~~PUBLIC~~

06 22 2017
587204

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

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

RESPONDENT 1-800 CONTACTS' POST-TRIAL BRIEF

Gregory P. Stone (gregory.stone@mto.com)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TREATISES

OTHER Aiiadem10(e)trh Empi4(i)-2arical3(k)-(h Ev3(a)4(i)1(adenc3(e)4(e f4(i)-2ar)(c

Seidman Diamond, Shari, *Reference Guide on Survey Research*

RECORD REFERENCES

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

RF # — Respondent Proposed Finding of Fact

CX 0# — Complaint Counsel Exhibit

RX # — Respondent Exhibit

Name of Witness, Tr. XX — Trial Testimony

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

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

Cmplt. ¶ X — Complaint

{bold} — In Camera Material

INTRODUCTION

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

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

But there is an even more fundamental problem. Complaint Counsel failed to prove their antitrust case. The settlements had numerous procompetitive benefits, such as protecting incentives to invest in brand-building and reducing consumer search costs. The agreements were

they prescribe for them to wear.

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

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

The lawsuits 1-800 Contacts filed and the settlement agreements that resolved them focused on 3(on)-[inttveusdtt4t d5.dCotonldmark, its b-10(a)4(voi)-2(r)32(va)4(4(nt).004 Tw d, a)4(voi)-2(r)(nd

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

So, why are we here? Because Complaint Counsel are intent on establishing new restrictions on the rights of trademark holders. They are asking this Court to bless allegedly infringing conduct challenged by 1-800 Contacts in the underlying cases. They seek this ruling even though no court has ever held that 1-800 Contacts' claims of infringement were without merit. To the contrary, two courts have expressly rejected that claim. *1-800 Contacts, Inc. v. Mem'l Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, at *6 (D. Utah Mar. 15, 2010); *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS, 2014 WL 12596493 (D. Utah Mar. 3, 2014), ECF No. 91, at 2. And Complaint Counsel have conceded that 1-e(ed)oT

sh(l)-2nedp(l)-2(0.001 T17d74)liyl

another firm's trademark to trigger paid search advertising—indisputably constitutes a use in commerce under the Lanham Act. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144-45 (9th Cir. 2011); *Rescuecom, Inc. v. Google Inc.*, 562 F.3d 123, 128-41 (2nd Cir. 2009). Courts have recognized that the restrained use can, in fact, cause actionable likely confusion, and have denied motions to dismiss and motions for summary judgment arguing to the contrary. *E.g.*,

In addition, *California Dental Ass'n v. FTC*

first analysis, his critical loss analysis, is entirely premised on what consumers will do if prices go up. Yet, Dr. Evans relied entirely on data that do not reflect consumer behavior in response to

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

[illegible]**, Complaint Counsel failed to meet their burden to prove that the settlement agreements enabled 1-800 Contacts to increase prices or reduce output of contact lenses.** Incredibly, Complaint Counsel's experts concede that they have not proved that prices were increased or output reduced as a result of the settlement agreements. Those concessions are fatal under Dr. Evans's own test: "[t]he only trustworthy way of finding out whether business practices harm consumers is to examine their impact on consumers. Have they raised prices, restricted output, or reduced quality? Or will they? Theory alone usually cannot answer those questions." David S. Evans, *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases*, 75 St. John's L. Rev. 545, 545-46 (Fall 2001). Rather, "***[illegible]***

[illegible]" *Id.* at 546 (emphasis added). But the only such evidence points the other way: (1) 1-800 Contacts' margins have remained consistent, and (2) inputting Google data into Dr. Athey's own model of the counterfactual world predicts that the settlement agreements actually *increased* sales of contact lenses to consumers who searched for 1-800 Contacts' trademarks. That evidence is a stunning repudiation of Complaint Counsel's case.

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

"[t]he question is not whether the universe of possible advertisements has been limited (as

Complaint Counsel did not account for the myriad complexities involved in determining the

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

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

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

relevant to that determination. If examining these factors shows that the settlement "reflects traditional settlement considerations, such as avoided litigation costs," it does not present the "same concern" and is not subject to antitrust scrutiny. *Id*. at 2236.

