

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

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In the Matter of

1-800 Contacts, Inc.,
a corporation

Docket No. 9372

ORIGINAL

RESPONDENT 1-800 CONTACTS' SECOND CORRECTED PRE-TRIAL BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	3
I. ALTHOUGH EYE CARE PROFESIONALS DOMINATE THE CONTACT LENS RETAIL INDUSTRY, CONSUMERS HAVE SEVERAL RETAIL OPTIONS.....	3
II. 1-800 CONTACTS’ BUSINESS MODEL IS TO COMPETE WITH EYE CARE PROFESSIONALS BY OFFERING BETTER SERVICE AND LOWER PRICES.....	5
A. 1-800 Contacts Led Efforts to Promote Greater Competition Between ECPs and Other Retailers.....	5
B. 1-800 Contacts Invests Heavily in Customer Service to Compete with ECPs.....	6
III. INTERNET ADVERTISING.....	8
A. Overview of Internet Advertising.....	8
B. Paid Search Advertising.....	9
1. Organic Search Results.....	10
2. Paid Search Results.....	10
3. The Complexity of Search Engine Auctions	11
C. Search Engines’ Trademark Policies	13
D. 1-800 Contacts’ Paid Search Practices	13
E. Other Retailers’ Paid Search Practices	15
IV. 1-800 CONTACTS’ TRADEMARK LITIGATION AND SETTLEMENTS.....	16
A. The Trademark Litigations	16
B. The Trademark Settlement Agreements	20
ARGUMENT.....	23
I. THE CHALLENGED AGREEMENTS ARE PROCOMPETITIVE SETTLEMENTS OF TRADEMARK LITIGATION.....	23
II. THE SETTLEMENT AGREEMENTS DO NOT GIVE RISE TO ANTITRUST LIABILITY BECAUSE THEY PROVIDED FOR RELIEF WITHIN THE	
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**TABLE OF CONTENTS
(continued)**

Page

**TABLE OF CONTENTS
(continued)**

	Page
B. Complaint Counsel Have Not Proven Any Anticompetitive Effects in the Market for the Sale of Contact Lenses.....	81
1. Complaint Counsel Have No Proof of Lower Output or Higher Prices.....	81
2. Complaint Counsel’s Theory of Harm to Competitors Reflects the Value of 1-800 Contacts’ Trademark.	86
3. Complaint Counsel’s Theory of Search Engine Harm Fails.....	91
V. THE AGREEMENTS’ PROCOMPETITIVE BENEFITS OUTWEIGH ANY ANTICOMPETITIVE EFFECTS.....	96
CONCLUSION.....	97

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>1-800 Contacts, Inc. v. Lens.com</i> , 722 F.3d 1229 (10th Cir. 2013)	19, 20, 37
<i>1-800 Contacts, Inc. v. Lens.com, Inc.</i> , No. 2:07-CV-591 CW, 2012 WL 113812 (D. Utah Jan. 13, 2012)	38
<i>1-800 Contacts, Inc. v. Memorial Eye, P.A.</i> , No. 2:08-CV-983 TS, 2010 WL 988524 (D. Utah Mar. 15, 2010)	18, 38
<i>1-800 Contacts v. WhenU.com and Vision Direct, Inc.</i> , 309 F. Supp. 2d 467 (S.D.N.Y. 2003).....	16
<i>AD/SAT, Div. of Skylight, Inc. v. Associated Press</i> , 181 F.3d 216 (2d Cir. 1999).....	74
<i>Addamax Corp. v. Open Software Found., Inc.</i> , 888 F. Supp. 274 (D. Mass. 1995)	93
<i>adidas-Am., Inc. v. Payless Shoesource, Inc.</i> , 546 F. Supp. 2d 1029 (D. Or. 2008)	31
<i>Alcon Labs. v. Reyes</i> , No. 15-252, 2015 WL 9236136 (D. Utah May 11, 2015)	5, 6
<i>Allen-Myland, Inc. v. Int’l Bus. Machs. Corp.</i> , 33 F.3d 194 (3d Cir.1994).....	74, 78
<i>Am. Home Prods. Corp. v. Barr Labs., Inc.</i> , 656 F. Supp. 1058 (D.N.J. 1987)	56
<i>Am. Sec. Vanlines, Inc. v. Gallagher</i> , 782 F.2d 1056 (D.C. Cir. 1986)	26, 30
<i>Asahi Glass Co. v. Pentech Pharms., Inc.</i> , 289 F. Supp. 2d 986 (N.D. Ill. 2003)	29, 36

TABLE OF AUTHORITIES
(continued)

	Page
<i>Balaklaw v. Lovell</i> , 14 F.3d 793 (2d Cir. 1994).....	72
<i>Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.</i> , 784 F.2d 1325 (7th Cir. 1986)	77
<i>Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.</i> , 140 F.3d 494 (3rd Cir. 1998)	76
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962).....	68
<i>Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.</i> , 846 F.3d 1297 (10th Cir. 2017)	68
<i>Buying for the Home, LLC v. Humble Abode, LLC</i> , 459 F. Supp. 2d 310 (D.N.J. 2006).....	38
<i>California Dental Ass'n v. FTC</i> , 526 U.S. 756 (1999).....	passim
<i>Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.</i> , 996 F.2d 537 (2d Cir. 1993).....	86
<i>In re Cardizem CD Antitrust Litigation</i> , 332 F.3d 896 (6th Cir. 2003)	45
<i>Cargill, Inc. v. Monfort of Colo., Inc.</i> , 479 U.S. 104 (1986).....	78
<i>CDC Techs., Inc. v. Idexx Labs., Inc.</i> , 186 F.3d 74 (2d Cir. 1999).....	63
<i>Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n</i> , 95 F.3d 593 (7th Cir. 1996)	68, 81
<i>Clorox Co. v. Sterling Winthrop, Inc.</i> , 117 F.3d 50 (2d Cir. 1997).....	passim
<i>Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.</i> , 79 F.3d 182 (1st Cir. 1996).....	77

TABLE OF AUTHORITIES
(continued)

	Page
<i>FTC v. Coca-Cola Co.</i> , 641 F. Supp. 1128 (D.D.C.1986)	69
<i>FTC v. Indiana Fed’n of Dentists</i> , 476 U.S. 447 (1986)	39, 67
<i>FTC v. Sysco Corp.</i> , 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015).....	72
<i>Fudruckers, Inc. v. Fudrucker’s Inc.</i> , 436 F. Supp. 2d 1260 (N.D Fla. 2006).....	30
<i>GEICO v. Google, Inc.</i> , No. 04-507, 2005 WL 1903128 (E.D. Va. 2005)	53
<i>Generac Corp. v. Caterpillar Inc.</i> , 172 F.3d 971 (7th Cir. 1999)	94
<i>Gillette Co. v. Norelco Consumer Prods. Co.</i> , 69 F. Supp. 2d 246 (D. Mass. 1999)	55
<i>Glob. Tel-Link Corp. v. Jail Call Servs., LLC</i> ,	

TABLE OF AUTHORITIES
(continued)

	Page
<i>In re Indep. Serv. Orgs. Antitrust Litig.</i> , 203 F.3d 1322 (Fed. Cir. 2000).....	90
<i>James Burrough, Ltd. v. Sign of Beefeater, Inc.</i> , 540 F.2d 266 (7th Cir. 1976)	54
<i>Jefferson Par. Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (1984).....	76
<i>Jim Beam Brands Co. v. Beamish & Crawford, Ltd.</i> , 852 F. Supp. 196 (S.D.N.Y. 1994)	55
<i>Johnson & Johnson Vision Care, Inc. v. Reyes</i> , 665 F. App'x 736 (10th Cir. 2016)	6
<i>K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.</i> , 61 F.3d 123 (2d. Cir. 1995).....	82
<i>Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.</i> , 908 F. Supp. 1194 (W.D.N.Y. 1995)	93
<i>Kargo Glob., Inc. v. Advance Magazine Publishers, Inc.</i> , No. 06-550, 2007 WL 2258688 (S.D.N.Y. Aug. 6, 2007).....	55
<i>King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.</i> , 791 F.3d 388 (3d Cir. 2015).....	33
<i>L.A.P.D., Inc. v. Gen. Elec. Corp.</i> , 132 F.3d 402 (7th Cir. 1997)	77
<i>In re Lamictal Direct Purchaser Antitrust Litig.</i> , 18 F.Supp.3d 560, 567 (D.N.J. 2014).....	33
<i>Leegin Creative Leather Prods., Inc. v. PSKS, Inc.</i> , 551 U.S. 877 (2007).....	71
<i>Lens.com, Inc. v. 1-800 Contacts, Inc.</i> , No. 2:12CV00352 DS, 2014 WL 12596493 (D. Utah Mar. 3, 2014).....	18
<i>In re Lipitor Antitrust Litig.</i> , 46 F.Supp.3d 523, 537 (D.N.J. 2014).....	33

**TABLE OF AUTHORITIES
(continued)**

	Page
<i>In re Loestrin 24 Fe Antitrust Litigation</i> , 814 F.3d 538 (1st Cir. 2016).....	33
<i>Lon Tai Shing Co. v. Koch + Lowy</i> , No. 90-4464, 1991 WL 170734 (S.D.N.Y. June 20, 1991)	53
<i>Louis Vuitton Malletier, S.A. v. Abags.co.UK</i> , No. 14-30288, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015)	35

TABLE OF AUTHORITIES
(continued)

