

FEDERAL TRADE COMMISSION

I N D E X

IN THE MATTER OF POM WONDERFUL LLC, ET AL.

TRIAL VOLUME 19

PUBLIC RECORD

NOVEMBER 4, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RE CROSS	VOIR
KANTOFF	3256				

EXHIBITS	FOR ID	IN EVID	IN CAMERA	STRICKEN/REJECTED
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(none)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
as successor in interest to)
Roll International Corporation,)
companies, and) Docket No. 9344
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually)
and as officers of the)
companies.)
)
-----)

Friday, November 4, 2011

11:03 a.m.

TRIAL VOLUME 19

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, RMR-CRR

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P R O C E E D I N G S

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JUDGE CHAPPELL: Back on the record Docket 9344.

We're reconvening to hear a rebuttal witness, and after that, I'm going to have some comments regarding closing of the record, briefing and maybe some other issues.

Yes?

MR. FIELDS: Good morning, Your Honor.

JUDGE CHAPPELL: Good morning.

MR. FIELDS: We have received demonstratives to be used in connection with this witness. These demonstratives make it very plain that complaint counsel intends to go far beyond the court's order with regard to this witness.

As Your Honor will recall, your order was that complaint counsel will not be allowed to elicit any opinions from Dr. Kantoff, and specifically, complaint counsel will not be allowed to elicit any testimony from Dr. Kantoff as to whether Dr. Kantoff agreed or disagreed with the conclusion that prostate cancer studies were successful or that there was or was not scientific agreement in the scientific community at large as opposed to the meetings at issue regarding conclusion of the respondents' studies or the role of

pomegranates in prostate health.

JUDGE CHAPPELL: That sounds like what I said.

MR. FIELDS: That was Your Honor's order.

And we have received demonstratives. One of them is a PowerPoint slide with at least three expert opinions expressed on it, and I assume the witness is going to be asked about those opinions. The other is a lengthy published study loaded with expert opinions.

Now, they represented that they were not offering expert testimony, they were just impeaching Dr. Heber's statement that he thought there was a consensus. To do that, they need two questions: Were you at the meeting? And was there a consensus?

And if they're trying to slide in his opinions by saying, well, didn't you say at the meeting this, didn't you show this slide, didn't you present this article, all of those things really are improper. He wasn't designated as an expert. We don't have a report. And it just -- I raise it now so that I don't have to keep interrupting the flow of the testimony.

JUDGE CHAPPELL: What's your position?

MS. DAVIS: I gave -- we did produce those to respondents as demonstratives. I don't know that we will actually use them. I think what we should do is -- I hope we can do is proceed with the questioning, and if

it comes up, the PowerPoint presentation that he's referring to was a presentation that Dr. Kantoff did make at the meetings that are at issue here.

JUDGE CHAPPELL: I was very clear that no opinions will be allowed. If you think you're going to flash up something that has opinions on it, you can forget that.

MS. DAVIS: Right.

JUDGE CHAPPELL: Next.

MS. DAVIS: But you did say that he could testify as to what statements he made.

JUDGE CHAPPELL: To the extent they're not opinions. I was very clear about that. And statements he made that are opinions are going to be ignored as far as they're opinions, but I'm not going to allow them to wholesale come into the record.

MS. DAVIS: Well, we are not trying to do that. I have your ruling here, and I plan to follow the rules of the road, so I think if we proceed and we see where it goes, if counsel wants to make objections, and then you can rule accordingly as we go through.

MR. FIELDS: Well, if Dr. Kantoff is going to say what he said at the meeting, he necessarily is going to be saying an opinion. If he goes beyond simply saying, which is what they represented, that either

there was a consensus or there was not any consensus -- that's what they're supposedly impeaching -- that can be done in a couple of questions: Doctor, were you at the meeting? Did you observe whether or not there was a consensus? Was there a consensus?

JUDGE CHAPPELL: Right. And when my order that I read into the record directed that you could ask him what he said, that means what he said that's connected to what you've told me you're going to rebut, and that is it.

MS. DAVIS: Yes. I understand that.

JUDGE CHAPPELL: Just so we're clear on that.

Let's proceed.

MR. FIELDS: Thank you.

JUDGE CHAPPELL: Call your next witness.

MS. DAVIS: Complaint counsel calls
Dr. Philip Kantoff to the stand.

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Whereupon --

PHILIP KANTOFF, M.D.

a witness, called for examination, having been first
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. DAVIS:

Q. Good morning, Dr. Kantoff.

A. Good morning.

Q. Could you please state your name for the record.

A. Philip Kantoff.

Q. And where are you employed?

A. I'm at the Dana-Farber Cancer Institute at Harvard Medical School.

Q. And what is your position there?

A. I run the genitourinary oncology program. I'm the division chief of the -- of solid tumors and the chief clinical research officer.