Complaint Counsel have failed to meet their burden to satisfy either *Actavis* requirement. As to the settlements' form, the uncontroverted evidence demonstrates that they are commonplace: they are standard non-use agreements routinely used in trademark disputes, including those involving paid search advertising, and provide for relief on terms that a court could have ordered if 1-800 Contacts prevailed. In addition, Complaint Counsel have not and cannot demonstrate that *any* of the five factors the Supreme Court identified in *Actavis* indicates that the settlements would tend to harm competition. To the contrary, Complaint Counsel's own exiineiith4(i)1at *v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting "the paramount policy of encouraging settlements"); *Asahi Glass Co.*, 289 F. Supp. 2d at 991 ("The general policy of the law is to favor the settlement of litigation. . . ."). As such, "settlement agreements are to be 'upheld whenever possible.'" *Am. Sec. Vanlines, Inc.*, 782 F.2d at 1060; *see, e.g.*, *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971).

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

The strong judicial support for private settlements applies wit(us)-1(t)]n substantiapr p disputes are costly to the parties and the courts. Defendant Lens.com estimated its litigation costs to be "approximately $1.4 million." *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591 (D. Utah Mar. 7, 2011), Defendant Lens.Com, Inc.'s Memorandum In Support Of Motion For Award Of Attorneys' Fees And Costs, Exhibit 2 (Declaration of Cary Samourkachian) at ¶ 4, Dkt. 271-2 (D. Utah Mar. 7, 2011). That sum did not include 1-800 Contacts' litigation costs or the costs of the parties' appeal. Settling trademark disputes early—including before lawsuits are ever filed—therefore avoids expensive and "time-consuming litigation." *Clorox Co.*, 117 F.3d at 60.

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

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

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

The "basic question" before the Court in *Actavis* was whether this "unusual" form of settlement agreement can "sometimes unreasonably

infringement dispute, is not against public policy and is an enforceable promise."); *MWS Wire Indus., Inc. v. California Fine Wire Co.*, 797 F.2d 799 (9th Cir. 1986) (upholding a non-use trademark settlement agreement as consistent with the "overriding public interest in settling and quieting litigation" (internal quotation marks and citation omitted); Trademark Settlement

RX

under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case." (RX 0679A).

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

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

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

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

In fact, Professor Tushnet has only *ever* reviewed *two* settlement agreements, other than those cited by Mr. Hogan. (Tushnet, Tr. 4489, 4492-4493). The contrast with Mr. Hogan could not be clearer. Mr. Hogan has personally negotiated "hundreds and hundreds" of trademark

related to keyword search advertising will sometimes be unjustified. To obtain the disruptive post hoc injunctive relief they are seeking in this enforcement action, Complaint Counsel are required under this factor to show that 1-800 Contacts' settlements, in particular, are unjustified. They have not done so here, where there are myriad "legitimate" procompetitive "justifications" associated with trademark protection that can justify any asserted limitations on competition in the settlement agreements.

provided similar testimony at trial. (Clarkson, Tr. at 244-245 ("I did reach out and consult local counsel. And local counsel said to me, you might be able to win this, but you're definitely going to spend at least six figures, maybe more . . ."); Clarkson, Tr. at 338-339 (outside counsel for ACLens told Clarkson that "the outcome was uncertain, that we may win or we may lose, but that either way it would be very expensiv

cases giving rise to a challenged settlement agreement despite the lengthy passage of time and the lack of complete discovery then or now.

The Commission itself has recognized the "practical concern," 133 S.Ct. at 2234, with the kind of hindsight proceeding that Complaint Counsel tried: "[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable." *Schering-Plough*, 136 F.T.C. at 997. In *Schering-Plough*, this Court held that Complaint Counsel's "proof of anticompetitive effects arising from an alleged reverse payment settlement requires proof on the merits of the underlying patent claims." *Id.* at 992 eliminate the risk and cost of litigation, and to resolve an issue so that you do not need to continue to litigate the same issue again and again." (Hogan, Tr. 3271). Non-use agreements provide the necessary "clear agreement that is easy to follow that does not invite future dispute." (Hogan, Tr. 3271).

As explained more fully below (*see infra*, Part III.C), Complaint Counsel's proposed alternatives do not achieve these settlement goals. A settlement "redressing the purportedly confusing text of the challenged advertisement" (RX 0680-0004), fails to properly protect 1-800 Contacts' trademark rights because courts have rejected the proposition that "as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff's] trademarks in the text." *Fair Isaac Corp.*

seeking to add disclaimer "must establish the disclaimer's effectiveness.").

