18-3848

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

1-800 CONTACTS,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON APPEAL FROM THE FEDERAL TRADE COMMISSION

BRIEF OF UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the United States Council for International Business ("USCIB") states that it is not a subsidiary of any corporation and that no publicly-held corporation owns more than 10% of its stock.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

A driving force for American business, *amicus curiae* the United States Council for International Business ("USCIB") promotes an open system of world trade, finance and investment in which business can flourish and contribute to economic growth, human welfare, and protection of the environment. Its membership includes over 200 U.S. companies, professional services firms, and associations. USCIB submits this *amicus curiae* brief to highlight the challenges American and international businesses would face under the recent Federal Trade Commission decision's approach to antitrust liability for trademark settlements, and to explain the potential negative impact that the Commission's decision is likely to have on businesses, consumers, and competition if left to stand.

In submitting this brief, USCIB takes no position on whether the use of a competitor's trademarks as internet search terms is an infringing use under any particular set of facts.

[1] This brief is filed with the written consent of all parties. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. Only the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The Federal Trade Commission's decision creates significant uncertainty around the lawful enforcement and settlement of all intellectual property rights. By treating intellectual property as a mere "procompetitive benefit" under the antitrust laws, the Commission's decision significantly abridges the rights of intellectual property holders. This decision will harm not only American and international businesses, but also consumers and competition itself.

This *amicus* brief makes two main points:

The Commission's Decision Creates Substantial Uncertainty Regarding the Ability to Settle Intellectual Property Disputes. Trademark rights are generally procompetitive; encouraging merits-based competition is their fundamental purpose. However, such rights are meaningless if they cannot be enforced. Enforcement, moreover, is possible only if settlements are available, as trademark holders rarely have the resources to fully litigate every infringement. Courts must therefore tread lightly when exposing trademark settlements to antitrust scrutiny, as such settlements are part and parcel of trademark rights.

In this matter, the Commission did not tread lightly. Quite the opposite. In the underlying trademark cases, 1-800 Contacts claimed that competitors' use of its trademarks as paid internet search terms infringed those trademarks, and the parties settled by agreeing not to use each other's trademarks in this way. Under

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993), and *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), as well as the more recent decision in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), such enforcement and settlement of intellectual property disputes should not be subject to antitrust liability without something more, such as sham litigation, fraud, or a large, unexplained reverse payment. The Commission ignored this. Instead, the Commission found antitrust liability by determining that competitors' use of 1-800 Contacts' trademarks as paid search terms was non-infringing "advertising" rather than trademark use as 1-800 Contacts claimed. Having thus discounted 1-800 Contacts' trademark rights, the Commission concluded that the settlements were therefore naked restrictions on such advertising.

The Commission's approach creates substantial uncertainty and the risk of arbitrary results. Under the Commission's decision, intellectual property settlements become antitrust violations whenever the Commission arbitrarily disagrees with the position taken by the owner of that intellectual property in the underlying dispute. There is no way to predict whether any settlement of such a dispute complies with antitrust laws under that standard. This uncertainty will chill intellectual property settlements, and thereby devalue intellectual property rights themselves.

This uncertainty is worsened by the Commission's refusal to respect settlement forms the Supreme Court has held should not be subject to antitrust challenge. In *Actavis*, the Supreme Court made clear that settlements, like the one at issue here, that merely compromise on the scope or term of an intellectual property right would not be subject to antitrust scrutiny. *Id*. at 159. This is particularly true where the settlements take the form of relief that could have been obtained from a court—such as, here, an order not to use trademarks as paid internet search terms. By ignoring that guidance, the Commission's decision creates exactly the uncertainty that the Supreme Court's decision in *Actavis* aimed to prevent.

Finally, the Commission's decision increases this uncertainty by allowing challenges to settlements many years after they are entered into. Under a "continuing violation" statute of limitations theory, a challenge may be brought for at least as long as the agreement respecting trademark rights remains in force. As a result, and as this case illustrates, parties that agree to respect each other's intellectual property rights via settlement will never find repose until either the intellectual property rights expire (which trademarks do not do) or the agreement is terminated. Here, the Commission challenged an agreement over a decade after it was entered into—and, under the Commission's theory, there would have been nothing stopping it from waiting even longer to bring such a claim.

Thus, not only do businesses face substantial uncertainty when settling intellectual property disputes under the Commission's decision, and the risk of arbitrary antitrust enforcement, they do so almost indefinitely.

