

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**        **Joseph J. Simons, Chairman**  
                                  **Noah Joshua Phillips**  
                                  **Rohit Chopra**  
                                  **Rebecca Kelly Slaughter**  
                                  **Christine S. Wilson**

**In the Matter of**

**1-800 Contacts, Inc.,  
a corporation,**

**Respondent**

**DOCKET NO. 9372**

**PUBLIC RECORD VERSION**

**OPINION OF THE COMMISSION**

By Chairman Joseph J. Simons, for the Commission:

This proceeding considers Complaint Counsel’s challenge to a number of agreements among horizontal competitors—in most instances, trademark litigation settlements—that, allegedly, anticompetitively limit internet search advertising and restrict bidding in internet search auctions to the detriment of consumers. Respondent 1-800 Contacts sued rival contact-lens sellers for trademark infringement when sellers’ online advertising appeared in response to consumers’ internet searches for “1-800 Contacts.” In nearly all cases, the litigation settled before trial. The resulting settlement agreements require the parties, when bidding at search engine advertising auctions, to take steps to ensure their ads do not appear in response to searches for the other party’s trademark terms.

At first glance, this proceeding may appear to contemplate little more than a few terms embedded in a document that purports to resolve a trademark dispute among internet sellers of contact lenses. But, in reality, this case grapples with issues of enormous import. We consider here consumer marketplaces that embody the very basic institutions of 21st century commerce. Increasingly, consumers no longer shop for goods by walking down Main Street and looking at the price tags on window displays or by wandering through the aisles of retail establishments comparing prices on shelves and product characteristics written on packages. Rather, consumers now frequently—and with increasing frequency—open their web browsers, enter desired product names or qualities into a search engine, and wait for Main Street or supermarket aisles to be digitally transported to them. This phenomenon is comparatively recent, but e-commerce

already comprises a significant and growing share of our economy's retail sales. Indeed, the Census Bureau estimated that e-commerce retail sales in the United States totaled \$127.3 billion in the second quarter of 2018, which comprised approximately 9.6 percent of total retail sales.<sup>1</sup>

We consider here the manner in which and conditions under which prices for contact lenses are advertised throughout the internet economy. Our decision will affect not only the price that consumers pay for some contact lenses but also the very manner in which substantial parts of price competition will occur throughout consumer markets today and tomorrow. As this agency has explained time and again, robust, accurate, and intelligible price competition among those who compete for consumers' dollars is one of the cornerstones of our vibrant market economy. When information is withheld from consumers, it frustrates their ability to compare the prices and offerings of competitors. This is as true today, when consumers search for goods online, as it was when people shopped open-air markets for vegetables every evening. In that important respect, nothing has changed.

Chief Administrative Law Judge ("ALJ") D. Michael Chappell held a 19-day administrative hearing involving the testimony of 43 witnesses, either live or by deposition, and more than 1250 exhibits. Judge Chappell issued an Initial Decision that held that the advertising restraints at issue harm consumers and competition in the market for the sale of contact lenses online. The ALJ held that the Supreme Court's decision in *FTC v. Actavis*, 570 U.S. 136 (2013) did not establish antitrust immunity for the trademark settlements. The ALJ also determined that the agreements do not have countervailing procompetitive benefits that outweigh or justify the demonstrated anticompetitive effects. He therefore concluded that the agreements unreasonably restrain trade in violation of the Federal Trade Commission Act ("FTC Act"). Respondent has appealed, and Complaint Counsel oppose that appeal.

Respondents in this appeal ask us to permit them to eradicate an important form of price competition as a means to protect the intellectual capital embedded in their trademarks. Of course, their claims deserve and receive full and respectful consideration. At the same time, we must be mindful that what is at stake is not only the proper antitrust response to certain lawsuit settlements, but also the very means by which and conditions under which retail price competition takes place in the 21st century internet economy. These are matters vital to the interests of consumers and producers in our evolving marketplace economy.

We affirm the ALJ's conclusions that *Actavis* does not confer antitrust immunity. If anything, *Actavis* follows a long line of cases that holds that patent-related settlements can sometimes violate the antitrust laws. Moreover, *Actavis* made clear that the effect of intellectual property on the application of antitrust laws in such settlements should be assessed through consideration of traditional antitrust factors. We therefore hold that the challenged agreements unreasonably restrain trade in violation of Section 5 of the FTC Act, although our analysis differs from that of the Initial Decision in some respects. We find that the agreements harm consumers and competition for the online sale of contact lenses. We also find that Respondent has not demonstrated valid offsetting procompetitive justifications for the advertising restraints, and that

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<sup>1</sup> U.S. Census Bureau, U.S. Census Bureau News (Aug. 17, 2018), [https://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf) (estimating adjusted retail e-commerce sales for the second quarter of 2018).

the restraints were not reasonably necessary to achieve the claimed procompetitive benefits. Consequently, we enter a cease-and-desist order that prohibits 1-800 Contacts from enforcing the unlawful provisions in the challenged agreements and prevents 1-800 Contacts from entering into similar agreements in the future. We also find that challenged agreements harm competition in bidding for search engine key words, artificially reducing the prices that Respondent paid and the quality of the search engine results delivered to consumers—without offsetting efficiencies.

## **I. BACKGROUND**

### **A. Respondent, 1-800 Contacts**

1-800 Contacts sells contact lenses to consumers throughout the United States. It started as a mail-order contact lens business in a college dorm in 1992. IDF 30-33.<sup>2</sup> The business changed its name in 1995 when it obtained the 1-800 Contacts telephone number. IDF 36. The company launched its website in 1996, and beginning in 2004, its internet sales exceeded its telephone sales. IDF 37, 67. In 2015, 1-800 Contacts' revenues were approximately \$460 million. IDF 68. Its annual volume of contact lenses sold via the Internet to U.S. consumers currently exceeds the online sales of contact lenses to U.S. consumers by any other company. IDF 69.

### **B. The Contact Lens Industry**

Contact lenses are a billion dollar industry in the United States. IDF 4. Contact lenses are medical devices that can be sold only pursuant to a prescription written by an optometrist or ophthalmologist, also called eye care practitioners ("ECPs"). IDF 8-12. A consumer interested in wearing contact lenses must first visit an ECP for a lens fitting and prescription. IDF 10. A consumer's prescription specifies the brand as well as the power and other characteristics of the contact lenses. A consumer's prescription expires in one year in most states, and two years in others; consequently, the consumer must regularly return to an ECP. IDF 18-19, 23.

In 2003, Congress enacted the Fairness to Contact Lens Consumers Act, which, along with the FTC's implementing regulations, gives patients an automatic right to their contact lens prescriptions upon completion of a fitting. IDF 17; *see also* 15 U.S.C. § 7601 (2003). This facilitates their ability to fill contact lens prescriptions through any retail channel they choose. ID at 111. Because prescriptions identify the power, base curve, and specific lens brand, the lenses a consumer receives are identical in every way, irrespective of the choice of retailer. IDF 23-27; Coon, Tr. 2667, 2687; Bethers, Tr. 3612; CX9017 (Blackwood Dep.) at 304. Consumers

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<sup>2</sup> We use the following abbreviations in this opinion:

Compl.:	Complaint
Answer:	Respondent 1-800 Contacts, Inc.'s Answer and Defenses to Administrative Complaint
ID:	Initial Decision
IDF:	Initial Decision Finding of Fact
Stip.:	Joint Stipulation Regarding Search Engine Mechanics and Glossary of Terms
RAB:	Respondent's Brief on Appeal
CCB:	Complaint Counsel's Answering Brief to Respondent's Appeal Brief
RRB:	Respondent's Reply Brief on Appeal

often buy contact lenses from ECPs when they return every 1-2 years for a new prescription. Other contact lens retailers compete mostly for consumers' "refill" sales. IDF 76, 403-05.

There are four types of retailers in the industry. IDF 73. First, many ECPs operate independent practices ("independent ECPs") and sell both their services (eye exams) and the products they prescribe (contact lenses). Independent ECPs sell contact lenses directly to consumers and, in 2015, accounted for 40 percent of all contact lens sales in the United States. IDF 75-76, 79, 491. Second, national and regional optical retail chains, such as LensCrafters and Visionworks, accounted for 20 percent of contact lens sales in 2015. IDF 84-85, 491. Third, mass merchants, such as Walmart and Target, and club stores, such as BJ's and Sam's Club, sell contact lenses and accounted for 23 percent of contact lens sales in 2015. IDF 90, 93, 491. Fourth, so-called "pure-play" online retailers, such as 1-800 Contacts, sell only online and do not have brick-and-mortar locations; pure-play online sellers accounted for 17 percent of contact lens sales in 2015. IDF 77, 98-99, 491. In 2015, 1-800 Contacts accounted for approximately [REDACTED] percent of online sales, which is more than four times the sales of the second-largest online retailer. IDF 495; *see also* IDF 494 (citing CX9001 (Bethers, IHT) at 159-60 (1-800 Contacts' CEO testifying that 1-800 Contacts' sales constituted more than 60 percent of the online contact lens market)).

The price for contact lenses varies significantly based on the retail channel. Among brick-and-mortar retailers, independent ECPs typically have the highest prices for contact lenses, followed by optical retail chains, which, on average, sell contact lenses priced just below those sold by ECPs. IDF 431-32. Mass merchants offer lower contact lens prices than independent ECPs and optical retail chains. IDF 441. Membership club stores have the lowest contact lens prices. IDF 448; Bethers, Tr. 3545.

Online contact-lens retailers—other than 1-800 Contacts—generally offer prices well below those of independent ECPs, optical retail chains, and mass merchants. IDF 442 (citing Bethers, Tr. 3536-37, 3544-45, Clarkson, Tr. 189-90 ("in most cases online pricing is significantly lower than for any of the brick-and-mortar channels, with the exception of the clubs")), 444 (online retailer AC Lens explaining ECPs' "prices are typically so much higher"); 446 (online seller Memorial Eye charged significantly lower prices online than it did in its physical stores).

But 1-800 Contacts' prices are higher than those of other online retailers. IDF 691. It sets its prices below ECPs' and optical retail chains' prices, but above prices offered by mass merchants and club stores. IDF 433-34, 441; Coon, Tr. 2695, 2708-10; Bethers, Tr. 3543-46. Importantly, 1-800 Contacts' prices are approximately [REDACTED] percent higher than other online retailer prices. IDF 692 (citing CX8007 (Athey Expert Report at 013-14, 045-51 ¶¶ 31-32, Exhibit D-1 to D-7)); *see also* CX0295 at 064, *in camera* (in January 2014, 1-800 Contacts prices were higher than those of other online retailers by [REDACTED] percent per box, [REDACTED] percent for a six month supply, and [REDACTED] percent for a 12 month supply); RX1228 at 036, *in camera* (2015 analysis showing that 1-800 Contacts' prices were higher than those of other online retailers; the net prices of Coastal Contacts, LensDirect, AC Lens, Vision Direct, and Lens.com were [REDACTED] lower than 1-800 Contacts' net prices).

### C. Paid Search Advertising

Online retailers use online advertising to attract new customers. Internet search engines, such as Google, Bing, and Yahoo!, allow internet users to search and retrieve content on the World Wide Web. In response to a user's search query, the search engine employs algorithms to match the text of the query with portions of the Web that may contain relevant content. Stip. at 2, 5. Links to webpages deemed potentially responsive to the user's search are ranked and presented to the user on a search engine results page ("SERP"). *Id.*

A typical SERP displays two sorts of search results: "organic" links and "sponsored" links, which are advertisements. Stip. at 2; ID at 36. Organic search results are links to websites that the search engine has identified as relevant to the user's query. No one can pay the search engine to have an organic result appear or to change a result's rank on the SERP. Rather, the appearance and rank of organic links are based on relevance to the user's search, with the most relevant results at the top of the SERP. Stip. at 5.

Sponsored links typically are displayed above, below, or to the side of the organic results, and often appear in a different colored box labeled with the word "Ad." Stip. at 5-6; ID at 36. Google and Bing display up to four search advertisements at the top of the page, above the organic search results. Stip. at 5; IDF 212, 234. As the name suggests, advertisers pay to have sponsored links appear on a SERP. To determine which ads appear, and in what order, search engines use an auction to sell advertising positions. Advertisers bid on "keywords," which are words or phrases that trigger the display of ads when they are determined to "match" a user's search. Stip. at 2; IDF 163. But the auction bids alone do not determine whether a particular ad appears. Search engines evaluate other factors, such as an ad's quality and its relevance to a user's search query, in determining the ad's location on a SERP and whether it displays at all. Stip. at 9-12; ID at 26-28. Thus, even a high auction bid will not result in an ad appearing if the search engine does not find the ad relevant to the user's search. Search engines have an incentive to show relevant ads because search engines are paid for displaying an ad only if the user clicks on the ad.<sup>3</sup> *Juda, Tr. 1072.*

Google, the leading search engine in the United States, receives more than eight out of every ten dollars spent on paid search advertising. IDF 137; Stip. at 5. Google's paid search platform is called "AdWords." When bidding on keywords in AdWords, advertisers may designate a keyword as "broad match," "phrase match," "exact match," or "negative match." Stip. at 6-9. When an advertiser designates a keyword as "broad match," its ad may appear when a Google search contains the specific keyword, any of its plural forms, synonyms, or phrases similar to the word.<sup>4</sup> When designated as "phrase match," the ad may appear when a search

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<sup>3</sup> The price that an advertiser pays to the search engine each time its advertisement is clicked is the cost-per-click ("CPC"). IDF 155. The CPC for each advertiser is based on the outcome of a generalized second-price auction. RX 0733 (Ghose Report) ¶51. Advertisers are not charged the amount they bid. Instead, the CPC is the bid amount needed to beat the rank of the advertiser in the next lower position. CX9019 (*Juda Dep.*) at 60, 137-38.

<sup>4</sup> Broad match seeks to match within the meaning of the user's search, rather than focusing on the text of any particular keyword. For example, if an advertiser purchases the keyword "low-carb diet plan" and selects broad

contains the keyword with additional words before or after.<sup>5</sup> And when designated as “exact match,” the ad may appear when a search contains the exact keyword and nothing more.<sup>6</sup> In contrast, an advertiser may use “negative keywords” to ensure its ad does not appear when a user performs a search for a selected word or phrase.<sup>7</sup> Similar to other keywords, negative keywords can be designated as broad match, phrase match, or exact match. *See* Stip. at 8-9.

Generally, search engines do not currently restrict keywords available for bidding in advertising auctions.<sup>8</sup> IDF 290, 298. In fact, it is common for companies to pay search engines to present their ads in response to a user’s search query of another company’s brand name. IDF 651-53. Before the agreements at issue in this case were in place, Google displayed ads for many of 1-800 Contacts’ retail competitors when those retailers bid on, and Google determined the ads were relevant to searches for 1-800 Contacts’ trademarks. IDF 653, 656.

Paid search advertising is an important method for marketing contact lenses online to obtain new customers and increase brand awareness. The paid search ad is presented to the consumer at a time when the consumer is more likely looking to buy. IDF 497-98, 500-03 (importance of paid search advertising to AC Lens), 523 (importance to LensDirect), 528-29 (importance to Lens Discounters), 532-33 (importance to Lenses for Less), 535, 538 (importance for Memorial Eye), 542-43 (importance for Vision Direct), 547-50 (importance for Walgreens), 553-54 (importance for Walmart), 557-58 (importance for Web Eye Care). In fact, many online retailers devote most of their advertising expenditures to search advertising. IDF 499 (search advertising accounts for 60-70 percent of AC Lens’ advertising expenditures), 521 (most of VisionWorks contact lens marketing budget is spent on keyword search advertising), 522 (paid search advertising accounted for 85-90 percent of LensDirect’s marketing expenditures in 2016), 527 (online paid search advertising is the “main form of advertising” for Lens Discounters), 531

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match, Google may select that advertiser’s ad in response to searches for “carb-free foods” or “Mediterranean diets” even though the advertiser did not bid on those particular keywords. Stip. at 7.

<sup>5</sup> For example, for the phrase match keyword “tennis shoes,” ads may be shown on searches for “red leather tennis shoes” or “buy tennis shoes on sale.” Stip. at 7-8.

<sup>6</sup> For example, the exact match keyword “tennis shoes” may be matched to searches for “tennis shoes” but not for “red tennis shoes.” Stip. at 8.

<sup>7</sup> For instance, “a retailer that sells eyeglasses may add the negative keyword ‘wine glasses’ to prevent its ads from showing in response to searches for that term.” ID at 25.

<sup>8</sup> Prior to 2004, Google permitted a trademark owner to restrict use of its trademark by third parties as keywords and in the text of advertisements. In April 2004, Google changed its trademark policy to allow third parties to bid on trademarks as keywords, but still prohibited advertisers from using others’ trademarks in the text of their ads without authorization. When Google changed its policy, Google stated on its website that “Google is not in a position to arbitrate trademark disputes between advertisers and trademark owners.” Google encouraged “trademark owners to resolve their disputes directly with the advertisers.” IDF 293. Google further revised its trademark policy in 2009 and now allows advertisers to include another company’s trademark in the text of ads unless the trademark holder complains to Google. IDF 287, 290-91, 294; *see also* CX9022 (Charlston Dep.) at 16-17 (describing Google’s policy as “reactive”).

At the time Microsoft launched Bing in 2009, Microsoft did not permit advertisers to bid on keywords consisting of a trademark owned by a third-party. IDF 296. In 2011, Bing changed its policy and began permitting advertisers to bid on competitors’ trademarked keywords. IDF 298.

(Lenses for Less uses no forms of internet advertising other than search advertising), 534 (the “vast, vast, vast majority” of advertising spending for Memorial Eye was for online search advertising), 540-41 (Vision Direct spent more for search advertising than for any other type of advertising), 546 (most of Walgreens’ contact lens advertising budget was spent on paid search advertising), 552 (search advertising is the only type of online advertising for contact lenses used by Walmart), 555 (Web Eye Care only engages in online advertising); CX9014 (Batushansky Dep.) at 110 (approximately █████ percent of Web Eye Care’s online advertising expenditures are for search advertising).

In contrast to other online contact lens retailers, 1-800 Contacts also advertises heavily offline, including printed matter, radio, television, and other means. IDF 61-62. According to Respondent, the company has “made enormous investments” in building its brand and convincing consumers to buy contact lenses online rather than from brick-and-mortar retailers. RAB at 6; IDF 50-66. Between 2002 and 2014, 1-800 Contacts spent a total of █████ on television advertising. IDF 64. Yet online advertising is still important to 1-800 Contacts. Between 2002 and 2014, it spent a total of █████ on online advertising. IDF 65. In 2014, █████ percent of 1-800 Contacts’ advertising budget was spent on internet advertising, and between █████ percent of 1-800 Contacts’ internet advertising budget was spent on paid search advertising each year from 2004 through 2014. IDF 66. When 1-800 Contacts bids on its trademark keywords, it bids high enough to ensure that 1-800 Contacts’ sponsored ad is the first advertisement displayed in response to searches for its own trademark. IDF 575; CX9028 (Roundy Dep.) at 86; CX9031 (Schmidt Dep.) at 125-26.

#### **D. 1-800 Contacts’ Conduct, Litigation, and the Settlement Agreements**

In 2002, 1-800 Contacts filed a complaint against Vision Direct alleging, *inter alia*, trademark infringement, claiming Vision Direct caused pop-up ads to appear when internet users visited the 1-800 Contacts website. The complaint did not include allegations regarding the use of 1-800 Contacts’ trademarks as keywords to trigger search engine advertisements.<sup>9</sup> IDF 301. 1-800 Contacts filed a similar action challenging pop-up ads against Coastal Contacts in March 2004. CX1615 (including trademark dilution claims). 1-800 Contacts resolved its disputes with Vision Direct and Coastal Contacts by executing settlement agreements that included terms related to pop-up advertising and the use of trademark keywords. IDF 306, 307 (Vision Direct settlement agreement, CX0311, included as prohibited acts “causing a Party’s website or Internet advertisement to appear in response to any Internet search for the other Party’s brand name, trademarks, or URLs”), 314, 315 (Coastal Contacts settlement agreement, CX0310, included as prohibited acts “causing a Party’s website or Internet advertisement to appear in response to any Internet search for the other Party’s brand name, trademarks or URLs but not through a search employing Generic or Descriptive terms”).

In addition to addressing pop-up ads, 1-800 Contacts monitored whether sponsored ads of its online competitors appeared on SERPs for queries involving the 1-800 Contacts trademarks. IDF 319-20, 322-23. Between 2005 and 2010, the company sent cease-and-desist letters to many

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<sup>9</sup> This lawsuit predated the change in Google’s trademark policy that allowed advertisers to bid on other companies’ trademarks as keywords. IDF 304.

of the online contact lens retailers whose ads appeared in the monitoring. IDF 325. The company later filed suit against several of these online retailers alleging federal trademark infringement and unfair competition under the Lanham Act §§ 32 and 43(a),<sup>10</sup> trademark dilution, state and common law unfair competition, and unjust enrichment based on the retailers' ads appearing on SERPs in response to searches for 1-800 Contacts' trademark terms. IDF 328-31. 1-800 Contacts filed suit against AC Lens (CX1623, Feb. 18, 2010), Contact Lens King (CX0461, Mar. 8, 2010), Empire Vision (CX0808, Feb. 25, 2010), EZ Contacts USA (CX1617, Dec. 6, 2007), Lensfast (CX1618, Dec. 23, 2008), Lenses for Less (CX0452, Jan. 20, 2010), Lens.com (CX1125, Aug. 13, 2007), LensWorld (CX1622, Jan. 8, 2008), Memorial Eye (RX0072, Dec. 23, 2008), Standard Optical (CX0965, July 13, 2010), Tram Data (CX0638, May 6, 2010), Walgreens (CX1620, June 8, 2010), and Web Eye Care (CX1621, Aug. 10, 2010).

