# 18-3848-ag

## United States Court of Appeals

*for the*

## Second Circuit

1-800 CONTACTS,

*Petitioner*,

– v. –

FEDERAL TRADE COMMISSION,

*Respondent.*

ON APPEAL FROM THE FEDERAL TRADE COMMISSION

# FINAL FORM REPLY BRIEF FOR PETITIONER (REDACTED VERSION)

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## PRELIMINARY STATEMENT

As Complaint Counsel's Opposition ultimately acknowledges, the Federal Trade Commission's opinion rests on two boundless and dangerous rules that this Court should reject.[1]

*First*, CC asks this Court to hold that all settlements—"*commonplace or otherwise*"—are subject to antitrust second-guessing. Opp. 35 (emphasis added). Under this rule, all parties settling intellectual property ("IP") disputes face the continuing risk of being attacked years later under antitrust's notoriously amorphous standards and with the sledgehammer of antitrust's draconian penalties (like treble damages). That is not the "balance" between antitrust and IP that was struck in *FTC v. Actavis, Inc.*, 570 U.S. 136, 148 (2013). It is a complete takeover of IP settlements by antitrust, to the detriment of IP owners and litigants everywhere. As other circuits have done, this Court should confirm that *Actavis* "exempted 'commonplace forms' of settlement" like the ones here from antitrust scrutiny. *See In re Lipitor Antitrust Litig.*, 868 F.3d 231, 250 (3d Cir. 2017); *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 544 n.4 (1st Cir. 2016).

[1] This brief refers to the part of the Commission prosecuting this appeal as "Complaint Counsel" or "CC" to distinguish it from those within the Commission that judged its trademark agreements to be an antitrust violation. Respondent 1-800 Contacts, Inc. will be referred to as "1-800," and the opposition brief as "Opposition" or "Opp."

*Second*, CC asks for a rule that *any* restriction on advertising is inherently suspect on "that basis alone"—regardless of whether that restriction flows from exercise of an IP right or is part of a commonplace settlement. Opp. 51. That broad rule was rejected two decades ago in *California Dental Ass'n v. FTC,* 526 U.S. 756 (1999), and it makes *even less sense* here, where the advertising restrictions are part of trademark settlements that are "favored" and pose little competitive risk because they are "by their nature non-exclusionary." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55-56, 60 (2d Cir. 1997). Nevertheless, and despite being told *again* in *Actavis* not to apply this standard to even exclusionary settlements, the Commission refuses to take "no" for an answer.[2] It is up to this Court to again tell the Commission to prove its case without a shortcut that should be "rare[ly]" used, but which the Commission routinely employs. *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018).

Absent the "inherently suspect" shortcut, there is nothing to support a finding of anticompetitive effects. Indeed, the Opposition confirms that the other method the Commission used ("direct evidence") is just a repackaging of the flawed

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[2] CC does not squarely confront the binding legal principles from these cases, which dictate the outcome here. Instead, it casts them aside as irrelevant musings that are explained away by factual "context." Opp. 69 (*California Dental* decided in the "professional context"); 58 (*Actavis* involves the "context of pharmaceutical reverse-payments"); 67 (*Clorox* involved only a "single competitor").

"inherently suspect" theory—that a reduction of advertisements, even in the context of trademark settlements, is "anticompetitive." Opp. 63. Nor is CC's attempt to fabricate Commission "findings" credible. For example, CC suggests the Commission found effects in the "*particular context*" of the "online market," Opp. 55, but the Commission explicitly *avoided* any "market" finding, SPA231-232.[3] Likewise, CC gives the veneer of a Commission finding that 1-800's strong brand did not explain its "higher prices," Opp. 77-78, even though the Commission's pricing analysis only mentions 1-800's brand to note that it has 20 times the brand awareness of rivals, SPA262-63.

In the end, all CC is left with is the argument (repeated over and over) that 1-800's settlements were "overbroad." However, this overbreadth argument never comes to grips with the undisputed fact that "non-use" and "negative keyword" requirements reflect the very same relief that courts regularly awarded in cases advancing the very same trademark claims. *See infra* § III.C. It cannot be "overbroad" for parties to assess what relief a court may award and, after weighing the costs and risks of litigation, decide to settle based on some or all of that relief. That is how settlement works. Far from being "overbroad," that is the definition of

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3 Virtually *all* of CC's arguments are based on the phantom finding of an "online market" and the allegation that the settlements covered most sellers in *that market*. *See*, *e.g.*, Opp. 22, 28, 31, 44. This *alone* requires reversal.

a "commonplace" settlement that *Actavis* held cannot be second-guessed under antitrust law. *See infra* § I.A.

## ARGUMENT

### I. THE SETTLEMENTS ARE NOT SUBJECT TO ANTITRUST SCRUTINY BECAUSE THEY RESOLVE LEGITIMATE TRADEMARK CLAIMS USING STANDARD TERMS

#### A. *Actavis* Exempts Commonplace Settlements from Antitrust Scrutiny

According to CC, *Actavis* "make[s] clear" that the Supreme Court's precedents do not exempt *any* settlements from antitrust scrutiny. Opp. 36. But CC only selectively quotes the "make clear" sentence from *Actavis*, which says in full: "For another thing, this Court's precedents make clear that patent-related settlement agreements *can sometimes violate the antitrust laws.*" 570 U.S. at 149 (emphasis added). Those "sometimes" are a specific set of circumstances where the Court determined that, given the relative "balance" between antitrust and IP interests, it made sense that antitrust should play some role.[4]

[4] *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 178 (1965) (fraud on the PTO exception); *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993) (sham litigation exception); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 196-97 (1963) (conduct held under patent law to be beyond the scope of the patents); *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948) (same); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 379 (1952) (same); *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 174 (1931) (same).

In *Actavis*, the Court was again asked to consider the "balance" and "accommodation" to be struck between IP and antitrust to determine whether antitrust should oversee a new area: reverse-payment patent settlements. 570 U.S. at 148, 158. The Court *nowhere* said that it was permitting antitrust scrutiny of *all* IP settlements. Indeed, *Actavis* acknowledged the "general legal policy favoring the settlement of disputes" and the "practical concern" that applying antitrust law to IP settlements would require litigation of the underlying IP right—factors that drove some courts to deem reverse-payment settlements outside of antitrust's reach. *Id.* at 153. But *Actavis* held these factors "should not determine the results *here*" because of "considerations" unique to reverse-payment settlements. *Id.* (emphasis added).

Those "considerations," *Actavis* explained, are based on the crucial differences between reverse-payment settlements and "commonplace" ones that make reverse-payment settlements both suspicious under antitrust law and capable of being adjudicated without delving into the merits of the underlying patent lawsuit. *Id.* at 154-58. As to "commonplace" settlements, however, *Actavis* confirmed it was not "alter[ing] the understanding" that these settlements are outside antitrust's reach. *Id.* at 152 ("Insofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding.").

