

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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.)

Docket No. 9344
PUBLIC

RESPONDENTS’ OPPOSITION TO COMPLAINT COUNSEL’S MOTION TO AMEND SCHEDULING ORDER

Although Complaint Counsel styles its motion as a “Motion to Amend Scheduling Order,” the motion actually seeks completely unprecedented and startling relief: Complaint Counsel seeks an order from this Court compelling Respondents to participate in an unsanctioned deposition of a third party in a foreign country. In doing so, Complaint Counsel asks this Court to set aside the requirements for seeking a foreign deposition set forth in Rule of Practice 3.36(b). Complaint Counsel offers no excuse whatsoever for its total failure to comply with Rule 3.36(b), except to suggest that it only recently realized that it had not left sufficient time for that procedure. Yet, Dr. Aviram, the witness that Complainant now seeks to depose, appeared on Complainant’s own Initial Disclosures List and on its Preliminary Witness List and the Complaint itself also references advertisements that mention Dr. Aviram. Compl. at Exs. I-L. [REDACTED]

[REDACTED]

Even more troubling, however, is Complaint Counsel’s request that this Court set aside the elements of showing required under Rule 3.36(b), which was specifically

amended to require that this Court (as opposed to the parties themselves) approve, subject to the requirements of Rule 3.36, depositions or discovery taken in a foreign country.

Throughout this case, Respondents have repeatedly reminded Complainant of the availability and requirements of Rule 3.36 in the event that they sought to depose Dr. Aviram. *See, e.g.*, E-mail from J. Graubert to H. Hipsley, dated Jan 14, 2011, attached hereto as Exhibit A. Yet, Complainant has insisted on proceeding with this deposition unilaterally.

As discussed below, the requirements of Rule 3.36 are important, address serious issues with regard to the Commission's jurisdiction, and protect all parties. Respondents cannot acquiesce to such a cavalier and unexplained disregard of Commission procedure by Complaint Counsel. Accordingly, the Complainant's motion should be denied.

ARGUMENT

To deflect attention from its startling request that this Court set aside the requirements of Rule 3.36, Complainant Counsel goes to lengths to discuss why proceeding with a deposition after the discovery cut-off is appropriate here. But, the fact that the requested deposition would take place beyond the discovery cut-off is actually the least of the problem -- as the correspondence with counsel indicates, Respondents were willing to work with Complaint Counsel up to a point, although Complainant now insists on unilateral scheduling that would conflict with expert preparation and discovery (to which Respondents do not agree). The most important issue, however, is that Complainant has failed to take the appropriate steps to conduct a deposition in a foreign country. Complainant cannot now --- after the discovery cut-off, during the expert discovery phase of this case, and [REDACTED]

██████████ -- force Respondents to participate in an unsanctioned foreign deposition.

A. Complaint Counsel Has Failed to Comply with Rule 3.36 to Obtain Court Approval Before Seeking to Conduct Dr. Aviram’s Deposition in a Foreign Country and Requesting to Amend the Scheduling Order.

Commission Rule of Practice 3.33(a), which governs the procedures for depositions in adjudicative proceedings, provides that “[a]ny party may take a deposition of any named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under §3.31(c)(1) **and subject to the requirements in §3.36.**” Rule 3.33(a) (emphasis added).¹

In 2001, the Commission, after a period of notice and comment, made a number of amendments to its Rules of Practice for Adjudicative Proceedings, including to Rule 3.36. Prior to its amendment, Rule 3.36 permitted the parties to self-prepare blank subpoenas obtained from the Secretary’s office and serve them upon domestic and foreign witnesses alike. 66 Fed.Reg. 17622-23. The Commission, however, recognized that party-driven foreign discovery raised serious jurisdictional issues² and decided to return foreign discovery requests back into the category of ALJ-supervised discovery.

In particular and in the interest of avoiding conflicts with the law of other jurisdictions, Rule 3.36(b) now requires that a party seeking to conduct a deposition in a foreign country must file a motion showing, *inter alia*, that it “has a good faith belief that

¹ Similarly, Rule 3.34, which addresses the subject of subpoenas, states that “[n]othing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas except in accordance with §§3.31(c)(2) **and 3.36.** (emphasis added).

² In its interim rules with request for comments published in the Federal Register, the Commission cites to two cases acknowledging jurisdictional limitations of foreign discovery: CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984) (district court lacks jurisdiction to enforce a CFTC investigative subpoena served on a foreign citizen in a foreign nation) and FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) (FTC Act does not authorize service of subpoenas abroad by registered mail).

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...” Rule 3.36(b)(4). Complainant has made no such showing.

Here, in planning the extrajudicial deposition of Mr. Aviram in Haifa, Israel, Complaint Counsel has failed to comply with the necessary procedures outlined in Rule 3.36 before a deposition in a foreign country may proceed. Indeed, Complaint Counsel does not have a subpoena issued by this Court (nor has it sought one) permitting Dr. Aviram’s deposition to be conducted on March 7 nor has it even made a showing that, among other things, his deposition “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.” See Rule 3.36(b)(4). Complainant Counsel’s only attempt to meet the requirement of Rule 3.36(b)(4) is its general, unsubstantiated description of their conversations with the Commission’s Office of International Affairs. Such a vague description does not come close to demonstrating that Complainant’s request complies with Rule 3.36(b). Moreover, any demonstration by Complainant Counsel on this point should have been made to the Court well in advance of the discovery cut off so that the deposition could occur in a timely fashion. Because Complainant failed to comply with the proper procedure for seeking foreign discovery, this motion should be denied.

