PUBLIC

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

In the Matter of **1-800 CONTACTS, INC.,** **a corporation,** **Respondent.**	**Docket No. 9372**

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INTRODUCTION

This case is about 14 almost identical agreements that 1-800 Contacts entered into with all of its major competitors to withhold bids from search advertising auctions and to suppress relevant and valuable advertising from unknowing consumers. This case does not present a conflict between antitrust law and trademark law. The two legal regimes are readily accommodated by: (i) permitting non-confusing search advertising, and (ii) prohibiting confusing search advertising (that is, prohibiting advertising that infringes a 1-800 Contacts trademark). Very similarly, at the interface of antitrust law and consumer protection law, courts safeguard truthful, non-deceptive advertising, and permit competitors to proscribe only deceptive advertising. This is well-trod ground.

In order to generate a conflict where none exists, 1-800 Contacts undertakes to show that it is too difficult to eliminate confusing search advertising *except* by eliminating *all* search advertising. (We must toss the baby out with the bathwater.) Trademark case law rejects this argument. If the 1-800 Contacts trademark does not appear in the text of the search ad, and the name of the competitor does appear in the search ad, then consumers are not likely to identify any such ad with 1-800 Contacts. This is a significantly less restrictive alternative. And, so, the various trademark defenses advanced by 1-800 Contacts fall away.

1-800 Contacts' next line of defense is to assert the sanctity of settlement agreements. Again, we are on well-trod ground. The Supreme Court has condemned settlements of intellectual property disputes, and has done so on a *per se* basis when (as here) the settlement terms restrict a fundamental aspect of competition and facially exceed the scope of the property right. 1-800 Contacts ignores these cases and jumps straight to *FTC v. Actavis*, 133 S. Ct. 2223

(2013). 1-800 Contacts misinterprets *Actavis* as effectively overruling all that came before. In truth, *Actavis* cites with approval the earlier patent settlement cases, and affirms that facially overbroad settlement terms are subject to standard antitrust analysis. Relative to the alternatives, the efficiency benefits of the Bidding Agreements are zero, or nearly so.

The remaining task is to determine whether 14 naked horizontal agreements (collectively, the "Bidding Agreements") that prohibit bidding and that restrict advertising have what Justice Breyer calls "serious anticompetitive tendencies." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 785 (1999) (Breyer, J., concurring in part and dissenting in part). Stated more concretely, does it "make a difference" (*id*. at 788-789) that the Bidding Agreements suppress hundreds of millions of ad impressions targeted at consumers who at that moment are poised to purchase contact lenses; who are, perhaps, inclined to purchase from 1-800 Contacts, but who are unaware that identical products may be purchased at a lower price from less well-known rivals? "No elaborate industry analysis" is required to conclude that the answer is yes. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). The legal precedents, economic learning, and basic industry facts all point in this direction.

Nevertheless, Complaint Counsel has supplied the Court with *two* elaborate industry analyses. Each concludes that, but for the Bidding Agreements, there would be far more search advertising, and consumer clicks would shift, in substantial numbers, from the website for 1-800 Contacts to the websites of rivals. Clicks are the lifeblood of online commerce, and the gateway to sales. Expert economic analysis attests that the expansion in rival advertising and the increase in rival clicks would lead to consumers purchasing from rivals at lower prices, and to substantial competitive pressure on 1-800 Contacts to lower its prices.

In sum, 1-800 Contacts' Bidding Agreements are anticompetitive, do not advance trademark policy, and should be reformed.

ARGUMENT

I. THE BIDDING AGREEMENTS ARE SUBJECT TO STANDARD ANTITRUST SCRUTINY, UNCHANGED BY *ACTAVIS*

1-800 Contacts' central defense is based on an egregious misreading of the Supreme Court's decision in *Actavis*, 133 S. Ct. 2223, a misreading that has already been rejected by the Commission in this case. *See* Opinion and Order of the Commission, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017) (hereinafter, "Commission Op."), slip op. at 4. The premise of 1-800 Contacts' flawed argument is that, until the reverse payment cases came along, antitrust law had never been applied to agreements settling legal disputes. Wary about venturing into the unknown, we are told, the *Actavis* court erected two "predicates" or "threshold" tests that a plaintiff must surmount in order to bring an antitrust claim against a settlement. 1-800 Contacts Post-Trial Brief ("Resp. Br.") at 15-16.

Of course, antitrust courts have been reviewing settlement agreements for the better part of the last century. Many settlements have been condemned based on a finding of competitive injury, without reference to any "threshold test." *E.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *See also In re Cardizem Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1309 (S.D. Fla. 2005) ("[T]here is nothing magical about a settlement that immunizes an agreement that may otherwise violate the antitrust laws."). The *Actavis* "predicates" contrived by 1-800 Contacts are a fiction. But, even if there were two "threshold" tests (there are not), both are satisfied here.

A. Public Policy Favors Only Reasonable And Procompetitive Settlements Of Trademark Disputes

The core issue in the present litigation is not whether 1-800 Contacts and its rivals are permitted to settle trademark disputes; settlement is, of course, permissible. The issue to be decided is whether a series of settlement agreements that are facially overbroad – and that restrict competition well beyond the scope of the parties' trademark rights – are lawful.

"While public policy wisely encourages settlements," some settlements can impose "too high a price." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *cf. United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975) ("Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.").

Competition policy is one countervailing objective that often overrides the preference for settlement. Parties to an ordinary commercial dispute might be willing to put their differences aside if they could enjoy the rewards of a price-fixing conspiracy. But the mere fact that such an agreement is memorialized in a litigation settlement does not exonerate it. *See, e.g.*, *Masonite Corp.*, 316 U.S. 265 (condemning price fixing agreements entered in settlement of patent disputes); Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ("Areeda & Hovenkamp") ¶ 2046c1 ("[W]e would not permit parties to settle an ordinary breach of contract dispute by an agreement fixing their prices or dividing their markets."). The *Actavis* opinion cites with approval several earlier Supreme Court cases where the settlement of a patent dispute was judged to violate the antitrust laws. *See Actavis*, 133 S. Ct. at 2231-32 (citing *Singer*, 374 U.S. 174

(applying *per se* analysis to overly broad patent settlements); *New Wrinkle*, 342 U.S. 371 (same); *Line Material*, 333 U.S. 287 (same)). These precedents "make clear" that "settlement agreements can sometimes violate the antitrust laws." *Actavis*, 133 S. Ct. at 2232. *Accord* Commission Op., slip op. at 4 ("The Supreme Court made clear in *Actavis* that neither the fact that the agreements in question were settlement agreements nor the fact that they concerned patent rights rendered them immune from antitrust scrutiny.").

B. *Actavis* Does Not Immunize "Commonplace" Forms Of Settlement Agreements

The asserted antitrust immunity for "commonplace" settlement agreements is a complete fiction. The principal issue presented in the *Actavis* case was how to judge the legality under the antitrust laws of a "reverse payment" agreement between a brand-name drug manufacturer and a potential generic competitor. In such an agreement, a patentee (the brand-name manufacturer) agrees to pay a substantial sum to an accused infringer (its would-be generic competitor), and the competitor agrees that it will not enter the market for a specified period. In the course of its legal analysis, the *Actavis* court contrasted a reverse payment settlement with a particular type of patent settlement agreement that is more common: "[a patentee] with a claim (or counterclaim) for damages receives [from the accused infringer] a sum equal to or less than the value of its claim." *Actavis*, 133 S. Ct. at 2233. The Court referred to the hypothesized agreement using the monikers "commonplace" and "traditional," and was quick to acknowledge that these particular patent settlement terms did not raise significant antitrust issues. *Id*. at 2233 ("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.").

The Court's clear message is that there exist ways of settling patent disputes that are commonly employed and also competitively benign. This does *not* mean (as 1-800 Contacts contends) that, through repeated use (by becoming "commonplace"), particular settlement terms take on an immunity to antitrust review.

The lower court, post-*Actavis* cases cited by 1-800 Contacts (Resp. Br. at 20) likewise do not hold that frequently used settlements are immune from antitrust scrutiny. Not one of the cited cases analyzes a frequently used settlement; these are all reverse payment cases. The lower courts follow *Actavis* and use the term "commonplace" as shorthand to refer to a specific situation where a firm "with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim." *Actavis*, 133 S. Ct. at 2233.

Indeed, repeated use of similar settlement terms may weigh in favor of finding antitrust liability. *United States v. Masonite*, 316 U.S. 265 (1942), involved competing manufacturers of wallboard. One firm, Masonite, developed and patented a superior wallboard product. Subsequently, Celotex and Insulite began manufacturing similar wallboard, and Masonite sued both companies. These patent infringement suits were settled on similar terms. Each rival acknowledged the validity of the Masonite patents, agreed to cease manufacturing the infringing product, and agreed to distribute and sell Masonite wallboard at prices set by Masonite. The price term was reciprocal, in the sense that Masonite was bound to adhere to the price it set for the rivals. During the same timeframe, Masonite entered into similar agreements with five other wallboard manufacturers. The Supreme Court judged this combination to constitute "unmistakable price fixing agreements with competitors," and a *per se* violation of Section 1. *Id*. at 283. To be clear, these agreements were *per se* unlawful notwithstanding Masonite's acknowledged patent rights; *per se* unlawful notwithstanding the litigation settlement posture; and *per se* unlawful notwithstanding Masonite's repeated use of the same settlement terms.

But this is a sideshow. *Actavis* simply did not hold that "commonplace" forms of settlement should be analyzed any differently from "unusual" forms of settlement. The holdings of *Actavis* are, first, that a reverse payment agreement is not immune from antitrust review, and second, that competitive harm may not be inferred from the existence of a reverse payment without more. *See Actavis*, 133 S. Ct. at 2227, 2237-2238. Neither holding assists 1-800 Contacts.

C. 1-800 Contacts' Bidding Agreements Are Not "Commonplace"

The salient and competitively important terms of the Bidding Agreements are: (i) that the rival may not bid for designated trademarks in a search advertising auction, even where consumers are not confused; (ii) that the rival must designate certain "negative keywords" in its search advertising campaigns; and (iii) that the settlement terms are reciprocal, constraining both 1-800 Contacts and the alleged infringer. If "commonplace" means occurring frequently or usually, then the Bidding Agreements do not embody "commonplace" terms for settling trademark infringement claims.

According to 1-800 Contacts, the *Actavis* court expressly cited *Metro-Goldwyn Mayer, Inc. v. 007 Safety Products, Inc.*, 183 F.3d 10 (1st Cir. 1999), "as an example of the kind of 'commonplace' settlement form it did not intend to displace." Resp. Br. at 21. The *MGM* settlement has **zero** of the three salient characteristics of the Bidding Agreements. *MGM*, 183 F.3d at 13 (describing terms of trademark settlement). Assuming *arguendo* that it matters one whit whether the Bidding Agreements are "commonplace" (it does not), the reality is that the

Bidding Agreements are unlike the agreement in *MGM*, and thus, are clearly not endorsed by *Actavis* as "commonplace."

Assume conservatively that 2,000 trademark lawsuits are filed each year in the United States.[1] Over the 17 years in which Howard Hogan, 1-800 Contacts' "trademark practitioner," has been practicing, this yields a universe of about 34,000 cases. Here are the relevant statistics:

- Mr. Hogan (and 1-800 Contacts) have identified **zero** trademark cases or settlement agreements that include all three of the salient characteristics of the Bidding Agreements in this case (**0 percent**).
- Mr. Hogan (and 1-800 Contacts) have identified **four** trademark cases or settlement agreements that include two of the three salient characteristics of the Bidding Agreements (roughly **.01 percent**).[2]
- Mr. Hogan (and 1-800 Contacts) have identified **zero** keyword bidding cases in which a court found trademark infringement where the alleged infringer did not bid on the plaintiff's trademark keyword. In other words, no U.S. court has ever found liability for an advertiser where the challenged ad was "matched" to a query by the search engine.[3]

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[1] Calculations based on Lex Machina's Trademark Litigation Report suggest that roughly 1,000 trademark cases are filed each year in the United States that result in some type of injunctive relief being granted. *See* Lex Machina Trademark Litigation Report (May 2016), available at http://pages.lexmachina.com/rs/098-SHZ-498/images/LexMachina%202016%20TM%20Litigation%20Report.pdf. The number of complaints that result in settlement agreements are estimated to be significantly higher. *See id*. (estimating an additional roughly 2,155 settlements per year); CX9047 (Hogan, Dep. at 26-28) (testifying that "for every case that is filed, there are something on the order of 99 that are settled prior to the filing of a formal complaint").

[2] Mr. Hogan identified four cases (three consent judgments and one default judgment) in which negative keywords have been ordered. Mr. Hogan testified he is not aware of any other cases in which negative keywords have ever been ordered. Hogan, Tr. 3486.

[3] Hogan, Tr. 3476, 3485; CX9047 (Hogan, Dep. at 125-126, 166, 168-170). *See also 1-800 Contacts v. Lens.com*, 755 F. Supp. 2d 1151, 1174 (D. Utah. 2010), *aff'd*, 722 F.3d 1229 (10th Cir. 2013) ("It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not

- Mr. Hogan (and 1-800 Contacts) have identified **zero** trademark cases or settlement agreements that include reciprocal terms.[4]

One final data point is this: During his career as a trademark practitioner, Mr. Hogan has been personally involved in a grand total of seven court cases that he identified as "keyword bidding" cases.[5] Mr. Hogan expressly disclaimed reliance on any "confidential" settlement agreements with which he is familiar (none of which he made available to Complaint Counsel or to this Court) as forming the basis for his opinion regarding the "commonplace" nature of the Bidding Agreements.[6] In other words, Mr. Hogan, like Complaint Counsel's expert, Professor Rebecca Tushnet, simply reviewed and relied on publicly available cases and settlement agreements to reach his opinion; and the statistics on those cases are described above.

Professor Tushnet, a Harvard law professor, is just as qualified as Mr. Hogan, if not more so,[7] to review publicly available legal materials and to reach a conclusion regarding those

incorporate a holder's mark in any way, even if the competitor's advertisement appeared when a *consumer* entered a trademark search term.") (emphasis in original).

[4] CX9047 (Hogan, Dep. at 197-198).

[5] RX0734 at 0007 (¶14) (Hogan Expert Report); CX9047 (Hogan, Dep. at 17); Hogan, Tr. 3313-3315. Mr. Hogan conceded that one of these cases, *Weight Watchers*, had no allegations relating to keyword bidding. CX9047 (Hogan, Dep. at 250).

[6] CX9047 (Hogan, Dep. at 18, 24, 31-33, 176-177). Mr. Hogan claims that he has advised clients with respect to "hundreds of settlement agreements" (Resp. Br. at 24), but most of those settlement agreements were unrelated to keyword bidding. CX9047 (Hogan, Dep. at 23) Mr. Hogan could "not recall" how many settlement agreements he negotiated relating to keyword bidding. *Id*. at 15, 17, 20.

[7] Professor Tushnet teaches courses on trademarks, advertising, and marketing law. She is actively involved in the legal bar, regularly submitting *amicus* briefs in novel and important trademark cases, and she maintains and writes a blog dedicated to trademark issues. Professor Tushnet has also written a casebook on advertising law that addresses trademark keyword bidding. Prior to her career as an academic, Professor Tushnet clerked for the Third Circuit and the Supreme Court, and spent two years as a litigation associate at a Washington, D.C., law firm, specializing in advertising, trademarks, and copyrights. Tushnet, Tr. 4373-4392. *See* CX8014 at 003-004 (¶¶ 3-5) (Tushnet Rebuttal Expert Report).

documents.[8] 1-800 Contacts asserts that Professor Tushnet's testimony showing that the Bidding Agreements are not "commonplace" should be disregarded because she did not read the actual agreements between 1-800 Contacts and its rivals. Resp. Br. at 26. But the only relevant question is whether Professor Tushnet understood the salient terms of the agreements (she did), which were expressly spelled out by Mr. Hogan in his report.[9] Professor Tushnet is perfectly capable of comparing those terms to the relief granted in other cases.

In any event, this Court need not rely on either Professor Tushnet or Mr. Hogan to conclude that the Bidding Agreements are not "commonplace" because, as described above, the data is clear. 1-800 Contacts has failed to cite *a single* case in which all three salient characteristics of 1-800 Contacts' Bidding Agreements are present. *See supra* p. 8.

Unable to provide any evidence suggesting that the Bidding Agreements are commonplace, 1-800 Contacts shifts ground. Its alternative contention is that the Bidding Agreements are immune from liability because they supposedly fall "within the range of relief that a court could have ordered." Resp. Br. at 21. This, too, is incorrect. Neither *Actavis* nor any other authority suggests that a court's power to order a settlement is a relevant consideration when assessing a settlement agreement. For good reason: there are few limits on what a federal court has the power to order in an appropriate case (including forfeiture of life, liberty, and

[8] Unlike Professor Tushnet, Mr. Hogan's "review" did not include reading the complaints in the majority of cases he relied upon in his report. *See* CC Br. at 163 n. 524. Rather, it consisted largely of reading recitations accompanying consent and default judgments, *i.e.*, documents that perfunctorily confirmed whatever relief the parties had privately agreed upon. *E.g.*, RX0732 at 0060-0066 (Ex. F) (Hogan Expert Report) (attaching *Rolex* order, a 6-page order summarily granting relief, not discussing the claims at issue); *id*. at 0067-0071 (Ex. G) (attaching *Partners for Health & Home* order, a 4-page order doing the same). As described in detail in Complaint Counsel's Post-Trial Brief, many of the cases he relied upon were not keyword bidding cases. CC Br. at 162-163.

[9] Tushnet, Tr. 4469; *see* RX0734 at 0096, 0115, 0117-0118 (¶¶ 145, 155, 158) (Hogan Expert Report) (describing terms of 1-800 Contacts' agreements, and quoting the relevant portions of the agreements).

property). And yet, the competitive restrictions imposed by the Bidding Agreements *are* unusual: no court has ever imposed an injunction with the three salient terms. Never. Just as the Bidding Agreements are not commonplace as settlements, they are unseen in the world of judicially imposed remedies. *See* Complaint Counsel's Post-Trial Brief ("CC Br.") at 147 & n. 468 (describing features of Bidding Agreements that have never been ordered by any court).

1-800 Contacts suggests that, because Complaint Counsel acknowledges the vast powers of federal courts,[10] the only dispute is "about whether 1-800 Contacts would have won [the 13 trademark litigations it filed], not whether the relief would have been appropriate if it did." Resp. Br. at 23. This is untrue. The competitive restrictions imposed by the Bidding Agreements are inappropriate *even if* 1-800 Contacts would have prevailed in one or more of its lawsuits.

Of course, Complaint Counsel cannot identify precisely what relief a court would have deemed appropriate, because no court has ever found liability on the theory promoted by 1-800 Contacts; *i.e.*, that a firm's keyword purchase of a competitor's trademark causes initial interest confusion, regardless of the text of the advertisement. As one district court recently observed:

> [Plaintiff] points to *no case* indicating that the simple purchase of advertising keywords, without more, may constitute initial interest confusion. As noted, '[i]nitial interest confusion . . . occurs when a customer is lured to a product by the similarity of the mark . . . .' Thus, the 'luring' becomes the critical element. In situations such as the one presented here, the use of a keyword encompassing a competitor's term does not necessarily product an infringing advertisement; it is the *content* of the advertisement and/or the manner in which the mark is used that creates initial interest confusion. *[Plaintiff's] premise logically culminates in the*

[10] Complaint Counsel has acknowledged this reality by stipulation. RX0679 at 4-5 (Complaint Counsel "admits" that "the obligations of 1-800 Contacts' counterparties to the Challenged Settlement Agreements under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case. For avoidance of doubt, Complaint Counsel specifically denies that such relief would have been appropriate or supported under either trademark or antitrust law, would have been supported by relevant precedent in analogous cases, or could reasonably have been expected to be ordered in the cases that Respondent filed.").

> *destruction of common Internet advertising methods and unreasonably encumbers generally accepted competitive practices.*

USA Nutraceuticals Group, Inc. v. BPI Sports, LLC, 165 F. Supp. 3d 1256, 1266 (S.D. Fla. 2016) (emphasis added). *See Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc*., 2015 U.S. Dist. LEXIS 120871, at *150 (C.D. Cal. Sep. 10, 2015) ("There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.").[11]

What we do know is that trademark courts consider clear identification of the advertiser in the text of the search ad as the appropriate way to avoid any confusion that may arise when competitors bid on trademark keywords. *E.g.*, *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 933 (9th Cir. 2015) (affirming that disclosure of the seller's name in the text of advertisements triggered by search queries including plaintiff's trademark was sufficient to prevent confusion "[b]ecause Amazon's search results page clearly labels the name and manufacturer of each product offered for sale"); *1-800 Contacts v. Lens.com*, 722 F.3d 1229, 1245 (10th Cir. 2013) ("[An] inference [that the trademark owner is the source of a rival ad] is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.") (following *Network Automation, Inc. v. Advanced Systems Concept, Inc*., 638 F.3d 1137, 1154 (9th Cir. 2011); *Playboy Enters., Inc. v. Netscape Communications Corp*., 354 F.3d 1020, 1025 n. 16 (9th Cir. 2004) ("Note that if a banner advertisement clearly identified its source, or even better,

[11] *See also, e.g.,* Hogan, Tr. 3459-3461; CX9047 (Hogan, Dep. at 130-131; 135; 140; 143-144; 148-149); CX8014 at 011-014 (¶¶ 24-28) (Tushnet Rebuttal Expert Report) (describing legal "consensus" that "keyword purchases . . . are legitimate," and collecting cases); *id*. at 014-021 (¶¶ 29-42) (distinguishing cases cited by Mr. Hogan); *id*. at 021 (¶ 43) (surveying cases, and observing that no court has ever found liability for trademark infringement based on keyword bidding alone).

overtly compared [plaintiff's] products to the sponsor's own, no confusion would occur under [plaintiff's] theory.").

Repeatedly, 1-800 Contacts asserts that the trademark infringement lawsuits that gave rise to the Bidding Agreements "were not sham." *E.g.*, Resp. Br. at 1, 4, 25 n.4, 64. Even if true (and Complaint Counsel does not concede this – *see* CC Post-Trial Br. at 148 n.471), this simply means that the lawsuits are a form of protected speech under the First Amendment (as is pornography). This is an exceedingly low bar. To say that the underlying lawsuits were not sham is not to say that the claims had any merit, or that 1-800 Contacts was entitled to any remedy. The act of filing the lawsuits is exempt from antitrust lability under the *Noerr* doctrine. The agreements settling these trademark lawsuits, the Commission has instructed, is not exempt. Commission Op., slip op. at 4 ("[I]f 1-800 Contacts restricted competition beyond 'the scope of any property right that 1-800 Contacts may have in its trademarks,' then the *bona fide* nature of the underlying trademark dispute would not be a defense.").

In sum, the Bidding Agreements are not "commonplace" settlements, but even "commonplace" settlements of non-sham litigation are subject to antitrust review.

D. <u>All Of The So-Called *Actavis* "Factors" Favor Antitrust Review Of The Bidding Agreements</u>

In *Actavis*, 133 S. Ct. 2234, the Supreme Court held that parties may incur antitrust liability when, in connection with the settlement of patent infringement litigation, a brand-name drug manufacturer pays a generic drug manufacturer to defer generic entry – even where generic entry occurs prior to expiration of the patent. The Eleventh Circuit had affirmed dismissal of the FTC complaint on the ground that an agreement is "immune from antitrust attack" if its anticompetitive effects are all within "the scope of the exclusionary effect of the patent." *Id*. at

2227 (*quoting FTC v. Watson Pharms., Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012). The Supreme Court reversed, rejecting this so-called "scope-of-the-patent" approach. *Id*. at 2230 ("[W]e do not agree that that fact, or characterization, can immunize the agreement from antitrust attack."). Instead, the Court concluded that the legality of a reverse payments settlement is to be assessed using "traditional antitrust factors." *Id*. at 2231. In explaining why the importance of subjecting reverse payment settlements to antitrust scrutiny "outweigh[s]" the "general legal policy favoring the settlement of disputes" the court discussed five relevant considerations. *Id.* at 2237. 1-800 Contacts refers to these as the five *Actavis* factors.

Neither the scope-of-the-patent defense nor the five *Actavis* factors has any applicability to the facially overbroad trademark settlements challenged here. *In re Loestrin 24 Fe Antitrust Litig*., 814 F.3d 538, 551 n.12 (1st Cir. 2016) ("We agree with the [plaintiffs] that the five [*Actavis*] considerations should not overhaul the rule of reason, nor should they create a new five-part framework in antitrust cases."). Antitrust scrutiny of facially overbroad and facially anticompetitive settlement agreements is not novel, and the Supreme Court has never required any threshold test. *E.g.*, *Singer,* 374 U.S. 174 (overly broad patent settlement agreement held *per se* unlawful); *New Wrinkle,* 342 U.S. 371 (same); *Line Material,* 333 U.S. 287 (same); *Masonite,* 316 U.S. 265 (same); *Cardizem*, 332 F.3d 896 (same); *Terazosin,* 352 F. Supp. 2d 1279 (same). *See also* Commission Op., slip op. at 4 (1-800 Contacts' settlement agreements are subject to antitrust review). The *Actavis* opinion does not signal any departure from standard antitrust analysis. In particular, the concern expressed in *Actavis* that antitrust review of reverse payment settlements may prove excessively "time consuming, complex, and expensive" (*Actavis*, 133 S.

Ct. at 2234) should have no traction where, as here, the already-completed trial presented no unusual difficulties.

In any event, the five *Actavis* factors support antitrust review of the Bidding Agreements. First, the Bidding Agreements have the "'potential for genuine adverse effects on competition.'" *Actavis*, 133 S. Ct at 2234 (*quoting FTC v. Indiana Federation of Dentists*, 476 U.S. 460-61 (1986)). Although 1-800 Contacts pretends otherwise, here (unlike in *Clorox*), the challenged agreements do not simply limit what name is placed on the label. *See Clorox Co. v. Sterling Winthrop*, 117 F.3d 50, 57 (2d Cir. 1997). Instead, the Bidding Agreements restrain bidding and advertising – two fundamental dimensions of rivalry – without regard to the label that appears on the competitor's product. It is beyond dispute that horizontal restraints on bidding and advertising have a genuine potential to harm competition by increasing prices, reducing output, and restricting consumer choice. *See Prof'l Eng'rs*, 435 U.S. at 692 (holding that any "agreement that [interferes] with the setting of price by free market forces is illegal on its face," and that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an "absolute ban on competitive bidding") (internal quotation omitted); *Cal. Dental Ass'n*, 526 U.S. at 773 ("[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price.") (internal quotation omitted).[12]

[12] For additional cases describing the "potential for genuine adverse effects on competition" from bid rigging, *see, e.g.*, *United States v. Portsmouth Paving Corp*., 694 F. 2d 312, 325 (4th Cir. 1982) ("Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. Section 1."); *United States v. Mobile Materials, Inc*., 881 F.2d 866, 869 (10th Cir. 1989) (same); *United States v. Capitol Serv., Inc*., 756 F.2d 502, 506 (7th Cir. 1985) ("anticompetitive character" of a ban on bidding is "readily apparent"); *United States v. Brighton Bldg. & Main. Co*., 598 F.2d 1101, 1006 (7th Cir. 1979) ("[a]n agreement among competitors to rig bids is illegal"). For additional cases describing the "potential for genuine adverse effects on competition" from advertising restraints, *see, e.g.*, *Morales v. Trans World*

Second, the "anticompetitive consequences" of the challenged restraints on price competition and advertising "will at least sometimes prove unjustified." *Actavis*, 133 S. Ct. at 2235. As *Actavis* contemplates, 1-800 Contacts had a full and fair opportunity to show that the Bidding Agreements are reasonably necessary to achieve a legitimate efficiency, and failed to do so. As discussed below, the competitive harm flowing from the Bidding Agreements is unjustified because the restraints on competition are facially and substantially overbroad, far exceeding what is reasonably necessary to protect 1-800 Contacts' trademark rights. *See infra* pp. 18-19; CC Br. at 131-138.

1-800 Contacts asserts that the settling parties "were motivated by traditional settlement considerations" (*i.e.*, they did not receive a cash payment from 1-800 Contacts). Resp. Br. at 29. This is one more attempt to argue, without basis, that only reverse payment settlements are potentially anticompetitive. Not so. The case law clearly provides that an antitrust plaintiff challenging an overbroad settlement agreement is not required to show a reverse payment, or even that the defendants had "bad" motives. *See supra* p. 3-4 (collecting cases).