1-800 Contacts settled most of the cases.<sup>11</sup> In the suit against Lens.com, however, the case went to a judge. In December 2010, the U.S. District Court for the District of Utah issued an opinion granting summary judgment in favor of Lens.com on 1-800 Contacts' trademark litigation claims. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010). The court found "insufficient evidence for a jury to conclude that Defendant infringed on Plaintiff's mark for all advertisements that did not use Plaintiff's mark in them." *Id.* at 1181.<sup>12</sup> In July 2013, the Tenth Circuit upheld this portion of the district court judgment. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013). The appellate court, however, did not resolve the question of whether use of challenged trademark keywords, divorced from the text of the resulting ads, could result in a likelihood of confusion, because it found that 1-800 Contacts' infringement claim "fail[ed] for lack of adequate evidence" of confusion. *Id.* at 1242-43.

Between 2004 and 2013, 1-800 Contacts entered into thirteen settlement agreements (including the agreements with Vision Direct and Coastal Contacts) to resolve its trademark disputes. IDF 343; *see* CX0313 (2008 settlement agreement with EZ Contacts USA); CX0314; CX0316 (2009 settlement agreement with Vision Direct entered as a permanent injunction by the

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<sup>10</sup> Under federal trademark law, to succeed on a trademark infringement claim, a plaintiff must prove (1) that it has a protectable mark, and (2) that the defendant used the mark without the plaintiff's consent in a manner that is likely to cause consumer confusion. *See* RX0734-0018 (Hogan Expert Report). "The most traditional form of trademark confusion is generally known as 'source confusion,' which is confusion as to the source of a good or service. . . . [C]ourts also recognize confusion as to *affiliation, connection, or sponsorship*. . . . because the Lanham Act . . . prohibits activity likely to cause '[t]he public's belief that the mark's owner sponsored or otherwise approved the use of the trademark[.]'" *Id.* at 0025. Courts have recognized that confusion is possible even if it does not occur at the point of sale. "*Initial interest confusion* . . . refers to the use of another's trademark in a manner calculated to capture initial consumer attention." *Id.* at 0027.

<sup>11</sup> In litigation against LensWorld, the court entered a default judgment and an order that prohibited LensWorld from purchasing 1-800 Contacts' federally registered trademarks as keywords for search engine advertising and required LensWorld to implement certain negative keywords where possible. IDF 337.

<sup>12</sup> The court, in *dictum*, went on to discuss the propriety of a claimed oral agreement that assertedly required Lens.com to employ negative keywords to prevent its ads from appearing in response to searches for 1-800 Contacts' trademark. "Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge. . . . A trademark right does not grant its owner the right to stamp out every competitor advertisement." *Id.* at 1188.



federal court); CX0315 (2009 settlement agreement with Lensfast); RX0028 (2010 settlement agreement with AC Lens); CX0319 (2010 settlement agreement with Empire Vision); CX0320 (2010 settlement agreement with Lenses for Less); CX0321 (2010 settlement agreement with Tram Data); CX0322 (2010 settlement agreement with Walgreens); CX0323 (2010 settlement agreement with Contact Lens King); CX0324 (2010 settlement agreement with Web Eye Care); RX0408 (2011 settlement agreement with Standard Optical); CX0326 (2013 settlement agreement with Memorial Eye). The settlement agreements include recitals that describe the litigation between the parties and state “the Parties have determined that, in order to avoid the expense, inconvenience, and disruption” of litigation, “it is desirable and in their respective best interests to terminate” the litigation and “settle any claims related thereto.” IDF 359. The settlement agreements release the parties of “any and all liability” arising from the claims and require dismissal of the litigation. IDF 360.

Although the language of the agreements varies, each includes provisions that prohibit the parties from using the other party’s trademarks, URLs, and variations of marks as search advertising keywords. IDF 361, 363. The settlement agreements also require the parties to employ “negative” keywords to prevent their ads from displaying whenever a search includes (or, as stated in some of the agreements, “contains”) the other party’s trademarks---even in situations when the advertiser did not bid on the other party’s actual trademark and the ad appears due to the search engine’s determination that the ad is relevant and useful to the consumer. IDF 364, 368. The agreements, however, do not specify whether negative keywords must be implemented under broad-match, phrase-match, or exact-match protocols. IDF 365.<sup>13</sup> The settlement agreements do not prohibit parties from bidding on generic keywords such as “contacts” or “contacts lens,” so long as they employ negative keywords as required. IDF 366-67.

Ten of the thirteen settlement agreements state that they do not prohibit the “use of the other Party’s trademarks on the Internet in a manner that would not constitute an infringing use in a[] non-Internet context” (*e.g.*, comparative advertising, parodies, and other non-infringing uses). *See* IDF 369.

1-800 Contacts enforced the settlements to prevent advertisements prohibited by the agreements from appearing. For instance, in April 2010, legal counsel for 1-800 Contacts wrote to AC Lens claiming AC Lens had breached the settlement agreement. IDF 372. Again, in 2014, 1-800 Contacts’ legal counsel notified AC Lens of another claimed breach. IDF 373. Legal counsel and 1-800 Contacts employees similarly contacted other online retailers to notify them that they were breaching the settlement agreements. *See* IDF 374-79 (communications with Coastal Contacts in 2006, 2011, and 2014), 380-82 (communications with Vision Direct in 2009, 2010, and 2013), 383-86 (communications with Walgreens in 2010 and 2014), 387 (communications with EZ Contacts in 2008), 388 (“Notice of Breach” sent by 1-800 Contacts’ counsel to Lensfast in 2014), 389-90 (letters from legal counsel sent to Contact Lens King in 2010 and 2014), 391 (legal counsel contacted Empire Vision in 2010), 392 (legal counsel sent letter to Lenses for Less in 2010).

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<sup>13</sup> Absent a negative keyword, in a broad or phrase match, a party that bids on the keyword “contacts” might find its ad displayed in response to a search for 1-800 Contacts.

In 2013, 1-800 Contacts entered into a sourcing and services agreement with Luxottica, a company that sells and distributes contact lenses through affiliates. IDF 86, 393; *see* CX0331 (Luxottica Sourcing and Services Agreement). Under that agreement, 1-800 Contacts provides fulfillment services by shipping contacts to Luxottica’s retail chain stores (*e.g.*, LensCrafters, Pearle Vision, Sears Optical, and Target Optical). The sourcing and services agreement contains reciprocal advertising restrictions similar to those in the thirteen settlement agreements; it prohibits use of trademark keywords and requires exact-match negative keywords. IDF 396.

## **E. Procedural History**

### **1. The FTC’s Complaint**

In August 2016, the FTC issued an administrative Complaint against 1-800 Contacts, alleging that the thirteen settlement agreements and the sourcing agreement (collectively, the “Challenged Agreements”) and subsequent policing of the agreements unreasonably restrain both price competition in search advertising auctions and the availability of truthful, non-misleading advertising in violation of Section 5 of the FTC Act. Compl. ¶¶ 3, 25, 33. The Complaint alleges that the Challenged Agreements prevented the parties from disseminating ads that would have informed consumers that identical products were available at different prices, which reduced price competition among online contact lens retailers and made it costlier for consumers to search prices offered by the retailers. Compl. ¶ 31. As a result, the Complaint alleges, at least some consumers paid higher prices for contact lenses. *Id.*

The Complaint also alleges that Respondent’s conduct undermined the efficiency of search advertising auctions, distorted the prices in those auctions by eliminating bidders, and degraded the quality of service offered by search engines, including the quality of the SERP displayed to users. *Id.*

### **2. Complaint Counsel’s Motion for Partial Summary Decision**

Prior to the hearing before the ALJ, Complaint Counsel filed a motion for partial summary decision to dismiss the second and third defenses asserted in Respondent’s Answer. Respondent’s second defense contended that the Complaint is barred because the trademark lawsuits underlying the settlement agreements had not been alleged and shown to be objectively and subjectively unreasonable. The third defense argued that 1-800 Contacts’ conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment.

On February 1, 2017, the Commission granted the motion for partial summary decision. *See 1-800 Contacts, Inc.*, Docket No. 9372, Commission Opinion and Order Granting Motion for Partial Summary Decision (Feb. 1, 2017). The Commission found that *Noerr* is not a defense because the Complaint challenges only private agreements. The Commission also found that the objective or subjective reasonableness of the trademark disputes is not an affirmative defense, even if the nature of the disputes may inform the antitrust analysis.

### 3. The Initial Decision

Chief Administrative Law Judge Chappell issued a 214-page Initial Decision and Order on October 20, 2017, finding the Challenged Agreements violated Section 5 of the FTC Act. *Id.* at 7, 138, 166, 190, 200. At the outset, the ALJ rejected 1-800 Contacts' assertion that, under *FTC v. Actavis*, the trademark settlement agreements should not be subject to antitrust scrutiny. The ALJ found that trademark settlements are not antitrust immune. *Id.* at 7, 120-22.

When considering liability, the ALJ applied Sherman Act Section 1 principles. To begin, he found there was "no dispute in this case that there was a contract, combination, or conspiracy" because 1-800 Contacts entered into fourteen agreements with online competitors. *Id.* at 118. Applying the rule of reason, the ALJ found that the relevant market in which to analyze the agreements' effects was "the online sale of contact lenses in the United States," *id.* at 138, 200, and that Complaint Counsel had met its burden of showing anticompetitive effects in that market. *Id.* at 7, 190, 200.

Specifically, the ALJ ruled that Complaint Counsel had established actual anticompetitive effects with harm to consumers and competition. *Id.* He explained that the advertising restrictions imposed by the Challenged Agreements harmed consumers by reducing the availability of information, which made it costlier for consumers to find and compare options for buying contact lenses online. He concluded that the reduced advertising "more likely than not resulted in consumers purchasing from 1-800 Contacts at higher prices than they would have paid to lower-priced competitors." *Id.* at 155-56.

The ALJ stated that, because Complaint Counsel had proven that the challenged agreements resulted in harm to consumers and competition, his Initial Decision need not, and did not, determine whether 1-800 Contacts' motives were anticompetitive. *Id.* at 139. In addition, although the Complaint alleged that "[a]s horizontal agreements that restrain price competition and restrain truthful non-misleading advertising, the Bidding Agreements are inherently suspect," Compl. ¶ 32, the ALJ did not address this allegation. *Id.* at 138-39. The ALJ also concluded that, having found liability under one theory (harm to consumers), he did not need to consider the other theory of alleged harm, based on injury to search engines. *Id.* at 166.

After finding anticompetitive effects, the ALJ considered and rejected Respondent's asserted procompetitive justifications. He concluded that, even if the settlement agreements reduced litigation costs and were favored by public policy, Respondent failed to proffer any consumer benefits flowing from the reduced litigation costs. *Id.* at 167-69. The ALJ also rejected Respondent's justifications related to trademark law. *Id.* at 169-84. According to the ALJ, even if protecting trademarks and thereby encouraging investment in a brand name is a procompetitive goal, Respondent improperly *assumes* the fact of infringement. The ALJ found that Respondent failed to provide legal support for its assertion that merely displaying an ad in response to a search query for a trademark term is "likely to confuse" consumers about source or affiliation, regardless of the text of the ad. *Id.* at 170. The ALJ also found that Respondent failed to support the conclusion that the appearance of an online ad in response to a trademark search due to broad matching an advertiser's bids on generic keywords (*i.e.*, the failure to identify trademark terms as negative keywords) is a trademark "use." *Id.*

Having found liability, the ALJ issued an order that bars 1-800 Contacts from agreeing with any marketer or seller of contact-lens products to prohibit or limit participation in search advertising auctions (including prohibiting or restricting the use of keywords or requiring the use of negative keywords) or to prohibit or limit search advertising. ID at 203. The ALJ's order contains a carve-out clause regarding future litigation; the carve-out establishes that the order does not prohibit Respondent from initiating or prosecuting a lawsuit or implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement. *Id.* The ALJ's order also requires Respondent to cease enforcing existing agreements that are inconsistent with the terms of the order's prohibitions. *Id.* at 204.

## **II. STANDARD OF REVIEW**

The Commission reviews the ALJ's findings of fact and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 3.54(a). The Commission may "exercise all the powers which it could have exercised if it had made the initial decision." *Id.* The *de novo* standard of review applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, 2007 WL 6936319, at \*16 n.11 (F.T.C. Oct. 30, 2009), *aff'd*, 635 F.3d 815 (6th Cir. 2011). We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

## **III. JURISDICTION**

Respondent does not dispute that the Commission has jurisdiction over it and over the conduct challenged in the Complaint. Section 5 of the Federal Trade Commission Act grants the Commission authority to prevent "unfair methods of competition in or affecting commerce" by "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(1)-(2). 1-800 Contacts is a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, over which the Commission has jurisdiction. *See* Joint Stipulations of Jurisdiction, Law, and Fact, JX0001 ¶ 2. The acts and practices of 1-800 Contacts at issue, including the agreements being challenged, are in commerce or affect commerce as "commerce" is defined in Section 4 of the FTC Act. IDF 3; Joint Stipulations of Jurisdiction, Law, and Fact, JX0001 ¶ 3; Answer ¶ 6.

## **IV. 1-800 CONTACTS' SETTLEMENTS ARE NOT IMMUNE FROM ANTITRUST SCRUTINY**

### **A. Actavis Does Not Immunize Commonplace Settlement Agreements or Settlements within the Scope of Potential Judicial Relief**

Respondent contends the settlement agreements between 1-800 Contacts and thirteen rival online sellers of contact lenses are not subject to antitrust scrutiny.<sup>14</sup> Respondent asserts that *Actavis* stands for the proposition that there can be no antitrust challenge to a settlement agreement that is commonplace in form. Here, Respondent claims its settlements of trademark litigation took the form of common, non-use agreements. According to Respondent, *Actavis*

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<sup>14</sup> Respondent's arguments about immunity for its settlement agreements, of course, offer no shelter for its Source and Services Agreement with Luxottica. That Agreement is not a settlement agreement.

exempted commonplace forms of settlement from antitrust scrutiny and held that “a party challenging a settlement must show that the settlement’s form is unusual.” RAB at 10 (internal quotation marks omitted). Respondent, however, reads *Actavis* much too broadly; the Court created no such shield from antitrust review.

As support for its argument, Respondent quotes the following sentence fragment in *Actavis*: “commonplace forms have not been thought for that reason alone subject to antitrust liability.” RAB at 3 (quoting *Actavis*, 133 S. Ct. at 2233). The Court’s wording is much more limited than Respondent suggests. The Supreme Court presented two examples of settlements: (1) where “Company A sues Company B for patent infringement and demands, say \$100 million in damages” and receives “some amount less than the full demand as part of the settlement – \$40 million, for example”; and (2) where “B has a counterclaim for damages against A” and “the original infringement plaintiff, A ... end[s] up paying B to settle B’s counterclaim.” *Actavis*, 570 U.S. at 151-52. The Court then explained: “Insofar as the dissent urges that settlements taking *these* commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding.” *Id.* at 152 (emphasis added). The Court did not state a general rule that removes settlement agreements from antitrust scrutiny, but rather characterized two specific types of settlements as commonplace, and made it clear that the form of the settlement *alone* is not what subjects an agreement to antitrust scrutiny.

Other portions of *Actavis* confirm this conclusion. Specifically, *Actavis* favorably cites three precedents that found antitrust liability for patent-related settlement agreements. First the Court relied on *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963). *Actavis* characterized the *Singer* Court as “emphasizing that the Sherman Act ‘imposes strict limitations on the concerted activities in which patent owners may lawfully engage’ . . . it held that the agreements, although settling patent disputes, violated the antitrust laws.” *Actavis*, 570 U.S. at 149 (quoting and citing *Singer*, 374 U.S. at 195, 197). *Actavis* also discussed *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952), and its holding that the settlement agreement between two patentees did not confer antitrust immunity: “Far from it, the agreement was found to violate the Sherman Act.” *Actavis*, 570 U.S. at 150 (citing *New Wrinkle*, 342 U.S. at 380). Finally, the *Actavis* Court noted that *Standard Oil Co. v. United States*, 283 U.S. 163 (1931) warned that the settlement agreements among patentees would have violated the Sherman Act “had the patent holders ... ‘dominate[d]’ the industry and ‘curtail[ed]’ the manufacture and supply of an unpatented product.” *Actavis*, 570 U.S. at 150-51 (quoting *Standard Oil*, 283 U.S. at 174). The *Actavis* Court stated these three cases sought “to accommodate patent *and* antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition.” *Id.* at 151 (emphasis added). There is no hint that the Court was departing from precedent and implementing a new standard limiting antitrust liability to “commonplace” forms of settlement agreements.

In any case, the challenged settlements are in fact unusual. Respondent directs us to consider the “form” of the settlements, not their substance. Thus, Respondent describes each settlement as “a standard, non-use agreement whereby a party agreed not to use another’s trademark,” a form that practicing lawyers allegedly recognize as regularly used to settle trademark litigation. RAB at 11, 13. Antitrust law, however, “has consistently prioritized substance over form.” *See In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 550 (1st Cir.

2016) (citing, *inter alia*, *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191–92 (2010); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760 (1984) (“[The Sherman Act] is aimed at substance rather than form.”)).

When we consider the substance of these settlement agreements, we find they *are* unusual. Trademark litigation typically seeks to bar the use on the infringer’s labels, ads, or other promotional materials of the plaintiff’s trademark or a similar mark in a way likely to confuse consumers. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), cited repeatedly by Respondent, provides a classic example where Clorox’s PINE-SOL products allegedly confused consumers of Sterling Winthrop’s LYSOL products. The settlement agreement upheld by the court restricted Clorox’s ability to market products as disinfectants or as special purpose cleansers under the PINE-SOL mark. *Id.* at 54. There the agreement did “no more than regulate how the name PINE-SOL may be used” in direct competition with LYSOL and did not restrict Clorox or other firms<sup>15</sup> from selling products that compete with LYSOL under a brand name other than PINE-SOL. *Id.* at 57. It therefore raised none of the competition concerns attached to agreements that divide markets. *Id.* at 55. Given this limited restraint upon one competitor among many, the court concluded that Clorox had not shown that the agreement significantly restricted Clorox, or restricted at all any of the other large potential entrants, from competing. *Id.* at 59.

Here, as discussed below, the settlement agreements effectively shut off an entire—and very important—channel of advertising triggered by an alleged use of the trademark in the generation of search advertising. Stated differently, each settlement reaches farther than a cure based on rewording a label or an ad—effectively eliminating an entire channel of competitive advertising at the key moment when the consumer is considering a purchase. Furthermore, 1-800 Contacts systematically applied similar restrictions to rival after rival that sought to challenge its position. And, contrary to *Clorox*’s premise, the agreements did achieve a market division through their reciprocal prohibitions on bidding in specific search auctions. Thus, from the perspective of substance, the settlement agreements between 1-800 Contacts and its thirteen rivals were indeed unusual.

Respondent, however, argues that under *Actavis*, settlement agreements that provide the same relief a court could have ordered are commonplace vis-à-vis the asserted trademark rights and immune from antitrust scrutiny. Respondent asserts that the challenged settlement agreements merely provide relief a court could have ordered if 1-800 Contacts had prevailed. RAB at 12-13. Respondent identifies no statement in *Actavis* of their asserted rule and no court opinion supporting the assertion or explaining why the scope of plenary powers of courts should determine the allowable extent of private agreements. In none of the cases addressed above did the Court, while engaging in its antitrust analysis of intellectual property-related settlement agreements, ask whether the agreement provided relief that a court could have ordered. *See Actavis; Singer Mfg.; New Wrinkle; Standard Oil*. A court’s plenary authority is irrelevant to whether private parties may agree to restrict competition, and private parties cannot rely on a court’s remedial authority to shield their agreements from antitrust scrutiny. *See infra* Section V.A.3.a.i.

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<sup>15</sup> The court emphasized that Clorox had “presented no evidence” that other firms could not enter. *Id.* at 58.

