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

In the Matter of **1-800 Contacts, Inc.,** **a corporation**	**Docket No. 9372**

RESPONDENT 1-800 CONTACTS' POST-TRIAL BRIEF

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

RF # — Respondent Proposed Finding of Fact

CX 0# — Complaint Counsel Exhibit

RX # — Respondent Exhibit

Name of Witness, Tr. XX — Trial Testimony

CX 0/RX # (Name of Witness, Dep. at XX) — Deposition Testimony

CX 0/RX # (Name of Witness, IHT at XX) — Investigational Hearing Testimony

Cmplt. ¶ X — Complaint

{bold} — In Camera Material

INTRODUCTION

Complaint Counsel contend that the challenged settlement agreements violate the antitrust laws. But the agreements were nothing more than garden-variety settlements, entered into in the face of legal and factual uncertainty. There is no dispute that the settlements resolved *bona fide* trademark infringement claims; Complaint Counsel have admitted that the underlying cases were not sham. At the time of the settlements, the law regarding trademark infringement in the keyword advertising context was still developing (and remains unsettled to this day). The question of whether each of the settling parties' paid search advertisements caused consumer confusion (and thus infringed 1-800 Contacts' trademarks) is inherently factual. And there was nothing unusual about the settlements' form; they were essentially standard non-use agreements, implemented through practical means, and limited to the type of relief 1-800 Contacts could have obtained had it prevailed in the trademark litigations.

Complaint Counsel's case—which involved extensive testimony and evidence regarding trademark infringement, the exact metes and bounds of the agreements, unilateral decisions by implementing parties on implementation, etc.—demonstrates the wisdom of the policies favoring settlement and finality. These policies should end the case at the outset. By framing these trademark issues as antitrust issues, Complaint Counsel ask the Court to relitigate the underlying lawsuits, resolve developing issues of trademark law, and decide issues of consumer confusion. Complaint Counsel thus ask the Court to adopt a rule that allows commonplace settlements of legitimate claims to be second-guessed, the state of the law reinterpreted, and the settling parties subject to antitrust liability. That is bad policy. And it lacks any legal basis.

But there is an even more fundamental problem. Complaint Counsel failed to prove their antitrust case. The settlements had numerous procompetitive benefits, such as protecting incentives to invest in brand-building and reducing consumer search costs. The agreements were limited to only one of many means contact lens retailers use to advertise (paid search advertising), and pertained to only a tiny fraction of such advertising. The relevant market includes a wide variety of retailers not subject to the agreements—including tens of thousands of eye care professionals, optical retail chains, and major retailers (such as Walmart, CVS, Costco, JC Penney, and Sam's Club)—who sell through multiple channels (online, in-store, and by phone). Barriers to entry are low; numerous new entrants have entered even in the last two years. And Complaint Counsel's experts concede that there is no evidence of increased prices, reduced quality, or reduced output. In short, the agreements did not have more than a *de minimis* effect on competitors and caused no substantial harm to competition.

Based on the evidence in the record, and as explained below, the Court should dismiss the Complaint.

SUMMARY OF ARGUMENT

To begin, let's start at the beginning. Respondent, 1-800 Contacts, was a "pioneer in the online sale of contact lenses." Cmplt. ¶ 15. It has spent hundreds of millions of dollars advertising its trademark, its brand name, and its customer service to persuade consumers that they can get the exact same contacts, delivered to their door, for less than they would pay at their doctor's office. Those are the very competitive efforts that Congress and the Commission sought to encourage when they enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), Pub. L. 108-164, 117 Stat. 2024 (Dec. 6, 2003), and the Contact Lens Rule, 16 C.F.R. § 315, *et seq.*, which seek to "increase[] consumers' ability to shop around when buying contact lenses." (RX 620-001). Despite 1-800 Contacts' pioneering efforts and one of the best customer service operations of any company in America, 1-800 Contacts sells no more than 10% of all contact lenses sold in the U.S.; the rest are sold by retailers such as Walmart, Costco, large optical chains such as Pearle Vision, and 16,000 doctors or ECPs with the unique power to sell patients what they prescribe for them to wear.

1-800 Contacts' success in breaking the stranglehold that ECPs had on the retail sale of contact lenses depended on its ability to distinguish itself in the eyes of consumers, to earn their trust, and to build its credibility. Indeed, 1-800 Contacts still has to fight to persuade new customers to trust an online business for the purchase of a medical device for their eyes, and it has to earn their loyalty year after year because state laws require that contact lens wearers must regularly renew their prescriptions, a requirement that gives ECPs the opportunity to make the sale for which 1-800 Contacts is competing. The company's investment in its trademark was essential to its success in persuading customers of its value proposition.

This case arises because 1-800 Contacts sought to protect its trademark from infringement; to prevent consumers from being confused or misdirected; to avoid dilution of the value of its trademark, its brand, and its investment in advertising; and to prevent rivals from free-riding on its investments.

The lawsuits 1-800 Contacts filed and the settlement agreements that resolved them focused on paid search advertisements displayed in response to a user search for "1-800 Contacts" or another variation of 1-800 Contacts' trademark. The settlement agreements did not affect rivals' ability to advertise in multitude of non-infringing ways, including television, radio, print, internet display advertising, social media advertising, and email advertising, or to present paid search ads in response to any query other than for 1-800 Contacts' trademark. The settlement agreements were thus very narrow in their scope, and in their effect. Even focusing just on paid search advertising, 98% of contacts-related searches use terms other than 1-800 Contacts' trademark and thus were not affected by the agreements.

These allegedly infringing ads were not essential to the success of 1-800 Contacts' rivals. 1-800 Contacts' rivals (including those who settled and those who did not) have succeeded. Competition has increased and consumers have benefited. Complaint Counsel have offered no concrete evidence of price increases or output reductions resulting from the challenged settlement agreements. To the extent market share has been lost, it is the sales of ECPs that have declined, and they are not parties to the challenged agreements.

So, why are we here? Because Complaint Counsel are intent on establishing new restrictions on the rights of trademark holders. They are asking this Court to bless allegedly infringing conduct challenged by 1-800 Contacts in the underlying cases. They seek this ruling even though no court has ever held that 1-800 Contacts' claims of infringement were without merit. To the contrary, two courts have expressly rejected that claim. *1-800 Contacts, Inc. v. Mem'l Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, at *6 (D. Utah Mar. 15, 2010); *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS, 2014 WL 12596493 (D. Utah Mar. 3, 2014), ECF No. 91, at 2. And Complaint Counsel have conceded that 1-800 Contacts' litigations were not sham. (RX 0680-0012-13).

If the underlying infringement claims were based on viable legal theories, if the cases were not sham, then what could give rise to an antitrust violation? Complaint Counsel contend that it is the settlement agreements that resolved these cases. But this theory of antitrust liability is fundamentally flawed.

The challenged settlements of admittedly *bona fide* trademark litigation impose restraints that "it is reasonable to presume . . . are pro-competitive" and "favored in the law." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997). This principle applies squarely to the settlement agreements in this case. The conduct restrained by the settlement agreements—using another firm's trademark to trigger paid search advertising—indisputably constitutes a use in commerce under the Lanham Act. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144-45 (9th Cir. 2011); *Rescuecom, Inc. v. Google Inc.*, 562 F.3d 123, 128-41 (2nd Cir. 2009). Courts have recognized that the restrained use can, in fact, cause actionable likely confusion, and have denied motions to dismiss and motions for summary judgment arguing to the contrary. *E.g.*, *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760–61 (D. Minn. 2009); *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009). And courts have ordered relief on the same terms provided for in the challenged settlement agreements.

Faced with both legal and factual uncertainty regarding the potential outcome of 1-800 Contacts' claims, the parties agreed to settlements designed solely to protect their respective trademark rights. There were no unusual payments or unrelated restraints. As Complaint Counsel's expert, Dr. Evans, conceded, the challenged 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), and "were economically rational for this set of firms because this set of firms succeeded in avoiding potentially expensive and risky lawsuits" (CX 09042 (Evans, Dep. at 119-20)).

This case, then, turns on whether the Commission and Complaint Counsel can rewrite trademark law to permit conduct that courts have repeatedly found can give rise to trademark infringement liability.

But the Commission and Complaint Counsel face an even greater challenge: They need to show that a company with a 10% share of the market, through bilateral agreements with companies with a collective share that is even smaller, by imposing restrictions on a fraction of a fraction of a fraction of contact lens advertising, and affecting no more than 2% of contact lens sales, has violated antitrust law. Complaint Counsel have not met their burden. There are at least five independent hurdles that Complaint Counsel must overcome—failing to overcome even one is fatal to their case—and Complaint Counsel have fallen short each time.

***First*, Complaint Counsel failed to meet their burden to prove that the challenged settlement agreements do not take "commonplace forms."** ***FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2233 (2013).** Under the Supreme Court's decision in *Actavis*, only settlements taking "unusual" forms that suggest some intent to divide monopoly profits can give rise to antitrust liability. *Id.* at 2236. Indeed, the Commission argued in that case that there is no reason for "antitrust concerns" where "an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled." *FTC v. Watson Pharm, Inc.*, No. 12-416, Br. for Pet'r, 2013 WL 267027 (U.S. Jan. 22, 2013) ("*Actavis* Br."), at *27.

The record on this threshold and dispositive issue is not even close. The evidence shows that numerous other parties have settled trademark litigation on terms that prohibit paid search advertising using another firm's trademark—just as the settlements do here. Complaint Counsel's only response to that evidence came from Professor Rebecca Tushnet, a law professor who has never settled a trademark case, did not read the challenged settlement agreements, and did not point to any settlement agreement involving paid search advertising taking a form different from the challenged agreements. Instead, she sought to espouse what she thought the law *should be*. That is irrelevant. The question is whether there is any reason for suspicion that these settlements were a mechanism to divide monopoly profits at consumers' expense, and there is not. Indeed, Dr. Evans conceded that the *only* benefit any settling party received here was avoiding the costs of litigation. (CX 09042 (Evans, Dep. at 114-116)).

Thus, the only way for Complaint Counsel to prove that consumers would be better off without the challenged agreements is to prove that 1-800 Contacts would have lost each and every one of its trademark cases. But the cases were concededly not sham; they were grounded in accepted legal principles. To prove that 1-800 Contacts would have lost each of those cases would require litigating the facts of cases not fully discovered, presenting evidence more than a decade old, and reviving defenses years after the parties chose not to invoke them. To do so is not possible, and Complaint Counsel made no such effort. Indeed, doing so would have been an incredible departure from the Commission's position 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); *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"). Rather, as the Commission has said, 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." 136 F.T.C. at 998.

In sum, under *Actavis*, the settlement agreements cannot give rise to antitrust liability.

***Second,* Complaint Counsel failed to show that the settlement agreements are inherently suspect.** Complaint Counsel simply cannot get around two Supreme Court decisions that the Commission lost. *Actavis* rejected the Commission's argument that settlements of patent litigation are "presumptively unlawful" even where they allegedly involve payments to competitors to stay out of the market. 133 S.Ct. at 2237. Here there is not even a reverse payment. That should be the end of the matter.

In addition, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), rejected the Commission's argument that advertising restrictions are presumptively anticompetitive where they "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Id.* at 771. That decision is controlling where the record contains abundant evidence of procompetitive effects related to the settlement agreements: (1) avoiding litigation costs, (2) protecting trademarks and their associated incentives to make procompetitive investments, (3) preventing consumer confusion, and (4) reducing search costs. On top of all that, an unrebutted analysis based on Dr. Athey's own model predicts that the settlements *increased* sales of contact lenses by consumers who search for 1-800 Contacts' trademarks.

Further, the economics of search engines has only recently developed and, as Dr. Evans and Dr. Athey concede, is more complex than in traditional industries. The paid search advertising business itself also requires specialized knowledge. The parties' efforts to explain search advertising generated a glossary of jargon, and Google and Microsoft executives described complexities that foreclose any finding that "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.

Finally, Complaint Counsel have utterly failed to prove that the settlement agreements warrant their "Bidding Agreement" label. There is no evidence that any party to the settlements was rigging bids. The record instead shows, in the words of a [redacted] executive, that the settling parties thought the litigation was just "not worth it." (CX 09000 ([redacted] at 93-94). The economic evidence demonstrates that the agreements cannot be characterized as bid rigging. Indeed, as Dr. Evans admitted in response to the Court's questioning, far from bid rigging, an agreement settling litigation that a defendant could not afford to fight is not collusion at all. (Evans, Tr. 1466.)

Thus, the rule of reason applies and Complaint Counsel failed to carry their burden under that rule. They did not prove a relevant market, market power or anticompetitive effects.

***Third*, Complaint Counsel failed to meet their burden to prove that online contact lens sales constitute a separate antitrust market.** Complaint Counsel's proffered online-only market defies the "business reality—[ ]of how the market is perceived by those who strive for profit in it." *FTC v. v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998). 1-800 Contacts' entire business model is focused on competing for customers who buy contact lenses from independent ECPs and optical retailers with in-house ECPs. These are its largest source of new business. That is why 1-800 Contacts spends hundreds of millions of dollars targeting advertising at those customers and generally sets its prices at a 5 to 10% discount to ECPs' average prices. That is well-nigh dispositive evidence that ECPs, optical retail chains, mass merchants and other offline retailers constrain 1-800 Contacts from raising its prices and thus belong in the relevant antitrust market. And there is more: the economic logic of both the manufacturers' efforts to establish minimum retail prices through their UPP policies and Congress and the Commission's regulatory efforts, as well as empirical analyses by 1-800 Contacts' expert, Dr. Kevin Murphy, confirm that only a "broader national market . . . reflects the reality of the way in which [1-800 Contacts] built and conduct their business." *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966). In that market, 1-800 Contacts' 10% market share (and the settling parties' combined less than 20% share) is too small, as a matter of law, to enable it to exercise market power.

Complaint Counsel's sole proof in support of its narrow, online-only market consists of two empirical analyses by Dr. Evans, each of which is legally and factually flawed. Dr. Evans' first analysis, his critical loss analysis, is entirely premised on what consumers will do if prices go up. Yet, Dr. Evans relied entirely on data that do not reflect consumer behavior in response to a price increase. Other courts have rejected analyses based on such data, and this Court should as well. Dr. Evans' second analysis, his supposed "natural experiment" based on an increase in contact lens prices during the UPPs, cannot support a finding of an online-only market. As Dr. Evans conceded, since the UPPs did not only apply to online sellers, but also to other retailers such as club stores like Costco, his analysis says nothing about whether these other retailers can be excluded from the relevant market. To the contrary, properly understood, his "experiment" shows that club stores and many mass merchandisers should be included.

***Fourth*, Complaint Counsel failed to meet their burden to prove barriers to entry and expansion.** "Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." *Will v. Comprehensive Accounting Corp*., 776 F.2d 665, 672 n.3 (7th Cir. 1985). Since there are many "unbound" retailers not subject to the settlements, and since many more could enter, Complaint Counsel had the burden to prove significant barriers to entry and expansion. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996). They failed.

The only "barrier" Complaint Counsel's expert identified was achieving brand awareness. But courts have held that brand awareness is the work of competition, not a barrier to it. At trial, Dr. Evans could not answer the Court's questions about the costs of a prescription verification system or contact lens inventory, and conceded that Memorial Eye, a small group of ECPs in Texas, was able to easily expand to sell contact lenses online throughout the nation.

Complaint Counsel similarly adduced no evidence that unbound contact lens retailers such as Walmart, Costco, BJ's, Sam's Club, and JC Penney were constrained in any way from expanding their online operations. Thus, the record does not support an inference that 1-800 Contacts had the power to harm consumers, even in the narrow online market proposed by Complaint Counsel.

Fifth**, Complaint Counsel failed to meet their burden to prove that the settlement agreements enabled 1-800 Contacts to increase prices or reduce output of contact lenses.** Incredibly, Complaint Counsel's experts concede that they have not proved that prices were increased or output reduced as a result of the settlement agreements. Those concessions are fatal under Dr. Evans's own test: "[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 Antitrust Cases*, 75 St. John's L. Rev. 545, 545-46 (Fall 2001). Rather, "***there must be empirical evidence***." *Id.* at 546 (emphasis added). But the only such evidence points the other way: (1) 1-800 Contacts' margins have remained consistent, and (2) inputting Google data into Dr. Athey's own model of the counterfactual world predicts that the settlement agreements actually *increased* sales of contact lenses to consumers who searched for 1-800 Contacts' trademarks. That evidence is a stunning repudiation of Complaint Counsel's case.

Complaint Counsel are thus left arguing that advertising for contact lenses was reduced as a result of the settlement agreements. That argument fails as a matter of law and fact. Complaint Counsel have not defined an advertising market in which any harm to advertisers or consumers would have occurred. And *California Dental* squarely forecloses substituting evidence of effects on contact lens advertising for evidence of effects on sales of contact lenses:

"[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. 526 U.S. at 776. Dr. Evans, again, had it right before he became Complaint Counsel's expert: "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.

Complaint Counsel also proffered no evidence that overall contact lens-related advertising was reduced. They failed to analyze whether restricting advertising in response to searches for 1-800 Contacts' trademarks simply channeled advertising monies to other avenues. Further, the settlement agreements had no effect on the 98% of searches that Dr. Evans testified did not involve 1-800 Contacts' trademark. Dr. Athey's premise that consumers did not or could not find that information in these other channels lacks any support and should be disregarded as not credible. Dr. Athey admits that she has no evidence that any consumer did not know how to conduct contact lens-related searches for terms other than 1-800 Contacts' trademarks. To the contrary, she testified that consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses (Athey, Tr. 913-914), more than [redacted] of online contact lens shoppers compare prices (Athey, Tr. 941; CX 01449-055), and [redacted] of online contact lens shoppers check prices at three, four or five stores or websites (Athey, Tr. 941; CX 1449-055).

Complaint Counsel likewise failed to prove harm to search engines such as Google, which they call a "multi-billion dollar advertising juggernaut" (CC Pre-Trial Br. at 78).

Complaint Counsel did not account for the myriad complexities involved in determining the settlements' effects (if any) on search engines, which was outlined in evidence from Google and Microsoft—[redacted] Most notably, as noted earlier, Complaint Counsel made no attempt to determine whether the settlement agreements simply channeled bidding to terms other than 1-800 Contacts' trademarks. Regardless, proof that search engines lost money from restrictions on their ability to sell 1-800 Contacts' trademark for advertising reflects nothing more than that search engines were not able to "tax" 1-800 Contacts' investment in its brand. And that takes Complaint Counsel full circle, underscoring that their case is really about undoing and devaluing 1-800 Contacts' trademark rights—about changing trademark law.

Indeed, this case is a trademark solution in search of an antitrust problem. No matter that Complaint Counsel's *economic* expert, Dr. Evans, has no opinion that trademark law's competitive balance should be shifted one direction or the other. (CX 09042 (Evans, Dep. at 158).) Rather, Complaint Counsel's case centers on Professor Tushnet's academic criticism that advertising in response to searches for another firm's trademark should not be actionable infringement. That argument is well made to Congress and in *amicus* briefs to courts hearing trademark cases—like the Second Circuit in *Rescuecom*, which expressly rejected Professor Tushnet's position as set forth in an amicus brief she signed: "If we were to adopt Google and its amici's argument, the operators of search engines would be free to use trademarks in ways designed to deceive and cause consumer confusion. This is surely neither within the intention nor the letter of the Lanham Act." 562 F.3d at 130. (*See also* Tushnet, Tr. 4520-21).

Antitrust enforcement is the wrong instrument to impose an academic critique of intellectual property rights that has failed in the courts. Not only is it unfair to force 1-800

Contacts to permit competitors to use its trademark to advertise their own products in ways that 1-800 Contacts has a good faith basis to sue them for, it also is at odds with settled antitrust law. *See Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1216 (9th Cir. 1997) (court could find "no reported case in which a court ha[s] imposed antitrust liability for a unilateral refusal to sell or license a patent"); *cf. Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 377-78 (7th Cir. 1986) (Posner, J.) ("You cannot conscript your competitor's salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant. Advertising a competitor's products free of charge is not a form of cooperation commonly found in competitive markets; it is the antithesis of competition.").

Compelling "firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 4107-08 (2004). By requiring parties enforcing their trademarks to incur either the full costs of trial or the risk of antitrust liability, Complaint Counsel's proposed rule would reduce incentives for firms across the economy to invest in their marks. That would be particularly harmful in the contact lens industry, where all online retailers—both 1-800 Contacts and its competitors—benefit from 1-800 Contacts' investments in advertising that makes consumers aware of their options.

1-800 Contacts' efforts, through litigation and settlements, to protect the trademark that made possible these procompetitive investments were grounded in trademark law. Complaint Counsel's attempt to change trademark law has no basis in antitrust law. Most significantly, Complaint Counsel failed to prove an antitrust violation.

ARGUMENT

I. THE CHALLENGED SETTLEMENT AGREEMENTS ARE NOT SUBJECT TO ANTITRUST SCRUTINY UNDER *ACTAVIS*

Complaint Counsel have not met their threshold burden under the Supreme Court's decision in *FTC v. Actavis*, 133 S.Ct. 2223 (2013), to prove that the settlement agreements warrant antitrust scrutiny in light of our legal system's longstanding policy in favor of private settlements. Prior to *Actavis*, courts concluded that if there is nothing suspicious about the circumstances of a patent settlement, "then to prevent a cloud from being cast over the settlement process a third party should not be permitted to haul the parties to the settlement over the hot coals of antitrust litigation." *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 992 (N.D. Ill. 2003); *accord In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 205, 208 (2d Cir. 2006). As the Supreme Court in *Actavis* explained, "in light of the public policy favoring settlement of disputes," courts held that they "could not require the parties to continue to litigate in order to avoid antitrust liability." 133 S.Ct. at 2230.

