PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Chairwoman**
Terrell McSweeny

In the Matter of **1-800 Contacts, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9372**

RESPONDENT'S REPLY BRIEF ON APPEAL

REFERENCES

References are made using the following citation forms and abbreviations:

CCB— Complaint Counsel's Answering Brief to Respondent's Appeal Brief

RB — Respondent's Brief on Appeal

RPTB — Respondent's Post-Trial Brief

RPTRB — Respondent's Post-Trial Reply Brief

RFF # — Respondent's Proposed Finding of Fact

ID — Initial Decision

F. — ALJ Findings of Fact

Name of Witness, Tr. XX — Trial Testimony

CX # (Name of Witness, Dep. at XX) — Deposition Testimony

CX — Complaint Counsel Exhibit

RX — Respondent Exhibit

{bold} — In Camera Material

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I. INTRODUCTION

1-800 Contacts sells roughly 10% of the contact lenses sold in the United States. F. 492. It generally offers lower prices than eye care professionals ("ECPs") and optical retailers, such as Lenscrafters, that together sell the majority of contact lenses. F. 434, 491. It offers one of the highest levels of service of any company in the entire economy. RFF 169-186. Complaint Counsel's experts offer no opinion that the challenged agreements reduced output of contact lenses or raised prices to supracompetitive levels. RFF 2039-2040, 2048-2051. And they concede that no structural barriers prevent major retailers such as Walmart and Costco from expanding in the contact lens retail market to compete away any supracompetitive profits. CX 9042 (Evans, Dep. at 136-138).

None of this has deterred Complaint Counsel. Even though many ECPs and major retailers sell both in stores and online, F. 80, 88, 91, 93, Complaint Counsel insist that there is a market limited to contact lenses sold online — one defined by a mode of selling rather than the product sold. They argue that 1-800 Contacts charges too much because certain online retailers sometimes charge less. And they claim that consumers cannot find these alternative sellers even though there is *no* evidence that any Internet consumer does not know how to conduct a Google search for "contact lenses" or "cheap contact lenses" that would yield ads for alternatives to 1-800 Contacts. CX 9043 (Athey, Dep. at 261); RFF 1941-1944.

The name recognition 1-800 Contacts has achieved is a paradigmatic sign of successful competition. 1-800 Contacts pioneered an alternative to ECPs who had long monopolized sales of contact lenses that only they can prescribe. It built a successful brand through investment, service, and advertising. And like most brands, it is protected by an uncontested and valuable trademark.

Consumers who type that trademark into a search bar expect to receive a link to 1-800 Contacts' website. RFF 1766-1767. That commonsense proposition is confirmed by Google's organic search results for "1-800 Contacts." Customers must click through several pages of organic results before they see a link for another seller's website. RFF 1824-1829. Those results, generated by enormous data on consumer search behavior, are powerful evidence of consumers' revealed preferences. RFF 755-758, 1825.

Other retailers paid to override these preferences and have their ads appear above the organic results. 1-800 Contacts believed that consumers who were trying to navigate to 1-800 Contacts' website would be confused when they saw links for other companies at the top of the search results. So 1-800 Contacts sued companies that paid for those links, alleging trademark infringement and related claims. Recognizing that 1-800 Contacts had winnable claims, 13 companies settled. 1-800 Contacts obtained only relief that, and less relief than, it could have obtained by winning at trial.

Complaint Counsel's efforts to extinguish these settlements as "overbroad" should be rejected. *First*, Complaint Counsel's theory requires the Commission to create new trademark law or adjudicate settled trademark claims in hindsight. The Commission should decline that invitation. Developing trademark law is best handled by the judicial system. Not only does the Commission lack the requisite trademark expertise, but it should not expand its regulatory authority to superintend settlements resolving good-faith trademark disputes. As the Commission itself has noted, regulatory review of the merits of settled claims will chill settlements. The Commission should not insert itself into every mediator's conference room where trademark cases are settled or every courtroom where judges approve or enforce those settlements.

Second, the Supreme Court agreed with the Commission in *Actavis* that IP settlements should not be subject to antitrust scrutiny unless they are "unusual" or not "commonplace." The settlements challenged here are traditional "non-use" trademark agreements. They do nothing more than prohibit the allegedly infringing use, *i.e.*, presenting ads when a consumer searches for 1-800 Contacts by typing its trademarks into a search bar. Other companies are free to present their ads in response to any other search, such as "contact lenses" or "cheaper contacts." The Commission not only has respected but heralded the strong policy against disturbing traditional settlements.

Third, Complaint Counsel ask the Commission to ignore settled antitrust principles, finding anticompetitive effects without evidence of reduced output, supracompetitive prices, barriers to entry and expansion, or empirical evidence defining the market.

II. <u>ARGUMENT</u>

Complaint Counsel's entire *prima facie* case fails to account for the trademark rights underlying the settlements. Even though they admit that the agreements encompass "potentially infringing" advertising, CCB 2, Complaint Counsel assert the settlements are "overbroad." But they make no effort to distinguish "potentially infringing" from "non-infringing" advertising, and place the burden on 1-800 Contacts to "justify" the settlements as necessary to protect trademark rights. CCB 37. This contravenes the Commission's precedents, the Supreme Court's decision in *Actavis*, and sensible limits on administrative regulation of settlements.

A. <u>Complaint Counsel's Claim that the Settlements Are "Overbroad" Asks the Commission to Create New Trademark Law and Reopen Settled Cases</u>

1. The Challenged Agreements Are Not Overbroad

The settlements prevent each party from presenting ads in response to a search for the other's trademark, *e.g.*, "1-800 Contacts," by prohibiting the purchase of the trademark as a keyword and requiring the use of the trademark as a negative keyword. RFF 1164-1165. These two provisions, together, prevent an ad from appearing in response to a search for "1-800 Contacts" while still permitting ads to be presented in response to searches for generic terms such as "contacts" or "contact lenses," or in response to a search such as "cheap contacts" or "cheaper than 1-800 Contacts." RFF 1159-1162; F. 366-67.

Such settlements are not "overbroad." Indeed, Complaint Counsel admit that the relief provided for by the settlements "was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case." RX 679A-0005. They also admit that the settlements bar "potentially infringing" advertising. CCB 2. And they recognize, as two courts have held, that 1-800 Contacts' claims for trademark infringement were not sham. RX 680; *1-800 Contacts, Inc. v. Mem'l Eye, P.A.*, No. 08-CV-983 TS, 2010 WL 988524 (D. Utah Mar. 15, 2010), at *6; *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014), ECF No. 91, at 2.

The record confirms that the settlements accurately reflect the law at the time of the agreements and the uncertainty of intensely factual trademark litigation. (RFF 1014-1069 (describing genesis of settlements); RFF 1070-1153 (describing settlements' legal context); RFF 1154-1249 (describing settlements' terms and purposes); RFF 1275-1366 (comparing settlements to other keyword advertising settlements, consent decrees, and default judgments).

Given the state of the law, it is unsurprising that the settling parties uniformly testified that they settled to avoid uncertainty. RFF 1253-1256, 1398-1404.

There are two elements to a trademark infringement claim: (a) an unauthorized use of the mark in commerce and (b) likely consumer confusion. *E.g.*, *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 599 (9th Cir. 2014); 15 U.S.C. §§ 1125(a), 1127. When the first challenged settlement was executed, it was uncertain whether advertising in response to a search for another firm's trademark was a "use in commerce." RFF 1077. But in 2009, the Second Circuit so held. *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129-30 (2d Cir. 2009); RFF 1080-1083. The "use" question is now settled. F. 333; RFF 1084; *Network Automation, Inc. v. Advanced Sys. Concept, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011).

The second element, likelihood of confusion, is "an inherently factual issue that depends on the facts and circumstances in each case." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012). *See* F. 334. Litigants "frequently . . . hire professionals in marketing or applied statistics," such as 1-800 Contacts' expert Dr. Van Liere, to "conduct surveys of consumers" regarding confusion, which results in a "battle of the experts." *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 414–15 (7th Cir. 1994). "[C]ourts have found a likelihood of confusion when survey results are between 10% and 20%," 6 McCarthy on Trademarks and Unfair Competition § 32:188 (5th ed.), less than the confusion found here. RFF 1564. Courts also uphold findings of likely confusion based on non-survey evidence, such as Dr. Goodstein's testimony, RFF 1716-1762. *E.g.*, *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 120 (1st Cir. 2006). The ALJ did not find Dr. Van Liere's or Dr. Goodstein's testimony inadmissible, nor could he.

Rosetta Stone Ltd., 676 F.3d at 159 (relying on Van Liere survey); Van Liere, Tr. 2978 (survey here involved same methodology as in *Rosetta Stone*). Such testimony could have persuaded a jury that the settling parties' ads displayed in response to searches for 1-800 Contacts' trademark were likely to cause consumer confusion.

The record also shows that the settlements the parties reached were within the scope of the relief that 1-800 Contacts could have obtained. A court entered an injunction providing 1-800 Contacts with the same relief. RFF 1109, 1198, 1263; F. 345-347. Numerous courts have issued similar injunctions. RFF 1325, 1328-1348; RPTB 22 n.1 (citing cases).[1]

2. Complaint Counsel's Theory To the Contrary Would Require the Commission to Create New Trademark Law

Retreating from their concessions, Complaint Counsel contend that the settlements are "overbroad" because they assertedly (a) prohibit advertising "that is not confusing" (because they are not limited to ads that use a trademark in their text), and (b) "prohibit advertising even where the competitor does not use 1-800's trademark" (because they require the use of negative keywords to address "broad matching"). CCB 3. But that was not the law then, or now.

Complaint Counsel ask the Commission to create new law that ads without 1-800 Contacts' trademark in their text are never confusing. Yet several courts have held that "[w]hether Defendants' sponsored advertisements actually include [the plaintiff's] trademarks in the text *is not determinative* of whether there has been any infringement." *Fair Isaac Corp. v. Experian Info. Sols., Inc.*, 645 F. Supp. 2d 734, 760–61 (D. Minn. 2009) (emphasis added); *see Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009) (denying motion to dismiss making Complaint Counsel's argument). It is not the

[1] We focus on the trademark claims, but the same relief was available under other causes of action brought by 1-800 Contacts, which Complaint Counsel do not challenge.