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

II. THE CHALLENGED SETTLEMENT AGREEMENTS HAD SIGNIFICANT PROCOMPETITIVE BENEFITS.

Following the teaching of *Actavis,* 1-800 Contacts should not have to defend its settlement agreements under the antitrust laws. However, to the extent that 1-800 Contacts' settlement agreements could in theory be subject to antitrust liability, those settlement agreements had a number of significant procompetitive benefits: (1) they avoided litigation costs, channeling resources to more productive forms of interbrand competition; (2) they protected 1-800 Contacts' trademarks and the incentives they create to invest in its brand and produce products and services of consistent quality; (3) they prevented consumer confusion; (4) they reduced consumers' search costs, and (5) they increased purchases of contact lenses by consumers who searched for 1-800 Contacts' trademarks.

A. Settlements Are Procompetitive

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

and before appeal to be "approximately $1.4 million." *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4.

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

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

willing to pay more when they find it. (RX 0737 ¶¶ 26-28). As such, trademark owners with well-

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

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

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

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

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

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

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

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

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

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

- 1-800 Contacts takes numerous actions to enhance the customer experience. For instance, 1-800 Contacts sends orders with no signature required, replacing at its own cost any package that the customer does not actually ref(g)10( )-4((.)-4( )]TJ 0 Tc 0 Twc)4ssnswer e and the company's growth potential—is higher than those of many well-known brands with fervently loyal customers such as Amazon, Netflix, Apple, and Trader Joe's. (RF 176).

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

The paid search advertising of certain competing retailers threatened to undermine 1-800 Contacts' investments in its trademark brand. After Google c 0 Tc22

Accordingly, "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Clorox Co.*, 117 F.3d at 60. And as a species of trademark protection, trademark settlement agreements "are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation." *Clorox Co.*, 117 F.3d at 60; *see also T & T Mfg. Co.*, 587 F.2d at 539; *Fuddruckers, Inc.*, 436 F. Supp. 2d at 1265.

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

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

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

It is important to make clear that while the negative keyword requirement avoids certain consequences of broad match bids on generic terms *as keywords*, it *does not* prohibit any advertising in response to *queries* for generic terms. The agreements are express on this point:

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

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

Finally, 2(on.)]TJ -0.-0.003 Tc 0.003 T0(Tc 0.003 3 Tc t)fa%(n)2(ts)it (,)Tjat adse(ma)6-2(as)1(w T beyond doubt. *Clorox* involved an antitrust challenge to a settlement of trademark litigation over the PINE-SOL mark that prohibited Clorox from using the mark in certain advertising. Clorox alleged that "the agreement was being used unlawfully by Sterling . . . to perpetuate a monopoly in certain cleaner-disinfectant markets." *Clorox Co.*, 117 F.3d at 54. The district court dismissed the antitrust claim, and the Second Circuit affirmed.

The Second Circuit reasoned that "because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difl>e non concluded that "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies. Where large competitors each represent their respective trademark interests, unless one party is irrational, the result should accord with how the parties view tve to the appearance and labeling of sponsored ads over the last ten years, and (3) evidence of the intent and expectations of consumers who search for a particular brand or trademark term. (*See* RX 0736 ¶¶ 43-71, 78-85). Consumer surveys conducted by in trademark litigation with and Yahoo! also showed substantial levels of confusion from sponsored ads—in some cases despite the absence of other companies' names in the ad text. *See id.* ¶¶ 72-77; R. Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 Trademark Reporter 732, 758-70 (May-June 2015).

Second, 1-800 Contacts presented the testimony of Dr. Kent Van Liere regarding actual confusion based on a survey of consumers who conducted an internet search for "1-800 Contacts." Dr. Van Liere has been retained as a survey expert by the Commission and other

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

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

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

[redacted]

