PUBLIC

FEDERAL TRADE COMMISSION RECEIVED DOCUMENTS 07 20 2017 587584 SECRETARY

ORIGINAL

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

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

RESPONDENT 1-800 CONTACTS' CORRECTED POST-TRIAL REPLY BRIEF

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

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

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

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

Counsel for Respondent 1-800 Contacts, Inc.

PUBLIC

TABLE OF CONTENTS

Page

RECORD REFERENCES XXIII

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 9

1. 1-800 Contacts Did Not Enter Into the Agreements to Harm Competition or Rig Bids 9

a. 1-800 Contacts Was One of Many Trademark Owners to File and Settle Trademark Litigation Regarding Paid Search Ads 10

b. 1-800 Contacts Did Not Intend to Harm Consumers 14

c. The Law Highlights the Flaws in Complaint Counsel's Argument 17

2. Complaint Counsel Failed to Prove that the Settlement Agreements Prevent Consumers from Obtaining Information About Lower-Priced Alternatives 18

3. Complaint Counsel Have Not Proven that the Settlement Agreements Restricted Advertising that Was Significant to Retailers' Ability to Compete 23

III. COMPLAINT COUNSEL HAVE NOT MET THEIR BURDEN TO DEMONSTRATE THAT 1-800 CONTACTS' SETTLEMENT AGREEMENTS ARE ANTICOMPETITIVE 29

A. Complaint Counsel Failed to Prove Their *Prima Facie* Case 29

1. Complaint Counsel Have Failed to Prove that the Settlement Agreements Are Inherently Suspect 29

a. The Challenged Agreements Are Settlements, Not Bid Rigging 29

b. Complaint Counsel Have Failed to Prove That the Settlement Agreements Constitute Inherently Suspect Restraints on Procompetitive Commercial Advertising 33

i. Complaint Counsel Assume Rather than Prove That the Restrained Advertising is Not Misleading 33

ii. *California Dental* Supports Rule of Reason Treatment 36

iii. Complaint Counsel's Authorities Are Inapposite 41

TABLE OF CONTENTS
(continued)

Page

c. *Actavis* and *Clorox* Require Rule of Reason Analysis....44

2. Complaint Counsel Have Failed to Adduce Evidence of Actual Harm to Consumers Necessary to Establish Their *Prima Facie* Case....49

a. Complaint Counsel Have Failed to Prove Harm to Consumers of Contact Lenses....49

b. Direct Evidence of Harm to Search Engines....54

3. 1-800 Contacts and the Settling Parties Do Not Have Market Power....57

a. Complaint Counsel Failed to Prove a Relevant Product Market Limited to Online Sales of Contact Lenses....57

i. "Practical Indicia" Prescribed by *Brown Shoe* Do Not Support Relevant Market for Online Sales....57

ii. Ordinary Course Documents Do Not Support a Relevant Market for Online Sales....62

iii. Professor Evans' Critical Loss Analysis Is Flawed, and Complaint Counsel Misstate the Record Regarding It....65

iv. Complaint Counsel Draw Incorrect Conclusions From the Multiplicity of Critical Loss Analyses....67

v. The "Unilateral Pricing Policy" Is Not a Natural Experiment and Does Not Support An Online Market....69

vi. Complaint Counsel Have Not Demonstrated Direct Evidence of Competitive Effects Supporting an Online Market....70

b. The Settling Parties' Share of the Relevant Market Does Not Suffice to Prove Market Power....71

c. Complaint Counsel Failed to Prove Substantial Barriers to Entry and Expansion....72

IV. 1-800 CONTACTS HAS IDENTIFIED PLAUSIBLE AND COGNIZABLE PROCOMPETITIVE JUSTIFICATIONS....74

A. Complaint Counsel's Arguments Regarding Free-Riding Lack Merit....76

TABLE OF CONTENTS
(continued)

Page

B. 1-800 Contacts' Trademark Rights Justify The Restraints 78

1. The Settlement Agreements' Scope is Not Impermissibly Overbroad 78

2. Complaint Counsel Failed to Prove Viable Less Restrictive Alternatives 83

3. Complaint Counsel Are Wrong that Consumers' Intent is Irrelevant....86

4. Complaint Counsel Misconstrue the Law Regarding Trademark Infringement in the Keyword Context 89

5. Complaint Counsel Have Failed To Satisfy Their Threshold Burden Under *Actavis* To Prove That 1-800's Settlement Agreements Are Subject To Antitrust Scrutiny 93

6. 1-800 Contacts Had Viable Dilution Claims and State Law Claims Based on Its Competitors Use of Its Trademarks in Keyword Advertising. 99

C. Complaint Counsel's Criticisms of 1-800 Contacts' Experts Lack Merit 101

1. Complaint Counsel's Criticisms of Dr. Van Liere Lack Merit....101

2. Complaint Counsel's Criticisms of Howard Hogan Lack Merit 106

3. Complaint Counsel's Criticisms of Dr. Goodstein Lack Merit 109

4. Complaint Counsel's Criticisms of Dr. Landes Lack Merit 114

5. Complaint Counsel's Criticisms of Dr. Ghose Lack Merit....116

a. Dr. Ghose Properly Disclosed His Opinions 116

b. Dr. Ghose's Opinions Undermine Complaint Counsel's Case....117

6. Complaint Counsel's Criticisms of Dr. Murphy Lack Merit....121

V. COMPLAINT COUNSEL'S PROPOSED ORDER IS UNCONSTITUTIONAL, VIOLATES SETTLED PRINCIPLES OF ADMINISTRATIVE LAW, AND MUST THEREFORE BE MODIFIED....125

A. The Proposed Order Appears to Include Relief That Violates the Separation of Powers By Preventing Courts From Exercising Their Inherent Powers to Approve and Enforce Settlements 126

TABLE OF CONTENTS
(continued)

Page

B. As Applied to 1-800 Contacts' Existing Settlement Agreements, The Proposed Order Violates Settled Principles of Administrative Law and Is Unconstitutional....133

1. An Order Effectively Dissolving Existing Settlement Agreements Would Contravene Administrative Law Principles....133

2. The Proposed Order Retroactively Deprives 1-800 Contacts of an Opportunity to Pursue Lawful Relief....139

3. An Order Effectively Dissolving Existing Settlement Agreements Would Violate the Constitution....143

C. Paragraphs II.C. and II.D of The Proposed Order Should Be Stricken Because They Create Impermissible Obey-The-Law Injunctions....145

VI. CONCLUSION....150

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

1-800 Contacts, Inc. v. Coastal Contacts, Inc.,
Case No. 2:04-cv-249, Dkt. 18 (Nov. 15, 2004)....................144

1-800 Contacts, Inc. v. Empire Vision Center, Inc.,
Case No. 2:10-cv-173, Dkt. 12 (May 18, 2010)....................143

1-800 Contacts, Inc. v. Lens.com, Inc.,
722 F.3d 1229 (10th Cir. 2013).................... 11, passim

1-800 Contacts, Inc. v. Lens.com, Inc.,
No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011)....................27

1-800 Contacts, Inc. v. Walgreens Co.,
Case No. 2:10-cv-536, Dkt. 18 (Jul. 20, 2010)....................143

1-800 Contacts, Inc. v. WhenU.com,
309 F. Supp. 2d 467 (S.D.N.Y. 2003), *rev'd* 414 F.3d 400 (2d Cir. 2005)....................11

1-800 Contacts, Inc. v. WhenU.com, Inc.,
414 F.3d 400 (2d Cir. 2005)....................11

1-800Contacts, Inc. v. Mem'l Eye, P.A.,
2010 WL 988524....................29

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.,
881 F.2d 1396 (7th Cir. 1989)....................10

A.J. Canfield Co. v. Vess Beverages, Inc.,
796 F.2d 903 (7th Cir. 1986)....................92

Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.,
751 F.3d 796 (7th Cir. 2014)....................38

Albany Gen'l Hosp. v. Heckler,
657 F. Supp. 87 (D. Or. 1987)....................135

Am. Airlines, Inc. v. Google, Inc.,
No. 4:07-CV-487-A (N.D. Tex. Oct. 24, 2007)....................100

TABLE OF AUTHORITIES
(continued)

Page(s)

Am. Home Prods. Corp. v. FTC,
695 F.2d 681 (3d Cir. 1982)....................150

Aro Corp. v. Allied Witan Co.,
531 F.2d 1368 (6th Cir. 1976) 144

Australian Gold, Inc. v. Hatfield,
436 F.3d 1228 (10th Cir. 2006) 84

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994)....................122

Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.,
784 F.2d 1325 (7th Cir. 1986) 73

Ballato v. General Elec.,
147 F.R.D. 95 (E.D. Pa. 1993)....................131

Barry Wright Corp. v. ITT Grinnell Corp.,
724 F.2d 227 (1st Cir. 1983)....................10

Bates v. State Bar of Arizona,
433 U.S. 350 (1977)....................44

Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.,
550 F.3d 465 (5th Cir. 2008) 92

Bd. of Trade of City of Chicago v. United States,
246 U.S. 231 (1918)....................10, 33

Bean Meridian, L.L.C. v. Suzuki Motor Corp. (In re C.F. Bean L.L.C.),
841 F.3d 365 (5th Cir. 2016) 104

Bell v. Schexnayder,
36 F.3d 447 (5th Cir. 1994) 130

Benihana of Tokyo, LLC v. Benihana, LLC, No. 14 Civ. 224 (PAE)
2017 WL 1424325 (S.D.N.Y. 2017)....................113

Benrus Watch Co. v. FTC,
352 F.2d 313 (8th Cir. 1965) 143

TABLE OF AUTHORITIES
(continued)

Page(s)

Blackburn v. Sweeney,
53 F.3d 825 (7th Cir. 1995) 44

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982)...30

Borinquen Biscuit Corp. v. M.V. Trading Corp.,
443 F.3d 112 (1st Cir. 2006)..92

Bresler v. Wilmington Trust Co.,
855 F.3d 178 (4th Cir. 2017) 103

Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,
441 U.S. 1 (1979)...30, 147

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993)...16

Brookfield Communications, Inc. v. West Coast Entertainment Corp.,
174 F.3d 1036 (9th Cir. 1999) 11

Brown Shoe Co. v. United States,
370 U.S. 294 (1962)...57

Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.,
846 F.3d 1297 (10th Cir. 2017) 43

Buckley v. Valeo,
424 U.S. 1 (1976)...132

California Dental Ass'n v. FTC,
224 F.3d 942 (9th Cir. 2000) 5, 17, 51, 52

California Dental Ass'n v. FTC,
526 U.S. 756 & 778 (1999)... 3, passim

Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.,
824 F.2d 665 (8th Cir. 1987) 34, 79

In re Cardizem Antitrust Litigation,
332 F.3d 896 (6th Cir. 2003) 45, 46

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Cardizem CD Antitrust Litig.,
105 F. Supp. 2d 682 (E.D. Mich. 2000)....................46

Cassell v. FCC,
154 F.3d 478 (D.C. Cir. 1998)....................138

Checkpoint Sys., Inc. v. Check Point Software Techs.,
269 F.3d 270 (3d Cir. 2001)....................47

City of Mishawaka v. Am. Elec. Power Co., Inc.,
616 F.2d 976 (7th Cir.1980)....................146

City of New York v. Mickalis Pawn Shop, LLC,
645 F.3d 114 (2d Cir. 2011)....................141

Clorox Co. v. Sterling Winthrop, Inc.,
117 F.3d 50 (2d Cir. 1997).................... 2, passim

CNG Fin. Corp. v. Google, Inc.,
No. 1:06-cv-040 (S.D. Ohio Nov. 21, 2006)....................101

Coastal States Mktg. v. Hunt,
694 F.2d 1358 (5th Cir. 1983)....................129

Cohlmia v. St. John Med. Ctr.,
693 F.3d 1269 (10th Cir. 2012)....................71

Cohn v. Petsmart, Inc.,
281 F.3d 837 (9th Cir. 2002)....................92

CollegeSource, Inc. v. AcademyOne, Inc.,
597 F. App’x 116 (3d Cir. 2015)....................91

CollegeSource, Inc. v. AcademyOne, Inc.,
No. CIV.A. 10-3542, 2012 WL 5269213 (E.D. Pa. Oct. 25, 2012)....................91

Commodity Futures Trading Comm’n v. Schor,
478 U.S. 833 (1986)....................127

Cty. of Tuolumne v. Sonora Cmty. Hosp.,
236 F.3d 1148 (9th Cir. 2001)....................85

TABLE OF AUTHORITIES
(continued)

Page(s)

Dominguez v. Yahoo!, Inc.,
No. 13-1887, 2017 WL 390267 (E.D. Pa. Jan. 27, 2017)..136

Downs v. Director, Office of Workers Compensation Programs,
803 F.2d 193 (5th Cir. 1986) 144

EarthCam, Inc. v. OxBlue Corp.,
49 F. Supp. 3d 1210 (N.D. Ga. 2014)...91

Eastman Kodak Co. v. Image Tech. Servs., Inc.,
504 U.S. 451 (1992)..40

Edible Arrangements, LLC v. Provide Commerce, Inc.,
No. 3:14-CV-00250, 2016 WL 4074121 (D. Conn. July 29, 2016) 13, 47, 100, 112

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council,
485 U.S. 568 (1988)..127

Fair Isaac Corp. v. Experian Info. Sols., Inc.,
645 F. Supp. 2d 734 (D. Minn. 2009)..35, 90

Fashion Originators' Guild of America v. FTC,
312 U.S. 457 (1941)..77, 78

Federated Nationwide Wholesalers Serv. v. FTC,
398 F.2d 253 (2d Cir. 1968)..147, 148

Fitz, Inc. v. Ralph Wilson Plastics Co.,
174 F.R.D. 587 (D.N.J. 1997)...104

Florida Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.,
225 F.3d 1208 (11th Cir. 2000) 145

Fragrancenet.com, Inc. v. Les Parfums, Inc., et al.,
Case No. 2:09-cv-2626, Dkt. 23 (E.D.N.Y. Mar. 8, 2010)...48

FTC v. Actavis, Inc.,
133 S. Ct. 2223 (2013).. 1, passim

TABLE OF AUTHORITIES
(continued)

Page(s)

FTC v. Advocate Health Care Network,
841 F.3d 460 (7th Cir. 2016) 69

FTC v. Royal Milling Co.,
288 U.S. 212 (1933)....................147

FTC v. Slimamerica,
No. 97-CIV-06072, 2011 U.S. Dist. LEXIS 24177 (S.D. Fla. Mar. 9, 2011) 146

FTC v. Sysco Corp.,
113 F. Supp. 3d 1 (D.D.C. 2015)....................68

FTC v. Washington Data Res.
No. 8:09–cv–2309–T–23TBM, 2012 WL 2075827 (M.D. Fla. June 8, 2012)....................146

FTC v. Whole Foods Mkt., Inc.,
548 F.3d 1028 (D.C. Cir. 2008)....................63, 64

G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.,
871 F.2d 648 (7th Cir. 1989) 132

Generac Corp. v. Caterpillar Inc.,
172 F.3d 971 (7th Cir. 1999) 56

Gilbert v. Fed. Mine Safety & Health Review Comm'n,
866 F.2d 1433 (D.C. Cir. 1989)....................134, 136, 137

Globetrotter Software v. Elan Comput. Grp.,
362 F.3d 1367 (Fed. Cir. 2004)....................129

Gonzales & Gonzales Bonds & Ins. Ag. Inc. v. Action Immigration Bonds & Ins. Servs., Inc.,
Case No. 2:10-cv-1162, Dkt. 15 (C.D. Cal. Apr. 7, 2010) 48

Google Inc. v. Am. Blind & Wallpaper Factory, Inc.,
No. C 03-05340 JF, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005)....................90, 100

Gov't Employees Ins. Co. v. Google, Inc.,
330 F. Supp. 2d 700 (E.D. Va. 2004) 100

TABLE OF AUTHORITIES
(continued)

Page(s)

Greenberg Smoked Turkeys, Inc. v. Tsavo Media, Inc.,
Dkt. 29, Consent Decree and Final Judgment, Case No. 6:11-cv-37 (E.D. Tex. Jan. 23, 2012) 48

Happy Feet USA, Inc. v. Serenity "2000" Corp.,
Case No. 6:09-cv-1832, Dkt. 22 (M.D. Fla Mar. 16, 2010) 48

Harley-Davidson, Inc. v. Morris,
19 F.3d 142 (3d Cir. 1994) 34, 79

Hearts on Fire Co., LLC v. Blue Nile, Inc.,
603 F. Supp. 2d 274 (D. Mass. 2009) 35, 90

Herbko Int'l, Inc. v. Kappa Books, Inc.,
308 F.3d 1156 (Fed Cir. 2002) 92

Hibbs v. Winn,
542 U.S. 88 (2004) 81

Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship.,
34 F.3d 410 (7th Cir. 1994) 38

ITT Cont'l Baking Co. v. FTC,
532 F.2d 207 (2d Cir. 1976) 148, 150

Jacob Siegel Co. v. FTC,
327 U.S. 608 (1946) 147

John H. Harland Co. v. Clarke Checks, Inc.,
711 F.2d 966 (11th Cir. 1983) 34, 79

K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.,
61 F.3d 123 (2d. Cir. 1995) 50

King Drug Company of Florence, Inc. v. Smithkline Beecham Corp.,
791 F.3d 388 (3d Cir. 2015) 96

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 107

TABLE OF AUTHORITIES
(continued)

Page(s)

Landgraf v. USI Film Products, Inc.,
511 U.S. 244 (1994)....................139, 144

Landis v. North Am. Co.,
299 U.S. 248 (1936)....................131

Lasoff v. Amazon.com Inc.,
No. C16-151 BJR, 2017 WL 372948 (W.D. Wash. Jan. 26, 2017)....................56

LBF Travel, Inc. v. Fareportal, Inc.,
No. 13 CIV. 9143 LAK GWG, 2014 WL 5671853 (S.D.N.Y. Nov. 5, 2014) 90

Lenox, Inc. v. FTC,
417 F.2d 126 (2d Cir. 1969)....................127, 129, 143, 145

Lens.com v. 1-800 Contacts, Inc.,
No. 2:12CV00352 DS (D. Utah Mar. 3, 2014)....................29, 93

Lineback v. Spurlino Materials, LLC,
546 F.3d 491 (7th Cir. 2008) 145

Link v. Wabash R.R, Co.,
370 U.S. 626 (1962)....................130

Litton Indus., Inc. v. FTC,
676 F.2d 364 (9th Cir. 1982) 149

Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB,
727 F.2d 1184 (D.C. Cir. 1984)....................133, 135

In re Loestrin 24 Fe Antitrust Litig.,
814 F.3d 538 (1st Cir. 2016)....................96

Los Angeles Mem'l Coliseum Comm'n v. NFL,
726 F.2d 1381 (9th Cir. 1984) 31

Louis W. Epstein Family P'ship v. Kmart Corp.,
13 F.3d 762 (3d Cir. 1994)....................145

Matal v. Tam,
137 S. Ct. 1744 (2017)....................138

TABLE OF AUTHORITIES
(continued)

Page(s)

McDonald v. Watt,
653 F.2d 1035 (5th Cir. 1981) 139

McLean v. Fleming,
96 U.S. 245 (1877)....................87

Microcomputer Tech. Inst. v. Riley,
139 F.3d 1044 (5th Cir. 1988) 134

Montgomery v. Noga,
168 F.3d 1282 (11th Cir. 1999) 92

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992)....................44

Morningware, Inc. v. Hearthware Home Prods., Inc.,
673 F. Supp. 2d 630 (N.D. Ill. 2009) 100

N. Pipeline Const. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982)....................132

Nat'l Soc. of Prof'l Engineers v. United States,
435 U.S. 679 (1978)....................32, 33, 77, 78

Neiberger v. FedEx Ground Package Sys.,
566 F.3d 1184 (10th Cir. 2009) 104

Network Automation, Inc. v. Advanced Sys. Concept, Inc.,
638 F.3d 1137 (9th Cir. 2011) .... 11, passim

NetworkIP, LLC v. FCC,
548 F.3d 116 (D.C. Cir. 2008)....................139

Nobel Sci. Indus., Inc. v. Beckman Instruments, Inc.,
670 F. Supp. 1313 (D. Md. 1986)....................62

NYNEX Corp. v. Discon, Inc.,
525 U.S. 128 (1998)....................77

Packingham v. North Carolina,
137 S. Ct. 1730 (2017)....................7

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Paoli R.R. Yard PCB Litig.,
35 F.3d 717 (3d Cir. 1994)....................104

Payne v. Travenol Labs., Inc.,
565 F.2d 895 (5th Cir. 1978) 146

Pensacola Motor Sales v. E. Shore Toyota, LLC,
No. 3:09CV571/RS-MD, 2010 WL 3781552 (N.D. Fla. Sept. 23, 2010) *90*

Perez v. Ohio Bell Tel. Co.,
655 F. App'x 404 (6th Cir. 2016) 146

Person v. Google, Inc.,
No. C06-7297 JFRS, 2007 WL 1831111 (N.D. Cal. June 25, 2007),
aff'd, 346 F. App'x 230 (9th Cir. 2009)....................56

Photovest Corp. v. Fotomat Corp.,
606 F.2d 704 (7th Cir. 1979) 64

Playboy Enters., Inc. v. Netscape Communications Corp.,
354 F.3d 1020 (9th Cir. 2004) 11, 90, 91

PODS Enterprises, LLC v. U-Haul Int'l,
126 F. Supp. 3d 1263, 1275-78 (M.D. Fla. 2015)....................112

Polk Bros., Inc. v. Forest City Enterprises, Inc.,
776 F.2d 185 (7th Cir. 1985) 31

Polygram Holding, Inc. v. FTC,
416 F.3d 29 (D.C. Cir. 2005)....................4

Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n,
814 F.2d 358 (7th Cir. 1987) 77

Qualitex Co. v. Jacobson Prods. Co., Inc.,
514 U.S. 159 (1995)....................115

Read v. Baker,
438 F. Supp. 732 (D. Del. 1977)....................132

TABLE OF AUTHORITIES
(continued)

Page(s)

Rebel Oil Co., Inc. v. Atlantic Richfield Co.,
51 F.3d 1421 (9th Cir. 1995) 73

Reifert v. S. Cent. Wis. MLS Corp.,
450 F.3d 312 (7th Cir. 2006) 56

Rescuecom Corp. v. Google, Inc.,
562 F.3d 123 (2d Cir. 2009)....................11, 13, 110

Resolution Trust Corp. v. Platt,
853 F. Supp. 294 (S.D. Ill.1993)....................131

Retail, Wholesale & Dep't Store Union v. NLRB,
466 F.2d 380 (D.C. Cir. 1972)....................133, 134, 136, 137

Retina Associates, P.A. v. S. Baptist Hosp. of Florida, Inc.,
105 F.3d 1376 (11th Cir. 1997) 71

Rhino Sports, Inc. v. Sport Court, Inc.,
No. CV-02-1815-PHX-JAT, 2007 WL 1302745 (D. Ariz. 2007)....................98, 99

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980)....................130

Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.,
745 F.3d 343 (9th Cir. 2013) 129

Rosetta Stone Ltd. v. Google, Inc.,
676 F.3d 144 (4th Cir. 2012) .... 11, passim

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986)....................31, 36

Sabinsa Corp. v. Creative Compounds, LLC,
609 F.3d 175 (3d Cir. 2010)....................92

San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.,
483 U. S. 522 (1987)....................138

Satellite Broad. Co. v. FCC,
824 F.2d 1 (D.C. Cir.1987)....................139

TABLE OF AUTHORITIES
(continued)

Page(s)

SCFC ILC, Inc. v. Visa USA, Inc.,
36 F.3d 958 (10th Cir. 1994) 54

Se. Missouri Hosp. v. C.R. Bard, Inc.,
642 F.3d 608 (8th Cir. 2011) 73

Sears, Roebuck & Co. v. FTC,
676 F.2d 385 (9th Cir. 1982) 149

SEC v. Sky Way Global, LLC,
710 F.Supp.2d 1274 (M.D. Fla. 2010)....................146

Seidenstein v. Nat'l Med. Enters., Inc.,
769 F.2d 1100 (5th Cir. 1985) 56

Shapero v. Kentucky Bar Ass'n,
486 U.S. 466 (1988)....................78

Sherman v. United States,
801 F.2d 1133 (9th Cir. 1986) 130

Simon Prop. Group, Inc. v. Taubman Ctrs., Inc.,
262 F. Supp. 2d. 794 (E.D. Mich. 2003)....................129

Simon Prop. Grp. L.P. v. mySimon, Inc.,
104 F. Supp. 2d 1033 (S.D. Ind. 2000)....................89

Sosa v. DIRECTV, Inc.,
437 F.3d 923 (9th Cir. 2006) 129

Standard Oil Co. v. FTC,
577 F.2d 653 (9th Cir. 1978) 146, 148, 149

Starbucks Corp. v. Wolfe's Burrough Coffee, Inc.,
736 F.3d 198 (2d Cir. 2013)....................112, 113

In re Stone,
986 F.2d 898 (5th Cir. 1993) 127, 130, 131, 132

SunAmerica Corp. v. Sun Life Assurance Co. of Canada,
77 F.3d 1325 (11th Cir. 1996) 31

TABLE OF AUTHORITIES
(continued)

Page(s)

Sweet St. Desserts, Inc. v. Chudleigh's Ltd.,
2016 WL 3924239 (3d Cir. Jul. 21, 2016)..........129

Swift & Co. v. United States,
196 U.S. 375, 25 S.Ct. 276 (1905)..........146

TNT Mktg., Inc. v. Agresti,
796 F.2d 276 (9th Cir. 1986)..........131

Tops Mkts., Inc. v. Quality Mkts., Inc.,
142 F.3d 90 (2d Cir. 1998)..........50

Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.,
959 F.2d 468 (3d Cir. 1992)..........56

Toyota Motor Sales U.S.A., Inc. v. Tabari,
610 F.3d 1171 (9th Cir. 2010)..........91

Trippee Mfg. Co. v. Am. Power Conversion Corp.,
46 F.3d 624 (7th Cir. 1995)..........131

U-Haul International, Inc. v. WhenU.com, Inc.,
279 F. Supp. 2d 723 (E.D. Va. 2003)..........11

United States v. Addyston Pipe & Steel Co.,
85 F. 271 (6th Cir. 1898)..........31

United States v. Capitol Serv., Inc.,
756 F.2d 502 (7th Cir. 1985)..........30, 33

United States v. Dentsply Int'l, Inc.,
No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6994 (D. Del. May 10, 2000)..........103

United States v. Gasoline Retailers Ass'n, Inc.,
285 F.2d 688 (7th Cir. 1961)..........44

United States v. Gen. Motors Corp.,
384 U.S. 127 (1966)..........33

United States v. H & R Block,
833 F. Supp. 2d 36 (D.D.C. 2011)..........64, 68

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Holtzman,
762 F.2d 720 (9th Cir. 1985) 129, 143

United States v. Mobile Materials, Inc.,
881 F.2d 866 (10th Cir. 1989) 33

United States v. Portsmouth Paving Corp.,
694 F.2d 312 (4th Cir. 1982) 30

United States v. Rose,
449 F.3d 627 (5th Cir. 2006) 30

United States v. Sarracino,
340 F.3d 1148 (10th Cir. 2003) 105

United States v. Sungard Data Sys., Inc.,
172 F. Supp. 2d 172 (D.D.C. 2001) 57

United States v. United States Dist. Ct. for the N. Mariana Islands,
694 F.3d 1051 (9th Cir. 2012) 132

United States v. Waste Mgmt., Inc.,
743 F.2d 976 (2d Cir. 1984) 73

Valley Liquors, Inc. v. Renfield Importers, Ltd.,
822 F.2d 656 (7th Cir. 1987) 71

Visa Int'l Serv. Ass'n v. JSL Corp.,
610 F.3d 1088 (9th Cir. 2010) 99

Visible Sys. Corp. v. Unisys Corp.,
551 F.3d 65 (1st Cir. 2008) 92

Weight Watchers Int'l, Inc. v. Luigino's, Inc.,
423 F.3d 137 (2d Cir. 2005) 84

Wells Fargo & Co. v. WhenU.com, Inc.,
293 F. Supp. 2d 734 (E.D. Mich. 2003) 11

White v. Fisher,
No. 1:07-cv-00317-SEB-TAB, 2008 WL 687000 (S.D. Ind. Mar. 7, 2008) 132

TABLE OF AUTHORITIES
(continued)

Page(s)

Will v. Comprehensive Accounting Corp.,
776 F.2d 665 (7th Cir. 1985) 72

Worldwide Basketball & Sport Tours, Inc. v. NCAA,
388 F.3d 955 (6th Cir. 2004) 43

Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.,
103 F. Supp. 3d 1032, 1041 (D. Minn. May 5, 2015)....................13, 47

STATE CASES

Cent. Fla. Invs., Inc. v. Parkwest Assocs.,
2002 UT 3 81

Glenn v. Reese,
2009 UT 80 81

Hall v. Utah State Dept. of Corrections,
24 P.3d 958 (Utah 2001)....................81

Kimball v. Campbell,
699 P.2d 714 (Utah 1985)....................81

Pierce v. Pierce,
2000 UT 7 82

Upland Indus. Corp. v. Pacific Gamble Robinson Co.,
684 P.2d 638 (Utah 1984)....................82

COMMISSION CASES

Am. Med. Ass'n,
94 F.T.C. 701 (1979)....................44, 78

Arizona Automobile Dealers Ass'n,
117 F.T.C. 781 (1994)....................78

Mass Bd. of Registration in Optometry,
110 F.T.C. 549 (1988)....................44, 78

TABLE OF AUTHORITIES
(continued)

Page(s)

In re N. Tex. Specialty Physicians,
140 F.T.C. 715 (F.T.C. Nov. 29, 2005) 4

Personal Protective Armor Ass'n,
117 F.T.C. 104 (1994)..78

In the Matter of Polygram Holding, Inc.,
136 F.T.C. 310 (2003).. 4, passim

In re Realcomp II Ltd.,
2007 WL 6936319 (FTC 2009) .... 19, passim

In the Matter of Schering-Plough Corp.,
136 F.T.C. 956 (2003)..7, 35, 47, 48

COMMISSION BRIEFS

FTC v. Actavis, Inc.,
No. 12-416, Reply Br. for Pet'r, 2013 WL 1099171 (U.S. Mar. 18, 2013)........................47, 97

FTC v. Watson Pharm, Inc.,
No. 12-416, Br. for Pet'r, 2013 WL 267027 (U.S. Jan. 22, 2013) 95

FEDERAL STATUTES

15 U.S.C. § 45(a)(4)(B) 127

15 U.S.C. § 46(a)(4)(B) 127

15 U.S.C. § 1114(1)(a)...92

15 U.S.C. § 1125(c) 99

15 U.S.C. § 1125(c)(1)...112

15 U.S.C. § 1125(c)(2)(B) 113

FEDERAL RULES

Fed. R. Civ. P. 37(c)(1)..103

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL REGULATIONS

16 C.F.R. § 315.5 60

LEGISLATIVE MATERIALS

H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759 ....58, 61

H.R. Rep. No. 104-374 (1995)....................99

TREATISES

10-55 Moore's Federal Practice § 55.12[3] (2017) 141

5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th ed.) 31, 34, 79

Areeda & Hovenkamp, *Antitrust Law*, ¶1907b n. 13 (3d ed.) 77

McCarthy on Trademarks and Unfair Competition § 18:82 (4th Ed. 2016 update)....................31

McCarthy on Trademarks and Unfair Competition § 25A:9 (4th ed.) 11

Restatement (Third) of Unfair Competition § 20 cmt. h (1995)....................87

Restatement (Third) of Unfair Competition § 35 (1995)....................31

OTHER AUTHORITIES

Becthold, S. and Tucker, C. "Trademarks, Triggers and Online Search," 11 *J. of Empirical Legal Studies* 718 (Dec. 2014)....................40, 41

Bird, Robert C. & Steckel, Joel H., *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. Pa. J. Bus. L. 1013 (2012) 92

DOJ & FTC, Horizontal Merger Guidelines § 4.1.1 (Aug. 19, 2010)....................68

Evans, David S., *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases*, 75 St. John's L. Rev. 545 (Fall 2001)....................51, 52

R. Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 THE TRADEMARK REPORTER 735 (2015)....................110, 114

TABLE OF AUTHORITIES
(continued)

Page(s)

Hyman, D. & Franklyn, D, *Trademarks As Search-Engine Keywords: Who, What, When?*, Texas L. R. 2117 (2014) 12, 111

W. Landes & R. Posner, *The Economics of Trademark Law*, 78 T.M. Rep. 267 (1988) 115

Simonov, A., Nosko, C. and Rao, J., "Competition and Crowd-Out for Brand Keywords in Sponsored Search," *Working Paper* (Sept. 8, 2016) 40

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

RF # — Respondent Proposed Finding of Fact

CX # — Complaint Counsel Exhibit

RX # — Respondent Exhibit

Name of Witness, Tr. XX — Trial Testimony

CX / RX # (Name of Witness, Dep. at XX) — Deposition Testimony

CX / RX # (Name of Witness, IHT at XX) — Investigational Hearing Testimony

CC Post-Trial Br. — Complaint Counsel's Post-Trial Brief

1-800 Post-Trial Br. — 1-800 Contacts' Post-Trial Brief

1-800 Pre-Trial Br. — 1-800 Contacts' Pre-Trial Brief

Cmplt. — Complaint

Reply to CCF — Reply to Complaint Counsel's Proposed Finding of Fact

Stipulation — Joint Stipulation Regarding Search Engine Mechanics and Glossary of Terms

{bold} — In Camera Material

I. INTRODUCTION

The record in this case is enormous. It includes over 1400 documents, voluminous search engine data, 13 expert reports, transcripts of 12 investigative hearings and 38 depositions running many thousands of pages, and a hearing transcript more than 4500 pages long. Together, the parties have submitted hundreds of pages of pre- and post-trial briefs and more than 3000 proposed findings of fact. And their replies to their adversary's proposed findings will add several hundreds of pages more.