Respondent appears to argue that because a prohibition on use of a trademark is within the exclusionary potential of the trademark (and therefore is a remedy that a court could have ordered), a settlement requiring non-use is immune from antitrust condemnation. *See* RRB at 4. But the crux of the *Actavis* decision was that there could be antitrust liability for a settlement of non-sham litigation with anticompetitive effects within the scope of the patent’s exclusionary potential. The *Actavis* majority could not have been clearer:

Solvay’s patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement’s anticompetitive effects fall within the scope of the exclusionary potential of the patent. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

*Actavis*, 570 U.S. at 147 (internal quotation and citation omitted). Here, even assuming *arguendo* that the settlement agreements’ effects were within the scope of Respondent’s enforceable trademark rights<sup>16</sup>—and hence within the scope of relief that a court might have ordered, *Actavis* stands for the possibility of antitrust liability, not for the foreclosure of antitrust review. As *Actavis* explains, we need to consider *both* antitrust and intellectual property policies. *See id.* at 148 (“it would be incongruous to determine antitrust legality by measuring the settlement’s anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well”). Respondent’s rule looks only to half of the equation, *i.e.*, trademark policies, and does not withstand a thorough understanding of *Actavis*.

## **B. The “*Actavis* Considerations”**

Respondent argues that even if the Commission finds the challenged settlements were unusual, dismissal still would be appropriate because Complaint Counsel did not prove any of the five “*Actavis* considerations” that, taken together, could outweigh the desirability of settlements, to favor antitrust scrutiny. The *Actavis* Court identified five factors that convinced it to give the FTC an opportunity to prove its antitrust claim: (1) the specific restraint’s potential for genuine adverse effects on competition; (2) the potential that the anticompetitive consequences will sometimes prove unjustified; (3) the likelihood that the patentee possesses the power to bring about unjustified competitive harm in practice; (4) the administrative feasibility of an antitrust action; and (5) the risk that finding antitrust liability for a particular form of settlement would prevent litigants from settling (*i.e.*, the litigants’ ability to settle in other ways that do not harm competition). 570 U.S. at 153-58. Respondent treats these factors as threshold requirements for conducting antitrust review and argues that the ALJ erred by ignoring these considerations. RAB at 16. We disagree that *Actavis* requires this five-factor test to be applied to antitrust review of all settlements of intellectual property litigation. Moreover, even if the Court had created such a requirement, the litigation in this case would pass.

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<sup>16</sup> *But cf. infra* Section V.B.1.b (discussing Respondent’s assertions regarding trademark rights).

But the Court did not characterize these considerations as prerequisites for antitrust review of all intellectual property-related settlement or as defining the content of their analysis under the rule of reason. Rather, the Court described the factors as considerations relevant to the particular antitrust claim before it:

We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

*Actavis*, 570 U.S. at 153. Interpreting these considerations as requirements applicable to all settlements (or even all settlements of intellectual property disputes) risks straight-jacketing the analysis within bounds that were intended to address a particular case. *Cf. Loestrin 24*, 814 F.3d at 551 n.12 (“the five [*Actavis*] considerations should not overhaul the rule of reason, nor should they create a new five-part framework in antitrust cases”).

Regardless of whether the Court intended to create a new litmus test, many of the same considerations are present in this case, and they favor proceeding with the antitrust inquiry. As Respondent suggests, RAB at 16, the first three factors all relate to whether a challenged settlement poses a significant risk of unjustified anticompetitive harm. Sections V.A.1, V.A.3.b, and V.C below explain at length that the restraints at issue bear considerable potential for unjustified competitive harm by limiting truthful advertising, increasing prices paid for contact lenses, and impeding search auction bidding. The remaining two *Actavis* considerations also support antitrust review. Our analysis below demonstrates the administrative feasibility of this inquiry: antitrust liability can be found without the need to relitigate trademark infringement issues in situations such as this, where the challenged restraints are not reasonably necessary to achieve procompetitive benefits. For all the reasons stated above, we conclude that 1-800 Contacts’ settlements are not immune from antitrust scrutiny.

## V. ANTITRUST ANALYSIS OF THE CHALLENGED AGREEMENTS

The Complaint alleges that the series of agreements between 1-800 Contacts and numerous online sellers of contact lenses are agreements to restrain competition in violation of Section 5 of the FTC Act and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act. Compl. ¶¶ 33-34. To assess whether the Challenged Agreements violate Section 5 of the FTC Act, we are guided by case law concerning Section 1 of the Sherman Act.<sup>17</sup>

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<sup>17</sup> The Commission’s authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g., Actavis*, 570 U.S. at 145; *California Dental Ass’n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953), *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941). In the present case, our analysis under Section 5 is the same as it would be under Section 1 of the Sherman Act.



Under Section 1 of the Sherman Act,<sup>18</sup> except for a small group of restraints that are *per se* unlawful because they “always or almost always tend to restrict competition,” restraints are evaluated under the rule of reason. *See, e.g., Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). When applying the rule of reason, courts rely on a burden-shifting framework. Under this framework, the plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers. If the plaintiff meets its initial burden, the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the plaintiff must show that the procompetitive justification could be reasonably achieved through less anticompetitive means or that the anticompetitive harms outweigh the procompetitive benefits. *See, e.g., id.* at 2284; *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *accord Polygram Holding, Inc.*, 136 F.T.C. 310, 349-50 (2003), *aff’d*, 416 F.3d 29 (D.C. Cir. 2005). When operationalizing this framework, the sequence for evaluating particular evidence may vary under a particular structured analysis, but the ultimate burdens remain unchanged.

In *Polygram*, the Commission traced the Supreme Court’s development of the rule of reason. 136 F.T.C. at 325-44. One feature of the Court’s jurisprudence is that the rule of reason calls for “an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint,” with a goal to reach “a confident conclusion about the principal tendency of a restriction.” *Realcomp*, 2007 WL 6936319, at \*18 (quoting *California Dental*, 526 U.S. at 781). Cases such as “*BMI*, *NCAA*, and *IFD* indicate[] that the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect.” *Polygram*, 136 F.T.C. at 336 (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986) (“*IFD*”).

The Court has defined three separate but not entirely distinct ways for a plaintiff to show that a challenged restraint resulted in anticompetitive effects under a rule of reason analysis. First, the *IFD* Court observed that the particular horizontal restraint at issue, by its very nature established that anticompetitive effects were likely; it did not require “elaborate industry analysis . . . to demonstrate the anticompetitive character of such an agreement.” *IFD*, 476 U.S. at 459. In *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and *Polygram*, we labeled such restraints “inherently suspect.” Second, the Court in *IFD* held that, even if the restriction in question was “not sufficiently naked” to be considered inherently suspect based on the nature of the restraint, the plaintiff’s *prima facie* case was established, even without a detailed market analysis, because the record contained direct evidence of anticompetitive effects. *IFD*, 476 U.S. at 460. Third, the Court’s discussion made clear that the traditional mode of analysis—inquiring into market definition and market power to determine whether an arrangement has the potential for genuine adverse effects on competition—was also available. *Id.* Any one of these modes of analysis is sufficient to establish a *prima facie* case.

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<sup>18</sup> Violations of Section 1 of the Sherman Act require (1) a contract, combination, or conspiracy, that (2) unreasonably restrains trade. *See, e.g., Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). Here, the trademark litigation settlement agreements and the Luxottica Sourcing and Services Agreement easily satisfy the first element. *ID* at 117-18. Consequently, our analysis focuses on the second element.

In this case, we use two of these modes of analysis to assess whether 1-800 Contacts' agreements resulted in anticompetitive effects: (1) we consider whether the Challenged Agreements are inherently suspect; and (2) we examine whether there is direct evidence of anticompetitive effects. Each mode of analysis provides an independent basis for finding that the Challenged Agreements have substantial anticompetitive effects and leads us to find liability. We explain the structure of the analysis based on the case law for these modes in the sections devoted to each. We also examine Complaint Counsel's allegation that the Challenged Agreements have substantial anticompetitive effects on competition with respect to bidding on search terms, which again leads us to find a violation of Section 5 of the FTC Act.

Although we discuss particular evidence that leads us to conclude that the restraints in the Challenged Agreements have substantial anticompetitive effects under different modes of analysis, our review of the evidence is not rigidly compartmentalized. For instance, evidence regarding the significance of search advertising generally and searches for 1-800 Contacts' trademarks in particular, which is discussed as part of the inherently suspect analysis, informs our understanding of the direct evidence of anticompetitive effects. Although the two modes of analysis provide different structures, they reach the same conclusion. The restraints on advertising and bidding at advertising auctions imposed by 1-800 Contacts' agreements have substantial anticompetitive effects and, unless reasonably necessary to achieve a valid procompetitive rationale, violate Section 5 of the FTC Act.

#### **A. Analysis of the Challenged Agreements for Effects on Consumers Under *Polygram's* Inherently Suspect Framework**

In *Polygram*, we held that in a limited but significant category of cases, “the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.” *Polygram*, 136 F.T.C. at 344. In these cases, “scrutiny of the restraint itself . . . without consideration of market power” is sufficient to condemn the restraint, unless the defendant can “articulate a legitimate justification” for that restraint. *Id.* at 344-45; *see also California Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (describing a “quick-look analysis” applicable when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets”); *IFD*, 476 U.S. at 459 (finding “no elaborate industry analysis” was required to demonstrate the anticompetitive character of a “horizontal agreement among participating dentists to withhold from their customers a particular service that they desire”).

Drawing from the Supreme Court's analysis in *California Dental*, 526 U.S. at 779, *Polygram* spelled out the structure of the “inherently suspect” analysis for the plaintiff's demonstration that a restraint has anticompetitive effects. A plaintiff must

demonstrate[] that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition. . . . [T]he defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. . . . When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed

likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail “the fullest market analysis.” Depending upon the circumstances of the cases and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. Such a showing may, for example, be based on a more detailed analysis of economic learning about the likely competitive effects of a particular restraint, in markets with characteristics comparable to the one at issue. The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

*Polygram*, 136 F.T.C. at 344-49 (quoting *California Dental*, 526 U.S. at 779) (citations omitted). On review, then Chief Judge Douglas Ginsburg, writing for the D.C. Circuit, “accept[ed] the Commission’s analytical framework.” *Polygram*, 416 F.3d at 36; *see also North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008) (“the Commission’s articulation of the shifting burdens employed in its [inherently suspect] analysis appears, at least facially, to comport with the framework provided by the Supreme Court’s precedent”).

### **1. The Anticompetitive Nature of the Restraints**

Inherently suspect conduct “ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation.” *Polygram*, 136 F.T.C. at 344-45. Consequently, our analysis considers whether there is a “close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.” *Polygram*, 416 F.3d at 37. The determination is based on the conduct’s “likely tendency to suppress competition.” *Polygram*, 136 F.T.C. at 344. “At this stage, the focus of the inquiry is on the nature of the restraint rather than on the market effects in a particular case.” *North Texas Specialty Physicians*, 140 F.T.C. 715, 733 (2005) (“*NTSP*”).

We previously recognized that an inherently suspect analysis and a *per se* analysis are “close neighbors.” *NTSP*, 140 F.T.C. at 719. Consequently, the Commission previously condemned conduct as inherently suspect that approximates conduct that had otherwise been characterized as *per se* violations of the antitrust laws. For instance, in *Polygram*, we condemned as inherently suspect an agreement between record album distributors to suspend temporarily advertising and discounting of particular performers’ earlier concert albums. The D.C. Circuit agreed, explaining that “[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as *per se* unlawful. The Supreme Court has recognized time and again that agreements restraining autonomy in pricing and advertising impede the ‘ordinary give and take of the market place.’” *Polygram*, 416 F.3d at 37 (quoting *IFD*, 476 U.S. at 459). Similarly, in *NTSP*, we condemned as inherently suspect certain contracting practices of a physician trade association, while also recognizing that “*NTSP*’s activities could be characterized as *per se* illegal because

they are closely analogous to conduct condemned *per se* in this and other industries . . . .” *NTSP*, 140 F.T.C. at 731.

In the present case, the agreements between 1-800 Contacts and its rivals prohibit each party from causing or allowing advertisements to appear in response to an internet search for the other party’s trademarks or URLs, or variations of the trademarks or URLs. Those agreement terms and 1-800 Contacts’ subsequent enforcement of them prevent the agreeing parties from offering advertising in response to an internet search for “1-800 Contacts” or similar queries. IDF 371. Thus, the Challenged Agreements are, in essence, agreements between horizontal competitors to restrict the information provided by advertising to consumers when they search for 1-800 Contacts’ trademark terms and URLs; consumers could have used that withheld information to compare and evaluate the prices and other features of competing online sellers. Ultimately, the effect of the advertising restrictions is to make information enabling consumer comparisons more difficult and costly to obtain.

Online search is one of the key methods by which consumers discover vendors and compare products and services. IDF 564. It is an important method by which lower-priced rivals compete with 1-800 Contacts. IDF 565. Rival online sellers generally offer lower prices than 1-800 Contacts, IDF 693, and much of the advertising for those retailers emphasizes those lower prices. *See* IDF 587, 591, 603, 611, 646, 703, 724; Holbrook, Tr. 1904. This is particularly important because the advertising is presented to a consumer at a time when the consumer is more likely to be looking to buy. IDF 498.

Economic theory indicates that restrictions on this type of advertising are likely to harm competition. A flow of information between buyers and sellers is an essential part of the market system. Buyers have to find out who they can buy from and on what terms, and sellers must let consumers know how to find them, what they have to offer, and on what terms. IDF 681 (citing CX8006 (Evans Expert Report) at 080 ¶ 178). Restrictions on advertising interfere with that flow of information and raise the cost to consumers of finding the most suitable offering of a product or service. CX8006 (Evans Expert Report) at 080-084; IDF 683. Faced with these higher search costs, consumers must either spend more time and money looking for a lower-priced supplier or end their search because the cost of continued search exceeds the likelihood of finding a lower price. Ultimately, as a result of the reduced information flow, some consumers will pay higher prices for the particular good or service while others stop their search before they find a price that induces them to buy, which reduces the quantity sold. In addition, advertising restrictions “reduce[] sellers’ incentives to lower prices. One reason a restriction on advertising may reduce a seller’s incentives to lower prices is that, absent an ability to advertise, lower per-unit prices may not be sufficiently offset by higher volume.” *Polygram*, 136 F.T.C. at 355 (citations omitted).

Empirical studies confirm the anticompetitive effects of advertising restrictions. Complaint Counsel’s expert, Dr. Evans explains,

Economists have conducted more than 21 studies that assess the effect of advertising restrictions on prices and other aspects of competition. . . . Almost all

of these studies<sup>19</sup> find that advertising restrictions result in higher prices. Many of them show that the consumers are not getting higher quality products or services at those higher prices. At least one of the studies finds that the advertising restrictions tend to suppress entry.

CX8006 (Evans Expert Report) at 081-082. As Dr. Evans concludes: “There is a consensus in the economics literature that restrictions on advertising among rivals impair competition and harm consumers.” *Id.* at 081. Dr. Evans also confirmed that greater availability of pricing information affects the prices that consumers pay for products sold online. *Id.* at 084. Dr. Evans noted that prior empirical work found that consumers paid significantly less for life insurance plans and cars because online price comparison sites made price shopping much easier. *Id.* Dr. Evans also cited a study finding that dissemination of price information online made demand curves for online sellers much more elastic. *Id.* The Commission has prior experience with this literature; we cited many of these same empirical studies when we considered the economics of advertising restrictions at issue in *Polygram*. See *Polygram*, 136 F.T.C. at 355 n.52.

Consistent with the economic literature, over the past 40 years, the Commission has repeatedly found that advertising restrictions harm competition and consumers. See *Am. Med. Ass’n*, 94 F.T.C. 701, 1010 (1979) (condemning an agreement among physicians not to advertise), *aff’d*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982) (*per curiam*); *Mass. Board*, 110 F.T.C. at 598 (condemning a licensing board’s ban on advertising). Among the more recent cases, in *Polygram*, we concluded that an agreement between music companies not to advertise two recordings for a short time period was inherently suspect. See *Polygram*, 136 F.T.C. at 353-58. Courts have similarly recognized the role of advertising in fostering competition and have condemned advertising restrictions. The Supreme Court explained that advertising “serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.” *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). The Supreme Court further explained, “[I]t is clear as an economic matter that . . . restrictions on fare advertising have the forbidden significant effect upon fares. . . . Restrictions on advertising ‘serve to increase the difficulty of discovering the lowest cost seller . . . and [reduce] the incentive to price competitively.’” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377).

More recently, in *California Dental*, the Court found “unexceptionable” the Ninth Circuit’s “statements that ‘price advertising is fundamental to price competition’ and that ‘restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [sellers] to compete on the basis of price.’” *California Dental*, 526 U.S. at 773 (quoting *California Dental Ass’n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997)). The Court, however, found that the professional services market at issue permitted “the possibility that the particular restrictions on professional advertising could have different effects from those ‘normally’ found in the commercial world.” *Id.* Thus, even when the Court did not affirm liability in *California Dental*, it recognized that in ordinary commercial markets, bans on truthful advertising normally are likely to cause competitive harm.

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<sup>19</sup> Among the cited studies, there is only one, involving advertising for professional services, that shows lower prices when there is no advertising. See CX8006 (Evans Expert Report) at 081 n.186.

Courts have long condemned advertising restrictions. The D.C. Circuit affirmed our analysis in *Polygram. Polygram Holding Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (“we have no difficulty with the Commission’s conclusion . . . An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors”). Other advertising restrictions have similarly been condemned. *See, e.g., Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (finding advertising restraint that prohibited attorneys from advertising in particular geographical regions *per se* unlawful); *United States v. Gasoline Retailers Ass’n, Inc.*, 285 F.2d 688 (7th Cir. 1961) (agreement between trade association and gasoline station operators that stations would not advertise—including by posting signs at the stations showing prices—or give premiums was *per se* Sherman Act violation).

Our conclusion that the particular advertising restrictions imposed by the Challenged Agreements are inherently suspect is a limited finding. We do not contend that all advertising restrictions are necessarily inherently suspect. The restrictions in this particular case prohibit the display of ads that would enable consumers to learn about alternative sellers of contact lenses and give them the opportunity to make price comparisons at the time they are likely to make a purchase. Importantly, the restrictions at issue here are not limitations on the content of an advertisement a consumer would otherwise see; they are restrictions on a consumer’s opportunity to see a competitor’s ad in the first place. Moreover, the record shows that the suppressed ads often emphasize lower prices. In this context, we find the advertising restrictions are inherently suspect. Because the Challenged Agreements restrict the ability of lower cost online sellers to show their ads to consumers, it is easy to see how “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *California Dental*, 526 U.S. at 770.

## **2. Preliminary Analysis of Respondent’s Justifications**

That conclusion is not the end of the analysis. As we explained in *Polygram*,

If the challenged restrictions are . . . inherently suspect, then the defendant can . . . advanc[e] a legitimate justification for those practices. . . . At this early stage of the analysis, the defendant need only articulate a legitimate justification. . . . [T]he proffered justifications must be both cognizable under the antitrust laws and at least facially plausible. . . . When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.

*Polygram*, 136 F.T.C. at 345-48. Moreover, Respondent bears the burden of “articulat[ing] the specific link between the challenged restraint and the purported justification.” *Polygram*, 136 F.T.C. at 347. In this case, Respondent must articulate the specific link between restraints on its competitors’ use of search advertising and the protection of its own trademark rights.

“[C]ognizability allows the deciding tribunal to reject proffered justifications that, as a matter of law, are incompatible with the goal of antitrust law to further competition. Cognizable

justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation.” *Id.* at 345-46. “A justification is plausible if it cannot be rejected without extensive factual inquiry. The defendant . . . must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals . . . .” *Id.* at 347.<sup>20</sup>

Here, Respondent has articulated two legitimate justifications that are cognizable and, at least, facially plausible: avoidance of litigation costs through settlement and trademark protection.<sup>21</sup> Settling costly litigation is a cognizable and facially plausible justification for the settlement agreements. As the Supreme Court explained in *Actavis* and we recognized in *Schering-Plough*, 136 F.T.C. 956, 1003 (2003), there is a “general legal policy favoring settlement of disputes.” *Actavis*, 570 U.S. at 153; *see also In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006) (noting public’s “strong interest in settlement” of complex and expensive cases). While this public policy favoring settlements does not create antitrust immunity, *see supra* Section IV, it is, nonetheless, a legitimate justification that we do not ignore.

Settling lawsuits is generally economically efficient. IDF 355 (citing RX0739 (Murphy Expert Report) at 0053; CX9042 (Evans Dep.) at 196). Avoiding unnecessary expenses is consistent with competition principles. The record shows that these concerns motivated 1-800 Contacts’ rivals to settle. *See* IDF 349 (knowing that Lens.com had spent \$2 million and its litigation was not yet concluded, Memorial Eye settled its case because of the cost of the litigation and the legal uncertainty), 352 (AC Lens made a business decision to settle in light of potential costs and protracted nature of the litigation), 353 (Web Eye Care settled because the costs of litigation were “way more than we wanted to spend” and “not worth it” and because of the risks of losing the litigation), 354 (Empire Vision settled to avoid the litigation expense). *But cf. infra* Section V.A.5.a (noting the absence of evidence linking litigation cost savings in this case to benefits to consumers).

