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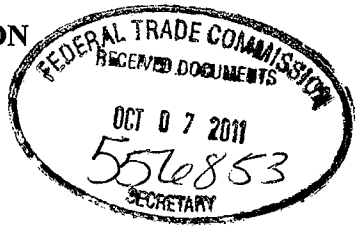
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL REBUTTAL FACT WITNESS AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Commission Rule 3.22(a), Complaint Counsel respectfully submits this motion for leave to call Dr. Philip W. Kantoff as a rebuttal fact witness. Since 2010, Dr. Kantoff has served as an outside advisor to Respondents regarding POM Wonderful's prostate cancer research program. Dr. Kantoff is a professor of medicine at Harvard Medical School and chief of the division of solid tumor oncology at Dana-Farber Cancer Institute. Dr. Kantoff also is a practicing physician at Brigham and Women's Hospital.

Complaint Counsel wishes to call Dr. Kantoff to rebut the unexpected factual testimony of Dr. David Heber during Respondents' case suggesting that there was scientific agreement on the significance of POM's prostate cancer research among experts at meetings convened by Respondents. Dr. Kantoff's rebuttal factual testimony would be limited to the statements he made and the tenor of the agreement or not among researchers that he observed during these meetings.

I. Factual and Procedural Background

Complaint Counsel provided Respondents with its initial disclosures on October 25, 2010. (PX0279). The initial disclosures identified Dr. Philip Kantoff as an individual likely to have discoverable information relevant to the allegations asserted in the Complaint, the proposed relief, or Respondents' defense. (PX0279_0012). Complaint Counsel began deposing fact witnesses in November 2010 including several scientists and researchers who had conducted research on POM products and participated in various scientific meetings hosted by Respondents.

On January 28, 2011, during Complaint Counsel deposition of Dr. David Heber as a fact witness, Complaint Counsel questioned Dr. Heber about conversations at POM scientific advisory board meetings in which he had participated. (CX1352). Dr. Heber testified as follows:

> Q. Okay. Now, have you ever heard anybody else tell Stewart Resnick or the folks at -- at POM that there was a substantial body of scientific agreement that pomegranate juice or -- or pomegranate extract could prevent prostate cancer?
>
> A. No. I -- I think what happened is we had these meetings. You've kind of seen the agenda here.
>
> Q. Mm-hmm.
>
> A. And Allan Pantuck presents all of the current state of knowledge. Other clinicians commented on it, like Phil Kantoff or others, like Michael Carducci, who had experience with patients –
>
> Q. Mm-hmm.
>
> A. -- and how they feel about it. And then –

> and that was all just thrown out there. No one made any comment to Mr. Resnick, of the type that you've indicated.

(CX1352_0329-0330).

Based upon Dr. Heber's deposition testimony and other information obtained during fact discovery, Complaint Counsel concluded that there was no consensus among the scientific advisors on POM's prostate cancer research. With this understanding, Complaint Counsel submitted its final proposed witness list on March 29, 2011 without identifying each and every scientist and/or researcher who attended scientific advisory meetings or research summits hosted by Respondents,[1] and in May 2011, made representations in its pre-trial brief that Respondents were aware of the inadequacies of their scientific research in part through Respondents' communications with leaders in the medical community. Complaint Counsel's Pretrial Brief at 27-28.

Complaint Counsel presented its direct case over several days in May and June 2011. Respondents commenced their case in August 2011. When Dr. Heber testified at the hearing on August 31st during Respondent's case, he recanted his prior deposition testimony relating to the thrust of the scientific advisory board meetings where Dr. Kantoff was present. To Complaint Counsel's surprise, Dr. Heber affirmatively stated that POM's scientific advisors agreed that the body of scientific evidence shows that POM products can help to prevent, reduce the risk of, or treat prostate cancer. The following is an excerpt from Dr. Heber's hearing testimony:

> Q. Okay. Was there a consensus about what the evidence showed about the prostate cancer research at that meeting or any of those meetings?

[1] Complaint Counsel, however, did reserve the right to supplement the list to identify witnesses to rebut unanticipated testimony offered during Respondents' case. Complaint Counsel's Final Proposed Witness List at 1.

> A. Oh, I think that there was a consensus that there's a significant body of scientific evidence to indicate that both pomegranate fruit juice and pomegranate extract can help to prevent or reduce the risk or help to treat prostate cancer by the various observations made in these studies.

(Tr. 2155-56).

Complaint Counsel recently interviewed Dr. Kantoff about discussions at the meetings Dr. Heber described in his testimony. Based upon that interview, Complaint Counsel believes Dr. Kantoff's testimony will demonstrate that there was a lack of consensus among the scientific advisors on the significance of Respondents' prostate cancer research.

