UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

Jon Leibowitz, Chairman J. Thomas Rosch Edith Ramirez Julie Brill Maureen K. Ohlhausen	
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ORDER RULING ON MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE A REPLY

On June 13, 2012, Counsel for the Complaint filed a Motion To Reopen the Record in this matter ("June 13 Motion"), and to admit into the record "(1) certain POM product advertisements that Respondents created after the issuance of the Initial Decision; and (2) the Declaration of William Ducklow authenticating these advertisements." On June 25, 2012, Respondent Matthew Tupper and the other Respondents respectively filed Oppositions to the June 13 Motion. On July 2, 2012, Counsel for the Complaint filed a Motion For Leave To File Reply in support of the June 13 Motion.

The evidence that Complaint Counsel attempt to introduce into the record includes (1) advertisements disseminated by Respondents that include quotes from the ALJ's Initial Decision; and (2) other advertisements, some of which are already in the record, and the meaning of which Complaint Counsel are already in the process of appealing to the Commission.

Under Commission Rules 3.51(e)(1) and 3.54(a), 16 C.F.R. §§ 3.51(e)(1), 3.54(a), a party may move to "reopen the proceeding for the reception of further evidence" at any time before the Commission issues its decision. *Brake Guard Products* sets forth the applicable standard for reopening the record. Under that test, "the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for

the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party. *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998).

We find that Complaint Counsel has acted with diligence, as the facts regarding publication of these claims and advertisements were not available until after the issuance of the Initial Decision. Based on our analysis of the remaining three factors, however, we do not find that Complaint Counsel's arguments warrant reopening the record in this matter to introduce the proposed new exhibits.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion to Reopen the Record is denied; and

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Leave to File a Reply is denied.

By the Commission.

Donald S. Clark Secretary

ISSUED: July 25, 2012