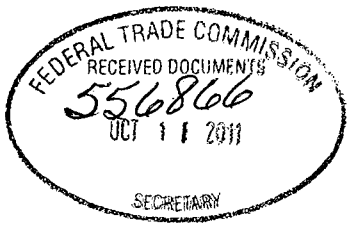
ORIGINAL



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL A REBUTTAL WITNESS

Having failed to provide evidence on what they believe is a central theme of their case Complaint Counsel now seeks the Court's permission to delay the closing of these proceedings for two weeks in order to call an additional rebuttal witness, expert urologist, Dr. Phillip Kantoff. Complaint Counsel, having nearly four years to investigate and build its case, now proposes to call Dr. Kantoff to present evidence regarding the scientific consensus regarding the prostate health benefits of pomegranates, stating that they desire to call Dr. Kantoff for the purpose of rebutting "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." Mot. at 1. Respondents do not believe that Dr. Kantoff's testimony will rebut Dr. Heber's testimony and, in any event, Dr. Heber's testimony was not "unexpected" or in conflict with any other part of the record, as Complaint Counsel claims.

Complaint Counsel's theory about the views of Respondents' scientific advisors could and should have been presented as part of their case in chief. Instead, Complaint Counsel

elicited the testimony For Dr. Heber at issue in their cross examination of Dr. Heber during Respondents' case. Complaint Counsel should not be permitted to cure their utter failure to present evidence with regard to a central theme of their case by manufacturing a conflict between Dr. Heber's deposition testimony and his trial testimony. Accordingly, Complaint Counsel's motion should be denied.

ARGUMENT

Complaint Counsel's motion seeking leave to call Dr. Kantoff is factually and legally flawed. Factually, Complaint Counsel have not shown that Dr. Heber presented any "unexpected" testimony or that Respondents presented any "new" theory in their case warranting rebuttal testimony. Legally, Complaint Counsel has failed to meet its burden of showing Dr. Kantoff's testimony meets the standard for rebuttal testimony and they have also failed to show that Dr. Kantoff, who was not properly disclosed on Complaint Counsel's witness list prior to trial, will testify solely to issues of impeachment. Any one of these deficiencies is sufficient to deny Complaint Counsel's motion, and, taken together, they compel that result.

It is black letter law that rebuttal testimony should be limited to "that which is precisely directed to rebutting new matter or new theories presented by the defendant's case-in-chief." *Bowman v. Gen. Motors Co.*, 427 F. Supp. 234, 240 (E. D. Pa. 1977); *see also Peals v. Terre Hauge Police Dept.* , 535 F.3d 621, 630 (7th Cir. 2008) ("[T]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party.") (internal citations omitted); *In the Matter of Schering-Plough*, No. 9297, 2001 FTC LEXIS 175 (October 26, 2001) (rebuttal witnesses no appropriate when Complaint Counsel could have anticipated the need for testimony to support its case prior to filing witness list). Here, Respondents did not present any "new" theory in their case that Complaint Counsel was

not previously aware. Complaint Counsel has been on notice of Dr. Heber's testimony and opinions for more than six months and had the ability, prior to filing their witness list, to determine the best way to respond.

Moreover, federal courts have denied efforts by parties to present substantive testimony from a witness who has not been named at least 30 days prior to the commencement of the proceedings. Because Dr. Kanotff, a urological expert, will provide substantive testimony, which Complaint Counsel could have presented in their affirmative case had they disclosed him properly, Complaint Counsel's attempt to call Dr. Kantoff should be denied.

I. The Testimony that Complaint Counsel Seeks to Rebut Is Not Within the Scope of Permissible Rebuttal Testimony

As a threshold matter, the evidence that Complaint Counsel seeks to rebut was brought out by Complaint Counsel -- not Respondents -- on cross examination. It was not part of Respondents' case and, accordingly, is not within the scope of rebuttal testimony. *See, e.g., Peals*, 535 F.3d at 630 ("[T]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party.") (emphasis added). Because the testimony provided by Dr. Heber was not offered by Respondents, it is not within the proper scope of rebuttal evidence.

