

ORIGINAL

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



In the Matter of)
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)
POM WONDERFUL LLC and)
ROLL INTERNATIONAL CORP.,)
)
companies, and)
)
)
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies,)
Respondents.)
_____)

DOCKET NO. 9344

**ORDER ON CROSS-MOTIONS REGARDING
LIMITATION ON NUMBER OF EXPERT WITNESSES
DESIGNATED BY RESPONDENTS**

I.

This is an action for alleged deceptive advertising by Respondents, in violation of Sections 5 and 12 of the Federal Trade Commission Act. 15 U.S.C. §§ 45, 52 (“FTC Act”). The Complaint alleges that Respondents’ advertisements (the “Challenged Advertisements”) made false or misleading representations that Respondents’ three pomegranate products, POM Wonderful 100% Pomegranate Juice, POMx Pill capsules, and POMx Liquid Concentrate (the “Challenged Products”), have been scientifically proven to prevent, reduce the risk of, treat, or otherwise be a benefit for conditions involving cardiovascular functioning, prostate cancer, and erectile dysfunction. Complaint ¶¶ 12-18. The Complaint also alleges that the Challenged Advertisements made unsubstantiated claims that the Challenged Products had the above-mentioned health benefits. Complaint ¶¶ 19-22. Respondents deny making any false or unsubstantiated claims. Answer ¶¶ 12-22.

On February 1, 2011, Respondents served Complaint Counsel with expert witness designations naming eight (8) proposed experts. On February 10, 2011, Complaint Counsel, citing Rule 3.31A(b) of the Commission’s Rules of Practice, 16 C.F.R. § 3.31A(b) (hereafter, “Rules”), filed a Motion to Limit Respondents to Five Experts and Memorandum in Support Thereof (“Motion to Limit”), as well as a Motion to Expedite Respondents’ Response to the Motion to Limit (“Motion to Expedite”). On February 11, 2011, also relying on Rule 3.31A(b), Respondents filed a Motion to Exceed the Five

Expert Limit (“Motion to Exceed”).¹ Complaint Counsel filed an opposition to Respondents’ Motion to Exceed on February 14, 2011. On February 15, 2011, Respondents filed a response to Complaint Counsel’s Motion to Expedite, stating that they did not oppose the motion and that they would file their opposition to the Motion to Limit on February 17, 2011, as requested in the Motion to Expedite. Respondents filed their opposition on February 17, 2011.

Upon full consideration of the parties’ motions and respective oppositions, and as further explained below, Complaint Counsel’s Motion to Limit is DENIED and Respondents’ Motion to Exceed is GRANTED. Complaint Counsel’s Motion to Expedite is DENIED as moot.

II.

A. Overview

Each party relies on Commission Rule 3.31A(b), which states:

(b) No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

16 C.F.R. § 3.31A(b).

Respondents request an order permitting them to designate the eight witnesses identified on their expert witness list, while Complaint Counsel seeks an order limiting Respondents to five expert witnesses. Thus, the issue to be determined is whether the circumstances of the instant case present the “extraordinary circumstances” that would permit Respondents to call the designated experts to testify at trial.²

B. Respondents’ Motion to Exceed

Respondents contend that this case presents multiple technical issues requiring expert testimony, including scientific issues, nutritional issues, and consumer perception and marketing issues. For these reasons, Respondents assert that they need eight expert witnesses, to testify on the following areas:

¹ Respondents first filed a motion to exceed the expert limit on January 28, 2011, but withdrew that motion on February 9, 2011.

² The five-expert limit in Rule 3.31A(b) refers to the number of expert witnesses that may be called at trial; however, an expert must first be designated and provide an expert report, in order to be allowed to testify. Thus, the Rule indirectly affects the number of experts that may be designated.

- (1) the role of the Challenged Products on blood pressure, blood flow, and arterial plaque, in order to defend against the alleged false or unsubstantiated cardiovascular health claims (“Cardiovascular Expert”);
- (2) the role of the Challenged Products with regard to prostate health (“Prostate Expert”);
- (3) the effect of the Challenged Products in the areas of treatment, cure, or prevention of erectile dysfunction (“ED Expert”);
- (4) the chemistry of nitric oxide, its effect on blood flow and erectile dysfunction, the role that Challenged Products play in protecting nitric oxide against destruction in the body, and interpretation of scientific literature regarding the effect of pomegranate products on the availability of nitric oxide in the body (“Nitric Oxide Expert”);
- (5) the level of substantiation required for Respondents’ claims; specifically, whether competent and reliable scientific evidence is necessary to substantiate claims about food products such as the Challenged Products (“Substantiation Expert”);
- (6) the mechanisms of action, bioavailability and metabolism of pomegranate polyphenols in the human body, and the way such polyphenols relate to antioxidation and inflammation, in order to support Respondents’ claims as to health benefits of the Challenged Products (“Nutritional Expert”);
- (7) consumer science, to testify regarding how consumers may perceive the Challenged Advertisements, including whether the alleged claims are material to consumers (“Consumer Science and Materiality Expert”); and
- (8) linguistics and semiotics³, to testify how the Challenged Advertisements at issue might reasonably be interpreted by consumers (“Linguistics and Semiotic Expert”).

