

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



ORIGINAL

Docket No. 9372

In the Matter of

1-800 CONTACTS, INC.,
a corporation

COMPLAINT COUNSEL’S MOTION TO DISREGARD AND STRIKE CERTAIN PORTIONS OF THE REPORT AND TESTIMONY OF DR. KENT VAN LIERE

INTRODUCTION

By this motion, Complaint Counsel respectfully requests that the Court disregard and strike from the record those sections of the Report of Dr. Kent Van Liere providing his affirmative findings regarding consumer confusion, as well as any related testimony.¹ Paragraph 19(b) of the Scheduling Order requires that “[a]t the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g).” During the course of Dr. Van Liere’s testimony, it became apparent that Respondent violated the Order. Dr. Van Liere testified that he had run a large number of internet searches on both Google and Yahoo for the search term “1-800 Contacts,” and that the resultant search engine results pages (SERPs) had, in some undefined number of instances, not included 1-800 Contacts sponsored ads. He relied upon these SERPs to create the test and control conditions for his survey—mock-up versions of Google

¹ Specifically, Complaint Counsel requests that the Court disregard and strike RX0735 (Expert Report of Dr. Kent Van Liere), paragraphs 12-13, 27-40, 63 and Exhibits C (RX0730), and D (RX0731), as well as trial testimony at 2975:15-3074:25, 3228:21-3238:15 (May 2-3, 2017). Complaint Counsel does not move to strike Dr. Van Liere’s criticisms of Dr. Jacoby’s Report, and recognizes the Court will afford them such weight as it deems appropriate.

and Yahoo SERPs, none of which contained an ad for 1-800 Contacts. These test and control conditions provide the sole basis for his conclusions regarding consumer confusion.

Because Respondent did not produce—and Dr. Van Liere did not retain—the SERPs resulting from his internet searches, Complaint Counsel was unable to question Dr. Van Liere on the contention that he observed a non-trivial number of searches that did not return 1-800 Contacts sponsored ads. As the materials upon which Dr. Van Liere relied in formulating his opinions regarding confusion were improperly withheld, any material contained in his Report or testimony relating to such conclusions should be disregarded and struck from the record.

The myriad conceptual and technical flaws in Dr. Van Liere's survey are in and of themselves sufficient to afford his survey little if any weight, but this fundamental violation of Paragraph 19 of the Court's Scheduling Order means that Complaint Counsel was precluded from questioning him about the very bases of his conclusions. Respondent should not be allowed to disregard the Court's Order yet introduce materials and testimony predicated on the unproduced SERPs.

ARGUMENT

I. Dr. Van Liere Relied on SERPs He Claims Did Not Include 1-800 Contacts Sponsored Ads

Dr. Van Liere testified—repeatedly—that he ran a series of actual searches that he relied upon as the bases for developing the mock-up SERPs (“stimuli”) for the “test” and “control” conditions that users saw in his consumer survey.² Dr. Van Liere admitted that these searches served as “the basis for constructing this stimulus.”³

Neither Dr. Van Liere’s test nor control SERPs contained a 1-800 Contacts sponsored ad, which he testified was consistent with the results of some (presumably non-trivial) number of searches he ran:

Q: And when you were doing your searches on “1-800 Contacts” in order to get the basis for the stimuli, did ads for 1-800 Contacts come up sometimes, always, at all?

A: As I generally recall, the 1-800 Contacts sponsored link was sometimes there and sometimes not.

May 2, 2017 (Vol. 13) Trial Tr. 3010:11-16.

Q: Did you get results pages on searches for “1-800 Contacts” that only had organic links and no sponsored links?

² “Q. Now, were you personally involved in creating the stimuli that you used in your survey? A. Yes. Q. Okay. And could you tell us how you created those. A. Sure. So when we were first engaged, I and my staff, we did a wide variety of searches on “1-800 Contacts,” on some generic — “contact lenses,” for example, for — we searched for the brands of the other settlement agreement parties, and we just looked at them to see, well, what does a search results page typically look like. And then based on that, we did specific searches that we used as the base starting search for constructing these stimuli, made whatever changes we made to [] fit the experiment that we're doing here, and then we used those — those as our stimuli.” May 2, 2017 (Vol. 13) Trial Tr. 3002:24-3003:16.

³ “Q. And is that what you used as the — one of those as the basis for constructing this stimulus? A. Yes. Basically, that’s right.” May 2, 2017 (Vol. 13) Trial Tr. 3010:25-3011:02. *See also* May 2, 2017 (Vol. 13) Trial Tr. 3013:22-3014:01 (“Q. So did you do a number of searches on the Yahoo search engine in order to find the basis for this stimulus? A. Yes — well, we did a lot of searches on both Yahoo and Google just to look at things. Sure.”)

A: Yes. We also had that occur.

May 2, 2017 (Vol. 13) Trial Tr. 3010:21-24.

Q: So, Dr. Van Liere, you recall you testified earlier today that a number of the searches that you and your team ran did not return 1-800 Contacts as a sponsored advertisement.

A: Yes, that's correct. We did searches where 1-800's sponsored ad did not appear.

May 2, 2017 (Vol. 13) Trial Tr. 3099:13-18.

But Dr. Van Liere could not testify with any specificity as to the number of such searches that he had seen, or even whether it was a large number of such results.⁴ Indeed, Dr. Van Liere could not testify whether there were more than ten such instances, or more than 500 such instances.⁵ Indeed, Dr. Van Liere could not even testify as to how many searches were run as part of the design of his test and control condition pages.⁶

II. Dr. Van Liere Did Not Produce or Retain the SERPs He Relied Upon

Paragraph 19(b) of the Scheduling Order entered by the Court provides a clear mandate for expert discovery:

At the time an expert report is produced, the producing party shall provide to the other party all documents and written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g).

⁴ May 2, 2017 (Vol. 13) Trial Tr. 3099:22-25 (“Q: Do you recall if it was a large number of instances? A: I don’t remember specifically how many. I don’t know that we ever kept track of it that way.”).

⁵ *Id.* at 3100:01-04 (“Q: Was it more than ten? A: I don’t recall. Q: Was it more than 500? A: I don’t know.”).

⁶ *Id.* at 3100:16-23 (“Q: And as you sit here today, Doctor, you have no idea how many searches you ran; correct? A: No. Between myself and my team I don’t know how many we ran. Q: You could not testify it was more than a hundred? A: I would say it was probably more than a hundred, but I don’t know the exact count.”).

There is no dispute that Respondent failed to produce the SERPs that Dr. Van Liere relied upon to Complaint Counsel. Moreover, Dr. Van Liere testified that he has not maintained a set of those documents.⁷ Dr. Van Liere also admitted that there is no record to support his assertion that he saw SERPs in response to a query for 1-800 Contacts in which a 1-800 Contacts sponsored advertisement did not appear.⁸ Finally, Dr. Van Liere admitted that he did not believe he or anyone on his staff had maintained any record of the searches that purportedly did not return 1-800 Contacts sponsored advertisements.⁹

Respondent is, therefore, in clear violation of paragraph 19(b) of the Scheduling Order, with no ability to remedy this violation.

III. Dr. Van Liere's Failure to Produce the SERPs that he Relied Upon to Construct His Survey Denied Complaint Counsel the Opportunity to Fully Test his Conclusions at Trial

Dr. Van Liere testified repeatedly during his examination about the significance of using real-world searches as the foundation for his test and control conditions.¹⁰ He also testified that his test and control stimuli faithfully represented the real world because a non-trivial number of the SERPs he relied on did not contain 1-800 Contacts sponsored ads.¹¹ Yet, because

⁷ Q: Dr. Van Liere, have you maintained copies of the searches that you ran in order to develop your test and control search engine results pages? A: I have not, no. May 2, 2017 (Vol. 13) Trial Tr. 3133:12-15.

⁸ Q: So there's no record to support your contention that you saw advertisements—excuse me—that you saw search engine results pages in which a 1-800 Contacts ad did not appear; is that correct? A: That's correct. I don't have a set of copies of those searches. May 2, 2017 (Vol. 13) Trial Tr. 3133:16-21.

⁹ Q: And did you or anyone on your staff keep a record of those searches that would indicate how many searches did not contain 1-800 Contacts' ads? A: Not that I'm aware of, but I don't know with certainty for staff. May 2, 2017 (Vol. 13) Trial Tr. 3133:22-3134:01.

¹⁰ See e.g., May 2, 2017 (Vol. 13) Trial Tr. 3002:24-3005:24.

¹¹ See e.g., May 2, 2017 (Vol. 13) Trial Tr. 3099:13-18.

Respondent never produced these searches, Complaint Counsel was unable to test whether Dr. Van Liere's claim that excluding *all* 1-800 Contacts sponsored ads from his test and control conditions replicated real-world conditions. As a result, Complaint Counsel was unable to test whether his survey stimuli were properly designed.

The inability to test the basis for constructing Dr. Van Liere's stimuli is particularly important because the record evidence in this case contradicts Dr. Van Liere's assertion that under real-world conditions, searches for 1-800's trademark keywords fail to return SERPs displaying advertisements for 1-800 Contacts.¹² Indeed, Respondent's own pretrial brief contradicted Dr. Van Liere's assertion, claiming that 1-800 Contacts always seeks to ensure that its ad appeared in "the top position on searches for its trademark keywords".¹³ In contrast, Dr. Van Liere was unable to point to anything beyond the non-produced SERPs suggesting that 1-800 Contacts would not appear on a SERP in response to a search for "1-800 Contacts."¹⁴ Thus, the only predicate for Dr. Van Liere's creation of his test and control conditions was the non-

¹² Bethers Testimony, May 9, 2017 (Vol. 16) Trial Tr. 3787:24-3788:02, *in camera* ({} [REDACTED]); Ex. A ({} [REDACTED]) at -035 ({} [REDACTED]); Ex. B (CX9028 (B. Roundy Dep.)) at 86:16-88:04; Ex. C (CX9031 (C. Schmidt Dep.)) at 125:16-127:20.

¹³ Respondent's Second Correct Pre-Trial Brief at 14 (Apr. 7, 2017) (*in camera*) ("1-800 Contacts prioritizes its trademark keywords, so that customers who are attempting to navigate to 1-800 Contacts' website can find it easily. The company allocates {} [REDACTED]}. [citations omitted] If the cost of obtaining *the top position* on searches for its trademark keywords increases, then 1-800 Contacts increases its spending on those keywords, and decreases its spending on other keywords.") (emphasis added).

¹⁴ May 3, 2017 (Vol. 14) Trial Tr. 3216:03-10 (*e.g.* Q: Have you reviewed anything, Dr. Van Liere, that would suggest that 1-800 Contacts had a strategy not to bid on keywords in the future? A: I had discussions with counsel about why it would be inappropriate to have those ads in the future, but I did not specifically review any documents by 1-800 Contacts or otherwise about their future strategies.").

produced SERPs, and Complaint Counsel had no way to question him about these non-produced materials and thereby demonstrate that his stimuli do not resemble the real-world SERPs on which he claimed to rely.

IV. Dr. Van Liere's Report Should be Disregarded as to Findings Concerning Confusion

Respondent has failed to produce the SERPs that served as the basis for the test and control stimuli that underlie Dr. Van Liere's report. The Court has already ruled on the consequences of failure to comply with the Scheduling Order with regard to this issue: "Well, here's my ruling. My ruling is consistent with what you just read there [Scheduling Order 19(b)]. Any opinions that wherein — any opinion by any expert wherein the party on the other side was not given appropriate documents relied upon by the expert, if that's pointed out in posttrial briefing, **those experts or those expert opinions will not be considered.**" (May 2, 2017 (Vol. 13) Trial Tr. 3135:18-25) (emphasis added). That should be the result here. This is particularly important given the significance of the materials involved. Dr. Van Liere's purported "net overall confusion" findings are based entirely on the confusion levels that he derived from his test and control stimuli.¹⁵ If these fundamental underpinnings are removed, his purported net confusion numbers are simply random numbers without any meaning.

CONCLUSION

For the foregoing reasons, Complaint Counsel requests that the Court disregard all those portions of Dr. Van Liere's Report and testimony identified in footnote 1, and strike those portions from the record to avoid confusion in any subsequent proceedings.

¹⁵ See RX0735-0006 (Van Liere Report) (21 percent net overall confusion rate equals the confusion rate from test condition minus the confusion rate from control condition).

Dated: May 18, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

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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: May 18, 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,

- (1) That the following be disregarded and struck from consideration of Dr. Van Liere's Report (RX0735): Paragraphs 12-13, 27-40, and 63, and Exhibits C and D;
- (2) Dr. Van Liere's trial testimony at 2975:15-3074:25; 3228:21-3238:15 (May 2-3, 2017).

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated: _____

EXHIBIT A

REDACTED IN ENTIRETY

EXHIBIT B

In the Matter of:

1-800 Contacts

January 19, 2017

Brady Roundy - Highly Confidential

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Roundy - Highly Confidential

1-800 Contacts

1/19/2017

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A P P E A R A N C E S

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2

FEDERAL TRADE COMMISSION

IN THE MATTER OF: : Docket No. 9372

1-800 CONTACTS : :

Thursday, January 19, 2017

Parr Brown Gee & Loveless
101 South 200 East, #700
Salt Lake City, Utah

HIGHLY CONFIDENTIAL

The above-entitled matter came on for
investigational hearing, pursuant to notice, at 9:33
a.m.

4

Thereupon,

(Exhibits premarked for identification.)

BRADY ROUNDY,

called as a witness, being first duly sworn, was
examined and testified as follows:

EXAMINATION BY THE COUNSEL FOR THE FTC

BY MR. MATHESON:

Q Good morning.

A Good morning.

**Q My name is Daniel Matheson. I represent the
Federal Trade Commission.**

MR. MATHESON: Counsel, would you like to
introduce yourself?

MR. RAPHAEL: Sure. Justin Raphael, Munger,
Tolles & Olson, San Francisco, for respondent 1-800
Contacts and the witness.

BY MR. MATHESON:

**Q Could you state your name for the record
please, sir?**

A Brady Roundy.

**Q And what is your current position at 1-800
Contacts?**

A I'm a search marketing manager at 1-800

5	<p>1 Contacts.</p> <p>2 Q You've been deposed before?</p> <p>3 A Yes.</p> <p>4 Q So if you ever want to take a break, please</p> <p>5 just let me know. Let's try not to step on other's</p> <p>6 sentences. And verbal responses work best so if I</p> <p>7 prompt you for a yes or no when you feel you already</p> <p>8 answered by saying uh-huh or huh-uh, I'm not being rude.</p> <p>9 I'm just trying to make sure everything is very clear on</p> <p>10 the transcript.</p> <p>11 A Okay.</p> <p>12 Q Okay. I would like to hand you a document we</p> <p>13 have marked CX0703.</p> <p>14 Please take whatever time to need to review</p> <p>15 this, sir, and let me know when you've had a chance to</p> <p>16 do so.</p> <p>17 A Can I trade with you?</p> <p>18 Q Do you recall -- do you recognize this</p> <p>19 document, sir?</p> <p>20 A Yes. Vaguely.</p> <p>21 Q What is this?</p> <p>22 A It's just a correspondence between myself, one</p> <p>23 of our attorneys and then a member from Coastal</p> <p>24 Contacts.</p> <p>25 Q And who at Coastal Contacts was involved in</p>	7	<p>1 Q And this email is dated February 6, 2014,</p> <p>2 right?</p> <p>3 A Yeah.</p> <p>4 Q Do you recall -- or is it consistent with your</p> <p>5 recollection that Mr. Galan was passing on certain of</p> <p>6 his responsibilities to you at the time he sent this</p> <p>7 email?</p> <p>8 MR. RAPHAEL: Object to form.</p> <p>9 THE WITNESS: Can you repeat that.</p> <p>10 BY MR. MATHESON:</p> <p>11 Q Was Mr. Galan passing on certain of his</p> <p>12 responsibilities to you at the time he sent this email?</p> <p>13 A I -- I would believe so.</p> <p>14 Q Was one of the responsibilities Mr. Galan was</p> <p>15 transferring to you at the time he sent this email the</p> <p>16 responsibility for discussing trademark issues with</p> <p>17 Coastal Contacts?</p> <p>18 MR. RAPHAEL: Object to form.</p> <p>19 THE WITNESS: No. He was passing on contact</p> <p>20 information so that if there were issues, our legal</p> <p>21 team, we could work together and then work with the</p> <p>22 representative of those companies.</p> <p>23 BY MR. MATHESON:</p> <p>24 Q Did you have any contact with Mr. Peterson</p> <p>25 between February 6, 2014, and the email exchange we</p>
6	<p>1 this correspondence?</p> <p>2 A It looks like Braden.</p> <p>3 Q That's Mr. Braden Hoepfner?</p> <p>4 A Yes.</p> <p>5 Q What about Mr. Chris Peterson. Do you recall</p> <p>6 contact with him?</p> <p>7 A Yeah. It looks like he was no longer with the</p> <p>8 company.</p> <p>9 Q Did you have contact with Mr. Peterson prior</p> <p>10 to this email exchange?</p> <p>11 A Me personally, not that I can recall right</p> <p>12 now.</p> <p>13 Q Hand you a document, sir, we marked as CX1376.</p> <p>14 Do you recognize this document, sir?</p> <p>15 A Not really.</p> <p>16 Q Sitting here today what do you understand this</p> <p>17 document to be?</p> <p>18 A It looks like when Rick left 1-800 Contacts he</p> <p>19 sent an email to Curtis and added me as a cc.</p> <p>20 Q And by "Rick" you mean Rick Galan?</p> <p>21 A Galan.</p> <p>22 Q Mr. Rick Galan.</p> <p>23 And by "Curtis" you mean Mr. Curtis Peterson</p> <p>24 of Coastal Contacts?</p> <p>25 A Yes.</p>	8	<p>1 discussed as CX0703?</p> <p>2 A I -- I don't know.</p> <p>3 Q You can't recall one way or the other?</p> <p>4 A No.</p> <p>5 Q So you might have, you just can't recall?</p> <p>6 MR. RAPHAEL: Object to form.</p> <p>7 THE WITNESS: No, I don't know.</p> <p>8 BY MR. MATHESON:</p> <p>9 Q Well, that's my question. Are you saying</p> <p>10 you're certain you didn't have any, or are you simply</p> <p>11 saying you can't recall whether or not you had any</p> <p>12 contact with him?</p> <p>13 A I can't recall.</p> <p>14 Q Hand you another document marked as CX1375.</p> <p>15 A Okay.</p> <p>16 Q Do you recognize this document, sir?</p> <p>17 A Vaguely.</p> <p>18 Q What is this document?</p> <p>19 A When Rick left he sent an email to the --</p> <p>20 someone over at Walgreens.</p> <p>21 Q Who at Walgreens received this email?</p> <p>22 A It looks like Andrea Kaduk.</p> <p>23 Q Did you have any contact with Ms. Kaduk?</p> <p>24 A Other than this email that I was cc'd on, I</p> <p>25 don't believe so.</p>

9	<p>1 Q Ms. Kaduk addresses you, correct, in the email</p> <p>2 at the top when she says, and I quote, "Brady, please</p> <p>3 reach out regarding trademark issues and I will do the</p> <p>4 same."</p> <p>5 Did you understand that to be a comment</p> <p>6 addressed to yourself?</p> <p>7 MR. RAPHAEL: Object to form.</p> <p>8 BY MR. MATHESON:</p> <p>9 Q I'm sorry. I didn't get your answer, sir.</p> <p>10 A Yes, that looks like it was addressed to me.</p> <p>11 Q Did you respond to her in any way?</p> <p>12 A I don't know.</p> <p>13 Q Can you recall telling her I will not reach</p> <p>14 out you regarding trademark issues?</p> <p>15 MR. RAPHAEL: Object to form.</p> <p>16 THE WITNESS: I can't recall at this time.</p> <p>17 BY MR. MATHESON:</p> <p>18 Q You can't recall one way or the other?</p> <p>19 A No.</p> <p>20 Q Do you recall reaching out to anybody at</p> <p>21 Walgreens regarding trademark issues after February 6,</p> <p>22 2014?</p> <p>23 MR. RAPHAEL: Object to form. Vague.</p> <p>24 THE WITNESS: I -- I don't know.</p> <p>25</p>	11	<p>1 responsibility.</p> <p>2 BY MR. MATHESON:</p> <p>3 Q Do you ever recall having contacted a</p> <p>4 competitor to discuss the appearance of the competitor's</p> <p>5 advertisement on a search engine results page?</p> <p>6 A Yeah.</p> <p>7 Q Which competitors do you recall having</p> <p>8 contacted?</p> <p>9 A Vision Direct and Coastal.</p> <p>10 Q Anyone else?</p> <p>11 A Not that I can recall at this time.</p> <p>12 Q Why did you contact them?</p> <p>13 A I was directed by our legal team.</p> <p>14 MR. RAPHAEL: I'm am going to just caution you</p> <p>15 not to reveal the substance of anything that the legal</p> <p>16 team told you.</p> <p>17 BY MR. MATHESON:</p> <p>18 Q Did you understand there was an agreement --</p> <p>19 strike that.</p> <p>20 Let focus on your contact with Vision Direct.</p> <p>21 Do you recall who you contacted at Vision Direct?</p> <p>22 A I contacted Glenn Hamilton.</p> <p>23 Q Do you recall when that contact occurred?</p> <p>24 A Not a specific date.</p> <p>25 Q Do you recall approximately when that contact</p>
10	<p>1 BY MR. MATHESON:</p> <p>2 Q Do you recall reaching out to anybody at</p> <p>3 Walgreens regarding trademark issues at any time?</p> <p>4 MR. RAPHAEL: Object to form.</p> <p>5 THE WITNESS: I -- I don't recall.</p> <p>6 BY MR. MATHESON:</p> <p>7 Q You just can't recall one way or the other if</p> <p>8 you ever had any contact with anybody at Walgreens</p> <p>9 regarding trademark issues?</p> <p>10 A Yeah, I can't recall.</p> <p>11 Q Was one of your job responsibilities</p> <p>12 subsequent to February 6, 2014, to communicate with</p> <p>13 competitors whose search advertisements appeared on</p> <p>14 search engine result pages in response to a search run</p> <p>15 for a 1-800 Contacts trademark?</p> <p>16 MR. RAPHAEL: Object to form.</p> <p>17 THE WITNESS: Can you repeat that.</p> <p>18 BY MR. MATHESON:</p> <p>19 Q Was one of your job responsibilities</p> <p>20 subsequent to February 6, 2014, to communicate with</p> <p>21 competitors whose search advertisements appeared on</p> <p>22 search engine result pages in response to searches run</p> <p>23 for a 1-800 Contacts trademark term?</p> <p>24 MR. RAPHAEL: Object to form.</p> <p>25 THE WITNESS: No. That was not my</p>	12	<p>1 occurred?</p> <p>2 A I don't.</p> <p>3 Q Was it after February 6, 2014?</p> <p>4 A I have no idea. I don't know the dates.</p> <p>5 Q Did you understand at the time you contacted</p> <p>6 Vision Direct that there was an agreement in place</p> <p>7 between 1-800 Contacts and Vision Direct regarding the</p> <p>8 display of search advertising?</p> <p>9 A Yes.</p> <p>10 Q What was your understanding of what that</p> <p>11 agreement required 1-800 Contacts to do?</p> <p>12 MR. RAPHAEL: Just in answering that question,</p> <p>13 don't reveal anything that's based on what conversations</p> <p>14 you had with counsel.</p> <p>15 But you can answer the question.</p> <p>16 THE WITNESS: Can you repeat your question.</p> <p>17 BY MR. MATHESON:</p> <p>18 Q At the time of the contact of Vision Direct</p> <p>19 that you had in mind, what was your understanding of</p> <p>20 what the agreement in place between 1-800 Contacts and</p> <p>21 Vision Direct required 1-800 Contacts to do?</p> <p>22 A We would not bid on Vision Direct's trademark</p> <p>23 terms and Vision Direct would not bid on our trademark</p> <p>24 terms.</p> <p>25 Q Now, the contact you had in mind with Coastal,</p>

13	<p>1 when did that contact occur?</p> <p>2 A I don't know dates.</p> <p>3 Q Do you recall approximately when it occurred?</p> <p>4 A Sometime in 2014.</p> <p>5 Q At the time that contact occurred, did you</p> <p>6 understand there was an agreement in place between</p> <p>7 Coastal Contacts and 1-800 Contacts?</p> <p>8 A Yes.</p> <p>9 Q What was your understanding of what that</p> <p>10 agreement required?</p> <p>11 A Similar to the Vision Direct. We don't bid on</p> <p>12 their trademark terms, and they don't bid on our</p> <p>13 trademark terms.</p> <p>14 Q Did you understand the agreement between</p> <p>15 Coastal and 1-800 Contacts to which you just referred to</p> <p>16 require 1-800 Contacts to implement negative keywords?</p> <p>17 A Yes.</p> <p>18 Q Did you understand that agreement to require</p> <p>19 Coastal to implement negative keywords?</p> <p>20 A Yes.</p> <p>21 Q Is there a distinction in your mind between</p> <p>22 bidding on a trademark term and implementing a negative</p> <p>23 keyword?</p> <p>24 MR. RAPHAEL: Object to form.</p> <p>25 THE WITNESS: Can you repeat that.</p>	15	<p>1 And with respect to what the agreement required, I'm</p> <p>2 going to instruct you to answer only on the basis of</p> <p>3 your independent knowledge and not anything that counsel</p> <p>4 told you.</p> <p>5 THE WITNESS: Okay.</p> <p>6 MR. RAPHAEL: So if you have independent</p> <p>7 knowledge about what the agreement required, then you</p> <p>8 can answer the question.</p> <p>9 THE WITNESS: And I don't know the details of</p> <p>10 that agreement. I've not read the agreements, and I</p> <p>11 don't know exactly specifically what they state.</p> <p>12 BY MR. MATHESON:</p> <p>13 Q Did the agreement require 1-800 Contacts to</p> <p>14 implement negative keywords?</p> <p>15 MR. RAPHAEL: Same instruction.</p> <p>16 THE WITNESS: I believe so, but I don't know</p> <p>17 for certain.</p> <p>18 BY MR. MATHESON:</p> <p>19 Q Have you ever taken any action in your</p> <p>20 professional cannot based on your belief that the</p> <p>21 agreement required 1-800 Contacts to implement negative</p> <p>22 keywords?</p> <p>23 MR. RAPHAEL: Object to form.</p> <p>24 THE WITNESS: We have added negative keywords</p> <p>25 to our accounts.</p>
14	<p>1 BY MR. MATHESON:</p> <p>2 Q What I'm curious about, just to make sure</p> <p>3 we're communicating clearly, is -- that the objection to</p> <p>4 form, I just want to set groundwork. I asked you what</p> <p>5 the -- what the agreement required, and you said not to</p> <p>6 bid on each other's keywords.</p> <p>7 When you answered that, did you -- were you --</p> <p>8 did you mean to incorporate the obligation to implement</p> <p>9 negative keywords or are those obligations different in</p> <p>10 your mind?</p> <p>11 A No.</p> <p>12 MR. RAPHAEL: Object to form. Compound.</p> <p>13 MR. MATHESON: Sure. Sure.</p> <p>14 MR. RAPHAEL: You can answer if you know.</p> <p>15 THE WITNESS: So I would say it is in addition</p> <p>16 to not bidding on trademark terms, there are negative</p> <p>17 keywords that were added to the agreements.</p> <p>18 BY MR. MATHESON:</p> <p>19 Q Okay. Okay. So let's focus on the</p> <p>20 communication you can recall with Coastal and the</p> <p>21 agreement in place at that time, okay?</p> <p>22 A Okay.</p> <p>23 Q What did that agreement require of 1-800</p> <p>24 Contacts, other than not bidding on Coastal's keyword?</p> <p>25 MR. RAPHAEL: So I am going to object to form.</p>	16	<p>1 BY MR. MATHESON:</p> <p>2 Q Have you ever taken any action in your</p> <p>3 professional capacity based on your belief that the</p> <p>4 agreement between Coastal and 1-800 required 1-800</p> <p>5 Contacts to implement negative keywords?</p> <p>6 MR. RAPHAEL: Object to form.</p> <p>7 THE WITNESS: I don't completely understand</p> <p>8 your question.</p> <p>9 BY MR. MATHESON:</p> <p>10 Q I asked if you've taken any action, and you</p> <p>11 said we have added negative keywords to our accounts.</p> <p>12 My question to you was not have you ever added negative</p> <p>13 keywords to your accounts. My question was, have you</p> <p>14 ever taken any action based on your belief. I'm just</p> <p>15 trying to connect if you added negative keywords based</p> <p>16 on your belief. So I will strike that and I'll ask a</p> <p>17 very clear question.</p> <p>18 Have you ever added a negative keyword to</p> <p>19 1-800 Contacts' accounts based on your belief that the</p> <p>20 agreement between Coastal and 1-800 required you to do</p> <p>21 so?</p> <p>22 MR. RAPHAEL: Object to form.</p> <p>23 And to the extent your belief about the</p> <p>24 requirements is based on communications with counsel,</p> <p>25 then I would instruct you not to answer that.</p>

17	<p>1 THE WITNESS: I don't remember if it was with 2 counsel or not.</p> <p>3 MR. RAPHAEL: Do we need to step out and talk 4 about it for a minute? We're allowed to do that if you 5 have concerns about whether you're going to reveal 6 something from counsel.</p> <p>7 THE WITNESS: Step out.</p> <p>8 MR. RAPHAEL: Yeah, sure. Off the record for 9 a minute.</p> <p>10 (Recess.)</p> <p>11 BY MR. MATHESON:</p> <p>12 Q Have you ever added a negative keyword to 13 1-800 Contacts' accounts based on your belief that the 14 agreement between Coastal and 1-800 Contacts required 15 you to do so?</p> <p>16 MR. RAPHAEL: Again, I'm just going to 17 instruct you not to answer the question in a way that 18 reveals anything about beliefs based on what legal 19 counsel told you, but if there are actions based on 20 beliefs outside of that, then you can answer.</p> <p>21 THE WITNESS: Typically we go through legal 22 for anything that has to do with these agreements. 23 There may have been an instance where we receive 24 something from Coastal and added negative keywords to 25 our account.</p>	19	<p>1 first document I handed you this morning. I would like 2 to direct your attention to page 2 of the document. The 3 second email down appears to me to be an email that you 4 sent to Mr. Braden Hoepfner and Mr. Curtis Peterson on 5 June 9, 2014. Is that fair?</p> <p>6 A Yeah.</p> <p>7 Q And in the email you state, and I quote, "My 8 former coworker, Rick Galan, reached out to Curtis 9 Peterson a couple of months ago and had this issue 10 resolved."</p> <p>11 Do you see that portion of the email?</p> <p>12 A Yes.</p> <p>13 Q Which issue were you referring to?</p> <p>14 A I believe it was Coastal sending us something 15 about adding negative keywords.</p> <p>16 Q Directing your attention to the first email -- 17 sorry, the email at the bottom of the first page of the 18 document, this email appears to me to be an email you 19 sent to Mr. Braden Hoepfner on June 10, 2014.</p> <p>20 A Okay.</p> <p>21 Q Is that consistent with your understanding?</p> <p>22 A Yes.</p> <p>23 Q Now, the second sentence, you state, "The 24 violations in the letter are for clearlycontacts.ca. I 25 have listed the terms that are in violation and attached</p>
18	<p>1 BY MR. MATHESON:</p> <p>2 Q Was the answer to my previous question 3 impacted in any way by Mr. Raphael's instruction not to 4 reveal anything about your beliefs that you formed based 5 on what legal counsel told you?</p> <p>6 MR. RAPHAEL: Object to form.</p> <p>7 THE WITNESS: No.</p> <p>8 BY MR. MATHESON:</p> <p>9 Q So what do you understand the agreement -- 10 strike that.</p> <p>11 You understand the agreement between 1-800 and 12 Coastal requires 1-800 to implement negative keywords, 13 right?</p> <p>14 A Yes.</p> <p>15 Q And have you ever taken any actions based on 16 that belief -- strike that.</p> <p>17 Have you ever taken any actions to implement 18 negative keywords based on a request you received from 19 Coastal?</p> <p>20 A I think so.</p> <p>21 Q And you did that because you understood that 22 there was an agreement between the companies that 23 required it, right?</p> <p>24 A Yes.</p> <p>25 Q Okay. Let's return to CX0703, which is the</p>	20	<p>1 a few screen shots as well."</p> <p>2 Do you see that portion?</p> <p>3 A Yes.</p> <p>4 Q What were the violations you were referring 5 to?</p> <p>6 A The tool that we used to monitor trademarks 7 had shown that the clearlycontacts.ca website was 8 showing ads on these terms.</p> <p>9 Q When you say "showing ads on these terms," 10 they were displaying search advertising on search engine 11 results pages in response to searches that contained 12 these terms?</p> <p>13 A Correct.</p> <p>14 Q At the bottom of the email, you inform 15 Mr. Hoepfner that "A few negative keywords should take 16 care of the problem. Please let me know when these are 17 added to the account."</p> <p>18 Did I read that right?</p> <p>19 A Yes.</p> <p>20 Q Do you -- did you understand based on 21 Mr. Hoepfner's response to your email that he had 22 actually added negative keywords to his account?</p> <p>23 A From his response it sounded like he had.</p> <p>24 Q When you asked him to add the negative 25 keywords, did you expect him to do so?</p>

21	<p>1 A Yeah.</p> <p>2 Q Why did you expect that he would agree to add</p> <p>3 negative keywords to his account?</p> <p>4 A Because of the agreement with the companies.</p> <p>5 Q When you say "the agreement with the</p> <p>6 companies," you mean the agreement that was in place in</p> <p>7 2014 between Coastal contacts and 1-800 Contacts, right?</p> <p>8 A Yeah.</p> <p>9 Q Did you ever investigate to see if</p> <p>10 Mr. Hoepfner -- strike that.</p> <p>11 Other than the agreements we've discussed this</p> <p>12 morning with Vision Direct, Coastal, are there are any</p> <p>13 other agreements you're aware of that 1-800 Contacts has</p> <p>14 reached with sellers of contact lenses regarding the</p> <p>15 display of search advertising?</p> <p>16 MR. RAPHAEL: I would say you can answer that</p> <p>17 question to the extent your knowledge is based on</p> <p>18 anything other than what counsel has discussed with you.</p> <p>19 THE WITNESS: I don't know. I can't recall</p> <p>20 right now.</p> <p>21 BY MR. MATHESON:</p> <p>22 Q When you say you don't know, do you mean you</p> <p>23 don't know if you're aware, or are you saying you cannot</p> <p>24 currently think -- or strike that.</p> <p>25 Was your response to my question meant to</p>	23	<p>1 whatever time you need to review it, sir. My only</p> <p>2 question will be directed to the text that follows</p> <p>3 Arabic numeral 8 on the second page of the document.</p> <p>4 A Okay.</p> <p>5 Q Do you recognize this document, sir?</p> <p>6 A No.</p> <p>7 Q Have you ever been informed that you would</p> <p>8 testify on behalf of 1-800 Contacts regarding each</p> <p>9 negative keyword 1-800 Contacts implemented as a result</p> <p>10 of a supplement agreement and the date each such keyword</p> <p>11 was implemented?</p> <p>12 A Me personally?</p> <p>13 Q Correct.</p> <p>14 A No.</p> <p>15 MR. MATHESON: Can we go off the record one</p> <p>16 second.</p> <p>17 (Recess.)</p> <p>18 BY MR. MATHESON:</p> <p>19 Q Let's go back on the record.</p> <p>20 Hand you a document, sir, that we have marked</p> <p>21 as CX0296.</p> <p>22 Please take whatever time you need to review</p> <p>23 this, sir. Just to prevent you from wasting time you</p> <p>24 would prefer not to waste, my questions will you</p> <p>25 directed to the pages labeled CX0296-024, 027 -- sorry,</p>
22	<p>1 indicate you cannot currently recall any agreements</p> <p>2 between 1-800 Contacts and a seller of contact lenses</p> <p>3 relating to the display of search advertising other than</p> <p>4 the agreements with Vision Direct and Coastal?</p> <p>5 A I believe there are other companies.</p> <p>6 Q Which other companies?</p> <p>7 MR. RAPHAEL: Again, same instruction. You</p> <p>8 can answer to the extent your knowledge is based beyond</p> <p>9 what counsel has told you.</p> <p>10 THE WITNESS: Walgreens.</p> <p>11 BY MR. MATHESON:</p> <p>12 Q Any others?</p> <p>13 A Not that I can recall off the top of my head.</p> <p>14 Q Did Mr. Raphael's instruction to answer only</p> <p>15 to the extent your knowledge is based on things other</p> <p>16 than what counsel has told you impact your response to</p> <p>17 my questions?</p> <p>18 A No.</p> <p>19 Q So there are no other companies you can recall</p> <p>20 right now based on what counsel has told you?</p> <p>21 A Not that I can recall at this time.</p> <p>22 Q I would like to hand you a document we've</p> <p>23 marked as CX1437. I'm afraid I only have one copy.</p> <p>24 It's just the Rule 3.33(c)(1) notice, requesting a</p> <p>25 corporate deposition of 1-800 Contacts. Please take</p>	24	<p>1 028 and 034. And by those I'm talking about these</p> <p>2 numbers here in the lower -- the CX numbers. They're CX</p> <p>3 numbers here, and then Bates numbers here.</p> <p>4 A Okay.</p> <p>5 Q When I say 024, I mean CX024.</p> <p>6 Please take whatever time you need and let me</p> <p>7 know when you've had a chance to review it.</p> <p>8 A Okay.</p> <p>9 Q Directing your attention to CX096-024 --</p> <p>10 first, do you recognize this document, sir?</p> <p>11 A Yeah, it looks familiar.</p> <p>12 Q What does this document -- what is this</p> <p>13 document?</p> <p>14 A It's a slide deck that was put together for</p> <p>15 affiliate marketing and paid search.</p> <p>16 Q And what is your involvement in paid search</p> <p>17 marketing?</p> <p>18 A I run the paid search program.</p> <p>19 Q Now, I understand slide CX024 to be referring</p> <p>20 to the contribution margin of two types of paid search</p> <p>21 advertising; is that fair?</p> <p>22 MR. RAPHAEL: Object to form.</p> <p>23 THE WITNESS: What do you mean "two types"?</p> <p>24 BY MR. MATHESON:</p> <p>25 Q Trademark search -- trademark keyword and</p>

25

1 nontrademark key keyword.
 2 A Okay.
 3 **Q Well, how would you describe what slide 024**
 4 **presents?**
 5 A Just shows the contribution margin for
 6 trademark and nontrademark for 2013 and 2014.
 7 **Q When you say "the contribution margin for**
 8 **nontrademark for 2014," what does nontrademark mean in**
 9 **that statement?**
 10 A Nontrademark would be any of our general
 11 contact lens-type keywords that we use, as well as any
 12 other product specific keywords, like Acuvue Oasis, like
 13 the actual product names themselves. So that kind of
 14 keyword.
 15 **Q So is it accurate to state that this slide**
 16 **displays the contribution margin for paid search**
 17 **advertising displayed in response to nontrademark**
 18 **keywords?**
 19 A Yes.
 20 **Q And what is contribution margin?**
 21 A I -- I don't know. I don't know what it's
 22 referred to in here.
 23 **Q Do you have any understanding of what**
 24 **contribution margin means?**
 25 A Not really.

26

1 **Q Is contribution margin a term you've heard in**
 2 **the ordinary course of business?**
 3 A Not very often, for me anyway.
 4 **Q What do you understand it to mean when --**
 5 **strike that.**
 6 **Looking at this document does it appear to**
 7 **you -- or strike that.**
 8 **Did 1-800 Contacts trademark keywords produce**
 9 **a positive contribution margin in 2013?**
 10 MR. RAPHAEL: Object to form. Lack of
 11 foundation. He's asking him to read the document.
 12 THE WITNESS: Say that again.
 13 BY MR. MATHESON:
 14 **Q Did 1-800 Contacts trademark keywords produce**
 15 **a positive contribution margin in 2013?**
 16 A It looks like it, from the document.
 17 **Q Do you have any independent knowledge of**
 18 **whether 1-800 Contacts trademark keywords produced a**
 19 **positive contribution margin in any year you've been**
 20 **employed by the company?**
 21 A Not that I can recall. I'm not looking at the
 22 contribution margin on an ongoing or regular basis.
 23 This isn't something that I -- I look at. This is more
 24 from our finance team.
 25 **Q Were you involved in the preparation of this**

27

1 **presentation?**
 2 A Yeah.
 3 **Q Did you have an opportunity to review these**
 4 **slides before this presentation was delivered?**
 5 A I believe so.
 6 **Q Do you believe that the information in this**
 7 **presentation is accurate?**
 8 MR. RAPHAEL: Object to form.
 9 BY MR. MATHESON:
 10 **Q Strike that.**
 11 **At the time that you participated in the**
 12 **preparation of this presentation, did you conclude that**
 13 **any of the information in this presentation was**
 14 **inaccurate?**
 15 MR. RAPHAEL: Object to form. Lack of
 16 foundation.
 17 THE WITNESS: I think -- I would imagine it's
 18 accurate. I don't know.
 19 BY MR. MATHESON:
 20 **Q Do you recall ever informing any of your**
 21 **coworkers that you believe the information in this**
 22 **presentation was inaccurate?**
 23 A Not that I recall.
 24 **Q It would be your business practice to call to**
 25 **the attention of your coworkers information in an**

28

1 **important presentation that you felt to be inaccurate;**
 2 **is that fair?**
 3 MR. RAPHAEL: Object to form.
 4 THE WITNESS: Yeah, I guess. I don't know.
 5 BY MR. MATHESON:
 6 **Q Well, it's generally your understanding of**
 7 **your responsibilities as an employee of 1-800 Contacts**
 8 **to convey accurate information to your coworkers, right?**
 9 A Yeah, we try to share accurate information.
 10 **Q You're not trying to mislead your coworkers on**
 11 **a daily basis?**
 12 A No.
 13 **Q The first bullet point here states "Overall CM**
 14 **increases in 2014 and 2015 despite NTM decrease."**
 15 **Did I read that right?**
 16 A Yes.
 17 **Q Do you understand that to mean that the**
 18 **overall contribution margin of paid search advertising**
 19 **increased between 2014 and 2015?**
 20 MR. RAPHAEL: Object to form. Lack of
 21 foundation. He testified he doesn't know what
 22 contribution margin is.
 23 THE WITNESS: It looks like that's what it
 24 says.
 25

7 (Pages 25 to 28)

29	<p>1 BY MR. MATHESON:</p> <p>2 Q But nontrademark terms had a negative</p> <p>3 contribution margin in 2013 and 2014 based on this</p> <p>4 document; is that right?</p> <p>5 A Looks like that's what it shows.</p> <p>6 Q Okay. Now, the next bullet states, quote,</p> <p>7 "Lifetime customer value, long-term benefits of search</p> <p>8 impressions and driving sales and other channels</p> <p>9 potentially would offset the investment in NTM paid</p> <p>10 search."</p> <p>11 Did I read that right?</p> <p>12 A Yes.</p> <p>13 Q What do you understand "lifetime customer</p> <p>14 value" to mean in this statement?</p> <p>15 A Basically customers returning to 1-800</p> <p>16 Contacts to reorder and repurchase.</p> <p>17 Q What do you understand the phrase "investment</p> <p>18 in NTM paid search" to mean in this bullet?</p> <p>19 A Spending more on nontrademark paid search, or</p> <p>20 spending -- spending advertising budget on nontrademark</p> <p>21 paid search.</p> <p>22 Q And when you say "spending more on</p> <p>23 nontrademark paid search," do you mean spending more</p> <p>24 than the immediate short-term revenue generated by</p> <p>25 nontrademark paid search?</p>	31	<p>1 other channels would potentially justify losing money on</p> <p>2 nontrademark search advertising in a given year?</p> <p>3 MR. RAPHAEL: Object to form. Calls for</p> <p>4 speculation.</p> <p>5 THE WITNESS: Yeah, I don't -- I can't -- I</p> <p>6 can't know what's going to happen in the future. But</p> <p>7 potentially it could have an impact for long-term</p> <p>8 performance.</p> <p>9 BY MR. MATHESON:</p> <p>10 Q I mean, you are responsible for determining</p> <p>11 how to allocate spending on keywords for 1-800 Contacts,</p> <p>12 correct?</p> <p>13 A Yeah.</p> <p>14 Q And you're aware that nontrademark keywords</p> <p>15 cost the company more money than they generated in the</p> <p>16 short-term in 2013; is that fair?</p> <p>17 MR. RAPHAEL: Object to form. Lack of</p> <p>18 foundation.</p> <p>19 THE WITNESS: Yeah. It sounds -- sounds</p> <p>20 correct.</p> <p>21 BY MR. MATHESON:</p> <p>22 Q But the potential long-run benefits to 1-800</p> <p>23 Contacts meant that it made sense to make that</p> <p>24 investment?</p> <p>25 MR. RAPHAEL: Object to form. Foundation.</p>
30	<p>1 A No. I didn't actually mean to say "more" in</p> <p>2 my initial statement.</p> <p>3 Q What does "driving sales and other channels"</p> <p>4 mean in the context of this bullet?</p> <p>5 MR. RAPHAEL: I'm going to object and have a</p> <p>6 standing objection to the entire line for lack of</p> <p>7 foundation, given I don't think that you've established</p> <p>8 he has any basis to know what these terms are.</p> <p>9 THE WITNESS: Basically looking at attribution</p> <p>10 where nontrademark clicks end up as an order in another</p> <p>11 channel or through another search term.</p> <p>12 BY MR. MATHESON:</p> <p>13 Q What about "long-term benefits of search</p> <p>14 impressions," what does that mean in context of this</p> <p>15 bullet?</p> <p>16 A Getting the 1-800 Contacts brand name visible,</p> <p>17 making people aware of the brand.</p> <p>18 Q And that benefits 1-800 Contacts how?</p> <p>19 A People will search for other search terms.</p> <p>20 They will know about the company and help the</p> <p>21 reputation, building -- building the reputation of the</p> <p>22 brand basically.</p> <p>23 Q So is it fair to state that lifetime customer</p> <p>24 value, the long-term benefits of search terms</p> <p>25 impression, and the possibility of driving sales in</p>	32	<p>1 THE WITNESS: Yeah.</p> <p>2 BY MR. MATHESON:</p> <p>3 Q I mean you would have changed if it if you</p> <p>4 didn't think it made sense, right? It's your goal to</p> <p>5 benefit the company, not to waste money on unproductive</p> <p>6 search advertising, right?</p> <p>7 MR. RAPHAEL: Object to form. Compound. Two</p> <p>8 questions in there.</p> <p>9 BY MR. MATHESON:</p> <p>10 Q Strike that.</p> <p>11 Is it your goal when you determine how 1-800</p> <p>12 Contacts allocates its search advertising spent to waste</p> <p>13 the company's money?</p> <p>14 A No.</p> <p>15 Q Is it your goal to -- when you're -- strike</p> <p>16 that.</p> <p>17 Is it your goal when determining how 1-800</p> <p>18 Contacts should allocate its search advertising spend to</p> <p>19 help the company grow?</p> <p>20 A Yeah.</p> <p>21 Q Do you think the investments that you made in</p> <p>22 2013 in search advertising were mistakes?</p> <p>23 A No.</p> <p>24 Q You're trying to do a good job like everyone</p> <p>25 else, right? You're trying to help the company you work</p>

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1 for. You're aware that you might lose money in the
2 short run, but you believe that the long-run benefits
3 justify that short-run investment.
4 MR. RAPHAEL: Objection to form. There's
5 three questions there.
6 BY MR. MATHESON:
7 **Q In nontrademark search advertising, right?**
8 A The long-term benefit, that's what it says in
9 here. Offset the short-term loss.
10 **Q And you're the one who makes the decisions on**
11 **how to allocate spend on search advertising terms,**
12 **right?**
13 A Yes.
14 **Q And so after you've helped prepare this**
15 **presentation, did you suggest that spending on**
16 **nontrademark search advertising should be changed in**
17 **order to generate a positive contribution margin?**
18 MR. RAPHAEL: Object to form. Foundation.
19 THE WITNESS: Not that I can recall.
20 BY MR. MATHESON:
21 **Q And you would have made that recommendation if**
22 **you thought it was in the best interest of the company,**
23 **right?**
24 MR. RAPHAEL: Same objection.
25

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1 BY MR. MATHESON:
2 **Q You mean you try to act in the best interest**
3 **of the company, right?**
4 A Yeah.
5 **Q Let's look at slide -027. CX029- -- sorry.**
6 **CX296-028. I made a mistake and messed up.**
7 **Please take whatever time you need to review**
8 **this and let me know when you've done so, sir.**
9 A Okay.
10 **Q Did you participate in the preparation of this**
11 **slide?**
12 A I don't remember.
13 **Q Do you have an understanding of what this**
14 **slide discusses?**
15 A Yes.
16 **Q Do you have an understanding of what this**
17 **slide discusses based on information beyond just reading**
18 **the slide sitting here today?**
19 A I don't know what you're trying to --
20 **Q I just want to know -- I mean, do you recall**
21 **coupons.com in 2015?**
22 A Yeah.
23 **Q Do you recall what the Eckim test was?**
24 A Yes.
25 **Q Okay. And that's not so -- we're not just --**

35

1 when I ask questions about this slide, do you have an
2 independent recollection beyond the four corners of this
3 document about the subject matter to which this slide
4 relates?
5 A Yeah.
6 **Q First bullet -- strike that.**
7 **So this title of this slide is coupons.com**
8 **(Eckim test). What does Eckim mean?**
9 A Eckim was purchased by coupons.com, and so
10 it's just one of the affiliates that 1-800 Contacts
11 works with.
12 **Q And so is coupons.com an affiliate of 1-800**
13 **Contacts?**
14 A Yes.
15 **Q And Eckim was a different affiliate of 1-800**
16 **Contacts that was purchased by coupons.com?**
17 A Yes.
18 **Q What does it mean in the first bullet to**
19 **state, and I quote, "Coupons.com (Eckim) bids below us**
20 **on a select list of TM plus terms allowing us to capture**
21 **customers who are more likely to select an offer from an**
22 **affiliate site than with us"?**
23 A So they bid on 1-800 Contacts coupon search
24 terms.
25 **Q So does "TM plus terms," as used in this**

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1 **bullet, refer to the search term 1-800 Contacts coupon?**
2 A Yes.
3 **Q Strike that.**
4 **Does the -- does the phrase "TM plus terms,"**
5 **as used in this bullet, refer to the keyword 1-800**
6 **Contacts coupon?**
7 MR. RAPHAEL: Object to form. Lack of
8 foundation. He didn't write this slide.
9 THE WITNESS: I believe it does.
10 BY MR. MATHESON:
11 **Q What other -- in the ordinary nature course of**
12 **business when you see the phrase "TM plus terms," what**
13 **do you understand it to mean?**
14 A Terms that have our trademark that also
15 include something else like coupon or coupon code, or
16 something in addition to our trademark.
17 **Q Okay. And you understand that's what it means**
18 **in this bullet?**
19 A Yeah.
20 **Q Now, what does it mean to state that**
21 **coupon.com Eckim bids below us, in this bullet?**
22 MR. RAPHAEL: Same objection. Lack of
23 foundation.
24 THE WITNESS: They show up below our ad.
25

37

1 BY MR. MATHESON:
 2 **Q Does it mean that they place a bid that is**
 3 **lower than the max bid 1-800 Contacts places on the TM**
 4 **plus terms?**
 5 MR. RAPHAEL: Same objection.
 6 THE WITNESS: I don't know.
 7 BY MR. MATHESON:
 8 **Q Who would know?**
 9 A I don't know.
 10 **Q Who was responsible for the -- strike that.**
 11 **It says the coupons.com Eckim test. What do**
 12 **you understand "test" to mean?**
 13 MR. RAPHAEL: Same objection. Lack of
 14 foundation.
 15 THE WITNESS: Running a test to see if the
 16 coupons.com site could bring in additional traffic to
 17 the website.
 18 BY MR. MATHESON:
 19 **Q When you say "running a test," what do you**
 20 **mean by "running a test"?**
 21 A It's not something that we normally do. It's
 22 new. It's a test. It's something that's never been
 23 done before.
 24 **Q But how does one run a test in -- as it's used**
 25 **in this slide? You don't take out a Scan-Tron and fill**

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1 **in bubbles, right? What does it mean to run a test?**
 2 A Run a test.
 3 **Q Does it mean to try a new policy -- or strike**
 4 **that.**
 5 **Does it mean to try an action and then see**
 6 **what happens for the purpose of measuring the results?**
 7 A Yeah. It's -- it's try something, see if it
 8 works or not. Actually how it works.
 9 **Q So what was the test that was run?**
 10 A Allowing coupons.com to show up for our
 11 trademark plus search terms.
 12 **Q So prior to the time that this test was run,**
 13 **coupons.com was prohibited from displaying its search**
 14 **advertising in response to 1-800 Contacts' trademark**
 15 **search terms, right?**
 16 MR. RAPHAEL: Objection. Foundation.
 17 THE WITNESS: As far as I know, yes.
 18 BY MR. MATHESON:
 19 **Q And then in order to see what happened, 1-800**
 20 **Contacts allowed coupons.com to display its search**
 21 **advertising in response to searches for 1-800 Contacts**
 22 **trademark terms?**
 23 A The trademark plus terms.
 24 **Q So it allowed coupons.com to display search**
 25 **advertising in response to searches for 1-800 Contacts**

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1 **trademark plus terms?**
 2 A Yes.
 3 **Q The second bullet, it states that "CPC does**
 4 **increase on these terms when this is active, but the**
 5 **orders/revenue generated compensate for that increase."**
 6 **Did I read that right?**
 7 A Yes.
 8 **Q What does "CPC" in this bullet?**
 9 MR. RAPHAEL: Object to form. Lack of
 10 foundation. Also have a standing objection. He didn't
 11 write this slide.
 12 THE WITNESS: Cost per click.
 13 BY MR. MATHESON:
 14 **Q What's that based on, your answer? I mean,**
 15 **you know what CPC means, right?**
 16 A Yeah. From the search engines, it's just the
 17 average costs per click that you pay for a click on your
 18 ad.
 19 **Q You use that term every single day you're at**
 20 **work, right?**
 21 A I don't know about every day.
 22 **Q You use it every week you're at work, right?**
 23 A Yes.
 24 **Q It's a fundamental key performance indicator**
 25 **with which you're intimately familiar in the ordinary of**