	Page
<i>Oahu Gas Serv., Inc. v. Pac. Res., Inc.</i> , 838 F.2d 360 (9th Cir. 1988)	77
<i>Olympia Equip. Leasing Co. v. W. Union Tel. Co.</i> , 797 F.2d 370 (7th Cir. 1986)	90
<i>Orion Bancorp, Inc. v. Orion Residential Fin., LLC</i> , No. 07-1753, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008)	36
<i>Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.</i> , 69 F. Supp. 3d 175, 211 (D.D.C. 2014)	55, 57
<i>Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.</i> , 469 U.S. 189 (1985)	24
<i>Person v. Google, Inc.</i> , No. C06-7297 JFRS, 2007 WL 1831111 (N.D. Cal. June 25, 2007)	94
<i>Pfizer, Inc. v. Perrigo Co.</i> , 988 F. Supp. 686 (S.D.N.Y. 1997)	55
<i>Pinterest, Inc. v. Pintrips, Inc.</i> , 140 F. Supp. 3d 997 (N.D. Cal. 2015)	55
<i>Polygram Holding, Inc. v. FTC</i> , 416 F.3d 29 (D.C. Cir. 2005)	passim
<i>Qualitex Co. v. Jacobson Prods. Co.</i> , 514 U.S. 159 (1995)	40
<i>Quality Inns Int’l v. McDonald’s Corp.</i> , 695 F. Supp. 198 (D. Md. 1988)	54, 56, 57
<i>Quidgeon v. Olsen</i> , No. 10-1168, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011)	35
<i>Rebel Oil Co. v. Atl. Richfield Co.</i> , 51 F.3d 1421 (9th Cir. 1995)	77, 81
<i>Reifert v. S. Cent. Wis. MLS Corp.</i> , 450 F.3d 312 (7th Cir. 2006)	68

TABLE OF AUTHORITIES
(continued)

	Page
<i>Rescuecom, Inc. v. Google Inc.</i> , 562 F.3d 123 (2nd Cir. 2009).....	18
<i>Rhino Sports, Inc. v. Sport Court, Inc.</i> , No. 02-1815, 2007 WL 1302745 (D. Ariz. May 2, 2007)	38
<i>Rosetta Stone Ltd. v. Google Inc.</i> , 676 F.3d 144 (4th Cir. 2012)	19, 37, 51, 53
<i>Ryko Mfg. Co. v. Eden Servs.</i> , 823 F.2d 1215 (8th Cir. 1987)	63
<i>SCFC ILC, Inc. v. Visa USA, Inc.</i> , 36 F.3d 958 (10th Cir. 1994)	88
<i>Schering-Plough Corp. v. FTC</i> , 402 F.3d 1056 (11th Cir. 2005)	26
<i>SCM Corp. v. Xerox Corp.</i> , 645 F.2d 1195 (2d Cir. 1981).....	90
<i>SD3, LLC v. Black & Decker (U.S.) Inc.</i> , 801 F.3d 412 (4th Cir. 2015)	82
<i>Seidenstein v. Nat’l Med. Enters., Inc.</i> , 769 F.2d 1100 (5th Cir. 1985)	94
<i>Simon & Schuster, Inc. v. Dove Audio, Inc.</i> , 970 F. Supp. 279 (S.D.N.Y. 1997)	55
<i>Skydive Ariz., Inc. v. Quattrocchi</i> , No. 05-2656, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010)	35
<i>Smith v. Wal-Mart Stores, Inc.</i> , 537 F. Supp. 2d 1302 (N.D. Ga. 2008).....	55, 57
<i>Spectrum Sports, Inc. v. McQuillan</i> , 506 U.S. 447 (1993).....	89
<i>St. Louis Mining & Milling Co. v. Montana Mining Co.</i> , 171 U.S. 650 (1898).....	26, 30

**TABLE OF AUTHORITIES
(continued)**

	Page
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997).....	25
<i>T & T Mfg. Co. v. A. T. Cross Co.</i> , 587 F.2d 533 (1st Cir. 1978).....	30
<i>In re Tamoxifen Citrate Antitrust Litigation</i> , 466 F.3d 187 (2d Cir. 2006).....	o.

TABLE OF AUTHORITIES
(continued)

	Page
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001)	78, 79
<i>United States v. Syufy Enters.</i> , 903 F.2d 659 (9th Cir. 1990)	93
<i>United States v. Visa U.S.A., Inc.</i> , 344 F.3d 229 (2d Cir. 2003).....	82
<i>United States v. Waste Mgmt., Inc.</i> , 743 F.2d 976 (2d Cir. 1984).....	78, 79
<i>Valley Prods. Co. v. Landmark, Inc.</i> , 128 F.3d 398 (6th Cir. 1997)	76, 92
<i>Verizon Directories Corp. v. Yellow Book USA, Inc.</i> , 331 F. Supp. 2d 134 (E.D.N.Y. 2004)	55
<i>Verizon Directories Corp. v. Yellow Book USA, Inc.</i> , No. 04-0251, 2004 WL 1598916 (E.D.N.Y. July 19, 2004).....	55
<i>Weight Watchers Int’l, Inc. v. Stouffer Corp.</i> , 744 F. Supp. 1259 (S.D.N.Y. 1990).....	56, 58
<i>Wells Cargo, Inc. v. Wells Cargo, Inc.</i> , 606 F.2d 961 (C.C.P.A. 1979)	34
<i>Will v. Comprehensive Accounting Corp.</i> , 776 F.2d 665 (7th Cir. 1985)	77
<i>Williams v. First Nat’l Bank</i> , 216 U.S. 582 (1910).....	26, 30
<i>World Entm’t, Inc. v. Brown</i> , No. 09-5365, 2011 WL 2036686 (E.D. Pa. May 20, 2011).....	35
<i>Worthington Foods, Inc. v. Kellogg Co.</i> , 732 F. Supp. 1417 (S.D. Ohio 1990)	56

TABLE OF AUTHORITIES
(continued)

	Page
FTC CASES	
<i>Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment</i> , 48 FR 9023-02, 1983 WL 169978 (Mar. 3, 1983)	passim
<i>In the Matter of Kraft, Inc.</i> , Dkt. No. 9208, 1989 WL 1126655 (1989).....	56
<i>In the Matter of Novartis Corp., et al.</i> , Dkt. No. 9279, 127 F.T.C. 580 (1999).....	55
<i>In the Matter of Realcomp II Ltd.</i> , Dkt. No. 9320, 2007 WL 6936319 (F.T.C. Oct. 30, 2009).....	46
<i>In re Telebrands Corp.</i> , Dkt. No. 9313, 140 F.T.C. 278 (2005).....	53
FEDERAL STATUTES	
15 U.S.C. § 1114.....	18
15 U.S.C. § 1125(a)	18
Fairness to Contact Lens Consumers Act, 15 U.S.C. § 7601 <i>et seq.</i>	6, 70
STATUTES - OTHER	
Utah Code Ann. § 13-5-1 <i>et seq.</i>	18
FEDERAL REGULATIONS	
FTC, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)	4
LEGISLATIVE MATERIALS	

**TABLE OF AUTHORITIES
(continued)**

Page

TABLE OF AUTHORITIES
(continued)

	Page
J. Jacoby & M. Sableman, <i>Keyword-Based Advertising: Filling in Factual Voids (GEICO v. Google)</i> , 97 Trademark Reporter 681 (2007).....	56
William M. Landes and Richard A. Posner, <i>The Economic Structure of Intellectual Property Law.</i> , Ch. 7 (Harvard University Press 2003)	24
Daniel P. O'Brien, Abraham L. Wickelgren, <i>A Critical Analysis of Critical Loss Analysis</i> , 71 Antitrust L.J. 161 (2003)	72
Maria Sampalis, "Minimum Pricing on Contact Lenses: A Win for Independent ODS," <i>Review of Optometric Business</i> , http://reviewob.dev04.jobson.com/minimum-pricing-on-contact-lenses-a-win-for-independent-ods.aspx	71

than [REDACTED]. The settlements did not affect in any way the vast majority of advertising and competitive tools available to competitors; they restricted only using 1-800 Contacts' trademarks to trigger presentation of another company's paid advertisements. It is not surprising, therefore, that Complaint Counsel will not be offering any hard proof that the challenged settlements harmed consumers. They have no proof that the settlements reduced output of contact lenses and no quantitative support for their theory, speculated to by their experts, that the agreements enabled 1-800 Contacts to raise prices.

In the end, Complaint Counsel's case boils down to an attempt to re-litigate the trademark claims that the parties made rational business decisions to settle. There is no precedent for that kind of antitrust claim, or for using the FTC Act to reshape intellectual property rights according to Complaint Counsel's policy views of what trademark law should be.

BACKGROUND

I. ALTHOUGH EYE CARE PROFESSIONALS DOMINATE THE CONTACT LENS RETAIL INDUSTRY, CONSUMERS HAVE SEVERAL RETAIL OPTIONS.

Contact lenses were originally made of a rigid material and required an eye care professional ("ECP") to custom fit each pair. *See, e.g.,* RX0569 (*The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*) at 5. In the 1980s, contact lens manufacturers began to produce disposable lenses "designed to be replaced on a daily, weekly, or monthly basis." *Id.* Although a prescription is still required for these lenses, an ECP does not need to custom fit each pair. Consumers now can either purchase disposable lenses directly from their ECP, or obtain a copy of their prescription to purchase them from an alternative retailer.

