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

ORIGINAL

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 IndustriesTexas, LLC v. Thomas & Betts Corporation*, Case No. 2017-215-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”).

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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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:

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The Honorable D. Michael Chappell
Administrative Law Judge
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DATED: April 17, 2017

By: /s/ Eunice Ikemoto
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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
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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:

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

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