Third, 1-800 Contacts and the settling parties plainly possess sufficient market power to harm competition. *See infra* Section III.B.1.b (1-800 Contacts and the settling parties collectively comprise roughly 80 to 90 percent of the market for online sales of contact lenses); *see also* CC Br. at 121-122. This would be true even under 1-800 Contacts' proposed market definition. *See*

Airlines, Inc., 504 U.S. 374, 388 (1992) ("it is clear as an economic matter that . . . restrictions on fare advertising have the forbidden significant effect upon fares"); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (advertising "performs an indispensable role in the allocation of resources in a free enterprise system"); *In re Realcomp II, Ltd.*, 148 F.T.C. __, No. 9320, 2007 WL 6936319 (F.T.C. Oct. 30, 2009), *aff'd*, 635 F.3d 815 (6th Cir. 2011) (advertising restraint deemed inherently suspect); *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (2003) (*Polygram I*), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (*Polygram II*) (same); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (advertising restraint judged *per se* unlawful); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (same); *United States v. The House of Seagram, Inc.*, 1965 Trade Cas. (CCH) 71,517 (S.D. Fla. 1965) (same).

Resp. Br. at 76-89 (proposing market for retail sale of contact lenses). As the Supreme Court has observed, where competitors agree to restrain price competition, only a small degree of market power is needed to injure competition. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434-35 (1990). The same is true of advertising restraints. *See Polygram I*, 136 F.T.C. at 342-43. Advertising restraints may be harmful even in deconcentrated markets. *E.g., Am. Med. Ass'n*, 94 F.T.C. 701, 1009 (1979), *aff'd*, *Am. Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by equally divided Court*, 455 U.S. 676 (*per curiam*) (1982) (no evidence of "widespread abuses among the 47.4% of licensed physicians in the United States who are not members of AMA").

Fourth, we all now know with absolute certainty that the antitrust action against 1-800 Contacts was "administratively feasible." *Actavis*, 133 S. Ct. at 2236. The Court need not determine whether the 1-800 Contacts trademarks were valid or infringed. Even assuming, *arguendo*, trademark validity and (past) infringement, 1-800 Contacts is liable if the Bidding Agreements are facially and unreasonably overbroad.

Fifth, here as in *Actavis*, the theory of antitrust liability does not prevent parties from settling *bona fide* trademark infringement claims. Complaint Counsel (and trademark courts) have identified settlement terms that are significantly less restrictive than the Bidding Agreements, yet protective of trademark rights. This issue is discussed in greater detail in Section III.B.3, *infra*.

II. THE BIDDING AGREEMENTS DO NOT HAVE PROCOMPETITIVE BENEFITS

"In the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification." *Cal. Dental*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part). Courts evaluate whether claimed efficiencies are plausible, *NCAA v. Bd. of Regents*, 468 U.S. 85, 114 (1984); *Ariz. v. Maricopa County Medical Soc*., 457 U.S. 332, 353 (1982), and whether the challenged conduct is reasonably necessary to achieve the legitimate objective identified by a defendant. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-21 (1979); *United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3d Cir. 1993); *In re North Texas Specialty Physicians*, 140 F.T.C 715, 912 (Initial Decision, Nov. 15, 2004), *aff'd*, 140 F.T.C. 715 (F.T.C. 2005), *aff'd in part, rev'd in part on other grounds, North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 555 U.S. 1170 (2009).

The issue to be decided is not whether 1-800 Contacts may file trademark infringement lawsuits against its rivals; whether 1-800 Contacts may settle these lawsuits; or whether, in such settlements, the rivals may agree to forbear from infringing 1-800 Contacts' trademarks. The issue is whether it is reasonably necessary for 1-800 Contacts and its rivals mutually to agree to forbear from legitimate, non-infringing, non-confusing advertising.

1-800 Contacts' Bidding Agreements sweep beyond the rights afforded by trademark law in at least three respects. First, they ban *all* advertising triggered by consumer search queries containing a 1-800 Contacts trademark. Thus, on their face, the agreements broadly ban truthful and non-misleading advertising. CC Br. at 31-33.

Second, the Bidding Agreements require the implementation of negative keywords, which means that, even where settling parties are not "using" (*i.e.*, bidding on) 1-800 Contacts' trademarks, settling parties are required to instruct search engines *not* to display their advertisements. CC Br. at 31-37. In instances where the settling party is not bidding on 1-800 Contacts' trademark, it cannot possibly be infringing on 1-800 Contacts' trademarks. *See Rhino*

Sports, Inc. v. Sport Court, Inc., 2007 WL 1302745, at *5 (D. Ariz. May 2, 2007) (rejecting claim that a sports equipment company's purchase of generic keywords "courts" and "basketball court" violated consent injunction against use of plaintiff's SPORT COURT trademark, concluding that "a contrary interpretation of the permanent injunction would not be reasonable because it would preclude [defendant] from using these generic terms as keywords"). Indeed, as the U.S. District Court for the District of Utah observed in a lawsuit brought *by 1-800 Contacts*:

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

Lens.com, 755 F. Supp. 2d at 1174 (emphasis in original).

The negative keyword requirement is particularly troubling because, in cases where the settling party is not bidding on 1-800 Contacts' trademark, but its advertisement is being displayed through Google's "broad match" feature, the Bidding Agreements expressly require the settling party to override the search engine's determination that the settling party's ad is relevant and valuable to consumers. *See* CC Br. at 12-13 (describing how advertiser's use of "broad match" designates Google as the advertiser's agent to use its own judgment as to when its ad will be relevant to consumers, regardless of keywords bid upon by advertiser).

Third, the Bidding Agreements are reciprocal, which means that 1-800 Contacts commits not to bid on the settling parties' trademarks, and to implement negative keywords to ensure that its own ads do not appear in response to searches that contain its rivals' trademarks. CC Br. at 32.

A. The Proposition That Settlement Agreements Are Favored Does Not Establish An Efficiency Defense

1-800 Contacts states, correctly, that the settlement of litigation is generally favored. Resp. Br. at 34. This does not begin to answer the question of whether the Bidding Agreements are procompetitive. To the contrary, settlement agreements are subject to standard antitrust analysis. They can be condemned as *per se* unreasonable, and have been numerous times as described above, and as detailed in Complaint Counsel's Post-Trial Brief. CC Br. at 88-90.[13] "[T]here is nothing magical about a settlement that immunizes an agreement that may otherwise violate the antitrust laws." *Terazosin*, 352 F. Supp. 2d at 1309.

The relevant question, then, is not whether settlement as a general matter is favored, but whether the terms of the Bidding Agreements are procompetitive. 1-800 Contacts must show that the Bidding Agreements benefit competition and consumers (here, the search engines and consumers of contact lenses.) "Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Polygram I*, 136 F.T.C. at 345-46.

1-800 Contacts states that the terms of settlement were satisfactory to the settling parties (1-800 Contacts and other online sellers of contact lenses) and viewed by these firms as preferable to continued litigation. Resp. Br. at 34-36. The mere fact that the Bidding Agreements are satisfactory to the settling parties does not show that the restraints have any procompetitive potential. *See BMI*, 441 U.S. at 13 ("Of course, a consent judgment, even one entered at the

[13] *See Actavis*, 133 S. Ct. at 2231-32 (citing *Singer*, 374 U.S. 174 (applying *per se* analysis to overly broad patent settlements); *New Wrinkle*, 342 U.S. 371 (same); *Line Material*, 333 U.S. 287 (same)). *See also Masonite*, 316 U.S. 265 (overbroad patent settlement subject to *per se* condemnation) *Cardizem*, 332 F.3d 896 (same); *Terazosin*, 352 F. Supp. 2d 1279 (same).

behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties."). In each of the *per se* liability cases cited above,[14] the settlement pleased the settling competitors; this provided no defense, as the agreements harmed third parties (consumers) who were not consulted. "It is well-known that parties to an intellectual property dispute have a strong incentive to enter into agreements that maximize their own interests but disserve the public's interest with respect to either competition or innovation." *Terazosin*, 352 F. Supp. 2d at 1309 (internal quotation omitted).

B. The Proposition That "Trademark Protection is Procompetitive" Does Not Establish An Efficiency Defense

1. The Relevant Issue In This Case Is Whether 1-800 Contacts May Impede Non-Infringing Advertising

1-800 Contacts states, correctly, that the protection of trademarks is generally desirable, and that trademarks may benefit consumers by reducing their search costs. Resp. Br. at 36. Complaint Counsel also does not dispute that 1-800 Contacts has invested in advertising and customer service. Resp. Br. at 37-38.

What 1-800 Contacts fails to address is that the price premium that consumers pay to 1-800 Contacts is not fully explained by either the company's reputation or its customer service. As described in Complaint Counsel's Post-Trial Brief, often consumers pay a price premium to 1-800 Contacts because they are unaware that identical contact lenses, comparable service, and substantially lower prices are available from online competitors. *See* CC Br. at 4, 15, 57, 78. The

[14] *See supra* n.13.

Bidding Agreements interfere with efforts by 1-800 Contacts' rivals to reach these consumers, to address this information deficit, and to compete more effectively. *See* CC Br. at 42-48, 56-57.

A general claim of "trademark protection" does not suffice to turn otherwise anticompetitive restraints into procompetitive ones. As the D.C. Circuit noted when Microsoft asserted a similarly broad copyright defense in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001):

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes. 'If intellectual property rights have been lawfully acquired,' it says, then 'their subsequent exercise cannot give rise to antitrust liability.' That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: *'Intellectual property rights do not confer a privilege to violate the antitrust laws.'*

Microsoft, 253 F.3d at 63 (quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000)) (emphasis added).

2. Protecting 1-800 Contacts' Financial Investment In Advertising and Customer Service Is Not A Defense To Agreements Interfering With Rivals' Freedom to Advertise

Complaint Counsel does not dispute that 1-800 Contacts has invested in both advertising and customer service. *See* Resp. Br. at 38-39. But 1-800 Contacts' desire to recognize a return on this investment is not a "procompetitive" justification for its Bidding Agreements. Nor does it matter that 1-800 Contacts would be incentivized to invest more money in brand-building if the company were able to prevent non-infringing, non-confusing uses of its trademark. *See* Resp. Br. at 40-41. This contention is addressed at length in Complaint Counsel's Post-Trial Brief. We explain that this argument was considered and rejected by the Supreme Court in *Fashion*

Originators' Guild of America v. FTC, 312 U.S. 457, 463-68 (1941), and by the Commission in *Polygram I*, 136 F.T.C. at 361-62. CC Br. at 126-129.

Congress defined the scope of trademark rights as enabling owners to prevent confusing uses (and not to prevent non-confusing uses) of the trademark.[15] In so doing, Congress struck a balance between competing interests. The owner of intellectual property is not entitled to greater rights than afforded by Congress. A desire to increase returns on intellectual property does not constitute a procompetitive justification for restraints on competition. For example, if Congress had set a longer term for patent rights (say, 25 years instead of 20 years), firms might increase their investments in innovation. Yet a desire to incentivize innovation does not justify a private agreement that extends the length of patent exclusivity. *Masonite Corp.*, 316 U.S. at 277 ("The owner of a patent cannot extend his statutory grant by contract or agreement. A patent affords no immunity for monopoly not fairly or plainly within the grant."); *Microsoft*, 253 F.3d at 63 ("'Intellectual property rights do not confer a privilege to violate the antitrust laws.'") (quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1325).

3. 1-800 Contacts' Assertion that Bidding Agreements Are "Limited" Is Neither Relevant, Nor Accurate

1-800 Contacts repeatedly asserts that the Bidding Agreements are "limited." Resp. Br. at 41-45. But 1-800 Contacts does not dispute the fact that the Bidding Agreements reach beyond the protections afforded by trademark law. To the extent that 1-800 Contacts suggests that this overreach harmed competition only to a "limited" degree, this is neither a procompetitive justification, nor an antitrust defense.

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[15] J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.10 ("MCCARTHY ON TRADEMARKS") ("The trademark laws exist not to 'protect' trademarks, but . . . to protect the consuming public from *confusion*. . . .") (emphasis added).

Moreover, 1-800 Contacts' description of the practical import of the Bidding Agreements is inaccurate. As written, as applied, and as enforced by 1-800 Contacts, competitors are prevented from placing search ads against any search query that includes a 1-800 Contacts trademark (or similar variations thereof), including queries that contain additional generic terms (*e.g.*, "1-800 Contacts coupons," or "contact lenses 1800contacts," or "1 800 contacts competitors"). 1-800 Contacts' denial (*see* Resp. Br. at 41-42) is contrary to the evidence, and implicitly, is an admission that the Bidding Agreements are indefensibly overbroad. *See* CC Br. at 31-39.

With regard to the negative keyword requirement, 1-800 Contacts asserts that this restriction on non-infringing advertising is necessary to carry out "the purpose of the agreements." Resp. Br. at 41. This admission is telling. If the purpose of the Bidding Agreements is to prevent confusing ads, then this provision is not reasonably necessary. *See Lens.com*, 755 F. Supp. 2d at 1174 (bidding on generic keywords is not infringing); *Rhino Sports*, 2007 WL 1302745, at *5 (same). If, on the other hand, the purpose of the Bidding Agreements is to suppress competitive advertising (and prevent so-called free-riding) regardless of whether the advertising causes confusion, then this goal is illegitimate and non-cognizable as a matter of law. *See Polygram I*, 136 F.T.C. at 361-62.

4. Assertion That Bidding Agreements Result In "Limited" Harm Is Not A Cognizable Procompetitive Justification

1-800 Contacts repeats the assertion that the Bidding Agreements' restraints on legitimate advertising are "limited," *e.g.*, not reaching television or all forms of internet advertising. Resp. Br. at 42-45. As noted above, this contention is not a procompetitive justification, as it relates to the *magnitude* of the anticompetitive harm flowing from the restraints, not their existence or direction. In addition, the Bidding Agreements restrained the most important form of advertising available to its rivals. *See* CC Br. at 14, 39-47, 81-82.

According to 1-800 Contacts, *Clorox* establishes that, because the Bidding Agreements involve trademarks and impact only certain forms of advertising, they are "procompetitive." Resp. Br. at 43-44. This is incorrect. Rather than presume the restraints were procompetitive, the *Clorox* court applied standard antitrust analysis. The court did not find any adverse effect on competition where the only issue was whether, in settlement of a trademark infringement claim, the defendant could agree not to *label* its product with a mark arguably similar to the trademark owned by the plaintiff. *See Clorox*, 117 F.3d at 57 ("The trademark agreement at issue here does no more than regulate how the name PINE-SOL may be used; it does not in any way restrict Clorox from producing and selling products that compete directly with the LYSOL brand, so long as they are marketed *under a brand name other than PINE-SOL*. Accordingly, at first blush it would not appear to restrict Clorox's, much less any other competitor's, ability to compete in the markets LYSOL products allegedly dominate.") (emphasis added). The court held that, because the plaintiff failed to establish any adverse effect on competition, the defendant was not required to establish a procompetitive justification. *See id.* at 59-60 ("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 procompetitive redeeming virtues. Accordingly, as Clorox has not shown that the 1987 Agreement can significantly affect competition as a whole, *it is immaterial* whether the Agreement is entirely necessary to protect the senior LYSOL mark.") (emphasis added). By contrast, in this matter, Complaint Counsel has established competitive harm, through each of three alternative means, thus shifting to 1-800 Contacts to burden to justify the Bidding Agreements.

Neither *Clorox* nor any other authority stands for the proposition that "limited" restrictions on advertising are presumptively procompetitive. Similarly "limited" advertising restraints were deemed presumptively unlawful by the Commission in *Realcomp*, 2007 WL 6936319, at *23, and *Polygram*, 136 F.T.C. at 353-58.

C. **The Bidding Agreements Are Not A Reasonably Necessary Means Of Preventing Confusion, And There Is No Evidence of Confusion**

1-800 Contacts asserts that the Bidding Agreements are procompetitive because they prevent confusion that arises when paid search advertisements for other retailers appear in response to searches for 1-800 Contacts' trademarks. Resp. Br. at 45. Even if it were true that the mere appearance of advertisements in response to searches for 1-800 Contacts' trademark was confusing (it is not), the Bidding Agreements are not a "reasonably necessary means" of addressing any purported confusion, *Realcomp II*, 2007 WL 6936319, at *17.

This is because there are a number of significantly less restrictive alternatives – prescribed by trademark courts themselves – that would suffice to ameliorate any purported confusion arising from the appearance of rival advertisements in response to consumer searches relating to 1-800 Contacts. *See infra* Section III.B.3. On this basis alone, 1-800 Contacts' "procompetitive" justification must be rejected. Thus, 1-800 Contacts' defense fails as a matter of law. *See Polygram I*, 136 F.T.C. at 335; *Realcomp II*, 2007 WL 6936319, at *17.

Nevertheless, 1-800 Contacts' assertions regarding confusion are addressed below.

1. Paid Search Advertisements for Other Retailers in Response to Searches for 1-800 Contacts' Trademarks Are *Not* Likely to Confuse Consumers

1-800 Contacts asserts that search advertisements for other retailers are *necessarily* confusing when they appear in response to consumer searches for "1-800 Contacts." Resp. Br. at 45. This assertion is unsupported by any evidence in this case, or in any other case. Indeed, this theory has been rejected time and time again by numerous courts that have addressed these claims, including by the Tenth Circuit in a lawsuit brought by 1-800 Contacts. *See Lens.com*, 755 F. Supp. 2d at 1173-74 (holding that the use of trademark keywords, divorced from the text of the resulting ads, could not result in a likelihood of confusion), *aff'd*, 722 F.3d 1229 (10th Cir. 2013).

To be clear: no court has ever found liability based on keyword bidding, absent a demonstration that the *content* of the triggered ad confuses consumers as to its source, sponsorship, or affiliation. Recent court decisions confirm this,[16] as does the expert opinion offered by Professor Tushnet,[17] and the trial testimony of 1-800 Contacts' own trademark expert, Howard Hogan.[18] In other words, no plaintiff – including 1-800 Contacts – has ever succeeded

[16] *E.g.*, *USA Nutraceuticals Group*, 165 F. Supp. 3d at 1266 ("[Plaintiff] points to no case indicating that the simple purchase of advertising keywords, *without more*, may constitute initial interest confusion. . . .") (emphasis added); *see also GoDaddy.com*, 2015 U.S. Dist. LEXIS 120871, at *150 ("There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.").

[17] CX8014 at 021 (¶ 43) (Tushnet Rebuttal Expert Report) (noting that the "preeminent expert on internet advertising law . . . has been unable to identify *any case* in which a defendant lost a trial on likely confusion based on purchases of a plaintiff's trademark as a search engine keyword – despite the filing of over a hundred such cases") (emphasis added).

[18] Hogan, Tr. 3459-3461 (acknowledging that *no court* has ever found liability based on keyword bidding alone).

on a trademark infringement claim by showing that keyword bidding, on its own, is confusing. Instead, courts have rejected these claims on numerous occasions.[19]

The most recent appellate decision to address keyword bidding, *Amazon*, instructs (like the cases before it) that, in assessing the likelihood that search advertising results in confusion, a court must consider both the use of the keyword *and* the actual content of the resulting ad. *Amazon*, 804 F.3d. at 937-39 (granting summary judgment for defendant based on the content of the ad, which was "clearly labeled" as to the source of the product, and citing *Davis v. HSBC Bank*, 691 F.3d 1152, 1162 (9th Cir. 2012) and *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995), for the same proposition); *id*. at 939 ("[W]here a court can conclude that the consumer confusion alleged by the trademark holder is highly unlikely by simply reviewing the product listing/advertisement at issue, summary judgment is appropriate.").

Other Courts of Appeals' decisions are in accord. *See, e.g.*, *CollegeSource, Inc. v. AcademyOne, Inc.*, 2012 U.S. Dist. LEXIS 153197, at *52-53 (E.D. Pa. Oct. 25, 2012) (no likelihood of confusion based on "the advertisement's appearance, especially the clearly differentiated text boxes and the fact that CollegeSource's name does not appear within the language of the advertisement"), *aff'd*, 597 F. App'x 116, 130 (3d Cir. 2015) (unreported decision); *Lens.com*, 722 F.3d. at 1245 ("[An] inference [that a trademark owner is the source of

[19] *See* CX8014 at 012-014 (¶¶ 25-28) (Tushnet Rebuttal Expert Report) (collecting cases). *See, e.g.*, *Infogroup, Inc. v. Database, LLC*, 95 F. Supp. 3d 1170, 1190-91 (D. Neb. 2015) (rejecting keyword bidding claim, citing *Lens.com*, 722 F.3d at 1245); *M-Edge Accessories LLC v. Amazon.com Inc*., 2015 U.S. Dist. LEXIS 10095 (D. Md. Jan. 29, 2015) (keyword bidding "cannot serve as a basis for a claim of unfair competition" where there is "legal authority supporting the permissibility of such practice," citing *Lens.com*, 722 F.3d 1229, among other cases); *EarthCam, Inc. v. OxBlue Corp*., 49 F. Supp. 3d 1210, 1241 (N.D. Ga. 2014) (citing *Lens.com*, 722 F.3d at 1245, for proposition that likelihood of confusion relates to labeling and appearance of advertisements); *3form, Inc. v. Lumicor, Inc*., 2012 U.S. Dist. LEXIS 27504, at *26 (D. Utah Mar. 1, 2012) ("As this Court previously concluded in *1-800 Contacts*, the fact that a competitor's search results appear as one of many options when conducting a web search will not confuse customers, as they will have different appearances.").

another webpage] is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for."); *USA Nutraceuticals Group,* 165 F. Supp. 3d at 1266 ("[T]he use of a keyword encompassing a competitor's terms does not necessarily produce an infringing advertisement; it is the content of the advertisement and/or the manner in which the mark is used that creates initial interest confusion."). *See generally* CC Br. at 140-143 & n. 453 (collecting additional cases).

1-800 Contacts relies on four pieces of "evidence" to support its claim that the mere presence of rival ads in response to searches for "1-800 Contacts" is confusing to consumers: (i) an unsupported opinion from Professor Ronald Goodstein; (ii) an unsound survey conducted by Dr. Kent Van Liere; (iii) a few **{**[redacted]**}** from a decade-old litigation; and (iv) an unrelated opinion from economist Dr. Anindya Ghose.

<u>Ronald Goodstein</u>. Professor Goodstein opines that paid search advertisements that appear in responses to searches for "1-800 Contacts" are "likely to cause confusion." Resp. Br. at 45. Professor Goodstein bases his opinion on published literature suggesting that (1) many consumers are unable to distinguish sponsored ads from organic links; and (2) many consumers want or expect search results that will take them to the website of the company they are searching for if their query is "navigational" in nature. Resp. Br. at 45-46.[20]

Professor Goodstein's analysis should be rejected by this Court because it is not relevant to the central question in a trademark infringement case, which is whether consumers are confused "as to the *source, affiliation, or sponsorship* of a [company's] products or services."

[20] *See* RX0736 at 018-031 (¶¶ 41-71) (Goodstein Expert Report).

Scott Fetzer Co. v. House of Vacuums, Inc., 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id*. § 1125(a)) (emphasis added). The gravamen of trademark “confusion” is not whether a consumer recognizes that a link for a rival advertiser, like Walgreens, is an ad or organic search result; instead, the question is whether a consumer recognizes the link for Walgreens as a link for *Walgreens*. *See* CC Br. at 130-131 (describing central goal of trademark law); *id*. at 165-166 (describing Professor Goodstein’s failure to address trademark confusion).

Furthermore, Professor Goodstein’s claim that consumers are likely to interpret a search ad for Walgreens as an organic link is flatly contradictory to 1-800 Contacts’ principal claim that this ad is viewed as an ad for (or sponsored by) 1-800 Contacts. To the extent that consumers are unable to distinguish between organic search results and ads, this is also true of the 1-800 Contacts ads (and any other ad) that the Bidding Agreements permit. So the Bidding Agreements are not a reasonable or appropriate remedy. In reality, of course, the Bidding Agreements were never intended to address this sort of confusion.

Similarly, even if most consumers want or expect to see only an ad for 1-800 Contacts in response to a search for “1-800 Contacts” (notably, this proposition is not supported by record evidence, *see* CC Br. at 42-47, 138 & n. 443), the standard for trademark confusion is not what consumers, in the abstract, “want” or “expect” to see. Rather, it is whether, when faced with an ad, a significant number of consumers are confused as to the source, sponsorship, or affiliation of that ad. On this key question, Professor Goodstein provides no answer, nor could he, as he undertook no survey for this litigation. Therefore, Professor Goodstein’s opinion is not relevant to this Court’s analysis.

Additionally, Professor Goodstein bases his opinion regarding consumer confusion on surveys that Dr. Van Liere conducted in the *American Airlines* case and in this case. *See* Resp. Br. at 46.[21] Dr. Van Liere did not assess whether consumers view competitor ads as organic links in either of these surveys. Dr. Van Liere's survey in *American Airlines* – which, contrary to 1-800 Contacts' assertion (Resp. Br. at 47), was never accepted by the court in that case – contains significant flaws. *See* CC Br. at 166. Dr. Van Liere's survey in this case (discussed *infra*, pp. 31-35) suffers from the same flaws, as well as multiple additional issues, and should be disregarded by this Court. Thus, Professor Goodstein's opinions that rely upon Dr. Van Liere's surveys should be disregarded.

Kent Van Liere. For purposes of this litigation, 1-800 Contacts commissioned a survey, conducted by Dr. Van Liere, to test for relevant confusion. Resp. Br. at 47-49. As a threshold matter, and as described in detail in Complaint Counsel's Post-Trial Brief, Dr. Van Liere's expert report and related testimony should be disregarded by this Court based on 1-800 Contacts' clear violation of Section 19(g) of the Scheduling Order in this matter. CC Br. at 152-154.

But even if the Court were to consider Dr. Van Liere's survey, its conclusions are entirely unreliable. Dr. Van Liere's survey purports to assess whether a consumer entering a search query for "1-800 Contacts" expects to see only ads for 1-800 Contacts, and will therefore be confused by ads for firms other than 1-800 Contacts. To do so, Dr. Van Liere should have isolated the (hypothesized) causal factor, and tested whether consumers who were not confused by ads displayed in response to a generic search query, like "contact lenses," were confused by *the same*

[21] *See also* RX0736 at 031-033 (¶¶ 72-76) (Goodstein Expert Report).

ads when they were displayed in response to a search query for "1-800 Contacts."[22] But he did not do that.

Instead, Dr. Van Liere had all respondents search for "1-800 Contacts," and then presented test respondents with one of two different SERPs: one with between six and eight ads; and one without any ads. Resp. Br. at 47-48.[23] According to Dr. Van Liere, a significant number of respondents were confused by the SERP with between six and eight ads. Resp. Br. at 47-48. This reported confusion may have been attributable to the specific ads selected by Dr. Van Liere; Dr. Van Liere's failure to include an ad for 1-800 Contacts itself (discussed below); the quantity of the ads or organic links presented;[24] or to any myriad of other factors, individually or collectively. By not isolating the search term as the relevant variable, Dr. Van Liere's survey could not possibly show whether users who type in the search term "1-800 Contacts" expect to see only ads for 1-800 Contacts, and are therefore confused by ads displayed for firms that are not 1-800 Contacts.

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[22] This theory has been explicitly spelled out by 1-800 Contacts, not just in complaints against rivals (*see, e.g.*, RX0072 at 006-007 (Complaint, *1-800 Contacts, Inc. v. Memorial Eye, PA*, No. 2:08-cv-00983-DN (Dec. 23, 2008) ¶ 20 ("The www.shipmycontacts.com website advertisements are triggered *upon a search for 1800CONTACTS* and thus, use of the 1800 CONTACTS trademark as a *triggering keyword* to display and promote Memorial Eye's directly competitive goods and services. In essence, Memorial Eye is using the 1-800 CONTACTS Marks to trick consumers into visiting the Memorial Eye Website.") (emphasis added)), but also by its employees in their deposition and investigational hearing testimony (*see, e.g.*, CX9017 (Blackwood, Dep. at 284-285) (testifying that the identical ads could be confusing when returned in response to a search to "1-800 Contacts," but *not* confusing when returned in response for a search for "contact lenses"); and by 1-800 Contacts' own experts. *See, e.g.*, CX9047 (Hogan Dep. at 132-133) ("Well, I think the very premise of these cases is that by inducing a search engine to serve up a sponsored link at the top of a page *in response to a search for 1-800 Contacts*, these advertisers were in effect *communicating to consumers that they were 1-800 Contacts* or were affiliated or endorsed or sponsored by 1-800 Contacts. . . .") (emphasis added).

