UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
J. Thomas Rosch
Edith Ramirez
Julie Brill
Maureen K. Ohlhausen

ORIGINAL

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 ANSWERING BRIEF AS TO RESPONDENT MATTHEW TUPPER'S APPEAL OF THE ALJ'S INITIAL DECISION

David C. Vladeck
Director

Mary K. Engle
Associate Director

Heather Hippsley
Assistant Director

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

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

Dated: July 18, 2012

Counsel Supporting the Complaint

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

In his May 17, 2012 Initial Decision, the ALJ found Respondent Matthew Tupper individually liable for POM Wonderful LLC's ("POM") violations of the FTC Act because he participated in and had control over the false and unsubstantiated claims relating to the sale of POM Wonderful 100% Pure Pomegranate Juice ("POM Juice"), POM_x Pills, and POM_x Liquid extract (collectively the "POM Products"). (Initial Decision ("ID") at 5-6, 296, 308, 329). POM advertised that the POM Products treated, prevented, or reduced the risk of heart disease, prostate cancer, and erectile dysfunction. (ID at 5-6). The ALJ entered a cease and desist order with injunctive relief against Mr. Tupper. (ID at 6).

Mr. Tupper appeals the ALJ's finding of individual liability and the entry of an order against him, asserting that he "never possessed the ultimate and requisite control regarding the alleged offending conduct or advertising[,]" and that "Complaint Counsel never made any evidentiary showing that an order against [him], a former employee, is necessary for the order to be fully effective in preventing the alleged deceptive practices . . . ." (Resp't Matthew Tupper's Br. on Appeal from the ALJ's Initial Decision ("Tupper Appeal Br.") at 1). Because the record is replete with evidence that Mr. Tupper controlled and participated in the deceptive acts or practices relating to the POM Products and the proposed order in Complaint Counsel's Appeal Brief ("proposed order") is reasonably related to the violations and necessary to prevent future misconduct, the Commission should uphold the ALJ's finding of individual liability and enter the proposed order against Mr. Tupper.[1]

[1] Complaint Counsel has requested that the Commission set aside the ALJ's order and instead enter the proposed order contained in its June 18, 2012 Appeal Brief. (Compl. Counsel Appeal Br. at 44). Complaint Counsel incorporates by reference any arguments raised in its Appeal Brief and its Answering Brief (filed on July 18, 2012).

II. STATEMENT OF FACTS

Starting in 2003, Mr. Tupper led POM as its Chief Operating Officer and later President and was responsible for managing the company's day-to-day affairs, which included overseeing marketing, advertising, consumer affairs, finances, personnel, operations, and scientific research. (Initial Decision Findings of Fact ("IDF") ¶¶37-38, 44-50; Compl. Counsel Finding of Fact ("CCFF") ¶57). Mr. Tupper oversaw and administered POM's budget for all departments and had authority to sign checks and contracts on behalf of the company. (IDF ¶45). POM's Vice President of Marketing, Vice President of Clinical Development, Vice President of Scientific and Regulatory Affairs, Vice President of Corporate Communications, and the respective heads of sales and operations reported directly to him. (IDF ¶¶47-50). He also hired and fired POM employees, including the head of POM's marketing department, on his own or in consultation with Stewart or Lynda Resnick. (IDF ¶46; *see also* CCFF ¶59 (noting that Mr. Tupper, in consultation with Mr. Resnick, eliminated the position of Vice President of Scientific and Regulatory Affairs and created the position of Vice President of Clinical Development)). Mrs. Resnick viewed Mr. Tupper as her "partner" at POM and relied on him to handle the marketing aspects of the business when she purportedly reduced her day-to-day involvement. (IDF ¶¶39, 1407). Likewise, Mr. Resnick "delegated to Mr. Tupper the authority to decide which advertisements should run." (IDF ¶1406). In this leadership role, Mr. Tupper testified that he was the "'connecting piece'" between the marketing and the science. (IDF ¶¶51-52, 1409, 1411).