Yet, for all that, a handful of undisputed (or indisputable) facts and legal propositions resolve this case in Respondent's favor:

As an initial matter, the Court need only look to Howard Hogan's undisputed testimony that the challenged settlements took forms that are commonplace in trademark disputes. That should dispose of the case at the threshold under the Supreme Court's decision in *Actavis,* which requires that a party challenging a settlement agreement under the antitrust laws must prove both (1) that a settlement takes an unusual form and (2) satisfy five factors indicating a risk that such a settlement will "tend to have significant adverse effects on competition" sufficient to displace the law's traditional policy in favor of settlement. 133 S. Ct. at 2231, 2234-37. Complaint Counsel's only evidence was the unreliable and purely speculative testimony by Professor Tushnet, who indisputably (1) never read the settlement agreements, (2) never settled a trademark case, and (3) did not identify any settlement taking any form that Complaint Counsel say was an alternative.

If antitrust scrutiny is warranted, two indisputable conclusions—each readily established—foreclose Complaint Counsel's plea for inherently suspect treatment.

First, the record establishes that the challenged settlement agreements were *bona fide* settlements of trademark litigation that are "favored in the law" and "it is reasonable to presume . . . are pro-competitive." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997). This is established by just a few pieces of evidence. Complaint Counsel concede, as two courts held, that 1-800 Contacts' trademark claims were not sham. (RX 680 at 12–13). Witness after witness from the settling parties testified that they settled to avoid the costs of litigation and the risks of loss. Complaint Counsel's own expert, Dr. Evans, testified that the challenged settlements "were economically rational for this set of firms because this set of firms succeeded in avoiding potentially expensive and risky lawsuits" (CX 9042 (Evans, Dep. at 119-20)).

Plainly, the settling parties were engaged in procompetitive settlements, not bid rigging or attempting to share monopoly profits. Indeed, the settlements here stand in stark contrast to those challenged in reverse payment cases. The *only* benefit any settling party received here was avoiding the costs of litigation, (CX 9042 (Evans, Dep. at 114-116)), and Complaint Counsel have conceded that the settlements provided for relief that 1-800 Contacts could have obtained if it prevailed in the underlying litigation. (RX 679A at 0005).

Second, the Court can conclude that this is not a case where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," *Actavis, Inc.*, 133 S. Ct. at 2237, simply by taking stock of the sheer complexity of the parties' evidence regarding paid search advertising's effects on consumers. That evidence includes extensive and technical testimony from search engine executives regarding the highly complex mechanics of paid search advertising, competing consumer surveys, and multiple expert analyses of large volumes of search engine data. The Court need not wade through this thicket; the thicket itself is the point. "Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do" and "the plausibility of competing claims about the effects of" the challenged settlement agreements "rules out the indulgently abbreviated review" called for by Complaint Counsel. *California Dental Ass'n v. FTC*, 526 U.S. 756, 775 n.12 & 778 (1999).

Of course, the Court could also just look at Dr. Murphy's analysis running search engine data through Complaint Counsel's expert's model of the counterfactual world, which shows that the settlements *increased* output; they made consumers who search for 1-800 Contacts' trademarks more successful in purchasing contact lenses, that is, more contact lenses were purchased in response to searches for 1-800 Contacts' trademarks with the settlement agreements in place than without them. That is proof positive that the settlement agreements "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *California Dental Ass'n*, 526 U.S. at 771.

Even if the Court were to find that Complaint Counsel bore their burden to show that economic learning and the experience of the market makes the settlements inherently suspect, Complaint Counsel still had to make a detailed showing of anticompetitive effects because 1-800 Contacts demonstrated plausible procompetitive efficiencies. Under the inherently suspect analysis, upon such a showing by Complaint Counsel, 1-800 Contacts' burden simply would be to "articulate a legitimate justification," *i.e.*, "plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question" or "reasons why the practices are likely to have beneficial effects for consumers." *In the Matter of Polygram Holding, Inc.*, 136 F.T.C. 310, 345 (2003); *see also Polygram Holding, Inc. v. FTC,* 416 F.3d 29, 36 (D.C. Cir. 2005) ("defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm"); *In re N. Tex. Specialty Physicians,* 140 F.T.C. 715, 734 (F.T.C. Nov. 29, 2005) ("The defendant need only articulate a legitimate justification" because "the issue at this initial stage is simply whether the practice should be condemned summarily").

1-800 Contacts clearly identified numerous plausible and cognizable procompetitive benefits that would "merit a more searching inquiry into whether the restraint may advance procompetitive goals, even" if the Court could find "it facially appears of the type likely to suppress competition." *Polgyram*, 136 F.T.C. at 347. *See* 1-800 Post-Trial Br. at 34-61; (RF 1385-1876). Thus, under the Commission's precedent, Complaint Counsel had the burden to "provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely, before the *evidentiary* burden shifts to the defendant." *Polgyram*, 136 F.T.C. at 345. In other words, because 1-800 Contacts identified plausible justifications, Complaint Counsel had to "make a more detailed showing that the restraints at issue are likely to harm competition." *In re N. Tex. Specialty Physicians,* 140 F.T.C. at 736. Only if Complaint Counsel made such a showing would 1-800 Contacts have to prove procompetitive efficiencies.

The conclusion that Complaint Counsel failed to make a detailed showing that the settlements are likely to harm competition is easily reached. Both of Complaint Counsel's economic experts conceded that they have no proof that the settlement agreements resulted in lower output or higher prices for contact lenses. (Evans, Tr. 1723-24; CX 9042 (Evans, Dep. at 257, 263); Athey, Tr. 799; CX 9043 (Athey, Dep. at 194-95, 201)). Those concessions are fatal to any case under the rule of reason, even setting aside evidence that 1-800 Contacts' margins remained constant. *See, e.g.*, *California Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000) (vacating commission order where "the FTC has never quantified any increase in price or reduction in output").

Little analysis is needed to conclude that Complaint Counsel's attempts to evade this failure of proof are meritless. Complaint Counsel's theory that settlements deprived consumers of information that would have led them to lower-priced retailers founders against a simple fact: because the settlement agreements had no effect on the 98% of contact lens-related searches that did not involve 1-800 Contacts' trademark, (Evans, Tr. 1725), consumers saw more than [redacted] ads for 1-800 Contacts' competitors. (RX 739-97, 99). All consumers had to know to find those ads is (1) 1-800 Contacts is not the only company that sells contact lenses online and (2) how to run generic searches. Dr. Athey, on whom Complaint Counsel bank this theory of harm, admitted she had no evidence that any consumer did not know either of these things. (CX 9043 (Athey, Dep. at 261-262)). And Professor Tushnet agrees that "consumers are well aware of different tools that allow them to compare their purchase options." (Tushnet, Tr. 4502; CX 8041 at 23).

Dispensing with Complaint Counsel's theory that Google was harmed, not contact lens consumers, is easy as 1-2-3: (1) Supreme Court precedent makes clear that a controlling question is whether "the limitation on advertisements obviously tends to limit the total delivery of" the product being advertised, *California Dental Ass'n*, 526 U.S. at 776, but as Dr. Athey's model was shown to predict, it does not; (2) Complaint Counsel have not defined a paid search advertising market; and (3) Complaint Counsel have not even tried to account for the enormous complexities the search engines testified are involved in determining effects on their revenues, including whether advertisers substituted to advertising sold in auctions Complaint Counsel have not analyzed.

In short, the Court does not need to scour the record to find that Complaint Counsel's case cannot stand on the antitrust principles that this Court is usually asked to apply.

Instead, Complaint Counsel are asking this Court to put the label "anticompetitive" on theories of trademark law that they think are wrong. In the first instance, this is the very question addressed by courts deciding trademark infringement cases. Yet, notwithstanding case law recognizing the validity of infringement claims for paid search ads that do not use a mark in their text—such as the ads at issue in the cases underlying the settlement agreements—Complaint Counsel would have this Court decide that restricting such ads went beyond 1-800 Contacts' trademark rights and was anticompetitive. And despite scarce case law addressing one way or the other whether ads generated through "broad matching" can give rise to trademark liability, Complaint Counsel would have the Court hold, for all cases and for all time, that 1-800 Contacts had no trademark right to restrict such ads and doing so harmed consumers. Complaint Counsel thus are trying to use this Court's authority to find antitrust violations as a lever for influencing an evolving body of trademark law grappling with how to apply longstanding principles to a novel form of advertising in a new Internet medium. Rather than persuade the Congress that makes trademark law or the federal courts that hear trademark cases that their view is procompetitive as a matter of policy, Complaint Counsel seek a ruling that existing trademark doctrine is anticompetitive as a matter of law.

Respectfully, this is not antitrust law's function or this Court's role. It is unwise and unfair for the Commission to use antitrust law to impose its trademark law views on the other branches. After all, the Commission itself has noted that "[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable." *In the Matter of Schering-Plough Corp*., 136 F.T.C. 956, 997 (2003). And such an after-the-fact inquiry "could have a chilling effect on [trademark] settlements down the road, and thus make it harder for parties to enjoy the advantages of certainty." *Id.* at 998.

Indeed, the Commission's effort to use antitrust law to regulate trademark use on the Internet is particularly fraught with unintended consequences: "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). Just as the Supreme Court found it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium," *id.*, so, too, should this Court refrain from limiting trademark protection on the Internet in one fell swoop.

1-800 Contacts respectfully submits that its pre- and opening post-trial briefs have discussed these theories and the relevant evidence at length. Therefore, it has endeavored not to repeat those efforts here. Similarly, 1-800 Contacts has not attempted to duplicate in this brief the refutation of Complaint Counsel's characterization of the record and the facts it has provided in its findings of fact and replies. In this brief, 1-800 Contacts has instead (1) highlighted three important issues on which Complaint Counsel have misstated the facts and (2) guided by the Court's order that "Reply briefs shall reply to the arguments in the same order as the arguments were presented by the opposing party in its opening brief," refuted Complaint Counsel's legal arguments in order. That is not to say that each of Complaint Counsel's legal arguments relates to an important issue or that all (or even any number) of them must be refuted for 1-800 Contacts to prevail. As noted above, this case can be resolved on the basis of a handful of clearly established propositions. But 1-800 Contacts has joined issue section-by-section with the hope of facilitating the Court's evaluation of whatever arguments it believes must be resolved to decide this matter. (For the sake of clarity, 1-800 Contacts notes that it has often used Complaint Counsel's headings, even when it completely disagrees with the statement in the heading, so that the Court will be able to readily find the relevant responsive discussion.)

II. FACTUAL BACKGROUND

Complaint Counsel's presentation of the relevant facts contains numerous misstatements and distortions of the record evidence. 1-800 Contacts has addressed these in its reply findings and therefore limits its discussion here to three important issues:

First, Complaint Counsel have mischaracterized the history and purpose of the settlement agreements.

Second, Complaint Counsel have not proven that the settlement agreements have denied consumers "sufficient information about the presence of competing firms and about the lower prices charged by these firms." CC Post-Trial Br. at 56-57. The record clearly shows, as simple logic suggests, that consumers who are interested in comparing retailers or prices have and use ample means to do so other than searching for 1-800 Contacts' trademarks.

Third, Complaint Counsel have not proven that the settlement agreements restricted advertising that was significant in order for an online retailer to be able to compete.

1. 1-800 Contacts Did Not Enter Into the Agreements to Harm Competition or Rig Bids

Complaint Counsel's suggestion that 1-800 Contacts' intent in entering into

the [settlements] was to suppress competition," CC Post-Trial Br. at 26, gets the facts and the law wrong. It is important to note that none of Complaint Counsel's theories about 1-800 Contacts' intent could make up for their lack of economic proof:

Intent does not help to separate competition from attempted monopolization and invites [factfinders] to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a [factfinder]. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation.

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.); *see also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.) ('"intent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses").

Complaint Counsel's distortions are a misguided attempt to distract the Court from the fact that 1-800 Contacts' lawsuits and settlements were an effort to protect its trademarks, just as many other companies did around the same time, and that Complaint Counsel are trying to change the trademark law that developed (and continues to develop) in response to this large number of claims. The only upshot of the intent evidence in this case is that 1-800 Contacts was not engaged in collusive bid-rigging or a scheme intended to harm consumers.

a. 1-800 Contacts Was One of Many Trademark Owners to File and Settle Trademark Litigation Regarding Paid Search Ads

"The history of the restraint," *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918), is missing from Complaint Counsel's brief.

1-800 Contacts was one of many firms in industries across the economy to enforce its trademark rights in the context of Internet advertising. (RX 734 at 58-70, 90-121). The advent of internet advertising led to an enormous amount of litigation brought by trademark owners, beginning with the use of trademarks in HTML code and metatags,[1] then the use of trademarks to trigger banner advertisements and pop-up ads,[2] and, most recently, the use of trademarks as keywords to trigger sponsored ads on internet search engines.[3]

The settlement agreements at issue here grew out of trademark litigation that 1-800 Contacts filed over pop-up ads that appeared when a consumer was on 1-800 Contacts' website. 1-800 Contacts sued Vision Direct (and WhenU.com, the advertising vendor) over that practice.

Contrary to Complaint Counsel's insinuation (CC Post Trial Br. at 16-17), "a number of companies sued 'WhenU.com' for placing computers programs on computers that triggered 'pop-up' ads." McCarthy on Trademarks and Unfair Competition § 25A:9 (4th ed.); *see also Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E.D. Mich. 2003); *U-Haul International, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D. Va. 2003). In 2003, the district court granted 1-800 Contacts' preliminary injunction motion. *1-800 Contacts, Inc. v. WhenU.com*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003), *rev'd* 414 F.3d 400 (2d Cir. 2005).[4]

---

[1] *See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999) (use of trademark in HTML code and metatags on competitor's website).

[2] *See, e.g., Playboy Enters., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004) (use of trademark to trigger banner ads); *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 406 (2d Cir. 2005) (use of trademark to trigger pop-up ads).

[3] *See, e.g., 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); *Network Automation, Inc. v. Advanced Sys. Concept, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011); *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009).

[4] In 2005, the Second Circuit reversed the district court, finding that the particular means used by When-U to trigger pop-up ads did not constitute a "use in commerce." *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d at 406.

Early the following year, while the injunction was being appealed, 1-800 Contacts' counsel wrote to Vision Direct regarding the appearance of Vision Direct's paid search advertisements in response to searches for 1-800 Contacts' trademark. (RX 100). At Vision Direct's suggestion, 1-800 Contacts attempted to resolve the trademark dispute by filing a complaint with Google. (Schmidt, Tr. 2896; CX 1054; CX 1397; RX 159, RX 796; CX 1396). So, too, did AC Lens. (Clarkson, Tr. 327-329; RX 1188).) Just a few months later, however, in April 2004, Google changed its trademark policy to stop trying to resolve trademark disputes. (CX 789). Google explained its decision in a filing with the SEC:

Under our new policy, we no longer disable ads due to selection by our advertisers of trademarks as keyword triggers for the ads. As a result of this change in policy, we may be subject to more trademark infringement lawsuits. Defending these lawsuits could take time and resources. Adverse results in these lawsuits may result in, or even compel, a change in this practice which could result in a loss of revenue for us, which could harm our business.

(RX 140 at 28). 1-800 Contacts met with Google representatives, who encouraged them to resolve their disputes directly with the advertisers. (CX 9031 (Schmidt, Dep. at 34-35); CX 9013 (Aston, Dep. at 170, 173)). Two months after Google changed its policy, 1-800 Contacts and Vision Direct reached a settlement agreement regarding paid search advertising. (CX 311). 1-800 Contacts also reached a settlement with Coastal Contacts in the same period. (CX 310).

Just as Google anticipated, however, "[t]rademark owners responded by filing more than 100 lawsuits in the United States and Europe, making the dispute the hottest controversy in the history of trademark law." D. Hyman & D. Franklyn, *Trademarks As Search-Engine Keywords:*

Who, What, When?, Texas L. R. 2117, 2118 (2014). 1-800 Contacts was just one of those trademark owners.

The key legal issue in the early years of this litigation was whether bidding on or selling another firm's trademark as a keyword in paid search advertising constituted a "use in commerce" that could give rise to liability under the Lanham Act. (RX 734 at 57). In 2009, in *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009), the Second Circuit answered that question in the affirmative. Other circuit courts agreed, and the "use in commerce" debate is now settled. *See*, *e.g.*, *Network Automation, Inc. v. Advanced Sys. Concept, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) ("[T]he use of a trademark as a search engine keyword that triggers the display of a competitor's advertisement is a 'use in commerce' under the Lanham Act.").

Once the "use in commerce" debate was settled, the trademark infringement analysis shifted to the likelihood of confusion. *Rescuecom*, 562 F.3d at 130; (RX 734 at 60-72). Different courts have taken different approaches to the application of the traditional multifactor "likelihood-of-confusion" test to the particular facts of keyword advertising.[5]

In this new legal landscape, where infringement claims would turn on highly factual and somewhat unpredictable inquiries into confusion, a number of companies, including search engines such as [redacted]

[5] *See*, *e.g.*, *Rosetta Stone,* 676 F.3d at 154-55; *Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-CV-00250, 2016 WL 4074121, at *6 (D. Conn. July 29, 2016) (looking to the balance of all factors); *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, 103 F. Supp. 3d 1032, 1041 (D. Minn. May 5, 2015) (factual disputes over a single factor are insufficient unless "they tilt the entire balance in favor of such a finding").

[redacted]. 1-800 Contacts entered into most of the challenged settlement agreements in this period following the *Rescuecom* decision as well.

In short, 1-800 Contacts' lawsuits, and the settlements resolving those lawsuits, kept pace with the evolution of trademark law and were in step with the actions of many other trademark owners. (RX 734 at 61-72). Indeed, 1-800 Contacts' settlement agreements took the same form and included the same provisions as settlement agreements entered into by other parties and were similar to many injunctions ordered by various courts. (RX 734 at 92-119).

b. 1-800 Contacts Did Not Intend to Harm Consumers

The foregoing provides strong evidence that, like other companies, 1-800 Contacts was trying to enforce its trademark rights, conduct protected by the First Amendment. The testimony was uniform that the company acted out of concerns protected by trademark law. (Bethers, Tr. 3688-91; Coon, Tr. 2726-29, 2731-38; CX 9017 (Blackwood, Dep. at 275-76); CX 9027 (Larson, Dep. at 87); CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9031 (Schmidt, Dep. at 14-15, 105-06, 112); CX 9001 (Bethers, IHT at 105-06))

1-800 Contacts, in fact, acted just as a company intending to protect its trademark rights would. It retained experienced outside counsel to assess its legal claims. (CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133)). And it monitored sponsored ads and sent screenshots of ads to its outside counsel. (CX 9031 (Schmidt, Dep. at

105); CX 9002 (Craven, IHT at 128-29); CX 9021 (Pratt, Dep. at 20-21, 78-79, 131-32); CX 9040 (Miller, Dep. at 19, 129, 132, 133)). These are hardly the makings of a conspiracy to pocket monopoly profits from inflated prices.

That is not to say that 1-800 Contacts was blind to the benefits of litigation for its business. But that, too, is unexceptional. Indeed, it would be surprising if 1-800 Contacts used its revenues to initiate litigation if it did *not* believe that doing so would help its business. But Complaint Counsel's characterization of 1-800 Contacts' business reasons for enforcing its trademarks are completely misleading and inaccurate. 1-800 Contacts' goals were not bid rigging or hiding the truth from consumers. There is no credible evidence of this.

Complaint Counsel's theory that 1-800 Contacts primarily was trying to cut costs by reducing auction prices makes no sense. Retaining counsel and initiating expensive litigation is a strange way to cut costs; the *Lens.com* litigation proves as much. And suing competitors on a *bona fide* theory would be a bizarre way to rig bids. That explains why there is not a single document or line of testimony in this case's enormous record indicating that any of the parties to the settlement agreements so much as mentioned to each other that the agreements would reduce their respective costs.

Complaint Counsel do cite a handful of internal documents with isolated references to advertising costs. CC Post-Trial Br. at 26-27. But Complaint Counsel do not and cannot point to any evidence that these statements reflect a bid rigging motivation. That inference would fly in the face of the fact that 1-800 Contacts spent no more than [redacted] of its total advertising budget on trademark paid search during the years 2004 through 2014. (CX 739 at

92; Coon, Tr. 2722-23 (paid search advertising for trademark terms was never a material cost for 1-800 Contacts' business)). The notion that 1-800 Contacts launched and settled potentially expensive litigation to achieve such minimal cost savings simply is implausible. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 24 (1993) ("although some . . . corporate planning documents speak of a desire to slow the growth of the segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anticompetitive means").

Complaint Counsel again miss the forest for the trees in suggesting that 1-800 Contacts intended to suppress competition from truthful, non-deceptive advertising. (CC Post Trial Br. at 28-30). As early as 2005, 1-800 Contracts' customer research showed that while most customers had never heard of any of the other online contact lens retailers, "they all know where to look" if they wanted to find other online contact lens retailers. (RX 781 at 5; Schmidt, Tr. 2917-21; Bethers, Tr. 3708-10). 1-800 Contacts also understood what Complaint Counsel's experts have conceded: the vast majority of internet searches relating to contact lenses were for generic terms (*e.g.*, the so-called "Big Three" search terms—"contacts," "contact lens," and "contact lenses") or product names. (Schmidt, Tr. 2924; CX 9029 (Bethers, Dep. at 19); CX 9001 (Bethers, IHT at 115)). It is hard to imagine why 1-800 Contacts would reach settlements involving a tiny fraction of contact lens-related advertising if it wanted to suppress the truth. But, it didn't.

Finally, Complaint Counsel mischaracterize the record evidence in suggesting that 1-800 Contacts' trademark enforcement efforts were motivated by "significant competitive pressure from emerging online sellers." CC Post Trial Br. at 16-17. The quotations from CX 459 in

Complaint Counsel's brief have nothing to do with competition from other online retailers. The quoted portions of CX 459 are discussing performance of 1-800 Contacts' own "incentive programs" for its marketing affiliates that "generat[ed] a lot of traffic" to its website but did not result in many conversions. (CX 459 at 1).

c. The Law Highlights the Flaws in Complaint Counsel's Argument

The Ninth Circuit's decision in *California Dental* on remand from the Supreme Court illuminates further why Complaint Counsel's cherry-picked evidence does not show an intent to harm competition. In that case, like Complaint Counsel here, the Commission relied on isolated statements of the respondent's supposed intent in restricting advertising. 224 F.3d at 948-49. The Court rejected this attempt: "[w]e do see substantial evidence that the CDA intended to restrict certain types of advertising, but in light of the CDA's plausibly procompetitive justifications for the restrictions, such intent has no bearing on the question of whether those restrictions are in fact likely to prove anticompetitive or procompetitive." *Id.* at 949 (footnote omitted). Just so here, in light of the extensive evidence supporting the settlements' procompetitive benefits. *See* 1-800 Post-Trial Br. at 34-61.

Moreover, the Ninth Circuit found it "entirely unclear" how a "crude" statement by a single CDA officer "evinces an intent on the CDA's part to restrain competition" and stated that "the FTC wisely de-emphasized" statements that were "ambiguous with respect to the purpose of the CDA's restrictions on advertising." 224 F.3d at 949 n. 4. Instead, the court pointed to "relatively unambiguous, albeit self-serving, evidence in the record indicating that CDA's motives in adopting advertising restrictions were benevolent." *Id.*

2. Complaint Counsel Failed to Prove that the Settlement Agreements Prevent Consumers from Obtaining Information About Lower-Priced Alternatives

Complaint Counsel argue that the settlement agreements harmed consumers by denying them "sufficient information about the presence of competing firms and about the lower prices charged by these firms." CC Post-Trial Br. at 56-57. The basic premise appears to be that information about 1-800 Contacts' rivals and their prices "never reaches consumers," who supposedly are "unable to make fully informed choices at precisely the moment when they are ready to purchase." *Id.* at 57. Complaint Counsel, however, have no evidence that consumers are unaware that firms other than 1-800 Contacts sell contacts online or are unable to find information about those firms' prices.

The record, in fact, shows consumers not only know about but have multiple means to obtain information regarding rival contact lens retailers. All consumers have to do is search for one of many generic terms or the brand name of their contact lens. (RX 733 at 60; CX 9048 (Murphy, Dep. at 56); CX 9046 (Ghose, Dep. at 78-80). Millions of them do just that: 98% of searches are for terms other than 1-800 Contacts' trademarks which are not affected by the settlement agreements. (Evans, Tr. 1725). Almost [redacted] of paid search advertisements were generated by bids on terms other than 1-800 Contacts. (RX 733 at 54). Google's "People Also Search For" and "related searches" functions, which are based on correlations among searches, demonstrate that consumers who search for 1-800 Contacts' trademarks also use generic searches. (Athey, Tr. 2119-20).

The settlement agreements did not affect those searches, which exposed consumers to an enormous amount of information. Despite the settlements, between 2004 and 2016, Google displayed more than [redacted] paid search ads for contact lens retailers other than 1-800 Contacts, more than [redacted] of them for the settling retailers. (RX 739 at 97, 99). Those ads accounted for between [redacted] and [redacted] of paid search advertising related to contact lenses in every quarter since 2002. (RX 739 at 62, 15; Murphy, Tr. 4195-98).

Consumers are exposed to information about competing retailers even when they search for 1-800 Contacts. Google search results for the query “1-800 Contacts” and variants of that search term include a Knowledge Graph regarding 1-800 Contacts, which includes links to competing contact lens retailers, including some that entered into settlement agreements with 1-800 Contacts, such as ACLens and Coastal Contacts. (*See, e.g.,* RX 310 at 1, 005; RX 311 at 1-3; *see also* CX 8007 at 10). Clicking on one of these links takes the user to the website of the retailer. (Juda, Tr. 1308). Moreover, at the bottom of a Google search results for the query “1-800 Contacts” and variants of that search term is a section entitled “Searches related to,” which includes links to searches for competing retailers, such as Walgreens, Vision Direct, Costco, and Coastal Contacts. (Juda, Tr. 1308-1309; RX 312-835; *see also* RX 310 at 32, 0072; RX 311 at 2).

In short, consumers know that other retailers sell contact lenses online (even if they cannot name them); consumers know how to search in order to compare contact lens prices and investigate retailers; and consumers saw billions of paid search ads for 1-800 Contacts' competitors. Complaint Counsel have made no effort to analyze whether the additional ads they say would appear absent the settlement agreements give consumers any information that they could not find today or do not know already. *Compare In re Realcomp II Ltd.*, 2007 WL 6936319, at *32 (FTC 2009) (Complaint Counsel's expert “found *significantly* fewer discount listings after the policies at issue were implemented") (emphasis added). That is hardly surprising, for Complaint Counsel's theory that there are consumers who do not believe there are other online contact lens retailers or do not know how to find them defies common sense, and any expert testimony to that effect would be disregarded as not credible.

Complaint Counsel's reliance on their experts to support their theory is misplaced.

First, Dr. Athey testified that she had no evidence that any consumer believes that 1-800 Contacts is the only firm that sells contact lenses online, (CX 9043 (Athey, Dep. at 261-62)), and that consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses (Athey, Tr. 913-914).

Second, Complaint Counsel point to Dr. Athey's counterfactual model. CC Post-Trial Br. at 54-55. [redacted] And as Dr. Murphy showed, [redacted] Dr. Athey has not identified any error in Dr. Murphy's calculations, and Complaint Counsel do no more than speculate, without any evidence, that the conversion rates that Dr. Murphy used would be different in a world without the settlement agreements. *See* CC Post-Trial Br. at 180.

Third, Dr. Evans based his model on the faulty and unsupported assumption that consumers would respond to all retailers' ads in response to searches for 1-800 Contacts' trademarks as they did to Memorial Eye's ads in response to those searches. (CX 8006 at 79, 96-105).

Fourth, Complaint Counsel cite Dr. Athey's conclusion that a supposed lack of information is "the best explanation" for the fact that 1-800 Contacts, on average, charges more than other online retailers. CC Post-Trial Br. at 56-57. But this opinion reflects the unsupported premise that contact lens consumers lack information about 1-800 Contacts' competitors and also lacks any basis. (RF 206-215). Dr. Athey concedes that [redacted]. (Athey, Tr. 2072). [redacted] (CX 9043 (Athey, Dep. at 255); Athey, Tr. 2072-2074). [redacted] (Athey, Tr. 2072-73). Dr. Athey is not a marketing expert and has no training to opine on that subject. And her opinion contradicts extensive evidence, confirmed by Dr. Ronald Goodstein, the only marketing expert in the case, that 1-800 Contacts has some of the best service in the entire economy. (RF 169-186). Dr. Athey's testimony on this point is not reliable and should be disregarded.

Complaint Counsel point to a presentation by the consulting firm Bain, purporting to show that [redacted]

[redacted] (CX 1449). Complaint Counsel ignore, however, that [redacted]. (Athey, Tr. 942-946).[6] [redacted] In fact, the very same presentation undercuts Complaint Counsel's theory that the settlement agreements create an information deficit. It reports that more than [redacted] of online contact lens shoppers compare prices (Athey, Tr. 941; CX 1449 at 55), and [redacted] of online contact lens shoppers check prices at three, four or five stores or websites (Athey, Tr. 941; CX 1449 at 55).

Finally, Complaint Counsel cite Google's statements that its policy of permitting advertising based on searches for other firms' trademarks will help consumers. CC Post-Trial Br. at 53 n. 210 (citing CX 471, CX 888). However, it is undisputed that Google's trademark policy is not socially optimal and is not a proxy for what enhances consumer welfare. (RX 739 at 35; Evans, Tr. 1817; CX 9043 (Athey, Dep. at 192-193)). Thus, the fact that Google permits advertising in response to searches for other firm's trademarks proves only that Google predicts this such advertising will enhance its long-term profits.

Indeed, it is undisputed that adding paid search ads for other retailers in response to searches for 1-800 Contacts' trademarks will push organic links, such as links to 1-800 Contacts' Facebook page, off the SERP. (Athey, Tr. 2082). But Complaint Counsel's experts have not

[6] Dr. Athey [redacted]

measured whether the paid search ads Complaint Counsel say should be shown instead provide consumers with more valuable information that the organic links they would replace. (Athey, Tr. 2082-83; CX 9043 (Athey, Dep. at 180, 281-82)). Complaint Counsel thus have no basis to say that consumers were harmed rather than benefitted by restrictions on paid search ads appearing in response to searches for 1-800 Contacts' trademarks.

3. Complaint Counsel Have Not Proven that the Settlement Agreements Restricted Advertising that Was Significant to Retailers' Ability to Compete

Complaint Counsel also claim that the record shows that the settlement agreements' restrictions on advertising in response to searches for 1-800 Contacts' trademarks "Precludes 1-800 Contacts' Online Competitors From Being Able to Compete Effectively for Consumers." CC Post-Trial Br. at 47. The record contains no proof of this assertion.

Whether "search advertising is 'essential' for online sellers of contact lenses" or "the most effective and most efficient means for obtaining new customers" (CC Post-Trial Br. at 39-42) is irrelevant because the settlement agreements did not restrict all search advertising; far from it. The question is whether search advertising *in response to searches for 1-800 Contacts' trademarks* that the settlements prohibited made the difference in other retailers' ability to effectively compete.

On that issue, Complaint Counsel's recitation of the facts relies almost entirely on testimony from contact lens retailers. CC Post-Trial Br. at 42-48. That is hardly surprising, given that neither Dr. Athey nor Dr. Evans conducted any analysis of whether advertising in response to searches for 1-800 Contacts' trademarks was profitable or material to the success of any online retailer. (CX 9043 (Athey, Dep. at 144); CX 9043 (Athey, Dep. at 296)). The retailer executives' testimony consists of speculation and generalities, devoid of real analysis.

For example, Eric Holbrook admitted that he never made any effort to determine the impact, if any, of the settlement agreement on Memorial Eye's business. [redacted] (Holbrook, Tr. 2039–2040). [redacted] (Holbrook, Tr. 2042). Although Mr. Holbrook vaguely testified that having Memorial Eye's ads appear in response to searches for 1-800 Contacts' trademarks was "important," he also acknowledged that he did not manage Memorial Eye's paid search advertising (CX9024 (Holbrook, Dep. at 47–48)); [redacted] (Holbrook, Tr. 2042); [redacted] (Holbrook, Tr. 1966). [redacted] (Holbrook, Tr. 1966).

Complaint Counsel point to only two "data" points in support of their claim about the competitive significance of advertising in response to searches for 1-800 Contacts' trademarks. Neither is reliable or probative.

