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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.	**DEFENDANTS VISION DIRECT, INC., WALGREENS BOOTS ALLIANCE, INC., WALGREEN CO., AND LUXOTTICA RETAIL NORTH AMERICA INC.'S MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT** Case No: 2:16-cv-01183-TC Judge: Tena Campbell Magistrate Judge: Dustin Pead

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RELIEF REQUESTED AND GROUNDS FOR RELIEF

Defendants Vision Direct, Inc., Walgreens Boots Alliance, Inc., and Walgreen Co., and Luxottica Retail North America Inc., by and through counsel of record, will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the Plaintiffs' Consolidated Amended Complaint (the "Complaint") for failure to state a claim upon which relief can be granted.

The Complaint should be dismissed because Plaintiffs lack antitrust standing: (1) they have failed to allege that their alleged injury was proximately caused by Defendants' alleged conduct; (2) they have failed to allege an "antitrust injury;" and (3) their alleged injury is too remote and unduly speculative. Additionally, Plaintiffs' overarching conspiracy claim under § 1 of the Sherman Act should be dismissed because Plaintiffs have failed to allege a cognizable relevant product market. Plaintiffs' overarching conspiracy claim under § 1 of the Sherman Act should also be dismissed for failure to allege anything more than a series of independent bilateral agreements. Further, Plaintiffs' claims accruing prior to October 13, 2012 against Vision Direct and Walgreens should be dismissed because they are time-barred under the Sherman Act's four-year statute of limitations. Finally, Plaintiff Elizabeth Henry's claim against Vision Direct should be dismissed because she was not named as a Plaintiff in the Complaint.

Defendants request oral argument on this Motion to Dismiss.

INTRODUCTION

In their Complaint, Plaintiffs hope to transform a series of bilateral agreements concerning the use of certain trademarked keywords in online advertising into an antitrust conspiracy that resulted in higher contact lens prices. But Plaintiffs do not even attempt to allege that Defendants conspired to fix prices or to forgo price competition. Instead, Plaintiffs focus on Defendants' agreements concerning advertising in response to online searches by consumers for certain contact lens sellers' trademarks, but Plaintiffs ignore wide swaths of other online and non-online advertising not at all impacted by the agreements. Nor do Plaintiffs allege that Defendants agreed to forgo using other, non-trademarked keywords, such as "cheap contact lenses" in their online advertising. Ultimately, Plaintiffs' conclusory allegations of the nature and cause of the harm purportedly suffered, the market in which the conduct and harm supposedly occurred, and the scope of the so-called anticompetitive "scheme" fail to state a claim under the Sherman Act.

The agreements at issue, except for one, are bilateral settlement agreements that arose in the context of separate trademark infringement lawsuits brought by Defendant 1-800 Contacts ("1-800 Contacts") against other online retailers of contact lenses (the "Settling Retailers"), including Defendants Vision Direct, Inc. ("Vision Direct"), Walgreens Boots Alliance, Inc., and Walgreen Co. (collectively, "Walgreens"). To resolve the potentially costly lawsuits and avoid the potential risks of taking those cases to trial, the Settling Retailers agreed to limit their usage of 1-800 Contacts' intellectual property in one method of online advertising—displaying advertisements on search engines like Google and Bing when consumers search for certain of 1-800 Contacts' trademarks. 1-800 Contacts agreed to reciprocal terms with regard to each

Settling Retailer's trademarks. The only other agreement at issue is between 1-800 Contacts and Defendant Luxottica Retail North America Inc. ("Luxottica").[1] That agreement is a standard sourcing agreement that established a partnership between the companies designed to increase efficiencies; it contains terms similar to those in the agreements between the Settling Retailers and 1-800 Contacts.

Twelve years after the first agreement was signed, Plaintiffs now claim that the terms of these agreements somehow artificially raised the retail price for all contact lenses the Defendants sold online. But the Complaint contains nothing more than threadbare allegations that fail the *Twombly* test, and the Court should dismiss the Complaint for each of the following three reasons.

First, Plaintiffs lack antitrust standing to assert their claim because they do not allege how the agreements actually caused the purported harm. Plaintiffs do not allege that Defendants engaged in anticompetitive conduct pertaining to the prices or sales of contact lenses, but merely that the agreements somehow "deprived Plaintiffs of truthful information" and that this somehow caused them to pay higher prices for contact lenses purchased online. But Plaintiffs fail to offer any details about how the agreements at issue actually deprived consumers of information about contact lens retailers and products. This is not surprising, given that the agreements only affected one method of advertising in a limited way, and did not restrict the online retailers' ability to advertise otherwise or to display pricing information in any other media, including

[1] In this motion, the term "Defendants" shall refer to 1-800 Contacts, Vision Direct, Walgreens, and Luxottica. Plaintiffs' Complaint also names Arlington Contact Lens Service, Inc. and National Vision, Inc. as defendants, but this action is stayed as to those parties in light of their Notice of Agreement in Principle to Settle. *See* ECF Nos. 96, 103.

online searches for "contact lenses" or "cheap contact lenses." Nor do Plaintiffs explain how, if true, the alleged deprivation of information proximately caused them to pay higher prices for contact lenses purchased online. They cannot, as their entire theory is economically flawed on its face. With more competition for trademarked keywords, advertising costs for those keywords could well have *increased*, which in turn would likely have caused an *increase* in contact lens pricing—a result that is exactly the opposite of what Plaintiffs allege. The lack of a plausible connection between the alleged anticompetitive conduct and injury is plainly insufficient, and for this reason alone, the Complaint should be dismissed.

