



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. DAVID S. EVANS

I. INTRODUCTION

Today, Complaint Counsel served Respondent 1-800 Contacts, Inc. (“1-800 Contacts”) with one hundred thirty-three (133) pages of demonstratives that are intended to be used by one of Complaint Counsel’s economists, Dr. David S. Evans, during his trial testimony on April 20, 2017. The demonstratives reveal that Dr. Evans’ testimony will be improper in several respects:

1. Dr. Evans plans to testify about 1-800 Contacts’ supposed “intent” or “purpose” in entering into the challenged settlement agreements;

[REDACTED]

[REDACTED]

[REDACTED]

3. Dr. Evans plans to testify about what whether Respondents’ experts dispute his opinions.

For the reasons that follow, 1-800 Contacts will and does object to such testimony as improper.

**II. ARGUMENT**

**A. Dr. Evans Should Be Precluded From Testifying About 1-800 Contacts’ Intent in Entering Into the Challenged Settlement Agreements**

Several of Complaint Counsel’s 133 demonstratives indicate that Dr. Evans intends to testify about 1-800 Contacts’ intent in entering into the challenged settlement agreements.<sup>1</sup> For example, according to CCXD0005-042, Dr. Evans plans to testify that “1-800 Contacts wanted to pay less for its brand-name keyword ads and reduce slots sold to competitors.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Such testimony is improper. Dr. Evans is not an expert on 1-800 Contacts’ intent or purpose and cannot testify to it. *See, e.g., Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 45 (S.D.N.Y. 2016) (“experts may not offer opinions regarding the intent or motive of parties as part of their analysis”); *Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F. Supp. 2d 1069, 1077-78 (D. Or. 2013) (“Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind”); *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (expert “could not testify *as an expert* that GM had a particular motive”).

Dr. Evans’ testimony on the “intent” issue consists entirely of summarizing record evidence already before the Court as fact-finder. Such expert testimony is improper and regularly excluded. *See, e.g., Robroy Industries-Texas, LLC v. Thomas & Betts Corporation*, Case No. 2:15-CV-215-WCB, 2017 WL 1319553, \*9-\*10 (E.D. Tex. Apr. 10, 2017) (Bryson,

<sup>1</sup> Examples of the demonstratives cited in this brief are attached hereto as Exhibit A.

Circuit Judge, sitting by designation) (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”); *Modica v. Maple Meadows Homeowners Ass’n*, 2014 WL 1663150, \*1 n. 3 (E.D. Pa. Apr. 2, 2014); *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”); *Kia v. Imaging. Scis. Int’l Inc*, No. 08-5611, 2010 WL 3431745, at \*5 (E.D. Pa. Aug. 30, 2010); 16 C.F.R. § 3.43(b) (“needless presentation of cumulative evidence” may be excluded).<sup>2</sup>

[REDACTED]

As Chief Trial Counsel told the Court: “the information from the Google AdWords Keyword Planner was never provided in any written document to complaint counsel. It was provided

<sup>2</sup> For the same reasons, Dr. Evans should not be able simply to quote documents or testimony on various other points, either. *See, e.g.*, CCXD0005-049 (quoting 1-800 Contacts e-mails); CCXD0005-106 (quoting deposition testimony).

orally over the phone from counsel for Walgreens to Complaint Counsel.” Rough Tr. 144:12-16, 145:3-5. [REDACTED]

[REDACTED] Complaint Counsel have not explained why the information was never written down and could only be transmitted through oral communications, first by outside counsel for a third party to Complaint Counsel, and then by Complaint Counsel to Dr. Evans or his assistants. Perhaps it was because *someone* in this unusual communication chain was concerned that the planned testimony by Dr. Evans could be undermined or disproven if the full set of inputs and outputs were memorialized in a writing and provided to Respondent.

The communications between counsel for Vision Direct and/or Walgreens and Complaint Counsel have never been fully disclosed to Respondent. Nor could Respondent discover Complaint Counsel’s communications with Dr. Evans in which they relayed the Keyword Planner estimates to him because, as Chief Trial Counsel told the Court, “communications between counsel and experts are not discoverable under the terms of the scheduling order in this case.” Rough Tr. 144:16-19; *see also* Scheduling Order, ¶ 19(g)(1). Thus, Respondent has had no means to test the accuracy or reliability of the estimates on which Dr. Evans is relying. Nor does Respondent know whether the Keyword Planner results contain information that could cast doubt on Dr. Evans’ reliance on the CTR estimates or his calculations based upon them.

