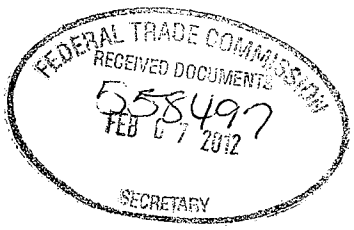
ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE 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
STEWART A. RESNICK, LYNDA RAE RESNICK, and MATTHEW TUPPER, individually and as officers of the companies.	)	PUBLIC

COMPLAINT COUNSEL'S REPLY TO RESPONDENT MATTHEW TUPPER'S POST-TRIAL BRIEF

Mary K. Engle
Associate Director

Heather Hippsley
Assistant Director

Andrew D. Wone
Tawana E. Davis
Devin W. Domond
Janet M. Evans
Mary L. Johnson
Elizabeth K. Nach
Michael F. Ostheimer
Serena Viswanathan
Elise D. Whang

Federal Trade Commission
Bureau of Consumer Protection
Division of Advertising Practices
600 Pennsylvania Ave., N.W.
NJ-3212
Washington, D.C. 20580
Telephone: (202) 326-3090
Facsimile: (202) 326-3259

Counsel Supporting the Complaint

COMPLAINT COUNSEL'S REPLY TO RESPONDENT MATTHEW TUPPER'S POST-TRIAL BRIEF [1]

I. INTRODUCTION

Despite being President of POM Wonderful LLC ("POM") and managing its day-to-day operations, including advertising, marketing, and scientific research, Respondent Matthew Tupper argues that he is not individually liable because he did not have ultimate control or participate in the conduct at issue. (Resp't Matthew Tupper's Post-Trial Br. ("Tupper Br.") at 6-8, 10). Mr. Tupper also asserts that the proposed Order does not bear a reasonable relationship to the violations, and is overbroad and unfair. (Tupper Br. at 9-10). Because Mr. Tupper directly participated in the wrongful acts or practices and had authority to control POM, and the proposed Order is reasonably related to the violations and is not overbroad or unfair, the Court should find Mr. Tupper individually liable and enter the proposed Order.

II. MR. TUPPER IS INDIVIDUALLY LIABLE

To obtain a cease and desist order against an individual, Complaint Counsel must prove the violations of the FTC Act by the corporation and show that "the individual defendant[] either participated directly in the deceptive acts or practices *or* had authority to control them." *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 636 (7th Cir. 2005) (emphasis added); *see also FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) (noting that either participation in or control over the false promotional activities would be sufficient for individual liability); *Griffin Sys., Inc.*, 117 F.T.C. 515, 582 (1994) ("It is well-established that an individual can be held liable for a corporation's violations of Section 5 if the individual formulates, controls or directs corporate

[1] This reply to Mr. Tupper's brief refers to Complaint Counsel's previously filed proposed findings of fact ("CCFF").

policy." (internal quotation marks omitted)); *Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 157, at *275-76 (Aug. 5, 2009) (same). "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *see also FTC v. World Media Brokers*, 415 F.3d 758, 764-65 (7th Cir. 2005) (finding that where the defendant held officers' titles and "perform[ed] a number of tasks that evince active participation in the corporate affairs" such evidence "establishe[d] a level of corporate involvement sufficient to demonstrate the requisite authority to control the corporate defendants"); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1996) (finding that a defendant's role as president and authority to sign documents on behalf of the corporation, which were relevant to the challenged conduct, demonstrated the requisite control over the corporation); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1117 (S.D. Cal. 2008), *aff'd*, 604 F.3d 1150 (9th Cir. 2010) (noting that the defendants' authority to control was reflected by their ability to cease the unfair practices or implement reasonable verification measures).

A. Mr. Tupper Controlled POM

Mr. Tupper's argument that he did not have *ultimate* control over POM, as evidenced by his lack of ownership interest and the Resnicks' involvement, and thus, is immune from liability is unavailing. (Tupper Br. at 2, 7). Ultimate control is not necessary to find individual liability. *Griffin Sys., Inc.*, 117 F.T.C. 515, 582-83 (1994) (stating the Commission was "not aware of any authority indicating that sole control of a company is necessary to establish individual liability [because] . . . more than one individual has been held to formulate, direct, and control the practices of a single corporation" and finding individual liability even though the individual was not an owner); *see also Bay Area Bus. Council*, 423 F.3d at 637 (finding no authority to support

the argument that being a salaried employee is somehow inconsistent with having corporate control for individual liability).