40

1 **job of your duties, right?**
 2 A Yes.
 3 **Q So there's no doubt in your mind about what**
 4 **this bullet means, is there?**
 5 A No.
 6 MR. RAPHAEL: Object to form.
 7 BY MR. MATHESON:
 8 **Q Who was responsible for creating the**
 9 **information displayed on this slide?**
 10 A I -- I don't know.
 11 **Q Whose job would it be to measure the number of**
 12 **Eckim orders that are displayed in a chart at the bottom**
 13 **of this page?**
 14 A Our affiliate manager.
 15 **Q And who was that in February 2015?**
 16 A I believe it was Jerry Turner.
 17 **Q Do you know who created this slide?**
 18 A I don't.
 19 **Q Turning your attention, sir, to slide**
 20 **CX0296-034. Sorry, CX0296-035. I apologize. Again,**
 21 **I'm using the wrong set of Bates numbers.**
 22 A Okay.
 23 **Q What does CPO mean as it's used on this slide?**
 24 A Cost per order.
 25 **Q Would you agree that there are two factors**

10 (Pages 37 to 40)

41	43
<p>1 that determine cost per order, those factors being cost 2 per click and conversion rate? 3 A Yeah. 4 Q Are there any other factors that would impact 5 the cost per order metric. And to be candid I can't 6 think of any. I just want to make sure we're 7 communicating clearly. 8 A The number of clicks you receive. 9 Q Why would the number of clicks -- I mean, I 10 understand how the number of clicks would impact the 11 total amount you would pay, but why would the number of 12 clicks impact the cost per order? 13 A The number of clicks multiplied by your CPC, 14 it takes that into account. And then -- as well as your 15 conversion rate. 16 Q Now, I just want to make sure we're 17 communicating clearly, so let's try to use really easy 18 numbers. 19 This doesn't need to be an exhibit. I just 20 want to make sure we're communicating clearly. 21 MR. RAPHAEL: I'm going to object and say if 22 you want to have him look at something, then you should 23 put it as an exhibit. 24 MR. MATHESON: You can go right ahead and 25 object, but that's a totally baseless objection, so feel</p>	<p>1 Q Okay. If the cost per click for a certain 2 keyword was \$1, and that keyword generated 1,000 clicks, 3 that would incur \$1,000 in cost, right? 4 A Yes. 5 Q If the conversion rate on that particular 6 keyword was 10 percent and it received 1,000 clicks, 7 that result in 100 orders, right? 8 A Correct. 9 Q What would the cost per order be if a keyword 10 generated 100 orders and \$1,000 in cost? 11 A \$10. 12 Q So the number of clicks, not keyword received, 13 doesn't change the cost per order, does it? 14 A No. Your original statement, though, with CPC 15 and conversion rate does not match up, though, because 16 it's your total cost, which is in there. 17 Q My original statement, sir, was -- and if I 18 misspoke, I apologize. So can we agree, no matter what 19 transpired before, that there are only two factors that 20 impact cost per order, and that those factors are cost 21 per click and conversion rate? 22 A Sure. 23 Q One factor that influences the cost per click 24 for a particular keyword is the bid 1-800 Contacts 25 places on the keyword, right?</p>
<p>1 free. 2 BY MR. MATHESON: 3 Q All right. 100 clicks -- 4 MR. RAPHAEL: Just -- just for the record, the 5 complaint counsel is showing the witness is a 6 handwritten example that he has refused to mark as an 7 exhibit. 8 MR. MATHESON: Don't feel like I haven't 9 refused. 10 BY MR. MATHESON: 11 Q 100 -- so I want you to just Imagine that you 12 have -- just want to make sure we're communicating very 13 clearly on numbers. If the cost per click for a certain 14 C word -- sorry. Strike that. 15 If a costs per click for a search keyword is 16 \$1 and there are 100 clicks on that keyword, that would 17 incur \$100 in cost, right? 18 A Right. 19 Q Now, if the conversion rate on that particular 20 keyword was 10 percent and you receive 100 clicks, that 21 would result in ten orders, right? 22 A Correct. 23 Q What would the cost per order be if you 24 received ten orders and paid \$100 in cost? 25 A \$10.</p>	<p>1 A That's one thing. 2 Q Another factor that influences cost per click 3 for a particular keyword are the bids other advertisers 4 place on that keyword, right? 5 A I -- yes. 6 Q Are there any other factors that impact cost 7 per click? 8 A Yeah. There is quality score for the search 9 engines as well as ad rank. 10 Q Anything else? 11 A Not that I can think of right now. 12 Q Returning to -- our attention to the slide we 13 were discussing, CX0296-035, the farthest box on the 14 right under the heading "Other MTM Keywords," the first 15 bullet indicates a CPO target of \$60. Is that fair? 16 A Yeah. 17 Q You were responsible for managing bidding on 18 keywords in order to achieve the CPO target, right? 19 A Correct. 20 Q Now, was it your goal -- or strike that. 21 And you understand that this goal related to 22 which period of time? 23 A I don't think it's referencing a period of 24 time. 25 Q Was -- was this a goal that you understood</p>

45	<p>1 1-800 Contacts to have in 2015?</p> <p>2 A Yeah.</p> <p>3 Q Now, this doesn't mean it was your goal to</p> <p>4 achieve a cost per order of \$60 for each particular</p> <p>5 nontrademark keyword, does it?</p> <p>6 A No. It's -- it's a total.</p> <p>7 Q So was it your goal to achieve an average cost</p> <p>8 per order of approximately \$60 for nontrademark keywords</p> <p>9 in 2015?</p> <p>10 A Yes.</p> <p>11 Q You would expect some to be lower than \$60 on</p> <p>12 a cost per order basis?</p> <p>13 A Yes.</p> <p>14 Q And would you expect some to be higher than</p> <p>15 \$60 on a cost per order basis?</p> <p>16 A Yes.</p> <p>17 Q Why didn't you just attempt to manage every</p> <p>18 keyword to a \$60 cost per order?</p> <p>19 A We broke our campaigns out into different</p> <p>20 separate pieces with our trademark keywords and our</p> <p>21 nontrademark keywords, and we handled our nontrademark</p> <p>22 keywords differently because they performed differently.</p> <p>23 They've got different conversion rates, different CPCs,</p> <p>24 all of those are different.</p> <p>25 Q That wasn't a very good question.</p>	47	<p>1 impression, an increasing in ad rank, right?</p> <p>2 MR. RAPHAEL: Object to form. Compound.</p> <p>3 THE WITNESS: It's all speculative.</p> <p>4 BY MR. MATHESON:</p> <p>5 Q No, I'm just asking as a general matter. All</p> <p>6 right. Strike that.</p> <p>7 Have you ever -- nothing difficult about it.</p> <p>8 Have you ever tested whether increasing a bid</p> <p>9 on a keyword would increase the revenues generated by</p> <p>10 that keyword?</p> <p>11 A Yes.</p> <p>12 Q Is it always the case that increasing a bid on</p> <p>13 a keyword is a good idea if it increases the revenues</p> <p>14 generated by that keyword?</p> <p>15 A No. Every circumstance is different.</p> <p>16 Q Sometimes it's a good idea and sometimes it's</p> <p>17 a bad idea, right?</p> <p>18 A Yeah.</p> <p>19 Q When is it a good idea?</p> <p>20 MR. RAPHAEL: Object to the form.</p> <p>21 THE WITNESS: When is it a good idea for what?</p> <p>22 BY MR. MATHESON:</p> <p>23 Q When is it a good idea to increase a bid on a</p> <p>24 keyword, even if that increases the cost per order?</p> <p>25 A If it's still within the target or if it's</p>
46	<p>1 Now, hypothetically let's assume a particular</p> <p>2 keyword in 2015 had a cost per order of \$40, okay. In</p> <p>3 some circumstances you might increase your bid on that</p> <p>4 term to see if that was a profitable course of action,</p> <p>5 right?</p> <p>6 A Yes or no.</p> <p>7 Q In some circumstances you might; in some you</p> <p>8 might not. Fair?</p> <p>9 A Yeah.</p> <p>10 Q One result of increasing your bid might be to</p> <p>11 increase the number of impressions on a keyword; is that</p> <p>12 fair?</p> <p>13 A Not necessarily.</p> <p>14 Q I didn't ask necessarily. One result might</p> <p>15 be. I didn't say in all circumstances it would. I'm</p> <p>16 just trying to make sure we're communicating clearly.</p> <p>17 A Yeah, sometimes it could increase impressions.</p> <p>18 Q And sometimes it might increase the quality of</p> <p>19 the ad rank?</p> <p>20 A Higher bid could increase the ad rank.</p> <p>21 Q So increasing a bid on a term, the</p> <p>22 hypothetical term we're discussing, that had a cost per</p> <p>23 order of \$40 could make sense because even though your</p> <p>24 cost per order could increase based on a higher bid, you</p> <p>25 might generate more orders due to an increasing</p>	48	<p>1 producing more volume and the overall total maintains</p> <p>2 the same.</p> <p>3 Q What do you mean by producing more volume?</p> <p>4 A It's generating more clicks and orders.</p> <p>5 Q What do you mean by "overall total maintains</p> <p>6 the same"?</p> <p>7 A Our -- our overall nontrademark bucket that we</p> <p>8 work out of, if the CPO would maintain the same by</p> <p>9 increasing the one keyword.</p> <p>10 Q What do you mean by "within the target"?</p> <p>11 A The cost per order target.</p> <p>12 MR. RAPHAEL: Good time for a good break.</p> <p>13 (Recess.)</p> <p>14 BY MR. MATHESON:</p> <p>15 Q Hand you a document, sir, that we have marked</p> <p>16 CX1155.</p> <p>17 A Okay.</p> <p>18 Q Do you recognize this document, sir?</p> <p>19 A Vaguely.</p> <p>20 Q What is this document?</p> <p>21 A It looks like it's an email from Kevin</p> <p>22 Hutchings to our Google reps.</p> <p>23 Q What was Kevin Hutchings' job at 1-800</p> <p>24 Contacts in October of 2014?</p> <p>25 A He was a paid search analyst.</p>

49	<p>1 Q What were his responsibilities?</p> <p>2 A Help manage and optimize the paid search</p> <p>3 accounts.</p> <p>4 Q Did he report to you in October of 2014?</p> <p>5 A Yes.</p> <p>6 Q And you're copied on the email at the top of</p> <p>7 this chain, correct?</p> <p>8 A Yes.</p> <p>9 Q And you said this email went to the -- your</p> <p>10 Google account reps. Who were your Google account reps</p> <p>11 in October 2014?</p> <p>12 A Natalia and Adrian.</p> <p>13 Q Natalia is Natalia Bohm, B-O-H-M?</p> <p>14 A Yes.</p> <p>15 Q And Adrian is Adrian Barajas, B-A-R-A-J-A-S?</p> <p>16 A Yes.</p> <p>17 Q For what purpose was Mr. Hutchings</p> <p>18 corresponding with 1-800 Contacts' Google reps in</p> <p>19 October of 2014?</p> <p>20 A It looks like he was trying to get</p> <p>21 clarification on how match types for negative keywords</p> <p>22 worked.</p> <p>23 Q Why did 1-800 direct the questions to Natalia</p> <p>24 Bohm?</p> <p>25 A She was --</p>	51	<p>1 A I can't recall anything specifically, but</p> <p>2 sometimes there were things that just didn't seem quite</p> <p>3 right.</p> <p>4 Q Is she still the Google account rep for 1-800</p> <p>5 Contacts?</p> <p>6 A No.</p> <p>7 Q When did she stop being the Google account</p> <p>8 rep?</p> <p>9 A Sometime last year.</p> <p>10 Q Sometime in calendar year 2016?</p> <p>11 A Yes.</p> <p>12 Q Did you ask for her to be removed?</p> <p>13 A I didn't know.</p> <p>14 Q Do you know if she was promoted within Google?</p> <p>15 A I don't know.</p> <p>16 Q Did you ever know Ms. Bohm to be incorrect</p> <p>17 about the operation of negative keywords?</p> <p>18 A No.</p> <p>19 Q When you received this email in October of</p> <p>20 2014, did you review it at the time?</p> <p>21 A I -- I don't remember.</p> <p>22 Q Did anything about this email strike you as</p> <p>23 inaccurate when you received it?</p> <p>24 A When I received it just barely, or when I</p> <p>25 received the email initially?</p>
50	<p>1 MR. RAPHAEL: Object to form. Lack of</p> <p>2 foundation.</p> <p>3 THE WITNESS: She was our contact at Google.</p> <p>4 BY MR. MATHESON:</p> <p>5 Q What was her job as her -- your contact at</p> <p>6 Google?</p> <p>7 A She would help us with our account.</p> <p>8 Q Did you take what she said seriously in 2014?</p> <p>9 A What specifically?</p> <p>10 Q Did you ever know her to be incorrect in 2014</p> <p>11 when you directed questions to her regarding Google?</p> <p>12 A No.</p> <p>13 Q Did you ever complain about her competence to</p> <p>14 her superiors at Google?</p> <p>15 A No.</p> <p>16 Q Did you ever personally question her</p> <p>17 competence?</p> <p>18 A Yes.</p> <p>19 Q In what was she not competent in your view --</p> <p>20 well, strike that.</p> <p>21 What caused you to question her competence?</p> <p>22 A Some of the things that she would tell us were</p> <p>23 not accurate from time to time.</p> <p>24 Q What can you recall that she told you was</p> <p>25 inaccurate?</p>	52	<p>1 Q When you received the email in 2014, did</p> <p>2 anything about it strike you as inaccurate?</p> <p>3 A I -- I don't really recall looking at the</p> <p>4 email in 2014.</p> <p>5 Q Does anybody about this email strike you as</p> <p>6 inaccurate as you sit here today?</p> <p>7 A No.</p> <p>8 Q Directing your attention to the second bullet</p> <p>9 in the email from Ms. Bohm to Kevin Hutchings, yourself,</p> <p>10 and Mr. Barajas, focusing specifically on that bullet,</p> <p>11 is anything in that bullet inconsistent with your</p> <p>12 understanding of how phrase match negative keywords</p> <p>13 work?</p> <p>14 A It looks accurate.</p> <p>15 Q When you say it looks accurate, do you mean it</p> <p>16 reflects your current understanding of how phrase match</p> <p>17 negative keywords work?</p> <p>18 A Yes.</p> <p>19 Q Has there ever been a time when you had a</p> <p>20 different understanding of how phrase match negative</p> <p>21 keywords worked?</p> <p>22 A No.</p> <p>23 Q Hand you a document, sir, we've marked at</p> <p>24 CX1120.</p> <p>25 A Okay.</p>

53	<p>1 Q Do you recognize this document, sir?</p> <p>2 A No.</p> <p>3 Q Do you recall -- or strike that.</p> <p>4 This document purports to be an email from</p> <p>5 Ms. Bohm to Mr. Hutchings, yourself, and Mr. Barajas in</p> <p>6 May 2014. Do you believe this document is a forgery?</p> <p>7 A No.</p> <p>8 Q Sitting here today do you believe this</p> <p>9 document constitutes an email sent to Mr. Hutchings,</p> <p>10 yourself, and Mr. Barajas in May 2014?</p> <p>11 A Yeah.</p> <p>12 Q You simply can't recall receiving it?</p> <p>13 A No, I can't.</p> <p>14 Q But you don't doubt that you did receive it?</p> <p>15 A No.</p> <p>16 Q Okay. Do you recall the interaction with</p> <p>17 Google regarding definitivedeals.com?</p> <p>18 A I believe definitivedeals.com the website is</p> <p>19 referring to our affiliate Eckim.</p> <p>20 Q So the former affiliate Eckim operated the</p> <p>21 website definitivedeals.com prior to the time Eckim was</p> <p>22 acquired by coupons.com?</p> <p>23 A I believe so.</p> <p>24 Q Turning our attention to the email at the</p> <p>25 bottom of the first page from Mr. Hutchings to Ms. Bohm</p>	55	<p>1 for those terms that we were bidding on for trademark</p> <p>2 plus.</p> <p>3 Q When you say "there was another website</p> <p>4 showing up for the terms," do you mean there was another</p> <p>5 advertiser displaying advertisements in response to the</p> <p>6 search terms included within the trademark plus number</p> <p>7 S002 campaign?</p> <p>8 A Yes.</p> <p>9 Q In which advertiser?</p> <p>10 A In Natalia's response she mentioned it was</p> <p>11 definitivedeals.com.</p> <p>12 Q Is that -- is it your understanding that her</p> <p>13 response is accurate?</p> <p>14 A Yeah.</p> <p>15 Q Did you take any action in order to prevent</p> <p>16 definitivedeals.com from displaying search advertising</p> <p>17 in response to the keywords included in the trademark</p> <p>18 plus number sign S002 campaign?</p> <p>19 A I don't believe so.</p> <p>20 Q Why not?</p> <p>21 A They are an affiliate of 1-800 Contacts.</p> <p>22 Q Why did the fact they were an affiliate of</p> <p>23 1-800 Contacts prevent you from attempting to take</p> <p>24 action in order to prevent their advertisements from</p> <p>25 driving up your costs per click?</p>
54	<p>1 in May 2014, the first sentence states, and I quote,</p> <p>2 "Last week we asked you if you had any insight into why</p> <p>3 we may be seeing a sudden and dramatic increase in our</p> <p>4 CPCs in our trademark plus number sign SOO2 campaign,</p> <p>5 trademark coupon/Pro Trons."</p> <p>6 Did I read that?</p> <p>7 A Yeah.</p> <p>8 Q Do you recall Mr. Hutchings -- strike that.</p> <p>9 Did you direct Mr. Hutchings to inquire of</p> <p>10 Google in May 2014 why 1-800 experienced a sudden and</p> <p>11 dramatic increase in the CPCs referred to in this</p> <p>12 sentence?</p> <p>13 A Not that I can recall.</p> <p>14 Q Do you recall whether or not 1-800 Contacts</p> <p>15 experienced a sudden and dramatic increase in cost per</p> <p>16 click in May 2014 on the terms referred to?</p> <p>17 A Yeah, I remember.</p> <p>18 Q So you recall that the increase occurred --</p> <p>19 A Yeah.</p> <p>20 Q -- in May 2014?</p> <p>21 Did you ever ascertain why this increase</p> <p>22 occurred?</p> <p>23 A Yeah.</p> <p>24 Q Why did the increase occur?</p> <p>25 A There was another website that was showing up</p>	56	<p>1 A We were running a test with them.</p> <p>2 Q So the increase in costs per click you</p> <p>3 experienced in May 2014 was a result of the test related</p> <p>4 to Eckim and coupons.com referred to in presentation you</p> <p>5 discussed previously?</p> <p>6 A Yes.</p> <p>7 Q Do you know if Eckim received any instructions</p> <p>8 regarding the bids it should place on the keywords</p> <p>9 included in the trademark plus S002 campaign?</p> <p>10 A It could have.</p> <p>11 Q Who would know whether Eckim received any</p> <p>12 instructions regarding the bids it should place on the</p> <p>13 keywords included in the trademark plus S002 campaign?</p> <p>14 A Maybe our affiliate manager Jerry.</p> <p>15 Q Jerry's last name is?</p> <p>16 A Turner.</p> <p>17 Q Turner.</p> <p>18 So if you wanted to know whether Eckim</p> <p>19 received any instructions, you would go ask Jerry</p> <p>20 Turner?</p> <p>21 A Yeah. He handles that relationship.</p> <p>22 Q Turn your attention to the final page of the</p> <p>23 document with writing on it, CX1120-005. I understand</p> <p>24 this to be the printout of the Excel attachment,</p> <p>25 attached to the email we were discussing. I just want</p>

57	<p>1 to walk through briefly if you understand what the</p> <p>2 headers of each column mean.</p> <p>3 The head of the -- the column on the far</p> <p>4 right, do you understand what top of page rate means as</p> <p>5 used by Google in this spreadsheet?</p> <p>6 A I believe so.</p> <p>7 Q What's your understanding?</p> <p>8 A My understanding is the ads that are placed at</p> <p>9 the top of the page in the top block as opposed to on</p> <p>10 the side.</p> <p>11 Q So top of page rate does not mean the first</p> <p>12 position within the top block?</p> <p>13 A No. I -- I don't know.</p> <p>14 Q Well, let's move to the next one.</p> <p>15 What about position above rate? What do you</p> <p>16 understand that to mean?</p> <p>17 A The position above rate is how often an</p> <p>18 advertiser showed up above you.</p> <p>19 Q By "above you," you mean how often an</p> <p>20 advertiser's search advertisement appeared higher within</p> <p>21 the top block than 1-800 Contacts' advertisement, right?</p> <p>22 A Yes, I believe so.</p> <p>23 Q So it makes sense that, for instance, looking</p> <p>24 at week April 14, 2014, definitivedeals.com had a top of</p> <p>25 page rate of 96 percent, so that means they appeared in</p>	59	<p>1 advertisements in response to 1-800 Contacts' trademark</p> <p>2 keywords, right?</p> <p>3 MR. RAPHAEL: Same objection. And assumes</p> <p>4 facts not in evidence.</p> <p>5 THE WITNESS: Can you repeat your question</p> <p>6 again.</p> <p>7 BY MR. MATHESON:</p> <p>8 Q The exception made for definitivedeals.com was</p> <p>9 made in order to test the impact of allowing affiliates</p> <p>10 to display advertisements in response to 1-800 Contacts'</p> <p>11 trademark keywords, right?</p> <p>12 A It was -- it was a test to see how it would</p> <p>13 perform, if we would generate additional orders and</p> <p>14 revenue by having an affiliate show up on those</p> <p>15 trademark plus terms.</p> <p>16 Q Currently does 1-800 Contacts allow</p> <p>17 definitivedeals.com to display search advertising in</p> <p>18 response to 1-800 Contacts' trademark terms?</p> <p>19 A We are allowing them to bid on our trademark</p> <p>20 plus terms currently.</p> <p>21 Q And that's because why?</p> <p>22 A I felt like it was making a positive impact.</p> <p>23 Q You ran the test. The results of the test</p> <p>24 were successful. You continued to allow</p> <p>25 definitivedeals.com to display search advertising?</p>
58	<p>1 the top block 96 percent of the time but they only</p> <p>2 appeared above 1-800 Contacts' advertisement 1 percent</p> <p>3 of the time, right?</p> <p>4 A I believe so.</p> <p>5 Q Turn back to the same page we were discussing</p> <p>6 previously, CX0296, page CX0296-035.</p> <p>7 A This one?</p> <p>8 Q Correct.</p> <p>9 Turning your attention to the block in -- on</p> <p>10 the far left of the page, under the heading trademark</p> <p>11 keywords.</p> <p>12 A Yes.</p> <p>13 Q The second bullet reads "key competitors and</p> <p>14 affiliates off," right?</p> <p>15 A Okay.</p> <p>16 Q Allowing definitivedeals.com to display</p> <p>17 advertisements triggered by 1-800 Contacts keyword terms</p> <p>18 was an exception to the policy of keeping competitors</p> <p>19 and affiliates off, right?</p> <p>20 MR. RAPHAEL: Object to form. Lack of</p> <p>21 foundation.</p> <p>22 THE WITNESS: Yeah.</p> <p>23 BY MR. MATHESON:</p> <p>24 Q And that exception was made in order to test</p> <p>25 the impact of allowing affiliates to display</p>	60	<p>1 A Yeah.</p> <p>2 Q Are any other affiliates permitted to display</p> <p>3 search advertising in response to searches for 1-800</p> <p>4 Contacts' trademark terms?</p> <p>5 A Yeah.</p> <p>6 Q Which ones?</p> <p>7 A Retail Me Not.</p> <p>8 Q Anybody else?</p> <p>9 A Not that I know of.</p> <p>10 Q And Retail Me Not, what's their business model</p> <p>11 if you know?</p> <p>12 A I don't know.</p> <p>13 Q What do they do?</p> <p>14 A I have no idea.</p> <p>15 Q Why does 1-800 Contacts permit them to display</p> <p>16 search advertising in response to 1-800 Contacts'</p> <p>17 trademark terms?</p> <p>18 A It's our trademark plus terms. It's the</p> <p>19 coupon terms. They're an affiliate of ours, and it's a</p> <p>20 similar situation as coupons.com or Eckim.</p> <p>21 Q So the purpose is they generate more orders</p> <p>22 and more profit for 1-800 Contacts?</p> <p>23 A Yeah.</p> <p>24 Q And the additional orders and profit they</p> <p>25 generate justifies any increase in 1-800 Contacts costs</p>

61	<p>1 per click for the trademark plus keywords?</p> <p>2 A I believe so.</p> <p>3 Q Hand you a document marked CX0960.</p> <p>4 A Okay.</p> <p>5 Q Do you recognize this document, sir?</p> <p>6 A Yeah.</p> <p>7 Q What is this document?</p> <p>8 A It's an email correspondence with Rick and</p> <p>9 myself and Curtis from Coastal.</p> <p>10 Q Turning your attention to the email at the</p> <p>11 bottom of the chain, did you understand this to be</p> <p>12 request from Coastal to 1-800 to implement negative</p> <p>13 keywords?</p> <p>14 A Yes.</p> <p>15 Q What was the GDN campaign referred to in the</p> <p>16 final sentence?</p> <p>17 A The Google Display Network.</p> <p>18 Q What is the Google Display Network?</p> <p>19 A Basically it's a network that allows you to</p> <p>20 advertise on other random websites, not just the search</p> <p>21 results pages.</p> <p>22 Q Turning your attention to the email in the</p> <p>23 center of the page, Mr. Galan states to you, "Looks like</p> <p>24 it's us. Will you make sure C-O-S-T-A-L and costl.com</p> <p>25 are added to the negatives."</p>	63	<p>1 coastal.com's, a misspelled variation of their website.</p> <p>2 That's what he was referring to, on the Display Network.</p> <p>3 Q So this does not relate to the display of</p> <p>4 search advertising on a search engine results page?</p> <p>5 A No.</p> <p>6 Q This relates to the display of advertisement</p> <p>7 on the website costal.com?</p> <p>8 A Yes.</p> <p>9 Q Did you add "costal" and "costal.com" to</p> <p>10 1-800's negative keywords in response to this request to</p> <p>11 Mr. Galan?</p> <p>12 A I can't recall at this time. I might have.</p> <p>13 I -- I don't remember. We have thousands of negative</p> <p>14 keywords in our account and I -- yeah, I don't know.</p> <p>15 Q You don't recall telling him I'm not going to</p> <p>16 do that?</p> <p>17 A No.</p> <p>18 Q Was he your supervisor at this time?</p> <p>19 A Yeah.</p> <p>20 Q So it would have been your business practice</p> <p>21 to follow his instructions?</p> <p>22 A Yes.</p> <p>23 Q So the list of negative keywords that you</p> <p>24 would have added these terms to in ordinary course, is</p> <p>25 that the same list of negative keywords that relates to</p>
62	<p>1 Did I read that correctly?</p> <p>2 A Yeah.</p> <p>3 Q What did you understand Mr. Galan requesting</p> <p>4 you to do?</p> <p>5 A To add those two terms, those negative</p> <p>6 keywords.</p> <p>7 Q Was it your understanding that 1-800 Contacts</p> <p>8 was bidding on the keyword C-O-S-T-A-L in January of</p> <p>9 2014?</p> <p>10 A No.</p> <p>11 Q Mr. Peterson from Coastal reports to Mr. Galan</p> <p>12 that the attached screen shots show 1-800 is bidding on</p> <p>13 a misspelling of Coastal's brand name, right?</p> <p>14 A No.</p> <p>15 Q It doesn't say that?</p> <p>16 A It might not saying that, but that's not what</p> <p>17 happening.</p> <p>18 Q So Mr. Peterson is incorrect to the extent he</p> <p>19 represented 1-800 was bidding on the misspelling of the</p> <p>20 brand name?</p> <p>21 A Yes.</p> <p>22 Q But Mr. Peterson was correct that 1-800's ads</p> <p>23 were being displayed in response to searches for</p> <p>24 misspelling of Coastal's brand name, right?</p> <p>25 A He was saying that this ad was showing on</p>	64	<p>1 the display of search advertising?</p> <p>2 A The same list of negative keywords that we</p> <p>3 have in our search accounts, that would be your --</p> <p>4 Q Yes. I'm just trying to understand if -- if</p> <p>5 you implement a negative keyword in order to impact the</p> <p>6 display of search advertising on a search engine results</p> <p>7 page, do you input that negative keywords into the same</p> <p>8 list that impacts the display of advertising on the</p> <p>9 Google Display Network?</p> <p>10 A Yes and no.</p> <p>11 Q Okay. In what sense is the answer yes, and in</p> <p>12 what sense is the answer no?</p> <p>13 A So you would put those terms into the same</p> <p>14 negative keyword list that we have. The Display Network</p> <p>15 is slightly different. You have negative keywords, but</p> <p>16 Google kind of takes liberty and shows you wherever they</p> <p>17 feel like you're relevant, to a certain degree. And so</p> <p>18 it basically picks and chooses the websites it wants you</p> <p>19 to show up on.</p> <p>20 Q So would implementing the term "costal,"</p> <p>21 C-O-S-T-A-L, as a negative keyword prevent the display</p> <p>22 of the advertisement in question on costal.com in the</p> <p>23 Google Display Network?</p> <p>24 MR. RAPHAEL: Object to form.</p> <p>25 THE WITNESS: It should.</p>

65	<p>1 BY MR. MATHESON:</p> <p>2 Q It's your understanding that -- that Google</p> <p>3 should interpret a negative keyword, costal.com, to</p> <p>4 prevent the display of the advertisement in question on</p> <p>5 the website costal.com on the Google Display Network?</p> <p>6 A It should.</p> <p>7 Q By implementing the negative keyword</p> <p>8 costal.com in your Google account, is it your</p> <p>9 understanding that would also prevent 1-800 Contacts'</p> <p>10 search advertisements from being displayed on a search</p> <p>11 engine results page in response to a search for the</p> <p>12 keyword costal.com?</p> <p>13 A Yes.</p> <p>14 MR. RAPHAEL: Mind if we take a two-minute</p> <p>15 break?</p> <p>16 (Recess.)</p> <p>17 BY MR. MATHESON:</p> <p>18 Q I would like to hand you a document we marked</p> <p>19 as CX0693.</p> <p>20 A Okay.</p> <p>21 Q Do you recognize the email chain --</p> <p>22 A Vaguely.</p> <p>23 Q -- in this document?</p> <p>24 A Yeah, vaguely.</p> <p>25 Q Do you recognize the final page of this</p>	67	<p>1 bids on EyeMed search terms prior to Mr. Roush's request</p> <p>2 to you?</p> <p>3 A Yes.</p> <p>4 Q Mr. Roush asks -- states to you, "I would</p> <p>5 like" -- strike that.</p> <p>6 Second sentence of Mr. Roush's email to you</p> <p>7 states "I would also like to understand any impact from</p> <p>8 this decision."</p> <p>9 Did I read that correctly?</p> <p>10 A Yes.</p> <p>11 Q When did you interpret Mr. Roush to be</p> <p>12 requesting?</p> <p>13 A To know how many clicks, impressions, orders</p> <p>14 were generated by those terms.</p> <p>15 Q And what is EyeMed?</p> <p>16 A I don't know.</p> <p>17 Q Do you know -- are you familiar with</p> <p>18 Luxottica, L-U-X-O-T-T-I-C-A?</p> <p>19 A I don't. I know it's a company.</p> <p>20 Q What does Luxottica do -- strike that.</p> <p>21 Does Luxottica sell contact lenses?</p> <p>22 A I don't know what they sell. I know they sell</p> <p>23 glasses. I don't know about contacts. I -- I don't</p> <p>24 know.</p> <p>25 Q Do you know if EyeMed is a brand name owned by</p>
66	<p>1 document, CX0693-004, as data you prepared and sent to</p> <p>2 Tim Roush as reflected in the second email in this</p> <p>3 chain?</p> <p>4 A Yeah, it looks like. I sent to him.</p> <p>5 Q All right. Third email on the first page,</p> <p>6 appears to be an email from Tim Roush to yourself</p> <p>7 copying Laura Schmidt and John Graham on November 21,</p> <p>8 2014.</p> <p>9 A Okay.</p> <p>10 Q Do you recall receiving this email?</p> <p>11 A Yeah.</p> <p>12 Q What did you understand Mr. Roush to be asking</p> <p>13 you to do in this email?</p> <p>14 A To stop showing ads on EyeMed searches.</p> <p>15 Q What do you mean by EyeMed searches?</p> <p>16 A Search that have the term "EyeMed."</p> <p>17 Q What step -- strike that.</p> <p>18 Did you, in fact, take any steps to stop</p> <p>19 showing ads on EyeMed searches in response to</p> <p>20 Mr. Roush's request?</p> <p>21 A Yeah. I paused some EyeMed search terms.</p> <p>22 Q Did you implement any negative keywords in</p> <p>23 response to Mr. Roush's request?</p> <p>24 A I can't recall. I -- I don't know.</p> <p>25 Q Do you recall that 1-800 Contacts was placing</p>	68	<p>1 Luxottica?</p> <p>2 A I don't.</p> <p>3 Q Do you know if EyeMed is a subsidiary of</p> <p>4 Luxottica?</p> <p>5 A I don't.</p> <p>6 Q Did you provide information in response to</p> <p>7 Mr. Roush's request to provide information that would</p> <p>8 help him understand any impact from this decision?</p> <p>9 A Yes.</p> <p>10 Q What information did you provide?</p> <p>11 A I provided him the data that's on the back of</p> <p>12 this document.</p> <p>13 Q How did you generate the data on the back of</p> <p>14 the document?</p> <p>15 A Ran reports in Google.</p> <p>16 Q Do you understand what -- strike that.</p> <p>17 Do you understand the information presented in</p> <p>18 this report?</p> <p>19 A Yeah.</p> <p>20 Q It was your responsibility to run such reports</p> <p>21 and analyze the information at this time, right?</p> <p>22 A Yeah.</p> <p>23 Q You're very familiar with what all the terms</p> <p>24 in this report mean, right?</p> <p>25 A Yeah.</p>

69	<p>1 Q The third column from the right is headed</p> <p>2 "CPA." What does "CPA" mean in this report?</p> <p>3 A Costs per acquisition.</p> <p>4 Q Is there any difference between cost per</p> <p>5 acquisition and cost per order?</p> <p>6 A No.</p> <p>7 Q What was the cost per acquisition of the</p> <p>8 EyeMed terms from January 1, 2014, to November 14, 2014?</p> <p>9 A It looks like it was \$40.83.</p> <p>10 Q What did you mean by "I paused the EyeMed</p> <p>11 search terms"?</p> <p>12 A These keywords that we have in the account, I</p> <p>13 paused them.</p> <p>14 Q What does "pausing a keyword" mean?</p> <p>15 A Stop showing.</p> <p>16 Q So on the left of this Excel spreadsheet there</p> <p>17 is a keyword state?</p> <p>18 A Yes.</p> <p>19 Q Would that column change from enable to</p> <p>20 something different when you paused it?</p> <p>21 A Yeah.</p> <p>22 Q Okay. Did you ever unpause the EyeMed search</p> <p>23 terms?</p> <p>24 A I don't know.</p> <p>25 Q Do you recall taking any further action</p>	71	<p>1 Q Hand you one more document that we've marked</p> <p>2 CX0648. And just so you know, I'm not intending to ask</p> <p>3 you about the Excel sheet that's attached.</p> <p>4 A Okay.</p> <p>5 Q Do you recognize this document, sir?</p> <p>6 A Yeah.</p> <p>7 Q What is it?</p> <p>8 A It's a email that I send out on a weekly</p> <p>9 basis, just following up on results from the previous</p> <p>10 week.</p> <p>11 Q To whom do you send the email?</p> <p>12 A To our marketing department.</p> <p>13 Q For what purpose do you send the email?</p> <p>14 A Keep everyone in our marketing department in</p> <p>15 the company updated.</p> <p>16 Q Is it your practice to include information in</p> <p>17 this email and the attachments that you believe to be</p> <p>18 accurate?</p> <p>19 A Yeah.</p> <p>20 Q The attachment is indicated PPC-4. What does</p> <p>21 "PPC" stand for, if anything?</p> <p>22 A Pay per click.</p> <p>23 Q Turn your attention to the sentence that</p> <p>24 appears just above the graphic on the first page.</p> <p>25 A Okay.</p>
70	<p>1 regarding EyeMed search terms after November 21, 2013?</p> <p>2 A Not that I can recall at this time.</p> <p>3 Q Do you recall ever discussing these EyeMed</p> <p>4 search terms orally or in writing with any of your</p> <p>5 colleagues after November 21, 2014?</p> <p>6 A Not that I can think of. Not that I can</p> <p>7 recall right now.</p> <p>8 Q Why did you choose to follow Mr. Roush's</p> <p>9 instruction and pause the EyeMed search terms?</p> <p>10 A That was his request.</p> <p>11 Q Mr. Roush indicated to you -- strike that.</p> <p>12 When you referred the email Mr. Roush sent you</p> <p>13 on November 21, 2014, he asked you to, and I quote,</p> <p>14 "Please follow up on this request from John and</p> <p>15 temporarily stop EyeMed searches," correct?</p> <p>16 Who did you understand John to refer to?</p> <p>17 A John Graham.</p> <p>18 Q Who was John Graham at this time?</p> <p>19 A I don't know what his position was.</p> <p>20 Q Is he still with the company?</p> <p>21 A Yeah.</p> <p>22 Q What's his position now?</p> <p>23 A I -- I honestly don't even know his title.</p> <p>24 Q Is he the chief operating officer?</p> <p>25 A That sounds accurate.</p>	72	<p>1 Q You state, and I quote, "I anticipate some of</p> <p>2 these sites to fall off over the next few weeks but fear</p> <p>3 that others will continuing advertising on our brand</p> <p>4 terms."</p> <p>5 Did I read that correctly?</p> <p>6 A Yeah.</p> <p>7 Q Why were you concerned that cites might</p> <p>8 advertise on 1-800 Contacts' brand terms?</p> <p>9 A So Google upgraded their system, their URLs,</p> <p>10 to a new format, so basically everyone in the entire</p> <p>11 search world had update to it. And what happened is we</p> <p>12 started to see a lot more broad matching is what it</p> <p>13 looked like showing up on our brand terms, and so my --</p> <p>14 my comment here was I am worried that some will continue</p> <p>15 to advertise on the term because they feel like it's</p> <p>16 providing value for their company potentially or they're</p> <p>17 seeing decent results from it.</p> <p>18 Q So your concern was that an increasing --</p> <p>19 strike that.</p> <p>20 Your concern was that some of the sights you</p> <p>21 refer to would continue to display search advertising in</p> <p>22 response to searches for 1-800 Contacts' brand terms?</p> <p>23 A Yeah.</p> <p>24 Q The first sentence -- the first sentence of</p> <p>25 that paragraph, you state, and I quote, "Over the last</p>

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1 two weeks we have been seeing an increase in competition
2 on our trademark terms," end quote.

3 Did I read that correctly?

4 A Yes.

5 Q What did you mean by "competition on our
6 trademark terms"?

7 A So websites were showing ads on our trademark
8 terms.

9 Q So you meant an increase in the number of
10 advertisements appearing in response to searches for
11 1-800 Contacts' trademark terms?

12 A Yes.

13 Q I'd like to turn our attention to CX0100-00.
14 Now, I will represent I'm happy to show you the Excel
15 sheet that the attachment, ad marketplace negative
16 keyword list .xlsx, is printed out on the pages that
17 follow the cover email here. There were three tabs in
18 that Excel sheet. One was called "Competitors." One
19 was called "General." One was called "Products."

20 The information displayed of a negative
21 keyword -- the information displayed on the third
22 through 16th page of the document represents the
23 information contained within the Excel worksheet titled
24 "Competitors." And starting on page 17 is displayed the
25 information contained in the Excel worksheet called

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1 A Yeah.

2 Q So it's your understanding that the Excel
3 sheet you sent accurately represents the negative
4 keywords 1-800 Contacts had implemented in its Google
5 account as of September 25th, 2014?

6 A Say that again.

7 Q Is it your understanding that the Excel sheet
8 you sent in this email accurately represents the
9 negative keywords that 1-800 Contacts had implemented in
10 its Google account as of September 25th, 2014?

11 A I believe so. I think that's where we got
12 them, but I -- I don't remember details.

13 Q Prior to appearing to testify today, did you
14 undertake any investigation to determine which negative
15 keywords 1-800 Contacts has implemented as a result of
16 an agreement with another seller of contact lenses?

17 A Can you repeat the question.

18 Q Prior to appearing to testify today, did you
19 undertake any investigation to determine which negative
20 keywords 1-800 Contacts has implemented as a result of
21 an agreement with another seller of contact lenses?

22 A No.

23 Q Prior to appearing today you were not informed
24 that you would be put forward as a corporate witness
25 regarding the negative keywords 1-800 Contacts has

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1 "General." If that helps you navigate the document, I
2 just wanted to provide that information. If you want to
3 check it, you can look at the worksheet. But when I
4 refer to the negative keywords contained in the
5 Competitor's tab, what I mean are the information
6 contained in the first 15 pages of the document, 16
7 pages --

8 MR. RAPHAEL: So where there's a break on
9 CX0100-016, that's the end of the first tab?

10 MR. MATHESON: Correct.

11 MR. RAPHAEL: Okay. Thanks.

12 BY MR. MATHESON:

13 Q Do you recognize this document, sir?

14 A Yeah.

15 Q What is this document?

16 A It's a list of our negative keywords that we
17 sent over to one of the second tier search networks that
18 we work with.

19 Q Why did you send the list to the second tier
20 search network?

21 A I can't remember if we started some new
22 campaigns or we just started with them. I -- I don't
23 remember.

24 Q Did you want to inform them of the negative
25 keywords you had implemented in Google?

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1 implemented as a result of agreements other sellers of
2 contact lenses, right?

3 A Correct.

4 Q Do you know whether or not -- strike that.
5 Can you identify any -- all right. Strike
6 that.

7 So pages 003 through 0016 of this document are
8 negative keywords that 1-800 Contacts had implemented in
9 Google as of September 25, 2014, right?

10 A I believe so.

11 Q Can you identify any of these negative
12 keywords that were implemented as a result of an
13 agreement between 1-800 Contacts and any other company?

14 A No. Most of these were in the account before
15 I even started working at 1-800 Contacts.

16 Q When did you start working at 1-800 Contacts?

17 A 2013.

18 Q Do you know when any of the negative keywords
19 listed on pages 3 through 15 -- strike that.

20 Do you know when any of the negative keywords
21 listed on pages 3 through 16 were implemented in 1-800
22 Contacts' Google account?

23 A I don't.

24 Q Did you undertake any investigation prior to
25 your testimony today in an attempt to ascertain when any

<p style="text-align: right;">77</p> <p>1 of these negative keywords were implemented in 1-800 2 Contacts' Google account? 3 A I pulled some change history reports. It's as 4 a result of the investigation, but I didn't investigate 5 or look at them. I pulled them and sent them to our 6 legal team. 7 Q When did you pull those change history 8 reports? 9 A I don't know. 10 Q Was it in the calendar year 2017? 11 A No. It was before that. 12 Q Was it in calendar year 2016? 13 A Yes, I believe so. 14 Q Was it in the winter of 2016? 15 A I don't know. 16 Q But you didn't review the change history that 17 you pulled? 18 A No. 19 Q If you wanted to know -- or strike that. 20 If you wanted to ascertain the date on which 21 any of these negative keywords was implemented in 1-800 22 Contacts' Google account, how would you go about finding 23 that information? 24 A The change history report to see when terms 25 were added. The change history report only goes back</p>	<p style="text-align: right;">79</p> <p>1 these terms had been implemented as negative keywords by 2 1-800 Contacts as of September 25, 2014, right? 3 A I would say it was done before that, but I 4 don't have any information. 5 Q So it's your understanding it had been 6 implement as an negative keyword prior to the date 7 September 25, 2014? 8 A Yes. 9 Q Does 1-800 Contacts continue to maintain 10 Walgreens as a negative keyword in its Google account? 11 A Yes. 12 Q This chart indicates that 1-800 Contacts had 13 implemented the negative keyword "Walgreens" as a phrase 14 match-type negative keyword as of September 25, 2014, 15 right? 16 A Yeah. 17 Q Is Walgreens -- or strike that. 18 Has 1-800 Contacts ever changed the match type 19 for the negative keyword Walgreens? 20 A Not that I'm aware of. I don't know. It was 21 before me. 22 Q Well, since your employment at 1-800 Contacts, 23 are you aware if 1-800 Contacts at any time changed the 24 match type, the negative keyword "Walgreens"? 25 A I'm not aware of that, no.</p>
<p style="text-align: right;">78</p> <p>1 for two years I think. It might be three, I can't 2 remember. But other than that Google is the only other 3 way you would find out if they had a longer time frame 4 that they look at. 5 Q So is it your understanding that if you wanted 6 to figure out when any of these terms was implemented as 7 a negative keyword, you would only be able to figure 8 that out if it was implemented within the approximately 9 two years covered by the change history available to 10 you? 11 A As far as I know. 12 Q Do you know if any of these negative 13 keywords -- strike that. I think you already answered 14 that question. 15 Turning your attention to the -- part way down 16 the page 003, the first page of this big long list, I 17 see the term "Walgreens." Do you see that? 18 A Yeah. 19 Q Is it your understanding that 1-800 Contacts 20 had implemented the term "Walgreens" as a negative 21 keyword as of September 25, 2014? 22 A Yeah, I didn't -- I didn't add the term, 23 but . . . 24 Q But based on the best information available to 25 you, it would be accurate to state, as we've said, that</p>	<p style="text-align: right;">80</p> <p>1 Q Okay. Why -- strike that. 2 Did 1-800 Contacts implement Walgreens as a 3 negative keyword in its Google account as a result of an 4 agreement with Walgreens? 5 A I don't know. 6 Q You just don't know one way or are or the 7 other? 8 A Yeah. 9 Q Same questions for "walgreens.com." 10 A I don't know. 11 Q Same question for "www.visiondirect.com"? 12 A I don't know. 13 Q If I were to ask you that question for any 14 other negative keyword on this list, would your answer 15 be the same? 16 A Yes. 17 Q Do you know if any negative keywords -- strike 18 that. 19 Are you aware of the reason that any of these 20 negative keywords were implemented by 1-800 Contacts? 21 A No. 22 MR. MATHESON: That is all I have for the time 23 being. I'm happy to turn it over to my colleague, or we 24 can break for lunch, or both. Whatever makes sense to 25 you.</p>

81	<p>1 MR. RAPHAEL: I don't think I have too much so</p> <p>2 we might just want to get this done. If you give me a</p> <p>3 five-minute break.</p> <p>4 (Recess.)</p> <p>5</p> <p>6 EXAMINATION</p> <p>7 BY MR. RAPHAEL:</p> <p>8 Q Good afternoon, Mr. Roundy. Barely afternoon.</p> <p>9 A Good afternoon.</p> <p>10 Q Let's start off where Mr. Matheson left off</p> <p>11 regarding negative keywords. And if you could look at</p> <p>12 CX1347. Which is the notice of deposition to 1-800</p> <p>13 Contacts. And I may have the only copy, so I'll pass</p> <p>14 that to you. And I'm going to direct your attention to</p> <p>15 page 2, number 8, that topic there.</p> <p>16 Do you see that?</p> <p>17 A Yes.</p> <p>18 Q Would you just read that topic into the record</p> <p>19 please?</p> <p>20 A "Each negative keyword 1-800 Contacts</p> <p>21 implemented as a result of a settlement agreement and</p> <p>22 the date each such negative keyword was implemented."</p> <p>23 Q Okay. Now, Mr. Matheson was showing you some</p> <p>24 lists of negative keywords; is that right?</p> <p>25 A Yes.</p>	83	<p>1 Q Okay. And to your knowledge based on your</p> <p>2 experience, did Mr. Galan remember when each one of the</p> <p>3 negative keywords on the list was added?</p> <p>4 A I -- I don't know.</p> <p>5 Q Based on your work with him, do you have the</p> <p>6 impression that he remembered when each one of the</p> <p>7 keywords was added?</p> <p>8 MR. MATHESON: Objection to foundation. Asked</p> <p>9 and answered.</p> <p>10 THE WITNESS: I would -- I would say no.</p> <p>11 BY MR. RAPHAEL:</p> <p>12 Q Okay. So I believe Mr. Matheson also asked</p> <p>13 you about some change reports that you provided to the</p> <p>14 legal team. Do you remember that?</p> <p>15 A Yes.</p> <p>16 Q Other than those change reports, is there any</p> <p>17 other source that you're aware of for where somebody</p> <p>18 could find out when 1-800 Contacts added a negative</p> <p>19 keyword to its list?</p> <p>20 A Not that I'm aware of. Google may be the only</p> <p>21 source that has any of that. We don't have access to</p> <p>22 any of that data.</p> <p>23 Q Okay. And so if someone asked you to find</p> <p>24 information about when or why 1-800 Contacts had</p> <p>25 implemented negative keywords, would you have any place</p>
82	<p>1 Q And was the list that you went through CX0100?</p> <p>2 A Yes.</p> <p>3 Q Now, to your knowledge is there anyone</p> <p>4 currently at 1-800 Contacts who knows more about the</p> <p>5 list of negative keywords than you?</p> <p>6 A Probably not.</p> <p>7 Q Okay. And how many keywords are on that list?</p> <p>8 A I have no idea. A lot. Thousands probably.</p> <p>9 Q So do you remember when each one of the</p> <p>10 negative keywords was added?</p> <p>11 A No.</p> <p>12 Q Do you remember why each of the negative</p> <p>13 keywords was added?</p> <p>14 A No. Some of them were added way before I</p> <p>15 start working so I have no idea.</p> <p>16 Q Now, before you were responsible for the</p> <p>17 negative keywords list, who was responsible, if you</p> <p>18 know?</p> <p>19 A I know Rick Galan was before me, and Bryce</p> <p>20 Craven before that, but I don't know past any of that.</p> <p>21 Q Okay. Now, to your knowledge -- sorry.</p> <p>22 Strike that.</p> <p>23 Do you have working experience with either of</p> <p>24 those individuals?</p> <p>25 A I worked with Rick for a while.</p>	84	<p>1 to look other than the change reports you just referred</p> <p>2 to?</p> <p>3 MR. MATHESON: Objection to the changed</p> <p>4 question risking mischaracterization.</p> <p>5 BY MR. RAPHAEL:</p> <p>6 Q So I'll just ask it this way: You produced --</p> <p>7 you produced reports, change reports regarding 1-800</p> <p>8 Contacts' negative keyword list, correct?</p> <p>9 A Correct.</p> <p>10 Q Okay. And if you were asked to investigate</p> <p>11 when 1-800 Contacts made changes to its negative</p> <p>12 keywords, would those change reports be one place you</p> <p>13 would look?</p> <p>14 A Yes.</p> <p>15 Q Can you think of any other place you would</p> <p>16 look to find that information?</p> <p>17 A The actual dates that it was implemented, no.</p> <p>18 Q Can you think of any person who you could talk</p> <p>19 to that would have a memory of that better than yours?</p> <p>20 A Not that I can think of.</p> <p>21 Q Okay. So, Mr. Roundy, when did you join 1-800</p> <p>22 Contacts?</p> <p>23 A 2013.</p> <p>24 Q So do you have any personal knowledge of</p> <p>25 anything that happened at 1-800 Contacts prior to when</p>

85	<p>1 you joined the company in 2013?</p> <p>2 A No, not really.</p> <p>3 Q Okay. And do you have any responsibility for</p> <p>4 TV advertising?</p> <p>5 A No.</p> <p>6 Q Any responsibility for any other kind of</p> <p>7 advertising besides paid search advertising?</p> <p>8 A No.</p> <p>9 Q Are you a lawyer?</p> <p>10 A No.</p> <p>11 Q Do you have any legal training?</p> <p>12 A No.</p> <p>13 Q Do any of your job responsibilities involve</p> <p>14 making legal judgments?</p> <p>15 A No.</p> <p>16 Q Okay. Have you ever seen any agreements</p> <p>17 between 1-800 Contacts and any other company related to</p> <p>18 paid search advertising?</p> <p>19 A No.</p> <p>20 Q Okay. Have you ever seen any settlement</p> <p>21 agreements between 1-800 Contacts and any other company</p> <p>22 settling any litigation whatsoever?</p> <p>23 A No.</p> <p>24 Q Are you aware of 1-800 Contacts' budget for</p> <p>25 paid search advertising?</p>	87	<p>1 on nontrademark keywords?</p> <p>2 A No.</p> <p>3 Q Do you know approximately what the split is?</p> <p>4 A Approximately like 80/20ish, something like</p> <p>5 that.</p> <p>6 Q 80 percent?</p> <p>7 A Nontrademark and 20 percent trademark.</p> <p>8 Q Okay. Now, have -- I believe you talked with</p> <p>9 Mr. Matheson this morning about there's been some</p> <p>10 occasions where you've seen the cost per click for</p> <p>11 trademark keywords rising.</p> <p>12 A Yeah.</p> <p>13 Q In those situations where you observe the cost</p> <p>14 per click for trademark keywords rising, did you ask</p> <p>15 finance to allocate more money for paid search</p> <p>16 advertising?</p> <p>17 A No.</p> <p>18 Q In situations where you observe the cost per</p> <p>19 click for trademark keywords to be rising, did you</p> <p>20 change how you allocate spending between trademark and</p> <p>21 nontrademark keywords?</p> <p>22 A No, we didn't allocate things differently.</p> <p>23 Trademark still took whatever we had and nontrademark</p> <p>24 took what was left over.</p> <p>25 Q So in situations where you observed the cost</p>
86	<p>1 A Yes.</p> <p>2 Q Are you responsible for determining what that</p> <p>3 budget is?</p> <p>4 A No.</p> <p>5 Q Who sets that budget?</p> <p>6 A Our marketing leadership team.</p> <p>7 Q Do you have the authority to increase 1-800</p> <p>8 Contacts' paid search advertising budget?</p> <p>9 A No, I don't.</p> <p>10 Q Are you responsible for allocating 1-800</p> <p>11 Contacts' paid search advertising budget?</p> <p>12 A What do you mean?</p> <p>13 Q So do you decide how 1-800 Contacts' paid</p> <p>14 search advertising budget is spent?</p> <p>15 A Yes.</p> <p>16 Q And what is your general approach for</p> <p>17 allocating how 1-800 Contacts' paid search advertising</p> <p>18 budget is spent?</p> <p>19 A We break it into trademark and nontrademark,</p> <p>20 and we -- we want to show up all the time for our brand.</p> <p>21 And whatever is left over, we use for our nontrademark</p> <p>22 activities.</p> <p>23 Q Now, is there a general split between the</p> <p>24 percentage of the budget that's spent on trademark</p> <p>25 keywords and the percentage of the budget that's spent</p>	88	<p>1 per click for trademark keywords to be rising, did you</p> <p>2 reduce the amount of the budget that you spent on</p> <p>3 nontrademark keywords?</p> <p>4 A Yeah. We pulled back.</p> <p>5 Q Now, I believe Mr. Matheson also asked you</p> <p>6 about some tests of bidding on certain keywords?</p> <p>7 A Yes.</p> <p>8 Q And that's something that you do from time to</p> <p>9 time?</p> <p>10 A Yeah. When it's part of my job. We test</p> <p>11 things.</p> <p>12 Q And how do you determine whether the tests</p> <p>13 that you conduct are successful?</p> <p>14 A We look at the data and see if it made any</p> <p>15 positive momentum or if it was a failure because it</p> <p>16 didn't produce positive results.</p> <p>17 Q And if you conclude from a test that a --</p> <p>18 given paid advertising strategy or change did not</p> <p>19 produce positive results, what would you do?</p> <p>20 A Stop the test.</p> <p>21 Q And would it be your practice in that</p> <p>22 situation to resume a test that did not produce positive</p> <p>23 results in the future?</p> <p>24 A No.</p> <p>25 Q Does 1-800 Contacts have data about how</p>

