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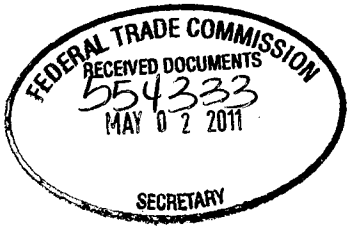
UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION



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

COMPLAINT COUNSEL'S RESPONSE AND OPPOSITION TO RESPONDENTS' MOTION IN *LIMINE* TO EXCLUDE UNDISCLOSED OPINIONS OF COMPLAINT COUNSEL'S EXPERTS

The Respondents move *in limine* to exclude testimony by Complaint Counsel's experts on matters that were not disclosed in their expert reports and to exclude any rebuttal opinions that were undisclosed as of March 28, 2011. (Resp'ts Mot. in *Limine* at 5).

The Respondents do not challenge specific testimony but request that the Court enter a broad order precluding any "additional opinions of Complaint Counsel's experts." (Resp'ts Mot. in *Limine* at 7.) Complaint Counsel interprets the Respondents' Motion as requesting the Court: (1) strike testimony from Complaint Counsel's affirmative experts on direct by characterizing it as rebuttal testimony; (2) prevent Complaint Counsel's experts from explaining or elaborating on the opinions in their reports; and/or (3) prevent the introduction of pure rebuttal testimony from

experts who did not provide a rebuttal report in accordance with deadlines set forth in the Court's scheduling order as amended.[1]

Respondents' request to strike testimony of Complaint Counsel's affirmative experts as rebuttal testimony should be denied as vague and premature. Respondents' request that Complaint Counsel's experts be prevented from explaining or elaborating on opinions in their reports should be denied as overreaching and premature. Complaint Counsel agrees that experts who did not produce a rebuttal report cannot provide pure rebuttal testimony.

BACKGROUND

The complaint alleges that Respondents engaged in deceptive acts or practices by making false and unsubstantiated health claims in advertising. The two theories upon which Complaint Counsel can prove Respondents' advertisements were deceptive or misleading are: (1) the "falsity" theory or (2) the "reasonable basis" theory. *In re Daniel Chapter One*, Docket No. 9329, 2009 FTC LEXIS 157, at *221 (Aug. 5, 2009). The complaint makes allegations under both theories, specifically alleging that the Respondents: (1) made representations that clinical studies, research, and or trials prove Respondents' products treat, prevent, or reduce the risk of heart disease, prostate cancer, and erectile dysfunction ("establishment claims"), when, in fact, such representations were false and (2) represented that they possessed and relied upon a

[1] Although the reports of Complaint Counsel's rebuttal experts, Drs. Michael Mazis and David Stewart, were filed after March 28, 2011, they were filed in accordance with deadlines of the Court's scheduling order. Reports to rebut Respondents' expert Dr. Ronald Butters were not due until April 4, 2011, and all other rebuttal expert reports were not due until March 30, 2011. *In re POM Wonderful LLC*, No. 9344, Order Granting Joint Motion to Extend Deadlines for Submission and Rebuttal of Expert Reports (Mar. 16, 2011) and Order Granting Motion to Extend Deadlines for Expert Reports (Mar. 18, 2011).

reasonable basis that substantiated the challenged claims at the time they were made ("efficacy claims"), when, in fact, Respondents did not possess and rely upon such.

Under both the falsity and reasonable basis theories, Complaint Counsel has the burden to prove that the Respondents made the challenged representations. Under the falsity theory, Complaint Counsel must show that the challenged claims are false. *Id.* at *222; *see also FTC v. QT, Inc.*, 448 F. Supp. 2d. 908, 959 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). Under the reasonable basis theory, Complaint Counsel must show that the Respondents lacked a reasonable basis for asserting the challenged claims are true. *In re Daniel Chapter One*, 2009 FTC LEXIS at *136-37; *see also FTC v. QT, Inc.*, 448 F. Supp. 2d. at 959. While the Respondents have the burden of establishing the substantiation they relied on at the time the claims were made, Complaint Counsel has the burden of proving that the Respondents' purported substantiation was inadequate. *Id.*

When evaluating whether Complaint Counsel has satisfied its burden for efficacy claims challenged under the reasonable basis theory, the court can look to a number of factors to determine whether Respondents' purported substantiation was inadequate, including the level of substantiation that experts in the field believe is reasonable. *In re Daniel Chapter One*, 2009 FTC LEXIS at *226-27. In its case-in-chief, Complaint Counsel intends to offer affirmative testimony from its four science/medical experts opining on the level of substantiation required to support the challenged representations and whether such substantiation existed to support the challenged claims made.[2] If Complaint Counsel's experts are precluded from explaining and elaborating on the opinions in their reports, including those concerning the inadequacy of

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[2] Complaint Counsel's experts will also assist in showing that Respondents' establishment claims are false.