Commission's role to decide today that these courts were wrong in 2009. The analysis must "focus on the state of the world as it was perceived by the parties at the time that they entered into the settlement agreement, when they could not be sure how the litigation would turn out." *Schering-Plough Corp*., 136 F.T.C. 956, 995 (2003).

Nor should the Commission decide the unresolved question of whether a firm "uses" a trademark when it causes ads to appear in response to a search for that trademark by bidding in "broad match" rather than directly on the mark as a keyword. CCB 43. (This is the conduct prevented by the use of negative keywords. F. 368.) From the consumer's perspective, this "use" of the trademark is the same as bidding on the trademark itself: The consumer searches for "1-800 Contacts," is presented with ads and links from other companies, but cannot tell what bids generated those ads. On appeal from the district court decision on which Complaint Counsel rely, the Tenth Circuit expressly did "not resolve [this particular] matter." *1-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1243 (10th Cir. 2013). Since no other court has addressed whether broad matching can be infringement, the issue can hardly be "beyond dispute." CCB 43.[2]

The Commission also should not determine in the abstract "what constitutes a reasonable trademark settlement" based on the "relevant legal rules." CCB 42. This would require making new law that ads generated in response to searches for a trademark are non-infringing as a matter of law, which Complaint Counsel's expert, Professor Tushnet, has failed to persuade the circuit courts to do. *Rescuecom*, 562 F.3d at 130; *see* Tushnet, Tr. 4520-21.

[2] The defendant in *Rhino Sports, Inc. v. Sport Court, Inc.*, No. CV-02-1815-PHX-JAT, 2007 WL 1302745 (D. Ariz. 2007), was engaged in broad matching, but the issue was "not whether Rhino Sports' current activities infringe [the plaintiff's] trademark, but whether [the defendant] substantially violated the permanent injunction." *Id.* at *4.

While Complaint Counsel hope that the courts will one day reconsider their judgment, it would be unfair and inappropriate to condemn 1-800 Contacts' agreements as *presumptively unlawful* because the settling parties took a different view of trademark law than Complaint Counsel do. For the Commission to enjoin 1-800 Contacts simply because litigants got the law "wrong" — to say nothing of triggering treble damages suits like those that have been filed against 1-800 Contacts — "could have a chilling effect on [trademark] settlements down the road, and thus make it harder for parties to enjoy the advantages of certainty." *Schering-Plough*, 136 F.T.C. at 998.

3. Complaint Counsel's Theory That the Settlements Are "Overbroad" Would Require Reexamining the Settled Claims

Since Complaint Counsel cannot show that the settlements "exceed[] 1-800's property right," CCB at 4, *as a matter of trademark law*, their argument that the settlements are "overbroad" asks the Commission to determine *as a matter of fact* that a substantial number of the ads were not potentially confusing. But that would require reopening the underlying cases. And such "[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable." *Schering-Plough*, 136 F.T.C. at 997. Indeed, the Commission has noted "the serious uncertainties that would confront parties who seek to settle patent litigation if the Commission undertook to examine the underlying merits itself later on, and gave them conclusive weight." *Schering-Plough*, 136 F.T.C. at 998. The courts agree that because "the parties" to a trademark settlement "are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves," it is "usually unwise for courts to second-guess such decisions"; instead, they "presume" that trademark settlements are procompetitive. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997).

Moreover, the record could not support findings that the ads addressed by the settlements would have been found non-infringing. Complaint Counsel did not introduce *any* evidence that 1-800 Contacts would have lost *any* of the claims it settled.[3] And even if there were evidence that the ads covered by the settlements were not confusing in all cases, the Commission could not condemn relief as overbroad for that reason without raising questions about whether its own power to ban ads that confuse as few as "15% (or 10%) of the buying public" is overbroad. *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 611 (6th Cir. 2017).

Forcing 1-800 Contacts to prove that it would have won each of the underlying lawsuits, as Complaint Counsel suggest, CCB 4, would be wrong. *E.g.*, *Schering-Plough*, 136 F.T.C. at 997-98. "Given the uncertainty as to the outcome of the infringement suit, and the contracting parties' divergent positions on the merits of that litigation, it would be unsound to assume for antitrust purposes that one party to the [settlement] agreement was right and the other was wrong." Br. for Petr., *FTC v. Watson Pharm., Inc.*, 2013 WL 267027, at *44 (U.S. Jan. 22, 2013) ("*Actavis* Br.").

4. Complaint Counsel's Other Efforts to Establish that the Settlements are "Overbroad" Fall Short

Complaint Counsel's last resort is to act as if the agreements are not settlements at all by analogizing them to professional ethics codes, which banned all solicitation or all discount advertising in an entire profession. This is misplaced. The professionals who adopted the regulations struck down in *American Medical Association* and *Massachusetts Board*, and First

[3] Complaint Counsel's expert, Dr. Jacoby, did not analyze whether *any* of the advertisements at issue in the underlying trademark litigation was likely to confuse consumers. RFF 1628-1645.

Amendment precedents such as *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) that the Commission cited, had not asserted any claims for misleading advertising against each other. They were engaged in collusion masking as *regulation*.

Thus, *Shapero* struck down a state bar's complete ban on solicitation letters because the First Amendment "impos[es] on would-be *regulators* the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id*. at 478 (emphasis added). Complaint Counsel omit this reference to "regulators," but it was critical to the Commission's reasoning in *AMA* and *Massachusetts Board* that "[w]here a state regulatory board is controlled by members of a profession . . . the board members' pecuniary interest may be stronger than their duty to the public in deciding such issues." *Mass Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988). Accordingly, "if professional associations are to have rules limiting false or misleading advertising, these rules and their enforcement must be scrutinized under the antitrust laws to ensure that the line is properly maintained between what is actually false or misleading." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2017) ("*Antitrust Law*"), ¶ 2023b5.

1-800 Contacts and the other settling parties, however, were not colluding under the guise of regulating their industry. They were litigation adversaries resolving a dispute about the law and its application to the facts. That distinction makes all the difference. *Cf. Actavis* Br., 2013 WL 267027 at *28 (fact that settlement "will entail the parties' agreement not to compete . . . alone is not a reason for skepticism in the patent litigation context, where the underlying dispute concerns [a] claimed legal right to prevent competition"). Unlike self-regulating professionals who can "profit from restraints limiting competition among them," *Antitrust Law*, ¶ 2023b5, an alleged trademark infringer has every incentive to defend its ability to advertise in ways that might benefit consumers. *Actavis* Br., 2013 WL 267027, at *28. And this "financial incentive" keeps "the competitive consequences of the settlement agreement in check." *Id.*

Complaint Counsel's position that the settlements should have restricted only "confusing" ads makes no sense where the agreement resolved a dispute about *which* ads were confusing. That is why settlements that restrict only "confusing" ads are heavily disfavored, (Hogan, Tr. 3272, 3305, 3495), and courts reject relief that simply bans confusing trademark uses because it "too broadly requires [the defendant] to guess at what kind of conduct would be deemed trademark infringement." *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 667, 669 (8th Cir. 1987); *see Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 146 (3d Cir. 1994); 5 McCarthy on Trademarks and Unfair Competition § 30:13.

Rather, a trademark settlement must make clear how a defendant can or cannot use a trademark. Hogan, Tr. 3305–06, 3272; RX 734 at 119–20. That is why trademark non-use agreements are "the order of the day." *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996). Of course, given the uncertainty and fact-intensive nature of trademark disputes, a non-use trademark settlement reached before a verdict on infringement (just like the typical Court-ordered injunction after trial) may prohibit some "potentially infringing" and some "non-infringing advertising." CCB 2-3. But any such "overbreadth" is "necessary to make that [settlement] effective." *Polygram Holding, Inc.*, 136 F.T.C. 310, 471 (2003). The fact that a trademark settlement prohibits some advertising that a jury might find "non-infringing" does not make the settlement "indiscriminate," CCB 25, and cannot suffice to condemn it.

B. <u>1-800 Contacts' Settlement Agreements Should Not be Subjected to Antitrust Scrutiny Under *Actavis*</u>

Complaint Counsel's case also fails for an independent reason: Under *Actavis*, 1-800 Contacts' settlements are not subject to antitrust scrutiny.[4]

Actavis's holding that some — but not all — settlement agreements are subject to antitrust scrutiny reflected the Commission's own position that "voluntary settlements" "do not generally violate the antitrust laws" and that parties "have substantial latitude to settle their differences in accordance with the settlement practices commonly used in private lawsuits." *Actavis* Br., 2013 WL 267027 at *27. As the Commission explained, a settlement is subject to antitrust scrutiny *only if* it does not "fit[] comfortably within traditional understandings of the way in which private litigation is generally settled." *Id*.

The Court agreed. Balancing competition concerns with the "principle that courts should favor voluntary settlements of litigation by the parties to a dispute," *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986), the Court held that settlements taking a "commonplace" form are not subject to antitrust scrutiny, whereas settlements taking an "unusual" form can be. RB 15 (circuit court decisions recognizing this holding). More specifically, the Court adopted the Commission's position that the dividing line between "commonplace" and "unusual" settlements is whether the agreement provides for relief that the parties "could not hope to obtain even if they *prevailed* in the litigation." *Actavis* Br., 2013 WL 267027 at *30. The Court held that a "reverse payment" settlement is "unusual" (and thus subject to antitrust scrutiny) because no "patent statute . . . grant[s]" a patent holder the right to

[4] The Commission has not rejected this argument. CCB 37. It merely rejected 1-800 Contacts' *Noerr-Pennington* defense. *In re 1-800 Contacts, Inc.*, No. 9372, 2017 WL 511541, *3 & n.4 (FTC Feb. 1, 2017).

pay a competitor to quit its patent invalidity or non-infringement claim, and therefore no court could have ordered such relief. 133 S. Ct. at 2233. That reasoning was squarely in line with the Court's pre-*Actavis* decisions in *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963), *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 378 (1952), and *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931), where the settlements involved price-fixing and patent pools that were beyond a court's power to order.

By contrast, Complaint Counsel's challenge to a traditional non-use trademark settlement concededly within a court's power to order would upset *Actavis*'s careful balance. It would subject vastly more settlement agreements to antitrust scrutiny than the Commission or Court intended, exposing legitimate settlements of legal disputes to the corrosive threats of regulatory intrusion and treble damages antitrust litigation.

