18-3848

United States Court of Appeals

for the

Second Circuit

1-800 CONTACTS,

Petitioner,

– v. –

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL TRADE COMMISSION

BRIEF FOR INTELLECTUAL PROPERTY, INTERNET LAW, AND ANTITRUST PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTEREST OF AMICI

Amici are professors of intellectual property, Internet, or antitrust law at universities throughout the United States. We have no personal stake in the outcome of this case, but have an intellectual interest in seeing that the law of antitrust and technology law develops in ways that promote healthy competition online.[1] All parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

1-800 Contacts agreed with its competitors to restrict how they participate in search engine auctions for advertising to each other's customers. That sort of agreement is normally illegal per se. The law condemns agreements to divide markets and agreements to rig bids without further inquiry because it views them as having no redeeming value. They serve only to reduce competition. What 1-800 Contacts did is both market division and bid rigging. It is anticompetitive.

Nonetheless, the Commission did not apply the per se rule. Instead, it bent over backwards to look for possible justifications for the agreement not to compete in search engine advertising. The Commission carefully considered and properly rejected 1-800 Contacts' defense that trademark law justified its conduct. It does

[1] No party or its counsel has paid for or contributed to the drafting of this brief. No one except the undersigned amici have drafted and filed the brief.

not. 1-800 Contacts' trademark claims were pretextual. No court has adopted its theories of trademark infringement – and 1-800 Contacts itself has lost in court the trademark argument it advances here. Furthermore, the evidence shows that 1-800 Contacts coerced its competitors to sign agreements that reached far beyond anything trademark law might protect and used litigation to try to prevent competition rather than to protect its trademarks. The Commission correctly held that 1-800 Contacts' conduct was illegal.

ARGUMENT

I. 1-800 Contacts Engaged in a Form of Unlawful Bid-Rigging

A. Competitive Keyword Advertising and Game Theory

The Prisoner's Dilemma is a well-known game extensively studied in game theory. In a two-player game, the parties cannot communicate. Both players benefit from "cooperating" with each other; but if one player cooperates and the other doesn't, the non-cooperating player gets even more benefit and the cooperating player gets a worse outcome. Because each player wants the increased benefits, and neither player can risk unreciprocated cooperation when they can't communicate with each other, both players choose not to cooperate—which causes both to get worse outcomes. *See generally* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994).

In mature industries with a small number of incumbents, the decision to purchase advertising triggered by a competitor's trademark (what we call "competitive keyword advertising") resembles a Prisoner's Dilemma. Assume an industry with two participants. One player engages in competitive keyword advertising targeted to reach its rival's customers; the other doesn't. The extra consumer awareness generated by the keyword ads should help the advertiser increase market share at the expense of the non-advertiser. The non-advertiser will respond by engaging in advertising as well to recapture the lost market share. In other words, once an industry participant starts competitive keyword advertising, its rivals will retaliate.

The rival's retaliation should largely restore the prior market share. By targeting each other's customers, each participant's competitive keyword advertising is likely to roughly offset each other's market share gains (except when a participant's ad copy persuades more effectively than the other's). However, the retaliatory advertising doesn't fully restore the status quo, because each participant is now paying for advertising to preserve its market share.

From the perspective of the companies involved, each participant would rather avoid those advertising expenditures (and competition for each other's customers), but neither can unilaterally stop advertising without giving up market share. This is a Prisoner's Dilemma. Even though both participants would be better off cooperating with each other by not engaging in competitive keyword advertising, instead they each must bear the advertising costs to get the same market share outcome – unless they can find a way to agree together on what they will do.

When an industry has new market entrants (like the online contact lens industry in the 2000s), the game looks slightly different than the Prisoner's Dilemma, but the consequences are the same. The new entrant doesn't have market share to lose, while the incumbents do. In these circumstances, the new entrant will engage in competitive keyword advertising against the incumbents to increase market share. The incumbents do not want to lose market share, so they might retaliate with competitive keyword advertising (i.e., displaying ads in response to searches for their new competitors' trademarks). More likely, they will engage in "defensive" keyword advertising (i.e., buying their own trademarks for keyword ads) to try to reduce the effect of the entrant's advertisements. Either way, the incumbents incur increased keyword advertising costs and possibly reduced market share. Those unwanted consequences give incumbents incentives to change the game to favor them more. And the easiest way to do that is by agreeing with rivals not to play the game.

