

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
POM WONDERFUL LLC and)
ROLL INTERNATIONAL CORP.,)
companies, and) Docket No. 9344
)
STEWART A. RESNICK,) Public Document
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

**COMPLAINT COUNSEL’S MOTION AND MEMORANDUM
TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY
RESPONSES FROM RESPONDENT POM WONDERFUL LLC**

In accordance with Commission Rule of Practice 3.38, Complaint Counsel respectfully files this Motion to Compel Production of Documents and Interrogatory Responses from Respondent POM Wonderful LLC (“POM”). As detailed below, the motion is limited to two categories of information that are essential to Complaint Counsel’s burden of proof for its case in chief and that are readily available to POM.

I. Introduction

Complaint Counsel served a Request for Production of Documents on POM on November 18, 2010. On December 20, 2010, the date responses were due, POM answered only with objections and failed to produce any documents as required by the Rules of Practice. Complaint Counsel also served Interrogatories on Respondents POM and Roll International Corp. on November 24, 2010. On the December 27, 2010 due date, Corporate Respondents

answered only with objections and failed to answer any Interrogatory as required by the Rules of Practice.

Subsequently, Respondents produced documents and provided selected interrogatory responses on a rolling basis over the next two months. During that time, Complaint Counsel has had to constantly request information that was missing or incomplete from the responses. To allow Respondents additional time to produce the remaining information – which Complaint Counsel intended to rely upon in order to propound requests for admissions (RFAs) – and in reliance on Respondents' promises to produce information before March 4, 2011, the parties sought discovery deadline extensions from the Court until March 4, 2011, for both motions to compel and requests for admissions. As of today, Corporate Respondents have produced only a portion of the missing information.

Despite Complaint Counsel's efforts to resolve this matter without the Court's intervention, we are left with no choice but to file the instant motion to compel production of: 1) a detailed accounting of the dollars spent by Respondents on research in 2009 and 2010, which go to their propositions that the Challenged Products are backed by \$32 million in research;¹ and 2) POM Juice ads and dissemination schedules prior to 2007.² These remaining pieces of information are highly relevant, directly relate to our burden of proof in this case, and are readily available to POM.

¹See POM's Supplemental Response to FTC's First Set of Interrogatories, No. 11 (Jan. 13, 2011) (Exh. A); POM's Response to FTC's Second Set of Interrogatories, No. 4 (Feb. 14, 2011) (Exh. B); POM's Supplemental Responses and Objections to FTC's First Request for Production of Documents, No. 12 (Feb. 18, 2011) (Exh. C).

²See POM's Supplemental Responses and Objections to FTC's First Request for Production of Documents, No. 1 (Feb. 18, 2011) (Exh. C); POM's Supplemental Response to FTC's First Set of Interrogatories, No. 2 (Jan. 13, 2011) (Exh. A).

Complaint Counsel respectfully requests that the Court order POM to produce the requested information within five (5) days of the Court's ruling.

II. Discussion

A. POM Has Failed to Produce a Complete Accounting of Dollars Spent on Research That Form the Basis for Its Advertising Claims

Complaint Counsel's First Set of Interrogatories, No. 11, Second Set of Interrogatories, No. 4, and First Request for Production of Documents, No. 12, each sought a detailed accounting of the dollars spent on research, including documents relating to the propositions that the Challenged Products are backed by \$23, \$25, and \$32 million in research. These types of claims appear prominently as part of Respondents' advertising. *See e.g.*, Complaint Exh. J (stating in a September 2009 ad that "POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities."). Although Respondents produced a spreadsheet describing various research expenditures (see Exh. D attached, RESP0005351), the spreadsheet lacks information essential to Complaint Counsel's evaluation of the substantiation for Respondents' establishment claims for the Challenged Products. Specifically, the spreadsheet did not provide vendor detail and expenditure information for January-December 2009 and January-December 2010, produced according to calendar year.³

Complaint Counsel raised the issue of the incomplete spreadsheet data in [REDACTED] deposition [REDACTED]. *See* Exhibit E. In this deposition, Complaint Counsel specifically requested data completing the spreadsheet through

³The spreadsheet also contained certain discrepancies between the line items and total financials (see, e.g., page 1 of the spreadsheet, years 1999-2001), which Respondents subsequently describe as "Other Research" (see attached, Exh. G). Respondents represent that they will provide detail on who paid for the "other research," but have not yet done so. Exh. F at 11.

