

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



In the Matter of
1-800 Contacts, Inc.
a corporation

Respondent

PUBLIC

DOCKET NO. 9372

ORIGINAL

NON-PARTY WALGREENS INC.'S MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), non-party Walgreens, Inc. ("Walgreens") respectfully moves this Court for in camera treatment of the attached competitively-sensitive, confidential business documents (the "Confidential Documents"). Walgreens produced these documents, among others, in response to third-party subpoenas and civil investigative demands in this matter. The Federal Trade Commission ("FTC") and 1-800 Contacts ("1-800 Contacts") have now notified Walgreens that they intend to introduce a selection of Walgreens' documents, including the Confidential Documents, into evidence at the administrative trial in this matter. See Letter from the Federal Trade Commission dated March 10, 2017 (attached as Exhibit A) and Letter from 1-800 Contacts dated March 15, 2017 (attached as Exhibit B).

All of the materials for which Walgreens is seeking *in camera* treatment are confidential business documents, such that if they were to become part of the public record, Walgreens would be significantly harmed in its ability to compete in the contact lens industry. For the reasons discussed in this motion, Walgreens requests that this Court afford its confidential business documents *in camera* treatment indefinitely. In support of this motion,

Walgreens relies on the Affidavit of Thomas Pemberton (“Pemberton Declaration”) attached as Exhibit C, which provides additional details on the documents for which Walgreens is seeking *in camera* treatment.

I. The Documents for Which Protection is Sought

Walgreens seeks *in camera* treatment for all or part of the following Confidential Documents, copies of which are attached (in electronic form) as Exhibit D:

Production Beginning Number	Description
CX1805-001	Presentation: Vision Direct Business Overview
CX8001-001	Declaration of Glen M. Hamilton (Walgreens, Inc.)
CX8002-001	Declaration of Glen M. Hamilton (Vision Direct, Inc.)
CX9007-001	IH Transcript of Stephen Fedele
CX9008-001	IH Transcript of Glen Hamilton
CX9038-001	Deposition Transcript of Glen Hamilton
WAG-00000074	FY15 Rev Analysis Vision.xlsx
WAG-0000251	AID Refer VisionDirect.xlsx
WAG-00000003	Spreadsheet: Report on Negative Keywords
WAG-00000008	Walgreens data files - affirmative bidding on competitors
WAG-00000009	Walgreens data files - affirmative bidding on competitors (SEM profiles)

Production Beginning Number	Description
WAG-00000016	Google - 1800 Negatives List.csv
WAG-00000017	Google -April 2016.csv
WAG-00000018	Google - General Negatives List.csv
WAG-00000019	Google -Nov 2015.csv
WAG-00000020	Google - Walgreens Negative Keywords.csv
WAG-00000028	2014_03_20 Walgreens Optical Business Update FINALrevised.pptx
WAG-00000031	Vision Direct Excel Spreadsheet
WAG-00000032	Vision Direct Excel Spreadsheet
WAG-00000037	Presentation: IVD 2005 Budget Discussion
WAG-00000038	Presentation: Contact Lens Business Overview
WAG-00000046	Spreadsheet: Overview by product
WAG-00000047	Vision Direct Business Overview June 1022 v.0.1.pptx
WAG-00000051	Spreadsheet: Acuvue information
WAG-00000053	Spreadsheet: Orders, Sales, Profit and AOV information
WAG-00000054	Spreadsheet: Walgreens.com Contact Lens Category (Placed Order Data)
WAG-00000062	Spreadsheet: VisionDirect.com Contact Lens Category (PLACED ORDER DATA)

Production Beginning Number	Description
WAG-00000073	Walgreens/Vision Direct data files - FY14 Rev. Analysis Vision Template
WAG-00000075	FY16 Rev Analysis Vision v2 (REVAMP).xlsx
WAG-00000076	Walgreens Contacts Sales Breakout.xlsx
WAG-00000077	Walgreens/Vision Direct data files - Walgreens Contact Lens Stats
WAG-00000080	Spreadsheet: Vision Direct P&L FY14-FY16
WAG-00000084	Spreadsheet: WAG FY15 P&L
WAG-00000085	Spreadsheet: WAG FY16 P&L
WAG-00000086	Spreadsheet: FY16 IVD Marketing
WAG-00000087	Spreadsheet: WAG Contacts FY15 Marketing
WAG-0000202	Optical Weekly Recap FY15 FW26.xlsx
WAG-0000214	Traffic and Orders by Channels v3.xlsx
WAG-0000215	Vision Direct One Pager v2014_09_22.docx
WAG-0000223	Walgreens data files - affirmative bidding on competitors (natural/paid data)
WAG-0000232	Vision Direct Baseline Usability Study for Refresh_Report_10242012.pdf

II. Walgreens' Documents are Secret and Material such that Disclosure Would Result in Serious Injury to Walgreens

In camera treatment of material is appropriate when its "public disclosure will likely

result in a clearly defined, serious injury to the person, partnership, or corporation requesting" such treatment. 16 C.F.R. § 3.45(b). The proponent demonstrates serious competitive injury by showing that the documents are secret and that they are material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re DuraLube Corp.*, 1999 F.T.C. LEXIS 255, *5 (1999). In this context, courts generally attempt "to protect confidential business information from unnecessary airing." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both secrecy and materiality, the Court may consider: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-457 (1977).