Actavis established a two-part test for the narrow circumstances where this policy in favor of settlement does not preclude antitrust scrutiny of settlement agreements.

First, a party alleging that a settlement violates the antitrust laws must show that the settlement takes an "unusual" form. *See Actavis*, 133 S.Ct. at 2231, 2233. If a settlement takes a traditional or "commonplace form," it is not subject to antitrust scrutiny. *Id.* at 2233. Indeed, the Supreme Court made clear that it did not intend to displace the rule that "commonplace forms have not been thought for that reason alone subject to antitrust liability." *Id*. at 2233.

Second, even if a settlement's form is unusual rather than traditional or commonplace, *Actavis* requires a challenger to show that "settlements taking this form tend to have significant adverse effects on competition." 133 S.Ct. at 2231. The Supreme Court identified five factors relevant to that determination. If examining these factors shows that the settlement "reflects traditional settlement considerations, such as avoided litigation costs," it does not present the "same concern" and is not subject to antitrust scrutiny. *Id*. at 2236.

Complaint Counsel have failed to meet their burden to satisfy either *Actavis* requirement. As to the settlements' form, the uncontroverted evidence demonstrates that they are commonplace: they are standard non-use agreements routinely used in trademark disputes, including those involving paid search advertising, and provide for relief on terms that a court could have ordered if 1-800 Contacts prevailed. In addition, Complaint Counsel have not and cannot demonstrate that *any* of the five factors the Supreme Court identified in *Actavis* indicates that the settlements would tend to harm competition. To the contrary, Complaint Counsel's own expert, Dr. Evans, concedes that the settlements reflected traditional considerations about litigation costs. And the hearing in this case illustrated the Supreme Court's "practical concern" about re-litigating the underlying claims that the parties settled. *Id.* at 2234.

Since Complaint Counsel have failed to satisfy *Actavis*'s predicates for displacing the law's well-settled policy in favor of settlements, they have failed to demonstrate that the challenged settlements are subject to antitrust scrutiny.

A. Public Policy Strongly Favors The Settlement of Trademark Disputes.

Public policy strongly supports the private settlement of legal disputes. *See, e.g., Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); *St. Louis Mining & Milling Co. v. Montana Mining Company*, 171 U.S. 650 (1898) ("[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."). Indeed, "[f]ew public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute." *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986); *see, e.g., TBK Partners, Ltd.*

v. W. Union Corp., 675 F.2d 456, 461 (2d Cir. 1982) (noting "the paramount policy of encouraging settlements"); *Asahi Glass Co.*, 289 F. Supp. 2d at 991 ("The general policy of the law is to favor the settlement of litigation. . . ."). As such, "settlement agreements are to be 'upheld whenever possible.'" *Am. Sec. Vanlines, Inc.*, 782 F.2d at 1060; *see, e.g.*, *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971).

This policy in favor of settlements makes good sense. Most obviously, settlements promote "judicial economy." *See Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1369 (Fed. Cir. 2001); *American Sec. Vanlines, Inc.*, 782 F.2d at 1060 n.5 ("[S]ettlements produce a substantial savings in judicial resources and thus aid in controlling backlog in the courts . . . ."). If every legal dispute had to be tried to completion, the courts would be hopelessly clogged and the wheels of justice would grind to a halt. Settlements also save parties from the massive costs of litigation. *See, e.g.*, *Schering-Plough Corp. v. FTC.*, 402 F.3d 1056, 1075 (11th Cir. 2005).

The strong judicial support for private settlements applies with special force to trademark disputes. Courts have routinely recognized that trademark settlements, in particular, are "favored under the law." *Clorox Co.*, 117 F.3d at 55; *see, e.g.*, *T & T Mfg. Co. v. A. T. Cross Co.*, 587 F.2d 533, 539 (1st Cir. 1978) (noting the "judicial policy of encouraging extra-judicial settlement of trademark litigation"); *Fuddruckers, Inc. v. Fudpucker's Inc.*, 436 F. Supp. 2d 1260, 1265 (N.D Fla. 2006) ("Trademark agreements in which two parties agree on their respective rights in a mark are favored under the law.") (internal quotation marks and citations omitted); *Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 965 (C.C.P.A. 1979) ("If there be a policy favoring challenges to trademark validity, it . . . has been viewed as outweighed by the policy favoring settlements.").

Once again, this policy results from considerations of cost and efficiency. Trademark disputes are costly to the parties and the courts. Defendant Lens.com estimated its litigation costs to be "approximately $1.4 million." *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591 (D. Utah Mar. 7, 2011), Defendant Lens.Com, Inc.'s Memorandum In Support Of Motion For Award Of Attorneys' Fees And Costs, Exhibit 2 (Declaration of Cary Samourkachian) at ¶ 4, Dkt. 271-2 (D. Utah Mar. 7, 2011). That sum did not include 1-800 Contacts' litigation costs or the costs of the parties' appeal. Settling trademark disputes early—including before lawsuits are ever filed—therefore avoids expensive and "time-consuming litigation." *Clorox Co.*, 117 F.3d at 60.

B. Settlements Taking Commonplace Forms Are Not Subject to Antitrust Scrutiny.

Consistent with these longstanding principles favoring settlements, the Supreme Court in *Actavis* established a high preliminary bar for when settlement agreements are subject to antitrust scrutiny. This threshold inquiry turns on the "form" of the settlement at issue: while "commonplace" forms of settlements are not subject to antitrust scrutiny, "unusual" ones may be. 133 S.Ct. at 2236. Under the Court's reasoning, a party alleging that a private settlement constitutes a violation of the antitrust laws first bears the burden of establishing why a particular "form" of settlement is sufficiently "unusual" to warrant antitrust scrutiny. *Id*.

Actavis involved a specific form of settlement agreement commonly known as a "reverse payment." Prior to *Actavis*, this form of agreement had been used to resolve patent infringement disputes between brand-name and generic drug manufacturers in the unique context of litigation under the Hatch-Waxman Act. *Id*. at 2227. As the Court explained, a "reverse payment" settlement occurs when (1) the claimed infringer agrees "not to produce the patented product until the patent's term expires;" and (2) the patentee agrees to pay the claimed infringer "many millions of dollars." *Id*. The "reverse payment" moniker reflects that the agreement "requires the patentee to pay the alleged infringer, rather than the other way around." *Id*.

The "basic question" before the Court in *Actavis* was whether this "unusual" form of settlement agreement can "sometimes unreasonably diminish competition in violation of the antitrust laws." *Id*. at 2231, 2227. The Court answered yes, rejecting the rule adopted by several lower courts that reverse payment agreements are "immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *Id*. at 2230.

The Court, however, took great pains to distinguish reverse payment settlements from "traditional" forms of settlements. *Id.* at 2233. As to reverse payments, it had "reason for concern that settlements *taking this form* tend to have significant adverse effects on competition." *Id.* at 2231 (emphasis added). In a reverse payment settlement, a party with "no claim for damages walks away with money simply so it will stay away from the patentee's market." *Id.* at 2233. The Court contrasted this unusual form of settlement with "traditional" forms of settlements, wherein "a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim." *Id*. The Court concluded that "settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability," and underscored that it did not "intend to alter that understanding" of commonplace forms of settlement. *Id.*

Significantly, the Commission itself advocated for this "commonplace/unusual" distinction in *Actavis*. The Commission argued that there is no antitrust concern where "an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled." *Actavis* Br., 2013 WL 267027, at *27. And it emphasized that "[p]ayments from patentees to accused infringers (or from defendants to plaintiffs more generally) are not a traditional settlement term." *Id*. at *28; *see also Actavis* Reply Br., 2013 WL 1099171, at *2 (stating that reverse payments are "an extraordinary and peculiar way to settle a lawsuit" and have "no apparent analogue in traditional settlement practice").

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

C. <u>1-800 Contacts' Trademark Settlements Took a Commonplace Form.</u>

Complaint Counsel have not met their burden to establish that the challenged trademark settlement agreements took a form that is "unusual" or "quite different" from traditional settlements. The only reliable and credible evidence presented in this case makes clear that these settlements took a "commonplace form" that is not subject to antitrust scrutiny**.**

1-800 Contacts' settlements were standard non-use agreements whereby a party agreed not to use the other's trademark. (RF 1275-89). This settlement form is routinely used to resolve trademark disputes. *See* McCarthy on Trademarks and Unfair Competition § 18:82 (4th Ed. 2016 update) ("An agreement not to use or register a mark, usually entered into to settle an infringement dispute, is not against public policy and is an enforceable promise."); *MWS Wire Indus., Inc. v. California Fine Wire Co.*, 797 F.2d 799 (9th Cir. 1986) (upholding a non-use trademark settlement agreement as consistent with the "overriding public interest in settling and quieting litigation" (internal quotation marks and citation omitted); Trademark Settlement Agreement and Release § 1, Practical Law Standard (Westlaw 2017) (offering trademark settlement template includes terms to "permanently cease all use of" the owner's trademark).

In fact, the *Actavis* Court explicitly pointed to non-use trademark settlement agreements as an example of the kind of "commonplace" settlement form it did not intend to displace. It expressly cited *Metro-Goldwyn Mayer, Inc. v. 007 Safety Products, Inc.*, 183 F.3d 10 (1st Cir. 1999), in which one party agreed to pay damages to a trademark holder, to not use a registered trademark, and to abandon a pending application for his competing trademark.

Moreover, settlements can hardly be deemed "unusual" when they fall within the range of relief that a court could have ordered, as these settlements plainly do. (*See generally* RX 0734 at ¶¶ 104-106, 149-151). In *Actavis*, one factor in the Court's finding that reverse payment settlements are unusual was that a payment from the plaintiff to the defendant was beyond the potential outcome of the litigation. *See* 133 S.Ct. at 2231. The settlements here are very different because a court could have entered an injunction in 1-800 Contacts' favor that parallels the terms of its settlements.

A non-use injunction is "the order of the day" in infringement actions. *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996); *see also* 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th ed.); Restatement (Third) of Unfair Competition § 35 (1995). In fact, in a case that led to one of the challenged agreements, a court issued an injunction providing for the same relief agreed to in the challenged settlements. (*See*

RX 0401 (*1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-1949, Dkt. 27 (S.D.N.Y. May 15, 2009))). And courts across the country likewise have issued similar injunctions barring entities from using another's trademark in the specific context of paid internet searches.[1] These judicial orders demonstrate that non-use injunctions are commonplace—including in the paid search context.[2]

Complaint Counsel have introduced no evidence to prove that a court could not have ordered *the same* relief that 1-800 Contacts received in the settlement agreements had it successfully litigated its cases against the settling parties. Indeed, Complaint Counsel conceded "that the obligations of 1-800 Contacts' counterparties to the Challenged Settlement Agreements

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[1] *See, e.g, Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, No. 14-1557, 2015 WL 1936502, at *9 (E.D. Va. Apr. 28, 2015); *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, No. 14-30288, 2015 WL 11197741, at *4 (S.D. Fla. Feb. 27, 2015); *Rolex Watch U.S.A., Inc. v. Hernandez*, No. 1:13-cv-20643, Order at 4 (Dkt. 14) (S.D. Fl. Aug. 20, 2013); *Partners for Health and Home, LP v. Yang*, No. 2:09-cv-7849, Dkt. 146, at 2 (C.D. Cal. June 21, 2012); *Select Mgmt. Res., Inc., et. al v. D & D Mktg., Inc. et. al*, No. 2:10-cv-10008, Dkt. 39 (C.D. Cal. July 15, 2011); *Quidgeon v. Olsen*, No. 10-1168, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011); *World Entm't, Inc. v. Brown*, No. 09-5365, 2011 WL 2036686 (E.D. Pa. May 20, 2011); *Skydive Ariz., Inc. v. Quattrocchi*, No. 05-2656, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010); *Transamerica Corp. v. Moniker Online Servs. LLP*, No. 09-60973, 2010 WL 1416979, at *7 (S.D. Fla. Apr. 7, 2010); *MasterCard Int'l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009); *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 07-1753, 2008 WL 816794, at *3 (M.D. Fla. Mar. 25, 2008); *cf. Google, Inc. v. American Blind & Wallpaper*, No. 03-5340, 2007 WL 1159950, at *11 (N.D. Cal. Apr. 18, 2007) (rejecting argument that defendant had unclean hands for purchasing competitor's trademarks as keywords because of its "willingness to enter into agreements with competing companies to refrain from buying each other's trademarks as keywords under the AdWords program."); *see generally* RX 0734 at ¶¶ 149-151.

[2] In this respect, non-use trademark agreements are fundamentally dissimilar from the reverse payment settlements at issue in *Actavis*. As the Commission recognized, reverse payments settlements provided relief well beyond what the Patent Act permitted. *Actavis* Br., 2013 WL 267027, at *29. The Court agreed, stating that the Patent Act does not permit the reverse payment settlement form. *Actavis*, 133 S.Ct. at 2233 ("The dissent does not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication."). But the opposite is true here: the Lanham Act fully envisages and authorizes non-use trademark agreements. This further confirms that the settlement forms at issue in this case are commonplace and do not raise any antitrust suspicions.

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 0679A). Though Complaint Counsel deny "that such relief would have been appropriate or supported under either trademark law or antitrust law, would have been supported by relevant precedent in analogous cases, or could reasonably have been expected to be ordered in the cases that Respondent filed," *id.*, that simply reflects a dispute about whether 1-800 Contacts would have won, not whether the relief would have been appropriate if it did.

The fact that the settlements parallel relief issued by courts is particularly salient for Complaint Counsel's threshold burden because it makes clear why commonplace settlements are not subject to antitrust scrutiny. If 1-800 Contacts had continued to litigate and won relief, it clearly would not be subject to antitrust liability for enforcing that relief. *See AndRX Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 818 (D.C. Cir. 2001) ("If anticompetitive harm is caused by the decision of a court, even though granted at the request of a private party, no private restraint of trade occurs because the intervening government action breaks the causal chain."); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Since the relief that 1-800 Contacts obtained through settlement is relief that a court could have ordered by continuing to litigate, Complaint Counsel's only basis to distinguish this case from one involving a clear rule against liability is their view that 1-800 Contacts would have lost the underlying trademark actions. But in *Actavis*, the Commission itself characterized its "approach" not as "requiring the antitrust court to assess the likely outcome" of the underlying litigation but instead as "focus[ing] on the presence or absence of a settlement term" casting doubt on the "integrity" of the settlement process. *Actavis* Reply Br., 2013 WL 1099171, at *4. Where, as here, a settlement mirrors the form of relief a party could have received if it undertook the time and expense of litigating its case to finality, it can hardly be deemed "unusual" within the meaning of *Actavis* so as to give rise to antitrust liability.

All of this legal authority would be sufficient, as a matter of law, to establish that 1-800 Contacts' settlement agreements took commonplace forms within the meaning of *Actavis*. The record removes any possible doubt on that issue.

1-800 Contacts called Howard Hogan, a seventeen-year trademark practitioner who has litigated and settled trademark cases involving paid search advertising, and has 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." (CX 09047 (Hogan, Dep. at 23); Hogan, Tr. 3240, 3242). Mr. Hogan testified that:

- The "form of the settlement agreements at issue is very typical." (Hogan, Tr. 3274).
- "In the trademark context, the most common form of settlement agreement is what we call a nonuse agreement." (Hogan, Tr. 3271-3272).
- The "vast majority" of matters that he has been involved in during his career have "resulted in informal resolution or formal settlement agreements," and "the trademark settlement agreements are issue in this case are very typical of the kinds of agreements [he] negotiated with numerous parties, both on behalf of trademark owners and on behalf of companies that are accused of trademark infringement." (Hogan, Tr. 3245, 3247-3248).
- "[T]hese agreements are very commonplace in terms of the settlement agreements that are used to resolve these kinds of disputes"—*i.e.*, disputes "relating to the use of trademarks as search engine keywords." (Hogan, Tr. 3248, 3246).

Mr. Hogan supported his opinions with numerous settlement agreements in the form of the challenged settlement agreements.[3] This evidence clearly demonstrated that the non-use

[3] *See, e.g., Probar, LLC v. Onebody et al.*, Case No. 2:14-cv-166, Dkt. 18 (M.D. Fla. Oct. 29, 2014 (entering consent agreement not to purchase trademarks from Internet search engines as keywords); *Greenberg Smoked Turkeys, Inc. v. Tsavo Media, Inc.*, Consent Decree and Final Judgment, Case No. 6:11-cv-37 (E.D. Tex. Jan. 23, 2012) (same); *Happy Feet USA, Inc. v. Serenity "2000" Corp.*, Case No. 6:09-cv-1832, Dkt. 22 (M.D. Fla Mar. 16, 2010) (same);

trademark settlements here are starkly different from the reverse payment settlements that the Supreme Court found to be "virtually unheard of outside of" Hatch-Waxman litigation. *Actavis*, 133 S.Ct. at 2235.[4]

Complaint Counsel's questioning of Mr. Hogan evinced a fundamental misapprehension of *Actavis*. Complaint Counsel repeatedly asked Mr. Hogan about the complaints that preceded certain settlement agreements and consent orders that he cited in his expert report. (*See, e.g.*, Hogan, Tr. 3391-3392). But as Mr. Hogan correctly explained, the words used in the complaint are "immaterial to *the form of relief* ordered at the end of the case." (Hogan, Tr. 3392 (emphasis added)). *Actavis* calls for an analysis of the *form* of settlement agreements—not for a detailed examination of the fit between the relief and the claims being settled. 133 S.Ct. at 2233.

On that issue, neither Complaint Counsel nor their expert identified a single settlement agreement in a keyword advertising case that did not include a provision restricting the use of a trademark as a keyword in paid search advertising. (*See* Tushnet, Tr. 4484). That should be the

Lounge 22, LLC v. Brand X Furniture, Case No. 2:09-cv-3692, Dkt. 26 (C.D. Cal. Oct. 16, 2009) (same); *Gonzales & Gonzales Bonds and Insurance Agency, Inc. v. Action Immigration Bonds and Insurance Services, Inc.*, Case No. 2:10-cv-1162, Dkt. 15 (C.D. Cal. Apr. 7, 2010) (same); *Fragrancenet.com, Inc. v. Les Parfums, Inc., et al.*, Case No. 2:09-cv-2626, Dkt. 23 (E.D.N.Y. Mar. 8, 2010) (same); RX 0732-0232–35 (*Yahoo!* settlement, which includes a provision restricting the use of a trademark as a keyword in paid search advertising); CX9022 [redacted]); RX 0732-0237–42 (*Pine Tree Legal* settlement, which includes a provision restricting the use of a trademark as a keyword in paid search advertising); Tushnet, Tr. 4529–32 (describing *Sen* settlement, which includes a provision restricting the use of a trademark as a keyword in paid search advertising); *see generally* RX 0734 (at ¶¶ 152-153.

[4] Relatedly, it is also significant that the challenged settlements resulted from *bona fide* legal disputes between the settling parties. Here, Complaint Counsel unambiguously conceded that the underlying suits that gave rise to the settlements were not sham. *See* RX 0680-013. Courts have held that the non-sham nature of underlying litigation can bear on whether there are "suspicious" circumstances surrounding the settlements such that antitrust scrutiny should apply. *Asahi Glass Co.*, 289 F. Supp. 2d at 993. Given Complaint Counsel's concession, there are no such suspicious circumstances here.

end of the matter. Complaint Counsel cannot show that the settlement agreements are unusual if they cannot point to any settlement involving paid search advertising that takes a different form.

Moreover, the testimony on this issue by Complaint Counsel's rebuttal witness, Professor Tushnet, was not credible and cannot sustain Complaint Counsel's burden under *Actavis*.

First, Professor Tushnet cannot reliably opine about the challenged settlement agreements' forms *because she has never read them*. (Tushnet, Tr. 4495-4496). Professor Tushnet's only understanding of the settlements came from what Mr. Hogan wrote about them in his expert report and a handful of e-mails attached to it. Professor Tushnet, therefore, cannot say what form the settlements took, let alone whether that form is commonplace. As the Court stated, if Professor Tushnet "didn't review the settlement agreements"—as she admitted she did not—"she will not be allowed to testify regarding the settlement agreements." (Tushnet, Tr. 4467-4468).

Second, Professor Tushnet's testimony revealed that she was not qualified to testify about the settlement agreements. Unlike Mr. Hogan, she has not litigated many—or settled *any*—trademark cases. Professor Tushnet worked on only a handful of trademark cases when she was a junior associate at Debevoise & Plimpton more than a decade-and-a-half ago. (*See* CX 08014-049; Tushnet, Tr. 4374)). Her only experience at Debevoise regarding paid search advertising was working on a single amicus brief. (Tushnet, Tr. 4482-84). Professor Tushnet has *never* negotiated any trademark settlement agreement regarding paid search advertising. (Tushnet, Tr. 4483-4484).

In fact, Professor Tushnet has only *ever* reviewed *two* settlement agreements, other than those cited by Mr. Hogan. (Tushnet, Tr. 4489, 4492-4493). The contrast with Mr. Hogan could not be clearer. Mr. Hogan has personally negotiated "hundreds and hundreds" of trademark settlement agreements that do not make it into the public record such that they could be cited in his report, (CX 09047 Hogan, Dep. at 23); he has advised "somewhere over a hundred clients in connection with legal issues relating to the use of trademarks as keywords," including in settling their disputes, (CX 09047 Hogan, Dep. at 15, 20); and he has extensive familiarity with the practices of other lawyers who settle these types of disputes, (Hogan, Tr. 3248-3249). That is the kind of experience a witness needs to credibly opine about whether 1-800 Contacts' settlements took a commonplace form. *Cf. 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). Professor Tushnet does not have the necessary experience.