Complaint Counsel do not grapple with the Commission's position or the Supreme Court's reasoning. Instead, they advance a vanishingly narrow definition of "commonplace": that the only "commonplace" settlement is one "in which a patentee with a claim for damages receives a sum equal to or less than the value of its claim." CCB 39 (quotations omitted). But if that were true, *all* settlements including non-monetary relief would be subject to antitrust scrutiny, which would significantly expand the power of the Commission and courts to intrude on settlement agreements. Moreover, Complaint Counsel's cramped definition cannot be squared with the Court's only example of a "commonplace" settlement form: the trademark non-use settlement addressed in *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10 (1st Cir. 1999) (cited in *Actavis*, 133 S. Ct. at 2233), which provided for non-monetary relief just as the settlements here did.

The record underscores that 1-800 Contacts' settlements took this "commonplace" form. Complaint Counsel do not attempt to refute Howard Hogan's unrebutted expert testimony that non-use settlements are the "most common form of settlement agreement." Hogan, Tr. 3240, 3242, 3246, 3271-3272; 3248. Indeed, such settlements are literally the template for how to settle a trademark case. Trademark Settlement Agreement and Release § 1, Practical Law Standard (Westlaw 2017). Thus, numerous settlements, consent decrees, and default judgments involving trademark challenges to keyword advertising have terms similar to those in the settlements. RFF 1275-1384.

Complaint Counsel try to gerrymander the settlements into three, highly-specific "salient characteristics" supposedly not present in other settlements. CCB 40. This misses the point. Whether a settlement was "commonplace" is not a counting contest. It is an inquiry into whether "an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled." *Actavis Br.*, 2013 WL 267027 at *27. And as *Actavis* held, the clearest indicator of those traditional understandings is whether courts can order such relief under any existing statute. *Actavis,* 133 S. Ct. at 2233. In *Actavis,* it was the Patent Act; here, it is the Lanham Act. Complaint Counsel *conceded* that 1-800 Contacts could have received the same relief under that Act if the company had fully litigated its suits. RX0679A at 5.

Complaint Counsel hardly address the second prong of *Actavis*' threshold test. As 1-800 Contacts explained (RB 16-20), *Actavis* analyzed whether five "considerations, taken together, outweigh the single strong consideration—the desirability of settlements." 133 S. Ct. at 2234-37. Complaint Counsel do not argue that *any* of these considerations weighs in favor of displacing the law's strong policy favoring settlements. They simply dismiss this analysis as irrelevant. But the only case they cite — *In re Loestrin 24 Fe Antitrust Litig*., 814 F.3d 538, 551 n.12 (1st Cir. 2016) — held the opposite. In the critical sentence preceding the one Complaint Counsel quote, the First Circuit agreed that the "considerations" that 1-800 Contacts has invoked are "justifications for why subjecting reverse payments to *antitrust scrutiny* outweigh the public policy in favor of settlements." *Id*. (emphasis added).

In short, Complaint Counsel have discarded the reasoning by which the Commission persuaded the Supreme Court to make a "limited ruling[]" that "a reverse payment settlement can *sometimes* violate antitrust law," Order of the Commission, *In the Matter of Impax Laboratories, Inc*., Dkt. No. 9373, 2017 WL 5171124 (FTC Oct. 27, 2017), at *8 (emphasis added). Complaint Counsel now read *Actavis* as a roving commission to courts and agencies to regulate all manner of voluntary settlement agreements. The Commission should reject this effort to discard the Court's finely-balanced limits and dramatically extend *Actavis*.

C. <u>Complaint Counsel Failed to Prove Any Anticompetitive Effects</u>

1. Complaint Counsel Failed to Prove Actual Anticompetitive Effects

(a) Complaint Counsel Do Not Identify Any Evidence of Reduced Output or Supracompetitive Prices

Complaint Counsel do not point to any evidence that the settlements decreased output or enabled 1-800 Contacts to raise prices to supracompetitive levels. And they still cannot substantively refute the showing that inputting Google data into their own expert's model indicates that the settlements *increased* output. *Compare* RB 8-9 (citing RFF 1861-1876); CCB 22.

Complaint Counsel instead argue they are "not required" to prove "a decrease in output," CCB 18, and can prevail even if 1-800 Contacts "did not earn supracompetitive profits" as a result of the settlements. CCB21. That is wrong. A factfinder "may not infer competitive injury" absent "evidence that tends to prove that output was restricted or prices were above a competitive level," *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993), *i.e.*, "a price above a firm's marginal cost." *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277 (6th Cir. 2014). Complaint Counsel, however, have not adduced any evidence that 1-800 Contacts used the settlements to earn an "abnormally high price-cost margin." *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 434 (3d Cir. 2016). The data (RX739-107) show that 1-800 Contacts' margins **{**[redacted]**}**:

{

[redacted]

No precedent supports Complaint Counsel's contention that 1-800 Contacts'**{**[redacted]} margins reflect supracompetitive profits. CCB 22. The defendant in *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015), was an "incumbent monopolist *already charging supracompetitive prices*." *Id.* at 839 (emphasis added). The defendant in *Toys 'R' Us*, 126

F.T.C. 415 (1998), orchestrated a group boycott that enabled it to charge higher *margins* than its competitor. *Id.* at 610. Complaint Counsel introduced no evidence about any other firm's margins. At most, Complaint Counsel proved that 1-800 Contacts sometimes charged consumers "higher prices than they would have paid to lower-priced competitors." ID 156. But a firm "may charge higher prices" than others "because it is offering better service" since "[g]enerally you must pay more for higher quality." *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.); *see also Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9025-26 (Mar. 3, 1983) (fact that "consumers [are] willing to pay a premium price in reliance upon [a] familiar and successfully advertised trademark . . . . reflect[s] a marketplace judgment about interbrand competition"); RFF 1438-1446.

Complaint Counsel theorize that, in the absence of the settlements, "*some* consumers would shift their purchases" or "receive a price-match" and this would create "downward pressure on prices." CCB12 (emphasis added). But they have no "empirical evidence," RB 24, that *a sufficient number of* consumers would have abandoned 1-800 Contacts such that it would have lowered prices. None of Complaint Counsel's experts studied demand elasticity or performed an "empirical analysis of the extent to which increases in searches [or] increases in consumer information would impact prices." CX 9043 (Athey, Dep. at 221-22).

(b) Fewer Advertisements Cannot Be An Anticompetitive Effect Because Every Trademark Settlement Reduces Advertising

Complaint Counsel cannot win an antitrust case with the tautology that settlements designed to stop infringing advertisements reduced the number of allegedly infringing advertisements. They agree *California Dental* "teaches that, when evaluating an advertising restraint, the court must consider the link between advertising and competition for the product being advertised." CCB 24. That ends the matter, since there is no evidence of lower output or higher prices for contact lenses.

Complaint Counsel rely on *IFD* to argue that a reduction in advertising shows anticompetitive effects. CCB 23-25. *IFD*, which involved a group of dentists' total ban on providing x-rays to patients' insurers, applied a "quick look" presumption of competitive harm, RB 23-24, and therefore does not hold that every agreement that restricts information has *actual* anticompetitive effects. Nor do Complaint Counsel explain how the Commission could condemn a trademark settlement on those terms without jeopardizing every trademark settlement that limits allegedly infringing advertising. RB 23. Their distinction between "facially and unreasonably overbroad" trademark settlements and "ordinary" ones, CCB 25, merely reinforces that their claim asks the Commission to assert broad regulatory authority over trademark settlements.

(c) Complaint Counsel's Proof of Supposed Search Engine Harm

Unable to show that the settlements harmed consumers, Complaint Counsel erroneously argue that the Commission should invalidate the settlements because they supposedly harm search engines such as Google. CCB 36.

First, *California Dental* made clear that the effects of advertising restrictions should be measured in the market for the product being advertised, where Complaint Counsel did not prove any anticompetitive effects. *California Dental Ass'n v. FTC*, 526 U.S. 756, 776 (1999) ("the relevant output for antitrust purposes here is presumably not information or advertising"). *Cf.* RX 739 ¶¶ 96-99.

Second, Complaint Counsel failed to define any relevant antitrust market for paid search advertising, (Evans, Tr. 1818; CX 9042 (Evans, Dep. at 35)), which means that a "court cannot determine the effect that an allegedly illegal act has on competition." *Southeast Mo. Hosp. v.*

C.R. Bard, Inc., 642 F.3d 608, 613 (8th Cir. 2011). Courts, in fact, have rejected a paid search advertising market. *Lasoff v. Amazon.com Inc.*, No. C16-151 BJR, 2017 WL 372948, at *9 (W.D. Wash. Jan. 26, 2017); *Person v. Google, Inc.*, No. C06-7297JFR(S), 2007 WL 1831111, at *5 (N.D. Cal. June 25, 2007), *aff'd*, 346 F. App'x 230 (9th Cir. 2009).

Third, Complaint Counsel have not proven any harm to search engines. They admit that "a reduction in the number of auction participants reduces the price paid by the auction winner and reduces the revenues to the search engines" *only if* "all other things [are] equal." CCB 36. But Complaint Counsel have no evidence that "all other things" did, in fact, remain "equal."

The record shows that firms unable to advertise in response to searches for 1-800 Contacts' trademarks will advertise more aggressively in response to searches for other terms. RFF 2092-2094. According to Complaint Counsel's own theory, that should raise the price of advertising on other searches. But they have not analyzed bids on terms other than 1-800 Contacts' trademarks, (CX 9043 (Athey, Dep. at 121-22)), let alone examined substitution of advertising demand to other searches. RFF 2095-2097. Nor have Complaint Counsel conducted the multi-variable analysis that Google and Microsoft executives testified is necessary to determine effects on their search engines. RFF 857-898, 2080-2097; RX 701 (Varian Decl.) ¶ 6; RX 704 (**{**[redacted]**}**) ¶¶ 20-22. Indeed, Microsoft's **{**[redacted]**}** testified that she is "**{**[redacted]**}**" (RX 704 (**{**[redacted]**}**) ¶ 23).

