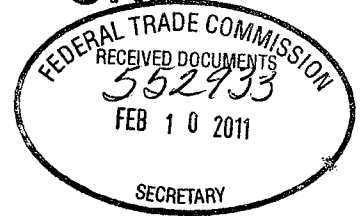


ORIGINAL



UNITED STATES OF AMERICA
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

Public Record

**COMPLAINT COUNSEL'S MOTION AND MEMORANDUM IN SUPPORT
TO LIMIT RESPONDENTS TO FIVE (5) EXPERT WITNESSES**

Pursuant to Commission Rule of Practice 3.22, Complaint Counsel respectfully submits its *Motion to Limit Respondents to Five (5) Expert Witnesses*.¹ On February 1, 2011, Respondents filed an expert witness list naming eight experts, rather than the five mandated by Rule 3.31A(b). Respondents failed to properly seek leave of court to exceed the five expert limit, and no extraordinary circumstances exist to warrant an exception of the rule. Respondents are now more than a week overdue in filing a proper witness list consistent with the Scheduling Order, prejudicing Complaint Counsel's preparation for expert discovery. Counsel respectfully requests that the Court require Respondents to withdraw three experts and to submit, forthwith, a revised list.

¹ Complaint Counsel does not waive, and expressly reserves, the right to file future motions *in limine* and objections to Respondents' expert witness reports and testimony.

I. Respondents Have Improperly Listed Eight Expert Witnesses, Impeding Complaint Counsel's Ability to Effectively Prepare

On February 1, 2011, Respondents filed an expert witness list, naming eight individuals. *See* Docket No. 9344. Although Respondents did not identify the substance of the witnesses' proposed testimony, the list appears to include six medical personnel – a doctor who has published on heart disease and prostate cancer, a doctor who has published on antioxidants and prostate cancer, an oncologist, and three urologists – and two consumer perception experts – a linguist and an individual who has published on marketing research.

The naming of eight witnesses is in violation Rule 3.31A(b). Consequently, Respondents are now nine days overdue in filing a proper expert witness list consistent with the Scheduling Order. Scheduling Order at 1. Not knowing which five will survive a ruling by this Court prejudices Complaint Counsel's ability to prepare to depose and rebut these witnesses. The Scheduling Order provides only a 25-day period in which to depose Respondents' experts after their expert reports are filed. *Id.* at 2-3. Complaint Counsel needs to know now which of Respondents' eight experts it must prepare to depose, so that it may begin review of the proposed witnesses' copious background materials.²

If Respondents desired to increase the expert limit, they should have filed a timely motion and obtained a ruling from the Court long before the February 1 deadline for identifying

² The prejudice to Complaint Counsel is apparent from review of the Curricula Vitae of the eight witnesses identified by Respondents. Dr. Burnett lists 177 articles, 40 books or book chapters, and 14 prior testimonies; Dr. Butters lists 95 articles, five books, and 16 prior testimonies; Dr. deKernion lists 228 articles, 133 books or book chapters; Dr. Goldstein lists 265 articles, 111 books or book chapters, and six prior testimonies; Dr. Heber lists 205 peer reviewed articles, 69 books or book chapters, and three prior testimonies; Dr. Miller lists 165 peer reviewed articles, 78 books or book chapters, and 19 prior testimonies; Dr. Ornish lists 33 peer reviewed articles and 21 books or monographs; and Dr. Reibstein lists 42 peer reviewed articles, 26 books or book chapters, and one prior testimony.

Respondents' experts.³ Indeed, Respondents' counsel was aware of their intention to make such a request as early as last October, and discussed it during the pre-hearing conference. *See* Prehearing Conference Transcript (Oct. 26, 2010) at 4-6.⁴

II. The Issues Presented by This Matter Do Not Warrant More Than Five Experts

There are no extraordinary circumstances that would warrant additional experts in this matter. This is a rather ordinary case, similar to other recent food and supplement advertising cases in which the FTC challenged multiple products touting a variety of claims. *See, e.g., FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd* 2009 U.S. App. LEXIS 27388 (11th Cir.), *cert. denied*, 131 S.Ct. 505, 2010 U.S. LEXIS 8554 (Nov. 1, 2010) (analyzing substantiation for twenty-two weight loss and erectile dysfunction claims made for three supplements); *FTC v. Direct Marketing Concepts Inc.*, 569 F. Supp. 2d 285 (D. Mass. 2008), *aff'd* 624 F.3d 1 (1st Cir. 2010) (evaluating multiple claims for two supplements marketed as treatments for diseases including Parkinson's, cancer, heart disease, diabetes, and arthritis).

