

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

ORIGINAL



In the Matter of)
)
)
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
as successor in interest to)
Roll International Corporation,)
companies, and)
)
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

DOCKET NO. 9344

**ORDER GRANTING CONSENT MOTION TO ALLOW
COMPLAINT COUNSEL TO DESIGNATE AN ADDITIONAL
REBUTTAL EXPERT AND TO AMEND SCHEDULING ORDER**

On April 4, 2011, Complaint Counsel, with the consent of Respondents, filed a Motion to Allow Complaint Counsel to Designate an Additional Rebuttal Expert and to Amend the Scheduling Order to extend the deadline for completing expert witness depositions from April 12 to April 29, 2011 ("Consent Motion").

Having fully considered the Consent Motion, and as more fully set forth below, the Consent Motion is GRANTED.

I. Consent Motion to Exceed Expert Limit

Commission Rule of Practice 3.31A(b) states:

(b) No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

16 C.F.R. § 3.31A(b).

Complaint Counsel seeks to designate Dr. David W. Stewart as an expert to rebut the

expected testimony of Dr. Ronald Butters, who has been designated by Respondents as an expert in linguistic science. Because Complaint Counsel has already designated five experts, the issue is whether “extraordinary circumstances” exist in this case to permit Complaint Counsel to designate one additional rebuttal expert.¹ In support of the Consent Motion, Complaint Counsel states that, pursuant to the Order on Cross-Motions Regarding Limitation on Number of Expert Witnesses Designated by Respondents, issued February 23, 2011 (“Order on Experts”), Respondents were permitted to designate eight experts, including Dr. Butters, and that Complaint Counsel’s request to designate Dr. Stewart is limited to potential rebuttal of Dr. Butters’ opinions. Complaint Counsel further notes that Respondents have consented to Complaint Counsel’s designating Dr. Stewart for rebuttal, as Respondents indicated they would when they moved to exceed the expert limitation for their own case.

As stated in the Order on Experts, Rule 3.31A(b) “was enacted as part of the 2009 amendments to the Commission Rules of Practice. The comments to the amendment explain: ‘It has been the Commission’s experience, . . . that five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases. The Rule also has a safety valve that allows a party to seek leave to call additional expert witnesses in extraordinary circumstances.’” Order on Experts at 5 (citation omitted). Having fully considered the Consent Motion and the circumstances of this case, it is appropriate to employ the “safety valve” to permit Complaint Counsel to exceed the expert limit and designate one additional rebuttal expert. Both the claims and the defenses in this case are broad and complex, and the additional expert is limited to rebuttal. Accordingly, the Consent Motion is GRANTED.

This Order holds only that the expert limit in Rule 3.31A(b) may be exceeded to permit Complaint Counsel to designate an additional rebuttal expert, so as to preserve Complaint Counsel’s ability to call Dr. Stewart in rebuttal at trial. *See* Rule 3.31A(b) (“No party may call an expert witness at the hearing unless he or she has been listed . . .”). This Order is not a determination that any of Dr. Stewart’s potential testimony will constitute admissible rebuttal evidence at trial. *See United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975) (“The function of rebuttal is to explain, repel, counteract or disprove the evidence of the adverse party.”); *accord Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004) (defining proper rebuttal evidence at trial as that which will explain, repel, counteract or disprove the evidence of the adverse party). *See also Duff v. Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17 (E.D. Ky. Nov. 14, 2005) (holding that evidence is outside the scope of fair rebuttal where it includes opinions on subjects not mentioned in opposing report or introduces new matters).

II. Consent Motion to Amend Scheduling Order to Complete Expert Depositions

The Consent Motion also seeks to extend the Scheduling Order deadline from April 12 to April 29, 2011 in order to complete expert depositions. Commission Rule of Practice

¹ The five-expert limit in Rule 3.31A(b) refers to the number of expert witnesses that may be called at trial; however, an expert must first be designated and provide an expert report, in order to be allowed to testify. *See* Rule 3.31A(b) (“No party may call an expert witness at the hearing unless he or she has been listed . . .”). Thus, the Rule indirectly affects the number of experts that may be designated.

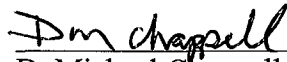
3.21(c)(2) states: "The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing . . . In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c)(2).

In support of the extension, Complaint Counsel states that the parties have worked expeditiously to schedule expert depositions so as to be completed by April 12, 2011, but that due to the number of experts in the case, and the experts' schedules, the parties were unable to schedule four of the expert depositions by the deadline. Complaint Counsel further states that neither party believes it will be prejudiced by the extension and that the extension will not affect any other deadlines, including the commencement of the evidentiary hearing on May 24, 2011.

Having fully considered the Consent Motion, and applying the factors in Rule 3.21(c)(2), the deadline will be extended as requested. The requested extension will not affect the date for commencement or conclusion of the evidentiary hearing or issuing an initial decision.² The complexity of the issues in this case also supports granting the Consent Motion. Accordingly, the Consent Motion to Amend the Scheduling Order is GRANTED, and it is hereby ORDERED that the Scheduling Order is amended to extend the deadline for completing expert depositions to April 29, 2011.

Except as amended by this Order or prior Orders, all remaining dates and all additional provisions in the October 26, 2010 Scheduling Order are unchanged.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 5, 2011

² As noted in the Order of March 25, 2011 granting the parties' consent motion to extend certain other pre-trial deadlines, over the course of this proceeding, numerous extensions have been requested and granted. Although the instant extension does not affect the date for the hearing, at this point in the proceedings there is substantial risk that further deadline extensions may affect the hearing date. Any change in the hearing date is governed by Rule 3.41(b)."