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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

J THOMPSON, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. 1-800 CONTACTS, INC., et al., Defendants.	**1-800 CONTACTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT** Case No: 2:16-cv-01183-TC Judge: Hon. Tena Campbell Magistrate Judge: Hon. Dustin Pead

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RELIEF REQUESTED AND GROUNDS FOR RELIEF

Plaintiffs' Consolidated Amended Complaint ("CAC") alleges a single Sherman Act claim against Defendants 1-800 Contacts and other online contact lens retailers based on a series of settlement agreements that 1-800 Contacts entered into with those other retailers between 2004 and 2013. The vast majority of Plaintiffs' claims are time-barred on the face of the complaint. The Sherman Act has a four-year statute of limitations, yet Plaintiffs seek damages going back to 2004. Moreover, all but two agreements were entered into more than four years before Plaintiffs filed the instant action.

Plaintiffs have not properly alleged any factual or legal theory to save their otherwise time-barred claim. They allege they could not have filed suit earlier because the facts necessary to initiate this action were not revealed until the Federal Trade Commission ("FTC") filed an administrative complaint in August 2016, on which Plaintiffs have piggybacked their case. But Plaintiffs' complaint is devoid of any relevant facts that were concealed within the limitations period. For good reason: the prior litigation and settlements now complained of were public at the time. As such, there could be no concealment.

Plaintiffs actually included allegations regarding these litigations in each of their pre-consolidated complaints (in some cases referring to the prior cases by docket number). Plaintiffs' previous complaints expressly challenged agreements that were settlements of trademark litigation that 1-800 Contacts filed against other contact lens retailers that were allegedly using its trademark to advertise on search engines such as Google. Plaintiffs alleged

that 1-800 Contacts "coerced" other retailers into settling "baseless" lawsuits.[1] Those litigations were a matter of public record, and the substance of the challenged agreements settling them, including some the agreements themselves, were disclosed in public SEC filings and court records since as early as 2008. Indeed, one of 1-800 Contacts' competitors, Lens.com, in 2011 made allegations virtually identical to Plaintiffs' about the very same agreements that Plaintiffs challenge in this case. Thus, Plaintiffs' fraudulent concealment allegations fail and the statute of limitations on their claim based on sales of contact lenses outside the four years limitation period has long ago run.

In addition, Plaintiffs' CAC should be dismissed in its entirety for the reasons set forth in the motion of Defendants Walgreens, Vision Direct and Luxottica (the "Setting Retailers' Motion"). *See* DUCivR7-1(a)(4). Plaintiffs have failed to plead antitrust injury and causation because they have not pled any facts showing how the alleged restrictions on search advertising resulted in supracompetitive prices for contact lenses. *See* Settling Retailers' Motion § I. Plaintiffs also have failed to plead facts defining a relevant antitrust market limited to online sales of contact lenses, a required element of their antitrust claim. *See* Settling Retailers' Motion

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[1] *See*, *e.g.*, *Bean v. 1-800 Contacts, Inc.*, Case No. 1:17-cv-00357-BSJ (E.D. Pa), ECF No. 1 at ¶¶ 25-26 (alleging that "1-800 Contacts proceeded to commence lawsuits against its rivals to coerce them" and that 1-800 Contacts' claims were "baseless"); *see also Bartolucci v. 1-800 Contacts, Inc.*, Case No. 2:17-cv-00273-JNP (D.D.C.), ECF No. 1 at ¶¶ 18, 73 (alleging that 1-800 Contacts was "filing lawsuits against these rivals" and that its claims were "baseless"); *Henry v. 1-800 Contacts, Inc.*, Case No. 2:17-cv-00274-BCW (D.D.C.), ECF No. 1 at ¶¶ 7, 58 (alleging that agreements settled "sham lawsuits"); *Thompson v. 1-800 Contacts*, ECF No. 1 at ¶¶ 6-7 (alleging that parties settled "sham lawsuits" and that "1-800 Contacts' position was legally baseless").

§ II. Plaintiffs also have failed to plead any facts supporting an inference of a single overarching conspiracy. *See* Settling Retailers' Motion § III.

