of the first page, it says the term. "The**  
 22 **term of this Agreement shall be the period of two**  
 23 **years from the Effective Date."**  
 24 **Do you see that?**  
 25 A. Uh-huh.

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1 **Q. Why did you put a term in this agreement?**  
 2 A. Standard Optical asked for it. They're  
 3 the only party that ever asked for a limit on term.  
 4 And similar to most other parties, they said, listen,  
 5 this doesn't really -- this isn't something that we  
 6 try to do. We don't -- we don't want to come up when  
 7 somebody searches for 1-800 Contacts. That's not  
 8 something that will help our consumers or help our  
 9 business. It's not something we're interested in  
 10 doing with our AdWords campaign.  
 11 So in one context they were the same as  
 12 everybody else, saying this isn't something that  
 13 gives us a benefit or provides the marketplace a  
 14 benefit. But they said, we want to evaluate it more,  
 15 and we would rather just have this limited to two  
 16 years and then we can regroup if we want to and talk  
 17 about it.  
 18 And my understanding is, even though this  
 19 expired, I don't think that they -- I think they  
 20 maintained the same practice. I don't think they  
 21 come up when somebody searches for 1-800 Contacts.  
 22 Maybe I'm wrong. I don't monitor it, but --  
 23 **Q. Do they communicate with you that we're**  
 24 **still -- that they're still maintaining the**  
 25 **agreement?**

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1 A. No. I guess that's just coming from my  
 2 communications with John Delaney. He was -- he was  
 3 saying my client wants a two-year term, because it's  
 4 kind of a logistics thing to always make sure you're  
 5 in compliance with a written agreement all the time.  
 6 He's all, they're going to implement these negative  
 7 keywords and they'll probably just keep them around.  
 8 They're not going to change it. They don't have any  
 9 reason to; they don't want to. They just don't want  
 10 a formal agreement hanging over them longer than the  
 11 two years. So they're the only ones that requested  
 12 that, and we agreed.  
 13 **Q. And 1-800 Contacts -- did 1-800 Contacts**  
 14 **have concern of future infringement after the two**  
 15 **years?**  
 16 MR. STONE: Okay. So to the extent you  
 17 have an understanding as to what 1-800 Contacts'  
 18 concern was that came from a privileged  
 19 communication, if you had one, you shouldn't reveal  
 20 any privileged communications. But to the extent you  
 21 had any concern that you either had or didn't have in  
 22 your own mind, you can share what was in your mind.  
 23 THE WITNESS: Yeah. I -- I don't think  
 24 I've ever been aware of any further infringement  
 25 concerns about Standard Optical. I do know from my

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1 discussions with John Delaney that 1-800 and Standard  
2 Optical have a pretty good relationship, just  
3 business relationship in general. They -- some of  
4 their principals knew each other and thing like that,  
5 at least back in this time frame.

6 So the two-year agreement was similar  
7 to -- I mean, there are parties that we identified  
8 as, you know, that we saw come up that sometimes we  
9 would send a demand letter to and they would say,  
10 we'll implement negative keywords. And we would  
11 never actually file a complaint or require a formal  
12 settlement agreement.

13 And this is a context where they  
14 represented that they don't have any interest in  
15 doing -- in -- in triggering their ads by searches  
16 for 1-800 Contacts. So a two-year agreement was  
17 enough of an expression of good faith, we're willing  
18 to do this. And John Delaney said, I mean, the  
19 likelihood is that's what they're going to do in the  
20 future. They don't have any interest in it. If they  
21 did, they know they'd be picking a trademark  
22 infringement fight. So a two-year agreement was  
23 enough of an assurance that even after the two years  
24 it's likely not going to happen again.

25 And so that's where I get my sense of

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1 assurance. I don't know if any issues ever came up  
2 at 1-800 with Standard Optical again. I don't know  
3 of any.

4 **Q. (By Mr. Chiarello) Is there any reason**  
5 **where on or about July 13th, 2010, wherein they filed**  
6 **a lawsuit -- wherein 1-800 Contacts filed a lawsuit**  
7 **against Standard Optical for infringement?**

8 A. Yeah. The reason we sent him a demand  
9 letter and the reason for the settlement agreement  
10 was we saw actions that we felt were trademark  
11 infringement, so we filed a lawsuit. And -- and it's  
12 kind of -- it's not an uncommon practice to file a  
13 lawsuit, not serve it, not -- it wasn't intended to  
14 be a threatening thing. I mean, it can always come  
15 across as threatening, but sometimes jurisdiction is  
16 an issue.

17 So one of our practices was if we were  
18 going to send a demand letter to a party that we  
19 thought might file their own declaratory judgment  
20 action in a different jurisdiction in response to our  
21 demand letter, we would first file a complaint. We  
22 wouldn't serve it. We would send it with our demand  
23 letter and just say, we would like to resolve this  
24 amicably, but we preserve our jurisdiction here.  
25 That was common. Standard Optical is a bigger

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1 company than some that we thought might file a  
2 declaratory judgment action.

3 **Q. Let's move on to the next document, and**  
4 **then we'll take a break.**

5 **I'm handing you CX1441, which is**  
6 **1-800 Contacts' Responses to Complaint Counsel's**  
7 **First Set of Requests for Admissions. And I'd like**  
8 **to draw your attention to Request for Admission**  
9 **No. 4.**

10 (Exhibit CX1441 was identified.)

11 A. Okay.

12 **Q. I asked earlier today if you were prepared**  
13 **to testify to this. And I'll just read for you that**  
14 **the request says, "Admit that 1-800 Contacts admitted**  
15 **[sic], at the time it executed each Settlement**  
16 **Agreement, that the Settlement would prevent a**  
17 **Settlement Partner's advertisements from appearing on**  
18 **Search Engines Results Page in response to User**  
19 **Queries containing a term on which 1-800 Contacts**  
20 **claims a trademark."**

21 **And respondents objected. And then the**  
22 **second sentence of the response says, "Subject to and**  
23 **without waiving its objections, 1-800 Contacts admits**  
24 **that it anticipated, at the time it executed each**  
25 **Settlement Agreement, that the Settlement Agreement**

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1 **would prohibit a Settlement Party from presenting**  
2 **paid ads or sponsored links (as opposed to organic**  
3 **links or other listings or information) on Search**  
4 **Engine Results Pages in response to certain User**  
5 **Queries, but not all User Queries, containing a term**  
6 **on which 1-800 Contacts claims a trademark. Except**  
7 **as expressly so admitted, 1-800 Contacts denies this**  
8 **Request for Admission."**

9 **My question to you is, what -- what does**  
10 **this mean that there were some queries for which --**  
11 **that the settlement agreement would prohibit a**  
12 **settlement party from presenting paid ads or**  
13 **sponsored links on search engine results page in**  
14 **response to certain queries, but not all user**  
15 **queries, containing a term in which 1-800 Contacts**  
16 **claims a trademark? What were those certain queries?**

17 A. Well, I think what we've talked about  
18 earlier, the queries -- any query that's a search for  
19 the terms in the exhibits to the settlement  
20 agreements, the -- a search for these trademark terms  
21 would be precluded, would -- would be -- that it  
22 would prevent them from placing their sponsored links  
23 on those searches. So that's some but not all,  
24 because not every query that would reference one of  
25 their trademarks is something that was ever intended

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1 or thought would be a problematic trademark  
2 infringement or prohibited.

3 So, I mean, the agreements identify the  
4 queries that would be prohibited. The overall  
5 concept was if somebody is searching for  
6 1-800 Contacts' trademark as a source, they're  
7 searching for us, that's the type of search they  
8 wanted to prevent.

9 If somebody's doing a search that is not  
10 necessarily a search for 1-800 Contacts as a source  
11 as a comparative search, as a search for multiple  
12 parties at the same time or something like that, that  
13 would not be something that would implicate trademark  
14 rights. It would not be something that they wanted  
15 to prohibit.

16 And then even in the context of searches  
17 that are looking for 1-800 Contacts, they -- the  
18 settlement agreements are defined narrowly to prevent  
19 certain searches based on those exhibits and also  
20 provides the opportunity to supplement those exhibits  
21 with additional negative keywords if the need arised  
22 [sic], if -- if an issue presented itself.

23 So I think we were focused on what's  
24 happening out there that we see in the real world and  
25 what we contemplated users might be searching for,

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1 and that's what we based our settlement agreements  
2 on. But it certainly doesn't preclude providing a  
3 sponsored link on any search that would include one  
4 of our trademark terms in the search. To me, they're  
5 pretty narrowly tailored.

6 **Q. Well, you just -- in the last sentence you**  
7 **said, "but it certainly doesn't preclude providing a**  
8 **sponsored link on any search that would include one**  
9 **of our trademark terms in the search."**

10 **If you would please turn to -- go back**  
11 **to 317, CX317, which was the AC Lens agreement.**

12 A. Okay.

13 **Q. It says -- I'm looking at paragraph 2,**  
14 **capital letter C, where it describes the**  
15 **implementation of negative keywords. And I'm at the**  
16 **top of page 3 of the agreement. And the second line**  
17 **says, "in order to prevent the display of**  
18 **advertisements and/or internet links in response to**  
19 **or as a result of any internet search that includes**  
20 **the other Party's trademark keywords."**

21 A. And which paragraph was that, again?

22 **Q. Sorry. I'm at the top of page 3. It's**  
23 **paragraph section 2, paragraph capital C.**

24 A. Right. Well --

25 **Q. And it says, "in order to prevent the**

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1 **display of advertisements and/or internet links as a**  
2 **result of any internet search that includes the other**  
3 **Party's trademark."**

4 **How does that square with your last answer**  
5 **that they could advertise when it says here they have**  
6 **to use negative keywords when the -- when the**  
7 **negative keyword is included in the query?**

8 A. Well, you have to read these agreements in  
9 the context of the entire agreement. I mean, there's  
10 a provision in page 2, subsection (B), that says use  
11 of the party's trademarks in a manner that would not  
12 constitute infringing. Comparative advertising,  
13 parodies, is excluded. You have to take into account  
14 that the term "party's trademarks," it says "as  
15 listed in Exhibit 1."

16 And the -- and with that, you know,  
17 context, the import is here are -- here are the  
18 searches we are specifically identifying in this  
19 agreement. And there can be searches that would  
20 include these terms, potentially, but would be  
21 excluded by that comparative advertising, fair use  
22 type stuff. And it was always the intent that we  
23 just want to make sure that this type of a search in  
24 this exhibit, any of these searches, don't trigger  
25 our ads, you know. And that's the language we use.

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1 That was always the intent.

2 That's the only thing that my  
3 understanding is that was ever monitored is exact  
4 searches for these terms in Exhibit 1. And the  
5 purpose of adding a provision where you can -- where  
6 you can supplement Exhibit 1, the purpose of that is  
7 so that you can narrowly tailor it as we're putting  
8 here. And if something becomes a problem, we can add  
9 it to Exhibit 1.

10 So I don't agree with the interpretation  
11 of the agreement that says, you know, you take that  
12 language out of context and say anything that  
13 includes one of these terms is prohibited. I don't  
14 think that's the import of this agreement or how the  
15 parties intended it to be. And if you take the  
16 agreement in its entire context, that's not how the  
17 parties implemented it or complied with it or  
18 understood it.

19 MR. CHIARELLO: Okay. Let's go off the  
20 record.

21 (Recess from 11:56 a.m. to 1:16 p.m.).

22 MR. CHIARELLO: Go back on the record.

23 **Q. (By Mr. Chiarello) Mark, I've handed you**  
24 **an exhibit marked CX638. Invite you peruse it. And**  
25 **when you're ready, please tell me what this is.**

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1 (Exhibit CX638 was identified.)

2 A. It looks like a demand letter that I sent  
3 to Tram Data for 1-800 Contacts for their --  
4 enforcing their trademark rights.

5 **Q. Do you -- do you remember sending this  
6 letter?**

7 A. Well, I mean, I can't tell you I have a  
8 distinct recollection of doing it, but I know I did  
9 it, if that makes sense. I can't tell you what the  
10 weather was like that day, in other words.

11 **Q. On page 2 of the letter at the top of it,  
12 it reads, "It has come to our attention that you are  
13 infringing upon our client's trademark rights through  
14 your purchase of sponsored advertisements at Google,  
15 Ask, AOL, and possibly other search engines."**

16 **Do you see that?**

17 A. Yeah.

18 **Q. What was the basis for your asserting that  
19 they were infringing upon your client's trademark  
20 rights?**

21 MR. STONE: So we need to be careful about  
22 privilege issues, Mr. Miller. So to the extent there  
23 were facts that came to your attention only in a  
24 privileged context or things you did that you would  
25 consider work product, you should not disclose those.

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1 But to the extent there were things that you shared,  
2 for example, with Tram Data's lawyers or things you  
3 would have shared with them if they'd asked because  
4 you didn't consider them privileged, you can provide  
5 all that.

6 THE WITNESS: Okay. Well, I think the  
7 basis, you know, I state it in this letter. I state  
8 it in the complaint we filed. And the basis is they  
9 were using their search engine advertising in a way  
10 that triggered their sponsored links in response to  
11 searches for the 1-800 Contacts trademark. And, you  
12 know, that can create a likelihood of confusion and  
13 lead to trademark infringement, and that was the  
14 basis.

15 **Q. (By Mr. Chiarello) What was the way they  
16 were using -- strike that.**

17 **What was the basis for your contending  
18 that they were -- that the advertisements were  
19 triggered by at least the following keywords, as you  
20 wrote in the end of the first paragraph on page 2?  
21 And there's a list of "1800 contacts," "1 800  
22 contacts," "1-800-contacts," "1-800 contacts,"  
23 "www.1-800contacts.com," and then "1800contacts.com."**

24 MR. STONE: Objection. Improper as to  
25 form. And compound.

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1 You can answer.

2 THE WITNESS: I don't have a specific  
3 recollection other than, you know, we would have --  
4 there would have been prior searches performed on  
5 those terms to, you know, reveal that their ads are  
6 coming up. And so that's why we put that in the  
7 letter, I guess.

8 **Q. (By Mr. Chiarello) Who would have  
9 performed those prior searches?**

10 MR. STONE: Objection. Improper as to  
11 form. And calls for speculation.

12 THE WITNESS: It wasn't always the same.  
13 It varied. Could have come from trademark monitoring  
14 reports that 1-800 Contacts performed on -- as part  
15 of their normal course of business. It could have  
16 been something we got out of a Keyword Spy report,  
17 BrandVerity report. We used a bunch of different  
18 tools to evaluate use of the trademark as a  
19 triggering keyword or search term. So I can't tell  
20 you exactly how this one played out.

21 **Q. (By Mr. Chiarello) What was the -- what  
22 was the BrandVerity report?**

23 A. I remember the name. It was -- it was,  
24 you know, an independent company that did some --  
25 some sort of analytics to evaluate other parties, you

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1 know, keyword use on a certain keyword and see what  
2 was coming up. And they would put it in a report  
3 that would show the keyword and then the  
4 corresponding ad text and the corresponding URL, you  
5 know, landing page and things like that so you could  
6 evaluate it.

7 Keyword Spy was similar. I don't -- I  
8 just can't remember specifically how BrandVerity  
9 reports actually looked in detail, but I remember the  
10 name. I remember using BrandVerity reports.

11 **Q. Do you know how these reports, BrandVerity  
12 and you mentioned Keyword Spy, how they would assess  
13 the keyword use?**

14 A. I don't know the details of their, you  
15 know, algorithm or their software or how they did it.  
16 I mean, I -- I don't know. I don't know how they  
17 implemented it.

18 **Q. Handing you an exhibit marked CX1071.  
19 (Exhibit CX1071 was identified.)**

20 **Q. My first question will be, what is this?**

21 A. Well, I don't know if I've ever seen this  
22 e-mail before. So -- I mean, looks like an e-mail  
23 from Jordan Judd to Bryce Craven with trademark  
24 monitoring reports attached.

25 **Q. Did you receive trademark monitoring**

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1 **reports from 1-800 Contacts?**  
 2 A. Yeah, I did from time to time.  
 3 **Q. If you flip through the document, you'll**  
 4 **see some attachments.**  
 5 A. Right.  
 6 **Q. Unfortunately, they're not labeled by the**  
 7 **document as indicated on the front of the e-mail.**  
 8 **But if you would please turn to -- unfortunately, it**  
 9 **doesn't look like it's marked, but it is the fifth**  
 10 **page of the document. It's got -- it's in color. It**  
 11 **says "Google" at the top, and then there's like a**  
 12 **spreadsheet coming down, a little halfway down.**  
 13 A. Right.  
 14 **Q. Do you see this?**  
 15 A. Uh-huh.  
 16 **Q. And the date says 4/16/2010.**  
 17 A. Okay.  
 18 **Q. Do you see that?**  
 19 A. Yeah.  
 20 **Q. Have you seen a table like this before?**  
 21 A. Yeah. I remember seeing these.  
 22 **Q. And what are these?**  
 23 A. I think these are the trademark monitoring  
 24 reports created in house at 1-800 Contacts by their  
 25 group.

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1 **Q. Okay. You see the first term under Google**  
 2 **says "1800contacts"?**  
 3 A. Uh-huh.  
 4 **Q. And over to the right under column 2 it**  
 5 **says "Replacemycontacts" --**  
 6 A. Right.  
 7 **Q. -- ".com."**  
 8 **Do you see that?**  
 9 A. Uh-huh.  
 10 **Q. Going back to the Tram Data, the letter**  
 11 **you sent to Tram Data, and it says "d/b/a**  
 12 **ReplaceMyContacts.com." I'm wondering if looking at**  
 13 **this table maybe refreshes your recollection as to**  
 14 **how you learned about or assessed that Replace My**  
 15 **Contacts was infringing upon 1-800's trademark**  
 16 **rights.**  
 17 A. I mean, I don't -- it could have been. I  
 18 don't recall specifically.  
 19 **Q. Did you receive these reports on a regular**  
 20 **basis from 1-800 Contacts?**  
 21 A. Yeah, I did. For a period of time I was  
 22 getting them on a regular basis, yeah.  
 23 **Q. What was that period of time?**  
 24 A. It would have been in 2010 and maybe part  
 25 of 2009, but 2010. Might have been '12. I mean, I

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1 didn't always review every one I got. I would get  
 2 them and, you know, sometimes I'd look at them.  
 3 Sometimes I'd just put them in a folder on my e-mail.  
 4 **Q. Would you receive them weekly?**  
 5 A. I don't recall how often they came.  
 6 **Q. Was this something you requested from**  
 7 **1-800 Contacts?**  
 8 A. No, I don't think so.  
 9 **Q. You mentioned the BrandVerity report and**  
 10 **the Keyword Spy reports.**  
 11 A. Uh-huh.  
 12 **Q. Were those reports that came to you**  
 13 **directly, or were they something that was sent to you**  
 14 **from 1-800 Contacts?**  
 15 A. I may have gotten some BrandVerity reports  
 16 from them from time to time. Keyword Spy I think was  
 17 something that at some point in time they set up an  
 18 account and gave me the log-in/password information  
 19 so I could log into Keyword Spy myself and generate a  
 20 report if I wanted to for any reason, enforcement or  
 21 things like that, or I needed to get something for a  
 22 letter or evaluate whether we should send a letter on  
 23 my own.  
 24 So I remember being able to generate  
 25 Keyword Spy reports myself. I'm not sure if they

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1 ever sent me those or if I only -- or if they used  
 2 BrandVerity for their stuff.  
 3 **Q. When you say you would generate a report**  
 4 **on your own, what does that mean?**  
 5 A. Boy, it's been a long time. I don't  
 6 remember how the system works. But in general, I  
 7 think it was like I'd log into Keyword Spy, and then  
 8 I could -- I could, you know, create a report,  
 9 produce a report based on a keyword, you know,  
 10 myself. And it would -- it would generate like an  
 11 Excel spreadsheet type of report based on the  
 12 settings I put in there. I don't even remember all  
 13 the details of how it worked.  
 14 **Q. And could you use that Keyword Spy report**  
 15 **that you generated to form a basis to determine if a**  
 16 **party was infringing upon 1-800's trademark rights?**  
 17 MR. STONE: So I think that may call for a  
 18 legal opinion that would -- you could be protected by  
 19 work product if he came to it on his own, or  
 20 privileged if he communicated it to the client.  
 21 I think you can answer the question, is  
 22 that something that you did look at in formulating  
 23 that? Is that something you did use? I think he can  
 24 say if he did use it. But the question as it was  
 25 framed was could you use that to form a basis, and

32 (Pages 125 to 128)



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1 I --

2 Do you have in mind the basis, Mr. Miller?

3 **Q. (By Mr. Chiarello) I would correct it to**  
4 **say "would you." Would you use the Keyword Spy**  
5 **report that you generated to form a basis to**  
6 **determine if a party was infringing upon 1-800's**  
7 **trademark?**

8 A. I think I can say just in general certain  
9 tools that I would reference without going into what  
10 my analysis of what the work product was. Right?

11 It was one of the tools that I would use  
12 in formulating or in evaluating potential trademark  
13 infringement.

14 **Q. And what were the other tools that you**  
15 **would use in addition to Keyword Spy?**

16 A. Well, screenshots, evaluation of  
17 screenshots and these trademark monitoring reports,  
18 BrandVerity reports and, you know, frequency of  
19 appearances, placement on the page and nature of the  
20 search, all those factors. And then just, you know,  
21 plugging those into a legal test are factors. So --  
22 but those tools are the tools that -- some of the  
23 tools that I could use and reference.

24 **Q. You said "frequency of appearances." What**  
25 **did you mean by that?**

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1 A. Well, is this somebody placing a sponsored  
2 link? Do they come up -- are they coming up every  
3 time, the top -- you know, if you look at these top  
4 four or five 1-800 Contacts searches, are they coming  
5 up every time in all these searches in high placement  
6 on misspellings? Are they a one-off that came up  
7 once and you didn't see again, and it came up -- you  
8 know, that's one data point factor.

9 **Q. How does the frequency that they come up**  
10 **affect the analysis of trademark infringement?**

11 A. Well, in my view, if -- if somebody is  
12 coming up more often on 1-800 search -- 1-800  
13 Contact's searches and misspellings on a -- on an  
14 extensive or regular basis, that can show they're  
15 targeting that term more.

16 It can also show there's -- there's more  
17 likelihood of consumers thinking there is an  
18 affiliation, because every time somebody searches for  
19 1-800 Contacts they're right there, and it's not very  
20 distinctive term. If it's like ShipMyContacts.com,  
21 consumers could think if they're always coming up  
22 when I search for 1-800 Contacts, maybe they're a  
23 fulfillment center. Maybe they've got some agreement  
24 with them. Maybe they've got some affiliation. Who  
25 knows.

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1 So the frequency is one data point that  
2 can point to that.

3 **Q. You mentioned placement on a page. By**  
4 **"page," did you mean the search engine result page?**

5 A. Yeah.

6 **Q. And what did placement on a page matter,**  
7 **in your assessment?**

8 A. It's just one data point. The higher they  
9 are in the placement -- you know, ordinary consumers,  
10 I still think even to this day there's -- there's a  
11 significant percentage of ordinary consumers that  
12 don't fully understand how Google works. They don't  
13 fully understand the distinction between the organic  
14 results and the paid advertising results and how  
15 those are searched and how those are put up. And --  
16 and people think that the content of that website  
17 that's being advertised must have a relation to the  
18 term I searched. So the higher up the content,  
19 sometimes people may think that's more relevant. So  
20 if they're in a number one position, I think that can  
21 lead to more confusion, too.

22 That's just one data point. It's not  
23 exhaustive or exclusive, but it's another data point.

24 **Q. So you mentioned the BrandVerity reports**  
25 **and the Keyword Spy reports and these trademark**

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1 **monitoring reports, the frequency that you saw them,**  
2 **placement on the page, screenshots. Anything else**  
3 **that you would analyze in assessing whether or not a**  
4 **party was infringing upon 1-800's trademark?**

5 A. Yeah. I mean, you look at the ads  
6 themselves, and you would analyze -- you've got to  
7 take into account the nature of the market, the  
8 nature of the parties, how strong the trademark is,  
9 consumer awareness of brands and retailer brands in  
10 the marketplace. There's a lot of factors that --  
11 outside of just looking at a search results page that  
12 you take into account when you're evaluating  
13 potential infringement.

14 And then if you have a basis to argue  
15 there's a likelihood of confusion or we've got a good  
16 faith basis to allege trademark infringement here,  
17 then you've got a claim. And then discovery will  
18 prove out what kind of evidence you have.

19 **Q. How long would this analysis generally**  
20 **take?**

21 A. Well, I don't --

22 MR. STONE: Objection. Assumes facts not  
23 in evidence. Improper as to form.

24 You can answer.

25 THE WITNESS: Yeah, every case is

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1 different, and I can't really go through how long I  
2 spent analyzing each issue first. There's no way.

3 **Q. (By Mr. Chiarello) When you -- did you**  
4 **undertake such an analysis before you sent this**  
5 **letter to Tram Data?**

6 A. Well, we would always evaluate the case  
7 before we made the allegations or filed the  
8 complaint, absolutely.

9 **Q. The second page lists these six keywords.**  
10 **Do you see that?**

11 A. Which page?

12 **Q. The second page of the letter that you**  
13 **sent to Tram Data.**

14 A. Oh, yeah.

15 **Q. At the back of the entire Exhibit CX638,**  
16 **page 024 is -- appears to be an attachment as**  
17 **Exhibit 2 to a draft settlement agreement.**

18 **Do you see that?**

19 A. Right.

20 **Q. You include here on this table many more**  
21 **words than were listed in the letter.**

22 A. Right.

23 **Q. Why is that?**

24 A. Well, because those are also our trademark  
25 rights that -- are 1-800's trademark rights they

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1 would want to protect, other misspellings that, for  
2 whatever reason, are included as meaningful  
3 misspellings based on -- I don't know exactly the  
4 evaluation of picking them. I don't recall. But  
5 they're included in there because they are relevant  
6 to 1-800's trademarks.

7 **Q. If you would look back at CX1071. We were**  
8 **looking at that table. It's right there in front of**  
9 **you. If you would turn to the next page.**

10 A. Okay.

11 **Q. And I'm wondering if on this page and the**  
12 **subsequent two or three pages, are these examples of**  
13 **screenshots that you were talking about?**

14 A. Yeah. These are some examples of  
15 screenshots that I would -- these come from 1-800's  
16 internal trademark monitoring reports that they would  
17 share with us.

18 **Q. And were you aware of how they would**  
19 **assemble their trademark monitoring reports?**

20 A. I don't know the process they went  
21 through.

22 **Q. You don't know how they conducted the**  
23 **searches?**

24 A. No. I may recall them communicating to me  
25 something about how they did it, but I don't know if

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1 that's privileged -- that's a privileged  
2 communication. I don't -- sitting here today, I  
3 don't really recall any details of what their process  
4 would be. So --

5 **Q. Is any part of that answer being withheld**  
6 **because of privilege?**

7 A. Yeah, a portion, a small portion of what I  
8 recall is. I don't know if you want to confer to see  
9 if I need to worry about that or not, but --

10 MR. STONE: Do you want us to confer?

11 MR. CHIARELLO: Yeah.

12 MR. STONE: Okay. Let's go off the  
13 record.

14 (Recess from 1:38 p.m. to 1:39 p.m.).