There are over 30,000 ECPs in the United States. RX0153 at 12. Most consumers must visit an ECP's office at least once a year to get a new prescription. Nearly half of ECPs have their own online retail website to sell contact lenses. RX1117 at 4. In addition, the largest

provider of vision insurance, VSP, has its own online retail website for contact lenses. *Id.*

Consumers also can purchase contact lenses at the most ubiquitous retailers in the country, including Walmart, Sam's Club, and Costco. These major retailers have physical locations throughout the country *and* each sells contact lenses online through its own website. *See* RX1117 at 68. Other well-known retailers, such as Target, CVS, JC Penny, and BJ's, also sell contact lenses online through their own branded websites.

In addition to ECPs and leading brick-and-mortar retailers, consumers can shop for contact lenses from a large number of other internet retailers. 1-800 Contacts is just one of those. Purely online contact lens retailers that are not party to any of the challenged settlement agreements include, among others: AAlens.com, ContactsLand, Lens.com, LensDirect, LensDiscounters.com, Lens Benefits, LowestPriceContacts.com, Majorlens.com, PerfectLensWorld, and X-Contacts.com.

ECPs nevertheless continue to dominate the contact lens retail industry. The 2015 market share statistics relied upon by the Commission show that independent ECPs and optical chains make nearly 60 percent of all contact lens sales in the U.S. *See* FTC, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016). Mass merchants and wholesale clubs (*e.g.*, Walmart, Target, and Costco)

prescription.” H.R. Rep. No. 108-318 (Oct. 15, 2003), 2004 U.S. T D [T Td [A.N. 1739]d760se
dynamics have always made it difficult for non-ECP retailers to compete.

II. 1-800 CONTACTS’ BUSINESS MODEL IS TO COMPETE WITH EYE CARE PROFESSIONALS BY OFFERING BETTER SERVICE AND LOWER PRICES.

1-800 T Td cont which began selling contact lenses by phone in 1992, was one of the first
retailers to compete with ECPs. 1-800 T Td ontacts has always considered its principal competitor
to be the ET Td¹ However, consumers were accustomed to buying contact lenses directly from
their ET Td Ps, at times felt pressure to continue to do so, and often did not know alternative retailers
existed who offered lower prices, better service, and greater convenience. See, e.g., CX9029
(Bethers Dep.) at 110:21-111-12; C Td X003Td oon Dep.) at 28:9-Accordingly, from its
earliest days, 1-800 T Td ontacts invested substantial time and money to enhance its ability to
compete with ET Td Ps.

A. 1-

Labs. v. Reyes, No. 15-252, 2015 WL 9236136, at *2 (D. Utah May 11, 2015). 1-800 Contacts also was the principal proponent of federal legislation enacted in 2003, the Fairness to Contact Lens Consumers Act (“FCLCA”), that mandates ECPs provide patients a copy of their contact lens prescription immediately following the examination and fitting, and establishes a uniform, nationwide system for prescription verification. 15 U.S.C. § 7601 *et seq.* Congress’s express purpose in enacting the FCLCA was to foster competition from non-ECP retailers in the sale of contact lenses. *See* H.R. Rep. No. 108-318 (Oct. 15, 2003), 2004 U.S.C.C.A.N. 1759, 1760.

Most recently, 1-800 Contacts led efforts in opposition to resale price maintenance programs implemented by the four major contact lens manufacturers to set a floor on retail contact lens prices. *See* RX0713 at 6. The purpose of those programs was to reduce the price gap between ECPs and lower-priced retailers and thus limit the sales that ECPs lost to competing retailers. *Id.* at 8. 1-800 Contacts’ then-General Counsel testified before the U.S. Senate about these programs’ detrimental effect on competition, *id.* at 9, and 1-800 Contacts sponsored legislation to prohibit manufacturers from setting minimum retail prices, *see Alcon*, 2015 WL 9236136, at *4. 1-800 Contacts also supported the defense of such legislation in Utah. *See Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App’x 736 (10th Cir. 2016).

B. 1-800 Contacts Invests Heavily in Customer Service to Compete with ECPs.

1-800 Contacts’ strategy has always been to differentiate itself based on offering best-in-class service at prices lower than ECPs. *See* RX0904 at 16. 1-800 Contacts pioneered three main strategies to overcome ECPs’ inherent advantages and to win customers’ trust, an essential requirement for a company providing a medical device for consumers’ eyes.

First, 1-800 Contacts sets its retail prices primarily in reference to the prices charged by ECPs, seeking to have prices below ECPs, on a single-box basis and net of rebates. CX9001 (Bethers IH Tr.) at 80:25-81:3; CX9025 (Osmond Dep.) at 99:21-100:1.²

Second, 1-800 Contacts makes substantial investments in customer service and the purchasing experience. The company's guiding philosophy is: "Contact lenses are just the product we **deliver**. What we really sell is **service**." RX0560. "[T]he whole business is built on answering calls by the second ring, e-mails within ten minutes, answering calls with a live person, sending orders no signature required, handwritten apology notes when an order's late. Everything's all about making it simple, easy to order from us." CX9035 (Coon Dep.) at 17:5-10; RX0904 at 19. 1-800 Contacts does not try to compete solely on price with the lowest-priced discount retailers, like Costco and various online-only retailers. Instead, 1-800 Contacts positions itself at the top of the industry in terms of customer service.

purchase contact lenses online. Television is the principal means 1-800 Contacts uses to reach potential customers, including those who have not previously shopped online and may not know they can purchase contact lenses anywhere other than from their ECPs. RX0736 (Goodstein Report) ¶ 13. Between 2002 and 2014, 1-800 Contacts spent over [REDACTED] on advertising, more than [REDACTED]. *Id.* ¶ 12, Table 1; RX0739 (Murphy Report) Ex. 8. TV advertising builds brand awareness, which is critical for a company to increase the equity of its brand and differentiate itself from competitors. RX0736 (Goodstein Report) ¶ 17. As a result, 1-800 Contacts is consistently one of the most familiar brand names among all contact lens retailers, *see id.* ¶¶ 20-22, and its brand awareness is often more than 10 times that of the next closest online retailer, *id.* ¶ 22. 1-800 Contacts' TV advertising also drives traffic to its website, including from consumers who conduct an internet search for 1-800 Contacts' name and click on the 1-800 Contacts' sponsored ad. *See* RX0006 at 10 ("Paid trademark search impressions and TV are highly correlated (>.40).").

III. INTERNET ADVERTISING

A. Overview of Internet Advertising

Contact lens retailers have a wide array of means to advertise to consumers. 1-800 Contacts, for instance, has advertised to consumers through television, radio, print periodicals, direct mail, billboards, and over the internet.

Even on the internet, there are multiple advertising channels. For example, retailers engage in display advertising, which includes both text and banner advertisements, in addition to video and audio advertisements. Recently, retailers have invested in "remarketing" campaigns that display advertisements to consumers based on their location, search history, and other demographics. Retailers also advertise through affiliated websites that offer coupons or discounts. Email campaigns to lists of potential customers are a staple among contact lens

retailers. Retailers advertise on social media such as Facebook, Twitter, and Instagram. They also purchase “Product Listing Ads,” which provide an image and a price for contact lenses on the side of a search engine result page. And contact lens retailers are increasingly developing “apps” that can be downloaded on mobile devices.

There is no dispute that these various other forms of internet advertising, as well as all forms of non-internet advertising, are not restrained in any fashion by the challenged settlement agreements. To be clear, as discussed further below, this case concerns only one, very specific method of internet advertising: displaying an advertisement on search engine results pages, frequently referred to as “paid search,” in response to a consumer’s search for 1-800 Contacts’ trademark. The vast majority of 1-800 Contacts’ advertising spend—[REDACTED]—is spent on *other* forms of advertising. Indeed, since 2002, paid advertising in response to trademark searches has accounted for [REDACTED] of 1-800 Contacts’ expenses for paid search, less than [REDACTED] of its expenses for all internet advertising, and less than [REDACTED] of all its advertising expenses. RX0739 (Murphy Report) Ex. 8. Not surprisingly, the vast majority of 1-800 Contacts’ net revenue results from transactions that were initiated other than as the result of a consumer clicking on a “paid advertisement” presented in response to a search for 1-800 Contacts’ trademark. In short, what is at issue here is a small fraction of 1-800 Contacts’ revenue and advertising spend.

B. Paid Search Advertising

There are three major search engine providers in the United States: Google, Bing, and Yahoo!. Users can access these search engines through desktop computers, tablets, and mobile phones. Estimates of the market shares of these search engines vary across sources, but it is generally recognized that Google’s share of searches from desktops exceeds 60 percent and that its share of searches from mobile devices exceeds 80 percent. RX0739 (Murphy Report) ¶ 46.

RX0733 (Ghose Report) ¶¶ 40-41; RX0704 () ¶¶ 8-11. Unlike organic results, which are displayed solely based on their relevance, the display of paid search ads is a function of the advertiser's willingness to pay the search engine. *Id.* As a result, a paid search ad may appear on the first page of a SERP, even though the advertiser's website does not show up at all in the organic results. RX0733 (Ghose Report) ¶¶ 56-58. In other words, even if the

which are additions to the . CX9019
() at 30-33, 38-43; RX0733 (Ghose Report) ¶¶ 40-51; RX0704 () ¶ 10.

Whether an ad will be shown in response to a given search, as well as the position of an ad, is determined by a combination of the advertiser's bid and quality score.³ RX0733 (Ghose Report) ¶¶ 40-55; RX0704 () ¶¶ 3-15. Google refers to this combination as Ad Rank. The advertiser with the highest Ad Rank (the combination of bid and quality score) is given the top ad position

1-800 Contacts prioritizes its trademark keywords, so that customers who are attempting
omnintvngatt ni

marketing budget has a line item for marketing contact lenses, the majority of which is for paid search. CX9036 () at 53:2-8. These retailers manage their budget to bid on the keywords with the highest return on investment. *Id.* at 56:1-5; CX9024 () at 37:4-19.

