



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 TO SHORTEN THE TIME FOR
THE FILING OF A RESPONSE TO COMPLAINT COUNSEL'S MOTION
TO LIMIT RESPONDENTS TO FIVE (5) EXPERT WITNESSES**

Complaint Counsel, for the following reasons, respectfully moves that Respondents be required to file a response to the accompanying Motion to Limit Respondents to Five (5) Expert Witnesses ("Motion to Limit") within five days, no later than February 17, 2011.

On Friday, January 28, 2011, Respondents filed their Motion to Exceed Five (5) Expert Limit ("Motion to Exceed"), knowing that said motion would not be resolved until well after the February 1, 2011 deadline established by the Scheduling Order to file their expert witness list. On February 1, 2011, Respondents filed their Expert Witness List naming a total of eight expert witnesses, in contravention of the limit of five expert witnesses mandated by Rule 3.31A(b) of the Commission's Rules of Practice. Respondents simultaneously provided lengthy Curricula Vitae and some past testimony for the eight designated experts. On February 3, 2011, Respondents sought to further delay the resolution of this issue by sending a letter to Judge Chappell seeking to hold resolution of their Motion to Exceed in abeyance. That tactic was

rejected in an email of February 4, 2011 from Dana Gross to counsel for both Respondents and Complaint Counsel. On February 9, 2011, literally two and one half hours before Complaint Counsel's opposition to the Motion to Exceed was due to be filed, Respondents withdrew that motion, promising "to file a new motion on this issue" at some unspecified future time.

Respondents' unsanctioned filing of its Expert Witness List exceeding the limit prescribed by Rule 3.31A(b) by three experts is extremely prejudicial to Complaint Counsel. We are confronted with eight potential expert witnesses to begin researching, including reading prior testimony and literally hundreds of publications, without knowing which of these eight will be among the final five that ultimately should be permitted under Rule 3.31A(b). Moreover, Respondents' dithering over its Motion to Exceed, its February 9 withdrawal thereof, and the promised filing of a new motion sometime *in futuro* severely extends and enhances the prejudice to Complaint Counsel. Accordingly, Complaint Counsel filed its Motion to Limit on February 10, 2011.

By this motion, Complaint Counsel respectfully moves this Court, pursuant to Rule 3.23(d) ("within such . . . shorter time as may be designated by the Administrative Law Judge") for: 1) an order requiring Respondents to file their opposition, if any, to this motion within three days of filing, and 2) an order shortening Respondents' time to respond to the Motion to Limit to five days, *i.e.*, no later than February 17, 2011. This shortened time is necessary to end the prejudicial effect on Complaint Counsel of preparing for the depositions of additional experts who are not authorized by Rule 3.31A(b). The shortened response time should not prejudice Respondents, because they have known of the existence of, and their purported need for, the additional expert witnesses at least since the January 28, 2011 date of their Motion to Exceed. Indeed, counsel for Respondents raised the very issue of additional experts at the Scheduling

Conference in this matter held on October 26, 2010.

Dated: February 10, 2011

Respectfully Submitted,

s/ Mary L. Johnson

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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 To Shorten the Time For the Filing of A Response to Complaint Counsel's Motion To Limit 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 to state 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

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**[PROPOSED] ORDER REQUIRING RESPONDENTS TO FILE OPPOSITION, IF ANY,
TO COMPLAINT COUNSEL'S MOTION TO SHORTEN THE TIME FOR THE
FILING OF A RESPONSE TO COMPLAINT COUNSEL'S MOTION TO LIMIT
RESPONDENTS TO FIVE (5) EXPERT WITNESSES**

Based upon the arguments of the parties, there is good cause to shorten the time frame to require Respondents to file an opposition, if any, to *Complaint Counsel's Motion to Shorten the Time For the Filing of A Response to Complaint Counsel's Motion To Limit Respondents to Five (5) Expert Witnesses*. Therefore, pursuant to Rule 3.22(d), Complaint Counsel's motion is GRANTED, and Respondents are ORDERED to file an opposition, if any, to said motion no within three days of the issuance of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

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**[PROPOSED] ORDER GRANTING MOTION TO SHORTEN
THE TIME FOR THE FILING OF A RESPONSE TO
COMPLAINT COUNSEL'S MOTION TO LIMIT
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Based upon the arguments of the parties, there is good cause to require Respondents to file a response to *Complaint Counsel's Motion to Limit Respondents to Five (5) Expert Witnesses* within a shorter time period than the standard time period set in the Commission's Rules of Practice. Therefore, pursuant to Rule 3.22(d), *Complaint Counsel's Motion to Shorten the Time for the Filing of a Response to Complaint Counsel's Motion to Limit Respondents to Five (5) Expert Witnesses* is GRANTED, and Respondents are ORDERED to file their Response, if any, to said motion no later than February 17, 2011.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I certify that on February 10, 2011, I caused to be filed and served *Complaint Counsel's Motion to Shorten the Time For the Filing of A Response to Complaint Counsel's Motion to Limit Respondents to Five (5) Expert Witnesses* upon the following as set forth below:

One electronic copy via the 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