1-800 does not, as CC claims, "mistakenly rel[y], out of context, on a passing statement in *Actavis* that 'commonplace' forms of settlement have not been deemed subject to antitrust liability." Opp. 39. As both the First and Third Circuits recognize, *Actavis* was built on the distinction between "unusual" reverse-payment settlements and "commonplace" ones that are exempted from antitrust's reach. *Lipitor*, 868 F.3d at 250; *Loestrin 24*, 814 F.3d at 544 n.4.

For example, *Actavis* started by framing its concern around the *unusual form* of reverse-payment settlements:

> [T]he plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, *even though the defendants did not have any claim that the plaintiff was liable to them for damages*. *That form of settlement is unusual* . . . [and] *settlements taking this form* tend to have significant adverse effects on competition.

570 U.S. at 147-48 (emphasis added). Then, after carving out "commonplace forms" of settlements from antitrust liability, it drove the point home:

> *In the traditional examples cited above, a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim.* In reverse-payment settlements, in contrast, a party with no claim for damages . . . walks away with money simply so it will stay away from the patentee's market. *That, we think, is something quite different.*

*Id.* at 152 (emphasis added).

Notably, *Actavis* did not reach this conclusion in a vacuum: it is *exactly* what the Commission proposed. Distinguishing reverse-payment settlements from "traditional" ones, the Commission said:

> The extraordinary and distinguishing feature of reverse-payment agreements, however, is that the defendant generic manufacturers receive something—a substantial payment from the brand-name manufacturer that holds a patent—that they could not hope to obtain even if they *prevailed* in the litigation. That feature in turn implies that the other terms of the settlement agreement are disconnected from any justification they might otherwise have had in the Patent Act.

A2620. By contrast, 1-800 achieved through settlement only what it could achieve if it *prevailed* in litigation. That is the very type of "commonplace" or "traditional" settlement that *Actavis* carved out.

CC does not (and cannot) contest that many courts adjudicating trademark claims in this same context have entered injunctions barring use of trademark terms in search advertising ("non-use") *and* ordered the use of negative keywords. *See* 1-800 Br. 27-29 (collecting cases); Brief of *Amicus Curiae* of the American Intellectual Property Law Association 24-27, *1-800 Contacts v. Federal Trade Commission*, No. 18-3848 (2d Cir. Jun. 14, 2019) ("AIPLA Br."); A2194-2201, A2230-40, A2248-50 (collecting cases). Judge George B. Daniels of the Southern District of New York, for example, issued an injunction in one of 1-800's trademark cases barring trademark keyword bidding and requiring negative keywords. A593. Moreover, CC does not dispute that Google itself recommended the use of negative keywords to resolve trademark disputes after changing its bidding policy. *See* A1022-22.1. Apparently, in CC's upside-down world, Judge Daniels (like many of his colleagues) was actively promoting an obviously-illegal, near *per se* antitrust violation through his injunction, Google was setting up an antitrust conspiracy to *harm itself*, and all of the settling counterparties entered a "private conspiracy" to harm themselves and benefit 1-800. Opp. 92.

While the commonplace nature of the settlements *alone* is enough to tip the antitrust/IP "balance" in favor of no antitrust scrutiny, several additional features *confirm* it. *First*, although CC refuses to acknowledge it, this Court made perfectly clear that trademarks "are by their nature non-exclusionary" and thus "pose a far less serious threat" to competition than patents. *Clorox*, 117 F.3d at 56-57.

*Second*, unlike in *Actavis*, there is no way to determine the antitrust question without determining the validity of 1-800's trademark claims, which is not something anyone (much less an antitrust regulator like the Commission) is well-situated to do after-the-fact. That is why CC *denies* that the Commission considered the trademark merits, Opp. 93 ("The Commission did not adjudicate the merits of a trademark infringement claim."), but—in an about-face—lauds the Commission for doing just that, Opp. 91 (saying the Commission was right to reject 1-800's "feeble legal theory" of infringement). The fact that CC's only defense of this internal incoherence is to pretend it does not exist tells this Court all it needs to know about the viability of the antitrust theory here.

*Third*, there is no unusual regulatory structure, like the Hatch-Waxman Act in *Actavis*, which produces "incentives for collusion" in the settlement process here.

570 U.S. at 156 (citation omitted). Nothing more is afoot here than parties considering the potential outcome of trademark litigation, weighing the costs and risks of litigating, and arriving at a settlement reflecting relief a court could award. SPA237, 240. In that situation, *Actavis* and even the Commission itself (until now) presume the parties' interests are aligned with consumers' interest and, in deciding whether to settle or continue litigating an IP dispute, will produce the most efficient market outcome. *See Actavis*, 570 U.S. at 154; A2618 ("The generic manufacturer's desire to maximize its own profits therefore has the practical effect of aligning its [litigation] interests . . . with those of consumers . . . .").

### B. Subjecting Commonplace Settlements to Antitrust Scrutiny Upsets the Appropriate "Balance" Between Antitrust and IP

In these circumstances, this Court should recognize that the competitive interests underlying antitrust are less compelling and the costs of antitrust enforcement—both to IP rights and settlements—are simply too great. United States Council for International Business as *Amicus Curiae* in Support of Petitioner 16-17, 21, *1-800 Contacts v. Federal Trade Commission*, No. 18-3848 (2d Cir. Jun. 14, 2019) ("USCIB Br.") (antitrust scrutiny of commonplace settlements will devalue IP rights and strip settlements of finality). In so doing, this Court would be "strik[ing] the balance" *Actavis* commands, 570 U.S. at 148, while avoiding the false choice of extremes that CC offers this Court. Opp. 35 (saying *Actavis* makes all settlements subject to antitrust scrutiny while characterizing 1-800's position as based on the premise IP settlements enjoy a "general antitrust immunity").

Indeed, in its rush to defend the Commission's expansion of antitrust law, CC ignores one of the most important considerations in the "balance": the reality that antitrust is a blunt instrument, driven by vague standards, immense penalties, and voluminous discovery. SPA329; *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). As Judge Easterbrook famously put it: "Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason." Supp.A309-10.

Consistent with *Actavis*, "commonplace" settlements (particularly the non-exclusionary ones here) should present a safe harbor from antitrust litigation. Under the Commission's rule, by contrast, it is unclear how any brand or IP owner could ever win a motion to dismiss—or even possibly a summary judgment motion—in a subsequent antitrust suit challenging an ordinary settlement. Indeed, CC's "inherently suspect" and "direct evidence" analyses are built on the premise that, where a trademark settlement reduces advertising (precisely what it is *designed* to do), that *alone* satisfies the antitrust plaintiff's *prima facie* case. *See infra* § II.A.