Following entry of the injunction, on January 16, 2004, 1-800 Contacts' counsel wrote to Vision Direct regarding the appearance of Vision Direct's paid search advertisements in response to searches for 1-800 Contacts' trademark. RX0100. Vision Direct indicated it would notify its affiliates to cease their activities, but also advised that 1-800 Contacts could file a trademark complaint with Google requesting that the search engine take down advertising on 1-800 Contacts' trademark. CX1026. In April 2004, however, as earlier noted, Google modified its policies and encouraged advertisers to work out their trademark disputes amongst themselves. CX1148; CX9022 () at 19-20. Accordingly, 1-800 Contacts and Vision Direct began negotiating to resolve their trademark dispute and reached the first settlement agreement challenged in this case. CX0311.

Around the same time, in March 2004, 1-800 Contacts filed a complaint against Coastal Contacts challenging paid search advertisements for Coastal that appeared in response to searches for 1-800 Contacts' trademark. *1-800 Contacts, Inc. v. Coastal Contacts, Inc.*, Case 2:04-cv-00249-DAK (D. Utah Mar. 18, 2004). 1-800 Contacts also began an effort to uncover

trademark owners monitored search results for their trademarks on search engines and filed trademark infringement lawsuits based on paid search advertising in this period. *See generally* RX0734 (Hogan Report) ¶¶ 127-134.

Over the next several years, 1-800 Contacts sent cease-and-desist letters to some 13 other online contact lens retailers whose advertisements appeared in response to a search for 1-800 Contacts' trademarks. 1-800 Contacts ultimately filed complaints in the District of Utah against several retailers asserting claims for trademark infringement under 15 U.S.C. § 1114, in addition to federal unfair competition (15 U.S.C. § 1125(a)), state and common law unfair competition (Utah Code Ann. § 13-5-1 *et seq.*), unjust enrichment, and federal dilution.

As two courts expressly held, these trademark enforcement efforts were *bona fide*. *See 1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, *6 (D. Utah Mar. 15, 2010) (“Memorial Eye”)

each case.” *Rosetta Stone Ltd. v. Google Inc.*, 676 F.3d 144, 153 (4th Cir. 2012).

As it became clear that paid search advertising was actionable, albeit depending on the circumstances, 1-800 Contacts settled with nine retailers between the fall of 2009 and January 2011. For example, AC Lens settled within a month after its lawyer [redacted] 2(t)(3) -10na, pl.a-2(i)-1n10nahatih

confusion based on the record there “cannot support an inference that Lens.com’s keyword activity was likely to lure consumers away from 1-800.” *Id.* The Tenth Circuit also held that 1-800 Contacts “presented enough evidence to support a claim of contributory infringement” as to advertisements presented by Lens.com’s affiliates, where the evidence showed a greater number of consumers were affected. *Id.* at 1255.

In short, as this Court recently held, the result of *Lens.com* were “fact-specific” to that case and does

this point: each lists advertising in response to generic terms as a “non-prohibited act.” *E.g.*, CX0317 § 2(B); CX9040 (Miller Dep.) at 60:18-61:1. For example, the 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.” CX0326, § 3.

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.” *E.g.* CX0311, § 4(B).

Complaint Counsel have attempted to sow confusion by suggesting that the agreements go further than prohibiting advertising in response to user queries for 1-800 Contacts’ trademarks because they do not explicitly specify that the use of negative keywords may be limited to “exact match” negative keywords. Complaint Counsel incorrectly interpret the agreements.

Negative keywords can be instituted in exact, broad and phrase match. An exact match negative keyword instructs the search engine not to serve an ad in response to a query for the negatively matched keyword alone; broad and phrase match negative keywords instruct the search engine not to serve an ad for a broader set of queries relating to or including the negatively matched keyword. Complaint Counsel suggest that the settlement agreements require negative keywords on “1-800 Contacts” that instruct the search engine not to display ads for user

provisions expressly specify phrase or broad match types when that is what is intended. RX0734 (Hogan Report) ¶ 154. None of the agreements here so specifies. Rather, the one agreement that does specify a negative keyword type requires only exact match negative keywords, CX0331 and the other settlement agreements should be similarly understood to require only the use of exact match negative keywords.

time he or she sees the McDonald's mark. *Id.* Accordingly, trademarks benefit consumers not only by reducing search costs but by creating incentives for firms to provide products and services of consistent quality. *Id.* ¶¶ 32-35.

Trademark infringement and dilution undercut the incentives to engage in such interbrand competition by interfering with the signaling effect of a trademark. RX0737 (Landes Report) ¶¶ 37-44. Trademark protection against such harm advances the procompetitive goals of antitrust law by securing incentives for firms to engage in the kind of interbrand competition that it is the “primary purpose of the antitrust laws . . . to protect.” *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997); *see also* RX0737 (Landes Report) ¶¶ 43-45; RX0739 (Murphy Report) ¶¶ 83-90.

The Commission itself has recognized that trademark protection secures the procompetitive benefits of brand differentiation:

Complaint Counsel's expert Dr. Evans agrees that "[t]rademarks help companies convey information to consumers about themselves and their products," that "[t]hey 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." CX8006 (Evans Report) ¶ 292; *see also* CX8009 (Evans Rebuttal Report) ¶ 48 & n.67 (agreeing with Dr. Landes about "the role of trademark protection in encouraging firms to invest in quality"); CX9042 (Evans Dep.) at 196:3-8.

It is equally well-

) at 93-94; CX9014 () at 46:12-48:15; CX9024 () at 62:19-64:1, 75:18-77:3, 160:3-165:6; CX9039 () at 86-87, 144; CX9003 () at 108-109; CX0943 () ¶ 10.

In short, as settlements of litigation that protect trademark rights, the agreements that Complaint Counsel have challenged in this case are procompetitive twice over. That should dispose of this antitrust case, as it did in *Clorox*.

Clorox involved an antitrust challenge to a settlement of trademark litigation over the PINE-

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. As explained below, Complaint Counsel's expert concedes that the only "barrier to entry" in the retail contact lens business is building awareness, and the settlement agreements do not affect 1-800 Contacts' competitors' ability to build their own brands rather than freeriding on the investment 1-800 Contacts has made in its own brand.

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." *Id.* Accordingly, 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.* And 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.* ~~Compmpmgtcc ttcto~~

generic drug manufacturers under the Hatch-Waxman Act. 133 S.Ct. 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.* This form of 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 can “sometimes unreasonably diminish competition in violation of the antitrust laws.” 133 S.Ct.at 2231, 2227. The Court answered yes, rejecting the rule adopted by several lower courts that alleged reverse payment agreements are “immune from antitrust attack so long as” the agreements did not exceed “the exclusionary scope of the patent.” *Id.* at 2230.

The Court, however, took great pains to distinguish reverse payment settlements from “traditional” forms of settlements. 133 S.Ct. at 2233. It found “reason for concern that settlements *taking this form* tend to have significant adverse effects on competition.” *Id.* at 2231 (emphasis added). The Court contrasted a reverse payment settlement, in which a party with “no claim for damages . . . walks away with money simply so it will stay away from the patentee’s market,” with “traditional” settlements where “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 stated that “settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability” and that it did not “intend to alter that understanding.” *Id.*

Significantly, the Commission advocated for this “commonplace/unusual” distinction in its briefing in *Actavis*. The Commission argued that there is no reason for antitrust concern where “an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled.” Br. for Pet’r, 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* Reply Br. For Pet’r, 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”).

Further, numerous courts have interpreted *Actavis* as holding that antitrust scrutiny applies to unusual settlement forms, but not to commonplace ones. *See King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015) (*Actavis* holding “should not be read to subject to antitrust scrutiny ‘commonplace forms’ of settlement.”); *In re Lipitor Antitrust Litig.*, 46 F.Supp.3d 523, 537 (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 Litig.*, 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 Litigation*, 814 F.3d 538, 544 n.4 (1st Cir. 2016) (“The court noted that it did not intend to disturb commonplace settlement forms.”).

C. **The Non-Use Trademark Settlement Agreements Here Are Commonplace Under *Actavis* and Not Subject to Antitrust Scrutiny.**

Complaint Counsel have not met their burden to establish that the settlements at issue take a form that is “unusual” or “quite different” from traditional settlements.

1-800 Contacts’ settlements were standard non-use agreements whereby a party agreed not to use the other’s trademark. Parties routinely use that form of settlement to resolve trademark disputes. *See, e.g.*, 3 McCarthy on Trademarks & 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. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (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); *see generally* RX0734 (Hogan Report) ¶¶ 143-144. The Lanham Act envisages and authorizes non-use trademark agreements. *See, e.g., Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 965 (C.C.P.A. 1979); *see also* 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th Ed. 2016 update).

This form of settlement has frequently been used to settle disputes regarding the use of trademarks in paid search advertising. *See, e.g., Probar, LLC v. Onebody et al.*, 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.*, et e , c t --

as an example of the kind of “commonplace” settlement it did not intend to displace—citing *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.