Moreover, the factual basis of Complaint Counsel's motion -- that Dr. Heber presented "surprise" trial testimony -- is flatly contradicted by the record. Complaint Counsel first attempts to show that Dr. Heber's trial testimony regarding the scientific support for prostate health benefits of pomegranate juice was "unexpected" by quoting a partial line of testimony from Dr. Heber's discovery deposition wherein Dr. Heber testified to conversations that he may have had with Respondent Stewart Resnick. Mot. at 2. But, Complaint Counsel omitted the fact that Dr. Heber testified in his deposition, consistent with his testimony at trial, that there is a

"huge body of evidence" supporting the prostate health benefits of pomegranates. *See* Heber Dep. Jan. 2011, 328:1-3. For example, Dr. Heber stated:

> ....And so in my view, there's a huge body of evidence now relative to what we know about other nutritions, like lycopene in tomato juice or green tea. On that scale of comparison we know a lot about pomegranate, we know about targets of action, we know about effects on human prostate tumor growth, we know about angiogenesis and tumor -- and colon -- et cetera. So I would say from the totality of evidence, I can really strongly agree with the statement that it promotes prostate health.

Id. at 328:1 - 11. (emphasis added). Dr. Heber also stated, with regard to PSA doubling time, that there is great enthusiasm in the medical community for PSA doubling time as a clinically significant marker. *Id.* 316:24 - 317:1; 314:4-12. Dr. Heber further testified at his deposition that there was "great enthusiasm in the urological community" for studies of pomegranate's effect on prostate cancer. *Id.* at 327:17 - 18.

Based on Dr. Heber's deposition more than six months ago, Complaint Counsel was clearly on notice about Dr. Heber's views regarding the body of scientific research supporting prostate health claims. Dr. Heber's testimony at trial that there was consensus regarding this evidence was not "unexpected," and Complaint Counsel's attempt to manufacture "surprise" should be rejected.

Even if one assumes that Dr. Heber's testimony at trial was unexpected (and it was not), Complaint Counsel failed to ask Dr. Heber about any purported inconsistency on cross examination. Complaint Counsel cannot now cure their utter failure to present evidence of lack of scientific agreement or their failure to effectively cross Dr. Heber by calling in rebuttal a new expert witness, not disclosed on their witness list. If Complaint Counsel wanted to contradict Dr. Heber's conclusion with Dr. Kantoff's testimony, Dr. Kantoff should have been on their witness list and should have been called during their case in chief. Where, as here, Complaint Counsel

attempts to call rebuttal witnesses when the need for the testimony could have been anticipated prior to the filing of the witness list, this Court denies such attempts. *See, e.g., In the Matter of Schering-Plough*, No. 9297, 2001 FTC LEXIS 175 (October 26, 2001).

Moreover, Complaint Counsel's partial quotation from Dr. Heber's deposition testimony is not inconsistent with his testimony at trial. At trial, Dr. Heber testified that there was "a consensus" about the prostate cancer studies. Trial Tr. 2156:2 - 7. In the partially quoted part of his deposition, he said that no one made a statement to Mr. Resnick to the effect that there was an "agreement" on the success of these studies. *Id.* at 2159:20 - 2160:13. One statement is not inconsistent with the other. There was a "consensus," but no one told Mr. Resnick there was an "agreement." Even if "consensus" were deemed the same thing as an "agreement" (and it is not)[1], the question at trial asked what occurred at the meeting and the question partially quoted from the deposition asked whether a particular statement was made to Mr. Resnick. Accordingly, the actual questions on which Complaint Counsel bases their motion on are not inconsistent. Respondents should not be subjected to a further delay in the trial schedule because of the manner in which Complaint Counsel formed their questions.