B. Antitrust Law Condemns Such Efforts to Avoid Competition

While parties who avoid a Prisoner's Dilemma may benefit, society does not. Agreements between competitors to save money by not competing in particular ways or for particular customers may be rational to the parties, but they hurt competition generally. Consumers lose the benefits of that competition – lower prices, choice of products, and awareness of alternatives. Indeed, the primary purpose of section 1 of the Sherman Act (and its counterpart in section 5 of the F.T.C. Act) is arguably to disrupt these cooperative "solutions" to the Prisoner's Dilemma. Christopher R. Leslie, *Trust, Distrust, and Antitrust,* 82 Tex. L. Rev. 515 (2004). Competition *requires* that companies worry about what their rivals might do. It withers when companies can sign contracts that insulate themselves from a key aspect of the competitive process.

Antitrust law accordingly condemns many agreements between horizontal competitors designed to avoid competing. The classic example is a cartel that fixes prices. Cartels are unlawful per se because they short-circuit price competition. *F.T.C.* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986); *National Soc. of Professional Engineers* v. *U.S.*, 435 U. S. 679, 692 (1978). But other forms of agreement between competitors similarly prevent competition and are therefore also illegal per se. Market division agreements, in which each party agrees to stay out of each other's way, are also illegal per se. *Palmer v. BRG of Georgia*, 498

U.S. 46 (1990). Agreements that divide markets prevent competition by guaranteeing each company its own territory and its own customers.

Similarly, agreeing not to bid in an auction, or to purposefully put in a pre-set and uncompetitive bid, is illegal per se. *See*, *e.g.*, *United States v. Joyce*, 895 F.3d 673, 679 (9th Cir. 2018). Auctions are undermined when parties do not compete in good faith to win the auction. *See In the Matter of Polygram Holding, Inc.*, FTC Docket #9298 (2003) (finding agreements to restrict advertising anticompetitive).

1-800 Contacts engaged in a form of both market division and bid-rigging. Google and other search engines run auctions to sell advertising space keyed to specific user searches. By agreeing with multiple competitors that neither side would participate in certain auctions that reached the other side's consumers, 1-800 Contacts interfered with the search engines' auctions. Among other reasons, it did so to make sure that its customers weren't confronted with ads for identical items that they might prefer to 1-800 Contacts' higher-priced offerings. In return, 1-800 Contacts promised not to confront its competitors with its ads. 1-800 Contacts solved the Prisoner's Dilemma by agreeing with its competitors not to play the game at all.

That conduct is plainly anticompetitive. It interferes with the free marketplace, making it harder for competitors to get information about their products in front of a rival's customers and therefore reducing the incentive of the parties to compete on price and quality. *See* Mark R. Patterson, *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information* 14-15 (2017) ("[A]lthough the significance of much commercial information derives from its influence in markets for other goods, conduct involving information can and should be evaluated in terms of its effects in the markets for that information itself."). We believe an agreement of this sort could be condemned under the per se rule described above. *F.T.C.* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986) (noting that not every new sort of restraint on trade requires full scrutiny).

Nonetheless, the Federal Trade Commission, in an abundance of caution, did not apply the per se rule or even a traditional quick look analysis, but instead evaluated the anticompetitive consequences and gave detailed consideration to 1-800 Contacts' purported justifications.[2] The Commission may have felt constrained by *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), which applied the rule of reason to a non-profit association that restricted certain forms of advertising by its members that might be misleading. But that case is easily distinguishable. It

[2] The AIPLA's suggestion that the Commission presumed illegality cannot be squared with the Commission's opinion itself, which considered and balanced anticompetitive harms and purported procompetitive justifications. The Commission did dispense with the need for a detailed market definition analysis. That is what courts normally do when a section 1 case involves horizontal competitors.

involved a non-profit association that regulated misleading advertising and categorized certain types of price advertising as potentially misleading. The Court there found that the dental association had a plausible explanation for its nonprice advertising restrictions, namely that restricting unverifiable quality claims would have a procompetitive effect by preventing misleading or false claims that distort the market. *Id*. at 771-72.