Despite asserting that Mr. Tupper "never belonged in this case" and "never had the control required for liability to attach" (Tupper Br. at 2, 6), Respondents "admit[ted in their Answer] that Mr. Tupper, as an officer of POM Wonderful LLC, together with others, formulates, directs, or controls the policies, acts, or practices of POM Wonderful LLC."[2] (PX0364-0002, ¶ 5). Mrs. Resnick described Mr. Tupper as her partner at POM since 2003 and relied on him to oversee POM's marketing when she reduced her day-to-day involvement. (CCFF ¶¶ 49, 61). POM's Senior Vice President of Marketing, Vice President of Clinical Development, head of the Operations Department, former Vice President of Scientific and Regulatory Affairs, and Vice President of Corporate Communications reported to Mr. Tupper. (CCFF ¶¶ 50, 54-56). As President, Mr. Tupper, among other responsibilities: 1) managed POM's marketing and advertising, which included making marketing personnel decisions, approving advertising copy, and providing the marketing staff with the relevant scientific research; 2) was intimately involved in the decision making process and execution of POM's medical research program; and 3) oversaw its financial budget, which included the authority to sign checks and contracts. (*See, e.g.*, CCFF ¶¶ 49, 53-54, 58-60, 62-65, 68, 70, 72-73, 78, 80, 83, 165, 198, 215, 217). The record is replete with evidence showing that Mr. Tupper had authority to control POM's marketing, advertising, and scientific research, and therefore can be held individually liable. (CCFF ¶¶ 46-86); *World Media Brokers*, 415 F.3d at 764-65 (finding

[2] In contrast, in responding to the Complaint's allegations that Mr. and Mrs. Resnick formulated, directed, or controlled the policies, acts, or practices of the companies, the Respondents' Answer stated that these were legal conclusions to which no response was required. (PX0364-0001-02, ¶¶ 3-4).

individual liability where the defendants held themselves out to be corporate officers and assumed the duties of such positions).

B. Mr. Tupper Participated Directly in the Acts or Practices at Issue

Mr. Tupper argues that he is not individually liable because he "did not sufficiently participate in the alleged conduct . . . [and] had only limited involvement regarding the relationship between science and marketing" prior to 2007. (Tupper Br. at 10). Mr. Tupper cites no legal precedent showing that he "did not sufficiently participate" and relies solely on his own, self-serving testimony as factual evidence. (*Id.*) Although a showing of either control or participation is sufficient for a finding of individual liability, *Daniel Chapter One*, 2009 FTC LEXIS 157, at *275-76, the record overwhelmingly demonstrates that Mr. Tupper also participated directly in the acts or practices at issue. (CCFF ¶¶ 49, 53-54, 58-60, 62-65, 68, 70, 72-73, 78, 80, 83, 165, 198, 215, 217). For example, Mr. Tupper assisted in drafting a magazine wrap for *Time* magazine that warned consumers about the danger of prostate cancer, touted POM's medical research on prostate cancer, and emphasized that POM Juice's efficacy in treating, preventing, or reducing the risk of prostate cancer was backed by science. (CCFF ¶¶ 377-382). Indeed, Mr. Tupper's own statements to the public were deceptive. In a television interview aired on *Fox Business* in June 2008, Mr. Tupper stated:

> **MR. TUPPER**: With pomegranate, the dose that's been shown to be effective is eight ounces a day . . . pomegranate is the one fruit that's actually been tested in human beings by dozens of researchers across the globe. There's actually been a study published recently on prostate cancer. Men suffering from advanced stages of prostate cancer drinking eight ounces a day saw the progression of the prostate cancer actually slow dramatically. In addition, there have been a number of studies published on cardiovascular disease in which sick patients again consuming eight ounces of pomegranate juice every day saw dramatic improvements in things like atherosclerosis, which is plaque in the arteries, the amount of blood flow delivered to the heart.