II. The Cases Cited by Complaint Counsel Are Distinguishable

Complaint Counsel cites no relevant legal authority for their back-door attempt to introduce a completely new witness who was not disclosed on their witness list in rebuttal. For example, *Quinn v. Consolidated Freightways*, 283 F.3d 575 (3rd Cir. 2002), Mot. at 4, did not involve an attempt to call a previously undisclosed rebuttal witness. Rather, there, the court

[1] Dr. Heber's use of the term consensus does not imply that there was complete unanimity or a "full" consensus among all scientists, nor is such an agreement required. The FTC has recognized: "[T]he Commission does not require food advertisers to establish that there is scientific consensus in support of their claims. Similarly, FDA has clearly indicated that its 'significant scientific agreement' standard does not require that such agreement represent a 'full consensus among scientists.'" *See* FTC's Enforcement Policy Statement on Food Advertising.

considered whether the district court should have stricken new testimony of a witness as a discovery sanction for failing to amend interrogatories. In that case, unlike here, both parties participated in a deposition of the witness prior to trial. *Murphy v. Magnoila Elec. Power*, Mot. at 5, is equally unavailing. There, the Fifth Circuit reversed a trial court's determination that, due to a discovery violation, a party should be precluded from presenting an expert as part of their case in chief. *Murphy* did not involve the situation here where a party should have attempted to present a witness as part of their case and simply declined to do so. Indeed, to the extent that Complaint Counsel argues that Dr. Kantoff's testimony is "essential," Complaint Counsel's argument demonstrates why Complaint Counsel should have known either to depose Dr. Kantoff or to call him in their affirmative case.[2] The remaining federal court decisions relied on by Complaint Counsel, see Mot. at 4-6 were decided prior to the amendment to the Federal Rules in 1993, which made the requirement for disclosure of pre-trial witness more stringent to prevent backdoor tactics such as those by Complaint Counsel here.[3]

That Dr. Kantoff was not disclosed on Complaint Counsel's final witness list is another reason that he should be excluded. Federal courts have excluded witnesses who were not properly disclosed on a pre-trial witness list, even if ostensibly offered as "impeachment" witnesses, if their testimony will have any substantive significance. *See, e.g.,* Fed. R. Civ. P. 26(a)(3); *see also, Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) (requiring preclusion in roughly comparable circumstances involving a failure to conduct an adequate investigation),

---

[2]Even if Dr. Kantoff testifies that he disagrees with what Dr. Heber describes as a "consensus" at a meeting, (and we do not believe he will), this testimony is not significant to the case. *See supra* n. 1.

[3] To the extent that Complaint Counsel relies on the *Myers* factors, such factors, even if relevant, do not balance in their favor. Moreover, courts have recognized that "the standard required by Rule 16(e) is more stringent than the old *Meyers* standard." *United Linen Wholesale, L.L.C. v. Northwest Co.*, 2010 WL 4180957, *1 (D.N.J. 2010) (emphasis added).

superseded in unrelated part by Rule amendment, In re Subpoena to Witzel, 531 F.3d 113, 118 (1st Cir. 2008). Because Complaint Counsel are not offering Dr. Kantoff solely for impeachment purposes, he should be precluded from testifying because he was not listed on the witness list. *See, e.g., In the Matter of Schering-Plough*, No. 9297, 2001 FTC LEXIS 175 (October 26, 2001).

III. Complaint Counsel Should Not Be Permitted to Provide Rebuttal Expert Testimony When the Witness Was Not Listed on Complaint Counsel's Witness List and Did Not Submit a Report.

No matter how thinly Complaint Counsel may attempt to slice his testimony, Dr. Kantoff is an expert. As noted in the first paragraph of Complaint Counsel's motion, Dr. Kantoff is an urologist at the Dana-Farber Cancer Clinic at Harvard. Yet, Dr. Kantoff has not been designated as one of the Complaint Counsel's experts and has filed no report. To the extent that Complaint Counsel believes Dr. Kantoff will testify that he disagreed with the conclusion that the prostate cancer studies were successful, such testimony necessarily includes his statement of an expert opinion. There is no way to separate Dr. Kantoff's purported recollection of what he said at the meeting from his expert opinion.