Mr. Tupper was closely involved in the marketing process from strategy development to execution. He reviewed advertisements and creative briefs at the concept stage; provided medical research information and direction on how to describe such information in advertisements; assumed the lead role in communicating with POM's advertising agency when

necessary; edited, drafted, or approved advertisements and press releases; and led meetings to review advertisements from a scientific perspective prior to dissemination. (IDF ¶¶144, 154, 160, 162, 1408, 1410, 1412, 1414-23, 1430-31). For example, Mr. Tupper participated in drafting the *Time* magazine cover wrap advertisements that the ALJ found deceptive. The cover wrap advertisements communicated to consumers that: 1) "PSA (Prostate-Specific Antigen) is a biomarker that indicates the presence of prostate cancer[,]" 2) "PSA doubling time is a measure of how long it takes for PSA levels to double[,]" 3) "[a]fter drinking eight ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years [in a research study], these men experienced significantly slower PSA doubling times[,]" and 4) "[a] longer doubling time may indicate slower progression of the disease." (IDF ¶¶311 (internal quotation marks omitted), 581, 1431; ID at 228, 282-83). Moreover, the cover wrap advertisements used a medical symbol, had a quote from the POM prostate cancer study's lead researcher discussing the results, and informed consumers that POM Juice was "[b]acked by science" and that prostate cancer, the most commonly diagnosed cancer in men, was the second leading cause of death for men. (IDF ¶¶313-14, 316, 318). POM's former Senior Vice President of Marketing testified that she "relied on Mr. Tupper to be the 'arbiter' of whether people felt POM's advertising was accurate" and "'would never do something [Mr. Tupper] wasn't involved in.'" (IDF ¶¶1414-15 (brackets in original)).

Mr. Tupper also made the challenged disease benefit statements concerning POM directly to the public. 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). He also made statements on a POM website that the ALJ found deceptive. (IDF ¶¶580-82; ID at 225-26, 228, 289-90). For example, 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).

Mr. Tupper was also closely involved in POM's scientific research. He was involved in determining what research to conduct; identifying experts to conduct research for POM; overseeing POM's ongoing clinical trials; reviewing unpublished and published data; and participating in meetings with Mr. Resnick, POM's scientific personnel, and outside scientists to discuss study results, funding, and future research projects. (IDF ¶¶53, 119, 1424-29). For example, in 2009, Mr. Tupper, along with Mark Dreher, Vice President of Scientific and Regulatory Affairs, drafted a summary of POM's scientific studies that evaluated the level of evidence achieved and the business options for conducting additional research or publicizing the current results. (IDF ¶¶53, 1425). This medical summary described problems with POM's scientific evidence, including that POM's erectile dysfunction study did not have statistically significant results, POM's prostate cancer research had a "gap" because there were no data on prevention prior to radiation or prostatectomy, and POM's heart disease research had "holes" with the "current body of research . . . only viewed as a '3' on a scale of 1-10 by MDs[.]" (CCFF ¶¶971, 1047, 1096). Mr. Tupper wrote that POM could do "[a]dditional, targeted research for Marketing/PR/Medical Outreach purposes" or do "[n]o more clinical research [and] publicize" its results. (CCFF ¶¶971 (internal quotation marks omitted)). Mr. Tupper's role as the connecting piece between the marketing and the science clearly illustrates his control and participation in POM's deceptive advertising.

III. ARGUMENT

A. Individual Liability

1. Either Control or Participation Is Sufficient for Establishing Individual Liability

Despite well-established case precedent, Mr. Tupper asserts that "in practice, [individual] liability focuses almost exclusively on the ability to control or limit the offending advertising . .

." and that "mere participation" is insufficient. (Tupper Appeal Br. at 2). However, this argument is without merit and was rejected by the ALJ. (ID at 304 (rejecting the interpretation of "the rule that either participation or control suffices . . . to mean that only authority to control will suffice" (internal quotation marks omitted))). To establish individual liability after violation of the FTC Act by the entity has been proven, federal courts and the Commission have required proof 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); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005) (finding that injunctive relief was justified when an individual participated directly in or had authority to control the entity's deceptive acts or practices); *Telebrands*, 140 F.T.C. 278, 452 (2005) ("To obtain a cease and desist order against an individual, Complaint Counsel must prove violations of the FTC Act by the corporation and that the individual *either* directly participated in the acts at issue *or* had some measure of control over those acts." (emphasis added)); *Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 157, at *275-76 (Aug. 5, 2009) (initial decision), *aff'd*, 2009 FTC LEXIS 259 (Dec. 24, 2009).

