

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



In the Matter of

1-800 Contacts, Inc.,  
a corporation

Docket No. 9372

**RESPONDENT 1-800 CONTACTS' SECOND CORRECTED PRE-TRIAL BRIEF**

Gregory P. Stone (gregory.stone@mto.com)  
Steven M. Perry (steven.perry@mto.com)  
Garth T. Vincent (garth.vincent@mto.com)  
Stuart N. Senator (stuart.senator@mto.com)  
Gregory M. Sergi (gregory.sergi@mto.com)  
Zachary Briers (zachary.briers@mto.com)  
Julian Beach (julian.beach@mto.com)  
MUNGER, TOLLES & OLSON LLP  
350 South Grand Avenue  
Los Angeles, California 90071  
Phone: (213) 683-9100  
Fax: (213) 687-3702

Justin P. Raphael (justin.raaphael@mto.com)  
MUNGER, TOLLES & OLSON LLP  
560 Mission Street, 27<sup>th</sup> Floor  
San Francisco, California 94105

Chad Golder (chad.golder@mto.com)  
MUNGER, TOLLES & OLSON LLP  
1155 F Street NW, 7<sup>th</sup> Floor  
Washington, DC 20004

Sean Gates (sgates@charislex.com)  
CHARIS LEX P.C.  
16 N. Marengo Avenue, Suite 300  
Pasadena, California 91101  
Phone: (626) 508-1717  
Fax: (626) 508-1730

TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
BACKGROUND .....	3
I. ALTHOUGH EYE CARE PROFESIONALS DOMINATE THE CONTACT LENS RETAIL INDUSTRY, CONSUMERS HAVE SEVERAL RETAIL OPTIONS.....	3
II. 1-800 CONTACTS’ BUSINESS MODEL IS TO COMPETE WITH EYE CARE PROFESSIONALS BY OFFERING BETTER SERVICE AND LOWER PRICES.....	5
A. 1-800 Contacts Led Efforts to Promote Greater Competition Between ECPs and Other Retailers.....	5
B. 1-800 Contacts Invests Heavily in Customer Service to Compete with ECPs.....	6
III. INTERNET ADVERTISING .....	8
A. Overview of Internet Advertising .....	8
B. Paid Search Advertising.....	9
1. Organic Search Results .....	10
2. Paid Search Results .....	10
3. The Complexity of Search Engine Auctions .....	11
C. Search Engines’ Trademark Policies .....	13
D. 1-800 Contacts’ Paid Search Practices .....	13
E. Other Retailers’ Paid Search Practices .....	15
IV. 1-800 CONTACTS’ TRADEMARK LITIGATION AND SETTLEMENTS .....	16
A. The Trademark Litigations .....	16
B. The Trademark Settlement Agreements .....	20
ARGUMENT .....	23
I. THE CHALLENGED AGREEMENTS ARE PROCOMPETITIVE SETTLEMENTS OF TRADEMARK LITIGATION. ....	23
II. THE SETTLEMENT AGREEMENTS DO NOT GIVE RISE TO ANTITRUST LIABILITY BECAUSE THEY PROVIDED FOR RELIEF WITHIN THE POTENTIAL SCOPE OF 1-800 CONTACTS’ TRADEMARK RIGHTS. ....	29
A. Public Policy Strongly Favors the Settlement of Trademark Disputes.....	30

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
B. Commonplace Settlements Are Not Subject to Antitrust Scrutiny.....	31
C. The Non-Use Trademark Settlement Agreements Here Are Commonplace Under <i>Actavis</i> and Not Subject to Antitrust Scrutiny. ....	33
D. Even if the Challenged Settlements Are Uncommon, None of the <i>Actavis</i> Factors Warrants Antitrust Scrutiny. ....	39
III. THE SETTLEMENT AGREEMENTS ARE NOT INHERENTLY SUSPECT. ....	42
A. The FTC Failed to Persuade the Supreme Court That Intellectual Property Settlement Agreements Are Inherently Suspect. ....	43
B. The FTC Failed to Persuade the Supreme Court that Restraints on Advertising Are Inherently Suspect.....	45
C. The Challenged Agreements Have Significant Procompetitive Potential .....	47
1. Most Consumers Searching for 1-800 Contacts’ Trademarks Are Trying to Navigate to 1-800 Contacts’ Website .....	47
2. Advertisements for Other Retailers Have the Potential to Increase Consumers’ Search Costs. ....	50
3. Advertisements for Other Retailers Have the Potential to Confuse Consumers.....	51
(a) The Van Liere Study and Other Evidence of Confusion .....	51
(b) Complaint Counsel’s Survey on Consumer Confusion is Unreliable and Fundamentally Unsound. ....	55
4. Search Engines’ Policies Are Intended to Maximize Profits, Not Consumer Welfare. ....	58
D. The Settlement Agreements Did Not Prevent Meaningful Competition By Other Retailers. ....	62
E. Complaint Counsel’s Bid-Rigging Theory Lacks Support in the Evidence and Economics. ....	65
IV. COMPLAINT COUNSEL CANNOT MEET THEIR BURDEN UNDER THE RULE OF REASON TO PROVE THE SETTLEMENTS HARM CONSUMERS. ....	67
A. Complaint Counsel Cannot Prove That 1-800 Contacts Had the Power to Harm Competition in Any Relevant Contact Lens Market. ....	67
1. The Relevant Market Is Broader Than Online Sales of Contact Lenses. ....	68
2. 1-800 Contacts Does Not Have Market Power. ....	76

**TABLE OF CONTENTS  
(continued)**

	<b>Page</b>
B. Complaint Counsel Have Not Proven Any Anticompetitive Effects in the Market for the Sale of Contact Lenses.....	81
1. Complaint Counsel Have No Proof of Lower Output or Higher Prices.....	81
2. Complaint Counsel’s Theory of Harm to Competitors Reflects the Value of 1-800 Contacts’ Trademark. ....	86
3. Complaint Counsel’s Theory of Search Engine Harm Fails.....	91
V. THE AGREEMENTS’ PROCOMPETITIVE BENEFITS OUTWEIGH ANY ANTICOMPETITIVE EFFECTS.....	96
CONCLUSION.....	97

## TABLE OF AUTHORITIES

	Page
<b>FEDERAL CASES</b>	
<i>1-800 Contacts, Inc. v. Lens.com</i> , 722 F.3d 1229 (10th Cir. 2013) .....	19, 20, 37
<i>1-800 Contacts, Inc. v. Lens.com, Inc.</i> , No. 2:07-CV-591 CW, 2012 WL 113812 (D. Utah Jan. 13, 2012) .....	38
<i>1-800 Contacts, Inc. v. Memorial Eye, P.A.</i> , No. 2:08-CV-983 TS, 2010 WL 988524 (D. Utah Mar. 15, 2010) .....	18, 38
<i>1-800 Contacts v. WhenU.com and Vision Direct, Inc.</i> , 309 F. Supp. 2d 467 (S.D.N.Y. 2003).....	16
<i>AD/SAT, Div. of Skylight, Inc. v. Associated Press</i> , 181 F.3d 216 (2d Cir. 1999).....	74
<i>Addamax Corp. v. Open Software Found., Inc.</i> , 888 F. Supp. 274 (D. Mass. 1995) .....	93
<i>adidas-Am., Inc. v. Payless Shoesource, Inc.</i> , 546 F. Supp. 2d 1029 (D. Or. 2008) .....	31
<i>Alcon Labs. v. Reyes</i> , No. 15-252, 2015 WL 9236136 (D. Utah May 11, 2015) .....	5, 6
<i>Allen-Myland, Inc. v. Int’l Bus. Machs. Corp.</i> , 33 F.3d 194 (3d Cir.1994).....	74, 78
<i>Am. Home Prods. Corp. v. Barr Labs., Inc.</i> , 656 F. Supp. 1058 (D.N.J. 1987) .....	56
<i>Am. Sec. Vanlines, Inc. v. Gallagher</i> , 782 F.2d 1056 (D.C. Cir. 1986) .....	26, 30
<i>Asahi Glass Co. v. Pentech Pharms., Inc.</i> , 289 F. Supp. 2d 986 (N.D. Ill. 2003) .....	29, 36

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Balaklaw v. Lovell</i> , 14 F.3d 793 (2d Cir. 1994).....	72
<i>Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.</i> , 784 F.2d 1325 (7th Cir. 1986) .....	77
<i>Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.</i> , 140 F.3d 494 (3rd Cir. 1998) .....	76
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962).....	68
<i>Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.</i> , 846 F.3d 1297 (10th Cir. 2017) .....	68
<i>Buying for the Home, LLC v. Humble Abode, LLC</i> , 459 F. Supp. 2d 310 (D.N.J. 2006).....	38
<i>California Dental Ass'n v. FTC</i> , 526 U.S. 756 (1999).....	passim
<i>Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.</i> , 996 F.2d 537 (2d Cir. 1993).....	86
<i>In re Cardizem CD Antitrust Litigation</i> , 332 F.3d 896 (6th Cir. 2003) .....	45
<i>Cargill, Inc. v. Monfort of Colo., Inc.</i> , 479 U.S. 104 (1986).....	78
<i>CDC Techs., Inc. v. Idexx Labs., Inc.</i> , 186 F.3d 74 (2d Cir. 1999).....	63
<i>Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n</i> , 95 F.3d 593 (7th Cir. 1996) .....	68, 81
<i>Clorox Co. v. Sterling Winthrop, Inc.</i> , 117 F.3d 50 (2d Cir. 1997).....	passim
<i>Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.</i> , 79 F.3d 182 (1st Cir. 1996).....	77

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Cohlma v. St. John Med. Ctr.</i> , 693 F.3d 1269 (10th Cir. 2012) .....	76
<i>ConAgra, Inc. v. George A. Hormel &amp; Co.</i> , 784 F. Supp. 700 (D. Neb. 1992) .....	55
<i>Continental TV v. GTE Sylvania</i> , 433 U.S. 36 (1977) .....	26
<i>Data Gen. Corp. v. Grumman Sys. Support Corp.</i> , 36 F.3d 1147 (1st Cir. 1994) .....	90
<i>In re Disposable Contact Lens Antitrust Litig.</i> , No. MDL1030, 2001 WL 493244 (S.D. Fla. 2001) .....	5
<i>Dongguk Univ. v. Yale Univ.</i> , No. 08-441, 2012 WL 1977978 (D. Conn. June 1, 2012) .....	55
<i>E. &amp; J. Gallo Winery v. Consorzio del Gallo Nero</i> , 782 F. Supp. 457 (N.D. Cal. 1991) .....	56
<i>Eastman Kodak Co. v. Image Tech. Servs., Inc.</i> , 504 U.S. 451 (1992) .....	69, 72
<i>ECM BioFilms, Inc. v. FTC</i> , ___F.3d___, 2017 WL 1019064 (6th Cir. Mar. 16, 2017) .....	53
<i>Ehredt Underground, Inc. v. Commonwealth Edison Co.</i> , 90 F.3d 238 (7th Cir. 1996) .....	89
<i>Exxon Corp. v. Texas Motor Exch. of Houston, Inc.</i> , 628 F.2d 500 (5th Cir. 1980) .....	53
<i>Factory Five Racing, Inc. v. Carroll Shelby</i> , 2010 WL 4232609 (Trademark Tr. & Ap. Bd. 2010) .....	55
<i>FTC v. Actavis, Inc.</i> , 133 S.Ct. 2223 (2013) .....	passim
<i>FTC v. CCC Holdings Inc.</i> , 605 F. Supp. 2d 26 (D.D.C. 2009) .....	73

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>FTC v. Coca-Cola Co.</i> , 641 F. Supp. 1128 (D.D.C.1986) .....	69
<i>FTC v. Indiana Fed’n of Dentists</i> , 476 U.S. 447 (1986) .....	39, 67
<i>FTC v. Sysco Corp.</i> , 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015) .....	72
<i>Fudruckers, Inc. v. Fudrucker’s Inc.</i> , 436 F. Supp. 2d 1260 (N.D Fla. 2006) .....	30
<i>GEICO v. Google, Inc.</i> , No. 04-507, 2005 WL 1903128 (E.D. Va. 2005) .....	53
<i>Generac Corp. v. Caterpillar Inc.</i> , 172 F.3d 971 (7th Cir. 1999) .....	94
<i>Gillette Co. v. Norelco Consumer Prods. Co.</i> , 69 F. Supp. 2d 246 (D. Mass. 1999) .....	55
<i>Glob. Tel-Link Corp. v. Jail Call Servs., LLC</i> , No. 14-1557, 2015 WL 1936502 (E.D. Va. Apr. 28, 2015) .....	35
<i>Google, Inc. v. American Blind &amp; Wallpaper</i> , No. 03-5340, 2007 WL 1159950 (N.D. Cal. Apr. 18, 2007) .....	36
<i>Grappone, Inc. v. Subaru of New England, Inc.</i> , 858 F.2d 792 (1st Cir. 1988) .....	79
<i>Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway &amp; Sons</i> , 365 F.Supp. 707 (S.D.N.Y. 1973) .....	53
<i>Hershey Foods Corp. v. Mars, Inc.</i> , 998 F. Supp. 500 (M.D. Pa. 1998) .....	55
<i>Illinois Tool Works Inc. v. Indep. Ink, Inc.</i> , 547 U.S. 28 (2006) .....	76
<i>Image Tech. Servs., Inc. v. Eastman Kodak Co.</i> , 125 F.3d 1195 (9th Cir. 1997) .....	90

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>In re Indep. Serv. Orgs. Antitrust Litig.</i> , 203 F.3d 1322 (Fed. Cir. 2000).....	90
<i>James Burrough, Ltd. v. Sign of Beefeater, Inc.</i> , 540 F.2d 266 (7th Cir. 1976) .....	54
<i>Jefferson Par. Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (1984).....	76
<i>Jim Beam Brands Co. v. Beamish &amp; Crawford, Ltd.</i> , 852 F. Supp. 196 (S.D.N.Y. 1994) .....	55
<i>Johnson &amp; Johnson Vision Care, Inc. v. Reyes</i> , 665 F. App'x 736 (10th Cir. 2016) .....	6
<i>K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.</i> , 61 F.3d 123 (2d. Cir. 1995).....	82
<i>Kamine/Besicorp Allegany L.P. v. Rochester Gas &amp; Elec. Corp.</i> , 908 F. Supp. 1194 (W.D.N.Y. 1995) .....	93
<i>Kargo Glob., Inc. v. Advance Magazine Publishers, Inc.</i> , No. 06-550, 2007 WL 2258688 (S.D.N.Y. Aug. 6, 2007).....	55
<i>King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.</i> , 791 F.3d 388 (3d Cir. 2015).....	33
<i>L.A.P.D., Inc. v. Gen. Elec. Corp.</i> , 132 F.3d 402 (7th Cir. 1997) .....	77
<i>In re Lamictal Direct Purchaser Antitrust Litig.</i> , 18 F.Supp.3d 560, 567 (D.N.J. 2014).....	33
<i>Leegin Creative Leather Prods., Inc. v. PSKS, Inc.</i> , 551 U.S. 877 (2007).....	71
<i>Lens.com, Inc. v. 1-800 Contacts, Inc.</i> , No. 2:12CV00352 DS, 2014 WL 12596493 (D. Utah Mar. 3, 2014).....	18
<i>In re Lipitor Antitrust Litig.</i> , 46 F.Supp.3d 523, 537 (D.N.J. 2014).....	33

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>In re Loestrin 24 Fe Antitrust Litigation</i> , 814 F.3d 538 (1st Cir. 2016).....	33
<i>Lon Tai Shing Co. v. Koch + Lowy</i> , No. 90-4464, 1991 WL 170734 (S.D.N.Y. June 20, 1991) .....	53
<i>Louis Vuitton Malletier, S.A. v. Abags.co.UK</i> , No. 14-30288, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015) .....	35
<i>Malletier v. Dooney Burke</i> , 525 F. Supp. 2d 558 (S.D.N.Y. 2007).....	52, 55
<i>MasterCard Int’l Inc. v. Trehan</i> , 629 F. Supp. 2d 824 (N.D. Ill. 2009) .....	36
<i>Menasha Corp. v. News Am. Mktg. In-Store, Inc.</i> , 354 F.3d 661 (7th Cir. 2004) .....	68, 73, 75, 76
<i>Metro-Goldwyn Mayer, Inc. v. 007 Safety Products, Inc.</i> , 183 F.3d 10 (1st Cir. 1999).....	35
<i>Mozart Co. v. Mercedes-Benz of N. Am., Inc.</i> , 833 F.2d 1342 (9th Cir. 1987) .....	40, 62
<i>Mutual of Omaha Ins. Co. v. Novak</i> , 836 F.2d 397 (8th Cir. 1987) .....	53
<i>MWS Wire Indus., Inc. v. Cal. Fine Wire Co.</i> , 797 F.2d 799 (9th Cir. 1986) .....	34
<i>Nat’l Football League Props., Inc. v. ProStyle, Inc.</i> , 57 F. Supp. 2d 665 (E.D. Wis. 1999).....	55
<i>Network Automation, Inc. v. Advanced Sys. Concepts, Inc.</i> , 638 F.3d 1137 (9th Cir. 2011) .....	18
<i>Newcal Indus., Inc. v. Ikon Office Sol.</i> , 513 F.3d 1038 (9th Cir. 2008) .....	75
<i>Novo Nordisk of N. Am., Inc. v. Eli Lilly &amp; Co.</i> , No. 96-5787, 1996 WL 497018 (S.D.N.Y. Aug. 30, 1996).....	55

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Oahu Gas Serv., Inc. v. Pac. Res., Inc.</i> , 838 F.2d 360 (9th Cir. 1988) .....	77
<i>Olympia Equip. Leasing Co. v. W. Union Tel. Co.</i> , 797 F.2d 370 (7th Cir. 1986) .....	90
<i>Orion Bancorp, Inc. v. Orion Residential Fin., LLC</i> , No. 07-1753, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008) .....	36
<i>Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.</i> , 69 F. Supp. 3d 175, 211 (D.D.C. 2014) .....	55, 57
<i>Park ‘N Fly, Inc. v. Dollar Park &amp; Fly, Inc.</i> , 469 U.S. 189 (1985) .....	24
<i>Person v. Google, Inc.</i> , No. C06-7297 JFRS, 2007 WL 1831111 (N.D. Cal. June 25, 2007) .....	94
<i>Pfizer, Inc. v. Perrigo Co.</i> , 988 F. Supp. 686 (S.D.N.Y. 1997) .....	55
<i>Pinterest, Inc. v. Pintrips, Inc.</i> , 140 F. Supp. 3d 997 (N.D. Cal. 2015) .....	55
<i>Polygram Holding, Inc. v. FTC</i> , 416 F.3d 29 (D.C. Cir. 2005) .....	passim
<i>Qualitex Co. v. Jacobson Prods. Co.</i> , 514 U.S. 159 (1995) .....	40
<i>Quality Inns Int’l v. McDonald’s Corp.</i> , 695 F. Supp. 198 (D. Md. 1988) .....	54, 56, 57
<i>Quidgeon v. Olsen</i> , No. 10-1168, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011) .....	35
<i>Rebel Oil Co. v. Atl. Richfield Co.</i> , 51 F.3d 1421 (9th Cir. 1995) .....	77, 81
<i>Reifert v. S. Cent. Wis. MLS Corp.</i> , 450 F.3d 312 (7th Cir. 2006) .....	68

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Rescuecom, Inc. v. Google Inc.</i> , 562 F.3d 123 (2nd Cir. 2009).....	18
<i>Rhino Sports, Inc. v. Sport Court, Inc.</i> , No. 02-1815, 2007 WL 1302745 (D. Ariz. May 2, 2007) .....	38
<i>Rosetta Stone Ltd. v. Google Inc.</i> , 676 F.3d 144 (4th Cir. 2012) .....	19, 37, 51, 53
<i>Ryko Mfg. Co. v. Eden Servs.</i> , 823 F.2d 1215 (8th Cir. 1987) .....	63
<i>SCFC ILC, Inc. v. Visa USA, Inc.</i> , 36 F.3d 958 (10th Cir. 1994) .....	88
<i>Schering-Plough Corp. v. FTC</i> , 402 F.3d 1056 (11th Cir. 2005) .....	26
<i>SCM Corp. v. Xerox Corp.</i> , 645 F.2d 1195 (2d Cir. 1981).....	90
<i>SD3, LLC v. Black &amp; Decker (U.S.) Inc.</i> , 801 F.3d 412 (4th Cir. 2015) .....	82
<i>Seidenstein v. Nat’l Med. Enters., Inc.</i> , 769 F.2d 1100 (5th Cir. 1985) .....	94
<i>Simon &amp; Schuster, Inc. v. Dove Audio, Inc.</i> , 970 F. Supp. 279 (S.D.N.Y. 1997) .....	55
<i>Skydive Ariz., Inc. v. Quattrocchi</i> , No. 05-2656, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010) .....	35
<i>Smith v. Wal-Mart Stores, Inc.</i> , 537 F. Supp. 2d 1302 (N.D. Ga. 2008) .....	55, 57
<i>Spectrum Sports, Inc. v. McQuillan</i> , 506 U.S. 447 (1993).....	89
<i>St. Louis Mining &amp; Milling Co. v. Montana Mining Co.</i> , 171 U.S. 650 (1898).....	26, 30

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997).....	25
<i>T &amp; T Mfg. Co. v. A. T. Cross Co.</i> , 587 F.2d 533 (1st Cir. 1978).....	30
<i>In re Tamoxifen Citrate Antitrust Litigation</i> , 466 F.3d 187 (2d Cir. 2006).....	29
<i>TBK Partners, Ltd. v. W. Union Corp.</i> , 675 F.2d 456 (2d Cir. 1982).....	30
<i>Tiffany &amp; Broadway, Inc. v. Comm’r of Patents &amp; Trademarks</i> , 167 F. Supp. 2d 949 (S.D. Tex. 2001) .....	53
<i>Tops Mkts., Inc. v. Quality Mkts., Inc.</i> , 142 F.3d 90 (2d Cir. 1998).....	83
<i>Town Sound &amp; Custom Tops, Inc. v. Chrysler Motors Corp.</i> , 959 F.2d 468 (3d Cir. 1992).....	94
<i>Transamerica Corp. v. Moniker Online Servs. LLP</i> , No. 09-60973, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010).....	35
<i>Twin Labs., Inc. v. Weider Health &amp; Fitness</i> , 900 F.2d 566 (2d Cir. 1990).....	88
<i>United States v. Am. Exp. Co.</i> , 838 F.3d 179 (2d Cir. 2016).....	85, 88
<i>United States v. Brown Univ. in Providence in State of R.I.</i> , 5 F.3d 658 (3d Cir. 1993).....	82
<i>United States v. Cont’l Can Co.</i> , 378 U.S. 441 (1964).....	69, 74
<i>United States v. E. I. du Pont de Nemours &amp; Co.</i> , 351 U.S. 377 (1956).....	74
<i>United States v. H &amp; R Block, Inc.</i> , 833 F. Supp. 2d 36 (D.D.C. 2011) .....	73

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001) .....	78, 79
<i>United States v. Syufy Enters.</i> , 903 F.2d 659 (9th Cir. 1990) .....	93
<i>United States v. Visa U.S.A., Inc.</i> , 344 F.3d 229 (2d Cir. 2003).....	82
<i>United States v. Waste Mgmt., Inc.</i> , 743 F.2d 976 (2d Cir. 1984).....	78, 79
<i>Valley Prods. Co. v. Landmark, Inc.</i> , 128 F.3d 398 (6th Cir. 1997) .....	76, 92
<i>Verizon Directories Corp. v. Yellow Book USA, Inc.</i> , 331 F. Supp. 2d 134 (E.D.N.Y. 2004) .....	55
<i>Verizon Directories Corp. v. Yellow Book USA, Inc.</i> , No. 04-0251, 2004 WL 1598916 (E.D.N.Y. July 19, 2004).....	55
<i>Weight Watchers Int’l, Inc. v. Stouffer Corp.</i> , 744 F. Supp. 1259 (S.D.N.Y. 1990).....	56, 58
<i>Wells Cargo, Inc. v. Wells Cargo, Inc.</i> , 606 F.2d 961 (C.C.P.A. 1979) .....	34
<i>Will v. Comprehensive Accounting Corp.</i> , 776 F.2d 665 (7th Cir. 1985) .....	77
<i>Williams v. First Nat’l Bank</i> , 216 U.S. 582 (1910).....	26, 30
<i>World Entm’t, Inc. v. Brown</i> , No. 09-5365, 2011 WL 2036686 (E.D. Pa. May 20, 2011).....	35
<i>Worthington Foods, Inc. v. Kellogg Co.</i> , 732 F. Supp. 1417 (S.D. Ohio 1990) .....	56

