

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION



_____)
In the Matter of)
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)
POM WONDERFUL LLC and)
ROLL INTERNATIONAL CORP.,)
companies, and) Docket No. 9344
)
)
STEWART A. RESNICK,) Public Record
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

COMPLAINT COUNSEL’S MOTION AND MEMORANDUM
TO ENFORCE SUBPOENAS AGAINST
THE RESNICK FAMILY FOUNDATION, INC. AND
THE STEWART AND LYNDA RESNICK REVOCABLE TRUST

In accordance with Commission Rule of Practice 3.34, Complaint Counsel respectfully files this Motion to Enforce Subpoenas issued to third parties The Resnick Family Foundation, Inc. (the “Foundation”) and the Stewart and Lynda Resnick Revocable Trust (the “Trust”). Complaint Counsel served these subpoenas on November 24, 2010, and the subpoena recipients failed to raise objections in a timely manner pursuant to 3.34(c). In addition, although the third parties are purportedly producing documents, these documents are commingled with thousands of pages of documents produced by the Corporate Respondents and cannot be specifically identified as being responsive to the Foundation and Trust subpoenas.

Therefore, Complaint Counsel respectfully requests that the objections of the Foundation and Trust be deemed waived and that all responsive documents be produced. Complaint Counsel further requests that the Foundation and Trust be ordered to specifically distinguish documents they produce from documents produced by the Corporate Respondents.

I. The Foundation and Trust Failed to Timely Object to the Subpoenas, and Therefore Any Objections Have Been Waived.

Complaint Counsel issued subpoenas duces tecum pursuant to Commission Rule of Practice 3.34 to the Foundation and the Trust on November 24, 2010 with a return date of December 20, 2010. The Foundation and the Trust issued written responses, but did not provide documents, on December 27, 2010.¹ The responses raised various objections, and stated that for most of the requests, “Subject to and without waiving these objections, Non-party responds that it will produce non-privileged documents that are responsive to this Request.” Since then, documents have been produced on a rolling basis in response to Complaint Counsel’s Rule 3.37 requests for production of documents to the Corporate Respondents. Counsel for Respondents, who also represent the Foundation and the Trust, have stated that these documents, which are sequentially bates-labeled with the identifier “RESP_____” also contain responsive documents from the Foundation and the Trust, but have not specified which documents are from the third parties.

Per the Commission’s Rules of Practice, any request to limit or object to the subpoena should have been filed by December 6, 2010, ten (10) days after service. “Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by § 3.22(g).” 16 C.F.R. § 3.34(c). The Foundation and the Trust failed to do so; therefore their objections have been waived. Complaint Counsel requests a ruling that the

¹ The responses of the Foundation and the Trust are attached hereto as Exhibits 1-2.

Foundation's and Trust's objections to the subpoenas have been waived due to untimeliness, and that all non-privileged documents be produced within five (5) days notwithstanding any objections raised in their responses.² If all documents have been produced, then an appropriate individual at the Foundation and the Trust should be ordered to certify full compliance with the subpoenas and list the bates numbers of documents responsive to each subpoena specification that have been commingled with Corporate Respondents' document production.

II. The Foundation and the Trust Have Failed to Identify Which, If Any, Documents Are Responsive to the Subpoenas

The Foundation and Trust have stated that they will produce non-privileged documents, but have not specified when such production will be completed. Although documents responsive to the FTC's subpoenas are purportedly being produced among other documents responsive to the FTC's document requests to Corporate Respondents,³ despite repeated requests, counsel has not specified which of these documents are responsive to the third-party subpoenas to the Foundation and Trust, and which are from Corporate Respondents' files. The inability to identify party vs. non-party documents creates confusion as to the origin of the documents and whether the subpoenas have been fully complied with; furthermore, it may cause difficulties later when attempting to use the documents during depositions or the hearing. The subpoena requests sought information primarily on contracts, payments, and communications by these two

² Complaint Counsel is not seeking to force a waiver with respect to privilege; however, any documents withheld on the basis of a valid privilege should be described in an appropriately detailed privilege log, consistent with Rule 3.38A(a).

³ To date, Complaint Counsel has received approximately 16,000 pages of documents bates-labeled RESP ____.

entities to the various researchers and organizations that Respondents rely on for substantiation of their claims.