The Confidential Documents are both secret and material to Walgreens' business, as discussed in detail in the Pemberton Declaration. In sum, the materials at issue contain information of substantial competitive significance to Walgreens, including but not limited to the search engine advertising keywords it chooses to bid on, its overall business strategy with respect to online contact lens sales, and its prices, margins, and willingness to offer discounts in response to competition. Pemberton Decl. at ¶ 8. As a leading retailer of pharmacy and personal care products, Walgreens depends on continued investment in mass-market advertising to attract and retain customers. *Id.* at ¶ 3. Thus, it has developed specific and proprietary online

advertising and pricing strategies that are reflected in its keyword lists, performance reports and discussions of marketing strategy. *Id.* at ¶¶ 8-10. Such information and strategies are proprietary to Walgreens and not publicly known outside of Walgreens. *Id.* In recognition of these facts, when Walgreens produced the Confidential Documents, it took steps to maintain confidentiality by designating the documents "Confidential" and noting that it was producing them pursuant to the Protective Order in this case. Because of the highly confidential and proprietary nature of the information and its materiality to Walgreens' business, *in camera* treatment is appropriate.

Further, disclosure of the Confidential Documents will result in the loss of a business advantage to Walgreens. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999) ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'). The Confidential Documents are highly material to Walgreens' pricing, discounting and keyword bidding strategies in the fiercely competitive online contact lens sales marketplace. Pemberton Decl. at ¶¶ 8-10. Making such documents public would result in a loss of business advantage that Walgreens has built as the result of its own substantial investments in the development of its search engine bidding and online sales strategies.

Finally, Walgreens' status as a third party is relevant to the treatment of its documents. The FTC has held that "[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *H.P. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a third party, which deserves "special solicitude" in its request for *in camera* treatment for its confidential business

information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984) ("As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests."). Walgreens' third-party status therefore weighs in favor of granting *in camera* treatment to the Confidential Documents.

III. The Confidential Documents Contain Trade Secrets, which will Remain Sensitive Over Time and Thus, Permanent *In Camera* Treatment is Justified

Given the highly sensitive and technical nature of the information contained in the Confidential Documents, Walgreens requests that they be given *in camera* treatment indefinitely. There are two core categories of documents for which Walgreens is requesting *in camera* status: keyword lists and strategic analyses of advertising and pricing strategy. For the reasons described below, both categories are "likely to remain sensitive or become more sensitive with the passage of time" such that the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *7-8.

As discussed in the Pemberton Declaration, the keyword lists are the core ingredient in Walgreens' search engine advertising strategy, which in turn is a crucial part of Walgreens' effort to compete in the online contact lens space. Pemberton Decl. at ¶ 9. These lists represent the product of multiple years of expensive trial-and-error in contact lens SEM, as well as the combined business judgment of a team of digital marketing experts who are employed by Walgreens specifically to ensure that the Company succeeds in marketing its products to online consumers. Although keyword lists are constantly being updated and streamlined, the core lists of keywords in any product category, such as contact lenses, generally remain in place for several years or more,

with only a small portion of the more than 3,000 positive keywords that Walgreens regularly uses in the contact lens category being modified or replaced in any given year. *Id.* at ¶ 7. The lists are likely to remain in place far beyond the tenure of any specific Walgreens employee, and represent a key piece of intellectual property on which Walgreens' SEM activities rely. They are a paradigmatic example of the type of trade secrets which are granted more-than-ordinary protection under the FTC's precedents, *see In re Dura Lube Corp.*, 1999 FTC LEXIS at *5, and as such the Company requests that they receive in camera treatment indefinitely, or, at a minimum, for a period of 10 years.

