

ORIGINAL



**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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| In the Matter of |) | |
| |) | |
| POM WONDERFUL LLC and |) | |
| ROLL GLOBAL., as successor in interest |) | |
| to Roll International companies, and |) | Docket No. 9344 |
| |) | PUBLIC |
| |) | |
| STEWART A. RESNICK, |) | |
| LYNDA RAE RESNICK, and |) | |
| MATTHEW TUPPER, individually and |) | |
| as officers of the companies. |) | |

RESPONDENTS’ RENEWED MOTION FOR *IN CAMERA* TREATMENT

Pursuant to the Court’s May 9, 2011 Order on Respondents’ Motion For *In Camera* Treatment (the “*In Camera* Order”) and Rule 3.45(b) of the Commission’s Rules of Practice, Respondents’ respectfully submit their renewed motion for *in camera* treatment of specific documents that Complaint Counsel has designated as trial exhibits.

On April 20, 2011 Respondents filed a motion seeking *in camera* treatment of 244 documents. Complaint Counsel responded with general objections to 151 documents. The Court issued its *In Camera* Order, which granted Respondents’ motion in part and denied it without prejudice in part. With respect to the latter, the Court instructed Respondents to review their requests and to submit a renewed motion for *in camera* treatment of those documents that are “sufficiently secret” and “sufficiently material” that public “disclosure would result in serious competitive injury.” *In Camera* Order, p. 7.

Accordingly, Respondents have reviewed the 151 disputed exhibits for which they originally requested *in camera* treatment, and have identified eleven (11) of those exhibits that Respondents believe **must** be protected to safeguard them from serious competitive injury. These eleven exhibits disclose two broad categories of confidential information: [1]

Respondents' internal financial information; and [2] Respondents' secret product specifications, processes, and manufacturing information.¹ For the Court's convenience, electronic .pdf copies of these eleven exhibits are submitted herewith on a CD-ROM designated "Confidential."

As discussed below, as stated in the accompanying Declaration of Matthew Tupper ("Tupper Decl."), and as evident on their face, these eleven specific documents meet the standard for *in camera* treatment. Respondents' renewed motion should be granted.

ARGUMENT

The standard for granting *in camera* treatment requires a finding that public disclosure "will likely result in a clearly defined, serious injury to the . . . corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b). This standard is met by showing that the information concerned is "sufficiently secret and sufficiently material to [Respondents'] business that disclosure would result in serious competitive injury." See *Bristol-Meyers Co.*, 90 F.T.C. 455 (1977), *Matter of General Foods Corp.*, 95 F.T.C. 352 (1980). In *Bristol-Meyers* the Commission outlined six factors to weigh when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

¹ Certain other exhibits identified by Complaint Counsel include privileged material that was inadvertently produced, and which Respondents have requested be returned. The parties are currently engaged in a meet-and-confer process regarding such privileged documents, which are not the subject of this renewed motion.

1. Confidential Financial Information [Nine Exhibits: CX0376, CX0393, CX0483, CX0548, CX0706, CX1195, PX0335, PX0335a01, and PX0335a02]

This Court has long recognized the substantial injury that can result from the disclosure of private financial information. *See, e.g., In the Matter of SKF Indus., Inc.*, No. 9046C, 1977 F.T.C. LEXIS 86, at *3 (Oct. 4, 1977) (granting *in camera* treatment to exhibits containing detailed marketing information). This injury is especially severe with privately held corporations, such as Respondents Roll Global LLC and POM Wonderful LLC, which have no public reporting obligations.

In this renewed motion, Respondents seek *in camera* treatment for nine (9) specific exhibits containing highly confidential financial information that, if made public, would provide competitors with a prejudicial advantage against Respondents. *See* Tupper Decl., ¶ 4. POM keeps this information confidential, and it should not be disclosed to its competitors. *Id.*

CX0376 is a two-page document, the first page being a chart of POM's North American consumer marketing expenses for juice from April 2002 to November 2010, and the second a chart of POM's consumer marketing expenses for POMx from April 2007 to November 2010. This summary of POM's entire history of marketing investments is confidential, and could easily be used by competitors to POM's serious detriment.