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<b>FTC CASES</b>	
<i>Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment</i> , 48 FR 9023-02, 1983 WL 169978 (Mar. 3, 1983) .....	passim
<i>In the Matter of Kraft, Inc.</i> , Dkt. No. 9208, 1989 WL 1126655 (1989).....	56
<i>In the Matter of Novartis Corp., et al.</i> , Dkt. No. 9279, 127 F.T.C. 580 (1999).....	55
<i>In the Matter of Realcomp II Ltd.</i> , Dkt. No. 9320, 2007 WL 6936319 (F.T.C. Oct. 30, 2009).....	46
<i>In re Telebrands Corp.</i> , Dkt. No. 9313, 140 F.T.C. 278 (2005).....	53
<b>FEDERAL STATUTES</b>	
15 U.S.C. § 1114.....	18
15 U.S.C. § 1125(a) .....	18
Fairness to Contact Lens Consumers Act, 15 U.S.C. § 7601 <i>et seq.</i> .....	6, 70
<b>STATUTES - OTHER</b>	
Utah Code Ann. § 13-5-1 <i>et seq.</i> .....	18
<b>FEDERAL REGULATIONS</b>	
FTC, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016) .....	4
<b>LEGISLATIVE MATERIALS</b>	
H.R. Rep. No. 108-318 (Oct. 15, 2003), 2004 U.S.C.C.A.N. 1759.....	5, 6, 70
<b>TREATISES</b>	
2 Philip E. Areeda & Donald F. Turner, <i>Antitrust Law</i> ¶ 409d (1978).....	79
Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> , ¶ 563d (3d. ed. 2007).....	74

**TABLE OF AUTHORITIES**  
(continued)

	Page
Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> , ¶ 575 (3d. ed. 2007).....	93
Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> , ¶ 2011 (3d. ed. 2007).....	93
Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> , ¶ 1503b(1) (3d ed. 2007) .....	81
3 McCarthy on Trademarks & Unfair Competition § 18:82 (4th Ed. 2016 update).....	34
5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th Ed. 2016 update) .....	34
 <b>OTHER AUTHORITIES</b>	
American Intellectual Property Law Association, 2015 Report of the Economic Survey at 38-39, available at <a href="http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf">http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf</a> .....	31
Howard H. Chang, David S. Evans, Richard Schmalensee, “Has the Consumer Harm Standard Lost Its Teeth?,” Sloan School of Management, Massachusetts Institute of Technology, Working Paper No. 4263-02 (2002) (“Consumer Harm Standard”) .....	82
Susan Athey and Glenn Ellison, “Position Auctions With Consumer Search,” <i>The Quarterly Journal of Economics</i> (2011) 126, 1213-1270.....	49
Susan Athey, “The Importance of Search Result Location,” Microsoft on the Issues (Mar. 26, 2013), <a href="https://blogs.microsoft.com/on-the-issues/2013/03/26/the-importance-of-search-result-location/">https://blogs.microsoft.com/on-the-issues/2013/03/26/the-importance-of-search-result-location/</a> .....	51
S. Brin and L. Page, “The Anatomy of a Large-Scale Hypertextual Web Search Engine,” <i>Computer Networks</i> , vol. 30 (1998) .....	59
David S. Evans, <i>Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases</i> , 75 St. John’s L. Rev. 545 (Fall 2001).....	85, 89
DOJ & FTC, Horizontal Merger Guidelines § 9 (Aug. 19, 2010) .....	78
Gary Gerber, “What’s UPP, Doc?,” <i>Review of Cornea and Contact Lenses</i> (June 15, 2014), <a href="http://www.reviewofcontactlenses.com/content/d/out_of_the_box/c/48867/">http://www.reviewofcontactlenses.com/content/d/out_of_the_box/c/48867/</a> .....	71
R. Goodstein et al., <i>Using Trademarks as Keywords: Empirical Evidence of Confusion</i> , 105 Trademark Reporter 732 (May-June 2015).....	51, 54

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
J. Jacoby & M. Sableman, <i>Keyword-Based Advertising: Filling in Factual Voids (GEICO v. Google)</i> , 97 Trademark Reporter 681 (2007).....	56
William M. Landes and Richard A. Posner, <i>The Economic Structure of Intellectual Property Law.</i> , Ch. 7 (Harvard University Press 2003) .....	24
Daniel P. O'Brien, Abraham L. Wickelgren, <i>A Critical Analysis of Critical Loss Analysis</i> , 71 Antitrust L.J. 161 (2003) .....	72
Maria Sampalis, "Minimum Pricing on Contact Lenses: A Win for Independent ODS," <i>Review of Optometric Business</i> , <a href="http://reviewob.dev04.jobson.com/minimum-pricing-on-contact-lenses-a-win-for-independent-ods.aspx">http://reviewob.dev04.jobson.com/minimum-pricing-on-contact-lenses-a-win-for-independent-ods.aspx</a> .....	71

**INTRODUCTION**

1-800 Contacts has built a brand that consumers trust. Over a period of twenty-five years, it has invested heavily in developing a reputation for exceptional customer service and reliability. As a result of its commitment and investment—an investment totaling more than \$500 million—1-800 Contacts has succeeded in attracting an increasing number of contact lens wearers to purchase from it, rather than from higher-priced eye care professionals (“ECPs”). And, it has created, nurtured, and developed an extremely valuable brand and identifying trademark. Yet, 1-800 Contacts remains a small player, accounting for only 10% of sales, in a market dominated by ECPs who possess inherent market advantages (e.g., they write the prescriptions required for purchase). And, only a small fraction of 1-800 Contacts’ already-small market share is the result of sales that come about when a consumer enters “1-800 Contacts” or another 1-800 Contacts trademark into a search engine, is presented with a paid advertisement, clicks on that ad, and proceeds to purchase lenses.

1-800 Contacts sought the assistance of the courts to protect its trademark by preventing other contact lens retailers from infringing and diluting its mark, unfairly competing, and freeriding on its investment. Complaint Counsel concede, and courts have held, that the lawsuits 1-800 Contacts filed were not sham lawsuits—the claims asserted and the relief sought were within the scope of 1-800 Contacts’ property rights. These were *bona fide* disputes in a developing and unsettled area of law. The disputes were settled—not with reverse payments or other extraordinary terms—but with commonplace non-use agreements, where 1-800 took less than if it had prevailed and defendant gave up more than if it had won. Complaint Counsel, in fact, concede that the relief provided for in the settlements was within the scope of what a court could have ordered.

The record at the hearing will demonstrate at least four fundamental errors in Complaint Counsel's case:

*First*, Complaint Counsel's challenge to trademark settlement agreements contravenes the rule that "it is reasonable to presume that such arms-length [trademark] agreements are pro-competitive." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997).

*Second*, because the settlement agreements are commonplace non-use agreements of the kind that numerous courts have ordered in trademark cases involving paid search advertising, they are not subject to antitrust scrutiny under the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013), which made clear that only "unusual" settlements warrant antitrust scrutiny.

*Third*, to the extent that antitrust scrutiny is warranted, the settlement agreements are not inherently suspect. Complaint Counsel's contrary position runs roughshod over two Supreme Court decisions: (1) *Actavis*, which held that even alleged payments to competitors to stay out of the market entirely require a full rule-of-reason analysis; and (2) *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), which held that even bans on almost all price advertising required a full rule-of-reason analysis to account for potential procompetitive effects. Here, the evidence will show that the settlement agreements have significant potential to benefit consumers by saving litigation costs, reducing consumer search costs, and eliminating confusion. Taking proper account for these effects in an industry as new and complex as paid search advertising requires more than a "quick look."

*Fourth*, Complaint Counsel cannot meet their burden to prove that the challenged settlement agreements harmed competition. The settlement agreements applied only to a small portion of 1-800 Contacts' sales, and to an even smaller portion of all contact lens sales—less

than [REDACTED]. The settlements did not affect in any way the vast majority of advertising and competitive tools available to competitors; they restricted only using 1-800 Contacts' trademarks to trigger presentation of another company's paid advertisements. It is not surprising, therefore, that Complaint Counsel will not be offering any hard proof that the challenged settlements harmed consumers. They have no proof that the settlements reduced output of contact lenses and no quantitative support for their theory, speculated to by their experts, that the agreements enabled 1-800 Contacts to raise prices.

In the end, Complaint Counsel's case boils down to an attempt to re-litigate the trademark claims that the parties made rational business decisions to settle. There is no precedent for that kind of antitrust claim, or for using the FTC Act to reshape intellectual property rights according to Complaint Counsel's policy views of what trademark law should be.

### **BACKGROUND**

#### **I. ALTHOUGH EYE CARE PROFESSIONALS DOMINATE THE CONTACT LENS RETAIL INDUSTRY, CONSUMERS HAVE SEVERAL RETAIL OPTIONS.**

Contact lenses were originally made of a rigid material and required an eye care professional ("ECP") to custom fit each pair. *See, e.g.,* RX0569 (*The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*) at 5. In the 1980s, contact lens manufacturers began to produce disposable lenses "designed to be replaced on a daily, weekly, or monthly basis." *Id.* Although a prescription is still required for these lenses, an ECP does not need to custom fit each pair. Consumers now can either purchase disposable lenses directly from their ECP, or obtain a copy of their prescription to purchase them from an alternative retailer.

There are over 30,000 ECPs in the United States. RX0153 at 12. Most consumers must visit an ECP's office at least once a year to get a new prescription. Nearly half of ECPs have their own online retail website to sell contact lenses. RX1117 at 4. In addition, the largest

provider of vision insurance, VSP, has its own online retail website for contact lenses. *Id.*

Consumers also can purchase contact lenses at the most ubiquitous retailers in the country, including Walmart, Sam’s Club, and Costco. These major retailers have physical locations throughout the country *and* each sells contact lenses online through its own website. *See* RX1117 at 68. Other well-known retailers, such as Target, CVS, JC Penny, and BJ’s, also sell contact lenses online through their own branded websites.

In addition to ECPs and leading brick-and-mortar retailers, consumers can shop for contact lenses from a large number of other internet retailers. 1-800 Contacts is just one of those. Purely online contact lens retailers that are not party to any of the challenged settlement agreements include, among others: AAlens.com, ContactsLand, Lens.com, LensDirect, LensDiscounters.com, Lens Benefits, LowestPriceContacts.com, Majorlens.com, PerfectLensWorld, and X-Contacts.com.

ECPs nevertheless continue to dominate the contact lens retail industry. The 2015 market share statistics relied upon by the Commission show that independent ECPs and optical chains make nearly 60 percent of all contact lens sales in the U.S. *See* FTC, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016). Mass merchants and wholesale clubs (*e.g.*, Walmart, Target, and Costco) make about 25 percent of sales. And “pure play” online retailers, including 1-800 Contacts, make just 16 percent of all sales. The ECPs’ dominant market share reflects their inherent competitive advantage. Unlike medical doctors, who are prohibited from selling the pharmaceuticals they prescribe, ECPs “are able to fill the contact lens prescriptions they write. This sets up an inherent conflict of interest because third-party sellers are forced to compete for the sale of lenses with the individual who is writing the

prescription.” H.R. Rep. No. 108-318 (Oct. 15, 2003), 2004 U.S.C.C.A.N. 1759, 1760. These dynamics have always made it difficult for non-ECP retailers to compete.

**II. 1-800 CONTACTS’ BUSINESS MODEL IS TO COMPETE WITH EYE CARE PROFESSIONALS BY OFFERING BETTER SERVICE AND LOWER PRICES.**

1-800 Contacts, which began selling contact lenses by phone in 1992, was one of the first retailers to compete with ECPs. 1-800 Contacts has always considered its principal competitor to be the ECPs.<sup>1</sup> However, consumers were accustomed to buying contact lenses directly from their ECPs, at times felt pressure to continue to do so, and often did not know alternative retailers existed who offered lower prices, better service, and greater convenience. *See, e.g.*, CX9029 (Bethers Dep.) at 110:21-111-12; CX9035 (Coon Dep.) at 88:9-23. Accordingly, from its earliest days, 1-800 Contacts invested substantial time and money to enhance its ability to compete with ECPs.

**A. 1-800 Contacts Led Efforts to Promote Greater Competition Between ECPs and Other Retailers.**

1-800 Contacts led and supported numerous regulatory and legal challenges against ECPs to try to increase competition in the retail market for contact lenses. For example, in the 1990s, 1-800 Contacts supported an antitrust action challenging a conspiracy among contact lens manufacturers and ECPs to restrict the supply of contact lenses to non-ECP retailers. *See In re Disposable Contact Lens Antitrust Litig.*, No. MDL1030, 2001 WL 493244 (S.D. Fla. 2001). That case culminated in a landmark settlement that required manufacturers to sell contact lenses to non-ECP retailers on “commercially reasonable” and “non-discriminatory” terms. *Alcon*

---

<sup>1</sup> *See* CX9029 (Bethers Dep.) at 149:13-14 (“[O]ur principal competitor . . . is the independent eye care professional.”); CX9017 (Blackwood Dep.) at 99:13-21 (1-800 Contacts’ biggest competitor “is the independent eye doctors who have about 60 percent of the [market] . . .”).

*Labs. v. Reyes*, No. 15-252, 2015 WL 9236136, at \*2 (D. Utah May 11, 2015). 1-800 Contacts also was the principal proponent of federal legislation enacted in 2003, the Fairness to Contact Lens Consumers Act (“FCLCA”), that mandates ECPs provide patients a copy of their contact lens prescription immediately following the examination and fitting, and establishes a uniform, nationwide system for prescription verification. 15 U.S.C. § 7601 *et seq.* Congress’s express purpose in enacting the FCLCA was to foster competition from non-ECP retailers in the sale of contact lenses. *See* H.R. Rep. No. 108-318 (Oct. 15, 2003), 2004 U.S.C.C.A.N. 1759, 1760.

Most recently, 1-800 Contacts led efforts in opposition to resale price maintenance programs implemented by the four major contact lens manufacturers to set a floor on retail contact lens prices. *See* RX0713 at 6. The purpose of those programs was to reduce the price gap between ECPs and lower-priced retailers and thus limit the sales that ECPs lost to competing retailers. *Id.* at 8. 1-800 Contacts’ then-General Counsel testified before the U.S. Senate about these programs’ detrimental effect on competition, *id.* at 9, and 1-800 Contacts sponsored legislation to prohibit manufacturers from setting minimum retail prices, *see Alcon*, 2015 WL 9236136, at \*4. 1-800 Contacts also supported the defense of such legislation in Utah. *See Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App’x 736 (10th Cir. 2016).

**B. 1-800 Contacts Invests Heavily in Customer Service to Compete with ECPs.**

1-800 Contacts’ strategy has always been to differentiate itself based on offering best-in-class service at prices lower than ECPs. *See* RX0904 at 16. 1-800 Contacts pioneered three main strategies to overcome ECPs’ inherent advantages and to win customers’ trust, an essential requirement for a company providing a medical device for consumers’ eyes.

*First*, 1-800 Contacts sets its retail prices primarily in reference to the prices charged by ECPs, seeking to have prices below ECPs, on a single-box basis and net of rebates. CX9001 (Bethers IH Tr.) at 80:25-81:3; CX9025 (Osmond Dep.) at 99:21-100:1.<sup>2</sup>

*Second*, 1-800 Contacts makes substantial investments in customer service and the purchasing experience. The company’s guiding philosophy is: “Contact lenses are just the product we **deliver**. What we really sell is **service**.” RX0560. “[T]he whole business is built on answering calls by the second ring, e-mails within ten minutes, answering calls with a live person, sending orders no signature required, handwritten apology notes when an order’s late. Everything’s all about making it simple, easy to order from us.” CX9035 (Coon Dep.) at 17:5-10; RX0904 at 19. 1-800 Contacts does not try to compete solely on price with the lowest-priced discount retailers, like Costco and various online-only retailers. Instead, 1-800 Contacts positions itself at the top of the industry in terms of service, and its efforts have been successful. 1-800 Contacts received several prestigious awards for its customer service. *See* RX0736 (Goodstein Report) ¶¶ 26-27, 34-35 & Table 2. As an example, 1-800 Contacts was ranked seventh on a list of the top 100 online retailers for customer satisfaction, “right below companies like Apple, Amazon, and Avon.” RX0901. 1-800 Contacts also has a net promoter score (“NPS”)—a commonly used measure of customer loyalty—of about 74 percent, which is above many well-known brands with fervently loyal customers such as Amazon, Netflix, Apple, and Trader Joe’s. *See* RX0736 (Goodstein Report) ¶¶ 31-33; RX0427 at 26.

*Third*, 1-800 Contacts invests in educating consumers about its brand and their option to

---

<sup>2</sup> As part of its price-setting process, 1-800 Contacts devotes substantial resources to tracking ECP prices, which includes the task of compiling data on prices from approximately 50 different independent ECPs on a monthly basis (as well as prices at Walmart, LensCrafters, Costco, and other online retailers). CX9025 (Osmond Dep.) at 32:3-14, 98:18-99:13.

purchase contact lenses online. Television is the principal means 1-800 Contacts uses to reach potential customers, including those who have not previously shopped online and may not know they can purchase contact lenses anywhere other than from their ECPs. RX0736 (Goodstein Report) ¶ 13. Between 2002 and 2014, 1-800 Contacts spent over [REDACTED] on advertising, more than [REDACTED]. *Id.* ¶ 12, Table 1; RX0739 (Murphy Report) Ex. 8. TV advertising builds brand awareness, which is critical for a company to increase the equity of its brand and differentiate itself from competitors. RX0736 (Goodstein Report) ¶ 17. As a result, 1-800 Contacts is consistently one of the most familiar brand names among all contact lens retailers, *see id.* ¶¶ 20-22, and its brand awareness is often more than 10 times that of the next closest online retailer, *id.* ¶ 22. 1-800 Contacts' TV advertising also drives traffic to its website, including from consumers who conduct an internet search for 1-800 Contacts' name and click on the 1-800 Contacts' sponsored ad. *See* RX0006 at 10 ("Paid trademark search impressions and TV are highly correlated (>.40).").

### **III. INTERNET ADVERTISING**

#### **A. Overview of Internet Advertising**

Contact lens retailers have a wide array of means to advertise to consumers. 1-800 Contacts, for instance, has advertised to consumers through television, radio, print periodicals, direct mail, billboards, and over the internet.

Even on the internet, there are multiple advertising channels. For example, retailers engage in display advertising, which includes both text and banner advertisements, in addition to video and audio advertisements. Recently, retailers have invested in "remarketing" campaigns that display advertisements to consumers based on their location, search history, and other demographics. Retailers also advertise through affiliated websites that offer coupons or discounts. Email campaigns to lists of potential customers are a staple among contact lens

retailers. Retailers advertise on social media such as Facebook, Twitter, and Instagram. They also purchase “Product Listing Ads,” which provide an image and a price for contact lenses on the side of a search engine result page. And contact lens retailers are increasingly developing “apps” that can be downloaded on mobile devices.

There is no dispute that these various other forms of internet advertising, as well as all forms of non-internet advertising, are not restrained in any fashion by the challenged settlement agreements. To be clear, as discussed further below, this case concerns only one, very specific method of internet advertising: displaying an advertisement on search engine results pages, frequently referred to as “paid search,” in response to a consumer’s search for 1-800 Contacts’ trademark. The vast majority of 1-800 Contacts’ advertising spend—[REDACTED]—is spent on *other* forms of advertising. Indeed, since 2002, paid advertising in response to trademark searches has accounted for [REDACTED] of 1-800 Contacts’ expenses for paid search, less than [REDACTED] of its expenses for all internet advertising, and less than [REDACTED] of all its advertising expenses. RX0739 (Murphy Report) Ex. 8. Not surprisingly, the vast majority of 1-800 Contacts’ net revenue results from transactions that were initiated other than as the result of a consumer clicking on a “paid advertisement” presented in response to a search for 1-800 Contacts’ trademark. In short, what is at issue here is a small fraction of 1-800 Contacts’ revenue and advertising spend.

**B. Paid Search Advertising**

There are three major search engine providers in the United States: Google, Bing, and Yahoo!. Users can access these search engines through desktop computers, tablets, and mobile phones. Estimates of the market shares of these search engines vary across sources, but it is generally recognized that Google’s share of searches from desktops exceeds 60 percent and that its share of searches from mobile devices exceeds 80 percent. RX0739 (Murphy Report) ¶ 46.

## 1. Organic Search Results

When a user enters a search query, the search engine displays two types of results on the search engine results page (“SERP”). “Organic” or “natural” results are links to websites that the search engine determined are relevant to the user’s search query. In general, organic results are ranked in order of relevance to consumers, with the most relevant result at the top of the list. The relevance of organic results is determined by sophisticated algorithms that are proprietary to each search engine. RX0733 (Ghose Report) ¶¶ 25-26. Organic links are “free” in the sense that no one can pay the search engine to have an organic result appear or to change a result’s ranking, and no one pays when a consumer clicks on an organic link.

## 2. Paid Search Results

The second type of result is paid search advertising. These advertisements are displayed above, below, and (on some search engines) to the side of the organic results. RX0733 (Ghose Report) ¶¶ 34-35. As the name implies, advertisers pay to have advertisements placed on the results page. Search engines use a form of auction to sell the advertising positions. Advertisers bid on “keywords,” which are terms that trigger the display of advertisements when consumers use them in a search query. A retailer of contact lenses, for instance, may bid on the keyword “contacts,” desiring to display its ads in response to a search query for that term and related search queries.

Advertisers frequently bid on thousands of keywords. [REDACTED], for instance, bids on somewhere under [REDACTED] keywords related to contact lenses. CX9033 ([REDACTED]) at 26-27. Keywords may consist of a single word (e.g., “contacts”), a set of words (e.g., “contacts,” “Acuvue,” and “coupon”), a phrase (e.g., “contact lens”), or a combination of words and phrases.

To determine which ads to display in response to a search query, the search engines use algorithms that are markedly different from the algorithms used to generate organic results.

RX0733 (Ghose Report) ¶¶ 40-41; RX0704 ( [REDACTED] ) ¶¶ 8-11. Unlike organic results, which are displayed solely based on their relevance, the display of paid search ads is a function of the advertiser’s willingness to pay the search engine. *Id.* As a result, a paid search ad may appear on the first page of a SERP, even though the advertiser’s website does not show up at all in the organic results. RX0733 (Ghose Report) ¶¶ 56-58. In other words, even if the search engine’s algorithm determines that the advertiser’s website is not among the websites most relevant to the user’s query, an advertiser may pay its way onto the SERP.

### 3. The Complexity of Search Engine Auctions

Complaint Counsel seek to portray the search engine auction algorithms as merely a popularity poll in which users are “voting with their clicks.” CC Pre-Trial Br. at 8. The truth, however, is that search engine auction algorithms are incredibly complex and designed to protect search engine interests and maximize search engine revenues. Every time a user enters a search query, the search engine runs an instantaneous auction to determine which paid ads to display, how many to display, and in what position to display them.

Generally, advertisers pay for search advertising on a “pay-per-click” basis. RX0733 (Ghose Report) ¶ 31; RX0704 ( [REDACTED] ) ¶ 9. When a user clicks on an ad, and is thus taken to the advertiser’s website, the advertiser is charged the “cost-per-click” (CPC) determined by the auction algorithm. Accordingly, search engines consider not only the amount of advertisers’ bids, but also the relative likelihood that users will click on the advertisers’ ads.

The search auction algorithms also consider a so-called “quality score.” The quality score consists of several factors, such as (1) the [REDACTED] of the ad (*i.e.*, [REDACTED]), (2) the [REDACTED] to the [REDACTED] (*i.e.*, whether the [REDACTED]), and (3) the predicted effect on [REDACTED]

██████████ which are additions to the ██████████. CX9019 (██████████) at 30-33, 38-43; RX0733 (Ghose Report) ¶¶ 40-51; RX0704 (██████████) ¶ 10.

Whether an ad will be shown in response to a given search, as well as the position of an ad, is determined by a combination of the advertiser's bid and quality score.<sup>3</sup> RX0733 (Ghose Report) ¶¶ 40-55; RX0704 (██████████) ¶¶ 3-15. Google refers to this combination as Ad Rank. The advertiser with the highest Ad Rank (the combination of bid and quality score) is given the top ad position. The advertiser with the next highest Ad Rank is given the second position, and so on. RX0733 (Ghose Report) ¶¶ 45-51. Under this system, an advertiser with a low quality score can have its ad placed in a more favorable position (higher on the SERP) by bidding more.

The CPC for each advertiser is based on the outcome of a generalized second-price auction. RX0733 (Ghose Report) ¶ 51; RX0704 (██████████) ¶ 9. Advertisers are not charged the amount they bid for a click. Rather, the CPC for a given advertiser is the bid amount needed to beat the Ad Rank of the advertiser in the next lower position. Because Ad Rank is a combination of the bid and quality score, an advertiser in the top position with a high quality score may have to pay a *lower* CPC than advertisers in lower positions. Conversely, the advertiser in the lowest, least favored position, may have to pay a *higher* CPC than advertisers in more favored positions. Moreover, the CPC of the advertiser in the top position is not affected by bidders that end up in the third or fourth spots. CX9019 (██████████) at 60, 137-138.

---

<sup>3</sup> In addition, the auction algorithm also takes into account information about the ██████████ (e.g., the ██████████) when determining which ads to show and the position in which they are placed. CX9019 (██████████) at 134-136.

