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	)	
	)	

RESPONDENT MATT TUPPER'S REPLY TO COMPLAINT COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION AND STATEMENT OF THE FACTS

The ALJ's Initial Decision that injunctive relief should apply to Mr. Tupper is neither supported by facts nor the law; in fact, it is contrary to both, and Complaint Counsel's Answering Brief only serves to highlight the needlessness of an order against Mr. Tupper. The Commission should take no action against Mr. Tupper because (1) he never possessed or exercised the requisite level of control for a finding of individual liability; and (2) the ALJ and Complaint Counsel failed to show that any proposed order against Mr. Tupper reasonably relates to curbing the challenged conduct.

First, the key requirement of control does not exist here. As noted and ignored by the ALJ and Complaint Counsel, Mr. Tupper's position at Respondent POM Wonderful LLC ("POM") was not that of a typical officer of a closely-held private company. Unlike the vast majority of officers found liable under the FTC Act, Mr. Tupper did not have any ownership interest—not even in part—in POM. Mr. Resnick was, in his own words, the "ultimate sole decision-maker on everything." (RFF 99). Similarly, Mrs. Resnick had the final approval authority in deciding the content and concepts included in POM's marketing and advertising. (RFF 82). She was, in her own words, the "chief marketing person at POM." (L. Resnick, Tr. 289). In short, the Resnicks called the shots—not Mr. Tupper, he merely implemented their directions. As discussed below, in no case has participation alone been enough to support a finding of individual liability. As a result, Mr. Tupper should never have been named in this action.

Second, an order binding Mr. Tupper individually is not necessary and not reasonably related to the offending conduct. The primary purpose of such an order is to prohibit the offending company from repeating the offending conduct. Here, issuing an order against Mr. Tupper individually would not and could not curb any potential future violations. Mr. Tupper retired from POM at the end of 2011. (Tupper, Tr. 2972-73). His relationship with POM and Roll has, therefore, ended. (Tupper, Tr. 2974). Applying a "reasonable relation" standard, Mr.

Tupper does not pose an independent false advertising threat that could rationally justify his inclusion in the order – particularly now that he is no longer affiliated with POM.

In addition, the ALJ in its Initial Decision did not make any findings consistent with behavior by Mr. Tupper that warrants an injunction against him. Complaint Counsel fails to demonstrate the requirement of serious and deliberate violations. For an order to issue against him, Mr. Tupper must have knowingly and flagrantly violated the law. The record evidence demonstrates the exact opposite. As recognized by the ALJ, at all times, Mr. Tupper believed strongly in POM's carefully vetted science and relied on the internal process by which the advertisements were reviewed. Mr. Tupper has no history of any previous violations of any advertising law, let alone the FTC Act. Accordingly, the Commission should not find Mr. Tupper individually liable for violations of the FTC Act and should issue no order against him.

II. ARGUMENT

A. A Finding of Individual Liability Against Mr. Tupper Is Not Supported Legally or Factually

1. Individual Liability Requires Participation And Control

The ALJ, at the urging of Complaint Counsel, adopts an impractical and notably inaccurate interpretation of the law with respect to individual liability.[1] In its Answering Brief, Complaint Counsel seeks to perpetuate this mistake.

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[1] 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 *FTC 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 *FTC 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 *FTC v. Consumer Alliance, Inc.*, 2003 WL 22287364 (N.D. Ill.

Admittedly, Complaint Counsel does cite to a string of cases that state that individual liability 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). However not a single court in any of those cases found an individual liable based on participation alone. *See FTC v. Bay Area Bus. Council, Inc.* 423 F.3d 627, 637-638 (7th Cir. 2005) (finding individual liability of corporate officers because they "had ample authority to control the corporate defendants"); *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) (principal investor and CEO of a corporation found individually liable because "he not only participated in the false promotional activities but also had the authority to control them"); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005) (principal shareholder of a company found individually liable because he "was the controlling shareholder of the closely-held corporate defendants; in other words, he owned the corporate defendants. Consequently, a substantial inference exists that [he] had the authority to control the deceptive acts and practices carried on in the name of his corporations"); *Telebrand*, 140 F.T.C. 278, 452 (2005) (president of company found individually liable because he had the "authority to and did control the policies, acts, or practices" of the corporation); *In re Daniel Chapter One,* FTC Docket No. 9329 (2009), Initial Decision at pg. 77 (overseer of the corporation found individually liable because he "both participated in and had the authority to control the acts or practices").

