ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

RESPONDENT MATTHEW TUPPER'S POST-TRIAL BRIEF

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I. MATTHEW TUPPER IS NOT INDIVIDUALLY LIABLE AND NO ORDER SHOULD ISSUE AGAINST HIM

A. Introduction

Matthew Tupper never belonged in this case. Though rotely included by Complaint Counsel because he was the President of POM, POM is not a public company where the President is typically in charge. To the contrary, and as made clear by testimony and documents provided during the proceeding, POM is part of a privately held conglomeration of companies, wherein ultimate decision making authority when it comes to advertising lies not with Mr. Tupper, but with the owners of POM, Mr. and Mrs. Resnick. Mr. Tupper, though admittedly a high-level and loyal employee of POM until his retirement last year, was and has always been a facilitator of the will of the Resnicks when it comes to POM. But the direction and ultimate control of marketing and advertising was never within his purview.

Testimony and documentary evidence provided during the proceeding has punctuated this fact and no liability should attach to Mr. Tupper and no order should issue against him. As a preliminary matter, liability cannot attach to Mr. Tupper for all the reasons that POM should not be found liable. (*See* Respondents' Findings of Fact filed concurrently herewith on behalf of all Respondents).

Additionally, there certainly exists no basis for finding that Mr. Tupper knew or should have known of any deceptive conduct, or that the product claims were either deceptive or misleading, given his very reasonable belief that all of POM's advertising claims were well supported by substantial scientific research. (Tupper, Tr. 3015).

B. Individual Liability Under The FTC Act Requires The Ability To Control The Offending Conduct Or Practices

Individual liability is secondary and derivative of corporate liability and can only be imposed if the corporation is first found to have disseminated unfair, deceptive or otherwise misleading advertisements. *F.T.C. v. Bay Area Business Council, Inc.*, 423 F. 3d 627 (7th Cir. 2005). Assuming this threshold is met, individual liability then requires that the individual (1) directly participated in the challenged advertising or (2) had the ability to control it. *See Rentacolor, Inc.*, 103 F.T.C. 400, 438 (1984); *Thiret v. F.T.C.*, 512 F.2d 176 (10th Cir. 1975).

Although the above test is outlined as an either/or test, in practice, liability focuses almost exclusively on the ability to control or limit the offending advertising and not whether the individual actually reviewed or edited or approved the advertising at issue. *See F.T.C. v. Direct Marketing Concepts, Inc. et al.*, 624 F.3d 1 (1st Cir. 2010) (finding 50% owner and officer liable because he had the ability to stop the challenged ads); *F.T.C. v. Freecom Comm., Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005) (finding principal shareholder and decision maker at closely held corporation liable because he had the authority to control the deceptive acts or practices); *In the Matter of Auslander Decorator Furniture, Inc., Trading As A.D.F., Etc. et al.*, 1974 WL 175916 (F.T.C.) (1974) (finding individual respondents employees who participated in the dissemination of false and misleading advertisements lacked sufficient control or responsibility for liability).

In fact, Respondent is unaware of any case or decision where individual liability was imposed on an officer of a company for participation alone. The ability to control the offending conduct or advertising (*i.e.*, being the ultimate decision maker) is always the key inquiry. *See In the Matter of Universal Electronics Corp., et al.*, 1971 WL 128754 (F.T.C.) (1971) (finding liability against President and sole shareholder as he alone formulated, directed and controlled the acts and practices at issue and without his inclusion there is a possibility the FTC order would be evaded); *F.T.C. v. Swish Marketing et al.*, 2010 WL 653486 (N.D. Cal. Feb. 22, 2010) (finding against liability for CEO because FTC failed to plead sufficient facts showing he had requisite control or ability to control challenged acts); *F.T.C. v. Neovi, Inc. et al., 5*98 F.Supp.2d 1104 (S.D. Cal. 2008) (finding President and Vice President of company liable under the FTC Act because both men had ability to control the offending practices, participated directly, managed corporate affairs.); *F.T.C. v. Transnet Wireless Corporation*, 506 F. Supp. 2d 1247, 1261-1265 (S.D. Fla. 2007) (finding liability against individual officers and directors of two companies because they exercised direct control of the companies and had knowledge of the offending conduct.); *F.T.C. v. Verity International, Ltd.*, 335 F. Supp. 2d 479, 499 (S.D.N.Y. 2004) (finding liability against individual shareholder involved in an internet website business that had joint control of the acts and practices of the company); *F.T.C. v. Publishing Clearing House*, 104 F. 3d 1168, 1171 (9th Cir. 1997) (finding individual liability despite claims that individual lacked the requisite knowledge regarding the alleged deceptive practices because he was the President of the company, was ultimately in charge and had the ability to stop the offending practices); *F.T.C. v.*

