UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DISSENTING STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS

The majority's decision in this case deems "inherently suspect" and then condemns agreements to settle legitimate trademark infringement litigation. Applicable precedent requires the more thorough rule of reason analysis, with more credence given to the intellectual property at the heart of the case. The majority make a separate holding that the settlements are anticompetitive based on a showing of direct effects, but the evidence upon which they rely fails, both as a matter of law and as a matter of fact, to meet the legal requirement that such effects must be actual, sustained, and significant or substantial. I fear the majority's approach will foster uncertainty and undermine trademark policy, and so I respectfully dissent.

Neither the necessary judicial experience nor economic learning exist to apply a truncated antitrust analysis to the facts of this case. A fair reading of relevant case law makes clear that the full rule of reason should apply to the trademark settlement agreements between 1-800 Contacts and thirteen alleged trademark infringers (the "Trademark Settlements").[1] In supporting their choice of analytical framework, the majority avoid entirely the fact that the agreements at issue settle intellectual property claims. They then judge and discard entirely the value of those claims, a methodological error with a result that judicial experience and economic learning have taught us for decades to avoid—i.e., an unclear rule that is difficult to administer and harder still to predict, and that may capture and will chill procompetitive behavior.

The majority couch their holding as a limited one dealing with restraints on the opportunity to make price comparisons—an overstated conclusion—but their decision not to

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[1] I use the phrase "Trademark Settlements" to refer to the agreements settling trademark infringement litigation between 1-800 Contacts and the following thirteen contact lens retailers: (1) AC Lens, (2) Coastal Contacts, (3) Contact Lens King, (4) Empire Vision, (5) EZ Contacts, (6) Lenses for Less, (7) Lensfast, (8) Memorial Eye, (9) Standard Optical, (10) Tram Data, (11) Vision Direct, (12) Walgreens, and (13) Web Eye Care. The phrase "Trademark Settlements" does not include the sourcing and services agreement between 1-800 Contacts and Luxottica (the "Luxottica Agreement") because that agreement did not resolve trademark infringement litigation and, therefore, should be analyzed separately. *See* Section III, *infra*.

grapple fairly with the trademark context of the agreements results in a rule that appears to be one of the following:

- all advertising restrictions are inherently suspect, regardless whether they protect intellectual property rights, a rule supported by the logic of the opinion but which the majority disclaim expressly; or
- a standard of review under which the Commission will review as inherently suspect settlements of what it considers weak trademark infringement claims, leaving open the question of how it will analyze infringement claims that the Commission adjudges to be strong.

The former rule will treat clearly pro-competitive conduct as presumptively unlawful. The latter will require the Commission and federal courts to litigate (or re-litigate) inherently fact-specific intellectual property infringement claims in every antitrust challenge to a settlement agreement, a difficult process we have long eschewed. It will also create uncertainty for parties considering settlement, deterring enforcement and, in the case of trademarks, reducing the incentive to build brands.

Precedent offers—indeed, requires—a better approach: apply the full rule of reason to antitrust challenges to trademark settlement agreements like those at issue here, giving appropriate credence to the fact that the conduct at issue is the settlement of legitimate (i.e., non-sham) trademark infringement claims. Such a rule would provide guidance to the market, increase certainty, encourage brand investment, and enhance competition.

I. Background

Jonathan Coon started the business that would become 1-800 Contacts in 1992 from his college dormitory room with just $50 to his name, seeking to reduce prices, improve service, and provide a better customer experience for contact lens consumers. IDF 30-33, 43;[2] Coon, Tr. 2649:9-12, 2651:12-20. Over the next 26 years he would succeed, building a company (and a brand) from essentially nothing to one of the largest contact lens retailers in the country, while introducing American consumers to mail-order contact lenses (and later ordering contacts online), driving down prices, and attracting competition from small and large companies alike. That growth required a combination of a massive investment in advertising and a constant quest to improve the customer experience. That is the type of conduct that antitrust and trademark law should, and do, encourage.

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[2] For the sake of convenience and consistency, I use the same abbreviations as the majority for the following documents:

Compl.:	Complaint
ID:	Initial Decision
IDF:	Initial Decision Finding of Fact
Stip.:	Joint Stipulation Regarding Search Engine Mechanics and Glossary of Terms
RAB:	Respondent's Brief on Appeal

I also use the following abbreviations in citations:

Op.:	Opinion of the Commission
IH:	Investigational Hearing

A. 1-800 Contacts Invested a Tremendous Amount to Build Its Brand.

Trademarks encourage innovation and brand investment, giving more information to customers and attracting competition. *See* Section II(A)(4)(b), *infra*. 1-800 Contacts has a long history of taking risks to invest in its brand. In July 1995, when Mr. Coon and his business partner John Nichols renamed their company 1-800 Contacts and obtained the associated telephone number, the company's sales more than doubled in the first month. IDF 36-37; Coon, Tr. 2654:13-19, 2658:19-25, 2661:20-2662:16. It cost Mr. Coon and Mr. Nichols approximately $163,500 to obtain the telephone number "1-800-CONTACTS", but they only had $10,000 in the bank at the time, so they used that entire sum to make an upfront payment and agreed to pay the remainder in monthly installments of approximately 10% of the company's total monthly revenue. Coon, Tr. 2658:19-2660:25.

After it started marketing itself as 1-800 Contacts, the company saw an increase of 20% to 25% in customer acquisition and retention. IDF 51. The initial advertising campaign was in print, but shortly thereafter the company started advertising on television. IDF 50, 52. Television advertising had an immediate and significant impact, growing the business by approximately 50% in just a few months. IDF 53. Ever since, television has generally been the largest category of marketing spend in 1-800 Contacts' advertising budget. *See* RX0739 (Murphy Expert Report) at 092.

1-800 Contacts' approach to promoting itself was—and continues to be—designed to generate brand awareness and new orders through "a multichannel integrated marketing" strategy. IDF 60-61. This strategy has included "print advertising, television advertising, radio advertising, internet display advertising, affiliate marketing, social media advertising, and search engine optimization, in addition to internet search advertising." IDF 62.

Of particular relevance to this case, there is a positive correlation between 1-800 Contacts' television advertisements and traffic to 1-800 Contacts' website via searches for its trademarked terms. IDF 63; CX9017 at 045 (Blackwood Dep. 176:2-12); CX9032 at 063 (L. Schmidt Dep. 246:25-247:13); RX0736 (Goodstein Expert Report) at 008; *see also* CX9031 at 025-026 (C. Schmidt Dep. 95:25-97:15) (testifying that 1-800 Contacts saw an increase in the amount of paid search advertising on its trademarked terms in response to broad scale advertising, such as television and radio). Research conducted by 1-800 Contacts found that 40 percent of the traffic to its website from paid trademark search was directly related to television advertising. CX9017 at 059 (Blackwood Dep. 230:1-23).

1-800 Contacts has spent hundreds of millions of dollars to generate brand awareness and new orders. From 2002 to 2014 (just 13 of the 26 years the company has existed), 1-800 Contacts spent more than [redacted] on advertising, of which [redacted] (or more than [redacted]%) went to television advertising and almost [redacted] (or [redacted]%) to all internet advertising (not just paid search advertising). IDF 64-65; RX0739 (Murphy Expert Report) at 092. In 2014 alone (the most recent year for which data is available), 1-800 Contacts' marketing budget was [redacted]; [redacted] (or [redacted]%) of that total budget went to television advertising and [redacted] (or [redacted]%) to all internet advertising (not just paid search advertising). IDF 64-66; RX0739 (Murphy Expert Report) at 092. As these numbers show, television is 1-800 Contacts' principal means of advertising because it drives growth in terms of brand awareness and identifying and finding customers. *See* CX9001 at 016-017 (Bethers IH 60:15-61:3). Other online contact lens retailers generally have not invested in broad scale (e.g., television) advertising. CX9029 at 004 (Bethers Dep. 10:3-11:13); CX9035 at 023 (Coon Dep. 88:2-6); RX0736 (Goodstein Expert Report) at 009; *see also* Bethers, Tr. 3614:15-24 ("[W]e don't see anyone that invests in broad-scale advertising like us [1-800 Contacts]").

Paid internet search advertising through Google comprised between [redacted]% and [redacted]% of 1-800 Contacts' total advertising budget between 2004 and 2014.[3] *See* IDF 66; RX0739 (Murphy Expert Report) at 027-028, 092, 140. Paid search advertising through Google using 1-800 Contact's trademarked terms constituted no more than [redacted]% of 1-800 Contacts' total advertising budget and no more than [redacted]% of 1-800 Contacts' paid search advertising expenses in any year between 2004 and 2014.[4] RX0739 (Murphy Expert Report) at 027-028, 092, 140. In 2014 (the most recent year for which data is available), paid search advertising through Google constituted [redacted]% of 1-800 Contacts' total advertising budget of [redacted] and paid search advertising through Google on its trademarked terms accounted for [redacted]% of that total budget (and only [redacted]% of 1-800 Contacts' expenses on paid search advertising). RX0739 (Murphy Expert Report) at 027-028, 092, 140.

This massive endeavor—the kind of conduct trademark law is intended to foster—did more than benefit 1-800 Contacts: it pioneered the mail-order contact lens business and then the online contact lens business to the direct benefit of consumers in the form of reduced prices and increased convenience and choice.

B. 1-800 Contacts Has Been Committed to Improving the Customer Experience Since Its Founding.

As Administrative Law Judge D. Michael Chappell (the "ALJ" or "Judge Chappell") found in the Initial Decision, "1-800 Contacts' business objective from the company's inception was to make the process of buying contact lenses simple and it tries to distinguish itself from other contact lens retailers by making it faster, easier, and more convenient to get contact lenses." IDF 43; *see also* Coon, Tr. 2712:11-2713:7 (testifying that the company's strategy of distinguishing itself on service stemmed from a recognition that it would be easy for another retailer to match prices but it is very difficult to "create a brand and provide great service"). This contrasts with other online contact lens retailers, which generally do not seek to distinguish themselves on the basis of customer experience, customer service, or simplicity. *See* CX9029 at 004 (Bethers Dep. 9:12-11:13). 1-800 Contacts did not limit itself to competing on price because it found that many customers valued speed and convenience just as much as price. Coon, Tr. 2705:16 -2708:1; *see also* RX1117 at 028 [redacted].

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[3] 1-800 Contacts either did not spend money on paid search advertising in 2002 and 2003, or that data is unavailable. *See* RX0739 (Murphy Expert Report) at 092.

[4] As with paid search advertising, 1-800 Contacts either did not spend money on paid search advertising using its own trademarked terms in 2002 and 2003, or that data is unavailable. *See* RX0739 (Murphy Expert Report) at 092.

1-800 Contacts has made significant investments in providing high quality service to customers, including a dedicated call center, prompt shipping within two business days, quality control measures in inventory, prescription verification, and a 100% guaranteed return policy. CX9031 at 024 (C. Schmidt Dep. 90:2-92:3); Coon, Tr. 2690:20-2692:15. 1-800 Contacts stocks more contact lenses in inventory than any other contact lens retailer, which allows it to fill 98% of all orders from inventory on hand; answers most calls with a live person by the third ring and most emails within 10 minutes; has live customer support personnel available to answer text messages; offers click-to-chat customer service; and replaces torn lenses for free. IDF 44-46; Coon, Tr. 2690:20-2692:15; RX0904 at 016.

In addition, 1-800 Contacts designed its website with the same goals as Mr. Coons founded the company: to make the contact lens buying experience better for customers. *See* IDF 39. The website was as simple and efficient as possible, minimizing "the amount of time spent on the website and the number of clicks a consumer had to make to purchase contact lenses." *Id*. Over time, the company continued to improve its website and developed a mobile application to ensure that customers could purchase contact lenses as quickly and easily as possible. *See, e.g.*, IDF 40-42.

1-800 Contacts' relentless investment in its brand and in improving its customer service are recognized. Many third parties—including J.D. Power and Associates, StellaService Elite, and Foresee—have recognized or given awards to 1-800 Contacts for its customer service. IDF 47; *see also* RX0736 (Goodstein Expert Report) at 016, Table 2 (listing other awards received by 1-800 Contacts, including awards for its customer service). But that has not stopped 1-800 Contacts from continuing to invest in improving its service to enhance the customer experience. *See, e.g.*, IDF 48.

The service and brand investments made by 1-800 Contacts have resulted in millions of consumers purchasing contact lenses from 1-800 Contacts over the phone and online. They are precisely the types of investments that trademark law exists to protect and encourage. And, according to multiple witnesses, they created precisely the value that other retailers sought to derive by bidding on 1-800 Contacts' trademarked terms. *See, e.g.*, CX9033 at 017 (Mohan Dep. 61:9-12) (Walmart executive testifying that 1-800 Contacts' trademarks were more valuable as search terms "[b]ecause a lot more people know the brand."); CX9039 at 040 (Clarkson Dep. 155:25-156:8) (AC Lens executive testifying that the value it receives from paid trademark search advertising depends on the strength of the competitors' brand); *id*. at 026 (97:20-98:3) (noting 1-800 Contacts "unmatched brand awareness").

C. The Trademark Settlements Resolved Legitimate and Contested Trademark Infringement Claims.

1. The Context Surrounding the Trademark Settlements.

The Trademark Settlements resolved trademark infringement claims brought by 1-800 Contacts against certain other online contact lens sellers, which bought advertisements using 1-800 Contacts' trademarks as keywords—i.e., when consumers searched for "1-800 Contacts", the search engine would display advertisements for the other sellers. As early as 2002, online retailers of contact lenses expressed concern that bidding for advertisements using third parties' trademarks might be illegal. *See, e.g.*, IDF 583 ("In 2002, AC Lens decided not to use 1-800 Contacts' trademarks as keywords for paid search advertising because of legal concerns."); Clarkson, Tr. 325:6-23 (AC Lens executive testifying that "it was unclear to me what the legal situation was relative to advertising on other companies' trademarks" and that he had a concern about advertising on other companies' trademarks "for a long time"); CX9003 at 024 (Clarkson Dep. 90:21-91:10) ("I think I had a general sort of concern that [paid trademark search advertising] may not be legal anyway."). 1-800 Contacts itself had a policy that pre-dated the Trademark Settlements not to use other companies' trademarked terms as keywords to trigger paid search advertisements, in part attributable to a concern about the propriety of using other companies' trademarks as keywords. CX9031 at 016 (C. Schmidt Dep. 57:7-59:1); CX9001 at 027-028 (Bethers IH 104:4-105:20).

Prior to April 2004, Google—the largest search engine since before the first Trademark Settlements—did not permit advertisers to bid on keywords that contained a trademark owned by a third party. *See* IDF 137, 287. Microsoft, which owns Bing—the second-largest online search engine after Google—had the same policy until 2011. *See* IDF 298.

1-800 Contacts executives met with Google representatives in April 2004, the same month that Google changed its policy and began allowing advertisers to bid on the trademarks of other companies. *See* Schmidt, Tr. 2900:12-2901:1. At this meeting, 1-800 Contacts understood Google's position to be that while Google would no longer resolve trademark disputes directly, it offered negative keywords as an effective tool to prevent or inhibit future trademark infringement. Schmidt, Tr. 2904:2-16, 2905:16-25; CX9031 at 010 (C. Schmidt Dep. 33:20-34:21). Negative keywords prevent an advertisement from being triggered by the words or phrases comprising the negative keywords. Stip. at 2. According to 1-800 Contacts, Google representatives specifically suggested that 1-800 Contacts resolve its disputes directly with its competitors by telling them to implement 1-800 Contacts' trademarks as negative keywords. CX9031 at 010-011 (C. Schmidt Dep. 33:20-34:20, 36:13-37:3); CX9013 at 044-045 (Aston Dep. 170:8-20, 171:10-172:3, 173:5-20).

Following Google's policy change in April 2004, 1-800 Contacts continued to protect its trademarks vigorously because, among other things, failure to police a trademark could render a trademark unenforceable. Hogan, Tr. 3265:4-3266:9; *see also* RX0734 (Hogan Expert Report) at 013 (citing *Malaco Leaf, AB v. Promotion In Motion, Inc.*, 287 F. Supp. 2d 355, 364-65 (S.D.N.Y. 2003) ("[T]rade dress may become generic, meaning commonly used and not entitled to protection, as a result of the trademark owner's failure to police it") (citation, brackets, and quotation marks omitted); *Bachellerie v. Z. Cavaricci, Inc.*, 762 F. Supp. 1070, 1077 (S.D.N.Y. 1991) (failure of plaintiff to enforce its mark against third-party users "diminishes the strength of the mark")). Other trademark owners acted in a similar manner. *See* RX0734 (Hogan Expert Report) at 083-086; RX0926 at 001 (listing cases involving the "purchase of another party's trademark as a keyword for internet advertising"). Some of these attempts by trademark owners to protect their marks ultimately led to litigation.

