All Agreements Had Similar Requirements and Purpose

- Prohibited bidding on 1-800 Contacts brand name keywords
  - Blocked direct bid ads

- Required the use of negative keywords corresponding to 1-800 Contacts brand name keywords
  - Blocked matched ads

- Purpose: no competitive ads on queries with brand name terms
Summary of Findings

- Bidding agreements = collusion = presumptively harmful
- 1-800 Contacts wanted to pay less for its brand-name keyword ads and reduce slots sold to competitors
- Bidding agreements significantly reduced price 1-800 Contacts paid in search auction
- Bidding agreements significantly reduced quantity of ad impressions sold by search engines
- Bidding agreements degraded quality of search engine products
- Bidding agreements harmed consumers by reducing value of search engine result pages
Additional Evidence from Testimony of Executives

- Brian Bethers, CEO: “[I]f you have less competition in terms of trademarks, with Google, costs will be lower.” CX9001 (Bethers IH Tr.) 196:6-7.

- Laura Schmidt, Marketing Director: “There is less competitors showing up on our trademark keywords, and our spend – our costs for these terms went down.” CX9032 (L. Schmidt Depo Tr.) 188:2-4.

- Tim Roush, Chief Marketing Officer: “Another reason why I wouldn't want competitors to bid on our terms is that they would drive up our search costs… If more competitors were bidding on our term, then the costs would go up.” CX9034 (Roush Dep. Tr.) 60:15- 62:2.
Agreements Lowered Bid Volume, Cost Per Click Payments to Search Engines

- Jul. 28, 2008 email from Bryce Craven (1-800) to Brandon Dansie (1-800) (CX0915):
  “TM CPCs . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this past week (both local and national retailers), which increased competition and CPCs for our top terms.”

- Nov. 12, 2010 email from Jordan Judd (1-800) to Bryce Craven (1-800) (CX1080):
  “We are still being outbid on keyword ‘800contacts’ but just by one competitor. I have increased the bid.”
Murphy Does Not Know When An Advertiser Broad Matches to a Query

*Murphy Dep. Tr. 105-107*

Q. Is it correct that to measure or assess the effects of the agreement in this case you would want to consider the extent to which the agreements restricted ads that are coming up because of broad match?

A. I think that is part of the story, that you can look at broad matches as well as direct matches when you have the data.

Q. Which of your analyses did you use broad matched data?

A. I think -- where do we use broad matched data?

I don’t know if it is in any of the tables. I know we have done stuff with the broad matched data.

I think -- there is not one that comes to my mind off the top of my head.

I know we have the broad matched data and -- now, the broad matches are in our other data, they are just organized by keyword that was bid on. They are organized by the word -- the key words that were bid on, not the queries that they were matched.

So it is not that there aren’t broad matches in the other data, it is just they are associated with the key words that were bid on.

Q. Can you give me an example of what you mean by that?

A. I mean, like if somebody bid on contacts and showed up on a query on 1-800 Contacts that will show up as a transaction in our data, somebody pays the price, somebody either gets a click, somebody either gets a conversion, whatever it is, that will show up in that data.

Now, it won’t be -- we won’t know what the query was that generated that, we have it by keyword that they were bid on. That is what I mean.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

a. The bidding agreements precluded the rivals from bidding on 1-800 Contacts BKWs and buying “direct bid ads” from search engines. They also require the rivals to submit negative keywords to the search engines to prevent the search engines from showing “matched ads.”
5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

b. Based on a detailed analysis of data, 12 of the 14 firms that entered into bidding agreements purchased direct bid or matched ads prior to their respective agreements and effectively stopped purchases after the agreements.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

c. 1-800 Contacts adopted a strategy to quickly shut down the purchase of direct bid and matched ads by significant rivals and entered into bidding agreements with most of its significant rivals by 2005, based on a review of 1-800 Contacts documents and an empirical analysis of search engine data.
5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

d. The bidding agreements prevented 1-800 Contacts’ rivals from participating in search auctions for more than 34 million Google queries on 1-800 Contacts BKWs between January 2010 and June 2015 and from presenting direct bid and matched ads to consumers who made those queries.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

e. The bidding agreements reduced the number of firms competing for scarce ad slots on search engine results pages (SERPs) for queries on BKWs subject to the agreements, based on the terms of the agreements and the empirically observed behavior of the firms prior to the agreement.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

   ... 