* * *

> **MR. SULLIVAN**: There's a lot of different pomegranate things. How many more products can you put out there, and how much of it is just hooey, . . . you know, pomegranate pills, et cetera?
>
> **MR. TUPPER**: *** The products that we put into the market, though, all stem from the fundamental science of the pomegranate, and everything that we put into the market, whether it's juice, whether it's tea, whether it's the supplements that we sell, are all backed by an enormous investment in science. We've actually funded more than $25 million of scientific research worldwide since we started the business. And, therefore, every product that we sell is backed by that science. Every product that we sell contains those unique antioxidants. We don't do things for scents and flavors. We do them for the health benefits and for the science.

(CCFF ¶ 572). On a POM webpage from December 2009 titled "POM's Health Benefits: Fact or Fiction[,]" Mr. Tupper said:

> Based on the research that's been published on POM Juice, it's clear that Mother Nature gave this unique fruit some very special properties. As our scientists like to say, POM Juice is truly 'health in a bottle.' When you look at the medical research that has been conducted on POM and compare it to research that's been done on other foods and beverages, what's been done on POM is way, way more extensive. It's almost more akin to research being done on pharmaceutical drugs.

(CCFF ¶ 488). Likewise, on another POM webpage from December 2009 titled "What Exactly are Antioxidants Anyway?" Mr. Tupper stated:

> It's fine to say a product works as an antioxidant in a test tube, but that's just scratching the surface. What you really have to do is make sure that your product - and the antioxidants - end up being absorbed by your body, get transported through your blood stream, and make it to your vital organs, because that's really where the benefit occurs. Which is why we go beyond the test tube and do all this clinical research. It isn't until you see an effect in humans with measurements that are medically meaningful that you know you've got something going on.

(CCFF ¶ 491).

Furthermore, Mr. Tupper's own brief shows that he actively participated in the challenged conduct. For example, he stated that he:

- *managed* the day-to-day operations on behalf of the Resnicks and was *involved* in several aspects of POM's operations, science, and marketing,"
- was *responsible for administering* POM marketing and scientific research budgets,"
- "*implemented* the [marketing] direction once decided upon by the Resnicks[,]"
- "regularly *attended* the weekly POM meetings and was *aware* of most of the Challenged Advertisements and sometimes *participated* in the legal review process," and
- "has always been a *facilitator* of the will of the Resnicks when it comes to POM."

(Tupper Br. at 2, 7-8 (emphasis added)).[3] Because the record establishes that Mr. Tupper directly participated in the challenged acts or practices and had control over POM, he should be held individually liable. *FTC v. Consumer Alliance, Inc.*, No. 02C2429, 2003 WL 22287364, at *6 (N.D. Ill. Sept. 30, 2003) (finding individual liability where the defendant reviewed, approved, and drafted telemarketing scripts used to deceive consumers and had authority to supervise and discipline employees).[4]

[3] Even if it were true that prior to 2007 Mr. Tupper had only limited involvement in one aspect of POM's business, the relationship between science and marketing, Complaint Counsel challenges advertising and marketing materials that were disseminated from 2003 through 2010. (*See e.g.*, CCFF ¶¶ 325, 329, 336, 341, 349, 357, 363-364, 368, 372, 377, 381, 386, 389, 406, 419, 425, 430, 435, 443, 473, 501, 503, 536, 539, 563, 572). Thus, his direct participation, including in the most recent challenged conduct by Respondents, justifies a finding of liability.

[4] Mr. Tupper also argues that "there certainly exists no basis for finding that [he] knew or should have known of any deceptive conduct, or that the product claims were either deceptive or misleading[.]" (Tupper Br. at 2). Evidence of knowledge is not required when only injunctive relief is sought. *See Daniel Chapter One*, 2009 FTC LEXIS 157, at *275-76 (not requiring evidence of knowledge for a cease and desist order). However, given his active day-to-day participation in POM's marketing and medical research activities (*see, e.g.*, CCFF ¶¶ 83, 295, 674, 682-684), Mr. Tupper in fact "had or should have had knowledge or awareness of the misrepresentations." *FTC v. 1st Guar. Mortgage Corp.*, No. 09-cv-61840, 2011 WL 1233207, at *14-15 (S.D. Fla. Mar. 30, 2011); *see also FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1138-39 (9th Cir. 2010).

