



HEARING REQUESTED

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

RESPONDENTS' MOTION TO EXCEED FIVE (5) EXPERT LIMIT

Pursuant to the Rule 3.31A(b) of the Commission's Rules of Practice, Respondents respectfully request that the Court extend the number of expert witnesses that Respondents may designate from five to a maximum of eight. Rule 3.31A(b) empowers this Court to grant a request for additional witnesses where there are extraordinary circumstances. Such circumstances are present here because, unlike many advertising substantiation cases where there is a single core claim at issue, in this case, Complainant challenges a variety of alleged health claims that touch upon multiple, wholly distinct and independent areas of science.

In order to respond meaningfully to the Complainant's varied allegations, Respondents require expert witnesses from each of the fields of science implicated by the Complaint. In addition, and as is common in advertising substantiation cases, Respondents also will need to designate experts to opine on consumer responses to the advertisements at issue in this case, the meaning of such advertisements, and to opine on any interpretation of the ads proffered by Complainant. Permitting Respondents to designate up to eight experts will not result in duplicative expert testimony at the administrative hearing, but, rather, will allow Respondents to

address the various and diverse allegations in this case. Accordingly, this motion should be granted.

Background

This is an advertising substantiation case, but one involving an unusual variety of allegations and a truly unprecedented amount of relevant scientific research. Complainant alleges, among other things, that Respondents made unsubstantiated claims in their advertising and promotional materials regarding the health benefits of their pomegranate products (“Challenged Products”). In particular, the Complaint alleges that Respondents made claims, either expressly or impliedly, regarding the benefits that the Challenged Products have on cardiovascular health and disease, prostate cancer, and erectile dysfunction. With respect to cardiovascular claims, Complainant alleges that Respondents’ claimed that the Challenged Products would help prevent, treat, or cure heart disease, including blood pressure, blood flow, and could lead to a decrease in arterial plaque. Compl. ¶ 12. Each of these cardiovascular issues involve distinct and areas of specialization and expertise. The Complaint further alleges that, with regard to prostate cancer, Respondents made claims that the Challenged Products would help prevent, treat, or cure prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”). Compl. ¶ 14. The Complaint also alleges that Respondents made unsubstantiated claims regarding the Challenged Product’s ability to prevent, treat, or cure erectile dysfunction. Compl. ¶ 16.

The Complaint identifies more than twenty (20) advertising or promotional pieces, *see generally* Compl. at Exhibits A-N, and more than eight alleged unsubstantiated claims. Compl. ¶ 13-16; *see also* Complaint Counsel’s Response to Respondent POM Wonderful LLC’s First Set of Interrogatories at 3-12. Respondents will need to introduce expert testimony to assist this

Court in evaluating the merits of Complainant's claims and Respondents' defenses, including testimony on the extensive scientific context of the case as well as the significance of the challenged advertisements and alleged claims to consumers.

On January 20, 2011, after Complainant disclosed its proposed expert list, Respondents sought consent of Complainant's counsel to designate up to eight experts. However, Complainant declined to consent. Thereafter, Respondents filed the instant motion.

Argument

The Court should allow Respondents to designate up to eight expert witnesses because the array of allegations in this case -- which touch on distinct areas of science -- coupled with the number of advertisements referenced in the Complaint involve more than five areas of expertise and, therefore, more than five experts are required for Respondents to cover the waterfront of issues raised by this case. Unlike traditional substantiation cases where there is a central core claim at issue, here, the Complaint alleges that Respondents' made a variety of distinct claims -- each of which require expert testimony.