15 MR. CHIARELLO: Back on the record.

16 THE WITNESS: Okay. I think I can answer  
17 it a little bit without revealing communications that  
18 were for the purpose of giving advice. This is --  
19 what this triggers in my mind is I remember them  
20 explaining that when they run these searches, one  
21 thing they would often do is they'd clear -- they  
22 said they would clear their cache and other cookies  
23 or whatever, you know, search engine history data  
24 type of thing. They'd clear all that before they did  
25 the search so it didn't impact the search.

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1 And then they would click on the websites  
2 or on the links and go there, and they would create  
3 this -- they would show -- they would have it  
4 displayed as privacy report for each link. And my  
5 understanding was the purpose of this privacy report  
6 is it would help you understand whether, for example,  
7 ShipMyContacts.com was the party that paid for this  
8 sponsored link or whether it was an affiliate that  
9 was putting it up there on behalf of  
10 ShipMyContacts.com to get a commission. That's what  
11 the privacy reports are for. That's all I recall.

12 **Q. (By Mr. Chiarello) Do you know what the**  
13 **purpose behind the trademark enforcement program and**  
14 **these searches was for 1-800 Contacts?**

15 A. Well, trademark protection. I mean, from  
16 my perspective, the -- the sole focus we had was  
17 intellectual property is a valuable asset; and  
18 1-800 Contacts, their most valuable asset, in many  
19 respects, is that name. They had invested hundreds  
20 of millions of dollars in that name. And the purpose  
21 of this program was to maintain the goodwill that  
22 they had developed in that brand to avoid any  
23 dilution, to avoid it becoming I guess generic,  
24 genericized or genericness applying to it, or -- and  
25 to avoid trademark infringement, to avoid people

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1 misappropriating the goodwill they'd invested in --  
2 in that mark. Competitors doing that.

3 That was it. That was the sole focus. It  
4 was -- this trademark is -- I mean, I remember seeing  
5 their surveys where they would get -- I mean, I don't  
6 have the numbers right any more, it's been so long,  
7 but something like 40 percent unaided awareness of  
8 their name. You go up to consumers in a survey and  
9 you say, identify a company that sells contact lenses  
10 online or over the phone or through a catalog or  
11 something; and 40 percent, their first response would  
12 be 1-800 Contacts. And the next highest response of  
13 any retail brand was down in the like single digits,  
14 1 or 2 percent. Might have been LensCrafters.

15 So that brand recognition was a huge  
16 asset, and that's why internally it makes sense that  
17 a company would put together resources to make sure  
18 that brand name stayed strong, was protected and  
19 wasn't being infringed and misused by any  
20 competitors. That's my understanding of the purpose.

21 **Q. And is it your understanding that the**  
22 **employees, that these screenshots that we're looking**  
23 **at here were generated by the employees of**  
24 **1-800 Contacts?**

25 MR. STONE: The ones in this particular

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1 exhibit?

2 MR. CHIARELLO: In this particular  
3 example.

4 THE WITNESS: That's my understanding. I  
5 think certain employees in their search marketing  
6 department, Bryce Craven or Jordan Judd or people  
7 with -- I don't know how they train them or how it  
8 worked, but that's who would generate these.

9 **Q. (By Mr. Chiarello) Is it fair to say that**  
10 **they were generating this to see who else came up in**  
11 **response to that search?**

12 MR. STONE: Objection. Improper as to  
13 form. And calls for speculation.

14 You can answer.

15 THE WITNESS: They were generating these  
16 to see if anything was happening that -- that could  
17 negatively impact their trademark rights or result in  
18 confusion or infringement. That's my understanding.  
19 I mean, I wasn't internal there for any of their  
20 training, but that's what they were -- that's what it  
21 seems to me that their purpose was. That's what my  
22 understanding was.

23 **Q. (By Mr. Chiarello) Handing you CX0827 and**  
24 **CX828.**

25 (Exhibits CX0827 and CX0828 were identified.)

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1 **Q. I think I handed them to you out of**  
2 **sequence as far as chronological. But if you could,**  
3 **please, let's start with CX828.**

4 A. Okay.

5 **Q. And what is this?**

6 A. Looks like a letter sent to me from Kevin  
7 Drucker, who was counsel for Tram Data.

8 **Q. And do you recall this May 6th letter that**  
9 **you had sent?**

10 A. Well, I don't know if I -- I think that's  
11 the one we just looked at.

12 MR. STONE: CX638?

13 THE WITNESS: Yeah. That's the one we  
14 were just talking about a little while ago.

15 **Q. (By Mr. Chiarello) That's right. The**  
16 **first sentence in the third paragraph, he writes,**  
17 **"Tram Data is aware that 1-800 Contacts has, since at**  
18 **least as early as June 2009, been engaging in the**  
19 **very activity 1-800 Contacts now complains of."**

20 **Do you know what he's referring to there?**

21 A. Well, I think you just read --

22 MR. STONE: Objection. The document  
23 speaks for itself.

24 Go ahead and answer.

25 THE WITNESS: That's what he's referring

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1 to is what you read.

2 **Q. (By Mr. Chiarello) By "very activity**  
3 **1-800 Contacts complains of"?**

4 A. Yeah. I mean, he attached screenshots  
5 too. So he's saying that 1-800's sponsored links are  
6 coming up when somebody searches for  
7 ReplaceMyContacts.com.

8 **Q. Do you know if 1-800 Contacts was using**  
9 **Tram Data's intellectual property to deliver search**  
10 **advertising?**

11 A. Well, it appears that's what he's pointing  
12 out here. And that's why he says we should do these  
13 agreements, so neither of us is causing trademark  
14 infringement. I mean, that's what he's saying there.

15 **Q. I'm asking you, were you aware if**  
16 **1-800 Contacts was causing trademark infringement?**

17 A. Before he sent this letter?

18 **Q. Yes.**

19 A. No.

20 **Q. After he sent that letter?**

21 MR. STONE: Objection. Calls for a legal  
22 opinion as to whether or not it constituted trademark  
23 infringement.

24 So I caution you not to share any opinions  
25 that you shared with your client about whether or not

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1 it was trademark infringement. But you can otherwise  
2 answer.

3 THE WITNESS: I was aware after this  
4 letter that they were identifying behavior that they  
5 felt could give rise to a claim for trademark  
6 infringement potentially, similar to my letter that I  
7 sent him. That's what he's saying. That's my  
8 understanding of what he's saying.

9 **Q. (By Mr. Chiarello) Are you withholding  
10 any part of the answer based on privilege?**

11 A. No, not that I can think of.

12 **Q. Okay. You can set those two letters  
13 aside, then.**

14 **I'm handing you an exhibit CX643.  
15 (Exhibit CX643 was identified.)**

16 **Q. I'm also handing you CX1470.  
17 (Exhibit CX1470 was marked.)**

18 **Q. And with respect to CX643, what is this  
19 document?**

20 A. Looks like a letter I sent to Web Eye  
21 Care, August 10th, 2010.

22 **Q. If you turn to the second page, top of the  
23 page, it reads, "It has come to our attention that  
24 you are infringing upon our client's trademark rights  
25**

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1 **through your online advertising campaigns with  
2 Google, and possibly other search engines, that are  
3 designed to use at least the following  
4 keywords/search terms to trigger advertisements for  
5 your directly competitive services and links to your  
6 directly competitive website www.webeyecare.com."**

7 **Do you see that?**

8 A. Yeah.

9 **Q. First of all, what did you mean by  
10 "directly competitive services"?**

11 A. Web Eye Care sells -- is a retail --  
12 retailer of contact lenses online, and that's the  
13 exact same services 1-800 Contacts provides. So I  
14 don't know. I call that directly competitive  
15 services.

16 **Q. And the list below here of -- of the  
17 keywords that you listed, what was your basis for  
18 alleging trademark infringement based on those  
19 keywords?**

20 A. I think it's the same as I testified in my  
21 last letter. I mean, same thing. I think my basis  
22 is here. It's in the complaint. And it would be the  
23 same as I explained in regards to the last letter.

24 **Q. Where in the complaint and attachment is  
25 your basis?**

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1 MR. STONE: I don't think the complaint --  
2 oh, it is attached. I'm sorry.

3 **Q. (By Mr. Chiarello) It's behind the  
4 settlement agreement.**

5 A. Well, yeah. I think the complaint speaks  
6 for itself. We allege what their actions are, and we  
7 explain in the general allegations what they're  
8 doing. And then we explain the law and how it  
9 applies to the Lanham Act. So --

10 **Q. If you would turn to CX1470, and page 6  
11 of -- actually, let's start at the first page. Do  
12 you know what this is?**

13 A. It looks like another e-mail about the  
14 trademark monitoring reports from Jordan Judd to  
15 Bryce Craven. I don't recall seeing that before.

16 **Q. Would you please turn to CX1470-006. And  
17 if you look at the first line on the top of that  
18 page, it says "1800contacts," and then if you go over  
19 to column 3, it says "Webeyecare.com."**

20 **Do you see that?**

21 A. Yeah.

22 **Q. Do you know if that -- this report helped  
23 form the basis for your allegation that Web Eye Care  
24 was infringing upon 1-800 Contacts' trademark rights?  
25**

A. It could have. I can't say definitively.

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1 I don't recall.

2 **Q. And if you go to the next line, it says  
3 1800, space, contacts; and then in column 3 it has  
4 "Webeyecare.com" again.**

5 **Do you see that?**

6 A. Yeah.

7 **Q. This list of terms that forms -- I guess  
8 it's the first column on the left on the report. Do  
9 you know how that list of terms was assembled?**

10 A. I don't know what you mean by "assembled."  
11 I understand that those are the terms that they  
12 searched through Google. And then the next column  
13 would show the results page. And then the next  
14 columns would show what other, you know, who -- who  
15 was placing the ads. So how they chose the terms in  
16 that first column, I don't know.

17 **Q. If you go down to row 17, it says  
18 1800contacts, space, coupon, space, code.**

19 **Do you see that?**

20 A. Yeah.

21 **Q. Do you know how that was included as a  
22 search term?**

23 A. No. I mean, I'm sure they have their ways  
24 of deciding what terms were important and potentially  
25 more confusing than others, or more impactful on

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1 their trademark rights than others --  
 2 **Q. How would they know --**  
 3 A. -- but I don't know.  
 4 **Q. How would they determine what was more**  
 5 **impactful on their trademark rights than others?**  
 6 MR. STONE: Objection. Lacks foundation.  
 7 Calls for speculation.  
 8 THE WITNESS: I just said I wasn't part of  
 9 that. I don't know how they chose the words or the  
 10 terms searched in that column.  
 11 **Q. (By Mr. Chiarello) You used the term**  
 12 **"trademark rights," and it sounded like a legal term.**  
 13 **That's why I was wondering if they -- they did some**  
 14 **sort of analysis to determine words that would most**  
 15 **likely be most infringing on their trademark rights.**  
 16 A. Like I said, I don't know how they chose  
 17 that.  
 18 **Q. Do you know if they had separate trademark**  
 19 **counsel other than yourself and Mr. Pratt?**  
 20 A. I don't. I know that they understand  
 21 their trademark rights. I mean, and when they would  
 22 ask us for counsel on that, we'd give it to them. I  
 23 can't tell you -- I can't reveal any of those  
 24 communications, but I don't recall how they would  
 25 have -- how this particular group would have been

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1 selected for searching.  
 2 **Q. Would that be something you would inquire**  
 3 **about in determining -- in analyzing this report**  
 4 **that's being sent to you by your client?**  
 5 A. I mean, I may have, and I may have had  
 6 discussions with them about it. I don't recall  
 7 specifically. I don't know. I talked about these  
 8 reports with them from time to time. I know that.  
 9 And we would have discussed them.  
 10 I mean, just looking at them, these are  
 11 all searches that indicate a user looking for  
 12 1-800 Contacts as a source for contacts, specifically  
 13 looking for 1-800 Contacts. That's what these terms  
 14 reflect to me. So that could have been their aim for  
 15 we've got to find searches that indicate the user is  
 16 looking for us.  
 17 **Q. And they were implementing these terms to**  
 18 **see who else was appearing in response to these**  
 19 **searches for 1-800 Contacts?**  
 20 A. Well, I think they were implementing to  
 21 see who else was using their trademark to trigger  
 22 their advertisements, which can cause problems with  
 23 your trademark rights.  
 24 **Q. And is it your understanding that they**  
 25 **would implement these terms into the Google search**

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1 **bar and hit "search" and get a results page that was**  
 2 **I think what you referred to in that second column?**  
 3 A. Well, like I said, I -- I told you I  
 4 wasn't part of the process. I told you what I  
 5 recalled about how they did it, how they would clear  
 6 their cache and then do a search. That's -- that's  
 7 the best I know. I wasn't actually the one doing it,  
 8 so --  
 9 **Q. Do you know if they ever communicated with**  
 10 **Google or Yahoo that they were doing these searches?**  
 11 A. I have no idea.  
 12 **Q. If you would turn to CX1470-007. If you**  
 13 **look at the top screenshot there, it says**  
 14 **"1800contacts" next to the Google brand name.**  
 15 **Do you see that?**  
 16 A. Uh-huh.  
 17 **Q. Do you see that there's two ads on the**  
 18 **right side? And I apologize because it's very small**  
 19 **print.**  
 20 A. Right.  
 21 **Q. Do you see that kind of gray word up**  
 22 **there? I believe it says "Sponsored Links."**  
 23 A. Yes.  
 24 **Q. Okay. And the second one down, do you see**  
 25 **where it says guaranteed lower prices -- "lowest**

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1 **prices"?**  
 2 A. Uh-huh.  
 3 **Q. And there's a green link that says**  
 4 **"www.WebEyeCare.com"?**  
 5 A. Yeah.  
 6 **Q. As you look at the ad on that search**  
 7 **results page, does that lead you to believe that Web**  
 8 **Eye Care is infringing upon your client's trademark**  
 9 **rights?**  
 10 A. Yeah, potentially.  
 11 **Q. Why?**  
 12 A. Well, the -- the user has typed in  
 13 "1800contacts." This link comes up with kind of a  
 14 generic-looking source and language in it about  
 15 contact lenses retailers, and it's under the heading  
 16 of a sponsored link. And I think somebody looking  
 17 for 1-800 Contacts that sees that could think these  
 18 guys may be affiliated with 1-800 Contacts or maybe  
 19 they help 1-800 Contacts sell their over supply or --  
 20 you know, there's all kinds of ways that people could  
 21 mistakenly believe, you know, why would this come up  
 22 if I searched for 1-800 Contacts? Maybe  
 23 1-800 Contacts is on their website somewhere in the  
 24 content and that's what brought it up.  
 25 So people could mistakenly believe there's

37 (Pages 145 to 148)

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1 a sponsorship as a sponsored link or an affiliation  
2 or something like that. So yeah, that could  
3 potentially lead to trademark infringement.

4 **Q. And the user we know here was actually**  
5 **1-800 Contacts who conducted the search. Is that**  
6 **correct?**

7 A. Somebody at 1-800 Contacts, yes.

8 **Q. Okay. Going back to CX643, again, to this**  
9 **list. Is there anything else since we've had the**  
10 **discussion, looked at some of the report here, that**  
11 **would have informed your -- or maybe refreshes your**  
12 **recollection as to whether or not the -- basis that**  
13 **you made the allegation that Web Eye Care was**  
14 **infringing upon 1-800's trademarks?**

15 A. I -- I don't have a specific recollection  
16 of any specific analysis. What I've said before is  
17 the general tools we would use and things that would  
18 apply here too. So I can't tell you exactly other  
19 than what I've said went into that analysis. But --

20 **Q. I'm handing you CX1468.**  
21 **(Exhibit CX1468 was identified.)**

22 **Q. And also CX799.**  
23 **(Exhibit CX799 was identified.)**

24 MR. BEACH: Mr. Chiarello, the document  
25 states there's a complaint attached, but there is in

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1 **competitive services and website."**

2 **What did you mean by "directly competitive**  
3 **services and website"?**

4 A. Well, same thing I said before. Directly  
5 competitive services is, you know, one of the factors  
6 in evaluating trademark infringement is the nature of  
7 the services or goods. Are they the same? Are they  
8 different? Are they selling -- you know, are they  
9 selling watches or are they selling contact lenses?  
10 Are they a retailer? Are they a manufacturer? You  
11 know, trades of channel. So that's one aspect that  
12 goes into a trademark infringement analysis.

13 These guys are doing the exact same retail  
14 services for the exact same product through the exact  
15 same retail channels. All of that in decades-old  
16 trademark infringement law are factors that show --  
17 that -- that tilt the scale towards trademark  
18 infringement.

19 **Q. What steps, if any, did you take to assess**  
20 **whether or not Contact Lens King's services were**  
21 **directly competitive?**

22 A. Well, they were an online contact lens  
23 retailer. I mean, you can tell that by just going to  
24 their website.

25 **Q. Was there anything else besides going to**

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1 fact no complaint attached.

2 MR. CHIARELLO: It is incomplete.

3 MR. BEACH: Okay.

4 **Q. (By Mr. Chiarello) The first document I**  
5 **handed you, CX448, what is this?**

6 A. CX what?

7 MR. HOPKIN: 1468, I think.

8 THE WITNESS: 1468?

9 **Q. (By Mr. Chiarello) 1468.**

10 A. It's a letter I sent to Contact Lens King  
11 in February 2010.

12 **Q. And if you turn to the second page, this**  
13 **reads, "It has come to our attention that you are**  
14 **infringing on our client's trademark rights through**  
15 **your purchase of sponsored advertisements on Google,**  
16 **and possibly other search engines."**

17 **Do you see that?**

18 A. Yes, I do.

19 **Q. And what is the basis for your allegations**  
20 **that they were infringing upon your client's**  
21 **trademark rights?**

22 A. Again, it's the same thing I said in  
23 response to the other letters. We would have  
24 evaluated it and the same type of analysis.

25 **Q. And it says, "for your directly**

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1 **the website that --**

2 A. Well, no, I didn't talk to them, but the  
3 information we had showed that that's likely what  
4 they were. So that's how you start a case is you  
5 look at what evidence you have and the inferences you  
6 can make and you see if you've got a viable claim,  
7 and you assert the claim. If they came back and  
8 responded and said, hey, we're not a contact lens  
9 retailer, we just put pictures of them on our website  
10 but we don't sell any, then probably would have been  
11 a different story.

12 **Q. The list below that you provided for the**  
13 **following keywords, the first one says 1, space, 80,**  
14 **space, contacts. The next one says 1, space, 800**  
15 **space, c-i-n-t-a-c-t-s. The next one says 1, space,**  
16 **800 c-o-n-a-c-t-s. Where did this list come from?**

17 A. I don't recall. They're -- they're all  
18 just misspellings, variations of the 1-800 Contacts  
19 trademark. So I don't recall exactly where they came  
20 from. Probably through analysis of what searches  
21 were triggering the advertisements.

22 **Q. It seems to be a different list than that**  
23 **which we saw on the previous letters.**

24 A. Right.

25 **Q. Was there different -- a different source**

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1 **for that list?**

2 A. Again, I don't know. I don't know if I  
3 used a Keyword Spy report, BrandVerity report. I  
4 relied on 1-800's internal trademark monitoring  
5 report. You know, not every -- not every case was  
6 exactly the same, you know, analysis or process or --  
7 every player was different. So --

8 **Q. Okay. It says over on the third page,**  
9 **"We, therefore, demand that you immediately cease and**  
10 **desist from further use of 1800 Contacts marks, and**  
11 **confusingly similar variations thereof in all of your**  
12 **advertising campaigns and implement negative keywords**  
13 **to ensure further infringement and consumer confusion**  
14 **does not occur."**

15 **Do you see that?**

16 A. Yeah.

17 **Q. And then you have down here as the third**  
18 **bullet point -- well, you say, "Specifically, we**  
19 **demand that you provide us written certification that**  
20 **within the next ten days that you have," colon; and**  
21 **the third bullet point says, "implemented the**  
22 **above-listed keywords and the following list of terms**  
23 **and negative keywords" -- and it says, "For**  
24 **information on implementing" -- you give looks like a**  
25 **footnote to a website.**

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1 A. Right.

2 **Q. "In all of your keyword advertising**  
3 **campaigns."**

4 **So this list of keywords that you've**  
5 **demanded here, where did this come from?**

6 A. Again, I don't specifically recall. I  
7 assume it came from the client. Or maybe from our --  
8 we would have conferred with the client to create a  
9 list of keywords that relate to the trademarks and  
10 misspellings thereof and put it in here. But I  
11 don't -- I don't recall exactly where it came from or  
12 how it was assembled.

13 **Q. Okay. With respect to Contact Lens King's**  
14 **letter here, what evidence did you possess to assert**  
15 **a claim of infringement relative to -- well, what**  
16 **evidence of consumer confusion did you have to assert**  
17 **the claim of infringement here?**

18 MR. STONE: Be careful -- be careful of  
19 any privilege issues, but otherwise you can answer.

20 I also would object on relevance grounds.

21 THE WITNESS: We would have considered the  
22 same tools and sources and information that I said  
23 earlier with regard to evaluating potential  
24 infringement. I don't know if you meant -- what  
25 evidence of actual confusion? Is that what you

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1 meant? Or likelihood of confusion? Are you saying  
2 did we have actual consumer confusion at the time?

3 I -- I don't know. I don't recall. We  
4 would have conferred with the client. I don't recall  
5 specific conversations. I wouldn't reveal them  
6 anyway.

7 But my answer is we rely on the same, you  
8 know, factors of nature of the market and all those  
9 factors I said earlier and data points and other  
10 information we'd consider in evaluating the potential  
11 for a claim.

12 **Q. (By Mr. Chiarello) Would you send a**  
13 **letter alleging infringement if the evidence of**  
14 **consumer confusion was speculative?**

15 MR. STONE: Objection. Lacks foundation.  
16 Calls for speculation. And vague and ambiguous and  
17 improper as to form.

18 THE WITNESS: Yeah, I don't even know what  
19 you mean by that, "speculative."

20 **Q. (By Mr. Chiarello) Well, if -- you used a**  
21 **term "potential infringement" in your prior answer.**  
22 **So what would be evidence of potential infringement?**

23 A. Same things I've said before. I mean, I  
24 think I've explained that.

25 **Q. So would you send an infringement letter**

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1 **if you had evidence that consumers were potentially**  
2 **infringed even if you didn't have evidence that they**  
3 **were actually -- I'm sorry -- potentially confused,**  
4 **even if you didn't have evidence that they were**  
5 **actually confused?**

6 MR. STONE: Objection. Improper as to  
7 form. Calls for speculation. Beyond the scope of  
8 the issues that complaint counsel has put in dispute.  
9 Because you've said, A, none of the cases were sham,  
10 and, B, all that you're challenging are the  
11 settlement agreements. So I don't know why we're  
12 investigating and spending all this time on cease and  
13 desist letters, which are not part of your claims.

14 You can answer.

15 THE WITNESS: Nobody files a trademark  
16 claim only after they've proven that it's a slam  
17 dunk, guaranteed to win, and they've got a judgment  
18 type of claim. When you assert a trademark claim you  
19 believe somebody is misusing your trademark rights,  
20 and you do your analysis and figure out you've got a  
21 claim. You've got -- they're using your trademark  
22 rights. It's going to harm. It's going to a  
23 likelihood of confusion. And -- and you assert those  
24 rights.

25 So if I have a client that has a trademark

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1 and somebody else is using that exact same trademark,  
2 and that party using it sells the same product or  
3 offers the same services and they do it through the  
4 same channels of trade, then you're already halfway  
5 there on the factors of showing likelihood of  
6 confusion. And the case law is very clear that  
7 there's -- the absence of actual confusion evidence  
8 in no way says you can't have a trademark  
9 infringement claim.

10 So, yeah, I would assert a trademark claim  
11 without having actual confusion evidence as everybody  
12 around the country does all the time.

13 **Q. (By Mr. Chiarello) When you were**  
14 **preparing this and other infringement letters, was it**  
15 **your practice to verify from the search engines**  
16 **whether or not the alleged infringers were using**  
17 **1-800's trademark in their search advertising**  
18 **campaigns?**

19 MR. STONE: Objection. Assumes facts not  
20 in evidence that the search engines would tell you.  
21 Improper as to form.

22 MR. CHIARELLO: I'm not assuming that they  
23 would. I'm asking if he contacted them. I asked a  
24 question.

25 THE WITNESS: No, I would never contact

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1 Google on that. I think the search itself shows that  
2 they're using our mark. I've already explained that  
3 you can use it in a lot of different ways. You can  
4 make it be the keyword itself. You can broad match  
5 it and target it that way. Either way, you can use  
6 it.

7 And I'm pretty confident from things I've  
8 read that if I was to call Google and just request  
9 them to tell me that, they would say, no, send us a  
10 subpoena. Well, I can't send them a subpoena without  
11 filing a lawsuit.

12 **Q. But appearance was enough for you to**  
13 **satisfy the use factor?**

14 MR. STONE: Objection. Vague and  
15 ambiguous. Improper as to form. Incomplete  
16 hypothetical. And overbroad.

17 THE WITNESS: I don't know what you mean  
18 by "appearance was enough."

19 **Q. (By Mr. Chiarello) Well, you said that --**  
20 **that you saw on the search page that they were --**  
21 **that they appeared in the search engine result page**  
22 **and that you knew that was used. And I'm just**  
23 **confirming, I guess, that --**

24 MR. STONE: Same -- sorry. Same  
25 objections as to the preceding question.

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1 THE WITNESS: I think that's enough to  
2 give you a very well-founded belief that that's  
3 likely happening that they are using it.

4 **Q. (By Mr. Chiarello) Would the appearance**  
5 **of the ad on the search engine result page, would you**  
6 **know whether or not the alleged infringing party**  
7 **actually purchased or bid on the 1-800 Contacts**  
8 **trademark?**

9 A. Based on the appearance of the ad?

10 **Q. Based on the fact that they appeared on**  
11 **the search engine result page.**

12 A. Just based on one appearance of one search  
13 results page, it wouldn't tell you definitively  
14 whether they had or not. It would give you an idea  
15 that maybe they had.

16 Like I said, there's also factors of  
17 frequency. How many different misspellings of  
18 1-800 Contacts they come up on or how often they're  
19 coming up on can give you a better feel of are they  
20 using it in the sense of broad matching it, or are  
21 they using it in the sense of designating it as the  
22 keyword itself? You can -- you can get a good feel,  
23 not a guaranteed knowledge, but certainly enough to  
24 have a -- have a strong basis to assert the claim  
25 that they're using the trademark to trigger their

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1 advertisements. Because advertisers have complete  
2 control -- I mean, a significant amount of control  
3 over what searches are going to trigger their  
4 advertisements.

5 MR. CHIARELLO: Let's take a quick break.  
6 (Recess from 2:15 p.m. to 2:26 p.m.).

7 MR. CHIARELLO: Back on the record.

8 **Q. (By Mr. Chiarello) I'm handing you**  
9 **CX0796, which has several attached pages. And I'm**  
10 **going to ask you, what -- what is this document?**  
11 **(Exhibit CX0796 was marked.)**

12 A. This looks like a letter I sent to Contact  
13 Lens King about the settlement agreement, about a  
14 breach of the settlement agreement.

