



UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION

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

**COMPLAINT COUNSEL’S MOTION FOR, AND MEMORANDUM IN SUPPORT OF,
LEAVE TO EXTEND THE DEPOSITION TIME FOR
RESPONDENT MATTHEW TUPPER AND WITNESS HARLEY LIKER**

In accordance with Paragraph 9 of the Court’s October 26, 2010 Scheduling Order and Commission Rules of Practice 3.22 and 3.38, Complaint Counsel respectfully moves to extend the deposition time for Respondent Matthew Tupper and fact witness Dr. Harley Liker to no more than two, seven-hour days for each witness. Complaint Counsel anticipates needing in excess of seven hours to depose Respondent Tupper and Dr. Liker, given Mr. Tupper’s extensive involvement in the operations of POM Wonderful LLC (“POM”) and Roll International Corporation (the “Corporate Respondents”) and the marketing of POM Juice and POMx (collectively, the “Challenged Products”), and both individuals’ longstanding, integral business relationships with Respondents and roles in developing and overseeing POM’s scientific research. Their fact testimony is highly relevant to the Complaint’s allegations, in particular the issues of claims made for the Challenged Products and substantiation of those claims. Of the twenty-five fact depositions contemplated in this matter, approximately half of which already

have been completed, Complaint Counsel seeks a limited exception to ensure a full and fair examination of these two important fact witnesses, and will make all efforts to conduct the depositions as expeditiously as possible. As described below, it would be more efficient to conduct two-day depositions of Respondent Tupper and Dr. Liker, rather than depose several additional fact witnesses who may have only piecemeal information about the facts at issue.

I. The Court Has Authority to Extend the Deposition Time

Paragraph 9 of the Scheduling Order states that a deposition “may [not] exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.” This provision mirrors the Federal Rule, which prescribes the same time limit “[u]nless otherwise stipulated or ordered by the court.” Fed. R. Civ. P. 30(d)(1). Federal Rule 30(d)(1) further states that a “court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent” *Id.*

Complaint Counsel has tried, but is unable to reach agreement with Respondents on this issue. Respondents suggest that Complaint Counsel use the seven hours allotted for each of Respondent Tupper’s and Dr. Liker’s depositions before seeking consent from Respondents for additional deposition time. Given the close of discovery on February 18, 2011, and the compressed litigation schedule, Complaint Counsel prefers to seek early resolution of this issue via a Court order, rather than rely on the uncertainty of Respondents’ “wait and see” approach. Recognizing that Respondent Tupper and Dr. Liker have demanding work schedules, it also is more efficient to seek an extension now rather than risk learning near the end of discovery that the witnesses are unavailable for further examination.

Both the Scheduling Order and Federal Rule 30(d)(1) contemplate circumstances under which the Court may grant an extension. In addition, the Federal Rule annotations indicate

justification for additional deposition time when “the examination will cover events occurring over a long period of time.” Fed. R. Civ. P. 30(d) (quoting the Advisory Committee notes on the 2000 Amendment to the Rule). Respondent Tupper and Dr. Liker have had lengthy tenures with the Corporate Respondents and Respondents Lynda and Stewart Resnick. Indeed, both have performed critical duties on behalf of the Corporate Respondents since soon after the incorporation of POM in 2000.

II. The Facts Warrant Extending the Deposition Time for Respondent Tupper and Dr. Liker

A. Respondent Tupper, President of POM

From approximately 2001 to 2003, prior to becoming President of POM, Respondent Tupper was Vice President of Strategy at Respondent Roll International Corporation, where he provided business consulting services for the newly-incorporated POM. Since joining POM, Respondent Tupper has managed the company’s daily operations. Among other duties, he has directly participated in formulating the scientific research and marketing strategies for POM Juice and POMx, as evidenced by his substantial and frequent communications with Respondents Lynda and Stewart Resnick.

Regarding marketing in particular, Respondent Tupper possesses the unique perspective of having been directly involved in these activities over at least the past seven years and can provide the breadth and continuity of testimony that cannot be achieved with other witnesses who have worked for the Corporate Respondents for much shorter periods of time. For example, although Complaint Counsel has tentatively scheduled a half dozen depositions of employees involved in marketing of the Challenged Products, Respondents have identified approximately twice as many past and present marketing employees with potentially relevant information. *See,*

e.g., Respondents' December 15, 2010 Preliminary Witness List; Respondents' October 25, 2010 Initial Disclosures (and supplements thereto). Rather than spend several additional days deposing individuals (a number of whom are no longer with the Corporate Respondents) in order to gather key information about Respondents' marketing of the Challenged Products, it is more efficient to depose Respondent Tupper for two days given his intimate knowledge of the issues.