Scientific Experts

Expert testimony regarding health claims is typical in advertising substantiation cases. *See, e.g., In re Daniel Chapter One, et. al.*, 2009 WL 5160000 (Dec. 21, 2009) (considering scientific expert testimony (oncology) in evaluating substantiation of cancer treatment claim); *In re Kraft, Inc.*, 114 F.T.C. 40 (1991) (considering scientific expert testimony in evaluating substantiation of ingredient claim); *In re Bristol-Myers Co.*, 102 F.T.C. 21 (1983) (considering clinical and scientific testimony in evaluating substantiation claim for aspirin); *In re Sterling Drug, Inc.*, 102 F.T.C. 395 (1983) (considering scientific expert testimony in ad substantiation case). For example, in *Daniel Chapter One*, a case that concerned whether the respondents'

product was an effective therapy for cancer treatment, this Court considered the expert opinion of Dr. Dennis Miller, a medical doctor with specialization in oncology to evaluate the substantiation for the alleged cancer treatment claims.¹ Unlike *Daniel Chapter One* (and unlike other cases where there was a single core claim at issue), here, Complainant has not only alleged that Respondents' made cancer treatment claims, but they also contend that Respondents' made unsubstantiated claims regarding cardiovascular issues (including blood pressure, blood flow, and arterial thickness) and regarding the benefits of the Challenged Products in treating erectile dysfunction. Thus, Respondents require experts to opine on each of these issues as well as on the general health properties of the Challenged Products.

The array of allegations in this case coupled with the vast body of scientific literature regarding the healthy properties of the Challenged Products presents the requisite extraordinary circumstances under Rule 3.31A(b), which empowers the Court to extend the number of expert witnesses. This case is unlike other advertising substantiation cases where there is a single core claim at issue., e.g., *In re Daniel Chapter One, et al.* 2009 WL 5160000 (alleging unsubstantiated cancer and tumor treatment claims); *In re Novartis Corp., et. al.*, 1998 WL 34060101 (1998) (alleging unsubstantiated efficacy claim relating to back pain); *In re Telebrands Corp., et al.*, 140 F.T.C. 278 (2005) (alleging claim of weight loss and abdominal benefits); *In re Kraft, Inc.*, 114 F.T.C. 40 (1991) (alleging unsubstantiated claims regarding product ingredient), because the Complaint contains allegations touching upon many distinct and independent areas of science.

¹ Dr. Miller was designated in that case by the complainant. This Court criticized the expert testimony offered by respondents in *Daniel Chapter One*, as the respondents failed to designate a scientist appropriately qualified to opine on the support for the alleged cancer claims. Unlike the respondents in *Daniel Chapter One*, here Respondents intend to introduce testimony from leading scientific experts in the various fields of science referenced in the Complaint.

In particular, Respondents will need to introduce scientific expert testimony regarding the scientific support for various claims that Respondents' have made regarding the Challenged Products. As set forth in Respondents' Answer and as Respondents further noted at the initial Scheduling Conference before the Court, there is a vast array of scientific research demonstrating the healthy properties of the Challenged Products. To demonstrate the healthy properties of the Challenged Products and, specifically, that there was more than adequate scientific substantiation to support Respondents' health claims, Respondents intend to offer expert testimony regarding (1) the specific issues raised by Complainant and (2) the general nutritional and healthy properties of the Challenged Products, including the benefits of antioxidants present in the Challenged Products.² It is particularly noteworthy that in their initial designation of experts, Complaint Counsel not only designated experts to address specific issues relating to prostate cancer, erectile dysfunction and cardiovascular disease, but also a Professor of Epidemiology and Nutrition. Respondents agree (without knowing the substance or details of the specific testimony to be offered by this witness) that such a broad, overall perspective is appropriate when evaluating the health benefits of a natural product such as pomegranate juice. Respondents therefore expect that they, too, will require scientific experts to address the scientific support for the claims they made in each of the areas challenged by Complaint Counsel, as well as a more general explanation of the nutritional benefit of the products at issue in this case.

Consumer Science and Marketing Expert Testimony

² Indeed, the parties' ability to elicit testimony from the many scientists and researchers who performed research on the Challenged Products about that work will be crucial here: otherwise Respondents would need even more experts to review and opine on this material. As counsel noted at the initial scheduling conference, counsel for Respondents is working with Complaint Counsel to clarify the ground rules for that testimony to avoid issues under Federal Rule of Evidence 701.

