

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

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ORIGINAL

In the Matter of

**1-800 CONTACTS, INC.,
a corporation,**

Respondent.

Docket No. 9372

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INTRODUCTION

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

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

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

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

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

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

ARGUMENT

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

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

Of course, antitrust courts have been reviewing settlement agreements for the better part of the last century. Many settlements have been condemned based on a finding of competitive injury, without reference to any "threshold test." *E.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *See also* *io*,

laws.”). The *Actavis* “predicates” contrived by 1-800 Contacts are a fiction. But, even if there were two “threshold” tests (there are not), both are satisfied here.

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

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

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

Competition policy is one countervailing objective that often overrides the preference for settlement. Parties to an ordinary commercial dispute might be willing to put their differences aside if they could enjoy the rewards of a price-fixing conspiracy. But the mere fact that such an agreement is memorialized in a litigation settlement does not exonerate it. *See, e.g., Masonite Corp.*

(applying *per se* analysis to overly broad patent settlements); *New Wrinkle*, 342 U.S. 371 (same);

Line Material,

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

The lower court, post-*Actavis* cases cited by 1-800 Contacts (Resp. Br. at 20) likewise do not hold that frequently used settlements are immune from antitrust scrutiny. Not one of the cited cases analyzes a frequently used settlement; the only case cited is *United Patent*, 294 F.3d 485, 490 (CA-11, 2002), which held that a settlement between a patent holder and a generic drug manufacturer is not anticompetitive if the settlement is not a "pay-for-delay" arrangement. *United Patent*, 294 F.3d 485, 490 (CA-11, 2002).

acknowledged patent rights; *per se* unlawful notwithstanding the litigation settlement posture; and *per se* unlawful notwithstanding Masonite's repeated use of the same settlement terms.

But this is a sideshow. *Actavis* simply did not hold that "commonplace" forms of settlement should be analyzed any differently from "unusual" forms of settlement. The holdings of *Actavis* are, first, that a reverse payment agreement is not immune from antitrust review, and second, that competitive harm may not be inferred from the existence of a reverse payment without more.

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

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

Mr. Hogan (and 1-800 Contacts) have identified **zero** trademark cases or settlement agreements that include all three of the salient characteristics of the Bidding Agreements in this case (**0 percent**).

Mr. Hogan (and 1-800 Contacts) have identified **four** trademark cases or settlement agreements that include two of the three salient characteristics of the Bidding Agreements (roughly **.01 percent**).²

Mr. Hogan (and 1-800 Contacts) have identified **zero** keyword bidding cases in which a court found trademark infringement where the alleged infringer did not bid on the plaintiff’s trademark keyword. In other words, no U.S. court has ever found liability for

Mr. Hogan (and 1-800 Contacts) have identified **zero** trademark cases or settlement

documents.

property). And yet, the competitive restrictions imposed by the Bidding Agreements *are* unusual: no court has ever imposed an injunction with the three salient terms. Never. Just as the Bidding

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

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

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

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

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

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

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

D. All Of The So-Called *Actavis*1-

2227 (quoting *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012)). The Supreme Court reversed, rejecting this so-ca

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

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

Second, the “anticompetitive consequences” of the challenged restraints on price

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

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

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

II. THE BIDDING AGREEMENTS ARE UNREASONABLY OVERBROAD AND VIOLATE ANTITRUST LAWS

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

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

1-800 Contacts' Bidding Agreements sweep beyond the rights afforded by trademark law in at least three respects. First, they ban *all*

Sports, Inc. v. Sport Court, Inc., 2007 WL 1302745, at *5 (D. Ariz. May 2, 2007) (rejecting claim that a sports equipment company’s purchase of generic keywords “courts” and “basketball

A. The Proposition That Settlement Agreements Are Favored Does Not

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

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

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

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

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

¹⁴ *See supra* n.13.