In the initial years of paid search advertising litigation, between 2004 and 2009, it was unclear whether courts would recognize a cause of action under a theory that bidding on trademarked terms as keywords constituted a "use in commerce" under the Lanham Act, a critical predicate to establishing a trademark infringement claim. IDF 333; RX0734 (Hogan

Expert Report) at 059-060. Only three of the Trademark Settlements were signed during this period: Vision Direct (executed in June 2004), Coastal Contacts (executed in October 2004), and EZ Contacts (executed in May 2008). *See* IDF 306, 314, 344.

On April 3, 2009, however, the legality of 1-800 Contacts' competitors' bidding on advertisements with 1-800 Contacts' trademarks as keywords—precisely the conduct ended by the Trademark Settlements—became even more dubious when the Second Circuit issued an opinion holding that using trademarks as keywords in paid search advertising "fits literally within the terms specified by [the Lanham Act,] 15 U.S.C. § 1127" as a "use in commerce". *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 129-30 (2d Cir. 2009); *see also id*. at 127 ("The allegations of Rescuecom's complaint adequately plead a use in commerce.").

Following *Rescuecom*, federal circuit courts came to agree that bidding on trademarked terms as keywords for paid search advertising constituted a "use in commerce" for the purposes of trademark law, *see* IDF 333, eliminating a threshold defense in trademark infringement litigation. For advertisers bidding on other companies' trademarks, this shifted the focus to whether, in particular cases, the use was likely to cause confusion among customers, *see* IDF 333; Hogan, Tr. 3256:11-19, a highly fact-specific inquiry necessitating litigation. *See* Section II(A)(4)(a), *infra*. The legal risks rose, increasing the incentive for alleged trademark infringers to settle rather than endure a full trial on the merits, given the fact-specific nature of the inquiry into trademark confusion. *See, e.g.*, Hogan, Tr. 3260:21-3261:4.

In the wake of the *Rescuecom* decision and the resulting change in legal exposure, 1-800 Contacts entered nine of the thirteen Trademark Settlements between December 2009 and February 2011. IDF 348; CX0315 (Lensfast, Dec. 2009); RX0028 (AC Lens, Mar. 2010); CX0323 (Contact Lens King, Mar. 2010); CX0320 (Lenses for Less, Mar. 2010); CX0319 (Empire Vision, May 2010); CX0321 (Tram Data, May 2010); CX0322 (Walgreens, June 2010); CX0324 (Web Eye Care, Sept. 2010); RX0408 (Standard Optical, Feb. 2011).

One month after *Rescuecom*, 1-800 Contacts entered a second settlement agreement with Vision Direct to address Vision Direct's alleged violations of the 2004 settlement agreement for failing to implement negative keywords. *See* IDF 345-347; CX0314 at 004 ("The 2004 Settlement Agreement shall remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords shall be to comply with the terms of this Settlement Agreement."); *see also* CX0316 (Order of Permanent Injunction, *1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-cv-1949 (S.D.N.Y May 15, 2009)). Only one Trademark Settlement came after the initial wave of settlements following *Rescuecom*: Memorial Eye settled in November 2013, principally because of the legal uncertainty about its failure to implement negative keywords on 1-800 Contacts' trademarked terms. *See, e.g.*, IDF 349, 351; Holbrook, Tr. 1942:12-13 ("We knew that the [negative keyword] broad matching issue had not firmly been put to rest by the court."); CX9024 at 017 (Holbrook Dep. 63:13-18) ("We also knew that in the appellate court, I believe it was, that the appellate court had been silent on the [negative keyword] broad matching issue, which was to us the most important thing. It was a big deal. So there was a lot of legal uncertainty because of that still hanging out there."); *see also* IDF 617 (finding that Memorial Eye did not bid on 1-800 Contacts' trademarked terms as keywords in paid search advertising).

The Trademark Settlements resolved increasing legal risk for putative bidders on trademarked keywords. No one, even today, contends that the trademark claims asserted by 1-800 Contracts were shams or legal claims asserted to achieve an otherwise anticompetitive end. *See* RX0680 at 013 ("Complaint Counsel therefore does not contend that the lawsuits constituted 'sham' litigation as defined by the Supreme Court in *PRE*.") (referring to *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)); RX0678 at 008 ("Complaint Counsel does not contend that the lawsuit, *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, was Sham Litigation."); *id*. ("Complaint Counsel does not contend that the lawsuit, *1-800 Contacts, Inc. v. Lens.com*, was Sham Litigation."); *see also 1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 08-cv-983, 2010 WL 988524, at *6 (D. Utah Mar. 15, 2010) ("[T]he Court finds that Plaintiff's claim is not baseless"); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 12-cv-352, 2014 WL 12596493, at *1 (D. Utah Mar. 3, 2014) ("Because the district court and the Tenth Circuit agree that the underlying action was not baseless, this court agrees that Lens' claims, all of which center on the proposition that 1-800 engaged in sham litigation, should be dismissed with prejudice.").

2. The Relevant Terms Contained in the Trademark Settlements.

The Trademark Settlements resolved legitimate intellectual property infringement claims. They were bilateral: 1-800 Contacts entered each Trademark Settlement separately and with a single counterparty to protect each settling party's trademarks. No material amount of money changed hands.[5] Users who searched for 1-800 Contacts' trademarks would not see an advertisement for the other settling party (although they might see an "organic" search result, depending on relevance, *see* Stip. at 5). The parties were adjusting to an evolving market and increased legal risk, achieving by contract (with implementing guidance from Google)[6] what had previously been the stated policy of the two most popular search engines.[7] *See* CX9031 at 010-011 (C. Schmidt Dep. 33:20-35:2, 35:23-36:2, 36:13-37:3); CX9013 at 044 (Aston Dep. 172:1-3) ("They [Google] instructed us [1-800 Contacts] to have the offenders add those specific trademarked terms into their negatives for their -- for their AdWords campaigns."); *id*. at 044-045 (Aston Dep. 170:8-20, 171:10-19, 173:5-20). <u>First</u>, the Trademark Settlements prohibited both 1-800 Contacts and the counterparty from bidding on each other's trademarked terms as

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[5] Certain Trademark Settlements contained token amounts of monetary consideration, but nothing approaching the millions of dollars at issue in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), and always in the usual direction (i.e., from the defendant to the plaintiff). *See* CX0311 at 002 (Vision Direct paid $1 in monetary consideration in 2004); CX0313 at 002 (EZ Contacts paid $29,000 in monetary consideration); CX0314 at 001 (Vision Direct paid $475,000 in 2009 for "partial reimbursement of 1-800 Contacts' attorneys' fees"); CX0315 at 001 (Lensfast made a $20,000 payment); CX0323 at 001 ($8,000 payment by Contact Lens King); CX0324 at 001 ($2,000 payment by Web Eye Care); *cf. Actavis*, 570 U.S. at 145 ("[The branded manufacturer] agreed to pay millions of dollars to each generic"). None of the payments split monopoly rents, *cf. Actavis*, 570 U.S. at 154; indeed, the majority of Trademark Settlements had no monetary component. *See* CX0310 (Coastal Contacts); RX0028 (AC Lens); CX0320 at 002 (Lenses for Less); CX0319 (Empire Vision); CX0321 (Tram Data); CX0322 (Walgreens); RX0408 (Standard Optical); CX0326 (Memorial Eye).

[6] The April 2004 meeting between 1-800 Contacts and Google predated all of the Trademark Settlements, the first of which was executed in June 2004. *See* CX0311 (Vision Direct Trademark Settlement, dated June 24, 2004).

[7] All but one of the Trademark Settlements incorporated Google's advice to use negative keywords to ensure that the settling parties' trademarks were protected. *See* Compl. ¶ 24; CX0310 (1-800 Contacts' Trademark Settlement with Coastal Contacts did not include a provision requiring the implementation of negative keywords).

keywords. IDF 363. Second, twelve of the thirteen Trademark Settlements required both parties to implement negative keywords to prevent their advertisements from appearing in response to searches for the other party's trademarked terms. IDF 364; ID at 1; Compl. ¶ 24.

It is important to keep in mind what the Trademark Settlements did *not* require. The Trademark Settlements did not prevent 1-800 Contacts or other online contact lens retailers from engaging in any form of non-infringing advertising. There were no restrictions on the settling parties' ability to advertise offline (e.g., through print, television, or radio); to advertise using other forms of electronic/online advertising (e.g., internet display advertising, affiliate marketing, social media advertising, and search engine optimization); or to engage in paid search advertising as long as the advertisement did not appear in response to a search for one of the settling parties' trademarks. Nothing prevented the parties from buying advertisements to respond to consumers' searches for generic terms or phrases, such as "contacts", "contact lenses", "cheap contacts", "inexpensive contacts", or "discount contacts". *See, e.g.*, IDF 367. And the parties to the Trademark Settlements did, in fact, engage in many of these other types of advertising. *See* IDF 497-561 (describing the importance of paid search advertising generally—i.e., not just for trademarked keywords—to contact lens retailers, and noting that most retailers advertise in forms other than paid search advertising); *see also* Op. at 6-7 (noting the importance of paid search advertising generally—i.e., not just for trademarked keywords—to contact lens retailers). Neither the majority's opinion nor the Initial Decision identifies what portion of the marketing budgets of the counterparties to the Trademark Settlements comprises trademark search advertising (as opposed to paid search advertising generally).

Most of the Trademark Settlements specifically permit non-infringing uses like comparative advertising and parodies. For example, the 2004 settlement agreement between Vision Direct and 1-800 Contacts stated that the acts prohibited by the agreement "shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses . . . ." CX0311 at 004; *see also* IDF 369 (citing CX0311 at 004 (Vision Direct 2004); CX0313 at 004 (EZ Contacts); CX0315 at 004 (Lensfast); CX0319 at 002 (Empire Vision); CX0320 at 004 (Lenses for Less); CX0321 at 002 (Tram Data); CX0323 at 003 (Contact Lens King); CX0324 at 003 (Web Eye Care); RX0028 at 002 (AC Lens); RX0408 at 003 (Standard Optical)); *see also* Op. at 9 (citing IDF 369 for the proposition that ten of the thirteen Trademark Settlements contained a clause permitting non-infringing uses).

The Trademark Settlements likewise place no restrictions on the content that any of the settling parties may include in their advertisements. The settling parties are free to advertise lower prices and higher quality whenever and, in general, wherever they like. And, of course, the restrictions in the Trademark Settlements impact only those consumers who search specifically for 1-800 Contacts' trademarks, the vast majority of which searches are navigational, i.e., searches performed by the consumer with the intent to locate 1-800 Contacts' website. RX0733 (Ghose Expert Report) at 032, 050.

The Trademark Settlements sought to balance 1-800 Contacts' legitimate interests in protecting its trademarks with competitors' (and consumers') interests in truthful advertising.

II. The Majority Fail to Show That the Trademark Settlements Are Anticompetitive.

The majority deem the Trademark Settlements anticompetitive by applying the "inherently suspect" framework, which truncates the traditional rule of reason analysis, and, alternatively, by finding direct anticompetitive effects. Governing precedent supports neither approach on the facts adduced, and in neither analysis do the majority grapple adequately with the intellectual property rights at the heart of this case.

A. The Trademark Settlements Are Not Inherently Suspect.

1. Categorizing Conduct as Inherently Suspect Is a Drastic Step.

The Supreme Court has made clear time and again that "abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' [i.e., inherently suspect] approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"[8] *FTC v. Actavis, Inc.*, 570 U.S. 136, 159 (2013) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)). The *per se* and inherently suspect "standards are exceptional . . . and their application is reserved for the most patently anticompetitive restraints." *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 387 (8th Cir. 2007), *cert. denied*, 552 U.S. 1040 (2007). "[T]he Supreme Court has cautioned that presumptions of anticompetitiveness should not be lightly invoked." *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010) (en banc) (citing *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.* ("*BMI*"), 441 U.S. 1, 8-9 (1979)), *cert. denied*, 563 U.S. 987 (2011); *see also id*. ("Quick-look analysis applies to 'naked restraint[s] on price and output'") (brackets in original) (quoting *Cal. Dental*, 526 U.S. at 769-70). In our rulings, the Commission has recognized as much. *See*, *e.g.*, *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 719, 733 (2005), *aff'd in relevant part sub nom.*, *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 555 U.S. 1170 (2009).[9]

The Trademark Settlements do not approximate conduct that the Commission or courts have previously found to be inherently suspect, much less *per se* illegal. Those precedents make abundantly clear that the Commission should not treat the Trademark Settlements as

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[8] "Quick look" is the federal judiciary's equivalent to the Commission's "inherently suspect" framework. *See, e.g.*, *N. Tex. Specialty Physicians v. FTC* ("*NTSP*"), 528 F.3d 346, 360-61 (5th Cir. 2008) ("The 'inherently suspect' paradigm that the FTC employed in the present case is a 'quick-look' rule-of-reason analysis."), *cert. denied*, 555 U.S. 1170 (2009).

[9] The majority apparently do not view application of the "inherently suspect" framework as exceptional. Their opinion suggests that as long as they consider the specific procompetitive justifications of the challenged conduct, it does not matter whether the "inherently suspect" label is applied. *See* Op. at 41. The majority's view not only discounts any value of trademarks generally and relies on assessments in each case of the value of the trademarks at issue, *see id*. at 38-41, it also gives short shrift to the precedent instructing that application of the "inherently suspect" label is exceptional. *See, e.g.*, *Cal. Dental*, 526 U.S. at 769-81.

presumptively unlawful. That is especially so given the trademark rights involved, an issue that none of the cases on which the majority rely even consider.[10]

2. We Lack an Adequate Basis to Declare the Trademark Settlements Inherently Suspect.

In *California Dental*, the progenitor for the Commission's "inherently suspect" framework,[11] the Supreme Court outlined the test for when it is appropriate to truncate the rule of reason analysis: only "when the great likelihood of anticompetitive effects can easily be ascertained." *Cal. Dental*, 526 U.S. at 770 (citations omitted). "[W]here . . . any anticompetitive effects of given restraints are far from intuitively obvious," however, "the rule of reason demands a more thorough enquiry . . . ." *Id*. at 759. "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Id*. at 781.

Lower courts and the Commission have elaborated upon the market experience necessary to apply the "inherently suspect" framework. Interpreting *California Dental*, the D.C. Circuit held in *Polygram* that "[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful . . . ." *Polygram Holding, Inc. v. FTC* ("*Polygram II*"), 416 F.3d 29, 36 (D.C. Cir. 2005), *aff'g sub nom., In re Polygram Holding, Inc.* ("*Polygram I*"), 136 F.T.C. 310 (2003). We likewise stated that inherently suspect conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." *Polygram I*, 136 F.T.C. at 344-45. That judicial experience and economic learning are absent here.

a) We Lack Sufficient Judicial Experience to Presume the Trademark Settlements Are Unlawful.

The facts of this case do not fit neatly into the jurisprudence on advertising restraints. The cases upon which the majority rely involve complete advertising bans or limitations on the content that advertisements could contain, neither of which is present here. Such restraints prevent price signals from reaching the market, whereas the Trademark Settlements are alleged only to reduce the opportunity of certain consumers—specifically, those searching for 1-800 Contacts' trademarks—to see advertisements paid for by other sellers in response to those searches. In addition, none of the cases the majority cite implicate intellectual property rights, the presence of which necessarily changes the analysis because the Commission must account for a competing federal policy.

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[10] I disagree with the majority's attempts to distinguish the two relevant cases that involve intellectual property, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), and *Actavis*. *See* Section II(A)(3), *infra* (discussing *Clorox*); Sections II(A)(2)(a)(i), II(A)(4)(a), II(C), *infra* (discussing *Actavis*).

[11] *See NTSP*, 528 F.3d at 361 ("The FTC formulated its 'inherently suspect' analysis after the issuance of *California Dental Association*") (citing *Polygram Holding, Inc. v. FTC* ("*Polygram II*"), 416 F.3d 29, 35-36 (D.C. Cir. 2005)).

i. *California Dental* Supports the Application of the Traditional Rule of Reason Here.

