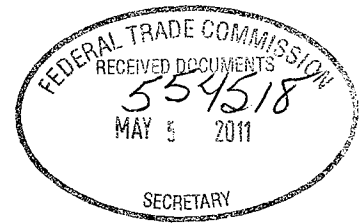


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



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
UNDISCLOSED OPINIONS OF COMPLAINT COUNSEL'S EXPERTS**

I.

On April 20, 2011, Respondents filed a Motion *in Limine* to exclude testimony by Complaint Counsel's experts on matters that were not disclosed in their expert reports, and, as to rebuttal opinions, matters that were not disclosed in the rebuttal report ("Motion"). Complaint Counsel filed an Opposition to the Motion on May 2, 2011.

Upon full consideration of the Motion and the Opposition thereto, and as further explained below, Respondents' Motion is DENIED.

II.

Respondents assert that at the depositions of Complaint Counsel's experts, Dr. Stampfer and Dr. Sacks, each expert indicated that his testimony might include opinions that were not stated in his report. Respondents infer from this testimony that Complaint Counsel is attempting to leave open the possibility of introducing additional, undisclosed expert opinions at trial. Respondents argue that under Commission Rule of Practice 3.31A and the Scheduling Order issued in this case, each expert report must contain "a complete statement of all opinions to be expressed and the basis and reasons therefor . . ." 16 C.F.R. § 3.31A(c); Scheduling Order, Additional Provision 16(c). Accordingly, Respondents conclude, an order *in limine* should issue precluding any of Complaint Counsel's experts from testifying to any opinions, on direct or in rebuttal, that

were not disclosed in that expert's report.

Complaint Counsel notes that Respondents do not challenge any specific testimony. Complaint Counsel does not deny the applicability of the general rule precluding the offering of new expert opinions at trial, but asserts that the rule is not intended to limit expert testimony to a line-by-line recitation of his report. For example, Complaint Counsel argues, an expert is permitted to explain or elaborate upon opinions expressed in his report, without violating the rule prohibiting new opinions. Complaint Counsel urges that the line between new opinions and explanatory opinions cannot be judged in the abstract, but only in the context of proffered testimony. Therefore, Complaint Counsel argues, Respondents' Motion should be denied.

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).

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).

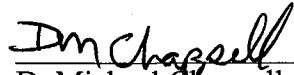
Applying the foregoing standards, there is insufficient basis for granting Respondents' Motion. Respondents do not point to any specific testimony to which their motion is directed; much less demonstrate that such testimony is "clearly inadmissible on all potential grounds." Whether or not an expert opinion amounts to an impermissible, undisclosed, "new" opinion cannot, and should not, be decided outside the context of trial. Rather, if and when Complaint Counsel attempts to elicit expert testimony which Respondents believe was not fairly disclosed, the proper procedure is to object at trial.

IV.

For all the foregoing reasons, Respondents' Motion *in Limine* to exclude testimony by Complaint Counsel's experts on matters that were not disclosed in their

expert reports, and, as to rebuttal opinions, matters that were not disclosed in the rebuttal report is DENIED. This Order shall not be construed as a ruling on the admissibility of expert testimony that may be offered at trial.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 5, 2011