

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

ORIGINAL



In the Matter of)
)
)

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 ON RESPONDENTS' MOTION TO EXTEND THE CLOSING OF THE
RECORD AND TO COMPEL COMPLAINT COUNSEL TO FURTHER DEFINE THE
ADVERTISEMENTS AND CLAIMS AT ISSUE IN THIS CASE, AND ON
RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY**

I. Introduction

On the record at the hearing in this matter on November 4, 2011, the parties were directed to work together in an attempt to narrow or consolidate the disputed issues requiring determination in this case, including the number of advertisements being challenged, the number of alleged misrepresentations being challenged, and the types of alleged misrepresentations. Transcript ("Tr."), 3267. The parties were further directed to attempt to stipulate to as many relevant facts as possible, including agreed meanings for the medical terms and research terms used in the case. Tr., 3267-3268.

The parties were advised that because any joint stipulations would become part of the evidentiary record, the record would remain open until November 14, 2011 for the purpose of receiving and admitting the stipulations. Tr., 3268. The parties were also informed that if progress was being made on developing stipulations, but additional time was needed, a joint motion for an extension of time for closing the record would be considered. *Id.*

The parties filed a short and limited list of stipulated facts on November 14, 2011. The parties did not agree to, and did not file, a joint motion for an extension of time for closing the record; rather, on November 14, 2011, Respondents filed a Motion to Extend the Closing of the

Record, which also included a Motion to Compel Complaint Counsel to Further Define the Advertisements and Claims at Issue in This Case (“Motion”). Complaint Counsel filed an Opposition to the Motion on November 15, 2011. On November 17, 2011, Respondents filed a Motion for Leave to File a Reply to Complaint Counsel’s Opposition, along with their proposed reply (“Reply”).

The Motion for Leave to File a Reply is DENIED because it fails to demonstrate that the Reply raises “recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief” as required by Commission Rule of Practice 3.22(d), 16 C.F.R. § 3.22(d).¹

As more fully discussed below, Respondents’ Motion to Compel is DENIED. Respondents’ Motion to Extend the Closing of the Record is also DENIED. An Order closing the record will be issued separately. Respondents’ request for an extension of time to submit post-trial filings is GRANTED. An Order setting the briefing schedule and other briefing requirements will also be issued separately.

II. Motion to Compel

Respondents’ motion for an order compelling Complaint Counsel to comply with the directions to the parties on November 4, 2011, by further defining the advertisements and claims at issue, lacks merit. As noted above, the parties were directed to meet and confer in an attempt to narrow or consolidate the scope of the case, including the number of alleged misrepresentations and the number of advertisements being challenged in this case. Tr., at 3267. Respondents do not contend that Complaint Counsel failed to meet and confer with Respondents, as required by the November 4 directive. Respondents argue that Complaint Counsel failed to provide them with a list of all the challenged advertisements along with the specific misrepresentations claimed for each such advertisement. To the extent that Respondents claim that the November 4 directive required Complaint Counsel to provide Respondents with a list of all the challenged advertisements along with the specific misrepresentations claimed for each such advertisement, Respondents have misread the directives.

Complaint Counsel asserts that it provided Respondents with a stipulated list of the “universe of advertising and promotional material being challenged.” Complaint Counsel further represents that its Proposed Findings of Fact will analyze each item of advertising set forth in that list. In this regard, it should be noted that Exhibit E to the Complaint, standing alone, comprises nine separate videos, including electronic “capturing” of lengthy web navigations of Respondents’ numerous websites and recordings of television appearances by Respondent Lynda Resnick and Respondent Michael Tupper. Moreover, a single paragraph of the Complaint, alleging false heart disease claims, alleges no fewer than 6 alternative misrepresentations, each alleged to be either express or implied (or both), regarding up to 3 separate products. Complaint ¶ 12. (“Respondents have represented, expressly or by implication, that clinical studies, research,

¹ Rule 3.22(d) states in pertinent part: “Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge’s or the Commission’s attention to recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief.”

and/or trials prove that: Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, prevents or reduces the risk of heart disease, including by (1) decreasing arterial plaque, (2) lowering blood pressure, and/or (3) improving blood flow to the heart . . . and treats heart disease, including by (1) decreasing arterial plaque, (2) lowering blood pressure, and/or (3) improving blood flow to the heart.”) (emphasis added).

In addition to the foregoing “falsity” claims relating to heart disease, the Complaint alleges that the same representations, described above, are also unlawful on the theory that the representations are unsubstantiated. Complaint ¶ 19. The Complaint makes the same or substantially similar allegations as to Respondents’ alleged prostate cancer and erectile dysfunction advertising, again on the theories of both falsity and lack of substantiation. Given the very broad scope of the allegations in this case, Complaint Counsel is mistaken in its assertion that a further grouping or consolidation of the multiple, alternative, and overlapping claims, products, advertisements, and legal theories presented by this case, beyond that set forth in the Complaint, “will not assist the Court. . . .” Opposition at 2-3. General and compound assertions such as those in the Complaint would provide little assistance and clarity in a post-hearing brief.

Because it does not appear that Complaint Counsel failed to comply with the directions stated from the bench on November 4, 2011, Respondents’ Motion to Compel is DENIED.