The *California Dental* experience, sunny and painful though it must have been, makes clear that we should not truncate the traditional rule of reason here. In that case, the California Dental Association adopted a policy that "effectively prohibited members from advertising price discounts in most cases, and entirely precluded advertising regarding the quality of services." *In re Realcomp II Ltd.* ("*Realcomp I*"), Dkt. No. 9320, 2007 WL 6936319, at *20 (F.T.C. Oct. 30, 2009), *aff'd sub nom.*, *Realcomp II, Ltd. v. FTC* ("*Realcomp II*"), 635 F.3d 815 (6th Cir. 2011), *cert. denied*, 565 U.S. 942 (2011). Limitations on price and quality advertising have a more obvious direct effect on the price setting mechanism of the market because they prevent information about price and quality from spreading. *See, e.g.*, *Cal. Dental*, 526 U.S. at 773 ("The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the [California Dental Association]'s restrictions on discount advertising began with the unexceptionable statements that price advertising is fundamental to price competition, and that restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price") (internal citations, quotation marks, and alterations omitted). Yet the Court applied the traditional rule of reason, because there was an insufficiently strong and obvious connection between the restraint and the price setting mechanism of the market for dental services. *See Cal. Dental*, 526 U.S. at 759, 774-78. The test, as the majority correctly note, is whether "the normal linkage between advertising restrictions and price/output effects in the underlying product market [i]s attenuated". Op. at 42.

The link between the restraints here and price or output effects is far more attenuated than that in *California Dental*. As a threshold matter, Complaint Counsel did not demonstrate any output effect. *See* ID at 153 n.36 ("Complaint Counsel does not contend that the Challenged Agreements reduced the output of contact lenses."). The Trademark Settlements permit advertising, including on price and quality. They do not restrict the content of advertisements that 1-800 Contacts or the counterparties can run in innumerable contexts, including in response to search queries. And, of course, the Trademark Settlements do not bind sellers of contact lenses that are not parties to those agreements. In all of these ways, information about prices continued to reach the market. For a subset of potential contact lens customers—who search specifically for "1-800 Contacts"—the Trademark Settlements reduce one avenue for discovering products offered by certain other sellers of contact lenses. But, even for those customers not looking for 1-800 Contacts' website,[12] the cost of additional discovery is minimal: another search, a scroll down the results page, a moment's hesitation. Given that the *California Dental* Court applied the traditional rule of reason to analyze restraints with a more obvious anticompetitive impact, *a fortiori*, the restraints here should not be analyzed under a harsher standard.

[12] According to Respondent's expert, Dr. Anindya Ghose, "the academic literature and the data [ ] indicate that the vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent." RX0733 (Ghose Expert Report) at 060.

Actavis supports this conclusion.[13] In that case, the Supreme Court rejected a "quick look" (i.e., inherently suspect) approach when analyzing three reverse payment settlements resolving Hatch-Waxman patent infringement litigation. *See Actavis*, 570 U.S. at 158-59. It did so even though the alleged conduct at issue was far more harmful to competition than anything at issue here, as well-established economic evidence demonstrated. In particular, the FTC alleged that Solvay, a maker of branded pharmaceuticals, paid millions of dollars to Actavis and other generic pharmaceutical manufacturers to delay their entry into the market for AndroGel (a transdermal gel formulation of testosterone). *Id*. at 145; *see also id*. at 154 (describing the settlement payments as potentially "a share of [the brand's] monopoly profits that would otherwise be lost in the competitive market"). The anticompetitive price effects caused by such settlements were well-established by studies conducted by the Commission. *See, e.g.*, Brief for the Petitioner at 8, *Actavis*, 570 U.S. 136 (No. 12-416); Fed. Trade Comm'n, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions*, at 8 (2010). Compared to a limited restriction within one channel of advertising, the complete exclusion of generic competition from the market in exchange for a share of the brand's monopoly profits—keeping prices at supracompetitive levels—is clearly worse for consumers. While *Actavis* may not, as the majority contend, "stand for the proposition that no restriction in a settlement agreement . . . can be inherently suspect", Op. at 35, it clearly does not support treating less egregious restrictions as presumptively unlawful.

The majority attempt to distinguish *California Dental* by limiting its holding to professional services. *See id*. at 21-22, 42. But the Court did not do so, applying its rule to situations that "fail[ ] to present a situation in which the likelihood of anticompetitive effects is [ ] obvious". *Cal. Dental*, 526 U.S. at 771. It has continued to rely upon that case outside of the professional services context. In *Actavis*, the Court applied *California Dental* to find that reverse payment settlements did not meet the criteria necessary to abandon "the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach)" because it was not the case that "'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *Actavis*, 570 U.S. at 159 (quoting *Cal. Dental*, 526 U.S. at 770). Other courts have similarly applied the logic of *California Dental* beyond the professional services context. *See, e.g.*, *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137-39 (9th Cir. 2011) (en banc).

While the potential procompetitive benefits of the advertising restrictions in the context of professional services helped persuade the Court to apply the rule of reason, *see Cal. Dental*, 526 U.S. at 771-73, the broader takeaway is that grappling with countervailing considerations gave it pause before classifying as presumptively unlawful restraints more obviously problematic than those at issue here. *See, e.g.*, *Polygram I*, 136 F.T.C. at 340 ("The Court [in *California*

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[13] I agree with the majority's conclusion that the Supreme Court's ruling in *Actavis* does not immunize the Trademark Settlements from liability. *See* Op. at 12-16. That said, I do not believe the majority opinion applies *Actavis* properly to the facts of this case. In *Actavis*, the Supreme Court rejected the "scope of the patent" test, which would have rendered all settlements of patent infringement claims immune to antitrust liability. *Actavis*, 570 U.S. at 147. There are four issues from *Actavis* worthy of note here: the Supreme Court (1) created an exception, (2) did not assess the underlying infringement claim, (3) called for traditional rule-of-reason treatment of the reverse payment settlement agreement at issue there, and (4) saw indicia of anticompetitive conduct in the reverse payment settlement that are not present here. For the reasons stated elsewhere in this dissenting statement, we should follow *Actavis* and (a) refrain from making a judgment on the underlying infringement claim and (b) apply the traditional rule of reason.

Dental] concluded that . . . in the absence of any empirical evidence supporting the theoretical basis for a presumption of anticompetitive effects, [the defendant]'s identification of plausible procompetitive justifications precluded the 'indulgently abbreviated' review of the Ninth Circuit.") (citing *Cal. Dental*, 526 U.S. at 774-78). In this case, the plausibility of the benefits that the protection of intellectual property rights bring to competition "rules out the indulgently abbreviated review" provided by the majority. *Cal. Dental*, 526 U.S. at 778.[14] "The obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id*.

ii. ***Polygram*** Does Not Support an "Inherently Suspect" Approach.

The majority rely on *Polygram* to support their categorization of the Trademark Settlements as inherently suspect. *Polygram* involved a worldwide and total ban on advertising. *See Polygram I*, 136 F.T.C. at 354-58, 372; *cf. id*. at 340 (distinguishing *California Dental* because the restrictions at issue in *California Dental* "did not ban advertising completely"). In addition to agreeing not to advertise at all, the *Polygram* defendants agreed not to discount the albums they were selling. *Polygram II*, 416 F.3d at 37. That is, they fixed prices—conduct long condemned as *per se* illegal. *Id*. Treating the price fixing agreement and the complete advertising ban together,[15] the D.C. Circuit focused on the former: "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*, which would ordinarily be condemned as *per se* unlawful." *Id*. (emphasis added). It was precisely because the agreement looked like price fixing—"behavior that past judicial experience . . . ha[d] shown to warrant summary condemnation", *Polygram I*, 136 F.T.C. at 344-45—that the D.C. Circuit upheld the Commission's decision to find the agreement presumptively unlawful. *See Polygram II*, 416 F.3d at 37-38.

There is no price fixing here. Nor is there an advertising ban. 1-800 Contacts and the counterparties to the Trademark Settlements were free to engage in any type of advertising they saw fit, including paid keyword search advertising, as long as they did not implicate each other's

[14] It is no answer at this stage in the analysis to say that 1-800 Contacts' underlying infringement claims were weak, a fact-specific judgment we should avoid for the reasons I discuss below. *See* Section II(A)(4)(a), *infra*. Were it so, the analytical framework we apply, a legal question, would depend on a highly-factual inquiry.

[15] Even if the advertising restrictions at issue in *Polygram* were treated separately from the price fixing agreement (contrary to the D.C. Circuit's approach), that case still does not support a finding that the Trademark Settlements are inherently suspect. In *Polygram*, the Commission and the D.C. Circuit found that both restraints (advertising and price fixing) were severable from the underlying joint venture. *See Polygram II*, 416 F.3d at 37; *Polygram I*, 136 F.T.C. at 359. This was a critical analytical step toward the finding that the agreement was inherently suspect because—without the underlying joint venture—the restraints became standalone (i.e., naked) agreements between direct competitors not to compete in significant ways. *See Polygram II*, 416 F.3d at 37; *Polygram I*, 136 F.T.C. at 359, 361, 363, 366. Nobody has suggested that the advertising limitations at issue here are somehow severable from the Trademark Settlements. Thus, even assuming that *Polygram* held that the advertising ban at issue there, standing alone, was inherently suspect (which the D.C. Circuit did not), the same logic cannot apply here because the alleged advertising restraint is not severable from the Trademark Settlements.

trademarks. The Trademark Settlements do not look "suspiciously" like any *per se* illegal conduct,[16] so *Polygram* does not support applying the "inherently suspect" framework here.

iii. Other Case Law Supports Application of the Rule of Reason.

The remaining cases cited by the majority for our judicial experience likewise do not support an "inherently suspect" approach on the facts adduced here. Critically, none involve intellectual property. And all involve advertising restrictions that bear no resemblance to the Trademark Settlements because the restraints at issue were: (1) complete bans on advertising[17]; (2) restrictions on the *content* of advertisements (i.e., limitations or bans on the ability to advertise price or quality)[18]; or (3) restrictions akin to *per se* violations of the Sherman Act.[19] The distinction between the restrictions at issue in those cases and the Trademark Settlements is significant, because it is obvious how a complete ban on advertising (without implicating intellectual property rights) and these other types of restrictions could be anticompetitive. Far less obvious is how some consumers not seeing advertisements in response to searches for certain trademarked terms has the same effect. That is precisely the line drawn in *California Dental*, and there should be no doubt on which side the Trademark Settlements fall.

b) We Lack Sufficient Economic Learning to Presume the Trademark Settlements Are Unlawful.

The economic studies cited by the majority do not examine paid search advertising, *see* Op. at 20-21, much less how restraints upon it interact with the trademark policies at issue here. The majority instead state that "the behavior of consumers and advertiser-sellers in response to this type of advertising is the same as for other types of advertising", *id*. at 35, an assertion that is both unsupported and inconsistent with the majority's position that "search-based keyword advertising" occurs in a "relatively new context", *id*. at 29; *see also id*. at 2 ("This phenomenon is comparatively recent"). The economic evidence upon which the majority rely is insufficient to

[16] The majority apparently want to have it both ways with respect to whether they believe the Trademark Settlements are analogous to *per se* illegal conduct. In one breath, they suggest that the Trademark Settlements are analogous to *per se* illegal bid rigging, *see* Op. at 14, but in the next they analyze the Trademark Settlements' alleged harm to search engines under the rule of reason, *see id*. at 50-54. As discussed in more detail below, there is insufficient evidence to conclude that Trademark Settlements harmed search engines, much less constituted *per se* illegal bid rigging. *See* Section II(E), *infra*.

[17] *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (state bar rule prohibiting all advertising by lawyers in newspapers or other media); *Polygram II*, 416 F.3d at 33 (agreement to prohibit discounts and advertising); *In re Am. Med. Ass'n*, 94 F.T.C. 701, 1979 WL 199033, at *231 (Oct. 12, 1979) ("[I]t is fair to say that almost all advertising and promotional activity is proscribed, with a few narrowly circumscribed exceptions.").

[18] *See, e.g.*, *Cal. Dental*, 526 U.S. at 762 (dental association rules effectively prohibited price advertising in most cases and entirely prohibited quality advertising); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-89 (1992) (state restrictions on airlines fare (i.e., price) advertising); *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549, 1988 WL 1025476, at *27-*29 (June 13, 1988) (complete ban on truthful advertising of discount prices and other categories of advertising).

[19] *See, e.g.*, *BMI*, 441 U.S. at 4 (agreements to fix prices); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98-101 (1984) (horizontal price fixing and restrictions on output); *NTSP*, 528 F.3d at 352 (horizontal price fixing); *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (horizontal agreement to allocate markets among competitors); *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688, 689-91 (7th Cir. 1961) (criminal prosecution for conspiracy to fix prices).

expand the scope of what we consider "inherently suspect" to include the Trademark Settlements.[20]

3. The Majority Should Not Have Truncated Their Rule of Reason Analysis.

Applicable precedent makes clear that the Trademark Settlements should be analyzed under the traditional rule of reason. And the cases on which the majority rely fail to provide support for truncating that analysis by applying the "inherently suspect" framework. As noted, those cases do not involve trademarks, or intellectual property of any kind. That is relevant—indeed, decisive—because trademarks often limit advertising in one way or another, and the logic of the majority's analysis would support a rule that stigmatizes conduct protecting those rights, which is clearly procompetitive, as presumptively unlawful.

Consider a situation in which a company uses a competitor's trademark in an advertisement in a way that clearly creates confusion and, thus, infringes on a valid trademark. The mark owner sues and the parties settle, barring the conduct in question. The settlement restrains advertising. Some consumers are deprived of the opportunity to see an advertisement for a lower-priced competing product, the nub of the majority's theory in this case. And the alleged infringer, which sells that competing product, reaches fewer customers because it is unable to use the more desirable advertising scheme. While the majority eschew the result, *see* Op. at 40, their logic would treat this settlement agreement as "inherently suspect" (i.e., presumptively illegal).

The answer is to follow the one case cited by the parties that considers a trademark settlement in the context of antitrust law: the Second Circuit's decision in *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997). *Clorox*, the only truly analogous case, and far more so than any case upon which the majority rely, makes clear that the Trademark Settlements should be evaluated using a traditional rule of reason analysis with appropriate recognition of trademark policy.

a) Summary of *Clorox*.

Clorox involved an antitrust challenge brought by Clorox (the then-current owner of the Pine-Sol trademark) against Reckitt (the then-current owner of the Lysol trademark) regarding a trademark settlement agreement executed by the parties' predecessors-in-interest. *See Clorox*, 117 F.3d at 52. The agreement restricted how Clorox could advertise Pine-Sol products and what products Clorox could sell under the Pine-Sol brand. *Id*. at 53-54. After acquiring the Pine-Sol mark, Clorox sued Reckitt claiming that the settlement agreement was anticompetitive because it restricted Clorox's ability to compete using the Pine-Sol mark and served no legitimate trademark purpose because there was no longer a likelihood of consumer confusion between the marks. *Id*. at 54.

[20] The majority also appear to require 1-800 Contacts to prove that paid search advertising is different from other types of advertising. *See* Op. at 34-35. This places the burden of proof on the wrong party; it is Complaint Counsel's burden to show that paid search advertising operates the same as other types of advertising.

The Second Circuit started its analysis with the proposition that trademark settlements are "common, and favored, under the law." *Id*. at 55 (citing J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:25 (4th ed. 1996) [hereinafter "McCarthy 4th Edition"]) (other citations omitted).[21] The court presumed that "arms-length [trademark settlement] agreements are pro-competitive", *id*. at 60, and that "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies", *id*. at 61.

The rule declared by the Second Circuit was not absolute and would not apply where a trademark settlement was a pretext for a *per se* violation of the antitrust laws.[22] *Id*. at 55-56 ("Unlike trademark agreements that in reality serve to divide markets and thus have been condemned as illegal *per se* under the antitrust laws, the agreement at issue here merely regulates the way a competitor can use a competing mark. Contrary to Clorox's argument, the agreement does not effect any of the types of restraints that have historically been condemned as illegal *per se*, such as price fixing, market divisions, tying arrangements, or boycotts.") (internal citations omitted); *see also id*. at 60 ("[I]n the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors . . . and absent exceptional circumstances, we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight.").