I. FACTUAL BACKGROUND

A. 1-800 Contacts and Retail Contact Lens Sales

Defendant 1-800 Contacts has been a leader in lowering the retail price of contact lenses for many years. Historically, eye care professionals ("ECPs")—ophthalmologists and optometrists—dominated retail sales of contact lenses. 1-800 Contacts sought to change this and offer consumers a lower-priced option for purchasing contact lenses. It began selling contact lenses over the phone in 1995, and later expanded its sales to the Internet as well. CAC ¶¶ 53-54.[2]

As Plaintiffs acknowledge, 1-800 Contacts was an early entrant and pioneer in online sales of contact lenses. *Id.* ¶ 54. 1-800 Contacts' success invited competition, and today, in addition to ECPs and brick-and-mortar retailers, there are numerous other online retailers of contact lenses, including Defendants Vision Direct, Walgreens, Arlington Contacts Lens Service, and Luxottica. *Id.* ¶¶ 29-33, 54. Online retailers, such as 1-800 Contacts, continue to offer contact lenses at lower prices than ECPs. *Id.* ¶ 43.

B. 1-800 Contacts Files and Settles Trademark Litigation

1-800 Contacts invested substantial sums and efforts to develop its trademark. Through this massive investment, 1-800 Contacts created a famous and very valuable trademark. Eventually, other companies sought to profit from the fame of 1-800 Contacts' trademark by

[2] "CAC" refers to Plaintiffs' Consolidated Amended Complaint filed on May 31, 2017. ECF No. 72.

purchasing advertising that appears when consumers search for that trademark on internet search engines. Beginning in 2004, 1-800 Contacts initiated lawsuits in this District against other online retailers for trademark infringement based on their advertising in response to searches for its trademarks.[3] (Kaplan Decl. Exs. 1-15.) Thirteen retailers ultimately settled 1-800 Contacts' trademark claims. CAC ¶¶ 2, 56.

In each of these settlement agreements, 1-800 Contacts and the defendant retailer agreed not to engage in the conduct at issue in the trademark litigation, *i.e.*, each agreed not to buy paid search advertising on search engines such as Google or Bing in response to searches for the other's name or trademarks. CAC ¶¶ 10, 58. In these settlement agreements, the defendant retailers and 1-800 Contacts also agreed to use certain negative keywords in their bids for online advertising, which instructed search engines not to display advertisements in response to a search query for the other parties' name or trademark. *Id.* ¶¶ 11, 58.

Although they carefully avoid mention of this context, it is these *litigation settlements* that Plaintiffs challenge as anticompetitive. All but one of the settlement agreements was entered into prior to October 2012, more than four years before Plaintiffs filed suit here.[4] CAC ¶ 56.

C. The Key Terms of the Challenged Settlements Were Made Public Years Ago

1. Vision Direct Settlements. In June 2004, 1-800 Contacts and Vision Direct entered into the first settlement agreement that is at issue here ("2004 Vision Direct Agreement"). *Id.* ¶

[3] This Court may take judicial notice of these publicly available docket sheets as set forth in 1-800 Contacts accompanying Request for Judicial Notice ("RFJN").

[4] 1-800 Contacts entered into a settlement agreement with Memorial Eye P.A. in November 2012. CAC ¶ 56.

61. In the 2004 Vision Direct Agreement, 1-800 Contacts and Vision Direct agreed to "refrain from 'causing [its] website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks, or URL'" and "'causing [the other] Party's brand name, or link to [its] Websites to appear as a listing in the search results page of an Internet search engine, when a used specifically searches for the other Party's brand name, trademarks or URLs.'" *Id.*

In 2008, 1-800 Contacts filed two lawsuits against Vision Direct for trademark infringement and breach of the 2004 Vision Direct Agreement in the District of Utah and the Southern District of New York, respectively. (Kaplan Decl. Exs. 14-15.) The 2004 Vision Direct Agreement was publicly filed by 1-800 Contacts as an exhibit to its complaint in the New York action. (Kaplan Decl. Ex. 16, at Ex. D.) In 2009, 1-800 Contacts and Vision Direct entered into a settlement agreement of that litigation, in which they agreed to implement negative keyword lists in connection with their internet advertising ("2009 Vision Direct Agreement"). CAC ¶ 63.