II. Argument

A. Excluding Complaint Counsel's Proposed Rebuttal Testimony Would Be An Abuse of Discretion

Courts have found that excluding witnesses on the ground that they were not previously disclosed to the non-offering party constitutes an abuse of discretion by the trial court in certain instances. See, e.g., Quinn v. Consol. Freightways Corp., 283 F.3d 572 (3d Cir. 2002) (holding that district court abused its discretion by excluding testimony of witness as a sanction for failing to disclose testimony in discovery process); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3rd Cir. 1977) (reversing district court for excluding testimony of witnesses not listed in pretrial memorandum), overruled on other grounds, Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656, 96 L.Ed.2d 572, 107 S.Ct. 2617 (1987); Cf. Fed. Aviation Admin. v. Landy, 705 F.2d 624 (2d Cir. 1983) (affirming district court decision permitting the rebuttal testimony of a witness not previously listed on the government's

witness list); Washington Hosp. Ctr. v. Cheeks, 394 F.2d 964 (D.C. Cir. 1968) (affirming district court decision modifying pre-trial order to permit expert testimony after surprise testimony by plaintiff's witness). In the Quinn case, the appellate court set forth the following standard for determining whether a district court abused its discretion in excluding testimony. "Along with the importance of the excluded testimony, the Meyers factors include (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or wilfulness in failing to comply with the district court's order." Quinn, 283.F.3d at 577. When these factors are applied to the facts of this case, it is clear that the exclusion of rebuttal testimony is unwarranted.

B. Proposed Rebuttal Testimony Strikes at the Heart of Complaint Counsel's Case And Must be Allowed

The Court must consider the importance of the proposed testimony when determining whether to exclude such testimony. Several courts have found that trial courts abused their discretion by prohibiting highly relevant and probative testimony. See e.g., Quinn, 283 F.3d 572 (district court abused discretion in prohibiting rebuttal testimony that had potential to provide strong support for plaintiff's case); Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232 (5th Cir. 1981) (reversible error to refuse to allow rebuttal witness testimony in light of the essential nature of the evidence).

To prevail in this case, Complaint Counsel must prove that Respondents made the claims alleged in the Complaint and that Respondents did not possess or rely upon competent and reliable scientific evidence to support their claims. See In re Daniel

Chapter One, No. 9329, Initial Decision (F.T.C. Aug. 5, 2009), pet. review denied, 2010 U.S. App. LEXIS 25496 (D.C. Cir. Dec. 10, 2010); F.T.C. v. Direct Mktg. Concepts, Inc., 569 F. Supp.2d 285 (D. Mass. 2008), aff'd, 624 F.3d 1 (1st Cir. 2010). In determining whether Complaint Counsel has met its burden of proof, the Court is likely to consider Dr. Heber's hearing testimony suggesting that Respondents' scientific advisors agreed that Respondents possessed adequate substantiation for their prostate cancer claims. Therefore, Dr. Kantoff's proposed testimony on the narrow issue of whether there was scientific agreement on conclusions that can be drawn from Respondents' prostate cancer research is extremely relevant and probative. Complaint Counsel must be permitted to rebut Dr. Heber's factual testimony to demonstrate that Respondents' scientific advisors were not in agreement about the significance of Respondents' prostate cancer research and Respondents were aware of this lack of scientific consensus.

C. Respondents Will Not Be Prejudiced if Rebuttal Witness is Allowed to Testify

Respondents will not be prejudiced if Dr. Kantoff is allowed to testify because they have been aware of his existence from the very beginning of the case. Courts have found that there is no prejudice when the opposing party knew of the existence of a witness. See, e.g., U.S. v. Quesada-Bonilla, 952 F.2d 597 (1st Cir. 1991) (defendant knew about existence of witness from the very beginning of the case); Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232 (5th Cir. 1981) (defendant aware of the identity of rebuttal witness from parallel litigation). Neither Dr. Kantoff's identity nor the nature of his testimony should come as a surprise to Respondents. Although Complaint Counsel did not list Dr. Kantoff as a witness on its final witness list,

Complaint Counsel identified Dr. Kantoff in its October 2010 initial disclosures as a person who was likely to have information about the matters alleged in the Complaint. (PX0279_0012). Therefore, Respondents have been aware of the fact that Dr. Kantoff may have discoverable information for almost a year.

In addition, Dr. Kantoff is well known to the Respondents. According to hearing testimony presented in this matter, Respondents invited Dr. Kantoff to attend scientific advisory board meetings to assist Respondents in understanding the significance of POM's prostate cancer research. See Tr. 1892-93. Dr. Kantoff attended these meetings, listened to presentations made by the principal investigators on POM prostate cancer research studies, and provided feedback to Respondents. Therefore, Dr. Kantoff's testimony as to the comments he made at these meetings will not be a surprise.