CX0393 is a complete summary, broken down by month, of POM's sales volume and revenue for its juice and POMx product, all the way from its beginning to November of 2010. This document would provide POM's competitors with a complete internal financial picture of its operations, which have not been publicly disclosed to date. It is vital that it be afforded *in camera* treatment to avoid serious prejudice to POM.

CX0483 is a detailed internal financial document, described as “monthly financials” for POM’s United States business unit, which provides just that: Month-by-month expenses and revenues, including detail on the production costs that POM incurs. Again, this detailed internal financial information is confidential, and would work serious harm on POM (a private company) if disclosed to the public.

CX0548 is a retention letter disclosing the annual salary for one of POM’s medical consultants. This information is confidential, and its disclosure could work competitive harm on POM by informing competitors how much POM pays its consultants – information that POM and its consultants keep confidential.

CX0706 is a similar letter, which discusses the same salary information for the same medical consultant. For the same reasons as CX0548, this information is confidential, and its disclosure would threaten POM with competitive harm.

CX1195 is a lengthy document entitled “POM WONDERFULY 2007 ACTUALS – Consolidated Financials,” covering the fiscal year ending on March 31, 2008. It is a consolidated financial statement that provides an exhaustive summary of POM’s internal financials for the entire year. This sensitive information is manifestly confidential, and would harm POM if disclosed to competitors.

PX0335 is a four-page excerpt from the “Confidential Deposition of Person Most Knowledgeable Of POM Wonderful LLC.” It contains four pages of discussion about POM’s confidential internal financials, including its specific contribution margin and back margin. This specific deposition excerpt was designated confidential, and should be kept confidential.

PX0335a01 is simply Respondents' version of the same document that Complaint Counsel lists as its exhibit CX1195, and merits *in camera* treatment for the same reasons discussed above regarding CX1195.

PX 0335a-2 is simply Respondents' version of the same document that Complaint Counsel lists as its exhibit CX0483, and merits *in camera* treatment for the same reasons discussed above regarding CX0483.

In previously objecting to *in camera* treatment of the broad category of financial documentation (which included a much larger set of exhibits), Complaint Counsel argued that because some private financial information may have been disclosed to competitors in prior litigation, such financial information is not sufficiently secret or there is little likelihood of competitive injury from its public disclosure. That generalized objection is unfounded, particularly in the context of the narrow subset of specific documents that is the subject of this renewed motion. When such confidential financial information was disclosed to opposing counsel in prior litigation, it was done so under strict protective orders, and was not subject to public disclosure. Moreover, some of the financial documents, such as the revenue and marketing expense spreadsheets, were produced for Complaint Counsel's reference in this litigation (rather than previously being produced), and designated confidential accordingly.

**2. Secret Product Specifications, Processes, and Manufacturing Information
[Two Exhibits: CX1019 and CX1404]**

The *In Camera* Order denied without prejudice Respondents' motion for *in camera* treatment of documents relating to product specifications, processing, and manufacturing. *In Camera* Order, p. 5. The evident basis for that preliminary denial was that Respondents did not provide sufficient detail on why the documents contain sensitive information. *Id.* After

reviewing these materials again pursuant to the Court’s direction, Respondents now renew their motion for *in camera* treatment of just two (2) of those documents, which manifestly contain highly sensitive and proprietary product-processing and product-specification information: CX1019 and CX1404.

The internal production information contained in these documents is secret, and is not disclosed outside of Respondents’ business, except when the document was produced pursuant to a protective order that carefully restricted its use and dissemination. *See* Tupper Decl., ¶ 5. These two documents contain confidential, sensitive and proprietary information that is closely guarded, and the disclosure of which would be of great value to competitors. *Id.* There is a significant and ongoing monetary investment into the proprietary processes these documents reflect. *Id.*

CX1404 at pp. RESP029363-68 contains a detailed description of what it terms the “Pom Wonderful Concentrate Blending Procedure and Juice Batching.” For five pages, the document describes in precise detail each aspect of production – a virtual “how to” internal guide that could be used by competitors to replicate POM’s juice manufacturing processes and systems. This is precisely the kind of proprietary production information that federal courts consistently recognize is entitled to protection from public disclosure. Although the document consists of interrogatory responses, the underlying litigation included a protective order which kept such information confidential.