2. Complaint Counsel Failed to Prove Market Power

Complaint Counsel also failed to prove market power. They did not prove barriers to expansion or entry. They make no attempt to "show that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); 2B *Antitrust Law*, ¶ 506d, at pp. 127-128 ("market power can persist only when there are significant and continuing barriers to expansion and entry."); RB 27-28. And they point to no evidence that Walmart or Costco (for instance) lack "a sufficient scale to compete on the same playing field." *Chicago Bridge & Iron Co. N.V. v. FTC,* 534 F.3d 410, 430 (5th Cir 2008) (CCB 32-33). While Complaint Counsel characterize other online retailers as "equally capable," CCB 1, they do not explain why these firms are not capable of using "television advertising to develop brand recognition" as 1-800 Contacts did. *Id*.

As to barriers to entry, Complaint Counsel treat a single slide in a third-party private equity firm's presentation as dispositive. CCB 33 (citing RX 1228-014). But Complaint Counsel's own expert testified that "for online firms, the capital requirements tend not to be substantial," (CX 9042 (Evans, Dep. at 137)), and the only barrier is "getting noticed online." RFF 642-643. The law is clear that "[e]stablished buyer preferences . . . will not ordinarily be a serious entry barrier." *Clorox Co.*, 117 F.3d at 58; *see Grappone, Inc. v. Subaru of New England, Inc*., 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983-84 (2d Cir. 1984).

As to market definition, Complaint Counsel do not explain why offline firms do not constrain 1-800 Contacts from raising prices. They do not mention the Fairness to Contact Lens Consumers Act, the Contact Lens Rule, the Commission's report, or the manufacturers' uniform pricing policies ("UPPs") — all of which show that offline competitors compete with online competitors. RB 29-31. They do not address the case law and writings that it is improper to conduct, as Dr. Evans did, a critical loss analysis based on switching data that does not reflect switching in response to a price increase. RB 31-32. They agree that Dr. Evans' analysis of the UPPs does not exclude club stores from the market. CCB 29. They are silent about case law holding that "distinct prices," CCB 31, do not define markets. RB 35. And they do not justify cleaving multi-channel sellers such as Walmart and Costco in two for market analysis.

Rather, Complaint Counsel try to prove market definition through cherry-picked facts while ignoring or dismissing contrary evidence. For example, Complaint Counsel claim that 1-800 Contacts' price match policy shows that the market is limited to online firms, CCB 31, but they omit that {[redacted]**}** of 1-800 Contacts' price matches were for offline firms. CX1334-007. They argue that 1-800 Contacts' "policy" not to price-match club stores excludes such stores from the market, but then dismiss 1-800 Contacts' policy of targeting ECP customers by setting prices at a discount to ECPs as not "germane" and "not evidence of price competition" between 1-800 Contacts and ECPs. CCB 30. Complaint Counsel's own precedent, however, holds that a "policy" to adopt a "price gap" as to certain products shows that those products are in the relevant market. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 165 (D.D.C. 2000)

3. Complaint Counsel Did Not Prove Less Restrictive Alternatives

Complaint Counsel are wrong that 1-800 Contacts had the burden to prove that less restrictive alternatives were unworkable. CCB 44-45. They do not address the case law requiring the *plaintiff* to prove practical alternatives. RB 39-40. But even if 1-800 Contacts had that burden, Complaint Counsel do not point to any evidence rebutting Mr. Hogan's testimony that Complaint Counsel's proposed alternatives are impractical. RFF 1367-1384. As explained above and in 1-800 Contacts' opening brief, RB 39-42, Complaint Counsel's alternatives fail to protect 1-800 Contacts' trademark rights.

4. The Settlements Are Not Inherently Suspect

Complaint Counsel cannot rely on a presumption that the settlements are anticompetitive. If *Actavis* held that settlements in which a defendant pays a competitor "in return for staying out of the market," are not presumptively anticompetitive, 133 S. Ct. at 2234, 2237, settlements restricting some companies from engaging in one narrow kind of advertising are not either. Indeed, the only Circuit decision addressing an antitrust challenge to a trademark settlement "presume[s]" that such a settlement is procompetitive under the rule of reason. *Clorox*, 17 F.3d at 56, 60. And, as explained above, the settlements cannot be condemned as "overbroad."

Complaint Counsel also have not satisfied the high standards for condemning the settlements as inherently suspect.

First, "economic learning" and the "experience of the market" do not make it "obvious" that the settlements are anticompetitive. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005). Paid search advertising's competitive effects have not "occupied a substantial amount of the agency's attention." *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250, *1 n.1 (2009). This emerging form of advertising, and the algorithms that power it, involve "complexities" that make it impossible for "an observer with even a rudimentary understanding of economics [to] conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Actavis*, 133 S. Ct. at 2237. *See* RFF 857-898; RPTRB 33-40.

Second, 1-800 Contacts introduced evidence (RPTB 34-59) why the settlements "might plausibly be thought to have a net procompetitive effect." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999). They reduced litigation costs, consumer confusion, and search costs, and they increased interbrand competition by enhancing incentives for 1-800 Contacts and its rivals to develop unique brands. RFF 1385-1466, 1470, 1484-1565, 1724-1745, 1766-1876. None of these justifications is implausible, “and neither a court nor the Commission may initially dismiss [them] as presumptively wrong.” *California Dental*, 526 U.S. at 775.

Third, there are plausible reasons why the potentially infringing advertisements addressed by the settlements “could have different effects from those ‘normally’ found in the commercial world,” *California Dental*, 526 U.S. at 773. Substantial record evidence shows that consumers who search using the term “1-800 Contacts” (or some variant): (1) are typically seeking to find the 1-800 Contacts website (RFF 1766-1767), (2) expect the most relevant results to appear at the top of the search results page (RFF 1727), and (3) cannot (according to the Commission) distinguish between paid search ads and organic results. RFF 1727-1740.

Finally, there is no evidence that ads in response to searches for 1-800 Contacts' trademarks were “competitively significant.” CCB 16. *See* RB 8; RPTB 95-98. Complaint Counsel merely purport to have shown that “search advertising” *generally* is an “important marketing tool” for some retailers. CCB 17.

D. Complaint Counsel's Request to Expand the Remedial Order Violates the Separation of Powers

Complaint Counsel do not explain how the Commission, an Executive agency, can displace existing judicially-approved settlement agreements without aggrandizing its own power “at the expense of,” *Buckley v. Valeo*, 424 U.S. 1, 122 (1976), the Judiciary's “inherent power to recognize, encourage, and when necessary enforce settlement agreements reached by the parties.” *Bell v. Schexnayder*, 36 F.3d 447, 449 (5th Cir. 1994); RB 42-43; RPTRB 126-133.

Instead, Complaint Counsel cite cases holding that the *Noerr-Pennington* doctrine does not prevent one federal court from scrutinizing reverse payment settlements approved by a federal court. That is not responsive to 1-800 Contacts' separation-of-powers argument: that permitting the Executive Branch to superintend Article III courts in encouraging, accepting or enforcing settlements would "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). Complaint Counsel's unsupported charge that Article III judges "often" approve a settlement "with little scrutiny," CCB at 48, underscores the contempt their remedy would show a coordinate constitutional branch.

Complaint Counsel's request to modify the ALJ's order to *expand* the Commission's interference with the Judiciary, CCB 47-50, further spotlights their disregard for our constitutional structure and their failure to reckon with the practicalities of litigation. Under their proposal, courts would be free to approve settlements, but the parties could not present them for approval. That represents a total ban on settlements that would invade the Article III courts' inherent powers. In any event, Complaint Counsel waived this objection to the order by not filing a cross-appeal. *See* 16 C.F.R. § 3.51(b) ("[a]ny objection to . . . a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived").

As 1-800 Contacts explained (RB 42-43; RPTRB 143-44), there is a simple solution to Complaint Counsel's constitutional problem: if a violation is found, the Commission should permit continued judicial enforcement of the *existing* settlement agreements while only barring 1-800 Contacts from entering *future* similar agreements without judicial approval.

III. <u>CONCLUSION</u>

The Commission should reject Complaint Counsel's invitation to overextend its competition authority into making trademark policy and reviewing traditional settlements for "reasonableness." The Commission should, instead, maintain the limits on antitrust regulation of settlements that it has long recognized and persuaded the Supreme Court to adopt. This case should be dismissed.

Dated: February 21, 2017

Respectfully submitted,

/s/ *Steven M. Perry*

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Counsel for Respondent 1-800 Contacts, Inc.

<u>ATTACHMENT AND NOTICE REGARDING *IN CAMERA* MATERIAL</u>

Pursuant to Rules 3.45(e) and 3.52(f) of the Commission's Rules of Practice, attached is a copy of the pages from Respondent's Reply Brief on Appeal containing *in camera* material.

Notice of the Commission's intent to disclose in a final decision the *in camera* material in the chart on Page 16 of Respondent's Reply Brief on Appeal should be made to Respondent's counsel in this proceeding: Steven M. Perry, Esq., Munger, Tolles & Olson LLP, 350 South Grand Avenue, 50th Floor, Los Angeles, California 90071.

Notice of the Commission's intent to disclose in a final decision the *in camera* material on Page 19 of Respondent's Reply Brief on Appeal should be made to counsel for Microsoft Corp. in this proceeding: Jonathan S. Kanter, Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, 2001 K Street, NW, Washington, D.C. 20006-1047.

Notice of the Commission's intent to disclose in a final decision any of the *in camera* material other than the material on page 21 of Respondent's Reply Brief on Appeal should be made to Respondent's counsel in this proceeding: Steven M. Perry, Esq., Munger, Tolles & Olson LLP, 350 South Grand Avenue, 50th Floor, Los Angeles, California 90071.

DATED: February 21, 2017

By: *<u>/s/ Steven M. Perry</u>*
Steven M. Perry
Counsel for Respondent 1-800 Contacts, Inc.

competitive injury" absent "evidence that tends to prove that output was restricted or prices were above a competitive level," *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993), *i.e.*, "a price above a firm's marginal cost." *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277 (6th Cir. 2014). Complaint Counsel, however, have not adduced any evidence that 1-800 Contacts used the settlements to earn an "abnormally high price-cost margin." *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 434 (3d Cir. 2016). The data (RX739-107) show that 1-800 Contacts' margins **{**[redacted]**}**:

{

[redacted]

No precedent supports Complaint Counsel's contention that 1-800 Contacts'**{**[redacted]} margins reflect supracompetitive profits. CCB 22. The defendant in *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015), was an "incumbent monopolist *already charging supracompetitive prices*." *Id.* at 839 (emphasis added). The defendant in *Toys 'R' Us*, 126

C.R. Bard, Inc., 642 F.3d 608, 613 (8th Cir. 2011). Courts, in fact, have rejected a paid search advertising market. *Lasoff v. Amazon.com Inc.*, No. C16-151 BJR, 2017 WL 372948, at *9 (W.D. Wash. Jan. 26, 2017); *Person v. Google, Inc.*, No. C06-7297JFR(S), 2007 WL 1831111, at *5 (N.D. Cal. June 25, 2007), *aff'd*, 346 F. App'x 230 (9th Cir. 2009).