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

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

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

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

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

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

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

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

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

---

211 (D.D.C. 2014); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1325–26 (N.D. Ga. 2008); *Factory Five Racing, Inc. v. Carroll Shelby*, 2010 WL 4232609, at *15 (Trademark Tr. & Ap. Bd. 2010); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, No. 04-0251, 2004 WL 1598916, at *1 (E.D.N.Y. July 19, 2004); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 134, 136 (E.D.N.Y. 2004); *Gillette Co. v. Norelco Consumer Prods. Co.*, 69 F. Supp. 2d 246, 263 (D. Mass. 1999); *In the Matter of Novartis Corp., et al.*, Dkt. No. 9279, 127 F.T.C. 580, 696 (1999); *Hershey Foods Corp. v. Mars, Inc.*, 998 F. Supp. 500, 511 (M.D. Pa. 1998); *Pfizer, Inc. v. Perrigo Co.*, 988 F. Supp. 686, 699 (S.D.N.Y. 1997); *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F. Supp. 279, 291 (S.D.N.Y. 1997); *Novo Nordisk of N. Am., Inc. v. Eli Lilly & Co.*, No. 96-5787, 1996 WL 497018, at *6 (S.D.N.Y. Aug. 30, 1996); , -*16(L)21(4.19 -1.o5L)21z.Y.o*

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

* * * *

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

D. <u>The Settlement Agreements Reduced Search Costs</u>

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

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

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

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

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

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

solely in terms of relevance, organic links are a reliable method for assessing what websites will be relevant and useful for consumers. (CX 09046 (Ghose, Dep.at 47); RX 0733-0010-011, -0024 –025)). Google, however, does not display organic links to any of 1-800 Contacts' competitors until far into the search results for a search for 1-800 Contacts' trademark. (Ghose, Tr. 3910-11; RX 0733-0024, RX 0733-0156 to -0190). The clear inference is that Google's highly sophisticated algorithms based on massive data about consumers' revealed preferences consider ads for 1-800 Contacts' competitors only minimally relevant to consumers searching for 1-800 Contacts' trademarks.

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

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

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

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

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

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

E. The Settlement Agreements Increased Online Purchases of Contact Lenses

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

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

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

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

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

Complaint Counsel failed to prove that they could avoid this burden on the ground that the

1. Trademark Settlement Agreements Are Presumptively Procompetitive

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

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

Complaint Counsel in fact concede, as two courts held, that 1-800 Contacts' trademark claims were not sham. (RX 0680; *1-800Contacts, Inc. v. Mem'l Eye, P.A.*, 2010 WL 988524, at *6; *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014), ECF No. 91, at 2). Wisely so, for there is no basis to find that the claims were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S.49, 60 (1993). The use in commerce issue is settled. *Network Automation, Inc.*, 638 F.3d at 1144-45; *Rescuecom, Inc.*, 562 F.3d at 128-41. Courts have held that the use can give rise to actionable confusion. *E.g.*, *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61; *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288. Certainly Dr. Jacoby's wholly unreliable surveys do not purport to measure confusion for every ad prohibited by the settlement agreements. And, as noted, courts grant relief on terms that parallel the settlement terms. (RF 1325-1348).

the form of non-use agreements at issue here are commonplace.

If a trademark settlement is overbroad as long as it covers advertising uncertain to infringe, only a settlement that prohibits “confusing” advertising alone would not be overbroad. But courts have rejected trademark relief barring just “confusing” uses because it “too broadly requires [the defendant] to guess at what kind of conduct would be deemed trademark infringement.” *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 667 & 669 (8th Cir. 1987); *see also Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 146 (3d Cir. 1994) (rejecting reading of consent decree that “would require the district court . . . to make determinations on . . . whether there was likelihood of confusion arising from any of [defendant]’s acts”); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 984-5 (11th Cir. 1983); 5 McCarthy on Trademarks and Unfair Competition § 30:13 (“An injunction which merely forbids a defendant from . . . ‘infringing upon plaintiff's trademarks and trade secrets’ adds nothing to what the law already requires. If an injunction is so worded, then the factual elements of what exactly is . . . ‘trademark infringement’ must be re-hashed all over again in a contempt hearing.”).

Trademark practice mirrors the law in this respect. As Mr. Hogan testified, parties involved in disputes or litigation over the use of their marks in paid search advertising do not want to litigate the use of their mark in every context any more than Complaint Counsel do, which is why they broadly agree not to use marks at all for paid search advertising. (Hogan, Tr. 3271–72, 3503). And, in the specific context here, they agree to use negative keywords.