Treating Intellectual Property Rights as a Mere Procompetitive Benefit Threatens to Devalue Those Rights. Intellectual property rights are rights granted by Congress, are often guaranteed by the Constitution, and have traditionally been enforceable whether or not enforcement of those rights would be procompetitive in any particular situation. Here, however, the Commission held that even if 1-800 Contacts' trademark rights were valid and infringed, this should be viewed only as one potential procompetitive benefit to be weighed among all other such benefits—and moreover to be thus disregarded under antitrust laws whenever a supposedly "less restrictive alternative" to enforcement of those rights is available.

The suggestion that intellectual property rights exist only to the extent that their enforcement can be shown to have procompetitive benefits that outweigh the anticompetitive effects, and only so long as there is no less restrictive way to enforce those rights, is novel, dangerous, and would substantially devalue intellectual property rights. This is particularly so here, where the Commission adopted a rule under which intellectual property settlements are subject to condemnation under an "inherently suspect" standard, thus putting a significant burden on the defendant to show the benefits of its intellectual property.

The Commission's approach therefore threatens to foreclose intellectual property enforcement rights significantly. USCIB encourages the Court to reverse the Commission's decision for this additional reason.

ARGUMENT

I. The Commission's Decision Creates Significant Uncertainty Regarding the Settlement and Enforcement of Intellectual Property Rights

The Commission's decision creates substantial uncertainty and the risk of arbitrary results, and therefore threatens to undermine the ability of businesses to enforce intellectual property rights and settle disputes.

A. The Benefits of Intellectual Property, Enforcement, and Settlement of Intellectual Property Disputes

Although the Commission's decision addresses only intellectual property *settlements*, its attack on such settlements threatens to harm intellectual property rights themselves. If the antitrust risk associated with settling an intellectual property dispute is too high, too uncertain, or too arbitrary, then parties will not seek to enforce intellectual property. And, if parties cannot enforce intellectual property, then that property is devalued. That is exactly the risk created by the Commission's decision here.

i. Intellectual Property Rights—Including Trademarks—Are Procompetitive and Critical To Business

Intellectual property rights—including trademark rights—are critical to American and international businesses and are generally procompetitive. "National protection of trademarks is desirable," the Supreme Court has explained, "because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Matal v. Tam*, 137 S. Ct. 1744, 1752

(2017) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 531 (1987)); *see also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) ("The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers."); *Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 322 (8th Cir. 2018) (discussing "the procompetitive purposes of trademark law"); *Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co.*, 963 F.2d 628, 640 n.13 (3d Cir. 1992) ("one of the goals of trademark law is to promote competition"; "protecting trademarks may have procompetitive effects"); *see also generally* Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Strong Patent Rights, Strong Economy: "Markets, Government, and the Common Good," Hillsdale College Free Market Forum (Oct. 13, 2017)[2] ("[S]trong intellectual property rights promote a vibrant economy by encouraging innovation.").

The Second Circuit likewise has made clear that "trademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion" and that such a result is "procompetitive." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir.

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[2] https://www.ftc.gov/system/files/documents/public_statements/1264483/ohlhausen_-_hillsdale_speech_10-13-17.pdf.

1997); *see also, e.g.*, *Merchant & Evans*, 963 F.2d at 639 ("even a successful invocation of trademark protection need not produce a monopoly" because trademark enforcement only requires that the conduct causing confusion cease). For this reason, trademarks are protected under both Congressional statutes and international treaties. *See* 15 U.S.C. §§ 1051–1127 (2018) (Lanham Act); Agreement on Trade-Related Aspects of International Property Rights, art. 41, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) (hereinafter "TRIPS Agreement").[3]

ii. Because Rights That Cannot Be Enforced Are Worth Little, Enforcement of Intellectual Property Rights Is Part and Parcel of Intellectual Property Itself

Due to their non-rivalrous nature, intellectual property rights are not self-executing and are therefore meaningless if they cannot be enforced through the judicial system—or at least the threat of the resort to a judicial system. *See, e.g.*, *NTP, Inc. v. Research in Motion, Ltd.*, 397 F. Supp. 2d 785, 788 (E.D. Va. 2005). Intellectual property enforcement is therefore best understood as an integral part of the intellectual property right itself.