[23] *See* RX0735 at 006 (¶ 12) (Van Liere Expert Report).

[24] As explained in Complaint Counsel's Post-Trial Brief, by including a greater number of links in the test condition than in his control condition, Dr. Van Liere clearly "stacked the deck" in favor of finding confusion in his test group. *See* CC Br. at 156-157 & n. 497.

1-800 Contacts suggests that *GEICO v. Google, Inc*., 2005 WL 1903128 (E.D. Va. 2005), supports Dr. Van Liere's use of the same search term in both test and control conditions. But the *GEICO* court expressly criticized such an approach, chastising the plaintiff's survey expert for using a "control [that] *retained the use of 'GEICO' as a keyword*, which *itself* was alleged to be a source of confusion." *Id*. at *5 (emphasis added). The court also observed that, because the test changed a number of other factors, the control could not "reveal which aspects" of the advertisements *caused* consumer confusion. By not accounting for these factors, "the survey did not produce evidence that the use of 'GEICO' as a keyword, without more, causes respondents to be confused by the appearance of the Sponsored Links." *Id*. *See id.* at *1 (rejecting plaintiff GEICO's claim that "the mere use by Google of the GEICO trademark as a search term or keyword" was confusing or infringing).

Here, as with the unreliable survey proffered by the plaintiff in *GEICO*, Dr. Van Liere failed to control for the only factor relevant to this litigation, and thus failed to answer the question central to each of 1-800 Contacts' trademark infringement claims. Indeed, as with the deficient *GEICO* survey, Dr. Van Liere failed to answer any question at all, as he changed so many elements between his test and control that Dr. Van Liere's study could not possibly "reveal *which* aspects" of *which* advertisements caused consumer confusion. *See GEICO*, 2005 WL 1903128, at *5 (emphasis added); *see also THOIP v. Walt Disney Co*., 690 F. Supp. 2d 218, 240-41 (S.D.N.Y. 2010) (excluding survey with improper control group that compared trademarked "Little Miss" tee-shirts with control tee-shirts that omitted the allegedly infringing text). Just as with the unreliable survey proffered by the plaintiff in *GEICO*, here, there is simply no way to conclude that "the use of [the trademark] as a keyword, *without more*, causes respondents to be confused by the appearance of the Sponsored Links." *See GEICO*, 2005 WL 1903128 at *5 (emphasis added). As such, Dr. Van Liere's survey provides no support for 1-800 Contacts' proposition that the mere presence of a rival ad in response to a search for "1-800 Contacts" causes confusion, or that the Bidding Agreements were reasonably necessary to reduce such confusion.

Further, as Dr. Van Liere himself concedes, if the "real world" is one in which 1-800 Contacts' own ad appears at the top of the SERP in response to a query for "1-800 Contacts" (as is the acknowledged strategy of 1-800 Contacts),[25] then Dr. Van Liere's conclusion regarding confusion is unreliable.[26] Notably, in excluding an ad for 1-800 Contacts from his test, Dr. Van Liere not only disregarded the "real world," he also removed an obvious alternative explanation for any resulting consumer "confusion" in his test condition. *See Simon Property Group LP v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2000) (survey excluded where mock-up webpage "distort[ed] the experience by removing the additional information available to help [Internet users] sort through those results," noting that "[t]he obvious effect of these distortions would be to exaggerate any confusion that might be detected, which thoroughly undermines the reliability of the surveys"). 1-800 Contacts' own trademark expert Howard Hogan testified regarding a Bing study that demonstrated that, **{**[redacted]**}** This study suggests that **{**[redacted]

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[25] *See* CC Br. at 153 & n.486 (citing 1-800 Contacts documents and testimony for proposition that 1-800 Contacts always bids enough to ensure that its advertisement appears at the top of the SERP for any search for "1-800 Contacts" or a variation thereof).

[26] *See* Van Liere Tr. 3222 ("I would have no way to know for sure if it would or would not change my results because I didn't test that.").

[redacted]}[27] Dr. Van Liere concedes that, in a world in which 1-800 Contacts' ad appears on the SERP (*i.e.*, the real world), his survey is worthless, because it failed to test whether consumers would be confused in the presence of a 1-800 Contacts ad.[28] For this reason alone, the Court should not credit Dr. Van Liere's testimony or report.[29]

Memorial Eye {[redacted]}. 1-800 Contacts references {[redacted]} instances of what it calls "evidence of actual confusion" from Memorial Eye {[redacted]}[30] Even assuming that {[redacted]}[31] is evidence of only *de minimis* confusion. Courts have routinely held that a stray handful of

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[27] Hogan, Tr. 3342-2244, *in camera*; RX0734 at 089 (¶ 132) (Hogan Expert Report), *in camera*.

[28] Van Liere, Tr. 3222 ("I would have no way to know for sure if it would or would not change my results because I didn't test that.").

[29] Complaint Counsel's Post-Trial Brief highlights multiple additional problems with both the design and the sloppy implementation of Dr. Van Liere's survey. CC Br. at 156-157 & n. 498. *See also* CX8011 at 010-027 (¶¶ 20-34) (Jacoby Rebuttal Expert Report) (describing multiple problems with Dr. Van Liere's survey, controls, and data collection).

[30] Holbrook, Tr. 1950-1951, 1957, *in camera*.

[31] Holbrook, Tr. 1957, *in camera*.

anecdotal examples are not sufficient to establish likely confusion. *See*, *e.g.*, *Hornady Mfg Co. v. Doubletap, Inc.*, 746 F.3d 995, 1005 (10th Cir. 2014) ("Even assuming that the three instances cited by [the plaintiff] constitute some evidence of actual confusion, we agree with the district court's assessment that a handful of instances over the ten years in which [the defendant] was in the market constitute *de minimis* evidence of a likelihood of confusion."); *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1150-51 (10th Cir. 2013) (recognizing "that isolated, anecdotal instances of actual confusion may be *de minimis* and may be disregarded in the confusion analysis. What is required for a claim of trademark infringement under the Lanham Act is a likelihood of confusion, not merely the possibility of confusion," and rejecting four instances of confusion cited by plaintiff as "isolated episodes with minimal probative value on whether reasonable consumers as a whole are actually confused"); *Nora Bevs., Inc. v. Perrier Grp. Of Am.*, 269 F.3d 114, 124 (2nd Cir. 2001) ("[W]e do not believe that the district court erred in finding that two anecdotes of confusion over the entire course of competition constituted *de minimis* evidence insufficient to raise triable issues."); *Checkpoint Sys. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 298-99 (3d Cir. 2001) ("We agree with the District Court that [approximately 20 instances of] . . . initial interest confusion (*i.e.*, the handful of e-mails and other anecdotal evidence of mistaken consumer inquiries) was de minimis when viewed in light of the length of time the parties operated together in the United States without significant evidence of confusion.").

In any event, {[redacted]

[redacted]}[32] {[redacted]}[33] {[redacted]},[34] {[redacted]}

Further, 1-800 Contacts' contention that Memorial Eye {[redacted]} (Resp. Br. at 50) is incorrect. Eric Holbrook, general manager of Memorial Eye, testified that Memorial Eye had a general policy of always clearly identifying itself to any

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[32] RX1775 at 0001, *in camera* [redacted]}; RX1776 at 0001, *in camera* {[redacted]}.

[33] RX1774 at 0001, *in camera* {[redacted]}; RX1777 at 0001, *in camera* {[redacted]}.

[34] RX1777, *in camera.*

[35] *See* RX1775, *in camera* {[redacted]}; RX1776, *in camera* {[redacted]}.

[36] Holbrook, Tr. 1957, *in camera.*

customer, including over email and in its advertisements.[37] 1-800 Contacts' claim that Memorial Eye's policy was {[redacted]} is wholly inconsistent with Mr. Holbrook's testimony (indeed, the testimony cited by 1-800 Contacts provides no support for 1-800 Contacts' assertion),[38] nor is it reliable, because, as described above, the evidence of any such confusion is *de minimis*.

Anindya Ghose. Dr. Ghose did not proffer any opinion regarding consumer confusion in his expert report. Nor is Dr. Ghose qualified to proffer any such opinion: he is an economist who was retained to analyze the impact of the Bidding Agreements on competition.[39] Thus, the Court should reject 1-800 Contacts' *post-hoc* attempt to rely on Dr. Ghose's report to buttress its unsupported assertions regarding consumer confusion. Resp. Br. at 50.

In any event, Dr. Ghose's testimony that consumers who search for 1-800 Contacts trademark terms convert at higher rates on 1-800 Contacts' website than on the websites of its rivals does not show that consumers are confused. Dr. Ghose himself explained that this difference in conversion rates "supports the inference that consumers who clicked on other retailers' ads might have done so by mistake . . . *or* might have preferred the experience of shopping on 1-800 Contacts' website."[40] In other words, Dr. Ghose has no idea why the conversion rates for consumers clicking on 1-800 Contacts' website in response to searches for

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[37] Holbrook, Tr. 1912-1914 (Memorial Eye "always" disclosed its name in any ads it placed); *id*. at 1952-1953, *in camera* {[redacted]}.

[38] *See* CX9024 (Holbrook, Dep. at 213-214), *in camera*.

[39] *See generally* RX0733 at 006-007 (Section III, "Summary of Opinions") (Ghose Expert Report).

[40] RX0733 at 0049 (¶ 109) (Ghose Expert Report) (emphasis added).

1-800 Contacts are higher than for consumers who click on other retailers' websites. He speculates that *maybe* consumers are confused, or *maybe* consumers are not confused at all; they simply like to comparison shop. Contrary to 1-800 Contacts' assertion (Resp. Br. at 50), Dr. Ghose's report provides no evidence of confusion in this case.

2. Complaint Counsel's Expert Testimony On Consumer Confusion Is Admissible, Reliable, And Should Be Credited By This Court

Complaint Counsel satisfies its burden in this case without offering *any* evidence disputing 1-800 Contacts' assertion that trademark advertising by its competitors is "confusing." To be clear, and contrary to 1-800 Contacts' assertion, Complaint Counsel need not offer any evidence demonstrating the "unlikelihood" of confusion to "refute" 1-800 Contacts' trademark infringement theory. *See* Resp. Br. at 55. This is because, as discussed above, even if the rival advertisements 1-800 Contacts challenged in its litigations *were* confusing (of which there is no evidence), 1-800 Contacts' Bidding Agreements are substantially overbroad relative to the goal of reducing such confusion. *See supra* pp. 18-19.

Moreover, it is settled law that keyword bidding, on its own, cannot result in confusion. *See Amazon*, 804 F.3d. at 937-39 (granting summary judgment for defendant based on the content of the ad, which was "clearly labeled" as to the source of the product); *Lens.com*, 755 F. Supp. 2d at 1173-74 (holding that the use of trademark keywords, divorced from the text of the resulting ads, could not result in a likelihood of confusion), *aff'd*, 722 F.3d 1229; *Netscape*, 354 F.3d. at 1030 & 1025 n.16 (holding that Netscape could be held liable for selling the trademark term "Playboy" to rival internet advertisers where the ads that Netscape displayed were not labeled with the name of the rival advertiser, but excluding from its holding any advertisement that "clearly identified its source" in the text of the ad); *USA Nutraceuticals Group*, 165 F. Supp.

3d at 1266 ("[T]he use of a keyword encompassing a competitor's terms does not necessarily produce an infringing advertisement; it is the content of the advertisement and/or the manner in which the mark is used that creates initial interest confusion.").

Nevertheless, Complaint Counsel has proffered substantial evidence that the mere placement of an advertisement by a rival in response to a consumer search for "1-800 Contacts" is *not* likely to confuse consumers. Complaint Counsel's evidence is credible and reliable. Importantly, it is also entirely consistent with the conclusions of both trademark courts and the search engines.[41]

a. Professor Tushnet Is Qualified to Testify Regarding Legal Standards and Evidence Relating to Trademark Infringement, Including Consumer Behavior Studies

Complaint Counsel offers Professor Tushnet as a rebuttal expert to rebut the suspect conclusions of 1-800 Contacts' experts, mainly Howard Hogan, a trademark lawyer,[42] and Ronald Goodstein, a marketing professor.[43] 1-800 Contacts complains that Complaint Counsel proffers Professor Tushnet as a "confusion" expert. Resp. Br. at 50. This is not true. Professor Tushnet's testimony was offered to clarify the standards used by trademark courts in evaluating infringement claims, in direct rebuttal to erroneous opinions offered by Mr. Hogan and Professor Goodstein.

1-800 Contacts challenges Professor Tushnet's rebuttal of Professor Goodstein's assertions regarding the published literature related to trademark infringement issues. *See* Resp.

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[41] *E.g.*, CX0582 at 001, *in camera* [redacted]}.

[42] *See* RX0734 at 006 (¶11) (Hogan Expert Report).

[43] *See* RX0736 at 003 (¶ 1) (Goodstein Expert Report).

Br. 50-51.[44] To be clear, Professor Tushnet approaches the literature from a legal perspective, making observations both about the types of confusion recognized by trademark courts and the types of evidence supporting such findings.[45] As part of this approach, Professor Tushnet naturally described the empirical studies, in the course of demonstrating why the studies on which Professor Goodstein relies do not provide evidence of the type that would support a finding of trademark infringement. This is not different from Mr. Hogan, a trademark lawyer, citing an internal Bing study in his report as the type of evidence a court might accept for the proposition that {[redacted]}[46]

Professor Tushnet, who has written "the only casebook dedicated to advertising and marketing law,"[47] is fully capable of reviewing the publicly-available articles cited by Professor Goodstein and describing their relevance (if any) to advertising and marketing law. Federal Rule of Evidence ("FRE") 702 does not require experts to have a specific educational background in order to amass "specialized" knowledge in her field. FRE 702.[48] Indeed, the Advisory Notes accompanying FRE 702 expressly contemplate that an expert may be qualified through "knowledge, skill, experience, training *or* education."[49] *See Betterbox Commc'ns, Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 327 (3d Cir. 2002) (FRE 702 requires only that expert "have

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[44] *See also* CX8014 at 023-034 (¶¶ 46-72) (Tushnet Rebuttal Expert Report).

[45] *E.g.*, CX8014 at 031, 033-034 (¶ 68, ¶ 72) (Tushnet Rebuttal Expert Report).

[46] Hogan, Tr. 3342-3344, *in camera*; RX0734 at 089 (¶ 132) (Hogan Expert Report), *in camera*.

[47] CX8014 at 003 (¶ 4) (Tushnet Rebuttal Expert Report).

[48] *See* Notes of Advisory Committee on Proposed Federal Rule of Evidence 702.

[49] Notes of Advisory Committee on Proposed Federal Rule of Evidence 702 (emphasis added).

'specialized knowledge' regarding the area of testimony, which can be based on 'practical experience as well as academic training and credentials.'") (internal quotations and citations omitted); *Paoli R.R. Yard PCB Litig*., 35 F.3d 717 (3d Cir. 1994) ("We have held that a broad range of knowledge, skills, and training qualify an expert as such.").

Moreover, the standard for "specialized knowledge" is a liberal one. *Betterbox Commc'ns*, 300 F.3d at 328; *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). *See Bagher v. Auto Owners Ins. Co.*, 2014 U.S. Dist. LEXIS 39238, at *15-16 (D. Colo. Mar. 25, 2014) ("The decision to qualify someone as an expert rests not on the specific academic degree held, but on the presence of sufficient knowledge, skill, experience, training or education."); *Arias v. DynCorp*., 928 F. Supp. 2d 10, 15 (D.D.C. 2013) ("A proffered witness who does not hold a specific academic degree may be qualified as an expert if he has some degree of specialized knowledge regarding the subject or a similar topic."); *Dyson v. Winfield*, 113 F. Supp. 2d 44, 50 (D.D.C. 2000) ("It is true that Dr. Smith is not a physician. But that does not automatically render him ineligible to testify on scientific matters pertaining to the human body. Rather, the key to qualifying him as an expert is his knowledge, not his academic degree."); *Mason v. E. L. Murphy Trucking Co*., 769 F. Supp. 341, 344 (D. Kan. 1991) (rejecting defendant's argument that "only persons with a formal education in a particular field are qualified to express an expert opinion").

In many cases, lawyers with "only" JDs have been qualified as experts in other areas, based on their practical training or experience. *See*, *e.g.*, *Ruggiero v. Yamaha Motor Corp*., 2017 U.S. Dist. LEXIS 48908, at *11-12 (D.N.J. Mar. 31, 2017) (the fact that a lawyer "is not a 'human factors' expert does not mean that there is no 'specialized knowledge' he can provide to inform Plaintiff's allegations" regarding inadequate warnings); *Cary Oil Co. v. MG Ref'g & Mktg., Inc*., 2003 U.S. Dist. LEXIS 6150, at *16 (S.D.N.Y. Apr. 11, 2003) (holding that "a professor of law at one of the nation's most esteemed law schools who teaches exclusively on matters involving corporations and who has lectured and published extensively on matters of corporate governance" is qualified to provide testimony regarding corporate governance issues).

Here, as Professor Tushnet testified, she has researched and written extensively on marketing and advertising law, and regularly teaches these subjects.[50] Moreover, as part of her professional obligations, Professor Tushnet regularly surveys, reviews, and contributes to studies relating to consumer behavior.[51] For example, Professor Tushnet reviewed and provided commentary to the Franklyn & Hyman study[52] cited by Professor Goodstein in his expert report[53] and discussed by Professor Tushnet in her own expert report.[54] Indeed, Franklyn & Hyman revised their study as a result of Professor Tushnet's comments on their original work.[55] Presumably, Franklyn & Hyman felt that Professor Tushnet was "qualified" enough to contribute to their study, even though 1-800 Contacts asserts that she is not "qualified" enough to discuss it in this matter. *See* Resp. Br. at 50-51. Professor Tushnet's extensive experience and academic

[50] *See* CX8014 at 003-004 (¶¶ 3-5) (Tushnet Rebuttal Expert Report); Tushnet, Tr. 4373-4392.

[51] Tushnet, Tr. 4432, 4434.

[52] David J. Franklyn & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?*, 26 HARV. J.L. & TECH. 481 (2013) ("Franklyn & Hyman").

[53] RX0736 at 081 (List of Materials Considered) (Goodstein Expert Report).

[54] CX8014 at 025-028 (¶¶ 52-53, 57-60) (Tushnet Rebuttal Expert Report).

[55] Tushnet, Tr. 4434.

work in marketing and advertising, including in the area of consumer behavior, more than qualifies her as an expert in this area.

b. Professor Jacoby's Testimony Is Credible, Reliable, and Consistent With Other Evidence

Professor Jacob Jacoby testified, based on the survey he conducted, that confusion resulting from the mere appearance of a rival ad in response to a search for the trademark term "1-800 Contacts" (or similar variations thereof) is *de minimis*.[56] Specifically, using mock-ups of a Google SERP (for both 2016 and pre-2016 conditions),[57] Professor Jacoby tested potential buyers of contact lenses for three separate types of confusion: source, sponsorship, and affiliation.[58] After typing the search term "1800contacts" (in the test condition) or the search term "contact lenses" (in the control condition), online users were shown an identical SERP, with the naturally-occurring organic links, along with real-world advertisements for 1-800 Contacts and several of its competitors. All users were then tested for confusion as to source, confusion as to sponsorship, and confusion as to affiliation.[59] Professor Jacoby found that there was *de minimis* confusion overall, and *de minimis* confusion as to each of the three types of confusion, measured separately.[60]

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[56] Jacoby, Tr. 2130; CX8008 at 008-010 (Principal Findings and Opinions) (Jacoby Expert Report).
[57] Over time, Google has made some changes to its SERP. However, the general advertising format (ads on the top and right-hand-side of the SERP) remained consistent until 2016. In February 2016, Google changed its ad layout format, from a maximum of three ads at the top of the SERP and a maximum of eight ads on the right-hand-side of the SERP, to a maximum of four ads at the top of the SERP, a maximum of three ads at the bottom of the SERP, and *no* ads on the right-hand-side of the SERP. *Id*. at 007 n. 3.

[58] CX8008 at 007-008 (Jacoby Expert Report). By contrast, Dr. Van Liere tested only source and affiliation confusion. RX0735 at 003 (¶ 1) (Van Liere Expert Report).

[59] CX8008 at 007-008 (Principal Findings and Opinions) (Jacoby Expert Report).

Although 1-800 Contacts offers several insubstantial criticisms of Professor Jacoby's survey, it is important to note that Professor Jacoby's conclusions are entirely consistent with prior studies by Google on this issue,[61] as well as with substantial court precedent finding that confusion from keyword bidding is highly unlikely, including in a lawsuit brought by 1-800 Contacts itself. *See Lens.com*, 755 F. Supp. 2d at 1181-82.

Nevertheless, 1-800 Contacts asserts that the survey proffered by Professor Jacoby is "unreliable." Resp. Br. at 51. As a threshold matter, 1-800 Contacts criticizes Professor Jacoby because his surveys have been rejected in four cases, and criticized in "almost 20" cases. Resp. Br. at 51. Of course, 1-800 Contacts fails to note the denominator of its fraction; Professor Jacoby's surveys have been accepted in some 200 other cases, and he has designed more than 1,000 surveys over his career.[62] To the extent that 1-800 Contacts wishes to track Professor Jacoby's win-loss record (using 1-800 Contacts' math, roughly two percent of Professor Jacoby's surveys evaluated by courts over 37 years have been excluded), Professor Jacoby's "wins" overwhelmingly dominate the handful of critiques he has received over his more than 40-year, highly-regarded career.

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[60] CX8008 at 008-010 (Principal Findings and Opinions) (Jacoby Expert Report). Courts have uniformly found that levels of confusion below 10 percent are *de minimis*. Many courts rely on a higher threshold of 15 percent. *Id*. at 010 & n. 12-13. Professor Jacoby found overall levels of confusion to be 1.1 percent on the pre-2016 format and 6.1 percent on the 2016 format, both well below the accepted standards for *de minimis* confusion. *Id*. at 008-009. Measuring source confusion separately, Professor Jacoby found levels of 1.9 percent on the pre-2016 format and 3.8 percent on the 2016 format. Measuring affiliation confusion separately, Professor Jacoby found levels of 1.5 percent on the pre-2016 format and 2.9 percent on the 2016 format. Measuring sponsorship confusion separately, Professor Jacoby found 0 percent on the pre-2016 format and 0.4 percent on the 2016 format. *Id*. at 009-010.

[61] *E.g.*, CX0582 at 001, *in camera* [redacted].

[62] Jacoby, Tr. 2134-2135.

Indeed, Professor Jacoby literally "wrote the book" on trademark surveys: in 2013, at the invitation of the American Bar Association, Professor Jacoby wrote the seminal treatise, *Trademark Surveys*, which instructs "how to design, implement and conduct trademark surveys."[63] He has also written numerous other books and close to two hundred articles.[64] In addition, Professor Jacoby teaches consumer behavior and research methods (including survey methodology) at New York University, where he has held an endowed chair since 1981.[65] Over the course of his lengthy career, Professor Jacoby has won numerous grants and awards; he is the most cited researcher in the seminal trademark treatise, MCCARTHY ON TRADEMARKS;[66] and he was recently recognized as one of "five legends in the field of consumer behavior."[67] In short, Professor Jacoby is "one of the most experienced trademark survey experts of all time."[68]

1-800 Contacts offers four criticisms of the survey Professor Jacoby conducted in this matter. First, 1-800 Contacts asserts that Professor Jacoby's test SERP did not replicate "marketplace conditions" because he used a real-world SERP for the search "contact lenses," and used the identical SERP for users who searched for "1-800 Contacts." Resp. Br. at 52. This criticism highlights 1-800 Contacts' fundamental misunderstanding of proper survey design,

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63 Jacoby, Tr. 2132.

64 CX8008 at 074-091 (App. A2) (Jacoby Expert Report).

65 Jacoby, Tr. 2132, 2137.

66 CX8008 at 061 (App. A1) (Jacoby Expert Report).

67 Jacoby, Tr. 2135-2136.

68 Eric Goldman, "FTC Explains Why It Thinks 1-800 Contacts' Keyword Ad Settlements Were Anti-Competitive – FTC v. 1-800 Contacts," *Technology & Marketing Law Blog*, Apr. 18, 2017, available online at http://blog.ericgoldman.org/archives/2017/04/ftc-explains-why-it-thinks-1-800-contacts-keyword-ad-settlements-were-anti-competitive-ftc-v-1-800-contacts.htm. By way of contrast, Dr. Van Liere has no academic experience, nor has he published or contributed to any books, written for any peer-reviewed journals, or edited any academic treatises in the past 15 years. Van Liere, Tr. 3160.

which dictates that the test and control stimuli "share as many characteristics . . . as possible, *with the key exception* of the characteristic whose influence is being assessed."[69] As described earlier, here the issue that needed to be tested is whether, having typed in the search term "1-800 Contacts," consumers are confused into thinking that clicking on one or more of the resulting ads will take them to the website for 1-800 Contacts, or that the operators of one or more of the ads (other than one for 1-800 Contacts) is affiliated with, or sponsored by, 1-800 Contacts.[70]

In order to answer this question, Professor Jacoby properly isolated the single variable – the search term – whose "influence [was] being assessed,"[71] and kept the SERPs identical. *See GEICO*, 2005 WL 1903128 at *5 (criticizing survey testing likelihood of confusion stemming from keyword bidding, where survey expert did not use different search terms for control and test conditions). Only in showing identical SERPs to users who typed in different search terms could Professor Jacoby properly test the question of whether a user who types in "1-800 Contacts" as the search term expects only search results relating to 1-800 Contacts and is, therefore, confused by unrelated search results. Indeed, the causal link between the two propositions could not be established in any other fashion.[72] Thus, maintaining identical SERPs for both the test and control groups was critical to conducting a proper survey.

With this understanding as background, it becomes obvious why Professor Jacoby could not properly use two different SERPs (one with results in response to a real-world search for

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[69] Diamond, *Reference Guide on Survey Research* at 399 (emphasis added).
[70] CX8011 at 008 (¶ 13) (Jacoby Rebuttal Expert Report).

[71] Diamond, *Reference Guide on Survey Research* at 399.

[72] *See* CX8008 at 014-015 (Design Overview) (Jacoby Expert Report); CX8011 at 008-009 (¶¶ 13-15) (Jacoby Rebuttal Expert Report).

"contact lenses" and one with results in response to a real-world search for "1-800 Contacts"). This would have rendered the "control" utterly worthless, because it would have changed multiple variables on the SERP itself, eliminating any ability to "reveal which aspects" of the test SERP *caused* consumer confusion. *See GEICO*, 2005 WL 1903128 at *5.

In any event, a SERP emulating a "real-world" search for "1-800 Contacts" that aims to test whether rival ads are confusing would be impossible, because a real-world search for "1-800 Contacts" returns no rival ads. Indeed, 1-800 Contacts' own survey expert, Dr. Van Liere, also had to "mock up" his test SERP to include ads that would not otherwise appear in real-world search results for "1-800 Contacts" today, precisely because 1-800 Contacts' Bidding Agreements prevent them from appearing. *See* Resp. Br. at 47 n. 8. Plainly, as both Professor Jacoby and Dr. Van Liere understood, some departure from "marketplace conditions" was necessary to test the relevant question.

Additionally, 1-800 Contacts asserts that Professor Jacoby "failed to replicate marketplace conditions" by using a pre-2016 test stimulus in one of his tests. Resp. Br. at 53. As described earlier, Professor Jacoby conducted two separate tests (one on a 2016 SERP layout; and one on a pre-2016 SERP layout), each of which may stand alone, and both of which inform Professor Jacoby's ultimate conclusion that consumers are not confused by the mere presence of ads in response to searches for "1-800 Contacts." Thus, even assuming that the testing of consumers on a pre-2016 test stimulus offers no additional insight into consumer behavior (Professor Jacoby believes that it does), the Court may simply disregard it. Professor Jacoby's test based on his 2016 test stimulus results in the same conclusion.[73]

[73] Jacoby, Tr. 2351; CX8008 at 008-010 (Principal Findings and Opinions) (Jacoby Expert Report).