In connection with the 2009 Vision Direct Agreement, 1-800 Contacts and Vision Direct sought a permanent injunction from the court, requiring the parties to implement the negative keyword lists. (Kaplan Decl. Exs. 17-18.) On May 15, 2009, Judge George B. Daniels of the Southern District of New York entered the permanent injunction. (Cite Permanent Injunction Order (Kaplan Decl. Ex. 19.) The permanent injunction included some of the allegedly anticompetitive search restrictions upon which Plaintiffs base their claim:

> The Parties shall implement negative keywords in accordance with paragraphs 2, 3, and 4 of this Permanent Injunction for the purpose of preventing a Party's Internet advertising from appearing in response to a search for another Party's (1) trademarks, (2) any identical or confusingly similar variation of the Party's

> trademarks, (3) domain names containing the Party's trademarks, (4) domain names containing any identical or confusingly similar variation of the Party's trademarks, (5) URLs containing the Party's trademarks, or (6) URLs containing any identical or confusingly similar variation of the Party's trademarks.

(*Id.* at 2.) At all times since May 15, 2009, the permanent injunction order has been publicly available on the Court's docket. (*See* Kaplan Decl. Exs. 15, 19.) A few months later, in August 2009, Drugstore.com, Vision Direct's parent company, publicly filed the 2009 agreement with the SEC. (Kaplan Decl. Exs. 17-18.)

2. LensWorld.com Default Judgment. In January 2008, 1-800 Contacts filed a trademark infringement action against Lensworld.com. (Kaplan Decl. Ex. 9.) On September 9, 2008, the court entered a default judgment against Lensworld.com. (Kaplan Decl. Ex. 20.) The Order of Default Judgment contains materially similar terms to the agreements that Plaintiffs allege are anticompetitive. *Id.* Specifically, the Order includes provisions (1) restricting Lensworld.com from purchasing "[1-800 Contacts] federally registered trademarks, or confusingly similar variations of [1-800 Contacts] federally registered trademarks, as keywords for any search engine advertising program," and (2) requiring Lensworld.com to implement certain negative keywords in any search engine advertising program campaign. *Id.* at 2. The Order of Default Judgment was publicly available on the court's docket. (Kaplan Decl. Ex. 9.)

3. Walgreens Settlement. In June 2010, 1-800 Contacts filed a trademark infringement action against Walgreens. (Kaplan Decl. Ex. 5.) 1-800 Contacts and Walgreens settled that trademark litigation on June 29, 2010. In the settlement agreement, the Parties agreed to "refrain from purchasing or using any of the terms the other Party has listed . . . as triggering keywords in any internet search engine advertising campaign; and implement all of the terms the other Party has listed . . . as negative keywords in all internet search engine advertising campaigns." CAC ¶

68. The dismissal indicating the matter was settled was and remains in the public docket. (Kaplan Decl. Ex. 5, ECF Nos. 5-6.)

4. AC Lens Settlement. In February 2010, 1-800 Contacts filed a trademark infringement action against Arlington Contact Lens Service. (Kaplan Decl. Ex. 11.) 1-800 Contacts and AC Lens settled that litigation on March 10, 2010. The settlement agreement contained similar reciprocal restrictions on causing advertisements to appear in response to searches for the other party's trademarks or name. CAC ¶ 70. The dismissal indicating the matter was settled was and remains in the public docket. (Kaplan Decl. Ex. 11, ECF. No. 5.)

D. This Court Previously Dismissed an Antitrust Lawsuit Against 1-800 Contacts Alleging the Challenged Settlement Agreements

1-800 Contacts did not reach a settlement with one retailer, Lens.com. 1-800 Contacts and Lens.com litigated that trademark case through summary judgment and appeal. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1181-82 (D. Utah 2010), *aff'd in part, rev'd in part*, 722 F.3d 1229 (10th Cir. 2013).

