UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

This proceeding considers Complaint Counsel's challen
among horizontal competitors—in most instances, trademark lit
allegedly, anticompetitively limit internet search advertising and
search auctions to the detriment of consumers. Respondent 1-8
lens sellers for trademark infringement when sellers' online adv
consumers' internet searches for "1-800 Contacts." In nearly al
before trial. The resulting settlement agreements require the pa
engine advertising auctions, to take steps to ensure their ads do
searches for the other party's trademark terms.

At first glance, this proceeding may appear to contempla
embedded in a document that purports to resolve a trademark di
contact lenses. But, in reality, this case grapples with issues of

already comprises a significant and growing share of our economy's retail sales. Indeed, the Census Bureau estimated that ecommerce retail sales in the United States totaled $127.3 billion in the second quarter of 2018, which comprised approximately 9.6 percent of total retail sales.[1]

We consider here the manner in which and conditions under which prices for contact lenses are advertised throughout the internet economy. Our decision will affect not only the price that consumers pay for some contact lenses but also the very manner in which substantial parts of price competition will occur throughout consumer markets today and tomorrow. As this agency has explained time and again, robust, accurate, and intelligible price competition among those who compete for consumers' dollars is one of the cornerstones of our vibrant market economy. When information is withheld from consumers, it frustrates their ability to compare the prices and offerings of competitors. This is as true today, when consumers search for goods online, as it was when people shopped open-air markets for vegetables every evening. In that the restraints were not reasonably necessary to achieve the claimed procompetitive benefits. Consequently, we enter a cease-and-desist order that prohibits 1-800 Contacts from enforcing the unlawful provisions in the

contains the keyword with additional words before or after.[5] And when designated as "exact match," the ad may appear when a search contains the exact keyword and nothing more.[6] In

(Lenses for Less uses no forms of internet advertising other than search advertising), 534 (the "vast, vast, vast majority" of advertising spending for Memorial Eye was for online search advertising), 540-41 (Vision Direct spent more for search advertising than for any other type of advertising), 546 (most of Walgreens' contact lens advertising budget was spent on paid search advertising), 552 (search advertising is the only type of online advertising for contact lenses used by Walmart), 555 (Web Eye Care only engages in online advertising); CX9014 (Batushansky Dep.) at 110 (approximately percent of Web Eye Care's online advertising expenditures are for search advertising).

In contrast to other online contact lens retailers, 1-800 Contacts also advertises heavily offline, including printed matter, radio, television, and other means. IDF 61-62. According to Respondent, the company has "made enormous investments" in building its brand and convincing consumers to buy contact lenses online rather than from brick-and-mortar retailers. RAB at 6; IDF 50-66. Between 2002 and 2014, 1-800 Contacts spent a total of on television advertising. IDF 64. Yet online advertising is still important to 1-800 Contacts. Between 2002 and 2014, it spent a total of on online advertising. IDF 65. In 2014, percent of 1-800 Contacts' advertising budget was spent on internet advertising, and between percent of 1-800 Contacts' internet advertising budget was spent on paid search advertising each year from 2004 through 2014. IDF 66. When 1-800 Contacts bids on its trademark keywords, it bids high enough to ensure that 1-800 Contacts' sponsored ad is the first advertisement displayed in response to searches for its own trademark. IDF 578; CX9 (Roundy Dep.) at 86; CX9031 (Schmidt Dep.) at 125-26.

D. 1-800 Contacts' Conduct, Litigation, and the Settlement Agreements

In 2002, 1-800 Contacts filed a complaint against Vision Direct alleging, inter alia, trademark infringement, claiming Vision Direct caused pop-up ads to appear when internet users visited the 1-800 Contacts website. The complaint did not include allegations regarding the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements.[9] IDF 301. 1-800 Contacts filed a similar action challenging pop-up ads against Coastal Contacts in March 2004. CX1615 (including trademark dilution claims). 1-800 Contacts resolved its disputes with Vision Direct and Coastal Contacts by executing settlement agreements that included terms related to pop-up advertising and the use of trademark keywords. IDF 306, 307 (Vision Direct settlement agreement, CX0311, included as prohibited acts "causing a Party's website or Internet advertisement to appear in respon9 (i)-16 (<ct)-6 (o)-4 (apr)-e1(i)-16 (<ct)-6 (o)-4 ((n)-4 (t)-16 (er)i)-

federal court); CX0315 (2009 settlement agreement with Lensfast); RX0028 (2010 settlement agreement with AC Lens); CX0319 (2010 settlement agreement with Empire Vision); CX0320 (2010 settlement agreement with Lenses for Less); CX0321 (2010 settlement agreement with Tram Data); CX0322 (2010 settlement agreement with Walgreens); CX0323 (2010 settlement agreement with Contact Lens King); CX0324 (2010 settlement agreement with Web Eye Care); RX0408 (2011 settlement agreement with Standard Optical); CX0326 (2013 settlement agreement with Memorial Eye). The settlement agreements include recitals that describe the litigation between the parties and state "the Parties have determined that, in order to avoid the expense, inconvenience, and disruption" of litigation, "it is desirable and in their respective best interests to terminate" the litigation and "settle any claims related thereto." IDF 359. The settlement agreements release the parties of "any and all liability" arising from the claims and

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In 2013, 1-800 Contacts entered into a sourcing and services agreement with Luxottica, a company that sells and distributes contact lenses through affiliates. IDF 86, 393; see CX0331 (Luxottica Sourcing and Services Agreement). Under that agreement, 1-800 Contacts provides fulfillment services by shipping contacts to Luxottica's retail chain stores (e.g., LensCrafters, Pearle Vision, Sears Optical, and Target Optical). The sourcing and services agreement contains reciprocal advertising restrictions similar to those in the thirteen settlement agreements; it prohibits use of trademark keywords and requires exact match negative keywords. IDF 396.

E. Procedural History

1. The FTC's Complaint

In August 2016, the FTC issued an administrative Complaint against 1-800 Contacts, alleging that the thirteen settlement agreements and the sourcing agreement (collectively, the "Challenged Agreements") and subsequent policing of the agreements unreasonably restrain both price competition in search advertising auctions and the availability of truthful, non-misleading advertising in violation of Section 5 of the FTC Act. Compl. ¶¶ 3, 25, 33. The Complaint alleges that the Challenged Agreements prevented the parties from disseminating ads that would have informed consumers that identical products were available at different prices, which reduced price competition among online contact lens retailers and made it costlier for consumers to search prices offered by the retailers. Compl. ¶ 31. As a result, the Complaint alleges, at least some consumers paid higher prices for contact lenses. Id.

The Complaint also alleges that Respondent's conduct undermined the efficiency of search advertising auctions, distorted the prices in those auctions by eliminating bidders, and degraded the quality of service offered by search engines, including the quality of the SERP displayed to users. Id.

2. Complaint Counsel's Motion for Partial Summary Decision

Prior to the hearing before the ALJ, Complaint Counsel filed a motion for partial summary decision to dismiss the second and third defenses asserted in Respondent's Answer. Respondent's second defense contended that the Complaint is barred because the trademark lawsuits underlying the settlement agreements had not been alleged or shown to be objectively and subjectively unreasonable. The third defense argued that 1-800 Contacts' conduct is protected under the Noerr-Pennington doctrine and the First Amendment.