If all of this were not enough, the settlements can hardly be deemed “unusual” when they plainly fall within the range of relief that a court could have ordered. *See generally* RX0734 (Hogan Report) 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 because a Hatch-Waxman patent defendant generally had no conceivable infringement claim against the plaintiff. *See* 133 S.Ct. at 2231. Here, by contrast, a court entered an injunction in 1-800 Contacts’ favor that parallels the terms of the settlements it reached with other retailers. *See* RX0401 (*1-800 Contacts, Inc. v. Vision -*

commonplace—including in the paid search context. And Complaint Counsel have admitted (subject to certain meritless objections) that “the obligations of 1-800 Contacts’ counterparties to the Challenged Settlement Agreements under those Agreements was comparable

Complaint Counsel nevertheless declare that the settlements portend anticompetitive

322 (D.N.J. 2006) (finding that the “purchase and/or sale of keywords that trigger advertising constitutes the type of ‘use’ contemplated by the Lanham Act” where an advertisement may have appeared because plaintiff purchased as a keyword the generic term “bedroom”).¹⁴ And, more generally, the claims that the settlement agreements resolved “involve[] an unsettled area of law given the emerging and changing nature of Internet competition.” *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-CV-591 CW, 2012 WL 113812, at *3 (D. Utah Jan. 13, 2012).

Thus, far from defeating the *Actavis* threshold test, Complaint Counsel’s attempt to draw trademark boundaries after the fact reinforces the test’s wisdom. Focusing on whether there are “unusual” features of the settlements identifies agreements that do not “accord with how the parties view their respective rights” without violating the principle that “it is usually unwise for courts to second-guess” the wisdom of settlements. *Clorox Co.*, 117 F.3d at 60. Under that test, since the settlements here are commonplace, they are not subject to antitrust scrutiny.

Were it otherwise, *every* settlement agreement would exist under the cloud of potential antitrust scrutiny as long as a third party could identify some legal rule that supposedly barred the claims that were settled. That is fundamentally inconsistent with the historic respect that courts have given to private settlement agreements. It is not the purpose of antitrust law to serve as a yardstick for private agreements that settle *bona fide* legal disputes, especially where private agreements track the relief a court could have ordered at the conclusion of a lawsuit. Nor is it the

¹⁴ The only case that Complaint Counsel rely on, via their expert Rebecca Tushnet, is *Rhino Sports, Inc. v. Sport Court, Inc.*, No. 02-1815, 2007 WL 1302745 (D. Ariz. May 2, 2007). But that case did not address whether advertising in response to user queries for trademarks based on broad matching constituted infringement but whether that activity contravened a pre-existing injunction: “At issue is not whether Rhino Sports’ current activities infringe Sport Court’s trademark, but whether Rhino Sports substantially violated the permanent injunction.” *Id.* at *4. Moreover, unlike the trademark owner in *Rhino Sports*, 1-800 Contacts’ settlement agreements never prevented a competitor from purchasing generic terms as keywords. See pp. 20-21, *supra*.

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. As noted elsewhere, there are myriad procompetitive efficiencies associated with trademark protection that can justify any limitations on competition in the settlement agreements.

Actavis’ third consideration 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, so the only market power a trademark holder may possess is due to the

scrutiny of reverse payments was appropriate because “the size of the unexplained 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 2236-37.

Here, however, there is no shortcut that makes the “antitrust game . . . worth th[e] litigation candle.” *Id.* at 2234. Accordingly, as their trial brief makes clear, CC Pre-Trial Br. at 49-66, Complaint Counsel intend to prove the trademark merits directly in order to show that 1-800 restricted competition beyond “the scope of any property right that 1-800 Contac

advertising (and the case law has not so limited trademark claims, either). *See* RX0734 (Hogan Report) at ¶¶ 104-108, 149-151. And Complaint Counsel’s suggestion that 1-800 Contacts could have required disclosures along the lines of what the Commission has required *in the false*

in place of a more sedulous one.” *Cal. Dental Ass’n*, 526 U.S. at 781. Here, the market and the courts have very limited experience with restraints on paid search advertising in response to searches for trademarks. Google eliminated some of its restrictions on such advertising only in 2004. CX1148. Bing did not do so until 2011. CX1454. Complaint Counsel’s expert, Dr. Evans, acknowledges that paid search advertising was in its “primordial swamp” a mere decade ago. CX9042 (Evans Dep.) at 170:12-171:10 And almost no cases have applied antitrust analysis to paid search advertising or restrictions on it.

The “economic learning” underlying paid search advertising is of recent vintage as well, which also weighs against inherently suspect treatment. *Polygram Holding, Inc.* 416 F.3d at 36. According to Dr. Evans, search engines are multi-sided advertising platforms, and the economics applicable to such platforms developed largely following a seminal article published by two French economists in the year 2000. CX9042 (Evans Dep.) at 158:12-159:8, 163:2-165:16. Dr. Evans also concedes that two-sided platforms such as internet search engines involve economic principles that are more complex than those that apply to most markets. CX9042 (Evans Dep.) at 159:23-160:13. Indeed, Complaint Counsel say that “[b]idding on keywords and running (often massive) search advertising campaigns is a complex business.” CC Pre-Trial Br. at 8.

Complaint Counsel’s argument that *Actavis* “*did not* direct that settlements of intellectual property disputes may *never* be judged inherently suspect,” CC Pre-Trial Br. at 35, addresses a straw man. That is not 1-800 Contacts’ argument. 1

trademark,” CC Pre-Trial Br. at 36, cuts against their position. As explained with respect to the *Actavis* factors, the narrower ambit of trademarks’ protection makes settlements of claims to protect them less competitively suspect than payments by a patentee to its competitors.

Finally, Complaint Counsel’s reliance on *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), CC Pre-Trial Br. at 37, which held a “reverse payment” settlement *per se* unlawful, simply ignores *Actavis* altogether. The Commission did not support *Cardizem’s per se* rule in *Actavis* and that rule did not survive *Actavis*.

B. The FTC Failed to Persuade the Supreme Court that Restraints on Advertising Are Inherently Suspect.

The Supreme Court’s decision in *California Dental* also precludes inherently suspect treatment. That case involved restrictions that essentially prohibited dentists in California from any advertising offering the “lowest prices” or making any “claims as to the quality of services.” *Cal. Dental Ass’n*, 526 U.S. at 760 n. 1. The Commission condemned these bans as inherently suspect. *Id.* at 762-63. The Ninth Circuit upheld the Commission’s decision, but the Supreme Court reversed, holding that the advertising restriction in that case should have been subjected to a full rule-of-reason analysis.

The Supreme Court noted that the challenged advertising restrictions “appear[ed] to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators).” *Cal. Dental Ass’n*, 526 U.S. at 775. The Court held that evaluating this balance of consumer effects was “a question susceptible to empirical but not *a priori* analysis.” *Id.* at 774. In its view, “[t]he plausibility of competing claims about the effects of” challenged “advertising

are presented with many ways to find competitors. CX8010 (Athey Rebuttal Report) ¶¶ 51-53.¹⁶

Under *California Dental*, the challenged settlement agreements in this case require a full antitrust analysis balancing the costs and benefits of limitations on advertising. *First*, the settlements here have clear potential to benefit consumers by reducing search costs and potential confusion. *Second*, the trademark settlements here are far less restrictive than the broad bans that the Court in *California Dental* held required a full analysis under the rule of reason.

C. The Challenged Agreements Have Significant Procompetitive Potential.

The challenged 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. As noted above, trademark settlements have significant potential to foster procompetitive activities that benefit consumers: they reduce litigation costs, lower consumers’ search costs, create incentives to produce quality products, and protect consumers from infringement and dilution that can undermine these benefits. Dr. Evans concedes as much. CX8006 (Evans Report) ¶ 292; *see also* CX8009 (Evans Rebuttal Report) ¶ 48 & n.67; CX9042 (Evans Dep.) at 196:3-8.

1. Most Consumers Searching for 1-800 Contacts’ Trademarks Are Trying to Navigate to 1-800 Contacts’ Website.

These efficiencies are hardly theoretical in this case. Extensive evidence at the hearing—including data from Google and Microsoft—will confirm the common sense proposition that most consumers using a search engine to search for 1-800 Contacts’ trademarks intend to navigate to 1-800 Contacts’ website.

¹⁶ Complaint Counsel’s reliance on a consent judgment with the Department of Justice, CC Pre-Trial Br. at 32, highlights the lack of precedent supporting their position.

contacts or that, if they are interested in finding other sellers they do not know how to do so, such as by searching for “contact lenses” or “who sells contact lenses?” Dr. Athey has no information about whether any consumers believe that 1-800 Contacts is the only retailer of contact lenses. CX9043 (Athey Dep.) at 262:16-20. At the same time, her own report makes

66 (May-June 2015); CX9049 (Van Liere Dep.) at 264:19-265-5.

Here, Dr. Van Liere designed a survey for 1-800 Contacts (“Van Liere Study”) that follows the same methodology and is substantially similar to the surveys he conducted for American Airlines and Rosetta Stone. CX9049 (Van Liere Dep.) at 265:22-266:6. The Van Liere Study tested survey respondents on a mock-up of both a Google and Yahoo! SERP, based on the appearance of those SERPs as of early 2017. The “test” condition asked respondents to search for “1-800 Contacts” and were shown either a Google or Yahoo! SERP that included sponsored ads from other contact lens retailers.¹⁸ Respondents were asked: (1) “click on the link or links, if any, that you think will take you to the website of the company that you searched for”; and then (2) “click on the link or links, if any, that you think will take you to the website of a company that is affiliated with the company that you searched for.” In the test condition, 28.7 percent of respondents were confused (39.2 percent with the Yahoo! SERP and 17.8 percent with the Google SERP). See RX0735 (Van Liere Report) at 19, Table 3.