15 **Q. Is this -- this type of breach letter**  
16 **something you did on behalf of 1-800 Contacts with**  
17 **respect to this and the other settlement agreements?**

18 A. Yeah, when there was a need.

19 **Q. And you sent an attachment here. If you**  
20 **look at CX796, page 002, it looks like a screenshot.**  
21 **Is that right?**

22 A. Yes, it looks like it.

23 **Q. And is the search term at the top of this**  
24 **page "1800contacts" without the T?**

25 A. 1800 -- looks like it might be. It's kind



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1 of blurry. I mean, that's the best I can see, I  
 2 guess.  
 3 **Q. Okay. And is the first ad underneath**  
 4 **here, does it -- is it 1800Contacts?**  
 5 A. The first ad, sponsored link?  
 6 **Q. Yes.**  
 7 A. Yeah, looks like it.  
 8 **Q. Okay. And do you see below that ad it**  
 9 **says "Acuvue Official Site"?**  
 10 **Do you see that?**  
 11 A. Yes.  
 12 **Q. Is that an ad for Acuvue, do you know?**  
 13 MR. STONE: Objection. Lacks foundation.  
 14 Calls for speculation.  
 15 THE WITNESS: It's an ad that says "Acuvue  
 16 Official Site."  
 17 **Q. (By Mr. Chiarello) And then right below**  
 18 **it are the words "Did you mean," and it spells out**  
 19 **"1800contacts."**  
 20 **Do you see that?**  
 21 A. Yeah, I do.  
 22 **Q. Do you know how that got there?**  
 23 A. I don't. That's -- I don't know how  
 24 Google runs its stuff like that in detail.  
 25 **Q. Do you think that that's something Google**

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1 **supplied on its search engine result page?**  
 2 MR. STONE: Objection. Calls for  
 3 speculation.  
 4 You can answer.  
 5 THE WITNESS: Again, I don't know.  
 6 **Q. (By Mr. Chiarello) And then on the**  
 7 **right-hand side of this search engine result page**  
 8 **screenshot it reads "1-day Acuvue Clearance."**  
 9 **Do you see that ad? That's at the top of**  
 10 **those four ads that are there.**  
 11 A. Yes.  
 12 **Q. And then it looks like the bottom -- and**  
 13 **it's faded, but it looks like the URL says**  
 14 **WWW.ContactLensKing.com.**  
 15 **Do you see that?**  
 16 A. Yeah.  
 17 **Q. Is that ad's appearance on this page what**  
 18 **gives rise to the allegation of breach of contract in**  
 19 **your letter?**  
 20 A. Well, I believe that the term  
 21 "1800contacs" without the T there was one of the  
 22 terms listed in Exhibit 2 with the Contact Lens King  
 23 settlement agreement.  
 24 **Q. Are you looking at CX323 right now?**  
 25 A. Yeah. And so -- and I believe that

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1 agreement required them to implement that term as a  
 2 negative keyword, and our understanding was -- at  
 3 least my understanding is that ad could not come up  
 4 if they were using that term as a negative keyword in  
 5 compliance with the agreement. So the fact that it  
 6 came up would indicate a breach, and that's why I  
 7 would have sent the letter.  
 8 **Q. The last four pages of this Exhibit CX796,**  
 9 **what is this?**  
 10 A. It looks like -- are you talking about  
 11 CX796 page 7?  
 12 **Q. Yeah.**  
 13 A. It looks like it's a BrandVerity report  
 14 that was created in April 2010.  
 15 **Q. And do you know if you created this**  
 16 **report?**  
 17 A. I don't recall.  
 18 **Q. Okay. And do you know how this report was**  
 19 **assembled?**  
 20 A. I don't.  
 21 **Q. And the sixth column over where it says**  
 22 **"Position," do you know what that means?**  
 23 A. No. I'm not -- I'm not certain. It could  
 24 be position on the search results page, but I don't  
 25 know if it's organic results or not. I don't know.

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1 I don't remember how to read these reports sitting  
 2 here today as well as I used to.  
 3 MR. CHIARELLO: At this time I'll reserve  
 4 the balance of my time.  
 5 MR. STONE: Okay.  
 6 Let me ask the reporter to mark RX0250.  
 7 (Exhibit RX0250 was marked.)  
 8 EXAMINATION  
 9 BY MR. STONE:  
 10 **Q. Mr. Miller, do you recognize this as a**  
 11 **series of e-mails between Mr. Zeidner and Ms. Pinney?**  
 12 A. Yes, I've seen this before.  
 13 **Q. And earlier today you were asked about the**  
 14 **initial settlement agreement with Vision Direct and**  
 15 **1-800 Contacts. Do you recall that?**  
 16 A. Yes.  
 17 **Q. And is this part of the information you**  
 18 **reviewed to be prepared to testify today as the**  
 19 **designated witness with respect to that settlement**  
 20 **agreement?**  
 21 A. Yes, it is.  
 22 **Q. Is it your testimony that that settlement**  
 23 **agreement, as best you know, was negotiated largely**  
 24 **between the in-house lawyers at 1-800 and at Vision**  
 25 **Direct?**

41 (Pages 161 to 164)

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1 MR. CHIARELLO: Objection. Calls for  
2 speculation.  
3 THE WITNESS: That's my understanding.  
4 **Q. (By Mr. Stone) Okay. Let me direct your**  
5 **attention to the first page of Exhibit RX0250. About**  
6 **two-thirds of the way down you'll see where it says**  
7 **"Also, I have deleted."**  
8 A. Yeah, I see that.  
9 **Q. And is that part of the text of an e-mail**  
10 **from Ms. Pinney to Mr. Zeidner?**  
11 A. Yes.  
12 MR. CHIARELLO: Objection. Calls for  
13 speculation. Document speaks for itself.  
14 **Q. (by Mr. Stone) And do you see there where**  
15 **it says, "We should both retain the right to**  
16 **participate in lawful comparative advertising,**  
17 **parodies," et cetera?**  
18 A. Yes, I do.  
19 **Q. And is seeing this language here**  
20 **consistent with any understanding you have as to**  
21 **where the language that shows up in many of the**  
22 **settlement agreements about comparative advertising**  
23 **and parodies comes from?**  
24 MR. CHIARELLO: Objection. Calls for  
25 speculation. Lacks foundation.

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1 THE WITNESS: I believe the language in  
2 the Vision Direct agreement at this time included a  
3 provision that would allow comparative advertising,  
4 and that's a provision that carried through to the  
5 settlement agreements later on, including the ones  
6 that I personally worked on. So my understanding is  
7 this negotiation with Vision Direct and Vision  
8 Direct's suggestion that -- about comparative  
9 advertising was the origin of -- of that concept.  
10 **Q. (By Mr. Stone) So take a look at what was**  
11 **earlier marked as CX0311, if you would.**  
12 A. All right. Okay.  
13 **Q. And turn, if you would, to page 5 of the**  
14 **document, which is numbered CX0311-004.**  
15 A. Okay.  
16 **Q. And look down at subparagraph (B) which is**  
17 **in paragraph 4.**  
18 A. Yeah, I see that.  
19 **Q. And in the language in subparagraph (B),**  
20 **little i, do you see language that is related to the**  
21 **language we just saw in the e-mail from Ms. Pinney?**  
22 A. Yes.  
23 MR. CHIARELLO: Objection. Calls for  
24 speculation. Lack of foundation.  
25 THE WITNESS: Yes, that's the similar

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1 language that carried through to later settlement  
2 agreements as well to make sure that no  
3 non-infringing uses of anybody's trademarks would  
4 actually be prohibited in any of these agreements.  
5 **Q. (By Mr. Stone) Okay. You can put that to**  
6 **one side if you would like.**  
7 MR. STONE: Let me ask the reporter to  
8 mark as RX0251 a three-page e-mail chain.  
9 (Exhibit RX0251 was marked.)  
10 **Q. Do you recognize this document as an**  
11 **e-mail chain between Mr. Craven of 1-800 Contacts and**  
12 **a representative of Contactlens.com?**  
13 MR. CHIARELLO: Objection. Calls for  
14 speculation. The document speaks for itself.  
15 THE WITNESS: Yeah, I do. I think that  
16 contact --  
17 MR. CHIARELLO: Lacks foundation.  
18 THE WITNESS: I'm sorry. I interrupted.  
19 I believe this is -- contactlens.com relates to  
20 Lensfast, and I remember the Lensfast agreement, that  
21 I was part of negotiating that.  
22 **Q. (By Mr. Stone) Okay. And let's go back**  
23 **and find the Lensfast agreement, if we can.**  
24 A. Okay, I've got it.  
25 **Q. Which number is it?**

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1 A. CX0315.  
2 **Q. Got it. And the effective date of that**  
3 **settlement agreement is what?**  
4 A. December 18th, 2009.  
5 **Q. Okay. And then what's the date of the --**  
6 **this e-mail chain?**  
7 A. Well, the first e-mail is January 7th,  
8 2010. So a few weeks after the agreement was -- the  
9 effective date of the agreement.  
10 **Q. Okay. And look, if you would, at the**  
11 **bottom of page 1 of Exhibit RX0251.**  
12 A. Okay.  
13 **Q. Do you see where it says "I think you**  
14 **should be fine with making the negative keywords**  
15 **exact match (putting them in brackets like you show**  
16 **below)"?**  
17 **Do you see that language?**  
18 A. Yes.  
19 **Q. And what does that refer to?**  
20 MR. CHIARELLO: Objection. Calls for  
21 speculation.  
22 THE WITNESS: Well --  
23 MR. CHIARELLO: Foundation.  
24 THE WITNESS: Well, my understanding is  
25 that's referring to them implementing the negative

42 (Pages 165 to 168)

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1 keywords associated with the settlement agreement. I  
2 recall when I discussed this settlement agreement  
3 with Lensfast, the counsel's name was Dan something.  
4 Dan --

5 **Q. (By Mr. Stone) Did it start with a G?**

6 A. Dan Garrity.

7 **Q. Garrity?**

8 A. Dan Garrity. So he was one that would --  
9 he was one that called me and actually asked me  
10 about -- we had discussions about negative keywords  
11 and how they work, and he actually raised issues of,  
12 you know, what about this type of search or  
13 comparative advertising, or what about if somebody  
14 searches for -- I don't know the exact examples he  
15 gave, but he would give examples like, you know,  
16 "1-800 Contacts competitors" or something other than  
17 that. Is negative -- are negative keywords going to  
18 preclude that kind of stuff? He raised that issue.

19 So I remember discussing that issue with  
20 him and explaining all we're interested in is having  
21 these exact phrases used as negative keywords. You  
22 can kind of do that however you want.

23 And he said, how do those work? And I  
24 think we talked about that a little. I may have sent  
25 him an e-mail with a link to Google on how negative

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1 keywords work. And then I -- I said, if -- if your  
2 marketing person needs help in how negative keywords  
3 work, they're free to contact Bryce Craven at  
4 1-800 Contacts, who does our negative keywords in our  
5 search advertising, so -- he understands Google  
6 better than I do.

7 And so I assume that's what happened here  
8 was Lensfast directed their guy to Bryce Craven, and  
9 Bryce helped them use the negative keyword exact  
10 match, which is what this e-mail shows.

11 **Q. Okay. Tell us -- go over it again, if you  
12 would. Tell us what conversations you recall having  
13 with Mr. Garrity regarding the implementation of the  
14 settlement agreement in terms of how it should be  
15 implemented.**

16 A. He -- the best I can recall is he  
17 expressed concerns. Mostly he's expressing concerns  
18 based on his clients' concerns of what is a negative  
19 keyword going to do. And I got the impression that  
20 this negative keyword concept was a new thing to  
21 them. So they said, if we put in, for example, some  
22 of these terms, one, space, 800, space, contact, how  
23 does the negative keyword work? Is it going to  
24 include more than just that term?

25 And -- and he wanted to make sure it

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1 didn't do that. He says, I don't think we should be  
2 able to -- I mean, I don't think this should be  
3 something that broadly precludes searches that just  
4 might include 1-800 Contacts in any respect. That  
5 was his concern.

6 And I said, well, I recall vaguely a  
7 discussion about the type of negatives that you can  
8 use; I'll find out for you. This was early on in me  
9 working on these issues with 1-800 Contacts. So in  
10 his first call, I don't think I really appreciated  
11 that negative keywords could be matched differently,  
12 just like the keyword matching.

13 So I believe I told him, let me find out.  
14 And I said, here's -- here's the intent of the  
15 agreement is that these terms right here, if somebody  
16 searches for just this term, you don't come up --

17 **Q. When you say --**

18 A. -- and that's it.

19 **Q. -- "these terms right here," what are you  
20 referring to?**

21 A. I'm referring to Exhibit 2 of the Lensfast  
22 settlement agreement, and Exhibit 3 where each party  
23 identifies their keywords -- their trademark terms  
24 and their website.

25 **Q. And that's CX0315?**

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1 A. Yes.

2 **Q. Okay.**

3 A. So I recall telling -- that's the intent  
4 of this. I recall pointing out to him, there's this  
5 provision that says anything that's comparative  
6 advertising or non-infringing definitely can't be  
7 included. We're trying to keep it narrow but  
8 protecting trademark rights. And then said, I'll  
9 figure it out and get back to you.

10 And I believe I later sent him an e-mail  
11 with a link to Google that kind of said, here's how  
12 Google does matching for negative keywords; here's  
13 some information if you need more. I remember -- I  
14 don't know if I told him in an e-mail or on the  
15 phone, you know, you can contact Bryce Craven for  
16 help at 1-800 Contacts.

17 But that -- that's the gist of the  
18 discussion I remember with Dan Garrity was we're just  
19 focusing on these terms in Exhibits 2 and 3 and we're  
20 not trying to carve out any search that would be  
21 broad matched or even necessarily phrase matched with  
22 these.

23 **Q. Okay.**

24 A. And that was his concern.

25 MR. STONE: Let me ask the reporter to

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1 mark as Exhibit RX0252 an e-mail from you to  
2 Mr. Garriott.

3 **Q. You need to give it to her to mark it, if  
4 you would.**

5 A. Oh, Dan Garriott, not Garrity. Sorry.  
6 (Exhibit RX0252 was marked.)

7 **Q. Can you tell us what RX-- well, do you  
8 recognize RX0252?**

9 A. Oh. Yup, I do. This is an e-mail. This  
10 is the e-mail I sent to Dan Garriott about the  
11 different ways to match negative keywords.

12 **Q. So earlier today when you and I might have  
13 said "Garrity," we were both misspeaking?**

14 A. We were both misspeaking.

15 **Q. The last name is G-a-r-r-i-o-t-t?**

16 A. Yes. Dan Garriott.

17 **Q. Okay. And what is this e-mail? What's it  
18 cover? What's it about?**

19 A. This is where I just sent him a link to  
20 Google's explanation of how negative keyword match  
21 types work, and it's because we had had a phone call  
22 where he was expressing some concerns. And, you  
23 know, he also had some concerns with some of the  
24 keywords in here that are like long phrases and how  
25 that works. And so this is where I'm sending him

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1 that, to help him understand how negative matching  
2 works. And he was free to use either exact match or  
3 phrase match, whichever his client wanted to use  
4 based on what his client wanted to -- how they wanted  
5 to tailor their AdWords campaign.

6 **Q. In the next to the last paragraph the  
7 first sentence reads, "It is clear that complete  
8 phrases can be implemented as negative keywords  
9 without each word of the phrase also operating as a  
10 negative keyword."**

11 **Do you see that?**

12 A. Yes.

13 **Q. And what was -- what were you trying to  
14 communicate with that sentence?**

15 A. You know, I remember him looking at -- if  
16 you go to the CX315 Lensfast agreement, if we go to  
17 Exhibit 2, some of these registered trademarks from  
18 1-800 Contacts are kind of some long phrases, like  
19 "The world's largest Contact Lens Store" or "exact  
20 same contact lenses, delivered to your door, for less  
21 than you're paying now," these -- these long phrases.  
22 And he was wondering how to do that whole phrase as a  
23 negative keyword, if that's -- if that's possible.  
24 And so that was one of the issues he raised, and  
25 that's what I respond to there in that e-mail of

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1 RX0252.

2 I believe we ended up throwing in a  
3 footnote somewhere in this agreement where he found  
4 out that that really long term, that really long  
5 phrase, "exact same contact lenses delivered to your  
6 door for less than you're paying now," could not be  
7 added as a negative keyword because it was so long.  
8 And so we just said, well, then you don't have to  
9 include that as a negative keyword.

10 **Q. And that's the footnote on page 4 of  
11 CX0315?**

12 A. Yes. That's footnote 1 of the Lensfast  
13 agreement.

14 **Q. Okay.**

15 A. So, yeah, he had raised those concerns.  
16 And honestly, that was kind of one of the learning  
17 points for me being kind of early on in the process  
18 of -- of this type of trademark infringement and  
19 understanding Google. And it was always our intent  
20 to have these pretty narrowly tailored, and that's  
21 what I told him and that's how he resolved it with  
22 his client.

23 **Q. So, for example, taking that phrase "exact  
24 same contact lenses delivered to your door for less  
25 than you're paying now" in Exhibit RX0252, were you**

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1 **telling him that if he made that a negative keyword  
2 it would not prevent him from putting up his ads in  
3 response to individual words within that phrase, such  
4 as the words "contact lenses"?**

5 A. Yes.

6 MR. CHIARELLO: Objection to form.

7 THE WITNESS: Yes, that's what we were  
8 trying to convey to him. He was worried that if you  
9 added that big phrase, or even any of the other  
10 phrases in that Exhibit 2 of the Lensfast agreement  
11 as a negative keyword, would the individual terms in  
12 those phrases operate to exclude certain searches.

13 So, for example, he also raised even the  
14 one like -- there's all these variations of  
15 1-800 Contacts on Exhibit 2 of the Lensfast  
16 agreement. And some of them are 1, space, 800,  
17 space, contact, and he even talked about that as  
18 would that prevent anything coming up that had one of  
19 those words in it; how do these negative keywords  
20 work. And we were explaining to him, no, you just  
21 use -- you can bracket those and make an exact match.  
22 It would have to have that exact search in order to  
23 block your ad.

24 **Q. (By Mr. Stone) And then the e-mail we  
25 marked earlier as RX0251 from Mr. Craven, did that**

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1 **come later in time subsequent to your e-mail RX0252?**  
 2 MR. CHIARELLO: Objection to form. Calls  
 3 for speculation.  
 4 THE WITNESS: Yeah, it did. It came  
 5 later, I believe after I sent this to him. I had  
 6 already told him he can contact Bryce Craven anytime,  
 7 and it looks like he directed his client to get in  
 8 contact with Bryce to make sure that they understood  
 9 how negative keywords worked.  
 10 MR. STONE: Okay. Let me ask the reporter  
 11 to mark as RX0253 a letter from Mr. Miller to  
 12 Mr. Delaney.  
 13 (Exhibit RX0253 was marked.)  
 14 **Q. Can you identify this document?**  
 15 A. Yeah. Looks like a letter I sent to John  
 16 Delaney, who was counsel for Standard Optical at the  
 17 time.  
 18 **Q. Looking at the second paragraph, you say,**  
 19 **"Your client's recent actions have demonstrated that**  
 20 **it has complete control over whether its**  
 21 **advertisements are triggered by a search for my**  
 22 **client's trademarks, contrary to your contention that**  
 23 **such a result is," quote, "'not a decision by an**  
 24 **advertiser like Standard Optical,'" close quote.**  
 25 **What did you have in mind when you said**

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1 **that?**  
 2 A. This followed some prior letters and even  
 3 a telephone call with Mr. Delaney, and his initial  
 4 reaction was -- he talked to his client, and their  
 5 initial reaction was, we don't have any control over  
 6 this, this is all Google's algorithm, we're not  
 7 choosing 1-800 Contacts as the keyword, and then we  
 8 pick our keywords and Google runs with it. And I was  
 9 trying to convince him, I don't think that's the way  
 10 it works, John. If you talk to your client and talk  
 11 to their AdWords people, you'll find out they have a  
 12 lot more control than you're -- than you're telling  
 13 me.  
 14 And so those are some early discussions we  
 15 had. And so I was -- I was telling him in this  
 16 letter after we kind of did some more research where  
 17 we were looking at some searches and stuff that they  
 18 have control. Google allows the advertisers to  
 19 control when -- when their sponsored links come up in  
 20 a variety of ways. And it isn't really out of their  
 21 hands. Google kind of puts it all into their hands  
 22 as much as they can.  
 23 **Q. And at the bottom of page 1 of Exhibit**  
 24 **RX0253 you say, "After you and I spoke about the**  
 25 **possibility of reaching an amicable settlement, I**

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1 **informed you that such negotiations are far more**  
 2 **likely to be fruitful if your client implements the**  
 3 **negative keywords within its control to prevent its**  
 4 **ads from being displayed in response to a search for**  
 5 **my client. Your client did so in mid-August 2010,**  
 6 **and its advertisements stopped appearing."**  
 7 **Do you see that language?**  
 8 A. Yes.  
 9 **Q. What did that refer to?**  
 10 A. It referred to something that we had  
 11 noticed in other situations, too, where the party  
 12 would say they use negative keywords, then later on  
 13 their ads would start coming up in response to the  
 14 terms that they said they were using as negative  
 15 keywords. And then when we'd bring it to their  
 16 attention, they'd go -- they'd stop again.  
 17 And so based on 1-800's monitoring, they  
 18 could tell when somebody essentially, you know --  
 19 sometimes we used the phrase "turn it on" and "turn  
 20 it off." They could just -- they'll activate their  
 21 negative keywords or they'll turn them off. And it  
 22 was -- it's easy to do at the click of a button.  
 23 And, you know, that was something that was  
 24 problematic for my client because of the concept of  
 25 initial interest confusion. You're diverting traffic

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1 that is intending to find 1-800 Contacts based on  
 2 their trademark. And when you divert that traffic  
 3 based on some initial interest confusion, that's  
 4 problematic. And some people would just turn it on  
 5 and turn it off at will until we raised it.  
 6 So when we saw that happen, that just is  
 7 evidence of how much control the advertisers have  
 8 over the search terms that they're using to trigger  
 9 their ads.  
 10 **Q. Do you recall any discussions with**  
 11 **Mr. Delaney about how to implement negative keywords?**  
 12 A. Yes. Mr. Delaney had similar -- he  
 13 expressed some similar concerns, kind of like Mr. Dan  
 14 Garriott earlier on, about making sure that we're  
 15 just talking about these exact phrases or these exact  
 16 terms that are listed in the agreement. And we  
 17 want -- he wanted to make sure the agreement was  
 18 clear that when we were talking about negative  
 19 keywords we were talking about just those terms,  
 20 nothing else. And he didn't want it to be  
 21 interpreted too broadly.  
 22 And I said, Dan, I have no problem with  
 23 that. We've always had a very narrow view that you  
 24 can exact match these terms and match the only  
 25 negative keyword you need to comply with to be in

45 (Pages 177 to 180)

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1 compliance with the agreement.  
 2 And that's why he wanted to add a little  
 3 bit of extra stuff on that Exhibit 2 in their  
 4 settlement agreement. I don't remember where it is.  
 5 **Q. We can pull that. The Standard Optical**  
 6 **agreement?**  
 7 A. The Standard Optical agreement. Here it  
 8 is. It's CX325. He wanted to add on Exhibit 2,  
 9 which is page 12 of the agreement, this little  
 10 statement at the top saying, "The 'keywords' and  
 11 'websites' listed below are intended to only be the  
 12 unitary phrase identified within quotation marks, and  
 13 not the individual component parts of any such  
 14 phrase."  
 15 He just wanted to make sure that there was  
 16 no requirement for them to do any kind of matching  
 17 that would go beyond that phrase itself. So he  
 18 drafted that language, and I said, that's always been  
 19 the intent. If you want to put that in here  
 20 expressly, we don't have an objection. And that's  
 21 what that was.  
 22 **Q. Thank you.**  
 23 MR. STONE: Let me ask the reporter to  
 24 mark as Exhibit RX0254 a one-page e-mail chain.  
 25 (Exhibit RX0254 was marked.)

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1 **Q. Do you recognize Exhibit RX0254 as an**  
 2 **e-mail chain on which you were copied?**  
 3 A. Yes. Yeah, I've seen this before.  
 4 **Q. Okay. And there's a reference here to a**  
 5 **Park Studebaker. Who's that?**  
 6 A. Which one was he related to? I've got  
 7 a -- it may be Lenses For Less. I don't recall  
 8 exactly. Have we looked at the Lenses For Less  
 9 agreement yet?  
 10 **Q. Yeah. It is 320, CX0320.**  
 11 A. Let's see. That doesn't help me.  
 12 **Q. Take a look at CX0320-005 for the notices.**  
 13 A. Yeah, there you go. Park Studebaker. So  
 14 he was -- he was related to Lenses For Less, and we  
 15 had a settlement agreement with them dated  
 16 March 23rd, 2010.  
 17 **Q. Okay.**  
 18 A. So this e-mail is where he reached out to  
 19 Bryce Craven again about the negative keywords  
 20 relating to the settlement agreement. And Bryce gave  
 21 him some best practices advice and suggested that he  
 22 apply the keywords across all the campaigns, not just  
 23 the ad groups, so that every time he had a new ad  
 24 group you don't accidentally fall into a breaching  
 25 situation, which happened a lot with others. And

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1 so --  
 2 He also -- if you see, Bryce was showing  
 3 exact match keywords.  
 4 **Q. Which ones are exact match?**  
 5 A. The ones in brackets. So at the top  
 6 e-mail there's brackets around "1-800 get lens,"  
 7 "1 800 lens.com."  
 8 **Q. And what do those brackets signify?**  
 9 A. My understanding is those signify an exact  
 10 match negative keyword.  
 11 **Q. And this is August of 2010?**  
 12 A. Yes.  
 13 **Q. Now let's look at what has previously been**  
 14 **marked as CX0709.**  
 15 MR. STONE: Ask the court reporter to mark  
 16 it with that number, because my copy isn't stamped.  
 17 (Exhibit CX0709 was identified.)  
 18 **Q. Do you recognize Exhibit CX0709 as an**  
 19 **e-mail chain on which you were copied?**  
 20 A. Yes. This is an e-mail from Bryan Pratt  
 21 to Matt somebody. Don't recall which company he  
 22 would have been with.  
 23 **Q. Do you see the subject line says "Lenses**  
 24 **for Less"?**  
 25 A. Oh, Lenses for Less. So this must have

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1 been relating to that one as well. And he's kind of  
 2 addressing two issues here. He kind of explains that  
 3 the purpose of the settlement agreement is to prevent  
 4 sponsored ads from being displayed when they search  
 5 for registered trademarks or exact URLs. Because  
 6 the --  
 7 **Q. Can I just ask you, that sentence that you**  
 8 **just were paraphrasing, the first sentence of the**  
 9 **second paragraph, "The general intent and focus of**  
 10 **the settlement agreement is to prevent sponsored ads**  
 11 **from being displayed in response to searches for the**  
 12 **other party's registered trademarks and exact URLs,"**  
 13 **was that your understanding of the intent and focus**  
 14 **of the Lenses for Less agreement?**  
 15 A. That was the general intent and focus of  
 16 every settlement agreement we entered into with  
 17 regard to this keyword search engine advertising type  
 18 of trademark cases. That was the general intent and  
 19 focus across the board.  
 20 And that -- that issue came up from time  
 21 to time when another party would propose when it was  
 22 their turn to identify what keywords and websites  
 23 they wanted in the exhibit. They -- sometimes they  
 24 would throw out some general terms, and we would do  
 25 our research and we would -- we would have to respond

46 (Pages 181 to 184)

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1 and say these agreements are limited to registered  
2 trademarks, trademarks that you can show you have  
3 established trademark rights in and specific  
4 websites, not just any word that may be related to  
5 you. You can do misspellings, common misspellings of  
6 your trademark, but it's got to be based on a  
7 registered trademark, and as Bryan says here in this  
8 e-mail, or confusingly similar variations. So that  
9 came up a lot. So that was always the intent and  
10 focus of all these settlement agreements.