Second, Plaintiffs fail to allege, as they must, a cognizable relevant product market. A properly defined relevant market must take into account all products that are reasonably interchangeable with one another, accounting for analyses such as the cross-elasticity of consumer demand for those interchangeable products. Here, Plaintiffs' allegation that Defendants possessed the necessary market power to impact prices is based on the unsupportable conclusion that online retailers do not compete with brick-and-mortar stores and eye care professionals that sell the same exact contact lenses. It is bedrock law that a plaintiff cannot gerrymander a relevant product market to fit only the conduct alleged to be anticompetitive, which is all Plaintiffs have done here. The Court should dismiss the Complaint on this ground as well.

Third, Plaintiffs stake their antitrust claim on the farcical notion that there was a single anticompetitive "scheme" among the Defendants and other Settling Retailers. To support their allegation of an overarching conspiracy, Plaintiffs must show that there was an agreement among all those entities. In other words, Plaintiffs must show a unity of purpose, a common design and

understanding, and a meeting of the minds among the alleged co-conspirators, but Plaintiffs fail to allege any facts supporting those elements. Instead, Plaintiffs allege a series of bilateral agreements between 1-800 Contacts and other online contact lens retailers. Plaintiffs allege no facts to even suggest, much less, show, that each of the contact lens retailers other than 1-800 Contacts coordinated in any way, or that there was any meeting of the minds among all the companies. Although 1-800 Contacts was party to each of the agreements, that is insufficient to establish a conspiracy involving all of the other retailers, including Defendants. Accordingly, Plaintiffs' claim should also be dismissed on this basis.[2]

FACTUAL BACKGROUND

A. The Parties and the Contact Lens Market

Plaintiffs are individuals who purport to represent a putative class of "all persons in the United States who made at least one online purchase of contact lenses from any Defendant." *See* ECF No. 72 (hereafter, "Compl.") ¶ 78. Plaintiffs claim to have purchased contact lenses from 1-800 Contacts through its website. *Id.* ¶¶ 19-27. Plaintiffs do not claim to have purchased contact lenses directly from any other Defendant.

Defendants are online retailers of contact lenses. *Id.* ¶¶ 28-30, 33. Plaintiffs allege that 1-800 Contacts currently sells more contact lenses than all other online retailers, including the other Defendants, combined. *Id.* ¶ 2.

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[2] Additionally, Vision Direct and Walgreens move to dismiss Plaintiffs' claims seeking damages prior to October 2012 on the basis of those claims being time-barred for the reasons stated in 1-800 Contacts' Motion to Dismiss. Vision Direct also moves to dismiss Plaintiff Elizabeth Henry for the reasons stated in 1-800 Contacts' Motion to Dismiss.

Plaintiffs allege that online retailers and retailers with physical locations do not compete with each other for sales of contact lenses. *Id.* ¶¶ 39-45. According to Plaintiffs, contact lenses sold in brick-and-mortar stores and by eye care professionals are not "adequate substitutes" for contact lenses sold by online retailers, although they do not allege that the contact lenses offered through these other sales channels are different in any way from the contact lenses offered by online retailers. *Id.* On that basis, Plaintiffs conclude that this case involves a single nationwide antitrust product market—"the market for online sales of contact lenses." *Id.* ¶ 36.

B. Advertising on Internet Search Websites

Online advertising can be done in many ways, one of which is to have a company's name and products appear in advertisements that are displayed with a consumer's search query using certain keywords. *Id.* ¶¶ 2-8. Contact lens retailers use many of these online advertising methods, including advertising on internet search websites. *Id.* ¶¶ 3-5. Online search advertisements appear when consumers enter queries into a search engine, such as Google or Bing. *Id.* ¶¶ 3-8. Search engines display such advertisements based on a system of keywords, which are matched to users' queries. *Id.* Retailers bid on keywords by offering to pay a particular amount each time a user clicks on one of their ads. *Id.* ¶ 8. For example, a company that wants to advertise when users search for "1-800 Contacts" could bid on the keyword "1-800 Contacts" and instruct the search engine to display ads only when users search for that exact phrase. That company also could bid on "contacts" by giving the search engines broader instructions to display ads for any search including or related to "contacts," including "1-800 Contacts." *See id.* ¶¶ 3-8.

Each time a person enters a search query into a search engine, the search engine runs a separate "auction" using computer algorithms that rank each ad based on the advertiser's bid, the quality of the ad, and other factors. *Id.* Retailers may also specify "Negative Keywords" to "prevent advertising appearing in response to irrelevant queries that may contain apparently similar but ultimately, irrelevant words." *Id.* ¶ 11. Negative keywords are the opposite of keywords; they instruct search engines *not* to display ads in response to queries that would be displayed based on the kinds of broad instructions noted above.

