Concurring Statement of Commissioner J. Thomas Rosch
In the Matter of POM Wonderful
Docket No. 9344
January 10, 2013

The Commission Opinion states that "[t]here are two analytical routes by which Complaint Counsel can prove that Respondents' ads are deceptive or misleading and both arise in this case." Commission Opn. at 17. The first is to demonstrate that the claims in the ads are false. The second approach relies on the "reasonable basis" theory; that is, that an objective claim about a product's performance or efficacy carries with it a representation that the advertiser had a reasonable basis of support for the claim. *Id.* I agree with these assertions.

Using this framework, the Commission Opinion separately analyzes the efficacy claims and the level of substantiation claimed by those advertisements. More specifically, the Commission first determines for itself whether and to what extent the ads make efficacy claims (*see, e.g.*, *id.* at 9); but the Commission relies on extrinsic evidence (the testimony of experts) to determine the level of substantiation required to support the claims made by the ads in that respect. The Commission ends up concluding on the basis of the testimony of those experts that the highest level of well-controlled studies (the "gold standard" of RCTs) is required to support the latter claims. *Id*. at 20, 22-23, 25-26, 30, 32, 35, and 38.

I agree with the Commission's conclusion. Moreover, I agree that the Commission reached that conclusion by using the most traditional (that is to say the safest) analytical route. However, that route entails a discussion of both the expert testimony and how the *Pfizer* factors should apply in this case. *Id.* at 20-38. I consider that lengthy discussion to be unnecessary. Beyond that, having served as a Commissioner for seven years and having been a trial lawyer for nearly 40 years before that, I am somewhat skeptical of relying so heavily on the opinions of experts who are paid by both Complaint Counsel and Respondents. Fortunately, I do not have to do so.

Instead, I would decide that the "net impression" left by the ads includes claims about what level of substantiation the advertiser is purporting to have; that a net impression may be conveyed both expressly and by implication; and that the substantiation claims in these ads are false.

First, let me emphasize that I, like my colleagues, have examined the ads myself. There can be no dispute that the net impression of the ads is what counts in determining what impression is conveyed to consumers. The case law has long held that. *See, e.g., American Home Prods. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). Moreover, there can be no quarrel with the proposition that the net impression conveyed by an ad includes implied claims, as well as express claims. The Commission itself has repeatedly been held to have the common sense and expertise to determine the net impression conveyed, "so long as those claims are reasonably clear." *Kraft,*

Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992);[1] *accord FTC v. Nat'l Urological Group, Inc.,* 645 F. Supp. 2d 1167, 1189-90 n.12 (N.D. Ga. 2008); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

Second, neither *Kraft* nor *Colgate-Palmolive* contains any suggestion that the Commission itself lacks the common sense and expertise to determine whether any false substantiation claims are conveyed by the ads, as part of its examination of the ads' net impression. Nor do other cases require that there ordinarily be any form of extrinsic evidence in that inquiry. *See, e.g.*, *FTC v. Nat'l Urological Group, Inc*., 645 F. Supp. 2d 1167, 1189 (extrinsic evidence "is only necessary when the asserted claims fall on the 'barely discernible' side of the continuum"); *FTC v. QT, Inc*., 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). Indeed, as the Commission Opinion acknowledges, *Sterling Drug*, 102 F.T.C. 395, 436 (1983), stands for the straightforward notion that "when an advertiser represents in its ad that there is a particular level of support for a claim, the absence of that support makes the claim false." Commission Opn. at 16, 20. Thus, I would hold that claims about the level of substantiation, no less than any other net impression conveyed by the ads, can be false, and that the Commission itself can make that determination.

Third, I would agree that if POM's ads simply made health claims, standing alone, they could not properly be challenged as false or deceptive. But they do not stand alone. In some instances the alleged health claim is expressly linked to a claim that the POM products treat, prevent or reduce the risk of heart disease or prostate cancer. The link between POM and the treatment, prevention or reduction of risk of those very serious diseases is at least implicit in many other instances. Those express and implicit links create a net impression that the highest possible level of substantiation exists for the POM product being advertised, and that claim is false.

More specifically, many of the advertisements expressly link POM to the treatment, prevention or reduction of the risk of heart disease or prostate cancer. *See, e.g.,* POM Claims Appendix, ads numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 16, 19, 20, 28, 29, 30, 31, 32, and 33. Other ads at least implicitly link POM or POMx to the treatment, prevention, or the reduction of risk of those very serious diseases by liberally quoting physicians. *See id.*, ads numbered 16, 18, 19, 21, 24, 25, 27, 28, 29, 30, 31, 32, and 33 in the Claims Appendix. Another set of ads implicitly link POM to the treatment, prevention, or the reduction of risk of heart disease or prostate cancer by equating POM with POMx (which is depicted as a prescription drug), or by depicting POM itself as a medicine. *See id.*, ads numbered 10, 13, 14, 16, 17, 18, 19, 22, 25, 28, 29, 30, 31, and 32. Furthermore, ads implicitly link POM to the treatment, prevention, or reduction of risk of these life-threatening diseases by describing POM as a life insurance supplement or a healthcare plan. *See id.*, ads numbered 29 and 31. Each of these claims creates

[1] It is worth noting that all of the appellate authority respecting the need for the Commission to consider expert opinions *predates* the *Kraft* case.

the net impression that the highest form of substantiation exists to support the claims linking POM to the treatment, prevention or reduction of risk from these serious diseases.

Fourth, I do not consider erectile dysfunction to be as serious as heart disease or prostate cancer. For example, while erectile dysfunction afflicts many men, it is generally not life-threatening. Thus, I do not think that linking POM with the treatment, prevention or reduction of risk of erectile dysfunction, standing alone, creates a net impression that claims respecting that malady are supported by the highest level of substantiation. But that does not mean the Commission Opinion is wrong in requiring that level of substantiation for erectile dysfunction as well. The Commission has long considered so-called "establishment" claims to be binding on the advertisers that make them. *See FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (for ads that "contain express or implied statements regarding the amount of support the advertiser has for the product claim . . ., the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers"). In this case, those associated with POM have made such claims. *See, e.g.,* POM Claims Appendix, ad numbered 33.