July 2010. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Since [REDACTED] deposition, Complaint Counsel has repeatedly sought in its meetings with Respondents' counsel the additional spreadsheet information described above. See attached, Exh. F. Respondents provided a revised spreadsheet on March 1, 2011. See attached, Exh. G. Although the updated spreadsheet presented the financial data according to calendar year as requested, the spreadsheet did not provide the vendor details and expenditure

4 [REDACTED]
[REDACTED]
[REDACTED]

information cited above nor an explanation of the discrepancy between the line items and total financials on the first page of the spreadsheet.

As is evident from ██████████ deposition testimony, POM is fully capable of providing the updated spreadsheet information, including detailed vendor and expenditures data, for calendar years 2009 and 2010. Indeed, POM provided this information in its initial spreadsheet of data for the years leading up to 2009. Furthermore, it was Complaint Counsel's understanding that the purpose of seeking extensions of time from the Court to file motions to compel was to allow POM to generate the requested data. POM has not provided a compelling reason why it has been unable to provide the requested financial information – information that it is obligated to supplement under Rule of Practice 3.31(e)(2) – in the past month since ██████████ deposition took place. Respondents' Counsel has represented that Respondents are working to provide the requested data, but have given no guarantee of when they will do so. As a result, Complaint Counsel has no choice but to file the instant motion to compel production of this information, as the delay has already compromised Complaint Counsel's ability to complete its remaining written discovery requests (*i.e.*, requests for admissions).⁵

B. POM Has Failed to Produce Sufficient Information To Identify POM Juice Ads and Dissemination Schedules Prior to 2007

Complaint Counsel's First Request for Production of Documents to POM, No. 1 requested, among other things, a copy of each piece of promotional material for POM Juice disseminated in the United States.⁶ Our First Set of Interrogatories to POM, No. 2 requested,

⁵Complaint Counsel intends to propound RFAs by today's deadline with placeholders for requests related to the spreadsheet.

⁶Per negotiations with Respondents, Complaint Counsel agreed to limit the request to POM Juice promotional material disseminated in the United States.

among other things, that POM identify and describe in detail the dissemination schedules for each advertisement and promotional material produced in response to Document Request No. 1. POM produced many of the requested ads and a partial dissemination schedule on February 25, 2011. Counsel for Respondents informed us, however, that the information on the dissemination schedule “only exists from 2007 going forward in the current format.” Exh. F at 11. As a result Complaint Counsel is unable to determine if the pre-2007 POM Juice ads that Respondents produced 1) are complete and 2) were in fact disseminated.

Counsel for Respondents suggest that Complaint Counsel rely on POM advertisements it “has already obtained . . . from publicly available sources and third parties indicating when these particular ads were disseminated.” *Id.* As Respondents know, Complaint Counsel has obtained advertisements from VMS, a third-party source of advertising content. *See* www.vmsinfo.com. However, Respondents have refused to stipulate to the authenticity of the VMS advertisements. Exh. F at 10 (stating “we cannot agree to stipulate to the accuracy of the dates that were provided by a third party. There is no obligation that we do so and we believe any motion to compel on your part on this subject would be unreasonable.”)

Essential components of Complaint Counsel’s burden of proof are to establish the representations made and that such representations were disseminated to the public. For example, for purposes of a Section 12 violation, Complaint Counsel must show, and the Court must find, that there has been (1) the dissemination of advertisements; (2) for the purpose of inducing, or which are likely to induce, purchases in or affecting commerce; (3) of “food” or “drugs.” *See, e.g., Daniel Chapter One et al.*, Docket No. 9329, 2009 WL 2584873 (August 5, 2009) (Initial Decision, Section C.1.). Given the importance of the ads and dissemination schedules to the case in chief, and Respondents’ unwillingness to stipulate to the authenticity of

the VMS acquired ad and dissemination information, Complaint Counsel has no option but to move to compel production of the pre-2007 POM Juice advertisements and dissemination schedules from Respondents, the primary source of such information.

C. The Requested Information Is Relevant, Necessary to Complaint Counsel's Burden of Proof, and Readily Available to POM

“Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” Rule 3.31(c)(1). The topics covered by these discovery requests are highly relevant to the core allegations in this case, including liability for misrepresentations, whether Respondents have competent and reliable substantiation, whether the ads were widely disseminated; and the existence of consumer injury. The requests are not burdensome and the information is readily available to POM. It is plainly insufficient and inconsistent with the parties’ obligation to conduct discovery to delay or refuse to produce these materials. *See Hautala v. Progressive Direct Ins. Co.*, No. 08-5003, 2010 WL 1812555, at *14 (D.S.D. May 3, 2010) (“The party resisting production of discovery bears the burden of establishing lack of relevancy or that complying with the request would be unduly burdensome.”)