D. Any Prejudice to Respondents Can be Cured With Little Disruption To the Hearing Schedule

Even if the Court were to find that Respondents are somehow prejudiced by the "surprise" of calling Dr. Kantoff as a witness, that prejudice can be cured. Complaint Counsel has consulted with Dr. Kantoff's attorney and Dr. Kantoff is available to present live testimony in Washington, D.C. on November 4, 2011. Respondents would then have several weeks to prepare for any cross-examination they intend to conduct. Complaint Counsel has tried in earnest to obtain alternate dates of availability in October; however, Dr. Kantoff's travel schedule, institutional leadership commitments, and patient schedule, have him fully committed starting from 7:00 a.m. into the evening throughout the month. If the Court so orders, we are willing to try to schedule an evening trial deposition in Boston, Massachusetts on Dr. Kantoff's personal time.

Finally, allowing Dr. Kantoff to testify either in person or by trial deposition will not significantly disrupt the hearing schedule. Courts have indicated that any disruption to the trial schedule caused by allowing a previously undisclosed witness to testify is far less significant in a bench trial. See, e.g., Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3d Cir. 1977) (orderly and efficient trial of case in bench trial not impeded by relaxation of the trial order).

E. There Is No Evidence that Complaint Counsel Has Acted In Bad Faith

There is no evidence that Complaint counsel acted in bad faith or intentionally violated the Court's Scheduling Order. Complaint Counsel's decision to call Dr. Kantoff as rebuttal witness is prompted solely by the fact that Dr. Heber unexpectedly recanted his deposition testimony at the hearing. Cf. In the Matter of Schering-Plough, No. 9297, 2001 FTC LEXIS 175 (October 26, 2001) (granting motion for protective order where witnesses were not proper rebuttal witnesses and complaint counsel could have anticipated the need for testimony to support its case prior to filing witness list). Courts generally allow rebuttal testimony where the offering party was surprised by unexpected testimony or arguments. See e.g., Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) (affirming district court decision to allow previously undisclosed prosecution rebuttal witness after defendant presented surprise alibi testimony); McClatchey v. Associated Press, No. 3:05-cv-145, 2007 U.S. Dist. LEXIS 40416 (W.D. Pa. June 4, 2007) (court allows rebuttal witness testimony in response to unexpected arguments in pretrial statement and where opposing party was aware of identity of witness and chose not to depose him).

III. Conclusion and Request For Relief

Based on the reasons set forth above, Complaint Counsel respectfully requests that the Court issue the attached proposed order granting Complaint Counsel leave to call Dr. Philip W. Kantoff as a factual rebuttal witness.

Dated: October 7, 2011

Respectfully Submitted,

s/Tawana E. Davis
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STATEMENT REGARDING MEET AND CONFER

After conducting a telephone interview with proposed rebuttal fact witness Philip Kantoff on Sept. 26, 2011, Complaint Counsel Tawana Davis and Mary Johnson contacted Respondents' Counsel John Graubert by telephone on Sept. 30, 2011 at approx. 5:30 pm Eastern to notify Respondents of Complaint Counsel's intention to call Dr. Kantoff as a rebuttal witness. At that time, Complaint Counsel sought, but did not obtain, Respondents' consent to bring Dr. Kantoff as a rebuttal witness.

During the week of Oct. 3, 2011, Complaint Counsel Mary Johnson, Tawana Davis, and Heather Hippsley corresponded with Respondents' counsel (primarily Skye Perryman, Johnny Traboulsi, Brooke Hammond, and John Graubert) by telephone and email regarding various witness and evidentiary issues. On October 5, 2011, at approx. 2:45 pm Eastern, Mary Johnson emailed Skye Perryman to reiterate Complaint Counsel's intent to file a motion for leave to call Dr. Kantoff as a rebuttal fact witness. Copied on the email were John Graubert, Kris Diaz, Johnny Traboulsi, and Brooke Hammond for Respondents, and Heather Hippsley and Tawana Davis for Complaint Counsel.

Respectfully submitted,

Date: October 7, 2011

/s/ Tawana E. Davis
Tawana E. Davis
Complaint Counsel

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STEWART A. RESNICK,	)	**PUBLIC DOCUMENT**
LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually and	)	
as officers of the companies.	)	

[Proposed] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL REBUTTAL FACT WITNESS

On October 7, 2011, Complaint Counsel filed a *Motion and Memorandum in Support for Leave to Call Rebuttal Fact Witness*. Finding good cause for the motion, Complaint Counsel's Motion is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I certify that on October 7, 2011, I filed and served *Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witness and Memorandum in Support Thereof* 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 Avenue, 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
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Attorneys for Respondents

Date: October 7, 2011

/s/ Tawana E. Davis
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Complaint Counsel