(is why th2(o us)boB4eD Tc 0 T seo (Heg50unsrch o2(ht)-2factuar‘i-2(he)-16(y)2 hrbids7(e)4(u3.82 0 Td [(l

of trade

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

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

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

Further, it is not obvious whether the vast majority of consumers who are looking for 1-800 Contacts' website are better off seeing advertisements that will take them somewhere else. The parties have introduced competing expert testimony regarding the advertisements' potential for confusion—Dr. Jacoby for Complaint Counsel, Dr. Van Lieoter /Typ.r(e)dr. Vrt me(i)-2(nt)or 1

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

> The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

Id. at 775.

3. Paid Search Advertising is Highly Complex

In addition, Complaint Counsel's efforts to shoehorn the settlement agreements into the inherently suspect analysis by labeling them "bidding agreements" ignores the incredible complexity of the search engine auction process. Because of this complexity, one cannot conclude that fewer paid search ads were shown or that the search engines were paid less without significant empirical analysis of the historical data from millions of auctions involw arnt

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

(RF 829). It is therefore possible

(RF 830).

In light of these complexities, Hal Varian, chief economist at Google, has explained that "any effort to determine what advertisers 'would have paid' under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed." (RX 0701 (Varian Decl.) ¶ 6). Dr. Athey testified that adding bidders to an Internet search auction will change the behavior (e)4R3b082(e)4(i)812(e)4(s)-1(t)-212(he)-

(RX 0704 ¶ 20).

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

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

settling parties faced litigation costs was a byproduct not of collusion but of 1-800 Contacts' exercise of its First

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

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

contact lenses. (Coon, Tr. 2666-67, 2687, 2695). In s.e2(

(CX 01334-007),

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

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

with ECPs, it made no economic sense for the manufacturers to require them to sell their products at the same prices. *Leegin*, 551 U.S. at 890 (resale price maintenance by definition assumes, and seeks to reduce, "competition among retailers selling the same brand"). Rather, both manufacturers and ECPs publicly supported UPP policies because of their effect on ECPs' ability to compete against lower priced contact lens retailers. (RX 0739-0019; Murphy, Tr. 4154-55, 4172.) And it is, of course, appropriate to assume that Walmart, Lens Direct and the manufacturers had "accurate perceptions of economic realities." *Rothery Storage & Van Co.*, 792 F.2d at 219.

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

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

Lenses: An FTC Study. (RX 0569). The Commission's report reiterated Congress's judgment about competition between ECPs and other retailers, finding that "[c]ompetition will constrain an ECP's pricing for contact lenses as long as a sufficient proportion of his patients know that they can purchase replacement lenses elsewhere, and the ECP cannot distinguish between informed and uninformed patients." (RX 0569-0024). 1-800 Contacts, of course, spent hundreds of millions on advertising—most of it on television—to ensure that consumers were sufficiently informed for this inter-channel competition to take place. (Bethers, Tr. 3614; CX 1446-010; Coon, Tr. 2721; RX 0736-006; RX 0739-0092). And the Commission found that "empirical evidence suggests that most consumers know that they can use a prescription from an ECP to purchase contact lenses elsewhere, including from mail-order companies." (RX 0569-0024).

The FCLCA also directed the Commission to promulgate rules to carry out the FCLCA. 15 U.S.C. § 7607. The Commission promulgated the Contact Lens Rule, 16 C.F.R. § 315, *et seq*., requiring ECPs to give patients a copy of their prescription in order to "increase[] consumers' ability to shop around when buying contact lenses." (RX 0620). According to the Commission, the Contact Lens Rule "was intended to facilitate the ability of consumers to comparison shop for contact lenses." (RX 0703-0001). Like Congress, the Commission appears to have had online sellers in mind: "[t]he development of disposable soft contact lenses, followed by the growth of 'alternative' retail sources of contact lenses (*e.g.*, non-eye care practitioners), *including mail order and Internet firms*, and mass merchants, has given consumers a greater choice of sellers and means of delivery when they purchase contact lenses." (RX 0566-002 (emphasis added)). Indeed, Dr. Evans wrote in his own report that the Contact Lens Rule "provided significant opportunities for online sellers who couldn't offer prescriptions but could sell contact lenses more conveniently and more cheaply than ECPs." (CX 8006-105).

