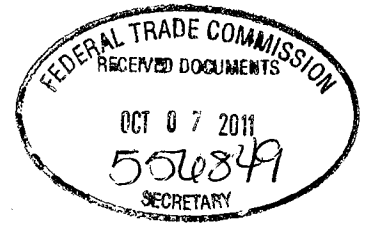


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
as successor in interest to)
Roll International Corporation,)
companies and)
)
)
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

Docket No. 9344
PUBLIC, NON CONFIDENTIAL

MOTION TO STRIKE THE BOVITZ SURVEY

Throughout this litigation Complaint Counsel has pointed to the so-called “Bovitz Survey” -- a study regarding billboards¹ -- in support of its contention that Respondents violated Section 5 of the FTC Act. *See* Tr. 43-45; PX0225; PX0236; CX0368; CX0369. Billboard advertisements do not contain the full text of the other advertisements that Respondents disseminate; they simply contain a headline and an image. The Bovitz Survey analyzed only billboards, which differ substantially from the full advertisements that Respondents have disseminated through other means. Yet, on September 2, 2011, during trial -- for the first time in this litigation -- Complaint Counsel stated that billboard advertisements, which do not contain the full text of ads, were not at issue in this case. Because the Bovitz Study analyzed billboards and did not analyze full advertisements, and because Complaint Counsel has now represented to

¹ The Bovitz Study analyzed billboard advertisements and other out-of-home advertisements, such as gym and subway posters. The content of the non-billboard out-of-home advertisements was the same as the depictions on the billboards. For the purposes of this motion, the term “billboards” or “billboard advertisements” encompasses all of the out-of-home advertising analyzed by Bovitz.

the Court that they are not attacking billboards, the Bovitz Survey is completely irrelevant and should be stricken from the record.

BACKGROUND

Since the inception of this action, Complaint Counsel have steadily increased the number of ads they are attacking in this case and have adamantly refused to reduce that list. Respondents have repeatedly asked -- both through formal discovery requests and in discussions with counsel -- that Complaint Counsel specify the advertisements that they allege violate the FTC Act. Notwithstanding these repeated requests, Complaint Counsel first took the position that they would provide "non-exhaustive" lists². In their supplementary interrogatory responses on March 11, 2011, and May 5, 2011, Complaint Counsel (after adding numerous additional allegedly improper ads to its previous Interrogatory responses), then announced that it would be "unduly burdensome" for it to further identify the representations it was challenging in the case, and even purported to reserve "the right to include on its trial exhibit list, and introduce, additional ads with the same or substantially similar text. . . ." *See* Exs. C and D. As Respondents' counsel has conveyed to Complaint Counsel on multiple occasions, Complaint Counsel's utter refusal to specify the ads at issue prejudiced Respondents' ability to prepare for trial and threatened to make the proceeding unmanageable.

Including the Bovitz Survey in the case is now a prime example of this prejudice. The Bovitz Survey, which is comprised of exhibits PX0225, PX0236, CX0368, and CX0369, is a

² *See, e.g.*, Complaint Counsel's Response to Respondent POM Wonderful LLC's First Set of Interrogatories at 3, dated Dec. 15, 2010, attached hereto as Exhibit A; Supplemental Responses to Interrogatories, dated Feb. 24, 2011 (same), attached hereto as Exhibit B; Supplemental Responses to Interrogatories, Mar. 11, 2011 ("Given the thousands of ads in various media disseminated by Respondents...it is unduly burdensome for Complaint Counsel to list every misrepresentation in every ad disseminated by Respondents, nor is it required."), attached hereto as Exhibit C; Supplemental Responses to Interrogatories, May 5, 2011 (same), attached hereto as Exhibit D.

survey of how people construed billboards, which contained only the picture and headlines from a few POM ads, without the accompanying text of the ads. In their opening statement, Complaint Counsel argued that the Bovitz Survey showed that 20% of the people who were shown the “Decompress ad” thought it referred to lowering blood pressure. Tr. 43-45. But, the Bovitz Survey did not deal with the full “Decompress ad,” which contains explanatory text making it clear that the advertisement was not about blood pressure. Instead, the Bovitz Survey reported regarding responders’ reaction to a billboard containing only the picture and headline from the “Decompress” advertisement without the explanatory text that makes clear the advertisement is not about blood pressure. Because the billboard for the “Decompress” advertisement did not contain the full text of the advertisement, the relevance of Bovitz Survey (which studied only billboards and not the complete ad) depended on Complaint Counsel’s attacking the billboards themselves.

On the assumption that Complaint Counsel was attacking the depictions on billboards (and having not been able to obtain from Complaint Counsel an exhaustive list of ads at issue), Respondents directed their expert to review and testify concerning this Survey. As that expert, Dr. Reibstein, testified, in fact the Bovitz Survey was fatally flawed and, in any event, the 20% figure used by Complaint Counsel was really only 5%. Tr. 2513:12-2515. During the cross-examination of Professor Reibstein, Complaint Counsel proclaimed, for the first time, that Complaint Counsel were not attacking respondents’ billboards³. Tr. 2540:19-20. Respondents’ counsel promptly objected that the Bovitz Survey should accordingly be stricken from the record, given that its only relevance was with regard to billboards, which, apparently, are not at

³ Because the billboards analyzed in the Bovitz study are the same in content as the other out-of-home advertising, Respondents understand Complaint Counsel’s representations to also mean that they are not attacking the other out-of-home advertisements analyzed by Bovitz.

issue in the case. See Tr. at 2573:12-17. The Court declined to rule on the objection at that time, indicating that to the extent that Complaint Counsel had not been clear as to which ads were at issue in the case the issue presented a “bigger problem” than could be addressed in a relevance objection. See Tr. 2576:13-15.