CX1019 at pp. 00010152-54 discloses in detail the production process for POMx, elaborated over three pages, including a section entitled “Extraction process description.” This information was communicated to the FDA under confidential circumstances in connection with a POMx safety assessment. POM keeps this production information confidential. See Tupper

Decl., ¶ 5. Document CX1019, however, provides competitors with a roadmap of POM's production details for POMx, including a highly technical discussion of its production chemistry. This kind of detailed proprietary information is precisely the type of information that federal courts have consistently recognized sufficient to merit protection from public disclosure. Indeed, POM provided the FDA with this information to aid its deliberations precisely because it was *not* otherwise available from public sources.

Like the federal courts more generally, the Commission has consistently recognized the sensitivity of this type of information. *See, e.g.*, FTC Operating Manual 15.4.1.1 (listing manufacturing formula and processes as categories of information requiring "close scrutiny" under section 6(f)); *Matter of General Foods Corp.*, 95 F.T.C. 352 (1980) ("ALJs may also find it useful to refer to recent court decisions dealing with the scope and subject matter of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) ('FOIA')").

CONCLUSION

For the foregoing reasons, Respondents' renewed motion should be granted, and *in camera* treatment provided for a period of five (5) years.²

Respectfully submitted,

/s/ Kristina Diaz
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² Should the Court decline to grant Respondents' motion, the person to be noticed that such information will become part of the public record is Kristina Diaz Roll Global, 11444 West Olympic Boulevard, 10th Floor, Los Angeles, CA 90064, Telephone: 310.966.8775.

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LLC, Roll International Corp., Stewart A.
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Tupper.*

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| MATTHEW TUPPER, individually and |) | |
| as officers of the companies. |) | |

DECLARATION OF MATTHEW TUPPER

I, Matthew Tupper, declare as follows:

1. I am President of Respondent Pom Wonderful LLC (“POM”) in the above-captioned matter. As POM’s President, I have knowledge of the background, development, and production of its products. I have personal knowledge of the facts as set forth herein and, if called upon to testify, could and would competently testify thereto.

2. I submit this declaration in support of Respondents’ Renewed Motion for In Camera Treatment (the “Renewed Motion”) of certain trial exhibits, which I understand have been identified by Complaint Counsel and/or Respondents as potential exhibits at the trial for this matter.

3. I have reviewed each of the exhibits that are the subject of the Renewed Motion: CX0376, CX0393, CX0483, CX0548, CX0706, CX1195, PX0335, PX0335a01, PX0335a02, CX1019 and CX1404.

4. Exhibits CX0376, CX0393, CX0483, CX0548, CX0706, CX1195, PX0335, PX0335a01, and PX0335a02 contain POM’s highly confidential financial information, including financial statements, balance sheets, and operating costs. POM considers such internal financial

information confidential, and strives to protect it from public disclosure. If POM's competitors obtain such internal financial information, I believe it threatens POM with significant harm. To the best of my knowledge, Respondents have not disclosed this information to the public.

5. Exhibits CX1019 and CX1404 disclose detailed information about POM's production processes for pomegranate juice and for POMx. POM invests significant financial resources in developing its proprietary production processes. As its President, I am familiar with the fact that POM strives to keep this information confidential, and believe that the detailed disclosure of POM's production processes is likely to cause it significant competitive harm.

6. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Los Angeles on this 13th day of May, 2011.

A handwritten signature in blue ink, appearing to read 'Matthew Tupper', is written over a horizontal line. The signature is stylized and cursive.

Matthew Tupper

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: Jon Leibowitz, Chairman
 William E. Kovacic
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

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CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **RENEWED MOTION FOR IN CAMERA TREATMENT**, and that on this 13th day of May, 2011, I caused the foregoing to be served by FTC E-File and hand delivery on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-159
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-110
Washington, DC 20580

I hereby certify that this is a true and correct copy of the PUBLIC version of Respondents' **RENEWED MOTION FOR IN CAMERA TREATMENT**, and that on this 13th day of May, 2011, I caused the foregoing to be served by e-mail on the following:

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Bureau of Consumer Protection
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Dated: May 13, 2011