Amy Travel Service, Inc., 875 F. 2d 564, 574-575 (7th Cir. 1997) (finding individual liability of principal shareholders and officers who were not only aware of the offending conduct and practices but had the ability to control it); *F.T.C. v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 998-1002 (N.D. Ind. 2000) (finding individual liability of employee despite not being shareholder or officer because individual had ability to control the offending conduct or practices); *F.T.C. v. J.K. Publications*, 99 F. Supp. 2d 1176, 1181-1185, (C.D. Cal. 2000) (finding husband and wife who operated business liable for violations in operations of adult content website because they were in control of the company and were the final decision makers.).

This standard was developed under the backdrop of individual liability as originally envisioned by the FTC Act: corporate officers may be held individually liable for violations of the FTC Act but only if the officer "owned, dominated and managed" the company and if naming the officer individually is necessary for the order to be fully effective in preventing the deceptive practices which the Commission had found to exist. *F.T.C. v. Standard Education Society,* 302 U.S. 112 (1937) (officers/managers and sole shareholders of closely held corporation that was dominated and managed by these individuals were held personally liable and included in cease and desist order because it was anticipated from past conduct that these persons would simply try to evade the FTC's order by setting up another company). As noted, individual liability was only to be used to stop owners of closely held corporations from dissolving the offending corporation and beginning a new one to avoid a cease and desist order of the FTC. *Id.* at 119. This later evolved into allowing non-owner officers to be found liable if they met the above

described "ability to control" tests or otherwise "formulated, directed or controlled any of the acts and practices" at issue. *In re Griffin Systems, Inc. et al.*, 117 F.T.C. 515, 563-564 (1994) (finding individual who was vice president, treasurer and director liable for distributing solicitation in violation of the FTC Act because he was in charge of the company.). Here, and as demonstrated during the proceedings, Mr. Tupper never had the control required for liability to attach.

C. Mr. Tupper Never Exercised The Requisite Control Over POM For Individual Liability To Attach

Mr. Tupper neither owns, dominates, nor ultimately controls POM Wonderful and never has. Mr. Tupper has no ownership interest or equity shares in POM Wonderful (and never has) and has no expectation of ever having such interest. (CX1353 (Tupper, Dep. at 14); Tupper, Tr. 2973). He retired from POM Wonderful at the end of the 2011 pomegranate harvest last year and informed the Resnicks of his intention to retire in June 2011. (Tupper, Tr. 2973). He will not be working for Roll Global or any other company owned by the Resnicks after his retirement from POM Wonderful. (Tupper, Tr. 2974). In other words, Mr. Tupper's involvement with POM Wonderful or any other Resnick related entity is over.

Prior to his retirement, Mr. Tupper reported directly to Stewart Resnick and had a "dotted line" to Lynda Resnick. (CX1375 (L. Resnick, Tropicana Dep. at 22-24): CX1367 (S. Resnick, Welch Dep. at 53; CX1364 (Tupper, Coke Dep. at 27, 107); Tupper, Tr. 891). Further, in Mr. Resnick's own words, he alone is the "ultimate sole decision-maker on everything", not Mr. Tupper, and has final authority as to whether or

not to run an advertisement. (CX1367 (S. Resnick, Welch Dep. at 55); S. Resnick, Tr. 1870). Mr. Resnick made clear Mr. Tupper had no more authority at POM Wonderful than was delegated to him by Mr. Resnick. (S. Resnick, Tr. 1870).

Additionally, although Mr. Tupper managed the day-to-day operations on behalf of the Resnicks and was involved in several aspects of POM's operations, science, and marketing, none were under his ultimate control and certainly not enough for liability to attach. (CX1363 (S. Resnick, Coke Dep. at 86); CX1348 (Perdigao, Dep. at 50, 60-61); CX1359 (L. Resnick, Dep. at 36); CX1362 (L. Resnick, Coke Dep. at 103-104); Tupper, Tr. 2974).