Determining that the trademark settlement at issue there "must" be examined under the rule of reason, *id*. at 56, the *Clorox* court gave appropriate weight to the value of trademark policy. It held that plaintiffs challenging trademark settlements under antitrust law face a "difficult task" of proving harm to competition. *Id*. at 56. That is so, the Second Circuit held, even when the underlying trademark settlement agreement "only marginally advances trademark policies". *Id*. at 57. "[R]egardless of whether the agreement is entirely necessary to protect [the defendant's] trademark rights", the Second Circuit held that a plaintiff still was required to show that an alleged anticompetitive restraint "may *significantly* harm competition as a whole". *Id*. at 57 (emphasis added) (citation omitted). After performing a rule of reason analysis, the Second Circuit held that the trademark settlement agreement at issue there did not violate the antitrust laws. *Id*. at 60-61.

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[21] *See also Clorox*, 117 F.3d at 60 ("[T]rademark 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.").

[22] The Second Circuit's finding that the rule of reason applies unless the challenged conduct is "auxiliary to an underlying illegal agreement between competitors", *Clorox*, 117 F.3d at 60, is reminiscent of *Polygram*, where then-Chief Judge Douglas H. Ginsburg found that "under the Commission's own framework, the rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram II*, 416 F.3d at 37.

b) Applying *Clorox* to the Trademark Settlements.

Clorox is on all fours with this case: an *ex post* antitrust challenge to an agreement that settled trademark infringement litigation.[23] And the restraint at issue here does not involve a settlement that is a pretext for a *per se* violation of the antitrust laws, so it does not fall into the exception to the rule of reason described by the Second Circuit. *See Id*. at 55-56, 60. As a result, the Commission should analyze the Trademark Settlements under the traditional rule of reason—without treating the Trademark Settlements as inherently suspect—as the Second Circuit did in *Clorox*.

Complaint Counsel "faces a difficult task" to show that the Trademark Settlements "*significantly* harm competition as a whole", *see id*. at 56, 57 (emphasis added), a burden they have not met here.[24] The inquiry is not simply whether the Trademark Settlements limited competition; some impact on competition is acceptable as a predictable result of the trademark policy, as the *Clorox* court addressed directly:

> It may well be that the restrictions in the [trademark settlement] agreement prevent Clorox from competing as effectively as it otherwise might. . . . The antitrust laws do not guarantee competitors the right to compete free of encumbrances, however, so long as competition as a whole is not significantly affected. . . . [T]he fact that Clorox can still compete despite the [trademark settlement] Agreement, and that numerous other companies are also capable of competing against Reckitt, seriously undermines Clorox's [antitrust] claim.

Id. at 59 (citations omitted). The limited advertising restrictions contained in the Trademark Settlements may well prevent 1-800 Contacts and the counterparties to the Trademark Settlements from competing free of encumbrances. The record reflects that competitors' advertisements may be less effective without the use of 1-800 Contacts' trademarks. But these restrictions do not *significantly* affect competition as a whole because the counterparties to the Trademark Settlements are still capable of competing against 1-800 Contacts—including by selling to whomever they wish, advertising aggressively, and even buying advertisements on

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[23] As discussed below, *see* Section II(A)(4)(a), *infra*, I disagree with the majority's characterization of the Trademark Settlements as "unusual". *See* Op. at 13-14. The Trademark Settlements, much like the agreement at issue in *Clorox*, "merely regulate[ ] the way a competitor can use a competing mark." *Clorox*, 117 F.3d at 55-56. The majority do not dispute that bidding on a trademarked keyword constitutes a "use" under the Lanham Act. In addition, the Second Circuit in *Clorox* held that courts should give "substantial weight" to the scope of agreements settling trademark infringement litigation. *Id*. at 60.

[24] Even if the majority were correct that the Trademark Settlements constitute a naked restraint of trade, they still may not be anticompetitive. As a leading antitrust treatise noted, "even a 'naked' horizontal market-division agreement is competitively harmless if it occurs in a competitive market in which the defendants are merely a few among several serious players *or* if the restraint does not suggest a significant potential for reducing marketwide output." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2046(b)(4) (emphasis added) (discussing *Clorox* as an example that fits this general statement). The market for the retail sale of contact lenses is clearly competitive and, according to Judge Chappell, "Complaint Counsel does not contend that the Challenged Agreements reduced the output of contact lenses." ID at 153 n.36.

search engines, just not all advertisements—as are numerous other sellers of contact lenses, including other online retailers (e.g., Lens.com), independent eye care professionals ("ECPs"), optical retail chains (e.g., Visionworks), mass merchants (e.g., JCPenny), and club stores (e.g., Costco).[25] To paraphrase the *Clorox* court, the fact that the counterparties can still compete despite the Trademark Settlements, and that numerous other companies are also capable of competing against 1-800 Contacts, seriously undermines Complaint Counsel's claim.

c) The Majority Fail to Distinguish *Clorox*.

Clorox is the most directly applicable precedent, and the majority's attempts to distinguish it are not convincing. They point to the purported strength of the trademark infringement claim in *Clorox*, contrasting it with what they believe were weak claims asserted by 1-800 Contacts. *See* Op. at 26-27. As discussed below (*see* Section II(A)(4)(a), *infra*), precedent, both parties in this case, the ALJ, and good policy all counsel against the Commission substituting its own view of the quality of non-sham intellectual property infringement claims for the business judgment of the contracting parties.[26] Even if the majority's assessment of 1-800 Contacts' infringement claims were accurate, *Clorox* remains applicable for at least two reasons. First, the *Clorox* court made clear that its rule applied even to weak trademark claims. *Clorox*, 117 F.3d at 57 (noting that its analysis should apply "[e]ven if [a settlement] agreement only marginally advances trademark policies"). Second, as authoritative antitrust commentators have noted, the trademark claims at issue in *Clorox* were, in fact, not strong at all. The authors of one prominent treatise questioned "whether the Pine-Sol name manifested a confusing similarity to the older Lysol name", noting that the Patent and Trademark Office examiner's conclusion that the marks were similar was "somewhat dubious". PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 2046(b)(4) (2018).

The majority also distinguish *Clorox* as involving only two competitors, whereas the "Challenged Agreements covered 14 different online contact-lens retailers that account for 79 percent of online contact lenses in the United States" and "cover the landscape of online contact-lens retailers".[27] Op. at 33. In the absence of a properly defined relevant product market (*see* Section II(D), *infra*), however, neither the numerosity of the Trademark Settlements nor what portion of "online contact-lens retailers" they cover is meaningful—it is far from clear, in other words, that settlements with fourteen companies here are meaningfully different from the one settlement involving two companies at issue in *Clorox*. The record reflects that sales by online retailers account for only 17% of total contact lens sales in the United States, IDF 491, and the

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[25] The majority have not defined a relevant product market (*see* Section II(D), *infra*), so they cannot claim that competition from companies other than the pure play online retailers do not compete directly with 1-800 Contacts.

[26] Consider the converse: a trademark infringement claim that everyone agrees is strong. Would *Clorox* then apply? If so, then the majority appears willing to put the factual cart (claim strength) before the analytical horse (inherently suspect). And, if *Clorox* still would not apply, would the majority deem "inherently suspect" a settlement of an unquestionably strong trademark infringement claim?

[27] This portion of the majority opinion is just one of the several instances in which the majority inappropriately group the Luxottica Agreement in with the Trademark Settlements. *See* Section III, *infra*; *see also* Op. at 10 (defining the term "Challenged Agreements" to encompass the Trademark Settlements and the Luxottica Agreement).

Trademark Settlements do not include certain large online sellers, such as Lens.com, that account for at least 21 percent of online sales. *See* Op. at 8, 33. If the majority believe that there is some smaller relevant market in which 1-800 Contacts has market power, they should define that market.

The majority go on to argue that "[p]redictably, Clorox was unable to muster much evidence of consumer harm." *Id*. at 33. But they focus on the wrong reason that the lack of such evidence was predictable. The Second Circuit in *Clorox* noted the consensus that "trademarks are by their nature non-exclusionary" because "unlike other intellectual property rights, [a trademark] does not confer a legal monopoly on any good or idea". *Clorox*, 117 F.3d at 56. Trademark owners cannot prevent others from manufacturing and selling identical goods under a different mark and, as a result, "the opportunity for effective antitrust misuse of a trademark, as distinguished from collateral anti-competitive activities on the part of the manufacturer or seller of the goods bearing the mark, is so limited that it poses a far less serious threat to the economic health of the nation." *Id*. (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 298 F. Supp. 1309, 1314 (S.D.N.Y. 1969), *aff'd in relevant part*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); and citing McCarthy 4th Edition, § 31:96). Thus, the difficulty of showing harm was not specific to *Clorox* and it is not specific to this case;[28] rather, it applies to trademark cases generally.

Contrary to *Clorox*, and citing *Actavis*, the majority believe that the Commission should second guess the form and scope of all settlements of trademark infringement litigation. *See* Op. at 33-34. This approach misses the mark in two important ways. <u>First</u>, the record reflects that non-use agreements are standard means of settling trademark disputes, *see* RX0734 (Hogan Expert Report) at 096, and bidding on trademark terms as keywords is a recognized "use in commerce" under the Lanham Act, *see, e.g.*, *Rescuecom*, 562 F.3d at 127, 129-30. <u>Second</u>, it was the form of the settlement in *Actavis*—namely the splitting of monopoly profits among the settling parties to the detriment of consumers—that led the Court to open the door to liability. *See Actavis*, 570 U.S. at 153-56. The Trademark Settlements include no splitting of monopoly profit—indeed, no material amount of money changed hands. *See* Section I(C)(2), *supra*. Nor, again, are they associated with the kind of conduct—price fixing, etc.—that has raised the suspicion of courts. *See* Section II(A)(2), *supra*.

According to the majority, *Clorox* involved labeling and, therefore, is not applicable here. *See* Op. at 14 (citing *Clorox*, 117 F.3d at 57); *see also* Draft Oral Arg. Tr. 43:19-44:6 (Complaint Counsel asserting that *Clorox* "was a case about labeling."). The majority cite no case for the proposition that, for trademark law purposes, labeling and advertising are categorically different, nor am I aware of any. Courts apply the same fact-specific test to determine the likelihood of customer confusion regardless of whether the use of the trademark was on a label or in an advertisement. *See, e.g.*, *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1125-31 & n.7 (9th Cir. 2014) (analyzing both "labels and advertising materials" under the eight-factor test for likelihood of customer confusion developed in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), *abrogated on other grounds by Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 n.19 (9th Cir. 2003)). Leaving aside the law and considering the facts, the non-use

[28] As discussed below, I do not believe Complaint Counsel has met its burden to show direct anticompetitive effects in this case. *See* Section II(B), *infra*.

agreement in *Clorox* operated in a manner similar to the Trademark Settlements, which themselves are a type of non-use agreement. The non-use agreement at issue in *Clorox* did not restrict Clorox or other firms from producing and selling products in direct competition with the Lysol brand as long as Clorox did not put the name "Pine-Sol" on those products. Op. at 14. And, likewise, the Trademark Settlements do not "in any way restrict [the other online contact lens retailers] from producing and selling products that compete directly with the [1-800 Contacts] brand," so long as they do not advertise in response to searches for 1-800 Contacts' trademarks. *See Clorox*, 117 F.3d at 57. That is a critical distinction under *California Dental*, because it demonstrates how price signals can continue to reach the market, making the link between the restraints and any price effect attenuated.

It also bears repeating that the Second Circuit in *Clorox* stated that the form and scope of trademark settlement agreements deserve "substantial weight" because the settling parties "are in the best position to determine what protections are needed" and "it is usually unwise for courts to second-guess such decisions." *Id*. at 60. Thus, even if the form or effect of the Trademark Settlements differed substantially from those at issue in *Clorox*, the Commission should give the parties' desired means of settlement deference because of the property right at issue and the absence of an auxiliary illegal agreement. *Id*.

4. The Majority's Rule Will Have Negative Consequences.

Treating the Trademark Settlements as "inherently suspect" yields an unclear rule that, regardless of interpretation, will, I fear, create uncertainty, dilute trademark rights, and dampen inter-brand competition. The majority couch their holding as a limited one dealing with restraints on the opportunity to make price comparisons, but, by adopting an analytical framework without accounting for the intellectual property at issue, they produce one of the following rules: either all advertising restrictions are inherently suspect, regardless whether they protect intellectual property rights, or the level of scrutiny applied to a particular restraint will depend on the strength of the trademark holder's underlying infringement claim.

The majority make it clear that they do not intend to label all advertising restrictions "inherently suspect", *see* Op. at 22, but several parts of their analysis suggest precisely such a conclusion. <u>First</u>, their determination that the Trademark Settlements are "inherently suspect" avoids any mention whatsoever of trademarks. *See id*. at 18-22. The majority rely heavily upon *Polygram*, but untether the advertising ban from the ban on discounting that led the D.C. Circuit to find liability. So the assertion stands alone, regardless of the existence of intellectual property. <u>Second</u>, the majority rely on precedents that do not involve trademarks, or intellectual property of any kind, and dismisses the one case—*Clorox*—that looks at a trademark settlement through the lens of antitrust law. In doing, they effectively declare that any advertising restraint is "inherently suspect", regardless whether such restraint is intended or necessary to protect intellectual property.[29] The majority cast this case as unique because the Trademark Settlements reduced the *opportunity* of some consumers to see some advertisements sometimes, but this description has no apparent limiting principle. Advertising is designed to grab attention,

[29] For instance, the majority assert that "[r]estricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm." Op. at 43.

including through the use (or misuse) of trademarks. All of this raises a serious concern that the rule the majority today promulgates (i) is overbroad and (ii) will reach procompetitive conduct.

Because the majority explicitly eschew a rule condemning all advertising restrictions, regardless whether they protect intellectual property rights, their reasoning suggests a rule under which the standard of review depends on (the Commission's view of) the strength of the underlying trademark infringement claim. For infringement claims that the Commission deems weak or implausible, the challenged restraint will be deemed "inherently suspect". This approach leaves open the question of how the majority would treat infringement claims that they believe are strong. Such a rule would put the factual cart ahead of the analytical horse, is wrong as a matter of law, and will require the Commission to litigate (or re-litigate) the underlying infringement claim—in every case—to determine what standard of review it will apply. That is precisely what happened here.

a) The Commission Should Not Litigate Inherently Fact-Intensive Infringement Claims.

The majority claim that they are not evaluating the underlying infringement claims. *See* Op. at 40 ("We are neither deciding matters of trademark law nor suggesting that to determine whether the Challenged Agreements unreasonably restrain competition, we need to conduct a mini-trial on the merits of the underlying trademark litigations."). But that is not the approach reflected in their opinion. Instead of following *Clorox* and according trademarks their appropriate weight, the majority rest several key conclusions on the premise that 1-800 Contacts' underlying trademark infringement claims were weak. The majority:

- Ignore the presence of 1-800 Contacts' intellectual property in their "inherently suspect" analysis, *see id*. at 18-22;
- Opine that customer confusion—part of 1-800 Contacts' trademark infringement claims—is not at issue when evaluating 1-800 Contacts' procompetitive justifications, *see id*. at 27;
- Distinguish *Clorox* based on a value judgment that the trademark infringement claims at issue in that case were somehow stronger than 1-800 Contacts' infringement claims, *see id*. at 26-27;
- Dismiss 1-800 Contacts' trademark infringement claims based on an abbreviated evaluation of consumer confusion,[30] which is a deeply factual issue, *see id*. at 28-29; and
- Reject 1-800 Contacts' trademark-related procompetitive justification based on their view of the strength of the underlying infringement claims, *see id*. at 37-40 & n.42.

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[30] The majority claim that their opinion does not hinge on the merits of the trademark infringement claim. Op. at 28 n.27. As this section demonstrates, the majority's view of the strength of 1-800 Contacts' infringement claims permeates their opinion. To the extent their opinion also applies to settlements of "strong" infringement claims, the majority do not answer the question of what standard would apply, or how that fact would bear on the analysis of a respondent's procompetitive justifications.

