

**ORIGINAL**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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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

**PUBLIC DOCUMENT**

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

Complaint Counsel hereby submits its response to Respondents' Motion Requesting *In Camera* Treatment of certain documents and information designated as potential trial exhibits, pursuant to Commission Rule 3.45(b). Respondents have identified 244 documents and depositions for which *in camera* treatment is sought in whole or in part, and have divided the documents into six categories. Within each category Respondents request *in camera* treatment for the documents via declarations from Respondent Matthew Tupper and Robert Bryant, Chief Financial Officer of Respondent Roll Global (formerly Roll International).

As set forth below, although Complaint Counsel does not object in principle to analyzing documents and information by category, a number of the individual documents for which *in camera* treatment is sought either do not fit squarely into the categories described by Respondents, or otherwise do not meet the burden for *in camera* treatment. Therefore, Complaint

Counsel opposes *in camera* treatment for 151 documents or depositions, which are identified in Exhibit A to this brief.

## 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. Ongoing and Future Research and Study Information

Respondents seek *in camera* treatment for their ongoing, unpublished scientific research as well as documents reflecting "internal strategic discussions regarding the nature and direction of future research contemplated by Respondents." Complaint Counsel does not object to *in camera* treatment of documents that describe medical research that is ongoing, or that is completed but in the process of being published by a peer-reviewed journal.<sup>1</sup> Complaint Counsel notes, however, that a number of the documents that Respondents have placed in this category (1) do not refer to specific ongoing research; (2) refer to studies that are completed; or (3) refer to

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<sup>1</sup> For example, Complaint Counsel does not object to *in camera* treatment of documents referring to an ongoing study being conducted by Johns Hopkins University. Johns Hopkins and Michael Carducci, M.D. have filed a similar motion seeking *in camera* treatment for six documents related to that study.

studies unrelated to Respondents' products. For example, Respondents seek protection for documents simply listing names (CX0415, CX1059); for a document referring to a completed, published study (CX0868); for documents referring to a study that was completed years ago and never published (PX0345a68 *et al.*); and for information about completed research, not on Respondents' products, done by one of their retained experts witnesses (PX0353 24:10-35:4).

Respondents also cite many documents that are well over three years old, and revealing such information at this point is unlikely to cause serious competitive injury. *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at \*15 (Jun. 26, 1996) (presumption that *in camera* treatment will not be accorded to information that is more than three years old). For example, Respondents seek protection for a 2004 research summary (CX0025). These documents reflect plans for research studies that are, by now, likely either completed or abandoned. Respondents have not explained, however, why such documents from several years ago warrant protection now. An explanation of the serious injury is particularly necessary here, because Respondents have *already* disclosed details of ongoing research, future research strategies, and research budgets to their competitors, in several private lawsuits initiated by POM Wonderful, LLC ("POM") against competitor beverage companies. *See, e.g.*, CX1030 (2009 Medical Research Summary disclosed in separate litigation). Thus these documents are not sufficiently secret, and competitive injury is unlikely. Therefore, Complaint Counsel asserts that these and similar documents, which are set forth in Exhibit A, do not meet the standard of Rule 3.45(b) and *in camera* treatment should be denied.

## **2. Confidential Financial Information**

Respondents also seek to place *in camera* certain financial information, which is defined in Respondent Tupper's Declaration as "internal budgets, sales information, revenues, and

transactional dealings between POM and Roll companies.” While Complaint Counsel understands the sensitivity of financial data for private corporations, and does not object to *in camera* treatment of some documents and information, Complaint Counsel also notes that detailed financial and business information about POM, including sales figures, budgets, marketing plans, and meeting minutes, already has been disclosed in private litigation that POM initiated against its competitors, including Tropicana, Coca-Cola, and Ocean Spray.<sup>2</sup> Thus, the information is not sufficiently secret, nor is there a likelihood of competitive injury.