Mr. Tupper did not, independent of the Resnicks, develop the marketing direction or decide how the POM Products would be marketed. (Tupper, Tr. 2974-2975; (CX1368 (L. Resnick Welch's Dep. at 9); L. Resnick, Tr. 93; PX0327 (Glovsky Dep. at 36). Instead, Mr. Tupper only implemented the direction once decided upon by the Resnicks. (Tupper, Tr. 2974-75). Lynda Resnick, for example, had the final authority over advertising campaigns. (Perdigao, Tr. 603-604). Stewart Resnick had the ultimate ability to decide whether any advertisements would be run. (S. Resnick, Tr. 1870; Tupper, Tr. 2975). If there were ever disputes or issues to resolve regarding advertising decisions, the final authority rested with either Lynda or Stewart Resnick, and not Mr. Tupper. (CX1365 (Perdigao, Coke Dep. at 36-37)).

Finally, although Mr. Tupper was responsible for administering POM marketing and scientific research budgets, he did not have the authority to set those budgets. Mr.

Resnick set and still sets the budgets for POM Wonderful. (Tupper, Tr. 912-13; S. Resnick 1631).

In sum, although Mr. Tupper regularly attended the weekly POM meetings and was aware of most of the Challenged Advertisements and sometimes participated in the legal review process, he was not the ultimate decision maker when it came to the marketing and advertising part of POM. Unlike the typical President of a public company, his authority was entirely derivative of and subject to the private owners above him (the Resnicks)—he is not the typical ultimate decision maker officer subject to liability in FTC cases. (S. Resnick, Tr. 1870); s*ee e.g. F.T.C. v. Publishing Clearing House*, 104 F. 3d 1168, 1171 (9th Cir. 1997) (finding individual liability for President of the company who was ultimately in charge and had the ability to stop the offending practices); *F.T.C. v. Neovi, Inc. et al.,* 598 F.Supp.2d 1104 (S.D. Cal. 2008) (finding President and Vice President of company liable under the FTC Act because both men had ability to control the offending practices, participated directly, managed corporate affairs.). Mr. Tupper's inclusion in any injunctive or related order, therefore, is not necessary to effectuate the cessation of the alleged offending conduct. *F.T.C. v. Standard Education Society,* 302 U.S. 112, 119 (1937) (officers/managers and sole shareholders of closely held corporation that dominated and managed the company were included in cease and desist order to ensure compliance with the order as these persons were ultimately in control). Additionally, Mr. Tupper's inclusion in any such order is unnecessary given that he has retired from POM and is not planning to return. (Tupper, Tr. 2973-74).

D. Any Order Against Mr. Tupper Is Unnecessary And Unreasonable

It would be facially unreasonable to issue injunctive relief against Mr. Tupper in addition to the other Respondents. "Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, ***subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices.***" *In re Daniel Chapter One, No. 9329, Initial Decision,* 2009 WL 2584873 at *101 (F.T.C. Aug. 5, 2009) (emphasis added), *pet. review denied,* 405 Fed.Appx. 505 (D.C. Cir. Dec. 10, 2010) (citing *FTC v. Colgate-Palmolive Co.,* 327 U.S. 374, 394-95 (1965); *FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612-13 (1946)). There must "be some relation between the violations found and the breadth of the order." *See Country Tweeds, Inc. v. FTC,* 326 F.2d 144, 148 -149 (2d Cir. 1964) (citing *FTC v. Mandel Bros., Inc.,* 359 U.S. 385 (1959); *FTC v. National Lead Co.,* 352 U.S. 419 (1957); *N.L.R.B. v. Cromption-Highland Mills, Inc.,* 337 U.S. 217 (1949*); N.L.R.B. v. Express Publishing Co.,* 312 U.S. 426 (1941)).

