

# ORIGINAL

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION




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In the Matter of )  
 )  
 )  
 POM WONDERFUL LLC and, )  
 ROLL GLOBAL LLC, )  
 as successor in interest to )  
 Roll International Corporation, )  
 companies, and )  
 )  
 STEWART A. RESNICK, )  
 LYNDRA RAE RESNICK, and )  
 MATTHEW TUPPER, individually and )  
 as officers of the companies. )

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Docket No. 9344

PUBLIC DOCUMENT

**CONSENT MOTION TO ALLOW COMPLAINT COUNSEL  
TO DESIGNATE AN ADDITIONAL REBUTTAL EXPERT AND  
TO AMEND SCHEDULING ORDER AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 3.31A(b) of the Commission’s Rules of Practice, Complaint Counsel respectfully moves the Court to allow Complaint Counsel to designate one additional expert beyond the five expert witnesses set by Rule 3.31A(b). Complaint Counsel also moves the Court for an order amending the October 26, 2010 Scheduling Order to permit extension of the April 12 deadline for deposing expert witnesses to no later than April 29, 2011. The parties have worked expeditiously to schedule the majority of the expert depositions by April 12, 2011; however, in light of the number of experts designated in this case and the experts’ schedules, the parties have been unable to schedule a few expert depositions by the April 12 deadline. Respondents consent to Complaint Counsel’s motion on the above two issues.

## Argument

### **I. Complaint Counsel Seeks Leave to Designate An Additional Rebuttal Witness to Address Respondents' Linguistics Expert**

With the Court's permission, Respondents designated eight experts in this matter, including two experts in the areas of consumer science and linguistics, Dr. David Reibstein and Dr. Ronald Butters. *Order on Cross-Motions Regarding Limitation On Number of Expert Witnesses Designated by Respondents* (Feb. 23, 2011) ("Order on Experts"). Respondents have designated Dr. Reibstein to offer a survey intending to evaluate the factors driving consumer purchase of POM Wonderful 100% Pomegranate Juice. In turn, Complaint Counsel has designated Dr. Michael Mazis, as a marketing and consumer behavior expert with expertise in survey issues, to rebut Dr. Reibstein's testimony. Respondents have designated Dr. Butters, as a specialist in linguistic science, and have asked him to opine on certain communications made by or on behalf of POM Wonderful. Complaint Counsel seeks to designate Dr. David W. Stewart as a rebuttal expert to Dr. Butters' testimony. Dr. Stewart is Dean of the School of Business Administration and the A. Gary Anderson Graduate School of Management at the University of California, Riverside and Professor of Management and Marketing.

Commission Rule 3.31A(b) permits a party to seek leave of court to call additional expert witnesses beyond the five specified by the Rule. In this case, there is good cause to permit Complaint Counsel to designate an expert to rebut Respondents' linguistics expert and Respondents consent to such designation, as they intimated they would in their motion of February 15, 2011. *Respondents' Renewed Motion to Exceed The Five (5) Expert Limit and Memorandum In Support*, at 9. Moreover, Complaint Counsel's request is limited to permission to designate Dr. Stewart as a rebuttal witness. Both Respondents and Complaint Counsel reserve

their rights to challenge the testimony of any designated expert witness, consistent with the Commission Rules of Practice and the Court's Order on Experts.

## **II. Circumstances Warrant Extending the Deadline for Expert Depositions to April 29, 2011**

The Scheduling Order sets April 12, 2011 as the “[d]eadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.” Scheduling Order at 3.

The parties seek to amend the Scheduling Order to allow the parties to depose four experts after April 12, 2011, but no later than April 29, 2011. In order to accommodate the schedules of the experts, Complaint Counsel has agreed to depose Respondents' experts Dr. David Reibstein and Dr. Dean Ornish the weeks of April 18 and 25, respectively. In turn, Complaint Counsel has proposed two dates in that time frame for Respondents to depose Complaint Counsel's rebuttal witnesses, Dr. Mazis and Dr. Stewart.

