



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

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

**RESPONDENT POM WONDERFUL LLC’S MOTION AND MEMORANDUM
TO COMPEL FURTHER RESPONSES TO FIRST SET OF
INTERROGATORIES TO COMPLAINT COUNSEL**

I.

INTRODUCTION

Pursuant to Commission Rule of Practice 3.34, Respondent POM Wonderful LLC (“POM”) respectfully files this Motion to Compel Complaint Counsel to provide further responses to Interrogatory Nos. 1, 2, and 11 of POM’s First Set of Interrogatories to Complaint Counsel.¹ POM served its First Set of Interrogatories on November 15, 2010. Complaint Counsel provided initial responses to POM’s First Set of Interrogatories on December 15, 2010² and supplemented certain of its responses on February 24, 2011.³

¹ Respondent POM brings the instant Motion to preserve its rights to receive full and forthright responses to POM’s First Set of Interrogatories before the expiration of the March 4, 2011 deadline for filing any necessary motion to compel. The Court previously granted the parties’ joint motions to extend the deadline until March 4th. To the extent that Complaint Counsel provides satisfactory supplemental responses after the March 4th deadline, POM will withdraw its Motion to Compel.

² Complaint Counsel’s Response to Respondent POM Wonderful LLC’s First of Interrogatories dated December 15, 2010 is attached hereto as Exhibit A.

By this motion, POM seeks an order compelling further responses to Interrogatory Nos. 1, 2, and 11 on the grounds that Complaint Counsel's responses are factually deficient and/or evasive as discussed in further detail below.

II.

ARGUMENT

A. Further Responses to Interrogatory Nos. 1 and 2 Are Warranted.

POM's Interrogatory Nos. 1 and 2 request that Complaint Counsel identify *every* express and implied misrepresentation that it contends Respondents allegedly made in violation of Section 5 of the FTC Act and to state the basis for its contention:

Interrogatory 1: Identify every representation that you contend the Respondents expressly made in their advertisements, publications, marketing materials, promotional materials, and/or media appearances that you contend is a violation of Section 5 of the FTC Act for any reason and state the basis for your contention. Your response should include reference to the specific materials that you contend contained such representations and should describe the claims that you contend were made by such materials.

Interrogatory 2: Identify every representation that you contend that Respondents made by implication in their advertisements, publication, marketing materials, promotional materials, and/or media appearances that you contend is a violation of Section 5 of the FTC Act for any reason and state the basis for your contention. Your response should include reference to the specific materials that you contend contained such representations and should describe the claims that you contend were made by such materials.

In response to Interrogatory No. 1, Complaint Counsel listed 18 alleged representations and claimed these statements constituted “a non-exhaustive list of representations that Respondents expressly made in their advertisements, publications, marketing materials, promotional materials, and/or media appearances...” (Ex. A, at 3) (emphasis added).

³ Complaint Counsel's Supplemental Response to Respondent POM Wonderful LLC's First Set of Interrogatories dated February 24, 2011 is attached hereto as Exhibit B.

In response to Interrogatory No. 2, Complaint Counsel qualified and limited its response in similar fashion by stating that “the implied claims made by Respondents **include, but are not limited to**, all representations specified in the response to Interrogatory 1 to the extent they are not express, and all other representations set forth in Complaint Paragraphs 9 and 10 and the advertisements, promotional and other material attached to the Complaint.” (Ex. A, at 15) (emphasis added). In addition, Complaint Counsel also stated that “[a]s discovery is continuing, Complaint Counsel will supplement its response to Interrogatory as appropriate.” (Id.)

To date, Complaint Counsel has conducted extensive factual discovery in this case regarding Respondents’ advertisements, including subpoenaing documents from third parties, and deposed numerous current and former employees of Respondents regarding the same. At this stage, given that the fact discovery cut-off period has ended, there is no good reason why Complaint Counsel cannot furnish a complete, exhaustive list of all the alleged express and implied representations made by Respondents which it contends violate Section 5 of the FTC Act. Indisputably, such information is critically important to Respondents’ defense in a false advertising case. Respondents are entitled to know the exact charges or claims to be made against them and to be afforded sufficient time to prepare before their potential use at the time of trial.

In short, Complaint Counsel’s limitation negates its responses. The purpose of Interrogatory Nos. 1 and 2 is to obtain a comprehensive list of the statements which the Commission contends violates Section 5 of the FTC Act. To allow Complaint Counsel to add other representations that are not disclosed in discovery would be tantamount to trial

by ambush. For these reasons, further responses to Interrogatory Nos. 1 and 2 are warranted.

B. A Further Response to Interrogatory No. 11 Is Warranted.

[REDACTED]

In its initial responses served on December 15, 2010, Complaint Counsel responded that it “does not have sufficient information to answer this interrogatory. Fact discovery, including discovery regarding Respondents’ research, is ongoing...Complaint Counsel will supplement its response to Interrogatory 11 as appropriate when it has sufficient information to answer.” (Ex. A, at 33-34.) On February 24, 2011, Complaint Counsel provided a supplemental response to Interrogatory No. 11 in which it stated that:

[REDACTED]

(Ex. B, at 33).