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[3] The Commission attacks trademark rights in this case as having resulted in higher prices. *In the Matter of 1-800 Contacts, Inc.*, 2018 FTC LEXIS 184, at *138–41 (F.T.C. Nov. 7, 2018). The ability to charge higher prices is exactly one of the key reasons why businesses invest in intellectual property. *See Actavis*, 570 U.S. at 147; *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 896–97 (2007); *United States v. Am. Express Co.*, 838 F.3d 179, 204–05 (2d Cir. 2016).

iii. Because Few Intellectual Property Owners Can Afford to Fully Litigate Every Infringement of Their Rights, Settlement of Intellectual Property Disputes Is Part and Parcel of the Enforcement of Intellectual Property Rights

Moreover, intellectual property enforcement is itself a meaningless right without the right and the ability to settle, because few intellectual property owners have the ability to fully litigate every infringement. Thus, most intellectual property disputes settle—either before they reach a court, or during the litigation process. *See, e.g.*, William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 HOUS. L. REV. 749, 775 (2004) ("[T]he number of intellectual property trials has fallen sharply as a percentage of intellectual property cases terminated from roughly 3.5% to 1.5% in the 1978 to 2000 period.").

The ability to settle intellectual property disputes has long been recognized as beneficial not only to the particular litigants, but also to consumers and the judicial system. *See, e.g.*, *Actavis*, 570 U.S. at 146 (acknowledging "public policy favoring settlement of disputes"); *id.* at 154 ("We recognize the value of settlements . . . ."); Brief for the United States as Amicus Curiae at 17, *Andrx Pharms. Inc. v. Kroger Co.*, 543 U.S. 939 (2004) (No. 03-779) (patent settlements may "facilitate innovation and investment in the patented technology by eliminating litigation risks and providing certainty over patent rights") (internal quotations omitted); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 305 (1986) ("general policy in favor of settlements"); *Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910)

("Compromises of disputed claims are favored by the courts . . . and, presumptively, the parties to the compromise in question possessed the right to thus adjust their differences."); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898) ("[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."); *accord Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) ("Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute."); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting the "paramount policy of encouraging settlements"); Saul Morgenstern & Adam Pergament, *The Rule of Reason in the Post-Actavis World: Commentary*, 18 COLUM. BUS. L. REV. 45, 56 (2018) ("The settlement of bona fide patent litigation is both lawful and procompetitive . . . . It saves the parties money, business time, and the distraction of litigation.").

Such settlements are valuable primarily because they avoid substantial litigation costs not only to the courts (and thus taxpayers) but also to the parties. While the direct costs of such litigation can be relatively straightforward, such as the cost of paying attorneys and experts, *see, e.g.*, *Actavis*, 570 U.S. at 170 (Roberts, J., dissenting) (estimating direct costs for patent litigation at $10 million per suit), the indirect costs can be greater. One study concluded that a litigation between Texaco and Pennzoil reduced the overall value of the two companies by about $2 billion, due in large part to indirect litigation costs. David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence From the Texaco-Pennzoil Litigation* 1-2, 13 (Nat'l Bureau of Econ. Research, Working Paper No. 2418, 1987). The study concluded that, even making generous allowances for the direct costs of paying lawyers, "we are unable to account for a large fraction of the loss in combined value. It appears that there have been additional costs to Texaco's shareholders from disruptions in Texaco's operations, difficulties in obtaining credit, incentive problems created by fears that Texaco would cease operations, and distraction of top management." *Id.* at 1-2; *see also id.* at 16 ("[L]itigation can often be an extraordinarily inefficient process eating up much of what is fought over."); Michaela Keet, Heather Heavin, & Shawna Sparrow, *Indirect and Invisible Organizational Costs: Making Informed Decisions about Litigation and Settlement*, 50 CARDOZO J. CONFLICT RESOL. 49, 51 (2018) ("[A] cost-benefit analysis of whether to litigate or settle must account for indirect organizational costs as well as direct legal expenses."). In short, if every intellectual property right must be litigated in order to be enforced, then not only would this be a burden on taxpayers, but companies would risk losing their businesses altogether due to the potentially crushing direct and indirect litigation costs.

Companies—and courts—thus recognize that settlement is often the better course, and that it may be preferable to enter even an otherwise unfavorable settlement to avoid the costs of litigating. *See, e.g.*, *Ironworkers Dist. Council v. Andreotti*, C.A. No. 9714-VCG, 2015 Del. Ch. LEXIS 135, at *80 (Del. Ch. Ct. May 8, 2015) (corporation could rightly consider time, expense, and business impact of litigation, including "significant distraction and impairment of morale for directors, officers, and employees of the Company"); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 81 (1991) ("[E]ven a bad settlement may be more advantageous in the long run than a good lawsuit."); *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., dissenting) (litigants must conduct "calculations as to whether litigation -- including the attorney's fees it entails -- represents a better investment than compromise and settlement or simply acceding to the opposing party's demands").

Settlements are therefore not just agreements between two parties. They are part and parcel of the enforcement of intellectual property rights granted by Congress and critical to the viability of those rights. A rule that subjects such settlements to undue, uncertain, and arbitrary risks therefore threatens to harm not just the settlement process but the value of intellectual property itself.