89	<p>1 customers get to its website?</p> <p>2 A We do have analytics data, yeah.</p> <p>3 Q And are you familiar with that data?</p> <p>4 A Yeah.</p> <p>5 Q Now, does 1-800 Contacts have data about the</p> <p>6 click-through rates and conversion rates for customers</p> <p>7 that access its website by searching for a trademark</p> <p>8 keyword?</p> <p>9 A Yeah.</p> <p>10 Q And are you familiar with that data?</p> <p>11 A Yeah.</p> <p>12 Q And does 1-800 Contacts have data about the</p> <p>13 click-through rate and conversion rates for customers</p> <p>14 that access its website by typing www.1800contacts.com</p> <p>15 into the address bar?</p> <p>16 A Yes.</p> <p>17 Q And are you familiar with that data?</p> <p>18 A Yeah.</p> <p>19 Q And have you compared the click-through rate</p> <p>20 for customers that access 1-800 Contacts' -- excuse me.</p> <p>21 Have you compared the conversion rates for</p> <p>22 customers that access 1-800 Contacts' website by</p> <p>23 searching for a trademark keyword to the conversion rate</p> <p>24 for customers that access the website by typing</p> <p>25 www.1800contacts.com into the address bar?</p>	91	<p>1 BY MR. RAPHAEL:</p> <p>2 Q And have you -- have you noticed any -- is</p> <p>3 the -- and so when you say -- you testified that the</p> <p>4 conversion rate for a customer who accesses the website</p> <p>5 by typing in the URL and the customer who accesses the</p> <p>6 website by searching for a trademark keyword are very</p> <p>7 similar?</p> <p>8 MR. MATHESON: Object to the leading</p> <p>9 foundation.</p> <p>10 THE WITNESS: Yes.</p> <p>11 BY MR. RAPHAEL:</p> <p>12 Q Let me -- let me just ask it this way: Have</p> <p>13 you -- over time have you seen any significant</p> <p>14 difference between the conversion rate for a customer</p> <p>15 that accesses the 1-800 Contacts' website by typing</p> <p>16 www.1800contacts.com into the address bar and the</p> <p>17 conversion rate for customers who access the website by</p> <p>18 searching for a trademark keyword?</p> <p>19 MR. MATHESON: Objection to the foundation.</p> <p>20 Vague.</p> <p>21 THE WITNESS: No, I haven't really seen much</p> <p>22 of a difference.</p> <p>23 BY MR. RAPHAEL:</p> <p>24 Q Now, does 1-800 Contacts have data about the</p> <p>25 frequency of searches for various keywords that include</p>
90	<p>1 MR. MATHESON: Objection to the foundation.</p> <p>2 Objection. Vague as to time.</p> <p>3 THE WITNESS: Can you repeat that.</p> <p>4 BY MR. RAPHAEL:</p> <p>5 Q Have you ever -- let me just say it this way:</p> <p>6 So are you familiar with -- at any time have you become</p> <p>7 familiar with the conversion rate for customers that</p> <p>8 access the website by typing in www.1800contacts.com</p> <p>9 into the address bar?</p> <p>10 A Yeah.</p> <p>11 Q Now, how does that conversion rate compare to</p> <p>12 the conversion rates for customers who access the</p> <p>13 website by searching for and clicking on a trademark</p> <p>14 keyword?</p> <p>15 MR. MATHESON: Objection to foundation. Form.</p> <p>16 Vague as to time.</p> <p>17 THE WITNESS: Very similar.</p> <p>18 BY MR. RAPHAEL:</p> <p>19 Q And have you seen the conversion rates for</p> <p>20 these two types of customers we've been talking about</p> <p>21 over time?</p> <p>22 MR. MATHESON: Objection to form.</p> <p>23 THE WITNESS: I've seen -- I've seen our paid</p> <p>24 search stuff. I haven't necessarily seen -- well, no.</p> <p>25 I've seen it over time, yeah.</p>	92	<p>1 its trademarks?</p> <p>2 A Yeah.</p> <p>3 Q And are you familiar with that data as part of</p> <p>4 your work?</p> <p>5 A Yeah.</p> <p>6 Q Now, to your knowledge how frequent are</p> <p>7 searches for keywords such as "cheaper than 1-800</p> <p>8 Contacts"?</p> <p>9 MR. MATHESON: Objection. Foundation. Vague.</p> <p>10 THE WITNESS: It's pretty small on a yearly</p> <p>11 basis.</p> <p>12 BY MR. RAPHAEL:</p> <p>13 Q And are they more or less frequent than</p> <p>14 searches for 1-800 Contacts?</p> <p>15 MR. MATHESON: Objection to foundation.</p> <p>16 THE WITNESS: Less frequent. If I remember</p> <p>17 right, I think the last time I looked, it was like 200</p> <p>18 searches a year for those types of terms.</p> <p>19 BY MR. RAPHAEL:</p> <p>20 Q Are you concerned about whether other</p> <p>21 companies' ads are being served for searches such as</p> <p>22 "cheaper than 1-800 Contacts"?</p> <p>23 A No.</p> <p>24 Q Why not?</p> <p>25 A It's not something that we monitor. It's --</p>

<p style="text-align: right;">93</p> <p>1 if that's what they are looking for, that's what they 2 should find.</p> <p>3 Q Now, is it part of your job to set prices for 4 the contact lenses that 1-800 Contacts sells?</p> <p>5 A No.</p> <p>6 Q Are you involved at all in setting prices for 7 the contact lens that's 1-800 Contacts sells?</p> <p>8 A No.</p> <p>9 Q Whose job is it to set prices for the contact 10 lenses that's 1-800 Contacts sells?</p> <p>11 A Our pricing manager.</p> <p>12 Q And how often do you communicate with that 13 person?</p> <p>14 A Not very often. Pretty rarely.</p> <p>15 Q How many times a year would you say you 16 communicate with that person?</p> <p>17 A On a personal level, quite a bit because he 18 sits by me. On a business level, once every couple of 19 weeks maybe.</p> <p>20 Q Okay. Now, has anyone involved in setting 21 prices ever asked you for information about the number 22 of advertisements from other retailers that are being 23 served on searches for 1-800 Contacts trademarks?</p> <p>24 A No.</p> <p>25 Q Has anyone involved in setting prices ever</p>	<p style="text-align: right;">95</p> <p>1 strike that.</p> <p>2 So you mentioned enhanced campaigns. Can you 3 describe what that is?</p> <p>4 A Yeah. So about three years ago I want to say, 5 Google announced they were coming out with enhanced 6 campaigns, which basically they took away the 7 functionality to create device-specific campaigns for 8 desktop, mobile, and tablet. They combined all three of 9 those device campaigns into one campaign. And then they 10 gave advertisers a modifier, a bid modifier for the 11 mobile side of things so we could adjust bids for mobile 12 with a device modifier.</p> <p>13 Q Did Google, putting in place these enhanced 14 campaigns, change the way that you operated the bidding 15 for 1-800 Contacts' paid search advertising?</p> <p>16 A Yeah, we had to. We had to add device 17 modifiers and things like that in order to keep up with 18 their system.</p> <p>19 Q Have any other search engines made similar 20 changes to enhanced campaigns that Google put in place?</p> <p>21 A Bing did the same thing the following year.</p> <p>22 Q And did Bing's changes, similar to those that 23 Google made, affect how you bid in 1-800 Contacts' paid 24 search advertising?</p> <p>25 A Yeah.</p>
<p style="text-align: right;">94</p> <p>1 asked you for data about the number of competitors whose 2 ads are being searched on searches for 1-800 Contacts' 3 trademarks?</p> <p>4 MR. MATHESON: Objection to foundation. 5 THE WITNESS: No.</p> <p>6 BY MR. RAPHAEL:</p> <p>7 Q To your knowledge has anyone made a pricing 8 decision based on the number of competitors whose ads 9 are served on searches for 1-800 Contacts' trademarks?</p> <p>10 MR. MATHESON: Objection to foundation. 11 THE WITNESS: No.</p> <p>12 BY MR. RAPHAEL:</p> <p>13 Q Now, how long have you been working in paid 14 search advertising?</p> <p>15 A Nine or ten years.</p> <p>16 Q And is it part of your job to keep up with any 17 changes that search engines make to how they operate?</p> <p>18 A Yeah.</p> <p>19 Q And have you seen any changes in how search 20 engines operate over the course of your work in paid 21 search advertising?</p> <p>22 A Yeah. There's always changes, upgraded URLs, 23 enhanced campaigns, the search pages. The layout 24 changes all the time. Things are always changing.</p> <p>25 Q And is it -- how much apart of your weekly --</p>	<p style="text-align: right;">96</p> <p>1 Q Can you think any of other changes that you 2 described earlier that affected how you bid for 1-800 3 Contacts paid search advertising?</p> <p>4 A Yeah. Recently Google took away all of the 5 ads on the side bar, and they have four ads that are 6 listed at the top. And so you have to show up in those 7 four spots or you don't show up at all, and so it does 8 change how you bid and how you operate things.</p> <p>9 Q How about changes in the way that the sponsor 10 links are displayed, is that something that you monitor 11 as part of your job?</p> <p>12 A Yeah.</p> <p>13 Q And do you notice that that occurs frequently 14 or rarely?</p> <p>15 A It happens --</p> <p>16 MR. MATHESON: Objection to form. 17 THE WITNESS: It happens frequently. They're 18 always testing their results page. They've changed the 19 background of the ads several times, the color. They've 20 gone away from the colored background to just a plain 21 white background. So yeah, it's constantly changing.</p> <p>22 BY MR. RAPHAEL:</p> <p>23 Q Do those changes in how ads are displayed 24 effect how you think about 1-800 Contacts paid search 25 advertising?</p>

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<p>1 A Yeah.</p> <p>2 Q Now, we were talking about earlier about the</p> <p>3 budget for 1-800 Contacts' paid search advertising</p> <p>4 right, and that's something you're responsible for?</p> <p>5 A Yes.</p> <p>6 Q Now, is that budget limited?</p> <p>7 A Yes.</p> <p>8 Q So earlier -- if you look at CX0296, this is</p> <p>9 the presentation from February 2015. And if you turn to</p> <p>10 the page -035, CX0296-035.</p> <p>11 A This one?</p> <p>12 Q Yes.</p> <p>13 So you see on the far right under other</p> <p>14 nontrademark keywords, you see there's a \$60 CPO target?</p> <p>15 A Yes.</p> <p>16 Q And did Mr. Matheson ask you some questions</p> <p>17 related to that?</p> <p>18 A Yeah.</p> <p>19 Q Now, is it your view that 1-800 Contacts</p> <p>20 should bid on every nontrademark keyword as long as the</p> <p>21 cost per order remains under \$60?</p> <p>22 MR. MATHESON: Objection to form and</p> <p>23 foundation.</p> <p>24 THE WITNESS: Yeah, I would say so.</p> <p>25</p>	<p>1 THE WITNESS: Yes.</p> <p>2 MR. MATHESON: And to the foundation and the</p> <p>3 incomplete hypothetical.</p> <p>4 BY MR. RAPHAEL:</p> <p>5 Q So let's look now it the same document --</p> <p>6 well, let me just ask one more question. If bidding on</p> <p>7 nontrademark keywords were going to cause you to run out</p> <p>8 of money in the budget, would you still do that, even if</p> <p>9 the cost per order were under the target?</p> <p>10 MR. MATHESON: Objection to the form.</p> <p>11 THE WITNESS: If we were going to run out of</p> <p>12 budget, we would have to scale back.</p> <p>13 BY MR. RAPHAEL:</p> <p>14 Q Now, if you go back to the page in this</p> <p>15 document that's -- has 028 in it. It concerns the</p> <p>16 coupons.com test. So do you recall Mr. Matheson asked</p> <p>17 you some questions about this?</p> <p>18 A Yes.</p> <p>19 Q And do you recall Mr. Matheson also asked you</p> <p>20 some questions about definitivedeals.com?</p> <p>21 A Yes.</p> <p>22 Q And retailmenot.com?</p> <p>23 A Yes.</p> <p>24 Q Did those companies provide coupons for</p> <p>25 customers to use to buy contacts from 1-800 Contacts?</p>	
<p>1 BY MR. RAPHAEL:</p> <p>2 Q And would that be true even if it reduces the</p> <p>3 amount of the budget that you have available to spend on</p> <p>4 trademark keywords?</p> <p>5 MR. MATHESON: Objection to the form. It's</p> <p>6 leading.</p> <p>7 THE WITNESS: Can you repeat that.</p> <p>8 BY MR. RAPHAEL:</p> <p>9 Q So let me go at it this way: Every dollar</p> <p>10 that you spend when somebody clicks, does that cut</p> <p>11 against the budget that you have?</p> <p>12 A Yes.</p> <p>13 Q So if you bid on a nontrademark keyword and</p> <p>14 somebody clicks on that, does that count against your</p> <p>15 budget?</p> <p>16 A Yes.</p> <p>17 Q So -- and that budget is limited?</p> <p>18 MR. MATHESON: Objection to the form.</p> <p>19 THE WITNESS: Correct.</p> <p>20 BY MR. RAPHAEL:</p> <p>21 Q So at some point if you keep bidding on</p> <p>22 nontrademark keywords, even if the cost per order is</p> <p>23 under \$60, will you run out of money in the budget?</p> <p>24 MR. MATHESON: Objection to the form and to</p> <p>25 the leading.</p>	<p>1 A Yes, they do.</p> <p>2 Q And so when somebody clicks on the ads that</p> <p>3 those coupon companies serve on 1-800 Contacts'</p> <p>4 trademark keywords -- strike that.</p> <p>5 And I believe you talked about trademark plus</p> <p>6 keyword with Mr. Matheson.</p> <p>7 A Yes.</p> <p>8 Q What are trademark plus keywords as you</p> <p>9 understood it from the documents he reviewed with you?</p> <p>10 A Basically the 1-800 Contacts' trademark plus</p> <p>11 additional terms like coupon or coupon codes or things</p> <p>12 like that.</p> <p>13 Q So if an ad for a coupons.com comes up in a</p> <p>14 search for 1-800 Contacts coupons, can someone clicking</p> <p>15 on that ad go to a page that enables them to get a</p> <p>16 coupon to use at 1-800 Contacts?</p> <p>17 A Yes.</p> <p>18 Q If an ad comes up for 1-800 Contacts for</p> <p>19 lens.com, to your knowledge can that person -- can a</p> <p>20 person who clicks on that link find a coupon they can</p> <p>21 use at 1-800 Contacts?</p> <p>22 A Say that again.</p> <p>23 Q If -- if an ad for Vision Direct appears based</p> <p>24 on a search for 1-800 Contacts coupons, can a person who</p> <p>25 clicks on that ad find a coupon to use at 1-800</p>	

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<p>1 Contacts?</p> <p>2 A No.</p> <p>3 Q And let's just go back to the page of this</p> <p>4 document with 024. This refers to contribution margin.</p> <p>5 A Okay.</p> <p>6 Q Did you draft this slide?</p> <p>7 A I don't think so.</p> <p>8 Q So to your knowledge was it part of your job</p> <p>9 to confirm the accuracy of this slide?</p> <p>10 A No.</p> <p>11 Q Did you ever, to your memory, make any attempt</p> <p>12 to confirm the accuracy of this slide?</p> <p>13 A No.</p> <p>14 Q Other than -- other than looking at the slide</p> <p>15 can you recall anything that would help you know one way</p> <p>16 or the other whether this slide is accurate?</p> <p>17 MR. MATHESON: Objection to the form.</p> <p>18 THE WITNESS: No.</p> <p>19 MR. RAPHAEL: Just go off the record for a</p> <p>20 second. I think that's probably all I have. I'm just</p> <p>21 going to confirm.</p> <p>22 I think that's it.</p> <p>23 MR. MATHESON: I've got a few. Not an</p> <p>24 inordinate amount.</p> <p>25 (DISCUSSION OFF THE RECORD.)</p>	<p>1 about whether any current employees have any information</p> <p>2 regarding the reasons that negative keywords are added?</p> <p>3 A No.</p> <p>4 Q Another topic we recently discussed is the</p> <p>5 notion that -- and correct me if I misheard you. I</p> <p>6 understood you to testify that 80 percent of the search</p> <p>7 advertising budget is allocated to nontrademark</p> <p>8 keywords; is that right?</p> <p>9 A Roughly.</p> <p>10 Q When you say "roughly," what's the exact</p> <p>11 number?</p> <p>12 A I don't know. I don't know percentages. It's</p> <p>13 roughly in the 80/20 range. I'm not keeping track of</p> <p>14 percentage.</p> <p>15 Q Is the percentage always the same every day?</p> <p>16 A I don't know.</p> <p>17 Q Do you always spend the same amount of money</p> <p>18 on search advertising every day?</p> <p>19 A No.</p> <p>20 Q Do you spend the same amount of money on</p> <p>21 search advertising every month?</p> <p>22 A No.</p> <p>23 Q Do you spend the same amount of money on</p> <p>24 search advertising every quarter?</p> <p>25 A No.</p>
<p>102</p> <p>1 FURTHER EXAMINATION</p> <p>2 BY MR. MATHESON:</p> <p>3 Q Mr. Raphael was -- or asked you about change</p> <p>4 data that you sent to the terms for 1-800 Contacts. Do</p> <p>5 you recall that?</p> <p>6 A Yes.</p> <p>7 Q Is there any information in that change data</p> <p>8 that would indicate why a keyword -- or strike that.</p> <p>9 Is there any information in that change data</p> <p>10 that would indicate why a term was added as a negative</p> <p>11 keyword?</p> <p>12 A No.</p> <p>13 Q If you wanted to know why a term was added as</p> <p>14 a negative keyword, could you ask somebody at 1-800</p> <p>15 Contacts?</p> <p>16 A No.</p> <p>17 Q You don't think anybody at 1-800 Contacts has</p> <p>18 any information regarding the reasons that any negative</p> <p>19 keywords have ever been added?</p> <p>20 A That I know, no, I don't.</p> <p>21 Q It's simply information that's unavailable to</p> <p>22 1-800 Contacts?</p> <p>23 A Yeah, I think it's with former employees. I</p> <p>24 don't know.</p> <p>25 Q And you've never conducted any investigation</p>	<p>104</p> <p>1 Q Now, you testified that on occasion -- or</p> <p>2 strike that.</p> <p>3 You suggested that on occasions when you have</p> <p>4 observed the cost per click on trademark terms</p> <p>5 increasing, you took action to reduce the amount of</p> <p>6 money spent on nontrademark terms; is that right?</p> <p>7 A Yeah.</p> <p>8 Q When is the last time that happened?</p> <p>9 A Probably 2015.</p> <p>10 Q What action did you take?</p> <p>11 A We started reducing bids on keywords. We</p> <p>12 paused keywords.</p> <p>13 Q Who did you tell to reduce bids on keywords?</p> <p>14 A We have a portfolio, a bid management system</p> <p>15 that does that.</p> <p>16 Q Who within 1-800 Contacts was responsible for</p> <p>17 reducing the bid on keywords?</p> <p>18 A Would be me.</p> <p>19 Q How many times in 2015 did you reduce the bids</p> <p>20 on keywords because you observed an increase in the cost</p> <p>21 per clicks you experienced on trademark terms?</p> <p>22 A I don't know the number of times. We had to</p> <p>23 set up some -- some bid management features in our</p> <p>24 portfolios in order to dial the spin back.</p> <p>25 Q What does that mean, "you set up bid</p>

105	<p>1 management features to dial the spin back"?</p> <p>2 A So basically we tell the bid management</p> <p>3 software that we're using we only want to spend this</p> <p>4 much on this section of keywords that we're advertising</p> <p>5 on.</p> <p>6 Q When you say "spend this much," what's the</p> <p>7 time period?</p> <p>8 A The time period?</p> <p>9 Q Spend that much over what period of time?</p> <p>10 A We've done it at a daily level so that we can</p> <p>11 control how much to spend per each day of the week.</p> <p>12 Q Is it always done on a daily level?</p> <p>13 A It's changed back and forth. Initially when</p> <p>14 we started it it was kind of a set up for a wide variety</p> <p>15 of things. And then since then it has evolved into</p> <p>16 doing it more at a daily level.</p> <p>17 Q Now, when you tell the bid management software</p> <p>18 you only want to spend a certain amount on a particular</p> <p>19 group of keywords, how is the amount you want to spend</p> <p>20 specified? Do you specify the number, or do you specify</p> <p>21 it in relation to something else?</p> <p>22 A Like the number -- like the cost?</p> <p>23 Q The dollar value, the specified dollar value.</p> <p>24 A We specified a dollar value, and it's done --</p> <p>25 we set up what's called portfolios, and we grouped</p>	107	<p>1 A Adobe Media Optimizer.</p> <p>2 Q Are any reports generated by Adobe Media</p> <p>3 Optimizer that would indicate over time the maximum</p> <p>4 amount allocated to nontrademark terms?</p> <p>5 A I don't know if it keeps track of that or not.</p> <p>6 Q Have you ever seen a report generated by Adobe</p> <p>7 Media Optimizer?</p> <p>8 A Not that I can recall.</p> <p>9 Q Are all trademark terms in the same portfolio?</p> <p>10 A I believe so.</p> <p>11 Q Is there a maximum dollar value per day</p> <p>12 assigned to that portfolio?</p> <p>13 A No.</p> <p>14 Q When is the last time you changed the dollar</p> <p>15 value assigned to the nontrademark term portfolio within</p> <p>16 Adobe Media Optimizer?</p> <p>17 A We did it a couple of weeks ago.</p> <p>18 Q What change did you make?</p> <p>19 A We cut back spending on some of our days that</p> <p>20 we were running.</p> <p>21 Q What do you mean "on some of the days you're</p> <p>22 running"?</p> <p>23 A We cut back on all seven days that we were</p> <p>24 running.</p> <p>25 Q So you reduced the maximum dollar value 1-800</p>
106	<p>1 certain keywords into certain portfolios. And each</p> <p>2 portfolio we can manage to a certain spend per day if we</p> <p>3 want to.</p> <p>4 Q Well, you say "each portfolio we can manage to</p> <p>5 a certain spend per day." Do you manage each portfolio</p> <p>6 to a certain spend per day?</p> <p>7 A Not all of our portfolios.</p> <p>8 Q Are all keywords assigned to a portfolio?</p> <p>9 A I believe so.</p> <p>10 Q Is it possible to -- strike that.</p> <p>11 How many portfolios, how many keywords are in</p> <p>12 a portfolio?</p> <p>13 A Depends on the portfolio. We've broken things</p> <p>14 into trademark portfolios and nontrademark portfolios,</p> <p>15 and there's -- I don't know.</p> <p>16 Q Is that how it's allocated? There's a</p> <p>17 portfolio of nontrademark terms?</p> <p>18 A Yes.</p> <p>19 Q And you specified the maximum amount you want</p> <p>20 to spend per day on the portfolio of nontrademark terms?</p> <p>21 A Yes.</p> <p>22 Q Where is that information?</p> <p>23 A It's in our paid search management software.</p> <p>24 Q What is the paid search management software?</p> <p>25 What's it called?</p>	108	<p>1 Contacts was willing to spend per day on negative</p> <p>2 keywords search advertising?</p> <p>3 A On negative keywords?</p> <p>4 Q I'm sorry. Strike that.</p> <p>5 You reduced the maximum dollar value 1-800</p> <p>6 Contacts was willing to spend per day on nontrademark</p> <p>7 keyword search advertising?</p> <p>8 A Yes.</p> <p>9 Q Why did you do that?</p> <p>10 A We've got new budgets for the new month and</p> <p>11 the new year.</p> <p>12 Q Do budgets change every month?</p> <p>13 A Yeah.</p> <p>14 Q Has it ever been your experience that you have</p> <p>15 increased the maximum value assigned to nontrademark</p> <p>16 keyword search advertising in Adobe Media Optimizer as a</p> <p>17 result of a budget change?</p> <p>18 A Can you repeat that.</p> <p>19 Q Has it -- have you ever increased the maximum</p> <p>20 value assigned to nontrademark keyword search</p> <p>21 advertising in Adobe Media Optimizer due to a budget</p> <p>22 change?</p> <p>23 A Due to a budget change? Yes.</p> <p>24 Q When did that happen? When is the last time</p> <p>25 that happened?</p>

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1 A Couple months ago. Like November.
 2 **Q Was there a new annual budget set in November?**
 3 A No.
 4 **Q Was it a new monthly budget that caused you to**
 5 **increase the dollar value assigned to nontrademark**
 6 **keyword search advertising?**
 7 A Yeah. We had some funds that were slated to
 8 be spent for another activity, and that activity was
 9 canceled and so they sent additional funds our way
 10 because of that cancellation.
 11 **Q What activity was canceled?**
 12 A I don't remember. I'm not involved in those
 13 conversations.
 14 **Q As far as you know it could have been radio**
 15 **advertising?**
 16 A Yeah, it could have been, I don't know,
 17 anything.
 18 **Q Have you ever requested -- strike that.**
 19 **If you wanted to increase the budget for**
 20 **search advertising for a month, right, let's say you**
 21 **have a gangbuster month. You create a ton of orders in**
 22 **April. If you wanted to increase the budget for search**
 23 **advertising, who could you ask?**
 24 A Our marketing leadership team.
 25 **Q Have you ever asked your marketing leadership**

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1 **team to increase the budget attributable to the paid**
 2 **search advertising?**
 3 A I have not.
 4 **Q Is it your -- strike that.**
 5 **Have you ever asked -- strike that.**
 6 **So if sometimes the monthly budget increases**
 7 **and sometimes it decreases, and that's not in response**
 8 **to a request from you, who makes those decisions?**
 9 A Our marketing leadership team.
 10 **Q And who's that?**
 11 A Our CMO Tim, and our directors over the
 12 marketing team.
 13 **Q Have you ever discussed with them the reasons**
 14 **that paid search advertising budgets are changed from**
 15 **month to month?**
 16 A Well, it doesn't happen regularly. This last
 17 one was a rare case.
 18 **Q Prior to the most recent time that you**
 19 **decreased the maximum daily spend for nontrademark**
 20 **keyword search advertising in Adobe Media Optimizer,**
 21 **when was the next most recent time you decreased that**
 22 **number?**
 23 A We did it just this last week.
 24 **Q Right. Prior to that time you did this last**
 25 **week.**

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1 A I -- I don't know, I. Can't recall. It
 2 changes frequently based off of our budgets.
 3 **Q But a change in the monthly budget is a**
 4 **require event, right?**
 5 A Yeah, but our monthly budgets aren't the same
 6 every month. So we have to spend different levels in
 7 order to reach our allocated amount.
 8 **Q All right. So it's not the case that**
 9 **management made a decision to deviate from a previously**
 10 **set plan when you say "a change in monthly budget"?**
 11 A Yeah.
 12 **Q Is that fair?**
 13 A Yes.
 14 **Q Okay. So the monthly budget for April is just**
 15 **different than the monthly budget from March sometimes?**
 16 A Yeah.
 17 **Q Okay. But that plan can be mapped out a whole**
 18 **year in advance?**
 19 A Yes.
 20 **Q Has it ever been the case that at the start of**
 21 **a year there was a budget laid out for September, and by**
 22 **the time September rolled around the budget for**
 23 **September changed?**
 24 A For like my original numbers that they give to
 25 me, no. We might move budget from one month to the

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1 next, depending on whether we spent the budget or not.
 2 Or if we spent a little bit more in one month than we
 3 had anticipated, we might cut back the next month. It
 4 just depends.
 5 **Q So you say you spent one more -- little more**
 6 **than a month than you anticipated, doesn't the maximum**
 7 **value that you put into Adobe Media Optimizer prevent**
 8 **more money from being spent on a particular portfolio?**
 9 A Yeah, to a certain degree.
 10 **Q To a certain degree. What does that mean?**
 11 A They've got -- they can go like plus or minus
 12 a percentage. I think it's like 10 percent on the
 13 budget that we set for the day. And so it could go over
 14 budget and be slightly over what we had anticipated.
 15 **Q Up to 10 percent over what was anticipated?**
 16 A Yeah, roughly.
 17 **Q What is the current daily budget in Adobe**
 18 **Media Optimizer for 1-800 Contacts' nontrademark**
 19 **keywords?**
 20 A I don't know off the top of my head. It's
 21 different for every single day of the week.
 22 **Q Can you recall within \$10,000 what it has been**
 23 **for any day recently?**
 24 A We're typically anywhere in the, like, 9- to
 25 \$10,000 range on the weekends, and then up to like 14 to

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1 15,000s during the week. But every day is different. I
 2 don't know off the top of my head.
 3 **Q And any day can vary by up to 10 percent more**
 4 **than the maximum allocated for that day?**
 5 A Yeah.
 6 **Q How do you keep track of whether 1-800**
 7 **Contacts' expenditures on its trademark keywords is**
 8 **going according to plan?**
 9 MR. RAPHAEL: Object to form. Vague.
 10 THE WITNESS: I don't have a plan for it.
 11 BY MR. MATHESON:
 12 **Q How do you keep track of whether or not 1-800**
 13 **Contacts' expenditures on its trademark keywords --**
 14 **well, strike that.**
 15 **How do you keep track on a daily basis -- or**
 16 **strike that.**
 17 **Do you track on a daily basis what 1-800**
 18 **Contacts spends on paid search advertising for its**
 19 **trademark keywords?**
 20 A Not for its trademark, no. I have an overall
 21 daily report that we look at, but it's not
 22 trademark/nontrademark specific. It's everything.
 23 **Q So if you saw an increase in the total spend**
 24 **on paid search advertising, the information you would**
 25 **review on a daily basis would not tell you whether that**

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1 **increase resulted because spending on trademark keyword**
 2 **had increased or whether spending on nontrademark**
 3 **keywords had increased?**
 4 A In the report that we have, no.
 5 **Q Do you run a weekly report?**
 6 A Yeah.
 7 **Q To provide that information?**
 8 A Yeah.
 9 **Q Have you ever -- strike that. It's a bad**
 10 **question.**
 11 **Have you ever documented in a weekly report --**
 12 **strike that.**
 13 **Have you ever documented in any report a**
 14 **decrease in the maximum spend in Adobe Media Optimizer**
 15 **on nontrademark keywords?**
 16 A Not that I can think of.
 17 **Q When you make changes to the maximum spend in**
 18 **Adobe Media Optimizer for nontrademark keywords, who do**
 19 **you discuss those changes with?**
 20 A We have some Adobe reps that meet with us that
 21 we work with.
 22 **Q When you say "we," who is we?**
 23 A Myself and Rob Donakey.
 24 **Q Who is Rob Donakey?**
 25 A He just started recently.

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1 **Q Prior to Rob Donakey starting, who would have**
 2 **fulfilled whatever role you meant by "we," when**
 3 **referring to Rob Donakey?**
 4 A Probably Kevin Hutchings.
 5 **Q Has Kevin left the company?**
 6 A Yeah.
 7 **Q Who are the Adobe reps with whom you currently**
 8 **have those conversations?**
 9 A Lance and Rob.
 10 **Q Do you remember their last names by any**
 11 **chance?**
 12 A Lance. I'm -- my blind is going blank. I
 13 don't remember.
 14 **Q Is there any -- strike that.**
 15 **Have you ever discussed a change to the**
 16 **maximum daily spend attributable to nontrademark**
 17 **keywords in Adobe Media Optimizer with any of your**
 18 **supervisors?**
 19 A Not that I can recall.
 20 **Q So how can I figure out how the spend changes?**
 21 **Is there any -- strike that.**
 22 **If you wanted to track over time the maximum**
 23 **spend in Adobe Media Optimizer for negative keywords,**
 24 **how would you figure out that information?**
 25 A I don't know about negative keywords. I don't

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1 understand your question.
 2 **Q Well, you have a maximum -- sorry. I keep**
 3 **saying negative keywords.**
 4 **If you wanted to track over time the maximum**
 5 **spend 1-800 Contacts has specified for nontrademark**
 6 **keywords in Adobe Media Optimizer, how would you figure**
 7 **out that information?**
 8 A I don't know. I don't know if they have
 9 reports. I -- I honestly don't know.
 10 **Q Where would you go to figure out whether that**
 11 **information exists?**
 12 A Probably Adobe Media Optimizer.
 13 **Q So you would log into the computer program?**
 14 A Yeah.
 15 **Q But you just don't know whether or not this**
 16 **computer program provides that information?**
 17 A I don't know if it provides or not, no.
 18 **Q Okay. Other than yourself is there anybody**
 19 **log in into Adobe Media Optimizer?**
 20 A Yeah. Rob Donakey logs in as well.
 21 **Q Prior to Rob's tenure, would Kevin Hutchings**
 22 **have logged in?**
 23 A Yes.
 24 **Q Anybody else besides Rob Donakey and Kevin**
 25 **Hutchings?**

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1 A I don't believe so.
 2 **Q If I were to ask you what the figure was in**
 3 **any given month that indicated the maximum spend**
 4 **attributable to nontrademark keywords, would you be able**
 5 **to recall that information?**
 6 A No.
 7 **Q Would you be able to recall that information**
 8 **for any period of time?**
 9 A No.
 10 **Q And there's no one else in the company who**
 11 **would be able to remember that?**
 12 A I don't think so.
 13 **Q You don't have Rain Man working there?**
 14 A No.
 15 MR. MATHESON: All right. That's all I have.
 16 MR. RAPHAEL: I don't have anything else. I
 17 just would like to designate the transcript highly
 18 confidential under the protective order.
 19 (Concluded at 1:10 p.m.)
 20
 21
 22
 23
 24
 25

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1 REPORTER'S CERTIFICATE
 2 STATE OF UTAH)
 3 COUNTY OF SALT LAKE)
 4
 5 I, Heidi Hunter, RPR, CCR, for the state
 6 of Utah.
 7 That the foregoing proceedings were taken
 8 before me at the time and place set forth in the
 9 caption hereof; that the witness was placed under
 10 oath to tell the truth, the whole truth, and nothing
 11 but the truth.
 12 That I thereafter transcribed my said
 13 shorthand notes into typing and that the typewritten
 14 transcript of said deposition is a complete, true
 15 and accurate transcription of my said shorthand
 16 notes taken at said time.
 17 I further certify that I am not a relative
 18 employee, attorney, or counsel of any of the parties
 19 nor am I a relative or employee of any of the
 20 parties' attorney or counsel connected with the
 21 action, nor am I financially interested in the
 22 action.
 23
 24
 25

 Heidi Hunter, RPR, CCR

118

1 CERTIFICATE OF DEPONENT
 2 Case: FTC v. 1-800 Contacts
 3 Reported by: Heidi Hunter, RPR, CRR
 4 Date Taken: January 19, 2017
 5
 6 WITNESS CERTIFICATE
 7 I, BRADY ROUNDY, HEREBY DECLARE:
 8 That I am the witness in the foregoing
 9 transcript; that I have read the transcript and know
 10 the contents thereof; that with these corrections, I
 11 have noted this transcript truly and accurately
 12 reflects my testimony.
 13
 14 PAGE-LINE CHANGE-CORRECTION REASON
 15 _____
 16 _____
 17 _____
 18 _____
 19 _____
 20 _____
 21 _____
 22 _____
 23 _____
 24 _____
 25 _____

I, BRADY ROUNDY, deponent herein, do hereby certify and declare, under penalty of perjury the within and foregoing transcription to be true and correct. hereby affix my signature to said deposition.

DATE _____ BRADY ROUNDY, Deponent

Subscribed and sworn to before me this _____ day of _____, 2016.

 Notary Public

EXHIBIT C

In the Matter of:

1-800 Contacts

January 24, 2017
Clint Schmidt - Confidential

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

1

1 UNITED STATES OF AMERICA
2 BEFORE THE FEDERAL TRADE COMMISSION
3
4 IN THE MATTER OF)
5)
6) Docket No.
7) 9372
8 1-800 CONTACTS, INC., A)
9 CORPORATION)
10)
11)
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25)

CONFIDENTIAL

DEPOSITION OF CLINT SCHMIDT
VOLUME 1
San Francisco, California
Tuesday, January 24, 2017

Reported by: Shaaron M. Shigio
CSR No. 12286
Job No: 20256

3

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2

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Deposition of CLINT SCHMIDT, taken on behalf
of Federal Trade Commission at the Law Offices of
Munger, Tolles & Olson, LLP, 560 Mission Street, 37th
Floor, San Francisco, California 94105, commencing at
8:02 A.M., Tuesday, January 24, 2017, before Shaaron M.
Shigio, Certified Shorthand Reporter No. 12286.

4

I N D E X

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7	E X H I B I T S	
8	Exhibit No. Description	Page
9	Exhibit RX156 LinkedIn Profile of Clint Schmidt	7
10		
11	Exhibit RX157 E-mail chain last dated February 13, 2004	20
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15	Exhibit RX159 E-mail from Josh Aston to Kevin McCallum, Joe Zeidner, and Clint Schmidt April 9th, 2004, bearing Bates stamp number 1-800F_00102777	28
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19	Exhibit RX160 E-mail chain last dated July 26, 2004	41
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1	Exhibit RX164	Letter dated May 6, 2005	72		1	San Francisco, California			
2	Exhibit RX165	E-mail last dated 5/23/2005	74		2	Tuesday, January 24, 2017			
3	Exhibit RX167	E-mail chain last dated March 15, 2005	116		3	CLINT SCHMIDT,			
4					4	having been first duly sworn by the reporter, was			
5					5	examined and testified as follows:			
6	EXHIBITS REFERENCED				6	[Whereupon, Deposition Exhibit RX156 was			
7	Exhibit No.	Description	Page		7	marked for identification.]			
8	Exhibit CX0055	E-mail last dated July 23, 2004	179		8	EXAMINATION			
9					9	BY MR. VINCENT:			
10	Exhibit CX0060	E-mail chain last dated August 11, 2005	245		10	Q. Good morning, Mr. Schmidt.			
11					11	Could you tell us your -- state your name and			
12	Exhibit CX0062	E-mail chain last dated August 3, 2006	99		12	current address for the record, please?			
13					13	A. Clint Schmidt. I live at 857 Seaview Drive in			
14	Exhibit RX106	E-mail chain last dated 3/11/2004	81		14	El Cerrito, California.			
15					15	Q. And are you currently employed?			
16	Exhibit CX0111	Letter dated April 25, 2005 on Keatin Muething & Klekamp letterhead	61		16	A. I am.			
17					17	Q. And what is your position?			
18	Exhibit CX0113	E-mail chain last dated May 6, 2005	65		18	A. I am the chief executive officer at Bloc, Inc.			
19					19	Q. What kind of company is Bloc, Inc.?			
20	Exhibit CX0117	E-mail chain last dated September 7, 2005	201		20	A. It's an online education company.			
21					21	Q. I'd like to show you -- direct your attention			
22	Exhibit CX0311	Settlement Agreement	40		22	to what's been marked as RX156 and just to ask you a			
23	Exhibit CX0404	E-mail chain last dated March 20, 2006	252		23	little bit about your educational employment			
24					24	background. I've printed out a copy of what appears to			
25	Exhibit CX1004	E-mail dated 2/13/2004	15		25	be your LinkedIn profile.			
				6					8
1	Exhibit CX1007	E-mail dated 2/20/2004	162		1	Could you tell us what this -- RX156 appears			
2	Exhibit CX1012	E-mail chain last dated 4/14/2004	215		2	to be a copy of that -- printout of that LinkedIn			
3					3	profile?			
4	Exhibit CX1015	E-mail chain last dated 5/8/2004	171		4	A. It is.			
5					5	Q. Okay. Could you, using that, just help me on			
6	Exhibit CX1020	E-mail dated 2/13/2004	13		6	dates and locations?			
7	Exhibit CX1053	E-mail dated February 9, 2004	254		7	Could you tell us your educational background?			
8					8	A. Yes, I got an undergraduate degree at the			
9	Exhibit CX1377	E-mail chain last dated August 8, 2004	190		9	Wharton School of Business at the University of			
10					10	Pennsylvania, bachelor's of science, graduated in 1997.			
11					11	Q. Any other formal education?			
12					12	A. No.			
13					13	Q. Could you tell us your employment background			
14	Exhibit CX1398	E-mail dated 2/27/2004	241		14	following your graduation from Wharton?			
15					15	A. Sure. I worked for a little over a year as a			
16					16	management consultant in Seattle, a company called MSI			
17					17	Consulting. I spent another year as an entrepreneur,			
18					18	as the founder and CEO of a startup called Captivate.			
19					19	I relocated to Philadelphia where I took a job			
20					20	in online marketing at a company called half.com.			
21					21	Spent two and a half years there. The company			
22					22	was acquired by eBay, and I spent another two and a			
23					23	half years in the executive Internet marketing role at			
24					24	eBay here in California.			
25					25	Following my tenure at eBay, I spent almost			

9	<p>1 two years at 1-800-CONTACTS where I led e-commerce and 2 our online business. I took a year off and since then 3 I've spent various stints as an executive at a number 4 of different venture-backed startups with some periods 5 in between some of those stints as an independent 6 consultant as well.</p> <p>7 Q. And are the -- referring to the LinkedIn 8 profile that we've marked as Exhibit RX156, do those 9 companies and dates of your -- on your employment 10 there, do those --</p> <p>11 A. Yeah, I keep this very accurate. This is 12 up-to-date and accurate.</p> <p>13 Q. Okay. Just a few questions about your 14 employment history prior to joining 1-800-CONTACTS. 15 Could you tell us what type of company MSI 16 Consulting group is and what your duties were there?</p> <p>17 A. Sure. I was an entry-level consultant. We 18 were a channel marketing consulting firm. We helped 19 hardware, software and telecommunications companies 20 design programs for their resellers and their channels 21 to sell more product.</p> <p>22 Q. Okay. And how about Captivate? 23 What kind of company is that and what were 24 your responsibilities there?</p> <p>25 A. Captivate, I was the founder and CEO --</p>	11	<p>1 advertising vehicles like paid search. In fact, I was 2 among Google's very first paid advertising -- paid 3 search advertising customers back in 2000 when they 4 first launched the capability.</p> <p>5 Q. How about eBay?</p> <p>6 Just tell us, generally, what eBay is and what 7 your general responsibilities were there.</p> <p>8 A. eBay is a global marketplace for people to buy 9 and sell goods from one another. And my role there was 10 as an Internet marketing executive.</p> <p>11 We, basically, spent money to acquire new 12 users. And my responsibilities there were to spend 13 those dollars through online channels and I led the 14 eBay affiliate program which, when I left, was the 15 world's largest affiliate program.</p> <p>16 Q. So prior to coming to 1-800-CONTACTS you had 17 experience in paid search marketing both at half.com as 18 well as eBay?</p> <p>19 A. Yes.</p> <p>20 Q. Thank you. Could you tell me about your 21 duties and responsibilities as head of e-commerce at 22 1-800-CONTACTS from 2004 to 2006?</p> <p>23 A. Sure. The long and short of it is that the 24 CEO and the EVP of -- of marketing, Jonathan Coon and 25 Kevin McCallum, respectively, tossed me the keys and</p>
10	<p>1 co-founder and CEO. And we made, even back in 1998, we 2 made advert games. These were branded software 3 applications that could be attached to e-mails and 4 forwarded along from one person to another.</p> <p>5 It was an attempt to try to create a branding 6 vehicle that was kind of on the back of viral e-mails 7 at that time.</p> <p>8 It wasn't so much social media, but e-mails 9 that people passed around and we tried to make 10 executable games, applications, independent 11 applications that were branded that could be e-mailed 12 around. That was short-lived, just a year.</p> <p>13 Q. And how about half.com? 14 What kind of company was that and what were 15 your duties there?</p> <p>16 A. Half.com was a place for people to sell or buy 17 used books, movies, CDs or video games. And it was an 18 online marketplace where people would set a fixed price 19 to sell the book or CD that they wanted to get rid of 20 and then another individual could buy it from -- 21 individuals could buy and sell from one another using 22 our platform.</p> <p>23 Q. Did you do any paid search marketing there?</p> <p>24 A. Yes, in fact, even though half.com was a small 25 company, we were pioneers of the sort in using online</p>	12	<p>1 said "fix it."</p> <p>2 There was really nothing off limits. I was 3 responsible for all of our online marketing and our 4 website as well as the -- if you could call it the -- 5 the intersection between our call center and our online 6 business units.</p> <p>7 Q. And so did your responsibilities include 8 overseeing all digital marketing, marketing at 9 1-800-CONTACTS?</p> <p>10 A. That is correct.</p> <p>11 Q. And that would include paid search 12 advertising?</p> <p>13 A. That is correct.</p> <p>14 Q. And it also included responsibilities for the 15 1-800-CONTACTS website?</p> <p>16 A. That is correct.</p> <p>17 Q. And who did you report to in that capacity?</p> <p>18 A. Kevin McCallum.</p> <p>19 Q. And he was the executive vice president for 20 marketing?</p> <p>21 A. Yes.</p> <p>22 Q. And did you have any direct reports at the 23 time?</p> <p>24 A. I had several when I inherited the job, I had 25 two.</p>

13	<p>1 Q. Okay.</p> <p>2 A. And I replaced those folks in relatively short</p> <p>3 order with a new team, and I think when I left I had a</p> <p>4 team of six.</p> <p>5 Q. And was there someone that was in charge of</p> <p>6 paid search that reported to you when you started at</p> <p>7 1-800-CONTACTS?</p> <p>8 A. Yeah, ostensibly. Yeah, his name was Josh</p> <p>9 Aston.</p> <p>10 MR. VINCENT: Okay. Let me -- direct your</p> <p>11 attention to what's been previously marked as Exhibit</p> <p>12 CX1020.</p> <p>13 [Whereupon, Exhibit CX1020 was</p> <p>14 referenced.]</p> <p>15 BY MR. VINCENT:</p> <p>16 Q. Which is a February 13th, 2004 e-mail from</p> <p>17 Kevin McCallum to Josh Aston, subject matter "bottom</p> <p>18 feeders."</p> <p>19 And I realize you're not on this particular</p> <p>20 e-mail, but I want to ask you about -- if you're</p> <p>21 familiar with the issue that's discussed therein.</p> <p>22 If you'd direct your attention to that e-mail,</p> <p>23 it says: (Reading.)</p> <p>24 "Josh, I see what you guys are talking</p> <p>25 about. I searched on 1-800-CONTACTS</p>	15	<p>1 online presence at that time where there would be</p> <p>2 companies, other third parties that would try to create</p> <p>3 customer confusion in order to get some traffic to</p> <p>4 their website.</p> <p>5 And they would place paid search ads that</p> <p>6 would be triggered based on another company's trademark</p> <p>7 term and creating confusion for folks who were looking</p> <p>8 for the trademark holder. And so we had pretty good</p> <p>9 qualitative and quantitative evidence that these third</p> <p>10 parties -- and others like them, not just limited to</p> <p>11 this list -- were creating confusion for customers.</p> <p>12 Q. And were you involved in the plan at</p> <p>13 1-800-CONTACTS to try to clean this problem up?</p> <p>14 A. Yes.</p> <p>15 MR. VINCENT: Direct your attention to what's</p> <p>16 been previously marked as Exhibit CX1004.</p> <p>17 [Whereupon, Exhibit CX1004 was</p> <p>18 referenced.]</p> <p>19 BY MR. VINCENT:</p> <p>20 Q. Is Exhibit CX1004, is that an e-mail from Josh</p> <p>21 Aston to you and Kevin McCallum on February 13th, 2004?</p> <p>22 A. That's correct.</p> <p>23 Q. And it's roughly the couple of hours after the</p> <p>24 e-mail we just looked at that was the subject matter,</p> <p>25 "bottom feeders"?</p>
14	<p>1 today and found all these jokers keying</p> <p>2 off our trademark name."</p> <p>3 And then there's a list of companies there.</p> <p>4 Do you see that?</p> <p>5 A. Yeah.</p> <p>6 Q. He goes on to say: (Reading.)</p> <p>7 "I recognize many as affiliates, but</p> <p>8 some are competitors. Stop by and take</p> <p>9 me through the plan to clean this up</p> <p>10 again."</p> <p>11 Do you see that?</p> <p>12 A. Yes.</p> <p>13 Q. Are you familiar with the issue that's been</p> <p>14 referenced here in Exhibit CX1020?</p> <p>15 A. Yes.</p> <p>16 MR. CHIARELLO: Objection; foundation.</p> <p>17 BY MR. VINCENT:</p> <p>18 Q. And what is that?</p> <p>19 A. I'm sorry. Could you clarify?</p> <p>20 Q. Yeah, and what is the -- what did you under --</p> <p>21 how is it that you're familiar with this issue?</p> <p>22 A. It was a pervasive issue and a point of</p> <p>23 customer confusion for us that it -- this is not unique</p> <p>24 to 1-800-CONTACTS. It's -- it's an issue that was</p> <p>25 shared by many websites and companies that had an</p>	16	<p>1 A. Yeah.</p> <p>2 Q. Okay.</p> <p>3 A. Just to point out on this one, this e-mail</p> <p>4 came during a period of time when I was an independent</p> <p>5 consultant for 1-800-CONTACTS and it preceded my</p> <p>6 official tenure as an employee.</p> <p>7 Q. Okay.</p> <p>8 A. I'm not sure if that's relevant but it's --</p> <p>9 that's the reason why it was sent to my Yahoo account.</p> <p>10 Q. Okay. And for approximately how many months</p> <p>11 were you an independent consultant? Do you remember?</p> <p>12 A. I think it was four or five months.</p> <p>13 Q. Okay.</p> <p>14 A. Not much longer than that.</p> <p>15 Q. Should it be reflected in the e-mails if we</p> <p>16 see the 1-800-CONTACTS e-mail?</p> <p>17 A. That's the distinction, really, when you see</p> <p>18 that I've got a 1-800-CONTACTS e-mail that marks the</p> <p>19 beginning of my tenure, yes. I didn't have a company</p> <p>20 e-mail before then.</p> <p>21 Q. Okay. And what do you understand CX1004 to</p> <p>22 be?</p> <p>23 A. This is -- I mean, basically, trying to get --</p> <p>24 get everybody on the same page and everyone kind of</p> <p>25 working with the same understanding here.</p>

17	<p>1 The important thing that I think to point out</p> <p>2 to this is that this e-mail came -- and I think</p> <p>3 correctly, documents, what the search engines' policy</p> <p>4 was at that moment in time and how to handle turf</p> <p>5 battles and disagreements and grievances around</p> <p>6 trademark terms and the protection thereof.</p> <p>7 Q. Umm-hmm. Now, this e-mail from Josh Aston</p> <p>8 says: (Reading.)</p> <p>9 Kevin, in regard to controlling bids on</p> <p>10 our trademark name, I recommend this</p> <p>11 battle should follow this order: 1)</p> <p>12 Search engines. They are the ones</p> <p>13 ultimately allowing this and they should</p> <p>14 understand their responsibility and</p> <p>15 liability in the situation. I think it</p> <p>16 will have the least negative effects</p> <p>17 upon the business by taking it up with</p> <p>18 them. It's really in their hands</p> <p>19 because they are allowing people to do</p> <p>20 it.</p> <p>21 Do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. What did you understand that to mean?</p> <p>24 A. Exactly as it suggests. This was the policy</p> <p>25 of the search engines at that moment in time, that they</p>	19	<p>1 Q. And just for the record, are affiliates</p> <p>2 websites or companies that you used to drive traffic to</p> <p>3 the --</p> <p>4 A. Yes.</p> <p>5 Q. -- to the website in exchange for a</p> <p>6 commission?</p> <p>7 A. Yes, those are third parties that bring</p> <p>8 traffic in exchange for commission of any goods sold.</p> <p>9 Q. Did you participate in all these discussions</p> <p>10 about the strategy to clean up this problem of</p> <p>11 competitor ads appearing in response to searches for</p> <p>12 1-800's trademarks?</p> <p>13 A. I recall that this was one of the first issues</p> <p>14 that I jumped in on as a consultant.</p> <p>15 Q. Okay.</p> <p>16 MR. CHIARELLO: Let me just make my -- on the</p> <p>17 record an objection to foundation, because I think that</p> <p>18 misstated what he testified to about the document</p> <p>19 before.</p> <p>20 BY MR. VINCENT:</p> <p>21 Q. Okay. Just to be clear, was the -- was the</p> <p>22 concern that you were trying to address at the time</p> <p>23 were competitor or affiliate ads appearing in response</p> <p>24 to searches for 1-800-CONTACTS trademarks?</p> <p>25 MR. CHIARELLO: Same objection.</p>
18	<p>1 would handle such grievances that were reported to</p> <p>2 them.</p> <p>3 Q. And did you understand Mr. Aston to be</p> <p>4 recommending that the -- the strategy should start with</p> <p>5 directing the concerns directly to the search engines?</p> <p>6 A. Yeah. And in fact he says so toward the end</p> <p>7 of the first paragraph there that if we push hard</p> <p>8 enough, they can control it. And at that time he was</p> <p>9 right to conclude that.</p> <p>10 Q. Okay.</p> <p>11 A. It was a squeaky-wheel-gets-the-oil type of</p> <p>12 policy.</p> <p>13 Q. Okay. And then he goes on to say: (Reading.)</p> <p>14 "However I also feel that we should</p> <p>15 inform our affiliates that it will not</p> <p>16 be tolerated and put a punishment in</p> <p>17 place (no commission if in violation)."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. What did you understand that to mean?</p> <p>21 A. Simply put, if they -- if the affiliates</p> <p>22 didn't have any incentive to bid on these keywords, if</p> <p>23 they knew that trademark keywords would be excluded</p> <p>24 from any affiliate commissions that they would receive,</p> <p>25 then they would simply stop doing it.</p>	20	<p>1 THE WITNESS: Yes.</p> <p>2 MR. VINCENT: Okay. Now, let's mark as</p> <p>3 Exhibit 157 an e-mail chain. At the top, it's from</p> <p>4 Kevin McCallum to Clint Schmidt and Josh Aston dated</p> <p>5 February 13th, 2004, bearing Bates stamp Number</p> <p>6 1-800F_00102782.</p> <p>7 [Whereupon, Deposition Exhibit RX157 was</p> <p>8 marked for identification.]</p> <p>9 BY MR. VINCENT:</p> <p>10 Q. Mr. Schmidt, is this e-mail correspondence</p> <p>11 between you and Mr. McCallum and Mr. Aston following up</p> <p>12 on that same discussion earlier that day with regard to</p> <p>13 competitor ads appearing in response to searches for</p> <p>14 1-800-CONTACTS trademarks?</p> <p>15 A. It is.</p> <p>16 Q. Okay. And you'll see at the bottom of the</p> <p>17 e-mail it's the e-mail that we went over earlier about</p> <p>18 Mr. Aston's proposed strategy to take care of the</p> <p>19 issues. Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. And then a response here. I'd like to direct</p> <p>22 your attention to your response in the middle. It</p> <p>23 appears in the middle of the first page. You say here:</p> <p>24 (Reading.)</p> <p>25 "I believe that Google has explicitly</p>

