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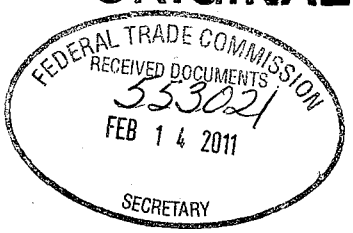

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION

In the Matter of	)	
POM WONDERFUL LLC and ROLL INTERNATIONAL CORP., companies, and	)	Docket No. 9344
STEWART A. RESNICK, LYNDA RAE RESNICK, and MATTHEW TUPPER, individually and as officers of the companies.	)	Public Record

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' RENEWED MOTION TO EXCEED FIVE (5) EXPERT LIMIT

Pursuant to Commission Rule 3.22(d), Complaint Counsel respectfully submits its opposition to *Respondents' Renewed Motion to Exceed Five (5) Expert Limit,* filed February 11, 2011 ("Motion"). Respondents' untimely attempt to cure their faulty expert list violates several procedural rules and fails to articulate the extraordinary circumstances required for additional experts under Rule 3.31A(b). Their Motion should be denied.[1]

I. Respondents' Motion Is Untimely and Procedurally Defective

On January 28, 2011, two days before the Scheduling Order's deadline to provide an expert witness list, Respondents filed their first motion to authorize additional experts. On February 1, 2011, Respondents filed a list naming eight purported experts, contrary to Rule 3.31A(b). On February 3, 2011, Respondents submitted a letter asking the Court to hold their motion in abeyance (the Court rejected that request on February 4, 2011). On February 9, 2011

[1] In filing this opposition, Complaint Counsel does not waive, and expressly reserves, the right to file future motions *in limine* or objections to Respondents' expert witnesses, expert reports, and expert testimony.

– just hours before Complaint Counsel's opposition was due – Respondents withdrew their (apparently flawed) first motion, and waited another two days before filing their renewed Motion.

Respondents' Motion should be denied as untimely. As early as October 2010, counsel stated that Respondents would likely seek to increase the expert limit. *See* Prehearing Conference Transcript (Oct. 26, 2010) at 4-6. Accordingly, Respondents should have filed a motion well in advance of the February 1 deadline, to permit Complaint Counsel time to respond and the Court to rule, before the actual expert witness list was due. Instead, Respondents filed an unauthorized list of eight experts on February 1 and waited ten more days before filing the instant Motion. Respondents' unsanctioned filing of an eight person expert list prejudices Complaint Counsel. Complaint Counsel needs to know, now, which of Respondents' eight experts it must prepare to depose, in order to begin reviewing the proposed witnesses' copious background materials.[2]

Moreover, both of Respondents' motions violate relevant procedural requirements. Neither motion was accompanied by the required meet and confer statement. Scheduling Order at 5. "Motions that fail to include such statement may be denied on that ground." *Id.* Neither motion included a draft order, violating Rule 3.22(c). Respondents' instant Motion further

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[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.

violates the 2,500 word limit.[3] Rule 3.22(c) ("Documents that fail to comply with these provisions shall not be filed with the Secretary.") For these timing and procedural reasons alone, Respondents' Motion should be denied.

II. The Issues Presented Here Do Not Warrant More Than Five Experts

This case does not present "extraordinary circumstances" warranting additional experts. It is an ordinary case, similar in complexity to other recent food and supplement cases. *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) (three supplements, over twenty weight loss and erectile dysfunction claims); *FTC v. Direct Marketing Concepts Inc.*, 569 F. Supp. 2d 285 (D. Mass. 2008), *aff'd* 624 F.3d 1 (1st Cir. 2010) (two supplements, multiple claims including treatment of Parkinson's disease, 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' advertising makes similar health benefit claims for the three products, specifically, prevention or treatment of 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

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[3] Respondents' Motion totals 2,713 words, based on the criteria of Rule 3.22(c). To arrive at this number, Complaint Counsel manually highlighted each page of text and each footnote from Respondents' Motion, copied and pasted them to a Microsoft Word document, and ran the software's word count function.

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. The Medical Issues Raised By This Case Do Not Constitute Extraordinary Circumstances

Commission cases routinely use fewer than five experts per side to address multiple product and health claims. In *National Urological Group*, the FTC offered two experts to address multiple weight loss and erectile dysfunction claims. *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 supplements.[4] *See* 569 F. Supp. 2d at 302, 304.

Respondents acknowledge that the Complaint in this matter raises questions involving three core scientific disciplines. Motion at 4-5. Although Respondents did not identify the substance of the witnesses' proposed testimony, their list includes 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.[5] Respondents concede that "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." *See* Respondents' Expert Witness List at 1,

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[4] 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.

[5] Respondents' Motion articulates a desire to present expert testimony on nitric oxide chemistry. If such testimony indeed is relevant to both erectile dysfunction and cardiovascular issues, one presumes that either their named cardiovascular expert and/or one of their three urologists can address this issue. If one of the other experts listed is uniquely qualified in this sub-specialty, again it is Respondents' choice whether to make room for him within the five expert limit.

n. 1; *see also* Motion at 7-8. 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.[6] *See, e.g., Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 157, *102-124 (Aug. 5, 2009) (one expert testified on both the necessary level of substantiation and whether the substantiation was adequate). Allowing multiple experts from the same discipline to appear will likely result in needless cumulative testimony; further, Respondents' suggested division of expert duties will be impossible to police.[7] It is noteworthy that Respondents' Preliminary Witness List identifies numerous scientists who can authenticate

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[6] Respondents' description of how they plan to use a "substantiation" expert demonstrates the cumulative nature of the testimony. Respondents state that this expert would opine on the level of substantiation required for a prostate cancer treatment claim and address whether or not prostate specific antigen doubling time is a proper research endpoint for such claims. Motion at 7-8. One must assume their prostate cancer expert will provide similar testimony.

