No. 18-3848

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

1-800 CONTACTS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL TRADE COMMISSION (DOCKET NO. 9372)

**BRIEF OF THE FEDERAL TRADE COMMISSION
(FINAL FORM)**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Advertising serves "an indispensable role … in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). Without timely information about competing products and sellers, especially about their relative prices, consumers cannot make informed choices and markets cannot function properly. Restricting truthful advertising thus interferes with the efficient operation of a competitive market.

This case involves an antitrust challenge to agreements between petitioner 1-800 Contacts and its competitors restricting competitive advertising in the online market for contact lenses. The agreements allowed 1-800 to maintain higher prices than its rivals by keeping consumers in the dark about lower prices elsewhere.

Competitive information is conveyed to consumers in different ways depending on the product and the market. Gas stations on opposite corners prominently post their prices on large signs. Stores place their house-brand products on the shelf next to the more expensive name brands. The online analog to those traditional advertising methods is showing consumers an advertisement for one company when they search for the name of a rival company. The central question in this case is whether the competing sellers may agree to limit the comparative advertisements consumers see under the guise of protecting their trademarked names.

Petitioner 1-800 Contacts is the largest and most expensive online seller of contact lenses. Its competitors sell the same lenses for less, and—until the illegal conduct at issue in this case—they competed directly with 1-800 by designating its brand name as a “keyword”—a term that causes search engines like Google to display an advertisement when a consumer searches for that term. Thus, a consumer who searched for “1-800 Contacts” or “cheaper than 1-800 Contacts” would see competing ads both from 1-800 and its less-expensive rivals and could then determine who offered the best value.

Search advertising using brand-name keywords is efficient for sellers, beneficial to consumers, and a very effective means of competing online. But the competition caused 1-800 to lose sales and, because keywords are sold by search engines through competitive bidding, drove up 1-800’s advertising costs. To avert these problems, 1-800 started filing (or threatening to file) lawsuits against competitors alleging trademark infringement. It then settled the disputes by agreeing with its rivals to refrain from bidding on one another's brand names in keyword auctions. Although a trademark is infringed only if consumers are confused about the source of the product, the settlement agreements broadly prohibit advertising without regard to the content of the advertisement or whether it is confusing to consumers. Indeed, the agreements prohibit advertising in situations where the competitor does not even use 1-800's trademark and infringement is impossible.

1-800 entered into 14 such agreements covering almost 80% of the online contact lens market. The agreements interfered with competition by eliminating millions of advertisements for lower-priced rivals. The agreements also eliminated rival bidders in millions of keyword auctions, reducing the revenue of search companies. 1-800 was thus able to continue its profitable business strategy of selling overpriced contact lenses to underinformed consumers.

In the order on review, the Federal Trade Commission found that the agreements between 1-800 and its rivals harm competition and violate the antitrust laws. Trademark considerations did not justify the agreements because the restrictions applied to a broad range of non-infringing advertising, and 1-800 could have protected its trademark rights using less restrictive arrangements. The Commission also found that the agreements amounted to bid rigging in keyword auctions. It ordered 1-800 to cease entering or enforcing such agreements.

The thrust of 1-800's argument on appeal is that its trademark claims trump the substantial harm to competition and render its actions immune from antitrust law. But as courts consistently recognize, while protecting intellectual property can enhance consumer welfare, trademark interests can justify interference with the operation of competitive markets only when the measures taken to protect the trademark are appropriately tailored to avoid infringement. Trademark law does not grant carte blanche to destroy competition by restricting legitimate advertising by rivals.

JURISDICTION

The Commission's Final Order [JA381] was entered on November 7, 2018. 1-800 timely filed its petition for review on December 28, 2018. This Court has jurisdiction pursuant to 15 U.S.C. § 45(c).

QUESTIONS PRESENTED

1. Whether 1-800's advertising restrictions are entirely exempt from antitrust scrutiny because they were agreed to in the course of settling litigation.

2. Whether the FTC properly deemed 1-800's agreements with its competitors to suppress competitive price advertising "inherently suspect" under the antitrust rule of reason.

3. Whether substantial evidence supports the FTC's findings that 1-800's agreements not to compete had actual adverse effects on consumers and competition in the online sale of contact lenses and in online advertising auctions.

4. Whether the FTC correctly found that 1-800's trademark rights and saved litigation costs do not justify its restraints of trade.

5. Whether the remedial terms of the FTC's Final Order are reasonably related to 1-800's violations of the FTC Act.

STATEMENT OF THE CASE

A. The Contact Lens Retail Industry

Contact lenses are a $5 billion industry with over 40 million American users. IDF 4-6 [JA74].[1] As medical devices, they can be sold only pursuant to a prescription by an optometrist or ophthalmologist. Op. 3 [JA276]. A contact lens prescription specifies both the characteristics of the lens (such as size, power, and base curve) and a particular manufacturer's brand (such as "Acuvue Oasys"). *Id.* Thus, competition between brands takes place only at the prescription stage. At the retail stage, the vendor may not substitute a different brand, so all sellers offer exactly the same lenses. The retail market therefore involves only the distribution of a commodity. IDF 23-27 [JA76-77].

Four categories of retailers sell contact lenses: independent eye care professionals (who both provide prescriptions and sell lenses); optical retail chains (such as LensCrafters and VisionWorks); mass merchants and club stores (such as Walmart and Costco); and so-called "pure-play" online retailers (such as 1-800 and its competitors at issue

[1] "IDF" refers (by finding number) to the Administrative Law Judge's findings of fact [JA74], "Op." to the Commission's Opinion [JA274], "ID" to the ALJ's Initial Decision [JA175], and "CX" to the FTC's exhibits introduced at trial.

here) who sell online and typically have no brick-and-mortar locations. Op. 4 [JA277]. In findings of fact adopted by the Commission, the ALJ determined that online sales of contact lenses constitute an antitrust product market and that the United States is the relevant geographic market. IDF 397-490 [JA120-132].

Although consumers receive identical lenses no matter which retailer they choose, 1-800's prices are substantially higher than those of its rival online retailers. Op. 4 [JA277]; *see* IDF 691-93 [JA158-59]. Despite 1-800's higher prices, it leads the market for online sales. Op. 3 [JA276]; IDF 67-69 [JA80]. 1-800 accounts for over 50% of all online sales of contact lenses in the U.S. and has the largest share of total contact lens sales, online and otherwise. IDF 491-96 [JA133].

B. Internet Search Advertising and Online Competition

1-800 and its rival online retailers extensively use paid internet search advertising to attract new customers and build awareness of their brands. Op. 5 [JA278]; IDF 497-98 [JA133-34]. Search advertising is an essential way for consumers to discover competing retailers and compare their prices. Op. 6 [JA279]; IDF 564 [JA141]. It is an especially efficient marketing tool for small businesses because advertising fees accrue only when a consumer clicks on a displayed ad. IDF 563 [JA141].

Online search advertising is particularly important in the contact lens retail market because ads are displayed precisely when the consumer is primed to buy. Op. 6 [JA279]. For that reason, most online retailers of contact lenses devote much, if not all, of their marketing expenditures to online search advertising. *Id.*; IDF 499, 521-22, 527, 531, 534, 540, 546, 552, 555 [JA134, 136-140]. 1-800 too advertises heavily online, but it also spends significantly on print, radio, television, and other media. Op. 7 [JA280]; IDF 61-62 [JA80].

When an online shopper enters a query into a search engine such as Google or Bing, the search engine presents the user with a search results page containing two types of listings: "organic" links and "sponsored" links. Op. 5 [JA278]. The organic links are those determined by the search engine's proprietary algorithm to be most relevant to the user's query. *Id*. They are typically arranged in order of relevance, and websites cannot pay to appear on the list. *Id*. Sponsored results, by contrast, are advertisements shown on the results page because the linked website paid for them to appear there. *Id*. The paid results typically are differentiated from the organic ones by use of labels (such as "Ad" or "Sponsored"); colored or shaded boxes; and a separate, clustered position above, below, or to the side of the organic results. *Id.*

A search engine determines which advertisements to display in response to a query based in part on the query's relevance to "keywords" chosen by the advertiser. Because many merchants are interested in the same keywords, search engines sell keywords through auctions. For example, in this case a merchant might bid on the keywords "contacts" or "contact lenses" so that their advertisements are displayed when a consumer looking to buy lenses searches for those terms. (A merchant may bid on numerous keywords.) When multiple advertisers bid on the same keyword, the ads of the highest bidders are typically displayed more prominently on the results page. Op. 5 [JA278].

A merchant may also designate how closely the keyword must match the consumer's search query in order for an ad to be displayed. *Id.* For example, Google—the most commonly used search engine—offers three levels of precision: "broad match," "phrase match," and "exact match." *Id.* "Broad match" focuses on the meaning rather than the precise text of the query, so an ad may appear when the search engine determines that the query is sufficiently relevant to a keyword upon which a merchant has bid. *Id.* at 5-6 & n.4 [JA278-79]. When an advertiser selects "phrase match," its ad can appear only when the query contains the exact keyword, although additional words before or after that keyword are permitted. *Id.* at 5-6. Thus, a phrase match for the keyword "contact lenses," could display the merchant's ads in response to a search for "best prices for contact lenses." With "exact match," the ad will appear only when the query contains the exact keyword and nothing more. *Id.* at 6.

An advertiser may also designate "negative keywords" that ensure that its ads do *not* appear when the query includes those particular keywords. Op. 6. A merchant selling eyeglasses, for example, may add "wine" as a negative keyword to prevent its ads from appearing in response to searches for wine glasses. Like other keywords, negative keywords can be designated for broad match, phrase match, or exact match. *Id.*

C. Competition in the Online Sale of Contact Lenses

Online contact lens retailers commonly designate their rivals' brand names or trademarks as keywords for search advertising. Op. 7

[JA280]; IDF 651-53 [JA152]. Like building a store next to a rival's location or placing a generic product on the same supermarket shelf as the brand-name one, using a competitor's name as a keyword allows online merchants to reach the consumers most interested in the products that both vendors sell at the moment they are interested in buying.

This digital proximity is particularly important to fostering competition when a leading brand (like 1-800) dominates the market. IDF 565 [JA141]. Seventeen percent of all search queries for contact lenses included 1-800's name (or a variation), similar in volume to the top three generic terms ("contacts," "contact," and "contact lenses") combined. Op. 32 [JA305]. Most of 1-800's new customers were led to the company's website by searching for its brand name. *Id*. 31 [JA304]. Indeed, one-third of consumers knew the name of no online seller other than 1-800. *Id*. 32 [JA305]. And most online contact lens shoppers do not know that 1-800's competitors offer the same products at lower prices. IDF 694 [JA159]; CX8007_021 ¶56 [JA1245] (*in camera*).

The use of rivals' names as search advertising keywords greatly benefits buyers by presenting immediate comparative information at a critical moment in the buying process. Op. 32 [JA305]. That is especially so in the online contact lens market, because the advertised products are commodities, identical in every respect, and the major difference between merchants is price (the Commission found that 1-800's allegedly better service did not explain the price difference, *see infra* at 77-78). A consumer who searched for "1-800 Contacts" because she had heard of that company would instantly learn that a rival sells the exact same product at a lower price.

D. 1-800's Response to Mounting Price Competition from Rivals: Agreements Not to Compete

As competition from lower-priced rivals mounted, 1-800 began to feel the heat, simultaneously losing sales and paying more in keyword auctions. Rivals were bidding against 1-800 to place ads in responses to popular searches, including for 1-800's name. The ads told consumers that they could get the same lenses at lower prices than 1-800 offered. Unsurprisingly, many consumers who initially set out to buy from 1-800 instead clicked on rival ads and then opted to purchase lenses from the cheaper competitor. IDF 710-718 [JA161-62]. 1-800's internal documents indicate that "once consumers make a purchase from another online retailer, they are unlikely to make their next purchase from 1-800 Contacts." Op. 48 n.51 [JA321]. 1-800 also internally bemoaned "more competitors showing up" on searches for its name, which resulted in 1-800 receiving "fewer orders." IDF 713, 714 [JA161].

1-800 responded to the growing competition with a plan to exclude competitors from bidding on its brand name (and variations of it) in keyword auctions. Doing so would keep consumers uninformed of lower prices elsewhere (or even the names of rivals) while lowering 1-800's search advertising costs. As 1-800 expressed internally, reducing competing ads in response to searches for 1-800's trademarks "always helps improve performance" in online sales. IDF 712 [JA161]. With respect to keyword bidding, 1-800 noted that "low competition = low cost." CX0051_004 [JA694].

1-800 undertook an aggressive campaign of trademark infringement lawsuits and cease-and-desist letters against rival online retailers. Op. 7-8 [JA280-81]. Its position was that its rivals could not bid on its trademarked name as a search advertising keyword or even bid on a *generic* keyword like "contacts" if the effect of doing so was that the rival's advertisement would appear in response to a consumer's search for "1-800 Contacts."

Under Sections 32 and 43(a) of the Lanham Act, trademark infringement requires: (1) a protectable mark; (2) unauthorized use of that mark; and (3)—the touchstone of trademark infringement—a likelihood of consumer confusion. 15 U.S.C. §§ 1114, 1125(a); *Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153, 160 (2d Cir. 2016). 1-800 did not challenge the text of its rivals' ads; its contention was that rivals "used" its mark when they purchased it as a search advertising keyword and that consumers were inherently likely to be confused when they searched for "1-800 Contacts" and saw advertisements for competitors underneath an ad for 1-800—no matter what the ads actually said.