**C. Search Engines' Trademark Policies**

Prior to 2004, Google's policy was to prevent advertisements from appearing in response to searches for a company's trademark if the company demonstrated that it had protectable trademark rights. CX1148; CX9022 ( [REDACTED] ) at 19-20. In 2004, Google changed its trademark policy. Under its revised policy, advertisers were allowed to bid on other companies' trademarks, but could not include the trademark in the ad copy. *Id.* Google informed trademark holders, including 1-800 Contacts, that they should resolve any disputes about advertisements in response to searches for their trademarks directly with the advertisers. *See* CX9031 (C. Schmidt Dep.) at 22:17-23:6, 26:7-28:24 (Google indicated it "would no longer be interceding" in such grievances and encouraged 1-800 Contacts to resolve such disputes directly with its competitors), 29:7-30:9 (Google suggested that 1-800 Contacts ask competitors to enter 1-800 Contacts' trademarks as negative keywords); RX1388.

Bing changed its trademark policy in 2011 to permit advertisers to bid on trademark keywords. RX0704 ( [REDACTED] ) ¶ 16.

**D. 1-800 Contacts' Paid Search Practices**

As earlier described, 1-800 Contacts uses paid search advertising as one of many methods of marketing its products and services. Between 2002 and 2014, less than [REDACTED] of 1-800 Contacts' advertising budget was spent on paid search advertising in response to consumer searches for 1-800 Contacts' trademark. RX0739 (Murphy Report) Ex. 8.

1-800 Contacts bids on three categories of keywords: (1) as just mentioned, keywords containing 1-800 Contacts' trademarks and variations of its trademarks; (2) generic keywords, such as "contacts" and "contact lenses"; and (3) thousands of other keywords, including keywords for contact lens types ("toric"), vision conditions ("astigmatism"), and popular contact lens brands ("Acuvue"). *See* RX0739 (Murphy Report) ¶ 63.

1-800 Contacts prioritizes its trademark keywords, so that customers who are attempting to navigate to 1-800 Contacts' website can find it easily. The company allocates [REDACTED] [REDACTED] [REDACTED]. CX9028 (Roundy Dep.) at 86:16-88:4; CX9031 (C. Schmidt Dep.) at 125:16-127:20. If the cost of obtaining the top position on searches for its trademark keywords increases, then 1-800 Contacts increases its spending on those keywords, and decreases its spending on other keywords. CX9020 (Craven Dep.) at 123:8-126:20. After [REDACTED] [REDACTED], it then uses search advertising management software to allocate the rest of its paid search budget to the thousands of other keywords, focusing primarily on the generic keywords "contact lens" and "contact lenses." CX9031 (C. Schmidt Dep.) at 126:21-127:20; CX9028 (Roundy Dep.) at 104:19-106:18.

It is more efficient for 1-800 Contacts to bid on its own trademark keywords than to bid on any other keywords. This is because consumers searching for 1-800 Contacts click on 1-800 Contacts' advertisements, and make purchases from 1-800 Contacts, at substantially higher rates than do consumers searching for other keywords. RX0733 (Ghose Report) Exs. 4A & 4B; RX0739 (Murphy Report) ¶ 68. Between 2004 and 2016, 1-800 Contacts' average click-through rate for its trademark keywords was [REDACTED], while its click-through rate for generic keywords was only [REDACTED]. *Id.*; Ex. 11B. Similarly, 1-800 Contacts' conversion rate for its trademark keywords was [REDACTED], whereas its conversion rate for generic keywords was only [REDACTED].<sup>4</sup> *Id.*

---

<sup>4</sup> Conversions are tracked by Google AdWords. Individual companies define the type of action that is recorded as a conversion, such as a sale, a download of an app, or something else. 1-800 Contacts defines a conversion as a sale. RX0739 (Murphy Report) ¶ 66. Researchers routinely use conversions as an indicator of whether a particular click was profitable for a company. *Id.*

During the same period, 1-800 Contacts' average cost per click for its trademark keywords was [REDACTED], whereas its average cost per click for generic keywords was [REDACTED]. *Id.* Thus, between 2004 and 2016, 1-800 Contacts' cost per conversion for its trademark keywords was [REDACTED], whereas its cost per conversion for generic keywords was [REDACTED]. RX0739 (Murphy Report) ¶ 68, Ex. 11B, Ex. 4C; *see also* RX0733 (Ghose Report) Ex. 4C.

1-800 Contacts' consistent policy has been not to bid on its competitors' trademarks. CX9015 (Galan Dep.) at 62:16-25, 142:15-25. The company believes that doing so is not an effective use of its advertising budget because keywords containing competitors' trademarks have lower click-through rates, lower quality scores, and higher costs per conversion. *Id.* at 190:6-19; *see also* RX0733 (Ghose Report) ¶ 103. In addition, 1-800 Contacts believes bidding on competitors' keywords is unethical and may result in legal issues surrounding trademarks. *See* CX9015 (Galan Dep.) at 193:1-10. Thus, even before the challenged settlement agreements were executed, 1-800 Contacts did not intentionally bid on competitors' trademark keywords.<sup>5</sup>

**E. Other Retailers' Paid Search Practices**

Other retailers of contact lenses have employed diverse strategies to select the keywords they bid on, and to set their bids for those keywords. They largely do this through a process of trial and error, attempting to find the keywords with a cost-per-conversion under a specified target. For example, although it has varied, [REDACTED] target cost-per-conversion is between [REDACTED]. CX9014 ([REDACTED]) at 51:9-14.<sup>6</sup> Some of the contact lens retailers have fixed budgets for paid search expenditures. For example, [REDACTED] annual

---

<sup>5</sup> On very rare occasions, 1-800 Contacts' advertisements inadvertently appeared in response to searches for a competitor's trademark. *See* RX0733 (Ghose Report) ¶ 122.

<sup>6</sup> *See also* CX9023 ([REDACTED]) at 53:7-11; CX9039 ([REDACTED]) at 176:4-18; CX9038 ([REDACTED]) at 67:18-24.

marketing budget has a line item for marketing contact lenses, the majority of which is for paid search. CX9036 ( [REDACTED] ) at 53:2-8. These retailers manage their budget to bid on the keywords with the highest return on investment. *Id.* at 56:1-5; CX9024 ( [REDACTED] ) at 37:4-19.

Without exception, the other contact lens retailers experienced significantly higher returns on investment on searches triggered by their own trademark keywords than they did for searches triggered by 1-800 Contacts' trademark keywords. RX0733 (Ghose Report) ¶¶ 128-132, Ex. 4C. For example, Coastal Contacts' cost-per-conversion for its own trademark keywords was [REDACTED], while its cost-per-conversion for 1-800 Contacts' trademark keywords was [REDACTED]. *Id.* Similarly, [REDACTED] cost-per-conversion for its trademark was [REDACTED], while its cost-per-conversion for 1-800 Contacts' trademark keywords was [REDACTED]. *Id.* Thus, it was significantly less efficient for the other retailers to bid on 1-800 Contacts' trademark keywords than it was for them to bid on their own trademark keywords.

#### **IV. 1-800 CONTACTS' TRADEMARK LITIGATION AND SETTLEMENTS**

##### **A. The Trademark Litigations**

The rise of internet business in the late 1990s and early 2000s generated new forms of advertising—as well as new forms of trademark infringement.

In 2002, 1-800 Contacts brought a trademark infringement claim against Vision Direct, Inc. (“Vision Direct”), another contact lens retailer, and the advertising software company WhenU, alleging that pop-up advertisements for Vision Direct would appear when consumers attempted to access 1-800 Contacts' website. *1-800 Contacts v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003). In 2003, the District Court enjoined the defendants from causing such advertisements to be displayed, *id.* at 498-508, (although the injunction was later reversed by the Second Circuit in 2005).

Following entry of the injunction, on January 16, 2004, 1-800 Contacts' counsel wrote to Vision Direct regarding the appearance of Vision Direct's paid search advertisements in response to searches for 1-800 Contacts' trademark. RX0100. Vision Direct indicated it would notify its affiliates to cease their activities, but also advised that 1-800 Contacts could file a trademark complaint with Google requesting that the search engine take down advertising on 1-800 Contacts' trademark. CX1026. In April 2004, however, as earlier noted, Google modified its policies and encouraged advertisers to work out their trademark disputes amongst themselves. CX1148; CX9022 (██████████) at 19-20. Accordingly, 1-800 Contacts and Vision Direct began negotiating to resolve their trademark dispute and reached the first settlement agreement challenged in this case. CX0311.

Around the same time, in March 2004, 1-800 Contacts filed a complaint against Coastal Contacts challenging paid search advertisements for Coastal that appeared in response to searches for 1-800 Contacts' trademark. *1-800 Contacts, Inc. v. Coastal Contacts, Inc.*, Case 2:04-cv-00249-DAK (D. Utah Mar. 18, 2004). 1-800 Contacts also began an effort to uncover others' unauthorized use of its trademark in paid search advertising. CX9021 (Pratt Dep.) at 25:23-30:8, 140:17-141:21; CX9040 (Miller Dep.) at 128:14-129:13. This effort included an analysis of whether the advertisements that appeared in response to searches for 1-800 Contacts' trademark had indicia of an infringing use, taking into account the factors and context that courts had identified as relevant to that determination. *See* CX9040 (Miller Dep.) at 19:3-20, 117:3-118:5, 129:14-132:18; CX9021 (Pratt Dep.) at 78:15-79:8, 84:3-11, 86:2-22, 131:19-132:13.<sup>7</sup>

1-800 Contacts was hardly alone in protecting its trademark in this way; numerous

---

<sup>7</sup> Consistent with trademark practice, however, 1-800 Contacts did not refrain from asserting its trademark rights until it had obtained actual evidence of confusion. CX9040 (Miller Dep.) at 156:15-157:12; RX0734 (Hogan Report) ¶ 134.

trademark owners monitored search results for their trademarks on search engines and filed trademark infringement lawsuits based on paid search advertising in this period. *See generally* RX0734 (Hogan Report) ¶¶ 127-134.

Over the next several years, 1-800 Contacts sent cease-and-desist letters to some 13 other online contact lens retailers whose advertisements appeared in response to a search for 1-800 Contacts' trademarks. 1-800 Contacts ultimately filed complaints in the District of Utah against several retailers asserting claims for trademark infringement under 15 U.S.C. § 1114, in addition to federal unfair competition (15 U.S.C. § 1125(a)), state and common law unfair competition (Utah Code Ann. § 13-5-1 *et seq.*), unjust enrichment, and federal dilution.

As two courts expressly held, these trademark enforcement efforts were *bona fide*. *See 1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, \*6 (D. Utah Mar. 15, 2010) (“Memorial Eye”); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS, 2014 WL 12596493, at \*1 (D. Utah Mar. 3, 2014). Indeed, Complaint Counsel concede as much. RX0680 (Response to Interrogatory No. 6) at 13.

In 2009, in *Rescuecom, Inc. v. Google Inc.*, 562 F.3d 123 (2nd Cir. 2009), the Second Circuit held that the display of sponsored links in response to a search for a trademarked term was a “use in commerce” that is actionable under the Lanham Act. *Id.* at 128-41.<sup>8</sup> With a threshold defense eliminated, alleged infringers realized that trademark infringement claims based on paid search advertising would turn largely on whether such advertising was likely to confuse consumers, “an inherently factual issue that depends on the facts and circumstances in

---

<sup>8</sup> The Ninth Circuit later reached the same conclusion, largely settling this key issue for trademark claims based on paid search advertising. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144-45 (9th Cir. 2011).

each case.” *Rosetta Stone Ltd. v. Google Inc.*, 676 F.3d 144, 153 (4th Cir. 2012).

As it became clear that paid search advertising was actionable, albeit depending on the circumstances, 1-800 Contacts settled with nine retailers between the fall of 2009 and January 2011. For example, AC Lens settled within a month after its lawyers explained that the result was “uncertain,” and that AC Lens “may well lose” the case. CX9039 ( [REDACTED] ) at 86-87, 114; CX9003 ( [REDACTED] ) at 108-109. [REDACTED] also settled within a month of 1-800 Contacts’ filing of a lawsuit in August 2010, *see* RX1032, reasoning that keyword advertising on trademark terms [REDACTED] CX9014 ( [REDACTED] ) at 204-205, 47-49; CX9000 ( [REDACTED] ) at 93-94.

One retailer, Lens.com, did not settle 1-800 Contacts’ claims. Complaint Counsel continue to mischaracterize the outcome of the Lens.com litigation. *See* CC Pre-Trial Brief at 2, 15, 50-51, 56-59. Although the district court dismissed 1-800 Contacts’ infringement claim on the ground that, “as a matter of law,” such a “keyword use can generate a likelihood of confusion only in combination with the specific language of the resulting impressions,” the Tenth Circuit, reviewing *de novo*, expressly reserved decision on that issue, stating that it “need not resolve the matter because 1-800’s direct-infringement claim fails for lack of adequate evidence of initial-interest confusion.” 722 F.3d at 1242-43. The Tenth Circuit explained that the existence of such confusion turns on multiple factors that “depend very much on context” and noted “the danger of applying the factors mechanically without attention to context.” *Id.* at 1243-44.

The Tenth Circuit acknowledged that users who clicked on a Lens.com advertisement displayed in response to a search for 1-800 Contacts’ trademark “may have been confused into thinking that Lens.com was affiliated with 1-800.” *1-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1244 (10th Cir. 2013). But the Court found that, in 2005-2007, the low incidence of such

confusion based on the record there “cannot support an inference that Lens.com’s keyword activity was likely to lure consumers away from 1-800.” *Id.* The Tenth Circuit also held that 1-800 Contacts “presented enough evidence to support a claim of contributory infringement” as to advertisements presented by Lens.com’s affiliates, where the evidence showed a greater number of consumers were affected. *Id.* at 1255.

In short, as this Court recently held, the result of *Lens.com* were “fact-specific” to that case and does not “bar Respondent from proving that other competitors’ use could have caused, or was likely to cause, such confusion.” Order Denying Complaint Counsel’s Motion to Bar Testimony And Argument (Feb. 21, 2017) at 3-4. Indeed, as an executive from ██████████ testified, the *Lens.com* decision created “a lot of legal uncertainty” regarding the scope of trademark rights with respect to paid search advertising, which is why ██████████ settled following the decision. CX9024 (██████████) at 63:13-20.

**B. The Trademark Settlement Agreements**

The settlement agreements that 1-800 Contacts reached with other retailers are narrow. They do not affect, for example, advertising on social media, display advertising, price comparison shopping sites, organic search results, or paid search advertising in response to thousands of internet searches related to contact lenses. The challenged agreements prohibit only one limited kind of infringing behavior: “causing a Party’s brand name, or link to the Party’s Restricted Websites to appear as a listing in the search results page of an internet search engine, when a user specifically searches for the other Party’s brand name.” *E.g.*, CX0311 (Vision Direct Settlement) § 4(A)e (emphasis added); *see also* CX0709 at 1 (explaining that the purpose of the settlement was “to prevent sponsored ads from being displayed in response to searches for the other party’s registered trademarks and exact URLs”); CX9040 (Miller Dep.) at 26:8-19. The settlements include two mechanisms to achieve that goal.

*First*, although the specific language varies, the settlements generally prohibit “using the other Party’s trademark keywords or URLs . . . to target or trigger the appearance or delivery of advertisements or other content to the user,” and include as exhibits lists of the specific restricted trademark keywords. *E.g.*, CX0317 (AC Lens Settlement) § 2(A)b.

*Second*, the settlements require the parties to implement the listed trademark terms as negative keywords, which instruct search engines not to display ads in response to searches for those terms.<sup>9</sup> This is necessary to carry out the purpose of the agreements because search engines frequently “broad match” the keyword that a retailer purchases to related, but not identical search queries. This can present a problem to the extent that a retailer’s trademark includes a generic term. Thus, absent the use of negative keywords, a retailer that instructed a search engine to display ads for any queries that are a broad match for the keyword “contacts” might cause its ads to be displayed in response to a search for 1-800 Contacts’ trademark.<sup>10</sup>

It is important to make clear, however, that while the negative keyword requirement avoids certain consequences of broad match bids on generic terms *as keywords*, it *does not* prohibit any advertising in response to *queries* for generic terms. The agreements are express on

---

<sup>9</sup> Negative keywords are commonly used industry tools that optimize return on paid search campaigns. *See, e.g.*, RX0734 (Hogan Rep.) ¶ 158; RX0494; RX0509. Contrary to the position taken by Complaint Counsel, Pre-Trial Brief p. 62 n.239, the settling parties frequently employed negative keywords in both exact and phrase-match type for strategic purposes regardless of contractual obligation. *See, e.g.*, CX9014 ( [REDACTED] ) at 159-160; CX9008 ( [REDACTED] ) at 72:19-74:3.

<sup>10</sup> By way of background, in October 2004, several months after their settlement, Vision Direct discovered 1-800 Contacts advertisements appearing in response to searches for “vision direct.” RX0258. This was because a 1-800 Contacts affiliate was “buying the keyword ‘vision’ and not adding the negative keyword ‘direct’ on Google.” *Id.* Vision Direct had already implemented negative keywords designed to avoid its ads appearing based on its bids for “contacts” and suggested that 1-800 Contacts do the same for “vision”; 1-800 Contacts agreed. *Id.*; RX0259. Following this experience, each subsequent settlement agreement included negative keyword provisions. CX9040 (Miller Dep.) at 28:6-23, 66:3-9.

this point: each lists advertising in response to generic terms as a “non-prohibited act.” *E.g.*, CX0317 § 2(B); CX9040 (Miller Dep.) at 60:18-61:1. For example, the [REDACTED] settlement agreement provides that “Nothing in this Section shall be construed to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyewear, frames, or other, similar generic terms as long as the appropriate negative keywords are implemented.” CX0326, § 3.

The agreements also have express protections for comparative advertising: “Prohibited Acts shall not include (i) use of the other Party’s Trademarks on the internet in a manner that would not constitute an infringing use in an non-internet context, e.g., the use on the internet of comparative advertising, parodies, and similar non-infringing, uses.” *E.g.* CX0311, § 4(B).

Complaint Counsel have attempted to sow confusion by suggesting that the agreements go further than prohibiting advertising in response to user queries for 1-800 Contacts’ trademarks because they do not explicitly specify that the use of negative keywords may be limited to “exact match” negative keywords. Complaint Counsel incorrectly interpret the agreements.

Negative keywords can be instituted in exact, broad and phrase match. An exact match negative keyword instructs the search engine not to serve an ad in response to a query for the negatively matched keyword alone; broad and phrase match negative keywords instruct the search engine not to serve an ad for a broader set of queries relating to or including the negatively matched keyword. Complaint Counsel suggest that the settlement agreements require negative keywords on “1-800 Contacts” that instruct the search engine not to display ads for user queries for 1-800 Contacts *and* other terms, such as “cheaper than 1-800 Contacts.”

This is incorrect, as 1-800 Contacts’ outside counsel who drafted the agreements testified. CX9040 (Miller Depo.) at 66:3-9; *see also id.* at 37:3-39:14. In general, negative keyword

provisions expressly specify phrase or broad match types when that is what is intended. RX0734 (Hogan Report) ¶ 154. None of the agreements here so specifies. Rather, the one agreement that does specify a negative keyword type requires only exact match negative keywords, CX0331 [REDACTED] and the other settlement agreements should be similarly understood to require only the use of exact match negative keywords.

Indeed, 1-800 Contacts’ outside counsel and paid search managers consistently communicated to settling parties that they “should be fine with making the negative keywords exact match.” RX0251; *see also* RX0253; RX0252; CX0709; CX9020 (Craven Dep.) at 117-121; CX9040 (Miller Dep.) at 173:19-174:5, 180:12-181:4; CX9021 (Pratt Dep.) at 116:22-117:23. Similarly, the other retailers testified that nobody from 1-800 Contacts ever told them that they needed to implement negative keywords in broad match. CX9039 ([REDACTED]) at 147:21-24; CX9014 ([REDACTED]) at 159-160; CX9008 ([REDACTED]) at 72:19-74:3.

## ARGUMENT

### I. THE CHALLENGED AGREEMENTS ARE PROCOMPETITIVE SETTLEMENTS OF TRADEMARK LITIGATION.

This is an antitrust case challenging settlements of *bona fide* trademark litigation—claims that Complaint Counsel concede were not sham. The law applicable to such agreements is clear: “[T]rademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation.” *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997). Accordingly, “in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors . . . and absent exceptional circumstances, we believe the parties’ determination of the scope of needed trademark

protections is entitled to substantial weight.” *Id.* Indeed, “it is reasonable to presume that such arms-length agreements are pro-competitive.” *Id.*

This rule reflects two well-settled economic principles: (1) trademark protection is procompetitive, and (2) settlements are generally procompetitive.

In enacting trademark protections in the Lanham Act, Congress concluded that “[n]ational protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985). The economic underpinnings of that judgment have been well-recognized for decades since the seminal work in the field by 1-800 Contacts’ expert, Dr. William Landes, and Judge Richard Posner. William M. Landes and Richard A. Posner, “Trademark law: an economic perspective,” 30 *The Journal of Law & Economics* 265-309 (1987); *see also* William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law.*, Ch. 7 (Harvard University Press 2003); RX0737 (Landes Report) ¶¶ 9-35; RX0739 (Murphy Report) ¶¶ 78-82.

As Dr. Landes has explained, by identifying brands, trademarks reduce consumers’ costs of searching for what to buy. RX0737 (Landes Report) ¶¶ 10-25. Because consumers spend less in finding what they want to buy, they are willing to pay more when they find it. *Id.* ¶¶ 26-28. As such, trademark owners with well-known brands can command a premium, which gives firms incentives to invest in building brands and the differentiated products or services associated with them. *Id.* But brands reduce search costs, and make premium prices possible, only if they send reliable and positive signals to consumers. *Id.* ¶¶ 29-30. A consumer cannot rely on the McDonald’s mark if each franchise serves a different menu and with varying levels of service. *Id.* ¶ 31. And a bad experience at McDonald’s may send the consumer to Burger King the next

time he or she sees the McDonald's mark. *Id.* Accordingly, trademarks benefit consumers not only by reducing search costs but by creating incentives for firms to provide products and services of consistent quality. *Id.* ¶¶ 32-35.

Trademark infringement and dilution undercut the incentives to engage in such interbrand competition by interfering with the signaling effect of a trademark. RX0737 (Landes Report) ¶¶ 37-44. Trademark protection against such harm advances the procompetitive goals of antitrust law by securing incentives for firms to engage in the kind of interbrand competition that it is the “primary purpose of the antitrust laws . . . to protect.” *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997); *see also* RX0737 (Landes Report) ¶¶ 43-45; RX0739 (Murphy Report) ¶¶ 83-90.

The Commission itself has recognized that trademark protection secures the procompetitive benefits of brand differentiation:

An integral part of the competitive process—i.e., the process by which consumers select the mix of goods and services they most prefer—is the cost to consumers of becoming informed about a brand's advantages and availability. An established brand is one which has invested capital to reduce those costs, having acquainted most consumers with the product and its quality. The premium accruing to a brand name is thus a form of good will, whose value can be measured by the strength of consumers' preference for that brand. Federal statutory policy with respect to trademarks expressly encourages and protects this form of good will.

*Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9025 (Mar. 3, 1983) (citation omitted). Indeed, the Commission has stated that the fact that “consumers [are] willing to pay a premium price in reliance upon [a] familiar and successfully advertised trademark . . . . reflect[s] a marketplace judgment about interbrand competition, which ‘is the primary concern of antitrust law.’” *Id.* at 9025-26 (quoting *Continental TV v. GTE Sylvania*, 433 U.S. 36, 52, n.14 (1977)).

Complaint Counsel’s expert Dr. Evans agrees that “[t]rademarks help companies convey information to consumers about themselves and their products,” that “[t]hey enable companies . . . to use a brand name to signal to consumers that the company provides a high quality product or offers particular attributes that consumers care about,” and that “[p]rotecting trademark rights encourages investment in this sort of brand-building activity, which in turn generates valuable market information, promotes competition and ultimately benefits consumers.” CX8006 (Evans Report) ¶ 292; *see also* CX8009 (Evans Rebuttal Report) ¶ 48 & n.67 (agreeing with Dr. Landes about “the role of trademark protection in encouraging firms to invest in quality”); CX9042 (Evans Dep.) at 196:3-8.

It is equally well-settled that settlements are procompetitive because they reduce litigation costs. RX0739 (Murphy Report) ¶¶ 83-86, 136-139. “[L]itigation breeds a litany of direct and indirect costs, ranging from attorney and expert fees to the expenses associated with discovery compliance.” *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1075 (11th Cir. 2005). Complaint Counsel’s expert, Dr. Evans, agrees, acknowledging that avoiding these costs enhances economic efficiency. CX9042 (Evans Dep.) at 196:17-20. That is why “[f]ew public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute.” *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986); *see also Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) (“Compromises of disputed claims are favored by the courts.”); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898) (“[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored.”). And the testimony at the hearing will show that this procompetitive benefit explains the settlements challenged here: other retailers settled to avoid litigation costs and the risks of losing. CX9000 ( [REDACTED] )

( ) at 93-94; CX9014 ( ) at 46:12-48:15; CX9024 ( ) at 62:19-64:1, 75:18-77:3, 160:3-165:6; CX9039 ( ) at 86-87, 144; CX9003 ( ) at 108-109; CX0943 ( ) ¶ 10.