Similarly, at this stage of the analysis, we consider protecting trademark rights to be a legitimate procompetitive justification. As Respondent’s experts, Drs. Landes and Murphy, explained, trademarks provide informational benefits to consumers about product and quality attributes that reduce consumers’ search costs. Trademark protection preserves those quality signals for consumers and encourages firms to invest in both product quality and the trademark. *See* RX0737 (Landes Expert Report) at 0005-0014, RX0739 (Murphy Expert Report) at 0032-0035. Also, at least facially, Respondent’s contention that the settlement agreements advance this procompetitive goal is plausible; “it cannot be rejected without extensive factual inquiry.” *Polygram*, 136 F.T.C. at 347. The trademark litigation underlying the settlement agreements was not sham. *Lens.com, Inc. v. 1-800 Contacts, Inc.*, 2014 WL 12596493 (D. Utah Mar. 3, 2014); IDF 340 (District court dismissed Memorial Eye’s counterclaim alleging the suit filed by 1-800 Contacts was sham litigation). Also, the record shows that 1-800 Contacts had a brand identity

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<sup>20</sup> Respondent apparently concedes that it bears the burden of showing that its justification is cognizable. RAB at 39 (stating “even if 1-800 Contacts had the burden to do more than prove that its claims were cognizable . . .”).

<sup>21</sup> A third purported benefit—avoidance of consumer confusion—is subsumed among the benefits of trademark protection.

that it wished to preserve. It had a marketing strategy to create brand awareness and during the period 2002 through 2014 had spent [REDACTED] on television advertising and [REDACTED] on internet advertising to build that brand. IDF 60, 64-65.

It is important to note that our determination that two of 1-800 Contacts' procompetitive justifications are legitimate at this stage of the analysis is not the end of our evaluation. We return to Respondent's procompetitive justifications with an "extensive factual [and legal] inquiry" when we move farther into the rule of reason analysis. In Sections V.A.3.a and V.A.5, we consider Complaint Counsel's contention that the procompetitive benefits could be reasonably achieved through less anticompetitive means and examine whether Respondent's procompetitive rationales are supported by the facts.<sup>22</sup>

### 3. Complaint Counsel's More Detailed Showing

Because Respondents have advanced legitimate procompetitive justifications, we do not summarily condemn the Challenged Agreements based only on an initial review of the nature of the restraints. Instead, to satisfy their burden under the rule of reason, Complaint Counsel must make a further showing. As we explained in *Polygram*,

When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail "the fullest market analysis." Depending upon the circumstances of the cases and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. . . . The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

*Polygram*, 136 F.T.C. at 348-49 (footnote and citations omitted); *see also Actavis*, 570 U.S. at 159 (explaining that the showing does not require that "the Commission . . . litigate the patent's validity, . . . present every possible supporting fact or refute every possible pro-defense theory. . . . [t]here is always something of a sliding scale in appraising reasonableness," and as such "the quality of proof required should vary with the circumstances.") (quoting *California Dental*, 526 U.S. at 780 and 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1507 (1986)).

In short, Complaint Counsel may meet their burden to show that the restraints at issue are likely to harm competition by either (i) identifying the theoretical basis for the alleged

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<sup>22</sup> We recognize the current limited inquiry regarding 1-800 Contacts' procompetitive justifications and the later steps in the rule of reason burden-shifting analysis "could be combined, [but] we think it analytically superior and consistent with the relevant case law to first screen the purported justification for legitimacy before engaging in a more extensive, and therefore longer and more resource-intensive, inquiry whether detailed analysis supports or refutes the justification. Antitrust courts have long held that preliminary analysis of purported justifications is appropriate." *Polygram*, 136 F.T.C. at 348 n.43.



anticompetitive effects and showing that these effects are likely in this particular setting or (ii) explaining how Respondent could have minimized the anticompetitive effects of its conduct or accomplished its procompetitive justifications through less restrictive alternatives. Here, Complaint Counsel show both that, in the context of online sales of contact lenses, the proffered procompetitive effects of the advertising restraints in the Challenged Agreements could be achieved through means less restrictive of competition, and that restraints “are indeed likely . . . to harm competition,” *Polygram*, 136 F.T.C. at 348. We address each of these approaches separately.

**a. Respondent’s Proffered Procompetitive Justifications Could Be Achieved Through Less Anticompetitive Means**

First, Complaint Counsel can rebut Respondent’s showing that litigation cost savings and trademark protection are cognizable and plausible procompetitive justifications by establishing that “the proffered procompetitive effects could be achieved through means less restrictive of competition.” *Polygram*, 136 F.T.C. at 349; *see, e.g., American Express*, 138 S. Ct. at 2284 (if defendant successfully shows a procompetitive justification, “then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means”); *Law v. National Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th Cir. 1998) (plaintiff may demonstrate that the challenged conduct is not reasonably necessary or could be achieved by less restrictive means); 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1505 (4th ed. 2017). The challenged conduct is not reasonably necessary if the parties could have achieved similar efficiencies by practical, significantly less restrictive alternatives. *See United States v. Brown Univ.*, 5 F.3d 658, 678–79 (3d Cir. 1993); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); 7 Areeda & Hovenkamp, *supra*, ¶ 1505; FTC & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations among Competitors* § 3.36(b).

Complaint Counsel argue that the Challenged Agreements are not reasonably necessary to protect 1-800 Contacts’ trademarks, but rather are unreasonably overbroad, prohibiting a wide range of truthful, non-confusing advertising; according to Complaint Counsel, the asserted procompetitive benefits could be achieved through less restrictive means. CCB at 4. Respondent disagrees. It contends that the Challenged Agreements are not overbroad and maintains that none of Complaint Counsel’s alternatives is workable.

**i. Overbreadth**

When an agreement limits truthful price advertising on the basis of trademark protection, it must be narrowly tailored to protecting the asserted trademark right. The agreements here are not—they restrict advertising regardless of whether the ads are likely to be confusing and, apparently, regardless of whether competitors actually use the trademark term (requiring negative keywords).

Respondent and the Dissent argue that the Challenged Agreements cannot be overbroad because their restrictions are similar to what a court could have ordered. RRB at 4. The fact that

a court has authority to enter an order of non-use, however, does not support a finding that it is always a permissible restraint when implemented by private parties.

As we have already discussed, *see supra* Section IV.A, a court’s plenary authority to issue relief is irrelevant to the question of whether private parties may, consistent with the antitrust laws, agree to restrict their competition. Courts have broad injunctive authority, and Respondent has failed to explain why the scope of judicial powers should define the scope of lawful private activity. Indeed, courts can order “fencing-in” relief, which restricts even *legal* conduct in order to help prevent future violations; this does not mean that private parties can agree among themselves to bar the same lawful, competitive activities.<sup>23</sup> Private parties cannot agree to limit non-infringing conduct with the effect of restraining competition, even if a court could do so. Moreover, in fashioning relief in trademark cases, courts are guided by equitable principles, which require closely tailoring injunctions to the harm that they address and giving due consideration to the public interest and the potential effect on competition between the parties. *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996) (quoting 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 30.03 [1] (4th ed. 1995)). Private parties need not consider public interest factors in their settlement agreements, and they cannot rely on the remedial authority of courts to shield their private agreements from antitrust scrutiny.

Similarly unavailing is Respondent’s and the Dissent’s suggestion that, just because a court issues a non-use injunction or approves non-use settlements in other trademark cases, it means that the remedy is appropriate here. Respondent asserts that non-use injunctions are “common” and are “the order of the day” in trademark infringement actions. RAB at 11-12. But, in the vast majority of trademark infringement cases, non-use is a perfectly reasonable remedy because it resolves the trademark issue without affecting competition; it simply requires a company with a name confusingly similar to a rival’s to refrain from identifying itself or its products by such a name. Consider, for example, the *Clorox* case cited above. *Clorox v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997). In *Clorox*, the court found that the “PINE-SOL” trademark and the “LYSOL” trademark were confusingly similar. Indeed, the U.S. PTO initially refused to grant the PINE-SOL trademark for that very reason. *Id.* at 53. In that context, the non-use agreement prevented a competitor from using a confusingly similar name for its products.

Here, no company names are alleged to be the cause of any confusion, and as noted above, non-use restrictions cut off an important channel of truthful price advertising. *See supra* Section IV.A. Whereas a typical trademark non-use remedy affects how a product may be

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<sup>23</sup> In some particularly egregious cases, for example, courts have banned defendants from practicing in certain industries altogether. *See, e.g., FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000), *aff’d*, 312 F.3d 259 (7th Cir. 2002) (banning defendants from engaging or assisting others in the businesses of telemarketing and marketing career advisory goods or services); *FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (affirming district court order banning defendant from engaging in the credit repair business); *FTC v. E.M.A. Nationwide, Inc.*, 2013 WL 4545143, at \*8 (N.D. Ohio Aug. 27, 2013), *aff’d*, 767 F.3d 611 (6th Cir. 2014) (enjoining defendants from working in the debt relief and mortgage assistance industries). That does not mean that private parties who are competitors can enter into an agreement preventing one of them from practicing in a particular industry.

labeled or what language may be used in the text of an ad, the non-use restriction here limits the number of times competitor ads are shown and insulates some 1-800 Contacts' consumers from becoming aware of its rivals.

Respondent also points to cases in which courts have issued orders that would prohibit use of trademarks in internet advertising, but most of those cases are either consent judgments or default judgments and involve infringing conduct beyond mere keyword bidding.<sup>24</sup> In any event, decisions about the appropriate remedy are inherently case-specific, and the fact that a court in some other context, with no or little consideration of the effects on competition, granted a broad injunction does not constitute an endorsement of the private agreements here or render them procompetitive.

## ii. Less Anticompetitive Alternatives

Complaint Counsel identify three alternatives to the restrictions in the Challenged Agreements. They suggest that Respondent could (1) bar the rival from using specific text alleged by 1-800 Contacts to cause confusion, including prohibiting the rival from using a name confusingly similar to its own; (2) require clear disclosure in each search advertisement of the identity of the rival seller; or (3) require the rival to refrain from using confusing or deceptive language in its search ads.

These options present alternative ways for avoiding litigation costs and achieving the procompetitive benefits that flow from trademark protection. The first and third proposed alternatives would adequately address consumer confusion stemming from the content of the ad. Respondent, however, claims that its trademark was infringed by the mere appearance of competitor ads in response to a trademark search, not from any confusing ad content. *See* RAB at 41. Assuming, *arguendo*, and contrary to our findings below, that protection against such infringement has been established as a valid procompetitive benefit here, alternatives one and three would not adequately address it. But the second proposed alternative—requiring clear disclosure of the identity of the rival seller—is a workable option that would achieve both litigation cost savings and protection of trademark rights, including prevention of the consumer confusion associated with infringement, in a significantly less anticompetitive manner. Respondent's arguments to the contrary are unpersuasive.

Respondent contends that a disclosure requirement would be unworkable because "clear and conspicuous disclosure" is an amorphous standard that would likely generate future

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<sup>24</sup> The two litigated cases Respondent's expert cites are distinguishable in material respects. *See* RX0734 (Hogan Expert Report) at 0099-0100 ¶149. In *Skydive Ariz., Inc. v. Quattrocchi*, 2010 WL 1743189, at \*8 (D. Ariz. Apr. 29, 2010), among other things, defendant used plaintiff's trademark on its website and falsely told its customers that the skydiving certificates it sold would be redeemable at plaintiff's facilities. The other litigated case is *PODS Enterprises, LLC v. U-Haul International, Inc.*, 126 F. Supp. 3d 1263, 1292 (M.D. Fla. 2015). In that case, PODS Enterprises sued U-Haul for referring to its product as a "U-Box pod" and using the terms "pod" or "pods" thousands of times on its website. The court broadly prohibited use of the term except in comparative advertisement, but it did not specifically discuss banning use of the term in keyword bidding or the effect on competition.

litigation. RAB at 40-41.<sup>25</sup> We, however, do not find a requirement to clearly disclose the seller’s identity to be “amorphous.” The Commission has ordered parties to implement clear and conspicuous disclosures in numerous cases involving misleading advertising and did not find the requirements too amorphous or otherwise problematic to serve its remedial goals.<sup>26</sup> Moreover, nothing prevents the parties, as part of their settlement, from agreeing on the specific language of the disclosure that would need to be included in the ads to dispel any purported consumer confusion.

Respondent also asserts that Complaint Counsel failed to introduce evidence that a clear disclosure would reduce consumer confusion.<sup>27</sup> But Complaint Counsel introduced evidence that there was only a *de minimis* likelihood of confusion in the first place,<sup>28</sup> and Respondent’s attempt to demonstrate confusion from keyword bidding was severely flawed, *see infra* note 39. At the same time, courts have held that a “minimal or moderate amount of potential confusion found could be cured effectively by use of a disclaimer.” *See Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325, 1330 (2d Cir. 1987). Indeed, the Tenth Circuit’s ruling in 1-800 Contacts’ own litigation supports the adequacy of disclosure. *See 1-800 Contacts, Inc.*, 722 F.3d at 1245 (consumer confusion would be unlikely “when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for”); *see also Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 937 (9th Cir. 2015) (“clear labeling can eliminate the likelihood of initial interest confusion in cases involving Internet search terms”); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011) (clear labeling might eliminate the likelihood of initial interest confusion in internet advertising); *Playboy Enters. Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1025 & n.16 (9th Cir. 2004) (“if a banner advertisement clearly identified its source or, even better, overtly compared PEI products to the sponsor’s own, no confusion would occur under PEI’s theory” (that appearance of a banner advertisement immediately after users

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<sup>25</sup> Courts have been inconsistent in their burden allocation in assessing less restrictive alternatives, “[b]ut the difference in assignment of this proof burden is more apparent than real.” 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1914c (3rd ed. 2011). As a leading antitrust treatise explains:

The most workable allocation gives the plaintiff the burden of suggesting, or proffering, a particular alternative claimed to achieve the same benefits but less restrictive of competition. The defendant then has the burden of showing that the proffered alternative is either unworkable or not less restrictive.

*Id.*

<sup>26</sup> *See, e.g., Paypal, Inc.*, 2018 WL 2716645 (F.T.C. May 23, 2018); *Lenovo (United States), Inc.*, 2017 WL 6885837 (F.T.C. Dec. 20, 2017); *Warner Bros. Home Entertainment, Inc.*, 2016 WL 6892613 (F.T.C. Nov. 17, 2016); *Machinima, Inc.*, 2016 WL 1130011 (F.T.C. Mar. 16, 2016).

<sup>27</sup> The Dissent argues that we “[d]ismiss 1-800 Contacts’ trademark infringement claims based on [our] evaluation of consumer confusion . . . .” Dissenting Statement at 21. That is incorrect. We merely evaluate Respondent’s argument regarding the evidence produced showing consumer confusion. As Section V.A.3.a.i. and this section show, our Opinion does not hinge on the merits of the trademark claim. We find that challenged restraints are overbroad, which is a question wholly suited for a rule-of-reason inquiry.

<sup>28</sup> *See* CX8008 (Jacoby Expert Report) at 008-010; Jacoby, Tr. 2130.

type in PEI's marks caused initial interest confusion)). Any potential for confusion lingering after clear disclosure of the rival seller's identity could be removed by a further disclosure disclaiming affiliation with 1-800 Contacts.<sup>29</sup>

Respondent additionally argues that this proposed alternative is "merely theoretical" because the record does not contain any real-world trademark settlements embodying such terms. RAB at 40. But insistence on identifying examples of other settlements that incorporate Complaint Counsel's specific proposal is unrealistic given the relatively new context of search-based keyword advertising, particularly in light of the large number of cases dismissing claims based on keyword bidding altogether.<sup>30</sup> Moreover, settlement agreements are often subject to confidentiality provisions and consequently unavailable. *Cf.* RX0734 (Hogan Expert Report) at 0107 ("many of the agreements I have knowledge of are subject to confidentiality provisions"). In any event, an absence of such settlement examples in the record does not determine whether the proposed alternative is workable. The idea that disclaimers can be used to eliminate consumer confusion is not new, and courts have ordered disclaimers as a remedy in internet-based trademark infringement cases. *See, e.g., Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000), *aff'd*, 246 F.3d 675 (9th Cir. 2000) (preliminary injunction requiring defendant Nissan Computer Corporation, owner of the websites nissan.com and nissan.net, to clearly identify itself on the website, disclaim affiliation with, and identify the correct website for, Nissan Motor Co., and not to display any automobile-related information or web links.); *Tempur-Pedic N. Am., LLC v. Mattress Firm, Inc.*, 2017 WL 2957912, at \*11 (S.D. Tex. July 11, 2017) (permitting defendant to continue to use plaintiff's trademark in Google AdWords, but limiting number of times defendant could use the mark on its webpage and requiring disclaimer of affiliation); *Simone v. VSL Pharm., Inc.*, 2016 WL 3466033, at \*27 (D. Md. June 20, 2016) (allowing competitor to post AdWords ads containing trademark term if such ads also include adequate disclaimer of affiliation, to be pre-approved by the court).

The FTC, too, in its decades of experience preventing and remedying false advertising claims and consumer deception, has ordered respondents to provide disclosures to avoid consumer confusion.<sup>31</sup> In fact, in 2013, the Commission published guidelines to assist businesses in providing clear, effective disclosures in space-constrained internet ads.<sup>32</sup> We thus have successfully employed remedial mechanisms similar to those urged by Complaint Counsel.

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<sup>29</sup> During oral argument, Respondent's counsel indicated that Google's policy prohibits a party from including a competitor's trademark in the text of the ad, even if the trademark is mentioned in order to disclaim any affiliation. Stone, Oral Arg. Tr. at 90. Google's trademark counsel, however, testified that Google does not prohibit use of another's trademark in an ad unless the trademark owner notifies Google that it does not want its trademark to be used in the ads by that advertiser. *See* CX9022 (Charlston Dep.) at 16-17, *in camera*.

<sup>30</sup> *See infra* note 38 and accompanying text.

<sup>31</sup> *See supra* note 24.

<sup>32</sup> .Com Disclosures: How to Make Effective Disclosures in Digital Advertising, available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

We see no reason why a brief statement identifying the ad sponsor and/or disclaiming affiliation with 1-800 Contacts would be ineffective or unworkable.<sup>33</sup>

Given the inherently suspect nature of Respondent’s advertising restraints and our finding that the procompetitive benefits asserted to justify those restraints could be achieved by significantly less anticompetitive means, we can conclude that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act. Although Complaint Counsel have met their burden by demonstrating that Respondent could have chosen a less restrictive alternative to achieve the same procompetitive benefit, we also consider whether Complaint Counsel has satisfied its further showing by focusing alternatively on the particular restraints and context presented here.

**b. Complaint Counsel’s Showing that the Restraints Are Likely, in the Particular Context, to Harm Competition**

Our review of the record shows that the restraints “are indeed likely, in the particular context, to harm competition.” *Polygram*, 136 F.T.C. at 348. Online search advertising is a key method for consumers to discover, compare, and reach online contact lens vendors and for lower-priced retailers to compete. IDF 564-65. It enables online sellers to increase brand awareness and to obtain new customers. IDF 497. It is displayed at the key moment when the consumer is more likely to be looking to buy. IDF 498.

For 1-800 Contacts, search advertising is important. From 2004 to 2014, between [REDACTED] percent of 1-800 Contacts’ internet advertising budget was spent on paid search [REDACTED]

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<sup>33</sup> In addition to asserting federal trademark infringement claims under the Lanham Act §§ 32 and 43(a), Respondent’s lawsuits alleged state and common law unfair competition (Utah Code Ann. § 13-5-1 et seq.), federal trademark dilution (15 U.S.C. § 1125(c)), and unjust enrichment, which they claim provide additional justifications for the challenged settlements. See RAB at 2. The state and common law unfair competition claims as well as the unjust enrichment claims are co-extensive with the federal trademark infringement claims, so they do not justify the restrictive settlement terms for the reasons discussed in the text. See *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 558 (10th Cir. 1984) (“This ‘likelihood of confusion’ test is also applicable to Amoco’s . . . state claims of infringement, Utah Code Ann. § 70-3-13 (1953), and its common law claims of unfair competition and deceptive trade practices.”); *Primary Children’s Med. Ctr. Found. v. Scentsy, Inc.*, 2012 WL 2357729, at \*9 n.4 (D. Utah, June 20, 2012), as amended, (July 6, 2012) (“Because [plaintiff’s] state law claims [including unfair competition under Utah Code Ann. § 13-5a-101 et seq. and common law unfair competition] all require a finding of trademark infringement or a likelihood of confusion, the court does not find it necessary to analyze these claims separately [from the federal claims.]”); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1190 (D. Utah 2010) (granting summary judgment on Respondent’s unjust enrichment claim because it did not adequately show trademark infringement; “if Plaintiff were able to obtain payment under unjust enrichment, common law would effectively expand the scope of Plaintiff’s statutory protection”). As to Respondent’s federal trademark dilution claim, this purported justification pertains at most to two agreements. Of the thirteen complaints filed in connection with the challenged settlement agreements, only two asserted federal trademark dilution, and these complaints challenged pop-up ads appearing on 1-800 Contacts’ website, not the display of ads on SERPs in response to searches for trademark terms. Indeed, Respondent stopped asserting trademark dilution claims after 2004, which suggests that even Respondent believed these claims to be either weak or at most peripheral to its case. Respondent’s briefing on appeal does not provide any explanation as to why dilution claims justify the settlements. Nor does it provide any reasons why its dilution concerns would not be adequately addressed by the less restrictive alternatives that Complaint Counsel have proposed. Accordingly, trademark dilution does not justify the Challenged Agreements either.

advertising each year. IDF 66. 1-800 Contacts earns approximately ██████████ of its sales from paid search advertising. IDF 580.