In any event, as Professor Jacoby testified, the pre-2016 test stimulus does add value in this particular context. This is because "that portion of [Professor Jacoby's] survey tested the way the world existed for many years prior to February 2016, *which constitutes the majority of the time 1-800 [Contacts'] challenged agreements were in force*, and under the specific circumstances in which 1-800 [Contacts] challenged its rivals' ads."[74] In February 2016, Google stopped showing ads on the right-hand side of the page. Although other SERP changes have been made by Google over the years, until February 2016, Google consistently showed ads on the right-hand-side of the SERP. Thus, using a pre-2016 mock-up was a "belt-and-suspenders" approach to testing consumer confusion: not only could Professor Jacoby confidently conclude that consumers were not confused by ads displayed in response to 1-800 Contacts searches when they were at the top of the SERP; he could also confidently conclude that they were not confused by ads were displayed in response to 1-800 Contacts searches when they were on the right-hand side of the SERP.[75]

1-800 Contacts' assertion that, between 2007 and 2016, other minor SERP changes were made by Google, is irrelevant. *See* Resp. Br. at 53. Professor Jacoby was not testing consumers' responses to those other changes; he was testing consumers only as to their understanding of ads appearing on the right-hand-side of the SERP, which remained consistent for more than a decade, until February 2016.

Second, 1-800 Contacts criticizes Professor Jacoby for using "green arrows" to highlight the particular ad he was asking the respondent about, when he asked: "If you click on *this* listing,

[74] CX8011 at 029 (¶ 27) (Jacoby Rebuttal Expert Report) (emphasis added).

[75] CX8008 at 007 & n.3, 0015 (Principal Findings and Opinions; Design Overview) (Jacoby Expert Report).

which company's website will it take you to?" Resp. Br. at 53 (emphasis added). As a threshold matter, the first screen shot that all respondents saw was a SERP, containing all of the organic links and advertisements, as they actually appeared on the SERP. For every single respondent in both the test and control groups, upon first encountering the SERP, there were no arrows pointing to any listing.

However, as each respondent moved through the survey, in order to determine whether the use of "1800contacts" as a search term or any particular ad was responsible for consumer confusion, "it was imperative [to] test whether *each* of the sponsored links was likely to cause confusion. . . ."[76] Thus, after each respondent had an opportunity to examine the SERP in its "pristine format," arrows appeared pointing to one of seven ads in order to identify *that link* as the one the respondent was being asked about. None of the links were diminished or augmented; the ad being asked about was simply identified so the focus of the question was clear. As Professor Jacoby states in his report: "This is comparable to having an interviewer in an in-person survey point to and/or verbally indicate which sponsored link was the focus of his question."[77] This is a widely accepted survey practice.[78] 1-800 Contacts points to no authoritative source to the contrary.

Instead, 1-800 Contacts relies upon two wholly inapposite surveys conducted in prior cases to criticize Professor Jacoby's use of a pointing mechanism. Resp. Br. at 54. Neither of

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[76] CX8011 at 032 (¶ 44) (Jacoby Rebuttal Expert Report) (emphasis in original).

[77] CX8011 at 032 (¶ 44) (Jacoby Rebuttal Expert Report).

[78] *E.g.*, Expert Report of Dr. Itamar Simonson at ¶ 37, *Am. Airlines, Inc. v. Google, Inc.*, No. 4:07-cv-00487, ECF No. 85 (N.D. Tex. Jul. 3, 2008) ("The interviewer told the respondent, 'Now I would like to ask you about some of the listings on this page.' Then, pointing to the sponsored listing at the top, the interviewer asked the following set of questions. . . .").

these surveys has any similarity at all to the survey Professor Jacoby conducted here. In the first survey, a disclosure identifying the advertiser was *artificially added* to the advertisement in question. *Quality Inns Int'l v. McDonald's Corp*., 695 F. Supp. 198, 219 (D. Md. 1988). The court expressly criticized this point in the very portion of its discussion cited by 1-800 Contacts (*id*. at 219 ("In none of [the real-life] usages is the qualifying language [that was "prominently added" to the mock-up of the ad] included.")), although 1-800 Contacts conveniently omits this explanation in its brief. *See* Resp. Br. at 54. This case is not at all on point, since it is undisputed that Professor Jacoby used real-world advertisements that, in many instances, were actually challenged by 1-800 Contacts in its complaints against rivals.[79] 1-800 Contacts does not contend (nor could it) that Professor Jacoby augmented or changed the content of these ads in any way; he certainly did not add "prominent[]" disclosures to the ads that did not exist in the real world. *See Quality Inns*, 695 F. Supp. at 219. (Although it is unfortunate for 1-800 Contacts' theory of confusion that, unlike the ads sponsored by Quality Inns in the case it cites, the ads challenged by 1-800 Contacts in this case clearly identify their sponsors.)

The second survey cited by 1-800 Contacts is equally inapposite. In that survey, respondents were "asked to pretend" that a particular SERP was "of interest and to act accordingly (looking at the page and scrolling through it as the respondent would 'normally' do) and then was directed to scroll down the page, below the first screen, and click on a specific . . . link. The respondent was *not asked what message he or she took from the website* or whether the website was in fact of interest." *Smith v. Wal-Mart Stores, Inc*., 537 F. Supp. 2d 1302, 1327 (N.D. Ga. 2008) (emphasis added). By contrast, in the survey Professor Jacoby conducted here,

[79] *See* CX8008 at 005, 007 & n.2 (Principal Findings and Opinions) (Jacoby Expert Report).

the only question asked about each listing was "*what message* he or she took from the [listing]." *See id*. at 1327 (emphasis added). Specifically, Professor Jacoby asked: "If you click on this listing, *which company's website* will it take you to?"[80] There was no suggestion that any respondent would be interested in any particular listing, nor any direction to click on or to follow that listing, nor any request that the respondent "pretend" that he or she was interested in clicking on that listing. *See Smith*, 537 F. Supp. 2d at 1327. In short, the grounds on which the survey in *Wal-Mart* was criticized – in that it assumed that "all consumers" would be interested in clicking on the same listing for one particular product (*id*. at 1327) – provides no support for criticizing Professor Jacoby's survey in this matter, in which no assumptions were made at all. To the contrary, consistent with the *Smith* court's view on how the survey should have been conducted, here, respondents were asked what *they* thought about a particular listing, not asked to "pretend" that they thought anything in particular. *See id*.

Third, 1-800 Contacts asserts that Professor Jacoby's primary question – "If you click on this listing, which company's website will it take you to?" – "functioned as a 'reading' test." Resp. Br. at 54. As a threshold matter, all tests are, by definition, either "reading" tests or "memory" tests; "there are no other possibilities."[81] As Professor Jacoby explained, if the stimulus is left in front of the respondent when the question is being asked – as was the case in the surveys conducted by both Professor Jacoby and Dr. Van Liere, and of course, as is the case in the real-world when a consumer views a SERP – it is, by definition a "reading test."[82]

[80] CX8008 at 435-440 (App. H) (Jacoby Expert Report) (emphasis added).

[81] CX8011 at 033 (¶ 46) (Jacoby Rebuttal Expert Report).

[82] *See* CX8011 at 033 (¶ 46) (Jacoby Rebuttal Expert Report).

In any event, Professor Jacoby did not ask the respondents to "read" anything; he simply asked the respondents what would happen if they clicked on a particular listing.[83] Presumably, respondents looked at (and read) the advertisements, in the same way that consumers generally look at (and read) the advertisements after entering a search query. (If 1-800 Contacts' complaint is that Professor Jacoby did not blindfold respondents and ask them to click on listings haphazardly, it is correct that Professor Jacoby did not do so.) Notably, under 1-800 Contacts' theory of the case, every respondent should have answered that every listing would take him or her to "1-800 Contacts," because, under 1-800 Contacts' theory, consumers simply assume that all ads appearing in response to a search for "1-800 Contacts" are related to 1-800 Contacts. *See supra* pp. 26, 27, 31-32 & n. 22. Certainly, that consumers can tell the difference between ads for 1-800 Contacts and ads for its rivals is problematic for 1-800 Contacts' trademark infringement theory; but that does not turn the survey question into an unfair "reading" test.

1-800 Contacts' criticism further ignores the fact that Professor Jacoby's control condition differed from Dr. Van Liere's control condition. Specifically, Professor Jacoby's control group respondents typed the generic term "contact lenses." Thus, Professor Jacoby could not have framed the question in the same manner, *i.e.*, "Would this link take you to the company you searched for?," because these respondents did not type in the name of any company. And Professor Jacoby could not ask different questions of his test and control groups, as this would have introduced a new variable into the study, "thereby rendering test and control group comparisons questionable at best."[84]

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[83] Jacoby, Tr. 2203.

[84] CX8011 at 034 (¶ 47) (Jacoby Rebuttal Expert Report).

Fourth, 1-800 Contacts asserts, without any explanation, that Professor Jacoby used the wrong control for his test group. Resp. Br. at 55. But, as described above (*see supra* pp. 46-47), Professor Jacoby used the only possible control that a proper survey could employ to test the question central to all of 1-800 Contacts' underlying complaints: whether a consumer entering a search query for "1-800 Contacts" expects to see only ads for 1-800 Contacts, and will therefore be confused by ads for firms other than 1-800 Contacts.[85]

If 1-800 Contacts' confusion hypothesis were correct, one would expect that consumers who were not confused by ads displayed in response to a generic search query, like "contact lenses," would be confused by those *same ads* when they were displayed in response to a search query for "1-800 Contacts." Of course, as Professor Jacoby's study shows, 1-800 Contacts' hypothesis is not correct: consumers were, by and large, no more confused by ads for rivals appearing in response to the search term "1-800 Contacts" than in response to the search term "contact lenses," demonstrating that 1-800 Contacts' theory of trademark infringement is invalid.[86]

In sum, Professor Jacoby, one of the leading survey experts in the United States, conducted a scientifically sound survey, and offered a credible and reliable opinion that confusion arising from the mere placement of rival advertisements in response to a search for "1-800 Contacts" is *de minimis*. That Professor Jacoby's survey is wholly consistent with the

[85] By contrast, Dr. Van Liere – who used the wrong control (and moreover, did not control for *any* single variable), as described above (*supra* pp. 31-34) – could not possibly answer that question.

[86] *See* CX8008 at 008-010 (Principal Findings and Opinions) (Jacoby Expert Report).

conclusions of trademark courts across the United States, and with Google's own internal studies on the issue,[87] lends further credence to his conclusions.

D. The "Choice Overload" Defense Is Without Merit; The Bidding Agreements Do Not Reduce Search Costs

Assume that a consumer's search query contains a 1-800 Contacts trademark. In a market unconstrained by the Bidding Agreements, the search engines would likely place at the top of the SERP four useful and relevant advertisements, followed by several thousand organic links. *See* CC Br. at 10-13 (describing Google's process of evaluating information based on consumer feedback). With the Bidding Agreements, the search engines commonly place at the top of the search results page a single ad for 1-800 Contacts, followed by several thousand organic links.[88]

According to 1-800 Contacts, the Bidding Agreements (resulting in one mainline ad) benefit consumers because the alternative (four mainline ads) presents consumers with too many choices; the cost of perusing these ads makes consumers "unhappy," a phenomenon referred to as "choice overload." Resp. Br. at 58-59. Below, we explain that this argument lacks both a sound theoretical basis and evidentiary support. Indeed, 1-800 Contacts' expert Dr. Ghose pointedly declined to opine that the reduction in the number of search advertisements forced by the Bidding Agreements *in this case* benefits consumers, enhances efficiency, is good for

[87] *E.g.*, CX0582 at 001, *in camera* {[redacted]}.

[88] *E.g.*, CX8007 at 010 (Figure 2) (Athey Expert Report) (Google SERP showing search results for 1-800 Contacts, featuring ad for 1-800 Contacts and multiple organic listings); CX8011 at 056-057 (App. K) (Jacoby Rebuttal Expert Report) (same); RX0733 at 0156 (App. D1) (Ghose Expert Report) (same).

competition, or promotes welfare.[89] But, before delving into the details, it is important to point out that, even if the "too much choice" theory were applicable to the facts of this case, it would not be a viable antitrust defense to the Bidding Agreements for two reasons. First, reducing consumer choice is not a cognizable defense. Second, the claim that horizontal collusion is necessary to improve the quality of a non-consenting third party's product is not a cognizable defense.

Are there too many restaurants in Washington, D.C.? Too many teeth whiteners in North Carolina? Too many salad dressings on the supermarket shelf? If there are too many choices, then the competitive process will weed out the least efficient suppliers and the least desired alternatives. 1-800 Contacts' counterproposal – that rivals may step in, collectively decide when there are too many choices in the marketplace, and then act in concert to exclude the excess – is antithetical to the antitrust laws. What is contemplated is not a refinement of the competitive process but rather a wholesale rejection of free market principles. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) (profusion of varied consumer options is pro-competitive); *Am. Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 574 (1982) (concerted exclusion of competitor is "repugnant to the antitrust laws"). As the Supreme Court has instructed, "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Prof'l Eng'rs*, 435 U.S. at 696.

A similar defense was rejected in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), where major oil refiners agreed to buy and remove from the market the oil of smaller

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[89] CX9046 (Ghose, Dep. at 238) (did not analyze effect on consumers); *id*. at 69-70 (did not analyze effect on efficiency); *id*. at 6 (did not analyze effect on competition); *id*. at 226 (did not analyze effect on consumer welfare).

refiners in order to remedy a perceived oversupply. The Court refused to consider the oil companies' contention that reducing the supply of oil benefitted consumers:

> Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Id. at 220-21. Just as antitrust courts should not entertain the defense that the market has too much supply, they should not assess whether markets offer consumers too much choice.[90]

1-800 Contacts has cited no case in which avoiding excess choice was treated as a legitimate antitrust defense. In contrast, there are a myriad of cases in which conduct that *expands* consumer choice is judged to be procompetitive and pro-consumer.[91] And there are a myriad of cases in which conduct that diminishes the alternatives offered to consumers is condemned as anticompetitive and anti-consumer.[92]

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[90] The leading antitrust treatise concludes that courts should reject any defense to a horizontal restraint premised on a reduction in the transaction costs of operating the competitive system itself. Areeda & Hovenkamp ¶1907c. The treatise identifies as examples of such non-cognizable defenses the cost-savings *incurred by sellers* by restricting bids or by restricting advertising. "The reason is that communicating information to consumers about a market's competitive offerings is an essential component of competition." *Id*. This analysis applies in full to the cost savings *incurred by consumers* when evaluating bids or when evaluating advertising (the defense advanced here by 1-800 Contacts). "Our entire market system is built on the premise that these costs are worth their price in the great majority of circumstances. Further, a rule that permitted judicial consideration of claimed cost reductions would be often asserted, extremely expensive to administer, and prone to the production of many errors; and it would free only a small number of defendants from liability." *Id*.

[91] *E.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) (resale price maintenance is potentially procompetitive because it has "the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between"); *BMI*, 441 U.S. at 21-22 (agreement among copyright holders potentially procompetitive because it creates a new and different product).

1-800 Contacts' excess choice defense is legally deficient for a second reason as well. The underlying issue here is not only how many ads will appear on the SERP, but importantly, *who* should decide. 1-800 Contacts prefers to be the only ad on the SERP when the consumer's query includes a 1-800 Contacts trademark, a form of exclusivity. The search engines formerly afforded exclusivity to 1-800 Contacts and other trademark owners. However, over a decade ago, Google determined that this was an inefficient use of *its* assets. As search engines are multi-sided advertiser-supported platforms, this judgment took into account the interests of consumers as well as the interests of advertisers.[93] For queries that include "1-800 Contacts," the search engines opened their search advertising auctions and the SERP to competing bidders, including competing online sellers of contact lenses.

1-800 Contacts responded by conspiring with competitors to withhold bids, thereby implementing *its* preference concerning the design of the SERP. But 1-800 Contacts' view that this conspiracy improves the quality of the Google (or Bing) SERP for consumers does not constitute a defense to antitrust liability. Antitrust courts categorically reject the argument that horizontal restraints somehow improve the efficiency or quality of the non-consenting target of the challenged conduct. *E.g.*, *Superior Court Trial Lawyers*, 493 U.S. at 421-24 (where competing lawyers boycotted supplier of legal services, rejecting defense that conduct increased the quality of legal representation for indigent defendants); *Indiana Federation of Dentists*, 476

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[92] *E.g.*, *American Society of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *North Carolina State Bd. of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015); *United States v. Dentsply*, 399 F.3d 181, 194 (3d Cir. 2005).

[93] With regard to the transactions that are relevant to this case, a profit-maximizing search engine will balance the interests on the stakeholders in a manner that approximates what a social planner would do. CX8009 at 018-019 (¶ 23) (Evans Rebuttal Expert Report); *see* CX8006 at 024-025, 035 (¶ 57, ¶ 79) (Evans Expert Report). In its brief, 1-800 Contacts misconstrues the testimony of Professor Evans and Professor Athey on this issue. *See* Resp. Br. at 58.

U.S. at 462-64 (where competing dentists boycotted insurance companies, rejecting defense that conduct increased the quality of services provided by insurance companies); *Fashion Originators' Guild*, 312 U.S. at 467-68 (where manufacturers of original design dresses boycotted retailers that sold pirated garments, rejecting defense that practices protected retailers from the "devastating evil" of pirated designs).

But even if we set aside the legal presumption that an agreement to withhold bids cannot be justified as "improving" the quality of a search engine's SERP, 1-800 Contacts has failed to establish that exposure to four search ads (above the thousands of organic links) harms consumers.

1. Consumers Search For 1-800 Contacts' Trademarks For Various Reasons

Search engines match consumers to a SERP using an ocean of data, and complex and continuously evolving algorithms. *See generally* CC Br. at 10-13. 1-800 Contacts contends that the search engines do an inadequate job in serving their consumers. The search engines, we are told, misjudge or disregard the consumer's intent. Resp. Br. at 56-58. The record evidence does not support this contention.

Common sense tells us that some consumers who search for a 1-800 Contacts trademark are initially interested in navigating to the 1-800 Contacts website. Other consumers who search for a 1-800 Contacts trademark are initially interested in obtaining other information, including perhaps broader information about sellers of contact lenses.[94] Many consumers from both groups ultimately navigate to the 1-800 Contacts website.

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[94] *See* Bechtold, S. and C. Tucker, "Trademarks, Triggers and Online Search," 11 *Journal of Empirical Legal Studies* 718 (Dec. 2014) ("Bechtold & Tucker"), at 721, 726; Franklyn & Hyman at 532 (when asked, in the

Dr. Ghose posits, without evidence, that all or most of the consumers who ultimately navigate to the 1-800 Contacts website had no interest in other websites at the very start of their search. Resp. Br. at 56-57. This is merely conjecture. No one has asked a sample of consumers, "what is (or was) your initial intent?" There is no relevant data in the record on this point.

2. Ads For Competing Sellers Are Useful And Relevant To Consumers Who Search For 1-800 Contacts' Trademarks

Removing the Bidding Agreements – that is, adding advertisements for competing online sellers to the SERP – causes a significant number of consumers to shift their clicks from the 1-800 Contacts website to the websites of the competing sellers.[95] This indicates that the competing ads are useful and relevant. When consumers shift clicks from 1-800 Contacts to online rivals, there is increased competitive pressure on 1-800 Contacts to reduce its prices.[96] This indicates that the ads are useful and relevant even for consumers who continue to purchase from 1-800 Contacts. 1-800 Contacts' experience in the real world confirms this: when rivals' ads appeared in response to searches for 1-800 Contacts, those rivals' ads received clicks, and the rivals placing those ads made additional sales. *See* CC Br. at 17-19, 42-47, 81-82, 95-96.

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abstract, what consumers wished to see in response to a brand search, almost *half* responded that they wanted to see information relating to other brands, suggesting that consumers want and "intend" different things). *See also* Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381 (2009), at 411-12 (the assumption that advertising against a trademark owner's mark is "stealing" the trademark owner's customer because of "the consumer's apparently expressed interest in the trademark owner" is "unquestionably incorrect; many consumers entering a trademarked search term may not be looking for the trademark owner's goods or services").

[95] CX8007 at 026-034 (¶¶ 73-98) (Athey Expert Report); CX8006 at 101-103 (¶¶ 220-224 & Table 6) (Evans Expert Report). *See* Simonov, A., C. Nosko, and J. Rao, "Competition and Crowd-out for Brand Keywords in Sponsored Search, *Working Paper* (Sept. 8, 2016) ("Simonov") at 15 (competitor ads capture 4.3 percent of clicks per 100 trademark searches); Bechtold & Tucker at 733 (after Google policy change "there was a 9.2 percent decrease in consumers reaching the trademark owners' websites who used a search phrase that exactly matched the trademark").

[96] CX8007 at 036 (¶¶ 105-106) (Athey Expert Report); CX8006 at 103-105 (¶¶ 225-229) (Evans Expert Report); *see* Bechtold & Tucker at 732 n.22.

1-800 Contacts asserts that "the vast majority of consumers who intend to navigate to 1-800 Contacts website" will not benefit from additional ads and will suffer increased search costs. Resp. Br. at 57. This assertion is supported by no record evidence or expert testimony. 1-800 Contacts' economic expert Dr. Ghose disclaims any ability to assess whether the "vast majority" of consumers, or any specific percentage of consumers, would benefit from or be harmed by additional ads.[97] 1-800 Contacts has provided the Court with no basis to believe that "vast majority," Resp. Brief at 57, or any specific proportion of consumers with navigational intent would be harmed by exposure to additional choices.

Further, 1-800 Contacts' exclusive focus on a consumer's initial intent at the instant a search query is entered is unhelpful. Consumer intent is fluid, and may be altered by advertising. *See* CC Br. at 82-83, 138 & n. 443, 173 (describing empirical studies). Dr. Ghose, in trial testimony and in his recent book on digital advertising, commends to companies a strategy of targeting advertising to consumers who have a present intention of engaging with that company's competitors. CC Br. at 173.[98] For example, consumers standing in line at Starbucks with the *bona fide* intention of purchasing Starbucks coffee may alter their plans if they learn through advertising that a better (or cheaper) alternative is available nearby.[99] According to Dr. Ghose: "What can change people's minds? Money. Consumers are willing to trade higher transportation

[97] Ghose, Tr. 3929 ("I haven't, you know, quantified the specific proportion of people who would be harmed. All I'm saying is, based on the analysis, that a large fraction of people would not find these competing ads relevant given the trademark search"); *id*. at 3930 ("Q. And can you tell me what percentage of consumers who – who search with navigational intent are likely to experience these higher search costs? A. No.").

[98] *See* Anindya Ghose, TAP: UNLOCKING THE MOBILE ECONOMY, MIT Press (2017) ("TAP").

[99] Ghose, TAP at 70.

and search costs for receiving a deeper discount . . ."[100] And search advertising is the best mechanism available to competitors of 1-800 Contacts for informing consumers that there exist lower-price alternatives. CC Br. at 39-47 (summarizing retailer testimony). Through exposure to search advertising, consumers' intent may readily be modified (and their click and purchase behavior may change).

1-800 Contacts asserts that competitor ads are only "minimally relevant" to consumers because the competitors often rank low in the search engines' organic listings. Resp. Br. at 57-58. This makes little sense. If the website for a particular firm ranks low in the organic listings, then the ability of that firm to reach consumers through search advertising takes on added importance for both buyer and seller. The claim that consumers are harmed where the advertised content differs from the unpaid content (the organic links) is at base a complaint about advertising. (Paid ads on television and radio are different from the free programming; this is not ordinarily viewed as imposing consumer harm.) Before the Court condemns Google's advertising-based business model as guilty of inflicting "choice overload," it should consider that search advertising funds the availability to consumers of free search services.[101]

3. Ads for Competing Retailers Do Not Meaningfully Harm Consumers

According to 1-800 Contacts, the Bidding Agreements benefit consumers by reducing the number of "minimally relevant" ads on the search results page. Resp. Br. at 58-59. The principal basis for this conclusion is a brief blog post authored by a behavioral scientist at Bing. The blog

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[100] *Id*. at 77.

[101] *See* CX8009 at 019 (¶ 24) (Evans Rebuttal Expert Report):

> Professors Ghose and Murphy have presented no economic theory or empirical evidence that search engines have balanced the interests of consumers and advertisers in a socially inefficient way. It is not sufficient to show examples in which consumers could be made better off [with fewer ads] without accounting for the loss of advertising revenue that would tend to make them worse off in the long run.

post reports that "too many choices can make us unhappy." Resp. Br. at 59 (quoting RX1963 at 0001). 1-800 Contacts re-prints most of the blog post, but omits the author's critical conclusion, that search engines are aware of the literature on search overload, and design their SERPs with this in mind:

> And the reason that we think about choice overload at Bing is that sorting through options is the very essence of what a search engines does . . . . A search engine's job is to determine the few [web pages] that may be most useful; we reduce the number of choices from millions down to the few that matter most. In search technology, this is often called 'relevance,' and is something that search engines are always looking to improve . . . .[102]

And so we return to our original question: Who should decide the layout of the search engine's SERP? 1-800 Contacts and its experts provide no sound rationale for taking this prerogative from the search engines (which face market incentives to deliver relevant links and avoid distressing consumers) and handing it to 1-800 Contacts and its competitors (which face no such incentives). 1-800 Contacts fails to relate the theory of choice overload to the facts of this case.[103]

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[102] RX1963 at 0001-0002. An even more blatant misrepresentation is 1-800 Contacts' claim that, "The strategy to deal with 'choice overload'" is "choice reduction." Resp. Br. at 59. The blog post states that narrowing the set of options is not the only strategy that Bing uses to address choice overload "and help use [users] decide." RX1963 at 0002.

[103] *See* CX9046 (Ghose, Dep. at 229) (no view as to whether search engines are placing too many ads when consumers search for "1800 Contacts"); *id*. at 231-232 (no opinion as to whether consumers would benefit if control of the search results page were shifted from the search engines to 1-800 Contacts). The academic literature concerning choice overload that is cited in Dr. Ghose's report does not support the conclusion that four search ads is "too many." RX0733 at 0030-0031 (¶¶ 71-73) (Ghose Expert Report). Quincy and Silas opine that, with regard to choosing a health insurance plan, "more than fifteen choices reduces a consumer's ability to make a health plan selection in their best interest." Quincy, L. and J. Silas, "The Evidence is Clear: Too Many Health Insurance Choices Can Impair, Not Help, Consumer Decision Making," CONSUMERS UNION HEALTH POLICY REPORT (2012). George Loewenstein cautions that the costs of expanded choice may exceed benefits "when new choices require expertise that people lack, introduce new risks when people want security, and require that people predict an inherently unpredictable future." Loewenstein, G., "Is More Choice Always Better?," pp. 1-7, SOCIAL SECURITY BRIEF (1999). Dr. Ghose cites no evidence that these conditions are present when consumers choose among sellers of contact lenses. Pan cites "a recent meta-analysis on choice overload." Pan, B., L. Zhang, and R. Law, "The Complex Matter

1-800 Contacts quibbles with the search engines' decision to publish its rivals' advertisements. We are told that a consumer who is shown a rival's ad, and does not then navigate to the rival's website, suffers material harm ("increased search costs"); and that this harm must be weighed when analyzing the Bidding Agreements under the rule of reason. Resp. Br. at 58-59. This argument cannot be reconciled with the long line of cases finding that truthful advertising is presumptively procompetitive. *E.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (advertising "performs an indispensable role in the allocation of resources in a free enterprise system"). Courts do not say that advertising is procompetitive only if every member of the audience is persuaded by the advertisement. The "harm" that 1-800 Contacts posits is trivial.

To be sure, some unknown number of search engine consumers are only interested in navigating to the 1-800 Contacts website. In the but-for world, absent the Bidding Agreements, these consumers will quickly find the 1-800 Contacts link that they are looking for at the very top of the SERP.[104] The cost to these consumers of ignoring the three search ads that follow the 1-800 Contacts ad is trivial. Therefore, these consumers will be happy. Alternatively, these consumers may navigate directly to the 1-800 Contacts website (*i.e.*, may bypass the search engine altogether) by typing "www.1800contacts.com" into the navigation bar of the computer's browser or accessing the 1-800 Contacts app on a mobile device or tablet.