Commission Rule of Practice 3.21(c)(2) provides that “[t]he 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.” The proposed amendment to the Scheduling Order would allow the parties a limited extension to depose their remaining expert witnesses in this matter on or before April 29, 2011. Each party believes it would not be prejudiced by the extension. Moreover, the proposed change would not affect any other deadlines prescribed by the Scheduling Order, including the Commencement of Hearing on May 24, 2011.

**Conclusion**

For the foregoing reasons, the consent motion should be granted. The parties are prepared to discuss this motion with the Court at its request. A proposed order is attached.

Date: April 4, 2011

/s/ Mary L. Johnson  
Mary L. Johnson (202) 326-3115  
Federal Trade Commission  
Bureau of Consumer Protection  
601 New Jersey Avenue, NW  
Washington, DC 20580

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

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

**[Proposed] ORDER GRANTING CONSENT MOTION TO ALLOW  
COMPLAINT COUNSEL TO DESIGNATE AN ADDITIONAL REBUTTAL EXPERT  
AND TO AMEND SCHEDULING ORDER AND MEMORANDUM IN SUPPORT**

On April 4, 2011, Complaint Counsel filed a consent motion: 1) to allow Complaint Counsel to designate one additional expert beyond the five expert witnesses set by Rule 3.31A(b), and 2) to amend the Scheduling Order dated October 26, 2010 to move the deadline for expert depositions from April 12, 2011 to April 29, 2011.

Based upon the representations of the parties, the consent motion is GRANTED. It is hereby ORDERED that Complaint Counsel may designate Dr. David Stewart as a rebuttal expert. It is FURTHER ORDERED that the Scheduling Order dated October 26, 2010 is amended such that the depositions of all expert witnesses (including rebuttal witnesses) take place

no later than April 29, 2011. The other dates and provisions in the October 26, 2010 Scheduling Order remain in effect.

ORDERED:

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D. Michael Chappell  
Chief Administrative Law Judge

Dated:

**STATEMENT REGARDING MEET AND CONFER**

On March 28, 2011, at approximately 5:30 p.m. (Eastern), Complaint Counsel Elizabeth Nach and Respondents' Counsel Paul Rose agreed by email to schedule the depositions of Dr. David Reibstein and Dr. Dean Ornish during the weeks of April 18, 2011 and April 25, 2011, respectively. Copied on the email were Complaint Counsel Heather Hipsley, Devin Domond, and Mary Johnson and Respondents' Counsel Kristina Diaz, John Graubert, and Skye Perryman.

On March 29, 2011, at approximately 6:30 p.m. (Eastern), Mary Johnson proposed to Respondents' Counsel a deposition date of April 21, 2011, for Complaint Counsel's rebuttal expert Michael Mazis. On April 1, 2011, at approximately 10:00 p.m., Ms. Johnson sought consent from Respondents' Counsel Mr. Graubert, Ms. Diaz, Ms. Perryman, Mr. Fields, and Mr. Johnny Trabousi, to designate an additional rebuttal expert and offered that the deposition of Complaint Counsel's second proposed rebuttal expert take place on or before April 29, 2011. Copied on the email were Complaint Counsel Hipsley, Michael Ostheimer, and Theodore Hoppock.

On April 4, 2011, at approximately 12:30 p.m. (Eastern), Mr. Graubert contacted Ms. Johnson to communicate Respondents' consent to this motion.

Respectfully submitted,

Date: April 4, 2011

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

## CERTIFICATE OF SERVICE

I certify that on April 4, 2011, I caused to be filed and served *Consent Motion to Allow Complaint Counsel to Designate An Additional Rebuttal Expert and to Amend Scheduling Order and Memorandum in Support* 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 paper copy via hand delivery and 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

One electronic copy via email to:

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Attorneys for Respondents

Date: April 4, 2011

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