C. The Trademark Agreements

Plaintiffs allege that, between 2004 and 2013, 1-800 Contacts entered into a series of separate bilateral settlement agreements with other contact lens retailers, including Vision Direct and Walgreens. *Id.* ¶ 12. Plaintiffs also allege that 1-800 Contacts entered into a Sourcing and Services Agreement with Luxottica in 2013. *Id.* ¶ 72. Each agreement was designed to prohibit each party from causing its advertisements to appear when consumers searched for the other party's names or trademarks, which 1-800 Contacts had claimed infringed its trademarks (the "Trademark Agreements"). *Id.* ¶ 12. The agreements accomplished this in two ways. *First*, in each agreement, the contracting parties agreed to cease using (or to refrain from using) certain keywords relating to the other party's names, websites, or trademarks. *Id.* ¶¶ 10-12. *Second*, the contracting parties were required to instruct the search engines not to return ads in response to searches for the other contracting party's trademarks by specifying the other party's name, website, or trademarks as negative keywords. *Id*. In other words, the agreements would prohibit Vision Direct from bidding on the keyword "1-800 Contacts" and required it to implement negative keywords instructing search engines not to display Vision Direct ads when consumers

searched for "1-800 Contacts." The agreements did not, however, prohibit Vision Direct from causing its advertisements to be displayed when consumers searched for phrases such as "cheap contact lenses" or other generic terms. *Id.*

Plaintiffs do not allege that any of the Defendants, either in the Trademark Agreements or anywhere else, agreed on prices, to refrain from competing on prices, or to refrain from other forms of online and non-online advertising for their contact lenses. Plaintiffs also do not allege that the Settling Retailers or Luxottica entered into any agreements among themselves, regarding pricing, sales, or advertising.

a. 1-800 Contacts' Settlement Agreements with Vision Direct and Walgreens

The Trademark Agreements between 1-800 Contacts and Vision Direct and between 1-800 Contacts and Walgreens arose from lawsuits 1-800 Contacts filed against each of those companies. *See* Exhs. 1-2.[3] In 2002, 1-800 Contacts sued Vision Direct for allegedly violating trademark laws and the Lanham Act by purchasing online search advertising that employed the use of keywords related to 1-800 Contacts' name, website, and trademarks. *Id.*; *see also 1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2002). In that litigation, 1-800 Contacts prevailed in obtaining an injunction against Vision Direct's advertising practices that purportedly touched on 1-800 Contacts' trademarks. *Id.* Subsequently, Vision Direct entered into a settlement agreement with 1-800 Contacts resolving the appeal of

[3] "Ex. _" shall refer to the exhibits attached to Movants' Request for Judicial Notice filed concurrently with this motion, which requests that the Court take judicial notice of some of the agreements at issue, as well as court records and proceedings. At Plaintiffs' request, 1-800 Contacts provided the agreements to Plaintiffs prior to the filing of the Complaint.

the injunction, and then entered into another settlement agreement resolving a separate trademark lawsuit brought by 1-800 Contacts in 2008. *See id.*; Exhs. 1-2; *1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-cv-1949 (S.D.N.Y. 2008). In 2010, Walgreens also entered into a settlement agreement that resolved similar trademark-related litigation with 1-800 Contacts. *See 1-800 Contacts, Inc. v. Walgreen Co.*, No. 2:10-cv-00536-TS (D. Utah 2010).

b. 1-800 Contacts' Sourcing and Services Agreement with Luxottica

With respect to Luxottica, Plaintiffs point to a Sourcing and Services Agreement that Luxottica and 1-800 Contacts entered into in the ordinary course of their business dealings as the source of the alleged competitive restraint. Compl. ¶¶ 57, 72. Plaintiffs allege "upon information and belief" that the agreement contains keyword advertising restrictions that are similar to those included in the Trademark Agreements. *Id.* ¶ 57.

D. Federal Trade Commission Action

On August 8, 2016, the Federal Trade Commission ("FTC") filed an administrative action against 1-800 Contacts, alleging a violation of Section 5 of the FTC Act, 15 U.S.C. § 45. *Id.* ¶ 81. The FTC did not bring an action against Vision Direct, Walgreens, Luxottica, or any other contact lens retailer. The FTC's action against 1-800 Contacts is ongoing, and the Administrative Law Judge has not yet issued a decision.

E. Plaintiffs' Claims

Plaintiffs allege that 1-800 Contacts "devised a plan to limit competition by manipulating the market for the placement of online advertisements through online search engines." *Id.* ¶ 55. According to Plaintiffs, this plan resulted in a single "unlawful scheme" in which each Defendant began participating on the date it signed its first agreement. *Id.* ¶ 52. Each

Trademark Agreement allegedly reduced bidding competition for the keywords specified in that agreement. *Id.* ¶ 58. Most of the Trademark Agreements also contained a non-disclosure provision that prevented the parties from disclosing the terms with anyone else, including other contact lens retailers. *See, e.g.*, *id.* ¶¶ 66, 69, 71. Plaintiffs allege they were harmed by this "unlawful scheme" because the Trademark Agreements "deprived the Class of truthful information about competing sellers of contact lenses online." *Id.* ¶ 73. Plaintiffs also claim that they paid artificially increased prices for contact lenses purchased from Defendants as a result of the alleged advertising restrictions. *Id.* ¶¶ 73-75.