The Tenth Circuit rejected that theory in the only case that 1-800 litigated to final judgment. In *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp.2d 1151 (D. Utah 2010), the court ruled that a jury could not conclude that Lens.com infringed 1-800's mark for "advertisements that did not use [1-800's] mark in them," even if the display of those ads had been triggered by purchase of "1-800 Contacts" as a keyword. *Id.* at 1181. The Tenth Circuit affirmed, stressing the absence of any evidence of confusion. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242-43 (10th Cir. 2013).

Nevertheless, between 2004 and 2013, 1-800 entered into thirteen settlement agreements with competitors in which the parties agreed not to bid on each other's trademarks, URLs (web addresses), and variations of trademarks as keywords for online search advertising. Op. 8-9 [JA281-82]; IDF 343, 361, 363 [JA113, 115]. The agreements also required the parties to employ negative keywords to prevent their ads from appearing in response to a search for the trademarked term *even when the advertising party did not use the trademark as a keyword*. For example, if Walgreens purchased the keyword "contacts" but not the term "1-800 Contacts," it was obliged to ensure that a Walgreens ad would not appear when a consumer searched for "1-800 Contacts" (and vice versa for 1-800). The competing advertisement was restricted even though no infringement was possible because there was no "use" of the trademark. Op. 9 [JA282]; IDF 364, 366-68 [JA115-16].

A fourteenth agreement neither settled litigation nor involved a trademark dispute. In 2013, 1-800 agreed to perform fulfillment services for Luxottica Group by supplying contact lenses to Luxottica's retail-chain stores including LensCrafters, Pearle Vision, Sears Optical, and Target Optical. Op. 10 [JA283]; IDF 86, 393 [JA82, 120]. Although there was no trademark dispute, the agreement contained reciprocal online advertising restrictions similar to those in 1-800's settlement agreements, including the negative keyword requirement for generic search terms. Op. 10 [JA283]; IDF 396 [JA120]. Altogether, the 14 agreements challenged by the FTC cover firms responsible for 79 percent of all domestic online contact lens sales. Op. 33 [JA306]; IDF 496 [JA133].

1-800's strategy worked. Reducing the appearance of competing ads in response to consumer searches for its name led to increased sales. Op. 33 [JA306] (citing documents); IDF 710-32 [JA161-164]. To take just one example, when LensWorld stopped bidding on 1-800's trademarked keywords, 1-800's sales increased the very next week. Op. 33 [JA306]. An internal 1-800 document noted that reducing competing advertisements "always helps improve performance." *Id*. Similar documents abound. *See, e.g.*, CX0914_001 [JA572] ("substantially less competitors" buying trademark keywords is "likely helping improve" 1-800's sales); CX0564-001 [JA661] (orders improved significantly with "the removal of a few competitors" bidding on 1-800's trademarks); CX0927_001 [JA668] ("excellent" sales figures attributable in part to "removal of ShipMyContacts from [1-800's] trademarks"); CX0836_001 [JA679] (new customer orders from 1-800's trademark ads "jumped to highest level of the year" due in part to "fewer competitors" appearing).

E. The Antitrust Enforcement Proceeding Against 1-800

In 2016, the FTC issued an administrative complaint against 1-800, charging it with unreasonably restraining competition in (1) the online retail sale of contact lenses and (2) online search advertising auctions. *See* Cmpl. ¶¶3, 28-31 [JA48, 53-54]. The FTC charged that 1-800's agreements with its competitors restricted the dissemination of truthful, non-infringing advertising about the availability of identical products at lower prices, leading consumers to pay higher prices for their contact lenses. *Id*. ¶31 [JA53-54]. It also charged that 1-800's restraints undermined search advertising auctions, distorted bidding prices, and degraded the quality of service provided by search engines. *Id*.

The case was tried before an ALJ, who issued an Initial Decision concluding that the challenged agreements violated Section 5 of the

FTC Act, 15 U.S.C. § 45. The ALJ defined a relevant antitrust market consisting of the online sales of contact lenses in the United States, IDF 138, 200 [JA87, 93], and found that the advertising restrictions significantly reduced the availability of information to consumers about lower-price competitors. ID 155-56 [JA221-22]. As a result, consumers paid higher prices than they would have paid in a competitive market. *Id.*

The ALJ rejected 1-800's asserted procompetitive justifications. He found that 1-800 failed to show that reducing litigation costs benefitted consumers in any way. ID 167-69 [JA233-35]. He also found that trademark protection, while a procompetitive goal, did not justify the overbroad advertising restrictions in this case. ID 169-172 [JA235-38].

On 1-800's administrative appeal, the full Commission reviewed the ALJ's findings and conclusions *de novo*. 16 C.F.R. § 3.54(a). It adopted the ALJ's findings, and affirmed his conclusion that 1-800's agreements violated Section 5 of the FTC Act. Op. 2-3, 12 [JA275-76, 285].

1. *The Effect of Litigation Settlements*

The Commission rejected 1-800's claim that the Supreme Court's decision in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), immunized litigation settlements from any antitrust scrutiny. It determined that

Actavis did not create a blanket antitrust exemption for litigation settlements. Op. 2, 12-16 [JA275, 285-89].

2. *Application of the Rule of Reason*

The Commission analyzed 1-800's agreements under the antitrust "rule of reason." The antitrust laws prohibit "unreasonable" restraints of trade. *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98 (1984). Some restraints, deemed "per se" anticompetitive, "would always or almost always tend to restrict competition and decrease output" and are therefore "presumed unreasonable without inquiry into the particular market context" in which they exist. *Id.* at 100 (cleaned up).[2] Others are not automatically deemed harmful, but are assessed under the rule of reason to determine if the restraint likely harms competition. Op. 17 [JA290]. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995).

Rule-of-reason analysis uses a burden-shifting regime in which the plaintiff (here, the FTC staff who prosecute the case, known as

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[2] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See*, *e.g.*, *Scrimo v. Lee*, 935 F.3d 103, 115 (2d Cir. 2019).

Complaint Counsel) bears the initial burden of proving a prima facie case that a restraint (such as 1-800's advertising restrictions) harmed competition. The burden then shifts to the defendant to show procompetitive justifications for the restraint, whereupon the burden shifts back to the plaintiff to show either that the procompetitive benefits could be achieved through less anticompetitive means or that the harm to competition outweighs the benefits. *See Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008).

3. Prima Facie Case

The first step of a rule-of-reason analysis "requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendants' conduct or policy has had a substantially harmful effect on competition." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993). The Supreme Court has explained that "there is generally no categorical line to be drawn" between ways to make the prima facie showing. *California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999). As a practical matter, however, there are three general methods.

First, a plaintiff can show that the defendant has sufficient power in a relevant market and that the restraint has a tendency to harm competition. *North Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018).

Second, it can show 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." *California Dental*, 526 U.S. at 770. The precise showing depends on "the circumstances, details, and logic of a restraint" and can vary from case to case. *Id*. at 781. Courts have called this the "quick look" approach; the Commission calls restraints that can be determined to harm competition without an analysis of market power "inherently suspect." *See, e.g.*, *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 604 (1988); *Polygram Holding, Inc.*, 136 F.T.C. 310, 344 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005); *North Texas Specialty Physicians*, 140 F.T.C. 715, 733 (2005), *aff'd*, 528 F.3d 346 (5th Cir. 2008).

Third, the plaintiff can prove a prima facie case without an "elaborate market analysis" if it shows "actual detrimental effects." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (*Indiana*

Dentists). As this Court has noted, if "a plaintiff can show an actual adverse effect on competition," the law does "not require a further showing of market power." *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001) (cleaned up); *accord K.M.B.*, 61 F.3d at 129; *Capital Imaging,* 996 F.2d at 546.

The Commission evaluated 1-800's agreements using the second and third modes of analysis. First, it found that the agreements were inherently suspect. It examined judicial precedent, economic theory, empirical studies of restrictions on price advertising, and the importance of advertising in the online contact lens market, and it determined that 1-800's advertising restrictions were likely to have anticompetitive effects. Op. 20-22 [JA293-95]. The agreements "restrict the information provided … to consumers" that they could use "to compare and evaluate the prices and other features of competing online sellers," at a time when they are likely to buy. *Id*. Anticompetitive effects were especially likely here since the challenged agreements affect sellers responsible for 79 percent of all online sales of contact lenses and neuter an especially effective means of competition. *Id*. 30-33

[JA303-06]. It therefore required no sophisticated analysis to determine that the agreements disrupt competition. *Id.* 22 [JA295].

Second, the Commission found "direct evidence of anticompetitive effects." Op. 42 [JA315]. 1-800's advertising and keyword bidding restrictions harmed consumers by reducing truthful advertising and by increasing prices paid for contact lenses. *Id.* 42-50 [JA315-23]. They harmed search engines by reducing the number of bidders in keyword auctions and thus the prices paid by auction winners, a form of bid rigging. *Id.* 50-52 & n.54 [JA323-25]. The resulting decrease in displayed ads also reduced the quality of the search engines' product, diminishing its value to consumers. *Id.* 53 [JA326].

4. Procompetitive Justifications

Having determined that the advertising restrictions harmed competition, the Commission shifted the burden to 1-800 to justify the harm. The company proffered two justifications: that its agreements saved litigation costs and that they are necessary to protect trademark rights. Op. 23 [JA296]. The Commission found both justifications facially plausible, *id.*, but rejected them as insufficient to justify the anticompetitive conduct.[3]

The Commission found that 1-800's trademark interests did not justify its broad advertising restrictions. Op. 25-30 [JA298-303]. It identified less anticompetitive alternatives that would have protected 1-800's trademark rights effectively. For example, 1-800 could have required prominent disclosures of rival sellers' identities or a prohibition of specific advertising text that was likely to confuse consumers. *Id.* at 27 [JA300].

Moreover, because the prohibited ads were not confusing to consumers, the trademark rights at stake could not justify the restrictions. Op. 38-41 [JA311-14]. For one thing, no theory of trademark protection could explain the negative keywords requirement. It is "beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not

[3] Following the framework it had set forth in *Polygram*, the Commission first engaged in a "preliminary analysis" of the justifications, then considered a "more detailed showing" of rebuttal by Complaint Counsel, and then considered 1-800's response to the more detailed showing before conclusively determining that the advertising restrictions were anticompetitive. Op. 22-41 [JA356-75]. We have simplified the analysis here, but the bottom line is identical.

incorporate a holder's mark in any way." *Id*. at 41 [JA314]. And 1-800's keyword-bidding theory of confusion did not meet the "minimum threshold of validity" required to justify suppression of truthful advertising, because "the weight of authority overwhelmingly points to non-infringement." *Id*. at 40 [JA313].

The Commission also found that 1-800 failed to show that its cost savings from litigation settlements actually provided any "tangible, verifiable benefit to consumers." Op. 37 [JA310]. Moreover, the same litigation costs would have been saved by settling on terms less harmful to competition. *Id*. at 27 [JA300].

In the absence of any argument or evidence sufficient to overcome the showing that the challenged agreements were anticompetitive, the Commission concluded that 1-800's actions were unfair methods of competition in violation of Section 5 of the FTC Act. Op. 54 [JA327].

One Commissioner dissented. In his view, the challenged agreements should have been analyzed under the fullest-scope rule of reason framework, and the Commission should have accorded dispositive weight to 1-800's trademark rights. Dissent 1 [JA335]. He also disagreed with the majority's evaluation of the direct evidence of anticompetitive harm. To the dissent, the evidence did not show actual, sustained, and substantial harm. *Id.*

The Commission entered a cease-and-desist order that bars 1-800 from enforcing the agreements' anticompetitive terms and entering into new agreements that unreasonably limit online search advertising or limit participation in search advertising auctions. Op. 54-58 [JA327-31].

SUMMARY OF ARGUMENT

1-800 Contacts, the best-known and highest-priced online seller of contact lenses, entered into classic horizontal restraints of trade with nearly all of its rivals. The companies—together accounting for almost 80% of online contact lens sales—agreed not to advertise against one another by forgoing using each other's brand-names as internet search keywords. By doing so, they cut off a critical channel of competitive advertising and deprived consumers of a very effective means of learning—at the moment they wanted to buy—that lower prices were available elsewhere. Having made it harder for consumers to learn they could get cheaper lenses from a competitor, 1-800 could sell overpriced contact lenses to underinformed consumers.

1-800 does not seriously contest that its advertising restrictions interfered with competition. Instead, it tries to excuse its anticompetitive behavior on the ground that the agreements were necessary to protect its trademark rights. But such rights, properly understood, are to be applied in a manner consistent with antitrust law. They may not be invoked as trump cards against antitrust enforcement or as excuses for anticompetitive agreements that go far beyond the rights protected.

In particular, a trademark protects only against uses of the mark that are likely to confuse consumers, yet 1-800's restrictions greatly exceed that limited scope. Under the agreements challenged here, competitors may not use each other's brand-names as keywords even if the ads displayed are not confusing to consumers. Those agreements prevent a consumer searching for "1-800 Contacts" from seeing an ad stating "We are not 1-800 Contacts but we offer lower prices." That ad could confuse no one, but the agreements ban it anyway. Worse, the negative keyword requirement makes competitors withhold their ads when consumers search for "1-800 Contacts" *even when the competitor is not using that trademark*. 1-800's advertising restrictions thus extend far beyond the limits of its trademark rights, denying consumers competitive price information with no genuine offsetting benefit.