First, Complaint Counsel point to testimony by Glenn Hamilton that Walgreens and Vision Direct each "was losing approximately [redacted] in sales each month due to the" settlement agreements. CC Post-Trial Br. at 48. But this evidence is unreliable. Mr. Hamilton's testimony was purportedly based on the supposed results of Google's AdWords Keyword Planner. Mr. Hamilton testified at trial, however, that [redacted] (Hamilton, Tr. 451-52). He could not recall critical details related to his use of the Keyword Planner, including the specific bid amounts he inputted for each of Respondent's trademarked terms. (Hamilton, Tr. 444-445). Likewise, Mr. Hamilton did not recall the "specific" outputs that resulted from his use of the Keyword Planner. (Hamilton, Tr. 444-445.) And he did not know what the Keyword Planner bases its conversion rates or how it takes into account quality score. (Hamilton, Tr. 445-447). At the hearing, the Court stated: "When it comes time to decide on these issues, I'm going to decide what weight, if any, to give this evidence." (Tr. 426). 1-800 Contacts' respectfully submits that Mr. Hamilton's estimate based on the Keyword Planner is entitled to no weight.

Second, Complaint Counsel argue that [redacted] CC Post-Trial Br. at 46. To begin with, at the hearing in this matter, the Court expressly prohibited Complaint Counsel from relying on the documents, created by their research analyst, that they now cite in support of this proposed finding. (Tr. 1990 ("[CX1626] is excluded."), 1964 (noting irrelevance of declaration created by Complaint Counsel's research analyst)). The only witness from Memorial Eye who provided sworn testimony, Mr. Holbrook, expressly testified that [redacted]

[redacted] At any rate, [redacted]

The fact is that the best evidence of whether paid search advertising in response to searches for 1-800 Contacts' trademarks was competitively significant lies in what online retailers did, not what they said. And as 1-800 Contacts explained in its opening brief (at 95-98) and findings of fact (RF 1985-2030), the data eviscerate Complaint Counsel's position.

At most, the settlement agreements could affect no more than [redacted] of contact lens sales and would have no effect at all on competition for [redacted] of all sales and more than [redacted] of online sales. (RX 739 ¶ 126). That leaves other retailers ample opportunities to compete, scale and grow. (CX 9048 (Murphy, Dep. at 175-76); RX 739 at 49).

Most telling is the real-world behavior of retailers not subject to any restrictions. For example, Lens.com did not bid on 1-800 Contact's trademarks even after obtaining a favorable Tenth Circuit decision (CX 9001 (Bethers, IHT at 302-303)), and still is the [redacted] online contact lens retailer (CX 8006, Table 1). More generally, retailers not bound by the settlement agreements, such as Walmart, Costco, BJ's, Sam's Club, Lens Direct and Lens.com (CX 8007 at 42; CX 9043 (Athey, Dep. at 117)) generated only [redacted] of their paid search advertisements on Google related to contact lenses based on bids for 1-800 Contacts' trademarks and earned only [redacted] of their total clicks from those ads. (RX 739 at 99).

In fact, Dr. Athey admitted that, today, the numerous retailers not bound by the settlement agreements do not fill the ad slots in response to searches for 1-800 Contacts' trademarks. (CX 9043 (Athey, Dep. at 297)). She further testified that this supports an inference that they believed that the economic benefits of bidding an amount sufficient to have their ad appear in response to a search for 1-800 Contacts' trademarks did not justify the costs of doing so. (Athey, Tr. 959; *see also* RX 739 at 48). And a number of the settling parties apparently reached the same conclusion, since four of them—Contact Lens King, Walgreens, Standard Optical and Memorial Eye—did not bid on 1-800 Contacts' trademarks at all prior to entering into settlement agreements with 1-800 Contacts. (CX 8006 at 57).

Equally telling are the settlements themselves. As Dr. Evans testified, the settling parties themselves are rational and the best judges of their own business interests. (Evans, Tr. 1830-31; CX 9042 (Evans, Dep. at 119-120)). Given that the only benefit that the settling parties received was saving roughly $1.4 million in litigation costs, (CX 9042 (Evans, Dep. at 114-116)), *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4, the fact that other retailers settled suggests that they did not value advertising in response to searches for 1-800 Contacts' trademark very highly.

Complaint Counsel also claim that "[a]s a result of 1-800 Contacts' conduct, one competitor – Memorial Eye – went out of business altogether." CC Post-Trial Br. at 49. That is completely false. Memorial Eye did not execute its settlement with 1-800 Contacts until November 26, 2013. (CX 326; Holbrook, Tr. at 1879). But Memorial Eye decided to shut down its online business in early 2012, more than a year and a half *before* it executed the settlement agreement. (CX 9024 (Holbrook, Dep. at 176); Holbrook, Tr. 2034). In other words, at the time Memorial Eye executed the settlement agreement with 1-800 Contacts, it *had already decided* to shut down its online business. The testimony on this point is definitive:

> **Q. At the time you executed the settlement agreement, had you already decided to stop selling contact lenses online?**
>
> A. We had made the decision to stop selling contact lenses online by that time, yes, we had.
>
> **Q. When was that decision made?**
>
> A. It was a gradual decision. I can't give you a specific date, but it happened sometime in early 2012.
>
> **Q. And the agreement wasn't executed until November 26, 2013, correct?**
>
> A. Correct.
>
> . . .
>
> **Q. Just so I understand, did you make the conclusion to stop selling contact lenses online more than a year before entering the settlement agreement?**
>
> A. Yes, we did.
>
> **Q. In fact, a little more than a year and a half before executing the settlement agreement, right?**
>
> A. Yes.

(CX 9024 (Holbrook, Dep. at 176–177)). Memorial Eye's decision to shut down its online business was *not* the result of any adverse impact caused by the settlement agreement.[7]

[7] A more plausible explanation for Memorial Eye's decision to shut down its online business is its commercial failure. [redacted] (Holbrook, Tr. 2038). [redacted] (Holbrook, Tr. 2038).

III. COMPLAINT COUNSEL HAVE NOT MET THEIR BURDEN TO DEMONSTRATE THAT 1-800 CONTACTS' SETTLEMENT AGREEMENTS ARE ANTICOMPETITIVE

A. Complaint Counsel Failed to Prove Their *Prima Facie* Case

1. Complaint Counsel Have Failed to Prove that the Settlement Agreements Are Inherently Suspect

a. The Challenged Agreements Are Settlements, Not Bid Rigging

Complaint Counsel's argument that the challenged agreements involve bid rigging is, frankly, absurd. There is absolutely no evidence that any of the settling parties was engaged in bid rigging, let alone evidence to support a bid rigging conspiracy. Party after party testified that they entered into the challenged agreements in order to settle legal claims and avoid the costs of litigation. (CX 9000 ([redacted] at 93-94); CX 9014 ([redacted] at 46-48); CX 9024 ([redacted] at 62-64, 75-77, 160-165); CX 9039 ([redacted] at 86-87, 144); CX 9003 ([redacted] at 108-109); CX 943 ([redacted]) ¶ 10). And Dr. Evans testified that the settlements "are the result of parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation." (Evans, Tr. 1831).

Complaint Counsel have conceded, as two courts have held, that 1-800 Contacts' trademark claims were *bona fide*. (RX 680; *1-800Contacts, Inc. v. Mem'l Eye, P.A.*, 2010 WL 988524, at *6; *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014), ECF No. 91, at 2)). Accordingly, Complaint Counsel cannot dispute that the challenged agreements were *bona fide* settlements of trademark litigation. "[I]it is reasonable to presume that [trademark settlement] agreements are pro-competitive." *Clorox Co.*, 117 F.3d at 60.

Not surprisingly, Dr. Murphy gave unrebutted testimony that the challenged settlement agreements lack the economic indicia of bid rigging agreements. (RX 739 at 57 to at 59); Murphy, Tr. 4178-79).

To prove that the agreements are inherently suspect, Complaint Counsel must do more than slap the label "bid rigging" on them, for "easy labels do not always supply ready answers." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979); *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 492 (1982) (Rehnquist, J., dissenting) ("Especially in the area of antitrust law, labels do not suffice when analysis is necessary."). As Complaint Counsel's own authorities explain, "collusive bidding is an agreement between competitors in a bidding contest to submit identical bids or, by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 n.18 (4th Cir. 1982) (quotation marks omitted). None of the challenged agreements involved such an agreement. None involved an agreement that a "co-conspirator would be the low bidder" or "refrain[] from bidding" on "contracts on which a . . . co-conspirator had been designated as the successful low bidder." *Id.* at 316; *see also United States v. Rose*, 449 F.3d 627, 630 (5th Cir. 2006) ("The companies allocated customers by deciding which company would offer the lowest price for choline chloride to a particular customer at the next bidding opportunity."); *United States v. Capitol Serv., Inc.*, 756 F.2d 502, 503 (7th Cir. 1985) ("The exhibitors take turns selecting films for their respective theatres, making sure that no two theatres in the same geographic zone play the same film."). Indeed, the agreements are not capable of accomplishing that objective because they did not bind many contact lens retailers.

The settlements were non-use agreements, a form of settlement that is routinely used to resolve trademark disputes, whether by settlement or injunction. (RF 1275-89). *See* McCarthy on Trademarks and Unfair Competition § 18:82 (4th Ed. 2016 update); *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996); 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th ed.); Restatement (Third) of Unfair Competition § 35 (1995).

To be sure, one mechanism by which the settlements achieved their goals of resolving the litigation and preventing future infringement was to limit the settling parties' bids on 1-800 Contacts' trademarks as keywords. (*E.g.*, RX 28 (ACLens Settlement) § 2(A)b).) But because search engines sell advertising via auctions, the only way to implement a non-use trademark settlement agreement regarding keyword advertising is to restrict auction bids on keywords.

Accordingly, restraining "bidding" was "only an incident to the main purpose" of the agreements to settle litigation and prevent potential infringement. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898). The restrictions on keyword bidding were "subordinate and collateral to a separate, legitimate transaction" and simply "serv[e] to make the main transaction," the settlements, "more effective in accomplishing [their] purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). Such ancillary restrictions are "necessary to make that transaction effective" and not inherently suspect. *Polygram*, 136 F.T.C. at 471 (quoting *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984)). Complaint Counsel fail to "distinguish between 'naked' restraints . . . and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985).

Complaint Counsel are wrong that the settlement agreements are "indistinguishable from the price restraints that prior cases have deemed to be inherently suspect." CC Post-Trial Br. at 76. None of the agreements involved any agreement on price at all. *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679 (1978), clearly is distinguishable. That case involved "an absolute ban on competitive bidding," which "prevent[ed] *all customers* from making price comparisons in the initial selection of an engineer." *Id.* at 692, 694-95 (emphasis added). As explained in 1-800 Contacts' proposed findings of fact, the challenged settlement agreements did not prevent any customers from making price comparisons, (1-800 Post-Trial Br. at 103-105; RF 960-984, 1932-1955), and contained express carve outs for comparative advertising. (RF 1174).

Complaint Counsel's suggestion that 1-800 Contacts and the settling parties could have engaged in bid rigging even though the settling parties did not benefit from the scheme contradicts their own expert's testimony. In response to the Court's questioning, Dr. Evans testified that an agreement settling litigation that a defendant could not afford to fight is not collusive. (Evans, Tr. 1466.) Regardless of whether mutual benefit is "a prerequisite to liability" for the agreements, CC Post-Trial Br. at 75, the fact that the settling parties did not benefit other than saving litigation costs indicates that Complaint Counsel are mischaracterizing those agreements for purposes of their inherently suspect analysis.

Finally, Complaint Counsel are wrong that the parties' underlying objective to settle litigation "has no bearing on whether the restraints themselves are inherently suspect." CC Post-Trial Br. at 76. "The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Bd. of Trade of City of Chicago*, 246 U.S. at 238. Complaint Counsel's own authorities reflect this principle. *See Nat'l Soc. of Prof'l Engineers*, 435 U.S. at 693 (noting "anticompetitive purpose" of the agreement); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 871 (10th Cir. 1989) ("The purpose was to circumvent price competition and enhance profitability."); *Capitol Serv., Inc.*, 756 F.2d at 503 (conspirators allocated films to movie theaters "for the purpose of eliminating competition among themselves"); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 147 (1966) ("one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition"). As noted, 1-800 Contacts had no such intent.

Calling a settlement a "Bidding Agreement" does not make it so. A label does not transform a presumptively procompetitive trademark settlement into an inherently suspect one.

b. Complaint Counsel Have Failed to Prove That the Settlement Agreements Constitute Inherently Suspect Restraints on Procompetitive Commercial Advertising

Lacking any sound basis to characterize the challenged settlement agreements as bid rigging, Complaint Counsel argue that a "restraint on truthful and non-deceptive advertising is likely to cause competitive harm." CC Post-Trial Br. at 76. But on that score, too, Complaint Counsel resort to assumption rather than proof.

i. Complaint Counsel Assume Rather than Prove That the Restrained Advertising is Not Misleading

Every trademark settlement is a restriction on advertising. Thus, if Complaint Counsel are correct that restrictions on advertising are inherently suspect, every trademark settlement is presumptively unlawful, which turns on its head the law's strong policy in favor of settlements. *See* 1-800 Post-Trial Br. at 16-18.

It is no answer to say that trademark settlements that restrict only "confusing" uses are not inherently suspect. If the parties agreed about what was confusing, they would not be litigating. That is why courts have rejected trademark relief barring just "confusing" uses because it "too broadly requires [the defendant] to guess at what kind of conduct would be deemed trademark infringement." *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 667 & 669 (8th Cir. 1987); *see also Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 146 (3d Cir. 1994) (rejecting reading of consent decree that "would require the district court . . . to make determinations on . . . whether there was likelihood of confusion arising from any of [defendant]'s acts"); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 984-5 (11th Cir. 1983).

Permitting the parties to settle by agreeing to follow the law is just a recipe for restarting the litigation they are trying to end. *See* 5 McCarthy on Trademarks and Unfair Competition § 30:13 ("An injunction which merely forbids a defendant from . . . 'infringing upon plaintiff's trademarks and trade secrets' adds nothing to what the law already requires. If an injunction is so worded, then the factual elements of what exactly is . . . 'trademark infringement' must be re-hashed all over again in a contempt hearing."). For these reasons, parties generally resolve trademark disputes with broad non-use agreements in order to achieve clarity and finality. (RF

1367-1384). As a practical matter, then, Complaint Counsel's rule renders every trademark settlement inherently suspect except for settlements that the parties will never reach.

Complaint Counsel cannot avoid this absurd result that necessarily follows from their position by pointing to some category of advertising prohibited by the agreements that they claim is not misleading as a matter of law. As 1-800 Contacts has explained, courts have rejected Complaint Counsel's argument that paid search ads that do not use a trademark in their text are not confusing as a matter of law. *E.g.*, *Fair Isaac Corp. v. Experian Info. Sols., Inc.*, 645 F. Supp. 2d 734, 760–61 (D. Minn. 2009) ("Whether Defendants' sponsored advertisements actually include [the plaintiff's] trademarks in the text ***is not determinative*** of whether there has been any infringement.") (emphasis added); *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009). And Complaint Counsel have not even tried to introduce any evidence in support of their theory that ads labeled with the name of the advertiser would eliminate any potential for confusion.

In fact, whether the advertising that the agreements restrain is misleading is a conclusion that follows from trademark litigation. But that is not a permissible path to inherently suspect treatment because "[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable." *Schering-Plough Corp.*, 136 F.T.C. at 997.

Regardless, there is extensive evidence showing that the settlements restrains advertising with significant potential to confuse consumers. (RF 1485-1565, 1716-1745, 1801; *see also* RF 1133-1145). Complaint Counsel's entire case to the contrary rests on Dr. Jacoby's surveys.

Those surveys are flawed for the reasons set forth in 1-800 Contacts' opening brief, (1-800 Post-Trial Br. at 51-55), and proposed findings of fact. (RF 1602-1715). More importantly, Dr. Jacoby's surveys do not demonstrate that advertisements covered by each of the settlement agreements is not deceptive. The only way to show that would be for Complaint Counsel to litigate each of the cases that 1-800 Contacts settled ten years after the fact, after the search engine user interfaces have significantly changed, [redacted]; *see also* RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)), and evidence has become stale. Complaint Counsel have not done that. Accordingly, the record provides no basis to conclude that the settlement agreements restrict to any meaningful degree advertising that would not give rise to likely confusion supporting a trademark infringement claim.

In short, as explained more fully below (*see infra* at 83-86), to the extent that one could assume *ex ante* that the settlement agreements prohibit at least some such advertising, that is inherent in the nature of trademark law and trademark settlements. If parties cannot achieve their goals of settling litigation over *bona fide* claims over paid search advertising without agreeing to broad non-use provisions, they are unlikely to be able to settle, and any "overbreadth" in the settlement is "necessary to make that transaction effective" and thus is ancillary, not inherently suspect. *Polygram*, 136 F.T.C. at 471; *see also Rothery Storage & Van Co.*, 792 F.2d at 224.

ii. *California Dental* Supports Rule of Reason Treatment

As 1-800 Contacts established in its opening brief, the Supreme Court's decision belies Complaint Counsel's simplistic argument that the settlements are inherently suspect because they restrict advertising. As in that case, this case involves "advertising restrictions [that] might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *California Dental Ass'n*, 526 U.S. at 771.

The Supreme Court in *California Dental* rejected inherently suspect treatment where the advertising restrictions "could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising." *Id.* at 773-74. Whether the prohibited advertising would be "less effective" was "a question susceptible to empirical but not *a priori* analysis." 526 U.S. at 774. The challenged restrictions "appear[ed] to reflect the prediction that any costs to competition associated with the elimination of" certain advertising "will be outweighed by gains to consumer information (and hence competition) created by" other advertising. *Id.* at 775. The Court held that, "[a]s a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong." *Id.*

The context of the advertising restrictions in this case leads to the same conclusion. Two features of the context are salient. *First*, the agreements are "designed to avoid false or deceptive advertising." *California Dental*, 526 U.S. at 771. They settled concededly *bona fide* trademark claims of a property right to prevent misleading uses of 1-800 Contacts' trademark in paid search advertising. In fact, the agreements' character as trademark settlements adds a procompetitive dimension to the analysis even beyond the factors that required rule of reason treatment in *California Dental*. "Efforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Clorox Co.*, 117 F.3d at 61. And trademark settlement agreements "are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation." *Id.* at 60.

Moreover, as the hearing in this case confirmed, trademark confusion is "a question susceptible to empirical but not *a priori* analysis." *California Dental*, 526 U.S. at 774. Indeed, consumer confusion from paid search advertising is "an inherently factual issue that depends on the facts and circumstances in each case." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012). That is true in part because "the parties to trademark disputes frequently as here hire professionals in marketing or applied statistics to conduct surveys of consumers." *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship.*, 34 F.3d 410, 414–15 (7th Cir. 1994) (Posner, J.), *abrogated on other grounds by Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014).

Second, the restricted advertising takes place "in a market characterized" by a persistent lack of understanding about the nature of the advertising. *California Dental*, 526 U.S. at 774. In *California Dental*, that lack of understanding flowed from "disparities between the information available to the professional and the patient," *id*. Here, the vast majority of consumers who search for 1-800 Contacts' trademark intend to visit 1-800 Contacts' website, and the Commission itself has found that "[t]o avoid the potential for deception, consumers should be able to easily distinguish a natural search result from advertising," but consumers often do not understand the difference between sponsored and organic links. (RX 597 at 1, 0003; *see also* RX 599; Goodstein, Tr. 2406-2407; RX 736 at 23-24). In that context, "the prediction that any costs to competition associated with the elimination of" paid search advertising for other retailers in response to such a search "will be outweighed by gains to consumer information (and hence competition) created by" those restrictions "is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong." *California Dental*, 526 U.S. at 775. In fact, Dr. Murphy's "empirical" analysis, *id.* at 774, using Dr. Athey's own model (RF 1861-1876) showed that permitting the restrained advertising would make consumers "less effective" in purchasing contact lenses. *California Dental,* 526 U.S. at 774.

Complaint Counsel improperly try to distinguish *California Dental* as holding only that professional advertising is not inherently suspect. The Supreme Court did emphasize that the restraints involved professional advertising. But nothing in the Court's decision confined its import to such advertising. And neither *Realcomp* nor *Polygram* holds that *California Dental* applies only to professional advertising. To the contrary, in both cases, the Commission read *California Dental* to set forth general principles regarding classifying restraints as inherently suspect. *See Realcomp*, 2007 WL 6936319, at *20-*21; *Polygram*, 136 F.T.C. at 338-349.

California Dental reflects a general principle: "before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do." 526 U.S. at 775. Complaint Counsel provide no principled basis for refusing to apply

California Dental's teaching in a case where the restricted advertising's context supports the same inference that "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Id.* at 771. Complaint Counsel's simplistic argument that this case does not involve professional advertising "rest[s] on formalistic distinctions rather than actual market realities [that] are generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992).

Neither of the studies that Complaint Counsel discuss in their brief are in the record. *See* Becthold, S. and C. Tucker, "Trademarks, Triggers and Online Search," 11 *J. of Empirical Legal Studies* 718, 731-32 (Dec. 2014); Simonov, A., C. Nosko and J. Rao, "Competition and Crowd-Out for Brand Keywords in Sponsored Search," *Working Paper* (Sept. 8, 2016). But Bechtold and Tucker do exactly the opposite of "disprove 1-800 Contacts' thesis regarding search advertising," CC Post-Trial Br. at 83:

> Imagine a consumer who wants to visit a trademark owner's website and simply is using the search engine to find out the correct URL. When such a consumer enters the trademarked product name into the search engine, she is looking for a website maintained or authorized by the trademark owner. For such a consumer engaging in a navigational search, allowing third-party use of trademarked keywords may make her search harder, as her attention is potentially drawn to many websites that are not maintained or authorized by the trademark owner. As a result, a keyword policy that allows third-party registrations of trademarked keywords may impede navigational search.

11 *J. of Empirical Legal Studies* at 731-32. Given this possibility, Becthold and Tucker find that to "determine the effect of keyword advertising on consumer behavior requires an empirical investigation," *id.* at 719, and that the "overall effect of keyword advertising policies seems

ambiguous." *Id.* at 739. That "economic learning," *Polygram*, 136 F.T.C. at 344-45, puts this case on all fours with *California Dental*.[8]

iii. Complaint Counsel's Authorities Are Inapposite

None of Complaint Counsel's authorities is to the contrary. The Commission's decisions in *Polygram & Realcomp* are distinguishable. The Commission in those cases simply found that, unlike in *California Dental*, the advertising restrictions "were demonstrably anticompetitive in the particular industry context in which they were imposed." *Polygram*, 136 F.T.C. at 374; *see also Realcomp*, 2007 WL 6936319, at *25 ("Seen in the context in which they arose, the restraints in question raise serious competitive concerns."). As noted, this case's trademark and Internet context is different.

Further, the record provides no support for Complaint Counsel's characterization that this case involves an agreement that "eliminated a competitively significant category of advertising." CC Post-Trial Br. at 79. Complaint Counsel's only support for that theory consists of evidence that [redacted] of 1-800 Contacts' orders come from advertisements in response to searches for its own trademark. But all that proves is that some portion of 1-800 Contacts' customers who are looking to visit 1-800 Contacts' website find it by searching for the company's trademarks rather than typing in the URL. Far more telling is that 1-800 Contacts generally spent less than [redacted] of its advertising budget on paid search advertising on its own trademark. (RX 739 at 28, 92;

[8] The Simonov study finds: "It is thus clear why brands have fought legal battles to ban competing firms from bidding on their trademarked terms. Smaller rivals use the focal brand's awareness as a form of targeting, which then creates the need for defensive positions." This illustrates that permitting advertising in response to searches for another firm's trademark forces firms to pay to restore the top position that they earn in organic links because their website is far and away the most relevant result. (RF 910-924).

Murphy, Tr. 4108-4113; Bethers, Tr. 3702; Coon, Tr. 2723). Moreover, rival retailers saw only a relatively minimal number of clicks and conversions on ads they served in response to searches for 1-800 Contacts. (RX 733 at 93-95).

In *Realcomp*, the Commission determined that restricting a broker's access to the MLS "put it at a considerable competitive disadvantage, particularly in the context of the increasing competitive importance of certain key Internet websites to disseminate listing information to consumers." 2007 WL 6936319, at *24. The restraint's effect was "limiting access to an input - *i.e*. full exposure on the approved websites - necessary for limited service brokers to compete effectively." *Id*. at *25.

As explained above (*see supra* at 23-28) and in 1-800 Contacts' opening brief (at 95-98), advertising in response to searches for 1-800 Contact's trademarks was hardly "necessary" for other online retailers to compete effectively. Thus, Complaint Counsel cite literally no evidence for the proposition that "advertising against 1-800 Contacts' trademarks is the best (and most direct) way for rival retailers to compete for 1-800 Contacts' existing customer base." CC Post-Trial Br. at 82. Testimony by online retailers that "they rely primarily, or even solely, on search advertising to reach new customers," CC Post-Trial Br. at 81, is not evidence that online retailers rely primarily on advertising *in response to searches for 1-800 Contacts' trademarks*. And the record is full of evidence that this is not so. (RF 1985-2030).

In short, whereas in *Realcomp*, without access to the MLS and its internet feeds restricted by the challenged agreement, sellers "would have to rely on a variety of less comprehensive sources of information," 2007 WL 6936319, at *23, it is undisputed that the settlement agreements in this case left open *more* comprehensive advertising channels, namely, paid search advertising on 98% of the searches that consumers conduct and more than [redacted] of advertisers' bidding. In addition, the settlement agreement put no limits on other forms of advertising, such as internet display, email, non-search social media, print, radio, and television. That record forecloses any finding that "[s]een in the context in which they arose, the restraints in question raise serious competitive concerns." *Realcomp*, 2007 WL 6936319, at *25.

Finally, unlike in *Realcomp* and *Polygram*, "here the relevant market is not readily apparent." *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004); *see also Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1312 n. 17 (10th Cir. 2017). That matters because an "'abbreviated or 'quick-look' analysis may only be done where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition." *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d at 961. That was not material in *Realcomp* or *Polygram*, because identifying the relevant market was not at issue; indeed, respondent in *Realcomp* conceded market power. 2007 WL 6936319, at *21. But "[w]here, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice." *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d at 961.

Complaint Counsel's other authorities are inapposite as well. None of those cases, or any of the 21 studies relied upon by Dr. Evans, involved advertising for which one party to the agreement had a trademark or other intellectual property right to sue the other. And none involved paid search advertising.

Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995), and *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), involved naked agreements among competitors not to advertise against each other. So did *Mass Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988), and *Am. Med. Ass'n*, 94 F.T.C. 701 (1979), and after *California Dental*, the Commission's decisions in those cases hardly support a categorical rule that all advertising restrictions are inherently suspect. Neither does *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), even setting aside that the Supreme Court held that the antitrust laws did not apply to the total advertising restrictions in that case. *Id.* at 362-363. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), was not an antitrust case at all. And it is ironic to say the least that Complaint Counsel rely on a *settlement agreement* by hospitals in West Virginia to argue that settlement agreements are inherently suspect. CC Post-Trial Br. at 80.

c. *Actavis* and *Clorox* Require Rule of Reason Analysis

FTC v. Actavis, 133 S. Ct. 2223 (2013), and *Clorox Co v. Sterling Winthrop*, 117 F.3d 50 (2d Cir. 1997), each require applying the rule of reason. Complaint Counsel's efforts to distinguish these cases fail.

Actavis. Complaint Counsel have no answer to why settlements in which the only benefit to the defendants was saved litigation costs, (CX 9042 (Evans, Dep. at 114-116)), can be inherently suspect when the Supreme Court in *Actavis* held that reverse payment settlements involving "payment in return for staying out of the market" and splitting monopoly profits are not. 133 S. Ct. at 2234-35, 2237.

To the extent that *Actavis* reaffirms any rule that "facially overbroad" settlements are inherently suspect, CC Post-Trial Br. at 88, that rule does not apply here. As 1-800 Contacts has explained at length, the Court cannot conclude from the face of the settlement agreements that they have the effect of "barring non-confusing uses of the trademark." CC Post-Trial Br. at 90. Courts have rejected Complaint Counsel's categorical view that keywords ads do not give rise to infringement claims unless their text contains a trademark. No case supports Complaint Counsel's view that "broad matching" does not involve a "trademark 'use.'" *Id.* Accordingly, Complaint Counsel did not and could not demonstrate that "1-800 Contacts restricted competition beyond the scope of any property right that 1-800 Contacts may have in its trademarks." Opinion and Order Granting Motion for Summary Decision, at 4 (Feb. 1, 2017).[9] Indeed, the fact that the settlement agreements took commonplace forms undermines any inference that the settlement agreements were a mere pretext for conduct not protected by 1-800 Contacts' trademark rights.

Complaint Counsel's argument regarding pre-*Actavis* cases such as *In re Cardizem Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), are controlling is wrong. The Sixth Circuit in that case held that a reverse payment settlement was *per se* unlawful. After *Actavis*, which held

[9] As for Complaint Counsel's argument that the settlements are reciprocal, *id.*, Mr. Hogan testified—again, unrebutted—that "[s]ettlement agreements are typically reciprocal." (Hogan, Tr. 3493). That makes good sense, since 1-800 Contacts would hardly be in a position to defend advertising in response to searches for other retailers' trademarks if it had sued those retailers for doing the same. The reason that the other retailers had no such claim is that [redacted] (RX 733 at 53; Ghose, Tr. 3923-24).

that the rule of reason applies, 133 S. Ct. at 2237, *Cardizem*'s vitality is in doubt. Regardless, the case is clearly distinguishable because it involved a reverse payment that is indisputably missing here. Indeed, the Sixth Circuit's opinion noted that "it is one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent's effectiveness in inhibiting competitors by paying the only potential competitor $40 million per year to stay out of the market." 332 F.3d at 908 (footnote omitted). And that court described the payments of "$10 million per quarter" as one of the "dispositive" facts for its conclusion. *Id*. at 907. The district court in that case also emphasized the alleged reverse payment. *See In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 682, 700-05 (E.D. Mich. 2000).

This puts the Sixth Circuit's passing statement that "the agreement's restrictions extended to noninfringing and/or potentially noninfringing versions of generic Cardizem," CC Post-Trial Br. at 90 (quoting 332 F.3d at 908 n. 13), in its proper context. To the extent it survives *Actavis*, *Cardizem* stands for the proposition that uncertainty about infringement does not save a settlement with an unusual form such as a reverse payment. But *Actavis* and *Cardizem* do not stand for the radical proposition that *uncertainty* about whether prohibited conduct is infringing alone *condemns* a settlement agreement. No case renders so precarious settlement agreements that are strongly favored in the law.

Indeed, that *cannot* be the law after *Actavis*, where the Supreme Court noted that "[t]he patent here may or may not be valid, and may or may not be infringed." 133 S. Ct. at 2231. If Complaint Counsel were correct that any settlement that potentially covers non-infringing conduct is inherently suspect, the Supreme Court should have agreed that the settlement agreements in *Actavis* deserved only a quick look. But it did not. *Id.* at 2237. Complaint Counsel cannot reconcile their rule that antitrust scrutiny should turn on the infringement merits with this ruling. Nor can they square that rule with the Commission's own views. *Schering-Plough Corp.*, 136 F.T.C. at 997; *see also FTC v. Actavis, Inc.*, No. 12-416, Reply Br. for Pet'r, 2013 WL 1099171 (U.S. Mar. 18, 2013) (*Actavis* Reply Br.), at *6 (antitrust analysis of a settlement "should not turn on a judicial assessment of the strength or scope of the *particular* patent involved in the case") (emphasis added).

Complaint Counsel correctly observe that the Supreme Court held that courts should apply a rule of reason analysis, and not a "quick look" approach, because of certain "complexities" associated with reviewing reverse payment settlements. *Actavis*, 133 S. Ct. at 2237. Complaint Counsel, however, are wrong that reverse payment cases involve more "analytical complexities" than cases involving the kind of trademark settlements at issue here.

Complaint Counsel insist that 1-800 Contacts' settlement agreements involve fewer complexities because "a valid trademark invests the owner with a limited right to bar only *confusing* trademarks." CC Post-Trial Brief at 90. But issues related to confusion are exactly why the analysis in the trademark context is *more* complex than in the reverse payment context. Determining whether a particular use of a trademark is confusing is an inherently factual analysis. *See Rosetta Stone Ltd.*, 676 F.3d at 153. And courts assess the likelihood of confusion under a complex multi-factor test.[10]

[10] *See Checkpoint Sys., Inc. v. Check Point Software Techs.*, 269 F.3d 270, 280 (3d Cir. 2001); *Edible Arrangements, LLC*, 2016 WL 4074121, at *6; *Zerorez Franchising Sys., Inc.*, 103 F.

Patent litigation, too, can be complex. But in the reverse payment context, "the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." 133 S. Ct. at 2236-2237. No such heuristic exists here to cut through the complexities of the trademark merits. And the Commission itself has recognized the challenges of a bare hindsight inquiry into the merits. *See Schering-Plough Corp*., 136 F.T.C. at 997.