By contrast, 1-800 Contacts is a for-profit company that entered into deals with its direct competitors that prohibited truthful competitive advertisements disseminated to reach each other's customers. That is anticompetitive on its face. And as we show below, trademark law does not justify that anticompetitive restriction.

II. Trademark Law Does Not Explain or Justify 1-800 Contacts' Bid Rigging

In its appeals brief, 1-800 Contacts claims that it "settled a series of legitimate trademark infringement lawsuits with settlement agreements that prohibited the infringing conduct." Brief for Petitioner at 22 ("Appellant Brief"). However, the conduct at issue was not infringing, and 1-800 Contacts' settlement campaign was not designed to protect 1-800 Contacts' trademark rights. Instead, 1-800 Contacts misused trademark law to advance its anticompetitive agenda.

A. 1-800 Contacts Used Pretextual Trademark Claims to Coerce Settlements That Eliminated Competition

1-800 Contacts' moves regarding competitive keyword advertising are consistent with the Prisoner's Dilemma we described above, rather than a legitimate effort to enforce trademark rights.

When it first faced competitive advertising, 1-800 Contacts experimented with retaliatory competitive keyword advertising against its rivals. In the early 2000s, it purchased competitive keyword advertising against its rivals Vision Direct, Coastal Contacts, and Lens Express – even though doing so putatively constituted trademark infringement pursuant to its own theories of trademark law. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F 3d 400, 409 n.12 (2d Cir. 2005).

That wasn't enough for 1-800 Contacts. As the incumbent selling a commodity product at prices higher than its rivals' prices, it had more to lose than its rivals from vigorous competition. This led 1-800 Contacts to explore different strategies.

A more profitable strategy for 1-800 Contacts would be to get its rivals to stop buying competitive keyword ads. This would help preserve 1-800 Contacts' market share—avoiding lower-cost competitors poaching its customers—while saving the cost of advertising. But how could it achieve that result? And how could it prevent the rivals from resuming competitive keyword advertising (as game theory predicts they would)?

Using trademark law as a weapon, 1-800 Contacts coerced its rivals into agreeing not to engage in competitive keyword advertising. Trademark law provided the tool that induced rivals to agree to outcomes that conflicted with the results predicted by game theory.

Nominally, 1-800 Contacts reciprocally promised not to engage in competitive keyword advertising against its rivals. However, 1-800 Contacts' concession was essentially meaningless given that retaliatory advertising against new entrants had little value to 1-800 Contacts.

1-800 Contacts insists that its rivals voluntarily "cooperated." For example, it claims that if "advertising on 1-800 Contacts' trademarks was material to any of the counterparties' ability to compete, they would have continued litigating the trademark claims that 1-800 Contacts was pursuing." Appellant Brief at 48-49; *see also* Appellant Brief at 81 ("if the counterparties thought that the ability to display ads in response to searches for 1-800 Contacts' trademarks was critical (or even material) to their competitive success, they would not have agreed to stop this advertising (and sometimes pay 1- 800 Contacts) and instead continued to litigate"). This argument is demonstrably false.

1-800 Contacts made it too expensive for rivals to litigate. It was cheaper and safer for 1-800 Contacts' rivals to cooperate with 1-800 Contacts' demands rather than resist. *See* Declaration of Peter Clarkson, docket no. 141-1, Thompson v. 1-800 Contacts, Inc., 2:16-cv-01183-TC-DBP (D. Utah filed Oct. 2, 2017) ("AC Lens felt coerced into signing the confidential agreement in order to avoid potentially ruinous litigation and to stay in business").