1-800's attempts to evade responsibility for its anticompetitive conduct fall flat.

1. The Supreme Court's decision in *Actavis* does not immunize trademark settlement agreements from antitrust scrutiny. Just the opposite; the Court expressly rejected that idea and ruled that a patent settlement can be examined under the antitrust laws. Nor did the Court excuse "commonplace" settlements from antitrust review. The Court made clear that any settlement of an intellectual property dispute can be subject to antitrust scrutiny. The Commission determined in any event that the settlements here were *not* "commonplace," both because they tied up most of the market and because they ban advertising without regard to trademark infringement.

2. The Commission found a prima facie case of anticompetitive effects, sufficient to shift the burden of justification to 1-800, under two different methods. Either is sufficient to uphold the judgment.

a. The commodity nature of the retail market for contact lenses, economic theory of advertising restrictions, empirical studies, and judicial experience with restraints on competitive advertising all permit a "confident conclusion about the principal tendency" of the advertising restrictions to harm competition. *California Dental*, 526 U.S. at 781. The Commission thus properly determined that 1-800's advertising restrictions are inherently suspect. In a commodity market, depriving consumers of critical price information at the time of a purchasing decision has an obvious tendency to distort "the price-setting mechanism of the market." *Indiana Dentists*, 476 U.S. at 461-62. Understanding why requires no sophisticated economic learning, making this a textbook case for applying the "inherently suspect" framework.

The restrictions on keyword bidding in search engine auctions call even more clearly for treatment as inherently suspect. Agreements by competitors not to bid against one another—bid rigging—are routinely held per se unlawful. It follows *a fortiori* that they satisfy a prima facie case of harm.

1-800 mainly attacks the inherently suspect framework itself, not the Commission's application of it to the facts of this case. But the Supreme Court has ratified the approach time and again, even when the Court declined to apply it in a particular case. And at least three courts of appeals have upheld the Commission's use of it. 1-800's hyperbolic claim that deeming the restrictions inherently suspect "virtually eliminated" the FTC's burden under the rule of reason is a caricature of the agency's careful analysis in this case. In reality, the Commission found a prima facie case and shifted the burden of justification to 1-800 only after a close examination of the restraints in their market context, and it then engaged in a thorough analysis of whether the restraints were justified.

b. The Commission found direct evidence that the advertising and keyword bidding restrictions adversely affected competition by substantially reducing price advertising, which caused consumers to pay more for contact lenses, and by reducing competitive bidding, which lowered auction revenue for search engines. The record amply supports all of those findings.

1-800 is wrong that the effects found by the Commission cannot constitute a prima facie case of anticompetitive harm. *California Dental* does not support that claim. The Supreme Court reiterated there that "price advertising is fundamental to price competition." 526 U.S. at 773.

The Court declined to find that restricting advertising in a market for professional services had anticompetitive effects because the link between advertising and competition there was unclear. Here, as the Commission found, the link is very clear.

Clorox likewise does not support 1-800. The restriction there prevented a single competitor from calling its product a specific trademark-infringing name. The restrictions in this case, in sharp contrast, cut off an entire channel of price advertising central to contact lens sales, even where there is no risk of trademark infringement. And the restrictions apply not just to one competitor, but to 14 of them, accounting for the vast majority of the market.

The Commission was not required to show a decrease in the sales of contact lenses in order to show anticompetitive effects. Output reductions are one type of anticompetitive effect, but they are not the only one. And the Commission did show that 1-800's agreements not to advertise caused a reduction in advertising—by more than 100 million ads.

American Express does not require the Commission to find that all consumers in the market were made worse off by 1-800's advertising restrictions. That case involved a "two-sided" market, and the Court held that the antitrust inquiry had to consider both sides of the market, not every single consumer in the market. The contact lens market is not a two-sided market, and it is enough that some subset of buyers was harmed, which the Commission found. Nor does *American Express* require a finding of abnormally high profit margins. That may be one way to find anticompetitive harm, but it is not the only one. Equally valid is a finding of pricing above competitive levels, which the Commission found and 1-800 does not dispute. The price difference cannot be explained by "brand preference"; indeed, 1-800 recognized internally that once consumers used another merchant "we've lost them."

3. 1-800's trademark rights do not justify its anticompetitive conduct. A justification for a restraint of trade must be reasonably necessary to achieve its objectives, but 1-800's advertising restrictions are far broader than necessary to protect its trademarks. They prohibit advertisements even where the text of the ad ensures that consumers could not be confused and—due to the negative keyword requirement—even in situations where the rival advertiser does not use the

trademark at all. 1-800 offers no reason to think that consumers could be confused.

The Commission properly rejected the theory that a consumer who searches for "1-800 Contacts" but also sees ads for rivals would be sufficiently confused, without regard to the text of the competing ad, to justify banning the advertisements completely. Courts and commentators too have rejected that theory, and even if it were not a sham, it is insufficient to justify the broad interference with competition presented here.

1-800 and its amicus are wrong that the company's investment in its brand earns it the right to prohibit competitive advertising that "free rides" on its name by using it as a search keyword. Accepting that claim would transform the limited protection granted by a trademark into the broad use exclusivity conferred by a patent. In fact, brand-based keyword advertising is the digital equivalent of a drugstore placing the house brand ibuprofen next to Motrin. Customers come looking for the famous brand, but they may opt for the cheaper alternative instead—much to their benefit. That is simply the nature of competition.

Finally, 1-800's litigation cost savings do not justify its anticompetitive advertising restrictions. Cost savings cannot salvage overbroad restrictions when less restrictive alternatives are readily available. Nor can they justify anticompetitive conduct at all in the absence of any evidence that the savings offset the anticompetitive effects and thereby benefited consumers.

STANDARD OF REVIEW

On judicial review, "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). "Supported by evidence" is the same as "substantial evidence." *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 559 (2d Cir. 1984). The standard demands "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Halloran v. Barnhart*, 362 F.3d 28, 31 (2d Cir. 2004) (cleaned up). The Commission's legal conclusions are reviewed de novo. *Indiana Dentists*, 476 U.S. at 454.

ARGUMENT

I. Trademark Settlements Are Not Exempt from Antitrust Scrutiny

The principal theme of 1-800's brief is that because its agreements to restrict advertising were reached through the settlement of trademark disputes, they are immune from the application of antitrust law. It argues first that the Supreme Court's decision in *Actavis* established a general antitrust immunity for settlements of intellectual property litigation, with a narrow exception for settlements that are not "commonplace." Br. 39-50. Oddly, 1-800 relies largely on the dissent in *Actavis* and on cases abrogated by the Court's decision. In fact, *Actavis* *rejected* the idea that a settlement of patent litigation, commonplace or otherwise, is immune from antitrust review.

Actavis concerned a so-called "reverse-payment" settlement in which the plaintiff, a patent holder, paid the defendant, a generic drug company that allegedly infringed the patent, to settle the case. 570 U.S. at 141, 155. As part of the settlement agreement, the generic company agreed not to compete with the patented drug for several years. The FTC charged the parties to the collusive agreement with an antitrust violation.

Several courts of appeals had rejected similar challenges, but the Supreme Court overruled those decisions and affirmed that traditional antitrust principles apply to patent-litigation settlements and that patent law confers no general immunity on them. The Court emphasized that there was "nothing novel about [its] approach," *id*. at 151, and discussed numerous decisions going back eight decades that "make clear" that patent settlements have never been exempt from antitrust scrutiny. *Id*. at 149-151 (citing *United States v. Singer Mfg. Co*., 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc*., 342 U.S. 371 (1952); *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931)). Indeed, the Court faulted the lower court for ignoring the role of antitrust law in determining the scope of protection from competition that a patent bestows on its owner. *Id*. at 147-49 (citing *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp*., 382 U.S. 172 (1965); *United States v. U.S. Gypsum Co*., 333 U.S. 364 (1948); *United States v. Line Material Co*., 333 U.S. 287 (1948)).[4]

[4] The Court explained that the antitrust concern at issue was the agreement by competitors to preserve and share monopoly profits. 570 U.S. at 156, 157. The concern was not, as 1-800 wrongly claims, the "*exclusion of competition from the market*." Br. 42.

The principle reiterated in *Actavis* that intellectual property rights confer no general immunity from antitrust law applies equally to trademarks. That much is clear from this Court's decision in *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), which assessed a trademark-litigation settlement under antitrust law. The Court considered the settlement of a dispute between the owners of the trademarks LYSOL and PINE-SOL, which had been deemed confusingly related. Soon after Clorox acquired the rights to PINE-SOL, it brought an antitrust challenge to a trademark litigation settlement that its predecessor-in-interest had entered, claiming that the agreement restrained competition without justification because there was no longer a likelihood of consumer confusion between the two marks. *Id*. at 52. This Court engaged in an in-depth antitrust analysis of the settlement agreement. *Id*. at 55-61. The analysis would have been unnecessary if the agreement was simply exempt from antitrust scrutiny.[5]

[5] Likewise, in *California Packing Corp. v. Sun-Maid Raisin Growers of Cal.*, 165 F. Supp. 245, 250-51 (S.D. Cal. 1958), *aff'd*, 273 F.2d 282 (9th Cir. 1959), the court dismissed an antitrust challenge to a trademark settlement agreement after a thorough analysis of the exclusionary reach of the settlement agreement.

1-800 is wrong that the holding in *Actavis* is limited to the unique reverse-payment settlement at issue there and does not apply to "commonplace" settlements. The claim rests on the false premise that intellectual-property-litigation settlements are generally exempt from antitrust law and that *Actavis* created an exception to that general rule.

That approach cannot be squared with *Clorox* or with the Supreme Court's reliance on cases applying antitrust scrutiny to a wide range of patent-litigation settlements. *Singer*, for example, held that patent settlement agreements were subject to (and violated) the antitrust laws. 374 U.S. at 195-97. *New Wrinkle* found unlawful a price-fixing scheme embodied in a patent-litigation settlement. 342 U.S. at 373-74, 380. *Standard Oil (Indiana)* found the patent settlement agreements lawful, but subjected them to a searching antitrust analysis and warned that they were close to the line of illegality. 283 U.S. at 167-170, 174. As the D.C. Circuit explained, "intellectual property rights do not confer a privilege to violate the antitrust laws." *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (cleaned up). Rather, the idea that the exercise of intellectual property rights "cannot give rise to antitrust liability" is "no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." *Id*.

Ignoring that considerable body of law, 1-800 mistakenly relies, out of context, on a passing statement in *Actavis* that "commonplace" forms of settlement have not been deemed subject to antitrust liability. 570 U.S. at 152. The Court made that observation in response to the dissent's argument that antitrust liability for reverse-payment settlements is not triggered solely because the plaintiff paid the defendant. Sometimes, the dissent explained, the patent holder ends up paying the alleged infringer due to a counterclaim. *Id*. at 151-52. The majority explained that "[i]nsofar as the dissent urges that settlements taking *these* commonplace forms have not been thought *for that reason alone* subject to antitrust liability, we agree, and do not intend to alter that understanding." *Id*. at 152 (emphasis added). In other words, commonplace settlements *without any additional indication of anticompetitive harm* do not give rise to antitrust liability. Here, the Commission found multiple indications that the settlements cause anticompetitive harm.

1-800 also incorrectly claims that the FTC itself acknowledged in its brief in *Actavis* and its recent decision in *Impax* that the *Actavis* decision created an exception for reverse-payment cases to the general antitrust immunity of intellectual property settlements. Br. 46-47, 49. Not so. The FTC's *Actavis* brief said that settlements generally do not *violate* the antitrust laws, and that pharmaceutical settlements generally do not raise antitrust concerns. Brief for the Petitioner 26-28, *FTC v. Watson Pharm., Inc.*, No. 12-416 (S. Ct. Jan. 2013). It did not suggest that intellectual property settlements are generally immune from antitrust scrutiny at all. The Commission's *Impax* decision likewise does not suggest that patent settlements are immune from antitrust scrutiny; it considered the reverse payment at issue in applying the antitrust rule of reason. Opinion of the Commission 15-16, *Impax Labs., Inc.*, FTC Dkt. No. 9373 (Mar. 28, 2019).

Even if the antitrust laws did not apply to "commonplace" settlements, however, the Commission found that the settlements challenged here are not commonplace. Op. 13-14 [JA347-48]. Comparing them with the routine non-use settlement at issue in *Clorox* shows why. The settlement agreement in *Clorox* did "no more than regulate how the name PINE-SOL may be used" in product labels, ads, or other promotional material. 117 F.3d at 57; *see id*. at 54 (describing the settlement's non-use terms). Clorox was free to produce and sell products in direct competition with LYSOL, "so long as they are marketed under a brand name other than PINE-SOL." *Id*. at 57.

Here, by contrast, 1-800's settlements ban rival advertising generated by specific search terms, *without regard to the content of the advertisements or what rivals are called*. It does not matter if 1-800's competitors take steps (such as clear disclosures) that eliminate any risk of consumer confusion. Op. 14, 27 [JA348, 361]. And the settlements require the use of negative keywords to ensure that there will be no competitive advertising *even when the competitor is not using 1-800's mark in any way*. The restrictions on keyword bidding shut down an entire channel of advertising and extend far beyond anything the Court considered in *Clorox*.