The second category of documents, strategic analyses of advertising and pricing strategy, consist of Walgreens' proprietary analyses of advertising performance, pricing, margins, inputs costs, and other highly sensitive strategic information. Pemberton Decl. at ¶ 10. These documents reveal highly confidential information concerning Walgreens' strategies in the contact lens marketplace, including details on Walgreens' online marketing budgets (*see* WAG-00000084 – 85), the costs, prices, discounts offered and margins earned on various contact lens products (*see, e.g.*, WAG-00000073), product-level price comparisons between the Company and its competitors (WAG-00000031), customer satisfaction levels and complaints (WAG-00000077), and high-level strategic analyses of the contact lens sector, including recommendations on Walgreens' future competitive posture (CX1805). While some of the details referenced in particular documents may change with time, the core information contained in these documents regarding Walgreens' corporate pricing tactics, willingness to offer discounts in response to competition, and strategy with respect to the contact lens industry as a whole have remained constant over the past several years, and will remain highly competitively

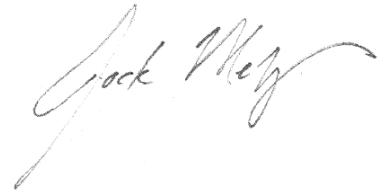
relevant for the foreseeable future. The Company therefore requests that these documents receive *in camera* treatment indefinitely, or, at a minimum, for a period of 3 years.

The litigants in this matter have also given notice that they intend to introduce deposition transcripts and declarations from Glen Hamilton and Stephen Fedele (CX8001, CX8002, CX9007, CX9008, and CX9038) in which these former Walgreens employees candidly discuss the strategic issues described above, including specific keywords employed by Walgreens in its SEM bidding activities, details on Walgreens keyword bidding strategy, the amount that Walgreens spends on search engine advertising, and the Company's strategies for increasing its share of the contact lens market in the future. For the portions of each transcript that fall into the categories for which Walgreens is requesting *in camera* treatment (keywords and strategic analyses), Walgreens has provided proposed redactions as part of Exhibit D. For the same reasons discussed above, requests that the redacted portions of these documents receive *in camera* treatment indefinitely, or, at a minimum, for a period of 3 years.

IV. Conclusion

For the reasons set forth above and in the accompanying Pemberton Declaration, Walgreens respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Documents indefinitely or, at a minimum, for periods of 3 and 10 years respectively.

Dated: March 27, 2017



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EXHIBIT A



Bureau of Competition
Anticompetitive Practices Division

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

March 10, 2017

Via E-Mail

Walgreens Boots Alliance, Inc.
Vision Direct Inc.
c/o Scott A. Sher, Esq.

RE: *In the Matter of 1-800 Contacts, Inc.*, Federal Trade Commission Dkt. No. 9372

Dear Mr. Sher:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intend to offer the documents and testimony referenced in the enclosed Exhibit A into evidence in the administrative trial in the above-captioned matter. The administrative trial is scheduled to begin on April 11, 2017. All exhibits admitted into evidence become part of the public record unless *in camera* status is granted by Administrative Law Judge D. Michael Chappell.

For documents or testimony which include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45, 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Jerk*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). You must also provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

Please be aware that under the current Scheduling Order dated September 7, 2016, the deadline for filing motions seeking *in camera* status is March 27, 2017.

If you have any questions, please feel free to contact me at (202) 326-3696.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron Ross". The signature is fluid and cursive, with the first name "Aaron" and last name "Ross" clearly distinguishable.

Aaron Ross

Counsel Supporting the Complaint

Exhibit No.	Description	Date	BegBates	EndBates
CX1057	Email from Glen Hamilton to Rick Galan re A new term for your negative list for Vision Direct: [www.visiondirect.com]	3/18/2013	WAG-00000094	WAG-00000094
CX1058	Email from Rick Galan to Glen Hamilton re: Trademarks	7/24/2013	WAG-00000097	WAG-00000097
CX1059	Email from Andrea Kaduk to Adam Garcia re: FW: Connect and apologize	4/12/2012	WAG-00000103	WAG-00000103
CX1060	Email from Rick Galan to Andrea Kaduk re: Some Trademark issues	7/12/2013	WAG-00000109	WAG-00000109
CX1204	Email from Brady Roundy to Glen Hamilton re: Trademark Terms	6/4/2014	WAG-00000096	WAG-00000096
CX1206	Vision Direct Excel Spreadsheet	10/4/2007	WAG-00000031	WAG-00000031
CX1207	Vision Direct Excel Spreadsheet	00/00/0000	WAG-00000032	WAG-00000032
CX1210	Presentation: IVD 2005 Budget Discussion	12/1/2004	WAG-00000037	WAG-00000037
CX1211	Presentation: Contact Lens Business Overview	1/12/2005	WAG-00000038	WAG-00000038
CX1213	Spreadsheet: Overview by product	00/00/0000	WAG-00000046	WAG-00000046
CX1214	Spreadsheet: Acuvue information	00/00/0000	WAG-00000051	WAG-00000051
CX1215	Spreadsheet: Orders, Sales, Profit and AOV information	00/00/0000	WAG-00000053	WAG-00000053
CX1216	Spreadsheet: Walgreens.com Contact Lens Category (Placed Order Data)	00/00/0000	WAG-00000054	WAG-00000054
CX1217	Email from Abel Cabrelle to Mark Miller re: Receipt of January 2, 2013 Letter	1/4/2013	WAG-00000098	WAG-00000098
CX1218	Email from Andrea Kaduk to James Lerner: 1800 Negs-Master List w/attach: 1800_Negs_All.xlsx	4/12/2012	WAG-00000100	WAG-00000100
CX1219	Spreadsheet: Keyword information	4/12/2012	WAG-00000101	WAG-00000101
CX1220	Email from Greg Mintzias to Andrea Kaduk re: 2 Confirmations for FTC (1800 contacts)	9/8/2015	WAG-00000106	WAG-00000106
CX1222	Spreadsheet: Report on Negative Keywords	00/00/0000	WAG-00000003	WAG-00000003
CX1489	Walgreens 2015 Cost/Revenue/Profit data	00/00/0000	WAG-00000074	WAG-00000074
CX1490	Walgreens 2016 cost/revenu/profit data	00/00/0000	WAG-00000075	WAG-00000075
CX1510	Walgreens 2013-2016 sales data	00/00/0000	WAG-00000076	WAG-00000076
CX1797	Walgreens data files - affirmative bidding on competitors	00/00/0000	WAG-00000008	WAG-00000008