The Complaint in this matter challenges advertising claims for three products produced from pomegranates – POM Wonderful 100% Pomegranate Juice, POMx Pill capsules, and POMx Liquid concentrate ("POM Products"). Compl. at 2. It alleges that Respondents'

³ Instead, Respondents filed a motion to exceed the five expert limit on Friday, January 28, 2011, and then withdrew that motion on February 9. *See* Resp. Notice of Withdrawal of Motion to Exceed Five (5) Expert Limit (Feb. 9, 2011).

⁴ At the pre-hearing conference, Respondents also stated that they would likely seek to solicit expert testimony from certain fact witnesses. Complaint Counsel will oppose any such attempt. The Scheduling Order specifically prohibits fact witnesses from providing expert opinion. Scheduling Order at 6. Similarly, Fed. R. Evid. 701 limits the testimony of a lay witness to opinions rationally based on the perceptions of the witness, such as a witness' personal knowledge of the facts of the science relied upon to support a challenged claim. *See also In re Basic Research*, Dkt. No. 9318, Order on Complaint Counsel's Motion *In Limine* (Jan. 10, 2006), at 4 (limiting testimony of lay witnesses).

advertising makes similar health benefit claims for the three products, specifically, that they will prevent or treat heart disease, prostate cancer, and erectile dysfunction. *Id.* at 16-19. Complaint Counsel has proffered four scientific experts and held a slot open for a possible rebuttal witness. While Complaint Counsel does not presume to advise Respondents as to how they should allocate their expert witnesses, within the limit of five set by Rule 3.31A(b), we do request that the Court hold Respondents to the number of experts stated in the Rule.

A. Respondents' Interest In Offering Communication Perception Testimony Does Not Warrant An Exception To The Five Expert Limit

Respondents list two consumer perception experts, presumably to show that their advertisements did not make the claims alleged in the Complaint. However, they offer no factual basis to support the need for two such experts and give no indication of the nature of these two individuals' testimony or how their testimony would not be cumulative. Extrinsic evidence is not required to determine whether or not the challenged claims were made. *See FTC v. Colgate-Palmolive*, 380 U.S. 374, 386 (1965) (sustaining Commission's finding that the challenged advertising claim was made, noting that the issue "is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves"); *In the Matter of Daniel Chapter One*, Docket 9329, Initial Decision, 2009 FTC LEXIS 157, *176 (Federal Trade Commission, Aug. 5, 2009) ("[t]he primary evidence of the claims an advertisement conveys to reasonable consumers is the advertisement itself.") (citations omitted). In *National Urological Group*, the district court stated that "[if] the advertisement explicitly states or clearly and conspicuously implies a claim, the court need not look to extrinsic evidence to ascertain whether the advertisement made the claim." *National Urological Group*, 645 F. Supp. 2d at 1189.

Respondents may, of course, use one or more of their five experts to introduce consumer science testimony and survey evidence if they wish. However, there is no need to exceed the limit to do so. Although the Commission is not presenting such affirmative expertise, it has reserved one of its five expert slots for a rebuttal witness to address any consumer perception testimony Respondents choose to proffer. In *National Urological Group*, the defendants offered a marketing expert to address whether the challenged advertisements were material to consumer purchasing decisions. *Id.* at 1203-1204. Both the FTC's rebuttal expert and the district court concluded that the defendants' expert failed to survey the actual advertising claims at issue, rendering defendants' proffered evidence immaterial. David Stewart Deposition, *FTC v. National Urological Group et al.*, 645 F. Supp. 2d 1157, 1203-1204.

B. No Extraordinary Circumstances Support Permitting Medical Experts Outside The Five Expert Limit

Respondents' expert witness list suggests they propose to offer six medical experts to address three to four areas of science – prostate cancer claims, cardiovascular claims, an erectile dysfunction claim, and possibly the antioxidant properties of the challenged products. Respondents concede that these witnesses have overlapping areas of specialty, but suggest that certain of their experts will testify as to the underlying science while others will opine as to the level of science required as claims substantiation. *See* Respondents' Expert Witness List at 1, n. 1 (“while it may appear that some of the designated experts have overlapping areas of expertise, in fact some experts will be testifying as to the underlying science while others will be testifying as to the appropriate level of scientific substantiation.”). This demarcation of testimony is nonsensical. Qualified experts in the areas of heart disease, prostate cancer, and erectile dysfunction are certainly able to opine on both the level of science necessary to substantiate

efficacy claims for these diseases and the underlying science proffered by Respondents. *See, e.g., In the Matter of Daniel Chapter One*, Docket 9329, Initial Decision, 2009 FTC LEXIS 157, *102-124 (Federal Trade Commission, Aug. 5, 2009) (citing analysis of expert Denis Miller on the issues of the level of substantiation required to support the claims and whether the respondents possessed adequate substantiation). Allowing multiple experts from the same discipline to appear is likely to result in needless cumulative testimony; further, Respondents' suggested division of expert duties will be impossible to police.⁵