The Lens.com case is a stark example of why rivals felt compelled to settle with 1-800 Contacts regardless of the legal merits rather than fighting 1-800 Contacts in court. In its lawsuit against Lens.com regarding competitive keyword advertising, 1-800 Contacts agreed with its lawyers to cap their attorneys' fees at $1.1 million.[3] Answer and counterclaim, ¶ 33, Rader, Fishman & Grauer LLC v. 1-800 Contacts, Inc., 2:10-cv-00191-TS-DN (D. Utah filed March 25, 2010), https://www.scribd.com/document/31405440/Rader-Fishman-v-1-1-800 Contacts-Answer. Meanwhile, Lens.com only made a total profit of $20.51 from its competitive keyword advertising on 1-800 Contacts' trademarks. 1-800 Contacts, Inc. v. Lens.com, Inc., 2012 WL 113812 (D. Utah Jan. 13, 2012). That's not $20

[3] 1-800 Contacts' actual legal fees were not disclosed. In a fee dispute lawsuit against 1-800 Contacts, the amount is redacted. Nevertheless, 1-800 Contacts' former lawyers referred to the Lens.com lawsuit as "an expensive piece of litigation." Complaint & Jury Demand, ¶ 25, Rader, Fishman & Grauer LLC v. 1-800 Contacts, Inc., 2:10-cv-191 (D. Utah filed Mar. 30, 2010), https://www.scribd.com/doc/31405474/Rader-Fishman-v-1-1-800 Contacts-Complaint.

per click; it literally made $20 of profit from all of its competitive keyword advertising against 1-800 Contacts.[4]

Why would 1-800 Contacts be willing to spend up to $1.1 million on legal fees to stop a rival from earning $20 in profit? That sounds economically irrational, particularly when, as explained below, 1-800 Contacts had little or no chance of winning that case (and it ultimately did lose the case—badly—in *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013)). But 1-800 Contacts' conduct is entirely consistent with game theory.

First, by eliminating Lens.com's competitive advertising, 1-800 Contacts thwarts Lens.com's attempts to gain market share while reducing 1-800 Contacts' spending on retaliatory[5] or defensive advertising.

Second, 1-800 Contacts' expenditures on the Lens.com litigation sent a powerful message to its rivals—you won't profit from competitive keyword advertising if you fight us in court. Indeed, Lens.com claimed to have spent at least

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[4] 1-800 Contacts unsuccessfully claimed that Lens.com was also responsible for profits generated from Lens.com's affiliates who bought competitive keyword advertising. Those profits might have been worth up to $40,000—still a trivial fraction of 1-800 Contacts' $1.1M attorneys' fee cap. *See* Eric Goldman, *Important Ninth Circuit Ruling on Keyword Advertising, Plus Recaps of the Past 4 Months of Keyword Ad Decisions*, TECH. & MKTG. L. BLOG, Mar. 9, 2011, https://blog.ericgoldman.org/archives/2011/03/important_ninth.htm.

[5] Although Lens.com was the market entrant, 1-800 Contacts apparently purchased retaliatory competitive keyword advertisements – thus engaging in an act it claims was infringing. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010).

$1.4 million on its legal defense costs, a significant amount for a startup fighting a well-funded incumbent. Complaint, ¶3(f), Lens.com, Inc. v. 1-800 Contacts, Inc., 2:11-cv-00918 (D. Nev. filed June 6, 2011), https://www.scribd.com/document/58768492/Lens-com-v-1-1-800 Contacts-Antitrust-Complaint.

Industry rivals surely noted the high costs of fighting 1-800 Contacts' trademark claims, and they would have rationally concluded that those costs would outweigh the potential profits they hoped to make from competitive keyword advertising. By changing its rivals' anticipated profitability from competitive keyword advertising, 1-800 Contacts thus coerced its rivals to "cooperate" with its no-advertising objective.

The phenomenon of "trademark bullying" includes situations where trademark owners use high trademark defense costs to thwart legitimate activities. *E.g.*, Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625. 1-800 Contacts' enforcement efforts against rivals' competitive keyword advertising are textbook examples of trademark bullying. Its rivals' capitulations were coerced, not voluntary, and the settlements were certainly not credible evidence of how much importance the rivals placed on competitive keyword advertising.

But even if that weren't true – even if all the parties to these settlements really wanted to enter into them and weren't coerced – the settlements are still anticompetitive. Consumers aren't a party to those agreements, and they are the ones who lost the most from 1-800 Contacts' efforts to restrict competition.