The majority do all of this notwithstanding the universal agreement (from the ALJ, Complaint Counsel, and Respondent) that evaluating the relative strength of 1-800 Contacts' infringement claims is unnecessary, improper, or both. ID at 171 ("[D]elving into the merits of 13 trademark lawsuits, after the fact, to determine whether or not 1-800 Contacts could ultimately have proven infringement, if even possible, would require unacceptable speculation and would constitute an unnecessary waste of judicial resources.") (citing *In re Schering-Plough Corp.* ("*Schering-Plough I*"), 136 F.T.C. 956, 997 (2003), *vacated on other grounds sub nom.*, *Schering-Plough Corp. v. FTC* ("*Schering-Plough II*"), 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006)); Draft Oral Arg. Tr. 49:5-13 (Complaint Counsel stating that "[i]t does not make a whit of difference whether 1-800 Contacts would have lost or won every single case it brought."); *id*. at 59:14-23 (Complaint Counsel explaining why "we don't need to evaluate the merits of the trademark claim"); RAB at 37-38. The reason the parties agree on this is clear: both precedent and sound policy counsel against having antitrust liability turn on *ex post* fact-intensive inquiries into the validity of non-sham intellectual property infringement claims. *See Schering-Plough I*, 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."). Complaint Counsel has taken a similar position in other litigation. *See, e.g.*, Reply Brief for the Petitioner at 6, *Actavis*, 570 U.S. 136 (No. 12-416) ("We agree that the antitrust analysis of a Hatch-Waxman [reverse payment] settlement should not turn on a judicial assessment of the strength or scope of the *particular* patent involved in the case.") (emphasis in original).

Actavis makes it clear that the Commission should not be in the business of evaluating the underlying infringement case when deciding an antitrust challenge; indeed, the *Actavis* Court explicitly declined do so. *See Actavis*, 570 U.S. at 159 ("To say this is not to require the courts to insist . . . that the Commission need litigate the patent's validity"); *id*. at 158 ("[A] court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications *without litigating the validity of the patent*") (emphasis added); *id*. at 153 (recognizing "the patent litigation problem"). The Court's willingness to subject the reverse payment settlements to rule-of-reason analysis stemmed not from the underlying merits but from the "unusual" nature of the settlements, including large payments by the plaintiff-branded pharmaceutical manufacturer to the defendant-generic pharmaceutical manufacturer in exchange for the generic staying out of the market entirely, which kept prices high while the brand and generic manufacturers split the monopoly profits. *See id*. at 154. The Trademark Settlements are nothing like that: no material amount of money changed hands, so the settling parties did not divide monopoly profits at the expense of the consumer, and, most importantly for the present case, no supplier of contact lenses agreed to stay out of the market.[31]

The general rule of not evaluating the merits of non-sham intellectual property claims is particularly apropos in the trademark infringement context because the legal issues generally—and customer confusion in particular—involve fact-specific inquiries that should be decided by a

[31] The majority claim that the Trademark Settlements are likewise "unusual" because they "reach[ ] farther than a cure based on rewording a label or an ad". Op. at 14. As *Clorox*—the case the majority cite for this proposition—makes clear, even aggressive assertions of trademark rights are procompetitive. *Clorox* 117 F.3d at 60-61. A standard non-use restriction that goes farther than an *ex post* proposed remedy does not take us out of that category, much less provide a basis for antitrust liability.

judge or jury. As the Fourth Circuit held in a case that also involved alleged trademark infringement caused by paid keyword search advertising, "the likelihood of confusion issue . . . is 'an inherently factual issue that depends on the facts and circumstances in each case.'" *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012) (quoting *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 933 (4th Cir. 1995)); *see also Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009) (refusing to grant the defendant's motion to dismiss because where "a plaintiff has alleged a plausible likelihood of confusion based on the overall context in which a consumer performs his internet search, he has stated a claim for trademark infringement and may proceed on an initial interest theory.") (internal reference omitted); *Fair Isaac Corp. v. Experian Info. Solutions Inc.*, 645 F. Supp. 2d 734, 761 (D. Minn. 2009) (refusing to grant summary judgment because "genuine issues of material fact" remained regarding "whether Defendants' purchase of keywords including [Plaintiff]'s trademarks, which caused Defendants' websites to appear on the results page when a consumer ran an internet search consisting of those keywords, created a likelihood of confusion"), *aff'd on other grounds*, 650 F.3d 1139 (8th Cir. 2011); *Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118, 1132 (D. Ariz. 2008) (granting summary judgment on mark owner's trademark infringement counterclaim because "the undisputed evidence in this case establishes that [the counterclaim-defendant] diverts the initial attention of potential Internet customers to its websites by using [the counterclaim-plaintiff's] trademark in keywords and metatags.").

Although the Commission should not evaluate the underlying infringement claim, the majority overstates the clarity of trademark law at the time of the Trademark Settlements. The record reflects that the parties entered the Trademark Settlements precisely because of the possibility that bidding on trademarked terms as keywords created liability for infringement, a reality exacerbated by the *Rescuecom* decision. *See, e.g.*, IDF 333, 349; Holbrook, Tr. 1942:12-13; CX9024 at 017 (Holbrook Dep. 63:13-18); Hogan, Tr. 3256:11-19, 3260:21-3261:4.

The majority also address *Soilworks* only in passing. *See* Op. at 38. In that case, a federal district court granted summary judgment because it found that the mark owner (Midwest) had met its burden to show that the use of its trademarks as keywords in paid search advertising and metatags by the alleged infringer (Soilworks) caused initial interest confusion.[32] *Soilworks*, 575 F. Supp. 2d at 1132. The *Soilworks* court considered, *inter alia*, the similarity between the keyword purchased by the alleged infringer and the trademark, the relatedness of the goods sold

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[32] The district court in *Soilworks* distinguished initial interest confusion from source confusion:

> Although the core element of trademark infringement is whether the similarity of the marks is likely to confuse customers about the source of the products, the Ninth Circuit and other courts have recognized a variation of trademark infringement that does not require such confusion. Under the 'initial interest confusion' theory of trademark liability, 'source confusion' need not occur. Rather, initial interest confusion occurs when the defendant uses the plaintiff's mark in a manner calculated to capture initial consumer attention. . . . When accomplished through the use of key words or metatags on the Internet, this wrongful conduct may involve no deception of the consumer. The consumer is simply led to the defendant's website through the unseen keywords and metatags the defendant has purchased on the web.

Soilworks, 575 F. Supp. 2d at 1129-30, 1131 (internal quotation marks, alterations, citations, and footnotes omitted).

by the parties, and the marketing channels employed by the two companies.[33] *Id*. at 1131. *All* of these factors would weigh in favor of a finding for 1-800 Contacts on a claim for initial interest confusion. And the district court's holding in *Soilworks* could have applied equally to one of 1-800 Contacts' trademark infringement claims:

> A person typing "soil sement" into a search engine presumably would be somewhat familiar with Midwest's product and would be looking for the product or its maker, and yet would be directed by the keywords and metatags to Soilworks' websites. The confusion—thinking one would be connected to Midwest when in fact Soilworks' websites also appear in the search results—would entirely be caused by Soilworks' use of Midwest's mark.

Id. at 1132. The majority's dismissal of *Soilworks* as "a single district court summary judgment decision from over ten years ago", Op. at 38, fails to account for the fact that *Soilworks* was decided just ten months before the wave of Trademark Settlements that followed *Rescuecom* began, and was therefore precisely the type of case that the settling parties would have considered at the time they entered the Trademark Settlements.

Like *Rescuecom*, *Soilworks* predated almost all of the Trademark Settlements. Those cases and other developments fed the legal uncertainty surrounding paid search advertising using trademarked keywords. Allegations of infringement based on trademark keyword bidding withstood dispositive motions. *See id*. at 38 & n.40.[34] And a judge could have ordered the same relief that is contained in the Trademark Settlements. *See, e.g.*, RX0679 at 005. Indeed, multiple federal judges later did. IDF 337 ("The court's order prohibited LensWorld from purchasing 1-800 Contacts' federally registered trademarks as keywords for any search engine advertising program and required LensWorld to implement certain negative keywords . . . where possible.") (citation and internal quotation marks omitted); CX0144; CX0162; Pratt, Tr. 2558:5-2559:4 (discussing CX0162). The parties may not have taken as dim a view of 1-800 Contacts' trademark infringement claims as the Commission does today. Cases on the books at the time of the Trademark Settlements suggested that using trademarked terms as keywords could constitute

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[33] The district court also identified several other factors that other courts have used to evaluate consumer confusion, but found them "less relevant", "of little import", of "diminished importance", "not directly relevant", or "relatively unimportant" in the keyword/metatag context. *Soilworks*, 575 F. Supp. 2d at 1132 (citations omitted).

[34] In addition to the cases cited by the majority, other infringement claims based on trademark keyword search advertising survived dispositive motions. *See, e.g.*, *Tokyo Broadcasting Sys. v. Am. Broadcasting Cos., Inc.*, No. 08-cv-6550, 2009 WL 10668456, at *11 (C.D. Cal. Aug. 12, 2009); *Gov't Emps. Ins. Co. v. Google, Inc.* ("*GEICO*"), 330 F. Supp. 2d 700, 704 (E.D. Va. 2004).

infringement regardless of the content of the advertisement.[35] *See, e.g.*, *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1024-26 (9th Cir. 2004) (keywords and metatags); *see also Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1057 (9th Cir. 1999) (domain names and metatags).

At most, the majority have shown that the legal status of using trademarked terms as keywords in paid search advertising was uncertain. When the settling parties entered the Trademark Settlements, courts did not "consistently reject[ ] the notion that buying or creating internet search terms" did not constitute trademark infringement. *See* Op. at 38-39 (quoting *Tempur-Pedic N. Am., LLC v. Mattress Firm, Inc.*, No. 17-1068, 2017 WL 2957912, at *7 (S.D. Tex. July 11, 2017)). To the contrary, most courts viewed trademark infringement and customer confusion in the context of paid search advertising as fact specific inquiries that should be decided by judges and juries. *See, e.g.*, *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 704 (E.D. Va. 2004). The risk of liability for trademark infringement became even more serious after the Second Circuit's decision in *Rescuecom*. *See* Section I(C)(1), *supra*.

The complexity of the legal regime and the majority's *ex post* determination of an inherently fact-specific question underscore the general rule that the Commission should not be in the business of litigating (or re-litigating) the underlying trademark infringement claim.

b) The Majority's Approach Will Reduce Brand Investment Incentives.

Predicating antitrust liability on an *ex post* judgement about the strength of intellectual property infringement claims—or ignoring the context of their protection entirely—not only will reduce clarity in the law, but also threatens to chill the procompetitive investment that is one of the hallmarks of trademark law. As Complaint Counsel's expert, Dr. Evans, put it:

> Trademarks help companies convey information to consumers about themselves and their products. They enable companies, for example, 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. Protecting trademark rights encourages investment in this sort of brand-building activity, which in turn generates valuable market information, promotes competition and ultimately benefits consumers. Moreover, trademark policy prevents the spread of misinformation as when a

[35] In a footnote, the majority cite a bevy of cases to support their claim that courts have consistently held that buying trademarked terms as keywords, standing alone, is insufficient to prove trademark infringement. *See* Op. at 39-40 n.43. However, almost all of those cases postdated the Trademark Settlements, so they could not have factored into the parties' decision to settle 1-800 Contacts' trademark infringement claims. *See id*. The few cases cited by the majority that predated the Trademark Settlements show—at most—that the legal landscape was uncertain, and support the fundamental proposition that trademark infringement and customer confusion are inherently fact-specific. *See, e.g.*, *GEICO*, 330 F. Supp. 2d at 704 ("Whether defendant's [trademark] uses . . . create a likelihood of confusion [is a] fact-specific issue[ ] not properly resolved through a motion to dismiss."); *Gov't Emps. Ins. Co. v. Google, Inc.*, No. 04-cv-507, 2005 WL 1903128, at *4 (E.D. Va. Aug. 8, 2005) ("[T]he Fourth Circuit has emphasized that likelihood of confusion is a highly factual issue, the assessment of which depends largely on the particular circumstances of each case, . . . and that the likelihood of confusion standard does not require that a plaintiff prove actual confusion.") (citations omitted).

> company claims falsely that it produces the same brand of a competitor or tries to confuse consumers into thinking they do by using similar words.

CX8006 (Evans Expert Report) at 135. In other words, trademark protection gives companies an incentive to maintain their reputations and improve quality, which promotes competition. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985) ("[T]rademarks desirably promote competition and the maintenance of product quality"); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987) ("[T]rademark protection encourages expenditures on quality"); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:4 (5th ed. June 2018) [hereinafter "McCarthy 5th Edition"].

Competition is not the only benefit of trademark protection; by encouraging brand investment, it also fosters innovation and gives more information to customers. *See, e.g.*, Landes & Posner, *supra*, at 269 ("In short, a trademark conveys information that allows the consumer to say to himself, 'I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier.'") (footnote omitted). "An important purpose underlying trademark law is the protection of the trademark owner's investment in the quality of the mark and the quality of the goods or services the mark identifies. . . . 'By contrast, if there were no trademarks . . . a manufacturer would gain little or nothing from improving his product's quality. . . . The result would be a race to produce inferior products, rather than competition to produce better ones.'" McCarthy 5th Edition, *supra*, § 2:4 (quoting Richard Craswell, *FTC Policy Planning Issues Paper: Trademarks, Consumer Information and Barriers to Competition*, at 7 (1979)).

The procompetitive benefits of trademarks are precisely why courts like the Second Circuit have encouraged zealous trademark enforcement, and declined to impose upon mark owners the fear of treble antitrust damages. *See, e.g.*, *Clorox*, 117 F.3d at 61 ("Efforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies."); *Drop Dead Co. v. S. C. Johnson & Son, Inc.*, 326 F.2d 87, 96 (9th Cir. 1963) ("[T]he bringing of infringement suits based on colorable similarity rather than on exact identity . . . constitute[s] the sort of aggressive competition and promotion that anti-trust law seeks to protect"), *cert. denied*, 377 U.S. 907 (1964); *see also Car-Freshner Corp. v. Auto Aid Mfg. Corp.*, 438 F. Supp. 82, 87 (N.D.N.Y. 1977) ("[T]he acts of the plaintiffs in registering and enforcing the trademark in issue . . . merely represent fair and aggressive competition which does not constitute a violation of the antitrust laws") (citation omitted). Zealous protection is precisely what 1-800 Contacts did here.

The crux of the majority's antitrust story underscores the point. The search engine results pages that appear in response to searches for "1-800 Contacts" were the supposed "critical battleground"[36] for competition precisely—and only—because of 1-800 Contacts' brand investment. *See, e.g.*, CX9033 at 017 (Mohan Dep. 61:9-12); CX9039 at 026, 040 (Clarkson

[36] Draft Oral Arg. Tr. 39:20-22; *see also* Op. at 14, 30, 32, 34 (describing the search engine results pages displayed in response to searches for 1-800 Contacts' trademarked terms as the "key moment" or "crucial moment" of competition).

Dep. 97:20-98:3, 155:25-156:8). In other words, 1-800 Contacts engaged in the type of brand investment envisioned by trademark policy, and, combined with its excellent service and constant efforts to improve the customer experience, built a brand that customers trust. The company then sought zealously to protect its brand.

Assigning liability—and the potential for treble damages, no less—to this conduct will not only chill brand investment, it will chill the very competition the majority seeks to protect.

c) The Policy Favoring Litigation Settlements Supports Application of the Traditional Rule of Reason.

Trademark policy is not the only one at stake. "Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute." *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (citations omitted); *accord Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982). That is because settlements of complex litigation allow the settling parties to avoid "a litany of direct and indirect costs". *Schering-Plough II*, 402 F.3d at 1075. Consistent with this precedent, both parties' experts agreed that settlements are economically efficient. *See* CX9042 at 050 (Evans Dep. 196:22-24); RX0739 (Murphy Expert Report) at 053; Murphy, Tr. 4207:22-4208:25; RX0737 (Landes Expert Report) at 017.

The majority's rule effectively makes non-use agreements—the most common means of settling trademark infringement litigation,[37] and favored in their own right on policy grounds[38]—"inherently suspect", opening the door to reviewing and/or litigating many more trademark settlements. This will increase the risk of settling trademark infringement litigation, which is efficient in part because it reduces risk. This is particularly so where, as here, the real issue is the highly fact-specific question of confusion. The Second Circuit explained the point in *Clorox*:

> [T]rademark 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. Parties such as Clorox, Sterling, and their predecessors, are in a position to structure such agreements in the way that the parties believe best accommodates their interests in light of trademark law. Accordingly, in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors—such as the territorial market division condemned in *Timken* [*Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951)]—and absent exceptional circumstances, we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight.

[37] *See* RX0734 (Hogan Expert Report) at 096.

[38] Trademark non-use agreements are "usually entered into to settle an infringement dispute", are "not against public policy", and "are routinely upheld and enforced." McCarthy 5th Edition, *supra*, § 18:82 (footnote omitted).

> At the time of the execution of such an agreement, the parties are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves. . . . In the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive.

