

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



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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 ON RESPONDENTS' MOTION FOR *IN CAMERA* TREATMENT**

**I.**

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the October 26, 2010 Scheduling Order entered in this matter, on April 20, 2011, Respondents filed a motion seeking *in camera* treatment of 244 documents ("Motion"). Complaint Counsel filed a Response on May 2, 2011. As set forth below, the Motion is GRANTED in part and DENIED WITHOUT PREJUDICE in part.

**II.**

Under Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, the Administrative Law Judge may order that material "be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b). Accordingly, in proceedings at the Federal Trade Commission, "requests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 1984 FTC LEXIS 60, at \*1 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Applicants for *in camera* treatment must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95

F.T.C. 352, 355 (1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of decisions at the Commission is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 58 F.T.C. at 1186. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

The Commission has recognized that it may be appropriate to provide *in camera* treatment for business records to be introduced as evidence. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at \*2 (April 5, 1982); *see Hood*, 58 F.T.C. at 1188-89; *Kaiser Aluminum*, 103 F.T.C. at 500. Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically extended for two to five years. *E.g.*, *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at \*2 (Nov. 22, 2004); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at \*13-14 (June 26, 1996); *Champion Spark Plug*, 1982 FTC LEXIS 85 at \*2 and 1982 FTC LEXIS 92, at \*2 (March 4, 1982). In addition, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *Conference Interpreters*, 1996 FTC LEXIS 298, at \*15 (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record and to overcome the presumption that *in camera* treatment may be withheld for information that is three or more years old, an affidavit or declaration demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury is required. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at \*2-3 (Apr. 23, 2004).

### III.

Respondents seek *in camera* treatment for 244 documents, falling into six categories, and have submitted two affidavits in support of their Motion. Respondents support their Motion with the Declaration of Matthew Tupper, President of POM Wonderful, LLC (“POM”) and the Declaration of Robert Bryant, Chief Financial Officer of Roll Global LLC. For each of the documents listed, Respondents seek *in camera* treatment for a period of five years.

Complaint Counsel opposes *in camera* treatment for 151 of the documents for which Respondents seek *in camera* treatment. Complaint Counsel asserts that some of the documents for which *in camera* treatment is sought do not fit into the categories

described by Respondents or do not otherwise meet the standard for *in camera* treatment. These categories and the underlying documents are discussed, in order, below.

### **1) Ongoing research and study information**

Respondents assert that if confidential studies are made public before the studies are published or the research is completed, Respondents and the public will be harmed because scientific journals will not publish information that is already known to the public. Respondents further assert that some of the documents falling into this category reflect internal strategic discussions regarding the nature and direction of future research contemplated by Respondents, which is competitively sensitive and would cause substantial harm to Respondents if disclosed.

Complaint Counsel objects to *in camera* treatment for documents that do not constitute ongoing research and study information. Complaint Counsel further objects to *in camera* treatment for documents that are over three years old.

As noted above, “there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old.” *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 100, \*4 (May 6, 2009). Respondents have not demonstrated that public disclosure of such documents is likely to cause serious competitive injury.

In addition, with respect to documents containing details of ongoing research, future research strategies, and research budgets that Respondents have previously disclosed in private lawsuits initiated by POM against competitor beverage companies, Respondents have not demonstrated that such documents are sufficiently secret and that further disclosure of such documents would likely cause competitive injury.

The request for *in camera* treatment is GRANTED for documents that describe medical research that is ongoing, or that is completed, but in the process of being published by a peer-reviewed journal.

The need for *in camera* treatment has not been demonstrated for documents that: (1) do not refer to specific ongoing research; (2) refer to studies that are completed but not in the process of being published; (3) refer to studies unrelated to Respondents’ products; (4) are over three years old; or (5) have previously been disclosed in other litigation. Respondents have failed to make the required showing to support their request for *in camera* treatment for the documents challenged by Complaint Counsel. The request for *in camera* treatment is DENIED WITHOUT PREJUDICE for documents that are listed as falling under Category 1 on Exhibit A to Complaint Counsel’s Response.

### **2) Confidential financial information**

Respondents assert that substantial injury can result from disclosure of private financial information, particularly when the financial information belongs to privately held corporations, which do not have public reporting obligations regarding financial

data. Respondents further assert that disclosure of such information, including internal budgets, sales information, revenues, and transactional dealings, is highly confidential, the disclosure of which could cause competitive injury.

Complaint Counsel asserts that many of the documents sought to be protected have previously been disclosed in private litigation that POM initiated against its competitors and thus are not sufficiently secret. Complaint Counsel further objects to granting *in camera* treatment for information that has been publicized by POM and to documents that reflect financial or other information that is over three years old.

Respondents have failed to make the required showing to support their request for *in camera* treatment for the documents challenged by Complaint Counsel. The request for *in camera* treatment is DENIED WITHOUT PREJUDICE for documents that are listed as falling under Category 2 on Exhibit A to Complaint Counsel's Response.

**3) FDA correspondence, information concerning an investigational new drug application (IND) for products challenged in the Complaint and related confidential information**

Respondents assert that materials that were submitted to the United States Food and Drug Administration ("FDA"), including information involving an IND, contain highly confidential information which, if made public, would cause substantial injury to Respondents.

Complaint Counsel asserts that not all of the documents listed by Respondents meet the standard for *in camera* treatment. By way of example, Complaint Counsel notes that Respondents seek to place *in camera* a warning letter from the FDA to POM that is publicly available on the FDA's website. In addition, Complaint Counsel asserts that some of the documents sought to be protected do not contain any references to INDs or other regulatory information.