Respondents also seek to place *in camera* information about how much money has been spent on scientific research and paid to medical researchers (including one of its own expert witnesses). Although Respondent Tupper’s Declaration states that injury would result if “POM’s competitors would learn how much ... money is spent on our research activities,” this information has been widely publicized by POM as part of its advertising. Respondent Tupper himself publicly stated that POM has “funded more than \$25 million of scientific research,” *see* Complaint ¶ 9.J. and Complaint Exh. E-7, and other POM advertisements proclaim even higher numbers, such as \$32 million. *See, e.g.*, Complaint ¶ 10.F. Also, as set forth above, POM has already revealed detailed financial information, including medical research budgets and plans for future research, to its competitors. It is therefore unlikely that revealing this information now would cause serious competitive harm. Finally, some of the documents also reflect financial or other information that is over three years old. The documents that Complaint Counsel believes do not meet the standard for *in camera* treatment are set forth in Exhibit A.

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<sup>2</sup> Several of the documents Respondents seek to protect here were produced in those cases, as is apparent from the bates numbers or exhibit labels.

### 3. FDA Correspondence, INDs, and Related Confidential Information

Respondents seek *in camera* protection for material submitted to the Food and Drug Administration (“FDA”), as well as “additional exhibits where information provided to FDA or other highly sensitive regulator [*sic*] information is reflected.” Complaint Counsel has also sought *in camera* treatment for a number of documents produced by FDA relating to POM’s Investigative New Drug applications (“INDs”), based on specific regulations prohibiting disclosure of IND information. However, not all of the documents listed by Respondents meet the standard for *in camera* treatment or refer to information that is protected by FDA regulations governing INDs. For instance, Respondents seek to place *in camera* a warning letter – publicly available on FDA’s website – from FDA to POM. Also, Respondents publicly state in their *in camera* motion that they have filed an IND with FDA, so a document that merely makes reference to, or contemplates the filing of, an IND is not sufficiently secret to warrant *in camera* treatment, unless there is a separate basis to protect the document. Finally, Respondents seek to protect some documents that do not contain any references to INDs or other regulatory information. The documents that Complaint Counsel believes do not fit into this category or do not meet the standard for *in camera* treatment are set forth in Exhibit A.

### 4. Product Specifications, Processes, and Manufacturing

Respondents seek *in camera* treatment of their information regarding “formulation specification, packaging, and manufacturing processes” for the products at issue in the Complaint. As noted above, however, POM initiated lawsuits against multiple competitors in which a core issue was the content of its juice compared to its competitors’ beverages. Thus, as part of those lawsuits, the formulation for POM’s juices has been disclosed. 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 cases. Also, Complaint Counsel notes that two of the documents Respondents have cited for this category do not appear to contain any proprietary formulation or manufacturing information. Therefore, certain documents, which are set forth in Exhibit A, should not be granted *in camera* treatment.

## 5. Personal Information

Respondents also seek to place *in camera* certain personal information about individuals that they assert is “irrelevant,” stating that disclosure of this information, including “salary information and sensitive personal communications,” would result in “an undue burden on personal privacy.” Although Complaint Counsel is highly sensitive to the protection of personal information, Commission Rule 3.45(b) clearly defines what constitutes “sensitive personal information” for the purposes of *in camera* treatment. To the extent that such information falls within the definition in Rule 3.45(b), Complaint Counsel does not object to *in camera* treatment. In some cases, however, it appears that redaction of the specific sensitive personal information only (*e.g.*, a date of birth, or the names of medical research subjects) would be sufficient and would not affect the use of the remainder of the document at trial.