B. The Commission's Decision Ignored the Supreme Court's Limitations on Antitrust Scrutiny of Intellectual Property Enforcement and Settlements, and Instead Simply Assumed Away 1-800 Contacts' Trademark Rights

Against this backdrop, courts and agencies should tread lightly in condemning intellectual property settlements. The Commission did anything but tread lightly here; it created a new, untested, and unworkable rule that subjects intellectual property settlements to antitrust scrutiny on an arbitrary and unpredictable basis.

Intellectual property enforcement typically will not run afoul of the antitrust laws unless it is based on fraudulently-procured intellectual property or objectively baseless (i.e., "sham") claims. *See, e.g.*, *Walker Process*, 382 U.S. at 179 (Harlan, J., concurring) (fraud on the Patent & Trademark Office); *Prof'l Real Estate*, 508 U.S. at 60 (sham litigation). No one has suggested that the trademarks were fraudulent, and the Commission has admitted that the enforcement actions were brought in good faith. *Id*. Although whether the use of trademarks as internet search terms infringes those trademarks is a fact-specific question, the Commission does not claim that 1-800 Contacts' position was "objectively baseless" here. *In the Matter of 1-800 Contacts, Inc.*, 2018 FTC LEXIS 184, at *69 (F.T.C. Nov. 7, 2018). And, though the Commission sought to describe the settlements here as unusual, *see infra* § I(C), it does not claim that they contained anything that could be construed as a "reverse payment." In short, the trademarks were not fraudulent; the enforcement was not a sham; the settlements involved no reverse payment. There was thus no basis under the antitrust laws to infer that the settlements at issue here could be improper or would be subject to antitrust liability.

So, instead, the Commission did something remarkable to overcome 1-800 Contacts' trademark rights: It rejected 1-800 Contacts' position in the underlying trademark case, holding that the use of 1-800 Contacts' trademarks as paid internet search terms was mere "advertising" rather than infringing trademark use. *See 1-800 Contacts*, 2018 FTC LEXIS 184, at *63 ("Courts have long condemned advertising restrictions."); *id.* at *38–39 ("[T]he settlement agreements effectively shut off an entire--and very important--channel of advertising triggered by an alleged use of the trademark in the generation of search advertising."). On that basis, the Commission ignored the trademark rights that 1-800 Contacts otherwise would have had to preclude infringing use, and condemned the settlement agreements as if those trademark rights never existed.[4] *See id.* at *116-17 ("Respondent's justifications [based on trademark rights] must meet at least a minimum threshold of validity—more than merely surviving challenges as shams.").

The Commission's leap of logic here is unsupportable. In neither *Prof'l Real Estate* nor *Walker Process* was there any suggestion that the intellectual property rights or their enforcement must be meritorious to avoid antitrust liability. On the contrary, both cases held that antitrust liability is not created merely because a court or agency later disagrees with the position taken by a party. *Prof'l Real Estate*, 508 U.S. 49 at 64 (though copyright holder lost on summary judgment, claim was not a

[4] The Commission claims not to base its decision on the trademark merits, *1-800 Contacts*, 2018 FTC LEXIS at n. 27 ("our Opinion does not hinge on the merits of the trademark claim"), but there is no way to read the Commission's decision that would not depend on rejecting the existence of trademark rights here.

"sham"); *Walker Process Equip.*, 382 U.S. at 180 (Harlan, J., concurring) ("monopolies practiced under patents [] for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent," but that is not a sufficient basis for a fraud claim). *Actavis* likewise suggested that the anticompetitive effect of settlements would not typically depend on the intellectual property's merits. 570 U.S. at 154, 158. The idea that a court or regulatory agency can determine anticompetitive effect of intellectual property settlements based on its view of the merits of the intellectual property rights is therefore novel and remarkable.

Nor can the Commission offer any justification for an approach that assumes the trademarks were not infringed. To try to justify its approach, the Commission asserted that antitrust scrutiny was appropriate here because *Actavis* supposedly abolished the "scope of the patent test" (or, in this case, presumably the "scope of the trademark test") and, in doing so, eliminated "immunity" for intellectual property settlements. *1-800 Contacts*, 2018 FTC LEXIS, at *41. Initially, this is incorrect. *Actavis* rejected an absolute rule in which any form of agreement was permissible as long as within the scope of the intellectual property. It did not, as the Commission suggests, declare the scope of intellectual property rights irrelevant to an antitrust analysis. That *Actavis* applied the rule of reason is itself a reflection of the continued importance of such intellectual property rights. *See Actavis*, 570 U.S. at 159.