Respondents have disclosed, in their public version of their motion for *in camera* treatment, that they have submitted materials to the FDA in support of INDs. Thus, the fact that Respondents have filed INDs is not confidential and documents that merely reference that fact do not meet the standard for *in camera* treatment. In addition, documents that are publicly available on the FDA's website do not meet the standard for *in camera* treatment.

Respondents have failed to make the required showing to support their request for *in camera* treatment for the documents challenged by Complaint Counsel. The request for *in camera* treatment is DENIED WITHOUT PREJUDICE for documents that are listed as falling under Category 3 on Exhibit A to Complaint Counsel's Response.

**4) Product specifications, processes, and manufacturing**

Respondents seek *in camera* treatment for documents containing what they

describe as highly sensitive information regarding the formulation, specification, packaging, and manufacturing processes for products challenged in the Complaint in this case. Respondents assert that this information, if made public, would harm Respondents and cause significant competitive injury to their business.

Complaint Counsel states that POM initiated lawsuits against multiple competitors in which a core issue was the content of its juice compared to competitors' beverages and that as a part of those lawsuits, the formulation for POM's juices has been disclosed. Complaint Counsel objects to *in camera* treatment of such documents, as well as to two documents listed in this category that do not appear to contain any proprietary formulation or manufacturing information. Complaint Counsel does not object to *in camera* treatment of formulation information about POMx Pills or POMx Liquid, which were not at issue in those lawsuits.

Respondents have failed to make the required showing to support their request for *in camera* treatment for the documents challenged by Complaint Counsel. The request for *in camera* treatment is DENIED WITHOUT PREJUDICE for documents that are listed as falling under Category 4 on Exhibit A to Complaint Counsel's Response.

#### **5) Personal information**

Respondents seek *in camera* treatment for documents that contain personal information such as salary information and sensitive personal communications. Respondents describe these documents as containing sensitive personal information, such as addresses, medical conditions of individuals, disclosures of individual participants, and their medical conditions in research studies.

Pursuant to Commission Rule 3.45(b), a party or third party may obtain *in camera* treatment for "sensitive personal information," which is defined in the Rule as including "an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b).

Complaint Counsel does not object to *in camera* treatment for information described in Rule 3.45(b), but does object to *in camera* treatment for information about salaries, payments made to Respondents' experts or third-party researchers, as well as other undefined personal communications.

The request for *in camera* treatment is GRANTED for sensitive personal information, as defined in the Rule, and including medical conditions of individuals, disclosures of individual participants, and their medical conditions in research studies. Because the information appears on Complaint Counsel's exhibits, Complaint Counsel is ORDERED to prepare redacted versions of the specific sensitive personal information and provide such redacted version to Respondents for their review, before introducing

such exhibits at trial.

With respect to personal information that falls outside the definition of “sensitive personal information,” Respondents have failed to make the required showing to support their request for *in camera* treatment. The request for *in camera* treatment is DENIED WITHOUT PREJUDICE for documents that are listed as falling under Category 5 on Exhibit A to Complaint Counsel’s Response.

#### **6) Sensitive FTC communications**

Respondents seek *in camera* treatment for documents that are confidential and reflect communications between Respondents and the FTC during the investigatory stage of this matter and communications aimed at settlement and negotiation between the parties. Complaint Counsel objects to *in camera* treatment for documents that merely reference the fact that the FTC was conducting an investigation. Complaint Counsel further objects that Respondents failed to specify which documents contain settlement discussions, and asserts that the documents do not reflect any specific settlement discussions. In addition, Complaint Counsel states that Respondents appear to be seeking protection under this category for documents and communications exchanged between Complaint Counsel and Dean Ornish, M.D., who, at the time, was responding to a Civil Investigative Demand as a third party.

Respondents have failed to make the required showing to support their request for *in camera* treatment for the documents challenged by Complaint Counsel. The request for *in camera* treatment is DENIED WITHOUT PREJUDICE for documents that are listed as falling under Category 6 on Exhibit A to Complaint Counsel’s Response.

#### **7) Depositions**

Respondents have specified on their list of documents for which they seek *in camera* treatment a number of depositions. These depositions are not listed as falling into any particular category and Respondents have offered no justification for withholding them from the public record. *In camera* treatment will not be granted for entire depositions. *In re Aspen Tech., Inc.*, 2004 FTC LEXIS 56, at \*5-6 (May 5, 2004). Rather, Respondents are required to identify the page and line numbers of the depositions that contain information that qualifies for *in camera* treatment and provide a justification for such request. Accordingly, the request for *in camera* treatment is DENIED WITHOUT PREJUDICE as to requests that seek *in camera* treatment for entire depositions.

### **IV.**

Respondents’ request for *in camera* treatment is GRANTED for the documents to which Complaint Counsel has no objection.

Respondents’ request for *in camera* treatment is DENIED WITHOUT

PREJUDICE for 151 of the 244 documents for which Respondents seek *in camera* treatment. For these 151 documents, listed on Exhibit A to Complaint Counsel's Response, Respondents are instructed to review their requests in compliance with the directives of this Order. If Respondents determine that any of these 151 documents do in fact meet the strict standards for *in camera* treatment, Respondents must sustain their burden of demonstrating that the documents sought to be withheld from the public record are sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.

Respondents may file a renewed motion for *in camera* treatment no later than May 13, 2011. Complaint Counsel shall file an opposition to any such renewed motion no later than May 17, 2011.

ORDERED:

Dm Chappell  
D. Michael Chappell  
Chief Administrative Law Judge

Date: May 9, 2011