Q. Dr. Kantoff, did there come a time when you were invited to attend scientific advisory meetings at POM Wonderful?

A. Yes.

Q. And what was your understanding of the purpose of these meetings?

A. My understanding was to look at the data that was generated in the context of clinical trials and to comment on and interpret the data --

Q. Okay.

A. -- and to potentially guide with regard to a path forward to the development of the product for -- for further -- further demonstration of efficacy.

Q. Okay. And what was your understanding of why

you were asked to attend the meeting?

A. As an adviser.

Q. And who invited you to attend these meetings?

A. One of the employees at POM. I cannot remember his name.

Q. Okay. And did you in fact attend these meetings?

A. I attended, to my recollection, two meetings.

Q. Okay. And when did these two meetings occur?

A. I believe in calendar year 2010. I don't remember the exact dates, but I believe that one occurred in November of 2010.

Q. And the other one would have occurred in 2010 as well?

A. I believe so.

Q. And is it possible that the first meeting occurred in January 2010?

A. It's possible.

Q. Okay. And the meeting that you had in November 2010, was that the first or the second meeting?

A. If I understand your question, the first one was in January of 2010, so the second one was in November of 2010, so the one in November would have been the second meeting.

Q. Okay. And where were these meetings held?

A. They were in Los Angeles in the headquarters of or the -- the headquarters of POM.

Q. And do you recall who attended the first meeting, the January 2010 meeting?

A. It's a bit of a blur in terms of who attended which meeting, but there were representatives from POM, there were academic scientists like myself, and there were outside advisers as well.

Q. Did Dr. Heber attend this meeting?

A. Yes. He attended at least one of the meetings.

Q. And what about Mr. Resnick?

A. He was there for at least one of the meetings.

Q. And what about Matt Tupper?

A. I don't remember.

Q. Do you recall Dr. Carducci being present?

A. Yes.

Q. What about Dr. Pantuck?

A. Dr. Kantoff?

Q. Sorry. Pantuck. I apologize.

A. Okay. Yes, he attended at least one of the meetings.

Q. And Dr. Kessler?

A. Yes. Attended at least one of the meetings.

Q. And was there a Dr. Eisenberg present?

A. Eisenberger?

Q. Yes, Eisenberger.

A. I don't recall him being there.

Q. What about Dr. Beldegrun?

A. I believe he attended one of the meetings.

Q. And what about Dr. Brad Gillespie?

A. Yes. And in fact, thank you for reminding me.

He was the gentleman that invited me to the meetings.

Q. What about Dr. Harley Liker? Was he one of the attendees?

A. I believe so.

Q. And did some of these same people also attend the second meeting in November 2010 that you mentioned?

A. As I said, it's a bit of a blur in terms of who attended which meeting, and there was probably some overlap between who attended both meetings, and there were probably some people who attended one meeting and not the other, but I cannot remember distinctly who did each meeting.

Q. One second.

Do you recall whether Stewart Resnick attended both meetings?

A. I remember him attending at least one of the meetings. I don't remember if he attended both meetings. I don't recall how much of the meeting he

attended.

Q. Okay. And what was the format of the meetings that you -- well, strike that.

Was the format of the two meetings that you attended -- were they similar?

A. It's very hard for me to distinguish the two meetings, but the general format was presentation of data and sort of a group discussion about the interpretation of the data and generally where do things need to go from there in order to move, move the concept forward.

Q. And when you say "presentation of data," you mean some of the participants actually make presentations; is that --

A. There were presentations. There were verbal presentations. There were PowerPoint presentations. Yeah.

Q. And what topics or subjects were discussed at these two meetings?

A. Well, what was mostly discussed was the potential use of pomegranate juice as a nutraceutical in the context of prostate cancer. That's what I remember because that's the area I'm most interested in.

Q. And was there any discussion regarding the

particular studies that had already been done on POM juice?

JUDGE CHAPPELL: You'll need to refrain from leading the witness.

MS. DAVIS: Okay.

BY MS. DAVIS:

Q. Other than the potential use of the POM juice as a -- the use of POM juice as a nutraceutical, were there any other topics that were discussed?

A. No. Not to my knowledge.

Q. And did you participate in discussions at both these meetings?

A. Yes.

Q. Okay. Was there any discussion at the meetings you attended on whether the current body of science supported a statement that POM juice or POM extract prevents prostate cancer?