Commission cases have routinely utilized under five scientific experts per side to address multiple product and health benefit claims. In *National Urological Group*, the FTC offered two scientific experts to address multiple weight loss and erectile dysfunction claims. One was an expert in weight loss, the other an expert in erectile dysfunction. *See* 645 F. Supp. 2d at 1202-1203. In *Direct Marketing Concepts*, the FTC offered four experts on the issues of complementary and alternative medicine, mineral bioavailability, and pulmonary diseases, to address multiple efficacy claims for two distinctly different dietary supplements.⁶ *See* 569 F. Supp. 2d at 302, 304.

⁵ Some federal courts, to limit needless expense and presentation of cumulative testimony, have limited expert testimony to one or two experts for each discipline. *Riley v. Dow Chemical Co.*, 123 F.R.D. 639, 640 (N.D. Cal.1989) (“[I]t is the usual practice of this Court, in the absence of extraordinary circumstances, to limit the parties to one expert for each distinct discipline, such as . . . epidemiology and oncology.”). “The real issue here is whether the testimony of [multiple] experts would be cumulative or whether each expert will add to the evidence presented at trial in a meaningful way.” *Washington v. Greenfield*, 1986 WL 15758, at *2 (D.D.C. Oct. 15, 1986) (rejecting request to call four gynecology experts).

⁶ The defendants in *National Urological Group* and *Direct Marketing Concepts* offered no expert testimony on the issue of substantiation. However, they presented volumes of published scientific literature in support of their claims, as Respondents have done here.

III. The Commission Has Stated Five Expert Witnesses Are Sufficient for Most Cases

The revision of Rule 3.31A(b) to create the expert witness limit was part of a comprehensive effort to expedite administrative proceedings. *FTC Rules of Practice, Final Rule*, 74 Fed. Reg. 1804 (Jan. 13, 2009). In revising Rule 3.31A(b), the Commission concluded that “five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases.” *Id.* at 1813. Accordingly, cases litigated prior to 2008 in which the complainant or respondent(s) used more than five expert witnesses are inapplicable.⁷

The newly imposed limit on expert witnesses has not hampered proceedings before this Court, regardless of a case’s complexity. For example, in *Polypore International, Inc.*, a complex merger case, each side presented only one expert despite the multiple issues at play. *In the Matter of Polypore International, Inc.*, Docket No. 9327, Initial Decision (Mar. 1, 2010) at 12. While this Court agreed to additional experts in *Intel*, this Court has cautioned that the circumstances in *Intel* were rare. *See* Transcript of Prehearing Conference, Docket No. 9344 (Oct. 26, 2010) at 8 (“the five-expert limit is the rule [I]n the *Intel* case . . . I expanded it, but that was the *Intel* case . . . that one was a lot more complicated”). Complaint Counsel agrees. Indeed, the fact discovery in *Intel* involved an exponentially greater number of documents and

⁷ In a recent advertising substantiation case filed before the rules were amended, complainant offered two experts and respondents offered three. *In the Matter of Basic Research*, Dkt. 9318, Order on Complaint Counsel’s Motion to Compel a Document from Respondents’ Testifying Expert Solan (Jan. 19, 2005); Order on Complaint Counsel’s Motion to Compel Production of Dr. Mowrey’s Expert-Related Documents (Aug. 9, 2005); Order on Respondents’ Motions to Exclude Complaint Counsel Witnesses Heymsfield, Mazis, and Nunberg (Dec. 7, 2005).

witness depositions than does this case. There is nothing exceptional about this matter that rises to the requisite extraordinary circumstances for expanding the five expert limit.⁸

IV. Request for Relief

This is an ordinary advertising substantiation case challenging three distinct areas of health claims for three products derived from pomegranates. Each side can comprehensively address these areas of science as well as issues of consumer perception using five experts as prescribed by Rule 3.31A(b). If Respondents wanted to seek an exception to the rule, they should have filed a motion well in advance of the February 1 deadline for Respondents' expert disclosure. As it is, Respondents have improperly filed a witness list naming eight expert witnesses, denying Complaint Counsel adequate and timely notice of which five experts Respondents will, in fact, use. For the reasons set forth above, Complaint Counsel respectfully requests that the Court order Respondents to withdraw three of the experts listed in their February 1 filing within one day of the Court's ruling on this motion.

