

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**RESPONDENTS’ MOTION IN *LIMINE* TO EXCLUDE
UNDISCLOSED OPINIONS OF COMPLAINT COUNSEL’S EXPERTS**

I. INTRODUCTION

Respondents POM Wonderful LLC (“POM”), Roll Global LLC, as successor in interest to Roll International Corporation, Stewart Resnick, Lynda Resnick, and Matthew Tupper (collectively, “Respondents”) respectfully submit this Motion in *Limine* to exclude any opinions that were undisclosed by Complaint Counsel’s experts by the deadlines set by the ALJ in the Scheduling Order issued on October 26, 2010. Specifically, Respondents seek to exclude testimony by any of Complaint Counsel’s experts on matters that were not disclosed in their expert reports. Respondents also seek to exclude any rebuttal opinions that were undisclosed as of March 28, 2011, the date set by the ALJ for Complaint Counsel to identify rebuttal experts and provide rebuttal expert reports. *See* Scheduling Order p. 2.

II. BACKGROUND

On March 4, 2011, Complaint Counsel produced the expert reports of Dr. Meir Stampfer, Dr. Frank M. Sacks, Dr. James A. Eastham, and Dr. Arnold Melman. On March 28, 2011, the deadline to identify rebuttal experts and produce rebuttal reports, Complaint Counsel identified Michael Mazis and produced his rebuttal report. On April 4, 2011, pursuant to agreement of the parties, Complaint Counsel identified David Stewart as a rebuttal expert and produced his report. Complaint Counsel did not identify any other rebuttal experts, or produce any other rebuttal reports.

III. ARGUMENT

A. Complaint Counsel's Experts Should Be Excluded From Testifying About Opinions That They Failed To Disclose In Their Expert Reports.

The October 26, 2010 Scheduling Order as well as the Commission Rules of Practice Section 3.31A govern expert discovery in this case. Both the Scheduling Order and Section 3.31A expressly states, “[e]ach expert report shall include *a complete statement of all opinions to be expressed* and the basis and reasons therefore.” Scheduling Order p. 7 (emphasis added). Section 3.31A(b) goes so far as to exclude any expert from testifying at the hearing unless the expert has provided an expert report. 16 C.F.R. § 3.31A(b).

The clear purpose of the Scheduling Order and Section 3.31A(b) is to allow the parties to have an opportunity to depose experts about the opinions disclosed in their reports, and to prepare for the testimony that the expert will proffer at the hearing. Indeed, this purpose is in line with a well-established principle of civil litigation that the scope of the expert's opinions at the trial should be limited to the opinions disclosed in that expert's report. *See, e.g., O2 Micro Int'l Ltd. V. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1368-69 (Fed. Cir. 2006) (affirming district court's exclusion of expert opinions concerning matters not disclosed in the opening

expert reports). It is “[i]nappropriate for an expert to try to beef up his or her opinion with second thoughts after he or she has already been deposed in connection with the detailed report of his or her opinions.” *See also Northlake Mktg & Supply, Inc. v. Glaverbel, S.A.*, No. 92 C 2732, 1996 U.S. Dist. LEXIS 19306, at *5-6, 11 (N.D. Ill. Dec. 17, 1996) (granting motion in *limine* to exclude expert from testifying on matters not set out in his initial report).¹ Although these cases were decided under the Federal Rules of Civil Procedure, the purpose of the expert discovery rules in the federal courts as well as hearings before the ALJ is the same – to avoid the trial by ambush scenario that would result if experts were allowed to offer previously undisclosed opinions for the first time at the hearing.

Complaint Counsel has stated in the depositions of several experts that their reports may not contain all of their opinions. For example, in response to Complaint’s Counsel question, “Do you have anything else you want to say,” Dr. Stampfer stated that in his report “I didn’t provide a completely exhaustive review of all of the limitations of the studies that were provided by the respondents, but only a summary. So this shouldn’t be taken to mean that it’s complete in all its detail. It’s complete and accurate as a summary.” *See* Deposition of Meir Stampfer 204:21-205:5, relevant pages attached as Ex. B. Although Dr. Sacks’ deposition transcript is not yet available, Complaint Counsel also stated at Dr. Sacks’ deposition that he may be offering other opinions beyond those provided in his expert report, including rebuttal opinions.