Under these circumstances, as the federal cases hold, Complaint Counsel should not be permitted to call him. Complaint Counsel has already called experts on the subject of prostate health studies, and to bring on an additional expert, Dr. Kantoff, to presumably to say the same thing is not only improper, it is cumulative and unnecessarily delays the time for resolution of this case. 16 C.F.R. 3.43(b) (authorizing exclusion of evidence that might cause "undue delay, waste of time, or needless presentation of cumulative evidence" and empowering the Court to "exercise of reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . [a]void needless consumption of time.").

Bowman is instructive. There, the court rejected proffered rebuttal testimony, noting that "to the extent that the evidence proffered would simply rehash plaintiff's basic theory . . . it was excludable as unnecessary cumulation." 427 F.Supp 234, 239. In that case, as here, "both parties had adduced extensive expert testimony" and "[t]o have permitted [the plaintiff] to present again plaintiff's general theory of the [case] would have added nothing substantive." *Id.* Similarly, this Court should reject Complaint Counsel's attempt to "get a re-run" of their case. *Id.*

CONCLUSION

For the foregoing reasons, Complaint Counsel's motion should be denied.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of Respondents' **OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL A REBUTTAL WITNESS**, and that on this 11th day of October, 2011, I caused the foregoing to be served by electronic filing and e-mail on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
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 Respondents' **OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL A REBUTTAL WITNESS**, and that on this 11th day of October, 2011, I caused the foregoing to be served by e-mail on the following:

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Associate Director for Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
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Washington, DC 20580

Mary Johnson, Senior Counsel
Heather Hippsley
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Telephone: 310.201.7454

Counsel for Respondents

Dated: October 11, 2011

EXHIBIT A

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation

Docket No. 9297

Federal Trade Commission

2001 FTC LEXIS 175

October 26, 2001

ACTION:
[*1]

SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER; ORDER GRANTING SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

OPINION:

SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

Respondent Schering-Plough Corporation ("Schering") moves pursuant to *16 C.F.R. §§ 3.31(c)* & (d) for a protective order preventing Complaint Counsel from taking the depositions of David Poorvin and Chris Dilascia.

Complaint counsel is well aware that neither Poorvin nor Dilascia had any involvement in the settlement or license agreements at issue. Additionally, neither Poorvin nor Dilascia have been listed on any party's witness list, and Complaint Counsel cannot establish the requisite good cause to identify Poorvin and Dilascia as potential witnesses at this late date. This is especially true since Complaint Counsel has been well aware of both Poorvin and Dilascia and their positions at Schering since the pre-complaint investigation stage of the case.

Furthermore, neither Poorvin nor Dilascia are proper rebuttal witnesses, despite Complaint Counsel's suggestion to the contrary. Complaint Counsel could reasonably have anticipated its need for the deponents' **[*2]** from the time they were first aware of the deponents in the pre-complaint investigation stage of the case. Therefore, these witnesses are improper rebuttal witnesses that clearly should have been identified, if at all, on Complaint Counsel's initial witness list.

Finally, Complaint Counsel has already conducted extensive discovery of individuals who actually have knowledge and information about events relevant to the case. Thus, deposing Poorvin and Dilascia would provide no conceivable benefit. Given the witnesses lack of involvement in the issues in this case, the limited possible use of their testimony and the fact that Complaint Counsel has already obtained relevant information from individuals with knowledge of the events at issue, subjecting Poorvin and Dilascia--a third party--to examination is overly burdensome. This burden clearly outweighs any potential benefits of deposing these individuals. Therefore, the Court should grant a protective order.

For the foregoing reasons and those set forth in the accompanying memorandum, Schering respectfully requests

that the Court grant the motion for a protective order.

Respectfully submitted,

John W. Nields, Jr.

Marc G. Schildkraut **[*3]**

Laura S. Shores

Charles A. Loughlin

HOWREY SIMON ARNOLD & WHITE, LLP

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 783-0800

Attorneys for Respondent

Schering-Plough Corporation

Dated: October 26, 2001

ORDER:

ORDER GRANTING SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

IT IS HEREBY ORDERED that Schering-Plough Corporation's Motion for a Protective Order preventing Complaint Counsel from taking the depositions of David Poorvin and Chris Dilascia is hereby GRANTED.