Search advertising is similarly important for 1-800 Contacts' online competitors. The record shows that online retailers have found search advertising much more effective in reaching potential buyers than other types of advertising. For example, AC Lens has found that, compared to other marketing channels, search advertising generates the most new customer orders and the most revenue, at a cost consistent with AC Lens' financial goals. IDF 500-01. Thus, for AC Lens, search advertising is the most effective and important marketing channel to grow its business. IDF 502.

Other online competitors reported similar reliance on search advertising. Vision Direct advertised almost exclusively online. IDF 540. Search advertising "was a major driver" in building its business, including driving traffic to Vision Direct's website and generating new and repeat sales. IDF 542-43. Web Eye Care predominantly relies on paid search advertising, because it has determined that search advertising "drives the most traffic" and orders at an acceptable cost. IDF 556-58. For LensDirect, paid search advertising constitutes its most important marketing channel and has been effective in generating growth. IDF 523. Lens Discounters found that paid search advertising is "essential" to its ability to attract new customers because it reaches customers who are seeking to purchase contact lenses online. IDF 528. For Memorial Eye, search advertising was the "most efficient," form of advertising, which was "critical" to the company's growth. IDF 535, 537. Similarly, search advertising was "[e]specially important" for Walgreens when it began selling contact lenses online because it helped let people know that Walgreens sold contact lenses; it was "an essential form" of advertising for Walgreens to remain competitive with other online retailers of contact lenses. IDF 549-50.

Not only is search advertising in general important, the record shows that search advertising generated by searches for 1-800 Contacts' trademark terms is important. Trademark search is a significant source of 1-800 Contacts' business. IDF 566. It accounts for the substantial majority of 1-800 Contacts' new customer orders attributable to paid search advertising. IDF 570. In 2006, 2007, and 2008, trademark search generated far more orders than non-trademark searches. IDF 572. In 2015, between 20 and 31 percent of 1-800 Contacts' initial web orders came from users searching for 1-800 Contacts' trademark terms. IDF 571. 1-800 Contacts' trademark terms have higher conversion rates<sup>34</sup> than non-branded search terms. IDF 573.

Similarly, for 1-800 Contacts' online rivals, advertising displayed for searches on 1-800 Contacts' trademark terms is important. During the period from 2002 through 2016, Google displayed advertisements for nine of the 14 contact lens retailers that are parties to the Challenged Agreements, as a result of their direct bidding on 1-800 Contacts' trademark terms prior to entering into the agreements. IDF 653. These nine firms found such keyword bidding to be worth the cost, and Google determined their advertisements were sufficiently relevant to

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<sup>34</sup> A "conversion" refers to a sale made over the internet. The conversion rate is the number of times a conversion occurs divided by the total number of ad clicks. IDF 156.

warrant display. *Id.* In addition, parties to the Challenged Agreements consistently testified that, absent the agreements, they would bid, or test bidding, on 1-800 Contacts’ trademark terms and/or remove negative keywords from their advertising accounts. IDF 590 (AC Lens), 595 (Empire Vision), 616 (Lenses for Less), 630 (Vision Direct), 634-35 (Walgreens), 650 (Web Eye Care).

Respondent argues that the Challenged Agreements prohibit ads for only a small number of searches. RAB 17. That argument is contradicted by the evidence. The volume of searches for 1-800 Contacts’ trademark terms is significant. Based on the comScore dataset of searches by users for the period July 2013, through July 2016 (the “comScore dataset”<sup>35</sup>) analyzed by Complaint Counsel’s expert witness, Dr. Susan Athey, 17 percent of search queries for contact lenses were for 1-800 Contacts’ trademark terms. IDF 657. The volume of searches for 1-800 Contacts’ trademark terms in the comScore dataset was similar in size to the collective volume of searches for the top three generic terms (“contact,” “contact lenses,” and “contacts”). IDF 658-59. The 1-800 Contacts search term is the largest, single brand-name search term, according to the comScore data analyzed by Dr. Athey. IDF 660.

The reason that 1-800 Contacts’ rivals’ ads are so important at this key moment is that the rival online sellers offer lower prices, IDF 661, 693, and advertising for those retailers often emphasizes those lower prices. *See* IDF 587, 591, 603, 611, 646, 703, 724; Holbrook, Tr. 1904. That information is valuable: online shoppers for contact lenses are primarily concerned with low prices, IDF 705-08. Yet, in a 2012 consumer survey of 1-800 Contacts’ customers, more than one-third of respondents explained that they initially purchased from 1-800 Contacts because “It Was the Only Online Contacts Site of Which I Was Aware,” IDF 695, 697, and a 2015 AEA Investors Fund analysis based on another survey found that actual price variances were “much more” than consumers thought them to be. RX1228 at 36.

Consumers respond to competitors’ ads displayed in response to searches for 1-800 Contacts’ trademark terms. Based on data analyzed by Complaint Counsel’s expert, Dr. Athey, firms that are currently bidding on “1-800 Contacts,” have a higher conversion rate for those searches than for other search terms. IDF 661. 1-800 Contacts observed that an increase in competitor ads appearing in response to a search for 1-800 Contacts’ trademark terms tends to decrease sales for 1-800 Contacts. IDF 711. For example, in a report covering the week ending September 22, 2007, 1-800 Contacts noted a 6 percent week-over-week drop in trademark paid search orders, in part because of competition from Vision Direct, which had been “advertising in the 2<sup>nd</sup> position on many of [the SERPs for searches for 1-800 Contacts’] branded terms in Google.” IDF 717. *See also* IDF 726 (report for the week ending March 12, 2010: 1-800 Contacts experienced a lower click-through-rate than in prior weeks, which is “likely the result of additional competitor’s ads . . . showing up on our best terms such as *1800contacts* and *1800 contacts*”), 727 (report for the week ending June 11, 2010: 1-800 Contacts’ trademark paid

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<sup>35</sup> ComScore is a company that collects data from a panel of internet users by installing software on consumers’ devices to track their behavior, including collecting information on the screens that users see when they perform searches. IDF 700. Dr. Athey received from comScore detailed online search information from 377,002 internet users in the United States from July 11, 2013, through August 14, 2016, covering all the search queries those users performed on all major search engines and reported at a query-by-query level. IDF 701.



search orders through Google and click-through rates for trademark ads “were slightly softer than [the preceding week] because of increased competition on [1-800 Contacts’] best branded terms”).

Similarly, 1-800 Contacts found that reducing the competitor ads that appear in response to searches for 1-800 Contacts’ trademark terms increased sales. IDF 710. For example, in a report covering the week of June 20, 2008, 1-800 Contacts attributed an increase in orders as being helped in part by “LensWorld finally removing all their ads from all of [1-800 Contacts’] trademark keywords.” IDF 719. *See also* IDF 725 (report for the week ending January 8, 2010: 1-800 Contacts achieved “an all-time record high” for orders obtained through searches for its trademark keywords, due in part to fewer advertisers appearing on searches for 1-800 Contacts’ trademark terms that week, “which always helps improve performance”), 730 (reporting that in late August 2010, orders from new customers coming through search ads on searches for 1-800 Contacts’ trademarks “jumped to the highest level of the year,” due in part to the appearance of “fewer competitors on [1-800 Contacts’] best TM words such as *1800contacts* *1 800 contacts* and *1800 contacts*.”), 723 (report for the week of March 6, 2009: “[t]here are substantially less competitors showing up on our list of monitored TM words . . . in Google[,] which is likely helping improve our TM [conversion rate] and TM order volume.”).

In addition, it is worth highlighting that Challenged Agreements covered 14 different online contact-lens retailers that account for 79 percent of online contact lenses in the United States. IDF 496. That is in stark contrast to the *Clorox* case. There, the court saw a jilted competitor who wanted to use an antitrust claim to negotiate a better trademark settlement. The court recognized that “the antitrust laws do not exist to protect competitors from agreements that in retrospect turn out to be unfavorable to the complaining party.” *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 57 (2d Cir. 1997). The court further expressed its skepticism where the challenged agreement restricted only one brand, PINE-SOL, and left “established large competitors” that are “some of the largest corporations in the country” free to compete, “as these companies have repeatedly done.” *Id.* at 58. Predictably, Clorox was unable to muster much evidence of consumer harm. The court found implausible the assertion by Clorox, a “megabrand with substantial brand equity,” that restrictions on the ability to use the PINE-SOL brand somehow erected an insurmountable barrier to competition. *Id.* The court dismissed as unpersuasive Clorox’s anecdotes of failed products because the trademark allegedly did not fit the new market. The court also rejected Clorox’s theory that only Clorox could provide competition to the LYSOL brand. *Id.* In short, *Clorox* bears very little resemblance to the present case. Unlike the one competitor that was worse off in *Clorox*, the challenged agreements here cover the landscape of online contact-lens retailers resulting in harm to competition overall. And unlike Clorox’s thin evidence of consumer harm, the record here is replete with direct evidence of anticompetitive effects.

The Dissent claims that the disposition of *Clorox* should be the same here. In particular, the Dissent claims that the court in *Clorox* thought “the form and scope of trademark settlement agreements deserves ‘substantial weight’ because the settling parties ‘are in the best position to determine what protections are needed’ and ‘it is usually unwise for courts to second-guess such decisions.’” Dissenting Statement at 19 (quoting *Clorox*, 117 F.3d at 57). But looking at the form and scope of an agreement is at the very heart of a Section 1 analysis. For instance, we

neither ignore nor defer to the parties in assessing the form and scope of an agreement in reverse payment cases because, indeed, the form and scope of the agreement lie at the very core of how parties make a reverse payment. By asking us to simply defer to the parties to a settlement, we fear that the Dissent essentially advocates for application to cases at the intersection of antitrust and trademarks a version of the “scope of the patent” test that was rejected in *Actavis*. We decline to follow that suggestion.

This examination of the context of the particular advertising restraints in the Challenged Agreements demonstrates that anticompetitive effects are likely. Economics and prior cases counsel that the challenged advertising restrictions prevent consumers from obtaining information that would permit price and service comparisons. The record evidence showing the significance of search advertising and searches for 1-800 Contacts trademark terms in particular; the price competition offered by 1-800 Contacts’ rivals; and the consumer responses to online competitors’ ads generated by searches for 1-800 Contacts trademarks confirm that the Challenged Agreements are “indeed likely, in [this] particular context, to harm competition.” *Polygram*, 136 F.T.C. at 348.

#### **4. 1-800 Contacts’ Response to Complaint Counsel’s Showing of Anticompetitive Effects**

1-800 Contacts responds to Complaint Counsel’s showing that the restraints are inherently suspect and likely to have substantial anticompetitive effects by challenging the factual, economic, and legal support for the demonstration of those anticompetitive effects. These challenges are not persuasive.

Respondent and the Dissent argue that the Challenged Agreements affected advertising by only some companies, in only one medium, in response to only a portion of internet searches related to contact lenses. RAB at 17. Of course, the fact that some advertising remained unrestrained does not excuse a restraint affecting a competitively significant subset of ads. While the Challenged Agreements do not prevent all advertising for the online sale of contact lenses, they affect a particularly significant type of advertising for online sales at the crucial moment when sales are about to be made. *See* IDF 661 (finding a higher conversion rate for bids on “1-800 Contacts” than for other search terms). The suppressed ads would have enabled consumers to learn about alternative, lower-priced sellers of contact lenses and to make price comparisons. Prohibiting this particular type of advertising is likely to have substantial anticompetitive effects.

Respondent argues that the ads banned by the settlements could have different effects from advertising in other markets. *See* RRB at 23. Although Respondent points to some attributes of search advertising—some consumers may be conducting navigational searches and expect to see the most relevant results appearing first,<sup>36</sup> and some consumers may be unable to

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<sup>36</sup> Respondent suggests that absent the advertising restrictions rivals’ ads would appear first. Yet “1-800 Contacts’ strategy to search advertising was to spend as much as necessary when bidding on its trademark keywords to meet its goal of ensuring that 1-800 Contacts’ advertisement was the first advertisement displayed in response to searches for its trademark.” IDF 575; CX0935. Viewed in light of this strategy, the advertising restrictions may enable 1-800 Contacts to reduce its bids and pay lower prices, but they do not better satisfy consumer expectations.

distinguish between paid search ads and organic results—Respondent does not identify any record evidence demonstrating that consumers’ purchasing behavior in response to search ads generated by 1-800 Contacts’ trademark terms differs from their response to other advertising. Nor does Respondent identify any other market effects that differ from other contexts. As previously discussed, consumers respond to the presence of rivals’ contact lens ads by clicking on the ads and converting those clicks to sales, even if some consumers are performing navigational searches. IDF 710-19, 723-31. Thus, when consumers are presented with information that informs them of alternative online sellers offering lower prices, they respond to advertising in this market the same way that they do elsewhere.

Respondent similarly argues that the economic literature has not looked specifically at paid search advertising, which involves “complexities” in the algorithms employed by search engines. RRB at 22. Although the algorithms underlying the search auctions are complex, the behavior of consumers and advertiser-sellers in response to this type of advertising is the same as for other types of advertising. Respondent identifies no differences in the responses of market participants, so the fact that economic studies did not specifically examine search advertising does not affect their relevance. As the D.C. Circuit has explained, condemnation of a particular horizontal restraint as inherently suspect looks only for “the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.” *Polygram*, 416 F.3d at 37.

Finally, Respondent argues that a finding that the settlement agreements are inherently suspect is inconsistent with the Supreme Court’s opinion in *Actavis*. See RRB at 22. We disagree. *Actavis* does not stand for the proposition that no restriction in a settlement agreement—even an intellectual property settlement agreement—can be inherently suspect. Indeed, the Supreme Court has often concluded that restraints embedded in settlement agreements are unlawful without resorting to a full rule-of-reason analysis. See *Singer Mfg.; New Wrinkle; U.S. v. Masonite Corp.*, 316 U.S. 265 (1942). Rather, *Actavis* describes how to analyze the reverse payment settlements there at issue. It says that Hatch-Waxman reverse-payment, patent settlements, without more, are not inherently suspect because reverse payments are a special breed of settlement. In particular, the Court recognized that reverse payment settlements are complex cases where the likelihood of “anticompetitive effects depends upon [the payment’s] size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.” *Actavis*, 570 U.S. at 159. Here, Respondent’s agreements take the form of a quintessential advertising restraint that is targeted to interfere with price-setting mechanism among online contact-lens sellers. The restraint involves none of the complexities identified by the Court in conjunction with reverse payments, and there is no reason its competitive harms cannot be established through *Polygram*’s inherently suspect framework.

Putting aside whether the restraints at issue here are properly classified as inherently suspect, Complaint Counsel’s more detailed showing described above and lack of offsetting efficiencies meet the requirements of the rule of reason to support liability. The *Actavis* Court noted that the Commission need not “litigate the patent’s validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory” to show that a reverse payment is anticompetitive. *Id.* at 159.

Rather, “[t]here is always something of a sliding scale in appraising reasonableness,” and as such “the quality of proof required should vary with the circumstances.” *Id.* (quoting *California Dental*, 526 U.S. at 780) (internal citations omitted). The Court stressed: “As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.” *Id.* Here, we simply follow *Polygram*’s framework for structuring the rule-of-reason inquiry in the context of an advertising restriction case and analyze the intellectual property issues in that framework.

## 5. Validity of the Asserted Procompetitive Justifications

As discussed in Section V.A.2, the avoidance of litigation costs through settlement and the protection of trademark rights are cognizable and facially plausible procompetitive justifications because, under the right circumstances, both cost savings and trademark protection can result in enhanced competition and innovation. But Complaint Counsel have shown that the purported procompetitive benefits could have been accomplished through means less restrictive of competition. *See supra* Section V.A.3.a. Even if no less restrictive alternative were available, however, Respondent’s case would falter because it has not shown that its purported justifications have a basis in fact, *i.e.*, that they are valid as well as plausible and cognizable. As we noted in *Polygram*, the respondent “has the burden of producing factual evidence in support of its contentions.” 136 F.T.C. at 350; *see also Mass. Board*, 110 F.T.C. at 604 (“if the efficiency justification is plausible, further inquiry . . . is needed to determine whether the justification is really valid”).

At this point, then, we look closer at Respondent’s asserted justifications and require sufficiently detailed evidence to establish that the justifications are not merely plausible, but actually valid. *See Polygram*, 416 F.3d at 36 (explaining that respondent’s burden at this stage is to show the restraint “in fact” does not harm consumers or has procompetitive virtues). We find that Respondent has not met this burden.<sup>37</sup>

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<sup>37</sup> In addition, the ALJ found that two other justifications suggested by Respondent—increased online sales of contact lenses and minimization of search costs—were unsupported, but Respondent has not challenged those portions of the ALJ’s decision on appeal. Accordingly, Respondent waived its arguments with respect to those justifications. *See* 16 C.F.R. § 3.51(b) (“[a]ny objection to a ruling by the Administrative Law Judge, or to a finding, conclusion, or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived”); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) (“a party seeking to raise a claim or issue on appeal must plainly and prominently so indicate”; otherwise, the issue “will be considered abandoned”). In any event, we agree with the ALJ that the increased sales justification lacks evidentiary support (*see ID* at 188-89), and the asserted benefit from minimization of consumer search costs is neither factually nor legally valid (*see id.* at 184-87 & n.45). *Cf. Polygram*, 136 F.T.C. at 356 (noting expert testimony that an agreement among competitors not to advertise is likely to harm consumers and competition by *raising* consumers’ search costs).

### a. Avoidance of Litigation Costs through Settlement

Although Respondent has identified litigation cost savings, it has not demonstrated that these cost savings would have procompetitive effects. Respondent must provide “some explanation connecting [its] practice[s] to consumers’ benefits.” *Chicago Prof’l Sports, L.P. v. Nat’l Basketball Ass’n*, 961 F.2d 667, 674 (7th Cir. 1992); *see also Polygram*, 136 F.T.C. at 345 (describing legitimate justifications as “reasons why the practices are likely to have beneficial effects for consumers”). But Respondent provides no basis for finding that the litigation cost savings would be passed through to consumers or would otherwise benefit competition in a way that could offset the anticompetitive effects. Capital savings are not cognizable efficiencies in and of themselves, though they may be cognizable if defendant demonstrates that avoidance of capital expenditures provides a tangible, verifiable benefit to consumers by lowering prices or improving service quality. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016). “While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws.” *Law*, 134 F.3d at 1023. Respondent has not demonstrated that the litigation cost savings provide benefits to consumers that could or would offset the competitive harms attributable to its conduct.

Moreover, the litigation settlement justification is at most partial. It has no bearing whatsoever on the Luxottica Sourcing and Services Agreement. That agreement involved no litigation, no settlement, and no litigation cost savings.<sup>38</sup>

The Dissent argues that our decision errs by failing to account for saved litigation costs that do not result in cost savings to consumers. The Dissent claims that our analysis contradicts *Actavis*, which it believes accommodates any saved litigation costs—irrespective of whether the savings passed down to consumers or not. Though not openly stated, the Dissent asks us to take up the *total* welfare standard for evaluating efficiencies, which does not require a showing of how the proffered efficiency benefits consumers.<sup>39</sup> We, however, believe the sounder approach—and the approach that is most consistent with long-standing antitrust practice—would be to ensure that if consumers are harmed by the challenged restraints, Respondent should be required to explain and detail how its restraints actually benefit consumers. The Dissent advocates skipping that step; we decline.

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<sup>38</sup> Section III.B of the Dissent offers considerations that might justify the challenged restraints in the Luxottica Sourcing and Services Agreement. But Respondent did not assert these potential efficiencies as procompetitive benefits and consequently did not attempt to carry its burden of establishing them. Nor has Respondent argued or submitted evidence that the challenged restraint is an ancillary restraint saved by the Luxottica Sourcing and Services Agreement.

<sup>39</sup> *See* Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSP. 155, 157 (2007) (“The proper objective of antitrust should be total surplus, not consumer surplus.”).

## b. Trademark Protections

Respondent and the Dissent argue that 1-800 Contacts' agreements facilitate trademark protection, which allows retailers to market products in a way that reduces the likelihood of consumer confusion and incentivizes brand-building. Both maintain that brand-building, in turn, assures consumers of consistent quality and reduces consumer costs of making purchasing decisions. Respondent's Post-Trial Brief at 36-38, 45; Dissenting Statement at 24-26. Although trademark protection can be a legitimate justification, it does not justify the restraints challenged in this case.

To overcome Complaint Counsel's showing of anticompetitive effects, Respondent must show that trademark protection is more than a procompetitive justification in theory and is, in fact, a valid justification for the restraints challenged here. *See Polygram*, 136 F.T.C. at 349 (explaining that if the respondent fails to refute the plaintiff's detailed showing of competitive harm, the respondent has the burden of showing that "detailed evidence supports its proffered justification"); *Mass. Board*, 110 F.T.C. at 604 (requiring a showing that "the justification is really valid"). We find that Respondent has not carried that burden.

