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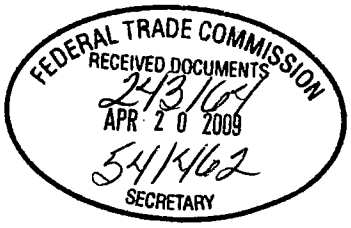

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
DANIEL CHAPTER ONE, a corporation, and	)	DOCKET NO. 9329
JAMES FEIJO, Respondents.	)	

ORDER DENYING RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE TESTIMONY FROM OPPIE AND CERTAIN EXHIBITS

I.

On March 16, 2009, Respondents submitted their Motion *in Limine* to Preclude Complaint Counsel from Introducing the Testimony of Ms. Lynne Givens Oppie at Trial, to Exclude Recordings and Transcripts of Radio Programs, Accent Radio Network Web Page, and Respondents' Educational Material ("Motion"). Complaint Counsel submitted its Memorandum in Opposition to Respondents' Motion on March 26, 2009.

Upon consideration of the arguments raised in Respondents' Motion and Complaint Counsel's Opposition, and as discussed below, Respondents' Motion is DENIED.

II.

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

"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 Corp.*, 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. Feb. 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). *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).

III.

A. Testimony of Ms. Lynne Givens Oppie

Respondents urge that Complaint Counsel be precluded from introducing testimony from Ms. Lynne Givens Oppie ("Oppie") at trial on the grounds that Complaint Counsel failed to properly disclose her to Respondents prior to the close of discovery. Specifically, Respondents state that Complaint Counsel failed to provide any contact information for her and that Complaint Counsel misspelled her first name, making it difficult for Respondents to locate Oppie. In addition, Respondents argue that the proposed testimony is not relevant.

Complaint Counsel argues that Respondents were not prejudiced by Complaint Counsel's actions because: Respondents delayed contacting Oppie until days before discovery was to close; Respondents did not inform Complaint Counsel that the information provided was incorrect; and Complaint Counsel offered to assist Respondents in scheduling Oppie's deposition, but Respondents rejected that offer. Complaint Counsel does not address whether the proposed testimony from Oppie is relevant.

In Complaint Counsel's Final Witness List, Including Rebuttal Witnesses, Complaint Counsel states that it does not believe that any consumer testimony is relevant to the issues being tried in this case and that it intends to oppose any efforts by Respondents to introduce such

testimony at trial. Complaint Counsel further states, in the event that Respondents are allowed to introduce consumer testimony, Complaint Counsel intends to call Oppie on rebuttal to testify about her father's battle with prostate cancer, his use of DCO products in his cancer battle, and his subsequent death from his cancer, as well as DCO's continued use of her father's testimonial that he was cured of cancer on its website, six years after his death.

Respondents' Motion to preclude Oppie's testimony is DENIED. First, Respondents have not demonstrated that any missteps by Complaint Counsel prejudiced Respondents. Respondents had the opportunity to schedule the deposition of Oppie prior to the close of discovery. In addition, by Order dated April 20, 2009, Complaint Counsel's motion *in limine* to preclude Respondents from introducing at trial evidence of purported consumer satisfaction was granted in part, "to the extent that Respondents seek to introduce evidence of satisfied consumers to show the claims were not deceptive and evidence of consumer testimonials to show the claims were not unsubstantiated." However, as also recognized in that ruling, it cannot be presumed, without the context of trial and a specific proffer of evidence, that all the proposed evidence from Oppie is inadmissible on all potential grounds.

B. Recordings and Transcripts of Radio Programs, Accent Radio Network Web Page, and Respondents' Educational Material

Respondents move to exclude recordings and transcripts of Daniel Chapter One ("DCO") radio shows (CX 3 – CX 8) on the grounds that they are not advertisements or promotional materials and do not consist of commercial practices or activities. Respondents also move to exclude the web page from Accent Radio (CX 32), which Respondents state is an introduction to, and description of the creation of, Accent Radio Network, and which Respondents argue has no apparent relevance to the issues in this case. In addition, Respondents seek to exclude four other exhibits: 1) Bioguide (CX 21); 2) The Truth Will Set You Free (CX 22); 3) How to Fight Cancer is Your Choice; Cancer News Letter Millennium Edition (CX 23); and 4) How to Fight Cancer is Your Choice, Cancer Newsletter 2004 (CX 24). Respondents contend that these four documents are educational, political and religious in nature and do not constitute advertisements, promotional material or other commercial activity.

With respect to CX 3 - CX 8, Complaint Counsel states that Respondents make bold claims about the efficacy of their products in preventing, treating, or curing cancer daily on their radio program and encourage listeners to order products using DCO's toll-free number. Thus, Complaint Counsel contends, Respondents' radio show is another avenue by which Respondents have sought to induce consumers to purchase the DCO products. Complaint Counsel further states that the radio network is one of the mechanisms through which Respondents promote their products and thus a document that describes the radio network, CX 32, is relevant.[1] Finally, Complaint Counsel states that CX 21 - CX 24 are vehicles through which Respondents disseminate their cancer treatment claims and are therefore wholly relevant to Complaint

[1] On April 6, 2009, the parties submitted a joint motion and stipulation to substitute for the single page CX 32 a multiple page exhibit, which was granted by Order dated April 7, 2009. Pursuant to the stipulation, the parties agreed that the substituted pages "make the exhibit more complete." *See* Order on Joint Motion and Stipulation Regarding Substitution of CX 32 (April 7, 2009).

Counsel's argument that Respondents disseminated claims that the DCO Products are effective in preventing, treating, or curing cancer.

Under Commission Rule 3.43, relevant, material, and reliable evidence shall be admitted. 16 C.F.R. § 3.43(b)(l). The evidence sought to be excluded by Respondents' Motion appears to encompass evidence that could properly be admitted on various grounds, and it cannot be presumed, outside the context of trial, that the proposed evidence is inadmissible on all potential grounds. Accordingly, Complaint Counsel will not be precluded from offering CX 3 - CX 8, CX 32, or CX 21 - CX 24, and Respondents' Motion to preclude Complaint Counsel from doing so is DENIED.

IV.

After full consideration of Respondents' Motion *in limine*, and Complaint Counsel's Opposition, and having fully considered all arguments and contentions therein, Respondents' Motion *in limine* is DENIED. This Order shall not be construed as a ruling on the admissibility of evidence that may be offered at trial.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: April 20, 2009