

Concurring Statement of Commissioner Maureen K. Ohlhausen  
In the Matter of POM Wonderful  
Docket No. 9344  
January 10, 2013

I disagree with the majority's findings on implied disease efficacy and establishment claims with regard to the exhibits detailed below for several reasons. First, several of these exhibits contain claims about the general effects of the POM products on the continued healthy functioning of the body but do not make references to diseases or health-related conditions. Despite the absence of such references or other suggestive indicators (e.g., strong medical imagery), the majority finds that these exhibits contain implied disease-related claims without extrinsic evidence that consumers viewing the exhibits would actually perceive such stronger claims and not simply perceive healthy functioning claims (akin to "structure/function" or "S/F" claims under Food and Drug Administration regulations).<sup>2</sup> I am concerned that, if the Commission too easily finds implied disease efficacy establishment claims in advertisements for foods, absent extrinsic evidence, then it may tend to undermine an important balance that is struck in the regulation of food, supplement, and drug advertising under the FTC Act and other federal laws.<sup>3</sup>

Second, for a number of advertisements, I believe the majority conflates disease treatment claims with prevention/risk reduction claims. In one instance, they find implied disease treatment claims where the exhibit appears only to claim or suggest that the risk of disease is, or may be, reduced by POM products. Conversely, in several others, they find implied prevention/risk reduction claims (not implied disease treatment claims) for exhibits that describe studies of subjects already suffering from prostate cancer or ED. For all of these exhibits, we lack extrinsic evidence that consumers would perceive all the various claims that the majority finds are implied by the exhibits. Because it seems unlikely that a consumer would assume that any food or food product that lowers the risk of disease is also a viable treatment for

establishment claims in the absence of extrinsic evidence supporting such a conclusion. Moreover, the majority argues that the challenged references reinforce the disease-related establishment claims by mentioning that POM spent millions on research. However, the references to the money spent on research appear to be significantly related to demonstrating the amount of antioxidants in the POM products and the general effects of those antioxidants on the human body. Therefore, we need extrinsic evidence to show that consumers would also take away the impression that the research supporting the disease claims is established and not merely preliminary.

Virtually none of the claims found by the Commission in the challenged exhibits is express – they are deemed to be implied. The Commission may undertake a net impression analysis and find implied claims when it “can conclude with confidence after examining the interaction of all the different elements in [an advertisement] that they contain a particular implied claim.” *In re Thompson Med. Co.*, 104 F.T.C. 648, 788-89 (1984); *Telebrands Corp.*, 140 F.T.C. 278, 290 (2004) (citing *Thompson Medical*). When such confidence is lacking, due to well-qualified claims or contradicting statements, however, “we will not find the ad to

that it only challenges reasonable interpretations of advertising claims.<sup>10</sup> As a procedural matter, we may begin by asking what particular claims – and categories of claims – are being made, and then ask what evidence should be required to substantiate such claims. We must keep in mind, however, that if we are too quick to find stronger claims than the ones reasonable consumers actually perceive, then we will inadvertently, but categorically, require an undue level of substantiation for those claims.

In particular, Congress and the Food and Drug Administration have create

mere mention of scientific evidence can imply a related establishment claim. For instance, Figures 12, 20, and 23 seem limited to addressing the product's general health benefits by providing antioxidants and fighting free radicals, and thus potentially reducing the risk of disease, while claiming that these benefits are backed by significant scientific or medical research about prostate or cardiovascular health. Based on the majority's views about these exhibits, it is difficult to imagine any structure/function claims that POM could associate with its products in the marketplace without such claims being interpreted, under the FTC precedent set in this case, as disease-related claims.<sup>15</sup>

A possible (though not plausible) argument from the majority's position is that these exhibits are somehow infused with messages from other ads included in some of POM's advertising campaigns that mentioned specific diseases or health conditions. However, we should not reach such a conclusion in the absence of extrinsic evidence in the record. *Thompson Med. Co.*, 104 F.T.C. at 789; *Telebrands*, 140 F.T.C. 379, 436 (2004) (ALJ Decision adopted by the Commission in *Telebrands*, 140 F.T.C. 278, 281 (2004) (requiring extrinsic evidence even though the ads at issue contained express references to other ads). More generally, we should be careful not to interpret claims so broadly that we undermine distinctions between types of claims, and the substantiation appropriate to them, that Congress and sister agency have found important to the public's health and wellbeing.

In sum, the majority's findings with regard to the exhibits detailed below in the absence of extrinsic evidence leave considerable room for marketers to make well-qualified and substantiated structure/function type efficacy or establishment claims because of the high risk that such claims will be found to imply the treatment, prevention, or risk-reduction of a disease, or that they are clinically proven.

I incorporate these arguments by referencing my views for specific exhibits in my comments below.

Figure 4. CX0031: "Floss Your Arteries" print advertisement

I disagree with the majority view that this print ad conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily ~~prevents~~ – rather than prevents or reduces the risk of – heart disease. ~~so I disagree with the majority and would uphold the ALJ's finding that the evidence fails to show that this print ad conveys to a significant minority~~

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<sup>15</sup> I am concerned that, for these exhibits, the majority's views are in conspicuous tension with the express findings and intent of Congress in enacting the Dietary Supplement Health and Education Act of 1994 (DSHEA), wherein Congress provides for structure/function claims that may be made on behalf of dietary supplements. In the statute itself are express findings that healthfu

of reasonable consumers that the claims contained in the advertisement are clinically proven. The advertisement's language states that drinking POM Juice "can reduce plaque by up to 30%" (emphasis added) and the citation to a study appears in a footnote too small to be clear and conspicuous under our own standards. See D at ¶ 447. Further, the imagery in the advertisement is that of regular hygiene, such as tooth brushing and flossing, not medical imagery related to heart disease that appears in other challenged advertisements where the Commission unanimously found an implied establishment claim.

Figure 6. CX0034: Amaze Your Cardiologist

I disagree with the majority view that this print ad conveys to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. I disagree with the majority and would uphold the ALJ's finding that the evidence fails to show that this exhibit conveys to a significant minority of reasonable consumers that the claims contained in the advertisement are clinically proven because the statement regarding plaque reduction is well-qualified ("can reduce plaque by up to 30%" (emphasis added)) and the reference to the study appears in a footnote too small to be clear and conspicuous under our own standards. See D at ¶¶ 465-468.

Figures 10 and 17. CX1426 Ex. I: Antioxidant Superpill Brochure; CX1426 Ex. N: POMx Prostate Newsletter

I disagree with the majority's view that these exhibits convey to a significant minority of reasonable consumers that daily consumption of POM products prevents or reduces the risk of prostate cancer, as opposed to treating prostate cancer. All references to that disease in the exhibit appear rooted in a study of 46 men age 65 to 70 who had been treated for prostate cancer. Further, CX1426 Ex. I specifically references "new studies are under way ... in patients with prostate cancer" (emphasis added).

Figure 12. CX0109: Heart Therapy

I disagree with the majority and would uphold the ALJ's findings that the evidence fails to show that this print ad conveys to a significant minority of consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease or that such claims are clinically proven. The imagery in this ad, which is a POM bottle reclining on a couch, suggests

Figures 13-14. CX0120: One small pill fomankind; CX0122: Science Not Fiction