Another factor that the Supreme Court identified in rejecting the Commission's quick look standard in *Actavis* was that the "existence and degree of any anticompetitive consequences may also vary among industries." 133 S. Ct. at 2237. The same is true with respect to trademark settlements with respect to keyword advertising. Firms in a variety of industries have reached such settlements.[11]

Clorox. The Second Circuit in *Clorox* held that trademark settlements should be analyzed under the rule of reason, 117 F.3d at 55-56, and are presumptively procompetitive, *id.* at 60. Complaint Counsel fail to explain why the closest case on point is not dispositive.

Complaint Counsel's basic argument is that "nothing prevented [the trademark defendant] from *displaying* or *offering* the competing merchandise, so long as it was not

---

Supp. 3d at 1041; *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1244; *Network Automation, Inc.*, 638 F.3d at 1148-49; *Rosetta Stone*, 676 F.3d at 154-55.

[11] *See, e.g.*, *Greenberg Smoked Turkeys, Inc. v. Tsavo Media, Inc.*, Dkt. 29, Consent Decree and Final Judgment, Case No. 6:11-cv-37 (E.D. Tex. Jan. 23, 2012) (turkey); *Happy Feet USA, Inc. v. Serenity "2000" Corp.*, Case No. 6:09-cv-1832, Dkt. 22 (M.D. Fla Mar. 16, 2010) (shoe insoles); *Gonzales & Gonzales Bonds & Ins. Ag. Inc. v. Action Immigration Bonds & Ins. Servs., Inc.*, Case No. 2:10-cv-1162, Dkt. 15 (C.D. Cal. Apr. 7, 2010) (insurance); *Fragrancenet.com, Inc. v. Les Parfums, Inc., et al.*, Case No. 2:09-cv-2626, Dkt. 23 (E.D.N.Y. Mar. 8, 2010) (perfume).

confusingly labeled." CC Post-Trial Br. at 91. That reads *Clorox* too narrowly. The agreement at issue in *Clorox* "merely regulates the way a competitor can use a competing mark." *Id*. at 55-56. That is precisely the case here. The challenged agreements simply prohibit a potentially actionable use of 1-800 Contacts' trademarks: causing paid search ads to be displayed in response to searches for the marks. Nothing in this case prevents other contact lens retailers from offering their products on the 98% of searches related to contact lenses that are not for 1-800 Contacts' trademarks (or in any other form of advertising). The fact that the use of the mark in this case relates to paid search advertising and not product labeling is a distinction without a difference that captures Complaint Counsel's refusal to abide the courts' adaptation of trademark principles to a new Internet context.[12]

2. Complaint Counsel Have Failed to Adduce Evidence of Actual Harm to Consumers Necessary to Establish Their *Prima Facie* Case

a. Complaint Counsel Have Failed to Prove Harm to Consumers of Contact Lenses

Complaint Counsel advance three theories of how the settlements supposedly harmed consumers: (1) the settlements supposedly enabled 1-800 Contacts to raise prices; (2) the settlements supposedly deprived consumers of information; and (3) the settlements supposedly prevented consumers from purchasing from competitors that may have offered lower prices for some contact lenses;. *See* CC Post-Trial Br. at 94-97. Each of these theories fails.[13]

---

[12] We already have explained why Complaint Counsel's arguments that the agreements "on their face[] preclude non-infringing activity," CC Post-Trial Br. at 92, are wrong.

[13] Of course, Complaint Counsel's statement that Dr. Murphy does not dispute "that consumers were harmed by the bidding agreements," CC Post-Trial Br. at 94-95, is false. An entire section

First, it is dispositive that Complaint Counsel failed to offer any quantitative proof that the settlement agreements enabled 1-800 Contacts to raise prices (Evans, Tr. 1723-24; CX 9042 (Evans, Dep. at 257); (CX 9043 (Athey, Dep. at 201)), or restrict output (Athey, Tr. 799; CX 9043 (Athey, Dep. at 194-95; CX 9042 (Evans, Dep. at 263)). As the Commission stated in *Polygram*, where, as here, "the defendant articulates plausible reasons why its restrictions may not result in competitive harm and may result in cognizable procompetitive benefits, then the plaintiff's showing of likely anticompetitive effects should have an 'empirical' foundation, whether based on evidence specific to a particular case or in empirical studies of similar markets." *Polygram*, 136 F.T.C. at 343–44; *see also Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (no proof of anticompetitive harm where plaintiff alleged "potentially" higher prices, but did not demonstrate that prices were actually higher across the market or that quality had actually decreased); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d. Cir. 1995) (no proof of harm to competition absent "empirical demonstration concerning the adverse effect of the defendants' arrangement on price or quality") (internal quotation marks and alterations omitted).

Dr. Evans agrees: "[t]he only trustworthy way of finding out whether business practices harm consumers is to examine their impact on consumers. Have they raised prices, restricted output, or reduced quality? Or will they? Theory alone usually cannot answer those questions." David S. Evans, *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government*

---

of his report is entitled, "EMPIRICAL ANALYSIS CONFIRMS THAT SETTLEMENTS DID NOT HARM CONTACT LENS COMPETITION OR CONSUMERS." (RX 739 at 61 to 0065).

Antitrust Cases, 75 St. John's L. Rev. 545, 545-46 (Fall 2001). Rather, "***there must be empirical evidence***." *Id.* at 546 (emphasis added).

Complaint Counsel have no empirical evidence of higher prices or reduced output. That is the end of the matter. *See California Dental Ass'n*, 224 F.3d at 957 (vacating commission order where "the FTC has never quantified any increase in price or reduction in output").

Complaint Counsel's half-hearted argument that additional ads for other retailers would put "downward pressure on prices across the board, and more likely than not, prices would fall," CC Post-Trial Br. at 61, contradicts its own experts' testimony. As 1-800 Contacts' explained in its opening brief, *see* 1-800 Post-Trial Br. at 99-101, both Dr. Evans and Dr. Athey testified that they had no quantitative proof whatsoever that the settlement agreements enabled 1-800 Contacts or any other retailer to raise prices. (Evans, Tr. 1723-24; CX 9042 (Evans, Dep. at 257); (CX 9043 (Athey, Dep. at 201)). Indeed, Dr. Athey admitted that she did not analyzes the price elasticity of demand at all, (CX 9043 (Athey, Dep. at 221-22), undermining Complaint Counsel's reliance on her testimony for any proposition regarding "pressure on prices."

Further, Complaint Counsel's theory that the settlement agreements enabled 1-800 Contacts to raise prices across the board cannot be squared with testimony of 1-800 Contacts executives that the settlement agreements played no role in 1-800 Contacts' pricing. (Bethers, Tr. 3712-13; CX 9025 (Osmond, Dep. at 98-100)). And 1-800 Contacts' margins remained essentially constant from 2002 through 2016, indicating that 1-800 Contacts did not use the settlement agreements to raise prices. (RX 739 at 64, 107).

Thus, tellingly, the most Complaint Counsel can say is that "perhaps" eliminating the settlement agreements would have led 1-800 Contacts "to lower its prices across the board." CC Post-Trial Br. at 60. After a year-long investigation, voluminous discovery, multiple expert reports and a six-week hearing, "perhaps" is not enough.

Second, Complaint Counsel's theory that the settlement agreements harmed consumers because they reduced the number of ads in response to searches for 1-800 Contacts' trademarks is foreclosed by Supreme Court precedent: "[t]he question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of" the product being advertised. *California Dental*, 526 U.S. at 776. Again, Complaint Counsel's own expert agrees: "In some literal sense, it could certainly be argued that [the] advertising restriction restrained competition—competitors certainly faced restrictions on the type of advertising they could engage in. In the absence of empirical evidence, that literal argument fails to show that consumers were actually harmed." Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John's L. Rev. at 549. *See also California Dental*, 224 F.3d at 957.

Third, Complaint Counsel argue that the settlement agreements harmed some consumers because, absent the agreements, some consumers "would have purchased from a lower-price seller or because they would have sought a price-match from 1-800 Contacts." CC Post-Trial Br. at 58. This claim is based on the flawed premise, just discussed, that consumers lack the means or information necessary to find any of 1-800 Contacts' competitors that offer lower prices for the contact lenses they wear. Indeed, far from showing that the settlement agreements harmed consumers, 1-800 Contacts' price-match data, *cf.* CC Post-Trial Br. at 59-60, demonstrate that consumers knew and know that other contact lens retailers exist and how to find them. Given that common sense reality, the fact that any consumers could have purchased from competitors at a lower price does not reflect harm attributable to the settlement agreements.

Further, even if Complaint Counsel had proof that some consumers would have paid lower prices by purchasing contacts from other retailers absent the settlement agreements, that would not suffice to prove that the agreements harmed those consumers. The proper measure of consumers' welfare from purchasing a product is the product's quality-adjusted price. (RX 739 at 83); CX 9042 (Evans Dep. at 202)). In their own post-trial brief, Complaint Counsel themselves quote economic literature that makes this point. *See* CC Post-Trial Br. at 77 ("consumers search the prices of different firms for the lowest quality-adjusted price"). But Complaint Counsel have not offered any evidence that consumers purchasing from lower-price competitors would have paid lower quality-adjusted prices. There is reason to doubt as much given that 1-800 Contacts offers some of the best service in the entire economy, (RF 169-186), and [redacted]

Complaint Counsel's other arguments do not make up for this lack of proof. Their argument that "[t]he models constructed by Professors Athey and Evans demonstrate that many consumers would respond to the presence of competing ads by shifting their purchases away from 1-800 Contacts," CC Post-Trial Br. at 58, is false. Dr. Athey testified that [redacted]

[redacted] In fact, she testified at her deposition that she has "not quantified the rate of consumer switching." (CX 9043 (Athey Dep., at 222-23)). And Complaint Counsel's arguments about a supposed "disparity between consumers' perception of the price differential between 1-800 Contacts and its lower-price rivals and the *actual* price differential," CC Post-Tr. Br. at 60, reflect the same flawed interpretation of the Bain survey discussed above.

Finally, Complaint Counsel's argument that the settlements harm consumers because they "impede market entry by removing a low-cost means for new rivals to gain market awareness and acceptance," CC Post-Trial Br. at 96, misstates the law. To be sure, "broad scale advertising is expensive." *Id.* at 96. That is why 1-800 Contacts needed confidence in trademark protection and return on investment to spend millions on television advertising. But the fact that other firms would rather not make those investments is immaterial. "The antitrust laws do not guarantee competitors the right to compete free of encumbrances . . . so long as competition as a whole is not significantly affected." *Clorox Co.*, 117 F.3d at 59; *see also SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 972 (10th Cir. 1994) (competitor claiming that it could "compete more effectively" absent restraint is not "the proverbial sparrow the Sherman Act protects"). The possibility that "the restrictions in the agreement prevent [a rival] from competing as effectively as it otherwise might" is insufficient to prove harm to competition. *Clorox Co.*, 117 F.3d at 59.

b. Direct Evidence of Harm to Search Engines

As 1-800 Contacts explained in its opening brief, *see* 1-800 Post-Trial Br. at 105-108, Complaint Counsel have not proven that the settlement agreements reduced search engines' revenues. Most notably, Complaint Counsel have not even tried to account for the myriad complexities, well-documented in the record, involved in determining the effect of any particular agreement on search engines' revenues, including accounting for effects in the sale of advertising on searches for terms other than 1-800 Contacts' trademarks. Complaint Counsel ignored substitution effects, *i.e.*, they did not analyze whether and the effect of the settling advertisers switching to alternative keywords and advertising media. (RX 739 at 67).

Moreover, Complaint Counsel rely on evidence regarding a *single* auction event. CC Post-Trial Br. at 63 (citing testimony from Google and Bing executives regarding hypothetical of bidder dropping out of an auction). But, as the declarations of Google's Chief Economist and [redacted] show, competition is not limited to a single, isolated auction event. (RX 701 (Varian Decl.) ¶¶ 6, 16-23; RX 704 [redacted]) ¶¶ 20-23). Any analysis of the effects of the settlement agreements must account for the myriad ways competitors may react to additional advertisers in the long run. (RX 701 (Varian Decl.) ¶ 16 ("we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently"); RF 867-878 (cataloging various potential advertiser responses)).

Complaint Counsel's theory of search engine harm also fails as a matter of law for two reasons. *See generally* 1-800 Post-Trial Br. at 101-103.

First, the Supreme Court made clear in *California Dental* that the effects of advertising restrictions should be measured in the market for the product being advertised. *California Dental*, 526 U.S. at 776 ("the relevant output for antitrust purposes here is presumably not information or advertising, but dental service themselves"). Dr. Murphy testified that this makes economic sense. (RX 739 ¶¶ 96-99).

Second, Complaint Counsel did not define any relevant market for advertising. (Evans, Tr. 1818; CX 9042 (Evans, Dep. at 34).) Courts have rejected such a market. *See Lasoff v. Amazon.com Inc.*, No. C16-151 BJR, 2017 WL 372948, at *9 (W.D. Wash. Jan. 26, 2017); *Person v. Google, Inc.*, No. C06-7297 JFRS, 2007 WL 1831111, at *5 (N.D. Cal. June 25, 2007), *aff'd*, 346 F. App'x 230 (9th Cir. 2009). And the law would not recognize an antitrust market limited to paid search advertising in response to searches for 1-800 Contacts' trademarks. *See Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999) ("Product markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product."); *see also Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 480 (3d Cir. 1992) ("Except in rare circumstances, courts reject market definitions consisting of one supplier's products where other brands compete."); *Seidenstein v. Nat'l Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985) ("absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market."). Complaint Counsel cannot prevail on their theory of harm to search engines that sell paid search advertising without defining a market for such advertising. *See Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006).

3. 1-800 Contacts and the Settling Parties Do Not Have Market Power

a. Complaint Counsel Failed to Prove a Relevant Product Market Limited to Online Sales of Contact Lenses

1-800 Contacts explained in its opening brief that Complaint Counsel failed to prove a market limited to online retail sales of contact lenses and why only a broader market is consistent with the economic evidence. *See* 1-800 Post-Trial Br. at 76-89. None of Complaint Counsel's arguments in their post-trial brief supports any other conclusion. Those arguments are based on a highly selective and, in some cases, completely false characterization of the record.

i. "Practical Indicia" Prescribed by *Brown Shoe* Do Not Support Relevant Market for Online Sales

In applying *Brown Shoe*'s "practical indicia" of the relevant market, Complaint Counsel focus on sound bites from some internet retailers other than 1-800 Contacts rather than the realities of how 1-800 Contacts does business. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-6 (1962). At most, the record reflects "heterogeneity" and "conflicting evidence relating to customer perceptions and practices." *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 182-83 (D.D.C. 2001). Given that Complaint Counsel have the burden to prove the relevant antitrust market, evidence and testimony illustrating the opposite of their cherry picked record "undercuts [their] product market definition." *Id.*

First, with respect to "industry or public recognition," *Brown Shoe*, 370 U.S. at 325, Complaint Counsel cite testimony from some online retailers that they consider other online retailers to be their main competitors. CC Post-Trial Br. at 103. But they ignore extensive testimony from 1-800 Contacts itself that its main competitors are ECPs and optical chains.

(Bethers, Tr. 3542; Bethers, Tr. 3600-01; Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)).

While Complaint Counsel characterize Mr. Bethers' interview as a moment of candor outside of litigation, their reliance upon it simply shows their lack of actual evidence for their proposed relevant market. The record contains abundant evidence created before the Commission began its investigation that corroborates the sworn testimony of Mr. Bethers and others. From its inception, 1-800 Contacts has addressed its advertising message to ECP customers. (Coon, Tr. 2666-67, 2687, 2695; Bethers, Tr. 3611; CX 9002 (Craven, IHT at 30, 34-36); CX 9029 (Bethers, Dep. at 56)). Every week, 1-800 Contacts sampled ECPs' prices. [redacted] And 1-800 Contacts tracked its market share based on all contact lens sales. (RX 904 at 39; CX 525 at 40; CX 1446 at 9; RX 1117 at 24). Similarly, 1-800 Contacts measured its brand awareness as compared to both online and offline retailers. [redacted] RX 736 at 10; CX 1446 at 11). These core business practices drown out Complaint Counsel's sound bite.

Complaint Counsel also completely ignore testimony from Walmart that it considers ECPs to be its largest competitor, (CX 9037 (Owens, Dep. 13-15, 60), and from LensDirect that it views ECPs, brick-and-mortar stores, and online retailers as competitors (Alovis Tr. 1026-1027; CX 9023 (Alovis, Dep. at 8-39)). And Complaint Counsel are wholly silent about Congress's and the Commission's recognition that the contact lens industry involves broad competition. *See* 1-800 Post-Trial Br. at 82-83; RF 542-555; H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1759-1760.

Second, Complaint Counsel are wrong that online retailers' pricing is distinct from offline retailers' pricing. CC Post-Trial Br. at 104-06. That argument contradicts the Commission's own finding: "[c]ompetition will constrain an ECP's pricing for contact lenses as long as a sufficient proportion of his patients know that they can purchase replacement lenses elsewhere, and the ECP cannot distinguish between informed and uninformed patients." (RX 569 at 24).

Complaint Counsel also ignore critical evidence in the record. They ignore the fact that 1-800 Contacts monitors prices offered by ECPs and optical chains and generally prices its contacts, on average, at a 5-10% discount off those prices. (Bethers, Tr. 3542, 3544, 3548-50, 3773; CX 9025 (Osmond, Dep. at 99); CX 535 at 10). They ignore testimony from Walmart that its retail prices for contact lenses are the same in-store and online (CX9037 (Owens, Dep. at 26)), and that it sets its retail prices by tracking the prices of 1-800 Contacts, Target, independent ECPs, Sears, JC Penney, ACLens, club stores, LensCrafters, Pearle Vision, America's Best, and Visionworks. (CX 9037 (Owens, Dep. at 22, 52).) They further ignore testimony from Costco that it checks the prices of brick-and-mortar stores and online stores in setting its prices. (CX 8004 at 2).

Complaint Counsel also do not address Dr. Evans' own testimony that (1) he does "not disagree with Professor Murphy that 1-800 Contacts price checks ECPs and mass merchants and that ECPs and mass merchants play some role in constraining prices at online sellers" (CX 8009 at 57 at n.128)), (2) that "one consequence of raising prices is a reduction in the ability to attract consumers from the physical retailers, including the ECPs" (Evans, Tr. 1757), (3) that it would make economic sense for 1-800 Contacts to consider how raising prices would affect the relationship between its prices and ECPs' prices (Evans, Tr. 1732), and (4) that it would make economic sense for 1-800 Contacts to consider how many customers it would lose to Costco or Walmart if it raised prices. (Evans, Tr. 1729-32).

Complaint Counsel's "distinct prices" argument therefore boils down to nothing more than that online retailers generally offer lower prices than offline retailers. But Costco and other club stores offer the lowest prices of all. (RX 739 at 89; Bethers, Tr. 3544-45; Coon, Tr. 2710). Complaint Counsel attempt to wave that fact away with some online retailers' testimony that they do not consider Costco a competitor. But they ignore that Walmart testified that it considers Costco's prices (CX 9037 (Owens, Dep. at 22, 52)), and Dr. Evans testified that it makes economic sense for 1-800 Contacts to do the same before raising prices. (Evans, Tr. 1729-32). While 1-800 Contacts' price match policy does exclude club stores, the fact is that [redacted]. (CX 1334 at 7).

Third, Complaint Counsel's argument that online retailers are "specialized vendors," CC Post-Trial Br. at 106-108, actually cuts against their position. The Commission's own Contact Lens Rule mandates a verification for every "seller" of contact lenses, not just online sellers. 16 C.F.R. § 315.5. And the fact that brick-and-mortar retailers have turned to online retailers to provide e-commerce, distribution, and fulfillment services, CC Post-Trial Br. at 107-08, demonstrates commonalities rather than differences between offline and online retailers. Indeed, 1-800 Contacts and AC Lens have provided fulfillment services for brick-and-mortar stores' offline sales, (Coon, Tr. 2675-76; Bethers, Tr. 3524-25, 3694-95; Clarkson, Tr. 175-177), which indicates that these capabilities are part of the offline business as well.

Finally, Complaint Counsel's argument that the "regulatory environment" of contact lenses is surprising given that Congress and the Commission regulated to stimulate competition between ECPs and other retailers, including ECPs. *See* 1-800 Post-Trial Br. at 82-83; RF 542-555; H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1759-1760. Indeed, Dr. Evans himself testified that the Commission's Contact Lens Rule "provided significant opportunities for online sellers who couldn't offer prescriptions but could sell contact lenses more conveniently and more cheaply than ECPs." (CX 8006-105).

Further, *all* contact lens wearers, not just those who buy contact lenses online, must return to their ECP to renew their prescription. If anything, the fact that online retailers' customers must return to ECPs who often can offer the same product reflects competition among online retailers and ECPs. No evidence supports Complaint Counsel's suggestion that consumers switch between ECPs for "on-site" purchases and online retailers for refill purchases. Certainly no such evidence would support the broad proposition that online retailers compete only for refill sales. Complaint Counsel have not defined any online market limited to refill sales. And 1-800 Contacts competes for all sales that could be made by ECPs. (Bethers, Tr. 3542, 3600-01; CX 9001 (Bethers, IHT at 78); Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)).

ii. Ordinary Course Documents Do Not Support a Relevant Market for Online Sales

Rather than address 1-800 Contacts' core business model, Complaint Counsel myopically focus on two slides that they claim "confirm the existence of a separate relevant market for online sales." CC Post-Trial Br. at 111. This is wrong. Courts are loath to find a relevant market based on business documents defining a so-called "market." *See Nobel Sci. Indus., Inc. v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1318-19 (D. Md. 1986) (business documents referring to products in certain "market" did not raise triable issue regarding relevant market).

One of the documents (CX 439) is a presentation that the private equity firm AEA Investors developed when it was considering buying 1-800 Contacts *not*, as Complaint Counsel claim, one of "1-800 Contacts' business documents." CC Post-Trial Br. at 111.

As for the presentation that actually was created by 1-800 Contacts employees, a lone reference to an [redacted] (RX 428 at 5), does not establish such a market as a matter of law in light of extensive practical evidence that 1-800 Contacts competes in a broader market. Indeed, the very slide on which Complaint Counsel rely says that 1-800 Contacts has the [redacted] and that 1-800 Contacts' value proposition is [redacted] (RX 428 at 5). [redacted] (RX 428 at 10), [redacted]

(RX 428 at 26.) [redacted] (RX 428 at 9).

Complaint Counsel dismiss such evidence that 1-800 Contacts tries to "draw customers from ECPs into the online channel," arguing that "[a]n innovative product can create a new product market for antitrust purposes by satisfying a previously-unsatisfied consumer demand." CC Post-Trial Br. at 111-12 (quoting *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008)). But Complaint Counsel's authorities are inapposite.

The Court in *Whole Foods* defined a market for premium natural and organic supermarkets such as Whole Foods that was separate from the market for traditional grocery stores. The Court pointed to extensive expert analysis (by 1-800 Contacts' expert here, and the FTC's expert there, Dr. Kevin Murphy) and normal course internal studies comparing the merging parties' margins. 548 F.3d at 1040, 1043-44. Complaint Counsel have not adduced any comparable evidence here.

Further, defining separate markets made sense in *Whole Foods* because the two kinds of stores sold different products: "everything Whole Foods sells is natural and/or organic, while many of the things sold by traditional grocery stores are not." 548 F.3d at 1045. In those circumstances, evidence that Whole Foods checked conventional grocery stores' prices was immaterial because "nearly all of the items on which Whole Foods checks prices are dry grocery items, even though nearly 70% of Whole Foods's revenue comes from perishables." *Id.* at 1049 (citing Dr. Murphy's analysis); *see also id.* at 1040.

This case is very different. 1-800 Contacts' general practice of setting prices at a 5-10% discount to ECPs' and optical chains' prices is not confined to a particular kind of contact lenses.

United States v. H & R Block, 833 F. Supp. 2d 36 (D.D.C. 2011), also is distinguishable. Rather than different methods of delivering the same products, that case also involved two very different products—do-it-yourself tax preparation services and software and tax preparation assisted by professionals. The court found an "overall lack of evidence of price competition" where the assisted tax preparation services that the defendants contended were part of the relevant market cost between $150 and $200—some 3 to 4 times as much as do-it-yourself tax preparation services. *Id.* at 55. Here, by contrast, it is undisputed that 1-800 Contacts monitors prices offered by ECPs and optical chains and generally prices its contacts, on average, at a 5-10% discount off those prices. (Bethers, Tr. 3542, 3544, 3548-50, 3773; CX 9025 (Osmond, Dep. at 99); CX 535 at 10). Complaint Counsel's claim that "online sellers do not react to the prices of ECP and brick-and-mortar retailers, because online prices are already substantially lower," CC Post-Trial Br. at 113, is incomplete and incorrect.

Finally, unlike *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), this is not a case where the defendant "has failed to provide any citation to the record in support" of its claim of "interaction in prices" between two kinds of retailers. *Id.* at 713. Again, 1-800 Contacts generally sets its prices at a discount to ECPs' and optical chains' prices, and Walmart sets its prices by reference to both online and offline retailers, (CX 9037 (Owens, Dep. at 22, 52, 60)). The Commission itself has found that "[c]ompetition will constrain an ECP's pricing for contact lenses as long as a sufficient proportion of his patients know that they can purchase replacement lenses elsewhere, and the ECP cannot distinguish between informed and uninformed patients." (RX 569 at 24). The manufacturers' UPPs reflect such "interaction in prices" between ECPs and online retailers. (RX 739 at 19; Murphy, Tr. 4154-55, 4172). And Dr. Evans testified that 1-800 Contacts should consider the effect of increasing prices on losing sales to ECPs and clubs stores such as Costco. (Evans, Tr. 1729-32).

iii. Professor Evans' Critical Loss Analysis Is Flawed, and Complaint Counsel Misstate the Record Regarding It

As explained in 1-800 Contacts' opening brief, *see* 1-800 Post-Trial Br. at 84-88, Dr. Evans' critical loss analysis is flawed because, among other things, he did not calculate the diversion ratio of customers that would switch to another online retailer based on data about where customers will go in response to a price increase. As Complaint Counsel acknowledge, the survey Dr. Evans relied on "did not indicate that consumers who left 1-800 Contacts were leaving due to price differentials." CC Post-Trial Br. at 114 n.376. Complaint Counsel blatantly mischaracterize the record in trying to rescue Dr. Evans' diversion ratio from this flaw.

Complaint Counsel claim that Dr. Evans used "lost sales data," namely, an "analysis of *lost customers* who were unlikely to return." CC Post-Trial Br. at 115 (emphasis added). That is false. Nothing in the slide on which Dr. Evans relied says that all of the 210 respondents surveyed had switched to other retailers. (CX1117 at 15.) Rather, Dr. Evans testified that the data included responses by consumers who most recently purchased from 1-800 Contacts:

> [Q.] Does this refresh your recollection that the people being surveyed included some people *who last*

> *bought from 1-800 Contacts*, but it was just some time ago, and the survey also included some people who last purchased from somebody other than 1-800 Contacts?
>
> A. That's correct.

(Evans, Tr. 1779 (emphasis added); *see also id.*, 1775-1780). There is no evidence that any of these consumers who "last bought from 1-800 Contacts" ever switched to any other retailer:

> Q. And at the time they were surveyed, there was no evidence that they had purchased from anyone other than 1-800 Contacts since that last 1-800 Contacts purchase that got them on the list in the first place.
>
> THE WITNESS: That's correct. It's a survey that is asking people what their intentions are.
>
> Q. So it doesn't tell us anything about what people's actual actions were, does it?
>
> A. That's correct.

(CX9042 (Evans, Dep. at 236-37).

In contrast, Dr. Murphy *did* calculate the diversion ratio using data from a survey of lost customers. Specifically, Dr. Murphy relied on a survey of 490 former 1-800 Contacts customers who reported that they made their last purchase from another retailer, *i.e.*, customers who had, in fact, switched. (*See* CX 1117 at 16.) Only 17% of respondents reported that they had switched to another online retailer, far lower ratio than the 40% ratio that Dr. Evans used. (*See* CX 1117 at 16.) Some 49% of respondents reported that they had switched to ECPs. (*See* CX 1117 at 16.)

Complaint Counsel again misstate the record in criticizing Dr. Murphy's analysis. Complaint Counsel claim that the survey relied upon by Dr. Murphy included "a large number of customers who recently purchased from an ECP but *intended* to make their next purchase from

1-800 Contacts." CC Post-Trial Br. at 116-17. But nothing in the slides or elsewhere in the record supports that claim and Dr. Evans' assertion that this was the case does not make it so. *See id.* at n. 385 (citing Evans, Tr. 1538-39).

It would not matter even if Dr. Murphy had relied on a survey that included consumers who had switched to other retailers and intended to switch back. As noted, no evidence supports Complaint Counsel's assertion that "it is typical for online consumers to make a purchase at an ECP when they visit to obtain or renew a prescription, and then to make their *refill* purchases online," CC Post-Trial Br. at 116, and no authority supports the proposition that such consumers are outside the relevant market for antitrust purposes. Certainly there is no evidence indicating how many, if any, of the 49% of consumers who reported that they had switched to their ECPs did so when renewing their prescription and intended to make refill purchases from 1-800 Contacts. Complaint Counsel therefore identify no support for their speculation that Dr. Murphy's diversion ratio calculation is unreliable because it supposedly includes consumers who switched only to buy their first set of contacts after renewing their prescription.

iv. Complaint Counsel Draw Incorrect Conclusions From the Multiplicity of Critical Loss Analyses

Dr. Murphy demonstrated that a candidate market of 1-800 Contacts and ECPs passed the SSNIP test. (RX 739 at 79, 110; Murphy, Tr. 4164-66). Dr. Evans, however, did not conduct a critical loss analysis with respect to a candidate market of 1-800 Contacts and ECPs. (Murphy, Tr. 4169-70). Complaint Counsel are wrong that these facts are legally immaterial.

According to Complaint Counsel's own authority, where the critical loss analysis potentially supports multiple relevant markets, "the critical loss test alone cannot answer the relevant market inquiry. While some inappropriate proposed relevant markets would be ruled out by the critical loss test, the fact that the test could still confirm multiple relevant markets means that the Court must rely on additional evidence in reaching the single, appropriate market definition." *H & R Block, Inc.*, 833 F. Supp. 2d at 64.

Complaint Counsel's position also is inconsistent with the Merger Guidelines: "if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product." *See* DOJ & FTC, Horizontal Merger Guidelines § 4.1.1 (Aug. 19, 2010). Dr. Murphy's critical loss analysis of a candidate market of 1-800 Contacts and ECPs illustrates this point. As noted, the survey of customers who had actually switched to other retailers on which Dr. Murphy relied found that 49% of such customers switched to ECPs, a far greater proportion than the 17% of such customers who switched to other online retailers (CX 1117 at 16) and a higher percentage than the 40% of customers that Dr. Evans (incorrectly) says switched to other online firms.

None of Complaint Counsel's authorities regarding the "narrowest" market principle requires ignoring Dr. Murphy's critical loss analysis involving ECPs. None of those cases involved multiple critical loss analyses defining overlapping candidate markets. In *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015), for example, the parties' experts disputed the proper diversion ratio with respect to the same candidate market. *See id.* at 36. And this is not a case where the record does "not explain why . . . a narrow candidate market would produce incorrect results." *FTC v. Advocate Health Care Network*, 841 F.3d 460, 473 (7th Cir. 2016). Dr. Murphy explained that the narrower market fails to account for 1-800 Contacts' business model, pricing decisions, and use of the trademarks protected by the settlement agreements.

v. The "Unilateral Pricing Policy" Is Not a Natural Experiment and Does Not Support An Online Market

Complaint Counsel are wrong that Dr. Evans' analysis of online firms' profits during UPP is a "natural experiment" that defines a market limited to online retailers. Dr. Evans acknowledged that in order to have a natural experiment regarding the effects of a price increase by online sellers, he "would need to see the – price going up just for the online retailers, and then I would need to determine whether, following that price increase, there's a switch to – a switch to Costco, but I don't have the benefit of that experiment." (Evans, Tr. 1446; *see also* RX 739 at 79). That is because the UPPs also forced club stores, such as Costco, as well as offline retailers, such as Walmart, to raise their prices. (Evans Tr., 1441-42,1445; Murphy, Tr. 4172-73; Bethers, Tr. 3675-76, CX 9037 (Owens, Dep. at 79-80)). Dr. Evans therefore necessarily had to concede that his analysis of online retailers' profits during the UPPs does not address [redacted]. Complaint Counsel similarly concede that "the results of the experiment, viewed alone, did not allow the exclusion of club stores from the relevant market." CC Post-Trial Br. at 119.