On June 6, 2011, after resolution of the district court proceedings in 1-800 Contacts' trademark case, Lens.com filed a complaint against 1-800 Contacts alleging that 1-800 Contacts' claims were baseless and, among other things, that 1-800 Contacts' trademark settlements with other contact lens retailers were anticompetitive. (Kaplan Decl. Ex. 21.) The Lens.com complaint contains nearly identical factual allegations to Plaintiffs' CAC. It details 1-800 Contacts' trademark litigation, *see id.* ¶¶ 59-139, and identifies each of the settlement

agreements that Plaintiffs allege in their complaint. *Compare id. with* CAC ¶ 56.[5] The Lens.com complaint has been publically available since it was filed on June 6, 2011. (*Id.*)

E. 1-800 Contacts Enters into Sourcing and Services Agreement with Luxottica

In 2013, 1-800 Contacts and Luxottica entered into a Sourcing and Services agreement. CAC ¶ 72. The primary purpose of the agreement was for 1-800 Contacts to assist in sourcing and managing Luxottica's contact lens business. Plaintiffs do not challenge that purpose or the main business terms of that agreement. Plaintiffs allege "upon information and belief" that the agreement includes reciprocal restrictions on using the other party's trademarks in search advertising that are similar to those included in the settlement agreements. *Id.*

F. Plaintiffs Waited Until Fall 2016 to File Their Complaints

Plaintiffs purport to have purchased contact lenses from 1-800 Contacts. CAC ¶¶ 19-27. Beginning in September 2016 and extending through April 2017, Plaintiffs filed eight putative class action lawsuits in district courts throughout the country seeking to represent overlapping classes of individuals who allegedly purchased contact lenses over the Internet. These class actions were all transferred to this District and consolidated before this Court. ECF No. 71.

On May 31, 2017, Plaintiffs filed their CAC. A number of the plaintiffs who had originally filed complaints which have been transferred to this Court have not joined the CAC. Nor have they explicitly dismissed their prior complaints.

In the CAC, Plaintiffs allege that the agreements prohibiting 1-800 Contacts and other retailers from using each other's trademarks to buy paid search advertising limited competition

[5] The district court dismissed the action on the pleadings for failure to state a claim. (Kaplan Decl. Ex. 22.)

for search advertising and thus restrained competition in the market for contact lenses in violation of the Sherman Act. CAC ¶¶ 13, 73-75. As a result, Plaintiffs allege that consumers have been deprived of truthful information about competing online sellers of contact lenses, the prices of contact lenses sold online have been artificially inflated, and consumers have been overcharged for contact lenses they have purchased on the internet. *Id.* ¶¶ 73-74. Plaintiffs seek to represent a putative nationwide class of all persons "who made at least one online purchase of contact lenses from any Defendant from January 1, 2004 through the present ('Class Period'), after that Defendant entered into one of the agreements to restrain online advertising for the sale of contact lenses." *Id.* ¶ 78(1).

Plaintiffs' CAC piggybacks on an administrative complaint filed by the Federal Trade Commission ("FTC") on August 8, 2016. *Id.* ¶ 81.

II. LEGAL STANDARD

To survive a motion to dismiss, Plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is appropriate. *Twombly*, 550 U.S. at 558. The court may consider not just the complaint, but also documents incorporated into it and facts subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also* 1-800 Contacts' Request for Judicial Notice (filed concurrently herewith).

III. ARGUMENT

A. Plaintiffs' Claims Based on Purchases Outside the Limitations Period Are Time-Barred

Plaintiffs' claim based on sales of contact lenses predating October 13, 2012 is time-barred as a matter of law. Claims for a violation of the Sherman Act are "forever barred" unless "commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. A cause of action in an antitrust action "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Here, Plaintiffs' claim is based on various agreements entered into by 1-800 Contacts between 2004 and December 2013. But Plaintiffs did not file suit until October 13, 2016. Therefore, Plaintiffs' claim is time-barred to the extent it seeks damages accruing prior to October 13, 2012—four years prior to the filing of the *Thompson* action.[6]

Plaintiffs may argue for application of the continuing violation doctrine. Although 1-800 Contacts is not presently challenging the applicability of that doctrine in this motion to dismiss, that doctrine does not toll the statute of limitations, even if it were applicable. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). At most, it permits recovery of damages for the four-year period prior to the filing of the litigation if, and only if, there was a new "overt act that is part of the violation and that injures the plaintiff." *Id.* at 189; *see also id.* at 187 (rejecting rule permitting plaintiffs to recover damages outside of the limitations period under the continuing violation doctrine because it "would permit plaintiffs who know of the defendant's pattern of

[6] The statute of limitations should begin to run from the filing of the *Thompson* action on October 13, 2016 because it is the first complaint to include the entire class alleged in this action.

activity simply to wait, 'sleeping on their rights,' as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the memories of witnesses have faded or evidence is lost") (citations omitted).