III. THE PROPOSED ORDER SHOULD BE ENTERED AGAINST MR. TUPPER

A. Proposed Order Is Reasonably Related to the Violations

In addition to a cease and desist, a court may order injunctive relief, including fencing-in relief when appropriate. "Fencing-in remedies are designed to prevent future unlawful conduct" and "are broader than the conduct that is declared unlawful and may extend to multiple products." *Daniel Chapter One*, 2009 FTC LEXIS 157, at *280 (internal quotation marks omitted). In determining whether a broad fencing-in order bears a "reasonable relationship" to a violation of the FTC Act, "[a court] considers (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations." *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992). "The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present." *Sears, Roebuck & Co.* v. *FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 833 (1983). "Courts should consider the circumstances of the violation as a whole, and not merely the presence or absence of any one factor." *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010).

As for Mr. Tupper specifically, he was intimately involved in the violations as set forth in Complaint Counsel's findings.[5] (CCFF ¶¶ 46-86). Under Mr. Tupper's control and with his direct participation, POM chose to make express health claims based on scientific data consisting largely of either unblinded, uncontrolled studies on questionable endpoints or well-controlled,

[5] These three factors are met for all the Respondents. (*See* Compl. Counsel's Post-Trial Br. at 57-62).

double-blind, randomized, placebo-controlled trials with negative results. (*See* CCFF ¶¶ 795, 857-58, 882, 914-15, 942, 953, 966-973, 1002, 1035, 1044-1054, 1076, 1096-1101).

As for deliberateness, Mr. Tupper made calculated decisions to disseminate false and unsubstantiated claims and still shows no remorse. (Tupper Br. at 11 (stating that "Mr. Tupper rightfully believe[s] 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")). For example, Mr. Tupper testified at trial that POM felt comfortable continuing to advertise the results of Dr. Aviram's carotid intima-media thickness ("CIMT") study despite the fact that Dr. Davidson's CIMT study found no benefit for patients with mild to moderate risk for coronary heart disease. (CCFF ¶¶ 951-953). In addition, Mr. Tupper testified that he still considers the Respondents' science on heart disease, prostate cancer, and erectile dysfunction to be an 8 out of 10 even though: 1) doctors viewed the cardiovascular research as only a 3 out of 10; 2) Dr. Pantuck, who conducted POM's prostate cancer study, told Respondents that the likelihood of obtaining a drug treatment claim with a prostate-specific antigen endpoint was remote; and 3) Respondents' own scientific director, Dr. Gillespie, stated that further publicizing the erectile dysfunction research would be difficult because the science was weak. (CCFF ¶¶ 971-972, 1050, 1054, 1098, 1100). Mr. Tupper's belief in POM's science is belied by a 2009 medical research portfolio summary, which he wrote (CCFF ¶ 966; Resp'ts' Proposed Findings of Fact ¶ 300), that sets forth how the treatment, prevention, or reduction of risk claims for these diseases were unsubstantiated. (CCFF ¶¶ 83, 683, 902, 952, 966-972, 1010, 1045-1047, 1096).

Furthermore, POM did not make any specific changes to its marketing after receiving letters from the FTC or the FDA (CCFF ¶ 684). Mr. Tupper dismissed such warnings, believing, for example, that the FDA was "off [its] rocker." (CCFF ¶ 682). When evaluating whether to

seek a qualified health claim from the FDA for pomegranate juice, Mr. Tupper testified that POM chose not to do so because such a claim provided no competitive advantage. (CCFF ¶ 683). Mr. Tupper's willingness to flout the law and make unsubstantiated health claims to gain an unlawful competitive advantage for POM clearly demonstrates why he personally must be under a reasonably related fencing-in order.

Although Mr. Tupper asserts that he has "retired and left POM Wonderful" (Tupper Br. at 11), his deceptive practices are easily transferable to other businesses and products in which he may become involved. *ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222-23 (2d Cir. 1976) (noting that "[m]isrepresenting the . . . properties of a food is a particular type of deceptive practice which the petitioners could equally well use in advertising other food products . . ."). Additionally, a past willingness to flout the law can give rise to a concern regarding additional violations. *Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 213; *see also FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005) (noting that an injunction can be appropriate even when a defendant has ceased operations because there is a possibility of misconduct in the future). Given the seriousness and deliberateness of Mr. Tupper's actions and the ease of transferability to other businesses or products, the proposed Order is reasonably related to the violations and should be entered against him.[6]

