

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION



_____))
In the Matter of))
))
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 REPLY BRIEF TO THE
STEWART AND LYNDA RESNICK REVOCABLE TRUST’S AND
THE RESNICK FAMILY FOUNDATION, INC.’S OPPOSITION TO
COMPLAINT COUNSEL’S MOTION TO ENFORCE SUBPOENAS**

In accordance with Commission Rule of Practice 3.22(c), Complaint Counsel respectfully submits its Reply to the opposition brief filed by The Resnick Family Foundation, Inc. (the “Foundation”) and the Stewart and Lynda Resnick Revocable Trust (the “Trust”) (together “the Third Parties”). Complaint Counsel served these subpoenas on November 24, 2010, with a return date of December 20, 2010. The Third Parties failed to raise objections in a timely manner pursuant to 3.34(c), and on December 27, 2010 responded to the subpoenas with various objections but did not produce documents. On January 10, 2011, Complaint Counsel filed a motion to enforce the subpoenas (hereinafter “Motion to Enforce the Foundation and Trust Subpoenas”). Thereafter, the Third Parties submitted amended responses to their December 27 submission. However, responses to three subpoena specifications are outstanding. Therefore, Complaint Counsel respectfully requests that the Court order the Third Parties to produce all

responsive documents to the remaining three subpoena requests, and to specifically distinguish documents they produce from documents produced by the Corporate Respondents.

I. The Foundation and Trust Subpoena Responses Remain Incomplete

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. 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.

On January 10, 2011, Complaint Counsel filed a Motion to Enforce the Foundation and Trust Subpoenas. On January 14, 2011, the Foundation and Trust responded with three sets of bates numbers labeled with the identifier “RESP____” that they stated were responsive to the subpoenas (*see* Third Parties’ Opp’n, Exh. A). On January 18, 2011, Complaint Counsel notified counsel for the Third Parties that the January 14 submission lacked sufficient detail to determine whether the subpoena responses were complete, and requested that the Third Parties submit separate detailed responses to each subpoena (*see* Exh. 1, attached). Later that day, the

Foundation and Trust filed an opposition to Complaint Counsel's motion to enforce the subpoenas.

On January 20, 2011, the Foundation and Trust submitted amended subpoena responses (*see* Exh. 1). Although the amended responses addressed several of the deficiencies previously identified by Complaint Counsel, the amended responses did not adequately address Subpoena Specification No. 5 to the Foundation and Subpoena Specification Nos. 6 and 7 to the Trust. On January 21, 2011, Complaint Counsel notified the Third Parties of these deficiencies, but have not yet received responsive documents (*see* Exh. 1).

Specification No. 5 to the Foundation and Specification No. 7 to the Trust request communications between the Third Parties and outside consultants and researchers. The communications are highly relevant to the issues of claim substantiation and common enterprise. Specification No. 6 to the Trust requests a summary of dollar amounts that the Trust received annually from Respondent Roll International Corporation. The summary is relevant to the Complaint allegation of common enterprise. Responsive documents to all three subpoena specifications are needed for a Rule 3.33(c)(1) deposition of the Corporate Respondents scheduled for February 3, 2011.

Complaint Counsel requests a ruling that the Foundation's and Trust's objections to the subpoenas have been waived due to untimeliness (*see* Complaint Counsel's Motion to Enforce Subpoenas, at 2-3) and that all remaining non-privileged documents be produced within three (3) days notwithstanding any objections raised in their responses. Complaint Counsel also requests that the Court order an appropriate individual(s) at the Foundation and the Trust to certify full compliance with the subpoenas.

II. Request for Relief

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

Dated: January 26, 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

EMAIL CORRESPONDENCE BETWEEN COMPLAINT COUNSEL AND
COUNSEL FOR FOUNDATION AND TRUST DATED JAN. 14-26, 2011,
INCLUDING COPIES OF RESNICK FAMILY FOUNDATION, INC.'S AND
STEWART AND LYNDA RESNICK REVOCABLE TRUST'S
AMENDED RESPONSES TO COMPLAINT COUNSEL'S SUBPOENAS DUCES TECUM

**AMENDED RESPONSES 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, and *Complaint Counsel's Reply Brief to the Stewart and Lynda Resnick Revocable Trust's and the Resnick Family Foundation, Inc.'s Opposition to Complaint Counsel's Motion to Enforce Subpoenas*, dated January 26, 2011. The parties' discussions after January 5, 2011 occurred as follows (*see Motion to Enforce Foundation and Trust Subpoenas for meet and confer communications on or before January 5, 2011*):