Moreover, the Commission's argument misses the point. Even assuming that settlements within the scope of the trademark rights can face antitrust scrutiny in some situations, and thus that the trademark does not create absolute "immunity," intellectual property rights are nonetheless granted by Congress and, as detailed above, are not typically subject to antitrust challenge absent other conduct. Thus, asking if the agreement is "immune" is the wrong question—the question, instead, is "on what basis can this exercise of a right granted by Congress be challenged?" Here, the Commission offers no basis other than that it arbitrarily disagrees with 1-800 Contacts' position regarding an allegedly-infringing use of its trademarks. *1-800 Contacts*, 2018 FTC LEXIS, at *110–18. This is not sufficient.

Ultimately, as Commissioner Phillips explained in his dissent in this case, the Commission's decision "create[s] uncertainty, dilute[s] trademark rights, and dampen[s] inter-brand competition." Dissent at 1–2, 10, 21. If an antitrust enforcer can seek to impose antitrust liability on intellectual property settlements simply by claiming that the plaintiff was wrong and the defendant was right, then no intellectual property settlement can provide certainty or finality. Instead, parties would fear that there might be subsequent antitrust liability depending on whether a later finder of fact agrees with the position taken by the intellectual property holder in the underlying dispute. If such uncertainty and potential antitrust liability becomes the new norm, then parties will have no incentive to settle these disputes and intellectual property will be devalued.

C. The Commission Ignored That the Settlements Took a Commonplace Form Designed to Permit Compromise, and under *Actavis* Should Thus Not Be Subject to Antitrust Scrutiny

The Commission's refusal to recognize forms of agreement not subject to antitrust scrutiny under *Actavis* further compounds the uncertainty.

In *Actavis*, the Supreme Court endorsed antitrust scrutiny of intellectual property settlements only in the case of "large," "unexplained," and "unjustified" reverse payment settlements. 570 U.S. at 147, 156–58. The Court limited antitrust scrutiny to such "unusual" settlements because settlements taking "commonplace forms have not been thought for that reason alone subject to antitrust liability." *Id.* at 152; *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 250 (3d Cir. 2017) (*Actavis* "exempted 'commonplace forms' of settlement from scrutiny."). *Actavis* further made clear that agreements that merely respect intellectual property rights, without more, raise no concerns—parties may compromise the difference between their positions, or one may accept the other side's position, without violating antitrust laws. *Actavis*, 570 U.S. at 158 (Companies "may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point."); *see also* Brief for Petitioner at 27, *FTC* *v. Actavis, Inc.*, 570 U.S. 136 (2013) (No. 12-00416) (no antitrust concerns when "an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled"). In light of these limitations, *Actavis* concluded that the rule it announced "does not prevent litigating parties from settling." *Actavis*, 570 U.S. at 158.

Such "commonplace" settlements include those in which the parties agree to the same relief (or a subset thereof) that would be available from the court if the case were fully litigated. In *Actavis* the Supreme Court held that traditional settlements included those in which "a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim." *Id.* at 152. It contrasted this against an "unusual" situation in which a "party with no claim" walks away with something it could not have obtained through litigation—a large, unexplained reverse payment. *Id.* The difference, then, is that in at least one form of traditional settlement, the litigants receive some or all of what they might expect to receive from the litigation, i.e., something the court might order. *See id.*

The Commission appears to acknowledge that 1-800 Contacts' settlements take a "commonplace form," and indeed merely reflect the relief that could have been obtained from courts after final resolution of the disputes. *See 1-800 Contacts*, 2018 FTC LEXIS 184, at *37, 77. The settlements "prohibit the parties from using the other party's trademarks, URLs, and variations of marks as search advertising keywords" and require the use of "negative" keywords, but "do not prohibit parties from bidding on generic keywords such as 'contacts' or 'contacts lens.'" *Id.* at *23. The Commission acknowledged that this was not only the type of relief typically available from a court, but indeed that at least one court had ordered such relief on behalf of 1-800 Contacts. *Id.* at *21 n.11 ("In litigation against LensWorld, the court entered a default judgment and an order that prohibited LensWorld from purchasing 1-800 Contacts' federally registered trademarks as keywords for search engine advertising and required LensWorld to implement certain negative keywords where possible."). Under *Actavis*, such commonplace forms of settlement should not be subject to antitrust scrutiny, much less antitrust liability.