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Complaint Counsel are wrong that 1-800 Contacts had the burden to prove that less restrictive alternatives were unworkable. CCB 44-45. They do not address the case law requiring the *plaintiff* to prove practical alternatives. RB 39-40. But even if 1-800 Contacts had that burden, Complaint Counsel do not point to any evidence rebutting Mr. Hogan's testimony that Complaint Counsel's proposed alternatives are impractical. RFF 1367-1384. As explained above and in 1-800 Contacts' opening brief, RB 39-42, Complaint Counsel's alternatives fail to protect 1-800 Contacts' trademark rights.

ATTACHMENT REGARDING *IN CAMERA* ORDERS

Pursuant to Rule 4.2(c)(2)of the Commission's Rules of Practice, attached is a copy of the ALJ's orders granting *in camera* status to the information set forth in the preceding Attachment and Notice Regarding *In Camera* Material. The orders are:

1. Order on Non-Parties' Motions for *In Camera* Treatment (Apr. 4, 2017);
2. Order on In Camera Treatment of Google Exhibits (Apr. 12, 2017); and
3. Order on Respondent's Motion for *In Camera* Treatment (April 4, 2017).

DATED: February 21, 2017

By: */s/ Steven M. Perry*
Steven M. Perry
Counsel for Respondent 1-800 Contacts, Inc.

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

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

ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the Scheduling Order entered in this matter, several non-parties filed motions for *in camera* treatment for materials that Federal Trade Commission ("FTC") Complaint Counsel and/or Respondent 1-800 Contacts ("Respondent" or "1-800 Contacts") have listed on their exhibit lists as materials that might be introduced into evidence at the trial in this matter. Neither Complaint Counsel nor Respondent have filed an opposition to any of the motions addressed below filed by the non-parties.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence "be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b).

A. Clearly defined, serious injury

"[R]equests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10

(Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is "the principal countervailing consideration weighing in favor of disclosure." *Id.*

The Federal Trade Commission recognizes the "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review.

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time. . . ." 16 C.F.R. § 3.45(b)(3). "Applicants seeking indefinite *in camera* treatment must further demonstrate 'at the outset that the need for confidentiality of the material is not likely to decrease over time' 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration." *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990). In *DuPont*, the Commission rejected the respondent's request for indefinite *in camera* treatment, but noting "the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry," the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C.

at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996). Where *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes "sensitive personal information," the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). "Sensitive personal information" is defined as including, but not limited to, "an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals' names and addresses, and witness telephone numbers have been found to be "sensitive personal information" and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (September 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers' names or other personal data where it was not relevant). "[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b)(3).

III.

As set forth below, each of the non-parties listed herein filed separate motions for *in camera* treatment. With two exceptions, each motion was supported by an affidavit or declaration of an individual within the company who had reviewed the documents at issue. These affidavits and declarations supported the applicants' claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. With one exception, the motions included the documents or deposition testimony for which *in camera* treatment was sought. Where *in camera* treatment for deposition testimony was sought, the non-parties narrowed their requests to specific page and line numbers. The specific motions of each of the non-parties are analyzed using the standards set forth above and are addressed below in alphabetical order.

AEA Investors LP ("AEA"):

Non-party AEA seeks *in camera* treatment for three documents that Complaint Counsel and Respondent intend to introduce into evidence. AEA states that these three documents are three different versions of a presentation AEA made related to a proposed acquisition. These documents are: RX1228, CX0439, and CX1343. AEA states that CX1343 is a version of the presentation that had been redacted for sharing with AEA's portfolio company, 1-800 Contacts. AEA seeks permanent *in camera* treatment for all three documents. In addition, with respect to RX1228 and CX0439, AEA requests that the court limit distribution to outside counsel only.

AEA supports its motion with a declaration from its General Counsel and Chief Compliance Officer. The declaration describes in detail the confidential nature of the documents, which contain evaluations of market factors, market risks, company advantages, company disadvantages, and company risks, and which also review future strategic plans, including financial metrics, customer and supplier data, and market growth indicators. The declaration also describes in detail the measures that AEA has taken to protect the confidentiality of the documents for which AEA seeks *in camera* treatment and explains the competitive harm AEA would suffer if these documents were made publicly available. Accordingly, AEA has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. However, AEA has not met its burden of demonstrating that RX1228, CX0439, and CX1343, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: RX1228, CX0439, and CX1343.

With respect to AEA's request that distribution of RX1228 and CX0439 be limited to outside counsel only, disclosure of RX1228 and CX0439 may be made only as permitted under the Protective Order entered in this case.[1]

Coastal Contact, Inc. ("Coastal")

Non-party Coastal seeks *in camera* treatment for documents and witness testimony that Complaint Counsel and Respondent intend to introduce into evidence. Coastal seeks *in camera* treatment for a period of three years.

[1] Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question. Protective Order ¶ 7.

Coastal supports its motion with a declaration from its Chief Financial Officer. The declaration describes in detail the confidential nature of the documents, which contain information on Coastal's pricing, competitive positioning, marketing and bidding strategies, and internal analyses of customer demographics and buying patterns. The declaration also describes in detail the measures that Coastal has taken to protect the confidentiality of the documents for which Coastal seeks *in camera* treatment and explains the competitive harm Coastal would suffer if these documents were made publicly available. Accordingly, with the exception of RX1222, Coastal has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. RX1222 is a 2012 Powerpoint presentation and Coastal has not demonstrated that this document meets the Commission's strict standards.

Coastal states it is seeking *in camera* treatment for 50 documents. A review of the documents shows that many of the documents are duplicates of each other, such that there are only 19 unique documents at issue.[2] Furthermore, although Coastal seeks *in camera* treatment for a period of three years, in order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency,[3] *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the 18 documents identified as: CX1465, CX1471, CX1686, CX1695, CX1698, CX1699, CX1700, CX1701, CX1702, CX1710/RX1209, CX1711, CX1714, CX1792, CX1793, RX1208, RX1210, RX1220, and "nonparty submission 00010405"[4].

In camera treatment is DENIED WITHOUT PREJUDICE for the document identified as RX1222. If Coastal wishes to file a renewed motion demonstrating that RX1222 meets the Commission's strict standards, Coastal shall have until April 10, 2017 to file a renewed motion for *in camera* treatment in accordance with this order.

Contact Lens King, Inc. ("CLK")

Non-party CLK seeks *in camera* treatment for four documents that Complaint Counsel intends to introduce into evidence. CLK seeks *in camera* treatment for a period of two to five years for CX1473 and CX1474, and indefinite *in camera* treatment for CX1476 and CX1794.

CLK supports its motion with an affidavit from its President. The affidavit explains that CX1473 and CX1474 contain sales and pricing data and that CX1476 and CX1794 contain "negative keyword" reports and information relative to bidding on competitors' keywords. The

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[2] With one exception, the duplicates that Coastal lists are documents which do bear a CX or RX number that are duplicative of documents which do not bear a CX or RX number. The one exception is CX1710 and RX1209, which are duplicates of each other and which both bear a CX or RX number.

[3] *See In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, *20 n.1 (May 25, 2011).

[4] It is unclear whether nonparty submission 00010405 has been assigned a CX or RX number. If either party seeks to introduce nonparty submission 00010405 as an exhibit, counsel shall prepare a proposed order indicating that nonparty submission 00010405 has been granted *in camera* treatment by this Order and identifying it by its CX or RX number.

affidavit describes in detail the confidential nature of the documents. The affidavit also describes in detail the measures that CLK has taken to protect the confidentiality of the documents for which CLK seeks *in camera* treatment and explains the competitive harm CLK would suffer if these documents were made publicly available. Accordingly, CLK has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. However, CLK has not met its burden of demonstrating that CX1476 and CX1794, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency, *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: CX1473, CX1474, CX1476 and CX1794.

Google, Inc. ("Google")

Non-party Google seeks *in camera* treatment for 242 documents and deposition testimony that Complaint Counsel and Respondent intend to introduce into evidence. Google seeks indefinite *in camera* treatment.

Google supports its motion with a declaration from its Director of Product Management and from its Senior Competition Counsel. The declarations explain that there are seven categories of documents for which Google seeks *in camera* treatment. These groups are: (1) datasets that contain customer data and Google search query data, including keywords that customers bid on, costs-per-click bid by customer, and click-through rates; (2) internal documents related to studies Google conducted to optimize formatting search engine results pages; (3) internal documents related to design and results of experiments conducted by Google, including systems used to implement policies reflecting Google's proprietary algorithms; (4) two documents which Google describes in the *in camera* version of its motion and declaration; (5) transcripts of depositions of Google employees in this matter, portions of which and the exhibits thereto included confidential and competitively sensitive information; (6) internal communications related to Google's responses to questions about AdWords raised by 1-800 Contacts, which reveal analysis and confidential data about bids and bidding strategies; and (7) a single internal document discussing quality score on AdWords. The declarations describe in detail the confidential nature of the documents. The declarations also describe in detail the measures that Google has taken to protect the confidentiality of the documents for which Google seeks *in camera* treatment and explains the competitive harm Google would suffer if these documents were made publicly available. Accordingly, Google has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection.

With respect to documents in groups 1, 6, and 7, Google has not met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as in groups 1, 6, and 7.

With respect to documents in groups 2, 3, 4, and 5, Google has met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. Indefinite *in camera* treatment is GRANTED for the documents identified as in groups 2, 3, 4, and 5.

Google has not identified the documents for which it seeks *in camera* treatment by CX or RX number. If either party seeks to introduce these documents as exhibits, counsel shall prepare a proposed order indicating that, by this Order, the document has been granted *in camera* treatment, the length of time *in camera* treatment has been extended, and identifying each document by its CX or RX number.