Respondent Tupper's enduring business relationship with Respondents Lynda and Stewart Resnick over the last decade, coupled with his continuous participation in the marketing and research strategies of Respondents, make his testimony extremely relevant and material to the Section 5 violations set forth in the Complaint and the issues of corporate and individual liability. A substantial portion of the documents produced to date indicate that Respondent Tupper is involved in every key facet of the operating decisions at POM regarding marketing and research.

B. Dr. Liker, Outside Medical Director for POM

Dr. Liker was hired as POM's Associate Medical Director in June 2001. Shortly thereafter, he became POM's full-time Outside Medical Director. In this capacity, Dr. Liker has supervised much of the research and development for the Challenged Products for over nine years and worked closely with Respondents Stewart Resnick and Matthew Tupper. Indeed, Dr. Liker is even listed as a co-author on certain published studies Respondents rely on for their advertising claims. A substantial number of documents illustrates Dr. Liker's deep involvement in the development of POM's research strategies. Complaint Counsel has deposed ten key researchers affiliated with the Corporate Respondents; however, Respondents have identified over twenty-five researcher scientists and hundreds of studies they deem relevant to the issues in this case. *See, e.g.*, Respondents' December 15, 2010 Preliminary Witness List; Respondents'

October 25, 2010 Initial Disclosures (and supplements thereto). The documents indicate that Dr. Liker has been a central point of contact between Respondents and their researchers and has intimate knowledge of the science purportedly used to support Respondents' claims. As with Respondent Tupper, it would be far more efficient to depose Dr. Liker for two days than spend, for example, eight days deposing additional outside researchers in an attempt to ascertain the significance of the voluminous studies purportedly relied upon by Respondents.

As described above, both Respondent Tupper and Dr. Liker are critical witnesses with extensive, substantive knowledge dating back to POM's formation, about a broad range of issues relevant to the Complaint's allegations. Rather than deposing dozens of other individuals who may have only piecemeal knowledge of relevant facts at issue in this case, two-day depositions for Respondent Tupper and Dr. Liker will reduce the burden on both sides.

III. Request for Relief

Accordingly, Complaint Counsel respectfully requests that the Court issue the attached proposed order extending the time allotted for the depositions of Respondent Matthew Tupper and Dr. Harley Liker.

Dated: December 27, 2010

Respectfully Submitted,

/s/ Mary L. Johnson
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STATEMENT OF COMPLAINT COUNSEL
REGARDING MEET AND CONFER

In accordance with Paragraph 4 and of the Court's Scheduling Order, the undersigned counsel certifies that Complaint Counsel conferred with Respondents in an effort in good faith to resolve by agreement the issue raised by *Complaint Counsel's Motion for, and Memorandum in Support of, Leave to Extend the Deposition Time for Respondent Matthew Tupper and Witness Harley Liker*, dated December 27, 2010. The parties' discussions occurred as follows:

- Complaint Counsel Mary Johnson first emailed Respondents counsel John Graubert, Skye Perryman, Kristina Diaz, and Bertram Fields, on December 10, 2010, at 1:26pm (Eastern), proposing deposition time extensions for Respondent Tupper and Dr. Liker. Heather Hipsley and Elizabeth Nach, Complaint Counsel, were copied on this email. Subsequent emails were exchanged between the same individuals on December 15, 2010, at 6:05pm (Eastern), December 15, 2010, at 7:39pm (Eastern), December 17, 2010, at 8:17pm (Eastern), and December 21, 2010, at 4:41pm (Eastern).
- The parties held a conference call on December 21, 2010, at 4:00 pm (Eastern) to discuss the proposed deposition time extension and other discovery matters. Mary Johnson, Heather Hipsley, Elizabeth Nach, and Serena Viswanathan, for Complaint Counsel, and John Graubert and Kristina Diaz, for Respondents, participated.

The parties have been unable to reach an agreement on the issue raised in the attached motion.

Respectfully Submitted,

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

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**[Proposed] ORDER GRANTING COMPLAINT COUNSEL’S MOTION
FOR LEAVE TO EXTEND THE DEPOSITION TIME FOR
RESPONDENT MATTHEW TUPPER AND WITNESS HARLEY LIKER**

On December 27, 2010, Complaint Counsel filed a motion for a Court Order to extend the deposition time for Respondent Matthew Tupper and fact witness Dr. Harley Liker to no more than two, seven-hour days for each witness.

IT IS HEREBY ORDERED that the motion to extend the time limit for deposing Respondent Tupper and Dr. Liker to two, seven-hour days is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I certify that on December 27, 2010, I filed and served *Complaint Counsel's Motion for Leave to Extend the Deposition Time for Respondent Matthew Tupper and Witness Harley Liker* 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-528
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy via email to:

John D. Graubert, Esq.
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Attorney for Respondents

Date: December 27, 2010

/s/ Andrew D. Wone
Andrew D. Wone
Complaint Counsel