PUBLIC

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

In the Matter of	)	
1-800 Contacts, Inc., a corporation,	)	DOCKET NO. 9372
Respondent.	)	

ORDER DENYING MOTION *IN LIMINE* TO PRECLUDE TESTIMONY OF DR. NEIL WIELOCH

I.

On March 22, 2017, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion *in Limine* to preclude Respondent 1-800 Contacts ("Respondent" or "1-800 Contacts") from calling Dr. Neil Wieloch as a fact witness at trial ("Motion"). Respondent filed an opposition to the Motion on March 28, 2017 ("Opposition"). On March 29, 2017, Complaint Counsel filed a Motion for Leave to File a Reply, together with its reply ("Reply"). Complaint Counsel's Motion for Leave to File a Reply is GRANTED. As explained below, the Motion is DENIED.

II.

Respondent's final witness list designates Dr. Wieloch, Respondent's Director of Marketing Strategy, as a fact witness expected to testify regarding:

> (1) Respondent's pricing strategies, and consumer's perceptions of these strategies; (2) consumer surveys conducted by Respondent regarding brand awareness, consumer perceptions, market competition, and customer buyer patterns; (3) the effect of the unilateral pricing policies of contact lens manufacturers on the retail market for contact lenses, including those policies['] effect on consumer perceptions; and (4) any other topics that were addressed in his deposition, or that are otherwise relevant to the allegations of Complaint Counsel's complaint, the proposed relief, or Respondent's defenses.

As set forth in *In re POM Wonderful LLC*, motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. Evidence should be excluded on a motion *in limine* only when the evidence is

clearly inadmissible on all potential grounds. 2011 FTC LEXIS 79, at *6-8 (May 6, 2011) (citations omitted).

In the instant case, Complaint Counsel does not assert any evidentiary basis for excluding Dr. Wieloch's testimony, such as relevance. Instead, as further detailed below, Complaint Counsel argues that any testimony from Dr. Wieloch should be precluded as a consequence for Respondent's alleged failure to provide Complaint Counsel adequate notice that it might call Dr. Wieloch as a fact witness, in order to avoid prejudice.

III.

Complaint Counsel cites paragraph 15 of the Scheduling Order, which precludes a party from including a witness on the party's final witness list that was not included on the party's preliminary witness list, absent consent of the opposing party or an order of the Administrative Law Judge based on a showing of good cause. It is undisputed that Respondent did not name Dr. Wieloch in its initial disclosures or in its preliminary witness list. However, paragraph 15 provides an exception where the person included on the final witness list "was deposed after exchange of the preliminary witness lists." Scheduling Order, Sept. 7, 2016, Additional Provision 15.

Complaint Counsel acknowledges that Dr. Wieloch was deposed on January 18, 2017, after the exchange of the preliminary witness lists. Complaint Counsel argues, however, that Dr. Wieloch had been designated only as a corporate designee, as opposed to a fact witness, who would provide "supplemental" testimony on a single topic of Complaint Counsel's notice of deposition to 1-800 Contacts ("topic nine," addressed further below). Complaint Counsel further asserts it did not have adequate notice that Dr. Wieloch was a fact witness because Respondent did not identify Dr. Wieloch as a document custodian and did not produce documents from Dr. Wieloch's files. Furthermore, Complaint Counsel argues, a supplemental deposition of Dr. Wieloch would not be an adequate remedy for the alleged lack of notice because Dr. Wieloch's document files have not been produced and there is insufficient time to "digest them, to take any other fact discovery to address his deposition testimony, or to incorporate new discovery into expert reports." Motion at 9 n.4. Complaint Counsel contends that under the circumstances presented, it would be prejudicial to allow Respondent to call Dr. Wieloch at trial.

Respondent argues that Complaint Counsel's Motion is based on incorrect factual premises. Relying on a declaration and related documents, Respondent asserts that its document production included 39 documents from Dr. Wieloch's files, and that a cross-reference file provided to Complaint Counsel with the document production expressly named Dr. Wieloch as the documents' custodian. Respondent further asserts that Dr. Wieloch provided deposition testimony regarding topic nine, as well as additional testimony beyond the scope of topic nine, in his individual capacity, pursuant to an agreement of counsel made prior to the deposition.

