

**ORIGINAL**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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’ MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice, Respondents seek *in camera* treatment of various documents that have been designated as potential exhibits for trial.

**INTRODUCTION**

As the Court has noted, this is a complex case. Complaint Counsel has designated over 1300 exhibits, containing more than 28,000 pages, which raise a number of confidentiality issues.<sup>1</sup> Complaint Counsel, nevertheless, has indicated that it does not intend to use all of the exhibits that it designated, stating that it expects its list of actual exhibits to be “condensed” before trial.<sup>2</sup>

Given the complex nature of this case and the voluminous material designated by Complaint Counsel, in consideration of the Commission’s Rules and the circumstances of this

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<sup>1</sup> Respondents have designated 531 exhibits, which were not included on Complaint Counsel’s final proposed exhibit list.

<sup>2</sup> Due to an error in the way that Complaint Counsel’s vendor processed the exhibits designated, Respondents, to date, have not received a complete set of exhibits and reserve the right to modify their requests as they receive corrected exhibits.

case, and after consultation with Complaint Counsel, Respondents propose to proceed as follows. First, Respondents identify in this motion and the corresponding affidavit the categories of material for which Respondents seek *in camera* treatment and identify, to the best of their ability, the exhibits that correspond to each category. This procedure was followed, for example, in the recent Polypore litigation. *See, e.g., In the Matter of Polypore International, Inc.*, 2009 WL 4694933 (Order of Nov. 19, 2009). Second, the parties intend in the near future to meet and jointly review all the proposed exhibits in this matter in an attempt to clarify to the extent possible which of proposed exhibits will actually be used at trial and what objections, if any, either party wishes to assert with respect to particular exhibits. The Court's ruling on the present motion will guide the parties' marking and use of materials actually offered into evidence. We respectfully submit this course of action is the most efficient and will result in the least possible burden to the Court.

Because of the voluminous amount of material in this case, along with the logistical issues encountered to date as a result of the various technical difficulties in trying to electronically access Complaint Counsel's exhibits, Respondents reserve the right to seek confidential treatment of any information that the Court determines warrants such treatment, in the event that Respondents have inadvertently failed to include certain individual exhibits in this motion.

### **LEGAL STANDARD**

This Court may order material, or portions thereof, offered into evidence. . . to be placed *in camera* on a finding that their 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) (emphasis added). Meeting such a standard requires Respondent to make a showing that the information

concerned is “sufficiently secret and sufficiently material to (Respondent's) business that disclosure would result in serious competitive injury.” See *Bristol-Myers Co.*, 90 FTC 455 (1977), *General Foods Corp.*, 95 FTC 352 (1980). In making this determination, this Court often considers six factors to be 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.*

Information in the following categories<sup>3</sup> meets the Commission’s standard for *in camera* treatment and is sufficiently secret that the disclosure of the material would harm Respondents:

### **1. Ongoing Research and Study Information**

Among the material designated as exhibits are confidential materials pertaining to ongoing scientific research and studies regarding the Challenged Products. Respondents have endeavored to attach a list of materials at Exhibit A to Matthew Tupper’s Declaration. Respondents have spent significant resources in funding this research with the goal of having it published in recognized medical and scientific journals. There is also a significant public interest that is served by dissemination of research to the scientific community in such publications.<sup>4</sup>

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<sup>3</sup> As set forth in the meet and confer statement, Respondents’ Counsel conferred with Complaint Counsel regarding these categories of information, and Complaint Counsel took no position.

<sup>4</sup> Certain information in this category also significantly affects the interests of third parties, as reflected by motions that research institutions such as Johns Hopkins will be filing.

If made public before the studies are published or the research is completed, medical and scientific journals will not publish information that is already known to the public. Thus, publication of the ongoing research in this proceeding would jeopardize the ability of the research to be published, thereby significantly injuring Respondents and the public interest.

Moreover, some documents reflect **internal strategic discussions** regarding the nature and direction of future research contemplated by Respondents. This information is competitively sensitive and would cause substantial harm to respondents if made public. Respondents make diligent efforts to keep ongoing study research confidential, as described in the attached Declarations of Matthew Tupper and Robert Bryant, respectively. Accordingly, this category of information meets the Commission's standard for *in camera* treatment.

