

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

ORIGINAL



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 ON RESPONDENT POM WONDERFUL LLC'S
MOTION TO COMPEL FURTHER RESPONSES TO FIRST SET OF
INTERROGATORIES TO COMPLAINT COUNSEL**

I.

On March 4, 2011, Respondent POM Wonderful LLC ("POM") submitted a Motion to Compel Further Responses to First Set of Interrogatories to Complaint Counsel ("Motion"). Complaint Counsel filed an Opposition ("Opposition") to the Motion on March 11, 2011.

Upon full consideration of the Motion and Opposition, and as further set forth below, the Motion is GRANTED in part, and is otherwise DENIED WITHOUT PREJUDICE.

II.

POM seeks an order requiring Complaint Counsel to provide further responses to Interrogatory Nos. 1, 2, and 11 of POM's First Set of Interrogatories to Complaint Counsel, within seven (7) days. The Interrogatories at issue are set forth below, in pertinent part:

Interrogatory No. 1: Identify every representation that you contend the Respondents^[1] expressly made in their advertisements . . . that you

¹ The term "Respondents" herein refers collectively to Respondents POM, Roll International Corp., Stewart A. Resnick, Lynda Rae Resnick, and Matthew Tupper.

contend is a violation of Section 5 of the FTC Act for any reason and state the basis for your contention.

Interrogatory No. 2: Identify every representation that you contend the Respondents made by implication in their advertisements . . . that you contend is a violation of Section 5 of the FTC Act for any reason and state the basis for your contention.

Interrogatory No. 11: Do you contend that Respondents . . . interfered with or manipulated any [research studies and if so] identify any such instances and describe the basis of your contention.

In response to Interrogatory No. 1, Complaint Counsel described in detail 18 separate representations. POM claims that Complaint Counsel's answer is insufficient because Complaint Counsel referred to the list as "non-exhaustive." Complaint Counsel's response to Interrogatory No. 2 stated that Respondents' implied representations "include, but are not limited to" the representations described in response to Interrogatory No. 1, "to the extent they are not express, and all other representations set forth in Complaint Paragraphs 9 and 10" and in the advertisements attached to the Complaint. POM contends that this answer is insufficient because, similar to Complaint Counsel's answer to Interrogatory No. 1, Complaint Counsel does not limit the representations upon which it will rely to the specified lists. In this way, POM argues, Complaint Counsel's answers fail to respond to each Interrogatory's request for identification of "every" representation upon which Complaint Counsel will rely for its case and leave open the possibility that Complaint Counsel may place in issue other, as yet unidentified, alleged misrepresentations.

In its Opposition, Complaint Counsel states that on March 11, 2011, it supplemented its prior answer to identify 37 express claims, and further directed POM, by Bates number, to over 100 advertisements that Complaint Counsel contends make express and implied claims in violation of Section 5. Complaint Counsel argues that such supplementation is sufficient and that it is unduly burdensome and not required for Complaint Counsel to identify every misrepresentation in every advertisement disseminated by Respondents. According to Complaint Counsel, its supplemental responses provide ample notice to Respondents of the conduct that is being challenged. Thus, Complaint Counsel concludes, POM's Motion to Compel further answers to Interrogatories 1 and 2 should be denied as moot.

Complaint Counsel's response to Interrogatory No. 11, as supplemented, advised that it did not have sufficient information to answer whether or not there was interference or manipulation of research by Respondents; that Complaint Counsel had not yet completed the depositions of Respondents Stewart and Lynda Resnick;² and that it would

² By order issued February 7, 2011, the parties' joint motion to amend the scheduling order was granted for the limited purpose of permitting the depositions of the Resnicks to occur after the fact discovery deadline; however, as of the date of this Order, the depositions have been postponed and the parties have not yet provided notice of rescheduling.

also rely on information from its experts and their reports in answering the Interrogatory. Thus, Complaint Counsel concluded, it would supplement its answer to Interrogatory No. 11, as appropriate, "after all fact and expert discovery is completed." POM asserts that the answer is insufficient because Complaint Counsel has deposed "approximately 11 researchers, doctors, or scientists who participated or conducted the studies at issue in this action." POM also states that Complaint Counsel has deposed 12 current and former employees of POM, obtained an extensive number of documents from Respondents and third parties, including from the researchers who participated in or conducted the studies at issue. Therefore, according to POM, Complaint Counsel should have sufficient information to determine whether or not it contends that any of the Respondents manipulated or interfered with research, as requested by Interrogatory 11. POM also argues that expert testimony is not material to the factual question of interference with the research and studies at issue, and that, in any event, Complaint Counsel's expert reports were due March 4, 2011. Thus, POM argues, Complaint Counsel's expert analysis on the issue will have been completed by this time.

