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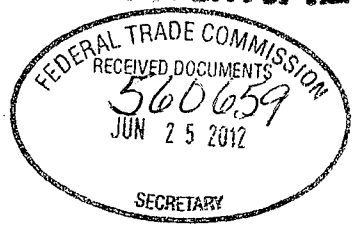

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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	)	
	)	

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD

I. INTRODUCTION

On May 21, 2012, after a lengthy trial and extensive record consisting of over 2,000 exhibits, testimony from 24 witnesses, 3,273 pages of trial transcript, and almost 4,000 proposed findings of fact, an Initial Decision ("decision") was issued in this matter. Complaint Counsel, apparently unsatisfied with the voluminous hearing record (and possibly the decision itself), now seek to reopen the record--six months after it fought to close it[1]-- to admit certain advertisements that POM Wonderful LLC ("POM") published in response to the ALJ's decision.[2] Complaint Counsel's Motion to Reopen the Record ("Motion") lacks merit and should be denied.

Although the Initial Decision deemed a small number of POM's ads to have made claims that the products allegedly "treat," "prevent", or "reduce the risk" of disease without sufficient

[1] On November 15, 2011, Complaint Counsel filed an opposition to Respondents' Motion to Extend the Closing of the Record.
[2] The trial in this matter concluded on November 4, 2011, and the ALJ closed the record on November 18, 2011.

substantiation, the ruling also importantly affirmed POM's right to advertise the general health benefits of POM Products, including those relating to prostate, erectile, and heart health.

On May 21, 2012, the same day the decision became publicly available, the FTC issued a press release ("Press Release") that omitted critical aspects of the ruling that were unfavorable to Complaint Counsel. For instance, instead of disclosing that Complaint Counsel had failed in its attempt to impose a heightened (and unconstitutional) standard of two double-blind, randomized, controlled trials (RCTs) to satisfy the "competent and reliable" standard for making health claims for natural-food products, the FTC instead proceeded to make inaccurate characterizations regarding POM's science. For instance, the FTC inaccurately stated that:

- POM's erectile science showed that POM juice was no more effective than a placebo;
- POM's science did not show a benefit to prostate health because the study relied on was not blinded or controlled; and
- POM's science did not show any benefits in connection with cardiovascular health.

The press and public adopted the FTC's misleading description of the decision. In order to publicly share the positive findings in the decision, POM launched an advertising campaign on May 24, 2012 that: (1) invited the public to read the entire decision for themselves, (2) advised the public that POM could, in fact, continue to make a number of health claims, (3) quoted verbatim from the ALJ's exact findings affirming the same (hereinafter, "POM's Responsive Ad Campaign")[3] and (4) provided access to a complete copy of the decision.[4]

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[3] "POM's Responsive Ad Campaign" includes the ad "You be the Judge" and "Heart Therapy" (CX0109), "Cheat Death" (CX0188), "Drink to Prostate Health" (CX0260), "What Gets Your Heart Pumping" (CX0192), "Antioxidant Superpill" (CX0180), "The Power of POM" (CX0169) and "I'm off to Save PROSTATES!" (CX0274) (which were part of the Initial Decision and not violative of the FTC Act) as well as "Forever Young", "Death Defying", "Extreme Makeover", "Life Preserver", "Health's Angel", and "Holy Health! Over 25 million in Medical Research" (which were never challenged by Complaint Counsel).

[4] POM also issued its own press release in response to the Initial Decision on May 21, 2012.

Complaint Counsel now argues that POM's Responsive Ad Campaign "flouted the law" and "pushed the envelope," and, therefore, necessitates reopening of the record. (Mot. at 6.)

As set forth below, POM's decision to launch a truthful, yet "aggressive advertising campaign" does not justify reopening of the record or provide support for a stronger order from the Commission. Moreover, Complaint Counsel has failed to show that POM's Responsive Ad Campaign adds any probative value. Rather, Complaint Counsel has asked the Commission to assume that this recent ad campaign is part of POM's standard health benefit advertising, not an entirely separate campaign with an entirely different purpose.

Reopening the record at this late hour would impose undue prejudice on Respondents by halting the appeal process and affording Complaint Counsel an additional, post-trial opportunity to address key issues. The prejudice suffered would be particularly high for Respondent Matt Tupper, who has not been employed by POM or any of the Resnick companies since the end of 2011.[5] This would perpetuate a pattern of procedural unfairness highlighted by Complaint Counsel's repeated failure to disclose what ads were actually at issue until ***after the close of trial.*** Complaint Counsel again seeks to move the goal post, this time without giving Respondents a full and fair opportunity to litigate the issues.