Moreover, the restrictions in *Clorox* applied to only one competitor in a market that "is the battleground of some of the largest corporations in the country, wielding numerous megabrands." 117 F.3d at 58. Here, the settlements apply to "rival after rival," restricting competing advertisements from 14 online vendors that account for 79 percent of the market. Op. 33 [JA306]; IDF 496 [JA133]. They undermine the price-setting mechanism of the market and affect competition itself. Op. 20, 35 [JA293, 308].

Given the overbreadth of the settlement agreements, 1-800 is wrong that the Commission could resolve this case only by deciding disputed questions of trademark law. Br. 47. As shown above, some of the advertisements barred by the settlements do not even use 1-800's marks and therefore plainly go beyond the scope of trademark protection. As to ads that do use the marks, the Lanham Act prohibits only *confusing* use, and the Commission determined that any consumer confusion could have been averted through disclosures that make the identity of the vendor clear. Op. 27-30 [JA300-03]. A restraint of trade cannot be justified if "the objective [of the restraint] can be achieved by a substantially less restrictive alternative." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1502 (3rd & 4th eds., 2019 Cum. Supp. 2010-2018) (Areeda & Hovenkamp). And in any event, the Commission explained that the overwhelming consensus of judicial and expert opinion is that keyword searching based on trademarked terms is not by itself confusing and thus cannot justify broad and anticompetitive advertising restrictions. Op. 38-40 [JA311-13]; *see infra* 88-90.

Finally, because *Actavis* did not create a rule that commonplace settlements are exempt from antitrust scrutiny, 1-800's claim that its agreements do not fall within the exceptions to such a rule fails from the start. Br. 45-50; *see Actavis*, 570 U.S. at 153-58. The claim lacks merit anyway for the reasons that the Commission articulated. Op. 16 [JA289]. *Actavis* warned of settlements that pose a risk of unjustified and genuine adverse effects on competition. 570 U.S. at 153-57. Here, the advertising restrictions do just that in the vast majority of the market. Op. 33 [JA306]. The restraints also amount to bid rigging in keyword search auctions. *Id.* 19-22, 30-34, 50-54 [JA292-95, 303-07, 323-27]. *Actavis* makes clear that "courts need to take more seriously the anticompetitive consequences of challenged horizontal agreements." Areeda & Hovenkamp ¶2046.d6.

II. THE COMMISSION PROPERLY DETERMINED THAT 1-800'S ADVERTISING AND KEYWORD BIDDING RESTRICTIONS ARE INHERENTLY SUSPECT

The Commission properly held that in the market for online sales of contact lenses, 1-800's restrictions were likely enough to cause anticompetitive harm that "no elaborate industry analysis [was] required" to shift the burden to 1-800 to show procompetitive justifications for them. *Indiana Dentists*, 476 U.S. at 459.

The restraints on head-to-head keyword advertising present a textbook case for applying the inherently suspect framework. It takes only basic common sense, not a Ph.D. in economics or a sophisticated antitrust background, to see that when direct-rival merchants agree to keep consumers from knowing at the critical moment of a purchasing decision that better prices are available elsewhere, competition will suffer. The "circumstances, details, and logic" of 1-800's advertising restrictions permit "a confident conclusion about the principal tendency" the restrictions will have in the market. *California Dentists*, 526 U.S. at 781. The same is true of the restriction on competitive bidding, which plainly distorts the "price-setting mechanism of the market" and resembles agreements that have been condemned as per se illegal. *Indiana Dentists*, 476 U.S. at 461-62.

A. 1-800's Advertising Restrictions Were Likely to Cause Anticompetitive Effects in the Online Contact Lens Market

The Commission analyzed the nature and effect of 1-800's advertising restraints in the market as well as economic and judicial experience with similar restraints, which together showed that the restrictions were likely to harm competition. Those are the factors that courts have used when applying (and upholding) an inherently suspect analysis. *See Indiana Dentists*, 476 U.S. at 456-58; *Polygram*, 416 F.3d at 37; *North Texas Specialty Physicians*, 528 F.3d at 362-67; *North Carolina State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013).

Operation of the advertising restrictions in the market. In the online retail market, contact lenses are a commodity: the prescription requires the consumer to get a specific lens, so all merchants sell identical products. Op. 3 [JA276]; IDF 23-27 [JA76-77]. Price is the primary—and often only—basis for competition and is the emphasis of much of the competing advertising. Op. 20 [JA293]. Yet, by preventing consumers from learning about rivals' lower prices when they search for "1-800 Contacts"—the most popular search term—the restrictions prevent direct price competition a substantial part of the time. Consumers are kept in the dark about critical information at the very moment they are poised to buy. Worse, the negative keyword requirement in 1-800's agreements means that competing ads will not appear in response to a search for "1-800 Contacts" even when competitors bid on generic keywords like "contacts."

The Commission found that the advertising restrictions are "agreements between horizontal competitors to restrict the information provided by advertising to consumers when they search for" terms including 1-800's trademarks. Op. 20 [JA293]. The record showed that price is "the top purchasing criterion" for online shoppers. IDF 706-07 [JA160-61]. Without the restriction, "consumers could have used that withheld information to compare and evaluate the prices and other features of competing online sellers." Op. 20 [JA293]. Instead, "information enabling consumer comparisons [was] more difficult and costly to obtain." *Id*. Moreover, "[o]nline search is one of the key methods by which consumers discover vendors and compare products and services," *id.*, and is the principal advertising expenditure, *id.* 6-7 [JA279-80]. 1-800's restrictions thus struck at the heart of where and how competition takes place in the online contact lens market.

Economic theory. The Commission explained that "[e]conomic theory indicates that restrictions on [online search] advertising are likely to harm competition." Op. 20 [JA293]. As a matter of basic economic logic, online shoppers who lack competitive price information will tend to pay more than they would have if they knew they could get the exact same lenses for less money. Even more persistent shoppers will have to try harder to learn about their options by performing multiple searches. Compounding the harm, the advertisements barred by 1-800's restrictions would have been presented to the consumer at the time he was most likely to make a purchase. *Id.* 6, 30 [JA279, 303]; IDF 498 [JA134].

Empirical studies. Economic studies further confirm that 1-800's advertising restrictions were likely to have anticompetitive effects. Economic expert witness Dr. David Evans testified to the "consensus in the economics literature that restrictions on advertising among rivals impair competition and harm consumers." CX8006_081

(Evans Expert Report) [JA1103]. Dr. Evans reviewed 21 empirical studies assessing the effects of advertising restrictions on various aspects of competition, including prices. *Id.* at 081-82 [JA1103-04]. All but one study (which examined advertising for non-commodity professional services) found that advertising restrictions led to higher prices, and many of those studies showed that consumers get no benefits (like higher quality or better service) in return. *Id.* Online advertising is no different. Dr. Evans reported that empirical studies show that price comparison websites, which allow consumers to compare prices easily, lead to lower prices for products as diverse as life insurance and cars. *Id.*

Judicial experience with similar restraints. Courts and commentators have long recognized the value to consumers of price advertising and the harm from restricting it. "[W]here consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377 (citing, *inter alia*, Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972)). In *California Dental*, the Supreme Court found "unexceptionable" the ideas 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 [sellers] to compete on the basis of price." 526 U.S. at 773 (cleaned up). Likewise, the Court found it "clear as an economic matter" that "restrictions on fare advertising" have a "significant effect" upon airfares. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992). A restriction on providing information important to consumer purchasing decisions 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." *Indiana Dentists*, 476 U.S. at 461-62.

1-800's advertising restrictions also bear a "close family resemblance" to similar restrictions "that already stand[] convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37. Limiting head-to-head advertising amounts to the digital equivalent of agreements to allocate territory. 1-800 and its rivals effectively agreed to divide the cyber terrain so that consumers who searched for 1-800's trademarks would not be tempted by a competitor's offerings (and vice-versa). Similar agreements "on the way in which [rivals] will compete with one another" have been deemed "unreasonable as a matter of law."

NCAA, 468 U.S. at 99. In *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995), for example, the court found that an agreement to limit advertising to different geographical regions "sufficiently approximates an agreement to allocate markets so that the per se rule of illegality applies." *See United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (*per curiam*).

The restrictions also resemble advertising bans that the Supreme Court and this Court have held unlawful, including a ban on prescription drug price advertising, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), a ban on attorney advertising, *Bates*, 433 U.S. 350, and a ban on advertising liquor prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). This Court similarly upheld an FTC order forbidding doctors from agreeing not to advertise. *Am. Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (*per curiam*). Courts have "recognized time and again that agreements restraining autonomy in … advertising impede the ordinary give and take of the marketplace." *Polygram*, 416 F.3d at 37 (cleaned up).

In the online contact lens market, a ban on keyword search advertising is often tantamount to a complete ban on advertising. More than one-third of consumers are aware of *only* the "1-800 Contacts" brand; as many people search for that brand name as search for "contact," "contacts," and "contact lenses" combined. Op. 32 [JA305]. That substantial segment of consumers is robbed of the chance to learn that they can get the exact same lenses for less money elsewhere. Thus, the restrictions directly affect "a consumer's opportunity to see a competitor's ad in the first place." Op. 22 [JA295].[6] As the Commission explained, "that some advertising remained unrestrained does not excuse a restraint affecting a competitively significant subset of ads." Op. 34 [JA307].

The Commission did not need to rely only on cases involving "trademarks, settlements, or search advertising" as 1-800 contends. Br. 56. Restrictions on advertising reduce competition whether they involve trademarks or not and whether they are the result of settlements or other collusive agreements—and they warrant quick-look review on that basis alone. Inherently suspect analysis requires only that there be

[6] For that reason, 1-800 is incorrect that the advertising ban cases are inapposite here because they involved total bans on advertising. Br.57.

a "close family resemblance" with the challenged restraint, not an identical twinship. *Polygram*, 416 F.3d at 37; *see also Indiana Dentists*, 476 U.S. at 458; *North Texas Specialty Physicians*, 528 F.3d at 362. The principal question now is whether a prima facie case of anticompetitive conduct exists; considerations that might justify that conduct, such as intellectual property rights, are analyzed later (which the Commission did at length, *see* Op. 22-30 [JA295-303]).

B. 1-800's Bidding Restrictions Amount to Bid Rigging for Brand-Name Advertising Keywords

The Commission also properly deemed inherently suspect 1-800's bidding restrictions in advertising keyword auctions held by search-engine companies. Op. 50-51 n.54 [JA323-24]. The Supreme Court has deemed bidding restrictions anticompetitive without the need for "elaborate industry analysis," even in the context of professional conduct rules, which generally merit greater deference. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). This Court likewise recognized that bid rigging is per se illegal. *State of N.Y. v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988); *United States v. Koppers Co.*, 652 F.2d 290, 293-94 (2d Cir. 1981). *See also United States v. MMR*

Corp., 907 F.2d 489, 496 (5th Cir. 1990) ("backing away from bidding" constitutes *per se* illegal bid rigging).

C. 1-800's Criticisms of the Inherently Suspect Framework Are Baseless

1-800's arguments amount largely to an attack on the inherently suspect doctrine itself. It caricatures the approach as "theories and suspicion," as "rarely used," and as an attempt by the Commission to shirk its duty of inquiry through "a dramatic departure from the default rule of reason." Br. 50-51, 61. 1-800 does not seriously address the Commission's thorough analysis of the extensive record.

Courts long have recognized that an abbreviated rule-of-reason analysis is appropriate where it is sufficiently obvious that a particular restraint will cause harm to competition. The Supreme Court approved such an approach in *Indiana Dentists*, finding the Commission's analysis justified by "common sense and economic theory." 476 U.S. at 456. Courts of appeals approved of it in *Polygram*, 416 F.3d at 37; *North Texas Specialty Physicians*, 528 F.3d at 352; and *North Carolina Dental Examiners*, 717 F.3d at 374; *cf. United States v. Apple, Inc.*, 791 F.3d 290, 329-330 (2d Cir. 2015) (Opinion of Livingston, J.). Indeed, even when the Supreme Court has disapproved its application in particular contexts, as it did in *Actavis* and *California Dental*, the Court has consistently recognized the validity of the approach. It may not be used often, but that is because relatively few practices are so plainly anticompetitive as 1-800's advertising restrictions.

1-800's description of the inherently suspect approach invoked by the Commission here is distorted. It claims that the analysis allowed the Commission to "virtually eliminate" its burden under the rule of reason, Br. 50, engage in "near-summary condemnation" of 1-800's agreements, Br. 51, 60, and declare that, from now on, "advertising regulations, as a category, are inherently suspect," Br. 54. All of those descriptions are phony.

In reality, the Commission extensively analyzed the effect of the advertising restrictions on the market and 1-800's justifications for them and concluded that Complaint Counsel had met "the requirements of the rule of reason to support liability." Op. 35 [JA308]. The only aspect of rule-of-reason analysis the Commission did not perform was the initial determination that 1-800 had market power in the online contact lens market before it shifted the burden to 1-800 to show procompetitive justifications. *See Polygram*, 136 F.T.C. at 344 (inherently suspect means that "scrutiny of the restraint itself … without consideration of market power" is sufficient). In all other respects, the analysis was identical to the traditional rule of reason. The Commission examined in great detail 1-800's justifications and found them wanting, but that is by no means "summary condemnation" akin to per se illegality. The Commission's approach, while less than "the fullest market analysis," was "meet for the case." *California Dental*, 526 U.S. at 779, 781.