## **2. Confidential Financial Information**

This Court has long recognized the substantial injury that can result from disclosure of private financial information. *E.g.*, *In the Matter of SKF Indus., Inc.*, No. 9046C, 1977 FTC LEXIS 86, at \*3 (Oct. 4, 1977) (granting *in camera* treatment to exhibits containing detailed marketing and financial information); *see also* FTC Operating Manual 15.4.1.1 (listing “recent balance sheets or profit and loss statements, current appraised value of assets, and current contract bids and negotiations as warranting “close scrutiny” under section 6(f)”). This injury is especially severe with privately held corporations, such as Respondents Roll Global and POM Wonderful LLC, which have no public reporting obligations regarding financial data. The documents listed in Exhibit A to Mr. Tupper's Declaration reflect highly confidential financial information, including budgets and priorities, which, if made public, could be used by competitors to harm Respondents' business. The specific injuries that Respondents would suffer should this information be revealed is further discussed in the attached Declaration.

### **3. FDA Correspondence, Information Concerning an Investigational New Drug Application (IND) for the Challenged Products, and Related Confidential Information**

Among the exhibits designated are materials that were submitted to the United States Food and Drug Administration (“FDA”), including information involving an investigational new drug application (“IND”) that contain highly confidential information about the Challenged Products. This information, if made public, would cause substantial injury to Respondents, as discussed on the attached Declaration. Respondents understand that the FDA is also filing a motion seeking confidential treatment of certain designated exhibits. Respondents support the filing of that motion for the reasons set forth by FDA and also seek to protect additional exhibits where information provided to FDA or other highly sensitive regulator information is reflected.

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

Complaint Counsel has also designated as exhibits documents and information that contain highly sensitive information regarding the formulation, specification, packaging, and manufacturing processes for the Challenged Products. This information, if made public, would harm Respondents and cause significant competitive injury to their business, as described on the attached declaration. The sensitivity of this information is well recognized by the Commission. *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)); *General Foods*, 1980 WL 338997, \*4 (“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’)”).

### **5. Personal Information**

Complaint Counsel has also designated as exhibits information that contain personal information that is irrelevant to this case. Complaint Counsel has agreed that, to the extent that such information contains private identification information or health information, as identified in Rule 3.34 that they will consent to the *in camera* treatment of such information. In addition, other documents designated as exhibits contain similar personal information that is irrelevant to the trial and that the disclosure of which would result in an undue burden on personal privacy, such as salary information and sensitive personal communications. Respondents have endeavored to identify such documents in Exhibit A attached to Mr. Tupper's declaration and ask the Court to designate these documents *in camera*.

#### **6. Sensitive FTC Communications**

Complaint Counsel also designated as exhibits documents that reflect communications between the Respondents and the FTC during the investigatory phase of this matter. These documents are confidential and reflect communications aimed at settlement and negotiation between the parties. Not only do Respondents doubt that such documents constitute proper evidence in this matter (which they will raise in their objections), but Respondents also believe such information warrants *in camera* treatment. The disclosure of this information would cause serious injury to Respondents, as described on the attached affidavit. Moreover, disclosure would harm the public interest and discourage parties from voluntarily communicating with the FTC during investigations.

\* \* \*

Given the volume of documents designated by Complaint Counsel, and the logistical problems in obtaining these documents, Respondents reserve the right to designate additional documents, if necessary, after they meet with Complaint Counsel to determine the exhibits that

are likely to be introduced at trial. Moreover, Complaint Counsel designated numerous documents that are subject to protective orders in other litigation and are presumptively confidential. Respondents are endeavoring to determine which of these documents may have been disclosed publicly and will modify their request for *in camera* treatment accordingly.

## CONCLUSION

For the foregoing reasons, and because the information attached hereto is highly sensitive and would cause injury, Respondents motion should be granted and *in camera* treatment be provided for a period of five (5) years.<sup>5</sup>

Respectfully Submitted,

/s/ John D. Graubert

John D. Graubert  
Skye L. Perryman

COVINGTON & BURLING LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004-2401  
Telephone: 202.662.5938  
Facsimile: 202.778.5938  
E-mail: JGraubert@cov.com  
SPerryman@cov.com

Kristina M. Diaz  
Roll Global  
11444 West Olympic Boulevard, 10th Floor  
Los Angeles, CA 90064  
Telephone: 310.966.8775  
E-mail: kdiaz@roll.com

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<sup>5</sup> Should the Court decline to grant Respondents' motion, the contact of 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.