On February 1, 2017, the Commission granted the motion for partial summary decision. See 1-800 Contacts, Inc

3. The Initial Decision

Chief Administrative Law Judge Chappell issued a 214-page Initial Decision and Order on October 20, 2017, finding the Challenged Agreements violated Section 5 of the FTC Act. ID at 7, 138, 166, 190, 200. At the outset, the ALJ rejected 1-800 Contacts' assertion that, under *FTC v. Actavis*, the trademark settlement agreements should not be subject to antitrust scrutiny. The ALJ found that trademark settlements are not antitrust immune. *Id.* at 7, 120-22.

When considering liability, the ALJ applied Sherman Act Section 1 principles. To begin, he found there was "no dispute in this case that there was a contract, combination, or conspiracy" because 1-800 Contacts entered into fourteen agreements with online competitors. *Id.* at 118. Applying the rule of reason, the ALJ found that the relevant market in which to analyze the agreements' effects was "the online sale of contact lenses in the United States," *id.* at 138, 200, and that Complaint Counsel had met its burden of showing anticompetitive effects in that market. *Id.* at 7, 190, 200.

Specifically, the ALJ ruled that Complaint Counsel had established actual anticompetitive effects with harm to consumers and competition. *Id.* He explained that the advertising restrictions imposed by the Challenged Agreements harmed consumers by reducing the availability of information, which made it costlier for consumers to find and compare options for buying contact lenses online. He concluded that the reduced advertising "more likely than not resulted in consumers purchasing from 1-800 Contacts at higher prices than they would have paid to lower-priced competitors." *Id.* at 155-56.

The ALJ stated that, because Complaint Counsel had proven that the challenged agreements resulted in harm to consumers and competition, his Initial Decision need not, and did not, determine whether 1-800 Contacts' motives were anticompetitive. *Id.* at 139. In addition, although the Complaint alleged that "[a]s horizontal agreements that restrain price competition and restrain truthful non-misleading advertising, the Bidding Agreements are inherently suspect," Compl. ¶ 32, the ALJ did not address this allegation. ID at 138-39. The ALJ also concluded that, having found liability under one theory (harm to consumers), he did not need to consider the other theory of alleged harm, based on injury to search engines. *Id.* at 166.

After finding anticompetitive effects, the ALJ considered and rejected Respondent's asserted procompetitive justifications. He concluded that, even if the settlement agreements reduced litigation costs and were favored by public policy, Respondent failed to proffer any consumer benefits flowing from the reduced litigation costs. Id. Idal1 (et)003 (i)-n898

Having found liability, the ALJ issued an order that bars 1-800 Contacts from agreeing with any marketer or seller of contact lens products to prohibit or limit participation in search advertising auctions (including prohibiting or restricting the use of keywords or requiring the use of negative keywords) or to prohibit or limit search advertising. ID at 203. The ALJ's order contains a carve-out clause regarding future litigation; the carve-out establishes that the order does not prohibit Respondent from initiating or prosecuting a lawsuit or implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement. Id. The ALJ's order also requires Respondent to cease enforcing existing agreements that are inconsistent with the terms of the order's prohibitions. Id. at 204.

II. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of fact and conclusions of law de novo, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 3.54(a). The Commission may "exercise all the powers which it could have exercised if it had made the initial decision." Id. The de novo standard of review applies to both findings of fact and inferences drawn from those facts. See Realcomp II, Ltd., 2007 WL 6936319, at *16 n.11 (F.T.C. Oct. 30, 2009), aff'd, 635 F.3d 815 (6th Cir. 2011). We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

III. JURISDICTION

Respondent does not dispute that the Commission has jurisdiction over it and over the conduct challenged in the Complaint. Section 5 of the Federal Trade Commission Act grants the Commission authority to prevent "unfair methods of competition in or affecting commerce" by "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(1)-(2). 1-800 Contacts is a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, over which the Commission has jurisdiction. See Joint Stipulations of Jurisdiction, Law, and Fact, JX0001 ¶ 2. The acts and practices of 1-800 Contacts at issue, including the agreements being challenged, are in commerce or affect commerce as "commerce" is defined in Section 4 of the FTC Act. IDF 3; Joint Stipulations of Jurisdiction, Law, and Fact, JX0001 ¶ 3; Answer ¶ 6.

IV. 1-800 CONTACTS' SETTLEMENTS ARE NOT IMMUNE FROM ANTITRUST SCRUTINY

A. Actavis Does Not Immunize Commonplace Settlement Agreements or Settlements within the Scope of Potential Judicial Relief

Respondent contends the settlement agreements between 1-800 Contacts and thirteen rival online sellers of contact lenses are not subject to antitrust scrutiny.[14] Respondent asserts that Actavis stands for the proposition that there can be no antitrust challenge to a settlement agreement that is commonplace in form. Here, Respondent claims its settlements of trademark litigation took the form of common, non-use agreements. According to Respondent, Actavis

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[14] Respondent's arguments about immunity for its settlement agreements, of course, offer no shelter for its Source and Services Agreement with Luxottica. That Agreement is not a settlement agreement.

exempted commonplace forms of settlement from antitrust scrutiny and held that "a party challenging a settlement must show that the settlement's form is unusual." RAB at 10 (internal quotation marks omitted). Respondent, however, reads *Actavis* much too broadly; the Court created no such shield from antitrust review.

As support for its argument, Respondent quotes the following sentence fragment in *Actavis*: "commonplace forms have not been thought for that reason alone subject to antitrust liability." RAB at 3 (quoting *Actavis*, 133 S. Ct. at 2233). The Court's wording is much more limited than Respondent suggests. The Supreme Court presented two examples of settlements: (1)

2016) (citing, inter alia, American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191–92 (2010); Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 760 (1984) (“The [Sherman Act] is aimed at substance rather than form.”)).

When we consider the substance of these settlement agreements, we find they are unusual. Trademark litigation typically seeks to bar the use on the infringer’s labels, ads, or other promotional materials of the plaintiff’s trademark or a similar mark in a way likely to confuse consumers. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50 (2d Cir. 1997), cited repeatedly by Respondent, provides a classic example where Clorox’s PINE-SOL products allegedly confused consumers of Sterling Winthrop’s LYSOL products. The settlement agreement upheld by the court restricted Clorox’s ability to market products as disinfectants or as special purpose cleansers under the PINE-SOL mark. Id. at 54. There the agreement did “no more than regulate how the name PINE-SOL may be used” in direct competition with LYSOL and did not restrict Clorox or other firms[15] from selling products that compete with LYSOL under a brand name other than PIn PI4 (r)2 (mp)2 (e)1w -17. (mp(L)23 oI)20(61ic4I)20(61ic4I)20(6und

Respondent appears to argue that because a prohibition on use of a trademark is within the exclusionary potential of the trademark (and therefore is a remedy that a court could have ordered), a settlement requiring non-use is immune from antitrust condemnation. See RRB at 4. But the crux of the *Actavis* decision was that there could be antitrust liability for a settlement of non-sham litigation with anticompetitive effects within the scope of the patent's exclusionary potential. The *Actavis* majority could not have been clearer:

> Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement's anticompetitive effects fall within the scope of the exclusionary potential of the patent. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

Actavis, 570 U.S. at 147 (internal quotation and citation omitted). Here, even assuming arguendo that the settlement agreements' effects were within the scope of Respondent's enforceable trademark rights[16]—and hence within the scope of relief that a court might have ordered, *Actavis* stands for the possibility of antitrust liability, not for the foreclosure of antitrust review. As *Actavis* explains, we need to consider both antitrust and intellectual property policies. See *id.* at 148 ("it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well")

But the Court did not characterize these considerations as prerequisites for antitrust review of all intellectual property-related settlement or as defining the content of their analysis under the rule of reason. Rather, the Court described the factors as considerations relevant to the particular antitrust claim before it:

> We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

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Under Section 1 of the Sherman Act,[18] except for a small group of restraints that are per se unlawful because they "always or almost always tend to restrict competition," restraints are evaluated under the rule of reason. See, e.g., Ohio v. American Express Co., 138 S. Ct. 2274, 2284 (2018) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)). When applying the rule of reason, courts rely on a burden-shifting framework. Under this framework, the plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers. If the plaintiff meets its initial burden, the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the

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In this case, we use two of these modes of analysis to assess whether 1-800 Contacts' agreements resulted in anticompetitive effects: (1) we consider whether the Challenged Agreements are inherently suspect, and (2) we examine whether there is direct evidence of anticompetitive effects. Each mode of analysis provides an independent basis for finding that the Challenged Agreements have substantial anticompetitive effects and leads us to find liability. We explain the structure of the analysis based on the case law for these modes in the sections devoted to each. We also examine Complaint Counsel's allegation that the Challenged Agreements have substantial anticompetitive effects on competition with respect to bidding on search terms, which again leads us to find a violation of Section 5 of the FTC Act.

Although we discuss particular evidence that leads us to conclude that the restraints in the Challenged Agreements have substantial anticompetitive effects under different modes of analysis, our review of the evidence is not rigidly compartmentalized. For instance, evidence regarding the significance of search advertising generally and searches for 1-800 Contacts' trademarks in particular, which is discussed as part of the inherently suspect analysis, informs our understanding of the direct evidence of anticompetitive effects. Although the two modes of analysis provide different structures, they reach the same conclusion. The restraints on advertising and bidding at advertising auctions imposed by 1-800 Contacts' agreements have substantial anticompetitive effects and, unless reasonably necessary to achieve a valid procompetitive rationale, violate Section 5 of the FTC Act.

A. Analysis of the Challenged Agreements for Effects on Consumers Under Polygram's Inherently Suspect Framework

In Polygram, we held that in a limited but significant category of cases, "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition." Polygram, 136 F.T.C. at 344. In these cases, "scrutiny of the restraint itself . . . without consideration of market power" is sufficient to condemn the restraint, unless the defendant can "articulate a legitimate justification" for that restraint. Id. at 344-45; see also California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (describing a "quick-look analysis" applicable when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"); IFD, 476 U.S. at 459 (finding "no elaborate industry analysis" was required to demonstrate the anticompetitive character of a "horizontal agreement among participating dentists to withhold from their customers a particular service that they desire").

Drawing from the Supreme Court's analysis in California Dental, 526 U.S. at 779, Polygram spelled out the structure of the "inherently suspect" analysis for the plaintiff's demonstration that a restraint has anticompetitive effects. A plaintiff must

demonstrate[] that the conduct at 2 (or)-2 (5.)Tjhagrc a1 (t)--5 (t)--2 (or)t tcc5.nge likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail the "fullest market analysis." Depending upon the circumstances of the cases and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. Such a showing may, for example, be based on a more detailed analysis of economic learning about the likely competitive effects of a particular restraint, in markets with characteristics comparable to the one at issue. The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

Polygram, 136 F.T.C. at 344-49 (quoting California Dental, 526 U.S. at 779) (citations omitted).
On review, then Chief Judge Douglas Ginsburg, writing for the D.C. Cir
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they are closely analogous to conduct condemned *per se* in this and other industries . . ." *NTSP*, 140 F.T.C. at 731.

In the present case, the agreements between 1-800 Contacts and its rivals prohibit each party from causing or allowing advertisements to [illegible]

> of these studies[19] find that advertising restrictions result in higher prices. Many of them show that the consumers are not getting higher quality products or services at those higher prices. At least one of the studies finds that the advertising restrictions tend to suppress entry.

CX8006 (Evans Expert Report) at 081-82. As Dr. Evans concludes: "There is a consensus in the economics literature that restrictions on advertising among rivals impair competition and harm consumers." *Id.* at 081. Dr. Evans also confirmed that greater availability of pricing information affects the prices that consumers pay for products sold online. *Id.* at 084. Dr. Evans noted that prior empirical work found that consumers paid significantly less for life insurance plans and cars because online price comparison sites made price shopping much easier. *Id.* Dr. Evans also cited a study finding that dissemination of price information online made demand curves for online sellers much more e

Courts have long condemned advertising restrictions. The D.C. Circuit affirmed our analysis in Polygram. Polygram Holding Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005) ("we have no difficulty with the Commission's conclusion . . . An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors"). Other advertising restrictions have similarly been condemned. See, e.g., Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995) (finding advertising restraint that prohibited attorneys from advertising in particular geographical regions per se unlawful); United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961) (agreement between trade association and gasoline station operators that stations would not advertise—including by posting signs at the stations showing prices—or give premiums was per se Sherman Act violation).

Our conclusion that the particular advertising restrictions imposed by the Challenged Agreements are inherently suspect is a limited finding. We do not contend that all advertising restrictions are necessarily inherently suspect. The restrictions in this particular case prohibit the display of ads that would enable consumers to learn about alternative sellers of contact lenses and give them the opportunity to make price comparisons at the time they are likely to make a purchase. Importantly, the restrictions at issue here are not limitations on the content of an advertisement a consumer would otherwise see; they are restrictions on a consumer's opportunity to see a competitor's ad in the first place. Moreover, the record shows that the suppressed ads often emphasize lower prices. In this context, we find the advertising restrictions are inherently suspect. Because the Challenged Agreements restrict justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Id.* at 345-46. "A justification is plausible if that it wished to preserve. It had a marketing strategy to create brand awareness and during the period 2002 through 2014 had spent on television advertising and on internet advertising to build that brand. IDF 60, 64-65.