Furthermore, the Commission expressly disclaimed the view "that all advertising restrictions are necessarily inherently suspect." Op. 22 [JA295]. The Commission assessed the specifics of the online contact lens market to determine that 1-800's advertising restrictions were "likely, *in this particular context*, to harm competition." *Id*. 34 (cleaned up; emphasis added) [JA307].

In 1-800's hyperbolic characterization, the Commission wholly ignored trademark rights in deciding this case. Br. 58 (faulting the Commission for not taking into account the restraints' "roots in trademark law"). But the time to address such an issue is at the justification stage of the inquiry, not the prima facie stage, where the question was whether Complaint Counsel showed a prima facie case of harm to competition sufficient to shift the burden. That issue does not turn on trademark rights.

Moreover, because the Commission found 1-800's trademark justification "cognizable and plausible," it required Complaint Counsel to make a "more detailed showing" that the advertising and bidding restrictions are "likely, in the particular context, to harm competition." Op. 18-19 [JA291-92]. Indeed, the Commission devoted a large portion of its 59-page opinion to a detailed analysis of the issue, addressed in Section IV below. 1-800 is just wrong to claim the Commission "simply assume[d]" that its trademark claims were invalid. Br. 60.

Finally, relying on dicta in two cases, 1-800 argues that, in this Circuit, once a defendant "has shown a procompetitive justification" for its conduct, the plaintiff is required to "abandon" the truncated analysis "and proceed to a full-blown rule of reason." Br. 60 (citing *Madison Square Garden, L.P. v. Nat'l Hockey League*, 270 F. App'x 56, 58 (2d Cir. 2008) (summary order); *Bogan v. Hodgkins*, 166 F.3d 509, 514 n.6 (2d Cir. 1999)). As we discuss below, 1-800 did not show a procompetitive justification for its restraints; at most, it raised the possibility of a justification, which it ultimately failed to prove.

In any event, *Madison Square Garden* and *Bogan* do not stand for the proposition that after the burden has shifted to the defendant, an allegation of procompetitive justification requires the Commission to go back and reconsider whether the burden should have shifted in the first place. That approach would nullify the inherently suspect doctrine, contrary to the Supreme Court's repeated endorsement of it. At most, *Bogan* and *Madison Square Garden* recognize that if a defendant establishes procompetitive justifications as a matter of fact, then the adjudicator may not condemn a practice without assessing whether it harms competition or the procompetitive benefits can be achieved through less anticompetitive means. The Commission analyzed both.

D. *Actavis*, *California Dental*, and *Clorox* Do Not Foreclose the Inherently Suspect Analysis in This Case

1-800 claims that the decisions in *Actavis*, *California Dental*, and *Clorox* preclude use of an inherently suspect analysis. Br. 51-55. They do not.

a. In *Actavis*, the Supreme Court rejected the use of quick-look analysis to assess all "reverse payment" settlements of pharmaceutical patent disputes. The Court did not, as 1-800 suggests, determine that litigation settlements may never be deemed inherently suspect. It held only that in the context of pharmaceutical reverse payments the likelihood of anticompetitive harm depended on facts specific to *each agreement*, including the size, scale, and independence of the payment, and industry specifics. 570 U.S. at 159. No such concerns apply to the advertising restrictions at issue here. Decades of judicial decisions and economic learning have recognized that such restraints pose significant competitive concerns, and the Commission thoroughly analyzed the market specifics that made past teaching applicable to the online sale of contact lenses.

Indeed, *Actavis* stressed that its holding did not "require the courts to insist" on a full-press rule-of-reason analysis in all cases. *Id*. Rather, the Court reiterated its determination in *California Dental* that there is "always something of a sliding scale in appraising reasonableness," so "the quality of proof required should vary with the circumstances." *Id*.; 526 U.S. at 780.

Contrary to 1-800's contention (Br. 52), the non-exclusionary nature of trademark rights makes the agreements at issue here *more* troubling, not less. Unlike patent rights, which forbid all unauthorized use of an invention, trademark rights protect against unauthorized use of the mark only to the degree it will likely cause consumer confusion. 15 U.S.C. §§ 1114, 1125(a). But 1-800's agreements restrict competitive advertisements and keyword bidding without regard to whether the ads could have confused consumers. Competing ads are barred even if they expressly say that the merchant is *not* 1-800. Worse, by mandating negative keywords, they forbid competitive advertising that does not use 1-800's trademarks at all.

b. *California Dental* also does not support 1-800's position. To the contrary, *California Dental* acknowledged that "price advertising is fundamental to price competition" and that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [sellers] to compete on the basis of price." 526 U.S. at 773. The Court thus recognized the "general rule" that "restrictions on advertisement of price and quality" have anticompetitive tendencies. *Id*. at 771; *see* Areeda & Hovenkamp ¶2023 (consumers generally benefit from more information, and restrictions on information raise consumers' search costs).

The Court declined to condemn the advertising restriction adopted by the dentists because of issues unique to the market for professional dental services. The "comparability of [dental] service packages [is] not easily established," and both consumers and competitors had "difficulty … get[ting] and verify[ing] information" about those services. 526 U.S. at 771. Moreover, because the dentists had far more information about the services at issue than the patients, advertising restrictions may have been procompetitive by preventing false or deceptive advertising. *Id*. The market for dental services therefore lacked the "normal linkage" between advertising restrictions and market effects. Op. 42 [JA315]. In that situation, the restricted advertising might not have enhanced competition. 526 U.S. at 771, 773.

By contrast, in the online retail contact lens market—a commodity market driven by price competition—there is no reason to question whether restricting advertising will harm competition. The general rule that restrictions on price and quality advertising impair competition applies with full force. But the Commission did not rely on that fact alone in finding 1-800's agreements inherently suspect: it also identified a slew of specific factors, discussed above, that make the expected anticompetitive effects especially likely. Its analysis was "less quick" and "more sedulous." *Id*. at 781.[7]

c. The Commission's analysis is also consistent with this Court's decision in *Clorox*, which did not involve inherently suspect analysis. *See* Br. 53. The parties settled trademark litigation with an agreement that prevented Clorox from labeling a disinfectant a particular name, PINE-SOL, deemed to be confusingly similar to the mark LYSOL. Rejecting Clorox's antitrust claim, the Court concluded that there was no reason to believe that the agreement would harm competition because it restricted only the name under which the product could be sold, not the sale of the product. Moreover, the market had a large number of other competitors who were not limited by the agreement. 117 F.3d at 57. As the Commission observed, in *Clorox* "the court saw a jilted competitor who wanted to use an antitrust claim to negotiate a better trademark settlement." Op. 33 [JA306].

[7] 1-800 mistakenly relies on *Polk Bros., Inc. v. Forest City Enterprises., Inc.*, 776 F.2d 185 (7th Cir. 1985), as requiring a complete rule of reason analysis of a covenant not to compete. Br. 54. The court there did not consider whether to apply a quick-look analysis; the question was whether the agreement at issue was *per se* unlawful. The court applied the rule of reason because the restraint was ancillary to the parties' building a joint facility "that would expand output." 776 F.2d at 189. No claim of ancillary benefit is present here.

Nothing in *Clorox* remotely suggests a bar on using a quick-look analysis to assess agreements banning online keyword advertising and involving 80% of a market. To the contrary, the Court warned against agreements that "in reality serve to divide markets." 117 F.3d at 55.[8]

III. The Commission Properly Found Direct Evidence of Anticompetitive Effects

As an alternative means of determining that Complaint Counsel had established a prima facie case of competitive harm, the Commission found direct evidence that 1-800's advertising and bidding restrictions (1) resulted in a substantial reduction in price advertising that (2) caused consumers to pay more for their contact lenses, (3) caused search engines to receive lower prices for search advertisements, and (4) lowered the quality of search engine results. Those findings are

[8] *American Express* is inapposite, as that case involved a *vertical* agreement between a service provider and its customers, not a *horizontal* agreement between competitors, which the Supreme Court explained "is markedly different" for antitrust purposes. 138 S. Ct. at 2290 n.10; 2285 n.7. Vertical agreements are less concerning because they "are a customary and even indispensable part of the market system" and the parties are not competitors. Areeda & Hovenkamp ¶1902d. Had American Express conspired horizontally with Visa and MasterCard to deprive consumers of information, the case would have been very different.

supported by substantial evidence, and each finding independently supports a prima facie case.

A. 1-800's Agreements Reduced Price Advertising and Interfered with Price-Setting Mechanisms

The Commission found that 1-800's advertising restrictions reduced the volume of advertising for low-price online sellers of contact lenses and disrupted information flow in the market.

"A concerted and effective effort to withhold (or make more costly) information desired by consumers … 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." *Indiana Dentists*, 476 U.S. at 461-62. Likewise, where brokers adopted rules limiting access to real estate listings, a reduction in the availability to consumers of such advertising constituted direct evidence of competitive harm. *Realcomp II, Ltd.*, FTC Dkt. No. 9320, 2007 WL 6936319, at *40-42 (Oct. 30, 2009), *aff'd*, 635 F.3d 815, 831-34 (6th Cir. 2011).

1-800's advertising restrictions are directly analogous to those in *Indiana Dentists* and *Realcomp*. As discussed above, the restrictions deprived consumers of information that would have enabled them to "compare and evaluate the prices and other features of competing online sellers," who offered identical commodity products distinguished mainly by price. Op. 3, 20, 32 [JA276, 293, 305]. Online search advertising, moreover—in particular, keyword advertising based on 1-800's brand name—was essential to both 1-800 and its online rivals in attracting customers and capturing a consumer's attention at the critical moment of sale. *See id.* 6-7 (summarizing evidence), 22, 30-32 [JA295, 303-05].

The Commission found considerable direct evidence showing that the agreements sharply reduced competitive advertising and sales:

- Competitors who had advertised in response to consumer searches for 1-800's trademarks stopped doing so almost entirely after the agreements. They testified that, but for the restrictions, they would have continued advertising using 1-800's trademarks. Op. 43 [JA316].
- One expert estimated that the advertising restrictions eliminated 114 million ads between 2010 and 2015. Op. 45

[JA318]; IDF 755 [JA167].[9] Another estimated that the restrictions reduced competitors' ads from 1.85 to 0.54 per search. Op. 44 [JA317]; IDF 749 [JA166-67].

- The elimination of ads led to fewer "clicks" taking consumers to rivals' websites. One expert estimated that, but for the restrictions, clicks on rivals' ads would have increased by 145,000. Op. 45 [JA318]; IDF 756 [JA167]. Another expert estimated that clicks on rivals' ads would have increased by 3.5 clicks per 100 searches. Op. 44 [JA317]; IDF 750 [JA167].
- Consumers who saw rivals' ads when searching for 1-800's trademarks clicked on those ads and purchased contacts from those rivals. Data from rival vendors shows a high level of "conversions" (sales from clicking a link) from ads generated by searches for "1-800 Contacts." IDF 596-609, 617-623, 662-669, 670-680 [JA145-46, 148-49, 153-55, 155-

[9] This expert analysis drew on the experience of online retailer Memorial Eye, which offered significantly lower prices than 1-800, and which continued to advertise against 1-800 after being sued. Memorial Eye bid on generic keywords such as "contacts," and its ads were displayed when a consumer searched for 1-800's brand name. Op. 44-45 & n.47 [JA317-18].

157]. 1-800 recognized that "[i]f they've gone online somewhere else—we've lost them." CX1117_023 [JA835].

This evidence firmly supports the Commission's conclusion that "the Challenged Agreements cut off advertising in a way that interfered with the operation of competitive forces in the online sale of contact lenses and disrupted consumers' mechanisms for comparing and selecting between alternative online sources." Op. 45 [JA318]. This is precisely the type of "disrupt[ion]" of price setting that the Supreme Court condemned in *Indiana Dentists*, 476 U.S. at 461-62.

In response, 1-800 does not challenge the Commission's findings. It contends only that these anticompetitive effects do not establish a prima facie case as a matter of law. The arguments lack merit.

1. *California Dental* and *Clorox* support the Commission's finding of anticompetitive harm

1-800's principal claim is that under *California Dental* and *Clorox*, direct evidence of decreased advertising is legally insufficient to state a prima facie case. In fact, those cases support the Commission's ruling.

First, 1-800 contends that *California Dental* held that advertising restrictions, "standing alone," cannot constitute anticompetitive harm as a matter of law. Br. 65 (citing 526 U.S. at 776). To the contrary, *California Dental* recognized that "price advertising is fundamental to price competition" and that "[r]estrictions 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." 526 U.S. at 773.

As described above (at 59-61), *California Dental* declined to apply the general rule disfavoring advertising restraints to the market for dental services because special factors not present in commodity markets indicated that the restricted advertising would not necessarily enhance competition. 526 U.S. at 771, 773. As discussed, contact lenses are a commodity product that consumers readily understand and for which price is the principal means of competition among online vendors. As shown in part III.B below, the advertising restrictions led to higher prices.

Nor does *Clorox* support 1-800's argument. The parties' agreement there prevented a single competitor from labeling a product with a particular trademark-infringing name. It did not restrict advertising, and there were multiple other competitors in the market. The Court found no reason to believe that competitive harm would result from that narrow restriction. *See Clorox*, 117 F.3d at 57.