Plaintiffs claim that the Trademark Agreements violate § 1 of the Sherman Act and § 4 of the Clayton Act. *Id.* ¶¶ 84-87. Plaintiffs seek to recover monetary damages for allegedly paying more for contact lenses than they would have but for the Trademark Agreements. *Id.* ¶ 75.

ARGUMENT

To survive a motion to dismiss, a complaint must "contain enough allegations of fact to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191 (10th Cir. 2009). "The mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). As the Supreme Court recognized, courts should be cautious about allowing thinly pleaded antitrust claims to proceed, given the high cost of antitrust discovery and the ensuing "*in terrorem*" settlement leverage plaintiffs can inflict on defendants. *Twombly*, 550 U.S. at 557-58; *see also Christy*

Sports, LLC, 555 F.3d at 1191 (recognizing the threat posed by "the high costs and frequent abuses associated with antitrust discovery" (citing *Twombly*, 550 U.S. at 558)).

A claim only has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). More is required "than a sheer possibility that a defendant has acted unlawfully." *Id*. Factual content is what makes a complaint sufficiently plausible. *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010); *In2 Networks, Inc. v. Honeywell Int'l*, No. 2:11-cv-6-TC, 2011 U.S. Dist. LEXIS 117589 (D. Utah Oct. 11, 2011) (Campbell, J.). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

I. Plaintiffs Lack Antitrust Standing To Bring Their Claims

Plaintiffs cannot show the requisite causation, antitrust injury, or proximity to the alleged restrictions on competition needed to demonstrate antitrust standing. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced" to an alleged antitrust violation. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (citation omitted) ("*AGC*"). Private parties, therefore, must demonstrate antitrust standing in order to state a claim. *See Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1254 (10th Cir. 2003). That showing requires an evaluation of the plaintiff's alleged harm, the defendant's alleged wrongdoing, and the "relationship between them." *AGC*, 459 U.S. at 535. Because of the harsh penalties for antitrust violations, standing requirements in the antitrust context are "more rigorous" than constitutional Article III standing, and antitrust standing is a "threshold inquiry in all actions."

City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 264 (3d Cir. 1998); *Tal v. Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006). Antitrust standing has several components and Plaintiffs must satisfy each one; failure to allege any one component is grounds for dismissal.

First, a plaintiff must show "a direct causal connection between [plaintiff's] injury and a defendant's violation of the antitrust laws." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 882 (10th Cir. 1997).

Second, a plaintiff must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Tal*, 453 F.3d at 1253. "[A]ctual injury attributable to something the antitrust laws were designed to prevent" is required because without the causal connection, the purported antitrust violation would only establish that injury "*may*" result. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

Third, even if a plaintiff can show causation and antitrust injury, that plaintiff must also demonstrate that the alleged harm is not too remote from the alleged antitrust violation. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986). Pursuant to the Supreme Court's decision in *AGC*, this remoteness analysis turns on five factors: (i) the causal connection between the antitrust violation and the plaintiff's harm; (ii) the nature of the injury; (iii) the directness of the injury, and whether damages are too speculative; (iv) the potential for duplicative recovery; and (v) the existence of more direct victims. *AGC*, 459 U.S. at 537-44. Some individuals who may have suffered harm from anticompetitive conduct may yet be barred from bringing a claim because "[a]n antitrust violation may be expected to cause ripples of harm to flow through the

Nation's economy; but . . . there is a point beyond which the wrongdoer should not be held liable." *Id.* at 534-35 (citation omitted).

A. Plaintiffs Fail To Sufficiently Allege That the Purported Limits on Competition Proximately Caused Their Alleged Harm

In this case, Plaintiffs, who are downstream consumers, seek to recover overcharges they allegedly paid for contact lenses purchased from certain online retailers. Notably, however, Plaintiffs do not allege that Defendants engaged in any anticompetitive conduct relating to the pricing of contact lenses—there are no allegations of price-fixing or agreements to forgo competition in setting prices. Instead, Plaintiffs claim they were harmed by settlement agreements that limited advertising of contact lenses when consumers searched for the Settling Retailers' trademarks. But Plaintiffs fail to allege any facts at all showing how these narrowly tailored advertising agreements caused them to pay higher prices for contact lenses than they would have but for the existence of those agreements. *See* Compl. ¶¶ 73-75.

Plaintiffs assert in conclusory fashion that the resulting alleged suppression of "truthful and relevant advertising" had some tangential effect on the downstream prices they paid for contact lenses. *See id.* ¶ 11. But Plaintiffs' bare assertion of harm falls far short of the pleading standard required under *Twombly*, and thus, the Complaint should be dismissed. *See In2 Networks*, U.S. Dist. LEXIS 117589, at *4 ("conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)); *see also In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 405 (S.D.N.Y. 2011) (dismissing case where complaint alleging restrictions in digital music market did not allege a "sufficient linkage" with compact disc purchaser plaintiffs to confer antitrust standing); *Garon v. eBay, Inc.*, No. C 10-05737 JW, 2011 U.S. Dist. LEXIS

148621, at *10-15 (N.D. Cal. 2011) (dismissing claim by small online auction sellers based on eBay policy favoring large sellers because there was no causal connection between alleged harm and reduction of competition in auction services market).