Exhibit No.	Description	Date	BegBates	EndBates
CX1798	Walgreens data files - affirmative bidding on competitors (SEM profiles)	00/00/0000	WAG-00000009	WAG-00000014
CX1799	Walgreens data files - affirmative bidding on competitors (natural/paid data)	00/00/0000	WAG-0000223	WAG-0000230
CX1805	Presentation: Vision Direct Business Overview	06/00/2011	CX1805-001	CX1805-016
CX1814	Walgreens/Vision Direct data files - FY14 Rev. Analysis Vision Template	00/00/0000	WAG-00000073	WAG-00000073
CX1815	Walgreens/Vision Direct data files - Walgreens Contact Lens Stats	00/00/0000	WAG-00000077	WAG-00000077
CX1821	Walgreens Boots Alliance 10-K Form	10/20/2016	CX1821-001	CX1821-216
CX8001	Declaration of Glen M. Hamilton (Walgreens, Inc.)	12/19/2016	CX8001-001	CX8001-008
CX8002	Declaration of Glen M. Hamilton (Vision Direct, Inc.)	12/19/2016	CX8002-001	CX8002-008
CX9007	IH Transcript of Stephen Fedele	10/15/2015	CX9007-001	CX9007-031
CX9008	IH Transcript of Glen Hamilton	10/15/2015	CX9008-001	CX9008-037
CX9038	Deposition Transcript of Glen Hamilton	1/17/2017	CX9038-001	CX9038-054
	Spreadsheet: VisionDirect.com Contact Lens Category (PLACED ORDER DATA)		WAG-00000062	
	Spreadsheet: Vision Direct P&L FY14-FY16		WAG-00000080	
	Spreadsheet: WAG FY15 P&L		WAG-00000084	
	Spreadsheet: WAG FY16 P&L		WAG-00000085	
	Spreadsheet: FY16 IVD Marketing		WAG-00000086	
	Spreadsheet: WAG Contacts FY15 Marketing		WAG-00000087	

EXHIBIT B

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March 15, 2017

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San Francisco, CA 94105-1126

Re: In the Matter of 1-800 Contacts, Inc., FTC Docket No. 9372

Dear Mr. Mellyn and Mr. Labow:

This letter will constitute notice to Walgreens and Vision Direct, pursuant to 16 C.F.R. § 3.45 and paragraph 7 of the Scheduling Order in this matter, that 1-800 Contacts, Inc. intends to use the materials referenced on the attached list, as evidence in the upcoming trial in this matter. In addition to the listed documents, 1-800 Contacts intends to use the following documents produced by Walgreens: WAG-00000102; WALG00002237. Moreover, experts or attorneys retained by 1-800 Contacts may provide testimony or argument that reference the content of the documents listed on the attached list or in this letter.

Any motion seeking *in camera* treatment for any of those materials must be filed on or before March 27, 2017. See Scheduling Order, p. 3. For your convenience, I have enclosed a copy of the Scheduling Order.

Jack Mellyn, Esq.
Ben Labow, Esq.
March 15, 2017
Page 2

The Scheduling Order requires that we inform you of the “strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 105); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004).” Scheduling Order, paragraph 7.

Please contact me or Greg Sergi if you have any questions regarding the foregoing.