Exposing all IP settlements to antitrust scrutiny would also work a sea change in how those settlements are negotiated and structured. According to CC, a primary sin of 1-800's settlements is that they did not meet the "less restrictive" means element of antitrust law. Opp. 2. But as *Amicus* USCIB explained: "Property owners, intellectual or otherwise, typically are not required to enforce the ownership of their property in the 'least restrictive' way from a competition standpoint, and a trademark owner should not have to choose the form of trademark enforcement that will permit the maximum amount of competition while still preserving the benefits of the trademark." USCIB Br. 26.

IP is, by its nature, *intended to prohibit* certain forms of competition (*e.g.*, through patent exclusivity or by barring advertising inconsistent with trademark rights). How can an IP practitioner know *ex ante* how to settle in a way that maximizes her client's IP interest, while at the same time preserving enough competition to be acceptable to a subsequent antitrust plaintiff wielding a "less restrictive means" stick? CC offers no answer. At the very least, where an IP practitioner structures a settlement to provide some or all of the relief a court could award—*i.e.*, designs a "commonplace" settlement—she ought to be able to comfort her client that the antitrust police will not be showing up later.

### C. CC's Remaining Arguments Are Meritless

CC mounts two remaining arguments. *First*, CC suggests *Clorox* means that all settlements are subject to antitrust scrutiny. Opp. 37-38. But *Clorox* was issued *before* the Commission launched its decade-long regulatory assault on IP settlements that led to *Actavis*'s compromise: "unusual" reverse-payment settlements can be subjected to antitrust scrutiny, but "commonplace" settlements cannot.

Moreover, *Clorox* is fully consistent with the unusual/commonplace distinction later memorialized in *Actavis*. *Clorox* held that unless a trademark agreement is "auxiliary to an underlying illegal agreement between competitors—such as [a] territorial market division . . . and absent exceptional circumstances, we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight." 117 F.3d at 60. That mirrors *Actavis*'s holding that, in "commonplace" situations, parties are in the best position to resolve disputes and structure their settlements; however, in the extraordinary circumstance of a reverse-payment settlement, the parties may have made an auxiliary agreement to split monopoly rents. *Actavis*, 570 U.S. at 154, 158.

*Second*, CC says the trademark settlements here are not "commonplace," primarily because they are different from the trademark agreement in *Clorox*. Opp. 40-42. That is irrelevant. As the quotations from *Actavis* above make plain, and the Commission advocated, the distinction in *Actavis* turned on whether the settlement terms reflected what a court could order if the plaintiff prevailed (*i.e.*, "commonplace" settlements) or went beyond that ordinary focus for settlements (*i.e.*, "unusual" settlements). *See supra* § I.A. There can be no dispute that 1-800's settlements are "commonplace" in the *Actavis* sense.[5]

## II. THE COMMISSION FAILED TO SHOW THE TRADEMARK AGREEMENTS ARE ANTICOMPETITIVE

The Commission recognizes that, in a "traditional mode of antitrust analysis," the adjudicator inquires "into market definition and market power to determine whether an arrangement has the potential for genuine adverse effects on competition." SPA231. But the Commission could not satisfy its burden in the "traditional" way, so it resorted to the rarely-used "inherently suspect" (or "quick look") shortcut and the "direct evidence" test. CC argues that both methods are satisfied here for the same basic reason: the number of potentially infringing advertisements were reduced, as were the number of sales that would have been triggered by those advertisements. Opp. 44, 63, 73-74. This supposed "inherently suspect" outcome and "direct evidence" is indistinguishable from 1-800's lawful exercise of its trademark rights. In other words, "by its very nature, trademark

[5] The remaining hodgepodge of factors that CC cites fail for the same reason. For example, CC suggests 1-800's settlements are not "commonplace" because they bar rival advertising "*without regard to the content of advertisements or what rivals are called*." Opp. 41. However, that is just another way of describing a standard non-use provision that, like "negative keywords," is a recognized remedy in trademark cases. *See also infra* § III.C.

protection sets limits on advertising," and that fact alone cannot—as a matter of law or logic—satisfy the Commission's *prima facie* case. AIPLA Br. 14.

### A. The "Inherently Suspect" Shortcut Is Inapplicable

Although the Commission regularly finds it applicable, the rest of the legal establishment—including courts and the DOJ—recognize the "inherently suspect" shortcut is reserved for "rare" cases that raise something just short of *per se* illegality. *See, e.g.*, *Butler*, 331 F. Supp. 3d at 793; *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 1000 (C.D. Cal. 2012). This shortcut applies only where (1) anticompetitive effects are "intuitively obvious" to an "observer with even a rudimentary understanding of economics," *California Dental*, 526 U.S. at 770, and (2) there is no reason to believe the arrangement "might plausibly" enhance competition. *MLB Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 318 (2d Cir. 2008) (citation omitted). This is not one of the "rare" inherently suspect cases.

#### 1. *CC ignores 1-800's trademark rights in applying the inherently suspect standard*

CC claims the "advertising restrictions" here present a "textbook case" for "inherently suspect" analysis in light of their "circumstances, details and logic." Opp. 47-54. Conspicuously absent from CC's seven-page "circumstances, details, and logic" discussion, however, is any acknowledgement of the most fundamental circumstance underlying this case: the "advertising restrictions," as CC labels them, are grounded in trademark settlements. And, when CC finally *does* acknowledge 1-800's trademark rights and the settlement context, it shrugs them off:

> The Commission did not need to rely only on cases involving "trademarks, settlements, or search advertising" as 1-800 contends.[6] Restrictions on advertising reduce competition whether they involve trademarks or not and whether they are the result of settlements or other collusive agreements—*and they warrant quick-look [or "inherently suspect"] review on that basis alone.*

Opp. 56 (emphasis added).

The problem with this cavalier approach is that, unlike the Commission, every other "observer" agrees that enforcement of trademark rights through settlements "might plausibly" enhance competition, rendering inherently suspect treatment inapplicable. *See Salvino*, 542 F.3d at 318 (citation omitted). Indeed, it is not a question of "might"—this Court *did* recognize that trademark settlements enhance competition and are "favored in the law," not least because they "avoid[] time-consuming litigation." *Clorox*, 117 F.3d at 60. In fact, *Clorox* recognized that it is "difficult to show an unfavorable trademark agreement raises antitrust concerns" at all—the opposite of the inherently suspect standard. 117 F.3d at 57. This Court

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[6] CC's clever statement that the Commission "did not need to rely *only*" on cases involving "trademarks, settlements, or search advertising" implies there are such cases out there or that it relied on some. That is misleading. The Commission did not rely on *any* and *none* exist.

would have to repudiate *Clorox* to deem the trademark settlements here *presumptively unlawful*.

It is no answer to say, as CC does, that trademark interests still may be considered, but "at the justification stage of the inquiry, not the *prima facie* stage." Opp. 55. What that effectively means—and this is no doubt the point—is that an antitrust plaintiff can meet its *prima facie* antitrust case simply by identifying trademark or IP settlements, which by definition reduce advertising or other potentially infringing conduct. In other words, the threshold burden to prove anticompetitive effects for IP settlements will disappear precisely when that burden is most needed. *See Clorox*, 117 F.3d at 59 ("Only if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its pro-competitive redeeming virtues.").

