

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

ORIGINAL



In the Matter of)
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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 TO STRIKE

I.

On October 7, 2011, Respondents submitted a Motion to Strike the Bovitz Survey ("Motion"). Complaint Counsel submitted its Opposition to the Motion on October 17, 2011.

Upon full consideration of the Motion and the Opposition, and as further explained below, Respondents' Motion is DENIED.¹

II.

The Bovitz Survey comprises exhibits PX0225 and PX0236, which were admitted into evidence at the commencement of the hearing in this matter on May 24, 2011, pursuant to a signed Joint Stipulation on Admissibility of Exhibits. JX-0002 at 000141. Respondents now contend that the Bovitz Survey should be stricken from evidence as irrelevant and immaterial.

¹ On October 17, 2011, Respondents submitted a letter to the Administrative Law Judge, with a copy to Complaint Counsel, raising another ground for the Motion. Respondents' effort to supplement the Motion in this manner, rather than by a filing a Supplemental, or Amended, Motion with the Secretary of the Commission, appears to be outside the spirit, if not the letter, of Commission Rules of Practice 3.22(a) ("All written motions shall be filed with the Secretary of the Commission . . .) and 3.22(c) (requiring that written motions state "the grounds therefor"). 16 C.F.R. § 3.22(a), (c). See also 16 C.F.R. § 3.22(f) (Replies may be allowed by order, "where the parties wish to draw the Administrative Law Judge's . . . attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief."). To avoid delay in the issuance of this Order, however, the contents of Respondents' October 17, 2011 letter have been considered in the exercise of judicial discretion.

As grounds for the Motion, Respondents state that the Bovitz Survey assessed consumer perceptions of Respondents' billboard advertisements, but that Complaint Counsel recently acknowledged at the hearing that billboard advertisements are not being challenged in this case. Respondents contend that they were unaware that Respondents' billboard advertisements were not being challenged until Complaint Counsel's acknowledgement of this fact at the hearing.

Respondents argue that because billboard advertisements are not being challenged in the case, survey responses regarding consumer perception of those advertisements are irrelevant and immaterial. Moreover, Respondents assert, citing testimony from Respondents' proffered rebuttal expert, Dr. Stewart, the Bovitz Survey is also irrelevant because it fails to show that the responses of the survey participants were in fact caused by Respondents' billboards, as opposed to extraneous factors. Respondents further argue that, to the extent the billboard advertisements evaluated by the Bovitz Survey reflect text that also appears in advertisements which are being challenged in this case, the Bovitz Survey's conclusions are nevertheless irrelevant because: the challenged advertisements contain additional, explanatory or qualifying text; the effect of such additional text was not assessed in the Bovitz Survey; and claims in the challenged advertisements can be resolved with reference to testimony and evidence pertaining to the claims in those advertisements, instead of the Bovitz Survey. Respondents further contend that, during discovery, Complaint Counsel, despite Respondents' requests, failed to timely identify all advertisements upon which Complaint Counsel was relying in the case, and that such failure has prejudiced Respondents' ability to prepare for trial. In this regard, Respondents state that they expended resources to produce an expert to refute the Bovitz Survey only to learn for the first time at trial that Complaint Counsel does not intend to challenge the billboards.

Complaint Counsel responds that POM commissioned the Bovitz Survey in 2009 to assess the effectiveness of Respondents' "Super Hero" advertising campaign, in relation to POM's earlier "Dressed Bottle" campaign. Complaint Counsel states that the Bovitz Survey used five "Dressed Bottle" billboards and five "Super Hero" billboards. Of those ten billboards, according to Complaint Counsel, five contain the exact headlines and imagery, such as "Heart Therapy," "Decompress," "Cheat Death," and "I'm off to save PROSTATES!" featured in print advertisements that are being challenged in this case. (*See Attachments B and C to Opposition*). Therefore, Complaint Counsel argues, consumer perceptions of the billboard headlines and images, as reported by the Bovitz Survey, are relevant to evaluating the impression created by challenged advertisements containing the same headlines and images.

In addition, Complaint Counsel asserts that the Bovitz Survey is relevant to rebut assertions by Respondents' proffered linguistics expert, Dr. Butters, that headings such as "I'm off to save PROSTATES!" constitute hyperbole that would not be viewed as communicating claims. Finally, Complaint Counsel rejects Respondents' assertion that they were unaware that Complaint Counsel was not challenging billboard advertisements, and further asserts that Respondents have been aware of Complaint Counsel's planned use of the Bovitz Survey to address the challenged advertisements, and to rebut Dr. Butters, but failed timely to object to such use.

III.

Pursuant to Commission Rule of Practice 3.43:

Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. 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 based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

16 C.F.R. § 3.43(b).

Having fully considered the arguments of the parties, it cannot be concluded that the Bovitz Survey, which evaluated the meaning of headlines and images from billboards, is irrelevant and immaterial for all purposes, including for the purpose of evaluating the meaning of challenged advertisements containing the same headlines and images. Respondents' arguments that the challenged advertisements contain additional, explanatory text that was not evaluated by the Bovitz Survey, and that other record evidence can serve to evaluate the challenged advertisements, go to the weight, not the admissibility, of the Bovitz Survey.

In addition, allowing the Bovitz Survey to remain part of the record will not result in prejudice to Respondents. Respondents presented evidence at the hearing intended to rebut the conclusions of the Bovitz Survey, through its proffered expert, Dr. Stewart. Thus, even if Complaint Counsel failed expressly to advise Respondents in a timely fashion that billboard advertising was not being challenged, such failure has not prejudiced Respondents' ability to rebut the conclusions of the Bovitz Survey.²

IV.

For all the foregoing reasons, Respondents' Motion to Strike the Bovitz Survey is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 19, 2011

² Respondents' claim that Complaint Counsel failed during discovery to timely identify all advertisements upon which Complaint Counsel relies was also raised in Respondents' Motion to Compel Further Responses to First Set of Interrogatories to Complaint Counsel, filed March 4, 2011. By Order dated March 16, 2011, that Motion was denied without prejudice to re-filing, in the event that Respondents found supplemental responses submitted by Complaint Counsel to be inadequate. Respondents did not re-file, and to revisit that discovery dispute at this stage of proceedings would be untimely.