Rule 3.43(b) is clear: “. . . unreliable evidence shall be excluded.” If Complaint Counsel wanted Dr. Evans to rely on results of the Keyword Planner exercise supposedly generated by Vision Direct or Walgreens, the proper course was to obtain the available written evidence that substantiates those results and the methodology involved and provide them to Respondent so that Respondent could have a fair opportunity to challenge them—just as Complaint Counsel did

with many other documents produced by third parties through subpoenas *duces tecum*. The proposed testimony is unreliable hearsay on top of hearsay and should be excluded.

**C. Dr. Evans Should Be Precluded From Testifying About Whether Respondent’s Experts Dispute His Opinions**

The demonstratives indicate that Dr. Evans intends to testify about whether Respondent’s experts dispute his opinions. Indeed, the Evans Demonstratives include some 13 slides (CCXD0005-064 through CCXD0005-076) with the heading “1-800 Contacts’ Experts Have Not Disputed Significant Analyses,” and excerpts of his rebuttal report in which he simply asserts that Respondent’s experts do not dispute various points. On the next slide, CCXD0005-077, Dr. Evans then identifies a list of what he calls “Disputed Topics.”

This is not expert testimony. Dr. Evans is not an expert on what in this case is disputed or undisputed. That is for the Court. Dr. Evans can testify about his own (otherwise proper) opinions in his rebuttal report about the opinions of Respondents’ experts. And Complaint Counsel can examine Respondent’s experts about whether they dispute Dr. Evans’ opinions. But Dr. Evans cannot speak for *Respondent’s* experts about whether they dispute his opinions.<sup>3</sup>

**III. CONCLUSION**

Respondent 1-800 Contacts respectfully requests that the Court sustain its objections to Dr. Evans’ demonstratives and testimony.

<sup>3</sup> Slide CCXD0005-063 is improper for similar reasons. It suggests that Dr. Evans plans to testify about what Professor Murphy supposedly “Does Not Know” based an excerpt of Professor Murphy’s deposition.

DATED: April 19, 2017

Respectfully submitted,

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***Counsel for Respondent 1-800 Contacts, Inc.***

# EXHIBIT A

# All Agreements Had Similar Requirements and Purpose

- Prohibited bidding on 1-800 Contacts brand name keywords
  - Blocked direct bid ads
- Required the use of negative keywords corresponding to 1-800 Contacts brand name keywords
  - Blocked matched ads
- Purpose: no competitive ads on queries with brand name terms



# Summary of Findings

- Bidding agreements = collusion = presumptively harmful
- 1-800 Contacts wanted to pay less for its brand-name keyword ads and reduce slots sold to competitors
- Bidding agreements significantly reduced price 1-800 Contacts paid in search auction
- Bidding agreements significantly reduced quantity of ad impressions sold by search engines
- Bidding agreements degraded quality of search engine products
- Bidding agreements harmed consumers by reducing value of search engine result pages

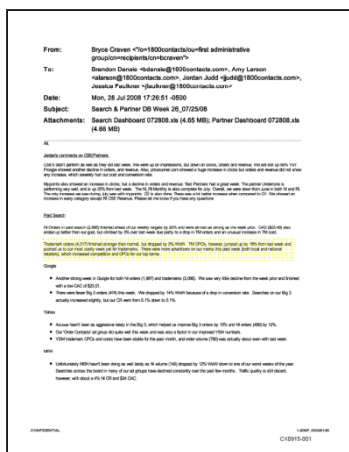


# Additional Evidence from Testimony of Executives

- Brian Bethers, CEO: “[I]f you have less competition in terms of trademarks, with Google, costs will be lower.”  
CX9001 (Bethers IH Tr.) 196:6-7.
- Laura Schmidt, Marketing Director: “There is less competitors showing up on our trademark keywords, and our spend – our costs for these terms went down.”  
CX9032 (L. Schmidt Depo Tr.) 188:2-4.
- Tim Roush, Chief Marketing Officer: “Another reason why I wouldn't want competitors to bid on our terms is that they would drive up our search costs... If more competitors were bidding on our term, then the costs would go up.”  
CX9034 (Roush Dep. Tr.) 60:15- 62:2.

