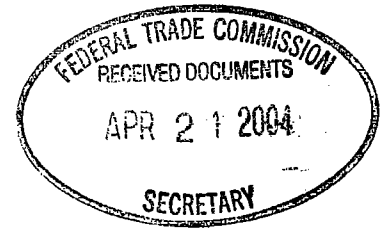


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

TELEBRANDS CORP.,)
TV SAVINGS, LLC, and)
AJIT KHUBANI,)
Respondents.)

Docket No. 9313

**ORDER ON COMPLAINT COUNSEL'S MOTION TO PARTIALLY
STRIKE RESPONDENTS' FINAL WITNESS LIST AND TO
PRECLUDE TESTIMONY OF DR. ERIC STERNLICHT**

I.

On March 31, 2004, Complaint Counsel filed a Motion to Partially Strike Respondents' Final Witness List and to Preclude Testimony of Dr. Eric Sternlicht at trial. On April 14, 2004, Respondents filed a Memorandum in Opposition to Complaint Counsel's Motion to Partially Strike Respondents' Final Witness List and to Preclude Testimony of Dr. Eric Sternlicht. On April 20, 2004, Complaint Counsel filed a Motion for Leave to File a Reply to Respondents' Opposition and on the same date filed its Reply. On April 20, 2004, Respondents filed an Opposition to Complaint Counsel's Reply.

Complaint Counsel's motion to file a reply is **GRANTED**. Complaint Counsel's motion to partially strike Respondents' final witness list is **DENIED** and Complaint Counsel's motion to preclude testimony of Dr. Eric Sternlicht is **GRANTED IN PART** and **DENIED IN PART**.

II.

Complaint Counsel's motion seeks an Order preventing Respondents from calling as a witness or otherwise presenting testimony at trial from Respondents' expert, Dr. Eric Sternlicht. Complaint Counsel contends that Sternlicht was not timely identified as an expert and that he is not a proper rebuttal witness.

Respondents assert that the identification of Sternlicht is timely. Respondents argue that Complaint Counsel's expert, Dr. Anthony Delitto, offered a new opinion during his deposition on

February 27, 2004 which went beyond the opinions provided in his original January 30, 2004 report. Respondents further assert that Complaint Counsel served a "Correction to the Record" on March 23, 2004, in which Delitto provided new opinions not previously disclosed. Respondents contend that Sternlicht's testimony is necessary to rebut or respond to Delitto's new opinions.

III.

Commission Rule 3.21 requires Administrative Law Judges to enter a scheduling order that "establishes a scheduling of proceedings, including a plan of discovery." 16 C.F.R. § 3.21(c)(1). Pursuant to 16 C.F.R. § 3.21(c)(1), Additional Provision Number Nine of the Scheduling Order, entered on November 5, 2003, states that "[t]he final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause." Under the Commission's Rules of Practice, the Administrative Law Judge may grant a motion to extend any deadline or time specified in the prehearing scheduling order "only upon a showing of good cause." 16 C.F.R. § 3.21(c)(2).

Respondents were required to provide their expert witness list on January 9, 2004. Respondents' January 9, 2004 expert witness list did not include Dr. Eric Sternlicht. Discovery closed on January 16, 2004. Pursuant to the First Revised Scheduling Order, entered on March 15, 2004, Respondents provided their final proposed witness list on March 29, 2004 and for the first time listed Sternlicht. Respondents did not file a motion to add witnesses, demonstrating good cause, as required by the Scheduling Order. Rather, in response to Complaint Counsel's motion to strike, Respondents argue that they have good cause for adding Sternlicht to respond to Dilotto's new opinions.

Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension. *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998); Fed. R. Civ. P. 16 Advisory Committee Notes (1983 amendment). If a delay is caused by an opposing party's conduct, good cause may be found. *See, e.g., In re Chicago Bridge & Iron Co.*, Docket 9300, 2002 FTC Lexis 69 (Oct. 23 2002).

In his January 30, 2004 report, Complaint Counsel's expert, Dr. Anthony Delitto, offers the opinions that: the use of Ab Force will not cause loss of inches, fat, and weight; the use of the Ab Force will not cause greater definition of the abdominal musculature; the Ab Force is not an effective alternative to volitional exercise; the evidence provided does not constitute a reasonable basis for these claims; and, the Ab Force device is not capable of producing a relaxing massage. Delitto report, ¶¶ 13-31. On February 27, 2004, at his deposition, Delitto initially stated that he did not have an opinion regarding whether the Ab Force was more or less effective for the improvement of abdominal muscle tone, strengthening of the abdominal muscles, or development of a firmer abdomen than the Slendertone Flex, an electronic muscle stimulation

("EMS") device approved by the FDA. Delitto deposition at 64-65. Delitto stated that he "really [can't] answer. . . because I don't know enough about the Slendertone." Delitto deposition at 65. On March 19, 2004, Delitto completed a two page Correction of the Record which discusses the pulse duration and phase duration of the Slendertone Flex and which concludes that he "estimate[s] that the phase charge of the Slendertone Flex is more likely to be ten times greater than the Ab Force." Delitto Correction at 2.

On March 29, 2004, Respondents listed Dr. Eric Sternlicht on their Final Witness List. On April 4, 2004, Dr. Sternlicht issued a "Rebuttal Declaration in Opposition to Motion for Summary Decision" which included opinions that the Ab Force can be used to tone, firm, and strengthen muscles; that the Ab Force is capable of producing a relaxing massage; that the Ab Force has the ability to promote active recovery of muscles after exercise; and that EMS devices like the Ab Force have other valid uses in addition to those detailed above. Sternlicht declaration at ¶¶ 20-47. The opinion that the Ab Force can be used to tone, firm, and strengthen muscles is based upon the mean voltages and mean currents of the Ab Force as compared to the Slendertone Flex. Sternlicht declaration at ¶¶ 20-25.

Upon review of the pleadings and attachments, it is clear that Delitto provided a new opinion in his March 19, 2004 correction. Respondents have thus demonstrated good cause for the limited purposes discussed below, for not identifying Sternlicht until March 29, 2004, ten days after receiving Delitto's correction. *See, In re Chicago Bridge & Iron Co.*, Docket 9300, 2002 FTC Lexis 69 (Oct. 23 2002); *In re Schering-Plough Corp.*, Docket 9297, 2001 WL 1589391 (November 28, 2001).

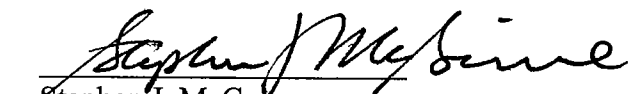
Accordingly, to the extent that Sternlicht's testimony is necessary to respond to opinions expressed by Delitto in his March 19, 2004 Correction to the Record that were not provided in his original January 30, 2004 report, Sternlicht will be permitted to testify. If Complaint Counsel chooses to present Delitto's opinion comparing the Ab Force with the Slendertone Flex, then Respondents will be permitted to present testimony from Sternlicht in response to that opinion. However, Sternlicht will not be allowed to testify in response to opinions found in Delitto's original, January 30, 2004 report.

IV.

For the above-stated reasons, Complaint Counsel's motion to partially strike Respondents' witness list is **DENIED** and Complaint Counsel's motion to preclude the testimony of Dr. Eric Sternlicht is **GRANTED IN PART** and **DENIED IN PART**.

Respondents will provide Complaint Counsel with Sternlicht's expert report no later than April 26, 2004. The parties have until April 29, 2004 to complete Sternlicht's deposition.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

April 21, 2004