Lens.com, Inc. ("Lens.com")

Non-party Lens.com seeks *in camera* treatment for one document that Complaint Counsel intends to introduce into evidence: CX1464. Lens.com seeks *in camera* treatment for a period of five years.

Lens.com supports its motion with a declaration from its Chief Executive Officer. The declaration explains that CX1464 details highly sensitive information regarding Lens.com's prices, sales, and financial performance. The declaration also describes in detail the measures that Lens.com has taken to protect the confidentiality of the document for which Lens.com seeks *in camera* treatment and explains the competitive harm Lens.com would suffer if the document were to be made publicly available. Accordingly, Lens.com has met its burden of demonstrating that the material for which it seeks *in camera* treatment should be given such protection.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the document identified as CX1464.

LensDirect LLC ("LensDirect")

Non-party LensDirect seeks *in camera* treatment for 26 documents and deposition testimony that Complaint Counsel intends to introduce into evidence. LensDirect does not indicate a specific time period for which it seeks *in camera* treatment.

In its motion and in its proposed order, LensDirect seeks *in camera* treatment for the following 26 documents: CX1639, CX1640, CX1641, CX1642, CX1643, CX1644, CX1645, CX1646, CX1647, CX1648, CX1649, CX1650, CX1651, CX1652, CX1653, CX1654, CX1655, CX1656, CX1657, CX1658, CX1659, CX1660, CX1661, CX1779, CX1780, CX1784, and for certain portions of the deposition of Ryan Alovis.

In support of its motion, LensDirect provides a declaration from its Chief Executive Officer. The declaration does not provide the information necessary to support a finding that any of the 26 documents are sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury, and should therefore receive *in camera* treatment.[5] Further, "there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old." *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 100, *4 (May 6, 2009). With respect to the documents that are more than three years old and the portions of the testimony from the deposition of Ryan Alovis about those documents, LensDirect has not demonstrated that public disclosure is likely to cause serious competitive injury.

For these reasons, LensDirect's motion is DENIED WITHOUT PREJUDICE. By April 10, 2017, LensDirect may file a renewed motion for *in camera* treatment which includes an affidavit or declaration from an individual within the company who has reviewed the documents demonstrating that the documents for which it seeks *in camera* treatment are sufficiently secret and material to the applicant's business that disclosure would result in serious competitive injury.

LensDiscounters.com ("LD Vision")

Non-party LD Vision seeks *in camera* treatment for four documents that Complaint Counsel intends to introduce into evidence. LD Vision seeks indefinite *in camera* treatment.

LD Vision supports its motion with a declaration from its Chief Operating Officer. The declaration explains that the documents include information related to LD Vision's financial condition, pricing strategies, investment strategies, and techniques for marketing and advertising its products. A review of the documents shows that CX1479, CX1812, and CX1813 contain competitively sensitive information, the disclosure of which would cause competitive harm. Accordingly, LD Vision has met its burden of demonstrating that CX1479, CX1812, and CX1813 should be given *in camera* protection. However, LD Vision has not met its burden of demonstrating that CX1479, CX1812, and CX1813, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as CX1479, CX1812, and CX1813.

CX8003 is a declaration prepared by an LD Vision employee and attached exhibits, many of which are dated 2005, and many of which appear to have been widely disseminated. A review of the declaration and the documents attached shows that CX8003 does not meet the Commission's strict standards for *in camera* treatment.

In camera treatment is DENIED WITHOUT PREJUDICE for the document identified as CX8003. LD Vision shall have until April 10, 2017, to file a renewed motion for *in camera* treatment seeking *in camera* treatment only for those paragraphs of the declaration and those exhibits attached thereto that meet the Commission's strict *in camera* standards.

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[5] The declaration provides information relative to whether certain documents (CX1242, CX1463, and CX1241) are business records. These exhibits are not listed in the motion as documents for which LensDirect is seeking *in camera* treatment.

Luxottica Retail North America, Inc. ("Luxottica")

Non-party Luxottica seeks *in camera* treatment for one document that Complaint Counsel intends to introduce into evidence. Luxottica seeks indefinite *in camera* treatment, or in the alternative, for a period of five years.

Luxottica supports its motion with an affidavit from its Senior Director. The affidavit describes in detail the confidential nature of the document, which consists of a detailed monthly breakdown of Luxottica's contact lens sales, separated by individual retail brands. The affidavit also describes in detail the measures that Luxottica has taken to protect the confidentiality of the document for which Luxottica seeks *in camera* treatment and explains the competitive harm Luxottica would suffer if this material were to be made publicly available. Accordingly, Luxottica has met its burden of demonstrating that the material for which it seeks *in camera* treatment should be given such protection. However, Luxottica has not met its burden of demonstrating that CX1817, which consists of an ordinary business record, is entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the document identified as CX1817.

Memorial Eye, PA ("Memorial Eye")

Non-party Memorial Eye seeks *in camera* treatment for documents Complaint Counsel and Respondent intend to introduce into evidence. Memorial Eye does not indicate a specific time period for which it seeks *in camera* treatment.

Memorial Eye supports its motion with a declaration from its General Manager. The declaration avers generally that the documents include financial statements that detail profit and loss, marketing reports, communications with customers and vendors, and documents related to previous litigation with 1-800 Contacts that contain confidential business information. However, the declaration does not explain specifically that each document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury. Furthermore, Memorial Eye did not provide a set of the exhibits for which it seeks *in camera* treatment and thus no determination can be made as to whether any of the documents meets the Commission's strict standards. Therefore, Memorial Eye's Motion is DENIED WITHOUT PREJUDICE.

Memorial Eye shall have until April 10, 2017, to file a renewed motion for *in camera* treatment seeking *in camera* treatment in accordance with this order.

Microsoft Corporation ("Microsoft")

Non-party Microsoft seeks *in camera* treatment for 16 documents and 3 sets of data that Complaint Counsel and Respondent intend to introduce into evidence. Microsoft seeks indefinite *in camera* treatment.

Microsoft supports its motion with an affidavit from its Assistant General Counsel. The affidavit describes the documents, some of which contain sensitive legal and client information, including statistics of the pricing impact on brand discounts, brand clicks and investment rates. The affidavit further avers that studies made by Microsoft's search engine Bing regarding brand term bidding for advertisements contain confidential information about how Microsoft's users click and evaluate bids on brand terms. With respect to the three sets of data, the declaration avers that the sets contain data on customer bids, ad campaigns, user clicks, ad impressions, and page views. The declaration states that public disclosure of its documents would harm its ability to compete with other search advertising platforms.

With respect to MSFT-108-127 (2004 settlement agreement) and MSFT-129-132 (2009 advertising agreement), these documents are over three years old and Microsoft has not demonstrated that they remain competitively sensitive. In addition, because these two documents do not bear a CX or RX number, it is not clear whether either party intends to introduce these exhibits at trial. With respect to CX1454, a review of the document shows that it is a cover email and does not contain confidential information. Microsoft's motion is DENIED WITHOUT PREJUDICE as to CX1454, MSFT-108-127, and MSFT-129-132. If Microsoft intends to renew its request for *in camera* treatment for these documents, Microsoft shall ascertain whether these documents are intended trial exhibits before filing such motion and such renewed motion shall be filed by April 10, 2017.

With respect to CX1662, CX1663, CX1664, CX1665, CX1666, CX1667, CX1668, CX1669, CX1670, RX0837, MSFT-001-19 (2015 litigation documents), and the 3 data sets identified as MSFT-FTC0001-FTC3057; FTC-MSOFT-0001-FTC0006; MSFT-FTC0001-FTC1879, a review of the declaration and the documents indicates that the documents contain confidential information, the disclosure of which would cause harm to Microsoft. However, Microsoft has not demonstrated that these documents reveal proprietary formulas or algorithms, or other information sufficiently secret and material to merit indefinite *in camera* treatment. Accordingly, *in camera* treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for these documents. With respect to MSFT-001-19 and the 3 data sets identified as MSFT-FTC0001-FTC3057, FTC-MSOFT-0001-FTC0006, and MSFT-FTC0001-FTC1879, if a party seeks to introduce these documents as exhibits, counsel shall prepare a proposed order indicating that the document has been granted *in camera* treatment by this Order and identifying it by its CX or RX number.

With respect to CX8005 (a January 2017 declaration of Rukmini Iyer, Scientist Manager at Microsoft) and to a February 2017 declaration of Rukmini Iyer, Scientist Manager at Microsoft that does not bear a CX or RX number, Microsoft has demonstrated that these declarations contain highly sensitive commercial information, including information pertaining to proprietary formulas or algorithms. Accordingly, with respect to these documents, Microsoft's motion is GRANTED and indefinite *in camera* treatment is GRANTED for the documents identified as: CX8005 and the February 2017 declaration of Rukmini Iyer. If a party seeks to introduce the February 2017 declaration as an exhibit, counsel shall prepare a proposed order indicating that the document has been granted *in camera* treatment by this Order and identifying it by its CX or RX number.

Visionworks of America, Inc. ("Visionworks")

Non-party Visionworks seeks *in camera* treatment for eight documents that Complaint Counsel and Respondent intend to introduce into evidence. Visionworks seeks *in camera* treatment for varying time periods, discussed below.

Visionworks supports its motion with a declaration from its Director of Marketing. The declaration describes in detail the confidential nature of the documents, which contain pricing strategies and data, sales data, revenues, documents concerning marketing strategies and budgets, and information on incentives, discounts, and rebates. The declaration also describes in detail the measures that Visionworks has taken to protect the confidentiality of the material for which Visionworks seeks *in camera* treatment and explains the competitive harm Visionworks would suffer if this information were to be made publicly available. Accordingly, Visionworks has met its burden of demonstrating that the material for which it seeks *in camera* treatment should be given such protection.

Of the eight exhibits, Visionworks seeks indefinite *in camera* treatment for one – CX1477. Visionworks has not met its burden of demonstrating that CX1477, which consists of an ordinary business record relating to its pricing strategy, margins, discounts, and sales, is entitled to indefinite *in camera* treatment. Accordingly, *in camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the document identified as: CX1477.

Of the remaining exhibits, Visionworks seeks *in camera* treatment for either three or five years. In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency, *in camera* treatment for a period of five years is granted as described below.