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

A general claim of “trademark protection” does not suffice to turn otherwise anticompetitive restraints into procompetitive ones. As the D.C. Circuit noted when Microsoft

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

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

3. 1-800 Contacts’ Assertion that Bidding Agreements Are “Limited” Is Neither Relevant, Nor Accurate

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

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

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

direction. In addition, the Bidding Agreements restrained the most important form of advertising available to its rivals. *See* CC Br. at 14, 39-47, 81-82.

According to 1-800 Contacts, *Clorox* establishes that, because the Bidding Agreements involve trademarks and impact only certain fo

each of three alternative means, thus shifting to 1-800 Contacts to burden to justify the Bidding Agreements.

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

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

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

This is because there are a number of significantly less restrictive alternatives – prescribed by trademark cop0.000 ContAsel(ives –)]Tj0.0002 Tc -0.108 Tw 19.105 0 Td[thawoulaidufficnse ta

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

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

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

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

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

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

Ronald Goodstein. Professor Goodstein opines that paid search advertisements that

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

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

Similarly, even if most consumers want or expect to see only an ad for 1-800 Contacts in response to a search for “1-800 Contacts” (notably, this proposition is not supported by record evidence, see CC Br. at 42-47, 138 & n. 443), the standard for trademark confusion is not what consumers, in the abstract, “want” or “expect” to see. Rather, it is whether, when faced with an

Additionally, Professor Goodstein bases his opinion regarding consumer confusion on surveys that Dr. Van Liere conducted in the *American Airlines* case and in this case. *See* Resp. Br. at 46.²¹ Dr. Van Liere did not assess whether consumers view competitor ads as organic links in either of these surveys. Dr. Van Liere’s survey in *American Airlines* – which, contrary to 1-800 Contacts’ assertion (Resp. Br. at 47), was never accepted by the court in that case – contains significant flaws. *See* CC Br. at 166. Dr. Van Liere’s survey in this case (discussed *infra*, pp. 31-35) suffers from the same flaws, as well as multiple additional issues, and should be disregarded by this Court. Thus, Professor Goodstein’s opinions that re

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

Instead, Dr. Van Liere had all respondents search for “1-800 Contacts,” and then presented test respondents with one of two different SERPs: one with between six and eight ads; and one without any ads. Resp. Br. at 47-48.²³

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

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

confused by the appearance of the Sponsored Links.” See *GEICO*, 2005 WL 1903128 at *5 (emphasis added). As such, Dr. Van Liere’s survey provides no support for 1-800 Contacts’

[REDACTED]

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

Memorial Eye { [REDACTED] }. 1-800 Contacts references { [REDACTED] } instances of what it calls “evidence of actual confusion” from Memorial Eye { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }³⁰ Even assuming that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }³¹

is evidence of only *de minimis* confusion. Courts have routinely held that a stray handful of

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

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

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

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

³¹ Holbrook, Tr. 1957, *in camera*.

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

In any event, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }³² { [REDACTED]

[REDACTED] }³³ { [REDACTED] },³⁴

{

}

Further, 1-800 Contacts' contention that Memorial Eye { [REDACTED]

[REDACTED]

[REDACTED] } (Resp. Br. at 50) is incorrect. Eric Holbrook, general manager of Memorial Eye, testified that Memorial Eye had a general policy of always clearly identifying itself to any

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

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

³⁴ RX1777, *in camera*.

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

³⁶ Holbrook, Tr. 1957, *in camera*.

customer, including over email and in its advertisements.³⁷ 1-800 Contacts' claim that Memorial Eye's policy was { }

1-800 Contacts are higher than for consumers who click on other retailers' websites. He speculates that

3d at 1266 (“[T]he use of a keyword encompassing a competitor’s terms does not necessarily

Br. 50-51.⁴⁴ To be clear, Professor Tushnet approaches the literature from a legal perspective, making observations both about the types of confusion recognized by trademark courts and the types of evidence supporting such findings.⁴⁵ As part of this approach, Professor Tushnet naturally described the empirical studies, in the course of demonstrating why the studies on which Professor Goodstein relies do not provide evidence of the type that would support a finding of trademark infringement. This is not different from Mr. Hogan, a trademark lawyer, citing an internal Bing study in his report as the type of evidence a court might accept for the proposition that {

