

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

RESPONDENTS' MOTION TO EXTEND THE CLOSING OF THE RECORD AND TO COMPEL COMPLAINT COUNSEL TO FURTHER DEFINE THE ADVERTISEMENTS AND CLAIMS AT ISSUE IN THIS CASE

In response to their request for a telephonic status conference, Respondents received the Court's message on November 11, 2011, instructing the parties to submit whatever stipulations they have agreed to by 4:00 p.m. on November 14, 2011, and informing them that the record would close shortly thereafter. Respondents will continue to work with Complaint Counsel to accomplish as much as possible by that deadline.

Respondents, nevertheless, respectfully request that the Court also consider (1) extending the closing date of the record and (2) compelling Complaint Counsel to comply with this Court's original order issued on November 4, 2011, which mandated that Complaint Counsel at least "attempt" to consolidate the scope of the case, including by identifying the types and number of all alleged misrepresentations made. Although Complaint Counsel has provided a list of advertisements ostensibly being challenged in this action, *see* Email from M. Johnson to S. Perryman, dated November 9, 2011, attached hereto, they made no meaningful effort to identify the alleged misrepresentations purportedly made by these ads, either specifically by ad or even

by category or group. Instead, Complaint Counsel takes the position that the Court's November 4th order does not require them to identify which claims are allegedly made in which ads. This provides very little useful information for the Court or Respondents. In addition, the designation of ads also continues to be overbroad: for example, Complaint Counsel still refers to Exhibit E to the Complaint, which is a CD containing voluminous materials taken from Respondents' websites. Further guidance and clarification from the Court, therefore, are needed in this area.

Second, but significantly, and as Respondents have previously informed the Court and Complaint Counsel, counsel for Respondents are scheduled to be in another trial (also involving Respondents) starting November 15, 2011. That trial is anticipated to end on or around December 2, 2011. (Complaint Counsel have been monitoring that litigation and have been aware of the trial schedule for some time). Despite strenuous efforts to avoid this conflict, including by opposing the delay caused by Complaint Counsel's request to call their additional rebuttal witness, Dr. Kantoff, Respondents are now faced with significant potential prejudice as a result of Complaint Counsel's trial strategy. The only relief Respondents can suggest at this point is to extend the dates for filing post-trial proposed findings and conclusions, *see* 74 Federal Register 1817 (Jan. 13, 2009) ("the schedule outline in the proposed Rule [3.46] . . . should be reasonable in the vast majority of cases. In the unusual situation, a party may move the ALJ under Rule 4.3 for an extension [f]or good cause shown") (emphasis added), or to keep the record open at least to December 2, to allow the parties to do further work on stipulations and other evidentiary issues that Respondents believe could prove helpful in consolidating the record.

Counsel have conferred and Complaint Counsel does not join in this motion.

RESPONDENTS' GOOD FAITH BASIS FOR AN EXTENSION

Good cause exists for the Court to order the record held open beyond November 14th given that: (1) the parties, in particular Complaint Counsel, would benefit from additional time to comply with the Court's order regarding the desired stipulations; (2) the parties, notwithstanding their progress on the ordered stipulations, still need to resolve evidentiary issues concerning the record; and (3) Respondents would suffer considerable prejudice absent an extension of time.

On August 30, 2011, the Court raised the issue that the parties should attempt to agree to some categories or groupings of the advertisements at issue. On November 4, 2011, the Court ordered that the parties meet and confer on limiting and/or consolidating the scope of this case, stipulate to as many relevant facts as possible, and prepare a comprehensive glossary of material terms, including without limitation, medical and research terms at issue in this case. In doing so, the Court indicated that the record would be held open until the parties submitted the requested stipulations. At the time, the Court tentatively projected a date of November 14, 2011 for the record to close. The Court, however, indicated that it would consider favorably a motion to keep the record open for additional time if the parties made good faith efforts to prepare the requested stipulations.