In attempt to support his argument that evidence of control is required, Mr. Tupper cited cases that analyzed whether the individuals in question had control over the deceptive practices. (Tupper Appeal Br. at 2-4). However, these cases explicitly stated that either control or participation is sufficient for individual liability, s*ee, e.g.*, *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007); *FTC v.*

J.K. Publ'ns, Inc., 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000), or focused on the element of control in order to resolve the issue on appeal, s*ee, e.g.*, *FTC v. Educ. Soc'y*, 302 U.S. 112, 119-20 (1937); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010).[2] Indeed, individuals have been found liable based on participation alone. The court in *FTC v. National Urological Group*, 645 F. Supp. 2d 1167, 1207 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009), found a defendant individually liable for his participation in the violations because he "helped develop the products, reviewed the substantiation regarding the ingredients in the products, . . . reviewed and edited the advertisements before they were disseminated[,]" allowed himself to be represented as the Chief of Staff and Medical Director in the advertisements, and knew that no clinical trials had ever been conducted on the products and that none of the studies that he reviewed were conducted on any of the products being sold. *See also J.K. Publ'ns, Inc.*, 99 F. Supp. 2d at 1205-06 (stating that at summary judgment "the FTC need not show authority to control to prevail [because a]lternatively if the undisputed facts show that [the defendant] participated directly in the wrongful acts or practices, she can be held individually liable for [the entity's] unfair practices"). Although either is sufficient, the evidence in this case proves both control and participation, and the Commission should uphold the ALJ's determination that Mr. Tupper is individually liable. (ID at 304).

2. Mr. Tupper Had Control over POM's Deceptive Acts or Practices

Mr. Tupper argues that he cannot be held individually liable because the Resnicks, owners of POM, had ultimate control or decision-making authority. (Tupper Appeal Br. at 1-2,

[2] Mr. Tupper also cites *FTC v. Swish Marketing*, No. 09-03814, 2010 WL 653486 (N.D. Cal. Feb. 22, 2010) (Tupper Appeal Br. at 4), but this case does not support his argument. *Swish* granted the individual defendant's motion to dismiss the complaint for failure to satisfy Federal Rule of Civil Procedure 8(a)(2), but with leave to amend. 2010 WL 653486, at *11. The *Swish* court later denied a motion to dismiss the amended complaint, noting that the FTC needed to prove that the "individual participated directly in the acts or practices *or* had authority to control them." *FTC v. Benning*, No. 09-03814, 2010 U.S. Dist. Lexis 64030, at *4 (N.D. Cal. June 28, 2010) (emphasis added).

4). "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." *Amy Travel Serv.*, 875 F.2d at 573; *see also FTC v. World Media Brokers*, 415 F.3d 758, 765 (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 at 1170-71 (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).

However, ultimate control is not necessary to establish individual liability. In *Griffin Systems, Inc.*, 117 F.T.C. 515, 582-83 (1994), the Commission stated that it 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 concluded that an executive vice president who, among other responsibilities, "shared authority" with others to set prices for service contracts and hire employees was individually liable. *See also* 117 F.T.C. at 564 (finding by the ALJ in the initial decision that because the respondent was "an officer in control of unlawful activities" the respondent's claim that "he only did what he was told" did not shield him from liability). Likewise, the Commission in *Telebrands* noted that showing an individual "had *some measure* of control over [the challenged] acts" would be sufficient for individual liability. 140 F.T.C. at 452

(emphasis added); *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).

Moreover, Mr. Tupper's attempt to portray himself after the fact as having no control over POM's deceptive advertising practices is contrary to the evidence. (Tupper Appeal Br. at 1-2, 4). Mr. Tupper admitted in his Answer to the Complaint that "[he], as an officer of POM Wonderful LLC, together with others, formulate[d], direct[ed], or control[led] the policies, acts, or practices of POM Wonderful LLC." (PX0364-0002, ¶5; IDF ¶42). Mrs. Resnick considered Mr. Tupper to be her partner at POM since 2003, and the Resnicks relied on him to oversee POM's marketing and make decisions. (IDF ¶¶39, 1406-07). Furthermore, the ALJ's findings clearly demonstrate that Mr. Tupper exercised control over POM's marketing, scientific research, personnel, and finances by, for example, approving advertising copy and hiring and firing employees. (*Supra* §II (discussing Mr. Tupper's control over POM)); *see also World Media Brokers*, 415 F.3d at 764-65 (finding individual liability where the defendants held themselves out to be corporate officers and assumed the duties of such positions); *Griffin Sys., Inc.*, 117 F.T.C. at 582 ("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 policy." (internal quotation marks omitted)). Mr. Tupper was clearly "part of the inner circle that formulated, controlled, and directed" POM. (ID at 308 (internal quotation marks omitted)).[3]

