

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,)
Respondents.)

DOCKET NO. 9344



ORDER DENYING RESPONDENTS' MOTION TO ADMIT DOCUMENTS

I.

On November 16, 2011, Respondents filed a Motion to Admit Exhibits ("Motion"). Specifically, Respondents seek admission of documents identified as RX1692, RX5000, RX5001, RX5003, RX5010, RX5017, RX5019, RX5020, RX5021, RX5022, and RX5025, comprising one advertisement, an interview with one of Complaint Counsel's expert witnesses, and a variety of scholarly articles relating to nutrition, coronary artery disease, and erectile dysfunction (hereafter, "Documents"). Complaint Counsel filed an Opposition to the Motion on November 17, 2011. For the reasons set forth below, the Motion is DENIED.¹

II.

As grounds for the Motion, Respondents state that the Documents were used by Respondents' counsel during witness examinations and that, therefore, "it will be useful for the Court to have the documents available in the record for reference." Respondents further state that it is appropriate to admit the Documents into the record at this time, "before the record closes." Motion at 1.

¹ Respondents also identify RX5007 as among the documents sought to be admitted pursuant to the Motion; however, Respondents and Complaint Counsel acknowledge that this document was already admitted at the evidentiary hearing. Therefore, the Motion as to admission of RX5007 is DENIED AS MOOT.

Complaint Counsel argues that Respondents have not demonstrated good cause for failing to seek admission of the Documents at the final prehearing conference, as required by the Scheduling Order in this case. Complaint Counsel further contends that the fact that the Documents were used in examination of witnesses does not make the Documents admissible as substantive evidence. Moreover, Complaint Counsel asserts, lacking notice that the Documents would be offered as substantive evidence, Complaint Counsel did not completely explore the Documents during the evidentiary hearing, and it will, therefore, be prejudiced by admission of the Documents at this stage of proceedings. Finally, Complaint Counsel contends that Respondents unduly delayed seeking admission of the Documents, despite numerous previous opportunities to do so.

III.

Paragraph 21 of the Scheduling Order issued in this case 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.

Respondents have failed to establish good cause. Respondents do not even attempt to explain why they failed to seek admission of the Documents at the prehearing conference, or at any other point in these proceedings prior to the present time. Moreover, Respondents do not undertake to demonstrate the relevance, materiality, or reliability of the Documents, but simply conclude that on the face of the Documents, “there are no issues with admissibility or reliability.” Motion at 2. *See* Commission Rule of Practice 3.43(b), 16 C.F.R. § 3.43(b) (“Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded.”).

In addition, Respondents’ attempt to have the Documents admitted at this stage of proceedings, after the conclusion of the evidentiary hearing, is untimely. On November 4, 2011, at the final day of the hearing, the parties were advised that the record would remain open until November 14, 2011 for the limited purpose of receiving any joint stipulations that the parties may negotiate. At a minimum, Respondents should have sought admission promptly after conclusion of the evidentiary hearing and before November 14, 2011. Instead, Respondents waited until November 16, 2011.

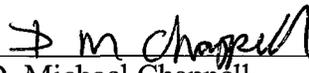
Finally, admitting the Documents into evidence at this stage of proceedings would be prejudicial to Complaint Counsel because there is no longer the opportunity to question the witnesses on the Documents, as there would have been had Respondents offered the Documents into evidence at the hearing.

IV.

Having fully considered the Motion and the Opposition, and all the arguments and

contentions therein, and for all the foregoing reasons, Respondents' Motion to Admit Documents is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: November 18, 2011