11 And then he also provided him with a  
12 similar link to Google's negative keyword page that  
13 explains what type of matching is used to show that  
14 it's clear that phrases can be implemented as  
15 negative keywords without each individual word also  
16 operating as a negative keyword.

17 **Q. So you're quoting there from the second**  
18 **page the sentence that reads, "Please note that it is**  
19 **clear that complete phrases can be implemented as**  
20 **negative keywords without each individual word of the**  
21 **phrase also operating as a negative keyword"?**

22 A. Yes. And that's similar to what I had  
23 provided to Dan Garriott from Lensfast.

24 **Q. Was it the case during the course of the**  
25 **negotiations of various settlement agreements that**

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1 **the other parties would sometimes ask you to include**  
2 **as words in response to which 1-800 Contacts would**  
3 **not present and add words that were not federally**  
4 **registered trademarks or URLs?**

5 A. Yes.

6 MR. CHIARELLO: Objection to form. And  
7 compound.

8 THE WITNESS: Yeah, that's what I was  
9 saying is that happened from time to time. I may not  
10 recall the exact parties. Contact Lens King I think  
11 might have done that; and we had to push to say,  
12 we're only using -- we can only use terms that are --  
13 that are registered trademarks or that are clearly a  
14 misspelling or variation of that registered  
15 trademark, but we can't just use "king" by itself  
16 because that -- you don't have trademark rights in  
17 "king." That would be like us trying to use  
18 "contacts" by itself as a negative keyword, which  
19 would be unfair and unrelated to trademark rights.

20 So that happened from time to time. I  
21 know it happened more than -- more than a few times.  
22 And sometimes there was written communication on it,  
23 sometimes it was in telephone calls. But it happened  
24 often enough we were -- that we would clarify, these  
25 are focused on protecting trademark rights, not just

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1 any term you're interested in.

2 **Q. (By Mr. Stone) Why would -- why would you**  
3 **not agree to include terms that were broader than**  
4 **just trademarks or misspellings of trademarks or**  
5 **URLs?**

6 A. Well, that's problematic. That's --  
7 that's when you get into an area that could  
8 potentially be called trademark misuse under the  
9 guise of trademark rights. Then you're trying to  
10 preclude somebody from doing something that the  
11 trademark laws couldn't arguably accomplish.

12 So the focus was here's the nature of our  
13 trademark infringement claims, here's the nature of  
14 our legal theory, and this is the type of injunctive  
15 relief we think that our theories could justify; and  
16 so we want to tailor our settlement agreement to that  
17 type of injunctive relief that is going to be  
18 designed to protect trademark rights.

19 And -- and we were willing to offer them  
20 the same -- you know, the same type of activity from  
21 our end. We were willing to do the same thing to  
22 protect their trademark rights in response so that  
23 everybody's protecting their rights the same.

24 So that's how we tried to focus the  
25 settlement agreements. And if you go beyond that,

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1 then you can get into problems. And that's why we  
2 would explain to them that we can't add more than  
3 just trademarks.

4 MR. CHIARELLO: Counsel, can I interrupt  
5 for a second? I don't believe you gave us a copy of  
6 the exhibit you're using, CX0709.

7 MR. STONE: Didn't I just hand it to you?

8 MR. HOPKIN: I don't think we have it.

9 MR. CHIARELLO: I don't think so.

10 MR. STONE: I'm sorry.

11 MR. CHIARELLO: We're checking our files  
12 here, and we didn't see that one.

13 MR. STONE: Here you go. I'm sorry. You  
14 should interrupt me if I don't do that. Don't  
15 hesitate.

16 MR. HOPKIN: We weren't sure.

17 MR. CHIARELLO: I thought it might have  
18 been -- when you start asking, I thought it might  
19 have been one we referred to earlier, so we were  
20 checking our --

21 MR. STONE: I'm so sorry. My bad.

22 Let me ask the reporter to mark as RX0255  
23 an e-mail chain back and forth to Mr. Miller.

24 (Exhibit RX0255 was marked.)

25 **Q. Do you recognize what the reporter has**

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1 marked as RX0255, Mr. Miller?  
 2 A. Yes. Looks like an e-mail communication  
 3 between me and Matt Jenkins, who was counsel for  
 4 Lenses for Less.  
 5 **Q. Let me draw your attention to the bottom**  
 6 **of the first page, the second -- the numbered**  
 7 **paragraph 2 that says "Keyword List."**  
 8 A. Bottom of the second page?  
 9 **Q. Bottom of the first page.**  
 10 A. Bottom of the first page. Okay. Oh, yes.  
 11 **Q. It says, "As you know, the keyword list**  
 12 **needs to be limited to registered trademarks and**  
 13 **confusing variations as well as domain names owned by**  
 14 **your client."**  
 15 **Do you see that?**  
 16 A. Yeah. And that's what I was talking about  
 17 earlier. This is one example of a party that wanted  
 18 to -- or proposed a lot of terms in their keyword  
 19 lists that were not trademark terms. They were just  
 20 terms they were interested in blocking ads for, it  
 21 seems. So we had to push back and say, you need to  
 22 have just your trademark and any confusing variations  
 23 and misspellings.  
 24 **Q. Okay. So this is an instance in which you**  
 25 **resisted somebody's efforts to expand the list of**

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1 **prohibited or restricted keywords beyond trademarks?**  
 2 A. Right.  
 3 MR. STONE: Okay. Take a short break.  
 4 (Recess from 3:12 p.m. to 3:19 p.m.)  
 5 MR. STONE: Let me ask the reporter to  
 6 mark as RX0256 a letter from Bryan Pratt.  
 7 (Exhibit RX0256 was marked.)  
 8 **Q. Do you recognize this document?**  
 9 A. I have seen this before.  
 10 **Q. What is this?**  
 11 A. Looks like this is a letter Bryan Pratt  
 12 sent to Vision Direct about a breach of the 2004  
 13 settlement agreement they had with 1-800 Contacts.  
 14 **Q. Okay. Ultimately, did this dispute ripen**  
 15 **or get -- end up in further litigation?**  
 16 A. I think it -- I think it did. I'm trying  
 17 to remember the details, but I don't recall the  
 18 details.  
 19 **Q. Okay. Take a look at the second page of**  
 20 **the letter where it says, "Specifically, in the more**  
 21 **than three years since the Settlement Agreement was**  
 22 **executed, the parties have taken care to avoid these**  
 23 **particular," quote, "'Prohibited Acts' by, for**  
 24 **example, using negative keywords that prevented the**  
 25 **listing or advertising of one party from appearing in**

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1 **response to a search conducted using the trademarks**  
 2 **and trademark variations of the other party."**  
 3 **Do you see that language?**  
 4 A. I do.  
 5 **Q. Is that consistent with your understanding**  
 6 **of the scope of the Vision Direct agreement that you**  
 7 **were shown earlier today?**  
 8 A. Yeah, I think in practice that's how the  
 9 parties implemented the prohibited acts was they  
 10 would use the tool of negative keywords in order to  
 11 comply with not causing their ads to -- to be  
 12 triggered by a search for one of the parties'  
 13 trademarks. And so, you know, my understanding was  
 14 that was the parties' practice in implementing that  
 15 settlement agreement for the period of years.  
 16 MR. CHIARELLO: I'm sorry. I didn't  
 17 get -- jump in fast enough, but my objection is to  
 18 foundation.  
 19 MR. STONE: Let me ask the reporter to  
 20 mark as RX0257 an e-mail chain from Mr. Pratt and  
 21 others.  
 22 (Exhibit RX0257 was marked.)  
 23 **Q. (By Mr. Stone) Earlier today, Mr. Miller,**  
 24 **you were asked some questions about whether a party**  
 25 **was causing its advertisements to be triggered if it**

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1 **was not purchasing the search term as a keyword. Do**  
 2 **you recall that line of questioning?**  
 3 A. Yes.  
 4 **Q. Does this e-mail speak to that topic?**  
 5 MR. CHIARELLO: Objection. Lacks  
 6 foundation. Calls for speculation.  
 7 THE WITNESS: Yeah, I believe it does.  
 8 **Q. (by Mr. Stone) Why do you say that?**  
 9 A. Well, the language they quote from the  
 10 Vision Direct agreement in -- I'm kind of looking at  
 11 Bryan's e-mail dated October 22nd, which starts at  
 12 the bottom of page 1 and goes onto page 2; and he  
 13 cites that language of causing a party's website to  
 14 appear in response to an internet search for the  
 15 party's brand or trademarks. He says there's no  
 16 requirement in these prohibited acts that state that  
 17 Drugstore.com will specifically use a trademark to  
 18 achieve -- "We believe that the terms of the  
 19 agreement that are currently being breached...are  
 20 clearly detailed in the letter received by your  
 21 client." So he's referring to his prior letter.  
 22 **Q. Right. Which we looked at earlier, which**  
 23 **was RX0256?**  
 24 A. Right.  
 25 MR. CHIARELLO: Can I just interrupt?

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1 Were you reading from the page --  
 2 MR. STONE: Page 2.  
 3 MR. CHIARELLO: 2?  
 4 MR. STONE: At the top.  
 5 THE WITNESS: So then she follows up and  
 6 says, how -- how are they causing it, and Bryan  
 7 explains in his final e-mail there at the top of  
 8 page 1 that by ceasing your neglect negative keywords  
 9 you're causing your results to be shown in response  
 10 to searches for our trademarks.  
 11 And that just goes to what my explanation  
 12 was earlier, that if you're going to broad match a  
 13 term that you know is going to encompass the party's  
 14 trademark and you don't do the negatives, you are  
 15 using their trademark, or you're causing your ads to  
 16 come up in response to that search for the trademark.  
 17 MR. STONE: Okay.  
 18 Let me ask the reporter to mark as RX0258  
 19 an e-mail chain from 2004.  
 20 (Exhibit RX0258 was marked.)  
 21 **Q. (By Mr. Stone) Is this a document you**  
 22 **reviewed in preparation for your testimony today to**  
 23 **testify as the designee of 1-800 Contacts?**  
 24 A. It is.  
 25 **Q. Okay. Take a look at the second page of**

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1 **RX0258. Do you see this is a Google search engine**  
 2 **results page?**  
 3 A. Yeah. It looks like a search for Vision  
 4 Direct on Google.  
 5 **Q. Okay. And do you see where 1-800 Contacts**  
 6 **comes up in response to that search?**  
 7 A. It looks like it's been highlighted over  
 8 on the right side.  
 9 **Q. Okay. So two different entries, perhaps,**  
 10 **or maybe --**  
 11 A. Yes.  
 12 **Q. Okay. And then turn, if you would, to the**  
 13 **earliest in time of the e-mails to Mr. Joe Zeidner**  
 14 **from Alesia Pinney.**  
 15 **Do you see that one?**  
 16 A. I do.  
 17 **Q. And do you see where she writes to**  
 18 **Mr. Zeidner, "Will you handle this one, please?"**  
 19 A. Yes.  
 20 **Q. And then she's forwarding an e-mail that**  
 21 **was sent to her in which it says, "Looks like they**  
 22 **(and one of their affiliates) are either buying our**  
 23 **trademark or are buying the keyword 'vision' and not**  
 24 **adding the negative keyword," quote, "direct," close**  
 25 **quote, "on Google. We have implemented a negative**

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1 **keyword matching strategy for all the iterations of**  
 2 **the keyword 1800 in a successful effort to avoid**  
 3 **showing up on any searches for 1800contacts.com.**  
 4 **Please ask them to do the same."**  
 5 **Do you see that?**  
 6 A. Yes.  
 7 **Q. And then is this one of -- in terms of the**  
 8 **document you've reviewed with respect to the**  
 9 **settlement agreements, is this one of the earliest**  
 10 **instances you saw of somebody asking for negative**  
 11 **keywords to be implemented?**  
 12 A. It is. This is something that would have  
 13 been consistent with my view of the settlement  
 14 agreements once I got involved in moving forward.  
 15 That was always my view of what the intent and object  
 16 of the settlement agreements were. Reviewing this  
 17 e-mail shows -- shows that at a very early stage with  
 18 Vision Direct, Vision Direct actually recommended the  
 19 use of negative keywords in order to comply with the  
 20 causing language in the settlement agreement.  
 21 Because the settlement agreement isn't worded in the  
 22 sense of what keywords can you choose in your AdWords  
 23 campaign. The settlement agreement is worded into  
 24 whether your AdWord settings are causing your ad to  
 25 come up in response to the searches. That's the

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1 language, And that was always the analysis and intent  
 2 of the settlement agreement. So --  
 3 MR. CHIARELLO: I'm sorry. Are you  
 4 referring to a settlement agreement that you're  
 5 looking off of now? Or --  
 6 THE WITNESS: No. I was just referring  
 7 to -- this is the e-mail about Vision Direct. The  
 8 Vision Direct 2004 settlement agreement uses language  
 9 causing a sponsored link to appear in response to a  
 10 search. That's the language. It doesn't say -- it  
 11 doesn't define it in terms of what keywords you  
 12 select. It's-- it's what are your settings causing  
 13 your ad to do.  
 14 And this e-mail here shows that Vision  
 15 Direct understood and implemented -- to comply with  
 16 that, implemented negative keywords, and felt that if  
 17 you're using a generic keyword without a  
 18 corresponding negative keyword, you're not going to  
 19 be complying with the restriction on causing your  
 20 ad -- or not causing your ad to come up in response  
 21 to the other party's trademark.  
 22 So this shows that that -- that mindset  
 23 that Vision Direct expressed in 2004 was the same  
 24 mindset that I had throughout my entire time working  
 25 with these settlement agreements later on and

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1 understanding what they meant -- what the earlier  
 2 settlement agreements meant when I was representing  
 3 1-800 Contacts.  
 4 **Q. (By Mr. Stone) So go back in the stack of**  
 5 **the settlement agreements, if you would, and go down**  
 6 **to the -- near to the bottom and pull out CX0311.**  
 7 A. Yeah.  
 8 **Q. I think you were asked this earlier, but**  
 9 **this doesn't -- this particular agreement is the one**  
 10 **with Vision Direct; is that right?**  
 11 A. Right.  
 12 **Q. And it does not talk about the use of**  
 13 **negative keywords explicitly?**  
 14 A. It doesn't say it explicitly, no.  
 15 **Q. And the provision you were referring to in**  
 16 **your earlier answer is where?**  
 17 A. It's d. So if you go to page 5, lower  
 18 case d.  
 19 **Q. So page 5, which is CX0311-004?**  
 20 A. Yes.  
 21 **Q. Okay.**  
 22 A. Lower case d and e are provisions that --  
 23 that say that you are prohibited from -- d says  
 24 "causing a Party's website or an Internet  
 25 advertisement to appear in response to any Internet

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1 search for the other Party's brand name, trademarks  
 2 or URLs"; and e says "causing a Party's brand name,  
 3 or link to the Party's Restrictive Websites to appear  
 4 as a listing in the search results page of an  
 5 Internet search engine, when a user specifically  
 6 searches for the other Party's brand name,  
 7 trademarks, or URLs."  
 8 So they're -- they're defining the  
 9 prohibited act in terms of what your search engine  
 10 settings are causing your ads to do with respect to  
 11 the search term entered by the user into the search  
 12 engine. And the way you accomplish that is you  
 13 use -- you strategically use negative keywords to  
 14 ensure it doesn't occur if you're going to broad  
 15 match some generic terms that may rope in your  
 16 competitor's trademark.  
 17 And that's clearly what Vision Direct's  
 18 understanding was in this e-mail, RX0258, and that  
 19 was always my understanding of the import and purpose  
 20 of any of the settlement agreements from that time  
 21 forward.  
 22 MR. STONE: Okay. Let me ask the reporter  
 23 to mark as RX0259 a two-page e-mail chain.  
 24 (Exhibit RX0259 was marked.)  
 25 **Q. Is this a document that you reviewed in**

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1 **connection with --**  
 2 A. Yes, it is.  
 3 **Q. And what is this document?**  
 4 A. This is -- it's an e-mail chain that  
 5 has -- one of the e-mails is the same e-mail that is  
 6 included in the prior RX0258. It's between  
 7 1-800 Contacts' in-house counsel, Joe Zeidner, and  
 8 Alesia Pinney from Vision Direct about this negative  
 9 keyword issue.  
 10 **Q. So did Mr. Zeidner -- in the bottom of**  
 11 **page 1, did he write to Ms. Pinney, "We are prepared**  
 12 **to take the step of requiring our affiliates to use a**  
 13 **negative keyword on all vision searches if you are**  
 14 **willing to do the same with your affiliates"?**  
 15 MR. CHIARELLO: Objection. Foundation.  
 16 Document speaks for itself.  
 17 THE WITNESS: Yeah, he said that. It  
 18 appears that when Joe looked into this there was --  
 19 they found some of their affiliates were the ones  
 20 where the ads were being triggered by the search for  
 21 Vision Direct, and he said, you know, they don't have  
 22 a problem requiring their affiliates to use the  
 23 negative keywords. Vision Direct obviously was  
 24 already doing that as a method of complying with  
 25 those causing provisions we read earlier in the

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1 Vision Direct agreement.  
 2 **Q. (By Mr. Stone) How did Vision Direct**  
 3 **respond to this information from Mr. Zeidner, if it**  
 4 **did?**  
 5 A. She said, "We already have our affiliates  
 6 apply the '1-800' negative and would appreciate your  
 7 doing the same. Thank you."  
 8 **Q. And what do you understand the "negative"**  
 9 **to mean in that context?**  
 10 A. Negative keywords relating to  
 11 1-800 Contacts' trademark. And my understanding is  
 12 all of this is for the purpose of complying with  
 13 those provisions in the parties' settlement  
 14 agreement.  
 15 **Q. Okay.**  
 16 MR. STONE: Let me ask the reporter to  
 17 mark as RX0260 a one-page e-mail chain between  
 18 Mr. Miller and Mr. Delaney.  
 19 (Exhibit RX0260 was marked.)  
 20 **Q. Do you recognize Exhibit RX0260?**  
 21 A. Looks like an e-mail between me and John  
 22 Delaney, 2011.  
 23 **Q. And what's the subject matter addressed**  
 24 **here?**  
 25 A. The settlement agreement with Standard

<p style="text-align: right;">201</p> <p>1 Optical.</p> <p>2 <b>Q. And what does this particular e-mail</b></p> <p>3 <b>relate to, if you know?</b></p> <p>4 A. Let's see. Let me read it for a second.</p> <p>5 Oh, okay. I recall this. This is kind of</p> <p>6 in the same context of what are the appropriate terms</p> <p>7 to be used in the settlement agreements that are</p> <p>8 resolving keyword advertising trademark infringement.</p> <p>9 And they had included terms that go beyond the retail</p> <p>10 sales of vision products business to include, like,</p> <p>11 health plan/network type of trademarks. One of them</p> <p>12 was Opticare, Optiport. And so we said we're only</p> <p>13 willing to include terms and websites owned by</p> <p>14 Standard Optical relating to vision care and retail</p> <p>15 business. And that's what I was telling him there.</p> <p>16 And that kind of goes towards the intent</p> <p>17 of these being trademark infringement settlement</p> <p>18 agreements. And I don't think 1-800 -- you know, if</p> <p>19 you go beyond the retail sale of contact lenses into</p> <p>20 general insurance plan and network area products or</p> <p>21 trademarks, it's going a little bit beyond the nature</p> <p>22 of the claims that were asserted in the case. And if</p> <p>23 they weren't parties to the case or signatories on it</p> <p>24 and there wasn't really trademark infringement</p> <p>25 directed towards that type of an industry, then we</p>	<p style="text-align: right;">203</p> <p>1 of negative keywords or the non-use of negative</p> <p>2 keywords. Nobody ever raised that with me. I never</p> <p>3 raised that with anyone else. It was just never a</p> <p>4 concept that was considered in the context of these</p> <p>5 settlement agreements.</p> <p>6 <b>Q. (By Mr. Stone) Complaint counsel in the</b></p> <p>7 <b>Federal Trade Commission refer to these settlement</b></p> <p>8 <b>agreements as bidding agreements. You're aware of</b></p> <p>9 <b>that?</b></p> <p>10 A. I think I did hear that a long time ago.</p> <p>11 <b>Q. Did you ever refer to these as bidding</b></p> <p>12 <b>agreements?</b></p> <p>13 A. No. No, we never talked about bidding at</p> <p>14 all. It -- the concept of bidding was never a</p> <p>15 concept that was even a consideration when we raised</p> <p>16 these claims and pursued these settlement agreements.</p> <p>17 <b>Q. Did the lawyers or parties you negotiated</b></p> <p>18 <b>with ever refer to these as bidding agreements?</b></p> <p>19 A. No.</p> <p>20 <b>Q. Had you ever heard these referred to as</b></p> <p>21 <b>bidding agreements until the Federal Trade Commission</b></p> <p>22 <b>and complaint counsel came up with that term?</b></p> <p>23 A. No.</p> <p>24 <b>Q. In discussions you had with the settling</b></p> <p>25 <b>parties and their lawyers, did they ever mention to</b></p>
<p style="text-align: right;">202</p> <p>1 didn't want to include those in the settlement</p> <p>2 agreement, so we would keep it narrowly tailored to</p> <p>3 the nature of the trademark infringement claims. If</p> <p>4 that makes sense.</p> <p>5 <b>Q. Did you ever have any conversations with</b></p> <p>6 <b>any of the settling parties or their lawyers in which</b></p> <p>7 <b>you talked about whether the purpose or effect of</b></p> <p>8 <b>these agreements was to save the parties' money that</b></p> <p>9 <b>they otherwise might spend in bidding for keywords on</b></p> <p>10 <b>Google or Bing or Yahoo?</b></p> <p>11 MR. CHIARELLO: Objection. Vague. Calls</p> <p>12 for speculation.</p> <p>13 THE WITNESS: No. I never had</p> <p>14 conversations about the bidding, the bidding</p> <p>15 practices within Google AdWords. I -- I was really</p> <p>16 never even familiar with how the bidding process</p> <p>17 worked. What I understood is you could select a</p> <p>18 keyword, you could select a match type, you could</p> <p>19 select negative keywords. Because my focus was on</p> <p>20 preventing, you know, trademark infringement and use</p> <p>21 of a trademark to trigger an advertisement.</p> <p>22 I never had a conversation with anyone I</p> <p>23 can think of that talked about how much -- you know,</p> <p>24 each keyword costs or what the price per click was or</p> <p>25 how -- how the price per click is affected by the use</p>	<p style="text-align: right;">204</p> <p>1 <b>you anything about any financial benefits that either</b></p> <p>2 <b>they would achieve or 1-800 Contacts would achieve by</b></p> <p>3 <b>not bidding on particular keywords?</b></p> <p>4 A. No.</p> <p>5 MR. CHIARELLO: Objection. Vague.</p> <p>6 THE WITNESS: No, nobody ever raised any</p> <p>7 issues of financial impact. It was always just,</p> <p>8 let's avoid using each other's trademarks to trigger</p> <p>9 advertisements so we avoid trademark infringement</p> <p>10 issues, and that was it. There was never a</p> <p>11 discussion of whether this could be detrimental or</p> <p>12 helpful from a financial perspective to either side</p> <p>13 other than avoiding trademark infringement.</p> <p>14 MR. STONE: Okay. Let me ask the reporter</p> <p>15 to mark as RX0261 an exchange of e-mails between you</p> <p>16 and Mr. Garriott.</p> <p>17 (Exhibit RX0261 was marked.)</p> <p>18 <b>Q. The reporter has handed you what we've</b></p> <p>19 <b>marked as RX0261. Can you tell us what this is?</b></p> <p>20 A. An e-mail between me and Dan Garriott.</p> <p>21 Have we not seen this today? Maybe we</p> <p>22 haven't.</p> <p>23 MR. CHIARELLO: I believe it's the same</p> <p>24 as --</p> <p>25 MR. BEACH: I don't think it's an</p>

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1 identical document. There was a --

2 THE WITNESS: Maybe similar -- a different  
3 version of a similar e-mail chain.

4 **Q. (By Mr. Stone) Tell us what this e-mail  
5 chain relates to, if you would.**

6 A. Yeah. So this is an e-mail chain where we  
7 had received Lensfast's proposed keyword and website  
8 list for the settlement agreement and went through  
9 it, and this was our response. And so we start by  
10 explaining -- I started by explaining to Dan that the  
11 agreement has to be tailored to just trademarks and  
12 domain names or URLs, federally registered trademarks  
13 and -- and website addresses.

14 And so we explained to him, look, these  
15 are -- these are the federal registrations we hold  
16 that relate to the terms that we are listing on our  
17 list for the settlement agreement, and we also own  
18 some websites listed in Exhibit 2. And we even  
19 identify that there are some websites we own that we  
20 didn't identify and we haven't identified some of  
21 these generic terms as part -- that are in our  
22 websites.

23 But what they proposed to us went beyond  
24 just their trademark rights. So we were just  
25 explaining to him, you've got to stick with the

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1 actual website name or a registered trademark or  
2 confusingly similar variations and misspellings of  
3 it, but you can't break your trademark up into some  
4 of these generic terms like "optometrists" or "1-800"  
5 separately and apart from anything else.

6 **Q. So what -- what were some of the other  
7 trade -- some of the other words that they were  
8 asking to be put on the restrictive list for use of  
9 negative keywords?**

10 A. Well, just from looking at this, I don't  
11 have the attachment here with me to see what their  
12 exhibit -- or what the proposed was, but it looks  
13 like they wanted "1800" all by itself and "1877" all  
14 by itself as negative keywords. And we said, you  
15 don't have trademark rights in those terms.

16 They wanted "optometrists" all by itself  
17 because they -- they own the website  
18 1800-optometrists.com, but they don't own trademark  
19 rights in the term "optometrist" or the term "1800"  
20 by itself.

21 So those were the terms that they wanted;  
22 and we explained, you know, if we went your route, we  
23 could just require "contacts," and -- and that's  
24 where you get into this problematic issue if you're  
25 going beyond what your trademark rights allow to you

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1 pursue. And, you know, any intellectual property  
2 litigator knows that when you're settling an  
3 intellectual property case, you don't go beyond the  
4 rights the intellectual property allows you, because  
5 that give the -- that can make a settlement agreement  
6 problematic down the road for enforceability.

7 So that's what this e-mail was about is  
8 explaining to them we've got to confine it to the  
9 domain names and to registered trademark rights. And  
10 I think we would also accept if they could show that  
11 they had common law rights in something that had been  
12 adjudicated, they had proven in court they had  
13 established common law rights of something, you  
14 could -- you could use those as well.