Clorox, 117 F.3d at 60.[39]

A rule requiring the *post hoc* evaluation of intellectual property infringement claims will be difficult for us to apply, but also, and more importantly, for private parties to self-administer. What level of infringement confidence is required? Are plaintiffs only allowed to settle trademark infringement claims that they know they are going to win? That certainly can't be the standard. Regardless, we are ill-equipped to judge. Clarity may only result from substantial litigation that follows the majority's opinion, animated by the prospect of treble damages.

B. The Evidence That the Trademark Settlements Had Direct Anticompetitive Effects Is Insufficient.

If the Trademark Settlements are not "inherently suspect", which they are not, Complaint Counsel can meet their initial burden of proof under the rule of reason in one of two ways: "an indirect showing based on a demonstration of defendant's market power" or "direct evidence of 'actual, sustained adverse effects on competition'". *Realcomp I*, 2007 WL 6936319, at *31 (quoting *FTC v. Indiana Federation of Dentists* ("*IFD*"), 476 U.S. 447, 461 (1986)) (other citations omitted). The majority take only the direct approach; they do not attempt an indirect showing of market power. *See* Section II(D), *infra*. To meet the initial burden of proof with direct evidence, a plaintiff must show adverse effects on competition that are actual, sustained, and significant or substantial. *See Realcomp I*, 2007 WL 6936319, at *31; Op. at 17 ("[T]he plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers."); *Ohio v. Am. Express Co.* ("*AmEx*"), 138 S. Ct. 2274, 2284 (2018) ("Under [the rule of reason] framework, the plaintiff has the initial

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[39] The Ninth Circuit rejected a challenge to a trademark settlement agreement for similar reasons:

> If the merits of a cause of action underlying a [trademark] compromise agreement could, as a matter of course, be inquired into in an action to enforce the settlement, neither settlement nor the policies it promotes would be fostered. The parties would be subjected to the expense, delay, and uncertainty they sought to avoid through settlement; the court would be burdened with trial of the underlying dispute and the preparation which precedes it.

MWS Wire Indus., Inc. v. Cal. Fine Wire Co., Inc., 797 F.2d 799, 802 (9th Cir. 1986); *see also T & T Mfg. Co. v. A. T. Cross Co.*, 449 F. Supp. 813, 827 (D.R.I. 1978) ("[T]he Court must balance the public interest against confusion, one of the significant purposes of trademark law, against the interest in enforcing contracts and protecting the reliance they induce. [¶] The Court must also add into this balance the interest in encouraging extra-judicial settlement of trademark litigation. *Insisting that a court review a settlement to assure that no public confusion will result would make such agreements of little value to the parties.* Parties would sensibly conclude that they might better litigate the issue of confusion to conclusion rather than reach a settlement which might later be found to be unenforceable. Such a premium on litigation would lead to a further drain on judicial resources. Moreover, we note the advantage of allowing business persons to determine whether their self-interest is better served by making such contracts or not.") (emphasis added), *aff'd*, 587 F.2d 533 (1st Cir. 1978), *cert. denied*, 441 U.S. 908 (1979).

burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers"); *Realcomp II*, 635 F.3d at 831-32 ("substantial consumer harm"); *Clorox*, 117 F.3d at 57 (requiring the plaintiff to show that the trademark settlement agreement "may significantly harm competition as a whole"). Complaint Counsel have not met that burden with its showing on direct effects.

1. In the Context of a Trademark Settlement Agreement, a Restriction on Advertising Is, by Itself, Insufficient to Show Direct Effects.

The majority first argue that Complaint Counsel established direct effects by showing that advertising was limited by the Trademark Settlements. But the Supreme Court held in *California Dental* that restrictions on advertising, by themselves, are insufficient to show anticompetitive harm.[40] *See Cal. Dental*, 526 U.S. at 776. The relevant inquiry is whether an advertising restriction limited output of the underlying product or service. *See id*. ("The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit [output of the underlying product or service].").

Other than *California Dental*, the only cases cited by the majority for the proposition that a reduction in advertising, by itself, is sufficient to show direct effects are *Indiana Federation of Dentists* ("*IFD*") and *Realcomp*, *see* Op. at 42-43, neither of which supports that proposition. Indeed, neither case involved advertising, a point the majority apparently concede. *See id*. at 43.

The majority rely on *IFD* for the proposition that a concerted effort to withhold "information"—a broad and nebulous category—constitutes a competitive harm and, therefore, any limitation on "information" constitutes direct evidence of anticompetitive effects. *See id*. at 42-43, 46 n.49. They misread the case. In *IFD*, the Supreme Court considered "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire", specifically, providing x-rays to insurers. *IFD*, 476 U.S. at 459. Thus, *IFD* is a case about agreeing not to provide a service, not about information or advertising. The Commission and the D.C. Circuit recognized as much in *Polygram*. *See Polygram I*, 136 F.T.C. at 335 (describing the restraint at issue in *IFD* as "an agreement among dentists to withhold from their customers a desired service"); *Polygram II*, 416 F.3d at 36 ("[I]n *IFD*, the Supreme Court ruled a horizontal agreement to withhold services could not be sustained"). As did the Supreme Court in *California Dental*, *see Cal. Dental*, 526 U.S. at 770, and other courts in the years since *IFD*. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008); *Int'l Healthcare Mgmt. v. Hawaii Coal. for Health*, 332 F.3d 600, 606 (9th Cir. 2003). Even assuming the majority's categorization of *IFD* were accurate (which it is not), nothing in *IFD* supports a finding that all restrictions on information (much less advertising), standing

[40] As discussed above, the majority's attempts to distinguish *California Dental* fail. *See* Section II(A)(2)(a)(i), *supra*.

alone, constitute direct evidence of anticompetitive effects.[41] The defendant in *IFD* implemented an outright ban on providing x-rays to dental insurers, whereas the Trademark Settlements merely raise the search costs (marginally) to a certain set of customers for information still very much available.

The majority's reliance on *Realcomp* as an "information" restraint case is similarly misplaced. *See* Op. at 43. The conduct at issue there was a policy that prohibited the dissemination of property listing information to competitors through Realcomp's multiple listing services ("MLS"). *Realcomp II*, 635 F.3d at 819. This prevented competing realtors from offering listings (i.e., their product) to their customers. *See id*. In other words, the restraint foreclosed access to a necessary input and directly reduced downstream output, *see Realcomp I*, 2007 WL 6936319 at *25, "restrict[ing] the ability of members to offer consumers products that create 'price pressure' on more expensive products", *id*. at *5. The restraint limited output, not advertising, so the anticompetitive effect (i.e., a reduction in output) was obvious. *See Realcomp II*, 635 F.3d at 829-30. *Realcomp* cannot support a finding that reductions in advertising or information, without a concomitant reduction in output, constitute direct anticompetitive effects.

According to the majority, any restriction on truthful advertising—indeed, even less, the restriction of truthful *information* that might impede a consumer's ability to discover a lower price—constitutes direct evidence of anticompetitive harm. *See, e.g.*, Op. at 43 ("Restricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm."). If all a plaintiff need show to establish direct effects is the existence of a restriction on advertising—regardless of justification, size, or effect—then all limits on truthful advertising are, effectively, inherently suspect, a result the majority specifically disclaim.[42] *See id*. at 22. And they must, as such a rule would inevitably treat conduct that would otherwise be considered competitively neutral or even procompetitive as presumptively illegal. *See, e.g.*, *Cal. Dental*, 526 U.S. at 771 ("[I]t seems to us that the [California Dental Association]'s advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."). A trademark non-use agreement that applies to advertising is just one example.

As a matter of law, then, the majority's attempt to establish direct effects by looking only at advertising fails. It also fails as a matter of fact. While advertisements in response to competitors' trademarked search terms were limited, the majority fail to establish that the amount of advertising was reduced. *See* Section II(E), *infra*.

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[41] Even the portion of *IFD* quoted by the majority does not support their position. *See* Op. at 43 ("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 to disrupt the proper functioning of the price setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher priced services than would occur in its absence.'") (quoting *IFD*, 476 U.S. at 461-62). The x-rays at issue allowed insurers to assess the appropriateness of claims for benefits. *IFD*, 476 U.S. at 455. There is no similar category of information withheld here.

[42] Analytically, categorizing conduct as "inherently suspect" has the same result as holding that direct effects inhere in it. If the Trademark Settlements are inherently suspect, then it is hard to imagine what advertising restrictions would not be inherently suspect.

2. There Is Insufficient Evidence of Direct Price Effects.

While restrictions on advertising are not themselves enough, the majority are correct that a showing of actual, sustained, and substantial or significant price effects would suffice. *See, e.g.*, *AmEx*, 138 S. Ct. at 2284; *Realcomp II*, 635 F.3d at 831-32; *Clorox*, 117 F.3d at 57; *Realcomp I*, 2007 WL 6936319, at *31; Op. at 17. I disagree that Complaint Counsel have met that burden here.

The majority's finding of direct price effects rests almost entirely on the unremarkable fact that 1-800 Contacts' prices were higher than some of its competitors' prices. *See* Op. at 46-47. The majority find that "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." *Id*. at 47. But Complaint Counsel failed to prove that the Trademark Settlements caused the price differential.

First, the record is clear that that price differential predated the Trademark Settlements. *See, e.g.*, *id*. at 46; CX9001 at 021 (Bethers IH 79:23-80:8) ("[W]e were never trying to compete with our online competitors on price. We basically came back and said our online competitors are going to have lower prices than we do. And they did from the day I started with the company [in July 2003]. They were significantly below our retail price."); CX0535 at 010 (2006 business plan stating that 1-800 Contacts' "pricing strategy" was to "[p]rice below independent ECPs, close to retail chains, but above our online competitors and Costco"); *see also* Coon, Tr. 2708:22-2709:9 (noting that "[l]iterally from the beginning", 1-800 Contacts' strategy was to price at a discount from ECPs but slightly higher than other online contact lens retailers; that strategy has "never changed"); IDF 434 ("1-800 Contacts on average has retail prices for contact lenses below independent ECPs and retail optical chains, but higher than mass merchants, club stores, and other online retailers.") (citation omitted).

Second, Complaint Counsel has put forward no evidence that the price gap increased as a result of the Trademark Settlements. There is no clear causal connection between the price gap and the Trademark Settlements, especially considering that the gap existed before the Trademark Settlements. And there are at least two innocuous and equally plausible reasons why 1-800 Contacts' prices are higher, including its superior service[43] and customers' preference for the

[43] The majority assert that certain evidence counters a finding that the service differential explains the price gap. *See* Op. at 48. But superior service is just one of the reasons that 1-800 Contacts' prices may be higher than its competitors' prices. Regardless of how persuasive one may find the evidence on the service differential, it is insufficient to show that the price gap is the result of supracompetitive pricing. Also, the majority's reliance on competitor testimony claiming that they "offer comparable service to 1-800 Contacts" is remarkable. *See id*. What competitor is going to get on the stand and testify under oath that its service is inferior?

1-800 Contacts brand.[44] Both of these were likely facilitated and enhanced by 1-800 Contacts' ability to earn a return on its brand.[45]

Without observable direct effects, the majority and Complaint Counsel rely on the claim that prices would have gone down but for the Trademark Settlements. But Complaint Counsel failed to quantify the amount that prices would have gone down in their but-for world. *See, e.g.*, Evans, Tr. 1723:20-1724:3 (Complaint Counsel's economic expert confirming that he did not quantify the extent to which 1-800 Contacts or any other company's prices would have gone down in the absence of the Trademark Settlements); *see also* CX8007 (Athey Expert Report) at 036 (providing no empirical evidence for her conclusions). The law requires more: specifically, actual, sustained, and substantial or significant effects. Without quantification, we cannot know whether the harm meets that test.

The majority also claim that 1-800 Contacts maintained supracompetitive prices. *See* Op. at 49. But Complaint Counsel did not adduce legally sufficient proof. "[T]o support a claim that a defendant set supracompetitive prices through direct evidence, a plaintiff must often provide an analysis of the defendant's costs, showing both that the defendant had an 'abnormally high price-cost margin' and that the defendant 'restricted output.'" *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 434 (3d Cir. 2016) (quoting *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004)). As for the second prong of that test, Complaint Counsel does not contend that the Trademark Settlements reduced output. *See* ID at 153 n.36.

Returning to the first prong, the majority do not even attempt to show that 1-800 Contacts' price-cost margin was abnormally high—either before or after the Trademark

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[44] *See, e.g.*, McCarthy 5th Edition, *supra*, § 2:5 (noting that neither brand preference nor paying a premium for branded products is irrational); RX0739 (Murphy Expert Report) at 081 ("Economists studying price dispersion have shown that a variety of characteristics beyond access to information, such as consumer trust, retailer brand, market and category characteristics, can play an important role in explaining price dispersion.") (footnote omitted); Borden, Inc., Proposed Order Modification with Statement to Aid Public Comment, 48 Fed. Reg. 9023, 9025 (proposed Mar. 3, 1983) (to be codified at 16 C.F.R. pt.13) (noting consumers' willingness to pay a price premium as the result of a company's "familiar and successfully advertised trademark", which "reflected a marketplace judgment about interbrand competition, which 'is the primary concern of antitrust law.'") (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 n.19 (1977)); Complaint at 7, *In re J.M. Smucker Co. & Conagra Brands, Inc.*, Dkt. No. 9381 (F.T.C. Mar. 5, 2018) ("Differences in shelf prices for branded and private label CV [i.e., canola and vegetable] oils reflect end consumers' perception of meaningful product differentiation between branded and private label CV oils. End consumers who buy branded CV oils generally pay a significantly higher price for a branded CV oil than for a private label CV oil.").

[45] As the Supreme Court has noted:

> Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 896-97 (2007).

Settlements.[46] Instead, they rely on inferences and arguments unsupported by proven facts to show that 1-800 Contacts charged supracompetitive prices. As an initial matter, it is obvious that Complaint Counsel failed to meet their burden here because they did not proffer any evidence on margins.[47] The only evidence in the record regarding 1-800 Contacts' margins was proffered by 1-800 Contacts, and that evidence showed that 1-800 Contacts' margins [redacted] from 2003 to 2016 despite the Trademark Settlements. RX0739 (Murphy Expert Report) at 064, 107. The majority claim that "[redacted] margins do not necessarily mean prices did not rise; without competitive pressures, costs *may* have risen as prices increased, [redacted]." Op. at 49 (italicized emphasis added). This argument substitutes conjecture for actual evidence by providing one possible theory for [redacted]. It is more likely that 1-800 Contacts' [redacted] margins were not affected by the Trademark Settlements. *See, e.g.*, RX0739 (Murphy Expert Report) at 064 (stating that 1-800 Contacts' margins have been [redacted] over time" and did not increase as a result of the Trademark Settlements, which "tells us that the settlements [redacted]."). Indeed, the founder of 1-800 Contacts testified that the company has had the same pricing and margin strategy since 1992. *See* CX9035 at 023 (Coon Dep. 86:15-87:14). Regardless of which explanation is more plausible, it is Complaint Counsel's burden to prove direct effects, and they have provided no evidence on the topic of margins.

In an effort to show that 1-800 Contacts' [redacted] profit margins could be explained by 1-800 Contacts' pre-Trademark Settlement supracompetitive prices, the majority attempt to put forward indirect evidence of market power. *See* Op. at 49. They claim that—because it was "the incumbent online seller" and had a large share of online sales—1-800 Contacts had market power, which allowed it to charge supracompetitive prices prior to the Trademark Settlements. *See id*. at 49. This argument fails as a matter of law. <u>First</u>, this is not an argument based on direct evidence of anticompetitive effects; rather, it is an attempt to shoehorn an indirect showing of market power into a direct effects analysis. *See Geneva Pharm.*, 386 F.3d at 500 ("[The] plaintiffs' assertion with regard to [the defendant]'s continuing high percentage market share is not direct evidence, but rather requires that we engage in the sort of inference more appropriate for market share analysis."). <u>Second</u>, an indirect showing of market power based on market shares requires a properly defined market, which is absent here. *See* AREEDA & HOVENKAMP, *supra*, ¶ 531 ("Market definition is the initial step in assessing a market's structure.") (footnote omitted); *see also id*. ¶ 532(a) ("Identifying a market and computing market shares provide an indirect means for estimating market power."). Without a properly defined market, showing that 1-800 Contacts had market power based on its share of online sales is impossible. And without a showing of market power, the inference that 1-800 Contacts could have been charging supracompetitive prices also fails. As a result, it is equally (if not more) plausible that 1-800 Contacts' [redacted] margin is consistent with a finding that the Trademark Settlements had [redacted]

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[46] The majority also fail to show that 1-800 Contacts' margins would have been lower but for the Trademark Settlements; indeed, the record is devoid of evidence of counterfactual margins.