Complaint Counsel nevertheless argue that Dr. Evans excluded Costco and other club stores from the relevant market "based on other factors." *Id.* But Dr. Evans' testimony plainly supports including club stores in the set of firms relevant to whether the settlement agreements enabled 1-800 Contacts to raise prices. Dr. Evans testified that, before raising prices, 1-800

Contacts would not want to consider the effect of the price increase on losing sales to Costco. (Evans, Tr. 1729-30; Evans, Tr. 1731-32 ("Q. So if 1-800 Contacts was going to raise their prices, one of the things they would have to think about is whether they're going to lose business to Costco to a greater extent than they're losing it now because the price gap between 1-800 Contacts and Costco would be increased; correct? A. Be something they'd consider.".). If 1-800 Contacts needs to consider Costco's prices before deciding whether to raise its own, Costco provides a competitive constraint and is in the same relevant market.

vi. Complaint Counsel Have Not Demonstrated Direct Evidence of Competitive Effects Supporting an Online Market

Complaint Counsel identify only one piece of supposed direct evidence of a market limited to online retailers. Complaint Counsel point to certain advertising messages regarding its price match guarantee that 1-800 Contacts began using in 2011. But 1-800 Contacts' policy is to beat the price offered by *any* retailer (other than club stores) by 2%, including ECPs and stores such as Walmart and Pearle Vision. (CX 9025 (Osmond, Dep. at 18); CX 1341 at 1). Thus, if 1-800 Contacts' price match policy is indicative of the scope of price competition in the relevant market, it points to meaningful competition beyond online retailers alone.

Complaint Counsel's reliance on 1-800 Contacts' change in messaging to emphasize its price match policy cuts against their case in another respect. 1-800 Contacts changed its messaging in 2011, *after* the challenged settlement agreements had been signed. (CX 946 at 1-2, 011-12; CX 9032 (L. Schmidt, Dep. at 132-133). If 1-800 Contacts' change in message reflects price competition as Complaint Counsel suggests, it follows that 1-800 Contacts continued to compete on price after the settlement agreements were signed. That, in turn, indicates that advertising unaffected by the agreements, such as advertising based in in response to generic searches, was sufficient to stimulate 1-800 Contacts to compete on price. [redacted] Indeed, Complaint Counsel themselves make this point in their Proposed Finding of Fact No. 1486: [redacted].

b. The Settling Parties' Share of the Relevant Market Does Not Suffice to Prove Market Power

For two reasons, Complaint Counsel are wrong that the fact that 1-800 Contacts and the other settling parties make a high percentage of online sales shows that they have market power.

First, as noted, the relevant antitrust market is the retail sale of contact lenses, in which 1-800 Contacts and the settling parties make less than 20% of sales. That share is insufficient for market power as a matter of law. *See* 1-800 Post-Trial Br. at 90 (citing *Cohlmia v. St. John Med. Ctr*., 693 F.3d 1269, 1283 (10th Cir. 2012); *Retina Associates, P.A. v. S. Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1997); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987)).

Second, as Complaint Counsel admit, even a high market share in an online-only market does not suffice to prove market power. CC Post-Trial Brief at 122. Rather, as 1-800 Contacts explained in its opening brief, *see* 1-800 Post-Trial Br. at 91-95, market power depends on whether barriers to entry and expansion mean that other firms could not expand supply to compete away any effort to raise prices as a result of the settlement agreements. *See, e.g.*, *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985) ("Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power."). As explained in the next section and in 1-800 Contacts' opening brief (at 91-95), Complaint Counsel failed to meet their burden to prove substantial barriers to entry and expansion.

c. Complaint Counsel Failed to Prove Substantial Barriers to Entry and Expansion

When asked about barriers to entry in the online contact lens market he tried to define, Dr. Evans testified that "[t]here are not barriers to entry in that market in the sense that anyone can set up a -- anyone can set up a website and anyone can start selling contact lenses and can go to a manufacturer and buy things." (CX 9042 (Evans, Dep. at 136-137.) Dr. Evans further testified that "for online firms, the capital requirements tend not to be substantial." (CX 9042 (Evans, Dep. at 137.) And he testified that that the only barriers to entry and expansion are "getting noticed online" and "making yourself known to the customers." (CX 9042 (Evans, Dep. at 137-139.) Complaint Counsel cannot evade their own expert's economic analysis.

Complaint Counsel point to a single page of a single presentation prepared by AEA Investors, a private equity firm, when AEA was considering buying 1-800 Contacts. (CX 1343 at 14; *see also* Evans, Tr. 942). This is *not*, as Complaint Counsel claim, one of "1-800 Contacts' business documents." CC Post-Trial Br. at 123. [redacted] That is no substitute for economic analysis. The supposed "barriers" discussed on the slide include a prescription verification system and inventory investments [redacted] And the record belies any suggestion that these requirements are prohibitive even for small ECPs, let alone major retailers. (RF 644-651).

Further, AEA's slide does not discuss barriers to expansion, which makes Complaint Counsel's reliance on it insufficient as a matter of law. *See Se. Missouri Hosp. v. C.R. Bard, Inc*., 642 F.3d 608, 622 (8th Cir. 2011) (referring to "significant barriers either to the entry of new firms or to increased output by existing firms"); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (antitrust claimant must "show that there are *significant barriers to entry and* show that existing *competitors lack the capacity to increase their output in the short run*") (emphasis added); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("If firms are able to enter, *expand*, or import sufficiently quickly, that may counteract a reduction in output by existing firms.") (emphasis added); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (high market share did not show market power where "entry into the relevant product and geographic market by new firms *or by existing firms*" was easy) (emphasis added). Indeed, Dr. Evans testified that economists analyzing competitive constraints consider the possibility of expansion by existing competitors. (Evans, Tr. 1765). But there is no evidence that any of the barriers listed in the AEA slide would preclude major retailers such as Costco, Walmart or JC Penney from expanding their online operations if 1-800 Contacts raised prices above the competitive level. Dr. Evans, in fact, testified that "nothing" prevents Walmart from expanding its online segment if it chose to do so. (CX 9042

(Evans, Dep. at 140-41).)

Complaint Counsel also are wrong that the settlement agreements themselves constitute a barrier to entry. CC Post-Trial Br. at 124. Dr. Athey testified that there is no evidence that the settlement agreements chilled any "unbound" contact lens retailer from advertising in response to searches for 1-800 Contacts' trademarks. (CX 9043 (Athey, Dep. at 117). Indeed, it is illogical that the costs of litigation with 1-800 Contacts would deter major retailers such as Costco, Walmart or Amazon from engaging in such advertising if they believed (contrary to the record) that it was important to compete in the marketplace.[14]

Finally, as to the actual history of entry, Complaint Counsel ignore the record evidence regarding the dozens of firms that have entered the online contact lens business, (Bethers, Tr. 3537-3541; RF 466-487), [redacted]. (Evans, Tr. 1691-92).

IV. 1-800 CONTACTS HAS IDENTIFIED PLAUSIBLE AND COGNIZABLE PROCOMPETITIVE JUSTIFICATIONS

As 1-800 Contacts explained in its opening brief, the settlement agreements had numerous procompetitive benefits: (1) they avoided litigation costs, channeling resources to more productive forms of interbrand competition; (2) they protected 1-800 Contacts' trademarks and the incentives they create for it to invest in its brand and produce products and services of consistent quality; (3) they prevented consumer confusion; (4) they reduced consumers' search

[14] Complaint Counsel's footnote suggestion that Amazon "does not sell contact lenses, reportedly because of the difficulties specific to the industry," CC Post-Trial Br. at 107 n.355, is based entirely on speculation from online retailers, not on any evidence from Amazon itself. Further, Amazon's status as an actual or potential competitor is confirmed by Dr. Athey's inclusion of it on her list of Unbound Competitors. (CX 8007 at 42 (Athey Expert Report)).

costs, and (5) they increased purchases of contact lenses by consumers who searched for 1-800 Contacts' trademarks. *See* 1-800 Post-Trial Br. at 34-61. If the extensive record, replete with expert testimony shows anything, it shows that the asserted procompetitive benefits "cannot be rejected without extensive factual inquiry." *Polygram*, 136 F.T.C. at 347. Rather than repeat all of the reasons why that is so, 1-800 Contacts explains below why Complaint Counsel's arguments to the contrary are wrong.

For starters, Complaint Counsel misstate the law in arguing that 1-800 Contacts' proffered "efficiencies must be supported by actual record evidence." CC Post-Trial Br. at 126. In fact, the Commission has made clear that "[a]t this early stage of the analysis, the defendant need only articulate a legitimate justification." *Polgyram*, 136 F.T.C. at 345. "[T]he defendant at this point is not obligated to prove competitive benefits"; all that is required is that "the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible." *Id.* Indeed, "the defendant *need not* produce detailed evidence at this stage" but simply "must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition." *Id.* at 347. When a respondent does so, Complaint Counsel must "provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely, before the evidentiary burden shifts to the defendant." *Id.* at 350.

Only if Complaint Counsel meet that burden does a respondent take on "the burden of producing factual evidence in support of its contentions, including documents within its control."

Id. Since Complaint Counsel have not proffered any evidence that anticompetitive effects are in fact likely, the burden never shifted to 1-800 Contacts to prove its procompetitive justifications with record evidence, although 1-800 Contacts nevertheless did so.

Complaint Counsel also misstate the law in arguing that 1-800 Contacts has the burden to demonstrate that the settlement agreements are a "*reasonably necessary* means to achieve a legitimate, procompetitive end." CC Post-Trial Br. at 126 (quoting *Realcomp*, 2007 WL 6936319, at *17). The Commission in *Realcomp* did not state that a respondent has the burden in all cases to prove that the settlement agreements are reasonably necessary to achieve their procompetitive benefits or that those benefits could not be achieved by less restrictive means. In fact, the Commission has made clear that, under the rule of reason, "if respondents are able to demonstrate procompetitive effects, *complaint counsel* then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." *Polygram*, 136 F.T.C. at 476 (emphasis added). As explained in 1-800 Contacts' opening brief, *see* 1-800 Post-Trial Br. at 108-110, and below, *see infra* at 83-86, Complaint Counsel have failed to meet that burden.

A. Complaint Counsel's Arguments Regarding Free-Riding Lack Merit

Complaint Counsel have misconstrued the facts and the law regarding free-riding. Complaint Counsel do not address Dr. Murphy's testimony that, by preventing infringement, the settlements' trademark protections induce other retailers to invest in developing their own valuable trademarks, which enhances interbrand competition and benefits consumers more than would competing for customers who are searching for 1-800 Contacts. (RX 739 at 36; Murphy, Tr. 4123-25).

Complaint Counsel also ignore that, as noted, 1-800 Contacts has a legitimate claim to a property right, protected by trademark law, to prevent other firms from capitalizing on its goodwill by using its trademark to engage in advertising on search engines. That distinguishes this case from *Professional Engineers*, 435 U.S. at 689, and *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368-69 (7th Cir. 1987), neither of which involved settlements regarding intellectual property rights. Complaint Counsel aver that "[t]he presence of trademarks here does not change the analysis." CC Post-Trial Br. at 129. But that cannot possibly be so, as their very next sentence indicates: "Rivals may seek to benefit from consumers' 'use' of the 1-800 Contacts trademark in search queries *so long as these rivals do not infringe the trademark*." *Id.* (emphasis added). Again, at every turn, Complaint Counsel simply assume away the fact that 1-800 Contacts had *bona fide* trademark claims to prevent other retailers from doing what the settlements prohibit.[15]

Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941), is inapposite. In that case, fashion designers "boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members." *Id.* at 461. Certain group boycotts are *per se* unlawful. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (discussing *Fashion Originators' Guild* as an example of

[15] This includes their citation to the Areeda treatise, which omits that text's footnote: "Of course, an agreement protecting intellectual property rights may be ancillary to other productive activities and thus qualify for rule of reason treatment." Areeda & Hovenkamp, *Antitrust Law*, ¶1907b n. 13 (3d ed.). Just so for the agreements here, which productively settled litigation (if they are subject to antitrust scrutiny).

a *per se* unlawful group boycott). Thus, the Supreme Court in *Fashion Originators' Guild* held it was "not error to refuse to hear" evidence that manufacturers had pirated the designers' fashion designs any more than it would be appropriate to hear evidence of "the reasonableness of the prices fixed" by a price-fixing agreement. 312 U.S. at 467-68. In other words, the Court held that *no* procompetitive justifications were cognizable defenses to the group boycott at issue there, not that any of 1-800 Contacts' procompetitive justifications for the settlements at issue here are not cognizable.

B. 1-800 Contacts' Trademark Rights Justify The Restraints

1. The Settlement Agreements' Scope is Not Impermissibly Overbroad

Like their characterization of the settlement agreements as "bid rigging," Complaint Counsel's arguments as to why the settlements are overbroad ignore that they are settlements. Those arguments, too, lack merit.

Complaint Counsel argue that "a restraint that fails to distinguish between deceptive advertising and truthful advertising is overbroad and unlawful." CC Post-Trial Br. at 131. But it is the argument, not any of the settlements, that is overbroad. Complaint Counsel rely on cases finding that professional licensing boards—such as the American Medical Association or Massachusetts' optometry board, *see* CC Post-Trial Br. at 131, 132 n.430, 133-34 (citing *Am. Med Ass'n*, 94 F.T.C. 701 (1979); *Mass Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988); *Nat'l Society of Professional Engineers*, 435 U.S. 679; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988))—or industry associations—*see* CC Post-Trial Br. at 133 n. 432 (citing *Personal Protective Armor Ass'n*, 117 F.T.C. 104 (1994); *Arizona Automobile Dealers Ass'n*, 117 F.T.C. 781 (1994))—could not ban all advertising because some advertising was deceptive.

The industry regulators' broad advertising bans were overbroad because if they wanted to prevent confusion to the public, they could do so simply by banning deceptive advertising and enforcing that ban through disciplinary proceedings.

The agreements here arise in a different context. Unlike the doctors or industry association members in Complaint Counsel's cases, the agreements here served the purpose of protecting trademark rights: 1-800 Contacts asserted that it had a legal right under trademark law to get a court to order the other parties to the agreements to stop engaging in certain advertising. Complaint Counsel have conceded as much. (RX680 at 12–13; RX 679A). And unlike the doctors or industry association members in Complaint Counsel's cases, the parties to the agreements here sought to reduce their litigation costs and avoid future litigation. Thus, the parties and the settlements had different purposes than in Complaint Counsel's cases.

Simply prohibiting deceptive advertising would not have served those purposes. As noted, courts reject trademark relief that simply prohibits confusing trademark uses. *See Calvin Klein Cosmetics Corp.*, 824 F.2d at 667 & 669; *Harley-Davidson, Inc.*, 19 F.3d at 146; *John H. Harland Co.,* 711 F.2d at 984-5; 5 McCarthy on Trademarks and Unfair Competition § 30:13.

Further, a settlement that focuses on whether the defendant's advertisement text is "confusing" would invite further disputes among the settling parties because it does not clearly define what constitutes "confusing" text, and parties to a trademark settlement agreement frequently do not agree on the issue. (Hogan, Tr. 3305–06, 3272; RX 734 at 119–20). Accordingly, trademark practitioners heavily disfavor settlements that restrict only "confusing" ads because they are a recipe for future litigation and its attendant costs. (Hogan, Tr. 3272, 3305, 3495). That evidence is unrebutted and distinguishes this case from those involving advertising bans untethered to any *bona fide* assertion of rights in litigation.[16]

The foregoing suffices to dispense with Complaint Counsel's overbreadth argument. But Complaint Counsel also mischaracterize the agreements' breadth. Complaint Counsel are wrong that the settlements prohibit advertising from appearing in response to "any search query *relating to* a 1-800 Contacts trademark." CC Post-Trial Br. at 32 (emphasis added).

Each settlement agreement explicitly permits the purchase of generic industry terms relating to 1-800 Contacts such as "contacts," "contact lens," and "contact lenses." (CX 317 § 2(B); CX 311 § 4(B); Hamilton, Tr. 453-54; CX 9031 (Schmidt, Dep. at 234)). Further, ten of the thirteen agreements specifically exclude uses such as comparative advertising, parodies, and other non-infringing uses from their other provisions. (CX 311 § 4(B); CX 317 § 2(B)). Mr. Hogan testified that these carve-out provisions make the 1-800 Contacts trademark settlements *narrower* than typical trademark settlement agreements. (Hogan, Tr. 3278-79). And their import is that the settling parties are expressly permitted to advertise in response to searches such as "cheaper than 1-800 Contacts" and "1-800 Contacts cheaper competitors." (CX 9031 (Schmidt, Dep. at 111, 115); Coon, Tr. 2743; CX 9040 (Miller, Dep. at 26-28); CX 9002 (Craven, IHT at 185-86); CX 9020 (Craven, Dep. at 18-19)).

The fact that a provision in six of the extant agreements requires the parties to refrain from causing an advertisement to be displayed in response to a search that "includes" the other

[16] The Commission's Policy Statement in Regard to Comparative Advertising (CC Post-Trial Br. at 132) is inapposite for the same reason, since it also does not involve assertions of or settlements related to trademark rights.

party's trademark does not change this conclusion. (CC Post-Trial Br. at 35-36; CX 317 § 2C). Complaint Counsel's reading that these provisions to override the express carve outs contradicts basic principles of contract interpretation. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (contract terms should be construed so that "no part will be inoperative or superfluous"); *Hall v. Utah State Dept. of Corrections*, 24 P.3d 958 (Utah 2001) ("when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision"); *Glenn v. Reese*, 2009 UT 80, ¶ 10; *Cent. Fla. Invs., Inc. v. Parkwest Assocs*., 2002 UT 3, ¶ 12 (courts should "attempt to harmonize all of the contract's provisions and all of its terms"). The lawyers who drafted the agreements explained how the agreements worked in this fashion. (CX9040 (Miller, Dep. at 60-61, 119-120); Pratt, Tr. 2551).

If the agreements are ambiguous on this point, extrinsic evidence makes clear that they were not intended to restrict advertising in response to any search including a retailer's trademark. *See Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) (contract's interpretation may be determined by extrinsic evidence of intent). 1-800 Contacts was not concerned about rivals placing advertisements in response to comparative queries, (CX9031 (Schmidt, Dep. at 111); Coon, Tr. 2741), and understood that the settlements would permit advertising in response to some searches that included 1-800 Contacts' trademark. (Coon, Tr. 2742-43; RX 250). 1-800 Contacts therefore never monitored comparative queries or complained about ads in response to them. (CX9031 (Schmidt, Dep. at 112-13); Coon, Tr. 2743).

Complaint Counsel also are wrong that the agreements have broad effects because they require phrase match negative keywords. CC Post-Trial Br. at 33-35. Nothing in the agreements requires this, and they should be interpreted to be less rather than more restrictive, *i.e.*, to require only exact match negative keywords that would stop advertising only in response to a search for 1-800 Contacts' trademarks. *Pierce v. Pierce*, 2000 UT 7, ¶ 19. Moreover, if the agreements required phrase match, the long lists of negative keyword permutations included in the agreements would be superfluous.

Again, if the agreements are ambiguous, extrinsic evidence confirms that exact match is all that is required. *See Upland Indus. Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 642 (Utah 1984). 1-800 Contacts and its outside counsel consistently took the position that no specific match type was required for negative keywords. (RX 251; RX 252; CX 709; RX 253; CX 9040 (Miller, Dep. at 66, 173-74, 180-81); CX 9021 (Pratt, Dep. at 109); CX9031 (Schmidt, Dep. at 116); CX 9020 (Craven, Dep. at 117-121); RX 1818; Craven, Tr. 641-42 (instructing exact match for identical affiliate policy)).

Complaint Counsel's only evidence to the contrary is testimony by witnesses from the settling parties who were unfamiliar with the terms they purported to interpret. For example, Mr. Holbrook of Memorial Eye testified at his deposition that he had never inquired as to how the negative keyword provision of the settlement agreement was supposed to operate, and then changed his mind at trial and decided that he had been incorrect when testifying under oath. (Holbrook, Tr. 2058). Likewise, Peter Clarkson of AC Lens and Peter Batushansky of Web Eye Care expressed uncertainty about how the provisions of the agreements worked together. CX9039 (Clarkson, Dep. at 147); Clarkson, Tr. 144-45; CX9014 ([redacted]). Glen Hamilton of Walgreens and Vision Direct did not read the settlement agreements and admitted that he did not fully understand how they worked or what they required. (Hamilton, Tr. 474). And Walgreens, in fact, advertised in response to generic terms. (Hamilton, Tr. 453-54).[17]

2. Complaint Counsel Failed to Prove Viable Less Restrictive Alternatives

Complaint Counsel's arguments that "1-800 Contacts could have achieved the claimed efficiency by practical, significantly less restrictive means" (CC Post-Trial Br. at 135) have been raised for the first time after the hearing and, in any event, lack merit.

1-800 Contacts' Interrogatory No. 1 to Complaint Counsel asked them to "[i]dentify each of the 'less restrictive alternatives' that was 'available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law,' as alleged in Paragraph 32 of the Complaint." (RX 680 at 4). In their response, Complaint Counsel identified only one alternative: "redressing the purportedly confusing text of the challenged advertisement rather than prohibiting the display of search advertising altogether." (RX 680 at 4). But in their post-trial brief, Complaint Counsel have identified at least three *additional* less restrictive alternatives: (1) "[r]equiring clear and conspicuous disclosure in each ad of the identity of the seller"; (2) "[p]rohibiting rival sellers from using *names* that were confusingly similar to 1-800 Contacts"; and (3) "[r]equiring clear and conspicuous comparative language." CC Post-Trial Br.

---

[17] Evidence that some retailers implemented phrase match negative keywords, CC Post-Trial Br. at 36 n.136, is immaterial because witnesses from those retailers testified that they implemented negative keywords in various match types without regard to the agreements' specific requirements and that their use of negative keywords exceeded the agreement's requirements. (CX 9039 (Clarkson, Dep. at 163-64); CX 9014 ([redacted], Dep. at 159-160); CX 9008 (Hamilton, IHT at 72-74) ("we're probably overly restrictive"); Hamilton, Tr. 474).

at 135-36. The Court should not consider less restrictive alternatives that Complaint Counsel generated after the hearing in this case.

Regardless, Complaint Counsel do not and cannot point to any *evidence* supporting their supposed less restrictive alternatives. Complaint Counsel did not introduce even one settlement agreement embodying any of their alternatives.

Certainly Complaint Counsel did not introduce any evidence regarding their supposedly less restrictive alternatives' effects on confusion, let alone evidence meeting their "heavy burden" to show that these alternatives "would significantly reduce the likelihood of consumer confusion," as much as the challenged settlements. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006); *see also Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 143–44 (2d Cir. 2005) (party seeking to add disclaimer "must establish the disclaimer's effectiveness."). And, as noted, none of Complaint Counsel's authorities holds that "clear labeling as to the identity of the advertiser eliminates the risk that search advertising will lead to consumer confusion." CC Post-Trial Br. at 136. In fact, as their brief shows, the most that the courts have said is that "clear labeling *might* eliminate the likelihood of initial interest confusion." CC Post-Trial Br. at 137 (quoting *Network Automation, Inc.*, 638 F.3d at 1153-54) (emphasis added). Professor Tushnet's academic opinion about what all "reasonable consumers" supposedly can do with labels, CC Post-Trial Br. at 137 n. 440, is not the law and not admissible.

At any rate, whether an ad "is clearly labeled as an advertisement," CC Post-Trial Br. at 137 (quoting *1-800 Contacts*, 722 F.3d at 1245), an issue on which the Commission itself has expressed concern, is as prone to dispute as whether an ad is likely to confuse. But Complaint

Counsel did not introduce any evidence that a settlement calling for "clear and conspicuous" disclosures or labeling would resolve the parties' dispute and reduce their litigation costs. The only evidence on that point is Mr. Hogan's testimony that parties to a trademark settlement agreement frequently do not see eye-to-eye on what is clear or confusing to consumers (Hogan, Tr. 3305, 3272)—after all, that is why they have a dispute—and therefore "parties to settlement agreements need to agree to objective measures, objective steps, that can be verified to resolve the dispute." (Hogan, Tr. 3305–06). "[A]dditional disputes between the setting parties are likely" if the settlement does not "set a sufficient berth between acceptable and unacceptable conduct." (RX 734 at 123). By precipitating further disputes, Complaint Counsel's alternatives would require the very litigation costs that the actual settlements eliminated, making them insufficient as a matter of law. *See Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (alternative must be "virtually as effective in serving the legitimate objective *without significantly increased cost*").

That leaves Complaint Counsel's attempt to draw a line at an ad's text. But as noted, this less restrictive alternative would not sufficiently protect 1-800 Contacts' trademark rights because courts have held that a trademark owner has a cognizable claim as to a paid search ad displayed in response to a search for its trademark even if those ads do not use the mark in their text. *See, infra*, at 90-91.

Under the rule of reason, then, Complaint Counsel failed to meet their burden to prove their less restrictive alternatives. *Polygram*, 136 F.T.C. at 476. But even if 1-800 Contacts had the burden on this score, Complaint Counsel are wrong that 1-800 Contacts' position that broad settlement agreements were the "only reasonable way" to resolve its litigations "is unsupported by any record evidence in this case." CC Post-Trial Br. at 136. Mr. Hogan testified on this issue based on his extensive experience that the settlement agreements at issue in this litigation achieve the goals that practitioners seek to accomplish in a trademark settlement agreement by clearly defining the scope of the prohibited conduct. (Hogan, Tr. 3276; *see generally* RF 1367-1384). Complaint Counsel offered no evidence to the contrary.

3. Complaint Counsel Are Wrong that Consumers' Intent is Irrelevant

As 1-800 Contacts explained in its opening brief and in its findings of fact, (RF 946-959, 1766-1820), the record contains abundant evidence of the obvious fact that the vast majority of consumers who search for 1-800 Contacts' trademarks intend to navigate to 1-800 Contacts' website. Complaint Counsel stray far from the record and the law in asking the Court to dismiss this evidence in evaluating 1-800 Contacts' procompetitive justifications.

First, as to the facts, Complaint Counsel's attempt to dispute the record regarding consumers' intent consists of a voluminous footnote, *see* CC Post-Trial Br. at 138 n. 443, based entirely on evidence that is not or cannot be admitted. None of the law review articles that Complaint Counsel cite are in evidence. Even if they were, as noted, the Bechtold and Tucker article clearly supports 1-800 Contacts' position and its experts' opinions. *See supra*, at 40-41. The expert report of Professor Tushnet, a law professor with no marketing experience, cannot support the proposition that any advertising is "helpful and valuable to consumers" at all, let alone "regardless of their intent." CC Post-Trial Br. at 138 n. 443 (citing CX8014). Dr. Ghose's book also is not in evidence, and his testimony on this point was clearly limited to certain practices and effects of advertising in the "context of the offline world." (Ghose, Tr. 3960-66, 3970-71).

Second, Complaint Counsel lack any basis to dispute the legal relevance of consumers' intent. It is true that the standard for trademark infringement is "likelihood of confusion." CC Post-Trial Br. at 139. But Complaint Counsel do not cite any authority for the proposition that consumers' intent is irrelevant to likelihood of confusion. In fact, that argument cannot be squared with the well-settled principle that infringement turns on whether "*ordinary purchasers*, buying with ordinary caution, are likely to be misled." *McLean v. Fleming*, 96 U.S. 245, 251 (1877) (emphasis added); *see also* Restatement (Third) of Unfair Competition § 20 cmt. h (1995) ("The reasonably prudent purchaser often invoked in determining likelihood of confusion is the *ordinary purchaser* of the goods or services buying with ordinary care.") (emphasis added). Indeed, consumers' intent likely bears on their sophistication and care in reviewing search results, which are factors relevant to likelihood of confusion. *See Network Automation*, 638 F. 3d at 1154; *Rosetta Stone Ltd.*, 676 F.3d at 153. Evidence that the ordinary consumer who searches for 1-800 Contacts' trademarks intends to navigate to 1-800 Contacts' website therefore is relevant. Further, it is undisputed that consumers' search costs in using search engines depend on their intent. (Ghose, Tr. 3903-04; CX 9043 (Athey, Dep. at 47-48)).

Third, Complaint Counsel also wrongly dismiss evidence from the Commission itself that "consumers cannot distinguish between organic search results and advertisements." CC Post-Trial Br. at 139. Courts in Complaint Counsel's own authorities have held that the location of ads compared to organic links and whether they were labeled as ads are relevant to whether those links are likely to confuse consumers. *See, e.g.*, *Network Automation, Inc.*, 638 F.3d at 1154; *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1245 (noting that the inference of confusion is unnatural where a link both "clearly identifies [its] source" and is "clearly label[ed] *as an advertisement*") (emphasis added). The Ninth Circuit has held that it was error not to consider the ads in the entire context of the search results page. *Network Automation*, 638 F.3d at 1154.

Accordingly, it is highly relevant that, as numerous surveys have found, many consumers cannot distinguish between paid and organic links. (Goodstein, Tr. 2406-2407; RX 736 at 23-24). Surely it is relevant that the Commission's Bureau of Consumer Protection warned search engines in 2013 that "[i]n recent years, the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers, especially for advertising located immediately above the natural results ('top ads')." (RX 597 at 1; *see also* RX 599). Those findings, issued *after* most of the Circuit decisions on which Complaint Counsel rely, call into doubt the basis of any permanent, categorical rule based on the assumption that consumers all know that paid ads are different from organic links and are not necessarily sponsored by or affiliated with the firm whose trademark they searched for. Indeed, such a rule is particularly unsound given that, as the Commission has noted, "[t]he ways in which search engines retrieve and present results, and the devices on which consumers view these results, are constantly evolving." ((RX 597). The evidence confirms that [redacted]; *see also* RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)).

Professor Tushnet's legal opinion in her report, *see* CC Post-Trial Br. at 139 & n. 448 (citing CX 8014), is not evidence. And *Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2000), did not even analyze confusion about the nature of sponsored links.

4. Complaint Counsel Misconstrue the Law Regarding Trademark Infringement in the Keyword Context

Eschewing their own concession that 1-800 Contacts' trademark infringement claims were not sham, Complaint Counsel attempt to argue that an advertisement in response to another firm's trademark can *never* be confusing as a matter of law unless the advertisement's text includes the other firm's mark. Complaint Counsel are simply wrong.

Complaint Counsel argue that "*no plaintiff* – including 1-800 Contacts – has *ever succeeded* on a trademark infringement claim by showing that keyword bidding, *on its own*, is confusing." CC Post-Trial Br. at 141. But whether 1-800 Contacts would have been the first to win a judgment on the kinds of claims it brought is not the test of whether 1-800 Contacts violated the antitrust laws. After all, no court has ever held that a trademark settlement providing for standard non-use agreements violates the antitrust laws. As such, Complaint Counsel's logic would plead them out of court.

The correct legal standard is whether the courts have recognized the trademark infringement claims that 1-800 Contacts filed and settled such that 1-800 Contacts could have won the relief provided for in the settlement agreements. The answer is yes. Complaint Counsel are wrong that courts have "uniformly" held that consumers are not confused as a matter of law by ads in response to searches for another firm's trademark that do not use the mark in their text. CC Post-Trial Br. at 141.

In fact, courts have denied motions to dismiss and motions for summary judgment premised on the very argument that Complaint Counsel are making here. *See, e.g.*, *LBF Travel, Inc. v. Fareportal, Inc.*, No. 13 CIV. 9143 LAK GWG, 2014 WL 5671853, at *9 (S.D.N.Y. Nov. 5, 2014); *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61; *see also, e.g.*, *Pensacola Motor Sales v. E. Shore Toyota, LLC*, No. 3:09CV571/RS-MD, 2010 WL 3781552, at *3 (N.D. Fla. Sept. 23, 2010); *Rosetta Stone Ltd.*, 676 F.3d at 160; *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288 ("While these advertisements may not have displayed the mark itself, the surrounding context supplies a sufficient basis to support allegations of consumer confusion at this early stage of the litigation."); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2005 WL 832398, at *7 (N.D. Cal. Mar. 30, 2005). Complaint Counsel, in fact, acknowledge as much. *See* CC Post-Trial Br. at 160 & nn. 510-512.

As one of those courts explained, "[w]hether Defendants' sponsored advertisements actually include [the plaintiff's] trademarks in the text ***is not determinative*** of whether there has been any infringement." *Fair Isaac Corp.*, 645 F. Supp. 2d at 760-61 (emphasis added). Complaint Counsel are just arguing that this court was wrong. That is an argument for Congress or an amicus brief, not a premise for antitrust liability.

The fact that some of Complaint Counsel's authorities instruct courts to consider a paid search ad's text as one factor in the infringement analysis, CC Post-Trial Br. at 142, does not support Complaint Counsel's categorical view that infringement turns on the text alone. None of these authorities holds that consumers are not confused as a matter of law. The court in *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004), merely noted that labeling "might eliminate the likelihood of initial interest confusion." *Id*. at 1030 n.43. The Third Circuit, in *CollegeSource, Inc. v. AcademyOne, Inc.*, 597 F. App'x 116 (3d Cir. 2015), affirmed a district court judgment which analyzed labeling as one factor that weighed against infringement. *See CollegeSource, Inc. v. AcademyOne, Inc.*, No. CIV.A. 10-3542, 2012 WL 5269213, at *18 (E.D. Pa. Oct. 25, 2012). And in *EarthCam, Inc. v. OxBlue Corp.*, 49 F. Supp. 3d 1210 (N.D. Ga. 2014), the trademark plaintiff presented "no evidence of the labeling and appearance of [the defendant's] advertisements and the surrounding context of the screen displaying the search results." *Id.* at 1241. None of Complaint Counsel's other authorities treated the absence of the mark in the text of the advertisement as dispositive. *Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010), involved domain names and does not hold anything about whether any paid search advertisements are likely to confuse consumers.[18]

Complaint Counsel also are wrong that "1-800 Contacts has proffered no evidence in this litigation (or in any other case) showing that any of the ads that it challenged were confusing." CC Post-Trial Br. at 143. 1-800 Contacts discussed such evidence at length in its post-trial brief and proposed findings of fact. (1-800 Post-Trial Br. at 51-55; RF 1133-1145, 1484-1565, 1716-1745). The evidence of confusion includes not only a survey by Dr. Kent Van Liere but

[18] To the extent that the Court's broad statements about consumers' supposed mindset are relevant, *Toyota Motor Sales* supports 1-800 Contacts' position regarding consumers' navigational intent: "When people go shopping online, they don't start out by typing random URLs containing trademarked words hoping to get a lucky hit. They may start out by typing trademark.com, but then they'll rely on a search engine or word of mouth." 610 F.3d at 1178.

testimony from Dr. Goodstein, a marketing expert, actual evidence of confusion from Memorial Eye records, and search engine data.