Based on this testimony, it appears that Complaint Counsel is attempting to leave open the possibility of presenting expert testimony at the hearing that has not been previously

¹ *See also Olson v. Mont. Rail Link, Inc.*, 227 F.R.D. 550, 553 (D. Mont. 2005); *Liquid Dynamics Corp. v. Vaughan Co.*, No. 01 C6934, 2004 U.S. Dist. LEXIS 29992 (D.Ill. Sept. 30, 2004).

disclosed in the expert reports. To allow Complaint Counsel to introduce any such undisclosed expert opinions at the hearing would constitute trial by ambush, which would be unfairly prejudicial to Respondents.² Any such eleventh hour attempt to introduce new expert opinions at the hearing would also result in confusion of the issues and undue delay as Respondents would not have had an opportunity to depose and clarify the expert's opinions. The Commission's own rules are designed to prevent this "lie in wait" approach to expert discovery. *See* 16 C.F.R. § 3.31A. The ALJ should preclude Complaint Counsel's experts from providing expert testimony at the hearing that has not been disclosed in their respective expert reports.

B. Complaint Counsel's Experts Cannot Provide Rebuttal Opinions To The Extent They Failed To Comply With The Deadlines For Disclosure Of Rebuttal Opinions.

The Scheduling Order states that by March 28, 2011, Complaint Counsel shall "identify rebuttal expert(s) and provide rebuttal expert report(s)." The Court further stated that "[i]f material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief." *See* Ex A., Scheduling Order p. 2; *see also* 16 C.F.R. § 3.31A.

Complaint Counsel failed to identify any rebuttal experts or provide any rebuttal reports other than that of Michael Mazis and David Stewart. Consequently, Complaint Counsel has waived the right to offer any rebuttal expert testimony from any of their other experts.

Indeed, Dr. Stampfer testified at his deposition that he knew he had the opportunity to provide a rebuttal opinion, but that Complaint Counsel did not ask him to form rebuttal opinions for a rebuttal report.

² Commission Rule of Practice Section 3.43(b) governs the admissibility of evidence in this proceeding, and states that the ALJ may exclude even relevant evidence if there is, among other things, danger of unfair prejudice, confusion of the issues, or undue delay.

Q: And were you asked by the FTC to form an opinion regarding the expert opinions of David Heber that are set forth in this document?

A: Not specifically.

Q: Were you aware – let me step back. Were you asked to issue any rebuttal reports in this action?

A: No.

Q: Were you aware of whether you had the opportunity to issue rebuttal reports?

A: Yes.

See Stampfer Dep. at 186:8-18, relevant pages attached as Ex. B.

Additionally, as of the date of his deposition, Dr. Stampfer had “no plan one way or the other yet” of specifically responding to the opinions stated in Dr. Heber’s report. *Id.* at 188:2-16. Having failed to identify Dr. Stampfer as a rebuttal expert by the March 28, 2011 deadline, Complaint Counsel cannot leave open the possibility that Dr. Stampfer will offer rebuttal opinions at the hearing that were previously undisclosed. Indeed, Complaint Counsel cannot offer rebuttal opinions from any other expert that they did not identify as a rebuttal expert, including Dr. Sacks, Dr. Eastham, and Dr. Melman.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the ALJ preclude Complaint Counsel’s experts from providing expert testimony at the hearing that was not disclosed in each of their respective expert reports. Respondents further request that the ALJ exclude any expert rebuttal opinions from any witness who did not offer a rebuttal report by March 28, 2011.

_____/s
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Attorneys for Respondents

April 20, 2011

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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| LYNDA RAE RESNICK, and |) | |
| MATTHEW TUPPER, individually and |) | |
| as officers of the companies |) | |

[DRAFT PROPOSED ORDER] GRANTING MOTION *IN LIMINE*

On April 20, 2011, Respondents moved this Court *in limine* to preclude additional opinions of Complaint Counsel’s experts. Having reviewed the Respondents’ motion and considered the reasons for this motion, the motion is GRANTED.

ORDERED

Honorable D. Michael Chappell
Administrative Law Judge

Dated:

STATEMENT OF PARTIES REGARDING MEET AND CONFER

On Tuesday, April 19, 2011, Respondents' Counsel regarding this motion. Complaint Counsel indicated that they would not consent to the motion.

Respectfully submitted,

/s

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CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of Respondents' **MOTION *IN LIMINE***, and that on this 20th day of April, 2011, I caused the foregoing to be served by hand delivery and e-mail on the following:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
H-135
Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondents' **MOTION *IN LIMINE***, and that on this 20th day of April, 2011, I caused the foregoing to be served by e-mail on the following:

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Dated: April 20, 2011