15 MR. STONE: Okay. Let me ask the reporter  
16 to mark as RX0262 an e-mail chain between you and  
17 Mr. Dan Harkins.

18 (Exhibit RX0262 was marked.)

19 **Q. Do you recognize this document?**

20 A. I do, yeah. This is an e-mail chain with  
21 Dan Harkins. He was counsel for the Empire Vision  
22 group of companies that were part of that settlement  
23 agreement, and this is a similar issue. He -- he  
24 proposed his client's keyword list, and we -- like I  
25 said, I remember this one. We did a lot of due

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1 diligence where we had to go through all of their --  
2 they proposed so many. We went through to find out  
3 which ones they would have trademark rights in that  
4 could be validly included in the agreement.

5 And so we sent him a list back that showed  
6 here's where we don't find any registered trademark  
7 rights. And -- and I told him it's got to be a  
8 registered trademark or an actual domain name that  
9 you own; and we need -- if there's these subsidiary  
10 companies, everybody has to be a party to the  
11 agreement and a signatory. And that's what this  
12 e-mail is about.

13 I don't remember exactly what terms they  
14 proposed or how many. I know it was a lot. And so  
15 we had to go through and find out which ones were  
16 genuine trademarks and which ones weren't.

17 **Q. And if I just show you CX0319, that's the  
18 settlement agreement that relates to this list of  
19 restricted terms?**

20 A. Yeah. That's the finalized settlement  
21 agreement.

22 **Q. Okay.**

23 A. So that would include the ones that we had  
24 already verified these are appropriately included. I  
25 think in his e-mail he sent me he had a list that was

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1 beyond this, and we had to weed them out to make sure  
2 we're only including relevant trademark rights or  
3 domain names that they owned.

4 MR. STONE: Okay, thanks.

5 I'll ask the reporter to mark as RX0263 a  
6 three-page e-mail chain between you and Mr. Slifkin.  
7 (Exhibit RX0263 was marked.)

8 A. Okay. Yeah, this is an e-mail between me  
9 and Neal Slifkin, who was counsel for Contact Lens  
10 King. We're negotiating the settlement agreement.  
11 And this again addresses a similar issue.

12 **Q. So go back to the earliest in time, if you**  
13 **would, of the e-mails that make up this chain --**

14 A. Okay.

15 **Q. -- and sort of explain to us what was**  
16 **going on.**

17 A. The e-mail on page 2 or on the second page  
18 of the exhibit is from Mr. Slifkin to me. And he had  
19 proposed some changes to the settlement agreement,  
20 and then he added his list or the terms that he  
21 wanted added to their list of terms for Exhibit 2.

22 And we responded -- revised the agreement.  
23 In the next e-mail up I responded, and I said --

24 **Q. You see where it says "Section 4.(A)a has**  
25 **been revised to alleviate your concerns for being too**

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1 **vague and broad"?**

2 A. Yeah.

3 **Q. So let's go take a look at 4(A) of this**  
4 **agreement.**

5 A. Yeah, I don't recall exactly what his  
6 concerns on that were. Maybe if I read 4(A), that  
7 would help me.

8 This is Contact Lens King, right?

9 **Q. Right. And it's CX323.**

10 MR. CHIARELLO: Are you referring to the  
11 signed agreement?

12 MR. STONE: Yes.

13 MR. CHIARELLO: Are you referring to the  
14 signed agreement?

15 THE WITNESS: Yes. There it is. So 4(A).

16 **Q. (By Mr. Stone) So you'll notice here it**  
17 **talks about engaging -- 4(A)a, which you reference in**  
18 **your e-mail. It says "engaging in internet search**  
19 **advertising that causes."**

20 A. Right.

21 **Q. Do you see that language?**

22 A. Yes.

23 **Q. And that's the first provision you**  
24 **addressed in your e-mail to him, right?**

25 A. Yes, it is.

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1 **Q. And then you went on to say, "My client**  
2 **wants" -- "With respect to the term 'using' in the**  
3 **subsequent sections, my client wants to keep that**  
4 **term. The Lanham Act discusses trademark 'use.' We**  
5 **want to keep that language consistent with the**  
6 **statute. I have revised it to specific 'sponsored'**  
7 **links and 'search engine' advertising."**

8 **Do you see that reference?**

9 A. Yes.

10 **Q. Okay.**

11 A. I believe what I'm recalling is as far as  
12 4(A)a, the part that he may have felt was too vague  
13 and broad, I believe it may have earlier been worded  
14 "engaging in" or "participating in," and he didn't  
15 want the "participating in." He thought that was a  
16 little too broad and he wanted that out. Something  
17 to that nature.

18 And then I think, you know, he had  
19 expressed a problem with "using," and I had to  
20 explain to him "using" is an important word because  
21 this settlement is about settling trademark  
22 infringement issues. "Use" in commerce is part of --  
23 is the first element of trademark infringement. We  
24 wanted to keep that language to be consistent with  
25 the purpose of the agreement. And so that's why I

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1 explained that to him there.

2 **Q. Because there was an earlier agreement we**  
3 **looked at today that had the language "engaging and**  
4 **participating"?**

5 MR. CHIARELLO: Objection.

6 THE WITNESS: I think so.

7 MR. CHIARELLO: Objection to form.

8 And for clarity, were you talking earlier  
9 of the Contact Lens King agreement?

10 MR. STONE: No.

11 THE WITNESS: No, no. But I think there's  
12 another settlement agreement. And it could be  
13 subsequent to this one. I don't know if it was  
14 before this one or the other one.

15 **Q. (By Mr. Stone) Look at 320. Look at the**  
16 **Lenses for Less one, Exhibit CX0320, if you would.**

17 A. Because I think at this period of time,  
18 you know, spring of 2010, we were trying to use  
19 basically the same standard agreement. And so we  
20 would have started with the same agreement with both  
21 Lenses for Less, which is CX0320, and Contact Lens  
22 King, which is CX0323. They were both executed near  
23 the same time, March 2010.

24 So we provided both of these companies  
25 with the same standard settlement agreement to start

53 (Pages 209 to 212)

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1 with. Contact Lens King was one that didn't like  
2 that language of "participating in." So if you look  
3 at Lenses for Less, the CX0320, and you go to  
4 section 4(A)a, it says "engaging in or participating  
5 in internet advertising."

6 He was concerned with participating in,  
7 that that could potentially be used too broadly in an  
8 enforcement action. So we agreed to pull it out and  
9 just have "engaging in" for the Contact Lens King  
10 one, CX0323.

11 So that was his concern in that e-mail  
12 about that provision being too broad, and we had --  
13 we had no problem with -- it was almost -- it wasn't  
14 an issue for us, so we took it out.

15 But then we wanted "using" to be in there  
16 so that it maintained the character of its purpose as  
17 resolving trademark infringement, focusing on use of  
18 trademark in commerce, and so we kept "use" in the  
19 other clauses.

20 **Q. And then if you go back to the e-mail,**  
21 **RX0263, still on the second page, you'll see where**  
22 **you said, "I also included your proposed**  
23 **section 4(B)(ii)."**

24 **Do you see that --**

25 A. Uh-huh.

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1 **Q. -- in the e-mail?**  
2 **And then look, if you would, at the**  
3 **settlement agreement, which is CX0323, with Contact**  
4 **Lens King. And do you see that language?**

5 A. Yes.

6 **Q. What's the language that you added at his**  
7 **request?**

8 A. So that little Roman numeral ii had the  
9 use of descriptive words on the internet search such  
10 as contact, contacts, contact lens, lenses and lens.  
11 He wanted that in there.

12 **Q. And that's on page 3 of CX323?**

13 A. Yes. And now that I read it, I think I  
14 recall thinking that's pretty redundant of the next  
15 phrase, which talks about using generic terms such as  
16 "contacts" or "contact lenses." He wanted a section  
17 that specified descriptive words rather than just  
18 generic, and I think that went to the concept of in  
19 trademark law trademarks are categorized on a  
20 spectrum of generic, descriptive, suggestive, or  
21 arbitrary on strength of the mark. And generic and  
22 descriptive are the weakest type of terms, and you  
23 can use descriptive terms.

24 And so he wanted to use the word  
25 "descriptive" and "generic" in there to show that

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1 there was no problem triggering your ads based on a  
2 search for these descriptive terms as long as you're  
3 using the proper negative keywords to prevent coming  
4 up in response to a search for the trademarked terms  
5 in a settlement agreement.

6 **Q. Okay. Now go back to the e-mail chain,**  
7 **RX0263, and go to the first page. You'll see he**  
8 **responded to your e-mail saying, "Mark, we are fine**  
9 **with the revised agreement. However, we would like**  
10 **to add to the list of Exhibit 2 the following: King,**  
11 **Kings, Lensking, Lenseking," spelled differently, and**  
12 **then two URLs.**

13 **Do you see that?**

14 A. Yes.

15 **Q. And what was your response?**

16 A. This is -- this is another one of those  
17 issues where they tried to add words that went beyond  
18 what their trademark rights would justify. The first  
19 inclusion of terms seemed okay based on their  
20 registered trademark rights, but we pushed back on  
21 those and said we don't agree to "king" and "kings"  
22 because those are too generic, too broad. That would  
23 be like 1-800 Contacts including just "contacts" or  
24 just "1-800."

25 And so we said we won't use those, but the

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1 Lens King ones seemed okay to us because they were  
2 Contact Lens King, and that was -- it would seem  
3 unlikely somebody's going to use "lens king" unless  
4 they're thinking of the trademark Contact Lens King.  
5 So we were okay with that. That was -- that was  
6 close enough to their trademark rights.

7 **Q. Okay.**

8 MR. STONE: Let me ask the reporter to  
9 mark as RX0264 a one-page e-mail from to you  
10 Mr. Dreitler.

11 (Exhibit RX0264 was marked.)

12 **Q. Do you recognize this document?**

13 A. Yeah. Looks like an e-mail between me and  
14 counsel for Arlington Contact Lens Service, or AC  
15 Lens. Let me read it and just kind of familiarize  
16 with it.

17 **Q. Sure.**

18 A. (The witness reviews the document.)  
19 Okay.

20 **Q. So do you recall this discussion?**

21 A. Well, yeah. It -- vaguely. I mean, I  
22 think -- it appears we had prior communications where  
23 they said, okay, we're good with the agreement, we  
24 accept it, we'll move forward and give you our  
25 trademark terms and we'll do it. And then they sent

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1 us a settlement agreement where they had redlined it  
2 a lot of all the terms.

3 And so I was explaining to him, I think  
4 we've already reached an agreement on everything  
5 except you just adding your trademark terms to the  
6 exhibit. So I felt like we had already resolved and  
7 reached an agreement on the issue.

8 **Q. Do you recall any issues that later arose  
9 with respect to their list?**

10 A. Yeah, I think -- not specifically, but I'm  
11 guessing it's probably a similar issue that was  
12 raised with a lot of other settlement agreements  
13 where they would try to include terms that went  
14 beyond actual trademark rights, and we had to push  
15 back and limit it to just registered trademarks and  
16 websites. Because in this e-mail I say, we'll wait  
17 for your client's list of trademark terms to add to  
18 Exhibit 1.

19 And so I was telling him, listen, we have  
20 a settlement agreement, and the only thing missing is  
21 your list of terms. So I was just waiting for that.

22 **Q. Okay. And let me ask the reporter to mark  
23 as RX0265 a letter to you from Arshil Abdulla, the  
24 CEO of LensDiscounters.com.  
25 (Exhibit RX0265 was marked.)**

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1 A. Okay. This is a response to a demand  
2 letter I must have sent to LensDiscounters.com about,  
3 you know, alleging trademark infringement for keyword  
4 advertising practices. And their response was that  
5 they would add 1-800 Contacts and reasonable  
6 confusing variations thereof as negative keywords to  
7 prevent their ads from coming up when a user is  
8 specifically searching for our website.

9 **Q. And was that description of the purpose of  
10 the settlement agreements and the request you were  
11 making of them in your cease and desist letter, is  
12 that consistent with the purpose of those requests in  
13 the settlement agreements?**

14 MR. CHIARELLO: Objection. Lacks  
15 foundation. Calls for speculation. The letter, if  
16 it exists, apparently speaks for itself.

17 THE WITNESS: Yeah, that was -- that was  
18 the purpose of us reaching out to them just like we  
19 did all the other parties, and they -- they quickly  
20 complied. And -- and I don't think we actually did a  
21 formal settlement agreement with these guys. I think  
22 they complied. They said, we have no problem adding  
23 negative keywords and confusing variations. And they  
24 did that, and didn't seem to have further problems  
25 with them. So we never demanded a settlement

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1 agreement from them, if I recall right.

2 Now, if you can show me a settlement  
3 agreement with Lens Discounters, I could be wrong.  
4 This was a long time ago, but --

5 **Q. So let me go back to this sentence. It  
6 says, "However, we will add '1800 CONTACTS' and  
7 '1-800CONTACTS'" without the space, "and any  
8 reasonable confusing variations thereof that you  
9 specify as 'negative keywords' in our ad campaigns to  
10 prevent our ads from coming up when a user is  
11 specifically searching for your client's website."**

12 **Do you see that?**

13 A. Yes.

14 MR. CHIARELLO: Just note that there were  
15 quotes around the term "negative keywords." But  
16 otherwise it read fine.

17 **Q. (By Mr. Stone) Okay. And when he says we  
18 will do this "to prevent our ads from coming up when  
19 a user is specifically searching for your client's  
20 website," is that a fair statement of the general  
21 purpose and intent of your cease and desist letter to  
22 Lens Discounters?**

23 MR. CHIARELLO: Objection. Lacks  
24 foundation. And calls for speculation as to whether  
25 or not what this person intended to write in their

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1 e-mail equates to what he's saying.

2 THE WITNESS: Well, the point we raise in  
3 our trademark infringement claims and -- and the  
4 point we raise with everybody we talk to is the issue  
5 is to prevent competitor ads from coming up when a  
6 search is done. The type of search that is done is  
7 somebody looking specifically for 1-800 Contacts to  
8 go to their website. And that's the context.

9 And so, you know, his response is  
10 consistent with any communications we might have had  
11 that we're looking at -- at situations where users  
12 are looking to go to the 1-800 Contacts' website.  
13 They're navigating towards us. Their searches are  
14 driven by their understanding of our brand. They're  
15 not doing a comparative search. They're not doing  
16 just a market research type of inquiry. They're  
17 looking for us as a source.

18 And so that was always the intent and  
19 import of all the settlement agreements and our  
20 request to them to implement negative keywords. And  
21 they -- we -- you know, they just did it, and there  
22 wasn't a need for a settlement agreement with these  
23 guys, as far as I recall.

24 **Q. So when you received this letter -- I  
25 understand you might not know what was in**

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1 **Mr. Abdulla's mind when he wrote it, but when you**  
 2 **received and read this sentence in the second**  
 3 **paragraph that I just read into the record that**  
 4 **closes with we will use these negative keywords in**  
 5 **our ad campaigns, quote, "to prevent our ads from**  
 6 **coming up when a user is specifically searching for**  
 7 **your client's website," close quote, did you**  
 8 **understand that language to be consistent with what**  
 9 **you were describing in your cease and desist letter**  
 10 **that you had sent him as your objective?**

11 A. Yes, yes. I didn't respond and say,  
 12 you're being too narrow, we need more than that. I  
 13 didn't try to push back and say, we want you to do  
 14 something broader than what you're suggesting. I  
 15 read that and thought, that's great, that's -- that's  
 16 what we're asking. That's all we've ever been  
 17 asking.

18 MR. STONE: Okay. Can we take a short  
 19 break?

20 (Recess from 4:10 p.m. to 4:17 p.m.)

21 MR. STONE: I don't have any further  
 22 questions at this time. I'll reserve the remainder  
 23 of my time.

24 FURTHER EXAMINATION  
 25 BY MR. CHIARELLO:

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1 **Q. Mr. Miller, if you can refer back to the**  
 2 **e-mail -- I'm sorry, RX263 -- from Mr. Slifkin to**  
 3 **you.**

4 A. Okay.

5 **Q. And, I'm sorry; this is from you to**  
 6 **Mr. Slifkin. The e-mail started at the bottom of the**  
 7 **page, dated March 25th at 10:57 a.m.**

8 **Do you see that?**

9 A. Okay.

10 **Q. The next paragraph on the next page says,**  
 11 **"As far as the monetary component, my client is**  
 12 **willing to settle at \$8K under the present contract."**  
 13 **What does that sentence mean?**

14 A. There was often a demand for a monetary  
 15 component to pay for, you know, past infringement as  
 16 part of the resolution of the case. Sometimes the  
 17 client wouldn't demand any money if the party was,  
 18 you know, if it was something where the party  
 19 cooperated really easy, they didn't have to put a lot  
 20 into the enforcement. If there was more that was  
 21 done in the enforcement, sometimes they'd demand  
 22 more. But they always tried to demand something,  
 23 some small amount, to show consideration for past  
 24 infringement as part of the settlement and then the  
 25 injunctive relief in the settlement agreement moving

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1 forward. So that's what that was.

2 So we were willing to settle for \$8,000  
 3 payment for past trademark infringement at that  
 4 point.

5 **Q. Do you recall on this particular agreement**  
 6 **what the initial demand was?**

7 A. I guess it might have been 10,000. I'm  
 8 not sure. I know that the e-mail right below that,  
 9 Neal Slifkin put a blank space in place of the  
 10 \$10,000 payment, so they asked for a reduced  
 11 settlement agreement payment. We said, we'll go to  
 12 eight. I don't know if the final agreement was  
 13 8,000. I think -- I don't know. What was it? If we  
 14 look at it, it was 8,000. So they asked for -- they  
 15 negotiated a smaller amount for the payment, and we  
 16 did it.

17 **Q. In part of your practice to send out the**  
 18 **infringement and demand letters, would you engage in**  
 19 **some -- any analysis on the economic impact of that**  
 20 **past infringement?**

21 MR. STONE: So be careful about any  
 22 privilege considerations. But you can maybe answer  
 23 that yes or no.

24 THE WITNESS: Yeah, we may have. It's  
 25 usually -- that would all be, you know, privileged

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1 interactions with me and the client. So I think  
 2 there would be some analysis.

3 **Q. (By Mr. Chiarello) Are you withholding**  
 4 **some information based on privilege in your answer?**

5 A. Well, that's tricky, because my memory is  
 6 I can't remember a specific analysis. I can remember  
 7 discussions about it in a general sense, but I'm not  
 8 withholding any specific information that I can  
 9 recall that says I recall this type of analysis for  
 10 this certain settlement agreement.

11 **Q. In general, what would be -- the analysis**  
 12 **be as to the economic cost of the infringement -- the**  
 13 **past infringement?**

14 A. That's what I'm saying. Beyond -- I -- I  
 15 can't recall.

16 **Q. What metrics or tools would you use to**  
 17 **assess not specifically the Contact Lens King but any**  
 18 **of the alleged infringers, of what the economic**  
 19 **impact or the economic harm would be to -- or caused**  
 20 **by the alleged infringement?**

21 A. Again, I can't recall. When you're  
 22 talking about trademark infringement, the damages  
 23 analysis generally under the statute is you get lost  
 24 sales, lost profits. So, you know, diverted sales  
 25 and -- and maybe lost licensing royalties that they



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1 should have paid for use of the mark, other things  
2 like that. So that's the type of damages you get in  
3 a -- in a trademark infringement suit.  
4 I can't -- you know, I don't recall or  
5 can't speak to any specific economic analysis we did  
6 at the time for these. But these were monetary  
7 components that would relate to, you know, both the  
8 cost of enforcement and maybe the -- maybe some lost  
9 sales or something due to the infringement, things  
10 like that. But it -- it wasn't a scientific  
11 down-to-the-dollar type of expert report type of  
12 analysis, I can tell you that much, which it never is  
13 in the settlement context in any IP litigation. It's  
14 more generalized.

15 **Q. Do you know if you or 1-800 Contacts did**  
16 **any studies as to lost -- let me lay some foundation**  
17 **first.**

18 **Do you know what the term, if I use the**  
19 **term "click" means?**

20 A. Yeah.

21 **Q. What does it mean to you?**

22 A. Well, when a person clicks on a link or  
23 something on a website, that's a click.

24 **Q. In relation to determining the amount of**  
25 **the demand in a settlement agreement or in the demand**

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1 **letter, would any analysis be done as to the amount**  
2 **of foregone clicks due to the alleged infringement?**

3 A. No.

4 MR. STONE: Objection. Improper as to  
5 form. Calls for speculation. Move to strike the  
6 answer for the purpose of interposing the objection.

7 Your answer is on the record.

8 THE WITNESS: Okay.

9 **Q. (By Mr. Chiarello) So is it your**  
10 **understanding that in relation to your demand letters**  
11 **that neither you nor 1-800 Contacts or anyone related**  
12 **to 1-800 Contacts undertook an analysis of foregone**  
13 **clicks in relation to the alleged infringement?**

14 MR. STONE: Lacks foundation. Calls for  
15 speculation. Improper as to form.

16 THE WITNESS: I'm not sure what you mean  
17 by "foregone clicks."

18 **Q. (By Mr. Chiarello) Is it your**  
19 **understanding that in relation to your demand letters**  
20 **that neither you nor 1-800 Contacts or anyone related**  
21 **to 1-800 Contacts undertook any analysis of lost**  
22 **clicks in relation to the alleged infringement?**

23 MR. STONE: Objection. Vague and  
24 ambiguous. Improper as to form. Lacks foundation.

25 THE WITNESS: I don't know. There --

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1 there could have been an analysis. I don't recall.  
2 There could have been a thought down that road, but I  
3 just don't know.

4 **Q. (By Mr. Chiarello) Earlier with Mr. Stone**  
5 **you testified to communications between yourself**  
6 **and -- or 1-800 Contacts and Vision Direct. Do you**  
7 **recall that?**

8 A. Yes.

9 **Q. Handing you a letter, CX141. Ask you to**  
10 **look at that.**

11 **(Exhibit CX141 was identified.)**

12 A. Okay.

13 **Q. What is this?**

14 A. It's a letter from Wilson Sonsini to Bryan  
15 Pratt.

16 **Q. Have you seen this document before today?**

17 A. I may have seen it before today, but I'm  
18 not familiar with it or the circumstances of it. I  
19 wasn't involved at that time.

20 **Q. If would you please look at what was**  
21 **previously marked as RX258, the one with all of the**  
22 **redactions at the top.**

23 A. 258, okay.

24 **Q. Do you recall your testimony at the bottom**  
25 **of the page regarding this e-mail from it looks like**

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1 **a Mr. Duerr to this person, Alesia Pinney?**

2 A. Yes.

3 **Q. And I believe you said that this was**  
4 **related to the implementation of negative keyword**  
5 **matching strategy that's becoming part of the**  
6 **agreement between 1-800 Contacts and Vision Direct.**  
7 **Is that accurate of your testimony?**

8 A. No.

9 MR. STONE: Objection. Misstates the  
10 witness's testimony.

11 You can answer.

12 THE WITNESS: Well, there's an e-mail that  
13 indicates Vision Direct indicating that they were  
14 negative matching and wanted 1-800 Contacts to do the  
15 same in order to comply with those causing provisions  
16 of the settlement agreement.

17 **Q. (By Mr. Chiarello) And was it your**  
18 **understanding from reviewing this document that an**  
19 **agreement existed as to negative keywords between**  
20 **Vision Direct and 1-800 Contacts?**

21 MR. STONE: Objection. Misstates the  
22 witness's prior testimony. Improper as to form.

23 THE WITNESS: I don't know if this e-mail  
24 is negotiating the scope of the agreement or talking  
25 about, like, negotiating issues that led up to the

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1 first agreement or talking about compliance with the  
 2 agreement. I'd have to look at the original  
 3 agreement and look at the dates.  
 4 **Q. (By Mr. Chiarello) If you look at CX311,**  
 5 **it's the settlement agreement between Vision**  
 6 **Direct --**  
 7 A. Okay.  
 8 **Q. -- and 1-800 Contacts. Do you see where**  
 9 **it says this agreement -- "This settlement agreement**  
 10 **is made and entered into as of June 24th, 2004"?**  
 11 **Do you see that?**  
 12 A. Yes. So this e-mail came afterwards. So  
 13 it would appear to me that they are talking about  
 14 compliance with this settlement agreement.  
 15 **Q. And that would be the 2004 settlement**  
 16 **agreement?**  
 17 A. That would be my understanding.  
 18 **Q. Okay. And then bottom of the page on**  
 19 **CX141, it reads --**  
 20 A. CX141?  
 21 **Q. 141, the exhibit I gave you, the letter**  
 22 **from Wilson Sonsini.**  
 23 **Do you see that?**  
 24 A. Uh-huh.  
 25 **Q. And it looks like this is a letter from**

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1 **someone named Scott Sher. Do you see that on the**  
 2 **back of the page?**  
 3 A. Yes.  
 4 **Q. It looks like Mr. Sher is writing,**  
 5 **"Separate and apart from Vision Direct's position**  
 6 **regarding the interpretation of the contract, set**  
 7 **forth in Ms. Caditz's November 5, 2007 letter."**  
 8 **Do you see that?**  
 9 MR. STONE: Objection. Lacks foundation.  
 10 **Q. (By Mr. Chiarello) Do you see the**  
 11 **reference to a letter?**  
 12 A. I see -- I see that statement, yeah.  
 13 **Q. Hyphen, "that is, that the Agreement does**  
 14 **not contemplate the implementation of negative**  
 15 **keywords," end hyphen. By reading that sentence,**  
 16 **what does that tell you as to what Mr. Sher believed**  
 17 **was the understanding as to whether or not negative**  
 18 **keywords were part of the agreement from Vision**  
 19 **Direct's perspective?**  
 20 MR. STONE: Objection. Lacks foundation.  
 21 Calls for speculation. Improper as to form.  
 22 THE WITNESS: I don't know. I don't know  
 23 the basis of what this letter is about. I wasn't  
 24 part of any of the earlier discussions. I don't know  
 25 what Mr. Sher was thinking. I just don't know. I

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1 can't give you an opinion on what I think he was  
 2 referring to. I don't know what that November 5th,  
 3 2007 letter is off the top of my head. So --  
 4 **Q. (By Mr. Chiarello) Proceeding on though,**  
 5 **it reads, "Vision Direct believes that any agreement**  
 6 **between the parties with regard to the implementation**  
 7 **of negative keywords creates an unacceptable risk of**  
 8 **violating" -- of violation "of section 1 of the**  
 9 **Sherman Act."**  
 10 **Do you see that?**  
 11 A. I do.  
 12 **Q. It goes on, "Any such agreement would**  
 13 **appear to represent a restraint unrelated to the**  
 14 **terms of the Agreement, and one that depresses the**  
 15 **price of keywords to search companies such as Google,**  
 16 **Yahoo! and Microsoft."**  
 17 **Do you see that?**  
 18 A. I do.  
 19 **Q. In your role of interpreting the**  
 20 **agreements between Vision -- between 1-800 Contacts**  
 21 **and the other parties, what does this tell you as to**  
 22 **what Vision Direct's position is as to negative**  
 23 **keywords at the time --**  
 24 MR. STONE: Objection.  
 25 **Q. -- of this -- at the time that Mr. Sher**

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1 **wrote this letter?**  
 2 MR. STONE: Objection. Lacks foundation.  
 3 Calls for speculation. Improper as to form.  
 4 THE WITNESS: I don't know the details of  
 5 what he's alleging here. He's kind of in general  
 6 statements. But there's a violation. I mean, it  
 7 seems by 2008, Vision Direct had changed their view  
 8 of what they thought the agreement did or what they  
 9 thought the agreement required or what it could  
 10 legally require. But I don't know what their basis  
 11 was for their change of view.  
 12 **Q. (By Mr. Chiarello) I am handing you an**  
 13 **exhibit marked CX314.**  
 14 MR. CHIARELLO: Counsel, we only have that  
 15 one copy.  
 16 (Exhibit CX314 was identified.)  
 17 MR. STONE: Oh, this is it. Is this the  
 18 2010 --  
 19 MR. CHIARELLO: Yes.  
 20 THE WITNESS: Effective date May 8th,  
 21 2009, Vision Direct Settlement Agreement.  
 22 MR. STONE: So is this missing -- oh, got  
 23 it. Sorry.  
 24 **Q. (By Mr. Chiarello) And my first question**  
 25 **is going to be, what is this?**

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1 A. Well, it appears to be a settlement  
2 agreement between Vision Direct and 1-800 Contacts.  
3 The effective date is May 8, 2009, and it's resolving  
4 litigation that seemed to be initiated in February  
5 2008.