Despite the "either or" language, liability focuses almost exclusively on the ability to control or limit the offending advertising and not whether the individual actually did review, edit,

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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.

or approve the challenged advertising. *See also 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. 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); *see also FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005). *FTC v. Standard Education Society*, 302 U.S. 112 (1937) (finding individual liability extended to officers when officers "owned, dominated and managed" the company.)

Participation alone has never been enough to support a finding of individual liability. (Respondent knows of no case ever holding as such) and a closer reading of the cases cited that purportedly state that participation alone is enough, bear this out. Control must always be present for individual liability. Complaint Counsel blindly points to *F.T.C. v. National Urological Group*, 645 F.Supp.2d 1167, 1207 for the proposition that "individuals have been found liable based on participation alone." (CCABTA at 7). However, an accurate analysis of the case illustrates just the opposite. In *National Urological Group*, the corporate officers were found individually liable because each, without question, knew the advertising statements were misrepresentations. *Id. at 1207-1208.* More importantly, the court explicitly pointed out that ***"these individuals clearly had the ability to control the corporate defendants."*** *Id.* (emphasis added). As the record clearly shows, Mr. Tupper never had that ability.

Complaint Counsel claims that the holding in *F.T.C. v. J.K. Publications* stands for the proposition that participation alone is sufficient to find liability (CCABTA at 7) – a position that is not supported by the actual facts and finding of the Court. While the Court in that case did find that a husband and wife had participated in the misconduct of the corporation, their individual liability was based on the fact the husband and wife ***"owned the company."*** *F.T.C. v. J.K. Publications*, 99 F.Supp.2d 1176, 1206 (C.D. Cal. 2000) (emphasis added).

Furthermore, and perhaps most telling, common sense tells us that participation alone can never be enough to find individual liability. If that were the case, then each and every person

that ever worked on an advertisement that is later challenged by Complaint Counsel could be brought before the Commission—in essence entire marketing and advertising departments. Such a list would include even the lowest-level employees acting only in supporting roles during the creation process. That cannot be the law.

2. Mr. Tupper Never Possessed the Requisite Level of Control for Individual Liability to Attach

Mr. Tupper's level of control at POM is easily distinguishable from the level present and required in the cases relied on by the ALJ and Complaint Counsel for individual liability. Mr. Tupper, unlike the individuals in those cases, did not control critical aspects of POM's business and did not have the requisite level of authority to satisfy the requirements for individual liability.

First, Mr. Tupper did not create POM or any of the Roll companies. *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 575 (7th Cir. 1989) (in upholding individual liability court considered that officers created the business and opened new ones and controlled the financial affairs the companies). Mr. and Mrs. Resnick are the sole owners of Roll and its affiliated companies, including POM Wonderful. (RFF 69). In fact, long before Mr. Tupper worked for any of the Roll companies, the Resnicks invested in the pomegranate business and decided to investigate the fruit's potential health benefits. (RFF 85, 251, 254, 257).

Second, Mr. Tupper was not ultimately in charge of the challenged conduct. *F.T.C. v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997) (finding individual liability where, in addition to signing on behalf of the company, corporate officer was "in direct charge" of the conduct at issue). Mr. Resnick was the ultimate authority at POM Wonderful, including any decisions to advertise health benefits and whether an advertisement would be disseminated. (RFF 74, 77-78). Mr. and Mrs. Resnick together had the ultimate authority in developing POM's marketing strategies, and Mrs. Resnick had the final approval authority in deciding content and concepts, not Mr. Tupper. (RFF 80, 82).