Complaint Counsel requests an order that the Foundation and the Trust specify which documents are specifically responsive to the subpoenas, for all documents already produced and for any documents going forward. This may be done by marking subpoena responses with unique bates identifiers, or, by specifying by bates range which documents labeled “RESP ___” are from the Foundation and the Trust.

III. Request for Relief

For the reasons set forth above, Complaint Counsel respectfully requests that the Court issue the attached proposed order.

Dated: January 10, 2011

Respectfully Submitted,

/s/ Mary L. Johnson

Mary L. Johnson
Federal Trade Commission
Bureau of Consumer Protection
600 Pennsylvania Avenue, NW
Room NJ-3212
Washington, DC 20580
Telephone: (202) 326-3115
Facsimile: (202) 326-3259
Email: mjohnson1@ftc.gov

EXHIBIT 1

RESNICK FAMILY FOUNDATION, INC.'S RESPONSE TO
COMPLAINT COUNSEL'S SUBPOENA DUCES TECUM

**DOCUMENT MARKED CONFIDENTIAL
AND FILED PURSUANT TO COURT'S PROTECTIVE ORDER**

EXHIBIT 2

STEWART AND LYNDA RESNICK REVOCABLE TRUST'S RESPONSE TO
COMPLAINT COUNSEL'S SUBPOENA DUCES TECUM

**DOCUMENT MARKED CONFIDENTIAL
AND FILED PURSUANT TO COURT'S PROTECTIVE ORDER**

STATEMENT OF COMPLAINT COUNSEL
REGARDING MEET AND CONFER

In accordance with Paragraph 4 of the Court's Scheduling Order, the undersigned counsel certifies that Complaint Counsel conferred with Respondents in an effort in good faith to resolve by agreement the issue raised by *Complaint Counsel's Motion to Enforce Subpoenas Against the Resnick Family Foundation, Inc. and the Stewart and Lynda Resnick Revocable Trust*, dated January 10, 2011. The parties' discussions occurred as follows:

- Email correspondence and telephone conference on December 21, 2010: At 9:09 a.m. (Eastern), Complaint Counsel Mary Johnson sent an email to John Graubert, counsel for Respondents as well as for the Foundation and Trust, to notify him that Complaint Counsel had not received the subpoena responses of the Trust and Foundation, which were due on December 20, 2010, and to ask for a status update. Also copied on the email were Respondents' counsel Kristina Diaz, Skye Perryman, and Bertram Fields, and Complaint Counsel Heather Hipsley and Elizabeth Nach. At 9:21 a.m. (Eastern), Mr. Graubert responded that he would check on the status of the subpoenas. At 4:00 p.m. (Eastern), the parties held a conference call to discuss discovery matters, including the subpoenas. Mary Johnson, Heather Hipsley, Elizabeth Nach, and Serena Viswanathan, for Complaint Counsel, and John Graubert and Kristina Diaz, for Respondents, participated. At that time, Complaint Counsel noted that any objections to the subpoenas should have been filed ten days after service, and thus were untimely.
- Email correspondence on December 27, 2010: On December 27, 2010 at 1:54 p.m. (Eastern), Complaint Counsel Mary Johnson sent an email to Kristina Diaz asking whether documents responsive to the subpoenas were included in a recent partial

document production bates labeled “RESP_____” submitted by the Corporate Respondents. Also copied on the email were Respondents’ counsel John Graubert, Skye Perryman, Bertram Fields, and two other attorneys from Roll Law Group, and Complaint Counsel Heather Hipsley, Elizabeth Nach, and Serena Viswanathan. At 4:03 p.m. (Eastern), Ms. Diaz responded by email that the documents included subpoena responses. Ms. Johnson requested in an email of 4:20 p.m. (Eastern) that separate bates identifiers be used for the Foundation’s and the Trust’s documents. Ms. Diaz stated in an email to Ms. Johnson at 5:31 p.m. (Eastern) that the Foundation’s and the Trust’s documents would continue to use the same bates numbers. Complaint Counsel Heather Hipsley sent an email to Ms. Diaz at 5:42 p.m. (Eastern) requesting identification by bates number or otherwise which particular documents were being provided by the Foundation and the Trust.