6 **Q. If you would please turn to page 4 of the**  
7 **agreement. And as we work on this agreement, I'm**  
8 **referring to CX0314-004. And I'll use that as my**  
9 **page numbers since --**

10 A. Okay.

11 **Q. -- we'll go back and forth.**

12 A. Okay.

13 **Q. Okay. You see paragraph 4 on page 004?**  
14 **It reads, The settlement agreement shall -- "The 2004**  
15 **Settlement Agreement shall remain in full force and**  
16 **effect except that the Parties' sole obligations with**  
17 **respect to the use of negative keywords shall be to**  
18 **comply with the terms of this Settlement Agreement."**

19 **Do you see that?**

20 A. I do.

21 **Q. And what does that mean?**

22 A. Well, it means that the 2004 settlement  
23 agreement is going to remain in effect and -- but  
24 with the exception of the obligations on negative  
25 keywords is -- is limited to the terms of this

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1 settlement agreement. So there's obviously an  
2 acknowledgement that there was some -- some portion  
3 of the 2004 settlement agreement that would  
4 incorporate an obligation relating to negative  
5 keywords; and they're saying moving forward, the  
6 negative keyword obligations are set forth in this  
7 2008 settlement agreement.

8 **Q. Did you help draft or work on this**  
9 **agreement?**

10 A. No.

11 **Q. Okay. If you would please turn to**  
12 **CX0314-009, Exhibit 1, and the subsequent pages are**  
13 **page 010 through 012 -- I'm sorry -- 013 and 014.**  
14 **What is -- what is this Exhibit 1?**

15 A. Well, it looks like the permanent  
16 injunction, that the parties were agreeing to the  
17 entry of a permanent injunction by the Court, and  
18 that permanent injunction would order the parties to  
19 implement negative keywords.

20 **Q. And if you turn to page 13, what is**  
21 **Exhibit A?**

22 A. Well, let me go back and look. That's a  
23 list of the negative keywords that the injunction  
24 would require Vision Direct and Drugstore.com to  
25 implement in connection with internet keyword

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1 advertising for the sale of contact lenses. That's  
2 paragraph 2 of -- or item No. 2 of the permanent  
3 injunction on page CX0314-011. So that's --  
4 Exhibit A are the terms that the injunction was going  
5 to require Vision Direct and Drugstore.com to  
6 implement as negative keywords.

7 **Q. Okay. And if you would please turn to**  
8 **page 15 of this, of CX314. At the top it says**  
9 **"Exhibit 2."**

10 **Do you see that?**

11 A. Yeah.

12 **Q. And if you look at paragraph D -- it's**  
13 **Roman numeral I, capital letter D.**

14 A. Okay.

15 **Q. Do you see that?**

16 **It reads, "The term 'Antitrust Opinion'**  
17 **shall refer to any judicial decision or any**  
18 **Department of Justice order, judgment, consent**  
19 **decree, or other statement issued finding an**  
20 **antitrust violation for actions substantially similar**  
21 **to those required by this Settlement Agreement."**

22 **What does that mean?**

23 A. I think it's pretty clear what it means.  
24 It's just defining the term "antitrust opinion" for  
25 purposes of this agreement. It's just saying when

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1 you see the word "antitrust opinion" it's going to  
2 refer to this, a judicial decision or any Department  
3 of Justice order, judgment, consent decree, or other  
4 statement issued finding an antitrust violation.

5 **Q. Do you know why that term was added to**  
6 **this agreement?**

7 A. I don't. I wasn't part of those  
8 discussions. I'm not sure who requested it or why it  
9 was added.

10 **Q. Have you been part of discussions since**  
11 **about this term?**

12 A. No, not -- I haven't been part of  
13 discussions about that term. I've read it.

14 **Q. If you would please turn to page 16 of the**  
15 **agreement.**

16 A. Okay.

17 **Q. And it reads -- at the bottom under**  
18 **"Antitrust Opinion" it reads, "Any Party may**  
19 **implement a Written Notice Procedure to notify**  
20 **another Party about an Antitrust Opinion."**

21 **Do you see that?**

22 A. Yeah.

23 **Q. And the next sentence says, "If any Party**  
24 **in good faith believes after consulting with outside**  
25 **antitrust counsel that the Antitrust Opinion is**

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1 sufficiently related to some of the actions required  
2 by this Settlement Agreement and makes the required  
3 conduct illegal, that Party may suspend its  
4 implementation of those actions pending the outcome  
5 of the following steps."

6 Do you see that?

7 A. Yeah.

8 Q. And then on page 17 of the agreement, it  
9 lists those steps under paren (a) and (b)?

10 A. Yeah, it identifies certain steps.

11 Q. Do you know why this component was added  
12 to the agreement?

13 A. I mean, I don't know the back-and-forth  
14 negotiations. I think that the -- the provision  
15 itself is self-explanatory. It says what it says.

16 Q. This is something 1-800 Contacts  
17 requested?

18 A. I'm not -- I don't know which party  
19 requested it.

20 Q. Is this something that 1-800 Contacts has  
21 ever requested in any other settlement agreement?

22 MR. STONE: Objection. Lacks foundation.  
23 Calls for speculation.

24 THE WITNESS: I haven't seen it in any  
25 other settlement agreement. And this -- this would

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1 contact Bryce Craven with any questions regarding the  
2 implementation of negative keywords. Is that a fair  
3 assessment of your testimony?

4 A. Well, in -- in -- I had several telephone  
5 conversations with Mr. Garriott, and I recall in some  
6 of those when he was asking about how negative  
7 keywords work and -- and questions like that, I said  
8 that his client could contact Bryce Craven who  
9 handles 1-800 Contacts' campaigns if -- if they  
10 wanted some help in understanding what type of  
11 negative keywords -- or how negative keywords work.  
12 So --

13 Q. Okay. In your RX252 e-mail, that's where  
14 you had this term "negative phrase-matched keywords."  
15 Is that right?

16 A. I identified -- I think those are  
17 cut-and-pasted portions from Google's site about  
18 negative phrase-matched keywords and negative  
19 exact-matched keywords and how -- how they work.

20 Q. Okay. So in your e-mail where it says,  
21 "You can create a negative phrase-matched keyword by  
22 surrounding the term with quotation marks," and then  
23 it says, quote, "free trial" underneath --

24 A. Right.

25 Q. -- is that a piece that was cut and pasted

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1 be part of -- oh, okay. It's in Exhibit 2, the  
2 settlement agreement. I haven't seen it in any other  
3 settlement agreement.

4 Q. (By Mr. Chiarello) Is it something you've  
5 ever requested on behalf of 1-800 Contacts, to be  
6 included in any settlement agreement?

7 A. I don't recall requesting that.

8 Q. Okay, you can set that aside.

9 If I could return to the exhibit marked  
10 RX251, which is an e-mail from Bryce Craven to looks  
11 like someone named Randy. And please also look at  
12 RX252, because I believe you were looking at both of  
13 those documents in conjunction with each other.

14 A. Okay.

15 Q. I believe you testified before that the  
16 e-mail exchange between yourself and Mr. Garriott  
17 occurred on January 4th, 2010. Is that correct?

18 A. What?

19 Q. I'm sorry. In --

20 A. Oh, in RX0252?

21 Q. Yes.

22 A. Okay. There is an e-mail exchange on  
23 January 4th, 2010.

24 Q. And I believe your testimony was before,  
25 you suggested that Mr. Garriott tell his client to

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1 in?

2 A. Yeah, I think so. That whole --

3 MR. STONE: Do you mean -- I'm sorry.  
4 Just to be clear: do you mean was "free trial" cut  
5 and pasted into this, or was the whole paragraph cut  
6 and pasted into the e-mail?

7 MR. CHIARELLO: I mean the whole  
8 paragraph, including that sentence, "you can create a  
9 negative phrase-matched."

10 THE WITNESS: I -- I think -- so you see  
11 where it says "of note are the following options,"  
12 and then there's a colon?

13 Q. (By Mr. Chiarello) Yes.

14 A. Everything following that down to the  
15 paragraph that ends, "The user would have to include  
16 those words in that exact order (free trial), in  
17 order for the ad to be blocked using a negative  
18 phrase match," I think that whole section is probably  
19 a cut-and-paste from Google's website help page that  
20 the link is above. I just cut and pasted that from  
21 there into the e-mail, and just to say, you know,  
22 here's what Google says. And then I -- I say, here  
23 are some more examples, and I give them another link.  
24 So all of that is just cut and pasted from Google's  
25 explanation of how those matching things work.

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1 **Q. The sentence at the bottom, just for**  
 2 **clarity's sake, that ends, "The user would" -- the**  
 3 **sentence reads, "The user would have to include those**  
 4 **words in exact order (free trial), in order for the**  
 5 **ad to be blocked using the negative phrase match," is**  
 6 **that a phrase that you wrote, or was that part of the**  
 7 **cut and paste?**

8 A. That's part of the cut and paste.

9 **Q. Okay.**

10 A. That -- that whole -- all the way down to  
 11 the end of that sentence I believe is the cut and  
 12 paste, starting with the bolded Roman numeral II,  
 13 "negative phrase-matched keywords," down to that  
 14 sentence.

15 **Q. And now turning to RX251. Were you copied**  
 16 **on this e-mail exchange?**

17 A. Let me look. I don't -- I don't see  
 18 myself copied on this.

19 **Q. Was any lawyer from 1-800 Contacts copied**  
 20 **on this, to your knowledge?**

21 A. Doesn't -- doesn't look like it. I think  
 22 issues, issues with regard to what the settlement  
 23 agreements meant and what their obligations were  
 24 would come up between lawyers often. And then issues  
 25 of implementing the obligations would sometimes be

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1 handled between, you know, the parties' marketing  
 2 people following instructions from either in-house  
 3 legal counsel or somebody else on -- on what the  
 4 obligations were, and then how to best execute those  
 5 obligations using Google's system. And the lawyers  
 6 weren't the experts on Google's AdWord system. So --

7 **Q. So back earlier today I asked you if there**  
 8 **was any, and I used the term "training," but**  
 9 **instruction provided as to how to implement the**  
 10 **settlement agreement. Would you have provided that**  
 11 **type of thing, type of instruction to 1-800 Contacts**  
 12 **so that they could go implement the settlement**  
 13 **agreement relative to the opposing party?**

14 MR. STONE: Object.

15 I'm sorry. Are you done?

16 MR. CHIARELLO: I -- I didn't mean to say  
 17 "opposing," but I meant to say the other party to the  
 18 settlement agreement.

19 THE WITNESS: Okay.

20 MR. STONE: Objection. Calls for  
 21 speculation. Lacks foundation. Improper as to form.

22 THE WITNESS: Without revealing specific  
 23 communications, I mean, I would -- I did have  
 24 communications with Dave Zeidner about the agreement.  
 25 I know Dave Zeidner oversaw Bryce Craven and the

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1 implementation of -- of the requirements of the  
 2 settlement agreements. And I did have conversations  
 3 with Bryce Craven about the settlement agreements at  
 4 times.

5 I do know that when we would tell somebody  
 6 if you need help understanding how Google works or  
 7 how to use negative keywords, if we told the other  
 8 party you can call Bryce Craven, we would contact  
 9 either David Zeidner or Bryce and let them know that  
 10 we said that and that -- you know, and potentially  
 11 talk about here's the settlement agreement, these are  
 12 the requirements, and potentially talk to them about  
 13 those. So --

14 **Q. (By Mr. Chiarello) Is there any part of**  
 15 **your answer that you were withholding due to**  
 16 **privilege?**

17 A. Well, I'm trying not to. And honestly,  
 18 maybe due to memory, I -- I probably can't get into  
 19 specific conversations of what exactly I'd say, but  
 20 I'm trying not to reveal a specific statement to  
 21 Bryce or a specific contextual conversation with  
 22 Bryce other than the fact that we would sometimes  
 23 contact him, let him know that somebody relating to  
 24 this settlement agreement might contact him. And  
 25 then any details of that I'm trying not to get into

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1 for privilege sake. I don't know if that's okay.

2 **Q. Let me ask it this way, then. What --**  
 3 **what would -- what would you instruct Bryce Craven**  
 4 **and others regarding the general application of the**  
 5 **settlement agreement as it pertained to the other**  
 6 **parties to the settlement agreement?**

7 MR. STONE: Objection. Assumes facts not  
 8 in evidence. Lacks foundation. Calls for  
 9 speculation.

10 THE WITNESS: And I would also say I'm not  
 11 going to respond to that based on privilege.

12 **Q. (By Mr. Chiarello) Okay. At the bottom**  
 13 **of the page there's an e-mail from Bryce Craven to**  
 14 **Randy, and it says, "I think you should be fine with**  
 15 **making the negative keywords exact match (putting**  
 16 **them in brackets like you show below). If I see any**  
 17 **problems in Google, I will let you know and then you**  
 18 **can change the negatives to 'phrase match' or broad**  
 19 **match."**

20 **Do you see that?**

21 A. Yeah.

22 **Q. Why would he suggest putting the negatives**  
 23 **in phrase match or broad match?**

24 MR. STONE: Calls for speculation. Lacks  
 25 foundation.

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1 THE WITNESS: I don't know what Bryce's  
2 conversations were with Randy specifically and what  
3 Randy's objectives were. Like I said, some --  
4 sometimes each party's objectives, if they use an  
5 exact match, then they're using a negative keyword in  
6 compliance with the agreements. But some parties  
7 might -- for purposes of their own preferences in  
8 their AdWords might want the match to be different.  
9 So I don't know what Randy and Bryce discussed.

10 **Q. (By Mr. Chiarello) It says, "If I see any**  
11 **problems in Google." Did Bryce or anyone else at**  
12 **1-800 Contacts ever talk to you about potential,**  
13 **quote, problems with -- in Google in relation to**  
14 **search advertising that might give meaning to why the**  
15 **phrase match or broad match in negative keywords**  
16 **would be more appropriate?**

17 A. Problems with Google. I'm not sure  
18 exactly what he's talking about there. I know that  
19 later on in his e-mail he's talking about adding  
20 negatives at the account level, and he's saying, I'm  
21 not sure you can do that in Google; you've got to do  
22 it at the campaign level.

23 Lensfast was one where in the agreement we  
24 had that footnote that said you can't use that huge,  
25 long phrase as a negative. That's another problem

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1 where they try to implement a negative that may not  
2 be allowable just technically, because it's too long.  
3 Those were some of the issues specifically with  
4 Lensfast they encountered. So --

5 **Q. When you just testified about at the**  
6 **account level, were you referring to the e-mail -- I**  
7 **thought you said earlier, but it's at the top of the**  
8 **page?**

9 A. It's the continuation of -- of Randy's  
10 e-mail to Bryce saying he didn't think that was  
11 possible with Google. Right? No, no -- Bryce's  
12 e-mail to Randy that starts at the bottom of page 1  
13 and goes into page 2 and Bryce was saying --  
14 explaining that.

15 **Q. Okay.**

16 A. I don't know the details of that. I know  
17 that we always specified trying to have the negative  
18 keywords be at the campaign level to make it easier.

19 **Q. Okay. If you could please turn to RX0254,**  
20 **which is an e-mail from Bryce Craven to Park**  
21 **Studebaker, copying you and Dave Zeidner.**

22 **And also I'm going to ask you about CX320,**  
23 **which is the agreement by and between 1-800 Contacts**  
24 **and Lenses for Less.**

25 A. Okay. CX254.

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1 **Q. RX254.**

2 A. RX254, sorry. There it is. Okay. And  
3 what else?

4 **Q. CX320, the settlement agreement with**  
5 **Lenses for Less.**

6 A. Okay.

7 **Q. The RX254 top e-mail says -- it reads --**  
8 **Bryce Craven writes, "Park, looks like you've got**  
9 **your bases covered. As a best practice, and to**  
10 **ensure you don't miss any ad groups, I recommend**  
11 **adding negative keywords at the Campaign Level (see**  
12 **screenshot below). This is safer because you know**  
13 **that the negative keywords are applied across the**  
14 **entire campaign, not just the ad group. Let me know**  
15 **if you come across any other questions." And then**  
16 **you've got the screenshot.**

17 **Do you see that?**

18 A. Yes.

19 **Q. My question is, if you look at page --**  
20 **Exhibit 2 of CX320 --**

21 A. Okay.

22 **Q. And I'm now going back and forth here. In**  
23 **254 there's a bracket, "1-800 get lens," end bracket.**  
24 **Do you know why Bryce Craven is sending that as an**  
25 **example of an exact match keyword, negative keyword**

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1 **if it's not in the settlement agreement?**

2 A. I -- I think the purpose -- if you read  
3 his e-mail, the purpose of this screenshot is to show  
4 Mr. Studebaker how you can implement the negative  
5 keywords at the campaign level, and he just took just  
6 a sample of negative keywords 1-800 is using to show  
7 that. And it shows that 1-800 had some exact match  
8 keywords for 1 800 lens -- or get lens.

9 **Q. 1 800 get lens?**

10 A. And 1 800 lens.com. So those are just  
11 negative keywords 1-800 is using. And he was just  
12 using that as a sample to show this is how you can  
13 implement them at the campaign level.

14 **Q. And the second set of keywords it says,**  
15 **quote, "1 800 get lens," end quote.**

16 A. Right. And that -- that looks like it  
17 would be a phrase match. And this is 1-800's  
18 negative keywords.

19 I don't think those keywords were  
20 specifically related to the Lenses for Less  
21 agreement. They were just -- he was just using the  
22 screenshot to demonstrate how you could apply them at  
23 the campaign level.

24 MR. CHIARELLO: Okay. Can we go off the  
25 record?

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1 MR. STONE: Sure.  
 2 (Recess from 4:55 p.m. to 4:57 p.m.)  
 3 **Q. (By Mr. Chiarello) Mr. Miller, could you**  
 4 **please turn to RX264.**  
 5 A. Okay.  
 6 **Q. Do you recall what terms Mr. Dreitler was**  
 7 **trying to add or modify in the settlement agreement?**  
 8 A. No. No, I don't.  
 9 **Q. And you wrote -- in the second paragraph**  
 10 **down you wrote, "It is intentionally bilateral and**  
 11 **poses the very same obligations, restrictions, and**  
 12 **penalties for breach on both sides." Does that**  
 13 **refresh your recollection as to what you might have**  
 14 **been concerned about?**  
 15 A. Well, I don't know if that has anything  
 16 to do with modifications he made to it. My next  
 17 sentence says, "I don't understand how you can call  
 18 it 'one-sided.'" So he obviously thought it was a  
 19 one-sided agreement. And I was explaining that the  
 20 purpose of this agreement is basically both parties  
 21 are agreeing to respect each other's trademark rights  
 22 and not infringe each other's trademark rights  
 23 equally. And so it's tailored so that we're not --  
 24 in other words, we're not valuing our trademark  
 25 rights above yours. So what we do to avoid

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1 infringing your rights is the same as what we're  
 2 asking you to do to avoid infringing our trademarks.  
 3 **Q. Okay. Let me ask this. Do you plan to be**  
 4 **in the United States in April and May of 2017?**  
 5 A. Yeah.  
 6 MR. STONE: Unless you get a better offer.  
 7 THE WITNESS: Yeah, we'll see. No, I do.  
 8 Yeah.  
 9 MR. CHIARELLO: Then I'll reserve the rest  
 10 of my time.  
 11 MR. STONE: Okay, let's take a short  
 12 break. I just want to grab one document.  
 13 (Recess from 4:59 p.m. to 5:06 p.m.)  
 14 FURTHER EXAMINATION  
 15 BY MR. STONE:  
 16 MR. STONE: Let me ask the reporter to  
 17 mark as RX266 a letter dated March 1, 2010.  
 18 (Exhibit RX266 was marked.)  
 19 **Q. Mr. Miller, we -- earlier you were**  
 20 **questioned about an e-mail that you sent to**  
 21 **Mr. Dreitler. Do you recall that?**  
 22 A. Yes.  
 23 **Q. That was I think RX0264?**  
 24 A. Okay.  
 25 **Q. And do you recall in that RX0264 makes**

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1 **reference to -- in your e-mail you say,**  
 2 **"Mr. Dreitler, I received your letter dated March 1,**  
 3 **2010." Do you recall that?**  
 4 A. Yes.  
 5 **Q. Then take a look at RX0266. Is this the**  
 6 **March 1, 2010 letter from Mr. Dreitler to you?**  
 7 A. Yeah, it appears to be. And that's where  
 8 he mentions it's a one-sided draft and that they want  
 9 to make -- "there are several changes we want to  
 10 make."  
 11 So reading this letter, it doesn't look  
 12 like he actually presented any -- any changes. He  
 13 just said, we want to make changes, and I was saying  
 14 in response in my e-mail that I think we already  
 15 reached agreement on the terms of the settlement  
 16 agreement. So maybe he didn't propose any redline  
 17 changes, just requested that he wanted to.  
 18 **Q. Do you have any recollection of him ever**  
 19 **proposing any changes other than giving you the list**  
 20 **of trademarks that he wanted included?**  
 21 A. No.  
 22 **Q. Okay. Let me ask you to pull out CX141**  
 23 **and CX0314.**  
 24 A. Okay.  
 25 **Q. To your knowledge, was the injunction that**

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1 **is attached to CX0314 at pages 10 and 11 and 12**  
 2 **entered by the Court?**  
 3 A. I believe it was.  
 4 MR. CHIARELLO: Objection. Lack of  
 5 foundation. Calls for speculation.  
 6 THE WITNESS: My -- my understanding is  
 7 this settlement agreement was executed by the  
 8 parties, the -- the May -- wait. What's the date  
 9 here? The May 8th, 2009 settlement agreement with  
 10 Vision Direct and 1-800 was executed by the parties,  
 11 and pursuant to the settlement agreement the parties  
 12 stipulated to the entry of that injunction. So I  
 13 assume that the Court eventually entered that  
 14 injunction pursuant to the settlement agreement.  
 15 **Q. (By Mr. Stone) To your knowledge, did any**  
 16 **lawyer for Vision Direct, either Mr. Sher or any**  
 17 **other lawyer, ever say to the judge, we think**  
 18 **entering this injunction might violate section 1 of**  
 19 **the Sherman Act?**  
 20 MR. CHIARELLO: Objection. Calls for  
 21 speculation. Lack of foundation.  
 22 THE WITNESS: Not that I'm aware of.  
 23 MR. CHIARELLO: He testified he wasn't  
 24 part of the agreements.  
 25 THE WITNESS: I'm not aware of anybody

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1 ever representing that to any courts.  
 2 **Q. (By Mr. Stone) And you were asked earlier**  
 3 **about the language in the Exhibit 2 to the agreement.**  
 4 **Do you recall that where it defined the term**  
 5 **"antitrust opinion"?**  
 6 A. Right.  
 7 **Q. And then you were asked about -- on page**  
 8 **CX0314-16 carrying over to 17, you were asked about**  
 9 **what happens in the event there is an antitrust**  
 10 **opinion. Do you recall that?**  
 11 A. Yes.  
 12 **Q. To your knowledge, has anyone from Vision**  
 13 **Direct ever claimed that there exists an antitrust**  
 14 **opinion as that term is defined in Exhibit CX0314?**  
 15 A. No. And I've never been made aware of  
 16 anything that would qualify as an antitrust opinion  
 17 pursuant to that definition.  
 18 **Q. Okay. And if you note -- on the first**  
 19 **page of Exhibit CX0314, do you see where it says that**  
 20 **the settlement sum being paid will be \$475,000?**  
 21 A. Yes.  
 22 **Q. And do you see that that's described as**  
 23 **reflecting a partial reimbursement of 1-800 Contacts'**  
 24 **attorneys fees?**  
 25 A. I do.

1 REPORTER'S CERTIFICATE  
 2 STATE OF UTAH )  
 ) ss.  
 3 COUNTY OF SALT LAKE )  
 4  
 I, Vicky McDaniel, Registered Professional  
 5 Reporter and Notary Public in and for the State of  
 Utah, do hereby certify:  
 6  
 That prior to being examined, the witness,  
 7 MARK MILLER, was by me duly sworn to tell the truth,  
 the whole truth, and nothing but the truth;  
 8  
 That said examination was taken down by me  
 9 in stenotype on February 8, 2017, at the place herein  
 named and was thereafter transcribed, and that a true  
 10 and correct transcription of said testimony is set  
 forth in the preceding pages;  
 11  
 That a copy for the witness to read and  
 12 sign be sent directly to the witness at his law firm,  
 Holland & Hart, 222 S. Main Street #2200, Salt Lake  
 13 City, Utah 84101.  
 I further certify that I am not of kin or  
 14 otherwise associated with any of the parties to said  
 cause of action and that I am not interested in the  
 15 outcome thereof.  
 16  
 WITNESS MY HAND this 14th day of February,  
 17 2017.  
 18  
 19  
 20  
 21  
 22 Vicky McDaniel, CSR, RMR  
 Notary Public  
 Residing in Salt Lake County  
 23  
 24  
 25

1 MR. STONE: Okay. I have no further  
 2 questions.  
 3 MR. CHIARELLO: I have no questions.  
 4 (The deposition concluded at 5:10 p.m.)  
 5 \* \* \*  
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1 Case: 1-800 Contacts  
 File No.: 141-0200  
 Reporter: Vicky McDaniel  
 Date taken: February 8, 2017  
 2  
 3  
 4 WITNESS CERTIFICATE  
 5 I, MARK MILLER, HEREBY DECLARE:  
 6 That I am the witness in the foregoing  
 transcript; that I have read the transcript and know  
 7 the contents thereof; that with these corrections I  
 have noted, this transcript truly and accurately  
 8 reflects my testimony.  
 9 PAGE/LINE CHANGE/CORRECTION REASON  
 10 \_\_\_\_\_  
 11 \_\_\_\_\_  
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 17 \_\_\_\_\_  
 18 \_\_\_\_\_  
 19 \_\_\_\_\_  
 20 \_\_\_\_\_  
 21 I, MARK MILLER, HEREBY DECLARE UNDER THE  
 PENALTIES OF PERJURY OF THE LAWS OF THE UNITED STATES  
 22 OF AMERICA AND THE LAWS OF THE STATE OF  
 THAT THE FOREGOING IS TRUE AND CORRECT.  
 23  
 24 DATE MARK MILLER  
 25



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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

NON-PUBLIC

Docket No. 9372

AMENDED RESPONSES OF RESPONDENT 1-800 CONTACTS, INC. TO  
COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES

Pursuant to Rule 3.35 of the Federal Trade Commission's Rules of Practice, Respondent 1-800 Contacts, Inc. ("1-800 Contacts") hereby provides amended responses to Complaint Counsel's First Set of Interrogatories ("First Set of Interrogatories"). The full text of each Interrogatory is set out below, followed by 1-800 Contacts' respective specific objections and responses. 1-800 Contacts has endeavored to offer a good faith response to the First Set of Interrogatories, but reserves the right to supplement its responses after the close of discovery, especially insofar as Complaint Counsel and various third parties may produce additional documents and information before the close of discovery, the review of which may alter the responses herein. Further, 1-800 Contacts' provision of a response to any Interrogatory shall not constitute a waiver of any applicable objection, privilege, or other right.