Professor Tushnet's testimony therefore lacks credibility and should be given no weight at all in rebutting Mr. Hogan's opinions. *See, e.g. In the Matter of ECM Biofilms, Inc.*, Dkt. No. 9358, 2015 WL 575402, Initial Decision In Regard To Alleged Violations Of Section 5 Of The Federal Trade Commission Act at ¶ 324 (Jan. 28, 2015) (Chappell, J.).

Against Mr. Hogan's testimony that the settlements took commonplace forms, Complaint Counsel offered nothing more than testimony of an unqualified and unreliable law professor who never read the settlement agreements. Complaint Counsel failed to carry their burden to show that the settlement agreements can give rise to antitrust liability.

D. Even if the Challenged Settlements Are Uncommon, None of the Factors Under the Second Prong of the Actavis Test Warrants Antitrust Scrutiny.

Under *Actavis*, proof that a settlement's form is unusual is necessary but not sufficient to trigger antitrust scrutiny. The Court in *Actavis* displaced the "general legal policy favoring settlement of disputes" as to reverse payments only after determining that five considerations "outweigh" courts' respect for "the desirability of settlements." 133 S.Ct. at 2237. Here, *none* of the five *Actavis* factors are satisfied—and certainly not all of them "taken together," *id.*

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

However, there is little risk that a trademark owner could settle trademark disputes to divide monopoly profits because "trademarks are by their nature non-exclusionary. A trademark, unlike other intellectual property rights, does not confer a legal monopoly on any good or idea; it confers rights to a name only." *Clorox Co.*, 117 F.3d at 56. The only profits that a trademark protects are those related to the "financial, reputation-related rewards associated with a desirable product." *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995). Unlike in the Hatch-Waxman context, any party not subject to a settlement agreement with 1-800 Contacts is free to challenge its trademarks. Accordingly, the fact that so many online retailers chose to settle with 1-800 Contacts using standard non-use agreements strongly suggests that the settlements here are "supported by traditional settlement considerations." *Actavis*, 133 S.Ct. at 2235.

The second *Actavis* consideration is whether any anticompetitive consequences associated with the settlements at issue "will at least sometimes prove unjustified." 133 S.Ct. at 2235-36. Complaint Counsel have not satisfied this factor with respect to 1-800 Contacts' settlements. This Court need not address whether, as a theoretical matter, some settlements related to keyword search advertising will sometimes be unjustified. To obtain the disruptive post hoc injunctive relief they are seeking in this enforcement action, Complaint Counsel are required under this factor to show that 1-800 Contacts' settlements, in particular, are unjustified. They have not done so here, where there are myriad "legitimate" procompetitive "justifications" associated with trademark protection that can justify any asserted limitations on competition in the settlement agreements. *Actavis*, 133 S.Ct. at 2236; *see infra* Part II.

Further, the Supreme Court in *Actavis* explained that an agreement will sometimes amount to "no more than a rough approximation of the litigation expenses saved through the settlement." *Id*. at 2236. When a restraint "reflects traditional settlement considerations, such as avoided litigation costs, or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Id*.

This case fits the traditional settlement paradigm to a T. As Dr. Evans testified:

> Q. In this case do you have any reason to doubt that the 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?
>
> A. I think as a general description that's – that's fine.

(Evans, Tr. 1831). Dr. Murphy agreed. (RX 0739-0049, -0050; Murphy, Tr. 4205-07).

But this court need not rely solely on expert testimony to conclude that 1-800 Contacts' settlements were motivated by traditional settlement considerations. Numerous fact witnesses also testified to that very fact. For example, [redacted] the founder of [redacted], testified in his deposition that he decided not to bid on 1-800 Contacts' trademarks because his lawyer said the result was "uncertain," that "we may well lose" the case, and that it would cost "well over $100,000" to litigate (CX 09039 ([redacted], Dep. at 86-87; 144). Clarkson provided similar testimony at trial. (Clarkson, Tr. at 244-245 ("I did reach out and consult local counsel. And local counsel said to me, you might be able to win this, but you're definitely going to spend at least six figures, maybe more . . ."); Clarkson, Tr. at 338-339 (outside counsel for ACLens told Clarkson that "the outcome was uncertain, that we may win or we may lose, but that either way it would be very expensive to fight it.")).

Similarly, [redacted] testified that [redacted] signed the settlement agreement because: [redacted] (CX 9000 [redacted], IHT at 93-94). [redacted] declaration on behalf of [redacted] explicitly stated the company signed its settlement agreement with 1-800 [redacted] CX 00943 [redacted] ¶ 10). And Eric Holbrook testified that Memorial Eye settled with 1-800 Contacts due to legal uncertainty regarding its case, (Holbrook, Tr. 2032; CX 09024 (Holbrook, Dep. at 63, 164-65)), coupled with "the continuing impact that the legal cost would have on [its] business," (CX 09024 (Holbrook, Dep. at 162); Holbrook, Tr. 2032)). These are manifestly traditional settlement considerations.

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

The fourth *Actavis* factor addresses the administrative feasibility of antitrust challenges to reverse payment settlements. As the Supreme Court explained, the Eleventh Circuit had held that reverse payment settlements were not subject to antitrust scrutiny in part because of the "underlying practical concern . . . that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement." 133 S.Ct. at 2234. "Any such litigation," the Court explained, "will prove time consuming, complex, and expensive." *Id*. Although the Court acknowledged the "value of settlements" in light of these problems, it nonetheless held that "it is normally not necessary to litigate patent validity to answer the antitrust question" in a reverse payment case because "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." *Id*. at 2234, 2236-37.

In this context, however, there is no available shortcut or surrogate that makes the "antitrust game . . . worth th[e] litigation candle." *Id.* at 2234. One need only look at the hearing in this case, where Complaint Counsel devoted extensive time to underlying trademark disputes, eliciting testimony from fact witnesses unrelated to classic competition issues and joining issue in the proverbial "battle of experts" associated with trademark disputes. *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 Ad. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014). Even that was insufficient. In order to truly re-litigate the trademark merits, Complaint Counsel would have had to litigate all of the claims in each of the cases giving rise to a challenged settlement agreement despite the lengthy passage of time and the lack of complete discovery then or now.

The Commission itself has recognized the "practical concern," 133 S.Ct. at 2234, with the kind of hindsight proceeding that Complaint Counsel tried: "[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*, 136 F.T.C. at 997. In *Schering-Plough*, this Court held that Complaint Counsel's "proof of anticompetitive effects arising from an alleged reverse payment settlement requires proof on the merits of the underlying patent claims." *Id.* at 992. The Commission disagreed with that conclusion, placing its "focus on the state of the world as it was perceived by the parties at the time that they entered into the settlement agreement, when they could not be sure how the litigation would turn out." *Id.* at 995. The Commission stated: "We question the utility of a rule that would give decisive weight to an after-the-fact inquiry into the merits of the patent issues in a settled case." *Id.* at 996. It noted "the serious uncertainties that would confront parties who seek to settle patent litigation if the Commission undertook to examine the underlying merits itself later on, and gave them conclusive weight." *Id.* at 998. The Commission's view weighs strongly against antitrust scrutiny.

Finally, the Court in *Actavis* reasoned that subjecting large, unjustified reverse payments to antitrust scrutiny "does not prevent litigating parties from settling their lawsuit [because they could] 'settle in other ways.'" 133 S.Ct. at 2237. But no such alternative exists here. The most traditional way to resolve a trademark infringement suit is through a non-use agreement like the one 1-800 Contacts used to resolve its disputes. (*See* Hogan, Tr. 3271-3272; RX 0734 ¶¶ 104-106, 149-151). Such an agreement captures the goals of settlement: to "achieve finality, to eliminate the risk and cost of litigation, and to resolve an issue so that you do not need to continue to litigate the same issue again and again." (Hogan, Tr. 3271). Non-use agreements provide the necessary "clear agreement that is easy to follow that does not invite future dispute." (Hogan, Tr. 3271).

As explained more fully below (*see infra*, Part III.C), Complaint Counsel's proposed alternatives do not achieve these settlement goals. A settlement "redressing the purportedly confusing text of the challenged advertisement" (RX 0680-0004), fails to properly protect 1-800 Contacts' trademark rights because courts have rejected the proposition that "as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff's] trademarks in the text." *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61. In fact, Complaint Counsel did not identify a single trademark settlement agreement in the context of keyword advertising limited to prohibiting the defendant from using the plaintiff's trademark in a confusing way in the text of the defendants' advertising. (*See* Hogan, Tr. 3503-3504).

Further, [redacted] (Hogan, Tr. 3495). Such agreements would hamper each party's ability to monitor compliance with the settlement agreement, (RX 0734)), and are [redacted] (Hogan, Tr. 3495). Mr. Hogan's testimony to this effect went unrebutted. And Complaint Counsel did not introduce any evidence that labeling reduced potential confusion. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006) (noting "heavy burden" to show that disclaimer "would significantly reduce the likelihood of consumer confusion); *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.").

For all of these reasons, the settlements at issue here are not subject to antitrust scrutiny and Complaint Counsel's case fails at the threshold stage.

II. THE CHALLENGED SETTLEMENT AGREEMENTS HAD SIGNIFICANT PROCOMPETITIVE BENEFITS.

Following the teaching of *Actavis*, 1-800 Contacts should not have to defend its settlement agreements under the antitrust laws. However, to the extent that 1-800 Contacts' settlement agreements could in theory be subject to antitrust liability, those settlement agreements had a number of significant 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 to invest in its brand and produce products and services of consistent quality; (3) they prevented consumer confusion; (4) they reduced consumers' search costs, and (5) they increased purchases of contact lenses by consumers who searched for 1-800 Contacts' trademarks.

A. Settlements Are Procompetitive

As noted, "[f]ew public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute." *Am. Sec. Vanlines*, 782 F.2d at 1060; *see also Williams* 216 U.S. at 595; *St. Louis Mining & Milling Co.*, 171 U.S. at 656; *TBK Partners, Ltd.*, 675 F.2d at 461 (noting "paramount policy of encouraging settlements").

This policy makes good economic sense because "litigation breeds a litany of direct and indirect costs, ranging from attorney and expert fees to the expenses associated with discovery compliance." *Schering-Plough Corp.*, 402 F.3d at 1075. Trademark litigation is no different. Lens.com estimated the cost of litigating its trademark dispute with 1-800 Contacts without trial and before appeal to be "approximately $1.4 million." *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4.

All parties' experts agree that settlements that reduce the costs of litigation are generally economically efficient. (CX 9042 (Evans, Dep. at 196); RX 0739-0053 ¶¶137, 139); Murphy, Tr. 4208; RX 0737-0017). There also is common ground about the basic economics of settlements: firms will settle trademark claims when the net benefits to both parties from continuing a challenged practice are lower than the expected litigation costs for both parties. (RX 0739 Murphy, Tr. 4203-05; CX 09048 (Murphy, Dep. at 272); Evans, Tr. 1830-1831; CX 8009-045). Thus, Dr. Evans wrote in his rebuttal report that "parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason." (CX 8009-045). [redacted]. (*See* RX 1805; RX 1807; CX 9022 [redacted] at 132-133; 138-140)).

As noted, the settling parties testified that they weighed the costs and uncertainties of litigation against the value of the likely benefits, and decided the costs were "not worth it." (CX 09000 [redacted] at 93-94); CX 09014 [redacted] at 46-48); CX 09024 [redacted] at 62-64, 75-77, 160-165); CX 09039 [redacted] at 86-87, 144); CX 09003 [redacted] at 108-109); CX 00943 [redacted] ¶ 10). Dr. Evans accordingly testified that the settlements "were economically rational for this set of firms because this set of firms succeeded in avoiding potentially expensive and risky lawsuits." (CX 09042 (Evans, Dep. at 119-20)).

The record contains no basis to disturb the settling parties' own judgment, based on their own business interests and assessment of 1-800 Contacts' trademark claims, that the lifetime potential benefits of the paid search advertising at issue in the litigation (and ultimately covered by the settlement agreements) were less than the costs of defending against 1-800 Contacts' trademark claims. (Murphy, Tr. 4205-07); (RX 0739-0049 to -0050). Certainly Dr. Evans made no "determination that the expected benefits of continuing with the challenged conduct were greater than or less than the out-of-pocket costs that they would have incurred in litigation." (CX 09042 (Evans, Dep. at 133)). As such, agreements to settle the litigations were procompetitive.

B. Trademark Protection is Procompetitive

The settlement agreements here were particularly procompetitive because they provided trademark protection, which promotes economic efficiency.

1. Trademark Protection Protects Economic Incentives to Invest

As the Supreme Court has recognized, "[n]ational protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); *see also* S. REP. 100-515, 4, 1988 U.S.C.C.A.N. 5577, 5580 ("Trademarks encourage competition, promote economic growth and can raise the standard of living of an entire nation.").

Trademarks benefit consumers by reducing their search costs. (RX 0737 ¶¶ 10-25). "[T]rademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions, for it quickly and easily assures a potential customer that this item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past." *Qualitex Co.*, 514 U.S. at 163–64. Because consumers spend less in finding what they want to buy, they are willing to pay more when they find it. (RX 0737 ¶¶ 26-28). As such, trademark owners with well-known brands can command a premium, which gives firms incentives to invest in building brands and the differentiated products or services associated with them. *Id.* However, only a firm whose brand sends a positive and reliable signal to consumers will lower search costs and reap the associated premium. (RX 0737 ¶¶ 29-30). Trademarks therefore incentivize firms to provide products and services of consistent quality. (RX 0737 ¶¶ 32-35).[5]

These basic economic principles are beyond dispute. Citing Dr. Landes' work, the Supreme Court, too, has explained that trademarks create procompetitive incentives: "the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product. The law thereby encourage[s] the production of quality products, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of an item offered for sale." *Qualitex Co.*, 514 U.S. at 163-64 (internal citation and quotation marks omitted) (citing, *inter alia*, Landes & Posner, *The Economics of Trademark Law*, 78 T.M. Rep. 267, 271–272 (1988)).

The Commission set forth these principles more than three decades ago:

> An integral part of the competitive process—i.e., the process by which consumers select the mix of goods and services they most prefer—is the cost to consumers of becoming informed about a brand's advantages and availability. An established brand is one which has invested capital to reduce those costs, having acquainted most consumers with the product and its quality. The premium

[5] 1-800 Contacts' economic experts, including Dr. William Landes, who wrote the seminal work on the subject with Judge Richard Posner, explained the economic logic. (RX 0737 ¶¶ 9-35; RX 0739 ¶¶ 78-82; *see also* William M. Landes and Richard A. Posner, "Trademark law: an economic perspective," 30 *The Journal of Law & Economics* 265-309 (1987); *see also* William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law.*, Ch. 7 (Harvard University Press 2003)).

> accruing to a brand name is thus a form of good will, whose value can be measured by the strength of consumers' preference for that brand. Federal statutory policy with respect to trademarks expressly encourages and protects this form of good will.

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

Complaint Counsel's expert Dr. Evans agrees that trademarks "enable companies . . . to use a brand name to signal to consumers that the company provides a high quality product or offers particular attributes that consumers care about," and that "[p]rotecting trademark rights encourages investment in this sort of brand-building activity, which in turn generates valuable market information, promotes competition and ultimately benefits consumers." (CX 8006 ¶ 292; *see also* CX 08009 ¶ 48 & n.67; CX 09042 (Evans, Dep. at 196)).

2. 1-800 Contacts Spent Hundreds of Millions to Build Its Trademark Brand Through Advertising and Best-in-Class Service

To overcome ECPs' inherent competitive advantages, 1-800 Contacts has invested over $500 million in advertising to: (1) convince consumers they could get the exact same contact lenses delivered to their door for a lower price than buying from their ECP; and (2) educate consumers about the ease of buying from 1-800 Contacts. (RF 81-88, 92-93, 260-262).

As a result of these investments, 1-800 Contacts consistently is one of the most familiar brand names among contact lens retailers. (RF 275-285). Its unaided awareness has been the highest of any retailer in the contact lens industry. (RF 275). For instance, 1-800 Contacts' unaided awareness has been 10 to 33 times the unaided awareness of the nearest online contact lens retailer. (RF 276-278).

Since its inception, 1-800 Contacts has sought to build its brand on superior service. (RF 124-133). Its mission statement is: "Customer retention is what drives us. The real value in this business is the reputation we build. Contact lenses are just the product we deliver. What we really sell is service." (RF 135).

Consumer research shows that in selecting a contact lens retailer, important factors for many consumers include the ease, convenience, and speed of delivery. (RF 127-130). 1-800-Contact thus invested enormous resources to create a best-in-class customer experience:

- 1-800 Contacts has more inventory in stock than any other contact lens retailer, allowing it to fill 98% of all orders with inventory on hand. (RF 144). In comparison, independent ECPs typically have about 40% of orders in stock. (*Id.*)

- Customers can reach 1-800 Contacts 24/7. Customers can place orders, either online or by phone, any time of day. (RF 146). 1-800 Contacts' customer care representatives are always available to answer questions. (RF 147). The representatives answer calls with a live person by the third ring, answer emails within 10 minutes, respond to text messages, and offer customer service through click-to-chat. (RF 150-153).

- 1-800 Contacts takes numerous actions to enhance the customer experience. For instance, 1-800 Contacts sends orders with no signature required, replacing at its own cost any package that the customer does not actually receive. (RF 157). It offers free replacements for torn contact lenses. (RF 154). It sends handwritten apology notes to customers if their order was late. (RF 158). It sends small, personalized gifts to some customers. (RF 159). And even the box that 1-800 Contacts uses to ship contact lenses to customers was specially designed to make it as simple as possible to open. (RF 155-156).

- 1-800 Contacts developed a highly-rated mobile app to make it easier and simpler for customers to order contact lenses online. (RF 162).

These investments have paid off. 1-800 Contacts' customer service has been recognized and received awards from a number of third parties, including J.D. Power and Associates. (RF 169-186). Its Net Promoter Score—an indicator of both the loyalty of a company's customers and the company's growth potential—is higher than those of many well-known brands with fervently loyal customers such as Amazon, Netflix, Apple, and Trader Joe's. (RF 176).

3. The Settlement Agreements Protected 1-800 Contacts' Trademark Rights and Thus Incentives to Invest

The paid search advertising of certain competing retailers threatened to undermine 1-800 Contacts' investments in its trademark brand. After Google changed its trademark policy in 2004 to permit advertisers to bid on other companies' trademarks (RF 926), certain competitors caused their ads to be placed in response to consumer searches for 1-800 Contacts' trademark. With respect to those ads, 1-800 Contacts had three main business concerns: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (RF 992). 1-800 Contact therefore sought to protect is trademark rights, including through litigation.[6]

There is no doubt that trademark infringement and dilution undermines incentives to invest in brand-building. ((RX 0737 ¶¶ 43-45)); (RX 0739 ¶¶ 83-90))). As the leading commentator has noted, "if freely permitted," trademark confusion "would eventually destroy the incentive of trademark owners to make the investments in quality control, promotion and other activities necessary to establishing strong marks and brand names." Thomas McCarthy, 1 McCarthy on Trademarks & Unfair Competition § 2:3 (4th ed. 2004). This "would have severe anticompetitive consequences." *Id.*

[6] 1-800 Contacts was not alone. Google's change in policy led to a number of litigations challenging the use of trademark keywords. (RF 1073). While most of these litigations were brought against the trademark holder's competitor that had bid on the trademark keyword, American Airlines and Rosetta Stone brought separate trademark infringement actions against Google. *See American Airlines, Inc. v. Google Inc.*, 4:07-CV-00487-A (N.D. Tex.); *Rosetta Stone Ltd. v. Google, Inc.*, Case No. 1:09cv736 (GBL/TCB) (E.D. Va.).

Accordingly, "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Clorox Co.*, 117 F.3d at 60. And as a species of trademark protection, 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." *Clorox Co.*, 117 F.3d at 60; *see also T & T Mfg. Co.*, 587 F.2d at 539; *Fuddruckers, Inc.*, 436 F. Supp. 2d at 1265.

Here, the settlements prohibit only one limited kind of infringing behavior: "causing a Party's brand name, or link to the Party's Restricted Websites to appear as a listing in the search results page of an internet search engine, when a user specifically searches for the other Party's brand name." (RF 1162). The settlements include two mechanisms to achieve that goal.

First, although the specific language varies, the settlements generally prohibit using the other Party's trademark keywords or URLs to target or trigger the appearance or delivery of advertisements or other content to the user, and include as exhibits lists of the specific restricted trademark keywords. (RF 1164).

Second, as Google suggested to advertisers when it changed its trademark policy, the settlements require the parties to implement the listed trademark terms as negative keywords, which instruct search engines not to display ads in response to searches for those terms. (RF 1165). This is necessary to carry out the purpose of the agreements because search engines frequently "broad match" the keyword that a retailer purchases to related, but not identical search queries. (RF 1188). Absent the use of negative keywords, a retailer that instructed a search engine to display ads for any queries that are a broad match for the keyword "contacts" might cause the retailer's ads to be displayed in response to a search for 1-800 Contacts' trademark. (RF 1190). Settling parties agreed that negative keywords were an easy and practical way to ensure compliance with the settlement agreements. (RF 1203, 1364).