As a result, in *every case*, the burden will shift to the settling parties to assuage the Commission that their IP claim was "good enough" (or else the Commission will reject the IP justification) and the settlement could not have been structured in a "less restrictive" way imagined by the Commission (or else the Commission will deem it an antitrust violation). In this way, the "inherently suspect" shortcut deputizes the Commission to decide the validity of IP claims and how they may be settled. That hostile takeover of IP law may be good news to the Commission—which gets an easy-to-use shortcut in its mission to regulate IP settlements—but it is bad news for

IP holders, who will be chilled from enforcing their rights and settling cases (and, as a result, investing in the first place).

### 2. *The Commission's "inherently suspect" analysis is based on a phantom "market" finding and misrepresents the agreements*

Further, CC's discussion of "circumstances, details, and logic" ignores important circumstances and details, makes others up, and defies logic.

*First*, CC premises its inherently suspect argument on a supposed Commission finding of an "online market." Opp. 45 ("A. 1-800's Advertising Restrictions Were Likely to Cause Anticompetitive Effects *in the Online Contact Lens Market.*") (emphasis added); *id.* (discussing "***Operation of the advertising restrictions in the market***"). However, the entire point of the "inherently suspect" standard is that the challenged conduct is so unseemly that the adjudicator need not define a market, much less analyze "operation" of that conduct within the market. *See California Dental*, 526 U.S. at 769-70. That is why it is also called a "quick look."

In any event, the Commission *did not* find an "online market." To the contrary, the Commission identified three alternative types of analyses: "inherently suspect", "direct evidence," and the "traditional mode" of defining a market and considering market power. SPA231. The Commission said (in no uncertain terms) that it was relying on the first two *instead of* using the "traditional mode." *Id.* That is why, at the outset of its Opinion, the Commission said that "our analysis differs from that of the Initial Decision," which did at least attempt to define a relevant market (albeit a faulty one) and consider market power. SPA216.[7]

CC takes as much creative license with the record as it does with the Commission's opinion. Attempting to inflate the scope and importance of the settlements, CC repeatedly says they "cut off a critical channel of competitive advertising," Opp. 26, 31, 68, and even deems them "tantamount to a complete ban on advertising," Opp. 51. That is false. The facts are:

- The agreements related to only one form of online advertising: *paid search advertising*. They did not prohibit *any* other forms of advertising (*e.g.*, internet display advertising, social media advertising, television, print). IDF 244-86 [SPA39-45], IDF 359-70 [SPA55-57].
- The agreements did not prohibit paid search advertising—only bidding on certain *trademark terms*. The Commission's expert admitted that "generic" terms (*e.g.*, "contact," "contact lenses," "discount contacts"), the name of contact lens brands, and other terms are more widely

[7] It is thus surreal for CC to suggest the "Commission adopted the ALJ's findings of fact, which included market definition." Opp. 81 (citing SPA226). The Commission adopted the ALJ's findings only "*to the extent that they are not inconsistent with this opinion.*" SPA226 (emphasis added). The ALJ's assessment of the market is, of course, completely "inconsistent with" the Commission's deliberate choice *to avoid* evaluating market definition and market power.

searched, accounting for approximately 83 percent of searches. SPA246; A1252. No "channel" of advertising, not even paid search advertising, was "cut off."[8]

- The *non*-settling retailers constitute [redacted] percent of the "online market," and the settling retailers constitute about [redacted] percent (1-800 constitutes about [redacted] percent). IDF 495-96 [SPA74]. In other words, almost as many of 1-800's online rivals were free to bid on 1-800's trademarks as rivals that were not.
- During the relevant period, Google alone displayed over *800 million* paid search ads related to contact lenses for the counterparties to the trademark agreements. A2352. Once a selected set of non-settling online retailers is included, there were over *1 billion* paid search advertisements. A2354.

In addition to grossly overstating the *amount* of advertising foreclosed, CC mischaracterizes *the type* of advertising these settling retailers displayed. CC says the trademark agreements "resulted in a substantial reduction in price advertising," Opp. 62, and repeatedly refers to the importance of "price advertising," Opp. 70, 72.

[8] To be clear, "negative keywords" did not foreclose 1-800's competitors' advertisements from appearing in response to consumer searches for these most popular search terms (only trademark terms). SPA246.

But CC's expert admitted that only 14 percent of the search advertisements from 1-800's rivals contained pricing information. A1259.[9]

Moreover, while CC tries to give the impression of a consuming public breathlessly waiting for paid-search advertisements from 1-800's competitors, undisputed expert analysis showed that, from 2004 through 2016, people who searched for 1-800's trademarks clicked on non-settling retailers' (who could bid on 1-800's trademarks) paid search advertisements on average only [redacted] percent of the time. A2354. The reason for this is simple: the vast majority of consumers who search for "1-800 Contacts" are "navigational searchers" who want to go to *1-800's website* to buy *from 1-800* because they know and trust *1-800*. Supp.A31-37.

No "observer with even a rudimentary understanding of economics" would intuitively understand that such a limited restriction on ads that almost no one clicked on would cause anticompetitive effects "in the market as a whole." *California Dental*, 526 U.S. at 770; *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016).

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9 Dr. Athey later upped that figure to 36 percent. Supp.A282. Even accepting her arbitrary revision, *most* of the competitive advertisements did not contain price information.

3. *California Dental, Actavis, and Clorox refute the inherently suspect standard.*

Once the procompetitive nature of trademark settlements is acknowledged, and the facts are brought to light, it is apparent this case is a redux of *California Dental*. There, like here, the Commission relied on cases and studies regarding complete advertising bans, as well as pronouncements like "price advertising is fundamental to price competition," to invoke the inherently suspect test, and the Ninth Circuit let the Commission get away with it. 526 U.S. at 773 (citation omitted). In reversing, the Supreme Court heavily criticized the Ninth Circuit for failing to consider that the advertising restrictions could have procompetitive virtue *and* ignoring that the restrictions were "very far from a total ban on price or discount advertising." *Id.* The Supreme Court's instruction to the Ninth Circuit was unambiguous: stop "over-relying on economic analyses and presumptions formed from circumstances involving total advertising bans." *California Dental Ass'n v. FTC*, 224 F.3d 942, 953 (9th Cir. 2000). But the Commission does it again here.[10]

[10] Putting aside cases involving complete advertising bans, the remainder of CC's authority—most of which does not involve advertising at all—is equally off base. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 448 (1986) ("*Indiana Dentists*") (agreement among dentists not to provide x-rays to insurers); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 602 (1972) (agreement not to sell products in certain areas); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (naked agreement to geographically allocate territories); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 353 (5th Cir. 2008) (joint negotiation among independent physicians that amounted to price fixing). And the others involve either an advertising ban to support price fixing

No matter how many factual distinctions CC conjures up, *California Dental* is fundamentally inconsistent with any notion that advertising restrictions are presumptively unlawful "*on that basis alone*," as CC claims (Opp. 51 (emphasis added)). *Actavis* confirms that rule cannot apply, at the very least, where those restrictions flow from IP settlements. 570 U.S. at 159. Indeed, *Actavis* refused to apply the inherently suspect standard to "unusual," exclusionary patent settlements. *Id.* It thus makes no sense that this standard should apply to non-exclusionary and limited trademark agreements that are "favored in the law." *Clorox*, 117 F.3d at 60.