Sincerely,



Steven M. Perry

SMP:ei

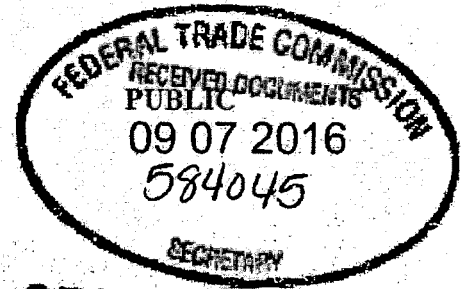
Enclosures

cc: Greg Sergi

Current List of Walgreens/Vision Direct Documents

Production Beginning Number	Description
WAG-00000016	"Google – 1800 Negatives List.csv"
WAG-00000017	"Google – April 2016.csv"
WAG-00000018	"Google – General Negatives List.csv"
WAG-00000019	"Google – Nov 2015.csv"
WAG-00000020	"Google – Walgreens Negative Keywords.csv"
WAG-00000028	"2014_03_20 Walgreens Optical Business Update FINALrevised.pptx"
WAG-00000047 (RX0149)	"Vision Direct Business Overview June 1022 v.0.1.pptx"
WAG-00000066	Alcon, Unilateral Price Policy For Select Alcon Contact Lenses in the U.S., Effective Date May 1, 2014
WAG-00000074	"FY15 Rev Analysis Vision.xlsx"
WAG-00000075	"FY16 Rev Analysis Vision v2 (REVAMP).xlsx"
WAG-00000076	"Walgreens Contacts Sales Breakout.xlsx"
WAG-0000202	"Optical Weekly Recap FY15 FW26.xlsx"
WAG-0000214	"Traffic and Orders by Channels v3.xlsx"
WAG-0000215 (RX0151)	"Vision Direct One Pager v2014_09_22.docx"
WAG-0000232 (RX0152)	"Vision Direct Baseline Usability Study for Refresh_Report_10242012.pdf"
WAG-0000251 (RX0148)	"AID Refer VisionDirect.xlsx"

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



ORIGINAL

In the Matter of)
)
1-800 Contacts, Inc.,)
a corporation,)
)
Respondent.)

DOCKET NO. 9372

SCHEDULING ORDER

- October 7, 2016 - Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
- October 21, 2016 - Respondent's Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
- December 14, 2016 - Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
- December 27, 2016 - Complaint Counsel provides expert witness list.
- January 9, 2017 - Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
- January 13, 2017 - Respondent's Counsel provides expert witness list.
- January 27, 2017 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- February 6, 2017 - Deadline for Complaint Counsel to provide expert witness reports.

- February 23, 2017 - Deadline for Respondent's Counsel to provide expert witness reports (to be provided by 4 p.m. ET). Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- March 1, 2017 - Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- March 8, 2017 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).
- March 14, 2017 - Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- March 15, 2017 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must

- provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).¹ See Additional Provision 7.
- March 20, 2017 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
 - March 22, 2017 - Deadline for filing motions *in limine* to preclude admission of evidence. See Additional Provision 9.
 - March 22, 2017 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
 - March 27, 2017 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
 - March 27, 2017 - Complaint Counsel files pretrial brief supported by legal authority.
 - March 28, 2017 - Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
 - March 29, 2017 - Exchange proposed stipulations of law, facts, and authenticity.
 - March 30, 2017 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
 - April 4, 2017 - Respondent's Counsel files pretrial brief supported by legal authority.
 - April 6, 2017 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.

¹ Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

April 11, 2017

- Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth only the docket number and the title of the submission.** The parties are not required to serve a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges.

2. The parties shall serve each other by electronic mail and shall include "Docket 9372" in the re: line and all attached documents in .pdf format. In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has 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. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with {bold font and braces}. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

9. Motions *in limine* are discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n 2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine only* when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs.

11. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document

request, the parties shall confer about the format for the production of electronically stored information.

12. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled. The parties need not separately notice the deposition of a non-party noticed by an opposing party. At the request of any party, the time and allocation for a non-party deposition shall be divided evenly between them, but the noticing party may use any additional time not used by the opposing party. If no party makes such a request, cross-examination of the witness will be limited to one hour.

14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 business days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause, except that a party may include on its final witness list any person deposed after that party exchanged its preliminary witness list, and except that Respondent may also include on its final witness list any person whose identity or status as a witness was not determined until after October 21, 2016, but who was added to Respondent's preliminary witness list on or before November 18, 2016.

16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties,

or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

18. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

19. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At 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).