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

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

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

Complaint Counsel ignore these commercial realities, relying instead on two empirical analyses by their expert, Dr. Evans: (1) a method used most often in merger cases known as critical loss analysis, *see generally* Daniel P. O'Brien, Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 Antitrust L.J. 161 (2003); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015), and (2) a supposed "natural experiment" based on the manufacturers' UPPs. Dr. Evans' analyses deserve some skepticism given his view that

(Evans, Tr. 1745), and that market definition "should avoid rigid boundaries" (Evans, Tr. 1430-31). In fact, both of his applications of the "hypothetical monopolist test" are flawed and neither proves a market limited to online retail sales of contact lenses. Rather, as Dr. Murphy testified, properly applying Dr. Evans' methods confirms that the relevant market includes all contact lens retailers.

Critn (. E)1(et)-9f n1(of)3(t)-firim ID Rcd ( )T itrust itiodb1 2oostb1 2le sio* [(a2, 1k)2(e)-10(o)

critical loss in sales the set of firms would experience above which it would not be profitable to raise prices. (RX 0739-0076, -077). If the actual loss that a set of firms that make up a candidate relevant market would suffer from lost sales in response to a price increase exceeds the critical loss, raising prices would not be profitable—meaning other firms constrain price increases and are part of the relevant market. (RX 0739-0077). The actual loss depends on the diversion ratio—the share of the firm's lost sales that would be diverted to other firms in the candidate market in response to a price increase of some specified level. (RX 0739-0077).

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

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

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

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

Dr. Murphy illustrated that Dr. Evans' results are unreliable. Dr. Murphy conducted critical loss analyses using estimates of the diversion ratio from other parts of the same survey that Dr. Evans relied on. While Dr. Evans cited these data, he did not rely on them. The reason is obvious.

(RX 0739-0078; CX 8006-122; CX 1117-016). Far more of the surveyed 1-800 Contacts customers who had switched—more than 50%—made their last purchase from an independent ECP or optical chain. (CX 1117-016).

Dr. Evans' cherry-picking skewed his results. Using the 17% figure rather than 40%, and keeping the rest of Dr. Evans' model constant, Dr. Murphy found that a hypothetical monopolist that owned 1-800 Contacts and other online sellers could *not* profitably raise prices by more than the 5% threshold set forth in the Merger Guidelines, meaning that other sellers provide a

First, the UPPs are not a natural experiment for analyzing a candidate market of online
. (
contact lens retailers. As Dr. Evans testified, in order to have a natural experiment regarding the effects of a price increase by online sellers, he "would need to see the – price going up just for the online retailers, and then I would need to determine whether, following that price increase, there's a switch to – a switch to Costco, but I don't have the benefit of that experiment." (Evans, Tr. 1446; *see also* RX 0739-0079). The UPPs did not enable Dr. Evans to isolate the effect of a price increase solely on online retailers because the UPPs also forced club stores, such as Costco, as well as offline retailers, such as Walmart, to raise their prices. (Evans Tr., 1441-42,1445; Murphy, Tr. 4172-73; Bethers, Tr. 3675-76, CX 09037 (Owens, Dep. at 79-80)). As Dr. Evans testified, his analysis of online retailers' profits during the UPPs does not address whether online retailers and club stores are in the same market. (Evans, Tr. 1446; Evans, Tr. 1748).

Second, Dr. Evans made no effort to quantify the extent to which online sellers were unable to acquire new customers as a result of the UPPs. (Evans, Tr. 1752). That was a critical omission. While the UPPs enabled online sellers to charge higher prices in the short term, in the long term, the reduction in the discount that online sellers could offer as compared to offline sellers (

1-800 Contacts does not have market power either alone or in combination with the other settling parties in the market for the retail sale of contact lenses. Together, 1-800 Contacts and the settling parties make less than [redacted] of all contact lens sales. (RX 0739 ¶¶ 113, 116). That is insufficient for market power as a matter of economics (RX 0739-0045), and as a matter of law: "[W]hile high market shares may give rise to presumptions of market power, a market share of less than 20% is woefully short under any metric from which to infer market power." *Cohlmia v. St. John Med. Ctr*., 693 F.3d 1269, 1283 (10th Cir. 2012); *see also Retina Associates, P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1997); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) ("a 20%-25% market share or less does not constitute market power") (internal citations omitted).

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

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

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

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

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

Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) ("Of course, virtually every seller of a branded product has *some* customers who especially prefe grew to over in revenue and in profit by 2015. CX 09000

at 8, 34, 38-40); CX 00324). And, as the Court pointed out,

Tr. 1578-79.