Nor can application of the inherently suspect standard be squared with this Court's command that, once the defendant offers a plausible procompetitive justification for an agreement (as 1-800 indisputably has), a plaintiff applying the inherently suspect standard must abandon that effort and proceed with "full-scale" rule of reason analysis. *Madison Square Garden, L.P. v. Nat'l Hockey League*, 270 F. App'x 56, 58 (2d Cir. 2008) (summary order) (quoting *Bogan v. Hodgkins*, 166 F.3d 509, 514 n.6 (2d Cir. 1999)); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 831 (3d Cir. 2010). CC claims that a defendant should have to *prove*

(*Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2001)) or a naked agreement not to advertise. *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995). Indeed, *Blackburn* suggested the advertising agreement would have been analyzed under the rule of reason if it was part of the resolution of the dispute at issue. *Id.* at 828.

procompetitive justifications "as a matter of fact" before reverting to the full rule of reason. Opp. 57. That is not the law. *See, e.g.*, *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018) (rejecting "quick look" because the agreement was "seemingly designed" for procompetitive reasons); *see also* Corrected Statement of Interest, *Stigar v. Dough Dough, Inc.*, Case No. 2:18-cv-00244-SAB, 17 (E.D. Wash. Mar. 8, 2019) (DOJ advocating against the "rare" "quick look" where the agreements "may indeed provide procompetitive benefits and promote interbrand competition.").

### B. The Direct Evidence Method Is Inapplicable

The Commission also dodged the traditional rule of reason by resorting to so-called "direct evidence." However, the "direct evidence" theory is just a repackaged version of its "inherently suspect" theory: that a reduction in advertisements due to a trademark settlement is *by definition* anticompetitive and sufficient to satisfy the Commission's *prima facie* case. *Compare* Opp. 51 ("Restrictions on advertising reduce competition . . . and they warrant quick-look review on that basis alone"), *with id.* at 63 (arguing the direct evidence test is satisfied because "1-800's advertising restrictions reduced the volume of advertising"). No matter what CC calls it—"inherently suspect," "direct evidence," or something else—this does not amount to anticompetitive effects as a matter of law.

***Reduction in Number of Advertisements.*** Without any apparent irony, CC cites snippets of *California Dental* to contend there is a "general rule" that any agreement to reduce any amount of advertising is a "direct" anticompetitive effect. Opp. 67. According to CC, this rule is supported by the following statement in "the leading antitrust treatise": "[a]greements restricting advertising are a form of output restriction in the production of information useful to consumers." Opp. 70-71 (quoting Areeda & Hovenkamp ¶ 2023b).

In fact, after the Ninth Circuit relied on virtually the same quotation citing the same "leading treatise" to sanction the same general rule in *California Dental*, the Supreme Court said:

> The [Ninth Circuit] began with the argument that "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid.* (citing P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1505, pp. 693-694 (1997 Supp.)). Although this sentence does indeed appear as cited, it is puzzling, given that *the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. 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.*

526 U.S. at 776 (emphasis added). Here, CC makes no contention that output of contact lenses—"the relevant output for antitrust purposes"—has decreased. IDF 153 n.36 [SPA160]. (internal quotation marks and citations omitted); *see* Opp. 31.

This *actual* rule from *California Dental* (requiring proof of an output effect) comports with the purpose of antitrust law: to protect consumers. Consumers are not concerned with maximizing the number of advertisements as such; indeed, many consumers would prefer to see *less* advertisements. Supp.A37-41; A2309-10. It is only when a reduction in advertisements leads to an *anticompetitive effect in the market*—such as by reducing output *of a product*—that the concerns of antitrust are triggered.

After turning *California Dental* on its head, CC pivots to *Indiana Dentists*—a case that does not involve advertising. Opp. 63, 66, 70. Instead, *Indiana Dentists* was about a group of dentists who refused to submit x-rays to dental insurers. 476 U.S. at 450-51. This does not support a rule that any restriction on "information" generally, much less advertising specifically, somehow related to "price-setting" is by definition anticompetitive.[11] It supports that doctors cannot conspire to reduce the output of services (there, x-ray submissions) to consumers (there, insurers).

Perhaps most telling, however, is that CC cannot cite a single case that has anything to do with trademarks or settlements in support of its rule that fewer

[11] CC also resorts to the Commission's own decision in *Realcomp II*. Even if this was reliable precedent for this Court, it does not support the Commission's ruling. In that case, the Commission found that the restrictions at issue (rules involving a real estate MLS) actually caused a reduction in the number of unbundled real estate brokerage *services* offered. *In the Matter of Realcomp II*, 2007 WL 6936319, at *41-42 (F.T.C. Oct. 30, 2009).

advertisements equates to direct evidence of anticompetitive effects. Trademark settlements by their nature reduce the allegedly infringing advertising. To say that alone is a "direct" anticompetitive effect reduces that test to a tautology.

***1-800's "Higher Prices."*** Secondarily, CC contends that there were "direct" pricing effects because 1-800 generally had higher prices than online competitors. According to CC: "Higher prices are the 'paradigmatic example[]' of antitrust harm." Opp. 72.

As a matter of antitrust law and basic economics, however, maintaining "higher prices" than some competitors proves *nothing*. The Commission was required to show that 1-800 maintained *artificially* higher prices *because of the trademark agreements* and not some other factor (like 1-800's brand). *See, e.g.*, *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.). The Commission failed to do this based on undisputed facts: (1) output was rising throughout the relevant time period, (2) 1-800's [redacted], and (3) 1-800 always maintained a policy to price at a discount to eye doctors, and at a premium to online competitors (who did not invest in their brands like 1-800), irrespective of the trademark agreements. IDF 4-5, 90-97, 106, 111, 117, 123-34, 433-35 [SPA15, 23-28, 66]; A2318-20.

In *American Express*, this Court and the Supreme Court cited these same factors as *refuting* the Government's attempt to rely on "direct" price effects.

- ***Growing Output.*** *See United States v. Am. Express Co.*, 838 F.3d 179, 206 (2d Cir. 2016) (increased output is "indicative of a thriving market"), *aff'd Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018) (output of credit card transactions grew and where "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand" (internal quotation marks and citations omitted)); *see also PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-08 (2d Cir. 2002) (market power is "the ability to raise price by restricting output" and "the more competition a company faces, the less it can control prices because competitors will undercut its prices to secure market share.").