It is important to note that our determination that two of 1-800 Contacts’ procompetitive justifications are legitimate at this stage of the analysis is not the end of our evaluation. We return to Respondent’s procompetitive justifications with an “extensive factual [and legal] inquiry” when we move farther into the rule of reason analysis. In Sections V.A.3 and V.A.5, we consider Complaint Counsel’s contention that the procompetitive benefits could be reasonably achieved through less anticompetitive means and examine whether Respondent’s procompetitive rationales are supported by the facts.[22]

3. Complaint Counsel’s More Detailed Showing

Because Respondents have advanced legitimate procompetitive justifications, we do not summarily condemn the Challenged Agreements based only on an initial review of the nature of the restraints. Instead, to satisfy their burden under the rule of reason, Complaint Counsel must make a further showing. As we explained in *Polygram*

> When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail “the fullest market analysis.” Depending upon the circumstances of the cases and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. . . . The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

Polygram, 136 F.T.C. at 348-49 (footnote and citations omitted); *see also Actavis*, 570 U.S. at 159 (explaining that the showing does not require that “the Commission . . . litigate the patent’s validity, . . . present every possible supporting fact or refute every possible pro-defense theory. . . . ‘[t]here is always something of a sliding scale in appraising reasonableness,’ and as such ‘the quality of proof required should vary with the circumstances’”) (quoting *California Dental*, 526 U.S. at 780 and 7 Phillip E. Areeda & Herbert Hovenkf0hd va6e anticompetitive effects and showing that these effects are likely in this particular setting or (ii) explaining how Respondent could have minimized the anticompetitive effects of its conduct or accomplished its procompetitive justifications through less restrictive alternatives. Here, Complaint Counsel show both that, in the context of online sales of contact lenses, the proffered procompetitive effects of the advertising restraints in the Challenged Agreements could be achieved through means less restrictive of competition, and that restraints "are indeed likely . . . to harm competition," Polygram, 136 F.T.C. at 348. We address each of these approaches separately.

a. Respondent's Proffered Procompetitive Justifications Could Be Achieved Through Less Anticompetitive Means

First, Complaint Counsel can rebut Respondent's showing that litigation cost savings and trademark protection are cognizable and plausible procompetitive justifications by establishing that "the proffered procompetitive effects could be achieved through means less restrictive of competition." Polygram, 136 F.T.C. at 349; see, e.g., American Express, 138 S. Ct. at 2284 (if defendant successfully shows a procompetitive justification, "then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means"); Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998) (plaintiff may demonstrate that the challenged conduct is not reasonably necessary or could be achieved by less restrictive means); 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1505 (4th ed. 2017). The challenged conduct is not reasonably necessary if the parties could have achieved similar efficiencies by practical, significantly less restrictive alternatives. See United States v. Brown Univ., 5 F.3d 658, 678–79 (3d Cir. 1993); United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003); 7 Areeda & Hovenkamp, supra a court has authority to enter an order of non-use, however, does not support a finding that it is always a permissible restraint when implemented by private parties.

As we have already discussed, see supra Section IV.A, a court’s plenary authority to issue relief is irrelevant to the question of whether private parties may, consistent with the antitrust laws, agree to restrict their competition. Courts have broad injunctive authority, and Respondent has failed to explain why the scope of judicial powers should define the scope of lawful private activity. Indeed, courts can order “fencing-in” relief, which restricts even legal conduct in order to help prevent future violations; this does not mean that private parties can agree among themselves to bar the same lawful, competitive activities.[23] Private parties cannot agree to limit non-infringing conduct with the effect of restraining competition, even if a court could do so. Moreover, in fashioning relief in trademark cases, courts are guided by equitable principles, which require closely tailoring injunctions to the harm that they address and giving due consideration to the public interest and the potential effect on competition between the parties. SunAmerica Corp. v. Sun Life Assur. Co. of Canada, 77 F.3d 1325, 1336 (11th Cir.

labeled or what language may be used in the text of an ad, the non-use restriction here limits the number of times competitor ads are shown and insulate 1-800 Contacts' consumers from becoming aware of its rivals.

Respondent also points to cases in which courts have issued orders that would prohibit use of trademarks in internet advertising, but most of those cases are either consent judgments or default judgments and involve infringing conduct beyond mere keyword bidding.[24] In any event, decisions about the appropriate remedy are inherently case-specific, and the fact that a court in some other context, with no or little consideration of the effects on competition, granted a broad injunction does not constitute an endorsement of the private agreements here or render them procompetitive.

ii. Less Anticompetitive Alternatives

Complaint Counsel identify three alternatives to the restrictions in the Challenged Agreements. ntlitigation. RAB at 40–41.[25] We, however, do not find a requirement to clearly disclose the seller's identity to be "amorphous." The Commission has ordered parties to implement clear and conspicuous disclosures in numerous cases involving misleading advertising and did not find the requirements too amorphous or otherwise problematic to serve its remedial goals.[26] Moreover, nothing prevents the parties, as part of their sett (r Tw 13.93 0 Td [(t o)2 (0d [(t o)aT 12 472.08 68 (o ca.34

advertising each year. IDF 66. 1-800 Contacts earns approximately of its sales from paid search advertising. IDF 580.

Search advertising is similarly important for 1-800 Contacts' online competitors. The record shows that online retailers have found search advertising much more effective in reaching potential buyers than other types of advertising. For example, AC Lens has found that, compared to other marketing channels, search advertising generates the most new customer orders and the most revenue, at a cost consistent with AC Lens' financial goals. IDF 500-01. Thus, for AC Lens, search advertising is the most effective and important marketing channel to grow its business. IDF 502.

Other online competitors reported similar reliance on search advertising. Vision Direct advertised almost exclusively online. IDF 540. Search advertising "was a major driver" in building its business, including driving traffic to Vision Direct's website and generating new and repeat sales. IDF 542-

warrant display. Id. In addition, parties to the Challenged Agreements consistently testified that, absent the agreements, they would bid, or test bidding, on 1-800 Contacts' trademark terms and/or remove negative keywords from their advertising accounts. IDF 590 (AC Lens), 595 (Empire Vision), 616 (Lenses for Less), 630 (Vision Direct), 634-35 (Walgreens), 650 (Web Eye Care).

Respondent argues that the Challenged Agreements prohibit ads for only a small number of searches. RAB 17. That argument is contradicted by the evidence. The volume of searches for 1-800 Contacts' trademark terms is significant. Based on the comScore dataset of searches by users for the period July 2013, through July 2016 (the "comScore dataset")[35] analyzed by Complaint Counsel's expert witness, Dr. Susan Athey, 17 percent of search queries for contact lenses were for 1-800 Contacts' trademark terms. IDF 657. The volume of searches for 1-800 Contacts' trademark terms in the comScore dataset was similar in size to the collective volume of searches for the top three generic terms ("contact," "contact lenses," and "contacts"). IDF 658-59. The 1-800 Contacts search term is the largest, single brand-name search term, according to the comScore data analyzed by Dr. Athey. IDF 660.

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search orders through Google and click

neither ignore nor defer to the parties in assessing the form and scope of an agreement in reverse payment cases because, indeed, the form and scope of the agreement is at the very core of how parties make a reverse payment. By asking us to simply defer to the parties to a settlement, we fear that the Dissent essentially advocates for application to cases at the intersection of antitrust and trademarks a version of the "scope of the patent" test that was rejected in *Actavis*. We decline to follow that suggestion.

This examination of the context of the particular advertising restraints in the Challenged Agreements demonstrates that anticompetitive effects are likely. Economics and prior cases counsel that the challenged advertising restrictions prevent consumers from obtaining information that would permit price and service comparisons. The record evidence showing the significance of search advertising and searches for 1-800 Contacts trademark terms in particular, the price competition offered by 1-800 Contacts' rivals, and the consumer responses to online competitors' ads generated by searches for 1-800 Contacts trademarks confirm that the Challenged Agreements are "indeed likely, in [this] particular context, to harm competition." *Polygram*, 136 F.T.C. at 348.