Date: ___, 2001

APPENDIX:

MEMORANDUM IN SUPPORT OF SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

Respondent Schering-Plough Corporation ("Schering") moves pursuant to *16 C.F.R. §§ 3.31(c)* & (d) for a protective order preventing Complaint Counsel from taking the depositions of David Poorvin, Schering's Vice-President of Worldwide Licensing, and Chris Dilascia, a former Schering employee. Neither had any involvement in the settlement or license agreements at issue. Neither is listed on any party's witness list, nor are they proper or necessary rebuttal witnesses. As such, respondent respectfully requests a protective **[*4]** order to protect the deponents and parties from these unnecessary, burdensome and unjustified depositions at this late date.

II. ARGUMENT

This Court has the power to issue a protective order to "protect a party or other person from . . . undue burden" or where the "burden . . . of the proposed discovery outweigh its likely benefit." *16 C.F.R. §§ 3.31(c)(1)(iii)* & (d). Here, a

protective order is appropriate to prevent Schering and the two proposed witnesses from burdensome depositions that will provide minimal benefit to complaint counsel.

Complaint Counsel already deposed the six individuals complaint counsel viewed as primarily involved in the licensing and settlement agreements--Messrs. Kapur, Lauda, Driscoll, Audibert, Hoffman and Wasserstein--in the pre-complaint investigative stage of the case. In the complaint stage, Complaint Counsel has already deposed five of these individuals for a second time, and by the close of discovery, will have deposed all six. Additionally, Complaint Counsel has deposed fifteen other Schering individuals, including cumulative examinations of six members of Schering's Board of Directors. Complaint Counsel has also **[*5]** noticed the deposition of six other individuals it intends to depose, not including Mr. DiLascia and Mr. Poorvin,

Significantly, neither Poorvin nor Dilascia had any involvement in the settlement or license agreements. It comes as no surprise then that during the extensive discovery had to date, Complaint Counsel never showed any interest in Poorvin or Dilascia. Indeed, Complaint Counsel never even sought to speak with Poorvin or Dilascia in the investigative stage of the case, much less seek to depose either of them. The reason quite frankly is that Complaint Counsel has already identified and thoroughly examined, some of them multiple times, all key individuals with any knowledge of the agreements at issue. As such, deposing these witnesses is unlikely to provide any significant additional benefit to complaint counsel, especially given the number of depositions and the over 100 boxes of document are produced by Schering in this matter.

That the proposed depositions of Poorvin and Dilascia will provide minimal benefit is also shown by the fact that neither is listed on any party's witness list. Pursuant to the Scheduling Order, the parties submitted their revised witness lists **[*6]** on September 20, 2001. No party can designate additional witnesses "unless good cause is shown." Second Revised Scheduling Order at 2. It is difficult to imagine how Complaint Counsel could establish good cause to identify Poorvin and Dilascia as potential witnesses at this late date. Good cause "demands a demonstration that the existing schedule [for identification of witnesses] cannot reasonably be met despite due diligence of the party seeking the extension." *Carrizales v. City of Omaha, 2000 U.S. Dist. LEXIS 19387,* *3 (D. Neb. Jan. 19, 2000) (internal quotations omitted). Complaint Counsel cannot meet that burden here, given that Complaint Counsel has been well aware of both Poorvin and Dilascia and their positions at Schering since Schering's document productions during the pre-complaint investigative phase of the case--almost two years ago. See SP 23 00037, SP 23 00065 (produced in response to Complaint Counsel's request of November 5, 1999); SPCID 00090 (produced in response to Complaint Counsel's request of April 13, 2000); SPCID2 1A 00056 (Produced in response to Complaint Counsel's request of August 18, 2000). Furthermore, Complaint Counsel's own expert identified **[*7]** Poorvin in his report months ago. See Levy Report at 14. Despite same, Complaint Counsel has waited until the twelfth hour to depose an individual whom Complaint Counsel's own expert describes as "not [being] involved at all with the licensing of Niacor-SR." Id.