- Email correspondence on January 14, 2011: At 7:51 p.m. (Eastern) on January 14, 2011, Johnny Traboulsi, counsel for Respondents as well as for the Foundation and Trust, sent an email to Mary Johnson, Complaint Counsel, to identify certain bates numbers produced by Respondents that also were responsive to Complaint Counsel's subpoenas to the Foundation and the Trust. Mr. Traboulsi requested that Complaint Counsel withdraw its Motion to Enforce the Foundation and Trust Subpoenas. Copied on the email were Respondents' counsel Kristina Diaz, Skye Perryman, and John Graubert.
- Email correspondence and conference call on January 18, 2011: At 1:11 p.m. (Eastern) on January 18, 2011, Mr. Traboulsi sent a follow up email to Ms. Johnson on the same topic, copying Ms. Diaz, Ms. Perryman, and Mr. Graubert for Respondents and Heather Hipsley, Complaint Counsel. At 1:26 p.m. (Eastern) on January 18, 2011, Ms. Johnson responded to Mr. Traboulsi, copying the same individuals, that the bates ranges provided

were inadequate to determine whether the subpoenas had been responded to in full, and in turn were insufficient for Complaint Counsel to withdraw its motion. At approximately 3:00 p.m. (Eastern), Ms. Johnson and Mr. Traboulsi spoke by telephone to discuss the outstanding subpoena responses. Ms. Johnson reiterated the problems with the January 14 response and stated that Complaint Counsel would be in a position to determine whether to withdraw its motion upon receiving more detailed responses to each of the subpoenas. Mr. Traboulsi indicated that the Foundation and Trust would file amended responses to the subpoenas and in the interim would file an opposition to Complaint Counsel's Motion to Enforce the Foundation and Trust Subpoenas.

- Email correspondence on January 20-21, 2011: At 1:58 p.m. (Eastern) on January 20, 2011, Mr. Traboulsi sent an email to Ms. Johnson attaching amended subpoena responses on behalf of the Foundation and Trust, and requesting that Complaint Counsel withdraw its motion to enforce the subpoenas. Copied on the email were Respondents' counsel Mr. Graubert, Ms. Perryman, Ms. Diaz, and Bert Fields, and Complaint Counsel Ms. Hipsley and Tawana Davis. At 1:08 p.m. (Eastern) on January 21, 2011, Ms. Johnson responded to Mr. Traboulsi that responses to three subpoena specifications were outstanding – Foundation Specification No. 5 and Trust Specifications Nos. 6 and 7. Ms. Johnson stated that Complaint Counsel would determine whether to withdraw its motion upon receiving answers to the remaining three specifications. Copied on Ms. Johnson's email were Mr. Graubert, Ms. Perryman, Ms. Diaz, and Mr. Fields for Respondents, and Ms. Hipsley, Ms. Davis, and Serena Viswanathan for Complaint Counsel.
- Telephone conversation and email correspondence on January 26, 2011: Elizabeth Nach for Complaint Counsel and Mr. Traboulsi conferred regarding the status of the

Foundation's and Trust's outstanding subpoena responses, specifically the responses to Specification No. 5 to the Foundation and Specification Nos. 6 and 7 to the Trust. Mr. Traboulsi could not provide a date(s) certain as to when documents responsive to the specifications would be produced. At 1:37 p.m. (Eastern), Ms. Johnson wrote to Mr. Traboulsi confirming that Complaint Counsel would file a reply brief as required by the Court, and that the parties had not resolved the outstanding issues regarding the remaining three specifications to the subpoenas.

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**

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

**[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”). To date, the Foundation and Trust have provided only partial subpoena responses. Specifically, the Foundation has not responded to Specification No. 5, and the Trust has not responded to Specification Nos. 6 and 7.

It is HEREBY ORDERED that Complaint Counsel’s Motion to Enforce Subpoenas is GRANTED. The Foundation’s and the Trust’s objections to the subpoenas, other than on the basis of privilege, are untimely and therefore WAIVED. It is FURTHER ORDERED that the Foundation and the Trust shall produce all non-privileged documents responsive to the subpoenas within three (3) days and provide Complaint Counsel with an appropriate privilege

log setting forth any documents withheld on the basis of privilege. It is FURTHER ORDERED that the Foundation and the Trust shall certify under oath full compliance with the subpoenas within three (3) days.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I certify that on January 26, 2011, I caused to be filed and served *Complaint Counsel's Reply to the Stewart and Lynda Resnick Revocable Trust's and Resnick Family Foundation, Inc.'s Opposition to Complaint Counsel's Motion to Enforce Subpoenas* 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 26, 2011

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