

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** )  
)  
)  
**STEWART A. RESNICK, LYNDA RAE** )  
**RESNICK, and MATTHEW TUPPER,** )  
**individually and as officers of the companies** )  
)  
)  
\_\_\_\_\_ )

Docket No. 9344  
PUBLIC

**RESPONDENT MATTHEW TUPPER'S BRIEF ON APPEAL FROM THE ALJ'S  
INITIAL DECISION**

Kristina M. Diaz, Esq.  
Alicia Mew, Esq.  
Johnny Traboulsi, Esq.  
Brooke Hammond, Esq.  
Roll Law Group P.C.  
11444 West Olympic Blvd., 10th Floor  
Los Angeles, CA, 90064  
Tel: 310.966.8400  
Fax: 310.966.8810  
Email: kdiaz@roll.com

Bertram Fields, Esq.  
Greenberg Glusker Fields  
Claman & Machtiger, LLP  
1900 Avenue of the Stars, Suite 2100  
Los Angeles, CA 90067  
Tel: 310.553.3610  
Fax: 310.553.0687  
Email: bfields@greenbergglusker.com

John Graubert, Esq.  
Skye Perryman, Esq.  
Covington & Burling LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
Tel: 202.662.6000  
Fax: 202.662.6291  
Email: jgraubert@cov.com

**TABLE OF CONTENTS**

I. INTRODUCTION AND STATEMENT OF CASE..... 1

    A. Statement of Facts..... 1

    B. Summary of Argument ..... 1

II. SPECIFICATION OF QUESTIONS INTENDED TO BE URGED ..... 1

III. ARGUMENT..... 2

    A. No Order Should Be Issued Against Respondent Matthew Tupper  
        Individually..... 2

    B. Complaint Counsel’s Motion to Reopen the Record Further Confirms that  
        Mr. Tupper Lacked the Requisite Control to Subject Him to Individual  
        Liability..... 5

IV. CONCLUSION..... 6

**TABLE OF AUTHORITIES**

	<b>PAGE</b>
<b>CASES</b>	
<i>F.T.C. v. Amy Travel Service, Inc.</i> , 875 F.2d 564 (7th Cir. 1997) .....	3
<i>F.T.C. v. Consumer Alliance, Inc.</i> , 2003 WL 22287364 (N.D. Ill. Sept. 20, 2003) .....	3
<i>F.T.C. v Direct Mktg. Concepts, Inc.</i> , 624 F.3d 1. (1st Cir. 2010).....	4
<i>F.T.C. v Freecom Communications, Inc.</i> 401 F.3d 1192 (10th Cir. 2005) .....	2
<i>F.T.C. v. J.K. Publications</i> , 99 F. Supp. 2d 1176 (C.D. Cal. 2000) .....	4
<i>F.T.C. v. Publishing Clearing House</i> , 104 F.3d 1168 (9th Cir. 1997) .....	3
<i>F.T.C. v. Standard Education Society</i> , 302 U.S. 112 (1937).....	2
<i>F.T.C. v. Swish Marketing</i> , 2010 WL 653486 (N.D. Cal. Feb. 22, 2010) .....	4
<i>FTC v. Transnet Wireless Corporation</i> , 506 F. Supp. 2d 1247 (S.D. Fla. 2007) .....	4
<i>In the Matter of Universal Electronics Corp.</i> , 1971 WL 128754 (1971).....	4
<i>In re Griffin Systems, Inc.</i> , 117 F.T.C. 515 (1994).....	2, 3

## **I. INTRODUCTION AND STATEMENT OF CASE**

### **A. Statement of Facts**

Respondent Matthew Tupper incorporates by reference the statement of the case and/or facts set forth in Respondents' Brief on Appeal from the ALJ's Initial Decision filed concurrently herewith.

### **B. Summary of Argument**

In addition to the arguments raised by Respondents in their Brief on Appeal from the ALJ's Initial Decision filed concurrently herewith, Mr. Tupper hereby submits the following additional grounds why no order should be issued against him individually, all of which are discussed in further detail below:

- (1) The ALJ's determination that injunctive relief should attach to Mr. Tupper is unsupported by both case law and by a preponderance of reliable evidence;
- (2) Mr. Tupper never possessed the ultimate and requisite control regarding the alleged offending conduct or advertising;
- (3) Complaint Counsel never made any evidentiary showing that an order against Mr. Tupper, a former employee, is necessary for the order to be fully effective in preventing the alleged deceptive practices which they claim to exist; and
- (4) Complaint Counsel's Motion to Reopen the Record further confirms that Mr. Tupper lacked the requisite control, given that the alleged offending advertising continued after his departure from Respondent POM Wonderful LLC ("POM") in late 2011.