However, Respondents also seek to place *in camera* information about salaries, payments made to Respondents’ experts or third-party researchers, including payments made by a trust owned by Respondents, as well as other undefined “sensitive personal communications.” This is not “sensitive personal information” under the Commission’s Rules. To protect such information, Respondents still must show a “clearly defined, serious injury” as set forth in Rule 3.45(b). Respondent Tupper’s Declaration only refers to “addresses, medical conditions of individuals, disclosures of individual participants and their medical conditions in research studies,” and the Bryant Declaration does not address the secrecy of this information at all. Therefore, there has

been no showing that this information about salary and payments or “sensitive personal communications” is sufficiently secret that its disclosure would result in serious injury. As the burden for *in camera* treatment has not been met, these documents, set forth in Exhibit A, should not be granted *in camera* treatment.

## 6. FTC Communications

Finally, Respondents seek *in camera* treatment for documents purporting to contain communications between Respondents and FTC during the investigation of this matter. Of course, the FTC investigation is now public. Thus, mere references to the fact that the FTC was conducting an investigation prior to filing the Complaint in this matter are not sufficiently secret to warrant *in camera* treatment. Although Respondent Tupper’s Declaration states that there are sealing orders in place in DC Superior Court regarding certain aspects of the underlying investigation, he gives no detail as to what information in the documents is subject to these sealing orders. He also states that he “understood that some of [POM’s] communications with the FTC” were confidential settlement discussions; however, he fails to specify which documents purportedly contain settlement discussions, nor do the documents reflect any specific settlement discussions.

Respondents also appear to be seeking protection under this category for documents and communications between Complaint Counsel and Dean Ornish, M.D. At the time, Dr. Ornish was responding to a Civil Investigative Demand as a third party. Neither of Respondents’ Declarations explains why these documents, produced by a third party, are “sensitive communications and correspondence between Respondents and the Federal Trade Commission” or why they should be granted *in camera* treatment. Therefore, these documents, set forth in Exhibit A, should not be given *in camera* treatment.

**7. Additional Documents**

Complaint Counsel notes that Respondents have failed to list a category for some documents in Exhibit A to their Motion. These include the entire transcripts of seven depositions. Without further specificity as to the information sought to be placed *in camera* or the justification, Complaint Counsel objects to these documents being afforded *in camera* treatment. In addition, the documents that Respondents submitted on a CD in support of their Motion included a number of documents that were not listed in Exhibit A of their Motion. It is unclear whether Respondents are seeking *in camera* treatment for these documents, on what basis, or for how long. Therefore, Complaint Counsel objects to these documents being placed *in camera* as well.

Respectfully submitted,

Date: May 2, 2011

/s Serena Viswanathan  
Mary L. Johnson (202) 326-3115  
Serena Viswanathan (202) 326-3244  
Federal Trade Commission  
Bureau of Consumer Protection  
600 New Jersey Avenue, NW, Room NJ-3212  
Washington, DC 20580

## CERTIFICATE OF SERVICE

I certify that on May 2, 2011 I caused the filing and serving of *Complaint Counsel's Response to Respondents' Motion Requesting In Camera Treatment* upon the following as set forth below:

One electronic copy of the redacted, public document via the FTC E-Filing System, and the paper original and paper copies of the full confidential document via hand delivery to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., N.W., Room H-159  
Washington, DC 20580

One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
600 Pennsylvania Ave., N.W., Room H-110  
Washington, DC 20580  
Email: oalj@ftc.gov

One electronic copy via email to:

John D. Graubert, Esq.  
Skye L. Perryman, Esq.  
Covington & Burling LLP  
1201 Pennsylvania Ave., NW  
Washington DC 20004-2401  
Email: jgraubert@cov.com; sperryman@cov.com

Kristina Diaz, Esq.  
Roll Law Group  
Email: kdiaz@roll.com  
Attorneys for Respondents

Bertram Fields, Esq.  
Greenberg Glusker  
Email: bfields@greenbergglusker.com  
Attorneys for Respondents Stewart Resnick and Lynda Resnick

/s/ Serena Viswanathan  
Serena Viswanathan  
Complaint Counsel

**EXHIBIT A**

**[REDACTED]**