- [redacted]**.** *See Am. Express*, 838 F.3d at 205 (Amex's higher fees were not supracompetitive where there was no showing that Amex's margins were "abnormally high"); *see also Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004) (rejecting alleged "direct proof" of supracompetitive pricing where "we do not know whether the allegedly elevated prices led to an abnormally high price-cost margin") (citation omitted)).

- ***Consistent Practice.*** *See Am. Express*, 138 S. Ct. at 2288 ("Amex has historically charged higher merchant fees than competitors").

CC does not attempt to explain in its pricing analysis how, in the face of all these factors, 1-800's prices were supracompetitive. At the least, the Commission needed to do some quantification to determine whether 1-800's pricing was supracompetitive and flowed from factors other than the trademark agreements. However, their experts *avoided* any price quantification in favor of platitudes like more advertising and consumer switching "would put downward pressure on prices." Opp. 80. To be clear, this is not an issue of "***[i]nsufficiently precise quantification***[,]" as CC frames it. Opp. 78. There was no price quantification at all. The Commission here demonstrated the same "aversion to empirical evidence" in favor of "implicit burden shifting" that resulted in reversal in *California Dental*, 526 U.S. at 776.

Not only did the Commission fail to conduct any empirical analysis of prices, it failed to *even consider* whether 1-800's brand explained its pricing. That omission is particularly glaring in light of the Commission's position that 1-800's competitors needed to free ride on 1-800's brand investments to compete.

It is well known that higher prices, even for identical products, often reflect consumer preference for a branded product—and this is particularly true of medical products. *See Geneva Pharm.*, 386 F.3d at 496-97; *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 788 (7th Cir. 1999) (Posner, J.) ("A consumer may rationally pay more for a trademarked product than for its physically identical substitute . . . ."). Even though the Commission's expert (Dr. Evans) *admitted* it is "possible that the price premium 1-800 Contacts obtains is in part the result of its brand advertising investments," A2436-37, the Commission nowhere addressed that obvious explanation or attempted to account for that brand premium. CC tries to do the Commission's work for it, hoping to give the appearance that the Commission confronted 1-800's "brand" effect. Opp. 77-78 (citing SPA262-63). But there is no analysis of 1-800's brand or discussion of 1-800's pricing strategy in the pages of the Commission opinion that CC cites. Opp. 77-78 (citing SPA262-63).

In the end, without any empirical (or other) evidence to show 1-800 maintained supracompetitive prices, not just "higher prices," all CC can do is assert the advertising restrictions "diverted sales away from lower-price sellers." Opp. 73. But this is just another way of ignoring legitimate and procompetitive trademark enforcement and relabeling it as an anticompetitive effect. In virtually every case involving a trademark settlement, the prohibition on certain infringing advertising will result in some lost sales for infringers, who often (because they do not invest in their *own* brand) charge lower prices. Opp. 32. The fact that "some subset of buyers" (*id.*) paid a lower price is not enough in any case, *Clorox*, 117 F.3d at 56 (requiring an "*actual* adverse effect on competition as a whole in the relevant market"), but it certainly cannot be enough where a trademark settlement is involved.[12]

***Supposed Harm to Search Engines.*** In defending the Commission's finding that Google and Microsoft were victimized, Opp. 82-83, CC fails to acknowledge the undisputed facts highlighting the absurdity of this theory: Microsoft [redacted]. A1853. Google encouraged 1-800 to enter into the provisions (like the "negative keywords") that resulted in its supposed harm, *see* A1022-22.1, and search engines themselves have resolved lawsuits by agreeing not to display ads trigged by searches for trademarked terms, A2085. Particularly since the test is whether *competition as a whole* is significantly affected, that is something that Microsoft surely would have noticed. And, Google does not need the Commission to *save it from itself*.[13]

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12 Similarly, CC claims that, because some people would have bought at a lower price had they seen the potentially infringing advertisements, "average price[s]" in the market would have been lower. Opp. 73. Of course, even one lost sale to the alleged infringer at a lower price will make the average price lower, but that does not mean that competition is harmed (particularly in a case involving trademark rights).

13 It is telling that one Commissioner wrote separately to say that she "would not have supported pursuing this case based on harm to search engines alone. The resources of the Commission are limited, and should generally be used to protect consumers, not large companies with substantial market share." SPA275.

Further, the Commission's "search engine harm" theory fails for the same reason as its "consumer harm" theory: the supposed harm is *entirely* the result of legitimate trademark enforcement. The only "evidence" CC cites is (1) the costs for bidding on 1-800's trademark (*i.e.*, the "cost per click") went down due to fewer infringers bidding on 1-800's marks—thus, Google and Microsoft [redacted]; and (2) more infringing ads would have existed absent the restrictions, which allegedly means degraded quality, Opp. 83-84. By this logic, any settlement agreement halting infringing advertisements in *any* advertising medium (television, radio, newspaper) will always amount to "direct effects," as advertising is *necessarily* reduced (that is the point) and the advertising medium *necessarily* loses the revenue from the infringing advertisement. The fact that some third-party vendor loses some revenue as a result of legitimate IP enforcement does not convert it into an antitrust violation.

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Because there is no proof the agreements are anticompetitive, the antitrust analysis ends at this point and there is no need for 1-800 to justify its trademark agreements. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 547 (2d Cir. 1993).

## III. THE COMMISSION WAS WRONG TO DISMISS THE TRADEMARK PROTECTION AND SAVED LITIGATION COST JUSTIFICATIONS AS WORTHLESS

There is no dispute that trademark protection and saved litigation costs are procompetitive benefits. SPA251-54. Nevertheless, after shifting the burden to 1-800 to *prove* these benefits, the Commission invented arbitrary rules ("pass on" and "not good enough") to ensure that such proof would be impossible. The Commission's refusal to give these benefits *any* weight should be rejected.

### A. The Commission's "Pass-On" Rule Is Contrary to Law

CC cannot cite *any* case that has ever rejected saved litigation costs due to the lack of "pass on." Indeed, CC cites no cases involving settlements at all, except for its failed attempt to distinguish *Actavis*. Opp. 98. There, the Supreme Court held that saved litigation costs were a procompetitive justification, without suggesting that they need to be passed on. 570 U.S. at 156. The Commission itself in *Actavis* described saved litigation costs as "the principal means of rebuttal," without mentioning a need to prove any pass on. A2607.