21	<p>1 removed itself from grievances related 2 to trademarked terms. They used to 3 block bidders if trademark holders 4 protested, now they will not." 5 Do you see that? 6 A. Yes. 7 Q. What did you mean by that? 8 A. Well, at this time, as I mentioned, I was an 9 independent consultant for 1-800-CONTACTS and my day 10 job was still at eBay. 11 eBay was the largest advertiser for Google 12 AdWords and I was aware of a change in Google's 13 approach to handling these type of trademark grievances 14 that was slow to get through the Google organization 15 and slow then consequently to get to 1-800-CONTACTS. 16 And I -- I just became aware of Google's new 17 policy before the folks at 1-800-CONTACTS and Draper 18 had. And the new policy, as we later came to find out, 19 1-800-CONTACTS, was that Google would not be 20 interceding any longer in those grievances. 21 Q. Okay. And what was it that Google told your 22 marketing team at eBay the new policy would be as far 23 as how -- how you should or would resolve any disputes 24 with advertisers that were using your trademarks? 25 MR. CHIARELLO: Objection; foundation.</p>	23	<p>1 for you to handle those grievances on your own in the 2 form of negative keywords. 3 Q. When you say, "handle the grievances on your 4 own," did you understand that to mean you should 5 resolve the dispute directly with the competitor? 6 A. Absolutely. 7 Q. When you say "negative keywords," do you mean 8 resolve the matter by having the competitor agree to 9 implement your company's trademarks as negative 10 keywords? 11 MR. CHIARELLO: Objection; leading. 12 THE WITNESS: That is exactly what negative 13 keywords are. They are specific terms that you can 14 identify on the Google AdWords platform to indicate to 15 Google that you do not want to trigger an ad for that 16 keyword or phrase. 17 BY MR. VINCENT: 18 Q. Was Google the one that made that suggestion 19 to you while you were -- your team while you were at 20 eBay? 21 A. Google made that suggestion to our team at 22 eBay and to many, many, many other keyword advertisers, 23 subsequently. I think it just so happened that at eBay 24 we were the first to get the news because we were 25 the -- the ones filing the most grievances --</p>
22	<p>1 MR. VINCENT: Let me re-ask the question. 2 BY MR. VINCENT: 3 Q. Were there communications between people at 4 Google and your marketing team at eBay about the -- the 5 problem of other companies' ads appearing in response 6 to searches for eBay's trademarks? 7 A. There were numerous conversations, on an 8 almost daily basis, about Google's policies. 9 Q. And is it your testimony that Google 10 representatives told you that this change was coming, 11 that they would not be interceding in the middle of 12 these disputes? 13 A. Google did communicate to our team at eBay, 14 and later to the team at 1-800-CONTACTS, that they 15 would not be interceding in trademark grievances any 16 longer. 17 Q. Did they say anything to your team about how 18 you should deal with these disputes with competitors or 19 others using your trademarks? 20 A. Yes, the message from Google had three parts. 21 The first is that Google would not be handling these 22 grievances any longer. The second is that you were, as 23 a trademark holder, you were responsible for handling 24 these grievances on your own and that there were tools 25 available on the AdWords platform that made it possible</p>	24	<p>1 Q. Okay. 2 A. -- with Google prior. 3 Q. Did this affect your job responsibilities at 4 all when you were at eBay, this change in policy? 5 A. Oh, yes, it was formidable in fact. It 6 shifted a lot of overhead and enforcement for the 7 trademark protection to the trademark holder. Google 8 was basically dumping off a problem that they had 9 previously solved back onto trademark holders. 10 Q. Okay. And so was this background that you had 11 at eBay the basis for your statement? 12 A. That's what informed my response to this 13 e-mail exchange here was the -- information that I had 14 about Google's changing policy that it did not appear 15 the folks at 1-800-CONTACTS had yet. 16 Q. Okay. The next sentence after you say: 17 (Reading.) 18 Overture should continue to block such 19 bids, but I'll need to verify that it's 20 still their policy. 21 Could you tell us what you meant by that? 22 A. Overture is another search engine. In fact, 23 they were a paid search advertising platform that 24 spanned several search engines, and their policy later 25 came to mirror Google's. But at this moment in time</p>

25	27
<p>1 when this e-mail was sent, Overture's policy was still 2 that they would handle such grievances for trademark 3 holders. That changed shortly thereafter. 4 Q. Now, in response to your e-mail at the top, 5 Mr. McCallum says: (Reading.) 6 Spoke with Google today. They said it's 7 their policy to block bidders of 8 trademark names and had a document one 9 filled out to make it happen. Net, per 10 their request and their process, 11 attached is what I sent them and they 12 said they would expedite it. We'll see. 13 Do you see that? 14 A. Yes. 15 Q. And did you understand the -- the policy that 16 Mr. McCallum is referencing he was told about was the 17 old policy -- 18 A. Yes. 19 Q. -- at Google? 20 MR. CHIARELLO: Objection; leading. 21 BY MR. VINCENT: 22 Q. Attached you'll see -- look at the third page. 23 Is that -- do you understand that to be the 24 complaint that Mr. McCallum sent in to Google on 25 February 13th, 2004?</p>	<p>1 following up on this plan to clean up the problem of 2 other companies' ads appearing in response to searches 3 for 1-800's trademarks? 4 MR. CHIARELLO: Objection to the form of the 5 question. 6 THE WITNESS: Yes, this is an e-mail that I 7 received from Kevin McCallum regarding the same issue 8 of trademark protection, but this time regarding Yahoo 9 and Overture. 10 BY MR. VINCENT: 11 Q. On the top e-mail -- and this, again, is the 12 same day of all these other e-mails we've been through 13 earlier today? 14 A. Correct. 15 Q. Okay. And Mr. McCallum says: (Reading.) 16 Spoke with Yahoo today as well. They 17 agree with our position as well and 18 suggest we take a tag team approach in 19 dealing with Overture. 20 Do you see that? 21 A. Yes. 22 Q. And what did you understand Mr. McCallum to 23 mean when he said "they agree with our position as 24 well"? 25 A. The understanding here was that Yahoo agreed</p>
<p>1 A. This is the complaint, yes, but I -- I -- I -- 2 I wasn't a part of putting this together. 3 Q. Right. It was -- as you can see, attached to 4 this e-mail and I'm just -- if you look down at the 5 bottom, just -- you'll see it's Kevin McCallum dated 6 February 13th. 7 A. I see that, yes. 8 Q. And then in the middle of the page it says in 9 bold: (Reading.) 10 "Any advertisement that triggers off the 11 1-800-CONTACTS trademark or any 12 variation of that mark for example --" 13 And then it lists some different misspellings 14 of the 1-800-CONTACTS trademark or URL. 15 Do you see that? 16 A. Yes. 17 MR. VINCENT: Let's mark as Exhibit 158 an 18 e-mail chain between Kevin McCallum, Clint Schmidt, and 19 Josh Aston dated February 13th, 2004, bearing Bates 20 stamp Number 1-800F_00102785. 21 [Whereupon, Deposition Exhibit RX158 was 22 marked for identification.] 23 BY MR. VINCENT: 24 Q. Mr. Schmidt, is this an e-mail you received on 25 or about February 13th, 2004, from Kevin McCallum</p>	<p>1 with our position that our trademark terms were 2 deserving of protection and this was an issue that was 3 relevant for Yahoo and Overture to address -- 4 Q. Okay. 5 A. -- given their policy at the time. 6 Q. All right. So when this issue arose at 7 1-800-CONTACTS, was it your understanding that 8 1-800-CONTACTS went out and tried to address this issue 9 directly with each of the search engines? 10 A. Yes, that approach was appropriate at the time 11 given the policy of -- policies of the respective 12 search engines at that time. 13 MR. VINCENT: Let's mark as Exhibit 159 -- 14 RX159 an e-mail from Josh Aston to Kevin McCallum, Joe 15 Zeidner, and Clint Schmidt, April 9th, 2004, bearing 16 Bates stamp Number 1-800F_00102777. 17 [Whereupon, Deposition Exhibit RX159 was 18 marked for identification.] 19 BY MR. VINCENT: 20 Q. Mr. Schmidt, is this an e-mail that you 21 received from Josh Aston, on or about April 9th, 2004? 22 A. Yes, and at this point I was an employee of 23 the company. 24 Q. Right. Reflected that it's at your e-mail 25 address at 1-800-CONTACTS now?</p>

29	<p>1 A. Correct.</p> <p>2 Q. Okay. You'll see in the attachment that he --</p> <p>3 first there's an e-mail from a Daniel Daugherty at</p> <p>4 Google. Do you see that?</p> <p>5 A. I do.</p> <p>6 Q. Who's Daniel Daugherty?</p> <p>7 A. He was the sales representative assigned to</p> <p>8 the region of Utah for Google.</p> <p>9 Q. He was 1-800-CONTACTS's --</p> <p>10 A. He was our sales representative, that's</p> <p>11 correct.</p> <p>12 Q. And in this e-mail to Josh Aston that was</p> <p>13 forwarded to you he says: (Reading.)</p> <p>14 "Our trademark policy team has recently</p> <p>15 notified your company 1800Contacts of an</p> <p>16 upcoming change to policy regarding the</p> <p>17 usage of trademark terms in AdWords ads</p> <p>18 or keyword lists. This change may</p> <p>19 affect how we handle the trademark</p> <p>20 complaint your company currently has on</p> <p>21 file with us."</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. And did you understand him to be referring</p> <p>25 to the trademark complaint that Mr. McCallum sent on</p>	31	<p>1 Q. And was this consistent with what had been</p> <p>2 conveyed to your team at eBay earlier?</p> <p>3 MR. CHIARELLO: Objection; foundation.</p> <p>4 THE WITNESS: This is the -- this is the</p> <p>5 representative of the time lag between when I found out</p> <p>6 as an employee of eBay and the team at 1-800-CONTACTS</p> <p>7 found out a couple months later about this change in</p> <p>8 policy.</p> <p>9 Simply put, Google was becoming a very large</p> <p>10 company very fast and I think it just took this amount</p> <p>11 of time for this policy to propagate from one of its</p> <p>12 biggest advertisers with eBay down to one of the</p> <p>13 smaller ones with 1-800-CONTACTS.</p> <p>14 BY MR. VINCENT:</p> <p>15 Q. Directing your attention to the attached</p> <p>16 policy entitled "Google Trademark Complaint Procedure."</p> <p>17 Do you see that?</p> <p>18 A. I see that.</p> <p>19 Q. In the first sentence it says: (Reading.)</p> <p>20 "As a provider of space for</p> <p>21 advertisements, please note that Google</p> <p>22 is not in a position to arbitrate</p> <p>23 trademark disputes between the</p> <p>24 advertisers and trademark owners."</p> <p>25 Do you see that?</p>
30	<p>1 February 13th, 2004?</p> <p>2 A. That is correct.</p> <p>3 (Brief recess.)</p> <p>4 MR. CHIARELLO: I was going to object to the</p> <p>5 foundation just to have it on the record, but okay. So</p> <p>6 we're now picking up. I'm sorry.</p> <p>7 MR. VINCENT: No problem.</p> <p>8 BY MR. VINCENT:</p> <p>9 Q. Directing your attention now to the second</p> <p>10 paragraph of Mr. Daugherty's e-mail. He says:</p> <p>11 (Reading.)</p> <p>12 "If you requested in your complaint</p> <p>13 letter that we prevent advertisers from</p> <p>14 using certain trademark terms anywhere</p> <p>15 in their ad text, we will continue our</p> <p>16 efforts to support your request.</p> <p>17 However, within the coming weeks our</p> <p>18 trademark complaint investigations will</p> <p>19 no longer result in Google monitoring or</p> <p>20 restricting keywords for ads served to</p> <p>21 users in the US and Canada."</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. And what did you understand that to mean?</p> <p>25 A. Google was changing the policy.</p>	32	<p>1 A. I do see that.</p> <p>2 Q. What did you understand that to mean?</p> <p>3 A. That is a dramatic change in their policy</p> <p>4 from -- from their previous policy when they would</p> <p>5 request that an advertiser submit a certain form, as</p> <p>6 Kevin McCallum had done in the February prior, and that</p> <p>7 Google would intercede in this situation. Now Google</p> <p>8 was very clearly saying that they would -- that they</p> <p>9 would not intercede in those trademark grievances.</p> <p>10 Q. At the end of the fourth line of that first</p> <p>11 paragraph it says -- after "accordingly" it says:</p> <p>12 (Reading.)</p> <p>13 "...we encourage trademark owners to</p> <p>14 resolve their disputes directly with the</p> <p>15 advertisers."</p> <p>16 Do you see that?</p> <p>17 A. I do.</p> <p>18 Q. What did you understand that to mean?</p> <p>19 A. That trademark owners would have to resolve</p> <p>20 their disputes directly with advertisers and no longer</p> <p>21 with Google.</p> <p>22 Q. Did you have any subsequent communications</p> <p>23 with Google about this new policy and problem of</p> <p>24 competitor ads appearing in response to searches for</p> <p>25 1-800's trademarks?</p>

33	35
<p>1 A. I did.</p> <p>2 Q. And with whom did you have these discussions?</p> <p>3 A. There were two people at Google who were</p> <p>4 responsible for the 1-800-CONTACTS account. One was</p> <p>5 Dan Daughtery, and the other was Tim Moniyan. And I</p> <p>6 had -- again, upon my arrival at 1-800-CONTACTS, it was</p> <p>7 my responsibility to establish correspondence with them</p> <p>8 and their responsibility to establish correspondence</p> <p>9 with me as the new person in charge.</p> <p>10 And so I recall having hosted one or both of</p> <p>11 them in my office in Draper to get acquainted and also</p> <p>12 to talk about Google's new policy and any other new</p> <p>13 features that they were bringing to their platform.</p> <p>14 And also had a number of -- fairly significant amount</p> <p>15 of e-mail correspondence with one or both of them in</p> <p>16 the months that followed, but I believe I only had one</p> <p>17 in-person meeting, perhaps a few phone calls here and</p> <p>18 there, and then a significant amount of e-mail</p> <p>19 correspondence.</p> <p>20 Q. And what did the Google representatives tell</p> <p>21 you about this change in policy and the problem that</p> <p>22 1-800 was raising about competitor ads appearing in</p> <p>23 response to searches for 1-800's trademark?</p> <p>24 MR. CHIARELLO: Objection; foundation.</p> <p>25 THE WITNESS: They had a very clear set of</p>	<p>1 team at eBay had with Google earlier?</p> <p>2 A. It is exactly the same conversation.</p> <p>3 Q. Did anyone from Google ever say that</p> <p>4 1-800-CONTACTS should not try to resolve the dispute</p> <p>5 directly with its competitors?</p> <p>6 A. No.</p> <p>7 Q. Did anyone from Google ever say that 1-800</p> <p>8 should not be asking competitors to implement its</p> <p>9 trademarks as negative keywords?</p> <p>10 A. No.</p> <p>11 Q. Did anyone at Google ever suggest at any time</p> <p>12 having competitors agree to implement 1-800's</p> <p>13 trademarks as negative keywords would be improper in</p> <p>14 any way?</p> <p>15 A. No, quite the opposite.</p> <p>16 Q. Did they ever say that at any time that having</p> <p>17 competitors agree to implement 1-800-CONTACTS</p> <p>18 trademarks as negative keywords would be bid rigging?</p> <p>19 A. No, quite the opposite.</p> <p>20 MR. CHIARELLO: Objection; seeks a legal</p> <p>21 conclusion, which he's not qualified to testify.</p> <p>22 BY MR. VINCENT:</p> <p>23 Q. When you say "quite the opposite," what do you</p> <p>24 mean?</p> <p>25 A. They did not express any concern of any kind</p>
<p>34</p> <p>1 three messages that they were conveying to all of their</p> <p>2 advertisers, including 1-800-CONTACTS.</p> <p>3 The first was that Google would no longer be</p> <p>4 interceding in these grievances.</p> <p>5 The second was that the responsibility to</p> <p>6 protect trademarks or to settle any grievances around</p> <p>7 trademark terms would not be the responsibility of the</p> <p>8 trademark holder.</p> <p>9 And the third piece was that, you know, making</p> <p>10 sure that we knew about the negative keyword tools that</p> <p>11 were available to advertisers to enforce any of those</p> <p>12 grievances.</p> <p>13 BY MR. VINCENT:</p> <p>14 Q. Did these Google representatives specifically</p> <p>15 suggest that 1-800 resolve the dispute directly with</p> <p>16 their competitors by telling them to implement 1-800's</p> <p>17 trademarks as negative keywords?</p> <p>18 MR. CHIARELLO: Objection to the form of the</p> <p>19 question.</p> <p>20 THE WITNESS: That is exactly what Google</p> <p>21 conveyed to us, yes.</p> <p>22 BY MR. VINCENT:</p> <p>23 Q. And was that general substance of the</p> <p>24 communications you had with Google while at</p> <p>25 1-800-CONTACTS, consistent with the communications your</p>	<p>36</p> <p>1 about us -- about advertisers using negative keywords.</p> <p>2 In fact, they were expressly encouraging it.</p> <p>3 Q. Did anyone from Google ever suggest at any</p> <p>4 time that having competitors agree to implement</p> <p>5 1-800-CONTACTS trademarks as negative keywords would</p> <p>6 cause Google harm?</p> <p>7 A. No.</p> <p>8 Q. Did anyone ever -- at Google ever suggest at</p> <p>9 any time that having competitors agree to implement</p> <p>10 1-800's trademarks as negative keywords would be</p> <p>11 objectionable to Google in any way?</p> <p>12 A. No.</p> <p>13 Q. Did you understand that it was Google's idea</p> <p>14 that 1-800-CONTACTS resolve such trademark disputes</p> <p>15 directly with its competitors by having them</p> <p>16 implemented as trademarks as negative keywords?</p> <p>17 MR. CHIARELLO: Objection; calls for</p> <p>18 speculation; lacks foundation.</p> <p>19 THE WITNESS: It was absolutely Google's</p> <p>20 suggestion, and their policy states as such in the very</p> <p>21 first paragraph of the attachment that you've created</p> <p>22 here or that you've presented here: (Reading.)</p> <p>23 ...advertisers themselves are</p> <p>24 responsible for the keywords and the ad</p> <p>25 text that they choose to use...we</p>

37	39
<p>1 encourage trademark owners to resolve 2 their dispute directly with the 3 advertisers. 4 BY MR. VINCENT: 5 Q. Okay. Are you aware of any of the search 6 engines ever voicing opposition of any kind to 7 1-800-CONTACTS resolving such trademark disputes 8 directly with its competitors by having them implement 9 1-800's trademarks as negative keywords? 10 A. I am not. 11 In fact, they were overjoyed at this -- at 12 this new policy because it absolved them of the 13 responsibility for enforcing any of the agreements 14 around these -- any of the solutions to these 15 grievances. 16 MR. CHIARELLO: I want to object on the record 17 that -- to foundation; calls for speculation on the 18 question. 19 BY MR. VINCENT: 20 Q. And your basis for believing that they were 21 happy about not having to enforce it anymore, what's 22 that based on? Their communications or what? 23 MR. CHIARELLO: Objection; foundation again. 24 THE WITNESS: Well, I hesitate to say this 25 with too much conviction because it sounds a bit</p>	<p>1 their -- the patterns of their behaviors and perception 2 around some of these issues. 3 Suffice it to say that the burden associated 4 with enforcing trademark complaints was growing 5 exponentially with their business. Their ability to 6 address any of these grievances in a timely manner and 7 resolve them in any kind of a timely manner was 8 suffering, and they had a large number of advertisers 9 that were simply unhappy and dissatisfied with the job 10 that Google was doing as the intermediary here, as the 11 resolver of these grievances. 12 So Google simply abdicated those 13 responsibilities and put them back on the trademark 14 holders, and negative keywords was their way -- this 15 policy very clearly suggesting that we were -- the 16 trademark holders were to take responsibility for these 17 grievances themselves and to use negative keywords was 18 their way of abdicating themselves from this 19 responsibility. 20 BY MR. VINCENT: 21 Q. Now, these communications you had with Google 22 representatives at -- while you were at 1-800-CONTACTS 23 about your concerns about competitors' ads appearing in 24 response to searches for 1-800-CONTACTS trademarks 25 were -- was Mr. McCallum or Mr. Aston or others</p>
<p>1 condescending, but I had rather deep subject matter 2 expertise as an advertiser on these paid search 3 platforms. 4 I was among Google's first customers at 5 half.com. The level of sophistication that we achieved 6 in using Google and Overture's platforms to acquire new 7 customers in a very cost-efficient manner was the basis 8 for my relocation from half.com to eBay, as eBay sought 9 to be, you know, world class in their capabilities to 10 require customers to these new platforms. 11 And at eBay, I brought a series of best 12 practices and subject matter expertise to our 13 operations there. And while I didn't maintain 14 responsibility for eBay's paid search campaigns on 15 Google while I was at eBay, I was very close to them 16 and worked on the same team alongside the folks that 17 did. 18 And I am confident in saying that familiarity 19 with Google's policies, how they evolved and how to 20 make best use of Google's AdWords platform was an area 21 of expertise that I possessed. And I brought that 22 perspective and expertise to these events at 23 1-800-CONTACTS. 24 I certainly had the -- the perspective of how 25 Google's policies had changed over time and what</p>	<p>1 involved in any of these communications? 2 A. They were. 3 Q. Okay. Is there anyone else you can recall 4 besides Mr. Daugherty, Mr. Monahan, yourself, 5 Mr. McCallum, Mr. Aston that were involved in these 6 communications where Google told you that -- suggested 7 that you resolve these disputes directly with your 8 competitors by having them implement 1-800 trademarks 9 as negative keywords? 10 A. I think that's the extent of participants in 11 this discussion. 12 MR. VINCENT: Okay. Direct your attention to 13 a document that's previously been marked as 14 Exhibit CX311. 15 [Whereupon, Exhibit CX0311 was 16 referenced.] 17 MR. VINCENT: For the record, CX311 is a 18 settlement agreement between 1-800-CONTACTS and Vision 19 Direct dated June 24th, 2004. 20 BY MR. VINCENT: 21 Q. Mr. Schmidt, did you see this settlement 22 agreement, this June 2004 settlement agreement between 23 1-800-CONTACTS and Vision Direct while you were 24 employed at 1-800-CONTACTS? 25 A. I did.</p>

41	<p>1 Q. And you're aware that there had been a dispute 2 that had resulted in this trademark settlement 3 agreement? 4 A. I was the -- the person responsible for or the 5 team responsible for composing this and arriving at 6 this agreement with our legal team at 1-800-CONTACTS. 7 Q. Okay. So the people that negotiated and 8 drafted this, this was the legal team at 9 1-800-CONTACTS? 10 A. That is correct. 11 Q. Okay. 12 A. I didn't have any involvement in the creation 13 of this agreement. 14 Q. Okay. But you were aware of its existence? 15 A. I was aware of it, yes. 16 MR. VINCENT: Okay. Let's mark as Exhibit 160 17 an e-mail from Joe Zeidner to Clint Schmidt, dated 18 July 26th, 2004, bearing Bates Stamp Number 19 1-800_F00036912. 20 [Whereupon, Deposition Exhibit RX160 was 21 marked for identification.] 22 BY MR. VINCENT: 23 Q. Mr. Schmidt, is Exhibit RX160 an e-mail that 24 was forwarded to you from Joe Zeidner on July 26th, 25 2004?</p>	43	<p>1 Q. And then she responds by saying: (Reading.) 2 Interestingly, this advertiser displays 3 our URL but the link goes to your site. 4 Must be an affiliate of both. We'll 5 send them a letter to get them to clean 6 this up. 7 Do you see that? 8 A. I see that. 9 Q. Following your June 2004 settlement agreement, 10 were there issues that arose about others -- each 11 other's ads appearing in response to searches for each 12 other's trademarks? 13 A. There were. 14 Q. Okay. And was there communication back and 15 forth like this between 1-800-CONTACTS and Vision 16 Direct about these concerns? 17 MR. CHIARELLO: Objection; foundation. 18 THE WITNESS: There was a -- a -- a steady 19 correspondence about our agreement and how to make sure 20 that it was enforced. 21 MR. VINCENT: Okay. Let's mark as RX161 an 22 e-mail from Clint Schmidt to Joe Zeidner dated 23 October 21st, 2004, bearing Bates 24 Number 1-800F_00036997. 25 [Whereupon, Deposition Exhibit RX161 was</p>
42	<p>1 A. It is. 2 Q. And it -- direct your attention to the 3 original e-mail. There's an e-mail from Joe Zeidner. 4 Just for the record, who was he? 5 A. Joe Zeidner was the chief legal counsel, 6 general counsel at 1-800-CONTACTS. 7 Q. Okay. And he's sending an e-mail to Alesia 8 Pinney. 9 Did you understand her to be counsel at Vision 10 Direct? 11 A. I did understand that she was the counsel at 12 Vision Direct, yes. 13 Q. Okay. And he says here: (Reading.) 14 "Alesia, Hope you are well. Our 15 marketing department brought this to my 16 attention today." 17 Do you see that? 18 A. I do. 19 Q. And then it says: (Reading.) 20 "It is a google search that clearly keys 21 off of our ip and brings up your website 22 in the paid search. Can you take a look 23 at it and let me know?" 24 Do you see that? 25 A. Yes, I do.</p>	44	<p>1 marked for identification.] 2 BY MR. VINCENT: 3 Q. Mr. Schmidt, is Exhibit RX161 an e-mail chain 4 that was -- that you were copied on on October 21st, 5 2004? 6 A. Yes. 7 Q. If I direct your attention to the bottom 8 e-mail, you'll see it's an e-mail from Eric Duerr to 9 Alesia Pinney on October 21st, 2004. 10 Do you see that? 11 A. I do. 12 Q. The subject is 1-800 contacts showing up on 13 keyword search for "Vision Direct"? 14 A. That's correct. 15 Q. Do you recall who Mr. Duerr is? 16 A. He was a member of the marketing team at 17 vision -- at Vision Direct. 18 Q. And did you understand this to be an e-mail 19 from him to his counsel at Vision Direct? Are these 20 the opinions -- 21 A. Yes, he is following the chain of 22 correspondence as it existed at the time. Marketing 23 would contact legal, legal would contact legal on the 24 other side, and then legal on the other side would 25 contact marketing on the other side.</p>

45	<p>1 This was the way that the correspondence ran 2 right after the settlement was agreed to. 3 Q. Okay. And in his e-mail he says here: 4 (Reading.) 5 Looks like they (and one of their 6 affiliates) are either buying our 7 trademark, or are buying the keyword 8 "vision" and not adding the negative 9 keyword "direct" on Google. 10 Do you see that? 11 A. I do. 12 Q. What did you understand that to mean? 13 A. He had observed, as this screen shot shows on 14 the back of the page, that there were 1-800-CONTACTS 15 ads that were showing up on the term "Vision Direct" 16 and surmising that, correctly I believe, that one of 17 our affiliates was buying the term "Vision Direct" but 18 directing the traffic to 1-800-CONTACTS. 19 Q. Okay. And is there any way to know for 20 certain when an ad appears in response to a search for 21 a trademark, another's trademark, whether that ad -- 22 whether the company displaying that ad had purchased 23 that trademark keyword or that they were simply broad 24 matching to another term? 25 MR. CHIARELLO: Objection to foundation; calls</p>	47	<p>1 instructed Google that they did not want their ads to 2 show up for. 3 And they had also directed their affiliates to 4 honor the same list of negative keywords, telling their 5 affiliates that they would not receive any commission 6 if they were bidding on 1-800-CONTACTS keywords but 7 directing the traffic to Vision Direct. 8 Eric Duerr was basically asking us to mimic 9 their approach, and we had already done so. This was 10 an example of one that either got through our 11 enforcement policies and was -- had not yet been 12 detected by us or simply didn't know that they wouldn't 13 be receiving commission for the traffic and they were 14 bidding on anyway. 15 Q. Did you -- did 1-800-CONTACTS respond to 16 Vision Direct's request -- well, let me step back. 17 Did you understand it to be Vision Direct's 18 idea that came from Vision Direct for 1-800-CONTACTS to 19 request its affiliates to -- to implement its 20 trademarks as negative keywords? In other words, to 21 avoid showing up on ads for -- in responses for 22 searches for Vision Direct's trademark? 23 MR. CHIARELLO: Objection to the form of the 24 question and lacks foundation. 25 BY MR. VINCENT:</p>
46	<p>1 for speculation, the form of the question. 2 THE WITNESS: There's no way for an observer 3 to know the basis for the match, no, whether it was 4 exact match or phrase match or broad match or broad 5 match modified. There's no way for a user to know, and 6 I think that's reflected here in Eric's e-mail. 7 He's unaware and unable to determine how the 8 ad got there, but asking that we investigate -- 9 BY MR. VINCENT: 10 Q. Okay. 11 A. -- as Google had directed us to do. You take 12 these things up with the -- with the -- with the 13 advertiser, directly. 14 Q. Then he goes on to say: (Reading.) 15 "We have implemented a negative keyword 16 matching strategy for all the iterations 17 of the keyword 1800 in a successful 18 effort to avoid showing up on any 19 searches for 1800contacts.com. Please 20 ask them to do the same." 21 Do you see that? 22 A. I do. 23 Q. What did you understand that to mean? 24 A. Well, they, as we had done as well in 25 response, had a list of negative keywords that they had</p>	48	<p>1 Q. You can answer. 2 A. Yes, they -- they were suggesting to us the 3 most efficient and effective enforcement mechanisms for 4 our agreement. 5 Q. And why did you think it was the most 6 efficient way to try to enforce or administer the 7 settlement agreement? 8 A. Just simply because it was. I mean, that -- 9 there were not any other ways to enforce an agreement 10 like this without using negative keywords. There were 11 no other tools that existed to do so. 12 Q. Could you go in and monitor the other side's 13 AdWords account or things of that nature? 14 A. You could but it simply wasn't -- that really 15 wasn't viable, and the exercise would have been 16 cost-prohibitive because you would literally have to 17 have people monitoring a large set of search terms in 18 every state because you have the ability to geotarget 19 the ads. 20 I can show a different set of ads and 21 campaigns to somebody in California than I do in Utah, 22 than I do in Oregon and so on. It was not feasible, 23 really, to enforce an agreement like this without using 24 negative keywords. 25 MR. VINCENT: Let me take one second here.</p>

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<p>1 THE WITNESS: Sure.</p> <p>2 MR. VINCENT: Let's mark as Exhibit RX162, an</p> <p>3 e-mail chain from Joe Zeidner to Clint Schmidt and</p> <p>4 others dated October 21st, 2004, bearing Bates Stamp</p> <p>5 Number 1-800_F00037005.</p> <p>6 [Whereupon, Deposition Exhibit RX162 was</p> <p>7 marked for identification.]</p> <p>8 BY MR. VINCENT:</p> <p>9 Q. Mr. Schmidt, is Exhibit RX162 an e-mail that</p> <p>10 you received from Joe Zeidner that was forwarded --</p> <p>11 from Joe Zeidner to you -- excuse me. Let me restate</p> <p>12 that.</p> <p>13 Is RX162 an e-mail that Joe Zeidner forwarded</p> <p>14 to you and others, on or about October 21st, 2004?</p> <p>15 A. That is correct.</p> <p>16 MR. CHIARELLO: Objection to the form of the</p> <p>17 question.</p> <p>18 BY MR. VINCENT:</p> <p>19 Q. Let me direct your attention to the bottom</p> <p>20 e-mail. You'll see there's the bottom e-mail is the</p> <p>21 request from Vision Direct that 1-800-CONTACTS request</p> <p>22 its affiliates to implement negative keywords.</p> <p>23 Do you see that?</p> <p>24 A. I do.</p> <p>25 Q. And then in response Mr. Zeidner says in -- it</p>	<p>1 Q. -- the word "Vision"?</p> <p>2 He goes on to say: (Reading)</p> <p>3 "However, we are prepared to take the</p> <p>4 extra step of requiring our affiliates</p> <p>5 to use a negative keyword on all Vision</p> <p>6 searches if you're willing to do the</p> <p>7 same with your affiliates."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And then in response, her e-mail she says:</p> <p>11 (Reading.)</p> <p>12 "We already have our affiliates apply</p> <p>13 the '1-800' negative and would</p> <p>14 appreciate your doing the same."</p> <p>15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. And what did you understand that to mean?</p> <p>18 A. Well, in professional parlance it's their way</p> <p>19 of communicating that they are managing their affiliate</p> <p>20 program with more sophistication than we are managing</p> <p>21 ours. It's a bit of a zinger across my bow.</p> <p>22 Q. Okay. Did you understand that they had</p> <p>23 already instructed -- that they had already</p> <p>24 voluntarily -- let me strike that.</p> <p>25 Did you understand that at this time they had</p>
<p>1 starts in the middle of the first page. It says:</p> <p>2 (Reading.)</p> <p>3 Alesia, I've now worked with our</p> <p>4 marketing folks to understand what is</p> <p>5 going on and what we propose to do. The</p> <p>6 link below is not from us but rather</p> <p>7 from an affiliate.</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And is that -- is that as you understood it?</p> <p>11 A. That's correct. In fact, Joe was conveying to</p> <p>12 Alesia here information that I had provided to Joe.</p> <p>13 Q. Says here: (Reading.)</p> <p>14 "However, to date we have not discussed</p> <p>15 going the extra step with our affiliates</p> <p>16 requiring them to use a negative keyword</p> <p>17 on searches they buy. Thus as a matter</p> <p>18 of course 1-800 the corporate entity</p> <p>19 does not engage in purchasing the word</p> <p>20 Vision in any matter."</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. And was that accurate that 1-800 didn't engage</p> <p>24 in purchasing --</p> <p>25 A. That's correct.</p>	<p>1 already instructed their affiliates to implement</p> <p>2 1-800-CONTACTS trademarks as negative keywords without</p> <p>3 any prompting from 1-800-CONTACTS?</p> <p>4 MR. CHIARELLO: Object to the form of the</p> <p>5 question.</p> <p>6 THE WITNESS: Yes, I will give drugstore.com</p> <p>7 and Vision Direct a lot of credit for the</p> <p>8 sophistication of their online marketing practices and</p> <p>9 their proactive behavior in enforcing the settlement</p> <p>10 agreement. They were -- they were very sophisticated.</p> <p>11 They -- they understood the best practices and were</p> <p>12 pretty -- as you can see from this e-mail -- pretty</p> <p>13 vigilant in encouraging us to follow the same best</p> <p>14 practices.</p> <p>15 BY MR. VINCENT:</p> <p>16 Q. Okay. And did you understand that the idea</p> <p>17 of -- of asking the affiliates to implement Vision</p> <p>18 Direct's trademarks as negative keywords came from</p> <p>19 Vision Direct?</p> <p>20 A. That's correct.</p> <p>21 MR. VINCENT: Okay. Let's mark as RX163 an</p> <p>22 e-mail from Eric Duerr to Clint Schmidt dated</p> <p>23 December 20th, 2004, and bearing Bates Stamp</p> <p>24 Number 1800_F00045765.</p> <p>25 [Whereupon, Deposition Exhibit RX163 was</p>

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1 marked for identification.]
 2 BY MR. VINCENT:
 3 **Q. Mr. Schmidt, is Exhibit RX163 an e-mail chain,**
 4 **the top one that you received from Eric Duerr, on or**
 5 **about December 20th, 2004?**
 6 A. It is. This is correspondence directly
 7 between me and Eric Duerr at Vision Direct/drugstore.
 8 **Q. Okay. If I direct your attention to the**
 9 **original e-mail at the very bottom of the -- on the --**
 10 **appears on the last page. There's an e-mail from Eric**
 11 **Duerr and the subject is "1800 affiliate still showing**
 12 **up on 'Vision Direct' search."**
 13 **Do you see that?**
 14 A. Yes.
 15 **Q. And then it appears that that was forwarded to**
 16 **his counsel, Alesia Pinney, saying: (Reading.)**
 17 **"I hope all is well. Will you forward**
 18 **this to your folks?"**
 19 A. I see that.
 20 **Q. And then it appears that after that there's an**
 21 **e-mail from you to Joe Zeidner.**
 22 **Do you see that?**
 23 A. I do.
 24 **Q. And -- excuse me.**
 25 **Alesia -- the next e-mail in the chain, is**

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1 **that an e-mail from you to Ms. Pinney at drugstore.com**
 2 **copying Joe Zeidner?**
 3 A. Correct.
 4 **Q. Okay. You say here: (Reading.)**
 5 **Hi, Alesia, I am the online marketing**
 6 **department at 1-800-CONTACTS -- excuse**
 7 **me. (Reading.)**
 8 **"Hi Alesia. I run the Online Marketing**
 9 **department at 1-800 Contacts, and I**
 10 **think it would be more efficient if I**
 11 **handle the follow-up on any reported**
 12 **infringements. Joe gets swamped with**
 13 **email, and his role as a middle-man is**
 14 **not really required at this point."**
 15 **Do you see that?**
 16 A. I do.
 17 **Q. What was it you were trying to convey to**
 18 **Ms. Pinney over at drugstore?**
 19 A. Simply trying to be more direct with our
 20 correspondence without having to tax Joe or Alesia with
 21 the correspondence.
 22 **Q. You say: (Reading.)**
 23 **"My team is working diligently to remove**
 24 **the offenders that you've identified,**
 25 **and we've already removed several**

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1 **affiliates from our program outright for**
 2 **repeat offenses."**
 3 **Do you see that?**
 4 A. That's correct.
 5 **Q. All right. And then in response here,**
 6 **there's -- there's the bottom of the first page, an**
 7 **e-mail from Mr. Duerr to you dated December 9th.**
 8 **Do you see that, 2004?**
 9 A. Yes.
 10 **Q. Says: (Reading.)**
 11 **"Hey Clint, please allow me to introduce**
 12 **myself. I'm Eric Duerr, one of the**
 13 **Search Marketing specialists at**
 14 **drugstore.com. Let's work directly**
 15 **together to ensure that our affiliates**
 16 **are complying with our negative keyword**
 17 **requests. Please send any offending ads**
 18 **to me, and I'll do the same for you."**
 19 **Do you see that?**
 20 A. I do.
 21 **Q. Can you tell me what's going on in this e-mail**
 22 **correspondence?**
 23 A. Yeah, this is a very sort of collegiate --
 24 collegial direct correspondence between the two members
 25 of the settlement agreement, making sure that we can

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1 efficiently resolved any differences or problems.
 2 **Q. Okay. And was this simply a way of notifying**
 3 **each other if you've seen problems with ads appearing**
 4 **before elevating it to legal?**
 5 A. We simply found that with the agreement in
 6 place it was unnecessary for everything -- all our of
 7 our correspondence to go through legal. It was
 8 certainly within our ability to resolve these items
 9 very clearly and easily and quickly by communicating
 10 directly, and Vision Direct was, you know, very open to
 11 that approach and very welcoming to that approach.
 12 **Q. Did the role in these discussions that you had**
 13 **extend beyond simply notifying each other of problems**
 14 **and to negotiating agreements on, you know, trademark**
 15 **settlement agreements or other things of that nature?**
 16 A. No, it was very straightforward and it was
 17 just about trademark infringement situations.
 18 **Q. Just notifying if -- if either side saw an**
 19 **incident?**
 20 A. That's correct.
 21 **Q. Okay. But you weren't involved at all in**
 22 **negotiating or drafting agreements --**
 23 A. I was not.
 24 **Q. -- with competitors?**
 25 MR. CHIARELLO: Objection to the form of the

<p style="text-align: right;">57</p> <p>1 question.</p> <p>2 THE WITNESS: I did not have any</p> <p>3 correspondence with their legal team, nor did I draft</p> <p>4 any agreements with Vision Direct or any other</p> <p>5 competitors.</p> <p>6 BY MR. VINCENT:</p> <p>7 Q. Was it -- at the time when you were there at</p> <p>8 1-800, did -- did 1-800-CONTACTS have a policy as to</p> <p>9 whether its ads should show up on searches for</p> <p>10 competitor trademarks?</p> <p>11 A. We did have a policy.</p> <p>12 Q. And what was that?</p> <p>13 A. We did not bid on competitors' trademark</p> <p>14 terms.</p> <p>15 Q. And why not?</p> <p>16 A. Three reasons. The first is that it was</p> <p>17 confusing for customers. When you're entering in a</p> <p>18 keyword like "Vision Direct" or "1-800-CONTACTS,"</p> <p>19 there's a very clear and proven navigational intent</p> <p>20 behind that. And so to confuse customers was sort of</p> <p>21 antithetical to our brand. We were about trust and</p> <p>22 credibility and great service, and creating confusion</p> <p>23 was not something that we wanted to do.</p> <p>24 The second reason was that it was very cost --</p> <p>25 it was very inefficient with regard to budget to bid on</p>	<p style="text-align: right;">59</p> <p>1 settlement relatively painless.</p> <p>2 Q. Are you aware of 1-800-CONTACTS ever</p> <p>3 purposefully purchasing a competitor trademark as a</p> <p>4 keyword to trigger a competing ad?</p> <p>5 A. I'm not aware.</p> <p>6 MR. CHIARELLO: Objection; vague as to time</p> <p>7 that he's talking about. Talking about whenever or</p> <p>8 during his employment?</p> <p>9 BY MR. VINCENT:</p> <p>10 Q. Did you understand the question to be "ever"?</p> <p>11 Have you ever -- are you aware of</p> <p>12 1-800-CONTACTS ever purposefully purchasing a</p> <p>13 competitor trademark as a keyword to trigger a</p> <p>14 competing --</p> <p>15 A. I'm not aware, no.</p> <p>16 Q. And did 1-800-CONTACTS implement competitors</p> <p>17 trademark as negative keywords when you were there?</p> <p>18 A. We did.</p> <p>19 Q. And you did so whether or not 1-800 had a</p> <p>20 settlement agreement with that particular party?</p> <p>21 A. We did it before the settlement was in place,</p> <p>22 yes.</p> <p>23 Q. And were you involved, personally, in</p> <p>24 preparing 1-800-CONTACTS' list of negative keywords?</p> <p>25 A. I don't recall. It's a pretty straightforward</p>
<p style="text-align: right;">58</p> <p>1 a navigational trademark term like that. Someone who's</p> <p>2 typing in "Vision Direct" were very clearly looking for</p> <p>3 Vision Direct, and if our ad showed up and they somehow</p> <p>4 got confused, we paid for traffic that didn't want to</p> <p>5 be on our site, that didn't convert into purchases, and</p> <p>6 it was a waste of our marketing dollars.</p> <p>7 And then the third reason, it's just -- it</p> <p>8 seemed improper. We wanted respect paid to our</p> <p>9 trademark, and we wanted to model that behavior in the</p> <p>10 marketplace.</p> <p>11 Q. And was this 1-800-CONTACTS' policy,</p> <p>12 regardless of whether or not they had a settlement</p> <p>13 agreement with another competitor?</p> <p>14 A. This was our policy even before any of these</p> <p>15 agreements were in place. One of the first things that</p> <p>16 I did upon arrival was put negative keywords in place</p> <p>17 for Vision Direct and Coastal Contacts and a number of</p> <p>18 other online competitors, simply because it was --</p> <p>19 again, felt like it was improper.</p> <p>20 We wanted respect paid to our trademark terms,</p> <p>21 and it was extremely inefficient with regard to budget.</p> <p>22 We were wasting money if we were bidding on those</p> <p>23 keyword terms.</p> <p>24 Those decisions preceded any settlement with</p> <p>25 Vision Direct, making our enforcement with that</p>	<p style="text-align: right;">60</p> <p>1 exercise in either event, but I don't recall if I was</p> <p>2 specifically involved in that.</p> <p>3 Q. And when was it that this -- this list of</p> <p>4 negative keywords was created at 1-800-CONTACTS? Can</p> <p>5 you give us a general ballpark time frame?</p> <p>6 A. I believe it was shortly upon -- shortly after</p> <p>7 my arrival as an independent contractor in January or</p> <p>8 February 2004.</p> <p>9 Q. At that time the list was created of negative</p> <p>10 keywords?</p> <p>11 A. Correct.</p> <p>12 Q. And you were involved in the creation of that</p> <p>13 list?</p> <p>14 A. I believe so, yes.</p> <p>15 Q. And did you include on that list negative</p> <p>16 keywords -- a list of negative keywords -- trademark --</p> <p>17 competitor trademarks of which you were aware?</p> <p>18 A. Yes.</p> <p>19 Q. And to the best of your knowledge, was that</p> <p>20 list implemented sometime in early 2004?</p> <p>21 A. It was.</p> <p>22 MR. VINCENT: Okay. Off the record just one</p> <p>23 second.</p> <p>24 (Off the record discussion.)</p> <p>25 MR. VINCENT: Direct your attention,</p>

61	<p>1 Mr. Schmidt, to what's been previously marked as 2 Exhibit CX111. 3 [Whereupon, Exhibit CX0111 was 4 referenced.] 5 MR. VINCENT: And for the record, this is a -- 6 Exhibit CX111 is an April 25th, 2005 cease-and-desist 7 letter from U.S. Shoe to 1-800-CONTACTS. 8 BY MR. VINCENT: 9 Q. Mr. Schmidt, directing your attention to 10 Exhibit CX111, do you see it's a letter from 11 U.S. Shoe? 12 Do you know who U.S. Shoe was? 13 A. I -- I didn't know before, but I came to know 14 that, yes, they were a subsidiary -- I believe a 15 subsidiary of Luxottica. 16 Q. Right. And you understood that they owned 17 LENSRAFTERS at the time? 18 A. I came to understand that, yes. 19 Q. Okay. 20 MR. CHIARELLO: Object to the form of the 21 question. 22 BY MR. VINCENT: 23 Q. If you look to your -- in this letter at the 24 second paragraph. First of all -- actually, you'll see 25 in the subject line it says: (Reading.)</p>	63	<p>1 MR. CHIARELLO: Objection to the form of the 2 question. 3 THE WITNESS: My understanding of what's being 4 alleged here, that they are alleging that 5 1-800-CONTACTS is bidding on a protected and 6 trademarked keyword. And it's also my understanding 7 here that LENSRAFTERS and Luxottica are doing a good 8 job of doing what they were told by Google. 9 Previously, they would have directed this type 10 of complaint to Google, and Google likely, as they did 11 with every other advertiser, rebuffed them with their 12 policy change, and so now they were directing their 13 attention to the advertiser, which they believed to be 14 us at 1-800-CONTACTS. 15 BY MR. VINCENT: 16 Q. If you go to the second page here of this 17 letter, into the second sentence it says: (Reading.) 18 U.S. Shoe is intent upon stopping this 19 trademark infringement, and thus thereby 20 demands that you immediately cease and 21 desist from any and all infringing 22 activities with respect to the 23 LENSRAFTERS trademark, and you must 24 immediately removed ALL sponsored 25 advertisements you have purchased</p>
62	<p>1 "Trademark Infringements of LENSRAFTERS 2 Trademark in Sponsored Advertisements, 3 Google and Related Search." 4 Do you see that? 5 A. Yeah. 6 Q. And if you go to the second paragraph down it 7 says: (Reading.) 8 Recently, it has come to our attention 9 that you are once again engaged in a 10 targeted scheme to infringe upon the 11 LENSRAFTERS trademark in that you have 12 purchased sponsored ads -- 13 advertisements at Google and possibly at 14 other search engines for the 15 LENSRAFTERS trademark, to trigger a 16 link to your directly competitive 17 www.1800Contacts.com website. At least 18 one of these advertisements has been 19 purchased through Google's AdWords 20 program. 21 Do you see that? 22 A. I do. 23 Q. And what's your understanding of what's being 24 alleged here? 25 A. Well --</p>	64	<p>1 through Google, Overture, and any and 2 all other search engines which are 3 triggered by the LENSRAFTERS trademark. 4 Do you see that? 5 MR. CHIARELLO: Objection to the form. I think 6 you misread the text. It's not "thereby." It says 7 "hereby," but with that correction. 8 BY MR. VINCENT: 9 Q. Do you see that? 10 A. I do. 11 Q. Did you understand this to be a 12 cease-and-desist letter from Luxottica with regard to 13 their allegation of 1-800-CONTACTS' use of the 14 LENSRAFTERS trademark in paid search advertising? 15 MR. CHIARELLO: Objection to the form of the 16 question to the extent it calls for a legal conclusion. 17 THE WITNESS: This seems to be the very 18 definition of a cease-and-desist letter, yes. 19 BY MR. VINCENT: 20 Q. Okay. Were you made aware at the time you 21 were at 1-800-CONTACTS that Luxottica had made this 22 allegation of trademark infringement against 23 1-800-CONTACTS? 24 A. I was made aware. 25 Q. Were you involved at all in discussions about</p>

65	<p>1 the resolution of that?</p> <p>2 A. I was.</p> <p>3 MR. VINCENT: Okay. Direct your attention to</p> <p>4 what's previously been marked as CX113.</p> <p>5 [Whereupon, Exhibit CX0113 was</p> <p>6 referenced.]</p> <p>7 THE WITNESS: Some of this correspondence is</p> <p>8 fun to read.</p> <p>9 BY MR. VINCENT:</p> <p>10 Q. Directing your attention to this CX113, is</p> <p>11 this -- you'll see midway down, appears to be an e-mail</p> <p>12 that was forwarded to you from -- you and others at</p> <p>13 1-800 from Kevin McCallum dated May 6th, 2005.</p> <p>14 Do you see that?</p> <p>15 A. I do.</p> <p>16 Q. Okay.</p> <p>17 MR. CHIARELLO: Just for clarification, are you</p> <p>18 talking on page 2 of the document?</p> <p>19 MR. VINCENT: No. I'm talking about the</p> <p>20 e-mail in the middle of page 1.</p> <p>21 MR. CHIARELLO: With the black?</p> <p>22 MR. VINCENT: Right.</p> <p>23 MR. CHIARELLO: Okay.</p> <p>24 BY MR. VINCENT:</p> <p>25 Q. And did you -- was this -- was the -- starting</p>	67	<p>1 (Reading.)</p> <p>2 "Good talking with you today. We agreed</p> <p>3 that some of your affiliates are</p> <p>4 inappropriately using our LensCrafters</p> <p>5 trademark (which is a violation of your</p> <p>6 contract with them)."</p> <p>7 And then there's a list. Do you see that?</p> <p>8 A. I do.</p> <p>9 Q. He goes on to say: (Reading.)</p> <p>10 "As agreed, please contact these</p> <p>11 affiliates and have them stop the use of</p> <p>12 our trademarks."</p> <p>13 Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. When he says here "which is a violation of</p> <p>16 your contract with them," do you know what he's</p> <p>17 referring to?</p> <p>18 A. Yes, he's referring to our agreement that we</p> <p>19 had with our affiliate marketing partners.</p> <p>20 Q. Okay. Referred to as your affiliate terms and</p> <p>21 conditions?</p> <p>22 A. That is correct our -- that is a clearer</p> <p>23 description of the document, our affiliate terms and</p> <p>24 conditions.</p> <p>25 Q. And prior to any discussion with Luxottica,</p>
66	<p>1 at the middle of the page there, was that e-mail</p> <p>2 correspondence below that forwarded to you from</p> <p>3 Mr. McCallum on May 6th, 2005?</p> <p>4 A. It was.</p> <p>5 MR. CHIARELLO: Objection to the form of the</p> <p>6 question to the extent it calls for speculation.</p> <p>7 BY MR. VINCENT:</p> <p>8 Q. Did you receive a copy of this e-mail from</p> <p>9 Mr. McCallum, on or about May 6th, 2005?</p> <p>10 A. I did. I was forwarded this e-mail on Friday,</p> <p>11 May 6th, 2005.</p> <p>12 Q. Okay. Now, starting with the original e-mail</p> <p>13 that was forwarded on to you, if you go to the last</p> <p>14 page. It appears to be an e-mail from Seth McLaughlin</p> <p>15 to Kevin McCallum dated May 5th, 2005.</p> <p>16 Do you see that?</p> <p>17 A. I do.</p> <p>18 Q. Do you know who Seth McLaughlin was?</p> <p>19 A. I came to find after some investigation that</p> <p>20 Seth McLaughlin was, I believe, the counsel for</p> <p>21 Luxottica Retail.</p> <p>22 Q. Okay. You understand it to be affiliated with</p> <p>23 Luxottica?</p> <p>24 A. I did, yes.</p> <p>25 Q. Okay. And he says here to Mr. McCallum, says:</p>	68	<p>1 did you already have affiliate terms and conditions</p> <p>2 that prohibited your affiliates from bidding on other</p> <p>3 competitors' trademarks?</p> <p>4 A. We did have specific provisions in our</p> <p>5 affiliate agreement that prohibited the use of</p> <p>6 third-party trademark terms.</p> <p>7 Q. Okay. The response is a response e-mail which</p> <p>8 is on the top of the second page. Mr. McCallum says at</p> <p>9 the beginning of the second paragraph: (Reading.)</p> <p>10 "With respect to what we agreed to, I</p> <p>11 think there is a need for additional</p> <p>12 sharing of information before our two</p> <p>13 organizations agree on anything with</p> <p>14 respect to this situation."</p> <p>15 Do you see that?</p> <p>16 A. I do.</p> <p>17 Q. What did you understand that to mean?</p> <p>18 A. Kevin was effectively trying to convey to</p> <p>19 Luxottica that we can create a very clear and direct</p> <p>20 correspondence with Luxottica in order to attend to any</p> <p>21 of these grievances as they come up, effectively</p> <p>22 removing the need for any further cease-and-desist</p> <p>23 letters, that they could just communicate with us, with</p> <p>24 the marketing department perhaps directly, and that we</p> <p>25 would be able to resolve the situation faster that way.</p>

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1 **Q. Was that because it was already your policy --**
 2 A. It was already our --
 3 **Q. -- to not allow your affiliates to do this?**
 4 A. It was already our policy, so it was very easy
 5 for us to address any concerns that were brought to us.
 6 **Q. Okay. Did you understand him to be saying**
 7 **here that we aren't agreeing to do anything that we**
 8 **hadn't already been doing?**
 9 A. That's correct.
 10 **Q. Okay. And then he goes on to say: (Reading.)**
 11 **"If we do agree on anything, it is our**
 12 **consistent position on this practice.**
 13 **1-800 has filed suits on our two largest**
 14 **competitors for this type of activity**
 15 **and reached settlement agreements in**
 16 **both instances."**
 17 **Do you see that?**
 18 A. I do.
 19 **Q. Do you understand what he means by "our**
 20 **consistent position on this practice"?**
 21 A. I do. It's in keeping with our view that it
 22 was not in 1-800-CONTACTS' best interest to confuse
 23 customers of any kind, and our belief that it was
 24 improper to use trademark terms in order to try to
 25 attract traffic.

