

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES



In the Matter of

1-800 CONTACTS, INC.,
a corporation,

Respondent.

Docket No. 9372

RESPONDENT 1-800 CONTACTS, INC.'S TRIAL BRIEF
REGARDING ANTICIPATED OBJECTIONS
TO THE TESTIMONY OF DR. SUSAN ATHEY

I. INTRODUCTION

Today, Complaint Counsel served Respondent 1-800 Contacts, Inc. ("1-800 Contacts") with 94 pages of demonstratives that are intended to be used by one of Complaint Counsel's economists, Prof. Susan Athey, during her trial testimony on April 18, 2017. Based on the demonstratives, 1-800 Contacts anticipates that Professor Athey's testimony will likely include a lengthy summary of testimony and documents that are already in the record. Because experts are routinely barred from synthesizing record evidence and presenting it as expert testimony, and because the rules applicable to this proceeding make it clear that testimony "may be excluded" if it would involve a "needless presentation of cumulative evidence," C.F.R. § 3.43(b), 1-800 Contacts will and does object to such testimony.

II. ARGUMENT

A. Professor Athey Should Be Precluded From Summarizing The Record Evidence In Her Direct Examination

It is well settled that “a party may not filter fact evidence and testimony through his expert merely to lend credence to the same, nor may expert testimony be used merely to repeat or summarize what the [trier of fact] independently has the ability to understand.” *Kia v. Imagine Scis. Int’l Inc.*, No. 08-5611, 2010 WL 3431745, at *5 (E.D. Pa. Aug. 30, 2010); *Robroy Industries-Texas, LLC v. Thomas & Betts Corporation*, Case No. 2:15-CV-215-WCB, 2017 WL 1319553, *9 (E.D. Tex. Apr. 10, 2017) (an “expert witness may not simply summarize the out-of-court statements of others as his testimony”) (citations omitted).

For these reasons, courts regularly exclude expert testimony that restates the proffering party’s positions by regurgitating or summarizing exhibits and deposition testimony. *See Modica v. Maple Meadows Homeowners Ass’n*, 2014 WL 1663150, *1 n. 3 (E.D. Pa. Apr. 2, 2014) (finding expert testimony inadmissible because significant portion summarizes deposition testimony); *Robroy Indus.*, 2017 WL 1319553, *10 (excluding testimony of expert economist on issue of causation in unfamiliar industry “because it simply parrots deposition evidence and exhibits produced during the pretrial process”); *Orthoflex, Inc. v. ThermoTek, Inc.*, 986 F. Supp. 2d 776, 798 (N.D. Tex. 2013) (“Nor is it acceptable for a party to call a witness who, after synthesizing the party’s trial arguments, presents them as expert opinions”).

The demonstrative material that Complaint Counsel propose to use in relation to Professor Athey’s anticipated testimony is replete with excerpts from record evidence and summaries of that evidence. The demonstratives include at least twenty-two pages of exhibits in

evidence;¹ eleven images of deposition transcript excerpts;² and in addition, seven slides that are merely lists of different pieces of evidence Professor Athey proposes to summarize.³ In sum, more than 40% of the anticipated demonstratives consist of Professor Athey synthesizing the evidence Complaint Counsel have assembled for their case, acting not as an expert but merely as a summary witness.⁴

Respondent does not dispute that Professor Athey may review record evidence and rely on it in forming her opinions. *Cf.* Fed. R. Evid. 703. However, because so many of her demonstratives consist of record evidence, Professor Athey seems poised to “become a vehicle through whom the party can summarize its case” in an attempt to confer the “imprimatur of the expert’s asserted ‘expertise’” regarding already-admitted evidence. *See Robroy Indus.*, 2017 WL 1319553, *10; *SAS Inst., Inc. v. World Programming Ltd.*, 125 F. Supp. 3d 579, 587 (E.D.N.C. 2015) (“Rule 702 does not grant an expert an unlimited license to testify in a manner that simply summarizes otherwise admissible evidence without some connection to the expert’s expertise”).

Professor Athey has not been qualified in this matter as an expert on the contact lens industry. As such, she should be limited to presenting her expert opinions crafted on the basis of her independent economic analysis, rather than spending the majority or even a substantial

¹ *E.g.* CCXD0003-014, -015, -020, -022, -027-29, -036, -041-42, -075-76, -078-81, -084-86, -088-90.

² *E.g. id.* at 008, -009, -016, -021, -023, -031, -032, -046, -082, -093, -094.