In its decision, however, the Commission nonetheless refuses to acknowledge any such limitation on its ability to condemn "ordinary settlement practices." *Id.* at *42 ("*Actavis* stands for the possibility of antitrust liability, not for the foreclosure of antitrust review"); *id.* at *41 ("[T]he crux of the *Actavis* decision was that there could be antitrust liability for a settlement of non-sham litigation with anticompetitive effects within the scope of the patent's exclusionary potential."). On the contrary, the Commission argues that it is "irrelevant" whether the relief agreed upon under the settlements is the same relief that would be available from a court. *1-800 Contacts*, 2018 FTC LEXIS 184, at *40–41 (rejecting argument that "under *Actavis*, settlement agreements that provide the same relief a court could have ordered are commonplace vis-à-vis the asserted trademark rights and immune from antitrust scrutiny" because "the scope of plenary powers of courts should [not] determine the allowable extent of private agreements"). The Commission thus reads *Actavis* to open the floodgates to antitrust scrutiny and liability for all intellectual property settlements—including, as the present case illustrates, those that contain no alleged "reverse payment" and that instead take a form that the Commission agrees is commonplace. *See id.* at *37, 77; *supra* §I(B).

To justify this conclusion, the Commission argues that the "form" of the settlements does not protect them from condemnation, asserting that *Actavis* "made it clear that the form of the settlement *alone* is not what subjects an agreement to antitrust scrutiny." *Id.* at *35. The Commission's decision thereby ignores the Supreme Court's use of form as a screen to avoid improperly condemning procompetitive conduct. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, for example, the Court looked to the form of the refusal to deal to provide critical guidance regarding the potential reach of antitrust laws. *See* 540 U.S. 398, 409–10 (2004). Similarly, in *Brooke Group v. Brown & Williamson Tobacco Corp.*, the Court focused on the form of the pricing (i.e., above or below cost) to do the same in the context of predatory pricing. *See* 509 U.S. 209, 224 (1993). *Actavis* likewise contrasts "traditional," "familiar," and "commonplace forms" of settlement that "have not been thought for that reason alone subject to antitrust liability," against the unusual "forms" of settlement that might raise antitrust issues. 570 U.S. at 152; *id.* ("familiar settlement forms"); *id.* at 147–48 ("That form of settlement [i.e., containing a reverse payment] is unusual"; "there is reason for concern that settlements taking this form tend to have significant adverse effects on competition.").

By refusing to respect traditional, commonplace settlement forms, such as those that merely allow the parties to realize relief they could have obtained from a court through litigation, the Commission's decision creates further uncertainty. Under its decision, the Commission reserves the right to bring claims not only based on mere disagreement with a position taken in an intellectual property dispute, but to do so even if the resulting settlements are traditional, commonplace, and thus ordinarily outside the boundaries of antitrust scrutiny. Such a result will further devalue intellectual property rights and chill enforcement and settlements.

D. The Uncertainty Created by the Commission's Approach Is Magnified By Its Willingness to Bring Claims a Decade or More After Settlement Agreements Are Entered Into

The risks to intellectual property rights are further increased if the enforcement and settlement of those rights can be treated as an antitrust violation years after the fact. Imagine this: In 2004, a company enters an agreement with a competitor to resolve a trademark litigation. The fact that they settled is made publicly known via the court docket. At the time, this agreement was both perfectly reasonable and consistent with standard market practices. However, twelve years later, in 2016, the Commission asks the company to justify the 2004 agreement. The individuals involved may have moved on, retired, or even died. Those who remain have spent twelve years doing anything *other* than think about an agreement they entered into in 2004. Yet, the Commission maintains that the settlement was "inherently suspect" and that the burden should shift to the company to prove otherwise. How can the company defend itself?

This is exactly the situation in which 1-800 Contacts finds itself, and USCIB is concerned that its members may find themselves in similar situations. *See 1-800 Contacts*, 2018 FTC LEXIS 184, at *118. The Commission's use of a "continuing violation" theory, under which the potential for antitrust condemnation exists for as long as the would-be infringer refrains from infringing under the settlements, effectively removes a statute of limitations. As a result, the Commission is left free to bring claims not only arbitrarily but indefinitely, thus further increasing the uncertainty the Commission's decision creates regarding settlements.

* * *

The Commission's decision therefore creates substantial uncertainty regarding the enforcement and settlement of intellectual property rights, increases the risk of arbitrary enforcement against even routine settlements, and potentially exposes settlements to such risk for decades. The decision should be reversed.