In addition, Respondents assert that there are over 20 separate items of advertising involved and 3 different pomegranate products. Because there are multiple products, multiple advertisements, and many different scientific areas requiring expert testimony, Respondents argue, there are extraordinary circumstances to merit the three additional designated experts.

³ According to the Oxford American Dictionary, “semiotics” is “the study of signs and symbols and their use or interpretation.” Oxford American Dictionary, p. 753 (2nd ed. 2008).

C. Complaint Counsel's Motion to Limit and Opposition to Respondents' Motion to Exceed

Complaint Counsel's Motion to Limit and Opposition to Respondents' Motion to Exceed make similar, parallel arguments.⁴ Complaint Counsel argues that the issues in this case do not present extraordinary circumstances warranting more than five experts. Complaint Counsel asserts that there are only three Challenged Products, which make similar health benefit claims, directed at only three scientific areas: heart disease, prostate cancer and erectile dysfunction. In this regard, according to Complaint Counsel, the instant case is quite typical of other deceptive advertising cases. Complaint Counsel notes that it has designated only four experts in this case, and that other cases under the FTC Act involving multiple claims and products have been prosecuted with fewer than five experts.

In addition, Complaint Counsel contends that there is overlap in the areas of expert testimony sought by Respondents, which likely will result in cumulative or duplicative testimony. According to Complaint Counsel, Respondents' expert witness list includes, among others, three urologists, two doctors that have published on prostate cancer, plus one oncologist. Moreover, Complaint Counsel argues, such experts should be able to opine on both the underlying science of their fields as well as the appropriate level of substantiation, and therefore, no separate expert on substantiation should be required.

Complaint Counsel further argues that extrinsic evidence of how consumers would interpret the Challenged Advertisements is not required to prove the alleged claims as a matter of law, and does not justify exceeding the five-expert limit. Finally, Complaint Counsel contends that it will be prejudiced by being required to prepare for and take eight expert depositions within the month-long period provided under the Scheduling Order for expert discovery.

⁴ Complaint Counsel also argues that Respondents' Motion violated procedural requirements, including (1) by designating eight expert witnesses on Respondents' expert witness list without first obtaining leave pursuant to Rule 3.31A(b); (2) by failing to include a proposed order and exceeding the 2,500 word limit by 213 words, *see* Rule 3.22(c) ("All written motions shall state the particular order, ruling, or action desired . . . and [m]emoranda in support of . . . any . . . motion [other than a dispositive motion] shall not exceed 2,500 words."); and (3) by failing to include a "signed statement representing that counsel for the moving party has conferred with opposing counsel . . . and has been unable to reach agreement." Scheduling Order, Additional Provision No. 4 ("Motions that fail to include such statement may be denied on that ground."). After full consideration of these arguments, none warrants an exercise of discretion to deny the Motion to Exceed. First, there is nothing in the language of Rule 3.31A(b) requiring leave in advance of designating experts. In addition, Respondents' Motion to Exceed sufficiently states the requested relief and that Respondents' efforts to resolve the dispute prior to filing were unsuccessful. Moreover, Respondents advised the Administrative Law Judge the day after filing the Motion to Exceed that the excess word count was an inadvertent software error, and submitted a corrected version, along with a proposed order, and a detailed "meet and confer" statement on February 15, 2011. Under these circumstances, the purported defects do not present adequate grounds for denying Respondents' Motion to Exceed.

D. Respondents' Opposition to Complaint Counsel's Motion to Limit

Respondents' Opposition contends that the cases relied upon by Complaint Counsel are inapposite. In addition, Respondents argue that there is no danger of duplicative expert testimony because each expert has a distinct area of scientific testimony to present. Moreover, Respondents assert, Complaint Counsel has proffered experts on prostate health, cardiovascular health, erectile dysfunction and the nutritional aspects of the Challenged Products, and that Respondents are entitled to the same. Respondents claim that they need an additional expert on nitric oxide, to explain the chemical science underlying cardiovascular and erectile health; an expert on substantiation, to assist Respondents in defending against Complaint Counsel's claimed level of required substantiation; and an expert to present evidence on consumer perceptions and reasonable interpretation of the Challenged Advertisements, to dispute that the Challenged Advertisements made the claims alleged.

Respondents further contend that the remedy for any risk of duplicative testimony is not to preclude Respondents from designating the eight experts, but for Complaint Counsel to move to preclude or limit particular expert testimony, prior to trial, once expert reports and depositions are completed.

Finally, Respondents dispute Complaint Counsel's claims of prejudice. Respondents argue that there are at least eight attorneys staffing the matter for Complaint Counsel, and also note that it is the broad scope of the Complaint that has put so many scientific areas and advertising pieces at issue. Therefore, Respondents assert, it is not Complaint Counsel, but Respondents, that will be prejudiced if Respondents are prohibited from designating the requested experts.

III.