With respect to CX1796, RX245, and RX246, which reveals the keywords Visionware bids on in Google Adwords, Visionworks has narrowly tailored its request to only the information set forth in column D of these documents. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for column D of CX1796, RX245, and RX246.

With respect to CX943, CX1778, and RX241, which constitute or include the June 3, 2016 declaration of Jared Duley, Visionworks has narrowly tailored its request to only paragraph 16 of the Duley declaration. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for paragraph 16 in CX943, CX1778, and RX241.

With respect to CX9036, the deposition of Jared Duley, Visionworks has narrowly tailored its request to only certain portions. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the following portions of CX9036: 22:22-23:23; 52:2-54:1; 54:2-56:5; 60:5-82:17; 101:10-14; 119:9-20; 120:21-132:15, 136:17-137:5, 149:9-155:13; 164:12-165:18; 167:3-12; 168:5-25; and 175:10-176:24.

Walgreens, Inc. ("Walgreens")

Non-party Walgreens seeks *in camera* treatment for 41 documents Complaint Counsel and Respondent intend to introduce into evidence, including portions of investigational hearing transcripts ("IHTs") and deposition transcripts. Walgreens seeks indefinite *in camera* treatment, or, in the alternative, with respect to one category of documents, ten years, and, with respect to another category, three years.

Walgreens supports its motions with a declaration from the Manager of Digital Marketing for Vision Direct, a subsidiary of Walgreens. The declaration describes in detail the confidential nature of the documents, which fall into two categories: (1) keyword lists, which the declaration states represent the business judgment of a team of digital marketing experts, and (2) strategic analysis of advertising and pricing strategy, including performance, pricing, margins, and costs. The declaration also describes in detail the measures that Walgreens has taken to protect the confidentiality of the documents for which Walgreens seeks *in camera* treatment and explains the competitive harm Walgreens would suffer if these materials were made publicly available. Except as noted below, Walgreens has met its burden of demonstrating that many of its documents should be given *in camera* protection. Walgreens has not, however, met its burden of demonstrating that any of its documents, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

A number of documents for which Walgreens seeks *in camera* treatment are over three years old and Walgreens has not demonstrated that these documents remain competitively sensitive. Therefore, Walgreen's motion is DENIED WITHOUT PREJUDICE as to the following documents: CX1206 (WAG-031), CX1207 (WAG-032), CX1210 (WAG-037), CX1211 (WAG-038), CX1213 (WAG-046), CX1805, and RX0149 (WAG-047). If Walgreens wishes to file a renewed motion demonstrating that these documents meet the Commission's strict standards, Walgreens shall do so no later than April 10, 2017.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: CX1214 (WAG-051), CX1215 (WAG-053), CX1216 (WAG-054), CX1222 (WAG-003), CX1489[6] (WAG-074), CX 1490 (WAG-075), CX1510 (WAG-076), CX1797 (WAG-008), CX1798 (WAG-009), CX1799 (WAG-223), CX1814 (WAG-073), CX1815 (WAG-077), RX0151(WAG-215), RX0152(WAG-232), and RX0148 (WAG-251).

There are a number of documents for which Walgreens seeks *in camera* treatment that do not bear CX or RX numbers. From the list of potential trial exhibits identified by Complaint Counsel, these are: WAG-062, WAG-080, WAG-084, WAG-085, WAG-086, and WAG-087.

[6] It appears that the documents identified as CX1489 (WAG-074), CX1490 (WAG-075), and CX1510 (WAG-076) were also listed as documents that Respondent intends to introduce at trial, but Walgreens did not identify the documents by their corresponding RX numbers.

From the list of potential trial exhibits identified by Respondent, these are: WAG-016, WAG-017, WAG-018, WAG-019, WAG-020, WAG-028, WAG-202, and WAG-214. *In camera* treatment, for a period of five years, will be given to these documents if they are offered into evidence by either party. If a party seeks to introduce any of these documents as exhibits, counsel shall prepare a proposed order indicating that the document has been granted *in camera* treatment by this Order and identifying the document by its CX or RX number.

With respect to CX8001 and CX8002, declarations provided by Glen Hamilton, Walgreens has narrowly limited its request to only specific paragraphs discussing confidential material. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for paragraphs 6, 20 and 21 of CX8001 and paragraphs 6, 19 and 20 of CX8002.

With respect to CX9007, CX9008 and CX9038, the IHTs and deposition transcripts of Stephen Fedele and Glen Hamilton, Walgreens has limited its request to only specific page and line numbers discussing confidential material. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the following portions of CX9007: 21:19-22; 22:12-13; 23:1; 41:8; 53:3, 9; CX9008: 9:12-13; 12:18-25; 13:1, 6-8; 35:2-10, 15-16; 36:1-2, 19-21; 44:5-9; 51:11-14; and CX9038: 27:24-25; 28:1, 32:13-20; 34:5, 10, 14, 18; 37:9-10, 20, 22; 39:8-10, 12, 17; 41:25; 42:3, 22, 25; 43:17; 44:12-14, 19-20, 25; 45:25; 45:1-7; 53:22-25; 54-55; 56:1-19; 60:21-25; 61:1, 22-24; 65:13-25; 66:1-23; 67:12-25; 68-69; 75:24-25; 76-77; 78:1-9; 79:25; 80:1, 13, 16, 22, 23; 90:18-23; 92:17-18, 21-24; 93:5, 19, 22; 94:1-16; 97:20-21; 98:5; 101:22; 102:5-10; 103:21-23; 113:17-22; 114:7-9; 116:3-25; 117:1, 9-22; 118:14-17; 119:9-10; 120:7-8; 121:6-25 and 122:1-3.

WebEyeCare, Inc. ("WEC")

Non-party WEC seeks *in camera* treatment for three documents and for portions of an IHT and a deposition transcript that Complaint Counsel and Respondent intend to introduce into evidence. WEC seeks indefinite *in camera* treatment, or in the alternative, for a period of five years.

WEC supports its motion with a declaration from its co-owner. The declaration describes in detail the confidential nature of the documents, which contain information about WEC's product sales and revenue, as well as its marketing and advertising practices, including statistics pertaining to its online search advertising efforts through keywords and search terms. The declaration further states that the IHT and deposition contain information related to WEC's marketing and advertising practices, customer acquisition methods and strategies, and WEC's internal views and analysis. The declaration also describes in detail the measures that WEC has taken to protect the confidentiality of the documents for which WEC seeks *in camera* treatment and explains the competitive harm WEC would suffer if these materials were made publicly available. With respect to the IHT and deposition of Peter Batushansky, WEC has limited its request to only specific page and line numbers discussing confidential material. Accordingly, WEC has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. However, WEC has not met its burden of demonstrating that the materials, which consist of ordinary business records, are entitled to indefinite *in camera* treatment.

In camera treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as: CX1467, CX1819, and CX1820/RX1849.

With respect to CX9000 and CX9014, the IHT and deposition transcript of Peter Batushansky, WEC has limited its request to only specific page and line numbers discussing confidential material. *In camera* treatment for a period of five years, to expire on April 1, 2022, is GRANTED for the following portions of CX9000: 6:18-21; 8:23-25; 9:1-4, 13-25; 10:1-8, 24-25; 11:1-15; 14:4-25; 15-69; 70:1-22; 73:13-25; 74:1-25; 75-91; 92:1-19; 93-102; 103:25; 104-122; 123:18-25; 124-126; 128:15-25; 129-132:1-12, and for the following portions of CX9014: 14:3-25; 15-19; 20:1-4; 21:1-24; 23:9-25; 24; 25:1-4; 26:22-25; 27-32; 33:1-2, 12-25; 34-39; 40:1-3; 41:5-25; 42-46; 47:1-3; 48-52; 53:1-8, 14-25; 54-64; 65:1-17; 67:18-25; 68-85; 86:1-2, 13-25; 87; 88:1-19; 89-100; 101:1-10; 102:16-25; 103-194; 195:1-12; 197:11-25; 198:1-16; 201:20-25; 202-208 and 209:1-11.

IV.

Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

It is apparent from the non-parties' motions that Complaint Counsel and Respondent seek to introduce duplicative copies of the same underlying document. For example, according to AEA, CX0439 and RX1228 are duplicates of the same document; according to WEC, CX1820 and RX1849 are duplicates of the same document. The parties are reminded of their obligation, pursuant to the Scheduling Order, to confer and eliminate duplicative exhibits in advance of the final prehearing conference.

ORDERED:

DM Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: April 4, 2017

PUBLIC

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

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

ORDER ON *IN CAMERA* TREATMENT OF GOOGLE, INC. EXHIBITS

By Order dated April 4, 2017, *in camera* treatment was GRANTED, for the specified time periods, for the following exhibits:

CX#	Bates Range	"Group"	Period
CX0470	GOOG-LENSE-00000910 - GOOG-LENSE-00000914	3	Indefinite
CX0578	GOOG-LENSE-00000471	6	Five Years
CX0580	GOOG-LENSE-00000859 - GOOG-LENSE-00000860	6	Five Years
CX0582	GOOG-LENSE-00000939 - GOOG-LENSE-00000942	3	Indefinite
CX0583	GOOG-LENSE-00001023	1	Five Years
CX0888	GOOG-LENSE-00000935 - GOOG-LENSE-00000938	3	Indefinite
CX1134	GOOG-LENSE-00000870 - GOOG-LENSE-00000871	3	Indefinite
CX1135	GOOG-LENSE-00001017	3	Indefinite
CX1136	GOOG-LENSE-00001021 - GOOG-LENSE-00001022	3	Indefinite
CX1143	GOOG-LENSE-00000872 - GOOG-LENSE-00000882	3	Indefinite
CX1174	GOOG-LENSE-00000906	3	Indefinite
CX1383	GOOG-LENSE-00000861	1	Five Years