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

- Simple Contacts is a new entrant that uses innovative technology to offer customers the ability to extend their contact lens prescription online. (RF 466-468). Customers may then purchase those lenses from Simple Contacts online.

- Sightbox is a new online entrant that operates on a subscription model. (RF 469). For a monthly fee, Sightbox supplies contact lenses, arranges appointments for an eye exam with an ECP, and pays for the eye exam. (RF 470-471).

- Hubble Contacts, which launched around the end of 2016, has its own brand of contact lenses, which it sells through a subscription model to consumers online. (RF 472-480).

- Daysoft is a UK manufacturer of contact lenses that sells its lenses directly to consumers online, including into the United States. (RF 481-83).

- Opternative is a new entrant that uses innovative technology to allow customers to obtain a vision test through a desktop computer and a prescription for the same brand of contact lenses that the customer is currently wearing. (RF 484-486). Opternative thus provides an opportunity for any online retailer to provide its customers with the ability to extend their contact lens prescription without vising an ECP's office. (RF 487).

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

That 1-800 Contacts and the other settling parties make a very high percentage of online contact lens sales is immaterial. "Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." *Will*, 776 F.2d at 672 n.3; *see also Allen-Myland, Inc.*, 33 F.3d at 209 ("Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the power to raise prices."); *Waste Mgmt., Inc.*, 743 F.2d at 983 (reversing finding of market power where defendant had 50% market share but entry was easy). "A high market

117 F.3d at 58, through television advertising, brand-building and elite service that other retailers are unwilling to pay for. That is the hallmark of a competitive market and the antithesis of market power. *See Am. Express Co.*, 838 F.3d at 204 ("We conclude that, so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene and disturb the present functioning of the payment-card industry.").

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

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

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

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

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

The actual facts make the contrast even starker. The settlement agreements did not bind numerous contact lens retailers, including Walmart, Costco, BJ's, Sam's Club, Lens Direct and Lens.com. (CX 08007-042). These retailers had every incentive to fill any productive void created by limitations on advertising in response to searches for 1-800 Contacts' trademarks; as Dr. Athey testified, there is no evidence that any of them were chilled by 1-800 Contacts' trademark litigation. (CX 09043 (Athey, Dep. at 117)). The data, however, show that paid search advertising in response to searches for 1-800 Contacts' trademarks was not important to these retailers. Only of paid search advertisements on Google for contact lens retailers not bound by the settlement agreements were displayed based on bid4(s)-1(f)3(or)3(1)-10(-)3((nt)-2(a)/d-2(r)3(e)4 generally spent less than of its advertising budget on paid search advertising on its own trademark. (RX 0739-0028, -092; Murphy, Tr. 4108-4113; Bethers, Tr. 3702; Coon, Tr. 2723). Four of the settling parties—Contact Lens King, Walgreens, Standard Optical and Memorial Eye—did not bid on 1-800 Contacts' trademarks at all prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057). Complaint Counsel have pointed out *ad nauseam* that Memorial Eye obtained impressions by "broad matching." But such a misguided attempt to evade potential trademark liability makes no difference to a consumer viewing a search results page. And only out of 1000 people who searched for 1-800 Contacts' trademarks and saw an ad for Memorial Eye purchased from that firm. (CX 8006-094, -095).

Of course, according to Dr. Evans, the settling parties themselves are rational and the best judges of their own business interests. (Evans, Tr. 1830-31; CX 09042 (Evans, Dep. at 119-120)). As such, the settlements themselves suggest that the lifetime benefits of advertising in response to searches for 1-800 Contacts' trademarks were less than the costs of litigating for the right to do so—costs that totaled $1.4 million for Lens.com pri2(i)-2(ng)12(udg)10.lial t2(a)4(l)-2(d6.88 ehl)-2(l

[redacted]

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

Complaint Counsel also failed to prove that the settlement agreements enabled 1-800 Contacts or the other settling parties to raise prices. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *Brown Univ.*, 5 F.3d at;

(CX 09043 (Athey, Dep. at 201)). And for good reason, since 1-800 Contacts executives testified that the settlement agreements played no role in 1-800 Contacts' pricing. (Bethers, Tr. 3712-13; CX 09025 (Osmond, Dep. at 98-100)). Not surprisingly, 1-800 Contacts' margins remained essentially constant from 2002 through 2016, indicating that 1-800 Contacts did not use the settlement agreements to raise prices. (RX 0739-0064, -0107).