This case bears no resemblance to *Clorox*. 1-800's advertising restrictions did not limit what competitors could label their products; they cut off an entire channel through which rivals could tell consumers that they offered the exact same products at a lower price, even where the advertising presented no risk of consumer confusion. The restrictions went to the heart of a central means of competition in the market. And unlike in *Clorox*, they applied not just to one competitor but to 14 of them, accounting for most of the market. *Clorox* warns against agreements "that in reality serve to divide markets," 117 F.3d at 55-56, which is precisely what 1-800's restrictions accomplish. *See* Op. 14, 33 [JA287, 306]; ID at 161-162 [JA227-28].

2. The Commission was not required to show an overall decrease in the sales of contact lenses

1-800 claims that the Commission was required to find a reduction in "output"—*i.e.*, total sales of contact lenses. Br. 65-67. The claim fails because "[a]lthough output reductions are one common kind of anticompetitive effect in antitrust cases, a 'reduction in output is not the *only* measure of anticompetitive effect.'" *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting Areeda & Hovenkamp ¶ 1503b(1)); *see also American Express*, 138 S. Ct. at 2284 (describing "'proof of actual detrimental effects,' *such as* reduced output, increased prices, *or* decreased quality") (cleaned up; emphasis added).

California Dental did not hold otherwise. That case does not stand for the proposition that *only* output reduction can lead to competitive harm; indeed, the Court recognized that, generally, "raising price, reducing output, and dividing markets have the same anticompetitive effects." 526 U.S. at 777 (cleaned up). Instead, the Court addressed when advertising restrictions can be a proper measure of (or proxy for) output for purposes of showing anticompetitive harm. The issue was whether certain dentists' rules on advertising content were sufficiently likely to harm competition to warrant an abbreviated rule of reason. *Id.* at 771-78. The Court confirmed the "general rule" that "restrictions on advertisement of price and quality" have anticompetitive tendencies. *Id.* at 771. But it held that rule inapplicable to the "professional context" of dental services because particular aspects of that market—including information asymmetry between dentists and patients that rendered some advertising claims unverifiable—distinguished it from "normal" commercial markets, and meant that the restricted advertising would not *necessarily* aid competition. *Id.* at 771-74. By contrast, 1-800's restrictions affected a commodity market where consumers can readily verify sellers' claims; restricted price advertising—the principal means of competition; and barred advertising regardless of content. Unlike in *California Dental*, there is no reason to doubt that, here, restricting price advertising harms competition, and 1-800 supplies none.

Indiana Dentists and *Realcomp* did not, as 1-800 wrongly contends, involve "reductions in output of the underlying services." Br. 67 n.16. To the contrary, as the Commission explained, the x-rays in *Indiana Dentists* were not offered as a separate product independent of dental treatment. Op. 46 [JA319]. They were only information used to assess the need for treatment and insurance coverage. The Court's analysis focused not on the "output" of x-rays as an end in itself, but on "the informational role of x-rays and the harm to market mechanisms that would flow from withholding that information." *Id.*; *see* 476 U.S. at 461-62. Similarly here, the decline in competitive price advertisements shows an anticompetitive effect without a separate showing that the output of contact lenses also fell. As the leading antitrust treatise recognizes, "[a]greements restricting advertising are a form of output restriction in the production of information useful to consumers." Areeda & Hovenkamp ¶2023b.

In *Realcomp*, the Commission likewise did not require a reduction in the number of "real estate listings" or in the number of home sales. Instead, the restraints found anticompetitive in *Realcomp*—like those here—had the purpose and effect of keeping consumers in the dark about the availability of lower-priced options for brokerage services. *See Realcomp*, 2007 WL 6936319, at *10, 12-13, 25-27, 40-42. They were thus condemned because they denied "competitively significant information" to consumers looking to buy a house.

3. The Commission showed that the agreements caused an actual reduction in advertising

Finally, 1-800 argues that even if a reduction in advertising demonstrates anticompetitive harm, the Commission proved no such reduction. Br. 67-68. The claim simply ignores the extensive findings, including two econometric models, discussed at length in the Commission's Opinion and in the Initial Decision. Op. 44-45 [JA317-18]; IDF 743-756 [JA166-67]. As discussed above (at 64-66), one expert testified that consumers saw *114 million* fewer competitive ads due to

1-800's restrictions, and another testified that the restrictions reduced competitor advertising to *less than one third* of expected levels. *Id.*

1-800 speculates that its competitors may have shifted advertising dollars to other keywords, resulting in no net reduction in competitive advertising. Br. 67-68 & n.17. But the evidence showed that competitors allocated keyword bidding budgets based on the return-on-investment generated by a particular keyword, and that they did not shift spending to cost-ineffective keywords after agreeing not to advertise head-to-head with 1-800. Op. 44 n.46 [JA317]. No further evidence was required.

B. 1-800's Advertising Restrictions Led to Increased Online Contact Lens Prices

Higher prices are the "paradigmatic example[]" of antitrust harm. *NCAA*, 468 U.S. at 107. The Commission correctly found that reduced price advertising led to higher online prices for contact lenses. Op. 46 [JA319]. That finding independently establishes a prima facie case.

1. Substantial evidence showed that the advertising restrictions led to higher prices and sales diverted to 1-800

1-800 admits that its prices were higher than those of its online competitors. Br. 70; *see* Op. 46 [JA319]; IDF 691-93 [JA158-59]. The evidence showed that the advertising restrictions diverted sales away from lower-price sellers and allowed 1-800 to maintain artificially high prices:

- Documents and testimony showed that consumers were generally unaware that contact lenses from 1-800 cost more than from other online vendors. Op. 47 & n.50 [JA320]; IDF 694-98 [JA159].
- Economic models showed that the suppression of rival ads and consequent reduction in clicks on rival ads caused diversion of sales from lower-price rivals to higher-price 1-800. Op. 46-47 [JA319-20]. One expert estimated that, but for the restrictions, lower-priced rivals' sales would have been 12.3% higher, lowering the average price paid in the whole market. Op. 45 [JA318].
- 1-800's own internal analyses showed that when rival ads appeared in response to consumer searches for 1-800's trademarks, 1-800's sales decreased, and conversely that the suppression of rival ads led to increased sales for 1-800. IDF 710-731 [JA161-64]; ID 155-56 [JA221-22].

- Retailer data showed that sales by 1-800's online rivals increased when their ads appeared in response to searches for 1-800's trademarks. IDF 618-623, 662-669 (Memorial Eye) [JA148-49, 153-55]; IDF 596-609, 670-680 (Lens Direct) [JA145-46, 155-57].
- 1-800 responded to price competition with a price-match policy offering to meet or beat competitors' prices. IDF 436-440 [JA126]; *see* Op. 47 [JA320]. Price-matching rose substantially as more consumers saw lower-price advertising. CX8009_071-072 ¶127 (Evans Rebuttal Expert Report) [JA2466-67].

This evidence establishes conclusively that the advertising restrictions "insulate[d] 1-800 Contacts from normal competitive forces," "divert[ed] sales from low-priced sellers to a high-priced seller," and "directly interfered with consumers' ability to trigger [price] discounts." Op. 47 [JA320]. As a result, consumers paid higher prices than they would have absent 1-800's restrictions. *Id.*

2. 1-800's responses lack merit

1-800 levies a barrage of attacks on the Commission's finding of price effects. It complains that the Commission (1) did not prove higher prices for *all* consumers; (2) did not prove that 1-800 garnered "abnormally high" profit margins; (3) failed to disprove 1-800's claim that its higher prices are justified by its "stronger brand"; (4) used analyses that were insufficiently "rigorous" and "precise" and relied on "mere theory"; and (5) did not define a relevant market. All of these arguments fail.

"All consumers." First, 1-800 claims that this Court's decision in *American Express* requires the Commission to show that the advertising restrictions made *all* consumers in the market "worse off overall," not just those who overpaid for lenses. Br. 64 (citing *United States v. American Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016)). The argument rests on an out-of-context quote; the case does not stand for that proposition.

American Express involved a "two-sided" market, in which the credit card processor simultaneously served both merchants that accept credit cards and consumers who use them. The Court held that proof of harm to merchants did not by itself establish a prima facie case because the inquiry had to consider both sides of the market—*i.e.*, the "market as a whole." The Court made clear that the phrase referred to "both cardholders and merchants," not to every single participant in the market. 838 F.3d at 204-05. As one court recognized, the antitrust laws "exist to protect competition, even for a targeted group that represents a relatively small part of an overall market." *FTC v. Staples, Inc.*, 190 F. Supp.3d 100, 126 (D.D.C. 2016).[10]

Profit margins. 1-800 next asserts that the FTC's direct price-effects evidence is insufficient because the Commission did not show that 1-800's profit margins increased during the relevant period. Br. 70. This Court observed in *American Express* that proof of "abnormally high" margins is *one* way to prove anticompetitive effects, 838 F.3d at 205, but it also stated that the government could meet its initial burden in other ways, including by showing "supracompetitive pricing." *Id.* at

[10] Nor do *MacDermid Printing Solutions LLC v. Cortron Corp.*, 833 F.3d 172 (2d Cir. 2016), or *CDC Tech., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74 (2d Cir. 1999), aid 1-800. In *MacDermid*, an antitrust challenge to a vertical restraint was dismissed because there was "no evidence that even a single customer" was harmed, through higher prices or otherwise. 833 F.3d at 186. Similarly, in *IDEXX*, the plaintiff offered no evidence of harm either to rivals or to consumers. 186 F.3d at 80-81.

205-06. The Commission found that 1-800's prices were higher than they would have been without its restrictions, which meets that test. It was not required also to prove increasing profit margins.[11]

But even assuming that 1-800's margins did not increase—when they would have been expected to decline in response to competitive pressure—that still would be consistent with the Commission's finding of harm. *See* Op. 49 [JA322]. Evidence that "prices did not fall" is "consistent" with a finding of adverse effects. *McWane, Inc. v. FTC*, 783 F.3d 814, 839 (11th Cir. 2015); *accord Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) ("to prevent a price collapse through coordination of action among competitors … is sufficient proof of actual anticompetitive effects").

Brand preference. 1-800 claims that the Commission "failed to account for obvious factors" that could have explained why consumers would pay higher prices for a commodity product, such as a preference for "the strength of 1-800 Contacts' brand." Br. 71. But the Commission found that consumer preference did not explain 1-800's higher prices.

[11] In any event, 1-800's blanket assertion concerning its margins, Br. 70, provides "no basis to conclude that they were properly measured." Op. 49 [JA322].

The evidence, including 1-800's own documents, showed that informed consumers choosing between 1-800's "brand" and lower-priced rivals regularly chose the rival. *See* Op. 48-49 [JA321-22]. Indeed, an independent evaluation of 1-800's business found that its "premium" pricing was "unsustainable" "given the commodity-like nature of contact lenses and 1-800's insufficiently distinguishable service." CX1109_003 [JA723]. 1-800's rivals also disputed the proposition that 1-800's service was superior. Op. 48 [JA321] (collecting testimony).

1-800's price-match policy—spurred directly by competitive pressure from lower-price online rivals—further undermines 1-800's claim that its higher prices were justified. When rivals advertised lower prices, 1-800 responded not by showing consumers that the higher price was worth it because its brand was better or its service superior, but by *lowering its prices*. Op. 49 [JA322]. As the Commission explained, "the need for 1-800 Contacts to offer a price-match policy suggests that the service differential is insufficient to offset the price premium." *Id.*

Insufficiently precise quantification. 1-800 admits that it had higher prices than its competitors, but asserts that the Commission did not sufficiently quantify the difference. Br. 72. As the Commission explained, the law does not require calculation of the "precise competitive price" to establish that the existing price is above the competitive level. *Id*. Proof that depriving consumers of truthful advertising caused them to incur higher prices is sufficient.

Thus, in *North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640 (2011), the Commission found "a precise quantification of the price increase … unnecessary" in light of the "obvious disruption of the proper functioning of the price-setting mechanism of the market." *Id*. at 686 (cleaned up). The Fourth Circuit affirmed that finding. 717 F.3d 359. Similarly, in *Toys "R" Us*, the Commission did not require a precise quantification of the competitive price where, but for defendant's restraints, retail prices would have been lower. 126 F.T.C. 415, 561-64 (1998). Affirming that decision, the Seventh Circuit held that "no more elaborate market analysis was necessary." 221 F.3d at 937.

"Mere theory." 1-800 next asserts that the Commission's direct evidence of price effects is "mere theory" offered by Complaint Counsel's experts. Br. 73. In fact, the evidence rests on undisputed facts of 1-800's higher prices and on econometric models, credited by the Commission, which together support the conclusion that without the advertising restrictions prices likely would fall, because (i) consumers would opt for the lower-price sellers rather than 1-800, thus forcing 1-800 to lower its own prices; and (ii) 1-800 would be forced to price-match more often, even if its list prices remained high. Op. 44-45, 47 [JA317-18, 320]. As both experts testified, the increased availability (and visibility) of price information, combined with consumer switching, "would put downward pressure on prices." IDF 741 [JA165]; Op. 46-47 [JA319-20].

The models are supported by record evidence showing that before 1-800 cut off competitive advertisements consumers *did* shift away from high-price 1-800 to its lower-price rivals, IDF 720-21 [JA162], and 1-800 had to price-match far more often. Evans Tr. 1608-1617 [JA408-10] (*in camera*); CX8009_071-72 ¶127 (Evans Rebuttal Expert Report) [JA2466-67] (*in camera*); CX8006_104 ¶227 (Evans Expert Report) [JA1126]. The experts' opinions "derive from the facts in the record" and "provide empirical evidence, not economic theory isolated from facts." Op. 48 [JA321].