[47] Given that Complaint Counsel bears the burden of proof to show direct effects, it is odd for the majority to argue that 1-800 Contacts somehow calculated its margins incorrectly without requiring any affirmative evidence from Complaint Counsel or any critique of 1-800 Contacts' margin calculation itself. *See* Op. at 49. It appears that the majority shift the burden to disprove direct effects to 1-800 Contacts while relieving Complaint Counsel of its burden entirely.

[redacted] on 1-800 Contacts' margins, rather than supracompetitive prices as the majority claim. *Cf*. Op. at 49.

The majority also claim that "[p]roof 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." [48] *Id*. While we may not need a "precise competitive price", we do need evidence of substantial (or significant) anticompetitive harm to find that Complaint Counsel met its burden to show actual, sustained, and significant or substantial direct effects, especially in the presence of real efficiencies that would weigh against any such harm. If the econometrics are insufficient to quantify harm, there is always the option of showing market power indirectly; but the majority opt not to perform that analysis here. *See* Section II(D), *infra*.

Finally, the majority argue that the 1-800 Contacts price match policy provides evidence that the Trademark Settlements "had actual price effects". Op. at 47. But the presence of a price match policy does not prove direct effects; it is equally consistent with a desire by 1-800 Contacts to price discriminate among its customers. And the mere existence of the policy itself signals to customers that they can buy their contact lenses from other suppliers at potentially lower prices.

C. The Majority Inappropriately Discount 1-800 Contacts' Procompetitive Justifications for the Trademark Settlements.

Given that Complaint Counsel did not meet their initial burden under the inherently suspect framework or by showing direct effects (and because the majority opt not to attempt an indirect showing of market power), 1-800 Contacts need not put forward procompetitive justifications. Nevertheless, the majority fail to give appropriate credit to 1-800 Contacts' proffered procompetitive justifications.

In their preliminary analysis of 1-800 Contacts' procompetitive justifications, the majority recognize that the avoidance of litigation costs through settlement is a "legitimate" justification that is "cognizable and, at least, facially plausible". Op. at 23. The majority also concede that avoidance of litigation costs is a well-recognized procompetitive justification. *See id*. (citing *Actavis*, 570 U.S. at 153; *Schering-Plough I*, 136 F.T.C. at 1003; *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006)). Both sides' experts recognize that settling lawsuits is generally economically efficient. IDF 355 (citing RX0739 (Murphy Expert Rep.) at 053, CX9042 at 050 (Evans Dep. 196:22-24)). "There is no question that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation." *Schering-Plough II*, 402 F.3d at 1075 (citation omitted).

Despite this clear precedent and their acknowledgement that avoiding litigation costs is procompetitive, the majority claim that, to be considered "valid", a respondent must show that

[48] This claim contrasts markedly with the majority's defense of the model put forward by Complaint Counsel's expert to support the alleged advertising restrictions: "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." Op. at 48.

any cost reduction achieved through settlement was passed on to customers. *See* Op. at 36-37. The majority cite no relevant case law for this proposition.[49] Economic theory cannot fill the precedential void for the majority's rule. Capital savings like reductions in litigation costs from settlements do not directly affect marginal costs, so it would be impossible to show that they were passed on directly to customers in the form of price reductions.[50] Thus, under the majority's analysis, savings resulting from settlements are "legitimate", "cognizable", and "facially plausible", but could never be "valid". *See* Op. at 23, 36-37. That cannot be the rule.

The FTC and Supreme Court in *Actavis* recognized that the litigation costs saved through a settlement could be an "offsetting or redeeming virtue[ ]". *Actavis*, 570 U.S. at 156. The Court explained that "[w]here a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Id*. In other words, the Supreme Court considered avoided litigation costs as a procompetitive justification. *Id*. Nowhere did the Court require a showing that savings be passed on to customers in order to be "valid".

Regardless, the Trademark Settlements had the added benefit of protecting the settling parties' intellectual property rights. As discussed above (*see* Section II(A)(4), *supra*), trademarks promote interbrand competition, which the Supreme Court has identified as "the primary concern of antitrust law". *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 n.19 (1977)). The ability to enforce and settle claims for infringement of those rights is essential to achieving their purpose. Thus, a reduction in—or elimination of—litigation costs as the result of a settlement is not just legitimate, it is also a valid procompetitive justification even without a showing that the specific reduction in litigation costs was passed on to consumers.

The majority's only rebuttal to 1-800 Contacts' argument that the trademark protections provided in the Trademark Settlements are procompetitive justifications is that 1-800 Contacts' trademark infringement claims were weak. *See* Op. at 37-41. Evaluating the merits of the underlying infringement claims is inappropriate for the reasons explained above. *See* Section II(A)(4)(a), *supra*. The majority's concern about the merits of 1-800 Contacts' infringement

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[49] None of the cases cited by the majority for the proposition that settlement-related saved litigation costs must be passed through to consumers in order to be "valid" involved a settlement of any kind. *See* Op. at 37 (citing *Chicago Prof'l Sports LP v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992) (challenge to the NBA's rule that certain television channels could not carry more than 20 games per season), *cert. denied*, 506 U.S. 954 (1992); *Polygram I*, 136 F.T.C. at 345 (challenge to joint venture agreement between competitors not to discount or advertise); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016) (challenge to a proposed merger between competing hospitals); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998) (challenge to an NCAA rule limiting coaches' compensation), *cert. denied*, 525 U.S. 822 (1998)). As a result, I do not find any of those cases as persuasive or as directly applicable to the present case as *Actavis*.

[50] *See, e.g.*, Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSP. 155, 157 (2007) ("Under a consumer surplus standard, only the saving in marginal costs will carry weight because it will reduce prices, while the fixed-cost savings is not considered as a benefit to consumers. . . . Gains that lead to lower fixed costs today can encourage research and development, new products, and plants in the future. However, by focusing only on efficiencies that influence price over a short period, a government antitrust agency risks failing to credit the future efficiencies that will benefit consumers in the long run. To put it another way, the fixed-cost savings of today are the variable-cost savings in the future for new products.").

claims causes them to miss the forest for the trees. Nowhere in their evaluation of the trademark-related procompetitive benefits of the Trademark Settlements do the majority recognize how trademark protections and the vigorous enforcement of trademarks encourage brand investment and promote competition. In fact, the majority dismiss the benefits of trademark policy entirely. This is inappropriate as a matter of law and ignores the facts of this case, including the tremendous amount of investment 1-800 Contacts has made in building its brand, lowering the price of contact lenses, and offering customers superior service. It also raises the question of what the majority's rule would mean for infringement claims they view as strong.

D. The Majority Forego an Indirect Showing of Market Power.

Because I do not believe that the majority have shown that the challenged conduct is inherently suspect or that Complaint Counsel have met their burden to show substantial direct anticompetitive effects, the only way for Complaint Counsel to meet its initial burden is through an indirect showing of market power.[51] But the majority opt not to take that route here, instead relying exclusively on their claim that the Trademark Settlements are inherently suspect or caused direct anticompetitive effects. Even though the majority do not establish a relevant market, assumptions about the market permeate their opinion, providing ballast to a number of their premises. Without a properly defined product market, each of these arguments fails.

For example, in their section on direct effects, the only support that the majority put forward for their claim that 1-800 Contacts charged supracompetitive prices prior to the Trademark Settlements was that "1-800 Contacts was the incumbent online seller, with a dominant share of online sales throughout this period." Op. at 49 (citations omitted). For the reasons discussed above, *see* Section II(B)(2), *supra*, any attempt to show that 1-800 Contacts charged supracompetitive prices as the direct result of its "share of online sales" requires a properly defined relevant market in which market power can be inferred from a high share. *See* AREEDA & HOVENKAMP, *supra*, ¶¶ 531-532. In other words, market definition is a prerequisite to inferring that 1-800 Contacts charged supracompetitive prices from its share of the market. Without a relevant market, any claim that 1-800 Contacts had market power based on its "share of online sales" and, therefore, charged supracompetitive prices is unsupportable.

The majority also "find that the agreements harm consumers and competition for the *online sale of contact lenses*." Op. at 2 (emphasis added). It is impossible for the Trademark Settlements to harm competition in a limited line of commerce like "online sales" without a showing that such a limitation is appropriate. In other words, by failing to prove that "the online sale of contact lenses" is a properly defined antitrust market, the majority cannot claim that customers or competition in that market were harmed. Elsewhere, the majority use similar claims that 1-800 Contacts had a large share of "online sales" to imply that 1-800 Contacts was somehow a dominant seller of contact lenses online. *See, e.g.*, *id*. at 4 ("In 2015, 1-800 Contacts accounted for approximately 54 percent of online sales, which is more than four times the sales

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[51] *See, e.g.*, *Realcomp I*, 2007 WL 6936319, at *31 (stating that—absent a finding that a restraint is inherently suspect—a plaintiff can meet its initial burden "in either of two ways . . . an indirect showing based on a demonstration of defendant's market power . . . [or] direct evidence of 'actual, sustained adverse effects on competition'") (quoting *IFD*, 476 U.S. at 461; and citing *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998); *Law*, 134 F.3d at 1019; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993)).

of the second-largest online retailer.") (citations omitted). However, because the majority opt not to define a relevant market, their attempts to show 1-800 Contacts was a dominant online seller—or even that they had a large share of contact lens sales—necessarily fail, as do any implications the majority would like to draw from those attempts.

The majority similarly assert that the Trademark Settlements are problematic because they cover a large number of online contact lens retailers that make up a large percentage of online contact lens sales. *See id*. at 33 ("Challenged Agreements covered 14 different online contact-lens retailers that account for 79 percent of online contact lenses in the United States. . . . [T]he challenged agreements here cover the landscape of online contact-lens retailers resulting in harm to competition overall.") (citations omitted). Because it relies on an indirect showing of market power, the majority's conclusion that the Trademark Settlements caused "harm to competition" requires proof of a relevant antitrust market comprised of the online sale of contact lenses in the United States. Absent a proper showing such a market exists, statements like these are irrelevant to the antitrust analysis and do not support the majority's assertion that the Trademark Settlements harmed competition.

Not only do these assumptions about the market support key aspects of the majority's analysis, while lacking support themselves, they elide difficult questions about the market in this case. Significant participants in the online sales of contact lenses were not party to the Trademark Settlements, and the record reflects that customers purchased the majority (83%) of their contact lenses from other kinds of retailers, including independent ECPs, optical retail chains, mass merchants, and club stores. *See* IDF 491. Some were more expensive; some cheaper. Competition from these other retailers cannot be ignored, especially without a properly defined relevant market.

E. The Majority Have Not Shown That the Trademark Settlements Have Anticompetitive Effects for Search Engines.

The majority also would condemn the Trademark Settlements as unlawful because of their effects on firms owning search engines, such as Google (the search engine owned by Alphabet, Inc.) and Bing (owned by Microsoft Corp.).[52] This legal theory is novel; none of the cases cited by the majority as involving advertising restrictions (e.g., *California Dental* and *Polygram*) considered such harm. If the theory is novel, the evidence that search engines have

[52] It is odd for the Commission to address this issue at all. Judge Chappell did not analyze the effect of the Trademark Settlements on search engines and Complaint Counsel did not appeal this portion of the Initial Decision. *See* Op. at 50 & n.52.

been harmed is all but absent.[53] Microsoft [redacted] and its [redacted] testified that the company is "[redacted]." RX0704 at 007.

As to Google—the largest seller of paid search advertising (*see* Stip. at 5)—I am concerned this theory of liability fails adequately to take into account record evidence about the putative victim's role in the alleged harm. As noted above, until 2004 Google itself banned as a matter of company policy the same conduct later barred by the Trademark Settlements (i.e., permitting advertisements for third parties to appear in response to searches for trademarked keywords). *See* Section I(C), *supra*. When it changed its policy, Google assisted trademark owners, including 1-800 Contacts, to address the threat to their marks, advising them specifically that negative keywords were an effective tool to prevent or limit the opportunities for trademark infringement. *See id*. There is some irony, then, in claiming that Google was harmed. At the very least, the fact that Google once required and, later, affirmatively encouraged the allegedly anticompetitive conduct suggests the Trademark Settlements do not harm Google, a sophisticated and aggressively competitive seller of search-based online advertising, in any material way.

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[53] I disagree with the conclusion the majority reach on the facts here, as explained in the text, but note that condemning actual bid rigging is a critical component of any robust antitrust regime. The Commission has a dual mission to protect consumers and to promote competition. *What We Do*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do. Promoting competition requires effective enforcement of the antitrust laws regardless of the identity of the harmed customer. *See, e.g.*, *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117-22 (D.D.C. 2016) (enjoining merger between the two largest office supply companies in the country because of the potential harm to large businesses, including some of "the most powerful companies in the world") (citation omitted); *id*. at 126 ("Antitrust laws exist to protect competition, not a particular set of consumers"); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (enjoining merger between the two largest broadline foodservice distribution companies in the country primarily based on potential harm to businesses with a nationwide or multi-regional footprint); *see also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016) (reversing the district court's denial of a preliminary injunction because the merger was likely to harm competition in the market for "general acute care ('GAC') services sold to commercial payors [i.e., insurers]"); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016) (same). And "there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) . . . can cause serious economic harm." Office of General Counsel, U.S. Sentencing Commission, Primer: Antitrust, at 1 (March 2018), https://www.ussc.gov/sites/default/files/pdf/training/primers/2017_Primer_Antitrust.pdf (footnote omitted).

In their analysis, the majority apply the rule of reason to consider the harm to search engines,[54] finding direct evidence of decreases in (1) search engine advertising revenue; and (2) the number of advertisements displayed, which the majority claim reduced both the total output of advertisements and the quality of the search engines' product, the search engine results page ("SERP"). *See* Op. at 50-54. Neither finding is sufficient to show direct effects under the Supreme Court's standard, recently reiterated in *AmEx*, that "[d]irect evidence of anticompetitive effects would be 'proof of actual detrimental effects [on competition],' such as reduced output, increased prices, or decreased quality in the relevant market". *AmEx*, 138 S. Ct. at 2284 (quoting *IFD*, 476 U.S. at 460) (other citations omitted); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power.") (citations omitted).

The evidence does not support a finding of a direct price effect (here, a reduction in paid search advertising auction prices). The majority do not cite evidence of reductions in advertising budgets or the number of advertisements created or displayed by the contracting parties. Instead, the majority proffer a theory that "a reduction in the number of search-advertising auction participants offering relevant ads reduces the price paid by the auction winners and reduces the revenue for the search engine." Op. at 51 (footnote omitted). While this might be correct with

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[54] In a footnote, the majority argue that the Trademark Settlements could also be evaluated in terms of their impact upon search engines under an "inherently suspect" framework. *See* Op. at 50-51 n.54. But the facts of this case do not meet the standard for applying that standard. The Trademark Settlements govern what kind of advertisements can be bought, not the amount of advertisements that a company can buy; and a rudimentary observer might very well conclude such conduct has no effect on search engines. What is more, the majority do not cite sufficient economic evidence or judicial experience that would justify the application of a truncated rule of reason analysis. *See id*. While bid rigging has indeed been condemned as violating the antitrust laws, the Trademark Settlements are categorically different from the types of conduct that the FTC and DOJ consider *per se* illegal bid rigging. *See Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For, An Antitrust Primer*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes [hereinafter "*DOJ Antitrust Primer*"]; *Bid Rigging*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/bid-rigging. They lack what almost all forms of bid rigging have in common: "an agreement among some or all of the bidders which predetermines the winning bidder". *DOJ Antitrust Primer*, *supra*, at 3. Nothing in the Trademark Settlements predetermined the winner of any auction. The Trademark Settlements also are not akin to *per se* illegal bid rigging because they were not intended to (and did not always) decrease auction prices, which happened (if at all) only incidentally as the result of the search engines' use of an auction algorithm. *Cf. Compact v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 594 F. Supp. 1567, 1575-76 (M.D. Tenn. 1984) (agreement to "fix the price of minority architect participation on public contracts" with the intent and "admitted purpose[ ]" of "eliminat[ing] competitive bidding between its members"). As a result, the Trademark Settlements do not bear the "close family resemblance" to classic bid rigging or rotation sufficient to apply "inherently suspect" analysis. *See Polygram II*, 416 F.3d at 36-37; *see also United States v. Heffernan*, 43 F.3d 1144, 1146-47 (7th Cir. 1994) (interpreting "bid rigging" as meaning "bid rotation", the latter of which "eliminate[s] all competition rather than just price competition") (citation omitted).

