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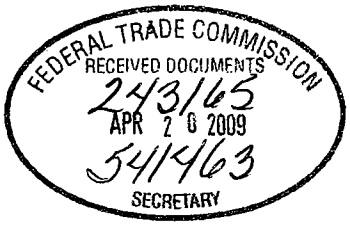

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER DENYING RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE COMPLAINT COUNSEL FROM INTRODUCING AT TRIAL THE TESTIMONY OF DR. DENIS R. MILLER

I.

On March 16, 2009, pursuant to the Scheduling Order in this matter, Respondents submitted a Motion *In Limine* to Preclude Complaint Counsel from Introducing at Trial the Testimony of Dr. Denis R. Miller and Memorandum in Support ("Motion"). Complaint Counsel submitted an Opposition to the Motion on March 26, 2009 ("Opposition").

Having fully considered all arguments in the Motion and the Opposition, and as discussed below, the Motion is DENIED.

II.

According to Complaint Counsel's witness list:

> Dr. Denis R. Miller, the FTC's expert witness, will testify that he was asked to consider whether there was any competent and reliable scientific evidence to support Respondents' representations that the products Bio*Shark, 7 Herb Formula, GDU and or [sic] BioMixx, treat, cure or prevent cancer . . . [and] will testify that there is no competent and reliable scientific evidence to support those representations. He will further testify that the materials identified by Respondents as substantiation do not substantiate Respondents' claims.

Respondents contend that Dr. Miller's testimony is not relevant because: (1) Dr. Miller's deposition testimony centered on how drugs are tested, rather than how herbal

products are tested; (2) Dr. Miller concluded that drug studies can be used to substantiate claims about herbal dietary supplement products; (3) Dr. Miller addressed no other information regarding substantiation, such as herbal formularies, the herbal Physicians' Desk Reference, traditional use, laboratory research, or other information that Respondents contend is commonly used to evaluate herbs and statements made about herbs; and (4) Dr. Miller did not offer any opinions on other factors that Respondents assert are relevant, such as the type of claims and products at issue, the benefits of truthful claims, the consequences of false claims, and the amount and type of substantiation that experts in the field of herbal science believe is reasonable.

Respondents also argue that Dr. Miller is not qualified to give expert testimony in the case because he is a pediatric oncologist with no experience with research on dietary supplements and because he has no expertise in linguistics, and therefore cannot properly opine on the "overall net impression" of Respondents' statements about their products or the "consumer expectations" arising from those statements.

Complaint Counsel contends that Respondents mischaracterize Dr. Miller's testimony and have failed to demonstrate that Dr. Miller is unqualified or that his testimony is unreliable or irrelevant. According to Complaint Counsel, Dr. Miller has 40 years of experience with cancer treatment and research. Complaint Counsel states that, contrary to Respondents' assertions in their Motion, Dr. Miller's report shows that he considered the substantiation offered by Respondents, as well as other alternative medicine sources, and he concluded that such materials did not constitute competent and reliable scientific evidence for claims that Respondents' products prevent, treat, or cure cancer. Complaint Counsel further contends that Dr. Miller did not analyze Respondents' advertisements to determine what claims the ads were making and therefore he need not have expertise in that area. Finally, Complaint Counsel argues that Dr. Miller's opinion as to whether there was "competent and reliable scientific evidence" to support Respondents' claims is highly relevant to whether the claims were deceptive, and should not be precluded.

III.

A. *In Limine* Standard

"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. February 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).

B. Standard Applicable to Expert Testimony

To be admissible, evidence must be relevant, material, and reliable, pursuant to Commission Rule 3.43(b)(1). When ruling on the admissibility of expert opinions, courts traditionally consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and the many cases applying *Daubert*, including *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54 (1999).

Rather than excluding expert testimony, the better approach under *Daubert* in a bench trial is to permit the expert testimony and allow "vigorous cross-examination, presentation of contrary evidence" and careful weighing of the burden of proof to test "shaky but admissible evidence." *The Ekotek Site PRP Committee v. Self*, 1 F. Supp. 2d 1282, 1296 n.5 (D. Utah 1998) (citing *Fierro v. Gomez*, 865 F. Supp. 1387, 1396 n.7 (N.D. Cal. 1994) (quoting *Daubert*, 509 U.S. at 596)). *See also Clark v. Richman*, 339 F. Supp. 2d 631, 648 (M.D. Pa. 2004) (stating that "[a]s this case will be a bench trial, the court's 'role as a gatekeeper pursuant to *Daubert* is arguably less essential.'") (citation omitted); *Albarado v. Chouest Offshore, LLC*, Civil Action No. 02-3504 Section "J"(4), 2003 U.S. Dist. LEXIS 16481, at *2-3 (E.D. La. Sept. 5, 2003) (stating that "[g]iven that this case has been converted into a bench trial, and thus that the objectives of *Daubert* . . . are no longer implicated, the Court finds that defendant's motion should be denied at this time. Following the introduction of the alleged expert testimony at trial, the Court will either exclude it at that point, or give it whatever weight it deserves.").

IV.

Applying the foregoing standards, Respondents' Motion, at this stage of the proceedings, is denied. Respondents' assertions -- that Dr. Miller is insufficiently knowledgeable about foods, food additives, or dietary supplements to render reliable opinions; failed to consider scientific sources related to herbs in forming his opinions; and has no opinions, and is not qualified to give opinions, on "net impression," "consumer expectations," or other factors that Respondents believe are relevant – address the weight, rather than the admissibility of Dr. Miller's opinions. Accordingly, those matters are best addressed through "[v]igorous cross-examination, [and] presentation of contrary evidence." *Daubert*, 509 U.S. at 596. Moreover, the messages that were conveyed by Respondents' communications about their products, as well as the type and amount of substantiation required for those claims, are matters that have not yet been resolved. Therefore, it cannot be determined, as a preliminary matter outside the context of trial, that Dr. Miller's opinions regarding substantiation should be excluded. *See In Re Basic Research, LLC*, Docket No. 9318, 2005 FTC LEXIS 152, at *2-3 (December 1, 2005) (denying motion *in limine* that appeared to seek to exclude evidence "about the very issue that must be decided after receipt of the evidence in this case").

Accordingly, after full consideration of all arguments in the Motion and the Opposition, Respondents' Motion *in Limine* to Preclude Complaint Counsel from Introducing at Trial the Testimony of Dr. Denis R. Miller is DENIED. Nothing herein shall be construed as a ruling on the admissibility of opinions or evidence that may be offered at trial.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: April 20, 2009