That these consumers sometimes prefer to use the search engine tells us that they are also interested in the contents of the SERP, or at least that they are not materially harmed by their

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of Online Hotel Choice," pp. 74-83, CORNELL HOSPITALITY QUARTERLY (2013). That study, "drawing on fifty experiments, shows there is insufficient evidence of adverse effects of increased choices." *Id*.

[104] *See* CC Br. at 153 & n.486 (1-800 Contacts' acknowledged strategy is to always bid enough to appear first on any search for its own trademarks). *See also* Simonov at 2 & n.2 (trademark owner's ad generally appears first).

exposure thereto. *See Indiana Federation of Dentists*, 476 U.S. at 463 ("there is no particular reason to believe" that consumers cannot digest the information that competition provides); *Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010) ("When a domain name making nominative use of a mark does not actively suggest sponsorship or endorsement, the worst that can happen is that some consumers may arrive at the site uncertain as to what they will find. But in the age of FIOS, cable modems, DSL and T1 lines, reasonable, prudent, and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary.") (internal citation omitted).[105]

Lastly, note that concern about excess choice played no role in the 1-800 Contacts' decision to enter into the Bidding Agreements. The fact that this argument is wholly pretextual is one more reason that the excess choice defense should be rejected. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 484 (1992) (rejecting pretextual justification for tying arrangement).

E. Bidding Agreements Did Not Increase Online Purchases of Contact Lenses

As 1-800 Contacts acknowledges, Professor Athey provided "empirical evidence" demonstrating that the Bidding Agreements reduced the number of clicks on advertisements for 1-800 Contacts' rivals and increased the number of clicks on 1-800 Contacts' own advertisements, "compared to a counterfactual world without" the Bidding Agreements. Resp. Br. at 59. Professor Athey explained that this places competitive pressure on 1-800 Contacts (CC

[105] *See also* CX8009 at 101-104 (¶¶ 193-197) (Evans Rebuttal Expert Report).

Br. at 56-60), but it is not possible to state with confidence precisely how 1-800 Contacts will respond (*e.g.*, by expanding its price match, or reducing prices across the board, or improving quality and service).

1-800 Contacts errs when it attempts to extrapolate from this evidence regarding *clicks* to its own prediction about *sales* in the counterfactual world. 1-800 Contacts inaccurately represents that Dr. Murphy provided an "analysis based on Dr. Athey's own model predict[ing] that the settlements *increased* sales of contact lenses by consumers who search for 1-800 Contacts' trademarks." Resp. Br. at 8 (emphasis in original). Dr. Murphy neither provided, nor purported to provide, any such analysis, and 1-800 Contacts' assertion to the contrary should be disregarded.

In his expert report, Dr. Murphy does not opine that the Bidding Agreements increased contact lens sales by consumers who search for 1-800 Contacts' trademarks. And at trial he expressly denied that the "analysis" in question supports 1-800 Contacts' assertion that, but for the Bidding Agreements, "consumers who search for 1-800 Contacts' trademarks would make fewer purchases" of contact lenses. Resp. Br. at 60.[106] Indeed, Dr. Murphy has candidly explained that the "analysis" which 1-800 Contacts now calls a "prediction" was an illustration of an abstract point, using illustrative rather than predictive numbers:

> [T]he effect on sales could go either way . . . *I am not saying this proves sales would go down in a but-for world*, it just says if you use the averages they go down and it illustrates my point that just having more ads you would say isn't unambiguous that it just creates more [sales]. That is all I am saying. That is what

[106] Murphy, Tr. 4235 ("Q. Now, Dr. Murphy, are you suggesting that your analysis shows that in a but-for world, absent the settlements, that fewer people are going to buy contact lenses? A. I don't think that's the way you would interpret this.").

it [sic] point of this is.[107]

Professor Athey provided empirical evidence that, in the counterfactual world, 1-800 Contacts' rivals would generate more ad impressions and attain more clicks, and that 1-800 Contacts would attain fewer clicks. CC Br. at 54-55. In response, Dr. Murphy argued that the implications of these results for contact lens sales "isn't unambiguous,"[108] and provided an illustration to argue that "the effect on sales could go either way."[109] Dr. Murphy's analysis makes no "prediction" that sales would fall absent the Bidding Agreements.[110]

Further, Dr. Murphy's analysis fails to support a prediction that "the effect on sales could go either way." He lacked the information necessary to make any prediction regarding *sales* based on Professor Athey's evidence regarding clicks, and he made no attempt to arrive at reliable estimates of the necessary information.

Extrapolating clicks into sales requires an estimate of the conversion rates that both 1-800 Contacts' rivals and 1-800 Contacts itself would experience in the counterfactual world.[111] Dr. Murphy made no attempt to estimate the conversion rate that would apply in the counterfactual

[107] CX9048 (Murphy, Dep. at 265-266) (emphasis added).

[108] CX9048 (Murphy, Dep. 265-266) (his analysis "illustrates my point that just having more ads you would say isn't unambiguous that it just creates more [sales]."); CX9048 (Murphy, Dep. 267-268) ("the net effect of that is ambiguous").

[109] CX9048 (Murphy, Dep. at 265-266).

[110] Professor Athey concluded that eliminating the Bidding Agreements would enhance consumer welfare because an increase in consumer information would lead consumers to take advantage of 1-800 Contacts' price-match program more often, and also because 1-800 Contacts' rivals would make additional sales. Athey, Tr. 795-796. But Professor Athey reached no conclusion about how many sales of each type would be made. Athey, Tr. 796 ("Did you form an opinion as to how many consumers would purchase at a lower-priced competitor as compared to price-match at 1-800 . . . ? A. No."). *See* CX9048 (Murphy, Dep. 262-263) (disclaiming statement in Paragraph 231 of Murphy expert report that "Dr. Athey estimates that 1-800 would have lost sales to .54 customers per 100 searches in a but-for world without the settlements," acknowledging that "she didn't say that.").

[111] Murphy, Tr. 4237, *in camera*.

world to the incremental {[redacted]} that 1-800 Contacts' rivals would attain.[112] Estimating such a conversion rate could be complex, because in the counterfactual world predicted by Professor Athey's model, conversion rates would "[a]bsolutely" differ from the conversion rates in the "actual world" distorted by the Bidding Agreements. [113] Professor Athey explained that, in the counterfactual world, more advertisements would appear for 1-800 Contacts' stronger rivals.[114] 1-800 Contacts' competitors' conversion rates in the "actual world" would have to be adjusted to generate a reliable estimate of conversion rates in the but-for world. Dr. Murphy did not attempt any adjustment that would translate conversion rates from the "actual world" to the counterfactual world.

Instead of attempting to calculate a reliable rate for an appropriate set of competitors in the counterfactual world, Dr. Murphy casually assumed that an appropriate conversion rate for "all competitors" in the counterfactual world would be {[redacted]} percent, based on incomplete data relating to three lesser-known competitors in the "actual world."[115] He made no effort to assess whether better-known or stronger rivals (*e.g.*, Walgreens, AC Lens, Vision Direct) would attract conversions at a higher rate than {[redacted]} percent. Indeed, he did not even provide any reason to believe that the {[redacted]} percent rate was indicative of other competitors whose ads are shown in the

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[112] CX9048 (Murphy, Dep. 266-267) ("Q. Did you do anything to assess that? A. No.").

[113] Athey, Tr. 2079-2080, *in camera*.

[114] Athey, Tr. 2081, *in camera*. *See* Murphy, Tr. 4134-4135, 4233-4234, *in camera* (acknowledging that Professor Athey did not provide an estimate of conversion rates or change in orders).

[115] Murphy Tr., 4226-4227, *in camera* {[redacted]}; Murphy, Tr. 4228-4230, *in camera* {[redacted]}.

"actual world." For example, Dr. Murphy conceded that the far higher conversion rate attained by Lens Discounters (**{**[redacted]**}** percent) in the "actual world" would lead to an increase in the total number of orders in the counterfactual world, if applied to the incremental **{**[redacted]**}** that rivals would achieve in the but-for world.[116]

Likewise, Dr. Murphy readily acknowledged that he did not know the conversion rate that 1-800 Contacts would have recognized on the incremental **{**[redacted]**}** it would lose in the counterfactual world.[117] Thus, as he conceded, he did not know how the loss of these clicks would impact conversions.[118] Dr. Murphy selected what he termed an "average conversion rate" achieved by 1-800 Contacts on searches for its trademark terms (**{**[redacted]**}** percent), in order to "make the point" that "the effect on sales could go either way."[119] But he provided no reason to believe that this "average conversion rate" would apply to the lost **{**[redacted]**}**.

Another reason that Dr. Murphy's work does not support any conclusion regarding the Bidding Agreements' impact on overall sales is that the analysis he presented was limited to an estimate of orders "per one hundred searches" for a 1-800 Contacts trademark term, and Dr. Murphy expressed no opinion regarding the total number of searches that would be run in the

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[116] Murphy, Tr. 4240, *in camera*.

[117] CX9048 (Murphy, Dep. 265) ("I don't think you know whether the conversion rate on those incremental ones would be higher or lower than [**{**[redacted]**}**], I don't think you know which way it goes.").

[118] CX9048 (Murphy, Dep. at 265-266).

[119] CX9048 (Murphy, Dep. 265-266).

counterfactual world.[120] In the counterfactual world, consumers who searched for 1-800 Contacts' trademarked term would see additional ads. This could increase the frequency with which consumers engage in comparison shopping – *i.e.*, click on 1-800 Contacts' rival's link to check prices, and then run a new search (or click the back button) to see how those prices compare to 1-800 Contacts' prices. An increase in this shopping behavior would increase the total number of searches. Thus, in order to make a prediction regarding total sales in the counterfactual world, Dr. Murphy would have had to model how consumers' comparison shopping behavior would change in the counterfactual world. He did not do so, nor did he provide any reason to believe that comparison shopping behavior would not change or conduct any analysis of the issue in an effort to make a prediction regarding sales in the but-for world. This is work that Dr. Murphy undoubtedly would have performed if his analysis was intended to, or sufficient to, support 1-800 Contacts' assertion that Dr. Murphy's analysis "predicts that the settlements *increased* sales of contact lenses by consumers who search for 1-800 Contacts' trademark." Resp. Br. at 8 (emphasis in original).[121]

[120] Murphy, Tr. 4232, *in camera* **{**[redacted]**}**; CX9048 (Murphy, Dep. at 58-59) ("[Y]ou can tell me they can go do another [search], that is fine, they can do another [search] . . . [m]aybe they go back to their eye care professional, maybe they do it another way, maybe they do another search another day.").

[121] Even if Dr. Murphy had taken this into account, his analysis would still not be reliable because it fails to account for one of the main ways that consumers would benefit from removal of 1-800 Contacts' advertising restrictions. Both Professor Evans and Professor Athey explained that additional information provided by ads placed in response to searches relating to 1-800 Contacts' trademarks likely would prompt additional customers to secure lower prices through 1-800 Contacts' price-match program. Because 1-800 Contacts requires that customers seeking a price match complete their purchase using 1-800 Contacts' call center, these transactions would not be counted as conversions in Professor Murphy's analysis.

III. **<u>COMPLAINT COUNSEL HAS MET ITS BURDEN TO PROVE ANTICOMPETITIVE EFFECTS</u>**

Complaint Counsel has met its burden of showing likely anticompetitive effects in each of the three ways identified in *Realcomp II*, 2007 WL 6936319, at *17-19. First, restraints on certain fundamental forms of rivalry are "inherently suspect," or in other words, presumed to be anticompetitive. Where a particular restraint "give[s] rise to an intuitively obvious inference of anticompetitive effect," *Cal. Dental*, 526 U.S. at 781, a court should "place the burden of procompetitive justification on those who agree [to the restraint]." *Id*. at 771. Inherently suspect restraints may be condemned without proof of market power. *Realcomp II*, 2007 WL 6936319, at *18.

Second, in the alternative, the plaintiff may show direct evidence of "actual marketplace effects." *See id*. at *19 (citing *Indiana Federation of Dentists*, 476 U.S. at 460-61). For example, in *Indiana Federation*, 476 U.S. 447, there was evidence that, due to the challenged agreement among dentists, insurance companies were unable to obtain x-rays as desired. *Id*. at 459. If a plaintiff shows actual marketplace effects, "that would be a basis for condemnation regardless of whether market power is shown." *Realcomp II*, 2007 WL 6936319, at *19 (citing *Indiana Federation*, 476 U.S. at 460-62).

Third, in the alternative, the plaintiff may establish that market power, together with the nature of the restraint, is likely to have "the potential for genuine adverse effects on competition." *Realcomp II*, 2007 WL 6936319, at *19 (citing *Indiana Federation*, 476 U.S. at 460).

A. <u>The Settlement Agreements Are Inherently Suspect</u>

Complaint Counsel's Post-Trial Brief explained that the Bidding Agreements are inherently suspect restraints on price competition. *See generally* CC Br. at 73-76. This conclusion is principally based upon: (i) case law teaching that price restraints, including agreements not to bid, are presumptively anticompetitive (CC Br. at 73-74); (ii) empirical and theoretical economic literature showing that restraints on bidding are likely to harm competition (CC Br. at 74); (iii) expert economic testimony concluding that the Bidding Agreements are likely to harm competition (CC Br. at 61); (iv) 1-800 Contacts' ordinary course documents showing that the purpose of the Bidding Agreements was to reduce the price paid by 1-800 Contacts to the search engines for search advertising (CC Br. at 26-28); and (v) 1-800 Contacts' ordinary course documents showing that the effect of the Bidding Agreements was to reduce the price paid by 1-800 Contacts to the search engines for search advertising. CC Br. at 27-28, 61-63.

Complaint Counsel's Post-Trial Brief also explained that the Bidding Agreements are inherently suspect restraints on advertising. *See generally* CC Br. at 76-84. This conclusion is principally based upon (i) case law teaching that advertising restraints are presumptively anticompetitive (CC Br. at 78-80); (ii) empirical and theoretical economic literature showing that advertising restraints are likely to result in higher prices (CC Br. at 76-78);[122] (iii) two empirical studies showing that trademark keyword advertising shifts consumer clicks from the website for the trademark owner to the websites of the competing advertisers (CC Br. at 82-83); (iv) record evidence that the 1-800 Contacts price premium is in part a result of consumers being unaware of

[122] 1-800 Contacts acknowledges that raising consumer search costs will reduce consumer welfare. Resp. Brief at 55.

the availability of identical products and comparable service from lower-price online competitors (CC Br. at 58-60, 81-82); (v) expert economic testimony concluding that unrestrained trademark keyword search advertising would bring clicks and conversions to 1-800 Contacts' competitors, and place competitive pressure on 1-800 Contacts to reduce its prices (CC Br. at 54-61); (vi) evidence that trademark keyword advertising is an important and effective form of advertising for internet sellers of contact lenses (CC Br. at 42-47); and (vii) 1-800 Contacts' ordinary course documents showing that the purpose and effect of the Bidding Agreements was to suppress competition from lower-price rivals (CC Br. at 28-30, 58-60).

With regard to the inherently suspect determination, the rebuttal advanced by 1-800 Contacts is insubstantial.

1. Trademark Settlement Agreements Are Not "Presumptively Procompetitive"

1-800 Contacts offers a series of arguments (and undeveloped assertions) purporting to show that *no* agreement settling a trademark dispute can be inherently suspect. This is not a serious proposition. Certainly, a (hypothetical) agreement among sellers of contact lenses to fix prices charged to consumers is *per se* unlawful, and remains *per se* unlawful even if structured as the settlement of a *bona fide* trademark dispute. *See* Areeda & Hovenkamp ¶1907b ("that collusion or market division is necessary to prevent firms from violating one another's intellectual property rights" is not a defense to horizontal restraints affecting price or output). *Cf. Masonite*, 316 U.S. at 274-79 (condemning price fixing agreements entered in settlement of patent disputes).

To determine whether the likelihood of anticompetitive effects is "obvious," *Cal. Dental*, 526 U.S. at 771, a court must consider the terms of the settlement agreement. 1-800 Contacts' arguments regarding the terms of the Bidding Agreements are without merit.

(i) 1-800 Contacts strings together phrases from the *Clorox* opinion, *Clorox*, 117 F.3d 50, purporting to show that a trademark settlement cannot be inherently suspect. *See* Resp. Br. at 63, 67. But this is not the holding, or even the implication, of *Clorox*. *See generally* CC Br. at 91-92 (describing *Clorox* decision). There, the Second Circuit was discussing an agreement restricting how the Clorox company could *label* its product. According to the court, if Clorox's cleaning product cannot be called "Pine-Sol," then call it "Brand Z," and the competitive process is not obviously impaired. *See Clorox*, 117 F.3d at 56-59. The Second Circuit did not consider any limitation upon the ability of Clorox to *advertise* Brand Z, or to bid in search auctions for any trademark. Further, in distinguishing the limited agreement at issue in *Clorox*, the Second Circuit confirmed that the *per se* rule remains applicable to trademark settlements "that in reality serve to divide markets" or that operate as price-fixing agreements. *Id.* at 55-56. *Clorox* does not preclude the application of truncated analysis to the settlement of a trademark dispute.

(ii) 1-800 Contacts argues that the Bidding Agreements cannot be inherently suspect because there is no reverse payment as in *Actavis*, 133 S. Ct. 2223. Resp. Br. at 63. Plainly, a settlement agreement can be inherently suspect in the absence of a reverse payment. *See supra* pp. 3, 14 (collecting cases). Here, "the great likelihood of anticompetitive effects can be easily ascertained," *Cal. Dental*, 526 U.S. at 770, because (unlike *Actavis*) the restraints on competition facially exceed the scope of the intellectual property right and restrict fundamental dimensions of competition. *See* CC Br. at 32-39, 89-90 (describing the sweeping overbreadth of the Bidding Agreements).

(iii) Complaint Counsel is not required to show that the trademark lawsuits that led to the Bidding Agreements were sham. *See* Resp. Br. at 64. Complaint Counsel is challenging the terms of settlement agreements, not the act of filing these lawsuits. Settlement agreements have been judged *per se* unlawful without a finding that they settled sham claims. *See supra* p. 3, 14 (collecting cases). *See also* Comm. Op., slip. op. at 4.

(iv) 1-800 Contacts suggests that characterizing the Bidding Agreements as facially overbroad involves a "hindsight inquiry" into the merits of the settled lawsuits, or requires a finding that 1-800 Contacts would have lost every lawsuit. Resp. Br. at 63-64. This is not correct. We may assume, *arguendo*, that one or more of the settling parties actually published confusing advertising and infringed a trademark owned by 1-800 Contacts. Nonetheless, a restriction on future, *non-confusing* advertising is, by definition, in excess of 1-800 Contacts' trademark rights. *See* CC Br. at 129-130 (explaining that trademark protects against *confusing* uses of trademark).

(v) 1-800 Contacts asserts that Complaint Counsel must show that the Bidding Agreements "*only* restrain 'non-misleading advertising' that would not give rise to an infringement claim." Resp. Br. at 63 (emphasis in original). Complaint Counsel is not required to show that the Bidding Agreements *only* restrain non-misleading advertising. It is sufficient that, by their terms, the Bidding Agreements restrict search advertising *without regard* to whether the advertising is or is not misleading. *See Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 607 (1988) ("Prohibiting truthful statements about a lawful affiliation relationship cannot be justified on the ground that some advertisers may seek to deceive the public."); *id*. at 588

("Preventing deception cannot justify a total ban on truthful advertising") (Initial Decision); *Am. Med. Ass'n*, 94 F.T.C. at 1009-1010 (condemning association restraints that go beyond preventing "false and deceptive advertising," operating instead as an "absolute ban" on advertising). This supports a finding that the Bidding Agreements exceed the scope of the asserted trademark right.

(vi) Perhaps 1-800 Contacts is claiming that the Bidding Agreements are presumptively procompetitive because *all* search advertisements triggered by a consumer's query for "1-800 Contacts" will, in fact, confuse the consumer. *See* Resp. Br. at 63-64. This is just false. Professor Jacoby's study proved that this is false. More definitively, the Tenth Circuit rejected this claim in *Lens.com*. Lens.com, a rival online seller of contact lenses, placed search ads in response to search queries for "1-800 Contacts," and the court concluded that this was not confusing for consumers. *Lens.com*, 722 F.3d at 1249.

(vii) 1-800 Contacts cites a handful of cases suggesting that drafting an order that by its terms only prohibits "confusing" uses of a trademark would "require[] [the defendant] to guess at what kind of conduct would be deemed trademark infringement." Resp. Br. at 66 (quoting *Calvin Klein Cosmetics Corp. v. Parfums de Couer, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987)). This does not show that 1-800 Contacts' Bidding Agreements are reasonable; none of the cases cited by 1-800 Contacts support this proposition.

In the context of trademark keyword advertising, the prophylactic solution preferred by the courts is to require that the identity of the advertiser be disclosed in the search ad. *See supra* p. 12-13 (describing cases); CC Br. at 135-138 (same). This is consistent with the remedy ordered in *Calvin Klein*, cited by 1-800 Contacts, in which the court held that the defendant's promotional slogan "could be used in conjunction with appropriate disclaimers or other source-identifying information." *Calvin Klein*, 824 F. 2d at 667. The availability of this and other significantly less restrictive means of addressing infringement establish that the Bidding Agreements are overbroad. (The subject of less restrictive alternatives is discussed, *infra*, Section III.B.3.)

(viii) Mr. Hogan testified that, when settling a trademark dispute, it is convenient to bar the alleged infringer from "using" the plaintiff's trademark (including by bidding for the trademark as a keyword), as this reduces the opportunity for future disputes. And, according to Mr. Hogan, parties often settle litigation with a "non-use" agreement. Resp. Br. at 66-67.

1-800 Contacts has not explained why this bears at all on the Court's assessment of whether the Bidding Agreements have obvious anticompetitive effects. There is a broad consensus in the courts and among economists that bidding restraints and advertising restraints are likely to harm consumers and competition. CC Br. at 73-84. Parties to trademark disputes, as a class, lack the expertise or authority to undermine this consensus. The Court should insist upon evidence and economic analysis, and should not defer to Mr. Hogan's blithe assurance that "this happens all the time."

If a non-use agreement is a convenient remedy, then a non-use agreement that carves out (*i.e.*, permits) trademark keyword bidding is only slightly less convenient for the competitors – and far superior for consumers.

In any event, 1-800 Contacts' Bidding Agreements extend significantly beyond a standard "non-use" agreement, as the negative keyword provisions require competitors to remove themselves from auctions even when they are not "using"1-800 Contacts' trademarks.

Moreover, the agreements reciprocally apply the restraints, even where no claim of trademark infringement has been made by one of the parties. *See supra* p. 7, 18-19 (describing the three central terms of 1-800 Contacts' Bidding Agreements).

(ix) 1-800 Contacts asserts that the Bidding Agreements cannot be inherently suspect if they adopt "the kinds of relief that courts have ordered." Resp. Br. at 67; *id*. at 64. This assertion has no foundation in the law (*see supra* pp. 10-11). But, even if it did, 1-800 Contacts has not shown that the Bidding Agreements are the type of relief that a court "would order" in a trademark case challenging keyword bidding. In fact, no court has ever concluded that simply bidding on a trademark keyword is illegal. So there has been no need to craft a remedy. *See supra* pp. 11-12, 27-28.

Further, in crafting injunctive relief, trademark courts have consistently emphasized that "remedies must be carefully tailored." CX8014 at 038-040 (¶ 84) (Tushnet Rebuttal Expert Report) (collecting cases). Of course, courts are not constrained by the antitrust laws. This immunity does not carry over to private settlements. *See* Commission Op., slip. op. at 4.

2. 1-800 Contacts Has Not Established That The Bidding Agreements Are Procompetitive

A defendant can justify an (otherwise) inherently suspect restraint by showing that the challenged restraint is reasonably necessary to achieve a legitimate and cognizable efficiency. *Polygram I*, 136 F.T.C. at 335 (citing *NCAA*, 468 U.S. at 118-19); *Realcomp II*, 2007 WL 6936319, at *17. This means that 1-800 Contacts cannot justify an advertising restraint simply by uttering the word "confusion." *Cal. Dental* does not suggest otherwise.

The Commission's *Polygram* decision analyzes *Cal. Dental* at length, calling attention to the Court's repeated references to the distinction between professional markets and markets for goods:

> [T]he Court found that the anticompetitive effect of the restrictions on professional advertising was not obvious. The Court emphasized the professional context of the case before it, questioning whether market forces 'normally' found in the commercial world apply to *professional* advertising, especially given that the market at issue was 'characterized by striking disparities between the information available to the professional and the patient.'

Polygram I, 136 F.T.C. at 340 (internal citations & footnote omitted). 1-800 Contacts asserts that it is of "no moment" that the market affected here is entirely distinct from the "professional" services market at issue in *Cal. Dental* (Resp. Br. at 70). However, the *Cal. Dental* decision, and the Commission's subsequent discussion of *Cal. Dental*, clearly suggest otherwise.[123] 1-800 Contacts has not claimed, and has not shown, that contact lenses are sold in a market characterized by a similar information asymmetry. *See* CC Br. at 84-88 (discussing *Cal. Dental*).

Section III.A.2 of the 1-800 Contacts' Post-Trial Brief lists a series of purported countervailing efficiencies. These defenses have been addressed in detail by Complaint Counsel, showing that each is without merit:

- The claim that the Bidding Agreements preserve incentives to invest in brand development is, in substance, a free-riding argument. This is a non-cognizable defense to an agreement among independent, unintegrated competitors. *See supra* pp. 22-23; CC Br. at 126-129.

[123] In *Cal. Dental*, the Supreme Court endorsed the "general rule" that "restrictions on advertisement of price and quality generally" have anticompetitive tendencies. The Court found the general rule inapplicable to the specific restraints at issue because "the very issue at the threshold of this case is whether *professional* price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule." *Cal. Dental*, 526 U.S. at 771 (emphasis added).

- The claim that the Bidding Agreements prevent consumer confusion fails because there are significantly less restrictive alternatives; and, in any event, there is no evidence of confusion. *See supra* pp. 26-55 (discussing evidence of confusion) & *infra* Section III.B.3 (discussing less restrictive alternatives); CC Br. at 140-146 (discussing evidence of confusion) & 134-138 (discussing less restrictive alternatives).
- The claim the Bidding Agreements address "choice overload" and so reduce consumer search costs is both non-cognizable and not plausible. *See supra* pp. 55-65; CC Br. at 138-140.
- The claim that Professor Athey's model predicts that the Bidding Agreements increase market output is false. *See supra* pp. 65-70.

Lastly, 1-800 Contacts offers the new claim that, but for the Bidding Agreements, advertisements for competing sellers of contact lenses may harm consumers by "push[ing]" the 1-800 Contacts Facebook page "off the search results page." Resp. Br. at 69. This is one more facile attack on advertising *qua* advertising, akin to saying that television advertising harms consumers (within the meaning of the antitrust laws) because it interrupts the regular programming. The answer in part is: (i) without advertising, there would be no free search engine and no free television, so advertising serves consumers' long-term interests;[124] and (ii) 1-800 Contacts has not explained why the design of the SERP should be shifted from the search engines to a combination of contacts lens sellers. (Also, in all likelihood, absent the Bidding Agreements, the Facebook page is not eliminated from the SERP, but rather demoted a few ranks.)

[124] CX8009 at 020-021 (¶¶ 26-27) (Evans Expert Report).

3. The "Complexity" of Search Advertising Auctions Offers No Defense

1-800 Contacts contends that agreements among competing bidders to refrain from bidding in search advertising auctions is not inherently suspect because the search advertising industry is new and "highly complex." Resp. Br. at 70-73. This argument lacks legal support and economic sense, and should be rejected.

In *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982), the Supreme Court rejected the defendant's plea to eschew *per se* analysis because the judiciary has little experience with the health care industry, observing that "the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id*. at 349 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)). The Court explained that, absent a true efficiency justification, market complexity is a factor supporting (not undercutting) presumptive condemnation of price restraints:

> [T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often fruitless when undertaken.

Id. at 351 (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

In what sense are search advertising auctions complex? The evidence cited by 1-800 Contacts indicates that would be difficult to calculate the precise auction price in the but-for world (absent the Bidding Agreements). But the "principal tendency," *Cal. Dental*, 526 U.S. at 781, of the Bidding Agreements is not complicated and is not in dispute. Google and Bing each testified that, all else being equal, fewer bids in a search advertising auction necessarily reduces the price paid to the search engine by the winning advertiser. CC Br. at 62-63. In ordinary course documents, executives and advertising personnel at 1-800 Contacts recognize that more bidders in trademark keyword search auctions results in higher costs; fewer bidders results in lower costs. CC Br. at 26-28, 61-62. Or, as succinctly stated in one report, "low competition = low cost."[125] 1-800 Contacts personnel were apparently able to reach this conclusion, this *correct* conclusion, without a deep understanding of Google's algorithms.

