



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**RESPONDENTS’ OPPOSITION TO COMPLAINT COUNSEL’S MOTION FOR
LEAVE TO EXTEND THE DEPOSITION TIME FOR RESPONDENT
MATTHEW TUPPER AND WITNESS HARLEY LIKER**

The motion filed by Complaint Counsel to extend past the 7-hour deposition limit for Respondent Matthew Tupper and fact witness Dr. Harley Liker is without merit. Complaint Counsel *speculates* it will need more than the designated 7 hours, but fails to actually demonstrate a need. Complaint Counsel premises its request for more deposition time primarily on the basis of “Mr. Tupper’s extensive involvement in the operations of POM Wonderful LLC (“POM”) and Roll International Corporation (the Corporate Respondents”) and the marketing of POM Juice and POMx (collectively, the “Challenged Products”), and both individuals’ longstanding, integral business relationships with Respondent and roles in developing and overseeing POM’s scientific research”. Motion at p. 1. Even assuming Complaint Counsel’s characterization of these individuals’ involvement in this case is accurate, their history with the companies or research demonstrate nothing more than they likely possess relevant information—information Complaint Counsel, by order and rule, is free to elicit in 7 hours of deposition time. But

possessing information, even a lot of information, is not a basis to exceed the 7 hours allotted in this case, which is the same time limit universally used in Federal Court. In fact, Mr. Tupper has been deposed several times in related litigation involving claims and cross-claims about POM's advertising, competitor advertisements and the health benefits of POM's pomegranate juice, and not once was it necessary for Mr. Tupper's deposition to exceed 7 hours. This case involves fewer legal issues and causes of action than any of those cases and therefore Complaint Counsel's motion should be denied.

I. Complaint Counsel has Failed to Demonstrate that it Needs More than 7 Hours per Witness

One purpose of the 7-hour deposition limit is to encourage parties to be efficient in their deposition taking. *See, e.g., In the matter of Intel Corporation*, 2010 WL 2332726 (May 28, 2010) (“Intel will necessarily be mindful of the seven hour time limitation, which is likely to encourage Intel to be efficient in its questioning and discourage Intel from duplicating prior lines of questioning.”). There is no reason to think that 7 hours, if used effectively, would not be enough time to depose these witnesses. As noted above, Mr. Tupper has been deposed repeatedly in related litigation—and in each case his deposition was completed within the 7-hour limit. Declaration of Daniel S. Silverman (“Silverman Decl.”), ¶ 6. And those cases involved more legal issues and causes of action than the instant case by Complaint Counsel. In those cases, POM brought suit for false advertising under the Lanham Act. Issues of preemption, labeling, marketing, advertising and juice formula, among other things, were all at issue in such cases. Additionally, in each of those cases, the defendants cross-claimed, challenging POM's health claims and advertisements or otherwise attempting to defend on the basis of unclean hands. *Id.* at ¶¶ 4-5. In other words, those cases involved

a myriad of difficult and diverse causes of action and defenses. Despite this, Mr. Tupper's depositions never exceeded one day. *Id.* at ¶ 6. And here, unlike in those previous cases, Complaint Counsel has the benefit of Mr. Tupper's deposition transcripts—it therefore already has a roadmap of what he will say and has already said. This will greatly expedite Complaint Counsel's examination and obviate the need for most unnecessary or inefficient avenues of questioning.

Moreover, and as conceded by Complaint Counsel, Complaint Counsel plans to conduct over 25 depositions in this proceeding, half of which have already taken place. Many of these witnesses either worked under, above or with Mr. Tupper and Dr. Liker. Accordingly, much of what Complaint Counsel seeks to elicit from Mr. Tupper and Dr. Liker will likely be duplicative of other testimony it already has or will get from other witnesses. So an additional day is simply not needed or warranted. And contrary to Complaint Counsel's assertion, piecemeal deposition testimony, though potentially not the most efficient means, is how discovery functions, and efficiency alone is simply not enough to subject Mr. Tupper and third party Dr. Liker to more than 7 hours of deposition questioning—particularly when Complaint Counsel has failed to demonstrate that more than 7 hours is even needed to elicit the full examination of these witnesses.

Complaint Counsel's motion, at best, contains only generalized statements regarding the topics on which it seeks to depose these witnesses and it never indicates with any degree of specificity why 7 hours is insufficient. Several relevant areas of inquiry are nothing unusual for deposition testimony—therefore the fact that Complaint Counsel intends to question in several different areas does not entitle it to more deposition time. As noted above, Complaint Counsel's apparent "best" reason for

extending the deposition time is that both individuals have a long-standing affiliation with POM. But, this is irrelevant. The complaint attacks particular ads and particular studies and not the entire history of the company or history of its marketing in general. That is where the questioning should focus. Nevertheless, Complaint Counsel is free to ask questions regarding company history—but doing so does not provide a basis to extend the time to ask questions.

