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

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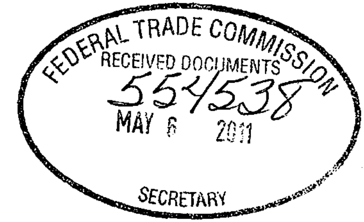


In the Matter of POM WONDERFUL LLC and ROLL GLOBAL LLC, as successor in interest to Roll International Corporation, companies, and STEWART A. RESNICK, LYNDA RAE RESNICK, and MATTHEW TUPPER, individually and as officers of the companies.	)	DOCKET NO. 9344

ORDER DENYING RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE POM ADVERTISEMENTS PUBLISHED PRIOR TO 2006

I.

This is an action for alleged deceptive advertising by Respondents, in violation of Sections 5 and 12 of the Federal Trade Commission Act. 15 U.S.C. §§ 45, 52 ("FTC Act"). The Complaint alleges that Respondents' advertisements (the "Challenged Advertisements") made false or misleading representations that Respondents' three pomegranate products, POM Wonderful 100% Pomegranate Juice, POMx Pill capsules, and POMx Liquid Concentrate (the "Challenged Products"), have been scientifically proven to prevent, reduce the risk of, treat, or otherwise be a benefit for conditions involving cardiovascular functioning, prostate cancer, and erectile dysfunction. Complaint ¶¶ 12-18. The Complaint also alleges that the Challenged Advertisements made unsubstantiated claims that the Challenged Products had the above-mentioned health benefits. Complaint ¶¶ 19-22. Respondents deny making any false or unsubstantiated claims. Answer ¶¶ 12-22.

On April 20, 2011, Respondents filed a Motion *in Limine* to exclude from evidence at the hearing in this matter, scheduled to commence May 24, 2011, Challenged Advertisements published prior to the year 2006 ("Motion"). Respondents state that pursuant to discovery in this matter, Complaint Counsel has identified six advertisements, dating prior to 2006, as containing express or implied misrepresentations upon which Complaint Counsel will rely to prove Respondents' alleged violations of the FTC Act. *See* Complaint Counsel's Second Supplemental Response to Respondents' Interrogatory

No. 1 (Exhibit A to Motion). Complaint Counsel filed an Opposition to the Motion on May 2, 2011 ("Opposition"), which attached the six pre-2006 advertisements upon which it intends to rely. *See* Opposition, Exhibit A, CX0016 (2003), CX0029 (2004), CX0031 (2004), CX0033 (2004), CX0034 (2005), CX0036 (2005) (hereafter, the "pre-2006 advertisements").[1]

After full consideration of the Motion and the Opposition, and as more fully set forth below, Respondents' Motion is DENIED.

II.

The admission of evidence is governed by Commission Rule 3.43, which states in part: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. §3.43(b)(l). Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 16 C.F.R. § 3.43(b)(l); *In Re Telebrands Corp.*, No. 9313, 2004 FTC LEXIS 270, at *2 (April 26, 2004).

Respondents argue that the pre-2006 advertisements are not sufficiently relevant, material or reliable to be admitted. Specifically, Respondents contend that the pre-2006 advertisements are too remote in time to be probative of whether Respondents are currently violating the law, or will violate the law in the future, for purposes of ordering injunctive relief. In addition, according to Respondents, pre-2006 advertisements constitute unreliable evidence because, due to the passage of time and changes in nutritional science, it can no longer be fairly determined whether the advertisements are false or unsubstantiated. Furthermore, Respondents contend that, assuming *arguendo* that pre-2006 advertisements make the same or similar representations as subsequently disseminated Challenged Advertisements, admission of the pre-2006 advertisements is needlessly cumulative and will only add length and complexity to an already lengthy and complex case.

Moreover, Respondents note that a three-year statute of limitations applies to violations for which civil penalties may be obtained, pursuant to Section 19 of the FTC Act. *See* 15 U.S.C. § 57b(d) ("No action may be brought by the Commission under this section more than 3 years after the . . . unfair or deceptive act or practice to which [a cease and desist order] relates . . ."). While Respondents' concede this limitation does not apply to an action for injunctive relief, such as the instant action, Respondents maintain that the same evidentiary principles disfavoring claims based upon remote acts should apply. Respondents further assert that despite the three-year statue of limitation on civil penalties, if the instant action leads to findings of liability with respect to pre-

[1] Although Complaint Counsel's final exhibit list appears to contain additional advertisements from the pre-2006 period, *see e.g.*, CX0030 and CX0032, Complaint Counsel states that, of the advertisements from pre-2006, it intends to introduce only those attached to Exhibit A to its Opposition.

2006 advertisements, Complaint Counsel may nevertheless attempt to obtain civil penalties based upon such findings, leading to future appellate disputes.

Complaint Counsel opposes the Motion, arguing that the pre-2006 advertisements are relevant, material and reliable, and are not cumulative. According to Complaint Counsel, the advertisements are probative of liability because they contain the types of health claims concerning heart disease that the Complaint contends are false or unsubstantiated. In addition, Complaint Counsel asserts, the pre-2006 advertisements will be shown to have been disseminated in similar publications to those dating from the post-2006 period. This proof, according to Complaint Counsel, shows Respondents' intent to target particular consumer segments, citing *In re Telebrands Corp.*, 140 F.T.C. 278, 433 (2004) ("While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made."). Complaint Counsel further asserts that the pre-2006 advertisements are relevant to the need for, and to the scope of, the injunctive relief sought in this case because, in conjunction with evidence of post-2006 advertisements, the pre-2006 advertisements demonstrate the "severity, intent, and duration of the Respondents' conduct in disseminating allegedly false or unsubstantiated health claims." Opposition at 7.

Complaint Counsel also disputes Respondents' claim that the pre-2006 advertisements are too remote in time to be reliable, arguing that whether an advertisement was properly substantiated is determined with reference to the substantiation the advertiser possessed at the time the claim was made. Thus, Complaint Counsel concludes, whether nutritional science has changed since the advertisements were disseminated, as urged by Respondents, is immaterial. Finally, Complaint Counsel asserts that the pre-2006 advertisements are not cumulative of subsequent advertisements making similar claims, but rather will assist in determining the overall net impression of all the advertisements at issue.

III.

"Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g.*, *In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).

Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, No. 96 C 1982, 1998 U.S. Dist. LEXIS 15431, at *6 (N.D. Ill. February 28,

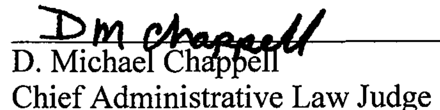
1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

Applying the foregoing principles, Respondents have not demonstrated that the six pre-2006 advertisements at issue are prejudicial or clearly inadmissible on all potential grounds, or that preclusion of the evidence, at this stage in the proceedings, is necessary to ensure evenhanded and expeditious management of the hearing. Accordingly, Respondents' Motion *in Limine* is DENIED.

IV.

Upon full consideration of the Motion and Complaint Counsel's Opposition thereto, Respondents' Motion *in Limine* to exclude from evidence at the hearing POM advertisements published prior to the year 2006 is DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of the pre-2006 advertisements that may be offered at the hearing.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 6, 2011