## **II. SPECIFICATION OF QUESTIONS INTENDED TO BE URGED**

Respondent Mr. Tupper incorporates by reference the questions intended to be urged as set forth in Respondents' Brief on Appeal from the ALJ's Initial Decision filed concurrently herewith and raises the following questions for the Commission on appeal:

- (1) Did the ALJ err in finding that certain of Respondents' advertisements violate Sections 5 and 12 of the FTC Act; and

- (2) Did the ALJ err in his imposition of relief against Respondents, and in particular, Mr. Tupper individually?

### **III. ARGUMENT**

#### **A. No Order Should Be Issued Against Respondent Matthew Tupper Individually.**

The ALJ's determination that injunctive relief should attach to Matthew Tupper is unsupported by both case law and by a preponderance of reliable evidence. "To justify the imposition of injunctive relief against [an] individual, the FTC is required to show the individual participated directly in the POM's allegedly deceptive acts or practices, or had the authority to control such acts or practices." *F.T.C. v Freecom Communications, Inc.* 401 F.3d 1192, 1204 (10th Cir. 2005). 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 never turns upon mere participation in the advertising process. While the ALJ questions whether or not "ultimate" control is required to find individual liability, the history of the FTC Act and subsequent case law support the conclusion that liability will only attach when an individual has ultimate control of the alleged deceptive or misleading conduct. *F.T.C. v Standard Education Society*, 302 U.S. 112 (1937) (finding individual liability extended to officers when officers "owned, dominated and managed" the company.). Historically, 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. Later, non-owners were found to be individually liable when they formulated, directed or controlled any of the acts and practices at issue. *In re Griffin Systems, Inc.*, 117 F.T.C. 515, 563-564 (1994).

The ALJ cites to several cases that purportedly stand for the notion that participation, in and of itself, is a sufficient basis for liability. However, the cited cases do not support such a

proposition. First, the ALJ cites to *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1997) (finding individual liability of individual shareholders and officers based on their knowledge of the deceptive practice). But here, the officers “admittedly had authority to control the deceptive sales operation and all other aspects of their business.” *Id.* at 574. The ALJ also cites to *F.T.C. v. Publishing Clearing House*, 104 F.3d 1168 (9th Cir. 1997) (finding individual liability despite claims that the individual lacked the requisite knowledge regarding the alleged deceptive practices because she was the President of the company). But here, again, the officer had the “requisite control over the corporation.” *Id.* at 1170. Similarly, in *In re Griffin Systems, Inc.*, 117 F.T.C. 515 (1994) (individual liability was found where the officer participated in the acts and practices of Griffin). Here, once again, the officer “participated in the acts and practice of Griffin, and controlled them to the extent needed to impose individual liability. . . .” *Id.* at 564. Finally, the ALJ misconstrues *F.T.C. v. Consumer Alliance, Inc.*, 2003 WL 22287364 (N.D. Ill. Sept. 20, 2003) (which found individuals knowingly and directly participated in activities that were in violation of the FTC act and Telemarketing Sales Rule in order to impose liability). In contrast, the ALJ in the current action did not make any finding that Mr. Tupper knowingly violated the FTC Act. And tellingly, in applying the ruling of *Amy Travel Service, Inc.* to its decision in *Consumer Alliance*, the Court failed to note that the individual liability found in *Amy Travel* was based upon participation and the “authority to control” the deceptive acts. *Amy Travel Serv.*, 875 F.2d at 574.

In sum, the above line of cases, at best, supports a test requiring both direct participation and control – Mr. Tupper however never possessed the ultimate control requisite to find him individually liable. Further, the FTC never made any evidentiary showing that an order against Mr. Tupper, a former employee, is necessary for the order to be fully effective in preventing the

alleged deceptive practices which they claim to exist. To the contrary, an order against Mr. Tupper is entirely unnecessary considering the fact that 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. Moreover, Mr. Tupper voluntarily resigned his position at the company prior the conclusion of the hearing before the ALJ.

As discussed above, the ability to control the offending conduct or advertising (i.e., being the ultimate decision maker) is always the key inquiry as to whether or not individual liability is justified. See *In re Universal Electronics Corp.*, 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*, 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); *FTC v. Transnet Wireless Corporation*, 506 F. Supp. 2d 1247, 1261-65 (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. J.K. Publications*, 99 F. Supp. 2d 1176, 1181-1185, (C.D. Cal. 2000) (finding a 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); *F.T.C. v Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12-14. (1st Cir. 2010) (finding 50% owner and officer liable because he had the ability to stop the challenged ads). As is clear from the record, Mr. Tupper did not have the requisite level of control to warrant a

finding of liability and order relief against him. (See F. 24, 31, 34, 35, 40, 43; and RFF 53, 77-78, 80, 82, 94-95, 99-102).

For all of the reasons stated above, the ALJ did not have a legal or factual basis to find Mr. Tupper individually liable for any violation of the FTC Act. As such, no liability should attach to Mr. Tupper and no order should issue against him.