In its Reply, Complaint Counsel argues that, regardless of whether Respondent produced some documents from Dr. Wieloch's files, Dr. Wieloch was not a named document custodian for purposes of Respondent's document search and collection efforts, and that Complaint Counsel has not received any "ordinary course" documents of Dr. Wieloch's, such as emails.

IV.

The record presented by the Parties shows the following:

Respondent produced documents to Complaint Counsel on November 21 and November 30, 2016 ("Document Production"). Declaration of Lisa Clark (attached to Opposition, hereafter "Clark Decl.") at ¶ 3. Included with each production of documents was a cross-reference file that disclosed, among other things, the custodian(s) of the documents produced. *Id.* ¶ 4. An excerpt from the cross-reference file submitted with the Clark Declaration shows that 39 documents attributed to Dr. Wieloch as document custodian were produced to Complaint Counsel in the Document Production. Clark Decl. ¶¶ 5, 7, 10-11 and Exhibit C.

On or about December 28, 2016, Complaint Counsel served a notice of deposition of 1-800 Contacts, specifying nine topics to be addressed. Motion Ex. A. On January 9, 2017, Respondent's counsel sent an email to Complaint Counsel ("January 9 email") regarding the deposition, scheduled for January 18, 2017. Motion Ex. F. Respondent's counsel referenced Complaint Counsel's "draft 3.33(c)(1) deposition notice," and stated that Respondent was designating two witnesses to testify who were not already scheduled to be deposed, Mr. Scott Osmond and Dr. Wieloch. Respondent's counsel advised Complaint Counsel that Mr. Osmond was designated to testify regarding topics four and nine, and Dr. Wieloch was designated as to topic nine. *Id.* Topic nine sought testimony regarding "[t]he effect of each Unilateral Pricing Policy ["UPP"] on 1-800 Contacts, including the effect on its retail prices, revenue, cost of goods sold, units sold, and EBITDA[[1]] for each of the past four years." Motion Ex. A at 2.

Respondent's counsel also stated in the January 9 email referenced above: "I expect you will depose [Mr. Osmond and Dr. Wieloch] in their individual capacities at the same time as you depose them as designees, and we plan to ask each of them some questions in their individual capacit[ies] as well as following up on the topic for which they are designated. . . . Once you decide whether to take them concurrently or consecutively, will you send out deposition notices for them?" Motion Ex. F. On January 10, 2017, Complaint Counsel replied to Respondent's counsel ("January 10 reply email") that Complaint Counsel "will plan to proceed as you have suggested. I agree that consecutively should work well . . . . We will send out deposition notices today or tomorrow." *Id.* On January 11, 2017, Complaint Counsel issued a notice of deposition naming nine individuals ("January 11 deposition notice"), including Mr. Osmond and Dr. Wieloch, "pursuant to Rule 3.33(a) and (c)(1)" of the FTC's rules of practice, which govern depositions of individuals and corporate designees, respectively. Motion Ex. G.

Dr. Wieloch testified at the deposition that he had been designated to answer questions on topic nine. Motion Ex. B (hereafter "Wieloch Dep.") at 14-15. Regarding his preparation for the deposition, Dr. Wieloch referred to two consumer surveys he conducted regarding UPPs. Wieloch Dep. at 16-21. When Dr. Wieloch testified that had no knowledge regarding the effect of UPP on EBITDA or the cost of goods sold, and could only speculate in that regard, Complaint Counsel objected. *Id.* at 22-23. Respondent's counsel responded that such financial information had been obtained from Mr. Osmond in his testimony that morning. Respondent's counsel

[1] "EBITDA" refers to earnings before interest, tax, depreciation and amortization.

explained that Dr. Wieloch was testifying "because he did some studies about the effect [of UPP] on 1-800 that is different from what you heard from Mr. Osmond this morning" and that, in that regard, Dr. Wieloch was "supplemental to Mr. Osmond." *Id.* Complaint Counsel posed a series of questions about Dr. Wieloch's surveys. *Id.* at 22-24. Complaint Counsel objected to Respondent's designating Dr. Wieloch as a witness for topic nine, asserting that he did not have any information on the effect of UPP on 1-800 Contacts, and concluded its direct questioning of Dr. Wieloch. *Id.* at 24.