[3] Mr. Tupper's argument that Complaint Counsel's motion to reopen the record demonstrates that he lacked the requisite control over POM is misplaced. Complaint Counsel's motion seeks admission of evidence relevant to the issue of remedy. (Compl. Counsel's Mot. to Reopen R. at 6-7 (June 13, 2012)). POM's recent dissemination of advertisements after Mr. Tupper purportedly left POM has no bearing on the issue of whether Mr. Tupper demonstrated control over POM to support a finding of individual liability.

3. Mr. Tupper Participated Directly in POM's Deceptive Acts or Practices

Even if the Commission were to find that Mr. Tupper did not have control, Mr. Tupper participated in POM's deceptive acts or practices as discussed in Section II. (*Supra* §II; ID at 305-06); *see also 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] Mr. Tupper, as the "connecting piece" between marketing and science, participated in the deceptive practices by, for example, writing advertising copy, drafting medical research summaries, and conveying scientific research results to POM's marketing staff. (*Supra* §II (describing Mr. Tupper's participation in POM)); *see also J.K. Publ'ns, Inc.*, 99 F. Supp. 2d at 1204 (finding a defendant who acted as the "common denominator that ties all the pieces of the puzzle together" in a fraudulent billing scheme individually liable). Additionally, he made numerous deceptive statements to the public concerning POM products on POM's websites and in his public television appearance on *Fox Business*. (*Supra* at 3-4). Because there is overwhelming evidence that Mr. Tupper participated in and controlled POM's deceptive acts or practices, the Commission should uphold the ALJ's finding of individual liability.

[4] Mr. Tupper also argues that the ALJ did not make any findings that Mr. Tupper knowingly violated the FTC Act. (Tupper Appeal Br. at 3). 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 scientific research activities (*see, e.g.*, IDF ¶¶44-53), Mr. Tupper in fact had or should have had knowledge of the misrepresentations. *Direct Mktg. Concepts, Inc.*, 624 F.3d at 14; *see also FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1138-39 (9th Cir. 2010); *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1270 (stating that the "degree of participation in business is probative of knowledge").

B. The Proposed Order Against Mr. Tupper Is Appropriate and Necessary

1. The Proposed Order Is Reasonably Related to the Violations

Upon a finding that Mr. Tupper is individually liable, the FTC Act authorizes the issuance of an order requiring a respondent to cease and desist from such acts or practices. (ID at 296); 15 U.S.C. § 45(b). In addition, fencing-in relief, which is "broader than the conduct that is declared unlawful and may extend to multiple products[,]" can be ordered when appropriate to prevent future unlawful conduct. *Daniel Chapter One*, 2009 FTC LEXIS 157, at *280; (*see also* ID at 297, 309). A court considers whether the fencing-in order has a reasonable relationship to the violation by looking at "(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."[5] *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.*, 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." *Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 213.

Mr. Tupper asserts that the "FTC never made any evidentiary showing that an order against [him], a former employee, is necessary for the order to be fully effective in preventing the alleged deceptive practices . . . ." (Tupper Appeal Br. at 3-4). However, this argument misconstrues the purpose of the proposed order and overlooks Mr. Tupper's participation in and control over POM's deceptive practices, which were serious, deliberate, and transferable. (ID at 310-13). Under Mr. Tupper's leadership, POM deliberately made widely advertised health

[5] Complaint Counsel is not aware of any prior violations by Mr. Tupper, but the absence of this factor does not preclude injunctive relief because the circumstances of the violation as a whole should be considered. *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010).

claims over many years concerning prostate cancer, heart disease, and erectile dysfunction by relying primarily on unblinded, uncontrolled studies with questionable endpoints or well-controlled, double-blind, randomized, placebo-controlled trials with negative results. (ID at 312-13; *see also* CCFF ¶¶795, 802-03, 857-58, 882-83, 814, 914-15, 942, 951-53, 966-73, 1002, 1035, 1044-54, 1076, 1096-98, 1100-01). Such health claims are serious because consumers are unable to assess the veracity of the claims or the significance of the purported scientific studies, and are susceptible to claims concerning product effectiveness and clinical proof. (ID at 312).