4. 1-800 Contacts' Response to Complaint Counsel's Showing of Anticompetitive Effects

1-800 Contacts responds to Complaint Counsel's showing that the restraints are inherently suspect and likely to have substantial anticompetitive effects by challenging the distinguish between paid search ads and organic results. Respondent does not identify any record evidence demonstrating that consumers' purchasing behavior in response to search ads generated by 1-800 Contacts' trademark terms differs from their response to other advertising. Nor does Respondent identify any other market effects that differ from other contexts. As previously discussed, consumers respond to the presence of rivals' contact lens ads by clicking on the ads and converting those clicks to sales, even if some consumers are performing navigational searches. IDF 710-19, 723-31. Thus, when consumers are presented with information that informs them of alternative online sellers offering lower prices, they respond to advertising in this market the same way that they do elsewhere.

Respondent similarly argues that the economic literature has not looked specifically at paid search advertising, which involves "complexities" in the algorithms employed by search engines. RRB at 22. Although the algorithms underlying the search auctions are complex, the behavior of consumers and advertiser-sellers in response to this type of advertising is the same as for other types of advertising. Respondent identifies no differences in the responses of market participants, so the fact that economic studies did not specifically examine search advertising does not affect their relevance. As the D.C. Circuit has explained, condemnation of a particular horizontal restraint as inherently suspect looks only for "the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37.

Finally, Respondent argues that a finding that the settlement agreements are inherently suspect is inconsistent with the Supreme Court's opinion in *Actavis*. See RRB at 22. We disagree. *Actavis* does not stand for the proposition that no restriction in a settlement agreement—even an intellectual property settlement agreement—can be inherently suspect. Indeed, the Supreme Court has often concluded that restraints embedded in settlement agreements are unlawful without resorting to a full rule-of-reason analysis. *See Singer Mfg.*; *New Wrinkle*; *U.S. v. Masonite Corp.*, 316 U.S. 265 (1942). Rather, *Actavis* describes how to analyze the reverse payment settlements there at issue. It says that H Tf (or)3 (t)-2 0.-4 (e Tc 0 Tw 6.32 0 6 w)2 (i)-< (.S)-n1 1

Rather, "‘[t]here is always something of a sliding scale in appraising reasonableness,’" and as such "‘the quality of proof required should vary with the circumstances.’" Id. (quoting California Dental, 526 U.S. at 780) (internal citations omitted). The Court stressed: "As in other areas of law, trial courts can structure antitrust litigation so2 (n)m-.002 Tw t(l)-2 (i2 (i)-d, 2 (( )-1(h t)-2

a. Avoidance of Litigation Costs through Settlement

Although Respondent has identified litigation cost savings, it has not demonstrated that these cost savings would have procompetitive effects. Respondent must provide "some explanation connecting [its] practice[s] to consumers' benefits." *Chicago Prof'l Sports, L.P. v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992); *see also Polygram*, 136 F.T.C. at 345 (describing legitimate justifications as "reasons why the practices are likely to have beneficial effects for consumers"). But Respondent provides no basis for finding that the litigation cost savings would be passed through to consumers or would otherwise benefit competition in a way that could offset the anticompetitive effects. Capital savings are not cognizable efficiencies in and of themselves, though they may be cognizable if defendant demonstrates that avoidance of capital expenditures provides a tangible, verifiable benefit to consumers by lowering prices or improving service quality. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016). "While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws." *Law*, 134 F.3d at 1023. Respondent has not demonstrated that the litigation cost savings provide benefits to consumers that could or would offset the competitive harms attributable to its conduct.

Moreover, the litigation settlement justification is at most partial. It has no bearing whatsoever on the Luxottica Sourcing and Services Agreement. That agreement involved no litigation, no settlement, and no litigation cost savings.[38]

The Dissent argues that our decision errs by failing to account for saved litigation costs that do not result in cost savings to consumers. The Dissent claims that our analysis contradicts *Actavis*, which it believes accommodates any saved litigation costs—irrespective of whether the savings passed down to consumers or not. Though not openly stated, the Dissent asks us to take up the total welfare standard for evaluating efficiencies, which does not require a showing of how the proffered efficiency benefits consumers.[39] We, however, believe the sounder approach—and the approach that is most consistent with long-standing antitrust practice—would be to ensure that if consumers are harmed by the challenged restraints, Respondent should be required to explain and detail how its restraints actually benefit consumers. The Dissent advocates skipping that step; we decline.

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[38] Section III.B of the Dissent offers considerations that might justify the challenged restraints in the Luxottica Sourcing and Services Agreement. But Respondent did not assert these potential efficiencies as procompetitive benefits and consequently did not attempt to carry its burden of establishing them. Nor has Respondent argued or submitted evidence that the challenged restraint is an ancillary restraint saved by the Luxottica Sourcing and Services Agreement.

[39] *See* Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSP. 155, 157 (2007) ("The proper objective of antitrust should be total surplus, not consumer surplus.").

b. Trademark Protections

Respondent and the Dissent argue that 1-800 Contacts' agreements facilitate trademark protection, which allows retailers to market products in a way that reduces the likelihood of consumer confusion and incentivizes brand-building. Both maintain that brand-building, in turn, assures consumers of consistent quality and reduces consumer costs of making purchasing decisions. Respondent's Post-Trial Brief at 36-38, 45; Dissenting Statement at 22-24. Although trademark protection can be a legitimate justification, it does not justify the restraints challenged in this case.

To overcome Complaint Counsel's showing of anticompetitive effects, Respondent must show that trademark protection is more than a procompetitive justification in theory and is, in fact, a valid justification for the restraints challenged here. See Polygram, 136 F.T.C. at 349 (explaining that if the respondent fails to refute the plaintiff's detailed showing of competitive harm, the respondent has the burden of showing that "detailed evidence supports its proffered justification"); Mass Board, 110 F.T.C. at 604 (requiring a showing that "the justification is really valid"). We find that Respondent has not carried that burden.

To establish a federal trademark infringement claim under either Lanham Act § 32 (15 U.S.C. § 1114) or § 43 (15 U.S.C. § 1125(a)), a plaintiff must show that use of its mark is likely to cause consumer confusion as to the source, affiliation, or sponsorship of a company's products or services. Scott Fetzer Co. v. House of Vacuums, Inc., 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); id. § 1125(a)); A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 210 (3d Cir. 2000). Confusion must be probable, not merely possible, id., and use of the mark must be likely to confound an "appreciable number of reasonably prudent purchasers exercising ordinary care." Boston Duck Tours, LP v. Super Duck Tours, LLC, 531 F.3d 1, 12 (1st Cir. 2008) (quoting Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir. 1996)) (internal quotation marks omitted); see also Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1151 (9th Cir. 2002); Savin Corp. v. Savin Grp., 391 F.3d 439, 456 (2d Cir. 2004).