II. The Commission Further Erred By Conditioning the Lawful Exercise of Intellectual Property Rights on the Owner's Ability to Show Benefits to Competition, and By Applying an Inherently Suspect Standard to the Exercise of Such Rights

The Commission compounded its error in subjecting these settlements to antitrust scrutiny here by also treating trademark rights as a mere procompetitive benefit—with the right for the Commission to then propose "less restrictive alternatives"—and by applying an overly-restrictive "inherently suspect" standard. These two additional errors in the Commission's approach further substantially devalue intellectual property rights.

A. Requiring Intellectual Property Enforcement to Be Affirmatively Procompetitive and Satisfy a "Less Restrictive Alternatives" Standard Substantially Devalues Intellectual Property Rights

As noted, the Commission inappropriately and retroactively decided that the intellectual property rights at issue were not actually infringed. *See supra* § I(B)(iii). Even where the Commission assumed *arguendo* that the intellectual property rights were infringed, however, it treated the enforcement of such rights as a mere "procompetitive benefit." *1-800 Contacts*, 2018 FTC LEXIS 184, at *42 (assuming only "*arguendo* that the settlement agreements' effects were within the scope of Respondent's enforceable trademark rights"); *id.* at 67 (listing "trademark protection" as a "justification"); *id.* at 74 (concluding that the agreements "are not reasonably necessary to protect 1-800 Contacts' trademarks"). On this basis, the Commission then rejected the importance of enforcing these trademark rights, erroneously finding that the benefits of such enforcement did not outweigh the supposed anticompetitive effects of the settlement agreements. *Id.* at 74.

Contrary to the Commission's approach, intellectual property rights are not a mere procompetitive benefit, existing only where they can be shown to further competition. They are *rights*, granted by Congress, treaties, and in some cases the United States Constitution. U.S. CONST. art. 1, § 8, cl. 8 ("The Congress shall have the Power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . ."); 15 U.S.C. §§ 1051–1127 (Lanham Act); TRIPS Agreement art. 41. Congress did not make the exercise of these rights conditional on first proving through litigation that, in any given situation, such an exercise would be procompetitive under the antitrust rule of reason. Rather, the owner of intellectual property may enforce it simply because the intellectual property rights include the right to enforce such rights against infringers. *See* 15 U.S.C. §§ 1051–1127 (permitting such enforcement of trademark rights); *cf. SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1204 (2d Cir. 1981) ("Simply stated, a patent holder is permitted to maintain his patent monopoly through conduct permissible under the patent laws.").

The Commission's decision, however, turns this on its head, requiring an intellectual property owner to justify the exercise of its rights. In doing so, the Commission undermines intellectual property rights substantially and invites endless litigation on the enforcement of intellectual property rights. Consider, for example, a patent covering an invention. For a period of 20 years the patentee can legitimately exclude others from making the same invention. Although in the short term this creates a period of exclusivity, and thus of decreased competition, the patent laws reflect Congress's judgment that over the long term the innovation incentives such exclusivity creates will benefit consumers. *Actavis*, 570 U.S. at 174 (Roberts, J., dissenting) ("[P]atent policy encompasses a set of judgments about the proper tradeoff between competition and the incentive to innovate over the *long* run.") (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust §7.3 (2d ed. 2003)). However, a plaintiff comes forward, claiming that in this case the invention is not sufficiently innovative to justify 20 years of exclusivity—and therefore that it is anticompetitive for the patent holder to continue to enforce it. Such a result would be absolutely antithetical to not just the antitrust laws but to the most basic ideas of intellectual property. *See Professional Real Estate*, 508 U.S. 49 at 64 (rejecting such an approach to patent rights); *Walker Process Equip.*, 382 U.S. at 180 (Harlan, J., concurring) (same).

Yet, that is exactly what the Commission proposes: To put intellectual property rights into, at best, the rule of reason (and, here, an even stricter "inherently suspect" standard akin to *per se* scrutiny) and allow the enforcement of such rights, including through settlements, only if the rights can be shown to be more procompetitive than anticompetitive. Such an approach abridges the very grant of intellectual property rights Congress provided.[5]

It gets still worse. Having mistaken intellectual property rights for a mere procompetitive benefit, the Commission further concluded that the enforcement of such rights must be accomplished through the least restrictive means available. *1-800 Contacts*, 2018 FTC LEXIS at *79–81. This rule both undermines intellectual property rights and invites constant litigation. *See Am. Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1249 (3d Cir. 1975) (businesses are not "guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question which would result in a somewhat lesser restriction of trade").