It is important to make clear that while the negative keyword requirement avoids certain consequences of broad match bids on generic terms *as keywords*, it *does not* prohibit any advertising in response to *queries* for generic terms. The agreements are express on this point: each lists advertising in response to generic terms as a "non-prohibited act." (RF 1171-1173). For example, the Memorial Eye settlement agreement provides that "Nothing in this Section shall be construed to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyewear, frames, or other, similar generic terms as long as the appropriate negative keywords are implemented." (RF 1173). It was sufficient under the agreements for the settling parties to implement the negative keywords using "exact match," which would prevent ads from appearing in response to searches using the trademark term only. (RF 1210-1236). Searches for terms such as "1-800 Contacts cheaper competitors" would not be blocked by exact match negative trademark keywords. (RF 776-780, 1238-39).[7]

The agreements also have express protections for comparative advertising: "Prohibited Acts shall not include (i) use of the other Party's Trademarks on the internet in a manner that would not constitute an infringing use in an non-internet context, e.g., the use on the internet of comparative advertising, parodies, and similar non-infringing, uses." (RF 1174).

4. The Limited Nature of the Settlements Demonstrates Their Procompetitive Character

The settlement agreements are limited to one advertising medium (the internet), one type of advertising (paid search advertising), and only ads served in response to one type of search

[7] 1-800 Contacts and its outside counsel took the consistent position that a counterparty to the settlement satisfies its obligations by implementing negative keywords for the terms in the settlement exhibits for *any* match type. (RF 1214).

query (for 1-800 Contacts' trademark and variations thereof). The agreements thus do not affect advertising through traditional media—television, radio, print, etc.

There also is no dispute that the challenged settlement agreements do not restrain various other forms of internet advertising. (RF 1158-1159). For example, the settling parties can engage in display advertising, which includes both text and banner advertisements, in addition to video and audio advertisements. (RF 1158; *see also* RF 667-670). They may also use "remarketing" campaigns that display advertisements to consumers based on their location, search history, and other demographics. (RF 671-678). The settling parties may also advertise through affiliated websites that offer coupons or discounts, use email campaigns to lists of potential customers, advertise on social media, such as Facebook, Twitter, and Instagram, purchase "Product Listing Ads" (which provide an image and a price for contact lenses on the side of a search engine result page), develop "apps" that can be downloaded on mobile devices, and invest in search engine optimization. (RF 679-740).

Finally, the vast majority of contacts lens-related paid search advertising is unaffected by the settlement agreements. The agreements pertain only to ads triggered by searches for trademarked terms. This is a very limited aspect of paid search advertising. Advertisers frequently bid on thousands of keywords. (RF 766). [redacted], for instance, bids on somewhere under [redacted] keywords related to contact lenses. (*Id.*). Dr. Evans conceded that 98% of contact lens-related searches were for terms other than the 1-800 Contacts' trademarks, and the data show that about [redacted] of ads appeared in response to a bid on a keyword other than one of 1-800 Contacts' trademarks. (RF 1946-1949).

The limited nature of the settlement agreements, combined with the non-exclusive nature of trademark rights, buttresses their procompetitive character. *Clorox* places this conclusion beyond doubt. *Clorox* involved an antitrust challenge to a settlement of trademark litigation over the PINE-SOL mark that prohibited Clorox from using the mark in certain advertising. Clorox alleged that "the agreement was being used unlawfully by Sterling . . . to perpetuate a monopoly in certain cleaner-disinfectant markets." *Clorox Co.*, 117 F.3d at 54. The district court dismissed the antitrust claim, and the Second Circuit affirmed.

The Second Circuit reasoned that "because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns." *Clorox Co.*, 117 F.3d at 57 (citation omitted). Accordingly, the Court held that "Clorox cannot make a case under the antitrust laws unless it demonstrates that the [settlement agreement] may significantly harm competition as a whole, *regardless of whether the agreement is entirely necessary to protect [the defendant's] trademark rights*." *Id.* (emphasis added). This was because (1) "[n]othing here suggests that the other large companies that produce cleaning products are incapable of successfully investing their resources, in the form of capital and brand name equity, to enter the markets [the defendant's] products allegedly dominate"; and (2) the settlement agreements "do not entirely prevent Clorox from using the PINE-SOL name to compete against LYSOL products." *Id.* at 58.

The *Clorox* Court also noted that "the pro-competitive justifications of the agreement bolster our conclusion that the agreement does not violate the antitrust laws." *Clorox Co.*, 117 F.3d at 60. Reasoning that "the parties" to a trademark settlement agreement "are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves," the Second Circuit held that "it is usually unwise for courts to second-guess such decisions. In the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive." *Id.* The Court concluded that "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies. Where large competitors each represent their respective trademark interests, unless one party is irrational, the result should accord with how the parties view their respective rights." *Id.* Just so here: 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; *see also* CX 09042 (Evans, Dep. at 119-20)). On that record, "it is reasonable to presume that such arms-length agreements are pro-competitive." *Clorox Co.*, 117 F.3d at 60.

C. The Settlement Agreements Prevented Confusion

By protecting 1-800 Contacts' trademarks, the settlement agreements also enabled retailers "to market products in a way that reduces the likelihood of consumer confusion." *Clorox Co.*, 117 F.3d at 60; *see also, e.g.*, *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1080-81 (D. Or. 2008).

1. Paid Search Advertisements for Other Retailers in Response to Searches for 1-800 Contacts' Trademarks Are Likely to Confuse Consumers

1-800 Contacts adduced evidence from four sources supporting a finding that the settlement agreements prevented paid search advertising that was likely to confuse consumers.

First, Professor Ronald Goodstein testified that paid search advertisements that appear in response to searches for 1-800 Contacts' trademarks are likely to cause confusion. Professor Goodstein finds reason to expect confusion from sponsored ads by other retailers on a search for "1-800 Contacts"—both at the time 1-800 Contacts filed many of the underlying trademark infringement suits (*i.e.*, 2008-2010) and today—based on (1) extensive research by independent third-parties and internal studies by both [redacted] and Yahoo! that show many consumers are unable to distinguish sponsored ads from organic links, (2) the changes made by search engines to the appearance and labeling of sponsored ads over the last ten years, and (3) evidence of the intent and expectations of consumers who search for a particular brand or trademark term. (*See* RX 0736 ¶¶ 43-71, 78-85). Consumer surveys conducted by [redacted] in trademark litigation with [redacted] and Yahoo! also showed substantial levels of confusion from sponsored ads—in some cases despite the absence of other companies' names in the ad text. *See id.* ¶¶ 72-77; R. Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 Trademark Reporter 732, 758-70 (May-June 2015).

While Dr. Goodstein did not present direct evidence of actual confusion with respect to the ads allegedly restrained here based on a consumer survey, such evidence 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).

Courts regularly uphold findings of infringement absent 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) (finding "no evidence that surveys are used by a majority or even a large plurality of litigants to prove likelihood of confusion in federal court").

Second, 1-800 Contacts presented the testimony of Dr. Kent Van Liere regarding actual confusion based on a survey of consumers who conducted an internet search for "1-800 Contacts." Dr. Van Liere has been retained as a survey expert by the Commission and other government agencies. (RX 0728; CX 09049 (Van Liere, Dep. at 266)). He has extensive experience designing and conducting surveys that relate specifically to keyword advertising, including surveys on behalf of American Airlines and Rosetta Stone in trademark litigations against Google that were considered reliable by the Fourth Circuit and the leading journal on trademark-related issues. *See Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 159 (4th Cir. 2012). (*See also* R. Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 Trademark Reporter at 761-66; CX 09049 (Van Liere, Dep. at 264-265)).

Here, Dr. Van Liere designed a survey for 1-800 Contacts (the "Van Liere Study") that follows the same methodology and is substantially similar to the surveys he conducted for American Airlines and Rosetta Stone. (CX 09049 (Van Liere, Dep. at 265-266)). The Van Liere Study tested survey respondents on a mock-up of both a Google and Yahoo! search engine results page ("SERP"). The "test" condition asked respondents to search for "1-800 Contacts" and they then were shown either a Google or Yahoo! SERP that included sponsored ads from other contact lens retailers.[8] Dr. Van Liere tested for both source confusion (where consumers believe an ad is for the trademark holder when it is not) and affiliation confusion (where consumers believe an ad is for a company affiliated with the trademark holder when it is not). In the test condition, 28.7% of respondents were confused (39.2% with the Yahoo! SERP and 17.8% with the Google SERP). (*See* RX 0735-021, Table 3).

[8] The Van Liere Study includes ads that "could appear if the [settlement] agreements challenged in the FTC's complaint were not in place," (RX 0735, ¶ 12), and that were actually run by the parties to the settlement agreements on other contact lens-related searches.

The Van Liere Study included a "control" condition to identify "'background noise' such as confusion due to elements of the test stimuli that are not allegedly infringing, demand effects of the survey instruments themselves, or guessing." (RX 0735 ¶ 28).[9] The control asked survey respondents to search for "1-800 Contacts" and then showed them a Google or Yahoo! SERP identical to the test condition except without the sponsored ads (*i.e.*, with the potentially infringing element removed). *See GEICO v. Google, Inc.*, No. 04-507, 2005 WL 1903128, at *5 (E.D. Va. 2005) ("[A]n effective control should have removed from the page viewed by the test group the allegedly infringing elements for which GEICO wanted to measure confusion, such as the Sponsored Links mentioning GEICO, while keeping the other elements as constant as possible"). The control asked respondents the same questions as in the test. In the control condition, 8.1% of respondents were confused (12.0% with the Yahoo! SERP and 4.5% with the Google SERP). (RX 0735-021, Table 3).

Dr. Van Liere subtracted the confusion in the control from confusion in the test to reach a level of "net" confusion for all respondents of 20.6% (27.2% for the Yahoo! SERP and 13.3% of the Google SERP). Dr. Van Liere's findings are sufficient to establish actual confusion. *See Rosetta Stone*, 676 F.3d at 159 (noting case law holding that "survey evidence indicating ten to twelve percent confusion was sufficient to demonstrate actual confusion"); *BellSouth Corp. v. Internet Classifieds of Ohio*, No. 1:96-CV-0769-CC, 1997 WL 33107251, at *20 (N.D. Ga. Nov. 12, 1997); *Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987); *RJR Food, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir. 1979); 6 McCarthy on Trademarks and Unfair Competition § 32:188 (4th ed.) ("Where other evidence is supportive, courts have found a

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[9] *See also Malletier v. Dooney Burke*, 525 F. Supp. 2d 558, 595 (S.D.N.Y. 2007) ("[a] control stimulus is used in trademark surveys to sufficiently account for factors legally irrelevant to the requisite confusion, such as the 'background noise'") (citation omitted).

likelihood of confusion when survey results are between 10% and 20%"). Given that there were approximately [redacted] internet searches on [redacted] for the terms "1-800contacts," "1-800 contacts," or "1 800 contacts" from 2010 through 2016, which is roughly [redacted] searches each year, (*see* RX 0733-0101), the results of Dr. Van Liere's study indicate the potential for consumer confusion from sponsored ads in over [redacted] per year for 1-800 Contacts' name on Google alone.[10]

Third, 1-800 Contacts introduced additional evidence of actual confusion from Memorial Eye. [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

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

[redacted]

[redacted] (CX 09024 [redacted] at 213-14)).

Fourth, Dr. Ghose testified that [redacted] of consumers buy from 1-800 Contacts after searching for 1-800 Contacts' trademark and clicking on its ad whereas only [redacted] of consumers buy from other retailers after searching for 1-800 Contacts and clicking on the other retailers' ads. (RX 0733 ¶¶ 107-113). This evidence supports the inference that consumers who searched for 1-800 Contacts' trademarks and clicked on an ad for another retailer found themselves in the wrong place. (RX 0733 ¶ 109).[11]

2. Complaint Counsel's Expert Testimony on Consumer Confusion is Inadmissible and Entitled to No Weight

Complaint Counsel's evidence on consumer confusion consisted of testimony from two experts: law professor Rebecca Tushnet and survey expert Dr. Jacob Jacoby. Both experts' testimony is unreliable and should be disregarded.

(a) Professor Tushnet is Not Qualified to Testify Regarding Consumer Confusion

The evidence at the hearing made clear that Professor Tushnet lacks the qualifications to offer expert testimony on consumer confusion. Professor Tushnet is a law professor with a law degree; as the Court noted, she has "the knowledge that every lawyer in this courtroom has."

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[11] Another explanation, of course, is that consumers who searched for 1-800 Contacts' trademarks and clicked on an ad for another retailer simply did not like what they saw from 1-800 Contacts' competitors. Dr. Athey tried to explain away the disparity with speculation that consumers buying from rivals for the first time might not have their prescription nearby, but she had no evidence to support that speculation. (CX9043 (Athey, Dep. at 284-86)).

(Tr. 4430). Professor Tushnet has no graduate degree in marketing, economics, sociology, psychology or mathematics. (Tushnet, Tr. 4479). She has never taught a marketing course. (Tushnet, Tr. 4480). She has not taken any courses in survey design or administered a consumer survey. (Tushnet, Tr. 4479-81). And she was not familiar with basic concepts in survey methodology, testifying that she had only a "minimal understanding" of conjoint analysis and would "have to refresh my memory" regarding a t-statistic. (Tushnet, Tr. 4483).

This makes Professor Tushnet unqualified to respond to Dr. Goodstein or Dr. Van Liere who have Ph.Ds in marketing and sociology, respectively, and extensive experience with consumer surveys. (Tr. 4408 ("I don't see how this person is an expert to talk about someone who's got a Ph.D.")). At a minimum, an "expert who gives an opinion about the adequacy and interpretation of a survey . . . should have general skills and experience with surveys and be familiar with all of the issues. . . ." Shari Seidman Diamond, *Reference Guide on Survey Research*, Federal Judicial Center Reference Manual on Sci. Evid. 359 (3d. ed.), 375-376, 2011 WL 7724258, at *11.

(b) Professor Jacoby's Testimony is Unreliable

Professor Jacob Jacoby's testimony regarding consumer confusion, which was based on a survey he conducted, also should be disregarded. Numerous courts have reached that conclusion. ***Four*** courts have entirely excluded Dr. Jacoby's testimony.[12] And nearly ***twenty*** others have afforded Dr. Jacoby's testimony little to no weight.[13]

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

[13] *See, e.g.*, *Pinterest, Inc. v. Pintrips, Inc.*, 140 F. Supp. 3d 997, 1015 (N.D. Cal. 2015); *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175,

This Court should do the same. Dr. Jacoby has departed from the methodology that he used in two prior studies regarding consumer confusion from paid search advertising. *See* J. Jacoby & M. Sableman, *Keyword-Based Advertising: Filling in Factual Voids (GEICO v. Google*), 97 Trademark Reporter 681 (2007); CX 09041 (Jacoby, Dep. at 22-29). His new survey methodology for this case suffers from at least four fatal flaws that make it "obvious that Dr. Jacob Jacoby, a veteran of the trademark litigation arena and the creator of the [consumer] survey, constructed [a] study specifically to disprove consumer confusion regardless of participants' reactions to the advertisements." *Weight Watchers*, 744 F. Supp. at 1274.

First, Dr. Jacoby's test stimuli did not replicate marketplace conditions. Rather than basing his "2016" test stimulus on a SERP for a search on "1-800 Contacts," Dr. Jacoby based it on a very different SERP for a search on "contact lenses." (RF 1617-1621). As a result of the significant differences between Dr. Jacoby's 2016 test stimulus and the actual SERP for the query "1-800 Contacts," Dr. Jacoby admitted that his 2016 test stimulus did not test whether

211 (D.D.C. 2014); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1325–26 (N.D. Ga. 2008); *Factory Five Racing, Inc. v. Carroll Shelby*, 2010 WL 4232609, at *15 (Trademark Tr. & Ap. Bd. 2010); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, No. 04-0251, 2004 WL 1598916, at *1 (E.D.N.Y. July 19, 2004); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 134, 136 (E.D.N.Y. 2004); *Gillette Co. v. Norelco Consumer Prods. Co.*, 69 F. Supp. 2d 246, 263 (D. Mass. 1999); *In the Matter of Novartis Corp., et al.*, Dkt. No. 9279, 127 F.T.C. 580, 696 (1999); *Hershey Foods Corp. v. Mars, Inc.*, 998 F. Supp. 500, 511 (M.D. Pa. 1998); *Pfizer, Inc. v. Perrigo Co.*, 988 F. Supp. 686, 699 (S.D.N.Y. 1997); *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F. Supp. 279, 291 (S.D.N.Y. 1997); *Novo Nordisk of N. Am., Inc. v. Eli Lilly & Co.*, No. 96-5787, 1996 WL 497018, at *6 (S.D.N.Y. Aug. 30, 1996); *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 852 F. Supp. 196, 199 (S.D.N.Y. 1994); *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F. Supp. 700, 725 (D. Neb. 1992), *aff'd*, 990 F.2d 368 (8th Cir. 1993); *E. & J. Gallo Winery v. Consorzio del Gallo Nero*, 782 F. Supp. 457, 466 (N.D. Cal. 1991); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1274 (S.D.N.Y. 1990); *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1446 (S.D. Ohio 1990); *In the Matter of Kraft, Inc.*, Dkt. No. 9208, 1989 WL 1126655, at *33-34 (1989); *Quality Inns Int'l, Inc.*, 695 F. Supp. at 218-19; *Am. Home Prods. Corp. v. Barr Labs., Inc.*, 656 F. Supp. 1058, 1071 (D.N.J. 1987), *aff'd* 834 F.2d 368 (3d Cir. 1987).

rivals ads shown in response to the query "1-800 Contacts" would be confusing. (RF 1623; Jacoby, Tr. 2281-82).

In short, Dr. Jacoby used the wrong test stimulus. That is a basic flaw in survey methodology. As Dr. Jacoby concedes, "it is important . . . in consumer surveys for the test stimuli to be as close as possible to what consumers would see in the real world." (Jacoby, Tr. 2298). *See also Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1043 (S.D. Ind. 2000) (rejecting "survey [that] does not ask respondent to view actual search engine results containing hyperlinks to these sites in a way that might actually occur in the marketplace").

Dr. Jacoby also had a "pre-2016" test stimulus, but that stimulus, too, failed to replicate marketplace conditions. Although Dr. Jacoby intended to create a stimulus based on a Google SERP as it appeared in early 2016, Dr. Jacoby ended up with a stimulus based on a SERP from 2007. (RF 1634-1636). The evidence shows that there have been numerous changes in the Google SERP format since 2007, and Dr. Jacoby admitted that the formatting of a SERP may affect confusion. (RF 1641). It is improper to test consumer confusion based on outdated SERPs, especially when consumers have not encountered the outdated format for at least 9 years. *See Gov't Emples. Ins. Co. v. Google, Inc.*, No. 1:04cv507, 2005 WL 1903128, at *6 (E.D. Va. Aug. 8, 2005) (rejecting survey where "the overall appearance of the outdated screen shot shown to survey participants differed markedly from the Google results page that a user would encounter in running a real search"). Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby's pre-2016 test stimulus rendered his study unreliable.

Second, Dr. Jacoby's survey failed to replicate market conditions. (RF 1647-1660). For instance, Dr. Jacoby inserted big green arrows that highlight a particular ad. (RF 1650-1651; *see* CX 8013, at 20-21, 56-57). By using the green arrow to identify specific elements of the SERP, the survey improperly led respondents to inspect it to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole, causing respondents to consider certain parts of the stimulus rather than letting them look at the stimulus as they normally would. (Van Liere., Tr. 3080-3081). Indeed, Dr. Jacoby admitted that the purpose of the green arrow in his survey was to do exactly that: draw attention to one particular ad. (Jacoby, Tr. 2313). Other courts have criticized Dr. Jacoby for similar distortions. *See Quality Inns*, 695 F. Supp. at 219 (finding it "troubling" that "over 70 percent of the respondents who correctly associated McSleep Inn with Quality International did so because they were reading the qualifying language 'by Quality International,'" which many consumers would not have encountered in reality); *Smith*, 537 F. Supp. 2d at 1327-29 (criticizing Jacoby for artificially manipulating respondents' interest in a particular internet link, which "did not sufficiently reflect actual marketplace conditions or typical consumer shopping behavior").

Third, Dr. Jacoby's primary question functioned as a "reading" test: "If you click on this listing, which company's website will it take you to?" (CX 8013, Appendix H at 36). Prompted to examine where a link would take them, 53% of respondents simply typed the URL in the highlighted sponsored ad and 8% simply typed the ad copy. (RX 0735-0025; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087.) In other words, the majority of respondents simply typed what they saw. Such a "reading test" does not measure confusion. *See Paleteria*, 69 F. Supp. 3d at 211 (criticizing Jacoby survey that "demonstrated little more than respondents' ability to read and comprehend the stimuli"). (*See also* RX 0735-0025 (quoting Swann, Jerre B. (2005) *"A 'Reading' Test or a 'Memory' Test: Which Survey Methodology Is Correct?"* Trademark Reporter, 95: 876-881)).

Fourth, Dr. Jacoby used an improper "control" condition. In the "test" condition, survey respondents entered a search on Google for "1-800contacts." In the "control" condition, respondents entered a search for an entirely different phrase, "contact lenses." This results in an improper comparison because, as explained more fully below, consumers who search for 1-800 Contacts' trademarks generally have a different intent than consumers who search for "contact lenses." (*See* RX 0733 ¶¶ 101-13; RX 0736 ¶¶ 65-71 & ¶¶ 79-82).

* * * *

In sum, Complaint Counsel failed to offer any competent, admissible evidence to refute 1-800 Contacts' showing that rivals' paid ads displayed in response to consumers' queries for "1-800 Contacts" can give rise to an actionable likelihood of confusion.

