

In the Matter of:

1-800 Contacts

January 19, 2017

Brady Roundy - Highly Confidential

Condensed Transcript with Word Index



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

Roundy - Highly Confidential

1-800 Contacts

1/19/2017

1

I N D E X

1		
2	BRADY ROUNDY	Page
3	By Mr. Matheson	4
4	Examination by Mr. Raphael	81
5	Further Examination by Mr. Matheson	102
6		
7	E X H I B I T S	
8	NUMBER	PAGE
9	CX0100	4
10	CX0703	4
11	CX1376	4
12	CX1375	4
13	CX1437	4
14	CX0296	4
15	CX1155	4
16	CX1120	4
17	CX0960	4
18	CX0693	4
19	CX0648	4
20		
21	* * *	
22		
23		
24		
25		

3

A P P E A R A N C E S

1	
2	
3	ON BEHALF OF THE FEDERAL TRADE COMMISSION:
4	Dan Matheson
5	Federal Trade Commission
6	400 7th Street, S.W.
7	Washington, D.C. 20024
8	Tel: 202.326.2435
9	Email: dmatheson@ftc.gov
10	
11	ON BEHALF OF 1-800 CONTACTS AND THE WITNESS:
12	Justin Raphael
13	Munger, Tolles & Olson
14	560 Mission Street, 27th Floor
15	San Francisco, CA 94105
16	Tel: 415.512.4085
17	Email: justin.rafael@mto.com
18	
19	
20	
21	
22	
23	
24	
25	

2

FEDERAL TRADE COMMISSION

IN THE MATTER OF: : Docket No. 9372

1-800 CONTACTS : :

Thursday, January 19, 2017

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

HIGHLY CONFIDENTIAL

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

4

Thereupon,

(Exhibits premarked for identification.)

BRADY ROUNDY,

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

EXAMINATION BY THE COUNSEL FOR THE FTC

BY MR. MATHESON:

Q Good morning.

A Good morning.

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

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

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

BY MR. MATHESON:

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

A Brady Roundy.

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

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

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

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

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

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

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

25	<p>1 nontrademark key keyword. 2 A Okay. 3 Q Well, how would you describe what slide 024 4 presents? 5 A Just shows the contribution margin for 6 trademark and nontrademark for 2013 and 2014. 7 Q When you say "the contribution margin for 8 nontrademark for 2014," what does nontrademark mean in 9 that statement? 10 A Nontrademark would be any of our general 11 contact lens-type keywords that we use, as well as any 12 other product specific keywords, like Acuvue Oasis, like 13 the actual product names themselves. So that kind of 14 keyword. 15 Q So is it accurate to state that this slide 16 displays the contribution margin for paid search 17 advertising displayed in response to nontrademark 18 keywords? 19 A Yes. 20 Q And what is contribution margin? 21 A I -- I don't know. I don't know what it's 22 referred to in here. 23 Q Do you have any understanding of what 24 contribution margin means? 25 A Not really.</p>	27	<p>1 presentation? 2 A Yeah. 3 Q Did you have an opportunity to review these 4 slides before this presentation was delivered? 5 A I believe so. 6 Q Do you believe that the information in this 7 presentation is accurate? 8 MR. RAPHAEL: Object to form. 9 BY MR. MATHESON: 10 Q Strike that. 11 At the time that you participated in the 12 preparation of this presentation, did you conclude that 13 any of the information in this presentation was 14 inaccurate? 15 MR. RAPHAEL: Object to form. Lack of 16 foundation. 17 THE WITNESS: I think -- I would imagine it's 18 accurate. I don't know. 19 BY MR. MATHESON: 20 Q Do you recall ever informing any of your 21 coworkers that you believe the information in this 22 presentation was inaccurate? 23 A Not that I recall. 24 Q It would be your business practice to call to 25 the attention of your coworkers information in an</p>
26	<p>1 Q Is contribution margin a term you've heard in 2 the ordinary course of business? 3 A Not very often, for me anyway. 4 Q What do you understand it to mean when -- 5 strike that. 6 Looking at this document does it appear to 7 you -- or strike that. 8 Did 1-800 Contacts trademark keywords produce 9 a positive contribution margin in 2013? 10 MR. RAPHAEL: Object to form. Lack of 11 foundation. He's asking him to read the document. 12 THE WITNESS: Say that again. 13 BY MR. MATHESON: 14 Q Did 1-800 Contacts trademark keywords produce 15 a positive contribution margin in 2013? 16 A It looks like it, from the document. 17 Q Do you have any independent knowledge of 18 whether 1-800 Contacts trademark keywords produced a 19 positive contribution margin in any year you've been 20 employed by the company? 21 A Not that I can recall. I'm not looking at the 22 contribution margin on an ongoing or regular basis. 23 This isn't something that I -- I look at. This is more 24 from our finance team. 25 Q Were you involved in the preparation of this</p>	28	<p>1 important presentation that you felt to be inaccurate; 2 is that fair? 3 MR. RAPHAEL: Object to form. 4 THE WITNESS: Yeah, I guess. I don't know. 5 BY MR. MATHESON: 6 Q Well, it's generally your understanding of 7 your responsibilities as an employee of 1-800 Contacts 8 to convey accurate information to your coworkers, right? 9 A Yeah, we try to share accurate information. 10 Q You're not trying to mislead your coworkers on 11 a daily basis? 12 A No. 13 Q The first bullet point here states "Overall CM 14 increases in 2014 and 2015 despite NTM decrease." 15 Did I read that right? 16 A Yes. 17 Q Do you understand that to mean that the 18 overall contribution margin of paid search advertising 19 increased between 2014 and 2015? 20 MR. RAPHAEL: Object to form. Lack of 21 foundation. He testified he doesn't know what 22 contribution margin is. 23 THE WITNESS: It looks like that's what it 24 says. 25</p>