Relatedly, if Complaint Counsel stops asking deponents to read voluminous documents and emails into the record, or otherwise reading them itself, depositions would go significantly faster. *E.g.*, *Forest*, 74:24-76:3, 114:22-116:7 (asked deponent 30 separate times to read portions of documents into the record); *DeGroof*, 53:12-14, 59:21-60:3, 60:22-61:3, 77:22-78:20, 80:18-81:9, 106:25-107:10, 117:10-20, 119:9-120:5, 125:19-126:6, 127:16-128:11, 138:23-139:1, 151:15-152:2 (on multiple occasions asked deponent to read documents into the record). Similarly, in several depositions, Complaint Counsel has continued asking deponents questions about particular documents even after the witnesses testified they have no knowledge of them. *E.g.*, *Padma-Nathan*, 40:19-41:11, 41:12-45:14, 46:11-49:11, 52:8-23, 57:8-61:18, 66:20-68:14; *DeGroof*, 146:7-16; 149:25-150:12.¹ Before asking, in advance, for additional time for depositions Complaint Counsel could exert greater effort to conduct depositions without such objectionable and inefficient practices.

II. Equity Compels Denial of Complaint Counsel’s Request for Additional Deposition Time

¹ True and correct copies of the above deposition transcript excerpts are attached hereto as Exhibits A-C, respectively.

As acknowledged by Complaint Counsel, both witnesses would likely be prejudiced (or at the very least significantly inconvenienced) by having to set aside 2 days of their schedules for what could result in 14 hours of questioning. Dr. Liker, a medical doctor, has patients and a demanding schedule. He is also a third party. Mr. Tupper is the President of a company and has many demands on his schedule. Although Respondents do not deny that Complaint Counsel has a right to take the depositions of these individuals, it does not have a right to unnecessarily burden them with additional questioning because it failed to use its 7 hours of deposition time efficiently. Depositions, like all discovery, is a practice in cost benefit analysis, time management and smart lawyering. Without demonstrated need, Mr. Tupper and Dr. Liker should not be made to suffer because Complaint Counsel has not used its time with them well.

Finally, Complaint Counsel challenges Respondents' "wait and see" preference as to the need for more deposition time because it might prejudice Complaint Counsel because of the February 18 discovery cut-off. But without a demonstrated need for more time, this is the best approach. As was discussed with Complaint Counsel, both witnesses have very busy schedules—Dr. Liker in particular has commitments to his practice. If Complaint Counsel actually runs out of time and legitimately needs more deposition time, Respondents' counsel is willing to sit down and discuss the matter to see if a solution is possible. This could include a multitude of possible solutions, including agreeing to a date after February 18 to conclude a deposition. Complaint Counsel, however, was unwilling to compromise or even discuss potential solutions and, instead, filed the instant motion. Deposition limits exist for a reason—to encourage efficiency and prohibit discovery harassment and abuse. Until and if Complaint Counsel can show

it needs an additional day of deposition time with either Mr. Tupper or Dr. Liker, it should be held to the 7 hours outlined in the Scheduling Order and as used in Federal Court.

Respectfully Submitted,

/Kristina M. Diaz

Kristina M. Diaz
ROLL LAW GROUP P.C.
1 1444 West Olympic Boulevard
10th Floor
Los Angeles, CA 90064
Telephone: 310.966.8775
E-mail: kdiaz@roll.com

John D. Graubert
Skye L. Perryman
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
Telephone: 202.662.5938
Facsimile: 202.778.5938
E-mail: JGraubert@cov.com
SPerryman@cov.com

Attorneys for POM Wonderful LLC

Date Submitted: January 6, 2011
Corrected Resubmission: January 7, 2011

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of **RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO EXTEND THE DEPOSITION TIME FOR RESPONDENT MATTHEW TUPPER AND WITNESS HARLEY LIKER**, and that on this 7th day of January, 2011, I caused the foregoing to be served by FTC E-File and hand delivery on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-135
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

I hereby certify that this is a true and correct copy of **RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO EXTEND THE DEPOSITION TIME FOR RESPONDENT MATTHEW TUPPER AND WITNESS HARLEY LIKER**, and that on this 7th day of January, 2011, I caused the foregoing to be served by e-mail on the following:

Heather Hipsley
Mary L. Johnson
Tawana Davis
Federal Trade Commission
601 New Jersey Avenue, NW