To establish a federal trademark infringement claim under either Lanham Act § 32 (15 U.S.C. § 1114) or § 43 (15 U.S.C. § 1125(a)), a plaintiff must show that use of its mark is likely to cause consumer confusion as to the source, affiliation, or sponsorship of a company's products or services. *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id.* § 1125(a)); *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000). Confusion must be probable, not merely possible, *id.*, and use of the mark must be likely to confound "an appreciable number of reasonably prudent purchasers exercising ordinary care." *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 12 (1st Cir. 2008) (quoting *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996)) (internal quotation marks omitted); *see also Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002); *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 456 (2d Cir. 2004).

Although claims based on keyword bidding have sometimes withstood dispositive motions,<sup>40</sup> apart from a single district court summary judgment decision from over ten years ago,<sup>41</sup> no court has found bidding on trademark keywords to constitute trademark infringement, absent some additional factor, such as a misleading use of the trademark in the ad text that confuses consumers as to the advertisement's source, sponsorship, or affiliation.<sup>42</sup> Rather,

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<sup>40</sup> *See e.g., Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009); *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760-61 (D. Minn. 2009).

<sup>41</sup> *See Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118 (D. Ariz. 2008).

<sup>42</sup> *See* CX8014 at 021 (¶ 43) (Tushnet Rebuttal Report) (noting that the "preeminent expert on internet advertising law . . . has been unable to identify any case in which a defendant lost a trial on likely confusion based on purchases of a plaintiff's trademark as a search engine keyword – despite the filing of over a hundred such cases"); Hogan, Tr. 3459-61 (1-800 Contacts' trademark law expert acknowledging that he was not aware of any court that had found liability based on keyword bidding alone); *USA Nutraceuticals Grp., Inc. v. BPI Sports, LLC*, 165 F. Supp. 3d 1256,

“[c]ourts have consistently rejected the notion that buying or creating internet search terms, alone, is enough to raise a claim of trademark infringement.” *Tempur-Pedic N. Am.*, 2017 WL 2957912, at \*7 (holding, on motion for preliminary injunction, that “[b]ecause the court has concluded that the purchase of AdWords alone, without directing consumers to a potentially confusing website, is unlikely to cause customer confusion, the AdWords will not be included in the injunction”); see *Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc.*, 2015 WL 5311085, \*50 (C.D. Cal. Sept. 10, 2015) (“There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.”).<sup>43</sup> Indeed, Respondent lost the one

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1266 (S.D. Fla. 2016) (“[Plaintiff] points to no case indicating that the simple purchase of advertising keywords, without more, may constitute initial interest confusion. . . .”).

<sup>43</sup> See also, e.g., *USA Nutraceuticals*, 165 F. Supp. 3d at 1274 (denying motion for preliminary injunction; “consumers viewing the advertisements are unlikely to be confused as to what, if any, relationship or affiliation exists” between plaintiff and defendant, as the advertisement “makes clear [who] is the proponent of the particular product”); *Novation Ventures, LLC v. J.G. Wentworth Co., LLC*, 2015 WL 12765467, at \*8 (C.D. Cal. Sept. 21, 2015) (granting motion to dismiss; “[i]f a consumer conducts an Internet search for the term ‘Novation’ and Defendants’ advertisements appear in the search results – again, labeled with the word ‘Ad’ – it would not confuse consumers.”); *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1190-91 (D. Neb. 2015) (denying motion for preliminary injunction; no likelihood of success on claim based on keyword bidding where ads “do not use [plaintiff’s] marks in the advertisement itself, and each is either separated from the search results or plainly labeled as a sponsored advertisement.”); *Goldline, LLC v. Regal Assets, LLC*, 2015 WL 1809301, at \*3 (C.D. Cal. Apr. 21, 2015) (granting motion to dismiss claims based on keyword advertising; “there is simply nothing stated, that if deemed true, constitute[s] commercial use that would likely cause confusion as to the origin or affiliation”); *Infostream Grp., Inc. v. Avid Life Media Inc.*, 2013 WL 6018030, at \*5 (C.D. Cal. Nov. 12, 2013) (granting motion to dismiss; “[plaintiff] cannot plausibly claim that [defendant’s] mere use of keywords caused any consumer confusion”); *Allied Interstate LLC v. Kimmel & Silverman, P.C.*, 2013 WL 4245987, \*6 (S.D.N.Y. Aug. 12, 2013) (granting defendant’s motion for judgment on the pleadings; display of ads “is an indicator of the relevance, not of the source of Defendants’ advertising,” and Google’s labeling of the ads “in no way suggests that it is advertising for or by Plaintiff”); *Gen. Steel Domestic Sales, LLC v. Chumley*, 2013 WL 1900562, \*10 (D. Colo. May 7, 2013), *judgment aff’d*, 627 Fed. Appx. 682, 2015-2 Trade Cas. (CCH) ¶ 79255 (10th Cir. 2015) (after trial, finding no likelihood of confusion due to trademark keyword bidding; “[a]dvertisements on Google appear in a list as distinct and independent entries that internet users can browse and select at will . . . . [T]he connection between the search term entered and the appearance of an advertisement is too attenuated to suggest an actual affiliation.”); *CollegeSource, Inc. v. AcademyOne, Inc.*, 2012 WL 5269213, at \*20 (E.D. Pa. Oct. 25, 2012), *aff’d*, 597 F. App’x 116 (3d Cir. 2015) (granting summary judgment for defendant; no likelihood of confusion found where the surrounding ad context, including separation of sponsored ad links and labeling of sponsored links, decreased any potential likelihood of confusion); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010) (granting motion to dismiss; “it is hardly likely that with several different sponsored links appearing on a page that a consumer might believe each one is the true ‘producer’ or ‘origin’ of the [plaintiff’s] product”); *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 527 F. Supp. 2d 205 (D. Mass. 2007) (finding that trademark keyword purchase did not violate preliminary injunction; because triggered advertisement clearly identified the defendant as the source of the ad, trademark use did not result in a likelihood of confusion but constituted “fair, albeit aggressive, competition not prohibited by the Lanham Act”); *J.G. Wentworth, S.S.C. Ltd. P’ship v. Settlement Funding LLC*, 2007 WL 30115, at \*6 (E.D. Pa. Jan. 4, 2007) (granting motion to dismiss; “Even accepting plaintiff’s allegations as true – i.e., assuming that defendant did in fact use plaintiff’s marks through Google’s AdWords program or in the keyword meta tags for its web site – as a matter of law defendant’s actions do not result in any actionable likelihood of confusion under the Lanham Act.”); *Gov’t Employees Ins. Co. v. Google, Inc.*, 2005 WL 1903128, at \*7 (E.D. Va. Aug. 8, 2005) (on motion for judgment as a matter of law, finding that “plaintiff has failed to establish a likelihood of confusion stemming from Google’s use of GEICO’s trademark as a keyword and has not produced sufficient evidence to proceed on the question of whether the Sponsored Links that do not reference GEICO’s marks in their headings or text create a sufficient likelihood of confusion); cf. *3form, Inc. v. Lumicor, Inc.*, 2012 U.S. Dist. LEXIS 27504, at \*26 (D. Utah Mar. 1, 2012) (granting motion for summary judgment based on use of trademark metatags

infringement case that it pursued to judgment. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (affirming, in relevant part, summary judgment in favor of defendant). As the appellate court explained:

Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.

*Id.* at 1245. Despite the accumulating evidence regarding the weakness of trademark infringement claims, 1-800 Contacts continued to police and enforce the Challenged Agreements and, consequently, continued to extend their anticompetitive effects.<sup>44</sup>

A leading trademark treatise agrees that displays of non-deceptive advertising links arising from competitors' purchases of trademark keywords are not confusing. *See* 5 McCarthy on Trademarks and Unfair Competition § 25A:8 (5th ed. Supp. 2018 update). The author explains that while "a web user may be 'distracted' or 'diverted' by the search engine displaying ads for other sources . . . distraction or diversion is not the same as 'confusion' by the web shopper." Rather, initial interest confusion can occur "only if the web user mistakenly thought she was going to a web site about TOYOTA cars when she clicked on the keyword link for VOLKSWAGEN. That would depend on how clearly labeled was the advertising link for VOLKSWAGEN." *Id.*

We are neither deciding matters of trademark law nor suggesting that to determine whether the Challenged Agreements unreasonably restrain competition, we need to conduct a mini-trial on the merits of the underlying trademark litigations. Respondent's justifications, however, must meet at least a minimum threshold of validity—more than merely surviving challenges as shams. In this case, the agreements restrict a type of competitive advertising that has never been found to violate the trademark laws, and the weight of authority overwhelmingly points to non-infringement. We are not convinced that trademark protection in this case is a valid procompetitive benefit that merits suppressing truthful advertising.

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because "the fact that a competitor's search results appear as one of many options when conducting a web search will not confuse consumers, as they will have different appearances").

<sup>44</sup> Respondent's effort to supply new information in support of its contention that the appearance of competitor ads in response to searches for "1-800 Contacts" generated consumer confusion—by introducing a consumer survey conducted by its expert, Dr. Van Liere—is unpersuasive. We find that survey deeply flawed and skewed in a way that overstates the difference between the percentage of confused consumers in the test group and the percentage of confused consumers in the control group. Among the problems with the survey are the removal of 1-800 Contacts' own ad from the test SERP, even though that ad would generally appear at the top of the sponsored results in the real world (IDF 767, 772-73); the failure to test whether the purported confusion was caused by use of the trademark keyword, rather than by other factors, such as the existence of sponsored links (*see* CX8011 (Jacoby Rebuttal Report) at ¶¶ 7-9, 11-19); and providing more total links in the test SERP than in the control SERP (*id.* at ¶¶ 30, 33(b)). For the reasons described in the Initial Decision, we also find that the expert opinions of Dr. Goodstein and Dr. Ghose, as well as the Memorial Eye customer service records, do not establish that consumers are likely to be confused about source, sponsorship, or affiliation of the sponsored ads. *See* ID at 172-75, 181-84.



The justification for including negative keywords in the agreements is even weaker. Not only is there a lack of support for a finding of confusion, discussed above, but no court has ever found that bidding on a generic keyword (like “contacts”), which may be broad or phrase matched by the search engine to a trademark search, is even a “use.” On the contrary, in the 2010 decision rejecting Respondent’s case against Lens.com, the district court stated:

It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder’s mark in any way, even if that competitor’s advertisement appeared when a *consumer* entered a trademarked *search term*.

*Lens.com*, 755 F. Supp. 2d at 1174 (emphasis in original).<sup>45</sup> Because there is no support for a trademark infringement claim based on a failure to designate negative keywords, Respondent has failed to establish that protecting trademark rights justifies negative keyword agreements between competitors.

Given the inherently suspect nature of Respondent’s advertising restraints and Complaint Counsel’s more detailed showing of likely competitive harm to consumers in the particular context at hand, Respondent’s failure to establish a basis in fact for its asserted procompetitive justifications—a showing that they are valid as well as plausible and cognizable—provides a further basis for condemning its conduct. Even if there were no less restrictive alternatives, Respondent has not established that its anticompetitive restraints in fact have procompetitive virtues. We conclude that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

The Dissent criticizes this Opinion for classifying the challenged restraints as inherently suspect. The Dissent asserts that we have not analyzed the challenged agreements under the rule of reason and therefore risk suppressing procompetitive conduct. These criticisms are misplaced. We rely on the *Polygram* framework because the challenged restraints are of a type that have been routinely condemned as inherently suspect, and *Polygram* furnishes a well-crafted framework for analyzing such restraints. But we also recognize that there may be plausible, cognizable justifications for trademark settlements. In fact, we consider Respondent’s specific evidence in support of those procompetitive justifications and ultimately find the evidence wanting. We also find that Respondent has less restrictive ways of accomplishing those procompetitive justifications and evaluate an extensive record of direct evidence showing anticompetitive effects. In short, though we find these restraints inherently suspect, we ultimately perform the “sedulous” analysis required under the rule of reason. *See Cal. Dental*, 526 U.S. at 781.

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<sup>45</sup> Respondent asserts that, on appeal, the “Tenth Circuit expressly did ‘not resolve [this particular] matter’” concerning whether bidding on generic keywords could be trademark infringement. RRB at 7 (quoting *1-800 Contacts, Inc.*, 722 F.3d at 1243) (brackets in RRB). This misconstrues the Tenth Circuit’s decision. What the appellate court expressly chose not to resolve was whether use of the challenged keywords alone could result in a likelihood of confusion. *1-800 Contacts, Inc.*, 722 F.3d at 1242-43.

## **B. Analysis of the Challenged Agreements for Effects on Consumers Using Direct Evidence of Anticompetitive Effects**

Even if we did not rely on the inherently suspect nature of the restraints in the Challenged Agreements to conclude that there is liability, a second way independently to establish plaintiff's initial burden to show that a particular horizontal restraint has anticompetitive effects is to consider direct evidence of those effects. When there is direct evidence of anticompetitive effects, detailed market analysis and proof of market power is unnecessary. "[S]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *IFD*, 476 U.S. at 460-61 (internal quotation marks omitted); *see also Ohio v. American Express Co.*, 138 S. Ct. at 2285 n.7 (explaining that market definition is unnecessary for the analysis of horizontal restraints when actual anticompetitive effects have been demonstrated).

When plaintiff satisfies the initial burden to show anticompetitive effects using direct evidence, the burden then shifts to the defendant. The defendant can challenge plaintiff's support underlying the initial showing. In addition, defendant can seek to establish procompetitive justifications for its conduct. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Ultimately, the fact-finder must consider whether the anticompetitive harms outweigh any procompetitive benefits.

### **1. Direct Evidence of Anticompetitive Effects for Consumers**

Like Judge Chappell, who considered the evidence only under this mode of analysis, we conclude that Complaint Counsel successfully established their *prima facie* case through direct evidence of two anticompetitive effects: the restriction of truthful advertising and an increase in contact lens prices sold online.

#### **a. Restriction of Truthful Advertising**

Respondent and the Dissent argue that a restriction on truthful advertising does not qualify as an anticompetitive effect; according to Respondent, only reduced output or higher prices for the underlying product is sufficient. RAB at 22-23. Respondent and the Dissent rely on *California Dental*'s statement that "the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves" so that "the question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of [the product being advertised]." RAB at 22 (quoting *California Dental*, 526 U.S. at 776).

But the Court's concern in *California Dental* was that the normal linkage between advertising restrictions and price/output effects in the underlying product market was attenuated in the context of professional services because consumers may not be able to make valid assessments regarding advertising claims about the quality, comfort, or other non-price aspects of dentists' services. *See, e.g.*, 526 U.S. at 778 (citing the "plausibility of competing claims

about the effects of the professional advertising restrictions” as the basis for concluding that “[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown”).

We find Respondent’s and the Dissent’s reliance on *California Dental* misplaced because there is no similar concern that consumers may be unable to assess the information contained in advertising for the sale of contact lenses. The record shows a focus on price advertising by many of 1-800 Contacts’ online rivals. See IDF 587, 591, 603, 611, 646; Holbrook, Tr. 1904. When consumers have a prescription and are shopping for contact lenses, the lenses they purchase are identical—by prescription, brand name, and even type (e.g., daily or biweekly)—regardless of the retailer. IDF 24-25. For such commodity products, consumers can comparison shop. In fact, the Fairness to Contact Lens Consumers Act, which requires prescribers to provide a patient with a portable copy of his or her prescription, “promotes competition in retail sales of contact lenses by facilitating consumers’ ability to comparison shop for contact lenses.” FTC Contact Lens Rule, 81 Fed. Reg. 88526 (Dec. 7, 2016) (review of Rule). Congress apparently had no concern that consumers would be unable to assess competing offers and prices for contact lenses.

Restricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm. As the Supreme Court explained in *IFD*, “a concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher priced services than would occur in its absence.” *IFD*, 476 U.S. at 461-62. We similarly found direct evidence of competitive harm from a showing that there were “significantly fewer discount [residential real estate] listings” available to consumers after an association of real estate brokers adopted rules that limited consumers’ access to information about the availability of lower-priced real estate services. See *Realcomp*, 2007 WL 6936319.

The record demonstrates that the settlement agreements were effective in restricting advertisements from 1-800 Contacts’ rivals. As already described, parties to the agreements consistently testified they would bid on 1-800 Contacts’ trademark terms or remove the negative keywords if the agreements were not in place. See IDF 590, 595, 616, 630, 634-35, 650. Yet, data provided by Google covering the period January 2002 to September 2016 show that the competitors who had been bidding on 1-800 Contacts’ trademark terms ceased doing so almost entirely after entering the Challenged Agreements. IDF 687, 689 (citing CX8006 (Evans Expert Report) at 061-062). Similarly, the use of negative keywords by 1-800 Contacts’ competitors required by the Challenged Agreements prevented ads from being shown to consumers even when the competitor did not bid on 1-800 Contacts’ trademark terms; a second Google data set covering the period from January 1, 2010 to November 2016 showed a substantial decline in advertisements displayed in response to a search that includes a 1-800 Contacts’ trademark term through phrase match to a generic term such as “contacts.” IDF 655, 688, 690 (citing CX8006 (Evans Expert Report) at 056-057). Here, the negative keyword requirement forces 1-800 Contacts’ rivals to override the search engines’ determination that the rivals’ ads are relevant and valuable to consumers. See [REDACTED].

Two models presented by Complaint Counsel's experts predicted the but-for world without the advertising restrictions. Similar to the Google data, they show that the advertising restrictions here substantially reduce truthful advertising provided to consumers. Professor Susan Athey constructed a two-stage model of the but-for world. In the first stage, based on data from the current, actual world, a multinomial logistic regression model predicts consumer click behavior when a consumer conducts a Google search related to contact lenses. The model considers variables for the consumer appeal of the advertised brand, the position of the ad on the SERP, whether the ad is for the seller searched for by the consumer, whether the ad is for 1-800 Contacts, and the propensity of the consumer to click on any ad. Athey, Tr. 766-72. In the second stage, Dr. Athey constructed the ad layout that a consumer would be likely to see in response to a search for 1-800 Contacts if rivals were free to bid on such search terms. That ad layout assumes that, without the advertising restraints in the Challenged Agreements, the SERP triggered by a search for 1-800 Contacts would be similar to the SERP triggered by queries such as "contact lenses" or "contacts." Dr. Athey then applied the model of consumer click behavior from the first stage to the ad layout in stage 2. Dr. Athey's model predicted that, absent the Challenged Agreements, the number of competitors' ads appearing on a SERP would increase from 0.54 to 1.85 per search, IDF 749, and consumer clicks on those ads would increase by 3.5 clicks per 100 searches. IDF 750.<sup>46</sup>

Complaint Counsel's expert, Professor David Evans constructed a model using a different data set and different methodology that produced results consistent with Dr. Athey's findings. One of Dr. Evans' empirical studies relies on the bidding experience of Memorial Eye, an online retailer that offered prices significantly lower than those of 1-800 Contacts. *See* IDF 693. Its advertisements to consumers heavily promoted its low pricing. Holbrook, Tr. 1904. Unlike most online competitors, Memorial Eye continued to advertise against 1-800 Contacts for several

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<sup>46</sup> The Initial Decision lists criticisms of Dr. Athey's model by Respondent's expert, Dr. Anindya Ghose, ID at 158-59, and, without substantive discussion, summarily concludes, "Although Respondent has identified some valid concerns regarding the underlying assumptions of . . . the Athey model . . . Respondent's criticisms do not warrant the conclusion that the model [is] so faulty that [it] should be rejected entirely as unreliable." ID at 160. The Initial Decision gives no indication which criticisms were valid and does not address Dr. Athey's responses to the criticisms. We reject the ALJ's conclusory statement.

Our substantive review of Dr. Ghose's criticisms reveals that the concerns are not valid. Dr. Ghose criticized the model for using searches for generic terms as a proxy when creating ad layouts in the counterfactual world. In response to the criticism, Dr. Athey conducted reasonableness and robustness checks on modified ad layouts. Those checks show that the results Dr. Athey reported are robust, and actually are conservative. *See* CX8010 (Athey Rebuttal Report) at 033-035. Dr. Ghose also claims the appearance of ads by non-settling retailers in the counterfactual shows faulty assumptions. Dr. Athey explains that their appearance does not affect the results because the number of instances is not significant. *Id.* at 037-038. Dr. Ghose contends Dr. Athey's model does not consider whether the settling parties increased advertising spending on generic searches when they could not bid on 1-800 Contacts' trademark terms. Dr. Ghose's suggestion is contrary to the evidence in this case; advertisers indicated that they bid based on the return on investment for each keyword rather than spending a fixed amount on search advertising regardless of the keywords that were permitted. *See, e.g.,* CX9039 (Clarkson Dep.) at 176; [REDACTED]. Finally, Dr. Ghose criticizes the model for failing to include an analysis of additional conversions in the counterfactual world. A model need not estimate everything in order to be valuable; in particular, it need not quantify the number of additional conversions when it estimates the number of additional ad impressions. In any case, the record clearly demonstrates that online sellers obtain sales when they advertise on searches for 1-800 Contacts' trademark terms. IDF 605, 611, 619, 644-46, 714-16, 720.

years after it was contacted by 1-800 Contacts and later sued. Thus, there is a data set showing the extent to which Memorial Eye ads appeared on SERPs generated by search queries for 1-800 Contacts' trademark terms<sup>47</sup> and whether those ad impressions led to consumer clicks for Memorial Eye. *See* CX8006 (Evans Expert Report) at 091-092. Based on the data for Memorial Eye, Dr. Evans projected the number of ads and clicks that would have resulted for the complete set of online rivals that were subject to the advertising restrictions. Dr. Evans' model estimated that, absent the Challenged Agreements, between January 2010 and June 2015, 114 million additional ads for competitors would have been displayed in response to queries containing 1-800 Contacts' trademark terms. IDF 755. The model also estimated that, absent the Challenged Agreements for the same period, clicks for 1-800 Contacts' competitors' ads would have increased by 145,000 and sales for the competitors would have increased by 12.3 percent. IDF 756.<sup>48</sup>

We find that this evidence directly shows that the Challenged Agreements were effective in restricting truthful advertising from being presented to consumers. The Google data showed that competitors largely ceased bidding on 1-800 Contacts' trademark terms, and the but-for models from Drs. Athey and Evans predict the substantial number of ads that were not displayed. In addition, the models show that information those advertisements would have conveyed was valued by consumers who would have clicked on the ads and made additional purchases. Together, this evidence directly shows the Challenged Agreements cut off advertising in a way that interfered with the operation of competitive forces in the online sale of contact lenses and disrupted consumers' mechanisms for comparing and selecting between alternative online sources.