A. No. It was really more an evaluation of the existing data and what needed to be done to move the concept forward.

Q. Was there any discussion at these meetings that you attended on whether the current body of science supported a statement that POM juice or POM extract reduced the risk of prostate cancer or treats prostate cancer?

A. I don't recall discussions like that.

Q. Okay. And at the meetings you attended, did you ever state that the current body of scientific evidence demonstrates that POM juice or POM extract prevents or reduces the risk of prostate cancer?

MR. FIELDS: Objection to the witness -- what the witness stated, which would necessarily give an opinion, Your Honor.

JUDGE CHAPPELL: You'll have to speak up.

MR. FIELDS: Oh, I'm sorry. Objection to what this witness stated in that the answer to that question would necessarily be a statement of his opinion.

MS. DAVIS: It's a factual question --

JUDGE CHAPPELL: It's a leading question.
Rephrase.

BY MS. DAVIS:

Q. Well, what statements did you make at the meeting regarding the current body of science as relates to POM juice and POM extract?

MR. FIELDS: The same objection, Your Honor. It necessarily elicits his opinion. If he tells us what his statement was, he's necessarily giving his opinion.

JUDGE CHAPPELL: I'll allow it. To the extent it's an opinion, it will vaporize.

MR. FIELDS: It will what?

JUDGE CHAPPELL: It will vaporize. It will escape like vapor and not be considered an opinion, as I said in my ruling.

MR. FIELDS: That allows him to state his opinions, and I necessarily have to then cross-examine him on his opinions even though it vaporizes.

JUDGE CHAPPELL: Was this witness deposed?

MR. FIELDS: No, Your Honor, the witness was not deposed. The witness filed no report. He wasn't designated an expert. He was just at the last minute, as Your Honor knows, called as a rebuttal witness simply to testify as to whether there was a consensus or not, which we could have established by the question was there a consensus or not.

JUDGE CHAPPELL: All right. Let me ask a few questions.

Sir, do you remember what you said at the meeting?

THE WITNESS: I remember -- I remember the essence of the meeting. I don't remember exactly what I said at the meeting. I remember elements of what I said at the meeting.

JUDGE CHAPPELL: Were you there to give opinions or to state facts? If you recall.

THE WITNESS: I was there to -- not state facts

about POM. I was not -- because I have no experience with the product, had done no research on the product, so I was really mostly there for the interpretation of what was presented to me.

JUDGE CHAPPELL: And did you make an interpretation?

THE WITNESS: My -- yes. I would say I have a general interpretation of what was presented to me.

JUDGE CHAPPELL: And do you recall what you said?

THE WITNESS: I said -- I think in essence what I said was that this was very encouraging, very encouraging data, and that more work needs to be done in order to demonstrate that it has effectiveness.

MR. FIELDS: I move to strike as an opinion, Your Honor. Even though some of it was very good for our side.

JUDGE CHAPPELL: I will allow the fact he made the statement, but it will not be considered an opinion to support any point or any issue in this case.

MS. DAVIS: Okay. That's -- I have no further questions, Your Honor.

JUDGE CHAPPELL: Thank you.

Any cross?

MR. FIELDS: No cross, Your Honor.

JUDGE CHAPPELL: Thank you, sir. You're excused.

All right. I have a few issues I want to go over here.

Regarding the exhibits -- by the way, is there anything further, any further witnesses, any further motions?

MS. JOHNSON: No for our side.

MR. GRAUBERT: Not from respondent's counsel.

JUDGE CHAPPELL: I will need one set of all exhibits, including deposition transcripts. Each party shall provide one set of its own exhibits.

And I would expect the parties to work together so that we don't have duplicates. Probably every case I've had there are five or six duplicate exhibits and sometimes fifty or sixty. And I don't care if it's labeled for the FTC or the respondent. If it's an exhibit, it's an exhibit. That doesn't matter to me.

I will need only an electronic set of exhibits on a CD or DVD for my office, except expert reports.

MR. GRAUBERT: Excuse me, Your Honor. So paper and electronic?

JUDGE CHAPPELL: Just electronic, except expert reports. For those, I will need one copy in hard copy to my office.

The exhibits are to be delivered to my office within five business days after the record closes. You may contact Dana Gross regarding delivery.

Next I want to talk about stipulations. And I need everyone's attention if I don't have it.

It's become apparent to me, as this hearing has progressed, that the evidentiary record has become somewhat unwieldy. Therefore, I am directing the parties to sit down to confer and attempt to narrow or at least consolidate the scope of this case, including, without limitation, the number of advertisements being challenged, the number of alleged misrepresentations being challenged, and the types of alleged misrepresentations.