Although claims based on keyword bidding have sometimes withstood dispositive motions,[40] apart from a single district court summary judgment decision from over ten years ago,[41] no court has found bidding on trademark keywords to constitute trademark infringement, absent some additional factor, such as a misleading use of the trademark in the ad text that confuvf thr6f .o ( )Tj -0.00c -1 th]TJ ( )Tcfnffou t2.32 0 Td fmTs, “[c]ourts have consistently rejected the notion that buying or creating internet search terms, alone, is enough to raise a claim of trademark infringement.” Tempur-Pedic N. Am., 2017 WL 2957912, at *7 (holding, on motion for preliminary injunction, that “[b]ecause the court has concluded that the purchase of AdWords alone, without directing consumers to a potentially confusing website, is unlikely to cause customer confusion, the AdWords will not be included in the injunction”); see Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc., 2015 WL 5311085, *50 (C.D. Cal. Sept. 10, 2015) (“There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.”).[43] Indeed, Respondent lost the one

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1266 (S.D. Fla. 2016) (“[Plaintiff] points to no case indicating that the simple purchase of advertising keywords, without more, may constitute initial interest confusion. . . .”).

[43] See also, e.g., USA Nutraceuticals, 165 F.Supp.3d at 1274 (denying motion for preliminary injunction; “consumers viewing the advertisements are unlikely to be confused as to what, if any, relationship or affiliation exists” between plaintiff and defendant, as the advertisement “makes clear [who] is the proponent of the particular product”); Novation Ventures, LLC v. J.G. Wentworth Co., LLC, 2015 WL 12765467, at *8 (C.D. Cal. Sept. 21, 2015) (granting motion to dismiss; “[i]f a consumer conducts an Internet search for the term ‘Novation’ and Defendants’ advertisements appear in the search results — again, labeled with the word ‘Ad’ – it would not confuse consumers.”); Infogroup, Inc. v. DatabaseLLC, 95 F. Supp. 3d 1170, 1190-91 (D. Neb. 2015) (denying motion for preliminary injunction; no likelihood of success on claim based on keyword bidding where ads “do not use [plaintiff’s] marks in the advertisement itself, and each is either separated from the search results or plainly labeled as a sponsored advertisement”); Goldline, LLC v. Regal Assets, LLC, 2015 WL 1809301, at *3 (C.D. Cal. Apr. 21, 2015) (granting motion to dismiss claims based on keyword advertising; “there is simply nothing stated, that if deemed true, constitutes [a] commercial use that would likely cause confusion as to the origin or affiliation”); Infostream Grp., Inc. v. Avid Life Media Inc., 2013 WL 6018030, at *5 (C.D. Cal. Nov. 12, 2013) (granting motion to dismiss; “[plaintiff] cannot plausibly claim that [defendant’s] mere use of keywords caused any consumer confusion”); Allied Interstate LLC v. Kimmel & Silverman, P.C., 2013 WL 4245987, *6 (S.D.N.Y. Aug. 12, 2013) (granting defendant’s motion for judgment on the pleadings; display of ads “is an ina1u12 (a)-7.8 (1.003)2.7 (l u)-7 (s)(a)4

infringement case that it pursued to judgment. See 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229 (10th Cir. 2013) (affirming, in relevant part, summary judgment in favor of defendant). As the appellate court explained:

> Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.

Id. at 1245. Despite the accumulating evidence regarding the weakness of trademark pat th esth,tr.

The justification for including negative keywords in the agreements is even weaker. Not only is there a lack of support for a finding of confusion, discussed above, but no court has ever found that bidding on a generic keyword (like "contacts"), which may be broad or phrase matched by the search engine to a trademark search, is even a "use." On the contrary, in the 2010 decision rejecting Respondent's case against Lens.com, the district court stated:

> It is beyond dispute that a competitor cannot be held liable for purchasing a generic keyword to trigger an advertisement that does not incorporate a holder's mark in any way, even if that competitor's advertisement appeared when a consumer entered a trademarked search term.

Lens.com, 755 F. Supp. 2d at 1174 (emphasis in original).[45] Because there is no support for a trademark infringement claim based on a failure to designate negative keywords, Respondent has failed to establish that protecting trademark rights justifies negative keyword agreements between competitors.

Given the inherently suspect nature of Respondent's advertising restraints and Complaint Counsel's more detailed showing of likely competitive harm to consumers in the particular context at hand, Respondent's failure to establish a basis in fact for its asserted procompetitive justifications—a showing that they are valid as well as plausible and cognizable—provides a further basis for condemning its conduct. Even if there were no less restrictive alternatives, Respondent has not established that its anticompetitive restraints in fact have procompetitive virtues. We conclude that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

The Dissent criticizes this Opinion for classifying the challenged restraints as inherently suspect. The Dissent asserts that we have not analyzed the challenged agreements under the rule of reason and therefore risk suppressing procompetitive conduct. These criticisms are misplaced. We rely on the Polygram framework because the challenged restraints are of a type that have been routinely condemned as inherently suspect, and Polygram furnishes a well-crafted framework for analyzing such restraints. But we also recognize that there may be plausible, cognizable justifications for trademark settlements. In fact, we consider Respondent's specific evidence in support of those procompetitive justifications and ultimately find the evidence wanting. We also

about the effects of the professional advertising restrictions" as the basis for concluding that "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown").

We find Respondent's and the Dissent's reliance on California Dental misplaced because there is no similar concern that consumers may be unable to assess the information contained in advertising for the sale of contact lenses. The record shows a focus on price advertising by many of 1-800 Contacts' online rivals. See IDF 587, 591, 603, 611, 646; Holbrook, Tr. 1904. When consumers have a prescription and are shopping for contact lenses, the lenses they purchase are identical—by prescription, brand name, and even type (e.g., daily or biweekly)—regardless of the retailer. IDF 24-25. For such commodity products, consumers can comparison shop. In fact, the Fairness to Contact Lens Consumers Act, which requires prescribers to provide a patient with a portable copy of his or her prescription, "promotes competition in retail sales of contact lenses by facilitating consumers' ability to comparison shop for contact lenses." FTC Contact Lens Rule, 81 Fed. Reg. 88526 (Dec. 7, 2016) (review of Rule). Congress apparently had no concern that consumers would be unable to assess competing offers and prices for contact lenses.

Restricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm. As the Supreme Court explained in IFD, "a concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough ( )-10 (e)4 (lto (v
yi(r)3m r6-2i r6a(n)-4 iulya(n)-4 (n)-4 h T* [e ((r)3i r6)-v(y)-1al(i6 (4 (5.e)41 (2)(0.9-2 ad T* [4 (5)4 a ((rr

Two models presented by Complaint Counsel's experts predicted the but-for world without the advertising restrictions. Similar to the Google data, they show that the advertising restrictions here substantially reduce truthful advertising provided to consumers. Professor Susan Athey constructed a two-stage model of the but-for world. In the first stage, based on data from the current, actual world, a multinomial logistic regression model predicts consumer click behavior when a consumer conducts a Google search related to contact lenses. The model considers variables for the consumer appeal of the advertised brand, the position of the ad on the SERP, whether the ad is for the seller searched for by the consumer, whether the ad is for 1-800 Contacts, and the propensity of the consumer to click on any ad. Athey, Tr. 766-72. In the second stage, Dr. Athey constructed the ad layout that a consumer would be likely to see in response to a search for 1-800 Contacts if rivals were free to bid on such search terms. That ad layout assumes that, without the advertising restraints in the Challenged Agreements, the SERP triggered by a search for 1-800 Contacts would be similar to the SERP triggered by queries such as "contact lenses" or "contacts." Dr. Athey then applied the model of consumer click behavior from the first stage to the ad layout in stage 2. Dr. Athey's model predicted that, absent the Challenged Agreements, the number of competitors' ads appearing on a SERP would increase from 0.54 to 1.85 per search, IDF 749, and consumer clicks on those ads would increase by 3.5 clicks per 100 searches. IDF 750.[46]

Complaint Counsel's expert, Professor David Evans constructed a model using a different data set and different methodology that produced results consistent with Dr. Athey's findings. One of Dr. Evans' empirical studies relies on the bidding experience of Memorial Eye, an online retailer that offered prices significantly lower than those of 1-800 Contacts. See IDF 693. Its advertisements to consumers heavily promoted its low pricing. Holbrook, Tr. 1904. Unlike most online competitors, Memorial Eye continued to advertise against 1-800 Contacts for several

[46] The Initial Decision lists criticisms of Dr. Athey's model by Respondent's expert, Dr. Anindya Ghose, ID at 158-59, and, without substantive discussion, summarily concludes, "Although Respondent has identified some valid concerns regarding the underlying assumptions of . . . the Athey model . . . Respondent's criticisms do not warrant the conclusion that the model] [is] so faulty that [it] should be rejected entirely as unreliable." ID at 160. The Initial Decision gives no indication which criticisms were valid and does not address Dr. Athey's responses to the criticisms. We reject the ALJ's conclusory statement.

Our substantive review of Dr. Ghose's criticisms reveals that the concerns are not valid. Dr. Ghose criticized the model for using searches for generic terms as a proxy when creating ad layouts in the counterfactual world. In response to the criticism, Dr. Athey conducted reasonableness and robustness checks on modified ad layouts. Those checks show that the results Dr. Athey reported are robust, and actually are conservative. See CX8010 (Athey Rebuttal Report) at 033-35. Dr. Ghose also claims the appearance of ads by non-settling retailers in the counterfactual shows faulty assumptions. Dr. Athey explains that their appearance does not affect the results because the number of instances is not significant. Id. at 037-038. Dr. Ghose contends Dr. Athey's model does not consider whether the settling parties increased advertising spending on generic searches when they could not bi (en)8 (t)2 years after it was contacted by 1-800 Contacts and later sued. Thus, there is a data set showing the extent to which Memorial Eye ads appeared on SERPs generated by search queries for 1-800 Contacts' trademark terms[47] and whether those ad impressions led to consumer clicks for Memorial Eye. See CX8006 (Evans Expert Report) at 091-092. Based on the data for Memorial Eye, Dr. Evans projected the number of ads and clicks that would have resulted for the complete set of online rivals that were subject to the advertising restrictions. Dr. Evans' model estimated that, absent the Challenged Agreements, between January 2010 and June 2015, 114 million additional ads for competitors would have been displayed in response to queries containing 1-800 Contacts' trademark terms. IDF 755. The model also estimated that, absent the Challenged Agreements for the same period, clicks for 1-800 Contacts' competitors' ads would have or7(r)075. 077.

ten selling products for the period 2010 to 2016); see also CX8003 (Mitha Decl.) at ¶ 4 ("In general, 1-800 Contacts' prices are higher than Lens Discounters' by a significant amount. In the past, we have found that 1-800 Contacts' prices were almost double Lens Discounters' prices for some products.").

On the facts of this case, we find the evidence that the Challenged Agreements insulate 1-800 Contacts from normal competitive forces and divert sales from low-priced sellers to a high-priced seller is direct evidence of an increase in price. The higher prices that consumers are paying do not reflect a producer selling a differentiated product, such as a product with new technology or additional features that offer more than the products of low-priced sellers. Instead, the higher prices are a consequence of 1-800 Contacts shielding itself from competitive pressure by preventing consumers from obtaining information that would enable comparison shopping. The economic principles and evidence regarding consumer search previously discussed, see supra Section V.A.1, provide the explanation. The record shows that many consumers are unaware of the price difference between 1-800 Contacts and its online competitors. IDF 694 (citing RX1228 at 36 (based on a consumer survey, AEA analysis stated, "Actual price variances [are] much more than perceived price variances")). Restricting the advertising presented to such consumers at the critical time when they are about to make a purchase impedes their ability to compare prices, which leaves them unaware of alternatives to 1-800 Contacts' higher-priced products.

Further evidence that the Challenged Agreements had actual price effects comes from 1-800 Contracts' price-matching policy, whereby it offered to meet or beat any price offered by online, or certain other, rivals. See IDF 436 (in 2011 1-800 Contacts' ad copy stated "We Beat Any Online Price"), 437 (referencing 1-800 Contacts' policy in 2014 to meet or beat rivals' prices), 438 (quoting 1-800 Contacts' 2016 policy stating, "We'll beat any price on every product we carry by 2%"). But to take advantage of the price matching policy, a customer had to contact 1-800 Contacts. IDF 439. By reducing rivals' ads and consumer clicks on those ads, the settlement agreements necessarily reduced access to the type of information that consumers needed to trigger 1-800 Contacts' price matches.

a. Respondent's Challenges to the Direct Evidence

Respondent and the Dissent challenge the direct evidence of anticompetitive effects on several grounds. First, Respondent argues that Complaint Counsel have presented only the theories of experts, not direct evidence of price effects. We reject this characterization. The opinions of Complaint Counsel's experts derive from the facts in the record and econometric analysis of those facts. The experts use known facts to quantify the impact of the advertising restrictions on the ads that would otherwise appear and on the consumer responses—including clicks and purchases—thereto. They provide empirical evidence, not economic theory isolated from facts, and the underlying facts are in the record.

Respondent and the Dissent next challenge the premise of higher prices, arguing that 1-800 Contacts offers a higher quality of service, so there is no reason to conclude that its prices are higher on a quality-adjusted basis. RAB at 25-26. Certainly, customer service can be a differentiating factor when a firm sells a commoditized product. See CX8007 (Athey Expert Report) at 015. But the record shows that without the Challenged Agreements, consumers would have shifted purchases from 1-800 Contacts to its rivals, which reveals customer preferences for the price/quality combination offered by rivals.[51] At least for these customers, 1-800 Contacts was offering a higher price, even after adjusting for quality.

Other aspects of the record show that 1-800 Contacts' service levels do not fully explain its higher prices. Professor Athey testified that "[D]irect facts and market data that support that there is a price premium [for 1-800 Contacts] and that that price premium is not fully accounted for by service differentials." IDF 740 (quoting Athey, Tr. 797). This testimony reflects numerous market facts.