B. The FTC Cannot Demonstrate Any Good Cause to Warrant Modification of the Scheduling Order.

Complaint Counsel also has not demonstrated “good cause” for amendment of the scheduling order, which provides a separate, and independent basis to reject its motion.

The Scheduling Order requires the parties to conduct all discovery on or before February 18, 2011, other than discovery permitted by Rule 3.24(a)(4), expert depositions

and discovery for authenticity and admissibility of exhibits. No good cause exists to amend the Scheduling Order to permit Complaint Counsel to depose Dr. Aviram well after the February 18, 2011 discovery cut-off date for the following reasons:

- Dr. Aviram, who currently heads the Lipid Research Laboratory, Rambam Medical Center and serves on the Technion Faculty of Medicine Bat-Galim, has conducted and published numerous research studies on the health benefits of pomegranates, including their polyphenol and antioxidant properties, on behalf of Respondent POM Wonderful. Complaint Counsel has known of Dr. Aviram's research regarding pomegranates and POM Wonderful products throughout the investigation of this case, as he is prominently identified in many of POM's advertisements. [REDACTED]

- Since the filing of this action on September 27, 2010, Complaint Counsel recognized Dr. Aviram would be an important witness at trial and had every opportunity to seek this Court's approval (subject to the requirements of Rule 3.36(b)) to conduct his deposition prior to the February 18, 2011 discovery cut-off date. Indeed, Complaint Counsel listed Dr. Aviram in their October 25, 2010 Initial Disclosures as an individual likely to have discoverable information.
- Both Complaint Counsel and Respondents listed Dr. Aviram on their respective Preliminary Witness Lists and describe his anticipated testimony to include, among other things, "his research on the antioxidant properties of POM Juice or POMx, his research exploring use of POM Juice or POMx for cardiovascular disease or conditions, and his communications with the Respondents" (Dec. 1, 2010 Complaint Counsel's Preliminary Witness List, ¶ 3) and "Respondents' defenses, his research regarding pomegranates and POM products, and his interactions with Respondents." (Dec. 15, 2010 Respondents Preliminary Witness List, ¶ 11.)

Complaint Counsel, therefore, cannot claim they suddenly learned of their need to take Dr. Aviram's deposition when they have known all along of his importance to this case. To date, Complaint Counsel has taken the depositions of 23 scientists and former and current employees of Respondents and conducted informal interviews of numerous third party witnesses. Complainant did not at any point over the last four months take the appropriate steps to seek approval from this Court for and arrange a deposition for Dr.

Aviram. Instead, Complaint Counsel waited until February 8, 2011, just ten days before the discovery cut-off to informally arrange for Dr. Aviram's deposition in Israel after the discovery cut-off. Complaint Counsel thus cannot demonstrate good cause for failing to depose Dr. Aviram prior to the close of discovery, especially in light of the fact that throughout the discovery period Respondents repeatedly reminded Complaint Counsel of the availability of the Commission's procedure for seeking a deposition of Dr. Aviram. *See, e.g.*, Ex. A.

C. Respondents Would Experience Considerable Prejudice Should the Court Amend the Scheduling Order.

Finally, Respondents would experience considerable prejudice should Dr. Aviram's deposition be allowed to proceed on March 7 in Haifa, Israel. Instead of preparing for the depositions of Complaint Counsel's experts and focusing on the completion of Respondents' expert witness reports which are due on March 18, 2011, counsel for Respondents would need to expend valuable resources to prepare for and attend the deposition of Dr. Aviram in Israel. It would be unfair to reward Complaint Counsel's laxity and failure to conduct Dr. Aviram's deposition during the discovery period and then punish Respondents by imposing an undue hardship upon them during an already compressed schedule after the fact discovery period has ended.

CONCLUSION

For the foregoing reasons, Complaint Counsel's Motion should be denied in its entirety.

Respectfully Submitted,

/Kristina M. Diaz

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*Counsel for Respondents Stewart
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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: Jon Leibowitz, Chairman
 William E. Kovacic
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

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as officers of the companies.)	

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO AMEND SCHEDULING ORDER**, and that on this 24th day of February, 2011, I caused the foregoing to be served by FTC E-File and hand delivery on the following:

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

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO AMEND SCHEDULING ORDER**, and that on this 24th day of February, 2011, I caused the foregoing to be served by e-mail on the following:

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

*Counsel for Respondents Stewart Resnick
and Lynda Rae Resnick*

Dated: February 24, 2011

EXHIBIT A

From: Graubert, John [mailto:jgraubert@cov.com]
Sent: Friday, January 14, 2011 5:18 PM
To: Johnson, Mary
Cc: Hipsley, Heather; Perryman, Skye; 'kdiaz@roll.com'
Subject: witnesses

My apologies for taking a while to respond on a few points, but we have been trying to chase various things down and I have had some other issues arise that complicated the schedule.

With respect to Professor Aviram, we do not control his availability and we are not aware of any planned visits by Professor Aviram to the US in the next month or so, so we suggest you pursue the avenues available to you under the Commission's rules should you want to depose him.

On the NIH witnesses, I have been unable to get a specific name for you but will pursue this and if we can get it clarified in the next week or so I will talk with you and see what can be worked out, given the parameters of the scheduling order.

thanks.

John

This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.

EXHIBIT B

REDACTED