D. The Settlement Agreements Reduced Search Costs

Other retailers' ads portend more than confusion. It is undisputed that consumers searching online will experience search costs and that those search costs will reduce their welfare. (Athey, Tr. 913, 949; CX 09043 (Athey, Dep. at 188); CX 08007-020; RX 0733-0028 to -0030; Ghose, Tr. 3912-13, 4013; CX 09046 (Ghose, Dep. at 74-75)). The magnitude of consumers' search costs depends on what they are looking to find. (Athey, Tr. 912; Ghose, Tr. 3917; RX 0733-0010). Consumers searching for 1-800 Contacts' trademarks generally intend to navigate to 1-800 Contacts' website. As Dr. Athey admitted, "if I type '1-800 Contacts' into the search bar, that would be a navigational search." (Athey, Tr. 347). Accordingly, the main effect of displaying additional ads for other retailers in response to those searches would be to increase consumers' search costs, harming consumers. The settlements reduced those costs, benefitting consumers.

1. Most Consumers Searching for 1-800 Contacts' Trademarks Are Trying to Visit 1-800 Contacts' Website.

The record is replete with evidence supporting the common sense proposition that most consumers who search for 1-800 Contacts' trademarks intend to visit its website. (RF 946-959; Ghose, Tr. 3869-70, RX 0733-0031 to -0037, -0045 to -052). According to Dr. Ghose's analysis of Google data, [redacted] of consumers who search for 1-800 Contacts' trademarks click on a paid ad for 1-800 Contacts (RX 0733-0046), and more than [redacted] of consumers who searched for 1-800 Contacts' trademarks click on an ad or an organic link that will take them to 1-800 Contacts' website (Ghose, Tr. 3890-91; RX 0733-051). Dr. Athey's comScore data corroborates this analysis: 82.6% of consumers who searched for 1-800 Contacts' trademarks click on an ad or an organic link for 1-800 Contacts. (RX 0733-0051; Ghose, Tr. 3891-92). These figures dwarf the rates at which consumers who search for 1-800 Contacts' trademarks click on Google ads for other retailers, which range from [redacted] to [redacted]. (RX 0733-0046; Ghose, Tr. 3883). Indeed, all of the data—whether from Google, Bing, or comScore, whether organized by search or by bid, whether before or after the settlement agreements—show the same stark reality: consumers who search for 1-800 Contacts' trademarks click on links to its website at rates many times the rates at which they click on ads for its competitors. (RX 0733-0051, -0095, -0103, -0104; (RX 0739-0029, -0096; (Ghose, Tr. 3881, 3884-88 3892-93).

Likewise, consumers who search for 1-800 Contacts' trademarks navigate to 1-800 Contacts' website at a far higher rate (more than [redacted] for Google searchers) than do consumers who search for other terms (roughly [redacted]). (RX 0733-0095; (RX 0739-0029). And other retailers see the same disparity in behavior as well: consumers who search for their trademarks navigate to their websites at far higher rates than do consumers who conduct other searches. (RX 0733-0095; Ghose, Tr. 3887-88; CX 08010-012; CX 08009-082). Further, the data show that consumers who search for 1-800 Contacts' trademarks and click on an ad for 1-800 Contacts convert at rates several times higher than do consumers who conduct that search and click on ads for other retailers. (RX 0733-0048 to -0050, -0095, -0096; Ghose, Tr. 3897-3900, 3927; CX 09043 (Athey, Dep. at 282-83)). These data leave no doubt that Dr. Clarkson of AC Lens had it right: "a substantial number of people who type in '1-800 Contacts' are looking for 1-800 Contacts." (Clarkson, Tr. 347).

The search engines themselves put the issue to rest. Bing has cited searches for retailers' names such as "target" and "amazon" as examples of "navigational queries" in which "users typically navigate to a single site or web page." (RX 0658-0003, -0004). Google recognizes that consumers who search for "amazon" have a "clear intent to go to the amazon.com website," and that "[a]lmost all mobile users would be immediately and fully satisfied by the result and would not need to view other results to satisfy their need." (RX 0121-076, -080). There is no basis in the record to say anything different about searches for 1-800 Contacts' trademarks. Google itself suggests as much by providing consumers who search for 1-800 Contacts' trademarks with a Knowledge Graph that includes information about the company and links to its Facebook, Twitter, Instagram and YouTube sites. (*See, e.g.*, CX 08007-010).

2. Ads for Other Retailers Are Only Minimally Relevant to Consumers Who Are Looking to Visit 1-800 Contacts' Website.

For the vast majority of consumers who intend to navigate to 1-800 Contacts' website, additional ads will increase their search costs while providing little if any benefit in return.

Additional ads for other retailers offer little benefit because they are only minimally relevant to consumers who are looking for 1-800 Contacts. (Ghose, Tr. 3911-12; RX 0733-0038 to -0040; CX 09046 (Ghose, Dep. at 84, 141, 175); CX 09048 (Murphy, Dep. at 79-82)). The search engines themselves show this. Because search engines' algorithms rank organic links solely in terms of relevance, organic links are a reliable method for assessing what websites will be relevant and useful for consumers. (CX 09046 (Ghose, Dep.at 47); RX 0733-0010-011, -0024 –025)). Google, however, does not display organic links to any of 1-800 Contacts' competitors until far into the search results for a search for 1-800 Contacts' trademark. (Ghose, Tr. 3910-11; RX 0733-0024, RX 0733-0156 to -0190). The clear inference is that Google's highly sophisticated algorithms based on massive data about consumers' revealed preferences consider ads for 1-800 Contacts' competitors only minimally relevant to consumers searching for 1-800 Contacts' trademarks.

Put another way, as Dr. Evans and Dr. Athey acknowledged, the fact that search engines might display ads for 1-800 Contacts' competitors in response to searches for its trademarks does not mean that consumers are better for it. (Athey, Tr. 949; CX 09043 (Athey, Dep. at 190); Evans, Tr. 1816-17; (RX 0739-0055, -0056). Search engines are interested in maximizing long-term profits, and trade off efficiency and revenue. (Athey, Tr. 949; CX 09042 (Evans, Dep. at 165, 184); CX 09048 (Murphy, Dep. at 60-61); CX 09043 (Athey, Dep. at 184); CX 09048 (Murphy, Dep. at 62-65)). Thus, as Dr. Evans and Dr. Athey also agree, search engines' trademark policies are not socially optimal. (Evans, Tr. 1817; CX 8006-019; CX 09043 (Athey, Dep. at 192-93)).

3. Minimally Relevant Ads for Other Retailers Increase Search Costs for Consumers Who Are Trying to Visit 1-800 Contacts' Website.

Providing consumers with additional ads that are only minimally relevant can harm them by increasing the costs of finding 1-800 Contacts (RX 0733-0038 to -0040; Ghose, Tr. 3928-30, 4080-81; CX 09046 (Ghose, Dep. at 84, 151-52, 175))—exactly the opposite of what trademarks are designed to do. *Qualitex Co.*, 514 U.S. at 163–64. (*See also* RX 0737 ¶¶ 10-25.) As a Bing behavioral scientist explained, even though it seems like more choices should always be better, we are actually less happy when we have too many choices." (RX 1963). This "choice overload" problem is intuitive; "if you've ever stood in the salad dressing aisle at your local supermarket, you know exactly what it is." (RX 1963). According to Bing's behavioral scientist, there are "several reasons that having too many choices can make us unhappy":

- "First, it can create post-decisional regret, sometimes called buyer's remorse: that feeling you get after you make a decision and instantly start worrying that another option might have been better. The more options, the more worry."
- "Second, even if we end up with choice we are confident about, more choices mean that searching takes longer. So even when we find something that makes us happy, our enjoyment is reduced by the time we spent sorting through the options."
- "Third, when the choice set gets too big, we may just give up. It is like looking at a line of people outside a theater and leaving because you feel like you'll just never get inside; too much choice can cause us to abandon the things that we truly want." RX 1963-001.

(RX 1963-001; *see also* RX 0733-0031 (describing empirical literature making similar findings)). The strategy to deal with "choice overload" is to "focus on narrowing down the set of options," or "choice reduction." (RX 1963-001).

These well-recognized phenomena explain yet another procompetitive benefit of the settlement agreements. They minimized search costs for the vast majority of consumers who search for 1-800 Contacts' trademarks for the same reason they would dial its telephone number or look it up in the White Pages—to reach 1-800 Contacts. (Ghose, Tr. 3960, 3994; CX 09046 (Ghose, Dep. at 186)).

E. <u>The Settlement Agreements Increased Online Purchases of Contact Lenses</u>

The record also contains empirical evidence from Complaint Counsel's own expert, Dr. Athey, regarding the benefits of reducing confusion and search costs for consumers who search for 1-800 Contacts' trademarks. Dr. Athey constructed a model for paid search advertising in response to searches for 1-800 Contacts' trademarks in a counterfactual world without the settlement agreements. Professor Murphy input data from Google regarding the rate at which consumers who conduct such searches buy from 1-800 Contacts and its rivals into Dr. Athey's model. The result? In the absence of the settlement agreements, consumers who searched for 1-800 Contacts' trademarks would have made fewer purchases of contact lenses.

Dr. Athey estimates that, in a counterfactual world without the settlement agreements, consumers would have clicked on 1-800 Contacts' ads [redacted] searches for 1-800 Contacts' trademarks. (CX 08007-032; RX 0739-0083, Murphy, Tr. 4135-36). According to Google data, on average, approximately [redacted] of consumers who search for 1-800 Contacts' trademarks and click on an ad for the company convert. (RX 0739-0083; Murphy, Tr. 4136). Multiplying Dr. Athey's two incremental clicks by the [redacted] conversion rate yields [redacted] more sales per 100 searches in a world without the settlement agreements. (RX 0739-0083; Murphy, Tr. 4134-36).

Dr. Athey also estimates that, in a world without the settlement agreements, consumers would have clicked on ads for 1-800 Contacts' competitors [redacted] searches for 1-800 Contacts' trademarks. (CX 08007-032; RX 0739-0083; Murphy, Tr. 4135-36). According to Google data, on average, approximately [redacted] of consumers who search for 1-800 Contacts' trademarks and click on an ad for another retailer convert. (RX 0739-0083; Murphy, Tr. 4136). Multiplying Dr. Athey's 3.5 incremental clicks by the [redacted] conversion rate yields [redacted] more sales per 100 searches for 1-800 Contacts' trademarks in a world without the settlement agreements. (RX 0739-0083, -0084; Murphy, Tr. 4136).

That incremental gain of [redacted] sales for 1-800 Contacts' rivals per 100 searches is less than the incremental loss of [redacted] sales for 1-800 Contacts per 100 searches. The upshot of Dr. Athey's model is that consumers who search for 1-800 Contacts' trademarks would make fewer purchases in a world without the settlement agreements. (RX 00739-0084; Murphy, Tr. 4127-

39).[14] That is powerful evidence that the settlement agreements enhance consumer welfare. And it strongly validates 1-800 Contacts' evidence that paid search ads for other retailers in response to searches for its trademarks make it more difficult for consumers to purchase contact lenses, meaning the settlements benefitted consumers by making it easier for them to do so.

III. COMPLAINT COUNSEL FAILED TO MEET THEIR BURDEN TO PROVE ANTICOMPETITIVE EFFECTS.

The standard framework for analyzing an action's anticompetitive effects on a market is the rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1."); *Agnew v. NCAA*, 683 F.3d 328, 335-36 (7th Cir. 2012). Under this framework, Complaint Counsel bore the burden of showing that the challenged settlement agreements produce significant anticompetitive effects within a relevant market. *See Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010). Complaint Counsel thus had to show anticompetitive effects, such as reduced output, higher prices, or deterioration in quality of goods or services. *E.g.*, *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993).[15]

As a threshold matter, Complaint Counsel had to prove market power in a relevant market—*i.e.*, the ability to raise prices significantly without going out of business—without which 1-800 Contacts could not cause anticompetitive effects. *See Agnew*, 683 F.3d at 335-36; *see also Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). Complaint Counsel therefore had to identify and prove the relevant market. *Worldwide*

[14] At the hearing, Complaint Counsel suggested that Dr. Murphy should have used conversion rates of [redacted] or [redacted] for unbound competitors Walmart and Lens Direct respectively rather than an average conversion rate for other retailers of [redacted] percent. Murphy, Tr. 4225-4232. But doing so would not change these results. Murphy, Tr. 4362.

[15] 1-800 Contacts preserves the argument that proof of a reduction in output is required.

Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 962 (6th Cir. 2004). "Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011); *see also Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006).

Complaint Counsel failed to prove that they could avoid this burden on the ground that the settlement agreements are "inherently suspect." Faced with the rule of reason as the test, they failed to prove the anticompetitive effects that rule requires.

A. The Settlement Agreements Are Not Inherently Suspect

To demonstrate that the settlement agreements are inherently suspect, Complaint Counsel had to prove that it is "obvious from the nature of the challenged conduct that it will likely harm consumers." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005). A restraint is inherently suspect only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Actavis, Inc.*, 133 S.Ct. at 2237. Only "[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition" can "the restraint [be] presumed unlawful. . . ." *Polygram Holding*, 416 F.3d at 36.

For three reasons, Complaint Counsel did not prove that "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of the restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Cal. Dental Ass'n*, 526 U.S. at 781. *First*, the challenged agreements are presumptively procompetitive trademark settlements. *Second*, the nature of the agreements and their context give rise to plausible competing claims as to their competitive effects. *Third*, the agreements involve paid search advertising whose economics are new and highly complex.

In addition, Complaint Counsel adduced no evidence to support their bid rigging theory.

1. Trademark Settlement Agreements Are Presumptively Procompetitive

The dispositive fact for the inherently suspect issue is that the challenged restraints are settlements of trademark litigation that are "common, and favored, under the law," and "merely regulate[] the way a competitor can use a competing mark." *Clorox Co*., 117 F.3d at 55-56. The Supreme Court in *Actavis* rejected the Commission's argument that patent settlement agreements in which the patentee allegedly pays the defendant to stay out of the market entirely should be treated as "presumptively unlawful." 133 S.Ct. at 2237. Rather, the Court held that the Commission must litigate a challenge to settlements "as in other rule of reason cases." *Id*. The settlement agreements here should not be *more* suspect than those in *Actavis* as here they involved no payment from 1-800 Contacts to the other settling parties and no attempt to divide monopoly profits. Rather than presumptively anticompetitive, "it is reasonable to presume that [trademark settlement] agreements are pro-competitive." *Clorox Co*., 117 F.3d at 60.

Complaint Counsel cannot shirk their burden to prove the settlements' antitrust demerits by attacking the agreements' trademark merits. Complaint Counsel have alleged that the settlements are inherently suspect because they supposedly restrain "non-misleading advertising." Cmplt. ¶ 32. Of course, the entire point of limiting antitrust scrutiny to settlements taking commonplace forms is to avoid such a hindsight inquiry into an issue such as confusion, "an inherently factual issue that depends on the facts and circumstances in each case." *Rosetta Stone Ltd.*, 676 F.3d at 153; s*ee also Schering-Plough*, 136 F.T.C. at 997 ("An 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."). But even setting that aside, Complaint Counsel have not come close to proving that the settlement agreements *only* restrain "non-misleading advertising" that would not give rise to an infringement claim.

Complaint Counsel in fact concede, as two courts held, that 1-800 Contacts' trademark claims were not sham. (RX 0680; *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). Wisely so, for there is no basis to find that the claims were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S.49, 60 (1993). The use in commerce issue is settled. *Network Automation, Inc.*, 638 F.3d at 1144-45; *Rescuecom, Inc.*, 562 F.3d at 128-41. Courts have held that the use can give rise to actionable confusion. *E.g.*, *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61; *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288. Certainly Dr. Jacoby's wholly unreliable surveys do not purport to measure confusion for every ad prohibited by the settlement agreements. And, as noted, courts grant relief on terms that parallel the settlement terms. (RF 1325-1348).

Simply put, Complaint Counsel have not proven, and could not prove, that 1-800 Contacts would have lost an infringement lawsuit as to *every* single advertisement prohibited by the settlement agreements. Accordingly, the record gives Complaint Counsel no basis to contest that 1-800 Contacts could have won an infringement lawsuit as to some of those advertisements, or as to all of them, in which case, to that extent, 1-800 Contacts' settlements would be as procompetitive as trademark law itself.

In fact, Complaint Counsel have not proven any basis to deny that the settlements are procompetitive as to *any* particular advertisement. Even crediting Dr. Jacoby's "tricks of the survey researcher's black arts," *Indianapolis Colts, Inc.*, 34 F.3d at 416, his surveys address but two particular contexts, one of them that was "not the real world." (Jacoby, Tr. 2298). As such, Dr. Jacoby does not answer the infringement question as to other ads, other retailers, or other permutations of the search results page.

For whereas patent infringement turns on the use of an invention alone, trademark infringement exists only when the use of a mark confuses consumers, which is based on a multi-factor test that accounts for the particular context of each advertisement. *See Checkpoint Sys., Inc. v. Check Point Software Techs.*, 269 F.3d 270, 280 (3d Cir. 2001); *Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-CV-00250, 2016 WL 4074121, at *6 (D. Conn. July 29, 2016); *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, 103 F. Supp. 3d 1032, 1041 (D. Minn. 2015); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1244 (10th Cir. 2013); *Network Automation, Inc.*, 638 F.3d at 1148-49; *Rosetta Stone*, 676 F.3d at 154-55. "[T]he weight of any given factor can depend very much on context" and there is "the danger of applying the factors mechanically without attention to context." *Lens.com*,, 722 F.3d at 1243-44.

The Court cited these principles in rejecting Complaint Counsel's attempt to use findings on confusion in *Lens.com* as a proxy for the entire spectrum of ads at issue. Order Denying Complaint Counsel's Motion to Bar Testimony and Argument (Feb. 21, 2017), at 4. And while Complaint Counsel would categorically carve out ads that use 1-800 Contacts' name in their text, courts have rejected their argument that trademark rights extend only so far. *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.

If Complaint Counsel complain that they cannot be expected to litigate the merits of every single advertisement prohibited by the agreements, they would hit on the head why the settlements are not inherently suspect for being "overbroad." Cmplt. ¶ 32. Indeed, that is why the form of non-use agreements at issue here are commonplace.

If a trademark settlement is overbroad as long as it covers advertising uncertain to infringe, only a settlement that prohibits "confusing" advertising alone would not be overbroad. But 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); 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.").

Trademark practice mirrors the law in this respect. As Mr. Hogan testified, parties involved in disputes or litigation over the use of their marks in paid search advertising do not want to litigate the use of their mark in every context any more than Complaint Counsel do, which is why they broadly agree not to use marks at all for paid search advertising. (Hogan, Tr. 3271–72, 3503). And, in the specific context here, they agree to use negative keywords. (Hogan, Tr. 3300–02). Thus, far from inherently suspect, broad non-use agreements are inherent in the nature of trademark claims and the element of likely confusion. Complaint Counsel's use of trademark law as an antitrust yardstick has nothing to do with how parties settle litigation in the real world.

Where 1-800 Contacts' claims were not sham and the agreements settling them provided for the kinds of relief that courts have ordered, Complaint Counsel's overbreadth argument is better read as an admission that the settlement agreements may or may not be as procompetitive as trademark law itself as to any particular advertisement. That possibility makes them no different than any other settlement, since if the parties knew the result of a particular lawsuit in advance, they would have no reason to settle (or litigate). Complaint Counsel's failure to prove that any particular advertisement prohibited by the settlements would not infringe means that they must "prove [their] case as in other rule-of-reason cases." *Actavis*, 133 S.Ct. at 2237. As the Court in *Actavis* explained, even in a case where antitrust law permits scrutiny of settlement agreements, "[w]hether a particular restraint lies 'beyond the limits of [an intellectual property right]' is a *conclusion* that flows from that analysis and not . . . its starting point." *Actavis*, 133 S.Ct. at 2231-32.

The *Clorox* Court made the point even more clearly: "because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns." 117 F.3d at 57 (citation omitted). Accordingly, Complaint Counsel "cannot make a case under the antitrust laws unless they demonstrate that the [settlement agreement] may significantly harm competition as a whole, *regardless of whether the agreement is entirely necessary to protect [the defendant's] trademark rights*." *Clorox Co.*, 117 F.3d at 57 (emphasis added).

Any contrary rule would violate the principle that "[t]he antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *Nat'l Football League v. N. Am. Soccer*

League, 459 U.S. 1074, 1079 (1982) (Rehnquist, C.J., dissenting from denial of certiorari); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), *overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Condemning a settlement agreement as inherently suspect if an "alternative would be less restrictive of competition no matter to how small a degree" "would place an undue burden on the ordinary conduct of business." *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975). And unduly burdening trademark protection that the Supreme Court has clearly recognized as procompetitive would "chill the very conduct the antitrust laws are designed to protect." *Trinko, LLP*, 540 U.S. at 414.

2. The Agreements' Context Reflects Plausible Competing Claims Regarding Competitive Effects

Inherently suspect treatment also is not appropriate because the settlement agreements "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Cal. Dental Ass'n*, 526 U.S. at 771. The Court in *California Dental* held that the Commission erred in giving inherently suspect treatment to restrictions that essentially prohibited dentists in California from *any* advertising offering the "lowest prices" or making any "claims as to the quality of services." 526 U.S. at 761. Inherently suspect treatment is no more appropriate for the limited settlement agreements here, which, as noted, had significant procompetitive effects—including preserving procompetitive incentives to invest in brand development, preventing consumer confusion, and reducing consumer search costs. As Dr. Evans himself wrote, trademark protections "reflect a balance between the benefits of encouraging investment in trademarks that are valuable for the competitive process and the benefits of encouraging the free flow of market information." (CX 8006-137).