The Van Liere Study includes 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.” RX0735 (Van Liere Report) ¶ 28.¹⁹ 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

¹⁸ The Van Liere Study includes ads that “could appear if the [settlement] agreements challenged in the FTC’s complaint were not in place,” RX0735 (Van Liere Report) ¶ 12, and that were actually run by the parties to the settlement agreements on other contact lens-related searches.

¹⁹ See also *Malletier v. Dooney Burke*, 525 F. Supp. 2d 558 (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).

2016, which is roughly [redacted] searches each year. *See* RX0733 (Ghose Report) Ex. 7. The results of Dr. Van Liere’s study therefore indicate the potential for consumer confusion from sponsored ads in well over [redacted] per year for 1-800 Contacts’ name on Google alone.²²

The results and conclusions of the Van Liere Study are consistent with other evidence. Professor Ronald C. 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* RX0736 (Goodstein Report) ¶¶ 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; *Using Trademarks as Keywords*, 105 Trademark Reporter at 758-70.

clicking on its ad is far higher than the percentage of consumers who buy from other retailers after searching for 1-800 Contacts and clicking on the other retailers' ads. RX0733 (Ghose Report) ¶¶ 107-113; CX9043 (Athey Dep.) at 202:21-203:17. Either consumers who search for 1-800 Contacts' trademark prefer what 1-800 Contacts' website has to offer or those who clicked on ads for other retailers found themselves in the wrong place. RX0733 (Ghose Report) ¶ 109.

(b) *Complaint Counsel's Survey on Consumer Confusion is Unreliable and Fundamentally Unsound.*

Complaint Counsel retained Professor Jacob Jacoby to conduct a study of potential confusion from sponsored advertisements that appear in response to an internet search for "1-800 Contacts." Complaint Counsel retained Professor Jacoby despite the fact that his studies have been entirely excluded in at least *four* cases,²³ and have been severely criticized or given little to no weight in nearly *twenty* other cases.²⁴

²³ *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 Glob., 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).

²⁴ *See, e.g., Pinterest, Inc. v. Pintrips, Inc.*, 140 F. Supp. 3d 997, 1015 (N.D. Cal. 2015); *Paletaria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175, 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); (footnote continued)

Professor Jacoby designed a study that purports to estimate consumer confusion from sponsored ads by other contact lens retailers that appear in response to an internet search for “1-800 Contacts.” See CX9008 (Jacoby Report) at 3-4. The Jacoby Study includes two stimuli: a mock-up of a pre-2016, and a 2016, Google SERP. In the “test” condition, survey respondents entered a search on Google for “1800contacts.” In the “control” condition, respondents entered a search for an entirely different phrase, “contact lenses.”

The Jacoby Study deviates from the two known studies that Professor Jacoby has conducted in similar contexts. See J. Jacoby & M. Sableman, *Keyword-Based Advertising: Filling in Factual Voids (GEICO v. Google)*, 97 Trademark Reporter 681 (2007); CX9041 (Jacoby Dep.) at 22:4 – 29:14. And it contains obvious and fundamental flaws:

Big Green Arrows. The Jacoby Study violates basic tenets of consumer-survey design by inserting artificial enhancements—big green arrows—that improperly highlight the sponsored ads on each SERP. See CX8013 (Jacoby Report) Appendix H at 20-21, 56-57. This forces respondents to focus exclusively on the sponsored ads rather than allowing survey respondents to consider the entire SERP (which has both organic links and advertisements), resulting in an artificially high level of attention to the sponsored ads. This effect improperly eliminated any confusion caused by consumers’ inability to differentiate organic links from the sponsored ads—confusion that the Commission itself has highlighted. See RX0512 ((Letter from Mary K. Engle, FTC, Bureau of Consumer Protection (June 24, 2013)); RX0599 (Letter from H. Hipsley, FTC, Division of Advertising Practices, to Mr. Gary Ruskin (June 27, 2002))).

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. v. McDonald’s Corp.*, 695 F. Supp. 198, 218-19 (D. Md. 1988); *Am. Home Prods. Corp. v. Barr Labs., Inc.*, 656 F. Supp. 1058, 1071 (D.N.J.), *aff’d* 834 F.2d 368 (3d Cir. 1987).

Indeed, Professor Jacoby's prior studies have been severely criticized for similar, yet less extreme, manipulations of marketplace realities. *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").

"Reading Test." The Jacoby Study's primary question functioned as a "reading" test, not a test of confusion as to the source of sponsored ads: "If you click on this listing, which company's website will it take you to?" CX8013 (Jacoby Report) Appendix H at 36. Many respondents did not answer with the name of a company but simply typed the URL in the highlighted sponsored ad. *See RX0735* (Van Liere Report) ¶¶ 46-48. In other words, a large number of respondents simply typed what they saw. *See Paleteria*, 69 F. Supp. 3d at 213 n. 13 (criticizing Jacoby survey that "demonstrated little more than respondents' ability to read and comprehend the stimuli"). *Cf.* CX1839 (S. Diamond, *Reference Guide on Survey Research*, in

and expectations when conducting an “informational” search with a generic search term (“contact lenses”) compared to a “navigational” search with a specific brand name. *See* RX0733 (Ghose Report) ¶¶ 101-13; RX0736 (Goodstein Report) ¶¶ 65-71 & ¶¶ 79-82. The court in *Weight Watchers* specifically criticized Professor Jacoby for doing exactly what he and Complaint Counsel try to do here: use a control condition “to show that consumers are generally

effects on consumers.

As the founders of Google recognized, search engines are for-profit businesses that trade off consumer welfare for revenue: “The goals of the advertising business model do not always correspond to providing quality search to users. . . . [W]e expect that advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers.”²⁵ Dr. Athey, in fact, admitted at her deposition that paid search advertising auctions do not generate the selection of advertisements that maximizes consumer welfare. CX9043 (Athey Dep.) at 190:12-15, 192:24-193:5. While Complaint Counsel suggest that search engines have some incentives to account for users’ interest in a positive search engine experience (CC Pre-Trial Br. at 6-7), Dr. Athey acknowledges that those incentives depend on competition among search engines. CX9043 (Athey Dep.) at 190:22-191:2. And she further acknowledges that this competition is not met here—that Google has sufficient market power to manipulate search engine results, just as the Commission’s own staff found during an investigation of Google’s search engine practices. *Id.* at 16:22-18:21; RX1961 at 68, 116; *see also* CC Pre-Trial Br. at 5-6 (stating that Google has *at least* a 64 percent market share).

Search engines’ basic workings make this clear. Search engines use different algorithms for organic links and paid search advertising. RX0733 (Ghose Repogeerent a76ialuB6p-7(g)100Tp(w)-2
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results “based on the predicted likelihood of their relevance”). By contrast, search engines display advertisements based both on a relevance assessment (different from the one used for organic links) *and* how much the advertiser has bid to pay if a consumer clicks on the advertisement. (Ghose Report) ¶¶ 40-55; CX9043 (Athey Dep.) at 49:16-22.

When one compares organic results—determined solely by relevance—to paid advertising results—

from (1) a free organic link to a brand's website to (2) a paid advertisement for the same website. RX0733 (Ghose Report) ¶¶ 59-63; CX9043 (Athey Dep.) at 84:14-25. Search engines earn additional revenue by permitting advertising to be triggered by searches for other firms' trademarks even if consumers do not click on the additional advertisements. RX0733 (Ghose Report) ¶ 64; CX9043 (Athey Dep.) at 85:2-11.

A trademark owner's agreements to protect its own trademarks cannot be presumed to

D. The Settlement Agreements Did Not Prevent Meaningful Competition By Other Retailers.

The limited scope of the challenged settlement agreements also scuttles any finding that “it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram Holding, Inc.*, 416 F.3d at 35.

To begin with, “trademarks are by their nature non-exclusionary.” *Clorox Co.*, 117 F.3d at 56. “[A] trademark protects only the name or symbol of the product. Market power, if any, is derived from the product, not from the name or symbol as such.” *Mozart Co.*, 833 F.2d at 1346. Indeed, it will be undisputed that trademark protection has only a limited effect on competition because it does not preclude rivals from selling an identical product but merely limits how rivals can advertise that product. RX0737 (Landes Report) ¶ 36.

In fact, the challenged agreements affect only a small sliver of contact lens advertising, making them analogous to the agreements upheld in *Clorox* that did “not entirely prevent Clorox from using the PINE-SOL name to compete against LYSOL products” but only restrained certain narrow uses of the mark. 117 F.3d at 58. The settlement agreements apply only to paid search advertising in response to searches for trademarks owned by 1-800 Contacts and the other settling parties. They do not affect paid search advertising in response to thousands of other internet searches for contact lenses that, as Dr. Athey agrees, are far more common than searches for 1-800 Contacts’ trademarks. CX8007 (Athey Report) Table 1 ([REDACTED]); RX0733 (Ghose Report) ¶¶ 141-143. They do not affect advertising on television, radio, or in print. They do not affect advertising to users who “liked” 1-800 Contacts on Facebook or other social media. They do not affect sending e-mails to 1-800 Contacts’ customers. They do not affect advertising through Product Listing Advertisements. They do not affect internet display ads, which Dr. Athey admits

for 1-800 Contacts' trademarks than they did for sales obtained by advertising in response to other searches. RX0733 (Ghose Report) ¶¶ 129. Complaint Counsel and Dr. Evans focus almost exclusively on [REDACTED], which decided to exit the online contact lens business during 1-800 Contacts' lawsuit, claiming that this shows competition was impossible without advertising on 1-800 Contacts' trademark. The full record shows otherwise.