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<sup>47</sup> Memorial Eye did not bid on 1-800 Contacts' trademark terms; its ads were displayed in response to search queries for 1-800 Contacts' trademark terms as a result of Memorial Eye bidding on generic terms such as "contacts" in broad match or phrase match. IDF 617.

<sup>48</sup> The ALJ's assessment of Dr. Evans' model was comparable to his assessment of Dr. Athey's model. The Initial Decision lists critiques by Respondent's expert, Dr. Ghose, but provides no substantive discussion or evaluation of those critiques and ignores Dr. Evans' responses. The ALJ again summarily stated, "Although Respondent has identified some valid concerns regarding the assumptions of . . . the . . . model, Respondent's criticisms do not warrant the conclusion that the model[] [is] so faulty that [it] should be rejected entirely as unreliable." ID at 160.

Again, we reject the Initial Decision's conclusory analysis. A substantive review of the model and the critiques reveals that the criticisms provide no basis for finding the model unreliable. Dr. Ghose argues that [REDACTED] is not representative of other online sellers and it therefore was improper to extrapolate data for [REDACTED] to other online sellers. *See* RX0733 (Ghose Expert Report) at ¶¶ 161-64. Dr. Evans responds that the difference between Memorial Eye and other online sellers is that Memorial Eye did not implement negative keywords when it was threatened with litigation by 1-800 Contacts, whereas other online sellers did. Consequently, the differences between Memorial Eye and other online sellers identified by Dr. Ghose reflect this fact. The increased number of ads for Memorial Eye displayed by search engines compared to other sellers actually provides the basis for the analysis; it is not evidence that Memorial Eye is unrepresentative. *See* CX8009 (Evans Rebuttal Report) at 073-075.

Dr. Ghose also claims the Evans model failed to account for ad activity found in the real world and, therefore, the model overstated the number of incremental impressions and clicks in the counterfactual world. We find there is insufficient evidence this occurred. Dr. Evans designed his methodology to estimate the activity of rival online sellers, and excluded ad impressions that were irrelevant, such as impressions from firms that do not sell contact lenses, *i.e.*, companies that bid on "1-800" because they sell contact information for people and businesses via 1-800 telephone numbers. *See* CX8009 (Evans Rebuttal Report) at 076-077.

Respondent and the Dissent also dispute that *IFD* finds that a restriction on truthful advertising is sufficient as evidence of actual anticompetitive effects. According to Respondent, in that case, the withholding of x-rays from insurance companies was an express restriction on output because x-rays were a service customers wanted. *See RAB* at 23. We disagree. X-rays were taken to assess the need for, and to guide the provision of dental treatment. X-rays were not offered as a separate product independent of dental treatment. Moreover, the Supreme Court’s analysis focused on the informational role of x-rays and the harm to market mechanisms that would flow from withholding that information. *See IFD*, 476 U.S. at 461-62 (“A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.”).

### **b. Increased Online Contact Lens Prices**

In addition to evidence of reduced advertising, Complaint Counsel presented direct evidence of a price effect, which provides a persuasive, independent basis for Complaint Counsel’s *prima facie* case.<sup>49</sup> As the ALJ found, “the evidence in this case proves . . . that at least some consumers have paid, or will pay, prices that are higher than they would otherwise be, absent the Challenged Agreements.” *ID* at 153. As we previously discussed, the record contains evidence that the Challenged Agreements reduced the number of competitor ads, and increased sales for 1-800 Contacts while reducing the sales for its rivals. *E.g.*, *IDF* 710-11, 717-19, 723, 725, 727, 730, 749-50 (citing Athey model’s results that without the Challenged Agreements, consumer clicks on competitor ads would increase by 3.5 clicks per 100 searches and clicks on 1-800 Contacts’ ads would decrease by 2 clicks per 100 searches), *IDF* 756 (citing Evans model’s result that absent the Challenged Agreements sales by competitors would have increased by 12.3 percent).

At the same time, prices charged by 1-800 Contacts were on average [REDACTED] higher than those of its online competitors. *IDF* 692 (citing *CX0547* at 032, *in camera* (1-800 Contacts document showing that prices from three major online rivals were [REDACTED] lower than 1-800 Contacts’ prices in 2006 and [REDACTED] lower than 1-800 Contacts’ prices in 2011); *CX0295* at 063, *in camera* (showing that in January 2014, 1-800 Contacts’ prices were higher than other online contact lens retailers by [REDACTED] per box, [REDACTED] for a six-month supply and [REDACTED] for a twelve-month supply); *RX1228* at 036 (2015 analysis showing that 1-800 Contacts’ prices were higher than those of other online retailers); *CX8007* (Athey Expert Report) at 013-014, 045-051, Exh. D-1 to D-7, *in camera* (calculating that 1-800 Contacts’ prices were [REDACTED] percent higher than online competitors’ prices, on average, for its top

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<sup>49</sup> The Dissent avers that “actual, sustained, and substantial or significant price effects” are required to meet the burden of showing direct evidence of anticompetitive effects. Dissenting Statement at 30. The Dissent claims the direct evidence presented does not meet the legal standard and goes on to recount a list of ways in which a direct effects showing can be satisfied. The Dissent’s view of direct effects evidence, however, is unduly cramped. Courts have recognized instances where parties colluded to withhold information (*see, e.g., IFD*, 476 U.S. 447) and cases where an agreement prevents consumers from gaining access to lower-costing alternatives (*see, e.g., Realcomp*, 635 F.3d at 831-34). The record here supplies more than enough evidence to clear that bar.

ten selling products for the period 2010 to 2016); *see also* CX8003 (Mitha Decl.) at ¶ 4 (“In general, 1-800 Contacts’ prices are higher than Lens Discounters’ by a significant amount. In the past, we have found that 1-800 Contacts’ prices were almost double Lens Discounters’ prices for some products.”).

On the facts of this case, we find the evidence that the Challenged Agreements insulate 1-800 Contacts from normal competitive forces and divert sales from low-priced sellers to a high-priced seller is direct evidence of an increase in price. The higher prices that consumers are paying do not reflect a producer selling a differentiated product, such as a product with new technology or additional features that offer more than the products of low-priced sellers. Instead, the higher prices are a consequence of 1-800 Contacts shielding itself from competitive pressure by preventing consumers from obtaining information that would enable comparison shopping. The economic principles and evidence regarding consumer search previously discussed, *see supra* Section V.A.1, provide the explanation. The record shows that many consumers are unaware of the price difference between 1-800 Contacts and its online competitors. IDF 694 (citing RX1228 at 36 (based on a consumer survey, AEA analysis stated, “Actual price variances [are] much more than perceived price variances”). Restricting the advertising presented to such consumers at the critical time when they are about to make a purchase impedes their ability to compare prices, which leaves them unaware of alternatives to 1-800 Contacts’ higher-priced products.

Further evidence that the Challenged Agreements had actual price effects comes from 1-800 Contacts’ price-matching policy, whereby it offered to meet or beat any price offered by online, or certain other, rivals. *See* IDF 436 (in 2011 1-800 Contacts’ ad copy stated “We Beat Any Online Price”), 437 (referencing 1-800 Contacts’ policy in 2014 to meet or beat rivals’ prices), 438 (quoting 1-800 Contacts’ 2016 policy stating, “We’ll beat any price on every product we carry by 2%”). But to take advantage of the price matching policy, a customer had to contact 1-800 Contacts. IDF 439. By reducing rivals’ ads and consumer clicks on those ads, the settlement agreements necessarily reduced access to the type of information that consumers needed to trigger 1-800 Contacts’ price matches.<sup>50</sup> The Challenged Agreements thus directly interfered with consumers’ ability to trigger discounts.

## **2. 1-800 Contacts’ Response to the Direct Evidence of Anticompetitive Effects**

Because Complaint Counsel have demonstrated anticompetitive effects, the burden now shifts to Respondent. 1-800 Contacts challenges the factual support for the direct evidence of anticompetitive effects and proffers procompetitive justifications for the restraints.

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<sup>50</sup> In fact, many 1-800 Contacts customers are unaware that other online contact lens sellers exist. *See* IDF 697 (citing RX0041 at 0019 (in consumer survey prepared for Berkshire Partners, which was considering acquisition of 1-800 Contacts in 2012, more than one-third of respondents said they initially purchased from 1-800 Contacts because it was the only online site the consumer was aware of), 698 (due diligence for Berkshire Partners in 2012 concluded, “1-800 likely benefits from a sizable segment of uninformed buyers who are simply unaware of the other (and growing) low-priced choices on the internet.”). Display of rivals’ search ads would tend to counter this ignorance.

**a. Respondent’s Challenges to the Direct Evidence**

Respondent and the Dissent challenge the direct evidence of anticompetitive effects on several grounds. First, Respondent argues that Complaint Counsel have presented only the theories of experts, not direct evidence of price effects. We reject this characterization. The opinions of Complaint Counsel’s experts derive from the facts in the record and econometric analysis of those facts. The experts use known facts to quantify the impact of the advertising restrictions on the ads that would otherwise appear and on the consumer responses—including clicks and purchases—thereto. They provide empirical evidence, not economic theory isolated from facts, and the underlying facts are in the record.

Respondent and the Dissent next challenge the premise of higher prices, arguing that 1-800 Contacts offers a higher quality of service, so there is no reason to conclude that its prices are higher on a quality-adjusted basis. RAB at 25-26. Certainly, customer service can be a differentiating factor when a firm sells a commoditized product. *See* CX8007 (Athey Expert Report) at 015. But the record shows that without the Challenged Agreements, consumers would have shifted purchases from 1-800 Contacts to its rivals, which reveals customer preferences for the price/quality combination offered by rivals.<sup>51</sup> At least for these customers, 1-800 Contacts was offering a higher price, even after adjusting for quality.

Other aspects of the record show that 1-800 Contacts’ service levels do not fully explain its higher prices. Professor Athey testified that “[D]irect facts and market data support that there is a price premium [for 1-800 Contacts] and that that price premium is not fully accounted for by service differentials.” IDF 740 (quoting Athey, Tr. 797). This testimony reflects numerous market facts.

Other online sellers judge that they offer comparable service to 1-800 Contacts. *See, e.g.,* [REDACTED]; CX9039 (Clarkson Dep.) at 88 (AC Lens president testifying that AC Lens is “pretty fanatical about service, by trying very hard to make the process convenient and quick, . . . getting orders shipped the day they arrive” and having net promoter scores “consistent with the highest on the internet”). The competitors’ view of service levels was shared by independent evaluators. The investment memorandum prepared by Berkshire Partners as part of the consideration of 1-800 Contacts stated, “[W]e are concerned that 1-800’s premium pricing positioning versus its competitors is unsustainable in the medium- to long-term given the commodity-like nature of contact lenses and 1-800’s insufficiently distinguishable service.” CX1109 at 003.

Other evidence supports the conclusion that 1-800 Contacts’ higher prices are not fully explained by the firm’s service level. Some statements by 1-800 Contacts’ employees express

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<sup>51</sup> Indeed, internal 1-800 Contacts documents suggest that once consumers make a purchase from another online retailer, they are unlikely to make their next purchase from 1-800 Contacts. Based on a small sample of 54 consumers whose most recent purchase was from another online retailer, 17 percent reported that they were likely to make their next purchase from 1-800 Contacts and 71 percent reported that they were not likely to do so. *See* CX1117 at 023. Thus, the customer service differential asserted by 1-800 Contacts did not support a return of customers who had purchased from another online contact lens retailer.



doubt that its service level is sufficient to justify the price premium. *See, e.g.*, CX1086 (email expressing concern that ads by lower priced competitors would lead to reduced 1-800 Contacts sales; comment in the email chain states, “The only other option I see is trying to convince customers that our existing prices are better than they really are or worth the cost. Tough challenge considering that we sell the exact same thing as everyone else.”). Similarly, some of 1-800 Contacts’ documents question the firm’s supposed quality advantage. *See* CX1117-022 (“Other online suppliers achieve satisfaction scores as high as us”). Finally, the need for 1-800 Contacts to offer a price-match policy suggests that the service differential is insufficient to offset the price premium.

Respondent and the Dissent also argue that Complaint Counsel have not shown that 1-800 Contacts’ price was supracompetitive. RAB at 22. We find Complaint Counsel’s showing sufficient. Proof of an anticompetitive effect does not require an econometric model to estimate a precise competitive price in order to establish that the existing price is supracompetitive. Complaint Counsel have, in fact, shown that the price consumers paid was higher with the Challenged Agreements than it would have been had the market been allowed to function without the advertising restraints. In addition to the direct evidence of actual price effects discussed above—the diversion of purchases from low-priced rivals to 1-800 Contacts and the withholding of information needed to trigger 1-800 Contacts’ price match—Dr. Athey testified that “if consumers become more informed, it will be difficult [for 1-800 Contacts] to sustain a price premium and . . . they would thus face a choice, either lose market share in the online channel, and particularly in the search channel, or lower their price. . . . [M]ore likely than not, prices – prices would fall. It’s also possible that [1-800 Contacts] could keep their prices high and – but consumers would use more price match, which would lead to a reduction in the effective price by 1-800 even if the list price stayed high.” Athey, Tr. 797-98

Similarly, Respondent and the Dissent argue that because 1-800 Contacts’ profit margins [REDACTED], even as the number of settlement agreements increased, the evidence contradicts an inference that the agreements raised prices to supracompetitive levels. RAB at 22, 26. We disagree. As an initial matter, measuring profit margins in an economically meaningful manner is difficult, and Respondent’s assertion gives us no basis to conclude they were properly measured. Moreover, [REDACTED] margins do not necessarily mean prices did not rise; without competitive pressures, costs may have risen as prices increased, [REDACTED]. Finally, if 1-800 Contacts started with a profit margin reflecting supracompetitive prices, there is no reason to expect its margin to increase. In fact, 1-800 Contacts was the incumbent online seller, with a dominant share of online sales throughout this period. *See* IDF 69; CX0055-009 (2004 1-800 Contacts strategy memo identifying “Market Leadership” as a strength and stating that 1-800 Contacts “leads US phone/internet retail market” in “size” and has “20 x unaided brand awareness of online competitors”); CX0526-007; Coon, Tr. 2668-70. Consequently, 1-800 Contacts’ [REDACTED] profit margin is consistent with a conclusion that the Challenged Agreements prevented the growth of online rivals when they entered the market, thus preventing the erosion of 1-800 Contacts’ supracompetitive margins.

Consequently, we find that Complaint Counsel have established a *prima facie* case of anticompetitive harm through direct evidence of the restriction of truthful advertising and through direct evidence of price increases.

## **b. Respondent’s Procompetitive Rationales for the Advertising Restraints**

Respondent may rebut Complaint Counsel’s *prima facie* case by establishing procompetitive justifications that outweigh the anticompetitive harms. Respondent has identified two justifications—the settlement of costly litigation and trademark protection—that we have found cognizable and facially plausible. *See supra* Section V.A.2. But, as discussed above in our analysis of the challenged restraints as inherently suspect, Respondent fails to sufficiently support its asserted justifications, and Complaint Counsel have demonstrated that the challenged advertising restraints are not reasonably necessary to achieve the asserted benefits. *See supra* Sections V.A.5 and V.A.3.a. In these circumstances, direct evidence of anticompetitive harm provides a second, independent basis for concluding that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

## **C. Analysis of the Challenged Agreements for Effects on Search Engines**

In addition to harm to consumers, the Complaint alleges that the Challenged Agreements harm search engines by, *inter alia*, unreasonably restraining price competition in certain search advertising auctions, preventing search engine companies from displaying to users the array of advertisements that are most responsive to a user’s search, and impairing the quality of service provided to consumers by search engine companies. Compl. ¶ 31a-d. Despite the allegations in the Complaint and the presentation of evidence on the issue, and contrary to Commission rules,<sup>52</sup> Judge Chappell determined that the “Initial Decision need not, and does not, . . . determine whether or not the Challenged Agreements have anticompetitive effects in the form of harm to search engines.”<sup>53</sup> ID at 166.

Our review of the record reveals that Complaint Counsel have presented a *prima facie* case of anticompetitive harm to search engines based on direct evidence of actual harm.<sup>54</sup>

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<sup>52</sup> Commission Rule of Practice 3.51(c) states “The initial decision shall include a statement of findings of fact . . . and conclusions of law, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . .” 16 C.F.R. §3.51(c).

<sup>53</sup> The ALJ’s decision not to address an independent theory of liability based on effects for search engines is particularly troubling because Judge Chappell omitted provisions from the proposed order that addressed “conduct, such as price-fixing and market allocation.” The ALJ reasoned that the provisions are “too far removed from the unlawful conduct found to exist in this case to conclude that the provisions . . . are justified as reasonably related, fencing-in provisions.” ID at 195-96. The deleted provisions addressed conduct related to the allegations regarding search engines. They are unrelated to the unlawful conduct found by the ALJ only because he failed to address all of the Complaint’s allegations. Complaint Counsel have not requested restoration of the deleted provisions, and in any event, we believe the Order without those provisions provides an effective remedy to harm against search engines.

<sup>54</sup> Alternatively, we could evaluate the Challenged Agreements under the inherently-suspect framework. For a restraint that “operates as an absolute ban on competitive bidding,” “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978). Economic learning clearly shows that cooperative bidding strategies among rivals impair competition, by raising what they can charge for goods or services or reducing what they pay when bidding to buy from a third party. *See* CX8006 (Evans Expert Report) at 070 & n.167. Indeed, in many contexts, bid rigging may

Absent a valid procompetitive justification, this provides a third, independent basis to find liability in this case.

Under the terms of the Challenged Agreements, 1-800 Contacts and its online rivals agreed to refrain from bidding in particular search-advertising auctions. Online rivals agreed not to bid when the consumer's search is for 1-800 Contacts' trademark terms, and 1-800 Contacts reciprocally agreed not to bid on the trademark terms of its rivals. The Challenged Agreements thus reduce the number of bidders participating in the auctions because the parties have agreed not to compete.

The record shows that the Challenged Agreements resulted in actual harm to search engines. Witnesses from both Google and Bing explained that a reduction in the number of search-advertising auction participants offering relevant ads<sup>55</sup> reduces the price paid by the auction winners and reduces the revenue for the search engine. Google's Director for Ads Quality testified that when advertisers that previously appeared on the SERP stop appearing,

[REDACTED] Juda, Tr. 1157, *in camera*. Bing's partner scientist in charge of Bing Ads similarly stated,

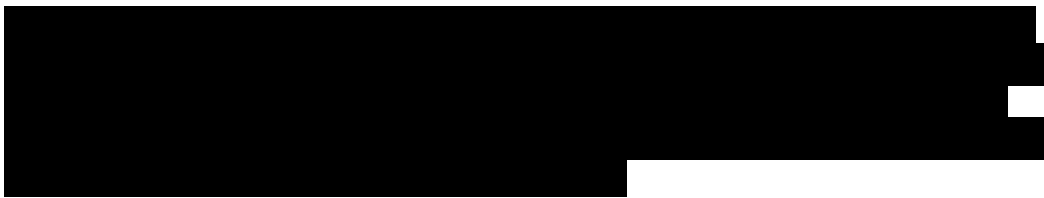
[REDACTED]

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be condemned as a *per se* offense. See, e.g., *United States v. MMR Corp.*, 907 F.2d 489, 496 (5th Cir. 1990) (finding no conceptual distinction between bidding high and "backing away from bidding" as means for carrying out a potentially *per se* illegal agreement to rig bids); *COMPACT v. Metro. Gov't*, 594 F. Supp. 1566, 1575-77 (M.D. Tenn. 1984).