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;

(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and

(iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;

(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

20. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

21. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

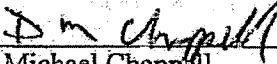
22. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

23. Complaint Counsel's exhibits shall bear the designation CCX and Respondent's exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation CCXD and Respondent's demonstrative exhibits shall bear the designation RXD or some other appropriate designation. Both sides shall number the first page of each exhibit with

a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

24. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if CCX 100 and RX 200 are different copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: September 7, 2016

Notice of Electronic Service

I hereby certify that on September 07, 2016, I filed an electronic copy of the foregoing Scheduling Order, with:

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

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

I hereby certify that on September 07, 2016, I served via E-Service an electronic copy of the foregoing Scheduling Order, upon:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
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Respondent

Lynnette Pelzer
Attorney

EXHIBIT C

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

In the Matter of)
) DOCKET NO. 9372
1-800 Contacts, Inc.,)
)
a corporation)
)
Respondents)
_____)

DECLARATION OF THOMAS PEMBERTON IN SUPPORT OF NON-PARTY
WALGREENS, INC.'S MOTION FOR *IN CAMERA* TREATMENT

I, Thomas Pemberton, hereby declare as follows:

1. I am the Manager of Digital Marketing for Vision Direct, a subsidiary of Walgreens, Inc. ("Walgreens" or "the Company"). I make this declaration in support of Non-Party Walgreens, Inc.'s Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.

2. I have reviewed and am familiar with the documents Walgreens produced in the above-captioned matter in response to subpoenas and civil investigative demands from the Federal Trade Commission and Respondent 1-800 Contacts. I provided a certification of authenticity as to the produced documents, including the documents that are the subject of the Motion. Given my position at Walgreens, I am familiar with the type of information contained in the documents at issue and its competitive significance to Walgreens. Based on my review of the documents, my knowledge of Walgreens' business, and my familiarity with the confidentiality protection afforded this type of information by Walgreens, I submit that the disclosure of these documents to the public and to competitors of Walgreens would cause serious competitive injury to Walgreens.

3. Walgreens is a leading global retailer of pharmacy and personal care products, operating in more than 25 countries and employing more than 400,000 people. The Company sells products both through its physical stores and through its online presence, which includes the websites Walgreens.com, VisionDirect.com, Lensmart.com, Lensquest.com, Lensworld.com, and until recently, Drugstore.com. The Company's e-commerce operation plays an important role in attracting consumers, with the Walgreens.com website alone receiving an average of 58 million visits per month.

4. Contact lenses are an important product segment sold by Walgreens through its online outlets. Contact lenses account for over \$100 million in annual online sales for Walgreens, and margins are frequently thin, with customers choosing primarily on the basis of price and reputation.

5. Search engine marketing ("SEM") – e.g., purchasing advertisements on search engines such as Google, Bing, and Yahoo – is an important tool in Walgreens' efforts to remain competitive and relevant in the sale of online contact lenses. Through online paid search advertising, Walgreens bids to have online search engines, such as Google and Bing, display paid advertisements for Walgreens.com and VisionDirect.com when a consumer conducts online searches that include terms related to contact lenses. Walgreens bids on such terms, including trademarked terms, by providing bid amounts and "keywords" to the search provider. If a consumer conducts a search that includes such keywords, an advertisement for contact lenses from Walgreens.com may appear on the webpage along with the search results. If a consumer then clicks on the advertisement for Walgreens.com, Walgreens pays a fee to the online search engine.

6. Choosing the right keywords – and avoiding the wrong ones – is crucial to

enabling Walgreens to win ad auctions and to efficiently allocate its marketing dollars.

Keywords can be both positive (e.g., “cheap contact lenses”) or negative (representing a category where the company would prefer not to pay for ads, like “I hate contact lenses”). Developing an efficient and comprehensive set of positive and negative keywords is a years’ long endeavor, and involves many hundreds of hours of ongoing attention from staff with expertise in the field of digital marketing, as well as extensive analysis based on the performance of various company ad campaigns over years of time.

7. Because various firms are in competition to place advertisements on the same core universe of keywords (such as “contact lens”), SEM bidding strategies and keyword lists are highly commercially sensitive. Although keywords lists are constantly being updated and streamlined, the core lists of keywords in any product category, such as contact lenses, generally remains in place for several years or more, with only a small portion of the more than 3,000 positive keywords that Walgreens regularly uses in the contact lens category being modified or replaced in any given year.

7. The creation and maintenance of keyword bidding strategies is one part of Walgreens’ digital and offline marketing strategy. Walgreens also engages in many other commercially sensitive business practices regarding its marketing efforts, including analyzing the performance of past advertisements, reviewing the efficiency of various marketing efforts across different channels, and assessing the larger competitive context in order to make high-level decisions about prices, discounts, marketing spending and other elements of business strategy. Walgreens’ documents regarding these efforts contain highly competitively sensitive information that could cause substantial business losses if released, and consequently are maintained under strict confidentiality procedures in the ordinary course of business by

Walgreens.