Thus, the Court should at a minimum dismiss the CAC to the extent it seeks damages for any purchases made outside the limitations period, *i.e.*, before **October 13, 2012**. *See*, *e.g.*, *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 748-49 (E.D. Pa. 2014); *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1285 (D. Kan. 2006).

B. The FTC's Administrative Action Does Not Toll Plaintiffs' Claim

Plaintiffs allege that the statute of limitations is tolled by the FTC's administrative action against 1-800 Contacts under the Clayton Act's tolling provision, 15 U.S.C. § 16(i). CAC ¶ 83. Section 16(i) tolls the statute of limitations for private antitrust actions during the pendency of and for one year after "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws," provided that the private action is "based in whole or in part on any matter complained of" in the government action. Here, Section 16(i) does not toll Plaintiffs' claim.

The FTC administrative action was not brought "to prevent, restrain, or punish violations of any of the antitrust laws." Rather, it was brought under Section 5 of the FTC Act, 15 U.S.C. § 45. The term "antitrust laws" is defined in the Clayton Act to encompass a specific list of federal antitrust statutes, 15 U.S.C. § 12(a), which the Supreme Court has held is exclusive. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958) ("[T]he definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment that [a statute not listed therein] may be colloquially described as an 'antitrust' statute."). That definition does not include Section 5 of

the FTC Act, and multiple courts have acknowledged that the FTC Act is not an "antitrust law." *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing "prima facie" weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that "prima facie weight is given only to violations of the 'antitrust laws' as defined by the Clayton Act," which "does not include violations of the FTC Act"); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is not "one of the 'antitrust laws' within the meaning of Sections [16(a) and 16(i)] of the Clayton Act").

Thus, an action brought under Section 5 of the FTC Act is not a proceeding "to prevent, restrain, or punish violations of any of the antitrust laws," and does not toll the statute of limitations. *See Laitram Corp. v. Deepsouth Packing Co.*, 279 F. Supp. 883, 891 (E.D. La. 1968) ("Since the FTC proceeding against [the defendant] was for violation of Section 5 of the FTC Act, not for violation of one of the antitrust laws within the meaning of Section 5 of the Clayton Act, the FTC proceeding does not toll the running of the statute of limitations.").

C. Fraudulent Concealment Does Not Apply to Plaintiffs' Claim

Recognizing that most of the conduct at issue in the CAC falls outside the limitations period, Plaintiffs allege that the statute of limitations was tolled based on the doctrine of fraudulent concealment. CAC ¶¶ 80-82. Fraudulent concealment "tolls the limitations period when a plaintiff's cause of action has been obscured by the defendant's conduct." *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 452 (D. Kan. 2006). To toll the statute of limitations based on fraudulent concealment, plaintiffs must allege: (1) the use of fraudulent means by the defendant, (2) successful concealment from the plaintiffs, and (3) that plaintiffs did not know or by the exercise of due diligence could not have known that they might have a cause of action.

Dummar v. Lummis, 543 F.3d 614, 621 (10th Cir. 2008). Because the doctrine is based on alleged fraud, Federal Rule of Civil Procedure 9(b) requires a plaintiff to plead fraudulent concealment with particularity. *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994). Plaintiffs' CAC fails to adequately plead any of the three elements, much less with particularity.

1. No Fraudulent Concealment of the Settlement Agreements

Plaintiffs do not plead any fraudulent act by 1-800 Contacts or the other defendants to conceal the allegedly anticompetitive conduct from them. Plaintiffs must plead that Defendants engaged in "affirmative acts or active deception . . . to conceal the facts giving rise to [plaintiffs] claim." *Industrial Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994). But Plaintiffs' CAC is devoid of any allegations of affirmative acts or deception by Defendants, let alone allegations that meet Rule 9(b)'s pleading standard.