CX#	Bates Range	"Group"	Period
CX1461	GOOG-LENSE-00000064	1	Five Years
CX1487	GOOG-LENSE-00000033	1	Five Years
CX1773	GOOG-LENSE-00000943 - GOOG-LENSE-00000944	3	Indefinite
CX1795	GOOG-LENSE-00000017; GOOG-LENSE-00000022; GOOG-LENSE-00000031; GOOG-LENSE-00000039; GOOG-LENSE-00000048; GOOG-LENSE-00000053; GOOG-LENSE-00000058; GOOG-LENSE-00000063; GOOG-LENSE-00001038; GOOG-LENSE-00001039; GOOG-LENSE-00001040; GOOG-LENSE-00001041; GOOG-LENSE-00001042; GOOG-LENSE-00001043; GOOG-LENSE-00001044; GOOG-LENSE-00001045; GOOG-LENSE-00001046; GOOG-LENSE-00001047; GOOG-LENSE-00001048; GOOG-LENSE-00001059; GOOG-LENSE-00001060; GOOG-LENSE-00001063; GOOG-LENSE-00001070; GOOG-LENSE-00001071; GOOG-LENSE-00001072; GOOG-LENSE-00001073; GOOG-LENSE-00001074; GOOG-LENSE-00001082; GOOG-LENSE-00001083; GOOG-LENSE-00001084; GOOG-LENSE-00001089; GOOG-LENSE-00001090; GOOG-LENSE-00001091; GOOG-LENSE-00001092; GOOG-LENSE-00001093; GOOG-LENSE-00001094; GOOG-LENSE-00001095; GOOG-LENSE-00001096; GOOG-LENSE-00001097; GOOG-LENSE-00001098; GOOG-LENSE-00001099; GOOG-LENSE-00001100; GOOG-LENSE-00001101; GOOG-LENSE-00001102; GOOG-LENSE-00001103	1	Five Years

CX#	Bates Range	"Group"	Period
CX9019	Excerpts of Adam Juda Deposition 7:1-2; 17:7-20:2; 24:18-21; 25:12-26:23; 31:16-38:2; 38:24-39:11; 40:5-18; 41:12-20; 42:20-43:7; 43:16-48:10; 48:16-54:3; 55:1-66:11; 67:2-69:3; 73:1-15; 75:12-76:9; 76:21-79:24; 80:13-83:13; 83:19-95:17; 104:13-18; 108:20-109:14; 110:5-112:6; 112:16-113:12; 113:23-114:15; 114:22-116:3; 116:21-117:6; 118:8-17; 119:13-123:16; 124:19-130:7; 132:4-137:5; 137:23-140:11; 142:10-143:13; 144:2-160:14; 163:20-168:10; 170:12-173:15; 174:8-11; 174:19-175:16; 176:13-181:13; 182:17-183:2; 188:7-192:19; 196:6-197:24; 198:12-200:13; 205:1-206:22; 207:14-217:16; 218:25-226:12; 227:12-229:4; 229:16-230:5	5	Indefinite
CX9022	Excerpts of Gavin Charlston Deposition 21:6-33:22; 34:23-45:4; 54:3-56:7; 56:15-62:1; 65:13-18; 66:13-78:8; 78:20-119:1; 119:17-18; 120:5-123:25; 126:7- 129:17; 131:4-18; 132:18-134:16; 135:17-136:10; 138:16-141:11; 141:22-143:6; 145:7-158:19; 162:13-170:21; 173:14-176:20; 180:24-182:14; 183:21-184:21; 187:19-189:8; 190:10-191:20; 192:13-205:13; 206:11-209:3	5	Indefinite

RX#	Beg. No.	End No.	"Group"	Years
RX0133	GOOG-LENSE-00000864	GOOG-LENSE- 00000869	4	Indefinite
RX0138	GOOG-LENSE-00000933	GOOG-LENSE- 00000934	3	Indefinite
RX0800	GOOG-LENSE-00004885	GOOG-LENSE- 00004963	2	Indefinite
RX1255	GOOG-LENSE-00005766	GOOG-LENSE- 00005873	4	Indefinite
RX1729	GOOG-LENSE-00005766	GOOG-LENSE- 00005873	4	Indefinite
RX1330	GOOG-LENSE-00000083	GOOG-LENSE- 00000083	6	5
RX1341	GOOG-LENSE-00000127	GOOG-LENSE- 00000127	6	5
RX1343	GOOG-LENSE-00000262	GOOG-LENSE- 00000262	6	5
RX1345	GOOG-LENSE-00000266	GOOG-LENSE- 00000266	6	5
RX1353	GOOG-LENSE-00000282	GOOG-LENSE- 00000283	6	5
RX1356	GOOG-LENSE-00000288	GOOG-LENSE- 00000288	6	5
RX1369	GOOG-LENSE-00000318	GOOG-LENSE- 00000318	6	5
RX1370	GOOG-LENSE-00000320	GOOG-LENSE- 00000321	6	5
RX1380	GOOG-LENSE-00000648	GOOG-LENSE- 00000648	6	5
RX1381	GOOG-LENSE-00000856	GOOG-LENSE- 00000858	6	5
RX1388	GOOG-LENSE-00000901	GOOG-LENSE- 00000905	3	Indefinite

RX1391	GOOG-LENSE-00000915	GOOG-LENSE- 00000921	3	Indefinite
RX1392	GOOG-LENSE-00000922	GOOG-LENSE- 00000924	3	Indefinite
RX1393	GOOG-LENSE-00000925	GOOG-LENSE- 00000931	3	Indefinite
RX1507	GOOG-LENSE-00001185	GOOG-LENSE- 00001186	6	5
RX1508	GOOG-LENSE-00001187	GOOG-LENSE- 00001188	6	5
RX1632	GOOG-LENSE-00003745	GOOG-LENSE- 00003752	3	Indefinite
RX1635	GOOG-LENSE-00003810	GOOG-LENSE- 00003814	3	Indefinite
RX1639	GOOG-LENSE-00004047	GOOG-LENSE- 00004048	3	Indefinite
RX1641	GOOG-LENSE-00004081	GOOG-LENSE- 00004089	7	5
RX1643	GOOG-LENSE-00004231	GOOG-LENSE- 00004237	3	Indefinite
RX1695	GOOG-LENSE-00004964	GOOG-LENSE- 00004964	2	Indefinite
RX1697	GOOG-LENSE-00005653	GOOG-LENSE- 00005687	2	Indefinite
RX1698	GOOG-LENSE-00005688	GOOG-LENSE- 00005735	2	Indefinite

ORDERED:

DM Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: April 12, 2017

PUBLIC

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

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

ORDER ON RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the Scheduling Order entered in this matter, Respondent 1-800 Contacts, Inc. ("Respondent" or "1-800 Contacts") filed a motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter ("Motion"). Federal Trade Commission ("FTC" or "Commission") Complaint Counsel has not filed an opposition. For the reasons set forth below, Respondent's Motion is GRANTED.

II.

The legal standards governing Respondent's Motion are set forth in the Order on Non-Parties' Motions for *In Camera* Treatment, issued on April 4, 2017. Of the 2,100 proposed trial exhibits, Respondent has tailored its request to 86 documents, each of which were created between 2014 and 2017, and each of which, Respondent asserts, contains competitively sensitive business records that, if publicly disclosed, would significantly harm Respondent's competitive position. Respondent requests *in camera* treatment for a period of five years.

To support its Motion, Respondent provides the declaration of the Vice President of Finance and Treasurer of 1-800 Contacts, Brett Gappmayer. The Gappmayer declaration explains that he reviewed the documents at issue and that the documents fall into five categories: (1) documents reflecting 1-800 Contacts' confidential pricing strategies; (2) documents reflecting 1-800 Contacts' confidential marketing strategies; (3) documents reflecting 1-800 Contacts' non-public analyses and due diligence of contemplated mergers and acquisitions; (4) presentations given to 1-800 Contacts' board of directors containing confidential financial and strategic information; and (5) documents reflecting confidential keywords that 1-800 Contacts bids on, and the amount of 1-800 Contacts' maximum bid for these keywords.

The Gappmayer declaration avers that each of these documents is a confidential business record that 1-800 Contacts has maintained as secret and has not disclosed publicly, and that if these documents were made public, 1-800 Contacts' competitive position would be significantly harmed. The Gappmayer declaration further avers that, due to the sensitivity of the information contained in these documents, 1-800 Contacts has maintained the secrecy and confidentiality of the documents and restricted access within the company.

III.

Respondent has met its burden of demonstrating that the materials for which it seeks *in camera* treatment should be given such protection. Accordingly, *in camera* treatment, for a period of five years, to expire on April 1, 2022, is GRANTED for the documents identified as:

CX94, CX295, CX296, CX428, CX430/RX429, CX547, CX549, CX605, CX648, CX954, CX1160, CX1162/RX444, CX1334, CX1335/RX1116, CX1336, CX1346, CX1391, CX1446, CX1447/RX1117, CX1449/RX447/RX1122, CX1546, CX1743, CX1783/RX451, RX425, RX953, RX983, RX958, RX959, RX1046, RX1047, RX1048, RX1049, RX1050, RX1051, RX1053, RX1061, RX1062, RX1063, RX1064, RX1067, RX1068, RX1069, RX1070, RX1079, RX1080, RX1081, RX1082, RX1083, RX1084, RX1085, RX1086, RX1087, RX1088, RX1089, RX1090, RX1091, RX1092, RX1093, RX1094, RX1095, RX1096, RX1097, RX1098, RX1099, RX1100, RX1101, RX1102, RX1103, RX1104, RX1105, RX1106, RX1107, RX1109, RX1111, RX1112, RX1113, RX1114, RX1115, RX1118, RX1119, RX1120, RX1121, RX1131 and RX1141.

IV.

Respondent shall inform its testifying current or former employees and experts that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

It is apparent from the Motion that Complaint Counsel and Respondent seek to introduce duplicative copies of the same underlying documents. For example, according to Respondent, CX430 and RX429 are duplicates of the same document. The parties are reminded of their obligation, pursuant to the Scheduling Order, to confer and eliminate duplicative exhibits in advance of the final prehearing conference.

ORDERED:

DM Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: April 4, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2018, I filed **RESPONDENT'S REPLY BRIEF ON APPEAL** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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

DATED: February 27, 2018

By: *\/s/ Eunice Ikemoto*
Eunice Ikemoto

CERTIFICATE FOR ELECTRONIC FILING

I hereby 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.

DATED: February 27, 2018

By: */s/ Steven M. Perry*
Steven M. Perry
Attorney

Notice of Electronic Service

I hereby certify that on February 27, 2018, I filed an electronic copy of the foregoing Respondent's Reply Brief on Appeal, with:

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

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

I hereby certify that on February 27, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Reply Brief on Appeal, upon:

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