Relevant market. Finally, 1-800 argues that the Commission's analysis of price effects is "flawed" because it simply "assum[es]" a market "limited to the sale of contact lenses online" without defining or proving "any relevant market." Br. 69 n.18.

The claim is flatly wrong. The ALJ found that "[o]nline sales of contact lenses constitute a relevant product market." IDF 397 [JA120]; *see id*. 398-490 [JA121-32]. The Commission adopted the ALJ's findings of fact, which included market definition. Op. 12 [JA285].

Even if the Commission had not defined a market, in cases challenging horizontal restraints of trade, a prima facie case based on direct evidence of harm does not require the court "to precisely define the relevant market" to conclude that agreements are anticompetitive. *American Express*, 138 S. Ct. at 2285 n.7. "The purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition," so proof of actual detrimental effects makes those inquiries superfluous. *Indiana Dentists*, 476 U.S. at 460-61.

C. 1-800's Keyword Bidding Restrictions Harmed Search Engines

Collusion between buyers that harms sellers violates the antitrust laws. *E.g., Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948). Direct evidence showed that 1-800's bidding restrictions had two anticompetitive effects on search engines selling advertising keywords: reducing their revenues and degrading the quality of their advertising product.

1. Reduced revenues

The bidding restrictions depressed auction prices for keywords, thereby reducing search engines' revenues. As described above, 1-800 and its rivals agreed not to bid against one another in millions of search auctions. They agreed not to bid both on one another's trademark terms, and on *generic* terms where doing so would result in the appearance of a rival's ad in response to a search for the trademark. *See* Op. 51 [JA324]. An agreement by rivals not to bid in a competitive auction obviously lowers the winning bid and reduces the seller's revenue.

Evidence from major search engines Google and Bing showed that "cost per click" bids fell. Op. 51-52 [JA324-25]. 1-800's own documents described its strategy as enforcing trademark policy "to remove competitors which in turn drives down how much we pay per click." CX0935 [JA598]. Or as succinctly put in one document, "low competition = low cost." CX0051_007 [JA697]. It worked: expert analysis credited by the

Commission estimated that 1-800 was able to reduce its winning bids substantially. Op. 52 [JA325]; CX8006_076 ¶168 (Evans Expert Report) [JA1098]; Evans Tr. 1648-50 (*in camera*) [JA412].

1-800 complains that the Commission did not define a relevant market for paid search advertising, Br. 74 n.22, but for the reasons discussed above (at 81), where there is direct evidence of actual anticompetitive effects, an antitrust plaintiff is not required to also define a market or offer proof of market power.

1-800's claim that any reduction in search engines' revenues was "infinitesimal," Br. 74, lacks support. A substantial fall in per-click prices, multiplied by millions of clicks, is hardly negligible.[12] CX8006_077 ¶169 (Evans Expert Report) [JA1099]. 1-800's argument boils down to a claim that the harm could have been worse, but that is no defense to an anticompetitive horizontal restraint.

1-800 speculates that competitors may have shifted their advertising budgets to other keywords. Br. 75. The evidence discussed above (at 72) shows otherwise.

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[12] 1-800 attempts to characterize this impact as a mere "reduction in the prices of *certain sales*," Br. 74, but the same could be said about *per se* unlawful bid rigging agreements.

Finally, 1-800 asserts that online retailers who were not party to the agreements could have filled in the search engines' revenue gap by bidding on 1-800's trademarks. Br. 75. The claim strains credulity both because the restrictions cover nearly 80% of the market and because 1-800 aggressively pursued every online retailer that dared bid on its trademarks. *See* IDF 319, 323-331, 371-392 [JA108-11, 116-20].

2. Reduced quality of search advertising product

The Commission also found that ads eliminated by the bidding restrictions "reduced the quality" of search results and "diminished the value of search engine service to consumers," thereby harming both search engines and consumers. Op. 53 [JA326]. Specifically, expert testimony showed that over 100 million more ads would have been displayed but for the agreements. *Id*. Witnesses from the major search engines testified that a larger pool of ads increases the search engine's ability to provide both pertinent search results and higher-quality advertising. *Id*. 1-800 does not challenge the Commission's finding, which is supported by substantial evidence.

1-800 contends instead that a direct showing of reduced quality does not establish a prima facie case of anticompetitive harm because it is "novel." Br. 73. But the Supreme Court has long recognized that "decreased quality" is a form of "actual detrimental effects," *American Express*, 138 S. Ct. at 2284, and this Court has agreed, *MacDermid,* 833 F.3d at 182.

IV. The Commission Properly Found 1-800's Asserted Procompetitive Justifications Insufficient

1-800 advanced two justifications for its advertising restrictions that, it claimed, were procompetitive: that they protect against trademark infringement and that they saved litigation costs. The Commission found neither justification valid to support the restraints at issue, and 1-800 shows no error in those findings.

A. 1-800's Trademark Protection Claims Do Not Justify Its Advertising Restraints

As the Commission recognized, protection of trademark rights can be a legitimate procompetitive justification for a restraint on infringing advertising—but only if the justification is factually credible and the means of protection sufficiently tailored. "Even if an anticompetitive restraint is intended to achieve a legitimate objective," it "only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant." *United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3d Cir. 1993).

The Commission therefore had to assess "whether comparable benefits could be achieved through a substantially less restrictive alternative." *Id*. As the leading antitrust treatise puts it, a procompetitive justification "will be lost if the plaintiff shows that the objective can be achieved by a substantially less restrictive alternative." Areeda & Hovenkamp ¶1502. "Less restrictive alternatives are 'those that would be less prejudicial to competition as a whole.'" *North Am. Soccer League*, 883 F.3d at 45 (quoting *Capital Imaging*, 996 F.2d at 543).

1-800's trademark interests cannot, therefore, justify its restraints if those interests could have been protected by something less anticompetitive than a complete ban on trademark keyword advertising. A trademark protects only against the likelihood of consumer confusion—"the crucial issue" for determining infringement. *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 (2d Cir. 1978). If a trademark "becomes a tool to circumvent free enterprise and unbridled competition … the rights enjoyed by its ownership [must] be kept within their proper bounds." *Ford Motor Co. v. United States*, 405 U.S. 562, 576 n.11 (1972) (cleaned up). Otherwise, intellectual property rights would improperly "confer a privilege to violate the antitrust laws." *Microsoft*, 253 F.3d at 63.

The Commission properly determined that 1-800 could have protected its trademark interests through less restrictive means by limiting the content of ads rather than eliminating them altogether. Instead of tailoring the restrictions to eliminate confusion, however, 1-800 broadly restricted competitive advertisements even when there was *no possibility of confusion*. For example, 1-800's restrictions would prohibit ads, prompted by a trademark keyword search, saying "We are Lens.com, *not 1-800 Contacts*, and we offer better prices then they do." Even more egregiously, the negative keyword requirement prohibits competitive advertisements *when a competitor does not even use the trademarks*. A "clear disclosure in each search advertisement of the identity of the rival seller" would have protected 1-800's trademark rights while still allowing head-to-head competition. Op. 27 [JA300]. Courts have found similar disclosures, clearly identifying the source of an advertisement, effective to prevent consumer confusion from keyword ads. *See Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 937-39 (9th Cir. 2015); *Boston Duck Tours, LP v. Super Duck*

Tours, LLC, 527 F. Supp.2d 205 (D. Mass. 2007), *rev'd on other grounds*, 531 F.3d 1 (1st Cir. 2008). Indeed, the Tenth Circuit emphasized, in rejecting 1-800's infringement claims, that consumer confusion would be unlikely "when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for." *1-800 Contacts,* 722 F.3d at 1245.

1-800 offers no reason why consumers would be confused by *merely seeing* a rival's advertisement in response to a search for "1-800 Contacts"—and would be so confused *regardless* of what the ad says. The Commission found that the evidence (including a consumer survey) showed a *de minimis* likelihood of confusion, Op. 28 [JA301] (citing CX8008_008-010 (Jacoby Expert Report) [JA1344-46]; Jacoby Tr. 2130 [JA418]), and held as a matter of fact that the claim of confusion did not meet "a minimum threshold of validity" sufficient to justify the scope of the restraints imposed by the agreements. Op. 40 [JA313].

Expert testimony revealed a "solidifying consensus" among both courts and academics "on the lack of confusion" posed by keyword search advertising, absent confusion caused by the advertising text. CX8014 ¶24 (Tushnet Rebuttal Expert Report) [JA2520]; *see id.* ¶28 (collecting cases) [JA2521-23].[13] The Commission identified 16 decisions rejecting keyword bidding infringement claims and noted the paucity of decisions finding "bidding on trademark keywords to constitute trademark infringement, absent some additional factor," such as misleading advertisement text. Op. 38-39 & n.43 [JA311-12].[14]

The single case that 1-800 litigated to final judgment rejected the claimed confusion. The Tenth Circuit explained that any inference of consumer confusion is "unnatural" where an advertisement, prompted by a search inquiry, "clearly identifies the source, which has a name quite different from the business being searched for." *1-800 Contacts v. Lens.com*, 722 F.3d at 1245. All the analytical indicia of confusion, in fact, "firmly support[ed] the *un*likelihood of confusion." *Id.* (emphasis

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[13] Two scholars analyzed consumer understanding of 2500 different trademark-based internet searches and found "little evidence" of consumer confusion. David J. Franklyn & David A. Hyman, *Trademarks As Keywords: Much Ado About Something?*, 26 HARV. J.L. & TECH. 481, 483-84 (2013).

[14] Only one outlier decision, from over a decade ago, has held that keyword bidding by itself can amount to trademark infringement. *See Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp.2d 1118 (D. Ariz. 2008).

added).[15] *See also Alzheimer's Disease and Related Disorders Ass'n, Inc. v. Alzheimer's Foundation of Am., Inc.*, 307 F. Supp.3d 260, 287 (S.D.N.Y. 2018) ("diversion" of customers by keyword bidding "without any hint of confusion, is not enough" for infringement).

The "scholarly consensus" is aligned with the judicial opinions. CX8014 ¶24 (Tushnet Rebuttal Expert Report) (collecting articles) [JA2520]. The leading treatise on trademark law advises that a "web user may be 'distracted' or 'diverted' by the search engine displaying ads for other sources," but "distraction or diversion is not the same as 'confusion' by the web shopper." J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 25A:8 (5th ed. & Supp. 2018 update).

1-800 offers nothing to counter the Commission's determination that its weak claim of consumer confusion is insufficient to justify its broad agreements. It argues instead that unless its lawsuits were shams, the Commission was required to accept the resulting

[15] The district court in that case "question[ed] whether" an agreement not to use keyword advertisements would "survive an antitrust challenge" because 1-800 "does not seek merely to preclude usage of its trademark," but "wants to obliterate any other competitor advertisement." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp.2d 1151, 1188 (D. Utah 2010). The court noted that a "trademark right does not grant its owner the right to stamp out every competitor advertisement." *Id.*

settlements without further inquiry. Br. 78. But the Commission is not required to accept a sweeping restriction on competitive advertising that rests on a feeble legal theory, even if it is not so empty as to be a sham. As this Court has recognized, a "minimal or moderate amount of potential confusion" can be "cured effectively by use of a disclaimer." *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325, 1330 (2d Cir. 1987).

Nor does it excuse 1-800's conduct that at the time 1-800 began entering into its agreements, the legal consensus on whether trademark protection applied to keyword bidding was less clear than it is now. 1-800 continued to enter and enforce agreements long after courts had rejected the idea that keyword bidding alone is confusing. And 1-800's grandfathering principle cannot be reconciled with *Actavis*, where the reverse-payment agreement was not obviously unlawful when it was executed (indeed, lower courts had rejected FTC challenges to similar agreements), yet the Court subjected it to antitrust scrutiny.

1-800 next tries to sidestep the Commission's finding that clear disclosures are an effective and less restrictive means of protecting 1-800 trademarks by claiming that *Clorox* requires the agency to defer to the settling parties' determination of the appropriate scope of their settlement agreement. Br. 80 (citing *Clorox*, 117 F.3d at 60). *Clorox* did not simply defer to the parties' agreement; it analyzed the agreement and found it consistent with antitrust principles. Moreover, it is one thing to give settling parties latitude when deciding whether to allow one party to renege on the deal, and another thing entirely when a government antitrust enforcer challenges a private conspiracy to violate the antitrust laws.

Nor did the Commission violate any principle of *Clorox* by "effectively dictat[ing] that *the only way* that *anyone* can settle these types of infringement claims is through use of disclosures." Br. 82. The Commission identified two other ways to settle a trademark dispute that would be less restrictive of competition while protecting 1-800's rights. Op. 27 [JA300]. It focused on disclosures because they present a common and effective solution. *Id*. 29 [JA302]. The Commission left ample room for resolutions of trademark disputes that do not unreasonably interfere with competition.

That courts have approved settlement agreements like those here does not make them valid under antitrust law. Br. 78-79. As the

Commission pointed out, courts approving agreed-upon settlements may have given "no or little consideration" to "the effects [of the agreement] on competition." Op. 27 [JA300]. That the court approved the private parties' broad injunction "does not constitute an endorsement of the private agreements here or render them procompetitive." *Id*. Otherwise, parties could grant themselves antitrust immunity for anticompetitive conduct simply by suing and settling.