In short, as settlements of litigation that protect trademark rights, the agreements that Complaint Counsel have challenged in this case are procompetitive twice over. That should dispose of this antitrust case, as it did in *Clorox*.

*Clorox* involved an antitrust challenge to a settlement of trademark litigation over the PINE-SOL mark that prohibited Clorox from using the mark in certain advertising. Clorox alleged that “the agreement was being used unlawfully by Sterling . . . to perpetuate a monopoly in certain cleaner-disinfectant markets.” *Clorox Co.*, 117 F.3d at 54. The district court dismissed the antitrust claim, and the Second Circuit affirmed. Noting that “Clorox challenges a trademark agreement” which is “common, and favored, under the law,” and that “the agreement at issue here merely regulates the way a competitor can use a competing mark,” the Second Circuit held that the rule of reason applied. *Id.* at 55-56.

In applying that rule, the Second Circuit reasoned that “because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns.” *Clorox Co.*, 117 F.3d at 57 (citation omitted). Accordingly, the court held that “Clorox cannot make a case under the antitrust laws unless it demonstrates that the [settlement agreement] may significantly harm competition as a whole, *regardless of whether the agreement is entirely necessary to protect [the defendant’s] trademark rights.*” *Id.* (emphasis added). The Court held that Clorox had not made the required showing because (1) “[n]othing here suggests that the other large companies that produce cleaning products are incapable of successfully investing their resources, in the form of capital

and brand name equity, to enter the markets [the defendant's] products allegedly dominate"; and (2) the settlement agreements "do not entirely prevent Clorox from using the PINE-SOL name to compete against LYSOL products." *Id.* at 58. As explained below, Complaint Counsel's expert concedes that the only "barrier to entry" in the retail contact lens business is building awareness, and the settlement agreements do not affect 1-800 Contacts' competitors' ability to build their own brands rather than freeriding on the investment 1-800 Contacts has made in its own brand.

The *Clorox* court also noted that "the pro-competitive justifications of the agreement bolster our conclusion that the agreement does not violate the antitrust laws." *Clorox Co.*, 117 F.3d at 60. Reasoning that "the parties" to a trademark settlement agreement "are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves." *Id.* Accordingly, the Second Circuit held that "it is usually unwise for courts to second-guess such decisions. In the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive." *Id.* And the court concluded that "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies. Where large competitors each represent their respective trademark interests, unless one party is irrational, the result should accord with how the parties view their respective rights." *Id.*

Complaint Counsel give *Clorox* the back of the hand, arguing that the case is distinguishable because "nothing prevented" Clorox "from *displaying* or *offering* the competing merchandise, so long as it was not confusingly labeled." CC Pre-Trial Br. at 37-38. That is misleading. The settlement agreement in *Clorox* did not prohibit marketing "products that compete directly with the LYSOL brand, so long as they are marketed under a brand name other than PINE-SOL." 117 F.3d at 57 (quoted in CC Pre-Trial Br. at 38 n.140). Likewise, nothing in

the challenged agreements prevents any contact lens retailer from displaying or offering its products in paid search advertising (or any other way), so long as they do not do so by using 1-800 Contacts' brand name to trigger the display of their advertising on search engines.

The rule of *Clorox* should dispose of this case. As explained below, two other dispositive legal consequences follow from the proper characterization of the challenged agreements as trademark settlements:

*First*, because settlements of litigation are procompetitive absent unusual circumstances, the agreements cannot give rise to antitrust liability because it is commonplace for parties to settle, as they did here, on terms within the scope of relief that could be obtained in litigation.

*Second*, even if the settlement agreements could in theory violate the antitrust laws, they are not inherently suspect because they “might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999). That, too, is dispositive because Complaint Counsel cannot prove that the agreements harmed competition by reducing output or increasing prices of contact lenses.

**II. THE SETTLEMENT AGREEMENTS DO NOT GIVE RISE TO ANTITRUST LIABILITY BECAUSE THEY PROVIDED FOR RELIEF WITHIN THE POTENTIAL SCOPE OF 1-800 CONTACTS' TRADEMARK RIGHTS.**

Prior to the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013), courts concluded that if “there is nothing suspicious about the circumstances of a patent settlement, then to prevent a cloud from being cast over the settlement process a third party should not be permitted to haul the parties to the settlement over the hot coals of antitrust litigation.” *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 992 (N.D. Ill. 2003); accord *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 205, 208 (2d Cir. 2006). Consistent with that principle, the Supreme Court in *Actavis* established a two-part test for determining when settlements can be challenged as violating the antitrust laws.

*First*, the party challenging a settlement on antitrust grounds must demonstrate that a particular form of settlement is sufficiently unusual to merit antitrust consideration. If a settlement takes a traditional or commonplace form, no antitrust scrutiny is warranted. Here, not only have many parties settled trademark disputes with non-use agreements similar to the ones challenged in this case, but 1-800 Contacts’ lawsuits were settled on terms that resulted in it obtaining relief no greater than the relief it sought in court and could have obtained had its infringement lawsuits been litigated to completion. As such, the settlement form at issue here is commonplace and the challenged agreements are not subject to scrutiny under *Actavis*.

*Second*, even if the challenging party can show that a settlement is not traditional or commonplace, the challenger also must demonstrate, based on several factors, that the danger of anticompetitive harm from the settlement outweighs the strong judicial interest in promoting and preserving private settlements. Complaint Counsel cannot demonstrate that *any* of those factors—let alone *all* of them, as in *Actavis*—are present here. That is another reason why the settlement agreements are not subject to antitrust scrutiny.

**A. Public Policy Strongly Favors the Settlement of Trademark Disputes.**

As noted, public policy strongly supports private settlements of legal disputes to reduce litigation costs and conserve judicial resources. *See Williams*, 216 U.S. at 595; *St. Louis Mining & Milling Co.*, 171 U.S. 650; *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting “paramount policy of encouraging settlements”). As such, “settlement agreements are to be upheld whenever possible.” *Am. Sec. Vanlines, Inc.*, 782 F.2d at 1060.

Likewise, as noted, courts routinely recognize that trademark settlements, in particular, are “favored under the law.” *Clorox Co.*, 117 F.3d at 55; *see, e.g., T & T Mfg. Co. v. A. T. Cross Co.*, 587 F.2d 533, 539 (1st Cir. 1978) (noting the “judicial policy of encouraging extra-judicial settlement of trademark litigation”); *Fudruckers, Inc. v. Fudrucker’s Inc.*, 436 F. Supp. 2d 1260,

1265 (N.D. Fla. 2006) (“Trademark agreements, in which two parties agree on their respective rights in a mark are favored under the law.”) (internal quotation marks and citations omitted).

Indeed, trademark disputes are costly to the parties and the courts.<sup>11</sup> Lens.com estimated the cost of litigating its trademark dispute with 1-800 Contacts to be “approximately \$1.4 million.” *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4. That did not include 1-800’s litigation costs or the costs of the parties’ appeal.

Trademark settlements also advance a fundamental goal of trademark law itself, by allowing competing parties “to market products in a way that reduces the likelihood of consumer confusion.” *Clorox Co.*, 117 F.3d at 60; *see also, e.g., adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1080-81 (D. Or. 2008).

**B. Commonplace Settlements Are Not Subject to Antitrust Scrutiny.**

Consistent with this longstanding policy favoring settlements, the Supreme Court in *Actavis* established a high preliminary bar for when settlement agreements are subject to antitrust scrutiny. The Court drew a sharp distinction between “commonplace” forms of settlements, which are not subject to antitrust scrutiny, and “unusual” ones, which may be. 133 S.Ct. at 2236. Under the Court’s reasoning, a party alleging that a private settlement constitutes a violation of the antitrust laws first bears the burden of establishing why a particular “form” of settlement is sufficiently “unusual” to warrant antitrust scrutiny. *Id.*

*Actavis* involved a specific form of settlement commonly known as a “reverse payment,” that allegedly had been used to resolve patent infringement disputes between brand-name and

---

<sup>11</sup> *See* American Intellectual Property Law Association, *2015 Report of the Economic Survey* at 38-39, available at <http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf> (estimating median litigation costs for trademark disputes at between \$500,000 and \$1.6 million depending on the amount at risk).

generic drug manufacturers under the Hatch-Waxman Act. 133 S.Ct. at 2227. As the Court explained, a “reverse payment” settlement occurs when (1) the claimed infringer agrees “not to produce the patented product until the patent’s term expires;” and (2) the patentee agrees to pay the claimed infringer “many millions of dollars.” *Id.* This form of agreement “requires the patentee to pay the alleged infringer, rather than the other way around.” *Id.*

The “basic question” before the Court in *Actavis* was whether this “unusual” form of settlement can “sometimes unreasonably diminish competition in violation of the antitrust laws.” 133 S.Ct.at 2231, 2227. The Court answered yes, rejecting the rule adopted by several lower courts that alleged reverse payment agreements are “immune from antitrust attack so long as” the agreements did not exceed “the exclusionary scope of the patent.” *Id.* at 2230.

The Court, however, took great pains to distinguish reverse payment settlements from “traditional” forms of settlements. 133 S.Ct. at 2233. It found “reason for concern that settlements *taking this form* tend to have significant adverse effects on competition.” *Id.* at 2231 (emphasis added). The Court contrasted a reverse payment settlement, in which a party with “no claim for damages . . . walks away with money simply so it will stay away from the patentee’s market,” with “traditional” settlements where “a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim.” *Id.* The Court stated that “settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability” and that it did not “intend to alter that understanding.” *Id.*

Significantly, the Commission advocated for this “commonplace/unusual” distinction in its briefing in *Actavis*. The Commission argued that there is no reason for antitrust concern where “an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled.” Br. for Pet’r, 2013 WL 267027, at \*27. And it

emphasized that “[p]ayments from patentees to accused infringers (or from defendants to plaintiffs more generally) are not a traditional settlement term.” *Id.* at 28; *see also* Reply Br. For Pet’r, 2013 WL 1099171, at \*2 (stating that reverse payments are “an extraordinary and peculiar way to settle a lawsuit” and have “no apparent analogue in traditional settlement practice”).

Further, numerous courts have interpreted *Actavis* as holding that antitrust scrutiny applies to unusual settlement forms, but not to commonplace ones. *See King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015) (*Actavis* holding “should not be read to subject to antitrust scrutiny ‘commonplace forms’ of settlement.”); *In re Lipitor Antitrust Litig.*, 46 F.Supp.3d 523, 537 (D.N.J. 2014) (“The Supreme Court provided two types of ‘commonplace forms’ of settlement that are not subject to *Actavis* scrutiny.”); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F.Supp.3d 560, 567 (D.N.J. 2014) (“[*Actavis*] explains that there is ‘something quite different’ about reverse payment settlements, as opposed to ‘traditional’ and ‘commonplace forms’ of settlement, which is why only the former are subject to antitrust scrutiny.”); *see also In re Loestrin 24 Fe Antitrust Litigation*, 814 F.3d 538, 544 n.4 (1st Cir. 2016) (“The court noted that it did not intend to disturb commonplace settlement forms.”).

C. **The Non-Use Trademark Settlement Agreements Here Are Commonplace Under *Actavis* and Not Subject to Antitrust Scrutiny.**

Complaint Counsel have not met their burden to establish that the settlements at issue take a form that is “unusual” or “quite different” from traditional settlements.

1-800 Contacts’ settlements were standard non-use agreements whereby a party agreed not to use the other’s trademark. Parties routinely use that form of settlement to resolve trademark disputes. *See, e.g.*, 3 McCarthy on Trademarks & Unfair Competition § 18:82 (4th Ed. 2016 update) (“An agreement not to use or register a mark, usually entered into to settle an

infringement dispute, is not against public policy and is an enforceable promise.”); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986) (upholding a non-use trademark settlement agreement as consistent with the “overriding public interest in settling and quieting litigation”) (internal quotation marks and citation omitted); *see generally* RX0734 (Hogan Report) ¶¶ 143-144. The Lanham Act envisages and authorizes non-use trademark agreements. *See, e.g., Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 965 (C.C.P.A. 1979); *see also* 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th Ed. 2016 update).

This form of settlement has frequently been used to settle disputes regarding the use of trademarks in paid search advertising. *See, e.g., Probar, LLC v. Onebody et al.*, No. 2:14-cv-166, Dkt. 18 (M.D. Fla. Oct. 29, 2014) (entering consent agreement not to purchase trademarks from internet search engines as keywords); *Greenberg Smoked Turkeys, Inc. v. Tsavo Media, Inc.*, Consent Decree and Final Judgment, No. 6:11-cv-37, Dkt. 29 (E.D. Tex. Jan. 23, 2012) (same); *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 6:09-cv-1832, Dkt. 22 (M.D. Fla. Mar. 16, 2010) (same); *Lounge 22, LLC v. Brand X Furniture*, No. 2:09-cv-3692, Dkt. 26 (C.D. Cal. Oct. 16, 2009) (same); *Gonzales & Gonzales Bonds and Insurance Agency, Inc. v. Action Immigration Bonds and Insurance Services, Inc.*, No. 2:10-cv-1162, Dkt. 15 (C.D. Cal. Apr. 7, 2010) (same); *Fragrancenet.com, Inc. v. Les Parfums, Inc., et al.*, No. 2:09-cv-2626, Dkt. 23 (E.D.N.Y. Mar. 8, 2010) (same); *see also* RX0734 (Hogan Report) at ¶¶ 152-153.

As these many cases demonstrate, non-use trademark settlements are used in a wide array of industries and contexts—making them very different from reverse payment settlements that the Supreme Court found to be “virtually unheard of outside of” Hatch-Waxman litigation. *Actavis*, 133 S.Ct. at 2234. In fact, the Court in *Actavis* pointed to non-use trademark settlements

as an example of the kind of “commonplace” settlement it did not intend to displace—citing *Metro-Goldwyn Mayer, Inc. v. 007 Safety Products, Inc.*, 183 F.3d 10 (1st Cir. 1999), in which one party agreed to pay damages to a trademark holder, to not use a registered trademark, and to abandon a pending application for his competing trademark.

If all of this were not enough, the settlements can hardly be deemed “unusual” when they plainly fall within the range of relief that a court could have ordered. *See generally* RX0734 (Hogan Report) at ¶¶ 104-106, 149-151. In *Actavis*, one factor in the Court’s finding that reverse payment settlements are unusual was that a payment from the plaintiff to the defendant was beyond the potential outcome of the litigation because a Hatch-Waxman patent defendant generally had no conceivable infringement claim against the plaintiff. *See* 133 S.Ct. at 2231. Here, by contrast, a court entered an injunction in 1-800 Contacts’ favor that parallels the terms of the settlements it reached with other retailers. *See* RX0401 (*1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-1949, Dkt. 27 (S.D.N.Y. May 15, 2009)). And courts across the country have issued similar injunctions barring entities from using another’s trademark in the specific context of keyword searches.<sup>12</sup> These judicial orders demonstrate that non-use injunctions are

---

<sup>12</sup> *See, e.g., Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, No. 14-1557, 2015 WL 1936502, at \*9 (E.D. Va. Apr. 28, 2015); *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, No. 14-30288, 2015 WL 11197741, at \*4 (S.D. Fla. Feb. 27, 2015); *Roxley Watch U.S.A., Inc. v. Hernandez*, No. 1:13-cv-20643, Order at 4 (Dkt. 14) (S.D. Fl. Aug. 20, 2013); *Partners for Health and Home, LP v. Yang*, No. 2:09-cv-7849, Dkt. 146, at 2 (C.D. Cal. June 21, 2012); *Select Mgmt. Res., Inc., et. al v. D & D Mktg., Inc. et. al*, No. 2:10-cv-10008, Dkt. 39 (C.D. Cal. July 15, 2011); *Quidgeon v. Olsen*, No. 10-1168, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011); *World Entm’t, Inc. v. Brown*, No. 09-5365, 2011 WL 2036686 (E.D. Pa. May 20, 2011); *Skydive Ariz., Inc. v. Quattrocchi*, No. 05-2656, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010); *Transamerica Corp. v. Moniker Online Servs. LLP*, No. 09-60973, 2010 WL 1416979, at \*7 (S.D. Fla. Apr. 7, 2010); *MasterCard Int’l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009); *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 07-1753, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008); *cf. Google, Inc. v. American Blind & Wallpaper*, No. 03-5340, 2007 WL 1159950, at \*11 (N.D. Cal. Apr. 18, 2007) (rejecting argument that defendant had unclean hands for purchasing competitor’s trademarks as (footnote continued)

commonplace—including in the paid search context. And Complaint Counsel have admitted (subject to certain meritless objections) that “the obligations of 1-800 Contacts’ counterparties to the Challenged Settlement Agreements under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case.” RX0679 at 5.<sup>13</sup>

Complaint Counsel appear to argue that the challenged settlement agreements are subject to antitrust scrutiny because, in their view, the settlements “extend to plainly non-infringing conduct.” CC Pre-Trial Br. at 61. But that argument simply underscores the logic of *Actavis*’s rule that commonplace settlements are not subject to antitrust scrutiny and why that rule applies to the challenged settlements here.

For one thing, it is difficult to reconcile Complaint Counsel’s argument that the settlement agreements reach conduct that is outside trademark protection with its admissions that (1) the trademark claims that 1-800 Contacts settled were not sham, RX0680 (Amended Response to Interrogatory No. 6), or (2) that “the obligations of 1-800 Contacts’ counterparties to the Challenged Settlement Agreements under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case.” RX0679 (Amended Response to Request for Admission No. 19). If 1-800 Contacts could have won relief on the settlements’ terms, how can the settlements exceed the scope of trademark protection?

---

keywords because of its “willingness to enter into agreements with competing companies to refrain from buying each other’s trademarks as keywords under the AdWords program.”); *see generally* RX0734 (Hogan Report) at ¶¶ 149-151.

<sup>13</sup> Relatedly, it is also significant that the challenged settlements resulted from *bona fide* legal disputes between the settling parties. Courts have held that the non-sham nature of underlying litigation can bear on whether there are “suspicious” circumstances surrounding the settlements such that antitrust scrutiny should apply. *Asahi Glass Co.*, 289 F. Supp. 2d at 993.

Complaint Counsel nevertheless declare that the settlements portend anticompetitive harm because they “ban[] advertising without regard to the likelihood that any particular ad will cause confusion.” CC Pre-Trial Br. at 62. But this overlooks the fact that the likelihood of confusion is “an inherently factual issue that depends on the facts and circumstances in each case.” *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012). As the Tenth Circuit explained in *Lens.com*, the existence of confusion turns on multiple factors that “depend very much on context.” 722 F.3d at 1243-44. And the context of 1-800 Contacts’ claims was not just the specific text of an ad, but the context in which it appeared and the possibility that consumers would be confused because of the navigational intent that led them to enter “1-800 Contacts” as a search query. *See* pp. 18-19, *supra*.

The fact that whether a given advertisement is likely to confuse consumers requires the “application of multiple factors,” Order Denying Complaint Counsel’s Motion to Bar Testimony And Argument (Feb. 21, 2017) at 4, is why parties settle trademark litigation on the basis of non-use agreements and why those agreements are favored in the law: “to eliminate the risks, costs, and uncertainties of litigation.” RX0734 (Hogan Report) at ¶ 140; *see also* pp. 20-21, *supra*. Indeed, a settlement requiring parties to agree not to use trademarks only in a confusing manner would be impossible to reduce to writing and equally impossible to enforce.

Complaint Counsel purport to identify certain features of the settlements that are categorically beyond trademark protection—for example, that they “require parties to implement ‘negative’ keywords, which necessarily broadens an agreement not to ‘use’ trademarked keywords into a ban on the use of generic keywords.” CC Pre-Trial Br. at 61. But the law belies this claim. *See, e.g., 1-800 Contacts, Inc. v. Memorial Eye, P.A.*, 2010 WL 988524, at \*5-6 (D. Utah Mar. 15, 2010); *Buying for the Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310,

322 (D.N.J. 2006) (finding that the “purchase and/or sale of keywords that trigger advertising constitutes the type of ‘use’ contemplated by the Lanham Act” where an advertisement may have appeared because plaintiff purchased as a keyword the generic term “bedroom”).<sup>14</sup> And, more generally, the claims that the settlement agreements resolved “involve[] an unsettled area of law given the emerging and changing nature of Internet competition.” *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-CV-591 CW, 2012 WL 113812, at \*3 (D. Utah Jan. 13, 2012).

Thus, far from defeating the *Actavis* threshold test, Complaint Counsel’s attempt to draw trademark boundaries after the fact reinforces the test’s wisdom. Focusing on whether there are “unusual” features of the settlements identifies agreements that do not “accord with how the parties view their respective rights” without violating the principle that “it is usually unwise for courts to second-guess” the wisdom of settlements. *Clorox Co.*, 117 F.3d at 60. Under that test, since the settlements here are commonplace, they are not subject to antitrust scrutiny.

Were it otherwise, *every* settlement agreement would exist under the cloud of potential antitrust scrutiny as long as a third party could identify some legal rule that supposedly barred the claims that were settled. That is fundamentally inconsistent with the historic respect that courts have given to private settlement agreements. It is not the purpose of antitrust law to serve as a yardstick for private agreements that settle *bona fide* legal disputes, especially where private agreements track the relief a court could have ordered at the conclusion of a lawsuit. Nor is it the

---

<sup>14</sup> The only case that Complaint Counsel rely on, via their expert Rebecca Tushnet, is *Rhino Sports, Inc. v. Sport Court, Inc.*, No. 02-1815, 2007 WL 1302745 (D. Ariz. May 2, 2007). But that case did not address whether advertising in response to user queries for trademarks based on broad matching constituted infringement but whether that activity contravened a pre-existing injunction: “At issue is not whether Rhino Sports’ current activities infringe Sport Court’s trademark, but whether Rhino Sports substantially violated the permanent injunction.” *Id.* at \*4. Moreover, unlike the trademark owner in *Rhino Sports*, 1-800 Contacts’ settlement agreements never prevented a competitor from purchasing generic terms as keywords. See pp. 20-21, *supra*.

role of antitrust law to serve as the mechanism for obtaining answers to disputed legal questions that parties choose to resolve outside of court. Complaint Counsel’s categorical rule would deter parties from settling and force courts and litigants to expend unnecessary resources to litigate cases to their finality, undermining the procompetitive benefits of settlements.

**D. Even if the Challenged Settlements Are Uncommon, None of the Actavis Factors Warrants Antitrust Scrutiny.**

Even if a challenger can demonstrate that a settlement’s form is unusual, *Actavis* holds that the “general legal policy favoring settlement of disputes” forecloses antitrust scrutiny unless several additional considerations are present. 133 S.Ct. at 2226. Specifically, the Court concluded that the application of five considerations to “large and unjustified” reverse payments outweighed the “desirability of settlements.” *Id.* at 2237. Here, however, *none* of the five *Actavis* factors are satisfied—let alone all of them “taken together,” as in *Actavis*, *id.* at 2237.

The first *Actavis* consideration is whether the “specific restraint at issue has the ‘potential for genuine adverse effects on competition.’” *Id.* at 2234 (quoting *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986)). The Court found such potential because (1) in its view, large reverse payments raise the concern that “the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market” in the form of lower prices to consumers, and (2) the Hatch-Waxman regulatory structure gave the patentee an incentive to make such a payment because a settlement with the first generic company to file with the FDA can prevent entry by other generic competitors. *Id.* at 2334-2335.

However, there is little risk that a trademark owner will try to settle trademark disputes to divide monopoly profits because “trademarks are by their nature non-exclusionary. A trademark, unlike other intellectual property rights, does not confer a legal monopoly on any good or idea; it

confers rights to a name only.” *Clorox Co.*, 117 F.3d at 56. The only profits that a trademark protects are those related to the “financial, reputation-related rewards associated with a desirable product.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995). Unlike in the Hatch-Waxman context, any party not subject to a settlement agreement with 1-800 Contacts is free to challenge its trademarks. Accordingly, the fact that so many online retailers chose to settle with 1-800 Contacts using standard non-use agreements strongly suggests that the settlements here are “supported by traditional settlement considerations.” *Actavis*, 133 S.Ct. at 2235.

The second *Actavis* consideration is whether any anticompetitive consequences associated with the settlements at issue “will at least sometimes prove unjustified.” 133 S.Ct. at 2235-36. As noted elsewhere, there are myriad procompetitive efficiencies associated with trademark protection that can justify any limitations on competition in the settlement agreements.

*Actavis*’ third consideration is that “where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice.” *Actavis*, 133 S.Ct. at 2236. Trademarks, however, only protect names and not goods or services, so the only market power a trademark holder may possess is due to the quality of its services. *See Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (“Market power, if any, is derived from the product, not from the name or symbol as such.”). Trademark settlements without substantial monetary payments provide no indication of market power.