CC suggests that *Actavis* did not address pass on because it only examined saved litigation costs "in the abstract." Opp. 98. But one would think that *someone*—including the Commission—might have mentioned this important (indeed, dispositive) limitation. Apparently, this Court, too, failed to recognize the critical pass-on requirement when it touted—and not "in the abstract"—the importance of saved litigation costs in *Clorox*, 117 F.3d at 60 (trademark agreements "avoid[] time-consuming litigation"). *See also* USCIB Br. 10-12 (collecting cases). The reality is that the Commission made up the pass-on requirement so that it could dismiss saved litigation costs as a justification in this case.[14]

In fact, although not in the settlement context, *American Express* specifically rejected a pass on requirement. 838 F.3d at 205. CC implies there was, in fact, pass on there with this quote: "'Amex uses its higher merchant fees to offer its cardholders a more robust rewards program.'" Opp. 98 (quoting 138 S. Ct. at 2288). However, "Amex *conceded*" that "not all of Amex's gains . . . are passed along to cardholders," yet this Court held this lack of pass on amounted to "nothing." 838 F.3d at 205.[15]

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[14] As 1-800 and Commissioner Phillips explained, litigation costs do not impact marginal costs and therefore cannot be shown to be directly passed on. 1-800 Br. 78. CC ignores this and blithely repeats its assertion that there must be proof of pass on without trying to explain how anyone could make that showing. Opp. 97.

[15] As to the Luxottica sourcing agreement, there is no dispute that the Commission simply lumped it in with the settlement agreements. Whether "vertical" or "horizontal," Opp. 99, the Commission must analyze the Luxottica agreement as a business collaboration (not a settlement) and consider the unique procompetitive benefits of that collaboration in the analysis. *See* SPA320 (citing the FTC/DOJ *Competitor Collaboration Guidelines*).

### B. The Commission's New "Not Good Enough" Standard Is Contrary to Law and Bad Policy

Like the Commission, CC does not dispute that 1-800's trademark claims were legitimate. But after recognizing this, and repeatedly disavowing any analysis of the merits of 1-800's trademark claims, it casts them off as being too "feeble." Opp. 91. In the other words, the trademark claims were good, just not "good enough"—an inquiry that, whatever it means, necessarily requires an examination of the underlying merits.

Why do CC and the Commission refuse to admit that their antitrust theory rests on second-guessing 1-800's legitimate trademark claims? Because that is not a valid way to conduct an antirust analysis. Asking whether IP claims are "good enough" after the fact is "novel, vague, and unworkable," and drastically increases the cost and risk of IP enforcement. AIPLA Br. 19-21. Indeed, *Actavis* allowed antitrust scrutiny precisely because it is "normally not necessary to litigate patent validity to answer the antitrust question" in a reverse-payment case as "the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness." 570 U.S. at 157-58.

Not only does CC assess the validity of 1-800's trademark claims, CC's *entire brief* is premised on an attempt to rewrite trademark law to hold that "keyword searching based on trademark terms is not by itself confusing" as a matter of law. Opp. 43. In CC's view, trademark confusion in this context depends *solely* on the *content* of advertisements. Opp. 88. That is why CC *assumes* that bidding on 1-800's trademark terms did not cause confusion—the very question that 1-800's trademark claims were designed to answer.[16]

CC's supposed "solidifying consensus" (Opp. 88) for its attempted rewrite is no "consensus" at all. Many courts have found that trademark owners have stated plausible claims based on allegations that competitors used their trademarks as search engine keywords. *See, e.g.*, 1-800 Br. 27-29 (collecting cases). Indeed, to this day, courts throughout the country *continue* to acknowledge the viability of trademark infringement claims based on bidding on trademark terms, *e.g.*, *St. George Exec. Shuttle, LLC v. W. Trails Charters & Tours LLC*, No. 2:17-CV-900-DN, 2018 WL 3350348, at *3 (D. Utah July 9, 2018); *Xymogen, Inc. v. Digitalev, LLC*, No. 6:17-cv-869, 2018 WL 659723, at *4 (M.D. Fla. Feb. 1, 2018), and these cases continue to be filed, *e.g.*, Compl., *Acquisition Mgmt., Inc. v. Zynpass LLC*, Case No. 5:19-cv-1870 (C.D. Cal. Sept. 30, 2019).

As these courts recognize, it is entirely plausible that consumers viewing an internet search results page could be confused into believing that an advertisement

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16 Opp. 33 ("The Commission properly rejected the theory that a consumer who searches for '1-800 Contacts' but also sees ads for rivals would be sufficiently confused, without regard to the text of the competing ad . . . ."); Opp. 88 ("1-800 offers no reason why consumers would be confused by *merely seeing* a rival's advertisement in response to a search for '1-800 Contacts' . . . *regardless* of what the ad says.").

(or "sponsored link") at the top of a search results page is actually a link to the website of the trademark owner after those consumers specifically search for that trademark owner. *See, e.g.*, *Xymogen, Inc.*, 2018 WL 659723, at *4. In *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012), the Fourth Circuit rejected summary judgment in a trademark search case based on evidence of confusion that included "an internal Google study reflecting that even well-educated, seasoned Internet consumers are confused *by the nature of* Google's sponsored links and are sometimes even unaware that sponsored links are, in actuality, advertisements." *Id.* at 160 (emphasis added).[17]

Incredibly, CC and its *amici* fail to even acknowledge *Rosetta Stone* and this Court's seminal decision, *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009). *Rescuecom* held that trademark infringement claims involving keyword bidding must be resolved *on their facts*. *Id.* at 130-31. *Rescuecom* also rejected CC's suggestion that, just as there is no trademark issue when stores "place their

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[17] The Fourth Circuit also found probative a survey conducted by Dr. Kent Van Liere, which showed that 17 percent of consumers were confused "by the appearance of sponsored links when consumers conducted a Google search for 'Rosetta Stone.'" *Rosetta Stone*, 676 F.3d at 159. 1-800 offered a survey by the same expert using the same methodology, which also showed confusion when consumers searched for 1-800, Supp.A212, 215 (finding 29 percent of consumers were confused), but the Commission dismissed it in a footnote as "deeply flawed." SPA254. By contrast, the Commission could not find a single thing wrong with CC's experts—and even chastised the ALJ for questioning one of them. SPA258.

house-brand products on the shelf next to the more expensive brand names," there is no trademark issue in the search advertising context, either. Opp. 1. Instead, *Rescuecom* analogized search engines to a retailer "paid by an off-brand purveyor to arrange product display and delivery in such a way that customers seeking to purchase a famous brand would receive the off-brand, believing they had gotten the brand they were seeking." 562 F.3d at 130.[18]

CC also asks this Court to make trademark law as to "negative keywords," positing that "no theory of trademark protection could explain the negative keywords requirement." Opp. 24. But the parties here settled by using negative keywords, in part, because of "legal uncertainty regarding the issue of advertisements that are triggered by broad matching of keywords." IDF 349 [SPA54]. There is no difference, from a confusion standpoint, in (1) an advertiser bidding on "1-800 Contacts" using exact-match; or (2) an advertiser bidding on "contacts" using broad-match *knowing* that will result in its ad being delivered to a user searching for "1-800 Contacts." That is why courts order "negative keywords" to prevent confusion in the broad-match context, settlements regularly require them, and Google

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18 The suggestion that 1-800 "bull[ied]" the likes of Walgreens (a multi-billion company) into settling trademark claims the Commission concedes are legitimate is absurd. Opp. 103. If 1-800's claims were "bullying," then there was and *still is* an epidemic of "trademark bullying" being perpetuated by courts to this very day.

suggested that 1-800 utilize them. *See supra* § I.A; A2248. In fact, one court recently recognized that a defendant's use of negative keywords was a key ingredient in *guarding against* trademark infringement.[19]

In effect, CC is asking this Court in an antitrust case to make new, sweeping pronouncements regarding hotly contested issues of trademark law and, on that basis, condemn trademark settlements that, in some cases, are *over a decade old*. Opp. 91. CC cites no court that has ever misused antitrust in this way. This Court should not be the first.