**GENERAL OBJECTIONS**

The following General Objections, except as otherwise indicated, apply to each Interrogatory in the First Set of Interrogatories, are incorporated by reference into each response, and are in addition to specific objections as applicable. The assertion of the same, similar, or

additional objections, or partial answers in response to an individual Interrogatory does not waive any of 1-800 Contacts' General Objections as to the other Interrogatories.

1. 1-800 Contacts objects to Complaint Counsel's definition of the terms "1-800 Contacts," "1-800," "Company," "Respondent" or "You" as overly broad, lacking in the reasonable specificity required by law, vague, and ambiguous, and seeking to impose obligations on 1-800 Contacts in excess of the obligations imposed on 1-800 Contacts by the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.35. For purposes of responding to these Interrogatories, 1-800 Contacts interprets these terms to mean Respondent 1-800 Contacts, Inc., its directors, officers, and employees, and its subsidiaries, and their directors, officers, and employees.

2. 1-800 Contacts objects to Complaint Counsel's definition of the terms "Settlement Agreement" and "Settlement Agreements" on the ground that the definition is overbroad, vague, and ambiguous to the extent it includes the phrases "informal," "allegation," and/or "or other matter." 1-800 Contacts interprets these terms as if such phrases were not part of the definition. Thus, 1-800 Contacts interprets the terms "Settlement Agreement" or "Settlement Agreements" to mean any agreement, including oral and written agreements, entered into by or between 1-800 Contacts and a Competitor to resolve any dispute or litigation concerning use of 1-800's trademarks as Keywords.

3. 1-800 Contacts objects to Complaint Counsel's definition of the term "Settlement Partner" on the same ground set forth in the preceding paragraph. 1-800 Contacts further objects on the ground that "Lensworld.com, Inc." is not an entity identified in the Complaint in this action as an entity with which 1-800 Contacts is alleged to have entered into a Settlement Agreement and to that extent the definition of "Settlement Partner" is overbroad, vague, and

ambiguous. 1-800 Contacts will exclude “Lensworld.com, Inc.” from the definition of “Settlement Partner” in responding to the First Set of Interrogatories. 1-800 Contacts further objects to the term “Settlement Partner” on the ground that it is argumentative and misleading. The entities identified by Complaint Counsel in paragraph 20 of its “Definitions” were litigation adversaries and, with the exception of Lensworld.com, Inc., were parties to trademark settlement agreements with 1-800 Contacts. Thus, they are more accurately described as “settlement parties,” rather than “settlement partners.” In responding to the First Set of Interrogatories, 1-800 Contacts will, for these reasons and so as not to perpetuate the use of an inaccurate, misleading, and argumentative term, use the terms “Settlement Party” and “Settlement Parties” to refer to the entities identified in Paragraph 20 of the Definitions.

4. 1-800 Contacts objects to the Instructions to the extent they seek to impose obligations on 1-800 Contacts that go beyond the obligations set forth in the Federal Trade Commission’s Rules of Practice, 16 C.F.R. §§ 3.31 and 3.35.

5. 1-800 Contacts objects to Paragraphs 3, 4, 6, and 7 of the Instructions on the ground that they seek to impose obligations on 1-800 Contacts in excess of the obligations imposed on 1-800 Contacts by the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.35.

6. 1-800 Contacts objects to Paragraphs 10, 11, and 13 of the Instructions on the ground that interpreting certain of the Requests as “instructed” renders the Requests vague, ambiguous, and largely unintelligible.

7. 1-800 Contacts objects to the First Set of Interrogatories as premature to the extent the Interrogatories seek information that relates to expert testimony prior to the dates prescribed by the September 7, 2016 Scheduling Order.

8. 1-800 Contacts objects to the First Set of Interrogatories to the extent that the Interrogatories, including all distinct subparts, exceed the limit of 25 interrogatories allowed in Paragraph 11 of the September 7, 2016 Scheduling Order.

9. To the extent 1-800 Contacts responds to specific Interrogatories to which it has objected, 1-800 Contacts reserves the right to maintain such objections with respect to any additional information and such objections are not waived by the furnishing of such information.

10. 1-800 Contacts does not, by any response to any Interrogatory, admit to the validity of any legal or factual contention asserted in the text of any Interrogatory except as expressly set forth.

11. 1-800 Contacts objects to the First Set of Interrogatories to the extent that they call for the disclosure of material protected by the attorney-client privilege and/or the work product protection or work product doctrine.

### **SPECIFIC RESPONSES AND OBJECTIONS**

Subject to the foregoing General Objections, which are incorporated by reference in each of the specific responses set forth below, 1-800 Contacts responds to Complaint Counsel's First Set of Interrogatories as follows:

#### **INTERROGATORY NO. 1:**

Identify each benefit that 1-800 Contacts received as a result of a Settlement Agreement, and identify each Settlement Agreement that resulted in 1-800 Contacts receiving such a benefit.

#### **RESPONSE TO INTERROGATORY NO. 1:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is vague and ambiguous and



lacking in the reasonable particularity required by law, including because it does not define the term “benefit.” 1-800 Contacts also objects to this Interrogatory as premature because (a) it calls for analysis of information such as search analytic data that is exclusively within the custody or control of third parties, such as Search Engine providers and Settlement Parties, (b) it calls for and will otherwise require expert analysis, and (c) disclosure of any such expert analysis will be provided in accordance with the dates and other provisions prescribed by the September 7, 2016 Scheduling Order. Subject to and without waiving its objections, 1-800 Contacts responds that it has not conducted a study or analysis the purpose of which was to determine each “benefit” that it actually received from each Settlement Agreement. Thus, its response to this Interrogatory is necessarily general in scope, limited in depth, and not comprehensive.

Subject to and without waiving its objections, each Settlement Agreement benefited 1-800 Contacts in that: it protected 1-800 Contacts’ trademarks from infringement and dilution; it protected 1-800 Contacts from a diminution or loss of its trademark rights as a result of attempts to render usage of its trademarks as “generic”; it prevented consumer confusion and deception; it reduced the costs and/or time for consumers to navigate to 1-800 Contacts’ website; it prevented other Persons from free-riding on 1-800 Contacts’ significant investments in promoting and advertising its trademarks and its goods and services, and in otherwise communicating to consumers that 1-800 Contacts’ trademarks serve as indicators of quality products and customer service; it protected 1-800 Contacts from being damaged as a result of deception, false advertising or unfair competition by other Persons; and it prevented other Persons from being unjustly enriched at 1-800 Contacts’ expense.

Each Settlement Agreement further benefited 1-800 Contacts in that: it resolved litigation; vindicated 1-800 Contacts’ legal rights; established clear, enforceable, and manageable

terms that the parties to each Settlement Agreement would follow in a relatively new and constantly changing advertising environment and medium; avoided the time and costs of litigation (including the litigation costs that 1-800 Contacts otherwise would have incurred had it been required to proceed through trial and appeals in order to obtain the relief provided for by each Settlement Agreement); and avoided the time and costs of further complicating future marketing decisions.

Each Settlement Agreement further benefited 1-800 Contacts in that it enabled 1-800 Contacts to invest additional funds in expanding its business, generating additional goodwill, and providing better service and lower prices to consumers, which funds otherwise might have been spent on further litigation to vindicate its legal rights in its trademarks, or administering a complex settlement agreement that was not clear, enforceable, and manageable. Each Settlement Agreement further benefited 1-800 Contacts in that it reduced confusion, frustration, dissatisfaction, and other negative reactions that some consumers would otherwise have experienced by entering as a search term in a Search Engine a trademarked term of 1-800 Contacts and being distracted, confused, misled, or diverted by paid advertisements of other Persons. Each Settlement Agreement further benefited 1-800 Contacts in that it enabled consumers seeking to navigate to 1-800 Contacts' website by entering a search term that was a trademark of 1-800 Contacts or substantially similar to such a trademark to more easily and quickly find and navigate to that website, without being distracted, confused, delayed, diverted, or frustrated, leading to increased consumer satisfaction and welfare, and increasing the likelihood that consumers would be able to purchase the contact lenses that they sought to purchase from 1-800 Contacts and increasing the likelihood of sales, and particularly repeat sales, to such consumer as a result.

1-800 Contacts expects that each Settlement Agreement provided some or all of these “benefits” to some and varying extents, but it does not at this time have data or information sufficient to enable it to make a specific quantification of benefits that it realized from each Settlement Agreement.

If Complaint Counsel’s methodology for counting subparts of interrogatories is ultimately adopted or endorsed by the Court, then this interrogatory consists of at least two distinct subparts.

**INTERROGATORY NO. 2:**

Identify each Settlement Partner which, prior to the execution of the relevant Settlement Agreement, communicated to 1-800 Contacts that the Settlement Partner did not use as a Keyword any term on which 1-800 Contacts owned a trademark.

**RESPONSE TO INTERROGATORY NO. 2:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is overbroad. Subject to and without waiving its objections, 1-800 Contacts responds that the first of the Settlement Agreements was entered into in 2004, and thus a request for information regarding communications prior to that date seeks information that is more than a decade old. It is unreasonable to expect individuals to recall events from that long ago. Furthermore, many of the persons who might have then worked at 1-800 Contacts and had such communications, if any such communications occurred, are no longer employed there. Thus, to the extent Complaint Counsel is seeking information about oral communications that have not been memorialized in written form, the request is unduly burdensome and overbroad. To the extent that Complaint Counsel seek information about oral communications that were memorialized in Documents or

written communications that were in the form of Documents, for instance emails or letters, that were sent to 1-800 Contacts, those Documents, to the extent they are in the possession, custody and control of 1-800 Contacts and can be located through a reasonable search, have been or will be included in the Documents that 1-800 Contacts has produced and is producing in connection with this matter and the investigation that proceeded it. Subject to and without waiving its objections, and recognizing that discovery and investigation are ongoing, 1-800 Contacts responds that it is not aware of any oral communication by which a Settlement Party, prior to the execution of the relevant Settlement Agreement, communicated to 1-800 Contacts that the Settlement Party did not use as a Keyword any term on which 1-800 Contacts owned a trademark. In this regard, Respondent notes that, prior to the filing of the Complaint in this matter, counsel for the Federal Trade Commission conducted lengthy depositions or Investigational Hearings of nine persons who are current or former employees of 1-800 Contacts. Those transcripts are equally available to Complaint Counsel as they are to counsel for 1-800 Contacts and it is possible that in those transcripts some information responsive to this Interrogatory may have been provided. However, because the burden of deriving or ascertaining information responsive to this Interrogatory from such transcripts is the same, or perhaps even less for Complaint Counsel than for Respondent and its counsel, Respondent has not undertaken to review those transcripts for the purpose of ascertaining whether any information responsive to this Interrogatory is contained therein.

With regard to any such written communications, that is, written communications by which a Settlement Party, prior to the execution of the relevant Settlement Agreement, communicated to 1-800 Contacts that the Settlement Party did not use as a Keyword any term on which 1-800 Contacts owned a trademark, 1-800 Contacts is aware of one such communication

made on May 21, 2010, in the form of an email from Cary Pumphrey at Walgreen Co. (“Walgreens”) to Dave Zeidner at 1-800 Contacts, 1-800F\_00046715 (CONFIDENTIAL). In addition, although the communications were not made directly to 1-800 Contacts, 1-800 Contacts believes that Memorial Eye, P.A., in connection with litigation between it and 1-800 Contacts, communicated generally that it did not use as a Keyword any term on which 1-800 Contacts owned a trademark. In each instance just described, the fact that such communication was made does not mean that the statement communicated was true.

In addition to Walgreens and Memorial Eye, P.A., and recognizing that discovery and investigation are ongoing, it is possible that there were other such Settlement Parties who had responsive communications, although no such Settlement Parties are currently known to Respondent. If any such communications were memorialized in writing, and if those writings were maintained by Respondent and located in the course of 1-800 Contacts’ efforts to compile documents requested by the FTC in the course of its investigation and by Complaint Counsel in the course of discovery in this matter, the identity of each such Settlement Party should be ascertainable from an examination or inspection of the Documents that have been or will be produced by 1-800 Contacts that memorialize or constitute such communications. Such Documents, which Respondent expects would be in the form of an email or letter from such Settlement Party to an employee of 1-800 Contacts, are equally available to Complaint Counsel and the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews (including as memorialized in notes and/or interview memoranda) with, and Investigational Hearings of, all or some of the Settlement Parties and current and former employees of Respondent. On this basis and for these

reasons, 1-800 Contacts additionally responds by referring Complaint Counsel to these Documents.

*[1-800 Contacts further responds, by way of example, that the data produced by Google to the FTC in this matter shows that sponsored links for Memorial Eye appeared over 2 million times during the course of just one year, 2012, in response to search queries on Google that contained or constituted 1-800 Contacts' trademarks. See GOOG-LENSE-00000861\_HIGHLY CONFIDENTIAL – FOIA CONFIDENTIAL TREATMENT REQUESTED.xlsx.]*

**INTERROGATORY NO. 3:**

Identify each Person, other than 1-800 Contacts or an Affiliate of 1-800 Contacts, that used as a Keyword a term on which 1-800 Contacts owned a trademark.

**RESPONSE TO INTERROGATORY NO. 3:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is overbroad and seeks information that is not in the possession of 1-800 Contacts. Subject to and without waiving its objections, 1-800 Contacts responds that discovery and investigation are ongoing and that it is not aware of the identity of all Persons who have used as a Keyword a term on which 1-800 Contacts owned a trademark. 1-800 Contacts further responds that, based on the information currently available to it, among the Persons who have used as a Keyword a term on which 1-800 Contacts owned a trademark are at least some of the Settlement Parties and/or their affiliates, Lens.com and/or some of its affiliates, Walmart and/or some of its affiliates, Luxottica Group S.p.A and/or some of its affiliates, various manufacturers of contact lenses, and numerous other Persons.

In addition, all of the Settlement Parties and/or their affiliates, Lens.com and/or some of its affiliates, Walmart and/or some of its affiliates, Luxottica Group S.p.A. and/or some of its affiliates, various manufacturers of contact lenses, and numerous other Persons caused paid advertisements and/or sponsored links of the Settlement Parties, Lens.com, Walmart, Luxottica Group S.p.A., various manufacturers of contact lenses, and numerous other Persons to appear in response to or be triggered by search queries for 1-800 Contacts' trademarks from time to time and in varying degrees of frequency, as shown by Documents that have been or will be produced by 1-800 Contacts, such as weekly or other periodic trademark monitoring reports such as those previously identified by Complaint Counsel as CX238, CX243, CX253, and CX256.. Such Documents are or will be equally available to Complaint Counsel, and the burden of deriving or ascertaining the answer is substantially the same, if not less, for Complaint Counsel as it would be for 1-800 Contacts.

In addition, as discovery and investigation continue, it is possible that the identities of additional such Persons will be obtained, including from Search Engine providers as a result of discovery in this case initiated by Complaint Counsel and/or Respondent. Such information is or will be equally available to Complaint Counsel, and the burden of deriving or ascertaining the answer from any such additional discovery will be substantially the same for Complaint Counsel as it would be for 1-800 Contacts and it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information.

*[In addition, and by way of example, 1-800 Contacts further responds that the data already produced by Google to the FTC in this matter shows, among other things, that the*

*following entities directly used 1-800 Contacts' trademarks or variants thereof as Keywords at some time during the period February 2002 to August 2016: Empire Vision*

*Center/Lens123/Visionworks [GOOG-LENSE-00000006\_HIGHLY\_CONFIDENTIAL.xlsx];*

*Lenses for Less [GOOG-LENSE-00000019\_HIGHLY\_CONFIDENTIAL.xlsx]; Lensfast LLC*

*[GOOG-LENSE-00000024\_HIGHLY\_CONFIDENTIAL.xlsx]; Replacemycontacts.com*

*[GOOG-LENSE-00000046\_HIGHLY\_CONFIDENTIAL.xlsx]; Coastal Contacts [GOOG-*

*LENSE-00000050\_HIGHLY\_CONFIDENTIAL.xlsx]; AC Lens [GOOG-LENSE-*

*00000055\_HIGHLY\_CONFIDENTIAL.xlsx]; and Walgreens/Vision Direct Inc. [GOOG-*

*LENSE-00000060\_HIGHLY\_CONFIDENTIAL.xlsx]. Thousands more Persons also have*

*recently been identified in Documents produced by Google to the FTC and provided by*

*Complaint Counsel to Respondent's counsel. See, e.g., Letter dated October 10, 2016, from Sara*

*Ciarelli Walsh of Google to Stephanie Langley and Charlotte Slaiman of the Federal Trade*

*Commission and the attachments and enclosures thereto, including GOOG-LENSE-00001036-*

*1109 [HIGHLY\_CONFIDENTIAL] In addition, the data produced by Walmart to the FTC*

*shows that Walmart used 1-800 Contacts' trademarks as Keywords. [WM2016-022541C000003*

*- 34 Native.xlsx (CONFIDENTIAL); WM2016-022541C000040 - 69 Native.xlsx*

*(CONFIDENTIAL).]*

**INTERROGATORY NO. 4:**

For each Person identified in response to Interrogatory 3, identify the period during which the Person used as a Keyword a term on which 1-800 Contacts owned a trademark.

**RESPONSE TO INTERROGATORY NO. 4:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is overbroad and seeks



information that is not in the possession of 1-800 Contacts. Subject to and without waiving its objections, 1-800 Contacts incorporates hereat by reference its Response to Interrogatory No. 3 and further responds that it is not aware of the identity of all Persons who have used as a Keyword a term on which 1-800 Contacts owned a trademark or the time periods during which they have done so, although discovery and investigation are ongoing. 1-800 Contacts further responds that it does not currently have information that would allow it to identify the exact “period” during which these other Persons used 1-800 Contacts’ trademarks as Keywords, except as may have been provided through discovery in litigation from those other Persons and that has been or will be produced in this proceeding. 1-800 Contacts further responds that the time period during which the Persons it has identified in response to Interrogatory No. 3 engaged in the conduct therein described is at least at times during the period from February 2002 until August 2016.

Subject to the responses in the preceding paragraph, 1-800 Contacts responds that at least some of the Settlement Parties and/or their affiliates used 1-800 Contacts’ trademarks as Keywords prior to the date on which each of the Settlement Parties entered into their respective Settlement Agreement or, in the case of Lensworld.com, Inc., the date on which a default judgment was entered, and may have done so thereafter. The district court in *1-800 Contacts, Inc. v. Lens.com*, 755 F. Supp. 2d 1151 (D. Utah 2010), found, based on the evidence presented, that Lens.com and/or some of its affiliates used 1-800 Contacts’ trademarks as Keywords during the course of 2007. Lens.com and/or some of its affiliates may have done so at other times as well.

In addition, and subject to the responses in the preceding paragraph, all of the Settlement Parties and/or their affiliates, Lens.com and/or some of its affiliates, Walmart and/or

some of its affiliates, Luxottica Group S.p.A. and/or some of its affiliates, various manufacturers of contact lenses, and numerous other Persons caused paid advertisements and/or sponsored links of the Settlement Parties, Lens.com, Walmart, Luxottica Group S.p.A., various manufacturers of contact lenses, and numerous other Persons to appear in response to or be triggered by search queries for 1-800 Contacts' trademarks at least at times during the time period from February 2002 to August 2016 and in varying degrees of frequency.

In addition to the examples given above and in response to Interrogatory No. 3, and subject to the responses in the preceding paragraph, *[Walmart and/or some of its affiliates have used 1-800 Contacts' trademarks as Keywords at certain points during the course of 2015 and 2016, and may have done so at other times as well. See, e.g., WM2016-022541C000003 to 34 Native.xlsx (CONFIDENTIAL).]*

1-800 Contacts further states that Documents and other discovery currently being sought by both Complaint Counsel and 1-800 Contacts from some of the Settlement Parties as well as certain Search Engine providers and other Persons may provide further information regarding the time period or periods during which other Persons used 1-800 Contacts' trademarks as Keywords. The burden of deriving or ascertaining the answer to this Interrogatory from the Documents or other discovery provided or to be provided is substantially the same for Complaint Counsel as it would be for 1-800 Contacts and it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information.

**INTERROGATORY NO. 5:**

Identify each Person other than an Affiliate which, at the request of 1-800 Contacts, informed 1-800 Contacts that the Person stopped using as a Keyword a term on which 1-800 Contacts owned a trademark.

**RESPONSE TO INTERROGATORY NO. 5:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is vague and ambiguous, including because it cannot be ascertained whether Complaint Counsel are asking whether the Person stopped at the request of 1-800 Contacts or informed 1-800 Contacts at the request of 1-800 Contacts. Given the placement of the phrase “at the request of 1-800 Contacts” immediately prior to “informed 1-800 Contacts” in the Interrogatory, 1-800 Contacts interprets this Interrogatory to ask for the Identity of each Person who was requested by 1-800 Contacts to inform 1-800 Contacts when that Person stopped using as a Keyword a term on which 1-800 Contacts owned a trademark. Subject to and without waiving its objections, and as so interpreted and construed, 1-800 Contacts responds that the Settlement Agreements might be interpreted to constitute such a request to “inform” 1-800 Contacts and, if so construed, then each of the Settlement Parties that entered into a Settlement Agreement that should be so construed or interpreted did so inform 1-800 Contacts, although some claimed not to have used as a Keyword a term on which 1-800 Contacts owned a trademark, and thus in those cases the Settlement Agreement might be interpreted to mean not that they had informed 1-800 Contacts that they had “stopped,” but rather that they would not do so in the future.

1-800 Contacts further responds that the answer to this Interrogatory, to the extent the responsive information is reasonably ascertainable from information that was in the

possession, custody or control of 1-800 Contacts prior to the commencement of discovery in this action or the preceding investigation, can be derived or ascertained from an examination or inspection of the Documents that have been or will be produced by 1-800 Contacts that memorialize or constitute such communications, that such Documents are or will be equally available to Complaint Counsel, and that the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds further by referring Complaint Counsel to these Documents.

In addition, discovery and investigation are ongoing and further responsive information may be obtained by Respondent's counsel and by Complaint Counsel during the course of such discovery and investigation. However, it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information.

1-800 Contacts further responds by referring to previously-produced Documents reflecting 1-800 Contacts' communications with contact lens manufacturers relating to their use of 1-800 Contacts' trademarks as Keywords for Internet search advertising. *See, e.g.*, Email from J. Park to L. Schmidt, "Re: Other Organizations' Ads on our Trademarks" (Jul. 30, 2011) [1-800F\_00033564-67 (CONFIDENTIAL)] (discussions with Johnson & Johnson and Ciba/Alcon); Email from L. Schmidt to B. Craven, "RE: Other Organizations' Ads on Our Trademarks" (June 21, 2011) [1-800F-00030492-94 (CONFIDENTIAL)] (same); Email from B.

Dansie to A. Guymon, "FW: J&J Search Activity" (Jun. 16, 2006) [1-800F\_00025067 (CONFIDENTIAL)] (noting Johnson & Johnson's implementation of negative keywords).

**INTERROGATORY NO. 6:**

Identify each Person other than an Affiliate which, at the request of 1-800 Contacts, informed 1-800 Contacts that the Person implemented as a Negative Keyword a term on which 1-800 Contacts owned a trademark.

**RESPONSE TO INTERROGATORY NO. 6:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is vague and ambiguous, including because it cannot be ascertained whether Complaint Counsel are asking whether the Person implemented as a Negative Keyword a term on which 1-800 Contacts owned a trademark at the request of 1-800 Contacts or informed 1-800 Contacts at the request of 1-800 Contacts. Given the placement of the phrase "at the request of 1-800 Contacts" immediately prior to "informed 1-800 Contacts" in the Interrogatory, 1-800 Contacts interprets this Interrogatory to ask for the Identity of each Person who was requested by 1-800 Contacts to inform 1-800 Contacts when that Person implemented as a Negative Keyword a term on which 1-800 Contacts owned a trademark. Subject to and without waiving its objections, and as so interpreted and construed, 1-800 Contacts responds that execution of a Settlement Agreements might be interpreted to constitute a communication in response to such a request to the effect that the Settlement Party implemented as a Negative Keyword a term on which 1-800 Contacts owned a trademark. Subject to and without waiving its objections, and as so interpreted and construed, 1-800 Contacts further responds that the answer to this Interrogatory can be derived or ascertained from an examination or inspection of the Documents that have been or will be produced by 1-

800 Contacts that memorialize or constitute such communications, that such Documents are or will be equally available to Complaint Counsel, and that the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds by referring Complaint Counsel to the Documents that constitute such communications to 1-800 Contacts, an example of which is 1-800F\_00078087 (CONFIDENTIAL). Other Documents, including Documents produced by Persons other than 1-800 Contacts, also evidence that various Persons were implementing Negative Keywords and notifying others that they were doing so, including, for example, 1-800F\_00080758 (CONFIDENTIAL), 1-800F\_00020910 (CONFIDENTIAL), 1-800F\_00020913 (CONFIDENTIAL), 1-800F\_00020968 (CONFIDENTIAL), 1-800F\_00078087 (CONFIDENTIAL), *[FTC-PROD-0006089 (CONFIDENTIAL)]*, a Letter from Neal L. Slifkin of Harris Beach PLLC to Mark A. Miller of Holland & Hart LLP (Apr. 29, 2010) [1-800F\_00020341-365 (CONFIDENTIAL)], Email of Pete Wilson of Walgreen to Mark Miller of Holland & Hart, (Apr 12, 2012) [1-800F\_00024263 (CONFIDENTIAL)], Email exchange between Randy Weigner of LensFast and Bryce Craven of 1-800 Contacts, (Jan 7, 2010) [1-800F\_00045162 (CONFIDENTIAL)], *[Email of Andrea Kaduk of Walgreen to Rick Galan of 1-800 Contacts (July 12, 2013) [WAG-00000104 (CONFIDENTIAL)]]*, Email exchange of Alesia Pinney of Drugstore.com and Joe Zeidner of 1-800 Contacts, (Oct 21, 2004) [1-800F\_00037005 (CONFIDENTIAL)], , and *[Email from Glen Hamilton of Walgreens to Rick Galan of 1-800 Contacts (July 24, 2013) [WAG-00000097 (CONFIDENTIAL)]]*. 1-800 Contacts further responds by referring to previously-produced Documents reflecting 1-800 Contacts' communications with contact lens manufacturers relating to their implementation of negative

keywords. *See, e.g.*, Email from B. Dansie to A. Guymon, “FW: J&J Search Activity” (Jun. 16, 2006) [1-800F\_00025067 (CONFIDENTIAL)] (noting Johnson & Johnson’s implementation of negative keywords).