Complaint Counsel cannot prevail on that record. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (no proof of anticompetitive harm where plaintiff alleged "potentially" higher prices, but did not demonstrate that prices were actually higher across the market or that quality had actually decreased); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d. Cir. 1995) (no proof of harm to competition absent "empirical demonstration concerning the adverse effect of the defendants' arrangement on price or quality") (internal quotation marks and alterations omitted).

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

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

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

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

As Dr. Evans has written, "[t]he only trustworthy way of finding out whether business practices harm consumers is to examine their impact on consumers. Have they raised prices, restricted output, or reduced quality? Or will they? Theory alone usually cannot answer those questions." Evans, *Dodging the Consumer Harm Inquiry*, 75 St. John's L. Rev. at 545-46. Rather, "[illegible]" *Id.* at 546 (emphasis added). Complaint Counsel provided none.

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

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

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

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

First, the Supreme Court in *California Dental* rejected the Commission's attempt to prove that advertising restrictions harmed competition by proving effects on advertising itself. The Court of Appeals in that case adopted the Commission's position that restrictions amounting to a near-

fact, Dr. Athey testified that most consumers who visit 1-800 Contacts' website already know there is somewhere else to buy contact lenses, (Athey. Tr. 913-914), more than 70% of online contact lens shoppers compare prices, (Athey, Tr. 941; CX 01449-057), and that more than half of them check prices at three, four or five stores or websites.

results, let alone shown that additional ads for other retailers would be more valuable. (Athey, Tr. 2082-83; CX 09043 (Athey, Dep. at 180, 281-82)). But the undisputed evidence suggests that the organic results are more relevant than ads for other retailers because the organic algorithms that rank links solely based on enormous amounts of consumer behavior indicative of relevance do not generate links to other retailers' website on the first page of search results. (CX 09046 (Ghose, Dep. at 47); RX 0733-0010 to -011, -0024 to -0025).

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

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

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

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

4036; CX 09046 (Ghose, Dep. at 52); CX 01665). That shift in clicks would increase search

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

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

*First*Po

infringer attempts to avoid a substantial likelihood of consumer confusion by adding a disclaimer, it must establish the disclaimer's effectiveness.").

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

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

PUBLIC

CERTIFICATE OF SERVICE

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

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I served via electronic mail a copy of the foregoing document on:

Thomas H. Brock, *tbrock@ftc.gov*
Barbara Blank, *bblank@ftc.gov*
Gustav Chiarello, *gchiarello@ftc.gov*
Kathleen Clair, *kclair@ftc.gov*
Joshua B. Gray, *jbgray@ftc.gov*
Geoffrey Green, *ggreen@ftc.gov*
Nathanial Hopkin, *nhopkin@ftc.gov*
Charles A. Loughlin, *cloughlin@ftc.gov*
Daniel Matheson, *dmatheson@ftc.gov*
Charlotte Slaiman, *cslaiman@ftc.gov*
Mark Taylor, *mtaylor@ftc.gov*
Mika Ikeda, *mikeda@ftc.gov*
Thomas Dillickrath, *tdillickrath@ftc.gov*
Jessica S. Drake, *jdrake@ftc.gov*
W. Stuart Hirschfeld, *shirschfeld@ftc.gov* SrhiAdT-2(r).12

Notice of Electronic Service

Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Sean Gates

Charis Lex P.C.
sgates@charislex.com
Respondent

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Zachary Briers
Munger, Tolles & Olson LLP
zachary.briers@mto.com
Respondent

Chad Golder
Munger, Tolles, and Olson
chad.golder@mto.com
Respondent

Julian Beach
Munger, Tolles & Olson LLP
julian.beach@mto.com
Respondent

Aaron Ross
Attorney
Federal Trade Commission
aross@ftc.gov
Complaint

Thomas Dillickrath
Attorney
Federal Trade Commission
tdillickrath@ftc.gov
Complaint

Jessica S. Drake
Attorney
Federal Trade Commission
jdrake@ftc.gov
Complaint

W. Stuart Hirschfeld
Attorney
Federal Trade Commission
shirschfeld@ftc.gov
Complaint

David E. Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Henry Su
Attorney
Federal Trade Commission
hsu@ftc.gov

Complaint

Steven Perry
Attorney