Further, it is not obvious whether the vast majority of consumers who are looking for 1-800 Contacts' website are better off seeing advertisements that will take them somewhere else. The parties have introduced competing expert testimony regarding the advertisements' potential for confusion—Dr. Jacoby for Complaint Counsel, Dr. Van Liere and Dr. Goodstein for 1-800 Contacts. While Dr. Jacoby's survey clearly is flawed, resolving the confusion issue hardly is simple. And the record shows that analyzing the settlement agreements' effects requires accounting for the behavioral economics of the "choice overload" problem.

As Dr. Murphy showed, the potential effects of confusion and choice overload are real, for Dr. Athey's own model of the counterfactual world predicts that eliminating the settlement agreements would make consumers who search for 1-800 Contacts' trademarks less successful in purchasing contact lenses. At the very least, this analysis shows that 1-800 Contacts' "prediction that any costs to competition associated with" the restrictions "will be outweighed by gains to consumer information" is "not implausible" and that "neither a court nor the Commission may initially dismiss it as presumptively wrong." *Cal. Dental Ass'n*, 526 U.S. at 775.

In fact, the settlement agreements have the potential to create "gains to consumer information" that Complaint Counsel have not even measured, let alone refuted. It is undisputed that additional paid search ads for other retailers would push organic results—such as 1-800 Contacts' Facebook page—off the search results page, denying ready access to information that could be at least as valuable to consumers searching for 1-800 Contacts as ads for other retailers. Complaint Counsel have not valued such organic results.

As in *California Dental*, then, "the plausibility of competing claims about the effects of" challenged "advertising restrictions rule[d] out the indulgently abbreviated review" called for by Complaint Counsel. *Id.* at 778.

The fact that the complexities in this case arise from paid search advertising rather than professional advertising as in *California Dental* is of no moment. What matters is that the "context" makes clear that the balance of competitive effects is "a question susceptible to empirical but not *a priori* analysis." *Id.* at 774. Indeed, the Supreme Court in *California Dental* explained its decision in broadly applicable terms:

> The point is that 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.

Id. at 775.

3. Paid Search Advertising is Highly Complex

In addition, Complaint Counsel's efforts to shoehorn the settlement agreements into the inherently suspect analysis by labeling them "bidding agreements" ignores the incredible complexity of the search engine auction process. Because of this complexity, one cannot conclude that fewer paid search ads were shown or that the search engines were paid less without significant empirical analysis of the historical data from millions of auctions involving searches on 1-800 Contacts' trademark. The complexity of the search engine auction process makes it impossible for someone with only "a rudimentary understanding of economics" to conclude that the settlements would have an anticompetitive effect. *Actavis, Inc.*, 133 S.Ct. at 2237.

Every time a user enters a search query, the search engine runs an instantaneous auction to determine which paid ads to display, how many to display, and in what position to display them. (RF 761). Whether an ad will be shown in response to a given search, the position of an ad, and the cost to the advertiser for any clicks on its ad is determined not only the advertisers' bids, but also a combination of several other non-price factors (a so-called "quality score"), such as (1) the expected click-through-rate ("CTR") of the ad (*i.e.*, a prediction of how often users will click on the ad and thus how often the search engine will be paid), (2) the relevance of the ad copy to the keywords (*i.e.*, whether the text of the ad relates to the search term), (3) the "landing page experience" (an estimate of how relevant the advertiser's landing page to the user's query), and (4) the predicted effect on [redacted] which are additions to the [redacted] (RF 803-804, 808, 839, 2115)[16] All of these non-price factors and the bid are inputs into complex proprietary algorithms, which give weight to each of the factors and produce an overall score called (in Google's system) an Ad Rank.

The cost-per-click (CPC) for each advertiser also is based on a complex system that prevents easy predictions. CPC is determined by the outcome of a generalized second-price auction. (RF 818, 848). The CPC for a given advertiser is the bid amount needed to beat the Ad Rank of the advertiser in the next lower position. (RF 819). Because Ad Rank is a combination of the bid and quality score, an advertiser in the top position with a high quality score may have a *lower* CPC than advertisers in lower positions. (RF 821). Conversely, the advertiser in the lowest, least favored position, may have to pay a *higher* CPC than advertisers in more favored positions. (RF 821). Moreover, the CPC of the advertiser in the top position is not affected by bidders that end up in the third or fourth spots. (RF 820).

Adding to the complexity, the outcome of one auction—the determination of which ads are shown and the CPC that will be charge the advertisers who ads are clicked on—cannot be used to predict the outcome of the another auction in the future. The quality score is determined

[16] In addition, the auction algorithm also takes into account information about the [redacted] (*e.g.*, the [redacted] when determining which ads to show and the position in which they are placed. (RF 825, 850).

by auction-time information. (RF 804, 806). It can thus vary from auction to auction, even for the very same query or the very same ad. (RF 823-830). Because an ad's quality scores may [redacted] (RF 829). It is therefore possible [redacted] (RF 830).

In light of these complexities, Hal Varian, chief economist at Google, has explained that "any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 0701 (Varian Decl.) ¶ 6). Dr. Athey testified that adding bidders to an Internet search auction will change the behavior of existing bidders. (CX 9043 (Athey, Dep. at 135)). And, according to the [redacted] search advertising auction algorithms, evaluating the effect, if any, of the agreements on its revenue would require one to [redacted] which [redacted] (RX 0704 (Iyer Decl.) ¶¶ 21-22). More specifically:

[redacted]

[redacted]

(RX 0704 [redacted] ¶ 20).

The absence of "economic learning and the experience of the market" regarding paid search advertising also cut against inherently suspect treatment. *Polygram Holding, Inc.*, 416 F.3d at 36. Paid search advertising was in its "primordial swamp" a mere decade ago. (CX 9042 (Evans, Dep. at 170-171)). Advertising on other firms' trademarks has only been possible since 2004. (CX 01148). Virtually no cases have applied antitrust analysis to restrictions on paid search advertising or two-sided platforms whose economics developed in 2000. (Athey, Tr. 2084; CX 9042 (Evans, Dep. at 158-159, 163-165)). And Complaint Counsel's experts agreed that analyzing markets for such two-sided platforms is more complex than analyzing more traditional industries. (Athey, Tr. 2084; CX 9042 (Evans, Dep. at 159-160)).

4. There is No Evidence of Bid Rigging

Finally, "there is not a scintilla of evidence," *Clorox Co.*, 117 F.3d at 60, to support Complaint Counsel's characterization of the settlement agreements as collusive bid rigging or to suggest that 1-800 Contacts "intended to conspire with" any settling party "to violate the antitrust laws in any way." *Id*.

As Dr. Murphy explained, the settlement agreements make no economic sense as an attempt to rig bids. (RX 0739 ¶¶ 151-55). They were not multilateral and did not affect a number of retailers, including Walmart and Costco, making it unlikely that the settling parties would be able to control the prices of winning bids. The agreements only affected advertising in response to searches for some trademarks, meaning that they gave the settling parties greater incentives to compete with respect to other advertising. And because 1-800 Contacts virtually never bid on the settling parties' trademarks, the settling parties had no incentive to collude unless 1-800 Contacts paid them for its efforts. (RX 0739 ¶ 155). It is undisputed that 1-800

Contacts did not do so. Dr. Evans testified that the only benefit that the settling parties received was avoiding litigation costs and uncertainty. (CX 9042 (Evans, Dep. at 114-116); RF 1250-53; CX 9040 (Miller, Dep. at 202-04; Pratt, Tr. 2561).

The settling parties' conduct itself precludes any inference that they colluded to protect monopoly profits. For example, if Vision Direct was colluding with 1-800 Contacts, why did it precipitate a second round of litigation by refusing to implement negative keywords and end up paying some $500,000? (RF 1196-98). If Memorial Eye was colluding with 1-800 Contacts, why did it obtain multiple stays of the litigation and settle only after the Second Circuit's decision in *Rescuecom* due to **"**the continuing impact that the legal cost would have on [its] business,**"** (CX 9024 (Holbrook, Dep**.** at 162))? And if settling was a form of profitable bid rigging, why did Lens.com and Lens Direct refuse to settle? (RF 1110-1127, 1261).

The only conceivable inference is that the settling parties made a business calculation that the costs of continued litigation did not outweigh the benefits. And, that is how they testified, supporting Complaint Counsel's own allegation that they settled "in order to avoid prolonged and costly litigation." Cmplt., ¶ 19. (RF 1253; Clarkson, Tr. 342; CX 9039 [redacted] at 86-87, 144); CX 9003 [redacted] at 108-109); CX 9000 ([redacted], IHT at 93-94.); CX 9014 ([redacted], Dep. at 46-48); Holbrook, Tr. 2032; CX 9024 [redacted] at 63, 160-62, 164-65; CX 0943 ([redacted] Decl.) ¶ 10).

Complaint Counsel have attempted to paint this run-of-the-mill reason for settling litigation as evidence of unfair "coercion." It is not. Complaint Counsel cannot seriously contend that 1-800 Contacts coerced a major retailer such as Walgreens to settle litigation against its will. And there is no evidence that Walgreens was capital-constrained—or, in fact, that any of the settling parties was. (Evans, Tr. 1832; CX 09042 (Evans, Dep. at 135)). The fact that the settling parties faced litigation costs was a byproduct not of collusion but of 1-800 Contacts' exercise of its First Amendment rights to enforce its trademarks. The settling parties' decision to avoid the costs of litigation and refrain from engaging in the allegedly infringing conduct is not inherently suspect.

* * * *

For all of these reasons, Complaint Counsel's plea to treat 1-800 Contacts' settlement agreements as "inherently suspect" must be rejected. Instead, just as in *Actavis* and *California Dental*, they must be evaluated under the rule of reason. That rule requires Complaint Counsel to prove that the settlements had anticompetitive effects. As detailed below, Complaint Counsel failed to do so.

B. <u>Complaint Counsel Failed to Prove Anticompetitive Effects Under the Rule of Reason</u>

1. Complaint Counsel Failed to Prove that 1-800 Contacts Had Market Power

Complaint Counsel's initial failure under the rule of reason was on market power.

The "purpose of the inquiries into market definition and market power" is "to determine whether an arrangement has the potential for genuine adverse effects on competition." *Indiana Fed'n of Dentists,* 476 U.S. at 460. "Firms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc*., 996 F.2d 537, 546 (2d Cir. 1993).

Accordingly, "[s]ubstantial market power is an indispensable ingredient of every claim under the full Rule of Reason." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996); *see also Menasha Corp.*, 354 F.3d at 663 ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Any given firm may cut its own output, but rivals will increase production in response.") (citation omitted). "Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without power bear no burden of justification." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334-5 (7th Cir. 1986).

For two reasons, Complaint Counsel failed to prove that 1-800 Contacts had market power to harm competition either on its own or jointly with the settling parties. *First*, the relevant market is for retail sales of contact lenses and the settling parties' less than 20% share is too small to give them market power. *Second*, even in a market limited to online sales of contact lenses, Complaint Counsel failed to prove barriers to entry or expansion that would prevent other firms from constraining 1-800 Contacts' ability to raise prices.

(a) The Relevant Antitrust Market is For Retail Sales of Contact Lenses

"To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). Complaint Counsel failed to prove that the relevant market for analyzing the settlement agreements' competitive effects is limited to online sales of contact lenses. The relevant market instead includes sales by online retailers, optical chains, mass merchants, and ECPs.[17]

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[17] Indeed, at the same time Complaint Counsel are arguing here for a restricted online market, [redacted] CX 8006 (Evans Report) Table 1. That strongly suggests that the Commission recognized, as it should, that the relevant market here is the market for the sale of contact lenses to consumers.

(i) Commercial Realities Show that Offline Sellers Provide a Competitive Constraint on 1-800 Contacts

"The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004); *see also United States v. Am. Express Co*., 838 F.3d 179, 199 (2d Cir. 2016) ("If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 81 (D.D.C. 2006). Because consumers' ability to switch to a substitute constrains a firm's ability to raise prices above the competitive level, market definition focuses on products reasonably interchangeable by consumers for the same purpose. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see also Geneva Pharm. Tech. Corp.*, 386 F.3d at 496; *Cardinal Health, Inc.*, 12 F. Supp. 2d at 46; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc*., 792 F.2d 210, 219 n.4 (D.C. Cir. 1986); *Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Virginia, Inc.*, 714 F.2d 351, 356 (4th Cir. 1983).

"'Interchangeability' implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively." *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994). Evidence of 1-800 Contacts customers' behavior directly illustrates that online sellers, ECPs, mass merchants, and optical chains satisfy this standard. The proportion of customers that [redacted] meaning that a higher percentage of 1-800 Contacts customers who switch go to ECPs rather than to other pure play online retailers. (RX 0739 ¶¶ 105-106 & Ex. 15; CX 1117-016).

While Complaint Counsel and their experts have suggested that pure-play online retailers in one channel may be more attractive to some consumers than others for various reasons, that does not mean that each channel is a separate market: "products or services need not be identical to be part of the same market." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999); *see also United States v. Cont'l Can Co*., 378 U.S. 441, 449 (1964); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956) (cellophane in same market as other flexible wrapping because "despite cellophane's advantages it has to meet competition from other materials in every one of its uses"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 563d at 389 (3d. ed. 2007) ("Areeda") ("Most courts correctly define the presumptive market to include similar products, though differentiated by brand or features."). The relevant economic question is not whether ECPs, mass merchants and optical chains are different from online retailers but whether they are so different that large enough share of consumers would not be willing to substitute between the two types of retailers such that the ECPs would not constrain online retailers from raising prices. (RX 0739-0040 to -0041, -0076).

Put differently, "[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to recognize competition where, in fact, competition exists." *Cont'l Can Co.*, 378 U.S. at 453 (1964) (quotation marks omitted). "The basic principle is that the relevant market definition must encompass the realities of competition." *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (internal quotation marks omitted)); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) ("proper market definition . . . can be determined only after a factual inquiry into the commercial realities faced by consumers") (quotation marks omitted).

The realities of how 1-800 Contacts competes in the marketplace clearly demonstrate that ECPs and mass merchants provide "competitive pressures that restrain" 1-800 Contacts' "ability to raise prices or restrict output." *Geneva Pharm. Tech. Corp.*, 386 F.3d at 496.

1-800 Contacts has always considered independent ECPs to be its principal competitors because every contact lens customer must go to an ECP for a prescription. (Bethers, Tr. 3542, 3600-01; CX 09001 (Bethers, IHT at 78); Coon, Tr. 2695; CX 09029 (Bethers, Dep. at 149); CX 09017 (Blackwood, Dep. at 99)). Independent ECPs sell approximately 40% of all contact lenses in the U.S., more than any other type of retailer. (RF 373; Bethers, Tr. 3552; RX 0739-0086). Independent ECPs therefore are 1-800 Contacts' primary source of new customers and its largest source of potential growth. (Bethers, Tr. 3547, 3600-01, 3625; CX 01336-078 [redacted]; RX 0739-0020, -0021; Murphy, Tr. 4104-05, 4149, 4159). In Dr. Evans' words, "I don't think there's any dispute that 1-800 Contacts is . . . getting customers from ECPs and other physical retailers and it's competing for that and it's growing, growing its sales and shares as a result of that." (CX 09042 (Evans Dep. at 248-49)). 1-800 Contacts also must continue to fight for *existing* customers with ECPs because every customer must visit an ECP at least once every year (or every two years in seven states) to renew his or her prescription. (Bethers, Tr. 3601, 3626-27; RX 0739-0042; Murphy, Tr. 4151; Evans, Tr. 1700-01).

1-800 Contacts runs its business "to pull consumers from the 'offline' world into the online one." CC Pre-Trial Br. at 47. 1-800 Contacts' value proposition is that ECP customers can get the exact same contacts, delivered to their door, for less than they would pay at an ECP's office. (RX 0905-0002; Murphy, Tr. 4097-99, 4100-01, 4105; RX 0739-0019; Bethers, Tr. 3600-01, 3625). 1-800 Contacts' marketing efforts have always focused on offering the consumer a better alternative to buying from their ECP because that is how most people buy contact lenses. (Coon, Tr. 2666-67, 2687, 2695). In setting its retail prices, 1-800 Contacts conducts a sampling of the 16,000 independent ECP practices on a weekly basis, (Bethers, Tr. 3546; CX 09025 (Osmond, Dep. at 98-99); RX 1128-0126), and also examines information on the pricing of contact lenses at retail optical chains, mass merchants, and club stores. (Bethers, Tr. 3548). And while pricing varies for each contact lens SKU, 1-800 Contacts sets its prices, on average, at a discount of 5 to 10 % off ECPs' and optical chains' prices. (Bethers, Tr. 3542, 3544, 3548-50, 3773; CX 09025 (Osmond, Dep. at 99); CX 00535-010).

All of this is just a sampling of the direct evidence of competitive constraints that place 1-800 Contacts in the same market as ECPs and other offline retailers. (RX 0739-0041, 00042). According to Dr. Evans, "one consequence of raising prices is a reduction in the ability to attract customers from the physical retailers, including the ECPs." (Evans, Tr. 1757; *see also* Murphy, Tr. 4158, 4161-62). Though Dr. Evans himself did not consider how increasing prices would affect 1-800 Contacts' ability to attract new customers, he agreed that it would make economic sense for 1-800 Contacts to take that into account in setting its prices. (Evans, Tr. 1732). Dr. Evans likewise agreed that 1-800 Contacts would want to consider the consequences of increasing the price gap with club stores such as Costco and major discounters like Walmart (Evans, Tr. 1729-32), which, on average, offers lower prices. (RX 0739-0089; Bethers, Tr. 3544-45; CX 09037 (Owens, Dep. at 27); Coon, Tr. 2710). It would make little sense for 1-800 Contacts to ignore the effects of becoming more expensive vis-à-vis mass merchants and club stores that account for 23% of contact lens sales. (RF 453).

Finally, 1-800 Contacts' price match guarantee reflects competition with the entire retail market. 1-800 Contacts offers to beat any price by 2%—not only other online retailers but ECPs and optical chains as well. (CX 09025 (Osmond, Dep. at 16, 18, 43-44, 39-40); CX 01341-001).

[redacted] (CX 01334-007), [redacted] (CX 09025 (Osmond, Dep. at 18-19); CX 01334-007).

In short, only a "broader national market . . . reflects the reality of the way in which [1-800 Contacts] built and conduct their business." *Grinnell Corp.*, 384 U.S. at 576.

Moreover, because market definition is, "a matter of business reality—[ ]of how the market is perceived by those who strive for profit in it, *Cardinal Health, Inc.*, 12 F. Supp. 2d at 46, it is telling that other market participants see the market the way that 1-800 Contacts does. [redacted] and [redacted] executives testified that ECPs, brick-and-mortar stores, and online retailers all compete. (CX 09037 [redacted] at 13-15, 60); CX 09023 [redacted] at 38-39)). Walmart, for instance, tracks the prices of 1-800 Contacts, Target, independent ECPs, Sears, JC Penney, AC Lens, club stores, LensCrafters, PearleVision, America's Best, and Visionworks. (CX 09037 [redacted] at 22, 52)). Walmart considers its largest competitor in the retail sale of contact lenses to be ECPs and tries to set its prices for contact lenses below those of 1-800 Contacts. (CX 09037 [redacted] at 13-14)).

ECPs' own competitive efforts also reflect meaningful competition with online sellers. Many ECPs now compete for sales using more than one channel. Although ECPs sell to consumers face-to-face at the time of the exam, a significant number also sell online through (or in conjunction with) services provided by manufacturers, wholesale distributors, and insurance providers. (Bethers, Tr. 3513-14). In fact, about 49% of ECPs provide consumers with the ability to re-order contact lenses online. (RX0117-0004, -0031).

Further, the contact lens manufacturers' UPPs reflect an economic judgment that ECPs and online retailers sell in the same market. (RX 0739 ¶ 112). If online retailers did not compete with ECPs, it made no economic sense for the manufacturers to require them to sell their products at the same prices. *Leegin*, 551 U.S. at 890 (resale price maintenance by definition assumes, and seeks to reduce, "competition among retailers selling the same brand"). Rather, both manufacturers and ECPs publicly supported UPP policies because of their effect on ECPs' ability to compete against lower priced contact lens retailers. (RX 0739-0019; Murphy, Tr. 4154-55, 4172.) And it is, of course, appropriate to assume that Walmart, Lens Direct and the manufacturers had "accurate perceptions of economic realities." *Rothery Storage & Van Co.*, 792 F.2d at 219.

Both Congress and the Commission appear to have shared the view that competition between online contact lens retailers and ECPs is economically meaningful. That was the logic of the Fairness to Contact Lens Consumers Act ("FCLCA"), Pub. L. 108-164, 117 Stat. 2024 (Dec. 6, 2003); (RX 0739-0043; Murphy, Tr. 4154). Congress found that "[t]he practice of optometrists withholding the prescription has limited the consumer's ability to shop for the best price and has impacted competition. H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1759. Congress sought to "promote[] competition, consumer choice, and lower prices by extending to contact lens wearers the same automatic right to copies of their own prescriptions and allow[] consumers to purchase contact lenses from the provider of their choice." *Id.* at 1760. Congress had in mind "a myriad of *competitive options* to fill contact lens prescriptions from the optometrist's office, to third party sellers like pharmacies, department stores, *and Internet or mail order outlets*." *Id.* (emphasis added).