In addition, discovery and investigation are ongoing and further responsive information may be obtained by Respondent’s counsel and by Complaint Counsel during the course of such discovery and investigation. However, it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information.

**INTERROGATORY NO. 7:**

Identify each Negative Keyword 1-800 Contacts has used on any search engine, and for each Negative Keyword identify: (a) the search engine 1-800 Contacts instructed to implement each Negative Keyword, and (b) the first date on which 1-800 Contacts instructed each such search engine to implement each Negative Keyword.

**RESPONSE TO INTERROGATORY NO. 7:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant or admissible evidence. For example, this Interrogatory is not limited to Keywords that are, or are substantially similar to, trademarks of other Persons. Subject to and without waiving its objections, 1-800 Contacts agrees to provide Documents sufficient to show the requested information, to the extent such Documents are in its possession, custody or control, and reasonably available.

**INTERROGATORY NO. 8:**

Identify each advertisement that 1-800 Contacts has identified to a Settlement Partner as an advertisement that infringes 1-800 Contacts' trademark rights, and for each advertisement: (a) describe the process used by 1-800 Contacts to determine that the advertisement infringed 1-800 Contacts' trademark rights; and (b) identify the factual basis for 1-800 Contacts' conclusion that the advertisement infringed 1-800 Contacts' trademark rights.

**RESPONSE TO INTERROGATORY NO. 8:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts objects to this Interrogatory on the ground that it is overbroad and seeks information protected from the discovery by the attorney-client privilege and/or the work product protection or work product doctrine. 1-800 Contacts further objects to this Interrogatory to the extent that it calls for 1-800 Contacts to recall and retrace the results of Search Engine searches that were seen and considered but not recorded contemporaneously many years ago, and to the extent records of such searches and advertisements still exist, they are or may be within the custody or control of third parties, such as Search Engine providers and the Settlement Parties.

Subject to and without waiving its objections, 1-800 Contacts responds that information responsive to this Interrogatory, to the extent that the information is not privileged, can be derived or ascertained from an examination or inspection of the Documents that have been or will be produced by 1-800 Contacts that constitute, mention, describe, discuss, or identify an advertisement that 1-800 Contacts has identified to a Settlement Party as an advertisement that infringes 1-800 Contacts' trademark rights, including any such advertisements attached to correspondence or emails between 1-800 Contacts and one or more Settlement Parties or to pleadings filed in connection with any litigation between 1-800 Contacts and one or



more Settlement Parties. Such Documents are or will be equally available to Complaint Counsel, and the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties and current and former employees of Respondent, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds by referring Complaint Counsel to these Documents.

Except as described in such Documents and in Investigational Hearings of 1-800 Contacts' current and former employees, the process and thought processes used by 1-800 Contacts and its attorneys to determine that any particular advertisement infringed 1-800 Contacts' trademark rights and the factual basis for 1-800 Contacts' conclusion or determination that the advertisement infringed 1-800 Contacts' trademark rights are protected from discovery by the attorney-client privilege and/or the work product protection or work product doctrine and, on that basis, will not be disclosed in response to this Interrogatory.

If Complaint Counsel's methodology for counting subparts of interrogatories is ultimately adopted or endorsed by the Court, then this interrogatory consists of at least three distinct subparts.

**INTERROGATORY NO. 9:**

Identify each advertisement of a Settlement Partner from 2002 to the present that 1-800 Contacts contends was likely to cause Consumer Confusion.

**RESPONSE TO INTERROGATORY NO. 9:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts further objects to Complaint Counsel's definition of Consumer Confusion as not fully describing the conduct that is addressed in 15 U.S.C. § 1125. However,

for purposes of responding to this Interrogatory, 1-800 Contacts will use Complaint Counsel's definition as it understands it, reserving its position that it does not agree with the definition. 1-800 Contacts incorporates hereat by reference as though fully set forth its Response to Interrogatory No. 8. 1-800 Contacts further objects to this Interrogatory to the extent that it calls for 1-800 Contacts to recall and retrace the results of Search Engine searches that were seen and considered but not recorded contemporaneously many years ago, and to the extent records of such searches and advertisements still exist, they are or may be within the custody or control of third parties, such as Search Engine providers and the Settlement Parties.

Subject to and without waiving its objections, 1-800 Contacts responds that the advertisements identified in response to Interrogatory No. 8 are ones that were likely to cause and/or capable of causing Consumer Confusion, depending at times on the search term that caused them to be displayed or that triggered their display, and thus infringed 1-800 Contacts' trademark rights. 1-800 Contacts further responds that the advertisements identified in its Response to Interrogatory No. 8 reflect only certain representative examples of advertisements by the Settlement Parties that were likely to cause Consumer Confusion. There were many other such advertisements by the Settlement Parties during this time period that 1-800 Contacts did not record or otherwise document in a complete and systematic fashion given, among other things, the volume of such advertisements and the constantly changing nature of Search Engine results, but some of which are reflected in the Documents that have been or will be produced.

1-800 Contacts further responds that Search Engines frequently used terms in conjunction with paid or sponsored advertisements and/or formatted the results page or pages that displayed paid or sponsored advertisements in ways that could cause, increase, or enhance Consumer Confusion, including when a consumer entered as a search term a trademark, such as

trademarks of 1-800 Contacts. For example, some Search Engines posted their paid or sponsored advertisements in a color, typeface, and/or font size that was not sufficiently different from the format in which they reported the results that their “natural” or “organic” search systems generated so as to enable consumers easily to differentiate between the two sets of results. To the extent that consumers did not detect a difference, they also may have believed that the paid or sponsored advertisements, often featured above or alongside genuine links to 1-800 Contacts’ website, were objectively identified by the search engine’s unprejudiced system to be the most relevant to their search and/or to be of, by, or affiliated with 1-800 Contacts. This further heightened the likelihood of Consumer Confusion caused by advertisements of the Settlement Parties from 2002 to the present.

1-800 Contacts further responds that third parties such as Search Engine providers and the Settlement Parties are or were in possession of the overwhelming majority of evidence that documents how advertisements of the Settlement Parties were likely to cause Consumer Confusion, including but not limited to: images of the relevant paid or sponsored advertisements as they appeared on search results pages; information concerning the placement of the paid or sponsored advertisements on search pages; the precise terms that were used to trigger the publication of such paid or sponsored advertisements; the proximity of such paid or sponsored advertisements to 1-800 Contacts’ trademarks, authorized advertisements for 1-800 Contacts, or links to 1-800 Contacts’ website; and information concerning the goods and services offered and/or sold to consumers who reached websites of the Settlement Parties as a result of the publication of the paid or sponsored advertisements.

1-800 Contacts further responds that the information requested by this Interrogatory, to the extent such information is available at the current time, can be derived or

ascertained from an examination or inspection of the Documents described above, including Documents that have been or will be produced by 1-800 Contacts, that such Documents that have been or will be produced by 1-800 Contacts are or will be equally available to Complaint Counsel, and that the burden of deriving or ascertaining the information requested in this Interrogatory is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties and Search Engine providers, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds further by referring Complaint Counsel to these Documents. To the extent information responsive to this Interrogatory is obtained as a result of discovery and investigation, and discovery and investigation are ongoing, such information is equally available to Complaint Counsel and it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information.

1-800 Contacts further responds that when a paid advertisement or sponsored link of another Person appears in response to or is triggered by a search term that is a trademark of 1-800 Contacts or a variant thereof, including particularly when such search term is being used to conduct a navigational search, Consumer Confusion often is likely to result.

**INTERROGATORY NO. 10:**

Identify each advertisement of a Settlement Partner from 2002 to the present that 1-800 Contacts contends was likely to cause Trademark Dilution.

**RESPONSE TO INTERROGATORY NO. 10:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts incorporates hereat by reference as though fully set forth its Responses

to Interrogatory Nos. 8 and 9. 1-800 Contacts further objects to this Interrogatory to the extent that it calls for 1-800 Contacts to recall and retrace the results of Search Engine searches that were seen and considered but not recorded contemporaneously many years ago, and to the extent records of such searches and advertisements still exist, they are or may be within the custody or control of third parties, such as Search Engine providers and the Settlement Parties.

Subject to and without waiving its objections, 1-800 Contacts responds that the advertisements identified in response to Interrogatory Nos. 8 and 9, as well as other advertisements by the Settlement Parties that appeared in response to an Internet search for 1-800 Contacts' trademarks, are ones that were likely to cause and/or were capable of causing Trademark Dilution with respect to 1-800 Contacts' trademark rights.

1-800 Contacts further responds that third parties such as Search Engine providers and the Settlement Parties are or were in possession of the overwhelming majority of evidence that documents how advertisements of the Settlement Parties were likely to cause Trademark Dilution, including but not limited to: images of the relevant paid or sponsored advertisements as they appeared on search results pages; information concerning the placement of the paid or sponsored advertisements on search pages; the precise terms that were used to trigger the publication of such paid or sponsored advertisements; the proximity of such paid or sponsored advertisements to 1-800 Contacts' trademarks, authorized advertisements for 1-800 Contacts, or links to 1-800 Contacts' website; and information concerning the goods and services offered and/or sold to consumers who reached websites of the Settlement Parties as a result of the publication of the paid or sponsored advertisements.

1-800 Contacts further responds that the information requested by this Interrogatory, to the extent such information is available at the current time, can be derived or

ascertained from an examination or inspection of the Documents described above, including Documents that have been or will be produced by 1-800 Contacts, that such Documents that have been or will be produced by 1-800 Contacts are or will be equally available to Complaint Counsel, and that the burden of deriving or ascertaining the information requested in this Interrogatory is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties and Search Engine providers, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds further by referring Complaint Counsel to these Documents. To the extent information responsive to this Interrogatory is obtained as a result of discovery and investigation, and discovery and investigation are ongoing, such information is equally available to Complaint Counsel and it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information.

1-800 Contacts further responds that when a paid advertisement or sponsored link of another Person appears in response to or is triggered by a search term that is a trademark of 1-800 Contacts or a variant thereof, including particularly when such search term is being used to conduct a navigational search, Trademark Dilution often is likely to result.

**INTERROGATORY NO. 11:**

Identify each of the “procompetitive benefits” referred to in the Fourth Affirmative Defense contained in 1-800 Contacts’ Answer to the Complaint in this matter.

**RESPONSE TO INTERROGATORY NO. 11:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts incorporates hereat by reference as though fully set forth its Response to

Interrogatory No. 1. 1-800 Contacts further responds that many of the “benefits” that it described as accruing to it also accrued to some or all of the Settlement Parties, such as the resolution of litigation, the elimination of uncertainty associated with litigation, savings of litigation costs that otherwise would have been occurred, and the resolution of litigation with clear and enforceable terms with respect to future conduct in a relatively new and constantly changing advertising environment and medium. These benefits were and are procompetitive benefits. 1-800 Contacts further responds that other procompetitive benefits of the trademark settlement agreements (and the sourcing and fulfillment agreement) referenced in the Fourth Affirmative Defense include increased competition on the merits, increased output of retail sales of contact lenses, increased consumer welfare, increased investments in and utilization of different forms of marketing and advertising, greater product differentiation, savings of time needed for consumers to conduct internet searches and to navigate to their intended internet destination, avoidance of consumer confusion and deception, increased consumer satisfaction, greater numbers of consumers using or continuing to use lower-priced channels of distribution for the purchase of contact lenses (such as online distribution channels as opposed to purchasing from an ophthalmologist), greater consumer awareness of the alternatives to purchasing contact lenses from their eye care professionals, and the various procompetitive effects described in the March 17, 2016 submission of Daniel L. Rubinfeld, “An Analysis of the Competitive Effects of the Settlements at Issue,” including at pages 22-28 [FTC-PROD-0001393 to 1427].

**INTERROGATORY NO. 12:**

Identify each Settlement Partner that has been 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.

**RESPONSE TO INTERROGATORY NO. 12:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts further objects to the phrase “should be implemented” as vague and ambiguous, including as to the source, reason, or derivation for or of the imperative “should.” 1-800 Contacts responds that the answer to this Interrogatory can be derived or ascertained from an examination or inspection of the Documents that have been or will be produced by 1-800 Contacts that memorialize or constitute such communications, that such Documents are or will be equally available to Complaint Counsel, and that the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties and nine current and former employees of Respondent, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds by referring Complaint Counsel to these Documents. Examples of such Documents are CX234 (CONFIDENTIAL) (January 10, 2010) (a communication with Lensfast/ContactLens.com), 1-800F\_00078087-088 (CONFIDENTIAL) (January 10, 2010) (a communication with Lensfast/ContactLens.com), 1-800F\_00020910 (CONFIDENTIAL), and 1-800F\_00020968 (CONFIDENTIAL) (August 6, 2010) (a communication with Park Studebaker). Bryce Craven also testified regarding such communications during his September 3, 2015 Investigational Hearing, including at 137:20 – 138:25 and 171:11 – 172:24, including with regard to communications with Coastal Contacts. During his testimony he was shown CX236, dated March 31, 2011, which constitutes such a communication.

1-800 Contacts further responds that any requirement in the Settlement Agreements to implement negative keywords, to the extent such a requirement exists, is



generally limited to implementation of those negative keywords as “exact” matches. *See, e.g.*, Email from B. Craven to Contactlens.com (Lensfast), “Re: Contactlens.com – 1800Contacts Negative Keyword Questions – Yahoo/Bing? (Jan. 7, 2010) [1-800F\_00045162-63 (CONFIDENTIAL)] (“I think you should be fine with making the negative keywords exact match . . . . Exact match will restrict your ads from showing up only if the user types in exactly what you’ve set as the negative keyword.”). Thus, many communications that did not specifically use the words “exact match” but did refer to negative keywords should be understood to refer to exact match negative keywords. CX236 identified earlier is an example of such a communication. The identity of the Settlement Party participating in such communication, and the date of the communication, can be derived or ascertained from an examination or inspection of the Documents that have been or will be produced by 1-800 Contacts that memorialize or constitute such communications. Such Documents are or will be equally available to Complaint Counsel, and the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties and with current and former employees of Respondent, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts further responds by referring Complaint Counsel to these Documents.

Other communications regarding the use of exact match negative keywords were made or received by outside counsel for 1-800 Contacts at various times, often in connection with the Settlement Agreements and the disputes and litigation that preceded them. To the extent information responsive to this Interrogatory is obtained as a result of discovery and investigation, and discovery and investigation are ongoing, such information, including information contained in Documents produced by outside counsel for 1-800 Contacts in connection with the Settlement

Agreements and related matters, is equally available to Complaint Counsel and it is improper, unduly burdensome, and invasive of the work product protection for Complaint Counsel to demand that Respondent undertake the efforts of reviewing this discovery and obtaining for Complaint Counsel the requested information. 1-800 Contacts further responds by identifying, by way of example, the following Documents obtained during the course of discovery and investigation that may be responsive to this Interrogatory: Email from Bryan G. Pratt to Matt Jenkins ([law@jnj.biz](mailto:law@jnj.biz)) at Lenses for Less (January 25, 2010) [1-800F\_00020910 (CONFIDENTIAL)]; Letter from Mark A. Miller to Anthony Hong, Re: Supplemental Discovery Responses (July 29, 2010) [1-800F\_00023004 at 9-10 (CONFIDENTIAL)].

If Complaint Counsel's methodology for counting subparts of interrogatories is ultimately adopted or endorsed by the Court, then this interrogatory consists of at least two distinct subparts.

**INTERROGATORY NO. 13:**

Identify the factual basis for the assertion in 1-800 Contacts' Answer to the Complaint in this matter, and in its Submission to the Federal Trade Commission dated March 1, 2016, that each litigation that resulted in each Settlement Agreement constituted "*a bona fide* trademark litigation."

**RESPONSE TO INTERROGATORY NO. 13:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts incorporates hereat by reference its Responses to Interrogatory Nos. 1, 8, 9, 10, and 11 above. 1-800 Contacts further responds that the use of a trademark as a Search Engine Keyword that triggers the display of a competitor's advertisement is a use in commerce under the Lanham Act. *See, e.g., Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d

1137, 1144 (9th Cir. 2011); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 128-41 (2d Cir. 2009). 1-800 Contacts further responds that such uses, depending on the specific facts and a number of different factors which need to be balanced (and which may differ by jurisdiction), may give rise to *bona fide* trademark litigation, including trademark infringement and trademark dilution. For example, as stated by the District Court in *1-800Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524 (D. Utah Mar. 15, 2010), “the Tenth Circuit has held that the purchase of another’s trademark through a search engine for the purpose of diverting internet traffic and using goodwill associated with that trademark, as alleged here, violates the Lanham Act.” *Id.* at \*6 (footnote omitted); *see also MasterCard Int’l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009) (enjoining defendant from using “any names, words, designations or symbols,” either directly or “in any buried code, metatags, search terms, keywords, key terms, hit generating pages, or any other devices” which are “used, intended, or likely to cause any web site or web sites of Trehan to be listed by any Internet search engines in response to any searches that include any terms identical with or confusingly similar to the [plaintiff’s] Marks”).

Factors that are balanced in evaluating trademark infringement include the likelihood of confusion, which includes initial interest confusion, source confusion, purchasing confusion, and sponsorship confusion. *See, e.g., Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 157 (4th Cir. 2012) (holding that “[m]ore than just source confusion is at issue in an infringement claim” and emphasized that confusion as to “sponsorship of the goods” can give rise to a claim under the Lanham Act). This is precisely why numerous courts have recognized the *bona fides* of trademark infringement and trademark dilution claims in analogous circumstances to those asserted by 1-800 Contacts. *See, e.g., Edible Arrangements, LLC v.*

*Provide Commerce, Inc.*, No. 3:14-CV-00250 (VLB), 2016 WL 4074121 (D. Conn. 2016) (denying summary judgment where “the strength of [plaintiff’s] mark, the similarity of the competing marks, the similarity of the competing products and the defendant’s bad faith each strongly suggest a likelihood of confusion from” defendant’s use of plaintiff’s mark in keyword advertising); *Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, No. 1:14-cv-1557, 2015 WL 1936502, at \*9 (E.D. Va. Apr. 28, 2015) (making permanent an injunction ordering defendant not to purchase search terms directly referencing plaintiff’s marks, which would serve the public interest “by prohibiting [defendant] from engaging in conduct that is likely to cause confusion or mistake as to the source, sponsorship, affiliation, or approval of [plaintiff’s] services.”); *LBF Travel v. Fareportal, Inc.*, No. 13 Civ. 9143 (LAK) (GWG), 2014 U.S. Dist. LEXIS 156583, at \*27 (S.D.N.Y. Nov. 5, 2014) (denying motion to dismiss because plaintiff’s “allegations raise the reasonable inference that Internet users have likely believed [plaintiff] sponsored, endorsed, or otherwise approved of [defendants’] use of the [plaintiff’s] mark”) (internal quotation marks omitted); *Gravity Defyer Corp. v. Under Armour, Inc.*, No. LA CV13-01842 JAK (JCGx), 2014 WL 3766724, at \*9 (C.D. Cal. July 7, 2014) (finding “a triable issue as to whether the appearance of the online advertisements and surrounding context would cause an ordinary consumer erroneously to conclude that there is an association between Plaintiffs and Defendants”).

1-800 Contacts further responds that the factual bases for its claims in each litigation can be found in the complaints and other pleadings in those litigations, as well as in correspondence and other communications relating to those litigations, all of which Documents are equally available to Complaint Counsel, and the burden of deriving or ascertaining the information requested by this Interrogatory is substantially the same for Complaint Counsel, and

perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds further by referring Complaint Counsel to these Documents.

1-800 Contacts further responds that in both the *Lens.com* and *Memorial Eye* litigations the courts rejected arguments that the cases were not *bona fide* trademark litigations, as set forth in *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1256 (10th Cir. 2013); Order, *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS, (D. Utah Mar. 3, 2014), ECF No. 91; *1-800 Contacts, Inc. v. Lens.com*, No. 2:07-CV-591 CW, 2012 WL 113812, at \*3 (D. Utah Jan. 13, 2012); and *1-800Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, \*1 (D. Utah, Mar. 15, 2010).

1-800 Contacts further responds that it has described the *bona fides* of its trademark litigations that resulted in Settlement Agreements in its White Paper dated March 1, 2016 to FTC staff, including pages 25-31 thereof, its letter to Gustav P. Chiarello dated May 2, 2015, including pages 4-9 thereof, and its letters to Hon. E. Ramirez, Hon. M. Ohlhausen and Hon. T. McSweeney, each dated July 8, 2016, including pages 3-4 thereof.

1-800 Contacts further responds that in the trademark litigations that resulted in Settlement Agreements, the fact of settlement meant that certain evidence of actionable conduct was not fully developed, and for a number of reasons it is not possible now to discover evidence that might have been available during those trademark litigations to the same extent as it would have been at the time those trademark litigations were ongoing. For example, consumer surveys are often conducted and offered as evidence in trademark litigation. Internet search has evolved since the time of the allegedly infringing conduct at issue, and consumers' understanding regarding Internet search has also evolved during this time period. This is especially significant

here where the conduct at issue involved a retailer's purchasing of Keywords used by consumers as search terms; in this situation, the point at which confusion would be relevant would be the point at which the consumer had, based on her circumstances, decided to enter those Keywords – a situation whose re-creation years after-the-fact for purposes of assessing confusion faces significant obstacles.

1-800 Contacts further responds that third parties such as Search Engine providers and the Settlement Parties are or were in possession of the overwhelming majority of evidence that documents how advertisements of the Settlement Parties were likely to cause or constitute consumer confusion, trademark dilution, false advertising, unfair competition, or unjust enrichment of Settlement Parties, including but not limited to: images of the relevant paid or sponsored advertisements as they appeared on search results pages; information concerning the placement of the paid or sponsored advertisements on search pages; the precise terms that were used to trigger the publication of such paid or sponsored advertisements; the proximity of such paid or sponsored advertisements to 1-800 Contacts' trademarks, authorized advertisements for 1-800 Contacts, or links to 1-800 Contacts' website; and information concerning the goods and services offered and/or sold to consumers who reached websites of the Settlement Parties as a result of the publication of the paid or sponsored advertisements.

1-800 Contacts further responds that the information requested by this Interrogatory, to the extent such information is available at the current time, can be derived or ascertained from an examination or inspection of Documents that have been or will be produced by 1-800 Contacts, that such Documents are or will be equally available to Complaint Counsel, and that the burden of deriving or ascertaining the information requested in this Interrogatory is substantially the same for Complaint Counsel, and perhaps even less because of their interviews

with and Investigational Hearings of all or some of the Settlement Parties, Search Engine providers, and current and former employees of Respondent, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts responds further by referring Complaint Counsel to these Documents.

If Complaint Counsel's methodology for counting subparts of interrogatories is ultimately adopted or endorsed by the Court, then this interrogatory consists of at least two distinct subparts.

**INTERROGATORY NO. 14:**

Identify the manner in which each of the "online sellers of contact lenses" referred to in Paragraph 2 of 1-800 Contacts' Answer to the Complaint in this matter "were using 1-800 Contacts' trademarks in commerce," and provide the factual basis for 1-800 Contacts' belief that such "use" occurred.

**RESPONSE TO INTERROGATORY NO. 14:**

In addition to its General Objections, which are incorporated hereat by reference, 1-800 Contacts responds that in Paragraph 2 of its Answer to the Complaint, 1-800 Contacts was referring to the purchase of Keywords that were, or were substantially similar to, trademarks owned by 1-800 Contacts and which were used, following their purchase, to trigger a display of a paid advertisement or sponsored link from such online seller of contact lenses in response to the entry of a trademark owned by 1-800 Contacts as a search term. 1-800 Contacts further responds that the use of a trademark as a Search Engine Keyword that triggers the display of a competitor's advertisement is a use in commerce under the Lanham Act. *See, e.g., Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 128-41 (2d Cir. 2009). 1-800 Contacts further

responds that the purchase of Keywords (whether or not trademarks owned by 1-800 Contacts or variants thereof) that were used, following their purchase, to trigger a display of a paid advertisement or sponsored link from a seller of contact lenses in response to the entry of a trademark owned by 1-800 Contacts as a search term constitutes a “use in commerce.” That such uses occurred can be observed by entering search terms that constitute trademarks of 1-800 Contacts or variants thereof and observing the results. Further information also can be obtained from third parties such as Brand Verity and Keyword Spy, which investigate such uses as reflected in Documents produced by or to be produced by 1-800 Contacts. That such uses occurred also is described, *inter alia*, in the complaints and other pleadings in the litigations referred to in Paragraph 2 of 1-800 Contacts’ Answer to the Complaint, as well as in correspondence and other communications relating to those litigations, and in Investigational Hearings, and also in weekly and other periodic trademark monitoring reports prepared by employees of 1-800 Contacts, such as Documents previously identified by Complaint Counsel as CX238, CX243, CX253, and CX256, all of which Documents are equally available to Complaint Counsel, and the burden of deriving or ascertaining the answer is substantially the same for Complaint Counsel, and perhaps even less because of their interviews with and Investigational Hearings of all or some of the Settlement Parties, Search Engine providers, and current and former employees of Respondent, as it is for Respondent. On this basis and for these reasons, 1-800 Contacts further responds by referring Complaint Counsel to these Documents.

If Complaint Counsel’s methodology for counting subparts of interrogatories is ultimately adopted or endorsed by the Court, then this interrogatory consists of at least two distinct subparts. Applying Complaint Counsel’s methodology, with which Respondent’s



counsel does not agree as reflected in an October 25, 2016 letter to Daniel Matheson, Complaint Counsel's First Set of Interrogatories consists of 20 interrogatories or distinct subparts.

DATED: October 31, 2016

Respectfully submitted,

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*Counsel for 1-800 Contacts, Inc.*

**VERIFICATION**

I, \_\_\_\_\_, declare:

I am \_\_\_\_\_ of 1-800 Contacts, Inc., which is the Respondent in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing document, except for those portions that on my copy have been redacted, entitled Amended Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Interrogatories, and am informed and believe that the information contained therein is accurate and true.

I declare under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed at Draper, Utah on November \_\_\_\_, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 31, 2016, I served a copy of **AMENDED RESPONSES OF RESPONDENT 1-800 CONTACTS, INC. TO COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES** via electronic mail on the following counsel supporting the Complaint:

Thomas H. Brock, *tbrock@ftc.gov*  
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Mark Taylor, *mtaylor@ftc.gov*  
*BC-1040-1800-SearchAdTeam-DL@ftc.gov*

DATED: October 31 , 2016

By: \_\_\_\_\_  
Gregory P. Stone

**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2017, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I also certify that 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  
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**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 29, 2017

By: s/ Daniel J. Matheson