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October 17, 2011

PUBLIC DOCUMENT

By FTC E-File & Hand Delivery

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW H-113
Washington, DC 20580

Re: In the matter of: POM Wonderful LLC, et al., Docket No. 9344

Dear Judge Chappell:

This letter is to bring to your attention a recent important development with respect to Respondents' Motion to Strike the Bovitz Survey that could not have been raised earlier in Respondents' principal brief. *Cf.* 16 C.F.R. 3.22(d). From the post-briefing testimony of Professor Stewart on October 14, 2011, it is clear that the Bovitz survey is irrelevant for still another reason in addition to those stated in Respondents' previously filed motion.

On October 14, Dr. Stewart conceded at trial that the Bovitz study does not show that the responses of the participants were caused by Respondents' billboards as opposed to extraneous factors. Draft Trial Tr. 100:13-101:3, attached hereto. If the billboard images and captions were not the cause of the percentage responses shown in the Bovitz study, they are irrelevant for this additional reason.

Sincerely,

/s/ John D. Graubert

John Graubert

cc: Counsel of Record

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
POM WONDERFUL LLC and)	
ROLL GLOBAL LLC,)	
as successor in interest to Roll)	
International Corporation,)	
)	
companies, and)	Docket No. 9344
)	PUBLIC
STEWART A. RESNICK,)	
LYNDA RAE RESNICK, and)	
MATTHEW TUPPER, individually and)	
as officers of the companies.)	

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of Respondents' **LETTER TO JUDGE CHAPPELL**, and that on this 17th day of October, 2011, I caused the foregoing to be served by electronic filing and e-mail on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
H-159
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-110
Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondents' **LETTER TO JUDGE CHAPPELL**, and that on this 17th day of October, 2011, I caused the foregoing to be served by e-mail on the following:

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Counsel for Respondents

Dated: October 17, 2011

CITED TRANSCRIPT PAGES

THIS IS AN
UNCERTIFIED ROUGH DRAFT
OF TRIAL VOLUME 18 IN RE POM WONDERFUL LLC,
TAKEN OCTOBER 14, 2011.

THE FINAL TRANSCRIPT MAY VARY
WITH REGARD TO PAGE/LINE NUMBERING
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APPROPRIATE DISCLOSURES.

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CONSTITUTES A FINAL TRANSCRIPT ORDER.

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1 read his report before you agreed to take on the
2 assignment?

3 A. Well, I'm not sure what you mean by take on the
4 assignment. I agreed before I got the report that I
5 would look at it. If you mean by did I -- did I agree
6 to develop a report before I saw the report,
7 Professor Butters, that's different.

8 Q. Did you agree to testify as an expert in this
9 case before you read his report?

10 A. I agreed that I would consider doing so.

11 Q. You agreed you would consider doing so.

12 Did you tell them you would be an expert before
13 you read his report, sir?

14 A. I don't believe that I did.

15 Q. Okay. Now, let's talk briefly and I mean
16 briefly -- about the Butters survey.

17 MR. OSTHEIMER: For clarification, do you mean
18 the Bovitz survey?

19 MR. FIELDS: Pardon me. Absolutely. I mean
20 Bovitz. When you get old, you get forgetful.

21 JUDGE CHAPPELL: Do you want to take a moment
22 and make sure you've got that set up right?

23 MR. FIELDS: It is set up. Thank you.

24 BY MR. FIELDS:

25 Q. Okay. Now, when you're doing a survey, isn't it

1 better to have a control for the questions you ask?

2 A. That depends on the purpose of the survey.

3 Q. Okay. And if it is a causal survey to show the
4 cause of something, you certainly want a control, don't
5 you?

6 A. We would generally like to have control in the
7 context of a survey or an experiment designed to show
8 causality.

9 Q. And you deduct the control group response from
10 the test group response in order to eliminate what we
11 call noise or yea-saying or bias; isn't that correct?

12 A. That is correct.

13 Q. Now, in the case of the Bovitz study, that study
14 really didn't show at all how -- what the effect would
15 be of any particular ad; isn't that right?

16 A. That's correct.

17 Q. So even though these people registered
18 particular percentages, there was nothing in that study
19 to show that that was caused by the Bovitz ad; isn't
20 that right?

21 A. Nothing that was causal, that is correct,
22 only -- only the proximity of the viewing of the ads to
23 the time in which the questions were asked.

24 Q. Yes. But despite the proximity, that survey
25 would not show you that in fact it was those billboards

1 that caused those percentages of perception; isn't that
2 right?

3 A. That would be correct.

4 MR. FIELDS: That's all I have, Your Honor.

5 MR. OSTHEIMER: Could I have two minutes,
6 Your Honor?

7 JUDGE CHAPPELL: To consult or redirect?

8 MR. OSTHEIMER: To consult with my colleagues
9 for just --

10 JUDGE CHAPPELL: Go ahead.

11 (Pause in the proceedings.)

12 - - - - -

13 CROSS-EXAMINATION

14 BY MR. OSTHEIMER:

15 Q. Dr. Stewart, I believe you testified that the
16 headlines such as the "Amaze your cardiologist" and
17 "Floss your arteries" are not to be taken literally.

18 Does that mean that those claims -- that those
19 headlines would not make serious claims?

20 A. No. Just because they're not taken literally
21 doesn't mean that they aren't making some serious
22 claims.

23 Q. Could they communicate significant
24 cardiovascular health benefits?

25 A. They could very well.

1 Q. And I believe you testified that better chucked
2 people would be more skeptical in general and that at
3 least based on the target audience POM users are better
4 educated.

5 Does that mean that you believe that POM users
6 should be skeptical of the challenged ads?

7 A. They may very well be skeptical as well, but
8 they also bring a lot of beliefs and a lot of
9 information to -- to the task of viewing the ads that
10 will also have an effect on the degree to which they
11 believe the claims.

12 Q. And are there elements of ads that could
13 overcome such skepticism?

14 A. Quite conceivably. In fact one of the reasons
15 for belief statements or belief propositions in support
16 of benefits is in fact to overcome skepticism.

17 Q. And when you were talking about the Bovitz
18 study, is that when you said it didn't show the effect
19 of any particular ad is that because you believe that
20 open-ended questions don't show causation?

21 MR. FIELDS: Objection. Leading.

22 THE WITNESS: No that's not why.

23 JUDGE CHAPPELL: Hold on. You need to rephrase.

24 BY MR. OSTHEIMER:

25 Q. When you said that the Bovitz study didn't show