B. Plaintiffs Fail To Sufficiently Allege Antitrust Injury

For similar reasons, Plaintiffs also fail to sufficiently allege antitrust injury. Plaintiffs merely allege the conclusion that the agreements somehow "deprived plaintiffs of truthful information." Compl. ¶ 74. This will not do. *In2 Networks*, U.S. Dist. LEXIS 117589, at *1. Plaintiffs do not allege that Defendants stopped advertising, or even that they advertised less frequently. Nor do Plaintiffs offer any allegations about: (i) how the agreements deprived them of truthful information; (ii) the scope or nature of the information of which they were deprived; (iii) the time period during which they were deprived of such information; (iv) why Plaintiffs were unable to obtain the information from sources unaffected by the allegedly anticompetitive agreements; and, most significantly, (v) how such deprivation of information supposedly caused prices to increase. Put simply, Plaintiffs fail to allege facts to demonstrate that the Trademark Agreements had any effect at all, much less that they caused antitrust injury to Plaintiffs.

The implausibility of Plaintiffs' assertion that they were deprived of "truthful information" is self-evident upon noting what Defendants did *not* agree to do. Although each Defendant and 1-800 Contacts bilaterally refrained from using each other's trademarks in bidding for search engine advertising, Defendants retained their rights to advertise in response to searches for terms not covered by the Trademark Agreements, including "generic" terms such as "contact lens" or "cheap contact lenses." *Compare* Compl. ¶ 10, *with id.* ¶ 70. Plaintiffs do not allege that the Trademark Agreements affected "organic" (non-advertising) online search results

related to contact lenses. *See id.* ¶ 4. Plaintiffs also do not (and cannot) allege that Defendants agreed to restrict the display of "truthful information" about each firm's prices, either within online advertisements displayed when consumers conduct searches unaffected by the agreements or through other means.[4] In short, even if "deprivation of truthful information" were a viable antitrust theory (and there is no reason to think it is in this case), the allegations here would not support it.

Finally, Plaintiffs' theory of harm is implausible on its face. From an economic standpoint, it makes no sense that contact lenses prices rose because of the Trademark Agreements. Plaintiffs contend that, but for Defendants' conduct, there would have been more competition for the specific keywords identified in each Trademark Agreement. But if there were more competitors in the market for advertising in response to these keywords, then the prices Defendants paid for those keywords could be expected to *increase*. If the Defendants' advertising costs for those particular searches increased in Plaintiffs' hypothetical "but-for" world, Defendants' sales prices for contact lenses would be expected to increase as well.

Plaintiffs presume the exact opposite—that limited competition for keywords, and the resulting *lower* cost of those keywords, somehow led to *higher* consumer prices. *See* Compl. ¶ 58 ("These agreements . . . preclud[e] certain competitive . . . online advertising."). The crux of Plaintiffs' Complaint is therefore premised on a theory that makes little economic sense—a

[4] Accordingly, Defendants were free to provide consumers with pricing information using a wide variety of methods, including search result blurbs/previews; Defendants' websites; online price aggregation services such as lensshopper.com, contactsprice.com, bizrate.com, and Google Shopping; non-online advertisements such as print media or TV advertisements; and price comparisons distributed by eye care professionals and other brick-and-mortar retailers.

conclusion that independently provides grounds for dismissal. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 597-98 (1986) (remanding conspiracy claim that was "economically senseless"); *see also DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) ("[T]he discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation."); *Universal Grading Serv. v. eBay, Inc.*, No. C-09-2755 RMW, 2011 U.S. Dist. LEXIS 25193, at *16 (N.D. Cal. Mar. 8, 2011) (dismissing claim because "plaintiffs have failed to establish a plausible claim of harm to competition that makes 'economic sense'").

C. Plaintiffs' Alleged Injury is Too Remote and Speculative

Even if Plaintiffs had attempted to include allegations explaining their theory of causation and demonstrating antitrust injury, Plaintiffs' harm (overcharges on contact lenses purchased online) is too far removed from the alleged anticompetitive conduct (restrictions on bidding for certain online advertising keywords relating to contact lenses) and therefore cannot serve as the basis for a viable antitrust claim. *AGC*, 459 U.S. at 537-44.

Lorenzo v. Qualcomm Inc. is instructive. There, a class of consumers who had purchased smartphones alleged that Qualcomm's purportedly unlawful practices related to the licensing of microchips to manufacturers ultimately led to inflated prices for their smartphones. 603 F. Supp. 2d 1291, 1296 (S.D. Cal. 2009). But whatever Qualcomm may have done unlawfully with respect to its practices for licensing to manufacturers required speculation about how that conduct could have impacted other elements of competition that dictated the prices paid by the consumer plaintiffs. *Id.* at 1301. The court concluded that the injury alleged was "too remote,"

and that the complaint failed to allege that Qualcomm's conduct "proximately caused Plaintiff's injury" or that the stated harm was "the type of injury that the antitrust laws were designed to prevent and that flows from the conduct that makes defendants' acts unlawful." *Id.* at 1301-02 (quoting *Cargill*, 479 U.S. at 113); *see also Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1027-28 (N.D. Cal. 2015) (finding smartphone consumers not to be "sufficiently close to the alleged anticompetitive conduct" where they alleged that agreements between Google and mobile device manufacturers concerning pre-loaded applications led to supracompetitive prices for phones).

