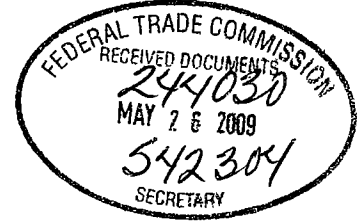


ORIGINAL



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

In the Matter of)	
)	
GEMTRONICS, INC.,)	
a corporation, and)	DOCKET NO. 9330
)	
WILLIAM H. ISELY,)	
Respondents.)	

ORDER DENYING RESPONDENTS' MOTION TO STRIKE

I.

On May 13, 2009, Respondents submitted a Motion to Strike Complaint Counsel's Exhibits 2, 4-8, and 62-66. Specifically, Respondents move to strike these exhibits from Complaint Counsel's March 18, 2009 exhibit list and for an order declaring that the exhibits may not be introduced at trial ("Motion"). Complaint Counsel submitted its opposition to the Motion on May 20, 2009 ("Opposition").

Having fully considered the Motion and Opposition, and as set forth below, Respondents' Motion is DENIED.

II.

Respondents' Motion is directed at the following 11 exhibits, as described on Complaint Counsel's March 18, 2009 exhibit list:

Exhibit No.	Description
CX 2	Internet Corporation Listing Service, annual website search engine listing for "raaxagaricus.com," 6/27/08 (R051-52)
CX 4	Domain Name Registration Information for "our-agaricus.com" from WHOIS.net database, 12/20/07 (F00161-63)

CX 5	Domain Name Registration Information for “our-agaricus.com” from WHOIS.net database, 4/9/08 (R006-7)
CX 6	Domain Name Registration Information for “our-agaricus.us” from WHOIS.net database, 4/9/08 (R0037-38)
CX 7	Domain Name Registration Information for “our-agaricus.us” from WHOIS.net database, 12/20/07 (F00032-34)
CX 8	Domain Name Registration Information for “takesun.com” from WHOIS.net database, 12/20/07 (F00190-92)
CX 62	Our-agaricus.com product description and ordering information for “Agaricus blazei Murill,” 12/13/07 (F00168-69)
CX 63	Our-agaricus.com Description and Online Ordering Information for Agaricus products, 12/13/07 (F00170-72)
CX 64	Our-agaricus.com webpage containing Bill Isely’s contact information, 12/13/07 (F00175-76)
CX 65	Our-agaricus.com product description and ordering information for Agaricus blazei Murill and Camu Camu, 12/20/07 (F00179-80)
CX 66	Our-agaricus.com product description and ordering information for Agaricus blazei Murill and RAAZ11[sic]

Respondents’ Motion did not attach any of the challenged exhibits.

Respondents contend that the Complaint in this case arises solely from alleged representations in the website www.agaricus.net. Respondents cite paragraph 5 of Complaint, which states: “Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an Internet website, www.agaricus.net, including but not limited to, the attached Exhibits A through D,” which are pages from that website. Respondents state that Complaint Counsel has not indicated in the Complaint or otherwise that any other websites are challenged in this proceeding, and further argue that to allow documents regarding websites with similar names to the alleged offending website will be unduly time consuming, confusing, and prejudicial.

Complaint Counsel responds that Respondents have placed other websites in issue through their Answer, Answers to Interrogatories, and exhibit list. Complaint Counsel

states that in paragraph 3 of their Answer, Respondents refer to using the website www.our-agaricus.com to sell RAAX11, and that Respondents have included the Answer and other documents referring to that website on their exhibit list. Complaint Counsel further argues that Respondents' exhibit list includes a number of other documents relating to additional websites, which documents in some cases contain information identical to that which Respondents' Motion seeks to preclude. In support of this claim, Complaint Counsel cites, but does not attach, the following Respondents' exhibits, which are described on Respondents' exhibit list as follows:

Exhibit No.	Description
RX 11	Copy of captured website WHOIS.net regarding our-agaricus.us (R037-38)
RX 12	Copy of document entitled "Internet Corporation Listing Service" regarding domain name: raaxagaricus.com (R051-52)
RX 13	Copy of captured website WHOIS regarding takesun.com (FTC 00190-92)
RX 14	Copy of captured website WHOIS regarding opc-agaricus.net (FTC 00032-00034)
RX 16	Copy of letter from U.S. Food and Drug Administration addressed to William Isely, Gemtronics, Inc., dated April 17, 2008 (FTC 00001-00003)
RX 30	Email from George Otto to Respondent Isely dated March 28, 2008, 6:26 p.m. (R032)
RX 36	WHOIS Search Results for Takesun.com (FTC 0190-92)

Complaint Counsel contends that, in these circumstances, the challenged exhibits should be deemed relevant, and that it would be prejudicial to preclude Complaint Counsel from introducing exhibits regarding other websites, while allowing Respondents to do so.

III.

The admission of relevant 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)(1). 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)(1). *See also In Re Telebrands Corp.*, Docket No. 9313, 2004 FTC LEXIS 270, at *2 (April 26, 2004).

Although Respondents titled their motion as a “Motion to Strike,” the relief they seek is an order precluding Complaint Counsel from introducing the challenged exhibits at trial. Accordingly, the motion to strike will be treated as a motion *in limine*. See *In re Basic Research*, Docket No. 9318, 2005 FTC LEXIS 159, at *2 (Dec. 6, 2005) (noting that although Respondents titled their motions as “Motions to Strike Expert Report,” rather than as motions *in limine*, they in fact sought to prevent introduction of the reports and to prevent the experts from testifying at trial).


“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). *In limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial. *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *Luce*, 469 U.S. at 41 (stating that a motion *in limine* ruling “is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant’s proffer”). “Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded.” *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1034 n.4 (N.D. Ohio 2002)

In this case, it cannot be presumed, without the context of trial and a specific proffer as to admissibility, that the proposed exhibits referred to in Respondents’ Motion are inadmissible on all potential grounds. This is particularly appropriate where, as here, Respondents have not even submitted the challenged exhibits for review. See *In re Heublein, Inc.*, Docket No. 8904, 1978 FTC LEXIS 321, at *5 (May 19, 1978) (deferring ruling on motion to strike proposed summary exhibit until summary is introduced at trial, where backup data required to evaluate admissibility of the summary had not yet been produced).

Having fully considered all arguments in the Motion and Opposition, Respondents' Motion to Strike Complaint Counsel's Exhibits 2, 4-8, and 62-66 is DENIED. This Order shall not be construed as a ruling on the admissibility of exhibits that may be offered at trial.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 26, 2009