Washington, DC 20580
Counsel for Complainant

Mary Engle
Associate Director for Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

John D. Graubert
Skye L. Perryman
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
Telephone: 202.662.5938
Facsimile: 202.778.5938
E-mail: JGraubert@cov.com
SPerryman@cov.com
Counsel for Respondents

Bertram Fields
Greenberg Glusker
1900 Avenue of the Stars
21st Floor
Los Angeles, CA 90067
Telephone: 310.201.7454
*Counsel for Respondents Stewart
Resnick and Lynda Rae Resnick*

/Kristina M. Diaz
Kristina M. Diaz
ROLL LAW GROUP P.C.
1 1444 West Olympic Boulevard
10th Floor
Los Angeles, CA 90064
Telephone: 310.966.8775
E-mail: kdiaz@roll.com

John D. Graubert
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COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
Telephone: 202.662.5938

Facsimile: 202.778.5938
E-mail: JGraubert@cov.com
SPerryman@cov.com

Attorneys for Respondents

January 7, 2011



In the Matter of:

POM Wonderful

December 7, 2010
Harin Padma-Nathan, M.D.

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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1 REPORTER'S CERTIFICATE

2

3 I, the undersigned, a Certified Shorthand
4 Reporter of the State of California, do hereby
5 certify;

6 That the foregoing proceedings were taken
7 before me at the time and place herein set forth;
8 that any witnesses in the foregoing proceedings,
9 prior to testifying, were placed under oath; that a
10 verbatim record of the proceedings was made by me
11 using machine shorthand, which was thereafter
12 transcribed under my direction; further, that the
13 foregoing is an accurate transcription thereof.

14 I further certify that I am neither
15 financially interested in the action, nor a relative
16 or employee of any attorney of any of the parties.

17 IN WITNESS WHEREOF, I have this date
18 subscribed my name.

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20 Dated:

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CHRISTINA KIM-CAMPOS

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CERTIFICATE NO. 12598

CERTIFICATE OF DEPONENT

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I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

CHRISTOPHER FOREST

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this _____ day of _____, 2010, and executed the above certificate in my presence.

NOTARY PUBLIC IN AND FOR:

MY COMMISSION EXPIRES:

1 WITNESS: CHRISTOPHER FOREST

2 DATE: DECEMBER 6, 2010

3 CASE: POM WONDERFUL, ET AL.

4 Please note any errors and the corrections thereof on
5 this errata sheet. The rules require a reason for any
6 change or correction. It may be general, such as "To
correct stenographic error," or "To clarify the record,"
or "To conform with the facts."

7 Page Line Correction Reason For Change

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In the Matter of:

POM Wonderful

December 6, 2010
Christopher Forest

Condensed Transcript with Word Index



For The Record, Inc.
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CHRISTINA KIM-CAMPOS

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CERTIFICATE NO. 12598

CERTIFICATE OF DEPONENT

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In the Matter of:

POM Wonderful

December 21, 2010
Robert Clifford deGroof

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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1 were no apparent treatment-related changes in any of the
2 chemistry, hematology or urinalysis laboratory results,"
3 is that referring to safety endpoints?

4 A. This is -- that is specifically related to the
5 safety endpoints.

6 Q. Okay. Does it have anything to do with the
7 biological efficacy endpoints?

8 A. No, it doesn't.

9 Q. Okay.

10 A. As I think Dr. Heber pointed out in one of
11 those earlier e-mails that the -- some of the tests
12 that they did also get done as part of safety labs, but
13 they're not done in the same way. They're screening
14 for safety as opposed to the more sophisticated
15 techniques they might use in his laboratory to
16 determine something.

17 Q. All right. And were the results of this first
18 study that we've been talking about on elevated waist
19 circumference ever published?

20 A. I have no knowledge of the publication status.

21 (deGroof Deposition Exhibit Number 10,
22 POM-HC0001735-0001739, Safety and Antioxidant Activity
23 of a Pomegranate Ellagitannin-Enriched Polyphenol
24 Dietary Supplement in Overweight Individuals with
25 Increased Waist Size, was marked for identification.)

1 BY MS. DOMOND:

2 Q. And Dr. deGroof, can you take a moment to look
3 at what's been marked as Exhibit 10 and let me know once
4 you've had a chance to review it.

5 (Pause in the proceedings.)

6 A. Okay.

7 Q. And for the record, Exhibit 10 is an article in
8 the Journal of Agricultural and Food Chemistry entitled
9 Safety and Antioxidant Activity of a Pomegranate -- I'm
10 going to mess that word up, so I'll just let you spell
11 it -- Enriched Polyphenol Dietary Supplement in
12 Overweight Individuals with Increased Waist Size, and it
13 ranges from Bates number POM-HC 0001735 to 1739.