As in *Lorenzo* and *Feitelson*, Plaintiffs here fail to allege that Defendants' advertising practices proximately caused higher downstream contact lens prices. Compl. ¶¶ 73-75. Thus, under four of the five factors in the *AGC* balancing test, Plaintiffs' claim is too remote and should be dismissed for lack of standing. In particular, (1) the causal connection between the alleged conduct and harm is unidentified and at best, speculative; (2) the nature of the injury is related to retail pricing of contact lenses, yet the subject of the allegedly anticompetitive agreements was wholly different; (3) the alleged injury is, at best, indirect because there are numerous intervening factors between the conduct at issue and Plaintiffs' purchase of the contact lenses that likely impacted any purported damages; and (4) to the extent the Trademark Agreements actually did contain anticompetitive terms, more direct claims, if any, would lie with other parties. *AGC*, 459 U.S. at 537-44.

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Having failed to allege any plausible connection between the purportedly anticompetitive conduct and the injury supposedly suffered, Plaintiffs' claim is too speculative and too remote to survive. Plaintiffs do not maintain that all contact lens advertising is restricted; nor do they

maintain that keyword advertising in response to searches for the parties' trademarks is the only, or even a significant, form of advertising available to Defendants. They also do not even attempt to account for the many other methods of advertising for online sales of contact lenses available to Defendants or for the other sources available to Plaintiffs to obtain truthful pricing information. Plaintiffs simply make conclusory allegations that the agreements restricted advertising in response to searches for other firms' trademarks, thereby supposedly causing a downstream effect on contact lens pricing. But Plaintiffs never identify *how* those steps logically took place. Plaintiffs have thus failed to meet their burden to demonstrate antitrust standing.

II. Plaintiffs Fail to Allege a Cognizable Relevant Market

Plaintiffs' claim also fails due to their inability to identify a plausible relevant product market, which is a required element of their antitrust claim. *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) (holding a Sherman Act § 1 claim requires proof "the defendant entered a contract, combination or conspiracy that unreasonably restrains trade *in the relevant market*") (emphasis added)). Plaintiffs posit that there is an online-*only* market for contact lenses. Plaintiffs, however, have not adequately explained or alleged why online contact lens retailers exist in their own market and are not constrained by competition from offline sellers, including eye care providers (optometrists and ophthalmologists) and retailers such as Costco and Walmart. That is fatal to their claim. *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008) (affirming dismissal of a complaint that imposed limitations on a proposed market "[w]ithout any explanation as to why we should not consider alternative buyers seeking similar services"); *Klein-Becker USA LLC v. Englert*, No. 2:06-cv-378 TS, 2007 U.S. Dist. LEXIS 71898, at *4 (D.

Utah Sept. 26, 2007) (dismissing an antitrust claim because plaintiffs did not "offer any plausible explanation as to why a market should be limited in a particular way").

A court defining a relevant product market starts with an assessment of the product at issue and the "reasonable interchangeability" of any available substitutes. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). In other words, the analysis seeks to identify "commodities reasonably interchangeable by consumers for the same purposes," recognizing that consumers' ability to switch between products—even products with varying characteristics, functionality, and prices—can constrain a firm's capacity to raise its own prices above a competitive level. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-400 (1956). Because a relevant market must include all products that are "reasonably good substitutes" for one another, a plaintiff's failure to "define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand" is grounds for dismissal. *Campfield*, 532 F.3d at 1118.

Here, Plaintiffs do not allege that online and offline contact lens retailers sell different contact lenses. That strongly suggests that all retailers that sell contact lenses are in the same market. Plaintiffs do not come close to alleging reasons why retailers who sell the exact same product do not compete in the same market for antitrust purposes. Plaintiffs' complaint identifies three reasons, alleged in conclusory fashion, why online retailers exist in their own market: (1) online sales are more convenient; (2) online retailers typically price lower than brick-and-mortar retailers and eye care providers and look to other online retailers in setting those prices; and (3) online retailers rely heavily on online advertising, while brick-and mortar retailers

and eye care professionals do not. Compl. ¶¶ 37-45. These allegations, however, do not support limiting the market for contact lenses to online retailers only.

