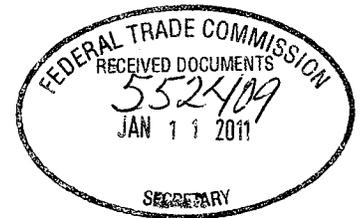


ORIGINAL



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

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,)
Respondents.)

DOCKET NO. 9344

**ORDER DENYING COMPLAINT COUNSEL'S MOTION
FOR LEAVE TO EXTEND THE DEPOSITION TIME FOR
RESPONDENT MATTHEW TUPPER AND WITNESS HARLEY LIKER**

I. Introduction

On December 27, 2010, Complaint Counsel submitted a Motion for Leave to Extend the Deposition Time for Respondent Matthew Tupper and Witness Harley Liker, and Memorandum in Support Thereof ("Motion"). Specifically, Complaint Counsel requests that it be permitted up to two, seven-hour days to depose each witness, rather than one, seven-hour day per deposition as required by the Scheduling Order in this case. Respondents submitted an Opposition to the Motion on January 6, 2011 ("Opposition").

Upon full consideration of the Motion and Opposition, and for the reasons set forth below, the Motion is DENIED.

II. Overview of Applicable Law

Paragraph 9 of the additional provisions of Scheduling Order states: "No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge." The parties are unable to agree and, therefore, any extension of time may be obtained only by order of the Administrative Law Judge.

Similar to Paragraph 9 of the additional provisions of Scheduling Order, Federal

Rule of Civil Procedure 30(d)(1) limits depositions to one day of seven hours, “[u]nless otherwise stipulated or ordered by the court.”¹ Rule 30(d)(1) imposes a presumptive durational limitation on depositions. *Roberson v. Bair*, 242 F.R.D. 130, 138 (D.D.C. 2007) (holding that extensions of the seven-hour limit under Rule 30(d)(1) should be the exception, not the rule, and that “[a]utomatic extensions eviscerate the rule.”); *Osborne v. Columbia Helicopters, Inc.*, 2009 U.S. Dist. LEXIS 62422, at *12 (S.D. W. Va. July 20, 2009) (holding that Rule 30(d)(1) establishes the presumptive length of a deposition, which may be exceeded only under certain circumstances”). See Notes of Advisory Committee on 2000 Amendments (Rule 30(d) “imposes a presumptive durational limitation of one day of seven hours for any deposition.”).

Federal Rule 30(d)(1) requires a showing of “good cause” to extend the time limitation on depositions. *Carmody v. Village of Rockville Ctr.*, 2007 U.S. Dist. LEXIS 54736, at *7 (E.D.N.Y. July 27, 2007); *Nicholas v. Wyndham Int’l, Inc.*, 2002 U.S. Dist. LEXIS 27111, at *3 (D.V.I. Nov. 18, 2002). See Notes of Advisory Committee on 2000 Amendments (“The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.”); 7 James Wm. Moore, et al, *Moore’s Federal Practice*, § 30.45 (3d. ed. 2006) (“A party seeking a court order to extend the time for examination or otherwise alter the limitations is expected to show good cause to justify such an order.”). For example, the court must grant additional time “if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.” Fed. R. Civ. P. 30(d)(1). Good cause to extend the seven-hour limit may also exist where the examination will cover events occurring over a long period of time or where the witness will be questioned about numerous or lengthy documents. Advisory Committee Notes to 2000 Amendments. In addition, an extension of the time limitation may be justified where a deponent has failed to familiarize himself with documents provided in advance or has failed to produce documents; in multi-party cases; and where the lawyer for a deponent wishes to question the witness. *Id.*

Permitting an extension of time pursuant to Federal Rule 30(d)(1) must be “consistent with [Federal Rule] 26(b)(2),” which limits discovery where “(1) the discovery is unreasonably cumulative or duplicative; (2) obtainable from another source that is more convenient, or less burdensome or less expensive; (3) the party has had ample opportunity to obtain the information sought; or (4) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” *Roberson*, 242 F.R.D. at 138; Fed. R. Civ. P. 30(d)(1). These limitations mirror those in Commission Rule 3.31(c)(2). 16 C.F.R. § 3.31(c)(2) (providing that discovery otherwise permitted under the rules may be limited where “(i) The discovery sought is unreasonably

¹ Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings. *L.G. Balfour Co., et al.*, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *4 (Oct. 17, 2000).

cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) The burden and expense of the proposed discovery outweigh its likely benefit”).