}⁴⁶i7.98 448()Tj18.910.0001 on.05

‘specialized knowledge’ regarding the area of testimony, which can be based on ‘practical experience as well as academic training and credentials.’”) (internal quotations and citations omitted); *Paoli R.R. Yard PCB Litig*

inform Plaintiff's allegations" regarding inadequate warnings); *Cary Oil Co. v. MG Ref'g & Mktg., Inc.*, 2003 U.S. Dist. LEXIS 6150, at *16 (S.D.N.Y. Apr. 11, 2003) (holding that "a professor of law at one of the nation's most esteemed law schools who teaches exclusively on matters involving corporations and who has lectured and published extensively on matters of corporate governance" is qualified to provide testimony regarding corporate governance issues).

Here, as Professor Tushnet testified, she has researched and written extensively on marketing and advertising law, and regularly teaches these subjects.⁵⁰ Moreover, as part of her professional obligations, Professor Tushnet regularly surveys, reviews, and contributes to studies relating to consumer behavior.⁵¹ For example, Professor Tushnet reviewed and provided commentary to the Franklyn & Hyman study⁵² cited by Professor Goodstein in his expert report⁵³ and discussed by Professor Tushnet in her own expert report.⁵⁴ Indeed, Franklyn & Hyman revised their study as a result of Professor Tushnet's comments on their original work.⁵⁵ Presumably, Franklyn & Hyman felt that Professor Tushnet was "qualified" enough to contribute to their study, even though 1-800 Contacts asserts that she is not "qualified" enough to discuss it in this matter. *See* Resp. Br. at 50-51. Professor Tushnet's extensive experience and academic

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

⁵¹ Tushnet, Tr. 4432, 4434.

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

⁵³

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

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

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

⁵⁶ Jacoby, Tr. 2130; CX8008 at 008-010 (Principal Findings and Opinions) (Jacoby Expert Report).

⁵⁷ Over time, Google has made some changes to its SERP. However, the general advertising format (ads on the top and right-hand-side of the SERP) remained consistent until 2016. In February 2016, Google changed its ad layout format, from a maximum of three ads at the top of the SERP and a maximum of eight ads on the right-hand-side of the SERP, to a maximum of four ads at the top of the SERP, a maximum of three ads at the bottom of the SERP, and no ads on the right-hand-side of the SERP. *Id.* at 007 n. 3.

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

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

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

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

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

Indeed, Professor Jacoby literally “wrote the book” on trademark surveys: in 2013, at the invitation of the American Bar Association, Professor Jacoby wrote the seminal treatise, *Trademark Surveys*, which instructs “how to design, implement and conduct trademark surveys.”⁶³ He has also written numerous other books and close to two hundred articles.⁶⁴ In addition, Professor Jacoby teaches consumer behavior and research methods (including survey methodology) at New York University, where he has held an endowed chair since 1981.⁶⁵ Over the course of his lengthy career, Professor Jacoby has won numerous grants and awards; he is the most cited researcher in the seminal trademark treatise, *MCCARTHY ON TRADEMARKS*;⁶⁶ and he was recently recognized as one of “five legends in the field of consumer behavior.”⁶⁷ In short, Professor Jacoby is “one of the most experienced trademark survey experts of all time.”⁶⁸

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

⁶³ Jacoby, Tr. 2132.

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

⁶⁵ Jacoby, Tr. 2132, 2137.

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

⁶⁷ Jacoby, Tr. 2135-2136.

⁶⁸ Eric Goldman, “FTC Explains Why It Thinks 1-800 Contacts’ Keyword Ad Settlements Were Anti-Competitive – FTC v. 1-800 Contacts,” *Technology & Marketing Law Blog*, Apr. 18, 2017, available online at <http://blog.ericgoldman.org/archives/2017/04/ftc-explains-why-it-thinks-1-800-contacts-keyword-ad-settlements-were-anti-competitive-ftc-v-1-800-contacts.htm>. By wa/6r6 bFTC L(TebBeg.02 78.Tw 14.192 0 Td[(, A)-in Li]) 0 Td(nd[(FTC)-6(in

which dictates that the test and control stimuli “share as many characteristics . . . as possible,
with the key exception

“contact lenses” and one with results in response to a real-world search for “1-800 Contacts”).