Here the FTC's proposed Order is unreasonably overreaching, and without evidentiary justification, in seeking to extend any Order against POM to include Mr. Tupper personally. The Commission's proposed Order defines "Covered Products" as any food, drug or dietary supplements, including, but not limited to, the POM products. (CX001426_0022). That language, combined with the proscriptions in sections II and III of the Order, would effectively ensure that no company, with interests in foods, drugs or supplements, would ever employ Mr. Tupper because any finding of individual liability against Mr. Tupper would potentially attach to any company he is associated with for the

next twenty years. Given the undisputed evidence of Mr. Tupper's inability to ultimately control the conduct at issue, such a penalty would be overly broad, unfair, and constitutionally suspect.

Additionally, assuming that this Commission disregards the law requiring "control" over the conduct at issue, Mr. Tupper did not sufficiently participate in the alleged conduct either. Specifically, Complaint Counsel is focusing heavily on POM's early advertisements that ran between 2003 and 2006. (CX1426; Ads in the Record). To the extent any of those early advertisements are problematic, and warrant an injunction several years after the fact, Mr. Tupper was not engaged in the marketing piece of the science-marketing dialogue during those years. (Tupper, Tr. 2975-77). Prior to 2007, Mr. Tupper had only limited involvement regarding the relationship between science and marketing. (Tupper, TR. 2975-77).

Finally, even assuming that Mr. Tupper's participation at POM Wonderful was sufficient to show some level of individual liability, the proposed Order, as it relates to him personally, would still be overly broad and without a sufficiently reasonable relationship to the alleged violations. There are three factors which bear on whether the breadth of an order has a "reasonable relationship" to the actual violation: "(1) the seriousness and deliberateness of the violation; (2) the ease with which the claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *Telebrands Corp v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006) (citing *Stoufer Foods Corp.*, 118 FTC 746, 811 (1994)). *See also Sterling Drug, Inc. v. FTC*, 741 F.2d

1146, 1155 (9th Cir. 1984); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (1978).

None of the three factors for the required "reasonable relationship" support the order against Mr. Tupper that the FTC seeks to impose. First, POM funded many millions of dollars of scientific research by renowned scientists, resulting in over 70 peer-reviewed publications. (CX1360 (S. Resnick, Dep. at 257-258); Liker, Tr. 1888). POM and Mr. Tupper rightfully believe in the merits of this science, and that all of the ads that POM has run are adequately supported by the extensive body of science available. (Tupper, Tr. 3015). Complaint Counsel also contends that the alleged false advertising was "serious" because it involved significant health issues. (Complaint Counsel's Pre-Trial Brief at 95). However, Complaint Counsel has not provided any evidence of falsity and/or produced competent evidence that the Challenged Products (POM Wonderful 100% Pomegranate Juice, POMx Pills and POMx Liquid) are not nutritious and safe food products.

The second factor looks to the ease with which the claims may be transferred to other products. Mr. Tupper, as represented to this Court, has retired and left POM Wonderful at the end of 2011 and does not work for any of the Roll companies. (Tupper, Tr. 2973-74). More importantly Mr. Tupper had only as much authority as Mr. Resnick delegated to him and Mr. Resnick in his own words is the "ultimate and sole decision-maker on everything." (CX1367 (S. Resnick, Welch Dep. at 55); S. Resnick, Tr. 1870). He is not in a position to transfer claims to other products.

The third factor, a history of prior violations, again cuts powerfully against finding a "reasonable relationship." Mr. Tupper, with years of business experience, has no history of prior violations.

Applying a "reasonable relation" standard, Mr. Tupper does not pose an independent false-advertising threat that could rationally justify his inclusion as a Respondent, particularly now that he is no longer affiliated with POM. Only as a POM employee did Mr. Tupper have any connection to the disputed advertising claims, yet any issued order would have a significant effect on his career for many years to come.

For all of the reasons stated above, no liability should attach to Matthew Tupper and no order should issue against him.[1]

/S

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[1] Respondent Matthew Tupper submits this Post-trial Brief concurrently with the Respondents' Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law.

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

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of Respondent Matthew Tupper's **POST TRIAL BRIEF**, and that on this 12th day of January, 2012, I caused the foregoing to be served by FTC E-File, hand delivery and e-mail on the following:

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The Honorable D. Michael Chappell
Administrative Law Judge
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Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondent Matthew Tupper's **POST TRIAL BRIEF**, and that on this 12th day of January, 2012, I caused the foregoing to be served by e-mail on the following:

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Dated: January 12, 2012