Both [REDACTED] and [REDACTED] grew significantly despite being bound by the settlement agreements. [REDACTED] launched in 2009 and grew to over [REDACTED] in revenue and [REDACTED] in profit by 2015. CX9000 ([REDACTED]) 8, 34, 38-40. [REDACTED] grew from 50 employees in 2010 to 170 as of December 2016 and shipped [REDACTED] orders with a retail value of [REDACTED] in 2015. CX9039 ([REDACTED]) at 11; CX9003 ([REDACTED]) at 9-10. [REDACTED] and [REDACTED] had compound annual growth rates from 2011 of [REDACTED]. RX0153-007. If [REDACTED], [REDACTED], [REDACTED], and [REDACTED] could grow rapidly despite the agreements, the agreements do not explain [REDACTED] decision to exit the online sale of contact lenses.²⁷

Despite the Tenth Circuit's decision partially in its favor, [REDACTED] [REDACTED]. CX9001 (Bethers IH Tr.) at 302:21-303:8. Yet, according to Dr. Evans, [REDACTED] is the third largest online contact lens retailer. CX8006 (Evans Report) Table 1. Indeed, while Complaint Counsel argue that advertising on SERPs for queries for 1-800 Contacts' trademark is critical to success in the contact lens business, the large number of unbound competitors, CX8007 at Ex. B, are not filling ad positions on those SERPs today. Dr. Athey has no explanation for this other than speculation that 1-800

²⁷ Even after [REDACTED] exited its online business, it continues to sell contact lenses through its brick-and-mortar locations.

Contacts' prior litigation "chilled" other competitors, which certainly would not apply to Walmart, Costco, JC Penney or other major retailers. CX9043 (Athey Dep.) at 113:16-117:18.

Search engine data undercut Complaint Counsel's theory as well. If it were true that exposing consumers to lower prices of other online competitors would lead them to switch away from 1-800 Contacts, one would expect that consumers who reach the websites of lower-priced competitors would purchase *at least as often* as consumers who reach 1-800 Contacts' website. But the data show otherwise. The percentage of consumers who buy from 1-800 Contacts after searching for 1-

The evidence will show, as the other retailers testified, that the settling retailers agreed to the settlements precisely as Complaint Counsel allege: “to avoid prolonged and costly litigation.” CX9000 () at 93-94; CX9014 () at 46:12-48:15; CX9024 () at 62:19-64:1, 75:18-77:3, 160:3-165:6; CX0943 () ¶ 10. Complaint Counsel’s expert, Dr. Evans, agrees that this is why other retailers settled. CX9042 (Evans Dep.) at 119:20;120:8. In fact, far from testifying that they rigged bids for their mutual advantage, the other retailers testified that they received no or only a “tiny” benefit from settlement. CX9039 () at 164:7-15; CX9014 () at 46:25-27:12; CX9024 () at 175:3-19 (). Dr. Evans agrees with that assessment, too. CX9042 (Evans Dep.) at 114:22-166:16. And it is hardly surprising given that 1-800 Contacts, as a policy, did not select other party’s trademarks as keywords.

Several of the retailers, such as , , (owned by) had more than ample resources to contest the litigation. *See* n.26 *supra*; CX9042 (Evans Dep.) at 134:25-135:11. Their decision to settle strongly suggests that the expected value of the advertising challenged in 1-800 Contacts’ litigation—in terms of the likelihood that the other retailer would win the litigation and the upside to its business—is quite small.

A bid-rigging agreement that does not benefit one of the alleged riggers is not a bid-

dispose of the case. *See Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) ("Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason."); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

1. The Relevant Market Is Broader Than Online 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). The relevant antitrust market here includes sales by online retailers, by mass merchants, and by ECPs. Complaint Counsel's proposed market limited to online retail sales fits the market to the challenged restraint rather than to the market facts.²⁸

As the Supreme Court has held, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between



consumers to switch to the other, and vice versa—

by buying online, and persuading ECPs' customers to purchase instead from 1-800 Contacts remains the company's largest source of new customers. RX0739 (Murphy Report) ¶¶ 104, 109. That is why 1-800 Contacts sets its prices at a discount to ECPs' prices. CX9001 (Bethers IH Tr.) at 80:25-81:3, 255:4-9; RX1117 at 4, 52-53; CX0439 at 10; CX9025 (Osmond Dep.) at 99:21-100:1.

1-800 Contacts also [REDACTED] to inform contact lens consumers about the option of buying online rather than from their ECPs. RX0736 (Goodstein Report) ¶ 12, Table 1; RX0739 (Murphy Report) Ex. 8. Notably, Congress and the Commission have said this fosters competition between online retailers and ECPs. In a study of competition for contact lens sales commissioned by Congress, the Commission concluded 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.” RX0569 (*The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*, Federal Trade Commission) at 20. That is why Congress passed the FCLCA and the Commission promulgated the Contact Lens Rule requiring ECPs to give patients a copy of their prescription: to “increase[] consumers’ ability to shop around when buying contact lenses.”²⁹ If online retailers are not in the same market as ECPs, Congress’s and the Commission’s predictions that expanding access to prescriptions would promote competition, *see* H.R. REP. No. 108-318, at 4-5, would have made no economic sense. *See* CX8006 (Evans Report) ¶ 230 (“Federal legislation and regulations had eliminated the ability of ECP[]s to tie prescriptions to contact lens sales. That provided

²⁹ “The Contact Lens Rule: A Guide for Prescribers and Sellers,” <https://www.ftc.gov/tips-advice/business-center/guidance/contact-lens-rule-guide-prescribers-sellers>.

significant opportunities for online sellers who couldn't offer prescriptions but could sell contact lenses more conveniently and more cheaply than ECPs.”).

In the same vein, the resale price maintenance policies that contact lens manufacturers instituted beginning in 2013—known as a Uniform Pricing Policy (“UPP”)—reflect an economic judgment that ECPs and online retailers sell in the same market. RX0739 (Murphy Report) ¶ 112. UPP required all retail sellers of contact lenses to resell those lenses at prices roughly equivalent to the prices offered by ECPs, the highest in the industry. As ECPs themselves explained, UPP’s purpose was to insulate ECPs from competition by online retailers: “This new pricing model enables optometrists to more easily compete with online retailers and make more money selling contact lenses in their offices.”³⁰ As one ECP put it, “[o]ne of the biggest benefits to practitioners of UPP is that it instantly creates a perfectly level playing field; volume discounts for large practices and online retailers go away.”³¹ If online retailers and ECPs do not compete in the same market, the manufacturers’ decision to try and reduce competition between them would have made no economic sense, for as the Supreme Court has explained, resale price maintenance by definition assumes, and seeks to reduce, “competition among retailers selling the same brand.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). The manufacturers’ attempt to reduce online retailers’ competitive threat to ECPs is powerful market evidence that online retailers compete with ECPs.

Complaint Counsel’s arguments for limiting the relevant market to online sales lack merit

³⁰ Maria Sampalis, “Minimum Pricing on Contact Lenses: A Win for Independent ODs,” *Review of Optometric Business*, <http://reviewob.com/minimum-pricing-on-contact-lenses-a-win-for-independent-ods/>.

³¹ Gary Gerber, “What's UPP, Doc?,” *Review of Cornea and Contact Lenses* (June 15, 2014), http://www.reviewofcontactlenses.com/content/d/out_of_the_box/c/48867/

Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008) (“The consumers do not define the boundaries of the market; the products or producers do.”).

Notably, Complaint Counsel will not quantify the proportion of consumers who place such a “high premium on the convenience” of online shopping that they would not switch to other retailers if online prices rose, let alone demonstrate that there is a sufficient number of such customers to define a separate submarket. Any theory that a substantial number of consumers are motivated solely by “convenience” over price runs squarely contrary to Complaint Counsel’s theory, espoused by its experts, that “[c]ontact lens consumers typically consider price as the primary consideration in determining where to make a purchase, particularly when buying online.” CX8007 (Athey Report) ¶ 30. A properly defined antitrust market does not consist of Jekyll and Hyde consumers who value convenience most of all for purposes of market definition and then value price most of all when it comes to assessing possible anticompetitive effects.

If, as it seems, both service and price are taken into account by many consumers, the proper comparison is to look at the quality-adjusted price, which Dr. Evans acknowledged he did not do. CX9042 (Evans Dep.) at 261:24-262:6. Further, survey evidence that customers switch from buying from 1-800 Contacts to ECPs at higher rates than they switch from 1-800 Contacts to other online retailers, RX0739 (Murphy Report) ¶¶ 105-106 & Ex. 15, undercuts any suggestion that consumers generally choose online purchasing for the convenience and then simply select the lowest online price. Certainly Complaint Counsel have not demonstrated whether any consumers behave in this way, let alone quantified that there are enough such customers to constrain 1-800 Contacts from raising prices vis-à-vis online retailers.

In short, the economic evidence strongly supports a relevant antitrust market for the retail sale of contact lenses by ECPs, mass merchants, and online retailers.

2. 1-800 Contacts Does Not Have Market Power.

“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.” *Menasha Corp.*, 354 F.3d at 663.