Between August 30, 2011 and the date of the Court's order, a period of more than two months, Complaint Counsel made no attempt to group or categorize the advertisements at issue. In the time since the Court ordered parties on November 4, the parties have worked together to propose and arrive at the stipulations as directed by the Court. To date, Complaint Counsel and Respondents each have exchanged proposed stipulated facts and glossary terms. Although they have made promising progress in this regard, only a limited number of stipulations have been

agreed to. Respondents believe that with additional time the parties could reach further stipulations.

In addition, as discussed above, Respondents submit that Complaint Counsel has not yet complied with the Court's November 4th directions. Although Complaint Counsel has provided Respondents with an initial list of challenged advertisements, Counsel has refused to specify which claims in those ads they are challenging. Furthermore, the list contains at least one reference, to Exhibit E to the Complaint, which is itself a voluminous set of documents and provides little guidance to the Court or Respondents about what Complaint Counsel is challenging. Complaint Counsel should not be permitted to hide the ball any longer. Respondents are entitled to know the specific ads at issue in this case and the claims that Complaint Counsel asserts were made in the advertisements. The Court should hold the record open until Complaint Counsel fully and faithfully complies with the Court's order.

Second, in addition to the stipulations that the Court has requested, Respondents need additional time to evaluate the corrected exhibits that Complaint Counsel has provided and to work with Complaint Counsel to address other issues, such as exhibit duplication and use of deposition testimony from other cases, prior to the closing of the record.

Finally, as the Court is aware, the same counsel for Respondents in this action, Mr. Fields and the entire Roll Law Group team led by Ms. Diaz, are set to begin trial on November 15, 2011 in the matter of *POM Wonderful LLC v. Ocean Spray Cranberries, Inc.*, Case No. 2:09-cv-00565 (C.D. Cal. 2009). The closing of the record during the week of November 14, 2011, therefore, would present undue hardship on Respondents given the unavailability of their counsel. Respondents understand that the Court is disinclined to keep the record open until December 5 or to some time thereafter. However, even an extension through December 1 would mitigate

against the prejudice that Respondents would otherwise suffer resulting from the additional, unforeseen extensions of the hearing in this case, including the additional rebuttal witness this Court allowed Complaint Counsel to present at trial.

CONCLUSION

For the above reasons, Respondents request that the Court direct Complaint Counsel to fully and clearly identify the claims they allege are at issue in this proceed, in specific ads or groups of ads, and otherwise afford Respondents relief from the scheduling conflict created by Complaint Counsel's calling of its rebuttal witness, by extending the record closing date to December 1, 2011.

Dated: November 14, 2011

Respectfully submitted,

/s/ Skye Perryman

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Counsel for Respondents

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

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

MEET AND CONFER STATEMENT

Respondents conferred with Complaint Counsel regarding the requests in this motion and Complaint Counsel declined to consent. John Graubert and Skye Perryman discussed the issues in the motion with Heather Hipsley and Mary Johnson, among others, in several telephone calls on November 10, 11 and 14, 2011.

Dated: November 14, 2011

Respectfully submitted,

/s/ Skye Perryman

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Counsel for Respondents

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	
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POM WONDERFUL LLC and)	
ROLL GLOBAL LLC,)	
as successor in interest to Roll)	
International Corporation,)	
)	
companies, and)	Docket No. 9344
)	PUBLIC
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 Respondents' **MOTION TO EXTEND THE CLOSING OF THE RECORD AND TO COMPEL COMPLAINT COUNSEL TO FURTHER DEFINE THE ADVERTISEMENTS AND CLAIMS AT ISSUE IN THIS CASE**, and that on this 14th day of November, 2011, I caused the foregoing to be served by hand delivery and e-mail on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
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

Bertram Fields
Greenberg Glusker
1900 Avenue of the Stars
21st Floor
Los Angeles, California 90067
Telephone: 310.201.7454

