

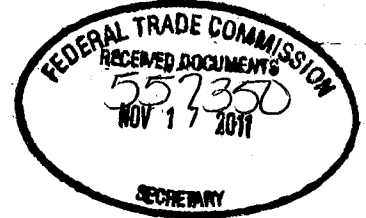
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UNITED STATES OF AMERICA  
THE FEDERAL TRADE COMMISSION

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In the Matter of )  
 )  
POM WONDERFUL LLC and )  
ROLL GLOBAL, as successor in interest )  
to Roll International, companies, and )  
 )  
STEWART A. RESNICK, )  
LYNDA RAE RESNICK, and )  
MATTHEW TUPPER, individually and )  
as officers of the companies. )  
\_\_\_\_\_ )

Docket No. 9344

Public Document



**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR  
ADMISSION OF DOCUMENTS INTO THE EVIDENTIARY RECORD**

Despite having numerous opportunities to seek admission of RX1692, RX5000, RX5001, RX5003, RX5010, RX5017, RX5019, RX5020, RX5021, RX5022, and RX5025 (collectively "RX documents"),<sup>1</sup> but failing to do so, Respondents now move to include the RX documents, which were "used by Respondents' counsel during witness examinations," in the "evidentiary record."<sup>2</sup> (Resp'ts Mot. for Admission of Documents ("Resp'ts Mot.") at 1.) Because Respondents have not shown good cause as required by the Court's scheduling order, and Complaint Counsel would be prejudiced by admission of the RX documents at this late stage of the litigation, the Court should deny Respondents' motion.

1 Respondents also move to include RX5007 in the evidentiary record. RX5007 has already been admitted into evidence (Trial Tr. at 884-85), and Complaint Counsel does not oppose adding RX5007 to the joint exhibit list, JX 2. (Trial Tr. at 6-7.)

2 Complaint Counsel does not object to both parties providing copies of any demonstratives exhibits or exhibits used during cross-examination to the Court as a reference. However, these exhibits would not be part of the evidentiary record and should not be cited to substantively. See *Daniel Chapter One*, No. 9329, Order on Post Trial Briefs at 2 (Apr. 29, 2009).

## Discussion

In the Court's October 26, 2010 Scheduling Order, Respondents' deadline to submit their final proposed exhibit list, copies of all exhibits, and the "basis of admissibility for each proposed exhibit" was April 5, 2011. *POM Wonderful LLC*, No. 9344, Scheduling Order at 2 (Oct. 26, 2010) (noting in ¶ 13 that "[t]he final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits"). Furthermore, paragraph 21 of the Scheduling Order states that "[a]t the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause." *Id.* ¶ 21.

I. Respondents' Proffered Reason Is Not Good Cause and Admission Would Prejudice Complaint Counsel

Respondents have failed to show good cause as required by the Court's October 26, 2010 scheduling order. Good cause requires the moving party to articulate an adequate basis to support the requested relief. *See e.g., Daniel Chapter One*, No. 9329, 2009 WL 1102983, at \*3 (F.T.C. Apr. 8, 2009); *see also Basic Research LLC*, No. 9318, 2006 WL 367356, at \*1 (F.T.C. Feb. 3, 2006) (finding good cause to permit additional exhibits to be added to the exhibit list where the evidence was "newly-obtained"). For example, in *Daniel Chapter One*, the Court found good cause to allow complaint counsel to modify its final exhibit list because the financial documents were relevant to a material issue in the case, and respondents had violated the Court's order by not producing such documents during discovery and would not be prejudiced. *Daniel Chapter One*, 2009 WL 1102983, at \*3.

Respondents move to admit the RX documents into the “evidentiary record.” asserting that “[b]ecause these documents were used with witnesses at the hearing, . . . it will be useful for the Court to have the [RX] documents available in the record for reference.” (Resp’ts Mot. at 1-2.) A document may be used at trial, but it is not necessarily admitted as substantive evidence. *See e.g.*, 2 Kenneth Broun, *McCormick on Evidence* § 214 (6th ed. 2009) (“[D]emonstrative aids do not have independent probative value for determining the substantive issues in the case.”); *id.* § 249 (stating that when impeaching the credibility of a witness with a prior inconsistent statement, such statement “is not offered for its truth . . . and do[es] not constitute substantive evidence”). Except for RX1692, a demonstrative exhibit used during Stewart Resnick’s direct examination, Respondents used the RX documents during cross-examinations of Complaint Counsel’s witnesses. The official trial transcripts of the witnesses’ responses relating to the RX documents are the properly admitted evidence for the Court’s consideration. The substance of these documents are not themselves evidence in this case. *See Daniel Chapter One*, No. 9329, Order on Post Trial Briefs at 2 (Apr. 29, 2009) (stating that the parties should not cite demonstratives as substantive evidence).

Without notice that the RX documents would be admitted into the evidentiary record, Complaint Counsel did not have a complete opportunity to explore these documents at trial. For example, with RX5017, Complaint Counsel limited its questions on redirect to the specific issue focused on during Respondents’ cross-examination of Dr. Melman. (Trial Tr. at 1195-96.) If the the RX documents were unconditionally admitted as evidence, Respondents would have latitude to cite any part of the RX documents substantively in support of their findings of fact. *See* Rule 3.46(a) (stating that proposed findings of fact “shall contain adequate references to the record

and authorities relied on”). Complaint Counsel would be prejudiced by the admission of the RX documents at this late stage.

II. Respondents’ Delayed Attempt to Add RX Documents to the Evidentiary Record Does Not Constitute Good Cause

Respondents had numerous opportunities since April to add the RX documents into the evidentiary record. Their attempt to do so now is long-delayed and does not show good cause. Respondents failed to include the RX documents on their exhibit list prior to the Court’s April 5, 2011 deadline and did not subsequently attempt to have it included in JX 2, which the Court admitted into evidence on May 24, 2011. When the RX documents were used at trial throughout May, June, and August, Respondents did not seek to move any of them into evidence as they did with RX5007. (*See* Trial Tr. at 884-85.) Respondents’ much delayed attempt to admit the RX documents just before the record is to close does not support a finding of good cause.

**Conclusion**

For the foregoing reasons, the Court should deny Respondents’ motion to admit the RX documents into the evidentiary record.

Dated: November 17, 2011

Respectfully submitted,

/s/ Andrew Wone

Andrew Wone

Heather Hipsley

Serena Viswanathan

Elise Whang

Complaint Counsel

Federal Trade Commission

600 New Jersey Avenue, NW, NJ-3212

Washington, DC 20580

Phone: 202-326-2934, -3285, -3244, -2061  
Fax: 202-326-3259  
Email: awone@ftc.gov, hhippsley@ftc.gov,  
sviswanathan@ftc.gov, ewhang@ftc.gov

**CERTIFICATE OF SERVICE**

I certify that on November 17, 2011, I caused the filing and service of Complaint Counsel's Opposition to Respondents' Motion for Admission of Documents as set forth below:

One electronic copy via the FTC E-Filing System to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Room H-159  
Washington, DC 20580

One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
600 Pennsylvania Ave., NW, Room H-110  
Washington, DC 20580  
Email: oalj@ftc.gov

One electronic copy via email to:

John D. Graubert, Esq.  
Covington & Burling LLP  
jgraubert@cov.com  
Attorneys for Respondents

Kristina Diaz, Esq.  
Roll Law Group  
kdiaz@roll.com.  
Attorneys for Respondents

Bertram Fields, Esq.  
Greenberg Glusker  
bfields@greenbergglusker.com  
Attorneys for Respondents

/s/ Andrew Wone  
Andrew Wone  
Complaint Counsel