In addition, I expect the parties to attempt to stipulate to as many relevant facts as possible. At a minimum, I see no reason why the parties cannot stipulate to a glossary of material terms, including, without limitation, medical terms and research terms that we've been hearing during this case.

These stipulations shall be filed with the Office of the Secretary marked JX next number, as well as submitted to my office.

The commission rule regarding closing the record is 3.44.

The stipulations I am directing the parties to produce will become part of the evidentiary record; and therefore, I'm holding the record open until these stipulations are submitted. The record will need to remain open I'm going to say seven days.

Submitted stipulations will be admitted in the order closing the record that I will issue.

Right now I'm projecting that I will hold the record open until Monday, November 14, which is about a week -- this is Friday -- for the purposes of receiving stipulations I've described earlier.

And again, the record will close on November 14. If progress is being made, if the parties are making good-faith efforts and stipulations are being created that will, let's say, focus this record, a joint motion may be filed and will be considered favorably requesting more time. In other words, I will hold the record open to receive this evidence.

Any questions on those issues?

MR. GRAUBERT: No, sir.

MS. HIPPSLEY: No, Your Honor.

JUDGE CHAPPELL: Posttrial briefs deadlines and requirements are covered in commission rule 3.46.

Each party may file proposed findings of fact and posttrial briefs within 21 days of the closing of

the record.

Each party may file reply findings of fact and briefs within 10 days of service of the initial proposed findings and briefs.

Now, I realize in a case like this that's probably not as much time as you would like, but I didn't write that rule. In fact, my comments on that rule were ignored.

I will issue an order setting forth deadlines for briefs in accordance with the deadlines set forth in the rules. That order will also specify requirements in addition to what's in the rule for the posttrial briefs and the proposed findings and replies.

Under commission rule 3.41, regarding closing arguments, each side is permitted to make closing argument no later than five days after the last filed proposed findings.

Do the parties wish to make closing arguments?

MR. GRAUBERT: Yes, sir.

MS. HIPPSLEY: Yes.

JUDGE CHAPPELL: Also, under rule 3.41, the argument shall last no longer than two hours, and as I've said before I think, that is a limit, not a goal.

After the order is issued closing the record, my office will contact the parties by e-mail regarding

possible dates for scheduling the closing argument within this five-day window that we're given. And again, I did not concur that the closing should be that soon after the briefs, but that's the rule.

MR. GRAUBERT: Your Honor, may I just make a few short comments?

JUDGE CHAPPELL: Yes.

MR. GRAUBERT: Thank you.

Your Honor, we will obviously proceed promptly and seriously on the stipulation process. Just two quick thoughts.

I think we have several times noted for the court in various briefs and otherwise that we do have some serious scheduling problems. Virtually everyone involved in this process has another trial starting on November 15 in a related matter, and then Mr. Fields has another trial in January, so we will proceed, but I don't want the court to be alarmed that we may very well need to take you up on your suggestion that we -- and I will obviously work with complaint counsel on this -- that we may need to ask for some additional time, assuming we are making good progress.

Also I believe that there is a possibility -- and this is just -- this is preliminary of course since we're not there yet. But I believe the court does have

authority under rule 4.3 to sort of disconnect the closing statement from the last filing of a brief or a finding of fact, so if there's some additional time that needs to elapse more than five days, I believe the court has authority to do that.

JUDGE CHAPPELL: Well, if the parties wish to file a joint motion to that fact, I will consider it favorably.

MR. GRAUBERT: Very good.

JUDGE CHAPPELL: And regarding the briefing deadlines, they are pegged to the close of the record, and so as long as the parties are making progress on stipulations, the record may remain open because these stipulations will be evidence in this case, and I'm holding the record open to receive evidence.

MR. GRAUBERT: I understand, Your Honor. And I believe we still also have some loose ends on other kinds of evidence, such as other deposition transcripts, but we are going to proceed expeditiously on all of that.

JUDGE CHAPPELL: All right.

MR. GRAUBERT: Thank you.

JUDGE CHAPPELL: Anything further?

MS. HIPPSLEY: No, Your Honor.

MR. FIELDS: No, Your Honor.

JUDGE CHAPPELL: Hearing nothing further, until we reconvene for closing arguments, we are adjourned.

(Whereupon, the foregoing hearing was adjourned at 11:28 a.m.)

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

DOCKET/FILE NUMBER: 9344

CASE TITLE: In Re POM Wonderful LLC, et al.

HEARING DATE: November 4, 2011

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

DATED: NOVEMBER 7, 2011

JOSETT F. WHALEN, RMR

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

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

ELIZABETH M. FARRELL