This would have rendered the “control” utterly worthless, because it would have changed multiple variables on the SERP itself, eliminating any ability to “reveal which aspects” of the test SERP *caused* consumer confusion. *See GEICO*, 2005 WL 1903128 at *5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

these surveys has any similarity at all to the survey Professor Jacoby conducted here. In the first survey, a disclosure identifying the advertiser was *artificially added* to the advertisement in question. *Quality Inns Int'l v. McDonald's Corp.*, 695 F. Supp. 198, 219 (D. Md. 1988). The court expressly criticized this point in the very portion of its discussion cited by 1-800 Contacts (*id.* at 219 (“In none of [the real-life] usages is the qualifying language [that was “prominently added” to the mock-up of the ad] included.”)), although 1-800 Contacts conveniently omits this explanation in its brief. *See* Resp. Br. at 54. This case is not at all on point, since it is undisputed that Professor Jacoby used real-world advertisements that, in many instances, were actually challenged by 1-800 Contacts in its complaint against its rivals. Cf. *Id.*, n. 5 (citing *id.* at 40 (“[I]n *Quality Inns*, the plaintiff’s complaint was not on point”).

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

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

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

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

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

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

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

⁸³ Jacoby, Tr. 2203.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁹ CX9046 (Ghose, Dep. at 238) (did not analyze effect on consumers); *id*

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

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

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

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

⁹⁰ The leading antitrust treatise concludes that courts should reject any defense to a horizontal restraint premised on a reduction in the transaction costs of operating the competitive system itself. Areeda & Hovenkamp ¶1907c. The treatise identifies as examples of such non-cognizable defenses the cost-savings *incurred by sellers* by restricting bids or by restricting advertising. “The reason is that communicating information to bid-seers at a market is anticompetitive and anti-consumer.”

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

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

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

⁹³ With regard to the transactions that are relevant to this case, a profit-maximizing search engine will balance the interests on the stakeholders in a manner that approximates what a social planner would do. CX8009 at 018-019 (¶ 23) (Evans Rebuttal Expert Report); *see*

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

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

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

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

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

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

Dr. Ghose posits, without evidence, that all or most of the consumers who ultimately navigate to the 1-800 Contacts website had no interest in other websites at the very start of their search. Resp. Br. at 56-57. This is merely conjecture. No one has asked a sample of consumers,

1-800 Contacts asserts that “the vast majority

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

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

3. Ads for Competing Retailers Do Not Meaningfully Harm Consumers

post reports that “too many choices can make us unhappy.” Resp. Br. at 59 (quoting RX1963 at 0001). 1-800 Contacts re-prints most of the blog post, but omits th

1-800 Contacts quibbles with the search engines' decision to publish its rivals' advertisements. We are told that a consumer who is shown a rival's ad, and does not then navigate to the rival's website, suffers material

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

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

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

As 1-800 Contacts acknowledges, Professo

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

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

In his expert report, Dr. Murphy does not opine that the Bidding Agreements increased contact lens sales by consumers who search for 1-800 Contacts’ trademarks. And at trial he expressly denied that the “analysis” in question supports 1-800 Contacts’ assertion that, but for the Bidding Agreements, “consumers who search for 1-800 Contacts’ trademarks would make fewer purchases” of contact lenses. Resp. Br. at 60.¹⁰⁶ Indeed, Dr. Murphy has candidly explained that the “analysis” which 1-800 Contacts now calls a “prediction” was an illustration of an abstract point, using illustrative rather than predictive numbers:

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

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

it [sic] point of this is.¹⁰⁷

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

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

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

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

¹⁰⁸

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

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

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

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

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

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

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

Likewise, Dr. Murphy readily acknowledged that he did not know the conversion rate that 1-800 Contacts would have recognized on the incremental { } it would lose in the counterfactual world.¹¹⁷ Thus, as he conceded, he did not know how the loss of these clicks would impact conversions.