That the price setting mechanism in an industry is complex has never deterred an antitrust court from concluding that a restraint is inherently suspect. For example, the method by which insurance companies determine what they will pay doctors for services is mysterious to outsiders. Nonetheless, the Supreme Court concluded in *Indiana Federation of Dentists*, 476 U.S. 447, that an agreement among dentists to withhold x-rays interfered with the insurance companies' internal price-setting mechanisms, and so was presumptively anticompetitive. *Id*. at 460. The precise relationship between x-rays and prices was not explored by the Court and played no role in its analysis.

It is not necessary that Complaint Counsel calculate the magnitude of the price distortion caused by the Bidding Agreements. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 424 (it "is no excuse that the prices fixed are themselves reasonable") (quoting *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (internal citations omitted)). Still, Complaint Counsel's economic expert, Professor David Evans, constructed a model showing that, as a result of the Bidding Agreements, 1-800 Contacts' cost-per-click on its own trademark keywords was reduced by between **{**[redacted]**}**.[126]

[125] CX0296 at 035; Bethers, Tr. 3786-3787, *in camera*.

[126] Evans, Tr. 1649-1650, *in camera*; CX8006 at 076-077 (¶ 168) (Evans Expert Report), *in camera*.

4. The Bidding Agreements Directly Restrain Price Competition In Search Advertising Auctions

1-800 Contacts denies that the Bidding Agreements restrain price competition in search advertising auctions. This is not a serious argument.

"Per se illegal bid rigging can take various forms, including comparing bids before submission, operating bid depositories, rotating bids, *agreeing to refrain from bidding*, knowingly submitting noncompetitive bids, and agreeing to rig bids by creating sham competition." ANTITRUST LAW DEVELOPMENTS (Seventh) at 93 (emphasis added). 1-800 Contacts and its rivals agreed to refrain from bidding in certain search advertising auctions, similar to *United States v. MMR Corp.*, 907 F.2d 489, 496-97 (5th Cir. 1990), a criminal prosecution.

1-800 Contacts invents a series of requirements that a bid rigging conspiracy must satisfy in order to be judged inherently suspect. But not a single legal authority is cited by 1-800 Contacts. In substance, 1-800 Contacts is calling for evidence that the conspirators have market power, and evidence that failure to bid led to lower prices. As a matter of law, where there is an agreement to refrain from bidding (or any other naked price restraint), such evidence is not required. *E.g.*, *Prof'l Eng'rs*, 435 U.S. at 692 ("no elaborate industry analysis is required to demonstrate the anticompetitive character" of an "absolute ban on competitive bidding"); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) ("Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. Section 1."); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989) (same); *United States v. Capitol Serv., Inc.*, 756 F.2d 502, 506 (7th Cir. 1985) ("anticompetitive character" of a ban on bidding "is readily apparent"); *United States v. Brighton Bldg. & Main. Co.*, 598 F.2d 1101, 1006 (7th Cir. 1979) ("[a]n agreement among competitors to rig bids is illegal").

1-800 Contacts contends that the parties to the Bidding Agreements (1-800 Contacts included) acted with good or reasonable motives, and did not intend to violate the antitrust laws. Resp. Br. at 73.[127] But bad intent is not an element of a Section 1 claim. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("[A] good intention will [not] save an otherwise objectionable regulation or the reverse. . . ."); *Socony-Vacuum Oil*, 310 U.S. at 212 (price-fixing conspiracy "is in itself an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units"). And, even if it were relevant, the record evidence shows that 1-800 Contacts plainly intended to remove its competitors from search advertising auctions in order to (i) reduce its own advertising costs and (ii) eliminate competition. *See* CC Br. at 26-30.

Relatedly, 1-800 Contacts offers two contradictory (and erroneous) propositions about the settling parties: (i) not all of the parties benefitted; and (ii) 1-800 Contacts did not coerce the settling parties. *See* Resp. Br. at 73-75. These contentions are irrelevant. Courts have often condemned conspiracies where certain conspirators were reluctant or unwilling participants. *E.g.*, *United States v. General Motors*, 384 U.S. 127, 147 (1966) (in *per se* unlawful boycott, retailers enlisted supplier General Motors to cut off "discounters" in order "to protect franchised dealers from real or apparent price competition"); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 932 (7th Cir.

[127] Curiously, although 1-800 Contacts quotes *Clorox* for this proposition, Clorox has nothing at all to do with bid rigging, and provides "not a scintilla" of support for 1-800 Contacts' novel view of bid rigging. *See Clorox Co.*, 117 F.3d at 60.

2000) (in *per se* unlawful boycott of warehouse clubs organized by toy retailer, "the biggest hindrance [Toys "R" Us] had to overcome was the major toy companies' reluctance to give up a new, fast-growing, and profitable channel of distribution") (internal quotation omitted). As the leading antitrust treatise observes: "[T]he exchange of promises or commitments forms a conspiracy even if one party assents reluctantly and only because the other party insists upon it or threatens some other action that the former wants to avoid. *Motivation is ignored*." Areeda & Hovenkamp ¶ 1408 (emphasis added).

In addition, 1-800 Contacts' various claims that that the settling parties did not benefit from the Bidding Agreements are incorrect. All of the settling parties avoided costly litigation with 1-800 Contacts. *See* CC Post-Trial Brief at 21-22, 50-52 (describing retailer testimony to this effect). And, for some settling parties, the benefit conferred by the Bidding Agreements extended beyond escaping a litigious bully. Recall that the restraints on competition are reciprocal. At least three parties (Luxottica, Coastal, and Walgreens) actively enforced the Bidding Agreements against 1-800 Contacts, showing that they, too, received tangible benefit from suppressing bidding and competitive advertising in response to searches for their brand names.[128]

B. <u>In The Alternative, Complaint Counsel Proved Anticompetitive Effects Under The Rule of Reason</u>

As an alternative to showing that the Bidding Agreements are inherently suspect, Complaint Counsel also proved that the Bidding Agreements likely cause substantial harm to

[128] *E.g.*, CX0087 (2005 cease-and-desist letter from Luxottica subsidiary LensCrafters to 1-800 Contacts in 2005, claiming that 1-800 Contacts had "purchased sponsored advertisements at Google . . . for the LENSCRAFTERS trademark, to trigger a link to [1-800 Contacts'] directly competitive . . . website"); CX0960 (2014 email from Coastal notifying 1-800 Contacts that it was in violation of Bidding Agreement); CX0713 (2012 email from Walgreens notifying 1-800 Contacts that it was in violation of Bidding Agreement).

both consumers and search engines. Complaint Counsel offered a market power analysis, and offered substantial direct evidence of harm. 1-800 Contacts' rebuttal is discussed below.

1. Complaint Counsel Proved That 1-800 Contacts Has Market Power

1-800 Contacts asserts that the settling parties have less than a 20 percent share of a broad market consisting of *all* retail sales of contact lenses and, thus, lack market power. Resp. Br. at 76. This argument fails. As explained in more detail in Complaint Counsel's Post-Trial Brief, the existence of a broad market does not disprove the existence of one or more narrower relevant market(s), and the appropriate market in which to analyze the competitive impact of a restraint is the *narrowest* market in which the competitive effects can be assessed. CC Br. at 116-118.

In the alternative, 1-800 Contacts asserts the absence of entry barriers sufficient to enable the exercise of market power in a market for the online sale of contact lenses. This argument also fails, as Complaint Counsel identified significant barriers that prevent timely entry on a scale sufficient to defeat a price increase. CC Br. at 122-125.

a. The Relevant Antitrust Market Is Online Sales Of Contact Lenses

1-800 Contacts acknowledges that the critical question for defining the relevant market in this case is whether eye care professionals ("ECPs") and offline retailers could "constrain online retailers from raising prices," Resp. Br. at 78, in the event that online retailers are united in a "hypothetical cartel." *Id*. at 77 (quoting *United States v. Am. Express Co*., 838 F.3d 179, 199) (2d Cir. 2016). Yet 1-800 Contacts' argument in favor of a market that includes both online and offline sales is based on the assertion that *1-800 Contacts itself* is "in the same market as ECPs and other offline retailers." Resp. Br. at 80. Even if this were true, it would not preclude a finding that there is *also* a relevant market consisting of all online sellers. As 1-800 Contacts' own economic expert explained at trial: "It's a well-known problem that you could have firm A in a relevant product market with B, but you could also think of a relevant product market with A with C."[129] Here, Complaint Counsel established, consistent with the narrowest market principle, a market for the online sale of contact lenses. *See* CC Br. at 101-120. This showing is not undermined even if 1-800 Contacts can establish that a larger relevant market also exists. CC Br. at 116-118.

i. Commercial Realities Show That Offline Sellers Do Not Provide A Competitive Constraint On 1-800 Contacts

1-800 Contacts attempts to show that "ECPs and mass merchants provide 'competitive pressures that restrain' *1-800 Contacts'* 'ability to raise prices or restrict output.'"[130] It may be true that 1-800 Contacts acting alone cannot profitably raise prices because it would lose sales to both rival online retailers and ECPs. But that is not the relevant question. What we need to know (and what is left unaddressed by 1-800 Contacts) is whether it would be profitable for 1-800 Contacts and rival online retailers, *acting in combination*, to raise prices. *See* CC Br. at 101-103. If such a hypothetical cartel could profitably increase prices "above competitive levels," *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 828 (6th Cir. 2011) – as Professor Evans's analysis shows and as Dr. Murphy does not dispute (CC Br. at 113-115) – a relevant market has been established. This showing is not undermined by a claim that, in the real world, the highest-priced

[129] Murphy, Tr. 4322-4323. See also Murphy, Tr. 4324 ("You could go back to the beginning, start with 1-800, add the online people, ask the same question, does that constitute a relevant market, that is, would somebody who controls those two be able to raise price a small but significant amount. The answer is it depends on the diversion ratio, maybe yes, maybe no, but you might get a relevant market there, too.").

[130] Resp. Br. at 79 (quoting *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (emphasis added).

participant in the relevant market (here, 1-800 Contacts) is constrained from increasing its current prices in part because of competition from offline sellers.[131]

1-800 Contacts cites no evidence that ECPs and other offline sellers could constrain the pricing of a hypothetical cartel of all online retailers. To the contrary, 1-800 Contacts' evidence simply shows that 1-800 Contacts underprices ECPs and attracts customers away from them. *See* Resp. Br. at 79-80.

1-800 Contacts asserts that its "price match guarantee reflects competition with the entire retail market." Resp. Br. at 80. To the contrary, 1-800 Contacts' price match guarantee expressly "does not apply to membership clubs or international retailers."[132] More importantly, 1-800 Contacts adopted its "We beat by 2%" price match program in response to *online discounters'* low prices and aggressive advertising,[133] not in response to competition from ECPs or club stores. *See* CC Br. at 59-60 & n. 232-235. Indeed, the data shows that ECPs barely register on 1-800 Contacts' price match policy: in 2016 only **{**[redacted]**}** percent of the orders on which customers

[131] Indeed, the considerable price differences between 1-800 Contacts and its online rivals suggest that 1-800 Contacts' focus on 1-800 Contacts' current pricing is an example of the "cellophane fallacy." When unrecognized, this fallacy produces erroneous and overly broad market definitions in markets exhibiting differential prices, such as when the highest-priced market participant is already pricing at a premium due to its market power. *See* Gene C. Schaerr, *Note: The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 Yale L.J. 670 (1985) ("Schaerr"). Tellingly, 1-800 Contacts explicitly relies on the widely criticized case that gives this fallacy its name. *See* Resp. Br. at 78 (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)); *see* Schaerr at 671 & n.6.

[132] CX1341-001. *See also* CX9025 (Osmond, Dep. at 18) ("The policy, though, the way it's written is that we don't match clubs because it requires a membership to get that price."); CX9025 (Osmond, Dep. at 19) ("Q. But when a new associate comes on board, they are told that the policy is not to price match clubs. Is that right? A. That's correct . . ."); CC Br. at 106 & n.349 (citing 1-800 Contacts executive testimony regarding price match policy).

[133] *E.g.*, CX9012 (L. Schmidt, Dep. 252-257) ("We beat any price" message was brought back "[b]ecause of aggressive pricing messages" from online competitors such as Lens.com, Vision Direct, and Coastal).

received discounts were attributed to ECP pricing, while at least {[redacted]} percent were attributed to just a handful of online rivals.[134]

1-800 Contacts points to no evidence suggesting that *any* of its online rivals are constrained by ECPs or offline channels. And 1-800 Contacts addresses none of the extensive trial testimony regarding the "economic realities" perceived by its online competitors, *see* CC Br. at 103-110. Its sole acknowledgement of a pure-play online rival consists of a citation to the deposition of LensDirect CEO Ryan Alovis (Resp. Br. at 81), but the cited testimony has no bearing on whether LensDirect views offline sellers as a meaningful constraint on its prices.[135] In fact, as Mr. Alovis testified, LensDirect views online competitors as its "main" competition.[136] 1-800 Contacts' only other reference to "economic realities" is to point out that Walmart competes with both physical retailers and online sellers. Resp. Br. at 81. This is unsurprising, as Walmart is a *physical* retailer as well as an online seller.[137] Evidence from Walmart in no way suggests that offline retailers constrain the prices of online players. To the contrary, Walmart recognizes that, "[t]hroughout the industry . . . offline prices are generally higher than online,"[138] which

[134] CX1334 at 007, *in camera* ({[redacted]}).

[135] *See* CX9023 (Alovis, Dep. at 38-39).

[136] CX9023 (Alovis, Dep. at 108, 110) (LensDirect's "main competitors" are exclusively online firms, and none of its main competitors are "companies that sell contact lenses in brick-and-mortar stores."); Alovis, Tr. 988 (LensDirect's "primary competition" consists exclusively of online firms).

[137] CX9037 (Owens, Dep. at 20) ("[W]e have in-store purchasing, but we also have the online purchasing available to our customers as well."); CX9033 (Mohan, Dep. at 95-96) (online sales are "just an added service for our store customer base").

[138] CX9037 (Owens, Dep. at 27).

suggests that online sellers price in response to other online rivals rather than in response to ECPs and other offline sellers.[139]

Likewise, 1-800 Contacts misses the mark when it suggests that "contact lens manufacturers' UPPs [Uniform Pricing Policies] reflect an economic judgment that ECPs and online retailers sell in the same market." Resp. Br. at 81. UPPs, in fact, prove the opposite – namely, that lens manufacturers believe that ECPs are unable to compete effectively with online retailers in the ordinary give and take of business. If ECPs were able to compete effectively with lower priced online sellers for customers who value low prices and convenience, lens manufacturers would not have elected to force online retailers to raise their prices by some *20 percent* across the board.[140] In any event, 1-800 Contacts ignores the reality that, even when manufacturers did "level the playing field" among online and brick-and-mortar retailers by raising online pricing significantly in excess of a SSNIP, online retailers remained profitable, confirming that a hypothetical cartel of online retailers *could* profitably raise prices significantly in excess of a SSNIP. *See infra* p. 96-97 (discussing UPP experiment).

Nor does 1-800 Contacts show that ECPs constrain online retailers by invoking "Congressional legislation and the Commission's rulemaking." *See* Resp. Br. at 82-84. As 1-800 Contacts acknowledges, a main purpose of this legislation was to facilitate consumers' access to online retailers. *Id*. at 83. Congress recognized that online sellers offered dramatically lower prices and that consumers would benefit if they were able to purchase online. This does not

[139] Walmart has made the decision to sell at the same price online and in its physical stores for customer relationship reasons, rather than in response to competition its online business faces from offline rivals. CX9037 (Owens, Dep. at 26-27) ("Q. Does Walmart price its contact lenses the same in store and online? A. Yes. Q. Why is that? A. Well, I believe it's bad business to tell a customer, if you shop in the store you maybe get one price, but if you shop online you get another price. . . .").

[140] CX8006 at 125-127 (¶¶ 272, 274) (Evans Expert Report).

suggest that ECPs are able to effectively constrain the prices of online sellers. 1-800 Contacts suggests that such actions "do not make any economic sense unless online sellers compete with ECPs and other offline sellers." *Id*. at 84. But some level of competition does not establish that firms participate in the same relevant market. To the contrary, while any number of firms with different business models "may compete at some level, this 'does not necessarily require that [they] be included in the relevant product market for antitrust purposes.'" *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011) (*quoting FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C.1997)).

Lastly, 1-800 Contacts makes a passing reference to "consumers switching patterns." Resp. Br. at 84. This references the suggestion, based on Dr. Murphy's report, that the proportion of customers who **{**[redacted]**}** *Id*. at 77. This is incorrect. Using Dr. Murphy's preferred assumptions about diversion ratios, 17 percent of 1-800 Contacts' lost sales go to other online retailers, which account for only about 7.7 percent of total contact lens sales (excluding, as is proper, the sales made by 1-800 Contacts).[141] Thus, even using 1-800 Contacts' preferred numbers, 1-800 Contacts customers are far more likely to switch to an online rival than would be anticipated based on the percentage of sales "made by that type of retailer." *See* Resp. Br. at 77.

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[141] *See* Respondent's Proposed Finding of Fact Nos. 453 (17 percent of all U.S. contact lens sales made by pure-play online retailers, 40 percent by independent ECPs), 454 (10 percent of all U.S. contact lens sales made by 1-800 Contacts); CX1117 at 016 (the source of Dr. Murphy's assumptions shows 17 percent of respondents made their most recent purchase from an online rival, 49 percent from "eye doctor"). Assuming that the "eye doctor" category captures only independent ECPs, which is the assumption most favorable to Murphy's analysis, independent ECPs make 44.5 percent of all national sales that are not made by 1-800 Contacts, and capture about 49 percent of purchases from 1-800 Contacts customers, which is 1.1 times as many purchases as their share would suggest. (49/44.5 = 1.1) By contrast, online rivals make 7.7 percent of sales not made by 1-800 Contacts, and capture 17 percent of its customers. (17/7.7 = 2.2). 2.2 is *not* "roughly the same as" 1.1.

In any event, Dr. Murphy's numbers are unreliable proxies for diversion because, as explained in Complaint Counsel's Post Trial Brief, these numbers do not represent customers who are switching away from 1-800 Contacts to a rival, which a proper diversion analysis should consider. CC Br. at 115-116. Instead, the numbers indicate only that many 1-800 Contacts customers are required periodically to visit an ECP, and may make a purchase during an ECP visit despite the higher prices. This indicates that contact lenses can be used for the same purpose no matter where they are purchased, *see* Resp. Br. at 77, but it says nothing about the likelihood that consumers will begin purchasing from offline sellers in the event of a price increase imposed by a hypothetical cartel of online sellers.

ii. Professor Evans' Empirical Analyses Support An Online Market

1-800 Contacts does not take issue with Professor Evans' use of a critical loss analysis, nor does it dispute his methodology. Instead, 1-800 Contacts faults Dr. Evans for relying "on data that do *not* reflect consumer behavior in response to a price increase." Resp. Br. at 10 (emphasis in original). According to 1-800 Contacts, any "critical loss analysis based on surveys or data about 'switching' in general rather than switching based on a price increase is unreliable." *Id*. at 86. Thus, 1-800 Contacts claims, "[o]ther courts have rejected analyses based on such data, and this Court should as well." *Id*. at 10. But 1-800 Contacts fails to cite a single case in which a court rejected a critical loss analysis because it was based on "surveys or data about 'switching' in general rather than switching based on a price increase." *Id*. at 86.

1-800 Contacts asserts, incorrectly, that *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011), and *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015), support its view. To the contrary, in *H & R Block*, 833 F. Supp. 2d 36, the court held that customer switching data not based on a price increase provided a useful proxy for the actual diversion that would occur in the event of a price increase. The court distinguished between "switching data," which indicates "the number of consumers who switch between different products for *any reason*" and "diversion," which "refers to a consumer's response to a measured increase in the price of a product."[142] After clearly defining these terms, the court held that "it was reasonable to use switching data as a proxy for diversion, especially since no more refined historical data apparently exists." *Id.* at 65. Thus, *H & R Block* plainly contradicts, rather than supports, 1-800 Contacts' proposed rule. 1-800 Contacts misrepresents the holding of *H & R Block* as "declining to rely on critical loss analysis based on survey about switching" (Resp. Br. at 86), but, in fact, the court accepted the critical loss analysis "as another data point suggesting that [the government's proffered market] is the correct relevant market." [143]

1-800 Contacts also misreads *Sysco*, 113 F. Supp. 3d 1, claiming that the court "declin[ed] to rely on FTC expert's critical loss analysis based on switching data." Resp. Br. at 86. This is plainly erroneous, as the FTC's economic expert in that case did not perform a critical loss analysis. Instead, as the court explained, the FTC's economic expert "conducted a SSNIP test, using what is known as an 'aggregate diversion analysis,'" which the court described as a "related methodology [to] critical loss analysis." *Sysco*, 113 F. Supp. 3d at 34 (citing *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 160 (D.D.C. 2000). Moreover, contrary to 1-800 Contacts' claims, the court accepted the analysis, holding: "[T]he court finds [the FTC

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[142] *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 62 (D.D.C. 2011) (emphasis added).

[143] *H & R Block*, 833 F. Supp. 2d at 65 ("Bearing in mind the shortcomings of the switching data, the Court will not treat [the government's expert's] hypothetical monopolist analysis as conclusive. The Court will treat it as another data point suggesting that [the government's proposed relevant market] is the correct relevant market, however.").

expert's] aggregate diversion analysis and conclusion to be more persuasive than that advanced by Defendants' expert. . . ." *Sysco*, 113 F. Supp. 3d at 36. The Court noted that, due to weaknesses in the FTC expert's proxies for diversion, "the court hesitates to rely on [the] precise aggregate diversion percentages. But, when evaluated against the record as a whole, [the FTC expert's] conclusions are more consistent with the business realities of the food distribution market than [Defendant's expert]." *Sysco*, 113 F. Supp. 3d at 37. Contrary to 1-800 Contacts' assertion, and just as in *H & R Block*, the *Sysco* court accepted an analysis that used proxies for diversion. This Court should do the same.

Curiously, 1-800 Contacts implicitly accepts the reliability of a critical loss analysis based on proxies for diversion, as it argues that Dr. Murphy's critical loss analysis (which employed the same methodology as Professor Evans) should be credited by the Court. Resp. Br. at 87. The only difference between Dr. Murphy's analysis and Professor Evans' analysis is that Dr. Murphy picked an inappropriately low number to use as his diversion ratio. Dr. Murphy picked a **{**[redacted]**}** percent figure to use as the diversion ratio, based on what 1-800 Contacts claims is data **"{**[redacted]**}"** Resp. Br. at 87. As previously explained, this is based on data that does not reflect "{[redacted]**}**; instead, it includes a large number of customers who had not switched their purchase intentions, they had simply made an interim purchase elsewhere – likely from an ECP when they were in the office for an annual visit to get their prescription.[144] By contrast, Professor Evans'

[144] Evans, Tr. 1452-1453 (discussing CX1117 at 015) ("74 percent of the people who they had identified were planning to buy from 1-800 [Contacts] the next time around. So those aren't lost sales; those are people who are going to buy the next time around.").

{[redacted]} percent diversion ratio represents actual lost customers. 1-800 Contacts suggests that Professor Evans concluded that the survey participants would likely make their next purchase from an online retailer (Resp. Br. at 85), but, in fact, it was 1-800 Contacts itself that made that determination, as Professor Evans explained at trial,[145] and it was 1-800 Contacts itself that concluded that "40% of those not likely to come back will go to another online supplier."[146]

Moreover, both Dr. Murphy and Professor Evans agree that a diversion ratio far below {[redacted]} percent would satisfy a SSNIP test and, thus, indicate a relevant market for the online sale of contact lenses. Indeed Dr. Murphy concedes that any diversion ratio above {[redacted]} percent would pass the SSNIP test and, thus, indicate a relevant online market.[147] Even apart from the reliable data on which Professor Evans relied to determine a diversion ratio of {[redacted]} percent, a number of different data points indicate a diversion ratio greater than {[redacted]} percent. For example, Dr. Murphy conceded that two of the four data points presented in his own expert report exceed that level.[148] With respect to a third data point, Dr. Murphy does not know whether it reflects a diversion ratio greater than {[redacted]} percent.[149] Instead of relying on any of these three data points, Dr. Murphy selected the fourth one – the only one low enough to suggest that an online market

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[145] Evans, Tr. 1453-1454 ("What *1-800 Contacts did* is they divided those responses into two groups. One, as I recall, the 'likely' group . . . [the other group was] characterized as unlikely to buy the next time around.") (emphasis added).

[146] CX1117 at 015.

[147] Murphy, Tr. 4274-4275, *in camera*. *See also* Murphy, Tr. 4168 (given a diversion ratio "in the mid-20s, [the online market] passes the SSNIP test and that would be suggesting that you could think of a candidate relevant market including 1-800 and the other online sellers.").

[148] *See* Murphy, Tr. 4275-4279, *in camera* (discussing Exhibit 15 of Dr. Murphy's report, RX0739 at 0102, *in camera*) (presenting diversion ratios to online competitors of {[redacted]}).

[149] Murphy, Tr. 4276-4278, *in camera*.

does not pass a SSNIP test. As discussed above, the {[redacted]} percent figure he cherry-picked is unreliable because it includes a large majority of customers who did not actually switch their purchases away from 1-800 Contacts.

UPP Natural Experiment. Contrary to 1-800 Contacts' assertions (Resp. Br. at 88-89), the manufacturers' imposition of UPP provides compelling confirmation of Professor Evans' critical loss analysis. As Professor Evans explained, when manufacturers forced online discounters and club stores to increase their prices on particular products, the profits of online retailers increased, providing evidence that consumers failed to switch sufficient purchases to independent ECPs or mass merchandisers to defeat a price increase.[150] Indeed, the evidence is particularly strong because the UPPs imposed a price increase of 20 percent, far above the SSNIP level of five percent that is typically used to define a relevant antitrust market.[151]

1-800 Contacts complains that the UPP experiment did not rule out the hypothesis that club stores participate in the same relevant market as online discounters. *See* Resp. Br. at 89. Professor Evans acknowledged this, and explained that additional evidence showed that club stores are not significant competitors to online contact lens retailers.[152] *See* CC Br. at 119. Specifically, Professor Evans relied on evidence showing that {[redacted]}[153] documents and testimony

[150] Evans, Tr. 1443-1444.

[151] CX8006 at 127 (¶ 274) (Evans Expert Report).

[152] Evans, Tr. 1446.

[153] CX8006 at 127-128 (¶ 276 & n.308) (Evans Expert Report), *in camera* (citing evidence that {[redacted]}) (citing CX1162, *in camera*).

showing that club stores were excluded from 1-800 Contacts' price match policy,[154] and a sworn declaration from Costco that it views its primary competitor as Sam's Club rather than online retailers.[155] This evidence was confirmed by other online retailers, who testified that club stores do not factor significantly into competitive decisions because club customers are "a very different category of customer."[156] *See* CC Br. at 104-106.

1-800 Contacts also claims that Professor Evans did not "quantify the extent to which online sellers were unable to acquire new customers as a result of the UPPs." Resp. Br. at 89. But this is a red herring, because, while *one* particular online seller was unable to attract new customers as a result of UPPs,[157] the results of Professor Evans' analysis show that, *as a group*, online sellers were able to attract enough customers to make a 20 percent price increase profitable. Moreover, as Professor Evans explained, any difficulty the online discounters might face in attracting new customers would likely be due to a difficulty in attracting new customers from 1-800 Contacts itself, because they were no longer able to undercut 1-800 Contacts' prices due to the UPPs.[158]

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[154] CX1341 at 001. *See also* CX9025 (Osmond, Dep. at 18) ("The policy, though, the way it's written is that we don't match clubs because it requires a membership to get that price."); CX9034 (Roush, Dep. at 156) ("[O]ur price matching has typically excluded clubs as a policy. And the reason for that is pretty simple, and that is that there's a fee, a membership fee that's associated with clubs, and so you have to pay that fee."); *id.* at 151-152; *id*. at 155-157.

[155] CX8004 at 001-002 (¶¶ 2-3, 8) (Salas, Decl.).