Nor is there any merit to the argument that "an antitrust determination" cannot be based on "the strength of the underlying [intellectual property] claim." Br. 41 (citing *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 204 (2d Cir. 2006), *abrogated by Actavis*, 570 U.S. 136). The Commission did not adjudicate the merits of a trademark infringement claim. It rejected 1-800's theory of trademark protection as a justification for an overbroad ban on advertisements that themselves pose no risk of consumer confusion. It held that less restrictive alternatives would protect the trademark interests just as well. Op. 40 [JA313].

1-800 asserts throughout its brief that because it invested substantial resources building its brand, it deserves protection from competitors piggybacking on its name. Br. 3, 21, 39, 58. Amicus Washington Legal Foundation devotes much of its brief to this "free-riding" argument. 1-800 raised no such argument before the Commission, and "[a]rguments raised for the first time on appeal are deemed waived." *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 163 (2d Cir. 2011); *accord Dalberth v. Xerox Corp.*, 766 F.3d 172, 184 (2d Cir. 2014).

The claim fails in any event because it wrongly conflates trademark protection and patent protection. Unlike a patent, 1-800's trademarks do not give it a right to prevent competitors from using its trademarks; they grant only a right against *confusing* use. In the absence of consumer confusion, 1-800 may not prevent competitors from targeting its brand; that's simply the nature of competition. *See Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122 (1938). It is no different from a non-brand gas station opening next to a famous-name one with a prominent highway sign. Drivers may be lured by the sign and the brand (which both cost money to build), but consumers are helped by the presence of a cheaper alternative, and they are not confused that they are buying ExxonMobil when they go to the no-name station. If the idea were correct, the first advertiser of a product would effectively have a property right to suppress advertising targeted against it by name, a prospect the D.C. Circuit called "nothing less than a frontal assault on the basic policy of the Sherman Act." *PolyGram*, 416 F.3d. at 38 (cleaned up).[16]

This Court has recognized as legitimate the directly analogous practice of a drug store placing "its own store-brand generic products next to the trademarked products they emulate in order to induce a customer who has specifically sought out the trademarked product to consider the store's less-expensive alternative." *1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 411 (2d Cir. 2005). Online search advertising "plays the same role as physical proximity: enabling competitors to find consumers where those consumers are looking." CX8014 ¶24 (Tushnet Rebuttal Expert Report) [JA2520].

Finally, 1-800 claims that its advertising and bidding restrictions facilitate ease-of-monitoring and certainty. Br. 81. But the Commission found that those goals can be achieved equally effectively, yet consistent

[16] The elimination of free-riding can be a legitimate defense when a restraint of trade is ancillary to a competition-enhancing arrangement, such as a joint venture. *See Polk Bros.*, 776 F.2d at 188-91. This case presents no such ancillary benefit.

with principles of fair competition, with clear disclosures of the advertiser's identity. The record showed that 1-800 diligently monitors the use of its trademarks in online search queries. Op. 7 [JA280]. 1-800 has not shown that assuring compliance with a disclosure requirement is more burdensome or less certain than the monitoring it already does.

B. 1-800 Failed to Show That Its Litigation Savings Justify Its Advertising Restrictions

The Commission also rightly rejected litigation savings as a procompetitive justification. Op. 37 [JA310]. Any settlement will save "litigation costs." But that alone cannot justify overbroad restrictions on advertising when less anticompetitive terms are also available. Furthermore, "mere profitability or cost savings have not qualified as a defense under the antitrust laws." Op. 37 [JA310] (quoting *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998)). Rather, the defendant must show "a *procompetitive* rationale for the restraint." *American Express*, 138 S. Ct. at 2284 (emphasis added); *accord Indiana Dentists*, 476 U.S. at 459; *Capital Imaging*, 996 F.2d at 543; *see Polygram*, 416 F.3d at 37-38 (enhancing profitability is not a procompetitive justification). General welfare benefits are not enough. Otherwise, the call for a justification would amount to no more than a showing that the anticompetitive conduct made economic sense for the offender.

While the claimed savings may have benefited 1-800's bottom line, 1-800 failed to "connect" them to any "consumer benefits." *Chicago Prof'l Sports, L.P. v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992). It has not shown, for example, that savings are passed on to consumers in the form of lower prices, that they benefit competition in improved service quality or in any other way.[17] Capital savings are not cognizable efficiencies in and of themselves. *See* Op. 37 [JA310] (citing *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016); *Law*, 134 F.3d at 1023); *see* ID at 167-68 [JA233-34] (citing additional cases). Nor has 1-800 rebutted the FTC's showing that less restrictive alternatives were available to 1-800 to settle its cases. Op. 27-30 [JA300-03]. Therefore, 1-800's litigation savings cannot justify the anticompetitive harm of these restrictions.[18]

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[17] The Commission did not restrict 1-800 to showing benefits only in the form of lower prices; 1-800 failed to introduce evidence of *any* benefit to competition or consumers.

[18] 1-800's agreement with Luxottica did not settle any litigation and could not have led to any cost savings. Op. 37 [JA310].

1-800 claims that *Actavis* and *American Express* "rejected the notion that there needs to be proof of pass on," Br. 77-78, but that is incorrect. *Actavis* noted—as did the Commission, *see* Op. 23 [JA296]—that, in the abstract, saving litigation costs can be a cognizable efficiency under the antitrust laws. 570 U.S. at 156. But *Actavis* did not examine the factual basis of an actual justification claim. *American Express* is entirely inapposite. That case did not deal at all with litigation savings as a procompetitive benefit, and the Court in fact limited its analysis to the first step of the rule of reason. 138 S. Ct. at 2290. At any rate, the Court found a direct competitive benefit of the conduct at issue because "Amex uses its higher merchant fees to offer its cardholders a more robust rewards program." 138 S. Ct. at 2288.

V. THE COMMISSION CORRECTLY CONDEMNED THE LUXOTTICA AGREEMENT'S RESTRAINTS AS ANTICOMPETITIVE

1-800 claims that its agreement with Luxottica is a vertical arrangement with unique procompetitive benefits, which the Commission wrongly ignored when it grouped that agreement together with the litigation settlements. Br. 82-83. 1-800 waived the argument by failing to raise it before either the ALJ or the Commission, despite numerous opportunities.[19] *Millea*, 658 F.3d at 163; *Dalberth*, 766 F.3d at 184.

Even if it were properly raised, the argument lacks merit. The advertising restriction that 1-800 and Luxottica agreed to pertains to a *horizontal* relationship. In addition to its brick-and-mortar stores, Luxottica "also operates internet websites for these stores," where "a consumer can purchase contact lenses … on the chain's website." IDF 86, 88 [JA82]. Luxottica also owns online retailer "glasses.com." CX9027_011 (Larson Dep.) [JA1020]. 1-800's fulfillment and sourcing services under the agreement do *not* extend to Luxottica's online business. CX9001_223-25 (Bethers IHT) [JA1017-18]. Therefore, when it comes to online contact lens sales, 1-800 and Luxottica are horizontal competitors—just like the other rivals with whom 1-800 agreed to restrain online search advertising. *See Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131-32 & n.6 (2d Cir. 1978) (*en banc*). Similar restraints between competitors who share both vertical and horizontal

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[19] *See 1-800 Contacts' Post-Trial Brief*, FTC Dkt. 9372 (June 15, 2017); *1-800 Contacts' Corrected Post-Trial Reply Brief*, FTC Dkt. 9372 (July 20, 2017); *Respondent's Brief on Appeal*, FTC Dkt. 9372 (Dec. 6, 2017); *Respondent's Reply Brief on Appeal*, FTC Dkt. 9372 (Feb. 21, 2018); Oral Argument Transcript, FTC Dkt. 9372 (June 26, 2018).

relationships have been condemned by the courts. *E.g.*, *Topco Assocs.*, 405 U.S. at 608-09; *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967).

And even to the degree the relationship is vertical, 1-800 has not shown that anti-advertising agreements enhance its efficiency. 1-800 provides "fulfillment services by shipping contact lenses to Luxottica's retail chain stores" and "assistance with sourcing contact lenses." IDF 394 [JA120]. 1-800 does not explain the relevance of advertising to that arrangement.

VI. The Terms of the Commission's Remedial Order Are Well Within Its Discretion

Once a violation of the FTC Act has been established, the FTC has considerable discretion to fashion an effective remedy. *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965); *FTC v. National Lead Co.,* 352 U.S. 419, 428-29 (1957); *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 611-13 (1946). The Commission's Final Order is a proper exercise of that discretion, reasonably tailored to remediate the harm caused by 1-800's restraints and prevent a recurrence of those violations. *See* 15 U.S.C. § 45(a)(2).

1-800 claims that Section II.C of the Commission's Order [JA383] (prohibiting agreements that limit "truthful, non-deceptive, and non-infringing advertising or promotion") is overbroad because it applies to all advertising and not just the search advertising that gave rise to this case. Br. 86-87.

As 1-800 concedes (Br. 86 n.27), "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *accord Bristol-Myers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984) (affirming FTC's "fencing-in" authority). An FTC order is proper if the remedy bears a reasonable relationship to the unlawful conduct. *Jacob Siegel Co.,* 327 U.S. at 613; *Ruberoid,* 343 U.S. at 473; *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402 (2d Cir. 1976). Here, 1-800 entered numerous agreements over many years that disrupted a critical means of advertising covering 79% of the market, even as courts indicated that its trademark claims were baseless. It was plainly reasonable for the Commission to address not only the "narrow lane" of search advertising, but also to "close all roads to the prohibited goal" of harming competition in the online sale of contact lenses. *Ruberoid Co.*, 343 U.S. at 473.

1-800 also claims that the Order leaves it no way to enforce its trademarks and settle disputes. Br. 87. In fact, the Order applies only to "truthful, non-deceptive, *and non-infringing*" advertising. Order § II.C [JA383] (emphasis added). And the Commission was careful to carve out 1-800's ability to protect its trademarks through litigation, litigation-related communications like demand letters, and enforcement of court orders approving settlements. Order § II.B [JA383]. Further, the Order permits 1-800 to enter settlements that preclude consumer confusion by requiring rivals to disclose their identities or affiliation. *Id.* § II.D [JA383].[20]

1-800 also complains about Sections IV.B.1 and 2 of the Order, which, for the next five years, require 1-800 to notify the FTC of its communications with alleged infringers. According to 1-800, these provisions "increase[] enforcement costs" and "make[] it less likely that

[20] To the extent that 1-800 is arguing that Section II.C amounts to an impermissible "obey the law" injunction, the claim is waived. The ALJ correctly rejected that argument, ID 195 [JA261], and 1-800 then abandoned it on appeal to the Commission. *See 1-800's Brief on Appeal, supra* note 19, at 42-45; *Reply Brief on Appeal, supra* note 19, at 23-24.

suspected infringers will cease the infringement." Br. 87. It is hard to see why. The cost of providing the required notice is surely reasonable. And that burden is justified by enabling the FTC to monitor 1-800's compliance with the Order, as 1-800 does not dispute. Nor does 1-800 explain how notification will lead to infringement. Notification does, however, rightly make it harder for 1-800 to bully its rivals into entering anticompetitive settlements like the ones struck down here. *See, e.g.*, Tr. 242-44 (Clarkson, of AC Lens, testifying to being pressured to settle); Tr. 1931-34 (Holbrook, of Memorial Eye, testifying to 1-800's intimidation tactics); CX0068_001 (Coon, of 1-800, acknowledging 1-800's reputation of "going after people."). Should the requirements turn out to be more burdensome than they appear, moreover, 1-800 may ask the Commission to modify them. *See* 15 U.S.C. § 45(b).

VII. Remand Is Necessary If the Petition for Review Is Granted

1-800 asks that if the Court finds error in the Commission's analysis, it simply vacate the Order without remand. Br. 83-86. The Court should deny that blanket request. The only scenario in which remand would be unnecessary is if the Court were to hold that trademark litigation settlements are immune from any antitrust scrutiny. Any other ground for reversal would leave the Commission with a substantial role to play on remand. For example, if the Court were to determine that the Commission should have applied a different rule-of-reason analysis with a determination of market power, the FTC should be given the chance to conduct that inquiry. Similarly, if the Court holds that the Commission improperly weighed the harm to competition against the alleged procompetitive justifications, the proper outcome is to send the case back to the Commission to re-weigh those factors in the first instance in light of the Court's holding.[21] It would be inappropriate simply to give 1-800 the free pass it asks for.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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[21] 1-800 claims (Br. 84 n.26) that there is no point in remand because the Commission's theory of harm improperly requires aggregating the effects of all the agreements. The Commission, in examining violations of the FTC Act, rightly applies the principles of the Sherman Act. Op. 11 [JA284]. Under Section 1 of the Sherman Act, the relevant inquiry is whether the defendant's agreements, in the aggregate, harm competition. *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 464 (1992); *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495 (1969); *see also* Areeda & Hovenkamp ¶310c1 ("aggregation of claims may produce sufficient proof of violation").

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF OF THE FEDERAL TRADE COMMISSION complies with the type-volume limitation of Local Rule 32.1(a)(4)(A), as modified by this Court's Order of May 20, 2019, because it contains 19,705 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) & (6), because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

/s/ Imad Abyad
Imad D. Abyad

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit, using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, so service is effected via the CM/ECF system. L.R. 25.1(h).

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