As to Plaintiffs' claim that buying contact lenses online is more convenient, *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216, 1220-21 (10th Cir. 1986), is instructive as to why Plaintiffs cannot define a market based on the channel in which the product is distributed (rather than the nature of consumer demand for the product). *Westman* involved a distributor's claim that Hobart, the defendant-manufacturer, excluded it from what the plaintiff alleged was a "one-stop shopping" market for kitchen equipment. *Id.* at 1220. Instead of placing all purveyors of kitchen equipment in the same proposed relevant market, the plaintiff maintained that only distributors that carried "multiple lines of the same product as well as lines of complementary products" could be included. *Id.* The district court accepted the proposed market definition citing the "convenience, cost savings and better service" provided by full-line distributors. *Id.* But the Tenth Circuit rejected the "one-stop shopping" market as a matter of law. The Court of Appeals criticized the trial court for "apparently focus[ing] on the system of product distribution rather than the market facing the consumer of restaurant equipment." *Id.* As the court explained, "[t]he fact that a distributor is able to satisfy all of a customer's needs at one location does not mean that it is free from competition from other types of distributors." *Id.* at 1221. And the fact that "'one-stop distribution' is an effective or even superior way to compete does not mean that the relevant market is limited to those who use that method of competition." *Id.* at 1220-21.

Indeed, while customers often must choose among products with various advantages and disadvantages, the market is defined by products that compete along these dimensions, not by the

"best" available option. *See Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1103 (D. Kan. 1999) (identifying certain benefits inherent in one form of advertising does not establish a relevant product market when the pleadings fail to explain why other forms of advertising are not reasonably interchangeable); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 563a, at 407-08 (4th Ed. 2016) ("Many machines performing the same function—such as copiers, computers, or automobiles—differ not only in brand name but also in performance, physical appearance, size, capacity, cost, price, reliability, ease of use, service, customer support, and other features. Nevertheless, they generally compete with one another sufficiently that the price of one brand is greatly constrained by the price of others."). As these authorities show, products need not have identical attributes to be in the same market; only "reasonable interchangeability for the purposes for which [the products] are produced—price, use and qualities considered"—is required. *du Pont*, 351 U.S. at 404.

Just so here. Plaintiffs have not alleged (and cannot allege) that contact lenses available online are any different from those available in brick-and-mortar locations; they simply allege that consumers have reasons to prefer some retailers over others. But Plaintiffs do not allege that those preferences are so strong or widespread that consumers who buy online are not the subjects of competition by retailers who sell offline. To the contrary, Plaintiffs themselves claim that contact lens consumers must visit their eye care provider every one to two years to renew their prescriptions. Compl. ¶ 41. Thus, one need not look far to find competition between online vendors and brick-and-mortar establishments. Plaintiffs' online-only market definition should accordingly be rejected. *See Opticsplanet, Inc. v. Opticsale, Inc.*, No. 09 C 7934, 2010 U.S. Dist.

LEXIS 71086, at *5 (N.D. Ill. July 14, 2010) (denying proposed online-only product market and finding it "unrealistic to ignore the far larger market for [optics] products in the generic sense").

Nor do allegations of lower online pricing establish a separate relevant market. "Although the *responsiveness* of one product to the price of another is at the heart of the market definition analysis, a mere price differential alone does not necessarily signal a distinct market." *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008); *see also Westman*, 796 F.2d at 1221 (rejecting the significance of testimony that "there was an absence of comparable substitutes *at a price comparable* with that of Hobart products"). Thus, even if Plaintiffs are correct that online pricing tends to be lower, that allegation says nothing about the fundamental inquiry for purposes of the market analysis. On that point, Plaintiffs offer only a conclusory statement that online sellers could increase price without losing so many sales to brick-and-mortar stores as to render the price increase unprofitable. *See* Compl. ¶ 40. But that conclusory recitation of a test that is sometimes used to analyze the relevant antitrust market is not enough to support an actionable claim. *See, e.g.*, *Psystar*, 586 F. Supp. 2d at 1198.

Plaintiffs' third justification—that eye care providers and brick-and-mortar retailers typically do not advertise online—also does not speak to whether the availability of the same item distributed through different channels provides a reasonably good substitute for purposes of the relevant market analysis. Online advertising is hardly the only method of competing for contact lens purchasers. The challenged restrictions on use of trademarked keywords leave open a myriad of other ways to reach consumers, including through print media, TV, radio, and information provided to patients by their eye care providers. Thus, certain brick-and-mortar sellers' alleged disinclination to advertise online does not indicate a lack of competition.

At bottom, Plaintiffs' allegation of an online-only market for contact lens sales is simply an attempt to gerrymander a market to fit their claim. But an antitrust plaintiff must to do more than "simply define a market as to cover only the practice complained of." *U.S. Gen., Inc. v. Draper City*, No. 2:05-CV-917 TS, 2006 U.S. Dist. LEXIS 41598, at *10 (D. Utah June 7, 2006). Plaintiffs have the burden of offering a "'theoretically rational explanation' for why the boundaries of the market are defined as they are." *Commercial Data Servers, Inc. v. IBM*, 166 F. Supp. 2d 891, 896 (S.D.N.Y. 2001). Despite the existence of obvious substitutes in the contact lens market, Plaintiffs have not done so. In the absence of any factual allegations on matters so crucial to establishing the boundaries of the relevant market, this Court has no obligation to accept Plaintiffs' unsupported conclusions as true. *See Iqbal*, 556 at 663-64 ("Determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."); *Campfield*, 532 F.3d at 1118 ("If the market described in the complaint fails to include 'reasonably good substitutes' then the plaintiff has not adequately alleged a relevant market."). Because Plaintiffs have not plausibly or logically foreclosed interchangeability with other types of sales, including from brick-and-mortar retailers and eye care professionals, the Complaint must be dismissed.