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

33

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

34

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

35

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

36

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

37

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

38

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

39

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

40

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

10 (Pages 37 to 40)

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

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

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

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

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

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

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

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

73

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

3 Did I read that correctly?

4 A Yes.

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

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

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

12 A Yes.

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

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

74

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

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

10 MR. MATHESON: Correct.

11 MR. RAPHAEL: Okay. Thanks.

12 BY MR. MATHESON:

13 Q Do you recognize this document, sir?

14 A Yeah.

15 Q What is this document?

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

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

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

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

75

1 A Yeah.

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

6 A Say that again.

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

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

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

17 A Can you repeat the question.

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

22 A No.

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

76

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

3 A Correct.

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

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

10 A I believe so.

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

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

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

17 A 2013.

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

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

23 A I don't.

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

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

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

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

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

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

	97	99
<p>1 A Yeah.</p> <p>2 Q Now, we were talking about earlier about the</p> <p>3 budget for 1-800 Contacts' paid search advertising</p> <p>4 right, and that's something you're responsible for?</p> <p>5 A Yes.</p> <p>6 Q Now, is that budget limited?</p> <p>7 A Yes.</p> <p>8 Q So earlier -- if you look at CX0296, this is</p> <p>9 the presentation from February 2015. And if you turn to</p> <p>10 the page -035, CX0296-035.</p> <p>11 A This one?</p> <p>12 Q Yes.</p> <p>13 So you see on the far right under other</p> <p>14 nontrademark keywords, you see there's a \$60 CPO target?</p> <p>15 A Yes.