Third, and perhaps most importantly, Mr. Tupper did not have the ability to stop the alleged deceptive conduct. *F.T.C. v. Neovi, Inc.*, 598 F.Supp.2d 1104, 1117 (S.D. Cal. 2008), *aff'd*, 604 F.3d 1150 (9th Cir. 2010) (control demonstrated, in part, by individual's ability to stop offending conduct). If there were any issues or disputes with respect to the advertising, the final authority rested with Mr. and Mrs. Resnick alone. (RFF 102).

Finally, and as noted above, Mr. Tupper did not have ultimate authority, or even authority equal to the Resnicks, during his tenure at POM. *In the Matter of Griffin Systems, Inc.*, 117 F.T.C. 515, 582-83 (1994) (requisite control demonstrated by corporate officer's shared authority over various aspects of closely held corporation). Although Mr. Tupper was involved with several aspects of POM Wonderful's operations, none were under his exclusive or majority control. (RFF 56). Further, Mr. Tupper was most certainly not on equal footing with Mr. and Mrs. Resnick. Mr. Tupper's reported directly to Mr. Resnick (the very scope of his authority was defined by Mr. Resnick) and he had dotted-line reporting to Mrs. Resnick. (RFF 57, 91-92).

B. The Proposed Order Is Not Reasonably Related to the Alleged Violations

The proposed order as to Mr. Tupper individually is not reasonably related to the alleged misconduct. "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)).

Under the reasonable relation test, the Commission must consider: "(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 Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994)). None of these factors weigh in favor of an order against Mr. Tupper.

First, the seriousness and deliberateness prong was not demonstrated in this case. The primary inquiry in determining the seriousness of any alleged conduct necessitates asking (1) was the product dangerous; and (2) was the product offered as a substitute for conventional medical care. *In re Daniel Chapter One,* FTC Docket No. 9329 (2009) (seriousness found where product was offered as a substitute for conventional medical treatment and posed a potential harm to consumer); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 747 (1994) (seriousness stemmed from negative health ramifications). In the current case, the answer to both of these questions is a resounding "no". The ALJ himself found the POM products to be absolutely safe and concluded that Respondents did not offer them as substitutes for conventional medical treatment. (IDF 77-81, 85-88).

In assessing deliberateness, the ALJ failed to apply the proper legal standard. The primary inquiry in the determination of deliberateness asks whether or not Respondents blatantly and utterly disregarded the law. *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978). The record must show that Respondents continuously and knowingly disseminated claims despite having substantial information that the statements were false. *See Brake Guards Prods, Inc.*, 125 F.T.C. 138, 213 (1998) (deliberateness found where record showed "respondents' continuous, knowing dissemination of claims designed to sell products regardless of whether they had sufficient information to support the truth of these claims, and despite substantial information that they were false.").

The record in this case refutes any findings that the Respondents knowingly disseminated false claims.[2] As noted on the record and in briefing, Mr. Tupper's belief that POM's cardiovascular, prostate and erectile health research was an "eight out of ten" strengthens rather than detracts from such a finding. (CCABTA at 12). In reality, it indicates that Mr. Tupper rightfully believed in the merits of POM's science and that POM's ads were sufficiently supported by an extensive body of competent and reliable scientific evidence. (RFF 395). Complaint Counsel's attempt to conflate lack of remorse with real belief does nothing to change this fact. Similar attempts to insert and take out of context Mr. Tupper's statements in POM's 2009 Medical Research Portfolio Review, ***ignore the mountain of testimony directly addressing the meaning and purpose of this document.*** (CCABTA at 12-13). As testified to at trial, this document, and others like it, reflect an assessment of the science from a narrow FDA drug approval perspective (and following the FDA's limited recognition of surrogate markers used in POM's research) for the purpose of preparing to potentially submit an application to the FDA for drug approval. (Tupper, Tr. 3011). Both of the authors, Dr. Dreher and Mr. Tupper, testified that the document was used solely to evaluate the strength of POM's science under the narrow parameters of FDA drug approval and not to assess POM's health claims or science generally. (Tupper, Tr. 3008-10, Dreher, Tr. 561-62).