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1 **Q. Okay. Under his point number 1, below, if**
 2 **you'll look down about five lines down, he says:**
 3 **(Reading.)**
 4 **"...we confirmed that none of our ads**
 5 **have been served for searches containing**
 6 **'Lenscrafters'."**
 7 **Do you see that?**
 8 A. I do.
 9 **Q. What did you understand that to mean?**
 10 A. We were just confirming for -- for Luxottica
 11 that 1-800-CONTACTS had not directly bid on any search
 12 terms that were protected trademark terms. That
 13 rather -- and that was referenced below in the second
 14 point, rather it was one of our affiliates or perhaps a
 15 few of our affiliates that had been engaged in this
 16 behavior.
 17 **Q. On point 2 he says: (Reading.)**
 18 **"In reviewing the list of affiliates you**
 19 **provided below that are allegedly**
 20 **bidding on your trademark and**
 21 **redirecting them to our websites, I have**
 22 **to respectfully disagree that this is**
 23 **occurring. None of the sites below are**
 24 **currently in our affiliate program."**
 25 **Do you see that?**

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1 A. I do.
 2 **Q. Did you understand that to be accurate at the**
 3 **time?**
 4 A. I did.
 5 In fact, it was very easy to point out one of
 6 them as Kevin does in the e-mail to suggest that
 7 LENS-CRAFTERS was taking up a grievance with us about a
 8 keyword that was being bid on by somebody else, Vision
 9 Direct, which as we just discussed previously was an
 10 entirely separate company and had no direct affiliation
 11 with 1-800-CONTACTS. So he's pointing out the flaw in
 12 their conclusions to them.
 13 **Q. And then in item 3 below he says: (Reading.)**
 14 **"What is most helpful in this situation**
 15 **to demonstrate the activities you are**
 16 **suggesting is to provide us with screen**
 17 **shots and the specific redirecting**
 18 **link's target URL. It is with this**
 19 **information we can confirm what is**
 20 **happening and who the violator is. If**
 21 **in fact, this is what we find, we will**
 22 **take immediate action to rectify it, and**
 23 **you need not have your attorney send us**
 24 **another belittling letter, you can just**
 25 **pick up the phone or shoot me an email."**

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1 **Do you see that?**
 2 A. I do.
 3 **Q. What did you understand him to be saying?**
 4 A. I think he's just asking for something more
 5 actionable and something more direct from Luxottica.
 6 "Actionable" meaning if you give us good information to
 7 work with, we can investigate it and resolve it more
 8 quickly. And if you bypass the cease-and-desist letter
 9 and communicate with us directly, we can address the
 10 situation faster.
 11 **Q. All right. And this was already, prior to any**
 12 **discussions with Luxottica, something that you**
 13 **prohibited your affiliates from engaging in?**
 14 A. That's correct.
 15 MR. VINCENT: Okay. Let's mark as Exhibit 164
 16 a one-page document dated May 6th, 2005, and bearing
 17 Bates Stamp Number LUX00000388.
 18 [Whereupon, Deposition Exhibit RX164 was
 19 marked for identification.]
 20 BY MR. VINCENT:
 21 **Q. Mr. Schmidt, you can see Exhibit 164 is an --**
 22 **a letter that 1-800-CONTACTS' David Zeidner sent to**
 23 **Luxottica's counsel on May 6th, 2005.**
 24 **Do you see that?**
 25 A. I do see that.

18 (Pages 69 to 72)

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1 **Q. Okay. And you'll see here it says:**
 2 **(Reading.)**
 3 **"Dear Ms. Gaunt, I am in receipt of your**
 4 **letter dated April 25th, wherein you**
 5 **allege that 1-800-CONTACTS has engaged**
 6 **in a targeted scheme to infringe upon**
 7 **the LENSRAFTERS trademark by purchasing**
 8 **sponsored advertisements at Google and**
 9 **others search engines for the**
 10 **LENSRAFTERS trademark to trigger a link**
 11 **directly to our companies website."**
 12 **Do you see that?**
 13 A. I do.
 14 **Q. Do you understand that to be referring to the**
 15 **cease-and-desist letter we looked at earlier?**
 16 A. That's precisely correct.
 17 **Q. Then he goes on to say: (Reading.)**
 18 **"Per the e-mails between Kevin McCallum,**
 19 **the Senior Vice President of Marketing**
 20 **at 1-800-CONTACTS and Seth McLaughlin,**
 21 **at Luxottica Retail, you will note that**
 22 **1-800-CONTACTS in fact has done nothing**
 23 **you have alleged in your letter. Based**
 24 **upon the email exchanges between**
 25 **Mr. McCallum and Mr. McLaughlin, I have**

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1 **deemed this matter closed."**
 2 **Do you see that?**
 3 A. I do see that.
 4 **Q. And did you understand this to be -- the**
 5 **matter was resolved between 1-800-CONTACTS and**
 6 **Luxottica?**
 7 A. I believe this was the resolution between this
 8 vendor -- of this matter between the parties, yes.
 9 **Q. You're not aware of any trademark settlement**
 10 **agreement or anything that was entered into between**
 11 **Luxottica and 1-800-CONTACTS?**
 12 A. No.
 13 **Q. And 1-800-CONTACTS didn't change its practices**
 14 **in any way as a result of this discussion with**
 15 **Luxottica?**
 16 MR. CHIARELLO: Objection; foundation; calls
 17 for speculation; leading.
 18 THE WITNESS: I can confirm that
 19 1-800-CONTACTS did nothing different in response to
 20 this correspondence with Luxottica.
 21 MR. VINCENT: Let's mark as Exhibit 165 --
 22 RX165, an e-mail from Kevin McCallum to Seth McLaughlin
 23 dated May 23rd, 2005, bearing Bates Stamp Number
 24 1-800_F00088269.
 25 [Whereupon, Deposition Exhibit RX165 was

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1 marked for identification.]
 2 BY MR. VINCENT:
 3 **Q. Mr. Schmidt, showing you this e-mail that has**
 4 **been marked as Exhibit 165, you will see it's an e-mail**
 5 **from Kevin McCallum to Seth McLaughlin.**
 6 **Do you see that?**
 7 A. I do.
 8 **Q. And I'm going to ask you about the substance**
 9 **of it, if you're familiar at all with it.**
 10 **Do you know if you received a copy of this or**
 11 **were made aware of it at the time?**
 12 A. I was certainly made aware of the
 13 correspondence, but I don't recall if I ever received a
 14 copy of this correspondence directly.
 15 **Q. Okay. How would you have been made aware?**
 16 **Would that have been through Mr. McCallum?**
 17 A. I was a key participant in any and all of the
 18 conversations that -- that we had with our trademark
 19 term grievances. I was never involved in any of the
 20 negotiations or drafting of legal agreements, but in
 21 terms of our correspondence I was always aware.
 22 **Q. Okay. You'll see here in this e-mail he says:**
 23 **(Reading.)**
 24 **"Seth, Just following up on the**
 25 **'trademark issue' that surfaced several**

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1 **weeks ago. I waited a couple of weeks**
 2 **to see if there was any more fall out**
 3 **and it appears there has been none.**
 4 **Here is where I think we netted:"**
 5 **Do you see that?**
 6 A. I do.
 7 **Q. And first he says here: (Reading.)**
 8 **"Our two organizations confirmed that**
 9 **1-800 did not bid on any keywords**
 10 **trademarked by Lenscrafters."**
 11 **Do you see that?**
 12 A. I do.
 13 **Q. Is that consistent with your understanding?**
 14 A. It is.
 15 **Q. Next it says: (Reading.)**
 16 **Our two organizations established that a**
 17 **1-800 affiliate may have bid on**
 18 **Lenscrafters' trademarked terms, but**
 19 **this could not be confirmed via**
 20 **generally accepted means of**
 21 **demonstrating the action (screen shots**
 22 **and specific URL data).**
 23 **Do you see that?**
 24 A. That's correct. Insufficient information to
 25 determine whether that had occurred or not.

19 (Pages 73 to 76)

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1 **Q. And you understand that that's how -- how it**
 2 **was resolved?**
 3 A. That is.
 4 **Q. Okay. Then third it says: (Reading.)**
 5 **"Our two organizations agreed to address**
 6 **all future trademark issues in a**
 7 **collegial matter -- we will contact each**
 8 **other directly if the other believes**
 9 **there is an issue with an affiliate."**
 10 **Do you see that?**
 11 A. I do.
 12 **Q. And then at the bottom he says: (Reading.)**
 13 **"Let me know if this is incorrect in any**
 14 **way."**
 15 **Do you see that?**
 16 A. I do.
 17 **Q. And is this consistent with your understanding**
 18 **of how this allegation of trademark infringement was**
 19 **resolved between 1-800-CONTACTS and Luxottica?**
 20 A. This is a correct depiction of how these were
 21 resolved.
 22 MR. VINCENT: This may be a good time to take
 23 a break.
 24 (Brief recess.)
 25 BY MR. VINCENT:

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1 **Q. All right. Mr. Schmidt, directing you to a**
 2 **document that's been marked as Exhibit RX166, which**
 3 **appears to be an e-mail from you to Mr. Aston dated**
 4 **March 1st, 2004.**
 5 **Do you see that?**
 6 A. I do.
 7 **Q. Can you tell me what Exhibit 166 is?**
 8 A. This is an e-mail from -- in which I am
 9 responding to Josh about the prospect of working with
 10 overstock.com.
 11 **Q. And can you recall what it was -- at least in**
 12 **general what was going on here?**
 13 A. I do. I believe the opportunity to
 14 collaborate that was being proposed here was for
 15 Overstock to offer contact lenses for sale to their
 16 customers and that 1-800-CONTACTS would be the provider
 17 of the lenses, and this was an opportunity that was up
 18 for consideration.
 19 **Q. And Mr. Aston is asking for your thoughts**
 20 **on -- on the -- on the possibility of doing this**
 21 **arrangement with Overstock?**
 22 A. Correct. He's trying to collect my
 23 perspective on this.
 24 **Q. In the response here you say: (Reading.)**
 25 **"I had a couple of thoughts on this:**

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1 **First, why the rush? Second, while I'm**
 2 **completely open to talking with them, my**
 3 **hypothesis is that consumers love**
 4 **Overstock for commodity items**
 5 **(bedsheets, electronics) but there might**
 6 **be a perception issue of low quality if**
 7 **you're buying eye care products through**
 8 **a liquidation website."**
 9 **Do you see that?**
 10 A. I do.
 11 **Q. What did you mean by that?**
 12 A. Well, although I was new to 1-800-CONTACTS, I
 13 had already come to understand how important trust and
 14 credibility were to 1-800-CONTACTS' customers, and
 15 that, you know, on balance these are health products,
 16 medical devices that you put into your eye.
 17 And the perception that a collaboration with
 18 Overstock would bring would be at odds with the type of
 19 brand that we had spent -- that 1-800-CONTACTS had
 20 spent so much time and money to build around trust and
 21 reliability and service.
 22 And so I just felt like, while there may be a
 23 revenue opportunity here, that it would be on balance
 24 detrimental to 1-800-CONTACTS with regard to our
 25 branding.

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1 **Q. The next sentence you say: (Reading.)**
 2 **"I'm a proponent of aggressive pricing,**
 3 **but I don't want to negatively affect**
 4 **our brand perception, either."**
 5 **Do you see that?**
 6 A. I do.
 7 **Q. What did you mean by that?**
 8 A. It's always important for us to be competitive
 9 on -- on price. If the contact lenses that we offered
 10 for sale were outside of market norms with regards to
 11 price, then it would be difficult for us to compete.
 12 But, you know, Overstock had a well-known
 13 reputation at this point for offering cut-rate,
 14 discounted prices, and there was also I guess a -- a --
 15 a negative quality halo that I was concerned about with
 16 regard to Overstock.
 17 These were -- the products that were offered
 18 on Overstock were often deeply discounted for a reason.
 19 They were either not popular or they were leftover
 20 inventory. It was a bit of a dumping ground for
 21 retailers, wholesalers, and distributors of many types
 22 to offload inventory.
 23 And I was concerned that the affiliation with
 24 Overstock would negatively affect the credibility that
 25 we had been working so hard to create in the eyes of

20 (Pages 77 to 80)

81	83
<p>1 our customers.</p> <p>2 Q. Were you involved with Mr. Aston in preparing</p> <p>3 a response to Overstock about their offer?</p> <p>4 A. I was. We collaborated on our response to</p> <p>5 Overstock very closely.</p> <p>6 MR. VINCENT: Now directing your attention to</p> <p>7 what's been previously marked as Exhibit RX106.</p> <p>8 [Whereupon, Exhibit RX106 was</p> <p>9 referenced.]</p> <p>10 BY MR. VINCENT:</p> <p>11 Q. Is RX106 a response that was given by Josh</p> <p>12 Aston to the people at Overstock on this --</p> <p>13 A. Yes.</p> <p>14 Q. -- this potential offer?</p> <p>15 A. Yes.</p> <p>16 MR. CHIARELLO: Objection to the form of the</p> <p>17 question.</p> <p>18 MR. VINCENT: Let me restate that.</p> <p>19 BY MR. VINCENT:</p> <p>20 Q. Can you tell us what Exhibit RX106 is?</p> <p>21 A. This is 1-800-CONTACTS' response to Overstock</p> <p>22 about the prospect of a partnership.</p> <p>23 Q. Okay. And you were involved in putting this</p> <p>24 together?</p> <p>25 A. I was.</p>	<p>1 are a medical device. As such,</p> <p>2 1-800-CONTACTS strives to communicate</p> <p>3 that we sell the 'Exact same contact</p> <p>4 lenses' as the eye doctor, but that we</p> <p>5 save the customer money.'</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. And what did you understand that to mean?</p> <p>9 A. It's just documenting very clearly the</p> <p>10 importance that we placed on a quality that was</p> <p>11 commensurate with what you would get from the eye</p> <p>12 doctor.</p> <p>13 We really went to great lengths to convey to</p> <p>14 current and prospective customers that these were the</p> <p>15 exact same lenses that you would otherwise -- that you</p> <p>16 might otherwise be purchasing directly from your</p> <p>17 doctor. We didn't want to compromise that perception</p> <p>18 in any way.</p> <p>19 Q. And was that part of 1-800-CONTACTS' general</p> <p>20 marketing message, 'exact same lenses as your eye</p> <p>21 doctor delivered to your door for less'?</p> <p>22 A. This is our core message, yes.</p> <p>23 Q. You go on to -- Mr. Aston goes on to say here:</p> <p>24 (Reading.)</p> <p>25 "In the contact lens industry, we feel</p>
<p>1 Q. Okay. You look down to the -- this is a --</p> <p>2 for the record an e-mail that was sent by Josh Aston to</p> <p>3 Sean McClaugherty on March 11th, 2004.</p> <p>4 Do you understand Sean McClaugherty to be a</p> <p>5 representative of Overstock?</p> <p>6 A. I did, correct.</p> <p>7 Q. Okay. It says: (Reading.)</p> <p>8 Sean, we are appreciative of the offer</p> <p>9 which Overstock has extended, but we</p> <p>10 would like to politely decline. We have</p> <p>11 thoroughly discussed the opportunity and</p> <p>12 feel it would not be -- would not be a</p> <p>13 position conducive to our business</p> <p>14 model.</p> <p>15 Do you see that?</p> <p>16 A. I do.</p> <p>17 Q. (Reading.)</p> <p>18 "Here is a brief summary of the problems</p> <p>19 we foresee."</p> <p>20 And then the first one is "Nature of Contact</p> <p>21 Lenses."</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. It says here: (Reading.)</p> <p>25 "As you are well aware, contact lenses</p>	<p>1 there's a fine line between saving the</p> <p>2 customer money and sacrificing</p> <p>3 credibility. We try to focus on</p> <p>4 service, rather than absolute lowest</p> <p>5 price so as to avoid being branded as</p> <p>6 selling 'discounted' or 'lower-grade'</p> <p>7 contact lenses (vital with a medical</p> <p>8 product)."</p> <p>9 Do you see that?</p> <p>10 A. I do.</p> <p>11 Q. What do you understand that to mean?</p> <p>12 A. I understand it to mean that we were hesitant</p> <p>13 to create a perception among customers that we sell</p> <p>14 discounted or lower-quality or lower-grade lenses.</p> <p>15 Q. He goes on to say: (Reading.)</p> <p>16 "One major hurdle that we have had to</p> <p>17 overcome as people begin buying lenses</p> <p>18 online, is that we must communicate that</p> <p>19 we receive lower prices because of</p> <p>20 volumes, and not because the product is</p> <p>21 of discounted quality."</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. Is that again a concern with the brand that</p> <p>25 had been built?</p>

85	<p>1 A. It is. It's again being very specific about 2 the fact that, while we value their prices, and we want 3 to be competitive on prices, what's paramount is that 4 we don't compromise the perception of 1-800-CONTACTS as 5 being comparable to buying from your eye doctor. 6 MR. CHIARELLO: My objection to the question is 7 it lacks foundation and calls for speculation and to 8 the form of the question. 9 BY MR. VINCENT: 10 Q. When the reference here is we try to focus on 11 service rather than absolutely lowest price. Have you 12 heard the term "crabs in a bucket"? 13 A. I have heard of the term "crabs in a bucket," 14 yes. It was a -- a phrase that was very frequently 15 used at 1-800-CONTACTS, and I believe it was -- it 16 originated with the founder and CEO Jonathan Coon. 17 Q. And in what way was it used? 18 A. It was meant to -- it was referring 19 specifically to, in aggregate, online competitors, 20 online contact lens retailers, in aggregate. The point 21 being -- the point of the phrase being that these 22 competitors were like crabs in a bucket. That one was 23 as good as the next and it was very difficult for a 24 consumer to distinguish one from the other. And that 25 our challenge was to set ourselves apart from all the</p>	87	<p>1 to do so. 2 Q. It goes on to say: (Reading.) 3 "This perspective requires that we 4 maintain slightly higher margins than 5 our 'absolute low price-low grade 6 service' competitors. We do not want to 7 sacrifice the experience that our 8 customers are receiving in order to get 9 them another \$.50 off their box of 10 lenses. We feel that we have achieved 11 an optimal balance of great price/great 12 service." 13 Do you see that? 14 A. I do. 15 Q. What was -- what did you understand that to 16 mean? 17 A. I'll try to boil it down, but if you -- if you 18 view the -- the market for contact lens buyers, there's 19 some faction of that market that will only ever buy 20 from their doctor, that there's nothing you can do to 21 earn their business if they're mentally focused and 22 committed to purchasing their lenses from their doctor. 23 That they can't be -- they can't be convinced 24 otherwise. 25 There's a second which -- a second portion,</p>
86	<p>1 other crabs in the bucket as being distinctive for 2 service, as being credible and commensurate with the 3 quality you would get from a doctor as being 4 trustworthy and reliable, and any opportunity that we 5 could point out to our customers or prospective 6 customers the distinction between 1-800-CONTACTS and 7 the credibility that -- that we carried and the, 8 quote/unquote, crabs in a bucket was an opportunity for 9 us to really underscore our differentiation as all 10 about service and all about quality. 11 Q. On the second -- excuse me, third full 12 paragraph here, titled "Service Emphasis" it says: 13 (Reading.) 14 "We are 100% devoted to ensuring that we 15 provide the best service. We provide 16 prices significantly lower than the eye 17 doctor, but ensure that we are offering 18 premium service to the customer." 19 Do you see that? 20 A. I do. 21 Q. And what did you understand that to mean? 22 A. That the competitive prices that we offer were 23 not a -- an indicator in any way of the value that we 24 placed on service. That we could still offer lower 25 prices but premium-quality service and that we strived</p>	88	<p>1 which we believe to be the largest portion of the 2 market, that was willing to consider purchasing their 3 lenses from someplace other than their doctor, but was 4 very apprehensive about compromising on quality. They 5 understood that this was a medical device. This was 6 not a situation where they wanted to gamble. They 7 wanted to get a better price but they didn't want to 8 take on any risk in the process. We believe that to be 9 the biggest part of the market and one that we had -- 10 that we were well-attuned to serving with our business. 11 There's a third portion of the market, and one 12 that we're referencing here, that are ruthlessly 13 focused on price. If they could get their contact 14 lenses for one cent less from purveyor X as opposed to 15 purveyor Y, they would patronize purveyor X. And the 16 next time that they went to buy lenses, if it was 17 purveyor Z that was to give them one cent lower price, 18 then they would move to purveyor Z. 19 They treat the contact lenses as a commodity. 20 They were willing to take on risk that may be -- that 21 may accompany that purchase. And that was not a 22 customer segment that we were interested in targeting 23 at 1-800-CONTACTS. They valued something that was not 24 the core of our value proposition. 25 Service and credibility were our core, and</p>

89	<p>1 these people didn't value service and credibility. 2 They valued price. And we didn't want to go chasing 3 the smaller part of the market, what we believed to be 4 the smaller part of the market and in the process 5 compromise our brand and our position relative to the 6 largest market opportunity.</p> <p>7 Q. The letter ends by saying: (Reading.) 8 We are absolutely impressed with your 9 business, but feel that a partnership 10 would be difficult as we involve vastly 11 different models. 12 What did you understand that to mean?</p> <p>13 A. Really referencing my prior comment. They 14 were a bit of a dumping ground for excess inventory and 15 ruthlessly focused on price. And we were not a 16 dumping -- we didn't need a dumping ground and we 17 didn't really covet the type of customers that we 18 believe they would avail us to.</p> <p>19 Q. Okay. How was it that 1-800-CONTACTS invested 20 in a brand and in building a reputation for trust, 21 reliability, and superior service as you referenced?</p> <p>22 MR. CHIARELLO: Objection to the form of the 23 question and to the extent it calls for speculation. 24 MR. VINCENT: Well, let me restate the 25 question.</p>	91	<p>1 wanted it to be a nice-looking box. We wanted it to be 2 clean. We wanted it to be well marked. We wanted it 3 to feel credible.</p> <p>4 Our quality control measures in our inventory 5 to make sure that the contact lenses that we were 6 shipping were the correct prescription, that they were 7 the correct brand, that they were nowhere near their 8 expiration date. Many people aren't aware that your 9 contact lenses actually have an expiration date.</p> <p>10 We had a number of quality control processes 11 in place to make sure we were shipping the right lenses 12 and -- and fresh lenses.</p> <p>13 And, perhaps as important as anything to the 14 customer, if there was ever any problem whatsoever with 15 the order, any delay, any problem with the shipment, 16 any error that was made, it didn't even have to be 17 any -- anything that -- for which 1-800-CONTACTS was 18 culpable.</p> <p>19 It could be that the customer just made a 20 mistake or simply woke up one day and had indigestion 21 and didn't like this contact lens. We would take 22 returns, no questions asked. It was really a part of 23 our commitment to providing high -- extraordinary 24 service at every turn. 25 So we made long and lasting investments in</p>
90	<p>1 BY MR. VINCENT: 2 Q. In your experience as a marketing professional 3 at 1-800-CONTACTS, did 1-800-CONTACTS invest in 4 building a reputation for trust, reliability, and 5 superior service?</p> <p>6 A. The company made extraordinary investments in 7 providing a credible service and a high-quality service 8 to customers. And there are lots of very easy facts 9 that can substantiate those investments.</p> <p>10 A very well-run and consistent call center 11 that was available 24 hours a day, seven days a week. 12 The phone was always answered on the second ring by 13 somebody's voice you could understand, who was well 14 trained to serve you.</p> <p>15 The fact that your contact lenses would be 16 shipped to you very promptly upon ordering, and we had 17 service level agreements both internally and with our 18 customers that required us to ship lenses, I think, 19 within two business days. That was certainly an 20 outlier in the industry at that moment in time, and the 21 speed of our service was very important.</p> <p>22 We invested a considerable amount even in the 23 packaging and the way that we boxed your contact 24 lenses, and we cared very much about your unboxing 25 experience when you received them in the mail. We</p>	92	<p>1 providing superior service in order to try to earn that 2 perception of credibility that we believe we had in the 3 market.</p> <p>4 Q. Were there also substantial expenditures made 5 in broad-scale advertising to convey that message?</p> <p>6 A. That is an understatement. The lion's share 7 of 1-800-CONTACTS' marketing investments were in 8 supporting that position of extraordinary service, the 9 exact same lenses as your doctor -- as you'd get from 10 your doctor. Emphasizing our returns policy that your 11 order was 100 percent guaranteed.</p> <p>12 I would -- I would consider the investments 13 that we made in -- in our brand, the advertising 14 investments we made in our brand to be significant.</p> <p>15 Q. Okay. Did 1-800-CONTACTS' online competitors 16 generally share these same reputation for being 17 trustworthy, reliable, or providers of superior 18 customer service?</p> <p>19 MR. CHIARELLO: Objection; calls for 20 speculation; lacks foundation; and form of the 21 question. 22 MR. VINCENT: Let me restate it. 23 BY MR. VINCENT: 24 Q. In your experience as a marketing professional 25 at 1-800-CONTACTS, did 1-800-CONTACTS' online</p>

93	<p>1 competitors share the same reputation as 1-800-CONTACTS</p> <p>2 for trustworthiness, reliability, and a provider of</p> <p>3 superior customer service?</p> <p>4 MR. CHIARELLO: Same objections.</p> <p>5 BY MR. VINCENT:</p> <p>6 Q. You can answer.</p> <p>7 A. It was very clear that 1-800-CONTACTS was an</p> <p>8 outlier in the market relative to other online contact</p> <p>9 lens retailers. There was not another company that</p> <p>10 shared our same service level agreement, our same</p> <p>11 service standards.</p> <p>12 From the quality of the box to the timeliness</p> <p>13 of the -- of the delivery to the return policies, there</p> <p>14 wasn't another company that could match our quality and</p> <p>15 service standards. In fact, we saw quite the opposite.</p> <p>16 So much of their messaging to customers was about</p> <p>17 price. The cheapest lenses, the cheapest lenses get</p> <p>18 the best price. And they were all -- again, that</p> <p>19 crabs-in-a-bucket mentality, each just trying to --</p> <p>20 kind of a race to the bottom with regard to price.</p> <p>21 And if that meant that their service had to</p> <p>22 suffer, so be it. They had to be the leader on price.</p> <p>23 It was the only way they were going to attract that</p> <p>24 small portion of the market that value price above</p> <p>25 everything else.</p>	95	<p>1 very long period of delay, sometimes four, even six and</p> <p>2 even eight weeks sometimes, between when the order was</p> <p>3 placed and when the lenses were delivered.</p> <p>4 And we speculated, based on our subject matter</p> <p>5 expertise in the contact lenses industry, that they</p> <p>6 didn't have the lenses in stock and they were going out</p> <p>7 to try to find a wholesaler or distributor that could</p> <p>8 give them the lenses so that they could then fill the</p> <p>9 order.</p> <p>10 And if they found that they couldn't find the</p> <p>11 lenses that were ordered, they would after six or eight</p> <p>12 weeks then send you an indication that your order had</p> <p>13 been canceled. You'd have to go somewhere else to find</p> <p>14 your lenses.</p> <p>15 This is, you know, completely antithetical to</p> <p>16 everything 1-800-CONTACTS was about. You would need to</p> <p>17 see the lenses on our proverbial shelf or listed on our</p> <p>18 website. If we didn't have them in stock, you couldn't</p> <p>19 ship them within two business days.</p> <p>20 This is just one example. I could go on and</p> <p>21 on talking about the -- the gaps and the holes and the</p> <p>22 problems that were resident in those competitive</p> <p>23 services.</p> <p>24 BY MR. VINCENT:</p> <p>25 Q. Now, based on your experience as a marketing</p>
94	<p>1 Q. Did you learn or hear about whether other</p> <p>2 online competitors were complying with laws in terms of</p> <p>3 verifying prescription and not substituting</p> <p>4 prescription product, or whether they were -- had</p> <p>5 people you could reach, a live person you could reach,</p> <p>6 or whether they had lenses in stock?</p> <p>7 Did you ever hear about any of those kinds of</p> <p>8 things while you were at 1-800-CONTACTS?</p> <p>9 MR. CHIARELLO: Objection to the form of the</p> <p>10 question to the extent it's compound; calls for</p> <p>11 speculation.</p> <p>12 THE WITNESS: Yeah, we didn't -- we didn't</p> <p>13 really have to speculate on what those practices were.</p> <p>14 It was usually very visible or blatant by omission in</p> <p>15 terms of their policies.</p> <p>16 And from time to time, we would spot-check by</p> <p>17 having, you know, a friend or a family member or a</p> <p>18 colleague place an order through some of those online</p> <p>19 competitors and we would be able to observe firsthand</p> <p>20 the low quality of service that their customers</p> <p>21 received, relative to our 1-800-CONTACTS customer.</p> <p>22 A couple of examples would be if you ordered a</p> <p>23 contact lens prescription that one of these other</p> <p>24 online retailers would put on the website and represent</p> <p>25 that they had an inventory, there would sometimes be a</p>	96	<p>1 professional at 1-800-CONTACTS, what did you understand</p> <p>2 that consumers searching for 1-800-CONTACTS' trademark</p> <p>3 were attempting to do?</p> <p>4 MR. CHIARELLO: Objection to the form of the</p> <p>5 question to the extent it calls for speculation.</p> <p>6 THE WITNESS: Glad you bring that up</p> <p>7 because -- I'm glad you bring up the objection because</p> <p>8 we didn't have to speculate. We did a pretty</p> <p>9 significant amount of customer research on this. And</p> <p>10 we had both qualitative and quantitative data that</p> <p>11 suggested to us that when people were searching -- were</p> <p>12 trying to get 1-800-CONTACTS, they -- the word that</p> <p>13 they would type is "1-800-CONTACTS" or "1," space,</p> <p>14 "800," space, "contacts." That they treated those</p> <p>15 terms as being the way to get to 1-800-CONTACTS.</p> <p>16 And we saw that, again, qualitatively and</p> <p>17 quantitatively.</p> <p>18 Qualitatively we did customer -- customer</p> <p>19 surveys and we did some focus groups where we asked</p> <p>20 some of our customers, how do you get to</p> <p>21 1-800-CONTACTS? And a very frequent response was, "I</p> <p>22 go launch a browser and I go to a search engine and I</p> <p>23 type in '1-800-CONTACTS.'"</p> <p>24 So that was a rather universal finding from</p> <p>25 that qualitative research.</p>

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1 And then qualitatively we would see when we
2 would, say, spend money in, for example, the Southeast
3 or Georgia on television advertising or radio
4 advertising or direct mail pieces, that we would see a
5 corresponding increase in the number of -- in the
6 amount of traffic that we got from that region for a
7 term like "1-800-CONTACTS."

8 It was very clear that when somebody wanted to
9 get to 1-800, we had the qualitative and quantitative
10 evidence to suggest to us that that was the method that
11 they used to get to us.

12 And if they didn't want to get to us
13 specifically, it was very well understood that they
14 would use a different set of terms or different search
15 query.

16 BY MR. VINCENT:

17 **Q. Did the make-up of the traffic coming to the
18 website through trademark search differ from other
19 types of, say, non-trademark traffic?**

20 MR. CHIARELLO: Objection to form.

21 MR. VINCENT: Go ahead.

22 THE WITNESS: Extraordinarily so. There was a
23 huge difference.

24 The traffic that came to the website by way of
25 a trademarked search or trademark search keyword, was

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1 yours and the ones that you aim to serve and which ones
2 are not yours and which you do not aim to serve. The
3 price shoppers were simply not our customer.

4 MR. VINCENT: Direct your attention to what's
5 previously been marked as CX62.

6 [Whereupon, Exhibit CX0062 was
7 referenced.]

8 BY MR. VINCENT:

9 **Q. Mr. Schmidt, could you tell us what
10 Exhibit CX62 is?**

11 A. Yes, this is the summary of the qualitative
12 customer research that we performed in early 2005.

13 **Q. If you direct your attention to the second
14 page it says: (Reading.)**

15 "This summarizes key learnings obtained

16 from qualitative research conducted in

17 Los Angeles, CA, Boston, MA, and

18 Minneapolis, MN in Jan-Feb 2005. 57

19 participants overall. In attendance

20 were Amy Guymon, Sunny Baker (LA), and

21 Clint Schmidt (LA)."

22 **Do you see that?**

23 A. Yes.

24 **Q. You were participating in this -- you were one
25 of the people that participated in this research?**

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1 much, much higher conversion to purchase, and also much
2 more likely to be a returning customer that was using
3 the term as their conduit to get back to
4 1-800-CONTACTS.

5 BY MR. VINCENT:

6 **Q. Does it make sense to you that consumers would
7 search for 1-800-CONTACTS' trademark in order to
8 comparison shop?**

9 A. No, we had qualitative data to support that as
10 well. Again, when we asked customers -- when we asked
11 both 1-800-CONTACTS customers and people who had
12 purchased contact lenses online, whether they were our
13 customers or not, what terms they would use if they
14 wanted to price shop, it was never a specific trademark
15 term. It was always a term like "contact lenses" or
16 "prices on contact lenses" or "where to buy contact
17 lenses."

18 A very stark difference existed between the
19 type of keyword that they would use when they wanted to
20 navigate to 1-800-CONTACTS and the type of keyword they
21 would use when they wanted to do some competitive
22 shopping.

23 That is the type of customer segmentation that
24 is critical in the marketing profession to be able to
25 distinguish, within the market, which customers are

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1 A. Yes, in fact I led this effort.

2 **Q. Okay. It looks like under the background
3 section you categorized contact lenses wearers into
4 four categories: loyal customers, lapsed customers,
5 competitor customers, and potential customers; is that
6 right?**

7 MR. CHIARELLO: Objection to foundation. It
8 wasn't clear that he drafted the document.

9 MR. VINCENT: Okay. Let me go back and ask
10 you.

11 BY MR. VINCENT:

12 **Q. You were -- you said you led this effort?**

13 A. I did.

14 **Q. Okay. And did you, in leading this effort,
15 did -- was part of that to categorized these customers
16 under these four categories?**

17 A. Yes.

18 **Q. Okay. And then underneath there it says, "key
19 learnings."**

20 **Do you see that?**

21 A. I do.

22 **Q. Let me ask you first about -- about this first
23 key learning where you -- it says here: (Reading.)**

24 "Overall, contact lens wearers who shop
25 online can be divided into 3 segments.

101	103
<p>1 Each segment will require a different</p> <p>2 message, particularly as it relates to</p> <p>3 credibility (achieved with reputation,</p> <p>4 name recognition, and site appearance.)"</p> <p>5 Do you see that?</p> <p>6 A. I do.</p> <p>7 Q. What did you understand that to mean?</p> <p>8 A. Again, this is just the exercise of segmenting</p> <p>9 your market in order to understand the motivation and</p> <p>10 behaviors of different portions of the market.</p> <p>11 Q. All right. Then under subsection A there,</p> <p>12 Loyal Buyers. It says: (Reading.)</p> <p>13 "This segment initially selected their</p> <p>14 current contact lens supplier based on</p> <p>15 price and credibility (as described</p> <p>16 above), but continue to purchase from</p> <p>17 them due to convenience and a positive</p> <p>18 purchase history. They may be aware</p> <p>19 that slightly lower prices likely exist</p> <p>20 elsewhere, but are disinterested in</p> <p>21 seeking them out."</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. What do you understand that to mean?</p> <p>25 A. That they value the convenience. These folks</p>	<p>1 around, they knew exactly how to do so. Whether they</p> <p>2 wanted to do so or not is another matter entirely, but</p> <p>3 they knew precisely how to comparison shop.</p> <p>4 And it was using these keywords that were more</p> <p>5 generic in nature like "contacts," "contact lenses,"</p> <p>6 "discount eye contacts."</p> <p>7 Q. You go -- it goes on to say here: (Reading)</p> <p>8 "This response about how to find</p> <p>9 suppliers was almost universal in all</p> <p>10 participant groups."</p> <p>11 Do you see that?</p> <p>12 A. I do see that. In fact, this was among the</p> <p>13 easiest conclusions to draw from the research. There</p> <p>14 was no customer confusion about how to comparison shop.</p> <p>15 Q. And when it referred to all participant</p> <p>16 groups, would that include loyal customers, lapsed</p> <p>17 customers, competitor customers, and potential</p> <p>18 customers?</p> <p>19 A. Yes, all of the groups that we categorized</p> <p>20 here across all, I guess, 57 -- yeah, 57 participants.</p> <p>21 Q. Okay. Based on your experience as a marketing</p> <p>22 professional at 1-800-CONTACTS, was it easy for</p> <p>23 consumers to comparison shop for those who wanted to do</p> <p>24 so?</p> <p>25 A. Yes.</p>
<p>102</p> <p>1 value the credibility and the convenience of purchasing</p> <p>2 through their contact lens provider, more than they</p> <p>3 value the additional price savings that they might be</p> <p>4 able to get if they -- if they shopped around.</p> <p>5 Q. And that's for this loyal buyer segment?</p> <p>6 A. That's the loyal buyer segment, yes.</p> <p>7 Q. Let me ask you about the key learning Number 8</p> <p>8 which I think you'll find on the page that ends with</p> <p>9 005 control number.</p> <p>10 A. Yeah.</p> <p>11 Q. It says here: (Reading.)</p> <p>12 "Most Lapsed and Loyal customers have</p> <p>13 never heard of any of our competitors,</p> <p>14 but they all know where to look."</p> <p>15 Do you see that?</p> <p>16 A. I do see that.</p> <p>17 Q. It says: (Reading.)</p> <p>18 "Google keyword searches: 'contacts',</p> <p>19 'contact lens', 'discount eye contacts'</p> <p>20 etc."</p> <p>21 Do you see that?</p> <p>22 A. I see that.</p> <p>23 Q. What does that mean?</p> <p>24 A. It was very clear in this research that if</p> <p>25 people -- if customers of any segment wanted to shop</p>	<p>103</p> <p>1 Q. And during your time there, was there any</p> <p>2 shortage of information out there about retailers'</p> <p>3 products or prices for consumers who wished to</p> <p>4 comparison shop?</p> <p>5 A. There was no shortage of information.</p> <p>6 Q. Have you ever heard of the phrase "Contact</p> <p>7 lenses are just the product we deliver. What we really</p> <p>8 sell is service"?</p> <p>9 A. That was a bit of a -- yes, that was a bit of</p> <p>10 a mantra within the company, within 1-800-CONTACTS.</p> <p>11 Q. Okay. Was that the company motto? One of the</p> <p>12 mottos?</p> <p>13 A. It was, yes.</p> <p>14 Q. Okay. Now, I wanted to go on to a different</p> <p>15 topic here.</p> <p>16 You referenced earlier your understanding as a</p> <p>17 marketing professional of consumers searching for</p> <p>18 1-800's trademark were generally trying to navigate to</p> <p>19 1-800's website.</p> <p>20 Were there business concerns about competitor</p> <p>21 ads appearing in response to searches for</p> <p>22 1-800-CONTACTS?</p> <p>23 MR. CHIARELLO: Objection to the form of the</p> <p>24 question. Misstates prior testimony and calls for</p> <p>25 speculation.</p>

105	<p>1 BY MR. VINCENT:</p> <p>2 Q. Just to avoid misstating your testimony, did</p> <p>3 you testify earlier that your understanding as a</p> <p>4 marketing professional was that consumers searching for</p> <p>5 1-800-CONTACTS' trademarks were generally trying to</p> <p>6 navigate to 1-800's website?</p> <p>7 A. That's correct.</p> <p>8 Q. And were there business concerns about</p> <p>9 competitor ads appearing in response to searches for</p> <p>10 1-800-CONTACTS' trademarks?</p> <p>11 A. We didn't believe that it was proper. We</p> <p>12 believed that you should have the respect for the</p> <p>13 trademark holder, yes.</p> <p>14 Q. Was it the legal department that was</p> <p>15 responsible for deciding whether the appearance of</p> <p>16 competitor ads in response to searches for 1-800's</p> <p>17 trademarks was confusing or legally problematic?</p> <p>18 A. Yes.</p> <p>19 MR. CHIARELLO: Object to the form of the</p> <p>20 question to the extent it calls for speculation.</p> <p>21 BY MR. VINCENT:</p> <p>22 Q. Did you have any personal opinion as to</p> <p>23 whether -- or did you ever have, based on your</p> <p>24 experience of a market -- as a marketing professional</p> <p>25 at 1-800-CONTACTS, believe the appearance of such ads</p>	107	<p>1 A. Yes, the -- yes, there were concerns about</p> <p>2 that, although I would suggest they were secondary to</p> <p>3 customer confusion because it was so clear to us that,</p> <p>4 you know, our proprietary keywords were navigational in</p> <p>5 nature, our trademarked terms were navigational in</p> <p>6 nature.</p> <p>7 But just given the way the search engines</p> <p>8 results were displayed, it was very easy, typically for</p> <p>9 an unsophisticated consumer, to get confused about</p> <p>10 whether a specific ad was -- was a 1-800-CONTACTS ad or</p> <p>11 was an ad that was placed there by a third party.</p> <p>12 It seemed that there was sort of willful</p> <p>13 intent there among some competitors to confuse folks</p> <p>14 that were searching in order to, in a way, try to trick</p> <p>15 them into believing that they were going to</p> <p>16 1-800-CONTACTS when indeed they were going to a</p> <p>17 third-party site.</p> <p>18 Q. Can you elaborate at all on that?</p> <p>19 A. Yeah, just, you know, references to, you know,</p> <p>20 being the -- for example, being the world's largest</p> <p>21 contact lenses retailer. We had a unique claim to</p> <p>22 that, but we would see that language being repurposed</p> <p>23 by competitors, and have the very kind of artful</p> <p>24 composition of the ad copy suggest to the person</p> <p>25 clicking that they would be going to 1-800-CONTACTS.</p>
106	<p>1 in response to searches for 1-800-CONTACTS was</p> <p>2 potentially confusing?</p> <p>3 A. I did believe it was potentially confusing,</p> <p>4 yes.</p> <p>5 Q. And why?</p> <p>6 A. Because we understood our trademark keyword</p> <p>7 terms to be navigational in nature, and the intent on</p> <p>8 the searches was to find their way to 1-800-CONTACTS,</p> <p>9 not to comparison shop.</p> <p>10 Q. Did you understand that others at the company</p> <p>11 had similar concerns about the appearance of competitor</p> <p>12 ads in response to searches for 1-800-CONTACTS'</p> <p>13 trademarks being confusing to consumers?</p> <p>14 A. That concern was shared among a number of</p> <p>15 stakeholders at the company.</p> <p>16 Q. Were there any other business concerns beyond</p> <p>17 the -- the potential confusion to consumers about</p> <p>18 competitor ads appearing in response to searches for</p> <p>19 1-800's trademark?</p> <p>20 A. It was the customer confusion that we were</p> <p>21 most concerned about.</p> <p>22 Q. Were there concerns at all about free-riding</p> <p>23 or misappropriation of the brand or association with</p> <p>24 other brands or other things of that nature or was</p> <p>25 it --</p>	108	<p>1 Google was typically good about making sure</p> <p>2 that the most overt attempts were precluded, but there</p> <p>3 were also other artful ways to trick consumers.</p> <p>4 Q. Were there other ways that it was potentially</p> <p>5 confusing to consumers, based on position on the</p> <p>6 page or labeling or things of that nature?</p> <p>7 A. Yes, again, I just refer back to my previous</p> <p>8 comment. Perhaps I should elaborate.</p> <p>9 If a competitor, an online retailer that we</p> <p>10 were competing with wanted to spend an exorbitant</p> <p>11 amount to displace 1-800-CONTACTS from the first</p> <p>12 position on the page, the highest position on the page,</p> <p>13 they could do so and increase the likelihood that a</p> <p>14 customer would be confused.</p> <p>15 By sort of paying a premium for the top</p> <p>16 position for a keyword like "1-800-CONTACTS," they</p> <p>17 would put the intended search result in the secondary</p> <p>18 position and put their more craftily worded add in the</p> <p>19 first position and increase the likelihood of</p> <p>20 confusion.</p> <p>21 MR. CHIARELLO: Let me just get -- I apologize</p> <p>22 for my late objections because you're answering the</p> <p>23 question. I don't want to interrupt --</p> <p>24 THE WITNESS: Sure.</p> <p>25 MR. CHIARELLO: -- but I did want to object to</p>

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<p>1 the question to the extent it was calling for 2 speculation. 3 And just so I'm going to try not to interrupt 4 your answer, but -- 5 THE WITNESS: I don't mind. That's fine. If 6 you feel like you've got to jump right in, I can 7 compose my thoughts again. 8 MR. CHIARELLO: Go ahead. 9 BY MR. VINCENT: 10 Q. Oftentimes were these ads on the search engine 11 page that were displayed in response to a search for 12 1-800-CONTACTS, were these competitor ads sometimes 13 labeled as sponsored ads or sponsored links? 14 MR. CHIARELLO: Object to the form of the 15 question. 16 THE WITNESS: Yes, they were. There is a 17 portion of the page that was designated as -- as being 18 sponsored ads. And, you know, again, my experience 19 working for -- working with Google for a long period of 20 time, I understood what the intent was. 21 The intent was to try to denote very clearly 22 for consumers that these were search results that were 23 paid search results and that there was another subset 24 of the results that was natural or organic or deemed to 25 be relevant by Google alone.</p>	<p>1 Q. Did you have a -- business concerns about 2 competitor ads appearing in response to comparative 3 searches containing 1-800-CONTACTS' trademark terms 4 such as "cheaper," "better," or "faster than 5 1-800-CONTACTS"? 6 A. No, we had no concern about those. 7 Q. Why not? 8 A. Because those are very clearly intended to do 9 price comparison shopping. So we didn't want to 10 preclude that behavior. We mostly just wanted to 11 protect our trademarked term. But insomuch as it 12 appeared in a search query that included other intent, 13 that was not our concern. 14 Q. Did you, as a marketing professional, have a 15 understanding that a consumer who was searching for 16 cheaper or better or faster than 1-800-CONTACTS was 17 looking for 1-800-CONTACTS? 18 A. No, not necessarily. 19 In fact, we were -- we were very wary of 20 investing money to try to attract that type of traffic. 21 If you were searching for 1-800-CONTACTS, we very much 22 wanted you to find us. And we allocated budget to make 23 sure that we could be present for those searches, but 24 if you were searching for -- if you searched using a 25 query like "cheaper than 1-800-CONTACTS," in fact, you</p>
110	112
<p>1 But the use of the word "sponsored" helped 2 create confusion when you were searching for a 3 trademarked term like this, because it was easy for a 4 person who was performing such a search to conclude 5 that any one of the results that appeared in these 6 sponsored ads section was put there by the company that 7 they were intending to navigate to, which in this case 8 was 1-800-CONTACTS. 9 So the idea that there are sponsored -- there 10 are several sponsored ads for a navigational search led 11 them to often conclude that any one of these ads was 12 put there by 1-800-CONTACTS and was worthy of their 13 click in order to get their intended designation. 14 BY MR. VINCENT: 15 Q. Was there a concern at the time that consumers 16 were not able to easily distinguish between ads and 17 organic listings? 18 A. There was a very profound concern about that, 19 and that was borne out not just in the studies that -- 20 that we did, but also in just my cumulative expertise 21 in having tried to tackle some of these problems at 22 prior companies and prior context. 23 I was very clear and it is a formidable 24 challenge for a marketer to try to resolve some of that 25 customer confusion.</p>	<p>1 were indicating that you weren't -- specifically not 2 looking for 1-800-CONTACTS, and it was very unlikely 3 that you would make a purchase even if you did make 4 your way to the site. So we were really unconcerned 5 about those keyword combinations. 6 Q. And was the concern about ads appearing in 7 response to searches for 1-800-CONTACTS' trademark a 8 concern about consumers trying to navigate to 9 1-800-CONTACTS' website? 10 A. Yes. 11 Q. Okay. And was a concern that those people 12 trying to navigate to that website were getting 13 confused, diverted, or finding it more difficult to 14 find in order from 1-800-CONTACTS? 15 A. Yes, you have summarized my comments well. 16 Q. Do those concerns at all -- did those same 17 concerns apply to -- to someone searching for 18 "cheaper," "better," or "faster than 1-800-CONTACTS"? 19 A. Those same concerns about navigational intent 20 were not present for search queries that included 21 phrases like "cheaper than 1-800-CONTACTS" or "lower 22 prices than 1-800-CONTACTS." 23 Q. Are you aware of anyone at 1-800-CONTACTS ever 24 complaining about competitor ads appearing in response 25 to comparative searches containing 1-800-CONTACTS'</p>

113	<p>1 trademark?</p> <p>2 A. No.</p> <p>3 Q. Are you aware of anyone at 1-800 ever</p> <p>4 purposefully trying to prevent competitor ads from</p> <p>5 appearing in response to comparative searches</p> <p>6 containing 1-800's trademark?</p> <p>7 A. No.</p> <p>8 Q. Did you ever bother monitoring ads that</p> <p>9 appeared on competitive searches containing</p> <p>10 1-800-CONTACTS' trademark?</p> <p>11 MR. CHIARELLO: Objection to the form to the</p> <p>12 extent it -- it's unclear as to time.</p> <p>13 THE WITNESS: Can you ask the question again?</p> <p>14 BY MR. VINCENT:</p> <p>15 Q. Was there any -- was there any monitoring of</p> <p>16 activity of competitor ads on comparative searches</p> <p>17 containing 1-800's trademark terms such as "cheaper" or</p> <p>18 "better" or "faster"?</p> <p>19 A. We didn't monitor those.</p> <p>20 MR. CHIARELLO: My objection was only to the</p> <p>21 extent you're talking about the time he was employed</p> <p>22 with 1-800-CONTACTS.</p> <p>23 BY MR. VINCENT:</p> <p>24 Q. And why not?</p> <p>25 A. They were -- they were simply keyword queries</p>	115	<p>1 permission or review their -- their plans with us in</p> <p>2 advance.</p> <p>3 Q. If someone truly wanted their ad to appear in</p> <p>4 response to such a comparative search, could they do so</p> <p>5 while implementing 1-800's trademarks as negative</p> <p>6 keywords?</p> <p>7 A. Yes.</p> <p>8 Q. How so?</p> <p>9 A. It was in a -- very easy. Google gives you</p> <p>10 the tools, gives you the negative keyword tools to very</p> <p>11 explicitly say, "I want a negative exact match for this</p> <p>12 term," and then also negative exact match for this term</p> <p>13 and negative exact match for this term.</p> <p>14 Tools that Google made available were very</p> <p>15 simple and easy to use, so that if you wanted a</p> <p>16 negative match for just 1-800-CONTACTS, but you did</p> <p>17 want to appear for something like "lower prices than</p> <p>18 1-800-CONTACTS," you could manipulate your negative</p> <p>19 keywords in the syntax associated with -- with those</p> <p>20 ads to do exactly that.</p> <p>21 Q. Would implementing 1-800-CONTACTS' trademark</p> <p>22 as a negative keyword and exact match type prevent that</p> <p>23 party's ad from appearing in response to a comparative</p> <p>24 search like "cheaper than 1-800-CONTACTS"?</p> <p>25 A. No.</p>
114	<p>1 that were meant to capture a customer that -- that was</p> <p>2 not a priority for us. Those price-sensitive shoppers</p> <p>3 were not our customer.</p> <p>4 Q. Are you aware of anyone ever complaining that</p> <p>5 the trademark settlement agreement with 1-800-CONTACTS</p> <p>6 prohibited their ads from appearing in response to such</p> <p>7 comparative searches?</p> <p>8 A. No, in fact they were quite eager to make</p> <p>9 clear that trademark -- the protection of the -- of the</p> <p>10 trademark terms and to make sure that it was</p> <p>11 reciprocal.</p> <p>12 Q. Are you aware of competitors or affiliates</p> <p>13 ever complaining that implementing 1-800-CONTACTS'</p> <p>14 trademarks as negative keywords was preventing their</p> <p>15 ads from appearing in response to a comparative search</p> <p>16 containing 1-800's trademark?</p> <p>17 A. No.</p> <p>18 Q. Are you aware of any competitor affiliate ever</p> <p>19 expressing interest in having their ad appear in</p> <p>20 response to a comparative search containing 1-800's</p> <p>21 trademark?</p> <p>22 A. No, they wouldn't have expressed that to us.</p> <p>23 Q. Why do you say that?</p> <p>24 A. They just would have gone and experimented</p> <p>25 with it on their own. They didn't ask for explicit</p>	116	<p>1 Q. Are you aware of anyone from 1-800-CONTACTS</p> <p>2 ever insisting that others implement 1-800-CONTACTS'</p> <p>3 trademarks as negative keywords in broad or phrase</p> <p>4 match?</p> <p>5 A. No.</p> <p>6 Q. Are you aware of anyone at 1-800-CONTACTS ever</p> <p>7 insisting on or purporting to require that?</p> <p>8 A. No.</p> <p>9 MR. VINCENT: Let's mark as Exhibit RX167 a</p> <p>10 document bearing Bates Stamp Number 1-800_F00037216</p> <p>11 which is the subject "Search Engine Copy Text Summary."</p> <p>12 [Whereupon, Deposition Exhibit RX167 was</p> <p>13 marked for identification.]</p> <p>14 BY MR. VINCENT:</p> <p>15 Q. Mr. Schmidt, can you tell me -- us what</p> <p>16 Exhibit RX167 is?</p> <p>17 A. Yes, this is a summary of our search engine ad</p> <p>18 copy test that we ran in early 2005.</p> <p>19 Q. You'll see here it says here this e-mail --</p> <p>20 this first page is an e-mail that was sent to you from</p> <p>21 Brandon Dansie, on or about March 15th, 2005; is that</p> <p>22 right?</p> <p>23 A. That's correct.</p> <p>24 Q. He says here: (Reading.)</p> <p>25 "Marketing Team, Last year we tested the</p>