Complaint Counsel's post-trial brief addresses only Dr. Van Liere's survey. But survey evidence of actual confusion is not necessary to prevail on a trademark infringement claim. *See*, *e.g.*, *Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 190 (3d Cir. 2010); *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 483 (5th Cir. 2008); *Visible Sys. Corp. v. Unisys Corp.*, 551 F.3d 65, 74 (1st Cir. 2008); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed Cir. 2002); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002); 15 U.S.C. § 1114(1)(a).

Indeed, courts uphold findings of infringement absent consumer surveys demonstrating actual confusion. *See*, *e.g.*, *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 120 (1st Cir. 2006); *Montgomery v. Noga*, 168 F.3d 1282, 1302 (11th Cir. 1999); *Smack Apparel Co.*, 550 F.3d at 483; *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir. 1986); *see also* Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. Pa. J. Bus. L. 1013, 1035 (2012) ("no evidence that surveys are used by a majority or even a large plurality of litigants to prove likelihood of confusion in federal court").

Regardless, Complaint Counsel's criticisms of Dr. Van Liere's survey are unfounded for the reasons set forth below and in 1-800 Contacts' opening brief and findings of fact. (1-800 Post-Trial Br. at 47-49; RF 1485-1565). And those submissions also explain why Complaint

Counsel's reliance on Dr. Jacoby's survey is misplaced. (1-800 Post-Trial Br. at 51-55; RF 1566- 1590, 1602-1715).

Two misstatements, however, should be corrected here. *First*, it is incorrect that the Tenth Circuit in *Lens.com* "found that confusion was *not* caused by the mere presence of a non-1800 Contacts advertisement in response to a search for the trademark '1-800 Contacts.'" CC Post-Trial Br. at 146. That is what the District Court held, which is why Complaint Counsel cite to that decision in their brief. *Id.* at n. 465. The Tenth Circuit expressly stated that it "need not resolve the matter." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1243. *Second*, it is not correct that Dr. Jacoby's "conclusions are entirely consistent with Google's prior studies on this issue." CC Post-Trial Br. at 146. In fact, Dr. Jacoby used a different methodology in this case than in the (entirely unreliable) studies conducted by Google. (*See* CX 9041 (Jacoby Dep.) at 29, 88-89; Reply to CCF 593.)

5. Complaint Counsel Have Failed To Satisfy Their Threshold Burden Under *Actavis* To Prove That 1-800's Settlement Agreements Are Subject To Antitrust Scrutiny

Complaint Counsel's argument regarding *FTC v. Actavis*' threshold test is as striking for what it does not say as for what it says. Although 1-800 Contacts discussed *Actavis*' two-part test for antitrust scrutiny at length in its pre-trial brief (at 29-42), Complaint Counsel have offered *no argument whatsoever* regarding the second part of that test. Apparently, they do not disagree that, under *Actavis*, the "general legal policy favoring settlement of disputes" forecloses antitrust scrutiny unless five additional considerations—"taken together"—are present. 133 S. Ct. at 2237. And they offer no argument with respect to those five factors.

Moreover, Complaint Counsel do not dispute: (1) the well-established legal policy in favor of settlements; (2) that *Actavis* itself pointed to a non-use trademark settlement as the only example of a "commonplace" settlement that the Court did not intend to displace; (3) that the Lanham Act envisages and authorizes non-use trademark settlement agreements; (4) that trademark disputes are routinely settled by non-use agreements; and (5) that numerous settlement agreements have involved prohibitions on the use of keywords and negative keywords just like those in 1-800 Contacts' settlement agreements. 1-800 Post-Trial Br. at 16-20. 1-800 Contacts made all of these points in its pre-trial brief as well (at 30-39). Yet, Complaint Counsel did not address any of them in their post-trial submission.

It is hard to imagine that Complaint Counsel overlooked a threshold issue presented by Supreme Court precedent regarding when settlements can violate the antitrust laws. More likely is that Complaint Counsel's attempt to give this argument the back of the hand, buried in the middle of nearly 200 pages of briefing, reflects that they have no persuasive response. That is hardly surprising given that Complaint Counsel did not point to a single settlement agreement that lacked the key features of the challenged settlement agreements. (Tushnet, Tr. 4489, 4492-93). Thus, it is undisputed that the "agreements are very commonplace in terms of the settlement agreements that are used to resolve these kinds of disputes." (Hogan, Tr. 3248). Each of Complaint Counsel's arguments why this supposedly does not matter lacks merit.

First, Complaint Counsel erroneously insist that the Commission previously rejected 1-800 Contact's argument that its commonplace settlement agreements are not subject to antitrust scrutiny. *See* CC Post-Trial Brief at 146 n. 466. Complaint Counsel already have lost this argument. Complaint Counsel argued to this Court that the Commission "already rejected" 1-800 Contacts' argument that "'the circumstances and character of the agreements make antitrust scrutiny inappropriate.'" *See* Complaint Counsel's Opposition to Respondent's Motion to Call Six Expert Witnesses at Trial at 5 (quoting Respondent's Motion to Call Six Expert Witnesses at Trial at 2). This Court disagreed, explaining that all the Commission held was that "(1) the *Noerr-Pennington* doctrine does not apply to private agreements such as the Challenged Agreements; and (2) to establish liability, 'Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham.'" Order Granting Respondent's Motion to Call Six (6) Expert Witnesses at Trial at 4.

Second, Complaint Counsel contend that it is "nonsensical" for 1-800 Contacts to argue that "if it is 'common' for *private settlement agreements to* take similar forms, then 1-800 Contacts' agreements should be presumed lawful." CC Post-Trial Brief at 148-149 (emphasis added). They contend that 1-800 Contacts' reading of *Actavis* would mean that if many parties agree to "price-fixing or market allocation agreements," those, too, would "cease to violate the antitrust laws" despite clear Supreme Court precedent to the contrary. This parade of horribles is not germane, for this case does not involve any *per se* unlawful price-fixing or market allocation; indeed, Complaint Counsel do not contend that the agreements are *per se* unlawful. Regardless, the Supreme Court surely was aware of its prior precedent when it held that settlements taking commonplace forms are not subject to antitrust scrutiny. Complaint Counsel cannot re-litigate that holding, especially where they drew the very same distinction in that case. *See FTC v. Watson Pharm, Inc.*, No. 12-416, Br. for Pet'r, 2013 WL 267027, at *27 (U.S. Jan. 22, 2013) (arguing that there is no reason for antitrust concern where "an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled").

To be clear, however: Respondent does not advocate that *all* settlement agreements are free from antitrust scrutiny. After all, *Actavis* itself held that "patent-related settlement agreements can *sometimes* violate the antitrust laws." *Actavis*, 133 S. Ct.. at 2232. The question is *when* a particular settlement agreement warrants antitrust scrutiny and in *what circumstances*. On that issue, *Actavis* "should not be read to subject to antitrust scrutiny 'commonplace forms' of settlement." *King Drug Company of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015); *see In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 544 n.4 (1st Cir. 2016) ("The court noted that it did not intend to disturb commonplace settlement forms."). Because the undisputed evidence shows that 1-800 Contacts' settlements took a commonplace form, they are not subject to scrutiny under the Supreme Court's governing legal test.

Third, Complaint Counsel also fight *Actavis* in arguing that there is "no way of knowing what terms are 'commonplace' and what terms are not" because "1-800 Contacts and its trademark expert have not reviewed the vast majority of trademark settlement agreements." CC Post-Trial Brief at 149. No expert in the world—including one of Mr. Hogan's vast experience in trademark practice—could reasonably be familiar with the "vast majority of trademark settlement agreements." *Id*. (*See* Hogan, Tr. 3504). If that were a prerequisite to applying the Supreme Court's "commonplace" standard, the standard would make no sense.

In fact, Mr. Hogan's seventeen-plus years of experience as a trademark specialist who has represented hundreds of clients in a wide array of public and non-public trademark litigation and counseling matters (Hogan, Tr. 3240, 3242) and negotiated, drafted and advised clients "with respect to hundreds and hundreds of settlement agreements that do not result from the filing of a formal litigation" (CX9047 (Hogan, Dep. at 23)), more than qualifies him to opine as to what is commonplace in the trademark field. The Commission itself invoked that kind of practitioner's experience in *Actavis*. *Actavis* Reply Br., 2013 WL 1099171, at *11 n.3 ("*Practicing lawyers* would have no difficulty recognizing . . . that the former type of consideration is regularly used to settle litigation while the latter is not.") (emphasis added). Complaint Counsel's expert, Professor Tushnet, did not have this experience and therefore could not sustain Complaint Counsel's burden to show that the settlements *did not* take commonplace forms, nor reliably rebut Mr. Hogan's testimony that they did.

Fourth, Complaint Counsel try to run away from their concession 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." (RX 679A at 5). As 1-800 Contacts explained its opening brief (at 21-24), this fact is simply further proof, on top of settlement agreements themselves, that 1-800 Contacts' agreements took commonplace forms. Thus, even if Complaint Counsel were right that they modified their concession with the caveat that the settlements' relief would not have been appropriate in any of the cases that 1-800 Contacts actually filed, CC Post-Trial Brief at 147, that would not change the outcome of the threshold *Actavis* issue.

In fact, however, it makes no difference whether Complaint Counsel believe that 1-800 would have prevailed on the merits; uncertainty on that point is precisely what motivates litigants to settle. What matters under *Actavis* is that the form of the settlement agreements here confirms that they reflected these "traditional settlement considerations." *Actavis*, 133 S. Ct. at 2235. The fact that numerous courts have, in fact, ordered such relief and that such relief is therefore within the legal scope of what a court could provide under the Lanham Act, *see* 1-800 Post-Trial Br. at 22 n.1, strongly corroborates that inference, *id.* at 21-24.[19]

---

[19] Complaint Counsel half-heartedly relegate three additional arguments to footnotes, and so 1-800 will respond in kind here. Complaint Counsel first contend that "no court has ordered reciprocity among parties." CC Post-Trial Brief at 147. But this does not mean that reciprocal non-use settlement agreements take an "unusual" form within the meaning of *Actavis*. The only relevant question under the first prong of the *Actavis* test is whether settlement agreements take a "commonplace" form. Howard Hogan testified at trial that reciprocal agreements are, in fact, commonplace: "That's the difference between a judgment in court and a settlement agreement. Settlement agreements are typically reciprocal. Judgments in courts are typically one-way." ((Hogan, Tr. 3493; *see* also CX 9047 (Hogan, Dep. 195)). This evidence is unrebutted.

Next, Complaint Counsel argue that "no defendant—outside of three consent judgments has—*ever* been ordered to implement negative keywords in *any* circumstances." But it is significant that *some* courts have ordered the implementation of negative keywords, for "courts do not willfully enter relief that they believe to be unlawful…. Therefore, they are a good indicator of what was commonplace in resolving trademark disputes." Hogan, Tr. 3401.

As for negative keywords, settlement agreements in cases involving keyword advertising typically require them, even if they are rarely litigated. *See* Hogan, Tr. 3298, 3304 ("Negative keywords have been an increasingly common part of the confidential settlement agreements in these kinds of disputes in recent years.… having an easy-to-administer solution, like a negative keyword, it makes it easier to settle these cases and eliminate the instances of advertising that lead to further disputes."). This, in turn, demonstrates that settlements with negative keywords take commonplace forms within the meaning of *Actavis*. And Complaint Counsel mischaracterize their only case on this issue. The issue in *Rhino Sports, Inc. v. Sport Court, Inc.*, No. CV-02-1815-PHX-JAT, 2007 WL 1302745 (D. Ariz. 2007), was "not whether Rhino Sports' current activities infringe Sport Court's trademark, but whether Rhino Sports substantially violated the permanent injunction." *Rhino Sports*, 2007 WL 1302745, *4. The Court was never

In short, Complaint Counsel failed to meet their threshold burden to prove that the challenged settlement agreements were unusual, not commonplace. Even if they had done so, Complaint Counsel failed to establish that the five factors set forth in the Supreme Court's decision outweigh the courts' longstanding policy in favor of settlements. Accordingly, Complaint Counsel cannot prevail in this case as a matter of law.

6. 1-800 Contacts Had Viable Dilution Claims and State Law Claims Based on Its Competitors Use of Its Trademarks in Keyword Advertising.

Complaint Counsel seek to minimize the viability of 1-800 Contacts' dilution and state law claims by cursorily stating that they are not "independent of its trademark infringement claims." CC Post-Trial Br. at 150. Although related, those claims were independent and viable.

Trademark dilution occurs when someone other than the trademark owner uses the trademark in a way that weakens the strength of the association between a famous trademark and the goods or services that the mark is used to promote. *See* 15 U.S.C. § 1125(c); *Visa Int'l Serv. Ass'n v. JSL Corp.*, 610 F.3d 1088, 1090 (9th Cir. 2010). A claim for trademark dilution is distinct from a claim for trademark infringement because dilution does not require a showing of likelihood of confusion. Instead, dilution law "protect[s] famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, *even in the absence of a likelihood of confusion*." H.R. Rep. No. 104-374, at 3 (1995) (emphasis added).

---

presented with, and never considered, the option of negative keywords in that case. *Rhino Sports*, 2007 WL 1302745, *2-5.

Finally, 1-800 Contacts has explained at length why the conceded proposition that its claims were not sham is relevant. *See* 1-800 Pre-Trial Brief at 1, 23, 36; 1-800 Post-Trial Brief at 7, 25 n.4, 67. Complaint Counsel are wrong that this fact is "wholly irrelevant." CC Post-Trial Brief at 148 n. 471.

Contrary to Complaint Counsel's contention that no court has found dilution in the context of keyword advertising, CC Post-Trial Br. at 152, the viability of this theory of liability was confirmed in *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012). In that case, the Fourth Circuit reversed the district court's grant of summary judgment in Google's favor on a dilution claim based on Google's sale of Rosetta Stone's trademarks as keywords. The court remanded, instructing the court to do a full dilution analysis to determine "whether Google's use is likely to impair the distinctiveness of Rosetta Stone's mark," and making clear that dilution is a viable cause of action in the keyword advertising context *Id.* at 171. Similarly, courts have denied motions to dismiss and motions for summary judgment on dilution claims based on the use of plaintiffs' trademarks as keywords. *See Edible Arrangements*, 2016 WL 4074121, at *16; *Am. Blind.*, 2005 WL 832398. Complaint Counsel point to no case holding dilution is inapplicable in the keyword advertising context.

Similarly, 1-800 Contacts had viable claims against the settling parties for state law causes of action, such as false advertising, misappropriation, and unfair competition. Courts regularly deny motions to dismiss these types of claims in the context of using a trademark to trigger keyword advertising. *See, e.g.*, *Morningware, Inc. v. Hearthware Home Prods., Inc.*, 673 F. Supp. 2d 630, 639 (N.D. Ill. 2009) (denying defendant advertiser's motion to dismiss deceptive trade practices and unfair competition claims); *Am. Blind.*, 2005 WL 832398, at *7 (denying Google's motion to dismiss false representation and unfair competition claims); *Gov't Employees Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 703-04 (E.D. Va. 2004) (denying Google's motion to dismiss false representation and unfair competition claims); *Am. Airlines*, *Inc. v. Google, Inc.*, No. 4:07-CV-487-A (N.D. Tex. Oct. 24, 2007) (D.E. 19) (denying Google's motion to dismiss claims for false representation, misappropriation, and unfair competition); *CNG Fin. Corp. v. Google, Inc.*, No. 1:06-cv-040 (S.D. Ohio Nov. 21, 2006) (D.E. 35) (denying Google's motion to dismiss claims of false representation and misappropriation). Complaint Counsel have not identified a single case suggesting that these claims were not viable.

Complaint Counsel lack any basis to suggest that 1-800 Contacts would not have prevailed on its dilution and state law claims. Indeed, they acknowledge that these claims were not sham. (RX 680 at 12–13). Instead, they argue what they believe the law should be, without citing any authority definitively implementing their aspirational policy views.

C. <u>Complaint Counsel's Criticisms of 1-800 Contacts' Experts Lack Merit</u>

1. Complaint Counsel's Criticisms of Dr. Van Liere Lack Merit

Dr. Kent Van Liere presented survey evidence that unequivocally confirms the intuitively obvious conclusion that consumers searching for "1-800 Contacts" often mistake competitor ads as either sponsored or affiliated with 1-800 Contacts. (RF 1564-1565 (showing a net overall confusion rate of 20.6%)). Given (1) the universal expectation that search engines place the most relevant results in the first position, (2) the unrebutted evidence showing that most consumers searching for "1-800 Contacts" are seeking to navigate to 1-800 Contacts' website, (3) the clear evidence that nearly 50% of users do not realize that paid search ads are not organic results, and (4) the fact that consumers view search results pages very quickly before clicking on a link (RFF 1680, 1727-1741), Dr. Van Liere's survey results are unsurprising.

Seeking to avoid the implications of this evidence, Complaint Counsel regurgitate their contention that Dr. Van Liere somehow violated the Scheduling Order and request the Court exclude Dr. Van Liere's opinion. (CC Post-Trial Br. at 152-154). The Court should reject this request.

First, there was no violation of the Scheduling Order. Dr. Van Liere did exactly what Complaint Counsel's expert, Dr. Jacoby, did. Each expert viewed various search results for background purposes. As Dr. Van Liere explained, he looked at search results as background information only to see what they "typically look like." (Van Liere, Tr. 3003; *id.* 3013-14 (searches done "just to look at things."). Complaint Counsel's own survey expert, Dr. Jacoby, did the same. As he testified, "We looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby Tr. 2272; *see also id*. 2273-74 ("we used a variety of pages we looked at"). Neither Complaint Counsel nor Respondent produced those search results. This is because neither expert "relied upon" those search results. Dr. Van Liere specifically confirmed that he did not rely on these searches in both his deposition and his trial testimony. There was thus no requirement to produce the results. *See* Scheduling Order, ¶ 19(b), Docket No. 9372 (Sept. 7, 2016).[20]

[20] Complaint Counsel contend that Dr. Van Liere relied on the search results in deciding not to include a 1-800 Contacts' sponsored ad in the stimuli of his study. But Dr. Van Liere clearly testified that his decision not to include a sponsored ad by 1-800 Contacts was based on a determination that the most appropriate design for his study would measure consumer confusion caused by other retailers' sponsored ads without Respondent being forced to pay for its own ad to appear. (CX 9049 (Van Liere, Dep. at 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800

Second, even if Dr. Van Liere "relied upon" the search results, exclusion of his opinions is entirely unwarranted. Although the Scheduling Order, not the Federal Rules of Civil Procedure, governs here, it is worth noting that under the Federal Rules, exclusion is not warranted where the alleged nondisclosure was "substantially justified or harmless." *See Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 190 (4th Cir. 2017); Fed. R. Civ. P. 37(c)(1). Here, even assuming Dr. Van Liere relied on the search results that he viewed (which he did not), nondisclosure would have been substantially justified[21] and would not have harmed Complaint Counsel. Given Complaint Counsel's nondisclosure of search results viewed by Dr. Jacoby, as well as their failure to cite any case law that a survey expert's marketplace background information must be produced, any nondisclosure by Respondent was substantially justified. *See United States v. Dentsply Int'l, Inc.*, No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6994, at *24 (D.

Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188.) His decision was based on a conceptual determination, not any conclusion he drew from viewing actual search results pages. (Van Liere, Tr. 3207-08, 3238). In fact, when asked by Complaint Counsel whether he would have changed any element of his study if there was evidence that a "de minimis number of such searches [searches for "1-800 Contacts"] did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded that he would not. (Van Liere, Tr. 3218-19).

[21] Substantial justification is "justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. . . . The test is satisfied if there exists a genuine dispute concerning compliance." *United States v. Dentsply Int'l, Inc.*, No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6994, at *24 (D. Del. May 10, 2000).

Del. May 10, 2000) (denying motion to exclude government expert in light of dearth of case law); *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 591 (D.N.J. 1997) (denying motion where there was "relatively little case law in existence" on point and it was "reasonable that the plaintiffs differed in their understanding of what the Federal Rules of Civil Procedure required them to disclose and supplement").

In addition, any nondisclosure was harmless, for there was no surprise or prejudice. *See Neiberger v. FedEx Ground Package Sys.*, 566 F.3d 1184, 1192 (10th Cir. 2009) (affirming refusal to exclude expert opinion because of lack of prejudice). Complaint Counsel was fully aware of Dr. Van Liere's opinions, which were laid out in his report (RX 735), and the fact that he had viewed search results to understand the marketplace was discussed at his deposition (CX9049 (Van Liere, Dep. at 181-182)). Complaint Counsel were not prevented from effectively examining Dr. Van Liere. The trial record has hundreds of examples of search results for the term "1-800 Contacts" and its variants, through which Complaint Counsel may show whether or not 1-800 Contacts ads sometimes appear and sometimes do not.[22]

Third, exclusion of an expert opinion is an extreme sanction. Many courts have refused to exclude substantive expert testimony in the absence of finding bad faith or other extreme conduct. *See, e.g.*, *Bean Meridian, L.L.C. v. Suzuki Motor Corp*. (*In re C.F. Bean L.L.C.*), 841 F.3d 365, 373 (5th Cir. 2016); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 791-92 (3d Cir. 1994) ("exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed

[22] Examples of searches in which no 1-800 Contacts ad appears are RX310 at 318, RX310 at 634-35, RX310 at 636-37, RX310 at 640-41, RX311 at 7-8, RX311 at 9-10, RX311 at 34-35, RX311 at 426-27, and RX 311 at 579-80.

absent a showing of willful deception or 'flagrant disregard' of a court order"); *United States v. Sarracino*, 340 F.3d 1148, 1171 (10th Cir. 2003) ("district judge erred by imposing the extreme sanction of excluding an expert witness' testimony).

Complaint Counsel also repeat their experts' various attempts to criticize Dr. Van Liere's survey. (CC Post-Trial Br. at p. 155-156). Dr. Van Liere meticulously dissected each of these supposed criticisms. (RF 1566-1590).

In particular, Complaint Counsel contend that Dr. Van Liere should have included 1-800 Contacts ads in his control condition. They argue that [redacted] CC Post-Trial Br. at 155. But that is precisely the reason why Dr. Van Liere excluded 1-800 Contacts ads from the control condition. The survey seeks to measure whether the rival ads are confusing, not whether the trademark holder can mitigate that confusion by paying to place its own ads. As Dr. Van Liere explained, "in this case and in prior of these cases I've worked on, the basic idea is you want to measure the impact of those ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area, so that's why we've designed these, both in other cases and here, without the trademark owner's sponsored link in the pool that's tested." (Van Liere, Tr. 3037-3038; *see also* CX 9049 (Van Liere, Dep. at 187-188 ("confusion has to be measured whether 1-800 Contacts is forced to purchase its own name as the first sponsored links or it is not.")).

Complaint Counsel also contend that having fewer links in the control condition affected the reliability of Dr. Van Liere's study. CC Post-Trial Br. at 156. Unless respondents were randomly clicking on links, this criticism is a non-starter. But the survey data show that respondents were not randomly clicking on links; the data show respondents were looking at the control search results and reacting to the content on the page. (Van Liere, Tr. 3031-3035). The survey data show that the average number of links clicked by respondents in the test group and the control group were very close. (RX 735 at 20). For instance, respondents in the Google test group clicked on an average of 1.8 links in response to the Source Question and those in the Google control group clicked on an average of 1.7 links for that question. (RX 735 at 20; Van Liere, Tr. 3034). These data show that having fewer links in the control stimulus than the test stimulus did not affect the reliability of the study. (Van Liere, Tr. 3031-3035).[23]

2. Complaint Counsel's Criticisms of Howard Hogan Lack Merit

This Court should reject Complaint Counsel's request that the Court discard the expert opinion of Howard Hogan. CC Post-Trial Br. at 157.

First, Complaint Counsel contend that Mr. Hogan's opinion that the challenged settlement agreements take a commonplace form "is not relevant to any issue in this case." CC Post-Trial Br. at 158. But the settlements' commonplace nature is directly relevant to *Actavis*'s requirement that, in order to displace the law's well-settled policy in favor of settlements, a party posing an antitrust challenge to a settlement agreement must prove that a settlement takes an unusual form. 133 S. Ct.. at 2231. For the reasons discussed above and in 1-800 Contacts

---

[23] Dr. Jacoby's basketball analogy is entirely inapt and misleading. Dr. Van Liere's survey does not compare the *number* of respondents confused on the test and control conditions. It compares the percentage. Using Dr. Jacoby's analogy, the question is not how many out of 20 or 14 free throws are missed. The question is what is the *percentage* missed.

opening brief (*see supra* at 93-99; CC Post-Trial Br. at 24-26), Mr. Hogan's expert testimony is probative of that question and not precluded by the Commission's February 1, 2017 Order.

Second, Complaint Counsel argue that Mr. Hogan presented his opinion "without any basis" because he did not exhaustively review every trademark settlement in the country. CC Post-Trial Br. at 157, 159. This point is meritless. In forming his opinions, Mr. Hogan relied on his review of more than fifty publicly available trademark settlement agreements, consent decrees, default judgments, and court rulings. (RX 734 at 58-119). He also properly relied on his own extensive experience litigating and negotiating settlement agreements. (Hogan, Tr. 3247); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience"). Mr. Hogan has represented clients in trademark matters with respect to "hundreds and hundreds of settlement agreements," litigated several of the most high-profile keyword advertising cases, and has intimate familiarity with the practices of other lawyers in the space. (CX 9047 (Hogan, Dep. at 23); Hogan, Tr. 3242-3451). Accordingly, Mr. Hogan has a substantial basis for his conclusions, notwithstanding the fact that, as Complaint Counsel concede, the vast majority of private settlement agreements are not publicly available. (CC Post-Trial Br. at 159; Hogan, Tr. 3247-48).

Complaint Counsel's critique, in fact, has force only when applied to their own expert, law professor Rebecca Tushnet, has never settled a trademark case, who has never been lead counsel in a trademark case, and did not even review the settlement agreements at issue in this case. (Tushnet, Tr. 4374, 4495-4496). Ms. Tushnet thus possesses no relevant experience with which to sustain her analysis. Moreover, neither Ms. Tushnet nor Complaint Counsel identified a single settlement agreement taking a form different than the form adopted by the challenged settlement agreements. (Tushnet, Tr. 4489, 4492-93). The fact that Mr. Hogan did not review *every* settlement agreement in existence does not undermine his unrebutted conclusion that these "agreements are very commonplace in terms of the settlement agreements that are used to resolve these kinds of disputes." (Hogan, Tr. 3248). Were it otherwise, the Supreme Court's *Actavis* standard would be make little sense.

Third, Complaint Counsel fall back to arguing that the cases Mr. Hogan cites do not establish that courts would, in every instance, impose liability solely "on the basis of keyword bidding." CC Post-Trial Br. at 160. That is not a rebuttal to Mr. Hogan's conclusion that the settlement agreements take a commonplace form. Complaint Counsel did not and cannot prove that 1-800 Contacts would not have prevailed on the trademark claims it asserted. Indeed, Complaint Counsel admit that 1-800 Contacts' litigation claims were not sham, (RX 680 at 12–13), and Complaint Counsel acknowledge that, had 1-800 Contacts prevailed, the obligations imposed by the settlement agreements are "comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order" (RX 679A at 5). If anything, Complaint Counsel's attention to the particular factual allegations in each of the individual trademark cases cited by Mr. Hogan underscores that the fact-intensive analysis of confusion defies bright line rules and makes non-use prohibitions an efficient, common, and logical remedy for parties and courts alike. (Hogan, Tr. 3258, 3261, 3434, 3459-60).

Finally, unable to rebut the core of Mr. Hogan's opinion, Complaint Counsel quibble with the factual allegations in the various cases he cites, arguing that some of those factual allegations are not identical to the allegations at issue in 1-800 Contacts' litigations. CC Post-Trial Br. at 160-61. But there is no category of "egregious infringing conduct" under the Lanham Act that could distinguish the cases producing the orders and agreements on which Mr. Hogan relied. As he explained, "that's not how trademark claims work." (Hogan, Tr. 3459). What is relevant is the type of relief that parties commonly agree to and courts commonly order, not whether the cases involved identical facts.[24] On that question, the evidence is not in dispute. Complaint Counsel failed to rebut Mr. Hogan's testimony, supported by a multitude of settlement agreements and court orders, that the settlements here took commonplace forms. (Hogan, Tr. 3248; RX 734 at 58-119).

3. Complaint Counsel's Criticisms of Dr. Goodstein Lack Merit

Professor Goodstein is eminently qualified to offer opinions, based on the extensive analysis set forth in his expert report, on the potential for consumer confusion and harm to the value of 1-800 Contacts trademark from sponsored ads displayed in response to searches 1-800 Contacts' trademark terms. (RX 736). Complaint Counsel do not contest Professor Goodstein's

---

[24] Mr. Hogan repeatedly emphasized the critical distinction here between the initial claims brought by the parties and the decision the court rendered, or the terms chosen by the parties in settlement, prohibiting the use of trademarks as keywords. (Hogan, Tr. 3445, 3447-48, 3451, 3453-54, 3456). Complaint Counsel seek to draw an inconsistency between Mr. Hogan's description of the cases he reviewed as "comparable" to 1-800 Contacts' cases and the absence of particular keyword-based allegations in certain complaints. CC's Post-Trial Br. at 163-64. But Mr. Hogan was consistent across his report and testimony that he "cited a number of cases for the very specific proposition that courts order prohibitions on the use of trademarks as keywords" — the salient fact in determining whether the settlement agreements take a commonplace form. (Hogan, Tr. 3446).

qualifications to offer his opinion that "it's reasonable to expect that both at the time of the [settlement] agreements and today that there's a likelihood that a significant percentage of consumers would be confused by the sponsored ads that appear as a result of people [searching] for '1-800 Contacts'." (Goodstein, Tr. 2381-82). Complaint Counsel's criticisms of Professor Goodstein expert testimony are baseless.

Professor Goodstein testified that "if I don't know what's an ad and what's an organic link, there's a much higher probability that what comes—appears towards the top left northern area, I would be confused into thinking that that's related to my search, is affiliated, sponsored, whichever of those words you'd want to use." (Goodstein, Tr. 2410).[25] Complaint Counsel argue that Professor Goodstein's analysis showing that many consumers do not recognize the distinction between sponsored ads and organic links "offers nothing relevant to the central question in a trademark infringement case." CC Post-Trial Br. at 165. That is not the law.

As noted, numerous cases, including those relied upon by Complaint Counsel, recognize that the labeling of sponsored ads is relevant to whether they are likely to confuse consumers.

See 1-800 Contacts, Inc., 722 F.3d at 1245; *see also Rescuecom*, 562 F.3d at 130-31 ("If the searcher sees a different brand name as the top entry in response to the search for 'Rescuecom,' the searcher is likely to believe mistakenly that the different name which appears is affiliated with the brand name sought in the search and will not suspect, because the fact is not

[25] Professor Goodstein's analysis also is consistent with his peer-reviewed article published in 2015 (long before he was ever retained as an expert by 1-800 Contacts). *See* Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 THE TRADEMARK REPORTER 735, 743 (2015) ("Confusion . . . is a real possibility given that many consumers may not know the difference between sponsored and non-sponsored links.")

adequately signaled by Google's presentation, that this is not the most relevant response to the search.").[26]

Similarly, the Commission's repeated recognition that search engines have not sufficiently delineated sponsored ads "paid advertisements" from organic links is relevant. (RX 575; RX 597; RX 598; RX 736 at 25-26). That evidence, and Dr. Goodstein's testimony, reveal the flaw in Complaint Counsel's position that the bounds of trademark law regarding paid search ads are clear and fixed and 1-800 Contacts' settlements exceeded them. In fact, trademark law in this area is as fluid as the design of Google's search results page, making settlements of trademark claims entirely reasonable and unexceptional.

Complaint Counsel's argument that Professor Goodstein's analysis of consumers' expectations for the top search results when using a trademark as a search term is not relevant is flawed for the same reasons. Again, as the Ninth Circuit explained, "a user searching for a distinctive term is more likely to be looking for a particular product, and therefore could be more susceptible to confusion when sponsored links appear that advertise a similar product from a different source." *Network Automation* 638 F.3d at 1149. Thus, Dr. Goodstein testified based on his marketing expertise that a search for "1-800 Contacts" is typically navigational in nature (RX 736 at 34-35), a that "1-800 Contacts' trademarks embody a highly recognized, distinctive, and valuable brand" (RX 736 at 4-17), and that "the 'navigational' nature of an internet search query increases the potential for consumer confusion from sponsored ads" (RX 736 at 29-31).