Plaintiffs' sole allegation relating to Defendants concealment is that the parties' settlement agreements contained non-disclosure agreements. CAC ¶ 80. The terms of these ordinary non-disclosure agreements, however, merely require the parties to agree on any public statements regarding disclosure. *Id.* ¶¶ 65, 69, 71. In *Dummar*, the Tenth Circuit concluded that a non-disclosure agreement between an employer and employees was insufficient to establish fraudulent conduct to toll the statute of limitations where the agreement did not require anyone to make affirmative misrepresentations of any sort. *Dummar*, 543 F.3d at 622. This reflects the general rule that "in the absence of a fiduciary duty between the parties, mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment." *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155 (10th Cir. 1981).

Moreover, not only were the settlements not concealed, Defendants publicly disclosed the material terms of the settlements at issue in open court and SEC filings. (*See* Kaplan Decl. Exs. 16-21.) Multiple courts have concluded that plaintiffs have failed to plead the concealment element where, as here, the Defendants publicly disclosed the material terms of the agreements at issue. *See In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 223 (E.D.N.Y. 2003) ("[N]ot only were the material terms of the settlement not concealed, defendants affirmatively disclosed those terms to the public."); *In re Lamictal Indirect Purchaser & Antitrust Consumer Litig.*, 172 F. Supp. 3d 724, 744-45 (D.N.J. 2016) (same).

2. Plaintiffs Were on Inquiry Notice of Their Claims

Plaintiffs' fraudulent concealment allegations also fail because Plaintiffs were on inquiry notice of their claims by at least 2009.

Tolling of the limitations period for fraudulent concealment is unavailable if plaintiffs were on notice of their potential claims. *Industrial Constructors Corp.,* 15 F.3d at 969. "A plaintiff need not know the full extent of his injuries before the statute of limitations begins to run." *Id.* Thus, courts addressing antitrust challenges to settlements of intellectual property claims have concluded at the pleading stage that plaintiffs are on inquiry notice of their claims where the settlements or material terms of the agreements are publicly disclosed. *See In re Lamictal*, 172 F. Supp. 3d at 744-45 (no fraudulent concealment where defendants made public filings with the SEC and issued press releases containing material facts regarding settlement that were "sufficient to inform Plaintiffs of the nature of their claims, or at least to allow them to discover the claims with reasonable diligence"); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 380 (S.D.N.Y. 2002) (plaintiffs were on inquiry notice of their claims where the underlying

patent litigation was in the public record and could have been discovered by reasonable diligence).

The same reasoning applies here. Defendants' public disclosures of a number of the agreements in court and SEC filings, as well as other documents in the public record disclosing the facts Plaintiffs now rely upon in their CAC, put Plaintiffs on inquiry notice of their claims. As explained above, in 2008, 1-800 Contacts publicly filed the 2004 Vision Direct Agreement as an exhibit to its complaint in action against Vision Direct for breach of that agreement. (Kaplan Decl. Ex. 16.) In 2008, 1-800 Contacts also sought and obtained a default judgment against contact lens retailer Lensworld.com, which contained materially similar restrictions on trademark search advertising and was publicly available on the court docket. (Kaplan Decl. Ex. 20.) In 2009, 1-800 Contacts and Vision Direct sought and obtained a permanent injunction in the Southern District of New York in connection with the 2009 Vision Direct Agreement. (Kaplan Decl. Ex. 19.) The permanent injunction order contained material terms of the challenged settlement agreement between those parties, and was publicly filed on the court's docket. (*Id.*) Later that year, in August 2009, Drugstore.com also publicly filed the 2009 Vision Direct Settlement as an attachment to its 10-Q. (Kaplan Decl. Exs. 17-18.)

Even if somehow Plaintiffs were not on inquiry notice of their claim at that point, they were certainly on inquiry notice as of June 2011, when Lens.com publicly filed a complaint against 1-800 Contacts based on the exact conduct alleged by Plaintiffs in the CAC. (Kaplan Decl. Ex. 21.) *See Donner v. Nicklaus*, 197 F. Supp. 3d 1314, 1328 (D. Utah 2016) ("Awareness of other lawsuits . . . involving a defendant puts a plaintiff on inquiry notice of the probability of fraud within another transaction involving the defendant.") (quoting *Sterlin v. Biomune Sys.*, 154

F.3d 1191, 1204 (10th Cir. 1998)); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1139 (C.D. Cal. 2011) (claims time-barred because earlier-filed lawsuits disclosed allegations outside limitations period); *Latham v. Matthews*, 662 F. Supp. 2d 441, 456 (D.S.C. 2009) (same); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (same). The fact that 1-800 Contacts filed trademark litigation against other contact lens retailers and that those actions were ultimately dismissed was also available in the public record, and could have been discovered with reasonable diligence. (Kaplan Decl. Exs. 1-15.)