In general, the law encourages litigation settlements. Settlements are often pro-competitive. However, 1-800 Contacts' settlement campaign shows that not all settlements are pro-competitive. In this situation, the settlement campaign was about overcoming the Prisoners' Dilemma-like game created by competitive keyword advertising.

In its efforts to defeat the game, the settlement campaign hurt ad sellers (like the search engines), who saw less revenue as advertisers dropped out of their auctions. More importantly, the settlement campaign hurt consumers, who were deprived of valuable information to improve their marketplace decisions as well as the benefits of 1-800 Contacts and its rivals competing more aggressively for consumers' business. Intellectual property owners violate antitrust law when they use the settlement of a putative intellectual property claim to avoid competition and share the profits from an unearned monopoly. *F.T.C. v. Actavis,* 570 U.S. __, 133 S.Ct. 2223 (2013). That was true in *Actavis* even when there was substantial doubt whether the patent in question was valid and infringed. It is even more clearly true here, where 1-800 Contacts had no realistic chance of success on any of its trademark claims, as we show in the next section.

B. Trademark Law Does Not Forbid Truthful Keyword Advertising

Trademark law is designed to help producers and customers find each other. Brands identify products, allowing companies to invest in quality products and allowing customers to form impressions of those products. By preventing counterfeit goods or deceptive marketing, trademark law reduces the cost to consumers of finding what they want and promotes a fair and healthy marketplace. *Smith v. Chanel*, 402 F.2d 562 (9th Cir. 1968); Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 Trademark Rptr. 1223 (2007).

Relevant, truthful advertising is critical to promoting that goal. While the Lanham Act prohibits false or misleading advertising, 15 U.S.C. §1125(a)(1)(B), brands and consumers won't be able to find each other without truthful ads that identify and describe their products. Truthful advertising promotes a competitive marketplace by giving consumers the information they need about what products are available, what they do, and how much they cost.

To overcome the "game" created by competitive keyword advertising, 1-800 Contacts needed some leverage to coerce its rivals' cooperation. Trademark litigation provided the desired leverage. However, 1-800 Contacts' trademark claims lacked legal merit.

Claims that competitive keyword advertising constituted trademark infringement never made much sense, even as a matter of logic. 1-800 Contacts' competitors did not seek to use its name in their ads or in any other way visible to consumers. Rather, the rivals simply sought to place their own ads about their offerings in a place where its customers might see them: next to organic search results on search engines like Google. Companies compete all the time by placing their products or ads near their competitor's, whether it is locating gas stations across the street from each other or putting competing products near each other on grocery store shelves. Eric Goldman, *Brand Spillovers*, 22 Harvard J. L. & Tech. 381 (2009). And the law has long protected comparative advertising. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 44 (2d Cir. 1994); *Smith*, 402 F.2d at 562.

1-800 Contacts never had judicial support for its trademark position. Courts regularly rejected lawsuits over competitive keyword advertising. By 2005, it was already clear that competitive keyword advertising didn't infringe. This legal principle was confirmed by *Government Employees Insurance Co. (GEICO) v. Google, Inc.*, 77 U.S.P.Q.2d 1841 (E.D. Va. 2005); and that year the Second Circuit also rejected 1-800 Contacts' case over competitive keyword advertising. *1-800 Contacts, Inc. v. WhenU.com,* 414 F.3d 400 (2d Cir. 2005). *See also* Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L.J. 507 (2005) (noting the weakness of these claims).

By 2005, 1-800 Contacts knew that its legal theory was untenable. It had already litigated and lost the trademark claims it now says justified its restrictive agreements. The legal rule never became more favorable to 1-800 Contacts after 2005. Quite the contrary. Occasionally, courts issued rulings that suggested different outcomes in non-final intermediate judgments over competitive keyword advertising or in cases where the advertiser displayed the trademark in the ad copy; but none of these rulings changed the basic legal principles. And no appellate court ever held that truthful keyword advertising was unlawful. *See* Rebuttal Expert Report of Professor Rebecca Tushnet 8-20, Mar. 8, 2017.