117	<p>1 value propositions, tone, and content 2 used in our paid search engine 3 advertising in an effort to identify 4 elements that improve performance for 5 various search queries. If the findings 6 or data from this testing might be 7 useful to you, please refer to the 8 attached summary." 9 Do you see that? 10 A. I do. 11 Q. And then on the attachment there it's entitled 12 "Search Engine Copy Test Summary." 13 Do you see that? 14 A. I do. 15 Q. Says: (Reading.) 16 "This summarizes the key findings from 17 the search engine copy testing conducted 18 August 16 - September 14, 2004." 19 Do you see that? 20 A. I do. 21 Q. Were you aware of this search engine testing? 22 A. I commissioned it, yes. 23 Q. You were involved in it? 24 A. I led this effort, yes. 25 Q. It says here under background it says:</p>	119	<p>1 Do you see that? 2 A. I do. 3 Q. Can you tell us what that's referring to? 4 A. We were just looking at the -- basically, 5 defining the success metric here of the test so if ad 6 copy was performing well, that would be measured by 7 orders per 1,000 impressions. And if our ad copy was 8 not performing well, this same metric would be the -- 9 the indicator to us. 10 Q. Directing your attention to the conclusion, 11 which you'll see in the middle of that page. It says: 12 (Reading.) 13 "When developing search engine creative, 14 the associated search query can be a 15 strong indicator of the potential 16 buyer's stage in the buying process and 17 how they are thinking about the purchase 18 decision." 19 Do you see that? 20 A. Yes. 21 Q. He goes on to say: (Reading.) 22 "For example, a potential customer who 23 uses a general search query like 24 'contact lenses' is generally in an 25 earlier stage of the buying process than</p>
118	<p>1 (Reading.) 2 In order to meet the objective above, 3 our paid-search keywords were divided 4 into three classifications: General 5 contact lens search queries, like 6 'contact lens' or 'contacts'; 2) Brand 7 or Product related search queries like 8 'acuvue advance' or 'toric lenses'; and 9 3) Proprietary search queries, like 10 '1 800 contacts' or 'lens express'. 11 Do you see that? 12 A. I do. 13 Q. Can you tell me what that's referring to? 14 A. It's just a very rough categorization of 15 different terms into three different categories as 16 listed here. 17 Q. And then at the second sentence underneath 18 that listing of those three categories it says: 19 (Reading.) 20 "Orders per One-Thousand Impressions 21 (OPM) was identified as a metric that 22 would quantify both potential customers' 23 propensity to click an ad and their 24 propensity to order once they were 25 directed to the website."</p>	120	<p>1 a those who uses a brand-related search 2 query, like 'O2 Optics online', and 3 buyers who use a brand or product 4 related search queries are generally in 5 an earlier stage of the buying process 6 than those that uses proprietary search 7 queries like, '1-800 Contacts'. 8 Do you see that? 9 A. Yes. 10 Q. Can you explain what that's referring to? 11 A. It's, basically, characterizing the stages of 12 the customer's decision-making process, from the 13 earliest stages when they're just trying to become 14 aware of different options to, you know, exploring and 15 becoming interested in a subset of those options, 16 making a decision on which one of the options they 17 wanted to take, and then actually taking the action. 18 So we would look at this as being the -- kind 19 of the consideration funnel, if you will, the 20 decision-making funnel for customers. 21 Q. And the top of that funnel, is that the -- is 22 that the -- where the generally contact lens search 23 queries like "contact lens" or "contacts" are? 24 A. That -- you understand it well, yes. 25 Q. Okay.</p>

121	<p>1 A. So you kind of make your way to more 2 specific -- you use very different search terms based 3 on where you're at in that decision-making funnel. 4 So if you are, perhaps, ordering contact 5 lenses on the Internet for the first time or you're 6 wanting to do a competitive search, you'll search for a 7 general term. If you're already committed to buying 8 your contact lenses online, you just want to see if 9 they have yours, then you'll be looking specifically 10 for your brand term. And if you're navigationally 11 focused and just want to make a direct visit to your 12 site of choice, then you use one of the proprietary 13 keyword terms. 14 Q. And you were testing ad copies on each of 15 those type of keywords? 16 A. That's right. That's right. 17 Q. And let's take the table below here. Let's 18 look at the example of brand or product. 19 It says -- if you look under "brand" or 20 "product," if you look under the category "Optimal 21 Value Propositions" -- 22 A. Yes. 23 Q. -- the first is "value" and the second is 24 "convenience." 25 Do you see that?</p>	123	<p>1 searching for more general terms like "Acuvue" or 2 product terms? 3 A. Price is simply not a consideration for folks 4 that were -- that were searching using a proprietary 5 term. 6 In fact, using copy that seemed to emphasize 7 our prices performed worse than copy that emphasized 8 our leading position in the industry or that this is -- 9 these were the exact same contact lenses that you order 10 from your doctor. 11 Q. If you go to the next page under "key 12 findings," it says: (Reading.) 13 "The value proposition of search engine 14 creative should be specific to the type 15 of keyword the searcher uses. Copy sets 16 with four different sets of themes of 17 value propositions, Value, Convenience, 18 Credibility, and Service, were tested to 19 identify what message best compelled 20 customers to click and order." 21 And then under C it says: (Reading.) 22 "Customers using Proprietary keywords 23 which include all searches related to 24 1-800 CONTACTS or Lens Express respond 25 best to messages emphasizing Credibility</p>
122	<p>1 A. Yes. 2 Q. What did you mean by the first being "value" 3 for people who are searching for brand or product? 4 A. Well, generally it's -- it's an indicator to 5 us that you're already comfortable buying contact 6 lenses online and there is some measure of value -- 7 some measure of emphasis that you're placing on the 8 price. But also included there, and importantly so, is 9 convenience. So if you're searching for your brand, 10 you're probably looking at where you can get your brand 11 at a good price and also probably quickly and with a 12 return policy that makes your life easier. 13 Q. And then if you look at the keyword 14 "proprietary," that's referring to, like, a 15 1-800-CONTACTS' trademark? 16 A. Yes, our trademark. 17 MR. CHIARELLO: Objection to form. 18 MR. VINCENT: Okay. 19 THE WITNESS: That's correct. 20 BY MR. VINCENT: 21 Q. And then optimal value proposition for that is 22 number 1, credibility; number 2, convenience. 23 Do you see that? 24 A. I do. 25 Q. How is that different than the people who are</p>	124	<p>1 and Convenience." 2 Do you see that? 3 A. I do. 4 Q. And was that the conclusion of the -- one of 5 the conclusions of your studies? 6 A. These were the key findings and conclusions of 7 our study, yes. 8 Q. All right. One last area I'd like to address 9 before we conclude is the -- is -- has to do with -- 10 the page search budget at 1-800-CONTACTS when you were 11 there. 12 During the time you had responsibility over 13 paid search, did you operate pursuant to a budget? 14 A. Yes, we had very rigid budgets, yes. 15 Q. How did that budget process work? 16 A. Typically, I was given an allocation to work 17 with in online channels and sort of looked at that -- 18 that budget allocation as being fixed. And I allocated 19 the budget to the most cost-efficient campaigns and 20 tactics first. 21 And so whichever was most efficient was the 22 first priority for the budget, and then as you made 23 your way down to, you know, second position on the cost 24 efficiency list and third position on the cost 25 efficiency list, then you would get whatever budget was</p>

125	<p>1 left.</p> <p>2 Q. Now, did you -- did you get, like, one</p> <p>3 marketing budget that you allocated among different</p> <p>4 channels? Is that how that worked?</p> <p>5 A. Yes, Kevin McCallum, the EVP -- the executive</p> <p>6 vice president of marketing had a sort of global</p> <p>7 marketing budget, and then I was allocated a subset of</p> <p>8 that for online channels.</p> <p>9 Q. And did you assign a specific amount for,</p> <p>10 like, the paid search channel?</p> <p>11 A. Yes, absolutely. Absolutely. Again, those</p> <p>12 budget allocations were relatively rigid.</p> <p>13 Q. And within "paid search," did they allocate</p> <p>14 that is budget among different types of keywords?</p> <p>15 A. Yes, we did.</p> <p>16 Q. And did they prioritize those categories of</p> <p>17 keywords in allocating their assigned budget?</p> <p>18 A. We did. In fact, the most cost-efficient</p> <p>19 terms would get the first -- would get first dibs, if</p> <p>20 you will, on the budget. So we wanted to make sure</p> <p>21 that we had allocated whatever percentage of our budget</p> <p>22 was needed in order to max out our most cost-efficient</p> <p>23 channels.</p> <p>24 So the one that was always at the top was our</p> <p>25 trademarked terms. If somebody was searching for</p>	127	<p>1 inefficient with regard to cost. Those were</p> <p>2 navigational in nature. We were just wasting our money</p> <p>3 to try to bid on any of them.</p> <p>4 And this was not something that we ever tried.</p> <p>5 This was a well-understood cardinal rule that I had</p> <p>6 gleaned in past experience. There was no benefit in</p> <p>7 that, so the allocation really followed cost</p> <p>8 efficiency, and so the -- for example, this</p> <p>9 exhibit that you pulled out here identifies three</p> <p>10 categories of keywords. I've got the wrong one.</p> <p>11 Exhibit 167. We talk about brand or product</p> <p>12 as a -- as a category of keywords. We would only</p> <p>13 allocate budget to brand or product keywords if there</p> <p>14 was budget left over to ensure that we were maxing out</p> <p>15 the traffic that we could get from our proprietary</p> <p>16 keywords. And then only spending money on general</p> <p>17 keywords if there was budget left over after brand or</p> <p>18 product.</p> <p>19 We really followed cost efficiency as our</p> <p>20 stack ranking function.</p> <p>21 Q. Did you often target lower positions rather</p> <p>22 than pay what is necessary to be in top position for</p> <p>23 non-trademark search keywords?</p> <p>24 A. We did, yes.</p> <p>25 Q. If the cost of 1-800-CONTACTS' trademark</p>
126	<p>1 1-800-CONTACTS, we needed to make sure that they found</p> <p>2 us and that we never starved that subset of keywords of</p> <p>3 any budget.</p> <p>4 Q. Did you generally always bid to be in first</p> <p>5 position, regardless of cost?</p> <p>6 A. Yes, yes.</p> <p>7 Q. And why is that?</p> <p>8 A. Because these terms were navigational in</p> <p>9 nature, and it only created confusion for our customers</p> <p>10 if there was another website that got into that first</p> <p>11 position.</p> <p>12 Q. And did the trademark search traffic convert</p> <p>13 at a much higher rate than other types of traffic?</p> <p>14 A. Yeah, it did convert at a much, much higher</p> <p>15 rate in order of magnitude higher than any other</p> <p>16 category of keyword.</p> <p>17 Q. How was the rest of the budget?</p> <p>18 After the -- after the budget that had been</p> <p>19 assigned to -- allocated to trademark search, how was</p> <p>20 the rest of the budget allocated after that?</p> <p>21 A. It was, again, kind of a stack rank with</p> <p>22 regard to cost efficiency.</p> <p>23 And so it's probably of no surprise that we</p> <p>24 had no interest in bidding on any of our competitors'</p> <p>25 trademarked terms because they were extremely</p>	128	<p>1 keywords had increased for any reason while you were at</p> <p>2 1-800-CONTACTS, would you necessarily have ended up</p> <p>3 spending more money with the search engines on your</p> <p>4 advertising campaigns?</p> <p>5 A. No, the budgets were relatively fixed.</p> <p>6 I mean, maybe at the end of the quarter or</p> <p>7 something there would be a very small amount that you</p> <p>8 might be able to add to your budget, but those were</p> <p>9 de minimus.</p> <p>10 Q. If the trademark search cost were to go up for</p> <p>11 any particular campaign, would it simply mean less</p> <p>12 money to allocate to the rest of the keywords in that</p> <p>13 campaign?</p> <p>14 A. That's exactly what I had intended to convey</p> <p>15 with my prior answer, yes.</p> <p>16 Q. And --</p> <p>17 A. The zero sum.</p> <p>18 Q. And would that be -- would that increase in</p> <p>19 trademark search cost be likely to have a major impact</p> <p>20 on the rest of the paid search campaign, even if there</p> <p>21 was some increase?</p> <p>22 A. No, our budgets were rather fixed.</p> <p>23 Q. Okay. And was the trademark search part of</p> <p>24 the overall budget a pretty tiny amount of money in the</p> <p>25 overall scheme?</p>

129	<p>1 A. It was, yes, but it got highest priority, yes.</p> <p>2 Q. Okay. So if there had been some increase in</p> <p>3 that tiny amount, it would -- would it have any kind of</p> <p>4 significant impact on the rest of paid search?</p> <p>5 A. No, it would have had to have been such a</p> <p>6 dramatic increase, that wasn't really plausible or</p> <p>7 likely in any way.</p> <p>8 MR. VINCENT: I have no further questions at</p> <p>9 this time.</p> <p>10 MR. CHIARELLO: Okay.</p> <p>11 MR. VINCENT: Do you want to go off the</p> <p>12 record?</p> <p>13 MR. CHIARELLO: Yeah, let's go off the record.</p> <p>14 (Off the record discussion.)</p> <p>15 (Brief recess.)</p> <p>16 MR. CHIARELLO: Let's go back on the record.</p> <p>17 EXAMINATION BY MR. CHIARELLO</p> <p>18 BY MR. CHIARELLO:</p> <p>19 Q. Mr. Schmidt, how did you prepare for today's</p> <p>20 deposition?</p> <p>21 A. I spoke with Garth and also reviewed a few</p> <p>22 documents.</p> <p>23 Q. Okay. Is Mr. Vincent representing you today?</p> <p>24 A. He's representing 1-800-CONTACTS, but I don't</p> <p>25 know that it necessarily means that he's representing</p>	131	<p>1 A. No.</p> <p>2 Q. Have you spoken with Jonathan Coon about this</p> <p>3 deposition?</p> <p>4 A. No.</p> <p>5 Q. Have you spoken with Jonathan Coon at all</p> <p>6 about this case?</p> <p>7 A. I haven't spoken with Jonathan Coon in years.</p> <p>8 Q. When did you speak with any -- anybody else</p> <p>9 who you worked with at 1-800-CONTACTS in that time?</p> <p>10 A. No.</p> <p>11 Q. No. Have you been deposed before?</p> <p>12 A. No.</p> <p>13 Q. Okay. If you could turn back to RX156 which</p> <p>14 is the first document Mr. Vincent gave you. I believe</p> <p>15 it is your LinkedIn page.</p> <p>16 Your record shows that you worked at</p> <p>17 1-800-CONTACTS from 2004 through 2006?</p> <p>18 A. Yeah, I think it was -- I think it was at the</p> <p>19 first week of 2006 was my last week, I believe.</p> <p>20 Q. So it was January 2006?</p> <p>21 A. Yeah.</p> <p>22 Q. Why -- why did you leave 1-800-CONTACTS?</p> <p>23 A. I -- biological clock. My wife's biological</p> <p>24 clock was ticking and we thought that if we were going</p> <p>25 to have kids, we'd better get on with it. But we also</p>
130	<p>1 me, personally.</p> <p>2 Q. Okay. How many times did you meet with</p> <p>3 Mr. Vincent or speak with him in advance of this</p> <p>4 deposition?</p> <p>5 A. Two times.</p> <p>6 Q. Two times. When did you meet?</p> <p>7 A. Once in person, two -- approximately two weeks</p> <p>8 ago, and then a very brief phone call yesterday.</p> <p>9 Q. What did you discuss?</p> <p>10 MR. VINCENT: Objection to the -- to the</p> <p>11 extent it requires to divulge attorney-client</p> <p>12 privilege. So if it's about the substance of our</p> <p>13 discussions about your time at 1-800-CONTACTS, then</p> <p>14 assert privilege.</p> <p>15 THE WITNESS: Okay. Just the high level,</p> <p>16 like, what is this case.</p> <p>17 MR. VINCENT: Yeah, just so we're objecting on</p> <p>18 the substance. He can ask you when we met or how long</p> <p>19 or where, but the substance is privileged, yeah.</p> <p>20 BY MR. CHIARELLO:</p> <p>21 Q. Have you reviewed the complaint that the FTC</p> <p>22 has issued in this case?</p> <p>23 A. No.</p> <p>24 Q. Have you had any discussions with anyone other</p> <p>25 than counsel regarding this deposition?</p>	132	<p>1 wanted to take a sabbatical of sorts and do some</p> <p>2 traveling before we hunkered down to have kids. So we</p> <p>3 left in order to travel so that we could get the travel</p> <p>4 done so that we could maybe get on with trying to have</p> <p>5 some kids.</p> <p>6 Q. Is it fair to say then that you terminated the</p> <p>7 relationship?</p> <p>8 A. I did, yeah.</p> <p>9 Q. Have you done any work for 1-800-CONTACTS</p> <p>10 since that time?</p> <p>11 A. No.</p> <p>12 Q. Since you met with Mr. Vincent two weeks ago,</p> <p>13 have you been in touch with anyone at 1-800-CONTACTS</p> <p>14 regarding any aspect of their business?</p> <p>15 A. No.</p> <p>16 Q. Have you worked in the field of contact lenses</p> <p>17 retail since that time?</p> <p>18 A. No.</p> <p>19 Q. Have you worked in the field of search</p> <p>20 advertising or marketing since that time?</p> <p>21 A. Oh, yes.</p> <p>22 Q. Okay. You said earlier -- you testified</p> <p>23 earlier that you reported to Mr. McCallum?</p> <p>24 A. That's correct.</p> <p>25 Q. Who did Mr. McCallum report to in the company?</p>

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1 A. At two different times, Brian Bethers and then
2 before that Jonathan Coon directly.
3 **Q. And during your two years at**
4 **1-800-CONTACTS, -- let me strike that.**
5 **Did you report to anyone else directly other**
6 **than Mr. McCallum?**
7 A. No.
8 **Q. And during your time at 1-800-CONTACTS, you**
9 **testified earlier that you had -- it sounded like you**
10 **inherited one report, Mr. Aston?**
11 A. Two.
12 **Q. Who was the other?**
13 A. Jason -- I forget his name. I'm sorry. I
14 should remember his name but I forgot. And he, like,
15 on my very first day was relieved.
16 **Q. Umm-hmm. What happened to Mr. Aston?**
17 A. He was not effective. We -- we let him go.
18 **Q. When did you --**
19 MR. VINCENT: Just -- I think the record you
20 said mister -- you said "Jason" and then you said
21 "Mr. Aston." I think there's a -- I think it got
22 messed up on the question.
23 BY MR. CHIARELLO:
24 **Q. Okay. Your record said that there's this --**
25 **someone named Jason and you don't recall his last name?**

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1 A. I've just forgotten his last name, yes.
2 **Q. And he finished his job right after you**
3 **started?**
4 A. I let him go upon arriving at 1-800-CONTACTS.
5 **Q. Why did you let him go?**
6 A. Because he was ineffective.
7 **Q. And you said that Mr. Aston --**
8 A. Mr. Aston stayed onboard for, I think, a
9 couple of months after my arrival, and then I let him
10 go too.
11 **Q. Okay. What were you -- go back to the staff.**
12 **Who -- who -- who did you hire to replace**
13 **these two people?**
14 A. Several people. Amy Guymon, G-u-y-m-o-n.
15 Sunny Hunt. They both have married names now, if that
16 matters. Brandon Dansie, Kevin Hancock, Bryce Craven.
17 Those were the extent of my direct reports. There were
18 a few other indirect folks that I helped to hire, but
19 that would be my -- my team.
20 **Q. I believe you testified earlier that when you**
21 **joined 1-800-CONTACTS in early 2004 you were hired or**
22 **called in to fix something.**
23 **What was it that -- which you were brought in**
24 **to fix?**
25 A. The -- the e-commerce department of the

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1 company was very poorly run. It was -- the goals were
2 unclear, the tactics were unclear and ineffective.
3 The -- the focus was unclear. The work ethic was poor.
4 There was just a number of problems with the staff and
5 the operations there.
6 **Q. Who preceded you in that position?**
7 A. Jason the fellow's name -- Matheson, Jason
8 Matheson was his name, excuse me.
9 So the two folks were Josh Aston and Jason
10 Matheson, I believe was his name. Jason was ostensibly
11 responsible.
12 **Q. What was the -- what was -- what was the --**
13 **the state -- other than it was in poor performance, but**
14 **how long had it been around prior -- e-commerce been**
15 **around at 1-800-CONTACTS prior to your joining?**
16 A. I'm uncertain. I'm speculating somewhat and
17 it's also been a long time. I think a couple years.
18 **Q. Why did they hire you?**
19 A. I think it's because I possessed the needed
20 subject matter expertise in e-commerce and also the
21 leadership capabilities to make e-commerce and online
22 advertising a core competence of the company.
23 **Q. Did your responsibility change after you**
24 **joined 1-800-CONTACTS?**
25 A. No, I filled the job description as it was

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1 written for me on day one until the day I left.
2 **Q. When you left, did you sign a non-disclosure**
3 **agreement?**
4 A. I don't recall.
5 **Q. Did you have a noncompete agreement?**
6 A. Likely, but I don't recall that either.
7 **Q. Were there any other severance agreements?**
8 A. Not that I recall, no.
9 **Q. Do you receive any other benefits from**
10 **1-800-CONTACTS today?**
11 A. No.
12 **Q. Are they paying you for your appearance today?**
13 A. No.
14 **Q. How did you learn about the position at**
15 **1-800-CONTACTS?**
16 A. An executive recruiter reached out to me.
17 **Q. If you would please turn to the document that**
18 **Mr. Vincent gave you marked CX1004.**
19 A. Yup. Got it.
20 **Q. I believe you described this document for**
21 **Mr. Aston as trying to get everyone on the same page.**
22 **Can you explain to me what you meant by**
23 **"trying to get everyone on the same page"?**
24 A. Josh and Kevin. Josh and Kevin both worked in
25 Draper in the same office, but I was a -- independent

34 (Pages 133 to 136)

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1 consultant and I wasn't in California at the time. So
2 rather than have separate conversations between Kevin
3 and I and then Josh and I, this was an attempt by Josh
4 to make sure that we were all in agreement on his
5 recommendation or on the recommendation and how to
6 proceed.

7 **Q. Okay. And when -- did you -- Mr. Aston wrote
8 this sentence under search engines: (Reading.)**

9 "It's really in their hands because they
10 are allowing people to do it."

11 A. Yes.

12 **Q. What does he mean by that?**

13 A. It's really in Google's hands because they are
14 allowing advertisers to do it.

15 **Q. And by "do it" they were allowing advertisers
16 to bid on keywords?**

17 A. To bid on trademarked keywords.

18 **Q. Okay.**

19 A. Sorry. Excuse me. I thought I turned that
20 off.

21 **Q. And I believe you testified earlier that from
22 your experience at eBay this was a policy that Google
23 had changed in the then recent past?**

24 A. As of February, this was a policy that we were
25 aware at eBay that Google was -- would be changing, but

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1 it was clear that that communication -- that had not
2 yet been communicated to the team at 1-800-CONTACTS.

3 **Q. And when you say "February," you mean
4 February 2004?**

5 A. February 2004, correct.

6 **Q. Were you still employed by eBay at the time?**

7 A. I was.

8 **Q. Were they aware that you also worked --
9 independent contractor with 1-800-CONTACTS?**

10 A. They were.

11 **Q. Was that a frequent business practice for
12 people at eBay?**

13 A. It was my only time ever --

14 **Q. Okay.**

15 A. -- and I don't know how frequent it was at
16 eBay.

17 **Q. What was the reaction at 1-800-CONTACTS when
18 they learned from you that this was a change in policy?**

19 A. It didn't seem to match with reality because
20 the old policy where you filed a form with Google still
21 seemed to be intact. And in fact, the subsequent
22 correspondence from Kevin McCallum validates that, in
23 fact, the old policy was still intact and he filled it
24 out and he had a letter for Google.

25 So it had -- it has not yet made -- the new

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1 policy had not yet made its way to 1-800-CONTACTS but
2 at the folks or for the folks at eBay here in
3 California, based on the amount of business that we did
4 with Google, I believe that we were probably the first
5 to know about this new policy.

6 **Q. And you testified before that you were one of
7 the first -- I think that's customers of Google's
8 AdWords program?**

9 A. Yes.

10 **Q. Why did you, initially when you were with
11 half.com, sign up for AdWords?**

12 A. It was very quantitative. We could determine
13 very quickly the cost efficiency of our marketing
14 expenditures, and we had some measure of control over
15 how much we decided to pay for various volume levels of
16 traffic. And so I was drawn to that particular
17 offering because of the very trackable nature of the
18 results.

19 **Q. I see.**

20 **What -- and then when you moved to eBay, if
21 you recall, how did AdWords change in those intervening
22 years?**

23 A. Depends on the month.

24 **Q. What do you mean?**

25 A. I think it's fair to characterize Google at --

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1 at the -- you know, in the year 2000, 2001, 2002 as
2 an -- forgive the analogy, but as an infant that was
3 maturing into an adult within about two years, and so
4 there were lots of growing pains. There were -- there
5 was lots of volatility in their policies and their
6 practices.

7 I can give you a few examples if you think it
8 would be helpful.

9 **Q. Sure. Maybe one?**

10 A. Okay. For example, when we began advertising
11 with Google back at half.com in 2000, we -- we paid a
12 flat cost per new buyer, cost per acquisition. We
13 called it a CPA, right. And while we were there,
14 Google dispensed with that model and instead required
15 advertisers to pay a cost per click as opposed to a
16 cost per acquisition.

17 Couple of months later, they evolved to a --
18 an auction-based model for cost per click. So within
19 the span of one year the terms of our advertising
20 agreement changed twice while I was at half.com. So it
21 was in keeping with the rapid rate of which they were
22 trying to innovate and keep up with the name.

23 **Q. And in that time you were at half.com, then
24 eBay, then to 1-800-CONTACTS and all the way through
25 there into, say, after you left 1-800-CONTACTS on your**

141	<p>1 sabbatical, did Google continue to change?</p> <p>2 A. Oh, yes. I mean, their practices were</p> <p>3 changing frequently, their policies were changing</p> <p>4 frequently. I think less frequently as they grew in</p> <p>5 size, so over time the amount of volatility was growing</p> <p>6 to be less and less, but in the early days it was very</p> <p>7 volatile.</p> <p>8 Q. Is that something you would expect to see in</p> <p>9 your experience from a new company that's grown from a</p> <p>10 nascent size to -- nascent stage to a more mature?</p> <p>11 A. Yes.</p> <p>12 Q. When the -- when -- if you would please turn</p> <p>13 to RX159 which Mr. Vincent gave you earlier today. In</p> <p>14 the first page of this or the second page is -- the</p> <p>15 last four digits on this are 2778.</p> <p>16 This is the e-mail from Mr. Daugherty at</p> <p>17 Google to Mr. Aston?</p> <p>18 A. Umm-hmm.</p> <p>19 Q. And I believe your testimony earlier was that</p> <p>20 this was Google notifying them of the change in the</p> <p>21 policy; is that right?</p> <p>22 A. Correct.</p> <p>23 Q. And attached is this -- at page 2779 and 2780,</p> <p>24 it looks like this is Google's trademark complaint</p> <p>25 procedure; is that right?</p>	143	<p>1 is a good representative example where Kevin McCallum</p> <p>2 says he spoke with Google today and includes an</p> <p>3 attached form on that. Last four digits 2784, last</p> <p>4 page of that one. This is the form.</p> <p>5 Q. And what --</p> <p>6 A. That Google asked advertisers to submit when</p> <p>7 they had an infringement claim.</p> <p>8 Q. When they would -- this form which is -- for</p> <p>9 the record is Bates label 1-800F_00102784.</p> <p>10 It looks like this is a letter from</p> <p>11 1-800-CONTACTS. Is this a 1-800-CONTACTS form or is</p> <p>12 this a Google form?</p> <p>13 A. It is, but it's followed -- sorry to get you</p> <p>14 paging back and forth, but if you go back to the</p> <p>15 exhibit that we were just on, 159, second-to-last page,</p> <p>16 document -- last four digits 2780. Google gives their</p> <p>17 explicit guidance on what should be included in those</p> <p>18 letters.</p> <p>19 Q. Okay.</p> <p>20 A. This is just a representative example. These</p> <p>21 are not the same guidelines that map to Kevin's letter</p> <p>22 because it's the new policy.</p> <p>23 Q. What is the expectation that Google will do</p> <p>24 when they get this form under the old form that he</p> <p>25 sent?</p>
142	<p>1 A. Correct.</p> <p>2 Q. Now, are you a trademark lawyer?</p> <p>3 A. No.</p> <p>4 Q. Do you understand the elements of a trademark</p> <p>5 claim, a legal claim for trademark infringement?</p> <p>6 A. I rely on counsel to advise on those matters.</p> <p>7 Q. Okay. So just to make the record clear,</p> <p>8 you're not competent to testify on whether certain</p> <p>9 conduct would or would not be legally trademark</p> <p>10 infringement?</p> <p>11 A. That's correct.</p> <p>12 Q. Is that right?</p> <p>13 The -- the new policy here, and I want to make</p> <p>14 sure I characterize this correctly.</p> <p>15 This was, from your understanding, a</p> <p>16 relatively new policy in the spring of 2004; is that</p> <p>17 right?</p> <p>18 A. Correct.</p> <p>19 Q. And your testimony earlier was that this was,</p> <p>20 in many ways, changing the -- the game as far as how</p> <p>21 trademark complaints were handled?</p> <p>22 A. Yes.</p> <p>23 Q. How were trademark complaints handled prior to</p> <p>24 this through Google?</p> <p>25 A. The document that was provided earlier. 157</p>	144	<p>1 A. Funny you should ask.</p> <p>2 Q. And particularly, I'm looking at -- you</p> <p>3 pointed me to the form on 102780, and I'm looking at</p> <p>4 the bold letters up there that says "Trademark</p> <p>5 Complaint Procedure - Trademark rights outside US and</p> <p>6 Canada."</p> <p>7 A. Google would typically give guidance on how</p> <p>8 such a complaint letter should be formatted to them, so</p> <p>9 Kevin's letter followed a recipe that was previously</p> <p>10 provided by Google on how the -- how the complaint</p> <p>11 should be filed with Google.</p> <p>12 Q. And that was in the United States?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And so this new policy -- you pointed</p> <p>15 us to --</p> <p>16 A. I was just using this as a -- yes, the new</p> <p>17 policies. I was just using this as a representative</p> <p>18 example of Google gives you a recipe to follow when you</p> <p>19 have a complaint. Not to specify that specify</p> <p>20 that recipe.</p> <p>21 Q. Okay. And so the -- if you follow the recipe</p> <p>22 prior to this new policy, what was the expectation that</p> <p>23 Google would do?</p> <p>24 A. The expectation was eroding very quickly</p> <p>25 underfoot. The expectations had previously been that</p>

145	<p>1 Google would very swiftly take action. They would 2 investigate what the claim that was being made. They 3 would follow up with the advertiser and either ask the 4 advertiser to make changes or block advertisers' ads in 5 some way. And they would do it swiftly. 6 Q. Was there an expectation that Google would 7 undertake a trademark infringement case on a 8 complainant's behalf? 9 A. I don't know if that was ever an expectation 10 that they would file a claim, no. They would go 11 directly to the advertiser and request that the 12 advertiser make changes to their ads or to their 13 keywords, and if -- and if they -- if they didn't see 14 those changes being made, they blocked that 15 advertiser's ads. 16 Q. Was the basis for doing that because it 17 violated Google's policy or was it because they believe 18 it violated the trademark laws? 19 A. It was my understanding it was based on 20 trademark laws. This was my understanding. 21 Q. Was it your understanding that they would -- 22 that Google would undertake a representation on behalf 23 of the complaining party to resolve the trademark 24 dispute? 25 A. I'm uncertain about that.</p>	147	<p>1 MR. VINCENT: Objection; assumes facts. 2 Misstates the document. 3 THE WITNESS: I don't understand the question. 4 BY MR. CHIARELLO: 5 Q. Okay. Let's -- I think I can ask a better 6 question if we can go down to the space where it says 7 "Please Note." 8 A. Okay. 9 Q. It says: (Reading.) 10 "The following procedure applies only to 11 the use of trademarks in advertisements, 12 which are clearly marked as sponsored 13 links on our results pages." 14 Do you see where I read that from? 15 A. Yes. 16 Q. What does that mean, as you read it today? 17 A. Google search engine results pages have always 18 had two subsets. The first is sponsored links. And 19 those links appear there because advertisers have paid 20 to put them there. The other section is commonly 21 referred to as natural search results or organic search 22 results, and there is nothing that an advertiser can do 23 to influence their position within that subset of the 24 search results. 25 Q. Umm-hmm.</p>
146	<p>1 Q. Okay. So the new policy came about in the 2 spring of 2004. It says as stated -- and I'm reading 3 here from the Bates label 2779: (Reading.) 4 As stated in our Terms and Conditions, 5 the advertisers themselves are 6 responsible for the keywords and ad text 7 that they choose to use. Accordingly, 8 we encourage trademark owners to resolve 9 their disputes directly with the 10 advertisers, particularly because the 11 advertisers may have similar 12 advertisements on their sites. 13 A. "On other sites." 14 Q. "On other sites." 15 Let's start with your correction there, "on 16 other sites." 17 What does that mean, as you read that today? 18 A. Typically, the advertisers that would place 19 ads on trademarked keywords would not be doing so 20 exclusively on Google; they would be doing so also on 21 other search engines. 22 Q. So does this suggest that if someone was using 23 a trademark within an ad, that Google is suggesting 24 that you shouldn't just resolve it through Google but 25 resolve it with the party?</p>	148	<p>1 A. So Google is trying to point out specifically 2 that this policy is only for the sponsored links and 3 does not affect the organic or natural search results 4 that comprise the other subset of Google search engine 5 result pages. 6 Q. Do you read that the words "use of trademarks 7 in advertisements" to mean anywhere on the sponsored 8 links or within the content of the sponsored links? 9 MR. VINCENT: Objection; vague. 10 THE WITNESS: I don't know. I'm sorry. I 11 don't understand your question. 12 BY MR. CHIARELLO: 13 Q. What do you take this to mean: (Reading.) 14 "The use of trademarks in 15 advertisements." 16 What does that mean? 17 A. I interpret it to be just as inclusively as 18 the wording is generic. The use of trademarks in 19 advertisements, any such use. 20 Q. Okay. The next sentence says: (Reading.) 21 "We do not take action on objections to 22 the use of trademarks in sites that 23 appear in our search results, i.e., the 24 left-side of a results page." 25 Do you understand what that means?</p>

149	<p>1 A. That's the natural or organic search engine</p> <p>2 results subset of the page.</p> <p>3 Q. Did you ever speak with your representatives</p> <p>4 at Google about what this means?</p> <p>5 A. No.</p> <p>6 Q. No. Did your -- to the extent you know, did</p> <p>7 1-800-CONTACTS ever receive legal advice as it related</p> <p>8 to what this means?</p> <p>9 A. Legal advice from whom?</p> <p>10 Q. From 1-800-CONTACTS. I'm not asking for the</p> <p>11 content of the advice. I'm just asking if that was</p> <p>12 asked.</p> <p>13 A. I'm not aware.</p> <p>14 Q. If you look down below, there's a bold. It</p> <p>15 says: (Reading.)</p> <p>16 "Trademark Complaint Procedure -</p> <p>17 Trademark rights in the US and Canada."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. The first sentence reads: (Reading.)</p> <p>21 When you receive a complaint from a</p> <p>22 landmark -- a trademark owner, we will</p> <p>23 only investigate whether the</p> <p>24 advertisements at issue are using the</p> <p>25 trademark term in ad text. If they are,</p>	151	<p>1 ...we will only investigate whether the</p> <p>2 advertisements at issue are using</p> <p>3 trademarked term in ad text.</p> <p>4 Is that a change of policy as it relates to</p> <p>5 use in ad text?</p> <p>6 A. Yes, because they would previously take action</p> <p>7 if the ads were triggered by a trademarked keyword.</p> <p>8 Now they're saying they will only take action if it's</p> <p>9 in the ad text.</p> <p>10 Q. Okay.</p> <p>11 A. And it's because that's -- that can be done in</p> <p>12 an automated way.</p> <p>13 Q. Did you speak to someone at Google about how</p> <p>14 to resolve disputes with other advertisers?</p> <p>15 A. Yes.</p> <p>16 Q. What did you -- who did you speak with at</p> <p>17 Google?</p> <p>18 A. Daniel Daugherty and Tim Moniyan, the two</p> <p>19 folks that I mentioned earlier.</p> <p>20 Q. Did they suggest taking legal action against</p> <p>21 competitors who were bidding on trademarked keywords?</p> <p>22 A. Not that I recall, no.</p> <p>23 Q. What action did they suggest taking against</p> <p>24 competitors who were bidding on trademarked keywords?</p> <p>25 A. They didn't suggest a specific course of</p>
150	<p>1 we will require the advertiser to remove</p> <p>2 the trademarked term from the text of</p> <p>3 the ad and prevent the advertiser from</p> <p>4 using the trademarked term in ad text in</p> <p>5 the future.</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Then it goes on to: (Reading.)</p> <p>9 Please note we will not disable keywords</p> <p>10 associated with trademark usage. In</p> <p>11 addition, please note that any such</p> <p>12 investigation will only affect ads</p> <p>13 served on or by Google.</p> <p>14 That paragraph, what does that mean to you,</p> <p>15 relative to what we've been talking about today,</p> <p>16 keyword search advertising?</p> <p>17 A. Google is very clearly saying that we will not</p> <p>18 disable keywords associated with trademark usage and</p> <p>19 that -- you know, again, I would -- my attention</p> <p>20 immediately goes to the first paragraph. (Reading.)</p> <p>21 "...we encourage trademark owners to</p> <p>22 resolve their disputes directly with the</p> <p>23 advertisers."</p> <p>24 Q. And the -- the first sentence of that</p> <p>25 paragraph says: (Reading.)</p>	152	<p>1 action, other than to suggest that whatever course of</p> <p>2 action would be up for us to decide and that it would</p> <p>3 not be Google's responsibility to intermediate or</p> <p>4 intercede any longer.</p> <p>5 When it came to actually making the settlement</p> <p>6 stick and enforcing any type of settlement that might</p> <p>7 be achieved, we were directed to use negative keywords</p> <p>8 and at that point we were -- we had already been using</p> <p>9 negative keywords at 1-800-CONTACTS, so we didn't need</p> <p>10 much of an instruction.</p> <p>11 Q. You just, I think, maybe jumped something</p> <p>12 there in that answer.</p> <p>13 A. Sorry.</p> <p>14 Q. You said, with respect to a settlement that</p> <p>15 might be achieved.</p> <p>16 Did Google advise you with respect to reaching</p> <p>17 an agreement or settling with an advertiser?</p> <p>18 A. They didn't -- they were actually completely</p> <p>19 hands off. They were eager to get out of any</p> <p>20 involvement between advertiser and trademark holder.</p> <p>21 So how to -- whether to reach an agreement, whether an</p> <p>22 agreement was necessary, how to address it, they wanted</p> <p>23 to abdicate any involvement in it.</p> <p>24 Q. Did they tell you one way to reach an</p> <p>25 agreement is you should use negative keywords?</p>

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1 A. No, it was if you come to any type of
2 agreement, a way that you can enforce it is negative
3 keywords.
4 **Q. And they told you one way to enforce it is**
5 **negative keywords?**
6 A. Right.
7 **Q. And when you were talking to them about an**
8 **agreement, what were -- what was the nature of the**
9 **agreement you were discussing?**
10 A. Like I said, they explicitly didn't want to
11 suggest an agreement, talk about an agreement, get
12 involved in any type of agreement. They didn't want to
13 administer to any of these grievances at all, except to
14 give us the tools to enforce them if we arrived at them
15 on our own.
16 **Q. What are the tools that they'd give you?**
17 A. Negative keywords.
18 **Q. Anything else?**
19 A. That's the extent of it.
20 **Q. And did they take any positions in any of**
21 **their policies and procedures with respect to their**
22 **search engine result page and the quality of the**
23 **results that were delivered on that page?**
24 A. Never.
25 **Q. Did they take a position as to whether or not**

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1 **they were creating confusing results?**
2 A. Never. In fact, it was church and state, very
3 much there. Very much like a newspaper, television
4 channel, any other content provider. There's editorial
5 over here and then there's people that are selling ads
6 over here. There was kind of a -- a clear line of
7 distinction between the two. What you did with one had
8 no impact of -- on what you did with the other.
9 **Q. Right, but what I'm asking you is that -- did**
10 **Google ever take a position that the whole page that**
11 **the consumer or their user or the person who's typing**
12 **in a query at Google, that deliverable is confusing in**
13 **one part but not the other or is confusing at all?**
14 A. I don't --
15 MR. VINCENT: Objection; vague; compound.
16 THE WITNESS: I don't think Google would ever
17 admit to putting something confusing in front of a
18 user, if that's what you're asking.
19 BY MR. CHIARELLO:
20 **Q. I'm asking if they ever talked about the**
21 **content of their page and whether or not the**
22 **combination of information that's provided on a search**
23 **engine result page would be confusing.**
24 MR. VINCENT: Same objections.
25 Go ahead.

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1 THE WITNESS: Not -- not explicitly. It was
2 left to those of us that were using these pages to
3 study them.
4 BY MR. CHIARELLO:
5 **Q. Okay. When you joined 1-800-CONTACTS back in**
6 **2004 -- and I asked you a little bit about this, but if**
7 **you could just put a little bit more content in there.**
8 **What was their e-commerce strategy at the**
9 **time? And I know you've testified that it was --**
10 **sounded like it was in disarray. But if you remember,**
11 **what was the plan in place that you quickly changed?**
12 A. They didn't really have one, actually. That
13 was a bit of the problem.
14 Consistency of messaging, integration with the
15 call center, usability of the website, speed with which
16 the pages rendered. I mean, that -- nothing was really
17 working well. No part of it was working well.
18 **Q. Were you able to order contact lenses online?**
19 A. Barely. I would venture to use the word
20 "barely," yes.
21 **Q. At that time and in your experience coming**
22 **from eBay and half.com, were consumers buying lots**
23 **of -- buying products online?**
24 A. Yes.
25 **Q. Was Amazon, for example, which is ubiquitous**

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1 **everywhere, was that taking off at the time as an**
2 **online retailer?**
3 A. Yes, although I'd say that they were still in
4 a nascent stage themselves. They only -- they sold a
5 handful of categories and products during that time.
6 **Q. When you jumped into the online sale of**
7 **contact lenses, were there other companies out there**
8 **selling contact lenses online?**
9 A. Yes.
10 **Q. In your opinion, were they outpacing**
11 **1-800-CONTACTS in that area?**
12 A. Not clear. We were not privy to their volume
13 or their revenue numbers.
14 **Q. Did you assess the competitive landscape when**
15 **you joined the company?**
16 A. We did. There were a lot of crabs in the
17 bucket, so to speak.
18 It was difficult for us to know how much
19 volume they were doing in revenue orders.
20 **Q. The crabs in the bucket comment that you made,**
21 **was that targeted towards the lower-priced competitors?**
22 A. Yes, explicitly targeted at the low-priced
23 competitors.
24 **Q. Is that -- whoever came up with the concept at**
25 **1-800-CONTACTS, is that kind of their way to saying**

39 (Pages 153 to 156)

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1 they provide the -- a product at a lower price, but not
2 with all of the other service offerings that you talked
3 about?

4 A. One is in no way distinguishable from the
5 other, yes.

6 **Q. What do you mean by "one is in no way
7 distinguishable"?**

8 A. Not one of those competitors is
9 distinguishable from the other in any way. They were
10 all strictly competing on price.

11 **Q. Okay. And so at the time that you joined in
12 2004, were those other competitors -- I think you
13 described them as "crabs in the bucket," but they were
14 indistinguishable because they were just competing on
15 price?**

16 A. Yeah, and depending upon your perspective they
17 were either -- and the day of the week, they were
18 either, you know, six crabs in the bucket or three or
19 20. The names seemed to come and go. There seemed to
20 be a lot of transitory businesses that were entering
21 and leaving the space.

22 **Q. After you joined in 2004, were you in part
23 responsible for building 1-800-CONTACTS' brand?**

24 A. Yes.

25 **Q. And what did you do to build or strengthen the**

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1 brand?

2 A. Well, part of service was giving you a
3 reliable, credible experience when you came on to the
4 site: one that was easy to use, one that was very
5 responsive, intuitive, easy for you to find your
6 contact lenses, easy for you to find your previous
7 orders and to reorder lenses.

8 And so, so much of what comprises a
9 high-quality, credible user experience on an e-commerce
10 website like this was missing at 1-800-CONTACTS, so we
11 tried to put that in place. It needed to behave and
12 feel and respond in a first-class manner in every way.

13 **Q. What role did Jonathan Coon play with regard
14 to that brand management at the time you joined the
15 company? I apologize. I think I misspoke when I said
16 "brand management." Strengthening the brand that --**

17 A. I think the strong hand in this was really
18 Kevin McCallum.

19 He came from a traditional brand-marketing
20 background and had a lot of experience in subject
21 matter expertise in how to build a brand and how to
22 maintain a strong brand. I think Jonathan's
23 contribution was, I guess, kind of organizational
24 alignment to make sure that everyone was indeed aligned
25 around the importance of trust and credibility and

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1 service. Less about the branding tactics specifically,
2 Jonathan wasn't really involved in that.

3 **Q. How long had Mr. McCallum worked with 1-800
4 before you joined?**

5 A. Couple of years, but I -- I hesitate to peg an
6 exact number because I really don't remember.

7 **Q. Are you -- sitting here today, are you
8 familiar with 1-800-CONTACTS' trademark enforcement
9 program?**

10 A. Not today, not in a contemporary way.

11 **Q. Going back in time, were you familiar with a
12 trademark enforcement program within 1-800-CONTACTS
13 when you were working there?**

14 A. No.

15 **Q. Were you familiar with any type of efforts
16 to --**

17 A. As I -- if you --

18 **Q. -- protect the trademark while you were there?**

19 A. Yeah. As a proper term, I don't recall a
20 specific effort or team that was tasked with -- with
21 this. As a proper noun, trademark enforcement,
22 generally speaking, we cared very much about protecting
23 our trademark, but I don't remember an isolated team
24 or that sort of an issue as it was --

25 **Q. Did you work at all with David Zeidner when**

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1 you were there?

2 A. Yeah, I did.

3 **Q. What did you work with him on?**

4 A. He was on the legal team, and so -- I mean, a
5 lot of marketing contracts and marketing agreements
6 would go through the legal team for review and he might
7 have been one of them that reviewed them from time to
8 time.

9 **Q. Did you work with Joe Zeidner?**

10 A. Yes.

11 **Q. What did you work with him on?**

12 A. The same. Anything that required legal review
13 needed to go through his team. So I would typically
14 start with Joe and then Joe would delegate to whichever
15 person on his team was best suited.

16 **Q. Did you discuss trademark issues with either
17 Joe or David Zeidner?**

18 MR. VINCENT: Object to the extent it will
19 require you to reveal the subject of communications
20 with your in-house counsel.