ARGUMENT

Commission Rule 3.43 mandates that “irrelevant, immaterial, and unreliable evidence shall be excluded” from evidence. 16 C.F.R. §3.43(b)(1). Indeed, it is a bedrock principle of litigation that irrelevant evidence that has no bearing on the underlying claims should be excluded. See, e.g., Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”); *Beatrice Foods Co. v. New England Printing and Lithographing Co.*, 899 F.2d 1171, 1173 (Fed. Cir. 1990) (“A trial judge has broad authority to manage the trial and exclude irrelevant evidence”); *Hennig v. Union Pacific R. Co.*, 530 F.3d 1206, 1219 (10th Cir. 2008) (“The district court was well within its discretion to exclude irrelevant evidence”).

The Bovitz Study should be stricken from the record because it is irrelevant and immaterial. The Bovitz Study only purports to show people’s interpretation of the billboards. Complaint Counsel has now stated that billboards are not at issue in this litigation. Complaint Counsel, thus, cannot attempt to establish liability using the Survey, which is extraneous material and analyzes billboards that are presumptively lawful and not challenged here.

Nor should Complaint Counsel be permitted to use the fact that they are challenging full ads as a backdoor way to introduce the Bovitz Survey into evidence. To the extent that Complaint Counsel continues to attack the full “Decompress” advertisement, which contains the accompanying text, making it clear that it is not about reducing blood pressure, such issues may be dealt with by testimony and evidence pertaining to the claims in that advertisement. But such

claims should not be analyzed with reference to the Bovitz Survey because the Survey analyzes only the billboards that omitted the critical text.

Respondents also note that they have been substantially prejudiced by Complaint Counsel's continued refusal to specify the ads at issue in this case. Respondents had to expend resources to produce an expert to refute the Bovitz Survey only to learn for the first time during trial that Complaint Counsel does not intend to attack the billboards.

Accordingly, the Bovitz Survey should no longer be in evidence or referenced in any way by Complaint Counsel. It should not have been in evidence or used in argument in the first place; and it should not be part of the record.

Dated: October 7, 2011

Respectfully submitted,

/s/ Skye Perryman

John D. Graubert
Skye L. Perryman
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
Telephone: 202.662.5938
Facsimile: 202.778.5938
E-mail: JGraubert@cov.com
SPerryman@cov.com

Kristina M. Diaz
ROLL LAW GROUP P.C.
11444 West Olympic Boulevard
10th Floor
Los Angeles, CA 90064
Telephone: 310.966.8775
E-mail: kdiaz@roll.com

Bertram Fields
GREENBERG, GLUSKER, LLP
1900 Avenue of the Stars
Los Angeles, CA 90067
Telephone: 310.201.7454
E-mail: bfields@ggfirm.com

Counsel for Respondents

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
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ROLL GLOBAL LLC,)
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STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

[DRAFT PROPOSED ORDER] GRANTING MOTION TO STRIKE

Having reviewed Respondents' motion and considered the reasons for this motion to strike, the motion is GRANTED.

ORDERED

Honorable D. Michael Chappell
Administrative Law Judge

Dated:

STATEMENT OF PARTIES REGARDING MEET AND CONFER

On October 4, 2011, Respondents' counsel contacted Complaint Counsel to seek consent to this motion. On October 6, 2011, Complaint Counsel informed Respondents' counsel that it would not consent to this motion.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)
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POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
as successor in interest to Roll)
International Corporation,)
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STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)

Docket No. 9344
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CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **MOTION TO STRIKE THE BOVITZ SURVEY**, and that on this 7th day of October, 2011, I caused the foregoing to be served by hand delivery and e-mail on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
H-159
Washington, DC 20580

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

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **MOTION TO STRIKE THE BOVITZ SURVEY**, and that on this 7th day of October, 2011, I caused the foregoing to be served by e-mail on the following:

Mary Engle
Associate Director for Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

Mary Johnson, Senior Counsel
Heather Hipsley
Tawana Davis
Federal Trade Commission
Bureau of Consumer Protection
601 New Jersey Avenue, NW
Washington, DC 20580

Counsel for Complainant

/s Skye Perryman

John D. Graubert
Skye L. Perryman
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
Telephone: 202.662.5938
Facsimile: 202.778.5938
E-mail: JGraubert@cov.com
SPerryman@cov.com

Kristina M. Diaz
Roll Law Group P.C.
11444 West Olympic Boulevard, 10th Floor
Los Angeles, CA 90064
Telephone: 310.966.8775
E-mail: kdiaz@roll.com

Bertram Fields
Greenberg Glusker
1900 Avenue of the Stars
21st Floor
Los Angeles, California 90067
Telephone: 310.201.7454

Counsel for Respondents

Dated: October 7, 2011

EXHIBIT A

REDACTED

EXHIBIT B

REDACTED

EXHIBIT C

REDACTED

EXHIBIT D

REDACTED