</p> <p>16 Q And did Mr. Matheson ask you some questions</p> <p>17 related to that?</p> <p>18 A Yeah.</p> <p>19 Q Now, is it your view that 1-800 Contacts</p> <p>20 should bid on every nontrademark keyword as long as the</p> <p>21 cost per order remains under \$60?</p> <p>22 MR. MATHESON: Objection to form and</p> <p>23 foundation.</p> <p>24 THE WITNESS: Yeah, I would say so.</p> <p>25</p>	<p>1 THE WITNESS: Yes.</p> <p>2 MR. MATHESON: And to the foundation and the</p> <p>3 incomplete hypothetical.</p> <p>4 BY MR. RAPHAEL:</p> <p>5 Q So let's look now it the same document --</p> <p>6 well, let me just ask one more question. If bidding on</p> <p>7 nontrademark keywords were going to cause you to run out</p> <p>8 of money in the budget, would you still do that, even if</p> <p>9 the cost per order were under the target?</p> <p>10 MR. MATHESON: Objection to the form.</p> <p>11 THE WITNESS: If we were going to run out of</p> <p>12 budget, we would have to scale back.</p> <p>13 BY MR. RAPHAEL:</p> <p>14 Q Now, if you go back to the page in this</p> <p>15 document that's -- has 028 in it. It concerns the</p> <p>16 coupons.com test. So do you recall Mr. Matheson asked</p> <p>17 you some questions about this?</p> <p>18 A Yes.</p> <p>19 Q And do you recall Mr. Matheson also asked you</p> <p>20 some questions about definitivedeals.com?</p> <p>21 A Yes.</p> <p>22 Q And retailmenot.com?</p> <p>23 A Yes.</p> <p>24 Q Did those companies provide coupons for</p> <p>25 customers to use to buy contacts from 1-800 Contacts?</p>	
<p>1 BY MR. RAPHAEL:</p> <p>2 Q And would that be true even if it reduces the</p> <p>3 amount of the budget that you have available to spend on</p> <p>4 trademark keywords?</p> <p>5 MR. MATHESON: Objection to the form. It's</p> <p>6 leading.</p> <p>7 THE WITNESS: Can you repeat that.</p> <p>8 BY MR. RAPHAEL:</p> <p>9 Q So let me go at it this way: Every dollar</p> <p>10 that you spend when somebody clicks, does that cut</p> <p>11 against the budget that you have?</p> <p>12 A Yes.</p> <p>13 Q So if you bid on a nontrademark keyword and</p> <p>14 somebody clicks on that, does that count against your</p> <p>15 budget?</p> <p>16 A Yes.</p> <p>17 Q So -- and that budget is limited?</p> <p>18 MR. MATHESON: Objection to the form.</p> <p>19 THE WITNESS: Correct.</p> <p>20 BY MR. RAPHAEL:</p> <p>21 Q So at some point if you keep bidding on</p> <p>22 nontrademark keywords, even if the cost per order is</p> <p>23 under \$60, will you run out of money in the budget?</p> <p>24 MR. MATHESON: Objection to the form and to</p> <p>25 the leading.</p>	<p>1 A Yes, they do.</p> <p>2 Q And so when somebody clicks on the ads that</p> <p>3 those coupon companies serve on 1-800 Contacts'</p> <p>4 trademark keywords -- strike that.</p> <p>5 And I believe you talked about trademark plus</p> <p>6 keyword with Mr. Matheson.</p> <p>7 A Yes.</p> <p>8 Q What are trademark plus keywords as you</p> <p>9 understood it from the documents he reviewed with you?</p> <p>10 A Basically the 1-800 Contacts' trademark plus</p> <p>11 additional terms like coupon or coupon codes or things</p> <p>12 like that.</p> <p>13 Q So if an ad for a coupons.com comes up in a</p> <p>14 search for 1-800 Contacts coupons, can someone clicking</p> <p>15 on that ad go to a page that enables them to get a</p> <p>16 coupon to use at 1-800 Contacts?</p> <p>17 A Yes.</p> <p>18 Q If an ad comes up for 1-800 Contacts for</p> <p>19 lens.com, to your knowledge can that person -- can a</p> <p>20 person who clicks on that link find a coupon they can</p> <p>21 use at 1-800 Contacts?</p> <p>22 A Say that again.</p> <p>23 Q If -- if an ad for Vision Direct appears based</p> <p>24 on a search for 1-800 Contacts coupons, can a person who</p> <p>25 clicks on that ad find a coupon to use at 1-800</p>	