Property owners, intellectual or otherwise, typically are not required to enforce the ownership of their property in the "least restrictive" way from a competition standpoint, and a trademark owner should not have to choose the form of trademark enforcement that will permit the maximum amount of competition while still preserving the benefits of the trademark. *See Trinko*, 540 U.S. at 415–16 (antitrust laws do not "give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater

[5] Nor is it any answer to say that the Commission is weighing the *agreement* rather than the intellectual property right itself. As shown above, settlement of an enforcement action is part and parcel of enforcement, and enforcement is part and parcel of the intellectual property right. *See supra* § I(A).

competition"); *cf. King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 409 (3d Cir. 2015) ("*Actavis* does not stand for the proposition that parties must reach the most procompetitive settlements possible."). Rather, the trademark owner generally may exercise its trademark as it chooses, including by not using it. *See Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 425, 429 (1908) (owner of intellectual property is "'neither bound to use his discovery himself or permit others to use it.'") (citations omitted).

Under the Commission's decision, then, companies may enforce their intellectual property rights only if they can show that doing so is procompetitive, and only if there is no less restrictive alternative. By applying this standard, the Commission improperly inserts itself into lawful business settlements, and in the process substantially devalues intellectual property rights.

B. Applying an "Inherently Suspect" Standard to Intellectual Property Enforcement and Settlements Ignores the Intellectual Property Rights Granted by Congress

The harm associated with treating intellectual property rights as a mere procompetitive benefit is further exacerbated by applying an "inherently suspect" test that may then in many cases ignore procompetitive benefits, such as, presumably, the very fact that there is an intellectual property right in the first place.

Notably, in finding that "unusual" reverse payment settlements were subject to antitrust scrutiny, the *Actavis* Court rejected an approach that would condemn such settlement agreements on a *per se* or quick look basis. *Actavis*, 570 U.S. at 159; *see also California Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999). Instead, the *Actavis* Court—over the Commission's objections—recognized that the settlement process is sufficiently complex that a full rule of reason inquiry should apply. *Actavis*, 570 U.S. at 159. However, the Commission ignores this guidance here, even though trademark enforcement presents an even lower potential for competitive concerns than the patent enforcement at issue in *Actavis*. *1-800 Contacts*, 2018 FTC LEXIS at *47–50.

The Commission's justification for doing so is not reasonable. The Commission argues that 1-800 Contacts' trademark rights do not apply, and thus that the settlements created a naked restraint on advertising. *See supra* § I(B); *1-800 Contacts*, 2018 FTC LEXIS at *57–65. If the Commission's approach had been applied in *Actavis*, however, and the patent rights in that case had been similarly ignored, then even the agreements the Court upheld as lawful and not subject to antitrust scrutiny—*e.g.*, those involving only an entry date settlement somewhere between the parties' respective litigation positions—would instead be improperly treated as *per se* violations of the antitrust laws, because they could be said to somehow divide the market. *See Actavis*, 570 U.S. at 158. In *Actavis* there is no such suggestion, however, *because there is a patent*, and the rights associated with that patent must be respected absent some suggestion (based on a large, unexplained payment) that the agreement was somehow improper relative to that patent.

Here, there is a trademark—and the Commission inappropriately disregarded 1-800 Contacts' trademark rights by applying an inherently suspect standard that could only apply in the absence of such rights. This approach, particularly combined with the approach of treating intellectual property rights as a mere "procompetitive benefit," risks significantly devaluing intellectual property rights. USCIB urges the Court to reverse the Commission's decision for this additional reason.

III. The Commission's Approach Would Permit the Commission to Arbitrarily Challenge Intellectual Property Settlements

Under the Commission's decision, intellectual property settlements can be challenged whenever, in the Commission's arbitrary judgment, the intellectual property rights are somehow insufficient. *1-800 Contacts*, 2018 FTC LEXIS, at *116 (arguing that intellectual property is insufficient when it fails to meet an unexplained "minimum threshold of validity"). Moreover, to survive antitrust scrutiny under this decision, intellectual property enforcement must be shown to be sufficiently procompetitive, and not achievable through any less restrictive means. *Id.* at *74–81. This test is so malleable and arbitrary that the Commission can likely challenge any intellectual property settlements it chooses, and impose whatever alternative form of settlement it wishes. Thus, the Commission effectively is seeking to set itself up to oversee intellectual property settlements on an *ad hoc* basis—a position Congress has not entrusted to the Commission. The Commission's decision therefore poses a risk to not just intellectual property settlements, but to the development, maintenance, and lawful enforcement of intellectual property rights.

CONCLUSION

In light of the errors in the Commission's decision highlighted in this brief, and the grave consequences it presents to American and international businesses and the intellectual property system as a whole, USCIB urges the Court to reverse the Commission's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2019, a true and correct copy of the foregoing Brief was served upon all counsel of record via ECF pursuant to Local Rule 25.1(h).

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