³ *E.g. id.* at 010 (summary of sources); -012 (summary of pricing evidence from the record); -018 (summary of product differentiation evidence from the record); -025 (summary of service differentiation evidence from the record); -034 (summary of consumer price knowledge evidence); -038 (summary of rival pricing evidence from the record); -044 (summary of record evidence of rivals interest in search bidding).

⁴ Exemplars of the slides in question are attached to this brief as Exhibit A. *See id.* at 014, -021, -022, -023.

amount of her testimony summarizing deposition testimony of fact witnesses and document exhibits available for the Court to review in its proper role as fact-finder.

III. CONCLUSION

Should Complaint Counsel seek to elicit the types of testimony that impermissibly summarize record evidence in this case, the Court should sustain 1-800 Contacts' objections.

DATED: April 17, 2017

Respectfully submitted,

/s/ Steven M. Perry

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EXHIBIT A



1-800 prices higher than online discounters



1-800 Overview

1-800 is the leading web and phone contact lens retailer with approximately \$380 million of sales, \$82 million of EBITDA and 3.3 million active customers. Founded in 1992, the Company went public in 1998 and was taken private by Fenway Partners in September 2007 for \$340 million (9.6x LTM adjusted EBITDA). 1-800 is headquartered in Salt Lake City, adjacent to its call center and nearby its distribution center. The Company carries over 60,000 SKUs and on a peak day ships more than 50,000 orders, with 75% of sales coming through its internet platform and 25% of sales through phone orders. 1-800's strategy is to deliver a best-in-class customer experience at a price point lower than independent eye care professionals, but higher than online discounters such as NVI's AC Lens division or Walgreens' Vision Direct subsidiary. 1-800 drives its 5x online RMS and high relative awareness through \$25 million to \$30 million of annual advertising spending, the bulk of which is apportioned to television spots. The

through phone orders. 1-800's strategy is to deliver a best-in-class customer experience at a price point lower than independent eye care professionals, but higher than online discounters such as NVI's AC Lens division or Walgreens' Vision Direct subsidiary. 1-800 drives its 5x online

Berkshire Partners Memo to Investment Staff (2012)



Contact lenses are a commodity



We're all about making it simple. That's one of the things that's driven our business. We sell a commodity that it's a mass produced product, a consumer can only buy one product. They have no ability to buy a different product. And the product we sell is the exact same product that you buy from any other retailer. And so the way that we differentiate ourselves and our business model is focused on a price lower than the doctors and exceptional service.`



*Deposition of Brian Bethers, CEO, 1-800 Contacts
January 20, 2017*



1-800 acknowledges lack of differentiation



From: Amber Powell
Sent: Tuesday, August 07, 2012 1:04 PM
To: Laura Schmidt; Rick Galan
Cc: Justin Olson
Subject: RE: just sayin...

Just brainstorming a little:

We DO actually have the lowest price on contacts - you just have to do a price match to get it. How can we leverage our trustworthy reputation (compared with other online sellers) along with price matching to carry people forward?

Tough challenge considering that we sell the exact same thing as everyone else.

the easiest thing to do...

The only other option I see is trying to convince customers that our existing prices are better than they really are or worth the cost. **Tough challenge considering that we sell the exact same thing as everyone else.** The insurance project

Internal email chain among 1-800 marketing staff, discussing the challenge of competing with lower-priced competitors in paid search (Aug. 7, 2012)



Contact lenses are a commodity

Q: "And the references contact lenses having a commodity-like nature. What does that refer to?"

A: "As soon as the doctor fits you for the particular contact lens, let's just say it's Accuvue [sic] Oasys, for example, that's the only thing you're allowed to buy...It's the same product wherever you buy it from, and in that sense, once you've been fit into a contact lens, it's very much a commodity."



*Deposition of Peter Clarkson, CEO, President, AC Lens
July 1, 2015*

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I filed **RESPONDENT 1-800 CONTACTS, INC.'S TRIAL BRIEF REGARDING ANTICIPATED OBJECTIONS TO THE TESTIMONY OF DR. SUSAN ATHEY** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

DATED: April 17, 2017

By: /s/ Eunice Ikemoto
Eunice Ikemoto

CERTIFICATE FOR ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

DATED: April 17, 2017

By: /s/ Steven M. Perry
Steven M. Perry
Attorney

Notice of Electronic Service

I hereby certify that on April 17, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Trial Brief Regarding Anticipated Objections to the Testimony of Dr. Susan Athey, with:

D. Michael Chappell
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Washington, DC, 20580

Donald Clark
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I hereby certify that on April 17, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Trial Brief Regarding Anticipated Objections to the Testimony of Dr. Susan Athey, upon:

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