The fourth *Actavis* factor addresses the administrative feasibility of antitrust challenges to reverse payment settlements. While the *Actavis* Court generally acknowledged the traditional settlement benefits of resolving “consuming, complex, and expensive” litigation and the challenges of an *ex post* inquiry into the merits, 133 S.Ct. at 2234, the Court found that antitrust

scrutiny of reverse payments was appropriate because “the size of the unexplained payment can provide a workable surrogate for a patent’s weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.” *Id.* at 2236-37.

Here, however, there is no shortcut that makes the “antitrust game . . . worth th[e] litigation candle.” *Id.* at 2234. Accordingly, as their trial brief makes clear, CC Pre-Trial Br. at 49-66, Complaint Counsel intend to prove the trademark merits directly in order to show that 1-800 restricted competition beyond “the scope of any property right that 1-800 Contacts may have in its trademarks,” Compl. ¶ 2. This Court cannot and should not brush aside the “practical concern” about re-trying the claims that were settled. Indeed, it is fundamentally unfair for 1-800 Contacts’ antitrust liability to turn on whether it can prove years later that it would have won each of the claims that it settled.<sup>15</sup>

Finally, the Court in *Actavis* reasoned that subjecting large, unjustified reverse payments to antitrust scrutiny “does not prevent litigating parties from settling their lawsuit because they could ‘settle in other ways.’” *Actavis*, 133 S.Ct. at 2237. However, subjecting non-use trademark settlements to antitrust scrutiny would significantly limit the latitude of parties to a trademark dispute to settle their claims because a non-use agreement is the most basic way to resolve a trademark infringement dispute. *See* RX0734 (Hogan Report) ¶¶ 104-106, 149-151. Complaint Counsel’s suggestion that 1-800 Contacts could have settled by prohibiting the use of a “name that evokes 1-800 Contacts,” CC Pre-Trial Br. at 63, ignores that 1-800 Contacts’ trademark claims were not limited to the use of 1-800 Contacts’ name in the text of paid search

---

<sup>15</sup> This feasibility problem is magnified by the fact that an alleged misuse of trademarks in the paid search context may give rise to a range of other viable legal claims, including federal and state trademark dilution and various other state law claims. *See generally* RX0734 (Hogan Report) at §§ VI, VII.

advertising (and the case law has not so limited trademark claims, either). *See* RX0734 (Hogan Report) at ¶¶ 104-108, 149-151. And Complaint Counsel’s suggestion that 1-800 Contacts could have required disclosures along the lines of what the Commission has required *in the false advertising context*, CC Pre-Trial Br. at 63, makes no sense as a trademark settlement alternative.

In fact, Complaint Counsel’s attempt to shoehorn other legal standards into the framework for evaluating trademark settlements confirms that their case is about remaking trademark law as Complaint Counsel wish it could be, not as trademark litigation actually happens to be. Even Complaint Counsel’s own expert, however, will not be opining that the balance “trademark law strikes should be shifted one direction or the other.” CX9042 (Evans Dep.) at 157:2-158:11. Standing alone, a different view of trademark law does not satisfy Complaint Counsel’s burden under the *Actavis* test’s second part to identify circumstances that warrant disturbing the “general legal policy favoring settlement of disputes.” 133 S.Ct. at 2226.

### **III. THE SETTLEMENT AGREEMENTS ARE NOT INHERENTLY SUSPECT.**

If the challenged settlement agreements are subject to antitrust liability, they require a full rule-of-reason analysis. The agreements are not inherently suspect as Complaint Counsel argue.

The Supreme Court has held that a restraint is subject to abbreviated antitrust analysis only where “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.” *Cal. Dental Ass’n*, 526 U.S. at 770. As such, a restraint is inherently suspect only if “it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005). Only “[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition” can “the restraint [be] presumed unlawful. . . .” *Id.* at 36.

As noted, Complaint Counsel’s position that the challenged settlement agreements are inherently suspect departs from the rule that “it is reasonable to presume that such arms-length agreements are pro-competitive.” *Clorox Co.*, 117 F.3d at 60. Complaint Counsel’s position also contravenes not one but two Supreme Court decisions ruling against the Commission: (1) *Actavis* and (2) *California Dental*.

**A. The FTC Failed to Persuade the Supreme Court That Intellectual Property Settlement Agreements Are Inherently Suspect.**

In *Actavis*, the Commission “urge[d] [the Supreme Court] to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a ‘quick look’ approach, rather than applying a ‘rule of reason.’” 133 S.Ct. at 2237. The Supreme Court “decline[d] to do so.” *Id.* Noting “that abandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where 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,” the Court determined that reverse payments did not “meet this criterion” in light of a number “complexities” associated with those agreements. *Id.* (quotation marks omitted).

The myriad complexities associated with settlements of trademark litigation regarding paid search advertising require the same result here. As noted, the circumstances of trademark settlements portend far less risk of such effects than reverse payments, which reflect an attempt by a monopolist to pay its competitors to stay out of the market. But there is more: the very nature of paid search advertising introduces complexities that warrant a full antitrust analysis.

In determining whether abbreviated review is appropriate, “[t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of the restriction will follow from a quick (or at least quicker) look,

in place of a more sedulous one.” *Cal. Dental Ass’n*, 526 U.S. at 781. Here, the market and the courts have very limited experience with restraints on paid search advertising in response to searches for trademarks. Google eliminated some of its restrictions on such advertising only in 2004. CX1148. Bing did not do so until 2011. CX1454. Complaint Counsel’s expert, Dr. Evans, acknowledges that paid search advertising was in its “primordial swamp” a mere decade ago. CX9042 (Evans Dep.) at 170:12-171:10. And almost no cases have applied antitrust analysis to paid search advertising or restrictions on it.

The “economic learning” underlying paid search advertising is of recent vintage as well, which also weighs against inherently suspect treatment. *Polygram Holding, Inc.* 416 F.3d at 36. According to Dr. Evans, search engines are multi-sided advertising platforms, and the economics applicable to such platforms developed largely following a seminal article published by two French economists in the year 2000. CX9042 (Evans Dep.) at 158:12-159:8, 163:2-165:16. Dr. Evans also concedes that two-sided platforms such as internet search engines involve economic principles that are more complex than those that apply to most markets. CX9042 (Evans Dep.) at 159:23-160:13. Indeed, Complaint Counsel say that “[b]idding on keywords and running (often massive) search advertising campaigns is a complex business.” CC Pre-Trial Br. at 8.

Complaint Counsel’s argument that *Actavis* “*did not* direct that settlements of intellectual property disputes may *never* be judged inherently suspect,” CC Pre-Trial Br. at 35, addresses a straw man. That is not 1-800 Contacts’ argument. 1-800 Contacts’ position is that if settlements involving alleged payments to competitors to stay out of the market are not inherently suspect, the narrow trademark settlements here are not inherently suspect either.

Further, Complaint Counsel’s argument that a “trademark is unlike a patent” because it “invests the trademark owner with a far more limited right to bar only *confusing* uses of the

trademark,” CC Pre-Trial Br. at 36, cuts against their position. As explained with respect to the *Actavis* factors, the narrower ambit of trademarks’ protection makes settlements of claims to protect them less competitively suspect than payments by a patentee to its competitors.

Finally, Complaint Counsel’s reliance on *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), CC Pre-Trial Br. at 37, which held a “reverse payment” settlement *per se* unlawful, simply ignores *Actavis* altogether. The Commission did not support *Cardizem’s per se* rule in *Actavis* and that rule did not survive *Actavis*.

**B. The FTC Failed to Persuade the Supreme Court that Restraints on Advertising Are Inherently Suspect.**

The Supreme Court’s decision in *California Dental* also precludes inherently suspect treatment. That case involved restrictions that essentially prohibited dentists in California from any advertising offering the “lowest prices” or making any “claims as to the quality of services.” *Cal. Dental Ass’n*, 526 U.S. at 760 n. 1. The Commission condemned these bans as inherently suspect. *Id.* at 762-63. The Ninth Circuit upheld the Commission’s decision, but the Supreme Court reversed, holding that the advertising restriction in that case should have been subjected to a full rule-of-reason analysis.

The Supreme Court noted that the challenged advertising restrictions “appear[ed] to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators).” *Cal. Dental Ass’n*, 526 U.S. at 775. The Court held that evaluating this balance of consumer effects was “a question susceptible to empirical but not *a priori* analysis.” *Id.* at 774. In its view, “[t]he plausibility of competing claims about the effects of” challenged “advertising

restrictions rule[d] out the indulgently abbreviated review” by the Commission. *Id.* at 778. The Court explained:

[B]efore a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

*Id.* at 775 n.12. The Court held that inherently suspect treatment was not appropriate where the “advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Id.* at 771.

Tellingly, Complaint Counsel bury their discussion of *California Dental*—the most recent Supreme Court precedent addressing the level of scrutiny in antitrust challenges to advertising restrictions—in a cursory footnote that does not address any of the foregoing. CC Pre-Trial Br. at 66 n. 251. Instead, Complaint Counsel make flawed comparisons to *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), and *In the Matter of Realcomp II Ltd.*, Dkt. No. 9320, 2007 WL 6936319 (F.T.C. Oct. 30, 2009). *See* CC Pre-Trial Br. at 31.

*Polygram* involved a “moratorium” on advertising and discounting albums; the case did not involve settlement agreements and the respondents did not argue that the advertising had any potential to confuse consumers. *Polygram Holding, Inc.*, 416 F.3d at 32. As explained below, the settlement agreements here left a wide swath of advertising untouched. *Realcomp* involved policies that simply “prohibited discount real estate broker listings from being distributed from Realcomp’s MLS to public websites.” 2007 WL 6936319 at \*7. As explained below, 1-800 Contacts did not prohibit the dissemination of any information to the public; in fact, Complaint Counsel’s own experts’ reports show that consumers searching for 1-800 Contacts’ trademarks

are presented with many ways to find competitors. CX8010 (Athey Rebuttal Report) ¶¶ 51-53.<sup>16</sup>

Under *California Dental*, the challenged settlement agreements in this case require a full antitrust analysis balancing the costs and benefits of limitations on advertising. *First*, the settlements here have clear potential to benefit consumers by reducing search costs and potential confusion. *Second*, the trademark settlements here are far less restrictive than the broad bans that the Court in *California Dental* held required a full analysis under the rule of reason.

**C. The Challenged Agreements Have Significant Procompetitive Potential.**

The challenged settlement agreements “might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Cal. Dental Ass’n*, 526 U.S. at 771. As noted above, trademark settlements have significant potential to foster procompetitive activities that benefit consumers: they reduce litigation costs, lower consumers’ search costs, create incentives to produce quality products, and protect consumers from infringement and dilution that can undermine these benefits. Dr. Evans concedes as much. CX8006 (Evans Report) ¶ 292; *see also* CX8009 (Evans Rebuttal Report) ¶ 48 & n.67; CX9042 (Evans Dep.) at 196:3-8.

**1. Most Consumers Searching for 1-800 Contacts’ Trademarks Are Trying to Navigate to 1-800 Contacts’ Website.**

These efficiencies are hardly theoretical in this case. Extensive evidence at the hearing—including data from Google and Microsoft—will confirm the common sense proposition that most consumers using a search engine to search for 1-800 Contacts’ trademarks intend to navigate to 1-800 Contacts’ website.

---

<sup>16</sup> Complaint Counsel’s reliance on a consent judgment with the Department of Justice, CC Pre-Trial Br. at 32, highlights the lack of precedent supporting their position.

As Dr. Ghose will explain, consumers who search for 1-800 Contacts’ trademarks click on ads for 1-800 Contacts at much higher rates than they click on ads for other retailers. RX0733 (Ghose Report) ¶¶ 102-103, 106, Exs. 4D, 5. This significantly elevated interest among users who search for 1-800 Contacts’ trademarks continues after they click: the proportion of such users who click on ads for 1-800 Contacts and purchase from 1-800 Contacts is much higher than the proportion of such users who click on other retailers’ ads and purchase from those retailers. *Id.* ¶¶ 107-113. Confirming that these data reflect consumer intent rather than an idiosyncratic feature of searches for 1-800 Contacts, the same effects hold when consumers search for other retailers’ trademarks: they click on and buy from the retailers they searched for at much higher rates than they click on ads for other retailers or buy from them. *Id.* ¶¶ 104, 110.

These data confirm the literature’s consensus, based in part on click-through rate data, that consumers who search for a retailer’s trademark generally intend to navigate to the trademark owner’s website. RX0733 (Ghose Report) ¶¶ 74-87. And search engines themselves appear to agree that searches for retailers’ brand names are “navigational.” *E.g.*, RX0658; RX1964; RX0659. [REDACTED] state that a link to a brand’s website [REDACTED], meaning that [REDACTED] [REDACTED]” RX0121 at 76, 80.

According to Complaint Counsel, advertisements for competing retailers provide valuable information for consumers even if they intend to navigate to 1-800 Contacts’ website because such advertisements make consumers aware of other retailers. But Complaint Counsel’s evidence to support this proposition is threadbare.

Complaint Counsel present no evidence that consumers are not aware of other sellers of

contacts or that, if they are interested in finding other sellers they do not know how to do so, such as by searching for “contact lenses” or “who sells contact lenses?” Dr. Athey has no information about whether any consumers believe that 1-800 Contacts is the only retailer of contact lenses. CX9043 (Athey Dep.) at 262:16-20. At the same time, her own report makes clear that Google’s search results page for a search for 1-800 Contacts includes links to other retailers and suggestions about how to find them. CX8010 (Athey Rebuttal Report) ¶¶ 51-53. Even so, Dr. Athey claims that presenting paid search ads from other retailers would nevertheless provide incremental value over existing links to such retailers because of the messages contained in the ad text. But she has not analyzed the value of this incremental information in the ad text and is, quite simply, guessing. CX9043 (Athey Dep.) at 179:12-180:24.

In fact, the evidence will confirm Dr. Athey’s prediction, not in her report here but in her work prepared for publication, that “the introduction of click-weighting [in internet search advertising auctions] can create incentives for firms to write misleading and overly broad text.” Susan Athey and Glenn Ellison, “Position Auctions With Consumer Search,” *The Quarterly Journal of Economics* (2011) 126, 1213-1270, at 1217. Exhibit B to Complaint Counsel’s Pre-Trial Brief is a perfect example. It shows an ad for Lens.com promising “up to 70% off,” but does not contain any reference to another competitor’s price, or a manufacturer’s recommended price, or a regular price charged by the advertiser.

This type of misleading advertisement is not uncommon; many online retailers of contact lenses use paid search to place ads promising that consumers will realize 25%, 50%, or even 75% off of some (unstated) price. *See, e.g.*, RX0304 (ad by lowestpricecontacts.com promising “75% off contact lenses.”). The evidence will show that even witnesses with years of experience in online marketing of contact lenses do not understand, and cannot explain, what “25% off” or

“75% off” claims refer to when used in an online ad for contact lenses. CX9023 (Alovis Dep.) at 79:22-80:5, 80:9-22 (discussing RX0305, a search on Yahoo! for “LensDirect coupon”); CX9018 (Drumm Dep.) at 49:3-50:2 (testifying about RX0015); *id.* 39:16-40:3. For that reason, the Commission has taken action in connection with advertisers’ use of “‘up to’ claims” and has stated “that advertisers using these claims should be able to substantiate that consumers are likely to achieve the maximum results promised under normal circumstances.” *See* RX0572 (Manoj Hastak & Dennis Murphy, Effects of a Bristol Windows Advertisement with an “Up To” Savings Claim on Consumer Take-Away and Beliefs (2012) (finding that approximately half of consumers exposed to “up to” ads believe they will receive maximum results)).<sup>17</sup>

**2. Advertisements for Other Retailers Have the Potential to Increase Consumers’ Search Costs.**

Evidence that most consumers who search for 1-800 Contacts’ trademarks intend to navigate to 1-800 Contacts’ website means that advertisements presented by other companies have the potential to increase search costs and cause confusion for many consumers.

It is undisputed that consumers using search engines experience costs to sort through a large volume of information. RX0733 (Ghose Report) ¶¶ 65-73, 88-91; CX9043 (Athey Dep.) at 188:23-25. For the majority of consumers who enter a 1-800 Contacts trademark as a search query intending to visit 1-800 Contacts’ website, advertisements for other retailers are likely to increase consumers’ search costs, including by pushing down organic links to 1-800 Contacts’ website or other pages affiliated with 1-800 Contacts such as its Facebook page or sites for downloading its mobile app. RX0733 (Ghose Report) ¶¶ 88-91. Indeed, a behavioral scientist at

---

<sup>17</sup> Here, however, the Commission turns a blind eye to such problems and instead relies on potentially misleading advertisements in support of its claims.

Bing has explained that increasing consumer search costs in the context of internet search can harm users. RX1963 (“Bing Your Brain: Choice Overload.”).

According to Complaint Counsel, consumers who search for 1-800 Contacts attempting to navigate to 1-800 Contacts’ website are better off if they see advertisements for other companies above links to 1-800 Contacts’ own website or sites affiliated with it. That simply makes no sense. As Dr. Athey has written, “a website’s location on a search results page does matter—and it matters a lot.” Susan Athey, “The Importance of Search Result Location,” Microsoft on the Issues (Mar. 26, 2013), <https://blogs.microsoft.com/on-the-issues/2013/03/26/the-importance-of-search-result-location/>; CX9043 (Athey Dep.) at 96:13-97:22.

**3. Advertisements for Other Retailers Have the Potential to Confuse Consumers.**

Consumers’ intent to navigate to 1-800 Contacts’ website also means that the advertising limited by the agreements would, if allowed, have significant potential to confuse consumers.

*(a) The Van Liere Study and Other Evidence of Confusion*

1-800 Contacts retained Dr. Kent Van Liere to design and conduct a survey of potential confusion among consumers from sponsored ads that appear in response to an internet search for “1-800 Contacts.” Dr. Van Liere has been retained as a survey expert by the Commission, the Department of Justice, the IRS, and other government agencies. RX0735 (Van Liere Report), Ex. A; CX9049 (Van Liere Dep.) at 266:7-17. He has extensive experience designing and conducting surveys on the internet and surveys that relate specifically to search-engine results, including surveys on behalf of American Airlines and Rosetta Stone in trademark litigations against Google that were considered reliable by the Fourth Circuit and the leading journal on trademark-related issues. *See Rosetta Stone Ltd.*, 676 F.3d at 159; R. Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 Trademark Reporter 732, 761-

66 (May-June 2015); CX9049 (Van Liere Dep.) at 264:19-265-5.

Here, Dr. Van Liere designed a survey for 1-800 Contacts (“Van Liere Study”) that follows the same methodology and is substantially similar to the surveys he conducted for American Airlines and Rosetta Stone. CX9049 (Van Liere Dep.) at 265:22-266:6. The Van Liere Study tested survey respondents on a mock-up of both a Google and Yahoo! SERP, based on the appearance of those SERPs as of early 2017. The “test” condition asked respondents to search for “1-800 Contacts” and were shown either a Google or Yahoo! SERP that included sponsored ads from other contact lens retailers.<sup>18</sup> Respondents were asked: (1) “click on the link or links, if any, that you think will take you to the website of the company that you searched for”; and then (2) “click on the link or links, if any, that you think will take you to the website of a company that is affiliated with the company that you searched for.” In the test condition, 28.7 percent of respondents were confused (39.2 percent with the Yahoo! SERP and 17.8 percent with the Google SERP). See RX0735 (Van Liere Report) at 19, Table 3.

The Van Liere Study includes a “control” condition to identify “‘background noise’ such as confusion due to elements of the test stimuli that are not allegedly infringing, demand effects of the survey instruments themselves, or guessing.” RX0735 (Van Liere Report) ¶ 28.<sup>19</sup> The control asked survey respondents to search for “1-800 Contacts” and then showed them a Google or Yahoo! SERP identical to the test condition except without the sponsored ads (*i.e.*, with the potentially infringing element removed). See *GEICO v. Google, Inc.*, No. 04-507, 2005 WL

---

<sup>18</sup> The Van Liere Study includes ads that “could appear if the [settlement] agreements challenged in the FTC’s complaint were not in place,” RX0735 (Van Liere Report) ¶ 12, and that were actually run by the parties to the settlement agreements on other contact lens-related searches.

<sup>19</sup> See also *Malletier v. Dooney Burke*, 525 F. Supp. 2d 558 (S.D.N.Y. 2007) (“[a] control stimulus is used in trademark surveys to sufficiently account for factors legally irrelevant to the requisite confusion, such as the ‘background noise’”) (citation omitted).

1903128, at \*5 (E.D. Va. 2005) (“[A]n effective control should have removed from the page viewed by the test group the allegedly infringing elements for which GEICO wanted to measure confusion, such as the Sponsored Links mentioning GEICO, while keeping the other elements as constant as possible”). The control asked respondents the same questions as in the test. In the control condition, 8.1 percent of respondents were confused (12.0 percent with the Yahoo! SERP and 4.5 percent with the Google SERP). RX0735 (Van Liere Report) at 19, Table 3.

Dr. Van Liere subtracted the confusion in the control from confusion in the test to reach a level of “net” confusion for all respondents of 20.6 percent (27.2 percent for the Yahoo! SERP and 13.3 percent of the Google SERP). These results—from a survey design that has been court-approved and documented in the peer-reviewed literature—demonstrate significant levels of confusion. *See, e.g., Rosetta Stone*, 676 F.3d at 159 (noting case law holding that “survey evidence indicating *ten to twelve* percent confusion was sufficient to demonstrate actual confusion”) (emphasis added).<sup>20</sup> The Commission has found companies liable for deceptive advertising citing studies showing that even lower percentages of consumers were misled.<sup>21</sup> To put the rate of confusion in context, there were approximately [REDACTED] internet searches on [REDACTED] for the terms “1800contacts,” “1800 contacts,” or “1 800 contacts” from 2010 through

---

<sup>20</sup> *See also Exxon Corp. v. Texas Motor Exch. of Houston, Inc.*, 628 F.2d 500, 507 (5th Cir. 1980); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987); *Tiffany & Broadway, Inc. v. Comm’r of Patents & Trademarks*, 167 F. Supp. 2d 949, 955 (S.D. Tex. 2001); *Lon Tai Shing Co. v. Koch + Lowy*, No. 90-4464, 1991 WL 170734, at \*22 (S.D.N.Y. June 20, 1991); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*, 365 F.Supp. 707, 716 (S.D.N.Y. 1973).

<sup>21</sup> *See, e.g., ECM BioFilms, Inc. v. FTC*, \_\_\_ F.3d \_\_\_, 2017 WL 1019064, at \*5 (6th Cir. Mar. 16, 2017) (unwillingness “to overturn the deception findings of the Commission” where an ad misled “15% (or 10%) of the buying public”); *In re Telebrands Corp.*, Dkt. No. 9313, 140 F.T.C. 278, 325 (2005) (finding a range of 10.5 percent to 17.3 percent “was sufficient to conclude that the challenged claims were communicated” to consumers), *aff’d* 457 F.3d 354 (4th Cir. 2006).

2016, which is roughly [REDACTED] searches each year. *See* RX0733 (Ghose Report) Ex. 7. The results of Dr. Van Liere’s study therefore indicate the potential for consumer confusion from sponsored ads in well over [REDACTED] per year for 1-800 Contacts’ name on Google alone.<sup>22</sup>

The results and conclusions of the Van Liere Study are consistent with other evidence. Professor Ronald C. Goodstein finds reason to expect confusion from sponsored ads by other retailers on a search for “1-800 Contacts”—both at the time 1-800 Contacts filed many of the underlying trademark infringement suits (*i.e.*, 2008-2010) and today—based on (1) extensive research by independent third-parties and internal studies by both [REDACTED] and Yahoo! that show many consumers are unable to distinguish sponsored ads from organic links, (2) the changes made by search engines to the appearance and labeling of sponsored ads over the last ten years, and (3) evidence of the intent and expectations of consumers who search for a particular brand or trademark term. *See* RX0736 (Goodstein Report) ¶¶ 43-71, 78-85. Consumer surveys conducted by [REDACTED] in trademark litigation with [REDACTED] and Yahoo! also showed substantial levels of confusion from sponsored ads—in some cases despite the absence of other companies’ names in the ad text. *See id.* ¶¶ 72-77; *Using Trademarks as Keywords*, 105 Trademark Reporter at 758-70.

Search engine data also support Dr. Van Liere’s finding of confusion. The percentage of consumers who buy from 1-800 Contacts after searching for 1-800 Contacts’ trademark and

---

<sup>22</sup> *See, e.g., James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976) (noting that the percentage confused in survey should be considered in the context of the effect on the “entire restaurant-going community”); *Quality Inns Int’l v. McDonald’s Corp.*, 695 F. Supp. 198, 220 (D. Md. 1988) (considering the percentage confused in survey as projected across the entire population of potential consumers).

clicking on its ad is far higher than the percentage of consumers who buy from other retailers after searching for 1-800 Contacts and clicking on the other retailers' ads. RX0733 (Ghose Report) ¶¶ 107-113; CX9043 (Athey Dep.) at 202:21-203:17. Either consumers who search for 1-800 Contacts' trademark prefer what 1-800 Contacts' website has to offer or those who clicked on ads for other retailers found themselves in the wrong place. RX0733 (Ghose Report) ¶ 109.