21 THE WITNESS: I think that's protected.

22 BY MR. CHIARELLO:

23 **Q. Did you discuss search advertising with David
24 Zeidner?**

25 MR. VINCENT: Same objections.

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<p>1 THE WITNESS: Same objection. 2 BY MR. CHIARELLO: 3 Q. Okay. 4 A. Yeah, that's privileged. 5 Q. Did you discuss anything that would be 6 non-privileged related to search advertising with David 7 Zeidner, for example, how search advertising worked, 8 how Google worked, how the products that 1-800 was 9 investing in through search advertising worked? 10 A. Not that I can recall. 11 MR. VINCENT: If there's something you can 12 talk about separate from what's legal. 13 THE WITNESS: Yeah, I mean, we talked about 14 golf, but I -- not that I recall. 15 BY MR. CHIARELLO: 16 Q. And so to be clear, there -- there -- anything 17 you discussed about search advertising with both David 18 and Joe Zeidner would be privileged? 19 A. I believe so, and it's because we were -- we 20 were really committed to making this a core competence 21 at the company. So yes, I would consider that to be 22 privileged and not generic in nature. 23 Q. If you know, do you know whose idea it was to 24 sue or challenge competitors to get them to stop 25 bidding on search advertising at 1-800-CONTACTS?</p>	<p>1 A. I forgot the exact date. 2 Q. So from January until early April? 3 A. Late January until sometime in April, yeah. 4 Q. During that time you were an independent 5 contractor? 6 A. Yeah. 7 Q. There was no time when you overlapped as a 8 dual employee? 9 A. No, no, no. 10 Q. Okay. I wanted to ask a few questions about 11 Kevin McCallum. 12 How was he regarded in the company? For 13 example, was he a visionary? 14 MR. VINCENT: Objection; vague; lacks 15 foundation; calls for speculation. 16 If you know, you can -- you should answer it. 17 THE WITNESS: I'm not sure how -- I'm not sure 18 how others viewed him. I can only speak to how I 19 viewed him. 20 BY MR. CHIARELLO: 21 Q. How did you view him? 22 A. Very high-integrity individual, very 23 charismatic guy, and someone who had genuine affection 24 for the people that worked for him. 25 Q. Umm-hmm.</p>
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<p>1 A. No. 2 MR. CHIARELLO: I'm handing you an exhibit that 3 is marked CX1007. 4 [Whereupon, Exhibit CX1007 was 5 referenced.] 6 MR. CHIARELLO: Oh, they're already premarked. 7 I invite you to look through that document, 8 please. 9 BY MR. CHIARELLO: 10 Q. My first question will be, when you're ready, 11 what is this? 12 A. This is a draft of my first major deliverable 13 after joining as an independent contractor or 14 consultant, a draft of the online marketing strategy. 15 Q. Okay. And the cover page, this is an e-mail 16 from you to Josh Aston and Kevin McCallum; is that 17 correct? 18 A. Yes. 19 Q. And this -- the date here of February 20th, 20 2004, were you still an independent contractor? 21 A. Yes. 22 Q. Just so my timeline is complete, when did you 23 terminate your relationship with eBay? 24 A. April-something of 2004. 25 Q. So from --</p>	<p>1 Was he older than you? 2 A. He was. 3 Q. Was he a mentor? 4 A. He was. 5 Q. In what ways was he a mentor? 6 A. As a -- as an example of great leadership, he 7 was a mentor rather indirectly, and then explicitly as 8 a subject matter expert in branding and brand 9 development he was a mentor. I learned a lot from 10 watching him do what he did and probably far more than 11 he learned from me with regard to e-commerce. 12 Q. The -- if you turn to your first deliverable. 13 What were you -- what was your overall theme 14 that you were trying to convey understanding that you 15 had just come into a company that sounded like, in your 16 words, that e-commerce was -- was at best nascent and 17 maybe in disarray -- at best nascent and was -- seemed 18 to be in disarray? 19 A. The thing they wanted under this was really -- 20 you know, from point A, where are we at, an assessment 21 of where we're at today; point B, where do you aspire 22 to go, and then a line in between, how might you 23 propose we might get there. 24 I think this was being received by an audience 25 that understood very well that I was still getting</p>

165	<p>1 familiar with the company --</p> <p>2 Q. Umm-hmm.</p> <p>3 A. -- and that there was a fair measure of</p> <p>4 speculation in what I was proposing here or what I was</p> <p>5 presenting here, but they wanted my thoughts</p> <p>6 nonetheless.</p> <p>7 Q. If you would, please, turn to the page that</p> <p>8 ends in 006 --</p> <p>9 A. Yup.</p> <p>10 Q. -- of the attachment. It says "Top 10" -- it</p> <p>11 says "2004 Online Marketing Action Plan" and it has ten</p> <p>12 priorities there.</p> <p>13 Do you see that?</p> <p>14 A. Yeah.</p> <p>15 Q. Number 1, it says: (Reading.)</p> <p>16 "Get staff appropriately and establish</p> <p>17 role clarity."</p> <p>18 What did you mean by that?</p> <p>19 A. That the two folks that I had inherited were</p> <p>20 ineffective and not fit for the job.</p> <p>21 Q. And number 2, what did you mean by "Improve</p> <p>22 granularity and availability of performance data"?</p> <p>23 A. So much of what you do online is trackable, is</p> <p>24 quantitative in nature. And there was a lot of</p> <p>25 performance data that we weren't collecting and</p>	167	<p>1 the online context and the price in the phone center --</p> <p>2 A. Call center.</p> <p>3 Q. Call center context, what do you mean that --</p> <p>4 that they're two different things?</p> <p>5 A. When you call into the call center, you are</p> <p>6 indicating through your choice of medium something</p> <p>7 about you as a customer.</p> <p>8 Q. By "you" you mean the customer?</p> <p>9 A. Right.</p> <p>10 Q. Okay.</p> <p>11 A. When one chooses to pick up the phone to order</p> <p>12 contact lenses, there are a set of expectations that</p> <p>13 they carry with them that we should understand.</p> <p>14 Q. What are those?</p> <p>15 A. And those are very different -- we came to</p> <p>16 find there was a very different set of expectations</p> <p>17 that a different customer might carry as indicated by</p> <p>18 their choice of the online medium to order their</p> <p>19 contact lenses.</p> <p>20 For example, in the call center, you had the</p> <p>21 benefit of being able to talk to a human being. And</p> <p>22 you might be really concerned -- you would likely be</p> <p>23 more concerned about reliability, right, when you</p> <p>24 picked up the phone.</p> <p>25 I want to talk to a human being. I'm going to</p>
166	<p>1 certainly were not analyzing and missing out on the</p> <p>2 benefits of this medium when you fail to do that.</p> <p>3 Q. If you scroll down -- or look down to number</p> <p>4 6, it says: (Reading.)</p> <p>5 "Tighten and clarify the online customer</p> <p>6 acquisition proposition."</p> <p>7 What does that mean?</p> <p>8 A. It was unclear -- the messaging that we were</p> <p>9 presenting to our online customers was unclear at that</p> <p>10 moment, and we needed to make it clear.</p> <p>11 Q. What did you mean by number 7: (Reading.)</p> <p>12 "Integrate online promotional and price</p> <p>13 testing into broader corporate price</p> <p>14 elasticity studies"?</p> <p>15 A. It seemed to me that there was a pretty strong</p> <p>16 understanding of how price was perceived in a call</p> <p>17 center context, and there was not much of a good</p> <p>18 understanding how price was perceived in an online</p> <p>19 context.</p> <p>20 And so I saw how strong the understanding was</p> <p>21 in one part of the business and then how there was no</p> <p>22 understanding in the online context, and I wanted to</p> <p>23 make sure that we understood both contexts well and</p> <p>24 that there was some relationship between the two.</p> <p>25 Q. When you say relationship between the price in</p>	168	<p>1 commiserate with them. I want to make sure all my</p> <p>2 details of my prescription are just as they should be.</p> <p>3 I don't want anything left to the computer to mess up.</p> <p>4 I want to talk to a human being. So reliability for</p> <p>5 those -- for those customers was paramount, right?</p> <p>6 In an online context, it was perhaps less</p> <p>7 about reliability and more about speed. I want to</p> <p>8 place this order today. When are my contact lenses</p> <p>9 going to get packaged? When are they going to get</p> <p>10 shipped? When am I going to receive them? And you</p> <p>11 could glean that information by studying those</p> <p>12 customers carefully.</p> <p>13 In the call center, you can derive what's</p> <p>14 important to them if you observe a large sample of</p> <p>15 calls, and then online if you talk to some of those</p> <p>16 customers, you can then observe what's important to</p> <p>17 them there.</p> <p>18 And so we understood, in the call center</p> <p>19 context what was important to customers and what their</p> <p>20 expectations were about price and a number of different</p> <p>21 variables in the business. We didn't understand that</p> <p>22 online. Online was this big gray area. Nobody knew</p> <p>23 who those customers were or why they were coming to us,</p> <p>24 what was important to them.</p> <p>25 Q. I see.</p>

169	<p>1 A. I wanted to fix that.</p> <p>2 Q. So in 7 and also, I guess, in 8 where it says:</p> <p>3 (Reading.)</p> <p>4 "Secure support from Finance on pricing</p> <p>5 analysis."</p> <p>6 Is that what you were trying to understand was</p> <p>7 that gray area?</p> <p>8 A. Correct.</p> <p>9 Q. And in the call center, where you described</p> <p>10 someone calling up and speaking one-on-one with a</p> <p>11 person, as far as resources within 1-800-CONTACTS,</p> <p>12 was -- was there a difference between the two as far as</p> <p>13 the amount of human resources, for example, needed to</p> <p>14 operate the online function versus the call center?</p> <p>15 A. Of course. Yeah, the call center was very</p> <p>16 labor intensive.</p> <p>17 Q. But did 1-800-CONTACTS keep the price the same</p> <p>18 across the two mediums?</p> <p>19 A. There was always a fair amount of, like,</p> <p>20 experimentation across both mediums, so I can't say, as</p> <p>21 a rule, there was consistency with regard to price</p> <p>22 treatment from one channel to another.</p> <p>23 Q. This number 9, it says: (Reading.)</p> <p>24 "Determine the future of eVision."</p> <p>25 What does that mean?</p>	171	<p>1 A. Cleaning up the mess?</p> <p>2 Q. Well, I was going to say terminating the</p> <p>3 program. Did it --</p> <p>4 A. Yes.</p> <p>5 Q. Did it end while you were there?</p> <p>6 A. Yes.</p> <p>7 MR. CHIARELLO: I'm handing you an</p> <p>8 exhibit marked CX1015.</p> <p>9 [Whereupon, Exhibit CX1015 was</p> <p>10 referenced.]</p> <p>11 BY MR. CHIARELLO:</p> <p>12 Q. And take a moment to look it over. And focus</p> <p>13 down below at the e-mail from Kevin McCallum.</p> <p>14 A. Okay.</p> <p>15 Q. What is this document?</p> <p>16 A. I think it's reflective of the internal</p> <p>17 discussions that were happening about what our price</p> <p>18 level should be both in the call center and online.</p> <p>19 Whether they should be -- the pricing policies should</p> <p>20 be consistent between the two, and if not, why not,</p> <p>21 how.</p> <p>22 This was a -- an issue -- I think this</p> <p>23 document represents just how much of a robust</p> <p>24 discussion there was and how much uncertainty there was</p> <p>25 about that pricing policy.</p>
170	<p>1 A. There had been a -- I would say a -- an</p> <p>2 imprudent experiment that was done with a launching of</p> <p>3 a secondary brand to sell contact lenses online, so</p> <p>4 that perhaps the call center would be 1-800-CONTACTS</p> <p>5 and the website would be eVision --</p> <p>6 Q. Umm-hmm.</p> <p>7 A. -- and it was poorly defined, and it wasn't</p> <p>8 based on any customer insights. And it was this</p> <p>9 wayward kind of listless experiment that was just</p> <p>10 sitting out there. No one was really guiding it.</p> <p>11 There seemed to be no purpose behind it.</p> <p>12 Q. Well, did it exist before you got to</p> <p>13 1-800-CONTACTS?</p> <p>14 A. Yes.</p> <p>15 Q. And did you ever talk to the people who came</p> <p>16 up with the concept of eVision?</p> <p>17 A. Yeah, and there was -- there was no strong</p> <p>18 basis for it. It seemed to be conflating activity with</p> <p>19 progress.</p> <p>20 Q. Was it an attempt to -- you said it was a</p> <p>21 different brand. Was it an attempt to launch some sort</p> <p>22 of different user experience?</p> <p>23 A. Nobody could really articulate why it was</p> <p>24 done, actually, which was disturbing to find.</p> <p>25 Q. Were you responsible for --</p>	172	<p>1 Q. The two lines -- I'm looking at the e-mail in</p> <p>2 the middle of the page. It says Saturday, May 8th,</p> <p>3 2004, 1:27 p.m. It says from Kevin McCallum.</p> <p>4 Do you see that?</p> <p>5 A. Umm-hmm.</p> <p>6 Q. And it says to Bruce Christy. Who was that?</p> <p>7 A. He was the director of design.</p> <p>8 Q. Was he somebody you hired?</p> <p>9 A. Creative director.</p> <p>10 Q. A creative director, does that mean the ad</p> <p>11 text in the search advertising?</p> <p>12 A. No.</p> <p>13 Q. Is that the labeling on the box?</p> <p>14 A. It was the logo on the box, that kind of</p> <p>15 stuff, yeah. Artwork.</p> <p>16 Q. And Ann Harrison, who is that?</p> <p>17 A. She was my colleague, my counterpart, and she</p> <p>18 administered to all of the offline advertising programs</p> <p>19 so any TV that we ran, any radio that we ran, any focus</p> <p>20 groups that we ran about those ads, and then the direct</p> <p>21 mail pieces that we ran, she was responsible for</p> <p>22 executing those.</p> <p>23 Q. And then it's you and then Sunny Baker.</p> <p>24 Was that someone you hired?</p> <p>25 A. Umm-hmm.</p>

173	<p>1 Q. Did Sunny work in search advertising?</p> <p>2 A. She didn't. She worked on the website</p> <p>3 experience, how to make the site itself better.</p> <p>4 Q. Okay. Who was Kevin Hancock?</p> <p>5 A. He was responsible for managing our affiliate</p> <p>6 program.</p> <p>7 Q. So if you turn over the page to CX1015 page 2.</p> <p>8 In the -- Kevin writes -- Mr. McCallum writes:</p> <p>9 (Reading.)</p> <p>10 "In time, I believe we should be testing</p> <p>11 a three tier pricing model."</p> <p>12 Do you see that?</p> <p>13 A. Yup.</p> <p>14 Q. And he says: (Reading.)</p> <p>15 "1. Call Center Pricing (high).</p> <p>16 2. 1-800 Website Pricing (medium).</p> <p>17 3. eVision pricing (low)."</p> <p>18 What do you understand him to mean there?</p> <p>19 A. He's conveying his belief about what we should</p> <p>20 be testing in regard to prices in each of our different</p> <p>21 channels. And as he points out later in the e-mail,</p> <p>22 his position is -- is not shared on the leadership team</p> <p>23 or even among all of us in marketing.</p> <p>24 Q. Umm-hmm.</p> <p>25 A. He was just floating out his thinking for our</p>	175	<p>1 just made, right? (Reading.)</p> <p>2 Much more memorable number than doctor's</p> <p>3 office.</p> <p>4 A. Correct.</p> <p>5 Q. Then it says point B: (Reading.)</p> <p>6 The Call Center offers different</p> <p>7 benefits from -- benefits than our</p> <p>8 website(s).</p> <p>9 And the first point says: (Reading.)</p> <p>10 "Much higher level of customer service."</p> <p>11 Do you see that?</p> <p>12 A. Yes.</p> <p>13 Q. Do you agree with that?</p> <p>14 A. Certainly. I mean, you could spend three</p> <p>15 hours on the phone with one of our call center</p> <p>16 representatives if you wanted to. If you wanted them</p> <p>17 to go get a box and give you the measurements of</p> <p>18 exactly how big the box is your contacts would be</p> <p>19 coming in because you want to see if it's going to fit</p> <p>20 in your mailbox, they'd go do that. That wasn't</p> <p>21 available to you if you ordered online.</p> <p>22 Q. The second point there: (Reading.)</p> <p>23 "Personal help from expert -</p> <p>24 reassurance."</p> <p>25 What does that mean?</p>
174	<p>1 consideration.</p> <p>2 Q. Is -- as premises here, whether or not they're</p> <p>3 accepted, but the premises that he said: (Reading.)</p> <p>4 "No other call center with a well known</p> <p>5 phone number."</p> <p>6 What -- what do you think he meant there?</p> <p>7 A. I mean, it's just -- it's very memorable that</p> <p>8 the name of the company is a phone number that's very</p> <p>9 easy to remember. If that's your -- that's what I</p> <p>10 believe he means there.</p> <p>11 Q. Is that compared to other companies that might</p> <p>12 have a call center? Is that what you mean?</p> <p>13 A. I'm not sure I understand the question.</p> <p>14 Q. Is he comparing 1-800's call center with other</p> <p>15 call centers?</p> <p>16 A. In terms of the memorability of the phone</p> <p>17 number, yes. I think he's saying our phone number is</p> <p>18 easier to remember than in other companies, yes.</p> <p>19 Q. The second point, they have: (Reading.)</p> <p>20 "No other call center that is supported</p> <p>21 with strong broadscale advertising."</p> <p>22 Is that similar comparing 1-800 with other</p> <p>23 companies that have call centers?</p> <p>24 A. I believe that's true.</p> <p>25 Q. And I think the third point is the one you</p>	176	<p>1 A. How does this work? This is my first time</p> <p>2 buying contact lenses online. I don't know how this is</p> <p>3 going to go. I am uncertain. I'm worried. I'd like a</p> <p>4 human being to put me at ease and explain the process</p> <p>5 to me.</p> <p>6 Again, that's something that could only be</p> <p>7 done in the call center.</p> <p>8 Q. And that -- that, what you just described,</p> <p>9 didn't exist on the online situation?</p> <p>10 A. That's correct.</p> <p>11 Q. The last point says: (Reading.)</p> <p>12 "C. In different forums on the Web we</p> <p>13 will need multiple price benefit</p> <p>14 platforms. - Price transparency is much</p> <p>15 higher in specific Web forums."</p> <p>16 What does that mean to you?</p> <p>17 A. It's easier for a customer to do competitive</p> <p>18 price shopping online than it is for them to call --</p> <p>19 the relative ease is -- is higher than calling your</p> <p>20 doctor's office, then calling another doctor's office,</p> <p>21 then calling a retailer, and then calling up the call</p> <p>22 center. It's just much more time intensive to get that</p> <p>23 competitive price comparison, when you're talking about</p> <p>24 the call center.</p> <p>25 Q. Do you know why this pricing proposal wasn't</p>

177	<p>1 adopted or what the basis of the disagreements among</p> <p>2 management and you said the marketing team would be?</p> <p>3 MR. VINCENT: Objection as assumes facts;</p> <p>4 misstates the document.</p> <p>5 MR. CHIARELLO: Let me restate.</p> <p>6 BY MR. CHIARELLO:</p> <p>7 Q. I thought you testified before that there was</p> <p>8 this disagreement as to follow -- whether or not to</p> <p>9 follow Mr. McCallum's proposal here among the marketing</p> <p>10 team; is that accurate?</p> <p>11 A. Yeah, he's got his --</p> <p>12 MR. VINCENT: Same objections. I'm referring</p> <p>13 to the proposal here, but go ahead. This was a</p> <p>14 proposal that was --</p> <p>15 BY MR. CHIARELLO:</p> <p>16 Q. Are you pointing to something specific in the</p> <p>17 document?</p> <p>18 A. Yeah, he's got something toward the bottom.</p> <p>19 Again, my position is not shared on the leadership team</p> <p>20 or even among all of us in marketing.</p> <p>21 He wasn't declaring that this is what we would</p> <p>22 do. He wasn't suggesting I think even anything -- he</p> <p>23 wasn't suggesting anything definitive. He was, I</p> <p>24 think, more airing this out for the members of his team</p> <p>25 that he thought needed to see it and kind of</p>	179	<p>1 job with two websites, concurrently. So I wanted to</p> <p>2 give our team the benefit of focus and discontinue any</p> <p>3 effort to support eVision.</p> <p>4 Q. Got it.</p> <p>5 You can set that document aside. I'm going to</p> <p>6 hand you a document marked CX1007. Strike that.</p> <p>7 I'm handing him a document labeled CX55.</p> <p>8 [Whereupon, Exhibit CX0055 was</p> <p>9 referenced.]</p> <p>10 BY MR. CHIARELLO:</p> <p>11 Q. If you could take a moment to look at that.</p> <p>12 A. There's a lot here. Do you want me to read</p> <p>13 through the whole thing?</p> <p>14 Q. Just flip through it. My first question is</p> <p>15 going to be, what is this?</p> <p>16 Do you know what this is?</p> <p>17 A. Yeah, this is a summary of a management team</p> <p>18 offsite in April 2004, and there was a lot of homework</p> <p>19 and kind of additional effort that came out of that</p> <p>20 offsite that culminated in the summary.</p> <p>21 Q. Did you prepare this document?</p> <p>22 A. I vaguely recall having prepared pieces of it,</p> <p>23 but I didn't prepare the whole thing.</p> <p>24 Q. Do you know who prepared this document?</p> <p>25 A. I think it was a group effort but I believe it</p>
178	<p>1 communicating clearly this thoughts.</p> <p>2 Q. And do you know if there were other</p> <p>3 discussions that you were privy to regarding leadership</p> <p>4 team or among in marketing --</p> <p>5 A. Certainly.</p> <p>6 Q. -- and why it wasn't -- why the position</p> <p>7 wasn't shared?</p> <p>8 A. Certainly. I mean, there -- this was a very</p> <p>9 complicated and long process for us to discuss and to</p> <p>10 reconcile internally. A lot of moving parts.</p> <p>11 Q. Yeah.</p> <p>12 A. I can give one example of where there was</p> <p>13 disagreement, if that's what you're asking about.</p> <p>14 Q. Yes, please.</p> <p>15 A. eVision, as you pointed out up top, was one of</p> <p>16 the things that Kevin had in his head about where we</p> <p>17 can do some price testing. I didn't agree.</p> <p>18 Maintaining a separate online entity with separate</p> <p>19 prices was a tremendous amount of management overhead,</p> <p>20 and it was not overhead that I was eager for us to take</p> <p>21 on, given that I was only a few months into my new</p> <p>22 tenure and had a very green team, very relatively</p> <p>23 inexperienced and new team.</p> <p>24 We were just trying to do a great job with the</p> <p>25 1-800-CONTACTS website, let alone trying to do a great</p>	180	<p>1 was Kevin McCallum that kind of assimilated it all and</p> <p>2 did the final editing.</p> <p>3 Q. If you look at the page -- the last three</p> <p>4 digits 004, CX0055-004 and 005.</p> <p>5 These statements of vision and mission and</p> <p>6 values, do you know who prepared those?</p> <p>7 A. These were very likely a group effort among</p> <p>8 the management team executives.</p> <p>9 Q. The -- I believe the document that says the</p> <p>10 offsite occurred in Park City.</p> <p>11 Do you remember attending that?</p> <p>12 A. I did.</p> <p>13 Q. And was it -- was there -- was there a</p> <p>14 facilitator who was running this -- or what -- from</p> <p>15 outside the organization?</p> <p>16 A. It was -- I don't recall that there was.</p> <p>17 There may have been and I don't remember, but I don't</p> <p>18 recall if there was.</p> <p>19 Q. If you turn to 006 of the document. The</p> <p>20 page is titled "Company Growth Strategies." First one</p> <p>21 says: (Reading.)</p> <p>22 "Create a seamless, closed loop</p> <p>23 experience to exceed contact lens</p> <p>24 wearer's needs."</p> <p>25 What does that mean to exceed the contact</p>

181	<p>1 lenses wearer's needs?</p> <p>2 A. We wanted every interaction with a customer,</p> <p>3 every stage of our relationship with every customer to</p> <p>4 be a "wow" interaction. From the fact that someone</p> <p>5 picked up the phone fast to the fact that they were</p> <p>6 well trained and able to take your order quickly in the</p> <p>7 call center to the speed with which the pages loaded on</p> <p>8 the website, the ease of use navigating the website and</p> <p>9 checking out, you know, all the way through to the</p> <p>10 veneer on the outer layer of the box packaging. We</p> <p>11 really wanted it all to be exceptional.</p> <p>12 Q. If you look at the third one down that says:</p> <p>13 (Reading.)</p> <p>14 "Develop and execute a plan to dominate</p> <p>15 the Internet contact lens market."</p> <p>16 What does that mean?</p> <p>17 A. I think it was just very clear that we were</p> <p>18 not at this point in a strong competitive position</p> <p>19 online, and we likely wanted to be in a stronger</p> <p>20 competitive position.</p> <p>21 Q. Does "dominate" mean to be in a stronger</p> <p>22 competitive position?</p> <p>23 A. Yeah.</p> <p>24 Q. Did you develop such a plan?</p> <p>25 A. I believe so, yeah.</p>	183	<p>1 compared to the other channels?</p> <p>2 A. I don't think anybody knew how much budget</p> <p>3 would -- was significant. I don't think anybody knew</p> <p>4 how much to ask for or why. There was no -- there was</p> <p>5 no bearing there.</p> <p>6 Q. In -- if you know, rough and tumble, when you</p> <p>7 came in what was the comparison of sales on -- on the</p> <p>8 online market versus the call center market?</p> <p>9 A. I don't recall, but I recall that a large</p> <p>10 majority of the business was done through the call</p> <p>11 center and the online was the minority.</p> <p>12 Q. And do you recall at that time what the</p> <p>13 difference was, if any, on the -- the customer</p> <p>14 acquisition costs of the call center versus the --</p> <p>15 A. Yeah, I don't recall.</p> <p>16 Q. -- online?</p> <p>17 A. I don't recall.</p> <p>18 Q. Do you recall when you left in 2006?</p> <p>19 A. I don't recall. If we got any correspondence</p> <p>20 or whatever, I didn't review it. I didn't see it.</p> <p>21 Q. If you --</p> <p>22 A. That's a long time ago.</p> <p>23 Q. I understand.</p> <p>24 If you would please turn to page 11 of the</p> <p>25 document.</p>
182	<p>1 Q. What was your plan?</p> <p>2 A. It started with talent. We didn't have</p> <p>3 anybody that knew what they were doing. One of the</p> <p>4 first thing I did, as I mentioned, was get rid of Jason</p> <p>5 and then later Josh, and then I also asked that they</p> <p>6 replace the company's CTO and a number of the software</p> <p>7 engineers that were there, and we needed to basically</p> <p>8 start from scratch on the website.</p> <p>9 We needed to start from scratch on the website</p> <p>10 analytics and the data that we captured. There was a</p> <p>11 total overhaul.</p> <p>12 Q. Did you have a sense coming in why 1-800</p> <p>13 was -- and I'm not trying to put words in your mouth,</p> <p>14 but it sounds like -- behind in its development of its</p> <p>15 Internet contact lens -- the presence of Internet</p> <p>16 contact lens market?</p> <p>17 A. I didn't really know -- I don't really know</p> <p>18 why they were -- they were kind of -- what I would say,</p> <p>19 underperforming.</p> <p>20 Q. Umm-hmm.</p> <p>21 A. But I think it had something to do with the</p> <p>22 talent that they had there. I mean, online was like</p> <p>23 a -- like somebody's hobby project almost. They</p> <p>24 weren't taking that part of the business seriously.</p> <p>25 Q. Did they have a significant budget for online</p>	184	<p>1 A. Okay. Weaknesses?</p> <p>2 Q. Weaknesses.</p> <p>3 A. Okay.</p> <p>4 Q. And I'm focusing down on number 5 where it</p> <p>5 says (reading.)</p> <p>6 "Marketing has not been as effective in</p> <p>7 attracting new customers."</p> <p>8 What does the second one: (Reading.)</p> <p>9 "Value proposition - it may be more</p> <p>10 difficult to deliver through TV</p> <p>11 advertising."</p> <p>12 What does that mean?</p> <p>13 A. I think it was -- it was intended and as it's</p> <p>14 written to be speculative in nature. I think there was</p> <p>15 a genuine curiosity as to whether television</p> <p>16 advertising was the most cost-efficient way to grow the</p> <p>17 business. There was a, I think, healthy sense of</p> <p>18 curiosity on that question.</p> <p>19 Q. And the next -- well, on that, were there</p> <p>20 distinct strong opinions as to whether it was or wasn't</p> <p>21 within the company, if you remember?</p> <p>22 A. Yeah, I mean -- again, it was mostly</p> <p>23 speculative because there wasn't enough good data to</p> <p>24 work with on the e-commerce side.</p> <p>25 Q. The next point says: (Reading.)</p>

185	<p>1 "Internet marketing skills - are not on</p> <p>2 a par with our competitors."</p> <p>3 What does that mean?</p> <p>4 A. If you visited any one of the number of</p> <p>5 different websites that sold contact lenses, the look</p> <p>6 and feel was more contemporary, the speed with which</p> <p>7 the pages rendered was faster. The sequence of steps</p> <p>8 that you had to follow to check out was more</p> <p>9 streamlined and efficient.</p> <p>10 It just seemed like if this was going to be</p> <p>11 your -- this was -- if this was going to be a battle</p> <p>12 you were going to pick, you were actually going to take</p> <p>13 e-commerce seriously, then you needed to, you know,</p> <p>14 pretty considerably upgrade your capabilities in this</p> <p>15 regard.</p> <p>16 Q. Earlier you testified about call centers and</p> <p>17 the service investment there. And I apologize if I'm</p> <p>18 misstating this, but I think you characterized it as</p> <p>19 service investment and one of the service investments</p> <p>20 involved the call center.</p> <p>21 Do you remember that?</p> <p>22 A. Yes.</p> <p>23 Q. The next-day service, was that also -- was</p> <p>24 that unique to the call center or was that shared by</p> <p>25 both?</p>	187	<p>1 if you wanted to shop around, you're shopping around to</p> <p>2 see, well, who has this lens and how much do they</p> <p>3 charge for it? They have to have my lens.</p> <p>4 Q. Within 1-800-CONTACTS, if I'm only going to</p> <p>5 1-800-CONTACTS, I can't shop for any other products on</p> <p>6 1-800-CONTACTS' shelf other than that one?</p> <p>7 A. Yeah, that's right. You can look around</p> <p>8 but -- and see how much other contact lenses cost.</p> <p>9 You're allowed to see, but you can't order them.</p> <p>10 Q. Okay.</p> <p>11 A. There were a few other contact products that</p> <p>12 you could buy. You could buy saline solution. You</p> <p>13 could buy, like, a contact lenses carrier, like, a</p> <p>14 travel thing. But no, you couldn't really buy -- you</p> <p>15 couldn't really buy any other contact lenses.</p> <p>16 Q. Okay. If you go -- back on CX55-15. And</p> <p>17 that's the page entitled "Threats."</p> <p>18 Number 4 says: (Reading.)</p> <p>19 "Wal-Mart - full meal deal for contact</p> <p>20 lenses."</p> <p>21 Do you know what that meant?</p> <p>22 A. Yeah, the -- the idea that they had this kind</p> <p>23 of all-in-one, like, one-stop shop. That's what he</p> <p>24 means when he says, "full meal deal," right?</p> <p>25 You could go in there and buy your groceries</p>
186	<p>1 A. That was shared by both.</p> <p>2 Q. And the other one you mentioned was the</p> <p>3 quality control to prevent errors.</p> <p>4 What did you mean by that?</p> <p>5 A. Jeez, I'm not really sure how to make it</p> <p>6 clearer, other than we had some quality assurance</p> <p>7 protocols and systems that reduced the likelihood that</p> <p>8 you would get the wrong order or that it would be</p> <p>9 shipped late.</p> <p>10 Q. The -- is it your understanding that the</p> <p>11 customer, when they purchase a product from</p> <p>12 1-800-CONTACTS, purchased contact lenses from contact</p> <p>13 lenses is limited to only that product which is in</p> <p>14 the -- described on their prescription?</p> <p>15 A. It is, yes.</p> <p>16 Q. So the shopping around for different lenses</p> <p>17 is -- is that somewhat limited to what the customer can</p> <p>18 actually do or at least what 1-800-CONTACTS can</p> <p>19 actually sell to the customer?</p> <p>20 MR. VINCENT: Objection; vague.</p> <p>21 THE WITNESS: Yeah, I --</p> <p>22 BY MR. CHIARELLO:</p> <p>23 Q. Let me ask it this way.</p> <p>24 A. You have a prescription for an Acuvue biweekly</p> <p>25 lens. This is the only contact lenses you can buy, and</p>	188	<p>1 and buy your paper towels and buy your -- you know,</p> <p>2 your aspirin and your, you know, drugstore items, and</p> <p>3 you can stop by and get your eyes checked. And then</p> <p>4 you know you're coming back next week to get more</p> <p>5 groceries or whatnot, so you can -- they don't have</p> <p>6 your lenses right there, you can pick them up when you</p> <p>7 go there. So it was very convenient for somebody who</p> <p>8 was a frequent Walmart shopper.</p> <p>9 Q. Do you know why that's viewed as a threat to</p> <p>10 1-800-CONTACTS?</p> <p>11 A. If you want to compete in terms of</p> <p>12 convenience, Walmart's pretty convenient if you are</p> <p>13 already a habitual Walmart shopper. Hard for you to</p> <p>14 say as 1-800-CONTACTS that this is more convenient for</p> <p>15 you than, you know, walking a mere 15 steps over to the</p> <p>16 contact lens department at Walmart.</p> <p>17 Q. But did Walmart have the next-day service as</p> <p>18 far as getting your contacts?</p> <p>19 A. Sometimes they would actually have them right</p> <p>20 there in the store, so there was no next-day anything.</p> <p>21 They could actually give you the lenses. If they</p> <p>22 didn't have those lenses in stock, then they would say,</p> <p>23 "You probably are a frequent shopper at Walmart."</p> <p>24 Likely this is -- you know, you've got them at</p> <p>25 a retail location, this is likely the case. "When you</p>

189	<p>1 come back next time, we'll have it ready." And they 2 would drop ship it to that location. 3 Q. The next threat says: (Reading.) 4 "Vision Direct/Drugstore - web savvy and 5 low pricing." 6 Do you see that? 7 A. Yeah. 8 Q. What does that mean? 9 A. I think if you just looked at the -- excuse 10 me -- if you looked at the website if you were doing a 11 very qualitative, subjective assessment with Vision 12 Direct on one screen and 1-800-CONTACTS on the other, 13 it was clear that Vision Direct just had a better 14 online shopping experience. It was faster, it was 15 clearer, it was easier to understanding what to do 16 next, easier process. 17 And, you know, it was very clear they had a 18 core competence in this area that 1-800CONTACTS didn't 19 yet have, and they also had competitive pricing. 20 Q. And number 22, it says: (Reading.) 21 "Ourselves - we are emotional 22 overachievers who do not prioritize 23 well." 24 What did that mean? 25 A. To me, it just means what it says, we want to</p>	191	<p>1 your general take on Google's offerings to other 2 advertisers and, particularly, with 1-800-CONTACTS? 3 MR. VINCENT: Objection; vague. 4 Go ahead. 5 THE WITNESS: They were -- I mean, these were 6 powerful tools they gave you if you knew how to use 7 them. But it was incumbent, and I think that's the 8 point that I made within this is you have to invest the 9 time and energy needed to use them well. 10 BY MR. CHIARELLO: 11 Q. Did they interview you for this? 12 A. Clearly, they must have but I, honestly, don't 13 remember any of this. I don't remember the 14 conversation if we had one. 15 Q. The -- the -- if you look at page 2 of the 16 document, and there's a header that says "Challenge." 17 A. Umm-hmm. 18 Q. And it says: (Reading.) 19 "Clint Schmidt, the company's Director 20 of Online Marketing, is a veteran of 21 online advertising. Since 2000, he's 22 used Google AdWords@ at businesses 23 including Half.com and eBay." 24 That's accurate? 25 A. Yes. Although, the part of using AdWords at</p>
190	<p>1 do everything that we -- that we endeavor to do. We 2 don't want to leave something undone or leave something 3 unfinished. There's a sense of ruthlessness that needs 4 to come with prioritization. And we were good at 5 prioritizing, but we were bad at the ruthless part. 6 So the way that I characterized it -- in fact, 7 as part of my contribution at the offsite was the 8 peanut butter problem. Spreading yourself so thin 9 across a number of different initiatives, and then not 10 really being able to make it a strong enough impact on 11 any one of them. 12 MR. CHIARELLO: I'm going to give you a 13 document marked CX1377. 14 [Whereupon, Exhibit CX1377 was 15 referenced.] 16 BY MR. CHIARELLO: 17 Q. And please look it over. 18 A. Okay. 19 Q. What is this? 20 A. This was a case study that Google was 21 preparing about 1-800-CONTACTS, and I think the goal 22 was to use this to establish credibility with other 23 advertisers about some of Google's offerings to those 24 advertisers. 25 Q. At the time that this was prepared, what was</p>	192	<p>1 eBay, it's more that I was a part of the team there. I 2 was not responsible for eBay's online advertising on 3 Google directly. 4 Q. The next sentence says: (Reading.) 5 "When he joined 1-800-CONTACTS in early 6 2004, he put AdWords contextual 7 advertising in the mix." 8 Is that accurate? 9 A. I think. 10 Q. Okay. 11 A. It's been a while. 12 Q. What does it mean by "contextual advertising"? 13 A. Yeah, I think this is the -- "contextual 14 advertising." I think this is the predecessor term to 15 what's now called Google AdSense, and that effectively 16 is a Google offering that a publisher of content on the 17 Web can include in their pages and Google will 18 determine what types of advertisements might be 19 relevant to somebody who's reading those pages and pull 20 from interested advertisers and put their ads in, but 21 Google technology determined the relevance of the ads. 22 Q. Did you engage in -- or did 1-800-CONTACTS 23 advertise its AdWords content through AdSense while you 24 were there? Did you trip the signal so that your ads 25 would appear in the content of another publisher?</p>

193	<p>1 A. Yes, yes.</p> <p>2 Q. And then it says: (Reading.)</p> <p>3 "Schmidt knows the value of testing to</p> <p>4 meet his numbers. 'It doesn't stop,' he</p> <p>5 says. 'You have to constantly refine</p> <p>6 and test variables. Then it's time to</p> <p>7 retest. Everything changes.'"</p> <p>8 Do you see that?</p> <p>9 A. Yeah.</p> <p>10 Q. Is that accurate?</p> <p>11 A. That sounds like it's representative of my</p> <p>12 philosophy generally, yes.</p> <p>13 Q. And was it in the nature of you and your team</p> <p>14 at 1-800-CONTACTS to test and retest variables?</p> <p>15 A. Yes.</p> <p>16 Q. What did it mean here when it says:</p> <p>17 (Reading.)</p> <p>18 He took the experience to 1-800-CONTACTS</p> <p>19 with the understanding that 'there are</p> <p>20 companies that are foregoing hundreds of</p> <p>21 thousands of dollars in revenue monthly</p> <p>22 by not optimizing.'</p> <p>23 A. Again, these are very powerful tools and</p> <p>24 Google could avail you to a lot of traffic, but you had</p> <p>25 to know how to use it in order to get that traffic cost</p>	195	<p>1 Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. What did you mean by that?</p> <p>4 A. Just like an example of the testing</p> <p>5 methodology at work. You can test what types of</p> <p>6 keywords or what types of content that you want to</p> <p>7 target for advertisements. You can test your ad copy,</p> <p>8 and then you can test what pages you direct the traffic</p> <p>9 to once somebody has clicked. And we tested all of the</p> <p>10 above.</p> <p>11 And in this case we found that a landing page</p> <p>12 that you might think would be intuitive actually didn't</p> <p>13 perform as well as one that gave the visitor some</p> <p>14 measure of browsability on the page.</p> <p>15 Q. And do you know why that was?</p> <p>16 A. Yeah, we could -- we could infer from later</p> <p>17 qualitative conversations that we had with customers</p> <p>18 that we would sometimes -- linking directly to the</p> <p>19 page would presuppose the amount of certainty that the</p> <p>20 customer had about their product.</p> <p>21 They knew that they had Acuvue, but they</p> <p>22 didn't know if they had Acuvue 2 or Acuvue 3 or Acuvue</p> <p>23 2 Daily, or Acuvue 3, so if you to tried to guess which</p> <p>24 product to land them on, you might guess wrong as</p> <p>25 opposed to just showing them all the Acuvue lenses that</p>
194	<p>1 efficient.</p> <p>2 And companies that didn't know how to use</p> <p>3 those tools or didn't know how to avail them to that</p> <p>4 traffic were likely foregoing a lot of revenue.</p> <p>5 Q. Okay. The next paragraph under results, it</p> <p>6 says: (Reading.)</p> <p>7 "We were able to lift our conversion</p> <p>8 rates for the categories from 1.5 to 4.5</p> <p>9 percent using contextual advertising and</p> <p>10 at a lower cost per conversion."</p> <p>11 What does that mean?</p> <p>12 A. Conversion rates are typically either</p> <p>13 impression-to-purchase ratios or visit-to-purchase</p> <p>14 ratios. And it's unclear for me which of those</p> <p>15 conversion rates they might be referring to here.</p> <p>16 Q. Okay. Then it says: (Reading.)</p> <p>17 "We debunked some myths, too,' he</p> <p>18 continues. 'For example, we had</p> <p>19 hypothesized that going to an exact</p> <p>20 product page would have the best</p> <p>21 conversion rate,' Schmidt continues.</p> <p>22 'Not so. When a searcher types in</p> <p>23 "Acuvue 2," it works better to send them</p> <p>24 to a page listing various Acuvue lenses</p> <p>25 than to the specific Acuvue 2 page.'"</p>	196	<p>1 we offer, and then they can pattern match as they see</p> <p>2 fit to find the one that they -- that --</p> <p>3 Q. So they might make mistakes when they're</p> <p>4 entering that in -- where does the query come from?</p> <p>5 From the Google page?</p> <p>6 A. Correct.</p> <p>7 Q. And so they enter "Acuvue 2" and instead of</p> <p>8 taking them there, you gave them the choices?</p> <p>9 A. We gave them all of the Acuvue 2 lenses as</p> <p>10 opposed to guessing which of the Acuvue 2 lenses they</p> <p>11 might be looking for.</p> <p>12 Q. And did that hold true among a lot of the</p> <p>13 product categories by giving them that choice that</p> <p>14 would get them ultimately to the right --</p> <p>15 A. Not always.</p> <p>16 Q. No?</p> <p>17 A. Oddly, not always. And that's, again, the</p> <p>18 power of some of these tools is that when it works, you</p> <p>19 could have idiosyncrasies for one category of keywords</p> <p>20 versus another.</p> <p>21 I vaguely recall one of them was -- one of the</p> <p>22 earlier manufacturers to do daily contact lenses was</p> <p>23 Focus. And there was only one Focus Dailies and that</p> <p>24 was -- I mean, that was the only one. There was no</p> <p>25 confusion about Acuvue 1, 2, 3, Dailies, this, that, or</p>

197	<p>1 the other. There are all these variations that Acuvue 2 has. 3 With Focus it was Dailies. And so within our 4 campaigns you could link directly from certain -- Focus 5 Dailies link directly on that page, which was -- the 6 Acuvue the same didn't work. And could you maintain 7 that idiosyncrasy across different subsets of your 8 keywords, if you needed to. 9 Q. With respect to search advertising, you 10 testified earlier that when someone entered 11 "1-800-CONTACTS" and that was a navigational query; is 12 that correct? 13 A. Umm-hmm. 14 Q. By "navigational" what did you mean? 15 A. They're intending to navigate to 16 1-800-CONTACTS. 17 Q. How would Google know that? 18 A. Do you know the number one search term at 19 Google? "Google.com." 20 Q. Are you talking about presently today? 21 A. Always has been is "Google." People want to 22 go Google and they don't know what they're doing, and 23 they're -- it's Google and they're trying to get to 24 Google.com. It's absurd. 25 When there's a bar that says "Where do you</p>	199	<p>1 right one. 2 Why wouldn't the same logic hold true for 3 Google when it delivers -- when someone types in 4 "1-800-CONTACTS" -- 5 A. It sort of does. We didn't take them to a 6 contact lens page, we took them to an Acuvue page, as 7 well as there's intent in the keyword. 8 Q. Okay. 9 A. I'm typing in "Acuvue," I'd like to see 10 Acuvue. I'm typing in "1-800-CONTACTS," I'd like to 11 see 1-800-CONTACTS. There's no -- there's no seam in 12 the logic there. 13 Q. Are you aware of any time when someone typed 14 in "1-800-CONTACTS" in the search page and didn't see 15 something from 1-800-CONTACTS, either in the natural 16 results or the ad results? 17 MR. VINCENT: Objection; vague; assumes facts. 18 THE WITNESS: It seems unlikely. 19 BY MR. CHIARELLO: 20 Q. Does that mean that they would -- that Google, 21 generally, would deliver a result with 1-800-CONTACTS 22 on it? 23 MR. VINCENT: Same objections. 24 THE WITNESS: In the organic search results 25 Google could typically be relied upon to deliver the</p>
198	<p>1 want to go?" and there's something navigational in 2 nature, rather than type in "YouTube.com," let's say, 3 into the browser bar, they'll go to Google and type in 4 "YouTube.com." 5 They actually created an extra step because of 6 their adherence to this navigational mode of thinking. 7 And this -- this holds true for, I would 8 venture to say, thousands upon thousands of websites. 9 The -- the navigational nature of the term, of the 10 proprietary terms, oddly people will go to Google and 11 type it in as opposed to just going to the browser bar. 12 So this helps for 1-800-CONTACTS as it does 13 for so many other businesses. 14 Q. Were you suggesting that 1-800-CONTACTS was as 15 synonymous as Google on Google's Web page? 16 A. No, I'm suggesting that it's representative of 17 a very well-known and time-tested user behavior as it 18 pertains to Google. 19 Q. And I guess what I'm wondering, and I don't 20 know if -- if this is -- what you know, but why 21 wouldn't the same hold true by Google offering a search 22 engine result page different choices when someone types 23 in the brand just like the person who types in "Acuvue 24 2," you offered them multiple Acuvue products on your 25 page, right? That's what -- and then they find the</p>	200	<p>1 most relevant search results for a given keyword term. 2 So if you were searching for 1-800-CONTACTS, Google's 3 organic search results would, yes, give you the first 4 result of 1-800-CONTACTS' page. Yes, that was -- that 5 was reliable. 6 MR. CHIARELLO: Umm-hmm. 7 THE WITNESS: What was less reliable and what 8 we sought to make more reliable was that in the 9 sponsored links when you typed in "1-800-CONTACTS," it 10 was indeed a 1-800-CONTACTS ad that showed up first. 11 Anything that wasn't, was confusing. 12 BY MR. CHIARELLO: 13 Q. Did you ever work for Google? 14 A. No. 15 Q. Did you ever work for Bing? 16 A. No. 17 Q. Yahoo? 18 A. No. 19 Q. In your experience, did you ever work in the 20 development of search algorithms? 21 A. No. 22 Q. Search advertising algorithms? 23 A. Nope. Only as a user, as an advertiser. 24 Q. So you've never worked on the delivery side of 25 the search ads; is that correct?</p>

201	<p>1 A. Correct.</p> <p>2 MR. CHIARELLO: Okay. I'm handing you a</p> <p>3 document marked CX117.</p> <p>4 [Whereupon, Exhibit CX0117 was</p> <p>5 referenced.]</p> <p>6 BY MR. CHIARELLO:</p> <p>7 Q. What is this?</p> <p>8 A. Oh, looks like the result of correspondence</p> <p>9 that we had with Luxottica or maybe Luxottica was</p> <p>10 pointing out some instances where they had issues with</p> <p>11 the Google search results.</p> <p>12 Q. You testified earlier that you oversaw the</p> <p>13 implementation of negative keywords?</p> <p>14 A. Yes.</p> <p>15 Q. And, in particular, you oversaw the addition</p> <p>16 of negative keywords that related to competitors; is</p> <p>17 that correct?</p> <p>18 A. Yes.</p> <p>19 Q. When you added the negative keywords, the</p> <p>20 competitors' negative keywords, were you the first</p> <p>21 person to do that at 1-800-CONTACTS?</p> <p>22 A. It's tough for me to recall precisely, given</p> <p>23 it was so long ago, but I can say for certain that our</p> <p>24 use of negative keywords and our sophistication in how</p> <p>25 we used them unequivocally went up upon my arrival,</p>	203	<p>1 A. Right.</p> <p>2 Q. -- but it's not your testimony that Google</p> <p>3 would undertake trademark infringement actions against</p> <p>4 either party? It would only be relative to Google's</p> <p>5 website?</p> <p>6 A. Yeah, I don't know how they handled it with</p> <p>7 regard to trademark claims.</p> <p>8 Q. With respect to the document you're looking</p> <p>9 at, was there -- could you describe the relationship</p> <p>10 between 1-800-CONTACTS and Luxottica or the people</p> <p>11 working at Luxottica as it came to adopting negative</p> <p>12 keywords?</p> <p>13 A. Yeah, I think we covered this in prior</p> <p>14 testimony where we got a cease-and-desist letter from</p> <p>15 Luxottica, and then as a result we investigated this</p> <p>16 and we found out we didn't have enough information to</p> <p>17 confirm that we were doing anything. In some cases</p> <p>18 they were attributing behavior to 1-800-CONTACTS that</p> <p>19 was actually being propagated by another competitor.</p> <p>20 So there was some faulty conclusions in that</p> <p>21 cease and desist, but one of the results of that</p> <p>22 correspondence was that we agreed to be more collegial</p> <p>23 in contacting one another if we had these types of</p> <p>24 grievances in the future.</p> <p>25 And somewhere someone at Google is smiling at</p>
202	<p>1 yes.</p> <p>2 Q. Did you, as part of your work, go about</p> <p>3 identifying competitors to add to the negative keyword</p> <p>4 list?</p> <p>5 A. Yeah, typically, because they -- those terms</p> <p>6 didn't perform well, and we also wanted to be offered</p> <p>7 the same measure of respect for our trademarked terms.</p> <p>8 Q. So when you would add negative keywords, would</p> <p>9 you actively go out and seek the competitor and say,</p> <p>10 "Hey, we're adding your negative -- your trademark to</p> <p>11 our negatives. You need to go add ours too"?</p> <p>12 A. No, when I first arrived, as you recall, the</p> <p>13 policy was that you went through Google to go settle</p> <p>14 that stuff.</p> <p>15 Q. Okay.</p> <p>16 A. Yeah.</p> <p>17 Q. And before you arrived, was it Google's policy</p> <p>18 to say, "Hey, you two competitors add each other's</p> <p>19 negative keywords"?</p> <p>20 A. I mean, their policy prior was if you have a</p> <p>21 trademark infringement claim of some kind or some type</p> <p>22 of grievance, bring it to Google and Google will</p> <p>23 intermediate.</p> <p>24 Q. But, again, I don't want to cover the ground</p> <p>25 we covered before --</p>	204	<p>1 that result, because that's exactly what they wanted to</p> <p>2 result was for us to settle this stuff on our own. So</p> <p>3 this looks like the -- the type of correspondence that</p> <p>4 might have resulted from this where you get a lot of</p> <p>5 robust chatter back and forth between the teams about</p> <p>6 how to adhere to this type of reciprocal agreement.</p> <p>7 Q. When you say someone at Google was smiling,</p> <p>8 someone was hoping that this was would happen?</p> <p>9 A. This is exactly what they wanted. They -- and</p> <p>10 previously this all would have had to go through</p> <p>11 Google.</p> <p>12 Q. What is your -- is it your testimony that</p> <p>13 Google wanted parties to adopt each other's negative</p> <p>14 keywords?</p> <p>15 MR. VINCENT: Objection; vague; assumes facts;</p> <p>16 misstates testimony.</p> <p>17 THE WITNESS: No, I'm saying Google just</p> <p>18 didn't want to deal with it.</p> <p>19 BY MR. CHIARELLO:</p> <p>20 Q. So Google doesn't want to be in the middle of</p> <p>21 it?</p> <p>22 A. Doesn't want to be in the middle of it at all.</p> <p>23 How we deal with it is not their concern, but, oh, by</p> <p>24 the way, if you have need of these negative keywords</p> <p>25 terms, then this is how to use them, this is how you</p>

205	<p>1 can get to them.</p> <p>2 Q. But you really have no idea if Google is happy</p> <p>3 that LENSRAFTERS has adopted your negative keywords to</p> <p>4 prevent their ads from coming up?</p> <p>5 A. I mean, again, specifically, even if you did</p> <p>6 ask Google, they would have said this is not our</p> <p>7 concern any longer.</p> <p>8 Q. Right, but you don't know whether or not</p> <p>9 they'd be happy or not?</p> <p>10 A. I don't know what their perception is. I can</p> <p>11 only assume that they'd be happy given that they</p> <p>12 changed their policy and said they didn't want to be</p> <p>13 involved in this stuff anymore.</p> <p>14 Q. And in your time -- and I'm looking here at</p> <p>15 September 2005, so I know you weren't with</p> <p>16 1-800-CONTACTS very long after that, maybe five months</p> <p>17 or so.</p> <p>18 What was the nature of the working</p> <p>19 relationship between LENSRAFTERS and 1-800-CONTACTS?</p> <p>20 As far as you know, were you all collegial?</p> <p>21 A. Yeah, I mean, if -- if -- if anything,</p> <p>22 sometimes I found that with Luxottica -- I vaguely</p> <p>23 recall with Luxottica. They were pretty</p> <p>24 unsophisticated and they would sometimes jump to</p> <p>25 conclusions about what we were doing and what our</p>	207	<p>1 Do you see that?</p> <p>2 A. Yeah.</p> <p>3 Q. Did you help write this e-mail?</p> <p>4 A. No.</p> <p>5 Q. The paragraph that begins number 3 at the</p> <p>6 bottom of 2, it says: (Reading.)</p> <p>7 "What is most helpful in this situation</p> <p>8 is to demonstrate the activities you are</p> <p>9 suggesting is to provide us with screen</p> <p>10 shots and the specific redirecting</p> <p>11 link's target URL."</p> <p>12 A. Right.</p> <p>13 Q. What does that mean?</p> <p>14 A. Screen shot by itself isn't enough. We need</p> <p>15 to know to where the URL is pointing. And in this</p> <p>16 particular case, if they would have taken the time to</p> <p>17 note the URLs, they'd see that the URLs were not</p> <p>18 pointing to 1-800-CONTACTS nor to any of our affiliate</p> <p>19 sites. They would have found they were pointing to</p> <p>20 either a competitor's website or a competitor's</p> <p>21 affiliate.</p> <p>22 Q. So did this -- does that mean that</p> <p>23 1-800-CONTACTS, in fact, wasn't bidding on those terms?</p> <p>24 A. I think, if I recall correctly, this -- this</p> <p>25 cease-and-desist letter and some of the substance of</p>
206	<p>1 intent was or whatever, so we had to kind of, you know,</p> <p>2 explain what was -- you know, what was happening to</p> <p>3 them very clearly, but it didn't occur to them</p> <p>4 naturally. But, yes, it did always seem very collegial</p> <p>5 and open and direct.</p> <p>6 Q. Do you recall if you had to instruct them</p> <p>7 about negative keywords?</p> <p>8 A. I don't recall. I believe that they knew</p> <p>9 quite well how to deal with that, but I don't recall.</p> <p>10 Maybe there's something in the correspondence here that</p> <p>11 sheds light.</p> <p>12 Q. I want to go back to CX113 which Mr. Vincent</p> <p>13 gave you earlier today. And it's correspondence that</p> <p>14 relates to the same trademark issue.</p> <p>15 A. Give me a tip of what this might look like</p> <p>16 here.</p> <p>17 Q. That (indicating).</p> <p>18 A. Those black bars are a helpful tip: Date on</p> <p>19 this document, please?</p> <p>20 Q. It is May 6th, 2005. I'm looking below the --</p> <p>21 A. I have it.</p> <p>22 Q. -- black bar.</p> <p>23 And this is the -- go to page 2 of the</p> <p>24 document and it looks like it's from Kevin McCallum</p> <p>25 dated 5/6/2005.</p>	208	<p>1 this one, there was no merit to it. We weren't doing</p> <p>2 any bidding that they were suggesting.</p> <p>3 Q. Umm-hmm.</p> <p>4 A. It was either a competitor or a competitor's</p> <p>5 affiliate.</p> <p>6 Q. Do you know if, at the time of this letter,</p> <p>7 you had adopted the negative keywords?</p> <p>8 A. We had -- I don't know if specifically we had</p> <p>9 adopted LENSRAFTERS' negative keywords, but yes, at</p> <p>10 this point we did have a robust portfolio of negative</p> <p>11 keywords terms that we hadn't placed.</p> <p>12 Q. But you don't know if at the time you had</p> <p>13 LENSRAFTERS'?</p> <p>14 A. I don't recall, exactly, yeah. I'm presuming</p> <p>15 that we did because they didn't present any information</p> <p>16 to us that suggested that we weren't. It would have</p> <p>17 been very easy for them to find, I guess, otherwise.</p> <p>18 Q. That's what he's suggesting here, number 3,</p> <p>19 right? Please supply the evidence, effectively?</p> <p>20 A. Right.</p> <p>21 Q. Do you recall the reaction that Mr. McCallum</p> <p>22 had when he got the letter and how it -- how he felt</p> <p>23 about this?</p> <p>24 A. Yeah -- I -- in fact, I can -- and it's</p> <p>25 represented on the first page of this. This was what</p>

	209	211
<p>1 became clear. 2 The very last sentence: (Reading.) 3 I'm not an expert on the Internet -- 4 just trying to help maintain our 5 trademarks (as you can appreciate). 6 They were pretty unsophisticated when it came 7 to -- this was a burden for us to -- to, like, instruct 8 them as to what was happening and keep them apprised of 9 what was happening. 10 Q. Internally, though, was Mr. McCallum and were 11 you annoyed by the fact that you had to hunt this down? 12 A. No. In fact, we didn't mind doing it at all 13 because we wanted them to do the same for us. 14 Q. Okay. And this says -- on page -- I don't 15 know, page 3. (Reading.) 16 "And you need not have your attorney 17 send us another belittling letter, you 18 can just pick up the phone or shoot me 19 an e-mail." 20 Do you see that? 21 A. Yeah. 22 Q. The -- the words "belittling letter," what 23 was -- 24 A. The cease-and-desist letter just carried a 25 tone that it didn't need to carry. I mean, you can be</p>	<p>1 do the same for you." 2 Do you see that? 3 A. I do. 4 Q. Did your -- were you aware of whether, A, was 5 drugstore.com and Vision Direct, were they one company 6 at the time? 7 A. I believe so, yes. 8 Q. And were you aware if they had adopted 9 negative keywords at the time in -- in Vision Direct 10 and drugstore.com? 11 A. I recall that that was the case, yes. 12 Q. Are you aware of any time that they stopped -- 13 Vision Direct stopped using negative keywords? 14 A. I'm unaware if or when they stopped using 15 them. 16 Q. While you were at 1-800-CONTACTS, did any of 17 the folks that -- companies that 1-800-CONTACTS had 18 agreements with regarding negative keywords, be it 19 Vision Direct or Luxottica or I think you testified 20 about Coastal before, did any of them raise antitrust 21 concerns that you're aware of? 22 MR. VINCENT: Objection; vague; assumes facts; 23 misstates the testimony; calls for a legal conclusion. 24 THE WITNESS: I have no idea. 25 BY MR. CHIARELLO:</p>	
<p>1 civil and collegial and not be nasty about it. 2 Sometimes lawyers have a tendency to puff out their 3 chest and want to show their fangs when there's really 4 no need. 5 Q. Yeah. The -- and, again, after -- after this 6 in the subsequent communication, as far as you know, 7 was it pretty collegial and cooperative? 8 A. I don't remember it being otherwise, yes. 9 Q. If you would please turn to document -- I'm 10 going to have to show it to you because I didn't write 11 the RX down. It's an e-mail from Brian Pratt to Eric 12 Duerr at drugstore.com. 13 A. Okay. 14 Q. It has Bates labeled 1-800_F00045765? 15 A. Yeah, it's Exhibit 163. 16 Q. RX163. The e-mail from Eric to you on 17 December 9th, 2004. It copies Alesia Pinney and Joe 18 Zeidner. It says: (Reading.) 19 "Please allow me to introduce myself. 20 I'm Eric Duerr, one of the Search 21 Marketing Specialists at drugstore.com. 22 Let's work directly together to ensure 23 that our affiliates are complying with 24 our negative keywords requests. Please 25 send any offending ads to me, and I'll</p>	<p>1 Q. Did anyone -- did any people that you worked 2 with at any of these companies communicate to you any 3 concerns over -- 4 A. No. 5 Q. -- antitrust issues? 6 A. No. 7 Q. And after you left 1-800-CONTACTS in 2006, you 8 testified that you had no involvement with -- any 9 involvement with anything to do with 1-800-CONTACTS; is 10 that correct? 11 A. That's correct. 12 Q. Are you aware that 1-800-CONTACTS entered into 13 other agreements related to search advertising with 14 competitors? 15 A. No, I had no involvement. 16 Q. All right. But that wasn't my question. It 17 wasn't you were involved. Are you aware? 18 A. No. 19 Q. Okay. And you testified that you haven't read 20 the complaint in this matter? 21 A. Correct. 22 MR. CHIARELLO: Okay. 23 MR. VINCENT: Go off the record for just one 24 moment. 25 (Off the record discussion.)</p>	