This Court routinely considers the testimony of consumer science and marketing experts to help determine the meaning of advertisements and claims at issue in advertising substantiation cases. Where, as here, the Complaint alleges that certain claims were made implicitly by the advertisements at issue, the Court looks to extrinsic evidence regarding the advertisements' meaning, including "expert opinion as to how an advertisement might reasonably be interpreted, copy tests, generally accepted principles of consumer behavior, surveys, or 'any other reliable evidence of consumer interpretation.'" *In re Telebrands Corp., et. al.*, 140 F.T.C. 278, 290-291 (2005) (citing *Cliffdale Associates*, 103 F.T.C. 110, 166 (1984); *In re Thompson Medical Co.*, 104 F.T.C. 648, 789-90 (1984) (expert testimony; consumer survey), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *In re Novartis*, 127 F.T.C. 580, 611-12, 617-33, 682-84 (expert testimony; copy tests); *In re Kraft*, 114 F.T.C. 40, 121-22 (expert testimony; copy tests); *In re Figgie Internat'l, Inc.*, 107 F.T.C. 313, 337-39, 377 n.10 (1986) (expert testimony), *aff'd*, 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)).

In many cases, parties have put forth numerous experts to, among other things, opine on the reasonable consumer interpretation of advertisements, interpret consumer surveys that have conducted to evaluate the message presented by such advertisements, and to evaluate whether the claims at issue were material to customers' purchasing decisions. For example, in *In re Novartis Corp., et. al.*, 1998 WL 34060101 (1998), this Court considered the opinion of seven experts in determining the meaning of the advertisements at issue. Five of the seven experts in that case were designated by the respondents.

In this case, which involves more claims and distinct scientific areas of inquiry than in *Novartis*, Respondents will need to introduce expert testimony regarding the advertisements themselves and also regarding the way in which consumers interpret such advertisements,

including whether the alleged claims are material to their decisions to purchase the Challenged Products. Respondents believe that they will need at least two experts. This is quite reasonable in light of the fact that in many less complex advertising substantiation cases numerous consumer experts have been designated. *E.g., In re Novartis Corp., et. al.*, 1998 WL 34060101 (1998) (designation of five consumer research experts by respondent), *In re Kraft, Inc.*, 114 F.T.C. 40 (1991) (designation of three consumer research experts by complainant).

Regulatory Expert

Complainant has also put in issue the relevance and proper interpretation of various issues involving the United States Food and Drug Administration (“FDA”). For example, Complainant has indicated in its Witness List and through correspondence with Respondents’ counsel that it intends to introduce documents that it obtained from FDA at the administrative hearing on this matter. In order to provide proper context regarding the documents, as well as to provide context for other issues concerning the FDA that Complainant has put at issue (including the types of studies that FDA requires for drug approval, and the relevance of FDA processes to both liability and remedy in this case), Respondents will need to introduce expert testimony regarding FDA regulatory issues.

Other Considerations

Granting this motion will not prejudice Complainant, who will have the opportunity through rebuttal to respond to any expert testimony offered by Respondents. Moreover, Respondents are willing to consent to the Complainant designating more than five experts if it can demonstrate the need for such witnesses. In contrast to the Complainant, who will not be prejudiced if this motion is granted, Respondents will be highly prejudiced if they are not able to

present expert testimony regarding the array of advertisements and claims at issue and the scientific substantiation supporting their claims.

Conclusion

For the foregoing reasons, Respondents' motion should be granted and Respondents should be permitted to designate up to eight expert witnesses. Respondents respectfully request a hearing on this motion.

Respectfully Submitted,

/s John Graubert

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FEDERAL TRADE COMMISSION**

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MATTHEW TUPPER, individually and)	
as officers of the companies.)	

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of the Respondents' Motion to Exceed Five (5) Expert Limit, and that on this 28th day of January, 2011, I caused the foregoing to be served by FTC E-File and hand delivery on the following:

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The Honorable D. Michael Chappell
Administrative Law Judge
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I hereby certify that this is a true and correct copy of the Respondents' Motion to Exceed Five (5) Expert Limit, and that on this 28th day of January, 2011, I caused the foregoing to be served by e-mail on the following:

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Dated: January 28, 2011