(b) *Complaint Counsel's Survey on Consumer Confusion is Unreliable and Fundamentally Unsound.*

Complaint Counsel retained Professor Jacob Jacoby to conduct a study of potential confusion from sponsored advertisements that appear in response to an internet search for "1-800 Contacts." Complaint Counsel retained Professor Jacoby despite the fact that his studies have been entirely excluded in at least *four* cases,<sup>23</sup> and have been severely criticized or given little to no weight in nearly *twenty* other cases.<sup>24</sup>

---

<sup>23</sup> *Dongguk Univ. v. Yale Univ.*, No. 08-441, 2012 WL 1977978, at \*6 (D. Conn. June 1, 2012); *Malletier*, 525 F. Supp. 2d at 570; *Kargo Glob., Inc. v. Advance Magazine Publishers, Inc.*, No. 06-550, 2007 WL 2258688, at \*7 (S.D.N.Y. Aug. 6, 2007); *Nat'l Football League Props., Inc. v. ProStyle, Inc.*, 57 F. Supp. 2d 665, 666-68 (E.D. Wis. 1999).

<sup>24</sup> *See, e.g., Pinterest, Inc. v. Pintrips, Inc.*, 140 F. Supp. 3d 997, 1015 (N.D. Cal. 2015); *Paletaria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175, 211 (D.D.C. 2014); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1325-26 (N.D. Ga. 2008); *Factory Five Racing, Inc. v. Carroll Shelby*, 2010 WL 4232609, at \*15 (Trademark Tr. & Ap. Bd. 2010); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, No. 04-0251, 2004 WL 1598916, at \*1 (E.D.N.Y. July 19, 2004); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 134, 136 (E.D.N.Y. 2004); *Gillette Co. v. Norelco Consumer Prods. Co.*, 69 F. Supp. 2d 246, 263 (D. Mass. 1999); *In the Matter of Novartis Corp., et al.*, Dkt. No. 9279, 127 F.T.C. 580, 696 (1999); *Hershey Foods Corp. v. Mars, Inc.*, 998 F. Supp. 500, 511 (M.D. Pa. 1998); *Pfizer, Inc. v. Perrigo Co.*, 988 F. Supp. 686, 699 (S.D.N.Y. 1997); *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F. Supp. 279, 291 (S.D.N.Y. 1997); *Novo Nordisk of N. Am., Inc. v. Eli Lilly & Co.*, No. 96-5787, 1996 WL 497018, at \*6 (S.D.N.Y. Aug. 30, 1996); *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 852 F. Supp. 196, 199 (S.D.N.Y. 1994); *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F. Supp. 700, 725 (D. Neb. 1992), *aff'd*, 990 F.2d 368 (8th Cir. 1993); *E. & J. Gallo Winery v. Consorzio del Gallo Nero*, 782 F. Supp. 457, 466 (N.D. Cal. 1991); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1274 (S.D.N.Y. 1990); (footnote continued)

Professor Jacoby designed a study that purports to estimate consumer confusion from sponsored ads by other contact lens retailers that appear in response to an internet search for “1-800 Contacts.” See CX9008 (Jacoby Report) at 3-4. The Jacoby Study includes two stimuli: a mock-up of a pre-2016, and a 2016, Google SERP. In the “test” condition, survey respondents entered a search on Google for “1800contacts.” In the “control” condition, respondents entered a search for an entirely different phrase, “contact lenses.”

The Jacoby Study deviates from the two known studies that Professor Jacoby has conducted in similar contexts. See J. Jacoby & M. Sableman, *Keyword-Based Advertising: Filling in Factual Voids (GEICO v. Google)*, 97 Trademark Reporter 681 (2007); CX9041 (Jacoby Dep.) at 22:4 – 29:14. And it contains obvious and fundamental flaws:

**Big Green Arrows.** The Jacoby Study violates basic tenets of consumer-survey design by inserting artificial enhancements—big green arrows—that improperly highlight the sponsored ads on each SERP. See CX8013 (Jacoby Report) Appendix H at 20-21, 56-57. This forces respondents to focus exclusively on the sponsored ads rather than allowing survey respondents to consider the entire SERP (which has both organic links and advertisements), resulting in an artificially high level of attention to the sponsored ads. This effect improperly eliminated any confusion caused by consumers’ inability to differentiate organic links from the sponsored ads—confusion that the Commission itself has highlighted. See RX0512 ((Letter from Mary K. Engle, FTC, Bureau of Consumer Protection (June 24, 2013)); RX0599 (Letter from H. Hipsley, FTC, Division of Advertising Practices, to Mr. Gary Ruskin (June 27, 2002))).

---

*Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1446 (S.D. Ohio 1990); *In the Matter of Kraft, Inc.*, Dkt. No. 9208, 1989 WL 1126655, at \*33-34 (1989); *Quality Inns Int’l, Inc. v. McDonald’s Corp.*, 695 F. Supp. 198, 218-19 (D. Md. 1988); *Am. Home Prods. Corp. v. Barr Labs., Inc.*, 656 F. Supp. 1058, 1071 (D.N.J.), *aff’d* 834 F.2d 368 (3d Cir. 1987).

Indeed, Professor Jacoby's prior studies have been severely criticized for similar, yet less extreme, manipulations of marketplace realities. *See Quality Inns*, 695 F. Supp. at 219 (finding it "troubling" that "over 70 percent of the respondents who correctly associated McSleep Inn with Quality International did so because they were reading the qualifying language 'by Quality International,'" which many consumers would not have encountered in reality"); *Smith*, 537 F. Supp. 2d at 1327-29 (criticizing Jacoby for artificially manipulating respondents' interest in a particular internet link, which "did not sufficiently reflect actual marketplace conditions or typical consumer shopping behavior").

**"Reading Test."** The Jacoby Study's primary question functioned as a "reading" test, not a test of confusion as to the source of sponsored ads: "If you click on this listing, which company's website will it take you to?" CX8013 (Jacoby Report) Appendix H at 36. Many respondents did not answer with the name of a company but simply typed the URL in the highlighted sponsored ad. *See RX0735* (Van Liere Report) ¶¶ 46-48. In other words, a large number of respondents simply typed what they saw. *See Paleteria*, 69 F. Supp. 3d at 213 n. 13 (criticizing Jacoby survey that "demonstrated little more than respondents' ability to read and comprehend the stimuli"). *Cf.* CX1839 (S. Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE SECOND EDITION 288 (2000) ("If the crucial question is sufficiently ambiguous or unclear, it may be the basis for rejecting the survey.")).

**Improper "Control" Condition.** The Jacoby Study utilizes an improper "control" condition in which users searched for "contact lenses" rather than "1800contacts," as in the test condition. Professor Jacoby therefore creates a completely different frame-of-reference and entirely different expectations of the search results in the test and control conditions. As Professors Ghose and Goodstein will demonstrate, consumers have significantly different intent

and expectations when conducting an “informational” search with a generic search term (“contact lenses”) compared to a “navigational” search with a specific brand name. *See* RX0733 (Ghose Report) ¶¶ 101-13; RX0736 (Goodstein Report) ¶¶ 65-71 & ¶¶ 79-82. The court in *Weight Watchers* specifically criticized Professor Jacoby for doing exactly what he and Complaint Counsel try to do here: use a control condition “to show that consumers are generally confused about advertisements and thus [try] to justify disregarding most confusion as irrelevant ‘noise.’” 744 F. Supp. at 1274.

Just as was found in a prior case, it is “obvious that Dr. Jacob Jacoby, a veteran of the trademark litigation arena and the creator of the [consumer] survey, constructed [a] study specifically to disprove consumer confusion regardless of participants’ reactions to the advertisements.” *Weight Watchers*, 744 F. Supp. at 1274.

\* \* \* \*

At any rate, the fact that the parties have joined issue on the potential of the advertisements limited by the settlement agreement to confuse consumers highlights why a full rule-of-reason analysis is required. The “plausibility of [the parties’] competing claims about the effects of” challenged “advertising restrictions rules out the indulgently abbreviated review” advocated by Complaint Counsel. *Cal. Dental Ass’n*, 526 U.S. at 778.

**4. Search Engines’ Policies Are Intended to Maximize Profits, Not Consumer Welfare.**

Complaint Counsel attempt to sidestep any balancing of procompetitive benefits, purporting to find the balance in search engines’ policies that permit the advertising that the settlements prohibit. CC Pre-Trial Br. at 70. The evidence will show, however, that search engines’ policies reflect their desire to maximize profits, not consumer welfare, and that the policy choices search engines make are not a substitute for actually evaluating the agreements’

effects on consumers.

As the founders of Google recognized, search engines are for-profit businesses that trade off consumer welfare for revenue: “The goals of the advertising business model do not always correspond to providing quality search to users. . . . [W]e expect that advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers.”<sup>25</sup> Dr. Athey, in fact, admitted at her deposition that paid search advertising auctions do not generate the selection of advertisements that maximizes consumer welfare. CX9043 (Athey Dep.) at 190:12-15, 192:24-193:5. While Complaint Counsel suggest that search engines have some incentives to account for users’ interest in a positive search engine experience (CC Pre-Trial Br. at 6-7), Dr. Athey acknowledges that those incentives depend on competition among search engines. CX9043 (Athey Dep.) at 190:22-191:2. And she further acknowledges that this competition is not met here—that Google has sufficient market power to manipulate search engine results, just as the Commission’s own staff found during an investigation of Google’s search engine practices. *Id.* at 16:22-18:21; RX1961 at 68, 116; *see also* CC Pre-Trial Br. at 5-6 (stating that Google has *at least* a 64 percent market share).

Search engines’ basic workings make this clear. Search engines use different algorithms for organic links and paid search advertising. RX0733 (Ghose Report) ¶¶ 25-26, 28. They display organic links essentially in descending order of relevance or usefulness, as determined by advanced computer calculations performed on massive sets of prior data regarding consumers’ preferences; these links are free and potential revenue is not a factor. RX0733 (Ghose Report) ¶¶ 25-26, 28; CX9043 (Athey Dep.) at 41:23-42:21; CC Pre-Trial Br. at 5 (search engine ranks

---

<sup>25</sup> S. Brin and L. Page, “The Anatomy of a Large-Scale Hypertextual Web Search Engine,” *Computer Networks*, vol. 30 (1998).

results “based on the predicted likelihood of their relevance”). By contrast, search engines display advertisements based both on a relevance assessment (different from the one used for organic links) *and* how much the advertiser has bid to pay if a consumer clicks on the advertisement. (Ghose Report) ¶¶ 40-55; CX9043 (Athey Dep.) at 49:16-22.

When one compares organic results—determined solely by relevance—to paid advertising results—determined by the search engine’s desire to maximize profits—one sees results that are entirely different. Search engines display *paid* advertisements in response to searches for 1-800 Contacts for companies whose search results (links) do not appear in even the first several pages of *organic* results. (Ghose Report) ¶¶ 56-58; CX9043 (Athey Dep.) at 51:15-52:2. Thus, search results pages themselves show that paid search advertisements do not display the information that is most relevant to consumers, as determined by the search engine algorithms. It is the organic results that reflect the information that the search engines have determined is most relevant to consumers. *The settlement agreements do not affect those results.* Accordingly, to the extent that Complaint Counsel suggest relying on search engines themselves to determine the relevance of the advertising restrained by the settlement agreements, the Court should look to the organic results. Focusing on the value of the paid search advertisements in a vacuum overrides revealed consumer preferences.

For many of these same reasons, it will be undisputed that search engines do not have optimal incentives to protect trademark owners’ marks. RX0739 (Murphy Report) ¶¶ 86, 144-149; CX9042 (Evans Dep.) at 165:23-166:8; CX9043 (Athey Dep.) at 192:11-193:18. That is why search engines encouraged trademark owners to address potential legal issues directly with advertisers. In fact, the evidence will show that, by pushing organic search results down the search results page, additional advertising in response to searches for trademarks shifts clicks

from (1) a free organic link to a brand’s website to (2) a paid advertisement for the same website. RX0733 (Ghose Report) ¶¶ 59-63; CX9043 (Athey Dep.) at 84:14-25. Search engines earn additional revenue by permitting advertising to be triggered by searches for other firms’ trademarks even if consumers do not click on the additional advertisements. RX0733 (Ghose Report) ¶ 64; CX9043 (Athey Dep.) at 85:2-11.

A trademark owner’s agreements to protect its own trademarks cannot be presumed to harm consumers simply because they adopt a different trademark rule than search engines did—particularly when search engines [REDACTED]. [REDACTED]. RX1805; RX1807; CX9022 ([REDACTED]) at 132:12-133:17; 138:12-140:4. Indeed, both [REDACTED] and [REDACTED] have [REDACTED]. [REDACTED]. *Id.* [REDACTED], have the same effect on the search engine results as [REDACTED]. [REDACTED]. And the fact that [REDACTED] and [REDACTED] [REDACTED] reveals that the challenged settlements were not entered into because the settling parties “were relatively small online retailers that lacked the resources to battle against 1-800 Contacts,” CC Pre-Trial Br. at 13, but rather were the result of economically rational decision-making.<sup>26</sup>

---

<sup>26</sup> Complaint Counsel’s argument, also picked up by Professor Evans, CX9042 (Evans Dep.) at 124:7-127:20, that the settling parties lacked sufficient economic resources to litigate, is further refuted by the fact that [REDACTED] has a market capitalization of over [REDACTED] billion, [REDACTED] has a market capitalization of over [REDACTED] billion, [REDACTED], and [REDACTED], owner of [REDACTED], is substantially larger than 1-800 Contacts.

**D. The Settlement Agreements Did Not Prevent Meaningful Competition By Other Retailers.**

The limited scope of the challenged settlement agreements also scuttles any finding that “it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram Holding, Inc.*, 416 F.3d at 35.

To begin with, “trademarks are by their nature non-exclusionary.” *Clorox Co.*, 117 F.3d at 56. “[A] trademark protects only the name or symbol of the product. Market power, if any, is derived from the product, not from the name or symbol as such.” *Mozart Co.*, 833 F.2d at 1346. Indeed, it will be undisputed that trademark protection has only a limited effect on competition because it does not preclude rivals from selling an identical product but merely limits how rivals can advertise that product. RX0737 (Landes Report) ¶ 36.

In fact, the challenged agreements affect only a small sliver of contact lens advertising, making them analogous to the agreements upheld in *Clorox* that did “not entirely prevent Clorox from using the PINE-SOL name to compete against LYSOL products” but only restrained certain narrow uses of the mark. 117 F.3d at 58. The settlement agreements apply only to paid search advertising in response to searches for trademarks owned by 1-800 Contacts and the other settling parties. They do not affect paid search advertising in response to thousands of other internet searches for contact lenses that, as Dr. Athey agrees, are far more common than searches for 1-800 Contacts’ trademarks. CX8007 (Athey Report) Table 1 ( [REDACTED] ); RX0733 (Ghose Report) ¶¶ 141-143. They do not affect advertising on television, radio, or in print. They do not affect advertising to users who “liked” 1-800 Contacts on Facebook or other social media. They do not affect sending e-mails to 1-800 Contacts’ customers. They do not affect advertising through Product Listing Advertisements. They do not affect internet display ads, which Dr. Athey admits

are an effective way to build the brand awareness that Complaint Counsel argues is necessary for online competition. CX9043 (Athey Dep.) at 170:6-19.

Properly interpreted, the agreements also did not affect advertising in response to comparative searches that include 1-800 Contacts' trademarks. Complaint Counsel are wrong in asserting the contrary, *see* CC Pre-Trial Br. at 17, but it would make no difference if they were right. The evidence shows that comparative searches that include 1-800 Contacts' trademarks searches—such as the search for “cheaper than 1-800 Contacts” that Complaint Counsel attached as Exhibit A to their Complaint—are extremely rare, accounting for less than [REDACTED] of all searches using 1-800 Contacts' trademark. RX0733 (Ghose Report) ¶¶ 133-137. That is far too small to make any competitive difference.

Finally, even if one assumes that the agreements prevented *all* competition for consumers that search for such trademarks (which they do not), the agreements would have no effect at all on [REDACTED] of sales of contact lenses in the United States and on more than [REDACTED] of sales of contact lenses online. RX0739 (Murphy Report) ¶ 126. That would leave ample room for rivals to compete and scale. *See, e.g., CDC Techs., Inc. v. Idexx Labs., Inc.*, 186 F.3d 74, 80 (2d Cir. 1999); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 (8th Cir. 1987).

Complaint Counsel argue that the challenged agreements' limited scope does not matter because paid search advertising on 1-800 Contacts' trademark was of “unique value”, CC Pre-Trial Br. at 10 & 32 n.116—a “particularly useful” and “low-cost means for a new rival to gain market awareness and acceptance,” *id.* at 34. As a matter of fact, however, it turns out that such freeriding was not necessary for other retailers to succeed and was not particularly valuable for retailers that also were investing in their own brand.

For example, retailers paid more for sales obtained by advertising in response to searches

for 1-800 Contacts' trademarks than they did for sales obtained by advertising in response to other searches. RX0733 (Ghose Report) ¶¶ 129. Complaint Counsel and Dr. Evans focus almost exclusively on [REDACTED], which decided to exit the online contact lens business during 1-800 Contacts' lawsuit, claiming that this shows competition was impossible without advertising on 1-800 Contacts' trademark. The full record shows otherwise.

Both [REDACTED] and [REDACTED] grew significantly despite being bound by the settlement agreements. [REDACTED] launched in 2009 and grew to over [REDACTED] in revenue and [REDACTED] in profit by 2015. CX9000 ([REDACTED]) 8, 34, 38-40. [REDACTED] grew from 50 employees in 2010 to 170 as of December 2016 and shipped [REDACTED] orders with a retail value of [REDACTED] in 2015. CX9039 ([REDACTED]) at 11; CX9003 ([REDACTED]) at 9-10. [REDACTED] and [REDACTED] had compound annual growth rates from 2011 of [REDACTED]. RX0153-007. If [REDACTED], [REDACTED], [REDACTED], and [REDACTED] could grow rapidly despite the agreements, the agreements do not explain [REDACTED] decision to exit the online sale of contact lenses.<sup>27</sup>

Despite the Tenth Circuit's decision partially in its favor, [REDACTED] [REDACTED]. CX9001 (Bethers IH Tr.) at 302:21-303:8. Yet, according to Dr. Evans, [REDACTED] is the third largest online contact lens retailer. CX8006 (Evans Report) Table 1. Indeed, while Complaint Counsel argue that advertising on SERPs for queries for 1-800 Contacts' trademark is critical to success in the contact lens business, the large number of unbound competitors, CX8007 at Ex. B, are not filling ad positions on those SERPs today. Dr. Athey has no explanation for this other than speculation that 1-800

---

<sup>27</sup> Even after [REDACTED] exited its online business, it continues to sell contact lenses through its brick-and-mortar locations.

Contacts' prior litigation "chilled" other competitors, which certainly would not apply to Walmart, Costco, JC Penney or other major retailers. CX9043 (Athey Dep.) at 113:16-117:18.

Search engine data undercut Complaint Counsel's theory as well. If it were true that exposing consumers to lower prices of other online competitors would lead them to switch away from 1-800 Contacts, one would expect that consumers who reach the websites of lower-priced competitors would purchase *at least as often* as consumers who reach 1-800 Contacts' website. But the data show otherwise. The percentage of consumers who buy from 1-800 Contacts after searching for 1-800 Contacts' trademark and clicking on its ad is far higher than the percentage of consumers who buy from other retailers after searching for 1-800 Contacts and clicking on the other retailers' ads. RX0733 (Ghose Report) ¶¶ 107-113; CX9043 (Athey Dep.) at 202:21-203:17. Either consumers are confused or Complaint Counsel are wrong that the settlement agreements were competitively meaningful limitations on information available to consumers.

**E. Complaint Counsel's Bid-Rigging Theory Lacks Support in the Evidence and Economics.**

Finally, Complaint Counsel cannot garner a presumption that the challenged agreements harmed competition simply by rebranding them as "Bidding Agreements" rather than settlement agreements. CC Pre-Trial Br. at 28-32.

There is no evidence in the record that any of the settlements involved bid rigging. CX9043 (Athey Dep.) at 195:22-25. Indeed, on this score, Complaint Counsel's theory of the case is at war with itself. Complaint Counsel sometimes argue that the Court should treat the agreements as though they are the product of *collusion* to rig bids. At the same time, however, Complaint Counsel allege that the agreements are the product of *compulsion*, namely, the need "to avoid prolonged and costly litigation." Compl. ¶ 19. Both characterizations cannot be true. And the bid-rigging theory is nothing more than rhetorical flourish, unsupported by fact or logic.

The evidence will show, as the other retailers testified, that the settling retailers agreed to the settlements precisely as Complaint Counsel allege: “to avoid prolonged and costly litigation.” CX9000 ( [REDACTED] ) at 93-94; CX9014 ( [REDACTED] ) at 46:12-48:15; CX9024 ( [REDACTED] ) at 62:19-64:1, 75:18-77:3, 160:3-165:6; CX0943 ( [REDACTED] ) ¶ 10. Complaint Counsel’s expert, Dr. Evans, agrees that this is why other retailers settled. CX9042 (Evans Dep.) at 119:20;120:8. In fact, far from testifying that they rigged bids for their mutual advantage, the other retailers testified that they received no or only a “tiny” benefit from settlement. CX9039 ( [REDACTED] ) at 164:7-15; CX9014 ( [REDACTED] ) at 46:25-27:12; CX9024 ( [REDACTED] ) at 175:3-19 ( [REDACTED] ). Dr. Evans agrees with that assessment, too. CX9042 (Evans Dep.) at 114:22-166:16. And it is hardly surprising given that 1-800 Contacts, as a policy, did not select other party’s trademarks as keywords.

Several of the retailers, such as [REDACTED], [REDACTED], [REDACTED] (owned by [REDACTED]) had more than ample resources to contest the litigation. *See* n.26 *supra*; CX9042 (Evans Dep.) at 134:25-135:11. Their decision to settle strongly suggests that the expected value of the advertising challenged in 1-800 Contacts’ litigation—in terms of the likelihood that the other retailer would win the litigation and the upside to its business—is quite small.

A bid-rigging agreement that does not benefit one of the alleged riggers is not a bid-rigging agreement at all. That is why, as Professor Murphy will explain, the settlement agreements do not exhibit any of the features common to bid-rigging agreements. RX0739 (Murphy Report) ¶¶ 151-55. Given that the settling parties stood to lose from the agreements, if 1-800 Contacts was rigging bids (and it was not), one might expect some mechanism for

compensating the other settling parties. RX0739 (Murphy Report) ¶ 155. But there is no evidence whatsoever of any such payment or transfer of value. The agreements also did not “reserve[] an entire class of auctions” to 1-800 Contacts. CC Pre-Trial Br. at 29. Dr. Athey identified more than a dozen competitors, CX8007 at Ex. B, including major retailers such as Walmart, Costco, and JC Penney, that remained entirely free to participate in any auction they liked.

Simply put, the fact that the agreements concerned advertising sold in auctions that involve bidding does not transform them into an inherently suspect “bid allocation scheme.” Compl. ¶ 2. Complaint Counsel’s argument to the contrary is a word game.

**IV. COMPLAINT COUNSEL CANNOT MEET THEIR BURDEN UNDER THE RULE OF REASON TO PROVE THE SETTLEMENTS HARM CONSUMERS.**

Since the challenged settlement agreements are not presumptively anticompetitive, Complaint Counsel have the burden to prove that the agreements harmed competition. Complaint Counsel cannot meet that burden.

**A. Complaint Counsel Cannot Prove That 1-800 Contacts Had the Power to Harm Competition in Any Relevant Contact Lens Market.**

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.” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460 (1986). These inquiries are telling here. The challenged agreements concern only the sliver of paid search advertising that involves 1-800 Contacts’ trademark, which is only one of many competitive tools available to online retailers, who account for less than 20 percent of contact lens sales. In other words, the agreements touch a fraction of a fraction of a fraction of the contact lens market. That precludes Complaint Counsel from showing that the agreements enabled 1-800 Contacts to exercise market power to harm competition in the market “as a whole.” *Clorox Co.*, 117 F.3d at 57. And that should

dispose of the case. *See Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (“Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason.”); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

**1. The Relevant Market Is Broader Than Online Sales of Contact Lenses.**

“To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market.” *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). The relevant antitrust market here includes sales by online retailers, by mass merchants, and by ECPs. Complaint Counsel’s proposed market limited to online retail sales fits the market to the challenged restraint rather than to the market facts.<sup>28</sup>

As the Supreme Court has held, “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). The evidence will show that ECPs and mass merchants are substitutes for online retailers such as 1-800 Contacts. Surveys of consumers themselves find that [REDACTED]

[REDACTED]

[REDACTED]. RX0739 (Murphy Report) ¶¶ 105-106 & Ex. 15. *See Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017) (“If two products share a high cross-elasticity of demand—in that an increase in the price of one product causes

---

<sup>28</sup> Indeed, at the same time Complaint Counsel are arguing here for a restricted online market, [REDACTED] CX8006 (Evans Report) Table 1. That strongly suggests that the Commission recognized, as it should, that the relevant market here is the market for the sale of contact lenses to consumers.

consumers to switch to the other, and vice versa—then those products likely are interchangeable and may properly be considered part of the same product market.”); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992) (defining “cross-elasticity of demand” as “the extent to which consumers will change their consumption of one product in response to a price change in another”). And the proportion of customers who [REDACTED] [REDACTED] [REDACTED], which strongly indicates that the switching activity is probative of a single, broad market. RX0739 (Murphy Report) ¶ 105.

