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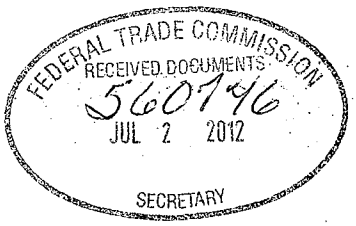
UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION

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



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 Document

COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF ITS MOTION TO REOPEN THE RECORD AND ADMIT RESPONDENTS' POST-INITIAL DECISION ADVERTISEMENTS AND COMPLAINT COUNSEL'S AUTHENTICATING DECLARATION

Pursuant to 16 C.F.R. § 3.22(d), Complaint Counsel respectfully moves for leave to file a reply in support of its Motion to Reopen the Record and Admit Respondents' Post-Initial Decision Advertisements and Complaint Counsel's Authenticating Declaration, filed with the Commission on June 13, 2012. In their responses to the motion and in their brief on appeal, Respondents set forth inconsistent factual assertions regarding the post-initial decision advertising campaign and dissemination of the challenged advertisements. Complaint Counsel's reply directs the Commission's attention to these facts and responds to Respondent's assertions which are directly relevant to the Commission's decision regarding the appropriate remedy to impose in this matter.

Complaint Counsel is conditionally filing the reply with this motion, which is appended hereto as Attachment A.

Dated: July 2, 2012

Respectfully submitted,

/s/ Tawana E. Davis

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[Proposed] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS MOTION TO REOPEN THE RECORD AND ADMIT RESPONDENTS' POST-INITIAL DECISION ADVERTISEMENTS AND COMPLAINT COUNSEL'S AUTHENTICATING DECLARATION

On June 13, 2012, Complaint Counsel filed a Motion for Leave to File a Reply in Support of its Motion to Reopen the Record and Admit Respondents' Post-Initial Decision Advertisements and Authenticating Declaration ("Motion for Leave to File a Reply").

It is ORDERED that Complaint Counsel's Motion for Leave to File a Reply is GRANTED.

By the Commission.

Issued:

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosch
Edith Ramirez
Julie Brill
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COMPLAINT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION TO REOPEN THE RECORD AND ADMIT RESPONDENTS' POST-INITIAL DECISION ADVERTISEMENTS AND COMPLAINT COUNSEL'S AUTHENTICATING DECLARATION

Pursuant to 16 C.F.R. § 3.22(d), Complaint Counsel respectfully files this reply in support of its Motion to Reopen the Record and Admit Respondents' Post-Initial Decision Advertisements and Complaint Counsel's Authenticating Declaration, filed with the Commission on June 13, 2012 ("Motion to Reopen"). Complaint Counsel directs the Commission's attention to Respondents' opposition to the Motion to Reopen, in which they *admit* that they have disseminated the post-initial decision ad campaign, which recirculates some of the challenged ads. Respondents' position is inconsistent with the facts and arguments represented in their Appeal Brief. Unless the evidence of the recirculated ads is admitted, Complaint Counsel is not

able to fully address the factual inaccuracies in Respondents' Appeal Brief and the deliberateness of their on-going actions.

DISCUSSION

Here, Respondents try to block *their own* new ad campaign from the record, while incorrectly asserting in their Appeal Brief that they have not run the challenged ads since the Commission began its investigation. The Commission should not accept this inconsistency, and should admit into the record the new ad campaign.

A. Respondents' Claim That the New Ads Lack Probative Value Is Without Merit

Respondents' claim that their new ad campaign "had nothing to do with making health claims as alleged in the Complaint," and is therefore not probative. (Resp. Opp. at 5). However, much of the campaign makes the exact claims challenged below. For example, as Respondents admit, seven of the challenged ads embedded in Respondents' current website are part of its new campaign. (Resp. Opp. at 2 n.3). The *New York Times* advertisement makes a virtually express claim that POM Juice is proven to prevent and reduce the risk of recurrence of prostate cancer. *See* Resp. Appeal Brief at 23 ("improve prostate health . . . is really just another way of saying that the POM Products reduce the risk [of] prostate disease . . . ."). Moreover, in arguing that injunctive relief in this matter is unwarranted, Respondents' claim that they have stopped the conduct at issue. (Resp. Appeal Brief at 40). The post-initial decision advertising campaign clearly shows otherwise.

Respondents' behavior is highly probative of their expected conduct if the ALJ's Initial Decision and Order stand. Complaint Counsel seeks to admit the new ads to show that Respondents immediately recirculated certain challenged ads after the Initial Decision as if the

ALJ found them to be lawful. In fact, the ALJ only stated there was insufficient evidence to determine whether these ads make the challenged claims. (ID at 224 (emphasizing "this is not a finding that the advertisements *do not* convey the alleged claims")). Complaint Counsel promptly appealed the ALJ's finding on the ads that Respondents now recirculate, and the Commission has yet to rule on them. In addition, Complaint Counsel's Appeal Brief urges the Commission to impose Part I of the Notice Order as appropriate relief. Respondents' new campaign underscores this need by demonstrating that Respondents' claim that it has ceased the conduct at issue is incorrect.