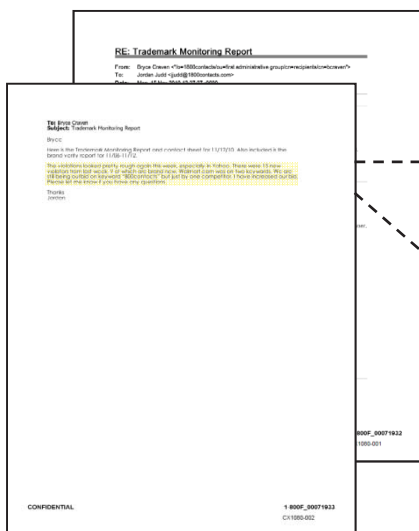
# Agreements Lowered Bid Volume, Cost Per Click Payments to Search Engines

- Jul. 28, 2008 email from Bryce Craven (1-800) to Brandon Dansie (1-800) (CX0915):



**“TM CPCs . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this past week (both local and national retailers), which increased competition and CPCs for our top terms.”**

- Nov. 12, 2010 email from Jordan Judd (1-800) to Bryce Craven (1-800) (CX1080):



**“We are still being outbid on keyword ‘800contacts’ but just by one competitor. I have increased the bid.”**

# Murphy Does Not Know When An Advertiser Broad Matches to a Query

*Murphy Dep. Tr. 105-107*

**Q. Is it correct that to measure or assess the effects of the agreement in this case you would want to consider the extent to which the agreements restricted ads that are coming up because of broad match?**

A. I think that is part of the story, that you can look at broad matches as well as direct matches when you have the data.

...

**Q. Which of your analyses did you use broad matched data?**

A. I think -- where do we use broad matched data?

I don't know if it is in any of the tables.

I know we have done stuff with the broad matched data.

I think -- there is not one that comes to my mind off the top of my head.

I know we have the broad matched data and -- now, the broad matches are in our other data, they are just organized by keyword that was bid on. They are organized by the word -- the key words that were bid on, not the queries that they were matched.

So it is not that there aren't broad matches in the other data, it is just they are associated with the key words that were bid on.

**Q. Can you give me an example of what you mean by that?**

A. I mean, like if somebody bid on contacts and showed up on a query on 1-800 Contacts that will show up as a transaction in our data, somebody pays the price, somebody either gets a click, somebody either gets a conversion, whatever it is, that will show up in that data.

Now, it won't be -- we won't know what the query was that generated that, we have it by keyword that they were bid on. That is what I mean.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:
  - a. The bidding agreements precluded the rivals from bidding on 1-800 Contacts BKWs and buying “direct bid ads” from search engines. They also require the rivals to submit negative keywords to the search engines to prevent the search engines from showing “matched ads.”

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

b. Based on a detailed analysis of data, 12 of the 14 firms that entered into bidding agreements purchased direct bid or matched ads prior to their respective agreements and effectively stopped purchases after the agreements.



# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- c. 1-800 Contacts adopted a strategy to quickly shut down the purchase of direct bid and matched ads by significant rivals and entered into bidding agreements with most of its significant rivals by 2005, based on a review of 1-800 Contacts documents and an empirical analysis of search engine data.



# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- d. The bidding agreements prevented 1-800 Contacts' rivals from participating in search auctions for more than 34 million Google queries on 1-800 Contacts BKWs between January 2010 and June 2015 and from presenting direct bid and matched ads to consumers who made those queries.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- e. The bidding agreements reduced the number of firms competing for scarce ad slots on search engine results pages (SERPs) for queries on BKWs subject to the agreements, based on the terms of the agreements and the empirically observed behavior of the firms prior to the agreement.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

f. Based on an empirical analysis of bid prices, statements by 1-800 Contacts, deposition testimony, and the trade literature on search-engine auctions, the reduction in competition for scarce ad slots resulted in 1-800 Contacts paying significantly lower prices in auctions related to 1-800 Contacts BKWs, restricted the number of ads that search engines could sell, and impaired the ability of the search engines to provide valuable ads to consumers.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- g. Peer-reviewed economic studies find that restrictions preventing competitors from presenting informative advertising result in higher prices for advertised products and harm consumers.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- h. 1-800 Contacts has adopted a pricing strategy in which its prices are significantly higher than those of other online contacts lens retailers; consumers significantly underestimate 1-800 Contacts' price premium; when consumers choose to purchase from lower-priced online retailers, they seldom return to 1-800 Contacts; and 1-800 Contacts recognizes that when it can avoid competitive advertising it has a greater chance of preventing the diversion to lower-priced rivals. These findings are based on a review of documents and deposition testimony.



# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- i. Online contact lens retailers who entered into the bidding agreements viewed direct bid or matched ads as competitively significant, based on deposition testimony and the observed behavior of the firms.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- j. Based on an analysis of the available data, Memorial Eye provides the best historical data for assessing the competitive impact of the bidding agreements on competition because it is the only firm for which there is a long enough period of time to evaluate the impact of the restrictions, and the only firm for which there is data on the extended use of matched ads prior to entering into the bidding agreement.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

- k. Google matched ads for Memorial Eye following queries for 1-800 Contacts BKWs got 49.5 percent as many Google ad impressions as 1-800 Contacts itself got from Google paid search advertising on its own BKWs. These ads accounted for 46 percent of Memorial Eye's Google search ad sales in 2010-2011.



# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

5. The experts for 1-800 Contacts do not consider, or rebut, substantial portions of my economic analysis and evidence including the following:

...

1. 1-800 Contacts responded competitively to rival firms that showed up in direct bid or matched ads on its SERPs by offering lower prices.

# 1-800 Contacts' Experts Have Not Disputed Significant Analyses

6. Findings 5(a)-5(f) demonstrate as an economic matter that the bidding agreements had a direct effect on competition in auctions for presenting ads on consumer queries regarding 1-800 Contacts BKWS. Findings 5(a)-5(l) demonstrate as an economic matter that the bidding agreements harmed competition for online retail sales of contact lenses and resulted in consumers paying higher prices.

# Disputed Topics

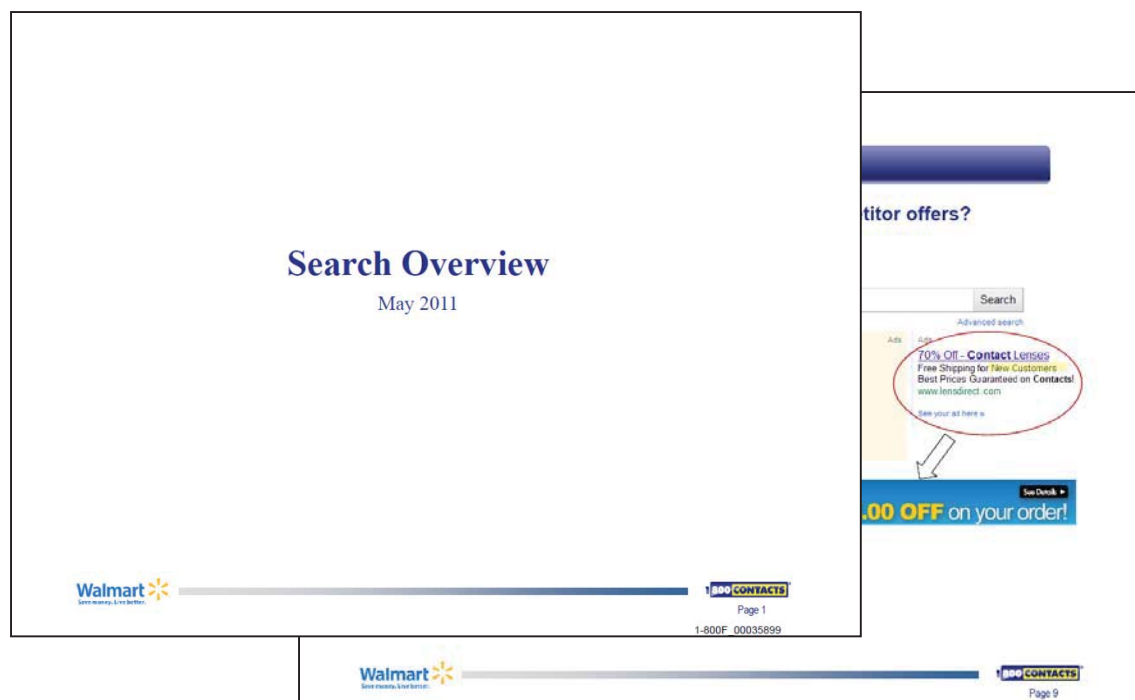
1. Relevant market
2. Market power
3. Impact/effect
4. Economic Model of Settlements
5. Efficiency justification