*Counsel for Respondents*

Bertram Fields  
Greenberg Glusker  
1900 Avenue of the Stars  
21st Floor  
Los Angeles, California 90067  
Telephone: 310.201.7454

*Counsel for Respondents Stewart Resnick and  
Lynda Rae Resnick*



**UNITED STATES OF AMERICA  
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POM WONDERFUL LLC and	)	
ROLL INTERNATIONAL CORP.,	)	
companies, and	)	Docket No. 9344
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LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually and	)	
as officers of the companies	)	

**[DRAFT PROPOSED ORDER] GRANTING MOTION FOR *IN CAMERA* TREATMENT  
OF CERTAIN TRIAL EXHIBITS**

On April 20, 2011, Respondents moved this Court for *in camera* treatment of certain exhibits. Having reviewed the Respondents' motion and considered the reasons for this motion, the motion is GRANTED.

ORDERED

Dated:

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Honorable D. Michael Chappell  
Administrative Law Judge

**STATEMENT OF PARTIES REGARDING MEET AND CONFER**

On Tuesday, April 19, 2011, Respondents' Counsel conferred with Complaint Counsel regarding the categories of information for which Respondents were seeking *in camera* treatment. Complaint Counsel indicated that they were taking no position on the categories.

Respectfully submitted.

/s/ Skye Perryman

John D. Graubert  
Skye L. Perryman

COVINGTON & BURLING LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004-2401  
Telephone: 202.662.5938  
Facsimile: 202.778.5938  
E-mail: JGraubert@cov.com  
SPerryman@cov.com

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

**CERTIFICATE OF SERVICE**

I hereby certify that this is a true and correct copy of Respondents' *MOTION FOR IN CAMERA TREATMENT*, and that on this 20th day of April, 2011, I caused the foregoing to be served by hand delivery and e-mail on the following:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
H-113  
Washington, DC 20580

Donald S. Clark  
The Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
H-135  
Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondents' *MOTION FOR IN CAMERA TREATMENT*, and that on this 20th day of April, 2011, I caused the foregoing to be served by e-mail on the following:

Mary Engle  
Associate Director for Advertising Practices  
Bureau of Consumer Protection  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20580

Mary Johnson, Senior Counsel  
Heather Hipsley  
Tawana Davis  
Federal Trade Commission  
Bureau of Consumer Protection  
601 New Jersey Avenue, NW  
Washington, DC 20580

*Counsel for Complainant*

/s/ Skye Perryman  
John D. Graubert  
Skye L. Perryman

COVINGTON & BURLING LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004-2401  
Telephone: 202.662.5938  
Facsimile: 202.778.5938  
E-mail: JGraubert@cov.com  
SPerryman@cov.com

Kristina M. Diaz  
Roll Global  
11444 West Olympic Boulevard, 10th Floor  
Los Angeles, CA 90064  
Telephone: 310.966.8775  
E-mail: kdiaz@roll.com

*Counsel for Respondents*

Bertram Fields  
Greenberg Glusker  
1900 Avenue of the Stars  
21st Floor  
Los Angeles, California 90067  
Telephone: 310.201.7454

*Counsel for Respondents Stewart Resnick and  
Lynda Rae Resnick*

Dated: April 20, 2011

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LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually and	)	
as officers of the companies.	)	

**DECLARATION OF MATTHEW TUPPER**

I, Matthew Tupper, declare under penalties of perjury that the following is true and correct:

1. I serve as President of POM Wonderful, LLC.
2. I am familiar with the documents of POM Wonderful LLC and the level of confidentiality associated with the subject matter therein.
3. I submit this declaration in support of Respondents' Motion for In Camera Treatment of certain trial exhibits, identified by Complaint Counsel and/or Respondents as potential exhibits at the trial for this matter.
4. I have endeavored to identify, in Exhibit A, attached hereto, the various documents for which Respondents seek in camera treatment, categorized by type of document.
5. As indicated in the Respondents' motion, the number of exhibits designated in this matter are voluminous and Exhibit A endeavors to identify all documents for which in camera treatment is sought and the period of time for which the treatment is sought.
6. The first category of documents pertains to Respondents' ongoing research and study information. The underlying data and the results of that research are highly

confidential. Public dissemination of that information can jeopardize the ability to get the research published at a later time. Respondents have invested thousands of dollars in this ongoing research, and spent considerable man hours and resources to develop this research. And internal strategies regarding our research program also have competitive implications and we believe that competitors should not have access to details regarding our ongoing research and planned future research. This research is highly confidential and Respondents have not disclosed the research to the public, to the best of my knowledge.

7. Should these documents be disclosed to the public it would cause substantial harm to Respondents. Again, disclosure of data from ongoing studies jeopardizes the ability to publish these studies and would cause the loss of our investment and resources devoted to these studies and our research program.