Respondents' purported substantiation, Complaint Counsel will be unfairly prejudiced from presenting its case-in-chief.

DISCUSSION

A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85 at *18 (Apr. 20, 2009) (internal quotations omitted). "Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds." *Id.* at 19; *see also In re POM Wonderful LLC*, No. 9344, Order Granting Consent Mot. to Amend Scheduling Order (Apr. 20, 2011).

Commission Rule 3.31A governs expert discovery. Section 3.31A(a) provides that parties "shall serve each other with a list of experts they intend to call as witnesses at the hearing," and serve each other "a report prepared by each of its expert witnesses." Under 3.31A(a), complaint counsel must "serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness," and the rebuttal report "shall be limited to rebuttal of matters set forth in a respondent's expert reports." Section 3.31A(b) prevents any party from calling expert witnesses at trial unless they were identified and provided reports as required under Rule 3.31A.

As Respondents noted, the purpose of Rule 3.31A is consistent with the principles of Federal Rules of Civil Procedure 26(a)(2)(B) and 37(c)(1), which govern expert discovery and testimony, the timely exchange of expert witness reports during discovery, and the exclusion of expert testimony. The primary rationale for excluding untimely expert opinions is to avoid an unfair "ambush" at trial from a party advancing new theories or evidence.

I. Respondents' Motion to Strike Testimony of Affirmative Experts as Rebuttal Testimony is Vague and Premature

Respondents' Motion to strike testimony from Complaint Counsel's affirmative experts on direct as rebuttal testimony should be denied as vague and premature. Respondents' have not challenged any specific deposition testimony of Complaint Counsel's experts as rebuttal testimony, and any request to strike trial testimony is premature. Whether an expert's testimony should be stricken as beyond the scope of his report should be a fact specific inquiry and should not simply be decided generally in the abstract. Moreover, Complaint Counsel is aware of the rule governing expert testimony and does not intend to offer any pure rebuttal testimony from its medical experts on direct.

II. Respondents' Motion to Prevent Experts from Explaining or Elaborating on Their Opinions Is Overreaching and Premature

Respondents seem to suggest, through reference to Dr. Stampfer's explanation that his report did not provide a completely exhaustive recitation of the limitations he found with the studies upon which Respondents purportedly relied to substantiate their claims but rather provided a complete and accurate summary thereof, that should Complaint Counsel's experts elaborate on or further explain the opinions summarized in their reports at trial, such testimony should be stricken as beyond the scope of their reports. (Resp'ts Mot. *in Limine* at 3.) Respondents have taken a far too narrow view of what is acceptable expert testimony and have interpreted the purpose of Rule 3.31A well beyond its intended purpose of narrowing issues at trial and eliminating unfair surprise of parties. Accepting such a narrow view would unfairly prejudice Complaint Counsel and prevent it from presenting its case-in-chief.

Courts consistently have held that experts are not limited in their testimony to the line-by-line language in their expert reports; rather, they are allowed to elaborate, explain, and

expand upon the opinions or issues addressed in their reports. "Section 26(a)(2)(B) does not limit an expert's testimony simply to reading his report. No language in the rule would suggest such a limitation. The rule contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006); *see also Mineabea Co., LTD. v. Papst*, Civ.A. 97-0590, 231 F.R.D. 3, 8 (D.D.C. 2005) (holding that defendant's objections to the testimony of plaintiff's expert took "a far too narrow view of what is acceptable direct expert testimony," because an expert's testimony is not limited to the line-by-line language in his report, rather an expert is permitted a certain degree of latitude to "expand upon and explain the opinions and conclusions in his expert report"); *Emcore Corp. v. Optium Corp.*, Civ.A. 6-1202, 2008 WL 3271553, at *4-5 (W.D. Pa. Aug. 5, 2008) (holding that although statements in an expert's declaration were not exactly what he stated in his report, they were not beyond the scope of his report because they did not express a "new opinion" but were "an elaboration of and consistent with an opinion/issue previously addressed in [his] report"); *In re Stand 'N Seal*, 636 F. Supp. 2d 1333, 1336 (N.D. Ga. 2009) (holding that an expert's affidavit elaborating on items discussed in her report should not be excluded because "some elaboration is allowed.").