The FCLCA directed the Commission to "undertake a study of the strength of competition in the sale of prescription contact lenses." 15 U.S.C. § 7609. In 2005, the Commission published a report entitled *The Strength of Competition in the Sale of RX Contact*

Lenses: An FTC Study. (RX 0569). The Commission's report reiterated Congress's judgment about competition between ECPs and other retailers, finding 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 0569-0024). 1-800 Contacts, of course, spent hundreds of millions on advertising—most of it on television—to ensure that consumers were sufficiently informed for this inter-channel competition to take place. (Bethers, Tr. 3614; CX 1446-010; Coon, Tr. 2721; RX 0736-006; RX 0739-0092). And the Commission found that "empirical evidence suggests that most consumers know that they can use a prescription from an ECP to purchase contact lenses elsewhere, including from mail-order companies." (RX 0569-0024).

The FCLCA also directed the Commission to promulgate rules to carry out the FCLCA. 15 U.S.C. § 7607. The Commission promulgated the Contact Lens Rule, 16 C.F.R. § 315, *et seq*., requiring ECPs to give patients a copy of their prescription in order to "increase[] consumers' ability to shop around when buying contact lenses." (RX 0620). According to the Commission, the Contact Lens Rule "was intended to facilitate the ability of consumers to comparison shop for contact lenses." (RX 0703-0001). Like Congress, the Commission appears to have had online sellers in mind: "[t]he development of disposable soft contact lenses, followed by the growth of 'alternative' retail sources of contact lenses (*e.g.*, non-eye care practitioners), *including mail order and Internet firms*, and mass merchants, has given consumers a greater choice of sellers and means of delivery when they purchase contact lenses." (RX 0566-002 (emphasis added)). Indeed, Dr. Evans wrote in his own report that the 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).

The data bear this out. The market share of "pure-play" online retailers has increased from about 7.5% in 2003 to about 17% in 2017. (RF 461). This increase was the result of gaining market share primarily from independent ECPs and retail optical chains. (RF 462).

In short, consumers' switching patterns, 1-800 Contacts' business model, manufacturers' UPPs, Congressional legislation, and the Commission's rulemaking do not make any economic sense unless online sellers compete with ECPs and other offline sellers.

(ii) Dr. Evans' Empirical Analyses Do Not Prove a Narrower Market

Complaint Counsel ignore these commercial realities, relying instead on two empirical analyses by their expert, Dr. Evans: (1) a method used most often in merger cases known as critical loss analysis, *see generally* Daniel P. O'Brien, Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 Antitrust L.J. 161 (2003); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015), and (2) a supposed "natural experiment" based on the manufacturers' UPPs. Dr. Evans' analyses deserve some skepticism given his view that [redacted] (Evans, Tr. 1745), and that market definition "should avoid rigid boundaries" (Evans, Tr. 1430-31). In fact, both of his applications of the "hypothetical monopolist test" are flawed and neither proves a market limited to online retail sales of contact lenses. Rather, as Dr. Murphy testified, properly applying Dr. Evans' methods confirms that the relevant market includes all contact lens retailers.

Critical Loss. A critical loss analysis asks whether it would be profitable for a set of firms that make up a candidate relevant market to raise prices by some threshold level if they jointly chose their profit maximizing prices. (RX 0739-0076; Murphy, Tr. 4156-57). For any given price increase by a set of firms that make up a candidate relevant market, there is some critical loss in sales the set of firms would experience above which it would not be profitable to raise prices. (RX 0739-0076, -077). If the actual loss that a set of firms that make up a candidate relevant market would suffer from lost sales in response to a price increase exceeds the critical loss, raising prices would not be profitable—meaning other firms constrain price increases and are part of the relevant market. (RX 0739-0077). The actual loss depends on the diversion ratio—the share of the firm's lost sales that would be diverted to other firms in the candidate market in response to a price increase of some specified level. (RX 0739-0077).

Dr. Evans estimated the diversion ratio at 40% in both directions: in the event of a price increase by 1-800 Contacts, 40% of its lost customers would supposedly go to other online retailers, and in the event of a price increase by other online retailers, 40% of their lost customers would go to 1-800 Contacts. Based on those estimates, Dr. Evans calculated that a hypothetical monopolist that owned 1-800 Contacts and other online sellers could profitably raise prices by more than the 5% threshold set forth in the Merger Guidelines, leading him to opine that other sellers did not provide a constraint and were outside the relevant market.

The flaws in Dr. Evans' analysis flow from the ground up. Dr. Evans relied on the result of a survey question that asked respondents to rate on a 0 to 10 scale how likely they were to make their next purchase of contact lenses from 1-800 Contacts. (Evans, Tr. 1452-1454; CX 1117-015). According to Dr. Evans, some 40% of respondents who responded with a number between 0 and 5 reported that they would likely make their next purchase of contact lenses from another online retailer. However, Dr. Evans did not know whether the respondents were actually asked where they would make their next purchase of context lenses. (Evans, Tr. 1782-1783). Accordingly, Dr. Evans does not know whether the survey on which he relied asked consumers what they would do if 1-800 Contacts raised prices, (Evans, Tr. 1777), and there is no reason to think that such a question was asked.

That is important because, as a tool for defining markets, a critical loss analysis is designed to measure "the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.*, 370 U.S. at 325. "Cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other." *E. I. du Pont de Nemours & Co.*, 351 U.S. at 400; *see also Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017) ("If two products share a high cross-elasticity of demand—in that an increase in the price of one product causes consumers to switch to the other, and vice versa—then those products likely are interchangeable and may properly be considered part of the same product market."); *Eastman Kodak Co.*, 504 U.S. at 469 (defining "cross-elasticity of demand" as "the extent to which consumers will change their consumption of one product in response to a price change in another"). Indeed, Dr. Evans has taught critical loss analysis based on a survey that asked customers of two parties to a merger about where they would buy *if their current supplier raised prices*. (Evans, Tr. 1770-1772).

Consumers, however, can switch between firms for reasons other than price, including service and convenience. Accordingly, a critical loss analysis based on surveys or data about "switching" in general rather than switching based on a price increase is unreliable because it does not capture whether firms outside the candidate market restrain a price increase. *See Sysco Corp.*, 113 F. Supp. 3d at 36-37 (declining to rely on FTC expert's critical loss analysis based on switching data that did not "describe[e] whether [defendants] lost a customer for a price-based reason or some reason having nothing to do with price"); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 69-71 (D.D.C. 2011) (declining to rely on critical loss analysis based on survey about switching, "not diversion based solely on a price change"). Even a critical loss analysis based on switching data from the IRS' comprehensive data on tax return preparation is not "conclusive" where it does not reflect switching for price reasons. *Id.* at 65. Dr. Evans' analysis deserves far less weight given that he also did not know whether the respondents were representative of 1-800 Contacts' customers. (Evans, Tr. 1777-78). *See United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 191-92 (D.D.C. 2001) (critical loss analysis based on a "minuscule" sample of the "entire universe" of customers is unreliable, particularly where it "does not indicate whether the customers . . . are representative of the entire universe").

Dr. Murphy illustrated that Dr. Evans' results are unreliable. Dr. Murphy conducted critical loss analyses using estimates of the diversion ratio from other parts of the same survey that Dr. Evans relied on. While Dr. Evans cited these data, he did not rely on them. The reason is obvious. [redacted] (RX 0739-0078; CX 8006-122; CX 1117-016). Far more of the surveyed 1-800 Contacts customers who had switched—more than 50%—made their last purchase from an independent ECP or optical chain. (CX 1117-016).

Dr. Evans' cherry-picking skewed his results. Using the 17% figure rather than 40%, and keeping the rest of Dr. Evans' model constant, Dr. Murphy found that a hypothetical monopolist that owned 1-800 Contacts and other online sellers could *not* profitably raise prices by more than the 5% threshold set forth in the Merger Guidelines, meaning that other sellers provide a competitive constraint and belong in the relevant market. Dr. Murphy also found that a hypothetical monopolist that owned 1-800 Contacts and all ECPs could profitably raise prices by more than the 5% threshold set forth in the Merger Guidelines, meaning that they meet the test for a relevant market. (RX 0739-0079, -0110; Murphy, Tr. 4164-66). Dr. Evans did not test that conclusion (Murphy, Tr. 4169-70), which is inconsistent with the Merger Guidelines. *See* DOJ & FTC, Horizontal Merger Guidelines § 4.1.1 (Aug. 19, 2010) ("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.").

The upshot is that Dr. Evans' critical loss analysis is unreliable and entitled to no weight, and that the relevant market is not limited to online sales.

Regardless, however, "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; *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41 (D.D.C. 2009) (relying on "real-world evidence" rather than critical loss analysis). Dr. Murphy offered unrebutted testimony to that effect. (Murphy, Tr. 4170; CX 09048 (Murphy, Dep. at 141-42)). And, as noted, the "realities of competition," *Balaklaw*, 14 F.3d at 799, are that 1-800 Contacts "built and conduct their business," *Grinnell Corp.*, 384 U.S. at 577, based on competition with ECPs and other offline sellers. Ignoring that competitive dynamic in analyzing the competitive effects of 1-800 Contacts' settlement agreements is improper.

UPP Natural Experiment. Dr. Evans also purports to define a market limited to online contact lens sales by using what he calls a "natural experiment" during manufacturers' UPPs. Dr. Evans purports to find that certain online retailers remained profitable when they increased prices as a result of the UPPs. For two reasons, Dr. Evans cannot reliably infer from this that online retailers exist in their own market and offline retailers are not a competitive constraint.

First, the UPPs are not a natural experiment for analyzing a candidate market of online contact lens retailers. As Dr. Evans testified, 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 0739-0079). The UPPs did not enable Dr. Evans to isolate the effect of a price increase solely on online retailers 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 09037 (Owens, Dep. at 79-80)). As Dr. Evans testified, his analysis of online retailers' profits during the UPPs does not address whether online retailers and club stores are in the same market. (Evans, Tr. 1446; Evans, Tr. 1748).

Second, Dr. Evans made no effort to quantify the extent to which online sellers were unable to acquire new customers as a result of the UPPs. (Evans, Tr. 1752). That was a critical omission. While the UPPs enabled online sellers to charge higher prices in the short term, in the long term, the reduction in the discount that online sellers could offer as compared to offline sellers had the potential to harm the online firms' growth. Mr. Clarkson, for example, testified that the UPPs made it very difficult for AC Lens to attract new customers, which made the UPPs a "long-term disaster" for that company. (Clarkson, Tr. 198). Mr. Drumm echoed that testimony, describing the UPP's effect on "lower new orders" as leading to a "slow burn." (CX 09018 (Drumm Dep. at 188)). Dr. Evans' analysis of online firms' margins during the UPPs did not account for these long-term countervailing effects. (RF 524).

Dr. Evans' UPP "natural experiment" is unreliable and entitled to no weight.

(b) 1-800 Contacts and the Settling Parties' Share of the Retail Market is Too Small to Exercise Market Power

1-800 Contacts does not have market power either alone or in combination with the other settling parties in the market for the retail sale of contact lenses. Together, 1-800 Contacts and the settling parties make less than [redacted] of all contact lens sales. (RX 0739 ¶¶ 113, 116). That is insufficient for market power as a matter of economics (RX 0739-0045), and as a matter of law: "[W]hile high market shares may give rise to presumptions of market power, a market share of less than 20% is woefully short under any metric from which to infer market power." *Cohlmia v. St. John Med. Ctr*., 693 F.3d 1269, 1283 (10th Cir. 2012); *see also Retina Associates, P.A. v. Southern 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) ("a 20%-25% market share or less does not constitute market power") (internal citations omitted).

(c) There Are No Barriers to Entry or Expansion in Complaint Counsel's Market for Online Sales.

Even if Complaint Counsel proved that the relevant market is limited to online sales of contact lenses, they still have not proven that 1-800 Contacts has market power because they have failed to prove barriers to entry and expansion.

The hallmark of market power "is the ability to control output and prices, an ability that depends largely on the ability of other firms to increase their own output in response to a contraction by the defendants." *Ball Mem'l Hosp., Inc.*, 784 F.2d at 1336. "If firms are able to enter, expand, or import sufficiently quickly, that may counteract a reduction in output by existing firms. And if current sales are not based on the ownership of productive assets . . . the existing firms may have no power at all to cut back the market's output." *Id.*; *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) ("It is also important to examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.") (quotations marks omitted). Thus, "the lower the barriers to entry, and the shorter the lags of new entry, the less power existing firms have." *Ball Mem'l Hosp., Inc.*, 784 F.2d at 1335. Complaint Counsel's expert Dr. Evans wrote in his own report that "[e]ven when a firm has a high market share it is possible that entry or the threat of entry could significantly restrain its market power" (CX 8006-130), and acknowledged the importance of considering barriers to entry and expansion (Evans, Tr. 1765).

Accordingly, Complaint Counsel had the burden not only to "(1) define the relevant market," and "(2) show that [1-800 Contacts] owns a dominant share of that market," but also to "(3) show that there are *significant barriers to entry and* show that existing *competitors lack the capacity to increase their output in the short run.*" *Rebel Oil Co.*, 51 F.3d at 1434 (emphasis added); *see also Microsoft Corp.*, 253 F.3d at 82 (government had "ha[d] the burden of establishing barriers to entry into a properly defined relevant market" and proving "that those barriers are 'significant'"); *Coastal Fuels of Puerto Rico, Inc.*, 79 F.3d at 197. "'Entry barriers" are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level." *Microsoft Corp.*, 253 F.3d at 51.

Complaint Counsel failed to prove significant barriers to entry or expansion by online contact lens retailers that would have prevented them from responding to an increase in price by 1-800 Contacts. At his deposition, Dr. Evans testified that becoming an online retailer of contact lenses requires minimal capital and testified that the only barrier to entry or expansion is brand awareness. (CX 09042 (Evans, Dep. at 136-38)). But courts and the Commission have held as a matter of law that goodwill is a product of competition, not a barrier to competition. *See Clorox Co.*, 117 F.3d at 58 ("'[E]stablished buyer preferences . . . will not ordinarily be a serious entry barrier.'") (quoting 2 Philip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 409d, at 302 (1978));

Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) ("Of course, virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose."); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983-84 (2d Cir. 1984) (reversing finding of market power where Court "fail[ed] to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition"); *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9026 (Commission erroneously "assumed that consumer preference for [Respondent] necessarily constituted an anticompetitive barrier protecting [Respondent's] monopoly position from erosion by new entrants").

At the hearing, Dr. Evans attempted [redacted] (Evans, Tr. 1576-77). Dr. Evans, however, [redacted] (Evans, Tr. 1587-1588). In response to the Court's questioning, Dr. Evans [redacted] (Evans, Tr. 1576-77, 1586-87). Moreover, the actual history of new entry by Memorial Eye and WebEyeCare, just by way of example, clearly demonstrated that there were no or very low barriers to new entry. Ultimately, Dr. Evans was forced to concede that [redacted] (Evans, Tr. 1691-92). WebEyeCare launched in 2009, settled with 1-800 Contacts in 2010 and grew to over [redacted] in revenue and [redacted] in profit by 2015. CX 09000 [redacted] at 8, 34, 38-40); CX 00324). And, as the Court pointed out, [redacted] Tr. 1578-79.

Indeed, there are dozens of Internet retailers of contact lenses who could afford these and other prerequisites. (Bethers, Tr. 3537-3541). In fact, in just the last two years, several retailers with innovative technology and new business models have increased consumers' options:

- Simple Contacts is a new entrant that uses innovative technology to offer customers the ability to extend their contact lens prescription online. (RF 466-468). Customers may then purchase those lenses from Simple Contacts online.
- Sightbox is a new online entrant that operates on a subscription model. (RF 469). For a monthly fee, Sightbox supplies contact lenses, arranges appointments for an eye exam with an ECP, and pays for the eye exam. (RF 470-471).
- Hubble Contacts, which launched around the end of 2016, has its own brand of contact lenses, which it sells through a subscription model to consumers online. (RF 472-480).
- Daysoft is a UK manufacturer of contact lenses that sells its lenses directly to consumers online, including into the United States. (RF 481-83).
- Opternative is a new entrant that uses innovative technology to allow customers to obtain a vision test through a desktop computer and a prescription for the same brand of contact lenses that the customer is currently wearing. (RF 484-486). Opternative thus provides an opportunity for any online retailer to provide its customers with the ability to extend their contact lens prescription without vising an ECP's office. (RF 487).

This evidence demonstrates a lack of entry barriers. *See* DOJ & FTC, Horizontal Merger Guidelines § 9 (Aug. 19, 2010) (regulators "consider the actual history of entry into the relevant market and give substantial weight to this evidence. . . .").

Nor is there any evidence of barriers that would prevent Walmart, Costco, BJ's, Sam's Club and JC Penney—none of which was bound by the settlement agreements—from expanding their online operations if 1-800 Contacts used the settlement agreements to raise prices. *See*

Clorox Co., 117 F.3d at 58 (plaintiff failed to prove harm to competition where "[n]othing here suggests that the other large companies that produce cleaning products are incapable of successfully investing their resources, in the form of capital and brand name equity, to enter the markets [the defendant's] products allegedly dominate"). Missing also is any evidence that Amazon, which Dr. Athey identified as an unbound competitor (CX 08007-042), could not enter the online contact lens business if 1-800 Contacts was enjoying supracompetitive profits.

That 1-800 Contacts and the other settling parties make a very high percentage of online contact lens sales is immaterial. "Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." *Will*, 776 F.2d at 672 n.3; *see also Allen-Myland, Inc.*, 33 F.3d at 209 ("Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the power to raise prices."); *Waste Mgmt., Inc.*, 743 F.2d at 983 (reversing finding of market power where defendant had 50% market share but entry was easy). "A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors." *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (citations omitted); *see also L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1997) ("To show market power, a plaintiff must establish that the defendant's sales loom so large in relation to rivals' sales and production capacity that a reduction in output by the defendant could not quickly be made up by other firms' increased output.").

1-800 Contacts has no such power over supply. Rather, 1-800 Contacts can maintain its market share only by incurring "the costs of creating or maintaining buyer preferences," *Clorox*, 117 F.3d at 58, through television advertising, brand-building and elite service that other retailers are unwilling to pay for. That is the hallmark of a competitive market and the antithesis of market power. *See Am. Express Co.*, 838 F.3d at 204 ("We conclude that, so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene and disturb the present functioning of the payment-card industry.").

2. Complaint Counsel Failed to Proffer Any Direct Evidence of Anticompetitive Effects

In addition to failing to prove that 1-800 Contacts had the power to harm competition, Complaint Counsel also failed to prove that the settlement agreements actually did so.

(a) Complaint Counsel Had a High Burden to Prove that the Trademark Settlements Restrained Competitively Significant Advertising

"[B]ecause the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns." *Clorox Co.*, 117 F.3d at 57 (citation omitted); *see also Mozart Co.*, 833 F.2d at 1346; (RX 0737 ¶ 36)). Just so here, where the record contains abundant evidence that the challenged settlement agreements restrained only a sliver of paid search advertising activity that did not make the difference in constraining 1-800 Contacts from raising prices or restricting output.

Even if the challenged settlement agreements prohibited all advertising by all firms in response to searches for 1-800 Contacts' trademarks (which they did not), they would affect no more than [redacted] of contact lens sales; the settlement agreements would have no effect at all on 1-800 Contacts' rivals' ability to compete for [redacted] of all sales and more than [redacted] of online sales. (RX 0739 ¶ 126). Those would not be restraints that obviously will harm competition or consumers. (CX 09048 (Murphy, Dep. at 175-76); RX 0739-0049). And they would be a far cry from the "moratorium" on all advertising at issue in *Polygram*, 416 F.3d at 32, or the total prohibition on distributing real estate broker listings to the public at issue in *In the Matter of Realcomp II Ltd.*, Dkt. No. 9320, 2007 WL 6936319, at *7 (F.T.C. Oct. 30, 2009).

The actual facts make the contrast even starker. The settlement agreements did not bind numerous contact lens retailers, including Walmart, Costco, BJ's, Sam's Club, Lens Direct and Lens.com. (CX 08007-042). These retailers had every incentive to fill any productive void created by limitations on advertising in response to searches for 1-800 Contacts' trademarks; as Dr. Athey testified, there is no evidence that any of them were chilled by 1-800 Contacts' trademark litigation. (CX 09043 (Athey, Dep. at 117)). The data, however, show that paid search advertising in response to searches for 1-800 Contacts' trademarks was not important to these retailers. Only [redacted] of paid search advertisements on Google for contact lens retailers not bound by the settlement agreements were displayed based on bids for 1-800 Contacts' trademarks, and retailers earned only [redacted] of their total clicks from those ads. (RX 0739-0099).

In fact, Dr. Athey admitted that most of the numerous retailers who were not bound by the settlement agreements did not have their ads appear frequently in response to searches for 1-800 Contacts' trademarks. (Athey, Tr. 955). Despite a favorable decision from the Tenth Circuit, Lens.com did not bid on 1-800 Contact's trademarks (CX 09001 (Bethers, IHT at 302-303)), and still is the [redacted] contact lens retailer (CX 8006, Table 1). Dr. Athey agreed that the unbound competitors' minimal use of 1-800 Contacts' trademarks to generate paid search advertising 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 0739-0048).