Dated: February 10, 2011

Respectfully submitted,

/s/ Mary L. Johnson

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⁸ Were the Court to entertain a request by Respondents for more than five expert witnesses, as a practical matter given the May 24, 2011 mandatory hearing date, Complaint Counsel may have to apply to the Court for: 1) more time to depose the additional experts given the limited window between the deadline for expert reports and deadline for expert depositions; and 2) a limit on the length of each expert report.

STATEMENT OF COMPLAINT COUNSEL
REGARDING MEET AND CONFER

In accordance with Paragraph 4 of the Court's Scheduling Order, the undersigned counsel certifies that Complaint Counsel conferred with Respondents in an effort in good faith to resolve by agreement the issue raised by Complaint Counsel's *Motion and Memorandum In Support to Limit the Respondents to Five (5) Expert Witnesses*. The parties' discussions on February 9, 2011 occurred as follows:

- At approximately 12:45 p.m. (Eastern), Skye Perryman, counsel for Respondents, left a voicemail message for Heather Hipsley, Complaint Counsel, stating that Respondents were withdrawing their Motion to Exceed Five (5) Expert Limit filed on January 28, 2011 and would refile the motion in a few days. At 2:06 p.m., Mallory Boyle, on behalf of counsel for Respondents, emailed Complaint Counsel a copy of the notice to the court withdrawing Respondents' motion. Included on the email were Kristina Diaz, John Graubert, Skye Perryman, Johnny Traboulsi, Paul Rose, and Bertram Fields for Respondents and Heather Hipsley, Mary Johnson, and Elizabeth Nach for Complaint Counsel.
- At 2:29 p.m. (Eastern), Ms. Hipsley emailed Ms. Perryman to acknowledge Respondents' withdrawal of the motion, and stating Complaint Counsel's position that Respondents have filed an expert witness list naming eight experts in violation of Commission Rule of Practice 3.31A and the Scheduling Order, which prejudices Complaint Counsel's ability to prepare for the expert phase of the case. Ms. Hipsley suggested placing a joint call to Judge Chappell on this issue. Copied on the email were Ms. Diaz, Mr. Graubert, Mr. Traboulsi, Mr. Fields, and Mr. Rose for Respondents.
- At 3:40 p.m. (Eastern), Mr. Graubert emailed Ms. Hipsley, noting that Respondents

indicated at the pretrial conference the view that Respondents would require more than five expert witnesses, thus resulting in Respondents' motion to the Court to exceed five experts and subsequent notification that Respondents would modify the motion based on refining areas of expert testimony. Based on guidance from the Court, Mr. Graubert stated that Respondents chose to withdraw the motion and will refile. Mr. Graubert further stated that Complaint Counsel is not prejudiced because Respondents' expert reports are not due until March 18, 2011. Copied on the email were Ms. Diaz, Ms. Perryman, Mr. Traboulsi, Mr. Fields, and Mr. Rose for Respondents.

- Shortly thereafter that afternoon, Ms. Hipsley called Mr. Graubert to advise him that unless Respondents agreed to limit their list of experts to five, Complaint Counsel would file motions on February 10, 2011 requesting the Court to limit Respondents to five expert witnesses and to require Respondents to respond to Complaint Counsel's motion in time period shorter than specified by the Rules of Practices. Mr. Graubert did not agree.

The parties have been unable to reach an agreement on the issue raised in the attached motion.

Respectfully Submitted,

s/ Mary L. Johnson
Mary L. Johnson
Complaint Counsel

UNITED STATES OF AMERICA
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

Public Document

**[Proposed] ORDER GRANTING COMPLAINT COUNSEL'S
MOTION TO LIMIT THE RESPONDENTS TO FIVE (5) EXPERT WITNESSES**

On January 10, 2011, Complaint Counsel filed a *Motion and Memorandum In Support to Limit The Respondents to Five (5) Expert Witnesses*. Finding good cause for the motion, Complaint Counsel's Motion is GRANTED. Respondents are HEREBY ORDERED to withdraw three of the experts listed in their February 1, 2011 filing, and to provide their revised list of five experts to Complaint Counsel within one day of the issuance of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I certify that on February 10, 2011, I filed and served *Complaint Counsel's Motion to Limit the Respondents to Five (5) Expert Witnesses* upon the following as set forth below:

One electronic copy via the FTC E-Filing System to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580

One electronic copy via email to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W., Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

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Attorneys for Respondents

Date: February 10, 2011

/s/ Mary L. Johnson
Mary L. Johnson
Complaint Counsel