Complaint Counsel’s supplemental interrogatory response to Interrogatory No. 11 is evasive and factually deficient. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In addition, Complaint

Counsel is in receipt of hundreds of thousands of pages of documents in this case from Respondents and third parties, including the researchers who conducted or participated in the studies in dispute. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In any event, Complaint Counsel's expert reports were due on *March 4, 2011*, so it cannot be argued, at this stage [REDACTED]

[REDACTED]

In addition, Complaint Counsel cannot claim that it needs to conduct the depositions of Stewart and Lynda Resnick before it can respond to this interrogatory given the extensive factual discovery conducted to date, including the production of all communications between the Resnick's and researchers [REDACTED]

In short, Complaint Counsel should be ordered to provide a further response to Interrogatory No. 11.

III.

REQUEST FOR RELIEF

For the reasons set forth above, POM respectfully requests that the Court issue the attached proposed order.

* * *

Respectfully Submitted,

_____/Johnny Traboulsi

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*Counsel for Respondent POM
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EXHIBIT A

REDACTED

EXHIBIT B

REDACTED

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)	
)	
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**STATEMENT OF RESPONDENT POM WONDERFUL LLC REGARDING
MEET AND CONFER**

In accordance with Paragraph 4 of the Court’s Scheduling Order, the undersigned counsel certifies that Respondent POM Wonderful LLC (“POM”) conferred with Complaint Counsel in an effort in good faith to resolve by agreement the issues raised by *Respondent POM Wonderful LLC’s Motion and Memorandum to Compel Further Responses to First Set of Interrogatories to Complaint Counsel*, dated March 4, 2011.

The parties’ discussions occurred as follows:

- Telephone conference on February 16, 2011: Counsel for Respondent POM (Johnny Traboulsi, Skye Perryman, and Alicia Mew) participated in a lengthy telephone conference at approximately 2:30 pm Pacific Standard Time (“PST”) with Complaint Counsel (Mary Johnson, Serena Viswanathan, and Elizabeth Nach) regarding outstanding discovery issues between the parties, including Complaint Counsel’s responses to POM’s First Set of Interrogatories served on December 15, 2010. During the discussion, Complaint Counsel agreed

to revisit its prior responses to determine if it could supplement any of its responses given the close of fact discovery.

- Telephone conference on February 17, 2011: Counsel for Respondents and Complainant Counsel discussed by telephone various discovery issues in this case.
- Email correspondence of February 18, 2011: Counsel for Respondent POM (Skye Perryman) transmitted an email to Complaint Counsel (Mary Johnson) at approximately 7:28 a.m. PST in which she memorialized POM's request that Complaint Counsel provide supplemental discovery responses to POM's First Set of Interrogatories:

[W]e would like to memorialize our request that Complaint Counsel provide supplemental responses to Respondent POM Wonderful LLC's First Set of Interrogatories to the extent that you indicated in your written responses that Complaint Counsel would supplement its responses. See, e.g. Responses to Interrogatories Nos. 2, 7-12. With respect to Complaint Counsel's response to Interrogatory No. 13, we also clarified that the meaning of the word "wrong" should be construed to mean anything improper, abnormal, mistaken, or incorrect, for instance, in the science or research sponsored by Respondents.

- Telephone conference on March 1, 2011: Counsel for Respondent POM (Johnny Traboulsi and Skye Perryman) participated in a telephone conference at 2:00 p.m. PST with Complaint Counsel (Mary Johnson, Heather Hipsley, Serena Viswanathan, and Elizabeth Nach) in which the parties continued their meet and confer dialogue in an effort to resolve their respective and outstanding discovery disputes. During the conference, counsel for Respondent POM requested that Complaint Counsel also provide supplemental responses to Interrogatory Nos. 1 and 2 on the grounds that their prior and supplemental responses were factually

deficient and incomplete. Complaint Counsel agreed to examine its prior responses to these particular interrogatories to determine if it could supplement its responses.

- Email correspondence of March 1, 2011: Counsel for Respondent POM (Johnny Traboulsi) transmitted an email to Complaint Counsel (Mary Johnson) at approximately 5:31 p.m. PST in which he summarized POM's request that Complaint Counsel provide further responses to Interrogatory Nos. 1 and 2:

As discussed, I am writing in regard to Complaint Counsel's Response to Respondent POM Wonderful LLC's First Set of Interrogatories. With respect to its response to Interrogatory No. 1, we note that Complaint Counsel has limited its response by stating: "Complaint Counsel sets forth below *a non-exhaustive list* of representations that Respondents expressly made in their advertisements..." (emphasis added). With respect to its response to Interrogatory No. 2, Complaint Counsel has similarly qualified its response by stating that "the implied claims made by Respondents *include, but are not limited to*, all representations specified in the response to Interrogatory 1..." (emphasis added). We request that Complaint Counsel supplement its responses to include all known express and implied representations responsive to these requests.