The record also shows that the settling parties did not attach competitive importance to paid search advertising in response to searches for 1-800 Contacts' trademarks. 1-800 Contacts generally spent less than [redacted] of its advertising budget on paid search advertising on its own trademark. (RX 0739-0028, -092; Murphy, Tr. 4108-4113; Bethers, Tr. 3702; Coon, Tr. 2723). Four of the settling parties—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 8006-057). Complaint Counsel have pointed out *ad nauseam* that Memorial Eye obtained impressions by "broad matching." But such a misguided attempt to evade potential trademark liability makes no difference to a consumer viewing a search results page. And only [redacted] out of 1000 people who searched for 1-800 Contacts' trademarks and saw an ad for Memorial Eye purchased from that firm. (CX 8006-094, -095).

Of course, according to Dr. Evans, the settling parties themselves are rational and the best judges of their own business interests. (Evans, Tr. 1830-31; CX 09042 (Evans, Dep. at 119-120)). As such, the settlements themselves suggest that the lifetime benefits of advertising in response to searches for 1-800 Contacts' trademarks were less than the costs of litigating for the right to do so—costs that totaled $1.4 million for Lens.com prior to trial. *See 1-800 Contacts, Inc. v. Lens.com, Inc.,* No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4.

The settling parties were able to grow despite being bound by the settlement agreements. As noted, WebEyeCare grew significantly. CX 09000 [redacted] at 8, 34, 38-40); CX 00324). After settling in 2010, [redacted] grew from 50 employees to 170 as of December 2016 and shipped [redacted] orders with a retail value of [redacted] in 2015. (CX 09039 [redacted] at 11); CX 09003 [redacted] at 9-10)). The company's settlement agreement with 1-800 Contacts did not deter National Vision from acquiring AC Lens in 2011. (Clarkson, Tr. 174). And [redacted] and [redacted]**}** had compound annual growth rates from 2011 of [redacted]. (RX 0153-007).

Overall, only [redacted] of all Google paid search advertisements related to contact lenses were displayed as a result of bidding on 1-800 Contacts' trademarks. (RX 0733-0055). Complaint Counsel are sure to point out that this figure does not (as others do not) account for ads displayed based on "broad matching." But their own expert, Dr. Evans, testified more than 98% of searches do not involve 1-800 Contacts' trademarks, which includes the "broad matching" that Complaint Counsel (and Memorial Eye) like to focus on. (Evans, Tr. 1724-25). Even so, the precise percentages are immaterial. The point is that advertising in response to searches for 1-800 Contacts' trademarks accounts for a very small percentage of paid advertising by firms that sell contact lenses online. Complaint Counsel have never pointed to any evidence that adding broad matching to the mix changes that fundamental fact.

(b) Complaint Counsel Did Not Prove That the Settlement Agreements Led to Higher Prices or Reduced Output in Any Contact Lens Market

The challenged settlement agreements not only affected a very small fraction of the sales of contact lenses, but they also left open a vast array of competitive avenues for 1-800 Contacts' rivals to use to compete. Thus, it is not surprising that Complaint Counsel have failed to prove that the challenged settlements caused harm to competition. *See Clorox Co.*, 117 F.3d at 58 (no harm to competition from settlement agreements that "do not entirely prevent Clorox from using the PINE-SOL name to compete against LYSOL products").

"[O]utput is a sound general measure of anticompetitive effect, and several Supreme Court decisions have emphasized it." Areeda, at ¶ 1503b(1); *see California Dental Ass'n*, 526 U.S. at 776 (asking "whether the limitation on advertisements obviously tends to limit the total delivery of dental services"). Indeed, "[t]he core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem." *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 597; *see also Rebel Oil Co.*, 51 F.3d at

1433. However, both Dr. Evans and Dr. Athey both conceded that they had no opinion that the settlement agreements reduced output. (Athey, Tr. 799; CX 09043 (Athey, Dep. at 194-95; CX 09042 (Evans, Dep. at 263)). To the contrary, as discussed above, applying conversion rates from Google data to Dr. Athey's model predicts that the settlement agreements *increased* output.

Complaint Counsel also failed to prove that the settlement agreements enabled 1-800 Contacts or the other settling parties to raise prices. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *Brown Univ.*, 5 F.3d at 668. Dr. Evans admitted that he has no quantitative proof that the settlements enabled any online seller of contact lenses to raise prices:

> Q. In the course of doing the modeling and
> everything that you did for this case, did you do any
> quantification of the extent to which you think
> 1-800 Contacts' prices would have gone down?
>
> A. I did not.
>
> Q. Did you do any quantification of the extent to
> which you think any company's prices would have gone
> down in the absence of the settlement agreements?
>
> A. I did not.

(Evans, Tr. 1723-24; *see also* CX 09042 (Evans, Dep. at 257)). So, too, did Dr. Athey:

> Q. Okay. And have you conducted any empirical
> analysis to determine by how much prices would be lower
> in a world without the settlement than they were with
> the settlements?
>
> A. No.
>
> Q. Okay. And so you don't intend to offer an
> opinion about how much prices would be lower in a world
> without the settlements than they were with the
> settlements?
>
> A. No.

(CX 09043 (Athey, Dep. at 201)). And for good reason, since 1-800 Contacts executives testified that the settlement agreements played no role in 1-800 Contacts' pricing. (Bethers, Tr. 3712-13; CX 09025 (Osmond, Dep. at 98-100)). Not surprisingly, 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 0739-0064, -0107).

Complaint Counsel cannot prevail on that record. *See 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).

In fact, Complaint Counsel's own expert, Dr. Evans, has argued that antitrust regulators should prove anticompetitive effects with empirical proof. *See* Howard H. Chang, David S. Evans, Richard Schmalensee, "Has the Consumer Harm Standard Lost Its Teeth?," Sloan School of Management, Massachusetts Institute of Technology, Working Paper No. 4263-02 (2002). Dr. Evans also criticized the Commission for pursuing a Part 3 action against Intel in which Complaint Counsel "did not have evidence on whether Intel's actions had reduced the rate of innovation, lowered prices, restricted output, or could have ever done so as a factual economic matter." Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John's L. Rev. at 550-51. And he criticized the Department of Justice for pursuing claims against Visa in which its expert made the very concession he made in this case, which he quoted:

> Q. Let me ask you, have you measured in an empirical way any
> price increases in this case?

> A. In terms of the narrow conception of pricing, how a price change has gone from a particular number of dollars and cents to another, no.

Id. at 552 (quoting Trial Testimony of Michael Katz at 3728 (No. 98-7076) (July 12, 2000), Visa U.S.A., Inc., Trade Cas. (CCH) 72, 584 (S.D.N.Y. 1999)).

As Dr. Evans has written, "[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." Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John's L. Rev. at 545-46. Rather, "***there must be empirical evidence***." *Id.* at 546 (emphasis added). Complaint Counsel provided none.

(c) Complaint Counsel Cannot Prevail By Proving Effects on Advertising

Complaint Counsel have tried to overcome their failure to prove that the settlement agreements harmed competition for sales of contact lenses by focusing on advertising. They have tried to show (1) that the settlement agreements supposedly reduced information available to consumers about contact lens retailers, and (2) that the settlement agreements supposedly harmed search engines such as Google by reducing their revenue from paid search advertising auctions. These theories fail as a matter of law and lack support in the record.

(i) Advertising Effects Alone Are Not Sufficient As a Matter of Law

As a threshold matter, proof regarding advertising divorced from the contact lenses being advertised is flawed as a matter of law for two reasons.

First, the Supreme Court in *California Dental* rejected the Commission's attempt to prove that advertising restrictions harmed competition by proving effects on advertising itself. The Court of Appeals in that case adopted the Commission's position that restrictions amounting to a near-total ban on price advertising by dentists "are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Cal. Dental Ass'n*, 526 U.S. at 776. The Supreme Court called this "puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental service themselves." *Id.* The Court stated: "The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services." *Id*. In other words, the law is that the competitive effects of an advertising restriction must be tested in the market for the product being advertised. That accords with economics. (RX 0739 ¶¶ 96-99).

Second, even if Complaint Counsel's focus on advertising were proper in theory, it would be misplaced here. Complaint Counsel did not define any relevant market for advertising. Evans, Tr. 1818; CX 09042 (Evans, Dep. at 34). There is none. *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 defining such a broad market here would be fruitless, because only [redacted] of all Google paid search advertisements related to contact lenses were displayed as a result of bidding on 1-800 Contacts' trademarks. (RX 0733-0054).

Nor could Complaint Counsel attempt to tailor the market to the restraint by focusing only on advertising in response to searches for 1-800 Contacts' trademarks. "Product markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product." *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999); *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's failure to define a relevant advertising market renders them unable to sustain their burden by proving advertising effects alone. *See Reifert*, 450 F.3d at 320.

(ii) Complaint Counsel's Theory That the Settlements Reduced Information is Legally Flawed and Lacks Evidentiary Support

One theory that Complaint Counsel advanced at the hearing was that the settlements harmed consumers by depriving them of information from advertising in response to searches for 1-800 Contacts' trademarks. As noted, that theory contravenes *California Dental*'s directive that "[t]he question is not whether the universe of possible advertisements has been limited." *Cal. Dental Ass'n*, 526 U.S. at 776; *see also Am. Express Co.*, 838 F.3d at 204 (restraints protecting defendant's "prestige" were not anticompetitive simply because they restrained some advertising for competitors in a multi-sided platform). Dr. Evans himself has described the case in these terms: "In some literal sense, it could be argued that [the] advertising restriction restrained competition—competitors faced restrictions on the type of advertising they could employ. But, in the absence of empirical evidence, that literal argument fails to show that consumers were actually harmed." Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John's L. Rev. at 549.

At any rate, Complaint Counsel's theory that the settlements reduced information available to consumers is not supported by the evidence. As noted, almost [redacted] of paid search advertisements were generated by bids on terms other than 1-800 Contacts, RX 0733-0054, which Dr. Evans admitted accounted for 98% of searches. (Evans, Tr. 1725). Those searches were unaffected by the settlement agreements and Dr. Athey concedes that there is no evidence that any consumer did not know how to conduct them. (CX 09043 (Athey, Dep. at 261)). In fact, Dr. Athey testified that most consumers who visit 1-800 Contacts' website already know there is somewhere else to buy contact lenses, (Athey. Tr. 913-914), more than 70% of online contact lens shoppers compare prices, (Athey, Tr. 941; CX 01449-057), and that more than half of them check prices at three, four or five stores or websites. (Athey, Tr. 941; CX 01449-057). Professor Tushnet also agrees that "consumers are well aware of different tools that allow them to compare their purchase options." (Tushnet, Tr. 4502; CX 08041-023). There is no evidence that any consumer was unable to find information about 1-800 Contacts' competitors.

The record, in fact, shows that it would difficult to avoid information about 1-800 Contacts' competitors. Between 2004 and 2016, Google displayed more than [redacted] paid search advertisements for contact lens retailers other than 1-800 Contacts, more than [redacted] of them for the settling retailers. (RX 0739-097, -099). Google displayed more than [redacted] paid search ads for the settling retailers in 2011, more than [redacted] in 2012, more than [redacted] in 2013, more than [redacted] in 2014, more than [redacted] in 2015, and more than [redacted] in 2016. (RX 0739-097). The settlement agreements did not make 1-800 Contacts' advertising any more prominent among this plethora of ads. 1-800 Contacts' competitors garnered between [redacted] and [redacted] of ads in response to Google searches related to contact lenses in every quarter since 2002. (RX 0739-0062, -015; Murphy, Tr. 4195-98).

Complaint Counsel also fail to reckon with the fact that the settlements keep information on the search results page that may be valuable to consumers. It is undisputed that additional ads for retailers other than 1-800 Contacts in response to searches for its trademarks would push off the results page organic results such as links to 1-800 Contacts' Facebook page or to download its mobile app. (Athey, Tr. 2082). Complaint Counsel's experts have not valued these organic results, let alone shown that additional ads for other retailers would be more valuable. (Athey, Tr. 2082-83; CX 09043 (Athey, Dep. at 180, 281-82)). But the undisputed evidence suggests that the organic results are more relevant than ads for other retailers because the organic algorithms that rank links solely based on enormous amounts of consumer behavior indicative of relevance do not generate links to other retailers' website on the first page of search results. (CX 09046 (Ghose, Dep. at 47); RX 0733-0010 to -011, -0024 to -0025).

Complaint Counsel's information theory of anticompetitive informational effects simply reflects a preference for paid ads for other retailers over organic links related to 1-800 Contacts, even though only the latter reveal consumers' preferences. The claim seems to be, as Dr. Evans tellingly wrote in his rebuttal report, that additional ads for 1-800 Contacts' competitors in response to searches for 1-800 Contacts' trademarks would be efficient "even if consumers did not want to see ads following their queries." (CX 08009-027). A consumer harm theory based on giving consumers what they have indicated to search engines they do not want is flawed.

(d) Complaint Counsel's Theory of Search Engine Harm is Legally Flawed and Lacks Evidentiary Support

Complaint Counsel also have pursued a theory that the settlement agreements harmed search engines by reducing their revenue for paid search advertising in response to searches for 1-800 Contacts' trademarks. For three reasons, however, Complaint Counsel cannot avoid their burden to prove harm to contact lens customers by trying to prove harm to Google, which Complaint Counsel call a "multi-billion dollar advertising juggernaut," CC Pre-Trial Br. at 70.

First, as noted, the record is clear that analyzing the effects of a restriction on paid search advertising is nearly as complicated as the algorithms that generate such advertising. Google and Microsoft executives testified that measuring effects on search engine advertising requires detailed individualized analyses of many factors and, ultimately, access to proprietary algorithms. RX 0701 (Varian Decl.) ¶ 6; RX 0704 [redacted] ¶¶ 20-22. In fact, Microsoft's [redacted] responsible for Bing's paid search advertising algorithms testified that she is [redacted] (RX 0704 [redacted] ¶ 23).

Second, Complaint Counsel have ignored important substitution effects. As Dr. Murphy explains, if (contrary to the record) consumers who search for 1-800 Contacts' trademarks are looking for information about other retailers and the settlement agreements meaningfully prevented them from obtaining it, consumers would use other searches to find the information. (RX 0739-0067). The increased traffic on other searches should, as a matter of economics, give advertisers an incentive to shift advertising, which, according to Complaint Counsel's own theory, increase the cost-per-click for those advertisements. (RX 0739-0067; CX 09046 (Ghose, Dep. at 135-36, 196-97); RX 0733-0067). Any increase in revenue from more clicks and higher cost-per-click on advertisements in response to searches for terms other than 1-800 Contacts' trademarks could have offset any decrease in revenue from reducing bidding on 1-800 Contacts' trademarks that might have resulted from the settlement agreements. (RX 0733-0067). But Complaint Counsel's experts have not made any attempt to examine this substitution effect. (CX 09043 (Athey, Dep. at 138-39)). They have not even analyzed bidder behavior with respect to searches other than for 1-800 Contacts' trademarks. (CX 09043 (Athey, Dep. at 121-22)).

Third, any revenue that search engines lost from the settlement agreements simply reflects 1-800 Contacts' return on its procompetitive investment in its trademark. [redacted] (CX 09043 (Athey, Dep. at 84); RX 0733-0025-0027; Ghose, Tr. 3893-94, 4036; CX 09046 (Ghose, Dep. at 52); CX 01665). That shift in clicks would increase search engines' revenue even if all consumers who searched for 1-800 Contacts' trademarks still navigated to the same website. (RX 0733 ¶¶ 59-64; CX 09043 (Athey Dep.) at 85). As such, search engines' incremental revenue from displaying paid search advertisements for 1-800 Contacts' competitors in response to searches for its trademarks may simply reflect a transfer of the return on those trademarks from the trademark owner to the search engines.

Antitrust law recognizes as much with respect to the kind of monopsony—or an agreement among buyers with market power—that Complaint Counsel have alleged here. The "consequence of monopsony power is reduced output on the monopsonist's selling side: that is, since the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less." Areeda, at ¶ 575 (emphasis in original); *see also Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995). In other words, the concern with restraints by buyers of advertising (an input) is reduced output of the product being advertised (the output). However, "if the monopsonist resells in a competitive market, price and output in the output market will be unaffected by the exercise of monopsony power." Areeda, at ¶ 575; *see also Addamax Corp. v. Open Software Found., Inc*., 888 F. Supp. 274, 280 (D. Mass. 1995) (noting that "[o]nly with control of a downstream market can the monopsonist decrease output and raise prices"). *Kamine/Besicorp Allegany L.P.*, 908 F. Supp. at 1203. The sellers' loss is a "mere wealth transfer that the antitrust laws were not designed to remedy." Areeda at ¶ 2011.

Just so here. Complaint Counsel failed to prove that 1-800 Contacts had market power or caused any harm to competition in the downstream contact lens market. Complaint Counsel therefore failed to prove anticompetitive effects.

3. Complaint Counsel Failed To Prove Reasonably Less Restrictive Alternatives To The Settlement Agreements.

Even if Complaint Counsel had met their burden under the rule of reason to prove anticompetitive harm, 1-800 Contacts showed that the settlement agreements had significant procompetitive effects. Under the rule of reason, then, Complaint Counsel had the burden to prove, as they alleged, that the settlement agreements were "not reasonably necessary" to achieve these procompetitive benefits and that 1-800 Contacts could achieve those benefits through reasonably less restrictive means, Cmplt. ¶ 32. *See Am. Express Co.*, 838 F.3d at 195; *Deutscher Tennis Bund*, 610 F.3d at 830; *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *Schering-Plough Corp.*, 402 F.3d at 1065; *Microsoft Corp*., 253 F.3d at 95–96. Complaint Counsel failed to meet their burden.

First, as noted, "redressing the purportedly confusing text of the challenged advertisement" (RX 0680-0004), fails to properly protect 1-800 Contacts' trademark rights because courts have rejected the proposition that "as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff's] trademarks in the text." *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61.

Second, Complaint Counsel have suggested that 1-800 Contacts should have settled by requiring its rivals to clearly label paid search advertising based on its trademarks. CC Pre-Trial Br. 63. But Complaint Counsel failed to support this supposed alternative with evidence.

As the party challenging the scope of trademark relief, Complaint Counsel have a "heavy burden" to prove that altering the allegedly infringing materials "would significantly reduce the likelihood of consumer confusion." *Australian Gold, Inc.*, 436 F.3d at 1243; *see also Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 143–44 (2d Cir. 2005) ("Where, as here, an infringer attempts to avoid a substantial likelihood of consumer confusion by adding a disclaimer, it must establish the disclaimer's effectiveness.").

Complaint Counsel, however, did not introduce any evidence that labeling ads in response to searches for 1-800 Contacts would reduce consumer confusion. Courts have rejected alternative trademark relief in such circumstances. *See CFE Racing Prod., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 596 (6th Cir. 2015) (reversing trademark injunction where "the district court pointed to no evidence that a disclaimer would be effective in eliminating the risk of confusion"); *Australian Gold, Inc.*, 436 F.3d at 1243 (where "Defendants offer only conclusory allegations that 'if there were any evidence of a likelihood of confusion, it could be remedied by a simple disclaimer,'" injunction not limited to disclaimers was "not overly broad"); *Home Box Office, Inc. v. Showtime/The Movie Channel Inc*., 832 F.2d 1311, 1315-17 (2d Cir. 1987) (vacating injunction requiring disclaimers for lack of evidence) (citing Jacoby & Raskoff, *Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth?,* 76 Trademark Rept. 35 (1986)).

In addition, Complaint Counsel's proposed alternative settlements reflect a hindsight abstraction not attuned to the practical realities of settling trademark cases. Complaint Counsel's ability to divine other ways that 1-800 Contacts should have settled does not sustain their burden to prove that the actual settlement agreements were anticompetitive. As Complaint Counsel's complaint reflects, Cmplt. ¶ 19, the standard is not whether the settlements are the least restrictive way that 1-800 Contacts could have protected its trademark rights but whether the agreements were "reasonably necessary" to do so. *See Nat'l Football League,* 459 U.S. at 1079-80 (Rehnquist, C.J., dissenting from denial of certiorari); *Arnold, Schwinn & Co*., 388 U.S. at 380; *see also Anderson v. American Auto. Ass'n*, 454 F.2d 1240, 1246 (9th Cir. 1972); *American*

Motor Inns, Inc., 521 F.2d at 1249.

As noted, Mr. Hogan offered unrebutted testimony that parties regularly settle trademark lawsuits by agreeing to the kinds of paid search advertising restrictions in the challenged settlement, and that they commonly seek clear non-use provisions to avoid future disputes. This testimony amply supports the conclusion that 1-800 Contacts' settlements were reasonably necessary to achieve the procompetitive benefits of trademark protection (an issue on which Complaint Counsel had the burden to prove the contrary). Complaint Counsel's and Professor Tushnet's attempt to parse the minutiae of each case relied upon by Mr. Hogan to determine whether the plaintiff expressly raised a formal infringement claim based on paid search advertising cannot sustain their own burden, and simply proves the point that the Second Circuit made in *Clorox*: "the parties" to a trademark settlement agreement "are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves," and "it is usually unwise for courts to second-guess such decisions." *Clorox Co.*, 117 F.3d at 60.

The record provides no basis for the Court to engage in such second-guessing here. If parties to trademark cases agree to settle on terms that prohibit paid search advertising in response to searches to trademark terms even in cases that do *not* involve express claims based upon that practice, it hardly was unreasonable for 1-800 Contacts to settle cases that *did* involve claims based on that practice by agreeing to the same prohibitions.

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: June 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2017, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to:

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DATED: June 15, 2017 By: */s/ Eunice Ikemoto*
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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: June 15, 2017

By: *<u>/s/ Steven M. Perry</u>*
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<u>Notice of Electronic Service</u>

I hereby certify that on June 22, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts' Post-Trial Brief, with:

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I hereby certify that on June 22, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts' Post-Trial Brief, upon:

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