Complaint Counsel's Opposition reiterates its need to complete the depositions of the Resnicks, who, according to Complaint Counsel, had some contact with research study authors. In support of its claim that expert opinion is also needed to answer Interrogatory No. 11, Complaint Counsel argues that Respondents' experts may have information on whether the type of participation or involvement by Respondents would be considered interference or manipulation. Complaint Counsel represents that "if, after the depositions of the Resnicks and the disclosure of Respondents' expert reports and opinions it determines that there is sufficient information to fully and truthfully answer, Complaint Counsel will amend before the close of expert discovery."

III.

Rule 3.31(c)(1) of the Commission's Rules of Practice (hereafter, "Rules") provides in pertinent part: "Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). In addition, a party is under a duty to supplement a discovery response with subsequently acquired information, where such information renders the prior response incomplete or incorrect, or if otherwise ordered by the Administrative Law Judge. 16 C.F.R. § 3.31(e). Even if relevant, however, discovery shall be limited by the Administrative Law Judge if it is determined that: (i) the discovery sought is unreasonably 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. 16 C.F.R. § 3.31(c)(2).

Interrogatory Nos. 1 and 2. Identification of the representations upon which Complaint Counsel will rely to prove the violations alleged in the Complaint is patently relevant. Complaint Counsel offers no authority for its contention that providing the requested information presents an undue burden or that Complaint Counsel is not

required to provide the requested information. POM has requested in discovery, and Complaint Counsel is required to disclose, those representations upon which Complaint Counsel will rely to prove its case at trial. *See In re Basic Research*, No. 9318, 2005 FTC LEXIS 167, at *9 (Dec. 14, 2005) (holding that disclosure of document eight months after its creation was prejudicial and document would be excluded from evidence at trial). Failure to timely supplement can result in evidence being excluded from trial. *Id.*; *see also* Fed. R. Civ. P. 37(c)(1) (providing that party that fails to timely supplement as required is not allowed to use that information, “unless the failure was substantially justified or is harmless”).

Because Complaint Counsel did not attach its most recent supplementary responses to Interrogatories 1 and 2, it cannot be determined from the present record whether these supplementary responses are adequate, or whether any further response must be ordered at this time. Accordingly, POM’s Motion to Compel further answers to Interrogatories 1 and 2 is DENIED WITHOUT PREJUDICE.

Interrogatory No. 11. Respondents are entitled to discover, as they request in Interrogatory No. 11, whether or not Complaint Counsel contends that any of the Respondents interfered with or otherwise manipulated their research studies. Complaint Counsel offers to supplement its answer after the completion of the depositions of the Resnicks, and before the close of expert discovery, “if” it has sufficient information “to fully and truthfully answer.” Expert depositions are scheduled to be completed by April 12, 2011. Trial is set for May 24, 2011. Undue delay in disclosure of a contention, with the conditions proposed by Complaint Counsel, could hamper Respondents’ ability to defend against the charge at trial and thereby present an unnecessary risk of prejudice to Respondents. *Cf. Combined Ins. Co. v. Hansen*, 130 F.R.D. 447 (D. Or. 1990) (denying motion to strike supplemental discovery response, noting that the supplemented responses were served within the discovery period, and no trial date had yet been set).³ To ensure timely supplementation and minimize the risk of prejudice, POM’s Motion to Compel a further response to Interrogatory No. 11 is GRANTED as provided herein.

After completion of the Resnicks’ deposition and completion of Respondents’ experts’ depositions, Complaint Counsel shall promptly supplement its response to Interrogatory 11 to disclose that it does, or does not, contend that any of Respondents interfered with or manipulated research studies, and if so, shall state the complete bases for such contention.


IV.

After full consideration of the Motion and Opposition, and in accordance with the provisions set forth above, Respondent POM Wonderful LLC’s Motion to Compel Further Responses to Interrogatories is GRANTED in part, and it is hereby ORDERED

³ Where the Federal Rules of Civil Procedure are similar to the Commission’s Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating a dispute. *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, *10 (April 27, 2010).

that Complaint Counsel fully respond to Respondents' Interrogatory No. 11 within five business days of the completion of the Resnicks' depositions and the depositions of Respondents experts, whichever is later, and disclose that it does, or does not, contend that any of Respondents interfered with or manipulated research studies, and if so, shall state the complete bases for such contention. In all other respects, the Motion is DENIED WITHOUT PREJUDICE.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 16, 2011