III. Plaintiffs Have Not Pleaded Facts To Support Their Alleged Overarching Conspiracy

The Complaint is also deficient because it fails to plead any facts to support the existence of a single overarching "unlawful scheme" in which all of the Defendants "committed not to compete against one another in certain, critical online advertising." Compl. ¶¶ 2, 52. Because the facts as pleaded do not support the alleged conspiracy, the Complaint must be dismissed.

To support allegations of an overarching conspiracy, it is not enough to identify a series of discrete, bilateral agreements between 1-800 Contacts and the other Defendants; instead, Plaintiffs must allege some connection between the agreements. *See In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 975 (D. Iowa 2011) (dismissing claims of a broad conspiracy drawn from allegations of discrete bilateral agreements when there were no allegations providing "the 'larger picture' from which inferences of a wider conspiracy can be drawn"); *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 (JG)(VVP), 2011 U.S. Dist. LEXIS 51330, at *95 (E.D.N.Y. Jan. 4, 2011) (dismissing allegations of a global conspiracy when the complaint was "silent as to how, when, or where these sixty-five defendants or the conduct identified in the 10 local conspiracy claims became connected to each other into one global conspiracy connected by common actors, methods and goals"). Plaintiffs have made no such allegations here.

Importantly, Plaintiffs do not allege any facts plausibly demonstrating a unity of purpose, a common design and understanding, or a meeting of the minds between Vision Direct, Walgreens, and Luxottica, or other factors that would support anything more than the existence of a series of independent bilateral agreements between 1-800 Contacts and each other Defendant. *See In re Iowa Ready-Mix*, 768 F. Supp. 2d at 973; *see also Twombly*, 550 U.S. at 556 ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice."). "While it is true that each co-conspirator need not know the identity of the other co-conspirators, there do need to be allegations that plausibly suggest that each of the defendants was aware of and committed to the essential purpose of the overarching conspiracy." *Cf. Precision Assocs.*,

2011 U.S. Dist. LEXIS 41330 at *104-05. But nothing in the Complaint so much as suggests that Vision Direct, Walgreens, and Luxottica had such knowledge or unity of purpose.

Simply put, Plaintiffs' unsupported accusation that Defendants engaged in an "unlawful scheme" is not enough to plead the single conspiracy they assert. *TV Commc'ns Network*, 964 F.2d at 1026 ("The use of antitrust 'buzz words' does not supply the factual circumstances necessary to support [the plaintiff's] conclusory allegations."). Plaintiffs' § 1 claim depends on the existence of a broader "unlawful scheme," but the facts they cite as support for their claim demonstrate, at best, a series of unconnected agreements. Accordingly, Plaintiffs have not provided a factual basis for the overarching conspiracy claim they assert, and for this independent reason, the Complaint should be dismissed. *Cf. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 256 (3d Cir. 2010) (affirming dismissal when the plaintiffs' complaint failed to assert a hub-and-spoke conspiracy and could not "be fairly understood to allege the existence of several unconnected, bilateral, vertical conspiracies").

IV. Plaintiffs' Claims Accruing Prior to October 13, 2012 Against Vision Direct And Walgreens Are Time-Barred

Plaintiffs' claims seeking damages accruing prior to October 13, 2012 against Vision Direct and Walgreens are barred by the Sherman Act's four-year statute of limitations. Sherman Act claims are "forever barred" if they are not "commenced within four years after the cause of action accrued." 5 U.S.C. § 15b. An antitrust cause of action "accrues and the statute [of limitations] begins to run when a defendant commits an act that injures the plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Vision Direct entered into Trademark Agreements with 1-800 Contacts in 2004 and 2009. Walgreens entered into a Trademark Agreement with 1-800 Contacts in 2010. Because Plaintiffs waited until Fall 2016 to

file their Complaint, all claims seeking damages that allegedly accrued more than four years before the filing of the Complaint are time-barred and should be dismissed. *See* 1-800 Contacts' Motion to Dismiss § III.A-C.

To the extent that Plaintiffs claim that the statute of limitations should be tolled based on the doctrine of fraudulent concealment, this argument should be rejected. As discussed further in 1-800 Contacts' Motion to Dismiss, there was no affirmative concealment of the Trademark Agreements, and Plaintiffs were on inquiry notice of their claims no later than 2009. *Id.* § III.C.

The Court should therefore dismiss Plaintiffs' claims for damages prior to October 2012.

V. Plaintiff Elizabeth Henry Should be Dismissed

Vision Direct was named as a defendant in an action brought by Plaintiff Elizabeth Henry prior to consolidation. Plaintiffs' Consolidated Amended Complaint does not include Henry as a named Plaintiff. For the reasons stated in 1-800 Contacts' Motion to Dismiss, Henry should be dismissed. *See* 1-800 Contacts' Motion to Dismiss § III.D.

DATED: August 4, 2017

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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/ Chul Pak
Chul Pak