Other online sellers judge that they offer comparable service to 1-800 Contacts. See, e.g.,

; CX9039 (Clarkson Dep.) at 88 (AC Lens president testifying that AC Lens is "pretty fanaticct 74.cac 0 Tw -9.4hvo (r(y)228<d (a

doubt that its service level is sufficient to justify the price premium. See, e.g., CX1086 (email expressing concern that ads by lower priced competitors would lead to reduced 1-800 Contacts sales; comment in the email chain states, "The only other option I see is trying to convince customers that our existing prices are better than they really are or worth the cost. Tough challenge considering that we sell the exact same thing as everyone else."). Similarly, some of 1-800 Contacts' documents question the firm's supposed quality advantage. See CX1117-022 ("Other online suppliers achieve satisfaction scores as high as us"). Finally, the need for 1-800 Contacts to offer a price-match policy suggests that the service differential is insufficient to offset the price premium.

Respondent and the Dissent also argue that Complaint Counsel have not shown that 1-800 Contacts' price was supracompetitive. RAB at 22. We find Complaint Counsel's showing sufficient. Proof of an anticompetitive effect does not require an econometric model to estimate a precise competitive price in order to establish that the existing price is supracompetitive. Complaint Counsel have, in fact, shown that the price consumers paid was higher with the Challenged Agreements than it would have been had the market been allowed to function without the advertising restraints. In addition to the direct evidence of actual effects discussed above—the diversion of pur Td [(dte)4 (—t)-2 (l)-2 suwetsTd [()2 (e)6 precp s-002 Tw T* [(s

b. Respondent's Procompetitive Rationales for the Advertising Restraints

Respondent may rebut Complaint Counsel's prima facie case by establishing procompetitive justifications that outweigh the anticompetitive harms. Respondent has identified two justifications—the settlement of costly litigation and trademark protection—that we have found cognizable and facially plausible. See supra Section V.A.2. But, as discussed above in our analysis of the challenged restraints as inherently suspect, Respondent fails to sufficiently support its asserted justifications, and Complaint Counsel have demonstrated that the challenged advertising restraints are not reasonably necessary to achieve the asserted benefits. See supra Sections V.A.5 and V.A.3.a. In these circumstances, direct evidence of anticompetitive harm provides a second, independent basis for concluding that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

Absent a valid procompetitive justification, this provides a third, independent basis to find liability in this case.

Under the terms of the Challenged Agreements, 1-800 Contacts and its online rivals agreed to refrain from bidding in particular search-advertising auctions. Online rivals agreed not to bid when the consumer's search is for 1-800 Contacts' trademark terms, and 1-800 Contacts reciprocally agreed not to bid on the trademark terms of its rivals. The Challenged Agreements thus reduce the number of bidders participating in the auctions because the parties have agreed not to compete.

The record shows that the Challenged Agreements resulted in actual harm to search engines. Witnesses from both Google and Bing explained that a reduction in the number of search-advertising auction participants offering relevant ads[55] reduces the price paid by the auction winners and reduces the revenue for the search engine. Google's Director for Ads Quality testified that when advertisers that previously appeared on the SERP stop appearing,

Juda, Tr. 1157, in camera. Bing's partner scientist in charge of Bing Ads similarly stated,

be condemned as a per se offense. See, e.g., United States v. MMR Corp., 907 F.2d 489, 496 (5th Cir. 1990) (finding no conceptual distinction between bidding high and "backing away from bidding" as means for carrying out a potentially per se illegal agreement to rig bids); COMPACT v. Metro Gov't, 594 F. Supp. 1566, 1575-77 (M.D. Tenn. 1984).

[55] As we previously discussed, Respondent has adva.001 Tw T-0.006 Tc 0.0 -16.25 -2 DRv dievt.t (t)2.8 0 Td ( )Tj t4 (vt a.)

CX8005 (Iyer Decl.) at 006, in camera, IDF 243.

are a result of agreements with its competitors not to bid at auctions, and cause a competitive injury to the search engine.[56]

agreements that are inconsistent with the Order. ID at 203 (ALJ Order Paragraph III). The ALJ's Order contains a number of notification requirements in connection with Respondent's future litigation and settlements. ID at 203 (ALJ Order Paragraph IV).

Respondent argues that the ALJ's Order encroaches on Article III courts' authority to enforce the existing settlements. It asks the Commission to delete all restrictions in the ALJ's Order on continued judicial enforcement of the existing settlements, while only barring 1-800 Contacts from entering into similar agreements in the future without judicial approval. RAB at 42-43. Respondent also argues that the ALJ's Order violates 1-800 Contacts' Fifth Amendment rights by retroactively depriving it of the ability to enforce its trademark rights, in violation of the Due Process and Takings Clauses. RAB at 43-45.

Complaint Counsel also ask the Commission to modify the ALJ's Order. CCB at 47-50. They urge the Commission to restore the original language that they had proposed for the carve-out and that the ALJ subsequently changed. Specifically, they would remove the language that provides that the ALJ's Order does not prohibit Respondent from implementing or enforcing the order entered by any court of law, "including an order approving a litigation settlement," and would replace this with language providing that the Commission's Order does not prevent Respondent from implementing or enforcing the order issued by any court of law "at the conclusion of a contested litigation." Id. at App. B ¶ II.A

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by the Act") (quoting Kelly v. Kosuga, 358 U.S. 516, 520 (1959)). Moreover, under the FTC Act, the Commission is directed to prevent "persons, partnerships or corporations . . . from using unfair methods of competition in and affecting commerce," 15 U.S.C. § 45(a)(2) (emphasis added), and, upon finding a violation, "shall issue and cause to be served on [the respondent] an order requiring such person, partnership or corporation to cease and desist from using such method of competition . . . ." 15 U.S.C. § 45(b) (emphasis added). Given that the Commission has found that Respondent's agreements violate the FTC Act, an order directing Respondent to cease enforcing the unlawful provisions is consonant with, and indeed integral to, the governing statutory scheme.

Respondent also claims that the Order violates its Fifth Amendment rights. Specifically, Respondent asserts that condemnation of the Challenged Agreements establishes a new trademark rule, and retroactive application .02 .83 0 Td ( )Tj 1F002 Tc -0.002 Tw 1o1.-6 (i)-5.9 7.86 0 .r if the defendant's circumstances have changed, are common. See, e.g., ProMedica Health Sys., Inc., 2012 WL 2450574, at *66-67 (F.T.C. June 25, 2012) (ordering divestiture after consummated merger notwithstanding the costs of unwinding already-consolidated services), petition for review denied, 749 F.3d 559 (6th Cir. 2014). Indeed, the Supreme Court confirms that "both within the settlement context and without, the Court has struck down overly restrictive . . . agreements." Actavis, 570 U.S. at 150.

Respondent asserts, in effect, that it has a constitutional right to continue to enforce illegal agreements in perpetuity. It does not. As the Supreme Court stated:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authosn3u.ly e.g -2 (i)-2 cb 0 Td [(ape)4 q 0 Tuu(n pe)4 4.8TJ l (i)-2 (t2)Tj 6.82 0 T 0 Td c2 (s)

order in a second way, designed to mitigate concerns that courts will issue anticompetitive decrees: he added a provision requiring Respondent to "[p]rovide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order." ID at 203 (ALJ Order be