The second factor looks to the ease with which the claims may be transferred to other products. Mr. Tupper, as represented to this Court, 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.

[2] Notably, the ALJ declined to make any assessment of Respondents' knowledge as to the adequacy of the science or the misleading nature of the challenged advertisements. (ID at 313 FN 24).

Resnick, Welch Dep. at 55); S. Resnick, Tr. 1870). He is not, and was not, in a position to transfer claims to other products.

Relatedly, Complaint Counsel argues in its Answering Brief, that Mr. Tupper "became aware of concerns about inadequate substantiation from the FDA or the FTC" and failed to make specific changes to POM's marketing. (CCABTA at 13). No such finding was made by the ALJ. Instead, the ALJ appropriately recognized that Respondents' disagreement with the FDA[3] and its choice to litigate this matter before the Commission cannot be interpreted as a willingness to flout the law. (ID at 322-23). Mr. Tupper's refusal to settle this matter similarly cannot serve as a basis for the proposed order and is certainly not evidence that Mr. Tupper was dismissive of the claims brought against him — he simply disagreed.

The third, and final, factor in the reasonable relation test also weighs heavily against the proposed order. Mr. Tupper has no prior history of violations in his more than ten years of business experience with the Respondents and other previous companies.

Mr. Tupper's retirement also weighs against the argument that an order against him would "prevent future unlawful conduct." (CCABTA at 14). Injunctive relief is only appropriate if there is something ***more than a mere possibility of recurrent violation***. *National Urological Group, Inc.*, 645 F.Supp.2d at 1209 (emphasis added). There must be a "cognizable danger." *Id.* To make this determination, the Commission must consider whether the defendant's current occupation positions him to commit future violations. *Id.* Here, as Mr. Tupper is retired – it simply does not exist.

Complaint Counsel's baseless conjecturing about Mr. Tupper's future plans should be ignored. There is no record evidence that Mr. Tupper intends to or will be given any additional opportunities at POM or any of the Roll companies. Mr. Tupper testified unequivocally that he

[3] Complaint Counsel misstate the record and argue that "Mr. Tupper dismissed such warnings." The record is clear on this point. After POM responded in a letter to the FDA's Warning Letter and made changes to its website whereby the research is only accessible through multiple clicks, the FDA has not expressed any further concerns. (Tupper, Tr. 2983).

informed the Resnicks of his impending departure and planned to retire at the end of 2011. (Tupper, Tr. 2972-73). The record reflects only Mr. Tupper's intentions to retire ***because the record closed prior to his departure in December 2011.***[4] Indeed, the record reflects that there is no possibility of a recurring violation let alone the requisite "cognizable danger" justifying an order here. Thus, all these factors weigh heavily against an order against Mr. Tupper.

Additionally, Complaint Counsel's meaningless statement that the consent order entered into by Dr. Mark Dreher somehow provides justification for issuing an order against Mr. Tupper as a former employee is also meritless. Mr. Dreher willingly entered into the consent order issued against him and his consent order was not the result of a fully litigated case where a court heard and carefully weighed extensive evidence. Any actions by Dr. Dreher therefore have no bearing on any misconduct or speculative future misconduct by Mr. Tupper.

Accordingly, the Proposed Order as it relates to Mr. Tupper personally is overbroad and not sufficiently related to the alleged violations and should not issue.

III. CONCLUSION

For the forgoing reasons, the Commission should reject the ALJ's Initial Decision and take no action against Mr. Tupper.

[4] Judge Chappell closed the record in this matter on November 18, 2011.

Dated: July 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of **RESPONDENT MATT TUPPER'S REPLY TO COMPLAINT COUNSEL'S ANSWERING BRIEF** and that on this 27 day of July, 2012, I caused the foregoing to be served by hand delivery and email on the following:

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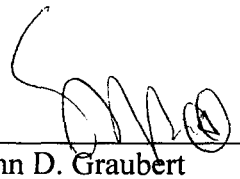

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