f. Based on an empirical analysis of bid prices, statements by 1-800 Contacts, deposition testimony, and the trade literature on search-engine auctions, the reduction in competition for scarce ad slots resulted in 1-800 Contacts paying significantly lower prices in auctions related to 1-800 Contacts BＫWs, restricted the number of ads that search engines could sell, and impaired the ability of the search engines to provide valuable ads to consumers.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

g. Peer-reviewed economic studies find that restrictions preventing competitors from presenting informative advertising result in higher prices for advertised products and harm consumers.
5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

h. 1-800 Contacts has adopted a pricing strategy in which its prices are significantly higher than those of other online contacts lens retailers; consumers significantly underestimate 1-800 Contacts’ price premium; when consumers choose to purchase from lower-priced online retailers, they seldom return to 1-800 Contacts; and 1-800 Contacts recognizes that when it can avoid competitive advertising it has a greater chance of preventing the diversion to lower-priced rivals. These findings are based on a review of documents and deposition testimony.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

i. Online contact lens retailers who entered into the bidding agreements viewed direct bid or matched ads as competitively significant, based on deposition testimony and the observed behavior of the firms.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

j. Based on an analysis of the available data, Memorial Eye provides the best historical data for assessing the competitive impact of the bidding agreements on competition because it is the only firm for which there is a long enough period of time to evaluate the impact of the restrictions, and the only firm for which there is data on the extended use of matched ads prior to entering into the bidding agreement.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

k. Google matched ads for Memorial Eye following queries for 1-800 Contacts BKWs got 49.5 percent as many Google ad impressions as 1-800 Contacts itself got from Google paid search advertising on its own BKWs. These ads accounted for 46 percent of Memorial Eye’s Google search ad sales in 2010-2011.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

... 

1. 1-800 Contacts responded competitively to rival firms that showed up in direct bid or matched ads on its SERPs by offering lower prices.
1-800 Contacts’ Experts Have Not Disputed Significant Analyses

6. Findings 5(a)-5(f) demonstrate as an economic matter that the bidding agreements had a direct effect on competition in auctions for presenting ads on consumer queries regarding 1-800 Contacts BKWS. Findings 5(a)-5(l) demonstrate as an economic matter that the bidding agreements harmed competition for online retail sales of contact lenses and resulted in consumers paying higher prices.
Disputed Topics

1. Relevant market
2. Market power
3. Impact/effect
4. Economic Model of Settlements
5. Efficiency justification
“Right now if someone types ‘1800Contacts’ and they go to paid search, for the most part they’re not exposed to competitors… And so in that instance also, they’re not exposed to competitive pricing.”

(CX9034 (Roush (1-800 Contacts) Dep. Tr.) 173:15-21)
1-800 Was Concerned About Competition in 2011
1-800 Was Concerned About Competition in 2011

NI Search – Competitive Activity

Losing NI customers to aggressive competitor offers?

Trademarked Searches

Google

1800contacts

About 216,000 results (0.97 seconds)

1800CONTACTS.com
Free Shipping on Contact Lenses + Easy Ordering at 1800 CONTACTS.
www.1800contacts.com

Easy Re-Order
Accurate Contact Lenses
All Optix Contact Lenses

Discount Contact Lenses - Save Up To 70% On Contact Lenses
Get Fast Service And Free Shipping!
shipmentcontacts.com is rated ★★★★★ (167 reviews)
www.shippmycontacts.com

FIRST TIME CUSTOMER COUPON:
Get FREE SHIPPING & $5.00 OFF on your order!

- LensDirect: Free Shipping + Coupon + 70% Off
- ShipMyContacts: Aggressive “70% Off”

Note: Red circles in original 1-800 presentation.
1-800 Was Concerned About Competition in 2011

From: Brian Bethers
Sent: Saturday, June 18, 2011 2:39 PM
To: Jonathan C
Cc: Joan Blackwood
Subject: RE: Google searches for keywords

I have also attached a document that shows how our copy looks on search compared to our competitors. My point is that our copy isn’t very compelling. We have competitors touting 70% off normal prices or 20% off for new customers. For individual products, they will always be able to quote a price lower than our price. This definitely impacts our conversion when we extend search out.

From: Joan Blackwood
Sent: Sunday, June 19, 2011 1:17 PM
To: Brian Bethers; Jonathan C
Subject: RE: Google searches for keywords

In addition to Brian’s points below – couple things we are doing:

- Testing some more aggressive search copy: we will be testing “we beat any price” – this was our number 1 producing search copy and we haven’t been able to beat it. We haven’t advertised this for the past few years as this program was turned off. Brian has given us permission to try it in search.