At the heart of Complaint Counsel's Motion is a disturbing effort to silence POM by trying to punish the company for suggesting that the FTC's Press Release is not the only viewpoint the public is entitled to hear. If Complaint Counsel is successful, it will not only chill POM's First Amendment right to speak about the decision, but will (as intended) stifle and discourage similar speech by future litigants.[6] Complaint Counsel's efforts, in effect,

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[5] *See* Respondent Matt Tupper's Opposition to Complaint Counsel's Motion to Reopen the Record filed June 25, 2012.

[6] It is well-settled that Respondents have a protected right under the First Amendment to discuss publicly the outcome of this administrative action. *See Edenfeld v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our society and cultural life, provides a forum where ideas and information flourish . . . [T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."); *Ibanez v. Florida Dept. of Business and Professional Regulation, Board of Accountancy*, 512 U.S. 136, 142 (1994).

monopolize public discussion on the meaning of the decision, and signal to other companies who disagree with Complaint Counsel (or the government) that their public disagreement will have consequences. These unjust tactics should not be condoned here.

II. COMPLAINT COUNSEL CANNOT MEET THE REQUISITE STANDARD FOR REOPENING THE RECORD

In determining whether to reopen the record, the Commission considers: (1) whether the moving party can demonstrate due diligence; (2) the extent to which the proffered evidence is probative; (3) whether the evidence is cumulative; and (4) and whether reopening the record would prejudice the non-moving party. *In re Brake Guard Products, Inc.* 125 F.T.C. 138 (1998). As discussed below, Complaint Counsel cannot satisfy this heavy burden.

A. POM'S Responsive Campaign Lacks Probative Value and Is Outside the Scope of the Complaint.

First, POM's responsive ads are wholly unrelated to the allegations in the Complaint and thus have no relevance or probative value. The Complaint alleged that Respondents' advertising and promotional materials falsely represented that the consumption of POM Products prevents, reduces the risk of, or treats heart disease, prostate cancer, or erectile dysfunction. (Complaint ¶ 9, 10, 19.) By contrast, POM's advertising (including the re-posting of non-violative ads) has nothing to do with making health claims as alleged in the Complaint. Instead, POM published such advertisements to educate the public by highlighting certain portions of the decision, especially those findings favorable to POM that the FTC had omitted from its own Press Release. The ads also emphasized, citing the Initial Decision, that many of POM's health benefit claims were substantiated, and POM was well within its rights to make such health benefit claims. Thus these ads do not fall within the Complaint's scope. Moreover, if there were any questions

regarding messages allegedly conveyed by the ads and/or their intent, then POM should be given a right to a trial. Any ruling to the contrary would constitute trial by ambush.

Second, POM's responsive ads are not probative of whether the scope of the proposed order is adequate because the ads are not misleading or deceptive. Even though POM's new advertisements quoted the *exact* language from the decision and invited readers to review both a number of the ads and decision for themselves, Complaint Counsel claims that POM's conduct was deceptive. (Mot. at 7). In particular, Complaint Counsel took issue with POM's recitation of three ***verbatim quotations*** taken from the ALJ's decision. (Mot. at 2-3). These quotations highlight the fact that the ALJ confirmed the truth in the message POM's ads conveyed all along - that pomegranates have significant health benefits. Not only are these statements truthful, but there is ***no new element of deceptiveness*** introduced by sharing these findings with the public. Complaint Counsel's argument that POM's responsive ads "uniquely display POM's plan to operate" under the ALJ's order is completely wrong. (Mot. at 7).

Finally, the only case Complaint Counsel cites that relates to the probative value of advertisements created during the appellate process *is FTC v. Nat'l Comm'n on Egg Nutrition,* 517 F.2d 485 (7th Cir. 1975). That case is clearly distinguishable. In *Egg Nutrition,* the court was asked to determine the appropriateness of issuing a temporary injunction and, in doing so, specifically limited the injunction by reserving respondent's right to make a "fair representation of its side of the controversy." – that is, ***the injunction did not limit respondent's ability to talk about the matters at issue on appeal.*** *Id.* at 489. Here, Complaint Counsel seek to introduce *new ads about the ALJ's ruling and the outcome of this litigation,* not the misrepresentations alleged in the Complaint.