Given the accelerated discovery schedule in this case, any further delay in providing discoverable information will have a significant effect on Complaint Counsel’s ability to obtain complete information in time to prepare for the depositions of key witnesses and for the administrative hearing. Depositions of Individual Respondents Lynda and Stewart Resnick are scheduled for March 14 and 16, 2011. Complaint Counsel’s RFAs on these issues will be yet again delayed. Complaint Counsel must produce a “final” exhibit list by March 24, 2011, which is impossible if it does not have key documents it intends to use. Respondents’ vague promise

that research expenditure information will be provided “as soon as possible” is unreliable given their track record of delays thus far. Courts have noted that receiving information close to the end of discovery can prejudice the requesting party. *Zornes v. Specialty Indus., Inc.* No. 97-2337, 1998 WL 886997, at *7 (4th Cir. Dec. 21, 1998) (noting that although documents were produced only eight days late, the fact that they were produced ten days before end of discovery resulted in “substantial prejudice”).

III. Request for Relief

Over the course of two months, Complaint Counsel has continued to narrow its requests to meet Respondents’ objections. The information and documents at issue are plainly discoverable and critically relevant. For the reasons set forth above, Complaint Counsel respectfully requests that the Court issue the attached proposed order compelling POM, within five (5) business days, to produce: 1) a detailed accounting of the dollars spent by Respondents on research and development, including the basis for the propositions that the Challenged Products are backed by \$23, \$25, or \$32 million in research, and 2) advertisements and dissemination schedules of POM Juice prior to 2007.

Dated: March 4, 2011

Respectfully Submitted,

/s/ Mary L. Johnson

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STATEMENT OF COMPLAINT COUNSEL
REGARDING MEET AND CONFER

In accordance with Paragraph 4 and of the Court's Scheduling Order, the undersigned counsel certifies that Complaint Counsel conferred with Respondents in an effort in good faith to resolve by agreement the issues raised by *Complaint Counsel's Motion and Memorandum to Compel Production of Documents and Interrogatory Responses from Respondent POM Wonderful LLC*, dated March 4, 2011. From February 16 - March, 2011, Complaint Counsel (Mary Johnson, Heather Hipsley, Elizabeth Nach, and Serena Viswanathan) and Respondents' counsel (Johnny Traboulsi, Skye Perryman, and Paul Rose) communicated nearly daily. *See* Exhibit F for excerpts from the parties' email communications. The parties have been unable to reach an agreement on the issue raised in the attached motion.

Respectfully Submitted,

s/ Mary L. Johnson
Mary L. Johnson
Complaint Counsel

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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In the Matter of)	
)	
POM WONDERFUL LLC and)	
ROLL INTERNATIONAL CORP.,)	
companies, and)	Docket No. 9344
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)	PUBLIC
STEWART A. RESNICK,)	
LYNDA RAE RESNICK, and)	
MATTHEW TUPPER, individually and)	
as officers of the companies.)	
_____)	

**[Proposed] ORDER GRANTING COMPLAINT COUNSEL’S MOTIONS TO COMPEL
PRODUCTION OF DOCUMENTS AND INTERROGATORY RESPONSES FROM
RESPONDENT POM WONDERFUL LLC**

On March 4, 2011, Complaint Counsel filed a *Motion and Memorandum to Compel Production of Documents and Interrogatory Responses from Respondent POM Wonderful LLC*. Upon full consideration of the parties’ arguments, Complaint Counsel’s motion is GRANTED, and it is hereby ORDERED that Respondent POM Wonderful LLC within five (5) business days to produce: 1) a detailed accounting of the dollars spent by Respondents on research and development, including the basis for the propositions that the Challenged Products are backed by \$23, \$25, or \$32 million in research, and 2) advertisements and dissemination schedules of POM Juice prior to 2007.

ORDERED:

Dated:

D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that on March 4, 2011 I caused the filing and serving of *Complaint Counsel's Motion and Memorandum to Compel Production of Documents and Interrogatory Responses from Respondent POM Wonderful LLC* upon the following as set forth below:

One electronic copy of the redacted, public document via the FTC E-Filing System, and the paper original and paper copies of the full confidential document via hand delivery to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., 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., N.W., Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy via email to:

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Date: March 4, 2011

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