Other evidence of competition in the marketplace will confirm this direct evidence. “Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to recognize competition where, in fact, competition exists.” *United States v. Cont’l Can Co.*, 378 U.S. 441, 453 (1964) (quotation marks omitted). Thus, ultimately, the determination of the relevant market is “a matter of business reality—[ ]of how the market is perceived by those who strive for profit in it.” *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C.1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987). On that score, [REDACTED] and [REDACTED] executives testified that ECPs, brick-and-mortar stores, and online retailers all compete. CX9037 ([REDACTED]) at 13:12-15:10, 60:14-25; CX9023 ([REDACTED]) at 38-39.

Further, 1-800 Contacts’ business reality—indeed, its business model—is competition with ECPs. As Complaint Counsel put it, “[t]here is no dispute that 1-800 Contacts competes with ECPs and other brick-and-mortar retailers, in the sense that it actively tries to pull consumers from the ‘offline’ world into the online one.” CC Pre-Trial Br. at 47. From its inception, 1-800 Contacts has been focused largely on persuading the majority of consumers who continue to buy contact lenses from ECPs that they can obtain lower prices and superior service

by buying online, and persuading ECPs' customers to purchase instead from 1-800 Contacts remains the company's largest source of new customers. RX0739 (Murphy Report) ¶¶ 104, 109. That is why 1-800 Contacts sets its prices at a discount to ECPs' prices. CX9001 (Bethers IH Tr.) at 80:25-81:3, 255:4-9; RX1117 at 4, 52-53; CX0439 at 10; CX9025 (Osmond Dep.) at 99:21-100:1.

1-800 Contacts also [REDACTED] to inform contact lens consumers about the option of buying online rather than from their ECPs. RX0736 (Goodstein Report) ¶ 12, Table 1; RX0739 (Murphy Report) Ex. 8. Notably, Congress and the Commission have said this fosters competition between online retailers and ECPs. In a study of competition for contact lens sales commissioned by Congress, the Commission concluded that “[c]ompetition will constrain an ECP’s pricing for contact lenses as long as a sufficient proportion of his patients know that they can purchase replacement lenses elsewhere, and the ECP cannot distinguish between informed and uninformed patients.” RX0569 (*The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*, Federal Trade Commission) at 20. That is why Congress passed the FCLCA and the Commission promulgated the Contact Lens Rule requiring ECPs to give patients a copy of their prescription: to “increase[] consumers’ ability to shop around when buying contact lenses.”<sup>29</sup> If online retailers are not in the same market as ECPs, Congress’s and the Commission’s predictions that expanding access to prescriptions would promote competition, *see* H.R. REP. No. 108-318, at 4-5, would have made no economic sense. *See* CX8006 (Evans Report) ¶ 230 (“Federal legislation and regulations had eliminated the ability of ECP[]s to tie prescriptions to contact lens sales. That provided

---

<sup>29</sup> “The Contact Lens Rule: A Guide for Prescribers and Sellers,” <https://www.ftc.gov/tips-advice/business-center/guidance/contact-lens-rule-guide-prescribers-sellers>.

significant opportunities for online sellers who couldn't offer prescriptions but could sell contact lenses more conveniently and more cheaply than ECPs.”).

In the same vein, the resale price maintenance policies that contact lens manufacturers instituted beginning in 2013—known as a Uniform Pricing Policy (“UPP”)—reflect an economic judgment that ECPs and online retailers sell in the same market. RX0739 (Murphy Report) ¶ 112. UPP required all retail sellers of contact lenses to resell those lenses at prices roughly equivalent to the prices offered by ECPs, the highest in the industry. As ECPs themselves explained, UPP’s purpose was to insulate ECPs from competition by online retailers: “This new pricing model enables optometrists to more easily compete with online retailers and make more money selling contact lenses in their offices.”<sup>30</sup> As one ECP put it, “[o]ne of the biggest benefits to practitioners of UPP is that it instantly creates a perfectly level playing field; volume discounts for large practices and online retailers go away.”<sup>31</sup> If online retailers and ECPs do not compete in the same market, the manufacturers’ decision to try and reduce competition between them would have made no economic sense, for as the Supreme Court has explained, resale price maintenance by definition assumes, and seeks to reduce, “competition among retailers selling the same brand.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). The manufacturers’ attempt to reduce online retailers’ competitive threat to ECPs is powerful market evidence that online retailers compete with ECPs.

Complaint Counsel’s arguments for limiting the relevant market to online sales lack merit

---

<sup>30</sup> Maria Sampalis, “Minimum Pricing on Contact Lenses: A Win for Independent ODs,” *Review of Optometric Business*, <http://reviewob.com/minimum-pricing-on-contact-lenses-a-win-for-independent-ods/>.

<sup>31</sup> Gary Gerber, “What's UPP, Doc?,” *Review of Cornea and Contact Lenses* (June 15, 2014), [http://www.reviewofcontactlenses.com/content/d/out\\_of\\_the\\_box/c/48867/](http://www.reviewofcontactlenses.com/content/d/out_of_the_box/c/48867/)

and ignore the foregoing “commercial realities” of competition. *Eastman Kodak Co.*, 504 U.S. at 482; *see also Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (“the relevant market definition must encompass the realities of competition”).

*First*, Dr. Evans’ “hypothetical monopolist test,” CC Pre-Trial Br. at 45, does not define an online-only market. Dr. Evans has used a method known as “critical loss analysis” used most often to define antitrust markets in merger cases. Daniel P. O’Brien, Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 Antitrust L.J. 161 (2003); *see generally id.* at 166; *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015). The analysis examines a hypothetical price increase by parties to the merger based on two factors: (1) the proportion of consumers who would switch to competitors if the merging parties increased prices, known as the “diversion ratio,” and (2) the merging parties’ profit margins. Based on these inputs, the analysis attempts to determine the percentage by which the merging parties could raise prices without losing profits because the higher margins they would earn on sales they would retain would offset any lost profits from sales they would lose to other competitors. If the merging parties could profitably raise prices by 5%, some economists conclude that other competitors do not constrain the merging parties from raising prices and are outside the relevant market.

There are significant methodological issues with applying a critical loss analysis outside the merger context. RX0739 (Murphy Report) ¶ 217. Nevertheless, *using Dr. Evans’ own method*, Professor Murphy defined a market that includes both 1-800 Contacts and ECPs. *Id.* ¶¶ 211-216 & Ex. 15. Professor Murphy reached those results based on diversion ratios taken from surveys of consumers who actually switched from 1-800 Contacts to other retailers, which showed that a higher proportion of surveyed customers switched from 1-800 Contacts to ECPs than from 1-800 Contacts to other online retailers. *Id.*

Dr. Evans acknowledged this survey evidence, but ignored it in his own critical loss analysis. Instead, Dr. Evans identified a diversion ratio based on a subset of consumers in another survey. CX9042 (Evans Dep.) at 235:22-237:8; *see also* RX0739 (Murphy Report) ¶ 214. Professor Murphy will explain that Dr. Evans’ definition of an online-market depends entirely on the survey responses he arbitrarily chose to fashion the diversion ratio. RX0739 (Murphy Report) ¶¶ 211-214. *Cf. Menasha Corp.*, 354 F.3d at 664-65 (rejecting definition of narrow market based on survey supposedly showing preference of narrow subset of “impulse shoppers”).

Yet, even if the Court gives Dr. Evans’s selectively hand-picked analysis some weight, that analysis cannot settle the market definition question in Complaint Counsel’s favor. Deciding between the experts’ analyses turns on which consumer survey is a reliable source of the diversion ratio. But there is almost no evidence in the record regarding any of the surveys’ methodologies—and certainly nothing close to the kind of detailed backup material generally required to admit survey evidence, such as the evidence presented by Dr. Van Liere and, in Complaint Counsel’s view, by Dr. Jacoby as well. Regardless, at the worst for 1-800 Contacts, “the fact that the test could still confirm multiple relevant markets means that the Court must rely on additional evidence in reaching the single, appropriate market definition.” *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 64 (D.D.C. 2011); *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41 (D.D.C. 2009) (relying on “real-world evidence” rather than critical loss analysis). The practical market evidence, as noted, shows that the market reality clearly reflects competition between ECPs and 1-800 Contacts.

*Second*, Dr. Evans’ analysis of prices as a result of UPP does not define an online-only market. *See* CC Pre-Trial Br. at 45. Since UPP increased prices offered by *all retailers*,

including both online retailers and mass merchants, it does not permit an event study of the effect of an online price increase on diversion to other retailers. RX0739 (Murphy Report) ¶¶ 219-221. In fact, as noted, the economic logic of UPP supports a broader market.

*Third*, more generally, Complaint Counsel’s online-only market departs from basic principles of market definition. In defining an antitrust market, “it is the use or uses to which the commodity is put that control.” *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395-96 (1956). Consumers can use ECPs, mass merchants, and online retailers to buy contact lenses. The fact that online sellers and ECPs offer different retail experiences does not preclude them from being interchangeable for market definition purposes. “‘Interchangeability’ implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively.” *Allen-Myland, Inc. v. Int’l Bus. Machs. Corp.*, 33 F.3d 194, 206 (3d Cir.1994). Accordingly, “products or services need not be identical to be part of the same market.” *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999); *see also Cont’l Can Co.*, 378 U.S. at 449; *E.I. du Pont de Nemours & Co.*, 351 U.S. at 399 (cellophane in same market as other flexible wrapping because “despite cellophane’s advantages it has to meet competition from other materials in every one of its uses”); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 563d at 389 (3d. ed. 2007) (“Areeda”) (“Most courts correctly define the presumptive market to include similar products, though differentiated by brand or features.”).

According to Complaint Counsel, “[o]nline customers place a high premium on the convenience of online shopping, home delivery and fast (and often free) shipping.” CC Pre-Trial Br. at 43. But the preferences of some consumers cannot support an online-only market because “[a]ttributes of shoppers do not identify markets.” *Menasha Corp.*, 354 F.3d at 664-65; *see also*

*Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (“The consumers do not define the boundaries of the market; the products or producers do.”).

Notably, Complaint Counsel will not quantify the proportion of consumers who place such a “high premium on the convenience” of online shopping that they would not switch to other retailers if online prices rose, let alone demonstrate that there is a sufficient number of such customers to define a separate submarket. Any theory that a substantial number of consumers are motivated solely by “convenience” over price runs squarely contrary to Complaint Counsel’s theory, espoused by its experts, that “[c]ontact lens consumers typically consider price as the primary consideration in determining where to make a purchase, particularly when buying online.” CX8007 (Athey Report) ¶ 30. A properly defined antitrust market does not consist of Jekyll and Hyde consumers who value convenience most of all for purposes of market definition and then value price most of all when it comes to assessing possible anticompetitive effects.

If, as it seems, both service and price are taken into account by many consumers, the proper comparison is to look at the quality-adjusted price, which Dr. Evans acknowledged he did not do. CX9042 (Evans Dep.) at 261:24-262:6. Further, survey evidence that customers switch from buying from 1-800 Contacts to ECPs at higher rates than they switch from 1-800 Contacts to other online retailers, RX0739 (Murphy Report) ¶¶ 105-106 & Ex. 15, undercuts any suggestion that consumers generally choose online purchasing for the convenience and then simply select the lowest online price. Certainly Complaint Counsel have not demonstrated whether any consumers behave in this way, let alone quantified that there are enough such customers to constrain 1-800 Contacts from raising prices vis-à-vis online retailers.

In short, the economic evidence strongly supports a relevant antitrust market for the retail sale of contact lenses by ECPs, mass merchants, and online retailers.

## 2. 1-800 Contacts Does Not Have Market Power.

“The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Any given firm may cut its own output, but rivals will increase production in response.” *Menasha Corp.*, 354 F.3d at 663.

As a matter of law, 1-800 Contacts does not have market power either alone or in combination with the other settling parties in a properly defined antitrust market. The sales made online by 1-800 Contacts and the settling parties account for less than the 20% of all contact lens sales. RX0739 (Murphy Report) ¶¶ 113, 116; CC Pre-Trial Br. at 4. That is insufficient for market power as a matter of law: “[W]hile high market shares may give rise to presumptions of market power, a market share of less than 20% is woefully short under any metric from which to infer market power.” *Cohlma v. St. John Med. Ctr.*, 693 F.3d 1269, 1283 (10th Cir. 2012); *see also Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 & n. 43 (1984), *abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (suggesting that market share of 30 percent “[do]es not create an unacceptable likelihood of anticompetitive conduct”); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3rd Cir. 1998) (“[S]ince *Jefferson Parish*, no court has inferred substantial market power from a market share below 30%.”); *Valley Prods. Co. v. Landmark, Inc.*, 128 F.3d 398, 402 n. 3 (6th Cir. 1997) (“[C]ourts hav[e] repeatedly held that a 30% market share is insufficient”).

1-800 Contacts and the other settling retailers still do not have market power even if the relevant antitrust market is limited to online retailers. RX0739 (Murphy Report) ¶¶ 114-115. Complaint Counsel are wrong that 1-800 Contacts and the settling retailers’ high share of online sales proves market power. CC Pre-Trial Br. at 48.

“[M]arket share is just the starting point for assessing market power. A high market

share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors." *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (quotation marks and citations omitted). The hallmark of market power "is the ability to control output and prices, an ability that depends largely on the ability of other firms to increase their own output in response to a contraction by the defendants." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1997) ("To show market power, a plaintiff must establish that the defendant's sales loom so large in relation to rivals' sales and production capacity that a reduction in output by the defendant could not quickly be made up by other firms' increased output."). Accordingly, "it is usually best to derive market share *from* ability to exclude other sources of supply." *Ball Mem'l Hosp., Inc.*, 784 F.2d at 1336.

For these reasons, "[t]o demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, *and* (3) show that there are *significant barriers to entry and* show that existing *competitors lack the capacity to increase their output in the short run.*" *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (emphasis added); *see also Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996). "Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n. 3 (7th Cir. 1985); *see also Allen-Myland, Inc.*, 33 F.3d at 209 ("Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the

power to raise prices.”); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) (“It is also important to examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.”) (quotations omitted); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (reversing finding of market power where defendant had 50% market share but entry was easy).

The evidence will show that 1-800 Contacts and the other online retailers have no power to exclude other sources of supply. RX0739 (Murphy Report) ¶ 115. During the relevant time, Walmart, Costco, Sam’s Club, JC Penney and BJ’s have all begun selling contact lenses online.<sup>32</sup> Antitrust regulators analyzing market power “consider the actual history of entry into the relevant market and give substantial weight to this evidence. . . .” DOJ & FTC, Horizontal Merger Guidelines § 9 (Aug. 19, 2010).

The evidence also will show that there are no barriers to these retailers further expanding their contact lens businesses, or to entry by other retailers. Complaint Counsel “have the burden of establishing barriers to entry into a properly defined relevant market” and “must not only show that barriers to entry protect the properly defined . . . market, but that those barriers are ‘significant.’” *United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001). “‘Entry barriers’ are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.” *Id.* at 51.

Dr. Evans concedes that almost no such barriers exist in Complaint Counsel’s proffered

---

<sup>32</sup>See, e.g., <https://www.walmartcontacts.com/>; <https://www.samsclubcontacts.com/>; <http://www.jcpenneyoptical.com/contact-lenses/>; <http://www.bjsoptical.com/all-contact-lenses.html>.

market for the online retail sale of contact lenses. He acknowledges that capital expenditures are minimal and that “anyone” can establish a website and a server. CX9042 (Evans Dep.) at 136:25-139:5. Indeed, both [REDACTED] and [REDACTED] grew significantly despite being bound by the settlement agreements. CX9000 ([REDACTED]) at 8, 34, 38-40; CX9003 ([REDACTED]) at 8-10; CX9039 ([REDACTED]) at 11.

Dr. Evans opines that an online retailer faces barriers to entry and expansion only to the extent that it must make itself known in the marketplace. CX9042 (Evans Dep.) at 136:25-139:5. But that is not a barrier to entry. Economic success does require investment. For years, 1-800 Contacts has invested enormous resources in developing an alternative business model to ECPs and earning market-leading brand awareness through dedicated brand-building, award-winning service, and sustained advertising. The goodwill that 1-800 Contacts has earned is the *product* of successful competition, not a barrier to competition. *See Clorox Co.*, 117 F.3d at 58 (“[E]stablished buyer preferences . . . will not ordinarily be a serious entry barrier.”) (quoting 2 Philip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 409d, at 302 (1978)); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) (“Of course, virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose.”); *Waste Mgmt., Inc.*, 743 F.2d at 983-84 (reversing finding of market power where Court “fail[ed] to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition”); *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9026 (Commission erroneously “assumed that consumer preference for [Respondent] necessarily constituted an anticompetitive barrier

protecting [Respondent's] monopoly position from erosion by new entrants").

*Clorox*, again, is closely on point. Much like Complaint Counsel here, Clorox argued that “due to the high costs of advertising new mass-marketed products, and the high risk of such products failing, it is important to use established brand names to introduce new products. Clorox argues that, deprived of the PINE-SOL name, it cannot effectively penetrate the alleged disinfectant cleaning markets dominated by the popular LYSOL brand.” *Clorox*, 117 F.3d at 58. The Second Circuit rejected that argument where there was “no evidence to support the theory that only Clorox is capable of competing against LYSOL products in the alleged markets LYSOL dominates.” *Id.* The court explained:

Although producing and introducing new products are attended with high costs to the entering producer, [s]ome of the costs of creating or maintaining buyer preferences must eventually be repeated, subjecting the established producer to high costs as well. Where, as here, established large competitors can afford to invest their resources over a long period of time, the expense and risk of failure should be less of a deterrent to entry. Nothing here suggests that the other large companies that produce cleaning products are incapable of successfully investing their resources, in the form of capital and brand name equity, to enter the markets LYSOL products allegedly dominate.

*Id.* (footnote, citations and quotation marks omitted).

Just so here. Some of the nation's largest retailers have entered the online contact lens business. The settlement agreements do not bind them and they concededly face no barriers to expanding their business other than earning brand equity. CX9042 (Evans Dep.) at 139:7-141:3. Similarly, with the exception of one unsuccessful online marketer, the settling parties themselves have grown while the agreements were in place. In that situation, 1-800 Contacts cannot use the settlement agreements to raise prices by restricting output but instead must continue the competitive efforts that built its brand, continually incurring “the costs of creating or maintaining buyer preferences.” *Clorox*, 117 F.3d at 58. That is the hallmark of a competitive market and

the antithesis of market power.

**B. Complaint Counsel Have Not Proven Any Anticompetitive Effects in the Market for the Sale of Contact Lenses.**

Consistent with the fact that Complaint Counsel cannot prove that 1-800 Contacts had the power to harm competition, they lack any proof that the challenged agreements did so.

**1. Complaint Counsel Have No Proof of Lower Output or Higher Prices.**

At the outset, Complaint Counsel's case fails because they will not be offering any proof that the challenged settlement agreements reduced output of contact lenses. "The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem." *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 597; see also *Rebel Oil Co.*, 51 F.3d at 1433 ("[A]n act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality."); Areeda, at ¶ 1503b(1) ("output is a sound general measure of anticompetitive effect, and several Supreme Court decisions have emphasized it."). Complaint Counsel's experts will not be offering any evidence that the challenged settlement agreements reduced output of contact lenses. CX9042 (Evans Dep.) at 263:17-21; CX9043 (Athey Dep.) at 194:25-195:21. In fact, as Professor Murphy will explain, Dr. Athey's own model (albeit flawed) of a world without the settlement agreements leads to the conclusion that the settlement agreements actually *increased* output of contact lenses. RX0739 (Murphy Report) ¶¶ 229-231. That should be the end of this antitrust case.

Complaint Counsel argue that the challenged settlement agreements caused consumers to

pay higher prices for contact lenses.<sup>33</sup> But Complaint Counsel will not be able to prove this. As Dr. Evans has written, anticompetitive harm is an issue that should be settled with empirical proof. *See* Howard H. Chang, David S. Evans, Richard Schmalensee, “Has the Consumer Harm Standard Lost Its Teeth?,” Sloan School of Management, Massachusetts Institute of Technology, Working Paper No. 4263-02 (2002) (“Consumer Harm Standard”). Dr. Evans admits, however, that he has not quantified any effect of the settlement agreement on contact lens prices, or on output. CX9042 (Evans Dep.) at 251:13-18, 257:6-13. Nor has Dr. Athey. CX9043 (Athey Dep.) at 201:7-202:22. That is fatal. *See K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d. Cir. 1995) (no proof of harm to competition absent “empirical demonstration concerning the adverse effect of the defendants’ arrangement on price or quality”) (internal quotation marks and alterations omitted).

Instead, piling assumption upon assumption, Dr. Evans and Dr. Athey have merely offered a *theory* for how the settlement agreements *could* have led to higher contact lens prices: *if* the settling parties could have had their advertisements displayed in response to searches for 1-800 Contacts, *some* consumers might have clicked on them, *some* of those consumers might have been unaware of or open to buying from competitors, *some* of these consumers *might* have discovered that other retailers offered lower prices, *some* of those consumers may have found that those lower prices offset any service advantage offered by 1-800 Contacts, *some* of those

---

<sup>33</sup> Some courts have suggested that proof of supracompetitive prices alone can suffice to prove harm to competition. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 668 (3d Cir. 1993). Since Complaint Counsel have not proven that the challenged agreements led to supracompetitive prices, its claims fail regardless of whether proof of lower output is required. But the better principle is that a reduction in output is required to prove harm to competition, and 1-800 Contacts preserves the argument that such proof of a reduction in output is required.

consumers *might* have decided to buy from 1-800 Contacts' rivals, and these lost sales *could* have induced 1-800 Contacts to lower its prices to remain competitive for these sales. CX8006 (Evans Report) ¶ 239; CX8007 (Athey Report) ¶ 108; CX9043 (Athey Dep.) at 208:4-209:2.

This is pleading masquerading as proof in a cloak of expertise. Complaint Counsel's experts have not even tried to quantify how many consumers who searched for 1-800 Contacts were unaware of its online competitors' existence or prices, how many of those consumers were interested in purchasing from 1-800 Contacts' competitors, or how many of those consumers actually would have done so. CX9043 (Athey Dep.) at 221:15-222:21.<sup>34</sup> Indeed, that would be a tall order given the uncontroverted testimony that 1-800 Contacts did not consider paid search advertising by other online retailers in setting its prices. CX9011 (Roundy Dep.) at 93:3-94:11; CX9031 (Schmidt Dep.) at 236:8-237:10. Thus, the most Complaint Counsel can muster is that the agreements "perhaps" would have forced 1-800 Contacts to "lower its prices across the board." CC Pre-Trial Br. at 21. One expects more from a supposedly inherently suspect agreement. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (no proof of anticompetitive harm where plaintiff alleged "potentially" higher prices, but did not demonstrate that prices were actually higher across the market or that quality had actually decreased).

The empirical studies that Complaint Counsel cite, CC Pre-Trial Br. at 31, simply make it more revealing that neither Dr. Evans nor Dr. Athey did such a study. At any rate, Complaint Counsel make no effort to link these studies to the facts of the present case, and they could not do so had they tried. None of these studies involved advertising for the retail sale of contact lenses or paid search advertising of any product or service. Rather, most involved industry-wide

---

<sup>34</sup> Dr. Athey, in fact, goes so far as to say that it is unnecessary to determine how many consumers would have purchased from competitors. CX8010 (Athey Rebuttal Report) ¶ 94.

bans on entire categories of advertising. The fact that such broad restrictions might raise prices says nothing about the effect of trademark settlements that have conceded procompetitive potential and that limit only one narrow type of many methods of advertising. RX0739 (Murphy Report) ¶¶ 156-159.

1-800 Contacts’ premium over other online retailers also cannot save Complaint Counsel’s case. If “consumers were willing to pay a premium price in reliance upon [1-800 Contacts’] familiar and successfully advertised trademark . . . [t]hat willingness reflected a marketplace judgment about interbrand competition,” not anticompetitive harm. *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9025 (citation omitted). Dr. Athey acknowledges that 1-800 Contacts’ service advantage accounts for at least some portion of the price premium, but she made no effort to estimate what portion, if any, of 1-800 Contacts’ premium was not accounted for by differences in service and the value of the trust of its consumers built up over many years. CX9043 (Athey Dep.) at 255:21-256:9. Dr. Athey simply read documents and testimony in the record, some of it from 1-800 Contacts’ rivals, and concluded that 1-800 Contacts does not offer superior service. In doing so, however, Dr. Athey ignored overwhelming evidence, summarized above, that 1-800 Contacts offers service nearly unparalleled, not only in the contact lens business, but in the entire economy. For example, Dr. Athey relied on a study of NPS scores that cautioned about its own small sample size while ignoring other evidence that 1-800 Contacts’ NPS scores are some of the highest in the entire economy—higher than Apple’s, Netflix’s and Amazon’s.<sup>35</sup>

---

<sup>35</sup> Dr. Athey also cannot explain why 1-800 Contacts’ price premium is attributable to the settlement agreements when there are other price premiums among online retailers that cannot be attributed to those agreements; for example, Dr. Athey cannot explain why Walmart charges a (footnote continued)

To place Complaint Counsel’s failure of proof in the proper context, it is important to keep in mind that the Commission itself has recognized *sua sponte* that ignoring the benefits of brand differentiation is error. *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9025 (citation omitted).