B. Reopening The Record Is Highly Prejudicial

Respondents would suffer severe prejudice should the hearing record be reopened because: (1) Respondents will have no opportunity to counter or rebut Complaint Counsel's evidence; (2) Complaint Counsel has had a full and fair opportunity to put on their case; and (3) reopening the record will frustrate the "overriding interest in prompt and efficient handling of this litigation," *See Joy Technologies, Inc. v. Flakt, Inc.*, 90 F.Supp 180, 183 (D. Del. 1995); and (4) it would violate Respondents' Due Process rights.

First, by their Motion, Complaint Counsel is attempting to shoehorn advertising into the case that is clearly outside the scope of the original Complaint, and which, at a minimum, cannot be fully adjudicated without affording Respondents the opportunity to address fully these advertisements during the regular course of discovery, trial, and post-trial briefing, which is now complete.

Second, Complaint Counsel has had ample opportunity to put on their case. The administrative hearing consisted of 19 days of trial, over a period of six months. Nearly 2,000 exhibits were admitted and 24 witnesses testified, either live or by deposition. Complaint Counsel should be limited to the current record and should not be permitted to supplement the evidence on key issues before the Commission. Indeed, justice requires that this matter be "decided on the law and facts as they exist at the evidentiary hearing or trial and not re-decided as later events occur, except in the most unusual circumstances; judicial proceedings cannot be denied finality and repetitively litigated." *Ulloa v. City of Philadelphia*, 692 F.Supp 481 (E.D. Pa. 1988).

Third, reopening the record would cause a significant delay in the appeal process. *Blinzler v. Marriott Intern*, Inc. 81 F.3d 1148, 1160 (5th Cir. 1996) (if gathering additional evidence portends a significant delay in the trial, the court ordinarily will have a greater reluctance to grant the motion) (*citing Rivera-Flores,* 64 F.3d 742, 746 (1st Cir. *1995); Joseph v. Terminix Int'l Co.,* 17 F.3d 1281, 1285 (10th Cir. 1994); Moore's Federal Practice ¶ 59.04 at 59-33 (2d ed. 1993). At such late stage in this case, when the parties have already filed appellate briefs and are preparing for oral argument, reopening the record would require that both

percipient and expert witnesses be deposed again in order to fully rebut, examine, or contradict Complaint Counsel's arguments with respect to the post-trial ads. *Scott v. Mahlmeister*, 319 Fed. Appx. 160, 161-62 (3d Cir. 2009) (affirming prohibition on supplemental testimony or argument in response to jury's questions because introduction of such evidence would require the opposing side to recall witnesses, delay resolution of the case, and would distort the importance of the evidence). It is also conceivable that reopening the record could necessitate the filing of supplemental appellate (and perhaps, post-trial) briefs by both parties. In short, reopening the record would delay proceedings that have been ongoing since May 2011.[7]

Finally, reopening the record would violate Respondents' Fifth Amendment due process rights because the Respondents were never given proper notice (in the Complaint or otherwise) that their right to speak freely or to generate advertisements pertaining to this trial were at stake. As explained above, the advertisements that Complaint Counsel seek to have admitted are unlike the ads at issue in the matter before the Commission and are outside the scope of the allegations of the Complaint. *Murphy Oil Corp. v. Fed. Power. Comm'n*, 431 F.2d 805, 813 (8th Cir. 1970) (parties are entitled to due notice as to the nature and scope of the contemplated inquiry); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981) (due process requires defining the issues, advising litigants of alleged violations of a specific complaint, and full hearing on the issues presented).

Moreover, as set forth above, reopening the record would deprive Respondents of any meaningful opportunity to be heard. Due process requires that Respondents be afforded an opportunity to confront and rebut the evidence. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses). Here, Respondents must be given the chance to

[7] If the ALJ were to grant Complaint Counsel's Motion, then this could lead to a never-ending cycle of closing and reopening the record – that is, as soon as Respondents disseminate a similar advertisement or another press release about this litigation, Complaint Counsel could and would move to reopen the record again and again. *See Federated Dep't Stores v. Moitie*, 452 U.S. 394, 402 (1981) ("the interest of the state requires that there be an end to litigation").

challenge Complaint Counsel's theory of the purpose and meaning of POM's new ads by cross-examination and introduction of their own evidence.

IV. CONCLUSION

For the foregoing reasons, Complaint Counsel's Motion should be denied.

Dated: June 25, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of Respondents' **OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD**, and that on this 25th day of June, 2012, I caused the foregoing to be served by hand delivery and email on the following:

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Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
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I hereby certify that this is a true and correct copy of Respondents' **OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD,**, and that on this 25th day of June, 2012, I caused the foregoing to be served by e-mail on the following:

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