101	<p>1 Contacts?</p> <p>2 A No.</p> <p>3 Q And let's just go back to the page of this</p> <p>4 document with 024. This refers to contribution margin.</p> <p>5 A Okay.</p> <p>6 Q Did you draft this slide?</p> <p>7 A I don't think so.</p> <p>8 Q So to your knowledge was it part of your job</p> <p>9 to confirm the accuracy of this slide?</p> <p>10 A No.</p> <p>11 Q Did you ever, to your memory, make any attempt</p> <p>12 to confirm the accuracy of this slide?</p> <p>13 A No.</p> <p>14 Q Other than -- other than looking at the slide</p> <p>15 can you recall anything that would help you know one way</p> <p>16 or the other whether this slide is accurate?</p> <p>17 MR. MATHESON: Objection to the form.</p> <p>18 THE WITNESS: No.</p> <p>19 MR. RAPHAEL: Just go off the record for a</p> <p>20 second. I think that's probably all I have. I'm just</p> <p>21 going to confirm.</p> <p>22 I think that's it.</p> <p>23 MR. MATHESON: I've got a few. Not an</p> <p>24 inordinate amount.</p> <p>25 (DISCUSSION OFF THE RECORD.)</p>	103	<p>1 about whether any current employees have any information</p> <p>2 regarding the reasons that negative keywords are added?</p> <p>3 A No.</p> <p>4 Q Another topic we recently discussed is the</p> <p>5 notion that -- and correct me if I misheard you. I</p> <p>6 understood you to testify that 80 percent of the search</p> <p>7 advertising budget is allocated to nontrademark</p> <p>8 keywords; is that right?</p> <p>9 A Roughly.</p> <p>10 Q When you say "roughly," what's the exact</p> <p>11 number?</p> <p>12 A I don't know. I don't know percentages. It's</p> <p>13 roughly in the 80/20 range. I'm not keeping track of</p> <p>14 percentage.</p> <p>15 Q Is the percentage always the same every day?</p> <p>16 A I don't know.</p> <p>17 Q Do you always spend the same amount of money</p> <p>18 on search advertising every day?</p> <p>19 A No.</p> <p>20 Q Do you spend the same amount of money on</p> <p>21 search advertising every month?</p> <p>22 A No.</p> <p>23 Q Do you spend the same amount of money on</p> <p>24 search advertising every quarter?</p> <p>25 A No.</p>
102	<p>1 FURTHER EXAMINATION</p> <p>2 BY MR. MATHESON:</p> <p>3 Q Mr. Raphael was -- or asked you about change</p> <p>4 data that you sent to the terms for 1-800 Contacts. Do</p> <p>5 you recall that?</p> <p>6 A Yes.</p> <p>7 Q Is there any information in that change data</p> <p>8 that would indicate why a keyword -- or strike that.</p> <p>9 Is there any information in that change data</p> <p>10 that would indicate why a term was added as a negative</p> <p>11 keyword?</p> <p>12 A No.</p> <p>13 Q If you wanted to know why a term was added as</p> <p>14 a negative keyword, could you ask somebody at 1-800</p> <p>15 Contacts?</p> <p>16 A No.</p> <p>17 Q You don't think anybody at 1-800 Contacts has</p> <p>18 any information regarding the reasons that any negative</p> <p>19 keywords have ever been added?</p> <p>20 A That I know, no, I don't.</p> <p>21 Q It's simply information that's unavailable to</p> <p>22 1-800 Contacts?</p> <p>23 A Yeah, I think it's with former employees. I</p> <p>24 don't know.</p> <p>25 Q And you've never conducted any investigation</p>	104	<p>1 Q Now, you testified that on occasion -- or</p> <p>2 strike that.</p> <p>3 You suggested that on occasions when you have</p> <p>4 observed the cost per click on trademark terms</p> <p>5 increasing, you took action to reduce the amount of</p> <p>6 money spent on nontrademark terms; is that right?</p> <p>7 A Yeah.</p> <p>8 Q When is the last time that happened?</p> <p>9 A Probably 2015.</p> <p>10 Q What action did you take?</p> <p>11 A We started reducing bids on keywords. We</p> <p>12 paused keywords.</p> <p>13 Q Who did you tell to reduce bids on keywords?</p> <p>14 A We have a portfolio, a bid management system</p> <p>15 that does that.</p> <p>16 Q Who within 1-800 Contacts was responsible for</p> <p>17 reducing the bid on keywords?</p> <p>18 A Would be me.</p> <p>19 Q How many times in 2015 did you reduce the bids</p> <p>20 on keywords because you observed an increase in the cost</p> <p>21 per clicks you experienced on trademark terms?</p> <p>22 A I don't know the number of times. We had to</p> <p>23 set up some -- some bid management features in our</p> <p>24 portfolios in order to dial the spin back.</p> <p>25 Q What does that mean, "you set up bid</p>

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

109

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

110

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

111

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

112

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

113

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

114

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

115

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

116

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

117

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

119

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

 Heidi Hunter, RPR, CCR

118

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

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

DATE _____ BRADY ROUNDY, Deponent

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

 Notary Public