Schering informed Complaint Counsel of Poorvin's and Dilascia's lack of knowledge of any material issues and stated its belief that these depositions were unnecessary, particularly in light of the imminent discovery deadlines and the numerous fact and expert witnesses yet to be deposed. The only justification offered by Complaint Counsel in response is that Complaint Counsel may possibly use their testimony in rebuttal to Schering's case in chief. Neither Poorvin nor Dilascia, however, is a proper rebuttal witness.

If a plaintiff could reasonably anticipate that it might need to present certain testimony, either to support its own allegations or to counter anticipated defenses, the witnesses that will provide this testimony are not appropriate "rebuttal witnesses" and should be identified on plaintiff's initial witness list. See *Young v. American Reliable Ins. Co., 1999 U.S. Dist. LEXIS 12353,* *12 (E.D. La. **[*8]** Aug. 9, 1999) (excluding testimony of "rebuttal" expert because "plaintiffs knew that the defendants were going to utilize a suicide defense well enough in advance whereby a so-called 'rebuttal' witness is not appropriate"); *In re Barge ACBL 1391, 1989 U.S. Dist. LEXIS 11479,* *2-*3 (E.D. La. Sept. 28, 1989) (denying motion to add rebuttal witnesses where movant failed to demonstrate "sufficiently compelling need" to justify rebuttal witnesses in light of late date of motion and fact that movant could have anticipated purported need for witnesses long before motion.). It is clear from Complaint Counsel's discovery and witnesses designations that a

conscious decision was made that Poorvin and Dilascia were not important enough to interview, depose or list as potential witnesses. Because Complaint Counsel was well aware of these individuals and chose not to list them as witnesses it simply cannot establish good cause to designate Poorvin or Dilascia as additional witnesses.

Here, Complaint Counsel clearly knew of, or could have anticipated, in advance of the deadline for submission of revised witness lists, any limited use it might have for Poorvin's and Dilascia's testimony. **[*9]** Complaint Counsel has stated to counsel for Schering that it intends to use Dilascia's testimony to rebut Schering's argument that it does not have monopoly power in the relevant market. However, Complaint Counsel bears the burden of proof with respect to market definition and monopolization, and thus it surely anticipated, prior to the deadline for the identification of witnesses, the need to present factual testimony with respect to the relevant product market.

Furthermore, given the fact that Complaint Counsel has already taken over a dozen depositions of individuals who actually do possess knowledge of relevant events, any information that deponents theoretically possess would be, at best, cumulative and unnecessary. Therefore, subjecting the deponents to examination is burdensome both to the individual deponents and to the parties, and would provide no material benefit. This burden is exacerbated by the fact that no cognizable benefit can come from permitting the noticed depositions--their testimony would likely be inadmissible at the hearing, since Complaint Counsel has not identified Poorvin or Dilascia on its revised witness list and these individuals are not proper rebuttal **[*10]** witnesses. The Court therefore should issue a protective order since the burdens imposed by this discovery at this late date in the case clearly outweigh any potential benefits.

III. CONCLUSION

For the foregoing reasons, Schering respectfully requests that the Court grant this motion for a protective order.

Respectfully submitted,

John W. Nields, Jr.

Marc G. Schildkraut

Laura S. Shores

Charles A. Loughlin

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(202) 783-0800

Attorneys for Respondent

Schering-Plough Corporation

Dated: October 26, 2001

EXHIBIT B

Slip Copy, 2010 WL 4180957 (D.N.J.)
(Cite as: 2010 WL 4180957 (D.N.J.))

H
Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
UNITED LINEN WHOLESALE, L.L.C., A New Jersey Corporation, Plaintiff,
v.
The NORTHWEST COMPANY, Defendant.

Civil Action No. 2:06-cv-5934 (DMC).
Oct. 19, 2010.

Peter William Till, Law Offices of Peter W. Till, Springfield, NJ, for Plaintiff.

Philippe Alain Zimmerman, Moses & Singer LLP, Fort Lee, NJ, Alexander Granovsky, Crowell & Moring LLP, New York, NY, for Defendant.