### C. Settling Based on Relief Ordered by a Court Cannot be "Overbroad"

Finally, in its "procompetitive justifications" rebuttal and throughout its entire brief, CC claims that 1-800's settlements are "overbroad" because there was a "less restrictive" way to settle: by "limiting the content of ads" or a "clear disclosure in each search advertisement of the identity of the rival seller." Opp. 86, 87; SPA241. Thus, CC and the Commission demand trademark settlements must be done *their way*—through text-based remedies.

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[19] *See DealDash Oyj v. ContextLogic Inc.*, No. 18-CV-02353-MMC, 2018 WL 3820654, at *3 (N.D. Cal. Aug. 10, 2018) (finding no trademark infringement because defendant stopped using plaintiff's trademarked terms as keywords and implemented negative keywords and therefore had "clearly shown it cannot 'reasonably be expected' to use [plaintiff's trademarks] as Internet search keywords in the future").

This Court's *Clorox* decision, however, cannot be squared with this "Commission knows best" paternalism. *Clorox* says that absent "exceptional circumstances," the "*parties'* determination of the scope of needed trademark protections is entitled to substantial weight." 117 F.3d at 60 (emphasis added). There are no "exceptional" circumstances here, where the scope of the settlements is limited to relief courts award and IP lawyers regularly include that relief in settlements as a way to both solve the infringement problem and minimize monitoring costs going forward. *See supra* § I.A (collecting cases); A2252-53 (trademark owners do not know which matching option triggered a paid search ad, so negative keywords minimize future disputes).

By contrast, CC (like the Commission) *fails to identify a single settlement that has ever resolved this type of trademark dispute with its text-based remedies*. Even if the "less restrictive alternative" analysis makes any sense when applied to IP settlements, and it does not (*see supra* § I.B), it requires *proof* that a less restrictive alternative is viable and would bring about the same benefits. *See N. Am. Soccer*, 883 F.3d at 45. It is not an imaginative exercise.

CC hypothesizes that, absent the restrictions, parties could have included disclosures like: "This is not 1-800 Contacts." *See* Opp. 27. That might be good fodder for a legal brief, but it is not something that would happen in the real world. By referring to 1-800, these supposedly "remedial" disclosures would be in effect *advertising for* 1-800. Not surprisingly, CC does not cite to any evidence that any settling retailer would have run ads with these types of disclaimers.

In short, the Commission's "less restrictive alternative" was made up out of whole cloth. 1-800 had the unassailable right to engage in litigation over the use of its trademarks and success in that litigation could have resulted in an injunction embodying the same relief in the agreements. *See* SPA237. The Commission believes the only way to get that relief was to *not settle* and litigate to judgment. That rule has no precedent, would only drive up litigation costs, and is bad policy. *See Nestle Co., Inc. v. Chester's Market, Inc.*, 756 F.2d 280, 284 (2d Cir. 1985) (reversing the district court because it "imposed the heavy burden on trademark defendants of having to continue to litigate when they would prefer to settle, a ruling without precedent."), *overruled on other grounds*, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27-29 (1994). It should be rejected.

## IV. THE COMMISSION SHOULD NOT BE GRANTED A DO-OVER

This case should be remanded with instructions for the Commission to dismiss the case. The Commission should not get a second bite at the apple on remand, as it requests. Opp. 103-04 (acknowledging that dismissal is required if the agreements are not subject to antitrust scrutiny, but otherwise suggesting remand is required).

By the time this Court issues an opinion, this case (including the CIDs that started it) will be five years old. 1-800 has spent many millions of dollars, and the

Commission's case has led to a class action in Utah where 1-800 is spending even more. The Commission *chose* to rest the most important element of an antitrust case—anticompetitive effects—on two standards ("inherently suspect" and "direct evidence") that fail as a matter of law and fact. It cannot now go back and try again to prove anticompetitive effects in the "traditional" way—by defining a market and showing market power. *California Dental*, 224 F.3d at 959 (rejecting a remand where the Commission chose to proceed on evidentiary shortcuts instead of the traditional rule of reason).

In any event, as CC's brief confirms, no "traditional" antitrust claim could succeed. *First*, the anticompetitive effects theory underlying this case (*i.e.*, that there were less allegedly infringing advertisements and less sales generated from those advertisements) is indistinguishable from the procompetitive exercise of trademark rights. *See supra* § II.A. There is no support for the proposition that the effects of good-faith trademark settlements, which reflect relief a court could award, can be rebranded as "anticompetitive."

*Second*, the Commission's case cannot survive *American Express*. In that case, this Court held, and the Supreme Court affirmed, that where a plaintiff fails to prove any output effect, and does not provide proof of abnormally high margins or any other empirical price analysis, any claim of anticompetitive effects or market power fails. *Am. Express*, 838 F.3d at 195, 205; 138 S. Ct. at 2288. That same failure of proof exists here.

*Third*, it is now clear that CC thinks, on remand, that it can lump all of the agreements together instead of proving each, individually, was anticompetitive (particularly considering that each of them have different terms and arose in different contexts). Opp. 104 n.21. However, the only cases they cite for this incorrect proposition are two tying cases involving one firm already found to have market power in one market trying to extend that power into another market. *Id.* The on-point cases reject aggregation. *See, e.g.*, *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 56-58 (1st Cir. 2016).

## CONCLUSION

For the foregoing reasons, this Court should reverse the Commission's decision and remand with instructions to dismiss.

Dated: October 10, 2019

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## CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Reply Brief of Petitioner 1-800 Contacts, Inc. is prepared in a proportionally spaced typeface (14-point Times New Roman) and contains 9,882 words, as calculated by the Microsoft Word program, excluding the parts of the Reply Brief exempted by Rule 32(a)(7)(B)(iii). Accordingly, it complies with the Court's order, dated September 13, 2019, granting Petitioner leave to file an oversized reply brief of up to 10,000 words.

Dated: October 10, 2019

/s/ Stephen Fishbein