As for deliberateness, the ALJ noted the "consistency of Respondents' advertising themes over the years" and found insufficient evidence of "accidental or inadvertent" conduct. (ID at 312). Moreover, Complaint Counsel asserts that Mr. Tupper made calculated decisions to disseminate false and unsubstantiated claims with no remorse. For example, Mr. Tupper testified at trial that POM felt comfortable continuing to advertise the results of a poorly designed carotid intima-media thickness ("CIMT") study despite a later well-designed CIMT study that found no benefit from POM Juice for patients with mild to moderate risk for coronary heart disease. (CCFF ¶¶951-53). Mr. Tupper still considers POM's science on heart disease, prostate cancer, and erectile dysfunction to be an eight out of ten even though: doctors viewed the cardiovascular research as only a three out of ten; the researcher who conducted POM's prostate cancer study told POM that the likelihood of obtaining a drug treatment claim with the prostate-specific antigen doubling time endpoint measure used in the study was remote; and POM's scientific director stated that further publicizing the erectile dysfunction research would be difficult because the science was weak. (CCFF ¶¶971-72, 1049-50, 1054, 1098, 1100). Moreover, Mr. Tupper's belief in POM's science is belied by a 2009 medical research portfolio summary, which

he co-wrote (*supra* at 5), that sets forth how the treatment, prevention, or reduction of risk claims for these diseases were unsubstantiated. (CCFF ¶¶83, 902, 966-71, 1010, 1045-1047, 1096).

Even when Mr. Tupper became aware of concerns about inadequate substantiation from the FDA or the FTC, POM did not make any specific changes to its marketing.[6] (CCFF ¶684). Mr. Tupper dismissed such warnings, believing, for example, that the FDA was "off [its] rocker." (CCFF ¶682). A past willingness to flout the law can give rise to a concern regarding future violations. *Sears, Roebuck & Co.*, 676 F.2d at 392; *Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 213; *see also Freecom Commc'ns, Inc.*, 401 F.3d at 1204 (noting that an injunction can be appropriate even when a defendant has ceased operations because there is a possibility of misconduct in the future).

Furthermore, the deceptive practices are easily transferable to other businesses or products that Mr. Tupper may become involved with in the future. *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 . . ."); *Telebrands Corp. v. FTC*, 457 F.3d 354, 361 (4th Cir. 2006) ("An unfair practice is transferable when other products can be marketed using similar techniques."). "[T]he advertising technique, *i.e.*, sponsoring research of a product's health benefits and using the results to make disease claims, is readily transferable to advertising any food, drug, or dietary supplement." (ID at 311). Mr. Tupper's willingness to deliberately make serious and transferable health claims to gain an unlawful competitive advantage for POM and mislead consumers clearly demonstrates that the proposed order is reasonably related to the violations.

[6] Because other evidence was found sufficient, the ALJ did not make any findings regarding the evidence related to deliberateness. (ID at 313 n.24).

2. The Proposed Order Is Necessary Against Mr. Tupper

Even if Mr. Tupper no longer works for POM, an order can be entered against a former employee and is necessary to prevent future violations.[7] For example, the Commission entered a consent order against former employee Mark Dreher (POM's Vice President of Scientific and Regulatory Affairs), after he had already left the company. *Mark Dreher*, No. C-4306 (F.T.C. Nov. 4, 2010); s*ee also Benrus Watch Co. v. FTC*, 352 F.2d 313, 324-25 (8th Cir. 1965) (affirming an order against an individual defendant who had controlled the company's policies and practices even though he allegedly no longer worked for the company). Mr. Dreher later worked as a consultant for POM (CX1346_00175-78; CX0338_0001; CX0341_0001-02) and another affiliated company under Roll Global, Paramount Farms (CX1366_0005-06). Like Mr. Dreher, Mr. Tupper could potentially avail himself of a similar opportunity to work for POM or Roll Global in the future.