"[D]isclosed facts in the public domain would have been more than adequate to raise [Plaintiffs'] suspicions as to their claim of injury." *In re Cipro*, 261 F. Supp. 2d at 224.

3. Plaintiffs Failed to Exercise Reasonable Diligence

Plaintiffs also may not invoke fraudulent concealment because they failed to exercise reasonable diligence in uncovering their claims. *Dummar*, 543 F.3d at 621. The CAC contains the wholly conclusory allegation that this element is satisfied "[b]ecause none of the facts or information available to Plaintiffs until well after August 8, 2016, even if investigated with reasonable diligence, could or would have led to the discovery of the conduct alleged in [the CAC]." CAC ¶ 82. This allegation is belied by the wealth of facts and information available in the public record, as detailed above. In light of this, Plaintiffs' allegations fall far short of pleading the exercise of due diligence. In *Dummar*, the Tenth Circuit concluded a plaintiff failed to meet the diligence requirement of fraudulent concealment where plaintiffs' "[c]omplaint [was] completely silent as to any efforts that [plaintiff] made to uncover his cause of action." 543 F.3d

at 623. The same rationale applies here. Plaintiffs do not and cannot allege that they diligently investigated whether Defendants' conduct injured them.

D. Plaintiffs in Prior Complaints Not Named in The CAC Should Be Dismissed

Prior to consolidation, Plaintiffs' counsel filed eight separate actions with 15 named plaintiffs. In the CAC, they do not include six of those previously named plaintiffs: Pam Stillings, Elizabeth Henry, Taylor Zimmerman, Kathryn Champion, Sara Hartman, and Robert Weinstein. As Plaintiffs' counsel no longer seek for these six individuals to serve as class representatives, 1-800 Contacts respectfully requests that they be formally dismissed as class representatives from this action to avoid confusion as to the parties to this consolidated proceeding.

E. Plaintiffs' Complaint Should Be Dismissed for Failure to Plead the Elements of Their Antitrust Claim

For the reasons set forth in the Settling Retailers' Motion, *see* DUCivR7-1(a)(4), Plaintiffs have failed to plead required elements of their antitrust claim and their CAC therefore should be dismissed. 1-800 Contacts adopts and incorporates the arguments for dismissal made in the Settling Retailers' Motion.

First, Plaintiffs have failed to allege antitrust injury, causation or antitrust standing because they have not alleged any facts showing how Defendants' narrow restrictions on one form of search advertising conduct could have enabled them to raise prices above competitive levels, which is the source of their alleged harm. *See* Settling Retailers' Motion § I. *Second*, Plaintiffs' claim also fails because they fail to plead facts defining a relevant antitrust market limited to online sales of contact lenses and separate from the market for sales made by offline

contact lens sellers, such as ECPs and brick-and-mortar retailers. *See* Settling Retailers' Motion § II. *Third*, Plaintiffs' claim fails because they fail to plead any facts to support the existence of a single overarching conspiracy. *See* Settling Retailers' Motion § III.

Thus, the Court should dismiss Plaintiffs' CAC in its entirety.

IV. CONCLUSION

Based on the foregoing, 1-800 Contacts respectfully requests that the Court dismiss Plaintiffs' CAC in its entirety for the reasons set forth in the Settling Retailers' Motion. At a minimum, the Court should dismiss Plaintiffs' claim to the extent it is based on sales of contact lenses made prior to October 13, 2012, and dismiss Plaintiffs Stillings, Henry, Zimmerman, Champion, Hartman, and Weinstein.

DATED: August 4, 2017

MUNGER TOLLES & OLSON

By: */s/ Justin P. Raphael*
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Ashley D. Kaplan

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CERTIFICATE OF SERVICE

On this 4th day of August, 2017, I hereby certify that I electronically caused to have filed the foregoing with the Clerk of Court using the CM/ECF system that will send an electronic notification to counsel of record for all of the parties.

/s/ Justin P. Raphael
JUSTIN P. RAPHAEL