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

¹²⁰ Murphy, Tr. 4232, *in camera* {
}; CX9048 (Murphy, Dep. at 58-59) (“[Y]ou can tell me they can go do another [search], that is fine,

III. COMPLAINT COUNSEL HAS MET ITS BURDEN TO PROVE ANTICOMPETITIVE EFFECTS

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

Second, in the alternative, the plaintiff may show direct evidence of “actual marketplace effects.” *See id.* at *19 (citing *Indiana Federation of Dentists*, 476 U.S. at 460-61). For example, in *Indiana Federation*, 476 U.S. 447, there was evidence that, due to the challenged agreement among dentists, insurance companies were unable to obtain x-rays as desired. *Id.* at 459. If a

A. The Settlement Agreements Are Inherently Suspect

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

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

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

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

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

1. Trademark Settlement Agreements Are Not “Presumptively Procompetitive”

1-800 Contacts offers a series of arguments (and undeveloped assertions) purporting to show that *no* agreement settling a trademark dispute can be inherently suspect. This is not a serious proposition. Certainly, a (hypothetical) agreement among sellers of contact lenses to fix prices charged to consumers is *per se* unlawful, and remains *per se* unlawful even if structured as the settlement of a *bona fide* trademark dispute. *See* Areeda & Hovenkamp ¶1907b (“that collusion or market division is necessary to prevent firms from violating one another’s intellectual property rights” is no0.00a

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

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

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

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

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

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

In the context of trademark keyword advertising, the prophylactic solution preferred by the courts is to require that the identity of the advertiser be disclosed in the search ad. *See supra* p. 12-13 (describing cases); CC Br. at 135-138 (same). This is consistent with the remedy ordered in *Calvin Klein*, cited by 1-800 Contacts, in which the court held that the defendant’s

promotional slogan “could be used in conjunction with appropriate disclaimers or other source-identifying information.” *Calvin Klein*, 824 F. 2d at 667. The availability of this and other significantly less restrictive means of addressing infringement establish that the Bidding Agreements are overbroad. (The subject of less restrictive alternatives is discussed, *infra*, Section III.B.3.)

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

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

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

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

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

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

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

The claim that the Bidding Agreements prevent consumer confusion fails because there are significantly less restrictive alternatives; and, in any event, there is no evidence of confusion. *See supra* pp. 26-55 (discussing evidence of confusion) & *infra* Section III.B.3 (discussing less restrictive alternatives); CC Br. at 140-146 (discussing evidence of confusion) & 134-138 (discussing less restrictive alternatives).

The claim the Bidding Agreements address “choice overload” and so reduce consumer search costs is both non-cognizable and not plausible. *See supra* pp. 55-65; CC Br. at 138-140.

The claim that Professor Athey’s model predicts that the Bidding Agreements increase market output is false. *See supra* pp. 65-70.

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

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

3. The “Complexity” of Search Advertising Auctions Offers No Defense

1-800 Contacts contends that agreements

documents, executives and advertising personnel at 1-800 Contacts recognize that more bidders in trademark keyword search auctions results in higher costs; fewer bidders results in lower costs. CC Br. at 26-28, 61-62. Or, as succinctly stated in one report, “low competition = low cost.”¹²⁵ 1-800 Contacts personnel were apparently able to reach this conclusion, this *correct* conclusion, without a deep understanding of Google’s algorithms.

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

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

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

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

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

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

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

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

756 F.2d 502, 506 (7th Cir. 1985) (“anticompetitive character” of a ban on bidding “is readily apparent”); *United States v. Brighton Bldg. & Main. Co.*, 598 F.2d 1101, 1006 (7th Cir. 1979) (“[a]n agreement among competitors to rig bids is illegal”).