Part I of the proposed order pertains to POM Products[8] only, and should not affect Mr. Tupper assuming he neither works for POM nor is involved with any other pomegranate product. 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 respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, when manufacturing,

[7] At trial, Mr. Tupper testified that he "plan[ned] to leave POM by the end of this year most probably, after our annual harvest. . . ." (Tupper, Tr. at 2973 (stating further that the harvest ends in the early part of December and that he "will be leaving by the end of the year")). The ALJ cited this trial testimony as the basis for concluding that Mr. Tupper had retired. (IDF ¶40). On appeal, Mr. Tupper asserts that he no longer works for POM (Tupper Appeal Br. at 4), but his trial testimony showed only an intent to retire. There is no evidence to confirm whether he in fact retired at the end of 2011.

[8] POM Products 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, POM_x Pills, POM_x Liquid, POM_x Tea, POM_x Iced Coffee, POM_x Bars, and POM_x Shots." (Compl. Counsel Appeal Br. at 45).

labeling, advertising, promoting, offering for sale, selling, or distributing any Covered Product, in or affecting commerce. (Compl. Counsel Appeal Br. at 45-46). The proposed order defines Covered Products as "any food, drug, or dietary supplement, including, but not limited to, the POM Products." (Compl. Counsel Appeal Br. at 44).

Parts II and III of the proposed order are reasonable given Mr. Tupper's 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. 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 proposed order. Likewise, these Parts do not affect Mr. Tupper if he sought employment outside of the food, drug, or dietary supplement industries.[9]

Because of his control and participation in the flagrant violations at issue, his denials of any wrongdoing by POM, and his erroneous view of his obligations under the law, an order is necessary to prevent Mr. Tupper from violating the FTC Act in the future with POM or any other business when promoting, selling, labeling, advertising, or manufacturing foods, drugs, or dietary supplements.

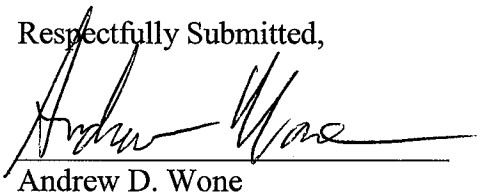
[9] Parts V through VII are standard recordkeeping, distribution, and notice requirements that will apply to Mr. Tupper and facilitate the enforcement of the proposed order if he engages in conduct covered by Parts I through III of the order. Part VIII is an employment notice provision that will apply to Mr. Tupper for ten years, and Part IX requires a report within sixty days of the proposed order's effective date detailing his compliance. (Compl. Counsel Appeal Br. at 46-48).

IV. CONCLUSION

The record demonstrates that Mr. Tupper controlled and participated in POM's deceptive practices, and an order with fencing-in relief is appropriate given the deliberate, serious, and transferable nature of the violations and necessary to prevent future violations. Accordingly, Complaint Counsel respectfully requests that the Commission uphold the ALJ's finding of individual liability and enter the proposed order against Mr. Tupper.

Date: July 18, 2012

Respectfully Submitted,



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

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 hereby certify that on July 18, 2012, I caused the filing and service of *Complaint Counsel's Reply to Respondent Matthew Tupper's Post-Trial Brief* as set forth below:

An electronic copy via the FTC E-Filing System and twelve paper copies to:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW H-135
Washington, DC 20580

An electronic copy via email and one paper copy to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW H-110
Washington, DC 20580
oalj@ftc.gov

An electronic copy via email to:

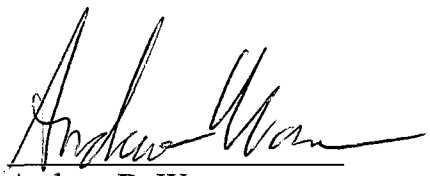
John D. Graubert, Esq.
Covington & Burling LLP
Email: jgraubert@cov.com

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

Edward P. Lazarus, Esq.
c/o Michael Small
Akin Gump Strauss Hauer & Feld LLP
Email: lazarus.eddie@gmail.com

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

Attorneys for Respondents



Andrew D. Wone
Complaint Counsel