**B. Complaint Counsel's Motion to Reopen the Record Further Confirms that Mr. Tupper Lacked the Requisite Control to Subject Him to Individual Liability**

On June 13, 2012, Complaint Counsel filed a Motion to Reopen the Record and Admit Respondents' Post-Initial Decision Advertisements and Complaint Counsel's Authenticating Declaration ("Motion to Reopen the Record"). In its Motion to Reopen the Record, Complaint Counsel seeks to admit into the record certain advertisements disseminated by Respondents after the issuance of the ALJ's decision on May 17, 2012. In support of its request, Complaint Counsel claims, among other things, that "Respondents' new POM product advertisements are highly probative of whether the provisions of the Order issued by the ALJ are adequate to address Respondents' conduct in the future" and suggest that "Respondents continue to engage in the deceptive conduct that Complaint Counsel challenged at trial..." (Mot. at 5.)

Complaint Counsels' recent effort to reopen the record to include additional advertisements after Mr. Tupper's departure from POM establishes conclusively that he lacked the requisite control for individual liability under the FTC Act. Indeed, as the record demonstrated, Mr. Tupper retired from POM at the end of 2011 and no longer has any involvement with the company. (RFF 53-54.) As such, given his departure in late 2011, Mr. Tupper certainly did not play (and could not have played) any role in launching POM's "aggressive advertising campaign" as alleged by Complaint Counsel in the Motion to Reopen the



Record. (Mot. at 6.) Instead, in Mr. Tupper's absence, Respondents continue to make the same advertising claims that Complaint Counsel now challenges in its Motion to Reopen the Record. For these reasons, given that Respondents continue to advertise in the same fashion irrespective of his employment at POM, Mr. Tupper, from onset, cannot be seen to have possessed the requisite control for individual liability in this action.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should reject the ALJ's Initial Decision and issue an order dismissing the administrative complaint and stating that the Commission will take no action against Mr. Tupper related to the matters set forth in the complaint.

Respectfully submitted,



---

Kristina M. Diaz, Esq.  
Alicia Mew, Esq.  
Johnny Traboulsi, Esq.  
Brooke Hammond, Esq.  
Roll Law Group P.C.  
11444 West Olympic Blvd., 10th Floor  
Los Angeles, CA, 90064  
Tel: 310.966.8400  
Fax: 310.966.8810  
Email: kdiaz@roll.com

John Graubert, Esq.  
Skye Perryman, Esq.  
Covington & Burling LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
Tel: 202.662.6000  
Fax: 202.662.6291  
Email: jgraubert@cov.com

Bertram Fields, Esq.  
Greenberg Glusker Fields  
Claman & Machtinger, Llp  
1900 Avenue Of The Stars, Suite 2100

Los Angeles, Ca 90067  
Tel: 310.553.3610  
Fax: 310.553.0687  
Email: [Bfields@Greenbergglusker.Com](mailto:Bfields@Greenbergglusker.Com)

**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 )  
\_\_\_\_\_ )

**[PROPOSED] ORDER**

Having considered the record below and the allegations made by Complaint Counsel in this case, it is hereby ordered that the Complaint is dismissed as to Respondent Matthew Tupper.

SO ORDERED \_\_\_\_\_.

DATED: \_\_\_\_\_.

## CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of **RESPONDENT MATT TUPPER'S BRIEF ON APPEAL FROM THE ALJ'S INITIAL DECISION**, and that on this 18th day of June, 2012, I caused the foregoing to be served by hand delivery and e-mail on the following:

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

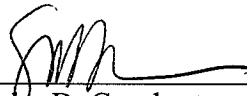
The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Rm. H-110  
Washington, DC 20580

I hereby certify that this is a true and correct copy of the foregoing and that on this 18th day of June, 2012, 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  
E-mail: mengle@ftc.gov

Mary Johnson, Senior Counsel  
Heather Hipsley  
Tawana Davis  
Federal Trade Commission  
Bureau of Consumer Protection  
601 New Jersey Avenue, NW  
Washington, DC 20580  
E-mail: mjohnson1@ftc.gov  
hhipsley@ftc.gov  
tdavis@ftc.gov

*Counsel for Complainant*



---

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  
Johnny Traboulsi  
Brooke Hammond  
Alicia Mew  
Roll Law Group P.C.  
11444 West Olympic Boulevard, 10th Floor  
Los Angeles, CA 90064  
Telephone: 310.966.8775  
E-mail: kdiaz@roll.com

Bertram Fields, Esq.  
Greenberg Glusker Fields Claman &  
Machtinger, LLP  
1900 Avenue of the Stars, Suite 2100  
Los Angeles, CA 90067  
Telephone: 310.553.0687  
Email: bfields@greenbergglusker.com

*Counsel for Respondents*