OPINION

DENNIS M. CAVANAUGH, District Judge.

***1** This matter comes before the Court upon emergent motion by United Linen Wholesale, L.L.C. ("Plaintiff") to impose fees, sanctions and other relief for discovery violations [FN1] on The Northwest Company ("Defendant"). For the reasons contained herein, the motion is **denied.**

> FN1. Although the instant motion does not specifically request that the Court amend the final pre-trial order, that is the only mechanism available to provide the relief requested by Plaintiff in the instant motion. The Court declines to amend the order.

I. ***BACKGROUND***

On September 27, 2010, mere hours before the case at bar was set for trial, Plaintiff informed the Court and Defendant that a witness with relevant knowledge and in possession of probative e-mails from Mr. Shay Auerbach had come forward by contacting the Plaintiff's brother. On the morning of September 28, 2010 when the parties appeared in Court for the purpose of selecting a jury and commencing trial, Plaintiff sought to amend the Final Pre-Trial Order by adding a newly discovered witness, Ms. Janet Park. The Final Pre-Trial Order had been filed on August 25, 2009, and discovery in this matter had concluded on May 21, 2008. Defendants object, claiming they would be unfairly prejudiced if the witness is allowed to testify.

II. ***LEGAL STANDARD***

A. Amendment of Final Pre-trial order

A motion to amend the final pretrial order is governed by Rule 16(e), Fed.R.Civ.P., which states:

> after any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Although there is no precise definition of "manifest injustice," courts have developed a series of factors to be evaluated as part of the inquiry. As the Court explained in *Scopia Mortgage Corp. v. Greentree Mortgage Corp.,* L.P. 184 F.R.D. 526, 528-529, (D.N.J., 1998),

> in 1977, prior to the amendment to Rule 16(e) to include the 'manifest injustice' standard for amendments to the final pretrial order, the Third Circuit noted that there are four main considerations behind this inquiry when it comes to adding new witnesses: (1) prejudice or surprise in fact to the nonmoving party; (2) ability of that party to cure the prejudice; (3) extent to which waiver of the rule would disrupt the orderly and efficient trial of the case; (4) bad faith or willfulness on the part of the movant. *Meyers v. Pennypack Woods Home*

Ownership Ass'n, 559 F.2d 894, 905 (3d Cir.1977). The Third Circuit derived those elements from case law, which provides a host of other *529 considerations as well, including the ability of the movant to have discovered witnesses earlier, the validity of the excuse offered by the party, and the importance of the proffered testimony. *Id.* at 904 (internal citations omitted). If anything, the standard required by Rule 16(e) is more stringent than the old *Meyers* standard. More recent cases have focused on additional factors such as the importance of the proffered testimony, *see Konstantopoulos v. Westvaco Corp.,* 112 F.3d 710, 720 (3d Cir.1997), and whether the decision to amend to include additional witness testimony is a matter of a new strategy or tactic. *Fashauer v. New Jersey Transit Rail Operations, Inc.,* 57 F.3d 1269, 1287 (3d Cir.1995). The Court should take all of these factors, those stated in *Meyers* prior to the amendment to Rule 16(e) and those emphasized in more recent years, to determine whether granting the amendment is necessary to prevent manifest injustice to the movant.

B. Impeachment

***2** Fed.R.Civ.P. 26(a)(3) states that evidence "introduced solely for impeachment purposes" is admissible even if it is not disclosed before trial. But the 9th Circuit held, in an opinion recently cited in our own Circuit (*see Mente Chevrolet Oldsmobile, Inc. v. GMAC,* --- F.Supp.2d ----, 2010 WL 2925738 (E.D.Pa., 2010) that impeachment is improper when it is "employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible." *United States v. Gilbert,* 57 F.3d 709, 711 (9th Cir.1995) (per curiam).

III. *DISCUSSION*

The relevant issues are whether allowing an amendment of the Final Pre-Trial Order would prevent "manifest injustice," and whether the e-mails from Ms. Park could be admissible for the limited purpose of impeaching Defense witnesses.