1-800 Contacts never varied its anticompetitive keyword advertising strategy, even as courtroom rulings highlighted the weakness of its trademark position. Indeed, even today 1-800 Contacts still insists that competitive keyword advertising infringes. *See* Appellant Brief at 21 & 79 n.24.

That legal position is simply not credible. By 2018, a court bluntly declared that "Virtually no court has held that, on its own, a defendant's purchase of a plaintiff's mark as a keyword term is sufficient for liability." *Alzheimer's Disease and Related Disorders Association, Inc. v. Alzheimer's Foundation of America, Inc*., 2018 WL 1918618 (S.D.N.Y. Apr. 20, 2018); *accord Greenberg v. Perfect Body Image*, LLC, 2019 WL 3485700 (E.D.N.Y. July 2, 2019).

Further evidence that 1-800 Contacts knew trademark law was not on its side comes from its repeated effort to lobby legislators to change the law in its favor. In addition to its litigation campaign to coerce its rivals' "cooperation," 1-800 Contacts tried to change the "game" by suppressing competitive keyword advertising legislatively in its home state of Utah. From 2007-09, the Utah state legislature tried twice to restrict competitive keyword advertising. The first law passed the Utah legislature, but it was repealed over 1-800 Contacts' objections. Eric Goldman, *Utah Amends Trademark Protection Act (But Only After Some Drama)*, TECH. & MKTG. L. BLOG, Mar. 7, 2008, https://blog.ericgoldman.org/archives/2008/03/utah_amends_tra.htm. 1-800 Contacts then sponsored a second bill. Eric Goldman, *Utah Trying to Regulate Keyword Advertising….Again!? Utah HB 450*, TECH. & MKTG. L. BLOG, Mar. 4, 2009, https://blog.ericgoldman.org/archives/2009/03/utah_trying_to.htm. That bill passed the Utah House before dying in the Utah Senate. Eric Goldman, *Utah HB 450 Dies in Utah Senate Without a Vote*, TECH. & MKTG. L. BLOG, Mar. 13, 2009, https://blog.ericgoldman.org/archives/2009/03/utah_hb_450_die.htm. 1-800 Contacts' legislative rent-seeking highlights how 1-800 Contacts hoped to mandate its rivals' "cooperation" with its no-advertising objectives. Those unsuccessful efforts would have been unnecessary if, as 1-800 Contacts now claims, trademark law had been on its side all along.

Finally, the nature of 1-800 Contacts' settlements further bolsters the conclusion that it was not acting based on the legal merits. 1-800 Contacts did not simply settle with its competitors by agreeing not to bid on each other's trademarks as keywords. As we have seen, that alone would go further than trademark law permits. But its agreements went even further.

For example, those agreements included a requirement that its competitors employ "negative keywords." *In the Matter of 1-800 Contacts, Inc*., Docket No. 9372 (FTC Nov. 7, 2018), at 9. A "negative keyword" ensures that any ad that would ordinarily have run will not run if the Internet searcher uses a specific term. For instance, imagine that a user types "luxury cars bmw Mercedes tesla" into Google. A positive keyword match would show an ad if the advertiser had bid to place ads near search results for a specific term – luxury car, or BMW, or Tesla, for instance. A negative keyword for "bmw" would ensure that, even if Tesla bid to place ads near search results for "tesla" or "luxury car," that ad would not appear because the search also included the excluded term.

There is no plausible argument that bidding to run an ad for "luxury car" or "contact lenses" violates anyone's trademark. Settling a trademark dispute by requiring competitors to make sure their ads never appear opposite their competitors, even if they never used the trademark at all, cannot possibly be justified by a claim that 1-800 Contacts was simply exercising its trademark rights.

The negative keywords clauses in the settlements are further evidence that those settlements were pretextual. The negative keyword agreements are also independently anticompetitive, restricting competition more than trademark law could possibly justify.

CONCLUSION

The Federal Trade Commission's finding of an antitrust violation should be affirmed.

Dated: September 12, 2019

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CERTIFICATE OF COMPLIANCE

I, Mark A. Lemley, counsel for Amici Curiae, hereby certify that the foregoing brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(a)(5) and Second Circuit Local Rule 29.1(c) because it contains 4,491 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

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