14 And Dr. deGroof, do you recognize what has been
15 marked as Exhibit 10?

16 A. I've never seen it before.

17 Q. Okay. By looking at the abstract of what's
18 marked as Exhibit 10 on page 1735 of the document, can
19 you tell what this journal article is about?

20 A. Yes, I can.

21 Q. Do you know what it's about?

22 A. It -- I do. It is the -- it is a review of
23 data from two studies, one of which appears to be the
24 study that we've spoken about before that Accelovance
25 conducted for POM, and there is also a second study done

1 in another group of patients who I don't know much
2 about, I don't know anything about, and they measured
3 some antioxidant activity, and the authors came to the
4 conclusion that not only was it safe, the POM
5 supplement, but that it provided evidence of antioxidant
6 activity in humans.

7 Q. Had anyone ever told you that they were going to
8 be publishing the results of the Accelovance study?

9 A. No. I don't think -- they would not have, and I
10 don't believe they did.

11 Q. Turning to that abstract again, in the middle of
12 the abstract where it says "Study 1 was designed for
13 safety assessment," do you see that?

14 A. Uh-huh. Yes.

15 Q. It says, "Study 1 was designed for safety
16 assessment in 64 overweight individuals with increased
17 waist size." Is this accurate?

18 MS. PERRYMAN: Object to the form.

19 THE WITNESS: You're asking me to comment on the
20 statement "designed for safety assessment"?

21 It was one of the designs, was safety. It was
22 safety and efficacy, was what was stated in the protocol
23 as the reason for doing the study.

24 BY MS. DOMOND:

25 Q. Okay. And can you turn to page 1736 of

1 Exhibit 10 for me.

2 A. Uh-huh.

3 Q. And look under the section Experimental Methods,
4 and just take a look at that and...

5 (Pause in the proceedings.)

6 Are you -- but just -- sorry. Give me a
7 second.

8 (Pause in the proceedings.)

9 Do you notice any discussion about the
10 Accelovance study regarding antioxidant or inflammation
11 testing in that section of Exhibit 10?

12 A. Give me a moment.

13 Q. Okay.

14 (Pause in the proceedings.)

15 MS. PERRYMAN: I'm just going to note our
16 continuing objection that having the witness read
17 documents during the deposition and report on what he's
18 reading we believe is not a proper use of the witness'
19 time.

20 THE WITNESS: Well, it specifically refers --
21 under the subsection on that page, Human Study, it
22 refers to the Accelovance study.

23 BY MS. DOMOND:

24 Q. Okay.

25 A. The Accelovance San Diego, California.

1 Q. Okay. And does it say anything about that the
2 study was for the purpose of testing the effect of the
3 product on antioxidation or inflammation?

4 MS. PERRYMAN: Same objection.

5 THE WITNESS: It does say that because it's
6 in -- to enrich the study population -- this is under
7 "exclusions" -- "To enrich the study population with
8 subjects who were more likely to have elevated levels of
9 oxidative markers, subjects were required to have an
10 above-normal body mass index (BMI) of 25 to 32 and to
11 have central obesity determined by waist measurement
12 (males, greater than 40 inches; females, greater than
13 35 inches)."

14 So that suggests they were looking at elevated
15 levels of oxidative markers.

16 BY MS. DOMOND:

17 Q. So you read into that that it was both a safety
18 and efficacy study?

19 MS. PERRYMAN: Objection as to the
20 characterization "read into."

21 THE WITNESS: I'm not reading into anything
22 here. I was just talking about whether it had to do
23 with oxidative markers.

24 BY MS. DOMOND:

25 Q. Okay. Is there any discussion in that section

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1 C E R T I F I C A T I O N O F R E P O R T E R

2

3 DOCKET/FILE NUMBER: 9344

4 CASE TITLE: POM Wonderful LLC, et al.

5 HEARING DATE: December 21, 2010

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: DECEMBER 28, 2010

14

15

16 JOSETT F. WHALEN, RMR

17

18

19 C E R T I F I C A T I O N O F P R O O F R E A D E R

20

21 I HEREBY CERTIFY that I proofread the transcript
22 for accuracy in spelling, hyphenation, punctuation and
23 format.

24

25

ELIZABETH M. FARRELL

1 DISTRICT OF COLUMBIA, to wit:

2 I, Josett F. Whalen, before whom the foregoing
3 deposition was taken, do hereby certify that the
4 within-named witness personally appeared before me at
5 the time and place herein set out, and after having been
6 duly sworn by me, according to law, was examined by
7 counsel.