At the conclusion of Complaint Counsel's questioning, Respondent proceeded to question Dr. Wieloch regarding his surveys on the impact of UPP on 1-800's customers, including customer and market awareness of UPP and perceptions of UPP on pricing. Wieloch Dep. at 25-35. Although Respondent's counsel did not bring copies of the surveys to the deposition, it is not disputed that the surveys had previously been produced to Complaint Counsel during discovery. Dr. Wieloch also testified regarding the surveys on issues other than those related to UPP. *Id.* After Respondent's counsel concluded his questioning, Complaint Counsel briefly cross-examined Dr. Wieloch. *Id.* at 35-36.

V.

Based on the foregoing, Complaint Counsel has failed to demonstrate that Dr. Wieloch should be precluded from testifying because of lack of adequate notice or prejudice. Although Respondent did not identify Dr. Wieloch as a fact witness on its preliminary witness list, Paragraph 15 of the Scheduling Order, upon which Complaint Counsel relies, does not bar calling such a witness provided the witness was deposed. Complaint Counsel's contention that Dr. Wieloch was produced for deposition only as a "supplemental" corporate designee, and not as a fact witness, is not supported by the record. As set forth above, Respondent's counsel told Complaint Counsel in the January 9 email that Dr. Wieloch was designated with respect to topic nine, and this was confirmed at the deposition. The reference to Dr. Wieloch's testimony being "supplemental," in context, appears to refer to the surveys of consumer perception of UPP as information that is supplemental to the financial information that Mr. Osmond had provided. Moreover, Dr. Wieloch provided testimony regarding surveys that he conducted on the effect of UPPs on the pricing perceptions of 1-800 Contacts' customers, the effect on customers who no longer purchased from 1-800 Contacts, and customer awareness of UPP.[2]

Furthermore, Respondent clearly notified Complaint Counsel in the January 9 email that Respondent's counsel planned to question both Dr. Wieloch and Mr. Osmond "in their individual capacity[ies]" at the corporate deposition and that he "expect[ed]" that Complaint Counsel would do the same. Complaint Counsel then confirmed in its January 10 reply email that it would question Dr. Wieloch and Mr. Osmond in their individual capacities consecutively with the corporate designee questioning, as suggested by Respondent's counsel. Complaint Counsel also confirmed in its January 10 reply email that Complaint Counsel intended to send out deposition

[2] Complaint Counsel's argument that Dr. Wieloch failed to provide testimony regarding topic nine is not supported by the deposition transcript. Topic nine sought testimony regarding the "effect [of UPPs] on 1-800 Contacts, *including* the effect on its retail prices, revenue, cost of goods sold, units sold, and EBITDA . . . ." (emphasis added). The effects of UPPs on 1-800 Contacts' customers constitute "effect[s] on 1-800 Contacts," albeit indirect effects, and such testimony is therefore within the broad scope of topic nine.

notices for these witnesses, and Complaint Counsel's January 11 deposition notice named Mr. Osmond and Dr. Wieloch, among others, as deponents pursuant to rules governing corporate designee depositions and depositions of individuals.[3]

Finally, the record shows that Complaint Counsel had the opportunity at the deposition to cross-examine Dr. Wieloch regarding his surveys and any other relevant topic. Even if Respondent did not fully search for and produce documents from Dr. Wieloch's files prior to Dr. Wieloch's deposition, it is undisputed that Complaint Counsel received relevant documents, and Complaint Counsel does not persuasively explain why, in the two months since the deposition, Complaint Counsel did not seek an extension or reopening of discovery to request a further search and production.

For all the foregoing reasons, Complaint Counsel's Motion to preclude Respondent from calling Dr. Wieloch as a fact witness is DENIED. This Order is not a determination as to the admissibility of any particular testimony that may be offered at trial.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 30, 2017

[3] Complaint Counsel asserts that it issued the January 11 deposition notice "after being informed that Dr. Wieloch would supplement Mr. Osmond's testimony on topic 9" (Motion at 8 n.3), implying that it relied on this representation in drafting the January 11 deposition notice. However, as noted above, the only reference to the alleged "supplemental" nature of Dr. Wieloch's testimony is in the January 18 deposition, which took place a week after the January 11 deposition notice. Based on the totality of the record, Complaint Counsel's assertion that the January 11 deposition notice combined 1-800's fact witnesses under Rule 3.33(a) with the corporate designees under 3.33(c)(1) only as "a matter of convenience," Motion at 8 n.3, is unpersuasive.