This is the first consumer case requiring application of the five-expert limit in Rule 3.31A(b), which was enacted as part of the 2009 amendments to the Commission Rules of Practice. The comments to the amendment explain: "It has been the Commission's experience, . . . that five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases. The Rule also has a safety valve that allows a party to seek leave to call additional expert witnesses in extraordinary circumstances." 74 Fed. Reg. 1804, 1814 (Jan. 13, 2009).

Having fully considered all arguments of the parties, it is appropriate to employ the "safety valve" in this case to allow Respondents to designate the requested three additional experts, based upon extraordinary circumstances. According to Complaint Counsel's Answers to Interrogatories, attached as Exhibit A to Respondents' Motion to Exceed, Complaint Counsel contends that, in up to 20 different advertisements, Respondents made express and/or implied claims that the Challenged Products: (1) prevent, reduce the risk of, or treat heart disease by improving blood flow to the heart; and have been clinically proven to do so; (2) prevent, reduce the risk of, or treat heart disease by decreasing arterial plaque; and have been clinically proven to do so; (3)

prevent or reduce the risk of prostate cancer, and have been clinically proven to do so; (4) treat prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”), and have been clinically proven to do so; and (5) treat erectile dysfunction, and have been clinically proven to do so. Thus, Complaint Counsel’s case challenges multiple products, multiple advertisements, and multiple areas of science. Moreover, Complaint Counsel poses at least two theories of liability: (1) that Respondents’ claims are false; and/or (2) that Respondents’ claims lack reasonable basis substantiation, because they are not based upon competent and reliable scientific evidence. *See FTC v. Pantron I*, 33 F.3d 1088, 1096 (9th Cir. 1994) (noting that liability for deceptive advertising may be based on two theories: the “falsity” theory or the “reasonable basis” theory). Having brought broad and comprehensive charges against Respondents, Complaint Counsel cannot in fairness claim it is prejudiced when faced with a broad and comprehensive defense.

The fact that the fewer than five experts were used to prosecute *FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff’d* 2009 U.S. App. LEXIS 27388 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 505, 2010 U.S. LEXIS 8554 (2010) and *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d 285 (D. Mass. 2008), *aff’d*, 624 F.3d 1 (1st Cir. 2010), both relied upon by Complaint Counsel, is not material to whether Respondents are entitled to defend themselves against the charges brought in this case with more than five experts. Similarly, the fact that Complaint Counsel is not legally required to present extrinsic evidence of consumer perceptions in order to prove an implied claim, *see Kraft, Inc. v. FTC*, 970 F.2d 311, 319-20 (7th Cir. 1992), does not preclude Respondents from defending themselves against allegations of implied claims by introducing extrinsic evidence of consumer perceptions, through expert testimony.

At a minimum, Respondents are entitled to proffer expert testimony in opposition to Complaint Counsel’s experts in the areas of cardiovascular health, prostate health, erectile dysfunction, and the chemical and nutritional aspects of the Challenged Products. Based on their representation that the chemistry of nitric oxide is critical to understanding cardiovascular health and erectile dysfunction, Respondents will be permitted to designate an expert in that area as well.

In addition, whether “competent and reliable scientific evidence” is the required level of substantiation for a product claim generally involves analysis of the factors described in *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986). These include: (1) the product involved; (2) the type of claim; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation experts in the field would agree is reasonable. *In re Thompson Medical*, 104 F.T.C. 648, at 821, 1984 FTC LEXIS 6, at *387 (Nov. 23, 1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986). Accordingly, in defending against Complaint Counsel’s theory that competent and reliable scientific evidence is necessary to substantiate Respondents’ claims, Respondents should not be precluded from proffering expert opinion that an alternative substantiation level is appropriate, including an analysis of the *Pfizer* factors.

This Order is limited to whether Respondents should be permitted to designate

more than five expert witnesses in order to preserve the right to call such experts at trial. *See* Rule 3.31A(b) (“No party may call an expert witness at the hearing unless he or she has been listed . . .”). There is insufficient basis, at this stage, to conclude that Respondents’ expert testimony at trial will be cumulative or duplicative. In this regard, Respondents will be restrained not just by Rule 3.43(b) (allowing exclusion of “needless presentation of cumulative evidence”) and by Complaint Counsel’s right to move *in limine* to preclude or limit Respondents’ experts’ testimony, but also by the time limits for trial under Rule 3.41(b) (stating hearing should be limited to no more than 210 hours). Accordingly, there are sufficient safeguards in place to prevent cumulative or duplicative expert testimony at trial.

IV.

After full consideration of Respondents’ Motion to Exceed and Complaint Counsel’s Motion to Limit, and the parties’ respective oppositions thereto, and for all the foregoing reasons, Complaint Counsel’s Motion to Limit Respondents to Five Expert Witnesses is DENIED, and Respondents’ Motion to Exceed Five Expert Limit is GRANTED. Complaint Counsel’s Motion to Expedite Respondents’ Response to the Motion to Limit is DENIED as moot. It is hereby ORDERED that Respondents are permitted to designate eight (8) experts, in accordance with the subject areas and purposes delineated by Respondents in their Motion to Exceed and Opposition to the Motion to Limit.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 23, 2011