

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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,)
Respondents.)

DOCKET NO. 9344

**ORDER GRANTING COMPLAINT COUNSEL'S
MOTION TO AMEND SCHEDULING ORDER**

I.

On February 16, 2011, pursuant to Commission Rule 3.21(c), Complaint Counsel filed a Motion to Amend Scheduling Order and Memorandum in Support Thereof ("Motion"), requesting extension of the February 18, 2011 fact discovery deadline for the limited purpose of taking a deposition in Israel of Dr. Michael Aviram. Respondents filed an Opposition on February 25, 2011 ("Opposition").¹

Upon full consideration of the Motion and Opposition, and for the reasons set forth below, the Motion is GRANTED.

II.

Complaint Counsel argues that good cause exists to modify the discovery deadline to permit the deposition of Dr. Aviram in Israel. According to Complaint Counsel, Dr. Aviram, a physician and researcher living in Israel, has been named as a fact witness by Respondents in their initial witness list which indicates, "Respondents anticipate that Dr. Aviram will testify regarding Respondents' defenses, his research regarding pomegranates and POM products, and his interactions with Respondents."

¹ An Order issued on February 17, 2011 which granted Complaint Counsel's Motion to Shorten Time for Respondents' Response to Motion to Amend Scheduling Order and directed that any such response be filed on or before February 24, 2011.

Complaint Counsel further states that Dr. Aviram and his research have been repeatedly cited in Respondents' advertising.

Complaint Counsel asserts that it began communicating with Respondents' counsel in early January 2011 regarding whether Respondents would make Dr. Aviram available for deposition in the United States, or advise that Dr. Aviram would not be testifying at the hearing. Complaint Counsel's e-mail communications with Respondents' counsel over the ensuing weeks, attached as exhibits to the Motion, show that Respondents' counsel advised Complaint Counsel, more than once, that Respondents' counsel did not represent nor control Dr. Aviram; that Respondents' counsel's inquiries to Dr. Aviram indicated that Dr. Aviram would not be travelling to the United States anytime soon; and that Complaint Counsel should proceed under the Commission's Rules governing subpoenas to take a deposition in a foreign country. *See* 16 C.F.R. § 3.36.

Complaint Counsel represents that it conferred with the Office of International Affairs within the Federal Trade Commission, which in turn consulted with Israeli officials regarding options for taking Dr. Aviram's deposition in Israel, including the process for proceeding by subpoena in Israel. After evaluating what it concluded were complex and time-consuming procedures for compulsory process, Complaint Counsel determined that it would be more efficient to attempt to obtain Dr. Aviram's consent to a deposition in Israel, based upon advice that Israeli authorities would not object if Dr. Aviram consented to a deposition in Israel and that the Office of International Affairs considered a voluntary deposition to be an appropriate approach. Accordingly, on February 8, 2011, Complaint Counsel contacted Dr. Aviram and requested his consent to a deposition in Israel, which consent Dr. Aviram provided by return e-mail on February 11, 2011. Dr. Aviram agreed to make himself available for deposition on the morning of March 7, 2011, at his office in Haifa, Israel. Complaint Counsel avers that it believed it would have Respondents' consent to the extension of the discovery deadline for the purpose of the deposition in Israel.

Respondents contend that Complaint Counsel's Motion should be denied because Complaint Counsel failed to proceed under Commission Rule 3.36 to procure Dr. Aviram's deposition. Respondents further contend that Complaint Counsel cannot show good cause for the requested extension of the discovery deadline because, by waiting until February 8, 2011 to informally arrange for Dr. Aviram's deposition, Complaint Counsel failed to act diligently to complete the deposition prior to the discovery deadline, despite having been aware of Dr. Aviram's role in the matter at least since the filing of the Complaint. Finally, Respondents contend that they will experience considerable prejudice if the March 7 deposition in Israel is allowed to proceed, because the deposition will take time and resources away from necessary work in connection with upcoming expert reports and expert depositions.

III.

Rule 3.36 of the Commission's Rules of Practice ("Rules"), governs, among other things, "subpoenas to be served in a foreign country." The Rule provides that an application "for the issuance of a subpoena to be served in a foreign country, shall be made in the form of a written motion" and sets out the requisite showing the motion must make in order to obtain the subpoena.² Nothing in Rule 3.36 addresses voluntary appearances in a foreign country. Therefore, Complaint Counsel's Motion will not be denied on the basis of Rule 3.36.

Rule 3.21(c) governs modification of scheduling order deadlines, stating in pertinent part: "The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing." Good cause exists when a deadline in a scheduling order "cannot be met despite the diligence of the party seeking the extension." *In re Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69, *2 (2002).

Complaint Counsel's Motion sufficiently demonstrates good cause for modifying the deadline for the purpose of taking Dr. Aviram's deposition. To be sure, some of the delay in arranging for Dr. Aviram's deposition resulted from Complaint Counsel's miscalculation in attempting to require Respondents' counsel to produce Dr. Aviram. Complaint Counsel knew, or should have known, that Dr. Aviram is a third party who is not represented by Respondents' counsel, and that, therefore, Respondents' counsel was not obliged to obey Complaint Counsel's request that Dr. Aviram be produced for deposition. However, it also appears that Respondents' counsel did not respond to Complaint Counsel's request to confirm whether Respondents did in fact intend to call Dr. Aviram to testify at trial. A prompt answer to this question could have expedited a resolution of the issue. Under these circumstances, it cannot be concluded that Complaint Counsel was not reasonably diligent in taking steps to procure Dr. Aviram's deposition.

Rule 3.21(c) also directs: "In determining whether to grant the motion [to modify scheduling order], the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c). In this regard, there have been two prior orders issued, granting

² Rule 3.36(b) states: The motion shall make a showing that: (1) The material sought is reasonable in scope; (2) If for purposes of discovery, the material falls within the limits of discovery under § 3.31(c)(1), or, if for an adjudicative hearing, the material is reasonably relevant; (3) If for purposes of discovery, the information or material sought cannot reasonably be obtained by other means or, if for purposes of compelling a witness to appear at the evidentiary hearing, the movant has a compelling need for the testimony; (4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery or testimony is sought and that any additional procedural requirements have been or will be met before the subpoena is served; and (5) If the subpoena requires access to documents or other tangible things, it meets the requirements of § 3.37.

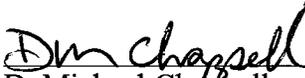
extensions to deadlines in the Scheduling Order.³ Neither of those extensions, nor the current proposed extension, will affect the hearing date or the rendering of an initial decision. The complexity of the issues in the case weighs in favor of allowing a brief extension, in order to discover information known by a potential witness.

Finally, allowing the deposition to take place will not result in undue prejudice to Respondents. Respondents have not established that they lack sufficient resources, among the eight attorneys who have filed notices of appearance in this case, to prepare for and attend the Aviram deposition, and also tend to matters of expert discovery. Moreover, whether Respondents choose to attend the deposition by telephone or in person is within Respondents' discretion.

IV.

For the above stated reasons, Complaint Counsel's Motion to Amend Scheduling Order is GRANTED and it is hereby ORDERED that the Scheduling Order dated October 26, 2010 is amended for the limited purpose of allowing, after the close of fact discovery, the deposition of Dr. Michael Aviram. The remaining dates and all additional provisions in the October 26, 2010 Scheduling Order remain in effect.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: February 25, 2011

³ On January 3, 2011, an order issued extending the deadline for issuance of requests for admission. In addition, an order dated February 7, 2011, extended the fact discovery deadline for the purpose of taking the depositions of the individual Respondents, Lynda and Stewart Resnick.