1-800 Contacts contends that the parties to the Bidding Agreements (1-800 Contacts included) acted with good or reasonable motives, and did not intend to violate the antitrust laws. Resp. Br. at 73.¹²⁷ But bad intent is not an element of a Section 1 claim. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (“[A] good intention will [not] save an otherwise objectionable regulation or the reverse. . . .”); *Socony-Vacuum Oil*, 310 U.S. at 212 (price-fixing

2000) (in *per se* unlawful boycott of warehouse clubs organized by toy retailer, “the biggest hindrance [Toys “R” Us] had to overcome was the major “R” Us companies’ reluctance to give up a

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

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

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

In the alternative, 1-800 Contacts asserts the absence of entry barriers sufficient to enable the exercise of market power in a market for the online sale of contact lenses. This argumee iaalso

own economic expert explained at trial: “It’s a well-known problem that you could have firm A in a relevant product market with B, but you could also think of a relevant product market with A with C.”¹²⁹ Here, Complaint Counsel established, consistent with the narrowest market principle, a market for the online sale of contact lenses. *See* CC Br. at 101-120. This showing is not undermined even if 1-800 Contacts can establish that a larger relevant market also exists. CC Br. at 116-118.

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

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

¹²⁹ Murphy, T4ticayeat, ine cannot pri Td[(ye cannoat, iT(, 61 Tf6.eat, 4TT0e(T(.0.2001TJ)4.9(hy)Tf6. T)0.145 0 (4t0 TTf6.eaTTfi0

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

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

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

¹³¹ Indeed, the considerable price differences between 1-800 Contacts and its online rivals suggest that 1-800 Contacts' focus on 1-800 Contacts' current pricing is an example of the "cellophane fallacy." When unrecognized, this fallacy produces erroneous and overly broad market definitions in markets exhibiting differential prices, such as

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

1-800 Contacts points to no evidence suggesting that *any* of its online rivals are constrained by ECPs or offline channels. And 1-800 Contacts addresses none of the extensive trial testimony regarding the “economic realities” perceived by its online competitors, *see* CC Br. at 103-110. Its sole acknowledgement of a pure-play online rival consists of a citation to the

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

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

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

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

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

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

Lastly, 1-800 Contacts makes a passing reference to “consumers switching patterns.” *Resp. Br.* at 84. This references the suggestion, based on Dr. Murphy’s report, that the proportion of customers who {


} *Id.* at 77. This is incorrect.

Using Dr. Murphy’s preferred assumptions about diversion ratios, 17 percent of 1-800 Contacts’ lost sales go to other online retailers, which account for only about 7.7 percent of total contact lens sales (excluding, as is proper, the sales made by 1-800 Contacts).¹⁴¹ Thus, even using 1-800 Contacts’ preferred numbers, 1-800 Contacts customers are far more likely to switch to an online rival than would be anticipated based on the percentage of sales “made by that type of retailer.”

See Resp. Br. at 77.

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

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

switching data not based on a price increase provided a useful proxy for the actual diversion that would occur in the event of a price increase. The court distinguished between “switching data,” which indicates “the number of consumers who switch between different products for *any reason*” and “diversion,” which “refers to a consumer’s response to a measured increase in the price of a product.”¹⁴² After clearly defining these terms, the court held that “it was reasonable to use switching data as a proxy for diversion, especially since no more refined historical data apparently exists.” *Id.* at 65. Thus, *H & R Block* plainly contradicts, rather than supports, 1-800 Contacts’ proposed rule. 1-800 Contacts misrepresents the holding of *H & R Block* as “declining to rely on critical loss analysis based on survey about switching” (Resp. Br. at 86), but, in fact, the court accepted the critical loss analysis “as another data point suggesting that [the government’s proffered market] is the correct relevant market.”¹⁴³

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

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

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

expert's] aggregate diversion analysis and conclusion to be more persuasive than that advanced by Defendants' expert. . . ." *Sysco*, 113 F. Supp. 3d at 36. The Court noted that, due to weaknesses in the FTC expert's proxies for diversion, "the court hesitates to rely on [the] precise

{ } percent diversion ratio represents actual lost customers. 1-800 Contacts suggests that Professor Evans concluded that the survey participants would likely make their next purchase from an online retailer (Resp. Br. at 85), but, in fact, it was 1-800 Contacts

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

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

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

Specifically, Professor Evans relied on evidence showing that {█
█} documents and testimony

¹⁵⁰ Evans, Tr. 1443-1444.

