

ORIGINAL

**UNITED STATES OF AMERICA
BEFORE 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)
)
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

Docket No. 9344

PUBLIC

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS'
RENEWED MOTION FOR *IN CAMERA* TREATMENT

Complaint Counsel hereby submits its response to Respondents' Renewed Motion For *In Camera* Treatment of eleven documents designated as potential trial exhibits, pursuant to Commission Rule 3.45(b).¹ Additionally, on May 6, 2011, before the Court issued its order on Respondents' original motion for *in camera* treatment, Respondents submitted a letter to the Court clarifying their motion and submitting certain pages of depositions. As set forth below, Complaint Counsel objects to *in camera* treatment of seven of the nine documents, and to portions of the two deposition transcripts submitted on May 6, based on Respondents' failure to meet the standards set forth in Rule 3.45(b). Complaint Counsel does not object to *in camera* treatment of the specific pages designated in CX1019 (pp. 00010152-54) and in CX1404 (pp.

¹ Of these, ten exhibits are documents and one exhibit consists of deposition excerpts. Two documents are duplicates appearing on both parties' exhibit lists, so there are in fact only eight documents at issue.

RESP029363-68).

DISCUSSION

Under Rule 3.45(b) of the Commission's Rules of Practice, the Court may designate material *in camera* upon a "finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b). Once the applicant makes a "clear showing that the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury," *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980), the Court must then balance this consideration against the importance of the information in explaining the rationale of the Commission's decision. *Id.*

1. Respondents Have Not Met the Burden for In Camera Treatment of CX0376 and CX0393.

Proposed exhibit CX0376 is a spreadsheet of monthly marketing expenses for the three products at issue in this case, starting as early as April 2002, and proposed exhibit CX0393 sets forth monthly sales for the same products, again starting as early as 2002. Although Respondents' brief states in a conclusory fashion that the marketing data "could easily be used by competitors to POM's serious detriment," neither the brief nor the attached Declaration of Matthew Tupper demonstrates a clearly defined, serious competitive injury that could result. Respondents state that they are privately held corporations with no public reporting obligations, and that revealing the sales data "would provide POM's competitors with a complete internal financial picture of its operations." Marketing and sales information are records kept by every business, however, and "[f]or such treatment of ordinary business records, neither embarrassment

of the movant nor the fact that competitors may be extremely desirous to possess the information should bar public disclosure.” *In re Amway Corp., Inc.*, Dkt. No. 9023, 1977 FTC LEXIS 24, at *1 (Nov. 11, 1977) (citing *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1189 (1961)). Respondents themselves often publicize their sales, including in a passage in Respondent Lynda Resnick’s published book, *Rubies in the Orchard* (CX0001_0011 - CX0001_0012) (“Our fresh pomegranate sales went from 100,000 cartons in 2001 to more than 2 million cartons in 2008. Similarly, in just four years, POM has gone from zero to \$165 million in sales[.]”) and in numerous publicly-filed complaints against competitors (CX1395_0004 (Coca-Cola); CX1396_0004 (Welch’s); 1397_0004 (Ocean Spray); CX1398_0004 (Tropicana)) (“POM Wonderful’s annual supermarket sales have, incredibly, gone from zero to well over \$70 million in [six years].”).² In addition, Respondent Lynda Resnick also disclosed in her book that “In Pom’s first four years, we spent a grand total of \$14 million on marketing.” That includes, advertising, promotion, public relations – the works.” (CX0001_0017 -CX0001_0018.) Given these prior disclosures, Respondents’ failure to describe with specificity how the monthly breakdown of such figures would cause serious competitive injury warrants denial of their *in camera* motion.

Also, much of the financial information in these exhibits is over three years old. There is “a greater burden on a respondent when the information is old The Commission has usually denied *in camera* treatment for data of that vintage.” *General Foods*, 95 F.T.C. at 353. Neither

² POM’s sales (and lost sales due to its competitors’ alleged conduct) were a key issue in the private lawsuits. POM’s damages expert in the *Tropicana* litigation, Vanessa Hill, testified before a federal jury on POM’s gross revenues from juice sales from 2002 to 2009 (TROPICANA-0004007); the cost of POM juice per ounce (TROPICANA-0003922-23); and POM’s average and incremental profit margins (TROPICANA-0003990), among other topics, and her report disclosing POM’s annual gross revenues was shown to the jury (TROPICANA-0003945-46; RESP028042).