[156] Clarkson, Tr. 196-197. *See also*, *e.g.*, CX9000 (Batushansky, IHT at 18-21), *in camera* {[redacted]}.

[157] Evans, Tr. 1755-1757.

[158] Asked to "assume that all online sellers" had difficulty attracting customers, Dr. Evans explained that the most plausible explanation for such a result would be a reduction in customers attracted from online competitors, principally 1-800 Contacts itself. Evans, Tr. 1755-1756.

b. The Parties To The Bidding Agreements Have Market Power In The Market For Online Retail Sales Of Contact Lenses

1-800 Contacts does not dispute that the parties collectively have a share of online sales of contact lenses that gives rise to a presumption of market power. Collectively, the parties to the Bidding Agreements comprise roughly 80 to 90 percent of the relevant market for the online sale of contact lenses. *See* CC Br. at 121-122.

c. There Are Substantial Barriers To Entry And Expansion In The Online Market

1-800 Contacts' brief fails to address the substantial evidence showing that, in order to compete effectively, a new entrant would need to attain **{**[redacted]**}**[159] Nor does 1-800 Contacts address the fact that many of the supposedly independent competitors it touts have been forced to purchase fulfillment and distribution capabilities from two established online retailers: National Vision (AC Lens), and 1-800 Contacts itself.[160]

Instead, 1-800 Contacts identifies Web Eye Care and Memorial Eye – two small players who entered the online market between 8 and 12 years ago, respectively, as evidence of "a lack of entry barriers." Resp. Br. at 92-93. Tellingly, Memorial Eye exited the online market in 2013

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[159] RX1228 at 014, *in camera* (**{**[redacted]**}**).

[160] RX1228 at 014, *in camera* (**{**[redacted]**}**); CX0331 at 031 (1-800 Contacts provides "prescription verification and . . . fulfillment for orders placed on" websites operated by Luxottica, including Searsoptical.com, Targetoptical.com, Contactsdirect.com, LensCrafters.com, PearleVision.com, Eyemedcontacts.com, referred to as "LUX Websites"); *id*. at 071 (defining "LUX Websites"); Bethers, Tr. 3721-3722; Clarkson, Tr. 175-177 (Walmart, Sam's Club, and CVS purchase fulfillment services from National Vision (AC Lens)).

because of its Bidding Agreement with 1-800 Contacts. CC Br. at 50-52. Web Eye Care has been unable to achieve significant sales (CC Br. at 125), and, thus, cannot possibly represent entry on a "sufficient scale adequate to constrain prices." *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 429–30 (5th Cir. 2008) (holding that "the Commission applied the correct legal standard and rightfully concluded that potential entrants would not be of a sufficient scale to compete on the same playing field as [the respondent] and thus would be unable to constrain the likely anti-competitive effects.").

The fringe players identified by 1-800 Contacts that have supposedly entered the online market "in just the last two years" are equally unconvincing. *See* Resp. Br. at 93. First, this entry apparently occurred after the FTC initiated its investigation of the Bidding Agreements; thus, it is unsurprising that they have not been sued or confronted by 1-800 Contacts. Should the Court uphold 1-800 Contacts' Bidding Agreements, there is every reason to believe that such agreements will increase in number, and that these "new entrants" will become subject to the same restraints that have impeded 1-800 Contacts' other online competitors.

More importantly, there is no indication that any of these rivals have achieved, or might achieve in a timely fashion, sufficient scale to be capable of constraining 1-800 Contacts' prices. *See Chicago Bridge & Iron*, 534 F.3d 410, 430 (relying on the Commission's findings that "entrants in this market also appear vastly overmatched by [the respondent]," and that testimony "does not demonstrate that [the entrants] are adequate replacement for the competition that has been lost.") (quoting Commission Op., at 66, 67). No evidence exists regarding these firms' market shares, sales, prices, or distribution capabilities. Thus, there is insufficient basis for the

Court to conclude that any of these firms is capable of entering the online market at a scale and cost of distribution that might constrain 1-800 Contacts' pricing.

While 1-800 Contacts suggests that the only cognizable barriers to entry are obstacles that might prevent competitors from making any sales at all, that is incorrect; entry barriers exist where potential entrants are unable to enter the market "at the same cost of production" as incumbents. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985); *see also* Areeda & Hovenkamp ¶ 941a ("Entry barriers are any factors that either block entry altogether or raise new entrants' costs above those of existing efficient firms."). 1-800 Contacts (and other major players) have made enormous investments in efficient distribution systems and prescription verification systems to lower their costs. *See* CC Br. at 123.[161] A new entrant would have to replicate these significant investments to achieve a scale sufficient to constrain the pricing of the parties to the Bidding Agreements, and there is no evidence that any firm has done so.[162]

2. In the Alternative, Complaint Counsel Offered Significant Direct Evidence Of Anticompetitive Effects

Complaint Counsel has proved its *prima facie* case through a third alternative method: direct evidence of anticompetitive harm. "Under this framework, a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded

[161] *See also* Clarkson, Tr. 181-182 (describing automated prescription verification system and large inventory requirements); *id*. at 193-194 (describing shipping process).

[162] *See, e.g.*, RX1228 at 014, *in camera* **{**[redacted]**}**.

innovation, or other manifestations of harm to consumer welfare." *Realcomp II*, 2007 WL 6936319, at *31. *See also Indiana Federation*, 476 U.S. at 460 (accepting as direct proof of anticompetitive effects evidence that in two localities, over a period of years, insurers were "actually unable to obtain compliance with their requests for submission of x-rays").

Two major academic empirical studies before the Court rely on click behavior to assess the market significance of trademark keyword advertising.[163] Both studies conclude that rivals' ability to engage in trademark keyword advertising significantly impacts consumer clicks. *See* CC Br. at 82-83. Here, Professor Athey and Professor Evans provided two distinct economic models demonstrating that this general result applies to the online sale of contact lenses. The Bidding Agreements suppressed millions of advertisements in millions of consumer search sessions. This restraint on competitive activity significantly increased the number of clicks received by 1-800 Contacts, and reduced the number of clicks secured by its lower-priced and less well known rivals.

Ad impressions and clicks are the lifeblood of online marketing. Professors Evans and Athey convincingly explained that by impeding the natural diversion of consumer clicks to online rivals, the Bidding Agreements cause consumers to pay higher prices than they would have paid but-for the Bidding Agreements. More specifically, the Bidding Agreements restrict the flow of competitively significant information in a market characterized by premium pricing by market leader 1-800 Contacts. This price differential is attributable in part to a lack of consumer information. As Professor Evans explained, absent the Bidding Agreements (that is, absent the artificial restriction on advertising and distortion of click behavior), competitive

[163] *See* CC Br. at 82-83 (discussing Simonov and Bechtold studies).

pressure on 1-800 Contacts would increase and consumers would pay lower prices for contact lenses:

> [C]onsumers would have seen more from online competitors, and the consequences of that would have been that more of the sales would have shifted to those online discounters . . . . [C]onsumers would have benefited in another way, which is as a result of seeing those ads, they would have learned about these low-cost alternatives, and that would have increased the likelihood they would have applied to 1-800 for the price-match program, and they would have benefited from lower prices in that way. And then, finally . . . 1-800 [Contacts] most likely would have been induced to lower its prices in competition with the online discounters who would be engaged in this activity to a much greater degree.[164]

The economic models and related economic evidence satisfy Complaint Counsel's burden by showing that consumers pay prices that likely are higher "than they would otherwise be" absent the Bidding Agreements. *NCAA*, 468 U.S. at 107. Indeed, this demonstration goes well beyond what is necessary to shift the burden to 1-800 Contacts to justify its restraints, as the Commission has instructed that no "showing of actual harm" is required when exclusionary acts designed to quash nascent competition are at issue, as they are in this case. *Realcomp II*, 2007 WL 6936319, at *42 ("[A]s the D.C. Circuit pointed out in *United States v. Microsoft*, the relevant question in dealing with emerging competition is not whether the new entrant would actually have developed into a viable substitute for the dominant product, but whether 'the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power.' . . . The *Microsoft* court therefore did not require a showing of actual harm . . . . Although the *Microsoft* court was analyzing a

[164] Evans, Tr. 1461. *See* Athey, Tr. 797-798 ("[I]f consumers become more informed, it will be difficult to sustain a price premium and [1-800 Contacts] would thus face a choice, either lose market share in the online channel, and particularly in the search channel, or lower their price. What they would choose, I didn't reach a conclusion on that. But more likely than not, prices – prices would fall. It's also possible that they could keep their prices high and – but consumers would use more price match, which would lead to a reduction in the effective price by 1-800 even if the list price stayed high.").

monopolization claim under Section 2 of the Sherman Act, we believe that the principle is equally applicable to this case.") (internal citations omitted). *See also McWane, Inc. v. FTC*, 783 F.3d 814, 838 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1452, 194 L. Ed. 2d 550 (2016) ("exclusive dealing measures that *slow* a rival's expansion can still produce consumer injury") (emphasis added). Complaint Counsel's demonstration that the Bidding Agreements distorted consumers' clicking behavior would, standing alone, provide a sufficient "manifestation[] of harm to consumer welfare." *Realcomp II*, 2007 WL 6936319, at *31.

1-800 Contacts offers a potpourri of criticisms attempting to show that competitive harm is limited or unquantified. The arguments are factually unsupported, and insufficient as a matter of law.

a. Complaint Counsel Proved That Bidding Agreements Have Restrained Competitively Significant Advertising

The record evidence shows that search advertising is the single most important form of advertising employed by online sellers of contact lenses, CC Br. at 39-47, and that consumer queries for "1800 Contacts" represent a substantial portion of contact lens-related search queries. CC Br. at 43 & n.162. *See infra* pp. 107-108.

1-800 Contacts advances two arguments suggesting that the search advertising restrained by the Bidding Agreements was not "competitively significant." Resp. Br. at 98. First, 1-800 Contacts asserts that search advertising triggered by its trademark terms represents a small portion of advertising "by firms that sell contact lenses online." *Id*. This argument fails, both legally and factually. As a legal and economic matter, there is no requirement that a restraint prevent *all* advertising in order to produce an anticompetitive effect, and neither case cited by 1-800 Contacts supports its argument. *Polygram* dealt with an advertising restriction relating to two recordings for six weeks. *See* CC Br. at 79. And, while 1-800 Contacts claims that *Realcomp* dealt with a "*total* prohibition on distributing real estate broker listings to the public," Resp. Br. at 95-96 (emphasis added), this is incorrect. In *Realcomp*, the challenged policy prevented only *some* public websites from displaying the discounted listings. *Realcomp II*, 635 F.3d at 829-830. Indeed, discounted listings could be displayed on a public website (Realtor.com) that by itself reached "approximately 90% of home buyers." *Id.* at 830. Based on this evidence, the ALJ in *Realcomp* mistakenly concluded that the restraints did not impact a competitively significant proportion of listings. *Id*. ("the website policy prevented [discounted] listings from reaching 'only a relatively small additional percentage of home buyers.'") (quoting Initial Decision). But the Commission, and the Sixth Circuit in affirming the Commission's opinion, found that the ALJ erred in concluding that this was too small of a percentage to matter, concluding that "reducing by 10% the number of home buyers that are exposed to discount listings" was sufficient to show an adverse impact on competition. *Id.* at 830-831.

Moreover, as a factual matter, 1-800 Contacts is incorrect in asserting that searches employing 1-800 Contacts' trademarks are infrequent. 1-800 Contacts states that "only {[redacted]} of all Google paid search advertisements related to contact lenses were displayed as a result of [an advertiser's] *bidding* on 1-800 Contacts' trademarks," Resp. Br. at 98 (emphasis added), citing Dr. Ghose's analysis of Google data.[165] Data regarding advertiser bidding does not measure the frequency of *consumer queries* relating to 1-800 Contacts' trademark. This is an

[165] *See also* Resp. Br. at 43 (claiming that "the data show that about {[redacted]} of ads appeared in response to a bid on a keyword other than one of 1-800 Contacts' trademarks"); *id.* at 103 ("almost {[redacted]} of paid search advertisements were generated by bids on terms other than 1-800 Contacts"). Note that, even assuming, counterfactually, that it were true that relatively few ads were *displayed* in response to searches for 1-800 Contacts trademark terms, it would demonstrate only that the Bidding Agreements were effective.

important distinction because the "broad match" service provided by search engines places ads in response to a relevant search query even where the advertiser did not bid on the specific keywords used by the consumer in his or her query. *See* CC Br. at 12-13 (describing Google's default use of broad match). Recall, for example, that Memorial Eye never bid on any of 1-800 Contacts' trademarks, but was frequently "broad matched" into search queries relating to 1-800 Contacts trademarks. *See* CC Br. at 42-43, 45-47. Google's data indicates that these impressions resulted from bids on generic terms **{**[redacted]**}**[166] As 1-800 Contacts' own expert Dr. Murphy explained, **{**[redacted]**}**[167] In other words, not a single impression from Memorial Eye would be identifiable in the Google data as resulting from a consumer query relating to a 1-800 Contacts trademark, even though, plainly, Memorial Eye advertisements frequently appeared in response to such searches.[168]

For the same reason, this Court should disregard 1-800 Contacts' claim that paid search advertising triggered by searches for 1-800 Contacts' trademark terms was "not important to" retailers who were not subject to the Bidding Agreements. Resp. Br. at 96. 1-800 Contacts suggests that only **{**[redacted]**}** of the clicks these retailers obtained were based on "bids for 1-800

[166] *See* CX1626, *in camera* **{**[redacted]**}**.

[167] Murphy, Tr. 4188, *in camera* (emphasis added); *see id*. at 4212-4221, *in camera*.

[168] CX1626, *in camera* **{**[redacted]**}**.

Contacts' trademarks," but that does not provide any information on the portion of these retailers' clicks resulting from *consumer queries* that include 1-800 Contacts trademark terms, because it disregards broad matching.[169] No data supports 1-800 Contacts' suggestion that ads triggered by searches for 1-800 Contacts' trademarks were "not important to" its rivals – indeed, Professor Murphy admitted at trial, **{**[redacted]**}**[170] And copious evidence contradicts this claim. *See* CC Br. at 39-47.

1-800 Contacts' experts did not provide any analysis showing that consumer queries related to 1-800 Contacts' trademark terms are infrequent. Dr. Ghose offered incomplete statistics to suggest that "search interest" in all 1-800 Contacts trademark terms was low.[171] But he was forced to concede on cross examination that his assessment of "search interest" was based on searches for a single term ("1-800 Contacts"), and that he cherry-picked this term even though it was not among the 50 most commonly searched variants of 1-800 Contacts trademark terms.[172]

1-800 Contacts repeatedly mischaracterizes Professor Evans' testimony and his findings in an effort to suggest that he offered an opinion concerning the percentage of internet searches that involve 1-800 Contacts' trademarks. Resp. Br. at 43, 98, 103.[173] Professor Evans did not

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[169] *See* Resp. Br. at 96 (citing RX0379-0099 (Murphy Report Ex. 13A)); Murphy, Tr. 4187-4188, *in camera* (explaining that **{**[redacted]**}**); Murphy, Tr. 4212-4214, *in camera* (same).

[170] Murphy, Tr. 4221, *in camera*.

[171] Ghose, Tr. 3918-3919.

[172] Ghose, Tr. 4076-4078. *See* RX0733 at 0101 (Ex. 7) (Ghose Expert Report) (most frequent query related to 1-800 Contacts generated 22,729,345 impressions; 50th most frequent query generated 20,180 impressions; and Dr. Ghose picked a term less common than the 50th most common query to illustrate what he termed "search interest").

express any such opinion,[174] and, indeed, did not have the data needed to do so.[175] The Google data analyzed by both Professor Evans and 1-800 Contacts' experts did not contain any information about the consumer queries themselves, as explained above.

Only Professor Athey analyzed the available data on the portion of consumer queries that involve 1-800 Contacts' trademark terms. This comScore data reveals that queries involving 1-800 Contacts' trademarks represent 30 percent of *all* queries related to contact lenses.[176] This is a competitively significant volume of searches, approximately equal to the volume of queries for

[173] Presumably, the same mischaracterization is the source for 1-800 Contacts' unsourced assertions that "98% of contacts-related searches use terms other than 1-800 Contacts' trademark and thus were not affected by the agreements," Resp. Br. at 3, and that "the settlement agreements had no effect on the 98% of searches that Dr. Evans testified did not involve 1-800 Contacts' trademark." *Id.* at 12.

[174] Professor Evans' statement was provided in response to the following question: "Q. In your data that you looked at, over 98 percent of the searches were for generic terms; correct? A. Yes." Evans, Tr. 1724. The only evidence in the record that could provide a basis for counsel to suggest that "over 98 percent of the searches were for generic terms" is Dr. Ghose's calculation that "bids on *keywords* containing 1-800 Contacts' trademark resulted in only 2.1 percent of all impressions in the [Google] data." RX0733 at 055. Given this context, Professor Evans reasonably understood the question to refer to the prevalence of 1-800 Contacts trademark *keywords* in the entire Google dataset, and answered that question affirmatively reflecting his understanding of Dr. Ghose's analysis to this effect.

[175] Because the Google data relied upon by Professor Evans consists of the *impressions* associated with keywords, it is impossible to even know the number of *searches* that generated the reported impressions. By way of illustration, if ten consumers ran a search for "1-800 Contacts," and nine of the ten searches generated one impression because of a bid on the keyword "1800contacts," the Google data would contain nine entries of an impression generated by the keyword "1800contacts." But those same ten searches might also generate 23 impressions because different advertisers bid on the keyword "contacts." The Google data would show that 23 out of 32 impressions were generated by a bid on the term "contacts," but that provides no way to determine that how many *searches* consumers ran for the query "contacts," or even how many searches consumers ran overall. *See*, *e.g.*, CX9042 (Evans, Dep. at 103-104) (Q. "What percentage of the queries that are, in your opinion, contact lens related are accounted for by [contacts, contact lens and contact lenses]? A. I don't have that number for you. Q. Can you give me an estimate? A. No.")

[176] CX8007 at 028 (¶ 81 & Table 1) (Athey Expert Report) (comScore data contains 9,450 generic queries and 2,769 1-800 Contacts Trademark queries: 2769/9450 = 29.3%); RX0733 at 055 n.278 (Ghose Expert Report (citing CX8007 at 028, 030 (¶ 90 & Table 1) (Athey Expert Report)) ("the quantity of generic searches is 3.4 times the quantity of 1-800 Contacts searches."); *id*. (.294% * 3.4= 100%).

the "Big Three" generic terms combined ("contacts," "contact lenses," and "contact lens").[177] 1-800 Contacts does not dispute the competitive significance of the "Big Three" terms.[178]

1-800 Contacts' second contention is that the parties to the Bidding Agreements "did not attach competitive importance to paid search advertising in response to searches for 1-800 Contacts' trademarks." Resp. Br. at 96. 1-800 Contacts simply ignores the record evidence demonstrating that paid search advertising, and trademark search advertising in particular, was of vital importance to both 1-800 Contacts and its rivals. *See* CC Br. at 39-47. 1-800 Contacts identifies no testimony from any witness that supports its assertion, only half-truths and mischaracterizations. For example, 1-800 Contacts asserts that it did not spend very much on paid search advertising for its own trademark, Resp. Br. at 96-97. But this only confirms that bid-rigging in auctions is an effective means of reducing spending. This is no surprise, as 1-800 Contacts has long recognized that "low competition = low cost."[179] The fact that 1-800 Contacts spent relatively little after eliminating all competition for its trademark keywords tells this Court nothing about the importance of trademark search advertising to its *sales*.

[177] Athey, Tr. 2107 (testifying that "the volume of the top three generic terms [in the comScore] data was collectively similar in size to the volume of 1-800 Contacts-related searches" in the comScore data."); CX8010 at 033-035, 056 (¶¶ 83-84 & Ex. C) (Athey Rebuttal Expert Report) (number of searches for top 10 1-800 contacts branded search queries); *id*. at 057 (Ex. D) (most commonly observed generic search queries).

[178] Bethers, Tr. 3655 ("'[C]ontacts,' 'contact lens' or 'contact lenses.' Those are what we refer to as the big three search terms in this industry, where consumers often go to find contact lens retailers to buy from."); CX0296 at 034 (four generic keywords account for 40 percent of non-trademark orders, including "contacts" and "contact lenses"). *See id*. at 3796 (explaining CX0296 at 034, testifying that, "I had mentioned the big three previously as being 'contacts,' 'contact lens' and 'contact lenses' as being Google keyword performance for non-trademark that we monitored closely. Those are what I knew to historically represent a meaningful amount of our volume."); Craven, Tr. 521-522 ("Big 3" keywords and trademark keywords were [the] two largest contributors to 1-800 Contacts orders"); *id*. at 673 ("From what I remember at 1-800 Contacts, the big categories were our trademark keywords, what we called the big three keywords, and kind of everything else."); Stone, Tr. 97 (1-800 Contacts Opening Statement) ("You will see during the course of this case that the three most common terms that people use when they're searching for information about contact lenses are what 1-800 Contacts refer to as the big three, 'contact lens,' 'contact lenses' and 'contacts.'").

[179] CX0296 at 035.

There is no dispute that at least {[redacted]} percent of 1-800 Contacts' internet sales result from {[redacted]} terms.[180] This {[redacted]} percent of customers are of enormous competitive significance because customers who make one purchase frequently make additional purchases.[181] Thus, competition for marginal customers willing to switch away from 1-800 Contacts (in favor of lower-priced rivals) would place competitive pressure on 1-800 Contacts to reduce its prices.[182]

1-800 Contacts' marketing personnel recognized that the company lost substantial sales to rivals when rivals displayed search advertising triggered by search queries relating to 1-800 Contacts' trademarks, and acknowledged the competitive significance of such lost sales. *See* CC Br. at 28-30, 58. Indeed, 1-800 Contacts founder and former CEO Mr. Coon testified that such lost sales amounted to millions of dollars, even though 1-800 Contacts' most effective rivals were constrained by Bidding Agreements.[183]

1-800 Contacts argues that its rivals must have concluded that "the lifetime benefits of advertising in response to searches for 1-800 Contacts' trademarks" was less than the $1.4 million in pretrial expenditures Lens.com was forced to spend to defend itself against 1-800 Contacts' lawsuit. Resp. Br. at 97. This argument fails for a number of reasons. At the outset, it assumes, counterfactually, that all of 1-800 Contacts' rivals had immediately available funds for

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[180] RX0428 at 030; Bethers, Tr. 3814-3816 ({[redacted]}).

[181] *See, e.g.*, Evans, Tr. 1620, *in camera* (lost sales estimate must take into account subsequent sales to the lost customers).

[182] Evans, Tr. 1644-1645, *in camera*.

[183] Coon, Tr. 2851-2865 (asserting that 1-800 Contacts lost sales that were greater than one percent of its total advertising spend due to rivals' search advertising on 1-800 Contacts' trademark terms).

litigation, so long as the long-term goal was worthwhile or profitable. As several of 1-800 Contacts' rivals testified, they did not have substantial funds for *any* purpose (indeed, many of them did not have a lawyer on staff), even where the rivals understood how profitable and important advertising against 1-800 Contacts' trademarks was to their businesses. For example, Memorial Eye general manager Eric Holbrook testified that Memorial Eye's litigation with 1-800 Contacts was financially ruinous for Memorial Eye's online business; and, even though Mr. Holbrook clearly understood that losing this traffic would be devastating, he simply could not afford to continue fighting 1-800 Contacts.[184] *See* CC Br. at 22, 48-52.

Further, 1-800 Contacts' assertion rests on the faulty assumption that, at the time of settlement, the settling parties could calculate the value of future advertising in response to queries relating to 1-800 Contacts. As Professor Evans testified, many of the firms that received cease-and-desist letters had very little experience advertising in response to such queries, and thus, could not be expected accurately to predict how successful this advertising strategy would be, certainly not with enough precision to balance it against the expected costs of litigation.[185]

The same reasoning applies to retailers that 1-800 Contacts claims were "not bound by the settlement agreements." Resp. Br. at 96.[186] Moreover, many of the retailers 1-800 Contacts refers to were restrained by unwritten Bidding Agreements (CC Br. at 21), by threats from 1-800

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[184] Holbrook, Tr. 1933, 1942, 1947-1948, 2065-2066.

[185] Evans, Tr. 1553-1554.

[186] Athey, Tr. 958 ("it was not in their economic interest to bid a sufficient amount and incur the risk of a lawsuit . . .").

Contacts,[187] or, in some cases, by the Bidding Agreement of an already-bound competitor (because of an affiliation between the two firms).[188]

Even if 1-800 Contacts were correct that not a single individual settling party thought that the profits it could obtain exceeded the expected costs of litigation (it is not correct), this does not mean that advertising in response to queries relating to 1-800 Contacts is not economically significant. It simply suggests that any rival advertising in response to queries relating to 1-800 Contacts would recognize relatively limited profits, assuming that many other advertisers adopted the same strategy. But *consumers* would recognize significant economic benefit, either because they would purchase contact lenses from one of many lower-priced retailers, or because they would use the information from a lower-price rival's ad to secure a price-match from 1-800 Contacts itself.[189]

1-800 Contacts also cites the modest growth of a few of its rivals as an indication that the Bidding Agreements did not produce anticompetitive effects. But "it is not necessary that all competition be removed from the market" for a restraint to be deemed anticompetitive. *United States v. Dentsply*, 399 F.3d 181, 191 (3d Cir. 2005). In any event, these random data points do not establish that any rivals subject to the agreement have been able to grow meaningfully.[190]

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[187] Athey, Tr. 955 (discussing Exhibit B of Dr. Athey's report, CX8007 at 042). Exhibit B of Dr. Athey's report includes Lens Discounters. There is no dispute that Lens Discounters ceased bidding on 1-800 Contacts' trademark terms and implemented negative keywords as a result of litigation threats from 1-800 Contacts. *See* CX8003 at 003-005 (¶¶ 11-28) (Mitha, Decl.).

[188] For example, Sears Optical, Target Optical, Pearle Vision, and Contacts Direct are all restricted by 1-800 Contacts' Bidding Agreement with Luxottica because Luxottica runs the website for each company. Bethers, Tr. 3721-3722. *See* CX8007 at 042 (listing each company as "unbound" because they did not have a written agreement with 1-800 Contacts). Athey, Tr. 955 (discussing Exhibit B of Professor Athey's report).

[189] *See* Evans, Tr. 1554-1555.

Indeed, all of 1-800 Contacts' restrained online rivals together have considerably smaller sales than 1-800 Contacts itself.[191] Moreover, 1-800 Contacts' ordinary course documents belie the notion that the Bidding Agreements were an ineffective means of suppressing competitors.[192]

b. Complaint Counsel Showed That The Bidding Agreements Led To Higher Prices In The Online Contact Lens Market

1-800 Contacts argues that Complaint Counsel must demonstrate that the Bidding Agreements either reduced output or "enabled 1-800 Contacts or the other settling parties to raise prices." Resp. Br. 98-99. This is incorrect.

The very authorities on which 1-800 Contacts relies state that "[a] reduction in output is not the *only* measure of anticompetitive effect." Areeda & Hovenkamp ¶ 1503b(1) (emphasis added). As the Ninth Circuit Court of Appeals recently held, a defendant's "contention that the plaintiffs' claim fails because they did not show a decrease in output in the [relevant] market is simply incorrect . . . Although output reductions are one common kind of anticompetitive effect in antitrust cases, a 'reduction in output is not the only measure of anticompetitive effect.'" *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting Areeda & Hovenkamp ¶ 1503b(1)). Indeed, "[i]n most cases it would be impossible for the court to measure the actual impact of a restraint on output. Rather, the test is whether the practice would '*tend to* restrict

[190] For example, Web Eye Care {[redacted]} of online sales several years after entering the market. CC Br. at 125. 1-800 Contacts also misleadingly implies that AC Lens expanded its sales significantly, but this is not accurate; a large portion of AC Lens' growth came from providing back-end fulfillment for companies such as Walmart, Sam's Club, and CVS, not from organic sales from its own website. *See* CX9003 (Clarkson, IHT at 9-10).

[191] RX0428 at 0009, *in camera* ({[redacted]}).