III. Motion for Extension of Time

In support of their claim that the time for closing the record should be extended, Respondents assert that the parties would benefit from additional time to work on stipulations; that additional time is needed to resolve certain evidentiary issues concerning the record; and that Respondents will be prejudiced by closing the record because the briefing schedule that would be triggered by closing the record as scheduled conflicts with Respondents’ counsel’s involvement in another trial involving Respondents, which began November 15 and is expected to last until approximately December 2, 2011. To accommodate that trial, Respondents request that the record be kept open until December 1, 2011. In the alternative, Respondents request an extension of time under Commission Rule of Practice 4.3, 16 C.F.R. § 4.3, to extend the time for submitting post-hearing filings under Rule 3.46. 16 C.F.R. § 3.46.

Complaint Counsel responds that the record should not remain open because Complaint Counsel attempted to reach agreement with Respondents on stipulations; and that certain stipulations were filed, but that further stipulations are unlikely. Complaint Counsel also argues that the record need not remain open because of the asserted conflict with another trial involving Respondents because there are numerous Roll attorneys and outside counsel attorneys who have been intimately involved in this matter, and can complete the post-trial briefs; and that ample time has already passed in which counsel could have been working on post-trial briefs.

Rule 3.44(c) of the Commission’s Rules of Practice states: “Upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record after giving the parties 3 business days to determine if the record is complete or needs to be supplemented.” 16 C.F.R. § 3.44(c). Applying the foregoing, the record in this case would have closed on Wednesday, November 9, 2011; however, a brief extension of 2 business days was

granted, to Monday, November 14, 2011,² for the limited purpose of giving the parties time to discuss stipulations and develop methodologies for narrowing or consolidating the issues for decision. Any extension of this time period was to be based upon a joint motion and progress being made. The parties submitted a very brief set of stipulations. There is little, if any, basis for believing that leaving the record open any longer will result in any additional, meaningful stipulations. Accordingly, Respondents' Motion to extend the deadline for closing the record is DENIED. A separate Order closing the record on November 18, 2011 will be issued.

Respondents further request, in the alternative, for an extension of the time for the submission of post-hearing filings under Rule 3.46. 16 C.F.R. § 3.46. Rule 3.46(a) provides that "[w]ithin 21 days of the closing of the hearing record, each party may file with the Secretary for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. . . . Reply findings of fact, conclusions of law, and briefs may be filed by each party within 10 days of service of the initial proposed findings." 16 C.F.R. § 3.46(a). The time limits in Rule 3.46 were proposed as part of the 2009 amendments to the Commission's Rules of Practice. In response to a comment that the proposed change "revokes the ALJ's discretion over the timing of proposed findings of fact, conclusions of law and briefs in favor of rigid, one-size-fits-all time schedules," the Commission stated: "The schedule outlined in the proposed Rule, however, should be reasonable in the vast majority of cases. In the unusual situation, a party may move the ALJ under Rule 4.3 for an extension '[f]or good cause shown.'" Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1817 (Jan. 13, 2009).

The hearing in this matter involved 18 days of trial, 24 live witnesses, including 14 experts, and voluminous exhibits, the listing of which required a near-200 page exhibit list. As noted on the record on November 4, 2011, managing the number of claims, advertisements, and alleged misrepresentations in this case has become "somewhat unwieldy." The extraordinary breadth of this case, as noted in Section II above, was among the bases for granting Respondents' motion to exceed the five expert limit in Rule 3.31A(b). Order on Cross-Motions Regarding Limits on Experts, Feb. 23, 2011. As noted in that Order, because Complaint Counsel's case challenges multiple products, multiple advertisements, and multiple areas of science, as well as two alternative theories of violation, extraordinary circumstances existed under Rule 3.31A(b) to justify exceeding the five expert limit.³ Given the extraordinary breadth of this case, and

² Friday, November 11, 2011, was a federal holiday and was not included in the above calculation. See Rule 4.3 (providing that computation of a time period of 7 days or less shall exclude Saturdays, Sundays, and holidays).

³ The Order stated in part: "According to Complaint Counsel's Answers to Interrogatories, . . . Complaint Counsel contends that 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." Order on Cross-Motions Regarding Limits on Experts, Feb. 23, 2011 at 5-6. Complaint Counsel's final supplemental responses to interrogatories, submitted May 2, 2011, identified 37 express representations covering numerous separate advertisements, and a greater universe of implied claims covering the same and additional advertisements. See Complaint Counsel's Second Supplemental Response to POM Wonderful LLC's First Set of Interrogatories, Nos. 1 and 2, March 11, 2011.

considering further the unavailability of key members of Respondents' defense team as they attend to another trial involving Respondents, good cause exists under Rule 4.3 to extend the deadlines for post-hearing filings in this case by an additional 30 days for opening briefs, and an additional 15 days for reply briefs, beyond the deadlines otherwise provided under Rule 3.46. Accordingly, Respondents' request for additional time for post-hearing filings is GRANTED.

A separate Order will address the briefing schedule, and the details concerning briefing requirements.

IV. Conclusion

After full consideration of Respondents' Motion and Complaint Counsel's Opposition thereto, and for the reasons set forth above, Respondents' Motion to Compel Complaint Counsel to Further Define the Advertisements and Claims at Issue in This Case is DENIED.

Respondents' Motion to Extend the time for closing the record is also DENIED. An Order closing the record shall be issued separately. In addition, Respondents' Motion for Leave to File a Reply is DENIED.

Respondents' request to extend the time to submit post-hearing briefs pursuant to Rule 3.46 and 4.3 is GRANTED, and it is hereby ORDERED that the time provided under Rule 3.46 shall be extended for all parties by an additional 30 days for opening briefs, and an additional 15 days for reply briefs. A separate Order on post-hearing briefs shall also be issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: November 18, 2011