B. Proposed Order Is Not Overbroad or Unfair

Mr. Tupper does not raise any issue with Part I of the Order as it applies to him personally. Part I pertains to POM's products only, and does not affect Mr. Tupper since he has

[6] Complaint Counsel does not disagree that Mr. Tupper has no history of prior violations. However, the absence of this factor does not preclude injunctive relief when the circumstances of the violation as a whole are considered. *Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 213.

left POM. Rather, Mr. Tupper focuses his argument on Parts II and III of the Order as overbroad and unfair. (Tupper Br. at 9-10). The proposed Order defines Covered Products as "any food, drug, or dietary supplement, including, but not limited to, the POM Products."[7] (CX1426_00022). Part II, which prohibits misrepresentations about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, and Part III, a fencing-in provision covering representations about health benefits, both apply to respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, when manufacturing, labeling, advertising, promoting, offering for sale, selling, or distributing any Covered Product, in or affecting commerce. (CX1426_00023-24).

Contrary to Mr. Tupper's arguments, Parts II and III of the proposed Order are reasonably related to his unlawful conduct in his sale of foods and dietary supplements at POM. These parts of the Order are designed to prevent Mr. Tupper from using POM's deceptive strategies for marketing the health benefits of foods and dietary supplements to consumers in any future employment. The requirement to make lawful representations under these provisions imposes the same obligation individuals and businesses are already subject to under the FTC Act.

Moreover, if Mr. Tupper chooses to work in areas of business that do not involve the promotion, advertising, sale, labeling, or manufacturing of a Covered Product, like accounting or human resources, he would be unaffected by Parts II and III of the Order. Likewise, these Parts do not affect Mr. Tupper if he sought employment outside of the food, drug, or dietary

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[7] POM Product are defined in the Order as "any food, drug, or dietary supplement containing pomegranate or its components, including, but not limited to, POM Wonderful 100% Pomegranate Juice and pomegranate juice blends, POMx Pills, POMx Liquid, POMx Tea, POMx Iced Coffee, POMx Bars, and POMx Shots." (CX1426_00022).

supplement industries.[8] The proposed Order is not unfair or overbroad given Mr. Tupper's conduct and critical involvement in the flagrant violations at issue. Because of Mr. Tupper's express denials of any wrongdoing by POM and his current erroneous views of his obligations under the law, an Order is necessary to prevent his future potential violations with POM or any other business when promoting, selling, labeling, advertising, or manufacturing foods, drugs, or dietary supplements.

IV. CONCLUSION

The record evidence demonstrates that Mr. Tupper both controlled POM and directly participated in the false and unsubstantiated claims, and that the proposed Order bears a reasonable relationship to his violations and is not overbroad or unfair. Accordingly, Complaint Counsel respectfully requests that this Court find Mr. Tupper individually liable and enter the proposed Order against him.

Respectfully Submitted,

Date: February 7, 2012

/s/ Andrew D. Wone
Andrew D. Wone
Tawana E. Davis
Devin W. Domond
Janet M. Evans
Mary L. Johnson
Elizabeth K. Nach
Michael F. Ostheimer
Elise D. Whang
Serena Viswanathan

[8] Parts V through VII are standard record keeping, distribution, and notice requirements that will apply to Mr. Tupper, and facilitate the enforcement of the proposed Order if he engages in conduct covered by Parts I through III of the Order. Part VIII is an employment notice provision that will apply to Mr. Tupper for ten years, and Part IX requires a report within sixty days of the Order's effective date detailing his compliance. (CX1426_00024-26).

Federal Trade Commission
Bureau of Consumer Protection
Division of Advertising Practices
600 Pennsylvania Ave., NW, NJ-3212
Washington, DC 20580
Telephone: (202) 326-3090
Facsimile: (202) 326-3259

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I certify that on February 7, 2012, I caused the filing and service of *Complaint Counsel's Reply to Respondent Matthew Tupper's Post-Trial Brief* as set forth below:

One electronic copy via the FTC E-Filing System to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580

Paper copies of the filing via hand delivery, and an electronic copy via email to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

Electronic copies of the filing via email to:

John D. Graubert, Esq.
Covington & Burling LLP
jgraubert@cov.com
Attorneys for Respondents

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

Bertram Fields, Esq.
Greenberg Glusker
bfields@greenbergglusker.com
Attorneys for Respondents

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