B. Respondents' Complaints About Prejudice Are Baseless

Respondents offer unpersuasive arguments about supposed prejudice if their own new ad campaign is admitted. It belies common sense for Respondents, who created and disseminated these ads that are are directly relevant to their future conduct, to claim that it is unfair for the Commission to consider them when fashioning an effective remedy. The Commission should consider this information, particularly in the face of Respondents' claims on appeal that they are reformed.

Respondents claim that Complaint Counsel is "shoehorning" the new advertisements into the original Complaint as if they are newly challenged claims. The new ads are not offered to establish liability, but to establish the need for the Notice Order and to rebut arguments in Respondents' Appeal Brief based on erroneous facts. (Resp. Appeal Brief at 39-40). Thus, Respondents' cases citing notice for purported new law violations are irrelevant.

Finally, Respondents suggest that they should have an opportunity to challenge the evidence or that the proceedings should be delayed for them to do so. (Resp. Opp. at 6).

Respondents' arguments are meritless. They need not "challenge" the evidence with witness examinations. The authenticity of the ads is undisputed; Respondents admit to creating and disseminating them. Respondents will have sufficient opportunity to "challenge" their relevance for the limited purpose of determining injunctive relief.[1] *See Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977) (finding Commission "was not required to allow" Respondent to submit rebuttal evidence after admitting newly created advertisements into record even after all briefing and oral argument had been completed); *see generally, e.g., Mester Mfg. Co. v. INS*, 879 F.2d 561, 569 (9th Cir. 1989) (noting the "flexible standard of due process" in administrative proceedings that depend on the circumstances).

C. Mr. Tupper's Claim about His Relationship to Corporate Respondents Is Unsupported And Does Not Preclude Admitting the New Advertisements

Mr. Tupper's claim that he no longer works for Corporate Respondents is unsupported by the record.[2] Notwithstanding his current employment status, evidence including the new advertisements is relevant to the imposition of the Notice Order against him. The Commission previously entered a similar consent order against POM's former Scientific Director, Mark Dreher, Ph.D., even though he had left the company at the time the order was entered.[3] Although

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[1] Assuming the Commission rules on the motion to reopen quickly, Respondents may argue the campaign's relevancy in their opposition to Complaint Counsel's Appeal Brief due July 18, 2012, their reply to Complaint Counsel's opposition to Respondents' Appeal Briefs due July 25, 2012, and at oral argument scheduled for August 23, 2012.

[2] At trial, Mr. Tupper testified that he "plan[ned] to leave POM by the end of this year [2011] most probably." (Trial Tr. at 2973). While the Initial Decision stated that "Mr. Tupper retired from POM at the end of the [sic] 2011," (ID¶40), it only cited Mr. Tupper's trial testimony, which revealed his *intent* to retire, but not that he in fact did so.

[3] *See In the matter of* Mark Dreher Ph.D., FTC File No. 082-3122.

Mr. Tupper may no longer work for POM, he still could rejoin Corporate Respondents or advise them as a consultant in the future, as Mr. Dreher has.[4] Thus, evidence related to the imposition of the Notice Order is relevant to his Order. Moreover, on appeal Mr. Tupper adopts all facts and arguments in Respondents' Appeal Brief. (Tupper Appeal Brief at 1). Thus, it is only fair for the Commission to be able to consider this rebuttal evidence in relation to Mr. Tupper's order. Mr. Tupper will not be prejudiced if the Commission does so.

CONCLUSION

Based upon the foregoing, Complaint Counsel respectfully requests that the Commission grant its motion and enter the proposed order reopening the record and admit: (1) the advertisements Respondents disseminated after the issuance of the Initial Decision; and (2) the Declaration of William Ducklow authenticating these advertisements.

Dated: July 2, 2012

Respectfully submitted,

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[4] For example, since leaving POM, Mr. Dreher has worked as a scientific consultant to Roll's company Paramount Farms. (*E.g.*, CX1366 (Dreher, TCCC Dep. at 5-6; CCCF¶12).

CERTIFICATE OF SERVICE

I certify that on July 2, 2012, I filed and served *Complaint Counsel's Motion for Leave to File a Reply in Support of its Motion to Reopen the Record and Admit Respondents' Post-Initial Decision Advertisements and Complaint Counsel's Authenticating Declaration* and an accompanying *Reply* upon the following as set forth below:

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

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-159
Washington, DC 20580

One paper copy and one electronic copy via email to:

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

One electronic copy via email to:

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Date: July 2, 2012

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