## **Record Evidence from 1-800 Contacts**

“Right now if someone types ‘1800Contacts’ and they go to paid search, for the most part they’re not exposed to competitors... And so in that instance also, they’re not exposed to competitive pricing.”

(CX9034 (Roush (1-800 Contacts) Dep. Tr.)  
173:15-21)

# 1-800 Was Concerned About Competition in 2011



1-800 Contacts, Search Overview, May 2011, CX0946-003

# 1-800 Was Concerned About Competition in 2011

## NI Search – Competitive Activity

Losing NI customers to aggressive competitor offers?

### Trademarked Searches

Google search for "1800contacts" showing results and ads. The search results include:

- 1800CONTACTS.com**: Free Shipping on Contact Lenses + Easy Ordering at 1-800 CONTACTS. [www.1800contacts.com](http://www.1800contacts.com)
- Easy Re-Order | Air Optix Contact Lenses | Acuvue Contact Lenses | Focus Contact Lenses
- Discount Contact Lenses - Save Up To 70% On Contact Lenses.** Get Fast Service And Free Shipping! shipmycontacts.com is rated ★★★★★ (167 reviews) [www.shipmycontacts.com](http://www.shipmycontacts.com)

Ads include:

- 70% Off - Contact Lenses** Free Shipping for New Customers Best Prices Guaranteed on Contacts! [www.lensdirect.com](http://www.lensdirect.com)

Below the ads is a blue coupon banner: **FIRST TIME CUSTOMER COUPON: Get FREE SHIPPING & \$5.00 OFF on your order!**

- **LensDirect:** Free Shipping + Coupon + 70% Off
- **ShipMyContacts:** Aggressive "70% Off"



Note: Red circles in original 1-800 presentation.

# 1-800 Was Concerned About Competition in 2011

**From:** Brian Bethers  
**Sent:** Saturday, June 18, 2011 2:39 PM  
**To:** Jonathan C  
**Cc:** Joan Blackwood  
**Subject:** RE: Google searches for keywords

I have also attached a document that shows how our copy looks on search compared to our competitors. My point is that our copy isn't very compelling. We have competitors touting 70% off normal prices or 20% off for new customers. For individual products, they will always be able to quote a price lower than our price. This definitely impacts our conversion when we extend search out.

**From:** Joan Blackwood  
**Sent:** Sunday, June 19, 2011 1:17 PM  
**To:** Brian Bethers; Jonathan C  
**Subject:** RE: Google searches for keywords

In addition to Brian's points below – couple things we are doing:

- Testing some more aggressive search copy: we will be testing “we beat any price” – this was our number 1 producing search copy and we haven't been able to beat it. We haven't advertised this for the past few years as this program was turned off. Brian has given us permission to try it in search





**CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 2017, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
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Federal Trade Commission  
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Washington, DC 20580

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

I also certify that I served via electronic mail a copy of the foregoing document on:

Daniel Matheson, *dmatheson@ftc.gov*  
*BC-1040-1800-SearchAdTeam-DL@ftc.gov*

DATED: April 19, 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 19, 2017

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

Notice of Electronic Service

**I hereby certify that on April 27, 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. David S. Evans, with:**

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**I hereby certify that on April 27, 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. David S. Evans, upon:**

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