As to the factors that the Court must consider in determining whether to amend the Final Pre-Trial Order to prevent manifest injustice, there is no question that Defendant was surprised, although that alone would not support the Court's ruling since the discussion which follows as to what Plaintiff should have known or suspected about the existence of Ms. Park applies per force to Defendant. The orderly and efficient conduct of the trial has already been disrupted, so the Court finds that factor inapposite in this circumstance. Most compelling amongst the factors that the Court is to consider is the ability of the movant to have discovered the witness earlier. In the colloquy that took place on the record between the Court and Plaintiff's attorney on September 28, 2010, it was clear that Plaintiff was in possession of sufficient information about the possibility of discoverable evidence concerning J.P. Imports, and had sufficient time in which to explore the relevance of that evidence prior to the eve of trial. Although the responses that Defendant made to Plaintiff's interrogatories are somewhat unclear, the fact that Plaintiff never objected nor requested supplemental information does not support the Plaintiff's argument that Plaintiff was misled or deprived of valuable information. Although Plaintiff may not have known of Ms. Parks herself, it certainly knew of her company, and its potential relevance [FN2]. Moreover, as Defendant points out, Plaintiff's contention that Defendant was required to disclose Ms. Parks as a potential witness pursuant to Fed. R. Civ P. 26 misconstrues the Rule, which states that disclosure of individuals with discoverable information must be provided to the adversary, but only to the extent that "the disclosing party may use [them] to support its claims and defenses." Since it is clear that Defendant never intended to call Ms. Parks nor use her to support a claim or defense, disclosure of her name as a potential witness was not necessary. Moreover, while discovery is meant to prevent either party from hiding relevant information, it is not intended to take the place of the ordinary investigative diligence that adversaries are expected to perform. This Court finds that Plaintiff could have contacted Ms. Park

prior to entering the Final Pre-Trial Order. This factor overwhelmingly favors a finding that there is no manifest injustice in precluding this witness at this late stage of the proceedings.

> FN2. The Court notes that in its reading of the moving papers from both parties in ruling on both the motion for summary judgment and the motions *in limine,* the Court was well aware of the existence and potential relevance of J.P. Imports to the proceedings. It is hard to imagine that skilled and experienced attorneys for Plaintiff would not have been similarly aware, and with nothing more than ordinary diligence might have discovered that Ms. Janet Park was the president of J.P. Imports, the company which bears her initials.

***3** Although Fed. R. of Ev. 26 allows for non-disclosure of evidence that is used solely for impeachment, courts have noted that this exception may not be used to allow inadmissible evidence in through the back door. The Court is concerned that allowing the evidence of Ms. Parks' contact with Mr. Shay Auerbach into evidence may be nothing more than Plaintiff's attempt to make an end-run around the Court's ruling as to the Statute of Frauds and the Dead Man's Statute. To the extent that there is legitimate impeachment value, the Court will permit the evidence, but not to the extent that statements by the late Mr. Auerbach may be used to impeach the testimony of other witnesses who lack first hand knowledge of what the late Mr. Auerbach may have written or said. The Court is not persuaded by the examples that Plaintiff cites from the deposition of Mr. Glen Auerbach, but reserves on the possibility that there may yet be impeachment value in the proffered e-mails. Nonetheless, the Court will not allow Plaintiff to construe or interpret, or ask a witness to construe or interpret, the writings of a witness who is now deceased, and who is therefore unable to explain or defend his own conduct, especially if the underlying purpose is not to impeach a witness but rather to admit parol evidence that the Court has already ruled to be inadmissible. For whatever limited impeachment value there may be that has yet to have been revealed, the Court reserves decision, and will resolve this issue at trial, if presented. At the appropriate time, the Court will also consider Defendant's hearsay objections.

The Court declines to impose sanctions on either party.

IV. *CONCLUSION*

For the foregoing reasons, Plaintiff's motion for sanctions is **denied.** An appropriate Order follows this Opinion.

D.N.J.,2010.
United Linen Wholesale, L.L.C. v. Northwest Co.
Slip Copy, 2010 WL 4180957 (D.N.J.)

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