III. Contentions of the Parties

Complaint Counsel argues that extending the deposition time to two, seven-hour days for each witness should be allowed because each witness has extensive knowledge of the facts in dispute. According to Complaint Counsel, it is more efficient to glean information in an extended deposition from one or two witnesses with far-reaching knowledge, than to gather information “piecemeal” by deposing numerous individuals who may have some knowledge, thereby lessening the overall discovery burden for both sides. Specifically, Complaint Counsel contends that Respondent Tupper (“Tupper”) has been president of Respondent POM for seven years, since 2003, and for the two preceding years provided consulting services to Respondent Roll International with regard to the creation of Respondent POM. According to Complaint Counsel, Tupper has managed POM’s daily operations, participated in formulating POM’s scientific research and marketing strategies, and communicated frequently with the individual Respondents, Lynda and Stewart Resnick. In addition, Complaint Counsel notes that a substantial number of documents produced to date show Tupper was involved in “every key facet” of marketing and research decisions.

As to fact witness Dr. Harley Liker (“Liker”), Complaint Counsel asserts that Liker was hired as associate medical director of POM in June 2001, and shortly thereafter became full-time outside medical director. In these capacities, according to Complaint Counsel, Liker has supervised much of the research and development for the POM products at issue in the case, including being listed as a co-author of a study upon which Respondents rely to substantiate their advertising claims. Furthermore, Complaint Counsel states that documents produced in the case indicate that Liker has been “a central point of contact between Respondents and their researchers and has intimate knowledge of the science” upon which Respondents rely.

Respondents argue that Complaint Counsel has failed to demonstrate that 14 hours of deposition time for each witness is required, and that equitable considerations mandate denying Complaint Counsel’s Motion. Respondents contend that Complaint Counsel’s arguments as to efficiency are not valid bases for exceeding deposition time limits because discovery is, at times, inherently an inefficient process. Moreover, Respondents claim that Complaint Counsel’s generalized assertions that the witnesses have considerable relevant knowledge, while justifying deposing the witnesses, do not justify overriding the presumption that seven hours is a sufficient time to complete the task. Respondents further note that Tupper has been deposed in a number of prior matters regarding POM and that none of these depositions has exceeded a single, seven-hour day.

Respondents also argue that the seven-hour time limit serves the purpose of

keeping lawyers efficient in their questioning, and that if Complaint Counsel uses the time efficiently, seven hours should be sufficient to complete the deposition of each witness. Respondents further state that if, at the conclusion of the seven hours, it appears that more deposition time is necessary, there are numerous possible solutions that Respondents' counsel is willing to discuss with Complaint Counsel including, if necessary, an agreement to seek an extension of the February 18, 2011 discovery deadline to complete the depositions of Liker and Tupper. Complaint Counsel rejects Respondents' "wait and see" approach.

IV. Analysis

Under Federal Rule 30(d)(1) a party generally "should not seek additional time for a deposition before the deposition is taken. Rather, the better practice is for the deposition to go forward to determine how much can be covered in the seven hours. If additional time is needed, counsel then should attempt to stipulate to the extension of time. The parties should seek court intervention for additional time only when such a stipulation cannot be reached." Moore's Federal Practice – Civil, *supra*, at § 30.45; *see Malec v. Trustees of Boston College*, 208 F.R.D. 23, 24 (D. Mass. 2002) (holding that motion to extend time was premature, where the deposition had not yet occurred). As the court noted in *Roberson v. Bair*, above, a "seven-hour limit encourages efficiency; it has been said that a writer's best friends are a deadline and a page limitation. The same may be said of lawyers conducting depositions." 242 F.R.D. at 138.

Exhausting the initial seven-hour period is not a prerequisite to requesting an extension, however. *Schmidt v. Levi Strauss & Co.*, 2006 U.S. Dist. LEXIS 56430, at *7 (N.D. Cal. Aug. 1, 2006) (noting that nothing in the language of Federal Rule 30(d)(1) requires exhaustion of the seven-hour period). Thus, the court in *Schmidt* declined to deny a motion to extend a deposition that had not yet occurred, further reasoning: "[I]t is not clear that requiring plaintiffs to proceed with the depositions first will necessarily obviate the instant motion or lead to a more efficient resolution of the dispute." *Id.*

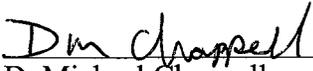
In the instant case, it cannot be concluded, prior to the depositions, that more than seven hours are needed to complete the depositions of either Liker or Tupper. Moreover, based on Respondents' representations in their Opposition, it is anticipated that requiring Complaint Counsel first to exhaust the allotted time, before requesting more, will result in an agreement of the parties and obviate any future motion on the issue.

V. Conclusion

Upon full consideration of the Motion and the Opposition, and for all the foregoing reasons, Complaint Counsel's Motion for Leave to Extend the Deposition Time

for Respondent Matthew Tupper and Witness Harley Liker is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 11, 2011