---

[26] *Cf.* Franklyn & Hyman, *Trademarks As Search Engine Keywords*, Harv. J. L. & Tech. at 529 (2013) (consumer knowledge regarding the distinction between sponsored ads and organic links "has obvious implications for the analysis of the likelihood of confusion, at least when someone other than the trademark owner purchases a trademark as a keyword").

Complaint Counsel's criticisms of Professor Goodstein's opinions related to dilution also lack merit. *First*, Complaint Counsel argue that Professor Goodstein's opinions on potential harm to 1-800 Contracts' trademark should be disregarded because federal trademark dilution law only applies if the defendant is a "seller of unrelated goods." CC Post Trial Br. at 167. But the Trademark Dilution Revision Act of 2006 expressly states that "dilution by blurring or dilution by tarnishment" may be found "regardless of the presence or absence of actual or likely confusion, ***of competition***, or of actual economic injury." 15 U.S.C. § 1125(c)(1). Courts thus have repeatedly applied federal trademark dilution law in situations where the plaintiff and defendant are selling competing products. *See, e.g.*, *Starbucks Corp. v. Wolfe's Burrough Coffee, Inc.*, 736 F.3d 198 (2d Cir. 2013) (defendant sold "roasted coffee beans" under the name "Charbucks Blend"); *Rosetta Stone*, 676 F.3d at 167 (defendant placed ads for competing products on searches for plaintiff's trademark term); *Edible Arrangements*, 2016 WL 4074121, at *1 & *15-16 ("Defendant . . . is a direct competitor of the Plaintiff"); *PODS Enterprises, LLC v. U-Haul Int'l*, 126 F. Supp. 3d 1263, 1275-78 (M.D. Fla. 2015) (plaintiff and defendant sold competing storage facilities) .[27]

Second, Complaint Counsel argue that Professor Goodstein's analysis of the possible "associations" that could be created in consumers' minds between 1-800 Contacts and retailers who placed sponsored ads on searches for 1-800 Contacts' trademark terms "is wholly invented,

[27] Complaint Counsel say the "key" for dilution is that the "defendant has adopted a name that is *identical* or *substantially similar* to the plaintiff's trademark." CC Post-Trial Br. at 151 & 167. In fact, the requirement is that the defendant make "use" of the plaintiff's trademark. *See, e.g.*, *PODS*, 126 F. Supp. 3d at 1275-76 (affirming judgement for plaintiff on dilution claim where defendant U-Haul used the plaintiff's trademark on its website, not as its own brand name).

and has no analogue in the law." CC Post-Trial Br. at 167. That argument, too, fails to reckon with the letter of federal trademark law, which identifies the following among the factors relevant to determining whether the use of a trademark is likely to cause dilution by blurring: "Whether the user of the mark or trade name intended to create an association with the famous mark" and "(vi) Any actual association between the mark or trade name and the famous mark." 15 U.S.C. § 1125(c)(2)(B).

Case law applying these factors emphasizes that the touchstone of a dilution-by-blurring action is to prevent "the whittling away of the established trademark's selling power and value through its unauthorized use by others." *Rosetta Stone*, 676 F.3d at 167; *Benihana of Tokyo, LLC v. Benihana, LLC*, No. 14 Civ. 224 (PAE), 2017 WL 1424325, at * 5 (S.D.N.Y. 2017); *see also Starbucks*, 736 F.3d at 211 ("the ultimate question is whether the Charbucks Marks are likely to cause an association arising from their similarity to the Starbucks Marks, which impairs the Starbucks Marks' tendency to identify the source of Starbucks products in a unique way.").

This is precisely what Professor Goodstein analyzed to explain why the use by other contact lens retailers of 1-800 Contacts' trademark as a keyword to trigger sponsored ads could diminish "the ability of that trademark to designate a sole source" by "alter[ing] consumers' stored information about the trademark and ultimately, over time, caus[ing] consumers to have divergent associations with the trademark." (RX 736 at 37-39).[28]

[28] Professor Goodstein's opinion is consistent with his own peer-reviewed article that explained the potential harm to a trademark's value from its use as a keyword for sponsored ads, namely, that the "investment in brand recognition is undermined when some type of system is used to make an otherwise unconsidered brand come into the evoked set, as in the case of paid search

4. Complaint Counsel's Criticisms of Dr. Landes Lack Merit

Complaint Counsel do not argue that any opinion that Dr. William Landes offered in this matter was wrong. That alone forecloses Complaint Counsel's argument that the Court should not rely on Dr. Landes' testimony. Complaint Counsel's arguments to the contrary lack merit.

First, Complaint Counsel are wrong that Dr. Landes' opinions are inadmissible because he did not testify at the hearing. Tellingly, Complaint Counsel cite no authority supporting their position. Dr. Landes submitted his report under penalty of perjury. (RX 737 at 21). Complaint Counsel had every "opportunity to cross-examine Professor Landes," CC Post-Trial Br. at 168, when they deposed him for multiple hours on March 7. *Id.* at 168 n.546. Complaint Counsel agreed that Respondents' expert reports would be admitted into evidence, subject to evidentiary objections. They have raised none. In fact, prior to the hearing, Dr. Evans agreed with Dr. Landes' opinions in his report that settlements generally are efficient and that trademark protection generally is procompetitive. (Evans, Tr. 1829; CX 9042 (Evans, Dep. at 157, 196); CX 8009 at 31.) 1-800 Contacts decided not to burden the Court, and further prolong the hearing, by presenting live expert testimony on undisputed issues. If Complaint Counsel are correct that a party may not rely on testimony by witnesses not called at the hearing, then Complaint Counsel are wrong to rely on testimony of such witnesses more than 50 times in their post-trial brief.

Second, Complaint Counsel are wrong that Dr. Landes' testimony regarding the economics of trademarks is cumulative of Dr. Murphy's testimony. Dr. Landes' report is 19

---

advertising." Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 The Trademark Reporter at 734-35.

pages, the shortest report by any expert in this matter. (RX 737). Respectfully, Complaint Counsel should not be heard to complain that these 19 pages from the leading authority on the economics of trademark law would materially bog down the Court's evaluation of the enormous record in this matter. Complaint Counsel previously raised a similar argument in their unsuccessful motion to limit the number of Respondent's experts. *Compare* Complaint Counsel's Opposition to Respondent's Motion to Call Six Expert Witnesses at Trial, at 6.

Third, Complaint Counsel are misguided in suggesting that the Court should brush aside Dr. Landes' testimony because it draws on "an article he co-wrote 30 years ago." CC Post-Trial Br. at 168-69. That article is the seminal work on the economics of trademark law, and has been cited by the United States Supreme Court. *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163-64 (1995) (internal citation and quotation marks omitted) (citing, *inter alia*, Landes & Posner, *The Economics of Trademark Law*, 78 T.M. Rep. 267, 271–272 (1988)). And the fact that Complaint Counsel consider Dr. Landes' opinions "uncontroversial," CC Post-Trial Br. at 169, hardly makes them less reliable.

Fourth, Complaint Counsel's argument that Dr. Landes agrees that some advertising can benefit consumers misses the point. This case is not about whether, in general, advertising can benefit consumers. It is about whether a particular kind of advertising—paid search advertising generated based on searches for another firm's trademark—can harm consumers. Dr. Landes' undisputed testimony regarding the economics of trademarks demonstrates that the answer is yes, because that advertising can increase consumers' search costs and undermine firms' incentives to act in ways that benefit consumers. That, in turn, supports an inference that restricting such advertising, as the challenged settlement agreements do, can benefit consumers. Dr. Landes' testimony therefore undermines Complaint Counsel's theory that the advertising restrictions at issue are inherently suspect because they *necessarily* harm consumers.

Finally, Complaint Counsel's argument that Dr. Landes' supposed "concession" that somehow "support[s] a finding of liability" is nonsense. CC Post-Trial Br. 169. Dr. Landes did not concede that there is "no theory of trademark infringement that suggests infringement cannot be avoided by clarifying language." *Id.* In fact, Dr. Landes testified that it is more efficient for parties to adopt clear, categorical rules against certain kinds of advertising rather than, as Complaint Counsel suggest, to prohibit "confusing" advertisements. (CX9050 (Landes, Dep. at 159)). Regardless, Dr. Landes is an economist, not a lawyer. His testimony about how "trademark infringement" can "be avoided," CC Post-Trial Br. 169, is irrelevant. It certainly cannot make up for Complaint Counsel's total failure to offer any proof that any clarifying language could reduce the confusion caused by any advertisement.

5. Complaint Counsel's Criticisms of Dr. Ghose Lack Merit

a. Dr. Ghose Properly Disclosed His Opinions

Complaint Counsel are wrong that Dr. Ghose failed to disclose his opinion that paid search advertisements for retailers other than 1-800 Contacts are "not very relevant" to consumers who search for 1-800 Contacts' trademarks. CC Post-Trial Br. at 170-171. Dr. Ghose opined in his report that the Google search results page for a search for 1-800 Contacts' trademark demonstrates that ads for other retailers "have little relevance or usefulness for a consumer who submits this query." (RX 733 at 25, ¶ 57; *see also id.*, ¶ 58).

Complaint Counsel's argument that "the opinion that consumers abandon the search process if exposed to different online offers is unsupported by evidence in the record or analysis in Dr. Ghose's report," CC Post-Trial Br. at 172, also lacks merit. Matt Wallert, a behavior scientist at Bing summarizing social psychology insights that Bing uses in developing its products, wrote that "when the choice set gets too big, we may just give up" and that "too much choice can cause us to abandon the things that we truly want." (RX 1963). Those statements are in the record for their truth, and Dr. Ghose quoted them in his report. (RX 733).

b. Dr. Ghose's Opinions Undermine Complaint Counsel's Case

Complaint Counsel's attacks on Dr. Ghose's testimony misconstrue his opinions and their import for this case.

First, Complaint Counsel's argument that "[t]he position assigned by a search engine algorithm to competitors' *organic links* provides no support for a conclusion about the relevance of competitors' *advertisements*," CC Post-Trial Br. at 171, is bizarre. Far from undermining Dr. Ghose's opinions, the fact that search engines do not display advertisements using the purely relevance-based algorithms they use for organic links is precisely the point.

It is undisputed that search engines display organic links solely in terms of their relevance based on highly sophisticated algorithms assessing, among other things, massive data about what consumers do when they search. (Stipulation ¶ 5; Juda, Tr. 1330; RX 704 ([redacted], ¶ 8). As Dr. Ghose showed in his report, these algorithms do not display organic links to other retailers' websites on the first page of the SERP when consumers search for 1-800 Contacts' trademarks. (RX 733 at 25). That is powerful evidence that other retailers' websites are not among the most relevant sites for consumers searching for 1-800 Contacts' trademarks, and that paid ads that would take consumers to those websites are not very relevant. Complaint Counsel's attempt to place paid search ads in a vacuum highlights that their case is about giving consumers information that the world's most sophisticated machines for divining consumer intent indicate they do not want. That makes no sense.

Second, as explained above, Complaint Counsel misunderstand the nature and import of Dr. Ghose's opinion regarding consumers' "navigational intent." Dr. Ghose opined based on his analysis of numerous bodies of search data and the academic literature that the vast majority of consumers who search for 1-800 Contacts' trademarks intend to navigate to the company's website. (RX 733 at 45-52; CX 9046 (Ghose, Dep. at 116-117); RF 1771-1804). He further opined that, for many of these consumers with this intent, ads for other retailers are only minimally relevant, as confirmed by the fact that when Google's algorithm ranks organic links in order of relevance, Google does not display a link to another retailer's website until the twentieth page of search results. (Ghose, Tr. 3904-05, 3911-12, 3929-31, 3955-56; RX 733 at 6, 24-25); CX 9046 (Ghose, Dep. at 49)). Complaint Counsel do not critique any of this.

Based upon his analysis, Dr. Ghose opined that "if users get exposed to other ads that are not very relevant to their query, they are unlikely better off. In fact, it might just be the opposite." (Ghose, Tr. 3913; *see also* RX 733 at 38-40; CX 9046 (Ghose, Dep. at 84, 151-52, 175)). "[I]f if the search costs go up a lot, then you can see why users will not be better off." (Ghose, Tr. 3913). Dr. Ghose in fact repeated this testimony in the portions of the record cited by Complaint Counsel: "it's very likely" that "a large fraction of consumers would not find these additional ads relevant and have an increase in search costs" and "a large fraction of people would not find these competing ads relevant given the trademark search, and that's why their search costs could go up, and it's likely then they could be harmed." (Ghose, Tr. 3929).

Complaint Counsel are wrong that Dr. Ghose's opinion "has no connection to the facts of this case," CC Post-Trial Br. at 174, merely because he was candid about the limits of his analysis and opinions. Indeed, Complaint Counsel's argument fundamentally misunderstands the role of Dr. Ghose's testimony in the antitrust analysis. Dr. Ghose's unrebutted testimony that many consumers who search for 1-800 Contacts' trademarks likely would be harmed by ads for other retailers because they intend to visit 1-800 Contacts' website establishes that the settlements have procompetitive potential to reduce consumer harm, and that Complaint Counsel therefore have the burden to establish that, on balance, any benefit to consumers from the restricted advertising outweighs its potential harm.

That Dr. Ghose has not categorically opined that that "every single consumer is harmed," (Ghose, Tr. 3928), quantified the precise harm from search costs, or netted out costs and benefits (Ghose, Tr. at 3995-96, 4007, 4011-12), does not change this. "[A]n efficiency defense is plausible if it cannot be rejected without extensive factual inquiry." *Polygram*, 136 F.T.C. at 337. Dr. Ghose's cannot, as he testified: "It's an extremely complicated, complex problem." (Ghose, Tr. 3995-96). *Compare California Dental*, 526 U.S. at 775 n. 12 ("Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do."). Thus, Dr. Ghose's testimony clearly demonstrates that the settlements "might *plausibly* be thought to have a net procompetitive effect," *California Dental*, 526 U.S. at 771, and his opinions regarding search costs are "not implausible." *Id.* at 775.

Nor does Dr. Ghose's testimony that, at a general level, advertising can in theory change some consumers' intent mean that he "endorses Complaint Counsel's theory of liability." CC Post-Trial Br. at 173. For one thing, this testimony stands in stark contrast to that of Dr. Athey, who was willing to adopt any presentation slide that could be stretched to support Complaint Counsel's position—including that there are consumers who believe that only 1-800 Contacts sells contacts online. Regardless, Dr. Ghose's testimony shows that analyzing the settlements' effects on consumers requires balancing harms and benefits, "a question susceptible to empirical but not *a priori* analysis." *California Dental*, 526 U.S. at 774. Dr. Ghose testified that his opinion would be useful to answering that question, but that he did not do so himself. (Ghose, Tr. 4081-82). But Dr. Murphy did, running search engine data through Dr. Athey's own model and showing that additional ads make consumers less successful in purchasing contact lenses. That powerfully corroborates Dr. Ghose's opinion that many consumers who search for 1-800 Contacts' trademarks do not find ads for other retailers very relevant because they intend to visit 1-800 Contacts' website.

Third, Complaint Counsel have misconstrued Dr. Ghose's opinion regarding the settlement agreements' limited effects on consumers. Based on his analysis of search engine data, Dr. Ghose found that only [redacted] of Google ads related to contact lens appeared based on bids for 1-800 Contacts' trademarks (RX 733 at 54 (Ghose Report)); that only [redacted] of ads displayed based on searches for contact lenses appeared based on searches that included both 1-

800 Contacts' trademark and "cheaper," "better," "vs," "expensive," or "competitor" (RX 733 at 59; Ghose, Tr. 3924-25); and that only [redacted] of Google ads for 1-800 Contacts appeared based on 1-800 Contacts' bid on another retailer's trademark. (RX 733 at 53; Ghose, Tr. 3923). In other words, Dr. Ghose found that the data are clear that the conduct affected by the agreements constitutes only a very small fraction of advertising activity. He did not need a counterfactual "model" to infer that, because the agreements are themselves limited, eliminating the agreements would have a limited effect. Dr. Ghose logically explained that the agreements' effect is likely to be minimal because the agreements do not affect consumers' ability to get information about other contact lens retailers by searching for generic terms, which accounts for most paid search advertising and consumer activity related to contact lenses. (Ghose, Tr. 3917-20; *see also* RX 733 at 53-64.)

6. Complaint Counsel's Criticisms of Dr. Murphy Lack Merit

Complaint Counsel grasp at straws and distort the record in trying to undermine Dr. Murphy's testimony.

As an initial matter, Complaint Counsel's footnote suggestion that Dr. Murphy did not rebut Dr. Evans' opinions that the settlement agreements (1) harmed search engines and (2) "resulted in consumers paying higher prices," and that this is "sufficient to find liability," CC Post-Trial Br. at 177 & n. 590, is way off the mark. Dr. Murphy testified that Dr. Evans could not find harm to search engines because he did not examine effects on auctions for advertising on searches for terms other than 1-800 Contacts' trademarks. (RX 739 at 67.) Dr. Murphy also testified that an economist cannot infer that consumers were harmed from the possibility that they might have paid less for contact lenses from other retailers because consumer welfare depends on the quality-adjusted price, which Dr. Evans did not measure. (RX 739 at 83.) Having quoted economic scholarship measuring welfare in terms of the "quality-adjusted price" in their own post-trial brief, CC Post-Trial Br. at 77, Complaint Counsel hardly can criticize Dr. Murphy on this point.

Complaint Counsel's other criticisms of Dr. Murphy regarding market definition and anticompetitive effects also lack merit.

Market Definition. Dr. Murphy opined that the fact that 1-800 Contacts uses its trademark to compete against ECPs makes it important to consider ECPs in analyzing the effect of trademark settlements on competition in the market. (Murphy, Tr. at 4152-55.) Complaint Counsel's only criticism of that opinion is that Dr. Murphy could not identify an economic article specifically discussing how trademarks affect market definition. CC Post-Trial Br. at 177. But that does not make Dr. Murphy's theory "concocted." *Id.* The dearth of literature regarding this issue simply reflects that Complaint Counsel's case is unprecedented. And Complaint Counsel cite no authority holding that an expert can only offer opinions that have previously been published in a journal. It makes eminent economic sense to include ECPs in the relevant market for analyzing restraints on advertising using 1-800 Contacts' trademarks when 1-800 Contact uses those trademarks to compete against ECPs (Murphy, Tr. 4116; CX 9048 (Murphy, Dep. at 40-41, 114-16, 117, 128-32, 188, 254-55); RX 739 at 42). *See Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (relevant market must reflect "realities of competition").

Complaint Counsel misleadingly argue that "using conventional tools and widely-accepted principles of market definition, Dr. Murphy *agrees* with Professor Evans that the relevant market is the sale of online contact lenses." CC Post-Trial Br. at 177-78. Dr. Murphy clearly disagrees with Dr. Evans about the relevant market, opining that it includes ECPs and other offline retailers in addition to online firms. (RX 739 at 7-9, 37-43 (Murphy Report); Murphy, Tr. 4092, 4148). While Dr. Murphy acknowledged that Dr. Evans' SSNIP test purports to satisfy the threshold for defining an online-only market, he also testified that "[t]here's lots of reasons why this would not give you the proper answer," Murphy, Tr. 4274, including that Dr. Evans used an arbitrary and improper diversion ratio and failed to account for the realities of competition, including 1-800 Contacts' use of its trademark. (*See, e.g.*, Murphy, Tr. 4151-52, 4158-63, 4169). Dr. Murphy further testified that, when more than one candidate market passes the SSNIP test, neither is "likely to tell you the story. You should look beyond that, look to what we would call direct evidence of effects, which, in order to analyze the direct evidence, you have to really look at a broader marketplace." (Murphy, Tr. 4171).

Anticompetitive Effects. Complaint Counsel are wrong that Dr. Murphy's opinion that the settlement agreements "are not competitively significant lacks any basis in fact." CC Post-Trial Br. at 178. As they acknowledge, Dr. Murphy's analysis of data regarding firms not bound by the settlement agreements found that these firms generated less than [redacted] of their impressions and [redacted] of their clicks by bidding on 1-800 Contacts' trademarks. *Id.* Complaint Counsel's only criticism is that these data do not account for any "broad matching" by non-settling firms. But this is pure speculation. Complaint Counsel do not point to any evidence in the record suggesting that accounting for broad matching would provide any basis to dispute Dr. Murphy's point that advertising on searches for 1-800 Contacts' trademarks was not meaningful for firms unbound by the settlement agreements. Complaint Counsel's constant refrain about broad matching is an effort at misdirection, not a substantive criticism.

So, too, for Complaint Counsel's attack on Dr. Murphy's application of Dr. Athey's own counterfactual model to show that eliminating the settlement agreements would makes consumers who search for 1-800 Contacts' trademarks less successful in purchasing contact lenses. Dr. Athey's counterfactual model predicted that, in a world without the settlement agreements, consumers who search for 1-800 Contacts' trademarks would click less on ads for 1-800 Contacts and more on ads for its rivals. To predict the effect of those changes on sales for 1-800 Contacts and its rivals, Dr. Murphy applied conversion rates (the proportion of consumers who click on an ad and convert) from enormous Google datasets to Dr. Athey's own predictions about clicks.

Complaint Counsel argue that Dr. Murphy should have modeled conversion rates in the counterfactual world rather than applying conversion rates from actual Google data. CC Post-Trial Br. at 180. But Complaint Counsel do not point to any evidence indicating that eliminating the settlement agreements would affect conversion rates at all, let alone enough to change Dr. Murphy's results. Dr. Athey herself offered no such opinion; [redacted] Dr. Evans testified that, in his view, the conversion rate for Memorial Eye's ads in response to searches for 1-800 Contacts' trademarks in a world without the settlements would be [redacted]—*higher* than the [redacted] rate that Dr. Murphy used. (Evans, Tr. 1809.) And Dr. Murphy explained on cross-examination that [redacted]

V. COMPLAINT COUNSEL'S PROPOSED ORDER IS UNCONSTITUTIONAL, VIOLATES SETTLED PRINCIPLES OF ADMINISTRATIVE LAW, AND MUST THEREFORE BE MODIFIED

As Respondent has demonstrated, Complaint Counsel have failed to satisfy their burden to prove that 1-800 Contacts violated Section 5 of the FTC Act. Accordingly, this Court need not consider Complaint Counsel's proposed remedial Order. However, if this Court disagrees and concludes that "1-800 Contacts restricted competition beyond 'the scope of any property right that 1-800 Contacts may have in its trademarks,'" Opinion and Order of the Commission at 4 (quoting Cmplt. ¶ 32), *and* if it decides that some form of remedy is appropriate, it cannot issue Complaint Counsel's proposed Order in its current form.

At the outset, it is important to emphasize that Complaint Counsel have offered virtually no explanation or argument in support of the relief they seek. Although this Court asked Complaint Counsel to "concentrate heavily on the remedy" (Tr. 4553), they offer only broad legal propositions and vague descriptions of the relief that they are seeking. 1-800 Contacts has endeavored to address Complaint Counsel's proposed remedy as best and specifically as it can, but Complaint Counsel's failure to explain exactly what they are seeking, or why, is problematic.

As Respondent understands it, Complaint Counsel's proposed Order is flawed in three significant respects. *First*, if interpreted as it appears Complaint Counsel intend, the proposed Order would impermissibly intrude upon the inherent powers of Article III courts in a way that exceeds the remedial powers of an Executive Branch agency such as the Commission. At a minimum, minor modifications to the language of Complaint Counsel's proposed Order are required in order to ensure that it does not have this unconstitutional effect. *Second*, the proposed Order cannot be applied to 1-800 Contacts' thirteen[29] existing settlement agreements without contravening settled principles of administrative and constitutional law. Accordingly, this Court should delete Paragraph III of Complaint Counsel's proposed Order and make clear that those agreements may remain in force. *Third*, Paragraphs II.C and II.D are impermissible "obey-the-law" injunctions and should be stricken as well. A red-lined version of Complaint Counsel's proposed Order is attached as Exhibit A to this brief.

A. The Proposed Order Appears to Include Relief That Violates the Separation of Powers By Preventing Courts From Exercising Their Inherent Powers to Approve and Enforce Settlements

As written, Complaint Counsel's proposed Order appears to be intended to bar Article III courts from accepting settlements between litigants before their lawsuits are tried to completion. The language in question is in Paragraph II.B., which provides that 1-800 Contacts is not prohibited from "implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation." The phrase "conclusion of a contested litigation" gives rise to an ambiguity. May 1-800 Contracts implement and enforce any court order that is entered at the conclusion of litigation, regardless of when or how the litigation is concluded, including an order approving a settlement and dismissing the litigation in light of the settlement? Or is 1-800 Contacts prohibited from implementing court orders unless the order was entered after a full-

[29] One agreement, the one with Standard Optical (RX 408 at 1), has expired by its terms.

blown trial?

If the latter interpretation is intended, then the Order Complaint Counsel propose be entered by an independent Executive Branch agency "impermissibly threatens the institutional integrity of the Judicial Branch," *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). An order restricting Article III courts from approving settlements and dismissing lawsuits in furtherance of the settlements would unconstitutionally prevent courts from exercising their "inherent powers . . . to protect the efficient and orderly administration of justice," *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993),[30] and would deprive Article III courts of their ability to advance the well-established and longstanding public policy in favor of settlements, 1-800 Post-Trial Br. at 16-18. There is "no justification" for an agency order that unlawfully intrudes upon the authority of the judiciary *and* squarely contravenes a public policy that courts regularly have "declared" vital to the operation of our legal system. *Lenox, Inc. v. FTC*, 417 F.2d 126, 128 (2d Cir. 1969). Consequently, this Court must make minor—but essential—modifications to Complaint Counsel's proposed Order to avoid encroaching on the power of Article III courts. *See id*.[31]

---

[30] At the very least, the proposed order raises serious doubts about the Commission's remedial authorities under 15 U.S.C. § 45(a)(4)(B) such that this Court should interpret Section 46(a)(4)(B) as not permitting Complaint Counsel's proposed Order so as to avoid these constitutional problems. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

[31] One might wonder why Complaint Counsel have proposed an Order that would encroach on the power of Article III courts, and perhaps they do not intend to do so and intend instead for

Specifically, this Court should thus make clear that Respondent is free to settle cases, obtain court approval of those settlements, and thereafter implement and enforce the settlements under the auspices of an Article III court. To do so, this Court should modify the language of Paragraph II.B.2 of the proposed Order by striking "at the conclusion of a contested litigation" and replacing it with the following bolded language so as to read as follows:

> Provided further that nothing in this Paragraph II.B. shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, **including an order approving a litigation settlement**.

This small modification will make clear that courts may still permit parties to settle once good-faith litigation has been initiated.[32] Should Complaint Counsel agree with these modifications to Paragraph II, the Court may wish to proceed to the next Section of this brief. But, given the risk that Complaint Counsel are actually seeking to compel all cases to be tried to their conclusion in order for an Article III court's orders to be enforced, 1-800 Contacts explains below why such a provision must be stricken from the Order.

---

their proposed Order to be narrowly interpreted and to permit enforcement of any court orders that terminate a lawsuit, including orders approving settlements. But it also is possible that they intend the broad construction because they recognize that "[c]ourt-ordered relief is beyond the reach of the antitrust laws." CC Post-Trial Brief at 147 & 158. Thus, if they want to discourage 1-800 Contacts from seeking to enforce its trademark rights and from obtaining judicial relief that is not subject to antitrust scrutiny, perhaps they seek to do so by forcing 1-800 Contacts to each time bear the financial expense of a full-blown trial before such relief can be obtained.

[32] To ensure maximum clarity, the same proviso in Paragraph II.B should be added to Paragraph II.A of the proposed Order.

At the outset, it is important to note that Complaint Counsel's proposed Order contains important and necessary changes from the remedy that they originally sought in their Complaint. At the start of this case, Complaint Counsel purported to seek an order prohibiting 1-800 Contacts "from filing or threatening to file a lawsuit against any contact lens retailer alleging trademark infringement, deceptive advertising, or unfair competition that is based on the use of 1-800 Contacts' trademarks in a search advertising auction." Cmplt., at 9 (Proposed Relief at ¶ 5). Recognizing that such relief would violate the Constitution, *see* Respondent's Opposition to Complaint Counsel's Motion for Partial Summary Decision (November 16, 2017) at 3-4, Complaint Counsel no longer seek that relief, *see* CC Post-Trial Brief at 183 ("These order provisions permit 1-800 Contacts and its rivals to pursue litigation (Paragraph II.B) or to settle any trademark dispute under terms that reasonably protect the parties' trademark rights.").[33]

---

[33] For the same First Amendment reasons, another provision of Complaint Counsel's proposed Order should be stricken. As written, Paragraph IV.B.1 would require 1-800 Contacts to provide the Commission with communications with any person regarding that person's suspected trademark infringement. But communications regarding anticipated lawsuits, just like lawsuits themselves, are protected First Amendment activity under the *Noerr-Pennington* doctrine. *See, e.g.*, *Sweet St. Desserts, Inc. v. Chudleigh's Ltd.*, 2016 WL 3924239, at *4 (3d Cir. Jul. 21, 2016) (cease-and-desist letters) (unpublished); *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343 (9th Cir. 2013) (same); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006) (demand letters); *Globetrotter Software v. Elan Comput. Grp.*, 362 F.3d 1367 (Fed. Cir. 2004) (threats to litigate); *Coastal States Mktg. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) (same). Complaint Counsel has offered no reason why 1-800 Contacts should be forced to disclose what they have every right to do under the First Amendment to an antitrust enforcement agency that does not argue such conduct violates the antitrust laws. Paragraph IV.B.1 would have an intolerable chilling effect on 1-800 Contacts' protected petitioning activity, *see Simon Prop. Group, Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d. 794 (E.D. Mich. 2003), and would serve a punitive and non-remedial purpose that this Court cannot countenance. *see Lenox, Inc*, 417 F.2d at 128; *see United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985) ("Even in the antitrust area, however, a necessary and appropriate injunction against otherwise lawful conduct must be carefully limited in time and scope to avoid an unreasonably punitive or nonremedial effect.").

Accordingly, nothing in the proposed Order would prohibit 1-800 Contacts' ability to: (1) threaten a lawsuit if another entity violates its trademark rights; (2) file that lawsuit in an Article III court; (3) prosecute that lawsuit through trial; and (4) obtain a court order in its favor "at the conclusion of a contested litigation."

Complaint Counsel, however, potentially seek to constrict when and how 1-800 Contacts and the Article III courts can conclude litigation. Although ambiguous, the phrase "at the conclusion of a contested litigation" in subpart (c) could be read to suggest that 1-800 Contacts can only enforce a court order issued after a full trial. So interpreted, the order effectively restrains courts' power to enter orders approving settlements before a case is tried to completion, for a court order in favor of a party that cannot enforce it is no order at all. That is, one possible interpretation of the proposed Order is that courts must try cases that parties want to settle.

Such an order from an agency would impermissibly encroach upon core judicial powers. "[A] district court has inherent power to recognize, encourage, and when necessary enforce settlement agreements reached by the parties." *Bell v. Schexnayder*, 36 F.3d 447, 449 (5th Cir. 1994). The courts derive this specific power from their general authority to protect the efficient and orderly administration of justice. *In re Stone*, 986 F.2d at 902; *see generally Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (discussing inherent powers of the courts). And these powers "stem[] from article III." *In re Stone*, 986 F.2d at 902. "[O]nce Congress creates the court[s]," *id.*, those courts necessarily have "broad inherent powers 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Sherman v. United States*, 801 F.2d 1133, 1135 (9th Cir. 1986) (quoting *Link v. Wabash R.R, Co.*, 370 U.S. 626, 630-31 (1962)); *see Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (court has inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *In re Stone*, 986 F.2d at 903 (discussing a court's "inherent power to manage its own docket to achieve the just and efficient disposition of cases").[34] An order that requires courts to expend resources on cases against the parties' wishes runs roughshod over this power.

Indeed, the courts' inherent judicial powers to promote efficiency necessarily include a wide range of concomitant powers related to accepting and enforcing settlements. For example, "a federal court has the inherent power to enforce and to consider challenges to settlements entered in cases originally filed therein." *Ballato v. General Elec.*, 147 F.R.D. 95, 97 (E.D. Pa. 1993). This power "has as its foundation the policy favoring the amicable adjustment of disputes and the avoidance of costly and time-consuming litigation." *Id.*; *see also TNT Mktg., Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986) ("The district court ha[s] inherent power to enforce the agreement in settlement of litigation before it"). In general, the

> power of a trial court to enter a judgment enforcing a settlement agreement in a case pending before it has its basis in the policy favoring the settlement of disputes and the avoidance of costly and time-consuming litigation. The power to enforce a pre-trial settlement agreement, upon motion or petition, does not rest directly on the federal rules of procedure, but rests upon the authority of the Court to enter judgments by consent, on what has consistently been recognized as the

---

[34] *See generally Trippee Mfg. Co. v. Am. Power Conversion Corp.*, 46 F.3d 624, 629 (7th Cir. 1995) ("Federal district courts have the inherent power to administer their dockets so as to conserve scarce judicial resources."); *Resolution Trust Corp. v. Platt*, 853 F. Supp. 294, 297 (S.D. Ill.1993) ("This Court, as well as most federal courts in the country, is overburdened by a crowded docket. Therefore, 'the promotion of settlement is, as a practical matter, "an absolute necessity.'").