- Email correspondence on December 28, 2010: At 3:25 p.m. (Eastern), Ms. Johnson sent an email to Ms. Diaz to notify her that Complaint Counsel received a second installment of documents from Corporate Respondents, which were identified as being responsive also to the subpoenas to the Foundation and Trust. Ms. Johnson requested that the responses to the third-party subpoenas be separated from those submitted by Corporate Respondents. Also copied on the email were Respondents’ counsel Mr. Graubert, Ms. Perryman, Mr. Fields, and two other attorneys from Roll Law Group, and Complaint Counsel Ms. Hipsley, Ms. Nach, and Ms. Viswanathan. Ms. Diaz sent an email to Ms. Johnson at 3:39 p.m. (Eastern) declining to parse out documents produced by the different entities. Ms. Johnson sent an email to Ms. Diaz at 7:56 p.m. (Eastern) again requesting separate identification of the Foundation’s and the Trust’s documents.

- In-person meeting on December 29, 2010: The parties held a meeting on December 29, 2010, at 1:30 p.m. (Eastern) to discuss pending discovery matters. Mary Johnson, Heather Hipsley, and Serena Viswanathan, for Complaint Counsel, and John Graubert, Christine Son, and Alicia Mew, for Respondents, participated (Ms. Son and Ms. Mew by telephone). At that time, Complaint Counsel reiterated its position that the time for objections to the subpoenas had expired 10 days after service and requesting that all responsive documents must be produced immediately.
- January 2011 correspondence: On January 5, 2011, Complaint Counsel Mary Johnson sent a letter by email to Respondents' counsel John Graubert, Skye Perryman, Kristina Diaz, and Bertram Fields on several discovery matters, including the Trust and Foundation subpoena responses. The letter renewed Complaint Counsel's request that the subpoena documents be specifically identified.

The parties have been unable to reach an agreement on the issue raised in the attached motion.

Respectfully Submitted,

s/ Mary L. Johnson
Mary L. Johnson
Complaint Counsel

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

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In the Matter of)	
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STEWART A. RESNICK,)	Public Document
LYNDA RAE RESNICK, and)	
MATTHEW TUPPER, individually and)	
as officers of the companies.)	
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**[Proposed] ORDER GRANTING COMPLAINT COUNSEL’S
MOTION TO ENFORCE SUBPOENAS AGAINST
THE RESNICK FAMILY FOUNDATION, INC. AND
THE STEWART AND LYNDA RESNICK REVOCABLE TRUST**

On January 10, 2011, Complaint Counsel filed a Motion to Enforce Subpoenas issued to third parties The Resnick Family Foundation, Inc. (the “Foundation”) and the Stewart and Lynda Resnick Revocable Trust (the “Trust”).

It is HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED. The Foundation’s and the Trust’s objections to the subpoenas, other than privilege, are untimely and therefore WAIVED. It is HEREBY ORDERED that all non-privileged documents responsive to the subpoenas shall be produced within five (5) days; and any privileged documents withheld should be set forth in an appropriate privilege log and provided to Complaint Counsel.

It is FURTHER ORDERED that, if all responsive documents have already been produced, the Foundation and the Trust shall, within five (5) days, identify by bates range or other means, which documents that have already been produced are specifically responsive to

the subpoenas. Any documents produced by the Foundation and the Trust after this date shall be similarly specifically identified within five (5) days. It is FURTHER ORDERED that, the Foundation and the Trust shall certify under oath full compliance with the subpoenas within five (5) days.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I certify that on January 10, 2011, I caused to be filed and served *Complaint Counsel's Motion and Memorandum to Enforce the Subpoenas Against the Resnick Family Foundation, Inc. and the Stewart and Lynda Resnick Revocable Trust* upon the following as set forth below:

One electronic copy via the FTC E-Filing System 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.
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington DC 20004-2401
Email: Jgraubert@cov.com

Kristina Diaz, Esq.
Roll Law Group
kdiaz@roll.com

Bertram Fields, Esq.
Greenberg Glusker
bfields@greenbergglusker.com

Attorneys for Respondents

Date: January 10, 2011

/s/ Mary L. Johnson
Mary L. Johnson
Complaint Counsel