8. The second category of documents pertains to Respondents' confidential financial information. These include internal budgets, sales information, revenues, and transactional dealings between POM and Roll companies. This financial information is highly confidential. We are not a publicly traded company and do not disclose this information to the public.

9. For instance, if such information is publicly disclosed, POM's competitors would learn how much and in what manner money is spent on our advertising, marketing, production, and research activities. This could result in a competitive injury to POM.

10. The third category of documents pertains to Respondents' correspondence and communications with FDA, and information regarding a potential investigational new drug application ("IND"). These drug applications and their indications are highly confidential and



the FDA assures participants of confidentiality and we always understood those were protected. Respondents have not disclosed the information to the public.

11. Should these documents be disclosed to the public it would cause substantial harm to Respondents. Specifically, the disclosure of POM's IND application materials would allow a competitor to determine the composition of our POMx product and how it is developed and manufactured. We understand that it is standard practice to treat these IND applications as confidential information.

12. The fourth category of documents pertains to Respondents' product specifications, processes, and manufacturing information. This manufacturing or specification information is highly confidential and Respondents have not disclosed the information to the public, to the best of my knowledge.

13. Should these documents be disclosed to the public it would cause substantial harm to Respondents. Obviously, our manufacturing process, particularly with respect to POMx products, which took years to develop, is highly confidential and would subject to POM considerable competitive harm.

14. The fifth category of documents identified in Exhibit A consists of documents that contain sensitive personal information, such as addresses, medical conditions of individuals, disclosures of individual participants and their medical conditions in research studies.


15. The sixth category of documents identified in Exhibit A consists of sensitive communications and correspondence between Respondents and the Federal Trade Commission. We currently have sealing orders in place in DC Superior Court regarding certain aspects of the underlying investigation that are also disclosed in communications with the FTC. We also



understood that some of our communications with the FTC were confidential settlement communications.

16. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in \_\_\_\_\_ on this \_\_\_\_ day of April, 2011.

  
Matthew Tupper

**EXHIBIT A**

**[REDACTED]**

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to Roll International companies, and	)	Docket No. 9344
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LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually and	)	
as officers of the companies.	)	

**DECLARATION OF ROBERT W. BRYANT**

I, Robert W. Bryant, declare under penalties of perjury that the following is true and correct:

1. I serve as Chief Financial Officer of Roll Global LLC. From June 2009 to December 31, 2010, I was the Chief Financial Officer of Roll International Corporation.

2. I am familiar with the level of confidentiality associated with the financial information of Roll Global LLC and Roll International Corporation.

3. I submit this declaration in support of Respondents' Motion for In Camera Treatment of certain trial exhibits, identified by Complaint Counsel and/or Respondents as potential exhibits at the trial for this matter.

4. A number of agents acting at my direction assisted me in reviewing the trial exhibits appearing on Complaint Counsel's and Respondents' respective lists. These reviews were conducted for the purposes of determining which proposed trial exhibits contain confidential information.

5. The first category of documents that should remain confidential pertains to Respondents' confidential financial information. These documents, include, among other things,



the Notification and Report Form for Certain Mergers and Acquisitions that was filed with Federal Trade Commission's Bureau of Competition as Premerger Notification involving the merger of Justin Vineyards and Winery Inc. and Roll Merger Sub LLC. This document contains highly confidential financial information, including financial statements, balance sheets, and cash flows of various private companies, including companies that have nothing to do with the above-referenced matter. To the best of my knowledge, Respondents have not disclosed the information to the public.

6. For the same reasons, my deposition testimony about Respondents' confidential financial information should remain confidential. For example, I was asked at my deposition about financial information provided in the Premerger Notification. This information is confidential and should remain confidential.

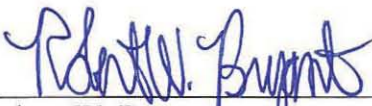
7. Lastly, any deposition testimony concerning Respondents' business practices is confidential and proprietary. For example, at my deposition, there were numerous questions about accounting practices, tax preparation, and services provided by Roll International to its affiliates. To the best of my knowledge, this information is not known to the public.

8. Should these documents and information be disclosed to the public it would cause substantial harm to Respondents. Roll International Corporation as well as its successor in interest, Roll Global LLC, are private companies that have carefully guarded their financial information and business practices. Such information should not be made public, including to competitors who may have an interest in learning the financial position, priorities, and business practices of Respondents.

9. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Executed in Bakersfield, CA on this 20 day of April, 2011.

  
\_\_\_\_\_  
Robert W. Bryant