[192] *E.g.*, CX0621 at 122 ("After achieving a market share of over 12% in 2005, Coastal Contacts ceased trademark advertising as a result of a settlement agreement with 1-800. At year end 2007, their market share had fallen in half to just 6%.")

competition and decrease output.'" Areeda & Hovenkamp ¶ 1503b(1)) (quoting *BMI*, 441 U.S. at 20) (emphasis added). Here, the bidding agreements "tend[ed] to restrict competition" and lead to higher prices, as Professors Athey and Evans have each explained. *See supra* pp. 101-102; CC Br. at 57-61.[193] Reaching these conclusions, and, thus, assessing the Bidding Agreements' impact on consumer welfare, did not require either expert to estimate output (that is, "the number of contact lenses sold")[194] compared to the but-for world absent the restraints.[195]

1-800 Contacts likewise errs in asserting that Complaint Counsel is obligated to quantify the price increase likely caused by the Bidding Agreements. *See* Resp. Br. at 99. The authorities cited do not support this argument,[196] as the appropriate question is whether consumers pay prices that are higher "than they would otherwise be" absent the restraint. *NCAA*, 468 U.S. at 107. *See Cal. Dental*, 526 U.S. at 781 (antitrust plaintiff required to show that "principal tendency" of the restraint is to harm competition). Indeed, the Commission has instructed that no "showing of actual harm" is required when exclusionary acts designed to quash nascent

[193] Evans, Tr. 1460-1461; Athey, Tr. 795-796, 799-800.

[194] CX9042 (Evans Dep.) at 263.

[195] 1-800 Contacts suggests that "applying conversion rates from Google data to Dr. Athey's model predicts that the settlement agreements *increased* output." Resp. Br. at 99 (emphasis in original). This argument is incorrect for the reasons discussed *supra* at pp. 64-69.

[196] For example, *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), Resp. Br. at 99, does not support 1-800 Contacts' contention. There, the Court of Appeals simply affirmed the district court's conclusion that the restraint at issue "requires some competitive justification even in the absence of a detailed market analysis." *Brown Univ.*, 5 F.3d at 673 (quoting *Indiana Federation of Dentists*, 476 U.S. at 460). The same conclusion is appropriate here. *See id.* at 677-678 (discussing the skepticism appropriate for horizontal restraints consistent with the "economic self-interest of the parties to them," such as the Bidding Agreements). In *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), the Fourth Circuit held only that "the issue of competitive harm is inadequately briefed," and noted that anticompetitive effects sufficient to support a complaint "include, but are not limited to, reduction of output, increase in price, or deterioration in quality." *Id*. at 432-433. Likewise, in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the Second Circuit merely noted that a plaintiff prevails by showing a restraint produced "substantial adverse effects on competition, such as increases in price, or decreases in output or quality." *Id*. at 238.

competition are at issue (as they are in this case).[197] Here, however, Professor Athey and Professor Evans provided evidence of "actual harm" compared to the but-for world, as discussed above.

1-800 Contacts argues that its profit margins were stable over time, and suggests this must mean that "1-800 Contacts did not use the settlement agreements to raise prices." Resp. Br. at 100. This is not the proper test of anticompetitive effect. *See NCAA*, 468 U.S. at 107 (the appropriate question is whether prices are higher "than they would otherwise be" absent the restraint). Nor is it appropriate to infer that, if 1-800 Contacts maintained stable margins, competition was unharmed. To the contrary, as Professor Evans testified, the Bidding Agreements helped 1-800 Contacts keep its margins from **{**[redacted]**}** over a 12-year period, despite technological and competitive developments that *should have* eroded its profitability.[198] Indeed, those technological and competitive developments are the very things that impelled 1-800 Contacts to implement the Bidding Agreements. *See* CC Br. at 15-19 (describing 1-800 Contacts' concerns over lower-price rivals eating into 1-800 Contacts' market share and profits).

Finally, 1-800 Contacts suggests that "empirical evidence" of price effect is required. Resp. Br. at 100. Although Complaint Counsel's experts provided extensive empirical analysis

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[197] *Realcomp II*, 2007 WL 6936319, at *42 ("[A]s the D.C. Circuit pointed out in *United States v. Microsoft*, the relevant question in dealing with emerging competition is not whether the new entrant would actually have developed into a viable substitute for the dominant product, but whether 'the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power.' . . . The *Microsoft* court therefore did not require a showing of actual harm . . . . Although the *Microsoft* court was analyzing a monopolization claim under Section 2 of the Sherman Act, we believe that the principle is equally applicable to this case.") (internal citations omitted). *See also McWane*, 783 F.3d at 838 ("exclusive dealing measures that *slow* a rival's expansion can still produce consumer injury.") (emphasis added).

[198] Evans, Tr. 1662, *in camera*.

of the Bidding Agreements' adverse effects on competition (*see* CC Br. at 53-61), no authority suggests that Complaint Counsel must provide an empirical estimate of how much higher consumer prices are with the Bidding Agreements in place than in their absence. Professors Evans and Athey did not need to model prices in the but-for world in order to conclude that prices charged to consumers are higher "than they would otherwise be."[199] The two cases cited by 1-800 Contacts, *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998), and *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995), have no bearing on this case. In both cases, plaintiffs relied entirely on affidavits that failed even to *allege* that the challenged conduct had an impact on prices. *Tops Markets*, 142 F.3d at 96 (plaintiff "relied almost entirely on . . . affidavit . . . which discussed [the defendant's] high market share and the competitive advantages that could have resulted in *potentially* higher prices, but significantly did not allege that prices were *actually* higher in the Jamestown market.") (emphasis in original); *K.M.B. Warehouse Distributors*, 61 F.3d at 128 (plaintiff's evidence of adverse effect "consists almost entirely of affidavits from twelve of its current customers stating that they prefer both [the products plaintiff was not allowed to sell do to the restriction] and [plaintiff's] superior service.").

c. A Reduction In Advertising Establishes Anticompetitive Effects In This Case

1-800 Contacts erroneously asserts that Complaint Counsel's proof that the Bidding Agreements reduced competitively significant advertising cannot establish anticompetitive effects "as a matter of law." Resp. Br. at 101. This argument misses the mark, because

[199] *See* Evans, Tr. 1644-1645, *in camera* (explaining conclusion that {[redacted]}); Athey, Tr. 797-798 (same).

Complaint Counsel went beyond demonstrating an impact on advertising and showed that the Bidding Agreements changed consumers' behavior, and that this change in consumer behavior impacted market prices. *See supra* pp. 101-102. Moreover, 1-800 Contacts' sole authority, *Cal. Dental*, 526 U.S. 756, fails to support its novel suggestion that "the law is that the competitive effects of an advertising restriction must be tested in the market for the product being advertised." Resp. Br. at 102.

i. Advertising Effects Are Sufficient As A Matter of Law

In *Cal. Dental*, 526 U.S. 756, the Court held that an advertising regulation impacting dentists should be condemned as inherently suspect only if it "*obviously tends* to limit the total delivery of dental services." *Id*. at 776 (emphasis added). The Court held that, because the regulations addressed potentially misleading claims and arose in the special context of professional services, the *tendency* of the advertising regulations on the output of dental services was not obvious,[200] and the restraints "could have different effects from those 'normally' found in the commercial world." *Id.* at 773. The Court did not hold that a plaintiff who is able to demonstrate a reduction in advertising that *does* have an obvious tendency to impact competition needs to make an additional showing by testing "the market for the product being advertised." *See* Resp. Br. at 102.

1-800 Contacts' proposed rule is not only unsupported by precedent, it would contradict the Supreme Court's instruction that a "concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular

[200] Notably, there was no indication that the restraints at issue reduced advertising, the Court noted only that the restraints limited "the *universe* of possible advertisements" by requiring that certain disclosures accompany price advertising, and forbidding "unverifiable quality and comfort advertising." *Id.* at 776, 778.

purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in . . . the purchase of higher priced [products] than would occur in its absence." *Indiana Federation of Dentists*, 476 U.S. at 461-62. Likewise, in *Realcomp*, 635 F.3d 815, Complaint Counsel demonstrated a reduction in the number of discounted listings in a database used by realtors, and on public websites. The Commission and the Court of Appeals both held that this demonstration was sufficient to demonstrate "direct evidence of competitive effects," *id.* at 831, without requiring any separate demonstration that the prices of real estate were impacted.

Moreover, 1-800 Contacts completely ignores the Commission's decisions in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and *American Medical Association*, 94 F.T.C. 701 (1979). These cases, like *Realcomp* and *Indiana Federation of Dentists*, contradict 1-800 Contacts' suggestion that an advertising restraint must be assessed by testing the market for the product being advertised. *See Mass. Bd.*, 110 F.T.C. at 605 ("Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. '[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality.'" (quoting *Am. Med. Ass'n*, 94 F.T.C. at 1030); *Am. Med. Ass'n*, 94 F.T.C. at 1006 (rejecting argument that "an impact upon physician fees must be demonstrated in order to characterize respondent's ethical restraints as unreasonably anticompetitive"). Instead, Complaint Counsel provides direct evidence of anticompetitive effects by proving that the Bidding Agreements tend to cause the anticompetitive effects "normally found in the commercial world." *Cal. Dental*, 526 U.S. at 773.

ii. Substantial Empirical Evidence Demonstrates That The Bidding Agreements Significantly Reduced The Availability Of Commercially Important Information

Complaint Counsel's Post-Trial Brief described the two sophisticated economic models demonstrating that the Bidding Agreements reduced the quality and quantity of valuable search advertising that would have benefitted consumers. *See* CC Br. at 53-57. These models disprove 1-800 Contacts' assertion that the Bidding Agreements eliminated only redundant or insignificant advertisements, because the models show that consumers would have changed their behavior in the counterfactual world. 1-800 Contacts does not address the implications of these models at all, instead offering various other statistics and arguments that purportedly show that consumers were exposed to *enough* advertisements. Resp. Br. at 103-104. These arguments fail, as they disregard the unique value competitors and consumers realize from search advertising triggered by queries for 1-800 Contacts' trademark terms and often delivered when the consumer is ready to make his purchase. *See* CC Br. at 39-52.[201]

In any event, 1-800 Contacts' arguments are entirely unpersuasive on their own merits. First, 1-800 Contacts repeats its erroneous assertion that the data shows that relatively few (**{**[redacted]**}** percent) of relevant search advertisements are shown in response to consumer queries for 1-800 Contacts' trademark terms. Resp. Br. at 103. This assertion has already been debunked above, *supra*, pp. 103-104. Second, 1-800 Contacts suggests that the parties to the Bidding Agreements displayed *other* search advertisements on Google (in responses to searches for generic

[201] *See also* Evans, Tr. 1545-1546 (explaining that consumers who search for 1-800 Contacts trademark terms "are considering a firm which is a large, established brand that charges higher prices than the online discounters . . . [t]hose are hot prospects for those . . . online firms. If as a result of the settlement agreements or something else those firms aren't able to put ads in front of consumers that are considering 1-800, they don't have any way to go sell to those consumers. They don't have any way to find them."); CX8009 at 088 (¶ 166) (Evans Rebuttal Report) ("for 1-800 Contact's rivals this is the last opportunity that they have to provide consumers with information that would lead them to purchase from one of those rivals rather than 1-800 Contacts.").

keywords). Resp. Br. at 104. But this does not rebut Professor Evans' conclusion that 114 million additional advertisements would have been displayed absent the Bidding Agreements, nor does it address the evidence that consumers are unaware of the price premium charged by 1-800 Contacts. *See* CC Br. at 57. 1-800 Contacts' assertion also ignores the fact that, for many retailers, advertising against 1-800 Contacts' trademarks was more valuable than advertising in response to generic keywords such as "contact lenses." *See* CC Br. at 42-47 (summarizing retailer testimony).

Finally, 1-800 Contacts argues that competitors' search advertising might displace organic links "such as links to 1-800 Contacts' Facebook page." Resp. Br. at 104-105. 1-800 Contacts claims that Complaint Counsel should have "valued" these additional links to 1-800 Contacts, and balanced that value against the value consumers derive from competitive advertisements. No precedent supports such an exercise, which is another version of 1-800 Contacts' "navigational intent" argument, addressed *supra*, pp. 54-64. Whether consumers "want to see ads following their queries," Resp. Br. at 105 (internal quote omitted), is not relevant to the analysis of competitive effects. The dispositive consideration is that consumers *benefit* from seeing additional information, which can inform them of options and impact their commercial intent. *See supra* pp. 60-62. And, in any event, as discussed earlier, it is not up to 1-800 Contacts and its rivals to determine how Google should arrange its SERP. Antitrust law does not permit – or "value" (in 1-800 Contacts' parlance, Resp. Br. at 104-105) – horizontal conspiracies that seek to "improve" the product or service offered by a non-consenting third party. *See supra* pp. 55-59.

d. Complaint Counsel's Theory Of Search Engine Harm Is Supported By Legal Precedent And Substantial Empirical Evidence

Professor Evans' model demonstrated that the Bidding Agreements harmed search engines in that 1-800 Contacts reduced its own cost-per-click by **{**[redacted]**}** percent. CC Br. at 61.[202] Further, Professor Athey's model shows that the Bidding Agreements reduced the number of advertising impressions *and* the number of clicks. CC Br. at 55.[203] Thus, even leaving aside Professor Evans' evidence that the Bidding Agreements reduced 1-800 Contacts' cost-per-click, and assuming, counterfactually, that the Bidding Agreements did not impact any advertiser's cost-per-click, the Bidding Agreements still harmed the search engines because they reduced the *number* of clicks for which the search engines were paid. 1-800 Contacts does not dispute these models, and instead argues that Complaint Counsel's "theory of search engine harm" is flawed. But none of its critiques are persuasive.

First, 1-800 Contacts asserts that the impact of bid-rigging is unknowable because the supposed complexity of the auctions at issue makes it difficult to predict how the Bidding Agreements impacted prices in any particular auction. Resp. Br. at 105-106. This argument is addressed above, *supra*, at pp. 80-81. Directionally, the tendency and the likely effect of the restraints is to reduce prices paid to search engines,[204] just as 1-800 Contacts intended. CC Br. at 26-28. 1-800 Contacts does not rebut the evidence demonstrating that one of its goals was to

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[202] Evans, Tr. 1649-1650, *in camera*; CX8006 at 076-077 (¶ 168) (Evans Expert Report), *in camera*.

[203] Professor Athey showed that, absent the Bidding Agreements, consumer clicks on 1-800 Contacts ads decline by 2 clicks per hundred searches, while consumer clicks on ads for competitors of 1-800 Contacts increase by 3.5 clicks per hundred searches. CC Br. at 55.

[204] *See* Juda, Tr. 1178-1179, *in camera* **{**[redacted]**}**.

subvert the competitive bidding process in order to decrease its advertising costs. This is persuasive evidence of the likely impact of the Bidding Agreements, because "[w]hile it is well settled that good motives themselves 'will not validate an otherwise anticompetitive practice,' courts often look at a party's intent to help it judge the likely effects of challenged conduct." *Brown Univ.*, 5 F.3d at 672 (quoting *NCAA*, 468 U.S. at 101 n.23). *See also McWane*, 783 F.3d at 840 ("[T]he clear anticompetitive intent behind the [challenged exclusive dealing program] also supports the inference that it harmed competition.").

Second, 1-800 Contacts asserts that, while the Bidding Agreements might have destroyed competition in auctions for 1-800 Contacts' trademark terms, this destruction would increase competition, and thus prices paid, in other auctions. Resp. Br. at 106. This argument fails on many levels. Notably, it concedes that 1-800 Contacts' Bidding Agreements distorted results in at least one set of auctions. This cannot be justified on the ground that it produced benefits in another, separate, set of auctions. In *NCAA*, 468 U.S. 85, the Supreme Court "rejected out of hand arguments that restrictions on one product (television rights) could be justified by the prospect of enhancing sales of another product (live attendance tickets)" as "'inconsistent with the basic policy of the Sherman Act.'" *Polygram*, 136 F.T.C. at 335 (quoting *NCAA*, 468 U.S. at 117).

Additionally, 1-800 Contacts' argument ignores the effect of this "distortion" on consumers, who do not see ads for lower-price competitors in response to search queries for 1-800 Contacts. As described earlier, the evidence in this case demonstrates that 1-800 Contacts charges a price premium that is not fully explained by either quality or service differences, and that consumers are unaware of the significant price differential between 1-800 Contacts and its online competitors. *See supra* pp. 21-22, 72-73, 119. Consumers' exposure to ads for lower-price competitors in response to search terms such as "contact lenses" thus does not redeem the impact of the *absence* of those ads in response to search queries for 1-800 Contacts, where they would be most valuable. *See supra* p. 118 & n.201.

Third, 1-800 Contacts asserts that the search engines are not entitled to be compensated when a consumer clicks on an ad for 1-800 Contacts, as this "simply reflects 1-800 Contacts' return on its procompetitive investment in its trademark." Resp. Br. at 106. No coherent explanation is provided for this claim. 1-800 Contacts suggests that distorting market outcomes by artificially reducing payments to search engines does not harm consumers if the action is taken by a monopsonist that "resells in a competitive market," that is, a monopsonist of search advertising that lacks market power in the market for the online sale of contact lenses. Resp. Br. at 107. This assertion is factually inapposite, as the parties to the Bidding Agreements collectively have market power in the market for the online sale of contact lenses. In any event, if the contention is that there is no antitrust remedy when a lawful monopsonist unilaterally reduces the volume of advertising that it purchases, the answer is that the present case is brought under Section 1 and involves collusion, which is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004).

In sum, 1-800 Contacts has failed to rebut the evidence showing a significant reduction in advertising and a significant distortion in consumer click behavior, which together like lead to less intense competition and higher prices. The burden shifts to 1-800 Contacts to establish a valid efficiency defense.

3. There Are Numerous Reasonably Less Restrictive Alternatives to the Settlement Agreements, None of Which Have Been Refuted by 1-800 Contacts

Complaint Counsel's Post-Trial Brief explains that 1-800 Contacts could have settled its trademark disputes with rival online sellers of contact lenses on terms that are significantly less restrictive of competition (as compared to the Bidding Agreements), while still protecting the company's legitimate trademark interests. *See* CC Br. at 134-138.

A good start, but only a start, is eliminating the indefensible negative keyword provisions in the Bidding Agreements. Where a rival is not using 1-800 Contacts' trademark, the rival cannot infringe. *See Lens.com*, 755 F. Supp. 2d at 1174 (bidding on generic keywords is not infringing); *Rhino Sports, Inc.*, 2007 WL 1302745, at *5 (same).

The next requirement is to eliminate indiscriminate restrictions on bidding in search auctions. An acceptable advertising restraint must "distinguish[] the truthful from the false, the helpful from the misleading." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988). The alternatives proposed by Complaint Counsel fulfill this requirement. As detailed below, 1-800 Contacts' criticisms of these less restrictive alternatives are without merit.

First, 1-800 Contacts states that a litigation settlement that only bars rivals from using the term "1-800 Contacts" (or a confusingly similar variation thereof) in the text of a search ad would be an insufficient remedy – as the rival's ad text may still confuse consumers. Resp. Br. at 108 (citing *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734 (D. Minn. 2009)). This is not the less restrictive alternative advanced by Complaint Counsel. Complaint Counsel would permit 1-800 Contacts and settling parties to agree to eliminate any confusing or deceptive claims from the text of their ads. So this criticism is misplaced.

Second, according to 1-800 Contacts, Complaint Counsel failed to adduce sufficient evidence that any remedy less restrictive than a complete ban on trademark keyword bidding would be effective at reducing infringing advertising by rivals. Resp. Br. at 108-109. This contention is incorrect for two reasons. 1-800 Contacts is wrong concerning the applicable evidentiary burden.[205] The Bidding Agreements do not reflect even a good faith effort on the part of 1-800 Contacts to distinguish between legitimate competition and infringing/confusing advertising. This Court needs no extrinsic evidence to conclude that the Bidding Agreements are facially overbroad and susceptible to narrowing; this conclusion is obvious. *NCAA*, 468 U.S. at 119.

Alternatively, Complaint Counsel can and has shown that there are effective and less restrictive alternatives by relying on precedent, *i.e.*, by directing the Court to prior cases embodying the judgment and experience of the federal courts and the FTC. For purposes of determining a proper remedy for allegedly unlawful conduct, case law is significantly more probative than the unsupported testimony of a single trademark practitioner.[206] As one signpost, in *Cal. Dental*, 526 U.S. 756, the Supreme Court viewed as potentially reasonable an agreement among dentists that all advertised price claims shall be accompanied by disclosures that render the claim precise and verifiable, *id*. at 779; in contrast, the Court was prepared to condemn an

[205] *See* Areeda & Hovenkamp ¶ 1913b ("Proffered less restrictive alternatives should either be based on actual experience in analogous situations or else be fairly obvious."); *id*. at ¶ 1914c ("The most workable allocation [of burden] gives the plaintiff the burden of suggesting, or proffering a particular alternative claimed to achieve the same benefits but less restrictive of competition. *The defendant then has the burden of showing that the proffered alternative is either unworkable or not less restrictive*.") (emphasis added).

[206] As noted earlier, 1-800 Contacts essentially asks the Court to trust Mr. Hogan's unverified claims that the Bidding Agreements are "typical" and that anything less would be impossible to enforce, based purportedly on some vast trove of confidential settlement agreements that Mr. Hogan did not make available to Complaint Counsel or to this Court, and that Mr. Hogan did not describe or reference in his report. *See supra* p. 9.

indiscriminate ban on discount advertising. *Id*. at 770-71. *See Polygram I,* 136 F.T.C. at 354-55. This preference for clarifying disclosures in lieu of more restrictive prohibitions was disregarded by 1-800 Contacts when crafting its Bidding Agreements.

Below, we list the less restrictive alternatives identified by Complaint Counsel (and incorporated into the Proposed Order), followed by the cases and authorities that endorse this approach:

- **Require clear and conspicuous disclosure in each search ad of the identity of the seller.** *See Multi Time Machine, Inc. v. Amazon.com*, 804 F.3d 930 (9th Cir. 2015) (initial interest confusion unlikely where seller's name is clearly disclosed in ad text); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (same); *Network Automation, Inc. v. Advanced Systems Concept, Inc.*, 638 F.3d 1137, 1153-54 (9th Cir. 2011) (same); *Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1177 (same); *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1025 n.16 (9th Cir. 2004) (same); *see also* Federal Trade Commission Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15 (encouraging comparative advertising that references competitors, together with disclosures as necessary to avoid deception).
- **Prohibit rival sellers from using names that are confusingly similar to 1-800 Contacts.** *See Clorox Co. v. Sterling Winthrop*, 117 F.3d 50 (2d Cir. 1997).
- **Require clear and conspicuous comparative language, such as "We are better [or different or cheaper or newer] than 1-800 Contacts."** *See Netscape*, 354 F.3d at 1025 n.16 (confusion unlikely where advertiser overtly compares its product to that of the rival/ trademark holder).

- **Require rival sellers to avoid any confusing or deceptive claims in the text of their ads.** *See Mass. Bd. of Registration in Optometry*, 110 F.T.C. at 594 (condemning broad restraint on advertising, but permitting trade association rules that prohibit "false advertising"); *Am. Med. Ass'n*, 94 F.T.C. at 1041 (same).

By way of response, 1-800 Contacts cites cases that have rejected the use of "disclaimers" (*e.g.*, "This product is not authorized or sponsored by [the trademark owner]") as a remedy for trademark infringement where a defendant fraudulently attempts to "pass off" its goods as those of the plaintiff/trademark owner. *See* Resp. Br. at 108-109. As compared to the Bidding Agreements, these cases arise in a wholly different commercial context, and present vastly different considerations. *See CFE Racing Prod., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571 (6th Cir. 2015) (defendant manufacturer of vehicle parts infringed by using a mark on its products that was "nearly identical" to the trademark owned by plaintiff, also a manufacturer of vehicle parts); *Weight Watchers Int'l, Inc. v. Luigino's Inc.*, 423 F.3d 137 (2d Cir. 2005) (defendant, a maker of frozen foods, infringed Weight Watcher's trademark "POINTS" by placing the word "POINTS" on the front of its package); *Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311 (2d Cir. 1987) (Showtime television service infringed by using the HBO trademark in an advertising slogan implying that the companies had merged: "SHOWTIME & HBO, It's Not Either/Or Anymore").[207]

[207] Regarding the use of disclaimers to remedy affirmative misrepresentations, one prominent critic of disclaimers explains: "To find . . . that the defendant has intentionally attempted to pass his goods as the plaintiff's, and then to permit him to continue to same acts, with an explanation which gives notice that the defendant is committing a fraud but the public should disregard it, is neither logical, nor it is the practical effective relief to which plaintiffs are entitled." 2 H. Nims, UNFAIR COMPETITION AND TRADEMARKS §§ 366f, 379a (4th ed. 1947), *quoted in* Jacoby & Raskoff, *Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth*?, 76 TRADEMARK REPT. 35 (1986). This criticism has no relevance to the case at bar.

In its discussion of disclaimers, 1-800 Contacts cites only one case involving online advertising, *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006). Resp. Br. at 108. Plaintiff Australian Gold manufactured indoor tanning lotions for use by tanning salons. Defendant Hatfield operated a website from which it sold, direct to consumers, indoor tanning lotions manufactured by competitors of Australian Gold. Hatfield violated the Lanham Act by, *inter alia*, bidding on the keyword "Australian Gold" and using plaintiff's trademark on its website even when it was not in fact selling products manufactured by Australian Gold. A disclaimer employed by the defendant was deemed inadequate to dispel initial interest confusion because the disclaimer appeared on the defendant's website (not in the search ad), visible to consumers only after the consumer had been misdirected to the defendant's website. The injunction approved by the Tenth Circuit barred the defendant from displaying the "Australian Gold" trademark on the internet, but *did not* restrict keyword bidding by the defendant. *Australian Gold*, 436 F.3d at 1241-42.

As compared to 1-800 Contacts' disputes with its rivals, the conduct in *Australian Gold* was more egregious, and the remedy approved by the Tenth Circuit less restrictive of competition. Further, for a more recent and more authoritative statement of the Tenth Circuit's views on keyword bidding and appropriate trademark remedies, this Court should consult *Lens.com*, 722 F.3d at 1245 (consumer confusion unlikely when a search advertisement "is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for."). In sum, the case law does not support 1-800 Contacts' contention that the Bidding Agreements are reasonable in scope and superior to the alternatives.

Mr. Hogan's testimony likewise does not show that the Bidding Agreements are reasonably necessary to protect 1-800 Contacts from trademark infringement. *See* Resp. Br. at 110. The claim that parties "regularly" settle trademark lawsuits with "non-use provisions" has no force. First, the Bidding Agreements include negative keyword requirements that are more restrictive than a standard non-use agreement. Second, we are addressing 1-800 Contacts' aggressive campaign to eliminate all competing bidders, not the settlement of an isolated lawsuit. Third, that other litigants may have agreed to non-use provisions does not show that alternatives are insufficient.

Mr. Hogan reported that broad restraints on advertising and bidding, including the use of negative keywords, are preferred by trademark owners in order "to avoid future disputes." Resp. Br. at 110. Alas, the competition that antitrust law is designed to protect is messy and contentious, and leads to disputes. In an antitrust action, 1-800 Contacts cannot justify restraints on competition that exceed the scope of its trademark rights by claiming that broad trademark rights are more conducive to living "the quiet life." This defense was mocked by Justice Breyer in *Cal. Dental,* 526 U.S. at 787-88 (Breyer, J., concurring in part, dissenting in part):

> With one exception, my own view of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made no virtually effort to sift the false from the true, that fact does not make out a valid antitrust defense.

Accord Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478 (1988) ("the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.") (internal quotation marks omitted).

The Bidding Agreements "ma[ke] no effort to sift" the confusing from the non-confusing, and do not distinguish infringing ads from the non-infringing. *See Cal. Dental*, 526 U.S. at 787-88 (Breyer, J., concurring in part, dissenting in part). The alternative settlement terms identified by Complaint Counsel perform this function, while safeguarding trademark rights.

CONCLUSION

Because the evidence establishes that 1-800 Contacts has violated Section 5 of the FTC Act, as alleged in the Complaint, this Court should enter the proposed Order (CC Br. at 184 (Section VII)) to restore competition and ensure that 1-800 Contacts cannot continue to engage in anticompetitive conduct.

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2017, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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CERTIFICATE FOR ELECTRONIC FILING

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

July 19, 2017 By: s/ Daniel J. Matheson

Notice of Electronic Service

I hereby certify that on July 19, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Post-Trial Reply Brief (Public), with:

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