[7] Some federal courts limited expert testimony to one or two experts per discipline. *See Riley v. Dow Chemical Co.*, 123 F.R.D. 639, 640 (N.D. Cal.1989) ("[I]t is the usual practice of this Court . . . 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 . . . in a meaningful way." *Washington v. Greenfield*, No. 86-930, 1986 WL 15758, at *1 (D.D.C. Oct. 15, 1986) (rejecting request to call four gynecologist experts).

Respondents' research and testify as to how it was conducted.[8] In sum, the medical issues raised by this case do not warrant an increase in the number of experts.

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

Respondents claim to need "at least" two consumer perception experts and have named two experts who purportedly have backgrounds in these fields.[9] Motion at 9. However, their premise that extrinsic evidence is required to determine whether or not the challenged claims were made is unfounded. *See FTC v. Colgate-Palmolive*, 380 U.S. 374, 386 (1965) (the issue whether a claim is made "is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves"); *Daniel Chapter One*, 2009 FTC LEXIS 157, *176 ("[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,

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[8] This includes Drs. Carducci and Pantuck (who conducted studies on prostate cancer patients for Respondents), Drs. Ornish and Davidson (studies on patients with cardiovascular health problems), Dr. Padma-Nathan and Mr. Forest (study on erectile dysfunction), and Dr. Heber (who has researched the pomegranate's mechanism of action and purported antioxidant properties). Resp. Preliminary Witness List at 4-5.

Respondents argue that they will require *more* than eight experts if they are unable to elicit expert testimony from these scientists and researchers. Motion at 5, n. 3 (stating a desire to "clarify the ground rules for that testimony to avoid issues under Federal Rule of Evidence 701"). The Court should prohibit such testimony. The Scheduling Order prohibits fact witnesses from providing expert opinion, Scheduling Order at 6, and Fed. R. Evid. 701 prohibits lay witnesses from offering opinions based on specialized knowledge. *See also Basic Research*, No. 9318, 2006 FTC LEXIS 5, *9 (Jan. 10, 2006) (Order on Complaint Counsel's Motion *In Limine*) (if the witnesses "perform[ed] the tests or have first hand knowledge of the tests upon which Respondents relied for substantiation for their products, they may testify, but only to the extent of their personal knowledge of how the conclusions were drawn").

[9] Respondents use of the term "at least" is troubling, as they have to date identified only two persons with arguable expertise in consumer perception.

the court need not look to extrinsic evidence to ascertain whether the advertisement made the claim." 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 – but there is no need to exceed the limit to do so.[10] Moreover, unless the Respondents have conducted a copy test of their advertising claims, any consumer research testimony is likely to be found irrelevant.[11]

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.[12]

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[10] Respondents cite *Novartis Corp.* and *Kraft, Inc.,* for the proposition that advertising cases require a larger number of consumer research experts. Motion at 9. These cases are inapplicable, as they predate the Commission's 2009 revision of Rule 3.31A(b) to limit the number of expert witnesses to five.

[11] It is not uncommon for the courts to bar the testimony of linguists as either unreliable under the standards of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) or unnecessary or irrelevant. *See Flagstar Bank, FSB v. Freestar Bank, N.A.*, 687 F. Supp. 2d 811, 819-22 (C.D. Ill. 2009) (striking plaintiff's linguist for failure to meet *Daubert* standards and as unnecessary, and striking linguist Butters' (Respondents' named expert) report as moot because it was nonessential); *Matthews v. First Revenue Assurance, L.L.C.*, 2001 U.S. Dist. LEXIS 11091, *4-5, 12-14 (N.D. Ill. July 31, 2001) (linguist testimony stricken pursuant to *Daubert*; court is able to conclude from the collection agency's letter itself that it violates the Fair Debt Collection Practices Act). *See also National Urological Group*, 645 F. Supp. 2d at 1203-1204 (rejecting consumer perception testimony as immaterial where the expert failed to survey consumers regarding the advertising).

[12] Indeed, Respondents seek "up to" eight experts, indicating they may ultimately use fewer. Motion at 3. The expert limit should not be expanded as a tool for Respondents to determine which of the eight experts they present.

The newly imposed limit on expert witnesses has not hampered proceedings before this Court, regardless of a case's complexity. In *Polypore International, Inc.*, a complex merger case, each side presented only one expert despite multiple issues at play. *Polypore International, Inc.*, No. 9327, 2010 FTC LEXIS 17, *22 (Mar. 1, 2010). While this Court noted it agreed to additional experts in *Intel*, the Court cautioned that the circumstances in *Intel* were rare. *See* Prehearing Conference Transcript 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.

IV. Conclusion

This is not an extraordinary matter but a straight-forward advertising substantiation case challenging three distinct areas of health claims. Respondents can readily defend the Complaint's allegations within the bounds of Rule 3.31A(b). Moreover, if Respondents wanted to seek an exception to the rule, they should have filed a motion meeting all technical requirements well in advance of the February 1 deadline. As it is, Complaint Counsel has been denied adequate and timely notice of which five experts Respondents will, in fact, use. Complaint Counsel respectfully requests that the Court deny Respondents' Motion and order the Respondents to withdraw three of its listed experts within one day of its ruling.

Dated: February 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2011, I filed and served *Complaint Counsel's Opposition to Respondents' Renewed Motion to Exceed Five (5) Expert Limit* upon the following as set forth below:

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

Donald S. Clark, Secretary
Federal Trade Commission
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Washington, DC 20580

One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell
Administrative Law Judge
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