The majority also suggest that Complaint Counsel's initial burden under the inherently suspect and direct effects standards "rely on the same evidence". Op. at 50-51 n.54. Suggesting that both standards utilize precisely the same evidence and failing to explain how the two analytical frameworks differ, I fear, will only exacerbate confusion in the law. As an expert antitrust agency, the Commission has a duty to help clarify the law, and its decisions certainly endeavor not to obfuscate antitrust analysis further.

respect to certain auctions and SERPs involving trademarked keywords, there is no evidence that this is true with respect to the purchases by the parties to the Trademark Settlements generally, including purchases of other paid search advertising, online advertising more broadly, or advertising as a whole.[55] But even accepting the specific auction as the relevant denominator, the record shows that it is not always true that if fewer advertisers participate in an auction that the price paid by the auction winner goes down. *See, e.g.*, IDF 219 ("Under the second price auction used by Google, the number of bidders may or may not affect the actual [cost-per-click]."); Juda, Tr. 1205:5-10 (Google executive testifying that "[i]t is not always the case that more advertisers results in higher [cost-per-click]"); CX9019 at 015, 036 (Juda Dep. 55:9-13, 137:18-138:22) (Google executive testifying that, in certain circumstances, an "increase in [the number of] bidders would have zero influence on the price that that highest person was paying", and that an additional bidder may or may not affect the cost-per-click of another advertiser in the auction).

As [redacted] whom the majority cite for the proposition that reducing the number of search engine auction participants could reduce the prices paid by the auction winners (and thereby reduce search engine revenue), *see* Op. at 51-52, explained, [redacted]" RX0704 at 006.

The majority also claim price effects on the theory that—because advertisements limited by the Trademark Settlements had a higher return on investment ("ROI")—advertisers would spend less in the absence of their availability. Op. at 53-54. That is a plausible assumption. But, especially given how important online advertising apparently was to the contracting parties, *see id*. at 6-7, 30-31, it is equally plausible they would have bought other advertisements, with no harm going to the owners of the search engines.

The majority's ROI theory also discounts the value of advertising purchased for brand-building (as opposed to only for sales) purposes. If advertisers viewed online search advertising as a branding opportunity, removing certain keywords from the available pool would most likely shift advertising purchases to other keywords, because brand building is more about appearing frequently than achieving a set ROI with each appearance. The record is replete with evidence that advertisers evaluated online search advertisements on a brand-building basis (in addition to

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[55] The majority do not articulate what the appropriate scope of an "advertising" market would be. The majority's analysis at best demonstrates a "direct effect" in the number of advertisements displayed in response to searches for the trademarked terms covered by the Trademark Settlements. Such a market seems implausible. Courts have rejected "search engine advertising" as a viable antitrust market because it is too narrow, but even that is far broader than the handful of trademarked keywords within search engine advertising at issue here. *See, e.g.*, *Lasoff v. Amazon.com Inc.*, No. C16-151, 2017 WL 372948, at *9 (W.D. Wash. Jan. 26, 2017) ("Because there is no basis for distinguishing the 'search engine advertising' market from the larger market of all internet advertising, the former is simply too narrow to form a meaningful 'relevant market' for purposes of antitrust liability.") (quoting *Person v. Google, Inc.*, No. C06-7297, 2007 WL 832941, at *4 (N.D. Cal. Mar. 16, 2007) ("The Court finds no basis for distinguishing the Search Ad Market from the larger market for Internet advertising. Search-based advertising is reasonably interchangeable with other forms of Internet advertising.")); *see also* Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc. / Trulia, Inc., FTC File No. 141-0214 (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

ROI). One witness explained that his company built its brand "primarily through the online search advertising." CX9024 at 011 (Holbrook Dep. at 40:4-7); *see also* [redacted] at 048 [redacted] at [redacted]) [redacted]); IDF 602 ("LensDirect believes there is value in showing an ad in response to a search for 1-800 Contacts, even if the ad is not clicked on, because it gives LensDirect brand visibility next to the larger players without any cost.") (citation omitted); ID at 144 ("As LensDirect's chief executive officer stated: '[T]he more times people see LensDirect, the better chance there is of them becoming a customer one day.'") (citation omitted). While removing certain keywords from the available pool would most likely shift advertisement purchases to other keywords, the necessity of brand building gives additional reason to assume the money would continue to go to online search advertising, even with a lower ROI.

Even if there were a reduction in advertising in response to searches for trademarked terms (which has not been proven), it is unclear that a reduction in the number of advertisements would negatively affect the quality of the search engine experience. As Complaint Counsel's expert testified, there is significant literature explaining that search engines, as multi-sided platforms, must balance the advertisers' desire to appear more frequently in SERPs and consumers' desire to be bombarded with fewer ads. CX8006 (Evans Expert Report) at 024-025. Purchased advertisements are how the search engines monetize their platforms; whereas organic results are where the search engines place the links they deem most relevant to consumers. Consistent with this notion, [redacted] testified that:

> [redacted]

RX0704 at 003. Thus, from the search engines' perspective, it is not clear how the quality of the advertisements are lessened.[56]

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[56] The majority assert that the Trademark Settlements prevented some consumers from clicking on advertisements that did not appear because of the agreements, presumably generating less value for the search engine. But it is not clear from the search engines' perspective (i.e., the theory of harm at issue here) why a consumer searching for "1-800 Contacts" is less likely to click through under the Trademark Settlements. They might be faced with a more obviously responsive advertisement (e.g., one for 1-800 Contacts), and thus more likely to click through on that advertisement than on an advertisement for another vendor. Indeed, record evidence indicates that most searches for the trademarked terms at issue were, in fact, navigational—that is, consumers typed in "1-800 contacts" because they wanted to reach 1-800 Contacts' website. RX0733 (Ghose Expert Report) at 007 ("[C]onsumers who searched for 1-800 Contacts' trademarks typically did so with a navigational intent."); *id*. at 060 ("[T]he academic literature and the data [ ] indicate that the vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent.").

F. The Trademark Settlements Were Appropriately Tailored.

The majority rest their liability theory, in part, on the claim that the Trademark Settlements could have been narrower. *See* Op. at 25-30. This substitutes the Commission's judgment for that of the parties, contrary to what *Clorox* requires. *See Clorox*, 117 F.3d at 60. But the Trademark Settlements also were appropriately tailored to achieve their objective. The searches that the Trademark Settlements prohibit are precisely those searches that implicate 1-800 Contacts' trademarks. They are also the searches through which users are most likely attempting to reach the 1-800 Contacts website (i.e., searches for 1-800 Contacts' trademark). *See, e.g.*, RX0733 (Ghose Expert Report) at 060 ("[T]he academic literature and the data [ ] indicate that the vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent."). Indeed, 1-800 Contacts considered navigational searches (i.e., paid searches for its trademarks) as "direct traffic" to its website (as opposed to indirect traffic). IDF 577. As a result, the settling parties structured the Trademark Settlements to prevent advertisements from appearing in response to searches for both parties' trademarks.

The settling parties included a negative keyword provision in response to Google's explicit encouragement for 1-800 Contacts to resolve its trademark disputes with competitors by having them implement 1-800 Contacts' trademarked terms as negative keywords. *See, e.g.*, Schmidt, Tr. 2904:2-16, 2905:16-25; CX9031 at 010-011 (C. Schmidt Dep. 33:20-35:2, 35:23-36:2, 36:13-37:3); CX9013 at 044 (Aston Dep. 172:1-3) ("They [Google] instructed us [1-800 Contacts] to have the offenders add those specific trademarked terms into their negatives for their -- for their AdWords campaigns."); *id*. at 044-045 (170:8-20, 171:10-19, 173:5-20). They did so because, without negative keywords, a settling party's advertisements could appear in response to searches for the counterparty's trademarked terms.

Almost all of the Trademark Settlements balanced these restrictions with a provision explicitly permitting a settling party to use the counterparty's trademarks in a manner that would not constitute infringement in the non-internet context, including comparative advertising. IDF 369 ("Ten of the thirteen Settlement Agreements provide that the prohibited acts 'shall not include (i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses.'") (citations omitted); *see also* IDF 305 (finding that 1-800 Contacts accepted changes to a draft settlement agreement with Vision Direct and stated that both parties should be able to engage in comparative advertising); IDF 309 (confirming that the 2004 Trademark Settlement between 1-800 Contacts and Vision Direct permitted non-infringing uses, such as comparative advertising, parodies, etc.).

As a result, in my view, the Trademark Settlements were appropriately tailored to achieve their goal of preventing trademark infringement while balancing the need to permit non-infringing advertising.

III. The Majority Fail to Analyze the Luxottica Sourcing and Services Agreement.

The majority do not analyze the sourcing and services agreement between Luxottica and 1-800 Contacts (the "Luxottica Agreement") correctly. Sourcing and services agreements, like trademark settlement agreements, are typically considered procompetitive. *See* Fed. Trade

Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, at 1 (Apr. 2000) [hereinafter "*Competitor Collaboration Guidelines*"]. As a result, courts typically analyze ancillary restraints accompanying sourcing and services agreements under the rule of reason. *See* AREEDA & HOVENKAMP, *supra*, ¶ 1908(c). The majority, however, treat the sourcing and services agreement between Luxottica and 1-800 Contacts as "inherently suspect" by lumping it in with the Trademark Settlements. *See* Op. at 10. The only time the majority discuss the Luxottica Agreement is to note that certain procompetitive justifications that 1-800 Contacts proffered for the Trademark Settlements do not apply to the Luxottica Agreement. *See, e.g.*, *id*. at 12 n.14, 37. By ignoring its plain language and considering the Luxottica Agreement to be just another Trademark Settlement, the majority lay bare the broad scope of the rule they announce and fail to address additional procompetitive justifications that typically accompany supply and sourcing agreements.[57]

A. The Luxottica Sourcing and Services Agreement Is a Supply Agreement, Not a Trademark Settlement.

In December 2013, 1-800 Contacts entered a sourcing and services agreement with Luxottica. IDF 393. Luxottica operates chains of brick-and-mortar retail stores—such as LensCrafters, Pearle Vision, Sears Optical, and Target Optical—that sell, among other things, contact lenses. IDF 394. The Luxottica Agreement did not end any alleged trademark infringement; instead, it provides for a mutually beneficial vertical relationship between 1-800 Contacts and Luxottica. *See* CX0331. In particular, under the Luxottica Agreement, 1-800 Contacts provides (1) fulfillment services by shipping contact lenses to Luxottica's retail chain stores and (2) other services, including assistance with sourcing contact lenses from the four major contact lens manufacturers. IDF 394.

Judge Chappell made explicit the benefit of the Luxottica Agreement to 1-800 Contacts: "As a result of the agreement between 1-800 Contacts and Luxottica, 1-800 Contacts is [redacted]." IDF 395 (citations omitted). But there were also benefits to Luxottica. In particular, 1-800 Contacts managed and operated Luxottica's contact lens business. *See* CX0331 at 006. In effect, Luxottica outsourced its entire contact lens business, including negotiating with contact lens suppliers, to 1-800 Contacts.[58] *See id*. at 025 ("LUX shall use 1-800 *exclusively* to source Trial Lenses and Revenue Product in the Territory.") (emphasis added); *id*. at 014 (defining "Revenue Products" as "contact lenses for retail sale"); *id*. at 018 (defining "Territory" as "the United States of America, its territories, and Canada"); *id*. at 026 ("1-800 shall lead all negotiations with Suppliers").

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[57] The majority defend their approach by stating that Respondent did not carry its burden of establishing the procompetitive nature of the Luxottica Agreement. *See* Op. at 37 n.38. That does not justify ignoring the plain terms of the Luxottica Agreement, which clearly is not a settlement of any kind, much less one of the Trademark Settlements analyzed here.

[58] Under the Luxottica Agreement, 1-800 Contacts maintained the inventory of contact lenses and shipped them directly to Luxottica's retail chain stores and directly to the homes of customers of Luxottica's retail stores. CX0331 at 029; Bethers, Tr. 3524:5-3525:6, 3694:14-3695:14. The packaging of all contact lenses shipped by 1-800 Contacts under the agreement bore Luxottica's labels and in no way indicated that 1-800 Contacts was involved. CX0331 at 029; Bethers, Tr. 3525:7-21, 3694:14-3695:14.

B. The Majority Ignore Procompetitive Justifications for the Luxottica Agreement.

The majority assert that certain justifications for the Trademark Settlements do not apply to the Luxottica Agreement, *see* Op. at 12 n.14, 37, but they simultaneously ignore procompetitive justifications for sourcing and services agreements. The Commission enumerated some of those justifications in guidelines jointly published with the U.S. Department of Justice. *See Competitor Collaboration Guidelines*. The Luxottica Agreement falls squarely within the agencies' definition of "competitor collaborations." *Id*. § 1.1 ("Competitor collaborations involve one or more business activities, such as research and development ('R&D'), production, marketing, distribution, *sales or purchasing*.") (emphasis added). The *Guidelines* recognize the Commission's view that agreements among competitors (or potential competitors)[59] can benefit customers in a variety of ways. *See id*. § 2.1. Among the many consumer benefits that could result from the Luxottica Agreement is the fact that 1-800 Contacts has the largest inventory of contact lenses in the industry, *see* IDF 44, and therefore may have a comparative advantage over Luxottica in negotiating with suppliers and delivering contact lenses to customers. As a direct result of its decision to outsource much of its contact lens business to 1-800 Contacts, Luxottica customers could receive lower prices and better service (e.g., faster delivery).

The majority opinion fails to analyze any of the foregoing (or any other potential) procompetitive justifications for the Luxottica Agreement.[60] Instead, they summarily condemn it as part-and-parcel of the Trademark Settlements. Given the seemingly apparent procompetitive justifications, I fear this omission speaks more to the breadth of the conduct the majority condemn.

IV. The Majority's Remedy

The remedy proposed by the majority is ineffective. The Order states that the only agreements that 1-800 Contacts can enter are those that, in effect, tell the counterparty that they cannot violate the trademark laws. *See* Final Order at 2-3. Such agreements resolve nothing and will only lead to more litigation to determine what conduct actually violates the trademark laws in the context of paid search advertising based on trademarked keywords. Because the Order only allows agreements that do not actually resolve the dispute in trademark infringement litigation, it will reduce the incentive to settle, which, in turn, will lead to either less trademark

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[59] I note that it is unclear from the majority opinion whether they view Luxottica (a brick-and-mortar retailer) and 1-800 Contacts (an online contact lens retailer) as direct horizontal competitors because the majority fail to define a relevant product market. Nevertheless, the same analysis is appropriate regardless of whether the two companies directly compete. *See Competitor Collaboration Guidelines*, § 1.1.

[60] The majority also fail to analyze the advertising restrictions in the context of the Luxottica Agreement. For example, the restrictions on paid keyword search advertising may have been necessary for the parties to enter into the Luxottica Agreement in the first place. Given the potential procompetitive benefits surrounding competitor collaborations like the Luxottica Agreement, it is likely that any anticompetitive harm caused by the advertising restrictions would be outweighed by the procompetitive benefits of the agreement as a whole.

enforcement or more costly litigation for the same reasons discussed above. *See* Section II(A)(4), *supra*.[61]

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The Commission's mandate is to enforce the antitrust laws, but we cannot do so in a vacuum. We need to consider competing policies, including federal trademark policy, when analyzing allegedly anticompetitive conduct. And we should recognize that unclear rules may do more to harm both to that policy and to competition than the alleged conduct here. In the case of the Trademark Settlements, precedent offers a better way: the Commission should analyze such agreements under the full rule of reason, giving appropriate weight to the trademarks at issue and the value they protect. Such a rule will decrease uncertainty in the market, encourage brand investment, and increase competition.

[61] In the section discussing the remedy, the majority repeat at least two of their earlier claims that I believe are not supported by the facts, law, or both. <u>First</u>, they claim that they "are not establishing a new trademark rule" and even go so far as to say that they "make no ruling on any trademark issue at all." Op. at 56. For the reasons discussed more fully above, there is a trademark ruling implicit in the majority's decision to truncate their rule of reason analysis. *See* Section II(A), *supra*. <u>Second</u>, they assert that the Order is not novel, in part, because "[a]ntitrust has long barred rivals' agreements regarding advertising and bidding restrictions." Op. at 56. This does not reflect a fair reading of the case law as applied to the Trademark Settlements, as I discuss above. *See* Section II, *supra*.