8 I further certify that the examination was
9 recorded stenographically by me and this transcript is a
10 true record of the proceedings.

11 I further certify that I am not of counsel to
12 any party, nor an employee of counsel, nor related to
13 any party, nor in any way interested in the outcome of
14 this action.

15 As witness my hand and notarial seal this 28th
16 day of December, 2010.

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JOSETT F. WHALEN

21

Notary Public

22

MY COMMISSION EXPIRES: 5-31-2015

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1 CERTIFICATE OF DEPONENT

2 I hereby certify that I have read and examined
3 the foregoing transcript, and the same is a true and
4 accurate record of the testimony given by me.

5 Any additions or corrections that I feel are
6 necessary, I will attach on a separate sheet of paper to
7 the original transcript.

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9 ROBERT CLIFFORD deGROOF

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11 I hereby certify that the individual
12 representing himself/herself to be the above-named
13 individual, appeared before me this
14 day of , 2010, and
15 executed the above certificate in my presence.

16

17

18 NOTARY PUBLIC IN AND FOR

19

20 MY COMMISSION EXPIRES:

21

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1 WITNESS: ROBERT CLIFFORD deGROOF

2 DATE: December 21, 2010

3 CASE: POM Wonderful LLC, et al.

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9 PAGE LINE CORRECTION REASON FOR CHANGE

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

Docket No. 9344

**DECLARATION OF DANIEL S. SILVERMAN IN SUPPORT OF
RESPONDENTS’ OPPOSITION TO COMPLAINT COUNSEL’S MOTION FOR
LEAVE TO EXTEND THE DEPOSITION TIME FOR RESPONDENT
MATTHEW TUPPER AND WITNESS HARLEY LIKER**

I, Daniel S. Silverman, declare as follows:

1. I am Associate General Counsel – Litigation at Roll Law Group P.C. , counsel for Respondents POM Wonderful LLC (“POM”), Roll International Corporation (“Roll”) , Stewart A. Resnick, Lynda R. Resnick and Matthew Tupper in the above-captioned matter. I have personal knowledge of the facts set forth herein and, if called upon to testify, could and would competently testify thereto.

2. Although I am not actively involved in Complaint Counsel’s action against Respondents, in my roll as Associate General Counsel, I am familiar with the claims, defenses and legal theories of the action.

3. During the last two years, I was intimately involved in false advertising litigation initiated by POM against several manufacturers of pomegranate juice blend products. These cases were all filed in District Court in the Central District of California:

POM Wonderful LLC v. The Coca-Cola Company, Case No. CV-08-06237 SJO (FMOx), POM Wonderful LLC v. Welch's Food Inc., Case No. CV-09-00567 AHM (AGRx), POM Wonderful LLC v. Tropicana Products, Inc., Case No. CV-09-00566 DSF (CTx), and POM Wonderful LLC v. Ocean Spray Cranberries, Inc., Case No. CV09-00565 DDP (RZx).

4. In these cases, POM brought suit for false advertising under the Lanham Act. Issues of FDA preemption, labeling, marketing, advertising and juice formula, among other things, were all at issue.

5. Additionally, in each of those cases, the defendants either cross-claimed, challenging POM's health claims and advertisements, or otherwise attempted to defend on the basis of unclean hands on the grounds that POM's health claims in advertising were not substantiated. In other words, these were complex cases with a myriad of claims and defenses.

6. Matthew Tupper's deposition was taken in each of these cases. His deposition did not exceed a one day, 7-hour deposition in any of these cases.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on this 6th day of January, 2011, in Los Angeles, California.

/s/ Daniel S. Silverman
Daniel S. Silverman



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)
)
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.)

Docket No. 9344

**DECLARATION OF HARLEY R. LIKER, M.D. IN SUPPORT OF
RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR
LEAVE TO EXTEND THE DEPOSITION TIME FOR RESPONDENT
MATTHEW TUPPER AND WITNESS HARLEY LIKER**

I, Harley R. Liker, M.D. declare as follows:

1. I am a medical doctor in internal medicine and am on the clinical faculty at the David Geffen School of Medicine at the University of California at Los Angeles. I also function as an outside medical consultant to POM Wonderful LLC. I have personal knowledge of the facts set forth herein and, if called upon to testify, could and would competently testify thereto.

2. I run a very active internal medicine practice. In addition, I assist in research into the possible health benefits of pomegranate juice and related products.

3. These activities, particularly my medical practice, keep me extremely busy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on this 6th day of January, 2011, in Los Angeles, California.

/s/ Harley R. Liker
Harley R. Liker, M.D.