

ORIGINAL

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



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 COMPLAINT COUNSEL'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND INTERROGATORY RESPONSES
FROM RESPONDENT POM WONDERFUL LLC**

I.

On March 4, 2011, Complaint Counsel filed a Motion to Compel Production of Documents and Interrogatory Responses ("Motion") from Respondent POM Wonderful LLC ("POM"). POM filed an Opposition to the Motion on March 9, 2011.

Upon full consideration of the Motion and Opposition, and for the reasons set forth below, the Motion is GRANTED in part, and is otherwise DENIED.

II.

Complaint Counsel contends that POM has failed to respond fully to requests for information regarding dollars spent by Respondents on research and development, including bases for Respondents'¹ alleged advertising claims that their products are backed by 23, 25, or 32 million dollars in research, as requested in Interrogatory No. 11 (First Set); Interrogatory No. 4 (Second Set); and Document Request No. 12. In addition, Complaint Counsel asserts that POM has failed to respond completely to Complaint Counsel's requests for information concerning POM's dissemination of advertisements, as requested in Complaint Counsel's Document Request No. 1 and Interrogatory No. 2 (First Set).

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

Regarding research expenditures, Complaint Counsel states that POM provided a spreadsheet with detailed vendor and expenditure breakdowns for relevant years, except 2009 and 2010. Exhibit D to Complaint Counsel's Motion to Compel (hereafter, "Exhibit"). Complaint Counsel further asserts that POM's CFO testified at deposition that such details could be provided, but had not been provided due to time constraints, and that POM agreed to provide the detailed information for 2009 and 2010. Exhibits E and F. POM thereafter provided an updated spreadsheet. Exhibit G. However, Complaint Counsel argues, the updated spreadsheet still lacks the detailed information for 2009 and 2010 which, according to Complaint Counsel, POM agreed to provide. Exhibits E and F. Complaint Counsel therefore seeks an order requiring POM to produce a detailed accounting of the dollars spent by Respondents on research and development in 2009 and 2010, within five business days. In its Opposition, POM states that it has complied with Complaint Counsel's request for a complete accounting of dollars spent on research, as evidenced by the spreadsheets in Exhibits D and G, as well as by another document, Bates Numbered RESP06916, which does not appear to have been submitted by POM or Complaint Counsel.

With respect to the dissemination schedules, Complaint Counsel states that POM has produced only a partial dissemination schedule, and that POM advised that the information on the dissemination schedule only exists from 2007 forward. Exhibit F. Complaint Counsel contends that it needs pre-2007 dissemination schedules in order to verify that the advertisements produced by POM are complete and to determine which produced advertisements were in fact disseminated. Complaint Counsel also notes that POM would not stipulate to the authenticity of pre-2007 dissemination information provided by third parties in discovery. In its Opposition, POM states that it has produced numerous advertisement or dissemination schedules, including print media archives, print position schedules, and an advertisement agency traffic schedule. In addition, POM states, it has produced internal marketing spreadsheets documenting when particular print advertisements ran for the years 2004-2008 and an internal traffic schedule listing project job numbers for Respondents' products. POM reiterates that an internal traffic schedule does not exist for the years prior to 2007.

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). 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).

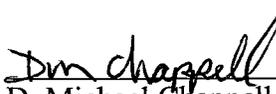
Regarding research expenditure information, there appears to be no dispute over the discoverability of the information requested by Complaint Counsel. The updated spreadsheet produced by POM, however, shows only partial expenditure detail for part of 2009, and no expenditure details at all for 2010, even though POM's CFO testified at deposition that such details could be provided. Exhibit G. Aggregate yearly totals for each of these years are not sufficient. Accordingly, the Motion is granted to require POM to produce a summary spreadsheet in the form of Exhibit G, containing specific expenditure detail, by vendor, for 2009 and 2010, within 5 business days of the date of this Order.

With respect to pre-2007 dissemination schedules for POM juice, again there appears to be no dispute over the discoverability of the information requested by Complaint Counsel. Rather, POM contends that the requested pre-2007 dissemination schedules for POM juice do not exist. Complaint Counsel does not contend, and thus has not demonstrated, that POM is withholding information within its possession or control. Complaint Counsel's suggestion that POM is required to stipulate to the authenticity of advertisement dissemination information produced by third parties is without merit. For these reasons, Complaint Counsel's Motion to Compel POM to produce pre-2007 dissemination schedules for POM juice is denied.

IV.

After full consideration of the Motion and Opposition, and for the reasons set forth above, Complaint Counsel's Motion to Compel Production of Documents and Interrogatory Responses from Respondent POM Wonderful LLC is GRANTED in part, and it is hereby ORDERED that POM shall produce an expenditure summary spreadsheet substantially in the form of Exhibit G attached to the Motion, which details each research and development expenditure, by vendor, for calendar years 2009 and 2010, within 5 business days of the date of this Order. In all other respects, the Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 15, 2011