As we previously discussed, Respondent has advanced legitimate procompetitive justifications, which, under the inherently-suspect framework, trigger a need for consideration of less anticompetitive alternatives to achieve the proffered procompetitive justifications or further factual findings and analysis regarding the likelihood of anticompetitive effects in the particular context. Respondent also has the burden of showing that the restraints in fact have the asserted procompetitive virtues. We already have addressed the availability and workability of alternative settlement terms that would be less restrictive of competition, *see supra* Section V.A.3.a., as well as Respondent's failure to show that its asserted justifications are valid, not merely plausible. *See supra* Section V.A. 5. A further showing of the likelihood of anticompetitive effects in the particular context would involve assessing the evidence that we discuss in the text below. Consequently, both modes of analysis rely on the same evidence, and we limit our full exposition regarding anticompetitive effects for search engines to the latter mode of analysis.

<sup>55</sup> Under the second-price auction used by search engines, if additional bidders enter the auction, but all of them have ads determined by the search engine algorithm not to be sufficiently relevant to consumers, then the increased number of bidders would not affect the price paid by the highest ranked advertiser. If some of the bidders have sufficient relevance (*i.e.*, a higher second highest AdWords score), the price paid by the advertiser with the first position would be higher. IDF 219.

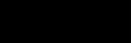


CX8005 (Iyer Decl.) at 006, *in camera*; IDF 243.

Here, we know the ads are sufficiently relevant to affect prices. During the period from 2002 through 2016, Google served advertisements for nine of the fourteen online contact lens sellers who were parties to the Challenged Agreements based on those firms' bids on the 1-800 Contacts trademark terms before they entered into the Challenged Agreements. IDF 653. This demonstrates that Google determined the ads were sufficiently relevant to be displayed, which indicates the ads would have affected the cost-per-click prices charged to the advertisers. *Juda, Tr. 1151, in camera*

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*see also* IDF 219 (describing the price effect of an additional bidder in a second-price auction used by search engines).

The record contains direct evidence of these price and revenue effects. 1-800 Contacts' internal documents acknowledge that one effect of the Challenged Agreements was reduced search advertising costs. A 2009 email from 1-800 Contacts' former Senior Search Marketing Manager explained that one part of 1-800 Contacts' "[t]rademark keyword management process" was to "[e]nforce trademark policy to remove competitors which in turn drives down how much we pay per click." CX0935; *see also* CX0051 at 007 (Presentation on Search Overview describing bid management for trademarks: "• Keep competitors & affiliates off • Low competition = low price"); CX0658 at 001 (weekly marketing report stating, "Compared with recent weeks, we saw fewer competitors showing on our [trademark] keywords this week, which helped drop our spend for these terms."); CX0915 (July 28, 2008 email from 1-800 Contacts' Senior Search Marketing Manager stating, "TM CPCs [trademark costs-per-click] . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this week (both local and national retailers), which increased competition and CPCs [costs-per-click] for our top terms.").

Dr. Evans' model, which estimated the net change in the number of rival ad impressions that would have been shown without the advertising restrictions, showed that the bidding restrictions in the Challenged Agreements reduced 1-800 Contacts' cost-per-click on its trademark keywords. The model estimated that the agreements reduced the prices paid by 1-800 Contacts by  percent. CX8006 (Evans Expert Report) at 076 ¶ 168; Evans, Tr. 1648-50, *in camera*. Dr. Evans concluded that "[t]he empirical analysis of the impact of the agreements on 1-800 Contacts' costs of bidding on its [brand name keywords] confirms" that "agreements among competitors not to enter into auctions would have a material impact on price." CX8006 (Evans Expert Report) at 077 ¶ 169. The lower prices paid by 1-800 Contacts

are a result of agreements with its competitors not to bid at auctions, and cause a competitive injury to the search engine.<sup>56</sup>

The Challenged Agreements also harm both the search engines and consumers by removing advertisements that otherwise would have been displayed, thereby decreasing the quality of the search engines' product. Search engines seek to show the most relevant ads to consumers; after all, search engines receive payment only when a consumer clicks on an ad. *Juda, Tr. 1072*. Having access to a larger number of relevant ads allows search engines to better fill SERPs with relevant ads that are valued by consumers. Bing's partner scientist in charge of Bing Ads explained that reducing the number of bidders



CX8005 (Iyer Decl.) at 005 ¶¶ 31-32, *in camera*.

Dr. Evans's model estimated that without the Challenged Agreements, Google would have displayed more than 100 million additional ads between January 2010 and June 2015. CX8006 (Evans Expert Report) at 010. Dr. Evans concluded that this reduction in the number of relevant ads displayed reduced the quality of the product offered by search engines and diminished the value of search engine service to consumers. *Id.* at 078. Dr. Athey's model similarly showed that many additional ads would have been displayed to consumers if the Challenged Agreements were not in place—with the number of competitor ads per search on 1-800 Contacts' trademark terms more than tripling. IDF 749; CX8010 (Athey Rebuttal Report) at 072. Her model also showed that those additional ads were valued by consumers; the model showed that consumers would have increased their clicks on competitors' ads. *See* CX8007 (Athey Expert Report) at 029-034.

Consequently, we find that Complaint Counsel have satisfied their initial burden and established a *prima facie* case of anticompetitive harm to search engines through direct evidence of reduced auction prices and reduced quality of SERPs presented to consumers. The burden now shifts to Respondent. Here, Respondent challenges the factual basis underlying the direct evidence of anticompetitive effects. In addition, Respondent again proffers its procompetitive justifications.

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<sup>56</sup> Contrary to Respondent's argument that Complaint Counsel failed to prove anticompetitive harm to search engines because Complaint Counsel failed to define a relevant antitrust market for paid search advertising, RRB at 18-19, proof of actual detrimental effects does not require market definition or proof of market power. *See IFD*, 476 U.S. at 460-61; *American Express*, 138 S. Ct. at 2285 n.7; *see also supra* Section V.B.

Respondent argues that the price effects for search engines occur only if “all other things [are] equal.” RRB at 19. Respondent argues that Complaint Counsel failed to demonstrate any impact on search engines’ revenue because the bidding restrictions would merely have caused advertisers to shift their bids to other keywords. Respondent would have us assume that denying advertisers access to their first-choice of keywords and forcing them to turn to what they consider less desirable alternatives has no effect on their search advertising spending and no effect on the quality of search engine results. The record contradicts Respondent’s argument. 1-800 Contacts paid less per click as a result of the Challenged Agreements. *See, e.g.*, CX0935; CX0051 at 007; CX0658 at 001; CX0915. Also, advertisers indicated that they bid based on the return on investment for each keyword rather than spending a fixed amount on search advertising regardless of the keywords that were permitted. *See, e.g.*, CX9039 (Clarkson Dep.) at 176; [REDACTED]. Preventing 1-800 Contacts’ online rivals from bidding on their first choices for keywords, leaving them to bid only for keywords that they value less, reduced those retailers’ demand for search advertising, reduced their purchases of search advertising, and reduced the search engines’ revenues.

While avoiding litigation costs through settlement and trademark protection are cognizable and facially plausible justifications, *see* Section V.A.2, reliance on those justifications falters for the reasons articulated above. *See supra* Sections V.A.3.a and V.A.5. Consequently, without an offsetting, valid procompetitive justification, the anticompetitive harm to search engines caused by the Challenged Agreements is a further, independent basis for concluding that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

## **VI. REMEDY**

The Commission is empowered to enter an appropriate order to prevent a recurrence of the violation. 15 U.S.C. § 45(a)(2); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (the Commission is permitted “to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices” in the future). It has considerable discretion in fashioning an appropriate remedial order, so long as the order bears a reasonable relationship to the unlawful conduct found to exist. *See FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946). “The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past,” but “must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

To remedy Respondent’s violation of Section 5, the ALJ issued an Order that bars 1-800 Contacts from agreeing with any seller of contact lens products to limit participation in online search advertising auctions (including restricting the use of keywords or requiring the use of negative keywords) or to limit online search advertising. ID at 203 (ALJ Order Paragraph II). The ALJ’s Order contains a carve-out clause regarding future litigation. The carve-out confirms that that Order does not prohibit Respondent from initiating or prosecuting a lawsuit; communicating to any seller its intention to initiate or prosecute a lawsuit; or implementing or enforcing an order entered by any court of law, including an order approving a litigation settlement. *Id.* The ALJ’s Order also requires Respondent to cease enforcing existing

agreements that are inconsistent with the Order. ID at 203 (ALJ Order Paragraph III). The ALJ's Order contains a number of notification requirements in connection with Respondent's future litigation and settlements. ID at 203 (ALJ Order Paragraph IV).

Respondent argues that the ALJ's Order encroaches on Article III courts' authority to enforce the existing settlements. It asks the Commission to delete all restrictions in the ALJ's Order on continued judicial enforcement of the existing settlements, while only barring 1-800 Contacts from entering into similar agreements in the future without judicial approval. RAB at 42-43. Respondent also argues that the ALJ's Order violates 1-800 Contacts' Fifth Amendment rights by retroactively depriving it of the ability to enforce its trademark rights, in violation of the Due Process and Takings Clauses. RAB at 43-45.

Complaint Counsel also ask the Commission to modify the ALJ's Order. CCB at 47-50. They urge the Commission to restore the original language that they had proposed for the care-out and that the ALJ subsequently changed. Specifically, they would remove the language that provides that the ALJ's Order does not prohibit Respondent from implementing or enforcing the order entered by any court of law, "including an order approving a litigation settlement," and would replace this with language providing that the Commission's Order does not prevent Respondent from implementing or enforcing the order issued by any court of law "at the conclusion of a contested litigation." *Id.* at App. B ¶ II.A-B (emphasis omitted).

#### **A. Enforcement of the Challenged Agreements**

Respondent asserts that the ALJ's Order improperly trespasses on Article III courts' authority. We disagree. The ALJ's Order restricts *Respondent* from enforcing or attempting to enforce the requirements in an existing agreement or court order that are inconsistent with the remedial provisions imposed by the Commission.<sup>57</sup> This does not direct or limit a court; it only restrains 1-800 Contacts. Our challenge here has focused on 1-800 Contacts' conduct in entering and policing private agreements, and our remedy governs 1-800 Contacts' conduct in continuing to enforce those agreements. The fact that a small number of 1-800 Contacts' private agreements have been embodied in consent orders does not remove them from our administrative review; the private agreements they entail remain subject to antitrust scrutiny and the Commission's remedial authority. *Cf. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519-22 (1986) (distinguishing giving effect to an obligation created by litigants' private agreement from giving effect to the power of federal courts unilaterally to impose that obligation); *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 264-66 (3d Cir. 2017) (incorporation into a consent order of a private settlement agreement did not inoculate it from antitrust scrutiny under *Noerr-Pennington* principles).

Moreover, Respondent's proposed modification of the ALJ's Order would allow it to continue enforcing restrictions that already have been found unlawful under the FTC Act. Provisions that have been found to violate the antitrust laws are unenforceable. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 80 (1982) (defense to an action based on contract is appropriate "where the judgment of the Court would itself be enforcing the precise conduct made unlawful

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<sup>57</sup> The Order also requires 1-800 Contacts to take whatever action is necessary to vacate or nullify the provisions in its existing agreements or court orders that are inconsistent with the Commission's remedial order.

by the Act”) (quoting *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959)). Moreover, under the FTC Act, the Commission “*is directed to prevent* persons, partnerships or corporations . . . from using unfair methods of competition in and affecting commerce,” 15 U.S.C. § 45(a)(2) (emphasis added), and, upon finding a violation, “*shall* issue and cause to be served on [the respondent] an order requiring such person, partnership or corporation to cease and desist from using such method of competition . . . .” 15 U.S.C. § 45(b) (emphasis added). Given that the Commission has found that Respondent’s agreements violate the FTC Act, an order directing Respondent to cease enforcing the unlawful provisions is consonant with, and indeed integral to, the governing statutory scheme.

Respondent also claims that the Order violates its Fifth Amendment rights. Specifically, Respondent asserts that condemnation of the Challenged Agreements establishes a new trademark rule, and retroactive application of that rule to 1-800 Contacts’ settled lawsuits is inequitable and violates the Due Process and Takings Clauses. There are a number of problems with this argument.

First, we are not establishing a new trademark rule; indeed, we make no ruling on any trademark issue at all. We hold only that, based on our assessment of existing trademark case law, Respondent has not presented sufficient evidence to establish the validity of a procompetitive benefit that might outweigh the anticompetitive harm of the Challenged Agreements, and that any such benefit could have been achieved by less anticompetitive means.

Second, the Order does not apply retroactively. It does not levy fines, determine damages, or impose any other sanctions for Respondent’s entry into and prior enforcement of the Challenged Agreements. Rather, the Order prohibits 1-800 Contacts from enforcing existing settlements in the future and from entering into new agreements containing the unlawful terms. Injunctive relief is inherently forward-looking. That it arises from past conduct does not render it retroactive. *See Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 273–74 (1994) (“When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. . . . [R]elief by injunction operates *in futuro*.”) (quotation marks omitted); *Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir. 1990) (the fact that prospective relief arises out of a past injury does not render an otherwise forward-looking injunction retroactive).<sup>58</sup>

Third, the Order is not novel, either in substance or in effect. It should not surprise Respondent that its agreements with competitors to restrict advertising and bidding were subject to an antitrust challenge. Antitrust has long barred rivals’ agreements regarding advertising and bidding restrictions. *See supra* Sections V.A.1.a and V.A.3. In fact, the District Court that rejected 1-800 Contacts’ trademark claims against Lens.com gave Respondent a clear warning in 2010: “Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge.” *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d at 1188.<sup>59</sup> Moreover, remedies requiring defendants to reverse an unlawful course of conduct, even

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<sup>58</sup> Even as to the future, the Order preserves 1-800 Contacts’ ability to defend its trademark rights. The Order states, “[N]othing in [Paragraphs II.A or II.B] shall prohibit Respondent from . . . initiating or prosecuting a lawsuit . . . .” Final Order ¶¶ II. A-B.

<sup>59</sup> Respondent was aware even earlier that antitrust considerations might preclude enforceability of its settlements. In a letter dated January 7, 2008, Vision Direct’s counsel wrote to 1-800 Contacts’ trademark counsel to express



if the defendant's circumstances have changed, are common. *See, e.g., ProMedica Health Sys., Inc.*, 2012 WL 2450574, at \*66-67 (F.T.C. June 25, 2012) (ordering divestiture after consummated merger notwithstanding the costs of unwinding already-consolidated services), *petition for review denied*, 749 F.3d 559 (6th Cir. 2014). Indeed, the Supreme Court confirms that “both within the settlement context and without, the Court has struck down overly restrictive . . . agreements.” *Actavis*, 570 U.S. at 150.

Respondent asserts, in effect, that it has a constitutional right to continue to enforce illegal agreements in perpetuity. It does not. As the Supreme Court stated:

Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts.

*Fleming v. Rhodes*, 331 U.S. 100, 107 (1947). We reject Respondent's arguments that the Order violates the Fifth Amendment.

## **B. Enforcement of Future Court Orders**

As initially proposed by Complaint Counsel, the remedial order included a provision specifying that nothing in the subparagraph that bars 1-800 Contacts from agreeing with any seller of contact lens products to limit online search advertising prohibits Respondent from “implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation.” The ALJ changed this carve-out to specify that nothing in the subparagraph prohibits Respondent from “implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement.”<sup>60</sup> Complaint Counsel contend that this modification permits recurrence of the very conduct found in this proceeding to be unlawful: “1-800 can file lawsuits, exact the same agreements with rivals, and place them before a court—where they will likely be approved.” CCB at 48. Respondent argued to the ALJ that the original language—limiting the exemption to court orders entered at the conclusion of contested litigation—would interfere with the ability of Article III courts to issue orders approving settlements and dismissing litigation. ID at 193.

We find Complaint Counsel's concerns overstated. The ALJ's carve-out allows “implementing or enforcing court orders.” It does not detract from the Order's prohibition against *entering agreements* with sellers of contact lens products to limit participation in search advertising auctions or to limit search advertising. Moreover, the ALJ modified the proposed

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“serious concerns regarding the enforceability of the Agreement, particularly as it relates to the implementation of negative key words” because such an agreement “creates an unacceptable risk of violating . . . Section 1 of the Sherman Act.” CX0141-001.

<sup>60</sup> The ALJ also attached the same proviso to Subparagraph II.A, which bars 1-800 Contacts from agreeing with any seller of contact lens products to limit participation in search advertising auctions.

order in a second way, designed to mitigate concerns that courts will issue anticompetitive decrees: he added a provision requiring Respondent to “[p]rovide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order.” ID at 203 (ALJ Order Paragraph IV.B.5). The ALJ’s Order thus preserves Respondent’s ability to implement court orders while ensuring that courts are made aware of the possible anticompetitive consequences before their orders are entered. Nevertheless, in addition to the ALJ’s modification, we also require Respondent to notify the Commission ten days before entering any stipulated order with a court and submitting a copy of the order at the time of notification. Such a notification provision will enable the Commission to intervene and apprise the court of any anticompetitive harm arising out of any stipulated order entered into by the Respondent. We find that the ALJ’s Order in conjunction with our notification provision confers adequate protection.<sup>61</sup>

## **VII. CHALLENGES TO THE LEGITIMACY OF THE FTC’S ENFORCEMENT PROCEEDING**

Finally, Respondent advances two arguments that contend that aspects of this enforcement proceeding lack legitimacy. One contention is that the Commission lacks a quorum. RAB at 46. That argument was advanced during a period when the FTC had two sitting Commissioners. Subsequently, however, additional Commissioners have joined the Commission, and the FTC currently has its full complement of five Commissioners to address this appeal. Respondent’s quorum arguments are therefore moot.

Respondent also maintains that this proceeding is unconstitutional because “it was conducted by an ALJ, an ‘inferior Officer[.]’ of the United States that Congress has improperly insulated from control by the executive branch by making Commissioners removable only for cause and authorizing them to remove ALJs only for cause.” RAB at 45 (citations omitted). Respondent did not raise this issue in its pleadings or while the matter was pending before the ALJ, but rather waited until the ALJ had ruled against it before first challenging the constitutionality of his functions in a single sentence on appeal. By waiting until this late date, Respondent has waived this claim. *See In re LabMD, Inc.*, 2015 WL 5608167, at \*2 (F.T.C. Sept. 14, 2015). By compressing its presentation of this broad issue into a single sentence, Respondent has failed to present a complete showing of constitutional harm. *See Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986) (refusing to consider the merits of a for-cause termination claim when the hospital raising the constitutional challenge had “not laid a proper foundation for its assault” on the FTC’s structure).

Such issues aside, the FTC’s ALJ occupies a different role than the Public Company Accounting Oversight Board (PCAOB) found to be improperly insulated from presidential control in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492-98 (2010), relied upon by Respondent. The FTC’s ALJ performs adjudicative rather than enforcement or policymaking functions, is subject to more Commission oversight, and is part of a well-established statutory

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<sup>61</sup> We do make one small additional change. The ALJ’s Order prohibits Respondent from entering into any agreement with a seller of contact lens products to “regulate” any search advertising. Lest this be interpreted to prohibit agreements to disclose the identity of the rival seller or to disclaim its affiliation with 1-800 Contacts, we have included an additional provision expressly permitting use of such less restrictive alternatives.

structure that has been in place for more than 70 years. In addition, if the Administrative Procedure Act’s “good cause” standard for removal is properly construed—*i.e.*, to allow removal of an ALJ for failure to perform adequately or to follow agency policies, and to limit the Merit Systems Protection Board’s role to determining whether a factual basis exists for the agency’s proffered grounds for removal—the APA gives the President a constitutionally adequate degree of control over ALJs. *See* Brief for Respondent Supporting Petitioners at 48-53, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130). Moreover, unlike in *Lucia v. SEC*, where the Court found that the ALJ was unconstitutionally appointed by SEC staff members, the FTC’s ALJ was appointed by the Commission, which is a “Head[] of Department[.]” *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

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In this opinion, we have evaluated traditional concerns of antitrust law—the anticompetitive harms that flow when rivals agree to restrict truthful advertising and to limit their participation in auctions—in a contemporary context involving online shopping and advertising via internet search engines. Our analysis has accounted for and given weight to justifications based on trademark protection as well as the benefits of settling costly litigation. We hold that Complaint Counsel have shown competitive harm by demonstrating the inherently suspect nature of the restraints at issue. We have determined that Respondent has asserted cognizable and plausible procompetitive justifications, requiring Complaint Counsel to make a further showing. Complaint Counsel have made that showing, both by demonstrating the availability of less anticompetitive alternatives to the challenged restraints and by showing in greater detail that those restraints are indeed likely in the particular context to harm competition. In contrast, Respondent has failed to establish that its justifications are not merely plausible, but in fact valid. We also hold that Complaint Counsel have shown competitive harm by providing direct evidence that the challenged agreements resulted in actual anticompetitive effects. Respondent, however, failed to rebut Complaint Counsel’s direct evidence and could not provide sufficient efficiency justifications that would outweigh the evidence of anticompetitive effects. Consequently, we conclude that the advertising restrictions in the Challenged Agreements between Respondent and 14 of its rival online sellers of contact lenses constitute unfair methods of competition, in violation of Section 5 of the FTC Act, and we require Respondent to cease and desist from enforcing the unlawful provisions in its existing agreements and from entering into similar agreements in the future.

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