In the end, all Complaint Counsel can do is fall back on the familiar refrain that the settlement agreements harmed the competitive process. But that is just another way of saying that the restraint restrains. As Dr. Evans has noted, “when agencies immediately disavow the need to present evidence of consumer harm after repeating those phrases, they are substituting slogans for analysis.” David S. Evans, *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases*, 75 St. John’s L. Rev. 545, 552 (Fall 2001) (“*Dodging the Consumer Harm Inquiry*”); *see also id.* at 550-551 (criticizing FTC for bringing case against Intel solely on basis that competitors had been disadvantaged).

The Supreme Court made clear in *California Dental* that the antitrust inquiry is not whether the party challenging a restraint can identify a limitation on competition but whether it can prove that the limitation harmed consumers. *Cal. Dental Ass’n*, 526 U.S. at 776 (“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 dental services.”); *see also Clorox Co.*, 117 F.3d at 59. Dr. Evans has perfectly captured the implications of that precedent for this case: “In some literal sense, it could be argued that [the] advertising restriction restrained competition—competitors faced restrictions on the type of advertising they could employ. But, in the absence of empirical evidence, that literal argument

---

20% premium for online sales as compared to AC Lens when AC Lens provides services for sales by both companies. CX9043 (Athey Dep.) at 249:9-253:1

fails to show that consumers were actually harmed.” Evans, et al., “Consumer Harm Standard,” at 5.

**2. Complaint Counsel’s Theory of Harm to Competitors Reflects the Value of 1-800 Contacts’ Trademark.**

At most, Complaint Counsel have proven that “some consumers would have purchased from lower-priced sellers in the face of advertisements from lower-priced sellers,” CC Pre-Trial Br. at 40. But the possibility that 1-800 Contacts’ rivals would sell more contacts if they could take advantage of 1-800 Contacts’ valuable trademark is not a cognizable antitrust theory. 1-800 Contacts’ trademark is a valuable competitive mechanism for its rivals only because of the goodwill 1-800 Contacts has earned. That goodwill, however, is precisely what makes 1-800 Contacts’ trademark worthy of protection. Complaint Counsel thus must resort to trying to eviscerate 1-800 Contacts’ trademark rights, which is a highly flawed basis for an antitrust case.

A fundamental precept of antitrust law is that restraints do not harm consumers unless they prevent competitors from increasing supply to dissipate an effort to raise prices by restricting output. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993) (“Firms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market.”). Dr. Evans agrees: “even a substantial reduction in the effectiveness of a few firms in a competitive market may not harm consumers at all if other firms or potential entrants have the ability and incentive to take up the slack.” Evans, et al., “Consumer Harm Standard,” at 8. Here, the fact that Lens.com, Walmart, Costco, and other major retailers could significantly expand their operations to compete away any profits that 1-800 Contacts would have earned

from raising prices strongly undercuts any inference that the settlement agreements enabled 1-800 Contacts to do so.

In those circumstances, although the settlement agreements may have taken away one of the many ways that 1-800 Contacts' rivals could compete, they did not eliminate competition to the point that consumers would feel the effects. Indeed, Dr. Evans himself has been careful to distinguish harm to competitors from harm to consumers: "Harm to competitors occurs when a competitor is disadvantaged—e.g., faces higher costs or lower demand as a result of the challenged action. Harm to consumers occurs when, e.g., prices are higher or industry output lower as a result of the challenged action." Evans, et al., "Consumer Harm Standard," at 7. In Dr. Evans' own view, a mere showing that challenged agreements hampered competitors does not suffice to prove harm to competition: "It is analytically correct to infer consumer injury from injury to competitors only if (1) the injury is severe enough to have a significant impact on the competitors' effectiveness; (2) the affected competitors are important enough so that their effectiveness matters to consumers in the short run; and (3) the short-run injury to competition cannot be easily overcome by the entry or expansion of other firms." *Id.* at 9.

Thus, Dr. Evans has written that, "[m]erely because a firm is disadvantaged does not mean its contribution to market competition is substantially reduced: the disadvantage may be minor or affect only fixed costs, or the firm may not be an important actual or potential competitor in the first place." Evans, et al., "Consumer Harm Standard," at 8. Rather, Dr. Evans says, "the courts should require plaintiffs to show that competition or consumer welfare has been harmed *significantly* as a result of competitor harm—that is, that other competitors cannot in effect replace the harmed firm or firms. Without this more stringent standard, the courts have no meaningful basis for distinguishing between procompetitive and anticompetitive behavior." *Id.*

at 14-15. In fact, in Dr. Evans' view, even "[a] showing that a competitor has been driven out of business . . . is not enough," *id.* at 9—which undercuts Complaint Counsel's reliance on Memorial Eye's decision to exit the online business. Indeed, roughly half of all businesses fail within the first five years.<sup>36</sup>

As such, the fact that 1-800 Contacts' rivals might win more sales if they took advantage of 1-800 Contacts' trademark has no antitrust significance. As the Second Circuit explained in *Clorox*, the fact that "the restrictions in the agreement prevent [a rival] from competing as effectively as it otherwise might" do not suffice to prove harm to competition. 117 F.3d at 59. "The antitrust laws do not guarantee competitors the right to compete free of encumbrances . . . so long as competition as a whole is not significantly affected." *Clorox Co.*, 117 F.3d at 59; *see also United States v. Am. Exp. Co.*, 838 F.3d 179, 204 (2d Cir. 2016) (restraints protecting defendant's "prestige" were not anticompetitive simply because they restrained some advertising for competitors in a multi-sided platform); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 972 (10th Cir. 1994) (competitor claiming that it could "compete more effectively" absent restraint is not "the proverbial sparrow the Sherman Act protects"). Where, as here, other retailers are profitable and growing, the possibility that "growth would have been even more rapid but for the advertising ban . . . hardly constitutes a showing of severe handicap" necessary to prove harm to competition. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990) (no harm to competition where competitors were "not only continuing to grow more profitable but were continuing to increase their market share"); *see also Ehredt Underground, Inc. v.*

---

<sup>36</sup> Bureau of Labor Statistics, *Entrepreneurship and the U.S. Economy*, "Survival rates of establishments, by year started and number of years since starting, 1994–2015, in percent," [https://www.bls.gov/bdm/entrepreneurship/bdm\\_chart3.htm](https://www.bls.gov/bdm/entrepreneurship/bdm_chart3.htm).

*Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996) (“[A]ntitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business.”); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (purpose of antitrust laws “is not to protect businesses from the working of the market”).

Labeling rivals’ supposed lost sales as a reduction in “average prices” for consumers, CX8006 (Evans Report) ¶ 240, does not change anything. Consumers who paid lower prices may in fact have been worse off if they received more value from buying from 1-800 Contacts despite its higher prices because 1-800 Contacts offers a superior product. RX0739 (Murphy Report) ¶ 229. As Dr. Evans has written, “if actions result in benefits and costs to consumers, both need to be weighed. It is not enough to show that some consumers are worse off—that is always true in competitive markets.” Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John’s L. Rev. at 558. The proper way to account for this balance of quality-adjusted price effects is to analyze the agreements’ effect on output. RX0739 (Murphy Report) ¶ 230. Dr. Evans has not done so. CX9042 (Evans Dep.) at 263:17-21.

It is true that consumers are unlikely to know about a company that has not invested in its brand or in differentiating its product or service from what other suppliers offer, as 1-800 Contacts has done for years. A company that has not made these competitive investments will find it more attractive to infringe the trademark of a company that has made that investment and freeride on the goodwill and trust that the other company has built up among consumers. And a company that does so might be more successful than it would if it tried to build its own brand.

Antitrust law, however, does not require a successful brand to act as an agent for its competitors because doing so would make it easier for its rivals to compete. *See Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 377-78 (7th Cir. 1986) (Posner, J.) (“You

cannot conscript your competitor’s salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant. Advertising a competitor’s products free of charge is not a form of cooperation commonly found in competitive markets; it is the antithesis of competition.”). And courts routinely reject arguments that the antitrust laws compel a firm to share its intellectual property to assist competitors. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216 (9th Cir. 1997) (court could find “no reported case in which a court ha[s] imposed antitrust liability for a unilateral refusal to sell or license a patent”); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994) *abrogated on other grounds by* 130 S. Ct. 1237 (2010); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1204 (2d Cir. 1981).

Yet, taken to its logical conclusion, Complaint Counsel’s theory would eviscerate the basis for trademark protection altogether. If Complaint Counsel were correct that agreements are anticompetitive whenever other retailers would be better off without them, trademark settlement agreements would always be anticompetitive under an antitrust standard; since using another firm’s trademarked brand is cheaper than building a brand from scratch, infringement would always be procompetitive. Perhaps that is why the alleged infringers here believe that “

[REDACTED]

[REDACTED] . . .” CX9024 ([REDACTED]) at 72:3-25; *see also id.* 135:12-136:10 (same); CX9000 ([REDACTED]) at 89-90 (“

[REDACTED]”); CX9014 ([REDACTED]) at 23-25 (1-800

Contacts is “[REDACTED]” and has “[REDACTED]

[REDACTED]” because “[REDACTED]

[REDACTED]”).

That sentiment captures that the core of Complaint Counsel’s case is about redrawing the boundaries of trademark law to limit 1-800 Contacts’ trademark rights. Thus, Complaint Counsel allege that the settlements “exceed the scope of any property right that 1-800 Contacts may have in its trademarks.” Compl. ¶ 32. And Complaint Counsel devote more of their brief to trademark law than to competitive effects, *see* CC Pre-Trial Br. at 49-66, asserting that the settlement agreements “extend to plainly non-infringing conduct.” *Id.* at 61. But all Complaint Counsel have done is sought to substitute *their* judgment as to how the cases would have come out had they been tried to final judgment for the *parties’ own* judgment in making rational and informed decisions to settle the lawsuits. And Complaint Counsel “cannot make a case under the antitrust laws unless it demonstrates that the [settlement agreement] may significantly harm competition as a whole, *regardless of whether the agreement is entirely necessary to protect [the defendant’s] trademark rights.*” *Clorox Co.*, 117 F.3d at 57 (emphasis added).

Complaint Counsel cannot meet that burden, and their attempt to define harm to competition solely in trademark terms is fatally flawed. The challenged settlement agreements are not anticompetitive merely because they force 1-800 Contacts’ rivals to do the hard work of building their own brands rather than simply poaching “customers that 1-800 Contacts itself had lured from the brick-and-mortar world into online shopping.” CC Pre-Trial Br. at 11.

### **3. Complaint Counsel’s Theory of Search Engine Harm Fails.**

Unable to prove that the challenged restraints on one form of advertising for contact lenses met their own expert’s standard for harm to competition, Complaint Counsel try to hit the mark by changing the target. Substituting alleged harm to Google—what they call a “multi-billion dollar advertising juggernaut,” CC Pre-Trial Br. at 70—for harm to contact lens wearers, Complaint Counsel argue that the challenged agreements harmed competition because they supposedly reduced revenues for Google and other search engines. *Id.* at 39. Complaint Counsel

point to evidence supposedly showing that 1-800 Contacts paid less per click on its own advertisements in response to searches for its own trademark than it would have paid in a world without the settlements. Complaint Counsel's arguments fail for three reasons.

*First*, Complaint Counsel's argument contravenes Supreme Court precedent. In *California Dental*, which involved a near-total ban on price advertising by dentists, the Court of Appeals stated that the "restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Cal. Dental Ass'n*, 526 U.S. at 776 (quoting 128 F.3d at 728). The Supreme Court called this "puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental service themselves." *Id.* The Court then stated: "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 dental services." *Id.* As noted, Complaint Counsel will not be offering any proof that the settlement agreements lowered output of contact lenses.

The Supreme Court's focus on downstream output of the advertised product rather than advertising itself makes good economic sense. RX0739 (Murphy Report) ¶¶ 96-99. Courts and commentators have emphasized that restraints on purchases of inputs (such as paid search advertising) generally do not harm competition unless they reduce downstream output (such as contact lenses). Rather, restraints on purchases of inputs generally will increase output of the sellers product and benefit consumers. Properly understood, what Complaint Counsel call harm to search engines is, in fact, an effort by search engines to protect their own higher prices, which has the effect of raising contact lens retailers' advertising costs, thereby harming buyers of

contact lenses.<sup>37</sup>

1-800 Contacts is in the business of selling contact lenses. Paid search advertising in response to searches for 1-800 Contacts’ trademarks is just one way in which 1-800 Contacts and other contact lens retailers can compete to sell contact lenses. If 1-800 Contacts paid the search engines less for advertising in response to searches for its own trademark, the only effect was to transfer the value of 1-800 Contacts’ trademark from Google or other search engines back to the trademark owner. Indeed, the evidence will show that displaying rivals’ ads in response to a search for a trademark can shift clicks from the brand’s organic link, clicks which are free, to clicks on the paid advertisement for the same website, which cost the brand money. CX9043 (Athey Dep.) at 84:14-25. In that scenario, displaying ads for rivals can cause a brand to pay a search engine more for advertising on its own trademark, even if consumers do not click on the rivals’ ads. RX0733 (Ghose Report) ¶¶ 59-64; CX9043 (Athey Dep.) at 85:2-11. As such, any revenue that search engines supposedly lost from the challenged agreements reflected part of the value of 1-800 Contacts’ trademark that rightly belongs to the trademark owner.

---

<sup>37</sup> Any agreement by contact lens retailers limiting paid search advertising would reflect monopsony, a “market situation in which there is a single buyer or a group of buyers making joint decisions.” *United States v. Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990). The common “consequence of monopsony power is reduced output on the monopsonist’s selling side: that is, since the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less.” *Areeda*, at ¶ 575 (emphasis in original); *see also Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995). In other words, the concern with restraints by buyers of advertising (an input) is reduced output of the product being advertised (the output). However, “if the monopsonist resells in a competitive market, price and output in the output market will be unaffected by the exercise of monopsony power.” *Areeda*, at ¶ 575; *see also Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995) (noting that “[o]nly with control of a downstream market can the monopsonist decrease output and raise prices”); *Kamine/Besicorp Allegany L.P.*, 908 F. Supp. at 1203; *Areeda* at ¶ 2011 (sellers’ loss is a mere wealth transfer that the antitrust laws were not designed to remedy.”).

*Second*, even if Complaint Counsel’s theory of search engine harm were cognizable, it fails as a matter of law because Complaint Counsel have not defined any relevant antitrust market for paid search advertising. CX9042 (Evans Dep.) at 35:1-7. At least one court has rejected an antitrust market for paid search advertising altogether. *See Person v. Google, Inc.*, No. C06-7297 JFRS, 2007 WL 1831111, at \*5 (N.D. Cal. June 25, 2007), *aff’d*, 346 F. App’x 230 (9th Cir. 2009). And Complaint Counsel will not prove that the challenged agreements reflect power over a market “for the sale of search advertising by auction in response to user queries signaling the user’s interest in contact lenses,” Compl., ¶ 28, because the agreements did not affect advertising on thousands of other keywords that account for the majority of searches related to contact lenses. CX8007 (Athey Report) Table 1; RX0733 (Ghose Report) ¶¶ 141-143.

There is no antitrust market limited to paid search advertising on 1-800 Contacts’ trademark. “Product markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product.” *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999) (“Not even the most zealous antitrust hawk has ever argued that Amoco gasoline, Mobil gasoline, and Shell gasoline are three separate product markets . . . .”); *see also Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 480 (3d Cir. 1992) (“Except in rare circumstances, courts reject market definitions consisting of one supplier’s products where other brands compete.”); *see id.* (“Despite Chrysler’s trademark, GM, Ford, Toyota, Honda, and other auto manufacturers are perfectly capable of producing functionally similar and competitive products.”); *Seidenstein v. Nat’l Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985) (“absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.”). 1-800 Contacts’ trademark reflects a property right with procompetitive value, not an antitrust market. Thus, any effect on the price of advertising on that

trademark alone is not antitrust harm because it says nothing about competition with respect to other kinds of advertising, including paid search advertising.

*Third*, for similar reasons, Complaint Counsel have no proof that the settlement agreements actually harmed Google or any other search engine. At most, Complaint Counsel have tried to prove that, but for the settlement agreements, 1-800 Contacts would have paid more per click on advertisements displayed in response to searches for its trademarks. That is not proof that the settlement agreements harmed any search engine’s revenue.

As Hal Varian, chief economist at Google has explained, “any effort to determine what advertisers ‘would have paid’ under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed.” RX0701 (Varian Decl.) ¶ 6. Indeed, Dr. Athey admits that adding bidders to an Internet search auction will change the behavior of existing bidders. CX9043 (Athey Dep.) at 135:18-20. And Microsoft has provided testimony that evaluating the effect, if any, of the agreements on its revenue would require one to “

” which “

.” RX0704 (Iyer Decl.) ¶¶ 21-22. As the

search advertising auction algorithms explained,

:

[REDACTED]

[REDACTED]

RX0704 ([REDACTED]) ¶ 20. Moreover, the [REDACTED] also testified that she is “[REDACTED]

[REDACTED]

[REDACTED]” *Id.* ¶ 23.

Complaint Counsel will not be able to prove any such harm because they have not conducted any analysis of how additional bidding on keywords that are 1-800 Contacts’ trademark would have affected existing bidders’ behavior. And they have not conducted any analysis of how restrictions on bidding on 1-800 Contacts’ trademark affected the settling parties’ advertising on other keywords. That is important because basic economic principles suggest that the settling parties would have substituted other paid search advertising when restrictions on advertising in response to searches for 1-800 Contacts’ trademarks went into effect. RX0739 (Murphy Report) ¶ 182. An increase in advertising activity on searches not covered by the settlement agreements could have increased the search engines’ revenue from advertising in response to those searches and offset any loss in revenue from advertising in response to searches for 1-800 Contacts’ trademarks due to the settlement agreements. Complaint Counsel cannot deny that this substitution effect occurred because their experts have not examined bidder behavior on searches other than searches for 1-800 Contacts’ trademarks. CX9043 (Athey Dep.) at 138:13-139:3.

**V. THE AGREEMENTS’ PROCOMPETITIVE BENEFITS OUTWEIGH ANY ANTICOMPETITIVE EFFECTS.**

As explained, the evidence will show that the challenged settlement agreements have significant procompetitive effects and no significant anticompetitive effects, meaning Complaint Counsel cannot meet their *prima facie* burden. Even if Complaint Counsel were able to meet

their *prima facie* burden, for the foregoing reasons, the evidence at the hearing will show that the procompetitive benefits of the challenged agreements outweigh any anticompetitive effects that they might cause.

**CONCLUSION**

The challenged settlement agreements do not violate the FTC Act.

DATED: April 7, 2017

Respectfully submitted,

/s/ Steven M. Perry

Gregory P. Stone (gregory.stone@mto.com)  
Steven M. Perry (steven.perry@mto.com)  
Garth T. Vincent (garth.vincent@mto.com)  
Stuart N. Senator (stuart.senator@mto.com)  
Gregory M. Sergi (gregory.sergi@mto.com)  
Zachary Briers (zachary.briers@mto.com)  
MUNGER, TOLLES & OLSON LLP  
350 South Grand Avenue  
Los Angeles, California 90071  
Phone: (213) 683-9100  
Fax: (213) 687-3702

Justin P. Raphael (justin.raaphael@mto.com)  
MUNGER, TOLLES & OLSON LLP  
560 Mission Street, 27<sup>th</sup> Floor  
San Francisco, California 94105

Chad Golder (chad.golder@mto.com)  
MUNGER, TOLLES & OLSON LLP  
1155 F Street NW, 7<sup>th</sup> Floor  
Washington, DC 20004

Sean Gates (sgates@charislex.com)  
CHARIS LEX P.C.  
16 N. Marengo Avenue, Suite 300  
Pasadena, California 91101  
Phone: (626) 508-1717  
Fax: (626) 508-1730

***Counsel for Respondent 1-800 Contacts, Inc.***

**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2017, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I also certify that I served via electronic mail a copy of the foregoing document on:

Thomas H. Brock, *tbrock@ftc.gov*  
Barbara Blank, *bblank@ftc.gov*  
Gustav Chiarello, *gchiarello@ftc.gov*  
Kathleen Clair, *kclair@ftc.gov*  
Joshua B. Gray, *jbgray@ftc.gov*  
Geoffrey Green, *ggreen@ftc.gov*  
Nathaniel Hopkin, *nhopkin@ftc.gov*  
Charles A. Loughlin, *cloughlin@ftc.gov*  
Daniel Matheson, *dmatheson@ftc.gov*  
Charlotte Slaiman, *cslaiman@ftc.gov*  
Mark Taylor, *mtaylor@ftc.gov*  
Mika Ikeda, *mikeda@ftc.gov*  
Thomas Dillickrath, *tdillickrath@ftc.gov*  
Jessica S. Drake, *jdrake@ftc.gov*  
W. Stuart Hirschfeld, *shirschfeld@ftc.gov*  
David E. Owyang, *dowyang@ftc.gov*  
Henry Su, *hsu@ftc.gov*  
*BC-1040-1800-SearchAdTeam-DL@ftc.gov*

DATED: April 7, 2017

By: /s/ Eunice Ikemoto  
Eunice Ikemoto

**CERTIFICATE FOR ELECTRONIC FILING**

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

DATED: April 7, 2017

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

Notice of Electronic Service

**I hereby certify that on April 10, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts' Second Corrected Pre-Trial Brief, with:**

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

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

**I hereby certify that on April 10, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts' Second Corrected Pre-Trial Brief, upon:**

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

Barbara Blank  
Attorney  
Federal Trade Commission  
bblank@ftc.gov  
Complaint

Gustav Chiarello  
Attorney  
Federal Trade Commission  
gchiarello@ftc.gov  
Complaint

Kathleen Clair  
Attorney  
Federal Trade Commission  
kclair@ftc.gov  
Complaint

Joshua B. Gray  
Attorney  
Federal Trade Commission  
jbgray@ftc.gov  
Complaint

Geoffrey Green  
Attorney  
Federal Trade Commission  
ggreen@ftc.gov  
Complaint

Nathaniel Hopkin  
Attorney  
Federal Trade Commission  
nhopkin@ftc.gov

## Complaint

Charles A. Loughlin  
Attorney  
Federal Trade Commission  
cloughlin@ftc.gov  
Complaint

Daniel Matheson  
Attorney  
Federal Trade Commission  
dmatheson@ftc.gov  
Complaint

Charlotte Slaiman  
Attorney  
Federal Trade Commission  
cslaiman@ftc.gov  
Complaint

Mark Taylor  
Attorney  
Federal Trade Commission  
mtaylor@ftc.gov  
Complaint

Gregory P. Stone  
Attorney  
Munger, Tolles & Olson LLP  
gregory.stone@mto.com  
Respondent

Steven M. Perry  
Attorney  
Munger, Tolles & Olson LLP  
steven.perry@mto.com  
Respondent

Garth T. Vincent  
Munger, Tolles & Olson LLP  
garth.vincent@mto.com  
Respondent

Stuart N. Senator  
Munger, Tolles & Olson LLP  
stuart.senator@mto.com  
Respondent

Gregory M. Sergi  
Munger, Tolles & Olson LLP  
gregory.sergi@mto.com  
Respondent

Justin P. Raphael  
Munger, Tolles & Olson LLP  
Justin.Raphael@mto.com  
Respondent

Sean Gates

Charis Lex P.C.  
sgates@charislex.com  
Respondent

Mika Ikeda  
Attorney  
Federal Trade Commission  
mikeda@ftc.gov  
Complaint

Zachary Briers  
Munger, Tolles & Olson LLP  
zachary.briers@mto.com  
Respondent

Chad Golder  
Munger, Tolles, and Olson  
chad.golder@mto.com  
Respondent

Julian Beach  
Munger, Tolles & Olson LLP  
julian.beach@mto.com  
Respondent

Aaron Ross  
Attorney  
Federal Trade Commission  
aross@ftc.gov  
Complaint

Thomas Dillickrath  
Attorney  
Federal Trade Commission  
tdillickrath@ftc.gov  
Complaint

Jessica S. Drake  
Attorney  
Federal Trade Commission  
jdrake@ftc.gov  
Complaint

W. Stuart Hirschfeld  
Attorney  
Federal Trade Commission  
shirschfeld@ftc.gov  
Complaint

David E. Owyang  
Attorney  
Federal Trade Commission  
dowyang@ftc.gov  
Complaint

Henry Su  
Attorney  
Federal Trade Commission  
hsu@ftc.gov

Complaint

Steven Perry  
Attorney