> trial court's inherent power to summarily enforce settlement agreements entered into by the parties' litigant in a pending case.

Read v. Baker, 438 F. Supp. 732, 735 (D. Del. 1977) (internal citations omitted).[35]

To the extent that Complaint Counsel's requested Order can be interpreted to bar courts from accepting or permitting settlements in certain trademark-related cases, the Order would result in an unconstitutional "encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122, (1976) (*per curiam*). An independent Article I agency like the Commission cannot lawfully bar courts from exercising their inherent power to accept settlements, for doing so would represent a massive and unjust amplification of the Executive Branch's power at the expense of the federal judiciary. "Such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982). To avoid this unconstitutional result, the proposed Order should be amended to delete the ambiguous phrase "at the conclusion of contested litigation," and replace it with "including an order approving a litigation settlement," as illustrated in the redlined Order at Exhibit A.

[35] In addition, courts have "broad authority to compel participation in mandatory settlement conference[s]." *United States v. United States Dist. Ct. for the N. Mariana Islands*, 694 F.3d 1051, 1057 (9th Cir. 2012). They also have inherent authority to require a party, including the government, to have a representative with full settlement authority present at a settlement conference. *In re Stone*, 986 F.2d at 902; *see also G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). Similarly, "when parties request assistance in resolving their disputes by way of a Court-supervised settlement conference, the Court is well within its authority to require the parties to negotiate in good faith prior to the conference so as to utilize everyone's time most efficiently and provide the best opportunity to achieve settlement." *White v. Fisher*, No. 1:07-cv-00317-SEB-TAB, 2008 WL 687000, at *1 (S.D. Ind. Mar. 7, 2008).

B. **<u>As Applied to 1-800 Contacts' Existing Settlement Agreements, The Proposed Order Violates Settled Principles of Administrative Law and Is Unconstitutional</u>**

In addition to raising serious constitutional concerns if applied prospectively to prohibit court-approved settlements, Complaint Counsel's proposed Order also raises both administrative and constitutional law concerns if it is applied to functionally dissolve 1-800 Contacts' existing settlement agreements.

1. An Order Effectively Dissolving Existing Settlement Agreements Would Contravene Administrative Law Principles

It is blackletter administrative law that courts should carefully scrutinize "whether a new rule developed in adjudication should be given retroactive effect." *Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184, 1194 (D.C. Cir. 1984). "[C]ourts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests." *Retail, Wholesale & Dep't Store Union v. NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972). The reason for this is understandable and central to the rule of law: "Unless the burden of imposing the new standard is *de minimis,* or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect." *Id*. at 392. Accordingly, if this Court concludes—for the first time ever—that 1-800 Contacts' settlement agreements exceed the scope of its available trademark rights because of provisions related to the use of keywords,[36] then that new rule should not be applied retroactively to the agreements that 1-800 Contacts reached many years ago when that rule of trademark law did not exist.

With these foundational administrative law principles in mind, courts have typically considered five non-exhaustive factors when determining whether to retroactively apply a new rule announced in an administrative adjudication:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390. A party need not satisfy all of these factors; courts have applied a balancing test when considering whether to retroactively apply a new rule that is first announced in a particular adjudication. *See Gilbert v. Fed. Mine Safety & Health Review Comm'n*, 866 F.2d 1433 (D.C. Cir. 1989). Some courts do not strictly examine these five factors but simply "balance the ills of retroactivity against the disadvantages of prospectivity." *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1988). It does not matter, however, which test this Court applies here: Complaint Counsel have not suggested any reason why this Court should apply its newly-announced rule regarding keyword search advertising to settlements reached almost a decade ago when the parties to the agreements could not have imagined that such agreements would violate either the antitrust or trademark laws.

[36] To be clear, as noted earlier, *supra* at 81-83, the provisions requiring settling parties to utilize negative keywords are satisfied by the use of "exact match" negative keywords.

To begin, this is not an issue of first impression. *Compare Local 900*, 727 F.2d at 1195 ("For a variety of reasons, it is often appropriate to apply a rule in the first case in which a given problem arises, but the present case is hardly one of first impression; as is evident from the discussion in part II, superseniority clauses have been litigated for years."). As noted in 1-800's post-trial brief and Mr. Hogan's expert report, courts across the country have addressed—and blessed—settlements such as the thirteen at issue here. 1-800 Post- Trial Br. at 22-25. In fact, a federal district court specifically sanctioned 1-800 Contacts' settlement agreement with Vision Direct (CX 144), and that settlement mirrors the other settlements that this Court would retroactively undo if it adopted Complaint Counsel's flawed proposed Order.

Likewise, numerous parties have engaged in the "well established practice" of settling disputes over the use of keywords just like 1-800 did. Respondent's Opening Post-Trial Brief at 24-25; *Local 900*, 727 F.2d at 1194. 1-800 Contacts and numerous other companies spent significant time and expense litigating as if those rules properly governed the keyword search marketplace; it therefore would be inappropriate and inequitable to force 1-800 Contacts to bear all of those costs when this agency suddenly declares a new, contrary rule of trademark law a decade or more later. *Cf. Albany Gen'l Hosp. v. Heckler*, 657 F. Supp. 87, 92 (D. Or. 1987) ("The court finds that it would be contrary to the standards of fair litigation to allow the Secretary at this stage in the proceedings to change the rule the plaintiffs must challenge.").

What is more, in reaching these settlements, 1-800 Contacts retained experienced trademark attorneys, as did many of the other settling parties. Other expert practitioners like Howard Hogan have advised hundreds of clients to enter similar agreements. (Hogan, Tr. 3245, 3247-3248; 3271-3272). *See Retail, Wholesale & Dep't Store Union*, 466 F.2d at 391 ("The record shows that in this case the Company at all times sought and closely followed the advice of counsel."). Indeed, based on counsel of this sort, "throughout this litigation, [1-800 Contacts] has demonstrated a sincere belief that the law" regarding keyword search advertising as applied to their trademarks was "settled." *Dominguez v. Yahoo!, Inc.*, No. 13-1887, 2017 WL 390267, at *11 (E.D. Pa. Jan. 27, 2017). These critical facts further undermine retroactively upending those settlements.

As noted, of the many cases dealing with keyword searches that both 1-800 Contacts and Complaint Counsel cited, this would be the *first one* in which a court of any kind held that those settlement agreements are unlawful under either the trademark or antitrust laws.[37] That kind of abrupt change in the law strongly weighs against retrospective application to 1-800 Contacts' entrenched settlement agreements. *Gilbert*, 866 F.2d at 1442 (holding that "there is no doubt that the Commission's changed policy under Rule 40(b) resulted in an abrupt departure from well established policy" (internal quotation marks omitted). At the time 1-800 Contacts entered into its settlement agreements, the case law was settled in its favor, the outcomes *in its own cases* were settled (including the court-sanctioned settlement with Vision Direct, (CX 144), and the

[37] It makes no difference that the questions presented in this case are issues of first impression for the Commission. "Since it is normally the Board's first announcement of a new rule in an adjudicatory setting that puts parties on notice and ends their ability to claim reliance on a previous standard, the question of retroactive application should not turn on whether the particular judicial forum the parties have chosen has had occasion to pass upon the rule." *Retail, Wholesale & Dep't Store Union*, 466 F.2d at 390 n. 22. Indeed, the "principal concern" of retroactivity rules "is lack of notice and the degree of reliance on former standards." *Id*. Surely, 1-800 Contacts could not have predicted that the Commission would one day look into its trademark settlement agreements when it first began entering them so many years ago, and it therefore lacked the notice needed to apply this new rule retroactively.

Lensworld default judgment, (CX 162)), and the legal advice that then prevailed led many others to settle cases on similar terms, (Hogan, Tr. 3245, 3247-3248). All of this counsels in favor of applying Complaint Counsel's new rule only prospectively—not retroactively.

In addition, the retroactive invalidation of 1-800's settlement agreements would impose significant burdens on 1-800 Contacts. These agreements were reached many years ago. The statute of limitations on most of the underlying trademark infringement and common law claims has passed, and 1-800 Contacts likely would not be able to re-litigate those claims if this Court suddenly undid its settlement agreements, per Paragraph III of Complain Counsel's proposed Order. Similarly, after the parties reached their settlement agreements, courts dismissed the cases with prejudice, which also would likely prevent re-litigation of the claims. And even if 1-800 Contacts could somehow bring its original legal claims again, the passage of time has guaranteed that important evidence has been lost, witnesses' memories will have faltered, and the basic nature of the Internet has changed, rendering a fair trial on the facts that existed at the time virtually impossible. This would leave 1-800 Contacts unable to recreate the circumstances that generated the underlying suits in the first place. It would be "the height of unfairness" to undo these settlement agreements without any realistic ability to litigate the issues that generated them so many years ago. *Gilbert*, 866 F.2d at 1442. These burdens are plainly not "*de minimis*"—and that alone should preclude its retroactive effect here. *Retail, Wholesale, & Dep't Store Union*, 466 F.2d at 392.

Finally, although Complaint Counsel may argue that there is an interest under the policies of the FTC Act in applying its new rule to these past settlements, that position is without merit.

Although Complaint Counsel perceive an important interest in barring settlements of this kind, they cannot ignore two countervailing public policies. *First*, it is undisputed that the Supreme Court has recognized the important public policy in favor of trademark protection. It noted just last month that "'[n]ational protection of trademarks is desirable,' we have explained, 'because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.'" *Matal v. Tam*, 137 S. Ct. 1744, 1752 (2017) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U. S. 522, 531 (1987)). Similarly, there is a strong public policy in favor of settlement agreements. Indeed, Complaint Counsel have never denied that the policy in favor of settlements exists and is squarely implicated by this case. That public policy must be considered alongside whatever public policy Complaint Counsel seek to vindicate under the FTC Act.

Given the strong and well-recognized interest in promoting and preserving settlement agreements, especially in the area of trademark law, there is no reason to upset *previously-reached* trademark settlement agreements when Complaint Counsel's new rule can adequately address any alleged consumer protection problems related to keyword search advertising in the future. To hold otherwise would cast a significant shadow over all settlement agreements and would drive parties (in trademark and other suits) to consider litigating to judgment or default judgment so as to avoid retroactive dissolution of their settlements, with serious attendant costs on the efficient functioning of the judicial system.

In the end, the basic test for retroactive application of new adjudicatory rules "boil[s] down . . . to a question of concerns grounded in notions of equity and fairness." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (internal citations and quotation marks omitted). 1-800 Contacts respectfully submits that it would be grossly unfair to torpedo a series of settlement agreements that the parties reached many years ago at a time when courts and trademark experts around the country were endorsing them. To upend those agreements now would impose enormous burdens on the 1-800 Contacts, a burden particularly unjustified where a prospective rule will cure many of the ills that Complaint Counsel have alleged in this case. *See McDonald v. Watt*, 653 F.2d 1035, 1046 (5th Cir. 1981) ("[f[inding the prospectivity side of the scale full and the retroactivity side empty" where an adjudicatory rule would impact numerous existing leases and where the statute at issue in the case did not absolutely compel the new rule). Indeed, the retroactive application of these rules would contravene established principles of administrative law. As the D.C. Circuit has explained:

> that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" has been well-established for "centuries." *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 265 (1994). Anything less ought not to be dignified with the title of law. These "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir.1987).

NetworkIP, LLC v. FCC, 548 F.3d 116, 122-123 (D.C. Cir. 2008).

2. The Proposed Order Retroactively Deprives 1-800 Contacts of an Opportunity to Pursue Lawful Relief

It is again important to emphasize that if this Court rules in Complaint Counsel's favor on the merits, it will be establishing an entirely new rule of law. As the Commission itself has held, for Complaint Counsel to prevail on its Section 5 claim, they must prove that "1-800 Contacts restricted competition beyond 'the scope of any property right that 1-800 Contacts may have in its trademarks.'" Opinion and Order of the Commission (Feb. 1, 2017) at 4 (quoting Cmplt., ¶ 32). Since Complaint Counsel have made no effort to show, on a case-by-case basis, that 1-800 Contacts necessarily would have lost each of the cases underlying the settlement agreements, the only way they can establish that the relief 1-800 Contacts obtained exceeded its trademark rights is to establish, *as a matter of law*, that a settlement agreement restricting the use of an allegedly-infringing keyword (or requiring the implementation of negative keywords) is *never permissible* under trademark law. As 1-800 Contacts has demonstrated, this is not the law, and it should not be the law. No court has ever held that claims related to the infringing use of search keywords are not cognizable under the Lanham Act (or any other cause of action). And certainly no court has concluded that 1-800 Contacts would have lost each of its fact-intensive suits that resulted in settlement agreements. However, if this Court disagrees and adopts such legal principle as an inviolate principle of trademark law for now and for all time, then it necessarily will be announcing a rule that was not the prevailing law when 1-800 Contacts entered into its settlement agreements.

This is important not just because applying such a new rule retroactively would violate principles of administrative law, but also because if 1-800 Contacts had known that this Court would announce a new rule of law that would topple its settlement agreements, it could and would have pursued a different legal strategy. It would not have agreed to those settlements. Instead, it would have continued litigating its cases to the point where a federal district court issued a final order—either approving a settlement if such a court order is enforceable or, if it is not, then after a trial on the merits or through a default judgment. Complaint Counsel concede that this "court-ordered" final judgment would be "beyond the reach of the antitrust laws." CC Post-Trial Brief at 147 & 158.

In addition, the final disposition of 1-800 Contacts' case against Lensworld.com illustrates an alternative path open to 1-800 Contacts that also would not run afoul of the antitrust laws and that was available to 1-800 Contacts if it had earlier been made aware of the "new trademark rule" advocated by Complaint Counsel. In September 2008, a federal district court in Utah entered a default judgment against Lensworld.com, Inc. in a trademark infringement suit that 1-800 Contacts brought. (*See* CX 162). Paragraph 2 of that default judgment Order provided that Lensworld.com may not purchase 1-800 Contacts' trademarks "as keywords for any search engine advertising program." (CX 162 at 1). Paragraph 4 of that Order provided that Lensworld.com was required to implement certain negative keywords "for so long as any one of [1-800 Contacts'] federally recognized trademarks remain active." (CX 162 at 2). This Court does not have the constitutional authority to interfere with the inherent powers of that court or its ability to enforce that default judgment for similar separation-of-powers-related reasons to those stated above. *See, e.g., City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 238 (2d Cir. 2011) ("Although Rule 55(a) contemplates that entry of default is a ministerial step to be performed by the clerk of court, a district judge also possesses the inherent power to enter a default." (internal citations omitted)); *see generally* 10-55 Moore's Federal Practice § 55.12[3] (2017) ("[T]he court also has the ability to enter default, or to order the clerk to enter default on the docket."). Tellingly, Complaint Counsel decided: (1) not to challenge the Lensworld.com disposition in this case, and (2) to craft their proposed Order only to prohibit 1-800 Contacts entering into a "combination, conspiracy, or agreement" with another contact lens retailer, which a default judgment is not.

The evidence in the record makes it quite likely that 1-800 Contacts could have obtained default judgments against the other settling parties. The record shows that the settling parties settled for *the same reasons* that a party chooses to default: after evaluating the strength of its claims and the future costs of litigation, they calculated that they would be better off settling than continuing to litigate. Indeed, Complaint Counsel's own expert testified that there was no reason to doubt that 1-800 Contacts' "settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation," (Evans, Tr. 1831), and numerous third-party witnesses agreed that the decisions to settle were based on exactly those considerations, *see* 1-800 Post-Trial Br. at 29-30. Thus, if 1-800 Contacts had persisted with its litigation because it was forbidden from settling (as it would be under Complaint Counsel's proposed Order), the settling parties would have made the rational economic and legal choice to default just like Lensworld.com. Those default judgments would have provided the exact same relief as the settlement agreements and yet would have been protected from antitrust challenge, as Complaint Counsel themselves concede. *See* CC Post-Trial Brief at 147 & 158 ("Court-ordered relief is beyond the reach of the antitrust laws.").

In short, Complaint Counsel's request for relief that will effectively dissolve 1-800 Contacts' existing settlement agreements punishes 1-800 Contacts for pursuing one then lawful means for resolving its trademark litigation (settlement) rather than others (default judgment or court-approved settlement either during litigation or after trial) on the ground that an agency has decided ten years later that the courts were wrong about trademark law. *See Lenox, Inc.*, 417 F.2d at 128 (striking a provision from a Commission remedial order where "no remedial purpose can be seen for the prohibition; it can only be regarded as punitive"); *Holtzman*, 762 F.2d at 726 ("Even in the antitrust area, however, a necessary and appropriate injunction against otherwise lawful conduct must be carefully limited in time and scope to avoid an unreasonably punitive or nonremedial effect."). Even if this Order purportedly has prospective effect, it punitively attacks litigation decisions made years ago and imposes burdensome costs that were not predictable when 1-800 Contacts rationally chose to settle instead of forcing a default judgment or obtaining a court-approved settlement. *Compare Benrus Watch Co. v. FTC*, 352 F.2d 313, 322 (8th Cir. 1965) ("Cease and desist orders are not punitive, and they operate prospectively. . . . As we have said, the order is not punitive, and compliance with it will not be hurtful or burdensome."). As such, the proposed Order exceeds the bounds of agency authority under the FTC Act.

3. An Order Effectively Dissolving Existing Settlement Agreements Would Violate the Constitution

For the same reasons discussed in Section A, *supra*, undoing the existing Settlement Agreements pursuant to Paragraph III of Complaint Counsel's proposed Order would interfere with Article III courts' power to enforce settlement agreements that were reached in the underlying litigations. Those cases resulted in court-approved dismissals because the cases were settled. (RX 1794 (dismissing the Memorial Eye case "*with prejudice*" (emphasis in original)); *1-800 Contacts, Inc. v. Empire Vision Center, Inc.*, Case No. 2:10-cv-173, Dkt. 12 (May 18, 2010) (order dismissing the case "With Prejudice"); *1-800 Contacts, Inc. v. Walgreens Co.*, Case No. 2:10-cv-536, Dkt. 18 (Jul. 20, 2010) (order dismissing case "*with prejudice*" (emphasis in original)); *1-800 Contacts, Inc. v. Coastal Contacts, Inc.*, Case No. 2:04-cv-249, Dkt. 18 (Nov. 15, 2004) (order dismissing case "with prejudice")). By functionally dissolving the settlement agreements over which the courts have power, Paragraph III of Complaint Counsel's proposed Order would intrude on the courts' ability to exercise "inherent power to enforce agreements entered into in settlement of litigation pending before them." *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976).

In addition, the proposed relief rubs up against an "antiretroactivity principle" which "finds expression in several provisions of our Constitution." *Landgraf v. USI Film Prods, Inc.*, 511 U.S. 244, 265 (1994). "The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation," and the "Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* (internal citation omitted); *see also Downs v. Director, Office of Workers Compensation Programs*, 803 F.2d 193, 198-99 (5th Cir. 1986) (upholding due process challenge to a retrospective challenge to an existing settlement agreement). Depriving 1-800 Contacts of the value of its contractual rights by announcing new rules of trademark law and imposing them retroactively raises serious concerns under the Takings and Due Process Clauses. At a minimum, this Court should not interpret its remedial powers under the FTC Act to raise serious constitutional issues. *See supra* at n. 30.

Accordingly, if this Court rules in favor of Complaint Counsel, it should make clear that its Order does not apply retroactively to 1-800 Contacts' well-settled and longstanding trademark agreements. Eliminating Paragraph III from Complaint Counsel's proposed Order will achieve that necessary end. *See Lenox, Inc.*, 417 F.2d at 128 (eliminating a paragraph from a FTC order to prevent an unlawful outcome).

C. Paragraphs II.C. and II.D of The Proposed Order Should Be Stricken Because They Create Impermissible Obey-The-Law Injunctions

Paragraphs II.C and II.D of Complaint Counsel's proposed Order would prohibit 1-800 Contacts from:

> C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion;
>
> D. Entering Into any combination, conspiracy, or agreement with a Seller to:
>
> 1. Fix, raise, or stabilize prices or price levels, or engage in any other pricing action; or
>
> 2. Allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

For a number of reasons, these provisions go beyond the Commission's remedial power and should not be included in any Order issued by this Court.

First, to the extent that the provisions merely restate the prohibitions of the Sherman Act or of Section 5, such "obey-the-law" provisions are impermissible and unenforceable.[38] Indeed,

---

[38] *See, e.g., Florida Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1222–23 (11th Cir. 2000); *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491 (7th Cir. 2008); *Louis W. Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994);

courts have invalidated obey-the-law injunctions both from the Commission and in the Sherman Act context. *See City of Mishawaka v. Am. Elec. Power Co., Inc.*, 616 F.2d 976, 991 (7th Cir.1980); *FTC v. Slimamerica*, No. 97-CIV-06072, 2011 U.S. Dist. LEXIS 24177, at *11 (S.D. Fla. Mar. 9, 2011) (refusing to impose requested "fencing in" provision because it simply required respondent to obey the law); *FTC v. Washington Data Res.* No. 8:09–cv–2309–T–23TBM, 2012 WL 2075827, at *5 (M.D. Fla. June 8, 2012). They have done so for a variety of reasons, including that such injunctions violate the Due Process Clause and separation-of-powers principles. *See*, *e.g.*, *SEC v. Sky Way Global, LLC*, 710 F.Supp.2d 1274, 1279-1282 (M.D. Fla. 2010).

In addition, courts have held that obey-the-law injunctions violate basic principles of equity. As the Sixth Circuit explained last year:

> The prohibition on overbroad or vague injunctions is deeply rooted in equity. The Supreme Court has warned against "sweeping injunction[s] to obey the law" and has cautioned courts about their "duty to avoid" such orders. *Swift & Co. v. United States*, 196 U.S. 375, 401, 25 S. Ct. 276 (1905). The warning followed from the Supreme Court's emphasis that "defendants ought to be informed, as accurately as the case permits, what they are forbidden to do." *Id*.

Perez, 655 F. App'x at 411. As another Court of Appeals explained, Commission orders "worded in such general language" that "in effect the petitioners are simply enjoined from violating the law … are disfavored because they alter the scheme of penalties and enforcement procedures defined by the Act without specific identification of the proscribed conduct." *Standard Oil Co. v. FTC*, 577 F.2d 653, 661 (9th Cir. 1978). Such a "cease and desist order

---

Payne v. Travenol Labs., Inc., 565 F.2d 895, 898 (5th Cir. 1978); *see generally Perez v. Ohio Bell Tel. Co.*, 655 F. App'x 404, 410-411 (6th Cir. 2016) (citing cases).

transfers responsibility for enforcement of the Act from the Commission to the district courts, … thereby causing a short-circuit in the normal procedure which gives an alleged section 5 violator a full hearing before the Commission." *Id.* Paragraphs II.C and II.D would short-circuit 1-800 Contacts' due process rights to a full hearing on alleged antitrust violations.

Second, Paragraphs II.C and II.D are not limited to the scope of the Sherman Act or Section 5 and go "further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933) (reversing Commission remedial order). Although the Commission may impose so-called "fencing in" provisions (which enjoin conduct beyond that found to be the violation of Section 5), such provisions must have a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946) (reversing Court of Appeals affirmance of Commission remedy). In particular, the Commission cannot impose "an order that "sweeps across lawful and unlawful behavior without distinction." *Federated Nationwide Wholesalers Serv. v. FTC*, 398 F.2d 253, 260 (2d Cir. 1968).

Paragraphs II.C. and II.D, as drafted, sweeps too broadly and would restrict lawful, procompetitive conduct. The scope of Paragraph II.D, unlike the Sherman Act, is not limited to agreements that *unreasonably* restrain trade. The language thus sweeps in potentially procompetitive agreements, such as joint venture agreements and patent pools. Such agreements often fix prices or divide markets, but are nonetheless entirely lawful because they bring about procompetitive benefits. *See, e.g.*, *Broad. Music, Inc.*, 441 U.S. at 9 ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act.")

Similarly, Paragraph II.C, which prohibits any agreement that would "place any limitation on truthful, non-deceptive, and non-infringing advertising," would effectively prevent 1-800 Contacts from entering into *any* settlement agreement involving allegedly trademark infringing or deceptive advertising, either as a plaintiff or a defendant. After all, one of the parties always contends that the at-issue advertising was "truthful, non-deceptive, and non-infringing advertising." 1-800 Contacts would thus have to obtain a judicial decision on the issue or face the prospect of having the Commission second-guess its settlement agreement.

By sweeping in both lawful and unlawful conduct, the proposed Order would be an abuse of discretion. *Federated Nationwide Wholesalers Serv.*, 398 F.2d at 260. Although the Commission may close off alternative avenues to the same violation, the Commission's fencing in authority does not permit an order that "leaves open no path on which [Respondent] can 'travel without anxiety.'" *Id.*

The restrictions imposed by Paragraphs II.C and II.D also fail because they are not "reasonably calculated to prevent future violations of the sort found to have been committed." *ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 221 (2d Cir. 1976). The Paragraphs impermissibly "go far beyond elimination of the specific [conduct at issue] and also beyond what in fairness could be deemed necessary to deter future unlawful conduct." *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978).

Indeed, Complaint Counsel made no effort to answer "the ultimate question" determining the need for and scope of any fencing in: "the likelihood of the [respondent] committing the sort of unfair practices they prohibit." *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982). To show such a likelihood, Complaint Counsel had the burden to prove that 1-800 Contacts' conduct showed "a ready willingness to flout the law, sufficient [to] cause for concern regarding further, additional violations." *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982). "Among the circumstances which should be considered in evaluating the relation between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices." *Standard Oil*, 577 F.2d at 662.

The record is devoid of evidence that would support such a finding. The settlement agreement cannot be characterized as a "blatant and utter disregard of the law." Complaint Counsel have conceded that the underlying litigations were *bona fide* and non-sham. The parties settled disputed claims in the face of factual and legal uncertainty. And the proscriptions in the agreements are similar to those in other settlement and court orders. *Standard Oil*, 577 F.2d at 663 ("The circumstances surrounding the violation . . . indicate that [respondents] did not act in blatant disregard of their responsibilities under the Act."). Moreover, 1-800 Contacts has no past record of violations. *See id.* at 663 ("Standard has never before been accused of false advertising, and BBD&O, the nation's third largest domestic advertising agency, has had one FTC consent order entered against it. The breadth of these orders cannot be justified by characterizing petitioners as habitual violators of the Act for whom special deterrence is required.”); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 707 (3d Cir. 1982) (fencing in provision justified because respondent had been the subject of three prior Commission orders). The overbreadth of Paragraphs II.C and II.D would therefore make the proposed order unenforceable. *See ITT Cont’l Baking Co*, 532 F.2d at 222 (Commission cease and desist order overbroad due to “sweeping language” proscribing misrepresenting nutritional characteristics of food “in any manner”).

The Court should excise Paragraphs II.C and II.D from the proposed Order.

* * * * *

Other changes necessary to conform the Order proposed by Complaint Counsel to the law and the limits proscribed by the Due Process Clause are included in the redlined version attached as Exhibit A.

VI. CONCLUSION

Complaint Counsel failed to meet their burden to prove that the challenged settlement agreements violate the FTC Act and this case should be dismissed.

DATED: July 20, 2017

Respectfully submitted,

/s/ Steven M. Perry

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

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

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

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

Counsel for Respondent 1-800 Contacts, Inc.

EXHIBIT A

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

In the Matter of	)	
1-800 CONTACTS, INC.,	)	
a corporation,	)	**DOCKET NO. 9372**
Respondent	)	

[PROPOSED] ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "1-800 Contacts" means 1-800 Contacts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts, and the respective ~~partners, directors, officers, employees, agents, representatives,~~ successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Communicate," "Communicating," or "Communication" means the exchange, transfer, or dissemination of any information, without regard to the manner or means by which it is accomplished.

D. "Entering Into" means entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.

E. "Keyword" means a word or phrase used to instruct a Search Engine to display specified Search Advertising.

F. "Negative Keyword" means a word or phrase used to instruct a Search Engine not to display specified Search Advertising.

G. "Person" means both natural persons and artificial persons, including, but not limited to, corporations and unincorporated entities.

H. "Search Advertising" means online advertisements displayed on a Search Engine Results Page in response to a user query.

I. “Search Engine” means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.

J. “Search Engine Results Page” means a web page displayed by a Search Engine in response to a user query.

K. “Seller” means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.

L. “Trademark Infringement Claim” means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the advertising, marketing, sale, or distribution of contact lenses in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from:

A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller’s participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.

<u>*Provided further* that nothing in this Paragraph II.A. shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent’s intention to initiate or prosecute a lawsuit, (c) implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement, or (d) enforcing any settlement agreements already entered into prior to the initiation of the Commission’s complaint in this matter.</u>

B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B. shall prohibit Respondent from entering into or complying with a written agreement providing that:

1. A Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or

2. A Seller’s Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B. shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, ~~or~~ (c) implementing or enforcing the order entered by any court of law ~~at the conclusion of a contested litigation~~, including an order approving a litigation settlement, or (d) enforcing any settlement agreements already entered into prior to the initiation of the Commission's complaint in this matter.

~~C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion;~~

~~D. Entering Into any combination, conspiracy, or agreement with a Seller to:~~

~~1. Fix, raise, or stabilize prices or price levels, or engage in any other pricing action; or~~

~~2. Allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.~~

C. Attempting to engage in any conduct that is prohibited by Paragraph II. of this Order.

~~III.~~

~~**IT IS FURTHER ORDERED** that Respondent shall:~~

~~A. Cease and desist from enforcing or attempting to enforce an existing agreement or court order that imposes a condition on a Seller that is not consistent with Paragraph II. of this Order.~~

~~B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any court order or agreement that imposes a condition on a Seller that is not consistent with Paragraph II. of this Order.~~

II~~V~~.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order is issued:

1. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;

~~2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:~~

~~(a) To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and~~

~~(b) With whom Respondent entered into any agreement prohibited by Paragraph II. of this Order.~~

B. For a period of five (5) years from the date this Order is issued:

~~1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;~~

~~2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1. of this Order no later than the time Respondent initially Communicates with such Person;~~

~~3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement; and~~

4. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position.

C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III~~V~~.

IV.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than ninety (90) days from the date this Order is issued, and

B. One (1) year from the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission may request.

V~~I~~.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order is issued, Respondent shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondent;

B. Any proposed acquisition, merger, or consolidation of Respondent; or

C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VI~~I~~.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order is issued, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII~~I~~.

IT IS FURTHER ORDERED that this Order shall terminate five (5) ~~twenty (20)~~ years from the date it is issued.

By the Commission

Donald S. Clark
Secretary

SEAL

ISSUED:

~~Appendix A~~

~~[Letterhead of 1-800 Contacts]~~

~~[Name and Address of the Recipient]~~

~~Dear (Recipient):~~

~~As you may know, the Federal Trade Commission issued an administrative complaint in 2016 against 1-800 Contacts, Inc. ("1-800 Contacts") challenging several agreements between 1-800 Contacts and other contact lens sellers that restrict the ability of any seller to purchase trademark keywords in search advertising auctions, or to place search advertising triggered by those keywords on internet search engine results pages.~~

~~The Federal Trade Commission has issued a Decision and Order ("Order") against 1-800 Contacts in connection with its complaint. This Order provides, in part, that 1-800 Contacts may not prohibit competing sellers of contact lenses from engaging in truthful, non-deceptive advertising or solicitation through the display of search advertising. Specifically, 1-800 Contacts may not:~~

1. ~~Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords;~~

2. ~~Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising; or~~

3. ~~Enter into, enforce, or attempt to enforce any agreement with a contact lens seller to allocate or divide markets or customers; or to raise, fix, maintain, or stabilize prices or price levels.~~

~~The Order further requires 1-800 Contacts to take whatever action is necessary to have vacated all court orders or other restraints related to trademark infringement claims initiated to accomplish any of the above-listed prohibited activities.~~

~~The Order does not prohibit 1-800 Contacts from entering into an agreement with a seller of contact lenses that requires certain disclosures in the *text* of an advertisement, including a clear identification of the seller placing the advertisement.~~

~~For more specific information, you should refer to the FTC order itself. The Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http:\\www.ftc.gov.~~

__PUBLIC__

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

DATED: July 20, 2017

By: */s/ Eunice Ikemoto*
Eunice Ikemoto

PUBLIC

CERTIFICATE FOR ELECTRONIC FILING

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

DATED: July 20, 2017

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

35645986.2

Notice of Electronic Service

I hereby certify that on July 20, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts' Corrected Post-Trial Reply Brief, with:

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

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

I hereby certify that on July 20, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts' Corrected Post-Trial Reply Brief, upon:

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

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

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

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

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

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

Nathaniel Hopkin
Attorney
Federal Trade Commission
nhopkin@ftc.gov

Complaint

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

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

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

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

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

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

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

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

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

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

Sean Gates

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

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

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

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

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

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

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

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

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

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

Henry Su
Attorney
Federal Trade Commission
hsu@ftc.gov

Complaint

Steven Perry

Attorney