The key issue in determining if an expert's testimony expresses a new opinion or merely elaborates on an opinion is whether the testimony presents a new or materially different subject matter or opinion than previously disclosed in the expert's report. *See Forest Labs, Inc. v. Ivax Pharmaceuticals, Inc.*, Civ.A. 03-891, 237 F.R.D. 106, 113 (D. Del. 2006) (holding the testimony of plaintiff's expert concerning violations of a study's protocol was admissible as a permissible elaboration on opinions in his initial and supplemental reports, but testimony about how the FDA would treat such violations was inadmissible because it was not a subject within

the reports); *Mineabea Co., LTD. v. Papst*, 231 F.R.D. at 9 (evaluating whether the challenged testimony was "the subject" of the expert's report or "materially different from the opinions in the expert report"); *Emcore Corp. v. Optium Corp.*, 2008 WL 3271553, at *6 (distinguishing the admissibility of testimony from an expert who "elaborate[d] on previously discussed issues" from that of an expert who "raised new issues that had not been identified previously.").

An expert should also be permitted to testify that his assumptions or opinions regarding a scientific study are more reasonable than those of opposing counsel's experts if his expert report generally discusses his analyses of studies. *Forest Labs, Inc. v. Ivax Pharmaceuticals, Inc.* at 114 (holding that testimony of defendant's expert that the assumptions in his analysis of a study were more reasonable than that of plaintiff's expert was not outside the scope of his initial and supplemental expert reports, despite him having not expressly stated such in his reports, because the reports were predominantly dedicated to the expert's analyses of various studies).

In accordance with case law governing the scope of expert testimony, Complaint Counsel's experts should not be limited to the line-for-line language in their reports but should be allowed to elaborate and explain the opinions and conclusions set forth in their reports. Complaint Counsel's experts also should be permitted to explain why they believe their opinions and analyses of Respondents' purported substantiation, as summarized in their reports, are more reasonable than those of Respondents' experts. If Complaint Counsel's experts are prevented from explaining and elaborating on their opinions, Complaint Counsel will be unfairly prejudiced and denied the opportunity to present its case-in-chief.

Moreover, until Complaint Counsel's medical experts have actually presented testimony, the Court cannot evaluate whether such testimony is a permissible explanation of opinions in

their reports or presents a new or materially different opinion. For the aforementioned reasons, Respondents' request should be denied as overreaching and premature.

III. Complaint Counsel Does Not Intend To Introduce Pure Rebuttal Testimony From Affirmative Experts

The scheduling order required that any rebuttal expert reports "be limited to rebuttal of matters set forth in Respondents' expert reports." *Accord* Commission Rule 3.31A(a) ("a rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports.") Rebuttal evidence is "[e]vidence offered to disprove or contradict the evidence presented by an opposing party." *Black's Law Dictionary* (7th ed.).

Respondents' medical experts did not present anything new (*e.g.*, there was no analysis based on previously undisclosed studies upon which Respondents' purportedly relied for substantiation) for Complaint Counsel's medical experts to rebut. Thus, Complaint Counsel's medical experts, Drs. Sacks, Stampfer, Eastham, and Melman, did not produce rebuttal reports. Complaint Counsel agrees with Respondents that these medical experts will not provide pure rebuttal testimony and does not intend to call these experts on rebuttal, unless Respondents' experts inappropriately testify at trial on new matters outside the scope of their reports.[3]

To establish its case-in-chief, Complaint Counsel must demonstrate that Respondents' purported substantiation is inadequate. Such requires Complaint Counsel's medical experts to explain the opinions summarized in their reports concerning why the studies relied on by Respondents' fail to meet the requisite substantiation standard. Respondents had ample

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[3] Complaint Counsel has identified two rebuttal experts to rebut Respondents' experts Drs. Butters and David Reibstein. Reports for these rebuttal experts were provided in accordance with the scheduling order's deadlines.

opportunity to thoroughly explore the bases for the opinions of these experts in day long depositions.

CONCLUSION

Because Respondents' motion to strike testimony of Complaint Counsel's affirmative experts as rebuttal testimony is vague and premature, and their motion to prevent Complaint Counsel's experts from explaining or elaborating on the opinions in their reports is overreaching and premature, Respondents' Motion should be denied. Complaint Counsel agrees that experts who did not provide rebuttal reports cannot provide pure rebuttal testimony, unless experts of the opposing counsel inappropriately testify on matters outside the scope of their reports.[4]

Dated: May 2, 2011

Respectfully submitted,

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[4] Complaint Counsel respectfully requests that any Court order simply state that unless an expert witness provided a rebuttal report in accordance with the Court's scheduling order, the court intends to disallow rebuttal testimony from that witness at the hearing.

CERTIFICATE OF SERVICE

I certify that on May 2, 2011, I caused to be filed and served Complaint Counsel's Response and Opposition to Respondents' Motion *in Limine* to Exclude Undisclosed Opinions of Complaint Counsel's Experts 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-110
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy via email to:

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Date: May 2, 2011

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