As a matter of law, 1-800 Contacts does not have market power either alone or in combination with the other settling parties in a properly defined antitrust market. The sales made online by 1-800 Contacts and the settling parties account for less than the 20% of all contact lens sales. RX0739 (Murphy Report) ¶¶ 113, 116; CC Pre-Trial Br. at 4. That is insufficient for market power 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.” *Cohlma v. St. John Med. Ctr.*, 693 F.3d 1269, 1283 (10th Cir. 2012); *see also Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 & n. 43 (1984), *abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (suggesting that market share of 30 percent “[do]es not create an unacceptable likelihood of anticompetitive conduct”); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3rd Cir. 1998) (“[S]ince *Jefferson Parish*, no court has inferred substantial market power from a market share below 30%.”); *Valley Prods. Co. v. Landmark, Inc.*, 128 F.3d 398, 402 n. 3 (6th Cir. 1997) (“[C]ourts hav[e] repeatedly held that a 30% market share is insufficient”).

1-800 Contacts and the other settling retailers still do not have market power even if the relevant antitrust market is limited to online retailers. RX0739 (Murphy Report) ¶¶ 114-115. Complaint Counsel are wrong that 1-800 Contacts and the settling retailers’ high share of online sales proves market power. CC Pre-Trial Br. at 48.

“[M]arket share is just the starting point for assessing market power. 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) (quotation marks and citations omitted). 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. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *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."). Accordingly, "it is usually best to derive market share *from* ability to exclude other sources of supply." *Ball Mem'l Hosp., Inc.*, 784 F.2d at 1336.

For these reasons, "[t]o demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, *and* (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. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (emphasis added); *see also Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996). "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); *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.”); *Cargill, Inc. v. Monfort of Colo., Inc.*

market for the online retail sale of contact lenses. He acknowledges that capital expenditures are minimal and that “anyone” can establish a website and a server. CX9042 (Evans Dep.) at 136:25-139:5. Indeed, both [REDACTED] and [REDACTED] grew significantly despite being bound by the settlement agreements. CX9000 ([REDACTED]) at 8, 34, 38-40; CX9003 ([REDACTED]) at 8-10; CX9039 ([REDACTED]) at 11.

Dr. Evans opines that an online retailer faces barriers to entry and expansion only to the extent that it must make itself known in the marketplace. CX9042 (Evans Dep.) at 136:25-139:5. But that is not a barrier to entry. Economic success does require investment. For years, 1-800 Contacts has invested enormous resources in developing an alternative business model to ECPs and earning market-leading brand awareness through dedicated brand-building, award-winning service, and sustained advertising. The goodwill that 1-800 Contacts has earned is the *product* of successful 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.”); *Waste Mgmt., Inc.*, 743 F.2d at 983-84 (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").

Clorox, again, is closely on point. Much like Complaint Counsel here, Clorox argued that “due to the high costs of advertising new mass-marketed products, and the high risk of such

pay higher prices for contact lenses.³³ But Complaint Counsel will not be able to prove this. As

consumers *might* have decided to buy from 1-800 Contacts' rivals, and these lost sales *could* have induced 1-

To place Complaint Counsel’s failure of proof in the proper context, it is important to keep in mind that the Commission itself has recognized *sua sponte* that ignoring the benefits of brand differentiation is error. *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9025 (citation omitted).

In the end, all Complaint Counsel can do is fall back on the familiar refrain that the settlement agreements harmed the competitive process. But that is just another way of saying that the restraint restrains. As Dr. Evans has noted, “when agencies immediately disavow the need to present evidence of consumer harm after repeating those phrases, they are substituting slogans for analysis.” David S. Evans, *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases*, 75 St. John’s L. Rev. 545, 552 (Fall 2001) (“*Dodging the Consumer Harm Inquiry*”); *see also id.* at 550-551 (criticizing FTC for bringing case against Intel solely on basis that competitors had been disadvantaged).

The Supreme Court made clear in *California Dental* that the antitrust inquiry is not whether the party challenging a restraint can identify a limitation on competition but whether it can prove that the limitation harmed consumers. *Cal. Dental Ass’n*, 526 U.S. at 776 (“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.”); *see also Clorox Co.*, 117 F.3d at 59. Dr. Evans has perfectly captured the implications of that precedent for this case: “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

20% premium for online sales as compared to AC Lens when AC Lens provides services for sales by both companies. CX9043 (Athey Dep.) at 249:9-253:1

fails to show that consumers were actually harmed.” Evans, et al., “Consumer Harm Standard,” at 5.

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from raising prices strongly undercuts any inference that the settlement agreements enabled 1-800 Contacts to do so.

In those circumstances, although the settlement agreements may have taken away one of the many ways that 1-800 Contacts' rivals could compete, they did not eliminate competition to the point that consumers would feel the effects. Indeed, Dr. Evans himself has been careful to distinguish harm to competitors from harm to consumers: "Harm to competitors occurs when a competitor is disadvantaged—e.g., faces higher costs or lower demand as a result of the challenged action. Harm to consumers occurs when, e.g., prices are higher or industry output lower as a result of the challenged action." Evans, et al., "Consumer Harm Standard," at 7. In Dr. Evans' own view, a mere showing that challenged agreements hampered competitors does not suffice to prove harm to competition: "It is analytically correct to infer consumer injury from injury to competitors only if (1) the injury is severe enough to have a significant impact on the

at 14-15. In fact, in Dr. Evans’ view, even “[a] showing that a competitor has been driven out of business . . . is not enough,” *id.* at 9—which undercuts Complaint Counsel’s reliance on Memorial Eye’s decision to exit the online business. Indeed, roughly half of all businesses fail within the first five years.³⁶

As such, the fact that 1-800 Contacts’ rivals might win more sales if they took advantage of 1-800 Contacts’ trademark has no antitrust significance. As the Second Circuit explained in *Clorox*, the fact that “the restrictions in the agreement prevent [a rival] from competing as effectively as it otherwise might” do not suffice to prove harm to competition. 117 F.3d at 59. “The antitrust laws do not guarantee competitors the right to compete free of encumbrances . . . so long as competition as a whole is not significantly affected.” *Clorox Co.*, 117 F.3d at 59; *see also United States v. Am. Exp. Co.*, 838 F.3d 179, 204 (2d Cir. 2016) (restraints protecting defendant’s “prestige” were not anticompetitive simply because they restrained some advertising for competitors in a multi-sided platform); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 972 (10th Cir. 1994) (competitor claiming that it could “compete more effectively” absent restraint is not ()-9.9(a)4(bs)9SVTJ 0.07 4(bs(a)4(bs)r4(a)4a -0.004 Tc a)-6(f)3(f)53pbs-4(t)114(ar)-1nt5dvabm(.3d./74

Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996) (“[A]ntitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business.”); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (purpose of antitrust laws “is not to protect businesses from the working of the market”).

That sentiment captures that the core of Complaint Counsel’s case is about redrawing the boundaries of trademark law to limit 1-800 Contacts’ trademark rights. Thus, Complaint Counsel allege that the settlements “exceed the scope of any property right that 1-800 Contacts may have in its trademarks.” Compl. ¶ 32. And Complaint Counsel devote more of their brief to trademark law than to competitive effects, *see* CC Pre-Trial Br. at 49-66, asserting that the settlement agreements “extend to plainly non-infringing conduct.” *Id.* at 61. But all Complaint Counsel have done is sought to substitute *their* judgment as to how the cases would have come out had they been tried to final judgment for the *parties’ own* judgment in making rational and informed decisions to settle the lawsuits. And Complaint Counsel “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.*” *Clorox Co.*, 117 F.3d at 57 (emphasis added).

Complaint Counsel cannot meet that burden, and their attempt to define harm to competition solely in trademark terms is fatally flawed. The challenged settlement agreements are not anticompetitive merely because they force 1-800 Contacts’ rivals to do the hard work of building their own brands rather than simply poaching “customers that 1-800 Contacts itself had lured from the brick-and-mortar world into online shopping.” CC Pre-Trial Br. at 11.

3. Complaint Counsel’s Theory of Search Engine Harm Fails.

Unable to prove that the challenged restraints on one form of advertising for contact lenses met their own expert’s standard for harm to competition, Complaint Counsel try to hit the mark by changing the target. Substituting alleged harm to Google—what they call a “multi-billion dollar advertising juggernaut,” CC Pre-Trial Br. at 70—for harm to contact lens wearers, Complaint Counsel argue that the challenged agreements harmed competition because they supposedly reduced revenues for Google and other search engines. *Id.* at 39. Complaint Counsel

point to evidence supposedly showing that 1-800 Contacts paid less per click on its own advertisements in response to searches for its own trademark than it would have paid in a world without the settlements. Complaint Counsel's arguments fail for three reasons.

First, Complaint Counsel's argument contravenes Supreme Court precedent. In *California Dental*, which involved a near-total ban on price advertising by dentists, the Court of Appeals stated that the "restrictions 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 (quoting 128 F.3d at 728). 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 then 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.* As noted, Complaint Counsel will not be offering any proof that the settlement agreements lowered output of contact lenses.

The Supreme Court's focus on downstream output of the advertised product rather than

contact lenses.³⁷

1-800 Contacts is in the business of selling contact lenses. Paid search advertising in response to searches for 1-800 Contacts' trademarks is just one way in which 1-800 Contacts and other contact lens retailers can compete to sell contact lenses. If 1-800 Contacts paid the search engines less for advertising in response to searches for its own trademark, the only effect was to transfer the value of 1-800 Contacts' trademark from Google or other search engines back to the

Second

RX0704 () ¶ 20. Moreover, the

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 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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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: April 7, 2017

By: /s/ Steven M. Perry
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Notice of Electronic Service

I hereby certify that on April 10, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Second Corrected Pre-Trial Brief, with:

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