Respondents' brief nor Respondent Tupper's declaration addresses what utility this old information might possess for competitors. In a subsequent ruling in *General Foods*, 96 F.T.C. 168, 170 (1980), the Commission upheld the ALJ's denial of *in camera* treatment of a company's marketing and sales information, where "the documents were three and a half to nine years old, and dealt with marketing campaigns that have already been put into effect." *See also Amway*, at *8 ("[T]here is no clear showing that information about the markets more than a few years old will help competitors defeat respondents at the present time to any substantial extent."). If the Court decides to grant *in camera* treatment for these documents, Complaint Counsel requests that such an order only apply to information under three years old, consistent with Commission precedent on this issue. *See, e.g., In re International Ass'n of Conference Interpreters*, Dkt. No. 9270, 1996 FTC LEXIS 335, at *4 (Jul. 26, 1996) (granting *in camera* treatment only for contracts less than three years old).

2. Respondents Have Not Met the Burden for *In Camera* Treatment of CX0483/PX0335a02, CX1195/PX0335a01, and PX0335.

Respondents also renew their motion for *in camera* treatment of two documents (CX0483/PX0335a02, CX1195/PX0335a01, which are in both Complaint Counsel's and Respondents' exhibit lists) and portions of deposition testimony about these documents (PX0335). These documents reflect similar financial information as the exhibits discussed in Section 1, *supra*, and Respondents again fail to describe the competitive injury that would result from their public disclosure particularly in light of their availability to competitors and use of similar documents in a public jury trial in their prior litigation. Furthermore, as with the exhibits above, some of the information is over three years old, but Respondents have not specifically addressed the presumption that such information should not be placed *in camera*. It is impossible

to evaluate the secrecy and materiality of the information using the multiple factors set forth in *In re Bristol-Myers*, 90 F.T.C. 455, 456-57 (1977), given the vague and conclusory justifications in Respondents' brief and declaration. However, as above, if the Court grants *in camera* treatment, any such order should run only as to information that is less than three years old.

3. Respondents Have Not Met the Burden for *In Camera* Treatment of CX0548 and CX0706.

In their original motion for *in camera* treatment, Respondents sought to protect CX0548 and CX0706, documents dated January 2002 and January 2005, respectively, under the theory that discussion of the salary paid to their consultant is "private." Apparently conceding that this information does not meet the definition of "sensitive personal information" under Rule 3.45(b), Respondents now assert, without further elaboration, that disclosure of the amount paid to a consultant would "threaten POM with competitive harm." Respondent Tupper's declaration appears to simply treat these documents as among those containing "highly confidential financial information, including financial statements, balance sheets, and operating costs," but does not address the specific considerations that would justify protecting a consultant's salary from six or more years ago. No basis in law or fact is provided to demonstrate that a consultant's compensation is sufficiently confidential to justify *in camera* treatment; in fact, such information is routinely disclosed in Court in regard to expert witnesses and other paid consultants. Again, Respondents' failure to set forth a "clear showing" of secrecy and materiality, particularly given the age of the documents, warrants denial of *in camera* treatment. If the Court grants *in camera* treatment, Complaint Counsel requests that the time period be minimal, no more than two years, considering that the latest document is already over six years old.

4. Respondents Have Not Met the Burden For *In Camera* Treatment of the Deposition Excerpts Submitted on May, 6, 2011.

On May 6, 2011, Respondents clarified their original motion for *in camera* treatment by submitting specific pages of testimony that had not been previously provided. Specifically, Respondents submitted pp. 10-13, 38-49, 54-57, 110-113, 166-169, 202-205, 234-237, and 270-273 of the deposition of Dr. Harley Liker, and pp. 1-8, 13-16, and 121-123 of Dr. Jean deKernion. The copies submitted to Complaint Counsel do not specify which lines or which category of information Respondents believe are at issue, but Respondents originally sought *in camera* treatment for these depositions under Category 5 (Personal Information). Complaint Counsel does not object to redaction of Dr. deKernion's home address (6:22-25), but objects to *in camera* treatment of the remainder of the pages as there is no showing that the information therein contains sensitive personal information or meets the standard for *in camera* treatment. Similarly, Complaint Counsel does not object to redaction of Dr. Liker's home address (10:19-21), but objects to *in camera* treatment of the remainder of the pages as there is no showing that the information therein contains sensitive personal information or meets the standard for *in camera* treatment.

In compliance with the Court's May 9, 2011 Order, Complaint Counsel will prepare a list of exhibits for which in camera treatment has been granted, as well as redacted versions of certain exhibits that contain sensitive personal information, prior to their introduction at trial.

Respectfully submitted,

Date: May 17, 2011

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CERTIFICATE OF SERVICE

I certify that on May 17, 2011 I caused the filing and serving of *Complaint Counsel's Response to Respondents' Renewed Motion For In Camera Treatment* upon the following as set forth below:

One electronic copy via the FTC E-Filing System to:

Donald S. Clark, Secretary
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One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell
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