8. Based on my review, the Confidential Documents that the parties are proposing to introduce in this matter fall into two categories: **keyword lists** and **strategic analyses of advertising and pricing strategy**. Both of these document sets contain highly material business and trade secrets, the competitive significance of which is unlikely to decrease over time, for reasons discussed in more detail below.

9. Documents WAG-00000003, WAG-00000008, WAG-00000009, WAG-00000016, WAG-00000017, WAG-00000018, WAG-00000019, WAG-00000020, and WAG-00000223 are **keyword lists** and related documents, such as automatically generated reports on keyword performance. For the reasons discussed above, the public release of these lists would be highly damaging to Walgreens. They are the “secret ingredient” in Walgreens’ search engine advertising strategy, which in turn is a crucial part of Walgreens’ effort to compete in the online contact lens space. The lists and performance reports represent the product of multiple years of expensive trial-and-error in contact lens SEM, as well as the combined business judgment of a team of digital marketing experts – myself included – who are employed by Walgreens to ensure that the Company succeeds in marketing its products to online consumers. The lists are kept highly confidential and are never revealed outside the company, except for the purpose of placing confidential bids on Google and other search engines. If the lists were revealed to the public, any competitor could quickly reverse-engineer Walgreens’ bidding posture, avoiding (or outbidding the Company on) keywords that are crucially important to Walgreens’ strategy, while gaining disproportionate market share by opportunistically bidding on keywords that Walgreens has not yet targeted for SEM attention. Such an outcome would cause Walgreens immediate and lasting economic harm.

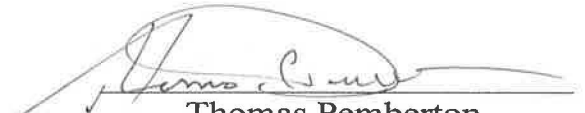
10. Documents CX1805, WAG-00000028, WAG-00000031, WAG-00000032, WAG-00000037, WAG-00000038, WAG-00000046, WAG-00000047, WAG-00000051, WAG-00000054,

WAG-00000073, WAG-00000074, WAG-00000075, WAG-00000076, WAG-00000077, WAG-00000080, WAG-00000084, WAG-00000085, WAG-00000086, WAG-00000087, WAG-00000202, WAG-00000214, WAG-00000215, WAG-00000232, and WAG-00000251 contain **strategic internal analyses of advertising and pricing strategy**. They reveal highly confidential information concerning Walgreens' strategies in the contact lens marketplace, including details on Walgreens' online marketing budgets (*see* WAG-00000084 – 85), the costs, prices, discounts offered and margins earned on various contact lens products (*see, e.g.*, WAG-00000073), product-level price comparisons between the Company and its competitors (WAG-00000031), customer satisfaction levels and complaints (WAG-00000077), and high-level strategic analyses of the contact lens sector, including recommendations on Walgreens' future competitive posture (CX1805). All of this information is competitively sensitive, and is treated as highly confidential in the ordinary course of Walgreens' business. Any competitor could easily use this information to disrupt Walgreens' business strategy, for example by opportunistically targeting products where Walgreens is at a cost or margin disadvantage, or by taking advantage of structural weaknesses that Walgreens has identified in its own performance. While some of the details referenced in particular documents may change with time, the core information contained in these documents regarding Walgreens' corporate pricing tactics, willingness to offer discounts in response to competition, and strategy with respect to the contact lens industry as a whole will remain highly competitively relevant for the foreseeable future.

11. The litigants in this matter have also proposed to introduce deposition transcripts and declarations from Glen Hamilton and Stephen Fedele (CX8001, CX8002, CX9007, CX9008, and CX9038) in which these former Walgreens employees candidly discuss the strategic issues described above, including details on Walgreens keyword bidding strategy, the amount that Walgreens spends on search engine advertising, and the Company's strategies for increasing its share of the contact lens market in the future. For the same reasons outlined above, Walgreens requests that certain designated

portions of these transcripts and declarations receive also *in camera* treatment indefinitely. Designated versions of these documents with proposed redactions are attached as part of Exhibit D.

I declare under penalty of perjury that the foregoing is true and correct. Executed March 24, 2017 at Bellevue, Washington.



Thomas Pemberton

EXHIBIT D

(CD ENCLOSED)

**DOCUMENTS MARKED
CONFIDENTIAL**

REDACTION REQUESTED

CERTIFICATE OF SERVICE

I, Jack Mellyn, declare under penalty of perjury under the laws of the District of Columbia that the following is true and correct. On March 27, 2017, I caused to be served the following documents on the parties listed below by the manner indicated:

- **NON-PARTY WALGREENS, INC.'S MOTION FOR *IN CAMERA* TREATMENT**
- **[PROPOSED] ORDER**

The Office of the Secretary: (via hand delivery)

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W., Room H-172
Washington, D.C. 20580

The Office of the Administrative Law Judge (via hand delivery and electronic mail)