In its March 1, 2011 email correspondence, Counsel for Respondent POM also stated that it was "still in the process of evaluating Complaint Counsel's remaining supplemental interrogatory responses" and would "get back to you [Complaint Counsel] with our [its] comments shortly."

- Telephone conference on March 3, 2011: Counsel for Respondent POM (Johnny Traboulsi and Christine Son) participated in a telephone conference at 1:30 p.m. PST with Complaint Counsel (Mary Johnson, Serena Viswanathan, and Elizabeth Nach) in which the parties appeared to resolve most, if not all, of their

remaining discovery disputes. During their discussion, Complaint Counsel agreed to provide further responses to Interrogatory Nos. 1 and 2 the following week. Similarly, Counsel for Respondent POM also agreed to provide a revised spreadsheet which had been requested by Complaint Counsel. Because both parties' promised discovery would not be completed until after the March 4, 2011 deadline to file any necessary motion to compel, the parties indicated that they would need to file such a motion to preserve their respective rights.

- Email correspondence of March 3, 2011: Counsel for Respondent POM (Johnny Traboulsi) transmitted an email to Complaint Counsel (Mary Johnson) at approximately 7:29 p.m. PST in which he requested that Complaint Counsel provide a supplemental response to Interrogatory No. 11 in addition to Interrogatory Nos. 1 and 2 of POM's First Set of Interrogatories:

In addition to requesting further responses to POM Wonderful Interrogatory Nos. 1 and 2 as we previously discussed, we note that Complaint Counsel's supplemental response to Interrogatory No. 11 is still deficient. Interrogatory No. 11 asks whether the Commission contends that Respondents interfered with or manipulated any studies, etc. and if so, to state the instances and basis for such contention. We disagree that a response to this request necessarily requires expert testimony or the depositions of Stewart or Lynda Resnick. Thus, we request that Complaint Counsel provide a supplemental response to Interrogatory No. 11 when it provides supplemental responses to Interrogatory Nos. 1 and 2 next week.

- Email correspondence of March 4, 2011: Counsel for Complaint Counsel (Mary Johnson) transmitted an email to Counsel for Respondent POM (Johnny Traboulsi) transmitted at approximately 8:13 a.m. PST in which she indicated that Complaint Counsel would provide further responses to Interrogatory Nos. 1 and 2 by Friday, March 11, 2011 and declined to provide a

further response to Interrogatory No. 11 until “fact and expert discovery is completed.” In the email, Complaint Counsel noted per the Court’s prior order, that “all motions to compel must be filed today.”

Although Complaint Counsel has promised further responses to POM Interrogatory Nos. 1, 2 and 11 after the March 4, 2011 deadline for filing a motion to compel, Counsel for Respondent POM brings the instant Motion to Compel to preserve its rights under the Scheduling Order and Commission’s Rules of Practice to receive full and forthright responses to its discovery responses before trial in this action. To the extent that Complaint Counsel provides supplemental responses to Interrogatory Nos. 1, 2, and 11 of POM’s First Set of Interrogatories, POM will withdraw its Motion to Compel.

Respectfully Submitted,

/s/Johnny Traboulsi

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*Counsel for Respondent POM
Wonderful LLC*

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

**[Proposed] ORDER GRANTING RESPONDENT POM WONDERFUL LLC’S
MOTION TO COMPEL FURTHER RESPONSES TO FIRST SET OF
INTERROGATORIES TO COMPLAINT COUNSEL**

On March 4, 2011, Respondent POM Wonderful LLC (“POM”) filed its Motion to Compel Further Responses to its First Set of Interrogatories to Complaint Counsel.

It is HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED. It is HEREBY ORDERED that Complaint Counsel provide further responses to Interrogatory Nos. 1, 2, and 11 within seven (7) days from the date of this order.

It is FURTHER ORDERED that Complaint Counsel certify under oath full compliance with this order and Interrogatory Nos. 1, 2, and 11 within seven (7) days.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: Jon Leibowitz, Chairman
 William E. Kovacic
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

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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 the PUBLIC version of Respondents' **MOTION AND MEMORANDUM TO COMPEL FURTHER RESPONSES TO FIRST SET OF INTERROGATORIES TO COMPLAINT COUNSEL**, and that on this 4th day of March, 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-159
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-110
Washington, DC 20580

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **MOTION AND MEMORANDUM TO COMPEL FURTHER RESPONSES TO FIRST SET OF INTERROGATORIES TO COMPLAINT COUNSEL**, and that on this 4th day of March, 2011, 2011, I caused the foregoing to be served by e-mail on the following:

Mary Engle
Associate Director for Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
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Washington, DC 20580

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*Counsel for Respondent POM Wonderful
LLC*

Dated: March 4, 2011