Counsel for Respondents

Dated: November 14, 2011

From: Johnson, Mary
Sent: Wednesday, November 09, 2011 4:47 PM
To: 'Perryman, Skye'; 'Graubert, John'; 'Diaz, Kristina (KDiaz@Roll.com)'; 'Traboulsi, Johnny (JTraboulsi@Roll.com)'; 'Hammond, Brooke (BHammond@Roll.com)'; 'BFields@greenbergglusker.com' (BFields@greenbergglusker.com)
Cc: Ducklow, William T.; Hipsley, Heather
Subject: RE: POM Wonderful et al., Dkt 9344 -- proposed stips re: challenged ads/misreps

Dear Skye:

In response to your letter this afternoon, we offer the following two stipulations to address the ads and misrepresentations challenged in this matter, and Respondents' proposed Stipulation I.

1. The parties stipulate that the universe of advertising and promotional materials that Complaint Counsel challenges as violating Sections 5 and 12 of the FTC Act (hereinafter "the Challenged Ads") are the following: CX0013; CX0016; CX0029; CX0031; CX0033; CX0034; CX0036; CX0044; CX0065; CX0103; CX0109; CX0120; CX0122; CX0128; CX0169; CX0180; CX0188; CX0192; CX0251; CX0260; CX0274; CX0279; CX0280; CX0314; CX0328; CX0331; CX0336; CX0337; CX0342; CX0348; CX0350; CX0351; CX0353; CX0355; CX0372; CX0379; CX0380; CX0463; CX0466; CX0468; CX0472; CX0473; CX1426 Exh. A-N. This stipulation does not address whether non-challenged advertising and promotional materials are or are not deceptive.

2. The parties stipulate that the alleged misrepresentations are those false and misleading or unsubstantiated representations, whether express or implied, contained in the Challenged Ads as described in Paragraphs 12 through 22 of the Complaint (CX1426).

Respondents' proposed Stipulation II does not make sense as written. If you wish to offer a stipulation as to ads that Complaint Counsel is not challenging, please ground the proposal by referencing specific ads on the JX2 exhibit list and corresponding dissemination run dates.

Please let us know before Friday, Nov. 11, 2011 whether you will agree to these stipulations.

Regards,

Mary

Mary L. Johnson
Attorney, Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
phone: 202-326-3115
fax: 202-326-3259

-----Original Message-----

From: Perryman, Skye [mailto:sperryman@cov.com]
Sent: Wednesday, November 09, 2011 1:35 PM

To: Johnson, Mary; Graubert, John; Diaz, Kristina (KDiaz@Roll.com); Traboulsi, Johnny (JTraboulsi@Roll.com); Hammond, Brooke (BHammond@Roll.com); 'BFields@greenbergglusker.com' (BFields@greenbergglusker.com)
Cc: Ducklow, William T.; Hipsley, Heather
Subject: RE: POM Wonderful et al., Dkt 9344

Dear Counsel,

Please see the attached correspondence.

Best Regards,
Skye

-----Original Message-----

From: Johnson, Mary [mailto:MJOHNSON1@ftc.gov]
Sent: Wednesday, November 09, 2011 11:59 AM
To: Graubert, John; Perryman, Skye; Diaz, Kristina (KDiaz@Roll.com); Traboulsi, Johnny (JTraboulsi@Roll.com); Hammond, Brooke (BHammond@Roll.com); 'BFields@greenbergglusker.com' (BFields@greenbergglusker.com)
Cc: Ducklow, William T.; Hipsley, Heather
Subject: POM Wonderful et al., Dkt 9344 -- proposed glossary of material terms

Dear Counsel:

Attached for your consideration is Complaint Counsel's proposed glossary of material terms. Please let us know before Friday, Nov. 11 if you agree with these terms.

Regards,

Mary L. Johnson
Attorney, Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
phone: 202-326-3115
fax: 202-326-3259