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

¹⁵² Evans, Tr. 1446.

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

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

1-800 Contacts also claims that Professor Evans did not "quantify the extent to which online sellers were unable to acquire new customers as a result of the UPPs." Resp. Br. at 89. But

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

because of its Bidding Agreement with 1-800 Contacts. CC Br. at 50-52. Web Eye Care has been unable to achieve significant sales (CC Br. at 125), and, thus, cannot possibly represent entry on a “sufficient scale adequate to constrain prices.”

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

While 1-800 Contacts suggests that the only cognizable barriers to entry are obstacles that might prevent competitors from making any sales at all, that is incorrect; entry barriers exist where potential entrants are unable to enter the market "at the same cost of production" as incumbents. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985); *see also* Areeda & Hovenkamp ¶ 941a ("Entry barriers are any factors that either block entry altogether or raise new entrants' costs above those of existing efficient firms."). 1-800 Contacts (and other major players) have made enormous investments in efficient distribution systems and prescription verification systems to lower their costs. *See* CC Br. at 123.¹⁶¹ A new entrant would have to replicate these significant investments to achieve a scale sufficient to constrain the pricing of the parties to the Bidding Agreements, and there is no evidence that any firm has done so.¹⁶²

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

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

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

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

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

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

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

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

two recordings for six weeks. *See* CC Br. at 79. And, while 1-800 Contacts claims that *Realcomp* dealt with a “total prohibition on distributing real estate broker listings to the public,” Resp. Br. at 95-96 (emphasis added), this is incorrect. In *Realcomp*, the challenged policy prevented only some public websites from displaying the discounted listings. *Realcomp II*, 635 F.3d at 829-830. Indeed, discounted listings could be displayed on a public website (Realtor.com) that by itself reached “approximately 90% of home buyers.” *Id.* at 830. Based on this evidence, the ALJ in *Realcomp* mistakenly concluded that the restraints did not impact a competitively significant proportion of listings. *Id.* (“the website policy prevented [discounted] listings from reaching ‘only a relatively small additional percentage of home buyers.’”) (quoting Initial Decision). But the Commission, and the Sixth Circuit in affirming the Commission’s opinion, found that the ALJ erred in concluding that this was too small of a percentage to matter, concluding that “reducing by 10% the number of home buyers that are exposed to discount listings” was sufficient to show an adverse impact on competition. *Id.* at 830-831.

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

¹⁶⁵ *See also* Resp. Br. at 43 (claiming that “the data show that about { } of ads appeared in response to a bid on a keyword other than one of 1-800 Contacts’ trademarks”); *id.* at 103 (“almost { } of paid search advertisements

important distinction because the “broad match” service provided by search engines places ads in response to a relevant search query even where the advertiser did not bid on the specific keywords used by the consumer in his or her query. *See* CC Br. at 12-13 (describing Google’s default use of broad match). Recall, for example, that Memorial Eye never bid on any of 1-800 Contacts’ trademarks, but was frequently “broad matched” into search queries relating to 1-800 Contacts trademarks. *See* CC Br. at 42-43, 45-47. Google’s data

Contacts’ trademarks,” but that does not provide any information on the portion of these retailers’ clicks resulting from *consumer queries* that include 1-800 Contacts trademark terms, because it disregards broad matching.¹⁶⁹ No data supports 1-800 Contacts’ suggestion that ads triggered by searches for 1-800 Contacts’ trademarks were “not important to” its rivals – indeed,

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

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

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

¹⁷⁴

the “Big Three” generic terms combined (“contacts,” “contact lenses,” and “contact lens”).¹⁷⁷ 1-

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

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

The same reasoning applies to retailers that 1-800 Contacts claims were "not bound by the settlement agreements." Resp. Br. at 96.¹⁸⁶ Moreover, many of the retailers 1-800 Contacts refers to were restrained by unwritten Bidding Agreements (CC Br. at 21), by threats from 1-800

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

¹⁸⁵ Evans, Tr. 1553-1554.