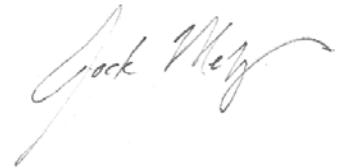
D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-106
Washington, D.C. 20580

Federal Trade Commission (via hand delivery and electronic mail)

Aaron Ross
Federal Trade Commission
600 Pennsylvania Ave, NW
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Counsel for 1-800 Contacts, Inc. (via overnight delivery and electronic mail)

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350 South Grand Avenue
Fiftieth Floor
Los Angeles, CA 90071-3426



Jack Mellyn

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

In the Matter of

1-800 Contacts, Inc.
a corporation

Respondent

PUBLIC

DOCKET NO. 9372

(PROPOSED) ORDER

Upon consideration of Non-Party Walgreens', Inc.'s ("Walgreens'") Motion for In Camera Treatment, it is **HEREBY ORDERED** that the following documents are to be provided permanent in camera treatment from the date of this Order in their entirety.

Production Beginning Number	Description
CX1805-001	Presentation: Vision Direct Business Overview
WAG-00000074	FY15 Rev Analysis Vision.xlsx
WAG-0000251	AID Refer VisionDirect.xlsx
WAG-00000003	Spreadsheet: Report on Negative Keywords
WAG-00000008	Walgreens data files - affirmative bidding on competitors
WAG-00000009	Walgreens data files - affirmative bidding on competitors (SEM profiles)
WAG-00000016	Google - 1800 Negatives List.csv
WAG-00000017	Google -April 2016.csv

Production Beginning Number	Description
WAG-00000018	Google - General Negatives List.csv
WAG-00000019	Google -Nov 2015.csv
WAG-00000020	Google - Walgreens Negative Keywords.csv
WAG-00000028	2014_03_20 Walgreens Optical Business Update FINALrevised.pptx
WAG-00000031	Vision Direct Excel Spreadsheet
WAG-00000032	Vision Direct Excel Spreadsheet
WAG-00000037	Presentation: IVD 2005 Budget Discussion
WAG-00000038	Presentation: Contact Lens Business Overview
WAG-00000046	Spreadsheet: Overview by product
WAG-00000047	Vision Direct Business Overview June 1022 v.0.1.pptx
WAG-00000051	Spreadsheet: Acuvue information
WAG-00000053	Spreadsheet: Orders, Sales, Profit and AOV information
WAG-00000054	Spreadsheet: Walgreens.com Contact Lens Category (Placed Order Data)
WAG-00000062	Spreadsheet: VisionDirect.com Contact Lens Category (PLACED ORDER DATA)
WAG-00000073	Walgreens/Vision Direct data files - FY14 Rev. Analysis Vision Template

Production Beginning Number	Description
WAG-00000075	FY16 Rev Analysis Vision v2 (REVAMP).xlsx
WAG-00000076	"Walgreens Contacts Sales Breakout.xlsx"
WAG-00000077	Walgreens/Vision Direct data files - Walgreens Contact Lens Stats
WAG-00000080	Spreadsheet: Vision Direct P&L FY14-FY16
WAG-00000084	Spreadsheet: WAG FY15 P&L
WAG-00000085	Spreadsheet: WAG FY16 P&L
WAG-00000086	Spreadsheet: FY16 IVD Marketing
WAG-00000087	Spreadsheet: WAG Contacts FY15 Marketing
WAG-0000202	Optical Weekly Recap FY15 FW26.xlsx
WAG-0000214	Traffic and Orders by Channels v3.xlsx
WAG-0000215	Vision Direct One Pager v2014_09_22.docx
WAG-0000223	Walgreens data files - affirmative bidding on competitors (natural/paid data)
WAG-0000232	Vision Direct Baseline Usability Study for Refresh_Report_10242012.pdf

Furthermore, the redacted portions of the following documents are to be provided permanent *in camera* treatment from the date of this Order.

Production Beginning Number	Description
CX8001-001	Declaration of Glen M. Hamilton (Walgreens, Inc.)
CX8002-001	Declaration of Glen M. Hamilton (Vision Direct, Inc.)
CX9007-001	IH Transcript of Stephen Fedele
CX9008-001	IH Transcript of Glen Hamilton
CX9038-001	Deposition Transcript of Glen Hamilton

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

Notice of Electronic Service

I hereby certify that on March 27, 2017, I filed an electronic copy of the foregoing Non-Party Walgreens Boots Alliance Inc. Motion for In Camera Treatment, with:

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

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

I hereby certify that on March 27, 2017, I served via E-Service an electronic copy of the foregoing Non-Party Walgreens Boots Alliance Inc. Motion for In Camera Treatment, upon:

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Jack Mellyn
Attorney