213	<p>1 2 (Whereupon, at the hour of 1:03 p.m. a recess 3 was taken until the hour of 1:40 p.m.) 4 ---oOo--- 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">AFTERNOON SESSION</p>	215	<p>1 A. No. 2 Q. Was this something that your department was 3 seeking to have? 4 MR. VINCENT: Objection; vague; lacks 5 foundation. 6 THE WITNESS: No, not specifically. 7 MR. CHIARELLO: Okay. I'm handing you a 8 document a marked CX1012. 9 [Whereupon, Exhibit CX1012 was 10 referenced.] 11 MR. VINCENT: Thank you. 12 BY MR. CHIARELLO: 13 Q. And my first question is going to be, what is 14 this? 15 A. I can't claim to know exactly what this was. 16 I don't really know, but I can tell you that, based on 17 a review of it now, it -- it is consistent with 18 occasional behavior that we saw out of Josh Aston that 19 was perhaps proclaiming the importance of every single 20 thing that crossed his desk. 21 I don't know how much importance I should 22 actually attribute to anything that had Josh's name on 23 it. It would take some more careful reading to 24 ascertain the importance. 25 I hope that gives some context here.</p>
214	<p>1 ---oOo--- 2 MR. CHIARELLO: Let's go back on the record. 3 BY MR. CHIARELLO: 4 Q. Mr. Schmidt, if you would please turn to the 5 document that was handed to you earlier this morning 6 marked CX0311. It was a settlement agreement. 7 A. Okay. 8 Q. I believe you testified that the legal 9 department handled the negotiation on this; is that 10 correct? 11 A. That's correct. 12 Q. Was there -- are you aware of any subsequent 13 agreements with Vision Direct? 14 A. I'm not aware of any, no. 15 Q. Were you part of the -- the -- as part of the 16 marketing team, were you involved in 1-800's pursuit of 17 this agreement in the potential litigation? 18 A. I was not, no. This was handled almost 19 exclusively by Joe Zeidner and the legal team. 20 Q. Were you ever -- I think you testified before 21 that you haven't been deposed before today; is that 22 correct? 23 A. I have not. 24 Q. Were you asked to provide any sworn statements 25 or anything in relation to -- to this?</p>	216	<p>1 Q. Well, I'm trying to understand what this box 2 is here that says "Google Toolbar"? 3 A. I think I can guess at that. When you 4 install -- excuse me -- in the past, when one installed 5 the Google Toolbar, they would be prompted to choose to 6 enable or disable certain features and to have this 7 type of privacy policy made available to -- to be 8 referenced here. 9 Google no longer, I think, offers this kind of 10 a toolbar, so it might not have contemporary relevance. 11 But it did give them some additional features and 12 control over the user experience as somebody surfed the 13 Web. 14 Q. As you read this today, can you tell me how 15 this relates to the subject line of the e-mail that 16 says "VD Settlement Agreement... music to my ears"? 17 A. I could speculate, but it -- it sounds like -- 18 MR. VINCENT: Object to the extent it lacks 19 foundation; calls for speculation. 20 If you have something you know or -- 21 THE WITNESS: I don't know anything 22 specifically about that subject line, but I'm guessing 23 that this was maybe referencing a time when they needed 24 Google's help to intercede into trademark grievances, 25 and to the extent that Google has more control then</p>

217	<p>1 Google is better able to intercede. But I'm uncertain. 2 BY MR. CHIARELLO: 3 Q. The date of this is April 14th, 2004, correct? 4 A. Okay. 5 Q. And we looked at a document earlier today with 6 an attachment that included the new -- what was the 7 then new trademark policy. 8 Do you remember that? 9 A. Right. Right. 10 Q. Do you have it there in your hand? 11 A. I think so. 159. And this e-mail was dated 12 April 9th. 13 Q. So -- 14 A. You got out of sequence. Yeah, yeah, I get 15 the sequence doesn't line up. Again, I would -- at the 16 risk of sounding defensive, I would sort of resist 17 assigning a lot of value to the correspondence that 18 came out of Josh. That was part of the reason why he 19 didn't last long at 1-800-CONTACTS. 20 Q. Okay. You can set that aside. 21 A. Okay. 22 Q. You testified earlier today about a query that 23 included the term "1-800-CONTACTS." 24 Do you remember that? 25 A. Yes.</p>	219	<p>1 A. That's correct. That's correct. 2 Q. And that's where you typically where you would 3 type in the "WWW." -- 4 A. The URL would go there, yes, but again, you 5 often find typing the URL that ought to go into the 6 address bar into the search box, right? 7 Q. All right. 8 A. Because they have this navigational intent. 9 Q. And they do that on the Google page. 10 And is that what you're saying, they do that 11 in the Google search box? 12 A. People, yes, they'll type a URL or the name of 13 a specific product or service into the URL wanting to 14 get directly to that. 15 Q. And you mentioned before that you had some -- 16 I thought you said you documented evidence of user 17 intent. 18 What evidence do you have that would point 19 to -- to -- to that? 20 A. One of the first ones I would point to is the 21 data that Google has released over the years to show 22 the most frequently searched terms. And you always 23 have things like "Pamela Anderson" and, you know, 24 raunchy terms and pop culture terms that often 25 proliferate those.</p>
218	<p>1 Q. And you used the term "navigational." 2 What did you mean by navigational? 3 A. There's -- there's a missing term there, 4 "navigational intent." 5 Q. Okay. 6 A. And that is to signify that when a user of 7 Google or any search engine types a specific 8 trademarked term it is not a leap at all. In fact, 9 it's very customary to assume that that is the thing or 10 the product or the site or the service that they are 11 specifically trying to navigate to. 12 That it is not exploratory, it is rather 13 singular in its focus. 14 Q. Are you -- 15 A. So I was alluding to this comment before that 16 some of the top search terms at Google are specific 17 websites that could very easily be entered directly 18 into the browser bar. "YouTube.com" is a top search 19 term on Google. You can just put it in the browser. 20 So navigational intent is a longstanding norm of user 21 behavior in search engines. 22 Q. The browser bar you're referring to; is that 23 the -- 24 A. The address bar -- 25 Q. -- the address bar at the top of the screen?</p>	220	<p>1 But if you look at the top 100, top 500, top 2 1,000 searched terms, it very often includes 3 navigational terms for high-traffic websites, 4 high-traffic terms. 5 So things like "YouTube" or "YouTube.com," 6 people are searching for that on Google when they could 7 very easily just put it in the address bar. 8 And this is something that anybody can observe 9 when you look at Google's search query data over time, 10 and there's a massive amount of research that has been 11 derived from user behavior on search engines just 12 because there's so much money and so much at stake for 13 advertisers to understand that behavior well and to 14 craft their strategies accordingly. 15 I don't have any of that, of course, in front 16 of me, but -- 17 Q. Right. 18 Do you know from any documents you've read or 19 from your experience what it is that Google looks at to 20 discern the user intent in their queries? 21 A. I don't know exactly what Google looks at to 22 discern intent. I think that theirs is all very 23 formulaic and algorithmic, so I don't -- I don't want 24 to presume that there's any human filtering or judgment 25 that's being applied there.</p>

<p style="text-align: right;">221</p> <p>1 Q. Do you know if -- well, I think it's 2 self-evident that they must look at the keywords that 3 are in the query. 4 A. Of course. 5 Q. And maybe the combination of those words? 6 What about the background data of the user, 7 previous searches, things like that? 8 A. I think that is more much likely to be used 9 now than it might have back in 2004, but the level of 10 sophistication that they're able to bring to bear to 11 determine what the best search results for you are is 12 much, much greater now than it was then. Past Web 13 history. 14 Q. Geolocation? 15 A. Geolocation. Other search results that have 16 been displayed for previous search engine queries and 17 how likely those results were to get clicked on or not 18 by others. So they've got a pretty formidable amount 19 of information to help determine, in an almost 20 personalized way, what's the most relevant term for 21 you. 22 Q. Right. 23 And in that answer, were you saying that it's 24 much different now in 2017, than it was in 2004 when 25 you were -- 13 years ago when you were joining</p>	<p style="text-align: right;">223</p> <p>1 THE WITNESS: I wouldn't overgeneralize that. 2 Of course, that exists now. People have 3 become more skilled at evaluating search engine pages, 4 but only provided they've been doing it for a long -- 5 extraordinary amount of time. Every day there's a new 6 grandma somewhere who's looking at Google for the first 7 time that offsets whatever sophistication might be 8 brought by a more seasoned visitor, so... 9 BY MR. CHIARELLO: 10 Q. The -- you mentioned before when you testified 11 about navigational intent that there were three reasons 12 that 1-800-CONTACTS didn't bid on other rivals' 13 keywords. 14 Do you remember that testimony? 15 A. Yeah. 16 Q. And I believe you wrote -- you said that they 17 were, one, confusing? 18 A. They were confusing to consumers. 19 Q. Number two, you said they were inefficient? 20 A. From a cost perspective, yes. 21 Q. And number three, you said it was improper? 22 A. It seemed improper, right. 23 Q. Let's start with confusing first. 24 Do you have evidence or are you aware of 25 evidence that the appearance of an ad in response to a</p>
<p style="text-align: right;">222</p> <p>1 1-800-CONTACTS? 2 A. Yes, today, in 2007, the variability in the 3 types of search engine results that you may get for a 4 single query is a much broader band of variability than 5 it was back then. They just -- they brought fewer 6 variables into the algorithm than they do now. 7 Q. What about the consumer? 8 If you know this, has the consumer or the user 9 on Google changed with -- has Google changed over time 10 with their experience and knowledge? 11 MR. VINCENT: Objection; vague; lacks 12 foundation; assumes facts. 13 THE WITNESS: I wouldn't know. I mean, the 14 law of large numbers has applied to Google since a very 15 early stage. 16 They've been in the hundreds of millions of 17 users for, you know, at least 15 years now, so... 18 BY MR. CHIARELLO: 19 Q. Right, but I'm wondering more from -- if you 20 know anything about the consumer's perspective, you 21 know, since you're in marketing. 22 Has the -- do consumers now have the skill and 23 knowledge of how to read the Google search results 24 page maybe better than they did before? 25 MR. VINCENT: Same objections.</p>	<p style="text-align: right;">224</p> <p>1 hypothetically navigational -- a query that had a 2 navigational intent would be confusing? 3 A. Yeah, this is -- this is really -- again, I 4 think it's probably helpful to provide this background. 5 How customers -- how users at large, how 6 prospective customers, the journey that they took to 7 get to your site is something that you really have to 8 master if your job is to acquire them as customers. 9 BY MR. CHIARELLO: 10 Q. "You" being 1-800-CONTACTS? 11 A. "You" being a marketer. 12 This was an era where there were no best 13 practices. There weren't lots of studies. This was 14 kind of a -- you know, the early days. There weren't a 15 lot of well-established research on this one. 16 So if I wanted to thrive as an effective 17 online marketer that understood the journey that his 18 customers were taking to get to whatever product or 19 service, half.com, eBay, 1-800-CONTACTS, I had to 20 understand how they interpreted the journey, right? 21 So that's why I would do very frequently 22 "drive-by research," I called it. I'd also refer to it 23 as "putting on my newbie glasses." And going up to 24 somebody in a workplace, in their home, a friend, a 25 colleague, saying, "Hey, if you wanted to go purchase</p>

225	<p>1 contact lenses online, what would you do? Do you mind 2 if I look over your shoulder while you do it?" 3 And there's another data point. And there's 4 another data point. If you just make a good practice 5 of this, I feel like it makes you better in the 6 profession -- the profession that I chose. And you 7 start to develop a good sense of how -- how people 8 react, what their behaviors are. In fact, it's my 9 craft to understand that well. 10 You add to that some of the actual more kind 11 of clinical research that we did at 1-800-CONTACTS and 12 past companies we'd also done that validate what you 13 collect more extemporaneously through these kind of 14 walk-around surveys. 15 And yeah, it's really not -- it's really 16 unequivocal that it's confusing for people when they're 17 looking at that search engine result page. 18 Particularly then. Less so now as you -- as you imply, 19 people are more seasoned searchers and more seasoned 20 shoppers now than they were then. But back then, what 21 was a sponsored link? Who -- who decided that that 22 goes there and how is it different than the link right 23 below it? It was very confusing. So a lot of people, 24 and smart people too, would get frequently confused. 25 Q. When you say that, "what was a sponsored</p>	227	<p>1 confusion with those proprietary terms that had 2 consistency and directing to 1-800. 3 Q. You mentioned a hypothetical query when I 4 think you were talking about confusion before. A great 5 query that you came up with, "Cheaper than 6 1-800-CONTACTS." 7 A. Umm-hmm. 8 Q. And using that as a -- as a query. 9 Let's go back. 10 I don't believe, but correct me if I'm wrong, 11 does that indicate navigational intent to you? 12 A. Absolutely not. Absolutely not. You are 13 explicitly saying in that query, in an indirect way but 14 in an explicit way, "cheaper than." Something else 15 different than 1-800-CONTACTS. You want options. 16 Q. But now in your hypothetical query there, 17 1-800-CONTACTS is part of that query? 18 A. Yes. 19 Q. Is that right? 20 A. Yes. 21 Q. So in using a negative keyword in that 22 instance, would that prevent, in your hypothetical 23 query, prevent that from coming up if the negative 24 keyword is meant to block something that's part of that 25 query?</p>
226	<p>1 link," was it the actual content in the ad, the 2 sponsored link, to use that term, or was it the entire 3 Google search engine result page experience, trying to 4 sort that out? 5 A. Either/or. Either/or. Honestly, it could be 6 a specific place on the page that was confusing. It 7 could be just the totality of it, not knowing why there 8 are two columns, why there's one up here that's 9 highlighted in yellow and another one down here that's 10 not. It could be kind of overwhelming. 11 One of the things that was most difficult in 12 that was -- and is today, proprietary keyword terms. I 13 search for 1-800-CONTACTS for example, and I see that 14 the first one up here might not be 1-800-CONTACTS. 15 Why? Why isn't the thing that I wanted to get to the 16 first thing here (indicating)? And that immediately 17 creates confusion. 18 And then that casts confusion on everything 19 else they see on the page. Now they're disoriented in 20 a way. Why is this not sensible? What else about this 21 page is not sensible? 22 And so, again, the walk-around, more 23 extemporaneous ad hoc stuff, in addition to the 24 usability research that we did suggested people are 25 easily confused and you could do a lot to remove</p>	228	<p>1 A. Per se, no. And it requires you to be more 2 skillful in how you use negative keywords. For 3 example, if you say -- sorry. Minus -- negative sign, 4 "1-800-CONTACTS." 5 Q. End quote? 6 A. End quote. 7 You're specifically telling Google that 8 phrase, very literally, if that's the only thing that 9 the user searches for, I don't want to show up for 10 that. 11 But if it's "cheaper than 1-800-CONTACTS," 12 well, that's more -- that's not this phrase exactly, 13 the exact match. It's a phrase that happens to include 14 "1-800-CONTACTS." So you can do negative exact, 15 negative phrase, negative broad match. And all these 16 have different repercussions on the ads that show up 17 within Google. 18 Q. I just want to see if we can make the record 19 clear. 20 Do you work in search advertising with 21 negative keywords? 22 A. I do. 23 Q. The -- and I know it's been a long day. 24 When you use the quotes, is that an indicator 25 of exact match or is that -- or are brackets used as an</p>

229	<p>1 indicator?</p> <p>2 A. I think -- yeah, sort of the answer -- you got</p> <p>3 a good point. I forget if it's -- one's brackets,</p> <p>4 one's quotes. I forget which one's exact and which</p> <p>5 one's -- I've been doing this for years and I still</p> <p>6 mess that one up.</p> <p>7 But skillful use of them can enable you to be</p> <p>8 omitted for queries where it's an exact match but be</p> <p>9 present when it's in a phrase.</p> <p>10 Q. So when you put the negative on for an exact</p> <p>11 match, then the whole query's got to match that?</p> <p>12 A. Correct.</p> <p>13 Q. And if you put on the phrase match, negative</p> <p>14 and the phrase --</p> <p>15 A. It's got to be the entire phrase, that's</p> <p>16 right.</p> <p>17 Q. -- then if it appears. So if you had phrase</p> <p>18 match on for your hypothetical query "cheaper than</p> <p>19 1-800-CONTACTS" --</p> <p>20 A. It would be negative for that one as well.</p> <p>21 Q. And your ad wouldn't appear to that?</p> <p>22 A. Correct.</p> <p>23 Q. And it wouldn't appear because</p> <p>24 "1-800-CONTACTS" is part of -- is part of that query;</p> <p>25 is that right?</p>	231	<p>1 "1-800-CONTACTS" is a part of the query, which I think</p> <p>2 is the phrase "match style"?</p> <p>3 A. Yeah, can I --</p> <p>4 Q. Go ahead.</p> <p>5 A. -- interject here before you continue?</p> <p>6 Q. Yes, please.</p> <p>7 A. For what it's worth, we would not have</p> <p>8 expected them to have a negative phrase match for</p> <p>9 1-800-CONTACTS. We would have only expected them to</p> <p>10 have a negative for an exact match.</p> <p>11 Q. And you're talking back to when you worked at</p> <p>12 1-800-CONTACTS?</p> <p>13 A. Correct. Correct.</p> <p>14 Q. And so -- just to reiterate, I think you</p> <p>15 testified before, you haven't seen anything since you</p> <p>16 left 1-800-CONTACTS?</p> <p>17 A. No, no. I was done with the contact lenses</p> <p>18 business my last day there. I haven't researched it</p> <p>19 since then.</p> <p>20 Q. But what you were saying you would have</p> <p>21 expected is that Vision Direct would have put in the</p> <p>22 exact match of 1-800-CONTACTS?</p> <p>23 A. Exact match. And probably several of them</p> <p>24 because you've got 1-800-CONTACTS, 1, space, 800,</p> <p>25 space, and all that.</p>
230	<p>1 A. Correct.</p> <p>2 Q. Okay.</p> <p>3 A. It's true that you need to be skilled in how</p> <p>4 you use these negative keywords; otherwise you get</p> <p>5 unintended consequences.</p> <p>6 Q. Yeah.</p> <p>7 So if the -- let's now say the hypothetical</p> <p>8 one. We were talking about the Vision Direct</p> <p>9 settlement before. If Vision Direct -- if someone</p> <p>10 wanted to do a comparison, compare Vision Direct with</p> <p>11 1-800-CONTACTS as a query.</p> <p>12 If -- if Vision Direct has added</p> <p>13 "1-800-CONTACTS" in as the phrase match, will it not</p> <p>14 deliver an ad because it is a part of the query?</p> <p>15 MR. VINCENT: Objection; vague; incomplete</p> <p>16 hypothetical.</p> <p>17 MR. CHIARELLO: I can break that down for you.</p> <p>18 THE WITNESS: Yeah, I would like you to.</p> <p>19 BY MR. CHIARELLO:</p> <p>20 Q. Let's assume the query is, compare Vision</p> <p>21 Direct with 1-800-CONTACTS. That's what it says</p> <p>22 written out.</p> <p>23 A. Okay.</p> <p>24 Q. Okay. And Vision Direct has adopted negative</p> <p>25 keywords such that, hypothetically, that where</p>	232	<p>1 Q. The various iterations of the same term?</p> <p>2 A. Yup.</p> <p>3 Q. And would you, because you testified earlier</p> <p>4 that you oversaw implementation of negative keywords,</p> <p>5 would you implement them in the same way?</p> <p>6 A. Yes.</p> <p>7 Q. Meaning you would implement them in an exact</p> <p>8 match?</p> <p>9 A. Exact match only. Because similarly, if</p> <p>10 somebody wanted to, say, enter a query that said</p> <p>11 "faster shipping than Vision Direct," we would want to</p> <p>12 appear for that.</p> <p>13 Q. Umm-hmm.</p> <p>14 A. Right.</p> <p>15 Q. Your other one you said the reason why you</p> <p>16 didn't bid on and -- on the rivals' trademarks was that</p> <p>17 they were inefficient.</p> <p>18 And can you explain what you mean by that?</p> <p>19 A. I mean, these -- as I mentioned before, these</p> <p>20 terms are navigational in nature. These trademarked</p> <p>21 terms are navigational in nature.</p> <p>22 So if I want to pay to appear when someone's</p> <p>23 searching for Vision Direct, I, of course, might be</p> <p>24 free to do so, absent any agreement with the</p> <p>25 competitor. I might be free to do so.</p>

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1 **Q. Could I stop you right there?**
 2 A. Sure.
 3 **Q. Would you have to pay to appear or to pay for**
 4 **the click?**
 5 A. You have to place a bid in order to even
 6 appear. So you at least have to be willing to bid
 7 something, but you don't actually pay unless there's a
 8 click. So thank you for the clarification. You have
 9 to be willing to pay.
 10 **Q. Okay.**
 11 A. I, of course, can put forth a bid, but as
 12 people who are searching for the term "Vision Direct"
 13 stumble across the ad for 1-800-CONTACTS on them and
 14 come to then find themselves on the 1-800-CONTACTS
 15 site, they were -- they would have been a very, very
 16 low conversion rate.
 17 And this is based on my cumulative knowledge
 18 from prior professional experience that this is a -- a
 19 losing proposition to try to bid on a proprietary
 20 keyword. They're not looking for you. If they find
 21 themselves on you, they'll just hit the back button and
 22 you will have paid for a click that doesn't -- that
 23 never results really in any sale.
 24 **Q. Umm-hmm.**
 25 A. And so it's a fool's errand. Don't even

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1 **Q. And so it's in Google's algorithm that in our**
 2 **hypothetical Vision Direct hasn't bid on**
 3 **"1-800-CONTACTS," but they've bid on the term**
 4 **"contacts." And Google says, "Hey, I see the word**
 5 **'contacts' there," even though it's part of a larger**
 6 **query, and they deliver the ad, is -- is that**
 7 **problematic? Is that a problem caused by Vision**
 8 **Direct?**
 9 MR. VINCENT: Objection; vague; lacks
 10 foundation; vague as to whether we're dealing with
 11 organic listing or paid search.
 12 MR. CHIARELLO: Only the paid search.
 13 THE WITNESS: Okay. Yeah, I mean, it would
 14 just indicate a lack of skill in implementing negative
 15 keywords properly.
 16 BY MR. CHIARELLO:
 17 **Q. But that doesn't mean that they were**
 18 **attempting to bid on -- that they didn't bid on the**
 19 **keyword. That doesn't mean they were necessarily**
 20 **attempting to advertise directly against**
 21 **1-800-CONTACTS, does it?**
 22 MR. VINCENT: Objection; vague; lacks
 23 foundation.
 24 THE WITNESS: Yeah, I'm actually unclear about
 25 what their intent might be. The point is, is that if

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1 bother trying.
 2 So, again, when I got there, we put in a
 3 number of different negative keywords, whether there
 4 was an agreement or not or otherwise, for a number of
 5 different competitors there because it's a waste of
 6 money.
 7 **Q. Suppose -- you know, suppose the rival Vision**
 8 **Direct or Coastal, the crabs-in-the-bucket people**
 9 **you're talking about, would have bid on the term**
 10 **"contacts" only and someone types in looking for**
 11 **1-800-CONTACTS as their query, and Google sends the ad**
 12 **up because they bid on the term "contacts" and maybe**
 13 **1-800-CONTACTS' ad --**
 14 A. We would have done the same, yes, of course.
 15 **Q. And -- I'll come back to that point there.**
 16 **But would that be -- would that be something**
 17 **you would expect to see, an ad from, say, like, a**
 18 **Vision Direct?**
 19 A. There should be robust competition --
 20 MR. VINCENT: Objection; vague; lacks
 21 foundation.
 22 THE WITNESS: There should be robust
 23 competition for that type of term. That's not a
 24 trademarked term for us.
 25 BY MR. CHIARELLO:

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1 their intentions weren't matched with the proper
 2 implementation of negative keyword terms, you would
 3 have all kinds of different spurious results that maybe
 4 you didn't intend.
 5 BY MR. CHIARELLO:
 6 **Q. If you remember, do you know if you bid on the**
 7 **term "vision" in the keyword?**
 8 A. I would be surprised if we didn't or at least
 9 phrases that included "vision," certainly.
 10 **Q. Did you bid on the term "lens"?**
 11 A. Again, unclear. Like with "vision," whether
 12 we would bid on that as an exact match term, but I mean
 13 certainly plenty of phrases that included those terms.
 14 **Q. Okay. Now, the third point you said was**
 15 **improper. What did you mean by that?**
 16 A. We just felt like there was -- there was brand
 17 equity that we had earned, and there was brand equity
 18 that they had earned. And even if it were cost
 19 efficient, which it wasn't, it seemed like an
 20 unscrupulous business practice.
 21 They had earned a certain amount of brand
 22 equity, and for a competitor to try to syphon off some
 23 of that equity, really probably just based on user
 24 confusion, just didn't seem like a good way to do
 25 business.

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1 And, again, it's sort of unnecessary frosting
2 on the point because the first two points were all the
3 reason that we needed. But it just so happened that it
4 didn't feel -- it never feels good to earn business
5 that way anyway.

6 **Q. How does that point you just made square with
7 the notion of -- well, let me establish some foundation
8 first.**

9 **Are you familiar with the term "comparative
10 advertising"?**

11 A. Of course.

12 **Q. What is comparative advertising?**

13 A. When you make reference to a competitor on a
14 given feature, price, or characteristic of the business
15 and you invite consumers or prospective customers to
16 compare the business on that axis.

17 **Q. If -- if Google is inviting competitors to bid
18 on each other's trademarks, and will deliver ads as
19 appropriate to whatever their algorithms say, how is
20 that form of advertising, search engine result page --
21 first of all, is that result comparative?**

22 MR. VINCENT: Objection; lacks foundation;
23 incomplete hypothetical.

24 BY MR. CHIARELLO:

25 **Q. Let me go back and start again.**

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1 **It says -- assume in generic terms, "contact
2 lenses" is a generic term and that's our query. And we
3 see a Google results page with let's just say eight
4 different advertisers. And then you have
5 1-800-CONTACTS. And if it's 2004, probably, the top
6 stop because you were running the bidding, and then
7 Vision Direct is in there, and then Coastal. And they
8 all have different --**

9 A. Assuming no agreements that would preclude
10 otherwise.

11 **Q. Right. Well, those are generic terms --**

12 A. Oh, contact lenses.

13 **Q. So you have an array --**

14 THE REPORTER: I'm sorry. This can't be a
15 conversation, because you guys are talking over each
16 other.

17 MR. CHIARELLO: I take responsibility for that.
18 Sorry about that. Okay. Is -- let me see here...

19 BY MR. CHIARELLO:

20 **Q. We're assuming the generic term "contact
21 lenses" is a query. Okay. And there's a -- a search
22 engine result page with many competitors appearing.
23 Do you follow me?**

24 A. Yes.

25 **Q. And those results that appear there when you**

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1 **see them side by side, in your experience would you
2 expect them to have different content within the small
3 search ads?**

4 MR. VINCENT: Objection; vague.

5 THE WITNESS: Only sometimes.

6 BY MR. CHIARELLO:

7 **Q. And would they invite comparison?**

8 MR. VINCENT: Same objection.

9 THE WITNESS: Often, yes. However, there are
10 some competitors that are specifically trying to cloak
11 themselves in copy and messaging that confuses. There
12 are some that -- that are specifically not trying to
13 create a distinction, but trying to create similarity.

14 BY MR. CHIARELLO:

15 **Q. And that maybe goes back up to the first point
16 on confusion and -- which I'll follow up with a
17 question on that in a moment.**

18 **But that form of comparative advertising,
19 assume that no one's trying to -- to engage in some
20 sort of false or misleading advertising.**

21 **Is that a form of comparative advertising as
22 you would understand it?**

23 A. No. Comparative advertising would be more
24 explicit. It would be specifically drawing attention
25 to Colgate gets your teeth whiter than Crest. One

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1 versus another on a specific characteristic of the
2 product.

3 **Q. When you're bidding on a generic term such as
4 "contact lenses" and you have a good idea that your
5 rivals are in the hope of delivering ads to that user
6 who is expressing maybe some intention or interest at
7 that point, what would you -- how would you define the
8 array of different advertisements that appear in that
9 response as a form of advertising?**

10 MR. VINCENT: Objection; vague.

11 THE WITNESS: I just don't know how to answer
12 your question. I'm sorry.

13 BY MR. CHIARELLO:

14 **Q. Well, is it just a variety of ads or is it --
15 is it -- is a search engine result page with multiple
16 ads, is it a form of comparative advertising?**

17 MR. VINCENT: Same objections.

18 THE WITNESS: In my professional opinion, no,
19 it's not.

20 MR. CHIARELLO: Okay.

21 THE WITNESS: It's the equivalent of shelf
22 space on a supermarket shelf. There can be three.
23 There could be four. It's up to the person that is --
24 that owns the shelf to determine how many options
25 appear there and some rationale for why they appear in

	241	243
<p>1 a certain order. 2 [Whereupon, Exhibit CX1398 was 3 referenced.] 4 BY MR. CHIARELLO: 5 Q. Okay. I'm handing you a document marked 6 CX1398. 7 A. Yes. 8 Q. And what is this? 9 A. This is a comparison of order volume of 10 1-800-CONTACTS relative to competitors, and this was 11 our best estimate. It was a guesstimate of sorts on 12 the order volume that our competitors might be 13 experiencing. 14 Q. Who is Cathy McCallum? 15 A. Cathy McCallum is Kevin McCallum's wife and 16 was also an employee of 1-800-CONTACTS as well. 17 Q. What division did she work in? 18 A. I believe she was an administrative assistant, 19 I think. 20 Q. And as you look at the competitive weekly 21 order volume, do you recognize the name "Vision 22 Direct"? 23 A. I do. 24 Q. Were they a competitor? 25 A. I do (sic).</p>	<p>1 not sure if it was somebody at the company or somebody 2 outside the company -- I'm uncertain about that -- 3 would place an order on each of these sites, and we 4 believed them to use a very rudimentary, almost 5 laughably rudimentary, if it were indeed the case, 6 method for assigning purchase numbers to each purchase. 7 So if you were the first one to purchase 8 today, you'd be number 1. And it would be visible in 9 your order confirmation mail as 10 orderconfirmation/page/page/?/ID=1. And yours would be 11 ID=2, and his would be ID=3, and mine would be 4. 12 And if you look at that once a week, you might 13 be able to benchmark, well, these were done in 14 sequence. Then the difference between last week's 15 benchmarks and this week's is the number of orders that 16 they did. 17 Couple of reasons why we -- why I never looked 18 at this is because -- I'm guessing that's coming next. 19 The first is that we -- I didn't know if we 20 could trust the data. They might be performing their 21 own testing, and the quantitative testing and order 22 testing mechanisms that could inflate the numbers in 23 volatile ways that we would never know. 24 The second is there were a couple of times 25 where we saw there would just be, like, no change.</p>	
<p>1 Q. AC Lens, do you recognize that name? 2 A. Only now after looking at this chart do I 3 remember that they existed, but yes. 4 Q. Another name here, YourLens.com. Do you 5 remember? 6 A. All of these I vaguely recall were competitors 7 at that point in time. These were the various crabs in 8 the bucket of which I spoke earlier. 9 Q. Okay. And then -- and these lines at the 10 bottom of the graph we're looking at, just so the 11 record's clear, Bates label is 80504. We're looking at 12 the lines in the big gray area here. 13 Are these the estimated order volume? 14 A. This is the estimated order volume, correct. 15 Q. Do you know where -- do you know who prepared 16 this? 17 A. I don't know who prepared it, actually. 18 Q. Do you think it would be Cathy McCallum? 19 A. That's a decent guess, but I really don't 20 know. 21 Q. Do you know how the employee at 1-800-CONTACTS 22 would have gotten this data? 23 A. I know how we guessed at it, yes. 24 Q. How did you guess at it? 25 A. Every week I think there is somebody -- I'm</p>	<p>1 242</p> <p>1 There would be, like, no orders week over week. And in 2 some cases, the competitive sets that you might have 3 observed, there was a lot of turnover within it because 4 sometimes they seemed to have stopped doing business or 5 they would not do any orders or their numbering scheme 6 would change in some way. 7 And then the third is it's just an 8 unproductive thing to do. Like, let's focus on making 9 our line go up. I don't really care what their lines 10 are doing. Let's focus on our business. All this 11 focus -- any of this focus that's on competitors is 12 just diluting our attention from -- 13 Q. Was this something that -- the creation of 14 this report that fell under your bailiwick? 15 A. No, this preceded -- the creation of this 16 preceded my arrival. 17 Q. The ongoing production of it, though, was 18 that -- 19 A. No, I don't think this ever -- I don't -- I 20 don't believe this ever fell under my purview. 21 Q. Okay. 22 A. I can tell you if it had, we wouldn't have 23 invested a lot of time and energy continuing to produce 24 it because I didn't value it. 25 MR. CHIARELLO: Okay. You can set that aside.</p> <p>1 244</p>	

245	<p>1 [Whereupon, Exhibit CX0060 was 2 referenced.] 3 BY MR. CHIARELLO: 4 Q. Giving you CX060. 5 A. Okay. 6 Q. And this is a three-page document e-mail 7 trail. 8 A. May I take a second to catch up on it? 9 Q. By all means. Take as much time as you need. 10 A. Okay. Yeah. 11 Q. What is this document? 12 A. This is a pop quiz from the CEO. 13 Q. What do you mean by pop quiz? 14 A. CEO jumps into Google and types in "contact 15 lens," and wants to see what he sees, and doesn't like 16 what he sees, and wants to know why what he sees has 17 happened this way. 18 Q. Were these pop quizzes in this e-mail exchange 19 something that happened in the ordinary course of your 20 duties at 1-800-CONTACTS? 21 A. They happened in the ordinary course of every 22 company's duties on high-volume search terms that any 23 CEO can easily pop into his phone or browser. 24 Q. So yes, it happens? 25 A. This is customary and not just to</p>	247	<p>1 sponsored results." 2 Do you see that? 3 A. Yes. 4 Q. What was he asking here? 5 A. He is curious about what's happening on the 6 sponsored links portion of the Google search engine 7 results page for contact lenses. 8 Q. And you have a little exchange back and forth, 9 and then you reply later here, and looking at the 10 bottom of page 2. And it says: (Reading.) 11 "We could not replicate the #5 position, 12 but we did see a result as low as the 13 third spot." 14 What did he mean by that? 15 A. We tried to reproduce what he saw on our own 16 computers, and we were unable to do so. He saw a 17 certain sequence where Vision Direct and Coastal were 18 in the first and second position and we were in the 19 fifth, and then when we did the same searches from 20 wherever we were at, we were unable to replicate that 21 same sequence, but did show a sequence where we were as 22 low as the third spot. In the others, we were in 23 either first or second, presumably. 24 Q. He asks in response to your e-mail: 25 (Reading.)</p>
246	<p>1 1-800-CONTACTS. 2 Q. Okay. And -- 3 A. It's healthy too. 4 Q. The -- if we could go to the first e-mail in 5 the exchange on Tuesday, August 9th. It looks like 6 8:50 in the morning. 7 Was this the first pop quiz you received from 8 Mr. Coon? 9 A. Oh, no, these pop quizzes happened pretty 10 frequently. 11 Q. By "frequently," do you do you mean every 12 week? 13 A. Could be. It's healthy. 14 Q. And what was generally -- what was the nature 15 of the pop quizzes that Mr. Coon would give? 16 A. Could be anything, really. Could be anything 17 from a banner that he saw, a search engine results 18 page, something that he observed on our website, the 19 speed with which our pages loaded for him on his 20 computer. It could be really anything. 21 Q. Your response right above here, he says -- 22 let's read what he says first. He says: (Reading.) 23 "I know we're supposed to meet on this. 24 In the meantime, why are VD and Coastal 25 1, 2 right now on Google? We're 5th on</p>	248	<p>1 What do our competitors do differently 2 from what we do? Do that have a 3 full-time person doing this real time 4 all day? 5 Do you see that? 6 A. I do. 7 Q. What did he -- what do you think he meant by 8 this e-mail? 9 A. I think he realizes the power and volume of 10 being very high in the -- on the search engine results 11 sponsored links sequence, that there's benefit in being 12 in the top one for a term like "contact lenses." 13 Q. The phrase where he says -- 14 A. And he wants to know if there's -- you know, 15 how they're having success at maintaining that spot. 16 What they're doing differently could be, as he 17 suggests, they've got more time and energy devoted to 18 solving the problem, solving the riddle of how to stay 19 in that spot. Could be that they're spending more or 20 it could be any one of a number of things. He wants to 21 know how they've done it. 22 Q. And is that what you glean from what he means 23 by do they have a full-time -- 24 A. Full-time person, yeah. 25 Q. And you responded above here 11:22 a.m.</p>

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1 **And what did you mean by your response? The**
2 **first sentence says: (Reading.)**

3 **"Our competitors do have full-time**
4 **employees dedicated to paid search**
5 **campaigns."**

6 **Is that accurate?**

7 A. We believed it to be accurate, based on our
8 read of their employee listings on their company pages
9 and maybe on employee pages that appeared on LinkedIn
10 or other search sites.

11 **Q. And then you have a "however" clause here. It**
12 **goes on, and without reading it all into the record**
13 **because the document will speak for itself.**

14 **But what were you trying to get at when you**
15 **replied here with this "however" clause?**

16 A. Long-winded way of saying we don't really know
17 how he got the results that he got and speculating
18 about what might have been the cause.

19 The search engine management software that I
20 referred to here is third-party software that interacts
21 with the Google AdWords platform on your behalf using
22 certain rules that you've programmed into it.

23 And the deployment of such tools and the
24 sophistication of such tools has always been a bit of
25 an arms race in every industry. When there's a lot of

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1 those who are actually trying to get the job done.

2 Or the second is it's too much information and
3 they glaze over it, and they don't really read it or
4 grok any of it, and they remain frustrated because it
5 was more information than they needed and it didn't
6 give them the concise answer to the question that they
7 wanted.

8 So I realized that I had two audiences on
9 this. One was Jonathan who needs to get a rather
10 concise answer, and Kevin who might want a broader set
11 of information to work with.

12 **Q. Umm-umm.**

13 A. And so that was the second e-mail.

14 **Q. How was Mr. Coon as far as working with**
15 **relative to search advertising? Did he get it or was**
16 **he much more removed?**

17 A. He was removed from the day-to-day, but he
18 loved these pop quizzes. He loved to jump in there and
19 just kind of take a snapshot of what was happening and
20 then get an explanation.

21 **Q. Are you aware if he would do these pop quizzes**
22 **in the other divisions?**

23 A. Oh, I'm certain of it. I'm certain of it. He
24 was a skilled CEO, and that's a good practice to have,
25 yes.

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1 value to be extracted from a certain set of keywords
2 like this, things like "contact lens," "contact
3 lenses," those terms carried a lot of value and a lot
4 of volume with him.

5 So they attracted the type of arms race with
6 regard to bid management and sophistication that I
7 alluded to in my response.

8 **Q. When you turn back to page 1 of the e-mail,**
9 **you send a separate e-mail to Kevin McCallum.**

10 **Do you see that?**

11 A. Umm-hmm.

12 **Q. And just look at the date stamp. It looks**
13 **like it was sent about 15 minutes after the one sent to**
14 **Mr. Coon.**

15 **Do you see that?**

16 A. Yes.

17 **Q. Why the separate e-mail to Mr. McCallum?**

18 A. Just because, if you opened up a wide panoply
19 of different options to the CEO -- I've learned this
20 over time, not just with Jonathan -- one of two things
21 happens, neither is good.

22 The first is that they keep digging for even
23 more granular information, that they really want to
24 study it and they basically want to climb right into
25 your cockpit and it just creates tons of overhead for

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1 MR. CHIARELLO: Okay. You can set that
2 document aside.

3 And I'm handing you CX404.

4 [Whereupon, Exhibit CX0404 was
5 referenced.]

6 BY MR. CHIARELLO:

7 **Q. My question is going to be, the first one is:**
8 **What is this?**

9 A. Let me see. Okay. I'm with you.

10 **Q. What is this?**

11 A. This looks like correspondence between two
12 attorneys that is a lot of fun to read.

13 **Q. Who are the two attorneys that you're**
14 **referencing?**

15 A. It looks like one is counsel for LensDirect
16 and the other is outside IP counsel for 1-800-CONTACTS.

17 **Q. And is the IP counsel Brian Pratt?**

18 A. Yes, that's correct.

19 **Q. Do you know why you were copied on this**
20 **e-mail?**

21 A. Yeah, likely because this was the type of
22 matter that we had come to establish a good
23 correspondence with other competitors for. I think the
24 hope was that we could get similar basis with other
25 competitors.

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1 I mean, Google encouraged us to take this up
2 directly with advertisers and they were doing as they
3 had asked. And as you've seen from other
4 correspondence with Eric Duerr at Vision Direct, we
5 were able to correspond directly without having to get
6 legal involved every time something popped up.
7 We tried to get the same with Luxottica with
8 regards to LENSRAFTERS. I think the hope was that we
9 could get to something here with LensDirect as well.
10 This is likely the basis of my inclusion in the e-mail.
11 **Q. The date of the e-mail is March 20th, 2006.**
12 **And I believe you testified earlier that you**
13 **were no longer with 1-800-CONTACTS --**
14 A. That's correct.
15 **Q. -- in early --**
16 A. That's correct.
17 **Q. So were you still with 1-800-CONTACTS in**
18 **March 2006?**
19 A. March 2006 I was in Thailand. I had been on
20 the road for three months. I never -- I would have
21 never received this e-mail.
22 **Q. Do you think that Mr. Pratt sent it to you in**
23 **error?**
24 A. Yes.
25 MR. CHIARELLO: Okay. I'll give you CX1053.

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1 [Whereupon, Exhibit CX1053 was
2 referenced.]
3 THE WITNESS: Oh, Dave Bascom.
4 BY MR. CHIARELLO:
5 **Q. Please look this over and tell me what it is.**
6 A. I mean, I haven't read every word, but I'm
7 familiar enough now with the correspondence if you want
8 to ask a question.
9 **Q. What is this?**
10 A. Dave Bascom is sending an e-mail here to Kevin
11 McCallum in which he's providing an update to Kevin on
12 his efforts. He was an outside, third-party consultant
13 that was advising 1-800-CONTACTS on paid search engine
14 advertising campaigns, and in some cases -- I think in
15 most cases actually operating those campaigns on behalf
16 of 1-800-CONTACTS.
17 **Q. So is it -- were they outsourcing a lot of**
18 **this work when you joined in 2004?**
19 A. Yes.
20 **Q. Did you continue to work with Dave Bascom**
21 **after you joined 1-800-CONTACTS?**
22 A. No.
23 **Q. Why not?**
24 A. I didn't believe him to be that competent.
25 **Q. Okay. You can set that aside.**

255

1 **If you would please go back into your stack of**
2 **documents from this morning. CX0062.**
3 A. Got it.
4 **Q. And my question to you in this is relative to**
5 **the date. This appears to be an e-mail from Brandon**
6 **Dansie to Kevin McCallum.**
7 **Do you see that?**
8 A. I do.
9 **Q. And it's dated 3rd of August 2006.**
10 **Do you see that?**
11 A. I do.
12 **Q. And then attached it says, February 2005.**
13 **Do you see that?**
14 A. I do.
15 **Q. And I just want to make sure that the record's**
16 **clear.**
17 **The attachment here, was this something you**
18 **prepared?**
19 A. It is.
20 **Q. Okay. And -- but when this e-mail from**
21 **Mr. Dansie to Mr. McCallum was sent, this was after you**
22 **left the company?**
23 A. More than a year and a half later, yes.
24 **Q. Wait, you left in January 2006?**
25 A. No, I'm just noting that the period of time

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1 between February 2005 and August 2006 is almost a year
2 and a half.
3 **Q. Okay. So let me go back and just make sure we**
4 **have a clean record here.**
5 **The August 13th -- August 3rd, 2006 e-mail was**
6 **sent at about eight months after you left; is that**
7 **correct?**
8 A. Correct.
9 **Q. And this e-mail is sent about a year and a**
10 **half after you wrote this document?**
11 A. Correct.
12 **Q. And do you know in the intervening time after**
13 **you wrote this document, which appears to be dated**
14 **March 2nd, 2005, if it had been updated in that time?**
15 A. I don't know.
16 **Q. While you were at 1-800-CONTACTS, do you**
17 **recall updating it in the remaining nine months of your**
18 **time there?**
19 A. Perhaps. Although, the timing is important
20 here. As my team was hired in 2004 after I arrived in
21 the spring of 2004, as they came on and got trained and
22 had very clear expectations and role clarity, a lot of
23 this became their autonomous responsibility and not
24 something that I might have done as an individual
25 contributor.

64 (Pages 253 to 256)

257	<p>1 So I would actually be surprised if there</p> <p>2 weren't other updates that had been made, but it is</p> <p>3 less likely that I authored them myself.</p> <p>4 Q. After you left and went on your sabbatical in</p> <p>5 early 2006, for documents like this or anything else,</p> <p>6 did any of the employees follow up with you or reach</p> <p>7 out to you to talk about what was going on at</p> <p>8 1-800-CONTACTS?</p> <p>9 A. Not that I can recall. It was a pretty clean</p> <p>10 break, as far as I remember. I wasn't in the country</p> <p>11 so I wouldn't have been able to respond on a timely --</p> <p>12 on a timely basis, in any event.</p> <p>13 Q. Okay. And so -- so our record is clear here</p> <p>14 too, the sum total of time for your knowledge related</p> <p>15 to 1-800-CONTACTS, is it limited to that early 2004 to</p> <p>16 January 2006 time frame?</p> <p>17 A. Correct.</p> <p>18 Q. And by "knowledge" I mean your personal</p> <p>19 knowledge of it.</p> <p>20 A. Correct.</p> <p>21 Q. And so you have -- is it fair to say that you</p> <p>22 have no knowledge of any of the -- any subsequent</p> <p>23 agreements that 1-800-CONTACTS might have entered into</p> <p>24 with any other party after the time you left?</p> <p>25 A. That's correct.</p>	259	<p>1 from the Southeast so that we could attribute not only</p> <p>2 call center volume increases to that TV campaign but</p> <p>3 also potentially a lift in Web traffic to that same TV</p> <p>4 campaign.</p> <p>5 So in terms of marketing measurement, it was</p> <p>6 important. But as a -- as a portion of our overall</p> <p>7 order volume, I believe that terms -- collectively</p> <p>8 terms like "contact lens," "contact lenses," and more</p> <p>9 generic terms comprised a larger number of orders than</p> <p>10 our trademark terms did.</p> <p>11 BY MR. CHIARELLO:</p> <p>12 Q. When you were at 1-800-CONTACTS from 2004 to</p> <p>13 2006, who were the closest rivals with respect to call</p> <p>14 centers that had rival call centers that competed with</p> <p>15 1-800-CONTACTS?</p> <p>16 A. I don't know of any.</p> <p>17 Q. Okay. And what about the closest rivals that</p> <p>18 provided online sales of contact lenses?</p> <p>19 MR. VINCENT: Objection; vague.</p> <p>20 THE WITNESS: I can speculate that it might</p> <p>21 have been Vision Direct and perhaps Coastal Contacts;</p> <p>22 although, our ability to understand their order volume,</p> <p>23 relative to ours, was specious at best.</p> <p>24 BY MR. CHIARELLO:</p> <p>25 Q. Was 1-800 concerned -- 1-800-CONTACTS</p>
258	<p>1 MR. CHIARELLO: Okay. Let's go off the record.</p> <p>2 (Off the record discussion.)</p> <p>3 MR. CHIARELLO: Go back on the record.</p> <p>4 BY MR. CHIARELLO:</p> <p>5 Q. During your time at 1-800-CONTACTS, as you</p> <p>6 were starting up the online business, how important was</p> <p>7 trademark advertising as far as pulling in new</p> <p>8 customers?</p> <p>9 MR. VINCENT: Objection; vague; lacks</p> <p>10 foundation.</p> <p>11 BY MR. CHIARELLO:</p> <p>12 Q. How important was trademark search</p> <p>13 advertising?</p> <p>14 MR. VINCENT: Same objections.</p> <p>15 THE WITNESS: The traffic was very</p> <p>16 high-conversion-rate traffic relative to other keywords</p> <p>17 that we might bid on. And in order of magnitude better</p> <p>18 converting traffic than other keywords they might have</p> <p>19 been bidding on. So in that regard, it was important.</p> <p>20 In a second regard it was important because it</p> <p>21 helped us correlate any additional impact of our</p> <p>22 traditional advertising on the Web, right? So to use</p> <p>23 my example earlier, if we did a flurry of television</p> <p>24 advertising in the Southeast, we would try to measure</p> <p>25 any corresponding increase in our trademarked terms</p>	260	<p>1 concerned about those competitors that you referred to</p> <p>2 as crabs in the bucket advertising against it with</p> <p>3 lower prices?</p> <p>4 MR. VINCENT: Objection; vague; lacks</p> <p>5 foundation; calls for speculation; assumes facts.</p> <p>6 THE WITNESS: That was a tempting distraction</p> <p>7 for us, chasing the lowest price on the Internet.</p> <p>8 And what we found was that we could not add in</p> <p>9 incremental new customers what we -- sorry -- we could</p> <p>10 not add in new customer order revenue what we had lost</p> <p>11 by dropping the prices from the existing order volume.</p> <p>12 I don't think I said that very articulately but perhaps</p> <p>13 the point got across.</p> <p>14 The tradeoff was not worth it. To lower</p> <p>15 prices to attract incrementally more customers that</p> <p>16 might have otherwise patronized the crabs in the</p> <p>17 bucket, we ended up losing more revenue by dropping our</p> <p>18 prices even if we added new customers in the process</p> <p>19 because the price drop was then shared by all our other</p> <p>20 customers.</p> <p>21 BY MR. CHIARELLO:</p> <p>22 Q. Assume that the prices stayed stable -- and we</p> <p>23 could go back and look at Mr. McCallum's e-mail that</p> <p>24 had proposed three price tiers that were rejected.</p> <p>25 Suppose they remained where they were and didn't drop</p>

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1 **to the lower price, was that -- the lower price crabs**
 2 **in the bucket?**
 3 **Was that a threat or concern that you would**
 4 **lose business to those lower-priced competitors through**
 5 **search advertising?**
 6 A. No.
 7 MR. VINCENT: Same objections.
 8 THE WITNESS: No, because we didn't compete on
 9 price alone. We had to be reasonable with regard to
 10 price, but we competed on service and credibility. And
 11 so we didn't look at those crabs in a bucket as being
 12 formidable threats to us. We were competing on a
 13 different basis than they were.
 14 BY MR. CHIARELLO:
 15 **Q. If -- in your time there, did you -- I guess**
 16 **you just testified to this.**
 17 **Did you see a decrease in volume as a result**
 18 **of competitor advertising on price?**
 19 A. No, by -- in fact, by turning our focus to
 20 what we could control and improving our own business
 21 and our own messaging, we were able to grow the
 22 e-commerce business pretty considerably year over year
 23 without regard to what might be happening among our
 24 competitors.
 25 **Q. And do you know if the competitors were also**

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1 **growing the business?**
 2 A. Unclear. And we didn't really care if they
 3 were or not. We just cared that our business was
 4 growing.
 5 **Q. And do you know if competitor -- if, in**
 6 **general, consumers were shifting their allegiance from**
 7 **brick-and-mortar or UCPs to going online? Were more**
 8 **consumers trying out purchasing contact lenses online**
 9 **in the time you were at 1-800-CONTACTS?**
 10 A. I'm uncertain --
 11 MR. VINCENT: Go ahead.
 12 THE WITNESS: I'm uncertain about whether
 13 contact lenses as a sector was a growing market or not.
 14 MR. CHIARELLO: Okay.
 15 Okay. I have no further questions.
 16 MR. VINCENT: I would just like to make sure
 17 we mark the transcript confidential, so we'll have an
 18 opportunity to look through and designate any portions.
 19 MR. CHIARELLO: And we get a quick turnaround.
 20 MR. VINCENT: Could you send me a rough?
 21 MR. CHIARELLO: Send us all roughs.
 22 (Off the record discussion.)
 23 BY MR. CHIARELLO:
 24 **Q. Are you planning to travel outside the United**
 25 **States between April and May of this coming year?**

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1 A. No.
 2 MR. CHIARELLO: Okay. Then we're done.
 3 Thanks.
 4
 5 (Whereupon, at the hour of 2:50 p.m. the
 6 matter was adjourned.)
 7
 8 ---o0o---
 9
 10 I declare under penalty of perjury that the
 11 foregoing is true and correct. Subscribed at
 12 _____, California, this _____ day of
 13 _____, 2017.
 14
 15
 16
 17 _____
 18 CLINT SCHMIDT
 19
 20
 21
 22
 23
 24
 25

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1 CERTIFICATE OF REPORTER
 2
 3 I, SHAARON M. SHIGIO, a Certified Shorthand
 4 Reporter of the State of California, duly authorized to
 5 administer oaths, do hereby certify: That I am a
 6 disinterested person herein; that the witness, CLINT
 7 SCHMIDT, named in the foregoing deposition was by me
 8 duly sworn to testify the truth, the whole truth, and
 9 nothing but the truth; that said deposition was
 10 reported in shorthand by me, SHAARON M. SHIGIO, a
 11 Certified Shorthand Reporter of the State of
 12 California, and thereafter reduced to typewriting, by
 13 computer.
 14
 15
 16
 17
 18 Shaaron M. Shigio
 19 CSR # 12286
 20
 21
 22
 23
 24
 25

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I filed the foregoing documents 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 documents to:

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Counsel for Respondent 1-800 Contacts, Inc.

Dated: May 18, 2017

By: /s/ Daniel J. Matheson
Attorney

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.

May 18, 2017

By: /s/ Daniel J. Matheson
Attorney