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

Contacts,¹⁸⁷

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

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

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

The very authorities on which 1-800 Contacts relies state that “[a] reduction in output is not the *only* measure of anticompetitive effect.” Areeda & Hovenkamp ¶ 1503b(1) (emphasis added). As the Ninth Circuit Court of Appeals recently held, a defendant’s “contention that the plaintiffs’ claim fails because they did not show a decrease in output in the [relevant] market is simply incorrect . . . Although output reductions are one common kind of anticompetitive effect in antitrust cases, a ‘reduction in output is not the only measure of anticompetitive effect.’”

O’Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting Areeda & Hovenkamp ¶ 1503b(1)). Indeed, “[i]n most cases it would be impossible for the court to measure the actual impact of a restraint on output. Rather, the test is whether the practice would *tend to* restrict

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

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

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

competition and decrease output.” Areeda & Hovenkamp ¶ 1503b(1)) (quoting *BMI*, 441 U.S. at 20) (emphasis added). Here, the bidding agreements “tend[ed] to restrict competition” and lead to higher prices, as Professors Athey and Evans have each explained. *See supra* pp. 101-102; CC Br. at 57-61.¹⁹³ Reaching these conclusions, and, thus, assessing the Bidding Agreements’ impact on consumer welfare, did not require either expert to estimate output (that is, “the number of contact lenses sold”)¹⁹⁴ compared to the but-for world absent the restraints.¹⁹⁵

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

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

¹⁹⁴ CX9042 (Evans Dep.) at 263.

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

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

of the Bidding Agreements' adverse effects on competition (

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

i. Advertising Effects Are Sufficient As A Matter of Law

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

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

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

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

Complaint Counsel's Post-Trial Brief described the two sophisticated economic models demonstrating that the Bidding Agreements reduced the quality and quantity of valuable search advertising that would have benefitted consumers. *See* CC Br. at 53-57. These models disprove

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

subvert the competitive bidding process in order to decrease its advertising costs. This is persuasive evidence of the likely impact of the Bidding Agreements, because “[w]hile it is well settled that good motives themselves ‘will not validate an otherwise anticompetitive practice,’ courts often look at a party’s intent to help it judge the likely effects of challenged conduct.”

Brown Univ., 5 F.3d at 672 (quoting *NCAA*

online competitors. *See supra* pp. 21-22, 72-73, 119. Consumers' exposure to ads for lower-price competitors in response to search terms such as "contact lenses" thus does not redeem the impact of the *absence* of those ads in response to search queries for 1-800 Contacts, where they would be most valuable. *See supra* p. 118 & n.201.

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

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

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

Complaint Counsel's Post-Trial Brief explains that 1-800 Contacts could have settled its trademark disputes with rival online sellers of contact lenses on terms that are significantly less

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

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

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

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

indiscriminate ban on discount advertising. *Id.* at 770-71. *See Polygram I*, 136 F.T.C. at 354-55.

This preference for clarifying disclosures in lieu of more restrictive prohibitions was disregarded by 1-800 Contacts when crafting its Bidding Agreements.

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

Require clear and conspicuous disclosure in each search ad of the identity of the seller. *See Multi Time Machine, Inc. v. Amazon.com*, 804 F.3d 930 (9th Cir. 2015) (initial interest confusion unlikely where seller's name is clearly disclosed in ad text); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (same); *Network Automation, Inc. v. Advanced Systems Concept, Inc.*, 638 F.3d 1137, 1153-54 (9th Cir. 2011) (same); *Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1177 (same); *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1025 n.16 (9th Cir. 2004) (same); *see also* Federal Trade Commission Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15

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

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

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

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

CONCLUSION

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

CERTIFICATE OF SERVICE

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

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CERTIFICATE FOR ELECTRONIC FILING

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

July 19, 2017

By: s/ Daniel J. Matheson

Notice of Electronic Service

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

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